

Journal Article - Case Comment

## Death and the transfer of heritable property.

Roddy MacLeod.

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[ [Juridical Review](#) ]

**Publication Date:** 2016

**Subject:** Succession . **Other related subjects:** Contracts. Equity. Heritable property.

**Keywords:** Breach of contract; Donatio mortis causa; Heritable property; Oral contracts; Promises; Remedies; Revocation; Right to buy; Scotland; Wills;

**Abstract:** Assesses the Outer House judgment in *Khosprowpour v MacKay* on the binding effect of an oral agreement that the pursuer's provision of financial assistance to his former mother-in-law to purchase her local authority flat under right to buy rules was conditional her bequeathing it to him on her death.

### **Legislation Cited:**

[Requirements of Writing \(Scotland\) Act 1995 \(c.7\)](#)

### **Cases cited:**

[Khosprowpour v MacKay \[2014\] CSOH 175; 2015 G.W.D. 1-8 \(OH\)](#)

[De Lathouwer v Anderson \[2007\] CSOH 54; 2007 S.L.T. 437 \(OH\)](#)

[McEleveen v McQuillan's Executrix 1997 S.L.T. \(Sh Ct\) 46 \(Sh Pr\)](#)

## Juridical Review

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### Case Comment

#### Death and the transfer of heritable property

Roddy MacLeod\*

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#### Legislation:

[Requirements of Writing \(Scotland\) Act 1995 \(c.7\) s.1\(2\)](#)

#### Cases:

[Khosrowpour v MacKay \[2014\] CSOH 175; 2015 G.W.D. 1-8 \(OH\)](#)

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#### \**Jur. Rev. 19* Introduction

The December 2014 case of [Khosrowpour v MacKay](#)<sup>1</sup> is a recent addition to a line of authorities relating to the interesting, but potentially complicated, regime that applies to disputed bequests of heritable property. [Khosrowpour](#) will likely be of current and future interest, as the decision at first instance is currently being reclaimed.<sup>2</sup>

Generally, the scenario whereby a first party gifts or bequests heritable property to a second party is not unusual; and where the bequest is properly documented, the matter may well be straightforward. In contrast, however, [Khosrowpour](#) and other cases (discussed below) highlight the difficulties in litigating about cases where the bequest arises from an imperfect agreement.

In the eponymous case, Mr Khosrowpour averred that he had entered into a contractual arrangement with his deceased former mother in law to financially assist her to purchase her local authority flat. This type of arrangement is not uncommon: of the reported decisions relating to the subject of this article, many concern the situation where the testator's purchase was in exercise of a right to purchase their local authority property. In such reported disputes, the relative's financial assistance was not gratuitous: they expected to inherit the property on the death of the testator; but, following death, it was found that the testator had bequeathed the property to another party. The issue in these cases was whether the relative had an enforceable right against the testator's estate. Indeed this was the issue in [Khosrowpour](#)<sup>3</sup>; the matter being complicated by the absence of a written agreement between the pursuer and the deceased.

Whether a person—in the shoes of the second party—will have an enforceable right to receive the heritable property will likely depend on the specific facts. Such facts will then provide a general matrix to the legal issues at play. This article considers such legal issues.<sup>4</sup> Broadly speaking, there will be a number of issues to navigate or discount in determining, first what the right *\*Jur. Rev. 20* is; and from that, secondly, what the remedy is. The legal issues are: (i) testamentary freedom (to bequest *and* to revoke); (ii) donation *mortis causa*; (iii) promise; (iv) contract to test; and (v) the [Requirements of Writing \(Scotland\) Act 1995](#).

Given the interplay between these issues, the potential difficulties—as encountered in [Khosrowpour](#)—may not be so unexpected.

## The factual and legal matrix

As a starting point, it will be necessary to clarify some initial points, being mixed factual and legal in nature.

First, in the context of a "right to buy" scenario as discussed in this article, it is a prerequisite that title to the property is taken in the testator's name alone<sup>5</sup> and not jointly with the second party. Secondly, it would be necessary to demonstrate that the second party's involvement/financial assistance was not gratuitous. That would be necessary in establishing a bilateral arrangement between the parties. A feature in many *undisputed* transactions, is that the relative/lender is granted a standard security over the property to protect their loan. This was also a feature in *Khosprowpour*, in which the pursuer averred that the standard security was demonstrative of there being an agreement between the parties. Thirdly, it will be necessary to clarify whether there is a written agreement. As noted below, the presence of a written agreement will be important, albeit perhaps only to a limited degree. For example, in *Hutchison v Graham's Executrix*<sup>6</sup> (in which the underlying issue was similar to *Khosprowpour*) there was an *ex facie* valid written agreement which specifically regulated the consequence of the property not being bequeathed to the lender. In contrast, in *Khosprowpour* a particular issue was the absence of such a written agreement.

