RFPG

Beneficiaries Rights

It could be argued that the rights of beneficiaries in Executries and Trusts has been a somewhat neglected topic in Scots law amongst those who have written books on the subject of Wills, Trusts and Succession.

If you look at the indexes in well-respected books on the subjects of Wills, Trusts and Succession you will not find a specific entry or listing for rights of beneficiaries. There is no such entry in:-

- Professor Meston's highly respected book on the Succession (Scotland) Act 1964, Fifth Edition.
- The Stair Memorial Encyclopaedia on "The Laws of Scotland", Volume 25.
- Property Trusts & Succession by Gretton and Steven.
- Currie on Confirmation, Ninth Edition.
- The Scots Law of Succession (Second Edition) by Hilary Hiram.

That is not to say that none of these works cover the rights of beneficiaries – perhaps rather the editors of the books did not think the topic sufficiently important to give it a separate entry in the relevant index.

However, there is such an entry in the index to Trusts, Trustees and Executors by Wilson & Duncan (Second Edition).

I wish to cover this topic from both points of view – it is not right in any way to say that beneficiaries in either an Executry estate or a Trust have no rights. Equally, in some respects, I think it fair to argue (as I will do in this paper) that they may not have sufficient rights.

What do Wilson & Duncan say about beneficiaries right? I think the first point to mention is that the following comments largely relate to the rights of a beneficiary under a Trust – but some of the points are equal application to an Executry estate.

At paragraph 10-01 of their book, Wilson & Duncan state:-

> "The beneficiary's right has often been described as a jus crediti (**Speirs v. Speirs 1850 13D 81**) and this term is to some extent appropriate in that the right is a right of action and not a jus in re or a right of property. Jus crediti, however, is frequently applied to a mere contractual right and

> the beneficiary's right is higher than this. He can vindicate the Trust property on the sequestration of the Trustee and he can procure the recovery of property from a third party who has received it gratuitously or in the knowledge that the conveyance is in breach of trust. McLaren favours the expression jus ad rem, but the meaning of this term is not precise (**Edmond v. Gordon 1858 3 Macq 116** at page 122 per Lord Cranworth). He suggests in the alternative "a personal right of property" that the passage in which the expression occurs was subsequently criticised in **Inland Revenue v. Clark's Trustees 1939 SC 11**."

At paragraph 10-02 of their book, Wilson & Duncan state:-

> "That decision (Inland Revenue v. Clark's Trustees) established that the beneficiary's interest consists of the following rights of action:-
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> (i) A right of personal action, usually of declarator or accounting to compel the Trustees to administer the Trust according to its terms;
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> (ii) A right to interdict the Trustees from breach of trust;
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> (iii) A right to recover damages from the Trustees from breach of trust;
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> (iv) A right to petition the Court to change the administration of the Trust by replacing the Trustees by new Trustees or a Judicial Factor (see again Inland Revenue v. Clark's Trustees)."

With regard to option (iv) above, the great difficulties in removing Executors and having their administration replaced is well illustrated by the recent case of **Campbell v Campbell's Executors 2021 CSOH 3** – well worth a read.

What happened in the Campbell case, decided by Lady Poole in the Outer House? There was a Petition for removal of Executors and appointment of a Judicial Factor. The deceased, who died on 14 June 2015 aged 92 had granted a Will in 2008 appointing the Respondents (a son and his wife) as his Executors. He had also granted a Power of Attorney in 2008 in favour of the Respondents as his Attorneys. The Petitioner (the other son of the deceased) lived in Holland.

The Respondents did not appoint Scottish Solicitors to wind up the testator's estate – although it would appear that they consulted with English Solicitors at one point. The Petitioner had raised an Action of Count Reckoning and Payment and was granted Decree. In July 2018, having made a payment initially of £16,000 to the Pursuer, the Respondents paid an additional £80,270.86 to the Pursuer. This was claimed to be in full and final settlement. However, it subsequently transpired that there had been

operations on two Airdrie Savings Bank Accounts for which the Respondents as Executors had given no full accounting. After the death of the testator a total of £30,500 had been removed from the two accounts and it would appear that the Respondents as Executors paid £25,500 equally between two grandsons of the deceased, claiming that it was the wish of the testator that this should be done after his death – although it was not provided for in his Will and there was no informal writing supporting the same. In the Action of Count Reckoning and Payment, it had also transpired that the Respondents had charged a sum of £15,000 for loss of income for a period of fifteen days following the deceased's death claiming that they had spent that time dealing with the administration of his estate.

Lady Poole carried out an examination of the cases in relation to removal of Trustees and appointment of a Judicial Factor.

She referred first of all to **Gilchrist's Trustees v. Dick 1883 11R 22** where the Court had said that:-

> "… there must be something more than mere irregularity or illegality. We are not in the habit of removing Trustees unless there has been a decided malversation of office and there is nothing of that kind here. There is no suggestion that the Trustees did not act in perfectly good faith."

In the Gilchrist case, the Trustees had illegally invested funds of the Trust estate.

In the case of **MacGilchrist's Trustees v. MacGilchrist 1930 SC 635**, the Court found that mere lack of co-operation or disharmony between Trustees or mere negligence on the part of a Trustee even if it resulted in some loss to the Trust estate may not afford sufficient grounds for removal of a Trustee. However, persistent wilful neglect, contempt and obstruction which taken together render the administration of the Trust impossible may be sufficient grounds to remove a Trustee.

In the case of **Shariff v. Hamid 2000 SCLR 351**, the Court refused to remove Trustees and said that the test to be applied was whether or not on the facts there was something equivalent to or as bad as malversation of office where a Trustee obstinately refuses to acknowledge his legal duty and to discharge his legal responsibility with the result of bringing the affairs of the Trust into confusion.

