RESTITUTION FOR THE ELDERLY CLIENT[1]

I. OVERVIEW – RESTITUTION AS AN ALTERNATIVE REMEDY

Real estate lawyers frequently deal with transfers of money and property between older adults and younger generations. Normally, transfers of wealth are pre-planned and take place at predictable times, such as the administration of the estate of a deceased person, or as part of a deliberate, well-advised and well-documented estate plan. However, in many cases older adults lose ownership or possession of real and personal property in ways that are unplanned, haphazard and under confusing circumstances that sometimes are not even fully known to the older adult.

It can be extraordinarily difficult to give cogent legal advice on the remedies available to an older adult who is disgruntled with the disappearance of assets and wishes to restore his or her estate. It can be difficult to factually determine the true circumstances surrounding a seemingly inadvertent wealth transfer, and rarely does clear documentary evidence exist that would lead to a straightforward claim for recovery. It can be difficult, if not impossible, for example, to determine after-the-fact whether money advanced was the subject of a personal loan, and if so what were the terms of repayment. Fortunately for the older adult whose rights are in issue, a claim based on restitution can often provide a viable legal remedy for restoring real and personal property that has been lost under questionable or suspicious circumstances.

This paper will outline some of the circumstances that can lead to the loss of property, common difficulties with traditional tort and contract remedies, a general outline of the law of restitution with some case examples, and suggestions for the avoidance of litigation and protection of the rights of an older adult.

II. REAL ESTATE AND OTHER ASSETS LANDING IN THE WRONG HANDS

Any experienced real estate lawyer will have innumerable “war stories” of clients, including many older adults, who one way or another have lost ownership or possession of assets that the client has later come to regret and wished to recover. In some cases the older adult would not have been fully aware of the facts, or the consequences of real property and other financial transactions at the time those transactions took place. It would be impossible to detail all the various means by which these transactions take place, but some of the most prominent themes include the following:

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[1] © Graham Webb, Staff Litigation Lawyer, Advocacy Centre for the Elderly, Toronto, Canada (2014).

1. Improvident Gifts/Loans

Older adults frequently transfer money to family, friends and other loved ones without clearly identifying the conditions of the transfer. The money could be derived from savings or investments, the proceeds of a loan borrowed on behalf of another person, or the proceeds of the sale or mortgage of real property. Frequently the nature of the transfer of funds is not documented as to whether it is a gift or a loan. If it were a gift, there might be implied conditions concerning the vesting of the gift. If it were a loan, the terms of repayment might not be documented or even discussed in advance of the transfer. Frequently, these types of transfers are driven by the financial circumstances of the recipient of funds, with much urgency for the completion of the transaction and little if any consideration given to the protection of the property rights of the older adult.

2. Inadvisable Real Estate Transactions

Older adults, for a myriad of reasons, frequently make inadvisable real estate transactions. They might mortgage a principle residence in order to donate the mortgage proceeds to another person with an immediate need for funds, under circumstances in which it is implied but entirely unclear as to when and under what conditions repayment will take place. They may convey a joint ownership interest as an estate-planning device when an *inter vivos* transfer of a real property interest was never intended. They may convey title to property outright to another person without ever intending to lose the ownership interest evidenced by the transfer. Commonly, they may sell a principle residence and apply the proceeds to the purchase of a new home held jointly with another person or entirely in the name of another person without ever having intended to lose control or the benefit of the original proceeds of sale. Sometimes, older adults are astounded to learn that they own a 1% interest as tenants-in-common in newly purchased property in respect of which they have supplied most or all of the purchase funds. Under these circumstances, rarely is there cogent documentary evidence of the actual intentions of the older adults involved in the transactions.

3. Misuse of Powers of Attorney

Powers of attorney for property give legal authority for an attorney to make financial transactions on the grantor's behalf, but do not change the legal or beneficial ownership of the grantor's property. Attorneys and guardians of property are fiduciaries who are required to act honestly and in good faith, and for the sole and exclusive benefit of the grantor of the power of attorney. Unfortunately, the breach of a fiduciary duty by an attorney for property is so common that powers of attorney are sometimes called "a licence to steal".

4. Abuse of Bank Signing Authority or Joint Bank Accounts

Informal banking arrangements such as on-line access to internet banking, debit cards, delegation of bank signing authority and joint bank accounts are sometimes used for the sake of convenience or as a substitute for the use of a continuing power of attorney for property, or for a statutory guardianship or court-appointed guardianship of property. The difficulties associated with unwinding the misuse of electronic access, debit cards, signing authority or a joint account are immense. Many older adults fail to realize that allowing another person to have on-line access to their bank accounts could permit that person to use the account for their own purposes or even to empty the account. In many cases, the older adult might not even be aware that on-line access had been acquired until an account history is obtained after-the-fact, because the person gaining access never suspected that the older adult would have the means to detect the on-line access in question. While internet banking transactions, once discovered, are relatively easy to trace, debit-card transactions are the opposite. It can be difficult if not impossible to forensically determine who made which ATM and point-of-sale transactions, and these types of transactions are particularly susceptible to abuse. Joint accounts give rise to the possibility of co-mingled funds, and aside from the difficulties associated with determining who took money out of an account and for which purposes, there can be the additional problem of figuring out who put money in and where the beneficial ownership of the account lies. Despite the common use of these informal banking arrangements, they are highly susceptible to abuse and are almost always inadvisable.

5. Fraud and Theft

In addition to all the means of loss in which the older adult him- or herself would usually have an integral role in terms of signing documents, providing passwords or paying or transferring money, there also exists the possibility of theft or fraud that might be commissioned without the active participation of the older adult whose rights are in issue. Fraud and theft, once identified, are best remedied with a police investigation and criminal charges if need be. In almost all cases, this would be the most sure and reliable legal process to follow.

