

## **MEETING EXPECTATIONS TO ENSURE COMPLIANCE AND WARD WELL-BEING**

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## **MEETING EXPECTATIONS TO ENSURE COMPLIANCE AND WARD WELL-BEING**

**Cryctal Spradley**

### **Abstract**

According to the U. S. Census Bureau, between 2000 and 2010, the population 65 years and over increased at a faster rate (15.1%) than the total U. S. population (9.7%). This trend has been referred to as the baby boomer bubble or the silver tsunami. The need for guardianships will rise as this trend progresses. Because of the silver tsunami, courts must find ways to monitor guardians in order to protect the ward. Even now, across the nation, there are countless stories of guardians mishandling funds, lack of court supervision, and ward neglect and abuse. The courts, and guardians alike, struggle with the current caseload, complexity, and compliance of these cases.

Guardianships are necessary to protect the vulnerable. A guardianship can come in three different forms—over the person, over the estate, or over both the person and the estate. There is also a variety of guardian types. Guardians can be friends or family members of the ward, a public entity, a corporate fiduciary, or a private professional guardian.

While past research helps to familiarize oneself with the guardianship process, it does little to address issues at the local level. By examining Lubbock County, Texas' guardianship cases, this paper will expand on the body of guardianship knowledge and more adequately define what issues courts are facing at the local level. This is important to Lubbock County as the amount of guardianship applications filed annually have doubled over the course of ten years.

In Texas, the larger, metropolitan counties have access to additional resources that most of the other county probate courts do not. Lubbock County is not considered metropolitan. Consequently, Lubbock County must find ways to ensure compliance with current resources. One way to increase compliance is to manage expectations. The reality is, and this research proves, that the court's and the guardian's expectations are not aligned. Dr. Randy Carlson (n.d.) states, "[e]xpectations minus reality equal disappointment" or in the case of guardians, non-compliance.

By answering the following questions, the Lubbock County courts can determine if needs and expectations are being met and then, strategize solutions to increase compliance. Is the court ordering adequate bond amounts as it relates to the condition of the ward or the ward's estate? Are guardians complying with statutory requirements after an Order for Guardianship has been entered? Is one type of guardian more compliant than the other types of guardians? What statutory requirements are guardians complying with? Are the court and clerk properly managing the guardianship caseload? Do local probate attorneys or court staff have suggestions on increasing guardian compliance?

The outcomes of the data analysis shocked the conscience. A review of guardianship cases in Lubbock County found that bonds were inadequate to protect the ward from abuse and neglect. Each case involving the ward's estate requires an inventory be filed. The bond amounts ordered in these cases covered less than half of the assets reported in inventories. In addition to inadequate bond amounts, the court erroneously waived the requirement of bond 68% of the time and guardians filed required inventories less than half of the time.

The court and the guardians should aim for a 100% timely compliance rate in all areas—qualification, inventories, annual reports, and annual accounts. Overall compliance was abysmal in Lubbock County. Guardians qualified 95% of the time; however, only qualified within the specified time frame (“timely qualified”) 82% of the time. Required inventories were filed less than half (45%) of the time, with only about one-third (35%) of those timely filed. Annual reports were filed about half of the time, but only 24% were on time. One-third of the annual accounts due were filed, with only 16% on time. Qualification was the only area in which guardians somewhat excelled. In all other areas, compliance was atrocious.

In recent years, proper case management has been lacking among court and clerk staff. Just over 30% of these cases should be closed because of clerk error, deceased wards, or by re-classification of the case type. The court rarely took action against a guardian for failing to timely comply (or comply at all) with statutory requirements. Applied to the whole caseload of 1,817 open cases, at the time of the review, the court should have closed approximately 600 cases.

How can guardian compliance and court management improve? The court should reassess the bond types and bond amounts in all open guardianship cases. The failure of a judge to set an adequate bond can be, per statute, considered gross neglect. By reassessing bond amounts, the court’s due diligence safeguards the ward’s assets, is fair to the guardian, and protects the judge from liability.

Furthermore, the court should take the lead in guardian education and outreach. Guardian non-compliance is partially due to a lack of education or available resources. The court should also conduct regular meetings with guardianship stakeholders. Each

meeting should focus on a particular aspect of the guardianship process—education, outreach, or the court process generally. The goals of these meetings should be to increase guardian compliance, create greater process efficiencies among the clerk and court, and provide a more open dialogue between the court and attorneys. The court should be perceptive to the needs of the guardians and local attorneys, in order to engage the stakeholders and improve the guardianship situation in Lubbock County.

## **Introduction**

Family dynamics have changed drastically for the Baby Boomer generation. Baby Boomers today may experience divorce, be a single parent, or be raising their grandchildren. Due to these factors, limited resources, and geographic restraints, caring for their elderly parents and/or incapacitated minors has also changed. In prior generations, wives and mothers did not work outside the home, making themselves available to care for children or aging parents and grandparents. Guardianships, by and large, were not as big a necessity then as they are today. Guardianships are on the rise and courts must find ways to monitor guardians in order to protect the ward. Across the nation, there are countless stories of guardians mishandling funds, lack of court supervision, and ward neglect and abuse. These issues arise largely because of a lack of court monitoring and/or guardian non-compliance. Lubbock County wants to be on the forefront of changing guardian monitoring and compliance.

## **The Definitions**

What is a guardianship? The Texas Guardianship Association defines guardianship as:

“a legal process designed to protect vulnerable persons from abuse, neglect (including self-neglect), and exploitation. Guardianship provides for the person’s care and management of his or her money while preserving, to the largest extent possible, that person’s independence and right to make decisions affecting his or her life”  
(Texas Office of Court Administration, 2014).

What is a guardian? A guardian is a person who is appointed by the probate court to protect the property and/or person of one who does not have capacity to protect his or her own interests. There are three types of responsibilities given to guardians. The first kind oversees the person. This guardian is responsible only for the person of the ward but not the ward's estate or property. The second type oversees the estate. This guardian is responsible only for the estate or property of the ward, but not the person. The third oversees both the person and the estate. As the name suggests, this guardian is responsible for both the person of the ward and the estate or property of the ward.

There are also three types of guardians. The first is a guardian who is a friend or family member of the ward. This project will refer to them as private guardians. The second is a public or governmental entity like the Department of Aging and Disability Services. The third is a professional guardian. There are two types of professional guardians (for purposes of this project). A private professional guardian has been certified by the state to be a guardian. Typically, private professional guardians have had no prior contact with the ward. Private professional guardians have to meet certain requirements to operate in Texas. First, they must be a high school graduate or possess the GED equivalent. Second, they must have two years of guardianship related work experience, a bachelor's degree in a field related to guardianship, or completion of an approved curriculum related to guardianship. Third, they must pass the state certification exam. Private professional guardians are also required to complete 12 hours of continuing education every two years, with two of these hours in ethics and one in legislative update (Rules, n.d.). Another kind of professional guardian

is a corporate fiduciary, such as a bank, that is appointed guardian to manage the estate of the ward.

What is a ward? A ward is an incapacitated person who has been placed in the care, custody and supervision of a guardian (Guardianship Glossary, n.d.). There are two classifications of incapacity as it relates to wards. One set is incapacitated due to their age of minority. The other set are adults who, because of a physical or mental condition, are substantially unable to provide for or care for themselves (Texas Estates Code 22.016).

Why would a person want to become a guardian? As research will indicate, most guardians are private guardians—friends or family of the ward. For private guardians, there is usually no monetary incentive. Their motivation is the well-being of the ward. The same can be said for public guardians. They receive no financial benefit in becoming a guardian. Public entities like the Department of Aging and Disability Services, are tasked with protecting the citizens of Texas, and that is incentive enough. Prior to appointment, professional guardians have little to no familiarity with the ward. There are a couple of reasons professional guardians are appointed. Unfortunately, private professional guardians are often appointed because no friend or family member was located or no one was willing to serve. Corporate fiduciaries are appointed because the ward's assets require extensive fiscal knowledge to manage them properly. Professional guardians are most often compensated for their services out of the ward's estate, and in some cases, through the ward's government assistance.

## **The Numbers**

Herein lies the problem. According to the U. S. Census Bureau, between 2000 and 2010, the population 65 years and over increased at a faster rate (15.1%) than the total U. S. population (9.7%). In addition, the population 65 years of age and older in the U. S. is likely to increase as a percentage of the total population to 20% by 2030. This trend has been referred to as the baby boomer bubble or the silver tsunami. In Texas, the population age 65 and older increased by 25.5% between 2000 and 2010. Further, between 2010 and 2013, Texas was one of the fastest growing states in the country (Texas Office of Court Administration, 2014). As it now stands, the courts, and guardians alike, struggle with the current caseload, complexity, and compliance rates of these cases. These issues will only intensify as the baby boomer bubble advances. The way guardianships are managed must change. We do not want this said of our court: “Ours is a dangerously burdened and troubled system that regularly puts elderly lives in the hands of others with little or no evidence of necessity, and then fails to guard against abuse, theft, and neglect” (Uekert, 2008).

Across Texas, 30,000 to 50,000 disabled and elderly people have lost the right to decide where they live, to choose a caretaker or to spend their life savings after being declared incapacitated and ordered into guardianships, according to new estimates obtained from the Texas Office of Court Administration and interviews with probate court officials statewide (Olsen, 2011). Yet, Texas does not have the resources allocated to safeguard this population. Texas has two court models when it comes to guardianship and probate matters; statutory probate courts and non-statutory probate courts. Out of the 254 counties in Texas, just 10 have statutory probate courts. These

probate courts are in the most populous counties in Texas. Unfortunately, Lubbock County is not one of them. Statutory probate courts have exclusive jurisdiction to hear guardianship cases. These probate courts have additional resources that non-statutory probate courts do not have. By statute, these courts must have a court investigator and a court visitor program. These two resources, under court supervision, monitor guardian compliance and ward well-being at least annually, but as often as necessary. In addition, statutory probate judges must be licensed to practice law in Texas. In the remaining counties, original guardianship (and probate) jurisdiction begins in the county court with the county judge. In contrast to statutory probate courts, these courts do not have a court investigator or court visitor program. And, under Texas law, the county judge is not required to be an attorney. In short, non-statutory probate courts do not have access to the same resources as statutory probate courts.

One of the primary purposes of courts is to do justice. Part of doing justice is protecting the rights of citizens that fall under the court's purview. This is true whether it is a child who is the subject of a family law suit, a defendant in a criminal case, or an incapacitated person in a guardianship proceeding. Once a case is filed in court, the court is obligated to manage it. For guardianship cases, this monitoring goes beyond getting a case to disposition. Guardianship cases are unique in that the court's responsibilities extend beyond disposition to the ward's recovering capacity or their death. This court management benefits everyone involved. The ward and their assets are protected from mishandling; guardians are deterred from committing wrongdoing; and society will likely partner with the courts to ensure wards are properly cared for. When courts play an active role in guardian compliance and ward well-being, courts

gain public trust and confidence. Doing justice for these citizens demands court supervision.

### **The Guardianship Process**

In Texas, guardianship proceedings begin one of two ways. The first is that any person may file a written application requesting an appointment of a guardian (Texas Estates Code 1101.001). The other way is initiated by the courts. If a court has probable cause to believe that a person living in the county is incapacitated, and the person does not have a guardian, the court appoints a guardian ad litem to investigate the person's conditions further (Texas Estates Code 1102.001). A guardian ad litem is required to investigate less restrictive alternatives to a guardianship and report the results of the investigation to the court (Texas Estates Code 1054.054). In other words, utilizing a guardianship is the last resort. If, after investigation, the guardian ad litem believes the person to be incapacitated and no less restrictive alternative exists, the ad litem files an application for the appointment of a guardian. Once an application is filed, the court appoints an attorney ad litem to represent the ward. An attorney ad litem is an attorney, appointed by the court to act on behalf of the ward who may not be capable of self-representation. In Texas, an attorney ad litem must be certified by the State Bar by successfully completing a course of study in guardianship law and procedure sponsored by the State Bar. The course must be four hours credit (Texas Estates Code 1054.201).

In most cases, medical, psychological, and intellectual records must be provided to the attorney ad litem prior to the court conducting a hearing. Next, the court conducts

a hearing. At the hearing, the court determines whether a guardianship is necessary and if so, who to appoint as guardian.

The order for guardianship must contain the following elements:

1. The name of the person appointed as guardian;
2. The name of the ward;
3. Whether the guardian is of the person or estate or both;
4. The amount of any bond required;
5. Whether an appraisal is necessary; and
6. That the clerk will issue letters of guardianship to the person appointed when the person has qualified according to law (Texas Estates Code 1101.153).

