

Question 9 – February 2020 – Selected Answer 1

(A) Under the Texas Probate Code, a court must find by clear and convincing evidence (i) the proposed ward is incapacitated, (ii) a guardianship is in the best interests of the proposed ward, (iii) the rights or property of the proposed ward will be protected, and (iv) alternatives to guardianship were considered and none are feasible.

A court will likely find by clear and convincing evidence that Ward is incapacitated since he is in a coma, it is in his best interests to have a guardian, his rights and property will be protected, specifically his business, and that alternatives were considered but none are feasible since he is in a coma.

A court must find by a preponderance of the evidence that (i) the court has venue, (ii) the applicant to be the guardian is not disqualified from serving as a guardian, (iii) if the guardianship is for a minor, that the primary reason is not to establish residency for purposes of attending a different school district, and (iv) the proposed ward is either totally incapacitated, or partially incapacitated because they are unable to support themselves with food, clothes, shelter, and take care of their financial obligations.

The court will likely find by a preponderance of the evidence that the court has venue, all the applicants are not disqualified, and that Ward is totally incapacitated since he is in a coma.

(B) Selma, Francis, and Alejandro all have standing to file applications for guardianship under the Texas Probate Code. In determining who to appoint as a guardian, the court will look into the applicant's experience, education, and abilities to serve as guardian. The court can look to the specific applicant's history in managing finances and their relationship with the ward.

(1) Selma

The court will likely not appoint Selma as a guardian. The issue is whether a ward's only living family member may be appointed as guardian, when there are potentially other applicants with a closer relationship.

The facts surrounding this case show that Selma is Ward's only living family member. There is a presumption that it is in the ward's best interests for a family member to serve as their guardian. However, the court can look to the specific facts and circumstances of a case. Here, Selma is Ward's only living family member, but she has

not been touch with Ward in 20 years and is constantly on the road. These facts show that it may not be in Ward's best interests for Selma to serve as guardian because of her availability. Therefore, the court will likely not appoint Selma as guardian even though she is Ward's only living family member.

(2) Frances

The court may appoint Frances as the guardian of Ward's person. A guardian of the person takes care of the ward's support and health. Here, Frances has a close relationship with Ward. A court may appoint Frances as the guardian of Ward's person.

The court will likely not appoint Frances as the guardian of Ward's estate. A guardian of the estate handles the property of the ward. The guardian of the estate takes care of the financial obligations of the ward. A court can look to the applicant's experiences and financial responsibility in determining whether to appoint the applicant. Here, Frances has struggled financially with her own money. She has been sued over an unpaid debt. Looking at the circumstances, it may not be in Ward's best interests for Frances to be appointed guardian of his estate.

(3) Alejandro

The court will likely appoint Alejandro as the guardian of Ward's estate. Because the guardian of the estate manages the ward's finances, the court will look to the applicant's experience and knowledge of handling and managing finances. Alejandro is Ward's accountant and has handled his business and personal tax matters for over 20 years. Under these facts, a court would likely appoint Alejandro as guardian of Ward's estate.

There is a basis for a temporary guardianship because some of the ward's property is in danger of losing its value since quickly. The poinsettias in Ward's inventory are worth \$60,000. If a temporary guardian is not appointed to make sure the flowers are sold, the value will substantially decrease since the poinsettias will die. The court may appoint Frances as a temporary guardian. Frances is also a florist and will have the experience to run Ward's business.

The court may also grant a joint guardianship of Ward's estate between Alejandro and Frances. Alejandro could handle the financial part of the business and Frances can handle the store front.

Question 9 – February 2020 – Selected Answer 2

A. Under the Texas Probate Code, clear and convincing evidence of physical or mental incapacity must be the findings that form the basis of a court's decision to appoint a guardian for Ward.

In Texas, anyone may petition the court in the county in which a proposed ward lives to make a finding of incapacity and appoint a guardian. The burden is on the party alleging incapacity to present clear and convincing evidence of a person's physical or mental incapacity. Clear and convincing evidence is a high evidentiary standard, but in the case of guardianship it is generally clear to a court whether a person is in need of a guardian based on the circumstances. A guardianship will end when the ward dies, regains capacity, or the guardian is removed for cause or resigns and is replaced.

In the case of an adult, a person is incapacitated when they have a physical condition that prevents them from being able to perform the daily activities that are considered necessary to function. Examples are getting dressed, feeding oneself, brushing teeth, etc. A person may also be incapacitated because of a mental condition that renders them incapable of performing these activities, or that renders them incapable of making decision related to managing their personal affairs or finances. A court may appoint a guardian of the person (GOP) to manage the actual physical "possession" of the ward, essentially charging them with helping the ward physically from day to day. A court may also appoint a guardian of the estate (GOE) who will handle the financial and business affairs of the ward while they are incapacitated. A court may also appoint one guardian to manage the person and the estate. A person may avoid the appointment of a guardian by executing a durable power of attorney or through a trust, among other options.

Here, it is likely that Selma, Frances, and Alejandro will be able to prove by clear and convincing evidence that ward is both physically and mentally incapacitated and is in need of a guardianship. He suffered a stroke and is being hospitalized while in a coma. Though he may very well wake up and be able to continue his normal way of life after whatever recovery is necessary, he will need a guardian until the incapacitation ends. While in the hospital, he is likely receiving the physical care he needs from the hospital staff. The court may still appoint a guardian of the person until he regains capacity, but the court may also appoint only a guardian of the estate at this point. Ward has a business to manage and business assets that will lose value in a short period of time. The need for a guardian of the estate is apparent and clear and

convincing evidence exists. Per the Texas Probate Code, the findings mentioned above will need to be made by clear and convincing evidence, and likely will here.

