

The difference between a loan and a gift in family law

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When the financial climate is strained, it is common for parents to financially assist their children. It's often referred to as the "bank of Mum and Dad". Sometimes financial assistance comes by way of a gift, and sometimes there is an expectation that there will be a repayment in the future; a loan. Where substantial gifts or loans are provided to one or both parties, it is sometimes difficult for parties to agree on how that gift or loan should be considered following a separation.

These situations often make it harder for separated couples to reach property settlement agreements after they separate. Often, one party will assert there is a loan that needs to be repaid when, in reality, there is no expectation of repayment. Or one party may assert that there was a gift from their parents, specifically and only for their benefit.

Under family law, the answer is different depending on whether your parents gave you a loan or a gift.

In this article, we will look at:

- the difference between a loan and a gift;
- how the difference may impact your property settlement; and
- how to avoid future family law disputes.

Was it a gift or a loan when negotiating property settlement?

A gift can come in different forms. It might include cash, property, or motor vehicles. It is considered a gift if there is no expectation of repayment.

A loan usually comes in the form of cash. It is considered a loan if there is an expectation that the money will be repaid. For example, a parent may loan their child the deposit money to assist them in purchasing a property.

Effect of a loan in family law property settlements

Given that a loan needs to be repaid, it becomes a liability of the parties and is to be treated as such in any property settlement negotiations.

The parties may decide to repay the loan to the lender. This will reduce the assets available for distribution between them. Alternatively, one party may agree to keep the loan as a liability that they are to retain. If one party opts to retain the loan, the other should ensure that they are released from any liability.

Often, one party will assert there is a loan when, in reality, it was a gift. In trying to determine whether there is a bona fide loan, the Court may look at things like:

1. Is there a loan agreement?
2. Have the parties been making repayments prior to separation?
3. Is interest payable under the loan?

In the absence of the traditional characteristics of a loan, it could be hard to prove the loan.

Effect of a gift in family law property settlements

How a gift is treated will be dependent on whether the gift was made to one or both parties.

If the gift is made to one party, that party may receive a percentage adjustment in their favour as they made a higher contribution to the overall assets available for distribution.

If the gift is made to both parties, the situation becomes more complex. In most cases, a gift made to both parties is viewed as a contribution by the party whose family provided the gift. The rationale is that, but for the relationship, the other party would not have received the gift.

However, in some circumstances, the Family Court may conclude that a gift from one party's family was made with the intention to benefit both parties. If the gift was made to both parties, neither party would receive a percentage adjustment in their favour. These cases are less common, but we do see them from time to time.

An example of a case where the Court determined a gift was made for the benefit of both parties

For example, in the case of *Mabb &Mabb &Anor [2020]*, during the relationship, the husband's parents gifted the husband and wife 60 acres of land. The parties ran a business on the land.

The husband's mother and wife continued to run the business following separation.

The wife argued that the land was a gift to both parties, the intention being that the husband's parents would eventually build a house on the land and be cared for by the husband and wife (if required).

The Court held that this was a gift to both parties. The husband did not receive a percentage adjustment in his favour.

It will be for the party asserting that the gift was made to both parties to provide evidence in support of their position. This is difficult as, more often than not, these arrangements are informal, and there is no written evidence of the parties' intentions.

If the gift is considered to be a gift to one party only, the next step is to determine how much weight is given to that contribution. This depends on a few factors, including:

1. the length of the parties relationship;
2. when the gift was received;
3. the value of the gift and, if money, how these funds were applied; and
4. contributions to the relationship as a whole.

For example, if it was a short relationship or the gift was received shortly before separation, the party may be credited based on the original value of the gift or close to it. On the other hand, if it is a long relationship or the gift was received early in the relationship, the gift may not be given as much weight.

Each case is different, so it is important to seek advice from an experienced family lawyer regarding your entitlements.

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How to avoid future disputes about gifts and loans in family law

If it is your intention for any financial assistance to be a loan (as opposed to a gift), it is best practice to:

1. have a clear and enforceable written loan agreement;
2. ensure that the loan agreement includes a repayment plan and interest provisions;
3. ensure you and your partner make payments in accordance with the repayment plan; and
4. ensure all parties receive appropriate legal advice.

Failure to do one/some of the above may result in the Family Court categorising the intended loan as a gift. If this happens, the funds will be added to the assets available for distribution between you and your former partner and will be dealt with under family law rather than being repaid to the lender.

Get help from a family lawyer

If you would like further information on this topic or specific advice regarding how a gift or a loan may impact your property settlement, get in touch to book a free appointment with one of our experienced family lawyers.

This blog is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.