Journal Article

# Opposing the appointment of an executor dative.

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**Subject:** Succession . **Other related subjects:** Family law.

**Keywords:** Appointments; Executors; Guardians; Scotland;

**Abstract:** Discusses, with reference to salient case law, the differing approaches to the appointment of an executor dative and a guardian, and the reasons behind such differences.

**Cases cited:**

Ford v Campbell 2015 G.W.D. 12-221 (Sh Ct (Glasgow))

West Lothian Council, Applicant 2015 G.W.D. 12-219 (Sh Ct (Lothian) (Livingston))

Russo v Russo 1998 S.L.T. (Sh Ct) 32 (Sh Pr)

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# Opposing the appointment of an executor dative

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***S.L.T. 103** *The author considers the differing approaches to the appointment of an executor dative and a guardian, and the reasons behind such differences.*

Read together, the recent sheriff court decisions in *Ford v Campbell,* Glasgow Sheriff Court, 24 March 2015, unreported (2015 G.W.D. 12-221) and *West Lothian Council, Applicant,* Livingston Sheriff Court, 13 March 2015, unreported (2015 G.W.D. 12-219), highlight the contrasting approach between the appointment of an executor dative, on the one hand, and a guardian, on the other hand. The essential difference in approach is the presence of judicial discretion. In that context, *Ford* highlights the limit to which an opponent can object to the appointment of an executor dative. In contrast, *WLC* records the discretion afforded to the sheriff in determining whether a competing applicant may be suitable for appointment as guardian.

It must be acknowledged that these cases concern different practice areas of law as between executry practice (*Ford* ) and adult incapacity practice (*WLC* ). However, despite this difference, there is also a degree of similarity; in so far as both executry practice and guardianship practice concern the appointment of an office holder on whom is bestowed obligations of trust (in a broad sense).

To that extent, it may appear peculiar that a court should be empowered to scrutinise the suitability for appointment of competing (prospective) guardians and yet not empowered to apply the same approach to competing (prospective) executors' dative. If one draws the analogy that the conceptual appointment of an executor nominate and an attorney are similar -- to the extent that the adult has specifically chosen a person to hold the particular office, so too may the conceptual appointment of guardian and executor dative be similar -- to the extent that the court is required to appoint the person.

The answer lies in considering the function of the court.

In *Ford,* the sheriff (at Glasgow) was presented with a petition for the appointment of an executrix dative, which petition was opposed (by way of note of objections). The objector submitted a competing petition. Sheriff McCormick followed the decision in *Russo v Russo,* 1998 S.L.T. (Sh Ct) 32 (a decision of the sheriff principal of South Strathclyde Dumfries & Galloway). These cases are authority for two principles: first, in determining an application for the appointment of an executor dative, the court's role is administrative; secondly, a party seeking to contest an application (and be appointed as executor dative in their own -- exclusive -- right) would require to be of a different class of person to the applicant, otherwise the best an objector can hope to achieve is to be conjoined as executor dative (assuming they have so petitioned).

As regards the first principle, the sheriff agreed with the sheriff principal in *Russo,* that: “the court's role is an administrative one, not judicial”. Although this statement is not elaborated on (beyond the deference to *Russo* ), it is consistent with a general principle that the office of executor is administrative in nature: “The office of executor has long ceased to be a beneficial one. It is an administrative one. Somebody must administer the estate, and acceptance of office does not disturb the distribution provided. The considerations are of propriety and convenience, not of abstract legal right” [*Smart v Smart,* 1926 S.C. 392 at 402]. From that flows the administrative function of the

commissary sheriff: “the duty of the Sheriff as Commissary is to determine who is entitled to the office of executor on the face either of the deeds which are put before the Court, or of the relation to the deceased” [*Martin v Ferguson's Trustees* (1892) 19 R].

In so determining the role of the (commissary) court, Sheriff McCormick dismissed the submission [interestingly on behalf of the petitioner, as opposed to the objector] that the court had discretion whether or not to appoint an applicant as prospective executrix dative. However, he acknowledged that there were aspects of an old authority, (*Schulze, Petitioner* 1917 S.C. 400) “which admit to the possibility of discretion” -- albeit ultimately following *Russo* in which the sheriff principal rejected previous authorities, including *Schulze.*

The second principle of *Ford* concerns the hierarchy of competing petitions: a competing petition will not be treated as superior unless it is presented by a person from a different class. This is consistent with the rationale of *Kerr, Petitioner,* 1968 S.L.T. (Sh Ct) 61 where there were competing applications by a widow (seeking appointment *qua relict* ) and daughter (seeking appointment *qua* next of kin) of a ***S.L.T. 104*** deceased. The widow had renounced her rights under the will, instead claiming the whole estate. In *Kerr,* the sheriff substitute conjoined the applications, “because of their contingency” [there is a similarity in procedure in *Ford* where, although there is no formal recognition of the cases being conjoined, both writs were disposed of together, answers only being lodged to one petition]. In holding that the widow was entitled to renounce the will, the sheriff substitute held that she had an exclusive right to appointment, as compared to the daughter's petition [other arguments in favour of the widow's petition (which are not recorded in the case report) were not determined, following the sheriff's decision as to the widow's exclusive right]. On appeal, the sheriff affirmed this decision.

