# Amy Edwards Family Law

Family Matters e-Newsletter

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**July 2019**

## What Happens to Child Support When a Special Needs Child Reaches 18?

By Amy A. Edwards

Before 1979, North Carolina parents had a legal obligation to support their child if he or she was mentally or physically incapable of self-support upon reaching age 18, the age of majority. There was considerable debate about whether to keep parents' responsibility in place or end support at age 18. Now, although there aren't any specific child support laws for children who have special needs, support can be extended to a maximum age of 20 in certain circumstances. Support can't be ordered past age 20 unless the parent signs a contract saying so.

### Child Support Law

In North Carolina, unless there's a contract that says otherwise, child support continues after age 18 if "the child is still in primary or secondary school when the child reaches age 18." In that event, support continues until "the child graduates. . . ceases to attend school on a regular basis, fails to make satisfactory academic progress towards graduation, or

reaches age 20, whichever comes first." NC Gen. Stat. §50-13.4.

**Non-Traditional Progress**

In 2001, forty years after repealing the statute that required parents to support their child if he or she was incapable of self-support, our Court of Appeals made a small step towards helping special needs children when it clarified that special needs children aren't penalized just because they are not in a traditional high school.

John Hendricks had Down Syndrome and attended a special program in a high school that taught "vocabulary and activities of daily living such as how to count money." When he reached the age of 18, his mom asked the court to end her child support obligation because he wasn't making satisfactory academic progress towards graduation. He wouldn't receive a traditional high school diploma. But John's teacher and school counselor testified that "John's attendance at school is in his best interests, [and] that he would continue to benefit in the future from the curriculum."

The Court of Appeals held that John was making satisfactory academic progress toward a non-traditional graduation, and it was equivalent to a traditional graduation. Child support would remain in place up to age 20 so long as John made progress in his program. The Court wrote: If John were not mentally disabled but instead was enrolled in a traditional high school curriculum, it is clear support would be continued. To treat a mentally disabled child any differently than a mainstream child in terms of support obligations would be patently unfair, against public policy and not in keeping with the legislative directive.

**Enforceable Agreements**

If a parent agrees in an enforceable contract to support a child past the age of majority, the court will enforce it. This is most commonly found in separation agreements when a parent agrees to pay some share of college expenses. A court can't order a parent to pay for college expenses because the child is an adult but when parents agree to share college expenses in a contract, it will be upheld. It is the same when parents agree to pay support until a certain age. If a parent relocates to North

Carolina from another state where 21 is the age of majority, for example, their separation agreement that requires paying until the child reaches 21 will be enforced here.

## Other Considerations

Parents should make efforts to talk with financial and legal professionals about supporting their special needs child, especially as the child transitions into adulthood. There are government benefits that come into play, sometimes before the age of 18. Payment of support can be tailored so that the support payments don't jeopardize those benefits. Parents should consider how their estate planning can protect those benefits. For example, there is a *special needs trust* that can maximize what the disabled child receives while preserving as many benefits as possible.

## Custody After Age 18

Although the original statute that required support obligations for special needs children was repealed, the wording of it was edited to make things slightly more convenient for the parents when it came to custody. If the parent does not already have guardianship (different from child custody) of a special needs child, the court can give "a person who is mentally or physically incapable of self-support upon reaching his majority" the same protections as a minor child. This means a District Court Judge continues to have the authority to create or modify a custody order for a disabled adult, which is useful when the parents dispute when they will spend time with their child.

NC Gen. Stat. §50-13.4
NC Gen. Stat. §50-13.8

*Hendricks v. Sanks*, 143 NC App. 544 (2001)

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## The Deployed Parents Act: Rights of Non-Parents (Part 2 of 2)

By Amy A. Edwards

Part one of this article discusses the problems military parents faced before the Act, who qualifies for the protections of it, and what the benefits are. This article focuses on third parties (non-parents). Parents can make temporary agreements that allow non-parents to spend time with a child during deployment and ask the court to treat the agreement as a court order. Or, a judge will have a trial on the deploying parent's request to appoint a non-parent to have temporary legal rights during deployment.

**Custodial Responsibility**

The Act uses Custodial Responsibility as a comprehensive term that includes any and all powers and duties relating to a child. The non-parent must be named a party to the lawsuit on a temporary basis during deployment. All types of Custodial Responsibility are available only to non-parents. The non-parent must be family member, including a sibling, aunt, uncle, cousin, stepparent, grandparent, or a person "recognized to be in a familial relationship with a child." If the non-parent isn't a family member, he or she must be someone with a close and substantial relationship with the child, meaning there is a significant bond between them. Without any formal agreement or a court order awarding Custodial Responsibility, no other person has any rights to visit or communicate with a child while a parent is deployed. There are three types of Custodial Responsibility.