Once the foregoing matters are clarified, the legal issues and interrelation of such issues can then be considered.

### (i) Testamentary freedom

Scots law generally recognises that a person has freedom to test. Such freedom is not absolute; being limited by, for example, legal rights and a general restriction on purposes which are *contra bonos more*. That apart, there is a freedom which subsists until the death of the testator. The important point, therefore, is that it is *death* which converts a testator's intention into a beneficiary's right.

In this context, therefore, it is logical that a party also has a general freedom to revoke their testamentary wishes until the date of death *\*Jur. Rev. 21*

"neither delivery of a testamentary writing, nor any integral clause of irrevocability, can effectively bar a testator from changing his or her mind".<sup>7</sup>

Such freedom can be restricted, but that would require to be explicit or through the operation of contract. This was the position as found by Lord Carloway in *Hutchison*:

"Mrs Graham was entitled, in her second will, to revoke the terms of the first will unless she had contractually bound herself not to do so."<sup>8</sup>

Within such a restriction, the law allows a person to regulate their own testamentary affairs as they see fit. Therefore, unless there is some alternative basis on which to strike at a testator's testamentary intention (for example incapacity, or undue influence<sup>9</sup>) a testamentary instruction would be *ex facie* valid. This is relevant as the effect of a later testamentary writing will normally revoke all earlier testamentary writings: "It is well settled that a second and later universal settlement of a testator's estate revokes a first and earlier universal settlement."<sup>10</sup>

Therefore in a "right to buy" scenario where the second party is providing financial assistance, the unsecured lender who doesn't have their involvement committed to writing, potentially perils their position against the testator's general freedom to test *and* to revoke.

### (ii) Donation mortis causa

The concept of testamentary freedom extends to donations *mortis causa*. A donation *mortis causa* is a gift

"made in contemplation of the death of the donor but it is not necessary that he should then be in immediate peril of death".<sup>11</sup>

A donation of this kind is generally revocable and to that extent there is a general similarity as with a testamentary bequest:

"It is well settled as a general rule that the granter of a will or mortis causa instrument is entitled to revoke or alter its dispositions so long as *\*Jur. Rev. 22* the instrument and the estate conveyed by it remain subject to his control."<sup>12</sup>

The issue of control is therefore key, and explains why the courts are not inundated with litigations concerning revoked testamentary intentions. Suffice to note that in the context of a "right to buy" scheme, a party would normally be unable to divest themselves of the heritable property during an initial period after purchase without creating a clawback to the local authority. Thereafter, there is often the practical matter of the testator wishing to remain in their property until death. To that extent, therefore, the testator typically continues to have title and control of the property during life, to the exclusion of the second party/relative.

### **(iii) Promise**

By extension, the concept of promise, as a means of disposing heritable property on death, will likely be subsumed into the foregoing class of donation *mortis causa*. In the case of *McGregor v Hepburn*<sup>13</sup> a lady executed a holograph writing in which she wrote, inter alia, that she "was giving" to her daughter and son in law, her heritable property and "at my earliest convenience I will sign over the titled [sic] deeds to make them sole heirs of same". Lord Grieve distinguished between a present gift (as the pursuer sought declarator for) and an intention on the part of the granter to ensure that the donees succeeded as her heirs to the heritable property. Lord Grieve held: "The granter promises to do something which is legally impossible"<sup>14</sup>; and:

"What the granter promises to do is to make the pursuer and his wife 'sole heirs' of the subjects. What the pursuer asks the court to do is to grant him a disposition of them. These two things are not the same and the action must fail."<sup>15</sup>

In comparing promise with a *Khosprowpour* scenario, one can exclude the second party's entitlement to seek a transfer of the property during lifetime, because that would violate the purpose of the "right to buy" scheme (see preceding comments). At first blush, this may tend to suggest that the second party's only protection would be to rely upon a *mortis causa* donation being perfected. However, that would ignore the important distinction, as highlighted by the reported cases, whereby the second party relies upon there being a bilateral *agreement* to effect a transfer of the heritable property after death.<sup>16</sup>

*\*Jur. Rev. 23*

### **(iv) Contract to test**

In the context of this article, the most obvious example of a bilateral agreement is a contract to test. A contract to test involves the first party contracting themselves to test (or write a will) in a particular manner. Whereas in a *Khosprowpour* situation a testator may elect to revoke a stated testamentary intention, a contract to test inherently disapproves of revocation:

"[An] *inter vivos* agreement to make a testament or grant a legacy will bar revocation of a will or legacy made in implement of it."<sup>17</sup>

In other words, the testator is specifically contracting out of their right to revoke their testamentary instrument.

