SHERIFFDOM OF LOTHIAN AND BORDERS AT LIVINGSTON

[2020] SC LIV 26

A50/16

JUDGMENT OF SHERIFF SUSAN A CRAIG

in the cause

COLIN LUKE CARNEGIE SMITH

Pursuer

against

ANDREW CARNEGIE

Defender

Pursuer: Wilson, Ennova Law
Defender: Party

Livingston, February 2020

The sheriff, having resumed consideration of the cause, makes the following FINDINGS IN FACT:

The parties

[1] Andrew Carnegie ("the deceased") was the parties' father. He died on 10 February 1999 and left no will.

[2] The deceased had five children, four with his wife, Thomasina Macfarlane Carnegie ("Mrs Carnegie"), and one with the pursuer's mother, Ann Smith.

[3] Although there was a separation agreement, the deceased and Mrs Carnegie were still married at the time of his death and remained on good terms, regularly socialising together.

[4] In the separation agreement (5/2/4 of process) the deceased and Mrs Carnegie discharged each other from any further claims.

[5] The deceased also had relationships with a number of other women, up to the time of his death.

The executry

[6] On 10 March 1999 the defender was appointed executor dative to the deceased's estate. Confirmation was granted on 12 July 1999.

[7] The deceased's children were the beneficiaries of that estate and each was entitled to a one fifth share.

[8] The defender was a motor engineer to trade and had no experience of legal matters. He instructed his father's solicitors, Jardine Donaldson, to act on behalf of the executry. They had acted for the deceased, and his mother before him, for many years and had drafted the separation agreement.

[9] At their first meeting, the defender gave Jardine Donaldson the papers he had found at the deceased's home. He had had no prior involvement with the deceased's financial affairs and did not know what assets he had. The defender did not know what bank accounts the deceased had operated and simply handed over the papers to Jardine Donaldson.

[10] Thereafter the defender let Jardine Donaldson get on with the process of administering the estate, signing such paperwork as they, from time to time, requested him to do, and followed the advice they gave him.

[11] Using the papers given to them by the defender and following their own enquiries, Jardine Donaldson prepared all the paperwork necessary for the administration of the estate, including the Inventory of the deceased's assets. From time to time they corresponded with solicitors instructed by the pursuer's mother. That included correspondence in which she claimed various items were not included in the Inventory. Some of the items said to be missing are not now claimed in this action; some of the items now claimed were not mentioned in that correspondence.

[12] Jardine Donaldson advised the defender in relation to each of the claims. He followed that advice.

[13] In due course Jardine Donaldson wound up the estate. In September 1999 they prepared a statement of the estate that gave a total value of £88,630.07. That included a heritable property, a former local authority council house the deceased had bought for his mother. She had been the tenant. The deceased had agreed his mother could continue to live in the house until her death. It was sold in February 2002 after she passed away. The net free proceeds of sale were £42,626 with each beneficiary being entitled to £8,525.20.

[14] By September 1999 Jardine Donaldson had ingathered the moveable estate and was in a position to distribute that estate amongst the five beneficiaries. They were each entitled to receive £9,955.14.

[15] Towards the end of 1999 there had been correspondence from the pursuer's mother's solicitors in which, in effect, she sought early payment of the pursuer's share of the as yet unrealised heritable estate as well as an additional sum which she said was for

"compensation". In return the pursuer's mother said she would "waive all claims which [the pursuer] may have against the executor and the estate" (5/3/8 of process).

[16] Concerned to make sure the executry was adequately protected, Jardine Donaldson sought advice about that proposal from the insurers who had issued the executor's Bond of Caution. The insurers were not prepared to agree to that arrangement and were concerned they may still be exposed to claims under the Bond.

[17] Jardine Donaldson approached the Accountant of Court for advice. They were told that the Accountant could issue a direction, directing the release of the pursuer's share into the Accountant's care and oversight. Such a direction would allow Jardine Donaldson to distribute the rest of the moveable estate to the other four beneficiaries who were entitled to that distribution, the funds having been ingathered.

[18] The Accountant made such a direction on 15 January 2001. On 19 January 2001 the pursuer's share of the moveable estate (£9,955.14) was paid to the Accountant, and, in due course, Jardine Donaldson also paid over his share of the heritable estate. At the same time the other four beneficiaries each received their shares of the moveable, and later, heritable estate. By spring 2002 the entire estate had been distributed to the beneficiaries and there were no funds left.

[19] The Accountant thereafter oversaw the management of the pursuer's share until he turned sixteen in 2012 when it was released to him.

[20] In around 2015 the pursuer started corresponding with the defender in which the pursuer made a number of challenges to the extent of the deceased's estate disclosed in the Inventory. The theme was that various items had been left off the Inventory. There were also allegations that the defender had failed to pursue a variety of claims on behalf of the

executry, including claims for medical negligence, hearing loss, payment protection insurance and over-charged banking charges.

[21] The defender addressed each those claims as best he could by explaining either the disputed items did not exist, had no value or were not matters that were known of by him either at the time of the preparation of the Inventory or thereafter.

[22] The pursuer did not accept those explanations. He persisted in making claims, culminating in the present action.

The inventory

[23] Jardine Donaldson prepared the paperwork for the confirmation, which the defender signed *qua* executor dative. The items in the Inventory comprised:

- Heritable property: 8 Burnside Crescent, Clackmannan, valued at £38,000.
- Moveable Estate in Scotland: two Scottish Life Policies totalling £17.08; a National Australia Life Bond number XXX valued at £24,000; a National Australia Life Personal Equity Plan £11,732.29; and compensation for hearing loss of £685.
- Estate in England and Wales: Clerical Medical Bond Policy number XXX valued at £14,195.70.

Items not in the inventory

[24] The following items were not included in the Inventory.

[25] **Clydesdale Bank account number #1**: an account in the joint name of the deceased and Mrs Carnegie and designed as "Equally or Survivor, Joint and Several". As at 20 January 1999 the balance at credit of that account was £1,416.31 (5/1/1 of process). Only

the deceased had operated that account for some time prior to his death and appeared to use it for day-to-day living expenses.

[26] At the time of signing the Inventory the defender did not know that account existed. He did not become aware there was an account in joint names of the deceased and the defender's mother until after the present action was raised. Following the raising of this action, and the objections to the accounting he had provided, he made inquiry with the Clydesdale Bank. In March 2019 the defender received a letter from the Clydesdale Bank (6/24/03 of process) in which they explained:

> "This account was held in joint names "Mr Andrew Carnegie and Mrs Thomasina Carnegie". This account was set up as "Either or Survivor" which means that upon the death of one of the parties the account would automatically by passed into the sole name of the surviving party.
>
> I can therefore confirm that when Mr Andrew Carnegie died this account was amended to the name of Mrs Thomisina Carnegie only."

The defender exhibited a copy of that letter to the pursuer once it was available.

[27] Clydesdale **Bank account number#2**: the whole of the sum at credit of that account at the date of death (£1,032.50) was used to pay some of the expenses of the funeral. In a letter to the pursuer dated 23 September 2015 (6/2/7 of process) the Clydesdale Bank explained they had no record of the deceased having any account with them other than that account.

[28] **Household contents**: The house contents were in a poor condition and had no value. There were no items capable of being sold. The defender asked each of the beneficiaries – including the pursuer's mother as his guardian – if they wanted to take any items from the deceased's home. The pursuer's mother asked for the carpets, which the defender and his brother uplifted and delivered to her at her home. She did not ask for any other items.

[29] The defender also approached local charities to ask if they wanted any of the household items, but they did not. The defender, with the assistance of other family members, took the remaining items to the local dump.

[30] **Model Cars**: At the time of his death the deceased had a number of toy cars. They did not have a financial value. The defender offered two cars (i.e. one fifth of their number) to the pursuer's mother but she did not collect them. They remain available to the pursuer for collection from the defender.

[31] **Watches**: The deceased did not own any watch or jewellery of value at the time of his death. At some point prior to his death the deceased gave Mrs Carnegie a watch he had been given on his retirement.

[32] **Stamp collection**: At the time of his death the deceased did not own a stamp collection. Within the wider family there was an album with stamps but the deceased did not own it. It was kept at his mother's house and may have belonged to his father but, in any event, had no value.

[33] **BMW car**: At the time of his death the deceased owned a BMW car registration number F144 COA. It was in poor condition and required extensive repairs in order to renew its MOT, which expired in March 1999. It could not remain at the deceased's property after his death and without an MOT could not be insured so would have to be kept off road. The defender paid for the necessary repairs with his own money. The cost of those repairs exceeded the value of the vehicle. Thereafter the defender used the car from time to time and at his own expense, a matter that was known of by the pursuer's mother and other beneficiaries.