B. The Court will likely appoint Frances as the guardian of Ward's person, but may elect to appoint Selma, and will likely appoint Alejandro as the guardian of Ward's estate. The Court may also rightly find it necessary to appoint a temporary guardianship here.

Courts tend to look to family members when appointing a guardian, but will not automatically place a ward in the care of a family member if evidence exists that it is not in the best interest of the guardian. Because a court may appoint a GOP and a GOE, a court will look to the qualifications of all willing candidates in coming to its decision. A GOP should generally be available to care for the ward and the ward's non-financial affairs on a daily basis, and adequately able to perform the tasks associated with the duties of a GOP. Similarly, a GOE should be qualified to prudently manage the financial matters of a ward while the ward is incapacitated. Guardians are subject to the duty of loyalty and good faith, duty of care, and duty of prudence. A temporary guardian may be appointed while a GOP and GOE are being sought if necessary. The overall consideration in all guardianship proceedings is the best interest of the guardian.

Here, although Selma is Ward's family, she is essentially an estranged relative. She has not spoken to ward in 20 years. Also, she is a travelling artist and is constantly on the road. Although these are not dispositive factors, the Court will certainly look to them in making its decision. The facts do not indicate that Selma's appointment as guardian would not be in Ward's interest, but she is not the best candidate for either GOP or GOE. However, if she is willing to remain in Austin to care for Ward, the Court may very well elect to appoint her GOP.

Frances is the best candidate for GOP as he is Ward's long-time best friend and likely lives in the area. Frances would not make a great candidate for GOE, especially in comparison to Alejandro, because of his past financial troubles. However, his experience as a florist is a factor the Court will consider. Alejandro is likely to be the court's choice for GOE as he has already managed Ward's finances as his accountant in the past.

While the Court is coming to its decision, a temporary guardian may be warranted, especially over the estate, because Ward's assets will literally wilt away and die in two weeks.

Question 9 – February 2020 – Selected Answer 3

A - Under the Texas Probate Code, the court must find, before appointing a guardian for Ward, that Ward is incapacitated and likely to remain incapacitated, and that his estate is such that a guardianship is required to protect it's assets (e.g., due to urgent business concerns). In determining between various candidates for guardianship, the court must find a person who serves the best interests of ward, which is dependent on various rules set forth in the Texas Probate Code. The evidentiary standard is clear and convincing.

The issue presented is whether Ward is incapacitated and in need of a guardian, and if so, the findings required to select between various applicants or a separate person not named in an application. The rule is that guardianship is required if the ward is incapacitated and likely to remain incapacitated such that the character of his estate is in jeopardy. That is, there must be a showing that the ward is unlikely to recover from his incapacitated state in a short enough time frame to adequately address the urgency of his estate.

Here, Ward recently suffered a stroke and is currently in a coma. Ward has maintained a very successful floral shop, and maintains a steady supply of fresh flowers. However, there is urgency regarding his shop because he recently stocked up on holiday poinsettias that are in high demand and must be sold during the holiday season to secure maximum return. Thus, the court would find that Ward is incapacitated and that his business interests require appointment of a guardian of his estate to protect the business livelihood. Ward is also hospitalized and will likely need a guardian of his person in order to live productively for the near future.

Regarding the findings needed to appoint a specific guardian, there is a presumption under the Texas Probate Code that family members, in a certain defined order, would serve the best interests of the ward as guardian. The order of preference is inapplicable here because Ward has only one surviving family member, Selma. Thus, the presumption is that appointing Selma as guardian would be in the best interests of Ward. However, this presumption could be rebutted by other factors that show it would not be in the best interests of the ward to appoint a family member of guardian. These issues are addressed in the second part of the question/answer.

B - The court is likely to grant guardianship to Alejandro. If the court grants guardianship to someone other than Alejandro, it would likely be Selma. The court does have a basis for ordering a temporary guardianship.

As previously noted, the court must appoint a guardian according to the best interests of the ward. There is a presumption that family members would serve the best interests of the ward. This presumption can be rebutted by other factors, such as business acumen, personal relationships, and familiarity with the estate assets.

Here, Selma, Ward's sister, is Ward's only remaining family member. Thus, there is a presumption that Selma would serve Ward's best interests. Further, Selma is an artist and thus may be tangentially familiar with floral arrangements. However, Selma is constantly on the road and has been out of touch with Ward for over 20 years. Thus, assuming there is another viable candidate, the court may consider the other viable candidate since the presumption that Selma - as sister - would be in the best interests of Ward are questionable due to their long estrangement.

Frances is an unlikely viable candidate in lieu of Selma. While Frances is Ward's best friend and Ward may have a personal affinity for Frances, Frances has a questionable business history. Indeed, Frances has struggled financially and was once sued over an unpaid debt. It is unlikely that the court would appoint Frances as guardian.

Alejandro, on the other hand, has handled Ward's business and personal tax matters for 20 years. Thus, Alejandro is familiar with the business and estate assets. While very little other information is given, it is likely that the court would find appointing Alejandro as guardian as being in the best interests of Ward.

With all that said, the court may appoint co-guardians. For example, Frances could be appointed guardian for purposes of Ward's person and Alejandro could be appointed guardian for purposes of Ward's estate and business. This would strike a balance between Ward's needs and best interests.

As previously noted, the court has a basis and should consider temporary guardianship. It is unsure how long Ward will be incapacitated. While strokes can sometimes take a significant time to recover from, there is no indication that Ward had previously suffered significant health issues. For example, this appears to be his first stroke. Accordingly, the court might find basis in appointing a temporary guardian until Ward's incapacity and recovery timeline are clarified.