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DRINK A PINT SMOKE A JOINT

The importance of distinguishing between substance use and substance abuse in custody cases

By Emily Gelmann

"Marijuana" is a bombshell term to drop in any custody case. Too often, the mere accusation that a parent "smokes marijuana" determines not just the tenor but also the outcome of custody litigation. This reality reflects the stigma associated with cannabis stemming from the "War on Drugs" in the 1980s. It does not reflect, however, modern use, opinions regarding use, or legalization trends.

Let's start, for example, with the term "marijuana". While the exact etymology is unknown, marijuana is a slang term. The plant from which marijuana emanates is named cannabis. Referring to it solely as "marijuana", therefore, is akin to calling alcohol only "hooch". Cannabis was long known in the United States as hemp, and its production was encouraged through the 1890s. After the Mexican Revolution of 1910, Mexican immigrants entered the United States in large numbers, and introduced the recreational use of cannabis, and the term "marihuana" (President Richard Nixon popularized the spelling as "marijuana"). This coincided with strong anti-immigrant sentiments that accompanied the Great Depression. The term, along with its social stigma, was introduced to mainstream culture in 1930 by Harry Anslinger, the head of the Federal Bureau of Narcotics who, while introducing a cannabis prohibition bill, stated "we seem to have adopted the Mexican terminology, and we call it marihuana." He further stated, "there are 100,000 total marijuana smokers in the US, and most are Negroes, Hispanics, Filipinos, and entertainers. Their satanic music, jazz, and swing, result from marijuana use." Mr. Anslinger intended his word choice to play on those anti-immigrant sentiments–imbuing the term with a negative connotation–to pass the bill. The use of the term "marijuana" represented a marked linguistic shift and the attachment of a profound stigma.

This stigma stills exists, and certainly persists in the courts; an accusation of cannabis use in a custody case can be an ace in the hole for the accusing parent. The Family Law and Cannabis Alliance notes that medicinal and recreational use of marijuana is still considered a problem by both Child Protective Services and family courts – even in states where cannabis use is legal. This stigma is readily observable in our own courts. In 2014, the Montgomery County Circuit Court, on an ex parte emergency motion, granted the father emergency custody over a child based on nothing more than an accusation that the mother had cannabis in her home. In another Montgomery County Circuit Court case in October of 2016, a mother who absconded from the state with the parties' two minor children was permitted to stay in another state and was awarded temporary custody of the children due, in large part, to allegations of recreational marijuana use by the father. The court made its decision despite the fact that the father was the primary breadwinner and maintained a high-paying job, and there were no allegations of abuse or neglect of the children. There were also no allegations that he ever used cannabis in front of the children.

Societal understanding and acceptance of cannabis use has changed significantly since President Reagan declared a War on Drugs. According to Gallup polls, support for legalization of cannabis was at just 25 percent through the 1980s and '90s. In 2000, it increased to 31 percent, and has continued to increase since then. In October 2016, support for legalization reached 60 percent nationwide. Support for the legalization of medical marijuana has increased at an even more rapid pace. As both the laws and understanding of cannabis use evolve, the courts must evolve along with them. Unfortunately, jurisprudence in this area is both unpredictable and unreliable.

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Cannabis use as a determining factor in custody cases

Reported family law cases across the country are replete with examples of courts determining parental unfitness based on cannabis use. In 1998, the Court of Appeals of Washington restricted a father's visitation rights until he stopped using marijuana. *State on Behalf of Hendrix v. Waters* 951 P.2d 317 (Wash. Ct. App. 1998). In 2002, the Court of Appeals of Arkansas, in an unreported case, held that the trial court had committed reversible error in failing to find a material change in circumstances to justify a modification of custody where there was undisputed evidence that the mother and her husband used marijuana in the home when the children were present. *Willis v. Shermer*, No. CA 02-178, 2002 WL 31303550 (Ark. Ct. App. October 9, 2002). In 2013, the Supreme Court of Alaska–a state which legalized recreational cannabis use just two years later–upheld the trial court's change in custody based on evidence that the father smoked recreational marijuana one to two times per week. The court further found that marijuana use limited the father's emotional availability and could affect the children's schedules. *Co v. Matson*, 313 P.3d 521 (Alaska 2013).

