

SUPPORT FOR DEPENDENT ADULT CHILDREN REAL-WORLD APPLICATIONS

Kimberly Rommel-Enright, Esq.

Sarah R. Sullivan, Esq.

Educational Institute for Magistrates and Hearing Officers

May 23, 2024

2:30-4:00 p.m.

PRIOR CASE LAW AND PUBLIC POLICY

In Florida, parents have a legal obligation to support their adult child who is dependent because of a physical or mental incapacity that began before the age of eighteen. (Perla v. Perla, 58 so.2d 689 (fla.1952) and its progeny).

Florida Statutes have never adequately addressed the public policy established over half a century ago.

Issues still left unresolved:

- How dependent adult support obligations should/could/would be enforced
- The rights of a parent to receive support from the other parent
- The right of an adult child to claim support.
- Who can file for support
- How the support should be calculated.
- When the right to support should be adjudicated.
- Which court/division had jurisdiction? Family court or probate court?



WHY STATUTORY CHANGE WAS NEEDED

- Fernandez v. Fernandez, 306 So. 3d 1013 (Fla. 3d DCA 2020).
- FACTS OF CASE
- Statutory guidance needed on how current obligations of financial support shall be obtained and calculated.
- Case referred to Florida Statute §743.07(2) which states: “This section shall not prohibit any court of competent jurisdiction from requiring support for a dependent person beyond the age of 18 years when such dependency is because of a mental or physical incapacity which began prior to such person reaching majority.”
- Issue on appeal: Whether the court had subject matter jurisdiction for an adult petitioner with no existing support order prior to age 18.
- Chapter 61, Florida Statutes, only contemplated support ordered during the child’s minority to be paid into a disabled adult child’s majority.
- Florida Statute Section 61.13(b) “For child support to terminate on a child’s 18th birthday unless the court finds or previously found that s. 743.07(2) applies, or is otherwise agreed to by the parties.”

Child support should terminate at age eighteen unless the court finds or has previously found that the child is "dependent in fact, is between the ages of 18 and 19, and is still in high school, performing in good faith, with a reasonable expectation of graduation before the age of 19." Parents can agree to extend support in an existing chapter 61 case. §61.13(1)(a).

The legal parents are responsible for supporting a dependent adult child (DAC) defined as "an unmarried adult who is incapable of self-support as a result of a physical or mental incapacity that began before the person reached the age of 18." § 61.1255(2)(a).

A civil suit under 61.1255 to establish support for an adult dependent child may only be filed in the circuit court where the DAC resides. Such suit may be filed at any time after the DAC reached the age of 17 years and 6 months, unless an order is already in place. §61.1255(2)(b).

STATUTORY SOLUTION

The suit may only be filed by the dependent adult child (who has not had the right to sue removed), the DAC's agent under a power of attorney, a parent or other person on behalf of the DAC, or the DAC's guardian or guardian advocate. §61.1255(2)(b)

Support ordered after the dependent adult child reaches 18 may be paid only to the DAC, or agent under a durable power of attorney, or his or her court-appointed guardian, guardian advocate or assigned to a special needs trust or pooled trust in order to maintain the DAC's means-based government benefits. §61.1255(2)(e).

The court shall consider any state and federal programs and benefits the DAC is receiving or may receive due to reaching the age of majority and the effect court-ordered support would have on the DAC's eligibility for such programs and benefits. The court may not order support that will cause ineligibility for such programs and benefits. §61.31(3)(4).

STATUTORY SOLUTION

A guardian may petition the court for authority to bring a civil action in circuit court to establish payments from either of both parents of the dependent adult child pursuant to 61.1255 if not otherwise provided for in the guardianship plan. The guardian does not have a duty or obligation to pursue said support. §393.12(3)(b) and §744.422

The Department of Revenue may not file a petition to establish, modify or enforce support under this statute. §61.1255(2)(f).

The child support guidelines DO NOT APPLY to support for a dependent adult child. §61.29(2).

The court may ASSIGN the support to a special needs trust. §61.31(2).

Court SHALL consider (a) Federal benefits received or may receive (b) effect of support on eligibility for benefits. §61.31(3)

If the support will make DAC ineligible for benefits, Court cannot award support. §61.31(4).

STATUTORY SOLUTION

The amount of support that parents owe for support of a dependent adult child should not be determined by the child support guidelines under § 61.30, but should be based on the needs of the DAC and the ability of the parents to pay, allowing flexibility to preserve government benefits. The court shall determine and consider the following. §61.31(1).

