OUTER HOUSE, COURT OF SESSION

2021 CSOH 3

P1030/19

OPINION OF LADY POOLE

in the Petition of

GRAEME SUTHERLAND CAMPBELL

Petitioner

against

JAMES AND MARGARET ANNE CAMPBELL

Respondents

Petitioner: Heaney; Urquharts
Respondents: Parties

20 January 2021

Factual background

[1] This is a petition for removal of executors and appointment of a judicial factor. The petitioner and the first respondent are sons of the late James Campbell (the "**deceased**"). The second respondent is the first respondent's wife. The deceased executed a will dated 18 January 2008. The respondents were appointed executors under that will. The petitioner is a beneficiary under the will. He would like the executors to be changed, and the executry to be completed by a judicial factor.

[2] At the same time as signing his will, the deceased granted a welfare and continuing power of attorney on 18 January 2008, registered with the Office of the Public Guardian on

28 January 2008. The respondents were his attorneys. They assisted the deceased with his affairs. Their involvement increased as the deceased aged. The respondents did many things for the deceased. They took him on holiday, including dolphin watching in Skye when he was 91 years old, and had him to stay at their home in England on numerous occasions. The deceased had severe kidney disease. He lived on his own. He needed carers. Due to the level of his resources, he had to pay for carers. The respondents arranged carers through private providers, including changing providers when this became necessary. Carers assisted with medication, meals and cleaning. Latterly the deceased required carers three times a day. The respondents assisted the deceased with utilities to his house, including arranging for his gas to be turned off after it had accidentally been left on twice, and making alternative arrangements. The respondents arranged shopping deliveries, and frozen meal deliveries from Wiltshire Farm Foods. They arranged transportation when the deceased needed it for medical appointments, eye tests and shopping. They made arrangements for advice from social care in Glasgow about special equipment, and alterations to the deceased's home, to make it safer for him. Acting on that advice a special orthopaedic chair was bought. The respondents assisted in moving the deceased's bedroom downstairs in his home, so he did not have to manage the stairs. They arranged for temporary toileting facilities to be installed. They arranged for a local gardening contractor to assist with the deceased's garden. They helped arrange contractors for work which was needed on the house. When the deceased wanted to make gifts during his lifetime to his grandchildren and others, they helped him do so. Assisted by the respondents, the wish of the deceased to remain at home for the rest of his life was fulfilled. The care needs of the deceased increased as his physical health deteriorated, but he remained of sound mind to the end of his life.

[3] On 16 August 2010, the respondents became signatories to a bank account held by the deceased with Airdrie Savings Bank (the "**first ASB account**"), as attorneys for the deceased. During the lifetime of the deceased, the respondents made transactions on the account in consultation and as agreed with the deceased. The respondents used their own funds to provide aspects of the help the deceased needed. With the agreement of the deceased, the respondents then used their powers as signatories to the first ASB account to reimburse themselves for expenditure made by them on behalf of the deceased. A number of transactions made on the first ASB account were by internet banking, which were carried out by the respondents because the deceased did not have a computer or smartphone.

[4] The petitioner resides in the Netherlands. The deceased did not appoint him as one of his attorneys or his executors. The petitioner was significantly less involved in his father's care than the respondents. He was not aware of the detail of the assistance provided by the respondents to his father, or the full extent of care arrangements needed by the deceased to be able to continue living at home to the end of his life.

[5] The deceased had regular hospital appointments in connection with his medical conditions. In the months prior to his death he knew his kidney function was worsening (at times it was 11% of normal function). He made a do not resuscitate instruction. He discussed his affairs with the first respondent. In June 2015 the deceased used the stairs in his house, and fell when doing so. He was taken to hospital. The deceased died there on 14 June 2015, aged 92.

[6] The respondents flew back from holiday in Cyprus to make the funeral arrangements. The first respondent and his sons spoke at the deceased's funeral. The petitioner also attended the funeral with his family, and stayed in the deceased's house when in Scotland to do so. When the petitioner left, he clandestinely removed the

deceased's bank book for the first ASB account from the house of the deceased. The respondents were listed on it as attorneys. The bank book showed balances in excess of £94,000 in 2013. The bank book was not the petitioner's to take. The petitioner did not tell the respondents at that time that he had removed the bank book.

