



- What is a conflict of interest?
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## WHAT IS A CONFLICT OF INTEREST?

A conflict of interest can arise where a solicitor acting for one party has had previous "dealings" with the other party (the second party). The concern that arises is that the solicitor may hold confidential information about the second party and therefore by acting against that person may breach their duty of professional privilege.

In such a case, the second party is entitled to ask that the solicitor cease involvement in the matter. If there is no agreement then the second party can make an application to the court seeking an order that the solicitor be restrained from representing the first party.

The court has jurisdiction to make orders restraining a solicitor from acting for a party to ensure that the integrity of the judicial process is protected. The court takes the view that a restraint is justified if there is a risk that confidential communications on relevant matters have been made by the second party even if the risk may be more theoretical than practical. Further, it is in the interests of justice that the court should have the assistance of independent legal representation for the litigating parties.

## Q & A

**Q:** Do I have to pay child support even if I am not spending time with my kids?

**A:** Yes, even if you don't spend any time with your children

you are still responsible to provide for them financially. You can use the child support calculator to estimate your child support payments.

## TESTING A CHILD'S WISHES

The paramount consideration for the court when considering parenting arrangements for a child, is that the orders are in the 'best interests' of the child. In considering this, one of the factors considered by the court are any views expressed by the child.

In a recent case, the question arose as to whether the strong views expressed by a 9 year old child were his own or whether they were enmeshed in the mother's own views.

### Facts:

- The parties had been in a brief relationship and at the time of the trial, the child was 9 years old.
- Following separation, the child had lived with the mother and spent time with the father.
- The matter had had a difficult history, with the parents having been involved in litigation over many years, and the mother having a history of making unfounded abuse allegations against the father.
- In 2013, the mother left Victoria and went to Sydney, and did not return. The father succeeded in an application for the return of the child to Victoria. He then sought orders that the child remain living with him. The mother opposed this and sought an order that she have sole parental responsibility.

- A family report was prepared and the child expressed strong and consistent views that he preferred to live with his mother.
- The report recommended that the child live with the father, as the father provided stability at home and for the child's education.

#### Findings:

- The report noted that the child was of an age where his wishes should be given substantial weight, however the difficulty was that his views were tangled in the "parenting role" the child had taken on whilst living with the mother.
- The court was unconvinced as to the mother's alleged reasons for moving to Sydney, and then insisting on remaining.

#### The Order:

- The child live with the father and spend time with the mother.

## A LOAN OR A GIFT? IT'S ALL ABOUT DOCUMENTS AND BEHAVIOUR

Determining if a payment from a friend or family member is a loan or gift is a frequent challenge in family law property settlements. If it is treated as a loan it will result in a reduction of the available property. If it is a gift it will be credited with a percentage adjustment in favour of that spouse – not a dollar amount.

The court recently considered such a case.

#### Facts:

- The husband's parents had loaned significant sums of money to the husband during the marriage. The wife accepted that most of the funds were loans however she

disputed an amount of \$110,000 stating that it was a gift.

- The husband's parents had prepared loan agreements for the funds paid to the husband by them at various times. There was a loan agreement for the \$110,000.
- Funds had been repaid to the parents during the marriage. Those repayments were not attributed to the \$110,000 amount, but rather other amounts loaned by the parents to the husband, meaning that the \$110,000 remained outstanding in full.

#### Decision:

- The husband's mother gave evidence that the money had not been repaid, that it was interest free and that they had not pursued the husband for repayments as there was a loan agreement in place on which they could rely.
- The court accepted this evidence and found that the repayment of the \$110,000 was likely to be met on the sale of one of the properties. The court noted the repayment of other loans by the husband to his parents and found that the \$110,000 was a loan rather than a gift.
- The court distinguished the facts of the case from others where parents loan their children money, and those monies even though they are legally enforceable are not enforced, ie. a loan made by parents in circumstances where the parent would never have asked for the re-payment but for the parties separation.

**Editor's Note:** In determining if funds loaned to a party by a parent should be considered a loan, the court will take into account the formality of the loan, the terms of repayment, any demands for repayment made, and the capacity to repay the amount loaned.

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