- (a) The dependent adult child's income and assets.
- (b) Any existing and future needs of the dependent adult child which are directly related to his or her mental or physical incapacity and the substantial care and personal supervision directly required by or related to that incapacity.
- (c) Whether a parent or other person pays for or will pay for the care or supervision of the dependent adult child or provides or will provide substantial care or personal supervision to the dependent adult child.
- (d) The financial resources available to each parent for the support, care, and supervision of the dependent adult child.
- (e) Any other financial resources or other resources of programs available for the support, care and supervision of the dependent adult child

STATUTORY SOLUTION

Other Statutory Changes that may affect Support for Dependent Adult Children Supported Decision Making

The Concept: An agreement made between a person with a disability and a “helper” to support independent decision making.

In weighing the appointment of a guardian, a court will be required to consider a person’s ability to independently exercise his or her rights with appropriate assistance.

The legislation defines supported decision making as “an agreement in which the power of attorney grants an agent the authority to receive information and to communicate on behalf of the principal in any subject matter.”

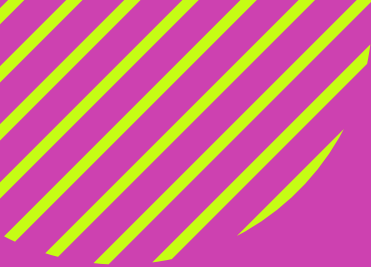
The bill language makes it clear that a supported decision-making agreement is not a durable power of attorney.

Another provision makes it easier for people with developmental disabilities to seek restoration of their rights with the aid of supported decision making.

The legislation has passed both houses and is headed to the Governor for approval.

**BENEFITS DAC'S
MAY HAVE
THAT ARE SUBJECT TO BE
REDUCED
OR
TERMINATED
IF IN RECEIPT OF
“UNEARNED INCOME”**

Medicaid
Supplemental Security Income
Food Stamps
Section 8 Housing Voucher
Home and Community Based Services Waiver
iBudget/CDC Plus--for I/DD
LTC--for disabled and elderly
Familial Dysautonomia Waiver--for those
with dysautonomia dx who are
medically fragile and requiring
hospital level of care
Model Waiver--degenerative
spinocerebellar disease
diagnosis, medically fragile, ages
0-20 years who meet a hospital
or nursing facility level of care.
Traumatic Brain/Spinal Cord Injury Waiver
for individuals with TBI or Spinal
Cord Injury
Medicare Low-Income Subsidy Program--“Extra
help” for low-income receiving
Part D insurance)
Any other means-tested program



HOW TO GET SUPPORT BUT **STILL** KEEP BENEFITS

Types of Income as defined by the SSA

- Earned Income is wages, net earnings from self-employment, certain royalties, honoraria, and sheltered workshop payments.
- Unearned Income is all income that is not earned such as Social Security benefits, pensions, State disability payments, unemployment benefits, interest income, dividends and cash from friends and relatives.
- In-Kind Income is food, shelter, or both that you get for free or for less than its fair market value.
- Deemed Income is the part of the income of your spouse with whom you live, your parent(s) with whom you live, or your sponsor (if you are a noncitizen), which we use to compute your SSI benefit amount.

The Court order must ASSIGN the payments to a benefits-preserving account.

- ABLE UNITED account---not specifically listed in the statute as a viable depository.
- Special Needs Trust
 - First Party
 - Third Party
 - Pooled

Income and benefits from social security

There are many different forms of social security income.

Title II

Employment taxes primarily finance Social Security retirement, survivors, and disability insurance benefits. This is either retirement income or SSDI (social security disability insurance).

Title XVI

Supplemental Security Income (SSI) is a Federal income supplement program funded by general tax revenues (not Social Security taxes):

- It is designed to help aged, blind, and disabled people, who have little or no income; and

- It provides cash to meet basic needs for food, clothing, and shelter.

Definition of Disability

Children: Must have a physical or mental condition(s) that very seriously limits his or her activities; and. The condition(s) must have lasted, or be expected to last, at least 1 year or result in death.

Adults: Must be unable to engage in any substantial gainful activity (SGA) because of a medically determinable physical or mental impairment(s) that is either expected to result in death or has lasted or is expected to last for a continuous period of at least 12 months.

Medicaid and Medicare

Social Security, assets, income, healthcare. . .they all fit together like a puzzle. This is over-simplification but is a good starting place to understand the two programs.

