

## WILLS II, ESTATE ADMINISTRATION, GUARDIANSHIP

### E. SPECIFIC GIFT OF ENCUMBERED PROPERTY – EXONERATION OF LIENS

41. [Four times since 1984] T's will devises Blackacre to Ann, \$25,000 to Ben, and his residuary estate to Carl. On T's death, Blackacre is subject to a mortgage securing a \$10,000 note on which T was personally liable. Ann demands that T's executor pay the \$10,000 debt out of the residuary estate so that she will take title free of the mortgage lien.

Yes Must the executor pay the debt?

Absent a contrary will provision, liens on specifically bequeathed property are: exonerated from residuary estate. Exoneration of liens doctrine.

But [Feb. 1989] if the \$10,000 note was non-recourse debt on which T was not personally liable (the lender had only its lien), Ann would **not** be entitled to have the lien exonerated. Exoneration does not apply unless testator was personally liable on note secured by the lien.

41a. July 1989] Same facts, except that T's residuary estate was exhausted by the payment of debts and expenses. Ann demands that the executor reduce the \$25,000 cash legacy to Ben in order to pay off the mortgage and exonerate Ann's lien on Blackacre.

No Must Ben's general legacy be reduced in order to exonerate the lien?

Only residuary estate is subject to exoneration.

### VIII. REFERENCE TO FACTS AND EVENTS OUTSIDE THE WILL

A. **INCORPORATION BY REFERENCE:** An extrinsic document, not present when the will was executed and thus not part of the duly executed will, can be *incorporated by reference* into the will *if*:

- (1) [Feb. 1993] *Writing must be in existence* when will executed;
- (2) Will must show an *intent to incorporate* the writing; and
- (3) Document must be *clearly identified by language in will*, "such that there can be no mistake as to the identity of the document referred to."

42. On July 1, 1992, Tim's will provides: "I devise Blackacre to the persons designated on the attached sheet, and I give my residuary estate to my brother Ben." After Tim's death, stapled to his will is a typewritten, signed, unwitnessed sheet dated May 11, 1992: "Pursuant to my will, I give Blackacre to my nephew, Norman." Evidence shows that the document was not attached at the time the will was signed by Tim and the witnesses. Who takes Blackacre?

No Incorporation by reference on these facts? Not a sufficient identification to point to and document only. "Attached sheet" not enough. Blackacre to residuary estate.

## B. ACTS OF INDEPENDENT SIGNIFICANCE [“NONTESTAMENTARY ACTS”]

43. [Feb. 1995, Feb. 2000] Trudy’s will provides: “I give the automobile that I own at my death to my nephew Ned, and the furniture and furnishings in my living room to my sister Sue.” A year before her death Trudy trades her 1990 Ford in on a brand new Mercedes. She also moves a \$25,000 Picasso from her den and mounts it on her living room wall. What is the effect of these acts on Trudy’s will?

Yes Does Ned take the Mercedes? Yes Does Sue take the Picasso?

*Acts of independent significance doctrine* (Also known as *nontestamentary acts doctrine*)

No [Feb. 1998] Does a bequest of “my Lane cedar chest” (or “my house at 2220 Casino Lane”) include the contents of the cedar chest (or house)?

No [Feb 1998] Does a bequest of “my Lane cedar chest *and its contents*” include *title documents*—deeds, stock certificates, bank passbooks etc.?

## IX. OTHER WILLS DOCTRINES

### A. MISTAKES OR AMBIGUITIES IN THE WILL

44. [Feb 2000] Tom instructs his lawyer to draw his will and to give his nephew Ed “300 shares of Exxon stock.” A typist types the quoted phrase but makes a mistake and writes the figure as “200,” which Tom did not notice when he signed the will in proper self-proved form. At Tom’s death he owns 300 shares of Exxon stock. What does Ed get and why?

200 shares: Plain meaning rule. There being no ambiguity, no extrinsic evidence admitted to explain will.

Absent suspicious circumstances, it is conclusively presumed that: Tom read will and intended its contents.

45. “I give \$10,000 to my nephew, John Paul Jones.” Problem: T has a nephew James Peter Jones, and a nephew named Harold Paul Jones, but no nephew named John Paul Jones. Who takes the \$10,000?

This is called a latent ambiguity because there is a misdescription.

Yes Is extrinsic evidence admissible to cure a latent ambiguity?

But what if the extrinsic evidence does not cure the ambiguity? It fails, no ascertainable b.

46. Tom’s lawyer prepares a will that includes this provision: “I bequeath the sum of Twenty-

Five Dollars (\$25,000) to my brother Bob.” What does Bob get?

This is called a: patent ambiguity - mistake appears on face of the will.

Yes Is extrinsic evidence admissible? All evidence admitted to cure ambiguity.

## **B. CONTRACTS RELATING TO WILLS**

[Feb 1991] By statute *for wills executed after Sept. 1, 1979*, a contract to make a will or not to revoke a will, “can be established only by provisions in the will (1) ***stating that a contract does exist*** and (2) ***stating the material provisions of the contract.***” [July 1995] The execution of a joint will or reciprocal wills does not of itself suffice as evidence of the existence of a contract.

Statute has eliminated litigation over joint wills (will of two persons on one piece of paper), as to whether the will was executed pursuant to a contract that the survivor would not revoke it. Texas cases sometimes found the existence of a contract merely from the execution of a joint will using plural possessive pronouns (we, us, our) that made a deposition of the combined estates.

[July 2000] Contractual will can be revoked by giving notice to other party to the contract.

**C. NONPROBATE ASSETS** are interests that pass at death other than by will or intestacy: are not part of the probate estate for administration purposes. Major types (also called ***nontestamentary assets***):

- #1. Property passing by ***right of survivorship*** (joint bank account, etc).
- #2. Property passing by ***contract***: life insurance, employee death benefits.
- #3. ***Property held in trust***, including a revocable trust; trust terms govern distribution of assets.
- #4. Property over which the decedent held a ***power of appointment***.

47. [July 1998] T has a \$50,000 Allstate life insurance policy that names Bill Bates as beneficiary. T dies leaving a will that provides: “I hereby direct that the proceeds of my Allstate life insurance policy be paid to my sister Ann Painter.” Who takes the \$50,000 policy proceeds?

No Can you change a life insurance beneficiary designation by will?

## **D. “NEGATIVE BEQUEST”**

48. Tammy’s will devises Blueacre to her son Sam and her residuary estate to her husband Harold. The will provides: “I intentionally make no provision for my daughter Nancy, as she married out of the faith and has been a great disappointment to me.” Tammy divorces Harold in 1995, and dies in 1997 without having changed her will; she is survived by Sam and Nancy as her nearest kin. (Nancy had no children.) Who takes the residuary estate?

Harold? No, divorce rule revoked estate to Harold.

Who takes then? Common law rule and **FORMER TEXAS LAW**: When the will does not make a complete disposition of the estate (partial intestacy), words of disinheritance are **ineffective**. Theory: Property passing by intestacy is governed by the intestate succession statute, not the decedent's will; therefore Nancy takes 1/2 of Tammy's estate.

