Proprietary Rights in Matrimony: A Call for Reform of Presumption of Resulting Trust and Advancement

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ABSTRACT

The presumption of resulting trust and advancement, as equitable principles, were developed in the English legal system to do justice on matters of proprietary rights between persons who are in one relationship or the other such as spouses, parents and their children amongst others. This article seeks to analyse the application of the presumptions of resulting trust and advancement and case law on the point. It questions the disparity of the application of the principles of presumption of resulting trust and advancement in spouses' relationships and that of parents and children. It, also, examines the relevance and the continued application of the presumption in the light of socio-cultural changes in the 21st century. This article further examines the applicability of the presumption in the relationship between couples of same-sex marriages. Finally, this article concludes by arguing that in the light of the socio-cultural changes, the court should be mindful of how it applies the principles with particular respect to the seemingly inequity in determining the proprietary rights in transactions between spouses and parents with children. The article canvasses that the presumption of resulting trust and advancement, which operates to favour women, need to be reviewed and possibly expunged as the purpose it was made to serve has long been corrected as a result of female empowerment.

1. INTRODUCTION

The concept of trusts has been employed by individual(s) as a means of making

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provision for persons or organisations they wish to provide for. The Law of Trusts is a development of the English legal system, through the instrumentality of the Court of Chancery, by exercising its discretionary powers to mitigate the harshness of the Common Law rule that failed to accord legal status to the rights of third party or parties in whose benefit a trust has been settled by vesting the legal interest of the trust property on a trustee. It was as a result of the hardship or difficulties suffered by such beneficiary or beneficiaries of the trust property who wish to enforce their beneficial interest in the trust property occasioned by the application of the doctrine of privity that this principle was created and became recognised by the courts.[1]

2. THE CONCEPT Of TRUSTS

The concept of trusts is an equitable obligation, binding a person (a trustee) to deal with property over which he has control (the trust property) for the benefit of persons (the beneficiaries or *cestuis qui trust),* of whom he may himself be one, and anyone of who may enforce the obligation.[2] A trust therefore results from property being transferred by its owner to a trustee or trustees to own, manage, and deal with it for the benefit of a beneficiary or beneficiaries or for a charitable purpose.[3]

When a trust property is settled, a trustee or the trustees will then emerge to manage the trust property for the benefit of those for whom the trust property was settled. The trustees so appointed to manage or deal with the trust property have two roles to play. First, is to administer and invest the trust assets; second, to distribute the income from those assets to appropriate beneficiaries; and, ultimately, to distribute the capital assets to beneficiaries.[4]

Notwithstanding that trust as an equitable principle is a creation of

1 Jil E. Martin, *Hanbury & Martin Modern Equity* 16th ed. (London: Sweet & Maxwell 2001), 4; J. O. Fabunmi., *Equity & Trusts in Nigeria* 2nd ed. (Ile-Ife: Obafemi Awolowo University Press Ltd, 2006), 1, M. I. Jegede., *Principles of Equity* (Lagos: M. I. J Professional Publishers 1981), 14 and I. E. Sagay, *Nigerian Law of Contract,* 2nd ed. (Ibadan: Spectrum Books Limited, 2000), p. 503.

2 D. J. Hayton, 1979. *Underhill's Law Relating to Trusts and Trustees*, 13th ed. (London: Butterworths 1979), 1. See also *Green v Russell* (1959) 2 Q.B 226 at 241 and *Re Marshall's Will Trusts* (1945) 2 All E.R 550 at 551 per Cohen, J.

3 D. Hayton D and & C. Mitchell, *Commentary and Cases on the Law of Trusts and Equitable Remedies* 12th ed. (London Sweet and Maxwell 2005), 1.

4 Hayton and Mitchell, *Commentary and Cases on the Law of Trusts and Equitable Remedies*, p. 1.

the Court of Chancery, it has been codified into legislative instrument. This is evidenced by the provision of Article 2 of the Hague Convention on the Law Applicable to Trusts and on their Recognition[5], which provides:

> "For the purposes of this Convention, the term 'trust' refers to the legal relationships created – *inter vivos* or on death – by a person, the settler, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose. A trust has the following characteristics – (a) the assets constitute a separate fund and are not part of the trustee's own estate; (b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustees; (c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law. The reservation by the settler of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust."

The foregoing Convention has been recognised by the English legal system which has incorporated the Convention into English law through the Recognition of Trusts Act 1987,[6] which provides in section 1, thus:

> "(1) The provisions of the Convention set out in the Schedule to this Act shall have the force of law in the United Kingdom. (2)Those provisions shall, so far as applicable, have effect not only in relation to the trusts described in Articles 2 and 3 of the Convention but also in relation to any other trusts of property arising under the law of any part of the United Kingdom or by virtue of a judicial decision whether in the United Kingdom or

5 The Hague Convention on the Law Applicable to Trusts and on their Recognition. Available at http://www.assetprotectioncorp.com/the Hague Convention on the Law Applicable to Trusts and on their Recognition.html. (accessed on 27.11.2013.)

6 Recognition of Trusts Act 1987. Available at http://www.trusts.it/admincp/UploadedPDF/200802151056400.sEngRecognitionTrustAct1987.pdf. Accessed on 27.12.2013.

elsewhere."

In Europe, the law of trust has been codified as in Article 2 of Principles of European Trust Law[7]. The Article states:

> "The general rule is that in order to create a trust a person called the "settler" in his lifetime or on death must, with the intention of creating a segregated trust fund, transfer assets to the trustee. However, it may also be ["it is also" for common law countries] possible to create a trust by making it clear that he is to be trustee of particular assets of his."

Trusts either arise under statute or are created intentionally by the act of the settlor, in which case they are called express trusts, or by implication of a court of equity where the legal title to property is in one person, and the equitable right to the beneficial enjoyment thereof is in another, in which case they are called implied trusts which may further be sub-divided into resulting trusts and constructive trusts.[8]

The focus of this article is to examine the principles of presumption of resulting trust and advancement and the continued relevance of their application in the light of socio-cultural changes and new developments particularly in the legal systems of Britain and Nigeria, centuries after its introduction by the English legal system. The scope of this paper is however, limited to the examination of the presumption with respect to persons who are of such special relationships; for instance, the relationships of spouses and that of parents and their children. In such a setting, the man most often than not makes provisions for the wife and, in very rare cases wife makes provision for the husband. Also either parents or both of them could make provisions for the children of the marriage. This could be in the form of real or personal property. It is presumed that when any of such provisions are made a beneficial gift is intended. This, however, is not the case, as the Court has been saddled with issues where properties given out in a family arrangement become a source of litigation. The Court in an attempt to resolve such matters then developed certain principles; presumption of resulting trust

7 Principles of European Trust Law. Available at https://openlibrary.org/books/OL21212963M/Principles_of_European_trust_law. Accessed on 27.12.2013.

