

Impressions

APPLICATIONS FOR LEGAL PRACTICE

INSIGHTS FROM THE PRACTICE
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Michelle F. Eabon, Ph.D.
Clinical Psychologist

CHILD SUPPORT FOR THE PERMANENTLY DISABLED ADULT CHILD *Determining Severe Disability*

20-124.2(C)The court may also order the continuation of support for any child over the age of 18 who is (i) severely and permanently mentally or physically disabled, (ii) unable to live independently and support himself, and (iii) resides in the home of the parent seeking or receiving child support.

The relatively simple language of this statute disguises semantic and definitional conflicts that are a struggle even for those working in the field of disability determination. When financial support for the disabled adult child is not contested, there is probably little need for further direction under this statute, especially if the disabling condition is a physical one. However, when support is contested, especially for mental impairments, issues of definition and impairment severity need to be supported or refuted with evidence, at least some of which will need to be quantifiable. Do the Courts then develop their own models for disability determination or do they adopt portions of already existing models with their known limitations? For example, the Social Security Administration (SSA) devotes hundreds of pages in the POMS to defining disabilities and their severity. Private disability insurance companies have their own procedures and finally, the IDEA (Individuals with Disabilities Education Act) contains language which can be adopted to support the definition of disability and quantify the degree of impairment associated with a disability, particularly a mental disability.

A recent Virginia Court of Appeals decision (Mayer v. Mayer, published January 2014) stated that courts “must give the words of this statute their common, ordinary, and accepted meaning” a conclusion which probably is well applied to establishing the severity, permanence, and functional limitations of physical disability. But in the case of mental impairment, subsequent challenges to this statute will eventually have to result in refinements to the definition of severe disability as well as to provide guidelines to quantify an individual’s degree of impairment.

20-124.2C refers to a permanent condition (i) which renders individuals over age 18 so functionally limited (ii) that they cannot live independently and support themselves. Prong (iii) is largely fact-based and establishing this should brook little argument although a litigant could debate the necessity for an adult child to live with the parent seeking continued child support.

Although not clearly stated, the assumption is that establishing prong (i) requires a medical or psychological diagnosis or an educational label. (It will become arguable whether an educational label alone will sufficiently establish a severe condition.) Then establishing prong (ii) requires a demonstration of functional limitations produced by severe disability. In Mayer v. Mayer, medical diagnosis established the permanent and severe conditions but only simple description

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Impressions is published by Michelle F. Eabon, Ph.D., a clinical psychologist in practice in Fairfax, Virginia.

Contact Information:

(703) 691-4204
4041 University Drive
Suite 403
Fairfax, VA 22030
www.DrEabon.net
DrEabon@DrEabon.net

DR. EABON does psychological evaluations for custody, visitation, and education litigation. She has a psychotherapy practice for adolescent and adult clients and does parent coordination. She began doing civil commitment evaluations in 1991 for the Fairfax-Falls Church CSB. Since then she has conducted parental competence, custody and visitation evaluations, brief focused assessments and diagnostic evaluations for juvenile offenders. She has been qualified as an expert witness in J&DR and Circuit Courts throughout Northern Virginia, in Chicago IL and Charlotte, NC as well as in U.S. Immigration Court. Dr. Eabon also does psychological evaluations for disability determination, educational accommodations, learning and psychological disorders, adoption, citizenship exam exemption, and immigration issues. Dr Eabon has been a consultant to SSA Disability Determination Services since 1994.

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was enough to establish severe functional limitations. Although not obvious, some of the evidence submitted in this opinion contained IDEA/special education language. Establishing functional limitations under this statute as written, and under the subsequent appellate court ruling, is far more lenient than would be the case under either SSA or IDEA requirements.

Intellectual Disability (Mental Retardation), Autism Spectrum Disorder, or Schizophrenia are a few examples of impairments understood among psychologists to be severe and permanent conditions. But, the label or diagnosis does not necessarily imply severe or permanent functional limitation, this has to be observed across time and situations or otherwise quantified and measured. So the semantically challenged question then becomes, “How impairing is the impairment?” and what is needed to establish or argue against impairment severity.

Responding to this question for application under the statute suggests a need for eventual quantifying of functional limitations to establish prong (ii) of this statute. For example, an individual formally diagnosed with ASD might have a measured IQ of 100, few friends, poor social skills and is behaviorally explosive. However, these facts alone are not evidence of the inability to live independently and be self-supporting. Prong (i) is met but prong (ii) cannot be determined without credible information about actual functional limitations. As another example, under SSA, a mentally retarded individual with an IQ of 59 or below is considered so severely functionally limited as to automatically qualify for disability benefits without proof of functional limitations. However also under SSA, an individual with a measured IQ of 60 to 70 and no other impairing condition does not automatically qualify for benefits. Most professionals, however, would probably agree that an individual whose only disabling condition is a measured, valid IQ under 70 is unlikely to be self-supporting or to live independently. Yet, under an SSA model,

this person would be considered severely disabled but not severely limited without additional proof of severe functional limitations. The alert reader by now is becoming aware that creating a model for disability determination does serve to open Pandora’s box.

Mayer v. Mayer also established that a permanent disability need not permanently render an individual unable to support him/herself. Many developmentally delayed individuals take longer to become self-supporting, and to live independently. Where child support is ordered or agreed upon under this statute, continuing functional limitation reviews will probably have to be undertaken in these cases where child support is temporarily extended under the statute but where improvement in functional limitations is expected and established by ongoing psychological, psychosocial and vocational evaluation.

20-124.2(C) lacks operational criteria for the concepts of impairing condition and severity of functional limitations (i and ii respectively) and does not even approach operationally defining “self-supporting.” Eventually, these issues will need to be addressed and prong (ii), in particular, will need supporting regulation to establish criteria for determining functional limitations. Consideration to disability determination models already in place will be helpful, unless courts have sufficient time and resources to re-create the wheel.

CONUNDRUM: *Social security disability benefits (SSI/SSDI) for the adult disabled child could reduce the financial burden for the parent providing support yet this is considered unearned income for the adult disabled child by SSA (POMS:SI00830.420) for the purpose of calculating the dollar amount of the disability benefit thereby potentially reducing substantially the amount of SSI/SSDI.*

Establishing Functional Limitations

- ◆ Obtain a vocational assessment from Woodrow Wilson Rehabilitation Center (<http://www.wwrc.net/>)
- ◆ Obtain a comprehensive psychoeducational evaluation from a clinical psychologist knowledgeable about disability determination at or just after age 18 (Use resources wisely—this kind of evaluation can be used to apply for ADA accommodations in college and SSI.)
- ◆ Pursue in-school supported employment through extended public school learning programs and obtain/save documentation of individual’s job site functioning.
- ◆ While the disabled soon to be adult child is still a high school senior, pursue services through the Department of Aging and Rehabilitative Services (<https://www.vadrs.org/>). Documentation obtained from a job coach, supported employment, or DRS assessment provides useful real-world functioning information.
- ◆ On the adult child’s behalf, apply for Social Security Disability (a long process). An award of disability benefits supports the argument for support after age 18 but, in seeming contradiction, a denial of benefits will not necessarily refute severe functional limitations.
- ◆ Encourage self-care and money management skills and social independence in the disabled individual and support opportunities for skill building and training. Credibly assessed success or failure in this area can establish the severity, or lack thereof, of functional limitations.