[7] The deceased's will directed the executors to pay the deceased's just and lawful debts, sickbed and funeral expenses, and the expenses of the executry. It bequeathed the residue of the estate of the deceased, after payment of those debts and expenses, equally to the petitioner and the first respondent. It directed executors to give effect to informal writings provided they were signed by the deceased, dated after the will and clearly expressive of the intention of the deceased. The will conferred various powers on the executors "including the powers, privileges and immunities conferred upon gratuitous trustees in Scotland". The will did not authorise the executors to charge for their time (unless they were solicitors or agents in which case they were allowed their usual charges).

[8] The respondents did not employ a solicitor to help them administer the estate. The second respondent filled in forms to confirm to the estate, and paid £221 in confirmation dues. The inventory of the estate provided with the application for confirmation listed property totalling £194,440.03. That included various assets such as premium bonds, national savings certificates and cash which the respondents had found in the house of the deceased. There was a declaration that the inventory was full and complete. Confirmation was granted on 22 January 2016 by the Sheriff Clerk at Glasgow. The petitioner later received a copy of the inventory of estate submitted for confirmation.

[9] By oversight the inventory did not include bank accounts with Airdrie Savings Bank. There were two such accounts. One was the first ASB account on which the respondents

were signatories as attorneys. There was a further account, into which the deceased paid other money (the "**second ASB account**").

[10] As part of the executry, the respondents sold the house in which the deceased had resided for £135,000 on or about 21 March 2016. They instructed a solicitor to assist with the sale. The sum paid to the estate after professional fees and associated expenses was £132,203.

[11] On 7 April 2016, shortly after receiving the free proceeds of sale from the deceased's house, the respondents acting as executors paid the petitioner an interim payment of £16,000 from the deceased's estate. The petitioner asked how much more he could expect to receive. He disputed the answer the respondents gave, on the basis that he thought there were further assets. The respondents asked him to specify what further assets he thought there were. They did not consider they could finalise the executry until this information was provided. They asked for that information in writing from the petitioner. The petitioner did not provide that information at any time between 2015 and November 2018. It would have been a simple matter for the petitioner to provide details of the first ASB account, since he had wrongfully taken the deceased's bank book from his home on the day of the funeral and retained it. Instead, the petitioner broke off direct communication with the second respondent.

[12] In 2016, the year after the death of the deceased, the petitioner instructed solicitors who wrote to the respondents asking for estate information and the petitioner's half share of the estate. In December 2016, the petitioner brought proceedings in the Sheriff Court for count, reckoning and payment, craving payment of £200,000. On 8 March 2017 the sheriff granted a decree ordaining the respondents to produce a full account of intromissions with the deceased's estate within 14 days. On 30 November 2017 the sheriff granted decree against the respondents for payment to the petitioner of £97,220 plus expenses of £266.28.

The decrees were extracted on 31 March 2017 and 27 December 2017 respectively. The decrees were granted in an action which proceeded as undefended. Much of the correspondence about the action directed to the respondents, including pre-action correspondence requesting schedules of estate assets and liabilities, was addressed with the wrong county and the wrong postcode for the respondents. As a result the respondents did not receive some of the correspondence, and received other items some weeks after it was sent. The wrong county and postcode address was also used in the initial writ and the court decrees. The correct address for the respondents was contained in the will, to which the petitioner's solicitor had access. There were problems with information provided to the respondents about how to defend the action and the fees payable. Despite trying on more than one occasion to lodge a notice of intention to defend, the action proceeded as undefended after issues with fees payable were not resolved. It was known to the solicitors for the petitioner that the respondents had attempted to lodge a notice of intention to defend, and had asked the Sheriff Clerk for guidance on how to proceed in the absence of a notice to defend form. Nevertheless, because the solicitors for the petitioner had obtained certificates of service signed by sheriff officers, including on 1 August, 12 October and 17 December 2016, and 8 April 2017 (all of which, except the one of 17 December 2016, contained an address for the respondents with the wrong county and postcode), decree of payment was sought and obtained by the petitioner. The initial writ did not mention that the petitioner had already received an interim payment of £16,000 from the respondents. The decree for payment was obtained without this matter being disclosed to the sheriff. Decree was extracted on 27 December 2017. A charge for payment was served on the respondents on 31 January 2018 by post, again using the wrong county and postcode.

