

## **Introduction:**

This paper aims to examine the distinction between a loan and a gift when money is given to a family member within an inner circle, and how Australian courts determine the nature of such transactions. Differentiating between a loan and a gift is crucial in determining whether the money should be repaid at a later time.

In the Australian legal system, there are various types of gifts that may have different consequences. When faced with a lack of evidence, it becomes essential to understand how the court assesses this type of situation. The decisions made by judges in similar cases can influence the outcome of such actions and set a precedent for how the court views the issue.

To determine whether the money given within an inner circle is a loan or a gift, it is necessary to consider the elements that constitute each. A loan typically involves an agreement between the parties regarding repayment terms, including interest and a fixed repayment schedule. On the other hand, a gift is an act of giving without any expectation of repayment.

In the absence of clear documentation or formal agreements, the court will rely on various factors to determine the intention behind the transaction. These factors may include the relationship between the parties, the context in which the money was given, and any evidence of discussions or understanding regarding repayment.

The court's assessment of such cases is crucial, as it determines the legal implications for both parties involved. If the court determines that the money given was a loan, the recipient may be obligated to repay the amount, along with any agreed-upon interest. However, if the court deems it to be a gift, the recipient will not have any legal obligation to repay the money.

Understanding how Australian courts approach these types of cases, particularly when faced with a lack of evidence, provides insight into the decision-making process and the factors that influence their judgments. This knowledge can be valuable in advising clients and navigating similar situations in the future.

In conclusion, determining whether money given to a family member within an inner circle constitutes a loan or a gift is essential in the Australian legal context. The court's assessment of the situation, particularly when faced with a lack of evidence, plays a significant role in determining the legal implications and obligations of the parties involved. By considering various factors and precedents, the court sets the tone for how such issues are viewed and resolved.

## **Definition of gift and loan**

To assess whether a transaction is a loan or gift, we must draw a clean line between the two concepts.

Gift, also known as donative promises, requires no consideration. A gift must be made voluntarily and not expressly conditioned on a reciprocal exchange, it could be made for

affective reasons, “such as love, affection, friendship, or gratitude, or to satisfy moral duties, such as generosity.”<sup>1</sup> In *Chaudhary v Chaudhary* [2017] NSWCA 222 at [98-99], the Court noted that if the gift is given that would return to the donor, the donor does not evince any intention to make an absolute gift to anyone.

Loan, on the contrary, requires repayment. In *Gray v Gray* (2004) 12 BPR 22,755; [2004] NSWCA 408 at [62], the judge referred to the facts that both litigants used the words “loan” and “repayment”, from the prima facie, it has the great probability are that the payment was made by the way of loan.

### **Elements of gift and loan**

This section serves to compare the distinctions between the common law system, with a specific focus on Australia, and the civil law system, with a particular emphasis on Mainland China, when it comes to distinguishing between a loan and a gift.

Common Law, as known as case law, the court decision is primarily based on the precedent; Courts in civil law system countries, use codified statutes as a support of their decision.

In China, the legal framework includes specific articles that define the nature of gift and loan contracts. According to

Article 657, a gift contract is a contract in which a donor gratuitously transfers their property to a donee, and the donee indicates acceptance of the gift.

Article 661 outlines that a gift may come with obligations, and in such cases, the donee must fulfill these obligations as per the agreement.

Article 667 defines a loan contract as an agreement where a borrower receives a loan from a lender and repays it with interest upon the due date.

Article 668 emphasizes the importance of a written agreement for loan contracts, except in cases of loans between individuals who mutually agree otherwise. These contracts typically include details such as the loan category, currency type, purpose, loan amount, interest rate, term, repayment method, and other relevant terms.

Within the legal context of Australia, the courts adopt a comprehensive approach to assess transactions, considering not only factual evidence but also moral and equitable elements, including the parties' conduct. In determining whether a payment constitutes a loan or gift, the courts make use of extrinsic evidence and consider the surrounding circumstances to aid their judgment.

However, the gift can become a loan when a certain condition is fulfilled, which is known as conditional gift; *Chaudhary v Chaudhary* [2017] NSWCA 222 at [99]. The conditional gift is clarified by Emmett AJA as “at the time was to make a gift, conditional upon completion of the ... contract.”

