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The remedy of reduction in executry cases: Part 2

Roddy MacLeod

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Case:

O'Neil v O'Neil 2017 G.W.D. 22-361 (Sh Ct (Glasgow))

***S.L.T. 21** *The author comments on the application of the remedy of reduction in contested executries. Part 2 considers reduction of confirmation — both as part of an action to reduce a testamentary document, and as a stand alone remedy.*

Reduction of confirmation

In *O'Neil v O'Neil, 2017 G.W.D. 22-361* (considered in Part 1 of this article at 2018 S.L.T. (News) 17), as the testator's will was not challenged and the executors had not confirmed to office, reduction of confirmation could not arise. However, in a typical case, confirmation may have been expeded by the executors acting on reliance of the disputed will. In such cases, an issue for practitioners will be to determine whether the grant of confirmation (assuming there is one) also requires to be reduced — although this issue will likely be subsidiary to an underlying challenge to the will.

Necessity of reduction

One of the first questions to be addressed will likely be whether — in the circumstances of the case — reduction of confirmation is necessary. In other words, what purpose would reduction serve in the future administration of the executry?

In this regard it is important to recognise that confirmation does not confer a beneficial office: rather: "confirmation gives the executors merely a right of administration" (*E M Scobie, Currie on Confirmation of Executors, 9th edn, at para.1-02*). Once confirmed, executors have duties as regards the administration of a deceased's estate. In *Matthews v Hunter & Robertson Ltd, 2008 S.L.T. 634* at p.645, Lord Brodie explained it thus:

"The estate of a deceased is not a natural or juristic person. Rather, it is a fund of property vested in an executor for the purposes of administration in respect of which debtors and beneficiaries have claims. It only vests on the death of the person in whom it was formerly. The intervention of the pursuer as executor, who is of course a natural person, is required in order to enforce the duty."

Generally he executor's duties will be: (i) to identify the estate and obtain confirmation; (ii) to ingather the estate; and (iii) to distribute the estate — in accordance with the will or under intestacy, after payment of debts and tax.

It should be noted, therefore, that even where a will has been or is to be reduced, the first two tasks of the executor may be unaffected. It is only the third task — distribution — which is potentially affected.

The fact that another party may have a 'better' right to be confirmed as executor does not invalidate confirmation. In the sheriff court case of *Todd v Todd*, 1886 2 Sh Ct Rep 83 it was held that, once confirmation was granted (in that case to a widow under (now) superseded legislation) a competing petitioner's rights were limited. The sheriff observed (and this was affirmed by the sheriff principal, on appeal) that the petitioner could seek an accounting from the executor or could seek confirmation *ad omissa* — in respect of any estate not given up in the original inventory — but they could not be confirmed in place of the existing executor, absent reduction of the original grant of confirmation.

Of course, in cases where: (i) the will has been, or is to be, reduced on account of a third party's influence; and (ii) the third party is the executor, there may be understandable concerns as to the

future administration of the estate.

But in contrast, where the confirmed executor is independent (in the sense of not having influenced the will), is reduction necessary?

In answering this question it may be necessary to consider the effect of reduction of the will. Would reduction of a will lead to intestacy? Alternatively, would reduction revive a previous will? In that event, does the previous will still exist? If not, an action to prove the tenor of the previous testament would first have to be contemplated. ***S.L.T. 22***

Jurisdiction

A further issue arises: in what forum can reduction of confirmation be sought?

As noted above, while reduction is now competent in the sheriff court (in terms of s.38(2)(g) of the Courts Reform (Scotland) Act 2014 ("the 2014 Act") that competence excludes "a decree of any court". This begs the question, what is the nature of a grant of confirmation?

In the first instance it should be noted that where confirmation is granted to an intestate estate the question is rather academic because there will be a decree decerning the petitioner(s) as executor dative(s).

Where confirmation derives from a will, however, Dobie observes: "the will itself contains [the executor's] appointment; but to enable him to uplift and discharge debts and generally to administer the estate, the executor must be confirmed by the sheriff" (*William Jardine Dobie, Law and Practice of the Sheriff Courts in Scotland, 2nd edn, at p.435*). In this regard the sheriff exercises a commissary function originally deriving from s.35 (now repealed) of the Sheriff Courts (Scotland) Act 1876 ("the 1876 Act") which abolished the commissary courts, transferring jurisdiction to the sheriff. Section 35 of the 1876 Act, as originally enacted, provided (emphasis added):

"the whole powers and jurisdictions of the commissary court in each commissariot shall be and the same are hereby transferred the sheriff in office at the commencement of this Act as the commissary of such commissariot, who shall thereafter, and his successors in office as sheriff, possess and exercise the whole of the said powers and jurisdictions **in all respects**."

So how does this jurisdiction affect a grant of confirmation?

Typically, the grant of confirmation is signed by the sheriff clerk (though it proceeds in the name of "*the sheriff*") without any ancillary decree — unless a special warrant has been sought and granted for confirmation.

