The Forfeiture Rule: The Destination of Property Interests on Homicide

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Introduction

It is a well established principle 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 forfeiture rule, as it is commonly known, is based upon public policy. As expressed by Fry LJ in *Cleaver v Mutual Reserve Fund Life Assurance*[1]:

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

The theoretical underpinnings of the forfeiture principle, and the ambit of it, are, however, disputable and have been the subject of much academic[2] and judicial debate. The position in the United Kingdom, prior to the

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1 [1892] 1 QB 147 at 156-157. Note, however, the comments of Scott, "The Effect of Homicide on Property Rights" (1963) 1 U of Tas LR 817 at 817, who asserts that this is too widely stated as a general principle of law.

2 See particularly Chadwick, "A Testator's Bounty to his Slayer" (1914) 30 *LQR* 211; Toohey, "Killing the Goose That Lays the Golden Eggs" (1958) 32 *ALJ* 14; Scott, above, n 1; Youdan, "Acquisition of Property by Killing" (1973) 89 *LQR* 235; Mackie, "Manslaughter and Succession" (1988) 62 *ALJ* 616; Goff and Jones, *The Law of Restitution*, 4th ed, London, Sweet and Maxwell, 1993, Ch 37. For the Canadian position, see Tarnow, "Unworthy Heirs: The Application of the Public Policy Rule in the Administration of Estates" (1980) 58 *Can Bar Rev* 582 and Maddaugh and McCamus, *The Law of Restitution*, Canada Law Book Co Inc, 1990, Ch 22. The American authorities are discussed by McGovern, "Homicide and Succession to Property" (1970) 68 *Mich LR* 65 and Fellows, "The Slayer Rule: Not Solely a Matter of Equity" (1986) 71 *Iowa LR* 489.

enactment of the *Forfeiture Act* 1982 (UK),[3] was to rigorously apply the forfeiture rule to situations of manslaughter as well as murder, the best known example being the decision in *Re Giles (Deceased)*.[4] There, a woman who had killed her husband with a blow from a chamber pot pleaded guilty to manslaughter on the basis of diminished responsibility and was sentenced to detention for hospital treatment. She was nonetheless disqualified from inheriting her husband's estate, the judge commenting that:

> "the deserving of punishment and moral culpability are not necessarily ingredients of the type of crime to which this rule applies, that is, culpable homicide, murder or manslaughter"[5]

and held that there was to be no sentimental speculation as to the motives and degree of moral guilt of a person who has been justly convicted.[6] The *Forfeiture Act* 1982 (UK) now enables a court to make an order modifying the effect of the rule in cases other than murder if it is satisfied that, having regard to the conduct of the offender and of the deceased and to other circumstances, the justice of the case requires modification. This requires a consideration of the moral culpability attending the killing.[7]

In Australia, there have been judicial attempts to modify the application of the rule. In *Public Trustee v Evans*,[8] for example, the rule was not applied where the killing occurred under extreme provocation in a case of domestic violence and the circumstances attracted no more than nominal punishment, a case followed in Victoria in *Re Keitley*.[9] In *Public Trustee v Fraser*[10] and *Public Trustee v Hayles*[11] it was held that the true basis of the rule was to be found in the doctrine of unconscionability, and so would not apply where the taking of a benefit would not be unconscionable as an unjust enrichment.[12] In *Troja v Troja*,[13] the New South Wales Court of Appeal, by majority, rejected these developments, and held the rule not to be based on unconscionability and should be rigidly applied. Meagher JA stated that the rule was absolute and inflexible and:

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3 For a critique of the technical provisions of this Act, see Cretney, "The Forfeiture Act 1982: The Private Member's Bill as an Instrument of Law Reform" (1990) 10 *Oxford J Leg Stud* 289.

4 [1972] Ch 544.

5 Above at 552.

6 Quoting with approval the words of Hamilton LJ in *In Estate of Hall* [1914] P 1 at 7.

7 See particular *Re K (Deceased)* [1985] Ch 85 (Vinelott J); [1986] Ch 180 (CA); *Re H Deceased* [1990] Fam L 175.

8 (1985) 2 NSWLR 188.

9 [1992] 1 VR 583.

10 (1987) 9 NSWLR 433.

11 (1993) 33 NSWLR 154.

12 Note also the dissenting judgment of Kirby P in *Troja v Troja* (1994) 33 NSWLR 269.

13 (1994) 33 NSWLR 269.

> "... 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."[14]

As a direct result of that decision, the New South Wales parliament passed the *Forfeiture Act* 1995,[15] which, like the United Kingdom legislation, allows the Supreme Court to make orders modifying the effect of the forfeiture rule in appropriate circumstances except in cases of murder. The Australian Capital Territory had earlier passed similar legislation.[16] In other jurisdictions, the rule remains unaffected by statute, and awaits further judicial consideration.

The purpose of this article is not to consider the forfeiture rule in general, but rather to examine one particular aspect of it, that relating to the actual destination of property interests once the forfeiture rule has been applied. This is a matter of judicial disagreement, but hitherto has attracted little academic comment. The matter, however, cannot be entirely divorced from either the justification for the doctrine of forfeiture or its modern application. In particular, it will be argued that the equitable doctrine of unconscionability, with the imposition of a constructive trust, provides an effective and flexible solution to the problems inherent in this area of the law.

