SHERIFF APPEAL COURT

[2026] SAC (Civ) 3
HAM-A140-18

Sheriff Principal N A Ross
Sheriff Principal G A Wade KC
Temporary Sheriff Principal E MacDonald

OPINION OF THE COURT

delivered by Sheriff Principal Ross

in appeal by

KEVIN GRAY

Pursuer and Appellant

against

(FIRST) MARION DIXON and (SECOND) HELEN PALMER or LAIRD or HEREDIA

Defenders and Respondents

Pursuer and Appellant: Clair, advocate: Leonards Solicitors Limited
Defenders and Respondents: Moore; Moore Macdonald

19 December 2025

[1] In this action of count, reckoning and payment the appellant, as son of the deceased Hugh Gray, sought an accounting from the respondents, who were joint attorneys prior to Hugh Gray's death and executors-nominate under Hugh Gray's will. No confirmation was ever sought as it was a small estate. The respondents maintained they had made an accounting, but in any event disputed the nature of their obligation to account.

[2] Hugh Gray's power of attorney in joint favour of the respondents was registered with the Office of the Public Guardian on 13 November 2009. He was admitted as an emergency admission to a care home on 8 February 2013. From that date onwards the first respondent started to intromit with his assets. Hugh Gray died on 1 December 2015. The appellant sought an accounting direct from the respondents *qua* attorneys from the date of appointment, namely 13 November 2009, until the date of death. He sought, in the alternative and following late amendment of the pleadings, an order that the respondents *qua* executors-nominate seek a full accounting from themselves *qua* attorneys, for their intromissions as attorneys.

[3] Following extensive procedure the action was appointed to a proof on the disputed nature and extent of the obligation to account. The sheriff proceeded to hear evidence and issued a brief decision. He stated that the attorneys were obliged to account to the appellant but determined that, following *Currie* v *Currie's Exr* 2023 SLT 113, the appellant had no title to sue the attorneys. We have not been able to reconcile these two statements. The sheriff proceeded to ordain the respondents *qua* attorneys to produce an account of their intromissions, presumably to the appellant. The sheriff found that the attorneys' obligation to account arose on the date they first started to act (8 February 2013) and not earlier. He did not pronounce any order ordaining the respondents *qua* executors-nominate to demand an accounting from the attorneys. He found that the second respondent had never acted as attorney, and assoilzied her, notwithstanding that he had ordained her to produce an accounting. The subsequent interlocutor was limited to an order against the first respondent only. During the appeal process the court ordained certain omissions be corrected, by insertion of pleas-in-law and an interlocutor.

Submissions for the appellant

[4] Counsel for the appellant submitted that the sheriff erred in finding that the respondents owed no duty to account to the appellant *qua* beneficiary. The sheriff appeared to accept that a duty was owed to executors. If that duty arose, it did not arise only when the attorney began to act in that capacity, but from the date of appointment. The interlocutor should have ordained an accounting to the executors for the full period since appointment. The purported absolvitor of the second respondent was in error, as she had intromitted with funds, and it was in any event inconsistent with an order to account.

Submissions for the respondents

[5] The agent for the respondents submitted that the decision was sound and reflected the evidence. The respondents had been entitled to act as attorneys and did not dispute a duty to account for those actings. That duty only arose, however, once they had started to act, namely 8 February 2013, and was not owed to a beneficiary. Only the executors could demand such an accounting, and the appellant's remedy was through them. However, an accounting was only for intromissions, and the appellant had not proved any intromissions prior to 8 February 2013. Executors could not be required to account for periods prior to their assumption of office, and therefore neither could attorneys.

Decision

[6] When the estate of a deceased is, prior to death, subject to intromission by an attorney, the attorney has a duty to account for their stewardship of the estate. That duty is owed to the relevant adult and, after death, to the executors of the estate. Where a beneficiary wants to discover what was done, they have, in the ordinary course, no direct

right to demand an accounting from that attorney (*Currie* v *Currie's Exr* 2023 SLT 113). Only the executors can demand an accounting. If they refuse or fail, the beneficiary can seek an order ordaining the executor to seek an accounting.

[7] There are, however, exceptions to the rule that a beneficiary has no direct right of action against a creditor of the estate (see generally Macleod: *Contentious Executries: Commissary and Executry Litigation in Scotland* (2nd ed) at paragraph 1-058 and following). One exception is where "exceptional circumstances" exist. The sheriff considered a submission that exceptional circumstances were constituted by the respondents being both executors-nominate and attorneys. The sheriff rejected that submission, on the grounds that such circumstances were not unusual. We agree with that proposition. In our view, exceptional circumstances would not arise where the beneficiary had an effective alternative remedy. Here, the appellant could have sought (and did so) an order ordaining the respondents *qua* executors to demand an accounting from themselves *qua* attorneys. The sheriff, in effect, granted that order in part, albeit without reference to the executors' obligations.

