



**SHERIFF APPEAL COURT**

**[2024] SAC (Civ) 44  
GLW-B1173-16**

Sheriff Principal A Y Anwar KC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL A Y ANWAR KC

in appeal by

MRS RUMELLAG SOOFI

Applicant/Appellant

in the cause

SANTANDER UK PLC

Pursuer/First Respondent

against

SAJJAD SOOFI, as Executor-Nominate of the Estate of MRS BUSHARA SOOFI

Defender/Second Respondent

**Applicant/Appellant: Clair, advocate; Balfour + Manson LLP  
Pursuer/First Respondent: Garden; Shepherd & Wedderburn LLP**

28 October 2024

**Introduction**

[1] Mrs Bushara Soofi was the registered proprietor of 147 Titwood Road, Glasgow. The first respondent, as heritable creditor, raised proceedings in May 2016 seeking recovery of possession of the property. Mrs Soofi died on 26 October 2016. In terms of her will, she

appointed her son, the defender and second respondent, together with her daughter, Ms McKerns, as her executors-nominate. Ms McKerns declined the appointment. The second respondent is her sole executor. In terms of her will, the late Mrs Soofi left the property to the second respondent and Ms McKerns to the extent of a  $\frac{2}{3}$ <sup>rd</sup> and  $\frac{1}{3}$ <sup>rd</sup> share respectively.

[2] In October 2017, the second respondent was sisted into the proceedings in his capacity as executor-nominate. In March 2018, the sheriff granted decree of ejection. Correspondence followed between the first and second respondents in an attempt to resolve matters without enforcement of the decree. Those attempts were unsuccessful. A charge for removing was served upon the second respondent in October 2023.

[3] The appellant is the wife of the second respondent. The appellant and second respondent reside in the property with their children and the second respondent's father. The property remains registered in the name of the late Mrs Soofi. The appellant lodged an application under section 24D of the Conveyancing and Feudal Reform (Scotland) Act 1970 seeking recall of the decree. She claimed that she was an "entitled resident", as that term is defined in section 24C(1)(b) of the 1970 Act; in other words, she claimed that as the property was her main residence and she was a non-entitled spouse, she could apply for recall of the decree of ejection issued in 2018. On 18 March 2024, the sheriff refused her application for recall as incompetent. She appeals against that decision.

[4] The question for this appeal is simply stated: can the spouse of an executor claim to be an "entitled resident" in terms of section 24C and 24D of the 1970 Act?

## Legislation

[5] In terms of section 24D(2)(c) of the 1970 Act an entitled resident may apply for recall of decree. The term “entitled resident” is defined in section 24C which provides as follows:

### “24C Entitled residents: definition

(1) For the purposes of sections 24B, 24D and 24E, an entitled resident is a person whose sole or main residence is the security subjects (in whole or in part) and who is—

- (a) the proprietor of the security subjects (where the proprietor is not the debtor in the standard security);
- (b) the non-entitled spouse of the debtor or the proprietor of security subjects which are (in whole or in part) a matrimonial home;
- (c) the non-entitled civil partner of the debtor or the proprietor of security subjects which are (in whole or in part) a family home;
- (d) a person living together with the debtor or the proprietor as husband and wife;
- (e) a person living together with the debtor or the proprietor in a relationship which has the characteristics of the relationship between civil partners;
- (f) a person who lived together with the debtor or the proprietor in a relationship described in paragraph (d) or (e) if—
  - (i) the security subjects (in whole or in part) are not the sole or main residence of the debtor or the proprietor;
  - (ii) the person lived together with the debtor or the proprietor throughout the period of 6 months ending with the date on which the security subjects ceased to be the sole or main residence of the debtor or the proprietor; and
  - (iii) the security subjects (in whole or in part) are the sole or main residence of a child aged under 16 who is a child of both parties in that relationship.”

The appellant relies upon section 24C(1)(b).

[6] “Non-entitled spouse”, “matrimonial home” and “debtor” are defined terms.

