Title

Remedying wrongful interferences in the making of gifts, whether outright or in trust: Equity's venerable unjust enrichment jurisprudence, not tort law, is where to start.

Text

Deep In the bowels of the Restatement (Second) of Torts (1979), specifically § 774B, is some law that is poorly coordinated with prevailing relevant equity doctrine. Here it is: "One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift." The title of the section is *Intentional Interference with Inheritance or Gift*. The problem is that when it comes to wrongful interference in the making of a gift, whether outright or in trust, equity's venerable and comprehensive unjust enrichment jurisprudence is generally far better equipped to fashion and execute a workable remedy, absent special facts. Assume a property owner is induced by someone's fraud, duress, undue influence, or mistake not to make a completed donative transfer of the property to a trustee for the benefit of Jack. The property owner dies. The property ostensibly passes to Jill, the property owner's only heir at law. If Jill had had something to do with the inducement, *even if she had not*, in equity she has been unjustly enriched. If she will not voluntarily transfer legal title over to the express trustee for the benefit of Jack, the equity court will secure Jack's equitable property rights by impressing a constructive trust on the property. It will then order her, the constructive trustee, to personally make restitution by transferring the legal title to the property to the express trustee for the benefit of Jack. As a matter of substantive law, the enrichment is unjust in that it has no justifiable basis in law and equity. Donative intent, for example, is lacking. The procedural equitable remedies are the constructive trust and the *in personam* specific performance order. The substantive equitable remedy is the restitution.

Now back to the Restatement (Second)'s tort of intentional interference with inheritance or gift. The wrongful inducement is fraud, duress, or "other tortious means." This tort-within-a-tort circularity is unfortunate. But it gets worse. The accompanying commentary incorrectly assumes that equity's remedy of restitution is not as capacious as it actually is, that it is limited only to situations where it is the "wrongdoer" who is unjustly enriched. *See* cmt. *e*. Not so, as we noted above in Jill's case. Moreover, equity's unjust enrichment doctrine captures not only the fruits of culpability but also the fruits of innocent mistake. Think the UPS package that has been mistakenly delivered to the wrong address.

All this having been said, at the margins the tort of intentional interference with inheritance or gift may be helpful in filling in some minor gaps in equity's remedial regime. Think an action in tort *against the wrongdoer* for the costs of the unjust enrichment action. Or the situation where neither the one unjustly enriched nor the enrichment itself is anywhere to be found. The victim's recourse then would be an action at law for damages *against the wrongdoer*, there being no adequate remedy in equity. None of this marginal utility is readily discernible from a reading of the text of § 774B and its accompanying commentary. The Restatement's law-equity coordination leaves much to be desired. That is why one court at least has taken the bull by the horns and declined to go the tort route unless or until all equitable remedies have been

exhausted, thus standing on its head the maxim "Equity follows the law." *See* Kinsel v. Lindsey, 526 S.W.3d 411 (Tex. 2017).

So, why all this wheel re-inventing and absence of serious law-equity coordination? Simply put: The law schools are no longer exposing their students to critical equity doctrine, doctrine that is of profound real-world utility. Torts is one of the few "doctrinal" subjects that has not been "reformed" out of the required curriculum, or out of the curriculum altogether. And as for the bar exam, forget about it. It is no wonder, then, that "when modern, Realist-trained lawyers see a setback connected to antisocial conduct, they instinctively reach for tort." See Goldberg and Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 Stan. L. Rev. 335, 397 (2013). In §8.15.78 of *Loring and Rounds: A Trustee's Handbook* (2022) we trace the evolution of the concept of unjust enrichment from Roman times down to the present. The section is reproduced in its entirety in the appendix immediately below. The 2022 Edition of the Handbook is available for purchase at https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP.

Appendix

§8.15.78 *Unjust Enrichment* [from *Loring and Rounds: A Trustee's Handbook* (2022), available for purchase at https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP].

