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!)

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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.

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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/yvevNu
Powers of attorney are the most cost-effective and efficient method for individuals to appoint another individual, or other individuals, to have the ability to make financial and/or healthcare decisions on his behalf. Powers of attorney, in most instances, can alleviate the need for the costlier and time-intensive guardianship (or conservatorship) proceedings, which requires the court's continued and ongoing involvement.

In 2002, a national study of durable powers of attorney was performed by the Uniform Law Commission and exposed the need to address many issues not contemplated in the original Uniform Durable Power of Attorney Act or in many states' statutes regarding powers of attorney. In 2006, the Uniform Law Commission created the Uniform Power of Attorney Act ("UPOAA"), which supersedes the Uniform Durable Power of Attorney act and the Uniform Statutory Form Power of Attorney Act; the UPOAA consists of four articles: 1) Definitions and General Provisions; 2) Authority; 3) Statutory Form; and 4) Miscellaneous Provisions.

Currently, Chapter 32A of the North Carolina General Statutes governs powers of attorney in North Carolina. On July 20, 2017, Governor Cooper signed the bill (Session Law 2017-153) allowing the North Carolina Uniform Power of Attorney Act (the “Act”) to become law effective January 1, 2018; the Act will be located in Chapter 32C of the NC General Statutes. Unlike the current law, the Act presumes that all powers of attorney enacted thereunder are durable unless the document states otherwise. G.S. § 32C-1-104. In addition, with a Power of attorney executed after January 1, 2018, the Act does not require that the power of attorney be registered in the office of the register of deeds unless the transactions concerns the conveyance of real property as provided in G.S. § 47-28.

The Act consists of four articles. The first contains the general provisions that pertain to the creation and use of a power of attorney. While there are mandatory rules in the first article, the majority of the provisions therein are default rules that can be altered by a power of attorney. Article 2 describes the different types of authority that can be granted to an agent, some of which must be expressly stated in the document. Article 3 provides a statutory short form power of attorney, which includes an agent's certification, and a limited power of attorney for real property. Article 4 includes miscellaneous provisions dealing with powers of attorney created before the enactment of the Act and the how the Act relates to other laws.

One major difference between Chapter 32A and the Act is that the Act provides protections for the principal as it relates to the agent, including mandatory and default duties for the agent, liability for agent misconduct, provisions for judicial review of the agent's conduct, and the requirement that the power of attorney has to include express language to grant an agent authority that could substantially reduce, or even eliminate, the principal’s property or modify the principal's estate plan. The Act mandates that the agent 1) "act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest," 2) "act in good faith," and 3) "act only within the scope of authority granted in the power of attorney." G.S. § 32C-1-114(a). Another difference between current law and the Act is that the Act makes a clear distinction between the termination of a power of attorney and the termination of the agent's authority under the power of attorney. Another primary purpose of the Act is to provide broad protections for good faith acceptance and refusals of powers of attorney, consequences for arbitrary refusals of an acknowledged powers of attorney, and recognition of the portability of powers of attorney validly created under other law.

The Act requires that certain powers, which are referred to as "hot powers", must be expressly granted in the power of attorney for the agent to have the authority to act. "Hot powers" include the ability to make a gift, create or change rights of survivorship, create or change a beneficiary designation, delegate authority granted under the power of attorney, waive the principal’s right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan, exercise fiduciary powers that the principal has authority to delegate, renounce or disclaim property, including a power of appointment, and exercise authority over the content of electronic communication sent or received by the principal. G.S. § 32-2-201(a). Prior to requiring that a principal expressly grant these “hot powers” to an agent in the power of attorney, these areas resulted in great deal of abuses of power, and breaches of fiduciary duty, by agents and thus subsequently resulted in substantial litigation.

