

TASMANIA
LAW REFORM
INSTITUTE

The Forfeiture Rule

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About this issues paper

This issues paper discusses reforming the law in relation to the forfeiture rule in Tasmania. Any group or person is invited to respond to this issues paper. Following consideration of all responses it is intended that a final report will be published, containing recommendations.

The topic for this issues paper was proposed by Ben Bartl. The Institute would like to thank Ben Bartl, Ken Mackie and Kate McQueeney for their assistance in the preparation of this report.

How to respond

The Tasmania Law Reform Institute invites responses to the issues discussed and proposals made in this issues paper. Questions are contained within the paper. The questions are intended as a guide only – you may choose to answer all, some or none of them. Please explain the reasons for your views as fully as possible. If you would like your views and/or the fact that you made a response to this paper to be kept confidential, simply say so, and the Institute will respect that wish.

Responses should be made in writing by 27 February 2004. If it is impracticable for you to make your response in writing please contact the Institute to make other arrangements.

Responses may be sent to the Institute by mail, fax or email.

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This issues paper is also available on the Institute's web page at: www.law.utas.edu.au/reform
or can be sent to you by mail or email.

Information on the Tasmania Law Reform Institute

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and The Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000.

The Institute is based at the Sandy Bay campus of the University of Tasmania within the Law Faculty. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself.

The Institute's Director is Professor Kate Warner of the University of Tasmania. The members of the Board of the Institute are Professor Kate Warner (Chair), Professor Don Chalmers (Dean of the Faculty of Law at the University of Tasmania), The Honourable Justice AM Blow OAM (appointed by the Honourable Chief Justice of Tasmania), Paul Turner (appointed by the Attorney-General), Philip Jackson (appointed by the Law Society), Terese Henning (appointed by the Council of the University), Mr Mathew Wilkins (nominated by the Tasmanian Bar Association) and Ms Kate McQueeney, (nominated by the Women Lawyers Association).

Part 1

Introduction

The forfeiture rule is a rule or principle that prevents a person from benefiting from their wrongful conduct. The rule is based on public policy. As was stated by Lord Justice Fry in *Cleaver v Mutual Reserve Fund Life Association*:¹

It appears to me that no system of jurisprudence can with reason include amongst those rights which it enforces, rights directly resulting to the person asserting them from the crime of that person.

The forfeiture rule can therefore be described as a fundamental principle of justice, embodied in one form or another in most if not all legal systems.² In relation to succession law, the principle can be said to embody the view that if a person is criminally responsible for the death of another, and that death is a material fact in the vesting of property in favour of that person then the interest in that property is forfeited. The effect of the rule is that the killer cannot inherit from the deceased either by will or intestacy,³ nor can a benefit be obtained over property through the right of survivorship.⁴ In short, a person ‘shall not slay [their] benefactor and thereby take [their] bounty’.⁵

Over time the courts developed some exceptions to the forfeiture rule, although what circumstances will justify an exception being made is far from clear. The United Kingdom, Australian Capital Territory and New South Wales have now introduced Forfeiture Acts, granting courts the discretion to modify the effects of the forfeiture rule in cases of unlawful killings (other than murder). The types of cases where courts have made exceptions to the forfeiture rule (at common law) or modified the effect of the rule (under one of the Forfeiture Acts) include suicide pacts,⁶ where the offender suffers from diminished responsibility,⁷ and cases where the offender has been subjected to ongoing domestic violence and the killing forms part of and is in response to that violence.⁸

According to Kearney J in the NSW case of *Perpetual Trustees v Fraser* the underlying principle of the forfeiture rule is unconscionability:⁹

...the fundamental question is to determine whether the taking of a benefit by a person through his crime would be unconscionable as representing an unjust enrichment of that person so as to attract the public policy rule.¹⁰

However there has been much academic¹¹ and judicial debate on whether the rule should be applied inflexibly to all unlawful killings, or whether unconscionability is the proper basis for the forfeiture rule, thus allowing for flexibility depending on the killer’s moral culpability.

¹ (1892) 1 QB 147 at 156.

² For example in the German case of *R(G) 1/88* a claimant was deprived of a widow’s pension because she had been convicted of manslaughter. In the United Kingdom see *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147. In the United States see *Riggs v Palmer* 115 NY 506; 22 NE 188 (1889). In New Zealand see *Re Lentjes* [1990] 3 NZLR 193.

³ *Re Pollock* [1941] Ch 219; *Re Callaway* [1956] Ch 559; *Re Dellow’s Will Trusts* [1964] 1 All ER 771; *Re Giles* [1972] Ch 544; *Re Lentjes* [1990] 3 NZLR 193.

⁴ *Re Barrowcliff* [1927] SASR 147, in this case the right of survivorship in a joint tenancy did not operate as it normally would because of the operation of the forfeiture rule.

⁵ *Hall v Knight and Baxter* [1914] P 1 at 7 per Hamilton LJ.

⁶ *Dunbar v Plant* [1997] 4 All ER 289.

⁷ *Re H* [1990] 1 FLR 441; *Re S* [1996] 1 WLR 235; *Gilchrist* [1990] SLT 494; *Jans v Public Trustee* [2002] NSWSC 628.

⁸ *Re K* [1985] Ch 85.

⁹ (1987) 9 NSWLR 433 at 444.

¹⁰ These comments were further supported by Young J in *Public Trustees v Hayles* (1993) 33 NSWLR 154.

¹¹ The literature is quite extensive. See K Mackie, ‘Manslaughter and Succession’ (1988) 62 *Australian Law Journal* 616; J Chadwick, ‘A Testator’s Bounty to His Slayer’ (1914) 30 *Law Quarterly Review* 210; J Toohey, ‘Killing the Goose that Lays the Golden Eggs’ (1958) 32 *Australian Law Journal* 14; S Cretney, ‘The Forfeiture Act 1982: the Private Member’s Bill as an Instrument of Law Reform’ (1990) 10 *Oxford Journal of Legal Studies* 289.

In Australia at least, the position has been clarified by the 1994 NSW Court of Appeal common law decision of *Troja v Troja*, in which the majority of the court adopted a rigid approach, asserting:¹²

the law as laid down... is that all felonious killings are contrary to public policy and hence, one would assume, unconscionable. Indeed, there is something a trifle comic in the spectacle of Equity judges sorting felonious killings into conscionable and unconscionable piles.

While other jurisdictions (including Tasmania) are not technically bound by this decision, it is highly persuasive and was followed in the Victorian decision of Gillard J in *Estate of Soukup*.¹³ This means the rule will operate regardless of whether the unlawful killing was by way of murder or manslaughter and regardless of the circumstances of the killing.

It is argued that in some cases, for example those involving severe domestic violence by the deceased or where the killer has been convicted of manslaughter on the basis of diminished responsibility,¹⁴ public policy does not necessarily require that the killer be disinherited. Kirby J, dissenting in *Troja v Troja*, pointed out that there may be instances in which the inflexible application of the forfeiture rule will operate against public policy by not granting a beneficial interest to a killer.¹⁵ With reform of the forfeiture rule failing to be addressed by the National Committee for Uniform Succession Laws¹⁶ Mackie has suggested that 'jurisdictions would be best to turn to legislative action to address this problem'.¹⁷

Part 2 of this paper examines when the forfeiture rule applies, the effects of the rule, and the common law and legislative development of the rule and its exceptions.

Part 3 looks at the case for reform. It is argued that to rely on the common law will in some cases produce a harsh and unjust outcome. Furthermore, with the recorded level of domestic violence in the general community increasing, there could be more cases coming before the courts in which the application and effect of the forfeiture rule are at issue.

Part 4 looks at the options of reform. These include enacting a *Forfeiture Act* granting judicial discretion to modify the effects of the rule as has been done in NSW, the ACT and the UK. An alternative option for reform is also canvassed: codification of the forfeiture rule and its exceptions, as has been proposed in New Zealand.

¹² *Troja v Troja* (1994) 33 NSWLR 269 at 299, per Meagher JA.

¹³ (1997) 97 A Crim R 103.

¹⁴ The defence of diminished responsibility is not available in Tasmania.

¹⁵ *Troja v Troja* (1994) 33 NSWLR 269 at 284.

¹⁶ Claire Reithmeiller, Co-ordinator of the National Committee for Uniform Succession Laws, personal communication 1/4/03.

¹⁷ K Mackie, 'The Troja Case – Criminal Law, Succession and Law Reform' (1998) 5 *Canberra Law Review* 177 at 201.

Part 2

The Current Law

This part examines when the forfeiture rule applies, the effects of the rule, and the common law and legislative development of the rule and its exceptions.

