



Précis Paper

Varying the Forfeiture Rule

A discussion on the recent decision of *Re Settree Estates: Robinson v Settree* [2018] NSWSC 1413.

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Varying the Forfeiture Rule

1. In this edition of BenchTV, Margaret Pringle (Barrister, Chalfont Chambers, Sydney) and Ken Harrison (Solicitor) discuss the recent decision in *Re Settree Estates: Robinson v Settree* [2018] NSWSC 1413.

Facts

2. The case of *Re Settree Estates: Robinson v Settree* [2018] NSWSC 1413 was decided by His Honour Justice Lindsey.
3. The case involved the estates of the late Mr and Mrs Settree who were killed by their son who was experiencing some mental illness at the time of their deaths.
4. The circumstances in which the killings occurred were such that when Mr Settree was prosecuted by the Crown in the criminal proceedings, he was ultimately found not guilty by reason of mental disease and was detained by the state under the *Mental Health (Forensic Provisions) Act 1990* (NSW).
5. Mr Settree was incarcerated at the Silverwater Correctional Facility and his sister, the other surviving heir of her parents was obliged to obtain a Grant of Probate of their wills and then to administer their estates.
6. The facts and circumstances of the killings however, gave Mrs Robinson, the surviving beneficiary, the right to apply to the court for orders under the *Forfeiture Act 1995* (NSW).
7. The Forfeiture Rule is a rule of public policy and common law whereby a murderer is not permitted to profit from their act of murder and this would have been the case in the Settree killings had Mr Settree been found guilty of murder.
8. He would have automatically forfeited his rights to the half share of his parent's estates to which he was entitled under their respective wills.

The Application under Section 11

9. The amendments which were made to the *Forfeiture Act 1995* (NSW) in 2005 permit the kind of application that was brought here. That is, where a court deems it just and appropriate, they may vary the outcome so that the killer, notwithstanding the fact that they are not guilty of murder, can still be ordered to forfeit their entitlement in the deceased's estate.
10. This was the application which was brought in this case.
11. Section 11 of the *Forfeiture Act 1995* (NSW) is the operative section under the act which allows for such an application. If the application is not made then the person

who has committed the felonious act may still be entitled to their bounty under the estate.

12. Section 11 provides that an interested person may make such an application as to deny the killer the fruits of the felonious act even if they have been found not guilty by reason of mental illness.

The criminal trial

13. Section 12 of the *Forfeiture Act 1995* (NSW) provides that the application must be brought within 6 months of either the date of the deaths or the determination where the killer is found to be not guilty of murder for any reason.
14. In this matter, there was an application for an extension of time as the application was commenced 24 hours outside of the date of the determination of the court.
15. Although Mr Setttee was not found guilty of murder, during the criminal proceedings, both the defence and the prosecution tendered a set of agreed facts to the court in which had Mr Setttee not been found to be suffering from a psychotic illness at the time of the killings, he most definitely would have been found guilty of the murders.
16. His presentation at the time he was arrested for the killings, was such that the court nor the psychiatrists that interviewed him were entirely sure that he did suffer from a psychosis.
17. However, after several interviews with psychiatrists on both sides of the record a determination was made that the sentence was agreed on the basis that he was not guilty by reason of mental disease or defect.
18. Having commenced an application and having obtained leave of the court for the small extension in time, the application proceeded under Section 11 of the *Forfeiture Act 1995* (NSW).
19. Section 11 allows the court to vary the effect of the Forfeiture Rule if an interested person makes the application.
20. Mrs Robinson, as the surviving child and heir to her parents and sibling of the killer who was responsible for the deaths, was entitled to bring that application as she had an obvious and direct interest in the case.
21. The application proceeded initially on the basis that the court should pass over Mr Setttee as an Executor as the Wills which provided for both Mrs Robinson and Mr Setttee to be appointed as Executors.
22. It is not appropriate for a person who is suffering mental illness to the degree that he was having been detained under the *Mental Health (Forensic Provisions) Act 1990* (NSW) to act as Executor and therefore the Court was first asked to pass over Mr Setttee and appoint Mrs Robinson as the sole Executrix of both Wills.