1991 statute: Words of disinheritance in a will: are now given full effect.

How do we distribute Tammy's estate, then? Old law Nancy took 1/2 3v3n though disinherited. New law Nancy gets 0 of estate. Treat Nancy as though Nancy predeceased. Sam takes all.

(But if Nancy had children, they would take that one-half as distributees; only Nancy was disinherited.)

## X. POWERS OF APPOINTMENT

49. Tom dies in 1980, leaving a will that bequeathed property in trust: "to pay the income to my daughter Dana for life, and on her death to distribute the trust principal to such persons, including Dana's estate, as she appoints by her last will. If Dana does not exercise this power of appointment, on Dana's death the trustee shall distribute the trust principal to Dana's descendants." [Purpose of a power of appointment: permits the life beneficiary to designate the remaindermen.]

Tom was **donor** of the power of appointment as his will created the power.

Dana is the **donee** of a general testamentary power of appointment, because she is not limited in the class of beneficiaries to whom she can appoint; she can appoint the property to anyone, including **herself, OR her creditors, OR her estate**.

Dana's descendants are **takers in default of appointment**, as they will take the property on Dana's death if the power of appointment is not exercised.

50. [Feb. 1984] Dana has dies, leaving a will that bequeaths her residuary estate "one-half to my husband Harry and on-half to my sone Steve."

No Did the residuary clause in Dana's will operate to exercise the testamentary power of appointment, when her will made no reference to the power of appointment?

50a. But the law recognizes **exercise by implication**. If the trust assets subject to the testamentary power of appointment included Greenacre and Dana's will said "I devise Greenacre to my son Steve," this would exercise the power (as to Greenacre) by implication, as that is the only way that the provision in Dana's will could be given effect.

51. Mom's will creates a trust: "Income to my daughter Beulah for life, and on her death principal to such of Beulah's descendants as she shall appoint by her last will. IN default of appointment, to Beulah's children in equal shares."

Beulah has been given a life estate and a special testamentary power of appointment because she is *limited* in the class of persons to whom she can appoint. She cannot appoint to herself, her creditors, or her estate.

Beulah dies ten years later. Her will devises “all my property, including any property over which I may have a power of appointment, to my daughter Diane.”

Yes Did Beulah’s will exercise the special testamentary power in favor of Diane?

51a. Same facts, except that the trust provided: “...and on Beulah’s death principal to such of Beulah’s descendants as she shall appoint by a will ***that specifically refers to this power of appointment***. IN default of appointment, to Beulah’s children in equal shares.” Beulah dies; her will devises “all my property, including any property over which I may have a power of appointment, to my daughter Diane.”

No Did Beulah’s will exercise the special testamentary power in favor of Diane?

## XI. WILL CONTESTS

52. [July 1989] Assuming the testator is of legal age, what must be alleged and proved to show that a testator had sufficient mental capacity to make a will.

Did testator have sufficient capacity to:

1. ***Understand the nature of the act he was doing?*** (he was writing a will)
2. ***Know the nature and value of his property?***
3. ***Know the natural objects of his bounty?***
4. ***Understand the disposition he was making?***

Evidence of T’s capacity or lack thereof must relate to the circumstances at the time the will was executed, or shortly before or thereafter. The more distant in time a particular fact may be, the less significance it has on the question in issue: Did T have capacity when the will was executed. {Feb. 1990: Six months before signing his will, T had been in a mental hospital suffering from paranoia and manic depression: Evidence was *too remote* to be relevant to condition at the time the will was signed.]

53. [July 1992] T was 93 years old when he executed his will. Six months earlier, T had been adjudged incapacitated; a guardian was appointed to manage his property. The trial judge granted the heirs’ motion for an instructed verdict on the ground that T did not have testamentary capacity.

No Was this action proper?

- #1: Adjudication of incapacity involves a different legal test. (capacity to contract, to manage one's affairs) than capacity to make a will.
- #2. Jury could find that the will was executed during a lucid interval.

If will is contested at time offered for probate, burden of proof is on will *proponents* to show T had capacity. *After* the will is admitted to probate (upon proof of its proper execution), contestants have *two years* in which to file a will contest, *they* have burden of proof on capacity.

Only *interested parties* can bring a will contest: persons with an *economic interest* that would be *adversely affected* by the will's probate. *July 1995*: Heirs, legatees under earlier will whose interest would be defeated if this will probated. *Feb. 1985*: A close personal friend, not named as legatee in an earlier will, has no standing to contest the decedent's will. *Feb. 1993*: B could not contest Will #2 which bequeathed \$100,000 to him, when Will #1 (which purportedly was revoked by Will #2) bequeathed \$50,000 to B – but if B were an heir he could contest both wills.

54. [July 1982, July 1984] Assuming that a person is of sufficient age and capacity to make a will, discuss briefly what must be alleged and proved to establish undue influence.

**Undue influence**: Existence of a testamentary capacity subjected to and controlled by a dominant influence or power. Contestant, who has burden of proof, must prove:

1. **EXISTENCE** and exertion of the influence;
2. **EFFECT** was to overpower the mind and will of the testator; and
3. **PRODUCT** was will (or gift in will) that would not have been made **BUT FOR** the influence.

“Influence is not undue unless the free agency of the testator was destroyed and a will produced that expresses the will, not of the testator, but of the one exerting the influence.” [“Mental duress”]

While evidence of undue influence is usually circumstantial, these by themselves aren't enough:

1. Mere *opportunity* to exert influence. Mere fact that one child (who received major share of estate) lived with mother, wrote checks for her, balanced the checkbook, helped on income tax, held a power of attorney...is not evidence that the opportunity was taken advantage of.
2. Mere *susceptibility* to influence due to illness, age. Fact that Mother was very old, had broken her hip, had memory lapses, took Valium...this is not evidence of undue influence.
3. Mere fact of *unnatural disposition*—i.e., that some children take less than others or are excluded entirely.

55. An occasional Wills question has given a fact situation involving eccentric behavior by

the testator and then advises that *e.g.* a nephew is considering a will contest. You are then asked to discuss the likelihood of the nephew's success if he contests the will. If you see this kind of question [Feb. 1990–Testator was discharged from mental hospital six months before he signed his will; facts suggest eccentric behavior and possible undue influence], remember that it has ***no clear answer***. You can't decide whether the testator had capacity or was subjected to undue influence; these would be fact questions for the jury. For this type of question:

- #1. List the four-point test for testamentary capacity; then discuss facts in the context of the legal test.
- #2. List the three-point test for undue influence; then discuss the facts in the context of the legal test—also discussing opportunity, susceptibility, and the effect of an unnatural disposition.

56. [Feb. 1986, July 1990] Tillie, 90 years old and in poor health, resides in Eagle Nursing Home. She tells Rob, the nursing home CEO, that she wants to write a new will leaving everything to charity, as her family hasn't visited her for over two months. Rob explains that the nursing home is a non-profit corporation that depends on donations for its operating expenses. With Tillie's consent, Rob writes a will that (a) revokes all earlier wills and (b) leaves everything to contest the will?