Lady Poole also referred to authorities on the other side including **Ewing's Trustees v. Ewing 1885 13 R HL 1**, in which the Court indicated that it will be guided by the welfare of beneficiaries and might remove a Trustee if continuance of that Trustee would present a situation where the Trust could not be properly executed.

At paragraph 27 of her Opinion, Lady Poole, having referred to the Ewing's Trustees case above stated:-

> "The Courts have intervened to remove Executors where they have obstructed the administration of an estate by ignoring correspondence and refusing to sign documents resulting in administrative deadlock (**Wilson v. Gibson 1948 SC 52**). There are other situations in which Trustees have been removed discussed under reference to authority at paragraphs 4.25-4.26 of the Scottish Law Commission's Discussion Paper No. 126 on Trustees and Trust Administration. One example which may lead to removal is where there is unacceptable conflict between an Executor's personal interests and fiduciary duties. Where an action based on fraud during a deceased's lifetime was brought against that deceased's estate by one of the Trustees of that estate, the Court found he could not also continue as Trustee of the deceased's estate (**Cherry v. Patrick 1910 SC 32**). However, a conflict may not result in removal if it was anticipated by the testator. In **Dryburgh v. Walker's Trustee 1873 1 R 31**, Trustees did not call in loans even although that might have been advantageous to beneficiaries, because the testator had known of the Borrower's financial problems and had elected to give the Trustees powers not to call up the money. There were no grounds for removal. "It is not a ground for displacing Executors that they have personal interests conflicting with their duty as Executors. The law supposes that they are able to reconcile their interest and their duty until the contrary is proved." (**Birnie v. Christie 1891 19 R 334** at 338 per Lord McLaren). Whether or not the Court will grant an application to remove Executors depends on the circumstances of the case."

Lady Poole stated in her judgement (declining the Petition) that she accepted that the Petitioner had some legitimate complaints about the Executry administration. However, she did not believe that what had happened amounted to grounds for removal of the Respondents as Executors and indicated that there was still a possibility of the Executors fully and finally properly winding up the deceased's estate.

Interestingly, and given what I am about to say in relation to the right of a beneficiary in an Executry estate to pursue a former Attorney, Wilson & Duncan state (without granting any particular authority therefore – paragraph 10-03):-

> "The beneficiary has no right of action by which he can vindicate for himself any of the Trust property but he can either compel the Trustees to give the use of their names in an action or sue a third party and call the Trustees as Defenders."

For a more detailed consideration of the rights of a beneficiary against the Trustee see also Chapters 27 & 28 of Wilson & Duncan's book.

What about beneficiaries in a Discretionary Trust?

In considering the question of exercise of discretion by Discretionary Trustees, Norrie and Scobbie "Trusts" 1990, state (Page 23) that

> "…..the Trustees must make their own decisions and bear the consequences themselves. The Court in Scotland is loath to become involved in the administration of Trusts and will not give the Trustees directions as to how best to exercise their discretion. As Wilson and Rankine put it "In Scotland, the cardinal principle is that the Courts will not control the exercise of a discretion which has been conferred on the Trustees. The great principle in the administration of Scotch Testamentary Trusts is, to leave the administration where the testator himself has placed it unless from fault or accident the Trust has become unworkable (quoting Lord President Inglis in **Orr Ewing –v- Orr Ewing's Trustees 1884 11R 600**).
>
> The law takes this view because it assumes that the Trustees are in the best position to make judgements properly, being more cognisant of the circumstances of the Trust than the Court ever can be".

For the most part, a decision by the Trustees as to how the exercise their discretion cannot be challenged unless it is put into effect in a manner which of itself amounts to a breach of trust or is considered by the Court to be so unreasonable that no reasonable Trustees would have reached such a decision.

In the case of **Chivas' Trustees –v- Stewart 1907 SC 701**, the Trustees were given discretion to lay aside a sum to pay an annuity to a beneficiary. It was alleged that they had been overly generous in the amount so put aside but the Second Division refused the challenge on the basis that it was not so extravagant an exercise of the discretion as to be wholly unreasonable.

In the earlier case of **Brown –v- Elder's Trustees**, the Court of Session had refused to interfere with the exercise by particular Trustees of a given discretion. The Court took the view that this would amount to the Court substituting its own view over that of Trustees who had been given the right to exercise appropriate judgement in the first place by the Trustor.

The particular protection is not, however, absolute. If the Court takes the view that the Trustees have unreasonably failed to exercise any discretion then it will act. However, where the Trustees

demonstrate that they took a conscious and reasoned decision not to act, again the Court is unlikely to interfere. In particular, where one beneficiary feels unhappy at the decisions of the Trustees, the Court will not intervene so as to order the Trustees to make an apportionment or appointment out in favour of that beneficiary, i.e. the Court may order Trustees to exercise their discretion but cannot force the Trustees to exercise their right of decision in any particular fashion or in favour of any particular beneficiary.

I think it fair to say that disputes more often arise in relation to Discretionary Trusts particularly where a Letter of Expression of Wish has been granted. Whilst there is authority in England that Trustees must in certain circumstances disclose the terms of a Letter of Expression of Wish, that is not the position in Scotland. In fact, a beneficiary in a Discretionary Trust has a very limited right to information. In that connection, I would refer you to paragraph 11-45 of the Scottish Law Commission's Report on Trusts 2014 No. 239. There, the Scottish Law Commission state as follows:-

> "Although we have said that we do not favour a statutory list of types of information which will generally be disclosed, for the reasons set out above, we consider that there is merit in saying what will generally not be disclosable. We have in mind information which falls under one of the following descriptions:-
>
> - Information as to Trustees deliberations or reasons for their decisions;
> - Information relating to another beneficiary or third party;
> - Letters of Wishes.
>
> In general, information falling within these three categories is not disclosable under comparable Trust jurisdiction which we have examined."

