Assisted suicide where the 'assistor' is a beneficiary under the deceased's will and/or attorney under a power of attorney granted by the deceased: What are the potential consequences?

By Barbara Hamilton and Tina Cockburn[1]

The recent criminal conviction[2] of Queensland teacher Merin Nielsen for aiding the suicide of an elderly acquaintance, Frank Ward, raises some timely issues, particularly for succession lawyers. This is the second time in recent years that there has been a conviction of a person who participated in a scheme for euthanasia, in circumstances where the convicted person was a substantial beneficiary under the will of the deceased person. In the other recent case, Shirley Justins was initially convicted of manslaughter for assisting her former de facto partner, former pilot Graeme Wiley, to commit suicide,[3] although the conviction was eventually overturned.[4] Justins then plead guilty to assisting suicide and the Crown accepted the plea.[5] Both cases involved the importation and administration of the euthanasia drug Nembutal/ Pentobarbital.

Voluntary euthanasia is legal in some overseas jurisdictions such as Switzerland, Holland, Belgium and Luxemburg. In 1997 legislation to legalise euthanasia in limited circumstances was enacted in the Northern Territory,[6] although this was repealed after only nine months operation. It would seem that there is support in certain sections of the Australian community for legalised euthanasia under controlled conditions. For example, it has been reported that former Brisbane Lord Mayor Clem Jones left a bequest of $5 million in his will to fund a campaign for the legalisation of euthanasia in memory of his late wife who he cared for while she suffered from cancer in the years preceding her death.[7] Such support for legalised euthanasia suggests that similar cases may arise again.

Nielsen

In the *Nielsen* case, Merin Nielsen was convicted of aiding the suicide of Frank Ward. The deceased was a widower aged 76, who had emigrated to Australia to marry. He had no relatives of his own, though his wife had relatives in Canberra. He had nursed his wife as sole carer over a twenty year period while she had multiple sclerosis, and had expressed a firm desire to himself avoid a prolonged illness or incapacity. Although the evidence was that Mr

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[2] *R v Nielsen* [2012] QSC 29l
[3] *R v Shirley Justins* [2008] NSWSC 1194
[4] Geesche, Jacobsen 'Degeneration of a life and death' *Sydney Morning Herald* 20 June 2008 http://www.smh.com.au/news/national/degeneration-of-a-life-and- death/2008/06/19/1213770827401.html; Souter, Fenella 'His life in her hands' *Melbourne Age* Good Weekend 2 August 2008.
[5] *R v Justins* [2011] NSWSC 568.
[6] *Rights of the Terminally Ill Act (1997)* http://corrigan.austlii.edu.au/au/legis/nt/consol_act/rottia294/
[7] Clem Jones's $5m last wish, http://www.brisbanetimes.com.au/news/queensland/clem-joness-5m-last-wish/2008/04/13/1208024954915.html

Ward was an isolated man in his old age, in her sentencing remarks, Justice Dalton concluded:

> "I don't accept that he was lonely or vulnerable because of his isolation. Witnesses described him as stubborn and cantankerous. He certainly knew his own mind, and there is no question that he had full capacity at all relevant times."[8]

Mr Nielsen met Mr Ward in about 1980/1981 when he joined a meditation group attended by Mr Ward. After Mr Ward suffered a minor stroke on 11 July 2007, the relationship between Mr Ward and Mr Nielsen increased. Justice Dalton found:

> "He asked you for help and you gave it. He trusted you. He made you his Power of Attorney on 25 July 2007, and he made you the sole beneficiary of a will dated the 5th of August 2007... At the same time, July 2007, as Mr Ward had his stroke, made you his Power of Attorney and made you his beneficiary, you contacted Exit International, a pro-euthanasia group on Frank Ward's behalf."[9]

During the period following Mr Ward's stroke, Mr Nielsen assisted him with shopping and banking, thus gaining some "idea of his financial state", although it did not appear that he had "any precise idea of his net worth."[10] Following Mr Ward's recovery from the stroke, contact became less frequent. However, Mr Nielsen remained in contact every one or two months, and told police that he felt somewhat obliged to continue being friendly to Mr Ward because he was a beneficiary under his will.[11]

In June 2009 following a request from Mr Ward, Mr Nielsen travelled to Mexico to purchase the drug Pentobarbital, which he gave to Mr Ward on 20 June. Mr Ward was found dead later that day with a bottle of Pentobarbital next to him, some of its contents in a glass.[12]

Following the death of Mr Ward, Mr Nielsen was charged, found guilty of aiding the suicide and sentenced to a term of three years imprisonment, with a parole release date following six months in custody.[13]

Justins

In the *Justins* case, former Qantas pilot, Graeme Wiley, who had been diagnosed with Alzheimer's disease and had twice previously attempted to commit suicide, made a will drawn by his solicitor a week before his death. Under this will he left his $2.4 million estate to his de facto partner, Shirley Justins, and only relatively small legacies to his two daughters. Under his previous will Wiley's estate was divided between Justins and his two daughters (the daughters being entitled to share one half of his estate). The daughters commenced proceedings to challenge the will for lack of capacity. According to a press report, the lawyer

