



CANADIAN CENTRE FOR
ELDER LAW

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1822 East Mall, University of British Columbia

Vancouver, British Columbia V6T 1Z1

Voice: (604) 822 0633 Fax: (604) 822 0144 E-mail: ccels@bccli.org

Website: www.ccels.ca

A DIVISION OF THE BRITISH COLUMBIA LAW INSTITUTE

Background

CCEL Report no. 1/ BCLI Report no. 32—Financial Arrangements Between Older Adults and Family Members: Loans and Guarantees

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Today's older adults are more likely to be asset-rich than today's younger generations. This at times encourages financial arrangements within families whereby the assets of older adults are used for the benefit of younger family members. These arrangements, including guarantees and loans, can work to the satisfaction of all parties. Under certain circumstances, however, outcomes can be very damaging.

When a loan is given, there is an obligation to repay the money according to the terms of the loan. There is no requirement that the loan be written down, and this is not often done in the case of family loans. This can be a source of problems if there is subsequent disagreement about the terms of the loan. When a guarantee is made, a person agreeing to act as a "guarantor" undertakes to be responsible for a loan made to a third person in the event that the borrower does not repay the loan. In this way, the guarantor provides security for the loan to the lender. Older family members may not understand the implications of agreeing to a guarantee. The characteristics of inter-generational family relationships can increase the likelihood that the transaction will create significant risk for the older lender or guarantor.

This report summarizes the current law and discusses various legal principles and concepts that can be used to address the problems which arise when financial arrangements between older adults and family members fall apart. First, *non est factum*, Latin for "it is not my deed," is a legal doctrine which allows the signing party of a document to escape performance of the agreement if the document was not executed because the act of signing was not his or her own. For example, *non est factum* might be claimed where the signature on a contract was signed by mistake, or when a document is fundamentally different in content or character from the document the signer intended to execute. A transaction might also be set aside where the transaction is unconscionable, unfair, or created under undue influence. A fiduciary relationship may be another context in which transactions can be set aside. This occurs in situations in which one party, called the beneficiary can reasonably rely on the other party, the fiduciary, to act in their best interests.

This report sets out recommendations intended to protect the interests of older adults who wish to use their assets for the benefit of younger family members. The report also aims to raise general awareness about the pitfalls associated with loans and guarantees, and how they can be avoided.