TEXAS LEGISLATIVE REPORT 1997
Next to Last Stop Before
The Millennium
(The End Is Near Report)

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A Special Thanks to
BARBARA KLITCH

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1. **Introduction**. This edition of this outline includes all bills passed and signed by the governor. Except that the home equity act was allowed to go into effect without his signature. This outline does not include any bills that did not pass or that were vetoed by the governor.

2. **Bar Bill**. Each legislative session the State Bar of Texas has a "Bar Bill." This year, as has been the case for the last several sessions, the "Bar Bill" does not have any legislation which impacts the probate and estate planning practice.

3. **Section Legislation**. The Probate and Trust division ("the Section") of the Real Estate, Probate and Trust Law Section of the State Bar of Texas had five bills. This legislation was authorized by the State Bar of Texas Board of Directors, but it is carried by the Section and is not a part of the "Bar Bill." All five parts have now passed; three have been signed by the Governor.

In addition, this session the Section obtained permission, during the legislative session, to oppose a bill requiring certification before a lawyer could participate in a guardianship proceeding. That bill was defeated as the result of the efforts of the Section.

4. **Texas Academy of Probate Lawyers.** The Academy is a voluntary organization of Texas attorneys who are board certified in estate planning and probate. This session they offered a bill to clarify the law on executors' compensation. While that bill, House Bill 3333, did not pass, the Academy also spent a great deal of time and effort working with the legislature on bills concerning the practice.

5. **Probate Judge's Legislation.** The judges of the various statutory probate courts are organized into an administrative division of their own. This year they have legislation that they are advocating. That legislation is designated as "Judge's Legislation."

6. **The Texas Bankers' Association: Trust Division.** The Trust Division of the Texas Bankers' Association also has bills concerning "the practice." It is noted as "TBA."

7. **Sources**

a. Ikard & Golden's Legislative Webb Page (Glenn Karisch author) tracks current legislation concerning probate and estate planning at the Texas Legislature. It can be accessed at

http://www.io.com/~karisch/97probate.html

b. The State of Texas has a Webb page for the Legislature:

http://www.capitol.state.tx.us/

c. Real Estate, Probate & Trust Law Section also has a Webb site under construction:

http://www.reptl.org

If you do not get access immediately keep trying.

d. Westlaw and Lexus. Apparently Westlaw and Lexus both have up to date session laws available.

e. Probate List. Karisch also maintains a "list" for discussions of probate issues in Texas. To subscribe send an email message to majordomo@lists.io.com. In the body (not the header) include the line: "subscribe probate." You can then "lurk" or participate, but please resist "flaming."

8. **1997 Legislature**

a. **Probate Code**

i. § 3ii, Definition of Statutory Probate Courts (HB 1152). There are a few courts (Brazoria County) that are called statutory probate courts in their title but their jurisdictional description is that of a county court at law. Others (Nueces County) have probate court jurisdiction in their enabling legislation. This bill clarifies that statutory probate courts are only those designated as a statutory probate court under Chapter 25 of the Government Code.

This act takes effect September 1, 1997.

This bill passed and was signed by the governor on May 7th. By May 16th Senator Truan (from Nueces County) passed a bill in the Senate reversing that statute (SB 1952).

A compromise was reached by amendment to HB 3086; Those courts in question retain their "statutory probate court jurisdiction" until 1999. Maybe more

significantly, an interim study committee is to look at this problem and generally the jurisdiction of probate courts.

ii. § 5A(b); Jurisdiction, Appertaining or Incident To; (Judge's Amendment to Senate 506). At the instigation of the Probate Judges, the definition of "appertaining to" or "incident to" an estate was expanded to include all actions "filed against or on behalf of" a personal representative. This was an effective end run when the Judges encountered problems passing an amendment to § 5B (the transfer or "reach out and touch someone" statute). The primary effect of this legislation is increasing the matters statutory probate courts can transfer under §5B.

Note that there is no similar legislation for guardianships.

Since this was an amendment made on the floor of the house, there is no legislative history. But because of the efforts to amend 5B there is little doubt that the moving forces behind this amendment intended to expand 5B.

However the amending language leaves an opportunity for confusion (new language in bold):

> ...all statutory probate courts may, in the exercise of their jurisdiction, notwithstanding any other provisions of this Code, hear all suits, actions, and applications filed against or on behalf of any heirship proceeding or decedent's estate, including estates administered by an independent executor; **all such suits, actions, and applications are appertaining to and incident to an state for purposes of this section.**

Some commentators, see Webmeister Karisch, think this language may somehow limit its meaning to 5A and thus not expand the reach (pun intended) of 5B.

Since this is Probate Judges' legislation, rest assured they will see it as expanding 5B.

This act takes effect on September 1, 1997 and applies only to the estates of persons dying after that date.

iii. § 10B, Access To Decedent's Medical Records and Communications (SB 506). A decedent's medical records are available

(1) To a party;

(2) In a will contest or other proceeding in which a party relies on the mental or testamentary capacity of the decedent;

(3) Upon subpoena; and,

(4) Proof of the filing of a will contest or other proceeding by certified copy.

This appears to be a procedural rule and should apply to all discovery procedures after the effective date. Unfortunately the effective date language for this bill which had 17 different sections provides that it only applies to estates of person who die after its effective date (September 1, 1997)

iv. § 36, Social Security Numbers (SB 506) (Section Legislation).. The Section's original legislation eliminated the requirement of social security numbers in applications (see below). Because probate judges rely on these numbers to trace wayward personal representatives, the bill as passed eliminated that they be in the applications, but gave the courts the right to require information from the personal representative including social security numbers. Such information is to be kept as a judicial record and not by the clerk.

This act takes effect on September 1, 1997 and applies only to the estates of persons dying after that date.

v. § 42: Family Code References (SB 506) (Section Legislation).. This corrects the references to the Family Code. In 1995 the Family Code was partially codified including moving the references found in Section 42 of the Probate Code.

vi. § 50(a)(b), Service on Persons <12 years of age in Heirship Proceeding (HB 3088). In heirship proceedings service on persons less than 12 years of age may be by service on their parent or guardian.

This act takes effect September 1, 1997 and only applies to heirship proceedings filed after that date.

vii. § 58b, Bequests to Attorneys Void (SB 1176). This bill voids any bequest to an attorney who prepares or "supervises" the will.

It also says,

> ...a devise or bequest of property in a will to an heir or employee of the attorney who prepares or supervises the preparation of the will is void.