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[8] *R v Nielson* [2012] QSC 29 at 2
[9] Ibid at 5
[10] Ibid at 6
[11] Ibid at 6
[12] Ibid at 13
[13] Ibid at 26

testified that she believed that her client had capacity and was not subject to undue influence.[14] She also testified that she had no knowledge that he had Alzheimer's disease, or that he had previously attempted to commit suicide.[15] Indeed, it has been reported that in the criminal trial the jury was informed that Justins had not told the solicitor that Wylie was suffering dementia when she asked her to draw up the new will.[16] In relation to this turn of events, in *Nielsen* Justice Dalton commented:

> "I find quite disturbing in that case a factor that, very shortly before the assisted suicide, the defendant had a solicitor, who didn't know her husband, and who wasn't told of his medical condition, prepare a new will under which she benefitted very substantially in relation to a very big estate, an estate worth about $2 million."[17]

Potential consequences of assisted suicide: Application of forfeiture rule, breach of fiduciary duty and/or undue influence?

In cases such as the *Nielsen* and *Justins* cases, where the person aiding a suicide is a principal beneficiary under the will of the deceased, various legal consequences may follow which may result in loss of such benefit.

(a) ***Forfeiture rule***

The public policy underlying the forfeiture rule is that where a person unlawfully kills another person, the killer should not benefit from the killing by inheriting all or part ofthe deceased's estate. [18] The rule has been applied even where the killer has been acquitted of murder or manslaughter, as proof of unlawful killing such as to invoke the rule can be on the civil standard.[19] The common law rule has been applied both flexibly[20] and rigidly[21] in modern case law. A flexible interpretation has frequently been sought when the context is a 'battered woman' has killed her spouse/partner in circumstances which suggest self-defence. Very often the woman pleads guilty to manslaughter to avoid risking a conviction for murder. A rigid interpretation of the rule by the majority of the NSWSC in *Troja v Troja.*[22] In that case the rule was applied to a battered woman who killed her husband in circumstances which arguably amounted to self-defence. Kirby J in dissent viewed the killing as in circumstances that were 'morally blameless'. The *Troja* case led to the enactment in NSW of the *Forfeiture Act,*[23] which gives the court an explicit discretion not to apply the rule as the justice of the case demands. A *Forfeiture Act* was introduced in 1991 in the ACT.[24] Both the

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[14] 'Lawyer unaware of client's dementia before new will drafted' *AAP* 21 May 2008.
[15] Ibid.
[16] Angus Hohenboken 'Manslaughter Ruling over euthanasia' 20 June 2008, http://www.theaustralian.news.com.au/story/0,25197,23892564-23289,00.html
[17] *R v Nielsen* [2012] QSC 29 at 26
[18] See generally Andrew Hemming, 'Killing the Goose and Keeping the Golden Nest Egg' (2008) 8(2) *QUTLJJ* 342.
[19] *Helton v Allen* (1940) 63 CLR 691; *Rivers v Rivers* (2002) 84 SASR 426..
[20] *Public Trustee v Evans* (1985) 2 NSWLR 188.
[21] *Troja v Troja* (1994) 33 NSWLR 269.
[22] Ibid.
[23] *Forfeiture Act 1995* (NSW)
[24] *Forfeiture Act 1991* (ACT)

ACT and NSW legislation was modelled on the UK *Forfeiture Act* 1982. No other Australian jurisdictions have followed suit, although in 2004 the Tasmania Law Reform Institute recommended legislation along the lines of the NSW model.[25] When the NSW Attorney-General introduced the NSW forfeiture legislation he specifically referred to certain kinds of cases, which might invite the court not to apply a forfeiture eg when the person who kills is a 'battered woman' or the killing is part of a suicide pact.[26] The New Zealand Law Commission's recommendation for codified forfeiture legislation (eliminating judicial discretion as in NSW and the ACT) also contended that a killing as part of a suicide pact or assisted suicide should not attract forfeiture.[27] So it would seem there is some support for a flexible approach to the application of the forfeiture rule.

