Wills & Estates
Winter Term 2018

Lecture Notes – No. 8

PROOF OF DEATH

At common law, *the fact* that someone has died and that there is no body available for the issuance of a Death Certificate can be resolved through proof before a court. The person seeking that judicial declaration can be aided through a rebuttable *presumption of death* where a person is missing and has not been heard of for seven years. The exact date of death may still require some form of proof even where the presumption applies and this is a question of fact for the court; **Re Miller (1978), 22 O.R. (2d) 111 (H.C.J.); cb, p.383.** Here the deceased was missing for many years and the court held that it had jurisdiction to fix the date of death (which might be important for a variety of reasons).

While a person remains missing, there is jurisdiction under the **Absentees Act, RSO 1990, c.A.3; cb, p.388,** to make a an order for administration of the absentee's assets and discharge of his or her obligations. Under the Rules of Civil Procedure, R.1.03(1), a person who is absent under that statute is a person 'under a disability' thus allowing the court to appoint a Litigation Guardian to litigate for that person.

As for declarations of death proper, the situation in Ontario (and elsewhere) has changed somewhat in the aftermath of 9/11. The **Declarations of Death Act 2002; cb., p.390,** aims to streamline the process of *declaring* a person dead where no remains can be located (the fact of death can still be pleaded and proved in an individual case). The Act allows a single application to be brought for a declaration that suits a wide variety of legal purposes.

Declarations of Death Act, 2002, S.O. 2002, c.14

Definitions

1. In this Act,
"interested person" means any person who is or would be affected by an order declaring that an individual is dead, including,

(a) a person named as executor or estate trustee in the individual's will,
(b) a person who may be entitled to apply to be appointed administrator of the individual's estate on intestacy,
(c) the individual's spouse,
(d) the individual's next of kin,
(e) the individual's guardian or attorney for personal care or property under the *Substitute Decisions Act, 1992*,
(f) a person who is in possession of property owned by the individual,
(g) if there is a contract of life insurance or group insurance insuring the individual's life,

(i) the insurer, and
(ii) any potential claimant under the contract, and
(h) if the individual has been declared an absentee under the *Absentees Act*, the committee of his or her estate; ("personne intéressée")

Order re declaration of death

2. (1) An interested person may apply to the Superior Court of Justice, with notice to any other interested persons of whom the applicant is aware, for an order under subsection (3).

Notice

(2) Notice under subsection (1),
(a) if given by or to an insurer, shall be given at least 30 days before the application to court is made;
(b) if not given by or to an insurer, shall be given as provided by the rules of court.

Power of court

(3) The court may make an order declaring that an individual has died if the court is satisfied that either subsection (4) or (5) applies.

Disappearance in circumstances of peril

(**4) This subsection applies if,**
(a) the individual has disappeared in circumstances of peril;
(b) the applicant has not heard of or from the individual since the disappearance;
(c) to the applicant's knowledge, after making reasonable inquiries, no other person has heard of or from the individual since the disappearance;
(d) the applicant has no reason to believe that the individual is alive; and
(e) there is sufficient evidence to find that the individual is dead.

Seven-year absence

(5) This subsection applies if,
(a) the individual has been absent for at least seven years;
(b) the applicant has not heard of or from the individual during the seven-year period;
(c) to the applicant's knowledge, after making reasonable inquiries, no other person has heard of or from the individual during the seven-year period;
(d) the applicant has no reason to believe that the individual is alive; and
(e) there is sufficient evidence to find that the individual is dead.

Scope of order

(6) The declaration of death applies for all purposes unless the court,
(a) determines that it should apply only for certain purposes; and
(b) specifies those purposes in the order.

Same

(7) The declaration of death is not binding on an interested person who did not have notice of the application.

Date of death

(8) The order shall state the date of death, which shall be,
(a) the date upon which the evidence suggests the person died, if subsection (4) applies; or
(b) the date of the application, if subsection (5) applies.

Same

(9) The order may state a date of death other than that required by subsection (8) if the court is of the opinion that it would be just to do so in the circumstances and that it would not cause inconvenience or hardship to any of the interested persons.

PROOF OF LOST WILLS

A Will that was known to be in the possession of the testator or testatrix at death and cannot be found after the fullest inquires will invoke the '**presumption of revocation**.'

