RFPG

Estate Planning by Interveners

In the course of this Seminar, I will be considering recent (some perhaps not so recent) and very important developments in relation to how far our law has moved inter alia in relation to what is, in essence estate and financial planning effected by Interveners acting under the Adults with Incapacity (Scotland) Act 2000.

I think my first point is to remind you all of the Guiding Principles which are set out in Section 1 of the 2000 Act and which are intended to guide and instruct the actings of any Intervener under the 2000 Act. I think that the Guiding Principles are reasonably well known but for the sake of completeness I would precis the same as follows:-

Principle 1

Any action or decision taken must benefit the adult and only be taken when that benefit cannot be reasonably achieved without it.

Principle 2

Any action or decision taken should be the minimum necessary to achieve the purpose; it should be the option that restricts the person's freedom as little as possible.

Principle 3

In deciding if an action or decision is to be made, and what that should be, account shall be taken of the present and past wishes and feelings of the adult, as far as they can be ascertained. The person should be offered appropriate assistance to communicate his or her views.

["*It should be noted that in the Code of Practice issued by the Scottish Government in respect of actings of a Continuing & Welfare Attorney it states that "it is compulsory to take account of the present and past wishes and feelings of the adult if these can be ascertained by any means whatsoever"*].

Principle 4

In deciding if an action or decision is to be made and what that should be, account shall be taken of the views of the nearest relative and the primary carer of the adult, the adult's named person, any Guardian or Attorney with powers relating to the proposed intervention, any person whom the Sheriff has directed should be consulted, any other person appearing to have an interest in the welfare of the adult or the proposed action where these views have been made known to the person responsible – in so far as it is reasonable and practicable to do so.

Principle 5

Any Guardian, Continuing Attorney, Welfare Attorney or Manager of an establishment exercising functions under this Act shall in so far as it is reasonable and practicable to do so encourage the adult to exercise whatever skills he or she has concerning property, financial affairs or personal welfare as the case may be and to develop such skills.

In the course of today's Seminar I hope to address the following matters:-

1. Are there any limits on the power of an Intervener under the 2000 Act to carry out Estate planning?

2. What might the Courts tolerate – and what might they not accept?

3. How do you ensure that Estate planning carried out by an Intervener complies with the Intervener's duties under the 2000 Act?

4. What is the view of HMRC in relation to Estate planning by an Intervener?

I commence with important Intervention Order and Financial guardianship cases

Recent (and not so recent) Case Law

Much of the recent case law under the Adults with Incapacity (Scotland) Act 2000 has arisen from the now retired Sheriff Baird at Glasgow Sheriff Court.

In a series of cases, the now retired Sheriff Baird indicated himself willing to grant Intervention or Guardianship Orders in relation to what frankly amounted to estate and Will planning. Initially, I

wondered if Sheriffs in other jurisdictions might not be prepared to follow Sheriff Baird's view of matters. However, it does appear that, for the most part (leaving aside the now infamous NW case) other Sheriffs have been prepared to follow his lead. I for one believe that Sheriff Baird did great service to the development of our law in the area of adults with Incapacity.

If we take as a starting point the case of **B Applicant 2005 SLT (Sheriff Court) 95**,

Sheriff Baird authorised the intervener to take steps on behalf of an incapax widow to secure compensation in respect of an action which had been commenced by her late husband prior to his death. This included authorising the intervener to apply for appointment as Executor dative in order to secure the right to obtain the element of solatium due to the deceased's estate, to which the widow would fall to be entitled as the beneficiary on intestacy. Sheriff Baird took the view that the 2000 Act was entirely apt for the latter authority to be granted.

Moving on, in the case of **HT Applicant 2005 SLT (Sheriff Court) 97**, Sheriff Baird authorised the granting of a Codicil to put right what appeared to be a possible unfair and unforeseen circumstance arising from the adult's Will (see below).

Perhaps the most interesting aspect of the HT Applicant case was the Sheriff's view of "benefit" – to be applied in relation to Guiding Principle 1 under the 2000 Act. A close reading of the HT Applicant case is of worth. The Sheriff indicated that there would be benefit in the previously expressed intention of the adult being put into effect. However, over and above this, he pointed out that the granting of the Codicil sought would free "capital which can be used for the benefit of the adult in the meantime". Some doubt was expressed by some observers as to whether or not the Sheriff's decision could be regarded as authority for the proposition that the "benefit" test will be met if it can be shown that the granting of the relevant Intervention Order would comply with the previously expressed wishes of the adult. There was initially some suggestion that the benefit test required something more than this. However, there is no doubt but that Sheriff Baird took the view that "benefit", in relation to the use of that term in the 2000 Act, was not intended to be restricted to a simple narrow financial benefit. His view now seems to be generally accepted and was repeated by him in later cases (see below).

In delivering his decision, the Sheriff stated that:-

> "The OPG pointed to the ruling provision of Section 1(2) of the Act to the effect that no intervention in the affairs of an adult shall be authorised unless (the Court) is satisfied that

the intervention "will benefit the adult" and it was suggested that the proposed intervention here would not benefit the adult".

That seems to me, with respect, to place an unduly restricted meaning on the word "benefit". While it may be that this intervention will not be to the direct financial benefit of the adult (in the sense that the proceeds would not come to her directly; she has already authorised the selling of the house and the potential investment of the proceeds in the Power of Attorney), they at least will be available to be used for her benefit in her remaining years, whereas at the moment there are, effectively, no such assets. But the Act does not specify that the only measure of "benefit" is direct financial benefit and other interventions have been granted which are not of direct financial benefit to the adult.

I recognise that the nature of the "benefit" here, for the adult, is to allow the regulation of her affairs in accordance with her previously stated wishes and that I must then be satisfied that such a step would "benefit" the adult even although she may have lost the capacity to know, understand or appreciate what is being done. I am quite certain that there have been many interventions which I have authorised which, when looked at objectively, are clearly to the benefit of the adults involved, even though they may have lost the capacity to appreciate that."

I have to say that I was surprised at the comments of the OPG in relation to this particular case given that, in my view, the OPG had previously expressed a diametrically opposite view in relation to the question of gifting by an Attorney. I appreciate that in that particular case, the circumstances were somewhat different, the Power of Attorney having been fully authorised to gift for IHT mitigation by the Attorney.

We move on now to another very interesting decision by Sheriff Baird – **M Applicant 2007 SLT (Sheriff Court) 24.**

In this particular case, the adult granted in favour of two of his sons a Power of Attorney containing a full range of powers – there was, however, no specific power to renounce an interest in the estate of a third party. The adult's wife had granted a Will in August 2000 appointing her two sons and a daughter as her beneficiaries. The Sheriff accepted that the mother had taken the view that she would survive the father and she therefore made no provision whatsoever in his favour in her Will. She left her whole Estate equally between her three adult children. However, she did predecease the father who by that time was incapax. He was unable to claim or to discharge his entitlement to legal rights. The three adult children sought an Intervention

Order to allow discharge of the father's legal rights. By that time, the adult was resident in a Care Home and was self-financing. However, evidence was led that notwithstanding this, his estate was increasing rather than decreasing. It was argued that there was no need for his estate to be increased by the addition thereto of a legal rights entitlement. The Applicants averred that the father would derive no benefit by claiming the entitlement in question.

One of the interesting points of this case (as with the HT Case) was that there was a clear conflict of interest between the Applicants and the adult. The Sheriff was sufficiently concerned that he ordered intimation on the Lord Advocate (it is understood that the Lord Advocate did not respond in any way).

The Sheriff, however, took the view that the application should be granted. The adult had no need for the money and it would appear that the Sheriff was persuaded that had the adult been capax, he would have elected to discharge his entitlement.

I turn now to another important decision of Sheriff John Baird – **JG Applicant 2009 SLT (Sheriff Court) 122.**

In that case, Sheriff Baird authorised the execution of a new Will on behalf of the incapax adult – using the existing but defective Will as the template for the new Will.

I turn now to another case – but not from Glasgow Sheriff Court. The case is **B's Guardian, Minuter (also known as Morton Minuter or Morton v. Bruce) 2010 WL 2937509**.

