WHO GETS WHAT?
DE FACTO RELATIONSHIPS AND IMPLIED TRUSTS

by
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Introduction

For better or worse, the '*de facto* relationship' has become an institution of our modern society. With it, however, has come a number of legal problems. Where two parties live together, buy joint property and live 'happily' as man and wife, no legal problems are likely to arise. What are the legal consequences, though, where their harmony is shattered and both parties go their separate ways? Put shortly, who gets what?

Because of the large number of couples currently living in *de facto* relationships and the considerable value of assets held by the parties, both individually and jointly, the practical importance of this question is obvious. If the parties were married, the court would be virtually unrestricted in the property orders it could make under the Family Law Act 1975. As yet, there does not exist in Queensland a statutory equivalent to the Family Law Act for those in a *de facto* relationship. In such cases, the answer to the question 'Who gets what?' is to be found in basic equitable principles which have developed over the years to cater for the changing conditions in our society.

Basic Concepts

Where real property has been acquired in the name of one or more persons, complex questions may arise as to who holds the beneficial interest in that property. Disputes frequently arise in the following cases:

1. Where property is purchased in the name of a person who does not provide any of the purchase price or make any other contribution to the household (financial or otherwise).
2. Where property is purchased in the name of a person who makes some contribution (financial or otherwise) to the household though no direct contribution to the purchase price.
3. Where property is purchased in the name of a person where it would be fraudulent, unconscionable or inequitable to deny another person a beneficial interest in the property.

The courts have recognised beneficial ownership of property in such cases by the imposition of trusts. There has been a marked development of case law in recent years dealing with resulting, implied and constructive trusts. As this law is undergoing change to reflect changing social conditions, it is becoming increasingly difficult to reconcile the reasoning in some of the cases. In particular, there have been inconsistencies in the interpretation of 'resulting', 'implied' and 'constructive' trusts going to the elements which found their existence.

In order to examine satisfactorily the current state of the law, a brief analysis of the definitions of resulting, implied and constructive trusts is necessary. Although on occasions judges have referred to these trusts as if they formed three separate categories, an examination of the major cases in this area discussed below indicate that the resulting and constructive trusts are a form of implied trust and will be treated accordingly in this article.

'Resulting trust' has been defined as 'An implied trust where the beneficial interest in property comes back, or results, to the person ... who transferred the property to the

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trustee or provided the means of obtaining it'.[1] Osborn proceeds to give examples of different kinds of resulting trusts, the one relevant for present purposes being as follows – 'where on a purchase property is conveyed into the name of someone other than the purchaser, there is a resulting trust in favour of the man who advances the purchase money' . . . (subject to the presumption of advancement to be discussed). The cases discussed below indicate broad judicial acceptance of these propositions and a number of examples will be discussed in more detail.

As will be illustrated, the presumption of resulting trust is merely a device used by the courts to ascertain the parties' intentions. If not rebutted by evidence to the contrary, the courts presume that where one party ('the purchaser') provides the purchase price and the property is purchased in the name of another ('the volunteer'), the latter holds the property on trust for the former. This form of trust is the most common species of resulting trust. Where it is clear from the evidence, however, that the purchaser intended the volunteer to obtain the entire beneficial interest in the property, no resulting trust will be presumed to exist – the presumption of a resulting trust in favour of the purchaser will be rebutted.

In addition to a finding of the existence of a resulting trust in favour of the purchaser solely, where there does not exist any evidence indicating the volunteer was intended to obtain any beneficial entitlement, the court may find a resulting trust in favour of the purchaser and volunteer jointly or in such proportions as reflects the 'common intention' of the parties as fit the circumstances. For example, if a property is purchased by a purchaser in the name of a volunteer and the evidence indicates a common intention that the parties were to hold the beneficial interest in the property equally, the court will hold that the volunteer takes the property on a resulting trust in favour of the purchaser and the volunteer in equal shares. Further examples of such cases will be discussed in more detail below.

It appears, however, that there has been greater judicial divergence of opinion regarding the concept of the 'constructive trust' in the area of beneficial entitlement to property. 'Constructive trust' is defined in Osborn as 'A trust which is raised by construction of equity in order to satisfy the demands of justice and good conscience without reference to any presumed intention of the parties . . .'.[2] It is a trust imposed by the court based not on the intention of the parties, and is imposed only in recognized categories of circumstances. An examination of some of the cases, however, indicate that the role of the constructive trust in this particular context in Australia is by no means settled.

The division of property acquired during a *de facto* relationship affords a valuable and insightful contemporary example of the application of these principles. Resulting and constructive trusts have evolved as the tools through which judicial attempts are being made to divide the property of a dissolved *de facto* relationship fairly and equitably. The recent High Court decision of *Muschinski* v. *Dodds*[3] itself reflects the current uncertainty in this area of the law. Because of the differing approaches of the judges in that case, it is difficult to determine the likely trend of the courts in future cases, and it may be necessary to await the outcome of further decisions before it can be determined with any degree of certainty 'who gets what'.

Where property is purchased in the name of a person who does not provide any of the purchase price or make any other contribution to the household (financial or otherwise)

Assume a case where there is a purchase of real property paid for by the purchaser out of

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1. *Osborn's Concise Law Dictionary*, (1983) at 292.
2. *Ibid.* at 89.
3. (1986) 60 A.L.J.R. 52.

his own funds, and the property is registered either in the volunteer's name alone or jointly with the purchaser. Here, the law presumes that the volunteer holds the legal interest in the property on trust for the purchaser alone, that is, there exists a resulting trust in favour of the purchaser, the volunteer being the trustee.

