

Case Note

Bosanac v Federal Commissioner of Taxation: The Future of the Presumptions of Resulting Trust and Advancement

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Abstract

This case note examines the decision of the High Court of Australia in *Bosanac v Federal Commissioner of Taxation* ('*Bosanac*'). Part II provides a case summary. Part III considers the future of the presumptions of resulting trust and advancement following *Bosanac*. Part IV discusses the judicial references in *Bosanac* to the presumptions being 'weak', and analyses whether these were an observation of the current state of the law or represent a change to it. Part V reviews the Court's clarification of an earlier case concerning the application of the presumption of resulting trust to married couples, *Trustees of the Property of Cummins (a bankrupt) v Cummins* ('*Cummins*'). The case note concludes that *Bosanac* is significant because it has paved the way for the future development of the presumptions, developed the law by weakening the presumptions of resulting trust and advancement, and helpfully clarified the effect of *Cummins*.

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I Introduction

Bosanac v Federal Commissioner of Taxation ('*Bosanac*') concerned the application of the presumptions of resulting trust and advancement.¹ The presumption of resulting trust is an equitable presumption that 'a person who advances purchase moneys for property, which is held in the name of another person, intends to have a beneficial interest in the property'.² The presumption of advancement is an 'exception'³ or 'counter-presumption'⁴ to the presumption of resulting trust where, in the case of transfers from husband to wife, male fiancé to female fiancée, and parent (or person in loco parentis) to child, equity presumes the transfer was a gift.

Part II of this case note is a case summary, highlighting the key facts, litigation history and decisive reasoning in *Bosanac*. Part III then considers the possible future development of the presumptions. Part IV discusses the High Court's references in *Bosanac* to the presumptions being 'weak'. Part V reviews the Court's clarification of an earlier case concerning the presumption of resulting trust, *Trustees of the Property of Cummins (a bankrupt) v Cummins* ('*Cummins*').⁵ Part VI concludes.

II Case Summary

A Facts

The appellant, Ms Bosanac, married Mr Bosanac in 1998. In 2006, Ms Bosanac purchased a home in Dalkeith, Perth (the 'Dalkeith property'). The couple paid a \$250,000 deposit on the Dalkeith property from a pre-existing loan account in their joint names, and paid the balance of the purchase price from two additional joint loan accounts. The couple was jointly and severally liable for the loans. The bank took security over the Dalkeith property and other properties owned individually by Ms and Mr Bosanac. The Dalkeith property was only ever registered in Ms Bosanac's name. Around 2012, the couple separated; however, they remained living together in the Dalkeith property until September 2015. Mr Bosanac has never claimed any interest in the Dalkeith property.

The respondent, the Commissioner of Taxation (the 'Commissioner'), was a creditor of Mr Bosanac, having been awarded a judgment sum against him of \$9,344,111.89 plus costs following a tax dispute.⁶ The Commissioner sought a declaration that Mr Bosanac had an equitable interest in the Dalkeith property to facilitate recovery of the debt.

¹ *Bosanac v Federal Commissioner of Taxation* (2022) 275 CLR 37 ('*Bosanac*').

² Ibid 49 [8] (Kiefel CJ and Gleeson J), citing *Calverley v Green* (1984) 155 CLR 242, 246 (Gibbs CJ) ('*Calverley*').

³ *Bosanac* (n 1) 49 [8] (Kiefel CJ and Gleeson J), citing *Napier v Public Trustee (WA)* (1980) 55 ALJR 1, 3 (Aickin J). See generally Jamie Glistler, 'Is There a Presumption of Advancement?' (2011) 33(1) *Sydney Law Review* 39.

⁴ *Bosanac* (n 1) 60–1 [52] (Gageler J).

⁵ *Trustees of the Property of Cummins (a bankrupt) v Cummins* (2006) 227 CLR 278 ('*Cummins*').

⁶ *Commissioner of Taxation v Bosanac [No 7]* (2021) 390 ALR 74, 75 [1] (McKerracher J) ('*Bosanac [No 7]*').

B *Litigation History*

The Commissioner commenced proceedings in the Federal Court of Australia and argued that Ms Bosanac held half of the Dalkeith property on resulting trust for Mr Bosanac.⁷ The Commissioner submitted that the presumption of resulting trust applied, but the presumption of advancement did not, because, following *Cummins*, the presumption of advancement no longer applied to the purchase of a matrimonial home.⁸ Relevantly, *Cummins* concerned a matrimonial home registered in the joint names of a husband and wife. The husband and wife had contributed unequal amounts to the purchase price, yet the Court found that their beneficial interests as joint tenants were equal.

The trial judge, McKerracher J, dismissed the Commissioner's application. His Honour held that *Cummins* did not qualify the presumption of advancement.⁹ Therefore, there was a presumed intention that Mr Bosanac's contribution to the purchase price of the Dalkeith property was a gift to Ms Bosanac.¹⁰ His Honour also found that the couple did not typically share their matrimonial assets and, therefore, the evidence did not rebut the presumption of advancement.¹¹ As such, Ms Bosanac was the sole legal and beneficial owner of the Dalkeith property.¹²

The Commissioner appealed to the Full Federal Court and was successful.¹³ In a unanimous judgment, Kenny, Davies and Thawley JJ found that 'the objective facts together with the inferences properly drawn from those facts, [led] to the conclusion that Mr Bosanac did not intend that his contribution to the purchase of their matrimonial home at Dalkeith be by way of gift to Ms Bosanac'.¹⁴ The Full Federal Court thus held that Ms Bosanac held a one-half interest in the Dalkeith property on trust for Mr Bosanac.¹⁵

C *In the High Court*

In the High Court, the Commissioner argued that the presumption of resulting trust applied. Further, the Commissioner contended that the presumption of advancement was either rebutted by the facts, no longer part of Australian law because it was discriminatory, or no longer part of Australian law in relation to the purchase of the matrimonial home following *Cummins*.