[34] **Pick-Up Truck**: The deceased did not own a pick-up truck at the time of his death.

[35] **Buccaneer Caravan**: There was a caravan in the deceased's garden at the time of his death. It was damaged and in very poor condition. It had no value. As with the BMW, the caravan had to be removed from the deceased's property. The defender's sister, Helen Rodger, paid for it to be uplifted and taken to her home where she had space to store it.

[36] **Elddis Caravan**: At the time of his death the deceased did not own a second caravan, an Elddis caravan.

[37] Tools **& Trailer**: At the time of his death the deceased did not own any tools or a trailer.

[38] **Bicycle**: By the time of his death the deceased was in very poor physical health and could not ride a bicycle and, at by the time of his death, did not own one.

[39] The defender has repeatedly explained to the pursuer, and his mother before him, why these items were not included in the Inventory. Once he became aware of it he explained why the account in joint names was not included. By letter dated 29 September 1999 Jardine Donaldson reiterated there were no assets other than those disclosed in the Inventory (5/2/60 of process). Despite these explanations the pursuer's mother, and later the pursuer, repeatedly challenged the defender alleging he had mishandled the executry and deprived the pursuer of inheritance.

FINDS IN FACT AND LAW

[1] The pursuer's mother not having discharged the pursuer's claims in the executry, the pursuer is not personally barred from pursuing this action.

[2] The pursuer's claim for an accounting remains extant, being an imprescriptible right in terms of Schedule 3 of the Prescription and Limitation (Scotland) Act 1973.

[3] The defender, as executor, had a duty to provide an accounting for the estate. He has fulfilled that duty.

[4] The defender, having confirmed the whole moveable estate of the deceased known to him at the time, has fulfilled the duties incumbent on him in terms of section 3 of the Confirmation of Executors (Scotland) Act 1823.

[5] The defender, who acted on the advice of executry's solicitors, fulfilled his duties as executor.

[6] The whole of the sum at credit of the deceased's Clydesdale Bank held in joint names with Mrs Carnegie as at the date of death formed part of the estate. The defender did not know of its existence at the time of the preparation of the Inventory. He did not fail in his duties as executor in not including that sum in the Inventory.

[7] On becoming aware of the existence of the account, the defender fulfilled his duty as executor by making enquires with the Clydesdale Bank. Having been told the sums at credit of that account had automatically been credited to the surviving account holder immediately following the death in 1999 and having no reason to doubt that statement, the defender, as executor, was not under a duty to challenge that statement. There was accordingly no duty on the defender *qua* executor, or otherwise, to pursue a claim against the Clydesdale Bank or the surviving account holder and no duty to obtain an eik to the Inventory

[8] Having provided the pursuer with that explanation in relation to the Clydesdale Bank account in joint names, the defender has fulfilled his duties in accounting for it. There having been no duty on his part to pursue the Clydesdale Bank or the surviving account holder and no duty to obtain an eik to the Inventory, there is no obligation to reckon to the pursuer, or make payment to him in respect thereof.

[9] There being no items omitted from the Inventory that the defender was under an obligation to include, he has provided a full account of deceased's estate.

[10] There are no sums justly owed by the defender to the pursuer.

ACCORDINGLY

In respect of the Record number 19 of process:

[1] Dismisses the pursuer's first plea in law as unnecessary;

[2] Repels the pursuer's second plea in law;

[2] Repels the defender's seventh plea in law in respect of personal bar;

[3] *Quoad ultra*, sustains the defender's pleas in law.

And in respect of the Record number 23 of process

[1] Repels the defender's second plea in law anent time bar and sustains the pursuer's sixth plea in law;

[2] *Quoad ultra*, repels the pursuer's pleas in law;

[3] Sustains the defender's first plea in law.

THEREFORE the issue of the defender's liability to account to the pursuer having been judicially examined and determined, assolizes the defender from the craves of the writ; and finds the pursuer liable to the defender in the expenses of the action (except in so far as already dealt with) as taxed.

NOTE

Introduction and general observations

[1] At its heart this case involves the duties of an executor to account to beneficiaries for the value of a deceased's estate and to pay sums "justly due"[1]. It is an action of count, reckoning and payment in which the pursuer argues the defender – his half-brother and their father's executor – has not properly accounted to him for sums he says he should have inherited on the death of their father. The pursuer claims there were nineteen separate items of value left off the Inventory of the estate and seeks payment for their value.

[2] One feature of the case is that although the action was raised in 2016, the parties' father had died in February 1999, and the last distribution of funds was in 2002 when the purser was just five years old. There are now no funds left and, given the passage of time, the solicitors that acted for the executry have destroyed their file.

[3] The nature of the action results in two sets of pleadings. The first (number 19 of process) sets out the parties' position in principle on the issues of liability and the second (number 23 of process) details the pursuer's objection to the accounting provided by the defender, and the defender's answers.

[4] The pursuer asks me to find the defender has not provided a proper accounting and order that he, personally, pay a sum to represent his unaccounted share or, possibly, a "random" sum of £30,000. The defender's position is that he has accounted for everything, and there is nothing due.

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[1] The Law of Civil Remedies in Scotland, David M Walker Chapter 17, p306

The proof before answer

[5] Following a number of procedural hearings a four-day proof before answer was held. By then the pursuer argued the defender had failed to account for:

1. **A Clydesdale Bank account number #1 in the names of the deceased and his wife, Thomasina Carnegie, jointly and the survivor**
2. **A Clydesdale Bank account number #2 in the deceased's sole name**
3. A Life Insurance Policy with the Norwich Union
4. A failure to pursue claims for Payment Protection Insurance
5. A failure to pursue claims for Direct Debit charges
6. **The** value **of the deceased's household items**
7. **The** value **of a collection of model cars**
8. **The** value **of the deceased's jewellery, including a gold watch**
9. **The** value **of a stamp collection**
10. **The** value **of a BMW motor car**
11. **The** value **of a pick-up truck**
12. **The** value **of a Buccaneer caravan**
13. **The** value **of an Elddis caravan**
14. The value of prefabricated outbuildings at the deceased's home
15. **The** value **of his tools and a trailer**
16. **The** value **of a mountain bike**
17. The value of a hearing loss claim
18. The value of an investment with National Australia Life
19. The loss of rental income from the deceased's heritable property occupied by his mother until her death

[6] At the start of the proof the pursuer withdrew claims three, four, five, fourteen, seventeen, eighteen and nineteen and the scope of the proof was restricted to the remaining items i.e. claims one, two, six, seven, eight, nine, ten, eleven, twelve, thirteen, fifteen and sixteen. For convenience those are highlighted in bold above.

[7] The defender had a preliminary plea of personal bar, arguing the pursuer's mother had compromised his claim in 2001 and discharged the defender. Evidence was required to determine that matter.

The evidence

[8] I heard evidence from

1. Colin Smith, the pursuer
2. Ian Thomson, a retired car dealer
3. Raish Allan, from the Office of the Accountant of Court
4. Greer Conroy, Solicitor, Jardine Donaldson
5. Allister Smith, the pursuer's cousin
6. Edward King, a neighbour of the deceased
7. Helen Rodger, the defender's sister
8. Stuart Carnegie, the defender's brother
9. Ann Smith, the pursuer's mother
10. Andrew Carnegie, the defender

Colin Smith

[9] The pursuer was two and a half at the time of his father's death. He had little memory of him and no memory at all of his father's assets. Once he was older he carried out investigations into assets he believed had been omitted from the Inventory.

[10] His evidence about his father's assets was entirely based upon what others had told him or what various documents bore to contain. He had no direct knowledge.

[11] The pursuer spoke to correspondence in which, over time, claims were made that multiple assets had been omitted from the Inventory. That correspondence carried on for some years, starting almost immediately after the death and initiated by his mother, with various and different heads of claim being made, and new and additional claims being added at other times. There was a lull in the correspondence from around 2002 until 2015 when the pursuer took up his claims on his own behalf. It was his evidence that he did not accept any of the explanations given by the defender, which were, largely, that the assets claimed either had no value or did not exist at all.

[12] With the exception of the hearing loss claim, none of the correspondence from the pursuer's mother's solicitors mentioned the heads of challenge the pursuer withdrew at the start of the proof. Those were challenges made by the pursuer either in his correspondence with the defender from 2015 onwards or in the course of this action.