(b) ***Breach of fiduciary duty***

Even if the scope of the forfeiture rule is not considered to include circumstances in which a person convicted of assisted suicide (as distinct from manslaughter), in cases such as *Nielsen*, where the person aiding the suicide had been appointed to be the attorney of the deceased, this relationship may form the basis for equitable relief such that any benefit obtained under the will of the deceased might be disgorged as a remedy for breach of equitable obligation. The relationship between principal and attorney under power is an established category of fiduciary relationship[28] and this is reinforced by the *Powers of Attorney Act* 1998 (Qld) s 73, which imposes a duty on an attorney for a financial matter not to enter into a conflict of interest transaction without the consent of the principal. That the fiduciary relationship between principal and attorney arises upon execution of the power of attorney and is not conditional upon exercise of power under the power of attorney was made clear in *Smith v Glegg.*[29] It is a general principle of equity that a fiduciary will be held liable to account (generally by way of equitable compensation) if it is established he or she has obtained a profit, personal benefit or gain in circumstances where there existed a conflict of personal interest and fiduciary duty, or a significant possibility of such conflict.[30] In *Nielsen,* Ward had appointed Nielsen to be his attorney and primary beneficiary under his will. That Nielsen had a financial interest in Ward's death is indisputable, although this was not put as a primary motive for assisting Ward to commit suicide.[31]

There is no precedent for setting aside a willed gift for breach of fiduciary duty at the suit of the person who would take in the event of the gift not being upheld. However equitable principle suggests that where there a fiduciary obtains a personal benefit by reason of breach of fiduciary duty, equitable compensation may be payable to the residuary beneficiaries of

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[25] Tasmania Law Reform Institute, *The Forfeiture Rule* , Final Report No 6 (2004) 18
[26] New South Wales, *Parliamentary Debates*, Legislative Coucil, 25 October 1995, 2257 (Hon JW Shaw) cited in Andrew Hemming, 'Killing the Goose and Keeping the Golden Nest Egg' (2008) 8(2) QUTLJJ 342 at 355 n121.
[27] Hemming n153, n178
[28] *McKenzie v McDonald* [1927] VLR 134
[29] [2004] QSC 443
[30] *Chan v Zacharia* (1984) 154 CLR 178 at 198-199 per Deane J, with whom Brennan and Dawson JJ agreed.
[31] *R v Nielsen* [2012] QSC 29 at 16-17.

the estate of the deceased or those who would take on intestacy, provided there is an adequate and causal connection between the unlawful gain and breach of duty.[32]

(c) Undue Influence

A will (where the principal beneficiary is the attorney and has aided the suicide of the willmaker as in *Nielsen*) may naturally be challenged on the ground of undue influence, which is often argued in conjunction with lack of testamentary capacity. As the probate doctrine of undue influence requires proof of coercion,[33] this is difficult to establish and would be particularly so on the *Nielsen* facts, given Dalton J's findings that:

> "I don't accept that he was lonely or vulnerable because of his isolation. Witnesses described him as stubborn and cantankerous. He certainly knew his own mind, and there is no question that he had full capacity at all relevant times."[34]

It may also be possible to raise a presumption of undue influence which arises where there is a transaction between a principal and an attorney under an enduring power of attorney (S87 *Powers of Attorney Act* 1998 (Qld)). The presumption has been applied even when the transaction is not effected by exercise of the power of attorney and comes into effect when an enduring power of attorney has been signed.[35] Whether a 'transaction' within the meaning of the section 87 would include a willed gift is debatable but possible. If so, a presumption of undue influence would arise, which would cast the onus on the attorney (Nielsen) to show the willed gift was the product of Ward's full, free and informed thought.

Conclusion

The recent criminal law decisions where people have been convicted of aiding suicide raise important legal and ethical issues in relation to whether euthanasia should be legalised. These cases also raise issues of great significance for succession lawyers.

There are some unanswered questions: Will the common law forfeiture rule be applied to a person convicted of aiding suicide as distinct from manslaughter? What are the consequences of forfeiture? If there is a forfeiture, is the wrongdoer obliged to hold his or her forfeited interest on a constructive trust or to be treated as having predeceased the testator? Should there be legislative reform to give a judicial discretion to modify the effect of the forfeiture rule where the Court is satisfied justice requires the rule to be modified? Should such reform follow the judicial discretion model adopted in the NSW and ACT forfeiture legislation? Would a better model for reform be the NZ proposed codified forfeiture legislation?

In cases where the person aiding the suicide had been appointed to be the attorney of the deceased, this relationship may form the basis for equitable relief (equitable compensation and/or constructive trust) for breach of fiduciary duty on the grounds of conflict of interest and duty. Furthermore, particularly in Queensland, the statutory presumption of undue

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[32] *Pilmer v Duke Group Ltd (in Liq)* (2001) 180 ALR 249; *Maguire v Makaronis* (1997) 188 CLR 449 at 473.
[33] *Winter v Crichton* (1991) 23 NSWLR 116
[34] *R v Nielsen* [2012] QSC 29 at 2
[35] *Smith v Glegg* [2004] QSC 443

influence resulting from s87 *Powers of Attorney Act* 1998 (Qld) may ensure the onus shifts to the beneficiary of the gift to show the gift was the product of the willmaker's full, free and informed thought.

Given that there remains ongoing community debate as to whether assisted suicide should be legalised, there is little doubt that the issues concerning the legal consequences where a person convicted of assisting suicide is a beneficiary under the will of the deceased will continue to arise.