The deteriorating testator - testamentary capacity, knowledge and approval and all that

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Two recent Court of Appeal decisions

1. I have chosen this topic, because the law concerning it has been clarified by 2 quite recent decisions of the Court of Appeal, Perrins v Holland [2011] Ch 270 and Barrett v Bem [2012] 2 All ER 920. The first gave a root and branch review to some of the most fundamental principles of probate law, in order to resolve a frontal attack on a common law principle thitherto founded on an 1883 first instance decision, Parker v Felgate 8 PD 171 (Sir James Hannen P and a jury). The second raised questions as to the ambit of a statutory rule, often referred to but seldom actually relied on, in which the Court disapproved the only modern judicial *dictum* on the point (in Fulton v Kee [1961] NI 1 per Lord MacDermott CJ (NI) at 14-15).

Three familiar rules

2. Amongst the requirements for the validity of a will are the following familiar rules:

    a. the testator must have been of full testamentary capacity, i.e. of sound mind, memory and understanding.[1] More fully, it is necessary that he:

    "*must not only be able to understand that he is by his will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom by his will he is excluding from all participation in that property..*";[2]

    or fuller again:

[1] ***Mortimer on Probate, Law and Practice***, 1st edn. (1911) p.42.
[2] Harwood v Baker (1840) 3 Moo PC 282, 290 per Erskine J giving the advice of the Privy Council.

> "*shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.*"[3]

b. the testator must have 'known and approved' of the contents of the will;[4]

c. a will must be signed by the testator, or by some other person in his presence and by his direction.[5]

Less familiar aspects

3. The requirement of testamentary capacity is not statutory, but has been part of the common law of England "from time immemorial".[6] The underlying reason is that:

> "*It is a general requirement of the law that for a juristic act to be valid the person performing it should have the mental capacity . . . to understand the effect of that particular act . . .*"[7]

4. Less familiar, however, is the question of when the testator must have had such capacity. In the ordinary case, the answer will be the same at all material times, and the question will be unimportant. But what where the testator's mental condition is deteriorating over the period between when he first expresses his wishes, and ultimately signs the resultant will? Contrary to the common assumption, but supported by at least 5 cases pre-dating the 1837 Wills Act, by Parker v Felgate, and now by Perrins v Holland itself:

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[3] Banks v Goodfellow (1870) LR 5 QB 549 at 565 per Cockburn CJ, giving the judgment of the court.
[4] See e.g. Barry v Butlin (1838) 2 Moo PC 480.
[5] Wills Act 1837 (as amended), section 9.
[6] ***Mortimer*** *supra, loc cit*, cited in Perrins v Holland by Morritt C at [13] and Moore-Bick LJ at [40].
[7] Hoff v Atherton [2005] 1 WTLR 99, at [33], per Peter Gibson LJ.

"*whilst what might be called full testamentary capacity is required at some time, that time does not have to be the moment of the execution of the will*."[8]

5. Turning to the second of the above 'three rules', what is often not appreciated about the requirement of 'knowledge and approval' is that its content is not as its name would suggest. The name is simply a shorthand for something which is not generally required to be proved, beyond simple proof of due execution,[9] at all; rather, the requirement is that if there are circumstances surrounding the execution of a particular will giving rise to suspicion as to whether the testator can really have intended to make a will in those terms, then those seeking nevertheless to propound that will must rebut the suspicion, with whatever species of evidence that the testator knew and approved of its contents is available and sufficient in the circumstances of the case to rebut that suspicion.[10]

6. The third of the above 'three rules' is the only one derived from statute. Though the possibility of signature being by another, at the direction of the testator, is well enough known, I imagine that most if not all of you will agree that it is rarely relied on in practice. That is probably due, at least in part, to the well known rule that a mark is a sufficient signing of a will, whether or not the testator was unable to write - hence "where a testator is prevented by illness from signing, he may sign by a mark".[11]

7. As an aside, a particular curiosity highlighted by the facts of Barrett v Bem is that the statutory invalidation of testamentary gifts to any person who acts as an attesting witness of the will in question[12] does not extend to such gifts in favour of a person who actually signs the will on the testator's behalf. Given its finding on the facts of the case, the Court of Appeal did not have to rule on the argument that it should

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[8] Perrins v Holland per Morritt C at [14]; see also at [23].
[9] Which, when coupled with testamentary capacity, gives rise to a (rebuttable) presumption of knowledge and approval: see the passages from Paske v Ollat (1815) and Ingram v Wyatt (1828) cited by Morritt C in Perrins v Holland at [26] &[27]; see also per Moore-Bick LJ at [41].
[10] Barry v Butlin (1838) 2 Moo PC 480 at 485-86 per Parke B giving the advice of the Privy Council, cited by Morritt C in Perrins v Holland at [28].
[11] ***Williams on Wills***, 9th edn (2008) at para 11.13.
[12] Wills Act 1837 (as amended), section 15.

