

PUBLIC TRUSTEE (WA) V MACK: AN UNCERTAIN FUTURE FOR THE FORFEITURE RULE IN ELDER ABUSE CASES?

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I THE FACTS

In 2012, Brent Mack ('Mack') was found guilty of the 2008 murder of his mother Ah Bee Mack. Following his conviction, the court ordered that the operation of the forfeiture rule precluded Mack from inheriting any part of his mother's estate, and instead ruled that her estate would pass to her only other son Adrian Mack.¹ However, Adrian Mack died intestate in 2014 and, as a result, the Public Trustee of Western Australia, acting as the Administrator of Ah Bee Mack's estate, brought an action to prevent Mack from indirectly inheriting any part of his mother's estate through the estate of his brother.² There had been no suggestion that Mack was involved in his brother's death.³

The forfeiture rule is a common law rule that developed to prevent those convicted of murder from inheriting directly from their victims.⁴ This rule is based on the principle that a person should not be able to receive the benefits that stem from their wrongful actions,⁵ and is strictly enforced at common law against those who are convicted of murder.⁶ The operation of the forfeiture rule had already prevented Mack from directly inheriting any of his mother's estate after being convicted for her murder.⁷ However, the question before the court was whether this rule should be extended beyond simply precluding Mack from inheriting from his mother, and should prevent him from inheriting anything from his mother's estate through his brother also.⁸ This would represent an extension of the forfeiture rule so that it would operate not only operated to prevent direct inheritance from victims, but also to prevent indirect inheritance of a victim's property.

II THE OPERATION OF THE FORFEITURE RULE IN AUSTRALIA

The forfeiture rule in Australia relies on the principle that one should not benefit from their wrongdoing. This principle is a well-established interpretive principle that assumes that Parliament could not have intended that any benefit conferred by statute would be awarded as the result of an unlawful act.⁹ On this basis, the forfeiture rule can be justified with reference to these public policy concerns, which override the usual laws of succession and inheritance set out in statute. It is considered against public policy to allow a person who is culpable for the death of another to benefit from their wrongful actions by inheriting any part of the victim's estate.¹⁰ It was on the basis of these public policy concerns that the operation of the forfeiture rule was extended to prevent those convicted of manslaughter, not only those convicted of murder, from inheriting from victims.¹¹ These principles that underpin the rule clearly also apply to a situation where someone is convicted of manslaughter. Where a person

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¹ *Public Trustee (WA) v Mack* [2017] WASC 325, 328.

² *Ibid.*

³ *Ibid.*

⁴ *Helton v Allen* (1940) 63 CLR 691 ('*Helton*').

⁵ *Ibid* 709.

⁶ *Troja v Troja* (1994) 33 NSWLR 269, 299.

⁷ *Public Trustee (WA) v Mack* [2017] WASC 325, 328.

⁸ *Ibid.*

⁹ F A R Bennion, *Statutory Interpretation*, (Lexis Nexis, 5th ed, 2008) 1141.

¹⁰ *Helton* (1940) 63 CLR 691, 709.

¹¹ *Re Hall* [1914] All ER Rep 381, 384.

has committed manslaughter, there remains a high level of moral culpability that should also preclude them from benefiting from their wrongdoing by preventing their inheritance of the victim's property.¹²

Although the forfeiture rule was established at common law, there have been significant statutory inroads into its operation in both NSW and the ACT.¹³ In these jurisdictions there is now considerable scope for judicial discretion in the application of the rule. In the 1980s and 1990s, case law began to suggest that equity provided a basis for introducing judicial discretion into the otherwise strictly applied operation of the forfeiture rule.¹⁴ In response, the NSW Court of Appeal firmly upheld that the rule from the High Court in *Helton v Allen* ('*Helton*')¹⁵ was to be strictly applied against anyone found culpable for homicide.¹⁶ Following this decision, NSW introduced the *Forfeiture Act*,¹⁷ which mirrored similar statutes already enacted in England in 1982,¹⁸ and the ACT in 1991.¹⁹ These statutes allow courts to amend the application of the rule for reasons relating to public policy, or to avoid unduly harsh results.²⁰ These statutory inroads into the forfeiture rule mean that there is a disparity between the application of the rule in states where the strict common law operates, and where statute has superseded the common law and allowed for increased judicial discretion.