8 Hayton, *Underhill's Law Relating to Trusts*, p. 21-22.

and advancement in determining whether the proprietary right is an absolute one or not.

This article will also attempt to examine the applicability of the principles to the proprietary rights of couples of same sex marriage relationships, an evolving trend in the world's legal jurisprudence.

3. THE PRINCIPLES OF PRESUMPTION OF RESULTING TRUSTS

The term "resulting" describes the effect of the trust in causing the beneficial entitlement to the property to spring back to the person who transferred it. Since it arises by operation of law, it may take effect informally.[9] A resulting trust is a situation in which a transferee is required by equity to hold property on trust for the transferor; or for the person who provided the purchase money for the transfer. The beneficial interest results or comes back to the transferor or to the party who provided the purchase money. In effect, resulting trust is the basis of a claim to recover one's own property.[10] A resulting trust is literally a trust which returns beneficial ownership of the trust property to a person who owned the property before it reached the trustee's hands: in equity, the beneficial interest "jumps back" to its previous owner.[11]

A resulting trust is, therefore, implied by the court in favour of or for the benefit of the settlor or transferor. This trust arises whenever the location of the equitable interest in property is so unclear that no other person is capable of making out a successful claim to the property. The occasions that give rise to the resulting trust may be classified into two broad categories: (a) automatic; and (b) presumed. An automatic resulting trust springs back in favour of the settlor/transferor simply because it cannot be acquired by anyone else. Thus, a transfer to a trustee subject to a condition precedent which fails to materialise gives rise to a resulting trust. A presumed resulting trust arises whenever property is purchased, or a voluntary transfer of the legal title is made, in the name of another, or others. If the purchase or transfer is silent as to the location of the

9 J. McGhee, *Snell's Equity* 31st ed. London: Sweet & Maxwell (2005), p. 573.
10 Martin, *Hanbury & Martin Modern Equity*, p. 237.
11 Hayton & Mitcheel., *Commentary & Cases on the Law of Trusts*, p. 289.

equitable title, a presumed resulting trust arises.[12] The principle of resulting trust was introduced by the English Court in the sixteen century in the case of *Dyer v. Dyer.*[13] In that case, one Simon Dyer acquired real property in his name and the names of the following, his wife Mary, and the defendant William (his other son) to take in succession for their lives, and to the longest liver of them with the purchase price paid by him. He survived his wife and lived until 1785, and then died, having made his will, and, thereby, devised all his interest in the premises to the plaintiff, his younger son. In an action commenced to determine the persons who have right over the property. The Court, per Eyre, LCB, stated the applicable principle, thus:

> "The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser; whether in one name or several; whether jointly or successive, results to the man who advances the purchase money. This is a general propositions supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to be rule of the common law, that where a foeffoment is made without consideration the use results to the foeffor..."

The Nigeria Supreme Court in the case of *Ezeanah v. Atta*[14] per Pats-Acholonu, J.S.C., described resulting trust thus:

> "Resulting trust is a trust that can be readily deduced as being implicit in the conduct of parties but without express intent. It is a trust that arises where a person makes, or causes to be made, a disposition of property under circumstances which raise an inference that he does not intend that person taking or holding that property should have the beneficial interest therein, unless the inference is rebutted or the beneficial interest is otherwise effectively disposed of."[15]

12 Ramjohn.,*Text, Cases and Materials on Equity*, p. 137.
13 (1788) 2 Cox Eq 92; 32 English Report, p. 42.
14 [2004] 7 N.W.L.R. (Pt.873) 468.
15 *Ibid,* at 522.

In this article, an attempt shall be made to examine certain situations where the Court can apply the principle of resulting trust so as to make it impossible for the nominal purchaser or the person in whose name a property has been transferred to take the property beneficially.

4. PROPERTY PURCHASED BY WIFE IN THE HUSBAND'S NAME

Usually, marriage union brings a man and a woman to live together as husband and wife. Lord Penzance while defining marriage in *Hyde v Hyde*[16] stated, thus: 'Marriage, as understood in Christendom, is the voluntary union for life of one man and one woman to the exclusion of all others.'[17] The above common law definition has been adopted by legislation and incorporated for the purpose of defining marriage in different jurisdictions of the world.[18] A wife in a marriage may choose to give property real or personal to her husband. This she can achieve either by acquiring such property in the name of the husband or transfering her interest in the property to him as an outright gift. Such gestures are usually extended by the wife to the husband during the course of amity between the couple. The husband, in the circumstance, takes the property and considers himself as the beneficial owner. In the event where the parties fall out, a separation order or dissolution of the marriage becomes inevitable. The final dissolution of the said marriage is likely to have some legal implications, which might question the proprietary rights of the husband to the said property; this may result in a legal action taken out by the wife seeking an order of the court to get back her property from the husband. This arose in the English case of *Mercier v. Mercier*[19] where the defendant who was entitled to a considerable amount of property, married one Colonel Mercier, who was almost without means. They both maintained a joint account that comprised mostly the money of the defendant. They bought a piece of land where they built a house. While the title document was in the name of the husband, the money for the purchase of the land and building the house was almost entirely that of the wife. Upon

16 (1866) LR 1 P & D 130.
17 *Hyde v. Hyde,* 133.
18 Marriage Act, Cap M6 Laws of the Federation of Nigeria, 2004.
19 19. (1903) 2 Ch. 98.

of his death, his heir-at-law took out an action against the defendant claiming that the property formed part of late Colonel Mercier's estate and, therefore, sought for an order that the widow, Mrs. Mercier, convey the property to him. The action was dismissed by the trial judge and the dismissal was affirmed on appeal. While dismissing the appeal, the court held that there had been no gift of the purchase-money to the property; and that the property belonged to the defendant.

5. PROPERTY PURCHASED BY MOTHER IN CHILD'S NAME

In the normal cause of event, children are the offspring of a marriage union between a man and a woman. Thus, their upbringing should, ordinarily, be the collective responsibility of the parents; parents in this context mean the father and the mother. The obligation of the mother to provide for her child or children has become a legal issue. The courts are being invited to answer the question whether a presumption of resulting trust or advancement/gift is intended where a mother either purchases property in the name of her child/children or transfers any of her property to her child/children. The line of authorities is to the effect that such property or properties vested in a child or children by the mother result to the mother except the child is illegitimate. The reasoning here is that a mother is not under any legal obligation to provide for her child,[20] as such obligation or duty rests on the father.

