

Abuse of Power: Exploitation of Older Americans by Guardians and Others They Trust

Written Testimony of David Slayton

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Background on Guardianship in Texas

Guardianship, as it is called in Texas, is a proceeding in which a court appoints an individual to make decisions and oversee the affairs of an individual (“a ward”) who has lost mental capacity or the capacity to make decisions independently. When a guardian is appointed, the ward loses the ability to make decisions such as whether she can drive, where she should live, whether she can marry, and how her money is spent. It is the most restrictive form of oversight a court can place on an individual. Guardianship is meant to protect wards from abuse or exploitation due to the limitation in their mental capacity.

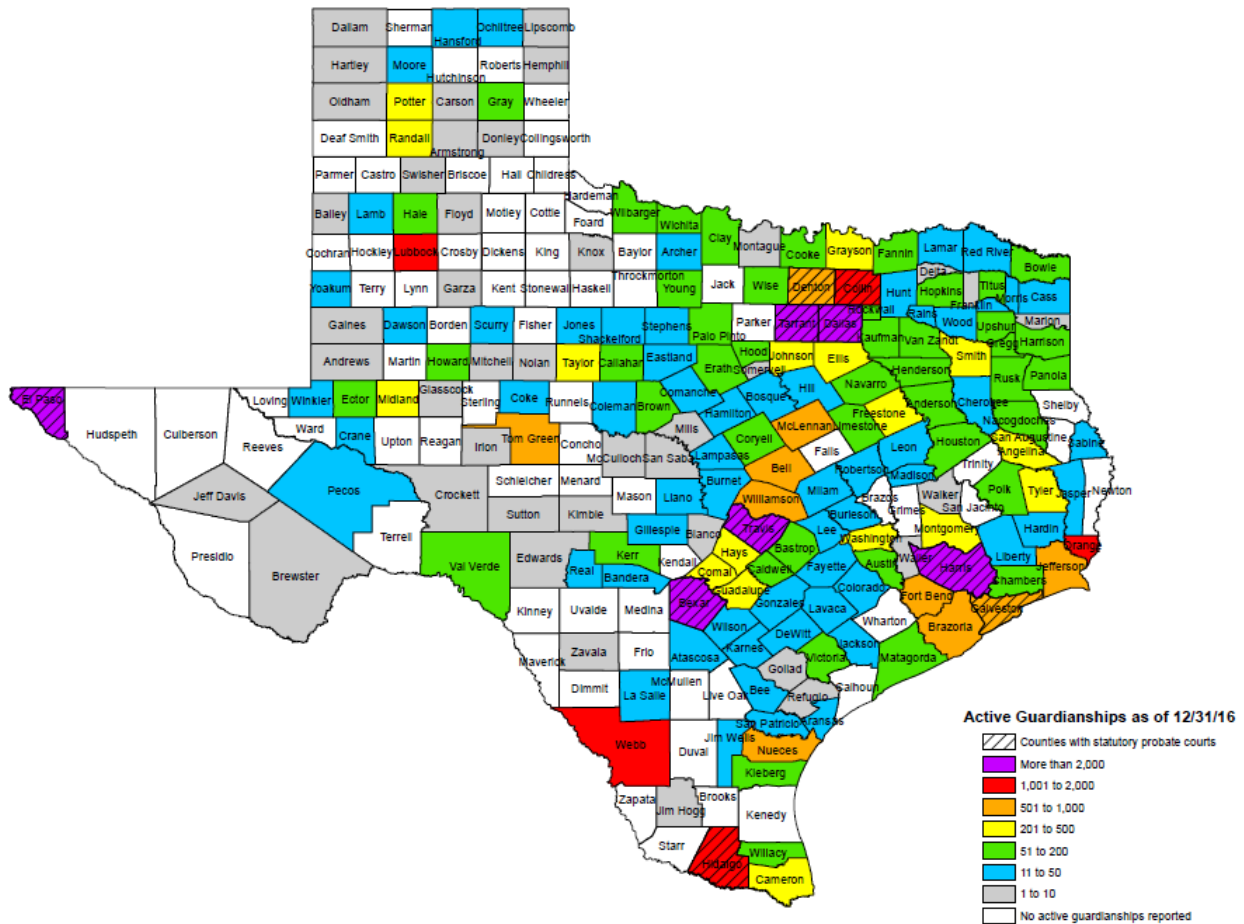
There are two types of guardianship proceedings in Texas. The first is guardianship of the person. In this type of proceeding, a guardian is appointed to manage the affairs of the ward with limited mental capacity but is not appointed as the manager of the finances of the person. Guardianship of the person is typically when the ward has a limited estate or income. The second type of guardianship proceeding is guardianship of the estate, sometimes referred to in other states as conservatorship. In this type of proceeding, a guardian is appointed to manage the ward’s financial affairs. A guardian may be appointed as the guardian of the person, guardian of the estate, or guardian of both the person and estate. While the appointed guardian is typically the same person, this is not required.

