



OUTER HOUSE, COURT OF SESSION

[2022] CSOH 88

A58/21

OPINION OF LORD BRAILSFORD

In the cause

LESLEY CURRIE

Pursuer

against

SUSAN JANE BLAIR

Defender

**Pursuer: Kinnear; Drummond Miller LLP  
Defender: R.Macleod; Anderson Strathern LLP**

10 February 2022

**Introduction**

[1] John Currie (“the deceased”) died on 16 January 2015. The pursuer, his daughter, and defender, his adoptive daughter, are the main beneficiaries of his estate. On 2 April 2013, following the deterioration of the deceased’s health, the parties were appointed his attorneys under a continuing and welfare Power of Attorney. Only the defender intromitted on the deceased’s assets and property. The present action concerns the defender’s intromissions between her appointment as his attorney and the date of his death, as well as her intromissions *qua* executor-nominate on the deceased’s estate from the date of his death until April 2015, being the date of closure of his bank accounts.

[2] In the summons the pursuer seeks three remedies against the defender. First, for production of the deceased's will. Secondly, for decree ordaining the defender *qua* executor-nominate to seek a full account of her intromissions as attorney between 2 April 2013 and 16 January 2015, failing which an order for payment to the estate of £72,835.36 together with interest due thereon. Thirdly, for decree ordaining the defender to produce a full account of her vitious intromissions as executor-nominate from 16 January 2015 until 9 April 2015 *and* for payment to the estate of £69,545.85 together with interest due thereon. In terms of this final remedy, the pursuer contends that the defender intromitted with the deceased's estate without obtaining a grant of confirmation and, as a result, those intromissions are vitiated.

[3] The matter called before me on the Procedure Roll to determine the defender's preliminary plea to the relevancy of the pursuer's case under her second conclusion. The defender contends that the pursuer has no title to sue and the defender *qua* attorney has no duty to account for her intromissions to the pursuer *qua* beneficiary.

### **The issue**

[4] By Power of Attorney executed on 2 April 2013 and registered on 16 September 2013, the deceased appointed the parties as his attorneys. Clause seventeenth of the Power of Attorney provides that the pursuer and defender shall be bound to account to the deceased (as grantor) for their intromissions while acting as attorneys. It is agreed that the pursuer did not intromit on the deceased's assets and property. The defender avers that the deceased undertook his own financial transactions until November 2013. From this date, his health deteriorated. He suffered from pulmonary fibrosis and latterly asbestosis. The defender assumed responsibility for the deceased's care. She was responsible *inter alia* for attending to him on a daily basis, shopping for him and making payments on his behalf. In

July 2014 the deceased's health deteriorated to such an extent that he entered a nursing home. The defender thereafter arranged for his house to be sold. She remained responsible for the deceased's financial matters from then until the date of his death.

[5] The deceased executed a will on 13 November 2013. His wife had predeceased him. The parties are the beneficiaries of his estate under the will. The deceased nominated the defender as executor of his estate. Following his death, the defender made a number of small payments of negligible value to the pursuer in respect of the estate. The pursuer avers that she became suspicious of the low value of the estate as a result. She obtained statements from the deceased's two bank accounts, which showed payments totalling £72,835.36 between the date he entered the nursing home and the date of his death and further payments totalling £69,545.85 between the date of death and closure of the accounts. In respect of the former, the pursuer avers that the majority of the payments were either made directly to the defender or concern expenditure unrelated to the deceased's needs.

[6] The defender does not dispute that payments were made from the deceased's account directly to her. The value of these payments are not specified. However, it is averred that such payments were gifts from the deceased. She contends that the deceased made gifts to her, her son (the deceased's grandson) and his fiancé, all of which were instructed by him before being implemented by the defender, the deceased having been unable to do so due to his health. The defender believes that the deceased made these gifts to show his gratitude for the care she provided to him and to equalise the gifts he has given to the pursuer in the past.

### **The defender's preliminary plea**

[7] It is accepted that the defender *qua* executor-nominate can be called on by the pursuer *qua* beneficiary to account for her intromissions with the deceased's estate. However, in terms of the defender's intromissions as attorney, it is contended that the pursuer lacks title to sue. As a beneficiary, she has no right to an accounting from the deceased's former attorney. Express provision was made in clause seventeenth of the Power of Attorney to the effect that the attorney was bound to account to the deceased as grantor. There was no duty to account to any other party. The defender *qua* executor-nominate stands *eadem persona cum defuncto* (as though the same person as the deceased) (*Pentland-Clark v Maclehose* [2012] CSIH 29, Lord Carloway at paragraph 41). The duty to account and the right to an account lies with the executor. The pursuer has no right or interest in the defender's intromissions prior to the date of death.

[8] Nor does a beneficiary have any right to seek payment from the defender *qua* attorney should she fail to account for her intromissions. The *ratio* in *Anderson v Wilson* 2019 SC 271 (Lord Menzies at 279 under reference to *Morrison v Morrison's Executrix* 1912 SC 892), is applicable to the instant case. The pursuer's argument fails to recognise the distinction in rights and responsibilities of office holders in relation to different patrimonies.

### **The pursuer's response**

[9] The second conclusion is a competent and relevant claim. The pursuer has title to bring the claim as a beneficiary of the deceased's will (cf *Donald v Hodgart's Trs* (1893) 21 R 246; *Clarke v Clark's Trs* 1925 SC 693). The pursuer raised the action against the defender *qua* executor-nominate to call on her to realise and account for the estate. This falls within the duties of an executor. Where a beneficiary contends, as here, that the defender has failed

to realise an asset and should be debited with its value, the usual remedy is to raise an action calling for him to realise and account for it (Wilson & Duncan, *Trusts, Trustees & Executors*, (2<sup>nd</sup> Edn), 26-01 to 26-06). By refusing to seek an account in respect of her intromissions as attorney, the defender *qua* executor-nominate is in breach of her fiduciary duty to the pursuer *qua* beneficiary. She becomes a constructive trustee of any profit or benefit she derives from that breach. She is liable to account and for any loss sustained by the beneficiary (Stair Memorial Encyclopaedia, *The Laws of Scotland, Reissue "Trusts, Trustees and Judicial Factors"*, paragraphs 169-171 & 218-219).