In determining whether a resulting trust in favour of the purchaser will be held to exist, it must be remembered that the presumption of a resulting trust is nothing more than that – a presumption. It is a device which is used by the courts to ascertain the intention of the parties if none has been expressed or implied from their conduct. For example, if it is clear that the purchaser intends the volunteer to obtain a beneficial interest in the property purchased, a resulting trust in favour of the purchaser will not arise.[4]

The presumption of the resulting trust, however, is to be tested against the 'presumption of advancement'. This notion is well explained by Deane J. in *Calverley* v. *Green*: 'there are certain relationships in which equity infers that any benefit which was provided for one party at the cost of the other has been so provided by way of 'advancement' with the result that the prima facie position remains that the equitable interest is presumed to follow the legal estate and to be at home with the legal title . . .'.[5]

For example, the presumption of advancement will apply in cases where a husband buys property in the name of his wife,[6] a father buys property in the name of his son,[7] and where a man transfers property into the name of his prospective wife.[8]

Despite the High Court's decision in *Napier* v. *Public Trustee (Western Australia)*[9] in which Aickin J. stated that it is 'well established that no presumption of advancement arises in favour of a de facto wife',[10] it has been suggested that it might still be possible to present a persuasive case for the recognition of the presumption in a *de facto* relationship, especially where the relationship has involved some length of time and some stability.[11] In *Napier's case*,[12] Mason, Murphy and Wilson JJ. concurred with the judgment of Aickin J. either expressly or by implication. Whether such concurrence extended to his remarks upon the presumption of advancement is unclear. In contrast, Gibbs A.C.J. (as he then was) noted that in light of the changing attitudes in society, it might be appropriate to extend the presumption of advancement to a *de facto* relationship. He added however, that even if there existed a presumption of advancement, it was rebutted on the facts.[13]

Gibbs C.J. further commented upon the presumption of advancement in *Calverley* v. *Green*[14] where he expressed the view that *Napier's case* was not authority for the rejection of the presumption of advancement in a *de facto* relationship. The learned judge said, the 'question is whether the relationship which exists between two persons living in a de facto relationship makes it more probable than not that a gift was intended when property was purchased by one in the name of the other'.[15] After concluding that on the facts of the case a presumption of advancement would arise, Gibbs C.J. concluded that the evidence rebutted the presumption. It appears, therefore, that it is by no means settled whether or not the

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4. For example, see *Russell* v. *Scott* (1936) 55 C.L.R. 440.
5. (1984) 155 C.L.R. 242 at 267.
6. *Ibid.* at 247.
7. *Shepherd* v. *Cartwright* [1955] A.C. 431.
8. *Wirth* v. *Wirth* (1956) 98 C.L.R. 228.
9. (1981) 55 A.L.J.R. 1.
10. *Ibid.* at 158.
11. See discussion "The presumptions of advancement and de facto spouses" (1981) 55 A.L.J. 179.
12. *Supra* n.9 at 2 and 5.
13. *Ibid.* at 154 – 155.
14. *Supra* n.5 at 250.
15. *Ibid.*

presumption of advancement currently applies in Australia in deducing the beneficial ownership of property acquired within a *de facto* relationship.

Once again, however, it should be remembered that the presumption of advancement is nothing more than a presumption which will be rebutted where there is sufficient evidence (either express or implied) to indicate a contrary intention.[16]

Applying the presumption of resulting trust to the *de facto* relationship, if a *de facto* husband purchases property in the name of his *de facto* wife, it is presumed that she will hold the property on trust for him. If the courts are prepared to concede that due to the permanence and stability of the relationship under consideration, it is appropriate that the presumption of advancement will apply, then the *de facto* wife will be entitled to the beneficial interest in the property.

As mentioned, if the property is in the name of the volunteer, whether or not the volunteer will have a beneficial interest in the property, depends upon the common intention of the parties. In other words, by looking at the common intention of the parties, it is possible to rebut the presumption that the volunteer is holding the interest of the purchaser as trustee. For example, in *Napier's case*,[17] two parties lived in a *de facto* relationship. The *de facto* husband ('the appellant') provided the funds for the purchase of a house which was placed in the name of his *de facto* wife. The *de facto* wife died. The house was not left to the appellant in her will. On the appellant's claim that there existed a resulting trust in his favour, the High Court held that a resulting trust had been created in relation to the interest in remainder – that is, the interest in the property remaining after the death of the *de facto* wife. Even though the parties may have intended the beneficial interest to be vested in the *de facto* wife during her lifetime, no such intention existed concerning the interest in remainder, and the appellant was beneficially entitled to the interest in remainder.[18]

The Federal Court decision of *Re Hope; Ex parte Carter*[19] is another example of the court finding that the presumption of resulting trust was rebutted because it was the intention of the transferor to benefit the *de facto* spouse. In that case, the parties lived in a *de facto* relationship in the home of the *de facto* wife ('the applicant'). The parties entered into a business partnership of transport trucking and two years later the applicant transferred the title of her home to herself and her *de facto* husband as joint tenants. The transfer was expressed to be in consideration of both parties taking over the liability of a debt secured by a mortgage over the home. Mortgage payments were being made from proceeds of the business. The parties separated and the applicant contended that her *de facto* husband held the property on trust for her.

Spender J. found that it was intended by the applicant at the time of the transfer that her *de facto* husband be beneficially entitled to the property and that at the date of the creation of the interests between herself and her *de facto* husband, it was intended not to create a trust in her favour. Although Spender J. did not specifically state the type of trust to which he was referring, one presumes the reference in that context was to the creation of a resulting trust.

