SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2017] SC GLA 45

F13/17

NOTE BY SHERIFF JOHN NEIL MCCORMICK

In petition to recall the appointment of an executrix-dative and to appoint substitute executors-dative

by

ALISON MARY RUSSELL

and

BEVERLY JANE McNAIR

GLASGOW, 8 August 2017

The Sheriff, having heard the solicitor for the petitioners, determines that the petitioners, as children of the deceased (where the prior rights of the surviving spouse exhaust the estate), have no title to be decerned executrices-dative and accordingly refuses to grant the warrant sought.

NOTE:

[1] This is a petition by Alison Russell and Beverly McNair seeking (a) to direct intimation of the petition upon their mother, Mary McNair, the executrix-dative of their father, William Alexander McNair; (b) to recall the decree-dative *qua relict* in her favour and (c) to decern the petitioners executrices-dative *qua* daughters to the deceased William Alexander McNair.

Background

[2] William Alexander McNair died intestate on 10 February 2014. On 28 August 2015 Mrs Mary McNair was decerned executrix-dative *qua relict* to the deceased. She has not expeded confirmation.

[3] Mrs Mary McNair is entitled to the whole estate (Succession (Scotland) Act 1964, sections 8 and 9(2)).

[4] The petitioners are the children of the deceased. It is averred that Mrs Mary McNair (the executrix/beneficiary) has lost capacity, does not have a guardianship order and that the petitioners are unaware of any party intending to obtain one.

The issue

[5] The issue is one of title and involves the interpretation of section 9(4) of the Succession (Scotland) Act 1964:

> "Where by virtue of subsection (2) of this section a surviving spouse or civil partner has right to the whole of the intestate estate, he or she shall have the right to be appointed executor".

[6] I assigned a hearing which took place on 6th July 2017. Miss Booth represented the petitioners. She argued that to obtain a guardianship order would be time consuming and costly. She referred me to Murray, Petitioner, 2012 S.L.T. (Sh Ct) 57 for the proposition that the daughters of a deceased are entitled to be appointed executrices-dative and moved that I grant warrant to intimate the petition.

Commissary practice

[7] Commissary practice has been to treat the surviving spouse or civil partner whose

rights exhaust the whole intestate estate as having the exclusive right to be appointed executor-dative. The word "exclusive" does not appear in the section.

[8] This practice stemmed from the Intestate Husband's Estate (Scotland) Acts 1911 and 1919 where a surviving spouse had an exclusive claim to the office of executrix-dative (Intestate Husband's Estate (Scotland) Act 1919, sections 1 and 3(1) as amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 but repealed by the Succession (Scotland) Act 1964, schedule 3).

[9] Currie on *Confirmation of Executors* by Eilidh M Scobbie, 9th Ed at paragraphs 6-36, 6-38 and 6-39 refers to three unreported decisions arising after the 1964 Act in support of a spouse or civil partner having exclusive claim to the office of executor-dative, namely *Doonan*, 22 February 1979, where a deceased had passed away almost thirty years after separating from his spouse who had emigrated to Australia. No trace of her could be found. The sheriff refused to appoint the deceased's sister as executrix-dative *qua* next of kin.

[10] In *Jack*, unreported, 2 March 1967, the widow was *incapax* and a medical certificate had been produced to that effect. The court refused to confirm the deceased's son. A curator bonis had to be appointed.

[11] In *Clark*, unreported, 23 August 2010 the widower was *incapax* but a power of attorney enabled the attorney to renounce the husband's succession rights. The court allowed one of the deceased's sons to be appointed.

[12] In Currie it is suggested that commissary practice may be open to challenge (paragraph 6-41). In support of that, the petitioners' solicitor drew my attention to the case of Murray.

[13] In *Murray*, the widow of the deceased had been made subject to a guardianship order. The normal procedure would have been for the widow to seek appointment as

executrix-dative but, as she lacked capacity, her guardian should have obtained the necessary power. That power was lacking from the guardianship order. A petition was presented by Dennis Murray for appointment as executor-dative *qua* son (not as guardian) of the deceased. The court granted the petition. In a brief note, Sheriff A G McCulloch concluded:

> "It appears that current commissary practice is to treat the surviving spouse whose prior rights exhaust the whole intestate estate as the sole person with the right to be appointed executor. However, that would appear to be a misunderstanding, or misreading, of the provisions of section 9(4). There is no exclusive right so to be appointed."