In three separate judgments, the High Court allowed Ms Bosanac's appeal, holding that she was the sole legal and beneficial owner of the Dalkeith property.

⁷ Ibid 75 [1] (McKerracher J).

⁸ Ibid 87 [70], 88 [72] (McKerracher J).

⁹ Ibid 121 [185], 131 [229].

¹⁰ Ibid.

¹¹ Ibid 84 [57].

¹² Ibid 131 [230].

¹³ *Commissioner of Taxation v Bosanac* [2021] FCAFC 158.

¹⁴ Ibid [22].

¹⁵ Ibid [27].

1 *Kiefel CJ and Gleeson J*(a) *The Presumptions*

Kiefel CJ and Gleeson J first discussed the nature of the presumptions of resulting trust and advancement, with a particular focus on the latter. Their Honours explained that the rationale for the presumption of advancement was originally that the relationships themselves were “good consideration” for the conveyance, but a rationale has come to be found in the *prima facie* likelihood that a beneficial interest is intended in situations to which the presumption has been applied.¹⁶

Kiefel CJ and Gleeson J hinted at the possible expansion of the presumption of advancement in future cases. Citing the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) and the *Marriage Amendment (Definitions and Religious Freedoms) Act 2017* (Cth), their Honours suggested that the presumption of advancement may now apply to transfers ‘between spouses more generally given the recognition by statute of de facto relationships in proceedings concerning property and same-sex marriage’.¹⁷ Their Honours did not express a concluded view on this point as it was not in issue.¹⁸

Their Honours observed that the ‘strength of the presumptions will vary from case to case depending on the evidence’, but suggested that, in modern times, it is unlikely a case will lack evidence capable of rebutting the presumptions.¹⁹ They also stated the strength of the presumptions is ‘weak’ or ‘diminished’ under modern social conditions in the sense that the presumptions ‘may readily be rebutted by comparatively slight evidence’.²⁰

Finally, Kiefel CJ and Gleeson J rejected the Commissioner’s contention that the presumption of advancement should no longer form part of Australian law. Their Honours took the view that abolishing the presumption of advancement would be contrary to the High Court’s previous decisions in *Nelson v Nelson* (*‘Nelson’*)²¹ and *Calverley*. In the former, Deane and Gummow JJ had described the presumptions as ‘entrenched “land-marks” in the law of property’ and observed that ‘[m]any disputes have been resolved and transactions effected’ by applying the presumptions.²² Kiefel CJ and Gleeson J found it ‘difficult to disagree’ with those reasons, but qualified this with the following:

[T]hat is not to accept that the presumptions when applied will carry much weight. Much has changed with respect to the various ways in which spouses deal with property. When evidence of this kind is given, inferences to the contrary of the presumptions as to intention may readily be drawn.²³

¹⁶ *Bosanac* (n 1) 51 [14], quoting *Wirth v Wirth* (1956) 98 CLR 228, 237 (Dixon CJ) (*‘Wirth’*).

¹⁷ *Bosanac* (n 1) 52 [17]. But see *Gleeson (Trustee); Re Coster v Eggleton* [2024] FedCFamC2G 11, [101] (Manousaridis J) (*‘Gleeson’*).

¹⁸ *Bosanac* (n 1) 52 [18].

¹⁹ *Ibid* 53 [21].

²⁰ *Ibid* 52–3 [19]–[22].

²¹ *Nelson v Nelson* (1995) 184 CLR 538 (*‘Nelson’*).

²² *Bosanac* (n 1) 55–6 [30] (Kiefel CJ and Gleeson J), quoting *Nelson* (n 21) 548.

²³ *Bosanac* (n 1) 56 [31].

(b) *Cummins*

Kiefel CJ and Gleeson J rejected the Commissioner's contention that *Cummins* displaced or qualified the presumption of advancement. Their Honours clarified that the relevant discussion in *Cummins* was not a statement of principle,²⁴ *Cummins* turned on the actual intention of the parties, and the facts in *Cummins* were different to the facts in this case.²⁵

(c) *Actual Intention*

Kiefel CJ and Gleeson J found that the intentions of both Ms and Mr Bosanac were relevant because they both contributed to the purchase price.²⁶ Since there was no direct evidence of intention, the question to be decided was what inference should be drawn from the evidence. Their Honours concluded that, 'in being a party to the loan accounts and using his property as security for them, Mr Bosanac intended to facilitate his wife's purchase of the Dalkeith property, which was to be held in her name'.²⁷ This was based on the couple's history of always holding substantial assets in their own names, not jointly.²⁸ The couple also had a history of using property held separately as security for joint loans.²⁹ Finally, Mr Bosanac's status as a 'sophisticated businessman' meant he would have understood the significance of who the registered titleholder was, and this weighed against an inference that Mr Bosanac intended to have a beneficial interest in the property.³⁰

2 *Gageler J*

(a) *The Presumptions*

Gageler J outlined the presumption of resulting trust as 'an ancient presumption of equity' that 'arises where property was purchased by one or more persons using funds contributed in whole or in part by one or more others'.³¹ His Honour described the presumption as 'akin to a civil onus of proof' that will 'yield to an actual intention to the contrary found on the balance of probabilities as an inference drawn from the totality of the evidence'.³²

His Honour outlined the 'similarly ancient counter-presumption' of advancement that arises when a husband contributes to the purchase of property held in his wife's name.³³ Gageler J stated that the presumption of advancement is 'not really a presumption at all',³⁴ but is a 'circumstance of evidence' of being in a

²⁴ Ibid 54–5 [23]–[28].

