

# Forfeiting your right

UNLESS THE CULPABILITY OF THE OFFENDER APPROACHES THAT OF SELF-DEFENCE, THE FORFEITURE RULE OPERATES TO DEPRIVE THE PERPETRATOR OF AN UNLAWFUL KILLING OF THE PROCEEDS OF A BINDING SUPERANNUATION DEATH BENEFIT NOMINATION IN THEIR FAVOUR. **BY MICHAEL WISE QC**

Domestic violence is rife in our community.<sup>1</sup> Occasionally and tragically it results in the death of one of the domestic partners,<sup>2</sup> often the female, but occasionally the male and sometimes both.<sup>3</sup>

The forfeiture rule, a rule of public policy that prevents a person from benefitting from their own criminal conduct, is well-known to deprive a person who has killed another of the benefits that would have accrued to them under the estate of the victim or under a life insurance policy.

Does the rule have any application where the victim has signed a current binding death benefit nomination naming the killer as the recipient of their superannuation death benefit?

The answer requires an examination of the scope of the forfeiture rule and consideration of the nature of superannuation and the legislative rules governing its operation.

## The forfeiture rule

The general principle is a rule of public policy that provides that no person can obtain or enforce any rights resulting to them by their own crime.<sup>4</sup> It has had wide application in the context of wills and intestacy. It is also widely applied in the context of life insurance policies.

The decision in *Cleaver v Mutual Reserve Fund Life Association (Cleaver)*<sup>5</sup> is acknowledged as the primary modern authority establishing the principle. Fry LJ said:

“This principle of public policy, like all such principles, must be applied to all cases to which it can be applied without reference to the particular character of the right asserted or the form of its assertion”.

### SNAPSHOT

- Domestic partners often name each other as the binding recipient of their superannuation death benefit.
- Where such a binding nomination is in force and one partner kills the other, usually in the context of pervasive domestic violence, a rule of public policy may prevent the perpetrator from receiving that benefit.
- Whether the rule does operate depends on the degree of criminal culpability – the rule will only be excluded where the culpability of the criminal conduct is so low as to approach that of self-defence.

## Domestic violence and superannuation

He also said:

“It would equally apply, it appears to me, to the case of a cestui que trust [a beneficiary] asserting a right as such by reason of the murder of the prior tenant for life or of the assured in a policy; and it must be so far regarded in the construction of Acts of Parliament that general words which might include cases obnoxious to this principle must be read and construed subject to it”.

These passages establish that the principle is one of general application. By reference to the second of those passages it applies at least to the class of cases mentioned which is to:

- deprive a beneficiary of a trust from taking a benefit consequent upon the murder of the prior tenant for life
- defeat the claim of the owner of a policy insured on the life of his murder victim
- deprive a person who would obtain a statutory benefit if the benefit accrued only as a result of the death of a person he had murdered.

The rule is applicable in the context of wills and inheritance where it is called “the forfeiture rule”. That is, that a person who would benefit under a will or intestacy upon the death of a person forfeits that right by reason of their unlawful killing of the deceased.

It has often been applied in the context of life insurance policies. It is repugnant to the law that a person should take the benefit of a life insurance policy that accrues by reason of having murdered the life assured.

### The forfeiture rule in a binding death beneficiary nomination

It is necessary to understand just how it is that, absent the forfeiture rule, the killer might become entitled to receive the death benefit under a superannuation trust. That entitlement arises as a result of three things:

- the constitution or governing rules of the superannuation fund as a trust fund, subject to trust law. It is common for those rules to permit a member to nominate the intended recipient of the benefit and, therefore, to oblige the trustee to pay the benefit to the named person if a valid nomination is in force
- the operation of the Superannuation Industry (Supervision) Regulations 1994 (SIS Regulations) 6.17A(4) which obliges the trustee to pay the benefit to the named person as long as they fall into certain categories<sup>6</sup> and there is a valid complying nomination in force
- the execution by the member of such a binding death beneficiary nomination which is valid and in force.

The fact that the superannuation fund is constituted as a trust brings into play Fry LJ’s first class of cases attracting the operation of the forfeiture rule.

The operation of the SIS Regulations brings Fry LJ’s third class of cases into play. As an instrument of subordinate legislation, the SIS Regulations must be read as subject to the forfeiture rule. So much is expressly mentioned by Fry LJ and was applied by the English Court of Appeal in *R v Chief National Insurance Commissioner: ex parte Connor*.<sup>7</sup> It has also been applied subsequently in Australia.<sup>8</sup>

The execution of the nomination is much like the act of a testator making a will. It is the reduction to writing in a binding form of instructions as to how a deceased’s bounty is to be distributed after death, to take effect upon death. The only difference is that a will governs the disposition of the assets and effects owned personally by the testator at the time of their death whereas a binding superannuation death benefit nomination deals with the benefit payable on their death. In both instances, by operation of the laws relating to inheritance and by the terms of the trust deed and rules, the bounty is required to be



distributed as the deceased has directed in their will, or in accordance with the nomination.

As a consequence, if its conditions are otherwise met, the forfeiture rule is applicable to the payment of a death benefit that has been the subject of a binding death benefit nomination.

