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Family Loan Checklist

*Giving Peace of Mind to the
Bank of Mum and Dad*



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Before making any gifts to family and loved ones, review the following checklist. It will help you feel confident that you're considering all the relevant factors and taking all the right steps.

Should you have any questions, get in touch with our team at Watts McCray Lawyers by calling 1300 516 443.

1. Are parents today playing a greater role in helping their kids into home ownership?

Historically parents have always assisted their children into home ownership though the extent of that assistance was often limited to the very wealthy with surplus resources. The very wealthy often provided a massive amount in assistance which enabled their children to have a very easy start to amassing their own fortunes, the not so wealthy maybe gave a one-off gift to assist with a deposit for a first home buyer. The sophisticated family with wealth often provided their assistance by way of Family Trusts so that the assistance was given as part of overall “tax planning”. Sometimes that assistance meant that the children never received the property in their own right as proprietors but rather enjoyed the benefit of the occupation of the property as a beneficiary to the Trust controlled by the parent providing the help. So assistance has always happened but in very different ways.

2. Is there an increase in the proportion of parents helping their children out financially?

With the massive increase in house prices and the development of wealth inequality in the last few decades, being a first home buyer has become more difficult. The “deposit gap” has grown even larger than ever before. The lack of supply in housing and the growth in population has seen to that. The size of the deposit you need has grown substantially faster than the ability to save. Lending rules for banks have become stricter since the Banking Royal Commission and really you need a 20% deposit and a strong income with secure employment proving you can sustain the repayments on the other 80% borrowed in an environment of rapidly rising interest rates. Then after you have “won” the loan you have to service that loan, increase repayments when the interest rate rises hit and afford to live at the same time.

At the same time the parents of home buyers have seen massive increases in the equity they have in their homes. They may have bought a home for \$100,000 in 1980 and struggled to pay their \$80,000 mortgage in the years since but paid that mortgage off in 2000. That home would be worth \$2 million now unencumbered. They have income and can offer security for a loan or have savings they have built up over time. It is much easier for them to come up with cash rather than their children borrow it. So, the capacity to help is there. Be the “bank of Mum and Dad” and help your kids get on to the “property ladder before the rung to enter is so high you just can’t reach that first step.

It almost impossible to make the step without the help.

3. Top 3-4 tips to help parents thinking about becoming the Bank of Mum and Dad

- Make the decision at the outset – Is this a gift or a loan or something else?
 - If it is a gift, then understand and accept that you won't get it back. Can you afford that? How will you feel if for some reason some disaster happens (a failed business venture or a family break up) and the money is wasted and lost as an asset to your child. You can't switch from it being a gift to all of a sudden when things go bad and you want it to be a loan and you want the money back rather than see it wasted.
 - If it is a loan then:
 - what are the terms and conditions of the loan and how is it to be repaid?
 - It should be documented, and all parties need independent legal advice before signing and the money advanced (don't do it after the purchase)
 - what security is being offered for the loan? Is that security going to be registered on title? If there is a first mortgagee bank lending part of the purchase price, will they agree to a second mortgage or caveat being registered on title for the loan?
 - Remember being a "secured creditor" is extremely important if say one of the owners is in a bad business and goes bankrupt and the unsecured creditors all form a queue to get their money and you have no priority over the rest of them.
 - If it is neither a gift nor a loan, then it must be that you actually own a part of the property. If you are going to advance say 50% of the purchase price and stamp duty, are you going to go on title as a 50% owner? Are you going to share in the increase of the property when it is eventually sold? It may be a very good investment in real estate where you don't get paid rent or interest, but you make a capital gain and have the satisfaction of seeing your children and grandchildren in a home. You have the benefit of being better than a secured creditor but being an owner. Remember you may incur land tax and you will have to be party to any mortgage agreement if the children who own the other half need to borrow their share of the purchase price. Make sure you are registered on title as an owner... it is risky to rely on a "handshake" or constructive or implied "trust".