This is a presumption which can be rebutted on a balance of probabilities, and many cases can be found where the presumption is rebutted by evidence to show, for example: the testator considered the Will valid at death – *Re Perry* (1924), 56 OLR 278 (CA); or that the testator put the Will in what he regarded to be a safe and secure place which was interfered with by a third party; *Re Cole* [1994] NSJ No. 256 (CA).

The leading Canadian dicta is that of Anglin CJC in Lefebvre v Major [1930] SCR 252:

> **... the presumption of revocation arising from the will, traced to the possession of the testator, [and] not being forthcoming... is said by Cockburn C.J., in *Sugden v. Lord St. Leonards* (1876), 1 P.D. 154, to be *presumptio juris*, but not *de jure*, 'more or less strong' according to circumstances such as the character of the testator and his relation to the beneficiaries, the contents of the instrument, and the possibility of its loss being accounted for otherwise than by intentional destruction on the part of the testator.**

Thus a lost Will – a Will is known to have existed in circumstances where its loss is not consistent with an act of revocation – can be proved by evidence of due execution,

testamentary capacity and intent, and its contents. How? Solicitor's notes, copies of the Will, etc.

A Court of Appeal case has called into question the strict burden of proof (reasonable doubt) in respect of proving a lost Will (rather than rebutting the presumption of revocation) in older Ontario jurisprudence, and has favoured (in dicta) the more conventional test of 'reasonable probability' used elsewhere in Canada.

Sorkos v Cowderoy
(2006), 26 ETR (3d) 108 (Ont CA); cb, p.398

The testatrix was in a second relationship, but unmarried, of long standing (41 years) at the time of her death. She also had a son from a prior relationship. A Will had been made some 17 years before her death leaving her estate to her son. The common law spouse alleged that a new Will was executed 13 years later after the first Will (4 years before the testatrix's death) leaving the estate to him, but had been lost. The son opposed admitting the new Will to probate and instead sought to admit the old Will. Per LaForme JA:

> ***(i) Proving a lost will***
>
> **8 The test for proving a lost will requires that Mr. Sorkos demonstrate:**
>
> **(1) due execution of the Will;**
>
> **(2) particulars tracing possession of the Will to the date of death, and afterwards if the Will was lost after death;**
>
> **(3) rebuttal of the presumption that the Will was destroyed by the testator with the intention of revoking it; and**
>
> **(4) proof of the contents of the lost Will.**
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> 9 The evidence clearly established the due execution of the Will, which the trial judge held to be identical to the one presented at trial. While Mr. Cowderoy points to inconsistencies in the evidence, it nevertheless remains uncontradicted that the testator executed the Will in the presence of two independent witnesses.
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> 10 Assuming that the presumption of revocation, as outlined below, applies in this case, Mr. Sorkos -- on a balance of probabilities -- would have been required to rebut the presumption that, because the executed copy of the Will was lost, the testator intended to revoke the Will. This burden flows from the principle that: when a will is traced to the possession of the testator and cannot be found at the date of death, there is a presumption that it was destroyed by the testator with the intention of revoking it: *Lefebvre v. Major*, [1930] S.C.R. 252 (S.C.C.) at 257.
>
> **11 For two reasons it is doubtful that the presumption of revocation applies in this case. First, the trial judge found that the testator had --**

apparently because of the progression of Parkinson's disease -- likely lost her capacity to revoke the Will by 1998, the date at which the Will went missing. Second, the testator entrusted Sorkos with the Will and assumed Sorkos had kept the Will for safekeeping. Consequently, the presumption of revocation would not apply since the originally executed Will was not in the testator's possession at the time it went missing.

12 Once again, assuming the presumption of revocation does apply, it was considered and rejected by the trial judge, and the evidence in this regard supported his findings and conclusion. It is true that the trial judge did incorrectly state that Mr. Sorkos' briefcase containing the Will was missing when in fact the evidence was that only the envelope containing the Will went missing. It appears to me that the trial judge merely misstated this evidence, which in my view is of no significance to his ultimate decision. I would not disturb his decision.