When the forfeiture rule applies

Neither the common law nor statute law has allowed any modification of the forfeiture rule in cases of murder.¹⁸ However, modification of the effect of the rule has sometimes been allowed in cases of ‘involuntary manslaughter’ by the common law, and statute in some jurisdictions has allowed applications to be made to court to modify the effect of the rule in cases of manslaughter. It follows that the distinctions between murder and manslaughter, and voluntary and involuntary manslaughter are important for the purposes of the application of the forfeiture rule. However, it should be noted that even if a person is acquitted of criminal charges arising out of the death of another person, the forfeiture rule may operate if the court determines on the civil standard of proof that the killing was unlawful.¹⁹

Murder and involuntary and voluntary manslaughter

There is a homicide when a person causes the death of another person. Homicide may be lawful or unlawful. A killing in self defence is an example of lawful homicide. *Unlawful* homicide is an umbrella term covering the crimes of murder, manslaughter and causing death by dangerous driving. The definitions of murder and manslaughter vary between jurisdictions and so the boundaries between these two unlawful homicides also vary. The physical elements of the crime are the same for murder and manslaughter but the fault element or state of mind differs. When death is caused which is unlawful or not justified and the causative act or omission is accompanied by an intent to kill, the crime is murder. However, various other states of mind or intent are also covered by the crime of murder depending on the jurisdiction, such as an intention to cause some form of serious bodily harm, recklessness as to causing death or even recklessness as to causing grievous bodily harm.²⁰ In Tasmania it is also murder where a person kills another by an unlawful act or omission which he or she knew or ought to have known to be likely to cause death.²¹

Where an unlawful killing does not amount to murder, it may nevertheless amount to manslaughter. Traditionally, the two main categories of manslaughter have been divided into ‘voluntary’ and ‘involuntary’ manslaughter. This distinction is important for the purposes of the forfeiture rule as courts have sometimes been prepared to modify the rule in cases of ‘involuntary’ manslaughter but have declined to do so in cases of ‘voluntary manslaughter’.

A ‘voluntary manslaughter’ occurs where the accused commits murder, intending to do so, but is convicted of manslaughter due to mitigating circumstances such as provocation²² or diminished responsibility.²³ In such cases the forfeiture rule has been held to apply. For example in the case of *Re Giles*²⁴ a wife who killed her

¹⁸ No jurisdiction recognises a modification of the forfeiture rule in relation to killings amounting to murder. For example see section 4 *Forfeiture Act 1991* (ACT); section 5 *Forfeiture Act 1982* (UK) & section 4(2) *Forfeiture Act 1995* (NSW).

¹⁹ *Helton v Allen* (1940) 63 CLR 691, where the court was satisfied on the balance of probabilities that the killing was unlawful, and so applied the forfeiture rule.

²⁰ Bronitt S and McSherry B, *Principles of Criminal Law*, LBC, Sydney 2001, 492.

²¹ *Criminal Code* (Tas) s 157(1)(c).

²² This defence has now been repealed in Tasmania, it was formerly in the *Criminal Code Act 1924* (Tas), s 160.

²³ Section 23A *Crimes Act 1900* (NSW); Section 304A *Criminal Code Act 1899* (Qld); Section 14 *Crimes Act 1900* (ACT); Section 37 *Criminal Code* (NT). It should be noted that this defence does not operate in Tasmania.

²⁴ [1972] Ch 544.

partner by striking out with a domestic chamber pot had pleaded guilty in criminal proceedings to manslaughter on the basis of diminished responsibility and received a sentence requiring detention for hospital treatment. In the later civil proceedings she was disqualified from any benefit due to the operation of the forfeiture rule. A similar outcome was achieved in *Jones v Roberts*²⁵ in which a son suffering from paranoid schizophrenia killed his parents whom he believed were KGB agents. The court accepted his plea of manslaughter on the grounds of diminished responsibility. Again the forfeiture rule was held to apply.

On the other hand, ‘involuntary manslaughter’ refers to an unlawful killing where the offender did not possess the relevant mental element for murder. The two basic categories of involuntary manslaughter at common law are where death was caused by an unlawful and dangerous act and negligent manslaughter. The Tasmanian Criminal Code has similar categories of manslaughter.²⁶ In the case of *Lundy v Lundy*²⁷ the Ontario Court of Appeal held that for the forfeiture rule to apply the act had to be of such a character as to show an intent to bring about death and therefore the forfeiture rule did not apply to cases of involuntary manslaughter. United States authorities have demonstrated some support for this approach,²⁸ as have English cases not involving succession.²⁹

The Effect of the Forfeiture Rule

The application of the common law forfeiture rule can be significant. It results in the killer being barred from taking any benefit from the estate of the deceased, irrespective of the source of the right. The rule has been applied to ensure that the killer obtains no benefit under the deceased’s will.³⁰ Consequently, a specific gift to the killer will fall into the residuary estate,³¹ but if there is no residuary estate (or if the killer is solely entitled to the residuary estate) then the gift will be distributed as on intestacy.³² The killer is barred from any possible benefit on intestacy. The rule has also been held to apply to joint tenancies with the killer unable to claim by right of survivorship.³³ There is also authority to the effect that the killer is barred from making an application under family provisions legislation,³⁴ and there is even authority to suggest that a killer will be barred from a pension.³⁵

While the application of the rule appears to be simple there is some dispute about how and to whom the property should pass once the killer is barred. The outcome may be different depending on whether a will, a joint tenancy or an intestacy is involved.

Wills

The effect of the forfeiture rule in relation to wills is of primary concern where the major (or sole) beneficiary is the killer, especially where there has been a substitution clause prescribing a gift over³⁶ for those instances in which the killer dies before the deceased. There have been three distinct approaches taken by the courts.

²⁵ [1995] 2 FLR 422.

²⁶ *Criminal Code Act 1924* (Tas) s 156(2) as interpreted in *McCallum* [1969] Tas SR 73; *Phillips* [1971] ALR 740.

²⁷ (1895) 24 SCR 650.

²⁸ *Minasian v Aetna Life Insurance Co* (1936) 3 NE 2d 17; *Metropolitan Life Insurance Co v McDavid* (1941) 39 F Supp 228; *Legette v Smith* (1955) 85 SE 2d 576; *Estate of Mahoney* (1966) 220 A 2d 475.

²⁹ For example in the context of indemnity insurance see *Tinline v White Cross Insurance Association Ltd* [1921] 3 KB 327; *James v British General Insurance Co Ltd* [1927] 2 KB 311; *Hardy v Motor Insurers Bureau* [1964] 2 QB 745.

³⁰ *Re Dellow’s Will Trusts* [1964] 1 All ER 771.

³¹ A residuary gift comprises all property not already disposed of in the will. It will comprise that property which remains after the payment of debts, liabilities and other devices or legacies under the will: *Re Peacock* [1957] Ch 310.

³² *Re Pollock* [1941] Ch 219; *Re Callaway* [1956] Ch 559; *Re Dellow’s Will Trusts* [1964] 1 All ER 771; *Re Giles* [1972] Ch 544; *Re Lentjes* [1990] 3 NZLR 193.

³³ *Re Barrowcliff* [1927] SASR 147.

³⁴ *Re Royse* [1985] 1 Ch 22; *Troja v Troja* (1994) 35 NSWLR 182. In Tasmania the relevant legislation is the *Testators Family Maintenance Act 1912*.

³⁵ *R v Chief National Insurance Commissioner; Ex parte Connor* [1981] QB 758.

³⁶ A ‘gift over’ can be likened to a security. If for example a gift in a will reads, ‘I leave all my estate to my husband, but if he dies before me then to my children’, the gift-over is the gift to the children.

According to the first approach the gift over should take effect on the killer's disqualification. For example in the case of *Re Barrowcliff*³⁷ a wife executed a will in which her entire estate was left to her husband in the event of him surviving her or in the alternative, there was a gift over to trustees upon certain trusts for named beneficiaries. The husband murdered the wife. Napier J held that the gift over was effective.³⁸

It could never have occurred to anyone concerned in the making of this will that there was any hiatus between these dispositions, or that this event might happen, to preclude the husband from taking and yet leave the condition of the gift over unfulfilled.

In *Troja v Troja*³⁹ a substitution clause was at issue. The facts of the case were that the testator's will left the whole of his estate to his wife, subject to her surviving him for 30 days, with a gift over to the testator's mother, in the event of the wife failing to survive. Waddell CJ in Equity concluded that the forfeiture rule did apply, that the disentitled wife was treated as notionally not being in existence, and stated that the law does not place any limitation on the way in which effect is given to the forfeiture rule. It was accordingly held that the estate was to be administered upon the basis that the wife held all her interest in the estate on a constructive trust for the mother, thus giving effect to the gift over.⁴⁰

The second approach, which is now more common, takes a more literal interpretation of the construction of the will, so that a gift over on the non-survival of the killer will have no effect.⁴¹ In *Davis v Worthington*⁴² for example, a testator left her estate to the killer provided he survived her for 14 days, failing which the estate was to go to a charity. Wallace J refused to treat the testamentary gift to the killer as struck out, because this involved the intervention of a fiction. Consequently, the gift over to the charity could not take effect and there was held to be an intestacy.⁴³

However in the more recent New South Wales Supreme Court decision of *Public Trustee v Hayles*⁴⁴ a third and novel approach was taken with Young J holding that the killer should hold the benefit on trust for those persons whom the court thinks to be appropriate. As Mackie expressed:⁴⁵

The constructive trust approach requires this intention of the testator, as far as possible, to be ascertained in order to benefit the best claimant. This, in the particular circumstances of a case, may mean that a gift over has effect, or, in other circumstances, that that gift may be disregarded so that the trust is fashioned in such a way as to benefit the next of kin of the deceased. Much will depend on the evidence here, but at least the court is endeavoring to establish, on equitable principles in order to avoid unconscionability, the person with the better entitlement to the estate.

