**The Competing Presumptions of Advancement (Gifts) and Resulting Trusts**

**(or What's in the Pool and What's Not)**

In **Kyriakos [2013] FCCA 1249** Judge McGuire was confronted with a variety of asset classes and liabilities located in Australia and Greece which presented many issues including deciding whether a father's transfer to his son of one of the more substantial assets amounted to a gift or a resulting trust.

Among the various contentious assets for inclusion in the pool were units in a Trust which held real estate purchased in 1984 by the husband's father who later transferred his interest into the names of his daughter and son (the husband) upon the son's 18th birthday, seven years before he married.

The husband transferred the units back to his father in 2008 after he and his wife separated. While a document tendered in evidence indicated consideration of $360,000, the husband conceded no money had changed hands.

The wife argued that the units should be included in the pool of property as an asset in the hands of the husband based on the 'Presumption of Advancement' (ie a gift) and that the subsequent transfer back was improper and significantly decreased the property pool available for distribution.

The husband argued that any Presumption of Advancement is rebutted by a resulting trust and that legal title to the units had simply returned to his father and should not be included in the parties' asset pool.

Usually when a donor purchases a property in the name of another, or transfers property to another, equity applies the presumption of a resulting trust with the recipient holding the property on trust for the donor. The presumption of a resulting trust means the recipient was never intended to hold the property beneficially.

However, where the donor and the recipient stand in particular relationships, then the presumption is one of advancement rather than of a resulting trust. Transfers from husbands to wives and from parents to children raise presumptions of advancement which presume an outright gift was intended.

Where the relationship between the donor and the donee gives rise to a presumption of advancement, the donor bears the onus of showing that on the balance of probabilities they formed no intention to make a gift to the recipient at the date of transfer thereby rebutting the presumption and enlivening a resulting trust.

Accordingly the onus was on the father to persuade the Court on the balance of probabilities that his intention at the time of the original transfer of the units in 1984 was to create a resulting trust in his favour. The motives of the husband and his father at the time of the more recent transfer back were immaterial and the Judge considered there was insufficient evidence to conclude that the units were held on a resulting trust.

While the Judge ultimately found that the husband's relevant financial contributions included the initial introduction of the units which were now valued at $468,000 as this contribution was made in 1984, its impact was reduced by the various other contributions made by both parties in the subsequent 22 years.

After considering the nature and quantum of all the contributions the Judge found there should be a 20% loading in favour of the wife before turning his attention to comparing the parties' future financial needs.

In that regard he was far more optimistic about the husband's future financial circumstances and decided there should be a further adjustment to the wife of 15%.

The Judge ultimately found that the net property of the parties was worth $1.3M (plus an unvalued interest in a property in Greece) and after considering their contributions and relevant 'future financial needs' factors, ordered that the wife should receive 85 per cent of the pool.