Journal Article

Redress of a beneficiary against an attorney.

Roddy MacLeod.

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Keywords: Beneficiaries; Executors; Personal representatives; Powers of attorney; Remedies; Scotland;

Abstract: Discusses the potential problems arising when a person holding a power of attorney also performs the role of executor after the grantor's death. Compares the duties held by attorneys and executors towards a testamentary beneficiary. Considers the remedies available under Scottish law to a beneficiary, both before and after the grantor's death, for an attorney's breach of duty.

Legislation Cited:

Adults with Incapacity (Scotland) Act 2000 (asp 4)s.6, s.12, s.20, s.81

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*Jur. Rev. 281 Introduction

In the course of estate planning, clients are often advised to sign powers of attorney in addition to wills; and there are a number of sound and compelling reasons to do so. Depending on the particular familial circumstances, it appears to be quite common for the same individual to be nominated (using that word neutrally) as both attorney and as executor. This may be because the person is perceived by the granter to be the most suitable person to administer their affairs.

In most cases, the foregoing situation is hardly noteworthy. However, in other cases there is a conflict. A recurring scenario is where it is alleged by a beneficiary that the individual who was appointed as attorney (and has become the executor) has wrongfully intromitted with the adult's estate, prior to death, for their own benefit. Such cases are often problematic.

The particular issues which are considered in this article are: the potential conflict that arises from the same individual acting as attorney and then executor; and the rights of redress available to a testamentary beneficiary in the beneficiary-attorney relationship.

The offices of executor and attorney

As a starting point, it might be useful to contrast the obligations owed to beneficiaries by each of the attorney and the executor. In particular, the obligations of an executor to a beneficiary are straightforward:

"The duty of an executor is one of factory. He requires to ingather the deceased's estate, to pay the debts due by the deceased and thereafter to distribute the ingathered estate to the beneficiaries in accordance with the wishes of the deceased as disclosed by any will."[1]

However, the relationship (and therefore obligations) of an attorney to a testamentary beneficiary is less clear.

During life there is only an indirect relationship as between beneficiary and adult. By extension, the relationship as between beneficiary and attorney cannot be greater, because: ***Jur. Rev. 282***

"The attorney is thus, in essence, a factor or general and special agent appointed and authorised by the granter to manage his affairs and, in the course of so doing, to bind him in legal relationships with third parties. There is, in my opinion, no legal fiction which treats the attorney as the same person in law as the granter, or which treats the attorney's acts as those of the granter. Rather, the attorney's acts are as valid and binding on the granter as if they had been carried out by him, and the attorney is accountable, as is any factor, agent or mandatory, to the granter for his intromissions."[2]

The attorney's principal obligations are to the granter of the power.[3] Their appointment is regulated both by the powers conferred in the deed of appointment and by common law, given that the office of attorney is a fiduciary office.

During life, the testamentary beneficiary has only a contingent interest in the adult's estate. That interest might be something akin to a suspensive condition which requires to be purified by the adult's death; such event being equivalent to delivery:

"Death in the case of a testamentary deed is thus the counterpart of delivery in the case of a deed not testamentary in character, and the law in effect implies in every ordinary testamentary deed a clause dispensing with delivery. Conversely, a deed which is rendered irrevocable by delivery cannot be an ordinary testamentary deed in the sense defined, but must be something else or something more."[4]

Furthermore, even if a beneficiary could establish an alternative challenge, such as pursuing a breach of contract to test[5] such a challenge will be affected (to some extent) by the adult's death.

It follows that the rights of a testamentary beneficiary depend on a continuing testamentary intention and the subsequent death of the testator; because until such time, the adult (assuming he or she retains capacity) may change their mind as regards their testamentary intentions. That is not to ignore the principle, summarised in *G, Applicant* [6] of the court authorising the making of a will for an adult who has lost capacity:

"I have not yet been asked to authorise the making of a will on behalf of an adult who does not have capacity to do so, and who has not previously ***Jur. Rev. 283** made one, but where the exercise of prudent estate planning might warrant it. It might not be easy to establish what the adult's testamentary intention would have been, but I cannot see any reason in principle why that should not happen, provided, again, that the application satisfies the general principles laid out in s 1 of the Act."[7]

Conflict

The potential difficulty caused by the same person holding office as attorney and then as executor, is that the person may not understand the distinction of roles, or they may choose to ignore that distinction.