Texas law provides a list of preference for who should be appointed as a guardian. In particular, the law requires that a preference be given to the person the ward might have designated as a preferred guardian, next to the spouse, and next to the nearest of kin. If no family members are appropriate for appointment, the judge can consider friends or other professionals, including attorneys and certified private professional guardians.

A guardian is responsible for maintaining safeguards for the ward and reporting regularly to the judge on the affairs of the ward. First, a guardian is required to immediately file a **bond** sufficient to cover the value of the liquid assets of the estate and the annual income to the estate. Second, the guardian is required to immediately file an **inventory** of all assets in the estate. Third, a guardian is required to file an **annual report of the person** detailing the condition of the ward each year on the anniversary of the qualification of

the guardian. Lastly, the guardian is required to file an **annual accounting** of the transactions from the estate with sufficient detail and documentation on the anniversary of the qualification of the guardian. The judge is required to review each of the filings, as well as the continuation of the guardianship, and enter an order approving each filing. Reviewing these filings is the method through which judges are able to monitor guardianships to ensure the protection of the individual under guardianship.

In Texas, there are **50,478 active guardianships** (as of August 31, 2017), with 5,186 new guardianship cases filed last fiscal year, a 7% increase over Fiscal Year 2016. Only 2,804 guardianship cases were closed during that period. The number of active guardianships has increased by 37% in the past five years and is one of the fastest growing case types in the state. We estimate that the value of the estates under guardianship in our state to be between **\$4-\$5 billion**. These cases are overseen primarily by constitutional county judges – judges who are not required to be law-trained and who also oversee the administration of counties. In a few of Texas’ 254 counties, the cases are overseen by law-trained specialty probate courts. Almost all of these courts are tasked with monitoring the cases with no additional staff resources.



Regulation of Guardians by the State

In 2007, the Texas Legislature began to require private professional guardians to be certified and continuously regulated by the state to be appointed by a judge as a guardian. The Judicial Branch Certification Commission (JBCC) performs this function, and there are currently 443 certified (373 full certifications and 70 provisional certifications) guardians appointed to just over 5,000 wards. A certified guardian is required to meet certain age, experience, and education requirements along with passage of an examination and no disqualifying offenses on a criminal background check. The criminal background check continuously monitors the private professional guardian and notifies JBCC if the private professional guardian has an event appear on his or her criminal record. The JBCC regularly rejects applications for certification due to disqualifying factors and receives numerous complaints each year about certified guardians. JBCC has revoked and suspended the certification of private professional guardians and has levied significant administrative penalties against the certified guardians where appropriate. When a private professional guardian's certification is revoked or suspended, the judge who appointed the guardian is notified to take appropriate action to remove the guardian from the ward(s).

In May 2017, the 85th Texas Legislature passed SB 1096 requiring a statewide guardianship registration and database to be created by June 1, 2018. The legislation requires all guardians, including family guardians to register with the state, complete an online training course before being appointed, and undergo a criminal background check prior to appointment as a guardian. The mandatory training course will “educate proposed guardians about their responsibilities as guardians, alternatives to guardianships, supports and services available to the proposed ward, and a ward’s bill of rights.”

Recent Guardianship Reform Efforts in Texas

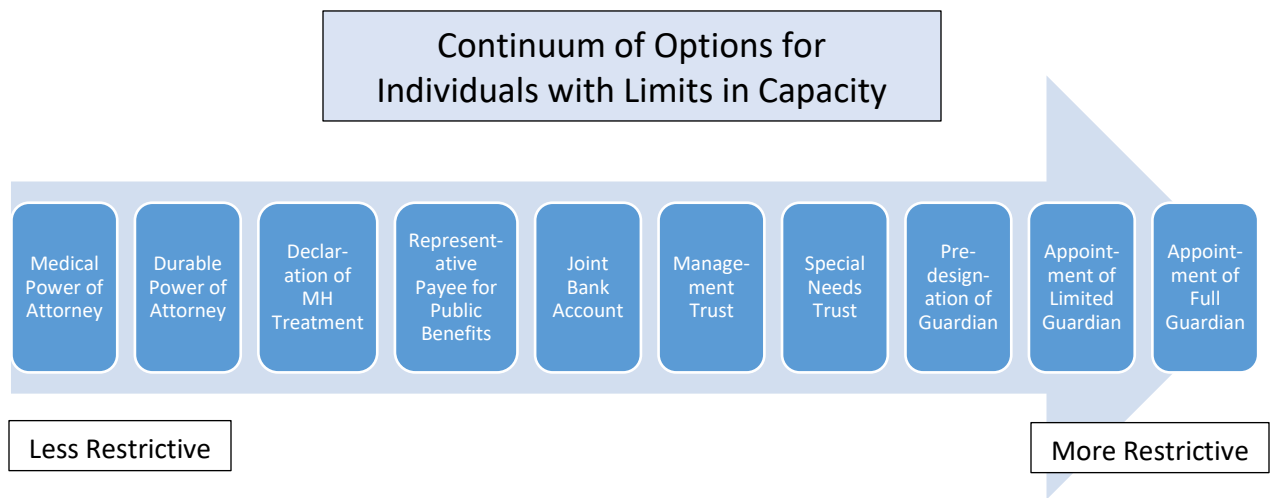
Seeing what he referred to as the “silver tsunami” approaching where the population in Texas over the age of 65 would double in the next twenty years, Supreme Court Chief Justice Nathan Hecht established a Working Interdisciplinary Network of Guardianship Stakeholders (WINGS) and called for the Texas Judicial Council, the policy-making body for the judicial branch, to study issues related to the elderly and incapacitated and the impacts of guardianship and to make recommendations for reform. Working with the WINGS group, the Elders Committee of the Judicial Council made several key recommendations, as follows:

- Ensure that all appropriate alternatives to guardianship were explored;
- Expand the alternatives to guardianship to include Supported Decision-Making Agreements;
- Consider the ability of the ward to make decisions about residence;
- Consider whether the ward’s condition will improve to negate the need for a guardian and review as appropriate;
- Require court approval prior to changing the residence of a ward to a more restrictive living facility; and
- Fund a pilot project to assist courts with appropriately monitoring guardianship cases.

The Judicial Council recommendations were filed as House Bill 39 (84th Legislature) and signed into law, effective September 1, 2015. In addition to these reforms, the legislature passed a ward’s bill of rights and required a study on establishing a guardianship registry for use when law enforcement encounters a ward.

Alternatives to Guardianship

Since September 1, 2015, the law has required the applicant for guardianship to certify to the court that all alternatives to guardianship have been explored. Ad litem attorneys appointed to the case must also explore all alternatives and certify to the court that none are appropriate. Finally, before appointing a guardian for a ward, the judge must find by clear and convincing evidence that alternatives to guardianship have been explored and none are feasible.











Texas became the first state in the nation to authorize an additional alternative to guardianship, the supported decision-making agreement. A supported decision-making agreement is an agreement between an adult with a disability and another adult that enables the adult with a disability to make life decisions with the assistance of the supporter adult. This type of agreement has been promoted and used as an appropriate alternative to guardianship for minors with developmental or other disabilities who are reaching the age of majority and other adults with disabilities. Since Texas' passage of this alternative, several other state have also enacted a supported decision-making agreement law and other states are considering it as well.

The Guardianship Compliance Pilot Project

As mentioned above, at the request of the Texas Judicial Council, the legislature funded a pilot project at the Office of Court Administration (OCA) to assist courts in adequately monitoring guardianship cases. The project provided expert staff resources to review the cases to determine whether or not the guardians were in compliance with reporting requirements and to determine whether there were irregularities in the financial dealing of the estate. This \$250,000 per year project with three authorized employees began in November 2015. Since that time, the project has reviewed over 27,000 guardianship cases in 27 counties.

The project has made disturbing discoveries. As mentioned above, guardians are required to file four basic items with the judge upon appointment or annually: 1) a bond; 2) an inventory of the assets in the estate; 3) an annual report of the person; and 4) an annual accounting of the transactions from the estate. Overall, 43% of cases were found to be out of compliance with reporting requirements. The vast majority of the cases out of compliance were cases where the guardian was a family member or friend. While the numbers tell a disturbing story, the findings from reviews of filed accounting and reports tell a more disturbing story. The project regularly found unauthorized withdrawals from accounts; unauthorized gifts to family members and friends; unsubstantiated and unauthorized expenses; and the lack of backup data to substantiate the accountings.

Guardianship Compliance Project Performance as of April 13, 2018

	41/27	Courts and Counties involved in the guardianship compliance project
	27,257	Guardianship cases reviewed by the guardianship compliance project
	17,345	Guardianship cases recommended for closure with 3,114 deceased
	9,912	Active guardianship cases
	1955*	Guardianship cases found to be out of compliance with statutorily required reporting
	32%*	Percentage of cases with missing reports of the person
	41%*	Percentage of cases with missing initial inventories
	44%*	Percentage of cases with missing annual accountings

* Note: These statistics are reported for the 23 counties in which the initial review process has been completed. The number of active guardianships in those 23 counties totaled 4949. With 1,955 cases out of compliance with required reporting, the percentage of cases out of compliance is 40%.