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- Once you have decided how you will help that then means that all parties need to have independent legal advice on the agreement before you go ahead. Don't rely on a "handshake" or the exchange of emails even though it is "family". Remember the agreement not only has to be enforceable between yourselves but valid at law so that you can maintain priority as a secured creditor in a queue of creditors or a family law dispute. A party who has not been given independent legal advice before entering into the agreement may be able to seek release from the terms of the agreement and have the agreement set aside. So, you may intend to make it a loan, but if the loan is not fair and they didn't get advice then, against your original intention, the loan might become a "gift".
 - Make sure you have a will that recognizes the agreement in some detail. It would also be important that the children have a will that considers the agreement as well. Remember there will one day be an estate to be divided fairly between your children. If you intend to divide your estate "fairly" between each of your children that "fairness" may turn on the terms and interpretation of the agreement being clear and then the children's compliance with the agreement since the loan was advanced will be important. For instance, if they were supposed to make repayments over time to pay off the loan have they done that or are they in default? This matters to the value of the estate and the fairness between the children. Make sure you don't leave behind the seeds of a messy dispute between your children as part of your legacy. If one child owes you money when you die, then that debt is an asset which forms "part of your estate" and will need to be recovered and distributed between all the beneficiaries in accordance with your will. You need to think about life insurance so that there is plenty of cash at your death to sort things out without the children coming into conflict. It is really important that there is certainty so that the lawyers helping with the administration of the estate can give independent and objective advice to help the children see that you made sure that things were fair between them.

Is your transfer a gift or a loan?

A transfer is generally considered a gift when it involves handing over money or an asset with the expectation of getting less than its market value or, more typically, nothing in return. On the other hand, a loan is where you get money, goods or services of the same value in return. It's important to understand your position, as they will be treated differently under relevant laws.

If your gift is a true gift, have you documented it as such?

Consider signing a deed of gift to document that the money or asset (including property) is being given without monetary consideration.

If your gift is actually a loan, have you documented it as such?

Written evidence of a loan agreement is a vital part of documenting that your transfer is actually a loan that requires repayment.



□ What types of transfers could be considered gifts?

Some examples of gifts are:

- Selling or transferring an asset that is less than its original value. This can include a car or property.
- Depositing money into a trust fund that you do not control.
- Paying tuition fees for grandchildren.
- Gifting money directly.

□ Is there a limit to the amount that I can gift to my family members?

In general terms, no. You may give away money and assets up to any amount at any time if you so desire.

However, if you receive a pension or other benefits from the government then you are limited to gifting \$10,000 in cash and assets over one financial year, or \$30,000 in cash and assets over five financial years.



What if you sell property or an asset to your child for less than it's worth?

This will be considered a gift. If you own a home worth \$850,000 and you sell it to your child for \$700,000, the \$150,000 gap would be regarded as a gift.

What if you go over the gifting limit?

If you receive a pension or other benefits from the government and you go over your allowable gifting amount, these overages could be considered a 'deprived asset' and they could then affect future payments from Centrelink.

What if you only need to make a gift to one child? Have you considered how you will ensure fair benefits for your other children

In this case, you may want to put some equalisation provisions in place in your estate plan. This can ensure that all your children receive equal benefits from you whether now or on your passing.



Have you considered the tax consequences of your gift?

In general, neither the giver nor the recipient will need to pay tax on gifts. However, if you set up a fund for the benefit of a family member specifically to finance a future expense (such as a child's education), the fund's income is taxable.

Have you kept all your records?

Retaining your legal information is an important part of protecting yourself and your assets.

Do you have an advisor who specialises in intergenerational wealth transfer?

If you are thinking of becoming another “bank of Mum and Dad” then please consider speaking to our specialists about what kind of loan arrangement and what type of loan security best suits your needs. We can design a bespoke agreement which is secured and assist in the implementation of your plans

Contact one of our specialists below, or by calling 1300 479 174.



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ABOUT WATTS MCCRAY LAWYERS

As a specialist and leading provider of Family Law services in Australia, Watts McCray Lawyers understand Family Law and the way the various Courts function. Our Family Lawyers, many of whom are Accredited Specialists, are well placed to provide clients with the best possible representation in all manner of Family Law cases.