

Question 8 – July 2018 – Selected Answer 1

A. Under Texas law and the limited facts provided Greg was eligible and did qualify as Ward's legal guardian.

Under Texas law, a guardian may be appointed over an adult who is mentally or physically incapacitated if it can be shown through clear and convincing evidence that it is in the best interest of the person to be appointed a guardian, that the guardian will be able to protect the interests of the person and that the person has a physical or mental disability, that substantially interferes with his ability to take care of himself, provide himself with food, shelter, clothing or physical health or his financial estate. Typically, a movant for guardianship must show through clear and convincing evidence that the ward is incapacitated through evidence tracking back the last 6 months with medical testimony taken 120 days before the hearing showing the court evidence of the incapacity. Anyone may be a guardian if their appointment is in the best interest of the person. A would be guardian has the burden of showing the court through a preponderance of the evidence that they are suitable to be appointed guardian. In order for a person to be suitable to serve as a guardian under Texas law they must not hold any conflicts of interest with the person, not have been convicted of sexual assault, not lack the experience required to serve as a guardian and not be incapable of serving as guardian because of disability or minority. Typically, Texas Courts hold certain preferences for appointing certain people guardians over others but the court always balances these underlying interests with the best interest of the person. The court would typically appoint a spouse of an incapacitated person as guardian followed by parent and sibling followed by anyone who is in the best interest.

Here, the court presumably was presented enough clear and convincing evidence of Ward's substantial incapacity on the hearing at February 1, 2018. The court presumably follows an order in appointing a guardian for a person but this order is contingent on the best interests of the person. Typically, the court would appoint Ward's spouse as guardian first however here Ward is widower. Next, the court would typically appoint Ward's parents as guardians but making assumptions off Ward's current predicament his parents may not be around or they may have been incapable as serving as his guardian for whatever reason. It looks like the court next looked at Ward's next of kin and determined that he was in the best interest of Ward to be appointed guardian. The Court properly placed several restrictions on Greg being appointed official Guardian which Greg ignored. The burden would have been on Greg through a preponderance of the evidence to show that he was suitable but through the lack of descriptions in the facts it can be assumed that this was met.

B. It was proper for the judge to remove Greg as guardian without a notice or hearing.

Under Texas law, there are several ways for a guardian to quit or be removed from his position as guardian. First, the guardian may relinquish his status and all that would be required him as would be to provide a final accounting to the court. If the guardian is removed typically the removal required a hearing for removal unless the guardian has varying bad acts. A guardian may be removed without a hearing if he 1. abandons the ward for a prolonged period. 2. If through clear and convincing evidence the court can show malfeasance of the guardian over the ward. 3. If the guardian fails to follow court procedures of appointment. If the guardian has not

committed any of these acts then a hearing is required for removal. If he has he can be removed without a hearing.

Here, Greg is guilty not of one or two of these acts but of all three. The court removal of Greg without a hearing was proper. First, on March 1, 2018 Greg placed Ward in an unlicensed nursing home in Galveston and then moved to New Orleans and did not return to Texas. Here, this not only meets element one of abandoning his charge but also clear and convincing evidence of malfeasance towards Ward. Second, Greg withdrew 100k from Ward's account which Greg then deposited in his own account in New Orleans, Louisiana. Again, this shows clear and convincing evidence of malfeasance towards Ward as well as a breach of the duty of loyalty tied to a guardian's care over Ward. Third, the court mandated that Greg issue a bond a \$50k in order to properly issue the letters of guardianship. There is clear and convincing evidence here that Greg failed to follow court procedures in being appointed proper guardian of Ward. Ultimately, it was proper for the judge to remove Greg as guardian without a notice or hearing.

C. Greg may reapply for reinstatement as Ward's guardian if he can show through clear and convincing evidence that he did not violate any of the nonhearing removal violations and that he filed this application 90 days from removal.

Under Texas law, a guardian who is improperly removed through lack of a court hearing may petition the court to be reappointed guardian of their charge upon a showing of clear and convincing evidence that the allegations against the guardian are false. Additionally, the reapplication must be done within 90 days of the discharge of the guardian's duties.

Here, Greg was removed on July 15, 2018 if he reapplies for a hearing on his removal and for reinstatement within 90 days of the termination and can show through clear and convincing evidence that he should still be appointed guardian in the best interests of the ward then the court may reinstate his position. It is unlikely that this will occur here as the substantial weight of the evidence shows that he was unsuitable to be guardian. Further, Greg having violated several of the fiduciary duties owed to his charge and now having open conflicts with the charge is unlikely to be successful in his reappointment.

