Expert Witness Testimony in Conservatorship Proceedings

Jerrold A. Adkins, DO
Fellow in Forensic Psychiatry

J. Richard Ciccone, MD
Professor of Psychiatry and Director

Steinberg Psychiatry and the Law Program
University of Rochester Medical Center
Rochester, NY

Physician Evaluators of Mental Fitness for the Purpose of Conservatorship Are Required to Be Unbiased and Neutral

In the *Matter of Campbell*, 666 S.E.2d 908 (S.C. 2008), the Supreme Court of South Carolina found that expert witnesses appointed to evaluate mental competency for the purpose of determining conservatorship need not be "disinterested parties" but must be "unbiased"—that is, be able to render an objective opinion that considers the best interests of the examinee.

Facts of the Case

Mary Schuyler Campbell (Daughter) petitioned the Cherokee County probate court of South Carolina to be appointed as conservator of Betsy M. Campbell (Mother) and her financial assets. Daughter made the following claims: Mother was no longer mentally capable of caring for herself or her assets because of dementia, and Mother's assets were being reduced because of the undue influence of her mother's financial advisor, William Brown.

Mother responded that she could manage her own financial affairs and did not need a conservator. However, if the probate court found that Mother needed a conservator, she requested that Mr. Brown be appointed.

In April 2002, Mother designated two physicians, lifelong friends as well as treating physicians, as expert witnesses to testify on her behalf regarding her mental fitness to manage her financial affairs. Shortly after, while in Greenville on other matters, Mother invited both expert witnesses and their wives to dinner to socialize and to evaluate her mental fitness. Mother's counsel provided questions that the expert witnesses could expect to be asked in court and guided their examinations.

In August 2002, the probate court appointed the two expert witnesses selected by Mother based on communications between the judge and Mother's counsel that did not include Daughter's counsel. Within a week, Mother flew both expert witnesses and Mr. Brown by private jet to Florida. They met with Mother and her psychiatrist.

Daughter and her counsel were not aware that the probate court planned to appoint the examiners until two days after their appointment. Daughter immediately filed a motion objecting to the appointment of Mother's lifelong friends as expert witnesses. Daughter argued that state statute requires that expert witnesses appointed to evaluate mental competency for the purpose of conservatorship must be "disinterested parties" and that the requirement precluded the appointment of these particular expert witnesses.

The hearing to address Mother's need for a conservator was held in October 2002. The probate judge denied Daughter's motion to reconsider the appointment of the expert witnesses. The judge ruled that the state statute did not require the witnesses to be disinterested parties and that he believed the two expert witnesses were qualified because they were well known to the court as "outstanding physicians." Daughter and her counsel requested that the probate judge recuse himself from the case on the grounds that the judge had engaged in *ex parte* communication with Mother's counsel and had directed unfavorable remarks toward Daughter's counsel.

In addition, Daughter's counsel objected to continuing the hearing because he believed the purpose of the hearing was only to address Daughter's motion objecting to the appointment of these expert witnesses. The judge overruled the objections and proceeded with the hearing. He allowed the two expert witnesses to testify that Mother was mentally competent to handle her financial affairs on the basis of their personal relationships with Mother and their interactions with Mother and her psychiatrist. They testified that they had performed no medical or psychological examinations of Mother to reach their conclusions. The probate court dismissed Daughter's petition to have herself appointed as Mother's conservator.

Daughter appealed to the circuit court, arguing that the probate court had erred on four counts:

> The appointed expert witnesses were the product of *ex parte* communication.

The expert witnesses were not "disinterested parties," as required by state statute.

The judge failed to recuse himself from the hearing.

The judge found that Mother was mentally competent to manage her financial affairs.

The circuit court agreed with Daughter's claim that state statute did require that expert witnesses be disinterested parties. The circuit court also found that the probate judge should have recused himself from the hearing.

The circuit court set aside the appointment of the expert witnesses and the probate court's dismissal of Daughter's petition for conservatorship. They remanded the case to the Spartanburg County probate court for resolution.

Mother appealed to the court of appeals, which affirmed the decision of the circuit court. The Supreme Court of South Carolina granted *certiorari* to address the meaning of the state statute requiring that examiners be disinterested parties.

Ruling and Reasoning

The Supreme Court of South Carolina agreed in principal with the findings of both the circuit court and the court of appeals but disagreed with the interpretation by both courts of the S.C. Code Ann. § 62-5-407 (2008), finding that it does not implicitly require that the court-appointed expert witnesses be "disinterested parties" but rather "unbiased"—that is, neutral and objective examiners who are capable of rendering an opinion to the probate court that considers the best interest of the allegedly incompetent party.

The court found that state law gave the probate court discretion with the best interest of the allegedly incapacitated person in mind. There was no requirement for the evaluators to be disinterested. In some cases, it may be preferable that a physician familiar with the individual perform the evaluation. The expert witnesses appointed by the probate court were not unbiased. They had been paid for their expert witness work by Mother and coached by Mother's counsel.

As an aside, the court of appeals found the recusal of the probate judge to be "moot" because of his death before the appeal; however, the Supreme Court disagreed and upheld the circuit court's order of recusal. They based this finding on the evidence of the probate judge's *ex parte* communications and disparaging remarks to Daughter's counsel.