***Undue influence?*** (Begin answer by laying out three-point test, *supra*. Then: Where a will is ***procured***

by one in a confidential relationship, there is an inference of undue influence, which is strengthened when there are suspicious circumstances.

If an inference is raised, while this doesn't affect the burden of proof (contestant still has burden of proof), will proponent has the burden of going forward with evidence that no undue influence was exerted. If the will proponent does not produce sufficient rebuttal evidence, the inference satisfies the contestant's burden of proof.

*Was there a confidential relationship?*

- (1) By advising her as to her will, Rob *established* a confidential relationship.
- (2) Tillie was totally dependent on nursing home and its staff for support and well-being.

***Lack of testamentary capacity?*** (Begin by laying our four-point test, *supra*)

57. Larry Lawyer, in preparing a will for Tanya, inserted a clause that bequeathed \$25,000 to Larry's secretary Stella, and \$50,000 to Larry's wife Lucy.

No Are these gifts valid? [1997 statute] Unless B is related to T w/I third degree fo consanguinity.

58. [Feb. 1985, Feb. 1990] T's will bequeaths \$10,000 to his nephew Ned, and the rest of his estate to his friend Bill. The will contains a no-contest ("*in terrorem*") clause: "Should any beneficiary contest this will, he shall forfeit all gifts hereunder, and shall take no part of my estate." Ned contests the will on grounds of incapacity and undue influence but loses the contest, and T's will is admitted to probate. Does Ned forfeit the bequest?

Yes ...unless probable cause and reasonable grounds for contest

No-contest clauses are given full effect *unless* trial court finds that the contest was brought in good faith and with probable cause (i.e., it wasn't a strike suit designed to extract a settlement). Thus Ned does not forfeit the legacy *IF* the *trial court* finds he had probable cause for bringing the contest.

No-contest clauses are *strictly construed*. They do not apply to will construction suit or [July 994] action brought against executor alleging improper administration of estate. *reason*: Does not challenge validity of the will. [Feb. 2000] Contest by guardian of incapacitated beneficiary did not trigger no-contest clause; gift should not be forfeited by action of someone other than beneficiary.]

## ESTATE ADMINISTRATION

Central feature of Texas estate administration law: Independent administration. In most states, all estates are subject to substantial court supervision, with numerous court hearings, notices, etc., even as to routine details. In Texas, TPC § 145 states that a will may name an independent executor, and provide (as Texas wills *invariably* provide) that no action shall be held in the courts other than probate of the will, and filing an inventory, appraisal, and list of claims of the estate.

The consequence is that most Texas estates are administered the same way as trusts are administered: *Without court supervision or involvement*.

1. When is an independent administration authorized under the Probate Code?

### #1. When provided for in will

Yes [July 1986] Will provides, "I designate my son John independent executor of my estate," but contains no provisions concerning administration of the estate. Is this sufficient to qualify the estate for independent administration?

*or* #2. If all distributees agree.

[July 1993, Feb. 1995] *If all distributees agree*, there can be an independent administration in cases of intestacy or where will does not name independent executor (*unless* probate judge finds independent administration not in best interest of estate).

-- If will creates a trust, income beneficiaries must agree on the independent administration. (No need to get consent of remaindermen.)

- If distributee is minor or incapacitated, guardian (or, if no guardian, guardian ad litem appointed by court) can agree.
- If will makes gifts conditioned on survival by *e.g.*, 90 days, for this purpose it is presumed that distributee so survived.

2. [July 1985] Absent provision in the will broadening the independent executor's powers, what are the powers of an independent executor with respect to the following transactions?

General test: Independent executor has the power to do, without court order: Anything a dependent administrator (under court-supervised administration) can be authorized to do with court order. However, the act must relate to (1) ***proper settlement of the estate*** (*e.g.*, to pay debts, taxes or expenses), or (2) ***preservation of estate assets***.

- a. Sale of real estate [also July 1984]? Yes
- b. Sale of personal property? Yes
- c. Borrowing money? Yes

[July 1997] If will does not give independent executor a power of sale, any purchaser from executor has burden to show that executor had authority to sell real property (*e.g.*, to pay debts). If there was enough cash on hand to pay debts, purchaser not protected.

3. Interested parties are entitled to an accounting from independent executor ***upon demand***  
15 months after will admitted to probate, and successive accountings ***on demand***  
12 months after last accounting was rendered.
4. [July 1990] What procedures may an independent executor use to close the administration?

**FILE CLOSING REPORT WITH VERIFIED AFFIDAVIT.** Closing report must show: (1) ***property initially received***; (2) ***debts and expenses paid***; and (3) ***names and addresses of distributees***.

[1999 statute:] **FILE FOR DECLARATORY JUDGMENT** seeking judicial discharge of independent executor from further liability.

5. [July 1985] For an estate under independent administration when and by whom may the closing or distribution of the estate be compelled?

***Interested party*** can ***petition*** for distribution of estate two years after independent executor was

appointed.

6. [Feb. 1999] What actions must the executor or (administrator) take within 120 days after appointment as personal representative?

Must ***post fiduciary bond*** within 20 days unless bonding requirement was waived by the will.

Must ***publish notice of administration*** in newspaper of general circulation with one month.

Must ***file inventory*** of estate within 90 days unless time period extended by the court.

Must give ***notice to charitable beneficiaries*** within 30 days after will admitted to probate.

7. Independent executor may be removed by the court for cause if:

- 1) [July 1994] Fails to return inventory within 90 days after appointment (unless time extended by court)'
- 2) Has misapplied or embezzled estate property, or there is cause to believe he is about to do so;
- 3) Fails to make a required accounting;
- 4) Is guilty of gross misconduct or mismanagement;
- 5) Becomes incompetent or is sentenced to penitentiary;
- 6) Fails to give notice to charitable beneficiaries within 30 days after will admitted to probate.

8. **Jurisdiction:** Counties with ***statutory county courts at law*** or ***statutory probate courts*** (e.g. Harris, Dallas, Bexar, Tarrant): ***county court has exclusive original jurisdiction***; appeal is to Court of Appeals.

***Counties with only constitutional county courts:*** county court and district court have concurrent jurisdiction.

- a. Uncontested matters (routine probates and guardianship administrations): County court.
- b. Contested matters are transferred to district court on motion; returned to county court for further administration when contested matter is resolved. Alternatively [1999 statute], county court judge can request that a statutory probate judge be assigned to the case.

Yes Do these same jurisdictional rules apply to a ***guardianship proceeding***?

9. [Feb. 1995–D left a will; Feb. 1995–D dies intestate] Estate included securities, real property, “Discuss methods by which the estate can be administered with the least burden and cost.”

General principle: Texas law favors informal administration of estates. But here we have land, securities; some procedure to *clear title* required, to recognize ownership rights of successors by will or intestacy.

- a. Independent administration if all distributees agree (and probate judge doesn't veto).
- b. [If D left a will:] Probate will as a muniment of title. When D left a valid will and there is no need to have an executor appointed and no need to formally administer his estate (family can wind up decedent's affairs informally), BUT formal recognition (e.g., in the land records) is needed to establish the title of successors named in the will. The will and the order admitting it to probate constitute a *muniment of title* (a link in the chain of title) that serves the same record function as a deed.

