

Guardianship and Conservatorship-Final Exam
Fall, 2008
Professor Cross

This is a 3 hour exam. There are 5 questions. At the beginning of each question, the value of the question is given (the number of points), along with a suggested time frame for answering the question.

As discussed in class, this is an open book exam.

Please number your blue books (1 of 2; 2 of 2, etc.). Please write your Social Security Number (not your name) on each of your blue books. Please also write "Cross" on each of your blue books.

Please keep in mind that I am looking not only for your answers and conclusions but also for an organized and concise analysis that leads to such conclusions.

GOOD LUCK!

Question 1 (25 points; suggested time 45 minutes)

You are a law clerk for Judge Judy Jones, an Associate Justice of the Massachusetts Probate and Family Court Department. Judge Jones has called you into her chambers and relates the following to you:

In her busy motion session earlier this week, Judge Jones allowed a motion for the appointment of a temporary guardian of an elderly person, Albert Clark, on an ex parte basis. The temporary guardian is Sonya Smith, Albert's niece. Ms. Smith is also Albert's only heir and the sole beneficiary of his estate.

At the time of hearing on the motion for temporary guardianship, Ms. Smith appeared with counsel, Attorney Priscilla Peabody. The pleadings presented to the Court by Attorney Peabody included an affidavit signed by a Dr. John Payne. Judge Jones waived the requirement that a Medical Certificate be filed. Dr. Payne stated in his affidavit that the proposed ward "is a mentally ill person to the degree that he is incapable of caring for his personal and financial affairs" and that he "is a person who is unable to make or communicate informed decisions due to physical incapacity." Dr. Payne further wrote, "Albert Clark, 63 year old bachelor, alcoholic, diabetic, legally blind. Admitted to Boston General Hospital over weekend after suffering minor stroke. Patient announced intention to leave hospital, against medical advice. Given present medical problems/condition, patient should remain at BGH, possibly 3 to 4 weeks. Uncooperative, verbally abusive, derides medical staff. At risk if leaves hospital. Barely able to walk. Early signs of dementia."

Sonya Smith also filed her own detailed affidavit, prepared by Attorney Peabody. Ms. Smith's affidavit states that Albert owns real estate (a house) and has substantial personal assets (\$600,000). The affidavit further states that Albert cannot presently live by himself. The affidavit indicates that if Albert returns to his home, he may forget to take his insulin, especially if he resumes his usual pattern of heavy drinking.

Judge Jones tells you that she allowed the temporary guardianship, giving Ms. Smith authority over Albert's person and estate, as well as authority to admit Albert, if necessary, to the separate, psychiatric unit at Boston General Hospital. The temporary guardianship was granted for a ninety day period. Yesterday, an attorney, Kevin Devries, entered an appearance for Albert, in opposition to the guardianship. Attorney Devries has also requested an immediate de novo, evidentiary hearing regarding the temporary guardianship. In addition, Attorney Devries has filed a request for an independent expert.

Counsel for Sonya Smith has filed an opposition to these requests for relief and has also filed a motion to strike the appearance of Attorney Devries, claiming that he has no standing to enter an appearance in this matter.

Judge Jones asks you to review the case thoroughly and to outline for her how she should proceed at this point. She wants to know the applicable standards in cases such as this one, including any relevant statutes, case law, and rules. As usual, Judge Jones is in a hurry. What will you tell her?

Question 2 (25 points; suggested time 35 minutes)

Several weeks ago, you were retained by Mr. Smith, an elderly client. Mr. Smith, who resides in an assisted living complex, requested that you prepare a comprehensive estate plan for him. Mr. Smith has never executed a will nor done any other type of estate planning.

At the initial interview, which was held at your office, you were struck by the fact that Mr. Smith appeared to be extremely frail. He was accompanied by his son, his sole heir. Mr. Smith's spouse died several years ago. During the course of the interview, Mr. Smith described for you how he wanted to distribute his estate: 1) an initial \$10,000.00 bequest to Massachusetts School of Law and 2) the remainder of the estate to his son. The estate is valued at approximately one million dollars, and Mr. Smith receives \$75,000.00 per year from his pension. During your conversation with Mr. Smith, he also stated to you: "If I ever get sick or something or reach the point where I can't handle things, I want my son to take over for me."

Following your initial meeting, you immediately began drafting the various estate documents that you discussed with both Mr. Smith and his son, including a trust, a will, a durable power of attorney, and a health care proxy. Unfortunately, however, before you were able to complete your work, Mr. Smith suffered from a serious stroke and is now failing, both physically and mentally. Based upon your lengthy discussions with Mr. Smith's son and his treating physicians, you have concluded that Mr. Smith is clearly incompetent. In fact, due to his stroke, he is presently unable to communicate in any manner whatsoever.

Given this situation, you have now advised Mr. Smith's son that he should pursue a guardianship for his father. Medical treatment decisions need to be made immediately, and someone needs to manage Mr. Smith's assets. If necessary, a chapter 201, section 38, estate planning petition can also be filed. Mr. Smith's son agrees with your recommendation but wants you to serve as co-guardian with him.

