Dementia and conveyances of property

It might surprise some lawyers to know that a person suffering from dementia may nevertheless be competent to convey away his or her property, and then gift the proceeds of the sale to a child. *Thorpe v. Fellowes Solicitors*[1] held that this is possible.

The defendant law firm represented a 77-year-old client on the sale of her home. The client, Mrs. H instructed that the sale proceeds be paid to her daughter. Mrs. H said that she and her daughter intended to live together. The solicitors did as they were instructed.

Several years later, Mrs H's son, the plaintiff Thorpe, sued the solicitors on his mother's behalf to recover the money paid to Mrs. H's daughter. The plaintiff acted with the authority of the Court of Protection. Mrs. H and her daughter did live together, but only for a short period of time, after which Mrs. H went to a nursing home. The plaintiff alleged that the solicitors were negligent in failing to test his mother's mental capacity, and in failing to appreciate her vulnerability and susceptibility to the daughter's influence.

The parties jointly retained a medical expert, a doctor. The doctor's expert opinion was that, at the time of the transaction, Mrs. H was suffering from mixed degenerative and vascular dementia that would have caused cognitive difficulties. However, in his view:

> "….cognitive function can be quite impaired and yet a patient can still have free will and sense of what they want and what they do not want. It would be egregious to deny patients with dementia a say in their own care and a say in the disposal of their possessions. Just because their intellectual capacity is reduced it does not mean that they do not have the right to still make decisions. It is impossible ever to know exactly when the capacity to make decisions is completely lost, but when assessing this medically one would question the patient about how she understands the effect of her decision on other people and if the patient does understand this, even if there is profound cognitive compromise, then I would suggest that capacity is retained. There is evidence from the solicitors that they met the client and she did understand the instructions and was, in fact, quite vehement in her direction to make a sale of the house and she understood the implications of this.
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> "Therefore my conclusion is that although she had cognitive problems that may have interfered with her decision making [s]he still had capacity in the sense that this was her opinion at the time and this was the expression of her free will." [2]

The doctor concluded it was unlikely that Mrs. H's dementia would have been apparent to a competent solicitor:

[1] [2011] EWHC 61 Q.B.
[2] *Ibid.*, para 64

> "Many patients with dementia actually come across as quite sociable and engaging and are able to … answer a number of questions reasonably coherently. This all depends on what type of dementia is occurring but I think it would be entirely plausible that someone with mild to moderate dementia, as [Mrs. H] was suffering from, would not be apparent to a solicitor who engages her in conversation for the first time."[3]

It was only if a solicitor perceived that there might be medical issues that a doctor's report would be obtained:

> "but as far as I understand it the medical circumstances surrounding [Mrs. H] were never discussed with the solicitor and one would not expect them to be discussed."[4]
> …
> "…there is no reason to suppose that actually [Mrs. H] was not acting with capacity at the time and this was not the expression of her free will."[5]

However,

> "Patients with dementia can be vulnerable to influence by other people. The dementia may impact on the understanding of particular matters. However, even patients with quite severe dementia could still have formed and reasonable opinion" (sic).[6]

The Court accepted the doctor's evidence, and found that there was no evidence of lack of capacity, notwithstanding that Mrs. H suffered from a progressive form of dementia, nor that the solicitor knew or ought to have known that Mrs. H suffered from dementia.

A solicitor is generally only required to make enquiries as to a person's capacity to contract if there are circumstances such as to raise doubt as to this in the mind of a reasonably competent practitioner. There is a presumption of capacity, and only if this is called into question should a solicitor seek a doctor's report (with client's consent). However, a solicitor must make his or her own assessment, and not rely solely upon the doctor's assessment.[7]

There is plainly no duty upon solicitors in general to obtain medical evidence on every occasion upon which they are instructed by an elderly client just in case they lack capacity. Such a requirement would be "insulting and unnecessary."[8]

The plaintiff's action was dismissed.

