

**PRIVATE PROFESSIONAL GUARDIANSHIPS IN  
TEXAS: THE GOOD, THE BAD, THE  
NOT SO UGLY**

Comment

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## I. INTRODUCTION

Mrs. Smith is a delightful elderly woman, married with two grown children. She has lived in the same town since the day she was married 48 years ago. Her children, Ryan and Betsy, have moved and settled into their own lives in different states. Although they call each other regularly, the visits are few and far between. Mr. Smith retired several years ago and provides income for Mrs. Smith and himself through Social Security and his pension.

One year ago, Mrs. Smith was diagnosed with Alzheimer's Disease, which forced Mr. Smith to place her in a nursing facility because he was unable to provide the care Mrs. Smith required. Mr. Smith spent hours visiting her each day until his death a few months ago.

Financially, neither of the children have the ability to move back home to help care for their mother. With the Alzheimer's steadily progressing, the medical staff at the nursing facility has begun to have issues caring for Mrs. Smith. Mrs. Smith's memory is beginning to fail rapidly, and she often believes she is staying in a hotel during a vacation she and Mr. Smith took years before. She has tried multiple times to sign herself out of the facility so that she can go home. So far, the nursing staff has been able to reason with Mrs. Smith and stop her from leaving.

The staff has contacted Ryan and Betsy to inform them of their mother's condition and that if Mrs. Smith insists on leaving the nursing facility, they cannot forcibly stop her from doing so. Ryan and Betsy have asked the nursing staff for information about how to keep their mother in the facility where she can continue to have care. The nursing facility referred them to an attorney.

The attorney informed Ryan and Betsy that because Mrs. Smith has no durable power of attorney or any other similar documents, they would need to initiate guardianship proceedings to make financial and medical decisions on their mother's behalf.<sup>1</sup> A guardianship would allow Mrs. Smith's guardian to compel her to remain in the nursing facility, whereas a durable and/or a medical power of attorney would not.<sup>2</sup>

However, Ryan and Betsy did not consider themselves as appropriate choices for the guardian because of the distance between them and Mrs. Smith, and neither of them has any training in providing care to someone with Alzheimer's.<sup>3</sup> The attorney suggested that Ryan and Betsy consider

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1. See generally MARGARET C. JASPER, GUARDIANSHIP, CONSERVATORSHIP AND THE LAW 1, 61 (2008); G. Ward Beaudry, Michael B. Cohen, Lee Craig, & Rick B. Weaver, *Fundamental Issues in Elder Law* 1, 96 (2007).

2. See Alison Barnes, *The Virtues of Corporate and Professional Guardians*, 31 STETSON L. REV. 941, 948 (2002).

3. See *id.*; JASPER, *supra* note 1, at 24.

hiring a trained, private professional guardian.<sup>4</sup> Ryan and Betsy had mixed emotions about hiring a private professional guardian because they had heard negative things about them.<sup>5</sup>

Ryan and Betsy found themselves in a position in which an increasing number of people, both care providers and family members, have found themselves.<sup>6</sup> They need to ensure the care and protection of an elderly person who no longer can make decisions on their own.<sup>7</sup> As the Baby Boomer generation ages, Ryan, Betsy, and Mrs. Smith's positions have become, and will continue to become more prevalent.<sup>8</sup> What are children or nursing facilities to do with adults who no longer have the capacity to make competent decisions about their care and finances?<sup>9</sup> If a person's mental and physical state has deteriorated sufficiently to incapacitate them, a private professional guardianship may provide the only available option.<sup>10</sup>

This Comment will provide insight into why private professional guardians' services have not become more prevalent in Texas.<sup>11</sup> This discussion will begin with an overview of the history and definition of a guardianship, followed by a review of the rights the ward retains when placed under a guardianship, and the authority the court can grant to the guardian.<sup>12</sup> Additionally, the Comment will address the steps required to become a guardian.<sup>13</sup>

Second, the Comment will discuss the advantages and disadvantages of appointing a private professional guardian instead of a family guardian.<sup>14</sup> The next section will explain why traditional estate planning documents may not provide the required authority to facilitate the care of an incapacitated individual.<sup>15</sup>

Finally, this paper will discuss the problems that private professional guardians face in marketing their services.<sup>16</sup> These problems include misinformation of how they receive funding, the lack of public education programs concerning guardianships, and problems with state oversight.<sup>17</sup> Once the legislature and community participants begin to address these

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4. See generally Sally Balch Hurme & Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 STETSON L. REV. 867, 921 (2002).

5. See *infra* Part III.

6. See Barnes, *supra* note 2, at 948.

7. See generally *id.*

8. MARY JOY QUINN, *GUARDIANSHIPS OF ADULTS* 1, 12 (Marshall B. Knapp ed., 2005).

9. See Barnes, *supra* note 2, at 948.

10. See *infra* Part III.

11. See *infra* Parts III–V.

12. See *infra* Part II.

13. See *infra* Part II.B.

14. See *infra* Part III.

15. See *infra* Part IV.

16. See *infra* Part V.

17. See *infra* Part V.

issues, more private professional guardians can provide services to those who otherwise would have no one to help them.<sup>18</sup>

## II. WHAT IS A GUARDIANSHIP?

The term guardianship may mean different things to different people.<sup>19</sup> Legally, a guardianship defines the fiduciary relationship between a ward and a guardian after a court has granted the guardian the ability to make decisions about the ward's property and person.<sup>20</sup> The following sections discuss the relationship between the guardian and the ward, as well as, how the guardianship appointment process has evolved.<sup>21</sup>

### A. *The Guardian and the Ward*

The relationship between the guardian and the ward creates statutory rights and limits.<sup>22</sup> However, this has not always been the case.<sup>23</sup> The history of guardianship began with the intent to protect property.<sup>24</sup> Then legislation incorporated what rights the ward maintains under a guardianship and the fiduciary duties required of the guardian in the Texas Estates Code.<sup>25</sup>

#### 1. *History of Guardianships*

Often, when one thinks of a guardianship, an adult's responsibility for a minor child naturally comes to mind.<sup>26</sup> However, adults can also become incapacitated and have a guardian appointed to aid or make decisions on their behalf.<sup>27</sup> Adult guardianships have existed for centuries; even Ancient Greece has documented accounts of guardianships for adults.<sup>28</sup> However, guardianships initially developed in ancient societies as a way to control the property of an incapacitated person, rather than as a way to provide for that individual's well-being.<sup>29</sup> The guardian's need has evolved to encompass both the need to control property and the need to care for the incapacitated person.<sup>30</sup>

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18. *See infra* Part V.

19. *See* BLACK'S LAW DICTIONARY 744–76 (9th ed. 2009).

20. *Id.* at 774.

21. *See infra* Part II.

22. *See infra* Part II.A.2–3.

23. *See* QUINN, *supra* note 8, at 18.

24. *Id.*

25. *See infra* Part II.A.1–2.

26. *See* TEX. EST. CODE ANN. § 1151.152 (West 2014).

27. *See* QUINN, *supra* note 8, at 18.