- **Caretaking Authority**

  A court may grant *Caretaking Authority* to a non-parent only if it is in the child's best interest to do so. A deploying parent who nominates someone to have *Caretaking Authority* is asking the court to let that person exercise the right to live with a child and care for that child on a day-to-day basis. It is roughly equal to physical custody and it includes the legal right to visitation, possession of a child for lack of a better word. It also includes the ability to make day-to-day decisions while the child is with that person, including the authority to designate another person to have limited contact with a child.

  For example, an aunt given *Caretaking Authority* may legally consent for the child to spend Saturday afternoon with grandparents during her weekend of visitation. Unless the parents agree, *Caretaking Authority* can't give the non-parent more time than the deploying parent has in any existing custody order, or more than "the amount of time that the deploying parent habitually cared for the child before being notified of deployment."

- **Decision-Making Authority**

  Someone granted *Decision-Making Authority* has a legal right to

make important decisions about a child's education, religious training, health care, extracurricular activities, and travel, but only if the deploying parent is unable to exercise that authority, and only if it is in the child's best interest. *Decision-Making Authority* is roughly the same as legal custody. Contrast this with the right to make day-to-day decisions while a child is with a someone who has Caretaking Authority. An order granting Decision-Making Authority must list the specific decision-making powers that will and will not be granted.

- **Limited Contact**

The non-parent given *Limited Contact* privileges has the right to visit for a limited period of time unless the court finds that doing so isn't in the child's best interest. *Limited Contact* rights are given a lower standard to meet than the other two types of Caretaking Authority, which require a judge to find that granting authority to the non-parent is in the child's best interest. *Limited Contact* includes authority to take the child from his or her home for a visit. A grant of *Limited Contact* can also be made to minors, such as siblings or step-siblings, giving them the right to see the child while mom or dad is deployed.

In the official comments, the Act says that *Limited Contact* is a more limited than visitation, meant to give the deploying parent the ability to maintain the relationship with the child by allowing someone that the child has a close relationship with to spend time with that child while he or she is absent.

* The Uniform Deployed Parents Custody and Visitation Act, Chapter 50A, Article 3 of the North Carolina General Statutes.

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## Harassment and Substantial Emotional Distress as Domestic Violence

By Amy A. Edwards

North Carolina courts can enter domestic violence protective orders (DVPOs) if any one of several grounds exist. DVPOs can require someone to stay away from the home, school or workplace of the other person, surrender firearms, cease all contact with the other person including by e-mail and text, and even award temporary child custody of the children of the parties. While a DVPO is a civil order and not a criminal order, the stigma associated with it is just as bad if not worse.

### What Are the Grounds for DVPOs?

There are four different grounds for the granting of a DVPO. One ground for getting a DVPO is any attempt someone makes to cause bodily injury, or intentionally causing bodily injury. Another ground is committing sexual assault against someone. These two grounds are more objective, looking at what any reasonable person would think about what happened. These grounds are sometimes easier to prove than the next two grounds.

The court will grant a DVPO is someone places someone "in fear of imminent serious bodily injury . . . that rises to such a level as to inflict substantial emotional distress." And the last ground for a DVPO is when someone places someone "in fear of continued harassment that rises to such a level as to inflict substantial emotional distress." [1] These require the court to make a ruling about how *the victim specifically* feels about what happened, using a subjective standard instead of looking objectively at how any reasonable person in that situation would likely feel. In other words, the court can find that grounds for a DVPO just because the victim was fearful because of what the defendant did even if most reasonable people wouldn't be fearful

**What the Legal Definition of Harassment?**

Our criminal statutes for stalking define harassment as "[k]nowing conduct . . . directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose." There are many ways someone can commit harassment, including "written or printed communication or transmission, telephone, cellular, or other wireless telephonic communication, facsimile transmission, pager messages or transmissions, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions." [2]

**What is Substantial Emotional Distress?**

For the court to enter a DVPO, there has to be harassment but it must also lead to *substantial emotional distress* to the person allegedly being harassed. The criminal laws define what this means in fuzzy terms: Significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling. [3] What meets the standard of harassment that causes this level distress? Like most legal issues, there's no clearly defined answer because North Carolina courts look at each situation on a case-by-case basis.