As a result, it can be challenging to establish a definitive demarcation between a loan and a

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<sup>1</sup> Melvin A. Eisenberg, *Foundational Principles of Contract Law* (Oxford University Press, 2018) 98.

gift in this legal framework. Depending on the specific circumstances, a gift may exhibit characteristics of a conditional gift, where the nature of the payment can transform when a certain condition is fulfilled. From an economic perspective there is no difference between a loan where the obligation to repay is conditional on the successful outcome of the litigation, and a conditional gift where the condition is that moneys paid would be repayable if the litigation were successful.<sup>2</sup>

The Australian Court also categorized a certain conditional gift where the condition is the death of the donor. Gifts inter vivos: a donor may make a gift to a donee during his or her lifetime and such a gift is called a gift inter vivos. **Such a gift is readily and easily identifiable.** Such a gift has effect immediately whereas a testamentary gift passes on death. The subject of a trust may take effect on death but that fact does not necessarily mean that it is testamentary in nature. A donor handing a passbook which records a credit balance to a donee but saying that he or she may revoke the gift at any time creates an immediate trust in favour of the donee: see *Kauter v Hilton* (1953) 90 CLR 86; 27 ALJ 714 at 100 (CLR). The nature of the gift depends upon the intention of the donor. The difference is:

- (a) if there is proof in writing or by extrinsic evidence that the donor intended that the gift was to take effect as if granted by a will; and
- (b) if death is the event which gives effect to it, then the writing is testamentary by nature: see *Milnes v Foden* (1890) LR 15 PD 105 at 107 per Sir James Hannen.

#### **Enforceability:**

Gift is completely enforceable in China, if all the elements in the Code are satisfied.

In the United States, the basic principle of gift under contract law is simple promises to give, which are unenforceable. According to chapter eight of the *Foundation Principles of Contract Law*<sup>3</sup>, promises of gifts that are relied upon, that are based on a moral obligation to compensate for a past benefit, or that are made to social service agencies raise special issues and are considered separately. The phenomenon of conduct that is morally but not legally required or prohibited is not limited to promises. Simple promises to give are the largest class of promises that are legally unenforceable because of lack of consideration.

Gift from a parent to child or between spouse is a voluntary donation within family, it is identified as social arrangement: *Todd v Nicol* [1957] SASR 72, which is not enforceable in Australian Court, for example, Justice Dixon noted that a spouse who promises their spouse an allowance cannot be sued in contract; *Cohen v Cohen* (1929) 42 CLR 91 at 96. Therefore, in order to enforce a gift, litigants would usually argue the money is a loan.

A gift is a promise without consideration, but it is possible to recover a gift. The idea of unjust enrichment can be used to make such claims. The disadvantage of unjust enrichment

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<sup>2</sup> *Bryant v Quinn* [2022] NSWCA 163 at 138.

<sup>3</sup> Melvin A. Eisenberg, *Foundation Principles of Contract Law* (Oxford Academic, 2018), 97.

is that it can cause a crisis of confidence in the country.<sup>4</sup> In determining whether the case can be established through unjust enrichment, it is noted by majority of the High Court judges in *David Securities Pty Ltd v Commonwealth Bank of Australia* that unjust enrichment is not a pure moral principle:

[I]t is not legitimate to determine whether an enrichment is unjust by reference to some subjective evaluation of what is fair or unconscionable. Instead, recovery depends upon the existence of a qualifying or vitiating factor such as mistake, duress or illegality.<sup>5</sup>

To establish unjust enrichment, the surrounding circumstances and extrinsic evidence need to be taken into consideration.

### **Evidence**

In order for the court to assess whether the money given within the inner circle was a loan or a gift, there must be factual matters that the money was meant to be repaid at a later date. A loan has its own specific characteristics, such as the terms of payment, interest and instalments. Such cases are difficult to prove because the conversation may have taken place in private, with no witnesses and no written notes. Both parties may have different perspectives on viewing the monies; judge in *Bryant v Quinn* noted that “One possibility is that it was, ... from the plaintiff’s point of view, a loan, but subject to a condition, or, from the defendant’s point of view, a gift but subject to a condition, conditional gift ...”.<sup>6</sup>

The court would reach a conclusion based on the prima facie rule as to what the money was used for and where it was used, the interpretation of the act of giving and receiving money, the circumstances of the recipient side (living conditions, ability to repay, any urgencies/emergencies), how both parties explain the money to their close friends/relatives.<sup>7</sup>

If a witness is involved, cross-examination may be used at the request of the litigant.

