Question 7 – July 2013 – Selected Answer 1

1.) Appointing a Guardian: It is likely that a guardian will be appointed for Will's estate, but not of his person. At issue are the factors required to appoint a guardian.

Texas law provides that any person is capable of petitioning a guardian action on behalf of another individual. In order for the court to appoint a guardian, there must be clear and convincing evidence that: (a) the proposed ward is incapacitated; (b) guardianship would be in the proposed wards best interest; and (c) guardianship is necessary to protect the ward's person or property. Additionally, the petitioner must show by a preponderance of the evidence that: (i) the court's venue is proper; (ii) the person applying for a guardianship is capable of being a guardian; (iii) the guardianship is not a scheme to allow a minor to attend schools he would otherwise not be able to attend based on his residence; and (iv) the proposed ward is totally incapable of managing his estate or person. In satisfying these factors, the court will look at the age of the proposed ward, any evidence relating to his competency, the size of the estate, and any other relevant factors.

George will be able to demonstrate clear and convincing evidence Will needs a guardian of his estate but not of his person. First, Will is not completely incapacitated as to his person. He sometimes forgets meals and is sometimes disoriented, but that does not amount to total incapacity. His doctor testifies that Will is capable of tending to his own needs, and Will testified in court that he can manage himself. The fact that will was capable of testifying lends strong evidence to the fact that he is not incapacitated. However, as to his estate, Will withdrew all of his savings, came into a large amount of money that he has no experience managing, is unsophisticated, and has memory loss. He would be easily susceptible to fraud. Additionally, a doctor testified that Will would not be able to manage his estate. Thus, there is clear and convincing evidence that Will is incapacitated as to his estate, but not his person. As such, the following discussion only revolves around George's estate. Secondly, George needs to establish clear and convincing evidence that guardianship would be in the ward's best interest. Here, there is evidence that Will is not capable of managing his estate, and he's recently come into a large amount of money that any person would need help managing. The fact that Will is unsophisticated and already has issues managing his money only adds to the fact that there is clear and convincing evidence it is in his best interest. George can also meet this burden. Thirdly, George must show that it is clear and convincing guardianship is necessary to protect Will's interests. As stated above, it's clear Will is incapacitated and incapable of managing his estate. He has a large inheritance which makes him vulnerable to anyone attempting to commit fraud or otherwise unduly influence him for a portion of his money. Further, the fact that Will already withdrew all of his savings and hid them under his bed suggests he needs a guardian to help protect his property. Accordingly, the clear and convincing standard is met here.

Finally, all of the preponderance of the evidence standards are met. There is nothing to suggest venue is improper, or that George is incapable of being a guardian, Will is not a minor, and the above evidence demonstrates Will is totally incapable of managing his estate. Therefore, guardianship of the estate is likely, whereas guardianship of the person will be denied.

2.) Serving as Guardian: Unless Banker assents to being Will's guardian, and is otherwise capable of serving, the court will appoint George as guardian. At issue are the factors considered in appointing one guardian over another and whether a guardian can be appointed over a ward's dissent.

The rule in determining which person should serve as guardian to a ward is that the court must select the guardian that is in the ward's best interest. In making that determination, the court must consider the age, experience, skills, talents, and education of the proposed guardian, along with any other relevant evidence such as a preference demonstrated by the proposed ward. Here, George or Banker may be considered to serve as Will's guardian. Because only a guardian of the estate will be appointed, the court should only consider evidence relevant to whether the guardian will act in the best interest of

the ward's estate. George has long been Will's friend and is a partner in an accounting firm. George clearly has the education and experience to manage Will's wealth, and appears to only have Will's best interests at heart. There is no apparent conflict of interest (like Will owing George money), and it does not appear George is only attempting to be Will's guardian to obtain a client, so it seems as though George would be a good fit for guardian of Will's estate. On the other hand, Will, disappointed that George petitioned for a guardian, wants Banker to serve as Will's guardian. Nothing is known about banker except that he is a friend of Will and Will's preference for guardianship. Thus, whether Banker will beat out will for guardianship will come down to whether Banker is capable of managing Will's estate (though from his name it appears he is) and whether Banker is WILLING to serve as guardian of Will's estate. Although great weight should be given to Will's choice of guardian, there is nothing that indicates Banker is willing to serve as guardian, and the court cannot appoint Banker against his will. Thus, if Banker refuses, George will still be appointed as guardian, despite it being against Will's wishes.

