

Question 11 – February 2015 – Selected Answer 1

1. The proper venue for a guardianship action is Harris County.

The issue here is which venue is proper for the guardianship action. Guardianship action is filed in the county where ward resides. Here, Wally, is a resident of Harris County, TX. A guardianship action must be commenced where Wally resides. In conclusion, Harris County where Wally resides is the proper county for guardianship action.

2. The issue here is what factors should court consider in determining the guardianship of Wally and his estate.

In determining the guardianship of a minor, court considers if the guardian is a parent of the minor, or if not a parent, a nearest relative who serves the best interest of the minor. The guardians must not have any adverse interest against the minor and should not be indebted to the minor. If a parent of the minor, prior to death wrote a person to be minor's guardian, court will appoint that person as guardian unless court finds the guardian to be unfit and would not serve the best interest of the minor.

In determining a guardian for managing the minor's estate, court will look at the grandson's competency to manage his finances, any prior misappropriations and money management skills.

Here, Diego, Wally's father wrote Agnes should be the guardian of Wally. Court usually appoints the guardian suggested by the parent unless it is not in the best interest of the child. Agnes is an artist, without a permanent residence. She lacks good business sense and her prior bankruptcy filing shows she is incapable to handle a \$5 million property of Wally. Agnes cannot offer a permanent place for Wally, when she is a traveling artist. Since Agnes cannot offer a permanent care and stay with Wally, court will determine Gabe, Wally's grandparent, who is a retired investment adviser can take good care of Wally and his estate.

In conclusion, Wally's guardian in person and estate will be Gabe, though Diego wished Agnes to be the guardian of Wally, for the best interest of the child.

3. Agnes cannot serve without posting a bond.

The issue here is if Agnes can serve as a guardian without posting a bond with the court as per Diego's document.

TX requires every guardian of a person and estate to post a bond as a measure/surety against personal liabilities, while serving as a guardian.

Here, Diego allowed Agnes to not post a bond. However, guardian is a responsible person and court requires a guardian to post a bond for any future liabilities towards the ward. So, court will not waive the bond requirement for Agnes.

In conclusion, Agnes must pay the bond to be a guardian.

Question 11 – February 2015 – Selected Answer 2

1. Venue is proper in Harris County in Probate Court.

A venue is proper for guardianship where the minor resides. If the minor does not reside in Texas, the venue would be proper where the substantial assets of his estate are. Here, the proper venue for guardianship of Wally would be in Harris County where he is a resident. Since Wally does not have any relationship with Travis County, this venue will not be proper. In addition, the estate assets location are not indicated within the facts but can be presumed to mostly be where the parents and child were resident.

Thus, a proper venue to determine who shall be guardian of Wally will be Harris County since that is the county Wally is a resident of. The courts with jurisdiction will be generally the District and Probate Court to determine guardianship. However, in Texas, the Probate Court has exclusive jurisdiction if the distributions were through testamentary intent. Since Diego and Maria left their estate to Wally through their Wills, the proper county would be Harris and the proper court would be the Probate Court.

2. The court should consider the suggestion of guardian by Diego and the best interest of Wally.

A different person can be guardian of the minor's person and estate in Texas. A minor can request a guardian to the court through a written and sworn letter that is filed. However, the minor can only do so if he is 12 years or older.

Anyone under the age of 12 is presumed to lack capacity to make such decision. Here, Wally is only 10 years old. His suggestion as appointing Agnes his guardian will not be a factor considered by the court. However, he can suggest to the court when he is 12 years old whom he would like to have as a guardian and the court will then consider the current guardian's statutes, Wally's suggestion, Diego's suggestion and what the best interest of Wally would be. Diego's suggestion will be taken into consideration in decision whom to appoint guardian of Wally. A last surviving parent can suggest a guardian in his Will and waive the posting of bond. Here, although the suggestion was not done by Will, the suggestion was done through a holographic codicil. This will presume to be part of Diego's Will since it was wholly written in the testator's handwriting and signed. Codicils are interpreted with the Will and will be valid unless the Will contradicts the Codicil or it is revoked. Neither of those cases applies here. A suggestion of guardianship by the last surviving parent will be accepted by the court unless the suggested guardian is disqualified, dead, refusing to serve or not in the best interest of the Will. A guardian is disqualified if she is incompetent, has conflicting issues with the child, lacks education or experience or is expressly disqualified. Here, Agnes is not disqualified to serve as a guardian. However, a court will not appoint as a guardian an adult who does not live in Texas, cannot be served or is constantly traveling and not staying put. Agnes in this case does not have a permanent residence and moves frequently. The fact she calls Austin "home" will only be considered if that is Agnes's residence and she permanently lives there. Here, Agnes stays for several months in Austin, New Mexico and California. She will be disqualified to serve because of this for guardian of Wally's person. In addition, a guardian who is unable to manage the ward's property, enforce the ward's obligation and defend or sue on behalf of the ward will be disqualified from serving as guardian of his estate. Agnes has a reputation of lacking good business sense and has been declared bankrupt. However, she has enjoyed recent success with her lawsuits. Gabe on the other hand is retired advisor, has brought suit on behalf of the minor and has applied for guardianship in the proper county.