The difficulties arising from the lack of rights of a discretionary beneficiary to information in my experience causes great difficulties between the beneficiaries and the Trustees – even more so if, against advice given to the Truster, the latter has appointed a majority of his children as Trustees in a family Discretionary Trust. It is my view that where a Truster wishes to set up what I would characterise as a family Discretionary Trust then he should appoint independent Trustees – otherwise it can become a "beanfest" for lawyers instructed for each of the family members who are disgruntled that they are not getting what they hoped or expected.

Moving on, I think one of the first points to consider is the rights of different beneficiaries.

I will deal firstly with Wills, beginning with the rights of beneficiaries inter se.

Classically in Scotland I think it fair to say that there are three distinct types of beneficiary being:-

(i) The specific legatee – to whom a specific item such as a house, a motor car, a work of art, a stamp collection etc has been left.

(ii) The pecuniary legatee – to whom a specific sum of money has been left.

(iii) The residuary beneficiary who is entitled to what is left – or if there is more than one residuary beneficiary to a share of what is left - after all debts, taxes and the implementation of prior purposes of the Will have been satisfied.

You will have noted that in the last paragraph I refer to "prior purposes of the Will". The reason for this is quite simple – there is indeed an order of ranking in entitlement between the three types of beneficiary detailed above.

In a properly and classically made Scottish Will, the bequests left by the testator will be ordered as to:-

- Specific bequests.
- Pecuniary legacies.
- Shares of residue.

The reason for this is reasonably straightforward. Many of our clients may make Wills when they are reasonably wealthy and have a number of assets. However, unexpectedly, they may meet financial problems which diminishes their estate. I have had to deal with estates like that.

Such financial problems can mean that the Will of the testator turns out to be out of kilter with his or her estate at date of death. Frankly, this is not uncommon, but on occasions difficult to deal with.

Where an individual dies leaving substantial debts, these debts may substantially eat into the value of the testator's estate – but not totally exhaust the same. Often, in those circumstances, abatement will apply.

This means that the residue "goes first". If the residue of the testator's estate is not sufficient to meet all outstanding debts, pecuniary legacies will abate proportionately – unless the Will says otherwise. Legacies will abate to "nil" in appropriate circumstances. If there are still debts outstanding then and only then do specific bequests "suffer". An Executor's first duty is to settle all debts due by the deceased. The terms of the deceased's Will are irrelevant to that duty. In a bad case, if the residue and all pecuniary legacies have been "subsumed" by debts – but there are still debts outstanding – then the Executors will require to sell the items left by way of specific bequest to meet the debts. If there is any balance leftover after sale of an item which was the subject of a specific bequest then that balance can be made over to the specific legatee. Abatement is a concept which can be extremely difficult to

explain to lay beneficiaries. I would bet that some of you have come across lay people who believe that an individual's debts die with them. This has never been part of Scots law. It could be even more difficult to explain to different beneficiaries under the same Will as to why some appear to be preferred above others – never the fault of the Solicitor dealing properly with the administration of the relevant estate – it is the law in Scotland, and if a particular beneficiary were to prove difficult, then the only way you can deal with such an individual is to advise them to take separate and independent legal advice on how the rules on abatement apply. In truth, in the past, it has been my practice where I have realised that abatement would apply to any extent, to advise all of the beneficiaries of the fact that the terms of the Will might not be capable of being implemented in full and that they should take separate and independent legal advice as to my view on the matter.

And what about ademption? How do you explain that concept to lay residuary beneficiaries, as they will be the ones who lose out if ademption is successfully claimed – see **Turner v Turner 2012 CSOH 41**

I turn now to the question of the rights of beneficiaries under a Will against those who have a claim to legal rights or legitim.

Again client perception differs from reality. Beneficiaries under a Will find it difficult to understand why someone – estranged spouse, civil partner, child or the issue of a predeceasing child who have been left nothing in the Will – should have rights which come before the final testamentary wishes of the testator. But that has always been the case.

In truth, the entitlement of someone to claim legal rights or legitim is not regarded in law as in any way akin to the rights of a beneficiary under the Will. In truth, the rights of a legal rights claimant have historically been regarded in Scots law as a "quasi debt". In that connection I would refer you to the case of **Naismith v. Boyes 1899 1 F 79 (HL)**.

In that case, legal rights were described as being:-

> "In the nature of debts which attach to the free succession after the claims of onerous creditors have been satisfied. Hence, it has been frequently said judicially that, in respect of their legal claims, the widow and children are heirs in competition with onerous creditors and are creditors in competition with heirs."

The prime duty of any Executor is to settle debts of the deceased first of all. Thereafter, bearing in mind the historical view taken of legal rights, Executors must settle legal rights. In most cases, this will mean that residuary beneficiaries will suffer although there can be cases where the residue is minimal which means that pecuniary legatees and specific legatees may find their benefit being reduced by what they might (in my experience will) consider to be an adverse legal rights claim.

The question of legal rights is a difficult one for Solicitors. On winding up an estate, it is likely that the Executry Solicitor will find that where there is a legal rights claim available, other members of the family who are beneficiaries under the Will will not have heard of the concept of legal rights and may react adversely (and sometimes with incredulity) when they are advised of the same. We should all bear in mind the guidance issued by the Law Society on Solicitor's duties in respect of Executry estates – framed with particular reference to legal rights.

