LAW REFORM COMMISSION OF SASKATCHEWAN

CONSULTATION PAPER

FAMILY LOANS AND GUARANTEES

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INTRODUCTION

Family members often help one another meet financial needs. Children often turn to their parents for assistance, and most parents regard it as appropriate to help. The assistance may take the form of an outright gift, but often involve loans or guarantees. A loan may be preferred to a gift if the lender must tap into savings that will be needed later, or if the financial need is expected to be short term. A family member may guarantee a loan from a financial institution. This places no immediate financial burden on the guarantor, but if the borrower defaults on the loan, the guarantor will be responsible for paying off the loan.

Arrangements such as these are common, a normal part of family life. However, they can go badly wrong. As the Canadian Centre for Elder Law Studies observed in a recent study, *Financial Arrangements Between Older Adults and Family Members: Loans and Guarantees*,

> Helping out younger family members is a priority for many older adults. Sometimes, however, that help can result in unintended and untenable financial hardship for older adults and strain family relationships to the breaking point,

even where all parties have the best of intentions.[1]

An American educational organization, the National Endowment for Financial Education, warns that

> When individuals encounter financial trouble, it's natural for them to look to family members for support by way of a loan. Keeping the transaction among relatives may appear easier than obtaining an outside loan. However, family loans are more complex than many people think, and if not executed properly, the negative consequences can far outweigh the benefits.
>
> Loans between family members happen all the time, but too often the parties involved don't fully understand the risks they are taking . . . The result can not only lead to financial hardship, but also bankrupt a relationship.[2]

The informality that often surrounds financial arrangements within families can lead to misunderstandings and conflicts even if the beneficiary of a loan or guarantee intends to repay the loan. Other financial obligations may come to seem more pressing, or the parties may have had different expectations about the transaction. In some cases, the arrangement may be abusive and exploitative from the outset. A family member may take advantage of good will of a relative, exercising undue influence to procure a loan that he or she never intends to repay.
Elderly family members are most at risk. It has been observed that:

> Older individuals may be more susceptible to financial exploitation and fraud simply because many have assets in the forms of savings, stocks, insurance policies, and property. Seniors with dementia or mental health concerns may be particularly vulnerable to financial abuse by friends and family members or court

[1]Canadian Centre for Elder Law Studies, *Consultation Paper on Financial Arrangements Between Older Adults and Family Members: Loans and Guarantees* (September, 2003). See also Canadian Centre for Elder Law Studies, *Report: Financial Arrangements Between Older Adults and Family Members: Loans and Guarantees* (October, 2004). The Centre is a British Columbia based organization. It studied loans and guarantees in the British Columbia context. The Commission acknowledges its debt to the work done in this area by the Centre.

[2]National Endowment for Financial Education, *Approach Family Loans with caution: Lending money to relatives can be risky financially—and emotionally* (March, 2003).

> appointed guardians who exert undue influence. . . . Detecting the abuse may be difficult as the victim may be generally isolated and dependent upon the abuser(s).[3]

Resentment toward an aging family member who is perceived as controlling family assets is perhaps a major factor when financial relationships become exploitative. The National Committee for Prevention of Elder Abuse found that the perpetrators of financial abuse[4] are usually:

> Family members, including sons, daughters, grandchildren, or spouses. They may:
>
> * Have substance abuse, gambling, or financial problems.
> * Stand to inherit and feel justified in taking what they believe is "almost" or "rightfully" theirs.
> * Fear that their older family member will get sick and use up their savings, depriving the abuser of an inheritance.
> * Have had a negative relationship with the older person and feel a sense of "entitlement."
> * Have negative feelings toward siblings or other family members whom they want to prevent from acquiring or inheriting the older person's assets.[5]

It is difficult to determine just how frequently family loans and guarantees become a serious problem. However, financial abuse is the form of elder abuse most often reported.[6] A recent study in Canada found that eight percent of older adults had been financially abused, losing, on average, $20,000 each.[7]

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[3]Clearinghouse on Abuse and Neglect of the Elderly (CANE), *Annotated Bibliography: Financial Abuse, Undue Influence, Scams, Frauds and Protection of Assets (2003).*

[4]"Financial abuse is the misuse of an older adult's money or belongings by a relative or a person in a position of trust." (Public Health Agency of Canada, Financial Abuse of Older Adults National Clearinghouse on Family Violence, *Financial Abuse of Older Adults*, 2005.) Thus family financial arrangements can be regarded as abusive even if not deliberately exploitative.

