

TEXAS GUARDIANSHIP REFORM

PROTECTING THE ELDERLY AND INCAPACITATED



JANUARY 2019

ENHANCING PROTECTIONS BY IMPLEMENTING
THE GUARDIANSHIP ABUSE, FRAUD AND
EXPLOITATION DETERRENCE PROGRAM



Texas Guardianship Reform

PROTECTING THE ELDERLY AND INCAPACITATED

What is guardianship?

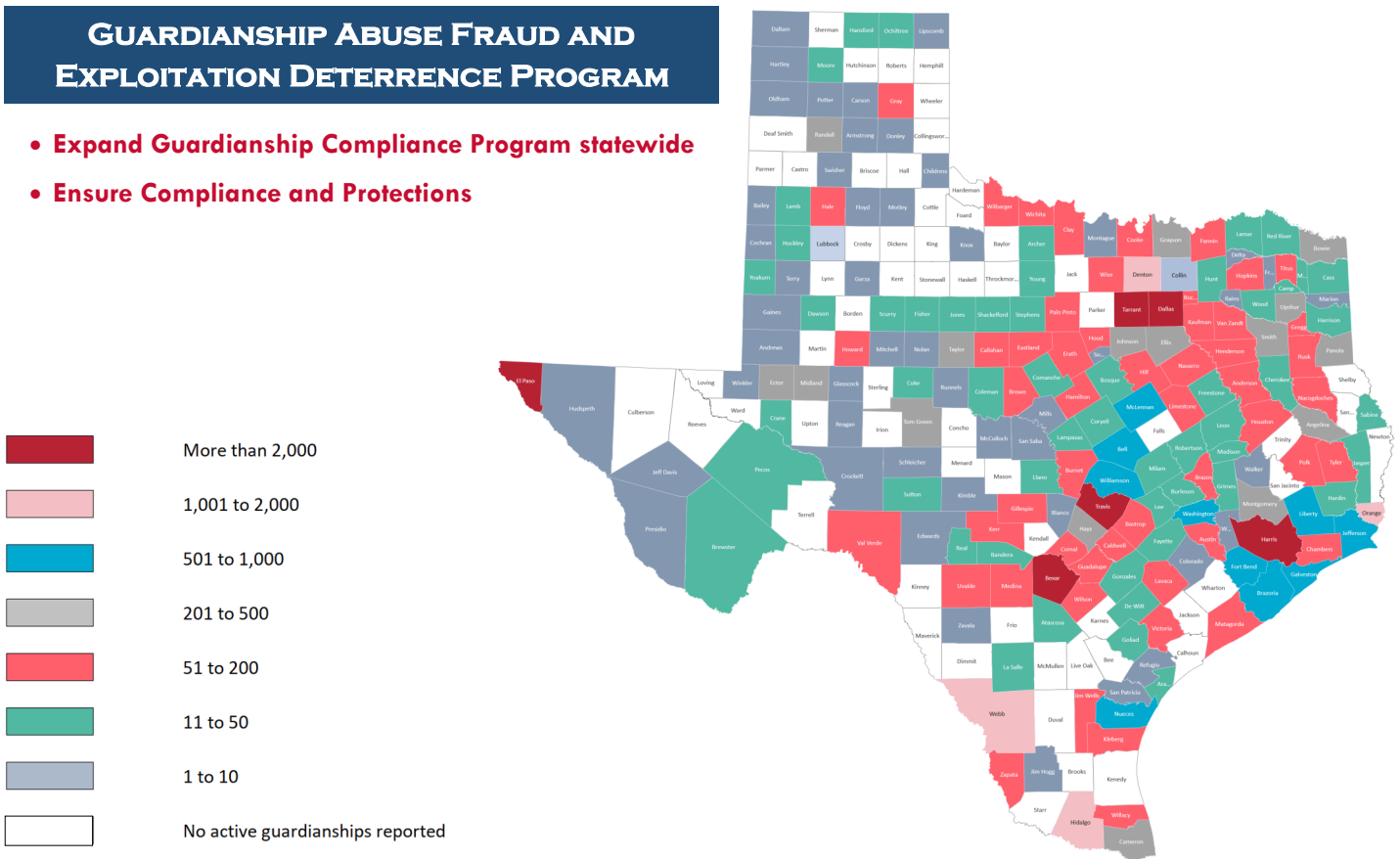
A person who is placed under guardianship loses civil rights, personal decision-making power, and the authority to control their own money and assets. Those rights and powers are entrusted to a guardian to protect the person from exploitation—but this arrangement leaves the person under guardianship vulnerable to exploitation if not properly monitored. For this reason, statutorily-required processes have been put in place to protect incapacitated persons who may be placed under guardianship – starting with an assessment of whether guardianship is necessary or whether an alternative to guardianship is a viable option. Laws are also in place requiring guardians to be bonded, to be registered, to report yearly to the court on the personal and financial position of persons under their care, and to obtain permission from the court before making major decisions in the life or financial management of a person in their care.

