

FAMILY LAW

PROMOTIONAL FEATURE

Relationships and ‘the Bank of Mum and Dad’

Family lawyer and partner at **Schetzer Papaleo Family Lawyers’ Daniel Myers** advises that to protect a parent’s gift or loan, you may want to consider the benefits of a binding financial agreement.



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RECENTLY wrote about pre-nuptial agreements, known as Binding Financial Agreements (BFA), as a common way to protect assets in the event of a relationship breakdown. The intention of a BFA is to allow couples to decide for themselves how their property will be divided if they separate, rather than according to the principles laid down under the Family Law Act 1975.

Gift or loan?

One of the quirky ways in which the Family Law Act 1975 operates is how financial assistance from parents to their adult child is treated under the law. Parents often give generous support to their son or daughter during their child’s relationship, for example, to assist with buying a house or renovations or just out of love or as an early inheritance. However, the line is often blurred as to whether the money is a “gift” or a “loan”. This distinction becomes important if they separate from their partner and disputes can arise around the characterisation of this financial assistance.

Why does it matter?

If it’s a loan, there’s an expectation the funds will be repaid from matrimonial property as a liability i.e. it’s assumed the monies will be returned to the parents in full. However, if it’s a gift, there’s no expectation that the money will be repaid. The related party can claim the funds as a contribution to their property settlement, but the recognition they receive will usually be less than dollar-for-dollar, and the weight attached to the gift will inevitably dilute further with the passage of time.

What can the court consider?

A court has significant discretion to decide whether monies advanced were in

fact a loan or a gift. Loans from parents to children are usually scrutinised particularly closely and it is not bound by the mere existence of a loan agreement. The more relevant question is whether the debt is ultimately likely to be enforced. This may be difficult to establish if, as is usually the case, the parent/child relationship was not at arm’s length in the first place. Quite often, the parents are in a comfortable financial position and only contemplated that the debt would be repaid at their child’s convenience.

In assessing these matters, a court will look at:

1. Whether any written loan agreement exists;
2. The terms of the agreement, including repayment terms;
3. Whether any repayments have been made;
4. Evidence of discussions between the parties as to the existence of the loan and terms of the loan;
5. Whether security has been provided (e.g. a mortgage);
6. Whether, and what, representations have

been made to others (e.g. the bank, ATO or Centrelink);

7. Whether the advance made more than six years ago (as it may not be recoverable under the Statute of Limitations);
8. Any evidence that the advance was intended to be a gift.

To help avoid these uncertainties, the couple could enter into a BFA (which can be entered into before commencement of cohabitation/marriage, during a relationship, or after separation) to ensure that monies given are treated as a proper liability between the spouses.

Keeping property in your parents’ name

Another common scenario is where a spouse puts property into their parents’ name to protect it from their partner. However, a court has power to scrutinise who truly owns property beyond what it is recorded on paper. For example, a house owned by parents is not automatically excluded from their child’s property settlement if the couple contributed towards the purchase or made mortgage repayments.

If an asset is transferred from child to parent during the relationship itself, it’s likely to get caught up in the family law dispute. Assets owned under a family trust can also be included depending on the level of “control” exercised by the child over the operation of the trust.

These matters may require the parents to give evidence in court about their ownership of assets, or possibly even join the proceedings as an independent party to protect their own property.

A BFA between the spouses can remove some of these uncertainties and ensure that property is ultimately retained as intended.



Daniel Myers.

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Wishing you a Happy Chanukah

Daniel Myers understands the complex issues that can arise with property or parenting disputes during a separation. Daniel is a qualified mediator and recent graduate of a psychology degree, Daniel uses his people skills alongside his significant legal expertise to help achieve excellent results for his family law clients in a respectful and dignified manner.



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