The authorities are unanimous in holding that application of the forfeiture rule results in the killer being disbarred in taking any benefit from the estate of the deceased. Thus the killer, and those claiming through him or her, are unable to take the benefit of specific or residuary gifts in wills, may not claim on intestacy, and, in the case of joint tenancies, cannot claim by right of survivorship. A family provision claim against the estate of the deceased is also denied.[17]

Where, therefore, does the property of the deceased go? Youdan[18] points out that just as the courts have not worked out a suitable justification for the forfeiture rule, so no rational theory has been devised for working out who becomes entitled to the property. The traditional approach is simplistic: specific gifts in wills to the killer fall into the residuary estate,[19] if the wrongdoer is the sole residuary legatee or if there is no residuary gift, the property is distributed as on the intestacy of the deceased.[20] The killer is disqualified from benefits under the intestacy, both where the intestacy results from the above rule, and where the deceased dies

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[14] Above at 299.
[15] The Act commenced on 1 April 1996. SR 1996 No 94, Gaz 35 of 22 March 1996.
[16] *Forfeiture Act* 1991 (ACT).
[17] *Re Royse (Deceased)* [1985] 1 Ch 22; *Troja v Troja* (1994) 35 NSWLR 182 (Master McLaughlin).
[18] Above, n 2 at 256.
[19] *Re Peacock* [1957] Ch 310.
[20] *Re Pollock* [1941] Ch 219; *Re Callaway* [1956] Ch 559; *Re Dellow's Will Trusts* [1964] 1 All ER 771; *Re Giles*, above n 4.

intestate.[21] Application of these principles in specific areas is considered immediately below.

Wills

The major problem in the application of the principle to wills occurs where the will benefits the killer, but contains a gift over in the event of the beneficiary pre-deceasing the testator. Most well drawn wills now contain such alternative provisions, thereby avoiding the complex area of lapse. If the gift to the killer falls to be distributed under the rules of intestacy, the result is that the gift over has no effect, even if one can be fairly certain that the testator would have intended the gift over to become operative if the killer beneficiary was disqualified. There may, in other words, be an intention that the estate should be distributed otherwise than under the intestacy rules.

The case law on this area reveals a tension between a literal approach to the construction of the will, and an interpretative one. Earlier decisions have taken the view that the gift over may take effect on the killer's disqualification. In *Re Barrowcliff*,[22] for example, a wife executed a will, leaving all her estate to her husband in the event of him surviving her, but in the event of him predeceasing her there was a gift over to trustees upon certain trusts for named beneficiaries. The husband murdered the wife. The case was primarily concerned with the effect of the forfeiture rule on the joint tenancy held by the husband and wife but Napier J also held the gift over to be effective. It was argued that the gift was expressed to depend upon the husband predeceasing the testator, and as this condition had failed (that is, the husband was still alive at the wife's death) an intestacy resulted. This argument was rejected as the testator had made manifest her intention to dispose of the property, and the will should be construed accordingly. The will was read as if in the gift over took effect subject to the interest previously given, Napier J commenting:

> "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."[23]

Some English authorities have suggested much the same result, but with the adoption of a fiction rather than a direct interpretative

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[21] See the authorities referred to in n 20 above, and *Re Tucker* (1920) 21 SR (NSW) 175; *Re Sangal* [1921] VLR 355; *Re Pechar* [1969] NZLR 574; *The Public Trustee v Fraser*, above n 10. The position in relation to joint tenancies is considered below: see Part 4.

[22] [1927] SASR 147.

[23] Above at 151.

construction of the will. Thus in *Re Callaway*,[24] Vaisey J was of the view that the benefit under the will had lapsed, which would, of course, bring the alternative gift over into operation. Whilst not directly using the language of lapse, there are also Australian authorities springing from the decision of Harvey J in *Re Tucker*,[25] which treat the beneficiary killer as being "struck out", or notionally not being in existence.[26] It should be noted, however, that these cases were not concerned with substitutional gifts in wills. *Callaway* was a case where the testator had left the whole of her estate to her daughter, who murdered her. There was no gift over. Her daughter and son would have been equally entitled on intestacy, but for the murder, and the son was therefore held beneficially entitled to the whole estate. This case is discussed further in Part 3 below. In *Tucker* and *Sangal* there were direct intestacies. *Fraser*, like *Calloway*, was concerned with a gift to the killer in a will but with no substitutional provision. Again, therefore, the issue really concerned the position on intestacy.

This is not to assert that the principles relating to wills and those relating to intestacies should necessarily be differentiated, but rather to suggest that direct authority is clearly lacking for the application of this principle to cases of substitutional gifts in wills. As far as can be ascertained, it has only been applied, and in a qualified way, by Waddell CJ at first instance in *Troja v Troja*.[27] There a testator was killed by his wife, who was convicted of manslaughter on the grounds of diminished responsibility. The testator's will left the whole of his estate to the 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 concluded that the forfeiture rule did apply, held the disentitled wife 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 Public Trustee was to administer the estate 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. It will be immediately apparent from this order that the case was really decided on equitable principles, and was not solely limited to the fictional device of either utilising the doctrine of lapse or treating the deceased as notionally not being in existence. The decision of Waddell CJ was upheld by a majority of the Court of Appeal in *Troja v Troja*,[28] but neither Mahoney or Meagher JJA, the majority judges, specifically dealt with this issue.[29] This was unfortunate, as, as already noted, both judges held that the doctrine of unconscionability has no role to play in the application of the rule. If that is so, it may

[24] [1956] Ch 559.
[25] Above, n 21.
[26] See *Re Sangal*, above, n 21: *Public Trustee v Fraser*, above, n 10.
[27] Unreported, New South Wales Supreme Court (in Equity) 15 February 1993. Noted (1993) *67 ALJ* 386.
[28] Above, n 13.
[29] The issue was, however, discussed by Kirby P in dissent, which judgement is considered in more detail in Part 5 below.

also be argued that it has no role to play in the question as to where the property should go, a matter addressed further below.

