



How Lawyers Can Plan When the Law Decides your Client's Children are Adults:

Navigating Child Support and Need for Potential Guardianship

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In custody and divorce cases, many parents count down from age 18 to determine the number of years they have left to co-parent or pay child support. However, for separated parents of children with special needs, the obligation to financially support their child may not end at age 18 or high school graduation. NRS 125B.110

governs when a parent has to support a child with a handicap beyond the age of majority. Parents can be ordered to make child support payments beyond the age of 18, until the child is no longer handicapped, or the child becomes self-supporting pursuant to NRS 125B.110 (1-2). If the child receives public welfare assistance that meets the child's needs, this situation can be considered self-supporting. Nevada's statute appears to be outdated in the use of the term "handicap," which has largely been replaced in recent years by the phrase "person with a disability." In *Edgington v. Edgington*, 80 P.3d 1282 (2003), the Nevada Supreme Court found that the Nevada Legislature adopted the federal definition of "disabled" to define "handicapped" in NRS 125B.110.¹ Handicap is defined in NRS 125B.110(4) as:

"handicap" means an inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

The Americans with Disabilities Act (ADA) was enacted in 1990 and defines a person with a disability as a person who has a physical or mental impairment that substantially limits one or more major life activity.² In the ADA definition, major life activities include bodily functions such as:

functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain respiratory, circulatory, endocrine, and reproductive functions.³

Nevada judges differ on whether all disabilities covered by the ADA would qualify a child for a support extension under NRS

125B.110. Many years ago, a client asked to extend child support for a Type 1 diabetic child who was graduating from high school. The child was planning to go to college while working a part-time job and could not afford private health insurance. This circumstance was problematic because the child could not afford lifesaving insulin and other necessary medical supplies. In that case, the Nevada judge agreed that the child qualified for extended child support through college, which allowed the filing parent to maintain health insurance for the child's medical expenses. This case was argued prior to the Affordable Care Act (ACA), which was enacted in 2010. Since its enactment, the ACA allows for parents to keep their children on their insurance through age 26, even if the dependent does not live with their parents and is not a student.⁴ However, in a case where a parent has access to affordable health insurance and can afford to maintain the child on their health insurance past the age of 18, there may not be a need to extend child support.

Judges may differ on their analysis of what type of special needs qualify to extend child support. The obligee parent will likely need more than just a high-cost health insurance plan to extend child support. If your client has a child with a health condition covered by the ADA, you may want to discuss whether the child can be self-supporting after emancipation while taking into consideration the significant medical costs for insurance, doctor appointments, future employment, and required medical supplies. These factors will be weighed by the court in determining whether to extend child support beyond emancipation.

When to File to Extend Child Support for a Special Needs Child

If your client has a special needs child at the time of separation or divorce, agreements regarding financial support for the child after emancipation should be included in the Custody Decree or Decree of Divorce. However, if the child is or will be entitled to any state benefits or disability funds, then it is important to ensure that extending child support will not reduce the child's benefits. If the benefits or state assistance will not make the child self-supporting, then it is critical to analyze options to extend support. Lawyers may want to include a trust attorney to set up a special needs trust, if necessary, to ensure that the child's Medicaid, Supplemental Security Income (SSI), and other needs-based benefits are not reduced by an extended child support order.

It is also important to determine whether the child qualifies for state benefits and/or disability funds. Due diligence may require you consult with the Supplemental Security Income (SSI) division to ensure that a post-emancipation child support award will not reduce or eliminate the adult child's benefits. A disabled child who receives SSI will automatically qualify for Medicaid benefits; however, for special needs children who may not qualify for any state benefits, the cost of private health insurance after age 18 should be considered in any decision to try to extend child support.

Timing is crucial when trying to extend child support beyond the age of majority. In cases where the final order is entered before the child developed a disability, the motion to extend child support pursuant to NRS 125B.110 *must* be filed before the child emancipates and prior to the end of court-ordered child support.

It is prudent to develop a long-term financial plan with your client to determine whether their child will need financial support beyond minority. Some children may develop a disability or health condition after the final custody order is entered, which could prevent them from becoming self-supporting after age 18. As soon as possible, parents should reasonably discuss their financial plan to care for their child after age 18. Any agreements made in contemplation of costs for a child after emancipation should be accompanied by a stipulation and order to ensure that the agreement is an enforceable order when needed.

Guardianship for a Special Needs Child After Age 18

For families who have been caring for special needs children, it is easy to overlook the milestone 18th birthday that turns a child into a legal adult. When the parent has been handling doctor appointments, finances, and daily care for their child, it can be an unwelcome burden to discover that they may need a guardianship to continue parenting their child after age 18. In most cases where post-emancipation child support is ordered, a guardianship will be necessary.

If the child has a physical impairment but has full capacity to grant decision-making authority to a parent, then it may be possible to utilize a power of attorney and avoid guardianship. If the emancipated child does not have full capacity, a parent will need to obtain guardianship in order to continue making medical decisions and to manage any state aid or disability funds received. Please note: If the child is not receiving any funds from state assistance or employment, then the guardianship can be for the person (i.e., the ward/child) only. When a child is receiving funds that the parent will need to manage, the parent must apply for guardianship over both the person and estate.

Parents who are able to obtain an order to extend child support beyond the age of majority will need to consider the accounting requirements for guardianship. When guardianship is granted over an estate, the guardian must file an inventory listing all of the protected person's assets. For example, if the child has no assets or bank accounts and receives \$700 per month that is spent on their expenses, then the guardian can request a summary administration for the estate by filing a Petition to Convert to Summary Administration. If the court grants the summary administration, then the requirement for yearly accounting is waived. However, the guardian will still need to file an annual report, which provides an update on the protected person's health and wellbeing. Divorced or separated parents can apply to be co-guardians, but this option is not recommended unless they have a strong co-parenting relationship. If one parent is handling the bulk of the child's care, then the other parent should be asked to consent to the guardianship. In guardianship cases, the guardian has to file notice with the court and to all interested parties prior to moving the protected person or disposing of assets. These requirements should assure the non-guardian parent that they will continue to have notice of decisions made for their child. By directing your clients to discuss whether guardianship may be needed with the other parent before the child turns 18, the parents can prepare in advance to assist with their adult children's needs.

ENDNOTES:

1. *Edgington v. Edgington*, 119 Nev. 577, 584 (2003).
2. 42 U.S.C. § 12102 (2(A)).
3. 42 U.S.C. § 12102(2(B)).
4. PPACA §1201.

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