

CVSA Submission on Forfeiture Rule

The Crime Victims Support Association hereby makes a submission to the Victorian Law Reform Commission on the review of the common law of forfeiture and circumstances of its application.

Overriding Fundamental Issues

The volition of the testator

The first consideration in administering a deceased person's remaining estate after all obligations have been met, is to ensure as much as practically possible, that the beneficiaries are those the deceased would want to be beneficiaries. A reasonable justification for the forfeiture rule is that the testator would no longer want a certain person to be a beneficiary if it was that same person who was to unlawfully cause their untimely death.

Forgiveness of Victim

Thus, if in full knowledge of what has been done, the dying testator should still want his killer to be in the will, whether due to the act being assisted suicide or because of forgiveness after a more sinister act, then that should so be. Similarly if the testator should be aware of someone with mental impairment and the testator possessing a history of tolerance towards resultant aberrant behaviour from that impairment, then it may be assumed that any subsequent action which may result in even the testator's death should not cause a forfeiture of whatever may be due from the will.

The "harshness" of the law

People talk about the harshness of the law in that someone who illegally causes the death of testator may not in most circumstances inherit from the estate of that deceased person despite possible mitigating circumstances.

This appears to be based upon two premises:

1. **The killer, or his family, have some form of right to the property of the deceased.**
 - a. But this is simply not the case. It is at the absolute discretion of the testator as to who he or she gives their property to. If you had no rightful claim to any property, then you cannot suffer by missing out on something you never possessed nor had a right to possess in the first place.
 - b. True, there are cases where family or others are morally owed part of the estate where property, such as the family home, are in the name of the testator but equity law would declare that it is equally owned by the spouse, or where others have given service to the testator over years in the implied understand that they would in return inherit part of the estate. However in those cases the validity of the will itself would be challenged as to what property the testator had a right to dispense, before the question of forfeiture could even be raised.

- 2. That property that the killer would have inherited would apparently otherwise go nowhere as though it were buried together with the victim.**
- a. Arguments in favour of loosening the forfeiture law question whether or not there should be so called “secondary victims”, the killer or his family, treated too harshly by not receiving property they might otherwise inherit. They are the only victims mentioned when reasons are given.
 - b. However if property does not go to them, it does not remain in limbo, but becomes part of the residual estate, to then go to other family, friends or charitable institutions chosen by the deceased, parties who did not have a hand in the killing.

What fundamental injustice?

To sum up, subject to the ‘volition of the testator’ above, it must be remembered that the property was that of the testator, he or she alone, and no one else, and there is no fundamental injustice in other people not receiving an unearned bequest they may have thought they would be receiving. Where there is, or could be injustice, is where someone profits from a criminal act or act of negligence directly, or through the knowledge that their family or chosen beneficiaries will be financially better off.

Responses to Set Questions

#2 Should the forfeiture rule apply to all types of unlawful killing?

Yes.

It must be remembered that a person can kill another and the act can still be judged by the courts to be lawful. Examples would be:

- killing an attacker in self-defence
- A battered spouse truly believes the life or herself or children are in danger and a lethal response is the least response applicable to save lives.
- A driver is distracted by a bee sting to the eye and runs over and kills a person on a pedestrian crossing.

After that, any action deemed by the courts to be an unlawful killing is precisely that, unlawful, and thus merits no mitigation where one should be denied the opportunity to profit from that crime.

When the crime is defined as not premeditated, such as culpable driving, negligence, recklessness or dangerous acts of omission, it is still a crime and the perpetrator or his surviving family deserves not to profit from it, and even then, can we ever be absolutely sure that there was no premeditation when an inheritance was on offer? Was the car crash simply an accident or did the driver know he exceeding a safe speed, did the dangerous dog happen to slip its lead on that day or was the lead intentionally put on looser than normal?

Killings such as involuntary euthanasia are currently unlawful in our jurisdiction, despite the claim that it removes the suffering of those who cannot communicate such a desire. However we must always respect the current laws of the land and loyally

follow them and their principles, until we, or others, have provided sufficient reasons to arrange to have them changed.

Thus, if our laws already define certain actions as crimes, then that should be the end to it and the rule should remain.

If certain crimes were to be categorised as exempted from the rule then clarity would be needed to give extremely objective definitions of said crimes. This in all probability could not eventuate and if alternatively, it was left to the subjective discretion of the court, then this would give rise to all manners of problems:

- In deciding a particular case on a controversial issue such as euthanasia or “self-defence killings”, how would the judge separate his/her own personal views on the issue when adjudicating?
- An extra drain on court resources to cater to new judgements of questionable value to be made.
- Would not court costs of the hearing be an unfair drain on the estate of the victim? Not only did the killer cause his death, but is now draining the estate wished for beneficiaries.

#3 Should moral culpability be relevant?

No. For a person to be found guilty by a court of law or to be presumed guilty in probate court on the balance of probabilities even if acquitted in criminal court, mens rea (a guilty mind) would first have to be ascertained.

As he/she already has been declared guilty, then degrees of guilt should not matter, especially when deducing them can only be an extremely subjective process. Let the victim’s estate go to the other beneficiaries totally free of guilt.

#4 Should the exception for persons not guilty by mental impairment be retained?

a) In what circumstances should the exception not apply?

In all circumstances except, as described in Question 6, where it is deemed probably that the deceased was aware of the killer’s mental impairment and would have still wanted he/she to inherit, even if sooner because of lethal actions, then exception to rule should be retained.

b) Should the court have a discretion to apply the rule in the circumstances of the case?

No. Apart from the exception for circumstances as described in part (a), the court should have no discretion in applying the forfeiture rule, but must always apply it.

This is because of the following reasons:

- A killer who has been declared not to understand that his killing was wrong, might still have understood that that same killing would have caused him to benefit financially.
- Unless contrary evidence exists, it is probable that the testator would want to give property to his beneficiaries to help them maximise the happiness of their normal lives. However if one of them would be spending most or all of

his/her remaining years incarcerated in an institution, then any wealth originally directed towards them would probably be thought by the testator to be better directed elsewhere to those who can productively use it.

- The task of declaring whether or not the accused was mentally impaired is not an easy, clear cut one. The court has always to balance probability of the harm of deceitful sane defendant not answering for his crimes, with that of a mentally impaired person being punished for something he did not understand was wrong. Because of this fear of punishing someone who lacked the mens rea, there is always the chance of an intelligent, sane killer escaping the justice net. Thus, as described in 'What fundamental injustice?' on page 2, as there is no fundamental wrong in denying an innocent person the inheritance anyway, why not play it safe by denying it to those who may be guilty.

#5 How should contingent gifts over be distributed upon the application of the forfeiture rule?

The killer should be deemed to have predeceased the victim for the purposes of dispositions under a will or on intestacy.

For the following reasons persons claiming through the killer should be prevented from inheriting:

- The motive would exist for someone to kill so as to financially benefit his or her family even if that person himself/herself directly should not benefit.
- It could not be ascertained with any degree of certainty that, where motive for an unlawful killing would be shared by more than one member of a beneficiary family, said criminal act would actually be instigated, planned and carried out by only one member.

#6 Should courts have discretion to rectify a will to fulfil the will-maker's probably intent?

As per section 'the volition of the testator' on page 1, yes.

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