

# Child Support for the “Emancipated” Special Needs Child

*If you have a child with special needs,  
being aware of your state’s law on child support is critical,  
regardless of the status of your marriage.*

BY SHEERA HERRELL AND NATHAN OLSON

Ben appeared to be a healthy child, managing typical milestones such as sitting up, crawling, and walking by ages comparable to his older sister. With the onset of speech, Ben exhibited difficulty in pronouncing his own name; his older sister often teased that he didn’t have a name, only the initial “N.” He also had trouble pronouncing the letters “M” and “P.”

Elementary school was a pleasant experience for Ben, who was bright and an eager learner. His mother, Kathy, reports that he was a happy child, although Ben seldom smiled. His drooping eyelids and expressionless face on school photos might have amused his sister, but were never a cause for real parental concern.

Ben’s father, Charles, was troubled by his son’s growing awkwardness and inability to do simple things like blow up a balloon, drink through a straw, or whistle. Ben seemed to waddle as he walked and sometimes relied on his sister to help pull him out of a chair instead of rising on his own. He became clumsy negotiating stairs or walking for long distances on uneven surfaces.

By high school, Ben was an honor roll student and excelled in every subject except physical education. Basketball, volleyball, and other sports that required overhead arm movement were nearly impossible for Ben, who had trouble even putting books on the top shelf of his locker. When he began tripping over his own feet, Ben’s parents looked to their family doctor for answers.

Just past his sixteenth birthday, Ben was diagnosed with Facioscapulohumeral muscular dystrophy (FSHD), a common form of muscular dystrophy most noted for the progressive weakening and loss of skeletal muscles. Muscles surrounding Ben’s eyes and mouth were most affected. By the time he was seventeen, weakness in his shoulders, hips, and pelvic girdle were worsening

and he was having difficulty hearing.

Ben’s parents struggled with the diagnosis. Charles had difficulty accepting the diagnosis and insisted on further tests. While the family insurance plan covered some of the tests and procedures, the family was left with mounting medical costs. Ben’s mother, Kathy, was more accepting of the diagnosis. She quit her job as a human resources administrator to assist Ben with his daily routine and to help him complete his school work.

By the time he graduated high school, Ben was dependent on a wheelchair and had significantly lost the ability to care for himself. His hearing was severely impaired and he developed severe loss of facial muscle control. Ben was a high school honors graduate who was unable to work, drive a car, or perform day-to-day tasks that most people take for granted.

Because there is no known cure for FSHD, Ben’s disabilities will, at best, remain constant, but could also worsen. FSHD typically does not affect smooth muscles and internal organs such as the heart, so Ben’s life expectancy is normal. He will be dependent on his family, or other caretakers, to complete daily activities.

Ben’s parents continued to struggle with how to handle his disability. Charles became depressed and more withdrawn from the family often spending several nights away from the home each week. Kathy became focused almost exclusively on Ben’s care and was unable to connect with Charles or discuss his depression. Four months after Ben’s eighteenth birthday, Charles filed for divorce.

As part of the divorce proceeding, Kathy requested spousal support (also referred to as alimony or maintenance), given that she was no longer working and was not the primary wage earner during the marriage. She also requested child support citing Ben’s



FSHD and his ongoing disability. Charles agreed to pay some spousal support, but argued that he should not have to pay child support because Ben is over the age of eighteen and is a high school graduate. Kathy believes that Charles has an ongoing duty to support Ben.

## It Depends on One's State of Residence

While the above scenario is fiction, the underlying legal question is very real. How do courts handle a request for child support for a disabled child when the request is made after the child turned eighteen? The answer is, "it depends." Most domestic relations law is statutory, meaning that the legislature of each state enacts laws dealing with domestic relations issues. The result is a lack of consistency between states and oftentimes significantly different laws. So for Kathy and Charles, the question depends primarily on their state of residence.

The genesis of statutes that provide courts authority to award child support stems from the common law theory that parents have a duty to support their disabled children who, after age eighteen, cannot independently care for themselves. Common law originated in England and is based on societal customs and rulings from the court. Statutory laws are written and enacted by legislatures.

While most would think that support for disabled children would be fairly straightforward, the sad truth is that in many states, the court has no authority to order initial support obligations if the disabled child is over eighteen.<sup>1</sup> The unfortunate reali-

ty for Kathy is that she may live in one of these states.

Our Virginia statute permits the continuation of support for a child who is severely and permanently disabled, not self-supporting and who lives in the home of the parent receiving support. The key word in the statute is "continuation." The Virginia courts have interpreted this to mean that there must be an existing order, specifically, a child support order must be in place prior to the child turning eighteen.<sup>2</sup> Based on the Virginia child support statute, because Ben is over the age of eighteen and graduated high school, Virginia has no authority to award child support. Clearly this result is a very harsh one for disabled children and their caregiving parents.

In other states, Kathy could petition for child support only if that state has a specific statute permitting her to do so. In 1976, the Supreme Court of Mississippi in *Watkins v. Watkins*<sup>3</sup> held that upon finding no statute vesting the authority to support disabled adult children, the court had no authority to do so. This is called strict construction - if the law is not on the books, relief cannot be granted. The Supreme Court of Nebraska took a similar position in the case of *Henderson v. Henderson*.<sup>4</sup> In this case, the Supreme Court reversed a lower court ruling factoring in support for the parties' developmentally disabled nineteen-year-old son. In its ruling, the court referenced the applicable child support statute<sup>5</sup> and stated that it cannot read the word "minor" out of the statute, nor can it add language covering "children who are handicapped."

