

DEMENTIA IN THE COURTROOM

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Robert Abrams, Esq.
Ellyn S. Kravitz, Esq.
Abrams, Fensterman, Fensterman, Eisman,
Formato, Ferrara, Wolf & Carone, LLP
1 Metrotech Center, Suite 1701
Brooklyn, New York 11201
(718) 215-5300
babrams@abramslaw.com
ekravitz@abramslaw.com



Dementia Defined

- How many different dementias are there?
- Are all dementias the same?
- Distinguishing the different types of dementia
- One out of every eight Americans 65 years or older have diminished mental capacity; one out of every four over age 75; and one out of every two over age 85.

Alzheimer's Disease

- Almost 6 million Americans are living with Alzheimer's Disease, most of whom are 65 years of age and older
- Early to End Stage
- Patient (self) awareness
- Memory loss, difficulty in Activities of Daily Living (ADL), behavioral changes, and confusion
- Risk factors include aging, diabetes, high blood pressure, smoking cigarettes and a family history of dementia
- 6th Leading cause of death

Lewy Body Dementia

- Relationship to Parkinson's Disease
- Impact on executive function
- Results from abnormal deposits of a protein called alpha-synuclein in the brain
- Typically begins at age 50 or older
- Query: Did Robin Williams suffer with Lewy Body Dementia and was such Dementia a factor that led to his suicide?

Other Dementias

- Frontotemporal Disorders (Pick's Disease)
- Alcohol Induced Dementia
- Vascular Dementia
- Mixed Dementias

Relationship between Dementia and Mental Health

- How do you distinguish Dementia from Delirium?
- How do you distinguish Dementia from Depression?
- How do you treat and/or manage older individuals who suffer from Dementia and one or more psychiatric impairments?
- Why is it important to understand the possible contraindications between psychotropic medications and Dementia medications?

Treatment Options
(No Cure)
Versus
Slowing Down and/or Managing
Symptoms

Caregivers

- Family
- Informal and Unlicensed
- Formal
- The Personal and Societal Costs of Caregiving

Who should assess diminished mental capacity?

- Physicians?
- Judges
- Lawyers?

Ethical Issues

- Should a Judge report a judicial colleague who appears to have diminished mental capacity?
- Should an attorney report a Judge?
- To whom should such reports be made?
- What are the possible ramifications to a Judge and/or attorney who makes such a report?

Appointment of Guardian ad Litem (GAL) for a Litigant who appears to have Diminished Mental Capacity

- Discretionary appointment
- Mandatory payment
- Who pays for the cost of the GAL?

Rules of Judicial Conduct

- State Courts
- Federal Courts

Guardianship Matters

- State Statutes
- Interstate (Granny-napping as form of venue shopping)
- Habeas Corpus proceedings

Guardianships

- Should medical evidence be considered by the Court before deciding whether to appoint a Guardian for an *Alleged Incapacitated Person*?
- HIPAA and other applicable state and federal statutes
- Special considerations involving alleged incapacitated persons with limited financial resources

Legal Effect of Decisions made by Individuals with Diminished Mental Capacity

- Distinguishing those who have not been adjudicated to be incapacitated from those who have been deemed to be in need of a Guardian and/or other form of Court supervision
- The legal impact of the Guardianship Order

Criminal Matters

- Defendants with diminished mental capacity
 - *Note: Neurodegenerative diseases can cause dysfunction of neural structures involved in judgment, executive function, emotional processing, sexual behavior, violence and self-awareness. Such dysfunctions can lead to antisocial and criminal behavior that appears for the first time in the adult or middle-aged individual or even late in life
 - CITE: Criminal Behavior in Frontotemporal Dementia and Alzheimer's Disease
- Prisoners with diminished mental capacity
- Capacity v. Competency

End of Life Matters Involving Individuals with End State Dementia

- Right to Die/Live cases
- Quality of Life Considerations
- Physician Assisted Suicide

Incidence of Dementia in the Legal Community

- Judges
- Lawyers
- Court Personnel
 - See “Out of Focus: Lawyers and Firms Can No Longer Ignore Dementia” Christine Simmons, *The American Lawyer*, February 25, 2018

Age Discrimination Based on the Reality of Diminished Mental Capacity

- Should state and/or federal judges be subject to mandatory retirement?
- Should law firms require attorneys to retire at 60? 65? 70? 75? 80? Never?
- If Dementia is not a necessary part of aging, why should, *inter alia*, Judges and lawyers be subject to mandatory retirement?