There are two requirements a person appointed as a guardian must do in order to be qualified. These requirements apply to all guardians, no matter their classification. The first is taking an oath to discharge faithfully the duties of guardian for the person or estate, or both, of a ward (Texas Estates Code 1105.051). The second is the giving of a bond, as required by the order for guardianship. Under most circumstances, the court may not waive the requirement of bond for the guardian of the estate (Texas Estates Code 1105.101(d)).

There are different types of bond that can be made. The first is called a cash bond. As the name suggests, the guardian posts the full amount of the bond ordered with the court. The cash bond is not returned to the guardian until the guardianship is closed, terminated, or a successor guardian is named. The second type is called a corporate surety bond. This bond is between three parties—the court, the guardian, and the surety company. The surety company guarantees to the court the full amount of the bond ordered and also guarantees that the guardian will do as the court ordered. Normally, the surety company bills the guardian a percentage of the total bond amount.

The actual bond amount is not deposited with the court; instead, a note from the surety company is placed in the file with the court. The third type is called a personal surety bond. The personal surety bond is similar to a corporate surety bond. The difference is that instead of a surety company guaranteeing the bond, natural persons swear to the court that they have enough assets to cover the guardian in case of default. If the guardian is using a personal surety bond, at least two individuals must be listed as the surety (Texas Estates Code 1105.160). The court does have the authority to waive a bond for a guardian of the person, but only in very limited circumstances. A bond is not required if the guardian is a corporate fiduciary or a guardianship program operated by the county, no matter the type of guardianship ordered. The court will not require a bond if the person to be appointed guardian was named in a will to be appointed as such and also directs that the person shall serve without a bond. This only applies to guardian of the person cases. The court may not waive bond in guardian of the estate cases (Texas Estates Code 1105.101). Lubbock County does not operate a guardianship program. Public guardians are exempt from making a bond.

Once the guardian qualifies, there are additional statutory requirements. If the guardian is appointed to the estate, an inventory must be filed within 30 days of the guardian qualifying. The inventory should contain all the ward's real property located in Texas and all the ward's personal property regardless of where the property is located (Texas Estates Code 1154.051). Furthermore, not later than the 60<sup>th</sup> day after the first anniversary of the guardian qualifying (and each year thereafter), the guardian of the estate must file an annual account. The annual account must show the changes that occurred to the ward's estate the previous year (Texas Estates Code 1163.001). The

same is true for the guardian of the person. While guardians of the person do not file an inventory, they must file, within the same timeframe as the annual account, an annual report detailing the changes and activities that happened to the ward throughout the previous year (Texas Estates Code 1163.101). Both the annual account and the annual report are required yearly until the guardianship is closed (Texas Estates Code 1163.002).

### **The Reality**

Meet Myrtle. Myrtle is in need of a guardianship since there are no less restrictive alternatives. Her daughter, Gertrude, through an attorney, makes application to the court to become Myrtle's guardian. After hearing evidence, the court appoints Gertrude to be Myrtle's guardian of the person and of the estate. Gertrude leaves with her appointment in hand, feeling relieved because her mother is now protected. But is she? Nowhere in the process was Gertrude oriented to what a guardian does or the responsibilities the position holds.

The court expects Gertrude to post a bond in the amount set by the court; to pay Myrtle's bills; to make decisions about and maintain Myrtle's assets; to ensure Myrtle's medical and living needs are met to the extent allowed by Myrtle's resources; to file annual reports and annual accounts with the court; and to ask the court's permission and approval of the actions she will take.

On the other hand, Gertrude has no real expectations of the court, other than to be allowed to take care of her mother. Gertrude definitely does not expect to have to ask the court's permission to expend funds on Myrtle's behalf or to annually account to the court for expenditures made or report on Myrtle's welfare.

As illustrated, neither party's expectations were clearly expressed to the other. People's perceptions equal their reality. Unless instructed otherwise, guardians, even well-meaning ones, continue in their ignorance and become legally non-compliant. Are guardians complying with statutory requirements after an Order for Guardianship has been entered? Is their compliance related to the level of instruction provided by the court? Dr. Randy Carlson states, "Expectations minus reality equal disappointment" or, in the case of guardianships, noncompliance.

## **Literature Review**

Considerable research has been done in the guardianship arena in recent years. National organizations like the National Center for State Courts (NCSC) to state organizations like the Office of Court Administration of Texas (OCA), and many in-between, have conducted research to understand the issues at hand and how they should be resolved. These organizations realize that with the silver tsunami, comes an increase in guardianship cases and the burden on the court to keep watch over guardians and wards.

### **The Start**

Probate law, and guardianship law in particular, has been long established. The early probate courts in America exercised equity jurisdiction. Modern counterparts of these equity courts are chancery, surrogate, and orphan's courts. In other American jurisdictions, a judge within a court of broader jurisdiction would typically be given responsibility for probate cases (usually in addition to other duties) because of that judge's expertise, interest in the area, or to expedite the handling of this group of cases. Over time, this caseload became sufficiently large to necessitate the assignment of full-time probate judges or the establishment of a separate probate court in some jurisdictions. This evolution, however, occurred differently in every state, and even between jurisdictions within a given state. As a result, there is considerable variation between (and often within) the various states in the way in which the state courts handle probate matters (Duizend, 2013).

## **The Problem**

Much research has explored guardianship standards and the current state of guardianships. OCA created a Working Interdisciplinary Network of Guardianship Stakeholders (WINGS) group. After considerable data collection and interviews of court personnel, this group published its findings in 2014. Compliance with statutory reporting requirements was the exception, not the rule. There was no greater compliance among professional guardians as opposed to private guardians. Timely reporting in guardianship cases in the counties visited was generally low. OCA observed that while required reports may be filed during the early stages of a case, reporting compliance rates often declined as a case aged. Letters of guardianship expire one year from the date of the guardian's qualification. Renewal of letters of guardianship are dependent on the submission and approval of annual reports and/or annual accounts. Texas law outlines reporting requirements and the reviews that courts should conduct to ensure the well-being of the ward and/or the ward's estate (Texas Office of Court Administration, 2014). Without receiving renewed letters of guardianship, previously appointed guardians are operating with no authority (even though they are probably operating under the guise of authority).

During OCA interviews, Texas judges commented about the lack of knowledge even among private professional guardians about important aspects of the guardianship process (Texas Office of Court Administration, 2014). These guardians should be the cream of the crop, and yet, even they are falling short of the court's performance expectations. OCA noted that, even with much training, private professional guardians failed to submit or untimely submitted inventory reports, failed to understand the limits of

compensation available to them, and in one case, failed to deposit monetary profits into a trust as ordered by the court (Texas Office of Court Administration, 2014).

WINGS found that statutory probate courts rely heavily on the court investigator and court visitor in making determinations in guardianship cases. Additionally, courts using visitors saw higher compliance rates in the annual reporting of both the well-being of the ward and financial accounting (Texas Office of Court Administration, 2014). Typically, non-statutory probate courts do not have a court investigator, and thus, cannot have a court visitor program. Texas law states, “A court investigator shall: supervise a court visitor program established under Subchapter C and, in that capacity, serve as the chief court visitor” (Texas Estates Code 1054.152). So, in order to have a court visitor program, you must have a court investigator. While court visitors serve on a voluntary basis, court investigators do not. With limited resources, a court investigator and court visitors are simply not viable options for most non-statutory probate courts.

While only a few states statutorily require that guardians receive training, most courts provide some level of orientation or education either through printed manuals, videos, on-line training and information, or in-person sessions (many in multiple languages). Example states include California, Florida, Georgia, Michigan, Minnesota, and Wisconsin (Qualifications, n.d.). Currently, Lubbock County does not provide orientation or education to guardians. There are blank annual report and annual account forms available through the County Clerk’s website, although these may be outdated. Other than that, there are no resources available to guardians through Lubbock County’s website.

## **The Recommendations**

The research conducted by the following organizations contain recommendations to probate courts. The recommendations have been widely uniform, but run the gamut from proper terminology to education. OCA recommended courts use technology to monitor cases and involve the local bar association to promote education. Through technology, notice can be provided to guardians regarding reports due and educate the public about the guardianship process. In addition, case management systems could use a tickler system to alert the court of pending or delinquent reports (Texas Office of Court Administration, 2014). Technology can also be used to develop a database of guardianship elements, including indicators of potential problems; schedule required reports; produce minutes from court hearings; generate statistical reports; develop online forms and/or electronic filing; and provide public access to identified non-confidential, filed documents (Third National Guardianship Summit Standards and Recommendations, 2011). As stated above, technology can assist in a variety of ways. Local bar associations can also be used to promote and encourage involvement of attorneys in the guardianship process. The local bar can train their members on ad litem requirements, individual court customs, and the role of an ad litem in a guardianship case, as well as offer ongoing guardianship education to attorneys and the public alike (Texas Office of Court Administration, 2014).

In 2011, the National Guardianship Network organized the Third National Guardianship Summit. This summit set out to address questions about the practice of guardianship itself. In so doing, the summit made recommendations for courts. One recommendation was guardian education and less confusion in guardianship rules. The

Summit recommended that statutes clearly express guardian duties and apply the duties to all guardians. These duties should be enumerated in a clear and succinct statement supplied to guardians at the time of appointment and be included in guardian training materials. The guardian must acknowledge, in writing, receipt of the information. The court needs to ensure that guardians, court and court staff, evaluators, and others involved in the guardianship process receive sufficient ongoing, multifaceted education to achieve the highest quality of guardianship possible. In addition, the Summit recommended courts provide continued assistance to the guardian about guardianship law and procedures, the guardian's duties and responsibilities, community resources and the rights of the ward. This may include assistance in completion of a guardianship plan and report; guidance on facility transfer or placement; providing for care at home; financial and healthcare decision-making; what to do when the person dies or disappears; burial and funeral planning; mental health services; and government benefits eligibility (Third National Guardianship Summit Standards and Recommendations, 2011). No recommendations included what would be considered acceptable compliance rates with statutory requirements.

### **The Research Gaps**

The national research provides a macro level view of guardianships. This is helpful to familiarize oneself with the guardianship process in general. However, this research, by its very nature, does little to address local issues that may not be seen at the national level.

The research conducted by the state of Texas was also limited in scope. To be included in the research, two conditions had to be met. First, only counties with no

statutory probate courts were considered. Of those 244 counties, in fiscal year 2013, the county had to receive less than 100 guardianship filings. Thus, only 5.5% (14 counties) in Texas were included. Out of these counties, only 165 guardianship cases were reviewed for statutory compliance.

Lubbock County was included in this study. In FY2013, Lubbock County had 98 guardianship cases filed (more than any other county included in the survey). At the time of the study, the county had 1,347 active guardianship cases. The study chose to review only 19 of those cases. While the scope was narrow, its findings were indicative of greater issues for Lubbock County. Lubbock County was the fifth largest county in the study, but ranked #1 in cases filed in FY13 and #1 in active cases (as of 8/31/13). Lubbock County had two times as many active cases as any of the four larger counties included in the survey. This limited research, though, does not tell the full story of the state of guardianships for Texas or for Lubbock County.

Nationally, research on guardianships continues to be hampered by the lack of quality data (Schauffler & Uekert, 2008). Recent attempts at collecting state data on guardianships have demonstrated the absence of meaningful data—NCSC found in 2006 only thirteen states and the District of Columbia could report complete statewide guardianship data (Uekert, 2010). The other challenge to reliable figures is that data varies from state to state. One question Dr. Uekert (2010) poses is whether the provision of “good” data is statewide, or subject to the capabilities and diligence of local jurisdictions. She states further that the lack of state-level data requires researchers to focus on local courts, the only source of accurate and reliable guardianship data (Uekert, 2010).

According to the U.S. Census Bureau, Lubbock County has a population of around 278,000. Approximately 32,000 persons (or 11.8% of this population), are over the age of 65. This percentage of the population is slightly less in Lubbock County than the national average, which is 13%. Currently, Lubbock County has 1,817 open (active and inactive) guardianship cases. Of these, 84% are guardianships for incapacitated adults. There has been an increase in the number of guardianship applications filed. From 2000 to 2004, on average, 68 applications for guardianship were filed per year and 72% are still open. From 2005 to 2009, on average, 90 applications for guardianships were filed annually and 73% of these are still open. From 2010 to 2014, on average, 130 applications for guardianships were filed, of these, 79% are still open. In short, Lubbock County has doubled the amount of guardianship applications filed annually over the course of ten years.

