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NOTES

Child Custody for Disabled Adults: What Kentucky Families Need

BY AMY P. HAUSER*

INTRODUCTION

“Perhaps the most heart wrenching aspect of the breakup of a marriage is the effect of the divorce on the children. . . . [But] [c]ustody issues do not end with the divorce.”¹ As the number of marriages ending in divorce increases, issues of child support and child custody multiply in importance.² Families with disabled children are more frequently included in these divorces than families without disabled children.³ Divorce court dockets contain many support and custody cases involving families with handicapped children partly because these families experience “unique burdens” due to the difficulties related to caring for handicapped children,⁴ and each case is distinct.⁵

* J.D. expected 2004, University of Kentucky. The author, foremost, gives thanks to the Lord for all His many blessings. The author would also like to thank Professor Louise Graham, Elizabeth Key, and W. Patrick Hauser for their advice and insight on this topic. She further gives credit and appreciation to her husband, Gus, and to her family for their constant encouragement and support.

¹ *Legal Information on Child Custody, Child Support, Prenatal Agreement, Shared Custody*, at <http://www.thelawyerpages.com/legalqna/Child%20Custody> (last visited Feb. 17, 2003).

² The National Center for Health Statistics set the divorce rate at 43% based on a study done in 1995, but the U.S. Census Bureau increased the rate to about 50% in 2002. Americans for Divorce Reform, *Divorce Rates—Divorce Statistics Collection*, at <http://www.divorcereform.org/rates.html> (last visited Feb. 17, 2003).

³ Michelle Turner, *Unhappy Families: Special Considerations in Custody Cases Involving Handicapped Children*, 24 J. FAM. L. 59, 59 (1985) (citing HEATHER FEATHERSTONE, *A DIFFERENCE IN THE FAMILY* 248 (1980)).

⁴ *Id.* at 59.

⁵ *Id.*

Across the country, the primary consideration for custody is the best interests of the child.⁶ In Kentucky, the courts have addressed the treatment of child support, custody, and visitation for minor children who are mentally and physically handicapped.⁷ However, the Kentucky legislature and courts have failed to give equal attention to these issues with respect to mentally handicapped children who have reached the age of majority.⁸ A primary issue remaining untouched by Kentucky statutes and courts is the question of which court has jurisdiction over the issue of custody of handicapped adult children. For instance, a parent may want to request a change of custody of an adult disabled or handicapped child to alter custody decisions that were made when the child was a minor. The result of this attempt by the parent is uncertain because the parent cannot, under present law, be sure of where to bring such an action. The role of a guardian, who is usually appointed for a handicapped adult, may need to be considered in deciding the jurisdiction of the courts. The jurisdictional issue may be further complicated by the recent addition of family courts in Kentucky.⁹ Kentucky's jurisdictional uncertainty, with respect to this issue, must be removed to insure that adult handicapped children's best interests are served. To this end, a statute that specifically addresses custody of a handicapped adult child would benefit Kentucky and its families.

Part I of this Note discusses the widely accepted duty of a parent of a mentally handicapped child to continue paying child support beyond the age of majority. The extension of this duty to adults who do not become disabled until after reaching the age of majority is also briefly examined.¹⁰ Part II explores custody decisions regarding mentally disabled adult children and examines statutes enacted by other states directed at this issue. The present statutes of Kentucky are also evaluated.¹¹ In Part III, the role

⁶ *Id.* at 60.

⁷ *See, e.g.,* *Brighty v. Brighty*, 883 S.W.2d 494 (Ky. 1994).

⁸ Issues surrounding the provision of support for a handicapped adult child have been addressed elsewhere. *See* M.C. Dransfield, Annotation, *Parent's Obligation to Support Adult Child*, 1 A.L.R.2d 910 (1948). *But see* *Breuer v. Dowden*, 268 S.W. 541 (Ky. 1925) (deciding whether a parent is liable for care of adult child who is sick and living at home); *Crain v. Mallone*, 113 S.W. 67 (Ky. 1908) (denying a charge against a helpless adult child for the value of his support by parent in distribution of estate).

⁹ Other states have looked at this situation, though narrowly, and have provided some insight to developing a solution. States including Tennessee and Ohio have noted this situation. The number of cases on this specific issue is limited but will be explored in this Note. *See infra* notes 18-30, 33 and accompanying text.

¹⁰ *See infra* notes 14-64 and accompanying text.

¹¹ *See infra* notes 65-126 and accompanying text.

of guardianship law and the impact of the advent of family courts throughout Kentucky are considered.¹² Part IV concludes that Kentucky should enact legislation that addresses the jurisdiction of courts to change custody for disabled adults by taking into account their best interests.¹³

I. DUTY TO PROVIDE CHILD SUPPORT FOR MENTALLY HANDICAPPED ADULTS

Generally, the duty of parents to support their children only endures until the child reaches the age of eighteen.¹⁴ Courts as early as 1908, however, have recognized the extension of this duty when the child is "helpless" or "incapable."¹⁵ The Kentucky Supreme Court in *Crain v. Mallone*¹⁶ remarked:

The duty and obligation of a parent to care for his offspring does not necessarily terminate when the child arrives at age or becomes an adult; nor is it limited to infants and children of tender years. An adult child may from accident or disease be as helpless and incapable of making his support as an infant, and we see no difference in principle between the duty imposed upon the parent to support the infant and the obligation to care for the adult, who is equally, if not more, dependant upon the parent.¹⁷

Historically, most states did not have a common law duty to continue supporting disabled children upon majority.¹⁸ However, many states did acknowledge a moral duty that in turn created a legal duty for a parent to continue to support children post-minority if they were unable to support

¹² See *infra* notes 127-55 and accompanying text.

¹³ See *infra* notes 156-75 and accompanying text.

¹⁴ See, e.g., *Mower v. Mower*, 199 N.W. 42, 42-43 (S.D. 1924) (quoting *Schultz v. W. Farm Tractor Co.*, 190 P. 1007, 1008 (Wash. 1920)). Cf. *Speck v. Speck*, 168 S.E.2d 672, 677 (N.C. Ct. App. 1969) (quoting *Wells v. Wells*, 44 S.E.2d 31, 35 (N.C. 1947) (holding that parental duty of support terminates when the child reaches majority, which is defined by the court to be twenty-one years old)).

¹⁵ *Crain v. Mallone*, 113 S.W. 67, 68 (Ky. 1908).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See, e.g., *Borchert v. Borchert*, 45 A.2d 463, 465 (Md. 1946), *superseded by* MD. CODE ANN., FAM. LAW § 13-102(b) (2002).

themselves due to a physical or mental disability.¹⁹ This duty found its roots in statutory provisions that mandated providing for the poor²⁰ or assigned criminal penalties for not supporting minor children.²¹ Blackstone's *Commentaries* expresses that "necessaries" must be supplied for those who are incompetent and not capable of working.²² Blackstone further characterizes this duty as a "principle of natural law."²³

Some jurisdictions did recognize a common law duty to care for disabled children post-minority.²⁴ The rationale for this common law duty was that "the wants and weaknesses of children render it necessary that some person maintains them, and the voice of nature has pointed out the parent as the most fit and proper person. The laws and customs of all nations have enforced this plain precept of universal law."²⁵ It soon became a trend for courts deciding these cases to declare such a duty.²⁶ The "tendency" to decide in this manner persisted even though many states did not have a statute to support enforcement of this duty.²⁷ For instance, the

¹⁹ *Id.*; Dransfield, *supra* note 8, § 2 (indicating that the moral obligation existed in England and a minority of American jurisdictions); *see also* Noralyn D. Harlow, Annotation, *Postmajority Disability as Revising Parental Duty to Support Child*, 48 A.L.R. 4th 919, § 2a (1986).