An alternative fiction to give effect to the gift over is to legally deem the beneficiary to having actually predeceased the testator. There is some support for this principle in texts,[30] journal articles[31] and law reform commission reports,[32] but judicial authority is scant. It has been said to be based upon statements by the President of the Probate Division in the case of *Re Estate of Crippen*[33] and the judgments in *Cleaver v Mutual Life Reserve Fund Life Association*,[34] but even an expansive reading of these authorities can hardly support this view. In *Re Stone*,[35] however, McPherson J of the Supreme Court of Queensland, relied on these cases to hold that a gift over in favour of the testator's children valid on the ground that the disposition to the killer "is to be considered as passing as if he had died immediately before the testator".[36] Whilst the actual result in that case was unexceptional,[37] and clearly carried into effect the intention of the testator, the means of achieving it by this method is clearly questionable. As Young J stated in *Public Trustee v Hayles*:[38] "To adopt this wider view would be merely to adopt a fiction and then use that fiction to bring about a particular result."

More commonly, a literal approach is taken in the construction of the will, so that a gift over on the non-survival of the killer will have no effect.[39] In *Davis v Worthington*,[40] for example, a testator left her estate to one Pace provided he survived her for 14 days, failing which the estate was to go to a charity. Pace murdered the testator, and survived her for more than 14 days. Both the next of kin of the testator and the charity claimed the estate. Wallace J held that as the testator clearly intended that the gift over to charity would take effect only if Pace did not survive her for 14 days, and as he had, and as there was no provision for what would happen to the estate if Pace was barred from taking, there was an intestacy. The question was one of construction of the will and it was not correct notion-

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30 *Williams on Wills*, 6th ed, (London, Butterworths, 1987) at 71; *Stair Memorial Encyclopaedia*, Vol 25, para 672 (Scotland).

31 See, for example, Chadwick, above, n 2 at 213.

32 *The Effect of Culpable Homicide on Rights of Succession* (October 1976): Report of the Property Law and Equity Reform Committee, New Zealand. *Scottish Law Reform Commission Report*, No 129, Part VII, para 7.15.

33 [1911] P 108

34 [1892] 1 QB 147

35 [1989] 1 Qd R 351.

36 Above at 355.

37 It would appear that the children would have been solely entitled under an intestacy in any event.

38 Above, n 11 at 170. See also *Re Lentjes* [1990] 3 NZLR 193 at 197 (Heron J); *Ekert v Mereider* (1993) 32 NSWLR 729 at 731-732 (Windeyer J).

39 If the will is sufficiently worded to indicate that if the initial gift fails of *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.

40 [1978] WAR 144.

ally to regard Pace as having died immediately before the testator nor simply to regard his name as having been "struck out". Wallace J relied on the earlier English decision of Karminski J in *Estate of Robertson, Marsden v Marsden*,[41] on similar facts, in reaching this conclusion.[42] The decision in *Re Barrowcliff*[43] was not cited. Similar decisions have been given by the Scottish Court of Session in *Re Kyd; Hunter's Executors*,[44] and, more recently, by the English Court of Appeal in *Jones v Midland Bank Trust Co Ltd.* [45]

In *Jones*, the testator left a will leaving the whole of her estate to her son Robert Jones, but if he predeceased her to her two nephews. Robert Jones killed his mother, was charged with murder, pleaded guilty to manslaughter, was convicted accordingly, and was sentenced to three years probation. On a preliminary issue, and subject to any order for relief from forfeiture under the *Forfeiture Act* 1982 (UK), the case was tried as to whether the testator's estate passed under the gift over to the nephews or devolved as on intestacy. At first instance, Judge Weeks QC, sitting as a member of the High Court, found in favour of the nephews, stating:

> "The actual event which occurred was not that Robert Jones predeceased his mother; Robert Jones killed his mother, and I think in the circumstances of this case the right inference to draw from the wording of the will is that the testatrix, if asked, would have said 'Of course, if he is to murder me, then my estate is to go to such of my nephews, Michael and Stephen Amplett, as shall be living at my death'. This seems to me an a fortiori conclusion from the actual wording of the will."[46]

The Court of Appeal overturned this decision and found for an intestacy, holding that the circumstances in which the son was prevented from benefiting under the will did not entitle the Court to speculate as to the testator's wishes and effectively rewrite the will. The situation provided for in the will, that is, the son predeceasing the testator, had not occurred and therefore the gift over could not take effect. The speculation by the judge as to what the testator would have wished was not permissible in the construction of wills.

With great respect to the Court of Appeal in this case, and indeed, to the other courts which have applied a literal construction to wills in these circumstances the construction of a will may not necessarily lead to this result. Whilst it is generally true that a basic principle of construction of wills is that a court is unable to give effect to an intention which is neither

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41 (1963) 107 Sol Jo 318.

42 The next of kin to take on the intestacy were the testator's daughter, and it appears (though this is not readily ascertainable from the report) her husband, whom she divorced some two months before her death, with the result that no decree absolute had been pronounced.

43 Above, n 22.

44 (1992) SLT 1141.