[10] *Anderson v Wilson* is distinguishable. The beneficiaries were held to lack title to sue a third party for a debt due to the estate, whereas in the instant case the pursuer sues the defender *qua* executor-nominate to account for assets she ought to have ingathered and which had been intromitted with by the deceased's attorney. A claim against the attorney for breach of duty is an asset of the estate. The fact that the defender is both attorney and executor-nominate is not legally significant. The order sought seeks a remedy against her in her capacity as executor-nominate.

### **Decision**

[11] The defender has produced the will. That being so, the first conclusion of the summons was no longer necessary and, pursuant to the joint motion of the parties, I dismiss it.

[12] As to the competence of the second conclusion, the *ratio* in *Anderson v Wilson* applies to this case. In *Anderson* the pursuers, as beneficiaries of the deceased's estate, raised an action against the defender, one of the beneficiary's husbands and the deceased's son-in-law, on the basis that he owed a debt to the estate. *Inter alia* it was averred that he had secured

the disposition of land to him by the deceased by means of fraud, facility and circumvention, or undue influence. The commercial judge dismissed the action on the basis that the pursuers had no title to sue. The pursuers reclaimed and the First Division upheld the decision of the commercial judge. It held that beneficiaries had no right to determine the extent or composition of the estate and thus, had no title to sue in these circumstances:

“[31] We agree with the submission by senior counsel for the defender and respondent that the right of beneficiaries to a deceased’s estate does not amount to a right to determine what the estate constitutes. The right of the beneficiaries is to inherit the estate as it is. The right to determine what is in the estate (its composition and extent) rests with the executor as the representative of the former proprietor of the estate. It is necessary to consider what is the nature of the right which the pursuers allege to have been infringed. There is no right of succession which is averred to have been infringed; rather, it is the right of the deceased himself which is averred to have been infringed, not a right of his beneficiaries. Title to sue (by whatever remedy is sought) rests with the executor, not with the beneficiaries.”

The same considerations apply in the instant case. The thrust of the pursuer’s claim in the second conclusion to the summons is that the defender *qua* attorney’s intromissions with the deceased’s assets and property ought to have formed part of the estate. That is on all fours with the circumstances in *Anderson*. The pursuer *qua* beneficiary has no right or interest in the composition of the estate. It is for the defender *qua* executor-nominate to determine. Only where the pursuer can demonstrate such an interest can an action competently be taken or, in other words, will she have title to sue (*Hutcheson & Co’s Administrator v Taylor’s Executrix* 1931 SLT 356, Lord Morison at 360; *D & J Nicol v Dundee Harbour Trs* 1915 SC (HL) 7, Lord Dunedin at page 11). Her right and interest is limited to succession to the estate as it was on 16 January 2015. I do not understand the pursuer to be averring that the defender *qua* executor-nominate has infringed any such right.

[13] That the defender *qua* attorney is not required to account for her intromissions to beneficiaries is not only a necessary implication of *Anderson*, but also follows from the

express terms of the Power of Attorney itself. Clause seventeenth provides that the attorneys shall only be bound to account for their intromissions with the deceased's assets and property to the grantor, that is, the deceased. The defender *qua* executor-nominate steps into the shoes of the deceased upon his death. It follows that the attorneys are only bound to account for their intromissions to the defender *qua* executor-nominate. I acknowledge that, in the present circumstances, this raises the peculiarity that the defender *qua* attorney can only be required to account for her intromissions to herself in a different capacity. However, that is not a reason to abandon established legal principles. It remains that beneficiaries have no right or interest to determine the composition of the estate. That is what the pursuer seeks to do in the second conclusion.

[14] I am not convinced by the pursuer's submission that *Anderson* is distinguishable from the instant case on the basis that, here, the pursuer seeks an order ordaining the defender *qua* executor-nominate to seek an account of her intromissions as attorney. I understand this submission to be an attempt to distinguish the instant case from circumstances where the beneficiary seeks an account from the attorney directly. Such a distinction appears to me artificial and to recognise it would be to permit an otherwise incompetent action to succeed through the back door. In any event the pursuer is not left without remedy, should she consider that the defender *qua* executor-nominate has failed to realise assets and hence owes a debt to the estate. The proper approach is that set out by Lord Rodger of Earlsferry in *Roberts v Gill & Co* [2011] 1 AC 240 in the context of trustees:

"87. ...Unquestionably, the general rule is that the beneficiary of a trust cannot sue a debtor of the trust: the relevant right of action is vested in the trustees and it is for them to enforce that right by raising an action, if appropriate. Where the trustees decline to take proceedings but the beneficiary insists, he can require them to assign the right of action or to permit him to use their name, provided that he gives them an indemnity for any liability for expenses."

Thus, the pursuer *qua* beneficiary, if of the belief that a debt is due to the estate, may bring proceedings in the name of the defender *qua* executor-nominate against the defender *qua* attorney. Neither of the other cases to which the pursuer refers, namely *Donald v Hodgart's Trs* and *Clarke v Clarke's Trs*, support the proposition that a former attorney is required to account for her intrusions with the deceased's assets and property to the beneficiaries of the deceased's estate. Both are distinguishable on their facts. Both concerned the trustees' intrusions with the deceased's trust estate.