

# In Holocaust restitution, a debate over aiding survivors or compensating heirs

*Where Jewish heirs did not file claims before deadlines, the Claims Conference became the legal successor. But attorneys argue the conference has been giving away private property.*

By HENRY ROME  
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**T**he statue of a young Frederick Augustus II of Saxony is made of red stoneware, a predecessor to porcelain. It portrays Frederick striking a confident pose, in spite of his size: the statue is tiny, less than a foot tall.

Yet this small statue has quietly emerged at the center of a major restitution controversy in Germany, pitting the heirs of the statue's former owner – a Jewish woman whose collection was stolen by the Nazis – against the Conference of Jewish Material Claims Against Germany, according to documents provided exclusively to The Jerusalem Post.

Unlike many prominent art restitution cases from recent months, there is little doubt this statue was stolen by the Nazis. The state museum that owned the statue after World War II agreed to restitute the piece to the Claims Conference because no heirs could be found.

But for more than two years, the Claims Conference has declined to provide the heirs of the collector with the money earned from selling the statue, even though other museums have complied in cases of other pieces in the collection.

The case highlights the Claims Conference's controversial legal position in Germany as the owner of property unclaimed by Jewish families. This position was reaffirmed in a highly contested ruling by a top German court last year.

The implications of this dispute extend far beyond the ownership of the Frederick statue. After claims deadlines passed, the Claims Conference obtained several billion dollars worth of unclaimed property, and it has allocated a portion of that money to programs that aid Holocaust survivors and a smaller percentage to research and education.

In essence, however, the conference was forced to make a decision: allocate money to Holocaust survivors or to the heirs of Holocaust victims.

But some attorneys argue this is a false choice. Since the private property has always belonged to the heirs, the conference has been giving away money that never belonged to it in the first place, they say.

The story of this dispute, which has spanned more than two decades, is reflected in the convoluted journey of the Frederick statue from Saxony.

**A** wealthy Jewish man named Henry Budge and his wife, Emma, moved to Hamburg in 1903 and began collecting art. By the time the couple died – Henry in 1928 and Emma in 1937 – they had amassed a stunning, 1,500 piece collection, including the Frederick statue.

Upon Emma's death, the pieces were seized by the Nazis and auctioned off, according to Germany's central office for the documentation of lost cultural property. Eventually, the Schwerin State Museum in then-East Germany acquired the Frederick statue, according to records kept by the Commission for Looted Art in Europe.

After the fall of the Berlin Wall, the statue encountered a fate similar to that of apartments, houses, businesses and other property in East Germany once owned by Jews: it was acquired by the Claims Conference.

Any Jew who could prove he once owned property in East Germany that was sold under duress or confiscated was eligible to claim property, and many did. The first filing deadline, which entitled heirs to full restitution, was December 1992, about two years after the government announced that Jews would be able to get property back.

But in reality, the challenges to identifying ownership were immense, and it became clear that the German government or the Nazi-era owners would end up with unclaimed property.

To avoid that outcome, the Claims Conference was allowed to file claims for Jewish property.

But in recent years, the conference faced stinging criticism that it did not devote resources to connecting previous owners to their land, especially considering that after the Holocaust and decades of Communism, it was challenging for heirs to acquire the necessary records.

“It is not in dispute that the Claims Conference did not publicize the information in its possession before the 1992 and 1993 time limits or seek to discover or contact the true owners or their heirs,” according to a confidential report prepared in 2010 for the Board of Deputies of British Jews.

“One can see possible moral and ethical problems in using funds derived from property where the heirs were alive but unable to claim due to lack of

information,” the report continued, if the Claims Conference had that information.

While the Frederick statue was restituted to the Claims Conference only in 2001 – a decade after most pieces of property – the situation was the same.

The heirs failed to make a claim by the deadline because they did not know details about the statue and other pieces from the collection.

The central question for the Frederick case became clear to Lothar Fremy, the art restitution attorney in Berlin who now represents the Budge estate and its heirs. When no one made a claim to the statue, did the Claims Conference become the legal owner?

**I**n April 2013, one of Germany’s top courts ruled on the ownership status of the Claims Conference. The court’s ruling – which has received little public attention – has over the past eight months become a centerpiece of arguments by both the conference and its critics.