However, in many cases an older adult would like to have recovery without initiating a police complaint or participating in any criminal proceedings. In many other cases, the older adult might seek legal advice knowing only that money or property has disappeared, without knowing the means of the disappearance. Investigation of the true facts can be significantly complicated if the older adult has health conditions or cognitive impairments that bring one's reason or memory into question. In those cases, there may be more than enough uncertainty over the accuracy and reliability of somewhat sketchy information to undermine a criminal investigation, or to make a police complaint or a civil action for fraud or theft completely inadvisable. However, even where actual fraud or theft has taken place, a claim for restitution can provide an additional or alternative route to recovery.

III. PROBLEMS WITH CONTRACT AND TORT REMEDIES

Naturally, the most immediate problem with recovery is that assets against which recovery could be made might no longer exist. However, where there would be a reasonable prospect of preserving property or satisfying a judgment, an older adult seeking legal advice would usually need very time-sensitive advice often based on incomplete facts and sometimes highly uncertain evidence.

It can be very difficult to quickly assess the evidence upon which a successful claim for recovery could be made. A lawyer needing to draft pleadings could have great difficulty in framing the facts in a way that properly reflects the evidence, and at the same time sufficiently describes the essential elements of a tort or contract claim. In that context, the most substantial problems associated with traditional tort and contract remedies could be summarized as follows:

A. Quasi-Contracts, Conditional Gifts and Loans

1. Absence of Certainty of Terms

In cases where money or property was transferred with implied conditions on the vesting of a gift, or an expectation of repayment of what in substance would amount to a loan, it might be almost impossible to describe the terms of transfer with enough certainty that would remotely resemble an enforceable condition, contract or quasi-contract. Most often, there might be scattered evidence of an acknowledgement of debt or some vague promise to repay, but identifying the terms of an intended condition or repayment can be highly elusive. Even where documentary evidence such as a promissory note exists, what actually happened might not remotely resemble the documentary evidence. An implied promise to pay when the debtor “is able” or at an undefined time in the future makes it difficult to plead when default took place. Most often, all that one is left with is evidence that money or property changed hands with a vague expectation of the performance of some duty or repayment that had never been reduced to any precise terms.

2. Absence of Evidence of Common Intention

It is essential in any contract or quasi-contract claim to prove the common intention of the contracting parties, without which any contract-based claim cannot succeed. One of the difficulties in pursuing a contract-based claim is that the parties may have commonly understood that money or property was to have been transferred from the older adult to another person, in consequence of which the person receiving the property would do something without ever clearly identifying what it was the recipient would do. It is often arduous to litigate the common intention of the parties, even where one party or the other is reasonably certain that a common intention in one form or another did exist.

B. Fraud and Theft

Where the likelihood of fraud or theft exists, lawyers can be justifiably reticent to advise civil proceedings based on those claims except in the clearest of circumstances. Legal actions of this type present complications that are not usually present in other forms of action.

1. Standard of Proof

The law of Ontario is that there is only one standard of proof in civil proceedings, which is proof of all material facts on a balance of probabilities.[2] Despite this clear, easily understandable and authoritative statement of law, triers of fact are usually much more reticent to make factual findings of fraud or theft than other types of findings. Perhaps some of that uneasiness is attributable to the vestiges of now displaced case law that would require a higher level of probability, or an increased scrutiny of evidence that is "commensurate with the occasion" of factual allegations that carry a moral stigma.[3] In any event, plaintiffs can expect a court to rise to the defence of a defendant accused in blunt terms of moral wrongdoing except on clear, cogent and convincing evidence. Where good evidence of fraud or theft exists, it should be pleaded. However, in many cases the evidence is uncertain at the outset of an action for recovery, and the risk of loss for actions brought in fraud, conversion and deceit in some cases can be unduly high.

2. Enhanced Costs Consequences

Furthermore, even where a plaintiff succeeds on other grounds, an unproven allegation of theft or fraud can lead to adverse costs consequences against an otherwise successful plaintiff. One would hope that the court, in looking at the overall picture, might find that that it had been reasonable to pursue such allegations based on the evidence available to the plaintiff at the outset of the proceeding, and at material times throughout the course of the action. However, without doubt, the potential adverse costs consequences of an unsuccessful claim in theft or fraud can severely complicate matters for the plaintiff. Fortunately, where theft or fraud is likely present, an alternative claim for restitution would usually be available without the same adverse costs consequences.

IV. THE LAW OF RESTITUTION IN ONTARIO

A. What is "Restitution"?

Restitution is a legal doctrine, or body of law, comprised of a collection of remedies "for benefits conferred under mistake of fact or law; under compulsion; out of necessity; as a

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[2] *F.H. v. McDougall,* 2008 SCC 53, [2008] 3 SCR 41 at paras. 40, 45-49, Rothstein, J. See also *McLean v. McLean,* 2013 ONCA 788, 118 O.R. (3d) 216 at para's 39-43, Weiler, J.A.

[3] See e.g.: *Bater v. Bater*, [1950] 2 All E.R. 458 (C.A.), Denning, L.J.; *Continental Insurance Co. v. Dalton Cartage Co.,* [1982] 1 S.C.R. 164 at 169-71, Laskin, C.J.C.

result of ineffective transactions; or at the defendant's request"[4] that are drawn together by the legal principle of unjust enrichment. In their comprehensive text on the subject, Professors Maddaugh and McCamus connect the concepts of restitution and unjust enrichment this way: "Restitution is by no means a new idea. Nor is the principle that underlies and unifies this body of legal doctrine – the prevention of an unjust enrichment."[5]

The unique advantage of a claim for restitution is that it is usually not necessary to show a "meeting of minds" or even a "common intention" between the older-adult plaintiff and defendant recipient of money or property in respect of which recovery is sought. This body of law alleviates the need for much evidence concerning what were the precise terms that the parties intended: it is enough to show the conferral of a benefit, and a corresponding deprivation with an absence of juristic cause.