²⁰ Dransfield, *supra* note 8, § 1, § 5; *see also* Harlow, *supra* note 19, § 2a.

²¹ *Borchert*, 45 A.2d at 465.

²² 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *449, *quoted in Borchert*, 45 A.2d at 465. *See also* *Breuer v. Dowden*, 268 S.W. 541, 542 (Ky. 1925).

²³ 1 BLACKSTONE, *supra* note 22, at 419, *quoted in Castle v. Castle*, 473 N.E.2d 803 (1984).

²⁴ *See, e.g., Castle*, 473 N.E.2d at 804, 806.

²⁵ *Id.* at 806 (quoting 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 190 (13th ed. 1884)).

²⁶ *See Borchert*, 45 A.2d at 465. *See also Sayne v. Sayne*, 284 S.W.2d 309, 311-12 (Tenn. Ct. App. 1955).

²⁷ *Borchert*, 45 A.2d at 465. Typically, the courts that found no duty to continue support past the age of eighteen despite the child's disability based this decision on the view that a statute was necessary, but lacking. *See Kramer v. Carroll*, 309 S.W.2d 654, 659-60 (Mo. Ct. App. 1958); Dransfield, *supra* note 8, § 5 (stating that some cases require liability for support as predicated on statute). Some states designate requirements that a parent must meet pursuant to this duty of support. For example, Maryland requires a parent of an incapacitated child to support that child if the parent has sufficient resources to provide such support. *See* MD. CODE ANN., FAM. LAW § 13-102(b) (2002). This statute is entitled "Acts barred; punishment." Subsection (b) describes a qualified duty to support a destitute child. *See also Freeburger v. Bichell*, 763 A.2d 1226, 1228, 1232 (Md. Ct. Spec. App. 2000).

New Jersey Supreme Court held in *Kruvant v. Kruvant*²⁸ that parents have a duty to support adult disabled children based on common sense and also because humanity calls for such action.²⁹ The court in *Kruvant* further determined that the duty to support does not end until the adult child's need ends.³⁰ Many courts today still follow this practice of creating a duty for parents to continue support of adult mentally and physically disabled children.³¹ In addition, most states now have some form of statute imposing civil liability on parents who fail to support an adult handicapped child.³²

Kentucky statutes provide child support guidance with respect to minor children, including children with disabilities. Kentucky Revised Statute ("K.R.S.") § 405.020 governs child support for children under the age of eighteen.³³ According to the statute, when a child becomes eighteen years old he is considered emancipated,³⁴ and at that time the support obligation terminates.³⁵ Child support for an adult handicapped child is governed by K.R.S. § 405.020(2), which states: "The father and mother shall have joint custody, care, and support of their children who have reached the age of eighteen (18) and who are wholly dependent because of permanent physical or mental disability."³⁶ This statute holds *both* parents responsible for a child who is "wholly dependent" when he becomes eighteen.³⁷ Notably, this child is not regarded as emancipated.³⁸

Jurisdiction over child support disputes is also controlled by statute. In Kentucky, such jurisdiction is specified in K.R.S. § 205.766, which explains that concurrent jurisdiction rests with the district and circuit courts "to establish, modify, and enforce obligations of child support" in situations where paternity is not a concern.³⁹ The court that issues the support order

²⁸ *Kruvant v. Kruvant*, 241 A.2d 259 (N.J. 1968).

²⁹ *Id.* at 265-66.

³⁰ *Id.* See also *Cohen v. Cohen*, 69 A.2d 752, 754 (N.J. Super. Ct. App. Div. 1949). This means that the support may continue indefinitely. *Id.* at 754.

³¹ See, e.g., *Breuer v. Dowden*, 268 S.W. 541, 542 (Ky. 1925); *Freeburger*, 763 A.2d at 1229. See also *Harlow*, *supra* note 19, § 2a.

³² See *Dransfield*, *supra* note 8, § 2.

³³ KY. REV. STAT. ANN. [hereinafter K.R.S.] § 405.020 (Banks-Baldwin 1998).

³⁴ *Id.* See also *Carricato v. Carricato*, 384 S.W.2d 85, 87-88 (Ky. 1964).

³⁵ K.R.S. § 403.213(3) (Banks-Baldwin 2000). See also *id.* § 403.212 (setting forth child support guidelines and factors used in calculating the amount of support).

³⁶ *Id.* § 405.020(2).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* § 205.766.

“has continuing, exclusive jurisdiction over [that] child support order.”⁴⁰ However, one must look to Kentucky case law to resolve the jurisdictional question with respect to child support disputes involving children over the age of eighteen. For example, in *Abbott v. Abbott*,⁴¹ the appellate court held that the circuit court that issued the original child support decree retained jurisdiction over the support provisions for a disabled child over the age of eighteen.⁴² The court utilized K.R.S. § 405.020(2) and K.R.S. § 403.250(3) to reach this conclusion.⁴³ The court reasoned that because wholly dependent children are not emancipated by law, the circuit court retains jurisdiction.⁴⁴ In cases where a non-handicapped child is involved, the jurisdiction over child support for adult children is generally different. In this situation, a contractual agreement between the parents calling for additional support beyond the age of eighteen is needed. Without such a contract, the circuit court does not possess jurisdiction to order post-minority support.⁴⁵

State courts throughout the nation are split on decisions regarding responsibility for adult children who become disabled *after* reaching the age of majority.⁴⁶ Cases focus on whether child support can be ordered and on which court has such authority.⁴⁷ In *Sininger v. Sininger*,⁴⁸ the Maryland Supreme Court held that a statutory obligation to support a handicapped child exists regardless of the time the incapacity developed.⁴⁹ According to

⁴⁰ *Id.* § 407.5205.

⁴¹ *Abbott v. Abbott*, 673 S.W.2d 723 (Ky. Ct. App. 1983).

⁴² *Id.* at 726.

⁴³ See K.R.S. § 403.250(3) (Michie 1984) (“Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child are terminated by emancipation of the child but not by the death of a parent obligated to support the child.”).

⁴⁴ See *Abbott*, 673 S.W.2d at 726.

⁴⁵ See *id.* at 725; see also *Wilhoit v. Wilhoit*, 521 S.W.2d 512, 513 (Ky. 1975) (“While it is true that the court may not require a parent to support a child beyond majority, there is no reason why a contract executed by a parent, which would require support to extend beyond that period, may not be enforced.”); *Showalter v. Showalter*, 497 S.W.2d 420 (Ky. 1973) (“[I]n the absence of a contract, the legal obligation of a father to support his child terminates upon his reaching his eighteenth birthday.”).

⁴⁶ *Turner*, *supra* note 3, at 66-67; see also *Harlow*, *supra* note 19.