In marriages, husbands and wives are treated equally; there is no superiority, and such union imposes equal rights and obligations on the parties to it. Hence, the obligation to cater for the children of such marriage devolves on the parents jointly; that is, the father and mother. Where in a situation the woman is the breadwinner of the home, as women are becoming financially empowered these days, will it be out of place for a mother to make provision for the children of such marriage? In the case of *Re De Visme,*[21] the mother of the petitioner, who was entitled to a separate estate, invested the savings from the estate in the purchase of stock in the joint names of her son and daughter.

20 Per Jessel M.R. *Bennet v. Bennet* 'But in our law there is no moral legal obligation – I do not know how to express it more shortly – no obligation according to the rules of equity – on a mother to provide for her child: there is no such obligation as a Court of Equity recognises as such.'

21 (1863) 2 De GJ & S 17, 46 English Report, 280 .

The son later turned a lunatic. The mother, before her death, appointed her daughter as her executrix. The daughter here petitioned asking a transfer to her as the executrix of her mother, of a sum of stock standing in the joint names of herself and the lunatic brother. The court held that there is no presumption that a purchase by a mother in the name of a child is intended for an advancement, though such a presumption does arise where the purchase is made by a father.[22]

Further, in *Bennet v. Bennet*[23] a widowed mother secured the sum of 3000 pounds with her life policy and gave the money to her son who could not provide sufficient security to enable him raise the money. The widowed mother had regarded the money she gave to the son as a loan. The son, however, predeceased the mother and she continued to pay the premiums on the policy and the interest on the 3000 pounds. In an action, the mother claimed to be a creditor upon the estate for the 3000 pounds, together with interest at 5 per cent from her son's death. The question was whether the 3000 pounds made available by the widowed mother to the son was a resulting trust or a presumption of advancement or benefit. The court held that there was a resulting trust. Jessel, M. R stated:

> "It has been held that no such obligation exists on the part of a mother; and therefore, when a mother makes an advancement to her child, that is not of itself sufficient to afford the presumption in law that it is a gift, because equity does not presume an obligation which does not exist."[24]

However, in the much earlier case of *Sayre v. Hughes,*[25] a widow, Susannah Barling, put 1300 pounds of India stocks into her name and that of one of her daughters Sarah Elizabeth Barling, in the bank. The widow had intended that S. E. Barling will hold the property in her lifetime and upon her death vest absolutely on her sister, S. Sayre, the plaintiff. The widow was advised not to include S. Sayre's name alongside the two names on account of her marriage. Upon the widow's death, S. E. Barling claimed that she was absolutely entitled

22 *Ibid,* at 281.
23 (1879) 10 Ch. D 474.
24 *Bennet v. Bennet* at 478.
25 (1868) 5 L R (Equity). 376.

to the 1300 pounds stock for her own benefit. In an action by S. Sayre, she prayed for a declaration that both sums of stock were at the testatrix's death, part of her estate, and that S. E. Barling was a trustee thereof for the estate. It was held that there was a presumption of intended benefit to the unmarried daughter which was unrebutted, and that the stock belonged absolutely to her. The court in this case stated:

> "It has been argued that a mother is not a person bound to make an advancement to her child, and that a widowed mother is not a person standing in such a relation to her child as to raise a presumption that in a transaction of this kind a benefit was intended for the children…But maternal affection, as a motive of bounty, is, perhaps, the strongest of all, although the duty is not so strong as in the case of a father, inasmuch as it is the duty of a father to advance his child. That, however, is a moral obligation, and not a legal one."[26]

The Nigerian Court had the opportunity to rule on the legal status of gift made by a mother to a child in the case of *Shekete v. Fitz-James*[27] where a testatrix, during her life time, possessed considerable real properties, which she had bought in the name of or transferred to her two children, the second plaintiff and the defendant, either jointly or severally. In making her will, she transferred some of the properties, which she bought in the name of her children, to third parties. Speaking for the court, Kazeem J.C.A., stated that 'she is not obliged in law to provide for them by way of advancement.'[28]

It is our view that applying different standards in situations where a father or mother gives property, whether personal or real, to his/her children, does not represent the true essence of marriage relationship and such a disparity is inequitable. The whole idea of equity is to do justice. For the court to establish two separate standards to determine the proprietary rights of a child or children over property or properties provided either by a father or mother is, no doubt, not equity.

26 *Ibid* at 381.
27 (1982) 3 FNR 14.
28 *Shekete v. Fitz-James,* at 19.

Eyre L.C.B., in *Dyer v. Dyer,* held that the relationship between parent and child is only a circumstance of evidence.[29] While stating the principle Eyre L.C.B., declared:

> "The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser; whether in one name or several; whether jointly or successive, results to the man who advances the purchase money. This is a general proposition supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to be rule of the common law, that where a foeffoment is a made without consideration the use results to the foeffor. It is the established doctrine of a Court of equity, that this resulting trust may be rebutted by circumstances in evidence. The cases go one step further, and prove that the circumstance of one or more of the nominees, being a child or children of the purchaser, is to operate by rebutting the resulting trust; and it has been determined in so many cases that the nominee being a child shall have such operation as a circumstance of evidence, that should be disturbing land-marks if we suffered either of these propositions to be called in question, namely, that such circumstance shall rebut the resulting trust and that it shall do so as a circumstance of evidence."[30]

In the above statement, the word 'father' or 'mother' was not used, and was, therefore, not contemplated that parent means father to the exclusion of a mother, as such the purchaser could either be the father or mother of the said nominee or nominees. Hence, to apply different rules to gift or gifts made by them to their children is not equitable at all, as a mother is no less a parent than the father. The above position finds supports in the language of Sir John Stuart, V. C. in *Sayre v Hughes* where he stated that: '[t]he word 'father' does not occur in Lord Chief Baron Eyre's judgment, and it is not easy to understand why a mother should be presumed to be less disposed to benefit her child in a

29 Per Sir John Stuart, V. C in *Sayre v. Hughes,* (1868), 381.
30 *Dyer v. Dyer,* at 43.

transaction of this kind than a father.'[31]

In the Canadian legal system, the Courts have expanded the application of the presumption of advancement to include a mother and child situation. In the case of *Re Dagle,*[32] Mrs. Lauretta Dagle, the mother of Francis, the defendant and Raymond, the plaintiff, had, together with her late husband, Charles, made identical wills leaving their property to each other with the survivor of them equally dividing the residue between their sons Raymond and Francis. She, however, by a deed, conveyed a real property to the defendant before she died. In an action by the plaintiff, he claimed that the defendant held the property for the estate of the deceased mother. However, Francis and the wife, Marguerit Dagle, who were sued together by Raymond, alleged that the real property in question was conveyed as a gift by his mother to him and that the presumption of advancement arose. It was held that there is a presumption of advancement. The trial judge made the following statement to conclude that there was not a resulting trust but, rather, a gift by way of advancement:

