

Problems and Solutions for Guardians of Disabled Adults in Addressing Family Court Support and Visitation Orders

All practicing family law attorneys are familiar with 750 ILCS 5/513, the provision of the Illinois Marriage and Dissolution of Marriage Act (IMDMA) addressing non-minor children. Section 513(a)(2) arises in almost every case involving children as it relates to the payment of education for a non-minor child. Most commonly, this provision addresses the expense of a college education. However, section 513(a)(2) also addresses professional



By
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education or other training after graduation from high school, as well as any period during which a child of the parties is still attending high school even though the child has attained the age of nineteen.

Not commonly addressed, but equally as important as section 513(a)(2), is section (a)(1) which states as follows:

513(a)(1):

The Court may award sums of money out of the property and income of either or both parents or the Estate of a deceased parent, as equity may require, for the support of the child or children of the parties who have attained majority in the following instances:

(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.

How does one define "disabled" for the purposes of section 513? "Disabled" for purposes of section 513 is not necessarily the same as "disabled" for purposes of the Pro-

bate Act, and it is not a prerequisite that the child first be declared disabled in a Probate Court proceeding. *In re Marriage of Lerner*, 316 Ill. App. 3d 1072 250 Ill. Dec. 219 730 N.E.2d 183 (1st Dist. 2000). Section 513(a)(1) further provides that application for support can be made before or after a child's majority. Therefore, practitioners should be aware that when there is a child who is determined to be disabled support is available beyond the child's minority.

750 ILCS 5/513 utilizes the term "non-minor children." Case law also utilizes this term, as well as the term "adult disabled child". It is important to note that both monikers are interchangeable and both refer to a child who is entitled to receive financial support pursuant to section 513 of the IMDMA. For purposes of clarity, I will refer to these children as "adult disabled children."

When an adult disabled child is unable to care for himself or herself without assistance, the court oftentimes appoints a guardian. A guardian makes medical, personal, and financial decisions for the adult disabled child. Guardians may have the responsibility of caring for the individual on a day to day basis or for managing the financial needs of the adult disabled child, or both. The guardian is not necessarily the parent of the adult disabled child. The obligation for support of an adult disabled child may continue beyond the child's minority and the guardian would have responsibility for managing the child's funds.

Adult disabled children may be eligible for Supplemental Security Income (SSI). This is a program administered by the federal government that pays monthly benefits to adult disabled children. SSI provides money for basic needs such as food, clothing, and shelter. When determining if an individual is "disabled" for SSI purposes, the Social Security Administration looks to see if the individual's income and resources are within SSI limits, and also looks to all documents and evidence pertaining to the disability of the individual. To determine SSI benefits a "needs tested" analysis is utilized. The

"needs tested" analysis is a complex analysis performed by the government when establishing SSI and Medicaid payments.

Attorneys must exercise extreme caution when representing a family with an adult disabled child, as the benefits provided by SSI, Medicaid, or Medicare are at risk unless the order of court providing for support is drafted in a specific fashion and the support payment is paid to a special needs trust.

It should be noted that there are two forms of special needs trusts. The OBRA pay-back trust is the form of special needs trust required to ensure child support supplements, and does not supplant the additional benefits provided by the government. The other form of trust, an Irrevocable Discretionary Special Needs Trust, is utilized solely for the purpose of gifts and inheritances. It is error to allow a support payment to be made for the benefit of an adult disabled child receiving SSI benefits unless the payment is made directly to the OBRA trust. Special care should be taken when a withholding order is entered so that the trust, and not the guardian, is the

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recipient of the support payment.

If the court order addresses more than one child, it must separately state the portion of support that is to be paid for the benefit of the child who has a mental or physical disability. Further, the court order *must* require that all such payments of support be paid directly to the established OBRA trust, containing "pay back" provisions, for that child's *sole* benefit. The language must be in accord with 760 ILCS 5/15.1, to be administered and subject to the express limitations, requirements, and provisions of such trust. This is necessary so that support payments supplement, and do not supplant, government benefits available to the child.

It is unquestioned that being a parent of an adult disabled child is difficult, but being a divorced parent of a disabled adult child may present even more obstacles. Parents must determine who will be the child's guardian. Guardianship petitions are heard in the Probate Division. The Probate Division, amongst other things, addresses the issue of visitation. There is an obligation to allow the non-custodial parent a reasonable amount of visitation unless it

would seriously endanger the disabled child's physical, mental, moral or emotional health. The issue of visitation arises more often than one would anticipate, as it is not uncommon for visitation of a disabled child to be governed by a Joint Parenting Agreement in the Family Law Division; yet when the child reaches majority the issue of visitation needs to be addressed once again. Does the Family Law Division retain jurisdiction or is the visitation issue one to be addressed in the Probate Division? *In re Marriage of Casorotto*, 316 Ill. App. 3rd. 567 736 N.E.2d 1169, 1172 (1st Dist. 2000), holds that the issue of visitation for an adult disabled child falls within the purview of the Probate Division and not the Family Law Division, notwithstanding an underlying Joint Parenting Agreement that addressed the visitation issues when the child was a minor.

Although visitation and guardianship issues are heard in the Probate Division and governed by the Probate Act, child support issues for disabled adult children are heard in the Family Law Division and are governed by the IMDMA. *In re the Marriage of Strom*, 13 Ill. App. 2d 354, 142 N.E.2d 172 (1st Dist. 1957). Mary Elizabeth Strom pe-

tioned the Court in the Family Law Division for an increase in child support and reimbursement for expenses incurred after the entry of her divorce from her ex-husband, even though her child had attained majority. The child suffered from an illness that left her incapacitated, and the Appellate Court held that the Family Law Division had jurisdiction to order the non-custodial parent to provide for the financial care and education of his disabled child beyond the period of her minority. Although *Strom* had significant relevance in determining a parent's responsibility for a disabled adult child, the case was decided before section 513 of the IMDMA was enacted, and therefore did not address *all* of the concerns regarding support for disabled adult children.