[5]National Committee for Prevention of Elder Abuse, *Financial Abuse* (2003). See also A.P. Blunt, "Financial exploitation: the best kept secret of elder abuse," (1996). *Aging*, No. 367.

[6] J. Wahl, & S. Purdy, *Elder Abuse: The Hidden Crime*, Centre for the Elderly and Community Legal Education Ontario (1991).

[7] C. Spencer, *Diminishing Returns: An Examination of Financial Abuse of Older Adults in*

Financial abuse is often not reported. Seniors may not realize that a legal remedy is available, or know who to report the problem to, or be embarrassed to admit having made a mistake.[8] When a loan or guarantee creates problems that fall short of deliberate abuse or exploitation, there may be a reluctance to seek a legal remedy. Parents are reluctant to take their children to court, and may not wish to jeopardize family relationships.[9]

For these reasons, legal solutions to problems created by family loans and guarantees, like other examples of financial abuse of the elderly, are difficult to devise.[10] Effective solutions must go beyond law reform. Education of the elderly and the helping professions, and creation of a network of support services to assist elderly citizens are clearly required to address the growing problem of financial abuse.[11]

However, it may be possible to address some of the problems surrounding family loans and guarantees through specific changes in the law. These reforms are intended to deter abuse and misunderstandings, and to make legal remedies clearer and more certain when family loans and guarantees come before the courts.

This discussion paper briefly describes the current law, and the reforms that might address the problems surrounding family loans and guarantees.

We welcome your comments. In particular, we ask readers to consider:

British Columbia. Vancouver, Gerontology Research Centre, Simon Fraser University (1998). See also E. Podnieks *et. al. National Survey on Abuse of the Elderly in Canada*, Ryerson Polytechnical Institute (1993).

[8]Marie Beaulieu & Charmaine Spencer, *Older Adults' Personal Relationships and the Law in Canada: Legal, psycho-social and ethical aspects,* Law Commission of Canada, 1999.

[9]L. G. Forer, *Unequal Protection: Women, Children and the Elderly in Court,* New York, 1991.

[10]See generally on the problem of dealing with financial abuse, Donald Poirier & Norma Poirier, *Why is it so difficult to combat elder abuse and, in particular, financial exploitation of the elderly?* Law Commission of Canada, 1999.

[11]For a general discussion of the problem of financial abuse and community-based responses, see Public Health Agency of Canada, Financial Abuse of Older Adults National Clearinghouse on Family Violence, *Financial Abuse of Older Adults,* 2005.

1. Whether family loans and guarantees create problems, particularly for the elderly, in Saskatchewan that should be addressed by law reform.

2. Whether the specific proposals for law reform set out below would make an effective contribution to the resolution of these problems.

LEGAL BACKGROUND

1. Loans

Family loan arrangements are often informal. They may not be in writing, and even if they are, the terms of the loan may not be clearly expressed and understood by the lender and borrower. This is often a source of misunderstanding and conflict when the lender seeks repayment. As the Centre for Elder Law Studies observes,

> Informal loans are not documented, and are generally made without objective third party input. The terms of these informal oral agreements may often tend to be very general and broad, and stated in colloquial language that is imprecise and may be misconstrued.[12]

A loan is a contract, even if it is not in writing. As a contract, the loan creates obligations that are legally enforceable. But the informality of family contracts can lead to three types of problems.

First, the terms of the loan may not be clear. What interest does it carry? When is it to be repaid? Financial advisors suggest that family loans should always be in writing, and clearly state the terms. For example, the National Endowment for Financial Education advises that any one making a loan to a family member should:

> Make the loan an "arm's length transaction." In other words, handle the loan to your relative as you would one with a stranger. Charge at least the minimum federal interest rate. . . . State in writing the amount of the loan, the interest rate and the repayment schedule.[13]

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[12]Canadian Centre for Elder Law Studies, *Consultation Paper on Financial Arrangements Between Older Adults and Family Members: Loans and Guarantees* (September, 2003).

[13]National Endowment for Financial Education, *Approach Family Loans with caution: Lending money to relatives can be risky financially—and emotionally* (March, 2003).