> "In cases where the grantee is the child of the grantor, there is a presumption that a gift was intended and which rebuts the presumption of the resulting trust. There is some authority that states that this presumption only applies when the transfer is from the father to a child and not from mother to child. I am of the opinion that, if the presumption of gift arises from father to child, then it also arises when the transfer is from mother to child… The trial judge was of the opinion that the presumption arises on a gift from mother to child. If the presumption is to continue to have weight for gifts to children then there can be no reason why it should not be applicable between mother and child."[33]

What then is the legal or moral basis for the court to refuse to apply the presumption of advancement in situations when mothers or wives provide for their child or children by acquiring properties in their names or caused properties to be transferred to them? Adigun had this to say:

31 *Sayre v. Hughes*, (1868), 381.
32 (1990) 70 D.L.R (4th) 201.
33 *Re Dagle* 207-208.

> "The question is whether a mother is *in loco parentis.* A child is a natural object of bounty of a mother and as well as of a father and the effect of their acts to the child should be the same. It is inequitable to hold otherwise. The intention of a giver of property is not to be determined with reference to the hard and fast rules laid down by judges, but by reference to the circumstances of the case, taking into consideration not only the formal relationship between the parties, but their actual response to each other."[34]

Apart the instances considered above, the application of the presumption of resulting trust has been expanded in the English legal system to include the rights of couples of same-sex relationship. Britain, as a nation, has joined the league of nations of the western world to legalise or make lawful the union of couples of same-sex relationship,[35] a phenomenon that was introduced into the world legal system toward the end of the 20th century.[36]

The application of the presumption of resulting trust in determining the proprietary rights was in the latter part of the twenty century employed by the English House of Lords to determine the rights of same sex partners in *Tinsley v. Milligan.*[37] In that case, two ladies, Stella Ruth Tinsley and Kathleen Milligan, who lived together as lovers, jointly acquired property but in the sole name of the appellant. They, also, had a bank account opened in the sole name of the appellant but into which they both deposited their money. Their action was intended to enable the respondent enjoy benefits from the Department of Social Securities. At the time they fell apart, the appellant, who moved out of the home,

34 O. Adigun., *Cases and Texts on Equity, Trusts and Administration of Estates* (Lagos: Mabrochi Int Books 2003), 316 and 317.

35 The Marriage (Same Sex Couples) Act 2013 which was passed into law on 17th July 2013. The first marriages of same sex couples took place on Saturday 29th of March 2014. Marriage (Same Sex Couples) Act: A factsheet. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/306000/140423_M_SSC_Act_factsheet__web_version_.pdf. Accessed on December 14, 2015.

36. The Netherlands was the first country to end the exclusion of same-sex couples from marriage in 2001, when their Parliament voted 107-33 to eliminate discrimination from their marriage laws. The law requires that at least one member of the couple be a Dutch national or live in the Netherlands, and it took effect on April 1, 2001. Anne-Marie Thus, a Dutch lesbian who married in 2001, explains, "it's really become less of something that you need to explain. We're totally ordinary. We take our children to preschool every day. People know they don't have to be afraid of us. In December 2012, the Dutch Caribbean Island of Saba also established the freedom to marry.

37 (1993) 3 All E.R. 65.

brought an action to claim as a beneficial owner of those properties vested in her by her partner, the respondent. The issue before the court was whether the appellant held the property as trustee for herself and the respondent to ground resulting trust or she obtained a gift of the property for the presumption of advancement to be applicable. The English House of Lords, while affirming the decisions of the lower court, held that resulting trust applied as the respondent had contributed to the purchase price.

The foregoing decision of the House of Lord has, effectively, made the principles of the presumption of resulting trust applicable to same-sex relationship in those jurisdictions where same-sex relationship has been accorded legal status,[38] as some countries still prohibit such relationship.[39]

6. PRESUMPTION OF ADVANCEMENT

Presumption of advancement, unlike resulting trust, is a principle of law which operates to conclude that a presumption of a gift can be found in favour of the transferee. This principle was introduced in the second limp of the case of *Dyer v. Dyer* to rebut the presumption of resulting trust where there appears to be a special relationship between the party who advanced the purchase money and the nominal purchaser or the transferor and the transferee. Eyre, LCB, having stated the presumption of resulting trust went ahead to state:

> "…It is the established doctrine of a Court of equity, that this resulting trust may be rebutted by circumstances in evidence. The cases go one step further, and prove that the circumstance of one or more of the nominees, being a child or children of the purchaser, is to operate by rebutting the resulting trust; and it has been determined in so many cases that the nominee being a child shall have such operation as a circumstance of evidence, that should be disturbing land-marks if we suffered either of these propositions to be called in question, namely, that such circumstance shall rebut the resulting trust and that it shall do

38 See The Netherlands Same Sex Law 2001, in Belgium, the Belgium Same Sex Marriage Law 2003.
39 See Nigeria's Same Sex Marriage (Prohibition) Act 2013, in Uganda, The Anti-Homosexuality Act 2014.

so as a circumstance of evidence."[40]

In the light of the foregoing, the transferor is presumed to lose his beneficial interest in the property. This presumption, like the presumption of resulting trust, may be rebutted by evidence of the intention of the transferor.[41]

This article examines below certain situations where the court has applied the principle of presumption of advancement in favour of the nominal party or transferee.

7. PROPERTY PURCHASED BY FATHER IN CHILDREN'S NAMES

Where a father purchases property in the name of his child, and he is proved to have paid the purchase money in the character of a purchaser, a *prima facie* but rebuttable presumption arises that the child takes by way of advancement, that is to say, takes beneficially. The presumption is counter-resulting trust. Evidence may be given to rebut this presumption and to show that the father did not intend the child to take by way of advancement, and, on the other hand, evidence may, where necessary, be given to support the presumption.[42] This principle was introduced in the eighteenth century in the English case of *Dyer v. Dyer*[43] where Eyre LCB., laid down the principle in the following words:

> "…It is the established doctrine of a Court of equity, that this resulting trust may be rebutted by circumstances in evidence. The cases go one step further, and prove that the circumstance of one or more of the nominees, being a child or children of the purchaser, is to operate by rebutting the resulting trust; and it has been determined in so many cases that the nominee being a child shall have such operation as a circumstance of evidence, that should be disturbing land-marks if we suffered either of these propositions to be called in question, namely,

40 *Dyer v. Dyer,* 43.
41 M. Ramjohn., *Text, Cases and Materials on Equity and Trusts* 4th ed. (London: Routledge-Cavendish 2008), p. 164.
42 Emeka Chianu, *Law of Sale of Land,* Abuja: Panaf Press (2009), p. 340.
43 (1788) 2 Cox Eq 92, 32 English Report, 42.