Question 7 – July 2013 – Selected Answer 2

1) The court is likely to grant a limited guardianship of the estate for Will, but unlikely to grant a guardianship of the person unless more evidence is presented to meet the clear and convincing evidence standard. The issue here is if there is enough evidence for Will to have a guardian of the estate and/or a guardian of the person. Under Texas law to have a guardian, it must be proven by clear and convincing evidence that that ward is incapacitated, that a guardian is necessary, and that the appointment of a guardian would be in the ward's best interest. Also under Texas law they must prove by the preponderance of the evidence whether the lack of capacity is complete or limited and who should be appointed by preponderance of the evidence. These standards apply both to the guardianship of the person and the guardianship of the estate Guardianship of the person looks at incapacity in light of the inability to care for the individual's reasonable needs, such as housing, clothing, food and medical or psychological care. Guardianship of the estate looks at the inability of the person to care for their financial needs and responsibilities. Because guardianship is a serious limitation on a person's individual rights, the clear and convincing evidence standard is used in addition to other procedural safe guards.

Here, there is not enough information about George's incapacity to care for himself to warrant a guardianship of the estate. Because incapacity must be proven by a clear and convincing evidence standard, this is a high burden for the potential guardian to meet. The only evidence her as to George's inability to care for himself and his needs are that he sometimes is forgetful about dates and telephone numbers, also that George Suspects that Will has missed meals due to his forgetfulness. Both physician experts claim that Will suffers only slight memory loss and that his main incapacity is in caring for his financial affairs. Thus, because there is no evidence to meet the clear and convincing standard, and instead is mere conjecture, the court is unlikely to find that it is necessary to appoint a guardian of the estate. On the other hand, there is evidence that could rise to a clear and convincing standard that Will is incapable of caring for his financial affairs. This also must be proven by clear and convincing evidence standard as well as the necessity for the guardianship. Incapacity can be shown by Will's inability to care for his financial affairs through him withdrawing all of his money from the bank and putting it in a suitcase under his bed. By putting $50,000 under his bed he clearly shows that he is unable to care for his estate and manage his financial affairs. Coupled with inheriting over a $10 million estate from his uncle, this is likely to show that Will can care for his finances because he could not handle his estate when it was small, thus he cannot handle it now. The court must find that the guardianship is necessary, which from the evidence provided it appears that it is necessary to protect his estate from the risk of having large amounts of cash on hand with a mildly forgetful person. Also they must prove that a guardianship of the estate is in the ward's best interest, which it appears to be because a guardianship would help protect his assets from him wasting the assets or leaving the assets in a place that is not reasonable or prudent, like under his bed. Because all three of the factors for a guardian of the estate are met the court is likely to appoint a guardian of the estate.