This was a Decision by Sheriff William Holligan in Edinburgh Sheriff Court.

The Financial Guardian for an incapax adult had applied for a Minute for Directions under Section 3(3) of the Adults with Incapacity (Scotland) Act 2000. The incapax Adult was the widow of an individual who had died on 6 April 2010. In terms of the deceased's Will dated 4 May 1985, the deceased appointed the Adult to be sole Executor and sole beneficiary. However, the incapax widow had lost capacity. Her Guardian wished to petition seeking his appointment as Executor Dative in respect of the husband's Estate. He also lodged a Minute for Directions under Section 3(3) of the 2000 Act. In the Minute for Directions, the Guardian had raised certain questions.

The first question raised was whether the Guardian had power to present an Application seeking the appointment of Executor Dative. In terms of the Interlocutor appointing the Guardian, he was granted power "to raise or defend…any actions or judicial or other proceedings in which the Adult

may be interested so far as they (sic) may consider necessary or expedient. In Sheriff Holligan's opinion, the power conferred upon the Guardian was broad enough to extend to the presentation of an application to seek appointment as Executor Dative. The powers granted to the Guardian were wide enough and as universal legatory, the incapax Adult had the necessary interest. Sheriff Holligan also expressed the view that, in future, when considering the drafting of such powers, it might be useful to make express reference to commissary proceedings so as to put the matter beyond doubt.

The second question was whether or not, give the function conferred upon the Guardian, it was necessary for him to apply to be appointed as Executor Dative as Guardian of the Adult in respect of the Estate of the Adult's deceased husband. Again Sheriff Holligan took the view that the answer to that question was "yes".

The third question was whether or not the Guardian could lodge an Inventory seeking Confirmation without also seeking appointment as Executor Dative. Sheriff Holligan took the view that in consideration of the necessary Authorities (including Currie on Confirmation), the matter was "less than clear". Sheriff Holligan took the view that the Guardian could not act in such a fashion as

> "the Adult was nominated personally by her late husband to be his Executor. It would seem an odd situation for the Guardian to attempt to substitute himself as Executor Nominate".

Sheriff Holligan took the view that the Guardian could not seek to substitute himself as Executor Nominate to the Adult's deceased husband.

Sheriff Holligan stated

> "In my opinion, the correct procedure for the Guardian is to apply to be appointed Executor Dative and not to proceed without doing so".

The case of **BH Applicant 2011 SLT (Sheriff Court) 178** is another example of the inter-relationship between an adult's existing will and the 2000 Act. This involved a Financial Guardian who wished power to sell the adult's dwellinghouse – however, there was a specific bequest of the property in the adult's will. Sheriff Baird required that the specific legatee should be allowed an opportunity to be represented. However on the basis of the notes taken by the Solicitor who

had prepared the will, the Sheriff decided not to adopt the stance he had taken in the HT Application – although he had been invited to do so by the agents for the specific legatee.

The **Application by the Financial Guardian of P – Glasgow Sheriff Court 23 November 2012 (AW310/12) see also 2012 GWD 39-771.**

P was an old lady who had developed dementia and in November 2011 Sheriff Baird had appointed one of her Nieces to be Financial Guardian. In 2012, the Financial Guardian returned to Court making two Applications. The first of these was fairly straightforward and was granted – the sale of P's dwellinghouse as P had gone into care. However, the second Application proved to be extremely controversial. P had a sister N who was already in care. The evidence submitted showed that P had supported her sister for some time. P owned a one half share of N's dwellinghouse. On 6 March 2009, P had made a Will in terms of which she had bequeathed her one half share in N's house to N. She had also left a pecuniary legacy of £50,000 to her sister. The second Application brought by P's Financial Guardian was to give authority to alter, amend or draft a Will. Specifically, P's Financial Guardian sought authority to take steps to revoke the pecuniary legacy in favour of N. There was a survivorship destination in the title to N's dwellinghouse. The Financial Guardian stated that she had already evacuated the survivorship destination and thereafter wished to redirect P's share in N's dwellinghouse. The residuary beneficiaries under P's Will were her nephews and nieces (including the Financial Guardian – who was to receive 30% of the residue).

Whilst Sheriff Baird regarded the first Application as uncontroversial, he appears to have taken serious exception to the second Application.

In support of the second Application, a Report from an independent solicitor had been lodged. That Report stated, in relation to how the proposed Order would benefit the Adult:-

> "The Adult will benefit as it is believed that if the Adult had not been incapable of managing her own affairs that she would have wished to have steps taken proposed to preserve the assets of the family and to pass on to her beneficiaries without risk of the funds being dissipated…unless the Order is made, the status quo shall prevail and if the Adult passes away, the subjects will pass to N and may be dissipated in care costs".

In his Opinion, Sheriff Baird stated that he "noted with considerable concern the use, twice, of the word "dissipated" in connection with the need to pay care costs for N".

Sheriff Baird made it clear that he did not regard payment of care costs as dissipation of assets. In fact, he regarded the averment that the bequest would be lost to P's family as "pretty breathtaking". As Sheriff Baird observed:-

> "….. the only benefit being talked about there is benefit to the family and pays no heed to the stated intent to P as recently as 2009, or to the benefit which N would derive if she inherited such assets".

Sheriff Baird reiterated that in his view the benefit was not simply to be judged in financial terms. He stated:-

> "Benefit need not be tangible; assuring peace of mind can constitute benefit".

Sheriff Baird was highly critical of the Financial Guardian. He did not believe that there was any satisfactory evidence that P's present wishes were as stated by the Financial Guardian and in fact (quite rightly in my view) indicated that the clearest indication of P's past and present known wishes, were her Will made in March 2009. Quite clearly, Sheriff Baird regarded the Application as being for the benefit of P's family, not for P nor her sister, N.

P's Financial Guardian had suggested that it had been intended that the bequest of £50,000 should be placed into a form of Discretionary Trust managed by a Financial Guardian and her solicitor. It would not form part of N's assets although "the Trustees might approve the use of some money for the benefit of N". Sheriff Baird indicated that it seemed to him to be completely clear that "the whole purpose of this is to remove a substantial sum from the available assets, in order to preserve it for the benefit of all the remaining beneficiaries, of course to include the Applicant and her sister, the proposed Trustees.

Sheriff Baird rejected the second Application. He clearly had difficulties with an Application which was intended to preserve an individual's estate and perhaps leave the Local Authority with an additional burden by way of care costs.

He was also highly critical of the obvious conflict of interest on the part of P's Financial Guardian.

However, in the applications in respect of **JM and Mrs. JM (www.scotcourts.gov.uk/opinions/aw426/12and427/12) 25 January 2013 see also 2013**

GWD 06-154, Sheriff Baird took the view that the alteration of the financial affairs of living adults, about to enter care, was in those associated cases, entirely justified.

Mr. & Mrs. M were an old couple who had been married for 62 years. In 1997, with financial assistance from one of their sons (the Second Applicant), they were enabled to purchase the dwellinghouse of which they had been tenants from the local Housing Association. Mr. & Mrs. M at that time were living only on their Pensions and they did not have either the capital to purchase the property (even taking into account a very substantial discount) or the income to service the loan which would require to be taken out to fund its purchase.

The son in question had stepped forward and had assumed responsibility for obtaining and making payment of the loan. Although originally taken out on an interest only basis, it was clear that not only had the son paid all fees and outlays in connection with the original transaction but since 1997 he had paid all common repair costs, ground maintenance charges, management fees, annual insurance premiums and moreover, had made payments towards the capital sum outstanding. At the time of the application, the sum due to him was approximately £23,000.

Although a Minute of Agreement had been entered into in 1997, one step (in the view of the Sheriff) had been omitted – the granting of a security in favour of the son in question. As so often happens, the old couple had lost capacity and both required to go into care. Although the old couple had put in place Wills whilst still capax, leaving the house to the son in question on second death, the likelihood was that this would be superseded by their loss of capacity. The Sheriff recognised that both now probably required nursing or care home accommodation "and that means fees will be exigible. The only way to realise the monies to pay these is by sale of the house".