45 Unreported, 17 April 1997. Lexis: 141 *SJ LB* 108. Noted (1997) 71 *ALJ* 598.

46 Cited by Nourse J in the Court of Appeal decision, above n 45.

expressed in nor implied by the words of the will,[47] so that hypothetical intentions, involving unforseen circumstances, cannot be taken into account, there are exceptions to this principle. This matter has recently been exhaustively examined by Rowland,[48] who concludes:

> "Many courts, compelled by a sense of justice and reasonableness, are finding means of varying the literal effect of a will to deal rationally with unforeseen circumstances. Most of the decisions concerned are based on *Jones v Westcomb*. While the cases which apply the 'rule in *Jones v Westcomb*' are not consistent, it is submitted that the decision and its successors support the existence of a wide and strong power to provide for unforeseen circumstances in a way which does not frustrate the probable intentions of the testator. Further, there are a number of decisions which, without relying on *Jones v Westcomb*, can only be explained on the basis that a power to deal properly with unforeseen circumstances exists. Taking all the cases together, it is submitted that a strong argument can be mounted that the courts have a power to intervene to ensure that a just and reasonable solution is found to help a would-be beneficiary under a will affected by unforeseen circumstances. The courts are not required always to capitulate and apply the basic principle that the court cannot give effect to any intention which is neither expressed in nor implied by the words of the will, and declare an intestacy or otherwise make shipwreck of the testator's intentions."[49]

Jones v Westcomb[50] was a case where a testator made a will in favour of his wife for life, and after her death to the child with whom she was then pregnant. If the child died before the age of 21 years, then the wife was to take one third of the benefit. The wife was not pregnant at all, but nevertheless was held to be entitled to the benefit. Whilst there have been various formulations of the principle,[51] a useful statement of the current Australian position is provided by Jacobs J in *Re Jolley*:[52]

> "... if an ultimate gift is made to take effect upon the determination of a prior interest in a particular manner, it may take effect upon the determination of that interest in another manner provided the Court is of opinion that the intention of the testator was to include determination in that other manner."

In that case a testator left a will in which he gave a house to his wife for life provided she remained single, but if she remarried, the house was

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47 The authorities are numerous, but see particular *Lutheran Church of Australia South Australia District Inc v Farmers Co-Operative Executors and Trustees Ltd* (1970) 121 CLR 628 at 646 (Windeyer J).

48 "The Construction or Rectification of Wills to Take Account of Unforseen Circumstances Affecting Their Operation" (1993) 1 *APLJ* 87 and 193.

49 Above at 113.

50 (1711) Prec Ch 316; 24 ER 149.

51 See particularly *In Re Tredwell* [1891] 2 Ch 640 at 650 (Bowen LJ); *Re Fox's Estate* [1937] 4 All ER 664 at 666; *Union Trustee Co of Australia Ltd v Church of England Property Trust, Diocese of Sydney* (1946) 46 SR (NSW) 298 at 306 (Nicolas CJ).

52 (1984) 36 SASR 204 at 206.

to be sold and the proceeds were to be equally divided amongst the testator's grandchildren. The testator's wife survived him for 30 years and died without remarrying. Applying the rule in *Jones v Westcomb*, Jacobs J held that although the gift over to the grandchildren was expressed to be only upon the re-marriage of the testator's widow, it took effect upon the termination of her estate by death.

It will be immediately apparent that this principle may readily be applied to cases involving forfeiture where there has been a gift over in the will; and it was so applied by Wanstall CJ of the Supreme Court of Queensland in *Re Keid*.[53] That case concerned a gift to a son, who murdered the testator, with the will providing a gift over, in the event of the son predeceasing the testator or leaving no issue, to the testator's sisters. The contest was between the sisters and the testator's mother, who would have been entitled on intestacy. The gift over was held effective. Wanstall CJ stated:

> "The contingency against which the testator's really had to guard was the failure of the gift to her son so that she would be left intestate. That being so, the court should look to that contingency and give effect to the will if it should happen."[54]

The rule in *Jones v Westcomb* was thus applied, the judge interpreting the will "as if the testatrix had thought the gift might fail for the reason it did, and had provided for that possibility."[55]

A triumvirate of more recent cases have also considered the *Jones v Westcomb* rule in these circumstances, but have taken a more cautious approach than that displayed by Wanstall CJ in *Re Keid*.[56] These cases are *Re Lentjes*,[57] *Ekert v Mereider*[58] and *Public Trustee v Hayles*.[59] All involved gifts to the killer as principal beneficiary, with a gift over provision in the event of that beneficiary predeceasing the testator. In all cases it was found that the gift over had no effect, and therefore an intestacy resulted. In *Lentjes*, Heron J noted that the difficulty is created because of the impact on the will of the disqualification to an entitlement in circumstances never likely to be in the contemplation of the testator, and because of this it was artificial to speak of the testator's intentions as taken from the document itself.[60] Rowland[61] has demonstrated, however, that this is an unnecessarily restrictive interpretation of the rule in *Jones v Westcomb* which rule does *not* depend upon the implication of testamentary inten-

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53 [1980] Qd R 610.
54 Above, 614.
55 Rowland, above, n 48 at 109.
56 Above, n 53.
57 Above, n 38.
58 Above, n 38.
59 Above, n 11.
60 Above, n 38 at 197.
61 Above, n 48 at 104.

tion, and he convincingly argues that the power given by *Jones v Westcomb* is a power to deal with unforeseen circumstances and thus give effect to hypothetical intentions. Necessary implication requires an actual intention which can be found implied in a will, and is not part of the *Jones v Westcomb* rule. In *Ekert*, Windeyer J held that the *Jones v Westcomb* rule may in a particular case be properly applied but not in order to bring about a result the court considers fair, and that "in many cases it would be dangerous for a court to interpret a will based on presumed intentions".[62] If one accepts Rowland's arguments, which were in fact accepted by Young J in *Public Trustee v Hayles*,[63] then the same criticism levelled at the judgment of Heron J in *Lentjes* may be made of these statements by Windeyer J. *Public Trustees v Hayles* was really decided on the basis of the imposition of a constructive trust and is discussed in that respect further below, but the judgment of Young J contains a valuable review of the authorities and support for the use of the *Jones v Westcomb* rule in appropriate circumstances. The factual circumstances of that case were not, however, appropriate.