Decision

[14] Sheriff McCulloch does not expand on his reasoning and it is unclear whether the earlier decisions referred to within Currie were brought to the attention of the court. The value of the estate is not disclosed. I am aware that such an approach has been welcomed (see article by J Inglis, 2012 S.L.T. (News) 155). However I take a less liberal view of the meaning of section 9(4) though I too am concerned that commissary practice may have been out of kilter with the legislation.

[15] To explain, Section 9(4) of the 1964 Act should be given its ordinary meaning. The words "he or she shall have the right to be appointed executor" mean merely that a spouse or civil partner of the deceased, the sole beneficiary, has the right to be appointed executor. It seems sensible that the spouse or civil partner should have the right to appointment, where nobody else has a beneficial interest in the estate.

[16] A criticism in Currie at para 6-32 is: "However, it should be remembered that the surviving spouse (or civil partner) whose prior rights to financial provision exhaust the whole estate may not be the only person with a beneficial interest in the estate: the deceased

may have made a testamentary writing disposing of part of the estate only, and the prior rights of the surviving spouse (or civil partner) would then apply only to part of the deceased estate." That may be true, but in that scenario the estate is not intestate, only part.

[17] To me the purpose of section 9(4) is to make clear that the surviving spouse or civil partner is the only person to be appointed executor-dative where his or her rights exhaust the estate.

[18] I would have taken a different view if the wording that a surviving spouse or civil partner shall have "the right to be appointed executor" (my emphasis) had either omitted the definite article "the" or if that word had been substituted by the indefinite article "a". The court is bound by the wording as enacted.

[19] In contrast, where an estate exceeds the prior rights of a surviving spouse or civil partner other relatives may apply for appointment. Such petitions are based on the relationship to the deceased (for example, qua child), not on a beneficial interest in the estate. This approach seems inconsistent. That inconsistency arises from statute.

[20] To return to the issues before me, obligations on an executor-dative include distributing the estate to the beneficiary. A danger might be that a surviving spouse or civil partner may never benefit from the prior rights (perhaps through delay, deliberate or otherwise) or that the person seeking appointment has other motives. That has to be guarded against (this is a general observation not a reflection on the current petitioners).

[21] Here Mrs Mary McNair had executed a continuing power of attorney in favour of her daughters (the petitioners) to whom the estate would be made over as attorneys. There is neither a guardianship order nor an intervention order in place. The pursuers seek to intimate the petition to Mrs McNair (the *incapax*); to have her removed from office and to substitute themselves as executrices-dative.

[22] In my opinion the petitioners, as children, have no title to petition standing the terms of section 9(4). Accordingly, I refuse to grant the warrant craved. Had there been a guardianship order with the appropriate powers, the position would have been different.

[23] At this point it is worth clarifying two issues to do with commissary practice. Firstly, the right to appointment is just that, a right. It is not compulsory. Indeed regularly the estate of a first deceased is wound up after the death of the surviving spouse or civil partner. That may be undesirable but it is understandable and not uncommon.

[24] Secondly, the right to appointment rests solely with the surviving spouse or civil partner where his or her claim exhausts the estate. In my opinion, that right may be expressly declined allowing a surviving spouse or civil partner (who may be reluctant, elderly or ill, but not infirm) to be relieved of the administrative burden of winding up the estate. Until then, the right vests solely in the surviving spouse or civil partner. The right to appointment would have to be expressly declined in favour of a named petitioner. It would not be sufficient in my opinion for a petitioner merely to intimate the writ upon the surviving spouse or civil partner. This clarification should resolve many of the practical issues which have crept into commissary practice, while giving effect to the meaning of section 9(4) and protecting the interests of the surviving spouse or civil partner.

[25] In particular it avoids the implication that the right to appointment vests in the surviving spouse or civil partner exclusively, in the sense that it could not be declined, which is not within the 1964 Act but is a throwback to earlier legislation (see para [8]).

[26] That aside, it must be remembered that the statutory provisions on intestacy are the default position where there is no will. They do not cater for every scenario. Indeed they may not even be consistent but we are bound by them.

[27] Finally, there can be an assumption that an estate exhausted by prior rights is a modest one. That is not necessarily so. Currently prior rights include heritage to £473,000, furniture to £29,000 and, if there are no children, cash to £89,000. Here the estate including heritage amounts to £227,000.