The application to allow a Standard Security in favour of the son in question was supported by his co-applicant and his other two siblings. There was no contradictor. Sheriff Baird stated:-

> "It is completely clear to me that in the circumstances of this case, both adults would have wanted the position of their son, the Second Applicant, to be protected and would have signed the proposed document if it had been recommended to them at the time. It is completely clear to me that if they were aware that such a step was being proposed now, it would be to their benefit, not least for the simple piece of mind it would give them, to take it themselves. Since, sadly they cannot do that themselves, I am quite satisfied that I should authorise that it be taken on their behalf, complying as it does with the provisions of Section 1(3) of the Act."

It seems fair to suggest that in granting the Order in the case of Mr. & Mrs. M, the Sheriff accepted that (at least to the extent of £23,000) there might be an effect on the public purse – by allowing the granting of the Standard Security, the Sheriff was effectively "ring fencing" the sum of £23,000 which could not otherwise be utilised in defraying Care costs. Sheriff Baird obviously considered that there was nothing improper in allowing that step to be taken, given that he was satisfied that it would have complied with the past and present known wishes of both parents.

Sheriff Baird further refined his position in this area in the case of **Application on behalf of MH – www.scotcourts.gov.uk/opinions/AW399_12 - 28 Feb 2013 - see also 2013 GWD 11-239.** In the latter case, he also indicated why he was prepared to differentiate this case from that of the Application on behalf of P's Financial Guardian. The MH case involved an Application for appointment of a Welfare Guardian and an intervener under Section 53 of the 2000 Act.

As I have indicated, the law is moving on here apace. The views which we held a few years ago may no longer be entirely sound and unless we test these against the provisions of the relevant legislation, we may find that we are the subject of some criticism.

Although some have criticised some of Sheriff Baird decisions under the 2000 Act as a step too far, they are "out there". We will need to consider them when consulted on difficult questions on the inter-relationship between an incapax adult's will and the funding of their care home costs etc. For my own part, I strongly agree with the standpoint adopted by Sheriff Baird.

Can an Intervener make a Will for an incapax adult?

Paisley Sheriff Court features in two cases.

In the case of M Paisley Sheriff Court 2009, the Sheriff granted an order to allow a Will to be made for an incapax person. The Will left the adult's estate to charities – but there was evidence that the adult had indicated an intention a Will to make just such a will whilst still retaining capacity.

In a more recent case in Paisley Sheriff Court, Adrian Ward sought authority by means of an Intervention Order to sign a Will on behalf of a client. The client suffered from a mental disorder – although the client was able to instruct exactly what he wished in his Will he was unable to bring himself to sign the document – an essential feature for any Scottish Will. At first instance, the Sheriff rejected Adrian Ward's Application.

Adrian Ward appealed to the Sheriff Principal. Sheriff Principal gave his decision on 17 December 2013 (**Paisley Sheriff Court AW/35/13: Ward Appellant 2014 SLT (Sh Ct) 15**).

In deciding the matter, the Sheriff Principal stated:-

> "The matter has to be viewed, I think, in the context of the Scots Law of Succession. **Permitting someone other than the testator himself to execute a Will for him would be regarded by most Scots lawyers, correctly in my view, as a large and substantial step into a new era**. (Note: my emphasis, and refers to my above comments) **It is therefore important that there should be adequate safeguards and in the end it is the Court that has to be the keeper of those safeguards**. It therefore seems to me necessary to stipulate that before granting such a power the Court must be satisfied that the WI person had testamentary capacity at the time of expressing his views ("wishes and feelings" in the wording of the Act) as to who should inherit his Estate on his death and that his expression of such views amounted to a declaration of testamentary intention. The Act in Section 1(4)(a) speaks of "present and past wishes and feelings" and to meet this wording in the context of making a Will it is my opinion necessary that the Court should also be satisfied that at the time of its decision to grant such a power to execute a Will the views and testamentary intentions of the WI person remained the same as before, whether or not he then retained a testamentary capacity.
>
> The foregoing opinion expressed by me runs counter to the first submission advanced by the Pursuer (Adrian Ward) as set out in his first ground of appeal. That submission was to the effect that it was unnecessary to consider whether the WI adult had capacity to instruct the preparation of a Will because Section 1(4)(a) of the 2000 Act on a proper interpretation required only that the WI person should have expressed some wishes and feelings concerning the disposal of his Estate on his death for it to be open to the Court to make an Intervention Order authorising the preparation and execution of a Will to that effect on his behalf. It was submitted that, even if the WI person never had capacity to make a Will, the Act seeks to supply the means to make good that deficiency. With this submission I do not agree."

The Sheriff Principal was somewhat critical of the original Sheriff's decision but the views of the Sheriff Principal might be summarised as follows:-

1. An Intervention Order authorising execution on behalf of a WI person of a Will may competently be granted by the Court under the Adults with Incapacity Act 2000 in appropriate circumstances.

2. The Sheriff was correct in thinking that he could not proceed to grant such an Intervention Order solely by reference to the principles set forth in Section 1 of the said Act but that he had to consider also whether or not the WI adult had capacity to give instructions regarding the preparation of a Will.

3. The Sheriff was incorrect in determining the question before him solely (or almost solely) by reference to an oral submission made to him by a Mental Health Officer at the Bar of Court (whom Adrian Ward was not allowed to cross-examine).

4. In order to justify the granting of an Intervention Order such as that sought here by the Pursuer, the Court has to be satisfied on appropriate evidence that the WI adult had testamentary capacity when he expressed a testamentary intention which remains the same at the time of granting that order.

The Sheriff Principal remitted the case back to the Sheriff for further consideration in the light of the former's Opinion. The case did not proceed further.

Powers of Attorney

An interesting case in relation to Powers of Attorney which is generally reasonably well known now is that of:-

McDowall's Executors –v- IRC (2004) WTLR 221

This case involved gifting by an Attorney. The gifting was challenged by HMRC on the basis that the Power of Attorney did not authorise the same. HMRC won. This highlights an

important point which I will touch upon later in this Seminar – the importance of ensuring that when you draft a Power of Attorney, suitable and full powers are made available to the Attorney to carry out (hopefully without challenge) steps which the Attorney believes should be taken on behalf of the adult and in conformity with the Guiding Principles under the Adults with Incapacity (Scotland) Act 2000.

Another important decision involved a Power of Attorney but again was decided by Sheriff John Baird at Glasgow. This was the case of the **Application by The Public Guardian for Directions www.scotcourts.gov.uk/opinions/AW267_09. (7 July 2009)**

What happened in that case? An elderly lady had appointed her Solicitor as her Attorney. However, she subsequently sought to revoke the Power of Attorney in favour of her Solicitor, appointing another third party as Attorney. The Solicitor in question objected to the revocation of the Power of Attorney in her favour to the OPG. The Solicitor submitted evidence to the OPG that the old lady had lost capacity and could therefore not validly instruct either the revocation of the existing Power of Attorney in favour of the Solicitor or indeed a wholly new Power of Attorney.

The Public Guardian appeared to be persuaded that there was some doubt regarding the old lady's capacity and therefore for the first time sought a direction from the Sheriff Court in terms of Section 3(3) of the 2000 Act.

Having heard evidence, Sheriff John Baird was satisfied that the old lady did not have capacity to revoke the existing Power of Attorney or grant a new one and therefore directed the Public Guardian not to proceed to register either the Notice of Revocation or the new Power of Attorney. Sheriff Baird, although not calling into question the good faith of the Solicitor who had prepared the Notice of Revocation and the new Power of Attorney, was critical of the Solicitor, commenting that she had not made sufficient enquiry of and into the old lady's capacity, particularly as the old lady was a wholly new client in so far as the Solicitor was concerned..

Another interesting Power of Attorney case was that of **The Executors of Thomas Ramage Watson –v- Isabella Watson & Another 2006 SCLR 121** – in that case, Sheriff McKay had no difficulty in holding that just as the adult could have held his Attorney to account so could the adult's Executors – standing in the shoes of the deceased (eadem personam cum defuncto).

In passing, can an Executor hold a former Financial Guardian to account? My answer to this point is "yes". In that connection, I would refer you to the comments of Lord Tyre in the case of

Turner v. Turner (2012) SLT. I would also refer you to Section 81 of the Adults with Incapacity (Scotland) Act 2000.

