

DEALING WITH DIVORCE AND THE BANK OF MUM AND DAD

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It's becoming more and more common for adult children to rely on the so-called "bank of mum and dad" for financial help when buying property, investing in business, or getting out of a sticky situation.

Grandparents are often also relied on for financial support, or to provide free child care.

That all adds up to a lot of time and money. What happens when a couple split up after receiving financial and non-financial help from a parent? Is this treated as part of the property settlement?

Property settlements don't have a set formula and there's certainly no automatic 50/50 division of money and assets.

In very simple terms, the first step is to work out the total value of the property, and secondly to determine the percentage that it should be divided by, considering each spouse's contributions.

The treatment of financial support may depend on the context of the support, whether it was considered a loan or gift, and whether it was intended to benefit both parties, or just one person.

Funds provided as a loan will generally be included in the asset pool for distribution and will reduce the available property. Depending on the amount of the loan, this could significantly impact the property pool.

Courts will look for some formality in a loan agreement, including documentation, whether there was a repayment plan in place, if there had been any demands for repayment and if any interest had been charged.

Most family loans are informal and don't have this level of detail available, which can make claiming the funds were "a loan" a lot more difficult.

If funds were given as a gift, it will be treated as a contribution by the person who was given the gift, and will be taken into account when determining the percentage of the assets to be split.

It is important to note, however, that the weighting of any gift will depend on the particular circumstances of each case, including the size of the gift, how those funds were used, the overall property pool and other contributions factors.

Non-financial contributions, such as babysitting, may also be considered as a contribution factor and again will be considered in the context of the relationship as a whole.

The court recently considered a case where a husband received a significant gift from his parents, however when the court looked at the intention of his parents when providing the gift, they came to the conclusion the gift was for the benefit of both parties.

The specific facts which pointed to the conclusion included the fact that the property was transferred into joint names and put an obligation on both the husband and the wife that they would support the parents if needed as they grew older.

When working out a property settlement, it's essential to know if there is a loan outstanding and family loans are often disputed on the basis that the money was "a gift".

The court recently looked at a case where:

- 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.

The husband's mother gave evidence that the money had not been repaid. She also gave evidence that it was interest free, and that they had not pursued the husband for repayments, as there was a loan agreement in place.

The court accepted this evidence and found that the repayment of the \$110,000 was likely to be met by the sale of a property. The court also 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.

Even though lending money to family, or giving it as a gift is a common practice, it's really vital to make sure the circumstances are well documented.

It might be awkward asking for a "loan agreement" from mum and dad, but in the event of any future relationship breakdown, it's going to save a lot of heartache.