In Article 2, the provisions concerning general authority are referenced in G.S. §32C-2-204 through G.S. §32C-2-217, including, but not limited to, real estate, tangible personal property, and stocks. A principal can incorporate by reference the general powers described in G.S. §32C-2-204 through G.S. §32C-2-217, which would also give the agent the authority to act as provided in G.S. § 32C-2-203. Additionally, a power of attorney that grants an agent authority to do all acts that a principal could do pursuant to G.S. §32C-2-201(d) also authorizes the agent to act as provided in G.S. § 32C-2-203. Please note the final version of the law that was adopted includes language in Article 2 that references G.S. §32C-2-220; however, the final version of Article 2 of the Act stops at G.S. §32C-2-219, and G.S. §32C-2-220 does not exist.

The Act also deals with the fact that most agents are family members, who are oftentimes presumed to have an inherent conflict of interest because they may be more likely to benefit from actions taken on behalf of the principal. These conflicts of interest do not necessarily prevent an agent from acting competently for the principal’s benefit. However, the Act addresses this dilemma in a default provision which recognizes that an agent who acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has conflicting interests.
Involuntary Commitments in North Carolina
By Marjorie J. Brown

Mary awoke one evening to find her husband Tim standing over her. Diagnosed with Alzheimer’s, Tim was in an agitated, confused and enraged state, and threatened to kill her. Mary ran out of the house and called the police. The police responded and recommended that Mary have her husband committed for evaluation and treatment.

Kevin’s mother lived with him and his wife. Not only did she have a diagnosis of Alzheimer’s, but she was also diagnosed with high blood pressure and diabetes. Kevin could not get her to take any of her medications, and she began to lose weight and decline. She refused to go to the doctor and Kevin became increasingly worried.

Kimberly, 73 years old, diagnosed with dementia and deemed incompetent, fell at home. Home health called 911, and her guardian, who met the EMTs at the house. Although her guardian requested she be transported to the hospital to be examined, Kimberly declined transport. The EMTs informed the guardian that they could not transport her since she declined transport and the guardian would have to go through the magistrate in order to get her transported.

These incidents, or ones that are similar, are occurring with regularity throughout the state. As a result, there is an increased request for assistance with the involuntary commitment process. The process may be initiated by any person who has reason to believe a person is mentally ill and is either a danger to themselves or others. (NCGS 122C-261(a)). When applied to an adult, the definition of mental illness, as per NCGS 122C-3(21), is “an illness which so lessens the capacity of the individual to use self-control, judgment, and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control”.

There are three tracks to initiate the process of involuntary commitment: layperson petitioner affidavit (which most of our clients will utilize), clinician petitioner exam and affidavit, and clinician exam and emergency certificate. The main difference between these are when a person is required to appear directly in front of the magistrate. When a layperson is the petitioner, Form AOC-SP-300 Affidavit and Petition For Involuntary Commitment must be filled out with the facts on which the petitioner’s opinion is based and presented in person to the magistrate; whereas if a clinician fills out the paperwork it may be simply faxed into the magistrate.

If the magistrate finds reasonable grounds to believe the respondent probably meets the criteria for commitment, an order will be issued for custody and transportation. The order will be issued to law enforcement or any other person authorized under 122C-251 to take the respondent into custody for examination. The interesting part is that we all know that this part of the process can be particularly unsettling for an individual with dementia or Alzheimer’s.

The statute allows for custody and transportation to be completed by family or friends if the danger to self or others by respondent is not substantial. (NCGS 122C-251(f)). Regardless of who carries out the custody and transportation order, transportation must occur within 24 hours of the order or a new custody order must be issued (NCGS 122C-261(e)).

Familiarize yourself with N.C General Statutes Chapter 122C as well as the UNC School of Government “The Magistrate’s Role in Involuntary Commitment” and the December 2014 issue Commitment Issues for Law Enforcement and you can effectively aid your clients as they navigate the Involuntary Commitment process.