B. Development of the Modern Law of Restitution in Ontario

1. Moses v. Mcferlen (1760)

The modern law of restitution finds its roots in equitable relief given by a famous judgment of Lord Mansfield in the 1760 decision of *Moses v. Mcferlen* [also known as *Moses v. McFarlan*], which awarded judgment for the repayment of money "[i]in circumstances where there was no possibility of imputing a promise to pay on the part of the defendant . . ." on the basis that "the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity, to refund the money."[6] Incidentally, it is rather astounding that despite fundamental changes in almost every aspect of the law, this 1760 judgment should continue to be cited in modern case law[7] and secondary legal literature.[8] However, and most importantly, the finding of liability where "obliged by the ties of natural justice and equity" and in the absence of a promise to repay has profound consequences for the very fact situations that are frequently presented by older adults: recovery is possible where money or property has changed hands without an express or certain promise to repay.

2. Abolition of the Forms of Action (1852)

Despite the ancient legal roots of the law of restitution, it is important to know that when English law was reformed with the abolition of the forms of action in 1852, the legal principles that are now expressed in the doctrine of restitution were largely renounced by

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[4] *Kerr v. Baranow,* 2011 SCC 10, [2011] 1 S.C.R. 269, Cromwell, J., at para. 31

[5] Peter D. Maddaugh & John D. McCamus, *The Law of Restitution*, looseleaf (Toronto: Canada Law Book, 2013) at 1-1. I am very grateful to the late Professor Peter Maddaugh and Professor John McCamus for my liberal use of their text and would urge the reader, if at all possible, to consult *The Law of Restitution* from which the following comments are substantially drawn.

[6] *Moses v. Mcferlen* (1760), 2 Bur. 1008 at 1012, Mansfield, L.J., as cited in Maddaugh & McCamus, *ibid.* at 1-5.

[7] See e.g.: *Pettkus v. Becker,* [1980] 2 S.C.R. 834 at 847, Dickson, J.

[8] See e.g.: A. Drassinower, "Unrequested Benefits in the Law of Unjust Enrichment" (1998), 48 *U. of T. L.J.* 459 at 470.

English courts well into the 20th century. On this point, Professors Maddaugh and McCamus write:

> Regrettably, however, with the abolition of the forms of action in the mid-nineteenth century, these so-called contracts implied-in-law, rather than being elevated to an independent status alongside the law of contract and the law of tort, were relegated to a subordinate position as an adjunct to the general body of contract doctrine. Thus, the law of quasi-contract in England became firmly impaled upon the pikestaff of 'implied contract'."[9]

3. *Sinclair v. Brougham* (1914)

The same authors go on to describe the renouncement and near disappearance of the principles of restitution in the landmark case of *Sinclair v. Brougham* (1914), which held that ". . . the common law of England really recognizes only actions of two classes, those founded on contract and those founded on tort . . ."[10] and "[t]here is now no ground left for suggesting as a recognizable 'equity' the right to recover money *in personam* merely because it would be the right and fair thing that it should be refunded to the payer."[11] The authors describe the "aftermath" of *Sinclair v. Brougham* as follows:

> . . . Lord Mansfield's principle of recovery, based on "the ties of natural justice", did not fare well. [Note: The principle became known as the "Mansfield fallacy".] In *Holt v. Markham,*[12] Scrutton L.J. referred to the "now discarded doctrine of Lord Mansfield" and characterized the evolution of the action for money had and received as a "history of well-meaning sloppiness of thought."[13]

The important point of this brief narrative of legal history is that even though the ancient roots of the law of restitution as formulated by Lord Mansfield in *Moses v. Mcferlen* continue to have modern relevance, a century of other conflicting caselaw that was laid down between the 1852 abolition of forms of action and the 1954 decision of the Supreme Court of Canada in *Deglman v. Guaranty Trust*[14] is largely inconsistent with current law concerning unjust enrichment and should be almost entirely disregarded. Unfortunately, from time to time courts are still drawn to early 20th century case law that is more reflective of the ratio in *Sinclair v. Brougham*[15] without necessarily appreciating the fundamental shifts in orientation of authoritative decisions that have since been made.

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[9] Maddaugh & McCamus, *supra* note 5 at 1-5 to 1-6.
[10] *Sinclair v. Brougham,* [1914] A.C. 398 (H.L.) at 415, Viscount Haldane, L.J., as cited in Maddaugh & McCamus*, ibid.* at 1-6.
[11] *Ibid.* at 456, Sumner, L.J., as cited in Maddaugh & McCamus, *ibid.* at 1-7.
[12] [1923] I K.B. 504 (C.A.) at 513.
[13] Maddaugh & McCamus, *ibid.* at 1-7.
[14] [1954] S.C.R. 725.
[15] *Supra* note 10.

4. *Restatement of the Law of Restitution* (1937)

Following *Sinclair v. Brougham,* it is enough to say that British-Canadian and American jurisprudence widely diverged on the availability of what are now known as restitutionary remedies. British and Canadian authorities were more or less stern and strict in the application of the doctrine of unjust enrichment in a way that tended to restrict or deny restitutionary relief. American jurisprudence proceeded on a different path that eventually culminated with the publication of the *Restatement of the Law of Restitution: Quasi-Contracts and Constructive Trusts*[16] which attempted to codify American law and which generally served as a model for the development of American case law on the topic in years to come. Professors Maddaugh and McCamus describe the effect of this publication as follows:

> . . . the *Restatement* set the law of restitution squarely upon the principle of preventing an unjust enrichment. Stated simply: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." . . . the *Restatement* established the law of restitution in America as an independent discipline, entirely separate from, but on an equal footing with, both the law of contract and the law of tort."[17]

5. *Deglman and Guaranty Trust* (1954)