Joint Tenancies

A joint tenancy exists where two or more people hold property together, with no notion of separate shares. Joint tenants are viewed as the single owner of the property, rather than each being separate owners of an interest in the property. Each joint tenant together holds the whole estate. An essential feature of a joint tenancy is the existence of a right of survivorship. The effect of this is that on the death of one joint tenant, that joint tenant's interest is automatically extinguished so that the surviving joint tenant or tenants become entitled to the property. Accordingly, any will made by a joint tenant as to the property held in joint tenancy

³⁷ [1927] SASR 147.

³⁸ [1927] SASR 147 at 151.

³⁹ (1994) 33 NSWLR 269.

⁴⁰ Thus the original decision of Waddell CJ was upheld by a majority of the Court of Appeal.

⁴¹ If the will is sufficiently worded to indicate that if the initial gift fails for *any reason*, then clearly the gift over will be effective. Most wills, however, only provide for substitutional gifts in the event of the initial beneficiary predeceasing the testator, or at least not surviving him or her for a short period.

⁴² [1978] WAR 144.

⁴³ Similar decisions have been given by the Scottish Court of Session in *Re Kyd; Hunter's Executors* (1992) SLT 1141 and by the English Court of Appeal in *Jones v Midland Bank Trust Co Ltd* Unreported, 17 April 1997.

⁴⁴ (1993) 33 NSWLR 154.

⁴⁵ K Mackie, 'The Forfeiture Rule: The Destination of Property Interests on Homicide' (1997) 2 *Newcastle Law Review* 30 at 48.

will be ineffective, and nor can the intestacy rules operate to benefit the next of kin.⁴⁶

Joint tenancies and the forfeiture rule are a complex area of the law. This is because while a killer who is a joint tenant has their rights enlarged, a beneficiary under a will or an intestacy has their right brought into being as a result of the death.⁴⁷ Expressed in another way, the killer has a right to and not merely an expectation in the property. In Australian common law two approaches have been taken.

The first approach, taken by Napier J in *Re Barrowcliff*,⁴⁸ is that there cannot be a right of survivorship in favor of a joint tenant who has unlawfully killed another joint tenant. Consequently Napier J believed that the killing in essence effected a severance of the joint tenancy resulting in the owners being treated as tenants in common.⁴⁹ This case was followed by the Supreme Court of Queensland in *Kemp v Public Curator of Queensland*,⁵⁰ but has since been criticised.

An alternative approach, which may be preferable,⁵¹ was established in the New South Wales decision of *Re Thorp and the Real Property Act*⁵² in which a husband killed his wife and then committed suicide. Jacobs J held that at law, there had been no severance of the joint tenancy, and that the legal title passed to the surviving joint tenant, who was thus entitled to be registered as sole owner. However, principles of public policy required the surviving joint tenant in equity to hold the property upon a constructive trust.⁵³ This case was followed in *Rasmanis v Jurewitsch*,⁵⁴ and has been accepted in New South Wales,⁵⁵ Queensland,⁵⁶ New Zealand⁵⁷ and Canada.⁵⁸

Intestacies

An intestacy occurs where the deceased dies without leaving a valid will. On intestacy the estate is distributed by statute⁵⁹ to the next of kin. The forfeiture rule disqualifies the killer from benefiting under an intestacy. In the Australian case of *Re Tucker*⁶⁰ it was held to apply to both the situation where an intestacy results from the killer being disqualified from taking a gift under a will (as discussed above), and where the deceased dies intestate. This decision was followed in *Re Sangal*,⁶¹ where the property passed entirely to the children, with no entitlement to the husband who murdered his wife, and more recently in *Public Trustee v Fraser*⁶² where the killer was regarded as notionally not being in existence: in short, the killer was to be treated as being 'no longer a member of the class constituted by the next of kin entitled to take on intestacy'.⁶³ Similar developments have occurred in the United Kingdom.⁶⁴

⁴⁶ In contrast is another form of co-ownership, tenancy in common. Unlike a joint tenancy, a tenant in common is said to have a distinct but undivided share in the property. There is no right of survivorship and on the death of one tenant in common the notional share will pass to the estate of that tenant in common.

⁴⁷ *Schobelt v Barber* (1966) 60 DLR (2d) 519 at 522 per Moorhouse J.

⁴⁸ [1927] SASR 147.

⁴⁹ A tenancy in common exists where the elements of a joint tenancy are lacking. It confers a proportionate share of the estate upon each co-owner. A tenancy in common does not give rise to the right of survivorship.

⁵⁰ [1969] Qd R 145.

⁵¹ K Mackie, 'The Forfeiture Rule: The Destination of Property Interests on Homicide' (1997) 2 *Newcastle Law Review* 30.

⁵² [1962] NSW 889.

⁵³ A constructive trust is an equitable remedy imposed by the courts irrespective of the intention of the parties holding legal title to the property. See *Baumgartner v Baumgartner* (1987) 164 CLR 137.

⁵⁴ [1968] 2 NSW 166; (1969) 70 SR (NSW) 407.

⁵⁵ *Public Trustee v Evans* (1985) 2 NSWLR 188 at 193; *Ekert v Mereider* (1993) 32 NSWLR 729 at 731.

⁵⁶ *Re Stone* [1989] 1 Qd R 351.

⁵⁷ *Re Pechar* [1969] NZLR 574.

⁵⁸ *Schobelt v Barber* (1966) 60 DLR (2d) 519.

⁵⁹ *Administration and Probate Act 1935* (Tas).

⁶⁰ (1920) 21 SR (NSW) 175.

⁶¹ [1921] VLR 355.

⁶² (1987) 9 NSWLR 433.

⁶³ (1987) 9 NSWLR 433 at 444.

⁶⁴ *Re Sigworth* [1935] Ch 89.

The forfeiture rule at common law

Although there has historically been some difference in judicial approach to the forfeiture rule in Australia, New Zealand and the United Kingdom, it now appears that the common law of all three jurisdictions has reached a similar position.

The United Kingdom common law

Early English authority rejected any distinction between murder and manslaughter, applying the forfeiture rule regardless. In *Cleaver v Mutual Reserve Fund Life Association*,⁶⁵ in which a wife had murdered her husband and then claimed the proceeds of her husband's life insurance policy, Lord Justice Fry held:⁶⁶

It is against public policy to allow a criminal to claim any benefit by virtue of his crime; she is therefore, disentitled to claim the proceeds of the policy in question, and the executors, who are her trustees, are equally disentitled... The principle of public policy invoked is in my opinion rightly asserted. It appears to me that no system of jurisprudence can with reason include amongst those rights which it enforces, rights directly resulting to the person asserting them from the crime of that person.

This decision was followed in subsequent cases.⁶⁷ However, while the appropriateness of the forfeiture rule has never been questioned in relation to murder,⁶⁸ some judges were concerned at the inflexibility involved in the application of the rule, particularly where the facts suggested the killer's moral culpability was low. One such example is that of *Re Dellow's Will Trusts*⁶⁹ where a wife who suffered from depression as a result of her husband's helplessness following a number of strokes, had turned on the gas taps on the kitchen stove, secured the kitchen against draughts and remained there with her husband until they both died. The judge reluctantly found that the wife had feloniously killed her husband and therefore was not entitled to his estate, but said:⁷⁰

Here was a woman who quite clearly enacted this tragedy not out of hatred for her husband – she and her husband had apparently been happily married for many years. She was deeply concerned for him particularly in the event of him surviving her. Doubtless she was exhausted by the work of continually looking after such a helpless man as her husband. It is in these circumstances that I find it somewhat repellent to have to hold that the wife was guilty of a crime which ranks amongst the most serious that can possibly be committed. The law in its concern for the protection of human life must be strong and, indeed, severe, but I cannot refrain from saying that, in its bearing on such a case as this, it is clumsy, crude and indeed, nowadays, if the case is regarded sympathetically, somewhat uncivilised... This is clearly a case for compassion rather than condemnation.

Until the 1970s no distinction was drawn between cases of murder and manslaughter. The conduct of the victim as well as the killer's motive and state of mind were disregarded. The defence of provocation and diminished responsibility were rejected⁷¹ as providing exceptions to the forfeiture rule, the only exception was granted for those killers suffering from either insanity or acting in self-defence.⁷²

The early 1970s saw the English Court of Appeal in *Gray v Barr*⁷³ question the forfeiture rule's application to all cases of manslaughter. Salmon LJ acknowledged that '[m]anslaughter is a crime which varies infinitely in its seriousness. It may come very near to murder or amount to little more than inadvertence...'⁷⁴ The Justices in that case⁷⁵ were consequently supportive of the test pronounced by Lane J in the court below:⁷⁶

⁶⁵ *Cleaver v Mutual Reserve Fund Life Association* (1892) 1 QB 147.

⁶⁶ (1892) 1 QB 147 at 156.

⁶⁷ *In the Estate of Crippen* [1911] P 108; *In Estate of Hall* [1914] P 1.