Section 24C(2) of the 1970 Act defines a “non-entitled spouse” by reference to section 1 of the Matrimonial Homes (Family Protection)(Scotland) Act 1981. Put shortly, a spouse who is entitled or permitted by a third party to occupy a matrimonial home, is an entitled spouse. The 1981 Act confers a right of occupancy upon the other spouse who is not so entitled or permitted (“the non-entitled-spouse”).

[7] Section 24C(2) of the 1970 Act defines “matrimonial home” by reference to section 22 of the 1981 Act which is in the following terms:

*“‘matrimonial home’ means, subject to subsection (2), any house, caravan, houseboat or other structure which has been provided or has been made available by one or both of the spouses as, or has become, a family residence and includes any garden or other ground or building usually occupied with, or otherwise required for the amenity or convenience of, the house, caravan, houseboat or other structure but does not include a residence provided or made available by a person for one spouse to reside in, whether with any child of the family or not, separately from the other spouse.”*

[8] The term “debtor” is defined in section 30 of the 1970 Act as including “any successor in title, assignee or representative of a ... debtor.”

### **The sheriff’s judgment**

[9] The sheriff noted that the term “debtor” in the 1970 Act extended to including the debtor’s representatives, such as an executor. However, he concluded that an executor does not obtain any personal rights nor proprietary rights upon appointment to office; they act as a trustee of the deceased’s estate for the benefit of the beneficiaries, subject to the rights of any creditors upon the estate. That being so, the spouse of an executor could not be regarded as an entitled resident in terms of the 1970 Act.

### **Submissions for appellant**

[10] The sheriff erred in his approach to the terms “debtor” and “proprietor”; he had impermissibly read additional words in to the legislation. Parliament had intended to extend the protection afforded by the 1970 Act to the widest class of persons. The sheriff had crossed the boundary between construction and interpretation of legislation (*Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 per Lord Nicholls at p592). The term debtor included any successor in title, assignee or representative, the latter being apt to include an executor (*Stewart’s Trustee v Stewart’s Executrix* (1896) 23 R 739 per Lord Kyllachy at p743). An executor is a proprietor, albeit uninfert. Any undesirable consequences of a more expansive interpretation are for Parliament to address.

### **Submissions for the first respondent**

[11] An executor cannot be an entitled spouse under the 1970 Act and, as a consequence, the appellant cannot be an entitled resident. By virtue of confirmation, the estate of the deceased vests in the executor for the purposes set out in section 14 of the Succession (Scotland) Act 1964. The duties of an executor are the same as those of a trustee. No personal rights can be conferred upon an executor as office holder (Gloag & Henderson, *The Laws of Scotland* (15<sup>th</sup> ed) paragraphs 40.10–40.13, 41.24–41.25). The role of an executor is purely administrative (*Smart v Smart* 1926 SC 392; Currie, *The Confirmation of Executors in Scotland* (9<sup>th</sup> ed) paragraph 1-17). The property vests in an executor only for that purpose. They are an office holder and not a beneficial owner. They cannot use property within the estate for their own purposes. The executor stands in the shoes of the debtor only to parties such as creditors or other third parties such as tenants, which does not have any bearing on his duties or rights in respect of the assets within the estate. The purpose of the definition of

a debtor in the 1970 Act is not to confer any personal rights, but to ensure that, upon death, heritable creditors have the same rights against the estate as they had against the deceased.

[12] The appellant cannot be a non-entitled spouse with occupancy rights. Occupancy rights are conferred where title is held by one spouse or civil partner and are conferred on the other or they arise if a third party has permitted occupation provided the third party has waived his right to occupy (Gretton & Reid, *Conveyancing*, 5<sup>th</sup> ed, paragraph 10.02). No personal rights attached to the office of executor and as such no person can derive occupancy rights from such an office holder. Were the appellant's position correct, it would lead to an absurd result; executors would be permitted to breach their duties to administer the estate for the benefit of beneficiaries or to avoid conflicts of interest.