In *Calverley* v. *Green*[20] the parties had been living in a *de facto* relationship for

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16. For an example where the presumption was rebutted, see *Werner Bloch* v. *Erich Bloch and Elizabeth Bloch* (1981) 55 A.L.J.R. 701.
17. *Supra* n.9.
18. For another example of a rebuttal of the presumption of resulting trust because of the contrary intention of the parties, see *House* v. *Caffyn* [1922] V.L.R. 67.
19. (1985) 59 A.L.R. 609.
20. *Supra* n.5.

approximately ten years in the house of the *de facto* husband ('the appellant'). The couple decided to move to another district and that the appellant would purchase a house in his own name. The appellant paid the deposit but the only way he could raise finance was to register the property in both names. The parties raised the remainder of the purchase price (after subtraction of the deposit) by mortgaging the property, both parties being legally obliged to meet the mortgage payments. The purchase proceeded and both were registered as proprietors. As contemplated by the parties, the appellant made all the mortgage payments. After the termination of the relationship, the appellant sought a declaration that the *de facto* wife ('the respondent') held her interest on trust for him and an order that she transfer her interest to him.

The Court held that a resulting trust was created, both parties being beneficially entitled in proportion to the portion of the purchase price contributed. Half of the loan advanced under the mortgage was effectively the respondent's contribution, giving her a beneficial entitlement to the property to this extent.

Although the principle expressed in this case is in accordance with the authorities, perhaps it is questionable whether the resulting trust imposed by the Court did in fact represent the common intention of the parties. It appears from the judgment that both parties intended the appellant alone to purchase the property. The respondent became registered as proprietor and mortgagor as that was the only way finance could be obtained. Although legally the respondent was liable to make payments under the mortgage, it was always intended by the parties that the appellant make all the mortgage payments. Arguably, it was also intended by the parties that he would be entitled to the entire beneficial interest in the property.

Whether the presumption of a resulting trust was rebutted by evidence of the parties' contrary intention was one of the issues canvassed in *Muschinski* v. *Dodds*.[21] The appellant, Muschinski, and respondent, Dodds, were living in a *de facto* relationship. They proposed to enter into a business venture to buy some land, subdivide and sell most of it and build a house on the remainder. The arrangement was that the *de facto* wife would provide the purchase price and the *de facto* husband would build the house, contributing his skills and providing the necessary finance. The purchase proceeded, the parties being registered as tenants in common in equal shares. The proposal, however, did not reach fruition as local council approval for the subdivision could not be obtained, and the parties did not proceed with the construction of the house. The *de facto* relationship terminated and the appellant sought a declaration that she was the beneficial owner of the whole property.

It was argued by the appellant that as she provided all of the purchase price (the respondent contributing a small amount to finance the improvement of the property), there was a resulting trust in her favour. The Court held that by examining the common intention of the parties at the time of acquisition of the property, it was clear that the parties intended that each should be equally entitled to the beneficial interest in the property, notwithstanding that the purchase price had been provided by the appellant. On the facts, the common intention of the parties rebutted the presumption of a resulting trust.

On the dissolution of a *de facto* relationship, then, the court will attempt to distribute the real property which has become property of the *de factos* by discerning the parties' intentions and giving effect to that intention. If no intention has been formed (and the presumption of advancement is considered inapplicable), whoever has paid for the property is likely to be the party entitled to it.

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21. *Supra* n.3.

Where property is purchased in the name of a person who makes some contribution (financial or otherwise) to the household though no direct contribution to the purchase price

Where one party ('the contributor') makes a financial contribution to the household so that the other party in whose name the property is registered is free to make financial contributions to the purchase price (in the form of mortgage payments), and this arrangement is coupled with the common intention that both parties would thereby acquire a beneficial interest in the property, the court will impose a resulting trust to give effect to this intention.[22]

It should also be noted here that the principle applies where the contributor provides some contribution, other than a financial one, to the household. For example, providing the requisite common intention exists, the court may find that a resulting trust exists where the contributor agrees to build a house on the property purchased,[23] the contributor agrees to give up his job to provide the other party with care, comfort and financial assistance[24] or the contributor and proprietor enter into some other financial arrangement.[25]

It appears, however, that if there is no evidence of the formulation of any common intention in this regard, the court will not be prepared to impute the common intention of the parties. In other words, the court will not be prepared to find that a resulting trust exists on the basis of a common intention that it feels the parties would have had, had they turned their minds to the question.[26]

An examination of some of the more important cases in this area in chronological order might give some indication of the direction of the courts concerning the imposition of resulting trusts and might also provide illustrations of the principles enunciated above.

Although the contributor was unsuccessful in her claim to a beneficial interest in the property of a *de facto* relationship in *Richards* v. *Dove*,[27] the Court acknowledged that a financial contribution, though not to the purchase price, might entitle a contributor to a beneficial interest if that contribution was made with the parties' intention that the contributor acquire a beneficial interest. The parties to the dispute had been living in a *de facto* relationship, the *de facto* wife ('the plaintiff') paying for the food and the gas while the *de facto* husband ('the defendant') paid for all other outgoings including the rent, the electricity and the general and water rates. The defendant bought a house in his own name, paying 350 pounds towards the purchase price, 150 pounds of which was lent to him by the plaintiff. The balance was obtained by a mortgage granted to the defendant. After moving into the new house, the plaintiff continued to pay for the food and gas, the defendant paying the other household bills and the mortgage payments.