> that such circumstance shall rebut the resulting trust and that it shall do so as a circumstance of evidence."[44]

A century later, the principle was applied in the case of *Crabb v. Crabb*[45] in which a testator, one James Crabb, in a Will made in 1802, bequeathed his property to children, including the plaintiff. Later in February 1824, James Crabb transferred the sum of 10,000 pounds, which formed part of a large sum of a life stock then standing in his own name, into the joint names of James George Crabb and of D. R. Remington, one of the partners in the banking house of Remington, Stephenson & Co. The testator later verbally instructed Remington to credit the dividends of the stocks into his son James George Crabb instead of the testator's. In July 1826 two codicils were executed bequeathing the residue of his fortune to his son James George Crabb for his life, with remainder to his children. In an action the Court held that the transfer made by James Crabb in 1824 was a presumption of advancement. Brougham, L.C., stated:

> "If the transfer is not ambiguous, but a clear unequivocal act, as I must take it to be upon the authorities, for explanation there is plainly no place; although, indeed, when we look at it, anything less clear than this supposed explanation can scarcely be conceived. By itself, it is hardly in any way sensible. At most, it may be regarded as barely intelligible, or rather is capable of being made so by insertions and alterations. If then, it cannot be admitted to explain, still less can it be allowed to qualify the operation of the previous act. The transfer being held an advancement, nothing contained in the codicil, nor any other matter *ex post facto,* can ever be allowed to alter what had been already done."[46]

The same principle was applied in the case of *Shephard v. Carthwright*[47] where a father, Mr. Philip Edward Shephard, allotted shares in four private companies to his children and had the shares registered in their names. He, thereafter, obtained a power of attorney from his children, which was signed by them, to enable him sell the shares to a new public company formed by him and

44 *Dyer. Dyer* (1788), at 43.
45 (1834) 1 My & K 511, 39 English Report 774.
46 *Crabb v Crabb*, at 777.
47 47. (1955) A.C 431.

his business associate, wherein his children were entitled to 45,937.10s in cash to Richards and 40,000 pounds in shares and Winifred to 26,737.10s in cash and 40,000 pounds in shares. Their father caused a bank account to be opened with Barclays Bank Ltd in the names of the children wherein the amount was paid into. Much later, Shephard obtained the signatures of his children authorizing him to sell their shares in the new public company and draw from the deposits standing to their names in the bank until the entire sum was exhausted. At the death of their father, the children brought an action against the executors of the estate of their father for the sum of money so spent by their father. It was, however, contended that the children were trustees to their father as the money paid into the bank in their names resulted to the estate of their deceased father. It was held that the shares registered in the names of the children were an advancement since, when shares were so registered, there was a presumption of advancement. Speaking for the court, Viscount Simonds stated, as follows:

> "The law is clear that on the one hand where a man purchases shares and they are registered in the name of a stranger there is a resulting trust in favour of the purchaser; on the other hand, if they are registered in the name of a child or one to whom the purchaser then stood *in loco parentis*, there is no such resulting trust but a presumption of advancement".[48]

The Supreme Court of Nigeria had an occasion to apply the principle of presumption of advancement in *Ughutevbe v. Shonowo.*[49] In that case, Chief M. A. K. Shonowo, the father of the 1st respondent, sometime in 1959 bought a parcel of land in the name of his son, the 1st respondent, who was aged 15 years and signed by him. While the 1st respondent was away for further studies overseas, the father sold the property to one Dick Ughutevbe, the father of the appellant. The 1st respondent returned from the United States of America after completing his studies only to find out that the property had been sold. He, then, took an action against the appellant father, challenging the sale. It was held by the court that a presumption of advancement arises in favour of the 1st

48 *Shephard v Carthwright*, at 445.

49 [2004]16 N.W.L.R. (Pt. 899) 300. See also *Roberts v. Wilson* (1962) L.L.R 39 and *Stamp Duties v. Byrnes* (1911) A.C. 386.

respondent over the property. Ejiwunmi, J. S. C., stated thus: 'Where any specie of property was allotted to and signed for by the children of a father who of his own volition caused the property to be assigned to his children, it must be presumed that such property was given as a gift of advancement to the children by their father.'[50]

7. TRANSFER OF PROPERTY FROM HUSBAND TO WIFE

The presumption of advancement applies where a husband makes a transfer to his wife or purchases property in the name of the wife. This principle was applied in a nineteenth century case *In re Eykyn's Trusts*[51] where one Mr. John Eykyn (deceased), the husband of the petitioner, Mrs. Geogina Charlotte Eykyn invested some sum money in the purchase of debentures in a Company in his name, his wife and Joseph Greenhill. He invested another sum of money for the purchase of shares in the Greenwich Railway Company, in his name, and those of his wife, Thomas Eykyn and Joseph Greenhill. By an indenture of settlement made on the marriage of John Eykyn and the petitioner, certain shares in public companies were transferred to the trustees, Joseph Greenhill, Thomas Eykyn and John Holderness, upon trust to pay the dividend and interest to the petitioner for life, and afterwards upon trust for John Eykyn for his life, with remainder to the children of the marriage. John made a will on the 23rd of September, 1851, and, thereby, appointed the petitioner and Joseph Greenhill, and his brothers William and Thomas Eykyn, executors thereof, and he devised and bequeathed his real and personal estate to his executrix and executors in trust for the benefit of his wife for life, and afterwards for his children then living, and, in default of issue. for the benefit of the testator's brothers and sisters and their issue living at the death of his wife. Upon the testator's death, the debentures and shares were sold and the proceeds were paid into court under the Trustees Relief Act. In a petition to declare to whom the proceeds of the debentures and shares belonged, the court held that the two investments were neither intended as an augmentation of the settlement fund, nor were they to form part of his residuary estate, but were advancements for the benefit of the wife and the strangers in

50 *Ughutevbe v. Shonowo* at 331.
51 (1877) 6 Ch. D 115.

each case were trustees for her upon her surviving her husband. Speaking for the court Malins, V. C., stated that 'The law of this Court is perfectly settled that when a husband transfer money or other property into the name of his wife only, then the presumption is that it is intended as a gift or advancement to the wife absolutely at once, subject to such marital control as he may exercise.'[52]
The Vice Chancellor stated, further:

> "When a man transfers money into the name of his wife, that must be intended as an advancement, and not less so because he places it in the name of another. I think the wife becomes absolutely entitled, and the other person must be intended as a trustee for her…It has never yet been decided that where money is transferred into the names of the wife and another person, it is an advancement, still, on the other hand, there is no decision to the contrary, there being in fact no judicial decision whatever upon the subject. In my opinion there is no difference whether it is in the name of the husband and wife, or the husband, the wife, and a third person, except that the third person must be a trustee for the survivor. Therefore, in this case, the wife being the survivor, Mr. Greenhill is a trustee for her. In other words, it is in the nature of an advancement for the wife."[53]

The principle was equally applied in the case of *Gascoigne v. Gascoigne*[54] where the plaintiff, the husband of the defendant, while living with her took out a lease in a certain land at Thames Ditton in her name and built a house on it in his own name. This action was taken at the time by the plaintiff because he was indebted to money-lenders and, in connivance with his wife, took this step in order to protect the property from his creditors. Afterwards, there was a separation between the parties wherein the defendant refused to reassign the property to the plaintiff. It was contended on behalf of the plaintiff that the defendant held the property as a trustee for him. It was held that the plaintiff could not be allowed to set up his own fraudulent design as rebutting the presumption that

52 *In re Eykyn's Trusts,* at 118.
53 *Ibid* at 119 and 120.
54 [1917) K.B.D 223. See also *In re Emery's Investments Trusts (Emery v. Emery)* [1959] 1Ch. 411and *Tinker v. Tinker* [1970], p. 136.

the conveyance was intended as a gift to her, and that she was entitled to retain the property for her own use notwithstanding that she was a party to the fraud.

8. A CRITIQUE

Marriage implies the union of a man and woman coming together as husband and wife and, thereby, forming one entity. The application of different principles in a situation where property or properties is vested in the name of the husband by the wife or when it is vested in the name of the wife by the husband as well as in the name of a child of the marriage by either of the parent does not, in any way, reflect the concept of marriage. The husband and the children to whom such property or properties have been granted ordinarily should have the property or properties as an absolute gift. This position is hinged on the fact that if a wife could assert beneficial ownership over any property or properties acquired in her name or transferred to her by the husband, the same rule should apply to the husband or his estate. And, likewise, a child should, in the same light, exercise absolute right over property or properties granted to him/her by the mother just the same way when a father gives property or properties to his child or children.

The above argument has found support in European countries by virtue of Protocol 7 to Convention for the Protection of Humans Rights and Fundamental Freedoms which provides:

> "Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This article shall not prevent States from taking such measures as are necessary in the interests of the children."[55]

The provisions of the above instrument apply to all European countries

55 Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol 11. Available at http://www.bing.com/search?q=&qs=n&form=QBRE&pq=protocol+no.+7+to+the+convention+for+the+protection+of+human+rights+and+fundamental+freedoms+as+amended+by+protocol+no.1+1&sc=0-0&sp=-1&sk. Accessed on 20/09/2013.

that have signed and ratified the protocol. However, there is no evidence that Britain has signed and ratified the above instrument; otherwise, the provisions would radically alter or modify the application of the two different principles in determining the proprietary rights of spouses over properties acquired in the name of either party or when such properties are transferred into the name of either party. The same applies to the proprietary right of the children of the marriage to such properties they may have been given by either parent. Though the instrument is not applicable in the Nigerian legal system, but it could be of persuasive force in the determination of cases, with a view to doing justice in deserving cases.

In the light of the foregoing, the question would be whether the application of the principle of resulting trust to situations where a wife gives property to the husband or where a wife gives property to her child or children is equitable? We are of the strong view that the continued application of this principle in a situation like this does a lot of injustice to the party who is denied such proprietary right. The above position is hinged on the fact that when gifts from the husband to the wife or a child/children are treated as an advancement to which the wife or child or children may take beneficially, the same rule should be applied in equal force when a wife gives property to the husband and to the children of the marriage union.

The continued relevance and application of the presumption of advancement and resulting trust indiscriminately is becoming increasingly doubtful as a result of the socio-cultural changes and economic and political developments witnessed in the latter part of the 20th century and the present 21st century. This was first raised by the English Law Lords in the case of *Pettit v. Pettit*[56] in which Lord Reid stated:

> "It was said that if a husband spends money on improving his wife's property, then, in the absence of evidence to the contrary, this must be regarded as a gift to the wife. I do not know how this presumption first arose, but it would seem that the judges who first gave effect to it must have thought either that the husbands so commonly intended to make gifts in the circumstances in which the presumption arises that

56 [1977] A.C. 777.

> it was proper to assume this where there was no evidence, or that the wives' economic dependence on their husbands made it necessary as a matter of public policy to give them this advantage. I can see no other reasonable basis for the presumption. These considerations have largely lost their force under present conditions, and, unless the law has lost all flexibility so that the court can no longer adapt it to changing conditions, the strength of the presumption must have been much diminished. I do not think that it would be proper to apply it to the circumstances of the present case."[57]

In the same case, Lord Diplock, while condemning the relevance of the principle, stated, thus:

> "The most likely inference as to a person's intention in the transaction of his everyday life depends upon the social environment in which he lives and the common habits of thought of those who live in it. The consensus of judicial opinion which gave rise to the presumptions of 'advancement' and 'resulting trust' in transactions between husband and wife is to be found in cases relating to the propertied classes of the nineteenth century and the first quarter of the twentieth century among whom marriage settlements were common, and it was unusual for the wife to contribute by her earnings to the family income. It was not until after World War II that the courts were required to consider the proprietary rights in family assets of a different social class. The advent of legal aid, the wider employment of married women in industry, commerce and the professions and the emergence of a property-owning, particularly a real-property-mortgaged-to-a-building-society-owning, democracy have compelled the courts to direct their attention to this during the last 20 years. It would, in my view, be an abuse of the legal technique for ascertaining or imputing intention to apply to 'presumptions' which are based upon inferences of fact which an earlier generation of judges drew as to the most likely intentions of earlier generations of spouses belong to the propertied classes of a different

57 *Ibid* at 793.

social era."[58]

The same position was held in *Falconer v. Falconer*[59] in which Lord Denning, M.R., stated:

> "…If this case had come up for decision 20 years ago, there would undoubtedly have been a presumption of advancement: because at that time whenever a husband made financial contribution towards a house in his wife's name, there was a presumption that he was making a gift to her. That presumption found its place in the law in Victorian days when a wife was utterly subordinate to her husband. It has no place, or, at any rate, very little place, in our law today."[60]

In the light of the opinions of Lords Diplock and Reid expressed in the case of *Pettit v. Pettit,* and that of Lord Denning MR in *Falconer v. Falconer* will the presumption of advancement apply in determining the proprietary rights of same sex couples*?* It is opined here that the presumption of advancement will apply depending on the circumstances of the case. Where however, one of the parties to the marriage stands in a disadvantaged position and is being exploited by the other party, any property vested in the name of that party by the more advantaged party would be considered as an absolute gift in favour of that party.

