Family Money: Gifts or Loans

Prepared for: Legal Education Society of Alberta

For Presentation In: Lake Louise, Alberta
May 2 – 5, 2009

For Presentation by: Wendy E. Best, Q.C.
Dunphy Best Blocksom LLP
Calgary, Alberta

FAMILY MONEY: GIFTS OR LOANS
By Wendy E. Best, Q.C.

If you practice family law, at some point you will be faced with a fact situation where money has been provided by a family member to a spouse during the relationship and upon separation, there is a dispute as to the characterization of those funds, including whether it is a gift or a loan and, if a gift, whether it is to one spouse or both.

The importance and impact of this characterization becomes readily apparent when considering the following typical fact scenarios:

1. If the wife's parents provide her with $200,000 during the marriage, she spends it and on separation claims those funds are a loan, then this debt is paid from the matrimonial property before it is divided. If, however, these funds are a gift, there is no such reduction as the exempt funds cannot be traced to an asset and therefore the husband would receive an additional $100,000 of matrimonial property.

2. If the wife's parents provide her with $200,000 during the marriage and she uses those funds to purchase a home in the joint names of the wife and the husband and the home is worth $300,000 at separation: if the funds are a loan, the husband will receive $50,000 from the equity of the home. Whereas if it is a gift, the husband will likely receive $100,000 from the equity.

Relevant to the issue of determining whether family money is a gift or a loan, is the recent Supreme Court of Canada decision of Pecore v. Pecore 2007 Carswell Ont. 275 (S.C.C.). In Pecore, the father put $1 million into a bank account and investment account that he held jointly with his adult daughter. The father died and the daughter and her husband separated. The husband claimed an interest in the funds as he was named as a beneficiary under the father's will. The issue was whether the father intended to gift these funds to his daughter or whether he intended that the daughter hold the money in the accounts in trust for the benefit of his estate to be distributed according to his will.

Until the Pecore decision, if the parents of an adult child advanced money or property, the presumption of advancement applied, which presumption was rebuttable. Thus, if the spouses did not agree as to the nature of the advancement (being a loan or a gift), then the court would presume that the money advanced was a gift, unless there was clear evidence to

the contrary. In the Pecore decision, the Supreme Court of Canada revisited the law with respect to the presumption of a resulting trust and the presumption of advancement. As a result of the Pecore decision, the presumption of advancement only applies to money advanced to minor children. Now, if parents transfer assets to adult children, there is a rebuttable presumption of a resulting trust that is that there is no gift, but rather the adult child is holding the money or property in trust for their parent.

The Supreme Court confirmed that there will be situations when the transfer of money from a parent to an adult child was be intended to be a gift and, in such situations, it is open to the adult child to rebut the presumption of a resulting trust by providing evidence in support of their claim.

The Supreme Court confirmed that the onus or burden of rebutting this presumption is therefore placed on the person taking the position that the transfer of funds was intended to be a gift. Equity presumes a bargain, not a gift. Therefore, in the event of a legal challenge, the parties' intentions must be carefully considered in order to resolve issues of this nature.

Ultimately, Ms. Pecore was successful in establishing that her father's intention was to gift her the balance in their joint accounts on his death, thus rebutting the presumption of advancement.

As a result of the decision, the first step in considering whether monies advanced from the parent or other family member to one spouse is a gift or a loan, is to apply the presumption of resulting trust (i.e. presume that it is not a gift). Secondly, because the presumption is rebuttable, all of the relevant evidence must be considered. Each case must be decided on its particular facts. Notwithstanding the change in presumption and the shift in onus, ultimately the evidence is key to the decision.

There are literally dozens of cases across Canada that have considered this issue, with one of three results:

i. the funds were a gift;

ii. the money was a loan; or