

ARTICLES

The appointment of an attorney as an executor

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The author considers Gordon, Petitioner, 2023 S.L.T. (Sh Ct) 187 and executry practice.

Introduction

This article comments on the decision of the Sheriff at Aberdeen in the case of *Gordon, Petitioner, 2023 S.L.T. (Sh Ct) 187* to allow the appointment of an attorney as executor *dative qua* relict of a deceased.

The wider issue

The decision in *Gordon, Petitioner* arises from a common scenario: an individual dies, survived by their spouse; the spouse being an adult with incapacity. The wider issue is this: can a representative of an adult with incapacity be appointed as executor of the adult's deceased relative?

Attorney vs Guardian

The potential lacuna — which may now be resolved by *Gordon, Petitioner* — was the ability of an individual to seek appointment as executor of a deceased *qua* attorney to an adult with incapacity (the adult having a right to appointment as executor).

The decision in *B's Guardian, Minuter* (Sh Ct, 21 July 2010, unreported (2010 G.W.D. 33-690)) — in which the author appeared as the minuter's solicitor) has offered a solution in the case of guardianship: i.e. where a guardian has been appointed to the adult. In *B's Guardian, Minuter* the Sheriff at Edinburgh granted a minute for directions that the guardian of an *incapax* individual could be confirmed as executor *dative qua* guardian. The Sheriff was satisfied that the guardianship order contained the necessary power for the guardian to seek appointment as executor.

In relation to attorneys, however, there was a potential difficulty with commissary practice, having regard to the commentary at paras 8–32 and 8–38 to 8–44 of *Currie on Confirmation of Executors* (9th edn). The relevant commentary may be summarised as follows:

- An attorney (with requisite powers) could decline office on behalf of an *incapax* executor nominate.

- Under reference to the unreported case of *Leishman*, 17 December 1980 “The power of attorney of a UK resident person will never enable the attorney to apply for confirmation on behalf of the *incapax*” — on the basis that an individual cannot delegate their duties as executor.

- If a “by-pass” cannot be found, then the only solution would be to appoint a judicial factor.

Analysis

In his decision in *Gordon, Petitioner*, the Sheriff noted the potential limitations of *Leishman*. (A copy of the decision in *Leishman* was not before the Court — which resonates with the author's unsuccessful attempts to procure a copy). As summarised in *Currie*, *Leishman* concerned a man who had been decerned as executor *dative* and *thereafter* the man's attorney signed the inventory for confirmation. Accordingly, it appears that a material issue in *Leishman* was the delegation of authority/duty *once* the executor *dative* had been decerned.

In *Gordon, Petitioner* at 2023 S.L.T. (Sh Ct), pp.188-189 the Sheriff concluded:

“[4] ... *Leishman* does not appear to me to be authority for the proposition that it is incompetent to appoint an attorney of an individual who is *incapax*. I am inclined to disagree with *Currie* on this matter so far as it concerns an *incapax*. I take no exception to the proposition that it is incompetent to appoint an attorney in place of a UK resident who is *capax*.

[5] The situation in this case appears to be different from the case of *Leishman*. The person with the entitlement to be appointed executrix here is *incapax*. I can see no reason in principle why it should not be equally as competent to appoint an attorney as to appoint

a guardian or the holder of an intervention order to the office of executor-dative *qua* such in these circumstances. All such representative parties are subject to the terms of the Adults with Incapacity (Scotland) Act 2000 (at least where the attorney is appointed after the coming into force of that Act). All are thus subject to supervisory powers of the public guardian and the court. All would require to find caution. One could argue that an attorney appointed by the person with the right to be appointed executor, and in whom that person has placed his trust, has a better claim to be appointed than a person appointed by the court. In many, if not most, cases the person who might be appointed attorney might also be the person who would be appointed guardian or intervener.

[6] It seems to me that there is a compelling public interest to ensure that the estates of deceased persons should be administered with the least possible delay and with the least possible expense. In a case where there is an attorney in place for an *incapax* individual with the right to be appointed executor, to insist that a guardian be appointed as a precursor to the appointment of an executor-dative does not satisfy that public interest.”

The author respectfully agrees with the Sheriff’s decision.

Furthermore, it is suggested that there are additional reasons in support of the decision in *Gordon, Petitioner*.

First, there is a difference between delegation of powers before and after appointment. Whereas a trustee cannot delegate any duties which are *delectus personae* (cf Mackenzie Stuart: *The Law of Trusts*, p.160 — albeit the principle of non-delegation is not absolute) the principle of non-delegation would not be offended if an attorney was confirmed as executor dative *qua* attorney — though the appointee could not delegate their duties *once* they were confirmed.

Secondly, commissary practice already recognises that an individual can be appointed as executor dative in a ‘representative’ capacity (using

that term broadly). Thus, it would be inconsistent if the law recognised the right of one representative but not another.

Thirdly, as alluded to by the Sheriff in *Gordon, Petitioner*, to differentiate the entitlement of an attorney to be appointed as executor from the entitlement of a guardian could fail to give effect to the wishes of the adult. This would contravene the s.1 principles of the Adults with Incapacity (Scotland) Act 2000 — which would otherwise fall to be considered if, for example, the procedural remedy was thought to be an intervention order (which would be permissible, per *Currie*). The relevant principles are (emphasis added):

“(3) Where it is determined that an intervention as mentioned in subsection (1) is to be made, such intervention *shall be the least restrictive option* in relation to the freedom of the adult, consistent with the purpose of the intervention.

(4) In determining if an intervention is to be made and, if so, what intervention is to be made, account shall be taken of— (a) *the present and past wishes and feelings of the adult* so far as they can be ascertained by any means of communication, whether human or by mechanical aid (whether of an interpretative nature or otherwise) appropriate to the adult ...”

Finally and for completeness, it may be noted that the commentary at p.92 of the seventh edition of *Currie* is more permissive than that in the current edition:

“A better procedure, if the *incapax* is also the universal legatory (or general donee or residuary legatee) is to present a petition to have the curator bonis decerned in a dative capacity as executor-dative *qua* curator bonis to the universal legatory (or general donee or residuary legatee) of the deceased (Dickson, May 2, 1963).”

The general commentary also refers to unreported cases (which the author has been unable to source). It is suggested that other than the decision in *Leishman*, there is no discernable reason as to why the relevant passage from the commentary in the seventh edition of *Currie* should not apply to an attorney.

Conclusions for practice

The decision in *Gordon, Petitioner* is welcome and may have general application, though there are specific points to consider in particular cases. These include:

- Ensuring that the power of attorney contains sufficient powers to allow the attorney to act. In this regard, it may be useful to have regard to the Lord Ordinary's comments in *Kaye's Executor Nominate v Kaye's Former Attorney* [2023] CSOH

30; 2023 S.L.T. 589 in addition to the comments of the Sheriffs in each of *Gordon, Petitioner* and *B's Guardian, Minuter* concerning the wording of powers.

- Designing properly the basis upon which the applicant seeks appointment: in *Gordon, Petitioner* the Sheriff allowed an amendment to replace "representative" with "attorney". The relationship between the adult with incapacity and the deceased ought also to be specified.