A contract to test situation is demonstrated in the case of *De Lathouwer v Anderson*.<sup>18</sup> *De Lathouwer*, like *Khosprowpour*, concerned the transfer of heritable property which the pursuer and her husband had purchased for the benefit of another couple. Title to the property had been transferred to the couple who undertook that they (and their survivor) would bequeath the house to the pursuer, by virtue of a probative writing in the pursuer's favour. Following death, however, it was found that neither of the couple's wills bequeathed the property to the pursuer.

Mrs De Lathouwer's primary conclusion was for a conveyance of the property in implement of the said writing, on the basis that it was testamentary in nature. At debate Lord Emslie rejected the principal claim—"it seems to me to confuse the concept of a testamentary writing, on the one hand, with, on the other, a deed which merely envisaged that something will happen on the death of the grantor"—allowing the pursuer's alternative case (for payment of damages for breach of contract) to

proceed to a proof before answer.

Whereas in [De Lathouwer](#) there was a valid agreement between two parties, the issue in [Khosrowpour](#) was whether there was an agreement between the parties *at all* and, if there was, then the nature of such agreement.

The decision in [Khosrowpour](#) followed the decision in a preceding sheriff court case, [McEleeven v McQuillan's Executrix](#).<sup>19</sup> In each of these cases, there was analysis of what the testators were potentially obliging themselves to do.

In [McEleeven](#), a deceased man, had (when in life) been assisted in the purchase of his local authority property by one of his daughters. In consequence of that assistance the father had undertaken—verbally—to ensure that his said daughter inherited the property. He executed a will to that effect. However, on death, a subsequent will was found which revoked the first will *\*Jur. Rev. 24* and bequeathed the estate (including the property) elsewhere. The disinherited daughter raised proceedings which were dismissed at first instance. On appeal, Sheriff Principal MacLeod accepted that "rights of inheritance conferred by writing can only be transferred by writing"<sup>20</sup> and held

"the agreement founded on by the pursuer is of a kind that requires to be constituted by probative writ, but even if that is not so it is an agreement that challenges a testamentary writing and as such requires writ for its proof".<sup>21</sup>

He refused the appeal.

In [Khosrowpour](#) Lord Turnbull approved of the rationale in [McEleeven](#) and distinguished the scenario as featured in those cases from the contract to test scenario as exemplified in [De Lathouwer](#). He summarised the distinction as follows:

"In my view, Sheriff Principal MacLeod's analysis provides a correct exposition of the law and the agreement founded upon in the present case is one which falls properly to be described as a contract relating to heritage.

In arriving at this decision I have not ignored what was said by Lord Emslie in the case of [De Lathouwer v Anderson](#) .... The agreement which featured in [De Lathouwer](#) was constituted by a probative writing in which the owners of the property undertook that they would leave and bequeath the house to the pursuer. Accordingly, the impediment which faced each pursuer in the cases of [Fisher](#)<sup>22</sup> and [McEleeven](#), and which faces the present pursuer, was absent."<sup>23</sup>

### **(v) The Requirements of Writing (Scotland) Act 1995**

The final legal issue, which adds a layer of legal complication to the scenario considered by this article, is the application of the provisions of the [1995 Act](#). The relevant part of [s.1\(2\)](#) provides

"Subject to subsection (3) below, a written document shall be required for— (a) the constitution of— (i) a contract or unilateral obligation for the creation, transfer, variation or extinction of an interest in land; ...."

Ignoring, for present purposes, subpara.(c),<sup>24</sup> the important restriction is that imposed by subs.(2)(a)(i). It is for this reason that in a typical "right to buy" *\*Jur. Rev. 25* scenario where a relative/second party is funding the transaction, the second party's interest is recorded in a written agreement.

Necessarily, for the reasons noted above, at the time of the original purchase of the property, the second party cannot take title to the property. To that extent, therefore, the second party's interest is contingent and relies upon the testator taking positive action to divest themselves of their heritable property at a future time, in favour of the said party.

### **Remedy**

Against the foregoing framework, and with analysis of the cases referred to above, the following general observations may be made concerning remedy:

First, where there is an agreement which provides a remedy, such remedy would be relied upon. See,

for example, the comments of Lord Carloway in [Hutchison](#):

"Where a particular breach averred is anticipated by an Agreement and a specific remedy is provided in that event, the contractual remedy must be seen as being intended as a substitute for, and not as a supplement to, those at common law."<sup>25</sup>

Secondly, in the case of a contract to test, breach of contract may give rise to damages against the testator's estate. The specific authority for that is [De Lathouwer](#) as approved of by Lord Turnbull in [Khosrowpour](#).