[13] It was clear from the evidence the pursuer was deeply distrustful of and hostile towards the defender and had, since he was old enough to do so, persistently maintained a campaign of challenge and accusations against the defender. He left possible stone unturned.

[14] I did not form an impression of the pursuer being a person who was merely being diligent. Rather, he was someone who bore animus towards the defender – his half-brother –

for reasons that were unclear. It was clear from the evidence that his mother had been similarly enthusiastic in her challenges of the defender from the very outset of executry, and the pursuer appears to have continued with that approach.

[15] All of the pursuer's evidence about his father's assets was hearsay. In itself that is not surprising given his age, and of course does not exclude that evidence. It does however raise the issue of what weight it should be given. In that regard, I formed the impression the pursuer's evidence was so coloured by his animus and distrust of the defender that I could not place any weight on it in matters of conflict.

Ian Thomson

[16] Mr Thomson explained that he was a retired car dealer, but had been the principal of Campbell Cars, Dunfermline. The deceased had been a customer. It was his evidence that in October 1998 the deceased had purchased an F registered BMW 535SE with around 128,000 on the clock for total price £6,900, trading in a Jaguar for which Mr Thomson gave an allowance of £4,000. The balance of £2,900 was paid in cash. Although it was a ten-year-old car with high mileage it was, said Mr Thomson, in excellent condition. His evidence was that it was always his policy to give a car a full MOT and a year's warranty.

[17] Mr Thomson said he had issued an invoice to the deceased at the time of the purchase. The Campbell Cars invoice dated 6 October 1998 (6/2/21 of process) however refers to a warranty covering only "engine and gear box for 60 days", that the price was "£1,800 plus Jag" and, on the reverse, acknowledges a payment of £100 as a deposit stating there was "a balance to pay of £1,700". There was no figure given for the value of the Jaguar.

[18] That was at odds with Mr Thomson's evidence. It was also at odds with the defender's evidence (which was consistent with that of Stuart Carnegie) that the MOT had expired in March 1999 and that he paid, from his own funds, for the repairs necessary to put it into a roadworthy condition at a cost that exceed the value of the car.

[19] The mileage recorded on the invoice was also at odds with other documents in process (6/2/17 and 5/2/63) that suggested the mileage was around 133,000.

[20] There was no evidence supporting Mr Thomson's valuation of the Jaguar and it was the defender's position that while the deceased had owned a Jaguar one at one time it would not even have been worth £400.

[21] Mr Thomson agreed he did not know the condition of the BMW by the time of the deceased's death. He was asked about the defender's position that by then the car was in poor condition, required £1,500 worth of work and a set of new tyres to obtain an MOT, but was only worth £1,475 even in good condition, which it was not. Mr Thomson was asked to comment on correspondence from Menzies Motors, Stirling, to that effect. While agreeing that all the faults listed in the Menzies correspondence could be expected in the vehicle, Mr Thomson said that was "exactly what you could expect" from a "main dealer" such as Menzies and, as he put it, "Menzies standards were far higher" than his.

[22] When pressed he agreed that the value of a car was what it could make at auction and that was where he had purchased the BMW in the first place. Mr Thomson said he did not know what he had paid but would have marked up the price by around £800. He went on to say that one could not compare a valuation provided by a main dealer to his own "as they would not have bought that car at auction" in the first place.

[23] Unlike other aspects of Mr Thomson's evidence, these passages of evidence had the ring of truth. He said he did not have high standards and bought cars that others would

not. However in other respects I found him to be an unimpressive witness, who was inappropriately hostile and aggressive towards the defender.

[24] Mr Thomson claimed the defender had come to his garage and threatened him. He said he had had to call the police. It was the defender's position that he had gone to the garage because he had been told (by the pursuer's mother) that Mr Thomson had said he would buy the BMW back for £6,000. That was too good a deal to refuse, said the defender, but when he got there Mr Thomson refused even to look at the vehicle, was the one who was threatening and aggressively demanded he leave.

[25] I did not find Mr Thomson reliable or credible on this point. There was nothing in his demeanour to suggest he was likely to be intimidated by anyone, least of all someone of the rather milder and meeker bearing and manner of the defender. Instead Mr Thomson gave the impression of someone who was aggressive, opinionated, and prepared to be partisan in support of the pursuer's position when, in reality, he ought to have been a third party, disinterested witness. It was not clear why he should be such a passionate supporter of the pursuer, and his mother before him, but that was a curious feature of the evidence of certain of the pursuer's witnesses.

[26] I did not consider I could rely on Mr Thomson's evidence in matters of conflict.

Raish Ross Allan

[27] Mr Allan explained he had worked at the Offices of the Accountant of Court and Office of the Public Guardian for 17 years. Recently he had responsibility for oversight of the estates of children managed by that office, the role being generally to make sure the child's property was properly administered until their sixteenth birthday. He had had day-

to-day oversight of the pursuer's estate once it had been placed in the hands of the Accountant of Court.

[28] Mr Allan gave evidence that in 2001 Jardine Donaldson, the executry's solicitors, approached the Accountant's office asking for guidance about the distribution of the pursuer's share of the deceased's moveable estate. The pursuer's mother was insisting on distribution but at the same time challenging the value of the estate, they said. Jardine Donaldson explained the pursuer's mother had threatened to raise an action for aliment against the executry and was also seeking a distribution of the pursuer's share of the heritable estate (although it had not yet been sold) against a discharge of the executor. The correspondence explained that the issuers of the executry's Bond of Caution were not prepared to allow a distribution in those circumstances but enquired whether the Accountant could issue a Direction to allow Jardine Donaldson to distribute the moveable estate notwithstanding the position of the Cautioners.

[29] Mr Allan explained that while Cautioners can express a view about the administration of an estate to a minor, ultimately that decision sits with the Accountant. The Accountant can issue Directions in cases of conflict, squaring the circle between an executor's obligation to distribute an estate (explaining that an executor cannot withhold sums once ingathered) and the responsibilities under the Bond of Caution. A Direction allows the Accountant to oversee the estate.

[30] In due course the appropriate Directions were issued, said Mr Allan, and the pursuer's share of both the moveable, and then the heritable, estate came under the supervision of the Accountant. Once he turned sixteen, the funds were distributed to him.

[31] It was put to Mr Allan that the Direction amounted to waiver of the pursuer's right to challenge the extent and value of the estate. The defender had argued the pursuer was personally barred by the actions of his mother in agreeing to the Direction.

[32] Mr Allan's evidence was that a Direction did not require the pursuer's mother's agreement and but was part of the Accountant's public function to oversee the estates of minors. Such a Direction did not discharge a beneficiary's rights as the Accountant's role is to oversee the management of estates as distributed, not to decide whether it was had correctly ingathered. On occasion, he said, the Accountant might point out "school boy errors" in an Inventory or distribution, but not whether there was anything absent from a confirmation or executry account.

[33] Plainly whether there has been a waiver or personal bar is a matter for the court based on the evidence. It was however of assistance to have Mr Allan's evidence about the role of the Accountant and the purpose of Directions. He spoke to his examination of the whole of the file relating to the pursuer's share of the estate and that he found no correspondence in which a waiver was given by the pursuer's mother. He was a clear and straightforward witness and I accept his evidence.

Greer Conroy

[34] Ms Conroy's evidence was interposed with the pursuer's witnesses. In chief she was asked by the defender to explain her involvement with the executry estate. Ms Conroy explained she was a solicitor with Jardine Donaldson and had being carrying out executry work for in excess of "twenty to thirty" years. She had not personally been involved with the deceased's executry (it had been her colleague who had since retired through ill health) but as far as she knew the administration was dealt with in the usual way and that

everything was "above board". As an intestate estate there was a Bond of Caution, and as far as Jardine Donaldson was concerned the executry had been brought to a conclusion when funds were distributed in 2002.

[35] Ms Conroy explained that from the conclusion of the executry there was no further contact about the estate until in around 2015 when the pursuer intimated an intention to raise an action of damages against the firm, alleging negligence in their handling of the estate. His letter indicated he was prepared to settle extra judicially on payment of a sum of money. No action was raised and no payment made.

[36] By the time of the pursuer's contact the executry file had been destroyed. When the defender asked the firm to act for him in the present action they had to decline, a potential conflict of interest having been created by the intimation of the pursuer's claim.

[37] Ms Conroy was not cross-examined and her evidence went unchallenged. That was a source of criticism by the defender in his submissions. He had produced a witness who could speak to the administration of the estate, he said, but the pursuer had not taken the opportunity to ask anything about it.

[38] I found Ms Conroy to be a clear witness, who gave her evidence in an entirely straightforward way, and it is accepted.

