RESTITUTION AS A REMEDY FOR FINANCIAL ABUSE

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My money and house are gone. Can I get them back?

Every year, ACE receives hundreds of complaints about the financial abuse of older adults. It seems there is no limit to the things that people will do to separate older adults from their money and property. While the nature of the financial abuse varies widely, an emerging trend is to remedy the financial abuse with a legal claim for “restitution.” However, restitution cannot be used as an effective remedy in all cases.

People should always be careful in managing their finances. We recommend that people obtain *independent* legal advice before signing legal documents or giving away property.

Real estate owned by an older adult is frequently the target of financial abuse. Older generations can be house-rich but cash-poor. The unencumbered title to the home that an older adult has occupied for decades may be his or her only significant asset with a value of several hundred thousand dollars.

Many scenarios can arise causing an older adult to part with the value of his or her real property. For example, a close family member or other trusted person induces the older adult to sign over title to real estate, without the older person receiving anything of value in return. At other times, the older adult is persuaded to sell his or her home and then transfer the proceeds of sale to someone else, frequently based on the promise that the older adult can live with the recipient free of charge for the rest of his or her life. These scenarios often do not work out very well for the older adult, who can find him or herself homeless when disagreements arise and relationships break down.

Pension incomes are another source of financial abuse. An older adult may allow another person to use his or her pension income without a proper accounting. Sometimes, the use of the pension incomes can be a bona fide sharing of living expenses. In other instances, there is no legitimate basis for an individual to appropriate the pension incomes of an older adult, and the loss of pension incomes is actually conversion or theft.

Bank accounts or other investments are also frequent sources of difficulties. The ways in which older adults can be separated from money and investments are countless. Common situations include the following:

- The older adult voluntarily transfers money to a family member or other trusted person, fully expecting that the money will eventually be repaid but it is not;
- The older adult feels that the circumstances of the transfer are less than voluntary and that he or she has no viable option but to hand over money or investments to someone else who wants them; and
- The older adult has absolutely no knowledge that money or valuable property has been transferred at all, and only discovers the transfer long after the fact.

Financial abuse also occurs where another person obtains credit in the name of an older adult without his or her knowledge or voluntary consent. The unauthorized use of another person's credit cards is an example of this type of financial abuse. ACE often hears about credit cards being obtained in the name of an older adult without his or her knowledge. As well, older adults may be pressured to obtain bank loans, lines of credit and mortgages on their homes. Although they do not receive a penny of the money loaned, they are later called on to repay the debt.

Personal property (e.g., automobiles, furniture, household effects, purses, wallets, cash and identification) are frequently taken without the older adult's permission when there is an unexpected event, such as hospitalization, or a change in living residence to a retirement home or long-term care home. These transfers of personal property can also be considered financial abuse.

Regardless of the form of financial abuse, the legal principle of "restitution" is often the basis of a legal action. Restitution is a "cause of action" (claim) that gives a person the legal right to a remedy if he or she can provide evidence that the essential elements of restitution are satisfied.

There are three essential elements of a claim for restitution. They are:

1. The claimant (the person seeking compensation) must have been deprived of some kind of money or property interest;
2. The defendant must be enriched in a way that corresponds to the claimant's deprivation; and
3. There must be an absence of "juristic cause" for the deprivation and corresponding enrichment.[1]

"Juristic cause" simply means a condition or event that gives legal authority for the transfer of money or property. For example, "donative intent" (the intent to give a gift) is one juristic cause that provides a defence to a claim for restitution. If an older adult

[1] See *Pecore v. Pecore*, [2007] 1 S.C.R. 795.

gives away money or property, fully intending that it should belong to someone else, then it is considered to be a gift that the older adult cannot later recover. However, the Supreme Court of Canada has found that even with the transfer of property between close family members, it cannot always be presumed that the transfer was a gift.[2]

In cases where there is a “presumption of advancement” (no presumption that the transfer was a gift), the burden of proof is on the recipient of money or property to prove on a balance of probabilities that it was always intended to be a gift.

Another example of a juristic cause could be the sharing of common expenses, such as when pension payments are used to share rent and living expenses. The repayment of a debt owed by an older adult to the recipient of property could also form a juristic cause that would provide a defence to a restitution claim. However, again, the burden of proof would lie on the defendant to prove that a debt had existed in the first place.
There are many other examples of juristic cause that would overcome a claim for restitution but the juristic cause itself must be proven with evidence in every case.

Restitution is widely available in all levels of court. Restitution is frequently the most easily litigated, accessible and valuable remedy to the financial abuse of older adults. Like most other legal claims, an action for restitution must be started within two years from the time that person discovered the fact that he or she had been financially abused. This two-year limitation rule is contained in the *Limitations Act*, which took effect on January 1, 2004. Older claims, which were discovered on or before December 31, 2003, are subject to a six-year limitation period, but the window for prosecuting those claims is quickly drawing to a close.

The most difficult thing for an older adult to overcome can be his or her own actions. Real estate, money and other valuable property that is freely given away is a gift and cannot be recovered. Legal documents that are signed are usually intended to mean what they say. Older adults who give away property or sign legal documents without being careful may find that restitution is not available because a gift is a gift, and other legal arrangements that are signed or freely and voluntarily entered into may form a valid basis for the transfer of property to another person. One should always be careful and judicious in how property transactions are handled to avoid being financially abused by others. It is almost always advisable to obtain some independent legal advice before making any significant financial transactions.

[2] See, for example, *Ferguson (Estate of) v. Mew* (2009), 96 O.R. (3d) 65 at 74 (C.A.).