## The forfeiture rule and manslaughter – a question of criminal culpability

The forfeiture rule is easily applied in cases of murder. Its application in cases of manslaughter has proved more difficult because cases of manslaughter differ in culpability from very high to very low.

The Victorian Court of Appeal has recently given detailed consideration to the application of the forfeiture rule in cases of manslaughter in *Edwards v State Trustees (Edwards)*.<sup>9</sup> The Court considered all of the relevant cases and decided that in Victoria the forfeiture rule applies on a case-by-case basis.

The issue is whether the criminal culpability of the offender requires that he or she should not be entitled to take a benefit arising from the death.<sup>10</sup> The Court of Appeal rejected the proposition that in cases of manslaughter the forfeiture rule must apply strictly. Rather, application of the rule in the context of manslaughter or analogous circumstances is discretionary, turning on the criminal culpability of the person seeking to take a benefit.<sup>11</sup>

## A tragic example of the application of the forfeiture rule

*Re Kumar (Kumar)*<sup>12</sup> was a tragic tale of domestic violence in which an abused wife killed her husband and then took her own life.

The proceeding was brought by the parents of the deceased husband who sought a grant of letters of administration of his estate. In order to determine whether a grant should be made the Court was required to determine whether the wife's estate had any interest in the deceased husband's estate. This required determination of two key issues:

- did the husband or wife die first?
- if the wife survived the husband, did the forfeiture rule prevent her estate from taking an interest in his estate?

The Court found on the evidence that it was likely that the wife inflicted the fatal injuries on the husband and that the extent of the injuries made it likely that he had died in the short time prior to her taking her own life.

On this basis, absent the operation of the forfeiture rule, the wife's estate would take an interest in the husband's estate.

The Court then determined that the circumstances of family violence in this case were such that, had the wife come to trial for murder or manslaughter it would have been open to her to take the defences of self-defence and defensive homicide and to avail herself of the family violence provisions of s9AH of the *Crimes Act 1958 (Vic)*.<sup>13</sup>

The Court decided that, having regard to the history of violence perpetrated on her, the acts of the wife in killing her husband constituted defensive homicide.

The judge then considered whether the wife's culpability was such that she should be precluded from taking an interest in his estate. After reviewing the authorities, the Court concluded that in order to prevent the operation of the forfeiture rule in the context of family violence, the conduct leading to death would need to approach that of self-defence.

The Court considered the history of violence throughout the marriage, particularly in the last few years leading up to the deaths. Its ultimate conclusion was:

"The issue is finely balanced. Although I have inferred in all of the circumstances that [the wife] held the belief that her actions were necessary in order to protect herself from death or really serious injury, with some difficulty, I find that her criminal culpability is not so low as to preclude application of the forfeiture rule. On the evidence, the degree of family violence, particularly in the period immediately leading up to [the wife's] criminal conduct, does not reduce her blame for the deceased's death to the requisite level. However, I note that were [she] alive today to give evidence, the outcome of this application may have been different".

Under those circumstances, the forfeiture rule prevented the wife's estate from taking an interest in the husband's estate.

Had the wife been the beneficiary of an in force binding death benefit nomination made by her husband, the same result would have been reached. This would have led his superannuation trustee to have a discretion to determine to which of the eligible beneficiaries to pay the death benefit, but whoever that should be, it would necessarily exclude the wife's estate. ■

**Michael Wise QC** is a commercial barrister and mediator at the Victorian Bar. He provides advice and appears in trials and appeals in matters related to all aspects of commercial relationships. He has a particular interest in contract, property, equity and trusts, corporations, Australian competition and consumer law and financial services and superannuation law.

1. See Chapter 3 of the Report of the Victorian Royal Commission into Family Violence – March 2016. <http://files.rcfv.com.au/Reports/Final/RCFV-All-Volumes.pdf>.
2. Between 1 July 2010 and 30 June 2014 there were 152 intimate partner homicides in Australia which followed an identifiable history of domestic violence (including a reported and/or anecdotal history of violence): Australian Domestic and Family Violence Death Review Network – Data Report 2010 – May 2018, [www.coronerscourt.vic.gov.au/sites/default/files/2018-11/website%2Bversion%2B-%2Badvdm\\_data\\_report\\_2018\\_.pdf](http://www.coronerscourt.vic.gov.au/sites/default/files/2018-11/website%2Bversion%2B-%2Badvdm_data_report_2018_.pdf).
3. *Re Kumar* [2017] VSC 81 in which the Court found that the wife beat the abusive husband to death and then hanged herself.
4. *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147.
5. Note 4 above.
6. The legal personal representative or a dependent of the deceased.
7. [1981] 1 QB 758 in which the rule was applied to deprive a widow of a statutory pension which accrued to her as a consequence of having stabbed her husband to death.
8. *Re Sangal (dec'd); Perpetual Executors and Trustees Assn of Australia Ltd v House* [1921] VLR 355; *Re Field and Commonwealth* (1983) 5 ALD 571 per Beaumont J and McLelland and Prowse (Members).
9. [2016] VSCA 28; (2016) 54 VR 1; (2016) 15 ASTLR 96.
10. Whelan JA at [66], (Kyrou JA concurring).
11. Note 9 above, at [87].
12. Note 3 above.
13. As in force at the time of the killing.