





Deeds of Gifts, Loan Forgiveness, UPEs and *The Protector*

Where and when to use them


2 July 2020



“The notion of a gift is simple. It is the transfer of money, assets or property to another person with no right of recourse. Once it has passed that is the end of the matter. It is a matter of contract law. If the gift was under malfeasance then there may be an equitable right of remedy but otherwise when it is gone it is gone.”



A loan is the provision of financial accommodation between parties to an agreement. It may, and is certainly best completed in writing otherwise how can you tell a “gift” from a “loan”.



Then there are family situations where the waters become murkier. That is where case law comes into play.

Cases on Loans, Gifts and the Protector



- The cases are fundamental for The Protector
- *Atia v Nusbaum [2011] QSC044* was right on point with The Protector style of gift and loan back. Dr Atia gifted his mother all rights and entitlements to a property at Kilkenny Court Sorrento. An amount of \$1M was lent back to Dr Atia secured over Kilkenny Court which was valued at \$400,000 at the time. Atia argued it was a gift from his mother but the Court held the loan and mortgage agreements valid
- Family law case of *Pelly & Nolan [2011] FMCAfam 530* the Family Court considered whether monies forwarded to a son by his father was a gift or a loan. A sum of \$320,000 advanced to buy a property was held to be a loan while a sum of \$200,000 was a gift. Beware!



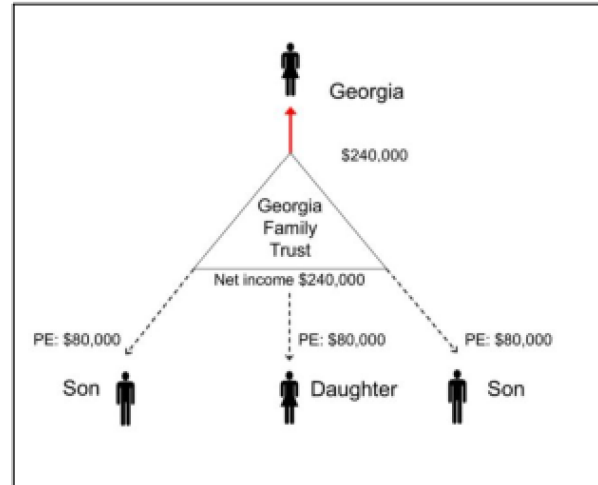
Loans, Gifts and UPE

- Where there is a unpaid present entitlement, financial accommodation is provided by the beneficiary to the Trustee of the Fund. Cash is left in the Trust for use by the Trustee
- The UPE may be gifted to the Trustee of the distributing trust
- The issue of section 100A – reimbursement arrangement may or may not be an issue if the arrangement is a ordinary family or commercial dealing (excluded)
- Section 100A formed part of the trust stripping rules introduced with Part IVA in 1978 by Treasurer Howard

Section 100 A Paper by Michael Butler, Finalysons Partner at TIA Convention in 2019

8.2 Tax Institute National Convention (March 2018)

At the 2018 National Convention, in a paper entitled "What's attracting Commissioner's attention", the following example was discussed:⁵⁴



Michael Butler

Section 100A: When is a dealing between members of a family not in the course of ordinary family dealing?

In that example, the Georgia Family Trust has distributed its net income of \$240,000 to 3 children. The issue is whether the gifting of the entitlements of the 3 children back to Georgia would be part of a "reimbursement agreement" that was not entered in the course of ordinary family or commercial dealing.

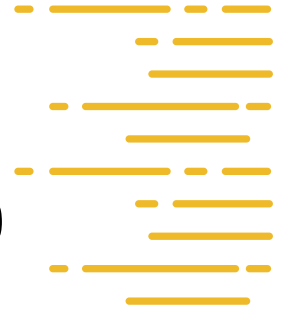
The various issues are considered further in Case Studies 2 and 3 below. Suffice to say that it is suggested the dealing in the Georgia Family Trust example clearly takes place in a family context and involves measures taken, within a family, voluntarily, for the benefit of the family members.

As argued above, this is a simple, one-step, transaction akin to transferring shares cum dividend or the issue of preference shares in the *Keighery* case. There is no artificiality in the *Newton* sense.

UPE Assignment

- What would happen if:
 - The UPE was assigned to a Family Protection Trust for the benefit of the beneficiary and their bloodline
 - The equity in the UPE was gifted to a Family Protection Trust by the beneficiary of the distributing trust for the benefit of the beneficiary and their bloodline
 - The UPE is evidenced by a loan and the loan is forgiven?
Have to be careful where the loan is a Division 7A loan as it a forgiveness is a deemed dividend.

Whats coming up?



- Book in for the Virtual Strategy Summit on 14 and 15 July 2020 where there are 28 speakers (and growing), 12 CPD hours and 10 CPE hours for the Tax Practitioners Board and lots of great strategies – lets do a quick review
- We are working on:
 - Loan and UPE assignment
 - The Moat and Castle
 - Upgrading the system to HotDocs Advance
 - Building a Succession, Asset Protection and Estate Planning course of 14 modules to provide accountants, planners and administrators with the skills in interviewing, compiling and delivering great SAPEP strategies for clients





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