This project will expand on the body of knowledge available in guardianship law and more adequately define what issues courts are facing at the local level by examining Lubbock County's guardianship cases. Where OCA research examined almost purely numbers and compliance rates, this research also invited local attorneys and the court to weigh in on addressing any concerns the data review revealed and the court's expectations as well as the guardian's. Questions addressed include the following:

- What are the needs and expectations of the guardians as well as those of the court?
- Are the court's expectations and the guardian's expectations aligned?

- Are guardians complying with statutorily defined duties and if not, which duties are noncompliant?
- Is one type of guardian more compliant than the other types?
- Is the court complying with statutorily defined duties?
- Is the court properly managing the guardianship caseload?
- Do local probate attorneys or court staff have suggestions to increase guardian compliance or meet statutory requirements?

By answering these questions, the court can assess if its needs and expectations are met and draw inferences into guardians' needs and expectations.

## **Methodology**

Initially, the data explored to answer the research questions was limited to case-related information. The data provided information on whether the court's needs and expectations are being met and drew inferences into the guardian's needs and expectations. The researcher was interested in data that indicated the following information. Although the case was classified by the clerk as a guardianship, was it actually a guardianship? What type of guardianship was initiated—one for an incapacitated adult or one for a minor? Was the guardian a private guardian, public entity, or professional guardian? What was the bond amount and what type of bond was issued? What were the amount of assets in the ward's estate? Were the guardians compliant with annual reports and accounts? If not, what action, if any, did the court take? Did any of the open guardianship cases involve a now deceased ward? Did some attorneys have higher compliance rates among their guardians than others?

In addition to collecting data from the case files, a survey among current guardians, local guardianship attorneys, and court staff was originally to be conducted as well as a statewide survey to consider how other court programs addressed similar issues. The purpose of these surveys was to provide insight as to what perceived (or real) problems existed and what should be done to resolve them. However, after collecting data from the case files, analyzing the case data led to greater challenges that needed to be addressed. To provide local insight and perspective, local guardianship attorneys and court staff were invited to answer survey questions about the guardianship process in Lubbock County (see Appendices A & B).

As of September 5, 2015, Lubbock County had approximately 1,800 open guardianship cases. In the case management system, these cases were classified as active or inactive; upon further review, a differentiation could not be made between these two status designations. From a case processing perspective, all 1,800 cases needed to be examined to ensure adequate attention was provided. However, it was not feasible for the scope of this project. Instead, a representative sample was chosen. In order to be representative of the full population of guardianship cases, a sample size of 318 cases was selected with a 5% or less margin of error. The sample was randomly selected from all 1,800 open guardianship cases. There was no date restriction applied as to when the guardianship cases were filed, so the sample included cases as early as the 1960s. There was also no restriction as to the type of ward involved. Thus, incapacitated adults made up 84% of the sample, minor children made up 11%, and erroneously classified cases made up the remaining 5%. The only inclusion criteria was that it was an open guardianship case as of September, 2015, and filed in Lubbock County.

First, data elements were selected and reviewed by experts in the field (see Appendix C). Lubbock County, for the most part, has a robust case management system. Nonetheless, most of the data points had to be extracted manually. The case management system had PDF images of most documents in these cases dating back to 2004. This proved to be the easiest of the collection efforts. Additionally, 127 cases filed prior to case imaging were pulled by the clerk's office for analysis. This process was time intensive, but the data mined proved invaluable. What emerged from the data collection could be considered performance measures. The Texas Estates Code

expects guardians to complete certain tasks. The first action the guardian must take after being appointed by the court is to qualify as the guardian. Second, if an estate is involved, the guardian must file an inventory, detailing the assets and liabilities. Finally, the guardian must report to the court annually about the condition of the ward and/or the estate. Each of these elements have specific time standards defined in the Estates Code. Research was conducted to find appropriate compliance standards for the guardians. None was found which led to the conclusion that compliance should be at or near 100% in all categories.

After reviewing the data and the challenges presented, local attorneys and court staff were invited to complete a short survey. Their perspectives were important because they work in the guardianship and probate field almost exclusively. The author sent surveys to five local attorneys. These attorneys were chosen because in the past five years, they accounted for just over 70% of the guardianship pleadings filed in the county. The topics covered included guardian education and potential court improvements (see Appendix A). These attorneys also practice in other jurisdictions, so they could offer constructive suggestions about what other jurisdictions were doing that Lubbock County was not. Out of the five attorneys surveyed, only one responded (20% response rate). Next, court staff were surveyed. Court staff included three judges who regularly handle guardianship proceedings and their four court coordinators. Some of the same questions were posed to them (see Appendix B). Much like the attorneys surveyed, less than one-third responded. They reported, in their view, answers to the following questions:

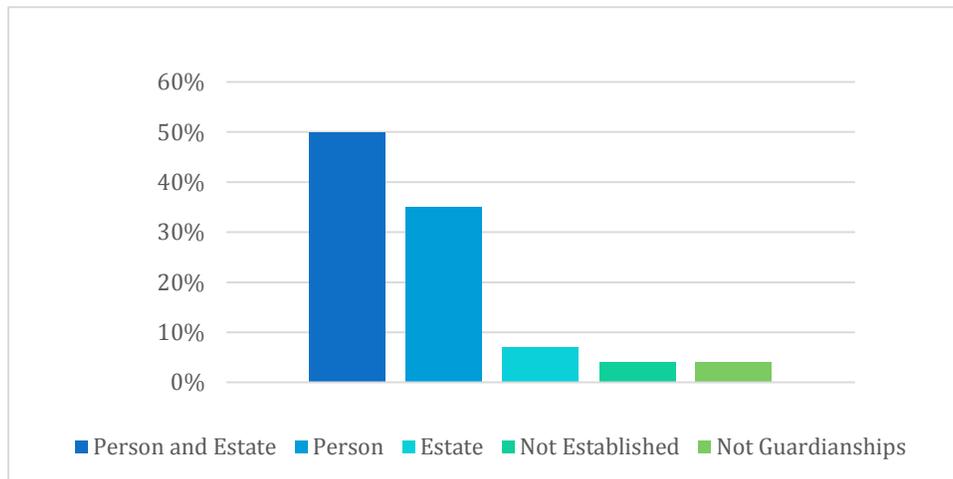
- What contributes to guardian compliance and ward well-being?

- What steps can be taken to increase compliance with statutory requirements and court expectations?
- What do they perceive the guardian's needs and expectations to be?
- How can the court meet those needs and expectations?

## Findings

In Lubbock County, guardians of the person accounted for 35% of the open guardianship caseload. Guardians of the estate accounted for 7%, while guardians of the person and estate accounted for 50%. The remaining caseload was split between open cases without an order for guardianship (4%) and open cases erroneously classified as guardianships but were not (see Figure 1).

**Figure 1. Overall Percentage of Case Types within Guardianship Cases**

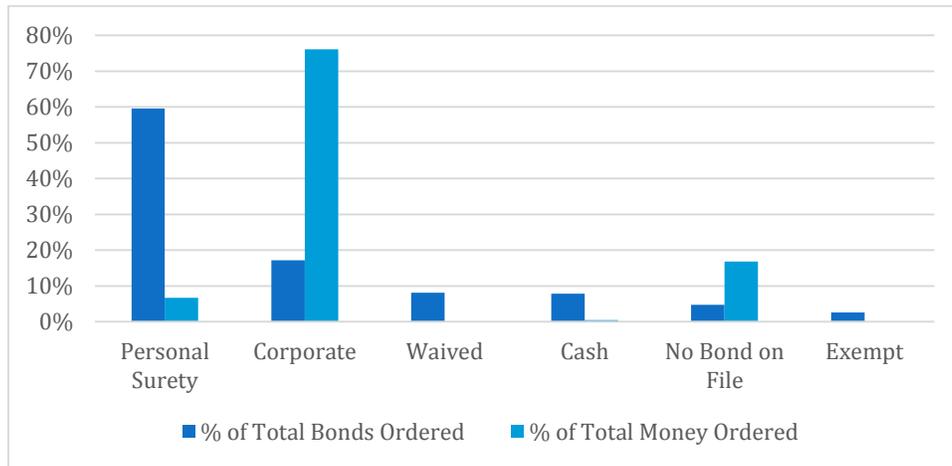


### **Finding 1: Bonds Were Inadequate in All Case Types to Protect the Ward from Abuse and Neglect**

The court ordered guardians to post a bond in most cases (96%). Other times, the court found the guardian was exempt from filing a bond (2.6%) or the court waived the bond (1.5%). Ultimately, the court ordered about \$3 million worth of bonds be made by guardians. Guardians utilized a cash bond, a corporate surety bond, or a personal surety bond. Cash bonds accounted for less than 1% of the \$3 million, while corporate surety bonds accounted for 93.6% and personal surety bonds accounted for 5.9%. In total, guardians posted roughly \$2.6 million in bonds, leaving about a \$550,000 deficit

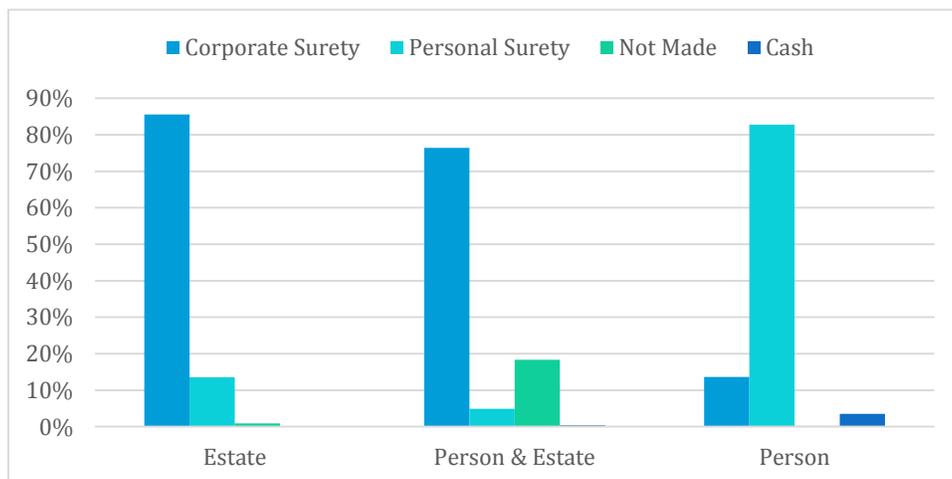
between bonds ordered by the court and bonds made by the guardians. Corporate surety bonds had the greatest amount of money bonded; however, personal surety bonds were utilized for the greatest number of cases (see Figure 2).

**Figure 2. Percentage of Total Bonds Ordered by Amount and Case Count**



Within each case type, though, the type of bond used varied (see Figure 3). Not surprisingly, corporate bonds were used more frequently when the ward's estate was involved and cash bonds hardly at all (less than 1%).

**Figure 3. Total Amount of Bonds Made by Case Type**



Before setting a bond in guardian of the person cases, the court must consider the familial relationship of the guardian to the ward; the guardian's ties to the community; the guardian's financial condition; and the guardian's past history of compliance with the court (Texas Estates Code 1105.102). This can be hard to quantify. Determining the adequacy of bond in estate cases is easier. An inventory must be filed within 30 days of the guardian qualifying in an estate case (Texas Estates Code 1154.051). The inventory includes the adequacy of the court-ordered bond amount and is easily determined by examining the inventory. The court may waive the filing of an inventory if the court determines that the ward's assets are minimal. Again, unless the court waives the inventory, the statute mandates that one be filed. In the cases that required an inventory, less than half (45%) of the guardians complied. Of those that did comply, only one-third (35%) of the inventories were timely filed. According to the inventories filed, reported assets equaled approximately \$6.5 million.

In order to further understand the issues, the following breakdown, by type of guardianship, was necessary.

