To gift or to loan? How advances on inheritances are viewed by the Family Court

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While loans to family members may be made in the hope that they give the family some certainty, they are not without problems. As Polonius advised his son Laertes in *Hamlet*:

> Neither a borrower nor a lender be;
> For loan oft loses both itself and friend,
> And borrowing dulls the edge of husbandry.

Is the financial support a loan or a gift?

While parents may not expect to be repaid, it often makes sense for asset protection purposes to structure an advance of support as a loan. Property to a marriage may be divided up between the parties in a split that the court decides is fair and reasonable in all of the circumstances.

A clear analysis of the court's interpretation as to who should receive the "contribution benefit" of a gift can be found in the leading case of *In the Marriage of Gosper*.[1] Essentially, the position in relation to gifts is that the party on whose behalf or to whom the gift was made is given credit for a more substantial contribution to the extent of the gift or the asset acquired by the gift (when the gift is money).

A gift to one party to the marriage by, say, his or her parents will be treated in a similar manner to an inheritance received by him or her — that is, if the gift is received at any time during a short marriage, the party who has received it will be given substantial credit insofar as the issue of contribution is concerned. If the gift is received early in a long marriage, where the other spouse who has not been the recipient has worked hard and earned substantial income or alternatively has devoted themselves to the role of homemaker, then the impact of the gift will be substantially diminished, perhaps eroded totally. As with all court cases, the degree of diminution of the effect of the gift will depend upon many factors, including the size of the gift and the length of the marriage.

The intention of the donor or gift maker is critical. If it is the donor's intention to benefit both the husband and wife equally, then — even if the donor is a parent of one of the parties — each party's contributions to that gift will be deemed equal.

In *Gosper*, the wife's parents had transferred two blocks of land to the couple. These blocks went up in value and, at the time of the hearing, were valued at $71,000. The husband contended that the blocks of land were given to him and the wife jointly and that, even though the donors of the gift were the wife's parents, he and the wife had contributed equally to this asset. The wife argued that, even though the property was transferred to the parties jointly, the court should assess the gift as a contribution made on her behalf. Justice Fogarty found that "the motivating circumstance was the relationship between the wife's parents and the wife, and it was transferred to benefit her because she was the daughter of Mr and Mrs T". His Honour went on to find that the land was a contribution made directly on behalf of the wife.

The court *In the Marriage of Kessey*[2] later found that contributions by a parent of a party to a marriage to the property of the marriage will be taken to be a contribution made by or on behalf of the party who was the child of the parent, unless there is evidence that establishes that it was not the intention of the parent to benefit only his or her child. The decision in *Kessey* suggests that there is an onus on the person married to a child of the donor to establish, on the balance of probabilities, that the gift was a contribution on behalf of both parties.

In *Kayes & Kayes*,[3] the parties were married in 1970 and separated under the one roof in 1995. The wife alleged that there had been gifts throughout the marriage from her parents totalling $79,500, together with several interest-free loans. The only documentary evidence put before the court in support of the gifts (which the husband indicated he was not aware of) was a handwritten note prepared by the wife's father (who was deceased at the time of the hearing), which was annexed to an affidavit of the wife's mother.

The evidence of the note had been excluded by the judge at first instance on the basis that the evidence about the loans was inadmissible. The Court of Appeal decided that the judge erred on this. Despite there being no stamped loan documentation before the court in accordance with s 29 of the Stamp Duties Act 1920 (NSW) (repealed and replaced by s 304 of the Duties Act 1997 (NSW)), the Court of Appeal found that the evidence supporting the wife's contention as to the gifts was persuasive and adjusted her contributions from 47% to 52%.

Other contributions of a non-financial nature can be provided by parents of one of the spouses. In his decision *In the Marriage of Pellegrino*,[4] Chisholm J explained that neither party had contributed any substantial asset of the marriage, but the parties had lived (together with their children) rent free for 17 years in accommodation owned by the wife's parents.

As a result of not having to pay rent for such a long period of time, the parties were able to acquire assets, including an investment property and an interest in a service station business.

The parties agreed that, other than the issue of the rent-free accommodation, their contributions to the asset pool of $1.1 million had been equal. In considering the appropriate allowance for this contribution, the judge referred to the abovementioned cases of *Gosper* and *Kessey*. He found that although the rent-free accommodation benefited both parties, it was intended for the benefit of the wife. The judge then found a 5% adjustment in favour of the wife, providing to her 55% and to the husband 45% on a contribution basis.

