

FAMILY LAW

The profits of crime

PRUE INNES looks at a recent Victorian Supreme Court decision which allowed a woman who killed her husband to inherit under his will.

Lawyers have welcomed the humanitarian approach of a Victorian Supreme Court decision to allow a woman who killed her husband, after he threatened to kill her, to inherit under his will (*Re Kettle* [1992] 1 VR 583).

Family law specialist, Mr Ian Kennedy, said Mr Justice Coldrey's decision — the first in Victoria — was significant in national and international terms.

It locks into a fairly enlightened view of the Supreme Court of New South Wales, that there are circumstances where it isn't inappropriate to override the traditional rule that someone who commits a crime can't benefit from the consequences of that . . . What it is saying is that the law is a dynamic institution and that it moves, rather slowly at times, and recognises that traditional rules don't necessarily apply to modern society; they can be reviewed, and reviewed in a humanitarian way.

He applauded the flexibility of looking at individual cases on their merits, particularly where a background of domestic violence sometimes led women, in particular, into desperate action to protect themselves.

It would be grossly unfair that they should be prejudiced by what really is an act that is almost inevitable if they are going to achieve their own protection or even their own salvation . . . We wouldn't expect it to be a widely applied principle, but it is very comforting to know the Supreme Court in Victoria is prepared to be sensible and practical about these cases.

In the decision, Mr Justice Coldrey said that the woman had been the victim of repeated violence or threats of violence, and the death occurred when, following her doctor's suggestion to leave him, she told her husband she was leaving and he threatened to kill her. She then heard him rattling a cutlery drawer where he kept a boning knife with which he had previously menaced her. The next thing she remembered was hearing a gun go off, and she realised she was holding the gun.

Two years ago she pleaded guilty to manslaughter and was placed on a three-year community-based order. Mr Justice Vincent, who sentenced her, said she was in a highly disturbed emotional state at the time, and her level of personal culpability 'is much less than is normally encountered in this court'. Mr Justice Coldrey said he agreed with that conclusion.

English courts have generally taken a rigid approach, saying that if a person is criminally responsible for the death of another, that person forfeits an interest in property which would otherwise be inherited. One famous case in 1911, cited in Mr Justice Coldrey's judgment, involved the notorious murderer, Dr Hawley Harvey Crippen, who made a will after he was convicted of the murder of his wife, in favour of his mistress. The mistress, as executrix of Crippen's will, claimed that she should be granted probate of his will, but the dead wife's family successfully argued that a convicted murderer could not inherit the property of the victim, and the estate went to Mrs Crippen's sister.

Recently, however, there has been a more liberal approach in recent cases in New South Wales. One New South Wales judge, who ruled in 1985 that a widow should not be precluded from inheriting her dead husband's estate, said:

My view of the ethos prevailing in this State at this time is that it is commonly recognised that unfortunate situations may occur in family groups whereby a death regrettably occurs because of a situation of domestic violence. [*Public Trustee v Evans* (1985) 2 NSWLR 188]

He said that had been recognised by the trial judge who discharged the jury from giving a verdict, which operated as an acquittal: 'and I believe it would be socially unreal for me not to recognise the same thing'. Mr Justice Coldrey said he was faced with a choice between the English and New South Wales authorities:

The New South Wales approach allows for the consideration of the circumstances surrounding the unlawful killing including the behaviour of the offender and the victim in assessing both the seriousness of the conduct and the level of moral culpability of the perpetrator of the fatal act.

He said he was satisfied that in this case, the killing had its genesis in ongoing domestic violence to the wife, and it occurred when the wife was gripped by fear. Further, he said it was neither possible nor desirable to list factors where the forfeiture rule should not operate: 'suffice it to say that the present case is not one in which the rule should operate to prevent the granting of probate'.

Another family law specialist, Mr Paul Staindl, welcomed the decision, but thought that legislation to clarify the situation would be useful. Victoria has no legislation dealing with the application of the forfeiture rule.

That creates an enormous amount of uncertainty in the minds of the public. If you have to go to court to find out if you fall within the discretionary rules, it is a terrible imposition on the client and on the court system. It would be more appropriate to have a piece of legislation setting out some guidelines so people know whether they are likely to fall within the limits of forfeiture, with a catch-all phrase saying a judge has a right to exercise discretion in borderline cases, thus giving some idea of where their legal rights lie.