[13] In 2017, the second respondent was diagnosed with a serious medical condition. She underwent treatment.

[14] The respondents became aware of the charge for payment. They instructed a firm of English solicitors. A negotiation ensued between those solicitors and solicitors for the petitioner. The solicitors for the respondents commenced by pointing out that the irregularities in the obtaining of the decree in the Sheriff Court would be sufficient to have a decree granted in similar circumstances set aside in England. They made a settlement proposal. The letter containing the proposal included estate accounts. Those accounts set out the assets confirmed to, and gave a list of items claimed as funeral and estate expenses which fell to be deducted in terms of the will before the residue was calculated. During negotiations, a number of items initially listed by the respondents as deductible expenses but challenged by the petitioner were removed, including a bill of £24.50 for the Rainbow room (a hairdressing salon) at the time of the funeral, £15,000 for the loss of income of the executors for 15 days when carrying out executry business, fuel expenses for travelling to Scotland to carry out executry duties, and meals of the executors while there. The correspondence for the respondents offered payment on the basis that the petitioner ceased any claim or related claim in the courts of England, Wales and Scotland, and permanently and irrevocably released the respondents from the claim and all related claims in regard to the estate. Eventually the parties agreed on a figure, which included £4,400 of legal fees allegedly incurred by the petitioner.

[15] At the end of July 2018, the respondents paid the petitioner, through their agents, the sum of £80,270.86, in return for an undertaking in the following terms:

> "I, Kevin Pike, Solicitor and Director of Livingstone Brown Solicitors, 84 Carlton Place, Glasgow G5 9TD, hereby undertake to receive the sum of £80,270.86 in respect of the estate of the late James Campbell as an interim payment to the beneficiary

> Graeme Campbell. I further undertake that no further enforcement action shall be taken, and Mr Graeme Campbell's further rights shall absolve and be discharged upon receipt of final date of death balances and share of said accounts pertaining to the deceased".

[16] By this time, judicial factors had been appointed to Airdrie Savings Bank. The assets of Airdrie Savings Bank were held by Wesleyan Bank. The respondents' solicitors obtained a document from Johnston Carmichael, the judicial factors, which confirmed that the deceased had two accounts with Airdrie savings bank and that the balances on the accounts at the date of death of 14 June 2015 were £21.94 on the first ASB account, and £830.44 on the second ASB account. A copy was sent to the solicitors for the petitioner on 8 October 2018. On 15 November 2018 solicitors for the petitioner wrote enclosing a copy of the bank book relating to the first ASB account which the petitioner had taken from the house of the deceased. They queried the date of death balances because of the substantial sums shown by the bank book to have been in this account in 2013. On 8 August 2019, after the balances disclosed by the judicial factor were received from Wesleyan bank, the respondents' solicitors arranged for the sum of £426.19 (half of these balances), to be transferred to the petitioner. Having done this, the solicitors for the respondents confirmed they were no longer instructed.

[17] In January 2019, the petitioner's solicitor requested bank statements from the judicial factor for the first ASB account from 1 January 2015 to 14 June 2015. A transaction list was provided. The last entry in that list was for 8 June 2015 and showed a balance of £5,137.70. This was a different figure from that earlier provided by the judicial factor to the respondents' solicitors. More extensive bank records were obtained in the course of this petition process. Those showed that at the beginning of 2007 the balance in the first ASB account was approximately £35,000. The deceased's pension and other payments were paid

into it, and outgoings paid out of it. At the beginning of 2010 the balance on the first ASB account was a little over £35,000. At the beginning of 2012 it was approximately £80,000. By October 2013, around about the time of the last entry in the bank book which the petitioner had clandestinely taken, the balance was approximately £98,000. By the beginning of 2014, it was approximately £101,000. By the beginning of October 2014 it had reduced to just over £53,000, and by the beginning of 2015 to just over £12,000. The most recent entry prior to the date of the death of the deceased showed a balance of £5,137.70.