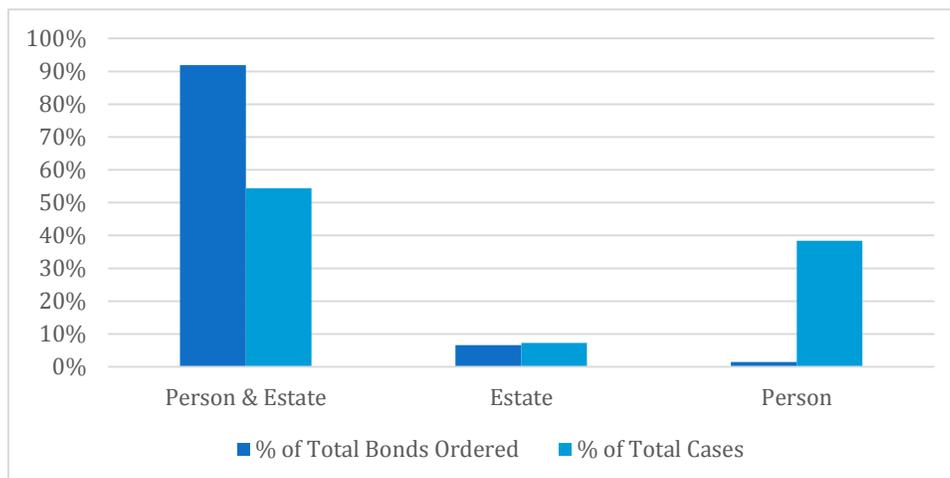
#### **Guardian of the person.**

Guardian of the person cases accounted for 35% of the open guardianship cases. The court ordered these guardians to bond a total of \$48,700. In other words, guardian of the person cases amounted to 1.5% of the entire amount of bonds ordered across all case types (see Figure 4). The majority of these bonds were set at or below \$500. The minority of guardian of the person cases involved cash bonds or corporate surety bonds. Private guardians made both the cash and the corporate surety bonds. As stated above, bonds may be waived under special circumstances or exempted if the

guardian involved is a public guardian. The court waived or exempted bonds in 14.4% of cases. The court waived bond in 7.6% of these cases, even though the special circumstance was not specified. A public guardian was involved in 6.8% of cases and exempt from posting bond. In one case the \$100 bond ordered by the court was not made by the guardian.

The majority (66%) of the guardian of the person bonds were made using personal surety bonds. These bonds totaled \$40,300. Almost all of the personal surety bonds were made by private guardians, totaling \$39,300. As a side note, attorneys of record accounted for 18% of the personal sureties on the bond for private guardians. The rest of the personal surety bonds (2.3%) were made by one private professional guardian (hereinafter PPG 1). Only one individual was listed as the personal surety on the bond. This person was listed as the only surety in all of PPG 1's cases. First, this conflicts with the statutory requirement of having two individuals listed on a personal surety bond. Second, having the same surety on all PPG 1's cases might be problematic because it is unlikely that the surety can cover the total amount of bond as a whole. This issue will be discussed later.

**Figure 4. Percentage of Total Bonds Ordered by Amount and Case Count Compared by Case Type**



**Guardian of the estate.**

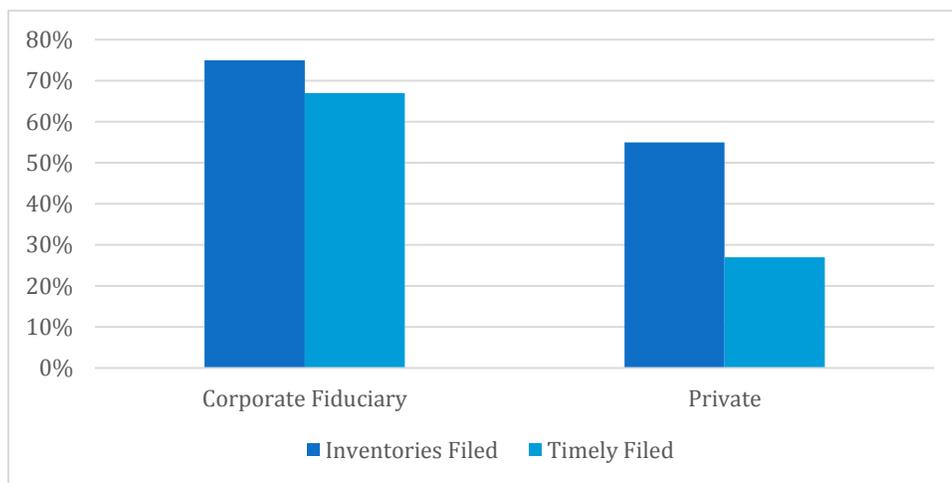
The court issued orders for guardian of the estate in 7% of the cases. A portion of bonds were waived (29%); with 12% of the bonds waived erroneously. It bears repeating, the court cannot waive the requirement of the bond for the guardian of the estate unless the guardian is a corporate fiduciary or a guardianship program run by the county (Texas Estates Code 1105.101). The largest portion (40%) of these bonds were for \$5,000 or less. The remaining bonds ranged from \$8,000 to \$50,000.

***Inventories.***

In cases involving the ward’s estate, an inventory must be filed within 30 days of the guardian qualifying (Texas Estates Code 1154.051). The only time an inventory is not filed is when the court finds the ward has minimal assets and waives the inventory. Thus, unless waived, every guardian of the estate is required to file an inventory. While a majority of these cases had inventories filed (58%), only one third of those were timely filed (see Figure 5). Based on the inventories filed, the reported assets were \$2,300,072. For purposes of this project, the reported assets mean only assets that

were easily transferrable or subject to misappropriation. The reported assets did not include real property or monies in safe-keeping. Based on the reported assets alone, 91% of the assets were not protected. For further analysis, private guardians filed inventories as ordered only 55% of the time, with only 27% timely. The inventories reported assets totaling \$681,789. On the other hand, professional guardians filed inventories at a much higher rate. These professional guardians were all corporate fiduciaries and filed inventories 20% more often than private guardians and were 40% more timely. The inventories filed by the corporate fiduciaries reported assets of \$1,618,284.

**Figure 5. Comparison of Inventories Filed versus Timely Filed**



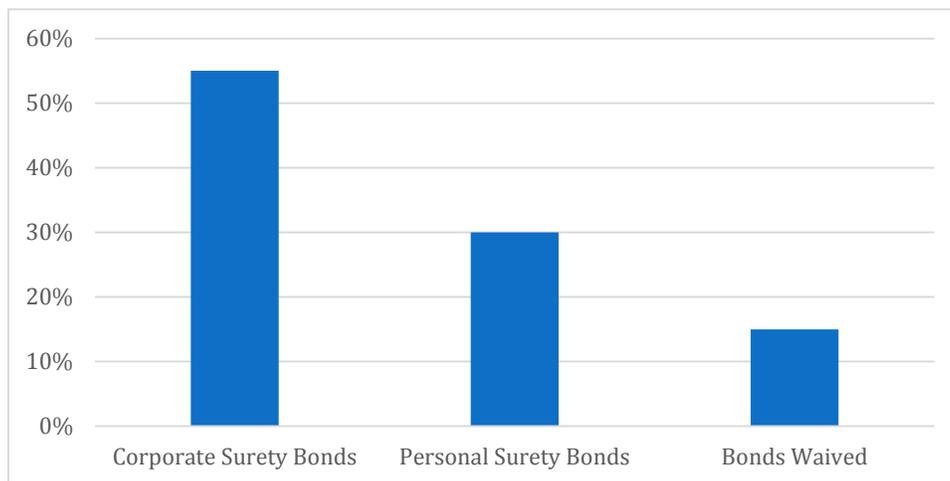
***Bonds.***

There were no cash bonds made in this case type. In one case, while a bond was ordered, no bond was filed. Corporate bonds accounted for the majority (46%) of bonds issued; personal surety bonds 24%; and 29% of bonds were waived by the court. Attorneys of record were listed as personal sureties on one-third of the personal surety bonds.

***Private guardians.***

Most of the guardians of the estate were private guardians. For these guardians, corporate surety bonds accounted for 55% of the bonds made (\$184,000), while personal surety bonds accounted for 30% (\$29,000). Of the personal surety bonds, one-third had the attorneys of record listed as sureties. The court waived the bond in 15% of the cases involving a private guardian (see Figure 6). The reported assets totaled \$176,500 in the cases where the bond was waived. Again, Texas law does not allow bonds to be waived under these circumstances.

**Figure 6. Types of Bonds Made Involving Private Guardians**



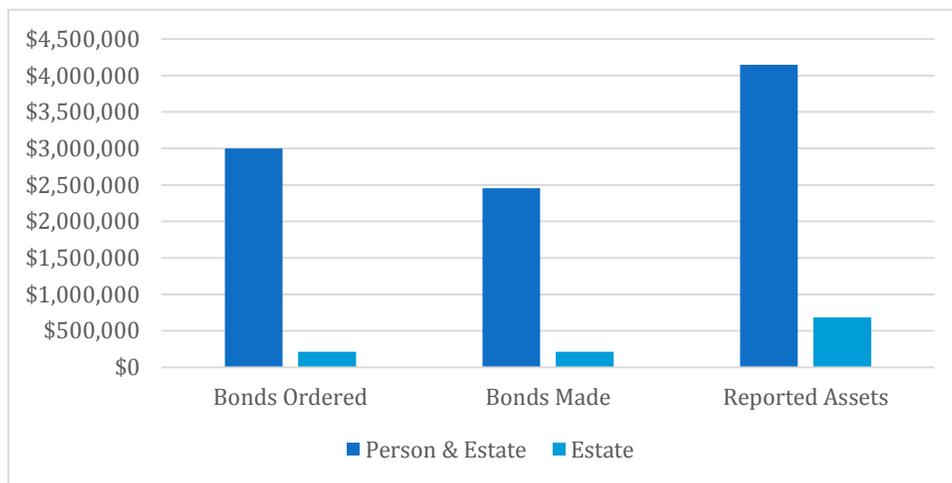
***Public and private professional guardians.***

There were no public guardians, and the rest were considered professional guardians. All of the professional guardians were corporate fiduciaries, with bonds waived by the court, according to statute. One guardian, a private professional guardian, had not made bond.

**Bonds not made.**

As can be seen below, not all court-ordered bonds were made by the guardian. In addition, the bonds ordered did not fully account for the reported assets (see Figure 7). The court ordered \$215,000 of bonds be made. While the guardians made 99% of those bonds, the bonds ordered fell short of covering the reported assets completely. The bonds ordered protected only 32% of the reported assets. To be fair, this percentage excluded corporate fiduciaries and their inventories because they were exempt from filing bond.

**Figure 7. Comparison of Bonds Ordered, Bonds Made, & Assets Reported**



**Guardian of the person and estate.**

Guardians of the person and estate manage both the ward and their estate. In these cases, over \$3 million in bonds were court-ordered. Guardians met the bond requirement only 87% of the time. Without any statutory authority, the court waived the bond in 3% of the cases. Bonds were set at less than \$1,000 more than 66% of the time.

### ***Inventories.***

Filing an inventory is not optional. In any case involving a ward's estate an inventory must be filed within 30 days of the guardian's qualification (Texas Estates Code 1154.051). Even so, only a minority (44%) of these cases had inventories filed and only 35% of the inventories were timely filed. Based on the inventories that were filed, reported assets were over \$4 million. The assets reported in the inventories were not fully covered by the bonds ordered by the court (see Figure 7).

### ***Bonds made.***

All cash and corporate surety bonds were made by private guardians. These bonds accounted for the minority. These bonds totaled \$2,305,300. The remainder were personal surety bonds.

### ***Private guardians.***

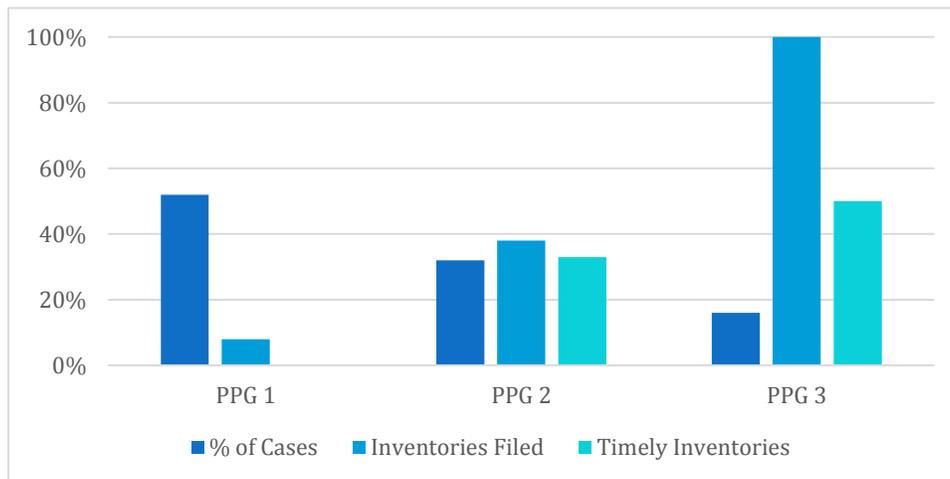
Private guardians accounted for a majority (77%) of the personal surety bonds. Attorneys of record were listed as sureties on the bond in this case type as well. They accounted for \$20,850 worth of bonds made to protect \$171,519 in reported assets.