A Financial Guardian may have an argument that if he is being discharged (his Accounts having been approved by the OPG), he has no further obligation to account. However, I do not see why a Curator Bonis should be regarded as different from a Financial Guardian and, if Lord Tyre is right, then a Curator Bonis has the same obligation to account to an Executor as an Attorney. If the Financial Guardian, having been discharged, refuses to account, then I would suggest an Application by the Executor who obviously has an interest in the Estate of the Adult under Section 3(3) of the 2000 Act.

The 2000 Act dealt with the limitation of liability of an Attorney under Section 82. In terms of that section, a continuing or welfare Attorney would not incur any personal liability if he has:-

(a) acted reasonably and in good faith and in accordance with the general principles set out in Section 1; or

(b) Failed to act and the failure was reasonable and in good faith and in accordance with the said general principles.

The important point to note from Section 82 is that it refers specifically to a continuing or welfare Attorney.
by Section 82 of the 2000 Act.

Protection of Attorneys

The first point to bear in mind is that an Attorney has no powers other than those specifically granted in clear terms.

Goodall v. Bilsland 1909 1 SLT 376 IH (1st Div)

The Australian case of **Re Viertel [1996] QSC 66 (26 April1996)** amply demonstrated one of the dangers which Attorneys might increasingly face, although the position in Scotland was clarified to a large extent in 2012.

I am of course referring to decision of Lord Tyre in the case of **The Executor of Isabella Coutts Gordon v. Turner and Others 2012 CSOH 41**. In that connection, to give you a fuller picture of what occurred in that case, I would refer you to the copy of my Article "Powers and Attorney and Ademption of Specific bequests" which appeared in the Scots Law Times in 2012.

Reverting to the Australian case, Amy Viertel executed her will on 2 November 1982, appointing the Public Trustee as Executor and Trustee of Queensland under her will. The will remained in the Public Trustee's custody. In 1987 Amy required to go into care. On 19 April 1992 she appointed two friends, Mr & Mrs McCallum, to be her attorneys under an enduring power of attorney. Amy suffered a stroke in June 1993. In terms of the power of attorney the McCallums had power to sell Amy's home and although Amy had initially indicated that she did not wish her home to be sold, the attorneys decided to sell the property to enable care home costs to continue to be funded. The sale was completed, with the transfer being registered 25 July 1994.

Prior to selling the property Mrs McCallum had written to the Public Trustee, seeking advice as to what should be done with the property. She was told that the Public Trustee was not at liberty to disclose the contents of the will and that they, as attorneys, would have to decide for themselves whether or not to sell Amy's home. Following her stroke, by the time the sale was effected, Amy did not have capacity to manage her own affairs or amend her will.

The sale of the house was a bona fide action on the part of the attorneys to realise and preserve the proceeds of an asset no longer required, and was carried out in ignorance of the fact that they themselves were beneficiaries of this specific asset under the will or of the adverse effect the sale of the asset would have upon that bequest. This could not be considered disposal of an asset by Amy, the testatrix, or even a disposal of which she was aware and indeed it was probably one of which she would have disapproved had she had capacity to manage her own affairs.

The question which the court had to consider in this case was whether or not an ademption was effected when a sale is lawfully made by an attorney who is ignorant of the terms of the will, when the testator is likewise ignorant of the action of the attorney and when the intention of the testator to benefit the beneficiary has not changed or is not capable of being changed at that time.

In the Viertel case, Amy's will bequeathed her house together with furniture and effects to the Attorneys, the McCallums. The only other asset in the estate was a cash fund. It was decided that the Attorneys' entitlement under the will was not lost. It would have been preferable that a point of this importance was decided by a court of greater authority but there was no adverse party opposing the relief sought by the McCallums in the Viertel case.

It is interesting to note that there appears to be some uncertainty on the law on this question both in the United States and in Canada.

As noted in American Jurisprudence 2nd ed Vol80 para 1714

"There is a conflict of authority as to whether or not the guardian or conservator of an insane or incompetent testator may so deal with the subject matter of a specific devise or bequest as to work an ademption thereof……."

A similar division can be seen in Canada (compare **Re Dupont 91977) 79 DLR (3d) 754** with **Re Stevens (1946) 4 DLR 322, 330-331)**

In the U.S. case of **Re Estate of Pearl Swoyer, Deceased 439 NW 2d 823 (SD1989)** which had considerable similarities to the Viertel case, the Appeal Court held that where a testator becomes incompetent following execution of a will and a guardian sells property specifically bequeathed under the will, proceeds from the property remaining at the testator's death are not adeemed. The Court's final opinion was expressed as follows:-

" Where the Testator is competent and disposes of the subject of the gift, the gift is adeemed; where the Testator is incompetent and the subject of the gift is sold by a guardian with court approval the gift is only adeemed to the extent the proceeds are used for the care and maintenance of the ward. The only question of intention involved is the opportunity of the testator to change the will. This opportunity is denied the incompetent testator."

Interestingly, the consequences of an inadvertent ademption by an official such as the Public Trustee in Australia have been addressed by legislation . In Queensland for example, s 89 of the Public Trustee Act 1978 together with clause 15 of the Fifth Schedule to the Mental Health Act 1974 permits discretionary relief to be afforded to an injured party in such circumstances, There are similar provisions, again in Australia, under the Protected Estates Act 1983 s48. This issue has not been addressed with regard to the acts of an Attorney under a power of attorney. There is no similar legislation covering inadvertent ademption as a result of the exercise of a power of

attorney on behalf of a testator who has lost capacity. The existence of legislation of this kind has probably resulted in a reduction of the number of occasions when the courts would be able develop the historical exception to ademption by reason of conversion of a testator's property by a third party.

Until 2012, it appeared that the position adopted by the Australian Court in Viertel would not have found favour before a UK Court

Consider the English position, specifically the case of **Banks v National Westminster Bank plc [2005] All ER (D) 159.**

The Attorney in this case acted under an enduring Power of Attorney and sold property which was the subject of a specific bequest under the granter's will. It was held that in this case, the bequest did adeem. The reasoning of this decision went with the purely literal argument that if the property did not exist at the date of death, then the bequest must adeem rather than the "intention based" decision in Re Viertel.

Still looking at the English position, how might their experience assist an Attorney faced with the problems highlighted in the Re Viertel case? Clearly the Attorney must act in the best interests of the granter and if a property needs to be sold, then the argument of necessity can be brought to bear per the view of Lord Tyre. It is when the Attorney is faced with the choice of selling a property and selling say a share portfolio and the choice is not so obvious that surely the Attorney must be under an obligation to consider the terms of the granter's will and to consider the effect his actions would have on it (and the spectre of personal liability if the attorney makes the wrong choice. The will after all reflects the expressed wishes of the granter. In England, where an Attorney feels he must nevertheless sell the property, the Court of Protection may offer some assistance. If the sale is carried out following an order of the court or by a receiver appointed by the court, para 8 schedule 2 of the Mental Capacity Act 2005 will apply so as to prevent, as far as possible, the gift adeeming. Instead it will apply to the sale proceeds of sale to the extent that they are held by the estate at death. Alternatively, the Court can be asked to approve a statutory will, adjusting the terms of the will so as to preserve an equivalent interest for the Attorney.

It appears from the English Law Society "The Guide to Professional Conduct of Solicitors" that it is suggested that there may be circumstances where it would not be in the granter's best interests for disclosure of the granter's will to be divulged. Advice, it goes on to suggest, should be sought from Professional Ethics. From this guidance it would appear that the English Law Society is

unsure whether a solicitor is *obliged* to disclose the contents of will especially where this may lead to the attorney acting against the known wishes of the granter.

The benefits of the Attorney having knowledge of the testamentary intentions of the adult can be seen in the case briefly referred to above **Mrs. HT Application 2005 SLT (Sh Ct) 97.** Briefly, an elderly lady had in her will bequeathed her house to her surviving son, leaving the residue of her estate (which was relatively small) to the widow of her predeceasing son. She also appointed her surviving son as her Attorney. On loss by her of capacity, her son and Attorney was left with the task of making arrangements for payment of her care costs. He was aware of the terms of his mother's will and realised that, if as Attorney, he sold her house to fund her care costs, he could possibly adeem his specific bequest, leaving himself as a result with only a legal rights claim against his mother's estate.

