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Family Law

## Support Awards for Adult Disabled Children in Illinois

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As social-service resources grow more scarce, parents will increasingly be called on to support disabled children past the age of majority. This article looks at the factors that affect support awards under 750 ILCS 5/513 and discusses national trends.

Parental support for disabled children past majority is a moral duty, but is it a legal one? Many states have established divorce statutes that obligate parents with the means to do so to provide for their disabled children well past the age of majority.

Yet this has always been an issue of split opinion in the United States. The opposition reasons that society is responsible for supporting the adult disabled members of our population instead.<sup>1</sup>

This article looks at the statutory factors Illinois courts consider when deciding whether to award support to adult disabled children and reviews selected decisions from other states.

### **Supporting disabled adults: low marks for Illinois**

Indisputably, the weak economy is hurting public programs that serve the disabled adult population. While the need for financial support for disabled adults is increasing, funds are less available. For example, in 1985 2.2 percent of American adults ages 25-64 received disability insurance through the Social Security Administration, a percentage that grew to 4.1 percent in 2005 and is predicted to continue to grow with no foreseeable increase in funding.<sup>2</sup> This could result in strict screening for SSI applicants that could deny much-needed support to disabled adults.

In Illinois the crisis is especially severe. Illinois has historically received low marks for how it cares for disabled individuals. Within the last five years, the National Mental Health Association (NAMI) has ranked Illinois 51st in the United States<sup>3</sup> and United Cerebral Palsy (UCP) has placed Illinois 48th in the country in serving those with developmental disabilities.<sup>4</sup> As for housing adults with developmental disabilities, Illinois ranks last nationally in the availability of residential settings with six persons or fewer.<sup>5</sup>

This means Illinois families must rely even more on personal resources for expensive private services, while more and more Illinoisans are unemployed (state employment rates are in the bottom half nationally).<sup>6</sup>

### **Most states require parental support**

With no foreseeable change likely in the quality or availability of public support services for disabled adults in Illinois, how will existing disability and divorce law be applied to meet the needs of this aging population? As litigation in this area increases, what test will the courts apply to achieve consistency?

Nationally, on the question of parental support for post-majority age children, states remain split along public policy lines. A handful of states do not mandate that parents support their adult disabled children as part of a dissolution agreement or otherwise. In New York, for example, courts have consistently upheld that the financial burden for adults with disabilities belongs to the state.<sup>7</sup>

However, most states have followed the common law that developed in accordance with the Poor Law Act statutes that were generally in place at the end of the 19th century. These statutes allowed for the support of disabled children with special needs, except when parents were unable to provide any such support.<sup>8</sup> Divorce statutes in the majority of states adopted this perspective in favor of parental responsibility.

### **Illinois gives courts equitable power to order support**

In Illinois, the common law rule is that parents are not obligated to support their adult children.<sup>9</sup> However, The Illinois Marriage and Dissolution of Marriage Act at 750 ILCS 5/513 gives the court powers of equity to provide support past majority in cases of need due to a child's disability or post-secondary education.

According to section 513(a)(1), "When the child is mentally or physically disabled and not otherwise emancipated, an application for support may be made before or after the child has attained majority."<sup>10</sup> Although not specified in the statute, Illinois case law consistently supports the majority view that the disability must begin before the child reaches age 18.<sup>11</sup>

A child's disability must be specified in a dissolution order and accompanied by a provision allowing for modification after the child reaches majority. Illinois courts then consider the factors identified in the statute to determine an appropriate amount for continuing support. Section 513(b) provides as follows:

In making awards under paragraph (1) or (2) of subsection (a), or pursuant to a petition or motion to decrease, modify, or terminate any such award, the court shall consider all relevant factors that appear reasonable and necessary, including:

- (1) The financial resources of both parents.
- (2) The standard of living the child would have enjoyed had the marriage not been dissolved.
- (3) The financial resources of the child.
- (4) The child's academic performance.<sup>12</sup>

Parents are not liable if they can prove they cannot support the child.<sup>13</sup> Note, however, that Illinois courts have ruled that third-party income can be considered as a financial resource when calculating child support.<sup>14</sup>

## **The effect of a disabled child's income**

Although the financial resources of parents are central to calculating post-majority support for adult disabled children, the financial resources of the child are also a factor. Because adults with disabilities are often unable to work, their financial resources are usually minimal and do not figure as prominently in support calculations as do the financial resources of the parents. But they are part of the calculus.

There is no definitive rule in Illinois that dictates how child support will be determined for a disabled adult child. Therefore, courts have discretion to apply the child support guidelines outlined in section 505 of the Illinois Marriage and Dissolution of Marriage Act or, alternatively, to apply a needs-based analysis to individual cases.<sup>15</sup> There is no indication that Illinois would buck the national trend in favor of awarding support to disabled adult children.

