8)

1.

No.

A guardianship applicant must file a doctor's report of the proposed ward with the court that details an examination of the proposed within 120 days of the application. The report must contain certain requirements mandated by the Texas Probate Code. The report, which must come from a licensed doctor, must detail the methods used to determine capacity, the results of the capacity tests, opine on the proposed ward's capacity, give the reason for and nature of the incapacity, indicate whether the incapacity is physical, mental or both, and whether the incapacity is temporary or permanent, total or partial. If the doctor finds that the incapacity is partial, the doctor must state the tasks that he believes the proposed ward is and is not capable of doing without a guardian.

The court did not err in striking the affidavit because it does not conform to the statutory requirements. The affidavit (1) references an exam of the proposed ward that is older than 120 days of the application (2) does not describe the methods of examination or the results thereof (3) does not name the reason and nature of the proposed ward's incapacity, the type, the duration, etc., and (4) does not state what the doctor believe the proposed ward is capable of doing.

2.

No.

Texas discourages guardianships except for in very specific instances as a guardianship deprives the proposed ward of certain fundamental rights. As such, Texas presumes people have capacity. In order to succeed on an application for guardianship, the applicant must show by clear and convincing evidence that (1) the ward is incapacitated and (2) the ward's person and/or estate is in need of protection. Then the applicant must prove by a preponderance of the evidence that (1) applicant is qualified for appointment (2) the appointment of the applicant is in the ward's best interest (3) and the degree of the ward's incapacity. Evidence from mental professionals is not conclusive on the issue of capacity and therefore capacity is always a fact issue to be decided by the trier of fact.

Harold (H) did not come close to proving by clear and convincing evidence that Nigel (N) requires a guardian. First, H's application is inadequate as he did not accompany it with a sufficient doctor's report as discussed above. Second, the testimony of the psychiatrist is neither direct nor conclusive as capacity is inherently a fact issue. Furthermore, the instances to which the doctor attested do not indicate that N has any sort of incapacity as being unkempt and making gifts and decisions to which others do not understand does not demonstrate by a clear and convincing standard that N lacks mental capacity or that he and/or his estate is in need of protection. Potentially the doctor's testimony could be included in evidence that proves incapacity by the clear and convincing burden. However, H's failure to offer any other evidence makes the doctor's testimony inadequate to rebut the legal presumption that N is competent and most certainly does not rise to the clear and convincing standard required to establish a guardianship.

END OF EXAM

8)

1) Yes the Court was correct in striking the psychiatrist affidavit. Under Texas Guardianship law, a third party may move to be appointed guardian of a person or of a person's estate. The motion must be support by substantial facts, by clear and convincing evidence, regarding the potential ward's inability to take care of himself or his estate and need for appointment of guardianship. Here, the psyciatrists affidavit is not sufficient on several grounds. First the statemnet was made five months before the guardianship petition and is not a timely assessment of Nigel's condition. Also, the affidavit merely states that Nigel is eccentric and irrational, and doesn't list any specific facts for a court to base a decision on. The judge as arbiter/gate-keeper of the evidence had the discretion to strike this affidavit. So yes it was proper to strike the affidavit.

2) No the Court did not err in dismissing Harold's guardianship petition.Texas law requires specific facts, by clear and convincing evidence, for a Court to impose a guardianship, facts indicating a severe mental instability, unable to take care of daily life and estate. Here the Psychiatrist's statements merely appear to be an observation of a normal rockstar, which the facts indicate the Nigel is. The court would therefore be reasonable in not finding clear and convincing evidence of mental instability - being ukempt, joining a commune, giving gifts, missing band rehersals, hiring a girlfriend are all sane acts, or at least normal acts for a rockstar. In fact Nigel's ability to do any of these acts show he is sane and able to manage his estate (ability to sell a house, ability to hire a manager).

A bad fact here is that Lucy and Nigel did not offer any evidence or testimony in opposition to the petition. However, because Harold did not prove by clear and convincing evidence, the burden of persuassion did not shift to Nigel, and Nigel was therefore not required to put on a defense.

If Harold had brought the petition in good faith, even if it was denied, he would be entitled to recompense from Nigel's estate for attorney fees and costs because Texas policy favors bringing petitions for guardianship.

END OF EXAM