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THE NEW NORTH DAKOTA SLAYER STATUTE: DOES IT CAUSE A CRIMINAL FORFEITURE?

BRADLEY MYERS*

I. INTRODUCTION

The obituary notice for Enolf Snortland listed his son Robert as one of his survivors.[1] The family knew what the community would soon learn—Robert had shot his father. The personal issues that could cause a minor fight over a dog chasing sheep to turn into a homicide would never be uncovered. The killing resulted in years of news coverage while authorities searched for Robert, not always with the support of the victim's family.[2] Authorities recovered Robert's body not far from the murder scene seven years later.[3]

Thirty years later, however, the killing of Enolf Snortland served as one of the motivations for a change to the Uniform Probate Code (UPC) as adopted in North Dakota.[4] Enolf Snortland's estate included property that he and Robert held in joint tenancy.[5] Applying the UPC as then effective in North Dakota, the district court ruled that the joint tenancy property was severed into equal shares of tenancy in common property, with Enolf Snortland's estate taking one share and Robert taking the other.[6] Some legislators expressed amazement that this was the result under the law.[7] The court also ruled that Robert's son, Robbie, would receive the intestate

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1. ROGER SNORTLAND, FROM GRAYSTONE TO TOMBSTONE 114, 120 (McCleery & Sons Publ'g 2002).

2. *Id.* at 147-48.

3. The condition of the body made it impossible to determine either a date or a cause of death. The cause of death was listed as exposure and the family used the date of the killing as Robert's date of death on his headstone. *Id.* at 150-51.

4. The UPC is adopted in North Dakota as North Dakota Century Code Title 30.

5. *See* discussion *infra* Part III.A.

6. The property consisted of two quarters, so the court partitioned the property and gave one share to the estate of Enolf Snortland outright and ordered the other share held by a conservator for Robert. SNORTLAND, *supra* note 1, at 121-22; *In re* Estate of Snortland, 311 N.W.2d 36, 37 (N.D. 1981). At the time of the supreme court's decision the whereabouts of Robert Snortland were unknown. *See* SNORTLAND, *supra* note 1, at 150.

7. Janell Cole, *Lawmaker Pushes for "Slayer Statute,"* GRAND FORKS HERALD, Mar. 4, 2007, at 1A.

share that Robert would have inherited.[8] The change adopted by the legislature reverses the first of these results by changing the treatment of joint tenancy property when one of the joint tenants kills another.

Equity has laid out the principle that no person should be allowed to profit from his or her wrongdoing.[9] Application of the Principle of Public Policy is often fairly easy. For example, there is no question that a thief is not entitled to keep the items stolen. Criminals can also be required to forfeit property acquired with the proceeds of criminal activity, used to facilitate a criminal offense or offered to others as an inducement to commit a criminal offense.[10]

Application of the Principle of Public Policy is more challenging, however, when the lives and property of the victim and the criminal are intertwined. Several situations exist where the death of one person will lead to property passing to another by operation of law. When the property passes by intestacy or by will, the transfer is covered by probate law.[11] When the property passes via some non-probate mechanism, the transfer is covered by general principles of property law.[12] Absent some exception, probate law will pass the property of a victim to a killer if the relationship between the parties would cause the property to pass by intestacy or if the killer is named in the victim's will.[13] A killer can also take property owned by the victim outside of probate if the ownership of the property provides for such a transfer.[14]

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8. Under North Dakota Century Code Sections 30.1-04-02 and 30.1-04-03, Enolf Snortland's surviving spouse Mae received the first $50,000 of the estate plus one half of the remainder. The other one-half of the remainder passed to Enolf Snortland's children by representation. Because Robert was treated as having predeceased under North Dakota Century Code Section 30.1-10-03(1), Robbie received the one-fifth share of the estate that would have passed to Robert. *In re* Estate of Snortland, 311 N.W.2d at 39.

9. For a review of the historical development of the Principle of Public Policy, see generally Alison Reppy, *The Slayer's Bounty—History of Problem in Anglo-American Law*, 19 N.Y.U. L. Q. REV. 229 (1942). The equitable principle shall be referred to in this paper as the "Principle of Public Policy." *See id.* at 241-42 (citing Amicable Soc'y v. Bolland, 4 Bligh (N.S.) 194, 5 Eng. Rep. 70 (1815)).

10. *See* N.D. CENT. CODE § 29-31-1 (2007).

11. Probate law is technically a subsection of property law. For purposes of this article references to "property law" will refer to all areas of property law other than probate law.

12. In some situations specific statutory schemes may have been adopted to take the transfer out of property law generally. In others, the transfer of property may be covered by contract law (*e.g.*, life insurance).

13. *See* UNIF. PROBATE CODE §§ 2-101,-103 (2006) (governing intestate succession); *id.* § 2-602 (providing that a "will may provide for the passage of all property the testator owns at death and all property acquired by the estate after the testator's death").

14. In addition to joint tenancy with right of survivorship, individuals can take property outside of property under a number of mechanisms, *e.g.*, payable on death provisions. *See* UNIF. PROBATE CODE §§ 6-101,-212 (2006).

The "slayer statute" is the application of the Principle of Public Policy when the property of a victim will pass to a killer because of the operation of property law.[15] Under the slayer statute, generally, a killer is prevented from receiving property from the victim's estate. Slayer statutes operate in part by automatically doing on behalf of the victim those things that the victim could have done while still alive. These include revoking gifts under a will or revocable trust, changing beneficiary designations under life insurance or payable on death bank accounts, and voiding any fiduciary nominations made by the victim on behalf of the killer.[16] When dealing with property that the killer owned by operation of law, courts have used constructive trusts to give equitable title to individuals other than the killer, while still giving legal title to the killer as required under probate or property law.[17]

Joint tenancy property has presented a difficult situation in applying the Principle of Public Policy because, unlike the other situations governed by the slayer statute, the killer actually owns a property interest in the joint tenancy property. A bedrock principle of modern law is that individuals should not be subject to forfeiture of their property simply because they committed a crime.[18] Such forfeiture would be punishment for the crime and punishment is the province of the criminal law system.[19]

North Dakota has long had a legislatively adopted slayer statute on the books.[20] Prior to the recent change, the slayer statute provided that when

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15. For purposes of this article the term "slayer statute" will refer to all legal mechanisms that alter property or probate law to prevent a killer from succeeding to the property of a victim whether that mechanism is created by legislation or common law.

16. *See* N.D. CENT. CODE § 30.1-10-03 (1996). In a similar manner, transfers from a decedent to a divorced spouse are also automatically revoked. *See* UNIF. PROBATE CODE § 2-804 (2006).

17. *See e.g.*, *In re* Cox's Estate, 380 P.2d 584, 588-89 (Mont. 1962).

18. Matthew B. Ford, Comment, *Criminal Forfeiture and the Sixth Amendment's Right to Jury Trial Post-*Booker, 101 NW. U.L. REV. 1371, 1403 (2007).

> Following ratification of the Constitution, attainder quickly went out of style. The First Congress quickly banned the use of *in personam* forfeiture, attainder, and corruption of blood, and several states passed similar laws in the years thereafter. With the death of attainder, American legislatures effectively laid criminal forfeiture to rest for the next two centuries.

Id.

19. Forfeiture in this situation needs to be distinguished from forfeiture of property used in the furtherance of criminal activity. Such forfeitures are considered *in rem* proceedings brought against the property itself. The actions are thus not criminal in nature and not subject to the general protections available under the criminal law. *See* State v. One 1990 Chevrolet Pickup, 523 N.W. 2d 389, 392-94 (N.D. 1994).

20. The first slayer statute in North Dakota was adopted in 1895:

> No person who has been finally convicted of feloniously causing the death of another shall take or receive any property or benefit by succession, will or otherwise, directly or indirectly by reason of the death of such person, but all property of the deceased

one joint tenant killed another, the joint tenancy was severed, with each party taking an equal share as tenants in common.[21] The change adopted by the North Dakota Legislature alters this result by holding that the interest of the killer in the property becomes void.[22]

The issue to be examined herein is the new North Dakota Slayer Statue and its consistency with general principles of equity and principles of law. This article will begin with a brief history of the slayer statutes, including their treatment under the Restatement of Property, the Uniform Probate Code and the North Dakota Century Code. Next, the paper will review the nature of joint tenancy ownership of property. A review of the historical treatment of criminal forfeiture will follow. Finally, the new North Dakota slayer statute will be assessed as a criminal forfeiture for its compliance with the constitutional requirements for such forfeiture.

II. SLAYER STATUTES

Neither American nor English courts were extensively troubled with the issue of killers taking the property of their victims until the middle of the nineteenth century.[23] However, a court actually confronted the issue as early as 1572.[24] The likelihood that the killer would be put to death coupled with the legal concepts of attainder, forfeiture, and corruption of blood resulted in neither the killer nor the killer's family inheriting any property from the victim.[25] With the repeal of attainder, courts, and, eventually, legislatures needed to find some other legal doctrine to prevent killers from profiting from their crimes. English courts did so by discovering the

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> and all rights conditioned upon his death shall vest and be determined the same as if the person convicted was dead.

REVISED CODES OF THE STATE OF NORTH DAKOTA § 3682 (1895). The state adopted the UPC and its version of the slayer statute in 1972. N.D. CENT. CODE § 56-04-23 (1972).

21. "The intentional and felonious killing of the decedent: . . . (b) Severs the interests of the decedent and killer in property held by them at the time of the killing as joint tenants with the right of survivorship, transforming the interests of the decedent and killer into tenancies in common." N.D. CENT. CODE § 30.1-10-03(3)(b) (1996).

