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## High Society: Washington State's Recreational Cannabis Law and Its Effects on Child Custody and Visitation Rights

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## High Society: Washington State's Recreational Cannabis Law and Its Effects on Child Custody and Visitation Rights

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Dana Petersen\*

### I. INTRODUCTION

Cannabis<sup>1</sup> is the most widely used illicit psychoactive substance in the United States.<sup>2</sup> While teenagers are stereotypically pegged as the biggest population of cannabis users, more and more parents are coming out of the cannabis closet, so to speak.<sup>3</sup> In January 2014 when dispensaries began selling recreational cannabis in Colorado, the vast majority of customers were over the age of 30.<sup>4</sup> Colorado<sup>5</sup> and Washington<sup>6</sup> were the first states to

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<sup>1</sup> There are many different terms one can use when talking about cannabis. One of the most common terms is "marijuana." However, there is "a longstanding theory that narcotics agents in the 1930s chose that word over the more scientific *cannabis* when crafting drug laws; the word is of Mexican-Spanish origin and thus, the belief is, sounded more exotic and sinister." Anna King, *Is the Word "Marijuana" Racist?*, SALON (Aug. 6, 2013, 9:10 AM), [http://www.salon.com/2013/08/06/weed\\_and\\_words\\_the\\_growth\\_of\\_dank\\_vocabulary\\_partner/](http://www.salon.com/2013/08/06/weed_and_words_the_growth_of_dank_vocabulary_partner/). I am choosing to use cannabis more often in this article, though marijuana may be used interchangeably on occasion.

<sup>2</sup> Am. Psychiatric Ass'n., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 512 (5th ed. 2013) [hereinafter DSM-5].

<sup>3</sup> Abby Haglage, *Parents Come Out of the Pot Closet*, THE DAILY BEAST (Jan. 15, 2014), <http://www.thedailybeast.com/articles/2014/01/15/parents-come-out-of-the-pot-closetparents-come-out-of-the-pot-closet.html>.

<sup>4</sup> *Id.*

<sup>5</sup> COLO. CONST. art. XVIII, § 16.

legalize recreational cannabis use for adults who are 21 years old and older. Voters in Oregon<sup>7</sup> and Alaska<sup>8</sup> approved measures to legalize recreational cannabis use for adults in November 2014. Washington, DC voters also approved the use of recreational cannabis for adults; however, a prohibition by Congress still makes buying or selling the drug illegal.<sup>9</sup> While Washington State's new cannabis law, and the similar laws in other states, may protect adults from criminal prosecution for cannabis possession,<sup>10</sup> it is still unclear how a parent's recreational use of cannabis could impact his or her rights in child custody and visitation disputes.

Historically, judges have viewed legal parental cannabis use as a negative or discriminating factor when deciding child custody cases.<sup>11</sup> States have a vested interest in ensuring the health and welfare of minor children within their borders.<sup>12</sup> This article argues that this interest can be fully served when courts use an objective test to evaluate the particular conduct of the parent that could risk serious physical harm or illness to the child(ren), rather than relying on the parent's general use of recreational cannabis.

Cannabis's negative side effects, revealed in studies below, could threaten the health and welfare of children. However, the likelihood of the

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<sup>6</sup> Marijuana Retailers, Employees of Retail Outlets, WASH. REV. CODE § 69.50.360 (2013).

<sup>7</sup> *Marijuana: Frequently Asked Question*, OREGON, <http://www.oregon.gov/olcc/marijuana/Pages/Frequently-Asked-Questions.aspx> (last visited Dec. 30, 2014).

<sup>8</sup> Suzanna Caldwell & Laurel Andrews, *Is Weed Really Legal? And Other Things You Need to Know About Marijuana in Alaska*, ALASKA DISPATCH NEWS, Nov. 8, 2014, <http://www.adn.com/article/20141108/weed-really-legal-and-other-things-you-need-know-about-marijuana-alaska>.

