ARTICLES

Death of an executor dative: appointment of a judicial factor

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The author considers the appointment of a judicial factor following the death of a sole executor dative.

Introduction

This article considers the appointment of a judicial factor following the death of a sole executor dative. In particular, the author comments on: (i) the circumstances under which a judicial factor may be appointed on a solvent intestate estate; (ii) the right of the 'executry solicitors' to seek appointment; and (iii) the powers of a factor so appointed.

Failure in an executry

If a sole executor dative dies then, depending on circumstances, there may be a number of procedures available to progress the administration of the executry.

For example, if there are surviving family members of the same 'class' as the deceased executor (see *Russo v Russo*, 1998 S.L.T. (Sh Ct) 32; 1997 S.C.L.R. 1035), then an application for confirmation *ad non executa* (in terms of s.7 of the Executors (Scotland) Act 1900 ("the 1900 Act")) will likely fall to be considered by those with the requisite title and interest.

However, a difficulty may arise if there are surviving relatives (of the same class as the executor) who are unable or unwilling to be appointed. Here is an example:

> "Mr A dies, unmarried and without issue, but survived by his uncles: UB, UC and UD, all of whom are domiciled abroad. UB is confirmed as executor dative and subsequently dies, though Mr A's estate has not been wound up. The estate comprises moveable and heritable property. UC is believed to be incapacitated but cannot be contacted. UD obstinately wants nothing to do with administering an estate in Scotland."

In some cases, the "representation" provisions under s.5(1) of the Succession (Scotland) 1964 Act ("the 1964 Act") might assist if UB was survived by a child. However, in the present example the provisions of s.5(2) might not allow UB's child to take up the executor baton. Section 5(2) states:

> "The right of any issue entitled to share in an intestate estate by virtue of the foregoing subsection to be appointed to the office of executor on the intestate estate shall be postponed to the right thereto of any person who succeeds to the whole or part of the intestate estate by virtue of the foregoing provisions of this Act apart from this section and who applies for appointment to that office."

In the present example, UC and UD's right is preferential, given the terms of s.2(1) of the 1964 Act. Section 2(1)(f) provides:

> "Where an intestate is survived by uncles or aunts (being brothers or sisters of either parent of the intestate), but is not survived by any prior relative, the surviving uncles and aunts shall have right to the whole of the intestate estate;"

UC and UD could decline the right to appointment. In this regard the author notes the decision in the case of *Russell v McNair's Executrix*, 2017 S.L.T. (Sh Ct) 247. *Russell* concerned the effect of a surviving spouse's "right" of appointment as executrix dative under ss.8 and 9 the 1964 Act. The general circumstances in *Russell* are not relevant for present purposes. Nevertheless, the sheriff's observation that "the right to appointment would have to be expressly declined" would appear to resonate with the present example. However, in the present example, the difficulty is that whereas it might be possible for UD to expressly decline his right of appointment, it is not possible to communicate with UC. This leaves uncertainty as to whether UC will seek appointment as executor.

Another remedy which might be appropriate, is for the executor(s) of the deceased executor dative to confirm to the first executry estate (in the present example that is Mr A's estate) under s.6 of the 1900 Act. The mechanics of proceeding under this manner are discussed in *Currie on Confirmation of Executors* 9th edition (Ch.16). In summary, the deceased's executor(s) would require to lodge an inventory and a supporting note. The executors would then have title to ingather the estate and transfer it to either: (i) those entitled to administer it; or (ii) the beneficiaries. In the abstract there could be an attractiveness to proceeding under s.6 of the 1900 Act, on account of simplicity and cost. But there may also be difficulties — for example if the executor died abroad and there is no information about the administration of their estate. So the procedure under s.6 on the 1900 Act might not assist in the present example.

For the avoidance of doubt, this article proceeds on the hypothesis that there is a "failure" in executry administration: i.e. there is no beneficiary (with title and interest) who will invoke procedure to progress the executry.

Back, then, to the present example. Mr A's solicitors (who were instructed as the executry solicitors by UB) are holding property; but they have no beneficial interest in the estate and they have no client. Furthermore, the solicitors are conscious that, as time goes on, Mr A's Georgian mansion is not being maintained. To make matters worse, a neighbour has complained about the state of the overgrown garden…

Entitlement of law agents to petition for the appointment of a judicial factor

In the foregoing circumstances, it would appear competent for the executry solicitors to petition for the appointment of a judicial factor.

The *Stair Memorial Encyclopaedia* (Vol.24, para.239) comments that "an appointment [of a judicial factor] can be made in all circumstances where it is necessary to prevent loss or injustice". This proposition reflects that the (historical basis) for the appointment of a judicial factor derives from the courts' *nobile officium*.