22. "The intentional and felonious killing of the decedent: . . . (b) Voids the interests of the killer in property held with the decedent at the time of the killing as joint tenants with the right of survivorship." N.D. CENT. CODE § 30.1-10-03(3)(b) (2007) [hereinafter, the new North Dakota slayer statute].

23. The history of the slayer statute relies heavily on the work of Reppy, *supra* note 9, at 229.

24. Reppy, *supra* note 9, at 229 (citing Brooke v. Warde, 3 Dyre 310b, 73 Eng. Rep. 702 (1572)).

25. *See* discussion *infra* Part IV.

Principle of Public Policy, "which forbade a criminal from profiting from his own wrong."[26]

Slayer statutes in the United States began first under common law interpretations of property law. More recently, these common law rules have been codified. Whether by court or legislature, the Principle of Public Policy is the driving equitable force behind the slayer statute.

A. COMMON LAW

The Supreme Court adopted in the 1886 case of *Mutual Life Insurance Co. v. Armstrong*[27] the Principle of Public Policy into United States law.[28] The case involved a killer who took out a policy on the life of the victim with the intent of killing the victim to receive the insurance proceeds. The Court held that as a matter of law one could not recover insurance money payable upon the death of a party whose life the killer had taken.[29]

Beginning with *Riggs v. Palmer*,[30] state courts began adopting the Principle of Public Policy into their common laws.[31] The Principle of Public Policy allowed courts to prevent slayers from inheriting property in the absence of a legislatively adopted slayer statute. The Restatement[32] has attempted to reconcile these common law differences.

The Restatement provides that a slayer must be "denied any right to benefit from the wrong."[33] The slayer's motive in committing the wrong is irrelevant and application of the slayer statute does not require establishment of a financial motive in the slaying.[34] The slayer statute

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26. "[T]he Court of Appeal in the *Cleaver* case . . . discovered and promulgated the 'so-called rule of public policy,' which forbade a criminal from profiting from his own wrong." Reppy, *supra* note 9, at 242 (quoting Cleaver v. Mutual Reserve Fund L. Ass'n., 1 Q.B. 147 (C.A. 1892)).

27. 117 U.S. 591 (1886).

28. Armstrong, 117 U.S. at 600 (1886) (citing the "common law maxim" *ex turpis causa non action* (no one shall be permitted to take advantage of his own wrong) as the justification for its ruling).

29. *Id.* at 600.

30. 22 N.E. 188 (N.Y. 1889). The *Riggs* case concerned a man who killed his grandfather to hasten his inheritance under the grandfather's will was prohibited from inheriting the property. *Id.* at 191.

31. Brian W. Underdahl, *Creating a New Public Policy in* Estate of O'Keefe*: Judicial Legislation Using a Slayer Statute in a Novel Way*, 44 S.D. L. REV. 828, 835-36 (1998).

32. References to the "Restatement" will refer jointly to the RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 8.4 (2003) (hereinafter RESTATEMENT OF PROPERTY); and the RESTATEMENT (FIRST) OF RESTITUTION § 188 (hereinafter RESTATEMENT OF RESTITUTION). Both the Restatement of Property and the Restatement of Restitution deal with the application of the slayer statute and the analyses under both are the same.

33. RESTATEMENT OF PROPERTY § 8.4(a); *see also* RESTATEMENT OF RESTITUTION § 188 cmt. a.

34. RESTATEMENT OF PROPERTY § 8.4(a) cmt. b.

applies even if the property probably would have gone to the slayer eventually.[35]

The Restatement recognizes that the slayer statute varies the results that would occur under normal property law rules and justifies this variation because the result is neither punitive, which is the function of criminal law, nor compensatory, which is the function of tort law. Both these conclusions, however, depend on the fact that the slayer statute "does not cause the killer to forfeit any of his or her own property . . . , but prevents the killer from benefiting from the wrong that he or she has committed."[36]

In most jurisdictions, the common law slayer statute has given way to a legislatively adopted slayer statute.[37] The common law history, however, is still helpful for courts in interpreting the slayer statutes.[38]

B. LEGISLATIVELY ADOPTED SLAYER STATUTES

Starting in the early 1900s, a majority of states began adopting slayer statutes to govern the situation where a property of a victim will pass to his or her killer.[39] The first attempt to bring uniformity to the area began with an article published by Professor John Wade of Harvard University.[40] Attempts at uniformity have continued through the work of the Uniform Law Commissioners.[41] These statutes, whether crafted by legislatures or by others attempting to bring uniformity to the area of the law, have attempted to specifically provide for the situations in which the slayer statute will apply and what should happen to the property affected.

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35. *Id.* cmt. c; RESTATEMENT OF RESTITUTION § 188 cmt. a ("[W]here it is doubtful whether or not he would have had an interest if he had not committed the murder, the chances are resolved against him.").

36. RESTATEMENT OF PROPERTY § 8.4 cmt. a; *see also* RESTATEMENT OF RESTITUTION § 188 cmt. a.

37. Forty-three states have passed legislative slayer statutes. Gregory Blackwell, *Property: Creating a Slayer Statute Oklahomans Can Live With*, 57 OKLA. L. REV. 143, 168 (2004). Three states still use common law slayer statutes: Maryland, Missouri and New York. *Id.* at 168-69 (citing Prince v. Hitaffer, 165 A. 470 (Md. 1933); Perry v. Strawbridge, 108 S.W. 641, 648 (Mo. 1908); and Riggs v. Palmer, 22 N.E. 188 (N.Y. App. Div. 1889)). Two states, Massachusetts and New Hampshire, have neither a judicial nor a legislative slayer statute. *Id.*

38. This is particularly true for slayer statutes that provide that the killer will not inherit property from the victim, but which fail to define the terminology or provide any other practical guidance. *See, e.g.*, Bradley v. Fox, 129 N.E.2d 699, 703-05 (Ill. 1955).

39. Forty-three states have passed legislative slayer statutes. Blackwell, *supra* note 37, at 168; *see also* Julie J. Olenn, Comment, *'Til Death Do Us Part: New York's Slayer Rule and In re* Estate of Covert, 49 BUFF. L. REV. 1341, 1341 n.3 (2001).

40. John W. Wade, *Acquisition of Property by Willfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715, 723 (1936). Twenty-five states had already adopted slayer statutes by the time of Professor Wade's article. *Id.* at 715 n.1.

41. The UPC was first promulgated in 1969. It has been significantly amended on several occasions. About one-third of the states have adopted all, or substantially all of at least part of the UPC. DUKEMINIER ET AL., WILLS, TRUST AND ESTATES 60 (7th ed. 2005).

Drafting a statute to apply the Principle of Public Policy can be quite challenging because the equitable arguments vary depending on the facts surrounding the killing.[42] Three general scenarios can be identified. The first scenario is where a killer is motivated by the desire to take the property from the victim. This can occur when the victim has made a will benefiting the killer and has threatened to change the will to disinherit the killer,[43] when the killer would inherit the property of the victim by intestacy,[44] or when the killer and victim are joint properties of ownership with survivorship.[45] In all these cases the killing causes the victim to lose enjoyment of the property and denies the victim the opportunity to affect the distribution of his or her property.[46]

The second scenario is killings where the fact that the killer inherits property from the victim either by inheritance, intestacy or survivorship plays no role in the motive for the killing. This usually occurs when the victim and killer are members of the same family.[47] These cases equally deprive the victims of the enjoyment of their property and control over its distribution. While these cases do not involve the greed motivation that exists under the first scenario, the fact that the perpetrator will take ownership of the victim's property has served as justification for treating these two scenarios the same.[48]

The third scenario involves killers who commit suicide immediately after killing the victim. It can be assumed that under this scenario the killer is not motivated by a desire to receive the victim's property. Further, the killer will not actually receive any property, preventing any "profit" from the killing. The question then becomes whether the slayer statute should be used to deny the killer's heirs, who may also be relatives of the victim, from receiving property from the deceased.

These shifting equitable considerations underlay the policy considerations faced by drafters in constructing a slayer statute. The more practical consideration, however, is how to provide sufficient guidance to the courts

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42. *See* Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489, 491-96 (1986).

43. Riggs v. Palmer, 22 N.E. 188, 189-90 (N.Y. 1889); Garwols v. Bankers' Trust Co., 232 N.W. 239, 239 (Mich. 1930).

44. Peeples v. Corbett, 157 So. 510, 511 (Fla. 1934).

45. *In re* Estate of Cox, 380 P.2d 584, 586 (Mont. 1963).

46. *See* Fellows, *supra* note 42, at 493.

47. State Farm Life Ins. Co. v. Smith, 363 N.E.2d 785, 785 (Ill. 1977) (wife killed estranged husband); Leavy, Taber, Schultz, & Bergdahl v. Metro. Life Ins. Co., 581 P.2d 167, 168 (Wash. Ct. App. 1978) (wife killed husband).

48. However, the killing is much more likely under this second scenario to be treated as manslaughter, which could result in the inapplicability of the slayer statute.

who must administer the law. In other words, how do we implement policy choices in structuring the slayer statute?