### ***Private professional guardians.***

There were several notable findings pertaining to private professional guardians. Three private professional guardians accounted for 22% of the personal surety bonds. The first private professional guardian (PPG 1) had 52% of these cases. PPG 1 was insured by the same person for a total amount of \$7,500. PPG 1 had only one individual named as surety instead of two (Texas Estates Code 1105.160). PPG 1 filed just one inventory and it was not timely. As such, PPG 1 complied with filing inventories

less than 10% of the time. The second private professional guardian (PPG 2) had 32% of these cases. PPG 2 was insured by the same two people for a total of \$43,000. This is significant because each surety's worth must equal at least twice the amount of the bond (Texas Estates Code 1105.201). PPG 2 filed inventories in just 38% of its cases with only one-third timely filed. The third private professional guardian (PPG 3) had the least of these cases. PPG 3 filed inventories in all of its cases; however only 50% were timely. PPG 3 was insured by the same two people, for a total of \$2,000. The same two people were named as sureties for PPG 2 and PPG 3, totaling \$45,000 worth of bonds. This is problematic as each surety would need reachable assets by creditors in excess of \$90,000. As can be seen by Figure 8, PPG 1 had the highest percentage of cases with the lowest percentage of compliance. Both the inventories filed and their timely filing by PPG 1 and PPG 2 should be at 100%.

**Figure 8. Comparison of Private Professional Guardians**



**Finding 2: Guardians of the Person Were Not Statutorily Compliant**

When the court signs an order appointing a guardian to a ward, the guardian has 20 days from the date the order is signed to qualify as guardian. In order to qualify, the

guardian must secure a bond and take the oath of guardian. Those appointed to be guardians of the person consistently qualified. The timeliness of the qualification was the issue. Almost 20% of guardians qualified outside the time standards set out by statute. After qualifying, the next statutory requirement for the guardian is the annual report. The reports are due each year, not later than the 60<sup>th</sup> day following the anniversary of the guardian's qualification. For example, if a guardian qualified on January 1, 2015, the annual report should be filed by March 1, 2016, and by that date each year thereafter. Compliance with statutory mandates is required.

#### **Private guardians.**

Out of the qualified guardians, almost 92% of the guardian of the person cases involved a private guardian. Of the reports that were due annually, the average percentage of compliance amongst private guardians was 66%. On average, the reports were timely filed a mere 28% of the time (see Figure 9).

In addition to the serious compliance issues, 7% of these cases involved a ward who died after the order for guardianship was entered. In a small percentage of cases where deceased wards were discovered (22%), the guardian followed statutory requirements by filing a final report with the court. The court ordered the cases closed, yet they remained open. Needless to say, in the remaining cases involving a deceased ward, the guardian should have filed a final report. Because no final report or order closing the guardianship was done, the cases remained open.

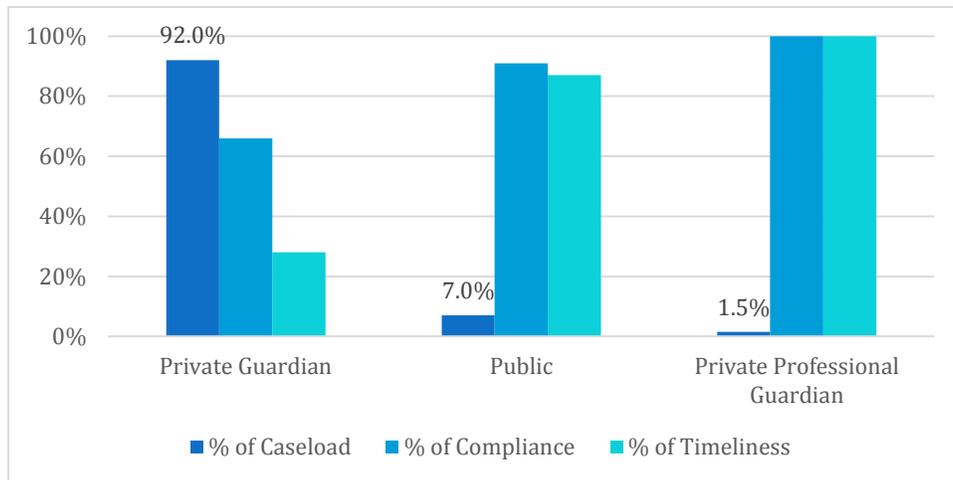
### Private professional guardians.

Out of the qualified guardians, private professional guardians covered a minute percentage (1.5%) of guardian of the person cases. Of the reports that were due annually, 100% were filed, and filed timely (see Figure 9).

### Public guardians.

Out of the qualified guardians, almost 7% of the cases involved a public guardian. Of the reports due annually, the average percentage of compliance was 91%. The public guardians' average percentage for timeliness was 87% (see Figure 9).

**Figure 9. Comparison of Guardians of the Person Annual Compliance**



### Attorney filing trends.

There were four attorneys who filed five or more cases within this case type. The attorney who filed the most cases had the highest percentage of both getting the reports filed and filing them on time. Still, this attorney only averaged 78% in guardians filing the annual report and the average for timeliness was just 35%. The remaining attorneys average was horrible--39% for compliance and 6% for timeliness.

### **Finding 3: Guardians of the Estate Were Not Statutorily Compliant**

Like with the other case types, once an order for guardianship is entered, the guardian of the estate has 20 days to qualify. In order to qualify, all guardians must post a bond and take the oath of guardian. Those appointed as guardians of the estate consistently qualified. But again, almost 20% of guardians qualified outside the statutory time standards. Like annual reports, annual accounts are due each year, not later than the 60<sup>th</sup> day following the anniversary of the guardian's qualification.

#### **Private guardians.**

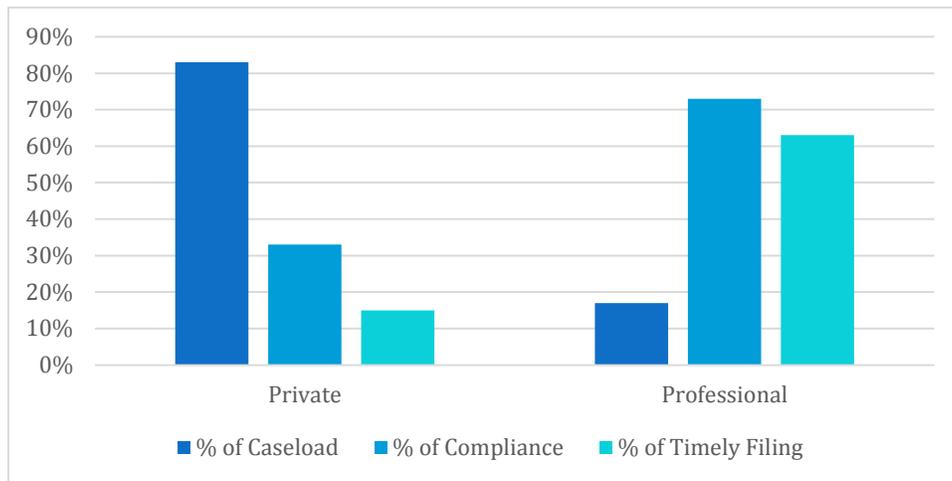
Out of the qualified guardians, private guardians accounted for the majority (83%) of this case type. They were the least compliant of the guardians. Of the accounts that were due annually, the average percentage of compliance was 33% and only 15% were filed timely (see Figure 10).

In one case under review, the ward died after the order for guardianship was entered. The death occurred in December, 2014, but the case was not closed until October, 2015.

#### **Corporate fiduciaries.**

Corporate fiduciaries accounted for the remainder of the guardian of the estate cases. Of the accounts that were due annually, the average percentage of timely filings was 73% and 63% of those were timely filed (see Figure 10).

**Figure 10. Comparison of Guardians of the Estate Annual Compliance**



There were no public guardians appointed for guardian of the estate cases.

There were no attorneys who filed more than one guardian of the estate case.

**Finding 4: Guardians of the Person and Estate Were Not Statutorily Compliant**

The court appointed a guardian of the person and the estate in 50% of the overall caseload. Of the guardians appointed, only 91% qualified. Like the other two case types, almost 20% qualified outside the statutory time standard. As stated previously, both the annual report and annual account are due each year not later than the 60<sup>th</sup> day following the guardian’s qualification date. Overall, guardians complied with filing annual reports and accounts 34% of the time with 14-16% filed within the time standard (see Figure 11).

**Private guardians.**

Qualified private guardians accounted for the overwhelming majority (85%) of guardians appointed to this caseload. Private guardians complied with filing annual reports and accounts, on average, just one-third of the time. The reports and accounts

were late over 80% of the time (see Figure 11). In this sample of cases, the court did not take any action against a private guardian for failing to file annual accounts.

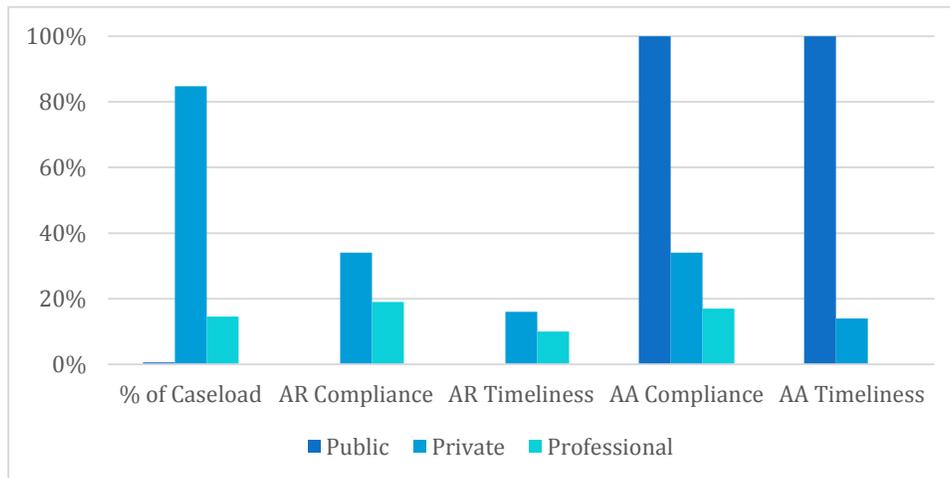
### **Private professional guardians.**

Qualified private professional guardians accounted for just under 15% of these guardians. Compliance rates among the private professional guardians was worse than that of private guardians. On average, more than 80% of the required annual reports and accounts were not filed. Of the annual reports and accounts filed, more than 90% were past due (see Figure 11).

### **Public guardians.**

The remainder of the caseload involved a public guardian. None of the annual reports (AR) that were due were filed, but each annual account (AA) was timely filed (see Figure 11).

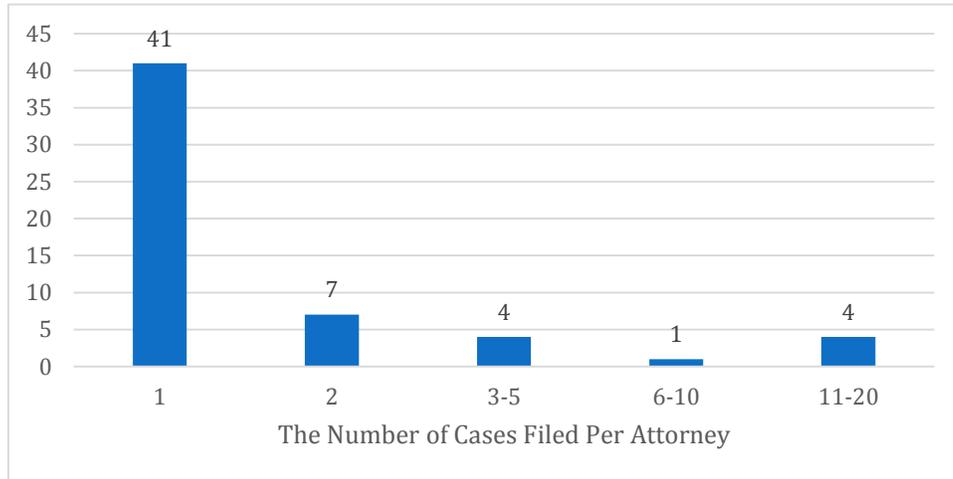
**Figure 11. Comparison of Guardians of the Person & Estate Annual Compliance**



### Attorney filing trends.

There were five attorneys who filed more than 5 cases (see Figure 12). Their guardians did slightly better than the overall trend in these cases, by filing 10% more annual reports and accounts, but the timeliness of both was about the same.

