Confusing signs

Emily Exton and Katherine Harper provide an update on the Court of Appeal decision in Barrett v Bem

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'Where a testator is not capable of personally signing their will and decides to direct some other person to sign it, it is crucial that the testator should make some positive and discernible communication that they wish for the will to be signed by that person.'

In January this year, the Court of Appeal set down its judgment on *Barrett v Bem* [2012], a bitter family legal battle that Lord Justice Lewison described as 'troubling'.

History of the case

Barrett revolved around the validity of a manuscript will allegedly made by Martin Lavin in favour of his elder sister, Anne Liston, some three hours before he died on 11 January 2004 (2004 will). The appellant was Michael Barrett, Martin's nephew. The principal respondent was Martin's niece, Hanora Bem (also Mrs Liston's daughter).

The case first came before the courts in 2009, when Mr JusticeVos found in favour of Michael and pronounced against the validity of the 2004 will on the grounds that Martin had not signed the will. Hanora appealed the decision. The Court of Appeal allowed the appeal but ordered a retrial because new evidence in the form of a witness statement from one of the witnesses to the 2004 will had come to light between Vos J's judgment and the appeal hearing. In addition, following the Court of Appeal's ruling, a further will of Martin's emerged (the 2002 will), which left everything to other members of his family but nothing to Anne. It was later found, at the retrial, that Hanora had known about the 2002 will during the first trial but had concealed it.

The result of the retrial in 2011 was that Vos J reversed his earlier decision and found in favour of the 2004 will on the grounds that it had been signed by Anne at Martin's direction.

Michael appealed on two grounds: first, that the facts found by Vos J did not amount in law to a direction to Anne to sign the will on Martin's behalf, and second that, as a matter of public policy and by analogy to the statutory rule that disqualifies an attesting witness from taking a benefit under a will, the 2004 will ought to be disqualified on the basis that the sole beneficiary had signed the will.

Facts of the case

Martin, a bachelor aged 69, was admitted to hospital in November 2003 suffering from serious lung problems exacerbated by infection. Martin was critically ill and, while anxious and miserable at times, his mental capacity was not in question.

By January 2004, Martin's condition had not improved and on 11 January 2004 the attending doctor explained to Hanora and Anne that Martin's condition was terminal. Hanora and Anne then visited Martin who told them that he wished to make a will leaving his entire estate – worth approximately £300,000 – to Anne. Hanora and Anne then left Martin's room and Hanora, formerly a legal secretary, wrote out the terms of the 2004 will by hand.

Meanwhile, Martin underwent physiotherapy, which unfortunately caused some chest drains under Martin's right arm to dislodge. After these had been repositioned, Hanora and Anne re-entered Martin's room and Anne asked the nurses to witness the 2004 will.

The facts of what happened next are uncertain. At the first trial, Hanora said that she explained the contents of the 2004 will to Martin and gave it to him to sign. Hanora said that Martin seemed to read the 2004 will and that he then signed it unaided in the presence of Nurses Haris and Hawadi. However, this version of

events was not accepted by Vos J who was 'entirely satisfied that Martin did not sign the will' due to the evidence of the handwriting expert and also the unreliability of both Hanora and Nurse Haris' evidence. It is interesting to note that the handwriting expert observed that Martin was propped up in bed with two chest drains in his right side,

> and Nurse Hawadi] that Anne did play a part. It is also common ground amongst them that, in the first instance, Martin tried to sign the 2004 will with a pen in his hand, but failed to apply the pen to the paper in order to do so because he was shaking so much... In the few seconds that followed, the witnesses have told me that they

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which would have made it, in Vos J's words:

> ... simply impossible for him to have signed a flowing well formed signature of the kind displayed in his supposed signature on the [2004] will.

Following the judgment at the first trial, Nurse Hawadi was traced and in her witness statement said that either Anne or Hanora had held Martin's hand to steady it while he signed the 2004 will. In fact, she said that she was '100% certain that the pen was in his hand when the [2004] will was being signed'.

By the second trial in 2011, Hanora had decided to change her evidence and now said that she remembered her mother's hand holding Martin's hand or wrist to stop it from shaking because, while Martin had tried to sign the 2004 will on his own, he could not. The result was that Anne came over to help and 'between the two of them they signed the [2004] will'. Nurse Haris followed suit and also changed her evidence to the effect that she remembered Anne holding Martin's hand in hers to stop the shaking.

Vos J did not find this evidence persuasive. Vos J's conclusion (at para 84) was that Anne had signed the 2004 will:

> At the first trial, Nurse Haris and Hanora relentlessly denied that Anne had had any part in signing the 2004 will. They said, in effect, that Anne had played no part whatsoever in the signing process. It is now common ground amongst [Hanora, Nurse Haris

> recollect that Anne stepped in to steady Martin's hand allowing him to sign. I think they are all wrong about that, though an attempt to steady him may momentarily have been made. Instead, on all the evidence, I am entirely satisfied that Anne stepped in, took the pen, and signed the 2004 Will on Martin's behalf.

A question of direction

The retrial judgment

Having reached the conclusion that Anne signed the 2004 will, Vos J went on to consider whether Anne had signed the 2004 will at Martin's direction.

Section 9 of the Wills Act 1837 states that:

> No will shall be valid unless –
>
> (a) it is in writing, and signed by the testator, or *by some other person in his presence and by his direction;* and
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> (b) it appears that the testator intended by his signature to give effect to the will; and
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> (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present and the same time; and
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> (d) each witness either –
>
> (i) attests and signs the will; or
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> (ii) acknowledges his signature in the presence of the testator (but not necessarily in the presence of any other witness), but no form of attestation shall be necessary. (Emphasis added).