On an application by the plaintiff for a declaration of a beneficial interest in the property, it was held that as she had not shown that the property had been acquired by the joint efforts of both parties, she was not entitled to succeed. The Court held that her contributions to household expenses had not changed since the acquisition of the property and could not be regarded as giving her any interest. The Court further noted that by the defendant borrowing the 150 pounds from the plaintiff, it would have been perfectly clear

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22. *Baumgartner* v. *Baumgartner* [1985] 2 N.S.W.L.R. 406. Compare with *Butler* v. *Craine* [1986] V.R. 274 where Marks J. held that in similar circumstances a constructive trust (rather than a resulting trust) arose.
23. *Muschinski* v. *Dodds*, *supra* n.3.
24. *Boccalatte* v. *Bushelle* [1980] Qd.R. 180.
25. See for example comments made by Glass J.A. in *Allen* v. *Snyder* [1977] 2 N.S.W.L.R. 685 at 691 approving statements made by Lord Morris in the House of Lords decision of *Gissing* v. *Gissing* [1971] A.C. 886 at 898.
26. See for example *Pettitt* v. *Pettitt* [1970] A.C. 777; *Gissing* v. *Gissing*, *supra* n.25; *Allen* v. *Snyder*, *supra* n.25; *Baumgartner* v. *Baumgartner*, *supra* n.22; *Muschinski* v. *Dodds*, *supra* n.3, in particular comments of Gibbs C.J. at 56.
27. [1974] 1 All E.R. 888.

to the plaintiff that the defendant was purchasing the house as his own property, on his own behalf. Consistent with the above principles, the Court noted that before a party can acquire a beneficial interest in property by making contributions, those contributions must be made with the aim of acquiring some interest in the property.

In any exposition of the development of resulting or constructive trusts in the area of *de facto* relationships, reference must be made to the frequently cited decision of the New South Wales Court of Appeal in *Allen* v. *Snyder*.[28] The facts of this case are not unique. A *de facto* relationship had existed for thirteen years, the parties occupying a house which was in the name of the *de facto* husband ('the plaintiff'). After the dissolution of the relationship, the *de facto* wife ('the defendant') claimed to be beneficially entitled to an interest in the property on the grounds, inter alia, that she furnished the home with her own funds and that it was only with her assistance that the plaintiff was able to raise the finance necessary to purchase the property.

The defendant's claim was based on two alternative grounds:

1. That the trial judge should have inferred from the conduct of the parties that they had at the time of acquisition of the property a common intention that the beneficial interest in the property would be equally divided between them; or
2. That even if the trial judge concluded that such a common intention did not exist, the trial judge should have imputed that intention to the parties as a matter of law.

Although all three judges had different views concerning when trusts will arise, they all held that the parties did not possess a common intention that the defendant should acquire a beneficial interest in the property. Accordingly, the first ground of the defendant's claim was unsuccessful.

It is in relation to the second ground of the defendant's argument and the treatment of this area of the law that the judges appeared to take differing views, making it difficult to draw a *ratio* from the decision. Because of the divergence of judicial reasoning, it is necessary to consider briefly each judgment.

Glass J.A. commented on the concept of the 'new model constructive trust' (discussed in more detail later) propounded by Denning M.R. in the case of *Fribance* v. *Fribance (No. 2)*,[29] being expressed in *Heseltine* v. *Heseltine*[30] in the following terms:

> If the conduct of the husband is such that it would be inequitable for him to claim the property beneficially as his own, then, although it is transferred into his name, the court will impose unpon him a trust to hold it for them both jointly or for her alone, as the circumstances of the case may require.

In such cases, Glass J.A. noted, the trust imposed is based not upon the actual intentions of the parties, inferred as a matter of fact, but upon intentions imputed to them, as a matter of law. Glass J.A. rejected this concept and held that it was not for a court to impute a common intention and, therefore, rejected the defendant's second claim.

The judgment of Samuels J.A. appears to follow the reasoning of Glass J.A., rejecting the so-called 'new model constructive trust' concept and declining to impute a common intention to the parties. While acknowledging that a constructive trust will arise where, according to the principles of equity, it would be a fraud for the person on whom the Court imposes the trust to assert a beneficial ownership, Samuels J.A. held that the facts of the present case did not fall within those principles of equity referred to requiring the creation of a constructive trust.

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28. *Supra* n.25.
29. [1957] 1 W.L.R. 384 at 387.
30. [1971] 1 W.L.R. 342 at 346.

Mahoney J.A., although ultimately deciding against the defendant, recognized that under the general law, a trust may be shown to exist, not only where the parties have a common intention, but where there is no such intention and equity deems that one should exist. Mahoney J.A. reviewed a number of factual situations where 'in view of equity', a trust was held to exist. Unfortunately, however, he did not indicate any guidelines for determining when the courts would be likely to impose a trust 'in view of equity' and there was no analysis of the type of trust (resulting or constructive) that would be imposed in those circumstances. Mahoney J.A. merely concluded by finding that on the facts, the defendant had not proved the proprietary interest that she claimed.

The single judge decision of the Queensland Supreme Court in *Boccalatte* v. *Bushelle*[31] applying *Allen* v. *Snyder*[32] involved a property dispute arising after the death of one of the parties to a *de facto* relationship. The *de facto* wife ('the defendant') and the deceased had lived in a *de facto* relationship and formed the common intention that in exchange for the defendant giving up her job and providing the deceased with care, comfort and financial assistance for the remainder of his life, the deceased would buy a home (in his own name) which would become their matrimonial home. After the death of the deceased, the defendant claimed that the plaintiff, the deceased's executor, held the land in trust for her.

