and the right to representation by counsel (*Long* and *Vitek)*. However unlike in *Vitek*, where there was a finding of a right to an adversary hearing before an independent decision maker, the Supreme Court of Connecticut held that a hearing before the Psychiatric Security Review Board was constitutionally sound. The idea was that the public must be protected from dangerous insanity acquittees, and the board was in the best position to provide that security. The Supreme Court of Connecticut acknowledged that this was in contrast to the treatment of civil committees. In the latter, the legislature had given physicians authority to form opinions about the patients and inform the probate court whether a less restrictive placement is available.

In *Addington v. Texas*, the U.S. Supreme Court held that a clear and convincing evidence standard, with the state having the burden of proof, is the constitutional minimum required by the Fourteenth Amendment in a civil commitment proceeding. The *Addington* Court reasoned that a lower standard jeopardizes individual liberty interest, while a higher standard is too restrictive to the state and poses a barrier to psychiatric treatment. In the hearing on his first motion to dismiss, Long referenced *State v. Metz*, 645 A.2d 965 (Conn. 1994), which interpreted Connecticut statue § 17–593c as requiring a burden of proof similar to that in *Addington*: clear and convincing evidence of mental illness and dangerousness to extend the commitment of an insanity acquittee.

The *Long* decision is in keeping with the public's intense and sometimes unreasonable fear that insanity acquittees will commit further violent crimes. Although the recidivism rate for insanity acquittees is substantially lower than that for released prisoners, the public appears to have taken a zero-tolerance stance. There is almost an implicit contract that in exchange for the NGRI finding, no further criminal conduct will be accepted.

Disclosures of financial or other potential conflicts of interest: None.

Undue Influence: Untangling the Web

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The Wyoming Supreme Court Upheld a Trial Court Ruling That the Testator's Stepdaughter and Her Husband Exercised Undue Influence in Procuring Testamentary Documents That Disinherited His Son and Made Them the Primary Beneficiaries of His Estate

In *Kelly v. McNeel*, 250 P.3d 1105 (Wyo. 2011), a testator's stepdaughter and her husband (the Kellys), appealed orders from the District Court of Sublette County finding that they had obtained their interest in his estate through undue influence and by removing Mrs. Kelly as guardian. The Wyoming Supreme Court upheld both orders.

Facts of the Case

Robert Lee McNeel, a 59-year-old widower, married Paula Webb in 1985. They had a son, Roby McNeel, in 1987. In 1997, Mr. McNeel's primary care physician suspected that he had an organic brain syndrome. By 2001, Mr. McNeel was taking donepezil (Aricept) for Alzheimer's disease. In 2002, he began accusing his wife of infidelity and claiming that Roby was not his biological son.

In February 2003, Mr. McNeel filed for divorce shortly after his stepdaughter, Roberta Jenkin, from his prior marriage, which lasted 36 years, moved to his ranch. Mrs. McNeel alleged that Mr. McNeel lacked the capacity to divorce. Mr. McNeel's attorney retained Dr. Bruce Kahn to examine Mr. McNeel. Dr. Kahn's diagnosis was mild dementia with delusions, and he concluded that Mr. McNeel had a delusional belief that Roby was not his biological son, despite DNA evidence to the contrary.

In June 2003, Mr. McNeel amended his trust. He disinherited his wife and named Roby as the sole beneficiary of his estate. In July 2003, Eva Kelly (Mr. McNeel's other stepdaughter and Mrs. Jenkin's sister) returned to live with her father after he told her that he needed help with the ranch. She was joined by her husband in 2005. Shortly after Mrs. Kelly moved in, Roby McNeel, who was then 15, left the home. He believed the two sisters were monitoring him and listening in on his conversations.

Mr. McNeel's house burned down in January 2005. A few days later, Mr. Kelly drove Mr. McNeel to an attorney's office to change his estate plan, dividing the estate between Mrs. Kelly and Mrs. Jenkins equally. On January 20, 2005, at Mr. McNeel's request, Mr. Kelly called the attorney to ask him to

change the plan to allocate two-thirds of the estate to Mrs. Kelly and one-third to Mrs. Jenkins.

