



OUTER HOUSE, COURT OF SESSION

[2024] CSOH 18

A99/20

OPINION OF LORD WOOLMAN

In the cause

LEE DONALD BARCLAY

Pursuer

against

THORNTONS TRUSTEES LIMITED AND OTHERS

Defender

**Pursuer: Deans; T C Young LLP**

**Defender: Welsh; Wright Johnston & Mackenzie**

23 February 2024

**Introduction**

[1] William Barclay died on 3 June 2018. He had been seriously unwell for some time.

Two days before his death he married his long-term partner, Mandy White. About

20 minutes later, he executed a new will. Both events took place in the bedroom of his

Edinburgh flat.

[2] The deceased had made a previous will in 2015. It provided that the residue of his estate should be divided equally between Ms White and his son, Lee Barclay. The 2018 will

adjusted the split to 75:25 in her favour. Under both wills, she received a liferent of the flat.

[3] Lee Barclay did not recognise his father's signatures on the 2018 will. He thought that they were not genuine. He instructed two forensic document examiners to investigate.

Their respective reports supported his position. Based on their opinion, Lee Barclay brought the present action, in which he seeks to reduce the 2018 will.

[4] The central line of defence is based on direct evidence. Ms White founds on three eyewitnesses (including herself), who say that they saw the deceased sign the 2018 will. She points out that, 20 minutes earlier, he signed the marriage schedule using a similar style of signature. Finally, she notes that the forensic document examiner whom she instructed believes that there is insufficient material to reach a conclusion on authenticity.

[5] It will be apparent from this short summary that credibility occupies a central role in the case. Did the eyewitnesses tell the truth? If so, that is the end of matters. But if they lied in court then they committed perjury.

### **Preliminary matters**

[6] By way of clearing the ground, I note the following:

- a. The will consists of six pages. The deceased's (disputed) signature appears on the first five pages, but not on the last page. That omission was subsequently corrected in the Sheriff Court.
- b. At one stage the pleadings contained a case of facility and circumvention. It had been removed, however, by the time of the proof.
- c. There is no challenge to the authenticity of the deceased's signature on the marriage schedule.

[7] It is also worth mentioning that the trustees of the deceased's estate were called as the first defenders, but did not participate in the proof. He had another son, who did not feature in the will, nor enter these proceedings.

## Background

[8] The deceased was a businessman, who was born in 1949. He entered into a relationship with Ms White in the early 2000s and several years later they began living together. She is a former head of human resources for Victim Support Scotland. His health declined from about 2015 onwards and he spent periods in hospital. His death certificate listed the cause of death as (a) cirrhosis of the liver and (b) hepatitis B. Prior to his death, he chose not to enter a hospice.

[9] The deceased's long-term financial adviser was Karena Platten. He met her three times in early 2018 to review his investment portfolio. He told her about his revised testamentary intentions. She proposed adjustments to his investments, which he authorised during a hospital visit on 21 March. Ms Platten made a comment that may explain why there is no capacity challenge:

"One important thing in my job is to be aware of a customer who is vulnerable. There was nothing in Mr Barclay's demeanour or conduct that gave me any doubt he was instructing exactly what he wished. He knew he was ill and he was trying to get his house in order. He died thinking that he'd done everything that was right."

[10] A few days after the hospital visit, the deceased instructed Kirsten McManus, solicitor, to prepare a new will. She sent a draft with the adjusted 75:25 split and visited his flat on 9 May to discuss queries he had about the operation of the liferent.

[11] Afterwards, Mrs McManus sent him the revised draft, on which she had marked pencil lines beside his three initials on each page to show where he was to sign. He told her that, to avoid further legal expense, he would return the will to her after he had arranged for it to be signed and witnessed.

[12] The deceased told Ms White about the alterations to will. She asked him whether he was going to inform his son about the new terms. He replied that he would do so during the next home visit.

[13] Lee Barclay had emigrated to Australia in 2004. He lives in Perth with his family, where he is a teacher. He made several trips to Scotland, the last one three months before his father's death. He had planned to return in late June 2018 to say a final goodbye.

### **The wedding ceremony**

[14] Because of the deceased's deteriorating health, the registrar granted a dispensation from the normal notice period. The wedding date was set for Friday 1 June 2018. The celebrant was Jacqueline Balfour, who has been an assistant registrar since 2014. Apart from her and the bride and groom, two married couples were also present: Mr and Mrs Hannigan and Mr and Mrs Tempany.

[15] Clare Hannigan is a business development manager aged 50. She was the deceased's goddaughter and had known him all her life. She described the wedding as "bittersweet", but Mr Barclay was happy and:

"He signed the marriage schedule without any assistance except for Mandy holding the clipboard for him to sign on because it was difficult for him to do with the board on his legs."