<sup>9</sup> Aaron C. Davis & Perry Stein, *D.C. Hosts Nation's Biggest Legal Marijuana Giveaway*, WASH. POST, Mar. 26, 2015, [http://www.washingtonpost.com/local/dc-politics/dc-is-about-to-host-the-nations-biggest-legal-marijuana-giveaway/2015/03/26/ec566ec8-d399-11e4-8fce-3941fc548f1c\\_story.html](http://www.washingtonpost.com/local/dc-politics/dc-is-about-to-host-the-nations-biggest-legal-marijuana-giveaway/2015/03/26/ec566ec8-d399-11e4-8fce-3941fc548f1c_story.html).

<sup>10</sup> WASH. REV. CODE § 69.50.360.

<sup>11</sup> Gene Johnson, *Medical Pot Can Cost Child Custody*, NBC NEWS (June 21, 2010, 1:37 PM), [http://www.nbcnews.com/id/37822194/ns/health-childrens\\_health/t/medical-pot-can-cost-child-custody/#.U09dKceKTgo](http://www.nbcnews.com/id/37822194/ns/health-childrens_health/t/medical-pot-can-cost-child-custody/#.U09dKceKTgo).

<sup>12</sup> *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (noting that “the well-being of its children is of course a subject within the State’s constitutional power to regulate”).

risk created is dependent on the circumstances involved. Currently there is no concrete legal guidance on the proper amount of scrutiny courts should apply when deciding child custody or visitation matters involving a parent's legal use of recreational cannabis. Too much scrutiny inhibits parents from exercising their legal right to use cannabis recreationally. Too little scrutiny could risk the health and safety of the child(ren) involved.

This article offers an objective checklist of questions for family law commissioners and judges to consider in an effort to create a baseline standard assessment to ensure that children are being parented safely, and that parents may use cannabis recreationally in accordance with state law without the fear of losing their child(ren) as a result.

Part II of this article explores how the courts have considered medical cannabis use by parents in child custody cases. Part III examines the Washington and Colorado state laws allowing recreational use of cannabis by adults because these were the first recreational cannabis laws enacted in the country. Part IV addresses the legal ramifications of cannabis use at the federal level, and how the landscape of cannabis legality is changing. Part V outlines the benefits and negative side effects of cannabis use that are relevant to child custody matters. Part VI identifies how much cannabis use is considered too much, and when a parent's cannabis use could constitute a disorder rather than a recreational activity. Part VII discusses the current standards of review courts consider when determining child custody. Part VIII proposes a baseline for a standard checklist of questions for courts to use to address a parent's recreational cannabis use while determining child custody and visitation rights. The checklist includes the following questions: (1) Is the parent a novice cannabis user or an experienced cannabis user? (2) How is the cannabis ingested? (3) Where does the parent use cannabis? (4) How is the cannabis stored inside the home? (5) What time of day does the parent typically use cannabis? And (6) What are the ages of the children in the home?

This article will conclude by encouraging Washington State courts to adopt the checklist of six objective questions concerning a parent's recreational use of cannabis. The checklist is aligned with the policies of Washington State's new recreational cannabis law. The checklist is intended to support recreational cannabis use while also ensuring that children are protected from any risks associated with the negative effects of their parents using recreational cannabis legally.

## II. MEDICAL CANNABIS USE IN CHILD CUSTODY CASES

Now that recreational cannabis use is legal for adults in Washington State, the question is how the new law could impact child custody and visitation disputes in the state. Parental cannabis use has long been an issue in child custody cases—not just in Washington, but also across the country.<sup>13</sup> In the past, parents who tested positive for illegal cannabis use or who admitted using cannabis have lost custody of their children or lost visitation rights because, very simply, they were breaking the law by using an illegal substance while caring for their children.<sup>14</sup> The advent of medical cannabis laws over the past 20 years has not done much to clarify, for the courts, when parental cannabis use should be a deciding factor in child custody and visitation cases.

Decisions involving disputed child custody and visitation in Washington State are soundly within the trial court's discretion.<sup>15</sup> Although a trial court has wide latitude in deciding parenting issues, it must make its decisions based upon the child's best interests and without abusing its discretion.<sup>16</sup> This wide range of discretion has led to inconsistencies in decisions regarding medical cannabis use in child custody or visitation cases, so wide

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<sup>13</sup> Stephanie Smith, *Does Medical Marijuana Equal Bad Parenting?*, CNN, Mar. 14, 2014, 9:09 AM, <http://www.cnn.com/2014/03/12/health/medical-marijuana-parents/>.

