

Question 7 Selected Answer #1

1. Yes. The court has authority to ignore Jane's wish in her will to have Mark appointed Alan's guardian for 3) reasons: 1) he is disqualified, 2) he refuses, or 3) it is not in the best interest of the ward. Here, the court could determine that appointment of Mark as the guardian of Alan's estate is not in the best interest of Alan. This could be evidenced by Mark's misapplication/embezzlement of funds or his poor history of money management.
2. In order to resolve the competing requests by Mark and Beth for appointment as guardian, the court will most likely split the proceeding into: 1) guardian of the estate and 2) guardian of the person.

Guardian of the Estate

For a large estate such as the \$2 mill estate left to Alan, the court will look to the best interest of property management and rights. The court will look at factors such as: ability, experience, and education. Here, Mark would most likely not be a good choice as guardian of Alan's estate. His being fired as a trust officer for misapplication of funds shows he is not good in situations involving large sums of money. On the other hand, Beth appears to be the logical choice as she is currently a securities broker who specializes in income-producing investments. Therefore, she has the knowledge, experience and capability to manage a \$2 mill estate. Further, she is likely to make more prudent income-producing investments on behalf of Alan.

Guardian of the Person

A guardian of the person's duty is to care for the basic needs of the ward. Here, Mark is the better choice for many reasons: 1) Jane's wish was for Alan to live with Mark, 2) Alan, who is over the age of 12, petitioned the court to stay with Mark, and 3) Alan would be able to maintain his same school, friends and life with Mark. Beth would not be a good choice. She is out of town 4 or 5 days a week, which would not provide a stable environment for Alan and Alan himself stated that he did not like Beth. The court is more likely to keep Mark as the guardian of Alan's person.

3. Yes. The court is likely to restore the \$50,000 to Alan's estate. The court may, upon finding out of Mark's use of Alan's funds, either involuntarily terminate Mark's position as guardian or provide notice and hearing to terminate upon suspicion of misapplication of funds or embezzlement. As noted, the court will probably maintain Mark as guardian of Alan's person but terminate with respect to the estate. The estate is entitled to the misapplied or embezzled funds. However, as guardian of Alan's person, Mark may petition the court for funds to provide for Alan's care.

END OF EXAM

7)

1. Yes, the court may lawfully ignore Jane's wish in her will to have Mark appointed Alan's guardian. Under Texas law, there is a presumption that a person designated in a will before the need for guardianship arises would be in the best interest of the ward, but the designation is not conclusive. A guardian of the estate or a guardian of the person will be appointed for a ward when there is clear and convincing evidence that doing so is in the best interest of the ward, the property of the ward will be well cared for, and the ward either lacks capacity or is a minor. Further, the determination of who should be guardian can be based upon a preponderance of the evidence that a certain person should be the guardian. Many classes of persons are excluded from being a guardian: persons who lack experience or skill, persons who lack capacity or are minors, persons with adverse interests (such as litigation) to the ward, persons who are excluded from being guardian prior to the time the need arises and persons who have committed notoriously bad acts will usually not be appointed guardian.

In this case, Jane stated in her will that she wants her brother Mark to be the guardian of her minor son Alan in the case that a guardian needs to be appointed. She then died. Her brother Mark currently has great job security, a comfortable home and wife, and the ward, Alan, likes him and would like to live with him. However, Mark has also been fired from a job for mismanaging a customer's trust account. Jane also has a sister, Beth, who is single and is a successful manager of income for clients. She travels out of town frequently. Because Mark was fired for managing other persons' money incorrectly, he probably lacks the experience or skill to manage the \$2,000,000 that was inherited by Alan. Because Beth is a good money manager, naming her as the guardian of the estate would probably be in the best interest of the ward because she is a relative and she will take care of the property properly. Because Mark has conducted activity that might exclude him from being Alan's ward, the designation of Mark as guardian over Alan in her will is not conclusive proof that he should be the guardian.