13 It is correct, as counsel for Mr. Cowderoy points out, that in Ontario it appears that Mr. Sorkos must prove that the contents of the will reflect the testamentary intentions of the testator beyond a reasonable doubt: Craig, Re , [1939] O.R. 175 (Ont. C.A.) at 179. However, other jurisdictions have held that the standard of proof required for the reconstruction of a lost will is that of reasonable probability: Wippermann, Re, [1953] 1 All E.R. 764 (Eng. P.D.A.), at 766; Squires v. Squires (1979), 24 Nfld. & P.E.I.R. 288 (Nfld. Dist. Ct.). It may be that the time has come for Ontario to reconsider this issue, however, I do not think that this is the appropriate case in which to do so. The evidence in this case overwhelmingly satisfies the standard of proof required in Ontario to prove the contents of the Will.

Procedure:
Re O'Reilly
2009 CanLII 60091 (Ont Sup Ct)

Per Brown J:

[1] This is an application under Rule 75.02 of the *Rules of Civil Procedure* to prove the validity and contents of a will, the original of which has been lost, and of which only a copy remains. In light of the evidence filed about the search for the original will conducted by the applicants, including their efforts to obtain the original from the solicitor who acted for their mother, and in view of the consents from all the potential beneficiaries, I grant the order sought.

[2] My only purpose in writing this brief endorsement is to deal with the form of the order. Since the *Rules of Civil Procedure* do not prescribe the form for an order made under Rule 75.02, judges see a wide range of language submitted for proposed orders proving lost wills. **In order to bring some uniformity to this type of application, I would ask applicants to submit draft orders using the language recommended**

several years ago by (now retired) Justice Haley. The draft order should read:

> **I declare that the Will of [insert name of deceased] dated [insert date of will] has been proved and that the copy of the Will adduced in evidence shall be admitted to probate as the last Will of [insert name of deceased] deceased, until such time as the original may be found.**
>
> **I direct that, subject to the filing of the appropriate documents with the Court, a Certificate of Appointment of Estate Trustee with a Will for the Will of [insert name of deceased] dated [insert date of will] be issued to the applicant(s).**

To this language should be added any other orders sought by the applicant, such as dispensing with service of the application, etc.

[3] Judges considering these applications are provided with a template endorsement using this language. Therefore, in order for an applicant to avoid the delays associated with submitting a draft with different language and then having to submit a revised order that tracks the language of the endorsement signed by the judge, the language I have set out above should be used in the draft order submitted with the application record.

CAPACITY OF BENEFICIARIES

'Capacity' refers to the legal ability of the beneficiary to accept / disclaim the gift. If the beneficiary is incapable of taking the gift it is void.

Illegitimacy and Adoption

The common law distinction between a child 'born outside marriage' and one who is 'legitimate' has been abolished in Ontario: a natural or adopted child of the deceased have equal rights; *Children's Law Reform Act*, ss. 1, 2; *Succession Law Reform Act*, s.1; *Child and Family Services Act*, s.58.

Homicide

Gifts under Wills can be held to be unenforceable as a matter of public policy, much as trusts or contracts can be held void on the same terms. The law of succession at common law carried the matter a step farther in respect of homicide on the general principle that a wrongdoer ought not to profit from his or her wrong. Thus a person who kills another unlawfully forfeits any share in the deceased's estate.

At common law, the forfeiture rule has an uncertain scope – did it cover accessories to suicide in addition to murder or manslaughter [see *Dunbar v Plant* [1998] Ch 412]. What of statutory offences like dangerous driving or torts? As one judge has said (in a different

context), '[t]he statement that a man shall not be allowed to profit from his own wrong is in very general terms, and does not of itself provide any sure guidance to the solution of a problem in any particular case;' *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 268 (HL), per Lord Griffiths).

Re Gore
[1972] 1 OR 550 (HCJ); cb, p.422

The forfeiture rule doesn't apply where a husband murdered his wife and children and then committed suicide. Her estate could rightfully receive proceeds from a policy of insurance on the husband's life.

Per Osler JA:

> While there is little authority in our jurisdiction, there have been a number of discussions of this problem in the Courts of the United States of America and the conclusion seems there to have been reached that the rule prohibiting a person from profiting from his own wrong has no application in such a case.
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> To say that the object of the murder was to accomplish what could be accomplished by the mere scratch of a pen carries its own refutation and leads to the conclusion that profit via the policy was not the object of the crime. The reason for the application of the rule failing, the rule cannot be invoked; *Union Central Life Ins. Co. v. Elizabeth Trust Co. et al.*, 183 Atlantic Rep. 181 at p. 185, per Berry, V.-C.
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> **… Joseph Hector Gore could have divested his late wife, the named beneficiary, of her contingent right to the proceeds of the policies "by the mere scratch of a pen" and hence, it cannot be assumed that he murdered her for that purpose. A proper case for the application of the rule does not arise, the rule being based on the axiom that nothing should be done to encourage murder.**