<sup>14</sup> Interview with Leonid Ponomarchuk, King County Superior Court Commissioner, in Seattle, Wash. (Mar. 3, 2014).

<sup>15</sup> State ex rel. Hendrix v. Waters, 951 P.2d 317, 320 (1998).

<sup>16</sup> *Id.*

discretion will likely exacerbate these inconsistencies in cases involving recreational cannabis use.

*A. Parental Provisions in Medical Cannabis Laws in Various States*

In 1996, California became the first state to allow patients to use cannabis for medical purposes under the state's Compassionate Use Act.<sup>17</sup> Now, some 19 years later, 22 states and the District of Columbia have joined California by enacting their own laws, which allow qualified patients to use cannabis for medicinal purposes.<sup>18</sup> While the medical cannabis laws in each state vary, most strive to ensure that qualifying patients, their primary caregivers, and the physicians who recommend using cannabis are not subject to criminal prosecution for using medical cannabis in accordance with state law.<sup>19</sup> Each state has drafted its own list of medical conditions for which patients may legally use cannabis as a treatment.<sup>20</sup>

While medical cannabis laws protect users from prosecution in general, a parent who is also a qualified medical cannabis patient can find himself or herself in a difficult legal position, often forced to choose between approved medical treatment and the threat of losing custody of his or her children.<sup>21</sup> Some states have enacted provisions in their medical cannabis laws that prevent parents from having to make this choice.<sup>22</sup> For instance, Arizona's

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<sup>17</sup> Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (2014).

<sup>18</sup> *Medical Marijuana: Pros and Cons*, PROS AND CONS OF CONTROVERSIAL ISSUES, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last visited Dec. 30, 2014).

<sup>19</sup> *Id.*; *Medical Marijuana*, NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS (NORML), <http://norml.org/legal/medical-marijuana-2> (last visited Mar. 27, 2014).

<sup>20</sup> *Medical Marijuana*, *supra* note 19.

<sup>21</sup> *See generally* Kristen Wyatt, *Changing Pot Laws Create Gray Areas in Child-Welfare and Custody Cases*, WASH. POST (June 15, 2014), [http://www.washingtonpost.com/national/changing-pot-laws-create-gray-areas-in-child-welfare-and-custody-cases/2014/06/15/594e752c-f49b-11e3-b633-0de077e9f768\\_story.html](http://www.washingtonpost.com/national/changing-pot-laws-create-gray-areas-in-child-welfare-and-custody-cases/2014/06/15/594e752c-f49b-11e3-b633-0de077e9f768_story.html).

<sup>22</sup> Arizona, Delaware, Maine, and Michigan each have provisions in their medical cannabis laws that state that cannabis use should not be a factor used to deny parental custody or visitation unless the parent's conduct is contrary to the best interests of the

Medical Marijuana Act states that “no person may be denied custody or visitation or parenting time with a minor, and there is no presumption of neglect or child endangerment for conduct, unless the person’s behavior creates an unreasonable danger to the safety of the minor as established by clear and convincing evidence.”<sup>23</sup> In effect, these provisions suggest that courts should decide child custody and visitation matters based on additional criteria as opposed to the parent’s status as a legal medical cannabis user.

In a recent decision, the California Court of Appeals seemed to agree with that sentiment, finding a distinction between cannabis “use” and “abuse.”<sup>24</sup> In the case of *Drake M.*, the court overturned a lower court’s decision to place Paul M., the child’s father, under the supervision of the Los Angeles County Department of Children and Family Services (DCFS), which required drug counseling, parenting classes, and random drug testing for the father.<sup>25</sup> These requirements stemmed from a tip to DCFS that Paul M. and the child’s mother were using cannabis.<sup>26</sup> At issue for DCFS was the fact that Paul M. drove to pick up his son from daycare roughly four hours after using cannabis.<sup>27</sup> During the DCFS inquiry, Paul M. admitted to a social worker that he had a prescription for medical cannabis and used the drug several times a week to deal with arthritis and pain.<sup>28</sup> He also testified that he did not use cannabis in the home in front of his son; instead, he went to a detached garage where the drug was kept locked in a toolbox on a shelf.<sup>29</sup> When Paul M. was in the garage using cannabis, either the child’s