It does make an exception if the attorney or employee is related to the 2nd degree of consanguinity or affinity to the testator. According to Chapter 573 of the Government Code, grandfather and grandchild are related in the 2nd degree of consanguinity but great grandfather and great grandchild are 3rd degree. People are related by affinity if they are married (Tex. Govt Code §573.024. However, it sheds no light on measuring 2nd degree of affinity.

These rules govern nepotism in government jobs and may or may not be determinative for this statute. Also see Tex.RulesCiv.Proc §18b and Texas Constitution Article V, Section 11.

This new section also does not apply to bona fide purchasers for value from a devisee.

This only applies to wills.

This act takes effect on September 1, 1997 and applies only to wills written on or after that date.

viii. § 69; Effect of Divorce (SB 506) (Section Legislation). § 69 voids any bequests or appointments in wills to former spouses. Unfortunately, survivorship was a condition in both Volkmer v. Chase, 354 S.W.2d 611 (Houston 1962) and McFarlen v. McFarlen, 536 S.W.2d 590 (Eastland 1976). In both the will said the

estate passed to the child if the spouse predeceased. Of course the spouse was living in each instance at the death of the testator. As a result the courts held that the estate did not pass to the child (the contingent taker under the will) but rather passed to the heirs at law.

A different, and it is believed the correct result, was reached in Calloway v. Estate of Gasser, 558 S.W.2d 571 (Tyler 1977). Because of this confused history, this amendment makes clear that §69 applies even when the will refers to survival.

ix. §§ 81 and 82; Social Security Numbers (SB 506) (Section Legislation). The public is very protective of its social security numbers. The requirement of social security numbers on probate applications is regarded by many as unduly and unnecessarily invasive of people's rights of privacy. These amendments eliminate that requirement.

This act takes effect on September 1, 1997 and applies only to the estates of persons dying after that date.

The attorney general has ruled that a court cannot require social security numbers from applicants. Tex.Atty.Gen.Opin. JM-924 (1988)

x. § 89A-C, Muniment of Title (HB 2007). This bill and HB 2003 are a package to replace Informal Probate. This bill in part expands the terms of § 89A. Unfortunately, as passed it has several problems:

(1) It copies the provisions of §§ 81 and 88 into the muniment of title statute. Unfortunately that creates several problems.

(2) As set up new §89A is the pleading statute, §89B is the proof statute and §89C (which is verbatim the current §89A) is the judgment statute.

(3) The bill requires under 89A and 89B pleading and proof that the decedent has not been dead more than four years. This is a big problem. Quite often muniments of title are used to probate a will where the decedent has in fact been dead more than four years. This appears to eliminate that good function.

(4) The bill also appears to eliminate probating a will as a muniment of title for "other good cause." Currently you can probate a will as a muniment if there are no unpaid debts (other than those secured by real estate) or for "other good cause." The bill requires, again in 89A and 89B, pleading and proof that there are no unpaid debts.

(5) Meanwhile, proposed 89C tracks our current statute. It makes no reference or restriction about probating a will within 4 years as a muniment of title. Further, it specifically continues the reference to probating a will as a muniment of title for "other good cause."

The testimony at the hearings makes clear that this is a clarification of existing law and no changes were intended. While the language is unfortunate it is not intended to change the law that wills can still be probated, as muniments of title after 4 years under Probate Code Section 73. Likewise, a will can still be probated as a muniment of title for "other good cause."

This act takes effect on September 1, 1997 and applies only to the estates of persons dying after that date.

xi. §§ 108-115, Funds for Burial, Access to Personal Property in Rental Property & Spouse's Burial Rights (HB 2003). This act moves parts of the Informal Probate Chapter to presently unused §§ 108 through 115 (The rest of the Informal Probate Chapter was repealed by HB 2007). This statute provides that without taking out an administration a person can:

(1) Apply to the court to obtain the release of funds to pay funeral expenses and the attorneys fees associated with the application;

(2) Also, if the deceased had personal property in an apartment or other rental unit, a person can apply to have the property removed from the apartment;

(3) Finally, it moves the provisions that restrict a spouse's right to control burial arrangements when the spouse is involved in the death of their spouse.

This act takes effect September 1, 1997. And applies only to applications filed on or after that date.

xii. § 131A(b), Temporary Administrations (HB 2007). Currently the statute only requires that the application reflect the requirements of Section 82. This amendment requires the pleading to reflect Section 81 if the decedent died testate.

This act takes effect on September 1, 1997 and applies only to the estates of persons dying after that date.

xiii. § 137(a), Small Estate Affidavits (HB 2007). Currently a small estate affidavit need only set out the heirs of the decedent. However, there is no requirement that the affidavit set out sufficient facts to allow the court to verify the heirship conclusions. This amendment requires that the underlying facts must be set out.

This act takes effect on September 1, 1997 and applies only to the estates of persons dying after that date.

xiv. § 234(a)(6); Abandonment of Estate Property (SB506) (Section Legislation). A trustee has long been able to abandon property (Texas Trust Code §113.020). This provision would finally allow a personal representative to abandon property provided only that it is burdensome or worthless. How you abandon real estate and what happens to abandoned real estate has not been answered.

b. **Claims Procedure.**

i. § 146(b); Notice by Secured Claimants to Independent Personal Representatives (SB 506) (Section Legislation). Section 146(b) now requires that a secured claimant give notice to the independent executor by certified mail. This bill makes that only one of several choices that would be available under new § 146(d).

This act takes effect on September 1, 1997 and applies only to the estates of persons dying after that date.

ii. § 146(d); Notice by Creditors to Independent Personal

Representatives (SB 506) (Section Legislation).

(1) This amendment sets out how creditors are to give notice to independent personal representatives. It applies to secured creditors under § 146(b) and to unsecured creditors who are noticed under the permissive provisions § 294(d).

(2) As with §294(d) it states that any unsecured claimants who do not give notice to the independent personal representative within 4 months are barred.

(3) With the passage of § 146(d) any notices required by creditors to independent personal representatives can be given by

i. Written notice (Certified mail, or hand delivery with proof of receipt)
ii. A pleading filed in a lawsuit concerning the claim; or,
iii. A written instrument or pleading filed in the court in which the administration of the estate is pending.