Brissette Estate v. Westbury Life Insurance Co.
[1992] 3 S.C.R. 87; cb, p.426, fn. 121

Here the insurer sought to avoid payment under a policy of life insurance where a husband murdered his wife, was the designated beneficiary to the proceeds of a policy of life insurance on her life, renounced his claim in favour of her estate, and then sought to have the proceeds paid into the estate which he would inherit. The issue was whether the policy of insurance should be enforced, and, if so, whether a constructive trust might arise against the murderer who would take on the intestacy.

For the majority of the Court, Justice Sopinka denied the claim on both bases. The contract of insurance contemplated that the husband would inherit, but that he could not do so on the traditional rule that one who murders the insured cannot claim insurance proceeds on the victim's life. The dissenters, Gonthier and Cory JJ., would not allow the murder to inherit but held that the contract should be enforced narrowly in favour of

innocent heirs; in other words, that the insurer would seem to gain inappropriately otherwise.

Sopinka J held:

> 7 In order to determine whether, as a matter of public policy, the Court should resort to the device of a constructive trust, it is appropriate to consider whether the application of public policy which denies payment to the felonious beneficiary would work an injustice if recovery is denied to the appellants. After all, it is this policy that prevents the contract from taking effect in accordance with its terms. If denial of recovery by the estate is not inconsistent with this policy, then there is no misuse of public policy which would warrant a conclusion that its application is unjust.
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> ...
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> 9 The rationale of the policy which denies recovery to the felonious beneficiary is that a person should not profit from his or her own criminal act…
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> ...
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> 13 But, even if I had concluded that the denial of recovery to the estate was inconsistent with public policy, in my opinion it would be contrary to established principles of equity to employ a constructive trust in this case. **A constructive trust will ordinarily be imposed on property in the hands of a wrongdoer to prevent him or her from being unjustly enriched by profiting from his or her own wrongful conduct. For example, in Schobelt v. Barber, [1967] 1 O.R. 349 (H.C.), the court imposed a constructive trust on property which passed to a joint tenant who had murdered his co-tenant. By virtue of the instrument creating the joint tenancy the surviving tenant acceded to the whole property. In order to prevent the wrongdoer from being unjustly enriched, the whole property was impressed with a constructive trust with the estate of the deceased joint tenant as beneficiary of one-half of the property.**
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> **14 The requirement of unjust enrichment is fundamental to the use of a constructive trust…**
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> …
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> 16 **In this case, no claim of unjust enrichment has been made out… It cannot be said that but for Gerald's act, Mary's estate would have recovered the money. The wrongdoer does not benefit from his own wrong, nor is the insurer in breach of its duty to Mary. It is simply complying with the express terms of the contract. Moreover, there is no property in the hands of the wrongdoer upon which a trust can be fastened. By virtue of public policy the provision for payment in the insurance policy is unenforceable and no money is payable to the wrongdoer. The effect of a constructive trust would be to first require payment to the wrongdoer and then impress the money with a trust in favour of the estate…**

Oldfield v Transamerica Life Co. of Canada
2002 SCC 22; cb, p.428, note 17

Here the insured died while committing an illegal act that was a cause of death (smuggling cocaine-filled condoms in his stomach which burst). The insurer sought to avoid paying the proceeds under the contract of insurance on the insured's life. In considering the extent of the forfeiture principle as set out in *Brissette*, the Court held the principle does not extend so far as to prevent the proceeds being paid to an innocent beneficiary where the insured does not intend the insured loss. That is, innocent beneficiaries are not affected by the public policy that a person ought not to be able to insure against his or her own criminal act and thus allow profit from a wrong. Per Major J:

> 23 In *Brissette*, *supra*, Sopinka J. held that it is consistent with public policy "that a person should not be allowed to insure against his or her own criminal act irrespective of the ultimate payee of the proceeds" (p. 94). Applied literally, it would prevent insurance proceeds from being paid to any innocent beneficiary named in an insurance policy so long as the insured event was occasioned while the insured committed a criminal act. In this case, it would prevent Maria Oldfield's claim.
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> 24 **Feldman J.A. recognized at the Court of Appeal that Sopinka J. did not hold that insurance contracts contain an implied term that criminal acts committed by the insured automatically exclude coverage even where the act is not committed with the intention of causing the insured loss. Likewise, he did not hold that there is a public policy rule that forbids payment to all beneficiaries, innocent or not, whenever the insured commits a criminal act. In *Brissette*, the insurance contract named the surviving spouse as beneficiary. The husband who murdered his wife committed a deliberate act intended to cause the insured event. There was no question that the husband was barred from receiving the proceeds; the Court had to decide whether the contract could be interpreted so as to vest the proceeds in the estate of the wife, or failing that, whether the device of a constructive trust could achieve the same result. The Court answered both of these questions in the negative. In contrast to *Brissette*, the insured in the present appeal did not intend to cause the loss. Nor does Maria Oldfield, who was expressly designated as beneficiary under the contract, need to resort to trust principles in order to receive the proceeds.**
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> 25 **In total, Sopinka J.'s decision in *Brissette* demonstrated that he did not intend to displace the principle that innocent beneficiaries who do not take through the criminal's estate should not be affected by public policy. In *Brissette*, Sopinka J. held that "[t]here is nothing unjust in refusing to pay the proceeds of insurance to a beneficiary <u>not designated by the insurance contract</u> when to do so would allow the insured to insure against his own criminal act" (p. 95 (emphasis added)).** Sopinka J. reinforced this statement during his consideration of

Cleaver, *supra*, in which the insured took out an insurance policy on his own life with his wife as beneficiary. The wife-beneficiary then murdered the husband-insured. By statute, the proceeds were declared payable to the estate of the insured, to be held in trust for the beneficiary. Public policy prevented any payment from being made to the felonious wife-beneficiary but, in Sopinka J.'s words, "[p]ublic policy was not allowed to abrogate a right that the estate had by virtue of the statute" (p. 95). Applying this case to the facts in *Brissette*, Sopinka J. held that "the result in *Cleaver* cannot be achieved in the absence of a provision, statutory or in the contract, providing for payment to the estate of the wife" (pp. 95-96 (emphasis added)). Because these passages appear after Sopinka J.'s earlier statement that "a person should not be allowed to insure against his or her own criminal act irrespective of the ultimate payee of the proceeds" (p. 94), it is clear that the earlier statement was not intended to be an open-ended change to the traditional public policy rule.

26 A universal rule that "a person should not be allowed to insure against his or her own criminal act irrespective of the ultimate payee of the proceeds" would have serious repercussions for *bona fide* creditors who provide value to obtain an interest in life insurance. Creditors in numerous instances such as a mortgage and other debt instruments will insist on obtaining an assignment of an insurance policy or being the named beneficiary sufficient to discharge the debt to protect their interest in the event of the debtor dying insolvent.

27 If Sopinka J.'s statement was given the broad interpretation that Transamerica seeks, *bona fide* creditors would be unable to obtain insurance proceeds where an insured died while committing a criminal act. To do so would run contrary to a long-standing principle that there is "no illegality in a stipulation that, if the policy should afterwards be assigned bona fide for a valuable consideration, or a lien upon it should afterwards be acquired bona fide for valuable consideration, it might be enforced for the benefit of others, whatever may be the means by which death is occasioned . . . ." (*Moore v. Woolsey* (1854), 4 El. & Bl. 241, 119 E.R. 93 (K.B.), at p. 98); see also *Beresford* (H.L.), *supra*, at pp. 607-8, *per* Lord Atkin, and at p. 611, *per* Lord Macmillan; *Stats*, *supra*, at p. 240; *Hardy*, *supra*, at p. 760, *per* Lord Denning M.R., and at p. 768, *per* Diplock L.J. ("an assignee for value before the occurrence of the event would not be prevented from enforcing the contract notwithstanding that the event was caused by the anti-social act of the original assured"). The exception was not mentioned or considered in Sopinka J.'s decision.

28 In *Brissette*, Sopinka J. did not intend to eliminate long-established exceptions to the public policy rule. *Brissette* does not bar a claim by an innocent beneficiary where the insured does not intend the insured loss.