hold there to be a common law rule of public policy to that effect, but it did express the view that Parliament should consider changing the statute so to extend the invalidation provision to catch proxy signatories as well as attesting witnesses.[13]

Borderline testamentary capacity and the deteriorating testator

8. The facts of cases in this area can give rise to debate as to where the merits lie, but mostly evoke a sense that the will ought to be upheld if doing so can be justified. Those opposing late wills made by deteriorating testators are often doing so in order to enforce gifts under an earlier will (or entitlements under the Intestacy Rules) which plainly did not accord with the wishes of the testator near the end of his life.

9. The law's approach to such cases is:

    a. to favour freedom of individual testamentary disposition,

    "*The English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice, or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of claims that ought to be attended to, yet, the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law*"[14]

    and

    b. pragmatically to acknowledge that once a testator loses testamentary capacity, not to regain it before passing away, he has no further opportunity to give expression to his wishes.[15]

10. The time at which full testamentary capacity is undoubtedly required is when instructions for the will are given.

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[13] Barrett v Bem at [39] per Lewison LJ.
[14] Banks v Goodfellow (1870) LR 5 QB 549 at 564.
[15] See Perrins v Holland per Morritt C at [23].

11. So if full testamentary capacity is not required at the moment of execution of the will, what mental capacity is required at that time? The answer comes from the judge's summing up and then questions to the jury in Parker v Felgate, which identifies 3 acceptable mental states, each falling short of full testamentary capacity (numerals added):

> *"If a person has given instructions to a solicitor to make a will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator, is that (1) he should be able to think thus far, "I gave my solicitor instructions to prepare a will making a certain disposition of my property. I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out." …That would be one state of mind. But if you should come to the conclusion that she did not at that time recollect in every detail all that had passed between them, do you think that (2) she was in a condition, if each clause of this will had been put to her, and she had been asked, "Do you wish to leave So-and-So so much," or do you wish to do this (as the case might be), she would have been able to answer intelligently "Yes" to each question? That would be another condition of mind. It would not be so strong as the first, viz., that in which she recollected all that she had done, but it would be sufficient. There is also a third state of mind which, in my judgment, would be sufficient. A person might no longer have capacity to go over the whole transaction, and take up the thread of business from the beginning to the end, and think it all over again, but if he is able to say to himself, (3) "I have settled that business with my solicitor. I rely upon his having embodied it in proper words, and I accept the paper which is put before me as embodying it;" it is not, of course, necessary that he should use those words, but if he is capable of that train of thought in my judgment that is sufficient….*
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> *SIR JAMES HANNEN. (1) Did the deceased when the will was executed remember and understand the instructions she had given to Mr Parker?*
> *The Foreman. No.*
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> *SIR JAMES HANNEN. (2) Could she, if it had been thought advisable to rouse her, have understood each clause if it had been put to her?*
> *The Foreman. No.*

> *SIR JAMES HANNEN. (3) Was she capable of understanding, and did she understand, that she was engaged in executing the will for which she had given instructions to Mr Parker?*
> *The Foreman. Yes."* "[16]

12. Hence, the law's 'bottom line' position on testamentary capacity can be summarised thus:

> "*What is required is due execution of a will which the court can be satisfied expressed the wishes of a testator at a time when he did have full testamentary capacity and has not been subsequently revoked.*"[17]

13. There are, perhaps inevitably, unanswered questions remaining after Perrins v Holland, but at least the principle is no longer dependent on a first instance decision dating from 1883, in a case decided by a judge and jury. One such unanswered question is how, if at all, the principle can be applied where the instructions for the will given by the deteriorating testator are given to someone other than a solicitor.

What difference does the requirement of knowledge and approval make?

14. Once the true nature of the requirement for proof of knowledge and approval is understood (see paragraph 5# above), and the position with regard to testamentary capacity at the time of giving instructions and at the time of execution is established, the former requirement presents little by way of additional difficulty. As Sir Andrew Morritt C put it in Perrins v Holland,

> "*if full testamentary capacity is not required at the time of due execution then it is not obvious why the requirement for knowledge and approval should import it indirectly. In my view it is clear that it does not.*"[18]

15. As explained above, in most cases, knowledge and approval will be presumed from the fact of due execution. However in a case where there is something suspicious about the circumstances such as to require addition proof so as to rebut that suspicion:

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[16] At 173-75.
[17] Perrins v Holland per Morritt C at [23].
[18] At [24].