Statute of limitation issues — Sulo v Colpetti

The case of *Sulo v Colpetti*[5] in 2010 reminded people that limitation periods apply to loans.

The rationales underpinning limitation regimes were set out by McHugh J in *Brisbane South Regional Health Authority v Taylor*:[6]

> The effect of delay on the quality of justice is no doubt one of the most important influences motivating a legislature to enact limitation periods for commencing actions. But it is not the only one. Courts and commentators have perceived four broad rationales for the enactment of limitation periods. First, as time goes by, relevant evidence is likely to be lost. Second, it is oppressive, even "cruel", to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed. Third, people should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them ...
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> The final rationale for limitation periods is that the public interest requires that disputes be settled as quickly as possible.

Table 1: Simplified limitation periods by state or territory

State or territory	Limitation period for simple agreement	Limitation period if cause of action founded on a deed
Australian Capital Territory	6 years	12 years
New South Wales	6 years	12 years
Northern Territory	3 years	12 years
Queensland	6 years	12 years
South Australia	6 years	15 years
Victoria	6 years	15 years
Tasmania	6 years	12 years
Western Australia	6 years	12 years

Note: This table is simplified, as there are numerous other rules in New South Wales, such as for personal injury claims under the Motor Accidents Compensation Act 1999 (NSW) and there is no limitation period under s 12A of the Dust Diseases Tribunal Act 1989 (NSW).

Whether a document constitutes sufficient acknowledgment must be determined on a case-by-case basis. However, a written offer to pay part or all of a debt under protest (or a request for information that implicitly acknowledges the existence of the transaction) may not in itself constitute a valid acknowledgment. This re-birthing may occur on numerous occasions (such as where a debtor continues to make payments). In this case, the limitation period is calculated from the date of the last payment, and not the original default. In Queensland, South Australia, Tasmania and Western Australia, a limitation period can be re-started at any time — even if the original limitation period has already expired. In contrast, in the Australian Capital Territory, New South Wales and the Northern Territory, a limitation period cannot be re-started once it expires. The legislation in New South Wales goes further than legislation in other jurisdictions: it specifically extinguishes the cause of action.[7] Therefore, after the limitation period expires, there will be no debt of which to request or demand payment.[8]

In all jurisdictions other than New South Wales, after the limitation period expires, the legislation operates "to bar the remedy rather than the right".[9] This means that the debt remains owing, but the legislation limits the enforcement options available to the creditor.

The document should, we suggest, if the parties operate in New South Wales, refer to the laws of that state applying to it. In 1993, each state and territory enacted legislation providing a nationally consistent regime. For example, s 5 of the Victorian legislation[10] provides that "if the substantive law of another place being another State, a Territory or New Zealand, is to

govern a claim before a court of this State, a limitation law of that place is to be regarded as part of that substantive law and applied accordingly by the court". This means, for example, that if a debt is governed by NSW legislation, the Limitation Act 1969 (NSW) will apply regardless of where legal proceedings are commenced.[11]

In *Sulo*,[12] Watt J considered Fullagar J in *Ogilvie v Adams*:[13]

> There is a long settled rule of construction that, where there is a present debt between the parties to a contract to repay money, and the only terms as to repayment of the debt are to be spelled out of a promise to repay on demand, or out of a statement that the money is to be repaid or repayable on demand (or on request), an instantaneous cause of action, upon the very creation of the contract, arises in the lender ... other words or terms may appear in the contract which may be in the circumstances sufficient to show an intention that the cause of action is not to arise until some actual demand or some form of demand is made or until some period after demand has elapsed.

Ogilvie v Adams was also considered by the NSW Supreme Court in *Chidiac v Maatouk*.[14] In that case, Ward J said:

> In *Ogilvie v Adams* [1981] VR 1041, Fullagar J (holding that, when money is advanced on terms that it is to be repayable "on demand", then the cause of action for recovery accrues on the date of the advance without the need for any demand) said (at 1043):
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> > The common law has always regarded the fact of indebtedness as a continuing detention by the debtor of the creditor's money, and this whether the creditor brought an action of debt or an action in indebitatus assumpsit. Therefore if A lends money to B, then instantly B is detaining A's money. *In order to prevent a cause of action for recovery arising in A instantaneously on paying the money, the parties must expressly contract out of that situation by words clearly inconsistent with that situation.* The courts have long since settled it that a mere statement or agreement that the money is repayable on demand (or request or at call) is not sufficient to contract out of that situation where all else that is known of the terms of the contract is that A has paid money to B by way of loan. The lender's cause of action still arises instanter on the receipt of the money by the borrower, so that the lender's cause of action becomes statute barred at the expiry of six years after the receipt of the money. (my emphasis).[15]