28. *Id.*

29. *See id.*

30. *See id.*

The first guardianship statutes in this country arose in context of the confinement of individuals determined to have a mental illness.<sup>31</sup> In 1969, the National Conference of Commissioners on Uniform State Law adopted the Uniform Probate Code.<sup>32</sup> This code provided procedures to create a guardianship, defined the term “incapacitated person,” required notice to the incapacitated person and his or her relatives, and provided that a court-appointed person, an attorney *ad litem*, would investigate the guardianship petition.<sup>33</sup>

Now, through the judicial process, guardians have the ability to provide care and protection, not only for the incapacitated person’s property, but also for their personal needs.<sup>34</sup> For adults who no longer have the capacity to make their own decisions and have neglected to grant authority to an agent, a guardianship may present the only option to ensure that the incapacitated individual receives proper care.<sup>35</sup>

## 2. Rights Maintained by the Ward

One misconception about guardianships concerns the rights the ward retains under a guardianship.<sup>36</sup> Many people believe that once a person becomes a ward under a guardianship, the person no longer has any individual rights and that the guardian becomes responsible for the ward’s actions.<sup>37</sup> However, a guardian cannot prevent a ward from making bad decisions—such as participating in criminal acts—or force the ward into an in-patient mental facility.<sup>38</sup> The ward retains sole liability for committing any wrongful acts and the decision to admit themselves into an in-patient mental facility.<sup>39</sup> In fact, the ward keeps every right that the court declines to specifically assign to the guardian.<sup>40</sup> Unassigned rights typically include the following: the right to petition the court to modify or to terminate the guardianship, the right to meet privately with an attorney or other advocate in a legal procedure, and the right to bring a grievance against the guardian.<sup>41</sup>

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31. *See id.* at 20.

32. *See id.* at 21.

33. *Id.* at 21.

34. *See id.* at 19–21.

35. *See* Beaudry et. al., *supra* note 1, at 96; JASPER, *supra* note 1, at 24.

36. Interview with Laura Beth Pleasant, Guardianship Attorney, Franks and Pleasant, LLP, in Lubbock, Tex. (Nov. 7, 2014).

37. *See generally*, TEX. DEP’T OF AGING & DISABILITY SERVS., *A Texas Guide to Adult Guardianship* 1, 8 (2009), [http://www.dads.state.tx.us/news\\_info/publications/brochures/pub395-guardianship.pdf](http://www.dads.state.tx.us/news_info/publications/brochures/pub395-guardianship.pdf) [<http://perma.cc/7EXG-QF4N>].

38. *See id.*

39. *See id.* at 8–9.

40. NAT’L GUARDIAN ASS’N, INC., *Rights of an Individual Under Guardianship* 1, 1 [http://guardianship.org/pdf/Rights\\_Individuals.pdf](http://guardianship.org/pdf/Rights_Individuals.pdf) [<http://perma.cc/GA8F-8K LX>] (last visited Sept. 20, 2015).

41. *Id.*

### 3. Guardian Duties

A guardian must follow the court order that grants the guardian specific duties, and not complete acts outside of the scope of the designated duties.<sup>42</sup> Once the court appoints a guardian, the guardian assumes all duties the court assigns to him or her.<sup>43</sup> A guardian has a fiduciary duty to advocate for an individual person who can no longer express or make his or her wishes known.<sup>44</sup> The court can appoint a guardian of the estate, a guardian of the person, or both.<sup>45</sup> A guardian of the estate has the following duties: (1) maintaining and managing the ward's estate as a prudent person; (2) supervising all income and disbursements of the estate; (3) "managing the estate only for the benefit of the ward"; (4) safeguarding estate assets through accurate recordkeeping; (5) keeping estate money separate from guardian's estate; (6) making and defending claims on behalf of the estate; and (7) creating an annual account of the ward's estate.<sup>46</sup>

On the other hand, a guardian of the person has the following duties: (1) ensuring that the ward lives in the most appropriate environment for the ward's needs; (2) "ensuring the provision of support, care, comfort, health, and maintenance of the ward"; (3) making reasonable efforts to secure medical and social services that would maximize the ward's independence; (4) seeking judicial authority when dissolution of marriage or other similar circumstance arises; (5) filing an annual report of the person; and (6) petitioning the court to modify or terminate the guardianship if and when the ward's capacity becomes partially or fully restored.<sup>47</sup>

These duties illustrate the differences between a guardian of the estate and a guardian of the person, but one person can successfully fulfill the duties of both appointments.<sup>48</sup>

#### B. Guardianship Process

The Texas Estates Code delineates the process of creating a guardianship.<sup>49</sup> To initiate a guardianship proceeding, a court with proper jurisdiction (typically the county probate court) must receive a referral from someone stating that an incapacitated adult would benefit from the services

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42. See Tex. Courts Online, *Minimum Standards for Guardianship Services 1* (2014), [www.txcourts.gov/media/178662/MinimumStandards.pdf](http://www.txcourts.gov/media/178662/MinimumStandards.pdf) [http://perma.cc/AJ96-S689].

43. See Christopher J. Pettit, *Vultures and Lambs: A Journey Through Protective Services for the Texas Elderly*, 33 ST. MARY'S L. J. 57, 70 (2001).

44. See Barnes, *supra* note 2, at 948.

45. See TEX. EST. CODE ANN. § 1101.151–.152 (West 2014).

46. Tex. Courts Online, *supra* note 42, at 11.

47. *Id.* at 6–7.

48. *Id.* at 6–7, 11.

49. See EST. §§ 1101.001–.155.

of a guardian.<sup>50</sup> Often, a family member or care facility refers the incapacitated person to the court or to a private professional guardian service to apply for a guardianship.<sup>51</sup> In Texas, the court can initiate a guardianship proceeding on its own authority when it becomes aware of a person who may have diminished capacity.<sup>52</sup>

A person willing to become a guardian should file an application with the county probate court.<sup>53</sup> After the proposed guardian files an application, the court must hold a hearing to determine if the proposed ward meets the legal requirements for an incapacitated ruling.<sup>54</sup> According to the Uniform Guardianship and Protective Persons Act, a court may find the individual incapacitated if they cannot perform essential requirements for physical health, safety, or self-care.<sup>55</sup> Usually, an application for guardianship must include a physician's evaluation or medical report, which generally satisfies the proof-of-incapacitation requirements.<sup>56</sup>

In Texas, a licensed physician must perform the required medical examination of the proposed ward.<sup>57</sup> This examination must be completed within 120 days before the submission date of the guardianship application.<sup>58</sup> The physician's medical report must include the following: (1) a description of the nature, degree, and severity of the individual's functional deficits regarding the ability to manage financial and business matters, consent to medical, psychiatric treatment, and to make personal decisions; (2) a summary of the individual's medical history; (3) a description of how and to what extent the proposed ward's mental and physical health affects the proposed ward's ability to communicate responsible decisions concerning himself or herself; (4) a disclosure of any medication the proposed ward may consume and the effects of that medication on the proposed ward's ability to participate in the court proceedings; (5) a description of the precise physical and mental conditions underlying the mental disability diagnosis; and (6) the doctor's opinion as to whether the individual would benefit from the support or services of a guardian and whether a guardianship provides the least restrictive environment to the individual.<sup>59</sup>

An interested party may contest a guardianship application; however, most applications proceed uncontested.<sup>60</sup> In both contested and uncontested

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50. *See id.* § 1103.001.

