

Guardianship and Conservatorship-Final Exam
Fall, 2005
Professor Cross

This is a 3 hour exam. There are 4 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, during the exam, you may use your text and your rules book.

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 35 to 40 minutes)

You have represented Mr. Smith, an elderly client, for a number of years. Prior to his retirement, you represented him in various business and commercial transactions. You have also drafted a comprehensive estate plan for him. Mr. Smith has always considered you to be his attorney.

Both Mr. Smith and his spouse, Mrs. Smith, now reside in an elderly housing complex. Recently, Mr. Smith has been failing, physically and mentally. Mr. Smith had a serious stroke several weeks ago, which has been a major setback for him. At the urging of various staff members at the elderly housing complex, Mrs. Smith has approached you about obtaining a guardianship for Mr. Smith. Mrs. Smith prefers that you become her husband's guardian, or, alternatively, that both you and she become co-guardians.

Your view is that Mr. Smith is now clearly incapable of handling both his personal and financial affairs. In your most recent meeting with him, there was no meaningful interaction or communication. He did seem to recognize you, however, and smiled when you entered his room. Despite all of this, you have some concerns about bringing a guardianship action "against" Mr. Smith. You have expressed your hesitation to Mrs. Smith.

Mrs. Smith has politely but firmly taken the position that if you are unwilling to proceed with a guardianship, she will hire another attorney to petition the Court. This also troubles you. Given your past involvement as counsel for Mr. Smith, you feel that you can best protect his interests and manage his affairs. In addition, you believe that this would be Mr. Smith's preference.

You are about to have another meeting with Mrs. Smith. You want to explain to her in a clear and detailed manner just what your legal and ethical obligations are at this point. What will you tell Mrs. Smith?

Question 2 (25 points; suggested time 50 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 several days ago, Judge Jones allowed a motion for the appointment of a temporary guardian of an elderly person, Emily Gale, on an ex parte basis. The temporary guardian is Sonya Smith, Ms. Gale's niece. Ms. Smith is also Ms. Gale's only heir and the sole beneficiary of her 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 included a Medical Certificate signed by a Dr. John Payne. Dr. Payne checked the standard section on the Medical Certificate form stating that the proposed ward "is a mentally ill person to the degree that he/she is incapable of caring for his/her personal and/or financial affairs." In the narrative section on the Medical Certificate form, Dr. Payne wrote, "Emily Gale is an elderly person who is failing, both physically and mentally. She needs a guardian to protect her personal and financial affairs. Her niece, Sonya Smith, reports that Emily Gale is refusing cataract surgery."

Sonya Smith, thru her attorney, has filed her own detailed affidavit. Ms. Smith's affidavit states that Emily Gale owns real estate (a house) and has substantial personal assets (\$600,000). The affidavit further states that Ms. Gale cannot continue to live by herself or otherwise function on her own and that she needs to move into an assisted living arrangement. The affidavit indicates that an assisted living unit is presently available. The affidavit also states that although Ms. Gale needs cataract surgery, she has put it off on at least two occasions.

Judge Jones tells you that she allowed a so-called "plenary" temporary guardianship, giving Ms. Smith complete authority over Ms. Gale's person and estate. Yesterday, an attorney, Kevin Devries, entered an appearance for Ms. Gale, in opposition to the guardianship. Attorney Devries has also requested a de novo hearing regarding the temporary guardianship. In addition, Attorney Devries has filed the following pleadings:

- 1) a motion to restrain the temporary guardian from utilizing any of the ward's assets or to make any personal decisions for Ms. Gale (including medical treatment decisions or decisions regarding place of residence),

- 4) a motion for an independent expert, and
- 3) a motion for the appointment of a guardian ad litem to investigate Ms. Gale's present circumstances and the need, if any, for a guardian.

Counsel for Sonya Smith has filed an opposition to all of 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 refresh her memory regarding the standards for appointing a temporary guardian. She also wants you to comment on all of the pending requests for relief made by the two attorneys in this case. She wants your comments before there are any further proceedings. As usual, Judge Jones is in a hurry. What will you tell her?

Question 3 (25 points; suggested time 55 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., Norwood Hospital initiated through the Judicial Response System a temporary guardianship seeking authority to administer a blood transfusion to a Ms. Valerie Meicher, who was admitted to the hospital in the late afternoon on an emergency basis. Ms. Meicher was involved in an automobile accident and suffered serious injuries. She is presently unconscious.

It is the opinion of the treating physicians at Norwood Hospital that a blood transfusion is necessary in order to save Ms. Meicher's life. Time is critical. The problem confronting the hospital is that Ms. Meicher is a devout Jehovah's Witness. Her medical records, readily obtained by the hospital, are replete with instructions conveyed by Ms. Meicher that under no circumstances is she to receive a blood transfusion. A principal tenet of her faith is that the act of receiving blood or blood products precludes an individual from resurrection and everlasting life after death.

The treating physicians believe that with a blood transfusion and other necessary medical interventions, including surgery, Ms. Meicher will in all likelihood recover completely. Without the transfusion, she will in all probability die.

Immediately following the hospital's call, you recruited an attorney, Kevin Devries, to represent Ms. Meicher. 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 opposes the blood transfusion, arguing that Ms. Meicher's substituted judgment determination would be to refuse such treatment, even if death would be the inevitable result. He bases his argument, in large part, upon two or three decisions from other jurisdictions upholding the right of Jehovah's Witnesses to refuse blood transfusions in virtually any and all circumstances.

At the makeshift hearing held over the telephone, which has just been completed, the Court has learned, in addition to the above, that Ms. Meicher is 38 years old and has two

minor children, ages 7 and 9. Prior to her accident, Ms. Meicher was in excellent health. Ms. Meicher's husband died over two years ago from a heart attack. He was also a Jehovah's Witness. Ms. Meicher has no extended family in the area. Her closest relative is her mother, age 85, who resides in a nursing home in Chicago. At the present time, Ms. Meicher's children are staying temporarily with a neighbor. There is no plan in place for any continued care of the children. On the other hand, there hasn't been much time to sort things out.

Judge Jones decides to authorize the blood transfusion and verbally issues an order granting the hospital's request for relief. She tells you that some day Ms. Meicher and her children will thank her. Judge Jones instructs you, as her law clerk, to begin to draft an opinion justifying her decision. 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. If indeed the case gets that far, 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 (25 points; suggested time 30 to 35 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.

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