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