### **Decision**

[13] In order for the appellant's application for recall of decree to be competent, five conditions require to be met: (a) the property must be a matrimonial home; (b) the appellant and the second respondent must occupy it as their sole or main residence; (c) the appellant's spouse (ie the second respondent) must be "the debtor or proprietor" of the security subjects (the property); (d) the appellant's spouse must be an entitled spouse; and (e) the appellant must be a non-entitled spouse.

[14] The appeal focussed on conditions (c), (d) and (e). There appeared to be no dispute that the property was occupied by the appellant and the second respondent. Before the sheriff, the appellant had submitted that the property was "plainly a matrimonial home". The first respondent did not take issue with that submission; the sheriff was not invited to address the issue; and it was not the focus of submissions before this court. A matrimonial home, as defined in the 1981 Act means any house, caravan, houseboat or other structure

“which has been provided or had been made available by one or both spouses as, or has become, a family residence ...”. There is no information in the application as to the basis upon which it is asserted that the property is a matrimonial home. The late Mrs Soofi was, and remains the proprietor. It is not said whether, when, or by what means, the second respondent has acquired any rights enabling him to “provide the property or make it available” as a family residence. I was not addressed on this issue and thus form no concluded view; however, in the absence of averments dealing with the basis upon which it is asserted that the property is a matrimonial home, the application may be of questionable competency.

[15] Much like the issues arising in *Pentland-Clark v Macle hose and others* [2012] CSIH 29, the answers to the issues raised in this appeal and which relate to the role of an executor are found in the application of straightforward and well-established principles:

“The duty of an executor is one of factory. He requires to ingather the deceased’s estate, to pay the debts by the deceased and thereafter to distribute the ingathered estate to the beneficiaries in accordance with the wishes of the deceased as disclosed by any will. He represents the deceased; that is to say, in questions with third parties, he is the same person as the deceased (*eadem persona cum defuncto*). The title which he holds is subject to all pleas that could have been taken against the deceased (see generally Wilson & Duncan: *Trusts, Trustees and Executors* (2<sup>nd</sup> ed) paras 31-09 to 31-11; 34-01 to 34.07).” (Lord Carloway, *Pentland- Clark* at paragraph [41]).

[16] Executorship has long been recognised as an office:

“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 SC 392 at p402)

[17] By virtue of confirmation, the deceased’s estate vests in the executor-nominate for the purposes of administration (section 14 of the Succession (Scotland) Act 1964).

Confirmation confers authority upon the executor to ingather, administer and dispose of the estate. After the claims of creditors have been satisfied, the executor is under a duty to

account for and distribute the balance of the estate to those who have a right to it.

Confirmation also confers a personal right upon the executor *qua* executor to the heritable property of the deceased (section 15(1) of the 1964 Act).

[18] The office does not transmit to the executor's heirs or representatives on death or incapacity, nor to his trustee in bankruptcy (Currie, *The Confirmation of Executors in Scotland*, (9<sup>th</sup> ed) paragraph 1-16). Several individuals can, and often are, appointed jointly as executors. Executors-nominate can be removed from office, resign or assume new executors. An executor does not acquire any rights to the estate of the deceased for his own personal benefit, use or enjoyment. He may have a beneficial interest, if he is also a beneficiary, but the office of executor confers no such interest.

[19] Applying these familiar and settled principles to the circumstances of the present case, this appeal falls to be refused; the sheriff was correct to conclude that the application was incompetent.

[20] The gravamen of the appellant's submission was that the appellant, being "the non-entitled spouse of a debtor or proprietor", was an entitled resident within the meaning of section 24C(1)(b) of the 1970 Act. The second respondent, it was submitted, was a debtor or proprietor as executor-nominate of the late Mrs Soofi.