Guardians are required by law to file with the court for the court’s approval:

- ◆ A bond to cover one year of revenue to the estate, plus the value of the ward’s personal property (within 21 days)
- ◆ An initial inventory detailing the assets in the estate (within 30 days)
- ◆ An annual report of the ward’s well-being (within 60 days of anniversary)
- ◆ An annual accounting detailing financial transactions of the estate (within 60 days of anniversary)

GUARDIANSHIP ABUSE FRAUD AND EXPLOITATION DETERRENCE PROGRAM

- Expand Guardianship Compliance Program statewide
- Ensure Compliance and Protections



Why is this important?

- ◆ \$4.9 billion in assets under court and guardian control in Texas.
- ◆ The population of Texans over age 65 is projected to double in size by 2030 to almost 6 million.
- ◆ 8% increase in guardianship during the last 5 years.
- ◆ Specialized Statutory Probate Courts are in only 10 of the state's 254 counties.
- ◆ In Texas' remaining 244 counties, the county judge or county court at law judge presides over guardianship cases without sufficient resources to monitor cases.
- ◆ Over 21,000 of the state's approximately 51,250 active guardianships reside in counties that lack resources to closely monitor these important cases.
- ◆ Review of 29,606 guardianship files found 41% out of compliance.
- ◆ Located 3,390 deceased persons under court control.
- ◆ Without proper monitoring, there is a high risk for exploitation and neglect.

What has been done?

IMPLEMENTATION OF GUARDIANSHIP REFORMS

With the “silver tsunami” rapidly approaching, when the population in Texas over the age of 65 is expected to double in the next twenty years, Supreme Court Chief Justice Nathan Hecht directed the Texas Judicial Council beginning in 2014 to study guardianship proceedings in the state and make extensive recommendations for reform. Many of these recommendations have been implemented to provide additional protections against exploitation and neglect of incapacitated persons. These reforms include:

- ◆ Expansion of alternatives to guardianship and a bill of rights for persons under guardianship - HB 39, SB 1881, & SB 1882 (84th R.S.)
- ◆ Added protections for person's while under guardianship - HB 39 & HB 2665 (84th R.S.), SB 39 & SB 1709 (85th R.S.)
- ◆ Emphasis on Restoration of a Person's Rights - HB 39 & HB 1438 (84th R.S.), SB 1710 (85th R.S.)
- ◆ Increased guardianship training & certification for attorneys & guardians - HB 39 (84th R.S.), SB 1096 (85th R.S.)
- ◆ Implementation of a statewide guardianship registration and enhanced criminal history checks on proposed guardians - HB 3424 (84th R.S.), SB 1096 (85th R.S.)
- ◆ Enhanced regulation of guardianship programs providing services - SB 36 (85th R.S.)

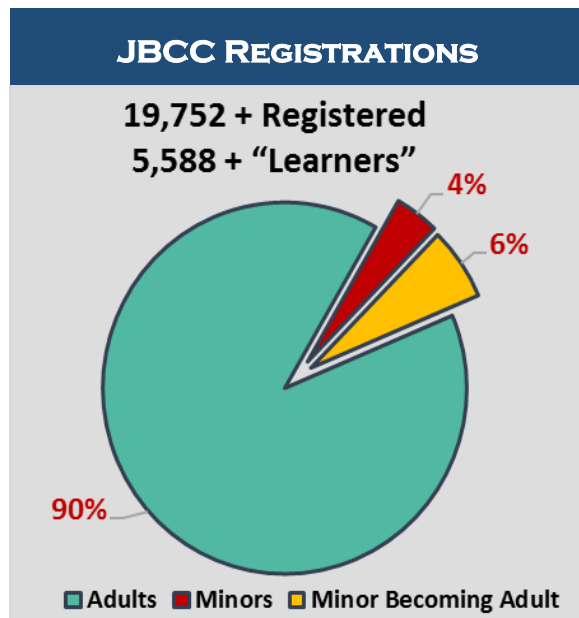
The United States Senate Committee on Aging recognized Texas' efforts as a model for other states in its November 2018 report “Ensuring Trust: Strengthening State Efforts to Overhaul the Guardianship Process and Protect Older Americans.”