While such cases may embolden those parties looking for an advantage in custody litigation, the landscape is not that predictable. There are also several contemporaneous cases where the courts did not find cannabis use to be significant when determining custody. For example, back in 1986 (the height of anti-marijuana sentiment), the Court of Civil Appeals of Alabama held that the father's admitted use of marijuana did not justify modification of custody of the parties' 7-year-old because the father never used marijuana around

the child, and there was no evidence that his occasional marijuana use – although illegal at the time – was detrimental to the child.

Maryland case law follows this same logic, although it is often not followed at the trial court level. In 2001, in *Barton v. Hirshberg*, 137 Md. App. 1 (2001), the Court of Special Appeals held that the trial court's finding that the father was a fit parent was not clearly erroneous just because the father used marijuana. The Court noted that the father never used marijuana in the child's presence, the child was unaware of the father's marijuana use, and marijuana is just "one factor" in determining parental fitness. However, in so holding, the Court included a condemnation of the father's actions noting that his marijuana use was "troubling" and that the court could not "condone it." This dicta evidences the Court's continued feelings and moral judgments on cannabis use.

Until there is some uniformity and consistency in how family courts view and consider cannabis use, allegations regarding use will continue to be wielded as a weapon to inflict a mortal blow to the "using" parent's parental fitness. And that determination is largely left up to the whim and personal bias of the judge.

A uniform approach: distinguishing between use and abuse

The inconsistency in how family courts consider and treat cannabis use in custody cases can leave parents blindsided. Just as discovery rules are meant to ensure no party is ambushed at trial, a uniform approach to considering cannabis use in custody cases would similarly prepare the parties for likely outcomes at trial, and set the same standards for all cases. A model for such a uniform approach emerged out of a 2012 California case.

In *In re Drake M.*, 149 Cal Rptr.3d 875 (Cal. Ct. Ap. 2012), the Court of Appeal grappled with the issue of a child's dependency status and a par-

ent's drug use. In the case, the child, Drake, was referred to the Department of Children and Family Services (DCFS) at just nine months old due to his mother's history of drug abuse. The social worker investigating Drake found that Drake lived with his family in an appropriate apartment, there was plenty of food in the house, and the utilities were operational. She also found that Drake was reaching his developmental milestones. Drake's father, Paul, also used cannabis. Importantly, Paul did not use it recreationally; he used it medicinally (and legally) for his arthritis.

Despite Paul's legal use of cannabis (medical cannabis use was legalized in California in 1996), the trial court ordered that Drake be placed in his care but under DCFS supervision. The court further ordered Paul to submit to weekly random drug testing with clean results. Paul filed an appeal arguing that DCFS did not present sufficient evidence to the trial court to support a finding that his conduct caused Drake "substantial risk of suffering and serious physical harm or illness."

The appellate court agreed with Paul and made a notable distinction between "substance use" and "substance abuse." The court stated that "both DCFS and the trial court apparently confused the meanings of the terms "substance use" and "substance abuse"…the mere usage of drugs by a parent is not a sufficient basis on which dependency jurisdiction can be found." The court went on to compare the father's marijuana use with that of a prescription drug: "use of medical marijuana, without more, cannot support a jurisdiction finding that such use brings the minors within the jurisdiction of the dependency court, not any more than use of the medications prescribed by a psychiatrist brings the children within the jurisdiction of the court." The Second District Court of Appeal went on to define "substance abuse" as either a diagnosis of a substance abuse problem by a medical professional, or meeting the criteria for substance abuse under the Diagnostic and Statistical Manual of Mental Disorders IV ("DSM IV").

The DSM IV defines substance abuse as "a maladaptive pattern of substance abuse leading to clinically significant impairment or distress, as manifested by one (or more) of the following, occurring within a 12–month period: (1) recurrent substance use re-

sulting in a failure to fulfill major role obligations at work, school, or home (e.g., repeated absences or poor work performance related to substance use; substance-related absences, suspensions, or expulsions from school; neglect of children or household); (2) recurrent substance use in situations in which it is physically hazardous (e.g., driving an automobile or operating a machine when impaired by substance use); (3) recurrent substance-related legal problems (e.g., arrests for substance-related disorderly conduct); and (4) continued substance use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance (e.g., arguments with spouse about consequences of intoxication, physical fights)."

