

Gift or Loan? The presumption of a bargain

It can be an easy decision to help a friend, family member, or a romantic partner in need of money. You probably think it is not necessary (perhaps offensive) to ask your boyfriend, girlfriend, or good friend for an acknowledgement of the payment. After all this is someone you trust.

Sadly, relationships break down and friendships end with no regard for the status of unpaid loans. When this happens, you may find yourself trying to get your money back. Your friend or family member might say that they thought the money was a gift and not a loan. You may end up in Court fighting to recover your money.

Gift or loan?

The Courts will look for any reason the payment was made. Was it a repayment of a previous loan? Well then, was it a payment for a good or service? If not, it must have been a loan. The Ontario Courts, relying on ancient legal doctrine, presume that an unexplained transfer of money is not a gift. This is expressed as "equity presumes a bargain."

Unless there is evidence to the contrary, the Courts will likely find that a transfer of money between unrelated persons is a demand loan with interest at the *Courts of Justice Act* [rate](#) (currently 3%).

Rebutting the presumption

The presumption of a loan does not end the matter. Presumptions can be rebutted by presenting evidence to the contrary which can sometimes be a high burden.

The Courts recognize how easy it is to allege 'gift' when faced with an action for repayment. In [Colangelo v. Amore](#), Mr. Colangelo had helped his girlfriend, Ms. Amore, with her living expenses and mortgage payments while she was unemployed. After the relationship broke down, he asked for the money to be repaid. Ms. Amore resisted on the grounds that the money was a gift to her. The Court did not agree. It found that:

Persons who obtain substantial sums of money from friends should be careful to ensure that if there is no intention to repay the money that this is evidenced satisfactorily so that there can be no doubt. Public policy demands that such casual passing of monies should be repayable unless there is satisfactory evidence to show that it was not intended by both parties to be repaid.

Satisfactory evidence can be a text message, an email, a thank you note, even an entry in a bed-time diary. Just make sure to reference the gift by date and amount if possible, and to keep a copy of it.

On the other side, if you have received a note thanking you for a thoughtful gift which you thought was a loan, you should not despair. Instead, you should write back explaining that the transfer was in fact a loan. Remember, in order for a transfer to be a gift, it must have been intended to be given and received as a gift.

A short list of don'ts

In order to protect yourself in case when loaning money to family and friends here is a short list of recommendations:

- Do not give money in cash - cash is difficult to trace and record. Ordinary people do not provide receipts. Cheques or E-transfers create a nice paper trail. They show the amount, the payee, the payor, and the date of the deposit clearly. Further, there is the option to include a note which would ideally say 'gift' or 'loan' according to your preference. That would go a long way to resolving the dispute;
- Do not rely on the honesty of people - document the transfer at the time it is made, and document repayments as they are made. This creates contemporaneous evidence. It is very persuasive in a Court room;
- Do not give an open-ended loan if possible. Give a deadline for the loan to be repaid. Without a timeline to repay, it can lead to uncertainty on when the loan is due, when to ask for the money back, and increases stress if you need the loan repaid;
- Do not give up - if you find that you inadvertently flouted all of these recommendations, do not despair, most people do. You can confirm your loan or gift now. The Courts will generally look at such correspondence, and the other party's response to determine your true intention.

Will this end up in Court?

Whether you start litigation or continue to trial depends on a few factors.

First, the amount of money in dispute is relevant. The amount in dispute must be worth the time and stress for both the creditor and the debtor; because of the stress and cost of litigation small loans typically do not make it far into the Court system.

Second, the strength of evidence is relevant. Cases with strong documentary evidence tend to settle early. The less promising the prospects for success look for the opposite side, the more likely they are to settle. This way they avoid the stress, expense, and cost consequences of taking a meritless claim to trial.

It is worthwhile to remember that even if you have everything documented, the person you loaned the money to may still want to fight in Court, despite all the contrary evidence.

We hope that you never have to see the inside of a Court room, but if you need to go there, we are here for you. At O'Connor Richardson P.C. we have experience preparing loan documents and representing both creditors and debtors in actions for unpaid loans. If you have questions about a gift or a loan, please [contact us](#).