What constitutes a gift versus a loan to your child in family law?

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Legal Consolidated Barristers and Solicitors' Adjunct Professor Dr Brett Davies discusses the case of *Rowntree v FCT* **[2018] FCA 182 and the difference between a gift and a loan to your child in family law.**

Family Court v Child Loan Agreement
Does your Loan Agreement stand the test?

Rowntree v FCT [2018] FCA 182 states that only a legally prepared Loan Agreement completelysatisfies the Family Court. This is for a loan from a parent to a divorcing child.

We love our children. We give them money. We provide property deposits, money for renovations and purchase of a car.

But what is the arrangement? Was your money a gift or was it a loan to your child?

* At the Family Court, your ex-son or ex-daughter in law argues it was a 'gift'. If successful they end up with half of your

'gift'.

* You, on the other hand, argue it was a loan. If you can prove it was a loan then you win. You get all your money back.

Sadly, there is often lack of clarity as to the arrangement.

We are all friends here. Can't we just infer a Loan Agreement?

These people are not your friends:

- Family Court
- ex-son in law
- ex-daughter in law
- Australian Taxation Office

An IOU on the back of an envelope signed by your child won't make the grade.

Was the money given with no agreed understanding? Was it to be repaid? If no, then there is no loan. If that is the case, your ex-child-in-law retains the benefit without consequences. In contrast, a loan is an agreement that money is repayable.

In *Rowntree v FCT* [2018] Mr Rowntree lacked evidence of a "contemporaneous, corroborating" Loan Agreement.

Instead, Rowntree argued that his Loan Agreement did exist but by inference. This was not good enough for the Court. The Court wanted to see the legally prepared Loan Agreement.

Rowntree even provided financial statements and accounts. The accounts recorded the money as a loan. It didn't work.

What does the Family Court accept?

Judge Edmonds' defines of a loan agreement in *FCT v Rawson Finances* [2012] FCA 182:

The essence of a loan of money from A to B is a corresponding contemporaneous obligation on the part of B to repay the money transferred from A to B. Absent that obligation, the transfer of the money from A to B is something else – a gift – but it is not a loan.

You can view a sample of a Family Court complying Loan Agreement **here.**

Can I sign a Loan Agreement after I lent the money?

A retrospective loan agreement is signed after the money is already handed over. While it is better than nothing, you are in a weaker position.

What can accountants and financial planners learn from this mess?

It is not good enough for parents to transfer money and try and cobble together some correcting or creating journal entries, minutes and other supporting documents. The Loan Agreement or Div 7A should be done before the loans are made.

Do you think that I am applying a high onus of proof? Remember the high onus of proof when challenging the Family Court or an ATO adverse assessment. You have to prove the nature of the movement of money. This requires a contemporaneous Loan Agreement or Division 7A Loan

Agreement. Minutes, journals and other records are not enough.

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