By Rebecca L. Smitherman

I really meant to dress up for Halloween this year. I always intend to have an exciting and clever costume, and I usually end up finding something that doubles as pajamas and makes my work day interesting. One year I was a dragon (in one-piece dragon pajamas), and one year I was Chewbacca (in one-piece Chewbacca pajamas). This year it just didn’t happen. It seems like things are speeding up. I am aware that my inability to pull together a Halloween costume is not the end of the world, but it’s a good reminder to slow down and take stock of where we are.

Our Section has been very busy over the last few months: The chair of our pro bono committee, Brooks Jaffa, has been heavily involved in coordinating legal relief efforts to North Carolinians hurt by the hurricanes this fall. There is a great need for legal help with hurricane relief. The relief effort comes in waves, as claims are filed and considered. If you can help, please sign up with Disaster Legal Services on the NCBA website. Brooks is also looking at refreshing the Hospice pro bono program.

Our Section continues to produce top notch CLE programs, including the fiduciary litigation CLE that will introduce the Fiduciary Litigation Manual. I want to thank the members of our Section who contributed to the manual. Our Fiduciary Litigation Committee is the newest standing committee of our Section, and it has really flourished through the hard work of its members. I remember Jim Hickmon presenting the idea of a standing fiduciary litigation CLE program.

The Life of a Lawsuit After the Death of a Party

By Brooks F. Jaffa

Ultimately, death stops for nothing. This includes lawyers and litigation. When a party to an ongoing lawsuit passes away, confusion about how to proceed and who to proceed against may follow. After death intervenes, however, these issues must be addressed.

At the moment of death the deceased party as a person loses not only the ability to continue prosecuting or defending the action against himself or herself individually, but also his or her authority and standing to do so. See Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp., 175 N.C. App. 474, 482, 624 S.E.2d 380, 386 (2006) (citing Pierce v. Johnson, 154 N.C. App. 34, 40, 571 S.E.2d 661, 665 (2002)). Under North Carolina law, the authority of the deceased party to pursue or defend a claim by or against the party in his or her individual capacity passes to the personal representative or collector of his or her estate (collectively, the “PR”), if the claim itself survives the death of the party. N.C.G.S. § 28A-18-1. Accordingly, the PR must be substituted as the party in the action in order for the lawsuit to continue.

Rule 25(a) of both the North Carolina Rules of Civil Procedure (the “North Carolina Rule”) and the Federal Rules of Civil Procedure (the “Federal Rule”) (collectively, the “Rules”) sets forth the procedure for substituting the PR for the deceased party if the claim may proceed post mortem. While the basic framework of the Rules is similar, some significant procedural differences exist between the North Carolina Rule and the Federal Rule. Despite these disparities, the result the North Carolina Rule and the Federal Rule seek to achieve is the same: the efficient substitution of the PR for the deceased party as the party to the lawsuit, thereby permitting the litigation to proceed with minimal delay.

This article discusses how Rule 25(a) operates under both the North Carolina Rules of Civil Procedure and the Federal Rules of Civil Procedure. As there are some slight variations in how the Federal Rule operates in each of federal judicial circuits, emphasis will be placed on how the Federal Rule operates in the Fourth Circuit and, more specifically, in the United States District Courts in North Carolina.

Before delving into the Rules, it is first necessary to review them. The North Carolina Rule provides:

(a) Death – No action abates by reason of the death of the party if the cause of action survives. In such case, the court, on motion at any time within the time specified for the

Continued on page 2

Continued on page 3
The Chair’s Comments, continued from the front page

committee to our Section Council, and I am glad that it has been successful and provided so much value to our members.

We offer scholarship opportunities to members for our CLE programs. The Section gives preference in granting scholarships to active members of the NCBA, with attention to those who have served in leadership roles in the NCBA or a local bar association, current members of our Section, and active participants in pro bono matters. The Scholarship Committee also considers the size of the firm that the applicant practices in and letters of recommendation from Section members (but letters of recommendation are not required). Andi Bradford, our Communities Manager with the NCBA, has scholarship information. Her email is abradford@ncbar.org. Our CLE programs are, I think, the very best in the state, and we owe that to our CLE Committee. It is a good thing that our Section can provide scholarships to help our members attend our programs.

The election season is over (and I’m glad that the election ad season is over!), but our legislative efforts are in high season. Our Section has presented seven proposals for approval to the NCBA’s Legislative Advisory Committee, including a revision to North Carolina’s joint tenancy statute, codification of North Carolina’s law of tenancy by the entireties, a clarification to the law regarding the modification of trusts to remove and replace trustees, a revision to the rule that in order to claim a year’s allowance a surviving spouse must be a resident of our State, an amendment to the guardianship statute to bring it in line with the Uniform Guardianship Jurisdiction Act, and an amendment to Chapter 28A with regard to the satisfaction of encumbrances.

The NCBA is making changes to how it advocates at the General Assembly and how it manages legislative efforts, and we are very hopeful that those changes will lead to success with our proposals, which are intended to improve North Carolina’s law for the benefit of its citizens. Our Legislative Committee, helmed by Janice Davies, has made great strides in working within the rules provided by the NCBA. We hope that with attention and diligence from the NCBA, along with our hard work, our proposals will become law. The NCBA’s legislative efficacy as it relates to our proposals is an ongoing conversation with NCBA leadership.

I am honored to be the chair of our Section. When I attend larger meetings, like the NCBA Board of Governors meeting in October, our Section is held up as an example of an active and involved Section. Our committees and the work that they do is the life blood of our Section, and I encourage Section members to become actively involved in a committee – it will lead to some interesting places.

And now that we’ve slowed down to recognize the things we’ve done, let’s speed back up and do some more. Happy Fall!