Thirdly, whereas a pursuer's rights will normally be enforceable against the executor(s) of a testator's estate, the nature of such rights will require to be considered against the terms of any agreement. In the face of an *ex facie* valid will—where reduction of that document will likely be impossible—it may not be possible to seek implement of obligations which are personal to the deceased and which fall within the class of *delectus persona*.<sup>26</sup> For example, it is suggested that an obligation to test would fall within such a class and could not, therefore, transmit to their executors

Fourthly, assuming the relationship between the parties is bilateral then, with the exceptions noted in the preceding paragraphs, normal contractual remedies would be expected to apply. To this extent, it is moot whether other remedies—particularly those falling under the head of unjustified enrichment—would be appropriate.

## Conclusion

As noted in the introduction, a "right to buy" scenario which is predicated on a subsequent bequest of heritable property is common and can be regulated. **\*Jur. Rev. 26** The litigations in [Khosrowpour](#) and similar cases might therefore have been avoided by perfecting the underlying agreements between the respective parties. In the area of contentious executries, of course, there is often the added difficulty of complicated personal relationships; these may be harder to resolve.

**\*Jur. Rev. 27**

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1. [Khosrowpour v MacKay \[2014\] CSOH 175](#).

2. The writer understands that the focus of the appeal concerns the operation of personal bar. As at the date of writing, the reclaiming motion is part heard and due to be concluded in mid-February 2016.

3. The defender's position being that the pursuer's case was irrelevant (see, in particular, [Khosrowpour v MacKay \[2014\] CSOH 175](#) at [8]).

4. It is intended to provide an overview (only) of the interplay between the legal issues.

5. To the extent regulated by [s.61\(6\) of the Housing \(Scotland\) Act 1987](#).

6. [Hutchison v Graham's Executrix, 2006 S.C.L.R. 587](#).

7. [De Lathouwer v Anderson \[2007\] CSOH 54; 2007 S.L.T. 437](#) at 439.

8. [Hutchison v Graham's Executrix, 2006 S.C.L.R. 587](#) at [7].

9. See, generally, for example, [Smyth v Romanes's Executors \[2014\] CSOH 150](#).

10. [Macrorie's Executors v McLaren, 1984 S.L.T. 271](#), per Lord Grieve at 272, approving [Bertram's Trustees v Matheson's Trustee \(1888\) 15 R. 572](#).

11. *Stair Memorial Encyclopaedia*, Vol.25, "Wills, Trusts and Succession". See, generally, the *Reissue on "Donation"* by W. Gordon (LexisNexis, 2011).

12. [McLachlan v Seton's Trustees, 1937 S.C. 206; 1937 S.L.T. 211](#).

13. [McGregor v Hepburn, 1979 S.L.T. 87.](#)
14. [McGregor v Hepburn, 1979 S.L.T. 87](#) at 88.
15. [McGregor v Hepburn, 1979 S.L.T. 87](#) at 89.
16. 16 In contrast to the "right to buy" scheme, see [Macdonald v Cowie \[2015\] CSOH 101](#) as a recent litigation concerning the effect (as regards an executry) of a writing which was claimed to be an enforceable promise to make an inter vivos gift of heritable property.
17. [Paterson v Paterson \(1893\) 20 R. 484](#), per the opinion of the Lord Ordinary, which decision was approved by the First Division.
18. [De Lathouwer v Anderson \[2007\] CSOH 54; 2007 S.L.T. 437.](#)
19. [McEleveen v McQuillan's Executrix, 1997 S.L.T. \(Sh. Ct\) 46.](#)
20. [McMurrich's Trustees v McMurrich's Trustees \(1903\) 6 F. 121; \(1903\) 11 S.L.T. 469](#), per Lord McLaren.
21. [McEleveen v McQuillan's Executrix, 1997 S.L.T. \(Sh. Ct\) 46](#) at 50.
22. [Fisher v Fisher, 1952 S.C. 347; 1952 S.L.T. 350.](#)
23. [Khosrowpour v MacKay \[2014\] CSOH 175](#) at [21] and [22].
24. "the making of any will, testamentary trust disposition and settlement or codicil."
25. [Hutchinson v Graham's Executrix 2006 S.C.L.R. 587](#) at [7].
26. See, generally, William W. McBryde, *The Law of Contract in Scotland*, 3rd edn (Edinburgh: SULI; W. Green, 2007), Ch.26, Pt 1.