Time is of the essence, and your plan is to start with a temporary guardianship. Despite all of this, you have some lingering concerns about any possible perception that you are bringing an action "against" Mr. Smith. On the other hand, you do have a great deal of expertise in this area of the law and firmly believe that you can legitimately protect Mr. Smith's interests and help manage his affairs on an ongoing basis. In addition, why should you give up a good case and what promises to be a substantial fee?

How will you proceed and why?

Question 3 (20 points; suggested time 50 minutes)

Over the course of the past several days, you have been working with Judge Jones, who has been assigned to the Judicial Response System. This is the system set up to provide judicial intervention in urgent matters when the Courts are closed. As Judge Jones' law clerk, you must also be available on the weekends and evenings when she is on-call to assist her with any cases that may arise.

This evening at approximately 6:00 p.m., Needham Hospital initiated through the Judicial Response System a temporary guardianship seeking authority to immediately begin major, life-saving surgery for Wayne M. Davis, a 24 year-old male who was involved in an automobile accident earlier in the day. Wayne suffered serious injuries to his head, neck, spine, and spleen. His left lung was also punctured by a broken rib. He is presently unconscious.

It is the opinion of the treating physicians at Needham Hospital that surgical intervention is necessary to save Wayne's life. Time is critical. The problem confronting the hospital is that Wayne's father is adamantly opposed to the surgery. His mother, however, supports the proposed treatment.

The treating physicians believe that with surgery, Wayne will survive. However, for the remainder of his life, he will almost certainly be paralyzed from the neck down and will also suffer from significant cognitive impairment. Without the surgery, Wayne will die. Based upon this prognosis, Wayne's father has taken the position that his son "would never want to live like that." Wayne's mother, a devout Catholic, favors any and all treatment.

Prior to the accident, Wayne worked at a fitness club as a personal trainer. He was very athletic and ran the Boston Marathon last year. He was a star athlete in both high school and college. According to Wayne's father, exercise and participating in sports has been his son's life. Although raised in the Catholic faith, Wayne has not been particularly religious since he was a child.

Immediately following the hospital's call, you recruited an attorney, Kevin Devries, to represent Wayne. Attorney Devries is an expert in the area of guardianship law and has, in the past, assisted the Court by representing the respondents/proposed wards in both urgent and complex medical guardianship cases. Attorney Devries participated in the drafting of the CPCS standards for attorneys representing respondents in extraordinary medical treatment cases. Attorney Devries supports the proposed treatment for his client, in opposition to the father.

At the makeshift hearing held over the telephone, which has just been completed, the Court has learned, in addition to the above, that Wayne is not married and has no children. For the past several years, he has lived with his parents. He has no siblings. Prior to his accident, he was otherwise in excellent health.

Judge Jones decides to deny the temporary guardianship filed by the hospital. She tells you that in the apparent absence of any advance directives or past statements by the son, she is inclined to agree with the father. Judge Jones, therefore, issues a verbal order denying the relief requested by the hospital. She instructs you, as her law clerk, to begin to draft an opinion justifying her decision denying the proposed treatment. In the meantime, Attorney Devries is in the process of contacting a single Justice of the Appeals Court on an emergency basis to seek a stay of and/or to overturn Judge Jones' decision. Your opinion, albeit hurried, will likely be read over the telephone to the single Justice.

How will you approach your assignment from Judge Jones? What will you include in the decision? What factors are and are not relevant? Remember, time is of the essence!

Question 4 (15 points; suggested time 25 minutes)

In the area of guardianship law of disabled persons (as opposed to minor children), please **briefly** describe and/or define all of the following:

- 1) the standard of proof to be applied in a temporary guardianship proceeding,
- 2) the standard of proof in a permanent guardianship proceeding,
- 3) “equity-style” decree (define and describe),
- 4) the “loving family” exception,
- 5) the “heightened preponderance” of the evidence standard (definition and applicability),
- 6) the authority of the agent pursuant to a health care proxy, and
- 7) the specific procedures for contesting a guardian’s account.

Question 5 (15 points; suggested time 25 minutes)

Judge Jones has one last issue for you. Presently, she has a contested permanent guardianship case before her involving an elderly woman who is refusing a nursing home placement. The petitioners are the proposed ward's two daughters. There are no other interested parties. According to Judge Jones, the proposed ward is clearly incompetent. Despite this, however, she has expressed a strong preference against living in a nursing home. She would prefer to remain in her apartment.

Judge Jones wants to know the current status of the law involving the admission of elderly persons to nursing homes. Is this case analogous to a civil commitment proceeding? What standard of proof should be applied? Is it enough to ascertain whether the nursing home placement is in the "best interests" of the proposed ward? On the other hand, perhaps a guardian, once appointed, has the inherent authority to admit his or her ward to a nursing home without any further Court involvement. In addition, what if the guardian, at some point in the future, wants to place the ward in a locked Alzheimer's unit? Finally, what can Judge Jones do to ensure that this is an appropriate placement?

As Judge Jones' law clerk, how will you respond to her questions?