The case was straightforward: a British woman sought the return of her family’s property in Germany from the Claims Conference, which had acquired it after the woman missed filing deadlines.

In its decision, the three judges rejected the request, but both sides have called it a major victory and vindication of their position.

The court determined that, for cases in which Jewish heirs or survivors did not file claims before the deadlines, the Claims Conference became the legal successor. The court further stated that the “cessation of the entitlement to restitution or compensation” is legal.

At the same time, the heirs never technically lose their “property right,” even though they “cannot assert any claims” to get the property back, the court said.

The most hotly debated part of the decision is in its sixth paragraph, which states that the Claims Conference “is entitled solely as trustee for Jews who were in fact persecuted by the Nazi regime, who themselves have no grounds for compensation or who themselves missed the cutoff dates.”

David Rowland, a New York attorney who represents claimants, said last week that the decision was “wonderful.”

Fritz Enderlein, who represented the British woman, wrote at the time that it was “sensational.”

Sam Dubbin, a Florida attorney who represents Holocaust Survivors Foundation-USA, echoed the comments.

“The German court decision has established that the Claims Conference owes a fiduciary duty to the heirs” because it is a trustee, he said.

The Claims Conference, in a statement on Wednesday, rejected that analysis, saying the “trustee” determination has been taken out of context by the conference’s critics.

“Such a reading not only disregarded the clear ruling of the court, but totally ignored that the trusteeship the court described was not on behalf of heirs who failed to file a claim by the 1992 deadline (as they had lost all of their legal rights to the property), but on behalf of the Jewish people,” the conference said in a statement.

In order to seek clarity on the ramifications of the decision, the Post interviewed two professors – one in Germany, one in the United States – who study German law.

The two professors had different interpretations but arrived at the same conclusion: The Claims Conference ultimately has control of the property.

Russell Miller, a law professor at Washington & Lee University in Virginia, recently co-authored a 900 page book, *The Constitutional Jurisprudence of the Federal Republic of Germany*, and is the co-founder of the *German Law Journal*.

He said the distinction between “trustee” and “owner” is likely not constitutionally significant, in contrast to the claims of the lawyers who have challenged the conference.

The German property law designates the Claims Conference as a “legal successor,” which, he said in an email, “need not imply trusteeship or full property ownership.”

“The law may create a status that is neither the proper ‘property owner’ as the [Claims Conference] seems to see it, nor a ‘trustee,’ with whatever duties that might imply, as the claimant seems to see it,” he said.

He said he anticipates the German Constitutional Court, to which the case has been appealed, will agree with the administrative court.

That said, Miller emphasized his “regret about this conclusion.”

“I desperately wish the German courts could find a way to see that the thin margin of justice offered to persecuted Jews by these restitution and compensation programs could be administered in the flexible manner necessary to ensure that no rightful claimant would be turned away,” he said. “Justice and history demand this.”

Ulrich Karpen, a law professor emeritus at the University of Hamburg, said that because the Claims Conference is “treated as if [it] were the proprietor,” it has certain obligations – but not to individual heirs.

“Owners’ rights are limited but not extinct,” Karpen wrote in an email. “The external rights of the trustee are clearly limited in that sense, that he may dispose of the trust funds only in the sense of the law, namely the collective reparation of the Jewish people.”

Despite the complexity of the legal status, survivors who visit the Claims Conference’s website seeking restitution funds see an unequivocal statement: “the Claims Conference has full legal title to the unclaimed property/ assets it received.”

When asked about the website, the conference defended its position.

“The court ruling is very clear. We do not see any simplification,” it said.

“Often, the debate is framed by lawyers who want to portray heirs against the [conference]. In fact, the [conference] has to balance care such as food, medicine and homecare for survivors who can’t otherwise afford it with a filing period that now is about 25 years,” it added.

**T**he tension between the Claims Conference’s role as both an organization aiding survivors and heirs can be shown by comparing the circumstances of two women: one in New York and the other in Ukraine.

Gretchen Friedlander’s father-in-law was the owner of a pharmacy in East Berlin that was closed by the Nazis. When Friedlander, of New York, sought restitution in the 1990s, she inadvertently only claimed the building in which the pharmacy was located, not the pharmacy as a business.

