



## A LOAN OR A GIFT? IT'S ALL ABOUT DOCUMENTS AND BEHAVIOUR

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Determining if a payment from a friend or family member is a loan or gift is a frequent challenge in family law property settlements. If it is treated as a loan it will result in a reduction of the available property. If it is a gift it will be credited with a percentage adjustment in favour of that spouse not a dollar amount.

The court recently considered such a case.

#### Facts:

- The husband's parents had loaned significant sums of money to the husband during the marriage. The wife accepted that most of the funds were loans however she disputed an amount of \$110,000 stating that it was a gift.
- The husband's parents had prepared loan agreements for the funds paid to the husband by them at various times. There was a loan agreement for the \$110,000.
- Funds had been repaid to the parents during the marriage. Those repayments were not attributed to the \$110,000 amount, but rather other amounts loaned by the parents to the husband, meaning that the \$110,000 remained outstanding in full.



#### Decision:

- The husband's mother gave evidence that the money had not been repaid, that it was interest free and that they had not pursued the husband for repayments as there was a loan agreement in place on which they could rely.
- The court accepted this evidence and found that the repayment of the \$110,000 was likely to be met on the sale of one of the properties. The court noted the repayment of other loans by the husband to his parents and found that the \$110,000 was a loan rather than a gift.

The court distinguished the facts of the case from others where parents loan their children money, and those monies even though they are legally enforceable are not enforced, i.e. a loan made by parents in circumstances where the parent would never have asked for re-payment but for the parties' separation.

**Editors Note:** In determining if funds loaned to a party by a parent should be considered a loan, the court will take into account the formality of the loan, the terms of repayment, any demands for repayment made, and the capacity to repay the amount loaned.

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