

Parent to child property loans a guide for parents



If you want to provide financial support to your child to buy a house there are some things to think about before you part with your money.

We recommend you speak to one of our lawyers about your situation before you give financial assistance to your child. It is important to have an independent lawyer advising you and not the lawyer acting for your child.

This brochure sets out some things to consider.

Will the money be a gift or a loan?



AS A GIFT

You may be happy to treat the money you give to your child as a gift, but you should understand there are circumstances where that gift may be lost.

Third party rights

- Your child's spouse or domestic partner may be entitled to some of the equity in the property if the relationship ends.
- If your child becomes a bankrupt the trustee in bankruptcy could be entitled to sell their assets including those your gift helped to buy.

Death

- If your child dies and the property is held as joint tenants with a spouse or domestic partner, that person as the remaining joint tenant would become the sole owner of the property.
- If you die, the gift may result in unintended inequity between the beneficiaries under your will.

Pension entitlements

- Any gift given by you may affect your pension entitlements. You should obtain advice from Centrelink about this before making a gift.



AS A LOAN

While you may trust your child completely to repay the loan without the need for a formal loan agreement or mortgage, that may not be enough to protect your funds. The money could still be lost in the same circumstances as listed in the gift section above.



Below are some recommendations and risks to consider.

The loan agreement should be in writing and signed by all the people to the agreement after each person has received independent legal advice.

- Everyone may agree to the arrangement and be trusted to repay at the time the agreement is being discussed. With time however, memories can fade and the detail of the arrangement may be forgotten or incorrectly remembered. Circumstance too can change and even the strongest of familial relationships can break down — we cannot always know what the future holds.



- It may also be important at a future time to prove to banks, a trustee in bankruptcy, creditors, Centrelink, your child's future partner or the Family Court what the arrangements were.
- Note — a documented loan may be subject to challenge in a court, particularly if there is no compliance with the terms of the agreement such as making repayments.

The loan should be secured against the property.

- A first mortgage is the best form of security as it means the property cannot be sold without first addressing your interest in the property. Other interests can still be registered against the title, sometimes without your knowledge or consent, but as a general proposition your mortgage will take priority.
- In most cases, your child will have a first mortgage with a bank, in which case a second mortgage will be the next best security. This means that if the property is sold, the first mortgage, including interest and costs, will be paid first. If there is any money left from the sale your loan will then be repaid.
- It is important to understand how much money is owed under the first mortgage and what ability your child has to increase those borrowings. This will tell you how much equity there will be in the property to pay your loan if the property is sold.
- It is important that any mortgage is registered on the title. While in some instances registering a caveat based on an unregistered mortgage is possible, it is not the best way to protect your position.
- If you do lodge a caveat over the property this acts as a notice on the title telling the world you have an

interest in the property. The right to do this must be conferred by way of an unregistered mortgage or a statement in the loan agreement providing a charge over the property. The right to lodge a caveat does not automatically happen just because you lent your child money. A caveat does not give you the right to sell the property to recover your loan money without having to first go to court to obtain an order for sale.

- We can discuss with you what is involved in lodging a mortgage and how much it will cost.

What if the property is owned by your child and their spouse or domestic partner?

- If the property used as security for your loan is owned by both your child and their spouse or domestic partner, then the loan agreement and mortgage should be signed by both owners.
- This means you can lodge a mortgage over the whole of the security property.
- It also makes it easier to enforce the mortgage if you need to, especially if your child dies leaving the property in their partner's name.
- Registering and enforcing a mortgage over only your child's share of the property can be a difficult and costly process.

What happens to the loan if you die?

You should think about what you want to happen to the loan if you die before it is paid back. You may need to amend your will to address this issue.

Timing

You should not advance the money until the loan agreement and mortgage are signed.