Dhingra v. Dhingra
2012 ONCA 261

per Rosenberg J.A.:

> [1] **This appeal concerns the rule of public policy that a person who kills another cannot share in the deceased's estate. The principal issue in this appeal is whether that rule applies where the beneficiary, in this case of an insurance policy, was found not criminally responsible on account of mental disorder in the death of the deceased**. A second issue is the role played by the Civil Remedies Act, 2001, S.O. 2001, c. 28. The application judge Pollak J. held that the public policy rule applied.
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> [2] For the following reasons, I would allow the appeal.
>
> ...

[After reviewing *Brissette* and *Oldfield*]

> [22] In my view, the public policy rule is as set out in Nordstrom and Re Dreger and the person who is not guilty by reason of insanity, now termed not criminally responsible on account of mental disorder, is not prevented from taking under an insurance policy. The only question, then, is whether the rule of public policy can be said to have been varied because of the intervention by the legislature through the Civil Remedies Act. I will deal with that particular issue later. At this point, I simply state my view that I can see no reason not to apply Nordstrom and Re Dreger. To the contrary, developments since 1976 have only strengthened the policy basis for making an exception for persons found not criminally responsible.
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> ...
>
> [24] **It seems to me that if a person found not criminally responsible on account of mental disorder is not "morally responsible" for his or her act, there is no rationale for applying the rule of public policy. That rule is founded in the theory that people should not profit from their crimes or, more broadly, by their own wrongs.** Section 16 and Part XX.1 of the Criminal Code deny that the NCR accused has committed a crime or can be held legally responsible for any wrongdoing. It was an error for the application judge to describe the appellant as having "committed second degree murder". Further in Winko, at para. 42, McLachlin J. makes the point that the NCR accused is not to be punished; rather, "Parliament has signalled that the NCR accused is to be treated with the utmost dignity and afforded the utmost liberty compatible with his or her situation."
>
> [25] The approach in other common law countries is generally to exempt persons with a mental disorder that would give rise to an insanity defence from the effect of the public policy rule. For example, in the United States, those states that have adopted § 2-803 of the Uniform Probate Code would exempt persons who are not "criminally accountable for the felonious and intentional killing of the decedent". Most so-called "slayer statutes" similarly exempt the insane beneficiary from operation of the public policy rule: see Laurel Sevier, "Kooky Collects: How the Conflict Between Law and

Psychiatry Grants Inheritance Rights to California's Mentally Ill Slayers" (2007) 47 Santa Clara L. Rev. 379; and Gary Schuman, "Life Insurance and the Homicidal Beneficiary: The Insurer's Responsibilities Under State Slayer Laws and Statutes" (2001) 51 Fed'n Def. & Corp. Counsel Q. 197.

[26] This same approach is generally followed in other common law jurisdictions such as Australia and New Zealand. In the United Kingdom, the common law would seem to exempt from forfeiture someone who was not guilty of "deliberate, intentional and unlawful violence, or threats of violence": see R. v. National Insurance Commissioner, ex parte Connor, [1981] 1 All E.R. 769 (Div. Ct.), at p. 774. Thus, a person found not guilty by reason of insanity would not be subject to the forfeiture rule: see Chris Triggs, "Against Policy: Homicide and Succession to Property" (2005) 68 Sask. L. Rev. 117, at p. 126. In any event, even if the forfeiture rule did apply to an insane accused, the common law has been varied to give the court discretion not to apply the forfeiture rule where "the justice of the case requires the effect of the rule to be so modified"; the court is to consider "the conduct of the offender and of the deceased and ... such other circumstances as appear to the court to be material": see the Forfeiture Act 1982 (U.K.), 1982, c. 34, s. 2(2).

[27] To conclude, it is my view that the public policy rule does not prevent the appellant from receiving the proceeds of the insurance policy.

...

[31] **I accept that the Civil Remedies Act is an indication that public policy in Ontario favours preventing persons from profiting from their crimes and that, given the provisions of s. 17, the policy extends to persons found not criminally responsible by reason of mental disorder. In my view, however, the Act does not supplant the common law rule of public policy that does not prevent an NCR accused from taking under an insurance policy or a will. At its highest, the Act indicates that the rule ought not to be applied automatically. The common law rule and the Act serve different functions. The common law rule simply prevents the wrongdoer, however defined, from receiving the proceeds of the insurance policy or the will. In many cases, that would mean that the funds would be available either to a secondary beneficiary in the case of an insurance policy, if one is named, or to other beneficiaries, in the case of a will.**

[32] A forfeiture order made under the Act, however, deprives everyone, including other beneficiaries, of the proceeds because the proceeds are forfeited to the Crown. A more compelling expression of public policy would be for the legislature to reverse the effect of the public policy that permits the NCR accused to take under a will or insurance policy by deeming the accused to have predeceased the victim. Such a provision would result in the proceeds usually ending up in the estate of the victim for the benefit of beneficiaries other than the accused.