Dementia frequently arises in the context of testamentary capacity. In *Otto v. Kapacila Estate,*[9] the Saskatchewan Court of Appeal was required to consider this issue. The court held:

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[3] *Ibid.*,, para 65
[4] *Ibid.*, para 66
[5] *Ibid.*, para 67
[6] *Ibid.*, para 69
[7] *Ibid*., para 75
[8] *Ibid*., para 77
[9] 2010 SKCA 85

"With respect to the various forms of senile dementia in elderly persons, *Halsbury's Laws of Canada, Wills and Estates*, 1st ed.(Markham: LexisNexis Inc., 2007) states:

> **'Dementia**
>
> **'HWE-22 Capacity may remain.** An elderly person's mental powers may be so reduced that he or she has lost testamentary capacity. Nevertheless, a person diagnosed as suffering from senile dementia may be able to make a will. The mind of the old person must be capable of carrying apprehension beyond a limited range of familiar and suggested topics. Merely being able to make rational responses is not enough, nor is repeating a tutored formula of simple terms. The mind must be able to comprehend of its own initiative and volition. Diagnosis of Alzheimer's disease is not conclusive of testamentary capacity, particularly as, like senile dementia generally, it is progressive. The delusions that may accompany Alzheimer's disease may not in themselves be sufficient to vitiate the required mental capacity but may be evidence of a general lack of capacity. On the other hand, courts should not lightly deprive people of the right to make a will, and testamentary capacity may remain despite other loss of abilities. [Bolding in original, underlining mine; footnotes omitted.]'"[10]

Martyn Frost, a well known British commentator on wills and estates matters, wrote a cautionary case comment on *Thorpe v. Fellows Solicitors*, published in the May, 2011 edition of *Trust Quarterly Review* [11] and in *The Step Journal.*[12] He suggests that where an elderly or infirm person gifts away a substantial asset, the rules developed in the context of testamentary capacity should be applied.

Mr. Frost discusses the "Golden Rule" articulated in *Kenward v. Adams*,[13] which holds: "In the case of an aged testator or a testator who has suffered a serious illness . . .the making of a will by such a testator ought to be witnessed or approved by a medical practitioner who satisfied himself of the capacity and understanding of the testator, and records and preserves his examination and finding."

Mr. Frost suggests that while the Golden Rule is a rule of solicitors' practice and not a rule of law, the Golden Rule ought to be applied in a case such as Mrs. H's, especially since she was gifting away her only substantial asset. Mr. Frost characterized the court's approach to the solicitor's duties in *Thorpe* as "narrow."

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[10] *Ibid*., para 36

[11] *Trust Quarterly Review*, May, 2011 http://content.yudu.com/Library/A1s65v/TQRMay2011/resources/index.htm?referrerUrl=http%3A%2F%2Fwww.yudu.com%2Fitem%2Fdetails%2F331666%2FTQR-May-2011, at pp. 25 – 28

[12] StepJournal: Wealth Structuring Analysis for Trust and Estate Practioners, May, 2011 *http://www.stepjournal.org/journal_archive/2011/tqr_issue_2_may_2011/thorpe_v_fellowes_solicitors.asp*

[13] [1975] CLY 3591

Whether Mr. Frost's criticism of the approach taken in *Thorpe* is correct or not, taking instructions from a client who is old and infirm is fraught with hazards. The defendant solicitors escaped liability, but only after defending a lawsuit. Solicitors cannot assume that they can safely make wills or complete property transactions for everyone who appears to indicate that they wish to do so.

There is no rule that obliges a solicitor to accept a retainer in every case.[14] If instructions are accepted, the solicitor needs to ensure that he or she receives them directly from the client, and that he or she makes detailed, contemporaneous notes. In appropriate cases, the Golden Rule should be applied. Elderly clients may find this process to be difficult and unpleasant, but when it is finished they can be confident that their wishes cannot be undone at a later date.[15]

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[14] *Hall v. Bennett Estate* (2003), 64 O.R. (3d) 191 (C.A.), reversing [2001] O.J. No. 5092

[15] See "Sting in the tail: Testamentary capacity, knowledge and approval" by A H R Brierley, *Private Client Advisor*, Volume 11, Issue 6, posted October 13, 2006
http://www.ecadviser.com/xq/asp/txtSearch.Probate/exactphrase.1/sid.0/articleid.FFAD236B-4D9B-48A3-A8BE-AE0C1865126D/qx/display.htm
See also "How to assess capacity to make a will" by Robin Jacoby and Peter Steer, BMJ, Volume 335, Number 7611, published July 19, 2007
http://www.bmj.com/content/335/7611/155.full