In summary, whilst the fictional approaches of either legally deeming the killer to have predeceased the testator or to treat the gift to the killer as having either lapsed or been 'struck out', should be rejected in the case of substitutional gifts in wills, it has been amply demonstrated by recent authority that a more interpretative approach, based upon a proper view of the rule in *Jones v Westcomb*, may be applied. Much will, of course, depend upon the terms of the actual will in question and the matrix of surrounding circumstances. In *Re Lentjes*,[64] Heron J correctly stated that a case by case approach may have to be the only rule that can be confidently stated;[65] to slavishly adhere, however, to a literal interpretation of the will is hardly a principled approach.

Much of the confusion in this area of the law probably stems from a misunderstanding of the *Jones v Westcomb* principle. In some decisions the rule itself is sometimes ignored altogether, or if discussed, as seen above, is not given its full effect. An excellent example of this is provided by the decision of the English Court of Appeal in *Jones v Midland Bank Trust Co Ltd*,[66] discussed above. The principal case on which the Court of Appeal relied to reach its decision was an earlier decision of the same court in *Re Sinclair*.[67] That case, with respect, made nonsense of the *Jones v Westcomb* rule, even if, unadvisedly, counsel had abandoned argument on it by the time the case got to the Court of Appeal.[68] Despite this, Slade

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[62] Above, n 38 at 732-733.
[63] Above, n 11 at 168.
[64] Above, n 38.
[65] Above, n 38 at 197.
[66] Above, n 45.
[67] [1985] 1 Ch 446.
[68] Slade LJ was of the opinion, however, that this course was correctly taken by counsel: Above, at 455.

LJ commented on the rule and limited its application to cases of necessary implication. The case was concerned with a gift by a testator to his wife, or if she predeceased him, to the Imperial Cancer Research Fund. Later, the marriage was dissolved. English legislation[69] then provided that a gift to a spouse who was subsequently divorced from the testator was to lapse. The court held the gift over to be ineffective, so the estate descended on intestacy. It seems clear that the testator would have wished the estate to go to the Imperial Cancer Research Fund if the gift to the wife could not take effect, and this was recognised by both Slade LJ and O'Connor LJ, the latter commenting that:

> "... it seems to me that in a very great many cases the result of this decision will be that the true intention of the testator may well be defeated."[70]

If ever there was a case where the *Jones v Westcomb* rule should have been applied, this was it, particularly as the legislation had been passed after the will was made, and therefore the effect of it could not possibly have been taken into account by the testator in the actual preparation of the will.[71] These matters were not, however, addressed by the Court of Appeal in *Jones v Midland Bank Trust Co Ltd.*[72]

Intestacies

It has already been noted that, on the grounds of public policy, a killer is disqualified from benefiting under an intestacy, both where an intestacy results from the killer being disqualified from taking a gift under a will, and where the deceased dies intestate. The basic objection to this approach is that public policy overrides clear statutory law. This was recognised as early as 1915 by Joyce J in *Re Houghton,*[73] where a son had been found guilty of his father's murder but insane. In these circumstances, the forfeiture rule was held to have no application,[74] so the son was entitled to his share of the estate under the intestacy rules. Nonetheless, Joyce J addressed himself to the general principles and cited with approval the following comments from the American case of *Re Carpenters Estate:*[75]

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[69] *Wills Act* 1837 (UK), s18A.
[70] Above, n 67 at 456.
[71] See also, Rowland, above, n 48 at 94, 110.
[72] Above, n 45. It should be noted that the Australian Capital Territory now has specific legislation dealing with unforeseen circumstances affecting wills: *Wills Act* 1968 (ACT), s12a(2). The scope of this legislation is discussed by Rowland, above, n 48.
[73] [1915] 2 Ch 173.
[74] Since followed in *Re Pitts* [1931] 1 Ch 546; *Re Plaister* (1934) 34 SR (NSW) 547; *Clift v Clift* [1964] NSWR 1896; *Re Pechar* [1969] NZLR 574.
[75] 50 Am St Rep (1895) 765 at 766-767.

> "It is argued, however, that it would be contrary to public policy to allow a parricide to inherit his father's estate. Where is the authority for such a contention? How can such a proposition be maintained, when there is a positive statute directing a precisely opposite conclusion? In other words, when the imperative language of a statute prescribes that, upon the death of a person, his estate shall vest in his children, in the absence of a will, how can any doctrine, or principle, or other thing called public policy, take away the estate of a child, and give it to some other person?"

Despite these reservations, when the matter first came before an Australian Court in *Re Tucker*,[76] Harvey J, albeit with some hesitation,[77] held that the public policy ruled applied to intestacies as well as wills, with the result that the killer was excluded. The property passed entirely to the only son of the intestate; the husband of the deceased, who killed her, being excluded. This decision was followed in *Re Sangal*,[78] where again the property passed entirely to the children, with no entitlement to the murderer of the wife, and more recently in *Public Trustee v Fraser*,[79] where the killer was regarded as notionally not being in existence. 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".[80]

Similar developments have occurred in the United Kingdom. In *Re Sigworth*,[81] Clauson J held that the principle of public policy which precludes a murderer from claiming a benefit confirmed on him by the victims will precludes him from taking a benefit confirmed on him by statute in the case of the victim's intestacy. This position has consistently been followed in that jurisdiction,[82] despite the doubts of Vaisey J in *Re Callaway*.[83] *Callaway* is an interesting case where a daughter, who was the sole beneficiary under her mother's will, murdered her mother and then committed suicide. The only other issue was a son, who claimed a declaration that he was solely entitled on his mother's intestacy. The Crown claimed to be entitled (as *bona vacantia*) to that half of the estate which would have gone to the daughter, on the ground that the effect of the forfeiture rule was simply to exclude the offender and not to create new interests. The forfeited interest was therefore one that nobody was entitled

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[76] Above, n 21.