1. NC General Statutes Chapter 122C Mental Health, Developmental Disabilities, and Substance Abuse Act of 1985

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I first met Tut and Myra Silvey in early May of last year at a Memory Care event. They were in their mid-80s and experiencing many of the same uncertainties and fears as their peers, but their story was a little different. Tut and Myra weren’t there for themselves, planning for their future. Rather they were there for their son Tom who, although 20 years younger, was suffering from dementia and had been for many years. Tom moved in with Tut and Myra, after Tom’s sisters in Tennessee were no longer able to care for him, and they needed help. Tom’s behavior was becoming unmanageable and the likelihood of an out-of-home placement probable. He had burned through robust savings, and he was being chased by the IRS for over $70,000 in back taxes. Tom’s life was spiraling out of control and his parents had no idea where to get help.

I met with Tut and Myra a couple of weeks later and to say they were overwhelmed would be a gross understatement. To the meeting they brought a gamut of emotions—anger, frustration, confusion, hopelessness, fear, debilitating anxiety, and profound sadness for their son. They needed a shoulder to lean (and cry) on, an ear to listen, a heart to care, and a clear head to sort through all the moving pieces falling apart. This meeting—the first of many—accomplished something for the Silveys. It allowed them to begin the process of letting go and giving over all of the baggage and sorrow that comes with caring for an adult child. It allowed them a moment to focus on their son and to begin grieving what they knew was the eventual end to Tom’s story.

I met with the Silveys almost weekly it seemed at first, and while we were able to deal with the easy stuff—getting the IRS to back off, finding Tom a more suitable home, and qualifying him for Medicaid—the job was far from over. Although their tears shifted from being shed in frustration to being shed in sadness for seeing their son slip away, I think the Silveys were relieved to finally have a person who understood, who cared enough to accept their burden, and who gave them the opportunity to be present with their son for so long as he was with them.

Tom passed away right before Christmas after a rapid deterioration and series of hospitalizations, and the seeds of anxiety over how to deal with the nasty letters from the IRS and the stress of settling his estate began to creep back in to Tut and Myra’s minds. We met again, but this time it was only to say, “We’ve got you. There is nothing more you need to do. We’ll handle it from here.” I’ve never felt greater satisfaction as an attorney for a job well done as when the tears shifted yet again to thankfulness and relief.

As elder and special needs attorneys we all have had our own “Tut & Myra” story. It is impossible to do this work and not, but no part of my legal training could have prepared me for the challenges delivered on that first visit. Little did I know but it was some special kids and unique adults I met nearly a decade before that equipped me with the tools necessary to help the Silveys.

Before I was an attorney I had the opportunity to work with some amazing kids and adults throughout Western North Carolina struggling with many of the same challenges, fears, anxieties, and confusion I encountered with the Silveys. I worked for many years with kids in residential treatment struggling with the effects of profound abuse and neglect and trying to figure out how to face the world without the supports so many of us take for granted. Following this time, I worked with adults with intellectual and developmental disabilities, and had the opportunity to collaborate with many amazing community resource providers to help keep these people, often in crisis, out of the hospital and in their homes. Needless to say, I often found myself confronted with people facing unimaginable hardships, trials, and experiences. Finding some semblance of “success” or “accomplishment” in these experiences demanded empathy, not sympathy, and taught me valuable lessons which I have carried with me and served me well so far in my practice.

But this is not a story about me. This is a story about all of us who endeavor to do this work and is intended to be a reminder of a few things we already know but perhaps could stand to remember of from time to time. I learned some invaluable lessons from my time in social services, and it lends me well to remember them every time I walk in a room and see all of the suitcases of emotion my clients have brought with them.

1. Service to others is universally valued.

After spending 15 years in Catholic school and another 2 studying the philosophies and religious traditions of the Far East, I came away with an awareness there is so much more uniting the peoples of the world than dividing us. One such tenet which stuck out so clearly is the universally-valued principal of service to others. Regardless of the purpose (e.g., to gain access to Heaven, to secure reincarnation to a higher plane of existence, to arrive at Enlightenment, to live a meaningful life, etc.) every major theistic (and atheistic) tradition recognizes and upholds a belief that working in the service of others is of paramount importance.

