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## *Davis & Peterson [2023] FedCFamC1A 13*

[Laura Johnston, Barrister](#)

A Full Court consideration of whether two real properties were held on trust for the de facto husband's parents.

### Facts

The de facto husband and wife commenced a relationship in 1999. In 2001, the husband's parents purchased two real properties. They used one as an investment rental property and the other as a holiday house.

The parents later faced financial difficulties. To avoid the parents losing the properties, the husband and wife obtained finance in their own name to pay out the existing mortgage. An agreement was reached (as alleged by the parents and husband) that the properties would be transferred to the husband and wife to enable them to obtain the finance and that the properties would later be transferred back to the parents when requested by them. The wife denied this agreement, and said that the properties were instead purchased by the husband and wife and held beneficially by them.

After the properties were transferred to the husband and wife, it was incontrovertible that:

- the parents paid the shortfall in the stamp duty on the transfer;
- the parents continued to use the properties as they had before the transfer: as a rental and holiday house;
- the parents received all rent from the property and paid all expenses, including mortgage repayments, maintenance, and outgoings. These expenses exceeded the rent they received; and
- the husband and wife made no mortgage repayments and otherwise paid no expenses in relation to the properties.

The Full court refers to these facts as the "*incontrovertible facts*".

The husband and wife separated in 2010. The parents joined the property proceedings between them, seeking a declaration that the properties were held on trust for them (by either a bare trust, common intention constructive trust or a remedial constructive trust).

The husband supported his parents' position in relation to the properties. It was opposed by the wife. The wife's trustee in bankruptcy was also a party to the proceedings, who likewise opposed the declaration sought by the parents in relation to the properties.

The primary judge refused to declare that the two real properties were held on trust for the parents. The parents appealed, supported by the husband. The appeal was opposed by the wife and her trustee in bankruptcy.

## Appeal

The Full Court (Tree, Christie and Schonell JJ) allowed the appeal. The Full Court declared that the two real properties were held on trust for the parents and ordered a transfer of the properties to them.

The wife and her trustee in bankruptcy were ordered to pay costs in the sum of close to \$100,000, with the trustee in bankruptcy to pay 75% and the wife 25%.

## Key principles

The legal principles in relation to trusts was not in dispute in this case, and the appeal instead focused on the facts of the case. That being said, the Full Court set out a useful summary of the legal principles in relation to trusts at [28]-[30]. In relation to a common intention constructive trust, the Full Court recorded at [29] that:

*"...a common intention constructive trust will be recognised where the common intention of the parties demonstrates that it was intended that the [parents] would have a beneficial interest in the properties and have acted to their detriment in reliance upon such intention. The establishment of a common intention is a question of fact that may arise from express agreement or will be inferred from conduct...Such intention is usually formed at the time of the transaction and may be established by the party claiming the beneficial interest having acted to their detriment...If established, it would be unconscionable for the other parties to deny the common intention" [citations omitted].*

The crux of the parents' appeal was that the incontrovertible facts "lead inexorably to only one outcome, namely that the [husband and wife] held the properties on trust for the [parents]" (at [26]).

# Case Note – Family Law

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The Full Court agreed, noting that there was a “*complete absence of any evidence of the [husband and wife] doing any act consistent with a beneficial interest in the properties. Their entire conduct was consistent with that of a bare trustee*” (at [44]).

In concluding that the primary judge erred, the Full Court stated that the “*...common intention inferred from the conduct of the parties evidenced by the incontrovertible facts...led inescapably to only one conclusion, namely that the properties were held by the [husband and wife] on trust for the [parents]*” (at [47]).

While the legal principles were uncontroversial in this case, it is a useful factual study of equitable principles being applied in the family law context. It also serves as a warning in relation to the significant costs order made, primarily against the trustee in bankruptcy.



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Laura specialises in family law and has practised exclusively in the area since coming to the bar in 2016. Laura is a nationally accredited Mediator and Arbitrator.

Prior to coming to the bar, Laura worked as a solicitor where she had the carriage of complex family law matters. She also previously worked as Legal Associate for Her Excellency the Honourable Linda Dessau AC CVO and the Honourable Peter Young AM KC, at the Family Court of Australia (as it was then known).

Laura is consistently recognised by Doyle's Guide as a leading family law barrister, both in Victoria and Australia. In the 2023 Doyle's Guide, Laura was listed as one of:

- [Victoria's leading family law barristers](#);
- [Victoria's preeminent parenting and children's matters barristers](#); and
- [Australia's recommended family law barristers](#).

Laura regularly presents papers and speaks on family law topics. She graduated from Melbourne University with First Class Honours. She was awarded the Wright Prize, as the top ranked student in family law.

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