

New South Wales Law Society: Elder Law and Succession Committee

1. Has the scope of the rule at common law in New South Wales been affected by the *Forfeiture Act 1995 (NSW)*?

Prior to the *Forfeiture Act 1995 (NSW)*, (the "Act"), the common law position in NSW varied until the decision in *Troja v Troja* 33 NSWLR 269.

Until *Troja* the courts developed some exceptions to the effect of the forfeiture rule in cases involving insanity, diminished responsibility, provocation, self-defence and so forth. This resulted in a lack of clarity as to the circumstances which would justify an exception to the forfeiture rule being made. In *Troja*, the court adopted a very rigid approach deciding that the forfeiture rule applied to all killings, regardless of extenuating circumstances.¹

The Act was introduced following the decision in *Troja* to enable the Supreme Court to modify the effect of the forfeiture rule in cases involving an "unlawful killing", such as manslaughter. The Act does not apply to murder.

The Act leaves the common law rule intact, but has allowed the common law to be modified.

2. Are the offences to which the forfeiture rule applies clear?

At common law the forfeiture rule applies to murder but has been extended to:²

- a. manslaughter (*Re Estate of Hall (dec'd)* [1914] P 1), whether voluntary or involuntary (*R v Giles* [1972] Ch 544 at 552; [1971] 3 WLR 640)
- b. death caused by dangerous driving (*Straede v Eastwood* [2003] NSWSC 280)
- c. suicide pacts (*Permanent Trustee Co v Freedom from Hunger Campaign* (1991) 25 NSWLR 140)
- d. where a person aids, abets or counsels the suicide of another, such an action being an indictable offence ((NSW) *Crimes Act 1990* s 31 C and see *Dunbar v Plant* [1998] Ch 412 at 437)
- e. motor vehicle deaths if the driver responsible for the collision intended to cause injury to himself or herself or others but not if the driver was merely negligent in

¹ See also *Hunter Area Health Service v Presland* [2005] NSWCA 33; [2005] NSWCA 33

² Halsburys-Lexis Nexis [395-1195] Forfeiture

causing death (*Australian Aviation Underwriting Pty Ltd v Henry* (1988) 12 NSWLR 121)

In Victoria, there is uncertainty as to whether the forfeiture rule also applies to unlawful killings that result from an inadvertent, involuntary or negligent act: *Estate of Soukup* (1997) 97 A Crim R 103.

3. Are executors and administrators of estates aware of the rule?

Trustee companies and solicitor executors should be aware of the rule, but lay executors who do not obtain legal advice may well be unaware.

The Committee's view is that generally, members of the public appear to be aware that a person cannot benefit from the assets of a person they have killed but it is unlikely that most people would be aware of the intricacies of the law.

The Committee notes that there is an ongoing role of education. The Committee notes also that there are community expectations that in forfeiture matters, the whole matter and context must be properly considered.

4. Are executors and administrators of estates incurring large legal costs, on behalf of the estate, to determine whether the rule applies, and the effect of the rule, as a result of the introduction of the Act?

The Committee notes a recent example in proceedings to obtain judicial advice where retaining a solicitor and obtaining counsel's opinion, together with filing fees, cost approximately \$10,000-\$15,000.

5. What has been the effect of applying the rule, at the court's discretion, to persons found not guilty because of mental illness in New South Wales?

Pursuant to s 11 of the Act, if a person who has killed another person is not subject to the forfeiture rule because the person has been found not guilty of murder by reason of mental illness, any interested person may make an application to the Supreme Court for an order that the rule apply as if the offender had been found guilty of murder.

Examples of cases where the court has applied forfeiture rule notwithstanding that the defendant was found not guilty of murder on the grounds of mental illness:

- a. *Public Trustee v Fitter* [2005] NSWSC 1188.
- b. *Guler v NSW Trustee & Guardian* [2012] NSWSC 1369 – notwithstanding that the defendant was found not guilty of murder on the grounds of mental illness the courts decided that the forfeiture rule should apply having regard to the defendant's conduct, the absence of any provocation by the deceased, the lack of contrition and the prior history of violent behaviour.
- c. *Hill v Hill* [2013] NSWSC 524 – de facto spouse found not guilty by reason of mental illness. Order made under s 11 of Act that the forfeiture rule applied. The court considered the conduct of the defendant, the conduct of the deceased and the effect of the application of the forfeiture rule on the defendant and the children

of the deceased and decided that justice requires the forfeiture rule to be applied as if the defendant had been found guilty of murder.

6. Are there any issues with the factors that courts are taking into consideration when deciding applications under s11(3)?

The Committee has no issues to raise in relation to this question, noting that the Court's discretion provided for by s 11(3) is very broad.