[77] He commented (above, n 21, at 181): "... 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."

[78] Above, n 21.

[79] Above, n 10.

[80] Above n 10 at 444. Rowland, in *An Annual Survey of Australian Law* (1990), at 375-376 observes that if it was "a stroke of luck that in this case the intestacy rules operated to produce a result the testator might have approved had she been able to provide for the circumstances which in fact arose, and which she could not have foreseen."

[81] [1935] Ch 89.

[82] See, eg *Re Giles*, above, n 4; *Re Dellow's Will Trusts*, above, n 20; *Jones v Midland Bank Trust Co Ltd*, above, n 45.

[83] Above, n 24.

to and therefore was *bona vacantia* and vested in the Crown. Vaisey J, in reliance on earlier authority, rejected this argument, but only reluctantly, and stated that but for that authority he would have acceded to this view:

> "That the plaintiff [the son] should take the whole seems to me to be both illogical and unmeritorious. For why, as I have already asked, should he be the person to profit by his sister's crime and the consequent frustration of his mother's testamentary intentions?"[84]

The solution would have been that the Crown was entitled to a transfer of the daughter's interest under the will, thus excluding any rights arising under intestacy, or, alternatively, if an intestacy resulted, the daughter's moiety went to the Crown as *bona vacantia*.

As has often been pointed out,[85] the objections raised by Vaisey J are not legally supportable, as the brother's claim was not through his sister but rather as next-of-kin of his mother. The son's interest was gained, in other words, simply as a result of the rules of intestacy, and was not a profiting by his sister's crime.[86] It should also be noted that the feudal doctrines of attainder, forfeiture, corruption of blood and escheat, which once operated to forfeit the killer's interest to the Crown, were abolished by the *Forfeiture Act* 1870 (UK).[87] To allow a claim by the Crown in these circumstances would have been an indirect reversal of the policy behind that legislation. It is no doubt for these reasons that the Crown has not claimed in any subsequent cases.

That being said, however, the point that Vaisey J was really making was that the wife, through her will, had clearly made it plain that she did not wish her son to benefit from her estate. She may not have done even in the unforeseen event of her being killed by her daughter. In the event, there were no other potential claimants to the estate, so the court could hardly have come to any other conclusion than it did. In other circumstances, however, it may well be that the intestacy rules do not necessarily truly reflect the wishes of the deceased, and it may be possible, though the imposition of a constructive trust, to give effect to that intention. It is indeed unfortunate that Mrs Calloway's will did not contain a gift over. If it had done, there seems to be little doubt that effect would have been given to such a gift, rather than the son taking the whole estate on intestacy.

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[84] Above, n 24 at 565.
[85] See the notes on this decision in (1956) 72 *LQR* 475; [1956] *Camb LJ* 167.
[86] See Toohey, above, n 2 at 17.
[87] These doctrines are discussed by Scott, above, n 2 at 818-819.

Joint Tenancies

As pointed out by Moorhouse J in the Ontario case of *Schobelt v Barber*,[88] the problem of joint tenants differs from that of a beneficiary either under a will or under an intestacy in that the survivor's right previously in existence is enlarged by the death whilst in the other situations the right is brought into being by the death. The killer, in other words, has a vested interest in the property, and not merely an expectation interest. There are a number of alternatives here,[89] but the case law, at least in Australian law, has embraced two approaches.

The first of these, which finds it authority in *Re Barrowcliff*,[90] is that the *jus accresendi*, that is, the legal right of survivorship, cannot operate in the favour of one joint tenant who unlawfully kills another joint tenant. Napier J held that whilst the killer had not forfeited his own interest in the property, the right of survivorship did not operate in his favour. Whether the unlawful homicide created an exception to the ordinary rules of survivorship or worked a severance of the joint tenancy, the beneficial interest passed at law as though the owners had been tenants in common. This case was followed by Hanger J of the Supreme Court of Queensland in *Kemp v Public Curator of Queensland*.[91]

The alternative, and preferable, view was established by Jacobs J in the New South Wales decision of *Re Thorp and the Real Property Act*,[92] in which case *Re Barrowcliff*[93] was disapproved. The husband and wife in that case were joint registered proprietors of Torrens system land. The husband murdered the wife and then committed suicide. The registrar refused to register any transmission to the personal representative until there had been adjudication as to entitlement. Drawing on an historical analysis, 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, the principle of public policy required the surviving joint tenant to hold upon a constructive trust in equity in favour of himself as to half and the estate of the victim as to the other half.[94] This case was followed in *Rasmanis v Jurewitsch*,[95] where there were two joint tenancies in respect of separate properties, the first held by the killer and one other, the second by the

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88 (1966) 60 DLR (2d) 519 at 522.

89 See the discussion by Moorhouse J above, and Macdonald, "Real Property - Joint Tenancy - Murder of One Tenant by Another - Share of the Survivor" (1957) 35 *Can Bar Rev* 966.

90 Above, n 22.

91 [1969] Qd R 145.

92 [1962] NSWR 889.

93 Above, n 22.

94 Jscobs J suggested that a caveat should be lodged on title to protect the equitable interest, in case there was further adjudication in the event of conflicting claimes on the equitable estate. This was unlikely, however, as the children of the marriage were next of kin.

