

Chapter 12

Question 1: Compare and contrast resulting and constructive trusts. Why do you think constructive trusts are preferred as a means of determining rights in the home?

This question requires you first to consider the similarities and differences between the resulting and constructive trust and then to consider why the latter type of trust has been preferred by the courts in determining ownership of the home. In addition to reading chapter 12 you may also find it useful to review the discussion of these different types of trust in chapter 11. In part 2.3.4 of this chapter we have highlighted a particular overlap between the purchase money resulting trust and inferred agreement constructive trust; both of which may be claimed by a person who has made a direct contribution to the purchase of property in the name of another. The existence of this overlap provides a useful focus for this question and you may find it useful to work through the reasoning that would underpin a claim to a resulting trust and a common intention constructive trust where a claimant has made a direct contribution. In the case of each type of trust, consider (a) how the contribution would be analysed as a claim to a beneficial share and (b) what proportion of the beneficial interest the claimant would receive.

We have seen that the resulting trust and common intention constructive trusts may be distinguished on doctrinal grounds, or according to the context of the claim. On either approach, however, the common intention constructive trust is more likely to be applied in relation to the home. Both the majority of the House of Lords in *Stack v Dowden* [2007] 2 AC 432 and the Supreme Court in *Jones v Kernott* [2011] 3 WLR 1121 preferred to use the constructive trust in relation to the home. In the latter case, the Supreme Court went one step further and held that the presumption of resulting trust no longer applies in a specific type of case; where the property is a home purchased 'in joint names for joint occupation by a married or unmarried couple, where both are responsible for any mortgage'. The Privy Council in *Marr v Collie* [2017] UKPC 17 also applied the constructive trust approach where the parties were in both cohabitantes and business partners where it possible to ascertain their common intention. In practical terms, the courts preference for the common intention constructive trust is primarily because of how beneficial interests are quantified in each type of trust. Under the resulting trust, a claimant obtains an interest in proportion to his or her contribution. Under the constructive trust, beneficial interests are quantified by reference to the common intention of the parties. This enables evidence beyond their contributions to be taken into account, as we have seen in the discussion in part 2.2.

Question 2: Are the problems of gender stereotypes that have been encountered in ascertaining the existence of detriment inherent in the adoption of the test provided by Nourse LJ in *Grant v Edwards* [1986] Ch 638? Is Browne-Wilkinson VC's test (in the same case) preferable?

To answer this question you should review the extract from *Grant v Edwards* in part 2.3.2 and the discussion of the different approaches to detriment taken in that case by Nourse LJ and Browne-Wilkinson VC. We have noted in that discussion that Nourse LJ's test of detriment requires conduct on the part of the claimant that he or she could not reasonably be expected to do unless he or she was to have an interest in the home. The adoption of this test has led courts to reject conduct that it considers reasonable for the claimant to have undertaken by reason of the parties' relationship. We have seen that in applying this approach the courts have tended to measure a claimant's conduct against gender stereotypes. It is as a direct result of this that domestic work such as child care has been rejected as constituting detriment; a rejection that we have seen has led to a powerful feminist critique. You may draw your own conclusion as to whether you consider this to be inherent in Nourse LJ's test, or merely the consequence of how that test has been interpreted and applied in subsequent case law. Browne-Wilkinson VC suggested that detriment should be established by any conduct undertaken by the parties as part of their joint lives. It seems likely that the adoption of this test would have led to a broader range of conduct being accepted as detriment. A party who takes on a domestic role in a relationship contributes to their joint lives even if (on Nourse LJ's approach) such conduct can be rejected as detriment on the basis that it is conduct a claimant can reasonably be expected to do even without having an interest in the home. With this in mind it seems possible, at the least, that one of the key criticisms of the operation of the

constructive trust could have been avoided if Browne-Wilkinson VC's test of detriment had been adopted in preference to that provided by Nourse LJ.

Question 3: Compare and contrast an inferred and an imputed intent. What role does each currently play as regards (a) the creation of a constructive trust and (b) the quantification of beneficial shares under a constructive trust?

This extent to which it is legitimate for the courts to impute a common intention as well as to infer one was a central issue that emerged from the decision of the House of Lords in *Stack v Dowden* [2007] 2 AC 432 and that was addressed by the Supreme Court in *Jones v Kernott* [2011] 3 WLR 1121. This question requires you both to identify what is meant by an imputed and inferred intent and to consider the role each now plays at the two different stages of a claim to a beneficial interest: the creation of the trust and the quantification of shares. A useful starting point is the definition of these terms by Lord Neuberger in the extract from *Stack v Dowden* in part 2.2.2 of the chapter (though it should be noted that the definition of these terms is not without controversy). The key difference between them is that an inferred intention is one *actually held* by the parties, while an imputed intention is one *attributed* to them by the court. In relation to the creation of a constructive trust, we have seen in part 2.3.1 that in *Lloyds Bank v Rosset* [1991] 1 AC 107 Lord Bridge accepted that the trust may arise on the basis of both an express or inferred agreement. We have suggested that at the current state of the authorities there is no basis for arguing that a trust can also be created through an imputed intent and indeed this is supported by the Court of Appeal decision in *Capethorn v Harris* [2015] EWCA Civ 955. In relation to the quantification of beneficial shares, however, we have seen in part 2.2.2 that in *Jones v Kernott* the Supreme Court unanimously accepted that the parties' common intention can be imputed. The Supreme Court explained that it would be appropriate for the court to do so only in those cases where there was no express or inferred intent. The preference, therefore, is to give effect to the parties' *actual* intention.