III THE DECISION

Master Sanderson held that the forfeiture rule, previously used only to preclude those convicted of murder from inheriting directly from their victims, could be extended to prevent Mack from inheriting that part of his brother's estate that was made up of Ah Bee Mack's estate.²¹ Master Sanderson focused his analysis on the construction of the forfeiture rule outlined in *Helton* where the High Court described the principle as meaning 'that a man should not slay his benefactor and thereby take his bounty'.²² He tracked the development of the rule in Australian law and held that the application of the forfeiture rule is founded on the jurisprudential position stated in *Helton*. Noting that there were no Australian cases on point relating to the indirect inheritance of property as a result of murder, Master Sanderson looked to decisions from the United States to support his ruling that Mack should not inherit from his mother's estate through the estate of his brother.

The forfeiture rule, referred to as the 'slayer rule' in the United States, similarly applies to those culpable of murder or manslaughter and prevents them from directly inheriting from their victims.²³ Further, the American 'slayer rule' has been extended to prohibit those found guilty of murder or manslaughter from indirectly inheriting from victims such as in the current case.²⁴ The primary justification for Master Sanderson's extension of the forfeiture rule is derived from his treatment of the American case of *Riggs v Palmer*,²⁵ wherein the court upheld the extended rule by reason of the common law maxim that 'no one shall be permitted to acquire property by his own crime'.²⁶ Master Sanderson found that because the principle

¹² Ibid.

¹³ *Forfeiture Act 1995* (NSW); *Forfeiture Act 1991* (ACT).

¹⁴ *Public Trustee v Evans* (1985) 2 NSWLR 188; *Public Trustee v Fraser* (1987) 9 NSWLR 433; *Re Keitley* [1992] 1 VR 583.

¹⁵ (1940) 63 CLR 691.

¹⁶ *Troja v Troja* (1994) 33 NSWLR 269, 299.

¹⁷ *Forfeiture Act 1995* (NSW).

¹⁸ *Forfeiture Act 1982* (UK) c 34.

¹⁹ *Forfeiture Act 1991* (ACT).

²⁰ Ibid s 3(2); *Forfeiture Act 1995* (NSW) s 5(2).

²¹ *Public Trustee (WA) v Mack* [2017] WASC 325, 334–35.

²² *Helton* (1940) 63 CLR 691, 709.

²³ *Riggs v Palmer*, 115 NY 506, 511 (1889).

²⁴ *Re Estate of Vallerius*, 259 Ill App 3d 350 (Ct App, 1994).

²⁵ 115 NY 506 (1889).

²⁶ Ibid 511.

underpinning the decision in *Riggs v Palmer* was significantly similar to the Australian position, the rule should similarly be extended in relation to Mack.

Examining various applications of the extended forfeiture rule in the United States, Master Sanderson cited *In Re Estate of Vallerius*,²⁷ where a grandson, found responsible for murdering his grandmother, was prevented from indirectly inheriting any part of her estate through the estate of his mother.²⁸ Similarly, he also referenced *In Re Estate of Macaro*,²⁹ where the court was in a similar position. In this case, there was also no precedent in the state of New York for determining the question of indirect inheritance. Without a case on point, the court held that the principle in *Riggs v Palmer* provided a basis for ruling that one cannot indirectly inherit any part of a victim's estate, even if it is being inherited from someone other than the victim. This, Master Sanderson opined, pointed to a well-established principle in the United States that a person is unable to *indirectly* inherit from a victim if that person is morally culpable for the victim's death. Drawing on the similarities between the principles found in the Australian case of *Helton* and the American case of *Riggs v Palmer*, Master Sanderson concluded that the extended rule should also apply in Australia.

While the decision of the court represents a significant development of the forfeiture rule in Australian common law, such an extended interpretation of the rule creates considerable uncertainty as to the rule's operation. Master Sanderson's decision was practically possibly largely because the estate of Ah Bee Mack remained almost completely unchanged since it had been inherited by Adrian Mack.³⁰ However, there is now uncertainty about how this extended rule will operate in circumstances where the property is no longer clearly defined or has merged with other property.