> **[33] Thus, there are competing public policies. On the one hand, the common law, reinforced by the policy as explained in Winko, is that an NCR accused is neither morally nor legally responsible for the death and therefore should be entitled to take under an insurance policy in which he or she is a beneficiary. On the other hand, there is the reflection of the public policy in the Act favouring the view that proceeds of crime in the hands of an NCR accused may be forfeited to the Crown.**
>
> **[34] In my view, the way to reconcile these competing policies is to allow the common law and the Act to each operate in their own spheres. That the legislature has so recently turned its mind to the question of criminals profiting from their crimes and not sought to wholly abrogate the common law rule suggests to me that the legislature intended to leave the common law rule intact. The legislature has expressed public policy in the province but limited forfeiture to applications made by the Attorney General.**
>
> [35] The common law rule does not prevent the appellant from receiving the proceeds of the insurance policy. However, it is open to the Attorney General to bring an application under s. 3 of the Act. I note that s. 4 gives the Attorney General the right to apply for any number of interlocutory orders to safeguard any "property" pending an application under s. 3. If such an application were brought, the court would determine whether it would clearly not be in the interests of justice to forfeit the proceeds to the Crown.

[The Crown did bring such an application; *Ontario (Attorney General) v. $51,000 in Canadian Currency (In Rem)*, 2012 ONSC 4958. The accused was ultimately absolutely discharged; 2015 CarswellOnt 445 (Ont. Rev. Bd.)]

WITNESSES AS LEGATEE / DEVISEE

Section 12 of the SLRA preserves the basic common law position voiding a gift to the witness developed under the Statute of Frauds 1677 in respect of competent witnesses and which later evolved through the Wills Act 1752 into section 15 of the Wills Act 1837 and is now modified in our own statute (which allows for a relaxing of the rule in some cases).

The Succession Law Reform Act provides:

> *Bequests to witness void*
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> 12.--(1) Where a will is attested by a person to whom or to whose then spouse a beneficial devise, bequest or other disposition or appointment of or affecting property, except charges and directions for payment of debts, is thereby given or made, the devise, bequest or other disposition or appointment is void so far only as it concerns,
>
> (a) the person so attesting;

(b) the spouse; or

(c) a person claiming under either of them,

but the person so attesting is a competent witness to prove the execution of the will or its validity or invalidity.

Where will signed for testator by another person

(2) Where a will is signed for the testator by another person in accordance with section 4, to whom or to whose then spouse a beneficial devise, bequest or other disposition or appointment of or affecting property, except charges and directions for payment of debts, is thereby given or made, the devise, bequest, or other disposition is void so far only as it concerns,

(a) the person so signing;

(b) the spouse; or

(c) a person claiming under either of them,

but the will is not invalid for that reason.

Where no undue influence

(3) Despite anything in this section, where the Superior Court of Justice is satisfied that neither the person so attesting or signing for the testator nor the spouse exercised any improper or undue influence upon the testator, the devise, bequest or other disposition or appointment is not void.

Exception

(4) Where a will is attested by at least two persons who are not within subsection (1) or where no attestation is necessary, the devise, bequest or other disposition or appointment is not void under that subsection.

Re Trotter
[1899] 1 Ch 764; cb, p.431

There are a number of exceptions to the general rule. For example, if the witness was not in the prohibited class when he or she attested, the gift is valid. Also, if the Will is incorporated into a subsequent testamentary instrument which is not witnessed by a person in the prohibited class, the gift to the attesting witness under the original Will is valid. **Per Byrne J: '… the legatee must be able to point to an instrument giving him his legacy not attested to by himself before he can establish his right to his legacy.'**

Re Ray's Will Trusts
[1936] Ch 520; cb, p.433

A nun left her estate to the Abbess of her abbey at her death; an attesting witness who was not the Abbess at the execution of the will was the Abbess when the testatrix died. As the gift was not left to her in her personal capacity, it was valid.