It should be remembered that a spouse or civil partner retains rights to claim legal rights even if they have been estranged from the deceased for many years. Obviously, this does not apply where there has been a divorce or where there is a Separation Agreement in place in terms of which the parties have expressly waived and discharged their respective entitlements to succession rights.

The Scottish Law Commission in framing its Report on Succession 2009 did consider whether separation (without there being a divorce etc or Separation Agreement in place) should negate an entitlement to legal rights. The Scottish Law Commission decided not to interfere with the existing law and therefore estranged spouses and civil partners still retain the right to claim legal rights from the estate of a deceased spouse or civil partner.

Yet another difficult issue arising from legal rights is where the deceased had made substantial lifetime advances of funds to a child who is not mentioned in the Will, but leaves his or her estate to his other children. The child who has been left nothing in the Will claims legal rights. The other children, being the residuary beneficiaries, object on the basis that substantial lifetime advances had been made to the child in question. Such complaints are largely irrelevant. The doctrine of collation cannot be brought to bear by residuary beneficiaries unless one or more of them also decide to claim legal rights. In any event, the doctrine of collation will, I think, disappear into the mists of time when there is a full revision of the Scots laws of succession by the Scottish Government. This reflects the views of the Scottish Law Commission.

The actual calculation of legal rights is not as simple as it might appear – however, that is a topic for another Seminar.

Beneficiaries often (wrongly) assume that they are entitled to a defining say in the administration of the testator's estate. This is not the case. However, I will revert to this.

I now wish to consider the rights of specific legatees, pecuniary legatees and residuary beneficiaries inter si – leaving aside the question of abatement which I have covered above. On the basis of my analysis, it is clear that specific legatees are in a favoured position in certain circumstances. Erskine characterises the rights of a specific legatee to that of an assignee. They have a right to the item bequeathed to them – unless of course the estate proves insufficient to meet all of the relevant

bequests. However, a specific legatee will “suffer” last of all. Pecuniary legatees are also in a favoured position when considered against the rights of a residuary beneficiary.

A residuary beneficiary is entitled only to an accounting from the Executors. He or she receives what is left (or a share of what is left if there are more than one residuary beneficiaries) after settlement of all debts, taxes and the implementation of prior purposes of the testator’s Will – and those prior purposes include specific legacies and pecuniary legacies. In particular, residuary legatees are not entitled to direct the Executors as to how a particular estate should be administered. This was decided in the case of **Cochrane’s Executors v. IRC 1974 SC 158**. However, whilst a residuary beneficiary cannot direct the Executors as to how they administer the estate they still have rights (see below). There is one particular area of concern from my perspective.

An example might assist thus, the deceased had appointed their eldest child as continuing & welfare Attorney. The deceased had also appointed their eldest child as sole Executor under their Will.

On death of the deceased, the younger siblings query the size of the deceased’s estate at date of death. They are all aware that the deceased had a reasonably sizeable estate prior to their death – but the Inventory of the deceased’s estate at date of death shows a significant diminution in the same. In terms of his Will, the deceased has left his estate equally between the eldest child (who had been appointed as Attorney) and his siblings.

The siblings indicate to the Executor that they do not understand why their parent’s estate at death appears to have been significantly reduced from their knowledge of the same prior to the deceased’s death. They are suspicious that their eldest sibling, acting as Attorney, has taken steps which improperly denuded the deceased’s estate. They demand that their eldest sibling as Executor show procure from the Attorney (himself) that an accounting of his actings as continuing & welfare Attorney be presented. The Executor refuses. Where do the younger siblings as residuary beneficiaries go from here?

Section 81 of the Adults with Incapacity (Scotland) Act 2000 is poorly framed – I say that with the benefit of hindsight – but should (and I anticipate will) be revisited.

Executors can hold a former Attorney to account (see **The Executors of Thomas R Watson v Isabella Watson and another Kilmarnock Sheriff Court 2005**), but not it would seem beneficiaries of the deceased without co-operation and consent of the Executor. Complaining to the OPG after the granter has died will at present get you nowhere – even if the complaint is made during the lifetime of the granter, the OPG will abandon an uncompleted investigation on death of the granter.

One of the most difficult areas can be where beneficiaries and Executors disagree about the composition of the estate. What happens if beneficiaries claim that there is a debt due to the estate which has not been pursued by the Executors? This is a difficult area for those advising beneficiaries as in truth, they have no direct right to demand that an Executor pursue a particular debt and they have no direct rights against the debtor in question.

This was emphasised in the case of **Anderson & Another v. Wilson 2019 CSIH 4**.

In this case, the deceased had been a dairy farmer who had died on 21 April 2016. He was survived by his wife for a short period and also by five daughters. Two of the daughters were the Pursuers in this case and the Defender was the husband of one of the other daughters. By Disposition dated 9 October 2011, the deceased disponed to the Defender about 255 acres of the estate which he owned. In early December 2011, the deceased gifted each of his five daughters £30,000. It was explained by his wife that the payments were made as the deceased had sold "a bit" of his estate.

By Will dated 17 October 2012 he left his estate to his wife provided she survived him for 30 days after his death whom failing so to survive to his five daughters equally amongst them. By Will dated the same date the deceased's wife made essentially the same provision leaving her estate to the deceased whom failing to her five daughters equally. The wife died on 22 November 2016.

The action was raised by two of the daughters as beneficiaries under the wife's Will.

They claimed that the Disposition of 2011 had been procured by undue influence or facility and circumvention. They indicated that the true value of the ground was just in excess of £1m whereas the Defender had paid only £420,000.