²⁵ Ibid.

²⁶ Ibid 56 [32].

²⁷ Ibid 58 [40].

²⁸ Ibid 57 [35].

²⁹ Ibid 58 [39].

³⁰ Ibid 58–9 [42].

³¹ Ibid 60 [51].

³² Ibid 64 [64].

³³ Ibid 60–1 [52].

³⁴ Ibid 64 [64].

relationship in which it is presumed that no resulting trust arises.³⁵ If there is no other evidence of intention, the relationship alone gives a ‘zero-sum’ result that negates the presumption of resulting trust.³⁶

Unlike the other Judges, Gageler J did not refer to the presumptions as ‘weak’.³⁷ However, he did observe that both presumptions will only be of ‘practical significance where the totality of the evidence is incapable of supporting the drawing of an inference ... on the balance of probabilities’.³⁸

Like the other Judges, Gageler J rejected the Commissioner’s contention that the presumption of advancement should not be part of Australian law because it is anachronistic and discriminatory.³⁹ His Honour seemed to concede that the presumption of advancement is anachronistic and discriminatory, but said it cannot be abolished without also abolishing the presumption of resulting trust, because the presumption of resulting trust is the ‘root anachronism’.⁴⁰ Gageler J found that, ‘[f]or better or for worse, the weight of history is too great for a redesign of that magnitude now to be undertaken judicially’.⁴¹

(b) *Cummins*

Gageler J adopted a similar approach to Kiefel CJ and Gleeson J in considering the Commissioner’s contention that *Cummins* required the Court to presume that the matrimonial home is held jointly.⁴² Regarding the relationship between *Cummins* and the presumptions of resulting trust and advancement, his Honour remarked:

The Commissioner’s invitation to recognise a standardised inference arising where a husband and a wife each contribute to the purchase by one of them of a matrimonial home is in effect an invitation to create a counter-counter-presumption. The invitation must be declined. Stereotypes are best avoided. Old ones die hard. New ones should not be created judicially.⁴³

(c) *Actual Intention*

Regarding the intentions of the parties in this case, Gageler J found the facts were capable of supporting an inference on the balance of probabilities that the parties intended that Ms Bosanac should be the sole legal and beneficial owner of the Dalkeith property.⁴⁴ His Honour looked to similar facts as Kiefel CJ and Gleeson J as well as the fact that Ms Bosanac was the sole contracting party and personally made the offer that was accepted by the vendor in circumstances that did not suggest she was ‘put up to the purchase by Mr Bosanac’.⁴⁵

³⁵ *Ibid.* See also Glister (n 3) 42–3.

³⁶ *Bosanac* (n 1) 61 [53], 64 [64].

³⁷ Cf *ibid* 53 [22] (Kiefel CJ and Gleeson J), 73 [99], 75 [103] (Gordon and Edelman JJ).

³⁸ *Ibid* 65 [67]. Cf *Morse v Duarte [No 5]* [2024] FedCFamC1F 7, [54] (Harper J).

³⁹ *Bosanac* (n 1) 61–2 [55]–[60].

⁴⁰ *Ibid* 61 [56]–[57].

⁴¹ *Ibid* 62 [58].

⁴² *Ibid* 63 [61].

⁴³ *Ibid* 63 [62].

⁴⁴ *Ibid* 65–6 [71].

⁴⁵ *Ibid* 67 [76]–[77].

3 *Gordon and Edelman JJ*(a) *The Presumptions*

Gordon and Edelman JJ outlined the presumption of resulting trust and explained that it functions as a ‘civil onus of proof and operates to resolve a factual contest when the relevant evidence is “uninformative or truly equivocal”’.⁴⁶ They discussed the presumption of advancement and remarked, like Gageler J, that it is not technically a ‘presumption’, but is a ‘circumstance of fact in which the presumption of resulting trust does not arise’.⁴⁷

Gordon and Edelman JJ acknowledged that it may be appropriate to expand the categories of relationship to which the presumption of advancement applies in future cases, ‘as was at least started in *Nelson*, where the lack of any presumption of resulting trust ... was extended to circumstances involving a transfer from a mother to a child’.⁴⁸ Their Honours did not elaborate on this as it was not necessary to decide the case.⁴⁹

Similarly to Kiefel CJ and Gleeson J, Gordon and Edelman JJ referred to the presumption of resulting trust as ‘weak’,⁵⁰ and explained that ‘the objective facts determine its position and significance (if any)’.⁵¹

Similarly to the three other Judges, Gordon and Edelman JJ stated that the presumption of resulting trust could not be abandoned by the judiciary because it is ‘too well entrenched as a landmark in the law of property’.⁵² Unlike Gageler J, their Honours did not consider the possibility of abandoning the presumption of advancement while maintaining the presumption of resulting trust.

(b) *Cummins*

Like the three other Judges, Gordon and Edelman JJ stated that *Cummins* did not create any standardised inference or presumption but, rather, was decided on the objective facts.⁵³

(c) *Actual Intention*

Gordon and Edelman JJ considered the facts of the present case and, like Gageler J and Kiefel CJ and Gleeson J, concluded that the objective intention of the parties was inconsistent with a declaration of trust in favour of Mr Bosanac.⁵⁴ The determinative facts were the ways in which the couple had arranged their finances

⁴⁶ Ibid 75 [105], quoting *Calverley* (n 2) 266 (Deane J).