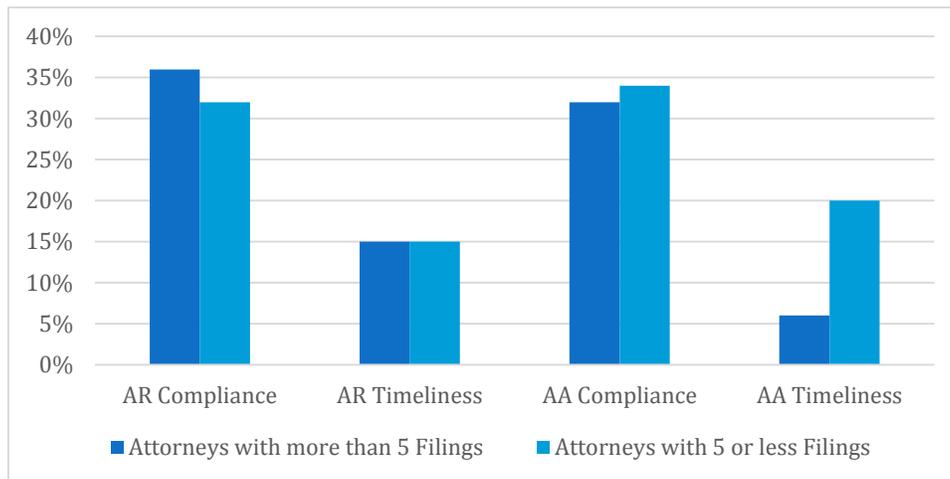
**Figure 12. Distribution of Cases Filed by Attorneys**



The majority (57%) of cases were filed by attorneys who had filed five or less of this case type. Most of these attorneys filed only one of this case type. Their guardians were comparable in compliance and timeliness to the attorneys who had filed more than five of these cases.

There was little, if any, correlation between how many guardianship cases an attorney filed and the rate of their guardian's compliance. The only noticeable difference between attorneys who filed more than 5 cases and those who filed less was in the annual account timeliness (see Figure 13).

**Figure 13. Comparison of Guardian Compliance by Attorneys Based on Their Number of Case Filings**



Approximately one-quarter (21%) of the wards had died since the order was established. All but one had a private guardian. The private guardians properly filed a final settlement in 10% of these cases. The court ordered these cases closed, yet the cases remained open. The remaining case had a public guardian and remained open.

**Finding 5: Private Guardians and Private Professional Guardians Were Not as Statutorily Compliant as Public Guardians and Corporate Fiduciaries**

**Private guardians.**

Approximately 87% of qualified guardians were private guardians. For the most part, private guardians always qualified; but not always in a timely manner. Private guardians filed required inventories just 46% of the time and two-thirds of those were untimely. Private guardians did not file annual reports over half of the time and less than one third were timely. Required annual accounts were filed less often than the annual reports, and timeliness was even worse (see Figures 14-16).

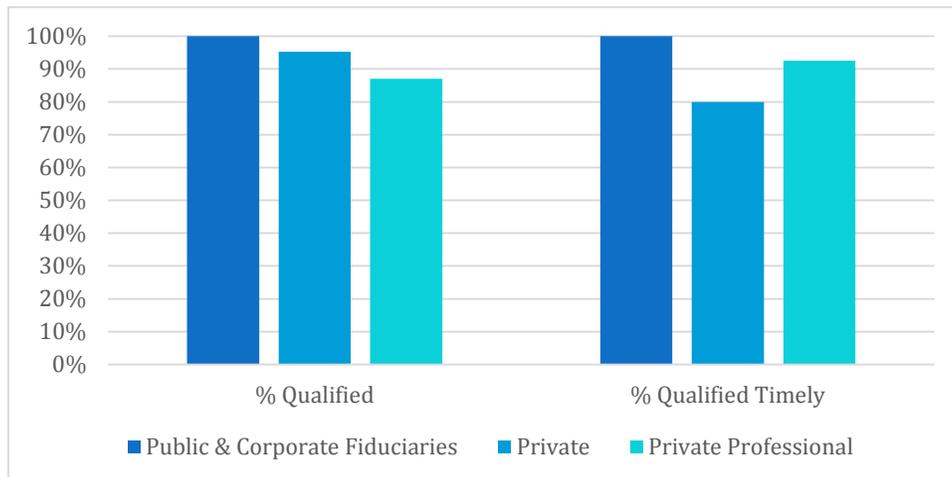
### Private professional guardians.

Approximately 8% of qualified guardians were private professional guardians. Private professional guardians qualified less often than their counterparts, while their average timeliness was greater than the private guardians. Private professional guardians had the lowest rate for filing required inventories. And, of the ones filed, only roughly one third met time standards. Private professional guardians ranked lowest at the remaining statutory requirements—filing of annual reports and annual accounts and filing both on time (see Figures 14-16).

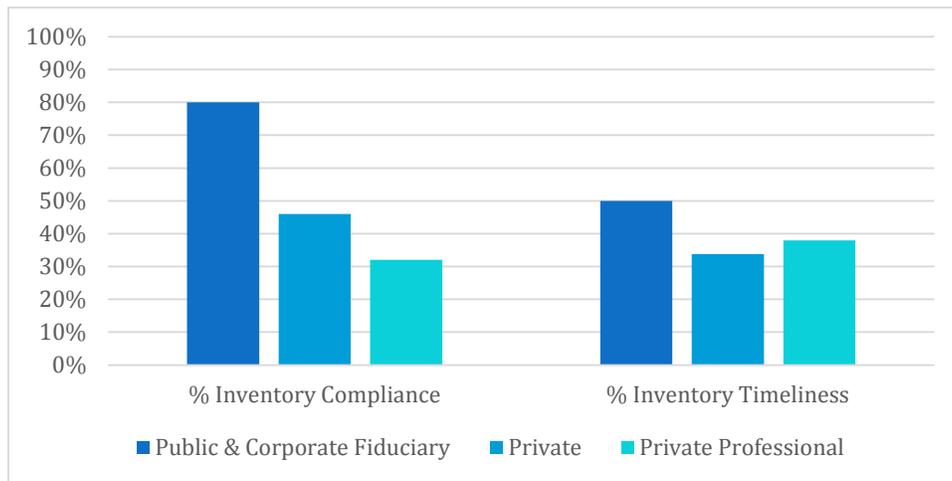
### Public guardians and corporate fiduciaries.

Approximately 4% of qualified guardians were public guardians or corporate fiduciaries. In contrast, public guardians and corporate fiduciaries had a much higher rate of compliance. These guardians always qualified timely. They resoundingly led the way in every compliance category (see Figures 14-16).

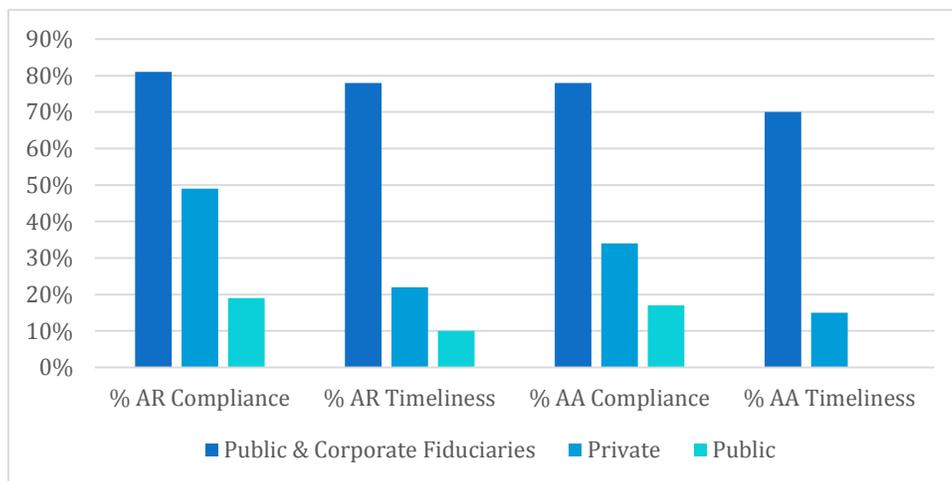
**Figure 14. Comparison of Guardian Qualification and Timeliness**



**Figure 15. Comparison of Guardian Filing of Inventories and Timeliness**



**Figure 16. Comparison of Guardian Filing of Annual Reports and Accounts**

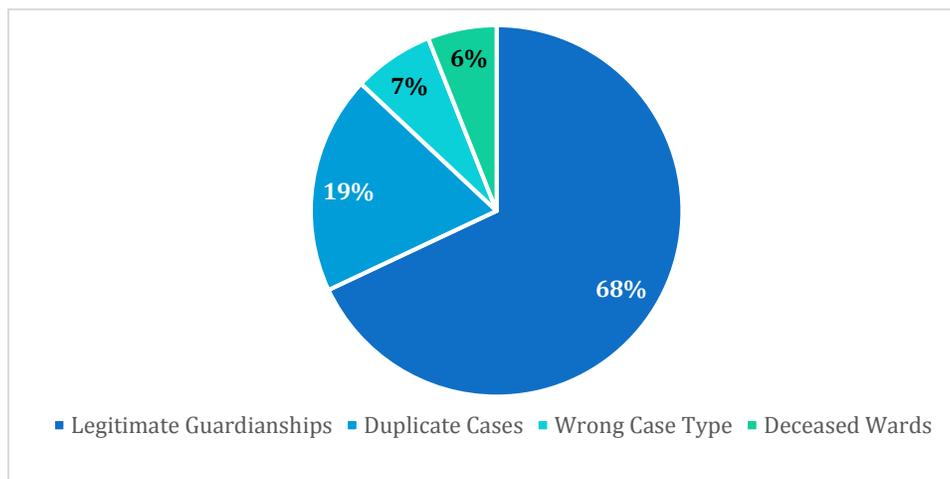


**Finding 6: Proper Case Management by Both the Clerk and the Court Was Lacking in Guardianship Cases for the Last Four Years**

Since 2011, 101 guardianship cases were filed. Duplicate cases accounted for 19% of those filed since 2011. Duplicate cases are created because the case management system has a maximum amount of fees that can be entered on each case. Once the maximum amount is reached, the clerk must open up what is called an “A” case. The only purpose for an “A” case is to record fees. Prior to 2011, and what is

currently the District Clerk’s practice, the clerk would open an “A” case, put the fees on, and immediately close it. Since 2011, the County Clerk has kept the “A” cases open, distorting the actual number of open guardianship cases. Along the same lines, since 2011, 7% of the cases opened were not actually guardianship cases. These cases were an assortment of case types—emergency protection of an elderly person, application to sell property, petition for the production of records, forcible entry, etc. Once again, failing to properly identify non-guardianship cases skewed the actual number of open guardianship cases. Furthermore, since 2011, 6% of the wards have died since the entry of an order yet the cases remained open (see Figure 17). In some instances, the guardians properly requested and received a court order closing these cases; but the cases remained open. On average, 13 years elapsed between the time of the request (and order) for closure was made and when this sample data was pulled.

**Figure 17. Percentage of Cases Filed Since 2011 that Need Closure**



### **Finding 7: The Court Rarely Took Action against Guardians for Failing to Comply with Reporting Requirements**

In guardian of the person cases, the court took action just twice against guardians who failed to file annual reports. In the first instance, the guardian was qualified on September 19, 2011. The first annual report was due no later than November 17, 2012. The guardian did not file the annual report as required. The court signed an order to appear and show cause on April 2, 2013, almost six months after the annual report was due. The guardian was ordered to appear before the court on May 7, 2013 to explain why the annual report was not on file. In response to the order to appear and show cause, the guardian filed the annual report on April 24, 2013, almost five months after the due date. Since then, no annual reports were filed and no other court action was taken against this guardian. In the second case, the guardian was qualified on January 14, 2010. The first annual report was due on March 15, 2011. In this case, the ward was a minor and the need for guardianship would end on October 31, 2011. Without an annual report, the court signed an order for final accounting on October 11, 2012, almost a year after the ward emancipated. Since that date, no final report has been filed with the court; the case remained open.

