

# Private Client Webinar: The Bank of Mum and Dad - Considerations for loaning money to your children

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Ilana Kacev, Angelo Bistolaridis, Jana Sosner and Camille Broadhurst



# Webinar housekeeping

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- All attendees will be on mute and their cameras turned off for the entire webinar.
- We have BD tech support live to assist with any technical issues.
- Use the chat function for any comments/technical issues.
- Use the Q&A function for specific questions related to the webinar content. Questions will be addressed at the end of the webinar.
- There will be a post-webinar survey link sent at the end of the webinar. We value attendee feedback. Presentation slides will also be sent to all attendees.
- We will also have a QR code linking to our feedback survey towards the end of the presentation so you can provide instant feedback.
- This webinar is being recorded.

## Disclaimer

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The information contained in this presentation is intended as **general commentary only** and should not be regarded as legal or financial advice.

Should you require specific advice on the topics or areas discussed, please contact the presenters directly.

# Types of agreements

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The old **handshake agreement** or known at law as an oral agreement

**I.O.U** – I owe you

**A.O.D.** – Acknowledgement of Debt

**All very simple in character.**



# Loan Agreement

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A loan agreement is the most formal approach to documenting a loan.

The terms of the loan can be tailored to the transaction. For example:

- Interest rate
- Repayment period
- Default
- Facility
- Death of a party
- Security
- Guarantors



# Enforcement & Asset Protection

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A “loan payable on request” (i.e. where no time for repayment is specified or where the loan is “on demand”) creates an immediate debt. As it is immediate, the clock begins to run on the Statute of Limitation period from the day the loan is made.

In NSW and VIC, the limitation period is 6 years.

When a lender doesn't enforce its rights against a borrower, it is at risk that its rights of enforcement go stale and become unenforceable.

# Enforcement & Asset Protection

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Here are some “sticking points” with enforcement of a handshake agreement or an I.O.U / A.O.D

## Handshake Agreement

How dusty is the memory? How “conveniently” will a party forget the terms of the agreement

How do you prove the terms of the agreement? Were there any witnesses or corroborating evidence?

Where do you go if something happens that is not contemplated by the agreement (because the terms are often so brief).

They are typically unsecured and therefore, even if it is enforceable, what are the chances of recoverability?

## I.O.U and A.O.D

Where do you go if something happens that is not contemplated by the agreement?

Has the statute of limitations made the loan go “stale” and become unenforceable?

They are typically unsecured and therefore, even if it is enforceable, what are the chances of recoverability?

# Enforcement & Asset Protection

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Many of the “sticking points” of the other three approaches can be readily resolved in a loan agreement.

However, recoverability can be increased where “security” is taken to literally *secure payment*.

Two common approaches are:

1. Lodging a **caveat** against the property being purchased with the money.
2. Lodging a **mortgage** against the title to the property.



# Priority of interests

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Once a mortgagee takes possession of the property and sells it, the net proceeds of sale must be applied according to the priority of interests.

Registered interests in order of time of registration.

**then**



Unregistered interests in order of time of creation.

# Common Characteristics of Family Loans dealt with in the Family Court of Australia

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- The loans are usually not in writing;
- The loans have usually not been enforced and are often claimed upon after separation (i.e. mum and dad decide they want to be paid back after son-in-law gets caught with a girlfriend!);
- The terms of the loans are vague and not exact;
- The monies advanced are evidenced through bank statements or pieces of paper which are not able to be dated or authenticated;
- The other party to the marriage at times has no idea about the loan even existing!

