24. Trusts of homes – commentary

Suggestion on how to go about answering questions on trusts of homes:

The suggested outline for answering problems on this topic is to follow this structure:

First apply the presumptions in Stack v Dowden and then discuss the following to see if those presumptions can be displaced:

1. apply the test in Lloyds Bank v Rosset literally and consider who wins and who loses;
2. apply the balance sheet / resulting trusts cases and see if the result is any different from 1;
3. apply the family assets cases and see if the result is any different from 1 or 2;
4. apply the unconscionability cases and see if the result is any different from 1, 2 or 3;
5. apply the doctrine of proprietary estoppel and see if the results are different from the above;
6. consider how any theoretical approaches would impact on the facts of the problem.

The suggested outline for essays is a matter for you. You could (i) create your own set of facts and through your essay reflect on how the different case law models would produce different results (perhaps by changing the facts of your own hypothetical example for emphasis) or (ii) consider some of the ideas set out in section (c) immediately below.

IDEAS ABOUT TRUSTS OF HOMES

There is a large literature on this topic. You could refer generally to Hudson (ed), New Perspectives on Property Law Human Rights and the Home (Cavendish, 2004) and in particular to the following essays:

- Rebecca Probert, “Family law and property law: competing spheres in the regulation of the family home”, p.37-52
- Anne Barlow, “Rights in the family home – time for a conceptual revolution”, p.53-78
- Simone Wong, “Rethinking Rosset from a human rights perspective”, p.79-98.

The footnotes to these essays contain an extensive bibliography of recent articles and books on this topic and are an excellent source of further reading. Choose the themes which interest you most.

a) Conflation or separation?
Reading: Hudson, section 15.10

b) Social justice and trusts of homes
Reading: Hudson, section 17.5

c) Human rights and trusts of homes
Reading: Hudson, sections 17.4

d) Family law and the law of the home
Reading: Hudson, sections 17.4