2) The court will likely appoint the former Banker or bank as the guardian of estate because of their familiarity with Will and their ability to act as a corporate guardian or a guardian in a limited capacity. The court is unlikely to appoint George as either guardian of the estate or guardian of the person because of the clear conflict between Will and George would make it not in Will's best interest to have George appointed. The issue here is who can act as Will's guardian and who the court is likely to appoint. When appointing a guardian to an incapacitated adult the priority of appointment is (1) person named in will of prior guardian, if any; (2) spouse; (3) next of kin; (4) person who would act in the ward's best interest. Here there is no spouse or next of kin identified, so likely the court will have to appoint a person or entity that will act in the person's best interest. The court can use a court created management trust to manage the estate. This would be a good option here because a corporate trustee could be appointed to manage the assets in Will's best interest. A guardianship by placing the money in the court's registry is not possible here because of the large size of the estate. The court is free here to consider what would be in the best interest of the ward. The court cannot consider someone who is (1) incapacitated; (2) incarcerated; (3) one whose conduct is notoriously bad; (4) one who has previously been blackballed; (5) one who has a conflict of interest against the ward's estate; (6) someone's whose lack of education or skill or management make them unable to act as guardian; or a person who is a sex offender is presumed to be ineligible, but can be rebutted. Here the court will likely consider the fact that Will disfavors George and that it appears that George pursued this guardianship proceeding after Will came into a significant estate. Because of these reasons the circumstances are suspicious and the court is unlikely to appoint George. On the other hand the court might appoint a corporate guardian like the Banker or a trust agency that is able to manage and invest the large estate in a way that would be in George's best interest. The court will likely follow George's preference in appointing a guardian of the estate. If the court decides to appoint a guardian of the person, they will consider the same disqualifying factors as they do for the guardian of the estate, but instead will focus on the ability to care for the person and provide food, clothing, shelter, and make decisions regarding medical, psychological and surgical care. The court will also consider the same priority of (1) spouse and then (2) next of kin, then (3) best interest of the ward. Here there is no spouse and no next of kin, so the court will be left to considered the best interest of the ward. There is no clear candidate here because though George was the best friend and neighbor, he has not shown by a preponderance of the evidence that he would be able to care for Will in providing food, shelter, and clothing and make important decision for George. Thus the court will have to inquire if they decide to appoint a guardian of the person for Will who would at in Will's best interest and who is best qualified to care for him as a person.

Question 7 – July 2013 – Selected Answer 3

1. The court is likely to appoint a guardian of Will's estate, but might not appoint a guardian of Will's person or instead might only appoint a guardian of Will's person who has only limited powers.

The Texas Probate Code permits any party to petition the court for the establishment of a guardianship for another party (i.e., a proposed ward). A court may create a guardianship of the person, a guardianship of the estate, or both on behalf of a proposed ward, who may be either a minor or an incapacitated adult. A guardianship of the person is one in which the guardian is tasked with the care, control, and possession of the ward, the provision of food, clothing, and medical care for the ward, the designation of the ward's residence, and the giving of consent for any necessary treatment or medical care for the ward. A guardianship of the estate is one in which the guardian is tasked with managing the economic and financial property held by or inherited by the ward, with the ultimate duty and goal of prudent management and adequate representation of the ward in his affairs.

To create a guardianship, Texas courts require that the requesting party satisfy a two- part test. First, he must establish two elements as to the need for a guardian by clear and convincing evidence: (1) that the proposed ward is incapacitated; and (2) that it would be in the ward's best interest to appoint a

guardian on behalf of the ward in order to protect his person and/or property. Second, he must establish three elements as to the proper person to be appointed guardian by a preponderance of the evidence: (1) the proposed ward lacks the capacity to manage his personal needs and/or his financial matters; (2) the requesting party is not disqualified to serve as the ward's guardian; and (3) appointment of the requesting party as the proposed ward's guardian would be in the proposed ward's best interest. In applying these two tests, however, Texas courts remain cognizant of the fact that a proposed ward should have the right and the power to manage his own personal affairs if he is capable of doing so, even if his capabilities are limited; in other words, a court may choose only to appoint a guardian to handle some things for the proposed ward while allowing the ward to retain the right and power to manage other things of which he is capable of management and control.

Here, the facts suggest that George will be able to satisfy the required elements by clear and convincing evidence with regard to Will's need for a guardianship of his estate. There appears to be clear and convincing evidence that Will lacks the education, experience, and knowledge that is necessary to manage his financial affairs based upon his actions in withdrawing all of his life savings ($50,000) from the bank and storing it in a suitcase under his bed to "keep it safe." Based on his treatment of $50,000 and his misplaced confidence in the fact that the money will be safe in an unlocked suitcase in his home, it is clear that he would not be able to adequately and prudently manage the $10 million he recently inherited. Thus, to protect his money and any other property he might have, an appointment of a guardian to manage it would be in Will's best interest. Based on the foregoing analysis, therefore, it seems as though a court would likely appoint a guardian of Will's estate.