The court did not taken any action against guardians of the estate or guardians of the person or estate for failing to comply with statutory requirements.

### **Finding 8: Attorneys and Court Staff Had Varying Views of Guardian Compliance and Education**

Surveys were sent to seven court staff and five local attorneys. The local attorneys surveyed represented 70% of all guardianship filings in the past five years, although each had varying degrees of guardian compliance. The response rate for the

survey among the attorneys was 20%. There were two attorneys who averaged the highest compliance rates across all areas. These areas included guardian qualification, inventories, annual reports, annual accounts, and the timely filing of each. The first was the attorney for a public guardian (Attorney 1). Attorney 1 was responsible for the least amount of cases filed. The rest of the attorneys surveyed were private attorneys. Attorney 2 had the second highest compliance rate among his/her guardians and was responsible for almost half (49%) of the survey group's filings (see Figures 18-20). Attorney 4 was the only responsive attorney and finished near the bottom in all areas of compliance.

The surveys sent to court staff received a slightly higher return. Court staff included three judges who regularly handled guardianship proceedings and their court coordinators; totaling seven staff. No judges responded. The response rate was approximately 29%.

### **Guardian education.**

The only responsive attorney practiced guardianship law for over 35 years. The attorney reported he/she does not educate the guardian as much as advise the guardian on what they can and cannot do within the confines of the guardianship. In addition to advising clients, the attorney believed guardian education by the court was essential.

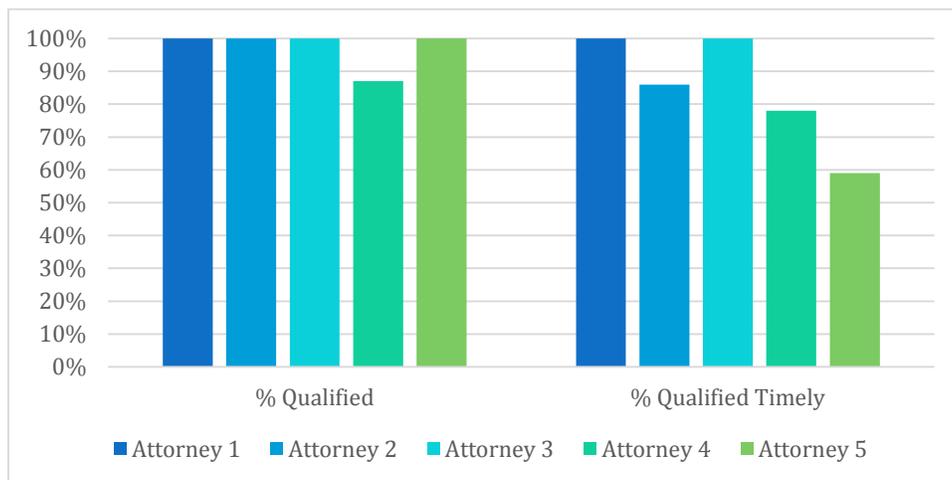
The court coordinators who responded to the survey believed that education was essential for both guardians and court personnel, but were divided on whose burden it was to educate guardians. Was it the court's responsibility or the responsibility of the attorney representing the guardian? As one coordinator pointed out, neither the county

judge nor staff were attorneys. The court must walk a thin line of providing legal information but not giving legal advice; therefore, the coordinator did not think that educating guardians was within their purview.

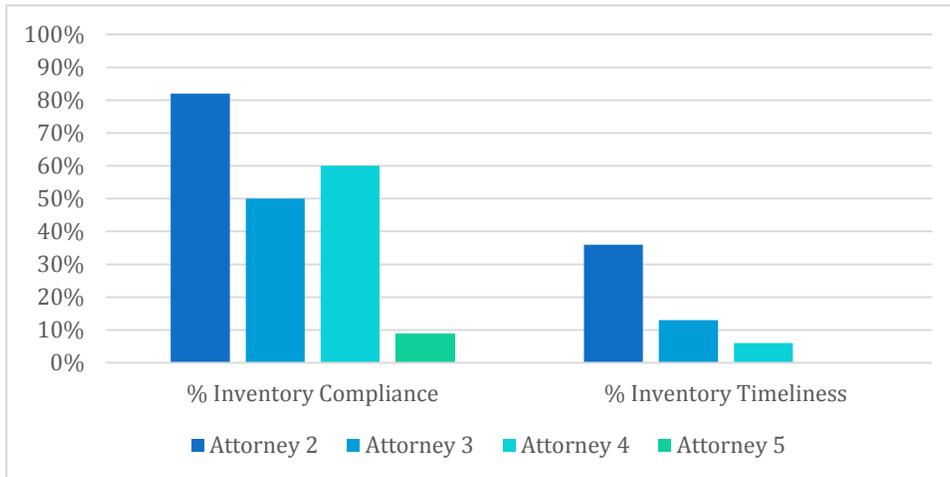
**Guardian compliance.**

The responsive attorney (Attorney 4) stated that his/her office calendared when the annual reports and accounts were due for each guardian. As the due date approached, the attorney would send a reminder letter to the guardian of the upcoming due date. But ultimately, the guardian was responsible for filing those reports/accounts, not the attorney. The attorney believed that a majority of his/her guardians complied with filing annual reports and accounts, but that proved unfounded upon examination of the case file data (see Figure 18-20). The attorney believed it would be too onerous for the court to monitor annual reports and accounts, although the attorney did not cite why. The attorney believed the better system was to have the attorney of record notify the guardian of upcoming due dates.

**Figure 18. Comparison of Top Filing Attorneys & Guardian Qualification**

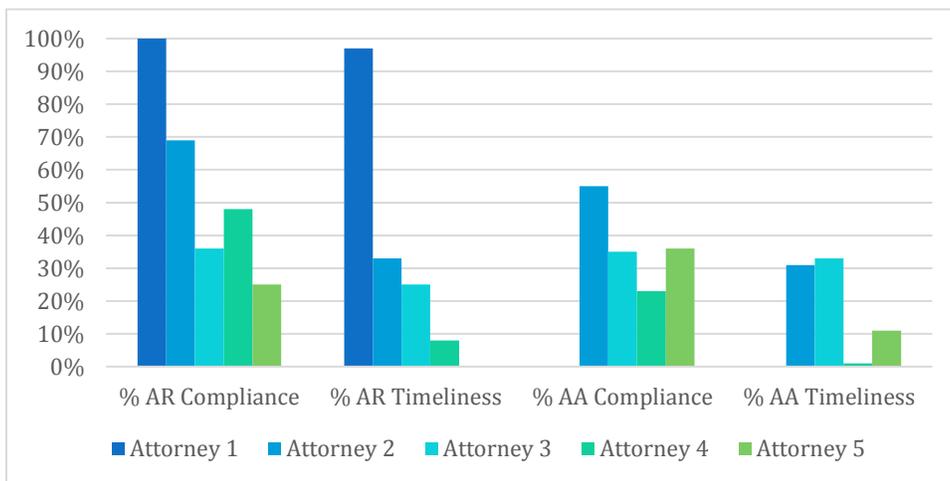


**Figure 19. Comparison of Top Filing Attorneys & Guardian Compliance in Inventories**



As can be seen in Figure 19, Attorney 1 was not involved in any cases involving the ward's estate. Also, Attorney 5 did not file any inventories timely.

**Figure 20. Comparison of Top Filing Attorneys & Guardian Compliance in Annual Reports and Accounts**



## Conclusions and Recommendations

### **Conclusion 1: Since Bonds Were Insufficient to Protect the Estate's Assets, the Court May Be Liable for Gross Neglect**

Judges acting in their official judicial capacity have immunity from liability and suit for judicial acts performed within the scope of their jurisdiction (*Dallas County v. Halsey*, Tex. 2002). This immunity is overcome only for actions that are: (1) non-judicial, i.e., not taken in the judge's official capacity; or (2) taken in the complete absence of all jurisdiction (*Mireles v. Waco*, 1991). However, there is a statutory exception to this within the Estates Code. It states that a judge is liable on the judge's bond to those damaged if damage or loss results to a guardianship or ward because of the gross neglect of the judge to use reasonable diligence in the performance of the judge's duty under this subchapter (Texas Estates Code 1201.003). The failure of a judge to set an adequate bond amount is considered gross neglect. While this is not the same as personal liability (see *Twilligear v. Carrell*, 148 S.W.3d 502 (2004 Tex. App. Houston 14th District 2004) (pet. denied)), judges with probate jurisdiction, especially statutory probate judges, do not relish having a target on the back of their robes. Active judicial oversight, requiring guardians to timely account, and employing ad litem to assist the court with enforcing the probate code, are the best defenses the courts have in minimizing loss to the wards and eventual distributees in probate (King, 2015).

In the sample, the court ordered \$3,216,220 worth of bonds be made in cases involving the ward's estate. Guardians reported assets of \$6,561,579. Of course, not every guardian reported assets as statutorily required. Less than half (42%) of the cases that required inventories had them filed. Overall, setting the total amount of

bonds at less than one-half of the reported assets might be considered gross negligence.

### **Recommendation 1: The Court Needs to Set an Appropriate Bond Amount**

Other than at the hearing, an inventory is the most practical method for the court to determine the amount of the bond. The court should hear evidence on the amount of all estate cash and personal property, the amount estimated to be needed for expenses for administration for one year, the anticipated revenue to the estate for one year, and the estimated amount of debts due and owed by the estate or ward. The bond should be equal to the value of all personal property plus anticipated revenue for one year (Texas Estates Code 1105.154). In Texas, a good rule of thumb is to set the bond at 10% above the value of all personal property. Setting the bond in this manner protects the estate and its creditors. Subsequent to the hearing, the inventory should be filed. The court should enforce the requirement of guardians filing required inventories. The court can do this by issuing an order to appear and show cause following the due date and serving it on the guardian. Once the inventory is filed, the court should re-evaluate the amount of bond and adjust it accordingly. In this way, the court's due diligence safeguards the ward's assets, is fair to the guardian, and protects the judge from liability. At least annually, all bonds should be reviewed to ensure the amount is sufficient and the sureties are still able to satisfy statutory requirements.

### **Conclusion 2: Since Personal Surety Bonds Accounted for the Majority of Bonds Made, the Court May Not Be Able to Recover an Amount for Damage to the Estate Caused by Neglect of the Guardian**

Personal surety bonds accounted for over 60% of the total bonds made in all case types. Personal surety bonds are authorized by the Texas Estates Code. On

these bonds, if the sureties listed are individuals, there must be at least two individuals. These individuals must execute an affidavit stating they each own non-exempt property of at least twice the amount of the bond (Texas Estates Code 1105.160) (Texas Estates Code 305.203). There are several reasons why corporate sureties are preferred over personal sureties. First, corporate sureties are generally better able to respond financially, which gives the court more confidence that the amount bonded is available/accessible. Second, a corporate surety bond is less prone to misinterpretation than the affidavit of a personal surety as to non-exempt assets. The personal surety may not understand all that he/she is agreeing to. Third, the guardian will not have to beg friends or family to personally guarantee his actions (King, 2012).

While approving personal surety bonds is cautioned in all cases, its use in guardian of the estate cases is most alarming. In these cases, personal surety bonds accounted for 56% of the bonds made for a monetary amount of \$176,820. The reported assets in inventories, however, amounted to \$965,172. Only 18% of the reported assets were covered. Obviously, the bonded amount is likely to cover less as 59% of cases involving the estate did not file an inventory. In addition, 18% of the personal surety bonds in the estate cases have the attorneys of record listed as a surety. While the total amount of bonds equaled \$21,850, only 9% of the reported assets were covered. Only 55% of these guardians filed inventories.

**Recommendation 2: The Judge Should Examine All Personal Surety Bonds and Amend Them to Corporate Surety Bonds**

The court should prioritize the examination of the guardian of the estate cases. To take a holistic approach, the first question to answer should be, “What is the value of the estate, excluding real property?” The next question should be, “Does the current

bond amount cover the assets plus one year's worth of income?" Once these questions are answered, then the court can determine if the amount of bond should be amended as well as require a corporate surety bond instead of a personal surety bond.

The court should also examine the guardian of the person cases. Specifically, the court should determine if circumstances have changed enough to warrant amending the guardianship to include the ward's estate. From there, the inquiry is similar to what was stated above. Is the bond amount still sufficient? Are the individual personal sureties still able to meet statutory requirements? At the very least, if an attorney(s) is listed as an individual on the personal surety bond, the court should require the guardian to name another individual(s).