The Committee notes paragraphs [55] to [60] in the *Fitter* decision, where the court considered the s.11 factors and decided that justice requires the forfeiture rule to be applied to the defendants.

Consequences of the Forfeiture Rule

7. What difficulties arise when distributing an estate now that the courts have a discretion to modify the effect of the rule, or to apply the rule to someone found not guilty because of mental illness?

Once the forfeiture rule has been applied the courts must determine how to dispose of the benefits that the killer would have otherwise been entitled to receive upon the death of the victim. This has resulted in a variety of approaches by the courts as outlined in chapter 4 of the consultation paper. For example, in circumstances where the victim's will provides for a contingent gift over to an alternative beneficiary upon a contingent event the court has taken a variety of approaches to the issue of how to distribute assets that are subject to a gift over.³ It is incumbent upon the executor or administrator of a deceased estate where the forfeiture rule applies to seek the court's advice in relation to the distribution of the estate.

8. Are persons claiming through the killer being prevented from benefits to which they should be entitled and how is this issue being addressed in practice?

The consequences for third party beneficiaries are considered in paragraphs 4.28 to 4.33 of the Consultation Paper. There appear to be different approaches in different jurisdictions.

9. Is the rule being applied to joint tenancies in a consistent way?

The decision in *Rasmanis v Jurewitsch* (1970) 70 SR (NSW) 407 established that "the felonious slaying of one joint tenant by another does not operate to sever the joint tenancy, such that the survivorship rule continues to apply so that the deceased joint tenant's interest accedes to the surviving felon in law, who is therefore entitled to become registered as proprietor, but that equity precludes the felon from taking that interest beneficially and imposes a constructive trust so as to ensure that it be held in the same way as it would have been held had there been, on the slaying, no enlargement of the interest of the felon. In those circumstances, the defendant is entitled to be registered as proprietor by survivorship of the whole of the property, but holds a half interest in it upon trust for the executors and could be required, in order to give effect to that trust, to transfer a half interest to the executors. Alternatively, the executors would prima facie be entitled to an order under s 66G of the *Conveyancing*

³ paragraph 4.9 – 4.10 of The Forfeiture Rule : Consultation Paper

Act 1919 (NSW) for sale of the property (Nay v Iskov [2012] NSWSC 598 at [12]-[13]).

The Committee is of the view that this rule is now being applied in NSW in a consistent way.

10. Are there any problems with the range of persons that may make an application under the Act?

The Committee notes that there are two different definitions of an "interested person" in the Act and "interested persons" for the purposes of a forfeiture application order under Part 3 of the Act does not include an offender or a person claiming through an offender (s 10).

The only potential problem may be in relation to whether a contingent beneficiary can apply for a modification, or application, order. They may be included in definition s 3(e) but this only applies if there is a modification order made under Part 2 of the Act.

11. Is the time limit for making an application in New South Wales sufficient?

This is consistent with, for example, the time frame under the *Succession Act 2006 (NSW)*.

12. Is this sufficient guidance for the courts?

Yes, the Committee believes that this is sufficient guidance available for the courts.

13. Further issues

The Committee noted in further discussion with the VLRC (on 15 April 2014) that there are a number of complexities that can arise in forfeiture matters. For the VLRC's convenience, below is a summary of the issues that were discussed in that telephone meeting:

- a. If there is a gift under the will to a number of individuals, but, if there is a forfeiture of interest to, for example, one of them, there are will construction issues that will arise. For example, does the forfeiture result in a partial intestacy, or is there an enlargement of a class gift?
- b. The Committee notes that there is a threshold procedural issue that may arise if the killer is an executor and will not renounce. The Committee suggests that disclosure in the application for grant of probate is one way to address this situation.
- c. The Committee notes that the circumstances of car/vehicle deaths can vary significantly (for example, there may be factors of negligence or drug and alcohol use present), and the outcomes are necessarily fact dependent.
- d. The Committee notes that there can be problems arising out of joint tenancies and how to deal with the remaining estate (including caveats, superannuation entitlements and so forth). The Committee notes that superannuation can be further complicated by binding nominations.

- e. The Committee notes also that there can be issues arising in relation to life tenancies, and that the judgment of Gzell J in *Batey v Potts* [2004] NSWSC 606 stands for the principle that the forfeiture rule will prevent a killer from benefiting from the acceleration of his/her interest resulting from killing the life tenant. The Committee notes that the guiding principle is the deprivation of interest accruing on death, and not the deprivation of a vested interest. His Honour considered the effect of the rule, the mental illness and state of mind of the killer, as well as the fact that the killer had been punished for his crime and had served his sentence, in his decision to modify the rule.
- f. The Committee notes that the issue of order of death will arise in murder-suicide cases.