When lack of compliance was found, the project worked with judges to contact the guardian seeking to restore compliance. Most of the guardians responded and reestablished compliance. However, many have not been responsive.

In addition to the physical review of guardianship files, the project is developing an automated tool that will allow guardianship filings to be electronically audited through fraud detection. This will enable the project to focus its efforts on potential abuse and exploitation.

The OCA, which oversees the program, requested expansion of the project to allow it to cover the entire state and review all guardianship cases regularly. This request was passed in SB 667 during the 85th Legislature and funding was provided in OCA's budget of just under \$3 million annually for expansion. Texas Governor Greg Abbott, line item vetoed the budget and legislation for the project's expansion saying in his veto proclamation for SB 667, "We should give the new statutory reforms a chance to work, and we should continue to look for cost-effective ways to address this challenge. The creation of a new state bureaucracy should be a last resort." OCA was able to maintain the pilot program's staff and continue the project in the interim. The Texas Judicial Council will likely once again recommend expansion and further funding for the program to the 86th Texas Legislature, which convenes again beginning in January 2019.

The State Courts Need For Funding

Texas is not alone in its desire to improve monitoring of guardianship cases. The Conference of Chief Justices and Conference of State Court Administrators have worked collectively to make improvements in this area. However, one of the limitations in making these improvements is the need for funding to provide adequate resources to monitor the cases. That is why the state courts were ecstatic about the passage of S. 178, the Elder Abuse Prevention and Prosecution Act, which incorporates S. 182, the Court-Appointed Guardian Accountability and Senior Protection Act. Signed into law by the President on October 18, 2017, this law provides authorization for grants to the state courts for guardianship activities. The state courts urge Congress to appropriate sufficient funds to fully implement the provisions of that Act.

Conclusion

We are instructed to "honor our fathers and mothers...and the least of these;" however, some of the practices involved in guardianship neither honor nor protect the elderly and incapacitated. We are working diligently in Texas to correct those practices and look forward to continuing this essential work moving forward.

Appendix A: Specific Examples of Findings from Guardianship Compliance Project

- Unauthorized ATM withdrawals totaling \$20,000+ and \$40,000 in “gifts” to grandkids.
- Unauthorized purchase of Ford pick-up truck, \$7,000.
- Checks written to cash \$2,000 and guardian’s credit card account paid \$18,000+.
- \$89,378.81 withdrawal with no court approval or additional information.
- \$400,000 transferred out of account. Forged checks. Additional \$500,000 allegedly hidden and unaccounted for. Case currently in District Court.
- Guardian of Person withdrew \$44,683.35 in Ward’s funds.
- ATM expenditures of \$16,390.66 in 2014. In 2015, there were ATM withdrawals over \$21,000 including charges to Victoria’s Secret and Bath and Body Works.
- Aircraft missing from estate.
- Guardian was reimbursed over \$25,000 for clothing/accessory costs and over \$4,000 for a birthday party from the ward’s trust.
- Order Authorizing Sale of Real Estate totaling \$543,140 was granted. No Report of Sale filed with the court. No follow-up.
- Estate dwindled by \$422,274 with no explanation.
- Ward’s Estate value of \$1,263,077.25. Appointing authorizes guardian to draw down an additional \$32,000 annually with no oversight.
- \$4,000 unauthorized monthly transfers to guardian’s account. Multiple \$200 ATM withdrawals from ward’s account.
- Ward awarded settlement and received \$108,983. No information as to how \$108,983 would be managed or guardian of estate appointed.
- \$1,500,000 trust for the ward. No Initial Inventory or Annual Accountings ever filed.

- Certified guardian failed to file an Inventory, Annual Report, or Annual Accounting. Estate value in application listed as over \$500,000. Another ward's personal funds were used by the certified guardian to pay the bond premium for this case.
- Certified guardian failed to respond to notice from Bastrop County that the ward had delinquent taxes due. Certified guardian failed to notify the court. Ward's property went to foreclosure and was sold on the courthouse steps. Property valued at \$153,808.
- Guardian ordered to place \$103,176.64 into safekeeping account and did not do so. \$18,711.39 in unauthorized withdrawals. Guardian sold a used refrigerator to the ward for \$529. Guardian has not visited ward since May 2012.
- Ward died due to neglect in a facility. Letter from Adult Protective Services in the file on 1/21/15 states ward's death was caused by facility staff neglecting him. Ward moved into the facility 10/15/2013, which was the last time the guardian saw him in person. No Annual Report filed for that year.
- Proposed guardian never qualified (never paid bond) and has moved onto his father's land. Guardian investigated by Adult Protective Services for exploiting his father's finances. Guardian never filed Initial Inventory or Annual Accountings.