In one case, the defendant sent text messages threatening suicide, then that "I invited you to come home time and time again. Take the wrath that comes." He sent numerous other texts and she feared that he was

"coming to kill" her. She became so fearful that it curtailed her ability to work, persuading the Court of Appeals to decide that her case did constitute substantial emotional distress. [4]

In another case, the Court of Appeals reminded us that just being harassed isn't enough. It has to rise to the level of substantial emotional distress. [5] There, the person seeking a DVPO said that the other person made Facebook posts in which "he continues to lie on social media about me[.]" In court, the attorney asked her what the posts had done to her, specifically. She replied that "It's emotional distress. I can't live every day wondering what he's going to do and say on Facebook that's going to damage my family, my children, my grandchildren, myself." This wasn't substantial emotional distress. It was merely harassment.

[1] NC Gen. Stat. §50B-1.
[2] NC Gen. Stat. §14-277.3A(b)(2).
[3] NC Gen. Stat. §14-277.3A(b)(4).
[4] Stancill v. Stancill, 241 N.C. App. 529, 543 (2015).
[5] Morgan v. Defeo, (unpublished) 822 S.E.2d 792 (2019).

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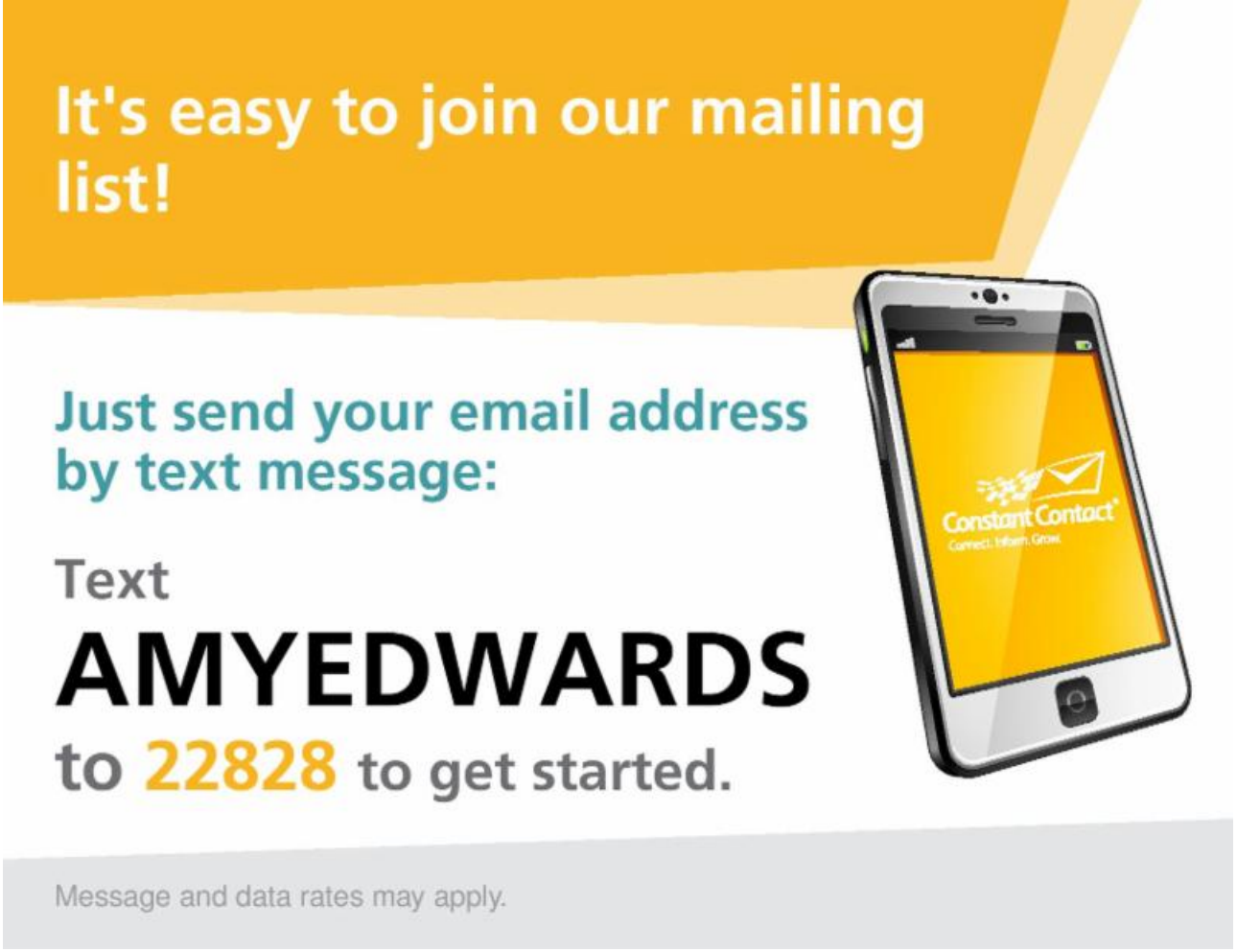


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