Approaching cannabis use like alcohol: use vs. abuse

Although *In re Drake M.* was a dependency jurisdiction case, and not a custody case, the analysis of parental fitness is still applicable. When it comes to the use of legal, or legally prescribed, substances, most courts already employ a use versus abuse analysis. For example, a parent taking Ativan (an addictive substance with potential side effects including severe dizziness, drowsiness, weakness, and memory problems) is not considered unfit so long as the drug is being taken as prescribed, but unfitness enters the equation when a parent is abusing a legally prescribed drug.

This approach is already used in cases where alcohol abuse is at issue. In *Cohen v. Cohen*, 162 Md. App. 599 (2005), the Court of Special Appeals upheld the imposition of a visitation condition whereby the father had to completely abstain from alcohol use. In so holding, the Court did an investigation into the father's use of alcohol to determine if there was abuse. The Court conducted a substance abuse assessment; it also received evidence that the father had three arrests for driving under the influence of alcohol and one arrest for driving a boat while intoxicated. The Court held that the evidence established that the father did not simply use alcohol, he abused alcohol. The Court further explained that not only did the father abuse alcohol, but the restriction on his access was permissible because it was reasonably related to advancing the child's best interest. In other words, there has to be a nexus between the alcohol use/abuse and the child's welfare. The Court was clear that "we will affirm the imposition of such a condition so long as the record contains adequate proof that the condition or requirement is reasonably related to the advancement of a child's best interests." The same analysis is, or should be, applicable to cannabis use.

In conducting this analysis, the Court noted that "alcohol we treat differently because we all have some tolerance for *some* level of alcohol ingestion." It is noteworthy that the Court emphasized its tolerance for some level of alcohol whereas in *Barton*, just four years earlier, the Court condemned the father's cannabis use. The juxtaposition of these two opinions highlights the negative light in which the court views cannabis use versus alcohol use. The opposing views of these two substances stems entirely from social acceptance rather than scientific fact. According to the Marijuana Policy Project, recreational cannabis is consumed similarly to alcohol: while socializing with friends or after work. And yet, unlike alcohol, cannabis has no proven statistical linkage to death, overdose, brain damage, cancer, violent crimes, or domestic violence.

The increasing prevalence and social acceptability of cannabis

Just as the Maryland Court of Special Appeals expressed some tolerance for alcohol use due to its social acceptance, courts should apply that same level of acceptance to cannabis use. Public support of cannabis legalization is not the only thing on the rise. Recreational cannabis use is now legal in eight states (Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, and Washington) and the District of Columbia, and medical marijuana is legal in twenty-nine (29) states. Maryland itself recently issued pre-approvals for companies to grow, process, and dispense medical cannabis. The Maryland Medical Cannabis Commission, which develops policies, procedures, and regulations to implement programs that ensure medical cannabis is available to patients, anticipates that medical cannabis will be available to patients by the end of summer 2017. Cannabis is often prescribed to treat conditions from cancer and seizures to anxiety and depression. Psychology Today has cited to studies that show cannabis being beneficial in the treatment of anxiety and depression. It can't be long before the courts have to consider whether a parent with anxiety is better off being treated with cannabis or Xanax–only one of which is physically addictive.

Given the increased prevalence, accessibility, and acceptance of cannabis for both medical and recreational purposes, courts should not continue to rely on cannabis use alone as evidence of parental unfitness. Allegations of use should no longer be the basis for any "emergency" or other custody determination. As is so often done when a party claims alcohol abuse in a custody case, and as the California appellate court did in In re Drake M., courts must evaluate use versus abuse, and determine if there is any detriment to the child's welfare as a result of parental use. Parental use alone, with no further evidence of harm to the child or other adverse effect on the child or parent, should no longer be a basis for finding parental unfitness. A parent who drinks a pint of beer with dinner every Saturday night is not automatically unfit; neither is the parent who socially smokes a joint with friends.

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