THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ELCS:EEsh1692567

3 May 2019

Professor John Williams
Director, South Australian Law Reform Institute
Adelaide Law School
University of Adelaide
SA 5005

By email: salri@adelaide.edu.au

Dear Professor Williams,

Review of the common law forfeiture rule

Thank you for the opportunity to comment on the South Australian Law Reform Institute's ("SALRI") review of the common law forfeiture rule. The Law Society's Elder Law, Capacity & Succession Committee contributed to this submission.

The Law Society supports the harmonisation of the law relating to forfeiture across state and territory jurisdictions.

Our preferred model from the options for reform listed in Question 22 is Option B. However, should SALRI recommend that the forfeiture rule be codified (Option D), we ask that consideration be given to extending the rule in two areas: indirect inheritance and elder abuse.

Our detailed comments on specific questions are set out below.

Question 13 - Should South Australia introduce legislation, like that in the United Kingdom, Australian Capital Territory, New South Wales and as recommended by the Victorian Law Reform Commission, that empowers a Court to modify the effect of the forfeiture rule?

Question 22 - Which of the Proposed Models should we adopt in South Australia?

Option A. The common law forfeiture rule remains as it is in South Australia with no legislative scope for the modification of the rule.

Option B. The common law forfeiture rule remains as it is in South Australia but introduce legislation that empowers a Court to modify the effect of the rule.

Option C. Introduce legislation codifying the forfeiture rule as it is to apply in South Australia with no scope for the modification of the rule.

Option D. Introduce legislation codifying the forfeiture rule as it is to apply in South Australia which also empowers a Court to modify the effect of the rule.

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NSW Position

It has been noted that, while "strict and unbending"[1] the boundaries of the common law forfeiture rule cannot be mapped with precision.[2] In *Re Settree Estates; Robinson v Settree* [2018] NSWSC 1413 the Supreme Court of NSW said:

> There is no single, universally correct statement of precise terms in which the common law "forfeiture rule" is to be expressed.[3]

The NSW Parliament has responded to some of the difficulties of the common law rule by enacting the *Forfeiture Act 1995* (NSW) ("Forfeiture Act"). The Forfeiture Act provides a broad judicial discretion that sits alongside the common law rule and enables the Court to make orders modifying the operation of the rule.

The Forfeiture Act provides that if a person has unlawfully killed another person, upon application the Court may make a *forfeiture modification order* modifying the effect of the common law forfeiture rule "in such terms and subject to such conditions as the Court thinks fit". The Court may, for example, confine its order to the property interests of the offender to the exclusion of the interest of any other joint tenant, or confine its order to particular parts of the offender's real or personal property.[4]

The Court may revoke a forfeiture modification order if justice requires it, for example, if the offender is pardoned or their conviction quashed.[5]

Importantly, the Forfeiture Act does not apply to an unlawful killing that constitutes murder. The forfeiture rule will continue to be strictly applied in that case.

However, if a person has been found not guilty of murder by reason of mental illness, upon application the Court may make a *forfeiture application order* which treats the person as if they had been convicted of the murder.[6] A forfeiture application order overcomes the common law exception to the forfeiture rule that would otherwise apply.

Before making a forfeiture modification order or a forfeiture application order, the Court must be satisfied "that justice requires the effect of the rule to be modified", having regard to:
(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, and
(d) such other matters as appear to the Court to be material.[7]

The discretion enables the Court to consider each case on its merits in the context of existing case law. The Court is thus able to ensure a just result in a wide range of criminal circumstances including:

- aiding, abetting, counselling or procuring a homicide[8] (which would include assisting a terminally ill person to die);
- dangerous driving causing death;[9]

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[1] *Gonzales v Claridades* [2003] NSWCA 227, [46].
[2] *Estate of Paul Novasadek* [2016] NSWSC 554, [16]: "its exact ambit has never been clear".
[3] [2018] NSWSC 1413, [48].
[4] Section 6.
[5] Section 8.
[6] Section 11.
[7] Sections 5(3), 11(3).
[8] Section 3.

- suicide pacts;[10]
- defensive homicide in the context of domestic violence;[11]
- criminal neglect occasioning death; and
- infanticide (although such cases may be rare).

