SUPREME COURT OF QUEENSLAND

CITATION:	*Pike v Pike* [2015] QSC 134
PARTIES:	**Adam Lindsay PIKE** (applicant) **v** **Stephen Jonathan PIKE** (respondent)
FILE NO:	SC No 3763 of 2015
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	11 May 2015
DELIVERED AT:	Brisbane
HEARING DATE:	11 May 2015
JUDGE:	Atkinson J

ORDERS:

1. **Pursuant to the formal requirements of the Registrar, a Grant of Letters of Administration of the will of Suellen Olivene Pike, deceased, dated 15 July 2010, be granted to the applicant, Adam Lindsay Pike.**

2. **I declare that, upon the proper construction of the will of the deceased and in the events that have occurred, the estate of the deceased should be distributed to the applicant pursuant to clause 9 of the will.**

3. **I direct that the applicant is justified in disposing as he sees fit of any property belonging to the respondent which remains in or on the property at 1/7 Woburn Place, Burleigh Waters, and paying any proceeds received from that disposal to the Public Trustee of Queensland as manager of the estate of the respondent.**

4. **I order that the applicant's costs of this application be paid from the estate of the deceased on an indemnity basis.**

CATCHWORDS: SUCCESSION – FORFEITURE WHERE TESTATOR OR INTESTATE KILLED UNLAWFULLY – GENERALLY – where named executor and sole beneficiary under the will of the deceased had been convicted of the manslaughter of the deceased, his mother – where the other son of the deceased applied for distribution of the estate in his favour – where the applicant relied on a substitutional clause of the will that would take effect on the failure of the clause benefiting the respondent absolutely – whether conviction of manslaughter of the testator enlivens the forfeiture rule – whether the forfeiture rule caused the clause benefiting the respondent to fail – whether the respondent forfeited his claim to the right of executorship

SUCCESSION – ADMINISTRATION OF ESTATE – OTHER MATTERS – where named executor and sole beneficiary under the will of the deceased had been convicted of the manslaughter of the deceased, his mother – where the respondent, a prisoner, had left personal property on the real property part of the estate – where the respondent took no part in the proceedings and made no arrangements for the removal of his personal property despite the applicant's communications – whether the applicant was justified in disposing of the property as he saw fit, pursuant to the court's power in relation to the administration of estates of deceased persons

Forfeiture Act 1870 (UK)
Forfeiture Act 1982 (UK) s 2
Forfeiture Act 1991 (ACT) s 3
Forfeiture Act 1995 (NSW) s 5, s 6
Succession Act 1981 (Qld) s 6
Uniform Civil Procedure Rules 1999 (Qld) r 603(1)(d), r 603(2)

Cleaver v Mutual Reserve Fund Life Assurance [1892] 1 QB 147, referred to
R v Pike [2014] QCA 352, referred to
Re Crippen (1911) P 108; [1911-13] All ER 207, followed
Re Edwards; State Trustees Ltd v Edwards [2014] VSC 392, distinguished
Re Estate of Luxton [2006] SASC 371; (2006) 96 SASR 218, cited
Re Nicholson [2004] QSC 480, cited
Re Stone [1989] 1 Qd R 351, referred to
State of Queensland v Byers [2006] QSC 334, cited
The Public Trustee of Queensland v The Public Trustee of Queensland [2014] QSC 47, cited
Troja v Troja (1994) 33 NSWLR 269, discussed

COUNSEL:	R T Whiteford for the applicant No appearance for the respondent
SOLICITORS:	The Estate Lawyers for the applicant No appearance for the respondent

[1] **ATKINSON J**: The applicant, Adam Lindsay Pike, filed an application in this court, to which the respondent was his brother Stephen Jonathan Pike, for the following orders:

1. Pursuant to rule 603(1)(d) and/or rule 603(2) of the *Uniform Civil Procedure Rules* 1999 (Qld) an Order that, subject to the formal requirements of the Registrar, a Grant of Letters of Administration with the Will of Suellen Olivene Pike, deceased, dated 15 July 2010, be granted to the applicant.

2. A declaration that, upon the proper construction of the Will of the said deceased, and in the events which have occurred, the estate of the said deceased should be distributed to the Applicant pursuant to clause 9 of the Will.