IV IMPACT ON CURRENT LAW

The extension of the forfeiture rule not only complicates what was previously a clearly expressed common law doctrine, but also complicates the operation of the rule which has, until now, been strictly applied in common law jurisdictions. The decision to extend the forfeiture rule in Western Australia, a state that still relies on the common law to dictate the rule's operation,³¹ is significant because it remains unclear whether this extended forfeiture rule will be enforced with the same rigidity. If it is not to be strictly applied, then this would represent a significant departure from the formulation of the rule that the common law has applied to date.³² However, strict enforcement of the extended forfeiture rule would cause significant complexities for courts where property is not as clearly defined as it was in this case.³³ Further, the increasing distance between the moral culpability of the offender, and the benefit obtained as a result, diminishes the weight to be given to the public policy justification for the extended forfeiture rule. This is especially true in situations where the extended forfeiture rule interferes with an innocent beneficiary's ability to freely dispose of property. This represents a particular problem in circumstances where the innocent beneficiary has been able to consider the wrongdoing of the offender before their death, and nevertheless wills them property which has come into their possession from the victim.

As there was no Australian authority on point, this decision has the potential to establish a precedent for the operation of the rule around Australia, except in NSW and the ACT where the rule is found in statute rather than at common law. In this way, Master Sanderson's

²⁷ *Re Estate of Vallerius*, 259 Ill App 3d 350 (Ct App, 1994).

²⁸ *Ibid* 354–55.

²⁹ *Re Estate of Macaro*, 182 Misc 2d 625 (NY, 1999).

³⁰ *Public Trustee (WA) v Mack* [2017] WASC 325, 334.

³¹ Andrew Hemming, 'Killing the Goose and Keeping the Golden Nest Egg' (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 342, 343.

³² *Troja v Troja* (1994) 33 NSWLR 269, 299.

³³ *Public Trustee (WA) v Mack* [2017] WASC 325, 334.

decision has inserted considerable uncertainty about the continued operation of the rule in most state jurisdictions around Australia. Thus, this case has transformed the forfeiture rule from a clearly defined doctrine to a more expansive but less defined principle that has the potential to complicate the law if it is not clarified.³⁴

Given the significance of the decision and the lack of in-depth analysis of its effects in the Australian context, an appeal to the Western Australian Court of Appeal is likely. However, the fact that the estate of Ah Bee Mack remained almost completely discrete and identifiable from Adrian Mack's estate means that it is unlikely that the decision will be overturned. Nevertheless, an appeal would allow the court to consider issues relating to the operation of the forfeiture rule that stem from this decision. Due to the unique circumstances of this case, it is likely that, even with an appeal, significant questions as to the future operation of the forfeiture rule would remain outstanding until further case law on the issue is developed.

V POSSIBILITIES FOR THE FORFEITURE RULE IN CASES OF ELDER ABUSE

The extension of the forfeiture rule, particularly in light of Master Sanderson's reliance on the extended rule found in the United States, has prompted at least one commentator to consider the possibility of further expansion of the forfeiture rule.³⁵ Significant debate on this issue in the United States has prompted some states to use the forfeiture rule as a means of deterring elder abuse by extending the rule to prevent those who have perpetrated elder abuse from inheriting from their victims.³⁶ However, as discussions about elder abuse legislation in Australia have found,³⁷ elder abuse is a difficult issue to define, and this impacts the effectiveness of this technique as a means of deterrence.³⁸ Further, the adoption of this kind of expansion in Australia has been discouraged by the Australian Law Reform Commission ('ALRC') in favour of exploring other strategies for responding to elder abuse.³⁹ Although the ALRC has not explicitly stated that the forfeiture rule should not be expanded to disinherit abusers of the elderly, it has highlighted a number of major concerns that arise in relation to expanding the rule in this way.⁴⁰ Firstly, the expanded forfeiture rule in the United States exists in the context of specific criminal laws that prohibit elder abuse.⁴¹ As the ALRC has previously recommended against the introduction of specific criminal legislation to deal with elder abuse, introducing a forfeiture rule would be particularly difficult without the existence of clear criminal statute that could determine when abuse has been perpetrated.⁴² Additionally, the ALRC has discouraged the rule's expansion because of the operation of family law provisions that affect the distribution of estates.⁴³ Thus, introducing an expansion of the forfeiture rule that prohibited abusers from inheriting would be particularly complex in the Australian legal framework. However, this expansion in the United States highlights the potential for the forfeiture rule to develop in a way that can be used as a deterrent in other areas of the law.