The discretion empowers the Court to determine the offender's entitlement to any interest in property and any family provision entitlement, as well as their entitlement to property that does not belong to the deceased at death, for example:

- rights of survivorship by reason of a joint tenancy;[12]
- proceeds of life insurance payable by reason of the deceased's death;[13]
- a pension payable pursuant to legislation;[14] and
- a death benefit payable by a superannuation fund.[15]

It also provides a means for determining who should inherit on distribution of the estate, insurance proceeds, death benefit and the like in the absence of the offender inheriting those funds. The issue was put this way in *Re Settree Estates; Robinson v Settree* [2018] NSWSC 1413:

> The modern forfeiture rule lacks the clarity of focus...it focuses attention on a killer's loss of benefits without certainty as to who, incidentally, acquires forfeited benefits. This is a problem inherent in the operation of the modern rule - determination of how far the rule operates derivatively and who takes the benefit of property the subject of a forfeiture.[16]

Option B

As stated earlier, the Law Society supports the harmonisation across state and territory jurisdictions of the law relating to forfeiture. The introduction of a consistent regime would help to simplify the web of existing Australian and UK case law in this area.

We recommend that South Australia adopt Option B in the Proposed Models listed in Question 22, that is, that the common law forfeiture rule remain, but that legislation be introduced that empowers a Court to modify the effect of the rule.

We recommend that the Forfeiture Act be used as a model in South Australia. Instances of unlawful killing by an heir are very rare, and the circumstances tend to be unusual and complex. In our view, although a judicial discretion may not bring simplicity or predictability to this area of law, it provides a mechanism for justice in what tend to be difficult cases. In practical terms, although making a Supreme Court application may add time and expense to the process of distributing an estate, in these cases a judicial declaration may provide the best outcome for beneficiaries as well as protection for executors or administrators.

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[9] See *Tinline v White Cross Insurance Association Limited* [1921] 3 KB 327; *James v British General Insurance Company Limited* [1927] 2 KB 311; *Hardy v Motor Insurers' Bureau* [1964] 2 QB 745; *Beresford v Royal Insurance Company Limited* [1938] AC 586.

[10] See *Dunbar v Plant* [1998] Ch 412; *The Public Trustee of Queensland v The Public Trustee of Queensland* [2014] QSC 47.

[11] See *In re Giles* [1972] 1 Ch 544; *In re K* [1985] 1 Ch 85; *Public Trustee v Evans* (1985) 2 NSWLR 188; *Re Keitley* [1992] VicRp 38; [1992] 1 VR 583; *Troja v Troja* (1994) 33 NSWLR 268.

[12] See *Rasmanis v Jurewitsch* (1970) 70 SR (NSW) 407; *Re Stone* [1989] 1 Qd R 351.

[13] See *The Amicable Society for a Perpetual Life Assurance Office v Bolland* ("Fauntleroy's case") (1830) 4 Bligh NS 194; 5 ER 70; *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147.

[14] See *Re Field and Commonwealth of Australia* (1983) 5 ALD 571.

[15] See *In the Estate of the Late Fiona Ellen Fitter & The Forfeiture Act 1995; Public Trustee of New South Wales v Fitter* [2005] NSWSC 1188; *97\111* [1997] SCTA 111.

[16] [2018] NSWSC 1413, [26] citing *Public Trustee v Hayles* (1993) 33 NSWLR 154; *Egan v O'Brien* [2006] NSWSC 1398.

Question 12
Are there any other matters that should be addressed in a codified rule (and how)?

An alternative approach to reform in South Australia is codification (Option D in the Proposed Models listed in Question 22). We note, however, the challenge in codification of reflecting the full range of circumstances in which the common law rule could arise, so as to minimise the risk of unintended or unjust outcomes. In our view should the rule be codified, there will remain a need for judicial discretion to modify the operation of the rule.

If codification of the forfeiture rule were undertaken in South Australia, it would present an opportunity to extend the operation of the rule. Consideration could be given to the extent of the rule in two key areas:

- forfeiture of an indirect inheritance;
- forfeiture where reprehensible behaviour of a beneficiary has perpetrated elder abuse on an elderly victim.