3. A direction pursuant to section 6 of the *Succession Act* 1981 that the Applicant is justified in disposing as he sees fit of any property belonging to the Respondent which remains in or on the property at 1/7 Woburn Place, Burleigh Waters, and paying any proceeds received from that disposal to the Public Trustee of Queensland as manager of the estate of the Respondent.

[2] The applicant also asks that his costs be paid from the estate of his mother, Suellen Pike, on the indemnity basis.

[3] In order to determine the appropriate outcome of this application, it is necessary to set out the circumstances which led to the application being made.

[4] The deceased, Suellen Pike, had two children. The older is the applicant, Adam Lindsay Pike, and the younger, Stephen Jonathan Pike, the respondent. Ms Pike died at the age of 62 in August 2010. The informants for her death certificate were the State Coroner and Adam Lindsay Pike. The cause of death was said to be unknown.

[5] On 12 December 2013, the younger son, Stephen Jonathan Pike, was convicted after a trial of the manslaughter of Ms Pike and was ordered to be imprisoned for a period of 10 years and six months. The sentencing remarks of the trial Judge set out the circumstances of Stephen Pike's killing of his mother. The death occurred within a month of Ms Pike's altering her will to benefit the respondent by making him the sole beneficiary. Unfortunately, that would appear to account for the motive for the respondent's killing of his mother.

[6] As is necessary in the case of a jury verdict of manslaughter, the sentencing Judge made findings as to the basis for that verdict. Her Honour said:

> "The prosecution case was a circumstantial one as your mother's body has never been found. The jury's verdict of guilty of manslaughter must be on the basis that the prosecution failed to prove beyond reasonable doubt that when you killed your mother, you intended to do so or cause her grievous bodily harm."

There does not seem to have been any other basis on the facts led at trial for a reduction of the conviction from murder to manslaughter.

[7] The circumstances of the killing are set out in full in the Court of Appeal decision which dismissed an appeal against conviction. In *R v Pike*,[1] Philippides J set out in detail the evidence led at the trial. The verdict of unlawful killing by the respondent of his mother appears inevitable once one is aware of the facts led by the prosecution in that case.

[8] It is necessary to say something about the wills that were written by the deceased before her death. An affidavit by the applicant exhibits three wills of his mother of which he was aware. The first was dated 7 September 2009. In that will, the applicant was appointed executor and trustee. The disposition of the will, after a specific bequest, was to leave 80 per cent of the residuary estate to the applicant, 10 per cent to the respondent, and 10 per cent to a friend. On 3 December 2009, another will was made by Ms Pike, in which the major change was to leave the residue of her estate equally between her two sons. Then on 15 July 2010, she made another will, which appears to be her last will and testament, in which she appointed the respondent as her executor and trustee and, leaving no specific gifts, disposed of the whole of her estate to the respondent absolutely. However, she did leave a substitutional provision, which provided that, if that provision for the distribution of her estate failed to take effect, then the subsequent provision would apply, and that was that she gave the whole of her estate to her son Adam Pike absolutely.

[9] The question in this case, essentially, is whether or not the provision in the last will of the deceased leaving the estate absolutely to the respondent has failed to take effect, with the result that the whole of the estate has been left to her son Adam Pike absolutely.

[10] The applicant has proved that the respondent killed the deceased, and that that killing was unlawful. This gives rise to consideration of the 'forfeiture rule'. The rule is described in Dal Pont and Mackie's *The Law of Succession*:

> "It is an established principle of law 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, the interest in that property is forfeited. The rule is based upon public policy, it being judicially remarked 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.'"[2]

The case therein referred to is *Cleaver v Mutual Reserve Fund Life Assurance* [1892] 1 QB 147 at 156-157 per Fry LJ.

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[1] [2014] QCA 352.
[2] LexisNexis, 2013, at [7.47].

