



What happens to a loan from parents if the children divorce?

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E&A Lawyers has made the decision to no longer provide family law services. While we no longer take on any new family law matters, we are happy to assist by referring you to lawyers specialising in this area. Please don't hesitate to contact us if you would like a referral.

[CALL US IF YOU'D LIKE A REFERRAL TO A FAMILY LAWYER: 02 9997 2111](#)

We have seen an increase in family law matters where one set of parents have provided money to their child and that child has subsequently separated from their partner. Whether the money provided by parents is a gift or a loan, can affect each party's entitlements when they divorce. This can often be a hotly contested subject.

If you want the money you have provided to your child to be repaid if your child divorces, then there needs to be evidence that it is a loan. And the [best evidence starts with a written agreement detailing the terms of the loan](#).

Do I need to document the loan?

Yes. There is a legal presumption that money provided by a parent to a child is a gift unless that presumption is rebutted by evidence showing it is a loan.

In family law proceedings, who decides if the money provided to my child is a loan or gift?

If the divorcing parties cannot agree whether the money was a loan that should be repaid upon divorce, then the Family Court will make that decision for them. The court has to be persuaded [that it was really a loan and not just a gift "cloaked" as a loan](#).

Is a written agreement stipulating that the money is a loan, enough?

Although a written agreement as to the loan is a good start, sometimes it will not be enough to convince the Family Court that it is a loan that should be repaid.

There are a number of cases where the court has concluded that it really was not a loan but was a gift made out to look like a loan (in the event that the relationship breaks down).

Repayment of the money to you will depend on both the terms of the loan and your conduct in respect of the loan. The Family Court is intrusive and looks at all aspects in respect of the loan.

What should be included in a loan document to protect it as a loan?

The main thing you want to ensure is that your loan does not look like a gift disguised as a loan.

The Family Court does not generally find there is a loan if the loan is only repaid to you if a certain event occurs; for example, making it repayable only if your child separates from their spouse.

The Family Court usually wants to see that the loan has all the hallmarks of being an arm's length arrangement before accepting that it is a debt repayable out of the assets of the relationship. Otherwise, the Family Court may declare that the money was provided as a gift, not a loan, and it does not need to be repaid out of the assets. In that situation, it forms [part of the property pool for distribution](#).

It is important that any loan document be properly drawn and accurate. We strongly recommend you engage a lawyer experienced in family law and commercial law to assist with this. Your child (and their partner) should also seek their own independent legal advice regarding the loan.

If the loan document is similar to a loan from a commercial lender, such as a bank, then it increases the chances that the loan document will protect your right to repayment. The document should include the following details.

- Identify the borrower – is it your child only or also the spouse?
- Note the background and intention of the loan;
- Clearly identify the amount of the loan;
- Set out what interest payments are required;

- Prescribe a requirement for regular loan repayments;
- Identify the length or term of the loan;
- Provide for security for the loan, such as a mortgage or caveat registered onto the title of your child's property; and
- Stipulate when the loan must be repaid.

You and your child should also adhere closely to the terms of the loan document to ensure that the credibility of the loan is not undermined.

An example of this is where the loan document provides that there are regular repayments to be made by your child, then the Family Court may want evidence that those regular repayments have actually been made.

I want a simple loan document. Is that possible?

We will always draft a loan document based on client's instructions – so it is possible but it comes with risks.

However, you need to be aware that the further you stray away from a proper loan arrangement similar to that of a commercial lender, the more that there might be a challenge to the credibility, and therefore enforceability, of the loan and your ability to be repaid if your child divorces.

What else should I consider before putting a loan in place?

- We suggest obtaining advice from an accountant to ensure there are no adverse tax implications.
- Advice from a financial advisor should also be sought to ensure you can fund the loan and that you are entering into the loan for the right reasons.
- Do your Wills need to be updated? How should the loan be dealt with on your death and does the loan create unfairness between any other children?
- Do you need to obtain insurance over the borrower's life so the loan can be repaid if the borrower predeceases you, loses their job or is unable to work for whatever reason?

How can E&A Lawyers assist?

Loans to family members, particularly children (before or during the marriage), can be a very complex area of Law.

As our team of lawyers specialise in a range of practice areas, we are well placed to ensure we mitigate any risks you may have in relation to loans to your children.

When you initially engage an E&A lawyer (regarding your proposed loan), you might speak with a family lawyer. That lawyer, in turn, will be able to liaise with colleagues in [estate planning](#) and [commercial law](#), to ensure a holistic approach to your requirements.

If you're looking to protect your interests in relation to family loans, please contact us to arrange a consultation to assess your needs.

Get help from a family lawyer

Contacting E&A Lawyers

For more information or to arrange a consultation with a lawyer, you can call or email us.

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