This act takes effect on September 1, 1997 and applies only to the estates of persons dying after that date.

iii. § 281; Exempt Property (SB 506) (Section Legislation). The current statute, and as it existed before the 1995 overhaul of the claims statutes, states that exempt property (except for the homestead or allowance in lieu of, thus furniture, livestock etc.) is liable for timely filed funeral and last illness expenses. Because the old 60 day time limit has been eliminated and the statute in fact limits class one claims to $5,000 (changed to $15,000 by this legislature), the reference is changed to "first class claims." That may in fact change to "class one claims" before the statute is finally enacted.

iv. § 290; Family Allowances (SB 506) (Section Legislation). Again the reference to funeral expenses and expenses of last illness are replaced with "first class claims."

v. §§ 306(e) & (f) Foreclosure (SB 506) (Section Legislation). Under the 1995 statute it appeared that a creditor would have to make two trips to the courthouse to be allowed to foreclose. The amendment corrects that.

This act takes effect on September 1, 1997 and applies only to the estates of persons dying after that date.

vi. § 320, Correction of Heading (HB 2007).. The heading for this section is corrected to read: "ORDER OF PAYMENT OF CLAIMS <AND ALLOWANCES>"

vii. § 320(a), 322, Increase Class 1 Claims to $15,000 (HB 881). This bill increases funeral and last illness expenses to $15,000.

This act takes effect September 1, 1997 and applies only to estates of persons dying on or after that date.

viii. §399(a)(9) and (c)(3), Accountings; Payment of Bond Premiums (HB 2189). This bill requires the statement and voucher proof that the bond premium has been paid for the accounting period.

This act takes effect September 1, 1997 and applies only to accountings due on or after that date.

ix. §405 (10), Final Accounting, Payment of Bond Premiums (HB 2189) Likewise on the final accounting the personal representative must state and be ready to prove that all bond premiums have been paid.

This act takes effect September 1, 1997 and applies only to accountings due on or after that date.

c. **NonTestamentary Transfers. § 450, Adding Securities and Brokerage Accounts to Multiparty Accounts (SB 506)**. In response to the passage of the Uniform Transfer on Death Security Registration Act (SB 506), infra, the legislature amended Probate Code § 450 and repealed that uniform act before its effective date.

i. This act adds to the §450 list of arrangements that are "deemed to be nontestamentary."

> "...securities and accounts with financial institutions as defined in Part 1 of this chapter..."

This act takes effect on September 1, 1997 and applies to the estates of persons dying after that date.

ii. By that one phrase, the substance of the uniform act has been incorporated into Texas law without the problems created by the uniform act.

iii. This legislation has passed both houses and should be signed by the Governor shortly.

d. **†Uniform Transfer on Death Security Registration Act., §§ 466 through 480 (SB 504, HB 411).** Despite a concerted effort to defeat it, this bill was signed by Governor Bush on April 17th. However, by amendment to Senate Bill 506 this statute will be repealed before its effective date and be replaced by an amendment to Probate Code § 450, discussed above.

This statute, which was also proposed last session, adopts a uniform law regarding the registration of securities. Like the existing multi-party account provisions of the Probate Code it allows the creation of non probate assets by the manner of registration. Unfortunately it uses very different nomenclature. For example (and these are taken directly from the statute):

(1) Multiple owners-sole beneficiary

> John S. Brown Mary B. Brown JT TEN TOD John S. Brown Jr.

(2) Multiple owners--primary and secondary (substituted) beneficiaries:

> John S. Brown Mary B. Brown JT TEN TOD John S. Brown Jr.SUB BENE Peter Q. Brown; or

> John S. Brown Mary B. Brown JT TEN TOD John S. Brown Jr. LDPS

The statute refers to tenancy by the entireties, an estate that is not a part of Texas law.

It also allows for contributions to pay taxes, debts and costs of administration. However, it is not tailored to our existing statutes, Probate Code §§ 322A and 322B.

e. **Durable Power of Attorney, §§ 481 et seq. (SB 620) (Section Legislation)**. The durable power of attorney statute (§§481 *et seq*) was originally enacted in 1993. This legislation represents several important changes to the existing statutes.

i. Divorce

(1) With new §485(a) any power of attorney granted to a former spouse terminates upon divorce unless the power of attorney expressly provides otherwise.

However, because of the importance of third parties being able to rely on powers of attorney some of the other sections are amended.

(2) Section 486 provides that the divorce (or annulment) does not terminate the power of attorney to anyone, other than the former spouse, who acts in good faith under or in reliance on the power.

(3) Section 487(a) provides that good faith reliance upon a power of attorney, when accompanied by the affidavit of the power of attorney holder that he had no actual knowledge of termination, is conclusively proof of the non termination. Section 487(a) applied to termination by revocation, death of the principal or qualification of a guardian of the estate of the principal. The 1997 legislation adds termination by divorce or annulment.

ii. §§ 486, 487, 490, Good Faith Reliance. The amendments to Section 486 and 487(a) make clear that third parties relying in good faith on the power of attorney are protected, in the face of revocation by divorce or annulment.

Section 490 previously provided that when the statutory form was used, third parties could rely on the agent's authority without fear of liability to the principal. That paragraph of 490(a) has now been deleted. In its place is 487(e). Protecting third parties only under a statutory form was determined to be unnecessarily restrictive.

The 1997 legislation adds Section 487(e) that third parties who rely in good faith on the acts of the agent are not liable to the principal.

iii. § 490, Statutory Form. The statutory form has been widely disseminated and used. The public has acquired and used these forms without any professional advice or input. Because of its widespread use, it was determined that it should be made more user friendly.

iv. Social Security Number. The requirement of the principal's social security number has been eliminated. This is consistent with the removal of the requirement of social security numbers on applications for probate and guardianship. As a general rule the public does not want their social security numbers made public.

v. Strikeout Form. The old form called for initialing each power to be conferred (or initialing the all encompassing power). Experience suggested that this procedure created confusion and uncertainty in laymen and was more susceptible to

fraud. The new form requires a striking out to eliminate a power.

vi. Gifts. The right to make gifts is specifically identified. If a person wants to give that power, it must be initialed.

The statutory gifting form is limited to the $10,000 annual exclusion rights.

If a person wants to give a broader gifting power, it has to be specifically set out. Because of the possible disastrous effects on the principal and the possible adverse tax consequences of a broader gifting power on the agent this is an area for professional input.

vii. Springing Powers. The form also adds specific instruction for the procedures to follow for springing powers of attorneys. The statute has always provided that the power of attorney can be effective immediately or only upon disability.

Because of the wariness of third parties with springing powers of attorney and the involvement of doctors , most practitioners recommended using immediately effective powers.

If a client insisted on a springing power or if a springing power made sense for the particular client, the attorney had to provide specific instructions.