[11] As Dal Pont and Mackie note, the rule is of comparatively recent origin, as, prior to 1870, a person convicted of an unlawful killing was subject to the forfeiture of all of their property to the Crown. That forfeiture was abolished in the United Kingdom by the *Forfeiture Act* 1870. Thereafter, the present forfeiture rule was formulated by the common law: essentially, a person who is criminally responsible for the death of another forfeits their right to take property to which they would otherwise be entitled upon the death of the person for whose death they are responsible. The rule applies both to wills and to taking on intestacy.[3]

[12] Although I have stated the rule very broadly, there remains some doubt as to its exact denotation and scope. Cases have arisen in which the moral culpability of a person convicted of manslaughter is very low and the unbending application of the common law principle may appear to be inappropriate. This dilemma has been dealt with in the United Kingdom, New South Wales and the Australian Capital Territory by the legislature passing a *Forfeiture Act* which allows the Court to take into account the moral culpability of the person convicted of an unlawful killing in all cases apart from murder.[4]

[13] The case which may be seen to have led to that statutory intervention in this country is *Troja v Troja*[5] and, in particular, the dissenting judgment of Kirby P, who was then President of the Court of Appeal in New South Wales. The Judges in the majority, Mahoney and Meagher JJA, set out the common law, as it was then understood to be. I shall refer to the judgment of Mahoney JA for the statement of principle. His Honour referred to the judgment below,[6] in which Wardell CJ in Equity had held that the respondent was not entitled to the whole of the estate under her husband's will, because the law does not allow a person who deliberately kills another to benefit from the killing. Mahoney JA said:

> "The principle involved is, in my opinion, plain. It is that the law will not enforce 'rights directly resulting to a person asserting them from the crime of that person'. This is the formulation adopted by Dixon, Evatt and McTiernan JJ in *Helton v Allen* [(1940) 63 CLR 691] (at 709). Their Honours (at 710) referred to 'the principle that by committing a crime no man could obtain a lawful benefit to himself'."[7]

[14] His Honour observed that the principle was not new, being based on the legal maxim that no man can benefit from his own crime.[8] Mahoney JA set out the development of the law in this area, then, in a passage which I think may well be said to apply in this case, stated:

> "In some cases, the wrong is done in order to obtain the benefit. In such cases the position is clear: the benefit cannot be claimed."[9]

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[3] Ibid.
[4] See *Forfeiture Act* 1991 (ACT) s 3; *Forfeiture Act* 1995 (NSW) ss 5, 6; *Forfeiture Act* 1982 (UK) s 2.
[5] (1994) 33 NSWLR 269.
[6] Ibid at 289.
[7] Ibid at 294-295.
[8] Ibid at 295.
[9] Ibid at 297.

[15] His Honour said that he could

> "see no difference where the killing is held to be manslaughter but not murder. The relationship between the killing and the claim to the benefit from it is direct. It is the killing which has brought about the operation of the will." [10]

[16] *Troja v Troja* has been followed in Queensland in the case of *State of Queensland v Byers*.[11] That case posed no difficulties as to moral culpability, as Ms Byers had been convicted of the murder of the deceased, from whom she wished to take the benefit. However, it does show some of the complexities in the way in which the principle may be given effect. Ms Byers had apparently taken the benefit by a fraud committed after the death of her victim, who was her de facto partner. Moneys were held in the trust account of a firm of real estate agents, over which a constructive trust had to be declared in order that she not gain the benefit of rentals received as a result of her fraud and the killing of her de facto partner.

[17] *Troja v Troja* was also followed by Gray J in his learned decision in *Re Estate of Luxton*,[12] where his Honour stated the rule as being:

> "Where a beneficiary under a will or a person eligible to take on an intestacy causes the death of the testator or the intestate in circumstances amounting to murder or manslaughter that person will not be in a position to claim under the will or upon intestacy. Public policy in these circumstances overrides the express provisions of a will and the statutory provisions relating to distribution on intestacy. This principle is referred to as the 'forfeiture rule'."[13]

[18] His Honour then referred to a number of the cases in which the rule has been applied since its first statement in *Cleaver v Mutual Reserve Fund Life Association* by Fry LJ in 1892.[14]

[19] The case has also been followed in Queensland in *The Public Trustee of Queensland v The Public Trustee of Queensland*[15] by de Jersey CJ when considering whether or not the rule applied to the crime of assisted suicide.

[20] The forfeiture rule has also recently been considered in the Supreme Court of Victoria in another very learned decision, being that of McMillan J in *Re Edwards; State Trustees Ltd v Edwards*.[16] Her Honour observed that:

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[10] Ibid at 297-298.
[11] [2006] QSC 334 at 26 per Douglas J.
[12] [2006] SASC 371.
[13] Ibid at [11].
[14] Ibid at [13]-[16].
[15] [2014] QSC 47.
[16] [2014] VSC 392.