23. This enabled Mrs Robinson to obtain Grants of Probate in both of her parent's estates and proceed to administer them.

Decision in Final Hearing

24. There was a delay between the commencement of the proceedings and the final hearing in September 2018.
25. The defendant had to first obtain the appointment of an appropriate tutor to act on his behalf, him having being detained under the *Mental Health (Forensic Provisions) Act 1990 (NSW)*.
26. The tutor who took the appointment was the paternal aunt of both Mr Setttee and Mrs Robinson which caused some tension within the immediate family.
27. Mrs Robinson relied on Section 11 of the *Forfeiture Act 1995 (NSW)*, which provides for the court to apply the Forfeiture Rule in circumstances where the court believes it is just and appropriate to do so.
28. If the court makes such an order then the court can apply the Forfeiture Rule as if the person had forfeiture their interest because they had been found guilty of murder.
29. In the current proceedings, the Judge did apply Section 11 of the *Forfeiture Act 1995 (NSW)*, in such a way so as to deprive Mr Setttee of his interest in his parent's estates.
30. However, he varied that order using his discretion under Section 86 of the *Civil Procedure Act NSW (2005)* in order to allow him to make provision by way of a trust fund in the amount of \$100,000.00 to be held by the NSW Public Trustee and Guardian for the duration of Mr Setttee's detention and for the rest of his life.
31. That fund was only to enable Mr Setttee to receive some comforts and benefits that he wouldn't otherwise be able to afford both whilst he is detained and after the event.
32. The Judge expressly precluded Mr Setttee from being able to call for those funds to be paid out to him because he had recovered his mental capacity at some point in the future.
33. Irrespective of Mr Setttee's mental status at any time, the funds were to be retained by the Public Trustee and applied for his benefit and incidentals but not to be paid out to him in full on the basis of an improvement in his overall mental capacity
34. Neither of the representatives for the plaintiff nor the representatives for the defendant asserted that the Judge had power under Section 86 *Civil Procedure Act (2005) NSW* to do this.
35. In exercising his discretion, His Honour analysed 4 reported cases in respect of section 11 of the *Forfeiture Act 1995 (NSW)*. These case were *Public Trustee v Fitter*

[2005] NSWSC 1188; Guler v NSW Trustee and Guardian [2012] NSWSC 1369; Hill v Hill [2013] NSWSC 524; 11 ASTLR 121; Estate of Raul Novosadek [2016] NSWSC 554.

Contentions advanced

36. His Honour, at paragraph 39 of the judgement noted that 3 contentions were advanced.
37. The first was that Section 11 of the *Forfeiture Act 1995* (NSW) relating to forfeiture application orders is, in terms, unqualified by an express power such as appears in section 6 of the Act as a feature of the power to make a forfeiture modification order.
38. Secondly, the legislative history indicated a clear indication to implement the Forfeiture Rule where justice requires, unattended by a qualification about orders being made or withheld on terms and conditions.
39. Thirdly, the fact that Section 86 of the *Civil Procedure Act* appears in the Case Management and Interlocutory Orders" rather than in Judgments and Orders and therefore is said to manifest an intention that section 86 be a power confined to interlocutory orders, not final orders.