The old statute made no provision for third parties to determine if the principal was disabled. Nor did it provide any protection to doctors who provided the necessary medical opinion.

Despite this, experience has shown that some practitioners and many members of the public want springing powers. The new form provides that a third party is fully protected if they are presented with a written certification of a medical doctor that the principal is "mentally incapable of managing [his] financial affairs."

Further, it authorizes a medical doctor to disclose the principal's physical and mental condition for purposes of the power of attorney.

viii. Statutory Definitions of Powers. Sections 491 through 504 provide definitions of the powers set out in the statutory form. Two of those sections have been amended.

(1) § 492(E) Oil and Gas (The Mineral Estate). Section 492 defines the powers regarding real estate. Subsection (E) was added to specifically include the mineral estate.

(2) Retirement Plans. Subsection (12) of Section 503 was amended to give a definition of "retirement plan." The definition includes any and all deferred compensation arrangements including IRAs and self employed pension plans.

ix. Effective Date. This act takes effect September 1, 1997 and only applies to powers of attorney executed after that date.

f. **Informal Probate,** Repealed (HB 2007). This bill repeals Chapter XII, Section 501 through 510 (not to be confused with Chapter XII Sections 481 to 506 on Durable Powers of Attorney).

This act takes effect on September 1, 1997 and applies only to the estates of persons dying after that date.

g. **Guardianship Code.**

i. § 609, More Corrections to the Revised Family Code (SB 997) (Section Legislation). Explained in heading.

ii. §601(17), Missing Person (HB 1317). Matters concerning missing persons are now moved from the Probate Code to the Human Resources Code, infra.

iii. § 601(29), Definition of Statutory Probate Court. See discussion under Probate Code Section 3(ii), supra.

iv. § 633, Notice and Citations (SB 997) (Section Legislation). The amendment adds persons who must be noticed of any proposed guardianship to include to the extent known:

(1) Any person designated to be the guardian in case of later need under § 679;

(2) Any person designated guardian under a probated will of the last surviving parent of the proposed ward; and,

(3) Any person designated to serve as guardian in a written declaratory by the proposed ward's last surviving parent.

v. § 677A Requirements for Designating a Guardian for A Minor (SB 997) (Section's Legislation). Currently §677A requires witnesses and a self proving affidavit for a parent to designate the guardian of a minor. That requirement was inadvertently inserted in 1995. This amendment restores the original requirements, as they existed before 1995.

vi. § 682, Social Security Numbers (SB 997) (Section Legislation). This is the companion to §§ 81 and 82 above. Social Security numbers will no longer be required on applications but judges may require them as judicial records. See discussion at §36, supra.

vii. § 691, MHMR, Agency of Last Resort (HB 3135). This bill repeals §691 which permitted appointment of agencies (MHMR, DPRS etc.) only as a last resort.

viii. § 702,702A, Waiver of Bond for County Guardianship Programs & New Types of Bonds (SB 318).

(1) §702. This bill allow any county that operates a guardianship program to do so without a bond.

Also see changes to the Civil Practice & Remedies Code, infra, regarding the liability of counties and their employees when running a guardianship program.

(2) §702A. Allows a guardian of a person to post bond in alternative ways. In addition to a corporate surety bond, now a GOP can use personal surety bonds, cash in lieu of a bond and personal bonds.

This act takes effect September 1, 1997 and applies only to applications for guardianship filed on or after that date.

ix. §743(b)(14), Annual Accounting, Bond Premium for GOPs (HB

2189). On the annual accounts the guardian of the person must state that all required bond premiums have been paid.

This act takes effect September 1, 1997 and applies only to accountings due on or after that date.

x. §749, Final Accounting, Bond Premiums and Taxes (HB 2189). In the final accounting the guardian must state, and be prepared to produce evidence, that all bond premiums have been paid.

It also requires that the guardian state that all tax returns have been filed, the amount of owed taxes paid and the any unpaid taxes or unfiled returns.

This act takes effect September 1, 1997 and applies only to accountings due on or after that date.

xi. § 774, Abandonment of Property (SB 997) (Section Legislation). Another companion piece. Like administrators under § 234, guardians will have a mechanism for disposing of worthless or burdensome property upon a showing that it is in the best interest of the estate.

xii. § 776, Maintenance and Support of Ward's Spouse and Dependents (SB 997) (Section's Legislation). Currently § 776 allows expenditures for the education and maintenance of the ward. The amendment will allow a guardian, with court permission, to make expenditures for the ward's spouse and dependents.

xiii. § 783(a), Replacing "Decedent" with "Ward" (SB 997) (Section's Legislation). The current section wrongly refers to the "decedent." The amendment merely changes that to "ward."

xiv. § 805, Order of Payment of Guardianship Claims (Amendment to HB 2189). Under this bill, if the estate is insolvent, costs of administration are to be paid first.

This act takes effect September 1, 1997 and applies only to guardianship applications filed on or after that date. Provided that the court may modify any existing guardianship to "conform to the requirements of Section 805..as amended by this Act." How all of that works is a mystery, see discussion under §856(a), infra.

xv. § 856(a), Tomorrow Fund, An Approved Investment (HB 1316). This statute permit guardians to invest in the "Texas Tomorrow Fund" with court permission.

This act takes effect September 1, 1997. It applies without reservation to guardianships established on or after that date. To apply to an existing guardianship the court may modify the guardianship on its own motion or the motion of any interested person.

What this means or how it works is unclear. For a guardianship established on September 2, 1997, the guardian must apply to the court for permission to invest in the "Tomorrow Fund." That's clear. However, what happens when a guardian (of a guardianship established in 1995) applies to invest in the "Tomorrow Fund." Must he also specifically ask for the court to modify the

guardianship? If he does not do so, is it an illegal investment? What public purpose is served by requiring a specific ruling of modification. Isn't the granting of permission to invest in the fund sufficient.

If the guardian, of an "old guardianship," had invested in the "Tomorrow Fund" without court permission before the effective date of the act, there may be an issue that should not be resolved by subsequent legislation.

But since this statute clearly requires court permission the formulation of the effective date appears to be a trap, and an unnecessary one, for the unwary.

This modification to adopt changes made by the 75th Legislature is found in at least one other statute passed this session. One attorney has suggested that the careful practitioner should immediately apply to the court to modify all of the lawyer's existing guardianships to pick up all of the modifications.

However, all of the modifications may not be to the benefit of the ward, or to the attorney.