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child. ARIZ. REV. STAT. § 36-2813(D) (2014); DEL. CODE ANN. tit. 16 § 4905A (2014); ME. REV. STAT. tit. 22 § 2423-E(3) (2014); MICH. COMP. LAWS ANN. § 333.26424 (c) (2014).

<sup>23</sup> ARIZ. REV. STAT. § 36-2813(D) (2014).

<sup>24</sup> In re *Drake M.*, 149 Cal. Rptr. 3d 875, 883–84 (2012).

<sup>25</sup> *Id.* at 878.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 881.

<sup>28</sup> *Id.* at 879.

<sup>29</sup> *Id.* at 879, 881.

mother, adult half-sister, or grandmother watched the child.<sup>30</sup> The social worker on the case found that Drake M. was healthy and “clean without marks or bruises” and “appeared to be reaching developmental milestones.”<sup>31</sup>

Despite finding Drake M. safe and healthy, the court issued temporary orders that mandated random drug testing for Paul M. in order for the child to remain in the home.<sup>32</sup> Unsurprisingly, Paul M. tested positive for cannabis.<sup>33</sup> As a result of the positive drug test, the temporary orders were made permanent after a hearing in October 2011.<sup>34</sup> Two months later, the court of appeals overruled the lower court.<sup>35</sup> The appellate court found that DCFS’s assertion that Paul M. was regularly under the influence while caring for his child was not proof in and of itself that Drake M. was suffering from neglect or harm.<sup>36</sup> The court went on to say, “[b]oth DCFS and the trial court apparently confused the meanings of the terms ‘substance use’ and ‘substance abuse.’”<sup>37</sup> The court’s distinction between medical cannabis “use” and “abuse” in this case is another step toward reforming how courts view medical cannabis use in determining child custody or visitation decisions. It further adds to the argument that when determining custody and visitation more factors need to be assessed besides just the parent’s use of cannabis.

#### *B. Washington State’s Medical Cannabis Law and Its Impact on Child Custody*

Washington State has a law in place to protect parents who use medical cannabis from losing their parental rights. In 1998, Washington became the

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<sup>30</sup> *Id.* at 879.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 880–81.

<sup>35</sup> *Id.* at 889.

<sup>36</sup> *Id.* at 885.

<sup>37</sup> *Id.* at 883–84.



second state, behind California,<sup>38</sup> to legalize the use of cannabis for medical purposes under the supervision of the patient's doctor.<sup>39</sup> Under the law, patients were allowed to possess or grow enough cannabis for a 60-day supply.<sup>40</sup> In 2007, then Washington Governor Christine Gregoire signed Senate Bill 6032 into law.<sup>41</sup> The bill amended the original Washington State Medical Use of Cannabis Act of 1998.<sup>42</sup> The new bill clarified how much cannabis a patient could legally possess, expanded the existing list of qualifying health conditions, and gave patients who possess medical cannabis more protection from arrest by state law enforcement.<sup>43</sup>

In 2011, the Washington State Legislature added a new medical cannabis law regarding parental rights and residential time with children:

A qualifying patient or designated provider may not have his or her parental rights or residential time with a child restricted solely due to his or her medical use of cannabis in compliance with the terms of this chapter absent written findings supported by evidence that such use has resulted in a long-term impairment that interferes with the performance of parenting functions as defined under [the law].<sup>44</sup>

The language in the law still leaves room for disparity in evaluating child custody and visitation disputes. One recent dispute involved Billy Fisher, a father and a medical cannabis patient in Spokane, Washington, who was denied custody of his infant daughter because he refused to attend an

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<sup>38</sup> Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (2014).

<sup>39</sup> Washington State Medical Use of Cannabis Act, WASH. REV. CODE § 69.51A.005 (2)(a) (2012).

