

that measures basic comprehension of *Miranda* rights.

Mr. Robinson also argued that the trial court had relied on evidence from an unreliable and biased witness. He asked the appeals court to overturn his conviction, claiming that without the testimony of this witness, there was insufficient evidence for a guilty finding. The court held that the determination of the credibility of the witness fell to the fact-finder in the trial court, the jury. As the appeals court did not find anything inherently incredible about the testimony of the witness, it found no basis for overturning the decision of the jury.

Discussion

Miranda v. Arizona established procedural safeguards to protect an individual's right against self-incrimination and right to counsel. This case highlights the reasoning used by the courts in determining whether a defendant's waiver of *Miranda* rights is knowing, intelligent, and voluntary. In deciding whether Mr. Robinson's confession met these conditions, the appeals court reviewed evidence related to his intellectual functioning, prior experience with the legal system, scores on Grisso's Instruments for Assessing Understanding and Appreciation of *Miranda* Rights, physical and emotional condition at the time of his confession, and the information presented to him by the detectives who interviewed him. Ultimately, the court identified the videotaped confession as the most compelling evidence that the defendant had, in fact, made a knowing, intelligent, and voluntary waiver of his rights. It pointed to the video as evidence that the appellant could understand complex words and concepts, and that he was not under duress at the time of his confession. It also noted his high score on the *Miranda* assessment instruments as further evidence of his comprehension of *Miranda* rights.

Forensic practitioners should take special note in this case of the weight the courts ascribed to the videotaped interview. The trial court found that the testimony of the experts was informative, as experts on both sides agreed that Mr. Robinson had learning disabilities, but that the videotaped confession was the "best evidence" of his mental condition. The case makes no mention of how or whether the appellant's experts tried to explain the discrepancies between their findings on cognitive testing (he reportedly bordered on mild mental retardation in reading and

spelling) and his apparent abilities during his videotaped interview. Given the potential power of a videotaped confession, it appears critical for the forensic practitioner to view such materials when formulating an opinion about competency.

The forensic experts on both sides of this case utilized the Grisso *Miranda* Instruments in assessing the competency of the appellant to waive *Miranda* rights. This instrument comprises a series of standardized instruments that assess an evaluatee's abilities to understand and appreciate the elements of the *Miranda* warnings. The instruments primarily address the "knowing" and "intelligent" aspects of waiving *Miranda* rights, as opposed to the "voluntary" component. Given the common usage of these instruments, the forensic practitioner should be familiar with their strengths and limitations.

Guardianship and Autonomy in Decision-Making

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It Is Improper to Remove a Husband as Guardian Unless It Is Determined to Be in the Best Interest of the Ward and Based on a Firm Factual Foundation of Conflict of Interest

In the case of *In re Penning*, 930 A.2d 144 (D.C. 2007), the District of Columbia Court of Appeals addressed the appointment of a guardian and conservator over the objection of an individual when there may have been a conflict of interest, and in so doing, examined evidentiary requirements to ensure that appointment of these decision-makers is in the best interests of the individual. In addition, the appellate court examined the lower court's decision on conflict of interest grounds to disqualify a law firm from serving as counsel. The appellate court held that the lower court abused its discretion in both areas because it made its rulings without a "firm factual foundation" and relied on suspicion alone.

Facts of the Case

Ann Cooper Penning, a retired lawyer, moved to Malaga, Spain, in the late 1980s. In January 2002, Ms. Penning was given a diagnosis of probable Alzheimer's disease by a neurologist in the United States. Six months later, while in Spain, Ms. Penning was hospitalized for gastroenteritis and dementia with "severe cognitive deterioration" that appeared compatible with Alzheimer's disease. Her brother, John Cooper, upon seeing her condition when he visited her in Spain, filed an intervention petition in the Superior Court of the District of Columbia for guardianship and conservatorship for property she held in the District of Columbia. He also filed a "petition for declaration of incompetence" in the Lower Court Number Two of Torrox in Malaga, Spain.

In January 2003, Ms. Penning married her long-time friend Ugo Gramegna. Around that time, she hired counsel from the law firm Hughes & Bentzen to represent her in dismissing her brother's petitions. Ms. Penning described a "hostile and disagreeable" relationship with her brother, denied that she was incapacitated or in need of a guardian or conservator, and stated that, if in the future she should require such assistance, her husband, Mr. Gramegna, could provide those services. She also executed a durable power of attorney designating Mr. Gramegna as her primary attorney-in-fact and Hughes & Bentzen as secondary attorney-in-fact. Furthermore, she executed a deed transferring her property in the District of Columbia to ACPG, LLC, an entity created by Hughes & Bentzen to hold her assets.

In July 2003, the lower court in Spain declared Ms. Penning incompetent but refused to appoint Mr. Gramegna as "tutor" (which closely approximates a guardian and conservator) on grounds that he had a "conflict of interest." In October 2003, because of complications in filings, the D.C. Superior Court dismissed Mr. Cooper's petition. He moved to set aside the dismissal order, alleging that Mr. Gramegna, not Ms. Penning, had hired Hughes & Bentzen and set up the limited liability company for his personal gain. Based on Mr. Cooper's motion, the superior court appointed an independent counsel, Robert Gazzola, for Ms. Penning, to represent her and to investigate Mr. Cooper's allegations.