The Court approved the conclusions reached in *Allen* v. *Snyder*[33] which it stated to be as follows:

1. The Court will give effect to an oral agreement concerning the manner in which the beneficial interest is to be held.
2. The common intention to which the Court gives effect may be expressed in the oral agreement or it may be inferred from the conduct of the parties.
3. The Court will give effect to the trust created by the agreement or common intention that if the parties contribute, as contemplated, the beneficial interest will be held in accordance with their agreement or common intention.[34]

Applying these principles to the facts, Matthews J. decided in favour of the defendant, finding that it was the common intention of the parties that the property was to be the defendant's if her *de facto* husband predeceased her. Although not deciding the kind of trust which arose in the circumstances, Matthews J. held that the plaintiff was holding the property on trust for the defendant. This result seems consistent with the principles set out above.

The more recent New South Wales Court of Appeal decision of *Baumgartner* v. *Baumgartner*[35] concerned a relationship where the parties were living for some time in a unit owned by the *de facto* husband ('the respondent'). At about the same time as the birth of their child, the respondent bought a house, finance being obtained and the house being registered in the respondent's name only. The reason for this was that finance was not available jointly to parties living in a *de facto* relationship. During the time the parties lived together, they pooled their wages (which were approximately the same) from which was paid their living expenses and fixed commitments (such as mortgage payments).

The majority (Kirby P. and Priestley J.A.) held that the parties had a common intention that the *de facto* wife ('the appellant') was entitled to a beneficial interest in the property and that the respondent held the beneficial interest on trust for her. Kirby P. held that the

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31. *Supra* n.24.
32. *Supra* n.25.
33. *Ibid.*
34. *Supra* n.24 at 185.
35. *Supra* n.22.

appellant's beneficial interest was co-extensive with her contributions,[36] and Priestley J.A. that the respondent held the land on trust for himself and the appellant as tenants in common in equal shares.[37] In his dissenting judgment, Mahoney J.A. concluded that the parties did not have a common intention that the appellant be beneficially entitled to an interest in the property.[38]

As mentioned above, in *Muschinski* v. *Dodds*,[39] although the respondent did not contribute to the purchase price, the Court found that the parties had a common intention that both should acquire a beneficial interest in the property. There was an intention that the respondent would acquire a beneficial interest, and in return he would attend to the erection of a house on the property. Put shortly, a resulting trust was held to exist to reflect the parties' common intention, notwithstanding that the respondent made no contribution to the purchase price.

As indicated from these cases, there appears to be judicial consensus concerning the imposition of a resulting trust to give effect to the common intention of the parties in these situations. Many of the judgments[40] also distinguish between the concepts of resulting and constructive trusts, the basic distinction being the requirement of common intention in the former, the latter arising irrespective of the intention of the parties. If this basic distinction is acknowledged, the terminology of the Supreme Court of Victoria in the recent case of *Butler* v. *Craine*[41] is difficult to reconcile with these decisions.

In *Butler* v. *Craine*,[42] the *de facto* husband ('the plaintiff') and the deceased had lived in a *de facto* relationship for seventeen years prior to the death of the deceased. The plaintiff alleged that they had agreed that if the plaintiff repaired the home and looked after the deceased, he would be entitled to own the property if she died first. After her death, the plaintiff claimed to be beneficially entitled to the property.

Although the Court decided in favour of the plaintiff on contractual grounds, the Court also considered the plaintiff's claim that a trust had arisen in his favour. Marks J. stated that he was following *Allen* v. *Snyder*[43] in holding that a constructive trust had arisen, the plaintiff having satisfied the following three elements:

1. The parties must form a 'common intention' as to the ownership of the beneficial interest in real property.
2. The claimant of the beneficial interest must have acted to his or her detriment consequent on the formation of the common intention.
3. It must appear that it would be a fraud on the claimant for the other party to assert that the claimant had no beneficial interest in the property.[44]

Upon consideration of all of the judgments in the above cases, it is perhaps questionable whether satisfaction of the above elements being necessary to establish a constructive trust is consistent with authority and can be justified by the decision of *Allen* v. *Snyder*.[45] Because the Court found that the parties had a common intention that the plaintiff acquire

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36. *Ibid.* at 418.
37. *Ibid.* at 446.
38. *Ibid.* at 430.
39. *Supra* n.3.
40. See for example comments by all judges in *Allen* v. *Snyder*, *supra* n.25 and by Kirby P. and Mahoney J. in *Baumgartner* v. *Baumgartner*, *supra* n.22. Both cases were cited with approval on this point by Spender J. in *Re Hope; Ex parte Carter*, *supra* n.19. See also comments made by Connolly J. in *Re Bulankoff* [1986] 1 Qd.R. 366.
41. *Supra* n.22.
42. *Ibid.*
43. *Supra* n.25.
44. *Supra* n.22 at 283.
45. *Supra* n. 25.

a beneficial interest in the property, the finding of a resulting trust (rather than a constructive trust) would perhaps evidence a greater consistency.

The effect of these decisions might be quite harsh on a *de facto* partner. For example, if it is agreed by the *de facto* parties that the 'wife' give up her employment to keep house or perhaps to raise a child of the relationship but the parties fail to form a common intention concerning the beneficial entitlement of the property, on the termination of the relationship, the 'wife' may not be benefically entitled to the property acquired out of the proceeds provided by her 'husband'. It is in this regard that the *de facto* wife in Queensland is at an obvious disadvantage compared with her 'married counterpart' who may be entitled to seek a property order under the Family Law Act 1975 vesting property owned by the husband in the wife.