51. Interview with Laura Beth Pleasant, Guardianship Attorney, in Lubbock, Tex. (Nov. 7, 2014).

52. STEVEN D. FIELDS, WHO CAN OR SHOULD BE A GUARDIAN? 1, 3 (Apr. 8, 2011), [Texasbarcle.com/Materials/Events/9946/130236\\_01.pdf](http://perma.cc/TJ6R-5465) [http://perma.cc/TJ6R-5465].

53. *See* Pettit, *supra* note 43, at 65.

54. JASPER, *supra* note 1, at 23.

55. *Id.* at 17.

56. *See id.* at 22.

57. TEX. EST. CODE ANN. § 1101.103 (West 2014).

58. *Id.*

59. *See id.*

60. JASPER, *supra* note 1, at 23.

cases, the court must appoint an attorney *ad litem* to advocate for the proposed ward.<sup>61</sup> The proposed ward and the attorney *ad litem* are entitled to appear at the hearing, cross-examine witnesses, and present evidence on the proposed ward's behalf.<sup>62</sup> During a guardianship hearing, the proposed guardian must provide clear and convincing evidence that the proposed ward requires a guardian.<sup>63</sup> However, the court usually relies on the medical report and any witnesses that can testify to the proposed ward's need of guardianship services.<sup>64</sup>

Once the judge reviews documentation, he or she then determines whether the proposed ward meets the incapacitation requirements and would benefit from the services of a guardian.<sup>65</sup> During this proceeding, the court must balance the proposed ward's needs and the qualifications of the proposed guardian in order to reach a decision that is in the ward's best interest.<sup>66</sup>

If the court determines that a guardianship would provide the least restrictive environment for the incapacitated person, the judge will then issue Letters of Guardianship.<sup>67</sup> Letters of Guardianship provide a guardian with the necessary legal documentation to enforce decisions made on behalf of the ward and the ward's estate.<sup>68</sup> However, the judge can create a limited guardianship.<sup>69</sup> A limited guardianship allows the ward to retain more rights while providing the ward with all the necessary services and care within the least restrictive environment.<sup>70</sup>

### III. PRIVATE PROFESSIONAL GUARDIANS V. FAMILY GUARDIANS

The Texas Estates Code defines a "private professional guardian" as a court appointed adult with no familial ties to an incapacitated adult.<sup>71</sup> Family members whom the courts have appointed as guardians are "family guardians."<sup>72</sup>

The controversy between private professional guardians and family guardians that causes the most contention revolves around the fact that private professional guardians provide guardianship services to unrelated

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61. *See id.*

62. *See id.*

63. *See id.*

64. *See id.*

65. *See* TEX. EST. CODE ANN. § 1151.152 (West 2014).

66. *See id.* §§ 1001.001, 1101.105.

67. *See* JASPER, *supra* note 1, at 24.

68. *See* EST. § 1106.005.

69. *See* JASPER, *supra* note 1, at 24.

70. *See id.* at 25.

71. *See* EST. §§ 1104.01–.36.

72. Hurme & Wood, *supra* note 4, at 921. This paper will also use the term "family guardian" when describing a family member that the court appointed as the guardian. *See id.* at 867, 877, 881, 884–85, 921.

individuals for profit.<sup>73</sup> Many people believe that this creates a conflict of interest and prevents a private professional guardian from providing adequate care, while exposing the ward to an increased risk of financial and personal abuse.<sup>74</sup> However, as described below, Texas law holds private professional guardians to a much higher standard than family guardians, and studies have shown that family members are more likely to commit financial and personal abuse than professional guardians.<sup>75</sup>

### A. Private Professional Guardian Minimum Standards

Private professional guardians in Texas must meet certain state standards before the state grants them certification, and can offer guardianship services to the public.<sup>76</sup> The next sections describe the standards that the National Guardianship Association (NGA) promotes, as well as the Texas standards.<sup>77</sup>

#### 1. National Guardianship Association

The National Guardianship Association has created standards that it believes every guardian, private professional or not, should follow.<sup>78</sup> Through the formation of the Center for Guardianship Certification, the NGA has led the way in advocating and ensuring that guardians meet and follow the NGA standards.<sup>79</sup> The NGA believes so strongly in its minimum standards that it encourages state governments to adopt or incorporate these standards into the states' guardianship laws and regulations.<sup>80</sup> These standards include how the guardian should interact with the court, the ward's family, and the ward.<sup>81</sup> Additionally, the standards include the following rules for decision-making, duties of the guardian of estate, duties of the guardian of the person, definitions of conflicts of interests, and qualifications for court appointed guardians.<sup>82</sup>

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73. Interview with Laura Beth Pleasant, Guardianship Attorney, in Lubbock, Tex. (Nov. 7, 2014).

74. See generally, Barnes, *supra* note 2, at 941, 948; Interview with Laura Beth Pleasant, Guardianship Attorney, in Lubbock, Tex. (Nov. 7, 2014).

75. See *infra* Part III.E.

76. See *infra* Part III.A.2.

77. See *infra* Part III.A.1–2.

78. Nat'l Guardianship Ass'n Inc., *About NGA*, <http://www.guardianship.org/overview.htm> [<http://perma.cc/7UNA-R6LY>] (last visited Oct. 16, 2014).

79. *Id.*

80. Nat'l Guardianship Ass'n Inc., *Policy Regarding the Use of the National Guardianship Association's Standards of Practice and Agency Standards* (2010), [http://www.guardianship.org/documents/Policy\\_Use\\_Distribution\\_NGA\\_Standards.pdf](http://www.guardianship.org/documents/Policy_Use_Distribution_NGA_Standards.pdf) [<http://perma.cc/4WCV-V7VQ>].

81. NAT'L GUARDIANSHIP ASS'N INC., *STANDARDS OF PRACTICE 1* (4th ed. 2013), [http://guardianship.org/documents/Standards\\_of\\_Practice.pdf](http://guardianship.org/documents/Standards_of_Practice.pdf) [<http://perma.cc/Z6WB-YZZB>].

82. *Id.*

## 2. Texas's Minimum Standards

Texas has based its minimum standards for guardians on the NGA's recommended standards.<sup>83</sup> Private professional guardians must meet this minimum set of standards to become certified.<sup>84</sup> In Texas, these qualifications range from the relationship a guardian has with the court, the ward, and the ward's family, to knowing and performing the duties of a guardian of the estate and person, including modification and termination of the guardianship.<sup>85</sup>

Before providing professional guardianship services in Texas, a private professional guardian must meet the minimum standards to become state certified.<sup>86</sup> The Judicial Branch Certification Commission (JBCC) supervises the certification process of individuals wishing to become private professional guardians in Texas.<sup>87</sup> According to JBCC Rule 7.2, for initial certification, an individual must have completed the following: attained at least twenty-one years of age, earned a high school diploma or a GED, completed two years relevant work experience related to guardianship, and passed a JBCC approved exam in no more than four attempts.<sup>88</sup> The JBCC does allow the completion of a bachelor degree program relevant to the guardianship field, completion of a JBCC approved course curriculum, or completion of training specifically related to the guardianship field as substitutes for the work experience requirement.<sup>89</sup>

The JBCC also requires disclosure of the following information: entering a plea of guilty for a felony or misdemeanor in exchange for deferred adjudication; removal of guardian responsibilities by a court, employer, or client; finding of civil liability or settling of a claim in an action and denial, revocation, suspension, or surrendering of certification in Texas or another state that requires certification.<sup>90</sup> Only after a candidate meets these requirements does the JBCC award that individual a two-year certification.<sup>91</sup> After two years, private professional guardians must renew their certification every three years.<sup>92</sup>

The renewal process includes submission of the renewal application, fees, and proof of completion of at least twelve hours of approved continuing education including: two hours in ethics, one hour in legislative update, and

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83. Tex. Courts Online, *supra* note 42.