> *"the fact to be proved is knowledge and approval in the sense of acceptance of the contents. That does not require full testamentary capacity."*[19]

16. Since the starting basis for the application of the principle in Parker v Felgate is that the testator gave clear instructions for his will at a time when he still had full testamentary capacity, if suspicious circumstances are suggested then rebuttal of them will to a large extent have to focus on the giving of the instructions rather than the execution of the will, with the evidence as to the period thereafter, up to and including the execution, quite possibly limited to the absence of any change of mind.

What where the testator cannot sign or has difficulty signing for himself?

17. Although there are numbers of cases about what suffices as a signature of the testator (the marking of a mark, application of a stamp, initials etcetera), prior to the decision in Barrett v Bem there was little authority on the signing of wills by someone other than the testator; the only modern case on the topic was Fulton v Kee.[20]

18. The essence of the decision in Barrett v Bem can be put quite shortly: the statutory requirement that signature by another for the testator, as well as being in his presence, must be "by his direction" will only be satisfied by "some positive communication" by the testator that he wishes that other person to sign on his behalf. Assumption, inference from passive acquiescence etcetera will not suffice.[21] Hence the Court did not agree with the earlier dictum of Lord MacDermott CJ (NI) that:

> *"it may be that such a direction can, on occasion, be implied from what is a negative rather than a positive attitude on the part of the testator."*

19. It is unsurprising that the court should take a strict line on this. The room for abuse is obvious, and upholding a will which the testator has not even signed, despite the generously broad judicial definition of what will suffice as a signature, is at the outer edges of what can suffice

[19] Perrins v Holland per Morritt C at [28].
[20] Barrett v Bem at [22] & [31] per Lewison LJ.
[21] Barrett v Bem at [35] - [37] per Lewison LJ.

as a legally effective direction as to the distribution of a person's property.

The deteriorating testator: some practical suggestions

20. The law having been clarified in these 2 cases, what are the practical implications for probate practitioners? Without attempting anything like an exhaustive list, a number of practical suggestions can be made:

- Where instructions for a will are taken from a person whose mental capacity is deteriorating or foreseeably may deteriorate in the near future, it is particularly important that a clear record of them is made. There would be merit in reading that note back over to the testator there and then, and asking him to initial the same to confirm that the same accurately record his instructions.

- The prospective testator should be invited to indicate whether the instructions are firm and settled, as opposed to provisional and subject to further consideration by him prior to a will being drawn up and executed.

- In any such case, it is obviously desirable that the will be prepared promptly, and (assuming the testator so wishes) appropriate steps be put in hand for its execution in unimpeachable circumstances.

- At the time of execution, provided the testator remains capable of understanding the same (Parker v Felgate categories 1 and 2), the will should be read over or clearly and accurately summarised in appropriate terms, clause by clause, and the testator invited to confirm that it accurately reflects his wishes.

- The practitioner should keep a formal record that this was done, and the terms in which the testator confirmed his approval of the same.

- If there are reasons to doubt whether the testator retains full testamentary capacity by the time of execution, then:

- As to attestation, the so-called 'golden rule'[22] should be followed, although the facts of Barrett v Bem suggest that physicians may be a better bet than nurses!

- The practitioner should also record his/her own contemporaneous view of which of the Parker v Felgate categories applied, with his/her reasons.

- If a will is to be signed not by testator but by another person at his direction:
  - That 'scribe' should be wholly independent (a solicitor or a physician might be appropriate, depending on the circumstances). Although there is authority that the 'scribe' who signs may also serve as an attesting witness,[23] in my view this is best avoided (if only to minimise any risk of future suspicion)
  - The will should first be read over, or clearly and accurately summarised in appropriate terms, clause by clause, and the testator invited to confirm that it accurately reflects his wishes – in the presence of the 'scribe' and of the attesting witnesses
  - The testator should give a clear and unambiguous instruction to the 'scribe' to sign on his behalf, in the presence of the attesting witnesses
  - It is good practice that the attestation clause should record:
    - that the will was signed by another person (signing his own or the testator's name, as the case may be) by the direction and in the presence of the testator, and
    - that the will had been read over to the testator and (if it be the case) that he appeared thoroughly to understand it

    (see Barrett v Bem at [36] [24]).

[22] Formulated and commended by Templeman J as he then was in ##########.
[23] Re Bailey's Goods (1838) 1 Curt 914; Smith v Harris (1845) 1 Rob Eccl 262; Re Ullersperger's Goods (1841) 6 Jur 156.
[24] Citing with approval ***Tristam & Coote's Probate Practice*** (30th edn, 2006), para 3.79.