

The difference between a loan and a gift to family members

Author: Lauren Weatherley
Email: lauren@ealawyers.com.au
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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.

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We have seen an increasing interest of late in parents considering providing money to their kids. One of the most common reasons is to help with the purchase of their first home as young people are finding it increasingly difficult to break into the property market.

Now with COVID-19 and the subsequent economic downturn, we expect to see a significant increase in parents providing money to their children for a number of reasons; not just to assist with the purchase of real estate.

But is that money a gift? Or is that money a loan that needs to be repaid? How do parents ensure that the money provided to their children is protected if they expect it to be repaid?

Determining if it's a or loan or gift?

This might seem simple but unfortunately, it can be far from it. In some instances, it is very complex trying to ascertain whether the money provided was a gift or loan, especially if the money is given from a parent to a child and there is a lack of evidence documenting the intention between the parties.

There is a legal presumption that money provided from a parent to a child is a gift unless the presumption is set aside and clearly demonstrated as being a loan. So, in the absence of loan documentation, it can be difficult to prove that the money provided was a loan.

When might the issue of loan or gift be problematic?

We have had several matters where there is a dispute between family members as to whether money provided to a child was a gift or a loan.

Quite often the issue arises when the parent dies and family members do not know when the loan needs to be repaid. There have also been several disputes where the intentions of the parties in respect of a loan have not been properly documented.

Example 1

- *In one matter, a dad died and left three children who were all on good terms. The dad had provided money to each of his children.*
- *Money provided to child one and child two was documented as a loan.*
- *Money provided to child three was undocumented.*
- *There was then argument among the children as to whether the money provided to child three was actually a loan that needed to be repaid to the estate.*
- *Child two also claimed that they had repaid the loan to their father.*
- *There was then a question of whether there was evidence documenting the repayment of the loan.*
- *The lack of adequate documentation in this matter led to a falling out between the siblings and extra expenses to the estate to litigate the dispute.*

Example 2

- *In a recent matter a Mum provided some money to daughter one to hold for Mum, for various reasons.*
- *Mum asked the daughter not to tell her brother and sister about it.*
- *Upon Mum's death, the brother and sister number two found papers referring to the money being held by daughter one and immediately decided that it must have been a loan and that interest should be paid on it.*
- *Daughter one believed she was merely holding the money for Mum and fully intended that it form part of Mum's estate but did not believe any interest had to be paid.*
- *There was then litigation between family members as to whether the money provided to daughter one was a gift, a loan or simply a trust arrangement.*

What should I do if the money is to be a gift?

If all parties agree the money is provided as a gift, it is still good practice to document it as a gift. This avoids any argument that it was a loan and the loan documentation has been misplaced.

What should I do if the money is to be a loan?

To avoid the presumption that money provided from a parent to a child is a gift, it should be formally documented as a loan. Documenting the arrangement may also avoid arguments as to when the loan is to be repaid, what interest is payable and so on.

Care should be taken by both the lender and the borrower to properly document every repayment, as it all comes down to evidence if there is a later dispute as to whether the loan arrangement was honoured. It may be good practice on the anniversary of entry into the loan, for the lender and borrower to document what the current loan amount is and any repayments made to that date.

If you think that there could be an issue in the future with other family members not knowing if a loan has been repaid or not (for example, upon the death of the lender when their estate is being administered), then it may be a good idea, if appropriate, to tell the other family members about the loan so everyone is on the same page.

How do I document a loan?

The type of document required will depend on what lengths you want to go to, in order to protect the money and ensure it is repaid.

Documenting a loan in a written agreement and having all lenders and borrowers sign the agreement, is an important step. The agreement needs to cover

- the background and intention of the loan;
- the amount of the loan;
- if there are interest payments;
- whether there are regular loan repayments;
- the period of the loan;
- if there is to be security for the loan, such as a mortgage or caveat registered onto the title of the borrower's property;
- when the loan must be repaid; and
- the parties to the loan – should it be just your child or should it include your child's partner?

How can E&A Lawyers assist?

Loans and gifts between family members can become quite complicated. We can assist you (either as the lender or borrower), to ensure your interests are protected and you understand any of the risks associated with the loan.

Our lawyers work across a variety of specialisations. As this type of matter can involve:

1. family law;
2. commercial law; and/or
3. estate planning law,

we are well placed to provide you with a holistic approach to your inquiry.

If you'd like to speak with someone about your loan or gift to a family member, feel free to start by contacting today's blog author, Lauren Weatherley.

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.

02 9997 2111

info@ealawyers.com.au

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