In Christianity, Jesus told the parable of the Good Samaritan and in Islam the Quran instructs followers to spend their time and efforts in the service of others especially those in great need. Buddhism holds out the ideal of the bodhisattva who rejects enlightenment in favor of serving all sentient beings, Judaism commands acts of lovingkindness are essential to the stability of the universe, and Sikhism extols service to others as the purest of action. This value is not isolated to religious traditions, and is upheld in atheistic philosophies as well.

Forgetting for a moment about why service to others is universally valued, and ignoring the bases of this principal, the essential point remains: the practice of law is rooted in the same tradition of service to, and advocacy of, others. A willingness to serve others, regardless of one’s ability to compensate the attorney, seems essential to a successful elder and special needs Law practice. This doesn’t mean one has to be willing to work for free; rather, it simply means one might consider taking a service-oriented approach when meeting a client for the first time or setting out a plan to assist them in achieving their goals. In the social service world more was gained when one approached a person or family with a willingness to serve rather than the audacity to instruct. I found the same to be true in my work with the Silveys and I would simply suggest perhaps greater success can be found when one aims to serve rather than demand.
2. Human beings are infinitely complex. You must always strive to see the whole person.

In the mid-2000s, mental health in North Carolina was all abuzz about an approach to serving youth called "Person-Centered Planning." This was a treatment intervention strategy focusing on a person's vision for their own future, and a way to get the person (child or adult), no matter their age, to take ownership of the vision and the efforts to execute the plan. The process was somewhat simple: the person would identify their hopes, dreams, desires, and goals, and along with their support team (e.g., family, therapists, doctors, etc.) would develop strategies to reach those goals. Even if the goal was totally unrealistic or unattainable, the process required investment by the person and allowed for self-realization along the way. More importantly it forced the treatment and care providers to keep their own opinions, values, and projections in check. It is easy to tell someone what they ought to do, it is entirely different to walk with and support them along their own path.

Person-centered planning recognizes the infinitely complex nature of human beings. It removed any option of cookie cutter plans and it forced us as caregivers to see people as holistic individuals each with a unique set of needs, values, dreams, and plans for the future. Person-centered planning also forced service providers to see beyond the walls of their own silos, collaborate with each other in an effort to support the youth and their vision, and accept they were not able to act alone but rather had to be a part of something much larger.

The practice of elder and special needs law is, or should be, Person-centered planning at its core. You meet a person for the first time and she is carrying with her all of the anxieties, uncertainties, and fears accompanying her new life. Yet at the time same time she has a vision and goal for how she intends to live her best life. Sitting in your office she is not simply a set of legal issues waiting to be deciphered, analyzed, resolved, and tied up in a neat package. Rather she is a complex, holistic creature with a set of goals and plans for her future which could include any number of legal, medical, and psychosocial factors. Focusing on just one ignores the complexities of life. Perhaps instead of finding comfort and security in the legal silos we often have built for ourselves, the elder and special needs law practitioner should aim to peer above the silo wall and see their client in all of their complexities and intricacies, identifying all of the resources and supports a person may need, and not know it yet, to achieve their own person-centered plan.

3. Preventing Burnout requires careful self-awareness.

According to the American Institute of Stress, “burnout” is understood as a “cumulative process marked by emotional exhaustion and withdraw associated with increased workload and institutional stress.” It is the gradual evolution of one’s attitudes towards their work, and the people they serve, from enthusiasm to apathy. It is destructive and can have a profound and permanent impact if you are not careful and self-aware. As a social service professional, it is almost easier to recognize the risk factors leading to burnout. The work requires a constant interaction with people who have experienced unimaginable trauma from abuse and neglect. The persistent onslaught of these stories requires one to ride the fence of apathy, but at the end of the day the most successful approach necessitates putting emotions and enthusiasm into “mental boxes.” This allows you to leave work where it belongs and keep some balance in your life.