⁴⁷ *Bosanac* (n 1) 78 [115]. See generally Glister (n 3) 42–3. See, eg, *Xin v Qinlang* [No 6] [2024] FedCFamC1F 8, [169]–[171] (Gill J) (‘*Xin*’).

⁴⁸ Ibid 78–9 [116], referring to *Nelson* (n 21).

⁴⁹ *Bosanac* (n 1) 78–9 [116].

⁵⁰ Ibid 72 [98].

⁵¹ Ibid 75 [103].

⁵² Ibid 71 [95], quoting *Calverley* (n 2) 266 (Deane J).

⁵³ *Bosanac* (n 1) 79–80 [117]–[120].

⁵⁴ Ibid 80–2 [121]–[126].

in the past and a lack of evidence of any reason for Ms and Mr Bosanac not to have been registered as joint tenants if they had so intended.⁵⁵

III The Future of the Presumptions

The presumption of advancement, as it currently operates, can be viewed as discriminatory.⁵⁶ In *Bosanac* and earlier cases the High Court has suggested that this status quo is undesirable.⁵⁷ This Part considers the future development of the presumptions of resulting trust and advancement, discussing first the most likely development, being expansion of the categories of relationship to which the presumption of advancement applies, then discussing abolition of the presumption of advancement alone, and, finally, abolition of both presumptions.

A Expanding the Presumption of Advancement

The High Court's view in *Bosanac* was that the presumption of advancement should be expanded in appropriate cases rather than abolished.⁵⁸ However, it was not necessary to actually expand the presumption in *Bosanac*. The leading Australian cases that have considered expansion of the presumption of advancement are *Calverley*, in which the High Court declined to extend the presumption to a transfer from a man to his de facto wife, and *Nelson*, in which the High Court extended the presumption to a transfer from a mother to her children.

1 Logical Necessity and Analogy

In *Calverley*, Deane J endorsed the approach of expanding the presumption of advancement by 'logical necessity and analogy and not by reference to idiosyncratic notions of what is fair and appropriate'.⁵⁹ His Honour considered that Mason and Brennan JJ in the same case gave 'convincing reasons for denying that either logic or analogy warrant the extension' of the presumption of advancement to de facto couples.⁶⁰ For example, Mason and Brennan JJ reasoned that there is a legal foundation of marriage,⁶¹ and, because that legal foundation was missing from de facto relationships, it was wrong to extend the presumption of advancement.⁶²

⁵⁵ Ibid 81 [124].

⁵⁶ Ibid 53 [21] (Kiefel CJ and Gleeson J), [59] (Gageler J). The Parliament of the United Kingdom attempted to abolish the presumption of advancement in 2010; however, the abolition has never been brought into force: Explanatory Notes to the *Equality Act 2010* (UK).

⁵⁷ *Bosanac* (n 1) 52 [17] (Kiefel CJ and Gleeson J), 62 [59] (Gageler J), 78–9 [116] (Gordon and Edelman JJ); *Calverley* (n 2) 269 (Deane J). See also Robert Chambers, *Resulting Trusts* (Oxford University Press, 1997) 30.

⁵⁸ *Bosanac* (n 1) 52 [17] (Kiefel CJ and Gleeson J), 62 [59] (Gageler J), 79 [116] (Gordon and Edelman JJ).

⁵⁹ *Calverley* (n 2) 268.

⁶⁰ Ibid.

⁶¹ Ibid 259–60.

⁶² Ibid.

(a) *Reasoning by Analogy to Statute*

Interestingly, in both *Calverley* and *Nelson* the High Court employed reasoning by analogy to statute to determine whether the presumption of advancement should be expanded.⁶³ In *Calverley*, Mason and Brennan JJ identified ‘special rules’ that allow courts to alter property rights between married couples where it is just and equitable to do so under the *Family Law Act 1975* (Cth).⁶⁴ That the ‘special rules’ in the *Family Law Act* indicated a clear policy distinction between married and de facto couples was cited as a reason to reject the expansion of the presumption to de facto couples.⁶⁵ Similarly, in *Nelson*, Dawson, Toohey and McHugh JJ in separate judgments noted that the *Family Law Act* imposed duties equally on mothers and fathers to maintain their children, and cited this as a reason for expanding the presumption to include transfers from mothers to their children.⁶⁶ Kiefel CJ and Gleeson J seemed to endorse this mode of reasoning in *Bosanac*, stating that *Nelson* raised the question whether the presumption of advancement ought to apply to same-sex married couples and de facto couples ‘given the recognition by statute’ of those relationships.⁶⁷

Reasoning by analogy to statute ‘is not quite as firmly established’ in Australia as in other common law jurisdictions.⁶⁸ However, as demonstrated by the judgments in *Calverley* and *Nelson*, the equitable presumptions seem to be an area in which the Court is willing to employ this mode of reasoning.

2 *Which Relationships Will Be Included?*

It is likely that logical necessity and analogy dictate extending the presumption of advancement to include transfers from wives to husbands and between de facto spouses and same-sex spouses. In *Bosanac*, Kiefel CJ and Gleeson J cited Dawson J’s observation in *Nelson* that there ‘was no reason now to suppose that the probability of a parent intending to transfer a beneficial interest in property to a child is any less the case with respect to a mother than a father’, and analogised that similar reasoning would apply in respect of wives, same-sex spouses and de facto couples.⁶⁹

However, application of the presumption of advancement to de facto couples was specifically rejected in *Calverley* in 1984. The question whether the

⁶³ Adam Waldman and Michael Gvozdenovic, ‘Development of the Common Law by Analogy to Statute’ (2023) 97(12) *Australian Law Journal* 912, 926–7.