### **Case Law**

In *Bryant v Quinn*<sup>8</sup>, where the appellant is the niece of the defendant. The dispute between the appellant and the defendant largely relates to the respondent’s claim that he provided funds for the appellant to meet her legal costs of proceedings against her grandmother were by way of a loan, whereas the appellant contended that the moneys were a gift. The appellant did not further proceed with the litigation.

The court assessed the case through considering the surrounding circumstances; The complaint made by the appellant is that the primary judge relied on what was written on the cheque butt (by the respondent) as to the characterisation of the payment and submitted that this was reliance on an uncommunicated subjective state of mind that would not be determinative of the issue as to whether a loan had been made. However, that was simply one of the factual matters to which his Honour must have had regard.

The court found that there was evidence from Mr Quinn that he had told Ms Bryant that he wanted the money back, and his cheque butt was annotated “loan”. And in circumstances

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<sup>4</sup> Kit Barker, ‘Unjust Enrichment in Australia: What is (n’t) it? Implication for Legal Reasoning and Practice’ (2020) 43(3) *Melbourne University Law Review* (advance)

<sup>5</sup> (1992) 175 CLR 353 at 379.

<sup>6</sup> n 2 at 156.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

where the loan was for the purpose of litigation funding, and Ms Bryant would not be able to repay it unless successful in the litigation, implication of a term that it was repayable only on the successful outcome of the proceedings was reasonable. The judge stated that there might be a difference in the causes of action for recovery of the advances (moneys lent or moneys paid to the defendant's use then repay later) and the available defenses. However, a defense of change of position is not available to an action for money lent.

Similar approach was taken in *Chaudhary v Chaudhary* [2017] NSWCA 222, where Adrian (the appellant) is Vincent (the second respondent)'s son and, at the time of the advances, Adrian and Justine were married. On 6 November 2004, following an auction, Adrian and Justine entered into a contract to buy the Property (the Purchase Contract). The purchase price under the Purchase Contract was \$1,530,000. At the time of the auction, the deposit of \$153,000 was paid with a personal cheque drawn by Vincent made payable to the agent. Vincent also paid the stamp duty on the Purchase Contract and other costs incurred in connection with the purchase. The remaining amount after the loan given by Westpac, a total of \$977,714.42 was paid by Vincent. Accordingly, together with the deposit, stamp duty and costs, the total amount advanced by Vincent was \$1,200,356.42. On 3 January 2014, after the breakdown of the marriage, Vincent made demand on Adrian for repayment of the sum of \$1,200,000.

The court determined the consideration what was said and done by Vincent is the key to identify loans or gifts and is not to be determined by reference to any uncommunicated subjective state of mind about which inferences may or may not be drawn.<sup>9</sup> The court also assess the intention of Vincent when he made the payments, it is submitted that even if Vincent's intention at that time was to make a gift, the advance of the deposit was, at most, conditional upon completion of the Purchase Contract.<sup>10</sup>

The court identified the conditional gift as:

If the deposit paid by respondent would return to him, since the respondent did not evince any intention to make an absolute gift of the deposit to anyone. Thus, the funds provided by respondent for the deposit were in the nature of a conditional gift to the appellant.<sup>11</sup>

Comparing and contrasting the above two cases, it is clear that the Court followed similar approaches in determining loans and gifts:

- (1) The uncommunicated subjective state of mind is not taken into account;
- (2) The court must assess the facts, such as any written evidence and what the parties said and done;
- (3) Intent must be proved by evidence.

### **Dispute resolution:**

Apart from resorting to legal action, individuals with complaints have access to alternative methods of resolving their disputes, such as mediation, conciliation, and negotiation. Even if a complaint escalates to litigation, the possibility of reaching a settlement outside the courtroom remains.

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<sup>9</sup> *Chaudhary v Chaudhary* [2017] NSWCA 222 at 100.

<sup>10</sup> *Ibid* 59.

<sup>11</sup> *Ibid* 98-99.

According to the 2022 Annual Report for the District Court of New South Wales, the Court in Sydney West referred 697 cases to mediation, with 632 of them being directed to private mediation and 65 to mediation provided by the court. Additionally, 1,308 cases had settlement conferences ordered. Approximately 39% of the matters referred to mediation, facilitated by Assistant Registrars, resulted in settlements.