While the typical elder or special needs law case may not be as traumatic per se, the stories and stressors our clients bring can still have a profound negative impact over time. Hearing similar stories of advanced cognitive loss, physical deterioration, and death of loved ones and friends can easily cause one to become desensitized, bordering on apathy. Without constant self-awareness and self-analysis, it is easy to see how one evolves towards burnout, becomes mentally and physically exhausted, and loses the enthusiasm and zealouness which led us to do this work and which every client deserves.

The answer is easy: Balance is essential. The challenge is knowing there is even a problem. Although awareness demands constant self-reflection, I would posit having honest, open, and trusting relationships and connections with others both inside and outside the field is more important. It is critical to have objective feedback from those who know you best and who you can trust to point out when burnout is approaching. Unlike social service where people most often work on teams, the practice of law can be isolating, even lonely, at times necessitating greater effort to reach out, engage with your peers and friends, and maintain a positive balance in favor of personal well-being.

I think fondly on my time as a social worker, but it was not until I started meeting with people like Tut and Myra I realized just how crucial the experience was to my practice. While I am not sure there is anything particularly profound or novel about the lessons I have carried with me, I think we all do well to remember from time to time why it is we do this work and how we can all continue to do it better.

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SAVE THE DATE
2018 Basics of Elder & Special Needs Law CLE
Oct. 12, 2018 | NC Bar Center, Cary
As elder law attorneys, we have probably become accustomed to the hypothetical elder law queries from friends at cocktail parties or the “easy” questions from family members about Medicaid. While we may generally shrug off these questions as solicitations for free legal advice, there is actually a hard-felt need for our pro bono services in North Carolina. Consider these statistics from a 2016 Impact Report from the North Carolina Equal Access to Justice Commission:

- 80 percent of all civil legal needs of the poor go unmet each year. This includes legal representation for domestic violence, divorce, child custody, housing, consumer protection, employment, and health benefits.
- There is only one legal aid attorney for every 11,000 North Carolinians eligible for legal services. Conversely, there is one private lawyer for every 362 North Carolina residents.
- In 2016, over 2.2 million North Carolina residents were eligible for legal aid services.

If these statistics are not incentive enough to lessen this divide, there are additional reasons to devote your time and legal expertise to fellow North Carolinians in need.

North Carolina’s Rule of Professional Conduct 6.1 encourages each attorney licensed in North Carolina to devote 50 hours each year to pro bono legal services, legal services at a substantially reduced fee, or activities that improve the law, legal system, or legal profession. These services can be provided to individuals of limited means or even some organizations.

You can log these service hours at ncprobono.org/volunteer/reporting by providing basic information about your time and services rendered. Attorneys who report more than 50 hours of pro bono legal service in one year receive additional recognition from the Supreme Court of North Carolina and become members of the N.C. Pro Bono Honor Society.

If you practice in a particular geographic area, contact that local legal aid office directly about pro bono opportunities. You can also find pro bono opportunities online through the North Carolina Pro Bono Resource Center at ncprobono.org, where you can search by geography, areas of law, population served, and any available support such as malpractice insurance or mentorship opportunities. Alternatively, you can select from your own client-base and offer your services at a reduced rate to a client in need. This last option is palatable to many elder law attorneys who are loathe to leave the comfort of their own substantive practice area.

As elder law attorneys, we know first-hand the urgent calls for help from institutionalized seniors who have only $2,000 in their name and have been denied for Medicaid. Be a force of change for the elder population that we serve and start reaping the rewards of pro bono work.

Kara Gansmann devotes her entire practice to elder law and estate planning in the Wilmington office of Cranfill Sumner & Hartzog LLP (CSH Law). In private consultations, Kara counsels individuals and families on tactics for estate planning, asset protection, and long-term care planning. Kara drafts wills, powers of attorney, and trusts, including pet trusts and special needs trusts. Kara also advises clients on eligibility and applications for Medicaid, Special Assistance, and certain Veterans’ Benefits.

We’re moving to NCBarBlog!

Elder & Special Needs Law is the latest of 30 NCBA Sections and Divisions to make the switch to NCBarBlog.com. Stay tuned for more info later this summer.