The Pursuers claimed damages from the Defender.

However, the Court found that the Pursuers had no rights against the Defender.

Senior Counsel for the Pursuers accepted that the difficulty which his clients faced were that, in the case of **Morrison v. Morrison's Executrix 1912 SC 892**, it had been decided that a beneficiary did not have title to sue for a debt due to the deceased's estate. Senior Counsel for the Pursuers also referred to **Cleugh v. Fleming & Others 1948 SLT (Notes) 60, Matossian v. Matossian 2016 CSOH 21** and **Neville v. Donald 2016 CSOH 6**. However, Senior Counsel argued that in this particular case the Pursuers were entitled to damages.

The Inner House upheld the decision in Morrison (above) i.e. a beneficiary in the Executry estate of the deceased cannot sue for a debt due to the estate. The Court stated that the Executor of a deceased's estate has the duty of ingathering that estate. If there are debts due to the estate or if there have

been improper alienations from it, the title to sue for recovery of these rests with the Executor, and not with the beneficiaries of the deceased's estate. In some circumstances it may be possible for the beneficiary to sue in the name of the Executor where the Executor will not raise an action which a beneficiary seeks to raise (against an indemnity). However, there was no suggestion that such a course of action had been sought or attempted in the present case.

The Inner House also agreed with the submission by Senior Counsel for the Defender that the right of beneficiaries to a deceased's estate does not amount to a right to determine what the estate constitutes. The right of the beneficiaries is to inherit the estate as it is. The right to determine what is in the estate – its composition and extent - rests with the Executor as the representative of the former proprietor of the estate. It is necessary to consider what is the nature of the right which the Pursuers alleged to have been infringed.

At paragraph 34 of their judgement, the Inner House stated:-

> "We are reinforced in that view by considering the decision of the UK Supreme Court in **Roberts v. Gill & Co 2011 1 AC 240** and in particular the remarks of Lord Hope of Craighead at paragraphs 80-84 and Lord Rodger of Earlsferry at paragraphs 87-93. As Lord Rodger observed (at paragraph 87):-
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> > "Unquestionably the general rule is that the beneficiary of a Trust cannot sue a debtor of the Trust. The relevant right of action is vested in the Trustees and it is for them to enforce that by raising an action, if appropriate. Where the Trustees decline to take proceedings but the beneficiary insists, he can require them to assign the right of action or to permit him to use their name, provided that he gives them an indemnity for any liability for expenses.
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> At paragraph 88 Lord Rodger referred to the opinion of Lord Shand in **Rae v. Meek 1888 15 R 1033 (at 1050-1051)**:-
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> > "If the Trustees do not think fit to raise an action against the debtors for certain debts, having doubts it may be how far they may be certain of success is it for a beneficiary or beneficiaries to do the same in their own name? I think they have no such right and I do not think that this is a matter of mere form; it is, in my view, a matter of substance, because if the law were otherwise, then debtors of Trust estates including amongst them Law Agents who may have been employed by the Trustees, would be liable to actions at the instance of many different person – of anyone having a beneficial interest in the Trust estate – requiring them to pay the amount of their debts to the Trustees. I think such actions are not competent and that the only persons who can maintain actions to recover

> debts due to an Executry or Trust estate are the administrators of the estate, the Trustees or the Executors."

This remains a difficult area of law – particularly in one set of circumstances. One adult child has been the sole Attorney for an elderly parent. The parent dies leaving a Will in terms of which the same child who was the sole Attorney is appointed as sole Executor. Other children of the deceased raise queries as to what has happened to the parent's estate which appears to have been greatly diminished. They request the Executor to demand an accounting of the Attorney (and this is something which Executors are entitled to do – see above). However, the Executor refuses. Quid iuris?

However, beneficiaries are not left without remedies in appropriate circumstances – **the Parachute Regiment Charity v Deborah Louise Hay 2019 SC ABE 26 (see below).**

The foregoing case also demonstrates what Executors and Trustees can and should do to avoid confrontation with beneficiaries.

Breach of Trust

Bearing in mind that Executors are also Trustees, Executors can be liable for a breach of trust just as in the same way as a Trustee – and can be held to account in appropriate circumstances. Norrie & Scobbie in their book "Trusts" at page 139 state, in relation to a breach of trust:-

> "Breach of trust is a concept which is very wide in its scope, and it includes much more than simply dishonest dealing with the Trust property, though that, of course, is the clearest example of a breach. Breach of trust may for example consist in a failure to invest the Trust Estate in accordance with the Trust Deed or the law, or a failure to account for any intromission, or a failure to timeously discharge a security, or a failure timeously to call in a debt, or a failure to take proper advice when that is required, or the making of a loan from the Trust Estate to one of the Trustees, or the payment of a Trust Estate to the wrong beneficiaries, or a failure to prevent a Company in which the Trust has controlling interest, and which the Trust Estate is substantially invested, from indulging in speculation as a result of which the value of the Company Shares (and thus the Trust Estate) substantially diminishes. Indeed, it includes any form of bad management or neglect or dilatory carrying out of the Trust purposes or anything that causes the Trust Estate to diminish in value which a Trustee acting reasonably could have avoided. Additionally, a breach of trust may be constituted by some act that goes against the terms or purposes of the Trust, even although that act results in an increase in the value of the Trust Estate; for the aim of a Trust is the achievement of purposes rather than the maximisation of profit."

Perhaps one of the clearest examples of a breach of trust is where an Executor/Trustee acts as auctor in rem suam.