2. The court will probably make Mark guardian of Alan's person and make Beth guardian of Alan's \$2m estate. The court might also create a limited guardianship. In Texas, any person has standing to bring an action to have a guardian appointed over another person. Under Texas law, a court must determine whether appointing a guardian is in the best interest of the ward, the

ward's property, and that the ward is incapacitated or a minor - these must be proven by clear and convincing evidence. The court may appoint one person to be guardian of the ward's estate and another person to be guardian of the ward's person. Courts in Texas often desire to engage in a 'limited guardianship,' where the ward is still able to manage some tasks on its own behalf. Courts prefer this course of action because the appointment of guardianship takes away all of the ward's legal rights; doing limited guardianship allows the ward to retain some of these rights.

In this case, the court may resolve the competing claims to guardianship by appointing one relative as guardian of the estate and one as guardian over the person. Here, Mark is bad at managing money but he is responsible, has a comfortable life, and Alan would like to live with him. He has not committed any action that would exclude him from being the guardian of the person (such as bad acts, excluded pre-need, lacking capacity), so he could be appointed guardian of the person if it is in the best interest of Alan. Beth, meanwhile, travels extensively but is a good money manager. She has also not met any of the disqualifiers for guardian status, so she could be appointed guardian of the estate. The court might also resort to a limited guardianship because Alan is 16, not incapacitated, and may be able to take care of certain things by himself.

3. Yes, the court may order Mark to restore the entire \$50,000. Under Texas law, a guardian may only deal with the ward's property in limited ways without first obtaining the court's consent. The guardian has the ability to receive property and hold it for one year (such as inherited property), the guardian may invest the ward's property according to a list of investments in the Texas statutes, the guardian may pay taxes and insurance. All other actions must be approved by the court. Further, the guardian may only dispose of the ward's personal property (such as money) if the property is unproductive, if it is disposed of in order to take care of the ward, or if it is disposed of in order to pay claims against the ward. When one becomes a guardian, he or she must apply to receive an allowance to care for the ward, which is to come out of the ward's estate. In general, a guardian of the estate has a duty to manage the ward's property in a way that is in the best interest of the ward.

In this case, Mark was appointed as guardian of Alan temporarily. He immediately took a loan out of Alan's estate in the amount of \$50,000 to remodel his home. He claims that the funds were to be used to remodel his home, and that some of the funds would be used to build a room to accommodate Alan's living with him. Because this was not approved and not necessary to pay a claim of the ward's or vital to take care of the ward, this \$50,000 expenditure of Alan's

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money is likely wrong and the money should be returned to the estate. This \$50,000 was also not part of any court approved allowance for ward maintenance, making it improper.

Further, a guardian can be removed ex parte if there is clear and convincing evidence of embezzlement of the ward's property. If there is no clear and convincing evidence, the guardian can be removed after notice and hearing if there are reasonable grounds to show that the guardian was abusing the property or engaging in gross misconduct or mismanagement. In this case, Mark may even be removed by one of these methods for his misappropriation of the funds.

**END OF EXAM**

7)

1.) Yes, a court can lawfully ignore a designation of guardian in a parent's will if it would be in the best interests of the child. Whenever a parent properly executes a will naming a guardian for her minor child (should the parent die while the child is still a minor), courts generally will uphold such guardianship designations. However, a court is not bound by such designation if the person named in the will to serve as guardian would not be in the child's best interests. Jane designated Mark as both the guardian of Alan's estate and his person. One person can serve both guardianship functions, or a parent can name two separate persons to serve each guardianship position. Because the court can set aside a guardianship appointment if in the best interests of the child, the court has discretion to set aside both the designation of guardian of the person and estate or just one. Again, while courts should generally honor a guardianship appointment by a parent, the probate court is not bound by it.

2.) As mentioned above, there are two types of guardianships: guardian of estate and guardian of the person. The guardian of a minor's estate manages the minor's financial assets that he receives under his parent's will (or if the minor receives inheritance from a third party, some type of property settlement, or damage award). The guardian of a minor's person is responsible for taking care of the child just as a managing conservator would do--i.e., provide housing for the child, feed and clothe the child, make educational decisions, make medical decisions. In Jane's will, she named her brother Mark as both the guardian of Alan's person and his estate in the event of her death. Because Alan is still a minor at age 16, he will need a guardian of the person and a guardian of the estate, given the value of the estate at \$2M. The court should honor Jane's appointment unless it finds that appointing Mark as guardian would not be in the best interests of Alan.

