First and foremost, on behalf of our entire Section, thank you to Nicki Applefield, Kara Gansmann, and David Silver for all of their hard work and dedication planning yet another amazing Elder & Special Needs Law Symposium in Pinehurst. On behalf of our entire Section, I sincerely appreciate the significant amount of time that you spent preparing for this program that we all look forward to each February.

At the end of 2017, NC Session Law 2017-153 was signed into law and North Carolina thereby adopted the N.C. Uniform Power of Attorney Act. The Act went officially into effect on Jan. 1, 2018. Back in November, the Elder and Special Needs Law Section partnered with the Estate Planning Section of the NCBA to bring an in-depth CLE on the new act. The program speakers were the primary drafters of the new act, and focused on both the background and practical application of the new act. The live event was so popular that it sold out, but video replays are still available for you via the NCBA website.

This year, our Section has focused its efforts on enhancing its membership experience and encouraging attorneys new to our practice area to get involved. We have had several informal meetups across the state including events in the Charlotte, Wilmington, and Asheville areas that ranged from coffee to breweries. We have several more in the works in the coming months. Keep an eye out for the emails, and let us know where you might like to see or host a meetup in your neck of the woods! (Reminder: Any Section member can plan a meetup. You do not have to be a council member!)

NC ABLE Account Glitch Fixed

By Anthony D. Nicholson

North Carolina ABLE accounts became available in January of 2017. This new tool was much anticipated in the special needs community as a way for people with needs-based public benefits to have more control over their funds and to have a bank account with more than the meager $2,000 limit for SSI and Medicaid. According to the North Carolina Treasurer’s office, about 200 individuals have already opened NC ABLE accounts and are reaping the benefits of more autonomy over their funds. Incidentally, at present the average balance of an NC ABLE account is about $3,000.

Until Governor Cooper signed into law a technical corrections bill on Oct. 8, 2017, a large segment of people with intellectual and developmental disabilities (“IDD”) faced a significant barrier to opening an NC ABLE account. Act of Oct. 5, 2017, N.C. Sess. Laws 2017-212 (technical corrections of 2017). Before going into the specifics of the problem that was fixed, I’ll identify the segment of people affected.

The Common Structure: Guardian of Person and Representative Payee

Anybody working in the special needs community knows that the most common framework for substitute decision-making for adults with IDD is to have a guardian of the person (or limited GOP) combined with a representative payee for SSI/SSDI benefits. Normally, a GOP, whether limited or not, is the choice form of guardianship because it gives parents or other family members the ability to deal with health care decision, living arrangements, job/service placements and other daily living activities. They don’t need guardian of the estate or general guardianship because the person with IDD does not normally have any assets when he or she reaches age 18. What they do frequently have at age 18 is Supplemental Security Income of $735 or some lesser amount. And the parent or other family member can become the representative payee by the Social Security Administration to have control of the SSI funds.

If a person has no assets and their only income is SSI/SSDI, the Clerks of Court don’t require court accounting of SSI since the representative payee must account to the SSA each year for the use of the SSI funds. Of course, the “accounting” to the SSA is little more than a yearly statement by the representative payee that the funds were spent for the benefit of the SSI beneficiary for allowable purposes. The bottom line is that the framework is pretty simple for families with little administrative responsibilities and follow up to any governmental agency. No court oversight for GOP and one yearly form sent to the SSA.

Published by the Elder & Special Needs Law Section of the North Carolina Bar Association • Volume 22, No. 2 • May 2018 • www.ncbar.org
The Problem for Those with the Common Structure

The federal ABLE Act, corresponding proposed regulations and the POMS recognize that some individuals may not be able to establish an account themselves and provided that an account may be established by the individual's parent, guardian or agent under the individual's power of attorney. I.R.C. § 529A (2017), Guidance Under Section 529A: Qualified ABLE Programs, 80 Fed. Reg. 119, 35604 (proposed June 22, 2015) (to be codified at 26 C.F.R. pt. 1, 25, 26, & 301), and Achieving a Better Life Experience (ABLE) Accounts, SA-POMS: SI 01130.740 (2017). But North Carolina’s statute left out the word parent as an individual who could establish such an account and allowed only a guardian or an agent under a power of attorney to create an NC ABLE account. N.C. Gen. Stat. § 147-86.70(b)(1) and N.C. Gen Stat. § 147-86.71(b)(1).

This created a problem for the segment of people identified above. The individual could not create an NC ABLE account since they were determined to be incompetent. The parent, individually, could not open the account. The parent, as guardian of the person, could not create the account since a GOP has no authority to handle financial matters. Therefore, the only solution for parents in this situation was to attempt to open an ABLE account under a different state which has laws corresponding to the federal law. Fortunately, states such as Ohio were able to accommodate them. Incidentally, parents of minor children were able to open an NC ABLE account even before the technical correction because they are deemed the natural “guardian.”

Word travels fast in the special needs community and many families opted to open ABLE accounts out of state (except for Florida which restricts their program to in-state residents only). So you can spread the word that the glitch has been fixed and encourage families to consider the NC ABLE Account. Nevertheless, they may want to shop around and compare ABLE accounts from different states. The ABLE National Resource Center website (ABLEnrc.org) has a host of helpful information for comparing ABLE accounts from different states. This includes a comparison tool where you can compare ABLE programs from three different states side-by-side on 14 different variables such as account fees, investment options and debit card options.

Anthony D. Nicholson focuses his practice on estate and trust planning and administration, as well as the related areas of special needs planning, elder law, taxation law, and business law. Tony is a Board Certified Specialist in Estate Planning and Probate Law by the North Carolina State Board of Legal Specialization, as well as a Certified Elder Law Attorney (CELA) by the National Elder Law Foundation. He is also an Accredited Attorney for Veterans Benefits by the Department of Veterans Affairs.

Practice Tip: Can you “reply all” to a group e-mail, in which opposing counsel has copied his or her client? The North Carolina State Bar adopted the 2012 Formal Ethics Opinion 7 on Oct. 25, 2013. The opinion provides that it is not ethical to “reply all” or copy the represented opposing party when responding to the email unless opposing counsel has consented to the communication. Be mindful of who is included in group e-mails and remove any represented opposing parties unless his or her counsel has provided consent. You may read the full opinion here: https://goo.gl/vvevNu