A TALE OF TWO PRESUMPTIONS: *BOSANAC V COMMISSIONER OF TAXATION* (2022) 405 ALR 424

HARRY YOUS* AND ANNIE YUAN†

'For better or for worse, the weight of history is too great for a redesign of that magnitude now to be undertaken judicially.'[1]

I INTRODUCTION

In *Bosanac v Commissioner of Taxation* ('*Bosanac*'),[2] the High Court, in considering the two equitable presumptions of resulting trust and advancement, allowed an appeal and rejected the contention of the Commissioner of Taxation that the presumption of advancement had been abolished judicially.[3] Despite all members of the High Court agreeing that the presumption of advancement was 'anachronistic',[4] their Honours unanimously confirmed the first instance decision of the trial judge, McKerracher J.[5] They held that the decision in *Trustees of the Property of Cummins (a bankrupt) v Cummins*[6] did not preclude the operation of the presumption of advancement in relation to the matrimonial home where a transfer occurred from a husband to a wife.[7]

In effect, the High Court in *Bosanac* acknowledged that while the operation of the presumption of advancement was particularly weak in contemporary

---

* LLB (Hons) (Adel).
† LLB (Hons) (Candidate), BCom (IntlBus) (Candidate) (Adel).

[1] *Bosanac v Commissioner of Taxation* (2022) 405 ALR 424, 436 [58] (Gageler J) ('*Bosanac*').

[2] *Bosanac* (n 1).

[3] Ibid 431–2 [29]–[30] (Kiefel CJ and Gleeson J), 436 [55]–[58], 437 [60] (Gageler J). See also ibid 449 [116] where Gordon and Edelman JJ acknowledged that the presumption of advancement is 'entrenched'. See *Trustees of the property of Cummins (a bankrupt) v Cummins* (2006) 27 CLR 278 ('*Cummins*').

[4] *Bosanac* (n 1) 431–2 [29]–[31] (Kiefel CJ and Gleeson J), 436 [55]–[56] (Gageler J), 443 [95] (Gordon and Edelman JJ).

[5] See *Commissioner of Taxation v Bosanac [No 7]* (2021) 390 ALR 74 ('*Bosanac [No 7] FCAFC*').

[6] *Cummins* (n 3). See *Bosanac* (n 1) 433–4 [41]–[42] (Kiefel CJ and Gleeson J), 439 [68]–[71] (Gageler J), 450 [121] (Gordon and Edelman JJ).

[7] *Bosanac* (n 1) 430–1 [23]–[25] (Kiefel CJ and Gleeson J), 437 [61]–[62] (Gageler J), 450 [118] (Gordon and Edelman JJ).

Australia, it remained as a 'landmark' in the law along with the presumption of resulting trust.[8] The two presumptions, being interrelated as they are, carried a weight in Australian legal jurisprudence that is far too great to warrant redesign.[9] Notably, while the issue of expanding the categories of relationships to which the presumption of advancement has been enlivened was regarded as important, this was beyond the consideration of the issues in dispute in *Bosanac*.

This case note examines the three separate judgments in *Bosanac* in light of the litigation history of the proceedings and the development of the presumptions of resulting trust and advancement in Australia facilitated by earlier key cases.[10] Further, this case note explores the implications of the decision in *Bosanac* in respect of future circumstances where the applicability of these two equitable presumptions may again be shrouded in uncertainty, discusses the utility of the presumptions against the backdrop of structural inequality and offers a critical perspective on gender neutrality as a model used in any prospective legislative reform.

II Background

A *'Duelling' presumptions: resulting trust and advancement*

The presumption of resulting trust was conceived in the case of *Dyer v Dyer*,[11] which established that 'a trust of a legal estate in property taken in the name of another is taken to "result" to the person who advances the purchase money'.[12] Where a transferor gratuitously transfers property to a transferee or contributes to the purchase of the property in the name of the transferee, equity places an onus on the transferee to show that the property was not held on trust for the benefit of the transferor or for the benefit of both parties proportionate to each party's contribution to the purchase of

---

[8] Ibid 436 [58], 437 [60] Gageler J, quoting *Dyer v Dyer* (1788) 2 Cox Eq Cas 92; 30 ER 42, 46 (Eyre CB) ('*Dyer*'). See also ibid 429 [20], [22] 431–2 [30]–[31] (Kiefel CJ and Gleeson J), 438 [67] (Gageler J), 443 [95], 444 [98], 446–8 [102]–[113] (Gordon and Edelman JJ).

[9] *Bosanac* (n 1) 436 [58], 437 [60] Gageler J, quoting *Dyer* (n 6) 46 (Eyre CB).

[10] See, eg; *Cummins* (n 3); *Dyer* (n 6); *Calverley v Green* (1984) 155 CLR 242.

[11] *Dyer* (n 6).

[12] *Bosanac* (n 1) 427 [12] (Kiefel CJ and Gleeson J), citing *Dyer* (n 6) 43 (Eyre CB).

the property.[13] Otherwise, a trust 'results', and the existence of such a resulting trust depends upon the evidence surrounding the transfer in respect of the intention of the parties.

However, the presumption of resulting trust does not operate where the presumption of advancement applies as an exception, where

> in the case of purchases by a husband in the name of a wife or a parent (or person who stands in loco parentis) in the name of a child, there is a presumption of advancement or, in other words, a presumption that the purchaser intended that the beneficial interest would pass with the legal interest.[14]

Therefore, where both presumptions apply, the person seeking to rely on the presumption of resulting trust must rebut the presumption of advancement in presenting evidence of such so as to protect their beneficial interest.

