SUBMISSION TO THE LAW REFORM COMMISSION

Carolyn Sparke Q.C[1].

I wish to make the following submissions to the Law Reform Commission. This is a personal submission only.

I make the observations here in based on my own experience. Regrettably I have not had time to carefully consider the operation of the statutory rules in other jurisdictions. I apologise for the somewhat cursory nature of my comment.

Forfeiture cases are not common. I have had to advise upon, or appear at in, a handful in my career. It is probably fair to say that most specialist practitioners in this area have dealt with a handful in their careers.

FORFEITURE RULE CONSULTATION PAPER

There is a clear need for reform. At present there are inequities in compelling the law to apply in situations where death has been caused in a situation of reduced mental capacity. The uncertainty in the construction of wills, the difficulty of applying *Jones v Westcomb* and the limits of section 45 of the *Wills act*, also can lead to incongruous results, as I comment below.

I recognise that any alteration of the forfeiture rule will necessarily require some element of "social engineering". Any default position which permits be children of the 'killer'[2] to take a benefit, or which has a default position which does not take into account the testators imputed intentions, effectively puts in place a social outcome based on community standards rather than the law. Whichever decision is made will lead to such results. The fact that there are inevitably going to be some cases which are difficult or which don't match community expectations, should not stop the broader process of law reform taking place.

There is a clear need for a flexible regime in which a court can vary de strict application of the forfeiture rule. However, there is also a need for certainty. Therefore, there should be clearly defined default position in any legislation rather than simply a broad-based discretion in the court. There should be strict time limits for any application to be made I recognise that these will not always be easy to implement.

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[1] About me:
I am a member of Queens Counsel at the Victorian Bar. I am one of the co-authors of the Lexis Nexis 'Wills Probate and Administration Service Victoria', a loose-leaf service widely used by practitioners and the Judiciary. I practice extensively in the deceased estate jurisdiction, primarily in the Supreme Court of Victoria. I have been doing so for approximately 19 years. I am regularly asked to present seminars to solicitors group and educational organisations on various aspects of the law in the deceased estate jurisdiction. I am on the editorial committee of the 'Wills and Probate Bulletin' published by Leo Cussen.

I am also been a mediator since 1996, now accredited under the National Accreditation Scheme. I regularly act as mediator for a variety of matters, primarily involving deceased estates.

[2] I use this word without moral overtone. It is intended neither to be pejorative nor judgemental. It is simply a statement of fact.

In my experience, the occasions in which I have been called upon to advise or to appear in forfeiture matters broadly fall into three categories: -

- cases where the killer would otherwise be a beneficiary, commonly a husband or child, there are no issues about who takes the estate otherwise, and the application of the forfeiture rule matches community expectations of a "just" outcome.
- Cases where the killer has been subject to mental impairment
- cases where (regardless of moral culpability) the primary issue is the destination of the gifts which would otherwise have fallen to the killer.

Grant of representation

Sometimes the killer is the person who is named as executor in the will. Where a killing has taken place, commonly an application for representation is made by a family member who would otherwise take a benefit under the will, and the court is willing to make an interim (or sometimes final) grant of representation to allow the family member to administer the estate whilst the accused person is tried. Commonly the person accused of the killing is in jail.
I have been involved in one matter where there was a contest over the question of a grant of representation between the killer and the other family member, but the court was able to deal with it by making a grant to the family member.

There is no change I see required at the stage of the grant of representation.

Use of estate funds by killer for trial

This is a vexed question and very difficult to answer.
The killer, who is of course innocent, often wishes to access funds from the estate (by selling a jointly owned property for example) to fund their defence. They are innocent, and *prima facie* entitled to the jointly held assets/estate assets to which they are entitled under the will. If they are ultimately found to be guilty, then their right to those assets is forfeit, and the monies unrecoverable. (the theoretical 'constructive trust' which applies to assets which fall into the killer's possession is no good when the money has been spent.)

I imagine the community will feel morally squeamish about it, but my own view is that if we are genuine about persons being 'innocent until proven guilty', the killer ought to have access to the funds. It may require a regime whereby the LPR is entitled to deny the killer access to the estate generally, despite their usual legal rights, but permit the use of funds for the defence of proceedings. In the event the killer is found guilty and therefore not entitled to any of the assets, any money advanced becomes a debt due by the killer to the estate. If it unable to be collected from the killer's other assets, the LPR is not to be held liable for having made those funds available.

Mental impairment

Given the moral roots of the forfeiture rule – that a person should not be permitted to take advantage of their own wrong - where a killer is mentally impaired, it should not attract the same moral criticism.

In my view, there ought to be a statutory modification of the rule which essentially has a cascading effect:-

- a person who causes the unlawful death of another should be deemed to forfeit any interest in their estate unless the court otherwise orders

- where a person is found not guilty by reason of mental impairment, the default position should be that the forfeiture rule should not apply, unless the court otherwise orders.
- In any event, the Court has the power, in its discretion, to modify the effect of the rule.