In the field of contentious executry cases, it is not uncommon for one or more family members to express concern about the suitability of another person to be appointed as executor (whether that be as executor nominate or as executor dative). Often such concern/opposition will be as a result of prior conduct of the prospective appointee. That was precisely the position in *Ford* and *Russo,* where the objectors had averred criticisms of the principal petitioners' conduct (coincidentally, in *Ford,* as guardian).

Against such concerns, in *Russo* (and accepted in *Ford* ) the sheriff principal appears to have been influenced, to some extent, by the existence of remedies if the appointed executor subsequently mismanaged the deceased's estate. However, it is not clear the extent to which this issue was fully explored. While statutory and common law remedies clearly exist, the practical reliance on such remedies is often less favourable.

Contrast, then, the position under adult incapacity practice, for opposing the appointment of a guardian.

*WLC* is a decision of Sheriff Craig at Livingston. The case concerned an application for the appointment of a guardian to an incapacitated adult. The applicant was the relevant local authority. The application was opposed by the adult's son who entered process as party minuter. The report of the case, including the sheriff's note, highlights the issues for determination at inquiry. One of these was whether the party minuter, who himself sought to be appointed as guardian to his mother, was suitable for appointment. The position of each of the applicant and the safeguarder was that the party minuter was unsuitable. To support their respective positions, evidence was led (some of which was admitted) as to the prior conduct of the party minuter which, it was submitted, rendered him unsuitable for office.

Section 57(1) of the Adults with Incapacity (Scotland) Act 2000 confers discretion on the sheriff to appoint a guardian: the sheriff may appoint “any individual” so long as they are “suitable”. Such considerations are not in immediate issue before the commissary sheriff.

However, in considering *WLC* against the regime for appointing an executor dative, there are a couple of points worth noting. The first is that in determining the suitability of the party minuter, the sheriff found on the evidence (of past behaviour) that there would likely be a conflict of interest as between the adult and the party minuter [see para.103]. According to the case report, that would have been sufficient to make the party minuter unsuitable. This view of unsuitability was reached despite the protection of a remedy (under s.57 of the 2000 Act) if the guardian were to mismanage the adult's affairs. In other words, in adult incapacity practice, the possibility of remedy is irrelevant to the question of an applicant's underlying suitability.

Another point to note is that in *WLC* the applicant was accepted to be the default guardian [see

para.118]. Accordingly, there did not require to be a comparison as to suitability of the applicant and the party minuter. This is noted to highlight the possible similarity in the context of opposing an executor dative appointment; where the petitioner will be assumed to have an underlying right to such office.

### *The case for a similar approach*

In the context of commissary practice, any change of approach from that summarised in *Ford* would require to look behind the general principle as espoused by *Russo* (and other cases) -- that the role of the commissary court is administrative. It would require to innovate and to distinguish between cases where the court is asked to determine competing petitions from individuals from within the same class. Such an approach might require a reconsideration of *Schulze,* a decision of the Second Division. In *Schulze,* each of Lord Salvesen and Lord Guthrie commented, albeit *obiter,* as to the court's discretion in decerning an executor dative; the comments of Lord Salvesen: “if we had a discretion in the matter (as we may well have)” being approved by the Lord Justice Clerk. Lord Guthrie went further: “it would not necessarily follow that the petitioner is ***S.L.T. 105*** entitled, as matter of right, to the office of executor dative… it might well have been that the Court, in the exercise of its discretion, would have preferred one or more of them [the deceased's siblings] to the office”. Following *Schulze* the later case of *Crolla, Petitioner,* 1942 S.C. 21 might also need to be considered, as it was in *Ford.* However, in *Crolla* their Lordships of the Second Division explicitly reserved their opinions on the question of whether the sheriff has discretion in decerning an executor dative. Accordingly, as matters stand, there is not definitive Court of Session guidance on this question.

There may be support for a change of approach. In its 2009 Report on Succession, the Scottish Law Commission recommended that “*the Sheriff should have a discretionary power to refuse to appoint a petitioner who, on cause shown, appears to be unsuited to the office of executordative* …”. The SLC's proposed draft legislation included a section in implementation of the foregoing proposal. Since this article was drafted, the Succession (Scotland) Bill has been published. While the Bill, as introduced, does not include the proposed section of the SLC, time will tell whether a statutory change will advance current commissary practice as encountered in *Ford.*

### *Postscript*

The report of *Ford* contains some useful guidance for practitioners instructed to consider a competing or rival appointment. A note of objections will, of itself, be insufficient to seek appointment: there must be a competing petition seeking appointment.

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