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# Litigation for the Executry Practitioner

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# Seminar overview

- Reduction of Wills
- Transactions in breach of trust
- Actions of Rectification
- Issues in relation to legal rights claims
- Lost wills
- Removal of trustees/executors

# Reduction of Wills

Grounds of challenge :-

1. Incapacity
2. Undue influence
3. Facility and circumvention

# Capacity

*Banks v Goodfellow* (1870) L.R. 5QB 549 / *Sievwright v Sievwright Trustees* 1920 (SC HL) 53

1. The testator must understand the nature of the act and its effects
2. The testator must understand the extent of the property he is disposing
3. The testator must understand the nature and extent of obligations which he may have to relatives or others.
4. That no disorder of mind shall poison the affections of the testator, pervert his sense of right or prevent the exercise of his natural faculties - that no insane delusion shall influence his will in disposing of his property and bring about a disposal of which, if the mind had been sound, would not have been made.

5. Unsoundness of mind is a question of degree
6. The testator must be able to exercise a rational appreciation of what he is doing
7. He must understand the nature of the act
8. He may make a Will in lucid intervals between two periods of insanity
9. If suffering from delusions, the delusion must be shown to be an actual and impelling influence

# Undue Influence

- Influence exercised by fraud or coercion by a dominant person in whom the testator trusted
- Abuse of a relationship of trust
- One party must be capable of exerting a strong influence over the other
- There must be some evidence that the testator's freedom of action or will was overpowered
- It is not necessary that the person exercising influence obtained a benefit

# Facility and Circumvention

- Gloag and Henderson (13<sup>th</sup> Edition)

“The Law also recognises the existence of a state known as facility, in which, while there is no incapacity to test, there is such weakness or pliability as exposes the testator to improper practices or solicitations by interested parties. The facility may be due to natural disposition, or to old age or ill health. It is not itself fatal to the Will; but if in addition, either fraud or circumvention has been used to impetrate the Will, it shall be reduced.”

To succeed, you must show:-

1. That the testator was facile - you are deemed to be facile if your mind is so weak that you are unlikely to resist pressure applied by another; and
2. That the testator was easily imposed upon
3. That the testator was actually imposed upon /pressured to make a new Will by circumvention or fraud.

There is no need to show that any harm has been caused. The very fact that the new Will has been made in such circumstances is sufficient.

Circumvention = the pressure exerted on someone who is of weak mind.

# Review of recent Case Law

## Capacity

### *Stewart v Franks* [2013] CSOH 63

- Action concerned the estate of the late Alfred Stewart
- Successful property developer and wealthy business man

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# Building tycoon Alfred Stewart cuts kids out of £7 million will days before his death

00:00, 4 JAN 2009 | [UPDATED 11:55, 1 JUL 2012](#) | BY RAYMOND HAINEY

A BUILDING tycoon axed his daughters from his £7million will days before he died.



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A BUILDING tycoon axed his daughters from his s7million will days before he died.

Alfred Stewart, 71, planned to leave Leonie, 40, and Linden, 42, each more than s1million worth of property.



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# *Stewart v Franks* [2013] CSOH 63

- Action raised by Mr Stewart's children
- Reduction of Will sought on grounds of incapacity
- Pursuers alleged that a longstanding personality disorder rendered Mr Stewart incapable of understanding the nature of his instructions
- Suggestions of domestic violence towards his first wife; abusive and insulting letters to his children; improper sexual conduct towards his step daughter and granddaughter; accusations of poisoning; examples of the testator taking a psychic advisor to meetings
- Witnesses for the defence – “astute and able businessman” – all said that in their view Mr Stewart had capacity

In relation to delusions passage from Gloag and Henderson (13th Edition, page 991) agreed to be an accurate statement of the law

*“Where there is no general incapacity on the part of the testator but merely delusions, it must appear that these delusions influence the dispositions made in the Will in order to deprive them of effect”*

Lord Strachan stated

1. Sexual dis-inhibition – “He seems to have been sexually predatory, selfish and careless for the feelings and wellbeing of others. That is however, irrelevant so far as the present action is concerned...The behaviour described may be repugnant, but it does not in my view shed light on the testator's capacity...”
2. Poisoning – such concerns cannot be properly characterised as delusional.
3. Psychic/Faith healer – while conventionally regarded as odd, it could not be construed as delusional.