The meaning of 'cause the unlawful death of another' should encompass both a finding of guilt and a finding in a civil proceeding as to the cause of death. I see no reason why the presently position should change. The consultation paper makes comment about the availability of confiscation proceedings. I see no inconsistency – if a person is acquitted on the criminal standard, they can nonetheless be found to have caused the killing on the civil standard, despite the absence of conviction. This would seem to parallel the Confiscation Act regime – where a person can be convicted or 'deemed' to have been convicted (found guilty but for various reasons not convicted). .

If they are found not guilty by reason of mental impairment, that should apply to override both a finding of guilt, and any finding of unlawful killing on the civil standard.

Regrettably I do not deal in the criminal system enough to make comment on the evidentiary difference or the definition of acting with 'diminished responsibility' as distinct from 'mental impairment'. Given that it is apparently a level of defence not available n Victoria, there will be no easy way for a court to simply apply the finding of the criminal court in making a determination of which 'default position' applies. Pragmatically therefore that seems best to be dealt with under an application for the court to exercise its discretion.

There are many levels of what might otherwise be called 'moral culpability'. There may be death caused by dangerous driving, death by a 'battered spouse' , by a minor, and other areas in which society would consider a lower level of moral culpability, and which society might well say ought not attract the operation of the forfeiture rule.

It is too difficult to create a set of principles which would universally apply on the question of moral culpability. It really can only be left to the Court on a 'case by case' basis.

There should therefore be an overriding discretion in the Court to order that in any given case the forfeiture rule does or does not apply. In the same way as a Judge considers morally exculpatory factors when sentencing, a similar process can apply.

However, there would be uncertainty created by a completely discretionary regime, thus in my view there ought to be a default position which applies unless disturbed.

Evidence

The Court ought to be able to make a determination on evidence on the civil standard.
The Court ought not be permitted to take into account (or give weight to) evidence of the impact upon the family, the killer, the other beneficiaries and so on. The question of culpability is one to be determined at the time of the killing, not according to subsequent events. (evidence of later events may be relevant to assessing the seriousness of the offence at the time, the mental state of the person at the time and the like, but that is the purpose for which such evidence ought to be admitted, rather than a broad scale enquiry as to the 'justice' of the situation.)

Where a victim's family forgives the killer, that is a moral matter rather than a financial one. It will have relevance to the hearing of any matter insofar as the family are willing to consent to an order that the forfeiture rule not apply.

Joint tenancies

The same rules should apply to joint tenancies.

At the roundtable, solicitors identified a potential problem with the Registrar of Titles not being aware of the forfeiture issue, and processing a survivorship application as if forfeiture did not apply.

It is not a straightforward situation – until the person is found guilty of the unlawful killing (or fond to have committed it on the civil standard) they are actually entitled to the property by survivorship. I am not certain that the Registrar of Titles would accept a legal personal representative of an estate of a person, where the killer has not yet been found guilty, as having a caveatable interest.

Perhaps such a right to lodge a caveat could be created by statute.

Will construction

Difficulties arise were a will (as is commonly the case) provides for a gift to '....[the killer], but in the event s/he predeceased me then....' . Strictly speaking the event of forfeiture is not an event of 'predecease' , giving rise the potential scenarios identified in *Egan v O'Brien.*

Jones v Westcomb provides something of an answer, in attempting to determine testamentary intent. However, it is limited and practically difficult to apply. Rarely will the testamentary intent be discerned from the will itself. (It will find new life as part of the factors taken into account by the Court in any application for the exercise of discretion.)

It is a difficult piece of social engineering – would the victim notionally have wanted the estate to pass to the other beneficiaries of the will/upon intestacy, or to the other family members of the killer (with whom the deceased may have had a relationship, and which may not be tainted by the acts of the killer. The historical approach appears to have been that the 'sins of the fathers' are visited upon the 'sons' – ie: there appears to be a leaning against permitting the killer's family to take, if they were otherwise going to be the takers under a 'gift over' or upon intestacy.

There are problems with either course. I have had one matter in which the parents (in effect) family were murdered by their son, and an issue arose about the entitlement of his son – the deceased's grandsons. The evidence potentially was to be that the grandmother (who generated the substantial wealth) had little interest in her grandson, and, if asked, probably would have declined for the grandchild to take.
Conversely, I have seen a situation (husband attempted murder/suicide, killed wife, burned down house, but he survived the attempt) where a man who kills his wife may have children, not biologically hers but raised as part of a family group. They may equally have suffered at the hands of their violent father. If he was treated as having predeceased, in circumstances where a gift over fell to his children, that may be quite an appropriate social outcome, and one which she would have intended.

It will be difficult to achieve the right social balance, and there will always be hard cases. However, there is utility in having some certainty in the position, even if it is liable to be subject to an 'otherwise direct' disposition by the court.

Personally, I am attracted to the ACT approach. (save that, intellectually the will ought not be 'rectified' to accord with some notional set of intentions, as that would act to undermine the ordinary 'rectification' principles, which rely on a court being satisfied of actual intention. However, I see nothing wrong with a statutory 'deemed construction'. It will simply be a unique creature of statute.) It essentially codifies *Jones v Westcomb*.

