

1GC | Family Law

WOOLLY LOANS

*How do you deal with parents?
What can you do to help?*

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The Question

How do you deal with parents over loans/gifts provided on 'woolly' and often, solely verbal terms?

What can and can't you do to help?

The Question

Parents of a child getting divorced come to see you and they want advice to protect their interests in respect of recovery of a loan they made to their child in circumstances where the other spouse is likely to characterise the loan as a gift

Unlock your inner Sherlock



Primary Evidence?



Contesting Primary Evidence

- Was money advanced under the agreement?
- Forgery of signatures on loan agreements
- Authenticity of the date of the document
- Sham
- Interpretation

Gift or Loan?

- Key determination required is whether capital advanced was to be repaid?
- Forensic analysis assisted by balance sheet approach

Corroborative Evidence

“Trivial facts are often the best hint to what is going on”

Chief Justice John Roberts
US Supreme Court



Corroborative Evidence

- Money trail - debit and credit
- Even cash has a trail
- Any repayment?
- Evidence of discussions surrounding advance and receipt?
- Traditional evidence
- Digital footprint: WhatsApp, text, email

Corroborative Evidence

- Parents' wealth and inferences and importance to parents of documenting the advance
- Siblings
- Discussions post advance/receipt

Corroborative Evidence

- Wills including attendance notes
- What was the money advanced under the loan to be used for? Trivial expenditure more likely to funded by gift?

Terms



Terms



Discussions

- Term loan?
- Interest on capital outstanding?
- Repayment obligations?
- Who were the parties to the loan? Both parents? Both spouses?

Woolly Loan

Nothing discussed about term of loan, nor interest, nor trigger events for repayment.

An advance of money with an obligation to repay albeit on unspecified terms.

Implied Terms

- Loan will be repayable on demand
 - necessary to make the contract work/so obvious goes without saying
- Contractual interest will not be recoverable
 - not necessary to make the contract work/not so obvious that it goes without saying

Recovery

- Demand repayment
- Does the parent creditor need and or want to take proceedings against the child debtor?
- Quantum of loan c.f. other resources of creditor and debtor and debtor's spouse

Recovery

- Risk loan treated as soft & therefore child debtor may not be left with sufficient resources to repay on demand
- Motivation to reduce the assets of the marriage

Joinder – FPR 2010, r 9.26B

- (1) The **court may direct that a person or body be added** as a party to proceedings for a financial remedy if:
 - (a) it is **desirable to add the new party** so that the **court can resolve all the matters in dispute** in the proceedings; **or**

Joinder-FPR 2010, r 9.26B

(b) there is an **issue involving the new party and an existing party** which is connected to the matters in dispute in the proceedings, and it is **desirable to add the new party so that the court can resolve that issue.**

Joinder

- ‘Desirable’ not ‘necessary’ so low bar
- In line with overriding objective
- Risk of inconsistent judgments
- How can court deal with computation element of financial remedy claim without determination of issue?

Joinder

- If demand not met letter before action indicating an intention to issue proceedings unless joined
- Request be invited to intervene or apply to intervene

Benefits of Joinder

- Party status and entitled to disclosure
- What does child say in his or her FE about debt?
- Debtor child bound by judgment on preliminary issue

Drawbacks of Joinder

- Expense
- Delay especially if full **TL v ML** procedure followed
- A creditor parent with resources might consider delay and expense a driver to settlement

Costs

- No order as to costs principle doesn't apply
- **Baker v Rowe [2010] 1 FLR 761**
'Clean sheet' principle
- Decisive factor likely to be whether successful on preliminary issue
- Calderbank offers are admissible

Procedure

TL v ML and Others (Ancillary Relief: Claim Against Assets of Extended Family) [2005] EWHC 2860 (Fam)
guidance for the management of cases requiring the joinder of third parties as follows [paras 35-37]:

TL v ML - Procedure

- The third party should be joined to the proceedings at the earliest opportunity;
- Directions should be given for the issue to be fully pleaded by points of claim and points of defence;

TL v ML - Procedure

- Separate witness statements should be directed in relation to the dispute;
- The dispute should be directed to be heard separately as a preliminary issue, before the financial dispute resolution (FDR) appointment

TL v ML - Procedure

- Guidance not a straitjacket
- **TL v ML** dealing with issues of beneficial ownership of property
- Proportionality of having a preliminary issue
- Or just join for FDR in first instance

Preliminary Issue

- Not determined on the exercise of a discretion but whether an obligation to repay is found to exist on the balance of probabilities
- Weight of evidence including the trivial facts
- Weight of testimony

Best Practice

- Assist with detailed forensic analysis of transaction and corroborative evidence in order to advise whether there is likely to be found to be an obligation to repay
- Develop strategy after detailed evaluation
- Joinder and preliminary issue or joinder and FDR