

Guidance for Disabled Parents in Custody Arrangements

Courts make decisions affecting child custody and visitation based on “the best interest of the child”. While the term resonates with most people, it often makes disabled parents feel they are at a disadvantage when navigating the family law court system. The reason is simple: the courts can and do consider a parent’s disability when determining what type of custody arrangement best serves the child’s interests.

It is important to understand how different jurisdictions define the best interest of the child and how a parent’s disability may affect that definition. Most states have adopted a variation of the Uniform Marriage and Divorce Act (UMDA), which provides that in deciding what is in the child’s best interest, courts shall consider all relevant factors, including: the parents’ and child’s wishes; the child’s interaction with her parents and siblings; the child’s adjustment to her home, school, and community; and the mental and physical health of everyone involved. The UMDA’s definition strongly suggests that courts should look at the big picture and not specifically focus on a parent’s disability, even though it is a factor.

In 1979, the seminal court case of *In re Marriage of Carney* reiterated this holistic approach. There, a father with full custody of his two children was injured in a motor vehicle accident and rendered quadriplegic. After the accident, the father filed for divorce from the children’s mother, whom they had not seen in five years. She moved for full custody, arguing the father could not take care of himself, much less their children. The trial court agreed, accepting the prevailing stereotypes about the physically disabled. The California Supreme Court reversed the trial court. In powerful language, the court held it is impermissible for trial courts to rely on a parent’s physical handicap as conclusive evidence the parent is unfit. It went on to write that the essence of parenting, “...lies in the ethical, emotional, and intellectual guidance the parent gives to the child throughout his formative years, and often beyond. The source of this guidance is the adult’s own experience of life; its motive power is parental love and concern for the child’s well-beinghowever limited his bodily strength may be, a handicapped parent is a whole person to the child who needs his affection, sympathy, and wisdom to deal with the problems of growing up. Indeed, in such matters his handicap may well be an asset: few can pass through the crucible of a severe physical disability without learning enduring lessons in patience and tolerance.”

While the *Carney* case was instrumental in advancing disabled parents’ custody rights, it did not guarantee favorable results in all cases. Some subsequent courts have taken a different view, especially where a parent suffers from a mental or intellectual disability, as opposed to a physical one.

It is paramount that disabled parents become familiar with the legal principles that serve to protect them. Some states have implemented statutory language to help level the playing field, most notably, California, Minnesota, and Idaho.

The California Family Code provides that a parent's disability may not be the basis for limiting the disabled parent's visitation or granting custody to the other party unless the other party demonstrates that giving the disabled parent custody or visitation would be detrimental to the health, safety, or welfare of the child. California's statute is important because it shifts the burden of proof to the disabled parent's opponent. Practically speaking, this means the other party must show how a parent's disability harms the child before the disabled parent is forced to rebut the claim. Prior to the *Carney* case and this statute, disabled parents were automatically forced to defend their fitness as parents as soon as the opposing party raised their disability because it was presumed to be detrimental to a child.

Minnesota has adopted a more detailed version of the UMDA definition of "best interests of the child". The statute expressly states that while the mental and physical health of all individuals involved shall be considered, a party's disability shall not be used as the main factor in deciding custody unless the proposed custody arrangement is not in the child's best interest. Again, the emphasis is on the child's best interest, but Minnesota law makes it clear there must be a showing the disability negatively impacts the child, instead of simply presuming it does.

Idaho has gone to great lengths to describe ways in which disabled parents can show their disability does not negatively impact their child. The Idaho statute defining the best interest of the child states the court shall advise a disabled parent of his or her right to provide evidence and information about how adaptive equipment (wheel chairs, home ramps, etc.) or supportive services (parenting classes, training or treatment opportunities, etc.) will help him or her carry out parenting responsibilities. Furthermore, it mandates that parental fitness evaluations take into account a disabled parent's adaptive equipment or supportive services.

Even if you do not live in a state (or commonwealth) that protects disabled parents' rights as much as the three described above, the legal and ethical argument remains the same: a parent's disability does not automatically mean that he or she is unfit or undeserving of custody or visitation. In fact, as the *Carney* court put it, such a disability may be a parent's greatest asset.

To learn more about resources available for disabled parents navigating family law courts you can go to the National Council on Disability's website at <https://www.ncd.gov/>. You can also call the Client Services Office at 804 765 1500 to schedule an appointment to speak with one of our attorneys.