The Claims Conference, however, claimed both, and it received 500,000 euros for the business, according to her attorney, New York-based Barbara Urbach Lissner. Friedlander realized the situation in 2008, after several deadlines had already passed.

Friedlander, whose family had a 50 percent share in the pharmacy, was eligible to receive only 25,000 euros because of a cap placed by the Claims Conference. She died last year with the case in limbo.

The Claims Conference has used money from properties deemed unclaimed, such as Friedlander’s pharmacy, to fund programs that aid Holocaust survivors across the world, especially in the former Soviet Union.

One Ukrainian Holocaust survivor, who lives in a Soviet-era, one-bedroom apartment, is cared for by such a program. When visited by a reporter last summer, the woman, 90, could barely move, only leaving her apartment to hobble her way to a bench outside of her apartment.

Her food comes by way of a homecare worker provided by the American Joint Distribution Committee who does her shopping, cleans her home and is the only person to visit on a regular basis.

“I live because I am with Chesed,” she said, referring to the network of social services center run by the JDC and funded in large part by the Claims Conference. “I cannot go outside,” she continues. “I can’t imagine what my life would be like if there was no Chesed.”

Yet, the Claims Conference’s efficacy in distributing funds to social service organizations has been continually questioned. In July, the conference’s ombudsman reported that “systematic failings and problematic organization behavior” as well as “management failings” were key in “facilitating” a \$57 million fraud.

The conference faced harsh criticism that it did not stop the theft, even though it was tipped off to the growing scandal in 2001.

The Claims Conference’s role also came under scrutiny this month in a case involving distributing the funds from Swiss banks.

In response, Menachem Rosensaft, general counsel for the World Jewish Congress, said that “over the years, the Claims Conference and the [JDC] have helped and are helping tens of thousands [of] survivors around the world. And that simple fact needs to be taken into any consideration when looking at the organization.”

Still, helping survivors involves trade-offs, which are apparent in the Frederick statue case.

**I**n 2007, the conference told Fremy that the Schwerin museum wanted to buy the statue back from the conference.

Fremy and the Claims Conference agreed in 2011 to a price of 275,000 euros. After the sale, Fremy said he tried to negotiate with the Claims Conference to determine how much of this money should go to the Budge estate.

The conference’s response was simple, according to Fremy: none of it.

The Claims Conference declined to comment on any aspect of the Budge case, stating that “this is an ongoing matter that would be premature to discuss in the

media until it is fully resolved.” But it did not dispute that it has not distributed those funds to the heirs.

According to Fremy’s account, the Claims Conference said it would not allocate funds to the executor of the estate and only to heirs. This policy is consistent with its regulations for other restitution cases: only close family members are entitled to funds.

Neither estates nor distant family members are eligible.

In an effort to cooperate with the Claims Conference, Fremy explained that he was also the representative of the heirs. But allocating directly to Budge’s heirs is a complicated proposition because the Budge couple had no direct heirs – instead, he represents approximately 40 claimants and three foundations.

But many of these claimants would not, in any case, be eligible for money because they are not direct relatives.

The Claims Conference has determined that only close relatives are eligible for restitution money, according to rules published on its website.

“Why does the Jewish Claims Conference have the right to exclude these people?” Fremy asked. “There’s no reason, if you ask me.”

Matthias Druba, another Berlin attorney who has argued restitution cases with the conference for two decades, said he has an answer: the conference makes limits on restitution so it can have the funds to provide other services.

“Attorneys don’t like it, because it means the great, great, great cousin” isn’t entitled to money, Druba said.

“You have to think about the large picture and whether there’s a certain wisdom in it,” he said.

Still, 16 museums and private collections across the world have recognized the Budge estate’s claim and restituted the property, Fremy said.

Claims Conference officials “play their own game,” said Fremy.

Despite many requests, he said he has not heard from the conference in six months.

*Sam Sokol contributed reporting from Kiev, Ukraine.*

Link: <http://www.jpost.com/Jewish-World/Jewish-Features/In-Holocaust-restitution-a-debate-over-aiding-survivors-or-compensating-heirs-339444>