Where property is purchased in the name of a person where it would be fraudulent, unconscionable or inequitable to deny another person a beneficial interest in the property

Although courts will impose a constructive trust in a variety of circumstances, for example, as a result of breach of fiduciary duty, the imposition of a constructive trust may be relevant in the area under consideration where there has been some form of fraudulent, unconscionable or inequitable conduct. It is established law that equity will grant relief against fraudulent or unconscionable conduct. A standard example of such a case is the English decision of *Bannister* v. *Bannister*.[46] In that case, the defendant sold two cottages to her brother-in-law, the plaintiff, the plaintiff verbally promising that the defendant could remain in one of the cottages rent free for the remainder of her life. The plaintiff subsequently sought possession of the cottage from the defendant, claiming that the verbal promise was unenforceable because it was not in writing as required by the Law of Property Act 1925 (the equivalent of Section 59 Property Law Act (Qld) 1974-1986). The Court of Appeal found in favour of the defendant, imposing a constructive trust upon the plaintiff and declaring that the plaintiff held the cottage on trust to permit the defendant to occupy it during her lifetime. This decision indicates that a constructive trust will be imposed to prevent a person unconscionably relying on the absence of written evidence to defeat the interest of another.[47]

The case law indicates that the Australian courts are also prepared to impose a constructive trust where there has been fraudulent or unconscionable behaviour by the proprietor.[48] For example, although Glass J.A. and Samuels J.A. ultimately decided in *Allen* v. *Snyder*[49] that a constructive trust had not arisen in the circumstances, as stated earlier, both acknowledged that a constructive trust would arise where it would be a fraud (in equity) for the legal owner to assert beneficial ownership.[50]

In numerous Australian cases, it has been stated that it would be enough to show unconscionable and inequitable (rather than fraudulent) behaviour for an equity to arise in

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46. [1948] 2 All E.R. 133.
47. See also *Binions* v. *Evans* [1972] Ch. 359.
48. See for example *White* v. *Cabanas Pty Ltd (No. 2)* [1970] Qd.R. 395.
49. *Supra* n.25.
50. These comments were cited with approval by Matthews J. in *Boccalatte* v. *Buschelle*, *supra* n.24 at 185 and subsequently by Spender J. in *Re Hope; Ex parte Carter*, *supra* n.19 at 611.
See also comments of Deane J. (with whose conclusions Mason J. was in agreement) in *Muschinski* v. *Dodds*, *supra* n.3 at 66 that although there existed no general principle that the doctrine of unjust enrichment is an acceptable basis for the imposition of a constructive trust (which appears to be the situation in the United States) the operation of equity (by the imposition of a constructive trust) will preclude a party from denying another a beneficial interest where it would be unconscionable for the former party to do so.

favour of a party. For example, McLelland J. held in *Morris* v. *Morris*[51] that it would be unconscionable and inequitable for the defendant to retain the benefit of expenditure by the plaintiff and, therefore, an equity was created in favour of the plaintiff. In that case, the father ('the plaintiff') sold his unit and spent $28,000 to extend the home of his son and daughter-in-law ('the defendants') so that the plaintiff could live there permanently. The marriage of the defendants broke down and the plaintiff left the home, claiming to be beneficially entitled to an interest in the home.

The Court held that as the plaintiff spent money on the property in the expectation induced by the defendants that he would be able to live there indefinitely, it would be unconscionable for the defendants to retain the benefit of the plaintiff's expenditure free of any obligation of recoupment to him. In the circumstances, the equity was protected by the imposition of an equitable charge over the property. Although McLelland J. did not elaborate on the point, he noted that in certain circumstances, the appropriate remedy might be the imposition of a constructive trust.

In the recent decision of the Supreme Court of Queensland, *Re Bulankoff*,[52] Connolly J. considered the circumstances in which equity will intervene to provide relief. In that case, Matrina Bulankoff bought a farm and registered it in her name and the name of her step-son, Valentine Bulankoff, as he had promised to help work the farm. Valentine disappeared and never worked the farm. Matrina sought a declaration that she owned the entire beneficial interest in the property.

Consistently with the authorities discussed above, Connolly J. held that at the time of acquisition of the farm, Valentine took a beneficial interest in it and there existed no resulting trust in favour of Matrina. This clearly reflected the common intention of the parties at that time. Connolly J. then considered the effect of the subsequent failure of the step-son to work the farm.

The learned judge was of the view that a constructive trust would arise where equity regarded one party's behaviour as unconscionable or as moral turpitude amounting to equitable fraud, irrespective of the intention of the parties.[53] Applying this principle it was declared that the step-son held his registered interest in trust for Matrina.

In England, there have also been attempts to extend the instances in which the court will impose a constructive trust, namely in situations which would otherwise be 'inequitable'. In the case of *Cooke* v. *Head*,[54] for example, the parties lived in a *de facto* relationship and decided to buy some land on which to build a bungalow. The *de facto* husband ('the defendant') paid practically all of the outgoings, the *de facto* wife ('the plaintiff') helping him greatly in the task of actually building the bungalow. After the dissolution of the relationship, the plaintiff brought an action claiming a share in the proceeds of the sale.

On appeal, Lord Denning M.R. said that whenever two parties by their joint efforts acquire property to be used for their joint benefit, the courts may impose or impute a constructive or resulting trust. In other words, the Court was prepared to impose a trust where the Court considered it to be fair and equitable to do so. This doctrine has become known as the 'constructive trust of a new model' and was briefly referred to earlier.

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51. [1982] 1 N.S.W.L.R. 61.
52. *Supra* n.40.
53. See also the comments of Kirby P. in *Baumgartner* v. *Baumgartner*, *supra* n. 22 at 419 that even if there existed no common intention that the appellant be beneficially entitled to an interest in the property, equity would intervene if it would be unconscionable and inequitable for one party to retain the benefit of another's expenditure. Note, however, that the form of equitable relief envisaged in such circumstances was the creation of an equitable charge over the property to the extent of the contributions, rather than the imposition of a constructive trust.
54. [1972] 1 W.L.R. 518.