⁶⁴ *Calverley* (n 2) 260–1.

⁶⁵ *Ibid.*

⁶⁶ *Nelson* (n 21) 574 (Dawson J), 586 (Toohey J), 601 n 240 (McHugh J).

⁶⁷ *Bosanac* (n 1) 52 [17], citing the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) and the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth).

⁶⁸ Sir Anthony Mason, ‘A Judicial Perspective on the Development of Common Law Doctrine in the Light of Statute Law’ in Andrew Robertson and Michael Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Bloomsbury Publishing, 2016) 119, 124. See further Andrew Burrows, ‘The Relationship between Common Law and Statute in the Law of Obligations’ (2012) 128 *Law Quarterly Review* 232, 248–58; Jack Beatson, ‘The Role of Statute in the Development of Common Law Doctrine’ (2001) 117 *Law Quarterly Review* 247, 264–72; Waldman and Gvozdenovic (n 63).

⁶⁹ *Bosanac* (n 1) 52 [17].

presumption applied to de facto couples arose again in 2012 in *Ryan v Ryan*.⁷⁰ In the intervening years since *Calverley*, de facto couples had been given the same ‘special rules’⁷¹ that apply to married couples under the *Family Law Act* giving courts a discretion to alter property rights where it would be just and equitable.⁷² However, Ward J in *Ryan* was bound by *Calverley* and thus unable to conclude that the presumption extended to de facto couples.⁷³

Expansion of the presumption of advancement to transfers from wives to husbands, between de facto couples, and between same-sex couples was mentioned as possible in *Bosanac*.⁷⁴ As social values continue to change in the future, will expansion of the presumption of advancement beyond these categories be required? It can be speculated that the question might arise in a case concerning spouses who are not husband and wife, but are also not same sex: for example, where one spouse is a woman and the other is a non-binary person. Even less predictable would be a case involving a throuple, which is ‘a romantic relationship shared by three people’.⁷⁵ Consideration of these speculative categories demonstrates that, if the presumption is going to continue to operate, the categories of relationship to which it applies must remain open and flexible.

B *Abolishing the Presumption of Advancement Alone*

In *Bosanac*, the Commissioner argued that the presumption of advancement should be abolished because it is anachronistic and discriminatory and has no acceptable rationale.⁷⁶ The Court did not disagree,⁷⁷ yet all the Judges stated that reform or abolition of the presumption of advancement is only appropriate for the legislature.⁷⁸ There are certainly ‘very powerful reasons’ the court should be cautious when developing the common law.⁷⁹ However, contrary to the Court’s view in *Bosanac*, there are several reasons abolition of the presumption of advancement alone might be considered in a future case.

First, judicial abolition of the presumption of advancement is appropriate because there is no indication that Parliament is likely to act on this issue. Certainly, the ‘court is neither a legislature nor a law reform agency’.⁸⁰ Yet the lack of movement from Parliament on this issue — combined with Gageler J’s recognition of the discriminatory operation of the presumption of advancement,⁸¹ and the High

⁷⁰ *Ryan v Ryan* [2012] NSWSC 636 (Ward J) (‘*Ryan*’).

⁷¹ *Calverley* (n 2) 260–1 (Mason and Brennan JJ).

⁷² *Family Law Amendment (De Facto Matters and Other Measures) Act 2008* (Cth) s 90SM.

⁷³ *Ryan* (n 70) [69], [74]. See also *Gleeson* (n 17) [101].

⁷⁴ *Bosanac* (n 1) 52 [17] (Kiefel CJ and Gleeson J).

⁷⁵ *Macquarie Dictionary* (online at 2 November 2023) ‘throuple’.

⁷⁶ *Bosanac* (n 1) 55 [29] (Kiefel CJ and Gleeson J), 61 [55] (Gageler J).

⁷⁷ *Ibid* 62 [59] (Gageler J), 78–9 [116] (Gordon and Edelman JJ).

⁷⁸ *Ibid* 55–6 [30] (Kiefel CJ and Gleeson J), 62–3 [60] (Gageler J), 71 [95] (Gordon and Edelman JJ), citing *Calverley* (n 2) 266 (Deane J) and *Nelson* (n 21) 602 (McHugh J).

⁷⁹ *State Government Insurance Commission (SA) v Trigwell* (1979) 142 CLR 617, 633 (Mason J).

⁸⁰ *Ibid*.

⁸¹ *Bosanac* (n 1) 62 [59] (Gageler J).

Court's recognition of the 'egalitarian nature of modern Australian society'⁸² — suggests that departure from the presumption of advancement would not require extensive law reform enquiries and could therefore be appropriately done by the Court.

Second, expanding the categories of relationship to which the presumption of advancement applies based on reasoning by 'logical necessity and analogy',⁸³ as the High Court currently favours,⁸⁴ presupposes that a principle underlying the presumptions has been 'extracted and accurately stated'.⁸⁵ However, the Court in *Bosanac* recognised that the underlying rationale for the presumption of advancement is unclear.⁸⁶ Logical necessity and analogy may therefore dictate an incremental contraction, rather than expansion, of the categories of relationship to which the presumption applies.⁸⁷ Indeed, before *Bosanac*, some lower courts took this view.⁸⁸ This incremental contraction of categories of relationship to which the presumption of advancement applies would be less radical than complete abolition of the presumption, and may therefore be a path to bringing the law in line with contemporary social conditions while ameliorating the Court's concern that 'the weight of history is too great' for judicial redesign of the presumptions.⁸⁹

In *Bosanac*, Gageler J reasoned that the presumption of advancement cannot be departed from without also departing from the presumption of resulting trust because the presumption of resulting trust is the 'root anachronism'.⁹⁰ His Honour also suggested that abandoning the presumption of advancement would bolster the anachronistic presumption of resulting trust.⁹¹ While abolishing both presumptions may be a neater solution, there does not appear to be a principled reason why having two anachronistic presumptions is better than having one. The benefit of retaining the presumption of resulting trust but jettisoning the presumption of advancement is that the presumption of resulting trust would apply equally to all individuals, whereas the presumption of advancement, as it currently stands, discriminates.