84. *Id.*

85. *Id.*

86. TEX. GOV'T. CODE ANN. § 111.042 (West 2014).

87. *Id.* § 152.051.

88. Tex. Judicial Branch, *Judicial Branch Certification Commission* (Jan. 21, 2015, 8:28 AM), <http://www.txcourts.gov/jbcc/jbcc-statutes,-rules-policies.aspx#Sec7.0> [<http://perma.cc/92XJ-DJZT>].

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

one hour in criminal history.<sup>93</sup> These requirements ensure that private personal guardians have the competency and the minimum skill set to provide guardianship services.<sup>94</sup> Yet, the courts do not insist that family guardians complete this same process.<sup>95</sup>

### *B. Increasing Numbers of Elderly*

Through the Texas Estates Code, the Texas Legislature began the process for encouraging private professional guardians to serve the increasing number of elderly.<sup>96</sup> The Baby Boomer generation, born between the years 1946 and 1964, produced an unprecedented growth in the number of people over the age of 65.<sup>97</sup> This generation's longer life span is linked to advances in medical treatments of chronic illnesses and has led to an increase in the number of elderly that outlive their family members.<sup>98</sup>

However, the public does not grasp the effect of its mobility on the increasing elderly population, which makes private professional guardians necessary.<sup>99</sup> Due to society's increased mobility, family members tend to move farther from their childhood homes than previous generations, thus weakening their ability to care for the older generation.<sup>100</sup> The country's growing over-sixty-five population and the decreasing likelihood that family and friends will live near enough to provide care, leads to an increase in the need for guardians.<sup>101</sup> Specifically, these factors increase the need for private professional guardians.<sup>102</sup>

### *C. Conflicts of Interest*

Traditionally, courts favor appointing family members or close family friends to serve as guardians of incapacitated adults.<sup>103</sup> Courts generally believe that a family guardian possesses a better understanding of the incapacitated adult's needs and desires.<sup>104</sup> However, appointment of a family guardian may lead to a conflict of interest that would not have arisen with the appointment of a private professional guardian.<sup>105</sup> For example, a conflict of interest may involve the potential amount of money or property the family

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93. *Id.*

94. *See id.*

95. *See* TEX. EST. CODE ANN. §§ 1104.251(a), 1104.252, 1104.255, 1104.256 (West 2014).

96. *See id.* §§ 1104.301–.306.

97. QUINN, *supra* note 8, at 12.

98. Barnes, *supra* note 2, at 948.

99. *See id.*

100. *Id.*

101. *See* QUINN, *supra* note 8, at 13.

102. *Id.*

103. Tex. Courts Online, *supra* note 42, at 1–15.

104. Barnes, *supra* note 2, at 954.

105. *Id.* at 955–56.

guardian stands to inherit from the ward's estate.<sup>106</sup> The more money used to cover the expenses of the ward's care, the less money the family guardian could potentially inherit.<sup>107</sup> A family guardian might be tempted to reduce the amount of care and services provided to the ward in order to maintain the maximum possible inheritance.<sup>108</sup> To reduce this possibility, the court could limit the family guardian's compensation.<sup>109</sup> But adjusting court-awarded compensation would not likely prevent the family guardian from making self-serving decisions.<sup>110</sup>

Not only does court-awarded compensation fail to negate the possibility of family guardian self-dealing, it also raises another possible conflict of interest, a family guardian might also choose life-sustaining options that the ward has expressly declined, because the family guardian has become dependent on the compensation derived from the guardianship.<sup>111</sup> Such a choice would conflict with the ward's best interests and would merely sustain the family guardian's income-stream.<sup>112</sup>

Conversely, private professional guardians rarely depend on a single ward for their entire income, nor do they receive any inheritances from the ward.<sup>113</sup> Thus, a private professional guardian could easily avoid these types of conflicts of interest.<sup>114</sup>

#### *D. Required Knowledge*

Texas does not require a family guardian to complete any special training or possess specialized knowledge in order to make decisions on the ward's behalf.<sup>115</sup> Nor does the state require a family guardian to receive formalized training concerning the ethics related to making personal and financial decisions for another person.<sup>116</sup> Because family guardians may have close emotional and personal ties to the ward, they are more likely to make decisions based on paternalistic concerns and their own view of the ward's best interests.<sup>117</sup> The fact that Texas and other states do not require family guardians to complete any amount of training may expose

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106. *Id.* at 955.

107. *Id.*

108. *See id.*

109. *See id.*

110. *Id.* at 951.

111. *Id.* at 956.

112. *Id.*

113. *Id.* at 971–72.

114. *See id.*

115. *See id.*

116. *See id.*

117. *Id.* at 956.

incapacitated individuals to an increased amount of risk, compared to appointing a private professional guardian.<sup>118</sup>

On the other hand, Texas requires private professional guardians to meet certain training criteria as well as complete continuing education courses.<sup>119</sup> Because of the required training, private professional guardians likely have a better understanding of the availability of community programs, government benefits, residences, and how to make competent health care choices.<sup>120</sup> Private professional guardians can rely on their training in making decisions that take the ward's best interests into consideration, whereas family guardians may rely solely on their best judgment, which frequently contains a paternalistic bias.<sup>121</sup>

#### *E. Abuse of the Elderly*

Studies have shown that those with special relationships to elderly individuals are more likely to commit abusive acts.<sup>122</sup> An elderly person is often vulnerable to abuse due to physical frailty, diminished mental capacity, and weakened support systems.<sup>123</sup>

According to the National Center of Elder Abuse, in 90% of abuse cases, the perpetrators are family members.<sup>124</sup> While one household survey revealed that spouses are more likely to abuse, another study showed that abuse by adult children draws more frequent notice.<sup>125</sup> Furthermore, adult children perpetrate 60% of the financial abuse committed against the elderly.<sup>126</sup>

Incidents of guardians committing abusive acts to an elderly ward occur with both family guardians and private professional guardians.<sup>127</sup> The caregiver-ward relationship typically determines whether someone will report the abuse.<sup>128</sup> For example, the ward might refuse to report the abusive acts of a family guardian because of their familial relationship.<sup>129</sup> People are more likely to report a private professional guardian's abuse because there is no emotional or familial relationship between the ward and the private

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118. *See generally*, Hurme & Wood, *supra* note 4, at 882 (discussing a lack of training as a guardian's most common complaint, and what training a guardian should have).