The best interest of Wally's person is likely to be Gabe because he is retired and qualified to be guardian. He will be more suitable to serve as Wally's guardian of his person because he is not frequently moving like Agnes and will be able to provide Wally with necessities, shelter and possession, consent to medical treatment and has Wally's best interest. Wally should also be appointed guardian of Wally's estate because he has already engaged in his duties by bringing suit on behalf of Wally and will be more suitable to manage the 5 million estate of Wally while enforcing Wally's obligations as he has been doing so.

3. The court can give effect to Diego's document stating that Agnes can serve without having to post bond.

The last surviving parent has the power to waive the requirement of having to post bond in addition to suggesting the guardian. This has to be done in the last parent's Will. However, Texas recognizes holographic codicils. Diego met the requirements of a holographic codicil since it was wholly in his handwriting, signed and created after the Will. This will be a sufficient codicil and will be considered part of Diego's Will. A court will need to accept the last surviving parent's suggestion unless it finds that it would not be in the best interest of the child to do so. Here, Agnes is not disqualified to serve, dead nor refusing. Although, as stated above, she is likely not the best pick for Wally's guardian of the person and estate. If the court appoints Agnes as guardian, she will be able to waive the requirement to post bond within 20 days.

The waiver of posting bond needs to be expressly stated by the last surviving parent. Diego did so. If the court accepts Diego's suggestion, the court can also accept the waiver of having to post bond within 20

days. Although a guardian of the person and estate is required to post bond and can be removed without notice for failure. If the parent of the minor waives that requirement, the court can accept such waiver and not remove the guardian for not posting bond within 20 days.

Question 11 – February 2015 – Selected Answer 3

1. Venue is proper in Harris county, because that is where Wally lives.

The issue here is what county is proper venue in a guardianship case. In guardianship cases, venue is proper in the county where the child lives.

Here, Wally lived with his parents in Harris County, so Harris County is the best place for venue. Further, Gabe filed his application in Harris county, so that is further reason to keep it in Harris county.

Harris County is appropriate venue.

2. The Court will consider the relative financial situations and competencies of Agnes and Gabe, Wally's stated preference, and Diego's written preference in deciding on guardianship, and after proper consideration, the Court should appoint Agnes as the guardian of Wally's person, and Gabe as guardian of Wally's estate.

The issue is what factors a court looks to in deciding on who to appoint as a child's guardian. In Texas, the dispositive consideration is: what is in the child's best interests? A child's stated preference can aid a court in making this determination, but it is not decisive if they are less than 12 years old. The handwritten designation of only one spouse is also not binding, but can help the court in making its decision, as well. Finally, the court will compare candidates, looking at their relative financial circumstances, domestic circumstances, and any other relevant factors, such as a history of violence or bad acts.

Agnes is the choice of both Wally and Diego, but Wally is only 10 years old, and Diego's designation is not decisive since Maria did not sign the designation document. The court will therefore consider their preferences in deciding what is in the best interests of the child, but it must also look to other relevant factors. Wally and Diego's preference for Agnes may indicate that she would be a good guardian of Wally's person, as they trust her. However, it is important to note that Wally has been left with a very large and wealthy estate, which would require expert management. Agnes' bankruptcy and reputation for poor business decisions, compared with Gabe's investment advisor career and concern for the estate in the filing of the wrongful death claim, tends heavily toward the appointment of Gabe as being the guardian of Wally's estate. Returning to consideration of guardianship of Wally's person, Agnes' lack of stability in terms of moving from place to place may also weigh against Agnes.

In consideration of the above factors, the Court should rule that it is in Wally's best interests that Gabe be the guardian of Wally's estate, as Gabe's career was one of financial management, and Gabe has demonstrated diligence in caring for the estate already, by filing the wrongful death claim. The Court should grant guardianship of Wally's person to Agnes, as while she does move around a lot, the recent success of her paintings business may allow her to settle down, and the preferences expressed by Wally and Diego lean heavily in her favor for guardianship of Wally's person.

The Court should grant guardianship of the person to Agnes, and guardianship of the estate to Gabe.

3. The Court will not give effect to Diego's waiver of Agnes' bond requirement, because of Agnes' financial history.

The rules regarding decision-making are listed above. The primary concern for a court is the child's best interest. The purpose of the bond is to secure, as much as is possible, effective guardianship behavior on the part of the guardian. If the guardian has a poor history of financial management, for example, the bond becomes even more necessary.

Diego's document will not bind the Court to action, as explained above. Therefore, the Court must decide

what is in the child's best interests. Here, it would be in the child's best interest if the bond were required, because it would help keep Agnes, if she were guardian of the estate, aware of the necessity for prudent management.

The Court would not give effect to Diego's bond waiver.