On the other hand, it has been argued that the presumption of advancement, as it currently operates between husbands and wives, appropriately benefits women in reflecting the reality of their disadvantaged economic status.⁹² However, this

⁸² *Nelson* (n 21) 586 (Toohey J), quoting *Brown v Brown* (1993) 31 NSWLR 582, 600 (Kirby P) ('*Brown*').

⁸³ *Calverley* (n 2) 268 (Deane J). See above Part III(A)(1).

⁸⁴ *Bosanac* (n 1) 62 [59] (Gageler J), 78–9 [116] (Gordon and Edelman JJ).

⁸⁵ Michael McHugh, 'The Law-Making Function of the Judicial Process: Part I' (1988) 62(1) *Australian Law Journal* 15, 27, quoting Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921) 31.

⁸⁶ *Bosanac* (n 1) 53 [20] (Kiefel CJ and Gleeson J), citing *Calverley* (n 2) 248 (Gibbs CJ), 78–9 [116] (Gordon and Edelman JJ).

⁸⁷ Canadian courts have begun to do this: see *Pecore v Pecore* [2007] 1 SCR 795.

⁸⁸ See, eg, *Ryan* (n 70) [69] (Ward J).

⁸⁹ *Bosanac* (n 1) 62 [57]–[58] (Gageler J).

⁹⁰ *Ibid* 61–3 [56]–[60].

⁹¹ *Ibid* 62 [59].

⁹² See Cathy Sherry, 'Conveyancing and Property: Resulting Trusts after *Bosanac v Federal Commissioner of Taxation*' (2023) 97(8) *Australian Law Journal* 527, 529–30; Lisa Sarmas, 'The Resulting Trust and the Family Home in Australia: The End of the Road?' (2015) 9(3) *Journal of Equity* 264, 277; Emitis Morsali, 'An Exercise in Restraint: Amending the Presumption of Advancement' (2023) 29(4) *Trusts & Trustees* 299, 307. See also Jamie Glistler, 'The Presumption

benefit does not justify the presumption of advancement's distinction between straight married couples and same-sex married couples. Further, expansion of the presumption of advancement to include transfers from wives to husbands, which seems likely,⁹³ would negative this possibly beneficial aspect.

C *Abolishing Both Presumptions*

Given the Court's reluctance to abolish the presumption of advancement alone, a position argued by the Commissioner in *Bosanac*,⁹⁴ it seems unlikely that the Court will take the more radical step of abolishing both presumptions in a future case. However, support for judicial abolition of both presumptions is not unprecedented. It is possible the Court will return to this view.

The most persuasive argument for judicial abolition of both presumptions is Murphy J's dissent in *Calverley*:

If common experience is that when one fact exists, another fact also exists, the law sensibly operates on the basis that if the first is proved, the second is presumed. It is a process of standardised inference. As standards of behaviour alter, so should presumptions, otherwise the rationale for presumptions is lost, and instead of assisting the evaluation of evidence, they may detract from it. There is no justification for maintaining a presumption that if one fact is proved, then another exists, if common experience is to the contrary.⁹⁵

Murphy J took the view that common experience was contrary to the presumptions.⁹⁶ None of the other Judges in *Calverley*, nor any of the Judges in *Bosanac*, explicitly disagreed. Indeed, the Court in *Bosanac* seemed to agree that the presumptions do not 'accord with the societal expectations of contemporary Australia'.⁹⁷ McHugh J in *Nelson* shared this view, stating: 'it seems much more likely that, in the absence of an express declaration or special circumstances, the transfer of property without consideration was intended as a gift'.⁹⁸ Murphy J's approach would bring the law in line with community expectations.

Another important argument in support of judicial abolition of both presumptions is that the cases suggest that individuals do not structure their transactions by reference to the presumptions. In *Nelson*, McHugh J was reluctant to depart from the presumptions because 'it may be that many transfers of property have been made on the basis of the presumptions'.⁹⁹ However, courts treat evidence that an individual was financially savvy,¹⁰⁰ received legal advice,¹⁰¹ or received

of Advancement' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing, 2010) 313–14.

⁹³ See above Part III(A)(2).

⁹⁴ *Bosanac* (n 1) 61 [54] (Gageler J).

⁹⁵ *Calverley* (n 2) 264. See also *Pettitt v Pettitt* [1970] AC 777, 824 (Lord Diplock) ('*Pettitt*'); *Brown* (n 82) 595 (Kirby P); *Stivactas v Michaletos* [No 2] [1994] ANZ ConvR 252 (Kirby P).

⁹⁶ *Calverley* (n 2) 264.

⁹⁷ *Bosanac* (n 1) 62 [57] (Gageler J), 78–9 [116] (Gordon and Edelman JJ).

⁹⁸ *Nelson* (n 21) 602.

⁹⁹ *Ibid.*

¹⁰⁰ *Bosanac* (n 1) 58–9 [42] (Kiefel CJ and Gleeson J), 65–6 [71]–[72] (Gageler J).