Also, courts that follow that trend would not allow supplemental benefits from the government to offset standard support calculations. Additional benefits, such as Social Security and Medicaid, would still be awarded independently of judicially determined post-majority parental support.

## **What does "emancipation" mean?**

Although the meaning of section 513(a)(1) appears transparent, two factors inherent in the statute, emancipation and employment, remain open to inconsistent interpretation. In Illinois, the age of emancipation is 18. Legal emancipation occurs when one is not only permitted to live apart from parents but has the intent to do so.<sup>16</sup> A look at rulings in other states is instructive.

The intent to be self-sufficient is typically manifested by marrying, moving out, and taking employment, among other things. Emancipation cannot be presumed, but must be established by evidence.<sup>17</sup> As long as a child is still under the care, custody, and control of his parents he or she is not emancipated.<sup>18</sup>

Courts look to the law to determine the criteria for emancipation, and they look to the facts to determine if it has taken place.<sup>19</sup> For example, adult children who reach the legal age of majority and live away from home are not necessarily emancipated. If a parent enables independent living by providing a high level of financial support, there is no emancipation.<sup>20</sup>

Presumed emancipation is particularly unsuited to cases involving disabled children. The legal age of majority is an artificial benchmark for most.<sup>21</sup> Disabled children who reach majority do not suddenly become self-sufficient. Some may be legally able to marry or live away from home but still require substantial parental support.<sup>22</sup>

## **Disabled-but-employable = ineligible for support**

Emancipation is an implied element of 513(a)(1) in the same way that employability is also inferred by the wording of the statute. Case law suggests that, in Illinois, the term "disability" is most frequently interpreted to mean "the inability to pursue an occupation or perform services for wages because of physical or mental impairment."<sup>23</sup> In addition to the ability to work, many courts in other states also consider whether employment is available to a disabled person at a supporting wage.<sup>24</sup>

Although courts differ from state to state concerning relevant and convincing evidence as proof of (un) employability, the majority of states apply a reasonableness standard<sup>25</sup> and place the burden of proof on the person claiming the disability.<sup>26</sup> In Illinois, courts have ruled accordingly. Without proof that the disabled adult child is incapable of or ineligible for employment, a court will not order parental support.<sup>27</sup> In the absence of clear evidence, such as expert testimony regarding diagnosis or work experience, courts will abuse their judicial discretion if they approve an application for support.<sup>28</sup>

## Constitutional challenges

Illinois will struggle with the same issues related to post-majority support for adult disabled children that challenge the nation as a whole. Alternative approaches bypassing dissolution statutes altogether, like those in Florida that encourage disabled adults to file individually for support,<sup>29</sup> raise problems of their own. Such approaches create an extra procedural complication for disabled adults and delay much-needed support.<sup>30</sup> Additionally, requiring 10 million disabled adults across the country to sue their parents to receive support is not a reasonable solution.<sup>31</sup>

Furthermore, statutes such as 513 continue to face constitutional challenges in various states. If a married parent has no legal obligation to support a disabled adult child, can a divorced parent constitutionally be ordered to provide support?<sup>32</sup> In the Pennsylvania case *Curtis v. Kline*, post-majority support was ruled unconstitutional because it violated the Equal Protection Clause<sup>33</sup> by treating similarly situated children unequally.<sup>34</sup> The distinction between children of divorced parents and children of married parents was found to be inequitable.<sup>35</sup>

However, South Carolina's law withstood constitutional challenge when a court found no equal protection violation because the statute treated divorced parents like all other parents.<sup>36</sup>

In 1978, the Illinois Supreme Court reversed the judgment of a trial court that declared section 513 unconstitutional.<sup>37</sup> The supreme court said the imposition of a support obligation on divorced parents, such as the one created by section 513, is constitutional because it is "reasonably related to a legitimate legislative purpose."<sup>38</sup>

However, a recent decision illustrates that the constitutionality issue continues to concern at least one member of the Illinois Supreme Court. In *Clark v. Children's Memorial Hospital*, Justice Freeman wrote in dissent that "if divorced parents may be required to provide support which married parents have no obligation to provide, this presents serious, potential constitutional questions concerning both equal protection and due process."<sup>39</sup>

Regardless of this larger legal issue, Justice Freeman's dissent includes the following observation about the disabled child in question: "Timothy will never become emancipated; he will never be able to care for himself...It is beyond question that Timothy's condition will not improve once he achieves the age of majority."<sup>40</sup> This gives hope to those who think section 513's minority/majority age analysis overlooks the fact that nothing changes in a disabled condition at the age of majority.<sup>41</sup> Supporters of this view feel that "[t]he arbitrary age chosen for the age of majority should not override...policy" and that "inconsistency and inequity" will follow.<sup>42</sup>