⁶⁸ *In the Estate of Crippen* [1911] P 108. Also see section 5 of the *Forfeiture Act 1982* (UK), section 4 of the *Forfeiture Act 1991* (ACT) and section 4(2) of the *Forfeiture Act 1995* (NSW).

⁶⁹ [1964] 1 WLR 451.

⁷⁰ [1964] 1 WLR 451 at 455.

⁷¹ *Re Giles* [1972] Ch 544.

⁷² *Re Houghton* [1915] 2 Ch 173 at 176; *Re Pitts* [1931] 1 Ch 546; *Re Pollock* [1941] Ch 219.

⁷³ [1971] 2 QB 554.

⁷⁴ [1971] 2 QB 554 at 581.

⁷⁵ Salmond LJ, Phillimore J and Lord Denning MR.

...the logical test...is whether the person seeking [the benefit] was guilty of deliberate, intentional and unlawful violence or threats of violence. If he was, and death resulted therefrom, then, however unintended the final death of the victim may have been, the court should not [allow the person to take the benefit].

This test was followed in the later cases of *R v Chief National Insurance Commissioner, ex parte Connor*,⁷⁷ *Re K (Dec'd)*,⁷⁸ the Scottish case of *Burns v Secretary of State for Social Security*⁷⁹ and in *Re H (Dec'd)*⁸⁰ in which Gibson J articulated the view that it is the nature of the act rather than the label attached to it which will determine whether public policy should deprive the killer.⁸¹ However, in other manslaughter cases the forfeiture rule continued to be applied,⁸² leading one commentator to admit 'the *Gray v Barr* test did not have the effect of modifying the rule in a meaningful way'.⁸³

Concerns about the absolute nature of the English common law led to the passing of the *Forfeiture Act 1982*.⁸⁴ The long title of this act declares it to be:

[a]n Act to provide for relief for persons guilty of unlawful killing from forfeiture of inheritance and other rights; to enable such persons to apply for financial provision out of the deceased's estate...⁸⁵

*Dunbar v Plant*⁸⁶ is an example of a case in which the Act has been applied by the English Court of Appeal. In that case the trial judge held that the defendant had illegally aided and abetted her fiancé's suicide and that the forfeiture rule applied to prevent her from succeeding to her fiancé's interests and entitlements. On appeal, the Court of Appeal held that at common law the rule remained absolute and inflexible. However, in the exercise of their discretion under the *Forfeiture Act* modification orders were granted by the trial judge and upheld on appeal.

The Australian common law

The Australian common law position began to develop along broader and more flexible lines in the 1980s. As Kirby P articulated in *Troja v Troja*:⁸⁷

A search for a rule more flexible than the absolute legal rule stated in *Cleaver* [1892] 1 QB 147, and in subsequent English cases, was soon seen to be necessary because of the grossly unjust consequences which that rule, in its full rigour, produced, both for the perpetrator of the homicide, and others taking through that person. In a word, the absolute rule, whilst apparently defensive of human life, paid no regard to the virtually infinite variety of circumstances in which a homicide may occur, and the ameliorative circumstances that may sometimes exist, especially in a domestic situation.

*Public Trustees v Evans*⁸⁸ was an application by the Public Trustee for advice on the administration of an intestacy of a deceased estate. The case followed a criminal trial where the jury were discharged and the accused was acquitted of manslaughter.⁸⁹ Young J, of the Equity Division of the Supreme Court of NSW,

⁷⁶ *Gray v Barr* [1970] 2 QB 626 at 640.

⁷⁷ [1981] QB 758. The facts of the case were that a woman was denied a widow's pension, to which she was otherwise entitled, on the ground that she had been convicted of the manslaughter of her husband.

⁷⁸ [1985] Ch 85 (Vinelott J). Affirmed by the Court of Appeal [1986] Ch 180.

⁷⁹ [1985] SLT 351.

⁸⁰ (1990) 1 FLR 441.

⁸¹ [1990] 1 FLR 441 at 446-7.

⁸² *Re Giles* [1972] Ch 544; *Re Royle* [1985] 1 Ch 22; *Jones v Roberts* [1995] 2 FLR 422.

⁸³ N Peart, 'Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia' (2002) 31 *Common Law World Review* 1 at 8.

⁸⁴ The genesis of the Act and its passage into law is detailed by S Cretney, 'The Forfeiture Act 1982: The Private Members Bill as an Instrument of Law Reform' (1990) 10 *Oxford Journal of Legal Studies* 289. The *Forfeiture Act 1982* (UK) is discussed in greater detail in a later chapter.

⁸⁵ Long Title.

⁸⁶ [1997] 4 All ER 289.

⁸⁷ (1994) 33 NSWLR 269 at 282.

⁸⁸ (1985) 2 NSWLR 188.

⁸⁹ Under section 24 of the *Crimes Act 1900* (NSW) if the judge is of the opinion that having regard to all of the circumstances, a nominal punishment would be sufficient in cases of manslaughter, the jury may be discharged.

held that there was no rule of public policy that prevented a woman, who had killed her husband to protect herself and her children, from inheriting the estate of the deceased. Whilst Young J rather cautiously confined himself to the facts of the case before him, the result nevertheless contrasts sharply with that taken by the English authorities. This judgment was followed in the NSW case of *Perpetual Trustees v Fraser*,⁹⁰ in which Kearney J continued the rejection of the English position by holding that the forfeiture rule was based on a broader principle of unconscionability.⁹¹

...the fundamental question is to determine whether the taking of a benefit by a person through his crime would be unconscionable as representing an unjust enrichment of that person so as to attract the public policy rule.

The Supreme Court of Victoria in *Re Keitley*⁹² followed the more flexible NSW authority with Coldrey J supporting the trial judge's assessment:

by reason of your highly disturbed emotional state at the time, the level of your personal culpability for the death of the deceased is much less than is normally encountered in this court.

Coldrey J subsequently held that the forfeiture rule had no application where a wife killed her husband out of fear that he would kill her. In contrast, Powell J in *Kemperle v Perpetual Trustees*⁹³ and *Bain v Morabito*⁹⁴ preferred the narrower English approach that any unlawful killing deprived the beneficiary of a benefit from the estate of the victim.

In *Public Trustees v Hayles*⁹⁵ Young J adhered to the view that the true basis of the rule was founded in the principle of unconscionability, while Rolfe J in *Permanent Trustee v Freedom from Hunger Campaign*⁹⁶ quite boldly held that the forfeiture rule did not apply unless it was established that the killing was intended to bring about a benefit from the estate of the deceased to the perpetrator. On this rationale, if the homicide was unlawful, and a benefit was secured, but this was merely consequential, and not the purpose of the crime, the forfeiture rule had no application.

This rather confused state of law was the position prior to the NSW Court of Appeal in *Troja v Troja*.⁹⁷ The facts of *Troja* were that the defendant, who had been the victim of domestic violence and was suffering from depression, shot and killed her husband. She was charged with murder, and pleaded not guilty. The jury returned a verdict of not guilty of murder but guilty of manslaughter. She was sentenced to gaol for an eight-year minimum term. In subsequent civil proceedings, a majority of the New South Wales Court of Appeal rejected the inroads that had been made into the forfeiture rule. In particular, their Honours explicitly held that the degree of moral culpability was not to be taken into account in assessing whether the forfeiture rule should be applied and further that the rule was not based on any notion of unconscionability.⁹⁸

In short, and in common with the decisions of Powell J⁹⁹ it was held that the forfeiture rule was absolute and the court did not have discretion as to whether or not to apply it in the circumstances. Mahoney JA held that the court could not enforce rights directly resulting to a person asserting them from the crime of that person, and whilst it was necessary to establish a direct relationship between the killing and the benefit, once that was established forfeiture automatically followed.¹⁰⁰ This decision was followed by the Supreme Court of

⁹⁰ (1987) 9 NSWLR 433. In that case, a son stabbed his mother to death whilst suffering from paranoid schizophrenia. Kearney J held that the forfeiture rule applied, as the son's moral culpability was sufficient.

⁹¹ (1987) 9 NSWLR 433 at 444.

⁹² [1992] 1 VR 583. The facts of the case were that the deceased frequently threatened and assaulted his wife. After the accused informed the deceased that she was leaving, he threatened her by rattling the kitchen drawer, in which a boning knife was kept and which he had menaced her with previously, she then shot him.

⁹³ Unreported, Supreme Court of NSW, Powell J, 20 November 1985.

⁹⁴ Unreported, Supreme Court of NSW, Powell J, 14 August 1992.

⁹⁵ (1993) 33 NSWLR 154.

⁹⁶ (1991) 25 NSWLR 140. The facts of the case were that following a suicide pact, an elderly married couple were found dead in bed, following the self-administration of a poison.

⁹⁷ (1994) 33 NSWLR 269.

⁹⁸ (1994) 33 NSWLR 269 at 299, per Meagher JA, Mahoney JA concurring at 298.

⁹⁹ See *Kemperle v Perpetual Trustees* Unreported, Supreme Court of NSW, Powell J, 20 November 1985 and *Bain v Morabito* Unreported, Supreme Court of NSW, Powell J, 14 August 1992.