# Legal Principles that arise with Family Loans

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- “*the presumption of advancement*” – that being, a presumption at law that an advance of property to a child from a parent is presumed to be a “*gift*” of the parent to the child and not a loan (*Nelson and Nelson* (1995) 184 CLR 538 and *Calverley and Green* (1984) 155 CLR 242) – this presumption can be rebutted by evidence of any intention (why was the money advanced) which is inconsistent with the presumption at the time of the advancement.
- The terms of the loan and any relevant time limitations (*the Limitations Act 1969* (NSW) and *Vadisanis & Vadisnais & Anor* [2014] FamCA 97);
- Defences to the loan – “Estoppel”;
- The treatment of the loan by the Family Court of Australia pursuant to discretion ( *Biltoft & Biltoft* [1995] FamCA 45)

*“Notwithstanding the general practice which has developed, the Court has indicated that it may properly determine not to take into account or to discount the value of an unsecured liability in certain circumstances. Such liabilities would include but are not limited to a **liability which is vague or uncertain, if it is unlikely to be enforced or if it was unreasonably incurred.**”*

# Family Loans in Practice – Vadisanis & Vadisanis & Anor

## [2014] FamCA 97

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- In 1995, the Husband's mother and father advanced \$50,000.00 towards the purchase of a property (Property "A") worth \$190,500.00. The Husband paid \$140,000.00 (74% to mum and dad's 26%).
- The ownership of Property A was reflected as 5% to the Mother and Father and 95% to the Husband.
- In 1997 (prior to the Husband and Wife getting together), Property A sold and after the mortgage was discharged, the Husband received \$110,000.00 – the Husband and Wife kept this money.
- After they got married and in 1997, they purchased a property (Property "B") worth \$282,000.00 and relevantly:
  - The Husband and Wife entered a mortgage agreement with the Mother (not the Father) of the Husband for \$65,000.00 at 10% per annum.
  - The mortgage was not stamped for duty and was not registered;
  - The mortgage was said to hold security over Property "B";

# Family Loans in Practice – Vadisanis & Vadisanis & Anor

## [2014] FamCA97

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- The amount referred to in the mortgage was said to reflect the money advanced in the Property “A” proportionally (so the increased value of the \$50,000.00 first paid);
- In October 2000, Property B was sold for \$455,000.00 and Property “C” was purchased for \$400,000.00 – the parties borrowed \$220,000.00 from a bank and used the money they got from the sale.
- In September 2003, the Husband’s father received \$220,200.00 in compo from a tribunal in NSW and thereafter passed away on 21 October 2003. In April 2004, the Husband’s mother received a second payment of \$182,000.00 in compo; In May 2004, the Husband’s mother paid \$50,000.00 of the compo payments to a joint account held by the Husband and Wife; In October 2004, the Husband’s mother paid \$100,000.00 (cash) to the Husband and that went to buying a property known as Property “D”.
- The parties separated in September 2008 (so they were together for about 10 years);The parties commenced court proceedings thereafter their case was first heard in 2013, was appealed and went to the Full Court in 2014 and thereafter returned before the Family Court of Australia for rehearing in March 2015 (so they were in court for approximately 7 years).