Allister Smith

[39] Mr Smith is the pursuer's cousin. He gave evidence he had known the deceased for at least ten years prior to his death. He had visited him at his home although that was a few years before his death, and described seeing cars (a Jaguar and a BMW), a white pick-up truck and another car at the house.

[40] Mr Smith explained that on one occasion, at what he described as the deceased's "old house" (i.e. where he lived before he retired), he had been shown a book that contained stamps. It was a "sizeable volume" with a blue or black cover. He was not interested in the book, said Mr Smith, and while the deceased told him he had inherited it from his father there was no discussion about its value or contents. Nevertheless Mr Smith felt able to give evidence that he "assumed they were worth quite a bit and there could even have been rare ones in there for all I know."

[41] Asked whether he had ever seen any model cars, Mr Smith said he could not really remember that although he (the deceased) "probably did have some lying about but I couldn't say". He could not remember seeing a caravan at the deceased's home.

[42] Under what was a rather brief cross-examination Mr Smith became aggressive and hostile towards the defender, demanding to know if he was being accused of lying.

[43] Mr Smith was not a particularly impressive witness and his evidence was so lacking in detail, time or specification it was of no assistance in determining the matters in dispute. He was the only witness to suggest that the deceased owned a Jaguar and a BMW at the same time and that was in conflict with the reliable evidence.

Edward King

[44] Mr King was the deceased's neighbour. They were not close, he said, but would say hello in passing and perhaps chat. Mr King gave evidence that there were vehicles at the house, a BMW, a red 4-wheel drive pick-up truck which sat in the drive, and a caravan in the back garden. The issue of cars did not come up in their chats, he said, but spoke to seeing the BMW being driven most days and the truck being used "on occasion".

[45] In relation to the caravan in the garden, Mr King's evidence was he could not say if it was used as a towed vehicle. He did not know what happened to the BMW.

[46] In cross-examination Mr King explained he had only ever seen one caravan at the house. He was unable to say anything more about the pick-up truck, explaining that he used to drive a lot (he was an HGV driver) and was not often at home in the months leading up to the deceased's death.

[47] Mr King's evidence was also somewhat lacking in detail on the matters in dispute but it is accepted for what it was worth.

Helen Rodger

[48] Ms Rodger is the defender's sister, and half-sister to the pursuer. It was her evidence that she went to her father's house, for the first time, after his death. It was, she said, the "saddest thing I'd ever witnessed" describing it as full of what appeared to be second hand furniture in poor condition. The British Heart Foundation had refused the donation of the majority of the furniture given its condition.

[49] Her father had owned what she described as a "dinky wee fishing caravan" that he had not used much before his death and was not roadworthy; it had to be stored off road. Ms Rodger explained the landlord had agreed to let it be stored in her father's drive until she paid for it to be uplifted and taken to her house where it could be stored in her garden.

[50] Asked about model cars Ms Rodger explained they had been bought as gifts for her father who was a "car fanatic".

[51] There was no cross-examination.

[52] I am satisfied that Ms Rodger was a credible and reliable witness. She had become upset and tearful in the course of her evidence but that did not undermine that evidence in any way. It is accepted.

Stuart Carnegie

[53] Mr Carnegie is the defender's brother, and the pursuer's half-brother. In the months before his death, he would see his father at least once a day, said Mr Carnegie. Asked about a 4 x 4 vehicle, he said that when his father had one it was white, not red and was a "scrapper". His father did not drive it and it was, in effect, a project. Mr Carnegie explained he had borrowed it around three years before his father's death but he (his father) had warned him not to use it, as there was a hole in the floor. It had not been used to tow a caravan, said Mr Carnegie, and he did not know what had become of it.

[54] In relation to the furniture in his father's house Mr Carnegie's evidence, which tended to support that of Ms Rodger, was that it looked as though it came from a jumble sale.

[55] His response to a suggestion that the BMW had a value of £6,900 at the time of his father's death was "don't be silly" and explained that his father was a "fixer upper" who did not spend money on cars and got them "cheap". The BMW's condition was "alright for its age" but he did not know what his father had paid for it.

[56] Pressed on this, Mr Carnegie explained that after his father's death he had asked to use the BMW but was told there was a problem with its gearbox and that the car was "broken".

[57] Mr Carnegie explained he did not know about any caravans but he believed there had been one at some stage. His father had no jewellery, said Mr Carnegie, although he

remembered seeing a watch given to him for twenty-five years service at work. He did not know what happened to it.

[58] His father had a few dinky toy cars, which his son played with sometimes, said Mr Carnegie, but that it was not a "collection".

[59] The only book of stamps he knew about, said Mr Carnegie, was one he had had as a child. He would buy "wee packets" of stamps "from the local sweetie shop for 70p".

[60] Mr Carnegie was a good, robust witness who gave his evidence with care and deliberation. I was satisfied I could rely on it as credible and reliable and do so on issues of conflict. He had personal and current knowledge of the arrangements at his father's home at the time of his death and the assets within. He visited his father every day in the period before his death and would know better than others (except perhaps the defender) what was, and was not, in the house, as well as its condition. His evidence was consistent with Ms Rodger's about the furniture's state of dilapidation and that any vehicles were in poor condition.

[61] I accept his evidence about the stamp book, in the sense that he said the only one he knew about was one he had as a child. He was not asked about its value but it is a reasonable inference that it would have been negligible. That evidence was not in conflict with other evidence about the existence of a book containing stamps within the wider family, and supported the evidence that the deceased did not own one when he died.

[62] Similarly, in relation to the model cars I accept as reliable Mr Carnegie's evidence that these were toys, and not a "collection" in the sense of signifying value, and was consistent with the defender's evidence on the point.

Ann Smith

[63] Ms Smith is the pursuer's mother. It was her evidence that she had been in a relationship with the deceased for over 19 years and described themselves as "partners". She had been due to move in to the deceased's home but continued to live in her own while it was being renovated. She had stayed over at his house six or seven times but did not visit the property very often as she was at college at the time. It was Ms Smith's evidence that the pursuer stayed with the deceased about three times a week.

[64] Prior to that she had visited the deceased, on occasion, at his former home (the one connected with his employment), said Ms Smith. They discussed financial matters and she knew the deceased had an account with the Clydesdale Bank. Although asked about the account in joint names between the deceased and his wife, her reply – "I knew there was *an* account" – did not suggest she was aware of its existence. The deceased did also have another account with that bank – account number #2. That was also consistent with there being no mention of the joint account in all the lengthy and detailed correspondence between Ms Smith's solicitors and Jardine Donaldson. She challenged them about a wide variety of other matters, but not that. It is further consistent with the defender's evidence that he knew nothing about it until the pursuer brought it to his attention in recent times.

[65] Notwithstanding her lack of knowledge of the account, its purposes and use, she was taken, in some detail, through a number of statements and asked for comment. Since she had no personal knowledge about what the deceased did with the joint account this evidence was really just reading it into the record rather than it having probative value of its own. Nevertheless in the absence of competing evidence, the entries in the statements suggest the deceased used the account for his sole household and not for Mrs Carnegie's or a joint household.

[66] Ms Smith's evidence was that there were items of value in the deceased's house, including a television. That was, she said, "really expensive" and he had paid over £1,000 for it. Ms Smith then spoke of visiting the defender's sister's house and was "quite astonished" to see the television there. However she did not explain how she knew it was the same television, and this matter was not put to Mrs Rodger who had by then already given her evidence.

[67] Ms Smith agreed that the defender had asked what she wanted from the deceased's house, and she asked for the carpets, which he uplifted and gave to her.

[68] As far as the model cars were concerned, they were not toys but had been given to the deceased as gifts, said Ms Smith. There were not less than twenty cars, she said, and were kept in good condition. Asked what had become of them, she said the defender had taken them. Ms Smith agreed she had told the defender she wanted "at least" two of these cars and although she had been told they had been set aside for the pursuer she had not picked them up. She did not explain why.

[69] The deceased had jewellery, said Ms Smith, including a gold watch she said the deceased had valued at £600. It had been given to him to mark twenty-five years service in his employment but he never wore it. Instead he wore a "silver watch" along with gold and silver chains, which he wore daily. The deceased had no intention of giving them away so still had them at the time of death, said Ms Smith.

[70] In relation to the stamp collection it was Ms Smith's evidence that it was kept in a black album. She had seen it at the deceased's house and he spoke of it often, saying he had inherited it from his father. As for its contents, Ms Smith said she knew nothing about stamps but that he had told her three in particular – Penny Blacks – were worth "a lot of

money". She agreed that she had not seen a valuation and there was no mention of Penny Blacks in the Record.