Since in this instance, and in other bills passed by this legislature, it allows for modification upon the court's own motion, the court may be able to enter a blanket order modifying all existing guardianships.

That raises the notice question. If a judge took such action, does due process require that the guardian be notified.

Similarly, if the guardian applies to modify, must all existing creditors also be notified? Should they be notified if the modification can reasonably be foreseen to adversely effect their rights as creditors or providers of the ward.

All of this is especially unfortunate since the original effective date provisions of the Probate Code (1956) speaks rather clearly to these points. See Probate Code §2.

Perhaps an amendment to §2 is in order. It could provide that amendments to the Code would be handled as was set out for the original adoption in 1956.

xvi. <u>§ 865, Tax Motivated Gifts (SB 997) (Section Legislation).</u> Currently tax motivated gifts are allowed to charities, heirs at law and devisees under the last will. There are two problems with "heirs at law." First, the living do not have heirs. Even assuming we know who the "heirs" are, that may be too restrictive. There are many people who are more inclined to give to relatives other than, or in addition to, their "heirs." To fix these problems, § 865(2) is amended to substitute "spouse, descendants, or other persons related by blood or marriage" for "heirs at law."

xvii. <u>§ 867, Need for Guardianship & Supplemental Needs Trusts (HB 1314) (Judges's Legislation) .</u> This statute has 3 primary purposes:

(1) The amendment will allow the creation of a 867 trust at the instigation of a guardian, the court, an attorney ad litem or any interested person.

(2) This amendment also makes clear that if an 867 trust is created, the underlying guardianship of the estate, if created, may be terminated; however, there must be at least an underlying guardian of the person in place.

(3) Finally, it would allow a court to create an 867 trust that clearly complies with all of the requirements of a supplemental needs trust under 42 USC § 1396p(d)(4)(A), sometimes also referred to as "(d)(4)(A) trust." This statute allows a person to transfer assets to one of these trusts and still qualify for medicaid. Some are concerned that under the existing statute, a special needs trust cannot be created. For a full discussion see *Court Created Trusts*, by Glen Karisch, 1996 Advanced Drafting Course, State Bar of Texas, and *Medicaid Trusts: Estate Planning Using Non-Medicaid Disqualifying Self-Settled and Third Party Created Trusts*, by Clifton Kruse, Jr., 1995 Advanced Estate Planning and Probate Course, State Bar of Texas.

(4) The bill requires that there be a guardian (either of the estate or the person) in place at all times.

(5) After much drafting, the final bill allows for the creation of a trust in any guardianship, even though it is in existence before the date of the act.

This act takes effect September 1, 1997 but applies to all trusts regardless of the date on which they were created.

xviii. §§ 887, 889, 890, Increases to $50,000 the amount Sold by or Paid to: Without Guardianships (HB 1126). Currently the law allows for payments by debtors of an incapacitated person (§887) and sales of an incapcitated person's property (§889) without a guardianship up to $25,000. This ups it to $50,000.

Incapacitated persons include minors [Probate Code §601(13)(a)].

With the addition of § 890, such a sale or payment can occur even when a guardianship of the person is in existence.

This act takes effect September 1, 1997.

xix. §§ 886(a)-(c) and 886A-F, POW & MIA Provisions (SB 334).. These provisions were in the Family Code. This Act moved them to the Probate Code intact.

h. **Trust Code**

i. § 112.035(e), Crummy Demand Rights (Section Legislation). Anyone who contributes to a trust, at least to the extent of their rights in the trust, is considered a settlor. As a result, the creditors of that contributor can access the trust to satisfy the settlor's debts [Texas Trust Code §112.035(d)] It was unclear under existing law how this applied to trust beneficiaries who hold demand rights (Crummy powers).

To clarify this, this act specifies that a beneficiary may not be considered a settlor merely because of a "lapse, waiver or release" of a Crummy demand right.

Legislative Council was insistent that the statute read "may not"

rather than "shall not." They constantly reassured that "may not" and "shall not" mean the same thing. There is substantial legislative history showing that the statute is mandatory.

Also, there is case law support for the proposition, see Hodges v Thompson, 932 S.W.2d 717 (Ft.Worth 1996) and Texas Attorney General Opinion, JM-501. The attorney general opinion also cites several other cases.

This act takes effect on September 1, 1997.

ii. § 114.001(e), Environmental Protection for Fiduciaries (SB 911) (TBA). Last year Congress passed House Resolution 3610. In a part described as "Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996" it provided protection from the federal environmental laws for fiduciaries. This statute incorporates the benefits of that legislation [42 USC §9607(n)] into state law. This act takes effect September 1, 1997.

i. **Property Code.**

i. §42.001(b), Alimony and Support Exempt from Forced Seizure (SB 1098) "Alimony, support, or separate maintenance received by the debtor for the support of the debtor or a dependent of the debtor" is exempt from forced seizure.

This act takes effect September 1, 1997, but only applies to payments received on or after September 1, 1997.

ii. §141.002, Contributions to Old TUGMAs OK (HB 887). In 1995 the old TUGMAs were replaced with the new Texas Uniform Transfers to Minors Act. Some brokerage houses and banks would not allow new contributions to old TUGMA accounts saying the law did not authorize them.

In some instances grantors prefer to make new contributions to the old accounts rather than open new TUTMA accounts. This amendment allows for those new contributions to the old TUGMAs.

This act takes effect September 1, 1997 but it applies to all transfers made to TUGMAs since September 1, 1995.

iii. § 142.005(g), Allowing Supplemental Needs Trusts (SB 912) (TBA Legislation) This statute makes clear that a court can create a trust under 142 that qualifies as a special (or supplemental) needs trust under 42 USC 1396p(d)(4)(A).

Unfortunately, it is very different from the guardianship trust bill. For example it is not clear if existing trusts must be (or even can be) modified so that the new law applies.

This act is effective immediately.

j. **Family Code**. §§ 1.001 et seq, Recodification of Family Code Title 1 (SB 334). This is a non substantive recodification of Title 1. The most unusual aspect is its effective date. The Governor signed it on April 17th and it became effective on that same day except that it does

not apply to proceedings pending on April 17th.

In addition it moves the POW and MIA provisions from the Family Code to the Probate Code §§ 886(a)-(c) and 886A-F.

Glenn Karisch has already prepared a "Guide to the Recodificaiton of Title 1 of the Family Code." Email him at Karisch@io.com and he will email you a copy in WordPerfect Format. It has the text of the statute and conversion tables (old to new and new to old).

k. **Government Code**

i. §25.022. Assignment of Probate Judges (HB 3086). Probate judges may be appointed to hear matters in county courts or statutory county court upon request to the presiding judge of an administrative judicial district.