Perhaps it should be no surprise that not long after publication of the *Restatement,* the Supreme Court of Canada set the path for a uniquely Canadian interpretation of the law of restitution that significantly departed from English authorities and more closely resembled American jurisprudence. While the actual decision in *Deglman v. Guaranty Trust*[18] took the form of a very specific and factually incremental departure from existing British-Canadian case law, the path it followed was a major departure that reflected the principle of restitution expressed by Lord Mansfield in *Moses v. Mcferlen,* and which set the path for development of Canadian jurisprudence since then. Specifically, in dealing with a claim for compensation under a factually implied *quasi-contract* that would have been unenforceable under the *Statute of Frauds,* the Court adopted the principle of restitution, as follows: "The statute in such a case does not touch the principle of restitution against what would otherwise be an unjust enrichment of the defendant at the expense of the plaintiff."[19]

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[16] (St. Paul: American Law Institute, 1937).
[17] Maddaugh & McCamus, *supra* note 5 at 1-10.
[18] *Supra* note 14.
[19] *Ibid*., as cited in Maddaugh & McCamus, *supra* note 5 at 2-3.

According to Professors Maddaugh and McCamus, this landmark judgment is consistent with the concept of restitution as a "third category" of law that is separate and distinct from tort and contract. With respect to *Deglman v. Guaranty Trust,* they write:

> . . . Cartwright J. drew support from the views of Lord Mansfield and Lord Wright, and quoted approvingly the famous passage from the *Fibrosa*[20] case in which Lord Wright adopted the unjust enrichment theory of restitutionary liability and observed that restitutionary remedies are generally different from those of contract and tort, and fall within a 'third category' of the common law.[21]

Deglman v. Guaranty Trust is the cornerstone and merely the starting point of Canadian jurisprudence on the law of restitution. Naturally, all preceding case law must now be considered in light of this decision, which represented a fundamental change in the law.

6. *Pettkus v. Becker* (1980)

The modern law of restitution came under intense scrutiny and analysis in a series of family law cases that examined property rights between married and unmarried spouses upon the breakdown of their union. In these cases, statutory rights to a division of property were not available, and the Supreme Court of Canada considered arguments for restitutionary relief in the form of a constructive trust, which Professors Maddaugh and McCamus describe as follows:

> In . . . *Murdoch v. Murdoch,*[22] the Supreme Court held . . . that [a claim for a beneficial interest in property owned by one's spouse] would not succeed in the absence of evidence of a common intention of the parties that the spouse who has taken legal title will hold beneficially for the other. In dissent, Laskin J. suggested that relief might be made available on the basis of a "constructive trust which does not depend on evidence of intention" which would be awarded in order to avoid "the unjust enrichment of [the plaintiff's] husband." This possibility was further explored by Dickson J. in *Rathwell v. Rathwell.*[23] In language reminiscent of Lord Wright's tri-partite division of the law of obligations into tort, contract and restitution in the *Fibrosa* case,[24] Dickson J. referred to the general nature of the constructive trust and its underlying theory in the following terms:
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> > The constructive trust amounts to a third head of obligation, quite distinct from contract and tort, in which the Court subjects "a person holding title to property . . . to an equitable duty to convey it to another on the ground that

[20] *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.,* [1943] A.C. 32 (H.L.) at 61. See also Maddaugh & McCamus, *ibid.* at 1-11.
[21] Maddaugh & McCamus, *ibid.* at 2-4.
[22] [1975] 1 S.C.R. 423, 41 D.L.R. (3d) 367.
[23] [1978] 2 S.C.R. 436, 83 D.L.R. (3d) 289.
[24] *Supra* note 20.

> he would be unjustly enriched if he were permitted to retain it." . . . The constructive trust is an obligation of great elasticity and generality.
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> Having thus adopted the American view that the constructive trust is a remedial device imposed to prevent and unjust enrichment, Dickson J. [in dissent] went on to indicate that such relief should be granted in cases of this kind even though the parties had not formulated an intention to share ownership of the property in question . . .
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> The Supreme Court returned to these questions a few years later in *Pettkus v. Becker*[25] and on this occasion the views of Dickson J. prevailed. Writing for a majority of the Court, Dickson distinguished between resulting trusts, which rest on the implication of an intention to hold property beneficially, and the constructive trust, which "is imposed without reference to intention to create a trust." As in *Rathwell,*[26] Dickson J. linked the constructive trust doctrine to a theoretical foundation in unjust enrichment: "The principle of unjust enrichment lies at the heart of the constructive trust . . ."
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> In this series of cases, then, the Supreme Court of Canada adopted, in the manner of the American *Restatement*,[27] the unjust enrichment principle as the theoretical foundation of the traditional doctrines of both quasi-contract and constructive trust . . ."[28]

Although the line of decisions that culminated with *Pettkus v. Becker*[29] were family law cases that dealt the restitutionary remedy of a constructive trust, the principles of law the court adopted and intended to be applied with "elasticity and generality" apply equally to all other areas of law and all other forms of restitutionary relief.

Furthermore, the *ratio* of *Pettkus v. Becker*[30] is important in and of itself to the immediate property rights of older adults, since the imposition of a constructive trust over real property held in the name of another person is a remedy that is directly applicable to their claims.

