Dancing with Mary Jane: What Family Courts are Making of Medical Marijuana Use in Custody Cases

by: Mark Jones[1]

Introduction

When I first started practicing family law in Georgia, I was utterly amazed at the sheer power wielded by a Superior Court Judge where children are involved. Superior Court Judges pursuant to the injunctive powers granted to them by the Georgia General Assembly under OCGA § 9-11-65(e) truly are the gatekeepers to our children's best interests. Under that code section, a Superior Court Judge may issue interlocutory injunctions concerning the custody of children, "with or without notice or bond, and upon such terms and conditions as the court may deem just." *Id.* In this code section, our legislature handed our Superior Court Judges a blank check to issue extraordinary and oftentimes ex parte injunctive relief when a child's best interests are at risk.

As the father of three young children, I am still slightly shocked at how much power this code section grants our judges. There is no doubt that these judges are responsible for ensuring our children are protected from threats to their best interests, regardless of whether the threat comes in the form of a prescription pill, a bottle at a liquor store, or a plant prescribed medicinally.

With the Georgia House and Senate passing a limited medical marijuana bill, my position is that medical and recreational marijuana use akin to the western states will eventually be in effect in Georgia – although the authors of the medical marijuana bill that passed the House and Senate swear that this is not the case.[2] The reason Georgia will eventually adopt a more extensive form of medical or recreational marijuana use is because of the tax revenue associated with it. Medical and recreational marijuana sales as a source of tax revenue, while initially underperforming, appear to be rising as a significant source of tax revenue in states that have legalized it.[3] Medical and recreational marijuana taxes will prove too lucrative for state legislators to ignore. *Id.*

Furthermore, regardless of whether Georgia does or does not pass medical or recreational marijuana laws akin to Colorado or Washington State's, given that everyone has a fundamental right to travel[4] and relocate to such a state, Georgia's family court system will inevitably have to address the issue

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[2] See Ga. S.B. 185 (2015-2016) ("nor is this legislation to be construed as any intent of the General Assembly to be moving in the direction of the legalization of the recreational use of marijuana or other controlled substances.").

[3] See, e.g., Hernandez, Elizabeth *Colorado's Record January Marijuana Sales Yield 2.3 Million for Schools*, *The Denver Post* available at: http://www.thecannabist.co/2015/03/11/colorado-pot-tax-results-january-2015/31462/ (noting "January's [2015] school-designated pot excise tax is more than 10 times the amount in January 2014, when the state first collected the tax on wholesale marijuana transfers.").

[4] See generally, *Crandall v. Nevada*, 73 U.S. 35 (1868) (noting "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.").

of medical or recreational marijuana use in the family law context in the event one parent to a custody dispute decides to move to such a state while the other parent remains in Georgia with the child.

Custody cases centered on medical marijuana use in states that permit such use involve a fascinating interplay between a parent's federal constitutional right to raise his/her children as he/she sees fit,[5] a parent's state-based statutory or state constitutional right to use marijuana,[6] and the age-old best interests of the child standard, which ensures that a child is raised in a healthy, wholesome environment.

With this in mind, one must address the issue of how medical and/or recreational use of marijuana will impact the largest subset of the legal industry: the family law system.

This article examines what family law courts are doing in states that have legalized medical or recreational marijuana in making custody determinations. In examining the appellate decisions, it is fair to say that the following axioms hold true:

- A family court cannot make a custody determination solely on the basis of a parent's medical or recreational marijuana use in states where such is legal; and

- Factors a family court judge will consider in making a custody determination include whether: (a) the parent using medical or recreational marijuana uses the drug around the child; (b) the parent using medical or recreational marijuana keeps the drug locked up and out of reach of the child; (c) the parent seeking custody abuses marijuana; (d) the parent's medical condition for which the parent uses medical marijuana; and (e) any other factor associated with the parent's marijuana use that impacts the health and welfare of the child; and

The article then concludes by suggesting that family law judges should still employ traditional tools at their disposal in making custody determinations, regardless of the legality of marijuana use in those states that permit it.

A Custody Determination Cannot Be Made Solely on the Basis of One Party's Marijuana Use Without a Showing of Specific Harm to the Child's Best Interests by the Parent's Marijuana Use

In states where medical or recreational marijuana use is legal, the appellate courts have uniformly held that a family judge cannot make a custody determination solely on the basis of one parent's marijuana use,[7] despite marijuana possession being illegal at the federal level.[8] Even illegal marijuana use, i.e., use without a prescription, in such states is still not enough by itself to warrant a custody denial or modification.[9]

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[5] See generally, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). *Pierce* is generally regarded by constitutional scholars as providing parents with a fundamental right to raise their children as they see fit pursuant to the parent's liberty interest under the 14th Amendment.