C. THE STRUCTURE OF A SLAYER STATUTE

The creation of a slayer statute, by either a court or a legislature, requires a resolution to three questions: Who is a slayer? What property is lost? And, who takes the property?[49]

1. *Who Is a Slayer?*

The slayer statute recommended by Professor Wade identified a killer as one whose act was willful and unlawful.[50] The majority of states have accepted the standard presented in the UPC that the killing must be felonious and intentional.[51] The Restatement uses the same language.[52] This definition limits the application of the slayer statute to murder and voluntary manslaughter. A small minority of states include killings with a lower level of culpability.[53] Clearly, however, one who might cause the death of another through negligence or some other non-criminal act will not have his chance to inherit affected by the slayer statute.[54]

An extremely important aspect of slayer statutes is that they do not require that the killer be convicted of a crime. While this makes sense in the abstract because of the great likelihood that in some cases the killer will not survive long enough to stand trial, it raises the distinct possibility that a person could be found not guilty of committing a murder, but still be

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49. *See* Blackwell, *supra* note 36, at 145. Legislature must deal with these questions directly. Court decisions are almost always limited to the facts before the court, making it difficult to find specific answers to these questions.

50. Wade, *supra* note 40, at 721-22.

51. UNIF. PROBATE CODE § 2-803(b) (amended 1997). The effect of the UPC definition of slayer is that many people who take the lives of others will not be considered slayers. Killers who are found to be insane, those whose acts were not intentional and those who killed in self-defense will not be affected by the application of the slayer statute. Callie Kramer, Notes & Comments, *Guilty by Association: Inadequacies in the Uniform Probate Code Slayer Statute*, 19 N.Y. L. SCH. J. HUM. RTS. 697, 705-08 (2003).

52. RESTATEMENT OF PROPERTY § 8.4(a). The Restatement of Restitution Section 188 does not provide a standard but merely refers to the "murder" of the victim by the killer.

53. Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CINN. L. REV. 803, 848 n.213 (1993) (citing the slayers statutes of Colorado, District of Columbia, Indiana and Oklahoma as referring to "manslaughter" and that the "criminal statutes of those jurisdictions characterize some unintentional homicides as manslaughter"). One commentator has recommended extending the slayer statute to elder abuse situations, even if the abuse was not responsible for the death of the victim. Robin L. Preble, *Family Violence and Family Property: A Proposal for Reform*, 13 LAW & INEQ. J. 401, 412-13 (1995).

54. This does not mean, however, that the estate of a tort victim does not have a claim against the tortfeasor. The extent the tortfeasor might inherit would be reduced by any recovery in the estate of decedent. Julie Waller Hampton, Comment, *The Need for a New Slayer Statute in North Carolina*, 24 CAMPBELL L. REV. 295, 295 (2002).

prevented from inheriting from the victim because of a determination that a felonious and intentional killing took place.[55] This is possible because the slayer statutes use a lower standard of proof than is required in a criminal trial. The felonious and intentional killing only needs to be established by a preponderance of the evidence.[56]

North Dakota had adopted the UPC definition and applies its slayer statute only to killers who have feloniously and intentionally killed their victims. Further, because North Dakota's criminal law contains the distinction between voluntary and involuntary manslaughter, the state is among the majority of states that require voluntary action on the part of the killer. North Dakota has also adopted without change the UPC's lower standard of proof in slayer cases and in allowing conviction of murder to be conclusively proven that an individual is covered by the statute.[57]

2. *What Property Is Lost?*

Discussion of what property the killer loses requires consideration of the property affected. One of the justifications for the slayer statute under the Restatement is the conclusion that the killer does not actually lose any of his own property.[58] The killing of another causes disruption to the "normal" transfer of property in three ways: (1) the victim loses the enjoyment of the property; (2) the victim loses the ability to change the disposition of the property on death; and, (3) the "normal" order of death of the victim and the potential takers of the property becomes unascertainable.[59] A slayer statute can do nothing to restore the victim's enjoyment of the property, but it should attempt to ameliorate the other two disruptions to the extent possible.[60]

One basic assumption under the slayer statute is that had the victims known that they would be killed, they would have elected to prevent the killers from inheriting any of their property. The easiest method of

55. A conviction that establishes felonious and intentional killing establishes the person as a killer for purposes of the UPC. UNIF. PROBATE CODE § 2-803(g) (2006). Some jurisdictions, however, allow the killer to relitigate his status as a killer, some even preventing the conviction from coming into evidence. Blackwell, *supra* note 37, at 173.

56. UNIF. PROBATE CODE § 2-803(g) (2006).

57. N.D. CENT. CODE § 30.1-10-03(7) (2007).

58. The main purpose of this paper is dealing with the question of whether the change to the North Dakota slayer statute has changed this justification.

59. Fellows, *supra* note 42, at 504.

60. *Id.* at 504-05.

implementing this presumption is denying the killer of the right to receive property by intestacy or by will.[61]

Much more challenging, however, is handling the non-probate methods of property transfer. Some of the non-probate interests can be denied using the same reasoning and implementation as the probate transfers. For example, if the killer is the beneficiary of a revocable trust established by the victim, the killer can be denied any benefit under the trust by treating the killer's interest in the trust as having been revoked.[62] Similarly, killers can be denied the right to receive the proceeds of life insurance on their victims.[63]

Other potential situations exist. As a general rule, the slayer statutes deny property to the killer if the victim had a right to revoke the gift.[64] Slayer statutes do not, however, deny property to the killer when the victim did not have a right to revoke the transfer.[65] This even includes situations where the victim could have altered the distribution of the property, but did not have a power to revoke. For example, a donor names the killer the taker in default of a power of appointment and the victim the donee. By killing the victim, the killer eliminates the only person who could deny him the property under the power of appointment, but the property did not belong to the victim and the designation of the killer as the taker in default is not in the discretion of the victim.[66]

Dealing with the fact that the killing changed the order of deaths is more difficult. While the fact that the killer might not have outlived the victim is dealt with by denying the killer the right to receive the victim's property, the same rule will not help in dealing with the fact that others might have predeceased the victim or with property not actually owned by

61. This result occurs not only in states with slayer statutes that specifically call for it, see Uniform Probate Code § 2-803, but also in states where it does not. Wright v. Wright, 449 S.W.2d 952, 953-54 (Ark. 1970) (involving a killer that was denied the right to take property by intestacy); Welch v. Welch, 252 A.2d 131, 133-34 (Del. Ch. 1969) (involving a killer that was denied the right to take property under the victim's will).

62. Because the trust is not under the jurisdiction of a court, it will be necessary for either the trustee or one of the other beneficiaries to ask a court to order the trustee not to provide any benefits to the killer.

63. This is easily the case if the victim owned the policy and retained the right to change the beneficiary. A more difficult question arises if the policy is owned by others. UPC Section 2-803(b) only revokes the designation of a killer on an insurance policy if the victim had the right to revoke the designation. Courts in some jurisdictions have, however, declared it a violation of public policy for a killer to receive the proceeds of life insurance on a victim regardless of who owned the policy. *See, e.g.*, Merrity v. Prudential Ins. Co., 166 A. 335, 336 (N.J. 1933).

64. The result can be affected either by treating the designation of the killer as being revoked or by treating the killer as having predeceased the event that would result in the killer receiving the property.

65. *See* Fellows, *supra* note 42, at 504-10.

66. *Id.* at 510.

the victim. For example, suppose a third party created an irrevocable trust that paid income interests jointly to the victim and killer. Here, the victim does not own the property, so the slayer statute should not apply. However, suppose the gift further provides that the corpus of the trust will go to the survivor of the victim and killer. Here, because the killing has determined who should take the property, the killer should be denied an interest to keep him from increasing his interest by committing the killing.[67] If the death of the victim has no impact on the ultimate receiver of the property, however, the slayer statute should not interfere.[68]

Other than with respect to joint tenancy property, North Dakota has adopted the UPC's position that denies killers the right to receive property from the estate of the victim by either will or intestacy and which revokes all revocable dispositions of property in favor of the killer.[69] North Dakota has not, however, taken any actions amending its version of the UPC to deal with the other situations where a killer might take property controlled by someone other than the victim.

3. *Who Takes?*

The biggest issue underlying the question of who should take the property in lieu of the killer is whether the issue of the killer should be allowed to take the property.[70] Although there is one example of a lower court preventing property from passing to relatives of the killer as well as the killer herself,[71] the general rule provides that the wrongdoing on the part of the killer is not attributed to members of the killer's family.

The main arguments provided by those who consider that family members should also be denied property have largely failed to achieve traction in either the courts or in legislatures. The family members are simply not guilty of any wrongdoing. In most cases, the family members are also objects of the victim's bounty as well. The fact that a man kills his father does not lead to the conclusion that the victim would want to cut off his grandchildren.[72]

It should be noted, however, that a court applying a common law slayer statute has prevented the heirs of a killer from receiving the victim's

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67. The UPC version of the slayer statute would have no impact under this scenario, allowing the killer to keep the property. *See, e.g.*, Fellows, *supra* note 42, at 510-11.

68. *Id.* at 511.

69. N.D. CENT. CODE §§ 30.1-10-03(3), 30.1-10-03(4) (2007).

70. *See* Kramer, *supra* note 51, at 697-98.

71. *In re* Estates of Covert, 761 N.E.2d 571, 575 (N.Y. App. Div. 2001) (denying property to relatives of a killer overturned on appeal).

72. Kramer, *supra* note 51, at 714.

property. In *Cook v. Grierson*,[73] the Maryland Court of Appeals ruled that the children of a slayer were prohibited from inheriting from the estate of the victim, their grandfather, under the common law slayer statute applicable in the state.[74] The decedent died intestate and the court ruled that the grandchildren could not take under the state's intestacy statute because their father, the killer, was still alive. The slayer statute disqualified their father from inheriting and the fact that the father was alive prevented the children from qualifying under the slayer statute.[75]

North Dakota has adopted the UPC language that provides that property will pass as if the killer had predeceased the victim.[76] Issue of the killer can step up and inherit from the victim under either intestacy or the application of the anti-lapse statute.

