

## South Carolina Court Takes a Close Look at Alzheimer's Disease

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A fascinating look at how courts view Alzheimer's disease is found in the recent South Carolina Court of Appeals decision of *Gaddy v. Douglass, et al*, (SC Ct. App. May 17, 2004). The decision, which is very readable, can be found by computer-savvy readers at <http://www.judicial.state.sc.us/opinions/displayOpinionPF.cfm?caseNo=3797>.

This decision is recommended reading for any attorney who represents families with Alzheimer's disease since it illustrates so many issues faced by many Alzheimer's families.

**The Quintessential Ms. M.** The decision concerns a woman, identified only as "Ms. M", who lives in Winnsboro, South Carolina, and was first diagnosed with "senile dementia of the Alzheimer's type" in 1996.

Far from being unusual, Ms. M is almost a paradigm for what can (and often does) happen to individuals with Alzheimer's disease.

In 1988, apparently before any symptoms of Alzheimer's disease had appeared, Ms. M asked Dr. Gaddy, her physician and also a close family friend, to accompany her to a visit with her estate planning attorney, where she named him as her agent under a durable power of attorney.

In the mid-1990's, Ms. M began to show symptoms of dementia, and Dr. Gaddy took steps to provide in home care for her. He also had her examined by a Columbia neurologist, who made the initial diagnosis of Alzheimer's disease.

Ms. M's relationship with her family was very distant and she had little or no contact with them until March, 1999, when two third cousins of hers visited her and took her to see a Columbia attorney, where she signed a new power of attorney naming the third cousins as her agents. The cousins did not tell the attorney, who had never seen Ms. M before, of her Alzheimer's disease, and the court notes that the cousins had to remind Ms. M of the purpose of the visit to the attorney several times on the way to Columbia.

Upon their return to Winnsboro, the cousins prohibited Dr. Gaddy from contacting Ms. M and even threatened him with arrest if he visited her.

Dr. Gaddy brought suit three days later to invalidate the new power of attorney.

The suit went to trial in February, 2001 and in May, 2001, after a four day trial, the trial court issued an order in Dr. Gaddy's favor invalidating the new power of attorney. The Court of Appeals decision was issued in May, 2004 and further appeal to the Supreme Court of South Carolina is still possible at this writing.

**Competency: The Main Act.** Of course, the case concerns the matter of competency, which is always a difficult issue, even in the best of circumstances.

The decision gives some fascinating insight into how the issue of competency might be approached in connection with an Alzheimer's patient. I'll discuss a few of these briefly.

**The Doctors.** During the trial, some five physicians testified, including three neurologists, and the court placed great reliance on medical testimony in deciding the competency issue.

**Proximity in Time of Examination.** The Court placed the greatest reliance on the doctors who had examined Ms. M closest in time to the execution of the power of attorney in question.

**Qualification.** The Court seemed to place greatest reliance on the neurologists, and indicated (more or less) that it agreed with one of the other doctors, an internist, who admitted that she had "less expertise" than a neurologist in evaluating a patient's mental status. I would also suggest that a psychiatrist is often helpful on competency issues regarding elderly persons, but that the neurologist may be an even more pertinent witness, especially when, as here, the competency problem (dementia) is of a physical nature.

**History.** The Court more or less disregarded the third neurologist's initial statement that Ms. M was competent and found it significant that he had never reviewed her medical records nor the records of the other neurologists. This would indicate that the Court felt that the medical history, and not just a "snapshot", was essential in determining the competency of an Alzheimer's patient.

**Anecdotal Evidence.** Several kinds of anecdotal evidence, meaning non-medical evidence, usually in the form of histories of episodes of the Alzheimer's patient's behavior, were considered by the Court.

**Friends.** Our own Judge Frank Eppes testified to Ms. M's failure to maintain her home, her confusion, her inability to recognize him, and her inability to understand legal matters. The Court also considered similar testimony from a friend and one of Ms. M's caretakers. It is clear that the Court placed reliance on this testimony, and it is probably important to note that having it presented by a person credible to the Court (for example, a member of the judiciary), probably affects the weight that will be placed on it.

**Ms. M's testimony.** Interestingly, even Ms. M testified and the court also appears to place much reliance on the cognitive problems revealed by her testimony, suggesting that the court may have felt free to disregard some of the medical evidence had she testified in a competent manner.

It is almost alarming to note that without all of this evidence, it is virtually certain that the third cousins would have remained in control of Ms. M's affairs.

**Lucid Moments.** One of the doctor's testimony contained a detailed discussion of the matter of "lucid moments" which is especially interesting in view of how often it is asserted that such moments might allow execution of a will or other document, even by an ostensibly incompetent individual. The court recognized and more or less adopted the point of view that the dementia that results from Alzheimer's disease is a permanent condition, and consequently, a "lucid moment" more or less doesn't happen with Alzheimer's disease.

**Tests for Capacity.** The decision describes some of the tests commonly used to diagnose Alzheimer's disease, but the most common was asking a series of simple and very straightforward questions, such as who the person was, where they are, what the date is, and so forth.

**The Legal Standard.** The Court affirmed the familiar legal principle that "in order to execute or revoke a valid power of attorney, the principal must possess contractual capacity", and defined "contractual capacity" as "the ability to understand in a meaningful way, at the time the contract is executed, the nature, scope, and effect of the contract."

Interestingly, the Court declared that the nature of Alzheimer's disease as a "permanent" and "chronic" mental condition made the testimony of the physicians as to Ms. M's prior mental condition relevant.

The Court also noted testimony to the effect that a person with dementia resulting from Alzheimer's disease could appear normal, when in fact, they were unable to understand business and legal matters or make rational decisions.

**Planning Reminders.** The decision provides useful information for attorneys and clients dealing with Alzheimer's disease.

**Do Your Planning Ahead of Time.** The planning that Ms. M did long before her Alzheimer's disease developed was the planning that ultimately was effective. I can't say it often enough: do your planning now, before you really need it.

**Opportunists.** In most families, there are opportunists who are tempted to seize control of a situation, whether or not planning has occurred. Of course, the less that the Alzheimer's patient has planned for herself, the greater the opportunity. As Ms. M's case illustrates, the presence of significant wealth (not specifically mentioned, but apparently present) creates an incentive, in this case drawing third cousins to inject themselves in the situation.

**Don't be Reluctant to Document Competency (or the lack thereof).** One of the lessons of Ms. M's case is something that most elder law attorneys know quite well: competency is a difficult issue, even in the best of circumstances. Don't be reluctant to request a medical opinion as to a client's capacity where it even might be important.

**Importance of Powers of Attorney.** More than anything else, this case illustrates the importance of a power of attorney for anyone who wants to make their own decisions about how

their affairs will be handled in the event of their incapacity. It's quite obvious that even with a lot of planning and attention from a very capable friend and physician (Dr. Gaddy), Ms. M barely escaped the attempt by her third cousins to seize control of her affairs.

**The Moral of the Story.** One of the morals of this story (and there probably are many) is to do your planning, do it early, and document it thoroughly. Even if you do this, watch your back.