¹⁰⁰ (1994) 33 NSWLR 269 at 294-5.

Victoria in *Estate of Soukup*.¹⁰¹ According to this approach the only exception to the forfeiture rule now is where the killer is found to be insane,¹⁰² a decision labelled by one commentator as ‘ruinously strict’.¹⁰³

Where does this leave the position in Tasmania? While there is little doubt that the forfeiture rule is part of the Tasmania common law, it appears that there has been no reported Tasmanian decision dealing with the forfeiture rule.¹⁰⁴ However this is not to say that there have not been cases in which the forfeiture rule could have been applied. For example in Tasmania over the last year, there have been three murder-suicides in which an estranged husband or de facto partner has killed his partner before turning the murder weapon on themselves.¹⁰⁵ In the case of *Franke*¹⁰⁶ a cruel husband who sexually assaulted his wife with the handle of a claw hammer was killed after she managed to seize the hammer and struck him with it. The approach taken by the Supreme Court in regard to the forfeiture rule remains unknown.

A Tasmanian Court called to rule on the matter could choose to adopt the flexible approach and allow exceptions to the rule in cases of manslaughter where the moral culpability of the killer is low. However it is more likely that a Tasmanian Court would follow more recent authority from other jurisdictions (particularly the NSW Court of Appeal in *Troja v Troja*) and adopt an inflexible approach to the rule. This inflexible approach could well be unjust, particularly when the high rate of domestic violence within society is considered.

The New Zealand common law

The New Zealand common law is similar to that of the United Kingdom in that the rule is inflexible. All of the New Zealand cases to date fail to consider the moral culpability of the killer. In *Re Pechar*¹⁰⁷ in which the accused killed his wife, daughter and father-in-law it was held that the forfeiture rule applied to all cases of manslaughter as well as murder. This decision was followed most recently in the cases of *Re Lentjes*¹⁰⁸ and *Re Tawhai*.¹⁰⁹ This equates with the position in Australia since *Troja*.

Legislative Intervention – The forfeiture Acts

Following the decision in *Troja v Troja*¹¹⁰ the NSW Parliament enacted the *Forfeiture Act 1995*.¹¹¹ Similar legislation had earlier been enacted in the Australian Capital Territory.¹¹² Both Acts are based on the United Kingdom *Forfeiture Act 1982*.¹¹³ The effect of the legislation is:¹¹⁴

Where a person (the offender) has unlawfully killed another and is thereby precluded by the forfeiture rule from obtaining an interest in any property, application may be made to the Supreme Court for an order modifying the effect of the rule.

While this statutory intervention does not shut the door on common law development of flexibility in the application of the forfeiture rule, the cases that have been judicially determined under this legislation have not attempted to revisit the common law rule. Indeed, it has been observed, the introduction of the *Forfeiture*

¹⁰¹ (1997) 97 A Crim R 103.

¹⁰² *Re Houghton* [1915] 2 Ch. 173; *Re Plaister* (1934) 34 SR(NSW) 547.

¹⁰³ A Dillon, ‘When Beneficiary Slays Benefactor: The Forfeiture ‘Rule’ should Operate as a Principle of General Law’ (1998) 6 *Australian Property Law Journal* 254 at 259.

¹⁰⁴ This may be about to change however. The Institute has been informed that there is currently a case before the Tasmanian Supreme Court in which the forfeiture rule is at issue.

¹⁰⁵ N Clark, Pollies feud in wake of tragedy, *The Mercury*, December 5 2002 at 7.

¹⁰⁶ Unreported, Supreme Court of Tasmania, Neasey J, 22 September 1985.

¹⁰⁷ [1969] NZLR 574.

¹⁰⁸ [1990] 3 NZLR 193.

¹⁰⁹ Maori Appellate Court of New Zealand, Takitimu District, 10 July 1998.

¹¹⁰ (1994) 33 NSWLR 269.

¹¹¹ Reproduced in the Appendix to this issues paper.

¹¹² *Forfeiture Act 1991*.

¹¹³ S Cretney, ‘The Forfeiture Act 1982: the Private Member’s Bill as an Instrument of Law Reform’ (1990) 10 *Oxford Journal of Legal Studies* 289.

¹¹⁴ Section 3(1) of the *Forfeiture Act 1991* (ACT).

Act has perversely strengthened the force of the common law rule and the courts now concentrate on modifying its effects in deserving cases.¹¹⁵

In the United Kingdom, where the legislation has been operational longest, the relevant cases indicate that a modification order is most likely to be successful where the killer has been subjected to on-going domestic abuse and the killing is in response to that violence,¹¹⁶ where the offender suffers from severe diminished responsibility,¹¹⁷ or where there has been a failed suicide pact.¹¹⁸

While there has not been any reported application under the *Forfeiture Act* in the ACT, the legislation has been used on a number of occasions in NSW, where, for the most part, the UK example of when and how it is to be applied has been followed. In *Jans v Public Trustee*¹¹⁹ the accused was charged with the murder of his wife. At trial the Crown accepted a plea of manslaughter based on the partial defence of diminished responsibility and a four-year good behaviour bond was imposed. In the subsequent civil proceedings, Campbell J granted the husband's application to apply the *Forfeiture Act* and modify the effect of the rule because the children of the deceased had consented to the husband's application, the plaintiff would be left with no assets apart from his superannuation, and the circumstances of the case.

In *Straede v Eastwood*¹²⁰ an application was made by a widower to take the benefit of his wife's estate. The wife was killed in a car crash caused by the dangerous driving of the widower for which he was convicted and imprisoned. The marriage between the widower and his wife had lasted 28 years, though for some years, the parties had lived with another woman with whom they both from time to time had sexual relations. The husband subsequently married this woman after his wife's death. At issue was whether the widower's conduct could be construed as immoral, and therefore material to section 5(3)(a) and (d) of the *Forfeiture Act 1995* (NSW) which states that when determining whether the effect of the forfeiture rule is to be modified the Court is to have regard to the 'conduct of the offender' and 'to such other matters as appear to the court to be material'. Palmer J held that the conduct of the parties during the marriage or the widower's remarriage was irrelevant as it had nothing at all to do with the cause of the wife's death.

In *Leneghan-Britton v Taylor*¹²¹ the plaintiff and her husband were asked to move in with the deceased (the plaintiff's grandmother) in order to take care of her. After some months, the plaintiff, burdened with considerable stress, attempted to commit suicide. She was subsequently diagnosed as suffering from a border-line personality disorder and serious depression. After her discharge from hospital she continued to care for her grandmother. During a heated argument, the plaintiff violently assaulted the grandmother, killing her. Steps were taken by the plaintiff and her husband to make the killing look like a botched robbery, but after several months the plaintiff confessed to the killing. The plaintiff pleaded guilty to a charge of manslaughter on the basis of diminished responsibility and was jailed for eleven years, with a minimum term of seven years. In Equity, Hodgson CJ held that a modification order could be made, giving consideration to the facts that there was no premeditation, there was no intention to profit from the crime, the daughter had sold her home in order to assist the deceased and had attempted to assist the deceased when no other members of the family were willing to do so.

¹¹⁵ M Briggs, 'Homicidal Heirs and Succession: The Scope of the Forfeiture Principle' (1999) *Butterworths Family Law Journal* 57.

¹¹⁶ *Re K* [1985] Ch 85; *Paterson* [1986] SLT 121.

¹¹⁷ *Re H* [1990] 1 FLR 441; *Re S* [1996] 1 WLR 235; *Gilchrist* [1990] SLT 494.

¹¹⁸ *Dunbar v Plant* [1998] Ch 412.

¹¹⁹ [2002] NSWSC 628.

¹²⁰ [2003] NSWSC 280.

¹²¹ [1998] NSWSC 218.

Part 3

The Need for Reform

As was explained in Part 1, in succession law the principle underlying the forfeiture rule is that a person shall not benefit from killing another. However, relying on the principle of unconscionability, some courts have recognised that an exception to the rule should exist in cases where its application would produce an unconscionable result. In short, where the moral blameworthiness of the killer was minimal, it would be unjust to apply the forfeiture rule. Thus, the courts have been willing to modify the effect of the forfeiture rule, or not apply the rule at all, in those cases involving:

- suicide pacts;¹²²
- where the offender suffers from diminished responsibility;¹²³ and
- in cases where the offender has been subjected to ongoing domestic violence and the killing forms part of and is in response to that violence.¹²⁴

The domestic violence cases are of particular concern. Over the last thirty years, there has been a growing awareness of the high level of domestic violence in Australian society. According to a definition provided by *Women Tasmania* domestic violence is the use of intimidation, violence or abusive behaviour by one partner to control the other partner and can include psychological, financial, social, sexual and physical abuse. Although the prevalence of domestic violence is difficult to determine precisely, due to the belief that most people do not report cases of domestic violence to the police, statistics provided for the last financial year demonstrate that domestic violence contacts with the *Department of Health and Human Services* have increased from 5777 in 2001-2002 to 9631 in 2002-2003. The *Women's Safety Survey*, conducted by the Australian Bureau of Statistics in 1996, found that 23% of women who had ever been married or in a de facto relationship had experienced violence by a partner at some time during their relationship.¹²⁵ The research also demonstrates that women are predominantly the victims of this domestic violence.¹²⁶

A correlative effect of this violence, according to Bradfield's study¹²⁷ of spousal killings in Australia between 1980 and 2000, is that most women who kill, kill in self-defence, or in reaction to longstanding abuse by the deceased.¹²⁸ Bradfield also found that 'nearly three killings every fortnight'¹²⁹ involved homicide between current or former married or de facto spouses.