C. The Tri-Partite Test for Restitution

1. *Peel v. Canada* (1992)

The Supreme Court of Canada has continued to apply and develop the modern law of restitution to this date. One of the most piercing and influential analyses of this body of

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[25] [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257.
[26] *Supra* note 23.
[27] *Supra* note 16.
[28] Maddaugh & McCamus, *supra* note 5 at 2-7 to 2-9.
[29] *Supra* note 25.
[30] *Ibid.*

law came in the court's 1992 decision of *Peel (Regional Municipality) v. Canada,*[31] which Professors Maddaugh and McCamus describe as follows:

> . . . In the *Peel* decision, McLachlin J. suggested that reasoning from the general principle and reasoning from the existing categories [of relief] represent two alternative and, apparently, complementary approaches to the analysis of restitutionary problems. The two approaches are described as follows:
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> > The first is the traditional 'category' approach. It involves looking to see if the case fits into any of the categories of cases in which previous recovery has been allowed, and then applying the criteria applicable to a given category to see whether the claim is established. The second approach, which might be called the 'principled' approach, developed only in recent years. It relies on the **criteria which are said to be present in all cases of unjust enrichment: (i) benefit to the defendant; (ii) corresponding detriment to the plaintiff; and (iii) the absence of any juridical reason for the defendant's retention of the benefit . . .** [32]
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> . . . Unsurprisingly, it has become accepted Canadian practice to plead and argue claims based on the tripartite general principle and for courts to analyze problems in these terms."[33]

This statement of the essential elements of a claim for restitution is authoritative law that can be concisely stated and relied on in all circumstances.

2. *Kerr v. Baranow* (2011)

The currency and flexibility of the authoritative tri-partite test for restitution is demonstrated by the judgment of Cromwell, J., in *Kerr v. Baranow*,[34] as follows:

> At the heart of the doctrine of unjust enrichment lies the notion of restoring a benefit which justice does not allow one to retain . . . For recovery, something must have been given by the plaintiff and received and retained by the defendant without juristic reason. A series of categories developed in which retention of a conferred benefit was considered unjust. These included, for example: benefits conferred under mistakes of fact or law; under compulsion; out of necessity; as a result of ineffective transactions; or at the defendant's request . . .

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[31] [1992] 3 S.C.R. 762, 1992 CanLII 21, McLachlin, J.
[32] *Peel (Regional Municipality) v. Canada*, *ibid.* at 784 [emphasis added].
[33] Maddaugh & McCamus, *supra* note 5 at 2-14 to 2-15.
[34] *Supra* note 4.

> Canadian law, however, does not limit unjust enrichment claims to these categories. It permits recovery whenever the plaintiff can establish three elements: an enrichment of or benefit to the defendant, a corresponding deprivation to the plaintiff, and the absence of a juristic reason for the enrichment . . . By retaining the existing categories, while recognizing other claims that fall within the principles underlying unjust enrichment, the law is able "to develop in a flexible way as required to meet changing perceptions of justice."[35]

While there are many variations on the interpretation of these principles throughout the case law, there has been no discernable change in this foundational statement of law since it was adopted by the Supreme Court of Canada in *Pettkus v. Becker* in 1980.[36] Therefore, this test forms an essential platform for assessing and presenting all forms of restitutionary claims.

V. EXAMPLES OF RESTITUTION CASES INVOLVING OLDER ADULTS

1. *Tomkewich v. Ellis* (2011)

Tomkewich v. Ellis[37] is a prototypical gift-loan case that was recently decided in favour of an elderly plaintiff on the basis of restitution. It has all the elements of mixed and confusing messages over the advancement of funds that would be familiar to most experienced real estate lawyers.

The 94-year-old plaintiff wrote a cheque for $140,898 to the Royal Bank to discharge a mortgage on the home of his son's then common-law partner. After their common-law union broke down, the plaintiff demanded repayment of the advance but the defendant refused to repay.

At trial, there was conflicting evidence concerning the circumstances of the payment. It was clear that the plaintiff had offered to pay out the defendant's existing mortgage entirely at his own initiative. After several requests that he be permitted to do so, the plaintiff arranged to attend the bank with his son and the defendant where he provided funds to pay out the mortgage.[38] He wrote the word "loan" on the memo line of the cheque.[39] The plaintiff testified that the money was always intended to be a loan, but admitted there were no formal set terms of repayment. The plaintiff also said that as a result of this payment, the defendant was to put his son on title as part owner of her house.[40]

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[35] *Ibid.* at para's 31-2, citing *Peel (Regional Municipality) v. Canada*, *supra* note 31 at 788.
[36] *Supra* note 25 at 849.
[37] 2011 MBQB 166, 266 Man. R. (2d) 293, Dewar, J.
[38] *Ibid*. at para. 8.
[39] *Ibid.*
[40] *Ibid.* at para. 9.

The defendant testified that this was an unsolicited gift in respect of which repayment and a transfer of title to her home was never discussed.[41] She submitted that this was a pure gift that is not repayable, and that the evidence of the plaintiff and his son was "simply after-the-fact testimony designed to retrieve a gift which on second thought after the breakdown of the relationship between [herself and the plaintiff's son] was considered to be a mistake."[42]

Following *Pecore v. Pecore*,[43] the court held that in the case of gratuitous transfers, the onus is on the recipient to rebut the presumption of a resulting trust.[44] It also held that to establish a gift the recipient must prove on a balance of probabilities three criteria: (i) an intention to donate; (ii) acceptance of the gift; and (iii) sufficient act of delivery.[45] Here, the court found that although there was delivery and acceptance of the property, the defendant had failed to satisfy the onus of proving a donative intent on the part of the plaintiff, and her claim that this was a gift therefore failed.[46]

The court went on to find that neither was the advance of money a loan for want of "a meeting of the minds." The court's finding of fact could easily reflect the sort of evidence present in many similar cases that pass through lawyers' offices on a daily basis:

> . . . To be a loan . . . both the plaintiff and the defendant must intend that the plaintiff advanced the monies to the defendant to be repaid upon demand or at some other future time. I have concluded that the plaintiff advanced the monies with no current intention of demanding them in the foreseeable future, but with the reservation that he could make a demand if he chose to do so at some future time. I have also found that he did not discuss repayment of the loan with the defendant. She therefore never agreed to any particular time or method of repayment. Under those circumstances, I am not prepared to imply terms into a contract which did not exist because the parties were not *ad idem* that the advance was to be a loan.[47]

The court then gave judgment for the plaintiff on the following basis:

> However, where monies are advanced by one party with the intention only of that party that the monies are a loan, the authority of the court to require a repayment is found in the law of unjust enrichment. Where there exists:
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> a) an enrichment of the defendant,

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[41] *Ibid.*
[42] *Ibid.* at para. 16.
[43] 2007 SCC 17, [2007] 1 S.C.R. 795.
[44] *Tomkewich v. Ellis, supra* note 37 at para 17, citing *Pecore v. Pecore, ibid.*
[45] *Ibid.* at para 18.
[46] *Ibid.* at para. 24.
[47] *Ibid.* at para. 27.

b) a corresponding deprivation to the plaintiff, and

c) an absence of juristic reason for the enrichment,

the court may make an order to repay the money to avoid an inequitable result.

