

# HOUSE BILL REPORT

## ESHB 1995

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### As Passed Legislature

**Title:** An act relating to civil forfeitures of property.

**Brief Description:** Revising provisions relating to civil forfeitures of property and convening a workgroup to evaluate civil forfeiture laws.

**Sponsors:** By House Committee on Judiciary (originally sponsored by Representatives Dickerson, Cairnes, Grant, Dunn, Campbell, Kagi, Pearson and Wood).

**Brief History:**

**Committee Activity:**

Judiciary: 2/22/01, 3/29/01 [DPS].

**Floor Activity:**

Passed House: 4/5/01, 96-0.

Passed Senate: 4/12/01, 42-4.

Passed Legislature.

### Brief Summary of Engrossed Substitute Bill

- Places the burden of proof on the law enforcement agency to show, by a preponderance of the evidence, that the real or personal property seized is subject to forfeiture.
- Entitles a claimant who has substantially prevailed in a forfeiture proceeding to reasonable attorney fees.
- Creates a joint Senate and House legislative workgroup to study civil forfeiture laws and practices.

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### HOUSE COMMITTEE ON JUDICIARY

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 10 members: Representatives Carrell, Republican Co-Chair; Lantz, Democratic Co-Chair; Hurst, Democratic Vice Chair; Lambert, Republican Vice Chair; Boldt, Casada, Dickerson, Esser, Lovick and McDermott.

**Staff:** Trudes Hutcheson (786-7384).

## **Background:**

There are various statutes authorizing the government to seize and forfeit property because of the property's connection with specific offenses. In particular, law enforcement agencies may seize and forfeit certain property under Washington's drug forfeiture statute.

### **A. Real and personal property subject to seizure and forfeiture.**

The drug forfeiture statute allows law enforcement agencies to seize the following property:

- **illegal drugs**, materials used for making illegal drugs, containers for illegal drugs, and illegal drug paraphernalia;
- **conveyances** (e.g., aircraft, automobiles, and boats) used in any manner to facilitate the sale, delivery, or receipt of illegal drugs;
- **money** intended to be used in exchange for illegal drugs;
- **personal property, proceeds, or assets** acquired in whole or in part with proceeds traceable to an illegal drug transaction; and
- **real property** (e.g., land and homes) used with the knowledge of the owner to manufacture illegal drugs, if the act giving rise to the forfeiture constitutes at least a class C felony and there is a substantial nexus between the real property and the commercial production or sale of illegal drugs.

There are some exceptions. For example, conveyances are not subject to forfeiture if used in the receipt of only an amount of marijuana for which possession constitutes a misdemeanor. In addition, conveyances may not be forfeited if the owner did not know or consent to the illegal activity.

The community property interest in real property of a person whose spouse committed the illegal act may not be forfeited if the person did not participate in the illegal act. A forfeiture of real property with a bona fide security interest is subject to the interest if the secured party neither had knowledge nor consented to the illegal activity.

Possession of marijuana may not result in the forfeiture of real property unless the possession was for commercial purposes, the amount possessed was five or more plants or one pound or more of marijuana, and a substantial nexus exists between the possession and the real property. The unlawful sale of marijuana or a legend drug may not result in the forfeiture of real property unless the sale was 40 grams or more and a substantial nexus exists between the unlawful sale and the real property.

### **B. Procedural requirements for seizure and forfeiture.**

Real property may only be seized upon process issued by a superior court. Forfeiture

proceedings for real property are always judicial, as opposed to administrative. The seizure must include a filing of a lis pendens by the seizing agency to give notice to prospective purchasers that the property's title is unsettled.

Prior judicial action is not always necessary for the seizure of personal property. For example, law enforcement may seize personal property if:

- the seizure was incident to arrest or under a search warrant;
- the officer has probable cause to believe the property is directly or indirectly dangerous to public health or safety; or
- the officer has probable cause to believe the property was used or intended to be used in violation of the drug laws.

Once the seizure of property occurs, the forfeiture proceeding is considered commenced. The law enforcement agency must give notice within 15 days of the seizure to the owner or anyone who has a known interest in the property. If no person notifies the law enforcement agency of an interest in the property, the property is deemed forfeited. The automatic forfeiture occurs 45 days after notice is given for personal property and 90 days after notice is given for real property when no person claims an interest.

If a person claims an interest in the seized property within the prescribed time period, the person will be afforded a reasonable opportunity to be heard. A hearing will be held before the chief law enforcement officer of the seizing agency or an administrative law judge. However, the person claiming an interest in the seized property may remove the case to a court of competent jurisdiction.

In cases of personal property, the seizing agency has the initial burden of showing probable cause exists to believe the property is subject to forfeiture. The burden shifts to the claimant to establish, by a preponderance of the evidence, that the property is not subject to forfeiture.

For real property, the burden of producing evidence and burden of proof that the real property is subject to forfeiture remains on the seizing law enforcement agency.

