

**HEARING BEFORE THE UNITED STATES SENATE  
COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON THE CONSTITUTION**

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“Toxic Conservatorships: The Need for Reform”

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I. Introduction and Background

Chairman Blumenthal, Ranking Member Cruz, and Distinguished Members of the Subcommittee:

Thank you for the opportunity to appear before you today to address an issue critical to the state courts. My name is David Slayton, and I am the new Vice President of Court Consulting Services at the National Center for State Courts and former Administrative Director of the Courts in Texas.

Conservatorship, or guardianship as it is called in Texas, is a proceeding in which a court, after a determination by the judge that an individual lacks mental capacity to make decisions independently, appoints an individual to make decisions and oversee the affairs of an individual (sometimes referred to as a ward). When a guardian is appointed, the individual loses the ability to make decisions such as whether she can drive, where he should live, whether she can marry, and how his money is spent. The individual can lose the right to vote or purchase firearms. It is the most restrictive form of oversight a court can place on an individual outside of the criminal context—sometimes referred to as the civil death penalty. Guardianship is meant to protect wards from abuse or exploitation by others due to the limitation in their mental capacity. In most guardianships, this is exactly what happens—family members or friends protect their loved ones with intense attention to the needs of the individual.

But sometimes this does not happen. Sometimes the individual is placed in a restrictive facility and rarely visited; sometimes the individual regains mental capacity but remains subject to the guardianship for years; sometimes the trusted guardian begins to pilfer the individual’s hard-earned estate; sometimes the individual dies under the guardianship but the court is not made aware for years.

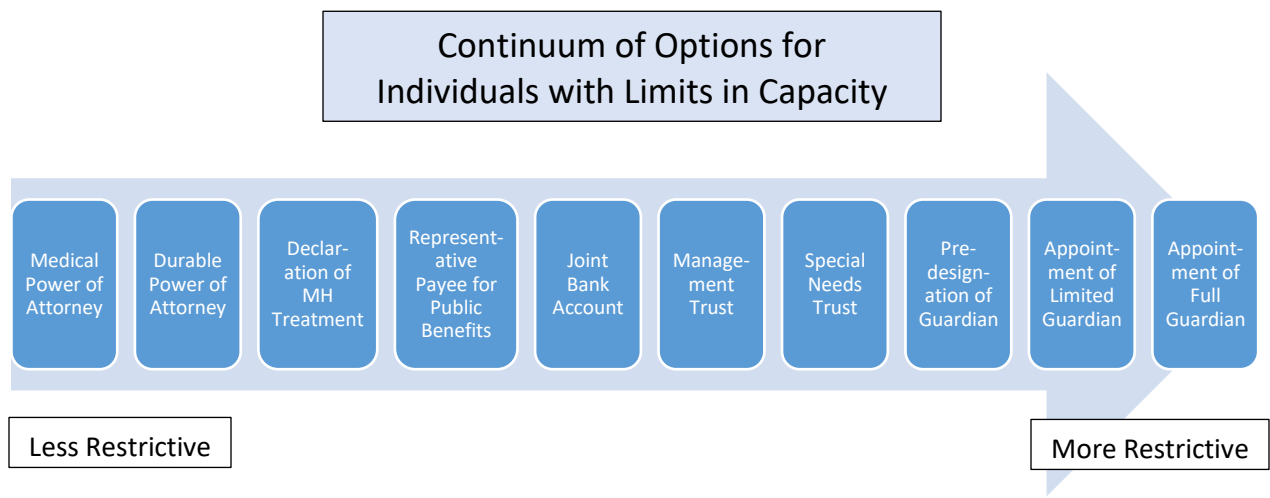
This isn’t supposed to happen. In Texas, as in other states, courts are charged with closely scrutinizing guardianship proceedings, beginning at the point where a guardianship is sought and lasting throughout the guardianship, which can often last until or beyond the end of the life of the individual. The courts do this by requiring certain information prior to establishing guardianships, regular reports from the guardian about the well-being of the individual,

inventories of the assets in the estate at the inception of the guardianship, and detailed accounting reports about the revenue and expenditures from the estate.

In Texas, there are just over 50,000 active guardianships,<sup>1</sup> some of which were established many decades ago. These 50,000 individuals under guardianship have estates that total an estimated \$4 to \$5 billion. In most of Texas’ counties, the cases are handled by judges who are not equipped with specialized staff to assist them in the monitoring process. Without adequate staff, judges are asked to serve in the role of judge, social worker, law enforcement, and accountant.

The situation could not be more dire. In a review of over 55,000 cases, Texas’ judiciary found that in 5,261 instances, the individual was deceased without the guardian alerting the judge. Forty percent of the cases lacked current required reports, meaning that the court was uninformed about the well-being of the individual or how the guardian was managing the finances of the estate.