Registration of Guardianships (Eff. June 1, 2018)

SB 1096 (Zaffirini/Smithee) created a safety net to ensure guardians are registered, properly trained, receive a criminal history background check, and guardian contact data is provided to DPS and its Law Enforcement Terminal System (TLETS) to identify persons under guardianship if law enforcement contact is made with them.

OCA developed a database to be filled with a registry of every guardianship in the state. As a registration prerequisite, the OCA conducts a criminal history background check and provides online training to proposed guardians. To date 19,752 proposed guardians have submitted data for registration, 5,588 have completed the training and over 2,400 criminal histories have been provided to the courts.

While the guardianship training is currently only available in English, OCA is developing the guardianship training in Spanish. For information on guardianship registrations, visit www.txcourts.gov/jbcc/register-a-guardianship/.



Alternatives to Guardianship (Eff. June 19, 2015)

Since the implementation of HB 39 (Smithee/Zaffirini), each applicant for appointment as guardian has been required to certify to the court that all alternatives to guardianship have been considered.

Guardians ad litem appointed to the case must also explore all alternatives and certify to the court that none are appropriate. Finally, before appointing a guardian for a ward, the judge must find by clear and convincing evidence that alternatives to guardianship have been explored and none are feasible.

In addition, Texas became the first state to implement the supported decision-making alternative in SB 1881 (Zaffirini/Pena) which permits a person to function with a supporter and maintain decision-making authority. The exploration of alternatives to guardianship has reduced the number of guardianship applications filed in Texas, a trend that was not occurring prior to the reforms.

- Advance Directives
- Power of Attorney
- Financial Planning and Management
- Community Administrator
- Supported Decision Making
- Surrogate Decision Making
- Other Supports and Services

Bill of Rights (Eff. June 19, 2015)

Protection services and due process have little value if the person to whom they are due does not know about their rights. Since the implementation of SB 1882 (Zaffirini/S. Thompson), each guardian is required to annually provide a document titled "The Ward's Bill of Rights" to each ward which lays out the codified rights for persons under guardianship. The document includes information the ward may use to contact the police, protective services, the court, the Judicial Branch Certification Commission, and advocacy organizations. Empowering wards to report abuse, neglect and exploitation serves to protect them from their guardians.

Restoration of a Person's Rights (Eff. September 1, 2015)

If a person subject to guardianship believes they no longer need a guardian or if the person's condition and circumstances have improved, they may send the court a letter requesting restoration of their rights. Courts are also required to annually determine the need to continue the guardianship. The person subject to guardianship or another interested person may also file an application with the court asking for restoration of rights.

RESTORATIONS

- 21 Recommended
- 8 Persons Restored

When restoring a person's rights, the law requires showing of capacity by a preponderance of evidence. HB 39 (Smithee/Zaffirini) added processes to allow for the automatic review of the necessity of continuing a guardianship when a person's condition is likely to improve. SB 1710 (Zaffirini/Neave) further expanded these protections during the 2017 session to ensure that the court reviews a restoration application prior to appointing a successor guardian. The GCP team has made 21 recommendations for restoration resulting in eight persons under guardianship having their rights reinstated by the court.

Guardianship Training & Certification for Attorneys

(Eff. September 1, 2015)

After learning of a need to better educate attorneys involved in the guardianship system, a 4-hour mandatory attorney training was implemented which has improved legal representation in guardianship cases. Since September 1, 2015- 5,635 attorneys have been certified - a 27.5 percent increase- and 9,437 have attended the course.

5,635

Total # of attorneys
certified throughout the state

Registration of Guardianship Programs (Eff. September 1, 2018)

SB 36 (Zaffirini/Thompson) created a registration for guardianship programs. This will allow JBCC to ensure that guardianship programs adhere to minimum standards that further the welfare of those under a program's care. The program registration will increase transparency by requiring mandatory reporting to the JBCC by the program. To date the JBCC has registered 15 guardianship programs throughout the state with three additional programs pending.