[6] For example, a citizen of Colorado has a constitutional right to use marijuana pursuant to the Colorado Constitution, article XVIII, § 14.

[7] *In re Alexis E.*, 171 Cal.App.4th 438, 90 Cal. Rptr. 3d 44 (Cal. App., 2009) ("mere use of marijuana by a parent will not support a finding of risk to minors.").

[8] See 21 U.S.C. §§ 841, 844; see also *Gonzales v. Raich*, 545 U.S. 1 (2005) (US Congress may criminalize marijuana use despite state permitting medicinal use).

[9] *Los Angeles County Dept. of Children and Family Services v. Cornelius*, No. LK04159 (Cal App. 2010) (unpublished) ("Several cases indicate that the mere use of marijuana, even illegally, is not alone sufficient …").

Indeed, in some states, such as Michigan, the medical marijuana laws actually codify this principle that mere use of marijuana, without more, does not justify a custody modification or finding of child endangerment.[10] The same holds true for Maine, although the legislature there specifically included a reference that a court could consider a party's marijuana use if it impacted the best interests of the child.[11]

Nevertheless, even in states that permit marijuana use, the family courts still consider marijuana as a factor in making a custody determination under current case law if the parent's marijuana use constitutes substance abuse or creates a risk of physical or mental harm to the child.[12] There must be some specific nexus, however, between the parent's marijuana use and the best interests of the child. Further, one must also remember that substance abuse in a clinical setting means, "a] maladaptive pattern of substance use leading to clinically significant impairment or distress ... occurring within a 12-month period."[13] In other words, in order for a parent's legal marijuana use to impact a custody determination, there must be some evidence that the parent's marijuana use endangers the child or is substantially and specifically connected to the parent's parenting skills or judgment.[14] The parent's marijuana use must effect the best interests of the child.[15]

Several Common Factors Used by Courts Appear in Cases Where a Parent's Marijuana Use is at Issue

Because the best interests of the child standard is traditionally a vague, squishy legal standard, each case involving a child custody determination and a parent's medical marijuana use is heavily fact intensive. However, certain common factors do appear in the appellate decisions in these cases. Generally, these factors center on whether the marijuana use by the parent constitutes substance abuse or somehow impacts the health and welfare of the child.[16]

Examples of specificity that warrants denying or modifying custody based on medical marijuana use include:

- whether the parent uses marijuana around the child;[17]

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[10] See, e.g., *In re Beeler*, No. 321648 (Mich. Ct. App.) (unpublished) (noting, "Michigan's Medical Marihuana Act ... provides in part, 'A person shall not be denied custody or visitation of a minor for acting, in accordance with this act, unless the person's behavior is such that it creates an unreasonable danger to the minor that can be clearly articulated and substantiated.'").

[11] 22 M.R.S. § 2423-E(3) (" a court may not use a parent's lawful use of medical marijuana as the reason to deny parental rights and responsibilities.").

[12] *In re David M.*, 134 Cal App. 4th 822 (Cal App. 2005) ("The record on appeal lacks any evidence of a specific, defined risk of harm to either David or A. resulting from mother's or father's mental illness, or mother's [marijuana] abuse.").

[13] *Jennifer A. v. Superior Court*, 117 Cal App. 4th 1322, 1346 (Cal App. 2004) (citing *American Psychiatric Association, Diagnostic & Statistical Manual of Mental Disorders* (4th ed.2000) p. 199).

[14] *Cornelius*, supra note 9 ("There was no testimony linking the mother's marijuana use to her parenting judgment or skills. There was no evidence of a diagnosis by a medical professional or any clinical evaluation and determination that the mother had a substance abuse problem based upon her use of marijuana.").

[15] *Daggett v. Sternick*, 2105 ME 8 (2015) ("the best interest of the child necessarily involves considering whether a parent's ability to care for his or her child is impaired, including by his or her marijuana use.").

[16] See *Dept. of Human Servcs v. Radiske*, 144 P.3d 943 (Or. App. 2006) (noting "Children have a right to grow up in a wholesome and healthy environment, free from abuse, injury, or neglect …").