He sought an Intervention Order from Glasgow Sheriff Court under Section 53 of The Adults with Incapacity (Scotland) Act 2000, to allow a Codicil to be made to his mother's will, effectively to ring fence for him and following her death the net proceeds on sale of the house which remained after funding of his mother's care costs. The Order was granted by Sheriff John Baird. Although this decision given by Sheriff Baird had been criticised in some quarters, the writer believes that the case was correctly decided and that the Sheriff, properly weighing all of the relevant issues, rightly took the view that allowing the Attorney to make a Codicil to his mother's Will would be in line not only with what the adult herself would have wanted but was also in the interest of the adult (applying a wide approach to the question of benefit)– thereby complying with respectively Guiding Principles 3 and 1 under the Adults with Incapacity (Scotland) Act 2000.

Increasingly, an Attorney may find himself in the position of requiring to take steps to fund the care costs of an adult who has lost capacity. Assume that the particular Power of Attorney contains no entitlement on the part of the Attorney to be informed as to the exact terms of the adult's testamentary instructions. The Solicitor holding the Will is not (as in the Viertel case) prepared to release any details as to the terms of the adult's Will on the basis that this would breach the adult's confidentiality. Confidentiality is of great importance to our practice. An Attorney himself is subject to the duty of confidentiality.

Article 4 of the Code of Conduct for Scottish Solicitors stated

"The observance of client confidentiality is a fundamental duty of solicitors. This duty applies not only to the solicitors but also to their partners and staff and the obligation is not terminated by passage of time."

Similarly confidentiality is a privilege which belongs to the client, not to the solicitor. Does it not follow from this that only the client can waive confidentiality?

What steps can be taken by the Attorney hereinbefore referred to?

The Code of Practice for Continuing and Welfare Attorneys (revised in April 2008 and March 2011) deals with this type of question (Paragraph 3.1). One suggestion might be that the Attorney might consider approaching the Law Society for assistance.

Even if the Law Society were in fact to recommend that details be released, the Solicitor in question may stand his ground and refuse any details to the Attorney. The Law Society has no power to enforce a breach of one of the rules which all solicitors should hold sacred. What then?

There are two suggestions here. The first (referred to in the Code of Practice) is that the Attorney should consider seeking an Intervention Order to secure release of the information. I suspect that even if a Solicitor refuses to release details of the Will on the basis of client confidentiality, the Solicitor may have a great degree of sympathy for the Attorney who is left with a difficult decision – does the Attorney blindly realise an asset which may be the subject of a specific bequest and hence run the risk that a disappointed beneficiary might seek to pursue the Attorney personally for taking the wrong decision from the beneficiary's point of view? However, even if a Sheriff can be persuaded to grant an Intervention Order for release of the information, even then the Solicitor might still argue (and with justification) that confidentiality still applied.

It is recognised that an exception to the obligation of confidentiality exists– countervailing public policy or interest. Might it be argued that it would not be in the public interest for the testamentary wishes of an individual to be frustrated by lack of knowledge on the part of an Attorney, coupled with strict adherence by the client's solicitor to the duty of confidentiality?

The second suggestion may in fact highlight a danger area if the firm of Solicitors holding the Will were also responsible for the drafting of the same. It is one also suggested by the Code of Practice – "…….. you should consider whether the party in question owes to the adult other duties in addition to the duty of confidentiality which may override the duty of confidentiality, and if so to explain this." (Para 3.2, page 26)

The **Holmes –v- Bank of Scotland (2002 SLT 544)** highlighted that, in certain circumstances, a Will draftsman could be liable to a disappointed beneficiary. Let us assume that the firm of Solicitors holding the Will were also responsible for the drafting of the same. The Will contains a specific bequest of a heritable property in favour of an individual, with the latter having no further interest in the deceased's Will or the deceased's Estate. The Solicitors in question refuse an approach for details as to the Will as there is no relevant power or entitlement in the Power of Attorney itself in favour of the Attorney making the request. They are made aware of the Attorney's dilemma. Lacking any information, despite having requested the same, the Attorney sells the dwellinghouse and effectively in the short term and as a practical matter negates the bequest.

If a Scottish Court were to find that the actions of the Attorney amounted to ademption, then the specific legatee has lost everything. In those circumstances, litigation against the Attorney by the disappointed beneficiary might ensue. However, might the disappointed specific legatee have yet another (and perhaps better) target – the Solicitor who refused to release details of the Will and thereby failed to protect the bequest in question? Would a Scottish Court extend the Holmes ratio to allow an attack on the Solicitor in question? This might well (and in my view would) be a step too far – after all, there has been no negligence in the drafting of the will itself – just how far does the duty of care of the draftsman extend? Is he obliged to "protect" the testamentary instructions of a client who has lost capacity? I do not believe that the duty of care should extend to the extent hereinbefore predicated. However, given that we are seeing widening parameters of attack by disappointed beneficiaries on Will draftsmen in England, it is not beyond the bounds of possibility that at the very least an action against the Solicitor will be raised by the disappointed beneficiary – what was considered to be too remote twenty years ago might now be held to be within the bounds of proximity and reasonableness. Is not the Holmes case an example of such a judicial change of standpoint?

Why put the Attorney through the above hoops? The message to draftsmen should be clear – include the power required in clear and specific terms in the Power of Attorney. Where it appears, the granter has clearly waived the privilege and right to confidentiality

What happens if, one way or another, the Attorney, acting for an adult who is now incapax, is aware that the dwellinghouse, being the prime target for realisation to pay care costs for the adult (particularly if the other assets of the adult's Estate are meager) is the subject of a specific bequest in the adult's Will? Is the Attorney still in danger if he nonetheless sells the dwellinghouse to fund the costs?

Section 82 of the 2000 Act provides that no liability shall be incurred by an Attorney or other intervenor for any breach of any duty of care or fiduciary duty provided that the Attorney etc acted reasonably, in good faith and in accordance with the Guiding Principles. That seems fair and straightforward – but what if there is a clash between the Principles?

To whom does the Attorney owe a duty of care? Without doubt, to the adult. This is made clear in the Code of Practice which, in Paragraph 3.1 (page26), states that the Attorney owes a fiduciary duty to the adult. "Decisions must always benefit the granter". In light of Lord Tyre's Opinion, can it still be argued that an Attorney does not fall to stand comparison with a Curator bonis. It was well settled in Scots law that the function of the Curator was to preserve the Estate of the ward for the latter should the ward recover capacity or if not, for the ward's heirs (**Macqueen v. Tod 1899 1 F 1063**). This duty meant that the Curator should not take steps which could alter the succession to the ward's estate I still retain doubt that an Attorney acting under a continuing Power of Attorney in terms of Section 15 of the Adults with Incapacity (Scotland) Act 2000 has to operate under the same yolk at all. The Attorney must act in accordance with the Guiding Principles. Compliance with Guiding Principle 1 requires in many circumstances that the Attorney apply the assets and estate of the adult even to the point of exhaustion, albeit in the interests of the adult. We live now in different times where state funded geriatric Wards are relics of a bygone age. Self funding and personal liability is now the lot of many elderly folk who require care. The Attorney must at all times act in the interests of the granter – often, those interests will be diametrically opposite those of the granter's beneficiaries under their Will, who may see the actings of the Attorney as denuding or otherwise adversely affecting their prospective inheritances. As the Code states "….Nor must you allow other influences to affect the way in which you act as an Attorney." (page 25)

In the particular example given above, unfortunately it seems to me that two of the Guiding Principles seem to be in conflict. The first (Guiding Principle 1) is that the Attorney must act at all times in the best interests of the adult. The second (Guiding Principle 2) is that, so far as possible, the Attorney must choose the least intrusive or restrictive option. It could be argued that the sale of the dwellinghouse is necessary in the interests of the adult – equally it could be argued that this is perhaps the most intrusive step which the Attorney might have taken, thus leaving the Attorney with a difficult dilemma. What should the Attorney do?