### **C. Distribution of forfeited property.**

When property is forfeited, the seizing law enforcement agency may:

- retain the forfeited property for official use by the agency;
- sell the forfeited property;
- forward the forfeited property to the drug enforcement administration; or
- request the sheriff or director of public safety to take custody of the forfeited property.

Seizing law enforcement agencies are required to remit 10 percent of the net proceeds from forfeited property annually to the State Treasurer to be deposited in the drug enforcement and education account. Net proceeds of forfeited property is the value of the forfeitable interest in the property after deducting the cost of satisfying any bona fide security interest to which the property is subject, or deducting the cost of sale in the case of sold property.

The seizing law enforcement agency is required to keep records regarding forfeited property. Specifically, the agency must keep a record of the identity of the owner, description and disposition of the forfeited property, value of the property at the time of seizure, and amount of proceeds realized from the sale of any forfeited property. These records must be maintained for at least seven years and must be submitted annually to the State Treasurer.

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### **Summary of Engrossed Substitute Bill:**

The civil forfeiture statute applicable to drug law violations is amended. In cases involving personal property or real property, the burden of proof is upon the law enforcement agency to establish by a preponderance of the evidence that the property is subject to forfeiture.

If a claimant substantially prevails in a forfeiture proceeding, the claimant is entitled to reasonable attorney fees that were reasonably incurred.

A 16-member workgroup is created to evaluate the civil forfeiture laws and practices. The workgroup must, among other things, study whether a requirement for a criminal conviction before forfeiture raises constitutional issues and review every civil forfeiture case that took place under state law during the year 2000.

The workgroup consists of:

- four members from the Senate, two from each caucus;
- four members from the House, two from each caucus;
- two representatives from the American Civil Liberties Union;
- two representatives from the Washington Association of Sheriffs and Police Chiefs;
- two representatives from the Washington Association of Prosecuting Attorneys; and
- two representatives from the Washington Association of Criminal Defense Lawyers.

The workgroup must submit its findings and recommendations to the Senate and House Judiciary Committees by December 1, 2001. The workgroup terminates on December 15, 2001.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Testimony For:** The law unfairly places the burden of proof on the claimant. Oftentimes the claimant's property is forfeited even when no criminal charges are ever filed. The law allows the seizing agency to be the judge and the jury, giving them an unfair advantage. The seizing agencies have a direct conflict of interest. There is no incentive to reign in police misconduct. The vast majority of cases are small time cases, not big drug dealers. Generally people are treated as "innocent" until proven guilty, but drug forfeiture is the one exception where people are first considered guilty. The laws create incentives for police to target people with assets even if those people are not the big drug dealers. If the police need money to fight crime, they should get it from the Legislature, not civil forfeitures.

**Testimony Against:** Requiring a conviction before forfeiture would make the law unworkable. The bill takes away the state's right to sue dealers for their trafficking. Drug dealers amass large amounts of property, and they should not be allowed to profit. The current law is functioning as it was intended. Forfeiture removes the cash incentive of criminal behavior and "cripples" the drug dealer's operation. Changing the law would make it more difficult to fight crime.

**Testified:** (In support) Representative Dickerson, prime sponsor; Representative Hurst; Jerry Sheehan, American Civil Liberties Union, Washington State; Richard Troberman, Washington Association of Criminal Defense Lawyers; Ken Houghton, Council for Legislative Action, Washington State; Erne Lewis, Liberty Initiatives; Bob Owen and Dr. David Edwards, Washington Hemp Education Network; Jeff Gilmore; Merton Cooper; and Al Woodbridge, Washington Firearms Rights Coalition and Washington Property Rights Alliance.

(Opposed) Jim Townsend and Tami Perdue, Washington Association of Prosecuting Attorneys; Fabienne Brooks, Office of the King County Sheriff and Washington Association of Sheriffs and Police Chiefs; Roger Lake, Washington State Narcotics Association; and Steve Tucker, Office of the King County Sheriff, King County Police Officers Guild, Seattle Police Guild, Bellevue Police Guild, Bellevue Police Department, Valley Narcotics Enforcement Team (including the Auburn, Kent, Renton, and Tukwila Police Departments), Spokane Police Guild, Spokane Police, Spokane Lieutenants and Captains Association, Office of Spokane County Sheriff, Spokane County Sheriffs' Deputies Association, WestNet Task Force (Bremerton Police, Bainbridge Island Police, Office of the Kitsap County Sheriff, Naval Criminal Investigative Service, Office of the Mason County Sheriff), Thurston County Narcotics Task Force, Office of the Thurston County Sheriff, Olympia Police, Tumwater Police, Lacey Police, Pacific Northwest

License, Tax, and Fraud Association, Snohomish County Regional Narcotics Task Force, Columbia River Drug Task Force, Law Enforcement Against Drugs Task Force in Central Washington, Spokane County Prosecuting Attorney, and Washington Council of Police and Sheriffs.