[Feb. 1986]: Order Admitting Will to Probate as Muniment of Title cannot be entered unless there are *no unpaid debts* (other than mortgage on the homestead). Funeral expenses, debts, etc. should be paid before petition for muniment of title probate is filed.

- c. [Feb. and July 1988, Feb. 1990–intestacy] Statutory heirship proceeding: When D died intestate and there is no need to formally administer his estate, *but* formal recognition (e.g., in the land records) needed to establish title of successors by inheritance. Judgment states that the person dies intestate, names and addresses of persons determined to be the heirs, and shares of the estate that each is entitled to take.

[Feb. 1992] The order entered in the statutory heirship proceeding also can be used to (*e.g.*) collect a bank account in the decedent's name. The bank or other party who pays over in reliance on the order is protected as fully as if payment had been made to the decedent's personal representative (executor or administrator).

- d. [Feb. 1998] *Small estate administration* by affidavit if value of *intestate* decedent's probate estate (not counting homestead, exempt personal property) is less than \$50,000. Affidavit (issued by court clerk serves the same function as letters testamentary granted to an executor (or letters of administration granted to an administrator). Party with the affidavit can collect the decedent's assets (e.g., bank account in her name) by furnishing a copy of the affidavit.

YES [Feb. 1994] Can a small estate administration be used to clear title to the decedent's homestead? [The affidavit must be recorded in the county where the land is located.]

No Can small estate administration be used to clear title to any other real property?

- e. [Feb. 1990–D died intestate] *Qualified community administration*: where decedent's one-half interest in community property passes by intestacy to descendants (*i.e.*, decedent had essentially the same powers that an independent executor would have. Descendants

cannot compel a distribution, terminating the qualified administration, for 12 months after the surviving spouse qualified by giving bond.

- f. [July 1993] H died intestate survived by W and two children by a former marriage who inherited H's ½ of the community estate). W needs to pay the funeral home and other community debts totalling \$25,000. W wants to sell a fishing cabin (community property) worth \$20,000. ***No administration is pending.***

Under TPC §155, W has authority to sell the cabin or any other community assets as ***unqualified community administrator*** (i.e., she didn't have to qualify in probate court) ***for the purpose of paying community debts***. However [Feb. 1997], if there is sufficient cash on hand to pay community debts, spouse does not have the power to sell assets as unqualified community administrator.

10. [Feb. 1995] Dad died intestate in 1975, survived by Mom, daughter Donna, and son Steve (by his first marriage), meaning that Dad's one-half community interest in the ranch passed by intestacy to the children. Mom and Donna continued to live on the ranch as before; it didn't occur to anyone that any probate proceedings should take place. Mom died intestate in 1984. Donna and her family continued to live on the ranch; no probate proceedings were taken out for Mom's estate. Donna has just died, and the surviving family members want to sell the ranch—but the chain of title is a mess. What should they do?

***Nonstatutory affidavit of heirship***, used primarily to clear title to land where owner died years ago and no action was taken to clear title at that time. Affidavits by neighbors or relatives recite facts of family history, that mom died intestate, that her heirs were son and daughter, etc. etc. Affidavit is filed in county records— and Texas title insurance companies and title examiners will act in reliance on validity of recitals in the affidavit.

11. [July 1992] Rosie died leaving a will that devised her entire estate to Millie, who had been in Rosie's employ as a maid for over 20 years. Millie, named as independent executor in the will, offered the will for probate, but in a will contest filed by Rosie's sister, the will was denied probate on the ground of undue influence.

Yes Is Millie entitled to attorney's fees from Rosie's estate for her unsuccessful attempt to probate the will?

12. [July 1988] A ***temporary administrator*** ("TA") can be appointed pending appointment of a permanent personal representative (e.g. will contest has been filed, meaning the will naming an executor has not been probated). The TA's powers are limited to those granted by the court. If the TA is appointed pending a will contest, the appointment continues until termination of the contest and appointment of a permanent representative. ***In all other cases***, the temporary administration ***cannot exceed 180 days***.

13. [Feb. 1981, Feb. 1985] Tom, a resident of Harris County, Texas, leaves a will that devises his entire estate to Betty and names Ed as independent executor. The will is admitted to probate in Harris County [Feb. 1987: Proper venue since Tom was domiciled there]. Ed duly qualifies as independent executor and files an inventory of the estate. Tom owned land in Harris County and

Travis County.

- a. Should anything further be done in Harris County to show that, under Tom's will, Betty has record title to the land located there?
- b. [Feb. 1985, July 1988] What, if anything, should be done to show that Betty has record title to the land in Travis County?

File certified copy of 1) the will; 2) order admitting it to probate.

14. [July 1986, Feb. 1993] T died domiciled in the state of Oregon, and his will was probated in Oregon. T owned land in Travis County, Texas. What proceedings should be taken in Travis County to establish title to T's land?

File certified copies of 1) the will; 2) order admitting it to probate in Oregon.

15. [July 1989] Tom's will named his brother as independent executor and devised his entire estate to his nephew Paul. Tom owned an apartment house in Travis County. After all debts were paid, Bob probated the will as a muniment of title in Travis County. Taking under the will, Paul immediately sold the apartment building to Jones. A year later, a second will was found, under which Tom revoked his earlier will, devised his entire estate to his sister Sue, and named Sue as independent executor. The second will was admitted to probate. Sue brings an action to set aside the deed from Paul to Jones, contending that Paul did not own the land and that the deed was invalid. Result?

Sue loses b/c Order admitting first will to probate: was validly entered. BFP's who rely on court orders are protected.

What does that leave Sue? Action against Paul to recover sale proceeds.

16. [Feb. 1986] Meg died in 1985; her will was not probated. Can the will be probated as a muniment of title in 1999?

No \* because a will must be offered for probate within four years

\**unless* the party offering the will for probate shows that he was "*not in default*" for not probating the will within that period. Stated another way, Meg's will *can* be admitted to probate *if but only if* it is shown that the party offering the will is "not in default" for failure to probate it earlier, in which case the will can be probated as a muniment of title; but no personal representative can be appointed and no estate administration can be opened more than 4 years after death.

17. [Feb. 1999; four times since 1991] Priority as to who is to be appointed personal representative: (1) Executor named in will; (2) *surviving spouse*; (3) principal beneficiary named in will; (4) any other beneficiary named in will; (5) *next of kin*, in nearest order of kinship. [Only the italicized two would apply in an intestacy situation.]

Disqualified from appointment are minors, incompetents, convicted felons, “*a person whom the court finds unsuitable.*”

Yes Can a nonresident of Texas serve as administrator of a Texas estate or [July 1999] as guardian of a proposed ward’s estate?

But he has to: appoint resident agent for service or process.

[July 1988] The statutory list of priority for appointment of a personal representative *does not apply* to the appointment of a *temporary administrator*. The probate court can appoint “any suitable person.”