Second, the parties may not both understand that the arrangement is really intended to be a loan. Generally, the law presumes that when money or other property is transferred, a gift is not intended unless there is good evidence to the contrary. However, the nature of the agreement between the parties may still be uncertain if it is not in writing. As the Centre for Elder Law Studies notes, ""I'll pay you back when I can" may mean one thing to the receiver, but be understood by the giver to mean something quite different.." The lender may regard the agreement as a loan that the borrower will make every effort to repay as promptly as possible, while the borrower may see it more as a gift, which will be returned only if it becomes convenient to do so. Often, the money remains unpaid when the lender dies. The borrower may believe that is the end of it. Other family members may regard the money as a loan owing to the lender's estate, or as an advance on the borrower's inheritance that should be deducted from the borrower's share of the estate.

Third, while informal and unwritten agreements can create binding contracts, they may be harder to prove and enforce in practice. If there is disagreement about the nature and terms of the arrangement, in the absence of a writing a court may find it difficult to reconstruct the intentions of the parties. In addition, legal rules that affect the interpretation of agreements may be more difficult to apply, and more apt to produce unwanted results, if the agreement is not clear and is not in writing.

Even when the terms of an family loan are clear, issues can arise. If the lender is vulnerable due to dependance or declining mental capacity, a family member may take advantage of the vulnerability. If there is a reluctance to reduce the agreement to writing, the opportunity for abuse is increased. Unfortunately, it is just those who are most vulnerable who may be most easily persuaded to agree to a vague, unwritten arrangement. As the Centre for Elder Law Studies observes,

> Older adults may be anxious to prevent this kind of familial squabbling but may also feel uncomfortable about asking for documentation or "going into details," fearing to suggest a lack of trust or confidence.[14]

Determining the status and terms of an family agreement is often primarily a question of fact.

[14]Canadian Centre for Elder Law Studies, *Consultation Paper on Financial Arrangements Between Older Adults and Family Members: Loans and Guarantees* (September, 2003).

The court will consider the written agreement if there is one, or attempt to sort out the conflicting evidence given by family members if there is not. However, there are legal rules that may also influence the outcome.

While the law usually presumes that a transfer of money or property is not intended as a gift unless there is clear evidence to the contrary, there are exceptions. There is a "presumption of advancement" from a father to his son or daughter. Thus a transfer from father to child is presumed to be a gift in the absence of evidence to the contrary.[15]. The presumption does not apply to transfers from mother to child. The presumption has been criticized, both because it does not apply equally to transfers from mothers and fathers, and as a rule that no longer reflects the usual expectations of parents and their adult children. In the present context, it could make it more difficult for a father to establish that a transfer to an adult child was intended to be a loan rather than a gift.

The lender may be able to overturn a loan contract or gift in some cases on the grounds that it was obtained by fraudulent misrepresentation or undue influence, or that it was unconscionable, or that there was a fundamental mistake in the lender's understanding of the nature of the agreement. These remedies may be valuable in cases of financial abuse, where the victim was taken advantage of by the beneficiary of the agreement. However, in the more usual case in which the issue is enforcement of payment of a loan, they are of limited value. They are more useful in cases involving guarantees, and will be discussed below in that context.

2. Guarantees

It is not uncommon for a family member to be asked to guarantee a loan for another family member. Often, the assistance is sought when the borrower has been told by a financial institution that a guarantor is required as a condition for the loan because the borrower has insufficient security to satisfy the lender. Unlike family loans, guarantees are almost always in writing, in the form required by the financial institution making the loan. When the borrower defaults on loan payments, the lender can demand payment from the guarantor.[16]

[15] *Re Wilson* (1999), 27 E.T.R. (2d) 97 (Ont. Gen. Div.).