Question 8 – July 2018 – Selected Answer 2

A

There are not enough facts to determine whether Greg was specifically eligible or qualified to be Ward's legal guardian. Although we do not have enough facts to determine the specifics of Greg's eligibility, if an appellate court was to look at this it would use an abuse of discretion standard. An abuse of discretion standard is judged by if the trial court acted in an arbitrary or unreasonable manner or without reference to guiding principles of law. We do know how Greg acted after being appointed guardian, though. Greg embezzled funds from Ward's account, and left his own brother in an unlicensed nursing home, and took off to Louisiana, avoiding his brother and his responsibilities. If there was any reason to know of this potential conduct or that Greg did not truly care for his brother, then the court could have abused its discretion in appointing Greg as Ward's guardian. As discussed below, the court was required to use a clear and convincing evidence standard in determining the Ward's best interest and if any of these signs of Greg's behavior were present at the time, the court probably did not have clear and

convincing evidence and Greg probably was not eligible to serve as guardian of Ward's person. We also don't know about Greg's financial experience, but if the court did not find that he had the experience to handle the ward's estate then they possibly abused their discretion as well.

In order to be appointed a guardian, first it must be found that the ward is incapacitated by clear and convincing evidence. Additionally, it must be found by clear and convincing evidence that guardianship is in the best interest of the ward. Once that is established, then it must be proven by a preponderance of the evidence that the ward either (1) is incapable of providing for his person, such as not being able to take care of himself or provide himself food, clothing, shelter, or everyday needs; or (2) incapable of providing for his estate, such as not making prudent financial decisions because of an incapacity. The court must find that the

A ward of the person for an adult is appointed by first looking at the ward's preference, and also if the person's spouse or next of kin. Here, Greg is a widower. Thus, his family will be who is looked at. There are not enough facts to know what other options the court had when deciding Greg, however, the court should have determined that as to Ward's person, that Greg (1) would be in the best interests of the Ward to take care of his person, and as to his estate, that Greg (2) had financial experience and education that would render him capable of taking care of Greg's estate. We do not have facts as to Greg's qualifications. We also do not know if Ward made a preference about who he wanted to serve as his guardian.

Additionally, as to eligibility, in order to be eligible to serve as a guardian, the individual cannot be someone who is incompetent, incapacitated, someone whose conduct is notoriously bad, or someone who is not in the best interests of the ward. Additionally, to be eligible as guardian of an estate, one typically must have the requisite financial experience to take care of an estate.

Thus, as discussed above, we do not have enough facts to determine whether Greg was actually eligible and qualified at the time of appointment, but we do know how he acted afterwards, and it is very likely that he was not eligible nor qualified.

B

Yes it was proper for Judge to remove Greg as guardian without notice or hearing for several reasons.

The issue is whether an appointed guardian can be removed without notice and hearing.

There are several statutory provisions that allow for a court to remove a guardian without notice and hearing. Among those include: failure to post a bond and swear oath within 20 days; moving out of Texas for 3 months with no way of delivering service; and embezzling funds or other breaches of fiduciary duties. All of these grounds must be proven by clear and convincing evidence for a court to remove a guardian without notice and hearing.

Here, there are several provisions that Judge could have relied on in removing Greg without notice and hearing. First, on the fact that Greg never took the oath of guardianship or ordered bond alone, Judge could have removed Greg without notice and hearing. That alone would have satisfied the standard. However, Greg engaged in other conduct that additionally deprived him of right to notice and hearing. Greg used Ward's account to withdraw \$100,000 and file it in his

own bank account. This was embezzlement and a breach of his fiduciary duty to the estate and ward, and is its own ground for the court to remove Greg without notice and hearing. Finally, Judge could have also relied on the ground that Greg moved out of the jurisdiction for 3 months and there was no way for him to be served with notice. Therefore, it was proper for judge to remove Greg as guardian without notice and hearing.

C

Greg cannot apply for reinstatement as Ward's guardian because he embezzled funds from the Ward's account and breached fiduciary duties.

The issue is whether a guardian who is removed for breach of fiduciary duties can reapply as a guardian to the ward.