⁴⁷ Interview with Louise Graham, Professor of Law, University of Kentucky College of Law, in Lexington, Ky. (Oct. 2, 2002).

⁴⁸ *Sininger v. Sininger*, 479 A.2d 1354 (Md. 1984).

⁴⁹ *Id.* at 1358.

this court, the circuit courts possess general equity jurisdiction to enforce a parental duty to support a handicapped or disabled child.⁵⁰ In *Freeburger v. Bichell*,⁵¹ the court revisited *Sininger* and held that Maryland law requires two factors be satisfied in order for the duty of support to apply.⁵² According to the Maryland statute,⁵³ the duty of support applies despite the time the disability arises: “if (1) the adult child has no means of subsistence and cannot be self-supporting due to physical or mental infirmity; and (2) the parent has the means or is able to earn sufficient means to provide the support.”⁵⁴ The opposite decision was made by the Texas Supreme Court in *Red v. Red*.⁵⁵ The court held that a request for post-majority child support payments could not be heard unless it had been previously established that the child required “continuous care and personal supervision because of the existence of mental or physical disability prior to reaching the 18th birthday.”⁵⁶ This issue is subject to continuous debate and varies between the states.

The statutory definitions for “children” or “minor” or “age of majority” often facilitate the interpretation of related state statutes governing child support. For instance, the Kentucky statute governing the age of majority, K.R.S. § 2.015, states that:

Persons of the age of eighteen (18) years are of the age of majority for all purposes in this Commonwealth except for the purchase of alcoholic beverages and for purposes of care and treatment of children with disabilities, for which twenty-one (21) years is the age of majority, all other statutes to the contrary notwithstanding.⁵⁷

Some states specifically define “children” as persons over the age of eighteen who are mentally or physically disabled. For example, in *Colburn v. Colburn*,⁵⁸ the definition of “minor child” vested jurisdiction in the

⁵⁰ *Id.* at 1361.

⁵¹ *Freeburger v. Bichell*, 763 A.2d 1226 (Md. Ct. Spec. App. 2000).

⁵² *Id.* at 1232.

⁵³ MD. CODE ANN., FAM. LAW § 13-102 (2002).

⁵⁴ *Freeburger*, 736 A.2d at 1232 (emphasis added).

⁵⁵ *Red v. Red*, 552 S.W.2d 90 (Tex. 1977), *superseded by* TEX. FAM. CODE ANN. § 154.002 (Vernon 2002).

⁵⁶ *Id.* at 94. The mother of the child requested child support payments eight years after the child reached the age of eighteen. *Id.* at 90-91.

⁵⁷ K.R.S. § 2.015 (Banks-Baldwin 2002). *See also* *Young v. Young*, 413 S.W.2d 887 (Ky. 1967).

⁵⁸ *Colburn v. Colburn*, 412 A.2d 1309 (Md. Ct. Spec. App. 1980).

circuit court to give orders for visitation rights.⁵⁹ The father was given custody and later appointed guardian of his mentally retarded son while the child was still a minor.⁶⁰ The issue later became whether the circuit court retained continuing jurisdiction over proceedings regarding the child once he had attained the age of majority.⁶¹ According to *Colburn*, the equity court in Maryland “has jurisdiction over the custody, guardianship, legitimation, maintenance, visitation and support of a child.”⁶² The court held that jurisdiction remained with the circuit court since the child was still considered a “minor child” under the definition in the statute, though he was technically an adult.⁶³ The court’s conclusion was also influenced by legislative policy that, while not in effect at the time of the case, defined “minor child” as: “‘a child 18 years of age or older who, because of mental or physical disability is dependent upon a parent.’”⁶⁴ While many states have vested jurisdiction in a particular court for child support disputes involving handicapped adult children, specific jurisdictional provisions for custody modification are not as certain.

II. CHILD CUSTODY FOR MENTALLY HANDICAPPED ACROSS THE COUNTRY

The “best interest” of the child is the primary concern and the “universal test” for courts in custody proceedings.⁶⁵ Kentucky has supported this view for many years. In 1942, the Kentucky Supreme Court in *Perkins v. Perkins*⁶⁶ determined that “the true guide for the court is the welfare of the child.”⁶⁷ The special needs of a handicapped child certainly

⁵⁹ *Id.* at 1313.

⁶⁰ *Id.* at 1310.

⁶¹ *Id.* at 1311.

⁶² *Id.* at 1312 (quoting MD. CODE ANN., CTS. & JUD. PROC. § 3-602 (1974, 1979 Supp.) (repealed 1984)). The Court examined two statutes in reaching this conclusion. *See also id.* at 1313 (quoting MD. ANN. CODE § 66(f) (1957, 1973 Repl. Vol.) (repealed)). Jurisdiction is entrusted to the equity court if the state was the matrimonial domicile of the couple, the court previously obtained jurisdiction of the parties, and one of the parties was a resident. *Id.*

⁶³ *Id.* at 1313. The court noted a definition of a “minor child” that included “‘a child 18 years of age or older who, because of mental or physical disability is dependent upon a parent.’” *Id.* at 1313 n.3 (citation omitted).

⁶⁴ *Id.* at 1313 n.3.

⁶⁵ Turner, *supra* note 3, at 60.

⁶⁶ *Perkins v. Perkins*, 165 S.W.2d 152 (Ky. 1942).

⁶⁷ *Id.* at 152. In providing the rationale behind this guideline, the court explained a child “is not a chattel,” but instead is a “human being.” Therefore, the child cannot be treated like a chattel and “disposed of” in a way that satisfies the

require that close attention be paid to the child's interests.⁶⁸ Other factors that courts may consider in custody decisions involving a disabled child include educational opportunities, how each parent can meet the child's needs, presence of a stable environment, whether the parent can spend plenty of time with the child, and the extent of the parent's knowledge regarding the disability.⁶⁹ The ongoing consideration of these issues remains important because the child's needs change as time passes, particularly as he grows older.

In making custody decisions for disabled or handicapped children, one court stresses: "[Custody] must be guided by such overriding policies [such as best interests of the child] rather than by the personal beliefs or attitudes of the contesting parties, since it is the child's interest which remains paramount."⁷⁰ The "overriding policies" referred to include protecting the needs of children "to be raised with love, emotional security and physical safety,"⁷¹ and providing the right to treatment and rehabilitation services, public education, social contact, and timely medical care.⁷² Usually, such policies are a product of the state legislature.⁷³

The Kentucky statute that resolves custody decisions is K.R.S. § 403.270.⁷⁴ This statute employs the "best interests" standard and contemplates additional factors including: (a) the parent or guardian's wishes; (b) the child's wishes; (c) the relations between the child, parent, siblings, and any other significant person; (d) the ability of child to adjust; (e) the mental and physical health of each person; (f) domestic violence information regarding any person involved; (g) the amount of nurture and care given by the primary caregiver; (h) the parental intent of placing the child with a de facto custodian; and (i) the situation that resulted in placement with a de facto custodian.⁷⁵

parents or someone else. *Id.*; see also *Batchelor v. Fulcher*, 415 S.W.2d 828, 830 (Ky. 1967); *McCormick v. Lewis*, 328 S.W.2d 415, 417 (Ky. 1959).