Attorney Malpractice Due to Dementia

- Will malpractice insurance provide coverage? If so, to whom?
- Are law partners of an attorney with Dementia who commits malpractice legally responsible?

State and Federal Initiatives

- Federal Initiative for Dementia Research
- Olmstead Decision
- State Legislation and initiatives
- Limited Medicare coverage
- Prevention and detection of abuse, neglect and financial exploitation of vulnerable adults
- Regulation of healthcare providers and professionals
- Restrictive Medicaid eligibility requirements
- Tax incentives for, *inter alia*, long term care insurance and family caregivers

Special Role of Lawyers and Judges to Educate Their Communities about Dementia

Planner or Gambler?

- Should we encourage ourselves and others to plan for the future?
 - Advance Directives
 - Health
 - Property Management
 - Insurance
 - End of Life
 - Protection of spouse, minor children and adult children with special needs, vulnerable parents, etc.

Impact of Laws and Ethics on Healthcare Surrogate Decision-Making for Incapacitated Individuals

- Does it matter where the person is?
 - Home?
 - Hospital or nursing home?
 - Senior living?
 - In an ambulance?

Cases throughout the United States and the World

Lingo v. Lingo (Delaware)

- Lingo v. Lingo, 3 A.3d 241 (Sup. Ct. Del. 2010) (discussing that an agent under a power of attorney, who breaches their fiduciary duty by taking advantage of a principal who suffers from dementia, should be ordered to pay restitution to make the principal whole again. Moreover, the Court further discusses that Delaware does not follow the jurisprudence of some other jurisdictions, including Wisconsin and Arizona, wherein in those states, an agent, who is also a legatee or intestate distributee, who takes advantage of the principal, forfeits their distributive share.).

Lingo v. Lingo (Delaware)

- Unlike other states such as Wisconsin and Arizona, Delaware statutes limit remedy to restitution for family Trustee who breached her fiduciary duty to her mother who was suffering from Dementia.

Matter of Joos (New York)

- Matter of Joos, 24 Misc. 3d 980 (Sup. Ct. Kings Cnty. 2009) (finding that a guardian took advantage of an IP, who suffered from dementia, in that the guardian improperly revoked the IP's trust. The court ultimately declined the guardian's commissions.).

People v. Kegerreis (Michigan)

- People v. Kegerreis, 2009 WL 2371538 (Ct. App. Mich. 2009) (finding a caregiver guilty of second-degree vulnerable adult abuse, when the caregiver was charged with the responsibility of taking care of a “vulnerable adult,” who was an “amputee with dementia and Alzheimer’s” and the caregiver acted recklessly in providing care, causing significant medical complications to the vulnerable adult).

In re Estate of Flowers (Ohio)

- In re Estate of Flowers, 88 N.E.3d 599 (Ct. App. OH 2017) (finding that the decedent's family members exerted undue influence over the decedent, who suffered from Alzheimer's and dementia, to force the decedent to change her annuity beneficiary designation. Moreover, the Court further found that based upon the medical evidence the decedent lacked the requisite mental capacity to change the beneficiary designation.).

In re Estate of Warren Renfrow v. Renfrow (Arizona)

- In re Estate of Warren Renfrow v. Renfrow, 2013 WL 1932833 (Ct. App. Ariz. 2013) (holding that an agent under a power of attorney, who took advantage of a principal that suffered from dementia, by improperly transferring assets into his own name and stealing the principal's money, was ordered to pay restitution to make the principal's estate whole, after the principal's death, and the agent, the son of the principal, forfeited all interests in the principal's estate).

Matter of D'Angelo (New York)

- Matter of D'Angelo, 158 A.D.3d 107 (2d Dep't 2017) (disbarring an attorney and sustaining a surcharge against the attorney, who took improper actions as an Article 81 guardian, including, but not limited to, improperly appointing his wife the AIP's geriatric care manager and paying her excessive fees, improperly selling real property owned by the AIP wherein the guardian selected a broker with whom he had a relationship and obtained a back-handed substantial referral fee, and improperly drafting a LWT for the AIP when the AIP was unable to understand the documents. The LWT that was drafted by the attorney/guardian, was witnessed by the attorney's wife (the AIP's geriatric care manager) and the attorney's mother. The will nominated the attorney/guardian the sole executor of the AIP's estate and established a testamentary charitable trust in which the attorney/guardian was the sole trustee. For a comparison of the Court's holding in connection with the settlement of the guardianship proceeding see In re Albert K., 96 A.D.3d 750 (2d Dep't 2012).).