In my view, the 2000 Act itself offers assistance here. Section 6 (2) (e) of the 2000 Act allows any intervener to seek guidance from the Office of the Public Guardian. Any Attorney faced with the circumstances hereinbefore outlined should make such an approach to the OPG.

The Attorney might also consider seeking a direction from the Sheriff in terms of Section 3(3) of the 2000 Act. It is not beyond the bounds of possibility that the Sheriff might exercise his discretion so as to decline to make any direction on the basis that this was truly a matter which fell solely within the remit of the Attorney i.e. the Court should not be asked to rule on a matter lying within the powers of the Attorney, properly instructed in terms of the Guiding Principles etc simply because the Attorney himself finds it difficult to reach a decision.

The third alternative is clear and may be one which Attorneys faced with the difficult decision hereinbefore outlined will prefer – follow the example of the Attorney in the Mrs. HT Application and seek an Intervention Order for alteration of the Will by way of Codicil so as to protect the realised cash value of the dwellinghouse so far as possible (and subject to the actual diminution of the same in paying care etc costs i.e ringfencing) for the specific legatee. As indicated, there have been some criticisms of the Mrs. HT decision. There is no certainty that another Sheriff would follow the lead given by Sheriff Baird in Glasgow, particularly given that the Public Guardian did not believe that the Intervention Order sought in Mrs HT's case would be in the interests of the adult – the Public Guardian opposed the granting of the Order. For the reasons expressed above, I do not share those doubts/concerns. An Attorney can be held to account by the Executors of the deceased adult, and may face action at the instance of a disappointed beneficiary (although again questions of proximity and reasonableness will certainly arise in the latter case). It seems to me only fair to put forward the view that no adult would wish to see their Attorney being faced with possible personal liability when the Attorney has been left with a very difficult decision in relation to what is in the best interests of the adult.

There may well be other answers. The first is specific drafting. The draftsman of the Power of Attorney could include a provision to the effect that the granter authorises the Attorney to realise/sell any asset of the adult's estate to fund care or other necessary costs, notwithstanding that the asset may be the subject of a specific bequest in the adult's will, and where the granter prospectively acknowledges that such action by the Attorney may result in and amount to ademption of the bequest. Such a provision would clearly demonstrate that a sale by the Attorney in the foregoing circumstances had been contemplated by the adult and authorised in advance-thereby protecting the Attorney against a complaint that he had not complied with the known wishes of the adult

It may be argued that such a power is tantamount to empowering the Attorney to alter the Will of the Granter - a power historically denied in Scotland to an Attorney. I do not agree. It could be argued that the granting of the continuing Power of Attorney of itself is a general authorisation to

the Attorney to alter the tenor and effect of the Granter's Will. Even where there are no specific bequests, it might transpire that in order to pay for care costs, the Attorney has to exhaust the greater part of the Granter's assets and Estate. Let us imagine that the Granter has, at the time of granting the Power of Attorney, an Estate having a total value of £100,000. In his Will, the Granter has left three legacies of £20,000 each to nephews, with the residue being left to a Charity. The Granter/adult losses capacity and has to go into a Care Home. The Attorney has to take steps to pay the care costs incurred. The adult dies after residing for three years in a Care Home during which time the Attorney, acting in the adult's interests, has denuded the adult's Estate by paying care costs to the extent that as at the adult's date of death only £30,000 remains after payment of funeral expenses etc. In the circumstances, the pecuniary legacies would abate. The nephews would receive £10,000 each with the Charity, as residuary beneficiary, receiving nothing. Surely in the foregoing circumstances, the Attorney has altered the adult's testamentary wishes?

There could be a danger area here.

See **Cancer Research and Others v. Brown & Co 1997 STC 1425**

The possible danger to an Attorney who is unaware of the terms of the adult's will were highlighted in an Article in Issue 24 of the Scottish Private Client Law Review in August 2008.

It might also be objected that even the inclusion of such a specific provision may not fully protect a well meaning Attorney. This is raises a further point. Should the draftsman of the Power of Attorney make specific enquiry of the adult as to whether or not the latter has included in his Will a specific bequest of a particular item? In my view, it would be good practice for this course to be followed. Where it is discovered that the adult/Granter has included such a provision in his will, then it may be advisable to explore with the adult/Granter (if they still retain capacity) whether or not such a specific bequest should not be abandoned completely or at least commuted to a pecuniary legacy see the comments of Sheriff Baird in the case of **BH Applicant Glasgow** above.

Whether or not an Attorney may have to explain himself to the beneficiaries of the deceased granter, I leave you with one final thought. Quite properly, the Law Society has made it clear that where we prepare a Power of Attorney, the Granter of the Power of Attorney is our client. Those who are appointed as Attorneys are not our clients in relation to the preparation, execution and registration of the Power of Attorney itself. There is an increasing recognition within our profession that Attorneys may unwittingly take steps which could result in them incurring personal

liability. Whilst in strict terms and at present it may be considered that we have no specific duty of care to those whom our clients choose to appoint as Attorneys, I would suggest that we have a moral obligation to arm those who are required to act as Attorneys (subject always to the particular instructions of our clients) with a sufficient range of powers to enable them to carry out their responsibilities so far as possible free of risk, and subject to the protection of Section 82 of the 2000 Act. At the very least, we should ensure that those who are appointed as Attorneys are specifically directed to the Guiding Principles and more particularly the Code of Practice, coupled with a warning that failure to comply with those Principles and the Code of Practice may indeed result in personal liability.

I accept that adopting such an approach might run the risk of leading some otherwise well meaning individuals to conclude that they do not wish after all to accept office as Attorney, an undesirable outcome for all concerned – however, I think that is a risk which our profession must run, if only in fairness to the widening number of individuals who (given the acknowledged increase in human longevity) will in years to come find themselves requiring to undertake the powers and duties with which they will need to cope when it becomes necessary for the relevant Powers of Attorney in their favour to be activated.

Concluding Remarks

At the start of today's Seminar I asked four questions. Given all I have said I would now seek to address the same as follows:-

1. From my own experience, and provided you can justify a proposed Estate planning action in terms of the Guiding Principles, I am not sure that I can say that there are any current limits – although I would accept that the view of the Sheriff Principal in the Paisley case does place limitations on the power of an Intervener to seek to make a Will for an incapax adult.

2. What might the Courts tolerate – I hope that I have demonstrated to you today that provided a case is properly structured, comes within the Guiding Principles and is properly put before the Court I do not envisage the Courts standing in the way of perhaps detailed and extensive Estate planning.

3. How do you ensure that Estate planning carried out by an Intervener complies with the Intervener's duties under the 2000 Act? Put simply, provided you can justify any proposed action in terms of the Guiding Principles, I think that the Court is likely to grant the relevant order to allow the proposed Estate planning to take place.

4. What is the view of HMRC in relation to Estate planning? I think that for the present, the view of HMRC is neutral – if not positive.

Be careful out there!

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Powers of Attorney and Ademption of Specific Bequests

In 2009, the author and his partner, Gillian Brown, had published in the Scots Law Times an article entitled "Powers of Attorney and the Duty of Confidentiality". Therein, the authors considered the benefits (if not the necessity) of an Attorney having knowledge of the testamentary intentions of the adult who had appointed the Attorney. The recent decision by Lord Tyre in the Outer House in the case of The Executor of the late Isabella Coutts Gordon –v- John Sutherland Gordon Turner & Others (2012) CSOH 41 touches upon certain of the issues reflected in said article but, more importantly, and in the words of Lord Tyre himself:-

> "… raises an important question which has not previously been the subject of decision by a Scottish Court. Where an Attorney acting prudently in accordance with the terms of a continuing Power of Attorney, disposes of an item of property from the granter's Estate after the granter has become incapable of managing his or her own affairs, is a bequest in the granter's Will of that property thereby adeemed?"