Despite the application of this principle espoused by Lord Denning M.R. in a number of English decisions,[55] it does not appear to have gained judicial acceptance in Australia.[56]

In *Muschinski* v. *Dodds*,[57] the High Court closely examined the current state of the law in Australia. As can be inferred from an analysis of the different judgments, however, it is difficult to discern a satisfactory *ratio* from the case and therefore to predict the likely future approach the courts will take. The facts of this case and the claim of the appellant have been set out previously. Regarding the first aspect of the case, the High Court was in general agreement that it was the common intention of the parties that each would acquire a beneficial interest in the property at the time of its acquisition.

As the parties were unable to carry out their business proposal due to the failure of the local council to give approval for subdivision of the property, the Court further had to decide whether the change in circumstances would result in a change in the beneficial ownership of the property. Unfortunately, all members of the Court (except Brennan and Dawson JJ., both dissenting) seemed to approach the problem in different ways.

Gibbs C.J. rejected the concept that a court was at liberty to impose a constructive trust whenever justice and good conscience require it. Instead, the Chief Justice decided the case without relying on the concept of constructive trusts, finding that the appellant was entitled to a contribution from the respondent to the extent to which she paid more than one half of the purchase moneys. Further, he was of the view that the appellant would be entitled to an equitable charge on the respondent's half interest for such an amount.

Deane J. (with whom Mason J. agreed) rejected as part of the law of Australia the imposition of a constructive trust where there has been any unjust enrichment of a party. He acknowledged, however, that the general principles of equity will operate to preclude unconscionable behaviour and that in the circumstances of the case, there should be a declaration that the property was held by the parties upon a constructive trust, the parties holding their legal interests as tenants in common upon trust to repay to each her or his respective contribution and as to the residue to them both in equal shares.

Although Brennan J. was in agreement with the other justices in finding that in Australia, there is no room for the imposition of a constructive trust on grounds of mere fairness, he decided the case on a completely different basis. He held that a conditional gift of the beneficial interest had been given to the respondent, the respondent being required to attend to the construction of the house. As fulfilment of the condition was only a personal obligation, the failure did not deprive the respondent of a beneficial interest in the property. Accordingly, Brennan J. (with whom Dawson J. agreed) was not prepared to impose a constructive trust in the circumstances and the appellant was held not entitled to the declaration sought.

It is submitted that the differing judgments of the High Court are indicative of the present unsettled state of the law. Although the circumstances in which a court will hold that a constructive trust exists is unclear, it appears that it will not be imposed in cases

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55. *Hussey* v. *Palmer* [1972] 1 W.L.R. 1286; *Eves* v. *Eves* [1975] 1 W.L.R. 1338.
56. In *Allen* v. *Snyder* [1977] 2 N.S.W.L.R. 685, Glass J.A. and Samuels J.A. specifically denied that the so-called 'constructive trust of a new model' had any application in Australia. See also similar comments of the High Court judges in *Muschinski* v. *Dodds*, *supra* n.3 detailed below.
57. *Supra* n.3.

where to do otherwise would be merely inequitable or unfair. There must be something more in the nature of unconscionability.[58]

In the light of the various views expresed by the High Court in *Muschinski* v. *Dodds*,[59] one wonders whether the statements made by Douglas J. in the Queensland Supreme court decision of *Dale* v. *Haggerty*[60] might still be considered good law in Queensland. A *de facto* couple lived in a relationship in the home of the *de facto* husband. He died. The plaintiff *de facto* wife contended that the deceased promised her that when he died, she would be entitled to the property. The deceased's will did not reflect this promise.

Although Douglas J. did not find in favour of the plaintiff and held that no constructive trust had arisen on the facts, he appeared to accept the principle of constructive trusts as enunciated in the Court of Appeal decision of *Eves* v. *Eves*.[61] The facts in that case were not dissimilar to those of *Dale* v. *Haggerty*[62] – the parties, who were living together as man and wife, purchased a dilapidated house as a home for themselves and their children. All of the purchase price was provided by the *de facto* husband ('the defendant'), but the *de facto* wife ('the plaintiff') did a considerable amount of work on the house. The Court of Appeal held unanimously that the plaintiff was entitled beneficially to a one-quarter share in the house under a constructive trust. Lord Denning M.R. based this conclusion on the principle enunciated in *Cooke* v. *Head*[63] (which, as discussed above, does not appear to have been accepted in Australia). The other two members of the Court, Browne L.J. and Brightman J., held that it could inferred from the circumstances that there had been an arrangement between the parties whereby the plaintiff was to acquire a beneficial interest in the house in return for her labour in contributing to its repair and improvement. This reasoning is consistent with the Australian authorities on the imposition of resulting trusts to reflect the common intention of the parties.

From the judgment in *Dale* v. *Haggerty*,[64] it is unclear whether Douglas J. is relying on the principles enunciated by Lord Denning M.R. or by Browne L.J. and Brightman J. If he was relying on the latter judges so that the acquisition of a beneficial interest depended on the common intention of the parties, then the decision would be consistent with current authority in Australia. In contrast, however, if Douglas J. had accepted the principle set out in *Cooke* v. *Head*[65] that whenever two parties by their joint efforts acquired property to be used for their joint benefit, the courts might imply or impute a constructive trust, the decision appears to be at odds with current authority.