In the author's view, the Inner House case of *Rutherford v Lord Advocate*, 1932 S.C. 674; 1932 S.L.T. 472 supports the proposition that a deceased's law agent can seek the appointment of a judicial factor where there are known heirs to the intestate estate but the heirs have not been decerned as executor dative.

In *Rutherford* the court expressly considered a practice which had emerged whereby judicial factors were being appointed to administer an intestate estate for which there were no known heirs. Lord President (Clyde) observed at p.679 (p.474):

> " Even the persons who find themselves in possession of a deceased intestate's estate are under no duty to find an heir for him, although they may very properly advertise for one. They are possessors custodiœ causa tantum, and as such their only right of intromission is for preservation — Ersk. Inst. III. ix. 53. If they know of an heir, they hold the custody for him, and become bound to give him intimation; but, if they do not know of an heir, they hold the custody for the Crown as ultimus hœres, and should give intimation to the King's and Lord Treasurer's Remembrancer accordingly".

In the course of its decision, the Inner House considered and overruled the case of *Handyside v Lord Advocate*, 1909 1 S.L.T. 268. The petitioner in *Handyside* was a partner of a firm which acted as the deceased's law agents. But neither in *Rutherford* nor in *Handyside* was any concern expressed as to the competence of a law agent seeking the appointment of a judicial factor. The issue in those cases was whether the particular situation merited the appointment of a judicial factor.

In the present example, there is a need for the appointment of an administrator because there is heritable property which ought to be insured and maintained.

For the avoidance of doubt, the appointment of a judicial factor in the circumstances of the present example falls to be distinguished with an appointment under s.11A of the Judicial Factors (Scotland) Act 1889 ("the 1889 Act"). Section 11A provides:

> "It shall be competent to one or more creditors of parties deceased, or to persons having an interest in the succession of such parties, in the event of… other parties having power to manage his estate or part thereof, or in the

event of such parties not accepting or acting, to apply … for the appointment of a judicial factor."

The wording of this section is very similar to the provisions of (the now repealed) s.163 of the Bankruptcy (Scotland) Act 1913. The latter section is cited in N M L Walker, Trusts, Trustees, Executors and Judicial Factors: Judicial Factors (1974) at p.31 as a ground for appointing a judicial factor where no executors are appointed, or where those who are appointed do not act.

However, it would appear unlikely that law agents would fall within scope of s.11A of the 1889 Act. In the present example the executry solicitors are not creditors of the deceased and they are not persons having an interest (i.e. a beneficial interest) in the succession of Mr A.

Powers of a judicial factor

Fast forward the present example: a judicial factor has been appointed with "the usual powers" on the estate of the late Mr A.

The role of the judicial factor so appointed is not just to act as a conservator — which is the function of a factor in many other scenarios. In contrast, when a judicial factor is appointed to an executry estate, the "purpose of the office… [is] to realise and distribute the estate" (*Stair*, supra, para.274). Accordingly, there is a general expectation that a factor appointed on an executry estate may require to sell property in order to satisfy the purpose of their appointment.

Whereas particular powers are not specified in the interlocutor (and in this regard the interlocutor will generally follow the craves of the petition), the powers of a factor "depend upon the nature of his duties" (*Walker*, supra, p.75).

In an executry context, the Inner House (Second Division) case of *Munro (Lowe's Judicial Factor), Petitioner*, 1925 S.C. 11; 1924 S.L.T. 751 is authority for the proposition that the "usual powers" of a judicial factor on a trust estate include a power to sell the factory estate. In *Munro*, the factor lodged a note seeking authority to sell heritage. The Lord Ordinary reported the matter to the Inner House. Under reference to sections of the Trusts (Scotland) Act 1921 ("the 1921 Act"), the Lord Justice Clerk (Alness) stated at p.15 (p.754):

"I find that trustees are authorised to sell trust estate at their own hand, except in a case which does not affect the question with which we are concerned, viz., when such a sale is at variance with the terms or purposes of the trust. And if it be asked, 'What is a trust?' the definition clause in the Act supplies the answer. It is, inter alia, 'The appointment of any tutor, curator, or judicial factor by deed, decree, or otherwise.' That is a highly artificial and technical view of a trust, but the language of the statute is plain. It would accordingly appear that a trust is created by the appointment of a judicial factor upon an estate. 'Judicial factor' is defined by the interpretation clause as meaning — I quote the relevant part — 'any person judicially appointed factor upon a trust-estate.'

