

A LOAN OR A GIFT? IT MATTERS ALOT

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When separation occurs it is necessary to do a property settlement and that means calculate the value of the property pool. In doing that it is essential to know if there is a loan outstanding. Quite often at this stage, an alleged family loan is disputed on the basis that it was a gift. The financial consequences can be significant – so, what do you do?

If a payment from a family member to one of the spouses is treated as a loan it will result in a reduction of the available property. If it is a gift it will form part of the property for a division and the other spouse will receive part of it.

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. Evidence 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 the repayment but for the parties separation.

Editor's 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.

The moral of the story is that if funds are lent the loan should be documented correctly, registered correctly and calculated and repaid in a commercial fashion.