The Texas Judiciary has been working diligently to address this issue by providing resources to courts and making statutory changes. Beginning in 2015, the Texas Judicial Council recommended statutory changes to require attorneys and judges in guardianship cases to explore alternatives to guardianship; to consider the ability of the individual to make her own decisions about residence; to provide for a regular review of the necessity of continuing the guardianship; and to create a new alternative to guardianship called Supported Decision-Making, the first state in the country to do so. Texas also enacted a bill of rights for individuals under guardianship, formally providing rights to information, support services, consideration of personal preferences, timely health care, privacy, communication and visitation with persons of their choice, and the right to petition a court for capacity restoration or modification of the guardianship.



In 2017, the Judicial Council sought legislation to require family members and friends to register as guardians with the state, have a criminal background check, and participate in online training

<sup>1</sup> Texas Office of Court Administration. *Annual Statistical Report for the Texas Judiciary: Fiscal Year 2020*. Available at [http://www.txcourts.gov/media/1451853/fy-20-annual-statistical-report\\_final\\_mar10\\_2021.pdf](http://www.txcourts.gov/media/1451853/fy-20-annual-statistical-report_final_mar10_2021.pdf). See page 140.

about their responsibilities as guardians. After finding that 98% of all issues were in guardianships where family members or friends were the guardian, this request was signed into law.

In 2019, after a successful pilot project, Texas appropriated \$2.5 million and provided 28 new employees to assist judges statewide in monitoring guardianships and reviewing annual accountings for financial fraud or exploitation.

And lastly, just this year, Texas continued its reforms by establishing the authority to have specialized guardianship courts and increasing the ability of the oversight program instituted in 2019 to have access to financial records from financial institutions to the extent allowed and in the manner required by federal law.

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 for over a decade – making recommendations for reform and endorsing at least 14 resolutions in the past 10 years. Unfortunately, most state courts lack the resources to put these kinds of reforms into action.

## II. Federal Issues and Needs

While states and state courts are responsible for the oversight of the guardianship system, there are several areas where the federal government could assist.

First, most adults in the guardianship system are Social Security recipients who have representative payees assigned by the Social Security Administration (SSA) to administer benefits. While it would seem to make sense that the representative payee be the same person as the court-appointed guardian, this is often not the case, meaning that the state court is responsible for monitoring the activities of one person who may be managing a portion of the individual's estate or well-being, while another not under the state court's control is managing some other portion of the individual's finances. In fact, when a state court removes a guardian due to abuse or financial exploitation, the SSA often does not follow suit and goes so far in its regulations to state that "SSA will not honor state court orders as a basis for disclosure" of information,<sup>2</sup> limiting the exchange of critical information between the state courts and SSA. What this means is that a representative payee that the state court has removed for cause, such as a fraud or dereliction of their responsibilities, can continue to receive and administer an individual's social security benefits. This should be fixed so that state court determinations receive recognition by the SSA.

Second, Congress could assist with issues related to the transfer of guardianships or guardians across state lines. Unfortunately, bad actors who run into issues establishing a guardianship in one state may choose to move the individual and seek a guardianship in another state. Or an individual found by one state court to have abused or exploited an individual in one state may

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<sup>2</sup> 20 CFR § 401.180

move his practice to another state, only to be court-appointed again without knowledge of the issues in the other state. Giving congressional consent to the states to establish an interstate compact creating a national registry of guardianships and procedures to address this problem is critically important. There are many examples of interstate compacts that we could look to for guidance.

Lastly, the federal government could assist the state courts by enacting an adult guardianship court improvement program to provide targeted funding to each state's highest court similar to the extremely successful child welfare court improvement program. The Conference of Chief Justices and Conference of State Court Administrators have endorsed a resolution<sup>3</sup> supporting such a program to improve data collection and analysis, evaluation, development of best practices and training, and collaboration to improve the management and outcome of guardianships.

### 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. The state courts are working to correct those practices and look forward to working with this Subcommittee and the Congress in continuing this essential work moving forward.

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<sup>3</sup> Resolution available at [https://ccj.ncsc.org/\\_data/assets/pdf\\_file/0018/67014/Resolution-4\\_Adult-Guardianship.pdf](https://ccj.ncsc.org/_data/assets/pdf_file/0018/67014/Resolution-4_Adult-Guardianship.pdf).