Court held that Mr Stewart did suffer from a paranoid personality disorder.

Lord Strachan (at page 55) stated:

*“The critical question is therefore whether that disorder was at times of such intensity that it effected the testator’s mind in such a way as to deprive him of testamentary capacity...I am not satisfied that the pursuers have established that there were periods when the testator’s paranoid personality disorder was of such delusional intensity as to deprive him of testamentary capacity. Whilst the testator was, on the basis of all evidence I have heard, clearly a driven man and capable of ruthless and even harsh behaviour...the evidence does not suggest that the behaviour was as a result of delusional thoughts.”*

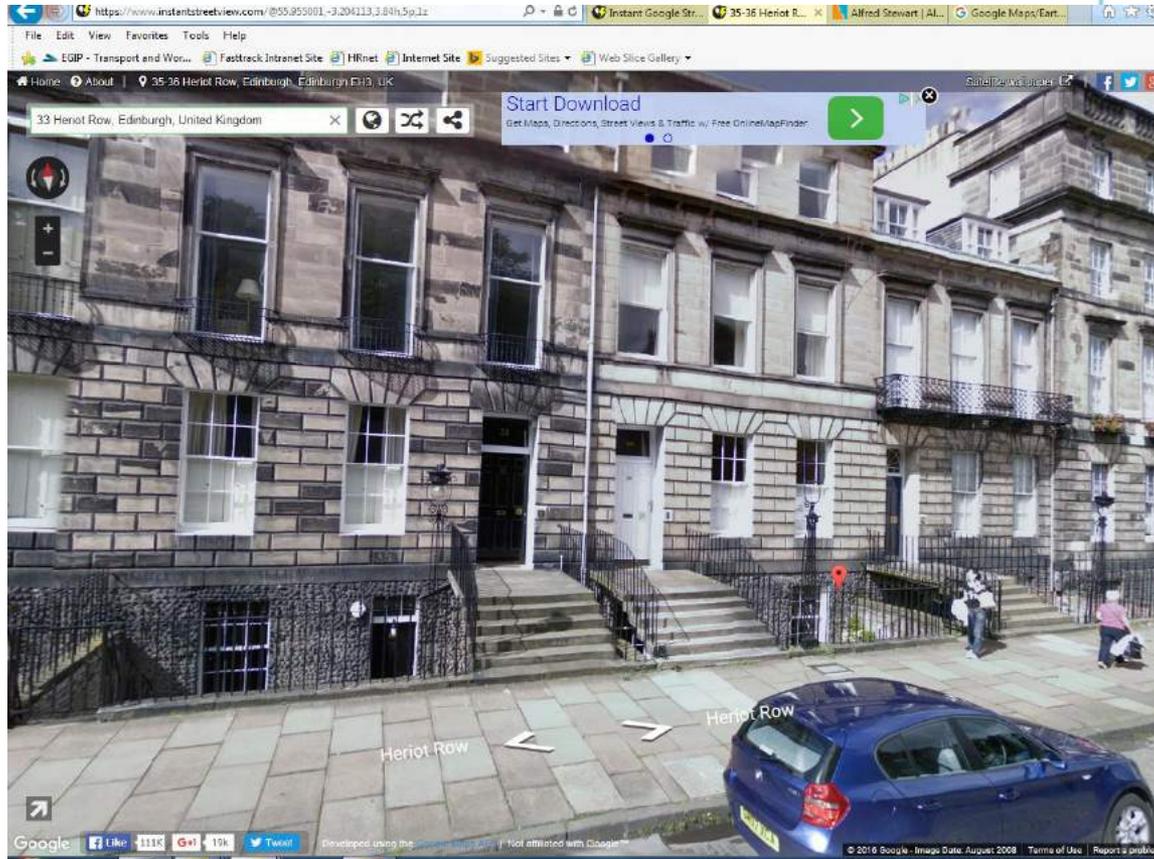
## *Burns v Burns* [2016] EWCA CIV 27

- Elderly lady had the requisite testamentary capacity and knew and approved the contents of her Will, despite showing signs of mental impairment at the time
- Medical evidence – poorly orientated as to where she was in time and place, had poor recall ... and ... had problems with analysis and simple task planning
- Judge entitled to pronounce in favour of the Will / appeal dismissed
- Reference to the “Golden Rule”

