



Is it a gift or a loan? The difference could be critical in your family law dispute

Date: Tuesday July 28, 2020

It is becoming more commonplace for family members to provide financial assistance to other family members to be used, for example, as a deposit for a property purchase, for renovations on a property, or to assist with cash flow for a business venture. How that arrangement is treated if you end up in family law proceedings can have a [significant consequence on the outcome of a property settlement](#).

Was the money a gift or was it a loan?

The outcome of this question is crucial.

If it can be successfully argued the funds were a gift, those funds will be treated as belonging equally to the parties, whether married or in a de facto relationship. If the funds are treated as a gift, it will likely be treated as a contribution of one of the parties, to the relationship.

Although that party may receive an adjustment in their favour for the gift, depending on a number of factors, including the timing of the receipt of the funds, it is unlikely they will receive the entirety of the funds back, in any final property division.

If it can be successfully argued that those funds were a loan and there was a genuine expectation that those funds would be repaid, then those funds will be treated as a genuine debt of the parties. The Court may make orders that such debt will need to be repaid by the parties as part of the terms of any property settlement, or one party will retain the liability (to repay those funds) to the exclusion of the other.

What is a loan?

Often during property proceedings, a party will claim that funds provided by a family member was a loan and that family member

has now called on the monies to be repaid.

Unfortunately, without any supporting documentation and evidence, those funds will likely be treated as a gift.

How do I prove it was a loan and not a gift?

For a loan to exist, there needs to be a written agreement that documents the terms and conditions of the loan.

The written agreement should include, at a minimum:

the amount being borrowed;

how the amount will be repaid (i.e. the amount and frequency of repayments);

any interest that will need to be paid;

if there is a guarantor for the amount loaned; and

if there is any security provided for the loan?

How does the court determine if it was a loan or a gift?

Funds will often be provided to parties at the commencement of a relationship, often from parents, for purchasing a property or starting a new business.

In the beginning, the funds may have been given by the parents and the parties to the relationship, as a gift. But if the relationship then sours and ends, the issue of how those funds are characterised can become a contentious one; not only for the separating parties but also for the parents who provided the funds and want them returned.

When the relationship ends, the parents may seek to argue those funds were provided as a loan and not a gift and should be repaid.

However, the court is unlikely to accept a re-categorisation of the funds simply for the sake of a property settlement.

The court will look at all the circumstances when the funds were provided and what steps (if any) were taken to document the provision of the funds. If a written loan agreement exists from the time the funds were provided and the agreement includes features that one would expect to find in an arms-length commercial contract (eg evidence of repayments of the funds), the court

may deem the funds to be a loan.

If none of the above factors exists, the funds are likely to be treated as a gift and therefore belong equally to the parties.

How can I ensure monies provided will be treated as a loan?

Due to the discretionary nature of Family Courts, there is no single answer to this question.

However, there are a number of steps that can be taken if a parent or family member is considering providing funds to a child or other family member, to protect their funds.

These include:

- Clear documentation of the loan in a written agreement, preferably prepared by a lawyer with experience in family and commercial law; and

- Once the agreement has been prepared and signed, the parties follow and comply with the terms and conditions of the agreement; eg adhering to the loan repayment schedule.

Can I create a loan agreement after providing monies?

While this is not ideal, you are able to enter into a retrospective loan agreement after monies have been provided to a third party. However, your position is weaker than if you had entered into an agreement before providing the monies.

The different treatment of funds advanced as either a gift or a loan can significantly affect the outcome of a property settlement. The team at Meillon & Bright Legal can assist you with all matters concerning your property settlement, including any questions or issues you have regarding gifts or loans.

The information contained in this article is of general nature and should not be construed as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.