On January 25, 2005, Mr. McNeel signed the trust amendment and will explicitly disinheriting his son and leaving two-thirds of his estate to Mrs. Kelly and one-third to Mrs. Jenkins. Mr. McNeel signed these documents over his court-appointed guardian's and conservator's objections. (The guardian had been appointed earlier in the proceedings at Mr. McNeel's request.)

In March 2005, Mr. McNeel was psychiatrically hospitalized after Roby McNeel found him walking down the road in a confused state. In July 2005, Mrs. Kelly became Mr. McNeel's guardian and conservator. Mr. McNeel was placed in a secure treatment facility. The Kellys built a $500,000 house on the ranch, using Mr. McNeel's funds. The Kellys lived in the new house, charged expenses to the trust account, and paid Mr. Kelly a salary from the trust account.

In 2007, Mr. and Mrs. Kelly filed a declaratory judgment action against Roby McNeel in the District Court of Sublette County. They sought (in relevant part) an order holding the 2005 trust amendment and will valid. They alleged that Roby McNeel had accused them of exerting undue influence in the guardianship proceeding. Roby McNeel responded in a counterclaim that the Kellys obtained their interest in the McNeel property by exercising undue influence over Mr. McNeel at a time when he lacked contractual or testamentary capacity. He sought an order declaring the 2005 documents invalid.

The district court ruled that Roby McNeel did not establish by a preponderance of the evidence that Mr. McNeel lacked testamentary capacity on January 25, 2005. However, the court found that he had established by clear proof that the Kellys exercised undue influence over Mr. McNeel in executing the 2005 trust amendment and will.

The court held invalid the January 2005 trust amendment and will, leaving intact the terms of the 2003 living trust naming Roby McNeel as sole beneficiary. The district court also entered an order removing Mrs. Kelly as guardian and conservator and substituting Roby McNeel. The Kellys appealed both of the district court's orders.

Ruling and Reasoning

The Wyoming Supreme Court affirmed both of the district court's orders. Findings of fact are set aside only if clearly erroneous. A finding is clearly erroneous if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (*Kelly*, p 1110).

The court found that Roby McNeel proved the four elements of undue influence: the relations between the Kellys and Mr. McNeel afforded them an opportunity to control the testamentary act; Mr. McNeel's condition was such as to permit subversion of his freedom of will; there was activity on the part of the Kellys; and the Kellys unduly profited as beneficiaries of the will and trust. The contesting party bears the burden of proving undue influence by presenting evidence "clearly demonstrating that the testator's free agency was destroyed and his volition was substituted for that of another" (*Kelly*, p 1110). The court commented, "In Wyoming, a will deliberately made by a person of sound mind will not be lightly set aside" (*Kelly*, p 1110).

The Kellys had the opportunity to exert undue influence (first element) and engaged in activity (third element). These elements were proved by the facts that the Kellys moved to Mr. McNeel's ranch, became his primary caregivers, played an active role in his divorce, and played an active role in the 2005 trust amendment and will. The court found that the testamentary act was unnatural in light of Mr. McNeel's prior good relationship with his son. The court noted that there was evidence that Mrs. Kelly believed that Mr. McNeel had started having an affair with Paula Webb while her mother was dying of cancer and that Mrs. Kelly attempted to prevent the marriage by telling Mr. Kelly that Ms. Webb was having affairs with other men. The court opined that Mrs. Kelly's statements created the seed for the delusion that Roby was not Mr. McNeel's son.