This act takes effect September 1, 1997 and applies to assignments made after that date.

ii. § 25.00255, Recusal of Probate Judges (HB 3086). This sets out the standards for recusal of a probate judge.

This act takes effect September 1, 1997 and only applies to motions for recusal filed on or after that date.

iii. Interim Study Committee on Probate Court Jurisdiction. (HB 3086). See discussion at §3(ii), supra.

iv. § 406.0165, Notary for Physically Unable Persons (HB 242). This act allows a notary to sign for a person unable to sign or make a mark.

This act is effective upon passage.

v. § 531.121, Creation of Guardianship Advisor Board (SB 586). This bill creates a guardianship advisory board that advises on minimum standards guardianship programs.

l. **Insurance Code**.

i. Article 3.50-2, Section 11A, Viatical Settlements of Group Life Insurance (HB 163). This act permits an insurance company to pay accelerated benefits under an individual or group policy when it receives proof that the insured has "a long term illness, a long-term care illness, or a specified disease. The commissioner is authorized to adopt rules to implement the act.

This act takes effect September 1, 1997 and only applies to policies delivered, issued for delivery or renewed on or after that date.

ii. Article 3.50-6 Accelerated Payments of Life Insurance (HB 1865) . This statute allows viatical settlements of life insurance policies

iii. Article 21.22, Insurance & Annuities Are Exempt (HB 2274). This statute clarifies (emphasizes) that life insurance benefits and annuities are exemptions from forced sale in addition to those set out in Chapter 42 of the Property Code.

This act is effective immediately and applies to all insurance and annuities whether issued before, on or after the effective date.

m. Local Government Code.

i. §117.001, Funds Deposited Into Registry of the Court (SB 1304). This revises substantially the rules for monies deposited with the court. It expands the authorization for investment as well as making provisions for reporting the income to IRS.

ii. §118.055(d), No additional Fees For 120 Days or Until Inventory Filed (HB 2702). Currently the clerk shall not charge any additional fees until the earlier of 90 days from the date of the original filing for probate or the approval of the inventory.

This bill makes the fee free period until the earlier of 120 days or the filing of the inventory, whichever occurs first.

This act is effective upon passage.

n. Civil Practice and Remedies Code.

i. §64.001(a)(6), Authority to Appoint Receiver for Missing Person (HB 1317). This provision gives a court of competent jurisdiction the authority to appoint a receiver for a missing person. The amendments to the Human Resources Code establish the procedure for that receivership, infra.

ii. §102.002 & 102.003, Limits of Liability for Running a Guardianship Program (SB 318). A local government, that does not post a bond, shall pay any damages awarded against an employee who is acting as a guardian if such action was within the scope of the person's employment. Also, the bill limits the local government's liability, when they act as guardian, to actual damages, not the usual $100,000, $300,000 ($10,000 for property damage) limitation.

iii. §137.001 et seq, Mental Health Treatment Decisions (SB 972).. This act provides a procedure and a form by which a person can set out their mental health treatment preferences in advance. Such a declaration is valid for 3 years. However, if on the expiration of 3 years the person is incapacitated, the declaration remains in effect for the duration of the incapacity.

o. Health and Safety Code.

i. §121.005 & 121.007, Proof of Identify of Person Acknowledging a Document (HB 243). Now a notary can determine the identify of a person acknowledging a document by examining their driver's license or other form of government issued identification if it has a photo and signature of the acknowledging person. Effective immediately.

ii. § 241.151, Release of Hospital Records, Patient & Authorized Agent (SB 975). Except by specific authorization, only the patient or a legally authorized agent can have access to hospital records.

A "legal authorized agent" is

(1) a parent,
(2) a guardian,
(3) a health care durable power of attorney agent,

(4) an attorney ad litem appointed for the patient,
(5) a guardian ad litem appointed for the patient,
(6) a personal representative or a statutory beneficiary if the patient is deceased, or
(7) the patient's attorney or the attorney in fact of the patient.

This act is effective upon passage.

iii. § 361.281, Fiduciary Exemption from Environmental Liability. This is another statute picking up the fiduciary benefits of the new federal provisions. See Trust Code § 114.001.

iv. §597.043, Surrogate Decision Making (SB 85). This amends who can serve on a consent committee to make medical and dental decisions for mentally retarded persons in state facilities. It also sets out the procedures to follow. The right to make these decisions is automatically suspended when a guardian is appointed.

v. § 576.005, Confidentiality of Mental Health Records (SB 208). This statute says mental health facility records are confidential. The current exceptions to this are struck from this statute and reference is made to disclosures allowed by other state law.

vi. § 593.021, Right of Guardian to Seek Voluntary Commitment (HB 3135). This will allow a guardian with the agreement of the ward to seek voluntary commitment. It also makes the provision consistent with Probate Code § 770.

This act takes effect September 1, 1997 and only applies to applications for mental retardation services made on or after that date.

vii. §672.003, 672.004 Directives to Physicians (HB 880). The persons who may not act as witnesses is expanded. Now persons responsible for treatment decisions cannot be witnesses, nor can an "officer, director, partner, or business office employee" of the health care facility. The revisions to the form are attached. This is effective for forms executed a on or after January 1, 1998.

viii. § 711.002(g), Right to Designate Cremation In Advance (HB 2078). A person may give written directions as to his burial wishes including cremation. This act is effective upon passage.

p. Human Resources Code.

i. §79.017, Receiverships for Missing Persons (HB 1317). When you have a missing person, the proper procedure is a receivership under the Human Resources Code and not the Probate Code. The authority to appoint a receiver is set out in the Civil Practice and Remedies Code.

This act takes effect September 1, 1997 and applies only to applications for receivership filed on or after that date..

ii. §101.031. Establishing Miller Trusts (HB 446). An area agency on aging may contract with private attorneys to establish trusts described in 42 USCA 1396p(d)(4)(B).

This act takes effect September 1, 1997.

iii. § 102.001 et seq, Rights of the Elderly (HB 3100). Includes provisions for making living wills, health care powers of attorney and designations of guardian.