Properly advised, the executor will be aware of their duties to the beneficiaries, and will understand the administrative nature of their office:

"He represents the deceased; that is to say in questions with third parties, he is the same person as the deceased (*eadem persona cum defunct*). The position which he holds is subject to all pleas which could have been taken against the deceased."[8]

Therefore, it would be competent and indeed necessary for an executor to take action against an attorney, where the attorney has wrongfully intromitted with estate. Typically, that might give rise to an action of reduction (for heritable estate) or an action of count, reckoning and payment (for moveable estate). In the interesting case of *Walker v Watson* [9] (an action concerned, inter alia, with the treatment of joint bank accounts), Sheriff McKay analysed the title to sue of executors in such a circumstance:

"The Pursuers are the Executors of the late Mr. Watson. In my view, as a matter of law, they step into his shoes and have the same right as he would have had, had he been alive, to call for an accounting from his wife."[10]

"So far as the Second Defender is concerned, in my view, she also has a liability to account to the Pursuers for her own intromissions with the funds of the joint accounts even if it is the case that such intromissions were in accordance with the terms of the Power of Attorney—or at least apparently so." [11]

But what remedies does a beneficiary have against the attorney?

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Beneficiary v attorney, during life

During an adult's lifetime, there is a statutory mechanism available to those with an interest (in a wide sense) in the adult's affairs, to air concerns about an attorney's conduct. In particular, ss.6, 12, 20 and 81 of the Adults with Incapacity (Scotland) Act 2000, provide a broad matrix of regulation.[12]

In the first place, the combination of ss.6(2)(c) and 12 provides a basis for the Public Guardian to receive and investigate complaints about a continuing attorney and to take consequential steps (including the raising of court action). On the other hand, s.20 provides direct remedies. For example, the sheriff can ordain the attorney to submit accounts, or revoke the attorney's appointment. Whereas s.6 is silent as to who may complain to the Public Guardian, s.20 affords a potential remedy to "*any person* [emphasis added] claiming an interest in the property, financial affairs or personal welfare of the granter". I suggest that this may include potential beneficiaries on death. However, remedies afforded by the foregoing sections are limited to the life of the adult, so they offer no redress once the attorney assumes office as executor.

In the alternative, s.81 confers a personal liability on an attorney (who has acted in breach of their fiduciary duty) to repay funds to the account of the adult. There are two particular matters of note as regards the operation of this section. The first is that, as with s.6, s.81 is silent as to who may invoke proceedings for payment under this power. The second is that, so far as I am aware, there is no reported decision as to the applicability of this section and whether, for example, it can be relied upon after the death of the adult. At first blush there may not be a reason as to why it should cease to apply. However, it should be noted that if the attorney can establish that their conduct comes within s.82(1)(a) or (b) there is an absolute defence.

Beneficiary v attorney, after death

In practice it is often only after death, that further information comes to light about the adult's estate—for example that the attorney has, in breach of their duties, taken ownership of the adult's property. This can crystallise the beneficiary's concerns and/or desire to hold the attorney to account. Standing the comments above, death might also represent the crystallisation of a beneficiary's right of redress.

The obvious difficulty here is that the attorney's office has terminated on the death of the adult. Notwithstanding this difficulty, where the attorney has *assumed* office as executor, there may be direct redress. An executor is akin to a trustee[13] and is therefore subject to common law regulation: ***Jur. Rev. 285**

"Having placed himself so in the position of executor he subjected himself, according to the express terms of section 20 of the Act of 1964 'to the same obligations, limitations and restrictions, which gratuitous trustees have, or are subject to, under any enactment or under common law'."[14]

Therefore, the executor has a fiduciary duty to the beneficiaries. An actual or potential conflict of interest is unlikely to be actionable. However, where an executor fails to discharge their underlying duties to the beneficiaries—by dint of their conflict—for example by failing to pursue the potential wrongful intromission of the deceased's estate, then there may be common law grounds for their being removed from office.[15]

Removal from office may not, however, be a cure to the underlying problem of wrongful intromission with estate (whether that be heritable or moveable assets). So what redress is available directly for a beneficiary against the individual who previously held office as attorney?

As regards heritable property, an action of reduction pursued by a beneficiary would appear to be competent: "A transaction in breach of trust is voidable at the instance of interested beneficiaries",[16] which was recently commented upon favourably by Lord Tyre in the case of *Moir v Moir*.[17]

The situation regarding moveable property, however, is less certain. Unless the statutory remedy under s.81 of the Adults with Incapacity (Scotland) Act 2000 can be invoked, there is not an obvious common law remedy. In my view, that is a pity. There is old case authority[18] where a beneficiary under a trust was held (on appeal) to have title to sue in an action for count, reckoning and payment against a debtor to the trust estate. This was in the circumstances where it was averred that the trustees were acting in concert with the debtor. In my view, the principles of this case are not *so* far removed from the concept of the attorney acting *actor in rem suam* and then assuming office as executor, there being a breach of trust (in a wide sense) in each example. However, the case is quite narrow as to its factual circumstances and has not been cited in any notable authority since.