> "the modern forfeiture rule is an instantiation of the wider principle of public policy that a person shall not be allowed to profit from [his or] her crime. It is an expression of the legal maxim *ex turpi causa non oritur actio*."[17]

[21] Her Honour's decision in *Re Edwards* might create some doubt as to whether or not the rule would apply in a case like the present one. Referring to common law cases of murder and manslaughter, her Honour said:

> "In my view, *Troja* and *Re Soukup* [(1997) A Crim R 103] are clear authorities for the proposition that the forfeiture rule will apply in all cases of voluntary manslaughter, viz, where the elements of murder are present, but for some reason the culpability of the offender is reduced. The rule laid down in the Australian authorities therefore appears to be that, at the least, a person who kills another person by a deliberate and unlawful act forfeits any benefit arising as a direct result of that act."[18]

[22] The law in Queensland is not limited in that way. The forfeiture rule has been held to extend even to cases of assisted suicide[19] and clearly, in my view, in this State covers all cases of murder and manslaughter, at the very least. This includes cases where the elements of murder are not present; that is, where an intention to kill or do grievous bodily harm is absent.[20] Accordingly, the forfeiture rule applies to this case and the provision in the will leaving the whole of the estate to the respondent must fail because he has been criminally responsible for the death of the testator. Hence it is his crime that would lead to his benefiting under her will, a situation which the common law cannot tolerate.

[23] A clear statement of this rule is found in the Queensland Law Reform Commission's *Review of the Law in Relation to the Final Disposal of a Dead Body*:[21]

> "There is … a settled principle at common law that a person who unlawfully kills another person is precluded from taking a benefit as a result of that crime, including as a beneficiary under the person's will or on the person's intestacy. [22]

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[17] Ibid at [87].
[18] Ibid at [102].
[19] See *The Public Trustee of Queensland v The Public Trustee of Queensland* [2014] QSC 47.
[20] See, e.g., *In the Estate of Hall; Hall v Knight and Baxter* [1914] P 1 at 6, where Cozens-Hardy MR, with whom Hamilton and Swinfen Eady LJJ, rejected the distinction between murder and manslaughter for the purposes of the forfeiture rule, citing *Cleaver v Mutual Reserve Fund Life Assurance* [1892] 1 QB 147 and *Re Crippen* (1911) P 108. As to the situation where the elements of murder are present but the offender is convicted of manslaughter based on diminished responsibility, see *Re Stone* [1989] 1 Qd R 351.
[21] Report Number 69, December 2011, at [6.154] and [6.155].
[22] Tasmania Law Reform Institute, *The Forfeiture Rule*, Final Report No 6 (2004) 4. The forfeiture rule has been traced to *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147, 156 (Fry LJ) (which involved a potential beneficiary under a life insurance policy): see *Helton v Allen* (1940) 63 CLR 691, 709 (Dixon, Evatt and McTiernan JJ); *Re Nicholson* [2004] QSC 480, [6] (Atkinson J); *Re Stone* [1989] 1 Qd R 351, 352 (McPherson J). See generally JR Martyn and N Caddick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (Sweet & Maxwell, 19th ed, 2008) [70-03].

> … This rule of public policy — known as the forfeiture rule — has been applied by Australian courts, for example, to deny a wife convicted of the manslaughter of her husband from taking under the husband's will.[23]"

[24] That report dealt with the difficult question of the right to dispose of the body of a deceased person. It pointed out that often, the person who would, under the common law, have the highest right to dispose of the deceased's body may well be a person who has been criminally responsible for that person's death and recommended legislative reform to deal with that unhappy situation.[24]

[25] In my view, it would also be useful for the legislature to consider legislation consistent with the *Forfeiture Acts* to which I have referred in the United Kingdom, New South Wales and the Australian Capital Territory. As I held in *Re Nicholson*:[25]

> "The forfeiture rule may be applied strictly unless modified by statute as has been the case in New South Wales and the Australian Capital Territory in the *Forfeiture Act* 1995 and the *Forfeiture Act* 1991 respectively which are based on the United Kingdom *Forfeiture Act* 1982."[26]