The North Dakota Supreme Court dealt with this issue directly in the *Snortland* case. The estate of the victim passed by intestacy.[77] The personal representative argued that the heirs of the killer should be precluded from taking anything from the victim's estate. The court, however, held that the statute clearly provided that "while a killer is not entitled to share in his victim's estate, the share he otherwise would have taken passes as though he had predeceased his victim."[78] Under the laws of intestacy, this means that the killer's heirs will take the killer's share of the estate by representation. The North Dakota slayer statute does not affect the relationship between the deceased victim and any person other than the killer.[79]

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73. 845 A.2d 1231 (Md. 2004).

74. *Cook*, 845 A.2d at 1232. Maryland does not have a legislative slayer statute. *Id*. at 1233.

75. If a slayer statute similar to the UPC version had been adopted in Maryland, then the killer would have been treated as predeceasing the victim and the grandchildren would have qualified under the intestacy statute in place in the state. Tara L. Pehush, *Maryland is Dying for A Slayer Statute: The Ineffectiveness of the Common Law Slayer Rule in Maryland*, 35 U. BALT. L. REV. 271, 289-90 (2004).

76. Under North Dakota Century Code Section 30.1-10-03(2) killers are treated as having disclaimed any interest as an intestate taker and under North Dakota Century Code Section 30.1-10-03(5) other governing instruments are given effect as if the killer disclaimed all revoked provisions. Disclaimers are governed by North Dakota Century Code Section 30.1-10.1-01-12 and provides generally that disclaimants are treated as having predeceased.

77. Under the intestacy statute in place at the time (North Dakota Century Code Section 30.1-04-02) the victims surviving spouse received the first $50,000 of the estate and one-half of the balance. The rest passed to the victim's heirs by representation.

78. North Dakota Century Code Section 30.1-10-03 only refers to the "individual who intentionally and feloniously kills the decedent" in application of the slayer statute. Any rights of the issue of the killer will be decided based on the relationship of those individuals to the decedent and the terms of any governing instrument. *See In re* Estate of Snortland, 311 N.W.2d 36, 39-40 (N.D. 1981).

79. *Id*. at 39 (citing the Editorial Board Comments to Title 30.1).

III. JOINT TENANCY AND THE SLAYER STATUTE

A. THE NATURE OF JOINT TENANCY PROPERTY

The new North Dakota slayer statute only differs from the UPC version in its treatment of property held by the victim and killer as joint tenants with right of survivorship. Joint tenancy property has always presented a bit of a problem under the slayer statute because of the difficulty in untangling the ownership interests of the killer and victim. The presumption, outlined by the Restatement, is that a slayer statute should only be used to prevent a killer from receiving the property of the victim and joint tenancy property is owned, at least in part, by the killer.

Joint tenancy is defined as ownership "by several persons in equal shares by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy."[80] Property held jointly that is not held in joint tenancy is held as tenants in common.[81]

Joint tenants have the right of survivorship, meaning that no probate or other proceeding is necessary to pass the property to the surviving joint tenants on death. This right was deemed to exist because the joint tenants, as a group, are deemed to own the property. Under this theory, each of the joint tenants owns the undivided whole of the property. When one member of the group dies, nothing transfers from the deceased to the other joint tenants. Rather, the ownership of the property continues in the joint tenant group, albeit now reduced in number by the loss of the decedent.[82]

Under the common law, joint tenancies required the existence of the "four unities" of interest, title, time, and possession to exist equally for all joint tenants at the same time.[83] A failure in one of these unities would

80. N.D. CENT. CODE § 47-02-06 (2007).

81. *Id.* § 47-02-08. "An interest in common is one owned by several persons not in joint ownership or partnership. Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership for partnership purposes, or unless declared in its creation to be a joint tenancy." *Id.*

82. It is this ownership by the group that allowed property held by joint tenants to avoid the requirements of the wills acts when one of the members died. Since nothing passed to the surviving joint tenant, it was unnecessary to effectuate the ownership in the survivors. Although treated as owning nothing for property and probate purposes, the value of the jointly held property is still included in a decedent's estate for purposes of determining the estate tax. *See* I.R.C. § 2040 (1981).

83. 4 THOMPSON ON REAL PROPERTY § 31.06(a) (David A. Thompson ed., 2d Thompson ed. 2004). The interest of each joint tenant must be acquired or vest at the same time; all joint tenants must acquire title by the same instrument; all tenants must have equal undivided shares and identical interests measure by duration; and each must have right to possession to the whole property. The requirement for equal ownership is largely ignored in cases where it matters, *i.e.*, if one of two joint tenants provides more than half of the capital necessary to acquire property, the court in a partition action would likely award the parties shares based on their actual contributions.

cause the ownership of the property to transmute to a tenancy in common.[84] Joint tenants could convert the joint tenancy to a tenancy in common at any time by destroying anyone of the four unities.[85] Joint tenants could also bring partition actions against one another asking the court to either divide the property into physically separate parcels or that the property be sold with the proceeds split between the joint tenants.

North Dakota, however, has long dispensed with the "Blackstonian" doctrine of the four unities and held that joint tenancy will exist when the conditions of the statute are met.[86] Essentially, joint tenancy with right of survivorship is created when the owners of the property take title as joint tenant.[87]

Many jurisdictions recognize tenancy by the entirety, a form of ownership similar to joint tenancy, for property jointly owned by spouses.[88] Tenancy by the entirety is a form of joint ownership that can exist solely between spouses. It is similar to joint tenancy in that the property automatically passes to the survivor on the death of one of the spouses. This form essentially adds an additional unity to the four required for joint tenancy, i.e., the requirement that the joint owners be married to one another. Tenants by the entirety face limitations on their ownership in that they may not change the ownership of the property without the consent of their spouses. This means that the ownership cannot be defeated by transferring the interest of one spouse to another and that neither spouse has the right to seek judicial partition of the property.[89] Tenancy by the entirety has never been recognized in North Dakota.[90] States with tenancy by the entirety will often include it in their slayer statutes.[91]

B. TREATMENT OF JOINT TENANCY PROPERTY UNDER THE SLAYER STATUTE

Joint tenancy property has always presented a special case under application of the slayer statute. Applying the slayer statute to property that was fully owned or controlled by the victim did not require taking property

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84. *See* Carson v. Ellis, 348 P.2d 807, 809 (Kan. 1960); Snyder v. Snyder, 212 N.W.2d 869, 872 (Minn. 1973).

85. This could be done by agreement of all the joint tenants, or by the action of a lone joint tenant by merely conveying his interest to a third party.

86. Renz v. Renz, 256 N.W.2d 883, 885 (1977).

87. *See* N.D. CENT. CODE § 47-02-06 (2007).

88. Tenancy by the entirety is recognized in approximately fifty percent of jurisdictions.

89. Any attempt by one spouse to transfer his or her interest in the property to a third party will be void.

90. *Renz*, 256 N.W.2d at 885 (citing Schimke v. Karlstad, 208 N.W.2d 710 (1973)).

91. *E.g.*, OR. REV. STAT. § 112.475 (2005).

away from the killer. The killer had, at best, an expectancy of receiving the property. Expectancies are not property rights, so denying the killer the right to receive the property did not require courts to examine or even consider the effect the slayer statute had on the property rights of the killer. Because joint tenancy property represents the ownership of at least some interest in the underlying property by the killer, application of the slayer statute requires courts and legislatures to determine what, if any, impact the existence of this property interest should have on the disposition of the property.

C. TREATMENT BY AUTHORITIES

The UPC takes the position that the killing should be treated as a severance of the joint tenancy.[92] The application of this provision was clearly demonstrated by North Dakota Supreme Court in *Snortland*.[93] The district court had held that the killer retained an undivided interest as a tenant-in-common with his father's estate in property that had been held by them as joint tenants with right of survivorship.[94] The court took note of the various common law solutions to the slayer situation, but held that it was merely necessary to apply the statute since the legislature had provided specific relief by adopting the UPC version of the slayer statute. The statute provided that when the killing of a joint tenant affects a severance of that tenancy, the severance of a joint tenancy results in the tenancy in common.[95]

Of particular importance is the court's footnote to this discussion. The court states that, "A contrary result, awarding all of the joint tenancy property to the decedent's estate, would work a forfeiture on the killer."[96] It then relates this forfeiture to common law attainders and ultimately to authority that such attainders have been abandoned under modern policies of law.[97]

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92. UNIF. PROBATE CODE § 2-803(c)(2) (2006).

93. *In re* Estate of Snortland, 311 N.W.2d 36, 37-39 (N.D. 1981). The son, Robert E. Snortland, was later discovered to have died not long after killing his father. Cole, *supra* note 7, at 4A. This fact was unknown at the time of the Supreme Court decision. *Id*.

94. *Snortland*, 311 N.W.2d at 36. The court applied North Dakota Century Code Section 30.1-10-03(2), which at the time provided that: "Any joint tenant who feloniously and intentionally kills another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as his property and the killer has no rights by survivorship." The language was taken from the Uniform Probate Code Section 2-803 (1969). *Id*.

95. *Id*. at 38 (citing Renz v. Renz, 256 N.W. 2d 883 (N.D. 1977)).

96. *Id*.