[8] Accordingly, the general rule applied, and the appellant had no entitlement to seek a direct remedy against the respondents *qua* attorneys. Crave 1 required to be refused. The appellant was, however, entitled to seek an indirect remedy via the executors, as alternatively craved. It was this latter remedy which the sheriff directed against the first respondent alone. In our view, the obligation was owed also by the second respondent. An obligation to account is owed by every attorney. The only reason to exclude the second respondent from such an obligation would be if the sheriff were correct to conclude that her duty to account only arose upon intromission.

[9] What, therefore, creates an obligation on an attorney to account – is it the mere fact of appointment, or is it the commencement of intromission with the estate? In our view it is the former. A financial power of attorney under the Adults with Incapacity (Scotland) Act 2000 comes into force immediately upon execution (section 15), unlike a welfare power of attorney which is engaged only at the moment of incapacity (section 16(5)(b)). It is not, in our view, possible to maintain that part of the period of empowerment is not subject to a duty to account. The respondents submitted that (i) a comparison should be made with the duties of an executor, who owed no duty to account until they sought confirmation; and (ii) an earlier duty could only arise if the appellant proved that there were earlier intromissions. In our view, that position was misconceived. An executor-nominate and an attorney are not in identical positions. An attorney (at least, under a financial power of attorney) has power to act from the date of appointment. An executor-nominate, by contrast, has no power to act until the death of the testator, and no responsibility for, or control over, the assets until at least that date. The date of appointment under the will is irrelevant. It is difficult to see why an attorney should be entitled to hold power without scrutiny. An attorney certainly cannot act with impunity – section 81 of the 2000 Act provides that an attorney has a duty to repay any funds used in breach of fiduciary duty, or outwith their authority. Here, the power of attorney itself included an express obligation in those terms. Such a situation requires transparency of dealing.

[10] Further, we do not accept that a beneficiary should be required to prove intromissions as a precondition for seeking accountability for those intromissions. The purpose of accountability is to show transparency in dealing. It is not for the beneficiary to prove, but for the attorney to show, what financial transactions have taken place. It is only once that is established that any further rights can be determined.

[11] The respondents further submitted that a power of attorney required to be expressly founded upon before it could be used, such as in a bank transaction, and transparency would arise at that stage. It was therefore unnecessary and onerous to impose a duty in the abstract, and it was impossible to prove a negative. We do not agree with that approach. An attorney is empowered to carry out all nature of transactions, including those which require no openness as to appointment: for example, everyday shopping transactions. And far from proving a negative, the absence of intromissions will impose no difficulty: all that is required is to make an accounting showing nil transactions for the relevant period.

[12] For these reasons, the sheriff erred in limiting any period of accountability to the period following the first intromissions (8 February 2013). The duty to account was created when the power to transact was created (13 November 2009). The duty was owed jointly by the attorneys, irrespective of the second respondent having made no intromissions with the estate. It was therefore an error to assoilzie the second respondent. The duty was owed to the estate from the date of appointment, when power to transact was conferred. The executors-nominate had power to demand an accounting for the period during which the attorneys' power endured. Confirmation to the estate was not a necessary precondition (see Macleod, above, at paragraph 1-025 and following).

[13] A further submission about the sheriff failing to rule on an application to withdraw an admission has now been superseded. A further submission on expenses was withdrawn.

Disposal

[14] It remains to identify the appropriate disposal. We consider that the findings in fact support the remedy in law of an accounting. The appropriate disposal is for the executors-nominate to be ordained to seek a full accounting of their intromissions *qua*

attorneys, as second craved in the Writ. We will quash the existing interlocutor and of new pronounce an interlocutor making an order directed against both respondents *qua* executors, ordaining them to seek an accounting from both respondents *qua* attorneys of their intromissions with the estate of the deceased Hugh Melvin Gray from the date of their appointment as attorneys (13 November 2009) to the date of death. That accounting should be completed within 3 months of the date of the interlocutor. We will meantime remit the matter to the sheriff to receive the accounting, and thereafter to proceed as accords.

[15] Parties agreed that expenses should follow success. The appellant was successful, and we will find the respondents liable for the expenses of the appeal, as taxed.