[16]Alternatively, a family member may co-sign a loan with another family member. In this case, both family members are principal debtors. In the case of a guarantee, the lender must demand payment from the borrower before seeking payment from the guarantor. The lender may demand

Family guarantees are most apt to cause difficulty if the guarantor does not understand the full implications of the guarantee. It has been suggested that:

> People often co-sign or guarantee a loan for a friend or relative without knowing what can happen. If they knew, they might not co-sign or guarantee the loan . . . . Sometimes it's necessary or helpful to co-sign or guarantee a loan. It may be a sound business deal, or it may help a family member. But before you agree to put yourself at risk, look at the situation carefully. Read the loan contract carefully. Ask questions like:
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> * Why does the lender require a co-signer or guarantor?
> * How high is the risk that the borrower will have trouble and you'll have to pay the loan?
> * What will happen if you don't sign?
> * Most importantly, can you afford to pay off the loan if the borrower can't?
>
> If you are not sure about your responsibility, or about anything else in the loan contract, get advice from a lawyer.[17]

The guarantor cannot always rely on the financial institution to provide information about the guarantee. Although it is standard practice to require the guarantor to sign it in the presence of a notary or lawyer, who is expected to give some explanation of its effect, the law generally does not require the lender to disclose information about the guarantee except in response to specific questions posed by the guarantor.[18]

The law presumes that guarantors understand the risk. But as the Centre for Elder Law Studies

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payment from either co-signer without demanding payment from the other. Because most people probably understand that co-signing a loan makes them liable to pay it, co-signing is less problematic than guaranteeing. The recommendation discussed below in regard to guarantees could, however, be adapted to extend to co-signing.

[17]Canadian Bar Association, *Co-signing or Guaranteeing a Loan*, 2003.

[18]*Rowlatt's Law of Principal and Surety*, 4th ed. (1982). There is an exception if any "unnatural circumstances" exist, but these do not include, for example, the reasons why the lender required the borrower to secure a guarantor.

observes:

> The presumption that risks are understood may not be accurate where the guarantor is a family member motivated by loyalty and the desire to help. Family member guarantors may have little experience with lending practices, and may not understand the reasons why guarantees are necessary . . . . A family guarantor may feel inhibited about asking questions, not wanting to suggest a lack of confidence in the ability of the borrower to make repayments or otherwise "rock the boat." [19]

If the guarantor has misunderstood the obligations he or she has undertaken, there are some limited circumstances in which the court may void the guarantee.

1. Mistake. The guarantor may allege that he or she was mistaken about the nature and terms of the agreement.[20] If successful, this plea will overturn the agreement, and require the borrower to return the money received. The courts rarely find that a mistake of this sort has occurred when, as in the case of guarantees, the agreement is in writing.[21] The rule also applies to family loans, but the courts are reluctant to make a finding of mistake, even if the agreement is not in writing. In the absence of undue influence or misrepresentation, this plea is most likely to succeed if the person pleading it can be shown to be mentally incompetent.[22] For that reason, mistake may be an important consideration in cases in which a family member has taken advantage of the declining mental capacity of an elderly person.

2. Misrepresentation. An agreement may be overturned on the grounds that one party has misrepresented the terms of the agreement to the other. In the case of a guarantee, the guarantor would have to show that the financial institution misrepresented the guarantee. In the case of a family loan, the loan could be overturned if the borrower misrepresented its nature or terms.

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[19]Canadian Centre for Elder Law Studies, *Consultation Paper on Financial Arrangements Between Older Adults and Family Members: Loans and Guarantees* (September, 2003).

[20]In law, a mistake of this kind is referred to as *non est factum* (literally "not his deed.")

[21]See *Duhaime's Canadian Contract Law*, 2004.

[22]*Beaulieu* v. *National Bank of Canada* (1984), 55 N.B.R. (2d) 154 (C.A.).

In the absence of undue influence or mistake, the misrepresentation must generally be fraudulent.[23] It has been held that for a finding of fraudulent misrepresentation to succeed, it must be shown:

> (1) that the representations complained of were made by the wrongdoer to the victim (before the contract); (2) that these representations were false in fact; (3) that the wrongdoer, when he made them, either knew that they were false or made them recklessly without knowing whether they were false or true; and (4) that the victim was thereby induced to enter into the contract in question.[24]

This is often a difficult test to meet in practice.

3. Unconscionability. An agreement may be overturned as unconscionable if one of the parties took unfair advantage of the frailties of the other to induce him or her to enter the agreement. A lending institution might be held to have taken advantage of a guarantor. If the unconscionable party is a borrower who induces the guarantor to provide the guarantee, the guarantee can be voided only if the lender knew of the unconscionability. In the context of family loans, the family member who borrowed from the victim might be accused of unconscionability.