The High Court in *Bosanac* thought that the 'presumption' of advancement was simply a reference to a set of factual scenarios, a 'circumstance of fact', that displaces the presumption of resulting trust.[15] In this regard, the decision aligns Australian law with the position in England.[16] In this context, the presumption of advancement refers to the legal concept that when a husband buys a property in the name of the wife or a parent in the name of a child, there is a presumption that the beneficial interests would pass with the legal interest.[17] Thus, the presumption of a resulting trust in Australia can no longer be described as restitutionary. This is because the presumption of advancement has nothing to do with preventing unjust enrichment.[18] Importantly, the presumption of advancement has

---

[13] Henry Cooney, 'Presumed Resulting Trusts on the Move' (2023) *Lloyd's Maritime and Commercial Law Quarterly* 28, 29.
[14] *Bosanac* (n 1) 426–7 [8] (Kiefel CJ and Gleeson J), quoting *Napier v Public Trustee* (WA) (1980) 32 ALR 153, 158 (Aickin J) ('*Napier*'); see *Nelson v Nelson* (1995) 184 CLR 538, 547–8 (Deane and Gummow JJ) ('*Nelson*').
[15] *Bosanac* (n 1) 428 [15] (Kiefel CJ and Gleeson J), 438 [65] (Gageler J), 448–9 [115] (Gordon and Edelman JJ).
[16] See *Pettitt v Pettitt* [1970] AC 777, 814 (Lord Upjohn) ('*Pettitt*').
[17] *Bosanac* (n 1) 428 [14] (Kiefel CJ and Gleeson J), 436 [55] (Gageler J), 449 [116] (Gordon and Edelman JJ). See also *Napier* (n 14) 158 (Aickin J); *Nelson* (n 14) 547–8 (Deane and Gummow JJ).
[18] Cooney (n 13) 29.

historically not applied to advances from a wife to a husband, de facto relationships or same-sex relationships.[19]

B *Relevant facts*

Mr Bosanac and Ms Bosanac married in 1998, and the appeal in *Bosanac* concerned Ms Bosanac's purchase of a residential property in Perth ('the Dalkeith property').

In April 2006, Ms Bosanac made an offer to purchase the Dalkeith property for $4,500,000, subject to obtaining approval for a bank loan of $3,000,000 from Westpac Banking Corporation. In May 2006, Ms Bosanac's offer was accepted, and she was required to pay a deposit of $250,000 within 30 days of acceptance, which she did using funds sourced from a pre-existing loan account jointly held with Mr Bosanac.[20] Ms Bosanac was then registered as the sole proprietor of the Dalkeith property without Mr Bosanac having claimed any interest in the Dalkeith property.

In October 2006, Mr Bosanac and Ms Bosanac applied for two loans — totalling $4,500,000 in value — for the purpose of paying the remainder of the purchase price of the Dalkeith property. In these loan applications, Mr Bosanac described himself as a 'self-styled venture capitalist' and disclosed substantial assets held solely, which included shares with a cash value in excess of $24 million and a gross annual income of $388,401. Contrastingly, Ms Bosanac disclosed approximately $94,000 in cash, a gross annual income of $56,900 and described her occupation as 'home duties'.

For these loans, the bank acquired as securities the mortgages over the Dalkeith property and three other properties, which comprised of two units owned solely by Mr Bosanac and another property owned solely by Ms Bosanac.

In late 2006, Mr Bosanac and Ms Bosanac moved into the Dalkeith property as their matrimonial home, and throughout their marriage they continued to share joint bank accounts but appeared on the evidence to have

---

[19] *Bosanac* (n 1) 429 [17]–[18] (Kiefel CJ and Gleeson J), 437 [59] (Gageler J), 449 [116] (Gordon and Edelman JJ).
[20] Ibid 426 [2] (Keifel CJ and Gleeson J), 441 [83] (Gordon and Edelman JJ).

owned substantial assets in their separate names.[21] In 2012 or 2013, Mr Bosanac and Ms Bosanac separated but continued to reside in the Dalkeith property together until September 2015, when Mr Bosanac moved to a new residential address, as evidenced by records held by the Australian Taxation Office ('ATO').

From 2006 to 2013, Mr Bosanac failed to lodge income tax returns with the Australian Taxation Office and became a debtor to the Commissioner for a $9 million judgment debt that the Commissioner sought to enforce in the Federal Court.[22]

C *First instance and issues on appeal*

At first instance, the Commissioner argued that one-half of the Dalkeith property was beneficially owned by Mr Bosanac, relying on the presumption of resulting trust given that Mr Bosanac had advanced purchase monies for the house held solely by Ms Bosanac.[23] Although the presumption of advancement ordinarily applies to preclude a resulting trust from arising (in cases of purchases made by a husband in the name of his wife), the Commissioner submitted that this presumption had been excluded from Australian law and no longer applies to matrimonial homes, following *Cummins*.[24]

This argument was rejected by the primary Judge, McKerracher J, who held that the presumption of advancement was not precluded by *Cummins* as it does not apply to certain species of property exclusively.[25] The Federal Court did not find any inference that Mr Bosanac intended to have any beneficial interest in the Dalkeith property to be supported by evidence: assuming joint financial liability for the two loans and the fact that the Dalkeith property was a shared matrimonial asset was insufficient to rebut the presumption of advancement.[26]

On appeal to the Full Court of the Federal Court, the Commissioner succeeded in obtaining a declaration that Mr Bosanac had a beneficial

---

[21] Ibid 426 [5] (Kiefel CJ and Gleeson J), quoting *Bosanac [No 7] FCAFC* (n 5) [57].
[22] See *Bosanac [No 7] FCAFC* (n 5).
[23] Ibid; *Bosanac* (n 1) [7]–[8] (Keifel CJ and Gleeson J).
[24] *Cummins* (n 3).
[25] *Bosanac* (n 1) 427 [9] (Kiefel CJ and Gleeson J).
[26] Ibid.

interest in the Dalkeith property that was held on trust by Ms Bosanac.[27] While the Full Court acknowledged that *Cummins* did not limit the presumption of advancement and its application to matrimonial homes, the evidence that Mr Bosanac assumed a 'substantial liability without acquiring any beneficial interest'[28] was sufficient to rebut the presumption as the requisite contrary intention was inferred from the joint borrowing of the two loans, the intention for joint enjoyment of the Dalkeith property as the matrimonial home, and the payment of the deposit from a jointly held account.[29]

Ms Bosanac then successfully sought leave to appeal to the High Court in contending that the Full Court erred in its inference of Mr Bosanac's intention to have a beneficial interest in the Dalkeith property.[30]

III DECISION OF THE HIGH COURT

The High Court unanimously held that the presumption of advancement remains applicable in Australia despite acknowledging its anachronic nature. The Commissioner argued that the High Court in *Cummins* had abolished the presumption of advancement. The High Court unanimously rejected this argument and refused to conclude that the law no longer recognises the presumption from arising in respect of gifts from a husband to his wife.