However, with regard to the appointment of a guardian of Will's person, George may not be able to satisfy the requisite tests. It is not apparent, by clear and convincing evidence, that Will needs a guardian to care for his everyday needs because there is no evidence to suggest that Will has become unable to function on a daily basis. As such, a court would likely hesitate to appoint a full-fledged guardian of Will's person. Instead, because Will apparently retains some ability to care for himself, the court might instead choose to appoint a guardian with limited powers over Will's person. As previously mentioned, in appointing guardians, Texas courts remain cognizant of the fact that a proposed ward should have the right and the power to manage his own personal affairs if he is capable of doing so, even if his capabilities are limited; in other words, a court may choose only to appoint a guardian to handle some things for the proposed ward while allowing the ward to retain the right and power to manage other things of which he is capable of management and control. Here, the fact that Will has become more forgetful and occasionally appears disoriented does not demonstrate that Will is clearly unable to take care of himself. Nor does the fact that George "suspects" that Will has missed meals due to forgetfulness; this is merely George's suspicion and has not been confirmed, thereby apparently not satisfying the "clear and convincing evidence" standard for a proposed ward's need for a guardian. Finally, the fact that Will was able to testify at the proceeding and disclaim his physical and mental impairments suggests that he retains at least some mental wherewithal to manage his own personal needs.

Thus, it seems as though a court would likely not appoint a full-fledged guardian of Will's person and instead might limit any appointment to a guardian of the person with limited powers.

2. After considering the priority order of individuals set forth in the Code, Will's expressed wishes, and ultimately Will's best interest, the court is likely to appoint Banker as guardian of Will's estate. Additionally, should the court appoint a guardian of Will's person (or one with limited powers), it will likely appoint George in that capacity.

Texas applies a hierarchical approach to the appropriate persons to serve as a guardian. With regard to the most appropriate guardian for an incapacitated adult, the order is as follows: (1) the individual designated in the proposed ward's "Designation of Guardian Before the Need Arises" document (or its

equivalent); (2) the proposed ward's surviving spouse; and (3) the proposed ward's next of kin in the nearest degree of kinship. In addition to this heirarchy, the court will also consider the person whom the proposed ward has expressed as his desired guardian in writing filed with the court. And ultimately, the court will based its determination on the proposed ward's best interest, bearing in mind the fact that certain individuals are treated as being disqualified from serving as guardians (i.e., persons who have engaged in notoriously bad acts; persons who are guilty of sexual misconduct or offenses; persons who lack the education, experience, or knowledge to manage the proposed ward's estate; incapacitated persons; persons having a conflict of interest against the proposed ward; and any person whom the proposed ward has expressly disqualified as being eligible to serve as his guardian).

Here, it has been established that a guardian of Will's estate should be appointed. In considering the foregoing factors, it is apparent that there is no one who is listed on the priority order who can serve as guardian for Will, as he apparently did not execute a document, he does not have a surviving spouse, and his next of kin in the nearest degree of kinship - his distant uncle - was his last relative and just recently passed away. Therefore, the court will be relegated to considering Will's expressed desires and also his best interest. Because Will testified in court that he did not wish George to serve as his guardian, and instead wanted Banker to be appointed, the court will likely give this weight; after all, if it is clear that a ward will not cooperate with his guardian, it will not be a successful and efficient guardianship. Presumably, Banker is not disqualified from serving, and based upon his name it appears as though he has the requisite education, experience, and knowledge to manage Will's financial estate. Thus, the court would in all likelihood appoint Banker as the guardian of Will's estate.

With regard to an appointed guardian of Will's person, should the court decide to appoint one, the court might grant this position - likely only with limited powers - to George. Again, while there are no available individuals on the priority order to serve as guardian for Will, the court will likely consider the fact that George is likely to be very familiar with Will's lifestyle after living next door to Will and being close friends with him for many years. However, it is important to note that the court might be inclined to consider Will's expressed desire that George not be appointed in any capacity as guardian, however, in which case the court would be required to appoint a third-party caretaker of some sort, should it determine that a guardian of the person (fully or with limited powers) is necessary.