Again making reference to Norrie & Scobbie's book, they state at pages 126-127 that:-

> "Any Trustee who permits a conflict to arise between his personal interests and those of the Trust is said to be auctor in rem suam, or author in his own cause, and as such is in breach of trust.
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> There are a number of reasons why the law prohibits Trustees from being auctor in rem suam. First, Trustees act in a fiduciary capacity which could be compromised by allowing personal considerations to be brought in. Secondly and more obviously, if a Trustee were allowed to act in a personal capacity in a transaction with the Trust, his personal interest could clearly clash with his Trust duties. Thirdly, Trustees have opportunities to acquire information regarding the Trust property which is not open to third parties, giving them an unfair advantage which they may turn to their own profit, even unconsciously. In another context this would be described as insider dealing which, of course, is not tolerated by the law. Fourthly, the Trust is always entitled to independent advice and representation and this would not always clearly be the case if the Trustees were allowed to give advice on matters that might affect themselves."

At pages 127-128 Norrie & Scobbie point out the possible consequences of being auctor in rem suam.

> "First and foremost, the Trustee allows himself to become auctor in rem suam will be in breach of trust …
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> Secondly a constructive Trust is created over any profit which a Trustee makes for it is irrebuttably presumed that he holds on behalf of the Trust any benefit he acquires from his position. The Trustee cannot plead otherwise. To do so would be to plead his own breach of trust (**Laird –v- Laird 1858 20 D 972**).
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> Thirdly, any transaction in which a Trustee is auctor in rem suam will be open to reduction. The transaction itself is not void but is voidable. Any beneficiary may challenge the transaction so long as he has both title and interest to do so (**Johnston –v- Macfarlane 1987 SLT 593**). Likewise it may be challenged by any co-Trustee (**Cherry's Trustees –v- Patrick 1911 2 SLT 313**) or by a Judicial Factor appointed to a Trust Estate (**Henderson –v- Watson 1939 SC 711**).

There is a trap for the unwary here.

Fees for acting as Executor or Trustee

Let us take the example of an Executry Estate where in terms of the Will, the Executors appointed to administer the Estate are two Solicitors. Their firm is dealing with the winding up of the Estate. A power granted in general terms for the Executors to appoint Solicitors and other professionals and allow them their usual professional charges will not permit in the example given the Solicitors firm to wind up the Estate and charge fees. This is now settled.

I would refer you to Wilson & Duncan "Trusts, Trustees and Executors", paragraph 26-34. In commenting on the duty of an Executor or Trustee not to act as auctor in rem suam Wilson & Duncan state:-

> "The second aspect of the doctrine is that in the absence of a special provision in the Trust Deed, a Trustee must act gratuitously.
>
> The principle is this: it is the duty of an Executor and a Trustee to be Guardian of an Estate and to watch over the interests of the Estate committed to his charge. If he be allowed to perform the duties connected with the Estate and to claim compensation for his services, his interest would then be opposed to his duty and, as a matter of prudence, the Court does not allow the Executor or Trustee to place himself in that situation. If he chooses to perform those duties or services on that Estate, he is not entitled to receive compensation. The case applies as strongly to an Attorney as that to any other person; for if an Attorney, who is an Executor, performs business that was necessary to be transacted – if this Attorney, being an Executor, performs those duties himself, he in my opinion is not entitled to be paid for the performance of those duties; it would be placing his interest at variance with the duties he has to discharge (**New -v- Jones 1 H &Tw 63** at page 634 per Lord Lyndhurst, cited by Lord Justice Clerk Hope in **Lord Gray & Others (1856) 19 D 1**)."

When framing Executors powers in a Will, I would recommend that you always state something along the lines of:-

> "My Executors shall have power to appoint themselves or any other person to be Solicitors, factors etc to the Executry Estate and to charge their normal professional fees."

Such a power is not a breach of the provision of auctor in rem suam as Scots law recognises that the testator/trustor can authorise his Executors/Trustees to act in such a fashion and to charge reasonable and standard fees.

Bear in mind however that you should never incorporate within a client's Will a statement that the Executors must instruct your firm to deal with the winding up of the client's estate.

Are there Defences available in respect of an alleged Breach of Trust?

Again I would refer to Norrie & Scobbie, page 148 where they state:-

> Section 31 of the Trusts (Scotland) Act 1921 provides for the possibility of relief for a Trustee who commits some breach of Trust at the instigation of a beneficiary. It provides that if a Trustee acts in breach of Trust at the instigation or request or with the written consent of a beneficiary the Court may, at its own discretion, make any such order as it thinks fit to apply all or any part of the interest of that beneficiary in indemnifying the Trustee for the amount he has to pay as a consequence of that breach of trust. This is a statutory formulation of a similar common law principle which was based on personal bar. It does not confer upon the Trustee a right of personal action against the beneficiary but rather allows the Court to authorise the Trustees not

to pay that beneficiary his full entitlement. If the Trustee is liable for more than the instigating beneficiary's interest he must suffer the loss himself.

There is also a statutory limitation under Section 32 of the 1921 Act, which provides that where it appears to the Court that a Trustee is or may be personally liable for any breach of trust but has nevertheless acted honestly and reasonably and ought fairly to be excused for such breach the Court in its discretion may relieve the Trustee wholly or partly from personal liability for it.