## Appendix: Major Guardianship Reforms in Texas

- 2005 – creation of the Guardianship Certification Board to regulate private professional guardians – testing, licensure, continuing education, and complaints – SB 6 (79<sup>th</sup> R.S.)
- 2015 – major Texas Judicial Council guardianship reform package passes (HB 39, HB 1438, HB 2665, SB 1881, SB 1882 – 84<sup>th</sup> R.S.):
  - *Ensuring alternatives to guardianship are explored*
    - Provides statutory alternatives to guardianship
    - Requires judges, attorneys, guardians ad litem, and applicants to explore alternatives to guardianship prior to the filing of an application or granting of a guardianship and to consider whether formal or informal resources and services could be put into place to prevent the need for guardianship
    - Establishes the supported decision-making agreement, an agreement between a disabled adult and an individual providing support with decisions regarding daily living, to create less restrictive substitute for guardianship
  - *Necessity and duration of guardianship*
    - Requires an attorney ad litem to discuss with the proposed ward the attorney ad litem’s opinion regarding whether a guardianship is necessary
    - Requires a physician’s certificate of medical examination accompanying an application for guardianship to include information on whether the proposed ward’s physical or mental condition might improve, and if so, the expected time frame of that improvement
    - Requires the ward to be reevaluated pursuant to the physician’s recommendation to determine whether a guardianship should be continued
  - *Limitation on guardianships*
    - Requires judges to consider whether a guardianship can be limited with supports and services and judges and attorneys to consider whether a proposed ward could retain the right to make decisions about his or her personal residence
  - *Moving wards without notice to family, friends*
    - Requires guardians to provide notice to the court an any person who has requested notice prior to moving the ward into a more restrictive environment
    - Allows judge or a person receiving notice of proposed move to object to the placement and requires a judge to hold a hearing if an objection is timely received
    - Permits a relative of a ward to file an application with the court requesting access, visitation, or communication with a ward

- Requires a guardian to inform certain relatives about circumstances regarding the ward's health and residence, and about funeral arrangements upon the ward's death
- *Training to reduce unnecessary applications for guardianship*
  - Requires an attorney filing an application for guardianship to obtain 4 hours of training in guardianship law prior to filing, including 1 hour on alternatives to guardianship
- *Ensuring proper qualifications of guardians*
  - Requires criminal history information to be obtained for a family member seeking a guardianship, in addition to other persons planning to represent the interests of a ward or guardian
- *Bill of Rights for Wards*
  - Establishes a bill of rights for wards under guardianship including, among others, rights to information, support services, consideration of personal preferences, timely health care, privacy, communication and visitation with people of the ward's choice, and the right to petition a court for capacity restoration or modification of the guardianship
  - Authorizes a ward to enforce these rights in a court having jurisdiction over the guardianship
- 2016 – Establishment of the Guardianship Accountability, Fraud, and Exploitation Deterrence Pilot Program to review guardianships for potential fraud and exploitation
- 2017 – Continued guardianship reform (SB 36, SB 1096, SB 1710 – 85<sup>th</sup> R.S.)
  - *Increased regulation of guardianship programs*
    - Requires guardianship programs to maintain registration with the Judicial Branch Certification Commission and to obtain professional certification for any direct supervisors of individuals providing guardianship services to a ward
  - *Statewide guardianship registry and background checks on all proposed guardians*
    - Requires proposed guardians to obtain training and criminal background check prior to appointment as guardian
    - Requires all proposed guardians (and established guardians at time of enactment) to register with the state
    - Requires law enforcement to check the database and notify the court with jurisdiction over a guardianship within 1 business day if a ward is arrested or detained
  - *Continuing existing guardianships when prior guardian resigns, is removed, or dies*
    - Prohibits a judge from requiring appointment of a new guardian before considering a ward's application for modification or complete restoration if the prior guardian resigns, is removed, or dies
  - *Restoration requests by ward*

- Clarifies that a judge can appoint a court investigator or guardian ad litem to investigate a modification or restoration requested by the ward by informal letter without the prior submission for a physician's letter.
- 2019 – statewide Guardianship Accountability, Fraud, and Exploitation Deterrence Program established (SB 31 – 86<sup>th</sup> R.S.)
  - Requires the Texas Office of Court Administration (OCA) to employ guardianship compliance specialists to conduct reviews and audits of guardianships and maintain a database to monitor guardianship filings, annual reports, and annual accounts
  - Provides funding of \$2.5 million per year and 28 FTEs for this purpose
  - Authorizes OCA to report possible judicial misconduct to the State Commission on Judicial Conduct related to guardianship compliance
- 2021 – Increased specialization and oversight (HB 79, SB 692 – 87<sup>th</sup> R.S.)
  - *Specialized courts to guardianship proceedings*
    - Establishes authority for specialized guardianship courts
  - *Increased access to financial records for oversight*
    - Requires financial institutions, to the extent allowed and in the manner required by federal law, to provide the Guardianship Accountability, Fraud, and Exploitation Deterrence Program with access to financial institution records, accounting records, and other financial records concerning a ward or a ward's estate, including receipts, records of deposits and withdrawals, invoices, bills, and any other records of transactions involving the money or assets of a ward of the ward's estate, for purposes of conducting reviews and audits under the program