Vos J's judgment considered the Northern Irish Court of Appeal case of *Fulton v Kee* [1961] in some detail, and noted that Lord MacDermott made it clear that 'a direction to sign can be negative as well as positive'. Vos J concluded that the 2004 will had been signed by Anne at Martin's direction.

Vos J referred to the fact that when Martin had failed to sign the 2004 will himself, he 'must have allowed Anne to take the pen from him and apply his name to the paper' (at para 86). Vos J said that this act of attempting to sign the 2004 will and failing to do so – having expressed that he wanted to make a will and having approved its contents along with allowing Anne to sign on his behalf – 'can and should be taken as a direction by conduct to Anne to sign the [2004 will] in those terms on his behalf'. Vos J also said that if Martin had made an attempt to sign the 2004 will with Anne's help but had failed, that could be taken as further evidence of a wish to direct Anne to sign for him.

The appeal judgment

On appeal, Lewison LJ's analysis of whether Anne had signed the 2004 will at Martin's direction began with some general observations regarding s9 of the Wills Act 1837. Lewison LJ stated that the starting point for understanding the requirements of the Wills Act 'must be the words of the section itself'.

Lewison LJ noted that if a testator was not personally signing their will, it was not enough that a third party sign the will in the testator's presence (para 21):

> ... section 9(a) of the Wills Act requires that the third party sign the will at the direction of the testator. Lewison LJ considered the ordinary dictionary definitions of 'direction' before coming to the 'provisional conclusion that something more than acquiescence or passivity on the part of the testator is required' and that what is required is something 'in the nature of an instruction'.

It was observed by Lewison LJ that there was little authority on the signing of wills at the direction of the testator and none that were binding the Court of Appeal. However, several cases of

interest were mentioned. For example, *Parker v Parker* [1841] suggested that the testator must make 'some positive communication of his desire that someone else should sign the will on his behalf'.

Lewison LJ, like Vos J, also considered the obiter remarks made in Fulton as to what amounts to a direction for the purposes of s9(a) of the Wills Act. However, by contrast to Vos J, Lewison LJ disagreed with Lord MacDermott's comment that a direction could 'on occasion, be implied from what is negative rather than a positive attitude on the part of the testator'.

Lewison LJ's view (at para 36) was that:

> ... the court should not find that a will has been signed by a third party at the direction of the testator unless there is positive and discernible communication (which may be verbal or non-verbal) by the testator that he wishes the will to be signed on his behalf by the third party.

Lewison LJ went on to find that there was insufficient evidence to support Vos J's previous conclusion that Anne had signed the will at Martin's direction. In coming to this decision, Lewison LJ started from Vos J's 'crucial finding of fact', which was that after Martin had tried and failed to sign the will Anne stepped in and signed the will on Martin's behalf. Lewison LJ emphasised that there had been no finding – and no evidence to support such a finding – hat Martin had asked Anne to step in and sign the will or that Anne had asked Martin whether she should sign the will.

Lewison LJ said that the fact that Martin had wanted to make a will and had tried but failed to sign it personally was insufficient to amount to a direction to Anne to sign the will and he was not persuaded by the argument from Hanora's counsel that the lack of protest or objection from Martin could amount to an 'implicit direction to Anne to sign the will'. It was pertinent that Martin was fully alert and capable of communicating his wishes and so the fact that Martin could have asked Anne to sign the will but did not or could have 'assented by word or a nod' to Anne signing the will pointed against the conclusion that Anne signed the will at Martin's direction. Accordingly, the appeal was granted on the first ground.

Public policy considerations

At the trial, the retrial and on appeal, the court was conscious of the need to be 'vigilant and jealous' when examining the evidence in support of a will where the party that writes or prepares the will takes a benefit (following the rule in *Barry v Butlin* [1838]).

At the retrial, Vos J also considered s15 of the Wills Act 1837, which provides that gifts made to an attesting will are null and void. Having heard submissions from counsel, Vos J concluded that the terms of s15 could not be widened so as to include persons signing at the direction of the testator. However, Vos J commented that it was plainly undesirable that beneficiaries should be permitted to execute a will in their own favour in any capacity and remarked that legislation might be considered to prevent such an event if it were a common occurrence.

As stated above, the second ground of Michael's appeal was that the 2004 will ought to be declared invalid on the grounds of public policy because a beneficiary executing a will in their favour was analogous to a witness attesting a will under which they took a benefit. Unfortunately, it was not necessary for the Court of Appeal to consider this interesting issue because Michael's appeal was granted on the first ground. However, Lewison LJ took the opportunity to echo Vos J's opinion on beneficiaries being permitted to execute a will in their favour and stated that Parliament should consider changing the law to ensure that this could not happen in the future.

Conclusions for practitioners

Recording the communication

It is clear that where a testator is not capable of personally signing their will and decides to direct some other person to sign it, it is crucial that the testator should make some positive and discernible communication that they wish for the will to be signed by that person.

Such communication need not always be verbal. Indeed, Lewison LJ noted that in some cases individuals may have to find other ways to communicate, such as through blinking their eyes in response to a letter board as famously described in the *The Diving Bell and the Butterfly*.

Practitioners should ensure that if the testator directs another to sign their will, the communication directing the signatory is carefully recorded.

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Lewison LJ also commented that it is:

> ... of course good practice that the attestation clause should show the will was signed by another person signing his own or the testator's name, by the direction and in the presence of the testator and that it had been read over to the testator and that he appeared to understand it.

The signatory

It goes without saying that practitioners should advise their clients that if the testator is directing some other person to sign their will, that person should not, ideally, be someone who takes a benefit under the will. ■

Barrett v Bem & ors
[2011] WTLR 1117;
[2012] WTLR 567 (CA)
Barry v Butlin
(1838) 2 Moo PCC 480
Fulton v Kee
[1961] NI 1
Parker v Parker
(1841) Milward 541