Implementation of the Guardianship Compliance Project (GCP)

At the direction of the Texas Judicial Council and Legislature, the Office of Court Administration launched the Guardianship Compliance Project to audit guardianships in multiple counties to determine the effectiveness of existing safeguards.

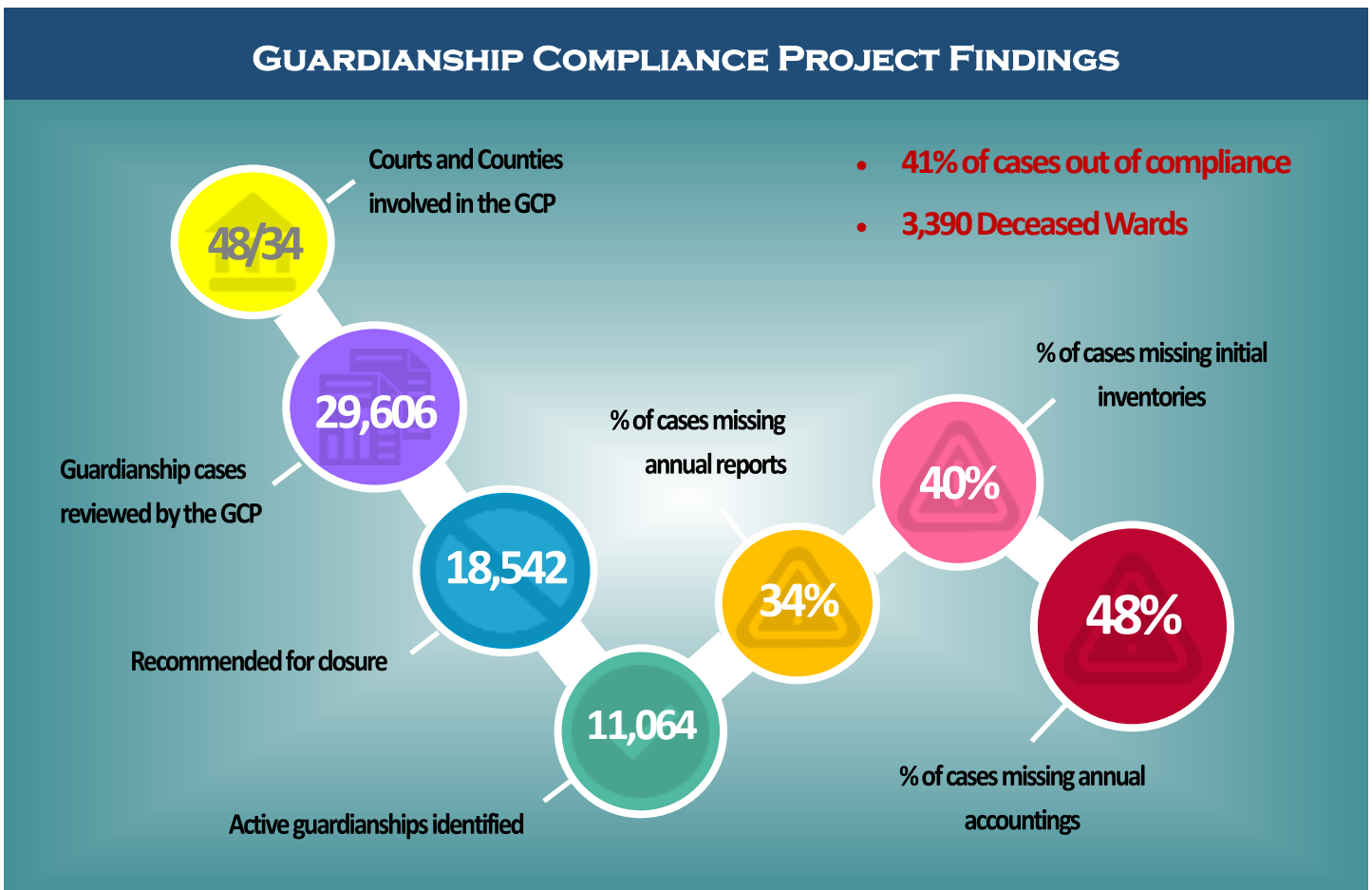
The study revealed most Texas Courts lack the personnel and resources to sufficiently provide oversight and protection for the elderly and incapacitated persons. The study also revealed serious failings in monitoring and managing guardianships. It has been determined that regular reports and accountings are not filed in almost half of all guardianships. Below are the services offered to enhance the protections to the elderly and incapacitated.