While the High Court agreed with the Commissioner's position that the presumption lacks any acceptable rationale in contemporary times, the inquiry in *Bosanac* was largely an objective and factual one, where evidence can be used to infer the intention of the parties to the contrary of the presumption.[31] In the case in question, neither the presumption of resulting trust nor the presumption of advancement was relevant against the considerable evidence of the intention of both Ms Bosanac and Mr

---

[27] See *Bosanac [No 7] FCAFC* (n 5).
[28] *Bosanac* (n 1) 427 [10] (Kiefel CJ and Gleeson J), citing *Bosanac [No 7] FCAFC* (n 5) [15].
[29] *Bosanac* (n 1) 432–4 [32]–[42] (Kiefel CJ and Gleeson J), 439–40 [68]–[77] (Gageler J), 450–1 [121]–[126] (Gordon and Edelman JJ).
[30] Ibid 427 [11] (Kiefel CJ and Gleeson J).
[31] Ibid 432 [31].

Bosanac to hold property separately throughout the course of their marriage.

As such, the High Court agreed with McKerracher J and held that Ms Bosanac solely held the beneficial title to the Dalkeith property in addition to her legal title.

A *Kiefel CJ and Gleeson J*

Chief Justice Kiefel and Gleeson J viewed the presumption of advancement to not operate strictly as a presumption, but more so as providing the 'absence of any reason for assuming that a trust arose'.[32] As such, it is 'no more than a circumstance which may rebut the presumption of a resulting trust or prevent it from arising'.[33] Their Honours considered the legislative treatment of the presumption in foreign jurisdictions and observed that the presumption remains in the UK as it has yet to be abolished in effect,[34] however much turns on the actual intention of parties in cases concerning the presumption, as evidence of contrary intention will prevail and rebut the presumption.[35]

Further, Kiefel CJ and Gleeson J questioned whether the presumption of advancement should continue in modern society to also apply to transfers of property beyond husband to wife in considering the decisions of Dawson and Toohey JJ in *Nelson*, given the 'position that many wives now have respecting income and property … [and] between spouses more generally given the recognition by statute of de facto relationships … and same-sex marriage'.[36] However, their Honours acknowledged that though such matters are important, they were not relevant to the contentions in the appeal,[37] though they agreed with the Commissioner that the presumption of advancement was 'anomalous, anachronistic and discriminatory'.[38]

On the diminishing weight of the presumptions, Kiefel CJ and Gleeson J agreed with Lord Reid's decision in *Pettitt v Pettitt* that past considerations of husbands commonly making gifts to wives or that 'wives' economic

---

[32] Ibid 428 [15], quoting *Martin v Martin* (1959) 110 CLR 297, 303. See also *Cummins* (n 3) 298 [55].
[33] *Bosanac* (n 1) 428 [15].
[34] Ibid. See *Equality Act 2010* (UK) s 199.
[35] *Bosanac* (n 1) 428 [13], [15].
[36] Ibid 429 [17].
[37] Ibid 429 [18].
[38] Ibid 431–2 [29]–[31].

dependence made it necessary as a matter of public policy'[39] have 'largely lost their force under present conditions'.[40] Their Honours did not consider whether the presumption of advancement could rebut the existence of a resulting trust, as it could not be inferred from the evidence that Mr Bosanac had any beneficial interest in the Dalkeith property. Therefore, no factual inquiry on the presumptions was necessary.

B *Gageler J*

Justice Gageler described the operation of one presumption as duelling with the other, where if 'other indications of intention are equal, or at least equivocal, the counter-presumption is a complete answer to the presumption.'[41] Where the presumption of resulting trust is one of fact, being 'functionally akin to a civil onus of proof'[42] and only 'yield[ing] to an actual intention to the contrary found on the balance of probabilities as an inference drawn from the totality of the evidence',[43] his Honour viewed it as inappropriate to regard the countering presumption of advancement as a presumption.[44] Rather, as Gageler J stated, the existence of a relationship within certain judicially prescribed categories upon which the 'presumption' of advancement hinges is 'no more than a "circumstance of evidence"'.[45]

Without any evidence that Ms Bosanac had been 'put up' by Mr Bosanac to purchase the Dalkeith property,[46] Gageler J went further than the primary Judge who had found that the evidence could not rebut the presumption of advancement.[47] Instead, his Honour considered that the primary facts directly supported an inference that Ms Bosanac was the legal and beneficial owner of the Dalkeith property, in light of the (1) likelihood of Mr Bosanac appreciating the significance of the consequence of holding

---

[39] Ibid 429 [20].
[40] *Pettitt* (n 16) 792–3 (Lord Reid).
[41] *Bosanac* (n 1) 435 [53] (Gageler J).
[42] Ibid 438 [64].
[43] Ibid.
[44] Ibid.
[45] Ibid 438 [65], quoting *Dyer* (n 6) 43 (Eyre CB). Cf Jamie Glister, 'Is There a Presumption of Advancement?' (2011) 33(1) *Sydney Law Review* 39.
[46] *Bosanac* (n 1) 440 [77].
[47] Ibid 439 [71].

property in one's name;[48] (2) separately owned marriage assets;[49] and (3) separately owned property used as security for joint loans.[50]