As indicated in the annual report of the Supreme Court of New South Wales for 2021, there was a 26% decrease in court-annexed mediation listings conducted by the Court's registrars. In 2021, there were 262 such listings compared to 331 in 2020. Overall, the registry documented a total of 950 referrals to mediation, whether court-annexed or private, representing an 11% reduction from the 2020 total of 1,055 referrals. The 'mediation referral index' reflects the percentage of cases referred for mediation in a given year in relation to the total number of cases, typically applicable for mediation, initiated in that year. In comparison to the previous year, the mediation referral index decreased from 22.2% to 19.8%.

Figure 1 (Annual Review 2021 The Supreme Court of NSW)

<b>Alternative dispute resolution</b>					
	<b>2017</b>	<b>2018</b>	<b>2019</b>	<b>2020</b>	<b>2021</b>
<b>Court-annexed mediations listed <sup>1, 2</sup></b>					
Total	571	428	474	331	262
<i>Common Law Division</i>	51	29	27	26	31
<i>Equity Division – not probate cases</i>	455	344	366	269	219
<i>Equity Division – probate cases</i>	64	55	80	36	11
<i>Court of Appeal</i>	1	0	1	0	1
Percentage settling at mediation <sup>3, 4</sup>	46%	47%	42%	42%	39%
Waiting time after the end of the year <sup>5</sup>	2 weeks	5 weeks	6 weeks	4 weeks	4 weeks
<b>Referrals to mediation generally</b>					
Total referrals recorded <sup>6</sup>	943	1,169	1,407	1,055	950
Mediation referral index <sup>7</sup>	20.8%	24.7%	30.3%	22.2%	19.8%
<b>Arbitrations listed <sup>8</sup></b>					
Total	0	0	0	0	0

In conclusion, it is evident that alternatives to litigation, including mediation, conciliation, and negotiation, offer individuals seeking resolution for their complaints the opportunity to find common ground and avoid the complexities and costs of formal legal proceedings. Even in cases that do proceed to litigation, the potential for settlements outside the courtroom remains a viable option. The statistics provided in the annual reports of the District Court of New South Wales and the Supreme Court of New South Wales shed light on the prevalence and effectiveness of these alternative dispute resolution methods in the context of the legal system. As these reports indicate, mediation plays a significant role in facilitating settlements, and while there may be fluctuations in its utilization, it remains a valuable tool for achieving amicable resolutions. Ultimately, the choice between litigation and alternative dispute resolution methods depends on the specific circumstances of each case, but the availability

of these alternatives ensures a flexible and adaptable approach to resolving disputes.

## **Conclusion**

In conclusion, this paper has examined the critical distinction between a loan and a gift when money is transferred within an inner circle of family members and how Australian courts determine the nature of such transactions. This distinction is important because it determines whether the money should be repaid at a later date.

Within the Australian legal system, the classification of gifts can have different consequences. When faced with a lack of concrete evidence, it is important to understand how the court will assess such situations. The decisions of judges in similar cases carry considerable weight and can set a precedent for the court's view on the matter.

Determining whether money within an inner circle is a loan or a gift requires an examination of the constituent elements of each. A loan typically involves an agreement between the parties, setting out the terms of repayment, interest and a fixed timetable. A gift, on the other hand, is a voluntary transfer with no expectation of repayment.

In the absence of formal documentation or agreements, the court will rely on several factors to determine the intent behind the transaction. These factors include the relationship between the parties, the context of the transfer and any evidence of discussions or mutual understanding regarding repayment.

The court's assessment in these cases is of paramount importance as it determines the legal implications for all parties involved. If the court finds that the money is a loan, the recipient may be required to repay the amount, together with any agreed interest. However, if the court decides that it is a gift, there is no legal obligation to repay.

Understanding how Australian courts approach such cases, particularly in the absence of hard evidence, provides an insight into the decision-making process and the factors that influence their judgments. This knowledge can be invaluable to legal practitioners when advising clients and dealing with similar scenarios in the future.

Essentially, the distinction between money as a loan or a gift within an inner circle is a central aspect of the Australian legal framework. The court's assessment, particularly in cases with limited evidence, plays a central role in determining the legal implications and responsibilities of the parties involved. By considering a variety of factors and legal precedents, the court shapes how such matters are perceived and resolved in the legal landscape.