[18] A number of payments reducing the balance on the first ASB account were made by internet banking to the first respondent. The sums paid out differed, but were ordinarily £5,000 or less. They were frequently round sum amounts. They were taken out at differing intervals. For example £1,000 was transferred on 19 May 2014 and a further £2,000 on each of 2 and 12 June 2014. Between the beginning of 2014 and the date of the deceased's death the sums paid out by internet banking to the first respondent exceeded £100,000 in total. Other than that, most of the sums coming out of the account were direct debits for items such as utility bills, insurance or media. The round sum payments prior to the death of the deceased to the first respondent's account were for two purposes. Some were gifts that the deceased had indicated to the respondents he wished to make during his lifetime, including to two grandsons who are the children of the respondents. Those grandsons were 35 and 31 respectively at the time of the proof. During the lifetime of the deceased, gifts to those grandsons were for amounts in the hundreds rather than thousands of pounds. Other payments made from the first ASB account to the first respondent were to reimburse the respondents for sums they had spent for the benefit of the deceased. They were payments the deceased had agreed with the respondents so that they could provide care, property maintenance, respite holidays, food, transport to appointments, and other services. It cost

significant sums to provide sufficient support for the deceased to remain living in his home, particularly as his health declined. The deceased gave his authority for those payments. The respondents did not keep detailed records of everything they did. Their focus was on looking after the deceased to the best of their ability and there were many different things they had to do for the deceased.

[19] Activity on the first ASB account also continued after the deceased's death. Some payments made from the account were direct debits for items such as electricity and insurance prior to the sale of the deceased's home. Others were to cover bills to make the house marketable before it was sold. There was a withdrawal of £5,000 from the first ASB account on 8 July 2015 to the first respondent's account. The first respondent transferred this sum because he believed it was his father's wish, following a discussion they had before his death about the deceased wanting the first respondent to be in funds to ensure his funeral and other arrangements went smoothly. Funeral expenses were claimed in the executry. There was also a deposit into the first ASB account in the sum of £25,000 on 21 July 2015. The respondents indicated that it came from the second ASB account. During his life the deceased had said to the respondents that he wanted to give money in this account to two of his grandchildren, the sons of the respondents. After the death of the deceased, the respondents transferred £25,500 from the first ASB account to the first respondent, and then transferred it to these grandsons. The deceased did not include any bequests to those grandsons in his will. There were no informal writings of the deceased confirming his wishes about the sums of £30,500 transferred out of the first ASB account after his death.

[20] Vouching of the deceased's assets at the date of his death and sums expended during the executry was not requested during the negotiations in 2018. Vouching was provided by the respondents after commission and diligence for the recovery of documents was granted

in this action. The vouching provided included invoices for works on the deceased's house during the executry, for example for boiler and window repairs, and various other receipts for items such as clothing and professional fees.

Evidential issues

[21] I heard proof over two days on 3 and 4 December 2020, and submissions on 6 January 2021. The petitioner did not attend or give evidence in person at the proof, despite the court offering electronic facilities for him to do so. Instead, an affidavit was provided. The main reason offered for the petitioner not giving oral evidence was to save court time. I allowed the affidavit to be led in evidence, because it was admissible under Section 2 of the Civil Evidence (Scotland) Act 1988, and the requirements of intimation and lodging in Rule 36.8 of the Rules of the Court of Session had been observed. In my factual findings set out above, I have found that the petitioner clandestinely took a bank book from his deceased father's house. He displayed a lack of openness and honesty in so doing, and in failing to disclose that he possessed the bank book until late 2018. His actions are indicative of a lack of candour and adversely affect his credibility. In the circumstances I give little weight to aspects of the affidavit which are not confirmed by other evidence.

[22] I heard oral evidence from three witnesses, the respondents Mr and Mrs Campbell, and Mr Pike, solicitor for the petitioner. I found Mr and Mrs Campbell to be truthful witnesses, although not always reliable due to the passage of time. Mr Pike was also a truthful witness. However, I found him guarded, particularly when answering questions put to him by the respondents.