Justice Gageler concurred with Kiefel CJ and Gleeson J in recognising that the Commissioner's argument that the presumption of advancement was 'anachronistic … and discriminatory' was convincing.[51] On the point of expanding the categories of relationships to which the presumption of advancement would arise, his Honour also concurred that by contemporary standards, it would be appropriate to consider a case expansion of those categories.[52]

While the Commissioner did not contend that the abolition of the presumption of advancement should also accompany the abolition or modification of the presumption of resulting trust[53] — given that his case predicates on the latter presumption — Gageler J asserted that the presumption of resulting trust was the 'root anachronism, perpetuating expectations of a segment of society within late medieval England'.[54] Nonetheless, his Honour saw it as too late to abolish the presumptions and that it could only be changed by law reform.[55]

C *Gordon and Edelman JJ*

In analysing the intentions of the parties, all members of the High Court held that the fact the property was solely registered in Ms Bosanac's name was indicative of an objective intention that Ms Bosanac would be the sole legal and beneficial owner of the property.[56] Gordon and Edelman JJ took particular note of the fact of registration and sole proprietorship of Ms Bosanac in respect of the Dalkeith property and the lack of evidence that

---

[48] Ibid 439 [72].
[49] Ibid 439 [73].
[50] Ibid 439 [74].
[51] Ibid 437 [59].
[52] Ibid, citing *Wirth v Wirth* (1956) 98 CLR 228, 238 (Dixon CJ) ('*Wirth*'); *Cummins* (n 3) 302 [69].
[53] *Bosanac* (n 1) 436 [56].
[54] Ibid, citing *Dullow v Dullow* (1985) 3 NSWLR 531, 535 (Hope JA, Kirby P agreeing at 532, McHugh JA agreeing at 541) ('*Dullow*'); *Nelson* (n 14) 602 (McHugh J); *Anderson v McPherson [No 2]* (2012) 8 ASTLR 321, 339 [114].
[55] *Bosanac* (n 1) 437 [60].
[56] Ibid 434 [42] (Kiefel CJ and Gleeson J), 439 [71]–[72] (Gageler J), 450 [121]–[122], 451 [124] (Gordon and Edelman JJ).

could indicate that Ms Bosanac and Mr Bosanac were prevented from joint purchase.[57]

As to the weight of the presumptions, Gordon and Edelman JJ asserted that 'no additional probative force should be attributed to a so-called presumption when there is evidence to the contrary'.[58] Their Honours agreed with Deane J in *Calverley* in that the presumption of resulting trust had 'evolved when a majority of adults laboured under restrictions and disabilities in respect of the ownership and protection of property',[59] and that the value of the presumption today was 'at best debatable'.[60]

Regardless, a resulting trust is an 'inference drawn in the absence of evidence'[61] which necessitates first an inquiry into the objective facts, which Gordon and Edelman JJ set out the three dimensions.[62]

Specifically, a defendant who wishes to rely on a resulting trust must meet the following cases by establishing whether objective facts based on evidence led by the plaintiff: (1) establish a trust by way of satisfying the three certainties, rather than a resulting trust;[63] (2) establish no objective intention inconsistent with the declaration of trust, however weak;[64] and (3) are 'neutral, truly equivocal, non-existent or uninformative as to the objective intention of the parties' so that the defendant who has provided part of the purchase price can draw an inference, consistent with the weak presumption, that there was a declaration of trust by them.[65]

On the presumption of advancement, Gordon and Edelman JJ noted that the appeal before the High Court did not depend on such presumption.[66] Their Honours held that the presumption of advancement is not a presumption at all but rather a circumstance of fact where a resulting trust does not arise.[67] Further, their Honours held that the rationale of the

---

[57] Ibid 450 [121]–[122], 451 [124] (Gordon and Edelman JJ).
[58] Ibid 445 [101].
[59] Ibid 444 [97], quoting *Calverley* (n 10) 265–6 (Deane J).
[60] Ibid.
[61] *Bosanac* (n 1) 447 [106].
[62] Ibid.
[63] Ibid 447 [108].
[64] Ibid 447 [109].
[65] Ibid 447 [110].
[66] Ibid 448 [114].
[67] Ibid 448–9 [115].

presumption has not been 'consistently explained' and that the limited classes of relationships to which the 'presumption' could be enlivened 'may not accord with contemporaneous practices and modes of thought'.[68] However, Gordon and Edelman JJ reinforced that the extension of the 'presumption' of advancement to a broader range of relationships — which began in *Nelson* to enliven the presumption for a transfer from mother to child and not just father to child[69] — was tenable in the future, but such issues did not arise in *Bosanac*.[70]

IV COMMENTARY ON THE IMPACT OF *BOSANAC*

A *Does* Cummins[71] *preclude the operation of the presumption of advancement?*

In *Cummins*, the High Court — quoting a passage from Professor Scott's work — held that there was no resulting trust and that

> [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, regardless of the amounts contributed by them.[72]

The High Court in *Cummins* further held that this 'reasoning applies with added force' where the spouses took title of the matrimonial home as joint tenants.[73] Thus, in the absence of evidence pointing to the contrary intention of the parties, 'equity will follow the law', and each spouse will have a one-half interest in the property as joint tenants.[74]

In *Bosanac*, the Commissioner contended that the presumption of advancement of a wife by her husband, which operates to preclude a

---

[68] Ibid 449 [116], quoting *Nelson* (n 14) 602 (McHugh J). See also Calverley (n 10) 265–6 (Deane J).
[69] *Nelson* (n 14) 548–9 (Deane and Gummow JJ), 574–5 (Dawson J), 585–6 (Toohey J), 601 (McHugh J).
[70] *Bosanac* (n 1) 449 [116] (Gordon and Edelman JJ).
[71] *Cummins* (n 3).
[72] Ibid 303 [71], quoting Austin W Scott and William F Fratcher, *The Law of Trusts* (Aspen Law and Business, 4th ed, 1989) vol 5, 197–8.
[73] *Cummins* (n 3) 303 [72].
[74] Cooney (n 13) 33.