1. This article focuses on the court's ability to award child support rather than other forms of support of disabled persons. Other forms of support, for example, by virtue of a conservatorship, are beyond the scope of this article.

2. See *Smith v. Smith*, 74 Va. Cir. 378 (2007).

3. 337 So.2d 723 (Miss. 1976).

4. 264 Neb. 916, 653 N.W.2d 226 (Neb. 2002).

5. Neb. Rev. Stat § 42-364.

States that have enacted statutes permitting initial child support awards for post-majority disabled children have done so for a specific reason - so long as there are parents to pay for the support of a disabled adult child, it is less likely the state will need to provide government assistance. Courts sometimes refer to this line of reasoning as aiming to avoid children becoming "wards of the state" or "public charges."

Some state courts have found that support may be ordered based on common law despite no statute allowing such relief. In 1988, the District of Columbia Court of Appeals in *Nelson v. Nelson*<sup>6</sup> held that in the absence of a statute, developing common law imposes a duty of support on parents. Essentially, the D.C. court ruled that although the legislature failed to provide for



## Researching the child support laws in your state is an investment worth making.

this relief specifically in a statute, the court was permitted to do so, based on common law.

In 1983, the Supreme Court of Alabama, in *Ex parte Brewington*<sup>7</sup> held the word "children" in the Alabama child support statute includes both minor and adult dependent children who continue to be disabled beyond their majority. After the Brewington decision, Alabama promulgated new child support guidelines, but the new statutes failed to specifically state that they were applicable to disabled adult children. Based on the Brewington decision, the Alabama Court of Civil Appeals held in *DeMo v. DeMo*<sup>8</sup> that because the statute contained no limitation for minor children only, no limitation was intended, therefore, the child support guidelines are applicable

to the establishment or modification of child support for an adult dependent child.

If Kathy and Ben lived in West Virginia, she would also be able to seek child support. In the 1991 case of *Kinder v. Schlaegel*, the Supreme Court of Appeals of West Virginia ruled that a parent can petition the court for an award of child support for a disabled child even if the petition was made after the child was beyond the age of majority.<sup>9</sup> The Court reasoned that parents may have a duty to support a child who has been mentally disabled since birth. In

1995, this Court expanded its decision to allow a party to petition for child support even if the disability occurred after the age of majority. The Court, in *Casdorff v. Casdorff*,<sup>10</sup> said that a disabled child's entitlement to post-majority child support is not determined solely by when the disability occurred. Instead, the Court reasoned that a duty of support may be premised upon a conclusion that the child had never practically been emancipated from his/her parents, which is often the case when the child is severely disabled.

Many states have enacted statutes that fall somewhere in the middle of the stricter laws in Virginia, Mississippi, and Nebraska, and those more liberal laws in Washington D.C., Alabama, and West Virginia. In these states, the larger question is whether the court can order support, for the very first time, after the child has turned eighteen. Many of these states have statutes that require that the disability of the child must have occurred before the child turned eighteen.

Arizona permits the filing of an initial child support petition after the age of majority if the court considers the factors in the statute, the child is severely mentally or physically disabled as demonstrated by the fact the child is unable to live independently and be self-supporting; and the child's disability began before the child reached majority.<sup>11</sup> Under Hawaii law<sup>12</sup> a court may order support and maintenance of an adult child or minor child, and support and maintenance of an incompetent

adult child whether or not the petition is made before or after the child has attained the age of majority. Illinois goes as far as to have a separate statute for support for adult children and educational expenses.<sup>13</sup> There, an application for support may be made before or after the child has attained majority and the court may award support for a mentally or physically disabled child who is not otherwise emancipated. In Iowa, parents are severally liable for the support of a dependent child eighteen years or older whenever such child is unable to maintain his or herself and is likely to become a public charge.<sup>14</sup>

Practically, what should a parent like Kathy do? No one likes to think about divorce or separation and certainly no one wants to make that first consultation with a domestic relations attorney. Some people delay seeking legal counsel thinking that it's not the right time to discuss separation or simply because they cannot afford the process. However, based on where you and your child live, researching the child support laws in your state is an investment worth making. As practicing domestic relations attorneys, we have seen too many cases like Ben's where a care-giving parent is without legal recourse for child support. If you have a child with special needs, being aware of your state's law on child support is critical, regardless of the status of your marriage. •

13. 750 ILCS 5/513 Support for Non-minor Children and Educational Expenses (Illinois Compiled Statutes (2013 Edition)).

14. Iowa Code Section 252A.3.

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6. 548 A.2d 109 (D.C. 1988).

7. 445 So. 2d 294 (Ala. 1983).

8. 679 So. 2d 265 (1996). For a discussion on what constitutes "disability" see *Ex Parte Cohen*, 763 So. 2d 253 (2000) and *Cohen v. Baker*, 763 So. 2d 258 (Ala. Civ. App. 2000).

9. 185 W. Va. 56, 404 S.E.2d 545 (W. Va. 1991).

10. 194 W. Va. 490; 460 S.E.2d 736 (W. Va. 1995).

11. Ariz. Rev. Stat. §25-320. See *Gersten v. Gersten*, 223 Ariz. 99, 219 P.3d 309 (Ariz. App. 2009).

12. Haw. Rev. Stat. 580-47.