119. Barnes, *supra* note 2, at 971–72.

120. *Id.* at 950.

121. *Id.* at 956.

122. *Id.*

123. *See id.* at 945–47.

124. LISA NERENBERG, ELDER ABUSE PREVENTION: EMERGING TRENDS AND PROMISING STRATEGIES 1, 85 (Sheri W. Sussman et al. eds., 2008).

125. *Id.*

126. *Id.*

127. *Id.* at 83.

128. *Id.* at 84.

129. *Id.* at 84–86.

professional guardian; the reporter does not have to worry about interfering with family affairs.<sup>130</sup>

The belief that private professional guardians are more likely to misappropriate funds of a ward than a family guardian is unjustified.<sup>131</sup> A court-appointed guardian, whether private professional or family, must obtain court approval before doing any of the following:

- (1) purchas[ing] or exchang[ing] property;
- (2) tak[ing] a claim or property for the use and benefit of the estate in payment of a debt due or owing to the estate;
- (3) compound[ing] a bad or doubtful debt due or owing to the estate;
- (4) mak[ing] a compromise or a settlement in relation to property or a claim in dispute or litigation;
- (5) compromis[ing] or pay[ing] in full any secured claim that has been allowed and approved as required by law against the estate by conveying to the holder of the secured claim the real estate or personal property securing the claim:
  - (A) in full payment, liquidation, and satisfaction of the claim; and
  - (B) in consideration of cancellation of a note, deed of trust, mortgage, chattel mortgage, or other evidence of a lien that secures the payment of the claim;
- (6) abandon[ing] worthless or burdensome property and the administration of that property;
- (7) purchas[ing] a prepaid funeral benefits contract; and
- (8) establish[ing] a trust . . . , and direct that the income of the ward as defined by that section be paid directly to the trust, solely for the purpose of the ward's eligibility for medical assistance under Chapter 32, Human Resources Code<sup>132</sup>

A guardian of the estate also must provide the court with an annual accounting of all financial transactions the guardian has performed on the ward's behalf during the previous year.<sup>133</sup> If a guardian incorrectly handles the ward's estate, the court is likely to notice.<sup>134</sup>

If a private professional guardian commits financial or physical abuse the guardianship company may provide additional training or supervision,

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130. *See id.* at 86.

131. *See id.* at 85; Joy Solomon, *Changing of Guardians: A Criticism and Analysis of the New York Guardianship Statute's Impact on Elder Abuse Victims*, 10 NAT'L ACAD. ELDER L. ATT'YS J. 2, 149, 150 (2014).

132. TEX. EST. CODE ANN. § 1151.102 (West 2014).

133. *Id.* §§ 1201.051–.054.

134. *See id.*

discipline, or other remedial action, up to and including termination, without a court order.<sup>135</sup> If the court suspects a family guardian has become abusive, the court must order removal and, hopefully, appoint a replacement.<sup>136</sup> Private professional guardian companies maintain the ability to prevent and remedy abuse without waiting on the court.<sup>137</sup>

#### IV. GUARDIANSHIPS V. TRADITIONAL ESTATE PLANNING

Critics of private professional guardians contend that alternative methods of providing care for incapacitated individuals exist.<sup>138</sup> Although these alternative instruments do create a fiduciary duty on the agent, they also require the principal to have at least testamentary capacity to create an agent's legal standing.<sup>139</sup> The following sections will first discuss an individual's ability to name a proposed guardian in a written declaration as part of an estate plan.<sup>140</sup> Then, a discussion of the alternatives to a guardianship will include: a durable power of attorney, a medical power of attorney, a medical directive, a trust, a will, and the insufficiencies of each.<sup>141</sup>

##### A. Guardianship

During the estate planning process, an individual may name a person or guardianship company to become the guardian of the estate and person through a written declaration.<sup>142</sup> The judge initially must consider the preference in the written declaration.<sup>143</sup> Unless the Texas Estates Code disqualifies the proposed guardian, or the proposed guardian does not wish to serve as a guardian, the court will usually appoint the named person.<sup>144</sup> For example, in *In re Guardianship of Cornelius*, the ward named an individual to serve as guardian to the ward's estate and person.<sup>145</sup> However, the court found the proposed guardian disqualified and appointed a private professional guardian despite the ward's request.<sup>146</sup>

The court must also heed the ward's expressed statements as to who may *not* become the guardian of the ward's estate and person.<sup>147</sup> If a ward expressly states that he or she does not want a certain person to become the

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135. NERENBERG, *supra* note 124, at 85–86.

136. *See id.* at 85.

137. *Id.*

138. *See* JASPER, *supra* note 1, at 51–52.

139. *Id.* at 51.

140. *See infra* Part IV.A.

141. *See infra* Part IV.B.

142. *See infra* Part IV.B.

143. FIELDS, *supra* note 52.

144. *Id.*

145. *In re Guardianship of Cornelius*, 326 P.3d 718, 720 (Wash. Ct. App. 2014).

146. *Id.*

147. FIELDS, *supra* note 52.

guardian, it does not matter if that person qualifies under Texas statute; the court cannot appoint that person guardian.<sup>148</sup>

The courts seem to prefer a written statement of the ward's guardianship preferences, especially when the ward's mental capacity has become questionable.<sup>149</sup> When a ward orally names or changes the name of the individual to act as guardian, issues arise as to whether the ward already lacked capacity or simply changed his or her mind.<sup>150</sup> Mind changing and oral nominations can become difficult for the court to prove and creates doubt upon which of the ward's preferences the court should use.<sup>151</sup>

### *B. Alternatives to Guardianships*

Certain instruments do provide an alternative to the judicial creation of a guardianship.<sup>152</sup> However, these alternatives also have limitations that may not grant enough authority for the agent to make the necessary financial and health decisions for the ward.<sup>153</sup> A typical estate plan includes documents such as a durable power of attorney, medical power of attorney, a medical directive, a trust, and a will.<sup>154</sup>

#### *1. Durable Power of Attorney*

A durable power of attorney provides an alternative to a guardianship by allowing a designated agent to make financial and business decisions, but not medical decisions for the principal.<sup>155</sup> A general power of attorney will end when the principal becomes incapacitated, while a durable power of attorney continues or begins when the principal becomes incapacitated.<sup>156</sup> Despite the title, power of attorney, the law does not require a person to be an attorney to act as an agent-in-fact for the principal.<sup>157</sup> The principal must delineate all powers the agent will have during the principal's incapacitation.<sup>158</sup> Therefore, if the principal fails to provide a certain power, such as the power to sell property, the only way to dispose of the property after the principal becomes mentally incapacitated may require a court to appoint a guardian over the principal's estate.<sup>159</sup>

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148. *Id.*

149. *See In re Guardianship of Parker*, 275 S.W.3d 623 (Tex. App. Amarillo—2008, no pet.).

150. *See id.* at 633.

151. *See id.*

152. *See JASPER*, *supra* note 1, at 51.

153. *See id.*

154. *See id.* at 51–52.

155. *Id.* at 60.

156. *Id.*

157. *Id.*

158. *Id.* at 61.