As the law currently stands, there would appear to be no direct route whereby a beneficiary can call on an attorney to account for their intromissions on a deceased's estate prior to death. One possible exception might be if an action was raised against an individual as opposed to their representative office. However, it is doubtful whether that could be competent.

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In *Hutcheson & Co's Administrator v Taylor's Executrix* [19] the Inner House considered the liability of a defender who was sisted as executrix of a debtor's executrix, to produce an account of their intromissions—ultimately upholding decree of absolvitor (without much difficulty it seems). Lord Morison examined the scope of the remedy sought:

"A relevant action of accounting only emerges where it is alleged that the defender has, either by himself or by his agents, intromitted with estate to which the pursuer has right or in which he is interested."[20]

If one concentrates on the personal capacity referred to in the preceding quote (i.e. "by himself"), there is a certain attraction to citing *Hutcheson* as authority in support of establishing that a testamentary beneficiary could competently sue a former attorney as an individual. However, on further consideration, such a rationale ignores the position and office of executor. It is the executor who has the primary title to sue and the primary obligation to account to the beneficiary.

Alternatively, applying the dicta of *Callander v Callander*, there might be circumstances which lend themselves to consideration of alternative redress as regards moveable property. For example, it would be interesting to consider whether a disappointed beneficiary could raise an action of delivery against a former attorney who had wrongfully conveyed moveable property to themselves. But the factual matrix of such an example is likely to be narrow and would, in any event, demand careful consideration.

Additional comments

It will be worth remembering that if a remedy is available to an aggrieved beneficiary, the basis for action will, likely, be the bad faith of the attorney. In those circumstances, not only might there be a cogent argument for the attorney incurring personal liability as regards expenses, but there may, in addition, be grounds for seeking to reflect such bad faith in the mode of taxation of such expenses. Of course, that will require analysis of the precise factual circumstances of the particular case.

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Roddy Macleod

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*. Senior Associate, Anderson Strathern LLP. The contents of this article represent my personal views. I would be pleased to receive responses—particularly if readers have any contrary views or experience of differing remedies.

1. *Pentland-Clark v Maclehose [2012] CSIH 29*, per Lord Carloway at [41].

2. *Turner v Turner [2012] CSOH 41; 2012 S.L.T. 877*, per the comments of Lord Tyre at [12].

3. Theoretically, the attorney could be called to account by the adult—see *David M. Walker, The Law of Civil Remedies in Scotland (Edinburgh: W. Green, 1974), p.304*.

4. *Clark's Executor v Clark, 1943 S.C. 216* at 225.

5. Along the lines considered in *De Lathouwer v Anderson [2007] CSOH 54; 2007 S.L.T. 437*.

6. *G, Applicant, 2009 S.L.T. (Sh. Ct) 122*.

7. *G, Applicant, 2009 S.L.T. (Sh. Ct) 122*, per Sheriff Baird at [22].

8. *Pentland-Clark v Maclehose [2012] CSIH 29*.

9. *Watson's Executors v Watson, 2006 S.C.L.R. 121*.

10. *Watson's Executors v Watson, 2006 S.C.L.R. 121* at [56].

11. *Watson's Executors v Watson, 2006 S.C.L.R. 121* at [62].

12. Section 3(3) of the 2000 Act might also provide a mechanism for an interested person seeking intervention in the affairs of the adult, but it is suggested that such a redress would be subsidiary to the specific powers contained in s.20.

13. In the case of an executor nominate, the position is defined with reference to s.2 of the Executors (Scotland) Act 1900;

and in the case of an executor dative, the position is defined with reference to s.20 of the Succession (Scotland) Act 1964.

14. *Inglis v Inglis, 1983 S.C. 8*, per Lord Hunter at 17.

15. See *MacGilchrist's Trustees v MacGilchrist, 1930 S.C. 635*, the test, according to Lord President Clyde at 638, being "whether there is not something either equivalent to, or as bad as, malversation of office when a trustee obstinately refuses to acknowledge his legal duty and to discharge his legal responsibility".

16. *Callander v Callander, 1975 S.C. 183*, per Lord Cameron at 210.

17. *Moir v Moir [2013] CSOH 177*.

18. *Watt v Roger's Trustees (1890) 17 R. 1201*.

19. *Hutcheson & Co's Administrator v Taylor's Executrix, 1931 S.C. 484*.

20. *Hutcheson & Co's Administrator v Taylor's Executrix, 1931 S.C. 484*, per Lord Morison at 492.