Accordingly, the defendant has been unjustly enriched and to remedy that situation, she is ordered to repay the sum of $140,898 to the plaintiff.[48]

Tomkewich v. Ellis could easily form a template for the determination of intergenerational gift-loan cases.

2. *Jones v. Jones* (2014)

Jones v. Jones[49] is a current example of a claim for restitution and other relief that fairly reflects the type of problems frequently encountered by older adults. In this case, a retired widow purchased a Toronto townhouse to serve as a residence for herself, her disabled son and her adult daughter. She contributed her savings to the down-payment, and financed the balance of the purchase price with a mortgage loan. Even though her daughter contributed nothing to the purchase price of the home, she put her daughter's name on title as a joint tenant. Although she always intended hold full beneficial ownership of the home, she said she put her daughter on title to hold the property in trust for her into her old age, and to provide security for her autistic son.

Years later, her daughter brought home a live-in boyfriend without the mother's permission, and with whom the mother could not get along. Eventually the mother asked her daughter and her boyfriend to leave the home, but they refused. The mother then brought an application for a vesting order to title to the house on the basis of a resulting or constructive trust; and collateral claims for other relief including the recovery of personal loans and advances of money; damages for the unauthorized use of a line-of-credit; and retroactive imputed occupation rent. These types of claims are very typical of the co-mingling of funds and of the informal, undocumented financial arrangements that often tag along with a claim for recovery of real property.

The daughter and her boyfriend were self-represented, and had still refused to vacate the property at the time of trial. However, they did at trial consent to an order vesting title in the mother and to vacate the property as directed. In consequence of that, there was no contentious issue as to the availability of restitutionary remedies with respect to title to the house. However, the court held that it would have granted those orders in any event based on:

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[48] *Ibid.* at paras. 27-28.
[49] ONSC 787 (Quigley, J.)

> (i) the evidence relative to the acquisition and ownership of the property; (ii) the fact that the position of the applicant was essentially unopposed by the respondents; and (iii) my own view that the evidence present in this record and the governing authorities supported a finding of resulting or constructive trust in favour of the applicant: see *Kerr v. Baranow*[50]*,Peter v. Beblow*[51]*, Pecore v. Pecore*[52]*; Madsen Estate v. Saylor*[53]*.*

The impressive effort the court then made in determining the collateral claims by the applicant based on a hodgepodge of evidence is instructive. It heard evidence spanning nearly ten years concerning the arrangement and payment of a personal car-loan for the daughter and a joint line-of-credit that was used by both mother and daughter; the mortgage-payment history; and the payment of household bills and utilities for a period of time that far exceeded the availability of financial records. In the end, the court was not able to unwind much of co-mingled finances of the parties, but it did award judgment to the mother by directing the daughter to pay out a jointly-held car-loan for an automobile owned by the daughter; and to repay the mother for the outstanding balance of a jointly held line-of-credit against which the daughter had drawn; and for unpaid household utilities upon which the daughter defaulted in payment.

In bringing a comprehensive claim for the restitution of real and personal property, it would be hard to imagine a court going to greater lengths to unwind the finances of the parties, and to any greater benefit for the applicant than occurred in this case.

It is also telling that in 2014 the Ontario Superior Court should be dealing with self-represented respondents in this proceeding, which is now happens very frequently in all types of proceedings. This phenomenon certainly makes litigation more complex and difficult. It also increases the likelihood that real estate lawyers will encounter their former clients who need to access closed file information in preparation for a self-represented proceeding. This inevitably may lead to self-represented litigants also looking to their former lawyers in the course of these encounters for other material evidence relative to the proceeding, and for legal advice.

3. Cooper v. Grace

Cooper v. Grace[54] is a simple, straightforward example of a gift-loan case that was decided in favour of the older-adult plaintiff. The plaintiff brought her claim upon the dissolution of the marriage of her daughter and son-in-law, to whom she had advanced

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[50] *Supra* note 4.
[51] [1993] 1 S.C.R. 980, 1993 CanLII 126.
[52] *Supra* note 43.
[53] 2007 SCC 18, [2007] 1 S.C.R. 138.
[54] 1998 CarswellOnt 4958 (SC), Donnelly, J.

$110,000 that she claimed was an interest-free loan repayable by installments to fund the purchase of their home.

The facts in this case were much more straightforward than in many other situations. There was evidence that her daughter, who admitted the debt, had made irregular installment payments. Although the defendant husband denied the existence of a loan, the court had little difficulty making findings of credibility that lead to the factual finding of a loan agreement on terms that were certain, and awarded judgment on the unpaid debt.

Of interest to this discussion is the court's finding that "[h]ad it been necessary to deal with the issue of a constructive trust I would have found the pre-requisites of unjust enrichment, corresponding deprivation and an absence of any juristic reason for the enrichment. There was a causal connection between the money and the unjust enrichment."[55]

4. *Gorodecki v. Rozen* (2001)

Gorodecki v. Rozen[56] is a peculiar, factually-complex case that was decided in favour of the older adult plaintiff without reference to the law of restitution. I include it in this small collection of cases because of the sort of facts it presents, and the type of legal reasoning that could be read between the lines.