Why might the court want to appoint someone other than next of kin as Temporary Administrator? (In what circumstances are most TAs appointed?)

Will contest! Family fighting one another.

18. [July 1987, Feb. 1991] Sam does not carry insurance on his 25-foot cabin cruiser because the insurance premiums are so expensive. Sam dies, and Phil is appointed independent executor. Six months later, the boat is destroyed by fire at a loss of \$20,000.

Yes Can Phil be held liable for failing to insure the boat?

General test is “prudence”, if prudent person would have insured then I Ex is under duty to protect assets.

**Compensation of executors and administrators—the “5% in, 5% out” rule.** Absent contrary will provision, a personal representative is entitled to a commission of *5% of all sums actually received* or paid out in cash. (Sale of assets for payment of debts; payment of taxes, income received from estate assets, etc.) This is known as the “5% in, 5% out” rule. The rule *does not apply to cash on hand* (including bank accounts, money market funds, and certificates of deposit) or the collection of life insurance proceeds. Thus, the executor doesn’t get a 5% fee for cashing in a bank account or certificate of deposit in the decedent’s name. (But *extra compensation* may be awarded if collection of the funds or insurance proceeds required *unusual effort*.) Also, the “5% in, 5% out” commission *does not apply to distributions to the beneficiaries or heirs*.

19. [July 1987] Tom dies in March; Dick is appointed independent executor. To raise money to pay claims, Dick negotiates a contract for the sale of Blackacre (Tom’s separate property) for \$500,000. The date for closing the sale is June 15. Dick dies on May 30; on June 6 Ed is appointed successor executor, and on June 15 Ed as executor completes the sale and receives a check for \$500,000.

No Is Dick’s estate entitled to a 5% executor’s commission for the sales contract negotiated by Dick as executor?

5% of sums actually received. Ed gets money for executor’s commission.

20. [Feb. 1987, Feb. 1989] What procedures apply to presentment of creditors' claims against an estate (1) in a dependent administration, (2) in an independent administration?

**Notice requirements are the same for dependent and independent administrations.**

**Notice by publication:** Within one month after being appointed, personal representative (executor if named in a will; administrator if appointed by the court) and being issued **letters testamentary** (or "letters of administration"), **must** publish notice in a newspaper of general circulation, requiring all persons having claims against the estate to present them within the time prescribed by law.

**PERMISSIVE personal notice to unsecured creditors:** Personal representative **may** give personal notice by registered or certified mail to general (*i.e.*, unsecured) creditors having **claims for money** stating that the creditor must present the claim **within four months** after receipt of notice; **otherwise the claim will be barred.**

**Personal notice to secured creditors:** Within two months after being appointed, the personal representative **must** give personal notice by registered or certified mail to secured creditors with valid liens.

In a **dependent administration**, a general creditor must file an **authenticated claim supported by an affidavit** with the probate court or the administrator. Administrator must then write a memorandum allowing or rejecting the claim **within 30 days**. [Feb. 1991:] What if the administrator doesn't take action on the claim within 30 days?

Conclusive presumption: claim has been rejected.

If the claim is allowed and approved by the court, it is paid. If the claim is disallowed, creditor must file suit on the claim within 90 days after it is rejected; if he fails to do so: claim is barred.

In a dependent administration, a creditor **cannot** bring an action on a "claim for money" unless claim is first presented to the administrator and rejected by the court. However, [July 1995] this rule **does not apply to unliquidated or contingent claims**. Thus a tort action can be filed without first presenting claim to administrator. This is not a "**claim for money.**"

[Feb. 1989] In an **independent administration**, executor **must** give notice by publication and personal notice to secured creditors, and **may** give permissive personal notice to general creditors, but **above rules governing presentment of claims do not apply**. Failure to formally present a claim does not affect creditor's right to bring an action on the claim.

21. Paul is badly injured in an accident in which Dan Doakes (who was killed in the accident) was the negligent driver. Paul files a petition that names "The Estate of Dan Doakes" as defendant and, in the resulting jury trial is awarded a judgment of \$140,000. The estate appeals; what result on appeal?

Reversed. An “estate” or entity that cannot be sued. Must sue personal representative himself.

22. **Secured creditors:** [July 1998, July 2000] If decedent was personally liable on a note secured by a mortgage, the creditor can present its claim for payment out of the general assets of the estate even if the note is not yet due (*e.g.*, there are still 12 years to go on a 20-year note). The point: This is the last opportunity for the mortgage to realize on the decedent’s personal liability.

In order to be paid out of the general assets of the estate, within (i) 6 months from date of personal representative’s appointment or (ii) 4 months after receipt of personal notice, whichever is later, secured creditor must file its claim as: matured secured claim.

If the secured creditor fails to file its claim as a matured, secured claim within the prescribed period, it is classified as: preferred debt and lien. Means: can only look to security interest in satisfaction of debt.

23. **Creditors’ claims in a guardianship administration:** To what extent do the procedures applicable to creditors’ claims in a dependent administration also apply in guardianship of an incapacitated person?

**YES** Notice by publication?

**NO** **PERMISSIVE personal notice** to unsecured creditors, requiring them to present claims for money within four months of receipt of notice; otherwise claim is barred? Mandatory personal notice to unsecured creditors.

**YES** Creditor must file an **authenticated claim supported by an affidavit**; guardian must write memorandum allowing or rejecting claim within 30 days; if guardian doesn’t take action on the claim within 30 days, treated as a rejection; if creditor doesn’t file within 90 days after claim is rejected, **claim is barred?**

**YES** Personal notice to secured creditors, who have the same options (matured, secured claim *versus* preferred debt and lien) as in an estate administration?

24. [Feb. 1990] In insolvent estate, claims are paid in following order:

**Class 1: Funeral expenses and expenses of last illness, up to \$15,000.**

Nest, **family allowance**. Funeral expenses up to \$15,000 only claim that takes priority over family allowance.

**Class 2: Expenses of administration.**

**Class 3: Secured claims, to extent covered by the lien.** [If creditor filed a “matured secured claim”]

**Class 4: Child support arrearages** reduced to judgment.

**Class 5:** [Feb. 1999] state taxes.

**Class 6:** Claims for repayment of medicaid assistance paid by state.

**Class 7:** Cost of confinement if decedent imprisoned in Texas prison.

**Class 8: All other claims**, including [Feb. 1999] funeral, last sickness expenses in excess of \$15,000.

But if estate is partially insolvent, remember: ( ) Residence may qualify for homestead exemption. (ii) [Feb. 1987] Furnishings, automobile, cattle, etc. (up to \$60,000) qualify for exempt personal property set-aside. [July 1991] Special limit as to jewelry: Cannot exceed \$15,000 (25% of \$60,000 amount).

*If the estate is solvent* [July 1999], the *set-aside is only temporary*, during the period of estate administration, after which the personal property passes under the decedent's will or by intestacy. But if the estate is *insolvent*, the set-aside is *permanent*, and the spouse gets to keep the property.