The emergence of the application of presumption of resulting trust and advancement was borne out of the fact that men, or husbands, were at the time considered to be more economically or financially advantaged than the women or wives.[61] That view may have held sway up to the mid-twentieth century. There is no doubt that in the present day women are becoming more empowered as they now take leading roles side by side with their male counterparts in every area of human endeavour. Presently, more of female folks are being engaged in gainful employment with their male counter-part.

In Britain where the principle of presumption of resulting trust and advancement was established, there is credible evidence to show that women

58 *Pettit . Pettit* (1977), at 824.
59 (1970) 1 WLR 1333.
60 .*Falconer v. Falconer,* 1335-1336.
61 .*Ibid.*

have turned the tide as more and more them are daily being engaged in gainful employment and equally involved in politics and decision-making. In the political arena, for instance, from the latter part of the twentieth century the statistics of female involvement in politics, particularly female representation at the British Parliament, indicates a steady increase, and this is capable of changing their status from being dependent on the men for sustenance. Female involvement in the political development in Britain has been carefully captured in this order. The percentage of women participation in elective positions, particularly the British Parliament, was 19.3 per cent in 1979; 23.4 per cent in 1983; 41.6 per cent in 1987; 60.0 per cent in 1992; 120.18 per cent in 1997, 118.18 per cent in 2001; 128.20 per cent in 2005; 143.2 per cent 2010; and 191.29 per cent 2015.[62] It is, also, common knowledge that late Margaret Thatcher was British Prime Minister from May 1979 to November 1990.

In Nigeria, for instance, it is common knowledge that women have continued to play dominant role in the nation's development. In a progressive manner, a large number of women have established themselves in both the public and private sectors of the nation's economy as well as in the political scene. It is public knowledge that women in Nigeria today have taken a leading role in food production as they contribute between 50 per cent and 70 per cent of the nation's food requirement.[63] The number of women in salaried workforce within the first five years of independence stood at 6.9 per cent, whereas in 1970 the total number of employees in the Federal Civil Service stood at 8.7 per cent. In 1980, the percentage of women engagement at the Federal Service rose to 12.6per cent.[64] In 1979, women constituted about 4.9 per cent of agricultural manpower; 1.4 per cent of artisans and craftsmen; and 1.6 per cent of professional/subprofessional group. In the medical sector, women constituted about 84.3 per cent of dieticians and 80.2 per cent as nurses.[65] To empower the women, getting them educated is very important, as it is much easier to empower educated persons. According to the Population Reference Bureau in

62 Record Numbers of Female and Minority-ethnic MPS in the British Parliament. Available at www.theguardian.co/politics/2015. Accessed September 2, 2015.
63 http://www.onlinenigeria.com/Nigeriawoman/?blurb-150. Accessed on September 2, 2015.
64 http://www.onlinenigeria.com/Nigeriawoman/?blurb-150. Accessed on September 2, 2015.
65 http://www.onlinenigeria.com/Nigeriawoman/?blurb-150.

1981 only 6 per cent of adult women were educated in Nigeria.[66]

In the nation's political arena, women are being empowered as a high number of them are being elected and appointed into public office to contribute to national development. The level of female participation in the nation's politics before 1999 never exceeded 3.1 per cent in the federal legislative body, while their representation in the Federal Executive Council was 5 per cent.[67] The empowerment of women in the political class experienced a steady progression in 1999, which marked the beginning of a new political era in the country. In 1999, female representation stood at 2.8 per cent for Senate; 3.3 per cent for the Federal House of Representatives. In 2003 it was 3.7 per cent for Senate and 5.8 per cent for the Federal House of Representatives. In 2007 it was 8.3 per cent for Senate and 7.2 per cent for the Federal House of Representatives. In 2011 it was 6.4 per cent for Senate and 6.9 per cent for the Federal House of Representatives; and in 2015 it was 6.4 per cent for Senate and 5.2 per cent for the Federal House of Representatives.[68] In the context of ministerial appointments, in 1999, female representation was at 13.7 per cent for senior ministers and 16.6 per cent for junior ministers.[69] Female representation at the State and Local government level also shows a gradual progression. For example, only 2.4 per cent of female made it to the States' Houses of Assembly in 1999, while in 2003 there was an increase to 3.9 per cent. In 2007, it was 5.8 per cent, whereas in 2011 it was 6.9 per cent. At the local government level, in 1999 it was 1.8 per cent, in 2003 it was 1.9 per cent while in 2007 it was 3.6 per cent.[70] The level of female participation in federal appointments in 2011, before the cabinet reshuffle of the administration of President Goodluck Jonathan, was at 31.0 per cent in respect of ministerial appointments, 25 per cent in respect of permanent secretaries and 38 per cent in respect of advisers.[71]

Beside the level of female participation in politics and decision-making

66 *Ibid.*

67 Ngara, Christopher Ochanja and Ayamba Alexius Terwase, "Women in Politics and Decision-Making in Nigeria: Challenges and Prospects" *European Journal of Business and Social Sciences,* Vol. 2, 8 (2013): p. 48. Available at http"www.ejbss.com/recent/aspx. accessed on November 19, 2015.

68 Maryam Omolara Quadri, "Women and Political Participation in the 2015 General Elections: Fault Lines and Mainstreaming Exclusion." Available at thttp://www.inecnigeria.org/wp content/uploads/2015/07/Conference-Paper-by-Maryam-Omolara-Quadri.pdf. accessed November 25, 2015

69 Ngara and Ayamba, "Women in Politics and Decision-Making in Nigeria," p. 48.

70 .Ngara and Ayamba, "Women in Politics and Decision-Making in Nigeria," at 50.