97. The North Dakota Constitution, Article I, Section 18, prohibits Bills of Attainder from being passed by the legislature. North Dakota Century Code Section 12.1-33-02 also provides

However, the court did leave open the possibility that it would accept the forfeiture of the property via another method. The estate of the decedent argued that the court should apply the portion of the slayer statute that calls for the victim's estate to be distributed as if the killer had predeceased the victim.[98] If this were done, then the joint tenancy property would pass completely to the victim. The court held, however, that because the legislature had provided a specific provision governing the disposition of joint tenancy property, that it was bound to follow that provision.[99] Failing to do so would render the joint tenancy provision "nugatory."[100] The court then stated, "If the legislature had intended that joint tenancy property be governed by § 30.1-10-03(1), NDCC, it could have expressly provided so."[101] The court does not provide any answer to the question of whether the legislature's attempt to give the property completely to the victim would survive the scrutiny of the law as a forfeiture, but merely describes the statutory structure that had, in fact, been adopted.

In dealing with joint tenancy property, the Restatement takes the position that the killer of a joint tenant retains a life estate in half the property.[102] The estate of the victim will hold a life estate in the other half of the property and the remainder interest in the property. In fact, the Restatement takes the position that treating the killing as effecting a severance of the joint tenancy requires some equitable justification.[103] A severance is viewed as benefiting the killer at the expense of the estate of the victim. In other words, prior to the killing, the killer only held a life estate and a possibility of receiving all the property on the death of the joint tenant. Turning this possibility of a remainder in all of the property into

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that "[e]xcept as otherwise provided by law, a person convicted of a crime does not suffer . . . forfeiture of estate or property."

98. N.D. CENT. CODE 30.1-10-03(1) (2007).

99. The dissent argues that "N.D.C.C. 30.1-10-03(1) is equally specific in prohibiting any killer from receiving 'any benefits under the will or under Chapters 30.1-04 through 30.1-11'" and would have held that the killer should have been treated as predeceased, resulting in the property passing to the victim's estate. *Id.* at 39 (Pederson, J., dissenting). This argument does not withstand scrutiny. Chapters 30.1-04 through 30.1-11 do not provide any benefits to a joint tenant killer and joint tenancy property does not pass under a will. The severance of a joint tenancy converts the property to tenancy in common by operation of law, not under any statutory provision.

100. *Snortland*, 311 N.W.2d at 39.

101. *Id.*

102. RESTATEMENT OF PROPERTY § 8.4 cmt. l; RESTATEMENT OF RESTITUTION § 188 cmt. b. The Restatement of Restitution further provides that the killer holds the property in a constructive trust. Presumably this constructive trust would exist to protect the interest of the estate of the victim in both its one half interest in the income of the property and the remainder interest in the entire property.

103. The comment does provide that this justification is only necessary when the severance is not "dictated by statute." Presumably this means the Restatement supports the notion that severances can properly be required by statute, as is true under the UPC.

outright ownership in part of it gives the killer a greater property interest then he had.[104]

D. TREATMENT IN THE VARIOUS STATES[105]

The various states have produced a variety of results in dealing with joint tenancy property under their slayer statutes, whether common law or legislative.

1. *Killer's Rights in Property Limited*

There is considerable support for the idea that a killer's survivorship rights in the property of a co-owner/victim should be limited.[106] The rationale of the courts is that Principle of Public Policy dictates that no person should be permitted to profit by his own wrongdoing and that taking full ownership of the joint tenancy property would result in such a profit.[107]

The method of actually limiting the right of the killer in the property is more challenging. By operation of law, property that is held with right of survivorship passes to the surviving joint owner. Simply taking the property right away is something courts have been reluctant to do.[108] One mechanism for overcoming this problem is the use of a constructive trust. The killer still takes legal title to the entire property as the survivor, but does so subject to a constructive trust which obligates the killer to hold a portion of the property for the benefit of others.

Courts that employ constructive trusts generally provide little discussion beyond the equitable maxims that underlie its use. In *Neiman v.*

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104. While the victim was still alive the killer could have caused a severance and received outright ownership of a portion of the property, but a court is certainly under no obligation to give a killer the benefit of what he could have done.

105. Cases dealing with the common law application of the slayer statute must either come from an era prior to the adoption of the state's legislature of a slayer statute or in a situation where the court found the slayer statute inapplicable to the facts before, requiring the application of the common law.

106. Jonathan M. Purver, Annotation, *Felonious Killing of One Cotenant or Tenant by the Entireties by the other as Affecting the Latter's Right in the Property*, 42 A.L.R.3d 1116, 1125-29 (1972 & Supp. 2007) (citing cases from seventeen jurisdictions that imposed limitations on survivorship rights in joint tenant and tenancy by the entirety cases).

107. *Id.* at 1129 (citing Barnett v. Couey, 27 S.W.2d 757 (Mo. Ct. App. 1930)).

108. Johansen v. Pelton, 8 Cal. App. 3d 625, 632 (1970).

> To deprive the heirs of the slayer of all interest in the property is to embrace a policy which tends to work a forfeiture, attainder, or corruption of the blood, with respect to the property interest which the surviving malefactor had at the instant before the slaying, and which, except for intervention on the theory adopted by the trial court, would have passed to his heirs.

Id.

Hurff,[109] the Supreme Court of New Jersey dealt with the estate of a woman who had been killed by her husband. The wife had named a charity as her sole beneficiary and it sought ownership of the couple's jointly held property. The trial court held that the husband took the property as trustee for himself and the charity.[110] The husband's interest was limited to an income interest in one-half the property. While the court felt that it would be "abhorrent" to allow the husband to retain title to the property, it felt that divesting him of all legal title "violates or does violence to the doctrine of vested rights" and would conflict with the state's statutory prohibitions on corruption of blood and forfeiture.[111] The court then held, however, that use of the constructive trust allowed the court to avoid conflict with both vested legal rights and the statutory prohibitions. "The doctrine is so consistent with the equitable principles that have obtained here for centuries that we have no hesitancy in applying it."[112] The court felt limited, however, in the extent it could use those equitable powers. Granting all equitable interest in the property to the charity would require depriving the killer of the right he held as a joint tenant to use of the property for his lifetime.[113] The court felt that since the killer had prevented the determination of the natural order of the deaths of himself and his wife, equity required a presumption that she would have outlived him.[114]

The Supreme Court of Illinois solved the problem by finding that the very act of killing caused a severance of the joint tenancy even in the absence of a statute mandating that result. In *Bradley v. Fox*,[115] the court dealt with a husband who killed his wife.[116] The husband and the wife's daughter from a prior marriage both made claims to the couple's joint tenancy property.[117] In the prior decision of *Welsh v. James*[118] the Illinois Supreme Court had held that a husband who had killed his wife was entitled

109. 93 A.2d 345 (N.J. 1952).

110. *Id.* at 346.

111. *Id.* at 347.

112. *Id.*

113. *Id.*

114. "Equity therefore conclusively presumes for the purpose of working out justice that the decedent would have survived the wrongdoer." *Id.* at 348.

115. 129 N.E.2d 699 (Ill. 1955).

116. *Bradley*, 129 N.E.2d at 701.

117. *Id.* The daughter also filed a wrongful death action against her mother's husband that had been dismissed by the lower court because the husband, as one of the class of beneficiaries under the wrongful death act, was prohibited from maintaining an action for damages that he had caused. *Id.* at 702. The court overruled the trial court and allowed the daughter's tort suit to continue. *Id.*

118. 95 N.E.2d 872 (Ill. 1950).

to the entire property which they had held in joint tenancy.[119] That decision, however, was based on the legal fiction that a joint tenant was "seized of the whole estate" and could not be divested "without violating the constitutional mandate against corruption of blood or forfeiture of estate."[120] The court concluded that the authorities relied upon in *Welsh* did not, in fact, mandate that conclusion.[121] They decided that stare decisis was not applicable and visited the question anew.

On reexamination, the court held that the prohibition of forfeiture was simply not applicable. The court began with the acceptance of the broad policy that a murderer should not enjoy the fruits of his crime.[122] The court then noted that the forfeiture question had been considered in numerous forums dealing with the question of whether legislative slayer statutes were enforceable. The court also noted that the slayers statutes "have been uniformly sustained on the theory that they do not deprive the murderer of his property, but merely prevent him from acquiring additional property in an unauthorized and unlawful way."[123]

Having determined that forfeiture did not prohibit altering the rights of the killing joint tenant, the court went on to consider the correct course to take. The court gave consideration to each of the possibilities and noted that the use of a constructive trust was urged by "legal scholars" and the Restatement of Restitution.[124] The court found it unnecessary, however, to use such a trust. Instead, the court gave a closer examination to the nature of joint tenancy. It found joint tenancy to be in the nature of the contract. Further, an implied condition of the contract was that neither party would acquire the interest of the other by murder. When the killer committed the murder, he violated this implied condition and this destroyed the unities of joint tenancy.[125] The destruction of one of the unities resulted in the conversion of the property to tenancy in common.[126]

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119. *Welsh*, 95 N.E.2d at 875. The facts of the *Welsh* case were not entirely on point because under *Welsh* the husband who had murdered his wife was judged to be insane when he committed the act. *Id*. at 873.

120. *Bradley*, 129 N.E.2d at 702.

121. *Id*. at 703.

122. *Bradley*, 129 N.E.2d at 704. At the time, Illinois had adopted the slayer statute suggested by Professor Wade that prohibited a murderer from inheriting. *See* Wade, *supra* note 40, at 716. The court correctly noted that the statute was not applicable to joint tenancy property, but did cite it as support for the broad policy of the state. *Bradley*, 129 N.E.2d at 704.

123. *Bradley*, 129 N.E.2d at 114.

124. *Id*. at 704-05 (citing JAMES BARR AMES, LECTURES ON LEGAL HISTORY & MISCELLANEOUS LEGAL ESSAYS 310, 321 (1913); GEORGE GLEASON BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 478; RESTATEMENT OF RESTITUTION § 188(b)).