Now Mr Cooper's client is to-day administering what is undoubtedly a trust-estate. It is not his estate. He holds it in trust for others. Apart from that, however, by his appointment, as the Act provides, a trust is constituted. The combined effect of section 4 and section 2 of the Act appears to me to be that a judicial factor, as administrator of a trust-estate, is empowered, like a trustee, to sell at his own hand the estate which he holds in trust."

In the present example, the interlocutor appointing the judicial factor affords them a title to act, conform to reg.13 of the Act of Sederunt (Judicial Factors Rules) 1992 (SI 1992/272). Following their appointment, the judicial factor is subject to the supervision of the accountant of court (per s.6 of the 1889 Act). Accordingly, the judicial factor is subject to a number of statutory requirements, including the requirement (under s.3 of the Judicial Factors Act 1849 ("the 1849 Act")) to lodge a list of funds and inventory of moveables. Section 12 of the 1849 Act places a corresponding duty on the accountant of court to ensure that the said list and inventory is lodged "so as to form a clear rule of charge against the factor at the commencement of his office".

If a particular power is required to allow a judicial factor to exercise some function, express authority is required (reg.17 of the 1992 Rules). However, if that is likely, thought might be given to seeking a particular power in the petition.

But special powers may not be necessary. In *Brower's Executor, Petitioner*, 1938 S.C. 451; 1938 S.L.T. 251 a petitioner seeking the appointment of a judicial factor, sought authority for the factor to complete title to certain stocks, in order that the interlocutor would expressly record that the stocks formed part of the trust-estate. The court dismissed the crave as unnecessary. In this regard, the decision in Brower appears to resonate with commentary in *Currie* (para.8-100) under reference to s.13 of the 1889 Act, which states that:

> "By virtue of the official certified copy of his appointment, a judicial factor has title to uplift the deceased's estate in Scotland or in the British Commonwealth, and accordingly need not apply for confirmation, though he may do so."

The consequence of the foregoing provisions is that, in the author's view, once a judicial factor has been appointed, the factor would not normally require to take any further step to complete title to the executry estate. That is in contrast to, for example, the procedure under s.7 of the 1900 Act.

In the present example, there is heritable property to be dealt with. To the considerable relief of Mr A's neighbour, the judicial factor instructed a gardener, a cleaner, and a house clearance firm. Just a few days after the property was marketed, an unconditional offer was received and accepted. Notwithstanding the grant of confirmation in favour of UB, the judicial factor has title to grant a disposition. Such title derives from s.1 of the Conveyancing Amendment (Scotland) Act 1938 which provides (emphasis in italics):

> "For the purposes of sections three and four of the Act of 1924, a judicial factor appointed by the court to administer a trust estate comprising any land or any heritable security or part of any heritable security or any lease or security over a lease, or a trustee appointed by the court on such a trust estate shall be deemed to be a person having a right within the meaning of the said sections to such land or heritable security or part of a heritable security or lease or security over a lease respectively, and shall with respect to any lease or security over a lease comprised in the trust estate be entitled to the benefit of all enabling powers and rights under section twenty-four of the Act of 1924, and *an extract of the act and warrant appointing such judicial factor or trustee shall, for the purposes of deductions of title in terms of the said Act, be a valid mid-couple or link of title*."

Accordingly, from a practical perspective, the interlocutor appointing the judicial factor, is key to the future administration of the factory estate.

Postscript: the lapsed trust

The author notes that a well recognised procedure where there is a lapsed trust, is for the appointment of trustees under s.22 of the 1921 Act; that is: "When trustees cannot be assumed under any trust deed, or when any person who is the sole trustee appointed in or acting under any trust deed [is unable to act]". In such an event, the court may appoint trustees "upon the application of any party having interest in the trust estate".

For the purposes of this article, the author reserves his view as to whether s.22 of the 1921 Act affords a remedy in the present example. In the meantime, the author notes the following:

The term "trust deed" is defined by s.2 of the 1921 Act as: "(a) any deed or other writing… constituting any trust, and (b) any decree, deed, or other writing appointing a judicial factor". A trust is defined under section 2 as "(a) … any deed or other writing" or "(b) the appointment of any judicial factor by deed, decree, or otherwise". Finally, section 2 defines a trustee as: "any trustee under any trust whether nominated, appointed, judicially or otherwise, or assumed … and shall include any trustee ex officio, executor nominate, and judicial factor".

Notwithstanding the provisions of s.20 of the 1964 Act — i.e. that the 1921 Act shall have effect as if any reference to a trustee included reference to an executor dative — the cumulative effect of the rather circuitous definitions in the 1921 Act appears to impart a specific distinction between a judicial factor and an executor dative. If that is correct, the remedy under s.22 of the 1921 Act may have a limited application.