

(1)

Finding a court must make before appointing Guardian for Walt (including evidentiary standard)

Before a court can appoint a guardian of an incapacitated adult or minor child, the court must find by clear and convincing evidence that the incapacitated adult is unable to care for his regular mental health, physical needs, able to manage financial affairs and other factors that the court may consider. Generally, the court is reluctant to put a total guardianship over a person because like dependent court-supervised executorship, the court doesn't like to put a total restraint on someone. Here, the court will find that Walt (incapacitated adult) is in need for a guardianship due to his recent incapacity which has rendered him in a coma (hospitalized), in need of physical care (surgey) and in need of someone to manage his estate (commercial fishing business which has orders that must be completed within the near future - within 5 days or potential risks being lost) and other personal financial affairs like Walt's investments, real property, and \$1 million inheritance.

There are two types of guardianships that the court may appoint when there is clear and convincing evidence that established an incapacitated adult needs guardianship: guardianship of the person and guardianship of the estate.

Guardianship of Estate (GOE) - The court has to determine by clear and convincing evidence that Walt is unable to manage his financial affairs and is in need of appointment. As mentioned above, Walt needs someone to manage his commercial fishing business and other financial affairs. Considering the above, including the substantial (\$1 million) size of the recent inheritance to Walt, the court will appoint a guardian to manage his estate.

Guardianship of Person (POE) - Court will appoint a guardian of Walt due to his recent physical incapacity which totally renders him unable to make basic daily decisions including food, shelter, medical treatment. Also, considering the fact that walter is in a coma (hospitalized) and his prognosis is uncertain, the court is likely to appoint a guardian fast so that Walt may have his guardian decide medical treatment necessary in furtherance of his rehabilitation.

(2) How is the court likely to rule on application filed by

Here, there are multiple people who wish to be appointed guardian of Walt. As mentioned above, there needs to be GOE and GOP. The court can choose to appoint the same person for both guardianships but that is unlikely here due to the significant size of Walt's estate. Walt did not have a durable power or attorney nor did he authorize anyone to operate his boat or fishing business. The court will apply various factors to determine what is in the best interest of Walt and his estate.

(a) Brian

Brian is the sole surviving member of Walt. Generally under the Texas Estate Code, family members are considered a good option for guardianships in the case of minor children or incapacitated adults. However, there are some issues with Brian that will interfere with him being appointing of both GOE and GOP.

GOE - Court is unlikely to appoint him because of the substantial size of the estate. A court may look to a number of factors including education, experience with financial matters, past conduct. The court may not appoint someone that wouldnot be in the best interest of the guardian. Here, Brian and Walt were close growing up but no longer speak, highly unlikely that Brian knows that is in his brother's best interest. Also, Brian has record that he was fired from a job because of theft. Also, there is no additional facts that appear to support Brian's appointment of the sizeable estate. The fact that they haven't spoken in years, prior theft (which would lead the court to believe that he wouldn't be fair in managing the estate/possible conflict) and no prior experience with big estate.

Could be argued that Brian is in the similar business since he works as a hunting guide. Although the two are similar and naturally as closet surviving family member, Brian has a chance but will not succeed in being appointed GOE.

GOP - court will not appoint Brian as GOP. Walt currently resides in Rockport, Texas while Brian resides in Alaska. There are no facts indicated that Brian would be oen to the idea of moving all the way to Texas for the care of his brother. Also, Brian and Walt have no spoken in over 20 years.

(b) Frank

Frank is likely to be appointed GOP.

GOP - Here, Frank apears to be Walt's life-long best friend and is also a very experienced fishermen. He is likely to know what type of care Walt needs due to their close relationship. Although Frank is not a surviving family member, he can trump in a guardianship proceeding over a disqualified family member.

GOE - Court will not appoint Frank as GOE because of his past financial troubles. Although Frank is a very experiences fisherman and is likely to know what type of transactions need to be taken care of involving Walt's commercial fishing business, this is not enough evidence. Here, Frank has struggled financial and previously declared bankruptcy. The court may take into consideration a number of factors in appointing guardianship. Also, there is no additional facts that seem to represnt whether Frank has any experience in handling the variety of Walt's assets.