Preliminary matter

[23] The respondents argue that this action should never have been brought because of the undertaking given in 2018 by the petitioner's solicitor when a further £80,270.86 was paid by the executors. The petitioner argues that the wording of the undertaking did not prevent an action for removal of executors, or if it did, the undertaking is voidable on the grounds of legal error and should be reduced.

[24] The effect of the undertaking on the present petition turns on the wording of the undertaking, set out in paragraph [15] above. The sum of £80,270.86 referred to in the undertaking was expressly an interim payment. The wording in the undertaking makes it clear that further action was necessary before there could be consequences for the end of the administration of the estate and a bar on enforcement action. The wording at the end of the undertaking set up a condition precedent that required to be fulfilled before the petitioner's rights were discharged, and before any obligation not to take further enforcement action arose. The condition was "receipt of final date of death balances and share of said accounts pertaining to the deceased". In my opinion, on the evidence led in this case, that condition has not been satisfied. Accordingly the undertaking did not prevent the petitioner from bringing this action. "Said accounts" is not defined in the undertaking, but construed in the context of the settlement correspondence I find "said accounts" means the first and second ASB accounts. The balance given in correspondence by the judicial factor for the first ASB account (£21.94) does not tally with the date of death figure (£5137.70) disclosed in the more complete record of transactions later provided by the judicial factor for the purposes of these proceedings. Nor does the figure of £830.44 given by the judicial factor for the second ASB account tally with the evidence that there was at least £25,000 in the second ASB account at the date of death, later transferred to the first ASB account and paid out to the respondents'

sons (unfortunately the full record of transactions for the second ASB account was not produced in the action). I do not consider that in these circumstances the final date of death balances have been received, or the petitioner's share of them paid out. The condition precedent in the second sentence of the undertaking has not therefore been fulfilled, and the petitioner was not prevented from bringing the present petition. In the circumstances it is not necessary for me to go on to construe what the words "enforcement action" and "further rights shall absolve" in the undertaking mean. Nor is it necessary to consider the extent to which the solicitor's undertaking bound the petitioner, or the petitioner's argument that the undertaking is void due to error and should be reduced.

Removal of executors at common law – governing law

[25] Executors appointed under a will have duties to gather in the estate of a deceased person, to pay debts (including any tax due on the estate), and to distribute any remaining assets to beneficiaries in accordance with the wishes of the deceased expressed in the will. A grant of confirmation gives executors title to do so. An executor is regarded as a trustee of the estate of the deceased, and has fiduciary duties to beneficiaries.

[26] This petition seeks removal of executors appointed under the will of the deceased, and appointment of a judicial factor, at common law. The courts have often been cautious about removing trustees such as executors at common law. In *Gilchrist's Trustees* v *Dick* (1883) 11 R 22, trustees under an antenuptial contract did not consult solicitors, did not keep records, and allowed trust funds to be invested in a business illegally. In a short extempore judgement, the court refused to remove the trustees and said:

> "The remedy suggested is that the trustee should be removed and a judicial factor appointed; but in order to justify us in adopting so extreme a measure as removal of a trustee, there must be something more than mere irregularity or illegality. We are

> not in the habit of removing trustees unless there has been a decided malversation of office, and there is nothing of that kind here. There is no suggestion that the trustees did not act in perfectly good faith".

In *MacGilchrist's Trs* v *MacGilchrist* 1930 SC 635, the court found that mere lack of co-operation or disharmony between trustees, or mere negligence on the part of a trustee even if it results in some loss to the trust, may not afford sufficient grounds for the removal of a trustee. However, persistent, wilful neglect, contempt, and obstruction, which taken together render execution of a trust a practical impossibility, may be sufficient grounds to remove a trustee (at 638); or unreasonable and wilful refusal to perform the duty of a trustee (at 639). The test applied by the court in *Shariff* v *Hamid* 2000 SCLR 351 in refusing to remove trustees was whether on the facts there was something equivalent to, or as bad as, malversation of office when a trustee obstinately refuses to acknowledge his legal duty and to discharge his legal responsibility, with the result of bringing the affairs of the trust into confusion.