This case involved an 83-year-old widower who was had been a sponsored immigrant to Canada, did not speak English, and was subjected to elder abuse according to the facts as found. The plaintiff was a Polish-born former resident of Israel. In 1967 the plaintiff and his late wife purchased a home in Israel in the name of their daughter, who later married and emigrated to Canada. In 1983, while still a resident of Israel, the plaintiff deposited money to a Canadian bank account held jointly with his daughter. In 1987 his wife died, and the next year he sold his home in Israel (still held in the name of his daughter), the proceeds of which were also deposited to a jointly held Canadian bank account.

In 1988 the plaintiff emigrated to Canada, and was sponsored by his daughter and son-in-law with whom he lived at their Toronto home. Shortly after his arrival in Canada, his daughter died.

After his daughter's death, the plaintiff did not get along well with his son-in-law. He then discovered that his son-in-law had, by use of a power of attorney, removed all his funds from his bank account. The court found that his son-in-law responded to his complaints over the conversion of his funds with an immediate and concerted campaign to force the plaintiff out of his home, which included turning off the power to his room and the stove,

[55] *Ibid.* at para. 15, citing *Sorochan v. Sorochan,* [1986] 2 SCR 38, 29 D.L.R. (4th) 1.
[56] 2001 Carswell Ont (SC) Backhouse, J., appeal dismissed at 2002 CanLII 53279 (ON CA).

and disconnecting his phone and cable. The defendant son-in-law also struck the plaintiff in the head with a hammer. His son-in-law eventually moved the plaintiff out of his home and into a seniors' residence that was funded by a letter of credit for the duration of the defendant's ten-year immigration sponsorship agreement.

The plaintiff later brought action to recover the $121,000 that had been taken from his bank account, and additional punitive damages. The defendant claimed a set-off for the cost of supporting the plaintiff throughout his sponsorship, and alleged that the letter of credit provided to fund the plaintiff's retirement residence was given in settlement of their respective debts. The court made multiple findings of credibility against the defendant, and without specific reference to any particular law gave judgment in favour of the plaintiff for the misappropriation of his funds, and for punitive damages.

This case is pertinent because it highlights many of the complex factual issues that are often present in cases of this type. It deals with a long history of intermingling of real and personal property that extended from 1967 to 1998. It involved real property purchased by the older adult in the name of his daughter (when she was only 19 years of age), in respect of which beneficial ownership was a live issue at the time of the December 2000-January 2001 trial. There were evidentiary issues over very old financial transactions where documentary evidence was no longer available. It involved money and valuable services flowing in both directions, from plaintiff-to-defendant and from defendant-to-plaintiff, over an extended period of time. It dealt with an older adult who was disadvantaged and marginalized (in this case due to language), and subjected power differentials and abuse at the hands of the defendant. In short, it is a microcosm of many issues that present themselves in random fashion in law offices throughout Ontario: issues that are often factually complex, extended, and perhaps difficult to understand or prove with satisfactory evidence.

Although the brief verdict of the court was the misappropriation of funds, evidence of a criminal complaint and investigation was conspicuous by its absence. That issue brings us back to the beginning of this paper: even though a police investigation and criminal charges might be the most appropriate remedy, that avenue is oftentimes not pursued because perhaps the evidence is too ambiguous or complex to support a charge; or for reticence to pursue a complaint; or in this case perhaps because of the disadvantage and isolation of the plaintiff. Even when civil action was brought, claims of fraud and theft were not plainly spelled out in the language of the judgment. The court's verdict of "misappropriation" surely implies the tort of conversion. However, it would have been impossible for the plaintiff to know from the outset that he would eventually benefit from the many findings of credibility made on his behalf that lead to a successful verdict.

In retrospect, *Godrecki v. Rozen* is exactly the type of case in which an older adult wishing to recover money or property could benefit from a claim for restitution without the same risk of loss associated with other forms of action. While the factual and evidentiary issues

were complex, the legal principles would have been clear: there had been an enrichment of the defendant, a corresponding deprivation of the plaintiff, with an absence of juristic cause.

VI. SUGGESTIONS FOR THE AVOIDANCE OF LITIGATION

The availability of claims for restitution for elderly clients has a very significant relevance to the daily practice of real estate lawyers in Ontario. Real estate lawyers are very closely connected with the communities they serve. They are often involved with the real property transactions that might later the subject of dispute. Even when they are not directly involved in the transfer of real or personal property, they are frequently consulted or asked about a potential transfer while acting in the course of drawing wills, powers of attorney or other legal business. They are sometimes ideally situated to give timely advice and representation that could later prevent needless litigation.

In the unhappy circumstance that litigation does ensue, real estate lawyers are once again often at the front lines. If a transaction has gone badly, the lawyer that handled the deal will often be the first to be asked what to do and where to turn, and it is therefore important that the real estate lawyer should have some sense of which remedies are available and of what might be done. Furthermore, the real estate lawyer might be a material witness, or in the worst case a co-defendant in ensuing litigation. They are, therefore, always generally attuned to what might be done to avoid needless litigation.

In addition to all the other steps that real estate lawyers already routinely take to prevent needless litigation, the issue of restitution suggests particular attention to some of the following issues:

1. Deeds of Gift

If a donative transaction involves the payment of money, it might be advisable to prepare a deed of gift. Preparation and execution of this form might not overcome substantive problems with the gift, such as a genuine lack of donative intent, misunderstanding about what is to be given and whether it is ever to be repaid, what if anything is to be done by the recipient in consideration for the gift, and whether there are any implied conditions or restrictions on the making or the vesting of the gift. However, it can provide a useful process for drawing the mutual attention of the lawyer and the client to these issues and deciding them in advance of any gift being made.

