

WHEN PARENTS LEND TO CHILDREN

Be alert to the risks when advising on parent loans to home buyers.

TIPS

- Approach the matter with due formality and professional rigour.
- Consider who you are acting for.
- Recommend in writing that unrepresented parties obtain advice.
- Think and advise about potential developments and proper security for the loan.
- Recommend the loan document covers everything an arm's length agreement would cover.
- Record your advice and the client's instructions.

Last year, financial services comparison site Mozo reported that young home buyers in Australia have borrowed \$65.3 billion from their families, making the bank of Mum and Dad the country's fifth biggest lender. The June 2018 LPLC column "Take a step back" discussed the need to properly assess your client's position and the risks they face. This is particularly important when acting in a transaction where parents lend money to their child to help them buy a house.

As a practitioner it is essential you consider who you are acting for and whether anyone else could think you are looking after their interests. If you are acting for the child in the purchase of the property, you should recommend that the parents obtain their own independent legal advice and tell them you cannot advise them.

Alternatively, if you are asked by parents to document a loan to their child you need to make it clear you are not acting for the child and recommend the child get their own legal advice.

Practitioners should recommend the loan document covers all the things that an arm's length agreement would cover, even if the parents just want a basic document covering the terms they had discussed with their child.

The question of security for the loan is an important subject to give clear advice and take full instructions about. There may be circumstances beyond the control of their child that affect whether the parents' loan is protected. The child could die or their domestic relationship could break down with the equity they have in the property lost in a property settlement. The child could become bankrupt and lose the property. In the event of the parents' death or insolvency, there could be beneficiaries or trustees in bankruptcy who complain you did not act appropriately.

Just as important is to keep a record of your advice and the client's response and instructions.

Financial transactions within families can be fraught with difficulty when the arrangements are handled in an informal way and the parties subsequently have a falling out. Do not assume the happy family today will remain that way.

Claim example

In one claim, the parents lent money informally to their son to buy a property with his de facto partner. The couple also borrowed money from a bank which had first mortgage security for the purchase. The couple were registered as joint proprietors.

A few years after the parents lent the money, the son and his de facto separated. The parents were concerned the loan was not formally secured so they instructed the practitioner to document the loan.

The practitioner prepared a simple loan agreement that was signed by the parents and their son but not his ex-partner. The agreement included a charge over the property in favour of the parents and the practitioner lodged a caveat over the title "pursuant to loan agreement" claiming an estate in fee simple.

The practitioner undertook a title search that showed the son and his ex-partner were joint proprietors. However, he did not think about severing the joint tenancy and failed to advise the parents on the implications of how the property was held.

When the son died, the property passed by survivorship to his ex-partner who was not a party to the loan agreement. The

parents' caveat lapsed as the son's interest in the property had ceased, leaving the parents without security and no further recourse on the loan.

The practitioner was focused on preparing what he thought was a straightforward agreement. However, he needed to step back and give more thought to the potential risks for the parents and what was necessary to properly protect their interest. ■

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