159. *See id.*

A power of attorney and a durable power of attorney allow an agent the right to administer the financial matters of the individual's estate.<sup>160</sup> However, it does not prevent the principal from signing documents, entering into financial arrangements or contracts, or bestowing gifts of money or property.<sup>161</sup> Yet, if one becomes a guardian of an incapacitated individual, the guardianship statutorily voids the durable power of attorney.<sup>162</sup> Unlike agents with power of attorney, a guardian will seldom argue over the status, scope, and validity of a guardianship.<sup>163</sup>

### 2. Medical Power of Attorney

A medical power of attorney allows a person to make limited health care decisions, but not financial decisions, should the principal become incapacitated.<sup>164</sup> The person granted medical power of attorney has the authority to make the principal's medical decisions.<sup>165</sup> Nevertheless, the agent must follow the principal's instructions provided in the document.<sup>166</sup> The principal may also appoint one or two alternate agents in the event that the first agent is unavailable or unable to act.<sup>167</sup> Unless specifically stated, in some jurisdictions, the person granted a medical power of attorney may not consent to the following: inpatient mental health services, electro-shock therapy, lobotomies or similar treatments, abortions, or declination of pain management or palliative care.<sup>168</sup>

### 3. Medical Directive

A medical directive, sometimes called a living will, states in writing, the principal's wish to receive or forgo specific treatments under certain conditions.<sup>169</sup> The medical directive allows the principal to choose what measures to take if he or she develops a terminal illness or enters a vegetative state and no reasonable chance of recovery exists.<sup>170</sup> However, a medical directive typically does not grant an agent the ability to make medical choices on the principal's behalf, and certainly does not afford the agent financial choices.<sup>171</sup>

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160. See Beaudry et. al., *supra* note 1.

161. *Id.*

162. *See id.*

163. *See id.*

164. JASPER, *supra* note 1, at 56–57.

165. *See id.* at 56.

166. *Id.*

167. *Id.*

168. *Id.* at 59–60.

169. *Id.* at 53.

170. *Id.*

171. *See id.*

#### 4. Trust

A trust allows the principal to grant a trustee the authority to only manage the principal's finances.<sup>172</sup> An individual creates a trust by transferring legal title of property to another individual or financial institution that acts as a trustee, imposing fiduciary duties upon the trustee.<sup>173</sup> The trustee must manage the property according to the instructions in the trust instrument.<sup>174</sup> A settlor, the individual transferring title, typically creates a trust to provide for and protect a beneficiary's interest.<sup>175</sup> This includes protecting the interests of minors, individuals that lack management skills, spendthrifts, and those who have been declared incompetent.<sup>176</sup> For incompetent individuals, trusts avoid the need for the court to appoint a guardian of the estate.<sup>177</sup> However, trusts do not provide an agent with the authority to make decisions regarding the care of an individual who is found incompetent.<sup>178</sup>

#### 5. Will

An individual may designate a preferred guardian in a will; however, this does not happen often because the will is not generally produced until an individual dies.<sup>179</sup> Traditionally, a will merely contains directions concerning the disposition of the decedent's property.<sup>180</sup> Since an individual must have at least testamentary capacity before executing a valid will, designating a guardian in a will may help a court determine whom the testator would prefer appointed as a guardian.<sup>181</sup>

#### 6. How a Guardianship Differs

A court creates a guardianship only after the individual has diminished capacity.<sup>182</sup> A durable power of attorney, medical power of attorney, medical directive, trust, and will have one thing in common; the principal must have at least the testamentary capacity to execute each instrument

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172. See GERRY W. BEYER, *TEXAS TRUST LAW CASES AND MATERIALS* 1, 2–5 (2010).

173. *Id.* at 2.

174. *Id.*

175. *Id.* at 3.

176. *Id.* at 3–4.

177. *Id.* at 4.

178. See *id.* at 1–5.

179. Tex. Young Lawyer Ass'n, *Protecting the Incapacitated: A Guide to Guardianships in Texas From Application to Oath* (2008), [http://tyla.org/tasks/sites/tyla/assets/File/35786-TYLA\\_GuardianPamphlet\\_FINAL.pdf](http://tyla.org/tasks/sites/tyla/assets/File/35786-TYLA_GuardianPamphlet_FINAL.pdf) [<http://perma.cc/92VR-D89F>].

180. BLACK LAW'S DICTIONARY 1735 (9th ed. 2009).

181. See *In re Guardianship of Parker*, 275 S.W.3d 623 (Tex. App. Amarillo—2008, no pet.).

182. See JASPER, *supra* note 1, at 17.

before it becomes legally binding.<sup>183</sup> Both guardianships and the powers granted through these alternative documents require a fiduciary duty to the ward.<sup>184</sup> Guardians act on their ward's behalf without any additional consent and make decisions designed to preserve the ward's estate and health.<sup>185</sup> Thus, the court can provide a guardian with broader authority than the above mentioned alternatives.<sup>186</sup> Once an individual loses mental capacity, a guardianship might be the only way to make medical and financial decisions on the incapacitated individual's behalf.<sup>187</sup>

## V. PAYING FOR PRIVATE PROFESSIONAL GUARDIANS

Private professional guardians receive payment in a variety of ways, but often do not set their fee amounts.<sup>188</sup> Depending on the condition of the ward's estate, the court decides whether Medicaid, the county treasury, or even the ward's estate compensates the private professional guardian.<sup>189</sup> The next sections explain how the court compensates the private professional guardian's services.<sup>190</sup>

### A. Private Funding

The court may award compensation for a guardian's services from the ward's estate, but the compensation cannot exceed 5% of the estate's gross income.<sup>191</sup> When determining the amount of compensation to award a guardian, courts consider the estate's gross income and whether the ward receives any benefits from Medicaid.<sup>192</sup> However, gross income does not encompass any income derived from Veteran Affairs or Social Security.<sup>193</sup> Once a guardian files an annual accounting of the guardianship, the court may award a reasonable fee.<sup>194</sup> The amount of compensation depends on whether the guardian has competently managed the ward's estate within the guidelines set forth in section 665 of the Texas Estates Code.<sup>195</sup> Accordingly, if the guardian fails to manage the ward's estate, the court may deny any

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183. *See id.* at 53–61.

184. Beaudry et. al., *supra* note 1.

185. *See id.*

186. *See id.*

187. *See JASPER*, *supra* note 1, at 61.

188. *See infra* Part V.A–C.

189. *See infra* Part V.A–C.

190. *See infra* Part V.A–C.

191. TEX. EST. CODE ANN. § 1155.002 (West 2014).

192. *Id.* § 1155.004.

193. *Id.* § 1155.001.

194. *Id.* § 1155.003.