In the question, the facts had been agreed between the parties. Miss Isabella Coutts Gordon had granted a Power of Attorney in 1996 in favour of her Solicitor. In terms of the relevant document, she had granted "power to do all things which can be lawfully done by an Attorney" including power to sell her moveable and heritable property. In 1997, she granted a Will in terms of which she left a specific bequest of her heritable property at 33 Dunnottar Avenue, Stonehaven to John Sutherland Gordon Turner. She bequeathed the residue of her Estate equally to nine individuals (including the Pursuer in the action and the first named Defender). In 2001, Miss Gordon became incapable of managing her own affairs and moved into a Care Home. In September 2001 the Attorney sold the dwellinghouse for £71,250. As Lord Tyre recorded, the parties to the action had agreed that:-

> "The sale of the house by (the Attorney) was a prudent act of administration, having regard to the disadvantage of leaving the house empty with attendant maintenance costs. It was not a necessary act, not having been an act which (the testatrix) as principal, had she been sui juris, would have constrained to effect, there being sufficient other funds available to meet the costs of (her) care."

Miss Gordon died on 27 January 2008. The Pursuer and First Defender were confirmed as her Executors in March 2008. In terms of the Confirmation, Miss Gordon's gross Estate at death amounted to £220,217. In April 2011, the value of the Estate was £173,455.

The First Defender argued that the sale by the Attorney had not adeemed the specific bequest of the dwellinghouse in his favour. The Pursuer however took the contrary view. The issue which Lord Tyre had to decide was who was correct?

Counsel for the Pursuer submitted that the house did not form part of Miss Gordon's Estate at her date of death; on the basis that the intention of the testator was irrelevant, the specific bequest had adeemed.

On the other hand, and as Lord Tyre stated in his Opinion (paragraph 10):-

> "Counsel for the First Defender submitted that a transaction carried out by an Attorney should be regarded as analogous to a transaction, carried out under pre-2000 law, by a Curator Bonis. A sale by a Curator Bonis affected neither conversion of the property nor ademption of a legacy thereof, unless it could be shown that it would have been a necessary and unavoidable act on the part of ward if sui juris. By agreement that was not the position here. The legacy was therefore not adeemed and the First Defender was entitled to the proceeds of sale as a surrogatum for the house."

In analysing law in relation to both Powers of Attorney and the powers of a Curator Bonis, including cases relating to the nature of the office of a Curator Bonis (Inland Revenue –v- McMillan's Curator Bonis 1956 SC142, Burn's Curator Bonis –v- Burn's Trustees 1961 SLT166 and D's Curator Bonis, Noter 1998 SLT1) Lord Tyre concluded (para.14):-

> "In my opinion, they (the cases above referred to) provide an authoritative statement of general application, that so far as management of the estate of the ward/granter (as the case may be) is concerned, a Curator Bonis was in a position similar to that of an Attorney appointed by a granter with full capacity, the only difference being that in the case of a Curator Bonis, the appointment necessarily had to be made by the Court. Each was/is authorised to act on behalf of a person who, for differing reasons, is or may be unable to manage his own affairs. The parallel seems to me to be even closer between, on the one hand, Curator Bonis appointed by the Court, and on the other, an Attorney acting under a Continuing Power of Attorney (2000 Act) granted by a person who has subsequently become incapable."

Lord Tyre stated that in addressing the issue arising in this particular case, he was satisfied that could and should "seek guidance from case law concerning the effect of the actings by a Curator Bonis on succession or on ademption of legacies."

Having made the foregoing association, Lord Tyre indicated that in his view, the case of Macfarlane's Trustees –v- Macfarlane 1910 SC 325 amounted to "the pivotal authority for present purposes".

In his Opinion, Lord Tyre carried out a detailed analysis of the law leading up to the decision in the Macfarlane's Trustee case. In the case in point, an individual had made a Will in terms of which he had bequeathed shares in a particular Company to four beneficiaries. Having made his Will, the testator became incapax and a Curator Bonis was appointed to manage his affairs. The Curator sold the whole shareholding in question as he considered it prudent to do so (but not because it was absolutely necessary for the maintenance of the testator). The sale apparently fell within the scope of the Curator who acted in ignorance of the terms of the ward's Will. The residuary beneficiaries argued that the sale of the shares adeemed the specific bequest of the same and they were therefore entitled to the remaining proceeds on sale of those shares. However, the Court held that the sale had not adeemed the specific bequest. The Court applied the test of "necessity" – in effect although the Curator had authority to effect the sale it was not necessary – if the ward had been sui juris, the ward (testator) would not have instructed the sale personally. If, however, the sale had been necessary for the maintenance of the ward (testator,) then the legacy of the shares would have adeemed. Lord Dundas (page 329) stated:-

> "It may have been in a sense "necessary" for the Curator to sell the shares, but it was obviously not necessary, in any sense for the ward to have done so if he had remained capax. In these circumstances, though the testator's Estate at his death did not, in fact, include the shares in question, they must, in my judgement, be held to have formed part of it at that date, and that without in any degree of impinging upon the well established general rule of law … that a testator's intention is not to be looked to in a question of ademption. The sale of the shares did not arise from any such intention, nor from any act of this testator, but from the act of a third party, the Curator Bonis, exercised at the time and in the circumstances already mentioned, in the proper course of his administration, but not owing to the necessities of his ward's position."

Lord Tyre stated (paragraph 27) that if "… I am correct in the view which I have already expressed that in deciding the present case I should seek guidance from the case law concerning

the effect of the actings of a Curator Bonis on ademption of legacies, I consider that McFarlane's Trustees provides the requisite authoritative guidance."

Having considered the various authorities submitted to him, Lord Tyre held that, given the parties' agreement that "the sale of the house by the Attorney was a prudent act of administration but not a necessary act in the relevant sense, the bequest of the house was not adeemed by the sale."

In reaching a decision, Lord Tyre explained why he did not feel inclined to accept the submissions on behalf of the Pursuer. In particular, Lord Tyre commented on the English case of Banks –v National Westminster Bank plc (2006) WTLR 1693. The facts in the Banks case were similar to those in the present case – with the exception that in the Banks case, the Attorney was (unfortunately as it turned out) also the beneficiary of the specific bequest of the testator's dwellinghouse. The judge in the Banks case reviewed the existing English authorities and held that the legacy had been adeemed. The English judge took the view that ademption could only be avoided where the sale was made without the testator's knowledge but also without either his or other "lawful authority". As the Attorney in the Banks case had authority to sell the dwellinghouse, the actings of the Attorney had been both lawful and proper, but the unfortunate effect was to adeem the bequest in her own favour. In the Banks case, the judge had noted that the Supreme Court of Queensland had reached the opposite view in the case of In Re Viertel (2003) WLTR 1075. The Viertel case has been followed by judges subsequently in Australia.

Lord Tyre concluded (para.32) that "a choice between the English and Australian approaches" was not before him, as "Scots law had adopted neither authority nor awareness as the criterion to determine whether the act of a representative such as an Attorney has ademptive effect. It is, although, of some reassurance that the approach which I consider that I am bound to adopt on the basis of Scottish jurisdiction produces a result which has generally been regarded in the Australian cases as a reasonable one and not the result which was regarded as unfortunate in (the Banks case). It may, finally, be noted that my opinion in this case accords with the proposal which was made by the Scottish Law Commission in its Discussion Paper No. 94 (1991) on Mentally Disabled Adults (at para. 5.68) but which is not included in the Commission's recommendations in its Report No. 151 (1995) on Incapable Adults because (para. 3.81) that Report was not considered to be the appropriate place to deal with the problem of ademption of legacies."

At the conclusion of his Opinion, Lord Tyre turned to the practical application of his decision in relation to disposal of the case (paragraph 33). Lord Tyre noted that the house had been sold in

2001 i.e. more than six years prior to the death of the testator and more than 10 years prior to his consideration of the issues. Lord Tyre stated:-

> "The First Defender is entitled to receive a sum equivalent to the proceeds of sale of the house. He is also entitled, in my opinion, to receive a sum representing the fruits of those proceeds during the period since the date of receipt of the sale proceeds. Without purporting to state any general principle, it seems to me that in the circumstances of the present case the sum payable to the First Defender by way of such fruits should approximate as closely as possible to the amount that has actually been earned by deposit or investment of the proceeds since 2001, after deduction of any tax paid thereon."