The typical scenario where women kill their male partner is that the killing follows a history of physical abuse by her male partner.¹³⁰ As Lawrence articulately expressed:¹³¹

¹²² *Dunbar v Plant* [1997] 4 All ER 289.

¹²³ *Re H* [1990] 1 FLR 441; *Re S* [1996] 1 WLR 235; *Gilchrist* [1990] SLT 494; *Jans v Public Trustee* [2002] NSWSC 628.

¹²⁴ *Re K* [1985] Ch 85; *Public Trustees v Evans* (1985) 2 NSWLR 188.

¹²⁵ Australian Bureau of Statistics, *Women's Safety Australia*, Cat. No 4128.0, Canberra: Australian Government Publishing Service, 1996 at 50.

¹²⁶ A Frerrante et al, *Measuring the Extent of Domestic Violence*, Sydney: The Hawkins Press, 1996; Australian Law Reform Commission, *Domestic Violence*, Canberra: Australian Government Publishing Service, 1986.

¹²⁷ R Bradfield, *The Treatment of Women who Kill their Violent Male Partners within the Australian Criminal Justice System*, PhD, University of Tasmania 2002.

¹²⁸ This contention is supported by other research. The literature is extensive, see particularly: A Jones, *Women Who Kill* (1980); W Bacon and R Lansdowne, 'Women Who Kill Their Husband: The Battered Wife on Trial' in C O'Donnell and J Craney (eds), *Family Violence in Australia* (1982); A Browne, *When Battered Women Kill* (1987); P Ewing, *Battered Women Who Kill – Psychological Self-Defence as Legal Justification* (1987); Australian Institute of Criminology *Homicide between Intimate Partners in Australia* Trends and Issues paper No 90, 1998.

¹²⁹ R Bradfield, *The Treatment of Women who Kill their Violent Male Partners within the Australian Criminal Justice System*, PhD, University of Tasmania 2002 at 14.

¹³⁰ Wallace reported that in 70% of cases where women kill their husbands, there was evidence of prior physical abuse by her husband. A Wallace, *Homicide: The Social Reality*, Sydney: NSW Bureau of Crime Statistics and Research 1986 at 97. See also W Bacon & R Lansdowne, 'Women Who Kill Husbands: The Battered Wife on Trial' in C O'Donnell & J Craney (eds), *Family Violence in Australia*, Melbourne: Longman Cheshire, 1982 at 71.

When women kill, the situation is most likely to be one of a woman in her third or fourth decade who has been the victim of physical and verbal abuse from an alcoholic ‘husband’ and living in lower socio-economic circumstances for many years; it is summer and vacation time. She is most likely not legally insane but may be suffering from a major depressive illness. Under increasing attack, she impulsively reaches for a weapon with which to defend herself, commonly a knife readily available in the home. The attacker then becomes the victim. Not uncommonly, family or neighbours later commented ‘I always thought he’d kill her one day’.

In the light of the data collected in these studies, it is not surprising to find it argued that ‘battered women who finally kill their husbands are often doubly victimised – first by the men who have abused them; and then, secondly, by the legal system itself.’¹³²

While Tasmania is yet to judicially determine the effect of the forfeiture rule, without the discretion to modify the effect of the rule under a forfeiture Act it is quite possible that the application of the rule could produce an unjust outcome.

The fundamental deficiency with the *Troja* decision is that the majority established a blanket rule in favour of forfeiture that will in future necessitate a finding of forfeiture on any unlawful killing, regardless of the circumstances. An absolute rule produces a result that may be grossly unjust, especially given that killings resulting in the application of the forfeiture rule are often a desperate reaction to domestic violence, which appears to occur at a disturbingly high rate in Australian society.¹³³ Kirby P, in a strong dissent from the majority decision in *Troja* argued:¹³⁴

The ultimate test is what the ‘sense of outrage’ requires, to which the law is responding. This necessitates the determination of the circumstances in which it will be unconscionable for the perpetrator of an unlawful homicide to derive benefits as a consequence of the felonious act. In many cases (perhaps most), it would indeed be unconscionable for any benefit to be derived by the perpetrator. But in some cases, in the infinite variety of circumstances that can lead to homicide, there will be no, or little, outrage. In such cases there will be no offence to conscience. To the contrary, it is the inflexible application of the ‘forfeiture rule’, in its original English exposition, that will cause the offence to conscience from which a court of equity will provide relief.

Strict application of the forfeiture rule results in denying the offender benefits under a will, on intestacy or through the right of survivorship of a joint tenancy, as well as to debar a claim under family provision legislation.¹³⁵ Indeed, the killer may even be denied a widow’s pension.¹³⁶

It is argued that applying the rule inflexibly is unjust because the reality is that society does view some killings as less morally blameworthy than others. This is reflected by:

- the different penalties applicable to different types of killings;
- the different sentences handed down by the courts for different types of killings,¹³⁷ and;
- the reaction of the public to different killings.

It is further argued that if the courts are unwilling to allow exceptions to the forfeiture rule in cases where an

¹³¹ J M Lawrence, ‘Women Who Kill: A Comparative Study in Queensland’ 26 in *Beyond These Walls – Report of Queensland Domestic Violence Task Force* (1988).

¹³² S Cretney, ‘The Forfeiture Act 1982: The Private Member’s Bill as an Instrument of Law Reform’ (1990) 10 *Oxford Journal of Legal Studies* 289 at 292.

¹³³ It is not known exactly how much domestic violence exists in Australia. But, in one month (November 1993) there were 3009 cases of domestic violence reported to the police in six States and Territories in Australia. These were NSW, NT, SA, ACT, Tasmania and Victoria: P Easta *Shattered Dreams Marital Violence Against Overseas-born Women in Australia*, Australian Government Publishing Service 1996.

¹³⁴ (1994) 33 NSWLR 269 at 284.

¹³⁵ Should the rationale in *Re Royse* [1985] Ch 22 be followed.

¹³⁶ Should *R v National Insurance Commissioner; ex parte Connor* [1981] QB 758 be followed.

¹³⁷ For example in Tasmania section 158 of the *Criminal Code Act 1924* (Tas) provides that a person convicted of murder is liable to imprisonment for the term of their natural life or ‘for such other term as the court determines’. While according to research conducted between 1978-2000 a single count of manslaughter attracted sentences of imprisonment ranging from 9 months to 10 years. See K Warner, *Sentencing in Tasmania*, The Federation Press: NSW 2002 at 274.

exception would create a just outcome, it is up to the legislature to resolve this injustice. The legislatures in the UK, NSW and the ACT have already seen fit to do so.

While we are aware of no Tasmanian cases where the application of the forfeiture rule has resulted in injustice, such a case could come before the courts at any time.¹³⁸ The enactment of Tasmanian legislation allowing for the modification of the effects of the forfeiture rule would avoid the possibility of injustice, and provide a more certain, and ultimately more conscionable, decision-making process.

Question

Please explain the reasons for your views as fully as possible.

1. Do you agree that legislation should be enacted to allow for the modification of the effects of the forfeiture rule in some situations?

¹³⁸ As mentioned above, the Institute is aware of a case currently before the Tasmanian Supreme Court in which the forfeiture rule is at issue.

Part 4

Options for Reform

The Institute is of the preliminary view that Tasmania should enact a Forfeiture Act. This Part discusses the options for the form and detail of such an Act.

The obvious model for a Tasmanian Forfeiture Act would be the UK *Forfeiture Act*, upon which the NSW and ACT Acts are based. The NSW *Forfeiture Act* appears to be the most comprehensive of these Acts.¹³⁹ However the following issues should be addressed:

- What matters should the court consider in deciding whether to modify the effect of the rule?
- Should a person be entitled to apply for a modification order in cases of murder?
- Who should be able to apply for a modification order?
- What types of property interests should the legislation extend to?

What matters should the court consider in deciding whether to modify the effect of the rule?

The UK based Acts essentially create a two-stage process. First, the court determines whether the forfeiture rule applies. Secondly, the court gives consideration to whether in the circumstances of the case, a modification order should be made.¹⁴⁰ When exercising its discretion the court must be satisfied that 'justice requires the effect of the rule to be modified'. To be so satisfied the court must consider a wide range of circumstances. These include:¹⁴¹

- (a) the conduct of the offender;
- (b) the conduct of the deceased person;
- (c) the effect of the application of the rule on the offender or any other person;
- (d) such other matters as appear to the Court to be material.

In *Dunbar v Plant*¹⁴² Mummery J acknowledged that there is a whole range of factors which need to be taken into account. These include:

- the relationship between the deceased and the killer as well as the deceased's intentions;
- the degree of moral culpability, the nature and gravity of the offence;
- the size of the estate and the value of the property in dispute;
- the financial position of the killer; and
- the more general claims of those whose benefits would be assured if the forfeiture rule was applied.