> *In 1997, Gummow, J, a justice of the High Court of Australia,…signaled in Hill v. Van Erp…his unhappiness with the exorbitant claims of those who sought to pack down the whole of restitution into a tight unjust enrichment box*.[1323]

Lord Mansfield (William Murray, 1st Earl of Mansfield), via the 1750 English case of *Moses v. Macferlan*, had injected unjust enrichment doctrine into the English legal tradition.[1324] Long before 1937, which was when the United States Supreme Court expressly applied the doctrine in *Stone v. White*, the doctrine also had been a thread in the fabric of America's (U.S.) legal tradition.[1325]

Unjust enrichment can be either an equitable or a legal wrong.[1326] Whether in equity or at law, unjust enrichment is the basic principle, on this side of the Atlantic, at least, that underlies the substantive equitable remedy of restitution.[1327] Restitution as a remedy for a trustee's unauthorized self-dealing is covered in §7.2.3.3 of this handbook. One who is unjustly enriched is unjustifiably enriched, that is to say there is no

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[1323]Justice Keith Mason, Chancery Bar Assoc., Inner Temple, *What Has Equity to Do with Restitution? Does It Matter?* (Nov. 27, 2006).

[1324]Moses v. Macferlan [1750] 2 Burr. 1005, 97 Eng. Rep. 676.

[1325]Stone v. White, 301 U.S. 532, 534–535 (1937).

[1326]Andrew Kull, James Barr Ames and the *Early Modern History of Unjust Enrichment*, 25 Oxford J. Legal Stud. 297 (2005).

[1327]Edwin W. Patterson, *Book Review*, 47 Yale L.J. 1420, 1421 (1938) (reviewing Restatement of Restitution).

legal or equitable basis for the enrichment, such as what might be supplied by the law of gifts or the law of contracts.[1328] "Restitution is accordingly subordinate to contract as an organizing principle of private relationships, and the terms of an enforceable agreement normally displace any claim of unjust enrichment within their reach."[1329] Likewise, absent special facts, gift doctrine trumps considerations of unjust enrichment. Thus the term *unjustified enrichment* better captures the essence of traditional unjust enrichment doctrine in the Anglo-American legal tradition. It also better approximates the gist of comparable doctrine in the civil law tradition. "One reason is that 'unjustified enrichment' makes an approximate translation of both the German *ungerechtfertige Bereicherung* (BGB §812) and the French *enrichissement sans cause*."[1330]

At law, the concept of unjust enrichment incubated in the corner of the common law we now refer to as quasi contracts or "contracts implied in law."[1331] "That heading includes a wide variety of situations…, as where a person by mistake pays a debt a second time, or is coerced into conferring a benefit upon another, or renders aid to another in an emergency or is wrongfully deprived of his chattels by another who has used them for his own benefit."[1332] The legal remedy is generally limited to the payment of money.[1333] In equity, the concept of unjust enrichment evolved as a corollary to both the fiduciary principle and constructive trust jurisprudence.[1334] The constructive trust is covered in §3.3 of this handbook and in §7.2.3.1 of this handbook. By the end of the nineteenth century American legal scholars were busy developing a unified theory of unjust enrichment that straddled and transcended the traditional law/equity divide of the Anglo-American legal tradition.[1335] The Restatement of Restitution (1937) is the culmination of those efforts. It purported to sever the concept of restitution for unjust enrichment from its various cultural roots and placed it in its own vase on the shelf of the constructs of the common law as it has been enhanced by Equity: "The task of 'restatement,' in this instance, took the form of a radical reconception of an important area of the law that antiquated formal categories had previously obscured, following exactly in this regard the

[1328]Restatement (Third) of Restitution and Unjust Enrichment §2 cmts. b (gift) and c (contract). *See, e.g.*, Rawlings v. Rawlings, 240 P.3d 754 (Utah 2010) (holding that the holder of the legal title to the family farm, who was claiming the full legal and equitable interest for himself, had been unjustly enriched by his siblings, the siblings having contributed to the farm's upkeep on the reasonable assumption that that he had received from their father legal title to the farm not outright but as trustee for the benefit of the entire family).