resulting trust from arising, is no longer part of the law of Australia in relation to the matrimonial home following the decision in *Cummins*.[75] The High Court held that *Cummins* did not create a new principle or presumption 'displacing or qualifying' the principle of advancement.[76] Furthermore, the High Court confirmed the decision of the trial judge, McKerracher J, that the decision in *Cummins* does not preclude the operation of the presumption of advancement in relation to the matrimonial home,[77] but it could be displaced by evidence of a contrary intention.[78] This is because the High Court held that the proper interpretation of *Cummins* is that there is

> no occasion in that case for equity to fasten upon the registered interest held by joint tenants a trust obligation representing differently proportionate interests as tenants in common … when the conventional basis of their dealings treats the matrimonial home as beneficially owned equally.[79]

The High Court essentially confined the principle espoused by Professor Scott to cases where spouses purchase a matrimonial home as joint tenants.[80] In his article, Henry Cooney disagrees with this interpretation.[81] According to Cooney, 'it is clear that the High Court [in *Cummins*] intended to modify the law of resulting trusts to better reflect changing societal attitudes toward non-monetary contributions in domestic partnerships'.[82] Justice Gageler held that the presumption of resulting trust (and therefore the presumption of advancement), as evaluated against the modern-day standard and expectations, is the 'root anachronism'.[83] Other commentators and judges have shared this view.[84] This is because the

---

[75] *Cummins* (n 3) 302–3 [71].
[76] *Bosanac* (n 1) 430–1 [25]–[28] (Kiefel CJ and Gleeson J), 437 [61]–[62] (Gageler J), 450 [118]–[120] (Gordon and Edelman JJ) . See Cooney (n 13) 33.
[77] *Bosanac* (n 1) 430–1 [23]–[25] (Kiefel CJ and Gleeson J), 437 [61]–[62] (Gageler J), 450 [118] (Gordon and Edelman JJ).
[78] Ibid 428 [15] (Kiefel CJ and Gleeson J), 438 [65] (Gageler J).
[79] Ibid 431 [28] (Kiefel CJ and Gleeson J), quoting *Cummins* (n 3) 303 [72]–[73]. See also ibid 437 [61] (Gageler J).
[80] *Bosanac* (n 1) 431 [28] (Kiefel CJ and Gleeson J), 437 [61] (Gageler J), 450 [119] (Gordon and Edelman JJ).
[81] Cooney (n 13) 33.
[82] Ibid.
[83] *Bosanac* (n 1) 436 [56] (Gageler J).
[84] Cooney (n 13) 32, citing *Dullow* (n 54) 535 (Hope JA, Kirby P agreeing at 532, McHugh JA agreeing at 541).

presumption of resulting trust was developed to deal with troubles faced by landowners during the medieval times that no longer exist today.[85]

Nevertheless, the High Court rejected the Commissioner's claim that the presumption should be abolished because it is 'anomalous, anachronistic and discriminatory'.[86] Thus, the presumption does not just survive the challenge, but the High Court now solidifies it as the continuing law in Australia.

B *Practical abolition*

The interpretation of the presumption of resulting trust and the presumption of advancement appears to intentionally fall short of an outright abolition of the doctrines. Members of the High Court unanimously held that the presumption of advancement is a 'circumstance' of fact or evidence indicative of an objective intention inconsistent with the creation of a trust.[87] Henry Cooney argues that this interpretation removes the 'defined categories approach' and practically abolishes the presumption of advancement.[88] Following the decision in *Bosanac*, a 'presumption of advancement' may not be necessary at all because 'objective intention' may be inferred directly from evidence, and its strength will depend on the evidence presented, which will vary case by case.[89]

While the presumption has been described as 'especially weak',[90] their Honours held that without legislative intervention — which is unlikely to occur any time soon[91] — the presumption of advancement is 'here to

---

[85] See *Bosanac* (n 1) 436 [56] (Gageler J), 443 [96]–[98] (Gordon and Edelman JJ); *Dullow* (n 54) 535 (Hope JA, Kirby P agreeing at 532, McHugh JA agreeing at 541). See also *Nelson* (n 14) 602 (McHugh J); *Anderson v McPherson [No 2]* (2012) 8 ASTLR 321, 339 [114].

[86] *Bosanac* (n 1) 431–2 [29]–[30] (Kiefel CJ and Gleeson J), 436 [55]–[58] (Gageler J), 443 [95] (Gordon and Edelman JJ).

[87] Ibid 428 [15] (Kiefel CJ and Gleeson J), 438 [65]–[66] (Gageler J), 448–9 [115] (Gordon and Edelman JJ).

[88] Cooney (n 13) 31. See also ibid 429 [17]–[18] (Kiefel CJ and Gleeson J), 437 [59] (Gageler J), 449 [116] (Gordon and Edelman JJ).

[89] *Bosanac* (n 1) 429–30 [20]–[22], 432 [31] (Kiefel CJ and Gleeson J), 438 [64]–[67] (Gageler J), 443 [95], 444 [98], 446–8 [102]–[113] (Gordon and Edelman JJ).

[90] Ibid 430 [22] (Kiefel CJ and Gleeson J).

[91] Emitis Morsali, 'An Exercise in Restraint: Amending the Presumption of Advancement' (2023) 29(4) *Trusts & trustees* 299, 302.

stay'.[92] Notably, the High Court's comments regarding the presumption of advancement are considered *obiter dicta,* given that it arrived at its decision by inference from the facts rather than by applying the presumptions. Contrary to the actual wording of the decision in *Bosanac*,[93] while the High Court did not expressly abolish the presumption of advancement in form, it has effectively abolished the presumption in substance. It is important to realise this is a significant change in Australian law.