[16] The ceremony lasted about 15 minutes. Afterwards the deceased held a glass out of which he sipped champagne. Mrs Hannigan's husband, an accountant aged 52, was to similar effect: "I think a board was put under the schedule to lean on it to make the signature."

[17] William and Anne Tempany had been close friends of the deceased for many years. They are both retired from their respective occupations of company director and primary school teacher. They both saw Mr Barclay sign the wedding schedule without assistance.

[18] Ms Balfour's evidence is especially helpful for two reasons. First, she is an independent witness. Second, she recalled the event in striking detail. She said that it was a

sad wedding ceremony to conduct, but “nothing seemed out of the ordinary to me.” As to the marriage schedule:

“It was difficult for me to hold my folder with the schedule on and trying to balance this for Bill to sign. He was in the middle of a double bed and extremely frail (this was not a hospital bed with controls that would raise the back of the bed). I attempted to lean over the bed at 5'2" and wearing a dress I found this difficult, Bill was also wincing in pain when the bed was being moved. Mandy brought over a beanbag type tray that provided a more stable platform. I asked Mandy if she was able to swap places with me and hold the tray.

Bill signed the marriage schedule in front of myself, Mandy and [the] witnesses. I believe he understood what he was signing. Had he been unable to sign his name I would have asked him to make his mark and I would have countersigned this. I then got Mandy, the witnesses and myself to sign the marriage schedule.”

[19] To reiterate, no challenge is levelled at the deceased’s signature on the schedule, which included his middle initial.

### **The 2018 will**

[20] At the end of the wedding ceremony, Ms Balfour left the flat. Mr and Mrs Hannigan went to organise a buffet meal in the kitchen with their two young children. That left four individuals in the bedroom: the deceased, Ms White, and Mr and Mrs Tempany.

[21] According to Ms White, the deceased first tried to sign the will while she held it above his head as he lay supine. That resulted in an indecipherable scrawl on the first page. With her aid, he then sat up, using a back rest and some cushions, and signed the will on a tray on his lap.

[22] Mr and Mrs Tempany did not recall the will being first held above the deceased’s head. But they both said that he signed the will without assistance. There was then a short conversation following which the deceased had something to eat and fell asleep. The others joined Mr and Mrs Hannigan for food in the next room.

**After death**

[23] Subsequently Ms White posted the will to Mrs McManus. About three weeks later the two met to discuss the administration of the estate. The solicitor pointed out that the deceased had not signed the last page of the will and that she would apply for that to be formally corrected. The application was subsequently granted.

[24] On learning of the terms of the new will, Lee Barclay wondered whether his father had been upset with him for some reason and whether the signatures on the will were genuine. He contacted Mr Tempany, who reassured him on both fronts and added: "... yes your dad did sign the will he was weak and was lying down in bed when he signed it."

**Credibility**

[25] Counsel for Lee Barclay invited me to reject the eyewitness evidence. In particular, he alleged that there were discrepancies in Ms White's account. She had said that the deceased: (a) lay on a hospital bed, (b) first attempted to sign the will as she held it over his head, (c) signed it with a clipboard underneath and (d) did so "slowly".

[26] Counsel argued that the weight of evidence established that it was not a hospital bed, that the testator had been propped up on pillows, that the will had not been held first above his head, that the schedule had rested on a cushioned tray, and that the expert witnesses said that the signatures showed a degree of speed and fluency.

[27] None of these discrepancies, taken either individually or collectively, are of any moment. They are precisely the type of variations in recall that one would expect. I attach no importance to any supposed difference in speed. Ms White's evidence was one of impression, not measurement.

[28] Counsel also submits that Ms White lied to Lee Barclay when he asked her whether she had known of the changes to the will prior to his father's death. She admits that she did so, but I unhesitatingly accept her explanation that she did not think it was her place to do so.

[29] In short, I accept the evidence of the three eyewitnesses. It is always difficult to gauge credibility solely on the basis of demeanour. I saw nothing, however, in their appearance and presentation in the witness box to indicate that they were dissembling or colluding. Rather, they each appeared to me to be measured and truthful in their testimony. Each of them was clear that the deceased had signed the will. Their accounts chimed with each other. Mr and Mrs Tempany stood to gain nothing by dishonesty.

[30] I add this observation. In cross-examination counsel did not squarely put to the eyewitnesses that they were lying. They therefore did not have an opportunity to respond and furnish their own account to such an allegation.

