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

717). Mr. Turner was strongly encouraged to continue with counsel, which he rejected because he did not believe that his attorney would present an adequate defense. After further discussion, the court ruled that he could proceed *pro se*: "Finding that you are competent, this is an informed decision that you are making. . ." (*Turner*, p 718). The court declined to appoint standby counsel.

During jury selection, Mr. Turner asked religiously themed questions of potential jurors. These included "whether they believed that Jesus forgives sins," "whether Matthew was a saint," and "whether the blood of Jesus washes away sin" (*Turner*, pp 718–9). He used his peremptory strikes to remove three jurors based on their response to his religious questions about forgiveness.

At trial, Mr. Turner appropriately requested witness separation. His opening statement was very brief and centered on an irrelevant, religion-based defense. He reasonably cross-examined five of six prosecution witnesses and asked questions relevant to his case. He raised reasonable objections. He did not testify on his own behalf, and failed to call defense witnesses or to present evidence. He used his closing argument to deliver a religious speech based on forgiveness and mercy. The jury deliberated for 20 minutes and delivered a guilty verdict.

Mr. Turner appeared *pro se* for sentencing. His presentence report verified a history of schizophrenia (with religious delusions) that had resulted in hospitalizations and was sufficiently severe to qualify for Social Security benefits. He had been found competent to stand trial in a previous case.

At sentencing, no parties raised the question of Mr. Turner's competency to stand trial. He was sentenced to the minimum 180 months of incarceration and he appealed.

Ruling and Reasoning

Mr. Turner appealed on three grounds. First, he challenged the district court's determination that his waiver of counsel was voluntary, knowing, and intelligent. Second, he asserted that the district court should have required a higher level of competency to proceed *pro se* than to stand trial. Third, he stated that his bizarre behavior at trial should have warranted a *sua sponte* competency hearing. The court of appeals affirmed the district court's ruling in its entirety and upheld his conviction and sentencing.

Regarding the first question, the Eighth Circuit acknowledged the precedent set in *Godinez v. Moran* (509 U.S. 389 (1993)), that the trial court must be satisfied that the waiver of counsel is knowing and voluntary, and "the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself" (*Godinez*, p 399; emphasis in the original).

The Eight Circuit also cited *Shafer v. Bowersox*, 329 F.3d 637 (8th Cir. 2003), "the Supreme Court has clearly established that the presiding court must inquire into the defendant's understanding of the right and must warn him of the dangers involved to ensure that he has full knowledge of the consequences of proceeding pro se" (*Shafer*, p 647).

The court of appeals found that Mr. Turner's waiver was knowing and voluntary. Before trial, the court questioned him about his reason for representing himself and told him that self-representation was a bad idea. The court of appeals stated, "A defendant's technical legal knowledge is not relevant to an assessment of his knowing exercise of the right to defend himself" (*Turner*, p 722) and further stated the "neither the Supreme Court nor this court has ever adopted a list of essential points that must be conveyed to a defendant in order for a waiver of counsel to be deemed knowing and voluntary" (*Turner*, p 722). The Eighth Circuit found that "the district court adequately warned Mr. Turner of the dangers of self-representation, and did not err in finding that he understood them and knowingly waived his right to counsel" (*Turner*, p 722).

Mr. Turner contended in his second point for appeal that the district court should have required a higher bar to proceed *pro se* than to stand trial. He quoted *Indiana v. Edwards* (554 U.S. 164 (2008)): ". . .ruling that the constitution permits states to insist upon representation by counsel for those competent enough to stand trial but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves" (*Edwards*, p 171). He argued that his questions during *voir dire*, along with his opening and closing statements, were hyper-religious and inappropriate. He believed that his behavior at trial, coupled with his history of mental illness, was sufficient evidence of his lack of competency to proceed *pro se*,

even though he was polite and not disruptive during the trial.

The Eighth Circuit concluded that the finding of competency by the district court was essentially a finding of Mr. Turner's competency to proceed *pro se*, because that was the specific area examined by the judge in finding that he had knowingly and voluntarily waived his right to counsel. Moreover, *Edwards* does not require that a trial judge conduct an inquiry into the competency of every defendant who requests to proceed *pro se* or hold a hearing before to making a competency determination. Further, it was noted that no parties, including Mr. Turner, raised the question of competency at any time, including those with the opportunity to observe and interact with him over an extended period. Therefore, the trial court had not erred when proceeding to trial without a competency hearing.

In his third point for appeal, Mr. Turner asserted that the district court had erred by not ordering, *sua sponte*, a competency hearing after his bizarre behavior in court. The court acknowledged *Vogt v. United States*, 88 F.3d 587 (8th Cir. 1996), which stated that the court "shall order" a competency hearing upon its own motion if "there is reasonable cause to believe" that a defendant is not competent (*Vogt*, p 590). A court "may order" a psychological evaluation before such a hearing. The court of appeals noted, "Not every manifestation of mental illness demonstrates incompetency to stand trial. Neither low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior compels a finding of incompetency" (*Turner*, p 725).

The Eighth Circuit concluded that the district court did not abuse its discretion in failing to order a *sua sponte* competency hearing. His unusual behavior was acknowledged. However, "such behavior does not invariably compel a finding of incompetency" (*Turner*, pp 725–6). The Eighth Circuit used such evidence as the fact that Mr. Turner was polite and respectful, that he invoked the rule on witnesses, that he used cross-examination to his benefit, and that he tried to appeal to the jurors' consciences to forgive him.

Mr. Turner further argued that the court should have ordered a competency evaluation before sentencing. The court of appeals noted that he was given the shortest sentence possible and therefore any error committed by the district court would have been harmless.

Discussion

United States v. Turner highlights some of the most common problems in assessing a mentally ill person's competency to proceed *pro se*. Determining competency to proceed *pro se* may involve a difficult evaluation. Often, defendants requesting to proceed *pro se* do so because of an irrational view of their defense strategy that is unrelated to mental illness. Their viewpoint is further complicated by the lack of an accepted standard for competency to proceed *pro se*, other than that the decision is made knowingly and voluntarily. The forensic clinician evaluating a defendant wishing to represent himself should carefully interview the defendant, assess for symptoms of a present mental condition, evaluate the impact that the symptoms may have on the defendant's decision, and investigate any symptoms that may impair the defendant's knowing and intelligent waiver of counsel. When evaluating an individual for competency to proceed *pro se*, it can be helpful to consult the relevant literature. (Here are some recent resources that can serve as a guide: Knoll JL, Leonard C, Kaufman AR, *et al*: A pilot survey of trial court judges' opinions…*J Am Acad Psychiatry Law* 38:536–9, 2010; Morris DR, Frierson RL: Pro se competence… *J Am Acad Psychiatry Law* 36:551–7, 2008; Mossman D, Noffsinger SG, Ash P *et al*: AAPL practice guideline…*J Am Acad Psychiatry Law* 35:S3–72, 2007.)

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Burden of Proof for Mental Retardation

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Georgia Supreme Court Rules Burden of Proof for Mental Retardation Is Beyond a Reasonable Doubt in a Death Penalty Case

In *Stripling v. State*, 711 S.E.2d 665 (Ga. 2011), a state law requiring that capital murder defendants