Again quoting from Norrie & Scobbie (page 50) they state:-

> "Both honesty and reasonableness must be established (and it is for the Trustee to prove this), and the Court must further be satisfied that it would be fair to excuse the Trustee. Though there are no cases defining "dishonesty" it probably serves to exclude any Trustee who acts for reasons other than his bona fide conclusion of what was in the interest of the Trust. Since negligence is, by definition, unreasonable behaviour, any Trustee who is negligent in the performance of his duties under the Trust would also be unable to relief under this section. In **Clarke -v- Clarke's Trustees 1925 SC 693**, a Trustee had in all honesty left a sum of money on deposit receipt for two years instead of investing part of it in an annuity for which the Trust had provided. It was held that this was not a reasonable course of action since it meant that the annuity would be chargeable to the whole fund rather than only to the part that ought to have been invested: relief under Section 32 was refused."

What happened in the Parachute Charity Regiment case referred to above?

The deceased had left a Will in terms of which he left a specific bequest of a property to a named beneficiary – which of itself raises an interesting drafting point. However, the deceased did not in fact actually own the property – it formed part of the residue of a relative's Estate. The deceased was a residuary beneficiary under the relative's Will. The deceased had left the residue of his Estate to two named charities, one being the Parachute Regiment Charity.

The Executor had received advice that the specific bequest left by the deceased had adeemed. She sought an opinion from an experienced Executry Practitioner, who took the view that the bequest could not be given effect to. She then sought the opinion of Senior Counsel who disagreed with the views previously expressed.

The Charity raised an Action of Accounting against the Executor.

At first instance, (**Parachute Regiment Charity –v- Deborah Louise Hay 2019 SC ABE 18**) the Sheriff found that the bequest in question had adeemed.

The later report dealt with the question of expenses.

Senior Counsel for the Charity moved that the Executor should be held liable personally for the whole expenses of the case. The Sheriff took the view that it was both unnecessary and unreasonable for the Executor to seek effectively a second/third opinion in all the circumstances of the case.

Senior Counsel for the Executor conducted a detailed examination of the case law in relation to circumstances in which an Executor should be entitled to relief for the expenses of litigation from the Executry Estate. Senior Counsel cited passages from the book by Wilson and Duncan "Trusts, Trustees and Executors" and the cases cited by those authors.

At paragraph 30-01 of their book, the authors had stated that a Trustee has right to be reimbursed in respect of all expenses properly incurred by him in the administration of the Trust Estate.

At paragraph 3-14, the authors stated that Trustees are entitled to reimbursement of the expenses of litigation properly incurred. In the case of **Wemyss –v- Kennedy 1906 14 SLT 237**, Lord Ardwall had stated (at page 238):-

> "I think that Trustees are, as a rule, very much harassed and bullied by beneficiaries, the Courts of Law and everybody else, but fortunately they have this decided in their favour – that if they expend money on litigation in the discharge of their duty as Trustees, they are entitled to take their expenses out of the Trust if they are successful, or even if they are unsuccessful."

At paragraph 30-15 of their book, Wilson & Duncan stated that the right to reimbursement of such expenses was not dependent upon success in litigation. They quoted Lord McLaren at page 893 in the case of **Gibson –v- Caddall's Trustees 1895 22 R 889** as saying:-

> "It is always understood that where Trustees, acting in the discharge of their duty, litigate in the name of the Trust Estate and for the protection of the interest of the Trust, they are entitled to charge the Trust with the account of expenses, upon the principle that representative persons are entitled to costs necessarily incurred in the interests of their constituents. It would, I think, be unfair that their rights should depend upon the circumstances of their being successful in the litigation."

At paragraph 30-18, the authors stated, making reference to the case of **Buckle –v- Kirk 1908 15 SLT 1002**, that if Trustees enter into a litigation on Counsel's advice that is normally enough to entitle them to reimbursement. At paragraph 30-27, Wilson & Duncan stated that if the difficulty giving rise to the litigation was created in the first place by the testator himself, the expenses should be borne by the Estate. They quoted by Lord Cowan at page 713 in the case of **Wright's Trustees –v- Wright 1870 3M 708** where he said:-

> "Where the question arises to the meaning of the Trust Deed, and is fairly brought before the Court, we are entitled to deal with expenses as we would in ordinary actions and make the testator's Estate pay for the ambiguities to which the Trust Deed has given rise."

Senior Counsel for the charity argued that it was neither necessary nor reasonable in the circumstances for the Executor to have sought Senior Counsel's opinion – appearing to suggest that the Executor had "shopped around" until she found an opinion which suited her.

The Sheriff agreed.

The Sheriff took the view that the defence of the action by the Executor was not reasonable. He suggested that the Executor should not have defended the action but have intimated it to the specific legatee who could have decided for her own part whether or not she wished to become embroiled in the litigation. The Sheriff suggested that had the Executor followed that course, she would not have found herself liable (as the Sheriff concluded) personally for the expenses of the action.

Is there a Difference Between an Executor Nominate and an Executor Dative?

There may well be.

In the case of **Watson -v- Watson's Trustees 1875 2 344**, it was held that when Trustees in good faith had entered into a process to defend the deed which they had the responsibility of administering, they were as a general rule entitled to their expenses – even if unsuccessful. However, I would refer you to the case of **Cameron -v- MacIntyre's Executor 2004 SLT 79**.

This was a troubling case. Effectively what had happened was that an individual who had been adopted at the age of 21 some 50 years later raised an action to reduce the Decree of Adoption. The effect of this would have been to open up rights of succession in the intestate Estate of the deceased's natural brother. Scottish Courts have always been very reluctant to overturn Decrees of Adoption. However, Lord Drummond Young took the view that in this case there may have been fraud involved (someone other than the adopted child may have signed the Form of Consent) and granted the Action of Reduction.

The case went to the Inner House (the original Pursuer having died and the matter being pursued by his Executor).