(c) George

Court will appoint George as GOE.

GOE - Court will appoint George as GOE because he is the best suited to manage an estate of this size. Here, George is Walt's current banker and has hanled Walt's banking business for over 10 years and is experienced in financial affairs. Here, George seems to be the most qualified in maintaining Walt's assets.

However, the biggest problem is the current size of the estate due to the recent \$1 million inheritance. The court might find that George is unanable to manage an estate of this size and perhaps may make that bank where George works at the GOE, and George could oversee certain transactions.

GOP - Court will not appoint George as GOP because although not completely disqualified, Frank appears to better qualified.

(d) Basis for temporary Guardianship

There could be a possible basis for temporary guardianship due to the recent unexpected (and uncertain) medical conditions of Walt (incapacitated adult due to medical and physical reasons). George is currently in a coma and therefore it is possible that he could wake up at anytime depending on how he responds to medical treatment. The court is able to consider a variety of factors. However, unlikely the court will appoint a temporary guardianship because of the severe unresponsiveness and uncertainty of Walt's condition. If Walt wakes up, there ways he can seek to have the guardianship terminated (if no longer needed) after overcoming the burden that he is no longer to care for health, safety, food, and shelter.

1. A court must find by clear and convincing evidence that Walt is incapacitated and unable to care for his property and assets before appointing a guardian of the estate (or person). The issue is what the court must find before appointing a guardian of Walt's estate.

Under the Texas Estates Code, generally, a person seeking guardianship of the estate or person need no special relationship. Anyone who believes that the proposed ward is unable to care of his estate or is incapacitated and unable to care for themselves, may file an application for guardianship. In order to succeed in their application, it must be proven by clear and convincing evidence that 1) the appointment is in the ward's best interest, 2) the ward is incapacitated, and 3) the appointment of the guardian will protect and preserve the ward's estate and interests.

In this case, Walt is clearly incapacitated. Normally, it must be shown that he lacks the ability to provide necessities for himself, such as clothing, food, and shelter, or that he completely lacks the ability to manage his estate. Walt cannot manage his estate at all right now because he is currently in a coma. There is no determination as to when Walt will wake up or what mental state he will be in when he wakes up. Therefore, it is presumptively in the proposed ward's best interest to appoint a guardian who can manage and preserve Walt's estate. If when Walt wakes, he no longer needs a guardian, the guardianship will be terminated.

Further, upon a guardianship appointment, one must take an oath and post a fiduciary surety bond within 20 days, file notice in the county newspaper within one month, file an inventory of the estate within 30 days, and file a petition for allowance with the court for the ward's reasonable need within 30 days. An oath must always be given for guardianship of the estate, but not for guardianship of the person. If any person cannot perform these duties, then they will be removed.

2. The court will likely appoint a temporary guardian, pending Walt's potential recovery or surgery, to last up to 60 days; the court may then make a further determination at that time and could either appoint a permanent guardian in the discretion of the court; Under these facts, the court would likely appoint George as the temporary guardian of Walt's estate, due to his financial acumen and experience. The issue is who is most likely to be appointed temporary guardian for Walt's estate based on their history, experience, education, and capabilities.

Under the Texas Estates Code, a temporary guardian is only put in place for 60 days. Therefore, it is likely in Walt's best interest to appoint a temporary guardian. The court may also limit the temporary guardian's powers. If the court so chose, they could limit the guardian to only have power over specific assets, like the fish, or could limit what the temporary guardian could do with the asset. Most everything done by a guardian must be approved by the court, other than retaining property for a year without diversifying, investment decisions, expending amounts over the allowance (if clear and convincing evidence and prior court approval was not available or burdensome), insure property, and pay taxes on the property.

