

1. No, Wanda's letter did not have the effect of requiring the court to appoint Steve.

Under Texas law a guardian is to be appointed who is in the best interest of the ward. A person named in a will is presumptively in the best interest of the ward, but the court is not mandated to act in accordance with such a document if finds the named guardian is not in the ward's best interest. If there is no document naming a guardian the court should then look to the next of kin, beginning with those most closely related.

Here Wanda named Steve as guardian in a letter. Usually this is done in a will, but if it is in writing, signed by the testator and properly authenticated in court the court will consider it. However, based on the rules stated above, this only raises a presumption as to what is in the ward's best interest and the court is not required to follow it.

Therefore, because a will or document naming a guardian raises only a presumption as to what is in the best interest of the ward, the court is not required to follow the instruction.

2. Yes, the court can properly consider Amy's declaration.

Under Texas law a child 12 years of age or older can properly express their desire to the court in writing and the court can properly consider it. Amy's preference is not binding on the court, but the court can take it into account in determining her best interest. It is presumed that putting a ward with a desired guardian is in the best interest of the ward, but this can be overcome.

Here Amy expressed her desire to the court in writing. Based on the above-stated rules the court can properly consider her desire to have Steve appointed as her guardian and not Harry.

Therefore the court can properly consider Amy's written declaration of preference as she is 12 years of age.

3. No, the court did not err in appointing Steve. The issue is what is in the best interest of the ward.

Under Texas law a guardian should be appointed in the best interest of the child. Many factors can be considered in making this determination, such as the intent of the decedent or the desire of the proposed ward. It is not mandatory that the court appoint any specific person, only that it is in the best interest. Also under Texas law certain people are disqualified from serving as a guardian – such as someone who is incompetent, someone expressly disqualified by the decedent, a convicted felon or someone otherwise not in the best interest of the ward.

Here the facts present two options as guardians. Harry was a high school dropout, unemployed and has a large amount of debt. This will not automatically disqualify him as a guardian, but it will certainly make it very difficult for the court to determine that naming him as guardian is in the best interest of Amy. However, the fact that Harry has 2 felony convictions will disqualify him from serving as guardian of Amy. If Steve, our alternative candidate for guardian in these facts, is not found to be in Amy's best interest

the court will move on to her grandparents or other next of kin. Steve, however, is properly found to be the guardian of Amy. Both the decedent and the ward expressed their desire for him to be guardian, which the court can properly consider and which raise a presumption that Steve is in the best interest of Amy. Additionally, there are no facts to suggest Steve is not in her best interest or to otherwise overcome the presumption.

Therefore, based on the stated Texas law as applied to the facts at hand, the court did not err in appointing Steve rather than Harry as Amy's guardian.

END OF EXAM

1. No, Wanda's letter did not have the effect of requiring the court to appoint Steve as Amy's guardian. The issue is whether Wanda's letter alone rebuts the presumption that it is in the best interest of a child to have a parent as guardian.

Under Texas law a parent is presumed to be the best guardian for a child and a request is not mandatory unless both parents are dead.

Here Wanda wrote the letter requesting Steve to be guardian while Harry was still living. Because Harry is alive, he is presumed to be the best guardian for Amy. On the other hand the court is not precluded from considering the request by Wanda when they make their determination.

2. Yes, the court can properly consider Amy's wishes in its determination of guardianship the issue is whether Amy is old enough to have her wishes considered by the court.

Under Texas law a child's wishes are considered if they are 12 or older. Here Amy is 12 therefore her wishes should be considered in the court's determination.

3. No, the court did not err in its appointment of Steve rather than Harry as Amy's guardian. The issue is whether there is evidence to rebut the presumption that it is in the best interest of the child to have a parent as guardian.

Under Texas law a parent is presumed to be the best guardian unless that presumption is rebutted clear and convincing evidence to the contrary.

Here there is sufficient evidence to rebut the presumption favoring Harry. The court can consider the desires of Amy and Wanda; both have expressed clearly Steve is more desirable.

The court can look at the life of Harry. Here Harry may not be able to support Amy. He is a high school dropout, burdened with significant debt, and unemployed. Additionally Harry has committed acts which could have his parental rights terminated. Specifically he has not contacted Wanda since the divorce in 1998. This is significantly more than the 3 years required for abandonment.