[71] The deceased had a black BMW at the time of his death and it was, said Ms Smith, a "really good car" for which he had traded in a Jaguar. Although she did not know exactly what he had paid for the BMW Ms Smith thought it was about "£1,000 plus the Jag". That was more consistent with the receipt from Campbell Cars but not with Mr Thomson's evidence. The car was, she said, in excellent condition and the deceased had never told her anything was wrong with it. Had there been, said Ms Smith, he would have fixed it.

[72] After his death Ms Smith had seen the BMW parked outside the defender's house. She also saw him driving it and, on one occasion, the pursuer had recognised the car and shouted "dad" but the defender drove by, laughing at her. She went straight to her lawyer, said Ms Smith.

[73] There was a pick-up truck at the property, said Ms Smith, which had been his "project" for a while. He had made it road worthy and used it to take out the pursuer. It was painted white for a while and then he sprayed it red. She did not know what became of it.

[74] The deceased had two caravans, said Ms Smith, and one had been purchased from Bankhead Caravans for between £1,500 and £1,800. After the deceased's death she had seen it at the defender's house, in his back garden. It was there for some time, explained Ms Smith, until she started asking questions about it when it disappeared. This was not put to Mrs Rodger, whose evidence was that she had the caravan.

[75] There was a second caravan, said Ms Smith, which the deceased had had "for a while" and certainly during the time she was seeing him. She spoke to a photograph she said was of her and the deceased in front of that caravan. She had shown the photograph to

Murray Caravans and they had said it was a "1970's style Elddis" caravan that, in good condition, had a value of "up to £5,000".

[76] In her evidence Ms Smith explained there were "better" photos than the one in process, which was of poor quality, with a hand written date, and with only a partial view of the caravan. However as the valuation was not spoken to by anyone other than Ms Smith there was no opportunity to test the robustness of the figure and I was not persuaded it was safe to place any reliance on it.

[77] I had other reservations about this passage of evidence. Ms Smith said that although she did not know what had happened to the caravan, she gave evidence that the deceased had told her it had been left with Stuart Carnegie for "safekeeping". In common with her evidence about the other caravan, that was not a matter put to Mr Carnegie.

[78] The deceased had "two garages full of tools" said Ms Smith and still had most of them at the time of his death. She had seen them in the outdoor buildings at his home before he died. He also had a mountain bike for which he said he had paid £500. He took the pursuer out on it, said Ms Smith, and still had it at the time of his death. Asked if she knew what had become of the bike, Ms Smith's evidence was there was lots of "talk" about it. There was a "taped" meeting when, she said, the defender had said he was not going to put "anything in the pot for the bike". No tape was played in the course of the proof, nor was that put to the defender.

[79] Ms Smith's evidence was that she had not discharged any of the pursuer's claims. She had become "disturbed" when the defender had asked her to provide a discharge to allow the funds transferred to the pursuer. Over time she had instructed two different firms of solicitors. She agreed that since shortly after the deceased's death she had been challenging the valuation of the estate. It was like a "spider's web" she said, with the

defender constantly changing his position on the existence and value of the estate's assets. In December 2000 she had instructed her solicitors to propose a settlement which included a sum of £7,500 for the pursuer's share of the heritable property although is was still occupied by the deceased's mother, and a sum of £2,500 "in compensation". Then, without telling her, the defender obtained the Direction from the Accountant of Court, she said. She was suspicious of his motives in doing so.

[80] I did not find Ms Smith a convincing witness. Her evidence was rather self-serving, and, as observed, somewhat lacking in first-hand detail. She was vague about some of the details of her relationship with the deceased, which was surprising if had it been the partnership she described. While it was entirely proper for her to seek advice to protect the pursuer's interests, the tone and content of the correspondence from her solicitors suggested that from the very outset of the executry she was suspicious, belligerent and challenging of the defender. Her correspondence was highly charged from the outset and did not improve over time.

[81] I am not persuaded I can rely on Ms Smith's evidence in matters of conflict.

Andrew Carnegie

[82] The defender is the deceased's oldest son. He gave evidence about his relationship with the deceased, which he said was good and close. Before his father retired they worked together so saw him every day and, in large part, that continued after the deceased retired. Along with the deceased and his late brother, Brian, the defender had been a stock car racer and was a proficient mechanic.

[83] The defender's evidence was that his father had died on 10 February 1999 following a fall down some stairs a couple of days before. He had sustained an injury to his leg, and that led to a blood clot.

[84] He knew the pursuer was his father's son, said the defender, although, initially at least, his name was not on the birth certificate. As he put it, his father had "so many women going on; it was unbelievable" and added that Ms Smith was not the only woman with whom he was having a relationship at the time of his death.

[85] The deceased's house was "quite embarrassing", said the defender. He gave evidence that the sofa was of such poor quality that when it was sat on one "didn't hit anything until you hit the floor." After his death the landlord had given the defender only a couple of days to clear the house so he asked "the family" (including Ms Smith) what she or he wanted to take. The defender's evidence, which was consistent with Ms Smith's, was that she asked for the carpets. The defender and his brother took them up and delivered them to her home. What was left in the house was then offered to charity shops but they would not take much because it was in such poor condition, so the rest went to the dump.

[86] The defender agreed that his father had a television but he did not know what happened to it or who took it when the house was cleared. He had never had it and, like the rest of the household contents, it would not have any resale value

[87] The defender's evidence was that after the death his brothers and sister asked him to be the executor. It was not a role he welcomed, he said, but he agreed. The defender said he and his brother Brian collected all of his father's papers and he took them to solicitors, Jardine Donaldson. He handed over the paperwork and let them get on with it. It was Jardine Donaldson that did all the research into his father's assets, said the defender, and he

had had no dealings with his father's finances before his death. It was Jardine Donaldson that drafted the Inventory and advised what should be in it.

[88] In relation to the joint account, the defender's evidence was that he did not know such an account existed, only finding out about it in the course of the current proceedings. He was not crossed on this point, nor was it suggested to him he should have known earlier. As far as he knew, Jardine Donaldson knew nothing about that account either. Ms Conroy was not asked any questions suggesting otherwise. He had not "touched a penny" of his father's money, said the defender, and all he did was sign the forms they gave him, and take their advice.

[89] The defender's evidence suggested his mother and father had a relatively fluid relationship and while he was aware they had separated did not know when or what financial arrangement they came to. He said they remained on good terms, and regularly saw each other socially.

[90] In relation to the items in dispute, the defender's evidence was either they did not exist or, if they did, had no realisable value. He said the household contents had no value. Ms Smith had a set of keys to the deceased's house and would have been free to take anything she had wanted. The small sum at balance in the Clydesdale Bank current account had been used to pay some of the funeral expenses (6/2/13 of process), said the defender.

[91] There was no "collection" of cars; instead there were toy cars. The pursuer, and his mother before him, had been offered two, but never picked them up. They were still available and the pursuer could have them any time he wanted. The deceased did not have or wear jewellery other than a cheap stainless steel watch, and while he had at one time owned a "long service" watch, it was not in his father's house when he died. The defender

believed it had been given to his mother who had, in turn, given it to one of their grandchildren at some point before the deceased died.

[92] The deceased had no interests in philately and had no stamp album; in an effort to find the one claimed by the pursuer, the defender's mother had identified one that had been in his grandmother's house. In an effort to address Ms Smith's repeated claims that there was a stamp album worth "£30,000" his mother had arranged to have it valued. That valuation had cost her £14 only to bring out a value of £8 (6/2/10 of process). His mother had offered to give the album to the pursuer but he had not accepted.

[93] The BMW was in poor condition and not road worthy; the MOT was about to expire and, without that, could not be insured or stored on road. The defender paid for repairs with his own money and at a cost that exceeded the value of the car. He had told, inter alia, Ms Smith what he had done with the car, which he used only occasionally.

[94] There was only one caravan, in a very poor state of repair with a hole in the side and water getting in; his sister stored it at her home. His father used to have tools but they were Imperial and worthless. When he retired he gave them to the apprentices at his work. Although he had had a pick-up truck at one time, the deceased had scrapped it before his death. The deceased did not own a mountain bike when he died.

[95] It was the defender's evidence that Jardine Donaldson gave him advice on all aspects of the executry, including these claims, and what items should be included in the Inventory. He had given them all the paperwork he could find and always followed their advice. That advice would be discussed with his siblings so the information provided to Jardine Donaldson about the value and existence of assets was a collective family effort. When Jardine Donaldson suggested he obtain a valuation for the BMW (the matter having been put in issue by Ms Smith) that was what he did. He was, he said, an engineer and not a

lawyer. Jardine Donaldson had given the pursuer, and his mother before him, all of the explanations he was giving in his evidence, said the defender, but they kept persisting in making more and more claims.

