Gifts, loans, debts and death

AMY BERRY AND MILLIE RAI EXPRESS THE NEED FOR CLARITY REGARDING GIFTS AND LOANS BEFORE A DEATH IN ENGLAND AND WALES

When somebody dies, whether a transaction is properly characterised as a loan or a gift can have important consequences for a beneficiary and, indeed, the administration of an estate as a whole.

If a loan is still outstanding as at the date of death, it will be classed as an asset of the estate (a debt owed). Personal representatives are under a duty to collect in loans as a part of estate administration.

A gift may be a transfer of ownership of anything with value (e.g., cash, land, chattels, shares) or a loss in value when something is transferred (e.g., if one sells their house to their child for less than it is worth, the difference in the value counts as a gift).

Under English and Welsh law, the general principle is that for a transfer of money to constitute a gift, there must be evidence of an intention to give. The burden will lie on those who assert a gift to prove it, in default of which the transfer will constitute a loan. The presumption of advancement is rebuttable. These are questions of fact.

WHY DOES IT MATTER TO PRACTITIONERS?

In the current economic climate, financial pressures mean that many more will die with debts, loans and/or mortgages, or as parties to gifts, loans or transfers. As a result, practitioners will increasingly have to grapple with a raft of questions, whether acting for an estate, beneficiaries or another party. For example:

- Was there a transaction at all? What was its nature? What were the terms? Is it repayable and, if so, when?
- Where debts are attached to chattels, will they be repossessed?
- If there is a gift of a property secured by a mortgage, does it pay its own mortgage or is the debt to be paid from the residue (what is left)? What if there are charging orders?
- Did the deceased have capacity and consent to a gift or were they vulnerable when a gift was made?
- Has there been a gift with reservation of benefit or an incomplete gift? Did the deceased buy into any asset? Is there any constructive or resulting trust or proprietary estoppel? Has there been an advancement?

WHAT CAN BE DONE TO PROTECT CLIENTS' POSITIONS?

Where practitioners are involved in non-contentious business, e.g., at the stage of drafting a will or making estate arrangements, it ought to be considered a cardinal rule for one's clients' intentions to be put into writing. For example, if the client decides to write off a loan during their lifetime, it would be wise to put this in writing immediately so that, in future, personal representatives are afforded some clarity. On the other side of the coin, clients should be advised to make a written list of gifts made. In these circumstances, more is more: the greater the detail that is documented, the quicker and cheaper the administration of an estate will be. There may also be a saving of inheritance tax as there are many gifts that attract reliefs.

WHAT PROBLEMS MIGHT ARISE?

It is not unusual for substantial lifetime gifts to arouse suspicion. Accordingly, lifetime transactions may be susceptible to challenge based on actual undue influence and/or presumed undue influence. Alarm bells should sound for practitioners where such transactions are entered into in circumstances of:

- **Omission:** namely, the absence of independent professional advice.
- **Sequestration:** namely, the removal of or isolation from friends and family.
- **Dependency:** e.g., for care, company and transport.

Where there is sufficiently strong evidence of lack of consent, undue influence or lack of capacity on the donor's part, a lifetime gift may be set aside. This notwithstanding, it is important to remember that a substantial lifetime gift is not in itself evidence of financial abuse. After all, the law does (contrary to popular opinion) permit kindness, generosity and tax planning.

EXAMPLE

Alex is the deputy of his mother Barbara and personally pays her care home fees. Barbara's will leaves her estate to Alex. It was always assumed that Alex would outlive Barbara. They never had a conversation about whether the payments of care home fees were gifts or loans because Alex would ultimately inherit everything in any event.

Alex dies unexpectedly in a car accident. Barbara dies shortly thereafter.

Alex's widow Charlotte claims repayment of the care home fees from Barbara's estate on the basis they were loans, with a view to maximising her inheritance from Alex's estate under the intestacy rules. Barbara's executors must ascertain the nature of the transfers from Alex to Barbara's care home.

In the absence of any written evidence or indeed evidence of discussions between Alex and Barbara, it is likely that the court would find that the payments were loans to the estate, such that the estate owed a debt to Charlotte as the beneficiary of Alex's estate.

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