[26] The cases deal with the vexed question of how to give effect to the principle: whether by assuming the prior death of the person convicted of the crime as held by McPherson J, as his Honour then was, in *Re Stone*,[27] or by declaring a constructive trust over the interest of the felon, as is apparently the case under the American Restatement (Third) of Restitution and Unjust Enrichment.[28] Interesting as that question is, it is not necessary to decide it in this case as the will itself provides for what should happen if the provision leaving the estate to the respondent should fail. That clause of the will does fail because of the application of the forfeiture rule to it, and hence, clause 9 of the will now has effect; that is, the whole of the estate of the deceased is given to the applicant, Adam Pike, absolutely.

[27] This also has an inevitable effect on who should be the executor. The same principle applies as set out by Evans P in *Re Crippen*:[29]

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[23] *Troja v Troja* (1994) 33 NSWLR 269, cited in *Queensland v Byers* [2006] QSC 334, 8 [26] (Douglas J). See also, for example, *Re Sangal; Perpetual Executors and Trustees Association of Australia Ltd v House* [1921] VLR 335, in which the deceased's wife, who was convicted of the murder of her husband, was disentitled to a share of the husband's estate on intestacy. But see *Re Vyner; Vyner v Vyner* (Unreported, Supreme Court of Queensland, Shepherdson J, 24 August 1999) in which it was held that, because the plaintiff son's mental condition at the time he killed his parents fell with s 27 of the Criminal Code (Qld) (Insanity), and that he had therefore not killed his parents unlawfully, the plaintiff was entitled to take as beneficiary under his parents' wills. See also the discussion of the forfeiture rule in Australian common law in Tasmania Law Reform Institute, *The Forfeiture Rule*, Final Report No 6 (2004) 11–13.

[24] Queensland Law Reform Commission, *Review of the Law in Relation to the Final Disposal of a Dead Body*, Report Number 69, December 2011, [6.135], Recommendations 6-14 and 6-15, and see generally [6.131]-[6.195].

[25] [2004] QSC 480.

[26] Ibid at [7].

[27] (1989) 1 Qd R 351.

[28] American Law Institute, 2011, at §45, as cited in *Re Edwards; State Trustees Ltd v Edwards* [2014] VSC 392 at [124]-[128] per McMillan J.

[29] (1911) P 108.

> "It is clear that the law is, that no person can obtain, or enforce, any rights resulting to him from his own crime; neither can his representative, claiming under him, obtain or enforce any such rights. The human mind revolts at the very idea that any other doctrine could be possible in our system of jurisprudence."[30]

[28] As Mr Whiteford observed in his learned submissions, a person named as an executor in the will of a deceased who is convicted of involvement in that person's death is not entitled to probate of the will, because that is a right arising from the death of the deceased. It is not necessary for me to consider whether or not the named executor should be passed over in these circumstances. In my view, he has no claim to the right to be the executor in the circumstance that he has been convicted of the manslaughter of the deceased.

[29] The third order sought under the application is really a pragmatic approach to dealing with the personal property of the respondent left in the real property owned by the testator. It seems to be an appropriate way of dealing with that, with the proceeds to be paid to the Public Trustee on behalf of the respondent. I should also state in these reasons that both the respondent and the Public Trustee have been served with these proceedings. However, it appears that the respondent has no interest in defending them and has not taken any steps so that the Public Trustee would give its written consent to his defending the proceedings.

Orders

[30] In the circumstances, the orders will be:

1. Pursuant to the formal requirements of the Registrar, a Grant of Letters of Administration of the will of Suellen Olivene Pike, deceased, dated 15 July 2010, be granted to the applicant, Adam Lindsay Pike.

2. I declare that, upon the proper construction of the will of the deceased and in the events that have occurred, the estate of the deceased should be distributed to the applicant pursuant to clause 9 of the will.

3. I direct that the applicant is justified in disposing as he sees fit of any property belonging to the respondent which remains in or on the property at 1/7 Woburn Place, Burleigh Waters, and paying any proceeds received from that disposal to the Public Trustee of Queensland as manager of the estate of the respondent.

4. I order that the applicant's costs of this application be paid from the estate of the deceased on an indemnity basis.

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[30] Ibid at 112.