⁶⁸ *Turner*, *supra* note 3, at 60.

⁶⁹ *Id.* at 60-65.

⁷⁰ *Guardianship of Phillip B. v. Warren B.*, 188 Cal. Rptr. 781, 792 (Cal. Ct. App. 1983).

⁷¹ *Id.* at 792 (citing CAL. CIV. CODE § 4600 (repealed 1994)).

⁷² *Id.* (citing CAL. CIV. CODE § 4502 (West 1998)).

⁷³ See *Castle v. Castle*, 473 N.E.2d 803, 807 (Ohio 1984) (Celebrezze, C.J., dissenting).

⁷⁴ K.R.S. § 403.270 (Banks-Baldwin 2002).

⁷⁵ *Id.* "De facto custodian" is defined by statute in K.R.S. section 403.270(1)(a): 'de facto custodian' means a person who has been shown by clear and convincing evidence to have been the primary caregiver for, and financial

Once a custody decision taking into account all of the aforementioned factors has been rendered, the question becomes what court has jurisdiction to decide cases in which a modification of the original decree is sought? Case law in other states elaborates on the jurisdiction of courts to hear matters relating to custody modifications involving minor children. The Ohio Supreme Court in *Loetz v. Loetz*⁷⁶ held that the original court that rendered the divorce and custody decrees retains continuing jurisdiction not only over custody, but also regarding care and support of the children.⁷⁷ The same court later elaborated on the *Loetz* holding in *In re Poling*.⁷⁸ *In re Poling* stands for the proposition that although the court issuing the original custody decision in a divorce case retains jurisdiction to modify that decision, a juvenile court may have concurrent jurisdiction regarding custody:⁷⁹ “the juvenile court may entertain and determine custody of children properly subject to its jurisdiction, even though there has been a prior divorce decree granting custody of said children to a parent.”⁸⁰

The Supreme Court of North Carolina agreed with Ohio in holding that the original court handing down the support and custody decision retains continuing jurisdiction over further matters⁸¹ “[u]nless that court was somehow divested of its continuing jurisdiction.”⁸² If the court was not divested of the jurisdiction it had obtained, “it was the only court which could modify the earlier judgment upon a motion in the cause and a showing of a change in circumstances.”⁸³ The “change in circumstances” was the necessary component for the court to consider altering the earlier court decree.⁸⁴ The new circumstances must also be coupled with an effect on the interests of the child.⁸⁵

supporter of, a child who has resided with the person for a period of six (6) months or more if the child is under three (3) years of age and for a period of one (1) year or more if the child is three (3) years of age or older or has been placed by the Department for Community Based Services.

Id.

⁷⁶ *Loetz v. Loetz*, 406 N.E.2d 1093 (Ohio 1980).

⁷⁷ *Id.* at 1094.

⁷⁸ *In re Poling*, 594 N.E.2d 589, 592-93 (Ohio 1992).

⁷⁹ *Id.* at 593.

⁸⁰ *Id.*

⁸¹ *Stanback v. Stanback*, 215 S.E.2d 30, 36 (N.C. 1975).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* See also *Crosby v. Crosby*, 158 S.E.2d 77, 79 (N.C. 1967).

In Kentucky, modification of a custody decree is governed by K.R.S. § 403.340.⁸⁶ K.R.S. § 403.340(3) requires a change in circumstances for modification of the custody agreement.⁸⁷ In *Youngblood v. Youngblood*,⁸⁸ the Kentucky Supreme Court acknowledged the jurisdiction of the circuit court "to amend, change or to alter any provisions of the judgment respecting the care, custody, or maintenance of the child as the circumstances of the parents and the welfare of the child may require."⁸⁹ The Kentucky Court of Appeals in *Burke v. Hammonds*⁹⁰ declared the circuit court's continuing jurisdiction over custody modification under K.R.S. § 403.340.⁹¹ These cases and statutes provide guidance for custody modification and jurisdiction when minor children are involved. However, the application to disabled children who have passed the age of majority remains unsettled by the Kentucky Legislature and courts. Other states may provide some guidance for Kentucky in considering and acting to meet this need.

In *Scott v. Scott*,⁹² a recent Tennessee case that examines the issue, the mother desired a modification of the custody arrangement previously provided by the court.⁹³ The child, Rebecca, was twenty years old and mentally retarded. Her parents divorced when she was one and a half years old, and at that time Rebecca was placed in the custody of her grandparents.⁹⁴ The Greene County Chancery Court dismissed the mother's repeated petitions for custody and informed her that she was utilizing the wrong channels to modify custody for her adult handicapped child. Instead

⁸⁶ K.R.S. § 403.340 (Banks-Baldwin 2002). This statute requires that a request for modification not be made within two years of its original decree unless there is good reason including the endangerment of the child's health (physical, mental, moral, or emotional) or the original custodian has placed the child with a de facto custodian. *Id.* § 403.340(2); *see also* *Youngblood v. Youngblood*, 252 S.W.2d 21, 22 (Ky. 1952) (indicating that the wishes of the parents are not the "controlling factor[s]" to decide custody).

⁸⁷ K.R.S. § 403.340(3).

⁸⁸ *Youngblood*, 252 S.W.2d at 21.

⁸⁹ *Id.* at 22-23. *See also* *Burke v. Burke*, 103 S.W.2d 291, 292 (Ky. 1937); *Belknap v. Belknap*, 96 S.W.2d 1012, 1013 (Ky. 1936); *Harmon v. Harmon*, 94 S.W.2d 670, 673 (Ky. 1936).

⁹⁰ *Burke v. Hammonds*, 586 S.W.2d 307 (Ky. Ct. App. 1979).

⁹¹ *Id.* at 308.

⁹² *Scott v. Scott*, No. 03A01-9708-CH-00305, 1999 WL 39506 (Tenn. Ct. App. Jan. 29, 1999).

⁹³ *Id.*

⁹⁴ *Id.* at *1.

of a custody decree, the mother needed to approach the situation through a conservator action.⁹⁵ This action required the court to apply the Tennessee Code Annotated (“T.C.A.”) § 34-11-101, which contains the definitions of “disabled person” and “minor” that influenced the court’s decision.⁹⁶ The trial court concluded that Rebecca did need a conservator and that her grandparents would best fill this position.

The mother, believing that her petition for custody should have been heard, appealed to the Tennessee Court of Appeals.⁹⁷ The mother argued that the Greene County Chancery Court maintained jurisdiction to modify the custody arrangement under T.C.A. § 36-6-101.⁹⁸ Rebecca’s mother argued that the definition of “minors” within this statute included Rebecca because she was disabled.⁹⁹ Rebecca’s grandparents argued that the conservatorship action, not the custody modification, was proper.¹⁰⁰ Agreeing with the grandparents, the court of appeals held that the trial court was correct in dismissing the custody petition and instead using the conservator procedure; therefore, T.C.A. § 36-6-101 did not apply.¹⁰¹ The

⁹⁵ *Id.* Under TENN. CODE ANN. § 34-1-101(4) (2002), “conservator” is defined as “a person or persons appointed by the court to provide partial or full supervision, protection and assistance of the person or property or both of a disabled person.”

