

Gifts, Loans and Family Property Disputes: Why Documentation Matters

It’s common for parents to advance money to children — to help buy a home, fund a business venture, or cover unexpected expenses. But when relationships sour or estates are being administered, the question often arises: was that money a gift, or was it a loan to be repaid?

The answer can have significant legal and financial consequences. Disputes of this kind frequently reach the courts, with judges turning to doctrines of resulting trusts, constructive trusts, and the presumption of advancement to work out what the parent intended.

The Presumption of Advancement

At common law, if a parent transfers property or money to a child without any clear documentation, the courts may presume it was intended as a gift. This is known as the presumption of advancement.

The presumption is not absolute. It can be rebutted by evidence showing that the money was intended as a loan or that the child was to hold the property on trust for the parent. But without written records, proving that intention is often difficult and expensive.

Resulting and Constructive Trusts

If the money was not a gift, courts may find that the child holds the funds or property on a resulting trust for the parent, particularly where the contribution can be traced directly to the parent's funds.

Alternatively, a constructive trust may be imposed where it would be unconscionable for the child to deny the parent's beneficial interest — for example, if the child induced the parent to contribute on the basis of a promise.

These are equitable remedies, highly fact-specific, and courts will look closely at evidence of intention, conduct, and circumstances at the time of the transfer.

Common Pitfalls

- "It was just family" – Many parents rely on trust and don't formalise arrangements, leaving ambiguity.
- Estate disputes – Siblings may argue whether funds advanced during the parent's lifetime should be brought back into account on death.
- Divorce and bankruptcy – Advances can be caught up in family law property settlements or creditors' claims if not properly documented.
- Tax and Centrelink impacts – Characterisation as a gift or loan can have flow-on effects.

Courts start from presumptions, but the best evidence is clear documentation. Without it, families risk costly litigation over what mum or dad really intended.

Practical Steps

1. Put it in writing – If the intention is a loan, prepare a simple loan agreement, setting out repayment terms and interest (if any).
2. Secure the advance where appropriate – For large sums (e.g. towards a house deposit), consider a registered mortgage or caveat.
3. Keep records – Bank transfer evidence, emails, or letters confirming the nature of the advance can make or break a later dispute.
4. Update estate planning – Wills and family arrangements should account for advances, so executors aren't left guessing.
5. Get legal advice early – Before advancing funds, clarify the risks and best protective measures.

What begins as a well-intentioned family gesture can quickly turn into costly litigation if intentions aren't clear.

If you mean it to be a loan, it is important to treat it like a loan. Proper documentation not only avoids disputes but also protects both parents and children in the long term.