95 [1968] 2 NSWR 166. (Street J) Affirmed by the Court of Appeal: (1969) 70 SR (NSW) 407.

killer and two others. Jacobs JA stated:

> "Upon the basis that legal title is unaffected but that equity will interfere on grounds of public policy, the question then is how equity will so interfere in order to prevent the felon from reaping a benefit from his slaying. It may do so by determining that the slaying caused a severance of the joint tenancy in equity, or it may do so by imposing a constructive trust. Again, the constructive trust may be in favour of the victim's estate or it may be in trust in favour of the third joint tenant. Where there are only two joint tenants there is no difference in result between severance and constructive trust ...
>
> I think that the primary rule to be enforced is that the felon must not be allowed to retain any benefit flowing to him from the slaying and that he is required to hold any such benefit which flows at law upon trust for someone other than himself. This someone may be either the estate of the victim or the third joint tenant ..."[96]

This position has since been consistently followed in New South Wales,[97] New Zealand[98] and Canada.[99] In the United Kingdom, Vinelott J in *Re K (deceased)*[100] accepted a concession by counsel that the forfeiture rule operated to sever the joint tenancy in the proceeds of sale and the rents and profits until sale, with the surviving joint tenant holding the beneficial interest in the property on trust, half for himself and half for the person entitled to the share of his victim. All of these cases thus accept the proposition that the legal title should follow the course appointed by law, but leaving the beneficial interest to be adjusted in view of the fact that the surviving joint tenant has been responsible for the death of the other joint tenant. Despite the decision in *Kemp v Public Curator of Queensland*,[101] more recently, McPherson J in *Re Stone*[102] preferred the constructive trust approach and declined to follow the earlier decision.[103] A trustee for sale of the jointly owned property was accordingly ordered to be appointed, in the meantime the killer holding the legal estate upon trust, to the extent to which his interest was enlargened by the killing for the persons entitled under the will of the victim. The killer was the principal beneficiary under the will, but as he was disqualified, a gift over in favour of the children of the deceased was effective, in the sense that the trust was to their benefit.

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96 Above, at 411.

97 *Public Trustee v Evans*, above, n 8, at 193; *Ekert v Mereider*, above, n 38, at 731.

98 *Re Pechar*, above n 21.

99 *Schobelt v Barber*, above, n 88.

100 [1985] Ch 85, 100.

101 Above, n 91.

102 Above, n 35.

103 Doubt was cast on the decision in *Kemp (inter alia)* on the unusual basis that it was decided shortly after the old Supreme Court building was damaged by fire and therefore Hanger J said that he was precluded from further investigation of the point involved because of the condition of the Supreme Court library: above, n 35 at 353.

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. As Youdan has cogently argued[104] it does less violence to the common law rule which operates quite irrespective of the manner of death, but accommodates the public policy rule to prevent any benefit accruing to the wrong doer from his killing.[105] It may also be argued that this solution should be applied in all situations, including those where the wrong doer acquires only an expected interest under a will or on intestacy. This matter is addressed immediately below.

A General Equitable Solution? - *Public Trustee v Hayles*[106]

In *Hayles* a testator made a will, clause 4 of which provided that his whole estate was given upon trust "for my friend, Todd Knowlson, absolutely, provided however should my said friend pre-decease me then for my friend Dierdre Hayles absolutely". Dierdre Hayles was the mother of Todd Knowlson. Knowlson murdered the testator. The executor sought directions as to whether the estate should go to Dierdre Halyes under the gift over, or should be distributed to the testator's next of kin under the intestacy rules. The interesting additional evidence, which was held admissible by Young J, was that the testator left with the Clerk of the Court at Tweed Heads a memorandum dated the day after he made the will. This memorandum indicated that the original of the will was with the Public Trustee at Lismore and that a copy was held by the Clerk of the Court. It also contained a direction that "under no circumstances whatsoever, contact be made with any of my relatives".

The traditional approach to this problem, as discussed above in Part 2, is either to give a literal approach to the will, so that the murderer has not in fact predeceased the testator, and the gift over is therefore ineffective, or attempt to save the gift over by utilising the rule in *Jones v Westcomb*.[107] Young J, however, in a detailed review of the authorities, preferred the view that the constructive trust rule applies to wills. On this view:

> "... one does not merely interpret the will, but one says that the will is quite plain, it makes a gift to the murderer and then the court makes the murderer hold the estate on trust for the person it thinks appropriate."[108]

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[104] Above, n 2, at 253.

[105] He also notes that it also has the practical advantage in that a bona fide purchaser for value of the wrongdoer's acquired interest would receive protection: above, n 2, at 255. See also Maddaugh and McCamus, above, n 2 at 491 and the comment of McPherson J in *Re Stone*, above, n 35 at 352-353. Cf Toohey, above, n 2, at 16.

[106] Above, n 11.

[107] Above, n 50.

[108] Above, n 11, at 171.

In coming to this conclusion, Young J relied particularly on American authority, including *Re Wilson's Will*,[109] where the court stated in the case of a gift over a constructive trust should be imposed under which the alternate beneficiary would take as the *cestui* of such a trust, as that disposition is more in keeping with the expressed intent of the testator than would be a disposition which handed the estate over to the next of kin. The constraints on this principle were also noted, the most important being that the alternate legatee must not be related to the murderer,[110] in that if the testator had known that he was being slain by the murderer, it is unlikely that his intention really would have been to benefit the murderer's near relation.[111] His honour was ambivalent as to this restriction, noting that in Australian law the clear policy has been to treat each individual as a separate person and reject the notion that wives or mothers are necessarily going to act in a particular way. Young J also rejected the view taken by Windeyer J in *Ekert v Mereider*[112] that the constructive trust approach is limited to cases of joint tenancies and does not extend to circumstances where a benefit under a will is forfeited.[113]