¹³⁹ The comprehensiveness of the NSW Act also ensures that the courts have greater power to extend time limits for making applications under the Act and to vary modification orders in cases where the offender is subsequently pardoned, where the conviction is quashed or where the offender is discovered to have committed the unlawful killing after the time for making an application for modification has expired.

¹⁴⁰ Section 2 of the *Forfeiture Act 1982* (UK), section 3 of the *Forfeiture Act 1991* (ACT) and sections 5 and 6 of the *Forfeiture Act 1995* (NSW). The second limb was discussed by Vinelott J in *Re K (dec'd)* [1985] 1 All ER 403 who held that the UK Act asked the court to look to the moral culpability attending the killing.

¹⁴¹ Section 5(3) *Forfeiture Act 1995* (NSW). Section 2(2) *Forfeiture Act 1982* (UK) and section 3(2) of the *Forfeiture Act 1991* (ACT) are to the same effect but do not include paragraph (c).

¹⁴² [1997] 4 All ER 289 at 302-3.

One suggestion that has been made by Dillon¹⁴³ is that when the court is to have regard to ‘(a) the conduct of the offender’ and ‘(d) such other matters’ it should also have regard to the following:

- (a) the moral culpability of the offender;
- (b) whether it would be unconscionable as an unjust enrichment for the offender to take the benefit;
- (c) whether there has been appropriate behaviour on the part of the offender.

Question

Please explain the reasons for your views as fully as possible.

2. If a Tasmanian Forfeiture Act was based on the UK model, what criteria should it include for considering whether the effect of the rule should be modified:
- a) the same criteria as in the NSW Act;
 - b) the additional criteria suggested by Mummery J in *Dunbar v Plant*;
 - c) the additional criteria suggested by Dillon?

Should a person be entitled to apply for a modification order in cases of murder?

In the other jurisdictions which have enacted forfeiture Acts they have expressly provided that the effect of the rule cannot be modified in cases of murder.¹⁴⁴ In Tasmania murder is a much broader crime than in other jurisdictions. This is because the defence of provocation no longer exists, the defence of diminished responsibility is not available and a person can be convicted of murder on the basis of an unlawful act or omission which he or she ought to have known to be likely to cause death. Furthermore, in cases of murder the jury may return a verdict of manslaughter even if manslaughter is not reasonably open on the facts, as a merciful alternative.¹⁴⁵ However this option may now be less likely to be employed as a life sentence is no longer mandatory for murder.¹⁴⁶ It could therefore be argued that there may be cases of murder where justice would suggest that the forfeiture rule should be modified on grounds of public policy. For example cases of suicide pacts gone wrong, killings in reaction to a history of domestic violence, or where a killer’s mental condition makes them less culpable (although they are not found not guilty on grounds of insanity).

Question

Please explain the reasons for your views as fully as possible.

3. Should a person be entitled to apply for a modification order in cases of murder?

Who should be able to apply for a modification order?

In England and the ACT the court has the power to modify the effect of the rule in deserving cases. However, this power is broader in the NSW *Forfeiture Act* which provides that an application may be made

¹⁴³ A Dillon, ‘When Beneficiary Slays Benefactor: The Forfeiture ‘Rule’ should Operate as a Principle of General Law’ (1998) 6 *Australian Property Law Journal* 254 at 273.

¹⁴⁴ Section 4 *Forfeiture Act 1991* (ACT); section 5 *Forfeiture Act 1982* (UK) & section 4(2) *Forfeiture Act 1995* (NSW).

¹⁴⁵ K Warner *Sentencing in Tasmania* 2002, The Federation Press, at 274, citing: ‘*Brown* (1913) CLR 570; *Beavan* (1954) CLR 660; ss 332(2) and 333 of the Criminal Code read together provide that on an indictment for murder the accused may be convicted of manslaughter ‘if it is established by the evidence to have been committed’. This suggests that the alternative of manslaughter is only open if established by the evidence, but the common law position is accepted in Tasmania, eg *Packett* (1937) 58 CLR 190. Only one case of a sentence for manslaughter based on a the merciful alternative was found: *Mason* Cosgrove J 5/12/1983 (the defendant, who may have been distraught, shot his wife; a sentence of 6 years imprisonment was imposed).’

¹⁴⁶ *Criminal Code Amendment (Life Prisoners and Dangerous Criminals) Act 1994*.

by an ‘interested person’ rather than being limited to the killer.¹⁴⁷ An ‘interested person’ is defined in section 3 as:

- (a) an offender;
- (b) the executor or administrator of the estate of a deceased person;
- (c) a beneficiary under the will of a deceased person or a person who is entitled to any estate or interest on the intestacy of a deceased person;
- (d) a person claiming through an offender;
- (e) any other person who has a special interest in the outcome of an application for a forfeiture modification order.

The importance of this provision is that where the killer cannot or does not wish to apply for a modification order a modification order can be applied for by other ‘interested people’ such as those who could inherit through the killer, or the killer’s creditors.

Question

Please explain the reasons for your views as fully as possible.

4. Should the right to apply for modification of the forfeiture rule be limited to the killer, or should it extend to any interested person in a Tasmanian forfeiture Act?

What types of property interests should the legislation extend to?

Section 3(1) of the ACT *Forfeiture Act* provides:

Where a person (the offender) has unlawfully killed another and is thereby precluded by the forfeiture rule from obtaining an interest in any property, application may be made to the Supreme Court for an order modifying the effect of the rule.

Would this reference to an ‘interest in property’ result in the killer being disqualified from a pension? In NSW a similar provision provides for a wider meaning with the term ‘benefit’ used instead of ‘interest in property’. This wider definition would probably ensure that pensions were covered.

Question

Please explain the reasons for your views as fully as possible.

5. Should a Tasmanian forfeiture Act apply to property only, or extend to other benefits?

Another option for reform: The New Zealand Draft Succession (Homicide) Act

A criticism that can be made of the *Forfeiture Acts* is that they leave too much discretion to individual judges, allowing for different outcomes in cases with similar facts. For example in *Jones v Roberts*,¹⁴⁸ where a paranoid schizophrenic son had beaten his parents to death, Kolbert J applied the forfeiture rule and refused the son’s application for a modification of the rule. This can be contrasted with *Re H (dec’d)*,¹⁴⁹ in which a husband suffering from hallucinations caused by a reaction to a prescribed drug, stabbed his wife to death. In that case, Gibson J followed the precedent established in *Gray v Barr*¹⁵⁰ and therefore found that the

¹⁴⁷ Section 5 *Forfeiture Act 1995* (NSW).

¹⁴⁸ [1995] 2 FLR 422 (UK, Chancery Division).

¹⁴⁹ [1990] 1 FLR 441 (UK, Chancery Division).

¹⁵⁰ [1971] 2 QB 544.

forfeiture rule did not apply. As a consequence, he did not need to modify the effect of the forfeiture rule through the discretion granted under the *Forfeiture Act*.¹⁵¹ Similar such contrasting decisions led Harvey J to comment in *Re Tucker*:¹⁵²

the whole doctrine seems to me to be in a very unsatisfactory condition; it is an extraordinary instance of Judge-made law invoking the doctrine of public policy in order to prevent what is felt in a particular case to be an outrage; but I cannot distinguish, consistently with these judgments, one case from the other.

In 1997 the New Zealand Law Commission proposed a Draft Succession (Homicide) Act ‘in place of the [forfeiture] rules of law, equity and public policy’.¹⁵³ The primary difference between the Draft Succession (Homicide) Act and the legislation of NSW, the ACT and the UK is that instead of providing for a modification order to be made where the ‘justice of the case requires’ the New Zealand Law Commission recommends codifying the forfeiture rule and the exceptions to it. The proposed Act therefore expressly stipulates the instances in which a killer will be disentitled arguing:¹⁵⁴

Ultimately the question whether a particular class of killing is sufficiently abhorrent to attract the application of the bar on profits is one of policy, rather than one of legal technique. For this reason it should be settled clearly and completely by Parliament.

Under the proposed New Zealand legislation a person guilty of unlawful homicide forfeits any benefit they may have obtained from the deceased’s estate.¹⁵⁵ ‘Homicide’ is defined in section 6 and includes certain exceptions:

- (a) a killing caused by a negligent act or omission; or
- (b) infanticide under section 178 of the Crimes Act 1961; or
- (c) a killing of a person by another in pursuance of a suicide pact.¹⁵⁶

While the Institute agrees with the notion that such matters of policy can be appropriately dealt with by Parliament, the Institute is of the preliminary view that such a provision is likely to be inadequate. The infinite array of circumstances in which people kill makes it more appropriate for a judge, considering the particular circumstances of the case, to decide whether it is an appropriate case for modification of the rule, by giving consideration to the factors set out in the UK based forfeiture Acts. For example, some concern has been raised by some commentators as to what is meant by a ‘negligent’ killing in the proposed NZ Act.¹⁵⁷ Would the widower in *Straede v Eastwood*¹⁵⁸ who killed his wife in a car accident satisfy the ‘negligent’ exception? What if the driving was also considered dangerous? Furthermore, killings that are reactions to domestic violence may not come within the ambit of the proposed NZ Act. This could produce injustice in some cases.