The High Court severely limited the occasions giving rise to a resulting trust,[94] and therefore limited the occasions on which there would be a need to apply the presumption of advancement by extension. The High Court — Gordon and Edelman JJ in particular — concurred with Deane J's approach in *Caverley*[95] and held that there is no need to apply the presumption of resulting trust if the objective facts of the case are indicative of the parties' intention.[96] As such, the presumption exists only to serve the purpose of filling a gap where there is an 'absence of evidence'.[97] Chief Justice Kiefel and Gleeson J further held that 'both presumptions … may readily be rebutted by comparatively slight evidence'.[98] In effect, the High Court's decision will restrict the operation of resulting trusts to the 'rare[st of] cases' — a practical abolition.[99]

In *Calverley v Green*, a de facto couple were joint tenants who both contributed to the purchase of their home.[100] The majority held that each partner held the title of the property 'on trust for themselves as tenants in common in shares proportionate to their contributions'. [101] The

---

[92] *Bosanac* (n 1) 431–2 [30] (Kiefel CJ and Gleeson J), 436 [58], 437 [60] (Gageler J), 443 [95], 449 [116] (Gordon and Edelman JJ).
[93] Ibid 431–2 [29]–[30] (Kiefel CJ and Gleeson J), 436 [55]–[58], 437 [60] (Gageler J), 443 [95], 444 [98], 449 [116] (Gordon and Edelman JJ).
[94] Cooney (n 13) 32.
[95] See *Calverley* (n 10) 270–1 (Deane J).
[96] *Bosanac* (n 1) 446–7 [103]–[110] (Gordon and Edelman JJ).
[97] Ibid 438 [67] (Gageler J), 446–7 [102]–[110] (Gordon and Edelman JJ). See also Simran Joshi, 'A Matter of Trusts: *Bosanac*: Presumption of Advancement' (2023) 57(8) *Taxation in Australia* 476, 477.
[98] *Bosanac* (n 1) 430 [22] (Kiefel CJ and Gleeson J).
[99] Ibid 438 [67] (Gageler J). See also ibid 429–30 [20]–[22], 432 [31] (Kiefel CJ and Gleeson J), 446–7 [102]–[105], [110] (Gordon and Edelman JJ); Cooney (n 13) 32.
[100] *Calverley* (n 10).
[101] Ibid 258 (Mason and Brennan JJ). See also ibid 251–3 (Gibbs CJ), 262 (Mason and Brennan JJ), 271 (Deane J).

presumption of advancement had no operation and could not act as a counter-presumption to the presumption of resulting trust in *Calverley* because the couple was not legally married.[102] Furthermore, there was no other evidence pointing to a common intention of the parties, which rebutted the presumption of resulting trust.[103] If the approach in *Bosanac* were to be applied to *Calverley*, the parties' relationship as a de facto couple would indicate that they objectively intended to equally share the beneficial ownership of the land as joint tenants.[104] This, perhaps, would be a circumstance of fact giving rise to the presumption of advancement, which would then rebut the presumption of resulting trust.[105]

Regardless, the conclusion would have been that there is 'no occasion to presume a resulting trust in favour of the person who provided part or all of the purchase price of a property, or gratuitously transferred a property, registered in the name of the other person'.[106] Similar to how the High Court in *Bosanac* treated evidence of Ms Bosanac's sole registration of ownership, evidence of joint tenancy is the 'slight evidence' indicative of an objective intention contrary to creation of a trust.[107] This difference in outcome may also have to do with the High Court's shifting attitudes and understanding of 'modern relationships'[108] reflecting those of modern society.

For instance, the High Court in *Bosanac* was far more willing to contemplate the expansion of categories of relationships recognised under the presumption of advancement to include de facto relationships and same-sex marriage than in *Calverley*.[109] In *Calverley*, Mason and Brennan JJ drew attention to the fact that ss 79 and 80 of the *Family Law Act 1975* (Cth) conferred 'a discretionary power upon the [Court] to alter the property interests of the parties to [a] marriage' but not a de facto

---

[102] Ibid 259–261 (Mason and Brennan JJ), 268–9 (Deane J).
[103] Ibid 251–2 (Gibbs CJ), 258, 261–2 (Mason and Brennan JJ), 270–1 (Deane J).
[104] Cooney (n 13) 31, citing *Bosanac* (n 1) 451 [125] (Gordon and Edelman JJ).
[105] See Cooney (n 13) 31.
[106] *Bosanac* (n 1) 448–9 [115] (Gordon and Edelman JJ).
[107] Cooney (n 13) 32.
[108] See *Bosanac* (n 1) 448–9 [115] (Gordon and Edelman JJ).
[109] Ibid 429 [17] (Kiefel CJ and Gleeson J), 437 [59] (Gageler J), 449 [116] (Gordon and
Edelman JJ). Cf *Calverley* (n 10) 259–261 (Mason and Brennan JJ), 268–9 (Deane J).

relationship.[110] Their Honours held that this 'furnish[es] a further ground for not' extending the presumption of advancement to de facto partners. Clearly, societal views of de facto relationships have shifted as these provisions in the *Family Law Act 1975* (Cth) now extend to de facto partners.[111]

In line with Gordon and Edelman JJ's observations in *Bosanac*,[112] Cooney provides examples of instances where a resulting trust should be recognised but would not when one applies the principles in *Bosanac*. For instance, a voluntary conveyance resulting trust whereby 'the transfer of legal title … provides the reason for which the transferor needs to seek recognition of a resulting trust' or when a person contributes to the purchase money but does not take legal title.[113] The Court is essentially requiring that there be evidence pointing to the parties' intention to create a trust in order to find a resulting trust.[114]

While the rationales behind the presumption of advancement have 'largely lost their force',[115] according to Kiefel CJ and Gleeson J, the interpretation of the presumption of resulting trust and the presumption of advancement appears to intentionally fall short of an outright abolition of the doctrines. The High Court held that the presumptions are 'here to stay',[116] and that any abolition or reform of the presumptions will be left to the legislature.[117]

C *Historical structural inequality experienced by women and the legal personhood of wives*