[96] The defender said he had been disadvantaged in these proceedings because of the passage of time and the fact that Jardine Donaldson had no file and could not act. He expressed the view that the pursuer went about "trying to get money from any source he could without working" and that he and Ms Smith were "professional litigators." He had had to "dig into his pension" to fund his defence despite having repeatedly answered all of the pursuer's challenges over many years.

[97] While the defender was robustly and closely cross-examined in significant detail he maintained his position on the issues in dispute. I formed the impression he was an honest witness on whose evidence I could rely. By the time of the proof he had been pursued by Ms Smith and, later, the pursuer, for twenty years, repeatedly dealing with their challenges and accusations. It was perhaps surprising he could still give his evidence with dignity and forbearance, but he did. Although unrepresented by the time of the proof he was able to present convincing evidence, which I accept in issues of conflict.

Submissions

[98] Both parties lodged detail written submissions, which I summarise.

Pursuer

[99] Relying on a number of authorities[i] the pursuer argued that while it was now too late for the defender to challenge any obligation to account, the accounting he had provided was deficient. The evidence established there were a number of items of value owned by the

deceased at the time of his death but which were omitted from the Inventory and confirmation. That was in breach of the defender's duties as executor to include the whole estate and not exclude any item of a value.

[100] The defender had failed to include the amount of the sum sitting in the Clydesdale Bank Account that bore to be in the joint names of the deceased and his wife. Unlike the position with such a destination in a heritable deed, the apparent survivorship destination did not have the effect of removing that sum from the deceased's estate, argued the pursuer. The full sum at credit of that account should have been included, not just a half share.

[101] As far as the other items were concerned, it was the pursuer's position that the court should prefer the evidence of the pursuer's witnesses and find it established that these were items of value owned by the deceased at the time of his death. They should have been included but were not.

[102] On the evidence, the defender's plea of personal bar should be repelled, and as the claim had not prescribed, the court should grant decree. In terms of remedy, submitted the pursuer, it was open to the court to grant decree in the alternative sum sued for (£30,000), or could instead grant decree for the pursuer's one fifth share of the value of the items the court was satisfied had been omitted.

[103] The defender's liability should be as an individual, not *qua* executor, said the pursuer, as there were no longer any executry funds. It would be inequitable to grant decree *qua* executor given the errors were the defender's own and the beneficiaries should not have to bear a share of correcting them. Similarly any expenses should be awarded against the defender personally given it was his failure to account.

Defender

[104] The defender's principal position was that the pursuer's claims either had been dealt with prior to the distribution of the estate or, if not raised previously, ought to have been. It was too late to bring those claims he said and, in any event, the pursuer was personally barred because of the actions of Ms Smith while he was in his minority. She had discharged the defender from liability and, if the pursuer had a claim, it was against her. The conditions she attached to the transfer of the pursuer's share to the Accountant of Court discharged any liability the defender had, as executor, to the pursuer.

[105] The defender criticised the absence of any formal valuations produced by the pursuer and that when given the opportunity to ask Ms Conroy about Jardine Donaldson's handling of the estate he chose not to do so.

[106] The Clydesdale Bank account in joint names had a clear survivorship destination and never became part of the estate on death. The funds went straight to his mother, the survivor; neither the defender nor Jardine Donaldson knew anything about the existence of that account until the action was raised.

[107] The funds in the other Clydesdale account were used to pay funeral expenses, a legitimate charge to the estate. The evidence, said the defender, did not support the pursuer's position in relation to all the other claims, and they should be dismissed. He should be awarded the expenses of the action.

Decision

[108] This case is about the duties and responsibilities of an executor, the person appointed, either by a will ("executor nominate") or, if there is no will, by the court

("executor dative"), to administer the estate of a deceased person "for all interested in the succession[2]".

[109] Administration involves ingathering assets, paying debts and then distributing any balance to lawful beneficiaries. Unlike other types of trust an executor's duty is, effectively, to reduce the executry estate to nil by distributing it to the beneficiaries. An executor can be a beneficiary and that also differs from other types of trust.

[110] Where there is no will, a person with an interest in the succession applies to the court to be appointed executor dative. Traditionally[3] this would be the "next of kin" – a spouse, sibling or child depending on who survived the deceased – but there is no longer a hard and fast rule. Very occasionally there will be more than one person seeking appointment and then the court may be asked to decide whom to appoint. Far more commonly, within families there will be someone who is the obvious choice. That might be, as in this case, the eldest male child.

[111] Once appointed, an executor applies for "confirmation". That is the process of vesting title to the deceased's estate in the executor "for the purposes of administration"[4]. The executor does not become the owner of the assets but the confirmation entitles her/him to ingather and then distribute assets to the beneficiaries.

[112] To obtain confirmation the executor requires to "exhibit" (i.e. produce) to the court "a full and true Inventory of the deceased's estate and effects"[5]. As part of that application the executor signs a form to that effect and also provides caution (i.e. insurance) for the amount shown in the Inventory.

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[2] Smart v Smart, 1926 SC 392

[3] Prior to the Succession (Scotland) Act 1964

[4] Succession (Scotland) Act 1964 section 14(1)

[5] ibid

[113] The deceased's assets are listed in the Inventory in four sections and a total value given at the end.

[114] Broadly speaking, obtaining confirmation serves two purposes. First, it gives the executor the formal right to ingather assets (bank accounts, insurance policies, investments, etc.) from third parties as well as selling (if necessary) items of value. Second, it is the basis for calculating Inheritance Tax due on the estate.

[115] Confirmation is not required in every case. If the value of the estate is small and there is no heritable property to be sold, third parties are often prepared to pay beneficiaries simply on sight of a death certificate. Similarly if assets have little or no resale value they may just be distributed among beneficiaries without requiring confirmation to establish ownership.[6]

[116] Heritable property with a survivorship destination never becomes part of a deceased's estate and would not be listed in an Inventory.

[117] The effect of a survivorship destination in moveable property is an issue in this case.

[118] It is within judicial knowledge that solicitors regularly act for executors and draft the "full and true Inventory" based on information available to them, either from the executor or through their own enquiries.

[119] Once confirmation is issued steps will be taken to collect the deceased's assets.

[120] In due course, once all the money has been received, and any debts paid, there is a final accounting to calculate what is due to the beneficiaries. Payment is then made and the executry is wound up.

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[6] See e.g. Currie on Confirmation of Executors, Chapter 13

[121] While the executor provides "a full and true Inventory of the deceased's estate and effects" to obtain confirmation, the amounts set out in the Inventory are likely to be different from that final accounting. Assets may be sold for less or more than the Inventory value; interest may have been earned or unexpected debts crop up. Sometimes other items are identified after confirmation has been granted.

[122] In that sense a "full and true Inventory" is not set in stone and confirmations can be amended. A process known as obtaining an "eik" will be necessary if confirmation is required to realise an asset not listed in the original Inventory[7].

[123] In this case one of the beneficiaries is challenging the executor's handling of the process of administration many years after the estate was distributed. That raises the issue of the extent of an executor's duty to account to a beneficiaries, in what form and whether the defender "justly owes" the pursuer[8].

[124] It was clear from the evidence that the deceased had a complicated personal life. He died unexpectedly, leaving no will. The defender's position (which I accept) was that he did not know how to go about the process of winding up the estate so went to see his father's solicitors, Jardine Donaldson, for advice. He gave them the deceased's papers and, essentially, asked them to get on with. It was Jardine Donaldson who worked out what the deceased owned, prepared the Inventory and obtained the confirmation.

[125] On the basis of the unchallenged evidence Jardine Donaldson appear to have acted in the way a solicitor would be expected to act in an executry, dealing with queries as they came along and providing advice and guidance. While the pursuer had threatened to raise an action of negligence (and thus stymied Jardine Donaldson from acting for the defender),

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[7] Section 3 Confirmation of Executors (Scotland) Act 1823

[8]The Law of Civil Remedies in Scotland, David M Walker p 306

no action was raised. Ms Conroy was not cross-examined on the firm's handling of the estate.

[126] I am satisfied on the evidence that the defender relied entirely on the advice and guidance he received from Jardine Donaldson and, left to his own devices, would not have known what to do as executor.