195. *Id.*

compensation because of the guardian's failure to adequately provide services.<sup>196</sup>

### B. Medicaid

Individuals who receive assistance under Medicaid or other public programs may have their private professional guardian's fee paid by those programs.<sup>197</sup> Actually, if a public program provides services to an individual, the courts are more likely to appoint a guardian for that individual.<sup>198</sup> Medicaid will adjust the applied income of the recipient's medical assistance to include the compensation of a private professional guardian.<sup>199</sup> Applied income is the portion of a person's income that Medicaid pays to the nursing home.<sup>200</sup> This means that Medicaid increases the amount of the individual's regular payment to incorporate the fees of private professional guardian services.<sup>201</sup> Many people, including nursing facility staff, employees of the county clerk's office, and attorneys, believe that compensation for private professional guardians comes out of the ward's already meager Medicaid personal allowance.<sup>202</sup> The Texas Human Resources Code states otherwise.<sup>203</sup>

### C. County Pay

If the court's assessment of the ward's estate reveals that the estate contains insufficient funds to pay a private professional guardian and the ward does not receive public assistance, the court has the authority to arrange payment from county treasury funds that have been set aside for such purposes.<sup>204</sup> The county not only has the responsibility to pay for private professional guardian services, but also for attorneys and mental health or other professionals on behalf of an indigent ward.<sup>205</sup>

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196. *Id.* § 1155.008.

197. *See* TEX. HUM. RES. CODE ANN. § 32.02451 (West 2011).

198. *See* Barnes, *supra* note 2, at 949.

199. *See id.*

200. Legal Hotline for Texans, *Nursing Home Medicaid*, <http://texaslawhelp.org/resource/nursing-home-medicaid/download/D821192C-C0C7-D074-E350669D2869?ref=eZJVv> [<http://perma.cc/D9MH-7ADA>].

201. *See* Barnes, *supra* note 2, at 949.

202. Interview with Kyla Baker, Private Professional Guardian, in Lubbock, Tex. (Nov. 7, 2014).

203. *See* TEX. HUM. RES. CODE ANN. § 32.02451 (West 2011).

204. *See* TEX. EST. CODE ANN. §§ 1155.001–.008 (West 2014).

205. *See id.* § 1155.054.

## VI. THE TEXAS LEGISLATURE AND PRIVATE PROFESSIONAL GUARDIANS

The Texas Legislature and the public must address the lack of consistent oversight of guardianships, education, and training of practitioners and communities.<sup>206</sup> The American population's life expectancy has increased, in part, because medical advances have increased survival rates for chronic impairments that adversely affect mental and physical capacities.<sup>207</sup> Therefore, private professional guardianship services must fill this void regardless of the level of public disfavor.<sup>208</sup>

The following sections will discuss how the lack of consistent oversight of guardianships, as well as how the wealth of misinformation the media and practitioners circulate in communities about guardianships hinder the growth of private professional services.<sup>209</sup> The Texas Legislature must find ways to focus on these issues, so a trusting relationship can develop between private professional guardians and the public.<sup>210</sup>

*A. Amount of Oversight Over Private Professional Guardians*

Courts need to create better systems for monitoring both private professional and family guardianships.<sup>211</sup> Since courts appoint and remove guardians, it seems logical that those courts would be in the best position to monitor guardians' conduct.<sup>212</sup> However, few individuals available to the courts possess the knowledge, concern, and access to information necessary to monitor guardianships effectively.<sup>213</sup> Herein lies a key issue with judicial oversight: courts have little actual knowledge of the interaction between a guardian and a ward and limited time and resources make it difficult to obtain that knowledge.<sup>214</sup>

In an attempt to monitor guardians' conduct, Texas requires guardians of the estate to file annual accountings and guardians of the person to file annual reports on the ward's well-being.<sup>215</sup> Guardians must present their annual account or report to the court within 120 days of the anniversary of the guardianship.<sup>216</sup>

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206. *See supra* Part V.A–B.

207. *See* Barnes, *supra* note 2, at 944.

208. *See id.*

209. *See infra* Part VI.A–B.

210. *See infra* Part VI.A–B.

211. Hurme & Wood, *supra* note 4, at 915–16.

212. *Id.* at 916.

213. Barnes, *supra* note 2, at 984.

214. *Id.*

215. TEX. EST. CODE ANN. §§ 1163.001–006, 1163.101 (West 2014).

216. *Id.* §§ 1163.001–006, 1163.101.

The Texas Estates Code requires a guardian to file an annual accounting of the ward's finances.<sup>217</sup> This annual account must include a list of the following: (1) all property not reported on the initial inventory or previous annual accountings, (2) any changes in property or property value not previously reported, (3) a complete accounting of receipts and disbursements during the reporting period, (4) a complete and detailed description of the property under management of the guardian, (5) the cash balance of all current accounts along with the name of the institution, and (6) a detailed description of personal property of the ward's estate.<sup>218</sup>

The guardian of the person must also file an annual report of the ward.<sup>219</sup> The guardian must create and swear to the accuracy of a report that includes: (1) receipt and disbursement for the support of the ward; (2) the guardian's current contact information; (3) the ward's date of birth and current contact information; (4) a description of the type of home and how long the ward has resided in the current residence; (5) an explanation for the move if the ward changed residences; (6) an account of how often the guardian visits the ward and the date of the last visit; and (7) whether the guardian controls the ward's estate.<sup>220</sup> The report must also state the guardian's views as to the ward's mental and physical condition over the past year and whether any changes have occurred.<sup>221</sup>

The guardian of the person must also include a report on the ward's medical care.<sup>222</sup> The report should include items such as the identity of the ward's primary care physician, the frequency which the doctor visits patients, and the identity of any other professionals or doctors who provide treatment to the ward.<sup>223</sup> The guardian must also provide information as to the ward's recreational, educational, or social activities, an evaluation of the ward's living arrangements, whether the ward is happy, and if any needs of the ward remain unmet.<sup>224</sup>

Problems arise when a court fails to read the reports and simply signs them, allowing the guardianship to continue without question.<sup>225</sup> Typically, the judge does not hold hearings concerning the annual accountings, but simply bases his or her decision on the collected reports.<sup>226</sup>

The Texas legislature should require courts to hold hearings to review annual reports.<sup>227</sup> Such a requirement would ensure that the judge reviewed

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217. *Id.* § 1163.001.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. Hurme & Wood, *supra* note 4, at 901.

226. Interview with Laura Beth Pleasant, Guardianship Attorney, in Lubbock, Tex. (Nov. 7, 2014).

227. *See generally* Hurme & Wood, *supra* note 4, at 901.

the annual reports, and would allow the judge an opportunity to question the guardian about the annual reports.<sup>228</sup> This requirement would also allow any interested person to report misconduct or contest the continuation of the guardianship.<sup>229</sup>

Another oversight problem involving guardianship reports is that no one verifies whether the guardians have filed the reports timely.<sup>230</sup> If the court tracked due dates of annual accounts and notified the guardians, it would help remind the guardian to file the annual reports on time.<sup>231</sup> The legislature could place the responsibility of such a tracking system to an agency, such as the Texas Department of Aging and Disability Services or Adult Protective Agency.<sup>232</sup> Also, the judge may investigate late submissions to ensure that misconduct did not cause the guardian to submit the reports late.<sup>233</sup>

Currently, no data system exists for tracking guardianship cases.<sup>234</sup> To help minimize costs, some states use retired certified public accountants and other volunteers to assist the court in reviewing annual documents.<sup>235</sup> Tarrant County uses the services of student-volunteers pursuing degrees in social work, who visit the wards on a monthly basis and monitor the wards' well-being.<sup>236</sup> Some states and counties use specialized courts or judges for guardianships to increase judicial awareness.<sup>237</sup> Such increased judicial awareness can limit the number of guardians abusing their position.<sup>238</sup>

Additionally, to increase judicial awareness, the court could make better utilization of court visitors in its monitoring efforts.<sup>239</sup> Courts could appoint court visitors after the creation of a guardianship to provide yet another layer of monitoring of guardians' conduct.<sup>240</sup> Courts may appoint a court visitor to evaluate the proposed ward or the proposed ward's situation based on the request of any interested person, the proposed ward, or the court's own motion.<sup>241</sup> Although this might sound like a program that would allow for oversight of guardians' actions, courts may only appoint visitors *before* creating guardianships.<sup>242</sup> Therefore, court-appointed visitors cannot ensure accountability once the court creates a guardianship.<sup>243</sup>

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228. *See id.*

229. *See generally id.*

230. *See id.* at 903.