[27] The court may be guided by the welfare of beneficiaries when deciding whether to change trustees, and might in principle remove a trustee if the continuance of that trustee would prevent the trusts being properly executed (*Ewing's Trustees v Ewing* (1885) 13 R (HL) 1 at 25). The courts have intervened to remove executors where they have obstructed the administration of an estate by ignoring correspondence and refusing to sign documents resulting in administrative deadlock (*Wilson v Gibson* 1948 SC 52). There are other situations in which trustees have been removed, discussed under reference to authority at paragraphs 4.25 - 4.26 of the Scottish Law Commission's Discussion Paper No 126 on Trustees and Trust Administration. One example which may lead to removal is where there is unacceptable conflict between an executor's personal interests and fiduciary duties. Where an action based on fraud during a deceased's lifetime was brought against that deceased's estate by

one of the trustees of that estate, the court found he could not also continue as a trustee of the deceased's estate (*Cherry* v *Patrick* 1910 SC 32). However, a conflict may not result in removal if it was anticipated by the testator. In *Dryburgh* v *Walker's Tr* (1873) 1 R 31 trustees did not call in loans even though that might have been advantageous to beneficiaries, because the testator had known of the borrower's financial problems and had elected to give the trustees powers not to call up the money. There were no grounds for removal. "It is not a ground for displacing executors that they have personal interests conflicting with their duty as executors. The law supposes that they are able to reconcile their interest and their duty until the contrary is proved" (*Birnie* v *Christie* (1891) 19 R 334 at 338 per Lord M'Laren). Whether or not the court will grant an application to remove executors depends on the circumstances of the case.

Decision

[28] The question before me in this petition is whether the respondents should be removed as executors and a judicial factor appointed. In my opinion it is premature to remove the executors and appoint a judicial factor in the particular circumstances of this case. I recognise the petitioner has some legitimate complaints about the executry administration to date. Nevertheless, for reasons set out below I do not consider that the difficulties so far justify removal of the executors. I therefore refuse the prayer of the petition in hoc statu. The order I make leaves it open to the petitioner to reapply to this court by note in this process (under Rules 14.10 and 15.2 of the Rules of the Court of Session) if matters cannot be brought to a satisfactory conclusion by the executors. At this stage, in my opinion, the test for removal has not been met. There has been no malversation of office, or persistent and wilful neglect by the executors. In this case, the executors have acted to

obtain confirmation, ingather and sell assets, settle debts, and make payments to beneficiaries. The completion of the executry is not a practical impossibility, nor is there administrative deadlock, and nor in my opinion is there an impermissible conflict of interest if the executors continue for reasons more fully set out below. In reaching my decision, I have taken into account the willingness of the executors to resolve problems with the administration of the deceased's estate so far (which they now understand as a result of this action), and the ability of the petitioner and respondents to reach a negotiated settlement in principle in 2018. I do not find that the executors have acted in bad faith in the mistakes that they have made in the administration of the estate, and I attach weight to that finding. Rather, the executors chose not to instruct a solicitor in Scotland to assist with the executry to save expense. They have accordingly not had the benefit of legal advice about permissible expenses and distributions. There is no doubt in my mind this has led to problems. Ignorance of legal requirements does not absolve executors from carrying out their legal duties. Nevertheless, the question of whether or not executors have breached any duties is not the same question as whether they should be removed from office. The cases of *Gilchrist's Trustees* and *MacGilchrist* cited above make it clear that breach of duty may not be enough for removal. In this case, in my opinion it remains both possible and desirable for administration of the estate to be completed in accordance with the testator's wishes as to his executors.

[29] There is still work to be done by the executors to complete the executry. Although it is a matter for the respondents whether to instruct solicitors to assist them, with the benefit of hindsight it might be thought that failing to instruct solicitors so far has been a false economy. Reasonable professional fees incurred in connection with an executry are ordinarily treated as executry expenses.

[30] Below I deal with the petitioner's detailed criticisms of the respondents' conduct of the executry in turn. I acknowledge that the first three criticisms necessitate further action by the executors before the executry can be completed, but I do not consider any of these matters, taken singly or cumulatively, justify removal of the executors at this time, applying the governing law set out above.