⁹⁶ TENN. CODE ANN. § 34-11-101 (1999) (current version at TENN. CODE ANN. § 34-1-101 (2002)). Under subsection (7), “[d]isabled person” means any person eighteen (18) years of age or older determined by the court to be in need of partial or full supervision, protection and assistance by reason of mental illness, physical illness or injury, developmental disability or other mental or physical incapacity.” Subsection (12) provides that a “‘minor’ means any person who has not attained eighteen (18) years of age and who has not otherwise been emancipated.” *Id.*

⁹⁷ *Scott*, 1999 WL 39506, at *1.

⁹⁸ *Id.* at *2; *see also* TENN. CODE ANN. § 36-6-101 (1999).

⁹⁹ *Scott*, 1999 WL 39506, at *2. TENN CODE ANN. § 36-6-101(b) (2000) states the following:

Notwithstanding any provision of this section to the contrary, the party, or parties, or other person awarded custody and control of such child or children shall be entitled to enforce the provisions of the court’s decree concerning the suitable support of such child or children in the appropriate court of any county in this state in which such child or children reside; provided, that such court shall have divorce jurisdiction, if service of process is effectuated upon the obligor within this state. Jurisdiction to modify or alter such decree shall remain in the exclusive control of the court which issued such decree.

Id.

¹⁰⁰ *Scott*, 1999 WL 39506, at *3.

¹⁰¹ *Id.* at *3-4.

court held that Tennessee courts presiding over conservator proceedings have plenary power¹⁰² and that the state has constitutional power to perform for incompetents.¹⁰³ Thus, this court reasoned that custody proceedings for handicapped children are not the same as those employed for minor children and that the court with jurisdiction is the court presiding over conservator actions.

The Ohio Supreme Court, in *Castle v. Castle*,¹⁰⁴ held that the trial court retains continuing jurisdiction over a minor child beyond the age of majority when the child is disabled.¹⁰⁵ In another Ohio case, *Abbas v. Abbas*,¹⁰⁶ the domestic relations court entered a divorce decree for the parents and awarded custody of the couple's fully disabled adult child to his mother.¹⁰⁷ The court concluded it was without authority to grant child support for the son, who was already twenty-five years old.¹⁰⁸ The mother argued that her son had not reached the age of majority because he was never emancipated.¹⁰⁹ To substantiate her claim, the mother referred to the statutory definition of the age of majority, which includes "[a]ll persons of the age of eighteen years or more, who are under no legal disability."¹¹⁰ Therefore, she argued, the jurisdiction the court exercised over the custody decree continued over further orders involving the disabled adult child.¹¹¹ The mother also argued that because *Castle* held that parents have the duty to support their handicapped child beyond the age of majority,¹¹² child support was necessary, and jurisdiction was present.¹¹³ The Court of Appeals of Ohio agreed with the mother and determined that continuing jurisdiction existed over these child support proceedings. The court

¹⁰² *Id.* at *3 (citing TENN. CODE ANN. § 34-1-121 (2000) (current version at TENN. CODE ANN. § 34-1-121 (2002))).

¹⁰³ *Id.* (citing *State Dep't of Human Servs. v. Northern*, 563 S.W.2d 197 (Tenn. Ct. App. 1978)).

¹⁰⁴ *Castle v. Castle*, 473 N.E.2d 803 (Ohio 1984).

¹⁰⁵ *Id.* (citing OHIO REV. CODE ANN. § 3109.01 (West 2002), which provides that: "All persons of the age of eighteen years or more, who are under no legal disability, are capable of contracting and are of full age for all purposes."); *see also supra* notes 24-25 and accompanying text.

¹⁰⁶ *Abbas v. Abbas*, 715 N.E.2d 613 (Ohio Ct. App. 1998).

¹⁰⁷ *Id.* at 614.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 615 (citing OHIO REV. CODE ANN. § 3109.01 (West 2002)).

¹¹¹ *Id.* *See also supra* notes 76, 78 and accompanying text.

¹¹² *Castle v. Castle*, 473 N.E.2d 803 (Ohio 1984).

¹¹³ *Abbas*, 715 N.E.2d at 613.

commented that “[b]y granting ‘custody’ of James, age twenty-five at the time, to the appellant, the court was essentially asserting that James had not reached the ‘age of majority.’”¹¹⁴ Here, the court that originally provided the custody arrangement would retain jurisdiction to modify that arrangement. The continued treatment of the disabled adult child as a minor affected this decision. Granting jurisdiction to the court that originally ruled in the case makes sense because that court has original jurisdiction and has already become acquainted with the family and the situation. These aspects increase the effectiveness of the presiding court.

Alabama addresses modification of custody decrees involving disabled adult children with the following statutory language:

Notwithstanding any law to the contrary, venue of all proceedings for petitions or other actions seeking modification, interpretation, or enforcement of a final decree awarding custody of a child or children to a parent and/or granting visitation rights, and/or awarding child support, and/or awarding other expenses incident to the support of a minor child or children, and/or granting post-minority benefits for a child or children is changed so that venue will lie in: (1) the original circuit court rendering the final decree; or (2) in the circuit court of the county where both the current custodial parent or, in the case of post-minority benefits, where the most recent custodial parent, that parent having custody at the time of the child’s attaining majority, and the said child or children have resided for a period of at least three consecutive years immediately preceding the filing of the petition or other action. The current or most recent custodial parent shall be able to choose the particular venue as herein provided, regardless of which party files the petition or other action.¹¹⁵

Alabama law recognizes two groups of individuals that may qualify for post-minority support.¹¹⁶ One group consists of children who want support

¹¹⁴ *Id.* at 615. The dissenting judges in *Abbas* offered an alternative for evaluating such situations and emphasized the importance of jurisdiction for these decisions. The dissenters argued that before determining if a court retains jurisdiction, the scope of the court’s jurisdiction must first be established. *Id.* at 616 (Vukovich, J., dissenting). In Ohio, a domestic relations court is without jurisdiction over a child who is already eighteen, and, therefore, could not have jurisdiction over a twenty-five year old child despite his disabilities and possible need for custody modification. *Id.*

¹¹⁵ ALA. CODE § 30-3-5 (2002).

¹¹⁶ ALA. CODE § 30-3A-101 cmt. (2002).

for post-secondary education.¹¹⁷ The second group includes disabled adult children.¹¹⁸ In *Ex Parte Brewington*,¹¹⁹ the Alabama Supreme Court expanded the definition of “children” in the child support statute to include disabled adult children.¹²⁰ The use of “and/or” in this statute can be construed to provide for the modification of custody decrees for “post-minority” children.¹²¹ Though not stated expressly, the same court will have jurisdiction over post-minority benefits and/or modification of custody because these actions grant support for a post-minority child. This approach gives jurisdiction to the original court issuing the decree or to the circuit court.¹²²

In Nebraska’s present statutes, jurisdiction over child custody and child support is limited to minor children.¹²³ This problem manifests itself in Kentucky statutes as well. K.R.S. § 403.110¹²⁴ states the legislative purpose of “[making] reasonable provision for spouse and minor children during and after litigation.”¹²⁵ It may be difficult, therefore, to fit adult disabled children in this statutory scheme. Even if there is a way to construe the statute to include adult handicapped children, the language is ambiguous and will only lead to inconsistent and unpredictable results. Other consequences involve avoidance of the issue and the exercise of improper jurisdiction. Under the present statutes K.R.S. §§ 403.270 and 403.340,¹²⁶ the circuit court has jurisdiction over child custody matters, but the application of the statutes apparently ends when a child reaches the age of eighteen.