Whether the gift over took effect therefore depended upon whether a constructive trust should be imposed in favour of Dierdre Hayles, the mother of the murderer, and this very much depended upon the evidence. In the circumstances insufficient evidence was available. Whilst the view could have been taken that the contents of the memorandum and its depositing with the Court at Tweed Heads:

> "made it abundantly clear that the relatives were not even to be informed of the testator's death, the court can very comfortably form the view that ... the relatives were not take..."[114]

and that the circumstances were such that the testator obviously had had a close attachment to the murderer and was out of contact with his family and relatives, that did not necessarily mean that the testator preferred his killer's mother to his next of kin. In the event therefore the trust was imposed in favour of the next of kin, that is in accordance with the law of intestacy. Young J held, however, that as no evidence was put forward otherwise than by the Public Trustee of the relationships and intentions which may affect the result on the constructive trust, the first defendant, that is Dierdre Hayles, should be given an opportunity to re-open the case, and directed a stay of the formal order. That opportunity was not taken up by the first defendant and formal orders were entered.[115]

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[109] 92 NW (2d) 282 (1958).
[110] *In the Matter of Safran's Estate* 25 ALR (4th) 766.
[111] Above, n 11 at 166.
[112] Above, n 38 at 733.
[113] Above, n 11 at 162.
[114] Above, n 11 at164.
[115] See Editorial Note, above, n 11 at 171.

The importance of this decision is undoubted. As far as can be established, it is the only case in Australian and English law that has directly utilised the constructive trust approach in determining the destination of property rights where such rights have been forfeited under a will. It receives support from the decision of Waddell CJ at first instance and the dissenting judgment of Kirby P in *Troja v Troja*,[116] although that case was concerned with the more direct question as to whether the forfeiture rule should be applied at all in the circumstances. The tenor of the majority judgments in that case, however, was to reject the constructive trust approach in the application of the doctrine, and it may be asserted, to also reject it in determining the destination of property rights on forfeiture, although the matter was not directly argued.[117] Much will, therefore, depend upon further judicial developments in this are, but it is argued below that the approach taken by Young J is a principled one, and should be extended to all cases involving forfeiture.

Conclusions

Writing in 1913, Professor Ames, in a well known article, considered the approach of the English courts to the forfeiture rule and stated:

> "It seems impossible to justify the reasoning of the courts in these cases. In the case of the devise, if the legal title did not pass to the devisee, it must be because the testator's will was revoked by the crime ... But when the legislature has indicated that no will shall be revoked except in certain specified modes, by what right can the court declare a will revoked by some other mode? In the case of inheritance, surely, the court cannot lawfully say that the title does not descend, when the statute, the supreme law, says that it shall descend."[118]

It is suggested that the approach adopted by Young J in *Public Trustee v Hayles*[119] overcomes these objections, but allows justice to be done without disturbing established principles of law. As far as the destination of property interests are concerned on forfeiture, it allows a constructive trust to be imposed in favour of the person, who, "in the eyes of equity, has the best right to it."[120] In particular factual situations, the result would

[116] Above, notes 27 and 13.

[117] Both Mahoney and Meagher JJA did point out, however (above, n 13 at 294, 300), that the wife, who had made substantial contributions to the common property, would have been entitled to an equity under the principles established in *Baumgartner v Baumgartner* (1987) 164 CLR 137 and that that equity would not be obliterated by the killing. This, however, is an entirely different question than that relating to the actual destination of property rights under a will or intestacy on forfeiture.

[118] "Can a Murderer Acquire Title by His Crime and Keep It?" in *Lectures on Legal History* (Harvard University Press, 1913) 310 at 312.

[119] Above, n 11.

[120] Youdan, above, n 2 at 257.

be as follows:

Wills: As demonstrated in Part 2 above, the application of the traditional rule is beset by difficulties. Resorting to fictional devices in order to give effect to the testator's supposed intentions is neither necessary or desirable. The application of the rule in *Jones v Westcomb*[121] is uncertain, most probably because the full effect of that decision, and its subsequent development, has not been fully appreciated. In the absence of statutory power,[122] courts have been inclined to support a strict literal approach, and have eschewed the proper role of investigation of the testator's intentions in the unforeseen circumstances which have occurred. 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 endeavouring to establish, on equitable principles in order to avoid unconscionability, the person with the better entitlement to the estate.

Intestacies: The constructive trust approach neatly avoids the objection that the public policy rule overturns statutory provisions prescribing the order of distribution on intestacy. The solution is simply to provide that the killer is entitled under the terms of the statute, but what he or she receives is held in trust for those who, because of the criminal act, have a better claim to it.[123] As to who has the better claim, in normal circumstances the next of kin will be entitled, but in special cases, it may well be that a testator has intended that the normal rules as to distribution on intestacy should not be followed. This would be an exceptional case,[124] but would again require evidence of the deceased's intentions and the surrounding circumstances.

Joint tenancies: Apart from the early decision in *Re Barrowcliff*,[125] the consistent force of later authorities is to favour the view that the joint tenant who kills his co-tenant may succeed to the legal title by the right of survivorship, but hold on trust to the extent to which his or her interest has been increased by the unlawful killing. Again, the trust will, in normal circumstances, be for the benefit of the estate of the victim. This position is consistent with that outlined above in the case of wills and intestacies.

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[121] Above, n 50.

[122] As in the Australian Capital Territory: *Wills Act* 1968 (ACT) s12a(2). See note 72.

[123] This view was upheld (obiter) by McPherson J in *Re Stone*, above, n 35, at 353.

[124] Youdan, above n 2, at 258, posits the situation where an intestate intended to make a will in favour of a particular person but was prevented from doing so by his murder.

[125] Above, n 22.