MEDICARE

Medicare is the federal health insurance program created in 1965 for people ages 65 and over, regardless of income, medical history, or health status. The program was expanded in 1972 to cover certain people under age 65 who have a long-term disability.

Medicare is most closely associated with Title II Social Security benefits. If you have paid into the system, prior to age 62, you can draw social security disability insurance. Once you turn 65, even if you are not disabled, you may enroll in Medicare.

If you become eligibility for SSDI (Title II), you become eligible for Medicare after a 2-year wait period. You can choose to be on “traditional” Medicare or you can choose to be on Medicare Advantage, which is a privatized managed care program.

Medi(CARE)—Care for the elderly and disabled.

MEDICAID

Medicaid is a joint federal and state program that gives health coverage to some people with limited income and resources.

If you apply for SSI, you also are applying for Medicaid. BUT, you can also apply for Medicaid independently of applying for SSI.

Medicaid can provide full and partial coverage.

Those who have Medicare but also qualify for Medicaid programs are called “dual eligible.”

Individuals on the “Waiver” in Florida are either on the Long-Term Care Waiver or the iBudget Waiver. These programs have different means testing for eligibility. You can generally have more income and assets on these programs.

Medic(AID)—Aid to the poor and disabled.

TYPES OF TRUSTS USED IN SPECIAL NEEDS PLANNING

1st Party Special Needs Trust

Only disabled persons under the age of 65 can create a self-settled special needs trust. At the time of the death of the beneficiary, the money goes back to Medicaid.

Pooled Trust

Generally, are less expensive to set up. Can be 1st or 3rd party for source of income. Stable and low account minimums. Money goes to non-profit if 1st party or to heirs of 3rd party at time of beneficiary's death.

3rd Party Special Needs Trust

Funded with someone else's money. No age limit, funds can be used for anything, no requirement of Medicaid payback so remainder of trust can go to other heirs.

Qualified Income Trust

Used for those who have monthly income that exceeds eligibility for certain long-term care programs. If someone's retirement income exceeds the monthly income ceiling for Medicaid long-term care, then the QIT would take the income overage into the trust.

ABLE accounts

"Achieving a better life experience"

- **Available since 2015.**
- **Tax-free savings and investment.**
- **Disregarded (generally) when determining eligibility for federal benefit programs.**
- **Current annual limit is \$18,000 (same as annual gift exclusion).**
- **ABLE accounts are by state. In Florida, it is ABLE UNITED.**
- **Must be a Florida Resident.**
- **Have a qualifying disability prior to age 26.**
- **Can only spend money from account on "qualified disability expenses."**
- **Can have ABLE Visa Prepaid Card.**
- **Benefits: The flexibility and access to funds when compared to a trust.**
- **Florida ABLE accounts don't have a "Medicaid Payback Provision"**
- **BUT. . .once the account holder dies, the money from the able account is subject to "Medicaid Estate Recovery."**

WHAT NEEDS TO BE IN THE PETITION

Petition:

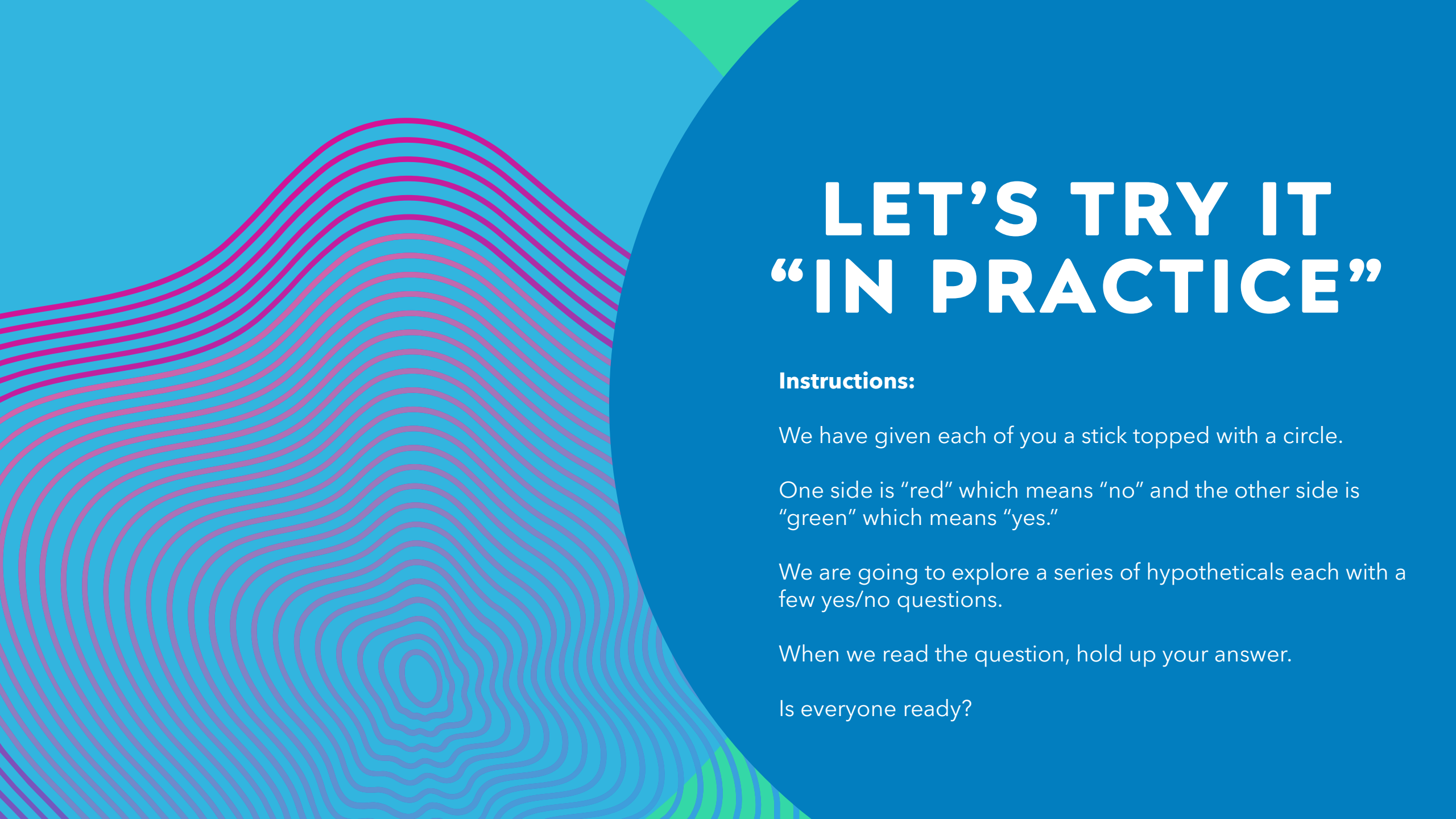
- Proper venue/jurisdiction allegations.
- Filed by an appropriate party under the statute.
- Assertion that Person for whom request is made is an unmarried adult who is incapable of self-support as a result of a physical or mental incapacity that began before the person reached the age of 18.
- Need for support and ability for payor to pay support.
- Public benefits received or eligible for and how support would/would not affect said benefits.
- Proper party (or account) under statute to receive the support.
- If child is not yet 18, but requesting that support continue beyond 18, cite to DAC statute for purposes of recharacterizing support upon child's 18th birthday to preserve benefits.

WHAT NEEDS TO BE IN THE FINAL JUDGMENT

Order:

Court findings following §61.31:

- The dependent adult child's income and assets.
- Any existing and future needs of the dependent adult child directly related disability and the care required.
- Whether a parent or other person pays for or will pay for the care or supervision of the dependent adult child.
- The financial resources available to each parent for the support, care, and supervision of the dependent adult child.
- Any other financial resources or programs available for the support of the dependent adult child.
- The need to establish a special needs trust to receive support for DAC.



LET'S TRY IT “IN PRACTICE”

Instructions:

We have given each of you a stick topped with a circle.

One side is “red” which means “no” and the other side is “green” which means “yes.”

We are going to explore a series of hypotheticals each with a few yes/no questions.

When we read the question, hold up your answer.

Is everyone ready?

HYPOTHETICAL FACT PATTERN 1

Robert, an average high school student with ADHD, attends a local college and receives a degree. He returns home at 21 after graduation to live with his parents and is unable to find a job that he likes. He sues his parents for support.

- Does he meet the criteria of a dependent adult child under the statute?
- What if his ADHD is the basis for an IEP or 504 plan in high school? Does this change the scenario?
- What if Robert qualified for supplemental security income as a *child* under the child listings of impairment?
- What if he receives adult supplemental security income but can only work part-time due to his ADHD?