United States v. Thomas M. Murtha (Connecticut)

- United States v. Thomas M. Murtha, Case No. 3:17 CR 1800 (MPS) (D. CT 2017) (discussing the criminal prosecution of a Connecticut attorney for stealing \$1.3 million dollars from approximately 20 individuals, including clients (many of who were elderly), friends and family members. Notably, Murtha stole over \$516,000 from an individual who suffered from mental illness. In entering his plea agreement, Murtha agreed to pay restitution in the amount of at least \$1,364,119.15, to forfeit his interest in a house he purchased with the stolen money, and a 2-karat diamond ring. Murtha will be sentenced by U.S. District Judge Michael Shea on September 11, 2018 and faces a maximum term of imprisonment of 20 years.).

Bakhtiar v Saghafi (Ohio)

- Bakhtiar v Saghafi, 75 N.E.3d 801 (Ct. App. OH 2016) (discussing the ability of a spouse, who has been adjudicated incompetent, to obtain a divorce. The wife therein was 81-years old and was deemed incompetent by the Lorain County Court of Common Pleas due to her cognitive deficiencies. The Court reviewed the evidence which demonstrated that the wife was “very bright, articulate and determined” and “consistently stated that she wishes to proceed with divorce.” Ultimately, the Court therein found that since the wife had clearly expressed, prior to being deemed incompetent, her desire and intention to divorce her husband, that she may do so.).

People v. Kress (New York)

- People v. Kress (Sup. Ct. Queens Cnty. 2003)/In re Kress, 304 A.D.2d 59 (2d Dep't 2003) (disbarring a lawyer and sentencing him to three to nine years in prison when the lawyer, over the course of six years, stole more than \$2.1 million from 17 incapacitated people for whom he was appointed guardian).

United States v. Powell (Kentucky)

- United States v. Powell, 423 Fed Appx 602 (6th Cir 2011) (affirming the United States District Court for the Eastern District of Kentucky's sentencing of the Defendant to thirty-six months of imprisonment and the imposition of a \$10,000 fine. The Defendant therein befriended an elderly woman, who suffered from dementia. Thereafter, the Defendant financially exploited the woman and physically abused her. The Defendant transferred significant amounts of his victim's money into accounts held by him and his wife and refused to purchase proper clothes or provide the necessary medical care. The Court therein found that the lower court's upward variance from the sentencing guidelines and its decision to impose a \$10,000 fine were reasonable due to the Defendant's actions.).

People v. Manse on Marsh Assisted Living Facility (California)

- In July 2018, Superior Court Judge Craig van Rooyen ruled that the owner and former Administrator of the Manse on Marsh Assisted Living Facility must stand trial for involuntary manslaughter and elder abuse because they admitted residents with dementia even though they were not licensed to do so, and one such resident was killed after being struck by a car at night as he walked in the dark about 10 miles away from the state licensed facility.

Random News Reports

- Third Assisted Living Worker Arrested in Case of Dementia Patient Duct-Taped to Chair (Florida); Becker's Hospital Review, August 7, 2018
- Georgia Police Use Taser on 87 Year Old Grandmother with Dementia (Georgia); The Root, August 2018
- Why are Nursing Homes Drugging Dementia Patients without their consent?; The Washington Post, Hannah Flamm, August 2018

Random News Reports

- Buzz Aldrin sues 2 of his children, claiming slander over dementia; Mike Schneider, Associated Press
- ‘Star Trek’ star Nichelle Nichols: Her son’s the problem, not dementia

Query: What is the Legal
Obligation of Owners of Sport
Franchises Where Their Players are
at Risk for Dementia Due to
Physical Contact?

Matters for Further Reflection

- Varying standards to define legal incapacity
- Inconsistency in state Guardianship laws
- By whom and how should capacity be assessed
- Validity of Advance Directives
- Mandatory retirement base or age

Public Guardian

- The New Yorker, October 9, 2017:
How the Elderly Lose Their Rights

John Oliver

- <https://www.youtube.com/watch?v=nG2pEffLEJo>