In *Sulo*, Watt J pointed out that:

> ... counsel for the wife submits that the husband's father's cause of action against the husband has become statute barred as six years has expired from the date of the original loan and from 30 April 2003 in relation to the second loan.
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> There is force in that argument.
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> The husband says that the statute of limitations is only a defence that could be raised against the possible action and he would not seek to raise it. He feels morally bound to satisfy the debt to his father.
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> The wife readily concedes that the monies that have been provided by the husband's father were significant contributions and need to be taken into account in a significant way but she says that should happen at the second step.
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> The difference as to whether or not they are added onto the balance sheet or taken into account at the second stage is not just an academic exercise. If the liability is added onto the balance sheet then the full weight of that loan together with accumulated interest is given, to the advantage of the husband, without any of its weight being lost, as will happen if it is weighed against the myriad of other contributions that are made during a long marriage like this one.
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> ...
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> I accept that the husband does not enjoy a close and loving relationship with his father but I conclude there is no present intention in the husband's father's mind to attempt to recover monies against the husband. In fact, the husband during the trial indicated that his main fear was that after his father died his five siblings would attempt to enforce the debt. I do not have a copy of the husband's father's will. The husband's father is 84 years of age and regularly holidays on an annual basis overseas.
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> I do not intend to add the amounts of the debt back onto the balance sheet. My reasons for that are as follows:
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> - The debts are statute barred;
> - There is no evidence that the husband's father is intending to actively pursue a claim against the husband for the monies (see *Biltoft & Biltoft* (1995) FLC 92-614).[16]

Guidelines from the Australian Securities and Investments Commission (from 2005, republished in 2010) acknowledge that:

> People often default on their debts as a result of circumstances beyond their control — such as unemployment, illness and family breakdown.[17]

It is suggested that, in the latter circumstance, default is the most common result.

Conclusion

Just as simple wills often force executors to "pay off all debts and testamentary expenses", loan arrangements are not always well thought through and documented. Not all debt is bad, and the creative use of loans can help keep assets in the family rather than see them go to its sworn enemies.

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Footnotes

1. *In the Marriage of Gosper* (1987) 90 FLR 1; 11 Fam LR 601; (1987) FLC 91-818.
2. *In the Marriage of Kessey* (1994) 18 Fam LR 149; (1994) FLC 92-495.
3. *Kayes & Kayes* (1999) 24 Fam LR 512; (1999) FLC 92-846; [1999] FamCA 357.
4. *In the Marriage of Pellegrino* [1997] FamCA 52.
5. *Sulo v Colpetti* [2010] FamCA 493; BC201050564.
6. *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541; 139 ALR 1; 70 ALJR 866; BC9604531.
7. Section 63 of the Limitation Act 1969 (NSW).
8. This general principle is subject to limited exception, as it is possible to seek an extension of a limitation period in certain circumstances. Where legal proceedings have been commenced, s 68A of the Limitation Act 1969 (NSW) operates to allow the defendant to waive the statutory protection by not pleading the extinction of the cause of action.
9. P Handford *Limitation of Actions: The Australian Law* Lawbook Co 2004 p 29.
10. Choice of Law (Limitation Periods) Act 1993 (Vic).
11. *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; 20 NSWCCR 111; [2000] HCA 36; BC200003351.
12. Above, n 5.
13. *Ogilvie v Adams* [1981] VR 1041.
14. *Chidiac v Maatouk* [2010] NSWSC 386; BC201002731.
15. Above, n 14, at [182].
16. Above, n 5, at [142]–[149]. In *In the Marriage of Biltoft* (1995) 126 FLR 385; 19 Fam LR 82; (1995) FLC 92-614, evidence "disclosed that [the father] has at all times been slow and/or reluctant to pursue his rights against the husband".
17. Australian Securities and Investments Commission *Regulatory Guide 96: Debt collection guideline: for collectors and creditors*, October 2005.