This act takes effect September 1, 1997.

iv. §161.001, Establishment of Guardianship Services Centers (HB 466). This bill would authorize creation of guardianship centers to operate pooled income trusts, advise local guardianship programs and provide information and training. It also has a funding provision allowing for the payment of estates, or parts of estates, to the guardianship centers if the beneficiary does not claim his or her share within a specified time.

q. **Transportation Code.** §521.401. Organ Donor's and Donor Cards (SB 952). This bill allows distribution of donor cards by DPS. Your donor intentions will no longer be on your driver's license. Currently donor status can only be placed on a driver's license. This act takes effect September 1, 1997.

r. **Trust Act (HB 1870)**. Of particular interest are the provisions concerning charities rights to act as trustees. Last session a statute was passed allowing charities to act as trustees if the trust had a charitable purpose. The amendment to this bill provides that Texas law has always allowed charities to act as trustees. It also removes the restriction requiring a charitable purpose.

s. Solid Waste Disposal Act §361.652 and §361.701 . (HB 2776) Adds provisions consistent with new federal law granting relief to lenders and fiduciaries who have not been involved in management of hazardous waste sites.

This act takes effect September 1, 1997.

t. Texas Constitution, Article XVI, Section 50, Lien On Homesteads (HJR 31). This legislation, if passed by the voters, will allow Texans to borrow against the equity in their homesteads. It provides a number of protections and restrictions

i. Only 80% loans;
ii. Without personal recourse;
iii. Foreclosure only by a court;
iv. Is not a part of any form of open-end account;
v. Is payable in advance without penalty;
vi. Is not secured by any other personalty or realty;
vii. Is not secured by homestead property designated for agricultural use;
viii. May not be accelerated because of a decline in market value or a default in other indebtedness not secured by a prior lien on the homestead; and
ix. No balloon payment.

There are others, this is just

the ones that stand out.

9. **Barbara Klitch.** Barbara is employed during the legislative session by the Real Estate, Probate & Trust Law Section of the State Bar of Texas to review the legislation appertaining or incident to probate and estate planning. She has provided me with a great deal of information about the legislation. And, she was gracious enough to read my draft and save you the reader from suffering through typos, grammar and the product of brain lesions.

10. APPENDIX OF FORMS

a. Statutory Durable Power of Attorney

STATUTORY DURABLE POWER OF ATTORNEY

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE DURABLE POWER OF ATTORNEY ACT, CHAPTER XII, TEXAS PROBATE CODE. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

I, _____ (insert your name and address), appoint _____ (insert the name and address of the person appointed) as my agent (attorney-in-fact) to act for me in any lawful way with respect to all of the following powers except for a power that I have crossed out below.

TO WITHHOLD A POWER, YOU MUST CROSS OUT EACH POWER WITHHELD.

Real property transactions;
Tangible personal property transactions;
Stock and bond transactions;
Commodity and option transactions;
Banking and other financial institution transactions;
Business operating transactions;
Insurance and annuity transactions;
Estate, trust, and other beneficiary transactions;
Claims and litigation;
Personal and family maintenance;
Benefits from social security, Medicare, Medicaid, or other governmental programs or civil or military service;
Retirement plan transactions;
Tax matters.

IF NO POWER LISTED ABOVE IS CROSSED OUT, THIS DOCUMENT SHALL BE CONSTRUED AND INTERPRETED AS A GENERAL POWER OF ATTORNEY AND MY AGENT (ATTORNEY IN FACT) SHALL HAVE THE POWER AND AUTHORITY TO PERFORM OR UNDERTAKE ANY ACTION I COULD PERFORM OR UNDERTAKE IF I WERE PERSONALLY PRESENT

SPECIAL INSTRUCTIONS: Special instructions applicable to gifts (initial in front of the following sentence to have it apply):

_____ I grant my agent (attorney in fact) the power to apply my property to make gifts, except that the amount of a gift to an individual may not exceed the amount of annual exclusions allowed from the federal gift tax for the calendar year of the gift.

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

_____
_____
_____
_____
_____
_____
_____
_____
_____

UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

CHOOSE ONE OF THE FOLLOWING ALTERNATIVES BY CROSSING OUT THE ALTERNATIVE NOT CHOSEN:

(A) This power of attorney is not affected by my subsequent disability or incapacity.
(B) This power of attorney becomes effective upon my disability or incapacity.

YOU SHOULD CHOOSE ALTERNATIVE (A) IF THIS POWER OF ATTORNEY IS TO BECOME EFFECTIVE ON THE DATE IT IS EXECUTED.

IF NEITHER (A) NOR (B) IS CROSSED OUT, IT WILL BE ASSUMED THAT YOU CHOSE ALTERNATIVE (A).

If Alternative (B) is chosen and a definition of my disability or incapacity is not contained in this power of attorney, I shall be considered disabled or incapacitated for purposes of this power of attorney if a physician certifies in writing at a date later than the date this power of attorney is executed that, based on the physician's medical examination of me, I am mentally incapable of managing my financial affairs. I authorize the physician who examines me for this purpose to disclose my physical or mental condition to another person for purposes of this power of attorney. A third party who accepts this

power of attorney is fully protected from any action taken under this power of attorney that is based on the determination made by a physician of my disability or incapacity.

I agree that any third party who receives a copy of this document may act under it. Revocation of the durable power of attorney is not effective as to a third party until the third party receives actual notice of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

If any agent named by me dies, becomes legally disabled, resigns, or refuses to act, I name the following (each to act alone and successively, in the order named) as successor(s) to that agent:_____ .

Signed this _____ day of _____, 19___

_____
(your signature)

State of _____
County of _____

This document was acknowledged before me on
_____(date) by _____
(name of principal)

_____
(signature of notarial officer)
(Seal, if any, of notary) _____
(printed name)
My commission expires: _____

THE ATTORNEY IN FACT OR AGENT, BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

b. Certificate of Acknowledgment

Sec. 121.007. FORM FOR ORDINARY CERTIFICATE OF ACKNOWLEDGMENT. The form of an ordinary certificate of acknowledgment must be substantially as follows:

"The State of _____,
"County of _____,
"Before me _____ (here insert the name and character of the officer) on this day personally appeared _____, known to me (or proved to me on the oath of _____ <or> <through _____ (description of identity card or other> <document)>) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.
(Seal) "Given under my hand and seal of office this _____ day of _____, A.D., _____."

c. Directive to Physician

Sec. 672.004. FORM OF WRITTEN DIRECTIVE. A written directive may be in the following form:

"DIRECTIVE TO PHYSICIANS
"Directive made this _____ day of _____ (month, year).
"I _____, being of sound mind, wilfully and voluntarily make known my desire that my life shall not be artificially prolonged under the circumstances set forth in this directive.
"1. If at any time I should have an incurable or irreversible condition caused by injury, disease, or illness certified to be a terminal condition by two physicians, and if the application of life-sustaining procedures would serve only to artificially postpone the moment of my death, and if my attending physician determines that my death is imminent or will result within a relatively short time without the application of life-sustaining procedures, I direct that those procedures be withheld or withdrawn, and that I be permitted to die naturally.
"2. In the absence of my ability to give directions regarding the use of those life-sustaining procedures, it is my intention that this directive be honored by my family and physicians as the final expression of my legal right to refuse medical or surgical treatment and accept the consequences from that refusal.
"3. If I have been diagnosed as pregnant and that diagnosis is known to my physician, this directive has no effect during my pregnancy.
"4. This directive is in effect until it is revoked.
"5. I understand the full import of this directive and I am emotionally and mentally competent to make this directive.
"6. I understand that I may revoke this directive at any time.