HYPOTHETICAL FACT PATTERN 2

o Heather, has an intellectual disability and graduates high school at age 22 with a deferred diploma. She attends a specialized program at her local college while living at home. After finishing her college program she enrolls in a work program through a sheltered workshop making less than minimum wage. She lives in a group home funded by the State. She sues her parents for support.

- Does she prevail?
- Can the Court order payments to be paid directly to Heather to assist with her day-to-day expenses?
- Would her living at home with the parents (instead of in a group home) affect the Court's decision to award support?

HYPOTHETICAL FACT PATTERN 3

Matthew, age 30, has Down Syndrome and has been raised by his grandmother. He receives SSI and services through Agency for Persons with Disabilities (APD) Matthew's grandmother sues his parents for support.

- Does grandmother have the standing to file suit under the DAC statute?
- Will she prevail?
- Does grandmother's "in-kind" contributions for caregiving factor into the amount of support?
- Does the support get paid directly to grandmother who is providing the caregiving?

HYPOTHETICAL FACT PATTERN 4

- Anna, 25 years old, is blind and lives at home with her mother. Her parents are divorced. Anna works in a special program through a local agency for the blind. She does not receive SSI but does make minimum wage for 20 hours a week of work. She sues her father for support.
 - Does she prevail?
 - Does she also need to join her mother in the suit?
 - If she worked full-time instead of part-time but still made minimum wage, could the Court still order support?
 - Would your answer change if Anna was receiving SSDI based on her father's social security retirement benefit?

HYPOTHETICAL FACT PATTERN 5

- Kevin was in an accident when he was 35 years-old and was paralyzed from the neck down. He requires daily in-home skilled nursing care but works 40 hours per week making \$50,000 a year. His mother and father are still married and earn a combined annual income over \$500,000.
 - If Kevin sues his parents for support, will he meet the criteria for dependent adult support?
 - Would the answer change if Kevin's mother was divorced from his father, lived with Kevin providing free caregiving, while Kevin's father earned \$500,000?
 - Does Kevin's employment bar him from receiving support for a dependent adult child?

HYPOTHETICAL FACT PATTERN 6

- Bill and Martha have been married for 20 years but have filed for divorce. They have a 17 year-old non-verbal daughter, Megan, on the autism spectrum. Megan doesn't have many behavioral challenges, but she does require round-the-clock supervision as she tends to elope. Although she is currently in a deferred diploma program that will last until her 22nd birthday through the county school district, she is expected to need total care upon her graduation. The divorce takes a while in the Court process, and meanwhile, Megan reaches the age of majority.
 - If Martha requested support for Megan as a dependent adult child, will it be granted?
 - If Martha requested child support, but not support for a dependent adult child, will the Court be able to award support for a dependent adult child?
 - Can the Court look at life for Megan AFTER she turns 22 and award support based on her future needs?
 - If Martha gets an award of alimony, will the alimony affect the award of support for Megan as a dependent adult child?

HYPOTHETICAL FACT PATTERN 7

- Same fact pattern as before, but let's assume that Megan wasn't awarded support for a dependent adult child in the original divorce proceeding. Megan is now 22 years old, is on the waitlist for APD services (so isn't receiving many services) and Martha is Megan's primary caregiver. Although Megan has good private insurance she still has to pay out-of-pocket for special dental services (like anesthesia) and intensive applied behavior analysis (ABA) therapy. Megan (with Martha's help) sues Bill for support for a dependent adult child. Will she prevail?
- Is she precluded from bringing the suit if Martha could have, but didn't ask for DAC in the divorce?
- If Martha asked for support for DAC but the Court denied her request, can Megan still ask for support? Does she request the support based on a substantial change in circumstance?

Public Policy dictates that individuals with disabilities maintain as independent and self-determined life as possible. Any decision-making authority requires the court to act in the least restrictive manner.

Support of DAC is a way to increase the standard of living beyond public benefits.

It was intentional that:

1. Parents, guardians, attorneys-in-fact or the DAC can petition the court for support under the statute.
2. Guardians, attorneys-in-fact or the DAC can RECEIVE the support. Parents were not included in those that can receive support.

Supported decision-making—the Florida legislature has considered for many years, the concept of supported decision-making. We should be on the lookout to see, if adopted, this type of decision-making authority will affect the DAC support statutes.

FINAL THOUGHTS



QUESTIONS?



MANY THANKS!