231. *See id.*

232. *See generally id.* at 903–05.

233. *See id.*

234. *Id.* at 903.

235. *Id.* at 907.

236. *Id.* at 909.

237. *Id.* at 917.

238. *Id.* at 915.

239. *See* TEX. EST. CODE ANN. § 1054.103 (West 2014).

240. *See generally*, Barnes, *supra* note 2, at 982.

241. EST. § 1054.103.

242. *Id.*

243. *See id.*

However, appointing court visitors after creating a guardianship may have unwanted consequences.<sup>244</sup> Constitutional issues may arise if courts conduct investigations or searches of the ward's home without sufficient legal grounds.<sup>245</sup> To avoid an issue with constitutionality, courts would have to make searches and check-ups routine or as a condition of the guardianship.<sup>246</sup> Of course, searches and check-ups would require more personnel and funding, thus raising the question of the appropriateness of court oversight.<sup>247</sup>

### B. Promoting Education and Training

Increased efforts to provide training and education opportunities in communities will help the public understand that private professional guardians have their place in caring for the elderly.<sup>248</sup> Each state has the authority to set the training standards of guardians, and Texas only requires private professional guardians, not family guardians, to complete training before a court can appoint them as a guardian.<sup>249</sup> The NGA believes that guardianship training should include the following: training in ethics and professional values; identification of different types of incapacities; modes of communication; and accounting and finance.<sup>250</sup> In 2000, a national survey revealed that 60% of respondents reported that the states merely provided some written instructions, training sessions, videos, or other type of training aides to guardians.<sup>251</sup>

The Texas Legislature needs to look into providing and requiring training for family guardians to help them overcome the emotional and psychological issues guardians face when making decisions for their wards.<sup>252</sup> Because private professional guardians must complete training and attend continuing education courses, they have the opportunity to experience and understand the difficulties guardians face.<sup>253</sup> Therefore, they are better equipped and trained to handle these situations.<sup>254</sup>

Critics of private professional guardianships believe that a gap exists between guardianship law and practice.<sup>255</sup> Out of habit and routine, guardians still behave as they did before the statutory reform.<sup>256</sup> The gap will

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244. See Barnes, *supra* note 2, at 982.

245. *Id.*

246. *Id.*

247. *Id.*

248. See *supra* Part VI.

249. See TEX. EST. CODE ANN. §§ 1104.251(a)–.252, .255, .256.

250. See Nat'l Guardianship Ass'n, *supra* note 80.

251. Hurme & Wood, *supra* note 4, at 877.

252. *Id.* at 883.

253. See *id.* at 884.

254. See *id.*

255. QUINN, *supra* note 8, at 42–43.

256. *Id.*

only close after changes occur in education and motivation of all of the participants within the complex guardianship environment.<sup>257</sup>

One suggestion that may help close this educational gap is for the state to begin sponsoring guardianship conferences where local judges, attorneys, doctors, and other practitioners come together to explain the guardianship process to members of the community.<sup>258</sup> Local practitioners could present similar presentations at nursing homes or other long term care facilities to help disseminate information regarding the details of the guardianship process.<sup>259</sup> The media could also effectively distribute correct information to promote private professional guardians.<sup>260</sup> A concentrated use of these methods would correct misconceptions of the guardianship profession, increase the community's general knowledge of guardians' duties to wards, and provide persons that may need or want more information about guardianship with contact information for people who understand the guardianship process.<sup>261</sup>

## VII. CONCLUSION

The Texas Legislature took steps that allow private professional guardians to provide services to those in need, but misinformation and lack of training has caused the public to disfavor private professional guardians.<sup>262</sup> This disfavor continues despite the fact that private professional guardians must meet certain criteria and training requirements that often make them a more experienced option for the court to appoint as a guardian.<sup>263</sup> Private professional guardians must complete a certification process and attend continuing education classes to maintain their certification status for a court to appoint them as a guardian, whereas family guardians do not have to meet such requirements.<sup>264</sup> Despite studies that show family guardians have a higher reported abuse rate and lack the requisite knowledge to responsibly administer medical and financial decisions on behalf of the ward, courts continue to favor them.<sup>265</sup>

Although Texas' system also includes due process safeguards to ensure that courts refrain from creating guardianships when no need exists, the subsequent oversight requires improvement.<sup>266</sup> Currently, a guardian of any type must obtain court permission before selling any of the ward's property

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257. *Id.*

258. *Id.* at 243.

259. *See id.* at 244.

260. Hurme & Wood, *supra* note 4, at 922.

261. *See id.* at 920–21.

262. *See supra* Part VI.B.

263. *See supra* Part III.A.2.

264. *See supra* Part III.D.

265. *See supra* Part III.C.

266. *See supra* Part VI.A.

and must submit an annual account of all transactions the guardian completes for the ward.<sup>267</sup> Still, guardians fail to submit, and courts fail to review, the documents.<sup>268</sup> Therefore, the legislature should encourage judicial awareness by requiring tracking systems or creating specialized guardianship courts.<sup>269</sup> In addition, courts could effectively monitor guardians' conduct through a modified use of court visitors.<sup>270</sup>

Also, the Texas Legislature needs to provide additional financing to agencies and courts to disseminate information concerning private professional guardianships to reduce public misinformation about the level of their qualifications.<sup>271</sup> Many people, including judges and attorneys, dislike the idea of someone profiting from a guardianship, despite the fact that family guardians may receive compensation too.<sup>272</sup> This type of hypocrisy hinders private professional guardians' ability to administer their services to the individuals who need them.<sup>273</sup>

Private professional guardians administer important services and care to people who have found themselves all alone.<sup>274</sup> The Texas Legislature needs to establish effective, uniform oversight procedures that actually monitor the conduct of guardians.<sup>275</sup> In addition, the legislature must increase financing and create more opportunities for courts and other agencies to inform and educate the public about the services private professional guardians provide.<sup>276</sup> Once the legislature and the public act against these problems, private professional guardians may increase the number of elderly benefiting from their services.<sup>277</sup>

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267. *See supra* Part IV.B.1.

268. *See supra* Part VI.A.

269. *See supra* Part VI.A.

270. *See supra* Part VI.A.

271. *See supra* Part VI.B.

272. *See supra* Part III.C.

273. *See supra* Part III.C.

274. *See supra* Part III.

275. *See supra* Part VI.A.

276. *See supra* Part VI.B.

277. *See supra* Part VI.