## Undue influence/ facility and circumvention

### *Smyth v Rafferty* [2014] CSOH 150

- Deceased had terminal cancer and significantly changed her Will just two weeks prior to her death.
- The pursuer (the deceased's sister) sought production and reduction of the new Will and previous codicil on the grounds of (1) lack of testamentary capacity (2) undue influence and/or (3) facility and circumvention.



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- Testator in extreme pain and on a lot of medication during the relevant period
- there was certainly potential for her to be incapacitated at points, she was not necessarily be incapacitated at all points.
- Solicitor did not observe anything which caused her to doubt the testators capacity
- Entirely clear in her intentions
- Testator in pain and discomfort but did not appear to affect her reasoning
- Lord Glennie concluded that she had full capacity at all material times. No facility and circumvention or undue influence

## *Matossian v Matossian* [2016] CSOH 21

- Action of reduction of prior disposition, not Will
- Elderly lady, medical problems
- Dispositions for transfer of properties to two of her three sons – April 2007
- Deeds drawn up by solicitor on instruction of son
- Executed at son's home in presence of solicitor
- No independent legal advice
- Wills executed in May 2007 – making different arrangements for the properties

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# Breach of Trust

1. Breach of Fiduciary duties
2. *Intra vires* acts – occurs where trustees have the power to do what they have done but have exercised that power negligently
3. *Ultra vires* acts – occurs where the trustees act outwith their powers

## Breach of Trust

- Personal liability of trustees
- Some transactions may also be voidable at the instance of beneficiaries

## Section 2(1) of the Trusts (Scotland) Act 1961 provides

*“Where, after the commencement of this Act, the trustees under any trust enter into a transaction with any person (in this section referred to as “the second party”), being a transaction under which the trustees purport to do in relation to the trust estate or any part thereof an act of any of the descriptions specified in [\[paragraphs \(a\) to \(eb\) of subsection \(1\) of section four\]](#) of the Act of 1921 (which empowers trustees to do certain acts where such acts are not at variance with the terms or purposes of the trust) the validity of the transaction and of any title acquired by the second party under the transaction shall not be challengeable by the second party or any other person on the ground that the act in question is at variance with the terms or purposes of the trust..”*

- Section 4 of the 1921 Act sets out the general powers of trustees and includes the power :
  - a) To sell the trust estate or any part thereof, heritable as well as moveable.
  - b) To grant leases of any duration (including mineral leases) of the heritable estate or any part thereof and to remove tenants.
  - c) To borrow money on the security of the trust estate or any part thereof, heritable as well as moveable.

## Actions of rectification

- Application to the Court to have a document rectified where the document does not reflect the intention of the grantor at the date of execution.
- Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 – Sections 8 and 9
- Currently not possible to seek rectification of a Will – position set to change shortly

## The Succession (Scotland) Bill

- Sections 3 and 4 allow the court to rectify a Will where it is satisfied that it does not accurately reflect the testator's wishes.
- This will apply where:-
  1. a person dies domiciled in Scotland leaving a Will;
  2. the Will was drafted not by the testator but on the testator's instructions;
  3. an application is made after the deceased's death to rectify the Will;
  4. the court is satisfied that the Will fails to express accurately what was instructed
- Application to Court of Session or relevant Sheriff Court

## Legal Rights

- Contentious issues arising in practice
- Succession Consultation
- Law Society Guidance

## Contentious issues arising in practice

- What interest rate should apply?
- What is moveable?
  - Partnership interests
  - Succession rights
  - Sale of an asset - *Turner v Turner* [2012] CSOH 41

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# Contentious issues arising in practice

## Date of Valuation?

- Russell v Attorney General 1977 SC 28
- Alexander v Alexander Trs 1954 SC 436

## What information should be supplied?

- Walker v Orr's Trs 1958 SLT 220

## Succession Consultation

- Legal Share - 25% of what the claimant would have received on intestacy
- dependent children only / capital sum?
- What are people's views? Did they respond to the consultation?