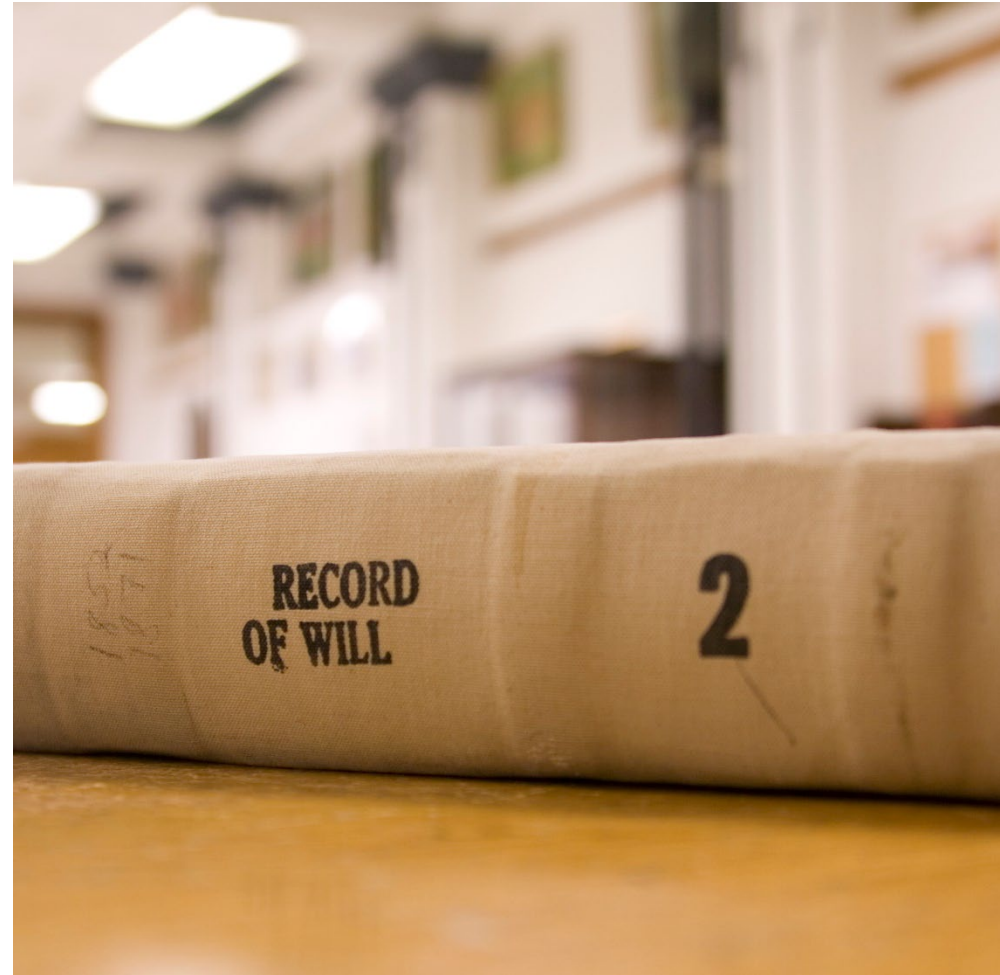
# Loans in Estate Administration

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**What happens to the loans if lender or borrower dies?**

**Handshake Agreement:**

1. Who knows about it?
2. What are the terms of the loan? And is death a trigger to repayment?
3. Can it be enforced?



# Practical Questions for Executors

- How is the loan treated in the Will of the deceased? Is the loan forgiven, expected to be repaid, or forming part of the borrower's share?
- Is it worth enforcing? Will the costs of enforcement be more than the original loan?
- If the borrower dies, are there sufficient funds for repayment?





# Key takeaways

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1. Lenders should **enforce the payment** of interest and document it to ensure that the loan does not go “stale” and become unenforceable.
2. The loan agreement should include a **purpose** for the loan.
3. Lenders should **not make any representations** that, even though they have loaned the money, they have no intention of receiving repayment.
4. Consider whether the borrower’s **spouse should witness** their signature to the loan agreement so they cannot argue they didn’t know about it if they split.
5. Encourage both parties to obtain **independent legal advice**.
6. Be wary of making **contrary declarations** to governing bodies, such as the ATO, Centrelink or the “big bank” as these could be used against a party.



# Contacts

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**Ilana Kacev**  
Special Counsel - Facilitator  
+61 3 8640 2370  
ikacev@rk.com.au



**Angelo Bistolaridis**  
Senior Associate  
+61 2 8987 0043  
abistolarides@rk.com.au



**Jana Sosner**  
Senior Associate  
+61 2 8987 0031  
jsosner@rk.com.au



**Camille Broadhurst**  
Associate  
+61 2 8987 0044  
cbroadhurst@rk.com.au



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Russell Kennedy Pty Ltd  
info@rk.com.au  
russellkennedy.com.au

**Sydney**  
Level 6, 75 Elizabeth Street  
Sydney NSW 2000  
Postal GPO Box 1520  
Sydney NSW 2001  
**T** +61 2 8987 0000 **F** +61 2 8987 0077

**Melbourne**  
Level 12, 469 La Trobe Street  
Melbourne VIC 3000  
PO Box 5146  
Melbourne VIC 3001 DX 494 Melbourne  
**T** +61 3 9609 1555 **F** +61 3 9609 1600

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