Question

Please explain the reasons for your views as fully as possible.

6. Should a Tasmanian forfeiture Act attempt to codify the forfeiture rule and its exceptions or is the flexibility of the UK, ACT and NSW forfeiture Acts preferable? If you are in favour of codification, what are the reasons for your view? Would you favour the exceptions set out in the NZ proposal?

Because the New Zealand proposal codifies the forfeiture rule, it also sets out the manner of distribution of

¹⁵¹ For a discussion on these cases see R Buckley, ‘Manslaughter and the Forfeiture Rule’ (1995) 111 *Law Quarterly Review* 196.

¹⁵² (1920) 21 SR (NSW) 175, at 181.

¹⁵³ Clause 4.

¹⁵⁴ New Zealand Law Commission, *Succession Law – Homicidal Heirs* Report 38 (Wellington, 1997) at 5.

¹⁵⁵ This is similar to section 4 of the *Forfeiture Act 1991* (ACT) and section 5 of the *Forfeiture Act 1982* (UK) which exclude convicted murderers.

¹⁵⁶ Assisted suicide is also included, as it is not a homicide. Consequently, the killer in *Dunbar v Plant* [1997] 4 All ER 289 would be exempted on this definition from the effect of the forfeiture rule.

¹⁵⁷ N Peart, ‘Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia’ (2002) 31 *Common Law World Review* 1 at 28.

¹⁵⁸ [2003] NSWSC 280.

the forfeited estate. Under the New Zealand proposal property subject to the forfeiture rule would be distributed as though the killer had predeceased the victim, unless there is an express testamentary direction to the contrary.¹⁵⁹ This provision would avoid the result arrived at in *Davis v Worthington*¹⁶⁰ in which gifts over conditional on the death of the killer failed when the court interpreted the will literally, because the killer had not in fact died. However, the outcome may still be unconscionable as the effect is that the killer is disbarred from rights they acquired legally or beneficially before the killing. The Institute is of the preliminary view that the better approach is that taken by Jacobs J in *Re Thorp and the Real Property Act*,¹⁶¹ in which the surviving joint tenant in equity held the property upon constructive trust.¹⁶² While the New Zealand proposal takes the position that this is ‘unnecessarily complex’, according to Mackie:¹⁶³

the constructive trust approach, imposed in order to prevent unjust enrichment, seems to be the more principled and elegant solution to the problems in this area.

Question

Please explain the reasons for your views as fully as possible.

7. If you are in favour of codification, should the effect of forfeiture be that the estate be distributed as if the killer had predeceased the victim, or should it be that the killer takes the property on constructive trust for the appropriate beneficiary?

¹⁵⁹ Clauses 7(3) and 8(3).

¹⁶⁰ [1978] WAR 144.

¹⁶¹ [1962] NSW 889.

¹⁶² A constructive trust is an equitable remedy imposed by the courts irrespective of the intention of the parties holding legal title to the property. See *Baumgartner v Baumgartner* (1987) 164 CLR 137.

¹⁶³ K Mackie, ‘The Forfeiture Rule: The Destination of Property Interests on Homicide’ (1997) 2 *Newcastle Law Review* 30 at 45.

Appendix

Forfeiture Act 1995 (NSW)

Long Title

An Act to provide relief for persons guilty of unlawful killing, and other persons, from forfeiture of benefits; and for related purposes.

1 Name of Act

This Act is the *Forfeiture Act 1995*.

2 Commencement

This Act commences on a day to be appointed by proclamation.

3 Definitions

In this Act:

benefit includes any interest in property and any entitlement under the *Family Provision Act 1982*.

deceased person means a person who is unlawfully killed.

forfeiture modification order means an order made under section 5.

forfeiture rule means the unwritten rule of public policy that in certain circumstances precludes a person who has unlawfully killed another person from acquiring a benefit in consequence of the killing.

interested person means any of the following persons:

- (a) an offender,
- (b) the executor or administrator of the estate of a deceased person,
- (c) a beneficiary under the will of a deceased person or a person who is entitled to any estate or interest on the intestacy of a deceased person,
- (d) a person claiming through an offender,
- (e) any other person who has a special interest in the outcome of an application for a forfeiture modification order.

offender means a person who has unlawfully killed another person.

unlawful killing means:

- (a) any homicide committed in the State that is an offence, and
- (b) any homicide that would be an offence if committed within the State, and includes aiding, abetting, counselling or procuring such a homicide and unlawfully aiding, abetting, counselling or procuring a suicide.

4 Application of Act

(1) This Act applies to the following:

- (a) an unlawful killing whether occurring within or outside the State,
- (b) property:
 - (i) located within the State, or
 - (ii) located outside the State, but only to the extent to which courts of the State have jurisdiction to make orders concerning the property.

(2) This Act does not apply to the following:

- (a) an unlawful killing committed in the State that constitutes murder,
- (b) an unlawful killing that would constitute murder if committed in the State.

5 Power of Supreme Court to modify effect of forfeiture rule

(1) If a person has unlawfully killed another person and is thereby precluded by the forfeiture rule from obtaining a benefit, any interested person may make an application to the Supreme Court for an order modifying the effect of the rule.

(2) On any such application, the Court may make an order modifying the effect of the forfeiture rule if it is satisfied that justice requires the effect of the rule to be modified.

- (3) In determining whether justice requires the effect of the rule to be modified, the Court is to have regard to the following matters:
- (a) the conduct of the offender,
 - (b) the conduct of the deceased person,
 - (c) the effect of the application of the rule on the offender or any other person,
 - (d) such other matters as appear to the Court to be material.

6 Forfeiture modification orders may be moulded to suit circumstances

- (1) The Supreme Court may make a forfeiture modification order in such terms and subject to such conditions as the Court thinks fit.
- (2) For example, the Court may modify the effect of the forfeiture rule in relation to property:
- (a) in the case of more than one interest in the same property (for instance, a joint tenancy) affected by the rule—by excluding the operation of the rule in relation to any or all of the interests, and
 - (b) in the case of an offender who has an interest in real property (such as a family home) and personal property affected by the rule—by excluding the application of the rule in relation to all the property or some of the property.
- (3) If the Court makes a forfeiture modification order, the forfeiture rule is to have effect for all purposes (including purposes relating to anything done before the order was made) subject to modifications made by the order.

7 Time for applications for forfeiture modification orders

- (1) Unless the Supreme Court gives leave for a late application to be made under subsection (2), an application for a forfeiture modification order must be made:
- (a) if the forfeiture rule operates immediately on the death of a deceased person to prevent the offender from obtaining the benefit concerned—within 12 months from the date of the death of the deceased person, or
 - (b) if the forfeiture rule subsequently prevents the offender from obtaining the benefit—within 12 months from the date on which the forfeiture rule operates to preclude the offender from obtaining the benefit.
- (2) The Court may give leave for a late application if:
- (a) the offender concerned is pardoned by the Governor after the expiration of the relevant period, or
 - (b) the offender's conviction is quashed or set aside by a court after the expiration of the relevant period and there are no further avenues of appeal available in respect of the decision to quash or set aside the conviction, or
 - (c) the fact that the offender committed the unlawful killing is discovered after the expiration of the relevant period, or
 - (d) the Court considers it just in all the circumstances to give leave.

8 Revocation and variation of forfeiture modification orders

- (1) If the Supreme Court has made a forfeiture modification order, an interested person may make an application to the Court for the revocation or variation of the order if:
- (a) the offender concerned is pardoned by the Governor after the making of the order, or
 - (b) the offender's conviction is quashed or set aside by a court after the making of the order and there are no further avenues of appeal available in respect of the decision to quash or set aside the conviction, or
 - (c) in all other cases—if the Court considers it just in all the circumstances to give leave for such an application to be made.
- (2) On any such application, the Court may revoke or vary the forfeiture modification order concerned.
- (3) The provisions of sections 5 (2) and (3) and 6 (1) and (2) apply to the determination of any such application in the same way as they apply to the making of a forfeiture modification order. In determining whether to revoke or vary the forfeiture modification order, the Court is also to have regard to the effect on the offender and other persons of any such revocation or variation.
- (4) If a forfeiture modification order is revoked or varied, the forfeiture rule is to have effect for all purposes (including purposes relating to anything done before the order was revoked or varied):
- (a) in the case of a revocation—subject to the terms on which the Court revokes the order, and
 - (b) in the case of a variation—subject to modifications made by the varied order.

9 Transitional provisions

- (1) A forfeiture modification order may be made in respect of:
 - (a) an unlawful killing occurring before or after the commencement of this Act, or
 - (b) the application of the forfeiture rule in proceedings commenced but not determined before the commencement of this Act.
- (2) A forfeiture modification order is not to be made modifying the effect of the forfeiture rule in respect of any interest in property that, in consequence of the rule, has been acquired before the commencement of this Act by a person other than the offender or a person claiming through the offender.
- (3) However, nothing in this Act affects any determination of a court concerning the application of the forfeiture rule in any proceedings that was made before the commencement of this Act.

10 Review of Act

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- (3) A report of the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.