[31] Persuasive support for their testimony comes from the evidence relating to the wedding ceremony. Twenty minutes before he signed the will, the deceased used the same style of signature on the marriage schedule. That strongly suggests that he had decided (at least for that day) to adopt a new style of signature. He may have been influenced by the fact that the signing instructions on the will contained his middle initial. I have also tested the eyewitness testimony against the opinion evidence, to which I now turn.

## Opinion evidence

### *Common Ground*

[32] Much of the expert evidence is uncontroversial. Three forensic document examiners gave evidence: Evelyn Gillies, Elizabeth Briggs, and Stephen Cosslett. They agree on a number of important matters, which can be summarised as follows.

[33] First, there are four stages of handwriting: formative, adolescent, mature, and degenerative. With regard to the last, Dr Gillies explained that:

“The writer’s skill will decline because of factors such as illness, advancing age, infirmity, or injury. ... The degenerative ... stage is prompted largely by neuro-physical degeneration, the onset and the magnitude of which varies with the individual. It is the stage in which tremors become evident; shapes, slopes and size become less consistent, and quality or skill in writing becomes progressively poorer.”

[34] Second, no two signatures are exactly the same. Each individual has a range of variation. The characteristics of a signature may change by reason of medication, pain, writing position, and type of writing implement.

[35] Third, the accepted methodology involves comparing the disputed signature against known signatures, of which there should be as many specimens as possible, preferably contemporaneous and on documents of similar importance.

[36] Fourth, the evaluation is based on scientific principles - such as shape, proportion, line length, thickness, and degree of angle. But it also relies on experience.

[37] Fifth, the deceased signed his name as “W Barclay” for 50 years up to and including March 2018. That is disclosed by the portfolio of sample signatures, dating from his marriage certificate to his first wife.



*Spectrum of opinion*

[38] The experts occupy a narrow bandwidth of opinion. In her first report dated 23 October 2020, Dr Gillies concluded that (1) the signature on page 1 of the will is not genuine, (2) that it is probable that it is a “guided hand” signature, (3) it is unlikely that the signatures on pages 2 to 5 were written by the deceased, and (4) it is probable that the signature on the marriage schedule is a “guided hand” signature. In her supplementary report dated 23 November 2023, she expressed herself in this way:

“In my opinion there is some limited evidence to show that the questioned ‘W D Barclay’ signatures on the Will ... were not written by William Barclay. Whilst I cannot exclude the possibility that he could be responsible, on the basis of the documents available I consider this to be less likely than another(s) having written the signatures.”

[39] Finally, in her addendum report of 30 November 2023 Dr Gillies stated:

“My opinions have not changed from those stated in the Supplementary Report but have been strengthened by the examination of the signature on the Marriage Schedule.”

[40] Mrs Briggs occupies an adjacent position on the spectrum of opinion. In her first report dated 22 November 2021, she concluded:

“In my opinion, there is some limited evidence to show that William Barclay did not write the signatures on the Will, and I consider it more likely that another person(s) was responsible.”

[41] After Mrs Briggs was provided with the originals of the 2018 and 2015 wills, she adhered to her view:

“Whilst I cannot exclude the possibility that [the deceased] could have written them, either independently or with some assistance, on the basis of the documents available, I consider it more likely that another person(s) was responsible.”

(addendum report 15 November 2023)

[42] She also pointed out that the deceased had used a fluid ink pen, which made it difficult to assess some of the finer details of construction as the ink had been absorbed into the paper.

[43] In the view of Mr Cosslett (report 3 March 2022), the signature on the marriage schedule was the best comparator. That was insufficient to enable him to reach an opinion:

“I have found the questioned signatures in the 2018 Will in Mr Barclay’s name to differ from the specimens available. I am unable to offer a reliable opinion as to whether these differences are due to Mr Barclay having written the signatures in a different style to the very limited specimens available, or whether some other person has made poor attempts to copy his signature.”

[44] Counsel for the pursuer submitted that Mr Cosslett was unimpressive, precisely because he was unable to offer an opinion. I disagree. It is crucial that expert witnesses identify situations where they cannot reach a conclusion. I prefer his approach in the circumstances of this case.

### **Summary**

[45] Taken at its highest, the expert evidence of Dr Gillies and Mrs Briggs only offers qualified support to the pursuer’s case. It does not persuade me that the signatures are not authentic. I accept the evidence of the eyewitnesses that the deceased signed the will unaided. Accordingly, the pursuer’s case fails.

### **Legal matters**

[46] I shall sustain the second defender’s second and third pleas-in-law, refuse the pursuer’s pleas-in-law; and grant decree of absolvitor. Counsel agreed that expenses should follow success. Accordingly, I award the expenses of process, insofar as not otherwise dealt with, in favour of the second defender. I also certify Mr Cosslett as a skilled witness.