The court, if it finds that it would not be in Alan's best interests for Mark to serve as guardian of Alan's person or his estate or both, then the court should appoint someone else to serve as guardian. The court is free to appoint different persons to hold each guardianship, so long as the determination is made in the child's best interests. Both Mark and Beth, Jane's sister and Alan's aunt, have moved to be appointed guardian. When a court finds that the appointed guardian in the last surviving parent's will is not in the child's best interest, the court should look to the statutory order for appointing a guardian. Under Texas statute, if there are no surviving parents and the guardian appointed in the last surviving parent's will is not in the child's best interests, then the next of kin should be appointed. Beth would be Alan's next of kin, thus under Texas statute, it would be appropriate for the court to appoint her guardian, if it first finds Mark would not be in Alan's best interests.

The court can look at various factors in determining whether the guardian appointed in a will would be in the minor's best interests. When determining whether it would be in Alan's best interests for Mark to serve as guardian of the estate, the court should look at Mark's financial abilities to handle and invest money. While the courts seem to apply a low standard (allowing a retired waitress grandmother to manage her grandchild's estate), the fact that Mark was fired for mismanaging a customer's trust account should be strong evidence against appointing him guardian of the estate. Clearly, Mark had a problem in the past handling funds on behalf of someone else. If he couldn't handle a trust account, he likely will not be able to manage Alan's \$2,000,000 estate left by Jane. Additionally, before Mark was even appointed permanent guardian, he took funds out of the estate to remodel his own home. While Mark claims that part of the money was used to benefit Alan, his actions still show that he cannot be trusted with such a large estate. All of these factors regarding Mark's past financial dealings, clearly support a finding that it would not be in the best interests of Alan for Mark to serve as the guardian of his estate. In reach this conclusion, the court should contrast Mark's financial and management abilities with Beth, who would be the next in line to serve as guardian of the estate under the Texas statute.

Beth is a successful securities broker specializing in the management of income-producing investments to her client. This shows that she would be a great choice to handle Alan's large \$2,000,000 estate. The fact that her work causes her to travel has should have no bearing on the court's determination that she would better serve Alan's interests as guardian of the estate. Guardian of the estate only handles the minor's property, not his person. Thus, whether she is in town or out of the country, she is still capable of investing and managing money. The only factor cutting against appointing Beth guardian of the estate is the fact that Alan stated in an affidavit that he did not like Beth. However, it seems as if Alan made this statement in support of his desire to live with his uncle Mark, which goes to the appointment of the guardian of his person, not his estate. Given Beth's financial prowess and Mark's record of ineptitude, the court will likely disregard Jane's appointment of guardian of the estate and appoint Beth.

As to the guardian of the person, however, the court should honor Jane's appointment because Mark would be in Alan's best interests as guardian of the person. First, a child that is 12 years of age or older has the right to designate his guardian in writing or in court. Alan signed an affidavit stating that he wanted to live with Mark. This shows that Alan has picked Mark as the guardian of his person. Second, by living with Mark, Alan would be able to graduate from his high school and keep his same friends. Given the trauma from his mother's death, it is best to keep Alan in a familiar setting with persons that he wants to live with. Because Alan expressly stated that he does not want to live with Beth and because Beth travels all the time, it would not be in Alan's best interests for the court to set aside Jane's appointment of Mark as guardian of the

person. Thus, the court should appoint Mark the permanent guardian of Alan's person.

3.) Yes, the court may order Alan to restore the entire \$50,000. As temporary guardian, Mark did not have the ability to make certain decisions on behalf of Mark. However, to withdraw money of this amount and to benefit himself was a breach of his fiduciary duty as guardian. Whenever a guardian seeks to use funds of the guardianship estate, he must seek court approval and it must be completely on behalf of the minor. Mark did not receive any court approval for this loan, and there was not emergency requiring him to take the money that would alleviate the requirement of prior court approval. Because only half of the loan proceeds were being spent on Alan, it was a breach of Mark's fiduciary duty. The fact that Jane promised to lend him the money has no effect. There was no contract to lend the money and Jane did not make any bequest to Mark. Thus, Mark must go through the proper procedures in order to use any of the minor's estate for the minor's behalf.

**END OF EXAM**