<sup>40</sup> *Id.*

<sup>41</sup> *Legislators Amend Washington State Medi-Pot Law*, NORML (May 17, 2007), <http://norml.org/news/2007/05/17/legislators-amend-washington-state-medi-pot-law>.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Parental Rights or Residential Time—Not to be Restricted, WASH. REV. CODE § 69.51A.120 (2011).

inpatient chemical dependency program for his medical cannabis use.<sup>45</sup> In 2013, the Department of Social and Health Services (DSHS) took Fisher's daughter from his estranged wife.<sup>46</sup> Fisher, who had authorization to use medical cannabis for pain resulting from a 2007 back injury, sought custody but the department ordered a drug assessment before they would place the baby with him.<sup>47</sup> In Washington State, medical cannabis use cannot be the sole reason a parent is denied custody unless there are written findings that the drug creates long-term impairment or that it interferes with parenting.<sup>48</sup> So, in addition to the medical cannabis use, DSHS pointed to the facts that Fisher had no experience caring for infants since he and his wife separated before the baby was born, that he had done time in prison in Idaho for burglary, and that he was once addicted to methamphetamine.<sup>49</sup>

As a result, DSHS recommended that Fisher undergo counseling, take parenting classes, and complete 30 days of inpatient chemical dependency treatment for cannabis use before his daughter could be placed in his care.<sup>50</sup> Fisher agreed to do the counseling and parenting classes, but he refused to go to inpatient treatment for cannabis use because he would lose his job if he took a month off to attend the treatment.<sup>51</sup> On the basis of Fisher's refusal to jeopardize his job by going to inpatient treatment for cannabis, DSHS provided the family court commissioner with an assessment that claimed Fisher was addicted to cannabis.<sup>52</sup> Fisher hired a chemical dependency expert who said he was "dependent" on the drug to get through

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<sup>45</sup> Jim Camden, *Medical Marijuana Patient Can Get Custody of Daughter*, SPOKESMAN REVIEW (Jan. 29, 2014), <http://www.spokesman.com/stories/2014/jan/29/medical-marijuana-patient-can-get-custody-of/>.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> WASH. REV. CODE § 69.51A.120 (2011).

<sup>49</sup> Camden, *supra* note 45.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

the day but was not addicted to the drug.<sup>53</sup> That expert defined chemical dependency as the condition where a person needs a drug to perform daily functions but the drug does not have a negative effect on his/her life.<sup>54</sup> The commissioner agreed with DSHS and required Fisher to attend treatment in order to get custody of his daughter.<sup>55</sup> Fisher appealed to the Spokane County Superior Court where the judge rejected the inpatient drug treatment for cannabis.<sup>56</sup> The judge stated, “The purpose of treatment is to help the person stop using the substance, and here Mr. Fisher has a valid reason and medical prescription for using marijuana.”<sup>57</sup> The judge went on to say that there was no evidence regarding impairment of Fisher’s parental abilities due to any cannabis use.<sup>58</sup>

The ruling allowed Fisher to begin visits with his daughter to help ease her placement into his home.<sup>59</sup> It is unclear how much this case will help other medical cannabis patients. An appellate court did not make the ruling so it is not binding on other judges.<sup>60</sup> However, it is another step toward courts beginning to see the value in assessing the parent’s conduct rather than just the parent’s use of cannabis when it comes to safe parenting. The concern that still remains, and that will be addressed in the objective checklist below, is exactly how the courts should evaluate the parent’s conduct regarding cannabis use.

### III. LEGAL RECREATIONAL USE OF CANNABIS

The recent legalization of recreational cannabis in Washington and Colorado adds a new issue for courts to grapple with as they decide how to

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

assess a parent's cannabis use in child custody and visitation disputes. Justice Sandra Day O'Connor wrote in her dissent in the famous medical cannabis case, *Gonzales v. Raich*, "One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'"<sup>61</sup> In November 2012, voters in Washington and Colorado made their states laboratories for the legal use of recreational cannabis by passing I-502 and Amendment 64. Neither state fully considered the role legalization of recreational cannabis would play in child custody or visitation disputes. As more states consider similar legislation,<sup>62</sup> it will be an important issue to clarify for the courts.