Question 4: Following *Stack v Dowden*, *Jones v Kernott* and *Marr v Collie* what reforms (if any) do you consider desirable to the current law concerning the creation of a common intention constructive trust?

This question is inviting you to assess the rules governing the creation of a constructive trust and to consider any reforms that you believe to be desirable in light of these cases referred to. You are being asked for your own views. Your views must, of course, be supported by the evidence found in the primary and secondary sources, but in a question of this nature the quality of the argument you make is more important than the views you express. This is an area where different opinions are often held – as will be apparent from the academic literature discussed in the chapter. The cases referred to in the question concerned the quantification of shares. The question is therefore inviting you to consider whether the courts' approach to quantification should be carried over to the creation of a trust. Since the decision in *Stack v Dowden* both the creation of a trust and the quantification of shares are based on the parties' 'common intention'. But we have seen that 'common intention' is defined differently in respect of these issues. Hence, as we have seen in part 2.3.1 and in question 3 (above) the common intention creating a trust can be express or inferred, but not imputed. In contrast, the common intention used to quantify shares may be imputed. Further, there are differences between the types of conduct the court will take into account when inferring a common intention depending on whether the creation of a trust or the quantification of shares is in issue. This has been explored in the section on inferred agreement in part 2.3.2. One question you might consider is whether the whole range of factors referred to by Baroness Hale in paragraph [69] of her judgment in *Stack v Dowden* (extracted in part 2.2.1) in relation to the quantification of shares should be equally relevant to inferring a common intention to create a trust. As we explain in part 2.3.1 the operation of the constructive trust at the acquisition state is currently at a crossroads. It is likely that in future the trust will develop along one of two lines:

- Retaining the *Rosset* criteria, but with some relaxation of the need for 'direct' financial contributions, discussed in part 2.3.2; or
- An expansion of the circumstances in which a common intention will be found by reference to some or all of the factors in paragraph [69] of Baroness Hale's judgment in *Stack v Dowden*. We have considered this proposition in part 2.3.3.

Question 5: What are the advantages and disadvantages of determining ownership of the home through the application of property law principles? Is the Law Commission justified in singling out relationship breakdown between cohabitants as a situation to be dealt with outside property law principles?

In part 1 of this chapter we noted the four key situations where ownership of the home falls to be considered by the application of property law principles. We have noted that where the issue of ownership arises as a matter of property law, the question for the court is what each party *actually* owns. This is in contrast to legislative schemes which, on divorce or the dissolution of a civil partnership, confer on the court a discretion to determine what each party *ought* to be given. Hence, to answer this question it is useful to consider the situations in which ownership of the home may arise and think about whether, in those circumstances, the court should be constrained into identifying the parties' actual rights or should be able to vary those rights. Different considerations may arise, for example, when the court's decision will impact on third parties (such as a secured creditor) from when the decision will affect only the parties themselves (such as a relationship breakdown). Currently, the position on the breakdown of a relationship between parties who have cohabited without marriage or entering a civil partnership stands in stark contrast to the situation where a marriage ends in divorce or a civil partnership is dissolved.

The property rights of cohabitants on the breakdown of their relationship remains determined by the application of property law principles. In the other cases of relationship breakdown, the courts have access to statutory schemes that enable them to make a property adjustment order. The Law Commission has recommended replacing the application of property law principles on the breakdown of a relationship between cohabitants who have lived as a couple in a joint household where certain eligibility criteria are met. We have explored these recommendations in part 4 and have noted that in 2011 the government announced that it did not intend to implement the recommendations during the 2010-2015 Parliamentary term. In response, the Law Commission expressed the hope that implementation would 'not be delayed beyond the early days of the next Parliament'. Lady Hale also used her Opinion in the Privy Council decision in *Gow v Grant* [2012] UKSC 29 to call for reform. Previously, the Law Commission considered whether a single scheme should be provided to determine ownership of a shared home in all cases where the issue arises (outside situations covered by existing statutory schemes). To understand the reasons for this change you will find it useful to read Law Commission Report No 278, *Sharing Homes: A Discussion Paper* (2002, part VI) and Law Commission Report No 307, *Cohabitation: The Financial Consequences of Relationship Breakdown* (2007). The Law Commission's recommendations may go some way to removing the current unfavourable treatment of cohabitants on the breakdown of their relationship, when compared to the position on a divorce or the dissolution of a civil partnership. Those recommendations therefore deal with the situation that has given rise to most criticism under the current law. Whether you consider those recommendations to go far enough may depend on your assessment of the advantages and disadvantages of using property law principles.

A further impetus for reform may come following the Supreme Court's ruling in *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development* [2018] UKSC 32, that it is a breach of a heterosexual couple's human rights under Article 8 (read with Article 14) to deny them the right to enter into a civil partnership under the Civil Partnership Act 2004. This legislation affords homosexual partners, who formalise their relationship by entering into a civil partnership, similar rights upon the break up of their civil partnership to those available to married couples including wide discretion for the court to alter their property rights.