It is not an ideal answer, but if it permits evidence beyond the will itself, and extends to evidence of direct intention of the testator, it can broaden (and make more useful) the ability to construe as given by *Jones v Westcomb*.
However, there should be a default position - again, so as to create certainty in the administration of the estate.

Perhaps a scenario of this type would work:-

- where the will deals with the issues by providing for a gift over in the event of 'failing to take a vest interest' or a class gift (for example) the will applies; (as it does at present)

where the will does not otherwise provide:-

- the killer is deemed to have died before the testator such that any 'gift over' (or other contingency) takes effect.

- with the power for the court, on application within limited time, to make orders 'deeming' a construction of the will based on an imputed likely intention of the victim. (ie: the ACT approach, although not calling it 'rectification')

Timing
There ought to be a time limit for making any application. Lawyers in this area are used to the idea of a '6 month' timeframe applying to testators family maintenance claims. A similar timeframe could be usefully applied. It could even be shorter, given that the killer will have been the subject of legal proceedings and likely to be actively engaged with lawyers. Such a time limit would have to flow from the date of the determination at trial (guilty plea/finding of guilt/not guilty etc).

It ought to be permitted to be extended by the Court, but not if distribution of assets has taken place.

Modification to s 45 of the Wills Act.
The sections provides that if issue 'predeceases' leaving issue, those issue will take. where the killer is the child of the deceased, the same will construction difficulties apply as above. Section 45 is not triggered by the forfeiture by a child.

It is also a difficult piece of social engineering, with the same issues as above – would the victim notionally have wanted the estate to pass to the other beneficiaries of the will/upon intestacy (depending on the nature of the gift), or to their grandchildren (children of the killer)?

The fact that the benefit of the section is limited to direct liner issue (ordinarily grandchildren of the victim) excludes those cases which arise where a stronger or more distant family member commits the killing. It cannot be assumed in those cases that the victim would want the killer's children to benefit.

One assumes that the reason for s 45 is the social view that a person intends their wealth to pass down the 'branch' of the family, unless they provide otherwise. If so, it is arguable that same assumption ought to apply in the event of forfeiture. Unless the children of the killer can themselves be tainted by the killing (in which case the overall discretion of the Court to 'order otherwise' may be appropriately called upon), the default position ought to be that in the event the child fails to take a vested interest by reason of forfeiture, than their share is treated as if they predeceased according to s 45 of the *Wills Act*.

I don't hold a strong view, I must say, and I am conscious that this is a social question.

From a lawyer's point of view, the position ought to be clarified.

Any statutory modification should take place in a separate Forfeiture Act. To modify s 45 would be very difficult, given that there may be other situations where a child fails to take a vested interest (by disclaiming, for example) where it may be appropriate for a gift to fall to their own children, but which require different social considerations.

Obviously the present situation, where the will applies if it 'provides otherwise' should continue to apply - If they have otherwise provided in the will for a situation where their own child does not take a vested interest, that proviso will apply.

Family provision applications

If there is to be a statutory framework in which the Court can be asked to modify the effect of the forfeiture rule, there seems little point precluding the same person from apply for provision. It is likely that overlapping considerations will apply to modifying the rule as would apply in any provision application.

A similar approach could be taken, that the default position is that a person who causes the unlawful death of another, is precluded from making application for provision, unless modified by Court.

In terms of timing, in the same way the time period in which to bring family provision claims is extended where a will is rectified, (as the rights the parties are not known until then) the 'usual' time (6 months from probate) from bringing a provision claim can be extended to the same time as the making of any application to modify the forfeiture rule (say, 3 months from the date of the court determination) whichever is the later date.

Summary

- the forfeiture rule ought be modified

- legislation could provide the following:-

  - default position for preserving the rule for unlawful killings

- default position of waiving the rule for person found not guilty by reason of mental impairment
- overriding power of the court to make orders varying either default position, according to the circumstances applying at the time of the death

- legislation could also provide
  - default position for killer to be treated as having predeceased the victim (unless the will otherwise provides)
  - power in the court to make orders construing the will differently according to the imputed intention of the testator
  - the effect of s 45 of the *Wills Act* be modified to deem killing 'issue' as having predeceased

- there be a time limit on application of, say, 3 months from court determination (or as extended but not able to be extended if assets are distributed)

- there be limited powers for an LPR to make funds available to the killer for the defence of their case, without liability on the LPR of the funds are unrecoverable in the event the killer is found guilty

- there should be a power for the LPR of an estate to lodge a caveat preventing a killer joint proprietor from lodging a survivorship application

- the default position ought to be that a person who causes unlawful death of another should be precluded from application for family provision from an estate, unless otherwise ordered by the Court.

I trust these observations are of assistance. If not, at least I hope it has been worthwhile reading!

I am happy to discuss any of these matters or have any further input the Commission may wish.

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