¹⁰¹ *Cummins* (n 5) 303 [73] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

advice from a real estate agent¹⁰² as indications that the individual would have understood the significance of who the registered owner of the property was, and *not* as evidence that they structured their transactions on the basis of the presumptions. This approach to evidence accords with Lord Upjohn's view in *Pettitt v Pettitt* ('*Pettitt*') that people 'do not give their minds to legalistic technicalities' and the presumptions were designed to reflect the 'common sense of the matter'.¹⁰³ If the presumptions no longer reflect the common sense of the situation, which Gageler J seemed to accept in *Bosanac*,¹⁰⁴ then the expectations of parties dealing with property may be defeated by continuing to apply the presumptions. Thus, this objection to judicial abolition of the presumptions falls away.

IV The Strength of the Presumptions

In *Bosanac*, Gordon and Edelman JJ referred to the presumption of resulting trust as 'weak'¹⁰⁵ and of 'debatable' worth,¹⁰⁶ and Kiefel CJ and Gleeson J considered that the presumption of advancement is 'especially weak today'¹⁰⁷ and of 'much diminished' strength.¹⁰⁸ These references to the strength of the presumptions could be either a practical observation or a development of the law by a weakening of the presumptions.

On one view, the Court has changed the law by weakening the presumptions. The notion that both presumptions are weak — in the sense that they are easy to rebut¹⁰⁹ — in response to contemporary social conditions was not new in *Bosanac*. In *Pettitt*, decided in 1970, Lord Reid stated that the strength of the presumption of advancement was diminished given that its rationales had 'largely lost their force' in contemporary social circumstances.¹¹⁰ Kiefel CJ and Gleeson J agreed in *Bosanac*.¹¹¹ Gordon and Edelman JJ also stated that 'the presumption of resulting trust *should* be recognised as a weak presumption given that the circumstances justifying it have changed so much since the foundations of the presumption in the 15th century'.¹¹² These references to social changes and the underlying rationales of the presumptions suggest the Court is developing the law in response to changing social circumstances such that the relevant intentions are only weakly inferred.

Another view is that, rather than developing the law, the High Court simply observed that the presumptions are unlikely to be determinative in modern times.¹¹³

¹⁰² *Anderson v McPherson [No 2]* (2012) 8 ASTLR 321, 344 [163] (Edelman J).

¹⁰³ *Pettitt* (n 95) 816. Cf *Nelson* (n 21) 548 (Deane and Gummow JJ).

¹⁰⁴ *Bosanac* (n 1) 62 [57].

¹⁰⁵ *Ibid* 72 [98], 75 [103], 77 [110].

¹⁰⁶ *Ibid* 72 [97].

¹⁰⁷ *Ibid* 53 [22].

¹⁰⁸ *Ibid* 53 [20], quoting *Pettitt* (n 95) 793 (Lord Reid).

¹⁰⁹ *Bosanac* (n 1) 53 [22] (Kiefel CJ and Gleeson J), citing *Pettitt* (n 95) 814 (Lord Upjohn); *Bosanac* (n 1) 74–5 [102] (Gordon and Edelman JJ), citing *S v S* [1972] AC 24, 41 (Lord Reid).

¹¹⁰ *Pettitt* (n 95) 793. See also *Calverley* (n 2) 270 (Deane J), quoting *Shephard v Cartwright* [1955] AC 431, 445 (Viscount Simonds).

¹¹¹ *Bosanac* (n 1) 53 [20], 56 [31].

¹¹² *Ibid* 72 [98] (emphasis added).

¹¹³ See, eg, *Perkins v Carey* [2023] NSWSC 210, [41]–[42] (Peden J).

That is, the Court seemed to imply that the presumptions are weak *because* it is rare that a modern case will lack evidence showing the actual intention of the parties.¹¹⁴

Importantly, these two views do not contradict each other. The Court's references to 'adapt[ing the law] to changing conditions'¹¹⁵ suggest an actual weakening of the presumptions, separate from the point that the presumptions are less likely to be decisive today than in the past. Further, the Court using 'weak' to mean 'easy to rebut' suggests an actual change of the law, because an observation that the presumptions are unlikely to be decisive in modern times would not affect how easy they are to rebut. Thus, the Court in *Bosanac* changed the law such that the presumptions are now weaker than in the past.

One possible result of this change in the law is that it may open the door for judicial abolition of the presumptions. If the presumptions only create a weak inference that is easily rebuttable and are susceptible to becoming even weaker as social values change, judicial abolition of the presumptions may be viewed as less radical than when it was proposed by Murphy J in 1984.

V Clarifying the Effect of *Cummins*

While *Bosanac* left open questions about the future development of the presumption of advancement, it conclusively resolved the related question posed by *Cummins*. In *Cummins*, the High Court had to determine the beneficial interest of a bankrupt in the property that was previously his matrimonial home with his then wife.¹¹⁶ In 1970, Mr and Mrs Cummins purchased a home and were registered as joint tenants,¹¹⁷ with Mrs Cummins having contributed 76.5% of the purchase price and Mr Cummins contributing the balance. Later (but before they separated), Mr Cummins became bankrupt. Mr Cummins then attempted to transfer his interest in the property to Mrs Cummins. This transfer was found to be void against the trustee in bankruptcy.¹¹⁸ The relevant question for the Court was whether, before the joint tenancy was severed by Mr Cummins' bankruptcy, (a) the equitable interest was at home with the legal title such that when the joint tenancy was severed, each of Mr and Mrs Cummins held a one-half interest in the property, or, alternatively, (b) the Cummins were equitable tenants in common such that when the joint tenancy was severed, they each held an interest proportionate to their contribution to the purchase price.¹¹⁹ The Court held that the equitable interest was at home with the legal interest and therefore Mr and Mrs Cummins each had a one-half interest in the property despite their unequal contributions to the purchase price.¹²⁰ Note it was not argued that the

¹¹⁴ *Bosanac* (n 1) 53 [21]–[22] (Kiefel CJ and Gleeson J), 65 [67] (Gageler J). But see *Xin* (n 46) [169]–[171] (Gill J).