Family Provision Claim

40. Another point that arose was whether or not as a consequence of any order for forfeiture the two sons of the killer might receive the one half share of the estate to which the killer is otherwise entitled.
41. In these proceedings, the killer's two sons rejected all offers of provision and further contact with their father as a consequence of his actions.
42. His Honour Justice Lindsey was not troubled about whether or not on a proper construction of the will, the fact of forfeiture of the killer's share would allow his two sons to take that benefit.
43. There was also concern between the Bench and the Bar in the proceedings about the appointment of tutors and consequent costs orders as well as whether any provision should be made for the defendant even though he had not made an application for himself under the *Family Provision Act 1982* (NSW) even though he had not made any application for himself under Chapter 3 of the *Succession Act 2006* (NSW).
44. The difficulty His Honour had and impressed upon counsel for both parties was firstly, as to the appointment of tutors at cost, it would not be in the interests of public policy that a tutor who assists a disabled person would be personally liable for costs.
45. Therefore, there would have to be some basis for the tutor to be indemnified out of some fund and in this case, the two estates.

46. The second part of the problem His Honour faced was that despite there being no application under the *Succession Act 2006* (NSW), was he defendant entitled to anything from his parent's estates
47. His Honour came to the conclusion that because of the family dynamics; that especially that the defendant's mother was very supportive of him through his troubled times with alcohol and drugs, they were there for him through thick and thin it was more than plausible and can be inferred that they wanted some sort of provision for him out of the estate despite his felonious act.
48. On that basis, it is to be understood that it is not that His Honour gave the defendant a handout, indeed he actually made an order that he should forfeit his right to the estate, but the order that he had some money for his education, maintenance and advancement in life whilst he is incarcerated and incapable, that a modest amount should be set aside.
49. If the defendant wished to appeal the decision, he would first have to seek leave of the court for the appeal and in doing so his Honour ensured that this matter would be disposed of with the orders having been made by him.

Justice and the application of the rule

50. The other consideration His Honour had to turn his mind to in considering Section 11(3) of the *Forfeiture Act 1995* (NSW) which gives the court the requirement to have regard to whether justice requires that an order be made to forfeit the killer's interest in the estate.
51. This section sets out 4 matters to which the court must turn its mind when determining whether justice requires the rule to be applied
52. The first is the conduct of the offender. On any objective analysis of what happened on that particular night, the conduct of the offender was fairly egregious if not cold-blooded.
53. He executed his parents with a shot gun, had the presence of mind to lock up the dogs, turn off the oven so the pizza did not burn, put the shot gun on the table so that if the police came they would not shoot him on account of being armed and then attended the local pub where he told the publican whom he knew to be a former police officer what he had done.
54. The sequence of events displays a certain clarity of mind and it is that clarity of mind that made it difficult for the psychiatrists on both the prosecution and the defence sides of the criminal proceedings to ascertain whether he truly suffered from a psychosis.
55. Ultimately, he was found to have a paranoid schizophrenia and that was agreed to be the cause of the killings.
56. The next point to be considered is the conduct of the deceased persons.

57. Neither Mr or Mrs Settree did anything other than support, love, care for and maintain their son.
58. The third point is the effect of the application of the rule on the offender or on any other person.
59. The effect of the rule on the offender was that he loses his entitlement and this was the critical point at which His Honour exercised the discretion to make an order whereby the defendant would forfeit not 100% of his interest of the estate, but the majority of his interest.
60. The fourth point is such other matters as to the court appears material.