25. 1995 statute: ***Emergency intervention to pay funeral expenses and to protect personal property in rental unit***. No sooner than 3 days and no later than 90 days after decedent's death, any person can file application for emergency intervention [*e.g.*, to withdraw funds from property located in a rental unit - as long as no application for appointment of a personal representative or small estate administration is pending].

26. [July 1993] Mary dies intestate and a dependent administration is taken out for her estate. The estate includes a \$100,000 house that is subject to a \$25,000 purchase money mortgage lien held by Bank. Bank does not file its claim for payment as a matured, secured claim within the six-month period (which would have entitled Bank to be paid the \$25,000 out of the general assets of the estate as a Class 3 claim). Therefore Bank has a preferred debt and lien, meaning that it can look only to security interest by foreclosure in satisfaction of the obligation. No mortgage payments have been made for five months.

No Can Bank foreclose on the mortgage without court approval? In a dependent administration, can't do anything without court approval.

After mortgagor's death, secured creditor must follow statutory procedures for collecting its debt; cannot foreclose on mortgage without court approval (unless it's an independent administration).

27. [July 1991] Outline the procedural steps for the sale of real property in a court-supervised administration.

[What are we going to do!!!!?]

#1. File application for sale describing property, amount of outstanding creditors' claims, property on hand available to pay creditors, other facts showing need to sell real estate for authorized purpose: funeral and administration expenses, debts,

family allowance.

- #2. Date for hearing set, and notice given to all persons interested in the estate.
- #3. Hearing held, at which court orders sale, specifying terms of sale.
- #4. Property is sold; sale reported to court within 30 days.
- #5. After notice to interested parties, hearing is held and court affirms sale.
- #6. Personal representative gives deed to purchaser.

28. **Urban homestead** consists of lot or contiguous lots not to exceed 10 acres without regard to value of improvements. Must be used as a residence and/or business property.

**Rural homestead:** 200 acres (need not be contiguous), without regard to value of improvements.

Single person homestead [not a member of a “family”]: 10 acres if urban, 100 acres if rural.

**Consequences of qualifying as a homestead:**

1. **Both spouses must join in conveyance of homestead property** (even if homestead is one spouse’s separate property).
2. **Free from creditors’ claims...except for:**
  - a. [July 2000] **Purchase money mortgage lien.**
  - b. **Taxes** – property taxes on the homestead itself. (A betterment assessment, e.g. for sidewalks, is not a tax.)
  - c. **Federal tax liens and loan to pay off federal tax lien.**
  - d. **Mechanic’s, materialman’s lien for improvements** on the homestead **where** written contract, signed by H and W, entered into before improvements are made, and recorded.
  - e. **Loan to enable parties to distribute or divide homestead on divorce.**
  - f. [1997 constitutional amendment] **equity loan (second mortgage loan)** for up to 80% of the value of the equity (difference between property’s fair market value and balance on purchase money mortgage).
3. On owner’s death **passes free of creditors’ claims** (other than claims listed above) **IF** owner survived by spouse, minor child, or **unmarried adult child**. Exemption attaches even though homestead passes to someone other than indicated relative.
4. **PROBATE HOMESTEAD:** [Feb. 1998] right to occupy the homestead (even if

homestead was decedent's separate property) rent-free for life, or for so long as she chooses to occupy it as a homestead, in favor of *surviving spouse* or *minor children*, but *not* in favor of adult child.

*Example:* W dies intestate survived by H and by S, her son by a former marriage. The family residence, which qualifies as a homestead, is community property. W's one-half interest passes by intestacy to S, making S and H tenants in common—subject to H's homestead right to occupy as long as he chooses to occupy it. Also, cannot be partitioned as long as H asserts homestead right.

*Example:* Hal, unmarried, executes a will that devises his house (homestead) to his sister Sue. Two years later, Hal married 30-year-old Winona, and three years later Hal dies without changing his will; he is survived by Winona and Sue. Legal title to the house passes under the will to Sue, who holds fee simple title—subject to Winona's probate homestead right of occupancy. As legal owner, Sue must pay casualty insurance premiums and mortgage *principal* payments. As homestead occupant, Winona must pay real property taxes and mortgage *interest* payments.

29. [Feb. 1990] H dies interstate, survived by W and his son S (by a former marriage)—meaning that S inherits H's ½ CP interest in the residence. W remarries, and occupies the residence with H-2 until her death ten years later. W leaves a will that devises “all my property” to H-2.

No H-2 claims that he is entitled to exclusive occupancy of the residence as a “probate homestead.” Is he right?

W's homestead right died with W. S's rights as a tenant in common (right to occupy; right to bring action to partition by judicial sale) were in abeyance only as long as W was asserting her homestead right.

30. “Homestead allowance” and “allowance in lieu of exempt personal property” are available to surviving spouse, minor children.

[Feb. 1994] **\$15,000 allowance in lieu of homestead** if decedent did not own a homestead. (In effect, available for apartment dwellers only.)

**\$5,000 allowance in lieu of exempt personal property.** Available to the extent that items on “exempt personal property” list are not in the estate at death. (\$5,000 total, not per missing item.)

31. **Family allowance:** Purpose is to provide support for surviving spouse, minor children during period decedent's assets are in administration. [Feb. 1994] Permissible allowance: **amount needed for support for a period of one year.**

The allowance in lieu of homestead, exempt personal property allowance and family allowance all come “off the top” of the estate. They are over and above the amount given by the will or the surviving spouse's (or minor child's) intestate share.

No [July 1986] In determining whether surviving spouse should be awarded a family allowance, is size of the community estate taken into account?

Yes [Feb. 1999] In determining whether a surviving spouse should be awarded a family allowance, is the value of *separate property* owned by the spouse taken into account?

[Feb. 1993] The court awards W a family allowance of \$20,000. Is this amount charged entirely against H's one-half community, or against the entire community estate as a community obligation (meaning that \$10,000 comes out of W's one-half share of the community property)?

## GUARDIANSHIP ADMINISTRATION

**Guardian of the person** [Feb. 2000] has right to physical possession of the ward; duty of care control and possession; duty to provide clothing, food, medical care and shelter; and power to consent to medical and psychiatric treatment. [Much like managing conservator of minor child under Family Code.]

**Guardian of the estate** has right and duty to manage ward's property, enforce the ward's obligations, and bring or defend suits by or against the ward.

1. Johnny (6 years old) was bequeathed 1,000 shares of IBM stock by his grandmother's will. Dad and Mom (Johnny's parents and natural guardians) want to sell 500 shares of Johnny's IBM stock and use the sale proceeds to buy Dell stock on Johnny's behalf. Can they do so?

No, only guardian of the estate has power to sell the property. Natural parents don't have power to sell Johnny's property.

a. *But* if the value of Johnny's entire interest in all of the property inherited from grandmother (not just the value of the property sold) is *less than \$100,000*; parent (or managing conservator, or guardian of person of incapacitated adult), can obtain a court order authorizing a sale without the appointment of a guardian; in which case, sale proceeds paid into the court's registry.

2. Mom died; then Dad died leaving a will that (*inter alia*) named Aunt Annie as guardian of 8-year-old Johnny's person and estate, to serve without bond.