On each personal surety bond, the court should determine what the total amount each individual surety is obligated for in Lubbock County. In other words, while an individual surety may be able to cover a \$500 bond on one case, if that individual is listed as a personal surety on 10 cases with \$500 bonds on each, he may no longer be qualified. This is the situation with the sureties involving private professional guardians. In the cases sampled, one individual was listed as the personal surety for all of PPG 1's cases. Two individuals were listed as the personal sureties for all cases involving PPG 2 and PPG 3. This is problematic if a private professional guardian mishandles estate assets or is no longer eligible to be a private professional guardian and the court calls the bond on all of the guardian's cases. The individuals listed as sureties are unlikely to produce the total amount of all the bonds called.

### **Conclusion 3: Since Almost 7% of Bonds Were Waived by the Court, the Ward May Not Be Protected**

The requirement of bond may not be waived for the guardian of the estate unless the guardian is a corporate fiduciary or a county guardianship program is involved (Texas Estates Code 1105.101). There are only a limited number of circumstances where the court can waive the guardian's bond in a guardian of the person case.

The court correctly waived the corporate fiduciary's bond 32% of the time. The rest of the time, the bonds were waived erroneously. Of the wrongly waived bonds, the court waived the guardian's bond in minor cases 16% of the time—all involving the minor's estate. Guardians of the person bonds were waived in error 58% of the time, even though the statutory requirement of a will or declaration directing the guardian to serve without bond was not met. The remaining 26% involved guardians of the estate for incapacitated adults. Again, these bonds cannot be waived under any circumstance.

### **Recommendation 3: The Court Should Examine All Cases in Which Bond Was Waived and Set Bonds Appropriately**

The court should discontinue waiving bonds in any case, unless statutorily permissible. The court should review all guardian of the estate cases in which the bond was waived. This case type should only have the bond waived if the guardian is a corporate fiduciary. An appropriate bond should be set for these cases, preferably as a cash bond or with a corporate surety. Next, the court should review cases involving guardians of the person with an incapacitated ward. The court should never waive bond in these cases. Last, guardian of the person cases involving a minor ward should be reviewed. The court needs to ensure that a will or declaration by the surviving parent

directs the guardian to serve without bond. If it does not, the court should set an appropriate bond.

**Conclusion 4: Since Private Guardians and Private Professional Guardians Were Less Compliant than Their Counterparts, the Person and Estate of the Ward May Be at Risk**

The data showed disconnect in expectations between the court and the guardians. The guardians, for the most part, qualified timely. That is where statutory compliance ended. The qualification usually takes place in close proximity to the court entering the order, sometimes on the same day. As such, guardians have the assistance of their attorneys to navigate the qualification process. The attorneys of record end representation of the guardian once the order is entered, so the guardian is not afforded the same assistance when filing annual reports or accounts.

**Recommendation 4: The Court Should Provide Education and Outreach to Private Guardians and Private Professional Guardians to Ensure Greater Compliance**

From the onset of the case, the court should provide in-person education to guardians about what the court (and the state) expects of them. The education should include an explanation of statutory provisions and guidelines. In addition, the court should provide resource materials, websites, and uniform forms that the guardians can refer back to as needed. This education should be offered monthly to all potential guardians. A guardian should be required to complete the training at least annually to account for statutory and court process updates.

The court should strive for the same compliance rate for all guardians. Obviously, the aim should be for 100% timely compliance in all areas—qualification, inventories, annual reports, and annual accounts. At this point for Lubbock County, that

may be too lofty a goal. It is more realistic for Lubbock County to take a stair-step approach, increasing the compliance rate incrementally over time. A mechanism within the case management system should be created, alerting the court to a deadline that is approaching or already passed. Each event and date due would be entered by court staff. Each week, court staff should run reports to monitor the progress of those events. In addition, the court should mail reminder notices to guardians of upcoming deadlines, along with web links to forms and additional information.

**Conclusion 5: Since Proper Case Management Has Been Lacking in Recent Years, Lubbock County's Open Guardianship Cases Are Exaggerated**

Lubbock County shows to have over 1,800 open guardianships. Of the sample, it was found that 4% of the cases identified as guardianships were actually not guardianships. Of the cases remaining in the sample, it was found that 14.5% of the wards were deceased. Of the cases remaining, duplicate case numbers affected 6.2% of the case sample. There were also 2.4% of cases that included the proper paperwork to close the case, yet the cases remained open. Finally, about 6.2% of the cases open have had no final order. In short, 34.6% of the cases sampled need to be closed. If this percentage were applied to the whole, it would significantly reduce Lubbock County's open caseload to around 1,200 cases.

**Recommendation 5: The Court Should Review Each Open Guardianship Case to Determine the Next Appropriate Action**

It is imperative that Lubbock County review each open guardianship file. There is no doubt the review will be time consuming. What is necessary is not always convenient. The court needs to know what is happening on each case and take control.

The question on every case is, "What needs to happen next?" The answer to this question can be narrowed down to five responses. These responses are:

1. No action is needed;
2. Issue a show-cause order;
3. Close the case;
4. Amend the case type; or
5. Appoint an ad litem.

If the guardian is compliant, no further action is necessary. Court staff would enter a reminder in the case management system to alert them to the next report/account due.

Second, the court may want to issue a show cause order. If the guardian is not compliant or if the court discovers the ward is deceased with no final report or account, a show cause order should be issued. Third, the court may discover that the case is ripe for closure and all final reports and accounts have been filed. The court then alerts the clerk that the case should be closed with no further action by the court or guardian.

The court may discover that a duplicate case number exists or that the case is not a guardianship at all. Again, the court directs the clerk to close the duplicate case. If the case is not a guardianship, the court directs the clerk to amend the case type to what is most appropriate. The final response for the court is to appoint an ad litem to investigate the ward's condition. This response applies in cases where a temporary order has expired or no order of any kind has been filed.

It is best to review the most recent guardianship cases first. This approach is advantageous since it is likely guardians or wards are still accessible and their attorneys may have good contact information for them. Also, the more recent the case, the more likely case information is available in electronic format. This will result in quicker review since the paper file will not have to be pulled to fully review the case.

**Conclusion 6: Since Only 25% of Attorneys and Court Staff Surveyed Responded, There Is a Perceived Lack of Interest in Guardian Compliance and Ward Well-Being in Lubbock County**

It can be said that perception equals reality for most people. With a lack of response from both attorneys and court personnel, the perception is hard to argue against. There could be a variety of reasons for the lack of response. Certainly, everyone invited to participate in the survey had busy schedules and full dockets. And, others may have believed their responses would not have made a difference in the day to day operations of the guardianship process.

**Recommendation 6: The Court Should Conduct Regular Meetings with Guardianship Stakeholders in Order to Exchange Ideas and Improve Guardian Compliance and the Overall Process**

The court should invite all stakeholders to regular roundtable discussions. These discussions should take place monthly. Each discussion ought to focus on a topic within guardianship, i.e. guardian education, guardian compliance, or court processes. Stakeholders include local attorneys, clerk staff, private professional guardians, mental health professionals, disability services, members of the public, and court staff. The court needs to ensure that all ideas presented are received and that changes are made with viable ideas. There is nothing worse than spending time in a meeting, presenting workable change, but the change is never implemented.

**Concluding Remarks**

Lubbock County has a long road ahead. Critical adjustments need to be made internally to the guardianship process. The court must take ownership of these cases and begin to manage them effectively. Initially, the work will be tedious and the light at

the end of the tunnel will be dim. However, if the court chooses to make necessary changes and involves stakeholders in those changes, the future is bright for guardians and wards in Lubbock County.

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Mireles v. Waco, 502 U.S. 9, 11-12 (S. Ct. 1991)

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Texas Estates Code 305.203

Texas Estates Code 1054.054

Texas Estates Code 1054.152

Texas Estates Code 1054.201

Texas Estates Code 1101.001

Texas Estates Code 1101.153

Texas Estates Code 1102.001

Texas Estates Code 1105.051

Texas Estates Code 1105.101

Texas Estates Code 1105.101(d)

Texas Estates Code 1105.102

Texas Estates Code 1105.154

Texas Estates Code 1105.160

Texas Estates Code 1105.201

Texas Estates Code 1154.051

Texas Estates Code 1163.001

Texas Estates Code 1163.002

Texas Estates Code 1163.101

Texas Estates Code 1201.003

## **Appendix A: Guardianship Attorney Survey Questions**

1. How long have you been practicing guardianships in Lubbock County?
2. How much of your practice is devoted to guardianships?
3. What type of education, if any, do you provide to the potential guardians you represent on their duties as a guardian?
4. What type of education, if any do you think the court should provide to potential guardians on their duties as a guardian?
5. What improvements, if any, do you believe the court should make to ensure greater guardian compliance with statutory guidelines?
6. Please provide any additional comments that were not addressed in the above questions.

## **Appendix B: Guardianship Judges & Court Staff Survey Questions**

1. What contributes to guardian compliance and ward well-being?
2. What steps can be taken by court staff and attorneys to increase compliance with the statutory requirements and the court's expectations?
3. What do you perceive the guardian's needs and expectations to be?
4. How can the court meet those needs and expectations?
5. Please add anything else that would contribute to increased compliance among guardians.

## Appendix C: Data Elements Used in Case Sampling

### DATA COLLECTION GUARDIANSHIPS

<p style="text-align: center;"><b>Case Information</b></p> <p>Cause Number _____</p> <p>Duplicate Number? YES or NO _____</p> <p>File Date _____</p> <p>Case Age _____</p> <p>Description _____</p> <p>Temporary Permanent _____</p> <p>Minor Incapacitated Adult _____</p> <p>Person Estate _____</p>	<p style="text-align: center;"><b>Ward Information</b></p> <p>Ward Name _____</p> <p>Date of Birth _____</p> <p>Age at Filing _____</p> <p>Current Age _____</p> <p>Date of Death _____</p> <p>Verified By _____</p>
<p style="text-align: center;"><b>Guardian Information</b></p> <p>Guardian Name _____</p> <p>Guardian Type _____</p> <p>Monthly Fee _____</p> <p>Applicant Attorney _____</p>	<p style="text-align: center;"><b>Order Information</b></p> <p>Date Granted _____</p> <p>Signing Judge _____</p> <p>Bond Amount _____</p> <p>Bond Type _____</p>
<p><b>Compliance Information</b></p>	
<p>Qualification Due _____</p> <p>Date Qualified _____</p> <p>Qualification EARLY or LATE _____</p> <p>Inventory Due By _____</p> <p>Inventory Filed? YES or NO _____</p> <p>Date Inventory Filed _____</p> <p style="padding-left: 100px;">Timeliness EARLY or LATE _____</p> <p style="padding-left: 100px;">Court Approved? YES or NO _____</p> <p>Value of the Estate _____</p>	
<p style="text-align: center;"><b>Annual Report</b></p> <p>Due _____</p> <p>Filed _____</p> <p>Time Period _____</p> <p>Timeliness EARLY or LATE _____</p> <p>Court Approved? YES or NO _____</p> <p>Signing Judge _____</p> <p>Signing Date _____</p>	<p style="text-align: center;"><b>Annual Accounting</b></p> <p>Due _____</p> <p>Filed _____</p> <p>Time Period _____</p> <p>Timeliness EARLY or LATE _____</p> <p>Court Approved? YES or NO _____</p> <p>Signing Judge _____</p> <p>Signing Date _____</p>
<p>Due _____</p> <p>Filed _____</p> <p>Time Period _____</p> <p>Timeliness EARLY or LATE _____</p> <p>Court Approved? YES or NO _____</p> <p>Signing Judge _____</p> <p>Signing Date _____</p>	<p>Due _____</p> <p>Filed _____</p> <p>Time Period _____</p> <p>Timeliness EARLY or LATE _____</p> <p>Court Approved? YES or NO _____</p> <p>Signing Judge _____</p> <p>Signing Date _____</p>
<p>Due _____</p> <p>Filed _____</p> <p>Time Period _____</p> <p>Timeliness EARLY or LATE _____</p> <p>Court Approved? YES or NO _____</p> <p>Signing Judge _____</p> <p>Signing Date _____</p>	<p>Due _____</p> <p>Filed _____</p> <p>Time Period _____</p> <p>Timeliness EARLY or LATE _____</p> <p>Court Approved? YES or NO _____</p> <p>Signing Judge _____</p> <p>Signing Date _____</p>
<p><b>Notes</b> _____</p> <p><b>Further action</b> _____</p>	