Publicly expressed attitudes

61. The starting point for the Court is that the forfeiture rule applies to cases where a person is found guilty of murder and the criminal law provides that a person is not found guilty of murder if they could not be deemed capable because of their mental illness
62. His Honour gives a clear and precise consideration for various publicly expressed attitudes for the forfeiture rule and goes into detail about the Victorian Law Reform reports on whether or not the forfeiture rule should be varied in that state by Statute
63. The initial responses from Victoria, being the only jurisdiction which has considered this in any detail, were quite strenuously against varying the Forfeiture Rule.
64. The attitude which was expressed in the Law Reform Paper is that if a person is incapable because of mental illness then the decision to vary the Forfeiture Rule so as to catch their interest in an estate, is saying that you do not have any trust in the decision of the court in the criminal proceeding
65. NSW is the only jurisdiction in Australia which has an act like the *Forfeiture Act 1995* (NSW) and it was an Act which arose and was a consequence of a series of egregious killings that happened over time.
66. The leading case prior to the commencement of the *Forfeiture Act 1995* (NSW) was the case of *Troga v Troga* (1994) NSWLR 269. The implementation of a formal Forfeiture Rule came out of that decision.
67. The later amendments to the *Forfeiture Act 1995* (NSW) arose as a consequence of representations made to the then Attorney General from the case of *Public Trustee v Fitter* (2005) NSWSC 1188 and were made in response to representations from homicide victims support groups.
68. His Honour took into account as required under Section 11(3) of the Forfeiture Rule 1995 (NSW) the conduct of the two deceased and that was that they had supported their son, the defendant, through everything that he had undergone .
69. Nevertheless, the amendment to the *Forfeiture Act* that commenced in 2006 enables an interested person to make an application as was brought in these proceedings.

70. It is important to note that the decision in this case was on its own particular set of facts and is not authority for people to benefit from their felonious acts.
71. There was some media comment after the decision was published to the effect that this defendant was receiving a benefit by virtue of some loophole in the forfeiture law.
72. This decision is not the result of a loophole or clever argument by an applicant seeking to avoid the effect of the Forfeiture Rule. Instead it is a very lucid and carefully considered decision from a Judge of the NSW Supreme Court whose responsibility is about what justice in these proceedings is.
73. His Honour was strong in his reasons for judgement that the Forfeiture Rule should apply but should apply on terms.
74. There was not an application by the defendant for provision out of the estate, instead, it was an application to keep him out of the estate and that application was, in essence, granted subject to provision being made for the defendant's maintenance, education and advancement in life.
75. His Honour also made the comment that the family should be able to conduct their lives including any contact they may have with the defendant uncomplicated by ongoing monetary ties which is why the NSW Trustee and Guardian was appointed as a neutral Trustee for the fund ordered to be created for the defendant.
76. The main takeaway from the case is that simply bringing an application under Section 11 of the *Forfeiture Act 1995* (NSW) is not going to guarantee success. Instead, justice must require that it is appropriate for the court to make such an order.

Costs

77. The question of costs incurred in such matters by the defendant is somewhat problematic.
78. In *Guler v NSW Trustee and Guardian* [2012] NSWSC 1369 Justice White held that the defendant, being in need of a tutor should have the tutor's costs indemnified on the ordinary basis out of the estate.
79. In these proceedings, His Honour made a similar order however His Honour was critical of the conduct of the defendant's case and his Honour referred to the fact that that criticism should be taken into account in any costs assessment which may be conducted.
80. The matter of costs has not yet been finalized in this case.

Grants of Probate

81. In cases where there are almost simultaneous deaths, the estate of the person who dies first will fall into the estate of the second person.
82. In this case however, the court chose to grant separate Grants of Probate and therefore there were two independent estates to administer.
83. This was because not all of the assets were held as joint tenants and as such it was not necessary to imply that the younger person of the couple that was killed died first or last or on any other terms.
84. In the case of the jointly owned assets, they fell into the estate of the one who was killed secondly.
85. It is important to note that the decision in this case was on its own particular set of facts and is not authority for people to benefit from their felonious acts.

BIOGRAPHY

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Graduated from Sydney Uni 1972 Bachelor of Arts 1972 and Bachelor of Laws 1975.
Worked as employed solicitor till 1977 and went into partnership. Became a sole practitioner in 1988.

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Re Settree Estates: Robinson v Settree [2018] NSWSC 1413.

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Legislation

Forfeiture Act 1995 (NSW)

Mental Health (Forensic Provisions) Act 1990 (NSW)

Civil Procedure Act NSW (2005)

Family Provision Act 1982 (NSW)

Succession Act 2006 (NSW)

Troga v Troga (1994) NSWLR 269

Public Trustee v Fitter (2005) NSWSC 1188