Although unconscionability is a doctrine originally developed by the courts, it has been partially codified in Saskatchewan. *The Unconscionable Transactions Relief Act*[25] provides:

> 3 Notwithstanding the provisions of any other Act, where, in respect of money lent, the court finds that, having regard to the risk and to all the circumstances at the time the loan was made, the cost of the loan is excessive or that the transaction is harsh or unconscionable the court may:
>
> (a) re-open the transaction and take an account between the creditor and the debtor and relieve the debtor from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of the principal and the cost of the loan . . . .

Note that the *Act* deals only with unconscionability on the part of lenders, not borrowers who

[23]Fraudulent misrepresentation may also be a criminal offence.

[24]G. Fridman, *The Law of Contracts in Canada*, 1994.

[25]R.S.S. 1978, c. U-1.

induce others to loan them money. Thus it has little application to family loans. However, the *Act* defines "debtor" to include a guarantor. Thus it does provide protection for guarantors.

To find unconscionability, the court must be convinced that the agreement was unfair, and that the parties were unequal because of "ignorance, distress or incapacity of the weaker party."[26] As the Centre for Elder Law Studies notes:

> [T]he pith of the doctrine is actual *exploitation* and the inequality of the weaker party must be known to and exploited for advantage by the stronger. Circumstances indicating exploitation may include excessive cost; additional security (as opposed to a fresh advance); cursory or perfunctory documentation and/or application process; irregular procedure; inadequate disclosure regarding the nature of the transaction and its risks; lack of fair consideration.[27]

The doctrine of unconscionability is obviously useful in cases of financial abuse. But as the Centre observes, to the extent that it involves the motives of the party charged with unconscionability, it may not always be available to overturn onerous contracts. It has been held not to apply to a contract that appeared unfair on its face when the motive was nonetheless a "genuine desire to assist a relative, without personal monetary gain."[28]

4. Undue Influence. Like unconscionability, undue influence involves one person taking advantage of a position of power over another person. However, the focus in this case is on the relationship between the parties, and the effect it has on the judgement of the wronged party rather than on deliberate exploitation by the wrongdoer. A person acting under undue influence is deemed not to be acting voluntarily. An agreement induced by undue influence will be overturned if it is unfair.

The law presumes undue influence in certain relationships. Thus, for example, a parent is presumed to have influence over a minor child. Other relationships are not presumed to give rise to undue influence, but are suspect, and may be found to involve undue influence on the facts of

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[26]*Murphy* v. *Murphy*, [1995] O.J. No. 3569 (Gen. Div.)

[27]Canadian Centre for Elder Law Studies, *Consultation Paper on Financial Arrangements Between Older Adults and Family Members: Loans and Guarantees* (September, 2003).

[28]Citing *CIBC* v. *Ohlson*, [1996] A.J. No. 185 (Q.B.).

the individual case. This includes relationships between husband and wife[29], and between elderly persons and their adult children.[30]

Closely related to undue influence, but technically distinct, are situations in which a fiduciary takes advantage of his or her position. A guardian is a fiduciary of a ward. More generally, financial dependency may create a fiduciary relationship.

[29] *Bank of Montreal* v. *Duguid* (2000), 47 O.R.(3d) 737 (C.A.)

[30] *Avon Finance Co.* v. *Bridger*, [1985] 2 All E.R. 281 at 288.

REFORMING THE LAW

1. Are there legal solutions for the problems of family loans and guarantees?

The legal remedies discussed above provide limited, but significant, protection for elderly family members when family loans and guarantees are made. As the Centre for Elder Law Studies concluded:

> The law currently protects the interests of borrowers and guarantors where it can be shown that the transaction was unfair because of lack of understanding or consent, pressure, exploitation of ignorance or other weakness, or the breach of a fiduciary duty. The equitable doctrines of undue influence and unconscionability, in particular, are especially likely to apply to older family members. The older adult who loans money to a younger family member may, like any other lender, ask to have the loan enforced (repaid, according to its terms) . . . .[31]

The Centre suggested some improvements that could be made to clarify the law and better adapt it to address family loans and guarantees. But the Centre suggested that the more pressing need is adoption of measures that will help prevent financial abuse and encourage family members who make loans and give guarantees to pursue their rights. These include measures to encourage documentation of family loans and enhanced disclosure to guarantors.