Yes\* Must the court appoint Aunt Annie as guardian of Johnny's *person* and *estate*?

\*unless court finds that the appointment is not in the ward's best interest

No Does Aunt Annie have to give bond as condition to serving as guardian of the *person*?

Yes Does Aunt Annie have to give bond as condition to serving as guardian of the *estate*?

Suppose that neither parent's will named a guardian, but Johnny is 12 years old. What happens?

12 or older can choose guardian in writing filed with court (unless court vetoes as not in best interest)

3. **Venue** for appointment of *guardian for minor*: County where parents (or parent who is managing conservator) reside. For *guardian for incapacitated adult*: county where proposed ward resides **or** county where principal estate is located. For appointment of *guardian named in parent's will*: County where will was probated **or** county where appointee resides.

4. Noreen, who was 75 years old, lived alone, and was in poor health, died leaving a will that devised her entire estate to her nephew Ned. Betty, Noreen's next-door neighbor (not related to Noreen and not named in any earlier will of Noreen's) is absolutely convinced that Noreen's will was the product of undue influence exerted by Ned.

**NO** Does Betty have standing to file a will contest challenging Noreen's will?

***Betty does not have an economic interest adversely affected by the will's admission to probate.***

**YES** Suppose, instead, that Noreen is alive, is in poor shape, and (in Betty's opinion) lacks the capacity to take care of herself. Does Betty have standing to commence a guardianship proceeding, seeking an adjudication that Noreen is incapacitated?

**YES** If Betty does bring a guardianship proceeding but is unsuccessful and guardianship proceeding is dismissed, is Betty entitled to recover her attorney's fees?

5. Who is eligible to be appointed guardian of the person and estate of a minor?

***Parents or surviving parent.*** Last surviving parent can name guardian of the child. [July 1999] It is presumed that person designated by parent is in child's best interest, but presumption is not conclusive.

Who is eligible to be appointed guardian of the person and estate of an ***incapacitated adult***?

[1] Person named in written, witnessed ***Designation of Guardian Before Need Arises.*** [July 1999] Designation is prima facie evidence that named person will serve the proposed ward's best interest, but court may decline to appoint the person if (*e.g.*) she is asserting a claim against the proposed ward's estate.

[2] If no such declaration: ( ) ***spouse***, (ii) ***next of kin*** in nearest degree of kinship. [July 1999]

b. General test as to who should be appointed guardian: best interest of the ward.

**NO\*** Can two persons be appointed as co-guardians? Only one

\* Except for husband and wife

6. Who is *disqualified* from being appointed guardian?

- ***Incapacitated person;***
- ***Conflict of interest*** (owes money to proposed ward [July 1999] or asserting claim against proposed ward—unless ( ) court determines there is no conflict; or (ii) guardian ad litem is appointed to represent proposed ward);
- ***Inexperience, lack of education, or other reason*** makes her incapable of prudently managing proposed ward or his estate;
- Person expressly ***disqualified in designation of guardian before need arises;***
- Person ***convicted of sexual offense***, sexual assault, injury to child or elderly person, etc. [Not disqualified per se, but appointment of such a person ***presumed*** not to be in the ward's best interest.]

7. Because an incapacitated person for whom a guardian is appointed loses all legal and civil rights and powers that are granted to his guardian, the Probate Code urges the court to order ***limited guardianships*** whenever possible—where the person lacks the capacity to do some, but not all, of the tasks necessary to care for himself and manage his property. The order appointing a guardian must specify ( ) the powers, duties, and limitations of the guardian, and (ii) the amount of the ward's funds that can be expended for the ward's care without court approval.

[July 2000] If the ward regains some of his cognitive skills, the ward or an interested person can petition to have the guardianship modified or terminated.

8. In an adult incapacity proceeding, what safeguards are imposed to insure that the proposed ward's rights are fully protected?

Yes Must the court appoint an attorney ad litem to represent the proposed ward?

No Must the court appoint a guardian ad litem on behalf of the proposed ward?

Yes Must the court appoint a court investigator? [Investigates the circumstances alleged in the petition, to determine whether a less restrictive guardianship is appropriate.]

No Must the court appoint a court visitor? [But ***statutory probate courts*** must have a court visitor program.]

Yes Must there be a physician's report?

Yes Must the proposed ward be present at the trial?

Yes Can the proposed ward (or her attorney ad litem) ask for a jury trial?

What is the evidentiary standard as to whether the proposed ward is incapacitated?

All other findings require a *preponderance of the evidence*: that court has venue; person to be appointed guardian is eligible; for a minor, guardianship not created to establish eligibility to enroll at another school; ward either totally lacks capacity to care for himself and manage his property, or lacks capacity to do some but not all of the tasks necessary to care for himself or his property.

If a guardian is appointed, letters of guardianship (serving same function as letters testamentary) in an estate administration proceeding) are valid for 16 months. This rule is a reflection of what policy? Annual review of status of guardianship.

9. What actions must the guardian take within 120 days after appointment?

Must *take oath* that she will faithfully perform within 20 days.

Must *post fiduciary bond* within 20 days.

Must *publish notice of administration* in newspaper of general circulation with one month

Must *file inventory* of the estate within 90 days unless time period is extended by the court.

10. The court may remove a guardian ***WITHOUT NOTICE OR HEARING*** if the guardian:

a. Fails to qualify by giving oath & bond within 20 days, or fails to file inventory within 90 days: ***or***

b. Moves from Texas; is absent from the state for more than 3 months; cannot be served with notices or other processes because her whereabouts are unknown or is evading service; ***or***

c. Has cruelly treated the ward, ***or*** has failed to maintain or educate the ward, ***or*** has misapplied or embezzled assets, ***or*** has removed assets from the state, any of these are shown by: clear and convincing evidence.

10a. The court may remove a guardian ***but only after notice or hearing***.

a. If there are grounds to believe [*but not clear and convincing evidence*] that she has cruelly treated the ward, has failed to educate or maintain the ward, or has misapplied or embezzled assets, or has removed assets from the estate; ***or***

b. If she is guilty of gross misconduct or mismanagement; ***or***

c. If she fails to comply with a court order; ***or*** fails to file accountings (or as guardian of the person fails to file her report), both of which are required: annually.

d. ***Or*** if she becomes incapacitated, is sentenced to the penitentiary, or ***for some***

*other reason* is incapable of properly performing the duties of guardian.

11. Randy is serving as guardian of the person and estate of his incapacitated mother, Maude. Maude, who lives at home, is attended to by Randy and by a vocational nurse. On a Thursday three weeks ago, Randy spent a total of \$8,000 in professional fees to acquire anew hearing aid, dentures, and bifocal glasses for his mother. On a Friday two weeks ago, Maude suffered a mild stroke. As soon as Maude's condition was stabilized, Randy had her admitted to the Balmy Court Retirement Village, which has a full-time nursing facility. As a condition to gaining Maude's admission to Balmy Court, Randy had to pay the home \$12,000. Thus Randy paid a total of \$20,000 from his personal funds; he now seeks court approval to be reimbursed for these expenditures out of the *principal* of Maude's estate.