- ◆ Review all guardianship cases to identify compliance and reporting deficiencies by the guardian
- ◆ Review annual accountings and well-being reports to spot fraud, neglect, and exploitation
- ◆ Provide accurate list of active and closed cases for judicial review

- ◆ Conduct research on location of guardians and wards
- ◆ Develop best practices in managing guardianship cases
- ◆ Initiate communication with guardian
- ◆ Assist court with compliance dockets
- ◆ Prepare report for the court on findings with recommendations
- ◆ Outreach and training for courts and clerks

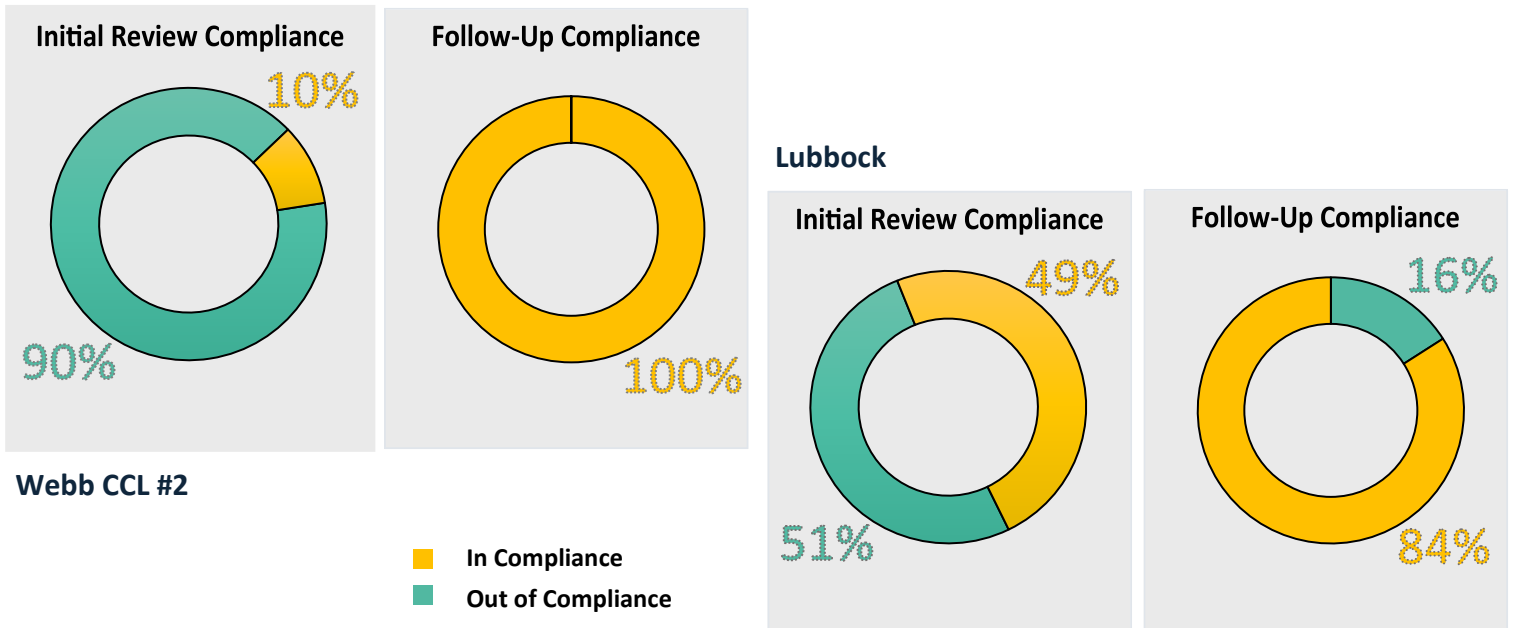
Sample Project Findings

- ◆ \$4 million estate— No reports or accounts ever filed.
- ◆ \$1 million estate- No reports filed.
- ◆ Ward’s whereabouts unknown since 2008.
- ◆ Ward allowed to marry per court order- Trust disburses \$90,000 annually at last report in 2013.
- ◆ Unauthorized ATM withdrawals of \$20,000 and \$40,000.
- ◆ \$400,000 transferred, forged checks and additional \$500,000 unaccounted for. Case currently in District Court.
- ◆ Lack of backup data, bank statements, receipts, check copies and invoices for the annual accountings.
- ◆ Deceased Wards located.