71 *Ibid,* at p. 52.

in the nation's political development, which amounts to female empowerment, it is worthy of note that in the federal universities in the country, women representation, though negligible, has led to the appointment of a woman to the highest position of a University Vice Chancellor (University of Benin, 2014).[72] At the judicial level, a number of female justices have been elevated to both the Court of Appeal and the Supreme Court in Nigeria. Even the highest judicial office, that is, the office Chief Justice of Nigeria, has, in the recent past, been occupied by a female justice.[73] The same holds true for the Court of Appeal Presidency which is presently been occupied by a female justice.[74] The list of female occupying public offices in Nigeria is endless.[75]

There is a deliberate policy by the Nigeria government to empower women in the country. All this put together is geared towards enhancing the economic status of women. The rationale of the policy is to address the gender question so as to stamp out any discriminatory practices against the females. This has led to establishment of the National Commission for Women, a body that is now known as the Ministry of Women Affairs. It has been canvassed, elsewhere, that "this ministry is created specifically for women to deal with issues of empowerment as well as poverty alleviation, a ministry aimed at catering for and improving the wellbeing of women."[76] According to Ige and Adekile:

> "Nigerian women have made in-roads into the paid labour force outside of the home; this is because literacy among women has risen sharply,[77] and many women have been able to get into professions erstwhile

72 University of Benin, "Terminal Report of Stewardship of Professor Osayuki Godwin Oshodin JP," Vol. 1 & 2, (Benin: Ambik Press, 2014). Professor Grace Alele-Williams emerged as the fourth as the Vice Chancellor of the University of Benin and held that position for the periods of 1985 to 1992.

73 Honourable Justice Aloma Mariam Mukhtar.

74 Justice Zainab Adamu Bulkachuwa.

75 Also the Independent National Election Commission of Nigeria has, as Chairman, the person of Amina Zakari.

76 "Measures to Increase Women's Political Participation in Nigeria and their Impact in the Last Decade" available at http://mobile.wiredspace.wits.ac.za/bitstream/handle/10539/8404/CHAPTER%204.pdf?sequence=4. Accessed on November 20, 2015.

77 University of Benin, "Terminal Report of Stewardship of Professor Osayuki Godwin Oshodin JP," at 45-46. "In the award of Higher Degrees, during the academic sessions of 2009 to 2014, in the University of Benin, females accounted for 34 per cent during the period. Whereas the undergraduate level, in 2009/2010 academic session females constituted about 39.2 per cent, in 2010/2011, females accounted for 39.8 per cent, in 2012/2013 academic session females accounted for 34.7 per cent. While sub degree programmes for the period 2009-2014, females accounted for 57 per cent."

> known as male professions. Today women are engineers, doctors, lawyers, accountants, and university teachers etc., the positive upsurge in women employment has not translated to equal status at work."[78]

Although, the engagement of women into paid employment in Nigeria is not at par with the male counter-part, this marks as a radical shift from the old norms where women were, basically, dependent on their men for general provision of their basic needs. The current trend indicated above is significantly sufficient for a review of the application of the principles of presumption of resulting and advancement to reflect the present reality and for justice to be done in deserving cases.

9. RECOMMENDATIONS

The expressions of Lord Diplock and Lord Reid in the case of *Pettit v. Pettit* by which they questioned the continued relevance of the presumption of advancement in the latter part of the twentieth century points to the need for a re-evaluation of the principles, more particularly in the 21st century. The social conditions prevalent at the time when the principle was formulated have drastically changed as more women are daily being empowered and now getting involved in politics, public or civil service and private industry.

It is our opinion that the courts should, in deserving cases, examine all the surrounding circumstances and, where appropriate, decline to apply the principle of presumption of advancement in favour of women or wives. This has succinctly been captured in the case of *Esther Mueller v. Werner Mueller,*[79] by Aderemi JCA (as he then was) in the following words:

> "Husband and wife, given the changes sweeping across our society today, in so far as the rights and duties to make financial provisions are concerned, albeit in theory, are gradually moving towards the footing base. Many wives are today more financially empowered than their husbands. And so the courts are fast moving away from the old rule

78 Asikia Ige and Oluwakemi Adekile, "Women's Rights to Work in Nigeria: An Appraisal," *US-CHINA LAW REVIEW,* Vol. 9:131, (2012), p. 140.

79 (2006) 8 NWLR (Pt. 977) 627.

> whereby they virtually ordered financial provisions in favour of the wife. Law, to be useful, must always reflect the norms and developmental stages reached in a society where it will apply."[80]

This same view has been given credence elsewhere in the following words:

> "Advancement is a technical word for 'gift.' At a time it was thought that when a husband gives money to his wife he intends an out-and-out gift with no expectation of a return. Put another way, where a husband starts out his wife in a business he is presumed not to expect any return for himself. But the age is long gone when the husband was the bread-winner, the wife contributing little or nothing to the family finances directly unless she came from wealth. Today, women are active in the professions, in industry, in political life, in social organizations and economic management. More and more women are looked upon as having equality of opportunity with men in business life."[81]

It is our recommendation that in applying the presumption of advancement the courts should adopt a more radical approach and make bold to depart, where necessary, from the centuries old principles.

The application of the presumption of resulting trusts between a mother and her child or children particularly needs to be revisited. This is hinged on the fact that a mother is no less a parent than the father;[82] so the obligations of a father to provide for his child or children should apply with equal force to the woman. Also, this can be achieved through legislation. It is recommended that the Nigeria's legislature should adopt the approach of the Canadian law which states "that every parent has an obligation to provide for his or her child."[83]

It is further recommended that the provisions of Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms be adopted by Nigeria's legislature and enacted, by way of reform, as a local legislation, which forms part of the nation's family law jurisprudence.

80 *Ibid, at 645.*
81 Emeka Chianu, *Company Law* (Abuja: Panaf Press 2012), p. 145.
82 Per Sir John Stuart, V. C. in *Sayre v. Hughes,* (1868), at 381.
83 83. Family Law Reform Act 1988 of Canada, Section 17 (1).

Such legal instrument, if pursued, could bring dynamism into the development of family law jurisprudence.

In the case of a wife's gift to the husband, if there is still any need to retain the principle of presumption of advancement, it should be applicable in equal force to gifts made to a husband by his wife just the same way it applies to the gift made by husband to the wife. This point has been granted legislative recognition in Nigeria by the Cross River State Law on the Right of Female Person to own and Inherit Property of 2007 which provides, in section 5 (3), that "where during the subsistence of a marriage either spouse gives any property to the other there shall be a presumption that the property thereafter belongs absolutely to the donee."

10. CONCLUSION

The principal reason for the introduction of the principles of the presumptions of resulting trust and advancement seems to have disappeared or lost relevance as a result of the socio-cultural development and advancement in the last forty years. The courts may need to review the relevance of the application of the principles of presumption of resulting trust and advancement in the present day world. It is worthy of note that the status of women, the supposed beneficiaries of these principles, has changed considerably today in comparison with the times when these principles were introduced. Women are more empowered today, such that they compete on equal terms with their male counterparts. Therefore, there is need for the courts to critically review the continuance of the principles in the modern day legal system, with a view to restating the law to meet the present day reality or having it expunged completely through judicial review. It is hoped that in the near future, the courts will finally take a clear and radical position on this issue, so that justice will be seen to be manifestly done.