Section 41 of the 1876 Act provides that a declaration of domicile (of the deceased):

"shall be sufficient warrant for the sheriff clerk to insert in the confirmation or to note thereon and sign a statement that the deceased died domiciled in Scotland; and such statement shall have the same effect as a certified copy interlocutor finding that the deceased person died domiciled in Scotland."

Accordingly, the grant of confirmation may have interlocutory effect.

More importantly, however, is the effect of a grant of confirmation. Under reference to the foregoing quotation from Dobie, the effect of confirmation is to give authority to the executor to intromit with the deceased's estate. Gloag & Henderson notes that the executor "must apply for, and obtain from the sheriff, **a decree** authorising him or her to uplift, receive, administer and dispose of the estate" (emphasis added) (*Gloag & Henderson, The Law of Scotland, 14th edn, at para.40.02)*.

The 2014 Act does not define the term "decree" (s.136 "interpretation" defines the term "decision"). However, given the *effect* of a grant of confirmation, some assistance might be derived from the Sheriff Courts (Scotland) Act 1907 ("the 1907 Act") which retains importance in respect of sheriff court practice. Part 30 of Sch 1 to the 1907 Act (the Ordinary Court Rules) provides: "In this Chapter, "decree" includes any judgment, deliverance, interlocutor, act, order, finding or authority which may be extracted". Although the foregoing provision has a defined application, the definition appears wide enough to encompass the juridical act which is effected by a grant of confirmation.

As yet, there does not appear to have been any decision on the scope of s.38(2)(g) of the 2014 Act. For the present time, it may be insightful to reconsider the basis of the sheriff's decision in the

aforementioned case of *Todd* in which the sheriff observed:

"I cannot, however, revoke or reduce the widow's confirmation, and the petitioner must do this, if he is in earnest, in the Supreme Court. ***S.L.T. 23*** "

This observation is consistent with commentary in Stair, that: "The decisions of the commissary court were subject to review by the Court of Session" (*Stair Memorial Encyclopaedia, Vol.6, at para.918*).

Even if a grant of confirmation is not, strictly speaking, a decree in its own right, it would at the very least, be an administrative act within the competence of the sheriff. Dobie suggests that "The duty of the Court is rather administrative than judicial". In this regard, *Walker, The Law of Civil Remedies in Scotland, 2nd edn, at p.187* cites examples of reduction of decisions of the sheriff taken in an administrative capacity.

In light of the foregoing, there is something of a procedural anomaly if the effect of s.38(2)(g) precludes reduction of confirmation in the sheriff court. On that basis, interested parties who seek reduction of a will and confirmation would have to rely on the jurisdiction of the Court of Session to raise one, comprehensive, action in terms of Rule of Court 53.

Reduction of confirmation alone

The previous paragraphs have considered the necessity of seeking reduction of confirmation predicated upon reduction of a will. However, there may be situations where reduction of confirmation might be sought independently of any underlying challenge to a will.

Reduction is a remedy subject to the court's discretion. Persuading the court to exercise its discretion may be easier where the action is predicated upon, for example, a third party's influence or the validity of a document (see, for example, *Macfadyen, Court of Session Practice at Ch.22* and *Stair Memorial Encyclopaedia, Vol.13, at para.43 et seq*). The case of *Dowie v Barclay (1871) 9 M. 726* (referred to in *Walker* per the above) suggests that in commissary practice, there may exist circumstances in which confirmation is "bad" where it proceeds on inaccuracy or nullity.

There is a paucity of authority in relation to reducing confirmation alone (as opposed to reducing confirmation as a supplementary remedy in an action to reduce a testamentary document, as considered above). However, *Walker at p.188* states that: "A decree of confirmation of a petitioner as executor may be reduced on the grounds of essential invalidity". In support of this proposition, *Currie at paras 19-91 et seq* suggests that the existence of an unrevoked will would establish essential invalidity.

Some further support may be taken from the case of *Baine's Executor v Clark, 1957 S.C. 342*, in which the executor of a deceased man sought reduction of a certification of a grant of probate. The circumstances were that the deceased was believed to have been domiciled in England, but it was later discovered that he was domiciled in Northern Ireland. The executor was faced with procedural difficulties in administering the estate and consequently raised proceedings for (and was granted) reduction of the certification of probate.

There is no reported opinion of the Lord Ordinary in *Baines*, though it appears that the difficulties in executry administration supplied the requisite need for the remedy. Accordingly, and as discussed above, the interest and necessity of proceeding with reduction will first require to be considered before embarking on litigation.

Concluding comments

In the author's experience the 'expectant beneficiary' may anticipate there to be an easily available remedy to counter impetration of a testator's will by a third party. However that is not necessarily so: the decision in the case of *O'Neil* puts in focus a number of factors which require to be addressed. This article has sought to comment on those factors and on certain other procedural issues which arise in actions of reduction. ***S.L.T. 24***

Roddy MacLeod

Advocate TEP

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