If a guardian is removed as a guardian on the grounds of breach of fiduciary duty, such as embezzling funds, then that guardian will not be entitled to seek reinstatement as the guardian of the Ward. Here, Greg embezzled \$100,000 from Ward's account and filed it in his own bank account. This was a direct breach of his fiduciary duties to the Ward's estate as his guardian of the estate, and will not allow Greg to be reinstated as guard A) Greg was eligible and did qualify as Ward's legal guardian because no facts are present stating that he was disqualified or that he lacked the intelligence or experience to take care of Ward's person and estate. The issue here is what is the standard to appoint a guardian. To appoint a guardian, the court must find by clear and convincing evidence that the Ward is incapacitated, that appointing a guardian is in his best interest, and that reasonable alternatives have been explored and deemed not feasible. To appoint a person guardian of the estate or person, the court must find by preponderance of evidence that the person to be appointed is in the best interest of the ward and that the person is not disqualified from serving as the guardian.

The court determined by clear and convincing evidence that Ward was incapacitated, and determined that it was in his best interest to have a guardian appointed for his person and his estate. There are no facts that state that Greg has any disqualifying attributes from being named guardian, and there is no evidence (before being appointed) of notoriously bad conduct. Priority of appointing guardianship is spouse, parents, next of kin, anyone else the court deems appropriate. Here, the court acted within their discretion to appoint Ward's brother because they determined it was in his best interest to be appointed. The basis for this decision is not stated in the facts, but Greg was likely eligible.

Greg may not have qualified to be Ward's legal guardian of his estate if the estate was too large for an individual to manage individually. If the estate was too large, the court should have appointed a bank or corporation to manage the estate. The court determined that Greg was qualified and eligible, however, so it is likely that he was eligible.

Question 8 – July 2018 – Selected Answer 3

A) Greg was eligible and did qualify as Ward's legal guardian because no facts are present stating that he was disqualified or that he lacked the intelligence or experience to take care of Ward's person and estate. The issue here is what is the standard to appoint a guardian. To appoint a

guardian, the court must find by clear and convincing evidence that the Ward is incapacitated, that appointing a guardian is in his best interest, and that reasonable alternatives have been explored and deemed not feasible. To appoint a person guardian of the estate or person, the court must find by preponderance of evidence that the person to be appointed is in the best interest of the ward and that the person is not disqualified from serving as the guardian.

The court determined by clear and convincing evidence that Ward was incapacitated, and determined that it was in his best interest to have a guardian appointed for his person and his estate. There are no facts that state that Greg has any disqualifying attributes from being named guardian, and there is no evidence (before being appointed) of notoriously bad conduct. Priority of appointing guardianship is spouse, parents, next of kin, anyone else the court deems appropriate. Here, the court acted within their discretion to appoint Ward's brother because they determined it was in his best interest to be appointed. The basis for this decision is not stated in the facts, but Greg was likely eligible.

Greg may not have qualified to be Ward's legal guardian of his estate if the estate was too large for an individual to manage individually. If the estate was too large, the court should have appointed a bank or corporation to manage the estate. The court determined that Greg was qualified and eligible, however, so it is likely that he was eligible.

B) Yes it was proper to remove Greg as guardian without notice or a hearing because there is clear and convincing evidence that he was misapplying funds, that he left the state for over 3 months and could not be served, he did not take the oath of guardianship, he did not file the ordered bond, and he did not file any documents with the probate court. As guardian, a person has many duties they must comply with or they may be removed as guardian. They must take oath of guardianship and file bond within 20 days of appointment. They must file an inventory or affidavit in lieu of inventory within 60 days. They must file with the court an investment plan within 180 days after appointment if they plan to invest in anything other than the statutorily allowed investments, such as government bonds. They cannot cruelly treat or neglect the ward. They cannot misappropriate or embezzle funds. They cannot leave the state for over 3 months without having an agent appointed for service. If any of these things are found to be done by clear and convincing evidence, the court may remove a guardian without a notice or hearing.

Here, Greg did not take the oath or file bond. He did not file an inventory with the court. He embezzled funds out of Ward's bank account and put them in his own account. He has not been present in the state for over 3 months and did not have an agent for service. He neglected Ward because he placed him in an unlicensed nursing home. These all give rise to the court being able to remove Greg as guardian, because there is clear and convincing evidence that he was acting in violation of his guardianship duties.

C) Greg must file a request for reinstatement on the basis that he did not misapply funds, that he did not neglect Ward, and that he did not fail to comply with any of his guardianship duties. He must file this application within 30 days of being removed as guardian. If a guardian can show that there is a valid explanation for the issues giving rise to his removal, the court will have to hold a hearing to determine if there is reason to believe that the guardian violated any guardianship duties.

Here, Greg will not be successful on any of his explanations because there is clear and convincing evidence that he did not comply with his guardianship duties.