In early 2004, Mr. Gazzola reported to the superior court that Ms. Penning appeared confused about several matters, including the duration of her mar-

riage. Thus, he requested that his appointment as her counsel be continued and that Hughes & Bentzen be prevented from taking any further action with regard to her property. Elizabeth Hughes (from Hughes & Bentzen) argued that Ms. Penning was not incapacitated at the time she hired the firm and that she had repeatedly informed Ms. Hughes of her wishes to remain in Spain with her husband.

At an *ex parte* hearing held in February 2004, Mr. Gazzola asked the court to disqualify Hughes & Bentzen from representing Ms. Penning due to an "appearance of a conflict of interest," based on his assumption that Mr. Gramegna had served as intermediary between her and Hughes & Bentzen. He also asserted that she was unable to function independently without the "assistance and/or influence" of Mr. Gramegna; therefore it was "highly questionable" whether she could work with Hughes & Bentzen without Mr. Gramegna's involvement. George Hughes (also of Hughes & Bentzen) argued that Mr. Gramegna had not acted as an intermediary and did not influence their actions as Ms. Penning's counsel. He presented an affidavit from her physician and Spanish legal counsel stating that she, at the time she retained Hughes & Bentzen (around January 2003), was not incapacitated, had been able to retain the firm, agreed to have her property incorporated into a company, wanted to retain ownership of her assets, and in the event that the superior court appointed a conservator, wanted Mr. Gramegna to provide those services.

After hearing the arguments, the superior court reinstated Mr. Cooper's petition and removed Hughes & Bentzen as Ms. Penning's counsel. Although the court could not find any wrongdoing, it questioned whether she had the capacity to make the decisions and the "sophistication" to have her property transferred into a separate company at the time of making these decisions. In addition, the court was concerned that Hughes & Bentzen had an "apparent conflict of interest." The court based this decision in part on the assumption that Hughes & Bentzen held the same position as Mr. Gramegna, whom the Spanish court had seen to be "highly suspect." The court thus appointed Iris McCollum Green as temporary conservator to help secure Ms. Penning's property in the District of Columbia.

On July 21, 2004, the Provincial Court of Malaga reversed the Spanish lower court's decision, holding that although Ms. Penning had been "totally dis-

abled,” the lower court had erred in its decision to refuse to appoint Mr. Gramegna as her tutor, given that there was not enough evidence to substantiate the allegations that she was incapacitated on the day of her wedding, or that he had a conflict of interest in serving as her tutor. In October 2004, he was appointed as her tutor by the Spanish lower court. He then petitioned the D.C. Superior Court to defer to the Spanish court’s decision and appoint him as conservator instead of Ms. Green. In a hearing on January 19, 2005, Mr. Gazzola and others argued that there was a great deal of evidence, including actual evidentiary testimony from the Spanish lower court, of an apparent conflict of interest between Mr. Gramegna and Ms. Penning. The superior court subsequently ruled that Ms. Green would continue to serve as temporary conservator. On March 16, 2005, the superior court ordered Ms. Green to be permanent conservator, directed her to dissolve the limited liability corporation, and ordered the LLC property to be transferred to Ms. Penning so that it could be controlled by Ms. Green. The superior court asserted that Mr. Gramegna’s actions were “suspicious and indicative of at least an apparent conflict of interest,” and that Ms. Penning’s capacity to make decisions about her marriage and her property at the time in question was suspect. Mr. Gramegna, as well as Hughes & Bentzen, appealed on the claim that the lower court had abused its discretion when it based these decisions on “apparent” conflicts of interest.

Ruling

The court of appeals found that the lower court had abused its discretion in both situations. The lower court’s rulings were reversed and remanded for further proceedings to determine, on the basis of a sound evidentiary foundation, whether it was in Ms. Penning’s best interest to appoint Mr. Gramegna and whether Hughes & Bentzen had a clear conflict of interest that justified the order that removed them as counsel.

Reasoning

Based on the Spanish appellate court’s ruling of Mr. Gramegna as Ms. Penning’s tutor, his designation by her in a durable power of attorney, and his status as her husband (while Ms. Green had no relationship to her), the appellate court determined that he was entitled to priority consideration under the District of Columbia Guardianship, Protective Proceedings, and Durable Power of Attorney Act of

1986 (referred to as the Guardianship Act). The court of appeals acknowledged that, according to *In re Orshansky*, 804 A.2d 1077 (D.C. 2002), the court may pass over a person’s having priority if it is acting in the best interest of the protected individual; but the decision in empowering a conservator must be based on “an elevated benchmark of informed and careful decision making that is commensurate with the gravity of the decision” (*Orshansky*, pp 1098–9).

