

COMMISSARIOT OF LoTHIAN AND BORDERS
SHERIFFDOM OF LoTHIAN AND BORDERS AT SELKIRK

[2024] SC SEL 8

NOTE BY SHERIFF P PATERSON

in Petition of

Joy Monique Cornforth and Andrew Cornforth

SELKIRK, 4 January 2024

[1] In this petition the petitioners seek to be appointed executors dative to the late Robert Thompson by virtue of the Power of Attorney (POA) granted in their favour by the late Mr Thompson's wife Jean Thompson (the incapax).

[2] The petition raises the not unfamiliar problem of an executor nominate who while having capacity, grants a POA, but subsequently loses capacity. It is accepted that the loss of capacity precludes the incapax seeking of confirmation as executor nominate - *Currie on the Confirmation of Executors 9th Edition (Currie)* paragraph 8.41 and Sheriff Holligan's decision in *B's Minuter* 2023 SCLR 601 paragraph 4.

[3] The difficulty has recently been considered by Sheriff Mann in the case of *Gordon Petitioner* 2023 SLT (Sh Ct) 187. Having considered the petition and the authorities referred to including Sheriff Mann's decision in the case of *Gordon's Petitioner*, I asked to be addressed further on a point that troubled me.

[4] The starting point is the proposition that an appointment as executor is a personal one and accordingly it is not possible for an executor to delegate the legal duties incumbent on an executor under a POA – *Currie* 8-32. It is of course competent for an executor to

appoint an agent to act in their name. That is what happens when an executor appoints a solicitor to assist in the winding up of an estate. What paragraph 8.32 appears to have excluded is not someone acting in the name of an executor but delegating the legal duties and obligations of executor to a third party. If an agent of an executor makes an error in the winding up of an estate, it is the executor that is liable in the first instance. That being so, it was not clear to me how an adult granting a POA could grant their attorney a power, which they themselves did not possess i.e. the power to delegate the legal duties of an executor to themselves as attorneys.

[5] I have now had the benefit of Mr MacLeod Advocate's very helpful written and oral submissions.

[6] He advanced five arguments why it was competent for an attorney to be appointed executor dative to an incapax who had been nominated as an executor, one of which was specific to this particular case.

[7] The first argument is that as the incapax has not expended confirmation there is no delegation of trust by her *qua* trustee.

[8] The second contention is based on the Will of the incapax's husband's, namely that it expressly allows for the appointment of substitute executors.

[9] The third proposition is that the POA does not amount to a delegation of trust.

[10] The fourth submission was that the attorney's duties require them to act, given the incapax is the universal legatee of her late husband.

[11] The last argument is that the POA reflects the wishes of the incapax and as such should be reflected.

[12] Before dealing with the various arguments advanced by Mr MacLeod, I should make it clear that I agree with one of Sheriff Mann's observations in *Gordon Petitioner* at

paragraph 6, namely the law should not place artificial barriers in the way of the winding up of a deceased's estate. The significance of this observation is that if the attorney cannot be appointed then the only alternative would be to seek appointment as guardian, with the concomitant delay and expense. That said, no matter the utility of allowing the appointment, the court cannot do something which offends against basic principles, namely the prohibition of delegation.

[13] For reasons that will become obvious I deal with the third argument first. The key to the proposition is the wording of the POA, which contains the general powers for management "full power for me and in my name". Therefore, it is said, that there is no delegation of the duty, rather the attorney is simply acting in the name of the executor. I am prepared to accept this argument for the reason advanced. It may be legitimately said that this is stretching a point in that the attorney is acting in the name of someone who does not have capacity. However, as it does not directly offend against the principle of non-delegation of the legal duties I am prepared to grant the petition on this basis.

[14] I now turn to the other arguments advanced in favour of the petition. The first was that given that there had been no confirmation there was no delegation. As Mr MacLeod has pointed out the Inner House in the case of *Crawford's Executors, Petitioners* 2023 SLT 1284 has recently made it clear that "Without confirmation, the petitioners have no status different from any other individual..." While that is undoubtedly true it does not circumvent the problem. If the powers cannot be delegated after confirmation I can see no *apriori* reason why the position should be any different prior to confirmation. There is still the same element of *delectus personae* involved.

[15] The next general proposition advanced was that because of the duties incumbent on an attorney ie "to exercise the diligence and skill of a prudent person in the management of

their own affairs” then the attorney ought to take steps to transfer the estate to the universal legatee, the incapax. The difficulty with this contention is, as is acknowledged in Mr MacLeod’s note of argument, it still involves a delegation of duties which crosses a “red line” according to the authorities.

[16] The final general argument advanced is that, to refuse the petition would mean a guardianship application and to force this would offend against section 1 of the Adults with Incapacity Act 2000, namely that an intervention under the Act should be the least restrictive option. It would offend against it because it is said there is the option of the granting the petition. With respect, this amounts to putting the cart before the horse. If the petition is incompetent, then the intervention order under the Act may be the least restrictive option.

[17] There is one other submission which is specific to the terms of the Will of the late Robert Thompson. In terms of the Will he allows for the appointment of substitute executors. In my opinion this suggests that the intention of the late Mr Thompson was that there was no *delectus persona* attached to the nomination of his wife, the incapax, and as such there is no bar to the delegation of duties. That being the case, I am prepared to grant the petition based on the particular terms of the late Mr Thompson’s Will.