The criticism of the presumptions as being anachronistic and discriminatory was shared by all members of the High Court in *Bosanac* without qualification, despite their ultimate refusal to abolish the presumptions. However, what was not contemplated by their Honours was

---

[110] *Calverley* (n 10) 260 (Mason and Brennan JJ).
[111] See *Family Law Act 1975* (Cth) ss 4 (definition of 'de facto property settlement or maintenance proceedings'), 90SL–90SM; Jacky Campbell, 'The Beginning of the End of Resulting Trusts? The High Court's Judgment in Bosanac v Commissioner of Taxation', Wolters Kluwer (Web Page, 25 October 2022).
[112] *Bosanac* (n 1) 448–9 [115] (Gordon and Edelman JJ).
[113] Cooney (n 13) 32.
[114] Ibid.
[115] *Bosanac* (n 1) 429 [20] (Kiefel CJ and Gleeson J).
[116] Ibid 437 [60] (Gageler J).
[117] Ibid 431–2 [30] (Kiefel CJ and Gleeson J).

the existence of any justification for the maintenance of the two presumptions, especially from the perspective of structural inequality and the status of wives — and, by extension, women — in the common law.

Historically, the existence of the presumption of advancement was to recognise the natural obligation owed by husbands to their wives in times when married women lacked legal personhood concerning property ownership and contractual capacity.[118]

Prior to Australia's federation, the laws that governed a married woman's rights to control real property within her marriage were derived from England, where under English doctrines of unity of spouses and of coverture, a wife did not have a separate legal existence and was inflicted with a legal disability that prevented her from entering into contracts, sue or be sued, or to recover rent monies and profits payable under freehold estate.[119] Though equitable exceptions were developed by the Court of Chancery in the 18th century to allow express agreements to separate certain property for the use of the wife as if she was unmarried and to prevent the alienation of such property by her husband, usage of the exceptions were often limited to wealthy women or their fathers to maintain wealth within the family,[120] and to especially protect the 'assets of the family of origin against an interloping husband'.[121]

Where 'marriage was the central experience of the lives of the majority of women', [122] further equitable protections from the harshness of the common law could be sought by women, specifically via the usage of trusts to control their property and by reliance upon the presumption of advancement.[123] This was not without issues; access to such equitable remedies was reserved for wives who could afford the costs of using the courts of equity. It is tenable that despite its protections, equity has not historically represented *all* women's rights — only a minority of wealthy married women — and the women's rights movement for 'full legal

---

[118] Renata Grossi, 'The Wife as Legal Subject in Equity and Commercial Law' (2002) 27(4) *Alternative Law Journal* 171, 173.
[119] Andrew Cowie, 'A History of Married Women's Real Property Rights' (2009) *Australian Journal of Gender and Law* 1, 3–4. See *McCormick v Allen* (1926) 39 CLR 22, 28 (Knox CJ).
[120] Ibid 5.
[121] Grossi (n 118) 172.
[122] Ibid.
[123] Ibid.

equality'[124] was largely achieved without reliance on equity's limited protections.[125]

In contemporary Australia, while women have achieved legal equality, the prevalence of the conventional gender roles of the wife undertaking domestic and childrearing duties still indicates the inequality of wives, both privately within the marriage and within the business functions that they perform.[126] As such, this article argues that the equitable protection of wives was, and continues to be, necessary, even if it does not reflect modern Australian ideals.

On this aspect, credit must be given to women's contributions in the commercial sphere, and the traditional application of the presumption of advancement must be reconsidered, 'given the position that many wives now have respecting income and property'.[127] Lisa Sarmas argues that regardless of whether the principle of advancement is based on the rationale of a moral obligation to provide for a dependent,[128] or on the rationale of there being a 'greater *prima facie* probability of a [gift] being intended in situations to which the presumption has been applied',[129] there is no basis for the law treating mothers and fathers differently because a mother owes the same moral obligations to her children as the father does,[130] and also has an equal probability of making a gift to her children.[131]

Equally problematic is how the presumption of advancement treats women as dependents incapable of having their own source of income and incapable of bearing the obligation to provide support for their husbands.[132] Nonetheless, the reality is that women have been subject to significant disadvantage and remain burdened under structural inequality, and it

---

[124] Ibid.
[125] Ibid.
[126] Ibid 175.
[127] *Bosanac* (n 1) 429 [17] (Kiefel CJ and Gleeson J).
[128] *Calverley* (n 10) 247 (Gibbs CJ).
[129] *Wirth* (n 52) 237 (Dixon CJ).
[130] See *Family Law Act 1975* (Cth) ss 66B and 66C and *Child Support (Assessment) Act* 1989 (Cth) ss 3 and 4.
[131] Lisa Sarmas, 'A Step in the Wrong Direction: The Emergence of Gender "Neutrality" in the Equitable Presumption of Advancement' (1994) 19(3) *Melbourne University Law Review* 758, 764.
[132] Ibid.

cannot be ignored that equity has assisted women to some extent in obtaining equitable outcomes.[133]

As such, this article makes a distinction between the existence of the presumptions as anachronistic and discriminatory versus the anachronism and discrimination caused by their ongoing existence and maintenance in Australian law, when the relationship categories upon which the presumption of advancement could apply remain as limited as they are now. This article argues that the focus should be placed on the latter proposition in aspiring towards legislative reform, given that *Bosanac* has confirmed that the presumptions have not, and will likely not, be abolished by the courts.