Lord Tyre's Opinion seems in all the circumstances to be entirely reasonable. The proceeds on sale should be regarded as a surrogatum for the specific bequest itself. An interesting point to note in this case is that the proceeds on sale remained available. Had the proceeds on sale not remained available, this might have raised the question as to the necessity of the sale of the house in the first place - although the answer here would obviously be that, whilst a sale of the house might ultimately have been required, it was not necessary at the actual time it was effected. However, let us assume that the sum retained by the Attorney at the granter's date of death was in fact less than the proceeds of sale. This would bring into play the doctrine of abatement. After settlement of all debts etc, the residuary beneficiaries would have received nothing. The specific legatee would "scoop the pool". This of course raises the question as to whether or not this is what the testator would have wished in the first place i.e. would the testator have provided for a different testamentary distribution of her estate had she foreseen the need to fund her care costs after loss of capacity? This raises an important point of practice for the legal profession (discussed below). However, in the putative circumstances before outlined, the residuary beneficiaries having found that, owing to the application of the doctrine of abatement, they received nothing from the testator's Estate, would they have had any claim against the Attorney (a topic touched upon in the 2009 Article referred to above)? Might the residuary beneficiaries not claim that the Attorney should have adopted the equitable (but ultimately unsuccessful)l approach suggested on behalf of the prospective specific legatee in the BH Applicant case (see below)?

Section 82 of the Adults with Incapacity (Scotland) Act 2000 provides a statutory limitation of liability for, inter alia, an Attorney. Section 82(1) states:-

> "No liability shall be incurred by a Guardian, Continuing Attorney or Welfare Attorney, a person authorised under an Intervention Order, a withdrawer or the managers of an

establishment for any breach of any duty of care or fiduciary duty owed to the adult if he has or they have:-

(a) acted reasonably and in good faith and in accordance with the general principles set out in Section 1;

(b) failed to act and the failure was reasonable and in good faith and in accordance with the said general principles."

In the above case, Lord Tyre appeared to accept that the Attorney had acted in accordance with the authority granted to him and in good faith. However, Section 82(1)(a) requires an Attorney etc not only to act reasonably and in good faith, but also in accordance with the general principles set out in Section 1 i.e. compliance with those general principles is an additional requirement for the statutory indemnity to apply. If an Attorney sells a dwellinghouse which is the subject of a specific bequest without checking the terms of the granter's Will, can this be said to be acting in accordance with the general principle (Section 1(4)) that:-

"In determining if an intervention is to be made and, if so, what intervention is to be made account shall be taken of … the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication, whether human or by a mechanical aid (whether of an interpretative nature or otherwise) appropriate to the adult."

It would appear to be reasonable to argue that selling a property subject to a specific bequest in the adult's Will (without having checked the terms of the Will and weighing up other relevant factors) cannot be said to be in compliance with the past and present wishes of the adult. It should be noted that Section 1(4) does not refer to the "known" present and past wishes and feelings of the adult – in the author's view, by implication, there appears to be a responsibility upon the Attorney to establish these. If the Attorney does not check the adult's Will has he complied with that provision? Harsh as it may seem, the author would submit that failing to check the terms of the adult's Will before selling a property or other asset which might be the subject of a specific bequest is not complying with Section 1(4) of the Act. Does this mean that the limitation of liability (effectively an indemnity) afforded by Section 82 will be denied such an Attorney etc?

The case under discussion resonates with the decision of Sheriff John Baird in the application in respect of BH (Glasgow Sheriff Court 23 December 2010 – www.scotcourts.gov.uk/opinions/BH.html). The BH Application related to the appointment of a

lay individual to be welfare Guardian to an old lady aged 87 and of a Solicitor to act as Financial Guardian. It was indicated that the old lady owned her own house, but that this would require to be sold to meet ongoing costs of care. Sheriff Baird made enquiry as to whether not the old lady's house had been the subject of a specific bequest in her Will which had been granted in 2003 when the old lady still retained capacity. The Will contained a provision that on her death, her Executors should make over to a named individual the house in which she then resided (or any other house which she might then own and occupy as her principal residence). The old lady still owned the house in question but had not occupied it since January 2010 and was not capable of returning there.

Sheriff Baird, noting the specific bequest, ordered that the application should be intimated to the individual named as the specific legatee in the old lady's Will.

At the Hearing, there was produced a letter from the prospective beneficiary, indicating the latter's understanding that the need to provide effective and continuing care for the old lady was paramount. However, Sheriff Baird was not convinced that the prospective beneficiary understood the potential consequences of granting the application before him. The Sheriff wished the individual to have the benefit of legal advice. At the continued Hearing, representations were made on behalf of the prospective beneficiary to the effect that as the house represented approximately 70% of the value of the old lady's Estate, a Codicil should be executed (as had been allowed in the case of T. Applicant 2005 SLT (Sheriff Court) 97) in terms of which the residue provision of the old lady's Will should be altered to the effect that the prospective specific legatees should receive 70% of whatever was left of the testator's Estate at the date of her death.

Sheriff Baird had rightly raised the question as to whether or not this had been the intention of the testator – in effect, did what was proposed comply with the present and past wishes of the testator so far as these would be ascertained. In the T. Applicant case, Sheriff Baird had allowed the granting of the Codicil as he was quite clear as to the intentions of the testator in that case. Sheriff Baird took the view that the Court did not have power ex proprio motu to instruct the making of such a Codicil. Section 3 of the Adults with Incapacity (Scotland) Act 2000 did not in the Sheriff's view allow the Court to have "carte blanche". The Sheriff indicated that he required to have some evidence of the intention of the testator. The Solicitors who had acted for the testator in 2003 consulted their file at the time the relevant Will had been made. This contained a note of an interview carried out by a partner in the firm with the old lady at the time in question. The note in relation to the specific bequest stated "house only, not money if house sold". Sheriff Baird noted that in the original manuscript version of the note prepared by the partner, the word "not" had been underlined twice.

The intention of the testator appeared to be clear. On enquiring what should happen if the house required to be sold if she required to go into care, the Solicitor taking her instructions had noted that the testator's view was that the bequest should lapse. There was to be no replacement legacy or other surrogatum. In the circumstances, Sheriff Baird concluded that it would be inappropriate to allow the Codicil sought by the prospective beneficiary (who seems to have accepted the Sheriff's decision with good grace). At the conclusion of his Opinion, Sheriff Baird stated:-

> "There is a lesson to be learned. It is that Practitioners who are instructed by a client to prepare a Will ought to make full and clear notes of the instructions given, perhaps ought to canvass alternative destinations in the event of subsequent changes in circumstances and ought to give serious consideration to retaining all such files for future reference."

In the author's view, that is excellent advice for our profession.

What is also clear is that Continuing Powers of Attorney must now contain authority for the Attorney to have knowledge of the terms of the testamentary writings granted by the adult. It is only with that knowledge that an informed decision can be taken by an Attorney in circumstances which are becoming, unfortunately, more common i.e. the need to provide for funding for care.

Within recognised limits, testamentary freedom applies to testators who are capax. Testators should be encouraged to consider perhaps an alternative testamentary structure in the event of their circumstances changing and their estate requiring to be utilised to pay care costs. In the author's view, many of our clients, faced with that unpalatable prospect, will realise that the Will which they had originally chosen to instruct might not be appropriate in those quite different circumstances. As suggested by the author and Gillian Brown in their previous article, if a Power of Attorney does not contain authority to allow the Attorney to view the terms of the adult's existing testamentary instructions, then the Attorney should consider obtaining an Intervention Order under Section 53 to that effect. In particular, and even where the Attorney becomes aware of a specific bequest of a particular dwellinghouse, there may be concern about potential liability – then, perhaps the way to avoid any question arising as to whether or not Section 82 and the indemnity contained therein applies is for the Attorney to consider seeking an Intervention Order.

Lord Tyre's decision is to be welcomed particularly as it clarifies a difficult area of law in respect of which different views have been expressed in recent years, with a number of Practitioners

holding the view that the decision in the Banks case (above) in England would also represent the Law of Scotland.