Similarly, caution must be exercised when reading the judgment of Connolly J. in *Re*

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58. It appears that recently the High Court has emphasized the importance of 'unconscionable behaviour' for the equitable jurisdiction to be invoked. See, for example, Mason and Deane JJ.s' comments concerning equitable intervention to provide relief against forfeiture in *Legione* v. *Hateley* (1983) 152 C.L.R. 406 at 444 that 'There is more to be said for the view that when the equitable jurisdiction is invoked to relieve against a forfeiture which is not in the nature of a penalty, equity looks to unconscionable conduct . . .'. Perhaps it can be expected that the same test, that of 'unconscionable conduct', will be used to determine whether the courts will impose a constructive trust.
See also comments made in *AMEV-UDC Finance Ltd* v. *Austin* (1986) 60 A.L.J.R. 741 by Mason and Wilson JJ. at 750 and Deane J. at 752 concerning when equity will intervene to prevent 'unconscionable' advantage being taken of the common law. Although the discussion here concerned the principle of equitable relief against penalties, perhaps the principles expressed on equitable intervention may be of more general application.
59. *Supra* n.3.
60. [1979] Qd.R. 83.
61. [1975] 1 W.L.R. 1338.
62. *Supra* n.60.
63. *Supra* n.54.
64. *Supra* n.60.
65. *Supra* n.54.

Bulankoff[66] where he cited Halsbury's Laws of England as authority for the proposition that 'a constructive trust attaches by law to specific property . . . which is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of the property'.[67] He also appears to rely on statements made by Lord Denning M.R. in *Binions* v. *Evans*[68] that a constructive trust is created wherever the trustee has so conducted himself that it would be inequitable to allow him to deny to the beneficiary a beneficial interest in the land acquired.

If Connolly J. is of the view that a constructive trust can be imposed merely on the gounds of what is fair and equitable, it is submitted that such a view cannot be supported. However, he proceeds in his judgment to state that a constructive trust will arise where, according to the principles of equity, it would be a fraud for the person on whom the court imposes the trust to assert a beneficial ownership. This statement suggests that something more than mere inequitable or unfair conduct is required and, therefore, appears to be consistent with present authority.

As the judgment in *Muschinski* v. *Dodds*[69] had not been delivered when the case was decided, the Queensland Supreme Court may take a different approach in subsequent decisions.[70]

Conclusions

The law concerning the imposition of the resulting trust to reflect the intention of parties appears to be comparatively settled both in Australia and England. Where *de facto* partners have acquired property through contributions of just one or both parties, but coupled with the intention that both parties were to acquire equal beneficial interests in the property, the courts will impose resulting trusts to give effect to such intentions. This equitable principle applies both to *de facto* couples and to married couples, subject, of course, to the current reluctance of some judges to apply the presumption of advancement to the *de facto* relationship.

As for the future of the constructive trusts in Australia, any projections must be tempered by the uncertainty wrought by *Muschinski* v. *Dodds*.[71] Even if a legal practitioner is sufficiently confident to advise a party to a broken *de facto* relationship that he or she is entitled to some form of equitable relief, it is doubtful whether even the more robust practitioner would be prepared to predict the precise nature of the relief that may be granted. Of course, the *de facto* party seeking the relief would be strongly relying on the judgments of Deane and Mason JJ. in *Muschinski's* case that the imposition of a constructive trust would be the appropriate form of relief. Such relief would prevent the other party from dealing with the property. Moreover, unlike the imposition of an equitable charge, a beneficial interest under a constructive trust would entitle the beneficiary to any improvements in the value of the subject property. Failing this form of remedy, an equitable charge might be imposed by the court, support for such a remedy being provided by Gibbs C.J. in *Muschinski*. Although such a remedy prevents the other party from dealing with the property except subject to the charge, the *de facto* party will not

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66. *Supra* n.40.
67. *Ibid.* at 369.
68. [1972] Ch. 359 at 368.
69. *Supra* n.3.
70. See also the decision of *Butler* v. *Craine*, *supra* n.22 and the doubt expressed earlier concerning whether it is possible to reconcile statements made in that case on the imposition of constructive trusts with current authority.
71. (1986) 60 A.L.J.R. 52.

be entitled to the advantage of any appreciation in value. Finally, and least satisfactory as far as the *de facto* person is concerned, is the remedy espoused by Brennan J. that the transaction amounted only to a conditional gift, breach of the condition by the other party providing the *de facto* party with a personal action in debt only, and no interest in the property.

In what circumstances the courts will be prepared to grant relief still remains somewhat unclear. Although there is currently little support for 'the new model constructive trust' in Australia, it is still unclear the precise nature of the conduct of the *de facto* which would justify the imposition of the constructive trust. Perhaps the requirement that the conduct be unconscionable and not merely inequitable will become the yardstick used by the courts.

So far as *de facto* partners are concerned, then, the law has a long way to go to provide adequately and equitably for the parties on the cessation of the relationship. No doubt legislation will ultimately intervene in Queensland and fill the legal void in this important area.[72] The increasing number of *de facto* relationships arising, with varying degrees of continuity and stability in which associated assets acquired by either or both parties indicate the pressing need for concrete answers to the question 'who gets what' when the 'better' turns out to be 'worse' and the parties go their separate ways.

There are many reasons people form *de facto* relationships. At the inception of the relationship, the last matter on their minds would be the acquisition of joint assets. Unfortunately, the division of jointly acquired assets is the first matter for concern upon a fracture of the relationship. If the division of property has become a minefield in matrimonial law, there is every indication of its becoming a battleground for those whose relationships do not have the benefit of clergy.

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72. For an example of statutory recognition and provision for connubial relationships, see Succession Act (Qld), Ss 40 and 41.