While real estate lawyers are not usually consulted on making casual or spontaneous gifts of money from bank accounts and investments, they might be. More frequently, older adults are apt to make a gift of money from the proceeds of the sale of their home, or certainly from the proceeds of a mortgage loan drawn for the purpose of assisting a family member. In addition to obtaining the usual direction on funds for payment of trust funds to a third person, it could be very useful to the client to walk through the process of

making a deed of gift any time a lawyer's trust cheque is drawn to make a gift of money on behalf of a client to a third person.

Furthermore, even where the client does not direct the payment of funds to a third person, it would be highly appropriate for a real estate lawyer conducting a sale or mortgage transaction on behalf of an older adult to enquire into the ultimate disposition of funds. If the older adult speaks of a donative intent, it would be very useful to work through the mechanics of an *inter vivos* gift to explore the same issues.

2. Other Documentary Evidence of Gift

Since *Pecore v. Pecore,* much ink has been spilled over what would form appropriate evidence of a gift of real or personal property. I would not wish to elaborate on that topic, except to say that in view of the presumption of a resulting trust these transactions are not self-explanatory and the statement of "natural love and affection" on a Land Transfer Tax affidavit no longer carries the evidentiary value it once did.

Estates lawyers have long been in the habit of preparing detailed memoranda written in the words of a donor-client, and to be signed by the client, explaining the client's reasons for making or not making a particular testamentary disposition. When I last practiced residential real estate some twenty years ago, that practice had not yet taken root in the real estate bar, and I have not yet seen evidence of it in the course of litigating contentious real estate transactions. Despite that, I have often thought that a detailed memorandum signed by a client at the time of a non-arms-length real estate transaction that sets out the background, reasoning, and the older-adult's understanding of the transaction at the time it was made could save the costs and uncertain outcomes of litigation.

3. Independent Legal Representation

Lawyers in all areas of practice have an underlying duty to avoid a situation of divided loyalty between clients. Where an existing client brings his or her family member into a lawyer's office for advice and representation on a non-arms-length transaction that involves both parties, the issue of divided loyalty and a potential conflict of interest almost invariably arises. It is nearly unavoidable.

Real estate lawyers are now reticent to provide a limited service of independent legal advice, and for good reason. Frequently, ILA has the appearance of nothing but a rubber stamp on an unstoppable and possibly improvident transaction. No matter the substance of the ILA, a client who is seen briefly on a one-time basis is there for only one reason: to complete the legal and financial arrangements that have already been put in place. With commitments already made and time and money already invested, it is not usually the best time and place for the older-adult client to have reservations and second thoughts, although well it should be. From a litigation point-of-view, ILA in many real estate transactions can look like marriage-preparation course that is given while the bride or

groom is walking down the aisle. The risks are unduly high and the rewards are unduly low for lawyers giving such advice, which more often than not falls on deaf ears.

Independent legal representation of the older-adult whose rights are in issue would in most cases be a highly preferable process. Normally, an older-adult client would need to see the lawyer on more than one occasion to complete a transaction. A truly independent lawyer would have no actual connection, nor the appearance of any connection, with the original lawyer on the other side of the transaction. If a transaction is truly inadvisable or improvident, the older adult whose rights are in issue has a much better chance of stopping a seemingly unstoppable train while independently represented. It might be necessary to delve into the 'why's' and 'where-fore's' of a transaction with the older adult, and to document and flesh those out. It might even be necessary to change or scuttle an entire transaction, for example, by changing a gift to a properly documented loan on negotiated terms, to balk at the transfer or mortgage of real property, to turn an implied or resulting trust into a legally documented trust transaction, or to properly document the conditions of an intended gift within the terms of a trust deed. These are substantively difficult issues for an older-adult client to deal with that are usually not sufficiently accommodated in a single summary advice session.

4. Assistive Devices

It would be impossible to over-emphasize the importance of good interviewing techniques and the use of assistive devices. Hearing impairments are so prevalent among older adults that every law office dealing with older adults on a regular basis should have on hand a pocket-talker or similar device to assist a hearing-impaired client. Similarly, clients who cannot see, or who are in some form of physical distress or discomfort, even due to incontinence, are not usually receptive to legal advice. It does not take much to offer the use of a washroom before an interview, or to enquire if he lighting is satisfactory and if one's client is comfortably positioned and can see and hear well. These accommodations can make an interview much easier and more effective for both lawyer and client.

5. Appropriate Use of Language Support

A lack of the appropriate use of language support is certainly one of the biggest single issues raised after-the-fact by older adults seeking restitution for real estate transactions that have gone wrong. In some cases, the lawyer acting on an impugned transaction does not speak the same language as the older adult whose rights are in issue and would have relied exclusively on the interpretation of a family member on the other side of the transaction, who was also present in the room throughout the interview. Aside from the very important issues of conflict of interest, there is no assurance of the quality of the language interpretation of the oral communication between lawyer and client. This invites miscommunication, misunderstandings, and possibly later misgivings and legal proceedings.

In addition to qualified and independent language interpretation, I question whether it would also be useful to have an interpreter's written statement made concurrently with the execution of each language-interpreted document. Certainly, in litigating restitutionary claims for the recovery of property (that unfortunately sometimes also include claims for damages for solicitor's negligence), our clinic would routinely use paid, qualified language interpreters to certify that English-language documents were properly interpreted to non-English-speaking clients before they were signed. Of course, there is a significant expense to that process that might be avoided if other less formal but equally effective forms of language support are available. In any event, in dealing with non-arms-length transfers of real and personal property, effective language support is imperative in all cases.

These suggestions are, of course, not comprehensive and are made from the perspective of an outsider to the practice of real estate law in Ontario. They might not be entirely practical or appropriate to the practice of real estate in Ontario. However, by whatever means are appropriate to the modern real estate bar, it is important to give considerable attention to the underlying substance of seemingly innocuous intergenerational wealth transfers to ensure that any unspoken terms are properly laid out within the four corners of the transaction, and not forensically examined in the course of ensuing litigation.