Indirect inheritance
Currently it is uncertain whether the forfeiture rule extends to cases where an offender who has forfeited inheritance of the deceased's property may ultimately inherit the property through a third party beneficiary.

In *Public Trustee (WA) v Mack* [2017] WASC 325 the Supreme Court of Western Australia extended the forfeiture rule in a manner not previously known to Anglo-Australian law. A son, Brent, had killed his mother. His inheritance of her intestate estate was forfeited, meaning her sole beneficiary was her other son, Gary. The mother's estate was not distributed at the time of Gary's death. The sole beneficiary of Gary's estate was Brent. Because the mother's estate had not been distributed, Brent's inheritance was to include the part of the mother's estate which had been forfeited. The administrator of Gary's estate brought the matter to Court for determination of the beneficiaries of that estate.

The Court observed that there may be some doubt as to whether the rule would hold good where there was a long period of time between the commission of the offence and the passing of an asset to the offender. In *Mack* there was no significant modification to Gary's estate, by the effluxion of time or otherwise, which caused difficulty with identification of the asset held by Gary consequent upon his mother's death. Accordingly, the Court made directions that on distribution of Gary's estate the administrator not pay Brent any part of the estate which derived from the mother's estate.

If the law were to be codified, legislation could assist by prescribing the extent to which remoteness or temporal proximity could be relied on to defend the forfeiture of an indirect inheritance.

Elder abuse
Currently the common law forfeiture rule does not extend to elder abuse, which involves improper dealings via an enduring power of attorney,[17] misusing electronic PIN access to bank accounts,[18] coercion in relation to will making[19] and improper dealings with real estate,[20] among other actions.

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[17] See *Smith v Smith* [2017] NSWSC 408; *McFee v Reilly* [2018] NSWCA 322.
[18] See *Lindsay v Arnison* [2017] NSWSC 41.

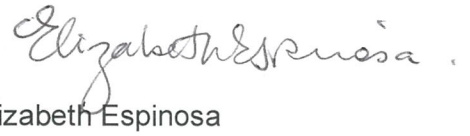
Very few elder financial abuse cases result in criminal prosecution. Civil redress in the equity division of the Supreme Court is more common,[21] but difficulties arise when the victim lacks mental capacity to provide evidence of the abuse or rebut a presumption of advancement.

In the United States, eight states have expanded the forfeiture rule (known as "slayer laws") to disqualify persons from inheriting if they have been involved in physical abuse or financial exploitation of the deceased, in order to reduce elder abuse.[22] This legislative approach is not unique. In China and in civil law countries, succession laws link repugnant behaviour or "unworthiness" to disinheritance. In New South Wales the Court extended the forfeiture rule based on this notion in *Cohen v Cohen* [2016] NSWSC 336.

However, as noted earlier, the Law Society's preferred model is Option B. While codification may help to bring clarity to the forfeiture rule, and may provide opportunities to address specific issues such as the two issues outlined above, in the absence of any judicial discretion, codification alone may lead to incongruous or unjust results.

If you have any further questions in relation to this letter, please contact Sue Hunt, Principal Policy Lawyer on (02) 9926 0218 or by email: sue.hunt@lawsociety.com.au.

Yours sincerely,



Elizabeth Espinosa
President

[19] See *Petrovski v Nasev*; *The Estate of Janakievska* [2011] NSWSC 1275; *Dickman v Holley*; *Estate of Simpson* [2013] NSWSC 18.
[20] *Cohen v Cohen* [2016] NSWSC 336.
[21] See for example *Smith v Smith* [2017] NSWSC 408.
[22] It has been recognised that the abuse is often committed by beneficiaries in wills or those who will inherit on intestacy, that is, close family members: see Jennifer Piel, 'Expanding Slayer Statutes to Elder Abuse' (2015) 43(3) *The Journal of the American Academy of Psychiatry and the Law*, 369.
The US statutes provide not only for forfeiture of estate assets but also "non probate assets" or "will substitute assets". An example of the application of this law in the context of elder financial abuse is *In re Estate of Haviland*, 301 P.3d 32 (Wash. 2013).