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6. United States Bureau of Labor Statistics, *Unemployment Rate, Illinois* (June 2011) (available at <http://www.google.com/publicdata>).
7. *See Beiter v. Beiter*, **539 N.Y.S.2d 271**, 273 (N.Y. Sup. 1989).
8. Kathleen Roseborough & Michelle M. Hughes, *Support for Disabled Children Past Majority*, 78 Ill. B. J. 138 (March 1990).
9. *See Clark v. Children's Memorial Hospital*, 2011 IL 108656, ¶ 33, WL 1733532 at \*6, **955 N.E.2d 1065**, 1074 (Ill. 2011).
10. 750 ILCS 5/513(a)(1) (2008).
11. *See In re Marriage of Lerner*, **316 Ill.App.3d 1072**, 1074, **738 N.E.2d 183**, 185 (1st Dist. 2000) (citing the trial court's finding that "[i]f the court had found that Andrew had become disabled after he became an adult, the circuit court could not have ordered Robert to pay support for Andrew pursuant to section 513"); *see also In re Marriage of Reich*, **208 Ill.App.3d 301**, 309, **566 N.E.2d 826**, 830 (4th Dist. 1991) (finding that "any court-ordered child support for Robert is reversible error" because he was emancipated at the time of his accident).
12. 750 ILCS 5/513(b)(1)-(4) (2008) (including the fourth factor, academic performance, which is considered when determining post-majority educational support).
13. Noralyn O. Harlow, *Postmajority Disability as Reviving Parental Duty to Support Child*, 48 A.L.R. 4th 919, § 4[c] (1986).
14. *In re Marriage of Drysch*, **314 Ill.App.3d 640**, 645, **732 N.E.2d 125**, 130 (2d Dist. 2000).
15. Marc. K. Schwartz, *Problems and Solutions for Guardians of Disabled Adults in Addressing Court Support and Visitation Orders*, 18:1 The Docket: Journal of the Lake County Bar Association 11, 13 (January 2011).

16. Laura W. Morgan, *What Constitutes Emancipation to Release a Parent from a Child Support Obligation*, 12 No. 1 Divorce Litig. 1 (2000).
  17. *See Free v. Free*, **581 N.E.2d 996**, 997 (Ind.App. 1991) (citing *Caddo v. Caddo*, **468 N.E.2d 593**, 594 (Ind.App. 1984)).
  18. *See Liddy v. Liddy*, **881 N.E.2d 62**, 67-69 (Ind.App. 2008).
  19. *Id.* at 66-68.
  20. *Id.* at 68.
  21. Jeffrey W. Childers, *Hendricks v. Sanks: One Small Step for the Continued Parental Support of Disabled Children Beyond the Age of Majority in North Carolina*, 80 N.C.L. Rev. 2094, 2102 (2002).
  22. *See Liddy*, 881 N.E.2d at 68.
  23. *See In re Marriage of Winters*, **512 N.E.2d 1371**, 1375 (Ill.App. 1987).
  24. *See Hanson v. Hanson*, **625 A.2d 1212**, 1214 (Pa. Super. 1993).
  25. *See In the Interest of M.W.T.*, **12 S.W.3d 598**, 605 (Tex.App. 2000).
  26. *See Free*, 581 N.E.2d at 997.
  27. *See Rosche v. Rosche*, **516 N.E.2d 1001**, 1005 (Ill.App. 1987).
  28. *See In re Marriage of Thurmond*, **306 Ill.App.3d 828**, 833, **715 N.E.2d 814**, 818 (2d Dist. 1999).
  29. *See Brown v. Brown*, **714 So.2d 475**, 477 (Fla. Dist. App. 1998).
  30. *See Taylor v. Bonsall*, **875 So.2d 705**, 712 (Fla. Dist. App. 2004) (Torpy, J., dissenting).
  31. Sande L. Buhai, *Parental Support of Adult Children with Disabilities*, 91 Minn. L. Rev. 710, 767 (2007).
  32. *See Riggs v. Riggs*, **578 S.E.2d 3**, 6 (S.C. 2003) (summarizing appellant's argument that continued parental support legislation is unconstitutional).
  33. *See Curtis v. Kline*, **666 A.2d 265**, 270 (Pa. 1995) (denying mandated, post-majority parental support for continuing education).
  34. *Id.*
  35. *Id.*
  36. *See Riggs*, 578 S.E.2d at 6.
  37. *See Kujawinski v. Kujawinski*, **71 Ill.2d 563**, 581, **376 N.E.2d 1382**, 1391 (1978) (holding that postmajority support as ordered for educational expenses is not unconstitutional).
  38. *Id.* at 580, 376 N.E.2d at 1390.
  39. *See Clark* at ¶148, 955 N.E.2d at 1096 (Freeman, J., dissenting).
  40. *Id.* at ¶137, 955 N.E.2d at 1092-93.
  41. *Id.* at ¶141, 955 N.E.2d at 1094.
  42. *See Sininger v. Sininger*, **479 A.2d 1354**, 1361 (Md. 1984).
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