[31] Sums taken out of the first ASB account after the death of the deceased. The deceased died on 14 June 2015. Statements from the first ASB account show that £5,000 was paid from the first ASB account to the first respondent on 8 July 2015. On 21 July 2015 there was a deposit into the first ASB account of £25,000. There was then a series of payments to the first respondent totalling £25,500 out of the first ASB account, the last of which was made on 22 September 2015. In my opinion, the £30,500 paid out of the first ASB account after the deceased's death was properly part of the deceased's estate, which should have been distributed in accordance with the will. I accept that the respondents did what they thought the deceased wanted, when they removed these funds to ensure the funeral went smoothly and pass on money "earmarked" for two grandchildren. However, from the date of death, the estate fell to be distributed in accordance with the wishes of the deceased as expressed in his will (or informal writings as authorised by the will), and not verbal wishes which might have been expressed during the deceased's lifetime. There was no specific bequest to the grandchildren in the will or in any other writing, nor anything such as a deed of trust with the grandchildren as beneficiaries. The sum of £30,500 therefore should have been treated as part of the deceased's estate, which under the will fell to be distributed equally between the petitioner and the first respondent (after payment of funeral and executry expenses). It would also be a form of double counting for the funeral expenses to be claimed as executry expenses (as they have been) as well as removed from the estate by

the bank transfer of £5,000 to the first respondent. The respondents informed the court that now they appreciated these funds should be distributed in accordance with the will rather than the deceased's verbal wishes before his death, they would go back to the petitioner to resolve this matter. In those circumstances I do not consider this is a sufficient ground to remove the executors.

[32] Balances on the ASB accounts at the date of death. On a related matter, it is accepted by the respondents that the two ASB accounts were not included in the inventory for confirmation by oversight. (The removal by the petitioner of the bank book for the first ASB account without telling the respondents, so that it was not with the other papers of the deceased in his house recovered for the purposes of completing the inventory, may be a partial explanation for the oversight). There are procedures for correcting oversights in inventories for confirmation which should be followed. It will also be necessary for the executors to obtain transaction records for the second ASB account from the judicial factor in order to ascertain the closing balance which forms part of the estate, given the conflict of evidence on this matter discussed in paragraph [24] above. The respondents expressed to the court a willingness to take steps to ascertain these balances, and act upon the information received in accordance with the terms of the will. In the circumstances I am not persuaded this is presently a sufficient ground to remove the executors.

[33] Accounting to beneficiaries. I accept the failure of the executors to provide an accounting in the past to the petitioner is open to criticism. It remains unclear to me why an accounting was not provided sooner, particularly since the respondents were aware of the Sheriff Court action for count, reckoning and payment, despite its various irregularities. Nevertheless, in 2018, an accounting was provided by the respondents to the petitioner in settlement correspondence. Further vouching was provided as part of this petition process

when requested by motion, and the petitioner has the inventory for confirmation and additional information about the ASB accounts. Updated executry accounts should be provided if requested at the end of the executry. But given that the obligation to account has now largely been met, I do not accept that the petitioner's complaints of failure to account justify removal of the executors at this time.

[34] Funeral and estate expenses. Criticisms were levelled at some of the items claimed by the respondents as funeral and estate expenses. Only reasonable funeral and executry expenses may be claimed against the estate of the deceased. In the circumstances of this case I considered the petitioner's complaints about funeral and executry expenses were de minimis, and did not properly take into account the agreement reached between the petitioner and the respondents as part of the settlement negotiations in 2018. In those negotiations, a full list of expenses initially claimed against the estate was provided by the respondents. It included some impermissible items, such as a hair appointment for the second respondent prior to the deceased's funeral, and a charge for the time of the executors, when under the will they were gratuitous trustees. But those items were removed as part of the settlement negotiations. Also removed, at the petitioner's request, were fuel expenses of £741.36. These were fuel costs for the executors to travel to Scotland on various occasions to deal with the estate, including when they were getting the deceased's house ready for marketing and sale. It was not clear to me why those were impermissible expenses, since at first sight they appeared reasonable out of pocket expenses incurred in connection with the executry. At the same time, the petitioner appeared to agree deductible expenses that might be open to argument, such as the respondents' flights back from Cyprus when the deceased died, and suits for two of the deceased's grandsons to wear to the funeral, which together totalled just under £650. As it happens, these expenses which were deducted and the fuel

expenses which were not roughly cancel each other out. That is so even if the further £83.30 claimed as an expense in respect of a restaurant meal and disputed in the petition is taken into account. In the circumstances, I do not consider that the approach to date of the executors to funeral and executry expenses provides sufficient ground for their removal as executors.