To continue to act in a manner that is in the best interests of the child, it is vital that Kentucky courts be able to alter custody arrangements for an adult child who is disabled. Kentucky must provide a procedure by which the court system can determine these issues even after the child is technically an adult. This procedure can only effectively be provided through legislation. Upon reaching the age of majority, a disabled child’s

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Ex Parte Brewington*, 445 So. 2d 294 (Ala. 1983).

¹²⁰ *Id.* at 296-97.

¹²¹ ALA. CODE § 30-3-5 (2002).

¹²² *Id.* In this author’s opinion, Kentucky should use a more direct approach than that of Alabama.

¹²³ See *Kimbrough v. Kimbrough*, 422 N.W.2d 556 (Neb. 1988). NEB. REV. STAT. ANN. § 42-351 (Michie 2002).

¹²⁴ K.R.S. § 403.110 (Michie 2002).

¹²⁵ *Id.* § 403.110(4).

¹²⁶ *Id.* §§ 403.270, 403.340.

needs do not go away and may take on new forms. Consequently, the initial custody decision may not always advance the child's "best interests," which means that a change is in order. For instance, an adult child who was institutionalized or placed in a home as a minor may no longer be best suited in that place due to changes in health or other circumstances.

The need to present these kinds of changing concerns for an adult handicapped child to a court is evident. Possible responses by Kentucky to provide for this gap in the law include guardianship law and family courts. Depending on the option chosen, a different court will be required to hear this concern. Each option presents a unique approach to child custody modification for mentally handicapped adults.

III. THE TWIST OF GUARDIANSHIP AND FAMILY COURT

K.R.S. § 387.510 defines a "guardian" as "any individual, agency, or corporation appointed by the court to have full care, custody, and control of a disabled person and to manage his financial resources."¹²⁷ The legislature has made it clear that guardians are neither necessary nor preferred by declaring that a court should appoint a guardian "only as necessary to promote the[] well-being, including protection from neglect, exploitation, and abuse" of a disabled person.¹²⁸ The four factors that Kentucky courts consider when evaluating whether a particular person is qualified to be a guardian are: "(1) [k]inship to respondent; (2) [e]ducation and business experience of applicant; (3) [c]apability to handle financial affairs; and (4) [a]bility to carry out the requirements set forth in K.R.S. 387.660 to 387.710 and 387.750."¹²⁹ A guardian may petition for reappointment pursuant to K.R.S. § 387.610.¹³⁰ The powers and obligations of a guardian are described in K.R.S. § 387.660.¹³¹ The court may make a

¹²⁷ *Id.* § 387.510(3) (discussed in Kentucky 2002 Session Law Regular Session, Ch. 162 (H.B. No. 455)).

¹²⁸ *Id.* § 387.500(3). A "disabled" person is defined in K.R.S. section 387.510 as one with "a legal, not a medical disability, and is measured by functional inabilities." *Id.* § 387.510(8). This definition applies to anyone fourteen years of age or older who cannot make informed decisions regarding certain personal affairs or financial resources. *Id.*

¹²⁹ *Id.* § 387.605.

¹³⁰ *Id.* § 387.610. The reappointment can be for a term of five years or less, and the petitioning guardian needs the required documents listed in this statute. *Id.*

¹³¹ *Id.* § 387.660. Specific powers include determining housing, providing for the care, comfort, and maintenance of the ward, organizing suitable services, giving consent for medical care or other services, acting to minimize rights and personal

variety of changes to the guardianship order upon request by the disabled or partially disabled person, his guardian, or another interested person according to K.R.S. § 387.620.¹³² A conservator may also be appointed to manage the financial resources of a disabled person.¹³³

District courts have exclusive jurisdiction over all guardianship and conservator matters, including the determination of disability, appointment and removal of guardians, modification of orders, and management and settlement of accounts.¹³⁴ This authority of district courts conflicts with the jurisdiction of circuit courts to modify custody decrees.¹³⁵ In the situations contemplated by this Note, the adult children would likely be eligible for guardians due to their inabilities and vulnerability to abuse and neglect.¹³⁶ Further, the adult children would likely be unable to make their own decisions in personal and financial matters.¹³⁷ The guardianship law was designed to take care of disabled individuals,¹³⁸ and thus in most situations an established guardianship will necessarily continue when the disabled child reaches the age of majority because reaching the age of eighteen does not cure the child's disability. While the guardian carries out his role to care and provide for the disabled person, issues may arise that require custody modification. Issues that the guardian may face involve medical decisions and treatment.¹³⁹ The key to the jurisdictional grant of district courts in K.R.S. § 387.520, as applicable to these adult disabled children, is the language "modification of orders."¹⁴⁰ Modification of child custody decrees, therefore, would seemingly rest with the district courts due to this express language and the inability to classify the adult children as minors. The fact that most disabled individuals will require a guardian exhibits the advantage of utilizing guardian law. The guardian has a duty to the court to provide for the disabled "child," meaning that the guardian must have a venue in which he can express the child's best interests regarding a change

freedom restrictions, and carrying out these duties by reasonably utilizing financial resources of the ward. *Id.*

¹³² *Id.* § 387.620(1). The court is able to terminate or modify an order, remove or replace a guardian, or renew the present guardian's appointment. *Id.*

¹³³ *Id.* § 387.510(1). *See also id.* §§ 387.680, 387.700 (listing duties and powers of conservators).

¹³⁴ *Id.* § 387.520(1).

¹³⁵ *Youngblood v. Youngblood*, 252 S.W.2d 21, 22-23 (Ky. 1952).

¹³⁶ *See supra* notes 127-32 and accompanying text.

¹³⁷ *See supra* note 128 and accompanying text.

¹³⁸ Interview with Louise Graham, *supra* note 47.

¹³⁹ K.R.S. § 387.660 (Michie 2002).

¹⁴⁰ *Id.* § 387.520.

in custody or with respect to other issues that will likely emerge in the adult child's life.

The Kentucky family court system presents an additional option for solving the jurisdictional question as applied to this issue. Family court commenced in 1991 as "pilot projects" across the state.¹⁴¹ The original family court was located in Jefferson County.¹⁴² This first court was followed by nine additional family court projects made effective by House Bill 544.¹⁴³ Presently, nineteen counties maintain these courts.¹⁴⁴ On November 5, 2002, Kentucky voted yes on the ballot to amend the Kentucky Constitution and provide for family courts.¹⁴⁵ The theme behind the establishment of family courts in Kentucky is "One Family, One Judge, One Court," meaning that one judge presides over any and all family-related affairs in one place.¹⁴⁶ The mission statement expresses the goals of the family court as follows:

The Department of Family Court provides service and support to the Court of Justice and, further, extends service and support to families who appear in our courts across the Commonwealth. It is our mission to assist the greater court system in providing an accessible, impartial and expeditious system of justice for Kentucky families and children. We are committed to showing respect and sincerity for every person regardless of their status, and we continuously strive to improve the quality and

¹⁴¹ *Id.* § 23A.100.