Discussion

Conservatorship is but one term used to describe surrogate decision-making; other terms include guardianship, interdiction committee, curator, fiduciary, visitor, public trustee, and next friend. There are many types of guardianship, including general guardian, guardian of the estate, and guardian of the person.

Legal approaches to guardianship can be traced to Egyptian and Greek legal writings. Many of our current approaches to guardianship are derived from Roman law. After the fall of the Roman Empire, English rules on guardianship evolved through the Visigothic Code (drafted between 466 and 485 CE), to the English guardianship statute *DePraerogativa Regis* created between 1250 and 1290 CE, to the commentary of Lord Coke in the early 17th Century. American guardianship law has its roots in colonial law. In colonial times, the expectation was that the immediate family would care for the incompetent individual. The colony had the ability to act to protect the interest of the incompetent if necessary (Johns AF: Ten years after: where is the constitutional crisis with procedural safeguards and due process in guardianship adjudication? *Elder Law J* 7:33–152, 1999).

In 1987, the Associated Press released its report, "Guardians of the Elderly: An Ailing System," which attacked the legal determination of guardianship and administration of the guardianship system in the United States. The report found that courts "routinely take the word of guardians and attorneys without independent checking or full hearings." In 1988, the American Bar Association responded with the Wingsspread Conference Recommendations. Hurme and Wood reviewed the recommendations and suggested ways for effective monitoring of the guardianship system and ways to standardize the training for judges and guardians and described the role of robust periodic court review. In addition, they proposed a tribunal alternative to court-determined guardianship (Hurme SB, Wood E: Guardian accountability then and now: tracing tenets for an active court role. *Stetson L Rev* 31:867–940, 2001).

The role of the expert witness was explored by Margaret Krasik who highlighted the views of Isaac Ray who argued for the importance of science and

medical expert testimony in the determination of guardianship (Krasik MK: The lights of science and experience: historical perspectives on legal attitudes toward the role of medical expertise in guardianship of the elderly. *Am J Legal Hist* 33:201–40, 1989).

With the population of the United States aging, it becomes increasingly important for forensic psychiatrists to focus their attention on guardianship concerns. This case underscores the importance of the expert witness's need to "strive for objectivity" (Am Acad Psychiatry Law: *Ethics Guidelines for the Practice of Forensic Psychiatry.* Available at http://www.aapl.org/ethics.htm. Accessed January 15, 2010).

Disclosures of financial or other conflicts of interest: None.

Disclosure of Mental Health Records

Timothy Beal, MD
Fellow in Forensic Psychiatry

Joshua C. W. Jones, MD
Director of Education

Department of Psychiatry
Steinberg Psychiatry and Law Program
University of Rochester School of Medicine and Dentistry
Rochester, NY

Courts Have a Gate-Keeping Role in Determining How Much of a Victim's Mental Health Records to Release to Defendants

In *State of Connecticut v. Kemah*, 957 A.2d 852 (Conn. 2008), the Connecticut Supreme Court reversed the trial court's decision to grant disclosure of the complainant's mental health records to the defendant. The defendant was charged with sexual assault and argued that, under Connecticut General Statutes, there was no initial gate-keeping role for the court because the complainant had waived confidentiality of her records to the prosecution and the police. The prosecution appealed and was granted an interlocutory order to the Connecticut Supreme Court on the basis that this legal issue is a matter of substantial public interest.

Facts of the Case

On December 8, 2004, the Connecticut State Police received a report of suspected sexual abuse at The Learning Clinic, a private residential school for children with emotional and behavioral problems. A 16-year-old female student claimed that she had been sexually involved with a male staff member, Ballah Kemah. As part of the police investigation, the complainant told an officer that she was at The Learning Clinic because of past drug use and that she was bipolar and had manic episodes. The State charged Mr. Kemah with one count of sexual assault in the second degree and one count of sexual assault in the fourth degree.

Mr. Kemah filed a motion for disclosure of the complainant's confidential mental health and school records. He asserted that the police and the state's attorney had been given access to the complainant's records and that it was his good-faith belief that the complainant had consented to such access. Mr. Kemah reported that the state had provided him with some confidential records, but had refused to disclose all such records, because an *in camera* review by the trial court was necessary in this case, pursuant to *State v. Esposito*, 471 A.2d 949 (Conn. 1984). Mr. Kemah contended that, under a line of appellate court cases, the *Esposito* "gate-keeping function" did not apply in the present case because the complainant had waived her right to confidentiality.

Mr. Kemah submitted as evidence of the complainant's consent three written releases: a release authorizing Day Kimball Hospital to disclose "any and all records pertaining to [the complainant's] treatment" to the police for purposes of "criminal investigation"; a release authorizing The Learning Clinic to disclose the complainant's "psychiatric/therapy records" to the police for purposes of "criminal investigation"; and a release authorizing The Learning Clinic to release "all information that you may have concerning [the complainant]. . .and [her] medical records, and psychological records including those of a confidential or privileged nature" to the office of the state's attorney. Mr. Kemah argued that disclosure of these records to him was necessary to protect his right to prepare a defense.

The trial court granted his motion for disclosure with the following proposition:

> Where the state's complaining witness has waived her right to confidentiality in "any and all information" concerning the witness and her medical and psychological records, including those of a confidential or privileged nature, and the records have been directly turned over to the prosecutor's office, there is no initial gate-keeping role for the court and the records should be disclosed to the defendant.