Mr. McNeel's condition permitted the subversion of his free will, as evidenced by medical opinions that Mr. McNeel had Alzheimer's disease with delusions. The court rejected the Kellys' argument that Mr. McNeel knew the value of his ranch, knew that Roby McNeel was his biological son, and was generally aware of his affairs from 2003 through 2005, finding medical evidence of dementia and the testimony of close contacts of Mr. McNeel to be more reliable. The Kellys unduly profited from the relationship, both under the new estate plan and by using Mrs. Kelly's position as guardian and conservator to pay personal expenses with Mr. McNeel's funds.

With regard to the removal of Mrs. Kelly as guardian and conservator, the Wyoming Supreme Court

affirmed the district court's order. Wyoming law calls for the removal of a guardian upon a finding that the guardian is not acting in the best interest of the ward.

Discussion

Undue influence is "any act of persuasion that overcomes the free will and judgment of another" (Lehman J, Phelps S: *West's Encyclopedia of American Law*. Detroit, MI: Thomson/Gale, 2005). Undue influence occurs when a vulnerable person's will is subjugated to the desires of another person. According to a recent MetLife study, senior citizens lost an estimated 2.9 billion dollars to elder financial abuse in 2010, up from 2.6 billion in 2008 (The MetLife study of elder financial abuse: crimes of occasion, desperation, and predation against America's elders, 2011).

As the court noted, undue influence is "seldom susceptible of direct proof" (*Kelly*, p 1113). Rather, undue influence is usually proved by evidence of the victim's susceptibility coupled with circumstantial evidence that the perpetrator had the opportunity and inclination to exert undue influence.

Forensic psychiatrists have an important but limited role in undue influence cases. Medical evidence is often relevant in establishing susceptibility to undue influence. Further, psychiatric testimony can sometimes be helpful in discerning the presence of relationship factors that can give rise to undue influence, such as isolating the victim, fostering dependence, and fostering a sense of vulnerability and powerlessness.

Treatment records and expert opinion played an important role in establishing Mr. McNeel's vulnerability to undue influence. Medical opinion established that Mr. McNeel had Alzheimer's dementia with paranoid delusional beliefs. The evidence used by the district court to find that the Kellys exerted undue influence on Mr. McNeel is consistent with red flags that have been identified in the psychiatric literature: Mrs. Kelly re-established a relationship with her stepfather after being estranged for 18 years. Mr. McNeel began to depend increasingly on the Kellys to manage his finances and to assist him in the divorce proceedings. Mrs. Kelly became Mr. McNeel's guardian.

The prevalence of undue influence is expected to grow in light of the aging population and the relative concentration of wealth in homes, retirement accounts, and savings. *Kelly v. McNeel* illustrates the complex family dynamics often present in situations of undue influence and the role of both expert and lay witnesses in these cases.

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Competency to Proceed *Pro Se*

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Eighth Circuit Court of Appeals Upholds District Court's Ruling That Defendant Was Competent to Proceed *Pro Se* for Trial and Sentencing

In *United States v. Turner*, 644 F.3d 713 (8th Cir. 2011), the Eighth Circuit Court of Appeals upheld a district court ruling that a mentally ill defendant had waived his right to counsel knowingly and voluntarily. The defendant, Samuel Turner, argued that the district court did not sufficiently question him about his competency to proceed *pro se*, erred by failing to require a higher level of competency to represent himself than to stand trial, and erred by not holding *sua sponte* a competency hearing during trial in response to Mr. Turner's bizarre behavior.

Facts of the Case

In July 2009, Samuel Turner, a convicted felon, was charged in federal court with being a felon in possession of a firearm or ammunition. A pretrial services report revealed that he had a history of schizophrenia. Three days before trial, he informed the court that he would represent himself. The district court inquired whether the defense attorney doubted Mr. Turner's mental capacity. The defense attorney replied that, despite Mr. Turner's history of schizophrenia, ". . .he understands. . .when we talk about his case, he asks relevant questions, has relevant concerns" (*Turner*, p 717).

Mr. Turner told the court that he wished to proceed *pro se* because "I feel I can defend myself" (*Turner*, p 717). He stated that his defense attorney "doesn't feel that I have a good defense" (*Turner*, p