[17] Cf. *Parr v. Lyman*, 240 P.3d 509 (Colo. App. 2010) (father objected to family law judge's condition that father refrain from marijuana use while exercising parenting time).

- the form of marijuana used by the parent;[18]
- how secure the parent keeps the marijuana stored;[19]
- the parent's attitudes towards marijuana use;[20]
- whether the parent exercising custody has a history of substance abuse;[21]
- whether the paren's friend or known associates use marijuana;[22] and
- lapses in parental judgment linked to marijuana use.[23]

Medical marijuana use by a parent also begs the question of *what exactly* is the medical issue the parent using medical marijuana is suffering from because a parent's physical health is surely a factor to consider in determining best interests of the child.[24]

In sum, factors the courts consider in making a custody determination where a parent uses marijuana legally generally revolve around whether the parent is abusing marijuana or whether the parent's legal marijuana use exposes the child to risk of harm.

Suggestions for Family Court Judges

In cases where a parent is using marijuana legally, a family court judge should not consider her hands tied. Rather, she should still employ traditional means of monitoring a parent for drug use such as drug tests[25] and drug counseling,[26] depending on the extent of the parent's marijuana use. A drug test for THC metabolites will still show the extent of a parent's marijuana use and drug counseling would be warranted where there is specific evidence of substance abuse or a need for parental education concerning the impact of marijuana use when children are around.

A judge absolutely can restrict a parent from using marijuana while in the presence of the child,[27] whether the use is legal or not and may even be able to restrict the parent's marijuana use to a specific form of marijuana[28] to prevent ill effects on the child. Though the appellate courts in states where some form of marijuana use is legal have uniformly rejected a per se custody denial or modification rule simply because a parent uses marijuana, they have also uniformly held that the child's health and well-being is the paramount concern in a custody dispute.[29]

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[18] See, e.g., *Riverside County Dept. of Pub. Soc. Servcs v. L.M.*, E061396 (Cal. App. 2015) (noting father exposed child to second hand marijuana smoke).
[19] *Daggett*, supra note 15 (parent stored "voluminous" amounts of marijuana in areas where child could access).
[20] *Cornelius*, supra note 9 (father testified that he was "not worried about [the child] eating marijuana.").
[21] *Id*.
[22] *Los Angeles Cnty. Dep't of Children & Family Servs. v. Anthony O. (In re S.U.)* (Cal. App., 2011) (court noted that father no longer associated with friends who used marijuana).
[23] *Jennifer A.* supra note 13.
[24] *Demski v. Petlick*, (Mich. App. 2015) (noting, "the mental and physical health of the parties" as a factor in relation to a parent's medical marijuana).
[25] *Jennifer A.* supra note 13 (court used drug tests to monitor extent of parent's medical marijuana use).
[26] See, e.g., *Anthony O.* supra note 22 (court ordered drug counseling as part of reunification plan).
[27] *Parr* supra note 17.
[28] Cf. *State v. Nelson*, 195 P.3d 826 (Mont. 2008) (court restricted probationer to pill form of marijuana despite medical marijuana prescription).
[29] *In re Marriage of Wieldraayer*, No. 59429-0-I (Wash. App. 12/22/2008) (Wash. App., 2008) ("Merely because Cameron is entitled to use marijuana to improve his medical condition under [the law] does not mean that such use is not detrimental to his young daughters. In the family law setting, the best interests of the child are of paramount importance.").

In short, in custody cases, family court judges should continue to use the tools at their disposal to monitor parents who are using marijuana legally but should be sure to include specific findings of fact in the event of a modification or denial of primary custody where a parent legally uses marijuana.

Conclusion

Like it or not, family court judges throughout the United States will continue to be confronted with a parent's legal marijuana use in family law cases because more states will continue to pass laws permitting medical or recreational marijuana use. As a general rule, even though marijuana use in any form remains illegal at the federal level, the case law is clear that marijunan use by a parent, without more, is not sufficient to warrant denying a parent custodial rights or modifying custody to a child. Rather a specific nexus between harm to the child's best interests and the parent's marijuana use must be shown. Common factors family courts have used in making custody decisions where a parent uses legal marijuana all center on whether a parent's marijuana use constitutes substance abuse or otherwise harms the child. Regardless of whether a parent's marijuana use is lawful, family court judges should continue to use traditional items in their judicial toolbox to monitor and otherwise regulate a parent's marijuana use in family law cases.