¹¹⁵ *Ibid* 53 [20] (Kiefel CJ and Gleeson J), quoting *Pettitt* (n 95) 793 (Lord Reid).

¹¹⁶ Family Court proceedings were pending; however, the interests in the property had to be determined at the time the joint tenancy was severed, which happened before the couple separated.

¹¹⁷ *Cummins* (n 5) 286–7 [13], 301 [66] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

¹¹⁸ *Ibid* 287 [14], 297 [54].

¹¹⁹ *Ibid* 297–8 [55].

¹²⁰ *Ibid* 302–3 [71]–[73].

presumption of advancement applied to transfers from wife to husband in respect of Mrs Cummins' greater contribution to the purchase price.¹²¹

Until *Bosanac*, the decision in *Cummins* had been the source of ongoing confusion for courts dealing with disputes over matrimonial homes.¹²² Confusion arose from the following passage in *Cummins*:

The present case concerns the traditional matrimonial relationship. Here, the following view expressed in the present edition of Professor Scott's work respecting beneficial ownership of the matrimonial home should be accepted:

It is often a purely accidental circumstance whether money of the husband or of the wife is actually used to pay the purchase price to the vendor, where both are contributing by money or labor to the various expenses of the household. It is often a matter of chance whether the family expenses are incurred and discharged or services are rendered in the maintenance of the home before or after the purchase.

To that may be added the statement in the same work:

Where 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.

That reasoning applies with added force in the present case where the title was taken in the joint names of the spouses.¹²³

In the 16 years between *Cummins* and *Bosanac*, one lower court took this as a statement of principle that effectively created an additional presumption that applied with the same force as the presumptions of resulting trust and advancement.¹²⁴ Other lower courts have considered the so-called '*Cummins* principle' in varying formulations. The narrower formulation was a presumption or inference that, where both parties to a marriage have contributed to the purchase price of the matrimonial home, the couple intended to have equal beneficial interests in that property regardless of the proportions they contributed.¹²⁵ Broader formulations have framed the decision in *Cummins* as authority for the proposition that 'ordinarily where property [is] held as joint tenants by husband and wife, it can be presumed that in equity they hold equal one-half interests', without the requirement that the property be the matrimonial home, or that each spouse contributed at least some money to the purchase price.¹²⁶ By contrast, other lower courts concluded that *Cummins* did not

¹²¹ Ibid 280–2.

¹²² See, eg, *Weston v McAuley* [2017] FCCA 1, [52]–[53] (Judge Driver) ('*Weston*'); Lisa Sarmas, 'Trusts, Third Parties and the Family Home: Six Years since *Cummins* and Confusion Still Reigns' (2012) 36(1) *Melbourne University Law Review* 216, 230; Sarmas, 'The Resulting Trust and the Family Home in Australia' (n 92) 271.

¹²³ *Cummins* (n 5) 302–3 [71]–[72] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), quoting Austin Wakeman Scott, *The Law of Trusts* (Little, Brown, 4th ed, 1989) vol 5, 239 (citations omitted).

¹²⁴ *Combis v Jensen [No 2]* (2009) 181 FCR 178, 195–6 [48]–[51] (Collier J).

¹²⁵ See, eg, *Weston* (n 122) [51], [53] (Judge Driver).

¹²⁶ *Van den Heuvel v Perpetual Trustees Victoria Ltd* (2010) 4 BFRA 802, 834 [197] (Young JA). See also *Commonwealth Bank of Australia v Lam* [2018] FCCA 1568, [43] (Lucev J).

create a new presumption or abolish the presumption of advancement but instead was decided based on the actual intention of the parties.¹²⁷

Bosanac resolved the issue by confirming that *Cummins* did not create a new presumption or abolish the presumption of advancement in relation to matrimonial homes. The Court observed that the relevant passage in *Cummins* was not a statement of principle but rather a ‘possible inference which might be drawn from particular circumstances’,¹²⁸ stereotypes should be avoided,¹²⁹ and the starting point for analysis is the objective facts.¹³⁰

VI Conclusion

The High Court decision in *Bosanac* is significant because it has helpfully clarified the effect of *Cummins* and has developed the law by weakening the presumptions of resulting trust and advancement. *Bosanac* is also significant because it hints at the future development of the equitable presumptions, suggesting that, although they may now be weak, they will continue to operate and the presumption of advancement will be expanded to include transfers between parties beyond those in the relationships to which the presumption has historically been applied.

¹²⁷ See, eg, *Silvia v Williams* [2018] FCA 189, [146] (Wigney J); *Bosanac* [No 7] (n 6); *Hua v Tuckerman* [2014] NSWSC 1426, [126]–[127] (Black J).

¹²⁸ *Bosanac* (n 1) 54 [25] (Kiefel CJ and Gleeson J), 80 [119]–[120] (Gordon and Edelman JJ). See above Part II(C)(1)(b).

¹²⁹ *Bosanac* (n 1) 63 [62] (Gageler J). See above Part II(C)(2)(b).

¹³⁰ *Bosanac* (n 1) 80 [118] (Gordon and Edelman JJ). See above Part II(C)(3)(b).