#### A. I-502

On November 6, 2012, Washington voters approved I-502, which allows adults to legally possess small amounts of cannabis.<sup>63</sup> I-502 decriminalizes cannabis possession for adults who are at least 21 years old and who possess up to the following: one ounce of loose cannabis, 16 ounces of cannabis in edible form, or 72 ounces in liquid form.<sup>64</sup> Adults are not allowed to grow their own cannabis<sup>65</sup> unless they qualify as patients for medical cannabis use.<sup>66</sup> Adults who want to buy cannabis, and who are not qualified medical cannabis patients, are required to purchase from a licensed retail outlet.<sup>67</sup>

<sup>61</sup> *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

<sup>62</sup> Rick Lyman, *Pivotal Point Is Seen as More States Consider Legalizing Marijuana*, N.Y. TIMES, Feb. 26, 2014, [http://www.nytimes.com/2014/02/27/us/momentum-is-seen-as-more-states-consider-legalizing-marijuana.html?hpw&rrref=us&\\_r=0](http://www.nytimes.com/2014/02/27/us/momentum-is-seen-as-more-states-consider-legalizing-marijuana.html?hpw&rrref=us&_r=0).

<sup>63</sup> WASH. REV. CODE § 69.50.360 (2013).

<sup>64</sup> *Id.*

<sup>65</sup> Prohibited Acts, WASH. REV. CODE § 69.50.401 (2013).

<sup>66</sup> Qualifying Patients & Designated Providers Not Subject to Penalties, WASH. REV. CODE § 69.51A.040(1)(a)(i) (2007).

<sup>67</sup> WASH. REV. CODE § 69.50.360 (2013).

The legislation did not propose any guidelines for how family law commissioners, judges, guardians ad litem, and attorneys should handle recreational cannabis when drafting parenting plans or deciding custody or visitation disputes. The initiative deliberately excluded not only these guidelines, but also a roadmap for how to educate the legal community.<sup>68</sup> ACLU Criminal Justice Director Alison Holcomb (who also wrote the 2012 initiative) stated,

On the one hand, we wanted it to be thorough enough to be reassuring that there were lots of safety bumpers in place and that we really did care about evaluating what was happening and being able to make adjustments along the way, but we also didn't want to have to over legislate and micro-manage too much.<sup>69</sup>

While it was logical to make such groundbreaking legislation malleable for the future, it presently leaves courts with little guidance as to how to view recreational cannabis in custody and visitation disputes. Some family law commissioners are holding recreational cannabis to the same standard as alcohol or prescription drugs, but many would like an objective test for how to deal with the issue.<sup>70</sup> While this article lays out a checklist of questions below in an effort to develop an objective test, until that checklist is universally adopted, commissioners and judges continue to have very wide discretion in deciding these cases. The outcomes could vary greatly.

#### *B. Amendment 64*

Colorado lawmakers also failed to take steps to specify how the courts in that state should view recreational cannabis in child custody and visitation disputes. At the same time that Washington voters passed I-502, Colorado voters passed Amendment 64. The Amendment (now enacted as article 18,

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<sup>68</sup> Interview with Alison Holcomb, Criminal Justice Director, ACLU of Washington, in Seattle, Wash. (Mar. 6, 2014).

<sup>69</sup> *Id.*

<sup>70</sup> Ponomarchuk Interview, *supra* note 14.

section 16 of the Colorado Constitution) addresses personal use and regulation of cannabis for adults 21 years old and older.<sup>71</sup> It effectively regulates cannabis in a manner similar to alcohol.<sup>72</sup> Under the law, adults 21 and older can grow up to three immature and three mature cannabis plants privately in a locked space; legally possess all cannabis from the plants they grow (as long as the cannabis stays where it was grown); legally possess up to one ounce of cannabis while traveling; and gift up to one ounce to other citizens 21 years of age or older.<sup>73</sup>

A special Amendment 64 Implementation Task Force has decided it will not address how the new cannabis law factors into child custody or visitation right cases in Colorado.<sup>74</sup> Despite the fact that some family law attorneys say more of their clients are asking how the new law will impact child custody and visitation rights, experts in the matter say that additional statutes or guidelines are not necessary.<sup>75</sup> For now, they plan to focus on whether substance abuse affects a parent's ability to keep the children safe<sup>76</sup> However, without a baseline standard of questions to consider like the checklist presented below, the courts may make inconsistent decisions regarding a parent's recreational cannabis use as it pertains to that parent's ability to parent safely.