The fact that part of Walt's estate is only temporarily valuable due to consumable and perishable goods, is a weighing factor when determining a temporary guardian. Walt's inventory of fish, valued at \$150,000, will spoil and be worthless if not promptly and properly taken care of.

A guardian is a fiduciary and is required to care for the ward's estate as they would their own. Their duty of care provides that they must act a reasonable and prudent person would in the circumstances. The court will consider who is best suited for this role according to their history, education, experience, business acumen, and relationship with the ward.

The priority of a guardian appointment in a guardianship proceeding for an incapacitated adult is: surviving spouse and then next of kin. In this case, Walt has no spouse. Therefore, the court would next look to Walt's next of kin. Walt's only next of kin is Brian. However, a potential guardian can be excluded for consider if they are deemed unfit. Someone who has an arrest record and a conviction would likely be deemed unfit to be the guardian of a multi-million dollar estate. However, Brian was not actually convicted. Even so, the court can take into account the previous accusation of his stealing to determine that he should not be appointed the guardian of Walt's estate because he is unfit due to bad character.

Next to consider is Frank. His position as Walt's long time friend makes his a good choice, because it is unlikely that he would breach his fiduciary duties to his best friend. Also, Frank is an experienced fisherman and would likely know what to do with the fish in Walt's estate that Walt need to sell before the go bad. However, Frank will likely not be appointed temporary guardian of Walt's estate because of his bad history with money. A court will consider one's financial acumen, business experience, and education, when determining who should be guardian. Because Frank has struggled financially and previously declared bankruptcy, he is presumed to be incapable of handling Walt's million dollar estate, even temporarily.

George should be declared the temporary guardian of Walt's estate because he is the most qualified and capable out of the three applications before the court. George has known Walt for over 10 years and has handled Walt's financial matters. Thus, George likely already is privvy to Walt's estate and knows how to handle large amounts of money. He is generally experienced in financial matters and would be a good choice for the court to appoint. If the court determines more oversight is necessary for such a large estate, the court could appoint the bank where George works to be the guardian of Walt's estate. However, if the court were to determine that George was not able to be the guardian, the court has the discretion to appoint a temporary guardian who did not file an application and is not related to or associated with Walt.

Further, it is important to note that the same person can be the guardian of the estate and the guardian of the person. Therefore, if Walt were determined to need a guardian of the person, the court could appoint George in that role. A bond must also be given for a guardianship of the person, unless it has been waived.

Q4 – July 2016 – Selected Answer 3

Question 4:

1. Findings a court must make before appointing guardian for Walt and under which evidentiary standard must it be made:

The issue is what investigation the court must conduct in order to name either a guardianship of the person or estate and what the proper evidentiary standard is for each. The court must make a finding that Walt is substantially unable to care for himself on a daily basis and provide for his basic needs in order to receive a guardianship of the person. In order to receive a guardianship of the estate, the court must find that he is substantially unable to handle his financial affairs, pay his bills, or understand and be responsible for any transactions. Both a guardianship of the person and guardianship of the estate must be found necessary under an evidentiary standard of clear and convincing evidence. All other findings (such as who will be appointed guardian) are to be made under a standard of preponderance of the evidence, which is a lower standard.

The court will take great care to consider Walt's rights during the guardianship proceeding. Any person has standing to bring a guardianship action- including concerned friends. Walt has a right to be appointed an attorney ad litem during the proceeding. The court does not have to appoint a guardian ad litem but it may at its discretion. Walt always has a right to be present at the proceedings. The court must also evaluate a physician statement and report that has been conducted within the last 120 days. It should lay out in detail the evaluation of Walt's mental, physical, and emotional state and that that bears on and effects his ability to care for himself on a daily basis and on his ability to conduct his basic financial affairs. He also has the right to have the determination made by jury trial. The court must also consider whether or not a lesser or less restrictive guardianship would be appropriate. Or possibly only grant a guardianship over his estate but not his person. In this situation, the report will likely include his prognosis from his injury and inform the court how long the doctors anticipate that the disability will last and what his expected recovery is.