¹⁴² See Kentucky Court of Justice, Family Court, at http://www.kycourts.net/AOC/FamilyCourt/AOC_FamilyCourt.shtm (last visited Jan. 31, 2003).

¹⁴³ *Id.* (stating that Governor Paul Patton signed House Bill 544 in 1998).

¹⁴⁴ See Joseph E. Lambert, *Family Court: Where Children and Families Come First*, KENTUCKY LIVING, Mar. 2002, at <http://www.kentuckyliving.com/article.asp?articleid=551&issueid=95> (last visited Jan. 31, 2003). The pilot projects are located in Jefferson, Gallatin, Boone, Franklin, McCracken, Christian, Warren, Clark, Madison, Pulaski, Lincoln, Rockcastle, Magoffin, Knot, Floyd, Pike, Oldham, Henry, and Trimble. *Id.*

¹⁴⁵ See Mark R. Chellgren, *Family-Court Landslide Taken as Mandate*, LEXINGTON HERALD-LEADER, Nov. 6, 2002, available at <http://www.kentucky.com/mld/kentucky/news/politics/4454278.htm> (last visited Jan. 11, 2003). County-by-county voting results are located at *Kentucky Family Court Amendment 1 Voting Results of November 5, 2002*, at <http://www.aoc.state.ky.us/jefferson/fnamend.htm> (last visited Jan. 10, 2003).

¹⁴⁶ *Family Court*, *supra* note 142. See also *The Family Court Constitutional Amendment*, available at <http://www.aoc.state.ky.us/jefferson/fcamend.htm> (last visited Jan. 10, 2003).

effectiveness of our services, while measuring success through the eyes of the families who are touched by our Court.¹⁴⁷

The effects of these courts include reduced stress caused by court-hopping and greater family stability. In addition, the family courts offer connections to other services and a trained staff to handle family matters.¹⁴⁸ K.R.S. section 23A.110 grants jurisdiction over child custody cases to the family courts.¹⁴⁹ Family court jurisdiction also reaches cases involving dissolution of marriage, visitation, spousal support, equitable distribution, adoption, termination of parental rights, domestic violence (including emergency orders), status offenses, paternity, dependency, neglect, and abuse.¹⁵⁰ Family court extends to a broad spectrum of family law issues.

The major impetus behind the creation of family courts is proclaimed to be better service to the children.¹⁵¹ Chief Justice Joseph E. Lambert, a proponent of family court, advanced public support for the courts by stating:

Family law cases are the only priority of Family Courts. When parents are in the middle of a bitter dispute, children suffer. If the process is drawn out or if the case is heard over and over again by different commissioners or judges, solutions may be delayed, inconsistent, or contradictory. While it's impossible to completely protect children from the difficulties of life such as divorce and family discord, Family Courts can help nurture children and families through these difficult times. . . . While all cases are important, none is more important than those involving children and families.¹⁵²

This method of thinking coincides with the standard applied during child custody proceedings.¹⁵³ Acquiring knowledge regarding the unique situation of each child through greater individualized attention advances the best interests of the child. Due to the specialized interest of the family

¹⁴⁷ *Family Court*, *supra* note 142.

¹⁴⁸ Chief Justice Joseph E. Lambert, *The Kentucky Family Court Amendment*, at http://www.kybar.org/PDF_files/KLU_2001_materials/FamCtAm.pdf, at 13 (last visited Jan. 10, 2003). *See also Family Court*, *supra* note 142.

¹⁴⁹ K.R.S. § 23A.110(3)(b) (Michie 2002).

¹⁵⁰ *Id.* § 23A.110(e).

¹⁵¹ Lambert, *supra* note 144.

¹⁵² *Id.*

¹⁵³ *See supra* notes 65-68 and accompanying text (discussing the "best interests" of the child standard).

court, this venue could be the best match for the custody issues of handicapped adult children. The trained family court staff would greatly aid in the discovery of the handicapped child's needs and could help determine the best methods by which those needs can be met.

Circuit courts exercise concurrent jurisdiction with the family courts, which complements the jurisdiction of circuit courts in child custody matters, as discussed above.¹⁵⁴ Again, however, jurisdiction over guardianship belongs to the district court.¹⁵⁵ It seems logical that the Kentucky Legislature should provide jurisdiction to the family court to hear cases on this issue. Issues such as guardianship and custody changes involving disabled adult children are an obvious fit with the special attention offered by the family courts, though adult disabled children have not been specifically named as intended beneficiaries of this court's services. As the law and jurisdiction develop in this new area of special Kentucky courts, wide openings ensue for the legislature to take steps to insert provisions for custody modification of handicapped adult children, who have heretofore been denied a comprehensive forum in which to have their needs discussed and settled.

For those children who have been handicapped prior to reaching the age of majority, family court may be the best venue in which to address their needs. Those children who become handicapped after reaching the age of eighteen could be best served by guardianship law. Uniformity is preferred, however, so the legislature should determine which procedure could best assist both groups together. The special training available to family courts, if enabling individuals to address the needs of handicapped children before and after the age of eighteen, would provide an advantage to placing jurisdiction with these courts.

IV. KENTUCKY SHOULD MAKE A STATUTORY MOVE

The Kentucky Legislature has not spoken on the jurisdiction of courts over the modification of custody for disabled children once they have reached the age of majority. As the practical circumstances of life reveal, courts will encounter this question, and a uniform answer is needed. Presently, judges in various courts may be making these decisions without proper jurisdiction and without the ability to determine the best interests of the child. Two options for Kentucky appear to be: (1) construe the present

¹⁵⁴ K.R.S. § 23A.010(5) (Michie 2002). *See also supra* notes 87-91 and accompanying text.

¹⁵⁵ *See supra* notes 133-34 and accompanying text.

statutes to confer jurisdiction over custody modification of adult handicapped children to a certain court; or (2) compel the legislature to act. Either option would require clarification of intent by the legislature.

Other states that have applied statutes to this situation present approaches to jurisdictional provision. The *Scott*¹⁵⁶ court placed a great deal of emphasis on legislative intent.¹⁵⁷ Under the statutes applied in that case, the court determined that jurisdiction was given to the court governing conservators.¹⁵⁸ This situation parallels the district court jurisdiction of guardianship in Kentucky.¹⁵⁹ The Ohio court in *Abbas*¹⁶⁰ granted jurisdiction to the court with original jurisdiction over custody proceedings.¹⁶¹ For children under the age of eighteen in Kentucky, this approach would probably result in circuit court jurisdiction.¹⁶² The *Abbas* court pointed to the statutory requirement that jurisdiction over child custody modification belongs to the court that exercised jurisdiction over the child in the first place.¹⁶³ In Kentucky, however, the circuit court's jurisdiction to modify child custody arrangements terminates when the child reaches eighteen per K.R.S. § 403.270.¹⁶⁴

The Kentucky Legislature must first take a hard look at the present state statutes. Deciding whether this issue should be resolved under child custody statutes or guardianship statutes constitutes a beginning step. The guardian is the person determined by the court to best represent and protect the needs and well-being of the adult disabled child.¹⁶⁵ If the district court has taken a serious look at the child's situation as required by the guardian statutes, then the guardian has been designated as the filter for changes in the adult disabled child's life. If the district court is also given statutory jurisdiction to modify custody of an adult disabled child, then the jurisdiction over the guardian and the adult disabled child will rest with the same court, therefore controlling both individuals and promoting a unified effort

¹⁵⁶ *Scott v. Scott*, No. 03A01-9708-CH-00305, 1999 WL 39506 (Tenn. Ct. App. Jan. 29, 1999).