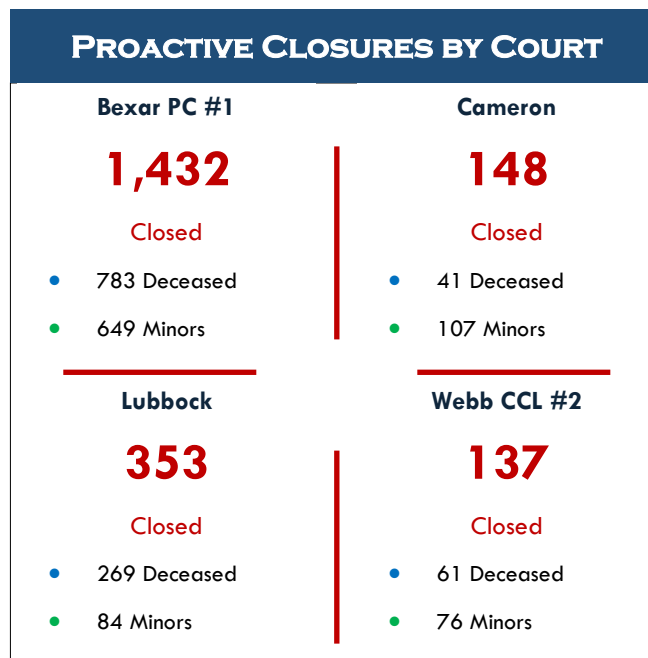


Guardianship Compliance Project Impact

- ◆ Follow-up reviews were conducted in Webb and Lubbock counties where all guardianship cases were reviewed a second time. Follow-up compliance is illustrated here.



- ◆ The GCP has recommended hundreds of cases for closure. Cases were closed by the courts in four participating counties based on GCP recommendations. Results are highlighted below.



Where do we go from here?

IMPLEMENTATION OF THE GUARDIANSHIP ABUSE FRAUD AND EXPLOITATION

DETERRENCE PROGRAM

While the reforms implemented to date have improved the guardianship system in Texas, a key to the reforms' success is ensuring compliance with the laws and reviewing guardianship activities to spot potential abuse, fraud, and exploitation. To provide a safety net for all vulnerable persons under the care of guardians, the Judicial Council proposes expanding the GCP statewide as proposed in OCA's legislative appropriations request and SB 31 (86th R.S., Zaffirini et al). Only by pro-actively training court personnel and proposed guardians on the fiduciary duties of guardianship, as well as auditing reports and accountings to detect and deter fraud and exploitation, will Texas be adequately braced to ensure the safety and well-being of this vulnerable and growing population.

Monitoring and Audits

The annual reports of the well-being and the financial annual accounts should be monitored and a sample of the reports should be audited to ensure that the data submitted is complete and accurate. Monitoring and auditing would also create a deterrence against theft and fraud.

Development of a Statewide Online Guardianship Reporting Portal

The Texas Office of Court Administration has been developing an automated, electronic tool for filing required reports, annual accountings and other documents in guardianship cases. This system will provide a method to notify courts when required reports are delinquent and to review annual accounting reports for potential fraudulent activities.

Training and Resources for Courts and Clerks

In addition to our online training of guardians on fiduciary record-maintenance and reporting duties, we recommend ongoing training and professional development for court and clerk staff on the collection and reporting of required guardianship data, as well as training on the fiduciary duties of guardians to inform the direction and guidance of proposed guardians.

SENATE BILL 31 IMPLEMENTATION



Audit all newly established guardianships in non-statutory probate courts



Audit estimated 10% all-others based on risk assessment



225 audits per year each auditor



Review guardianship cases to identify compliance and reporting deficiencies by the guardian



Review annual accountings and reports



Prepare report for courts on findings



Develop best practices in managing guardianship cases



18 guardianship compliance specialists, 2 managers, 4 support staff, 4 registration specialists = \$4.9 million over the biennium