In *Penning*, the lower court did not meet this benchmark in making its decision to bypass Mr. Gramegna, given that the lower court’s decision was based on unproven accusations and suspicions of an “apparent” conflict of interest rather than a “firm factual foundation.” Per *Orshansky*, when there is inadequate evidence, the trial court should “undertake a special factual inquiry” before rendering its decision. This “special factual inquiry” should have involved either the appointment of an independent examiner or “visitor” to investigate Ms. Penning’s condition or an evidentiary hearing to assess the allegations made by Mr. Cooper and Mr. Gazzola that she was incapacitated at the time she made the decisions in question. The appointment of Mr. Gazzola as counsel for her was not a suitable substitution for this inquiry. Since the lower court lacked the “firm factual foundation” to justify its rulings, the appellate court concluded that the lower court did not make an adequately informed decision and therefore did not exercise its discretion in appointing Ms. Green as conservator against Ms. Penning’s wishes and those of her husband. The appellate court ruled therefore that reversal of the lower court’s decision was appropriate.

With regard to the removal of Hughes & Bentzen, the appellate court similarly reasoned that the lower court disqualified the firm without basing the findings on fact. Since the allegations made by Mr. Cooper and Mr. Gazzola were denied by Hughes & Bentzen and Mr. Gramegna, an evidentiary hearing should have been held to determine the validity of the allegations. The appellate court affirmed that the trial court had jurisdiction to disqualify counsel based on sound discretion, but it must find that the conflict of interest would prevent counsel from “zealously representing” the individual. In addition, more than a mere possibility of conflict must be demonstrated. The trial court’s concerns that Hughes & Bentzen may have had a conflict of interest legiti-

mately warranted further inquiry, but did not justify disqualification without substantiation.

Discussion

The importance of this case involves matters relevant to autonomy in decision-making. It affirms that courts must respect the decisions that individuals make in choosing who would make their decisions in the event of incapacity and in retaining counsel of their choice to represent them. Individual wishes are generally upheld as long as there is no suspicion of lack of capacity. However, when a named conservator or counsel has an apparent personal interest in controlling the incapacitated individual's assets, such conflicts of interest may be considered in a legal challenge to the ability of a conservator, guardian, or attorney to act in the best interests of the individual, especially when that individual's competence is in question. In this case, the court also affirmed the importance of clearly defined prioritization of parties who may be in line to become a conservator of an incapacitated individual. Although trial courts retain the discretion to bypass individuals with priority if necessary, this decision again must be based on a "firm factual foundation," and not merely suspicions of conflict of interest. This case reflects the legal system's desire to ensure appropriate legal representation and transfer of decision-making authority.

Competence to Plead Guilty and Seek the Death Penalty

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A Competent Defendant May Enter Into a Plea Agreement to Forgo a Jury Trial and Sentencing and Volunteer for the Death Penalty

In *Chapman v. Commonwealth*, 2007 Ky. LEXIS 178 (Ky. 2007), the Supreme Court of Kentucky

affirmed the decision of the Boone circuit court allowing a competent defendant to enter into a plea agreement to forgo a jury trial and sentencing and volunteer for the death penalty. The Kentucky Supreme Court examined the legal standards for competence to waive counsel, to enter a guilty plea, and to seek a punishment of death.

Facts of the Case

In August 2002, Marco Allen Chapman entered the home of Carolyn Marksberry and stabbed her and her three young children, resulting in the death of two of the children. Mr. Chapman told authorities that he "bound Ms. Marksberry with a vacuum cleaner chord and gagged her with duct tape." He then stabbed her and the children. When arrested, Mr. Chapman asked a policeman to "do me a favor and put a bullet in my forehead." The trial court ordered the first of three competency evaluations at the Kentucky Correctional Psychiatric Center (KCPC) during pretrial proceedings. Dr. Steven Free, a psychologist at KCPC, testified that, despite having a history of mental health-related problems, Mr. Chapman was competent to stand trial.

Mr. Chapman wrote the trial court asking to "dismiss his attorneys, waive a jury trial and sentencing, plead guilty to all charges, and be sentenced to death," prompting a second competency evaluation. Dr. Free believed that Mr. Chapman was competent but thought that his legal choices might change with treatment. The trial court ordered the defendant to KCPC for 30 days of treatment and evaluation. A few weeks later, in a third competency hearing, Dr. Free found Mr. Chapman competent. The trial court ruled that he was competent to "fire his attorneys, to plead guilty, and to seek death." Over objections from Mr. Chapman and his former attorneys, the trial court appointed the same lawyers as standby counsel. At sentencing, the trial court acknowledged receiving a psychological report delivered by standby counsel. It had considered psychological evidence in determining competency on all three occasions, but did not consider it as mitigating evidence, citing Mr. Chapman's choice not to present mitigating evidence. He was sentenced to death.

The Department of Public Advocacy filed an appeal on Mr. Chapman's behalf raising numerous claims: (1) the death penalty is unconstitutional; (2) lethal injection and electrocution violate the Eighth Amendment; (3) Kentucky's method of proportion-