D *Gender 'neutrality' and 'identical treatment' in potential reform*

In *Brown v Brown*, Kirby J stated that 'in the operation of the presumptions, so long as they endure, their content should be, and is, gender neutral. In this respect, the rules reflect the egalitarian nature of modern Australian society, including as between the sexes.'[134] This reflects the rationale of the courts in opting for identical treatment between men and women, but only in respect of extending the presumption of advancement to recognise property dealings between mother and child when previous authorities confined the presumption to property dealings between father and child.[135]

Legislative reform in expanding the relationship categories in this area of law can only be deferred to parliament. However, the starting point for obtaining substantive equity between genders as an outcome is unclear. If the position of gender neutrality, as echoed by Kirby J in *Brown v Brown,* is applied generally without adaptation to be 'in tune with modern notions of equality between [men and women]',[136] then there is a live risk that a statutory model of identical treatment will not appropriately accommodate the structural inequality that exists even today.[137]

Specifically, this disadvantage suffered by women as a collective is supported by 'overwhelming' evidence, according to Sarmas, who argues

---

[133] Ibid 765, citing Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 1990); Australian Law Reform Commission, *Equality Before the Law* (Discussion Paper No 54, 1993).
[134] *Brown v Brown* (1993) 31 NSWLR 582, 600 (Kirby J).
[135] Ibid; Sarmas (n 131) 759.
[136] Ibid 246.
[137] Ibid.

that the gender neutrality model does not work due to the gender pay gap and due to women having to 'do less paid work as a result of their disproportionately high contribution to the work of the family home and the care of children and other family, and … hav[ing] less superannuation'.[138]

However, potential reform on equitable principles considered entrenched cannot focus solely on remediating the disparity between men and women. Legislative intervention in this area of law should also consider other types of inequality, such as variances in socioeconomic status. As highlighted earlier in this article, access to equitable remedies was historically reserved for the wealthy. In modern times, this poses as a symptom of a greater problem: the issues of access to justice in the contemporary Australian dispute resolution system. On this point, and in analysing the decision of the High Court in *Cummins*, Sarmas makes the following delineation:

> Women's undoubted structural disadvantage in relation to men should not, however, blind us to the differences that exist between women. There are, for instance, vast disparities in wealth between women. While some may have little sympathy for the relatively wealthy Mrs Cummins in her battle against the Australian taxpayer, the impact of losing a greater share of family property to creditors would undoubtedly have a more severe impact on the living standards of women on the lower end of the socio-economic spectrum. And while some heterosexual women in de facto relationships may be better off under the *Cummins* principle, it is impossible to foresee how women in non-heterosexual relationships would fare.[139]

Thus, without legislative intervention, the traditional position of the presumption of advancement with its discrete relationship categories may only further perpetuate the anachronism criticised in *Bosanac* and in previous decisions.[140]

On a historical assessment, equity appears to operate best in circumstances where it can achieve 'formal equality between parties in a legally regulated transaction',[141] but in operation, the development of the presumptions has

---

[138] Ibid 247.
[139] Ibid.
[140] See *Cummins* (n 3); *Calverley* (n 10); *Dullow* (n 54).
[141] Grossi (n 118) 175.

never acknowledged structural social differences beyond recognising the inequality that wives were subject to, such as by expanding equity's protections to other relationship types and the direction in which property is transferred between individuals. It is discriminatory that the benefit derived from applying the presumption of advancement exists only for transfers by husband to wife and not by wife to husband. Further, it is discriminatory that same-sex married couples or same-sex and heterosexual couples who are engaged in de facto relationships are excluded from the coverage of the presumptions, given the recognition of these specific types of relationships as being largely equal in the eyes of the common law as their heterosexual married counterparts.

If *Bosanac* confirmed that the presumptions cannot be abolished, then any efforts — whether arising from legal discourse or parliamentary reform — should be directed towards a 'fair and comprehensive legislative regime … that covers a diverse range of human relationships and situations'[142] and effectively reforms the common law position in equity and trusts law by expanding the relationship categories to which the presumption of advancement applies. As such, a nuanced legislative approach is necessary to account for both the ongoing structural inequality experienced by women as well as any inequality and imbalance in relationships beyond the heteronormativity of marriage that exists today in contemporary Australia.

V Conclusion

In *Bosanac*, the High Court preserved the existence of the presumption of resulting trust and the presumption of advancement in present-day Australian law despite expressing concern over their relevance in the context of contemporary values. However, neither presumption was applied to the factual inquiry surrounding the true ownership of the Dalkeith property by their Honours, who relied more on the inferences drawn from objective facts in reaching their respective decisions in favour of Ms Bosanac. Though the High Court did contemplate expansion of the principle of advancement to other types of relationships, *Bosanac* was not

[142] Sarmas (n 131) 766, citing the definition of a 'domestic relationship' in *Domestic Relationships Act 1994* (ACT) s 3(1) as an example of an inclusive definition.

the forum to decide such modification which is reserved as an exercise for parliament.

As the presumption of advancement lies in equity, legislative reform in this area could include federal, state and territory property, family and other laws. Undeniably, such reform will be a complex task. It remains to be seen if the comments by the High Court will lead to the abolition or amendment of the presumption. It also seems that — given the High Court's comments on reform — the question of whether the application of the presumption should be extended to include transfers of property between spouses more generally (given the position of women in modern society and the recognition by statute of de facto relationships and same-sex marriages) may also be an inquiry left for the legislature to determine.

Though *Bosanac* did not contemplate this, there is utility in considering the historical context in which the presumption of advancement was developed to remedy the disadvantage experienced by married women. The anachronism resultant from the presumption is the limitation of its protections in contemporary Australian society to other relationship categories rather than its conception from English law and intended use — this is the anachronism that parliament must mitigate if abolition is unfeasible.

Whatever position that legislative reform adopts should be one that accounts for both structural inequality of wives and women by extension and be nuanced to account for a diverse range of relationships (including same-sex married and de facto couples, and heterosexual de facto couples), to apply in circumstances where conclusive evidence of objective intention of the parties is lacking.

The practical effects of the High Court decision in *Bosanac* emphasises the critical importance of careful consideration used in transactions when creating contemporaneous legal documents which set out the true intention of parties regarding ownership of property, and of keeping records of contributions towards the purchase price. Where much of any case will turn on the evidence that can be adduced from the history of the parties' relationship and their past transactions, the weight of intention will likely prevail over the application of either presumption.