[127] I find all of that unsurprising, and I accept that when he signed the Inventory the defender did so honestly and believing it contained what it ought to contain. The decision about what to include in the Inventory was taken by Jardine Donaldson in the sense that they, as executry solicitors, knew what it ought to contain, and advised the defender accordingly. Specifically I accept that when the defender signed the declaration that it was "a full and true Inventory of the deceased's estate" he did so properly and in good faith.

[128] The proposition advanced by the pursuer was essentially that there was an absolute duty on the defender to list in the Inventory every single item that the deceased owned at the time of his death, whether it had any value or not and irrespective of whether it added to the overall value of the estate for beneficiaries. He relied on section 3 of the 1823 Act that provides:

> "Every person requiring confirmation shall confirm the whole moveable estate of a deceased person known at the time, to which such person shall make declaration."

[129] The section also provides for the ability to obtain an eik to "any part of such estate that may afterwards be discovered."

[130] Two points arise. First, the reference to "requiring confirmation" reflects that not every estate will require confirmation for assets to be realised. Second, the reference to "known at the time" and the ability to obtain an eik illustrates that the duty to identify items in an Inventory cannot be absolute in the sense advanced by the pursuer. The duty is

qualified by "knowledge at the time" and that an Inventory can be amended later if necessary.

[131] I found no support for the pursuer's proposition in any of the authorities to which he referred. As far as the cases he relied on, *Paterson* concerned the obligation to account and vouches the proposition that once an account has been provided an executor cannot argue no duty arises. That was not an issue in this case where an account was provided.

[132] *Forrest-Hamilton* and *Dinwoodie* each concern the issue of survivorship destinations in moveable items, which I consider below. *Neill* and *Chapman* each discuss the remedies available to a court in the event that payment is ordered (which, I have concluded, is not an issue in this case).

[133] *Clarke* involves the obligations of trustees in a traditional trust created in life but where the testator subsequently died. It has no application to the obligations of an executor dative administering an estate for the beneficiaries (per *Smart*).

[134] *Cameron* considers whether an executor dative should be found liable in expenses *qua* executor or, instead, personally, in circumstances where he unsuccessfully defended an action brought by a putative beneficiary. That issue also does not arise as I am satisfied it is the pursuer that should liable for the expenses of the action.

[135] The pursuer relied upon the section in Currie that considers survivorship destinations (see below). He referred to Gloag and Henderson at paragraph 42.15, a section that considers a beneficiary's remedy if there has been a breach of trust by a trustee. That paragraph deals with breaches in traditional *inter vivos* trusts, referring to unauthorised investments of trust funds resulting in loss, and employment of trust funds for private purposes. It discusses remedies where property has been acquired from a "mixed fund" and that if a trustee can show it was acquired using only her/his personal funds it does not

become the property of the trust. That principle, says Gloag, "has been applied to those in a fiduciary position, although not trustees in the ordinary sense." The paragraph that follows considers the effect of clauses in trust deeds apparently limiting or restricting trustees' liabilities. By definition, where there is an executor dative, there is no trust deed so that issue does not arise.

[136] There is nothing in any of those passages that suggests there is a liability on an executor dative to obtain a formal valuation of every item owned by a deceased irrespective of whether or not it had any value. Nor is there anything to suggest that an executor dative is not entitled to use his common sense in valuing items or rely on the advice of the executry solicitors about what should, or should not, be included in an Inventory.

[137] The proposition contended for by the pursuer goes too far, imposing as it would impossible and unreasonable obligations on an executor dative that would be onerous, impracticable and quite contrary to the purpose and objective of an executry.

[138] That purpose is to ingather items for which there is a value that can be realised and the objective is to pass that value to the beneficiaries. Where items have no value an executor is not under a duty to do anything other than, at best, dispose of them at as little cost to the estate as s/he can.

[139] Leaving aside the Clydesdale Bank account in joint names (see below), I am not satisfied the pursuer has established a duty on the part of the defender to include the items he claims in the Inventory. As I am satisfied these did not exist or had no value, no obligation to include them i.e. account for them, arises. They were not wrongly omitted from the Inventory. I am satisfied the defender has met his obligation to account to the pursuer and that there are no sums "justly owed" to the pursuer.

[140] The sum at credit of the Clydesdale Bank account in the deceased's sole name was put towards the funeral expenses. There was no suggestion those expenses were not properly incurred and in the pursuer's submissions it was accepted that if the Clydesdale Bank sum had been included in the Inventory there would have to have been a corresponding debit entry for those expenses. While it might have be a counsel of perfection for that double entry to have been included, the pursuer's criticism of the defender goes far further than saying that the Inventory was not perfect. He claims that not recording record that credit / debit amounts to a failure of duty by the defender for which recompense is sought.

[141] I do not accept that the pursuer's criticism is well made. There is an apt observation in Walker that:

> "The real question is how much, if any sum, the defender justly owes the pursuer, not whether the books were properly kept."

I am satisfied there was no error or breach of duty by the defender arising from the fact that the Clydesdale Bank account in the deceased's sole name was not included in the Inventory.

[142] Similarly, I do not accept the pursuer's criticism that there was no value given in the Inventory for the deceased's household items. All the witnesses who could speak to the matter agreed that in the days immediately following the death, members of the family, including the pursuer's mother, were given the opportunity to take what they wanted from the house. She elected to take the carpets. She did not suggest there was anything she asked for but was not given. She said she was coming to terms with the death but she had the presence of mind to ask for carpets to be uplifted and delivered to her home.

[143] The pursuer's mother did not ask for the television she now claims should have been included, nor, for that matter, did she ask for toy cars, jewellery or the stamp collection

despite it being her evidence that they were in the house at the time of the deceased's death. For completeness, it was not until some time after the house was cleared (and she knew it was being cleared) that the pursuer's mother started laying claim to any of the other items now in dispute. She had a set of keys, said the defender, and could have taken what she liked.

[144] I accept the evidence that the condition of household items was poor, to the extent that the defender could not even give them away. There was therefore no value to record in the Inventory and pursuer's criticism of the alleged omission is rejected.

[145] The pursuer claimed there was a "collection of model cars". I accept the evidence that the deceased had toy cars but not the suggestion there was error in not valuing them or including them in the Inventory. It was clear from the description of the cars that they were toys and not a "collection" in the sense of having any intrinsic value. In any event the pursuer, and his mother before him, have been offered his fifth share of the cars but never picked them up. In those circumstances it is somewhat disingenuous of the pursuer to criticise the defender for an alleged failure to value them. His claim on this matter is rejected.

[146] The pursuer claimed the defender breached his duties by not including a value for the deceased's jewellery, and, specifically, a gold watch, in the Inventory. While there was evidence that the deceased had a watch awarded to him when he retired I accept it had been given away long before his death. In the circumstances it is perfectly proper for it not to have been included in the Inventory, as he did not own it at the time of death.

[147] The evidence in relation to the watch the deceased wore immediately prior to his death was that it was an inexpensive steel watch with no value. There was no reliable

evidence that he had any other jewellery. The pursuer's criticisms of the defender under this heading are rejected.

[148] I also reject the claim in respect of the stamp collection. There was no credible or reliable evidence that the deceased (as opposed to anyone else in the family) owned a stamp collection that had value. There was some evidence that somewhere in the family there was a book with a stamp collection of some sort but not that the deceased owned it. The evidence led by the pursuer to support his claim that there was one of value rested entirely on Ms Smith's assertion that there were "three Penny Blacks". That evidence was rejected. What I do accept is that in an effort to be conciliatory or to bring a conclusion to the apparently never ending demands by the pursuer's mother and the pursuer, the defender's mother spent fifteen pounds to obtain a valuation of eight pounds.

[149] I am satisfied the deceased did not own a stamp collection. Its omission from the Inventory was entirely proper.

[150] The evidence led by the pursuer in relation to the value of a BMW was unsatisfactory and did not establish that it was an asset of value that ought to have been included in the Inventory. I was satisfied that by the time of the deceased's death it was in such a condition that the cost of making it roadworthy was significantly greater than any value it might have had. It was a liability to the estate, not an asset. Without a valid MOT it could not be insured and could not be parked on the road. The defender – properly in my view – paid for the car to be brought up to standard and thereafter used it from time to time, a matter that was known about by all concerned.

[151] I do not accept the criticism that there was a breach of duty on the defender's part in not including the BMW in the Inventory. That claim is rejected.

[152] I make the same criticisms of the pursuer's claims in relation to the pick-up truck and the two caravans. There was no reliable evidence that the deceased had a pick-up truck at the time of his death. There was certainly some evidence that he owned one at some point in the past but all witnesses (other than the pursuer's mother) agreed it would have been a "scrapper".