Mr Staindl has had several cases involving the forfeiture rule, which is not limited to wills, and said that if there was jointly owned property, for example between a *de facto* couple, and one partner was responsible for the death of the other, the rule could prevent the property passing automatically to the surviving partner.

The Registrar of Probate, Mr Andrew Dickson, said the decision had implications for about 30 cases a year. Previously, people would have been advised that they would not be able to inherit property, because of the public policy that a person could not profit from his or her crime.

He said that following Mr Justice Coldrey's landmark decision, all cases where the issue arose would be referred to the court for a decision on their merits.

Prue Innes is a Melbourne journalist.

LEGAL STUDIES

The Garry Webb case

NATALIE TRUONG is a Year 11 student at a Melbourne secondary college. Her teacher sent in this report to illustrate the calibre of work produced by first year VCE Legal Studies students.

'The balance between personal freedom and the public welfare is always delicate in a society. On one hand, there is a natural concern for the welfare of the general public and on the other there is a concern for the rights and civil liberties of an individual'.¹ A particular law/legislation that protects one person's interest may lead to another person being adversely affected.

Describe the purpose of the *Community Protection Act 1990 (Vic)*

When passing the *Community Protection Act 1990 (Vic.)*, the

Victorian Government delegated the authority to the Victorian Supreme Court to order the extended detention of Webb* for a further six months after his sentence expired: 'providing the necessary care, treatment and management of Webb'.² Webb was convicted of attempted murder, charged with threatening and attacking prisoners, prison staff and hospital staff and has inflicted horrendous mutilation acts on himself. The media featured Webb as a dangerous man and this contributed to the degree to which the community perceived him as a threat and hence the Act was also passed to provide for the safety of members of the public against such an individual.

The Act was passed hurriedly as Webb's prison sentence expired and he was due for release in February-April 1990. The Act which came into force to keep Webb in prison has a sunset clause. This means the Act is only valid for 12 months. In April 1991, when the Act was to expire, the Government pushed for the *Community Protection (Amendment) Act* to be passed. This extended the life of the Act till the year 1994.

I think the sanctions imposed on Webb are 'a sad indictment of both our Governmental and prison systems'.³ The Government argues that 'Webb was/is a mentally disturbed man',⁴ and yet they have sent him to prison and are willing to take extraordinary steps to keep him there. If he is a disturbed man, then surely he needs rehabilitation, rather than punishment. Imprisonment involves the isolation of the individual from the realities of a social life, which can hardly be said to assist in the rehabilitation process. Thus, I believe, the sanction constitutes an intolerable invasion of liberty and privacy, for the law to try to punish an individual for their personality and actions that have yet to be committed.

*Webb: Garry Webb, also known as Garry David.

For further discussion on this case see (1990) 15 LSB 114-117.

What comment can you make about the legal principles which are affected by this legislation?

The legal principles which are relevant to this case are:

- a) The presumption of innocence — whereby a person accused of committing a crime is presumed innocent until proven by the prosecution in a court of law to be guilty.
- b) Due process of law — whereby every member of society is given fair and open trial by a judge and jury.

The fundamental principle of our criminal justice system is the presumption of innocence; this has been shattered by the enforcement of the *Community Protection Act* to keep Webb in prison. The Government is prepared to risk the civil liberties of an individual 'on the basis of the idea that you can predict if somebody is going to be dangerous'.⁵ This indeterminate sentencing violates our justice system which in theory believes you are innocent until proven guilty, but in this case an individual is presumed guilty before he has committed the crime.

An equivalent expression for justice is 'fairness', and fairness is what we expect from the law, where an accused person is confronted by his/her accusers and is given a fair trial by that 'due process of law'. Webb has been deprived of this justice, because the *Community Protection Act* does not allow for a 'proper' trial (natural justice).

Regardless of how strongly I feel about the release of Webb, I still believe the legal principles are the foundation of our criminal justice system and of a just society. The legislation abuses a fundamental human right, and is capable of leading to the sort of injustice to an individual which cannot be tolerated in a humane society. How can people be expected to place their confidence and trust in these principles if the law-making bodies of our society fail to honour these themselves?