[35] Sums taken out of the first ASB account prior to the date of the deceased's death. One reason the petitioner sought removal of the executors and replacement by a judicial factor was because of concerns about payments out of the first ASB account during the deceased's lifetime, particularly payments made by way of internet banking to the first respondent. The respondents had not provided an accounting of their actions as attorneys of the deceased. It was submitted that a judicial factor would have powers to require the respondents to provide an accounting of what they had done as attorneys. In that way it would be possible to check that the intromissions by the attorneys were legitimate. It was submitted that the mechanisms for redress under Sections 6 and 20 of the Adults with Incapacity (Scotland) Act 2000 were not available because the deceased was no longer alive, and I was referred to an article "Redress of a beneficiary against an attorney" by Roddy Macleod at 2014 4 Jur Rev 281. Continuing or welfare attorneys are obliged to keep records of the exercise of their powers (Section 21 of the Adults with Incapacity (Scotland) Act 2000). If an appropriate person, such as the granter of the power of attorney or an executor on their estate, requests an accounting, those records can then be used to produce an accounting. I accept that where reliable evidence exists that a person who was an attorney and is now executor wrongfully intromitted with an adult's estate for their own benefit prior to death, but the executor refuses to request (or provide in their capacity as attorney) an accounting, a conflict of interest may arise. In those circumstances there might be grounds for removal as

executor. However, I do not find that is the factual situation in this case. There were payments out of the first ASB account during the lifetime of the deceased, which reduced the balance on that account considerably, particularly in 2014 and early 2015. Many of those payments were by internet banking to the first respondent. However, I have found as fact that payments during the lifetime of the deceased from the first ASB account were made in consultation with the deceased and with his agreement. The deceased was of sound mind throughout his life and capable of directing his financial affairs. As a generality, what the deceased chose to do with his assets during his lifetime was a matter for him. There was no obligation incumbent on him to retain his assets so they could be distributed on his death for the benefit of the petitioner. I accept the respondents' evidence that many of the "round sum" payments called into question by the petitioner were to reimburse expenditure by the respondents acting as attorneys to support the petitioner. The payments were made in the last part of the life of the deceased, at a time when his care needs were increasing. Carers provided three times a day by private care organisations come at a cost, as do many of the other things the respondents did as attorneys to support the deceased to remain in his own home. I also accept that some of the sums transferred were passed on to grandchildren by the first respondent as gifts from the deceased, at the deceased's request. It is incumbent on executors to declare lifetime chargeable transfers such as gifts made by a deceased person within seven years before death which may be subject to inheritance tax. However, it was not disputed by the petitioner that even if gifts from the ASB accounts to grandchildren were taken into account, the estate remained under the inheritance tax threshold (having regard to the confirmation inventory, subsequent information about the ASB accounts, and the level of gifts made). In the circumstances of this case, I am not persuaded there was anything wrongful about the respondents acting upon the deceased's instructions about

reimbursement of expenditure made on his behalf and lifetime gifts. Accordingly, I am not satisfied there were wrongful intromissions by the respondents with the deceased's estate prior to his death. The deceased deliberately appointed the respondents both his attorneys and his executors (*Dryburgh* v *Walker's Tr* (1873) 1 R 31), and there is no inevitable conflict between those roles. In the words of *Birnie v Christie* (1891) 19 R 334 at 338, it has not been proved that the executors are unable to reconcile their personal interests and duties as executors. On the facts of this case at present I do not consider sufficient grounds exist to establish a conflict of interest which could justify removal of the respondents as executors.

[36] I refuse the prayer of the petition in hoc statu. I reserve all questions of expenses.