After section 513 of the IMDMA was enacted, an appellate court decision held that "section 513 of the Act codifies previous Illinois common law recognizing that the trial court may also order the parent to pay child support after the child attains majority years when the child is mentally or physically disabled." *In Re the Marriage of Kennedy*, 170 Ill. App. 3d 726, 525 N.E.2d 168. In *Kennedy*, the parties had one son,

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Darin, who attended the Children Center for Behavioral Development, a school designed for emotionally disturbed, behaviorally disordered and learning disabled children. The appellate court reversed the trial court's decision and held that Darin's learning disabilities were severe enough to categorize him as mentally disabled under section 513 of the IMDMA. The appellate court also held that because Darin was mentally disabled, the respondent obligor was responsible under section 513 of the IMDMA to continue payments of child support to petitioner after Darin reached majority age. *Kennedy, supra.*

A recent Illinois decision defined support as "simply a general term that can include educational expenses for a child who has turned eighteen (18), but is still in high school, and 'educational expenses' may include room and board, just as the more generic term, support, may include shelter and food." *In re the Marriage of Petersen*, 932 N.E.2d 1184 (2010). The court in *Petersen* found that because support for non-minor children and educational expenses were considered child support under section 510, it was also modifiable under section 502(f). Section 502(f) deals with the

modification of marital settlement agreements. The terms of a marital settlement agreement that provide for support, custody and visitation of children are always modifiable. Because the court in *Petersen* found educational expenses to be considered child support, it stands to reason that child support for adult disabled children is also modifiable utilizing the same standards.

Digesting all of the above, and providing for a rule of thumb, the financial issues of support for an adult disabled child should be heard in the Family Law Division. The provisions of the IMDMA govern and are applicable regardless of the age of the child so long as it is determined that the child is disabled pursuant to the provisions of section 513 of the IMDMA. The issues of visitation for an adult disabled child are to be heard in the Probate Division and, although the Court may utilize the IMDMA as a guidepost, the provisions of the Probate Act govern visitation issues. Additional concerns to be addressed in this area are as follows:

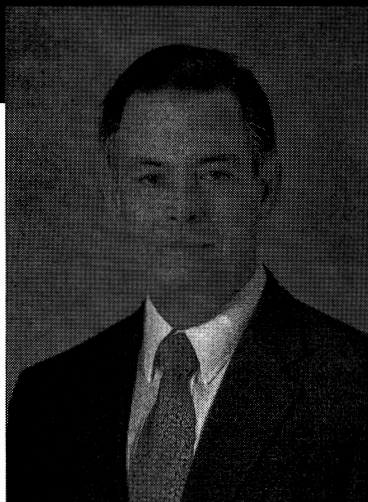
- The IMDMA clearly sets forth statutory guidelines for the payment of child support. They can be found in

section 505 of the IMDMA. In determining a child support payment for an adult disabled child, do these guidelines apply? There is no definitive Illinois case that dictates how child support will be determined for a disabled adult child. Since the cases tend to provide that the IMDMA governs the issue of child support for an adult disabled child, it stands to reason that the statutory provisions of section 505 apply. However, it has been my experience that many courts will apply a "needs based" analysis rather than a strict statutory analysis. It would seem that each case is fact specific.

- Does the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (750 ILCS 36/101 et seq), govern a modification of child support when parties reside in different states? No. Look instead to the Uniform Interstate Family Support Act (UIFSA) (750 ILCS 22/100 et seq.) which governs this issue. Therefore, if the child and custodial parent reside in a different state than the obligor, one should look to UIFSA to determine the jurisdiction for a modification of child support or even

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an initial claim for child support for an adult disabled child. Although there was some controversy over the proper jurisdiction under this scenario in the *Petersen* case, the holding of that case supports the fact that child support is governed by UIFSA regardless of the age of the child.

It is somewhat paradoxical that the UIFSA will apply such that jurisdiction is in the state of the obligor rather than the state in which the child and guardian reside. However, the policy argument is that courts do not want to

discourage out of state parents from pursuing their rights.

- Can support for a disabled adult child continue for an indefinite period? The case law is very clear that support for a disabled adult child may continue for an indefinite period of time or until a party petitions the court to terminate same. *In re Marriage of Strom*, 13 Ill. App. 2d 354, 142 N.E.2d 172 (1st Dist. 1957).
- Do the provisions of 750 ILCS 5/513 apply to matters filed pursuant to the

Parentage Act? The answer is resoundingly "yes," and therefore when handling a parentage case the same analysis applies. *Rawles v. Hartman*, 172 Ill. App. 3d 931 (2nd Dist. 1988).

Although addressing the needs of an adult disabled child

may require petitions to be filed in both the Probate and Family Law Divisions of the court, the law has evolved such that it is very clear that visitation is to be addressed in the Probate Division and support and financial matters in the Family Law Division. A practitioner addressing the needs of a family with an adult disabled child must carefully review the statutes and make certain that the proper petitions are filed in the divisions of the Court where they can ultimately be heard. As importantly, it is critical to the needs of the adult disabled child that support payments are paid to the child's OBRA pay-back trust. Failure to do so may result in the termination of the benefits to be provided to the child.

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