Reforms designed to achieve these purposes will be discussed below. However, an important threshold question is whether specific changes in the law addressed directly, and only, at the problems of family loans and guarantees will be effective.

It can be argued that neither enhanced legal rights nor preventative measures such as improved disclosure will be effective unless they are part of an integrated program of education and community support designed to combat financial abuse of the elderly. A paper prepared for the

[31]Canadian Centre for Elder Law Studies, *Report: Financial Arrangements Between Older Adults and Family Members: Loans and Guarantees* (October, 2004).

Law Commission of Canada concluded that the black-letter law currently in place is adequate. The problem, according to the paper, is attitudes and lack of a support network for seniors.[32]

If presented outside a broader context, specific reforms addressing family loans and guarantees may not only be ineffective, but unwelcome to many older citizens. The Centre for Elder Law Studies was told by financial advisors that most of their elderly clients did not take advice to refuse a family loan or guarantee. In many cases, a sense of family responsibility may be sufficient reason to run a risk, even if it is fully appreciated. But in the absence of a community support system, there may be other reasons why advice is ignored. The Centre observed that:

> Older adults as a group may be less likely than others to pursue legal action, however, especially where family members are involved. The failure of expectations - that loans were not repaid, that a daughter's business failure resulted in significant personal loss - may be a source of potent shame feelings for parents and other older family members (this kind of thing shouldn't happen to "nice" families). Demoralized older adults facing significant financial loss, potentially including homelessness, may not have the resources to seek out and obtain legal assistance.[33]

Factors such as these reduce the utility of even the kind of preventive measures advocated by the Centre.

Nevertheless, there may be a place for specific measures addressing family loans and guarantees. The law ought to be as useful and effective as possible. While specific reforms may not be a panacea, the law should make remedies available for those who seek them, and should at the very least make sure that adequate information for decision making is available. None of the measures discussed below will entail much expense to implement. If they can make a positive, even if limited, contribution to solution of the growing problem of financial abuse of the elderly, they may be worth adopting.

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[32] Donald Poirier & Norma Poirier, *Why is it so difficult to combat elder abuse and, in particular, financial exploitation of the elderly?* Law Commission of Canada, 1999.

[33] Canadian Centre for Elder Law Studies, *Report: Financial Arrangements Between Older Adults and Family Members: Loans and Guarantees* (October, 2004).

2. Loans

The protection provided by the legal rules relating to unconscionability and undue influence are likely adequate in regard to family loans. They could be used, for example, to rescind a loan made on unfair terms by an elderly family member. The general law is also adequate to enforce repayment of a loan if its terms and conditions are clear. The legal problems not clearly addressed by the current law appear to result largely from the fact that family loans are often unwritten and informal. The terms of the loan — such matters as interest and method of repayment — are often not clear. In some cases, it is not clear whether money transferred within the family is intended to be a loan or a gift.

The latter problem is made more difficult by the presumption of advancement from father to child. The presumption that a gift is intended in such a case (but not others, such as mother to child) likely does not conform to the expectations of either parents or their adult children.

The Centre for Elder Law Studies suggests that the problem of informality can be at least partially addressed by presuming that family transfers are loans made on default terms set by statute if the nature and terms of the arrangement have not been clearly expressed. The Centre recommends adopting the following provision:

> **Family transfer presumed to be a loan**
>
> (1) Subject to subsection (2) a family transfer is presumed not to be a gift but instead to be a loan made by the transferor to the transferee upon the following terms:
>
> (a) the loan is repayable on demand
>
> (b) the loan carries no interest, and
>
> (c) if, on the death of the transferor the loan is unpaid, the loan is payable to the transferor's estate and may be deducted from any entitlement of the transferee to share in or benefit from the estate.
>
> (2) The presumption created by subsection (1) may be rebutted if:
>
> (a) the transfer or any aspect of it is the subject matter of a writing, including a will, evidencing an intent by the parties to the transfer that is inconsistent with the presumption, or
>
> (b) all of the circumstances surrounding the transfer, including the amount of the transfer, suggest an intent by the parties that is inconsistent with the

presumption.[34]

Because family loans are essentially private matters within families, there is little opportunity for the use of mandatory forms and disclosure documents of the kind often required by consumer protection legislation. The Centre for Elder Law Studies suggests that some of the purposes of mandatory forms might be achieved by providing, in legislation or otherwise, a form to "assist members to document their loan transactions." The form would "serve as a checklist to ensure that the parties have turned their minds to the most fundamental terms of their agreement and as a template that will make it easy to record what those terms are (in particular encouraging the parties to make clear statements about the terms of repayment)." The preamble to the proposed form indicates its practical and educative function:

> **Our Family Loan**
> Our purpose in completing this form is to set out our intentions in relation to a proposed family loan and to ensure that we have thought about its important elements and that no uncertainty or confusion can arise later.