[153] The evidence about the Buccaneer caravan was that it was also in a terrible state of repair and had no value and the evidence about the existence and value of an Elddis caravan was unsatisfactory. The assertion that the deceased still had that caravan at the time of his death and that it was worth "up to £5,000" was based entirely on an extremely grainy, poor quality photograph. I place no reliance on that evidence and reject the pursuer's claims of breach of duty on the defender's part in relation to the pick-up truck and both caravans.

[154] The reliable evidence about the deceased's tools was that he had given them away on his retirement. There was no evidence of his having other tools or about there being a trailer. I reject the pursuer's claims in respect of these matters.

[155] I accept the defender's evidence that the deceased was in poor health in the period leading up to his death and did not own a bicycle when he died. The pursuer's claim on this point is rejected.

[156] I do not accept the pursuer's criticisms of the defender's actings in relation to the inclusion or omission of any of these items. He had no reason at all to go against advice he received from Jardine Donaldson about what should, and what should not, go in the Inventory. On one view, had he not followed that advice that might have been a legitimate source of criticism. Instead what the defender did was sign the Inventory they prepared based on the deceased's papers, and also sought advice from time to time when the pursuer's mother challenged him in the months and years that followed. I could not find

fault in the defender's execution of his duties and responsibilities as executor. The pursuer is the party responsible for this being a continuing source of conflict, not the defender.

[157] Comment is required in relation to the Clydesdale Bank account in joint names. It is clear from the evidence that until relatively recently the defender did not know the deceased had an account in joint names with his mother. There was no mention of it in any of the correspondence between the pursuer's mother's solicitors and Jardine Donaldson, nor in the correspondence spoken to by the pursuer. The information available to the pursuer from the Clydesdale Bank's correspondence with him in 2015 was that they only had a record of one account i.e. the one in the deceased's sole name. The pursuer gave no evidence about when he learned that there had also been a joint account or what happened to the funds. The defender's position – which I accept – was that he learned about it only once this action was up and running.

[158] I am satisfied that no question of fault on the defender's part arises from the joint account not being included in the Inventory signed in 1999. Nor do I find there to be any breach of duty in his not obtaining an eik to the confirmation prior to this action; he did not know his father had such an account or that the funds had been made over to his mother.

[159] However that is not quite the end of the matter. Before any obligation to account could arise the funds in the account would have to have formed part of the deceased's estate. When, twenty years later, he asked the bank what happened to them the defender was told they had been made over "automatically" to the joint account holder, Mrs Carnegie. Any duty (if there was one) to enquire further or to account for those funds could not have arisen before he learned what had happened and, by then, this action was underway and he was the subject of multiple challenges by the pursuer in on-going litigation.

[160] It is absurd to suggest that in those circumstances the defender was under any duty to pursue his mother for money twenty years after her husband's death. Moreover, to suggest, as the pursuer does, that the financial consequences of any failure on the defender's part should be treated as one for which he, as an individual, should bear responsibility, is equally absurd. I am satisfied on the evidence that those involved in the examination of the executry, including the pursuer's mother, knew nothing of the existence of this account until relatively recently and *esto* there was failure (which I do not accept) that is a failure *qua* executor and not a personal failure on the part of the defender.

[161] The pursuer's position is that the sum at credit of the account as at the date of death was £1,416.31 but that the true amount (taking account of certain payments due but not yet paid) was £1,539.60. The pursuer said the debits and credits suggested he used the account for household expenses and by that time he and Mrs Carnegie had separated and granted mutual discharges. That being so, said the pursuer, the whole of the funds in the account belonged to the deceased.

[162] The pursuer relied on Currie at paragraph 10-163 for the proposition that where there is a survivorship destination in moveable property and the investment is transferred to the survivor, that amounts to an administrative arrangement but does not affect the proprietary interest of the deceased. As they were separated, said the pursuer, the evidence displaced the presumption of equality of ownership between the deceased and Mrs Carnegie with nothing to suggest an intention to donate the sums to her (per *Forest-Hamilton* and *Dinwoodie*).

[163] I accept that the application of those principles have the result that the whole sum at credit of the Clydesdale Bank account in joint names as at the date of death (whether that be the greater or lesser amount) were, strictly, part of the deceased's estate. That would have

added, at best, £307.32 to the pursuer's share of the estate. There may have been some cost associated with the recovery of those funds. It is likely there would have been correspondence from Jardine Donaldson to the Clydesdale Bank given it believed Mrs Carnegie was automatically entitled to those funds. They may have taken some persuading they were wrong.

[164] I have no way of knowing what those costs may have been but it is reasonable to infer there would be some charge to the executry that would have had an impact on the net value of the amount credited to the estate. What I do know is that, at the very most, the pursuer has not had the benefit of just over three hundred pounds from his father's estate. What I am not satisfied about, however, is that that loss results from a breach of duty on the part of the defender, *qua* executor or personally. Accordingly I am not persuaded that there should be any finding against the defender in respect of this item and the pursuer's claim should be dismissed.

[165] Lastly, a few words about the formalities of this case. The procedure of count, reckoning and payment has resulted in two records (19 and 23 process). Although they each have various pleas in law they fall to be read together. While some of the articles of condescendence in the first record are not formally answered there, the response can be found in the objections record.

[166] In the first record the pursuer makes specific averments of duties on the defender. In article 4 he avers, inter alia, that the defender had a

> "…duty of care to the estate and its beneficiaries at common law to display that degree of skill, care, knowledge and diligence which would have been shown in 1999 by an executor dative administering and winding up an estate of ordinary skill and competence."

[167] In article 13 he averred the defender had

> "…adopted a course of action that no other executor dative of ordinary skill and competence in the circumstances would have adopted. Further, and in any event, in adoption this course of action the defender failed to exercise reasonable skill and care."

[168] These are averments of negligence. No evidence about that matter was led and the one witness that might, in theory, have been in a position to comment, Mrs Conroy, was not cross examined at all, on this or any other matter arising out of the issue of the proper handling of an executry estate.

[169] However, these pleadings are redolent of the antipathy the pursuer appeared to have towards the defender and his relentless grasping at straws with which to beat him. That was also apparent in the nature of the seven claims withdrawn at the start of the proof which included allegations of failures to pursue claims of a type (PPI and direct debit charge claims) that would not have been a feature of prudent financial management until many years after the deceased's death. The pursuer had also claimed the defender failed in his duty as executor by not charging his grandmother (the pursuer's great grandmother) rent for her occupation of the council house of which she had been the original tenant and which had been bought for her by the deceased. The pursuer had claimed the defender should have charged her rent from the time of the deceased's death until her own.

[170] Although those seven claims were, ultimately, withdrawn, the defender had had to answer them and was put to the time, expense and inconvenience of doing so, only for the pursuer to give them up at the last minute. The pursuer gave no explanation why they were removed from probation but had any issue of expenses against the defender arisen that is a feature of the litigation to which I would have had regard.

[171] The defender had a plea of personal bar, averring the pursuer's mother had discharged the defender. On the evidence that plea could not be sustained and was

repelled. However it was unsurprising that it should have been raised and it was a proper challenge for the defender to bring for enquiry. It could not survive on the evidence but that is not a measure of failure on the part of the defender. It only arose as a consequence of the pursuer's relentless pursuit of the defender and does not unsettle the usual practice in relation to expenses.

[172] I had asked parties if they wished a separate hearing on expenses but was invited simply to follow the usual practice of expenses following success. I will do so. In the circumstances the expenses, in so far as not already dealt with, are awarded against the pursuer in favour of the defender as taxed.

Susan A Craig

Sheriff of Lothian and Borders at Livingston

28 February 2020

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[i] 1. Paterson –v- Paterson 2005 SLT (Sh Ct) 148
2. Currie, Confirmation of Executors, paragraph 10 - 163
3. Forrest-Hamilton's Trustee –v- Forrest-Hamilton 1970 SLT 338
4. Dinwoodie –v- Wright (1895) 23R 234
5. Confirmation of Executors (Scotland) Act 1823, section 3 –
6. Neill –v Neill 1948 CLY 4687
7. Chapman –v- Money Wise (Scotland) Ltd 2002 GWD 1320
8. Gloag & Henderson The Law of Scotland paragraph 42.15
9. Clarke –v- Clarke's Trustees 1925 SLT 498
10. Cameron –v- MacIntyre's Executor (No 2) 2006 SLT 1088
11. Prescription and Limitation (Scotland) at 1973 sections 6, 7 and 8 and schedules 1 and 3