The court must find under clear and convincing evidence that for a guardianship of the person that he is unable to provide for his basic needs and take care of himself on a daily basis (feed, house, clothe, and bathe himself) and under an estate guardianship the court should be assured under clear and convincing evidence that he is unable to take on basic management of his financial affairs or that his estate is so large or complicated that he will be unable to manage it to a reasonable degree. In this situation, Walt is completely incapacitated in a coma and will meet this standard.

2. How is court likely to rule on the applications by Brian, Frank and George? Basis for temporary guardianship:

It is likely that George will be appointed temporary guardian of the estate; Frank will be appointed temporary guardian of Walt's person; and it is unlikely that Brian will be appointed either type of guardianship. The standard of the choice of guardian is preponderance of the evidence.

The issue is under what circumstances a temporary guardianship will be appropriate and who is an appropriate person to name for either type of guardianship. A temporary guardianship is appropriate where the person is unable to care for either their person or their estate possibly for a temporary duration. Here, it is likely that the court will name a temporary guardian instead of a more long term guardian. A normal guardianship is good for only 16 months to encourage the policy of annual review, as circumstances may change. Courts will always impose the least restrictive type of guardianship and look for lesser alternatives- to give the prospective ward the most respect and autonomy possible. Temporary guardianships cannot be granted effectiveness for more than 60 days.

Here, a temporary guardianship appears to be appropriate- both for the management of the estate and for Walt's person. Walt has considerable assets both in the bank from his inheritance and in his fishing business. He has an inventory of fish that will spoil soon if they are not delivered within 5 days or he will bear the loss. He has considerable investments, real property, and personal property. Walt is completely incapacitated, at least temporarily and will need someone to make medical decisions for him and take care of his estate. He may require surgery and his situation is uncertain. A long term guardianship is not appropriate when the situation is so uncertain but a 60 days temporary guardianship is definitely appropriate here. The court may appoint separate individuals as guardian of the person and the estate. The important qualities the court will look for with regard to guardian of the person is a close friend or family member that the prospective ward trusts and gets along with. Conversely, the court is more concerned about trustworthiness of the estate guardian and financial knowledge and competency in that regard.

Brian: the court is likely to conclude that he is not eligible for either type of guardianship. Brian is not an appropriate guardian of the person because he has not had much contact with Walt for several years and the two are no longer close. Furthermore, he lives in Alaska and Walt lives in Texas. He would not be around to make immediate medical and personal decisions for Walt's care while he is in the hospital and about to possibly undergo surgery. Brian is not an appropriate guardian for the estate because one of the highest considerations of the court is the trustworthiness of the guardian of the estate. Brian was fired from his job when suspected of stealing from his employer which casts a negative and suspicious light on his ability to be honest and trustworthy with other people's money. Beyond that, Brian is a hunting guide and has no special financial knowledge that would be helpful as a guardian of the estate so large as this.

Frank: Frank is likely to be appointed temporary guardian of Walt's person. He is his closest personal friend and the facts do not indicate that he lives far away. He cares for Walt on a personal level and would likely be someone that Walt would be happy to have be his personal guardian in this temporary situation and someone that Walt trusts. Frank would not be an appropriate guardian of the estate because he has trouble caring for his own financial affairs, struggles financially, and has declared bankruptcy. Beyond incompetency, even though there is no indication that Frank has ever done anything of an untrustworthy nature- the court does not want to put a bankrupt person in a situation where they might be tempted to take advantage of a ward's large estate. The estate is too large and complicated for someone like Frank to handle but Frank will make a wonderful temporary guardian of the person.

George: George is likely to be declared the guardian of the estate. The court will look at his financial experience and background as a banker and likely conclude that he is both trustworthy and experienced enough to handle a large estate. Beyond his general professional experience, he is someone that Walt has chosen personally to be his banker in the past- and obviously someone Walt trusts with his finances. He has handled his banking business for over 10 years and has experience with his portfolio and business. George will do an excellent job as the guardian of the estate.