125. The court does not specify which of the unities—interest, title, time or possession—was destroyed by the killing. It simply jumps to its conclusion that the killer had "by his felonious act,

2. *Killer's Rights in Property Unaffected*

The courts of four jurisdictions have taken the position that the survivorship rights of a killer should be unaffected by the murder.[127] These courts felt bound to follow property law and give ownership of the property to the surviving joint tenant.

In *Woodson v. Foster*,[128] the Supreme Court of Kansas upheld the vesting of the entire title in joint tenancy property to a husband who had killed his joint tenant/wife.[129] At this time, Kansas had adopted a slayer statute that prevented any person convicted of feloniously killing another from inheriting by will or otherwise. The court ruled that joint tenancy property was not a part of an estate and could not properly be characterized as inherited.[130] Therefore, the slayer statute did not apply. Most importantly, the court ruled that the interests of the joint tenants in the property vest upon the original conveyance. Because the husband had a vested interest, it was improper for property law to take the property away.[131] The same court specifically rejected, a decade later, the possibility of using a constructive trust to achieve the same result in equity that it rejected in law.[132] Courts from Colorado,[133] Illinois,[134] and Tennessee[135] have reached similar results.

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destroyed all rights of survivorship and lawfully retained only the title to his undivided one-half interest in the property." *Bradley*, 129 N.E.2d at 705-06.

126. "It is our conclusion that Fox by his felonious act, destroyed all rights of survivorship and lawfully retained only the title to his undivided one-half interest in the property in dispute as a tenant in common. . . ." *Bradley*, 129 N.E.2d at 706.

127. Purver, *supra* note 106, § 6 (citing cases from Colorado, Illinois, Kansas and Tennessee). Pennsylvania courts held that under the common law killers were not prevented from participating in the estates of theirs victims. The Pennsylvania legislature subsequently adopted a slayer statute that provided for the severance of joint tenancy property, with both the victim's estate and killer taking part of the property. *In Re* Estate of Larendon, 266 A.2d 763, 767 (Penn. 1970).

128. 320 P.2d 855 (Kan. 1958).

129. *Woodson*, 320 P.2d at 856.

130. *Id.* at 860. Under joint tenancy the survivor takes the property under the term of the original conveyance and not under the laws of intestate succession. *Id.*

131. *Id.* The court implied that it might have been acceptable for the legislature to amend the slayer statute to affect the interests of a killer-joint tenant, but it gives no indication of whether it meant merely limiting the interests of the killer or denying it entirely. *Id.* "Although a theory depriving a murderer of *any benefits* resulting from his crime appeals to our sense of justice and equity, we are not permitted to read something into the statute which is not there." *Id.*

132. United Trust Co. v. Pyke, 427 P.2d 67, 77 (Kan. 1967).

133. Smith v. Greenburg, 218 P.2d 514, 519 (Colo. 1950) ("[W]e believe it may properly be said that the creation of joint tenancies and the disposition of property thereunder is dictated as strictly by pertinent legislation as is the devolution of property under the laws of descent and distribution.").

134. Welsh v. James, 95 N.E.2d 872, 875 (Ill. 1950) ("There is no law in this State that deprives appellee of his vested right in the whole of the estate as the surviving joint tenant.").

135. Beddingfield v. Estill & Newman, 100 S.W. 108, 111 (Tenn. 1907)

3. *Killer's Rights in Property Eliminated*

Because the new North Dakota slayer statute has taken the position that the killer's interest in joint tenancy property should be voided, a close examination of the states that have a similar rule is important. Only a few jurisdictions reportedly take the position that a killer should be denied all rights in the property held jointly with the victim.[136] However, most of the cited cases show courts avoiding forfeiture issues by reaching the results of forfeiture through other legal means.[137]

In *Estate of Castiglioni v. Del Pozo*,[138] the California appellate court dealt with the disposition of bank accounts and real property held jointly by a woman and the husband she killed.[139] The court held that the wife was not entitled to receive the joint tenancy property.[140] It did not do so, however, through application of a slayer statute. In fact, the court clearly states that "we have squarely held the joint tenancy property is to be divided equally between the estates of the victim and the murderer."[141] The court denied the wife any right in the funds by holding that principles of tracing and reimbursement were applicable in determining the property interests of the victim and the killer.[142] In essence, the court did not rule that the slayer statute prevented the killer from taking a continuing interest in the property, but that the property in question was really not joint tenancy property.[143]

> It was not the intention of the General Assembly that vested rights of this character should be forfeited by the murderous act of the owner therein stated. It was only intended that he should not in any way acquire any new rights or property interest from others as the result of his crime. Any other construction of the statute would render it void.

Id.

136. The Restatement cites cases from California, Ohio and West Virginia. RESTATEMENT OF PROPERTY § 8.4 cmt. 1. *American Law Reports* cites Minnesota, New York, Pennsylvania, and Montana. Purver, *supra* note 106, at 1154-57.

137. *See, e.g.*, *In re* Gatto's Estate, 74 Pa. D. & C. 529, 538 (Orphans' Ct. 1950) (ruling that the victims estate took all of the joint tenancy property when the killer committed suicide and actually died before the victim).

138. 47 Cal. Rptr. 2d 288 (Cal. Ct. App. 1995).

139. *Estate of Castiglioni*, 47 Cal. Rptr. 2d at 289-90.

140. *Id.* at 290.

141. *Id.* at 296.

142. *Id.* The court used provisions of the Probate Code regarding the identification of separate and community property in holding that placing the funds in a joint tenancy account was insufficient to convert the funds from the separate property of the decedent to joint tenancy property. *Id.* The court similarly used portions of the Family Code allowing tracing in divorce to identify separate and community property. *Id.* at 301. While the court acknowledged that the Family Code was not applicable to the case before it, the court ruled that there were "strong indicia" of legislative intent to allow rebuttal of joint tenancy presumptions. *Id.* at 302.

143. For a comparison, see Vesey v. Vesey, 54 N.W.2d 385 (Minn. 1952).

In *In re Estate of Fiore*,[144] the Ohio Court of Appeals did allow the joint tenancy property to pass in its entirety to the victim's estate.[145] The case involved the disposition of funds in a joint tenancy bank account held by Charles DiPrima and Leonard Fiore.[146] Mr. DiPrima pled no contest to the charge of murdering Mr. Fiore.[147] The probate court awarded all property in the joint and survivorship account to the estate of the victim.[148] The appellate court upheld the decision.[149] Ohio's slayer statute did not address joint tenancy property directly, but did provide that the killer could not "in any way benefit by the death."[150] Further, the court ruled that the State's constitutional prohibition on forfeiture of property by those convicted of a crime did not apply.[151] This result, however, hinged on the fact that the joint tenancy property in question was a bank account in which both owners had the right to withdraw all the funds. The killer's rights to the account simply were not vested because "either party had full power at any time . . . , by withdrawals, to extinguish any rights of the other party."[152] The reasoning of the court could not apply to real property, where one joint tenant is incapable of extinguishing the rights of the other.

In *Lakatos v. Billotti*,[153] the West Virginia Appellate Court dealt with real property held jointly by married couple.[154] The husband killed his wife and shortly thereafter conveyed the property to his mother.[155] The husband was convicted of the murders and sentenced to life imprisonment without the possibility of parole.[156] The circuit court held that the estate of the victim had no interest in the property.[157] The court overturned its prior ruling. Although the state's slayer statute had no specific language dealing with joint tenancy property, the court ruled that it was "unthinkable that our [L]egislature contemplated giving the fruits of his crime to one who

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144. 476 N.E.2d 1093 (Ohio Ct. App. 1984).

145. *In re* Estate of Fiore, 476 N.E.2d at 1095.

146. The court was unable to establish how much the killer and victim had individually deposited into the account. *Id*. at 1095.

147. *Id*.

148. *Id*.

149. *Id*.

150. *Id*. at 1096 (citing OHIO REV. CODE § 2105.19(A)).

151. *Id*. at 1097.

152. *Id*. (citing Bauman v. Hague, 116 N.E.2d 439 (1953)).

153. 509 S.E.2d 594 (W. Va. 1998).

154. *Lakotas*, 509 S.E.2d at 595.

155. *Id*.

156. *Id*.

157. *Id*. (citing State *ex rel*. Miller v. Sencindiver, 275 S.E.2d 10 (1980)). The circuit court felt that it was bound by an earlier decision of the West Virginia Supreme Court which held that the state slayer statute did require divestment of any right in joint tenancy property. *Id*.

commits a homicide."[158] The result denying property to the killer was "inherent in the statute" dealing with joint property.[159] The court's opinion did not, however, discuss the nature of the killer's interest in the property or deal with the impact that forfeiture might have on the decision.

Of particular interest in the *Lakatos* decision is the fact that it cites the Montana case of *In re Cox Estate*[160] as supporting its conclusion. Unfortunately, the case provides no such support. In *Cox*, the Supreme Court of Montana dealt with property held jointly by a husband and wife. The husband killed his wife and then committed suicide.[161] The district court held that the husband took all the property because he survived his wife, albeit by only a short time, and the property was a part of his estate.[162] The district court, however, imposed a constructive trust on the interests of the wife in the property for the benefit of her heirs. The supreme court upheld the imposition of this constructive trust.[163] The interest held by the husband was not covered by this constructive trust and its ownership were not the subject of the appeal to the supreme court. Thus, the *Cox* case did not support the ruling of the *Lakatos* court in denying any interest to the killer.[164]

Bierbauer v. Moran[165] represents the clearest application of the denial of an interest in joint tenancy property to a killer. The case dealt with a husband who murdered his wife and then committed suicide.[166] The court was dealing with the question of whether the heirs of the wife or the heirs of the husband should receive the property. The court held that it would be improper to allow the "willful killing of the wife by the husband" to result in property going to his estate because "his estate would profit by his

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158. *Id.* at 597.