No: \$5,000/year only\* Is Randy entitled to reimbursement for the \$8,000 paid for dentures, hearing aid, etc.

\* if ( ) there is clear and convincing evidence that the expenditures were reasonable and proper *and* (ii) not possible to prior court approval

Probably Yes\* Is Randy entitled to reimbursement for the \$12,000 paid to the retirement home?

Nursing homes = no dollar limit. Subject to above test.

Yes Would the \$8,000 paid for dentures, hearing aid and glasses, have been proper if Randy had paid for these items out of *net income* from guardianship property?

OK, spending for maintenance out of income is OK. It's just principal that we have problems.

12. List five things that a guardian can do *without court order*.

- a. ***Guardian of the person can expend net income for ward's maintenance and education.*** If the guardian of the person and guardian of the estate are different persons, the guardian of the estate pays the guardian of the person ***an amount set by the court*** for these purposes.
- b. ***When obtaining prior court approval is not convenient or possible,*** may expend up to \$5,000 per accounting period from corpus for the ward's maintenance and education, if there is ***clear and convincing evidence*** that the expenditures were reasonable and proper. If the expenditure is made to a nursing home, there is no dollar limit on the amount that can be expended.
- c. ***Can invest in:*** bonds of the United States, Texas, or a political subdivision thereof; interest-bearing accounts secured by FSLIC (Federal Savings & Loan Insurance Company) of FDIC (Federal Deposit Insurance Company); secured bonds of companies incorporated in Texas.

- d. ***Can rent estate property for up to one year***—but if value of rented property [*not* value of the lease] is \$3,000 or more, must report rental to the court within 30 days. (Rentals for more than a year require court approval).
- e. ***Can retain property*** that was part of guardianship estate at its inception, without requirement to diversify and without liability for depreciation (subject to general test of prudence).
- f. ***Can insure property; pay taxes, court costs, bond premiums***; release lien on payment of debt; ***vote stocks***, including by proxy; pay calls and assessments on investments.

13. In general, what actions by a guardian require ***prior court approval***? Anything not on above list.

Sale of real or personal property of the guardianship estate [which ***always*** requires court approval] can be made ***only*** for purpose of:

- ( ) pay claims and expenses
- (ii) ward's maintenance if income insufficient
- or (iii) dispose of unproductive property.

Perishable personal property: court order for sale must be obtained as soon as possible.

***Compensation of guardian of person*** cannot exceed 5% of ward's gross income. ("Grtoss income" doesn't include social security or veteran's benefits.)

***Compensation of guardian of estate*** cannot exceed ( \_5% of ward's gross income ***plus*** (ii) 5% of all money paid out of the estate. (If that amount is too low, the court may authorize "reasonable compensation.)

14. 8-year-old Judy received \$45,000 in settlement of a personal injury claim; the money was paid to Judy's mother Martha, who had been appointed guardian of Judy's estate. Three years later, the value of the estate had dropped to \$18,000 because of court-approved expenditures for Judy's rehabilitation. Martha advises you that the guardianship, which has always been complicated, is now getting expensive in relation to the dollars involved. She wants to know: Are there any options?

- a. Can the guardianship be terminated: Yes: "If burdensome in relation to income"
- b. Any other options? Yes, if 50K or less, pay into court registry. Appear in court for each withdrawal.

15. 12-year-old Joey is about to receive \$1,000,000 in a personal injury settlement negotiated by his lawyer. What should be done to handle this vast amount of money?

- a. If a guardian of the estate has been appointed for Joey: "court created management

trust” under \_867 =

1. Bank must be trustee unless less than 50K involved.
  2. Trust can continue until age 25
- b. If **NO** guardian of the estate has been appointed:
1. “Article 142 Trust” under trust code.
  2. #1 above.
  3. #2 above.

[Feb. 2000] Court-created management trust under \_867 could be created for incapacitated adult ward who inherited substantial estate, with trust to continue until ( ) court determines that trust is no longer needed or (ii) ward is restored to capacity or dies. Trustee of a \_867 trust or Article 142 trust **must be a bank or trust company**; must file annual accountings with the Probate Court.

16. Moe, who was disabled in the Korean War, has lost the capacity to care for himself. Moe’s brother Bob has been appointed guardian of Moe’s person. No guardian of the estate has been appointed because Moe’s estate is so small that no guardianship is necessary. However, Moe receives a disability pension from the Veteran’s Administration, which under federal law cannot pay the pension to anyone other than a duly appointed guardian of the estate.

Bob as guardian of the person can be appointed **Guardian to Receive Funds from Governmental Source**, and can expend the pension payments on Moe’s behalf without court approval, if the amount of the disability is: \$12,000/year or less.

17. A **temporary guardian** may be appointed where there is substantial evidence that a person or his estate requires immediate appointment of a guardian. Temporary guardian’s powers are limited to those granted by the court. Temporary guardianship cannot remain in effect for more than 60 days.

18. Grace is incapacitated; her daughter Donna has been appointed as guardian. Grace’s husband Hal dies two years ago, leaving a will that bequeathed “all my property” [\$650,000; Hal’s one-half of their community property] “to Grace if she survives me, otherwise to our children.” (Donna as guardian could have made a partial disclaimer on Grace’s behalf, but she didn’t do so.) Grace now has a \$1.3 million estate, and projected estate taxes in her estate are in the \$250,000 range. Grace, who has three children and six grandchildren, has a 20-year-old simple will (that mirrors her later husband’s will), and lacks the capacity to write a new one. What should Donna do?

Tax-motivated gifts requires court approval, can make \$11K annual exclusion gifts.

19. Grace and Hal, who were longtime members of the choir at the Third Baptist Church of Houston, had always talked about giving as much as \$25,000 to the church endowment fund to support its music program. Donna wants to know if the probate judge will approve a gift of this amount (out of Grace’s guardianship estate) for this purpose. What do you advise?

The court can approve a charitable gift out of income if ( ) the gift will qualify for an income tax charitable deduction, (ii) net income from Grace's estate will probably exceed \$25,000, and (iii) the gift will probably not exceed 20% of net income of Grace's net income for the year.

Thus if Grace's projected net income for the year is \$50,000, the gift cannot exceed \$10,000.

20. Tom suffered serious head injuries in an accident and was incapacitated. His wife Angel, who had been appointed Tom's guardian, ( ) resigned as guardian and (ii) filed a petition for divorce in the Tarrant County District Court. IN the divorce petition, Angel raised issues as to the separate and community property characterization of various assets, sought a just and right division of the community estate, and sought custody of the couple's two children plus child support of \$1,500 per month. Tom's brother Bob, appointed as successor guardian, filed a motion to transfer the proceeding to the Tarrant County Statutory Probate Court; the court granted the motion. Angel appeals, arguing that the district court is the only proper court for a divorce action and for dealing with child custody and child support issues.

Yes Was the court correct in granting the motion to transfer: [*In re Graham* (Tex. 1998)] Texas Supreme Court matters incident to guardianship estate. Effect CP thus in Probate Court.