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Wills, Trusts & Estates

Gifts and loans to adult children: What you need to know

By **Emma Hamilton and Birute Luksenaite**

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(March 29, 2018, 9:10 AM EDT) -- It is not uncommon to see parents assisting their adult children well after post-secondary graduation. Assistance can come in a variety of forms, whether it's providing funds for a matrimonial home to their newly married child, a monthly allowance for their child during a period of unemployment, or assisting in funding a child's new business venture. Parents frequently provide help out of the goodness of their hearts without considering the impact this may have at a later date.

A parent who is helping or going to help an adult child should consider a few issues to minimize uncertainties and unintended disputes.

Supporting documentation

A parent should ensure their intention is properly documented at the outset when gifting or loaning to an adult child to prevent any legal issues in the future, including when the parent dies should a question arise of whether the child owes money to the estate or whether a gift was made.

If a parent intends to make a loan to their adult child, a promissory note, loan agreement, a provision in their will to equalize their children, or registered mortgage on title to the child's home should be considered. Proper documentation also provides protection if a loan repayment needs to be enforced (for example, against their child or their child's estate).

If a parent intends to make a gift of funds to their adult child, this should be specified in writing or in a deed of gift.

Marital property issues

A child's marital breakdown can result in a dispute over previous gifts or loans made to that child before or during their marriage. Under Ontario's *Family Law Act*, gifts from third parties during marriage are excluded from the net family property calculation and aren't subject to equalization on divorce, but with certain exceptions involving a matrimonial home as discussed below. The value of gifts received prior to marriage is deducted from net family property. Post-marriage income and gains are shared, unless a domestic contract was entered into to exclude them or the donor specifies otherwise when making a post-marriage gift.

A matrimonial home is an exception under Ontario legislation. Its value is not deductible from net family property if owned at the date of marriage and the date of marital breakdown. However, a loan from a third party (including from a parent) to a child to finance the purchase of a matrimonial home is a liability and therefore reduces the child's net family property. On the other hand, if the purchase (or improvement) of the matrimonial home was assisted by way of a gift from a parent made during the marriage, the gift is not excluded given the special treatment afforded to a matrimonial home.

This issue of whether a payment was a loan or gift has been dealt with by the courts in the context of matrimonial disputes. In order to determine the question, courts may look at various factors surrounding the transfer, including intention and documentation of the transfer (see *Barber v. Magee* 2015 ONSC 8054 and *Chao v. Chao* 2016 ONSC 7911). Additional problems in particular can arise if funds are advanced to the child and their spouse, as in *Chao*, and whether there were loans or gifts to both of them or loans meant to be repaid by both of them, or whether the proceeds of a home is held on resulting trust for the parents, if funds are used to purchase a home.

A parent should ensure that proper, updated documentation is in place and their intention is clear in order to avoid becoming the subject of a lengthy dispute. Reviewing estate plans every few years allows a parent to ensure circumstances have not significantly changed in regard to their adult child as well. As in all matters, proper planning and expert advice are key to avoiding unintended consequences.

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