159. *Id.*

160. 380 P.2d 584 (Mont. 1963).

161. *In re Cox Estate,* 380 P.2d at 585.

162. *Id.* at 585-86.

163. *Id.* at 591.

164. The Montana Supreme Court revised the issue in *Sikora v. Sikora*, a case cited by *American Law Reports*, as denying a killer joint tenant of the right to share in the estate of joint tenancy. 499 P.2d 808, 811 (1972). A close reading of the case, however, shows that it simply upholds the decision in *Cox* denying the killer an interest in the "share of the joint property owned by" the victim. *Id.* at 811.

165. 279 N.Y.S. 176 (App. Div. 1935).

166. *Id.* at 178-79. The fact of the killing made the then applicable simultaneous death statute inapplicable because the order of death was clearly ascertainable. If the statute had applied, the property would have been split between the two estates as if the decedents had been tenants in common. *Id.* Under a modern simultaneous death statute, the decedents would be treated as having died simultaneously despite the fact that the order of death could be determined. *See* UNIF. PROBATE CODE § 2-702 (2006).

crime."[167] The property was awarded entirely to the heirs of the wife.[168] The court did not discuss what interests the husband might have had in the property of why those rights could be terminated.

E. NORTH DAKOTA'S NEW STATUTE

The North Dakota Legislature amended its slayer statute in 2007 to provide that the interest of the killer in property held with the decedent as joint tenancy with the right of survivorship is voided.[169] The new North Dakota slayer statute only changes the treatment of joint tenancy.[170] So, while the killer's heirs will still take under intestacy, application of the anti-lapse statute, or as takers in default of a power of appointment, they will be denied the ability to inherit the joint tenancy property.

The legislature retained the subsequent provision in the North Dakota Century Code that provides protection to third-party purchasers for value of an interest in the property that had a good-faith reliance on the apparent title by survivorship in the killer.[171] Interestingly, this section does not provide that the proceeds of such a sale in the hands of the killer will become the property of the decedent's estate. Successors to the decedent's estate would presumably have to pursue the proceeds of the sale by filing a suit, probably in wrongful death, against the killer.

The new North Dakota slayer statute does not discuss or justify the removal of property rights in the joint tenancy property from the killer. North Dakota now becomes the first state to explicitly attempt to cancel all interests of a killing joint tenant in the joint tenancy property. Cancelling

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167. *Bierbauer*, 279 N.Y.S. at 179. The court did cite the principle that "no man shall be permitted to profit by his own wrong" and held that this principle applies to a wrongdoer's estate as well as to himself. *Id.*

168. The decision was followed in *In re Estate of Bobula*, 25 App. Div. 2d 241 (N.Y. App. Div. 1966), *rev'd on other grounds*, 227 N.E.2d 49 (N.Y. 1966). Again, the opinion did not include any discussion of the killer's property rights.

169. N.D. CENT. CODE § 30.1-10-03 (2007). "The intentional and felonious killing of the decedent: . . . (b) voids the interests of the killer in property held with the decedent at the time of the killing as joint tenants with the right of survivorship." *Id.* § 30.1-10-03(3)(b).

170. Other than the changes made to the treatment of joint tenancy property, North Dakota Century Code Section 30.1-10-03 uses the language contained in UPC Section 2-803.

171. N.D. CENT. CODE § 30.1-10-04 (2007). The voided interest

> under subdivision b of subsection 2 does not affect any third-party interest in property acquired for value and in good-faith reliance on an apparent title by survivorship . . . [in the killer] unless a writing declaring the . . . [voided interest] has been noted, registered, filed, or recorded in records appropriate to the kind and location of the property which are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership.

Id. § 30.1-10-04(3).

property interests by law raises the very real question of whether forfeiture has taken place, and if so, whether the forfeiture is allowed.

IV. FORFEITURE

Forfeiture occurs when a person is deprived of property because of the commission of some act.[172] Punishing a prisoner through the forfeiture of property is generally disfavored under the law of the United States.[173] North Dakota prohibits the forfeiture of a criminal's estate upon a conviction.[174] While some states contain similar provisions in their state constitutions,[175] North Dakota does so by legislative act. This statute is, however, related to the prohibitions on bills of attainder in the United States and North Dakota constitutions.[176] These provisions all deal with the treatment of a convicted criminal's property and are deeply rooted in history.

Attainder applied to a person convicted of a capital felony.[177] Attainder could be described as the extinction of person's "civil rights" at the same time as he is sentenced to death.[178] The attainder resulted in the criminal forfeiting all land and chattels, corruption of the blood.[179] This attainder comprised an additional component to the criminal's punishment for the crime. The criminal's execution meant that the burden of the forfeiture fell on the criminal's heirs, who were denied their inheritance of the criminal's lands and chattels. Corruption of the blood further prevented the issue of the criminal from inheriting from the convicted person any property that was not forfeited.

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172. Forfeiture: "2. The loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty." BLACK'S LAW DICTIONARY 677 (8th ed. 2004).

173. The federal judiciary is prohibited from imposing forfeiture or corruption of blood as a punishment for treason except during the life of the person who committed the treason. U.S. CONST. art. III, § 3, cl. 2.

174. N.D. CENT. CODE § 12.1-33-02 (2007). "Except as otherwise provided by law, a person convicted of a crime does no suffer civil death or corruption of blood or sustain loss of civil rights for forfeiture of estate or property, but retains all of his rights, political, personal, civil and otherwise. . . ." *Id.*

175. *See, e.g.*, TENN. CONST. art. I, § 12 ("No corruption of blood or forfeiture of estates."). The Tennessee Supreme Court has ruled that any statute that would deprive a joint tenant of any interest in the property as a result of committing murder would be void as forfeiture because of this provision. Beddingfield v. Estill & Newman, 100 S.W. 108, 111 (Tenn. 1907).

176. U.S. CONST. art. I , §§ 9, 10; N.D. CONST. art. I, § 18.

177. Reppy, *supra* note 9, at 231.

178. Jacob Reynolds, *The Rule of Law and the Origins of the Bill of Attainder Clause*, 18 ST. THOMAS L. REV. 177, 182 (2005).

179. Reppy, *supra* note 9, at 231. Attainder also resulted in "civil death," essentially the denial of access to the courts. *Id.* A similar forfeiting of property under escheat also could apply to one who was attained. *Id.* at 233. If the king failed to claim the property forfeited, it could not descend to the criminal's heirs because of the corruption of the blood, with the result being that it would escheat to the criminal's lord. *Id.* at 233-34.

The judicial concept of attainder is distinct, though related, to the legislative action of a bill of attainder.[180] Legislative bodies adopted bills of attainder to inflict additional penalty on an individual, usually one who had committed treason or some other serious felony.[181] Both the courts and the Congress maintained the possibility of imposing attainder, so the United States Constitution outlaws attainder in both Article I and Article III.[182]

Forfeiture and corruption of the blood existed in feudal England and were not abolished until late in the nineteenth century. The abolishment began in 1814 with the provision that corruption of blood should not extend to new statutory felonies,[183] and culminated with the passage of the Statute of Forfeitures for Treason and Felony passed in 1870.[184] As discussed earlier, the abolition of forfeiture and corruption of the blood gave rise to the need for slayer statutes.[185]

The abolition of forfeiture does not mean, however, that a criminal may not be required to forfeit property as punishment for committing a crime. Beginning in 1970 with the passages of the Racketeer Influenced and Corrupt Organizations Act[186] and the Comprehensive Drug Abuse Prevention and Control Act,[187] Congress introduced the concept of property forfeiture as a penalty for criminal convictions in some situations.[188] Modern criminal forfeiture differs from attainder in that the property forfeited still must bear some relationship to the crime committed.[189] These criminal forfeitures do not fall under the constitutional prohibition because they do not apply to treason,[190] and are not bills of attainder.[191]

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180. Reynolds, *supra* note 177, at 182.

181. *Id.*

182. U.S. CONST. art. I, §§ 9-10, art. III, § 3.

183. Reppy, *supra* note 9 at 234-35.

184. *Id.* at 238.

185. *See* discussion *infra* Part II.

186. 18 U.S.C. §§ 1961-1963 (1970).

187. 21 U.S.C. § 801 (1970).

188. The use of criminal forfeiture on the federal level has expanded since with the passage of a general forfeiture statute that has been used to target a variety of different criminal acts. *See* Ford, *supra* note 18, at 1405.

189. *Id.* at 1406-07.

190. U.S. CONST. art. III, § 3 (applying to the judiciary and only prohibiting corruption of blood and forfeiture during the life of a person committing treason under a declaration of Congress).

191. Bills of attainder are acts "of the legislature proposed and passed as any other bill, but for the specific purpose of attainting individuals. . . ." Reynolds, *supra* note 177, at 182.

Criminal forfeitures must be distinguished from civil forfeitures.[192] A criminal forfeiture comes out of a proceeding against a person for a criminal act. A civil forfeiture is an action in rem against the piece of property that was used in the commission of a crime or acquired as the result of criminal activity.[193] "It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient."[194] Civil forfeiture is a result of specific authorizing statutes and requires a lower burden of proof than criminal forfeiture.[195] Most importantly, because civil forfeiture is not based on the criminal culpability of any person, it is not considered punishment on a person.[196]

The difference between in rem and criminal forfeiture has procedural implications as well. Criminal forfeitures require higher levels of due process and can implicate other constitutional rights.[197] Civil forfeitures carry lower due process requirements, but the establishment of the fact that the property is subject to forfeiture is still required.[198]

A criminal forfeiture still might not trigger all the safeguards that exist under the Constitution for criminal trials.[199] In *Kennedy*, the United States Supreme Court has provided guidelines in determining whether a particular provision is so punitive that it may only be imposed after a criminal prosecution.