The Court took the view that the Executor Dative (MacIntyre) had in this case effectively "interfered" with the process when the Executor should not have taken that step. The Court appeared to suggest, countering the arguments put forward on behalf of the Executor Dative that the latter was merely seeking to protect the interests of the beneficiaries on intestacy who would succeed if the Action of Reduction of the Adoption Order failed, was not reasonable in all the circumstances – the Court in my

view appears to have suggested that it should have been the putative beneficiaries on intestacy (remoter relatives of the deceased than the original Pursuer) who should have sought to intervene in the case – this resonates with the view of the Sheriff in the Parachute Regiment case.

The Inner House referred to the case of **Watson -v- Watson's Trustees 1875 QR 344**. The Court indicated that "in the present case there is no deed or settlement to defend, the deceased having died intestate and the Executor Dative being required to administer the Estate in accordance with the general law. Moreover, if one addresses the matter more widely it can be said that the present litigation was truly a competition between the person who if the Adoption Order was reduced was entitled to the intestate Estate and those who were entitled to it if the order was not reduced.

What should Executors/Trustees do when they find themselves in a difficult situation, facing possible litigation?

One suggested course is that an Executor should be more proactive in the course of action to be followed. I think that this point was clear from the Parachute Regiment case referred to above.

Before considering the routes which an Executor might consider to obtain protection from personal liability in relation to litigation, I would mention the provisions of Section 23 of the Succession (Scotland) Act 2016 (which came into effect on 1 November 2017). Section 23 is in the following terms:-

"In the Trusts (Scotland) Act 1921, after Section 29 insert:-

29A. Errors in Distribution: Circumstances in which Trustee not personally liable:-

(1) A Trustee is not personally liable for any error in the distribution of any property or the income of property, vested in the person as Trustee if:-

(a) the error was caused by the Trustee not knowing (either or both):-
(i) of the existence, or non-existence of a person;
(ii) of a person's relationship, or lack of relationship to another person; and

(b) the distribution takes place:-
(i) in good faith and after such enquiries as any reasonable and prudent Trustee would have made in the circumstances of the case; or
(ii) in accordance with an Order of the Court.

(2) Sub-section (1) does not affect any right which a person entitled to the property or income concerned has to recover it from another person;

(3) Sub-section (2) is without prejudice to Section 24 of the Succession (Scotland) Act 2016;

(4) This section applies only in relation to a distribution which takes place on or after the day on which Section 23 of the Succession (Scotland) Act 2016 comes into force."

It is of course possible for Executors and Trustees to seek judicial guidance. In that connection, I would refer you again to the Trust Law Report of the Scottish Law Commission 2014 (No. 239), paragraph 16.5 et sequitur. I quote as follows:-

"16.5 We moved on to consider the extent to which the Courts were able to assist Trustees by providing guidance, directions and advice where Trustees encountered problems relating to the administration of the Trust or the rights of beneficiaries and other parties involved.

We gave particular consideration to the three main ways in which Trustees may obtain guidance from the Court;

A Petition for directions under Section 6(vi) of the Court of Session Act 1988.

The presentation of a special case.

An Action of Multiple Poinding.

We summarised the existing law on these procedures.

We noted that in relation to Petitions for directions, the Court will not consider applications that relate to complex issues of fact or otherwise require a full Hearing and comprehensive submissions by all parties.

It has been suggested that the Petition for directions had been designed for the summary disposal of urgent requests by Trustees and should not be used to decide cases that could be determined using other existing procedures.

In relation to the special case, agreement among all the interested parties as to the facts was essential.

Both a Petition for directions and a special case proceed straight to the Inner House.

Multiple Poinding procedure is available where the issue is one of competing claims to the same fund or property."

In its Report, the Scottish Law Commission concluded that the provisions for Trustees (and remember this includes Executors) obtaining advice via the Courts did require some reform.

I have heard it said that beneficiaries in an Executry estate cannot raise an Action of Multiple Poinding. That is not, in my view, correct. I believe that it is entirely competent for a beneficiary to seek to raise such an action. Having said that, experienced litigators are likely to say that an Actions of Multiple Poinding do have a reputation for being complex, expensive and time consuming.

However, where a beneficiary raises such an action, the Executor and all other beneficiaries in the Will would require to be called as parties. The procedure itself is separated into three parts:-

- Determination of the competency of the action.

- Determination of what just comprises the fund in medio.

- Adjudication on the various and competing claims in respect of the fund in medio.

Each stage may require pleadings and hearings. See the Ordinary Cause Rules, Chapter 35. In many cases, the first two stages detailed above are not difficult to navigate. The real dispute is likely to relate to the determination of the competing rights into the fund in medio.

However, notwithstanding the criticisms which I have outlined above, raising an Action of Multiple Poinding may in fact be an option which a beneficiary in dispute with an Executor should consider – as it is often the case that expenses are recoverable from the fund in medio and this allows a Pursuer with limited financial means to access a Court determination.

However, I think the message from the Parachute Regiment Charity case is clear. Trustees and Executors, where they find themselves faced with a difficult question, should be proactive and seek the assistance of the Courts. In the Parachute Regiment case, the Executor was not proactive; she appears to have adopted a “negative position” which affectively forced one of the residuary beneficiaries to take action against her as Executor. Had the Executor been proactive and herself raised proceedings in Court to seek to have the difficulty arising from the interpretation of the deceased’s Will properly interpreted by the Court, I have no doubt but that the Court would have awarded her expenses against the deceased’s Estate – that is the usual position in an Action of Multiple Poinding where expenses are awarded against the fund in medio.

The circumstances in the Parachute Regiment Charity case are unusual. But they do indicate that an Executor should be proactive in seeking to protect himself against personal liability when difficult legal issues arise.

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