[21] The term "proprietor" is not defined within the 1970 Act. The natural and ordinary meaning of that term refers to one who enjoys an exclusive right of ownership. That exclusivity is personal to the owner, in his or her own capacity. Ownership is defined by Erskine as "the right of using and disposing of a subject as our own, except in so far as we are restrained by law or paction" (Erskine *An Institute of the Law of Scotland*, Volume II, 1,1). It is the right of use, enjoyment and abuse (*jus utendi, fruendi, abutendi*) (*Stair Memorial Encyclopaedia*, Volume 18, paragraph 5). A proprietor may transfer title to or burden



heritable property at his or her own will. The term “proprietor” is not apt to include rights conferred upon those who occupy an office, such as that of executorship, which has, at its very core, the purpose of administering an estate by ingathering and distributing property; an executor has a duty to confer exclusive rights of ownership upon those with a right to it, namely the beneficiaries. As the sheriff correctly identified, an executor acts as a trustee of the deceased’s estate for the beneficiaries, subject to the rights of creditors.

[22] Separately, it was submitted that the second respondent, as executor and representative of the late Mrs Soofi, was a debtor in terms of section 24C; that term included “any successor in title, assignee or representative of a ... debtor.” On behalf of the appellant, it was submitted that both Lord Kyllachy (*Stewart’s Trustee v Stewart’s Executrix* (1986) 23 R 739 at 734) and Lord Carloway (*Pentland-Clark v Maclehose* at paragraph [41]) had referred to an executor as *eadem persona cum defuncto*; the same person as the deceased. Standing in the shoes of the deceased, the executor was a representative of the deceased. That submission too is unsound. Lord Kyllachy described an executor as being the same person as the deceased “towards the creditors of the deceased”. Lord Carloway described the executor as representing the deceased “in questions with third parties”. It is only to that limited extent, namely to preserve all pleas which may be taken by or against the deceased in questions with third parties, that an executor may be described as a representative of the deceased.

[23] A more fundamental misconception lies at the heart of the appellant’s submission. First, for the reasons explained above, an executor is neither entitled nor permitted, simply by taking up executorship, to occupy property belonging to the deceased and use it for his personal benefit as a family residence, claiming it as a “matrimonial home”. That being the case, an executor *qua* executor cannot properly be described as an “entitled resident” from

whom a non-entitled spouse may derive occupancy rights. Second, properly understood, the purpose of section 24C(1)(b) read together with the definition of “debtor” provided in section 30 is to ensure that the rights enjoyed by a non-entitled spouse are preserved upon transfer of a debtor’s interest in the property; they are not created by such a transfer. The “debtor” was the late Mrs Soofi. Plainly, the 1981 Act did not afford the appellant any rights of occupancy which she could assert against, or derive from, Mrs Soofi. It follows that there are no rights capable of being preserved; the Act does not afford the appellant any rights against Mrs Soofi’s successor in title, assignee or representative because it did not afford the appellant any rights against Mrs Soofi prior to her death.

[24] It was submitted by the appellant that Parliament had intended to extend the protections afforded by the 1970 Act to the widest class of persons. That may be so; however, the class of persons who enjoy the protection of section 24C(1)(b) do so by virtue of a relationship of marriage with the individual who is entitled or permitted by a third party to occupy a matrimonial home. Here, that individual, the “entitled spouse”, was Mrs Soofi. The appellant was not in such a relationship with the late Mrs Soofi.

[25] Finally, were the appellant’s interpretation of section 24C(1)(b) to be preferred, it would lead to manifestly unfair or unreasonable results. Most notably, an executor who occupies a property belonging to the deceased is likely to be acting in breach of his duty to administer the estate for the benefit of the beneficiaries. Difficulties too would arise upon the resignation or removal of an executor from office. Often, multiple executors are appointed to administer the deceased’s estate. How are competing claims to any right of occupancy to be resolved among them? In the absence of a clear intention on the part of the legislature to extend occupancy rights to executors and, in turn, their spouses, the expansive interpretation contended for by the appellant cannot be supported.

[26] Accordingly, I shall refuse the appeal. The expenses of the appeal are granted in favour of the first respondent.