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally

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192. While criminal forfeitures were absent from American law for almost two centuries after the adoption of the U.S. Constitution, the use of civil forfeiture "developed expansively." Ford, *supra* note 18, at 1403-04.

193. J. Andrew Vines, United States v. Ursery: *The Supreme Court Refuses to Extend Double Jeopardy Protection to Civil in rem Forfeiture*, 50 ARK. L. REV. 797, 805 (1998).

194. Waterloo Distilling Corp. v. United States, 282 U.S. 577, 581 (1931).

195. *See id.* (providing a full discussion of civil forfeiture and its case history).

196. United States v. Ursery, 518 U.S. 267, 273 (1996).

197. Among the constitutional rights that can be implicated are: double jeopardy, the right against self-incrimination, and the right to an attorney. *See* Douglas Kim, Note and Comment, *Asset Forfeiture: Giving Up Your Constitutional Rights*, 19 CAMPBELL L. REV. 527, 561-78 (1997).

198. *Id.* at 539.

199. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 184-86 (1963).

> be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant.[200]

Applying these standards, the Supreme Court has both struck down and allowed provisions.[201]

Cases applying a slayer statute have often dealt with the question of whether forfeiture has been imposed on the killer. Most of these cases, however, involve a killer's attempt to continue to inherit property owned by the victim. Courts have consistently held that denying a killer the right to inherit property from a victim does not work forfeiture. Forfeiture can only occur when property of the killer is taken away. Since killers have at best an expectancy of receiving property from the victim, it is not forfeiture to thwart that expectation. The new North Dakota slayer statute requires a new examination of the concept of forfeiture.

V. ANALYSIS

The threshold question in examining the new North Dakota slayer statute is whether it results in a forfeiture of the killer's property at all. The courts that have examined slayer statutes in multiple jurisdictions have determined that they did not result in forfeiture.[202] These cases, however, usually dealt with the general application of the slayer statute to prevent killers from inheriting any portion of the victim's estate, rather then with denying them something that the killer already owned.

The new North Dakota slayer statute not only prevents a killer from taking over the victim's interest in property held in joint tenancy, but also deprives the killer from any interest in the property. The revision is unique as it represents the first legislative attempt to use a slayer statute to completely deprive a killing joint tenant of any right in the property.[203] Both the

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200. *Kennedy*, 372 U.S. at 168-69 (footnotes omitted).

201. *Id.* at 148-86 (invalidating a statute that stripped the citizenship from any person remained outside of the United States to avoid military service during time of war); Wong Wing v. United States, 163 U.S. 228, 235-38 (1896) (invalidating a statute that required aliens to be held for one year at hard labor before being deported); Allen v. Illinois, 478 U.S. 364, 368-69 (1986) (upholding statute that provided for civil commitment of "sexually dangerous persons"); United States v. Ward, 448 U.S. 242, 248-51 (1980) (upholding statute that imposed civil penalties on parties discharging hazardous substances).

202. Bradley v. Fox, 129 N.E.2d 699, 704 (Ill. 1955) (upholding the slayer statute on the ground that it does "not deprive the murderer of property, but merely prevent[s] him from acquiring additional property in an unauthorized and unlawful way"); Neiman v. Hurff, 93 A.2d 345, 347 (N.J. 1952) (applying the slayer statute "does not interfere with vested legal rights"); *see also* Purver, *supra* note 106, § 8.

203. Two courts have ruled that legislatures have done so indirectly by providing that a killer should be treated as having predeceased the victim. *See* cases cited *supra* note 152 and 164. They ruled that using that fiction, the victim survived the killer and took full ownership of the property as the surviving joint tenant. *Id.*

Restatement and the UPC, by providing a life estate in the property to the killer or by severing the joint tenancy, have taken the position that depriving the killer of all interest in the property is improper.

The fact that no other jurisdiction or authority has gone as far as North Dakota in applying the Principle of Public Policy does not, by itself, mean that the new North Dakota slayer statute should not be adopted. What is vital, however, is that the new position be carefully assessed to ensure that other important legal principles will not be sacrificed. The new North Dakota slayer statute deprives a person of property and therefore must be consistent with the general principle disfavoring the taking of property. But, how does the statute take property and what is the significance of that method?

The new North Dakota slayer statute clearly causes the killer to lose property. The killer owns a property interest. This interest became fully vested at the time of the original conveyance of the property into joint tenancy. The new North Dakota slayer statute deprives the killer of the continued ownership and enjoyment of the property despite the fact that the killer satisfies the only pre-condition under property law, being alive. This is forfeiture.

While forfeitures can be either criminal or civil, the new North Dakota statute does not fit within the definition of a civil forfeiture. The property being forfeited, the killer's previously held interest in the joint tenancy property, is not the fruits of criminal activity and was not a part of the criminal activity.[204] Further, taking results because of a determination by a court that the killer had "feloniously and intentionally" killed another. Given the fact that the property taken from the killer does not have to be involved in the killing, it appears that the forfeiture cannot be deemed in rem. This leaves the only conclusion that the forfeiture is criminal in nature, i.e., a punishment for the commission of a crime. If the property is not "guilty" of a crime, then taking it from the owner must be because of the in personam actions of the person owning the property. "A civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes is punishment, as we have come to understand that term."[205] This makes the forfeiture under the new North Dakota slayer statute criminal in nature.

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204. United States v. Usery, 282 U.S. 267, 294 (1996) (Kennedy, J., concurring) ("The theory is that the property, whether or not illegal or dangerous in nature, is hazardous in the hands of this owner because either he uses it to commit crimes, or allows others to do so.").

205. United States v. Halper, 490 U.S. 435, 448 (1989).

Even as a criminal forfeiture, the new North Dakota slayer statute must be assessed to determine if it triggers full constitutional protections. Several of these *Kennedy* factors triggering full constitutional protection clearly exist in the case of the new North Dakota slayer statute.[206] Others are difficult to assess without knowing exactly what the legislature intended in adopting the new rule.[207]

The North Dakota Legislature may have had many motives in passing the new North Dakota slayer statute: As a preventative measure to discourage killing; as a punishment for killers; to provide for compensation for the heirs and devisees of the victim other than the killers. The North Dakota Legislature did not label its new slayer statute as a forfeiture, either civil or criminal. This perhaps is owing to the belief that it was merely amending a property law.

Whatever the intent of the North Dakota Legislature, it seems clear that the new North Dakota slayer statute is a forfeiture of property held by the killer. While criminal forfeitures are perfectly allowed, they must be accompanied by the procedural protections governing any criminal punishment. Even if application of the *Kennedy* factors would not trigger full due process, at least some protections would have to be provided. The new North Dakota slayer statute clearly lacks these protections.

Criminal forfeitures, like all criminal sanctions, can only be implemented with all of the procedural safeguards guaranteed by the Fifth and Sixth Amendments.[208] These safeguards are clearly denied in the

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206. The new North Dakota slayer statute clearly requires a finding of scienter, the behavior penalized is already a crime. The discussion of forfeiture *supra* at Section IV shows that denying a convicted individual of his property has also historically been considered punishment for a crime, though the rise of civil forfeiture may mean that this is no longer the case.

207. Any forfeiture or penalty could promote the traditional aims of retribution and deterrence. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963) (*citing* United States v. Constantine, 296 U.S. 287, 295 (1963) and Trop v. Dulles, 356 U.S. 86, 98, 111-12 (Brennan, J., concurring). The legislature did not attempt to connect any purpose to the rule, so it is difficult to determine whether such purpose is rational. Whether the penalty might be excessive will vary greatly on a case by case basis.

208. The Fifth Amendment reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the

implementation of the new North Dakota slayer statute. The killer's "guilt" is determined by a court, not by a jury. The standard for the finding is a preponderance of the evidence, not beyond a reasonable doubt. The sanction can be implemented even if the killer died before the proceeding begins, so the killer would be denied any opportunity to present a defense.

While it is unlikely that the new North Dakota slayer statute can pass constitutional muster, that does not mean that heirs of victims are without recourse. They have the same rights to prevent unjust enrichment by killers that existed prior to the recent amendment. A wrongful death suit can be filed against the killer or killer's estate and assuming the facts are proven, a judgment will issue. The victim's heirs can then assert this claim against the killer or killer's estate in the same manner as any other creditor.

The new North Dakota slayer statute fails equitable standards in other ways as well. While the assumption has been that only the killer, the victim, and their heirs are involved, this will not always be the case. Property held by any person or estate can be pursued by creditors. The new North Dakota slayer statute deprives the creditors of the killer from a source from which they could seek compensation for their claims.

The UPC and the Restatement have both provided systems for dealing with joint tenancy property held by killers and their victims. In both cases the rights of the killer have been protected by ensuring that only killers' chances to obtain more property than that which they already own will be affected by the killing. The Principle of Public Policy really asks for nothing more. The new North Dakota slayer statute, by crossing the line between denying a killer the chance to receive new property and taking the killer's existing property has turned the slayer statute into an instrumentality of criminal punishment.

While the North Dakota Legislature may have been trying to prevent situations that could be deemed "absurd," it did so by trampling the rights of the killer in a way that is not justified under the U.S. Constitution. The new North Dakota slayer statute should be repealed and either UPC or Restatement versions of the slayer statute adopted.

> witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.