"Signed ___
(City, County, and State of Residence)

<I am not a person designated by the declarant to make a> <treatment decision.> I am not related to the declarant by blood or marriage. I would not be entitled to any portion of the declarant's estate on the declarant's death. I am not the attending physician of the declarant or an employee of the attending physician. [I am not a patient in the health care][facility in which the declarant is a patient.] I have no claim against any portion of the declarant's estate on the declarant's death. Furthermore, if I am an employee of a health <care> facility in which the declarant is a patient, I am not involved in providing direct patient care to the declarant and am not <an officer,><director, partner, or business office employee of the health care> <facility or of any parent organization of the health care facility>[directly involved in the financial affairs of the health][facility].

"Witness ___

"Witness ___"

d. Declaration For Mental Health Treatment.

<Sec. 137.011. FORM OF DECLARATION FOR MENTAL HEALTH><TREATMENT. The declaration for mental health treatment must be in> <substantially the following form:>

<DECLARATION FOR MENTAL HEALTH TREATMENT>

<I, _____, being an adult of sound mind, wilfully> <and voluntarily make this declaration for mental health treatment> <to be followed if it is determined by a court that my ability to> <understand the nature and consequences of a proposed treatment, including the benefits, risks, and alternatives to the proposed treatment, is impaired to such an extent that I lack the capacity to make mental health treatment decisions. "Mental health treatment" means electroconvulsive or other convulsive treatment, treatment of mental illness with psychoactive medication, and preferences regarding emergency mental health treatment.>

<(OPTIONAL PARAGRAPH) I understand that I may become incapable of giving or withholding informed consent for mental health treatment due to the symptoms of a diagnosed mental disorder. These symptoms may include:>

<_____>

<_____>

<PSYCHOACTIVE MEDICATIONS>

<If I become incapable of giving or withholding informed consent for mental health treatment, my wishes regarding psychoactive medications are as follows:

<_____ I consent to the administration of the following medications:>

<_____>

<_____ I do not consent to the administration of the following medications:>

<_____>

<_____ I consent to the administration of a federal Food and Drug Administration approved medication that was only approved and in existence after my declaration and that is considered in the same class of psychoactive medications as stated below:>

<_____>
<_____>
<Conditions or limitations:_____>
<_____>
<_____>

<CONVULSIVE TREATMENT>

<If I become incapable of giving or withholding informed consent for mental health treatment, my wishes regarding convulsive treatment are as follows:
<_____ I consent to the administration of convulsive treatment.>
<_____ I do not consent to the administration of convulsive treatment.>
<Conditions or limitations:_____>
<_____>
<_____>

<PREFERENCES FOR EMERGENCY TREATMENT>

<In an emergency, I prefer the following treatment FIRST (circle one) Restraint/Seclusion/Medication.>
<In an emergency, I prefer the following treatment SECOND(circle one) Restraint/Seclusion/Medication.>
<In an emergency, I prefer the following treatment THIRD (circle one) Restraint/Seclusion/Medication.>

<_____ I prefer a male/female to administer restraint, seclusion, and/or medications.>
<Options for treatment prior to use of restraint, seclusion, and/or medications:>
<_____>
<_____>
<Conditions or limitations:_____>
<_____>

<ADDITIONAL PREFERENCES OR INSTRUCTIONS>

<_____>
<_____>
<_____>
<Conditions or limitations:_____>
<_____>
<_____>
<Signature of Principal/Date: _____>

<STATEMENT OF WITNESSES>

<I declare under penalty of perjury that the principal's name has been represented to me by the principal, that the principal signed or acknowledged this declaration in my presence, that I> <believe the principal to be of sound mind, that the principal has affirmed that the principal is aware of the nature of the document and is signing it voluntarily and free from duress, that the> <principal requested that I serve as witness to the principal's execution of this document, and that I am not a provider of health or residential care to the principal, an employee of a provider of> <health or residential care to the principal, an operator of a community health care facility providing care to the principal, or an employee of an operator of a community health care facility

providing care to the principal.>

<I declare that I am not related to the principal by blood, marriage, or adoption and that to the best of my knowledge I am not entitled to and do not have a claim against any part of the estate> <of the principal on the death of the principal under a will or by operation of law.>

<Witness Signature:_____>

<Print Name:_____>

<Date:_____>

<Address:_____>

<Witness Signature:_____>

<Print Name:_____>

<Date:_____>

<Address:_____>

<NOTICE TO PERSON MAKING A DECLARATION>

<FOR MENTAL HEALTH TREATMENT>

<This is an important legal document. It creates a declaration for mental health treatment. Before signing this document, you should know these important facts:>

<This document allows you to make decisions in advance about mental health treatment and specifically three types of mental health treatment: psychoactive medication, convulsive therapy, and emergency mental health treatment. The instructions that you include in this declaration will be followed only if a court believes that you are incapacitated to make treatment decisions.> <Otherwise, you will be considered able to give or withhold consent for the treatments.>

<This document will continue in effect for a period of three years unless you become incapacitated to participate in mental health treatment decisions. If this occurs, the directive will continue in effect until you are no longer incapacitated.>

<You have the right to revoke this document in whole or in part at any time you have not been determined to be incapacitated. YOU MAY NOT REVOKE THIS DECLARATION WHEN YOU ARE CONSIDERED BY A COURT TO BE INCAPACITATED. A revocation is effective when it is communicated to your attending physician or other health care provider.>

<If there is anything in this document that you do not understand, you should ask a lawyer to explain it to you. This declaration is not valid unless it is signed by two qualified witnesses who are personally known to you and who are present when you sign or acknowledge your signature.>