The form is not a model loan agreement, but a record of such matters as the identity and relationship of the parties, interest rate, and terms of repayment. [35]

3. Guarantees

The protection provided by the legal rules relating to unconscionability and undue influence are likely adequate in regard to family guarantees. They can be used to attack a guarantee if it is the result of unfair practices by the lender or the family member who benefits from the guarantee.

The principal inadequacy in the existing law identified by the Centre for Elder Law Studies is the limited disclosure lenders are required to give to guarantors. As the Centre notes

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[34]Canadian Centre for Elder Law Studies, *Report: Financial Arrangements Between Older Adults and Family Members: Loans and Guarantees* (October, 2004), p. 27.

[35]Canadian Centre for Elder Law Studies, *Report: Financial Arrangements Between Older Adults and Family Members: Loans and Guarantees* (October, 2004), p.32.

> The older adult who gives a family guarantee is in an extremely vulnerable position. Guarantees are often complex arrangements and there is a very real chance that the guarantor may not appreciate the nature of the risks being assumed or the extent of his or her obligations under the guarantee.

The Centre recommends adoption of legislation requiring enhanced disclosure to ensure that "the guarantor receives the information necessary to make an informed choice."

> **Family guarantees: disclosure by commercial lender**
> A commercial lender must deliver to the guarantor, before completing a family guarantee, a statement, disclosing the following:
> (a) whether the guarantee includes any prior loans to the borrower and, if so, the amount owing under the prior loans,
> (b) whether the guarantee covers any future extensions of credit and, if so, whether they are limited in time or amount,
> (c) the maximum amount for which the guarantor may become liable under the guarantee or, if the guarantor's liability is unlimited, a statement to that effect,
> (d) the right of the guarantor to cancel the guarantee . . . . and
> (e) a statement in the form set out in the Schedule to this Act.

The legislation would also give the prospective guarantor a 10-day "cooling off period" to consider the effect of the guarantee.[36]

The form required by the legislation would be educative, setting out information about the legal effect of a guarantee:

> **Schedule**
> **Important Information about Guarantees**
>
> A guarantee is a binding legal document. It imposes a serious liability. It is not a mere formality. Sign it only if you wish to be bound. If the borrower fails to repay what is owed, you, as the guarantor of the debt, become responsible to pay. If you

[36]Canadian Centre for Elder Law Studies, *Report: Financial Arrangements Between Older Adults and Family Members: Loans and Guarantees* (October, 2004), p.29.

fail to pay, your assets and income may become liable to seizure to satisfy the debt.

Make sure you understand the terms of the guarantee. It may cover more than the amount of the loan made or credit extended at the time the guarantee is given. Depending on how the guarantee is worded it may make you legally responsible to pay:

• old debts of the borrower owing to the same lender, or

• future loans made or credit extended by the lender to the borrower

If you are in any doubt, ask the lender to explain carefully the nature and extent of your legal responsibilities under the guarantee.

The law gives you a "cooling off" period of 10 days in which you may cancel the guarantee by giving a notice to the lender. Make sure you understand your right to cancel and how notice must be given to the lender.

4. Questions for discussion

This consultation paper is intended to be the basis for discussion and comment. Before proceeding to formulate its recommendations, the Commission would appreciate your comments and suggestions.

To focus discussion, the following questions may be helpful.

1. Do family loans and guarantees create problems, particularly for the elderly, in Saskatchewan that should be addressed by law reform?

2. Are there specific changes in the law that would make effective contributions to the resolution of these problems? These legal solutions might include:

(a) Enhanced disclosure requirements concerning the nature and effect of loan guarantees.

(b) A presumption in law that, unless clearly stated to be otherwise, advances of money between family members are presumed to be loans.

(c) Adoption of a standard form of family loan documentation that could be

used when family loans are made.