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The remedy of reduction in executry cases: Part 1

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Case:

O'Neil v O'Neil 2017 G.W.D. 22-361 (Sh Ct (Glasgow))

***S.L.T. 17** The author comments on the application of the remedy of reduction in contested executries. Part 1 considers reduction of a testamentary document, principally with reference to the recent case of O'Neil v O'Neil, 2017 G.W.D. 22-361 .*

Jurisdiction

Two and a half years have elapsed since the Courts Reform (Scotland) Act 2014 ("the 2014 Act") introduced a number of changes to civil jurisdiction in Scotland. Practitioners will, by now, be familiar with s.38 of the 2014 Act under which the jurisdiction of the sheriff court was extended. Of particular relevance to contested executries, two new competences were added to the jurisdiction of the sheriff: proceedings relative to (i) proving the tenor (s.38(2)(h)), (ii) reduction (s.38(2)(g)).

Until now there has been only a handful of sheriff court decisions in cases concerning (directly or indirectly) reduction, generally, with two opinions of the Sheriff Appeal Court being of prominence in terms of their binding authority (see *Iqbal v Parnez [2017] SAC (Civ) 7* and *Miller v Smith [2017] SAC (Civ) 26*). Of course, the number of reported sheriff court cases concerning reduction will likely not correlate with the actual number of cases raised: no doubt a number of actions have been raised and settled or, perhaps, determined without having been reported.

However, in July 2017, a decision from Glasgow Sheriff Court was issued which, in the author's view, deserves attention. The case of *O'Neil v O'Neil, 2017 G.W.D. 22-361* is not just one of the first sheriff court decisions concerning reduction, but for practitioners advising in the field of contentious executries it is a very helpful summary of the law concerning third party influence (using that term widely) and — more importantly — the pleading requirements to pursue an action of reduction on such basis.

The application of *O'Neil*

In the complex world of executry disputes, there is one particular type of challenge which, in the author's experience, often arises: a person seeks reduction of another's will on the basis that the will does not reflect the testator's true intention(s). Typically the challenge arises from a breakdown of a relationship which manifests itself after the death of the testator. Commonly, the 'expectant beneficiary' holds a belief that they would inherit from the testator. In some cases, the expectant beneficiary may have previously been informed about the testator's plans. In other cases there may be a concern expressed that the testator lacked testamentary capacity.

In this area there are three potential grounds of challenge. First, there may be challenge based on facility and circumvention. Secondly, there may be challenge based on undue influence. Lastly, there may be challenge to capacity. The first two challenges are similar (albeit distinct) and typically a challenger would advance a case on both grounds. A challenge to capacity is a different ground, although it may be pled as an alternative to the first two grounds of challenge. The October 2014 Outer House case of *Smyth v Romane's Executors [2014] CSOH 150* is a recent, comprehensive, discussion about the interplay of these grounds of challenge.

The case of *O'Neil* concerned the disposition of a house by a mother to two of her sons, which the pursuer (another son) claimed had been impetrated (i.e. procured — impetrated is the appropriate terminology for a plea in law) by the influence of the two sons. The defender sons were appointed as executors under a subsequent will of the mother, although they had not expeded confirmation.

Perhaps the most significant aspect of Sheriff Miller's opinion in *O'Neil* is the analysis of what a challenger must do to plead a case predicated upon undue influence and/or facility and circumvention.

In many circumstances, this is no easy feat. That is because, in a typical case, the challenger may have had little pre-death contact with the testator, in contrast to the person who is the main beneficiary under the testator's will. In such circumstances, very often the most the challenger can do is to rely on inference. ***S.L.T. 18***

It is important to bear in mind that, in advancing a challenge on the basis of facility and circumvention and/or undue influence, it is competent to rely on inference of another's influence. For example, in the case of *MacGilvary v Gilmartin, 1986 S.L.T. 89* it was observed at p.90:

"where there is evidence of lesion and facility, it is not necessary that... any specific acts of circumvention should be established. It was pointed out that in such cases what passes between the impetrator and the facile person is often unknown, and may properly be a matter of inference from the whole circumstances of the case..."

However, the critical point which is expressed in *O'Neil* is that there requires to be an evidential basis for drawing the inference of another party's actions. In *O'Neil*, the sheriff rejected both of the pursuer's grounds of reduction. As regards undue influence, at para.32 the sheriff held:

"The crucial elements of trust and confidence, influence and abuse of influence have no independent basis at all in the pleadings; at best, the pursuer believes them to be true. But with the circumstantial factors as set out at para.26 lined up against him, such inferences cannot get off the ground."

And at para.48, as regards facility and circumvention:

"While there may be a degree of lesion, I conclude that the pursuer has laid no basis for evidence of either facility or circumvention. To return to the arithmetical analogy, 0 x 0 = 0… The pursuer may 'believe and aver' that there has been facility and circumvention but, with so little to base such beliefs on, I reluctantly conclude in terms of the *Jamieson* test that he has no possible prospect of success even if all his factual averments are proved.""

Of course, every case must be looked at on its own facts and circumstances. Despite the result in *O'Neil*, there are cases where testamentary documents have been impetrated by the influence of others. Some of such cases are referred to in *O'Neil*, although the list is longer.

***O'Neil*: further guidance**

There are three other aspects of the *O'Neil* case which are worthy of comment.

The first is that the decision in *O'Neil* provides a useful signposting to many of the relevant authorities relating to actions of reduction based on third party influence.

For practitioners who are consulted by an 'expectant beneficiary', the starting point for considering reduction based upon undue influence is *Gray v Binny (1879) 7 R 332*, at p.347:

"in the first place, the existence of a relation between the granter and grantee of the deed which creates a dominant or ascendant influence, the fact that confidence and trust arose from that relation, the fact that a material and gratuitous benefit was given to the prejudice of the granter and the circumstance that the granter entered into the transaction without the benefit of independent advice or assistance. In such circumstances the court is warranted in holding that undue influence has been exercised."

And for facility and circumvention, the starting point is *Mackay v Campbell, 1967 SC (HL) 53*, at p.61:

"three matters have to be considered: (1) weakness and facility, (2) circumvention, and (3) lesion. These three factors are all interrelated and they must be looked at as a whole and not in separate compartments. The strength of averments on one matter may compensate for the weakness of averments upon other matters."

The second matter of note concerns title to sue. In *O'Neil*, the defenders challenged the pursuer's title to bring the proceedings on the basis that he was not a beneficiary under his mother's will. Therefore, the defenders argued, reduction of the disputed disposition would not provide the pursuer with sufficient interest. Such argument was rejected by the sheriff who held that the pursuer's "rights and interests are far more intimately bound up in the whole situation than those of a mere creditor on the estate." (para.22) ***S.L.T. 19***

Linked to this is a third matter which is of relevance to practice. In *O'Neil* the pursuer's action was solely focussed on reduction of the disputed disposition: he did not seek to reduce the subsequent will of his mother. At para.21 of the decision, the sheriff commented: "Had the will pre-dated the disposition, the pursuer would have had great difficulty in establishing either title or interest (unless, of course, he also sought reduction of the will)."

In this regard, the general point for practitioners to consider is the importance of establishing the rights and interests of a challenger. Such rights and interests would dictate the competence and selection of appropriate remedies. In the author's view, this should be one of the first considerations before addressing the merits of an underlying challenge.

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