## Guidance issued by the Law Society of Scotland on Legal Rights

- Guidance was issued following the Scottish Solicitors' Discipline Tribunal's findings in *The Law Society of Scotland v David Hadow Campbell* (11 March 2013).

The rules:-

1. Executors must inform potential claimants of the scope for claiming the legal rights vested in them.
2. While the residuary beneficiary is entitled to information in relation to fees (Rule B4) and is of course entitled to final accounts, they are not the client and may not instruct the solicitor-executor to refrain from informing potential claimants of their entitlement.

3. The solicitor-executor must advise any other executors as to their duties in relation to legal rights. If, despite that advice, a majority of the executors resolve not to inform potential claimants the solicitor-executor should:
- dissent from the decision and ensure his or her dissent is properly recorded and intimated in writing to all the other executors to include a declaration that the decision of the majority of the executors is contrary to the legal position; and
  - then immediately resign as executor to avoid being taken to acquiesce in the decision that potential claimants are not informed.

“Only by taking these actions can the solicitor-executor avoid breaching the duties of an executor and potential personal liability. In addition, obtaining an indemnity from the other executors in relation to such personal liability might be considered.”

4. a solicitor-executor in this position as a minority and who resigns as executor, is under no obligation to inform those who are entitled to claim legal rights in the estate of this entitlement per the Law Society Guidance (although authority in this area is unclear).
5. a solicitor-executor having held office as executor but who has resigned as executor in such circumstances must also cease (personally or via the firm or trust company) to act as law agent for the remaining executors. The logic being that the executor is aware that a breach is in contemplation, and cannot acquiesce it.

6. Where a solicitor acts only as law agent to the executors he or she must inform them of their duties in relation to legal rights and their potential personal liability. Despite that advice the executors may nevertheless instruct the law agent not to inform potential claimants. It is essential to get such instructions in writing. It is suggested that in such a situation, they should resign from acting.

## Lost Wills / Proving the tenor of a Will

- Previously actions had to be raised in the Court of Session – Sheriff Court now also has jurisdiction
- Pursuer – any party with an interest in the lost Will
- Defenders – need to call any party having an interest in the lost Will

## Lost Wills / Proving the tenor of a Will

Summons /Writ needs to set out:-

1. Terms of the Will and the circumstances of execution
2. The existence of “adminicles of evidence” – any documents which establish content of Will (eg draft, photocopy etc) – and all such documents lodged with the Court
3. The circumstances of the loss of the Will and steps taken to search for the document

## Lost Wills / Proving the tenor of a Will

- If action not defended – evidence normally given by sworn affidavit
- Move the court to grant decree – declarator that terms of Will are as set out
- Decree has same effect as original document

## Lost Wills / Proving the tenor of a Will

Practice points / tips:

- Good records
- Meeting notes
- Receipts
- Recorded delivery

## Removal of Executor/Trustee

Section 23 Trusts (Scotland) Act 1921 – insanity, incapacity and continuous absence

*Nobile officium* –

*MacGilchrist's Trustees v MacGilchrist* 1930 SC 635

- Petition for removal of trustee (also beneficiary) by remaining trustees
- Allegations of neglect of duties and obstruction of trust business
- No adequate explanation provided for conduct of defender
- Order for removal of trustee granted

## SLC Trust Law Consultation and Draft Bill

### Removal of trustee by the Court (Section 6)

If the court is satisfied that the trustee:

- (a) is unfit to carry out the duties of a trustee;
- (b) purports to carry out those duties but does so in a way that is inconsistent with or might be inconsistent with a trustee's fiduciary duty;
- (c) has neglected his or her duties as a trustee;
- (d) is incapable; or
- (e) is untraceable (reasonable and proportionate efforts should be made)

## Removal of trustee by co-trustee (section 7)

A majority of the remaining trustees should be able to remove a trustee who is

- (a) incapable;
- (b) untraceable;
- (c) convicted of an offence involving dishonesty;
- (d) sentenced to imprisonment.

## Removal by beneficiaries (section 8)

## Final thoughts ....

- Caveats – advance notice of applications for interim orders
- Seeking early litigation advice

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