¹⁵⁷ See *supra* notes 92-103 and accompanying text.

¹⁵⁸ See *supra* notes 95-103 and accompanying text.

¹⁵⁹ K.R.S. § 387.520 (Michie 2002).

¹⁶⁰ *Abbas v. Abbas*, 715 N.E.2d 613 (Ohio Ct. App. 1998).

¹⁶¹ See *supra* notes 106-11 and accompanying text.

¹⁶² K.R.S. §§ 403.270, 403.340 (Michie 2002).

¹⁶³ *Supra* notes 111-13. The Alabama statutes examined, ALA. CODE § 30-3-5 (2002), also provides jurisdiction to the original court possessing jurisdiction or the circuit court. See *supra* note 115.

¹⁶⁴ See *supra* note 126 and accompanying text.

¹⁶⁵ See *supra* notes 127-33, 138 and accompanying text.

for the adult disabled child.¹⁶⁶ The advantages of circuit court jurisdiction, however, include the time and previous exposure to the child and his situation. The circuit court knows why it gave custody to the particular parent at the time of divorce and has greater experience in custody matters. Undeniably, however, this jurisdiction could not apply to the adult child who becomes handicapped after reaching the age of eighteen because the circuit court would never have had jurisdiction over the child originally.¹⁶⁷ The same problem applies to parents who divorce after the child has already reached eighteen.¹⁶⁸ On the other hand, the district court has familiarity with the child when it appoints a guardian, and this court would have jurisdiction over an adult child who later becomes disabled because it determines when a guardian is needed, despite the age of disability.¹⁶⁹

Family court jurisdiction has only recently become a possible consideration for assisting disabled adults. Implementation of family courts across the entire state, beyond the pilot projects, may prove helpful in addressing this need. As was stated by former Kentucky Supreme Court Chief Justice Lambert, “[c]hildren and families are Kentucky’s most important resource. When they have legal problems and must come to court, they deserve our highest priority.”¹⁷⁰ Perhaps the passage of the family court amendment will raise concern in the legislature for custody changes in post-majority proceedings. With the jurisdiction over child custody and the goal of primarily serving the children through its expertise, the family court is a likely prospect for solving this problem.¹⁷¹ This issue is one of family law, and the family court was created for this purpose. The reach of the family court to adults, however, is uncertain.¹⁷² The legislature can make this decision presently and grant additional jurisdiction to the family court. Further, the legislature should address the definition of the age of majority and its application to statutes. Modification of custody decrees for adult disabled children suits the family court in a general sense and may be best served by the intricate and effective methods and

¹⁶⁶ See *supra* notes 134-40 and accompanying text.

¹⁶⁷ See *supra* note 126 and accompanying text.

¹⁶⁸ See *supra* note 126 and accompanying text.

¹⁶⁹ See *supra* notes 134-40 and accompanying text.

¹⁷⁰ Lambert, *supra* note 144.

¹⁷¹ See *supra* notes 141-55 and accompanying text.

¹⁷² Based on the author’s research, the applicability of the family court jurisdiction to adult children beyond the age of majority in any capacity may not have been decided yet. With the recent approval of the Family Court Amendment in November of 2002, these courts have not been completely implemented. Therefore, the jurisdiction issue could still be a consideration.

knowledge of the court and its staff, particularly considering the child's special needs. Guardianship would be a likely addition to family court jurisdiction because "dependency, neglect, and abuse," which are within the sphere of guardian protection, are already included.¹⁷³

In some states, including Kentucky, the court considers the wishes of the minor when making some of these important decisions.¹⁷⁴ If the child is at least fourteen, he can provide the district court with a nomination for guardian or conservator.¹⁷⁵ A question to consider is whether the same opportunity can be given to a disabled adult child. Certainly the particular situation and abilities of the child will influence the answer to this inquiry. The adult child is likely to have preferences, however, and, to the extent he can communicate these preferences, it seems most appropriate to consider these wishes. The inclusion of this aspect would be an additional benefit to the clear establishment of jurisdiction and consideration of this type of case.

CONCLUSION

As Kentucky pledges to place more emphasis on families and children, a necessary component of such emphasis is provision for custody placement and modification for mentally handicapped children over the age of eighteen. Over time, the modification in child support cases for mentally handicapped children beyond majority has received consideration.¹⁷⁶ However, the potentially numerous custody issues loom large. As parents are usually required to support their mentally handicapped children even beyond the typical time of emancipation,¹⁷⁷ they must further care for the placement of the child beyond this age. The solution to this issue remains with the Kentucky courts and legislature. Considering the actions of other states in this area, Kentucky must also take steps to address the problem.¹⁷⁸

¹⁷³ K.R.S. § 23A.110(3) (Michie 2002).

¹⁷⁴ *Id.* § 387.050.

¹⁷⁵ *Id.*

¹⁷⁶ *See supra* notes 30, 33-45 and accompanying text.

¹⁷⁷ *See* *Breuer v. Dowden*, 268 S.W. 541, 542 (Ky. 1925); *Freeburger v. Bichell*, 763 A.2d 1226, 1229 (Md. Ct. Spec. App. 2000); *see also* Dransfield, *supra* note 8.

¹⁷⁸ Tennessee has utilized conservator proceedings to address this issue. *See supra* notes 92-103 and accompanying text. Ohio has allowed the court with prior jurisdiction to retain that jurisdiction over later proceedings. *See supra* notes 106-14 and accompanying text.

Ultimately, the preferable solution is for legislative action to determine the jurisdiction for custody proceedings involving mentally handicapped adults. A court needs to retain or possess jurisdiction to respond to the changing circumstances in the lives of these adults. The implementation of family courts in Kentucky provides an opportunity for such action.¹⁷⁹ Until such action occurs, jurisdiction may be granted to either the district court or the circuit court under the child custody statute or the guardianship statute.¹⁸⁰ Uniformity of jurisdiction will not exist under these approaches, however. Therefore, the optimal decision is vesting jurisdiction in one court. At this time, it seems most appropriate to vest jurisdiction in the family court that is designed to deal with family matters in one place.¹⁸¹ An important aspect of placing jurisdiction with the family court is providing the family court with people who are specially trained to manage the needs of handicapped individuals and their families. This benefit could require further attention by the legislature and the family court in supplying such people to fill this role, but the training is important to meet everyday changes. An unresolved issue requires attention. Attention by the legislature to this necessity of handicapped adults can produce a resolution. Ending the uncertainty must begin now—the best interests of Kentucky's children and families demand it.

¹⁷⁹ See *supra* notes 141-54 and accompanying text.

¹⁸⁰ See *supra* notes 133-35 and accompanying text.

¹⁸¹ See *supra* notes 146-47 and accompanying text.