³⁴ Karen J Sneddon, 'Should Cain's Children Inherit Abel's Property? Wading into the Extended Slayer Rule Quagmire' (2007) 76(1) *University of Missouri-Kansas City Law Review* 101, 111.

³⁵ Barbara Hamilton, 'Be Nice to your Parents: or Else!' (2006) 4 *Elder Law Review* 8.

³⁶ Jennifer Piel, 'Expanding Slayer Statutes to Elder Abuse' (2015) 43(3) *Journal of the American Academy of Psychiatry and the Law* 369, 371.

³⁷ Hamilton, above n 35, 8.

³⁸ *Ibid* 12.

³⁹ Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) 165–66.

⁴⁰ Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017) 17, 280–81.

⁴¹ *Ibid*.

⁴² *Ibid*.

⁴³ *Ibid* 281.

Extending the forfeiture rule can be considered a contentious issue that delves into the debate between testamentary freedom and public policy concerns.⁴⁴ Although prohibiting named beneficiaries from inheriting property does significantly interfere with freedom to dispose of property, this is not a concept that is unheard of in the legal context.⁴⁵ The law has made substantial inroads into testamentary freedom for the provision of property in relation to family provisions,⁴⁶ and therefore further inroads into testamentary freedom for the purpose of preventing elder abuse is arguably equally justified. In relation to testamentary freedom and the forfeiture rule, the public policy benefit of prohibiting those convicted of killing from profiting from their crime is clearly beneficial. However, when extending the reach of testamentary interference to prohibit abusers from benefiting from their victims, one must consider the balance between upholding the wishes of a deceased, and deterring elder abuse by ensuring that one cannot benefit from their abuse actions.⁴⁷ Further, this area cannot be clearly explored while we still lack a definition of elder abuse.⁴⁸

Trends towards expanding the use of the forfeiture rule in countries such as the United States suggest that further development in this area of the law is likely with new cases. However, while Master Sanderson's decision indicates a move in the direction of expansion, it remains unclear how this extended forfeiture rule will operate in Australia.

VI CONCLUSION

Under current law, there is no crime in any Australian jurisdiction that specifically relates to abuse of the elderly.⁴⁹ There is an increasing recognition of the need for the law to protect elderly individuals from abuse where that abuse occurs as a result of their vulnerability. One of the difficulties in conceiving a framework for the dignified protection of the elderly, compared to those frameworks designed to protect other vulnerable groups such as children, is that the consequences of ageing are unpredictable and widely inconsistent. On the one hand, legislative frameworks devised to protect the elderly from harm can be an effective way to ensure against abuse, particularly because much elder abuse occurs within the private family setting.⁵⁰ On the other hand, excessive intervention in the lives of the elderly suggests that society disregards the autonomy and dignity of elderly people in favour of paternalistic policies and legislation. Extending the forfeiture rule to disinherit those who have subjected elderly people to abuse could help protect those who are vulnerable in the community. However, adopting a paternalistic approach that interferes with testamentary capacity may disregard the need to uphold the dignity and autonomy of the elderly. This is a difficult balance for the law, particularly when there continues to be no clear legal definition about what constitutes an act of elder abuse.⁵¹ The ruling in this case represents an interesting opportunity to examine how existing laws can impact elderly Australians. Further, it presents an opportunity for the law to expand in ways that could better protect elderly people in society. However, the definitional issues relating to the concept of elder abuse, and continuing tension between protection and autonomy, present significant challenges for this area of the law.

⁴⁴ Rosalind F Croucher, 'How Free is Free? Testamentary Freedom and the Battle Between "Family" and "Property"' (2012) 37 *Australian Journal of Legal Philosophy* 9, 10.

⁴⁵ *Ibid* 23.

⁴⁶ *Succession Act 2006* (NSW) ch 3.

⁴⁷ Croucher, above n 44, 9.

⁴⁸ Piel, above n 36.

⁴⁹ Australian Law Reform Commission, above n 39, 364.

⁵⁰ *Ibid* 96.

⁵¹ Piel, above n 36, 371.