Lastly the court can look at Steve's situation and its effect on the best interest of Wanda. Steve has been with Wanda since 2000 and can support Wanda through his successful business.

In this case the evidence rebuts the presumption that Harry is the best guardian for Wanda.

END OF EXAM

1. The court was correct in awarding Steve the guardianship of Amy. There are a lot of factors that the court may consider when determining guardianship. Many of these issues are present in this situation. Steven's guardianship award was proper of Amy because Wanda's letter created a presumption in favor of Steve that the evidence & testimony provided did not rebut. Amy's wishes are relevant and important in determining her guardian as well, and finally Steve fits all the requirements that are necessary to be appointed Amy's guardian.

First, Wanda's letter declaring Steve as Amy's guardian is not binding and doesn't require the court to follow it. However, the letter does present a presumption in favor of Steve. The Rule is that under the Texas Probate Code, the letter forms a presumption that the best guardian for Amy would be the person named in the instrument. The presumption can be rebutted by evidence that this is not true. That the person did not appoint someone that is eligible in the best interest of the child. To show that a person requires a guardian, it must be shown by clear and convincing evidence that the person requiring a guardian is 1) incapacitated, 2) would be in the best interest of the person. It must be shown by a preponderance of the evidence that the person requiring the guardian is 1) so incapacitated that they can not manage themselves and their estate properly, 2) that the person asking to be appointed guardian is eligible and 3) it is in the best interest of the guardian that person be appointed to the person requiring one.

Accordingly, Steve does qualify to be appointed Amy's guardian. First, the letter from Wanda creates a presumption that was not rebutted to the court that he is the most suited to be her guardian. The facts supporting this is as follows. After Wanda and Harry divorced, Harry kept no contact with Amy. Steve married Wanda and assumed responsibilities for raising Amy in 2000. From 2000 – 2006 Steve proved to be a great stepfather. Testimony proved that Steve had been an attentive stepfather to Amy. Amy, who is 12 and old & intelligent enough to know who she would like to stay with, expressed in a signed letter that she wanted Steve to be her guardian, not Harry. This shows that Steve's appointment by Wanda was in the best interest of Amy. Hence, the presumption created by the letter was not rebutted and should be given effect at the court's discretion.

The court can consider Amy's declaration expressing her desire that Steve be her permanent guardian. Under the Probate Code special weight should be given to the incapacitated person's desires towards their guardian. Amy is a minor, too young to handle her person & estate, but not young in respect to her desires. She is old enough to know by some degree of maturity whom she would rather live with. In considering the best interest of the child the fact that Amy knows and wants Steve to be her guardian is important for her. She has lived with Steve for 6 years, knows him well, been provided for by him, and is old enough to choose to live with him. Her desire, though not mandatory on the court, is important for the court to take into consideration.

The court did not err in appointing Steve rather than Harry as Amy's guardian. As discussed earlier it must be shown by a preponderance of the evidence that first Amy is incapacitated to make decisions and care for herself & her estate. This is shown by the fact that Amy is only 12 years old and lacks the intelligence, experience, and maturity to meet this requirement. Second, it must also be show that Steve is in the best interest of the child to be appointed guardian. This is evidenced by the fact that he has raised her

with Wanda for 6 years and has been an attentive stepfather. Also the fact that he was the owner of a successful business shows that he is capable of managing Amy's estate in good faith. This is also evidenced by Wanda's faith in appointing Steve guardian of Amy and reconfirmed by Amy's request to make Steve her guardian. This can also be shown by showing that the alternative, Harry as her guardian is counter to Amy's best interest. Harry has not contacted Amy almost since her birth, has not lived with her, is a high school dropout, has had 2 felony convictions, is unemployed, and has a large debt. He is obviously not suitable to manage Amy's estate. Amy does not want to reside with him either. Hence the second requirement that Steve is the best person to be appointed guardian is proven by a preponderance of the evidence. Third, the eligibility requirement may cause Steve some issue. Guardianship is preferred in the family, but is not required. According to all the above listed facts, Steve who is Amy's stepfather is much more appropriate to be her guardian than her real father.

In conclusion Steve was appropriately appointed by the court to be Amy's guardian. He is the best choice to manage her estate as well as her person.

END OF EXAM