[1329]Restatement (Third) of Restitution and Unjust Enrichment §2 cmt. c.

[1330]Restatement (Third) of Restitution and Unjust Enrichment §1, Reporter's Note. "In the statute law of Louisiana, the source of what is here called a liability in restitution is described as an 'enrichment without cause.' La. Civ. Code art. 2298. As expressed in Canadian law, a claim in restitution requires that the plaintiff establish an enrichment, a corresponding deprivation, and 'the absence of any juristic reason…for the enrichment.' Rathwell v. Rathwell [1978] 2 S.C.R. 436, 455." Restatement (Third) of Restitution and Unjust Enrichment §1, Reporter's Note.

[1331]Restatement of Restitution, Part I, Introductory Note.

[1332]Restatement of Restitution 1 (General Scope Note).

[1333]Restatement of Restitution 1 (General Scope Note).

[1334]Harold Greville Hanbury & Ronald Harling Maudsley, Modern Equity, Chap. 14 (10th ed. 1976).

[1335]Restatement (Third) of Restitution and Unjust Enrichment §4 cmt. b.

prescriptions of some noted realists."[1336] One such realist was Harvard's Prof. James Barr Ames.[1337]

And yet it is also said that the concept of unjustified enrichment is actually of exceedingly ancient origin. In the writings of Sextus Pomponius, a Roman jurist of the mid-second century A.D., appears this maxim: *Jure naturae aequum est, neminem cum alterius detrimento et injuria fieri locupletiorerm* ("It is a principle of natural justice and equity, that no one should be enriched through loss or injury to another").[1338]

The English and the Australians, however, have yet to fully buy into the American idea of a freestanding law of restitution for unjust enrichment.[1339] In any case, on this side of the Atlantic there are now few left who are equipped, by formal legal training at least, to appreciate the boldness of the efforts of the realists, via the Restatement of Restitution (1937), to colonize the "vast *terra incognita* occupied by the set of legal actions grouped under the impenetrable name of 'quasi-contract' and a miscellaneous set of equitable remedies (principally constructive trust)" in that "many American lawyers would be hard pressed even to say what equity is (or was)."[1340] For more on the marginalization of Equity in the curriculum of the American law school, the reader is referred to §8.25 of this handbook.

As to unjust enrichment as a principle of substantive liability, all that critical doctrine fell through the cracks years ago with the introduction of the traditional Remedies course into the American law school curriculum.[1341] The course was a pedagogical contraption of selected elements of the traditional Damages, Equity, and Restitution required courses.[1342] Now even Remedies is elective, or no longer offered at all. It is no wonder that unjust enrichment doctrine is generally a mystery to contemporary American lawyers, and to contemporary law professors even more so.[1343] "Much of the substantive law of equity—in particular, the law describing equitable interests in property held by another—suffered the same fate."[1344]

[1336]Andrew Kull, *Restitution and Reform,* 32 S. Ill. U. L.J. 83, 86 (2007).

[1337]*See generally* Restatement (Third) of Restitution and Unjust Enrichment §4, Reporter's Note.

[1338]Restatement (Third) of Restitution and Unjust Enrichment §4 cmt. b. and Reporter's Note.

[1339]*See* Charles E. Rounds, Jr., *Relief for IP Rights Infringement Is Primarily Equitable: How American Legal Education Is Short-Changing the 21st Century Corporate Litigator*, 26 Santa Clara Computer & High Tech. L.J. 313, 333–335 (2010).

[1340]Andrew Kull, *Restitution and Reform*, 32 S. Ill. U. L.J. 83, 87 (2007).

[1341]Restatement (Third) of Restitution and Unjust Enrichment §1, Reporter's Note.

[1342]Restatement (Third) of Restitution and Unjust Enrichment §1, Reporter's Note.

[1343]Restatement (Third) of Restitution and Unjust Enrichment §1, Reporter's Note.

[1344]Restatement (Third) of Restitution and Unjust Enrichment §1, Reporter's Note.