#### IV. LEGAL RAMIFICATIONS OF CANNABIS USE

Courts still have to consider federal law when determining child custody and visitation rights for parents who are medical cannabis patients. They

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<sup>71</sup> COLO. CONST. art. XVIII, § 16.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *No Laws Dictating Marijuana Consumption in Child Custody Cases*, 7NEWS DENVER (The Denver Channel broadcast, Feb. 27, 2013), available at <http://www.thedenverchannel.com/news/local-news/no-laws-dictating-marijuana-consumption-in-child-custody-cases>.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

will have to do the same as they begin to evaluate parents who are recreational cannabis users.

*A. Federal Cannabis Law Trumps State Cannabis Law*

The Controlled Substances Act (CSA) of 1970 categorized cannabis as a Schedule I drug, which prohibits the use of the drug for any purpose.<sup>77</sup> That means that whether it is for recreational or for medical use, those parents who use cannabis are violating federal law and are subject to criminal prosecution.<sup>78</sup> However, under both Washington State’s new recreational cannabis law<sup>79</sup> and its older medical cannabis law,<sup>80</sup> use is permitted and both laws promise to protect against criminal prosecution. While the state laws do have some teeth, it is important for parents who use cannabis to remember that federal law is the supreme law of the land and it supersedes state laws when those state laws contradict it.<sup>81</sup> The US Supreme Court held that federal law must have been made pursuant to a power that the Constitution granted to the federal government in order to be the supreme law of the land.<sup>82</sup> This means that the CSA supersedes the Washington State laws allowing recreational and medical cannabis use.

In 2005, the Supreme Court decided *Gonzales v. Raich*, upholding the constitutionality of the CSA as applied to individuals who legally under

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<sup>77</sup> Controlled Substances Act, 21 U.S.C § 801 (2012).

<sup>78</sup> *Id.*

<sup>79</sup> WASH. REV. CODE § 69.50.360 (2013).

<sup>80</sup> WASH. REV. CODE § 69.51A.005 (2)(a) (2012).

<sup>81</sup> The Supremacy Clause reads:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

<sup>82</sup> *McCulloch v. Maryland*, 17 U.S. 316, 406 (1819) (“The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, ‘anything in the constitution or laws of any state to the contrary notwithstanding.’”).

state law grow cannabis for personal medical use.<sup>83</sup> In *Raich*, Angel Raich and Diane Monson, who were both California residents, were using cannabis to treat serious medical conditions.<sup>84</sup> Both women were using cannabis in line with California's Compassionate Use Act,<sup>85</sup> and they sought an injunction to prevent the federal government from prosecuting them under the CSA.<sup>86</sup> They argued that the Act could not constitutionally be applied to their *intrastate* personal use of medical cannabis because it was not a commercial activity and did not impact interstate commerce,<sup>87</sup> which Congress can regulate under the Commerce Clause of the Constitution.<sup>88</sup> The Supreme Court disagreed, stating that Congress could use the power of the Commerce Clause to regulate homegrown intrastate cannabis because the production of cannabis for home use "has a substantial effect on the supply and demand in the national market."<sup>89</sup> The Court further noted that "Congress has a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA because of the difficulties in distinguishing between marijuana cultivated locally and marijuana grown elsewhere."<sup>90</sup>

The Court's decision that intrastate medical cannabis use falls within the scope of the CSA means the CSA supersedes state medical cannabis laws, and arguably state recreational cannabis laws as well. As a result, parents legally using cannabis either medically or recreationally under state law could still be prosecuted under federal law.

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<sup>83</sup> *Gonzales v. Raich*, 545 U.S. 1, 42 (2005).

<sup>84</sup> *Id.* at 6.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 7–8.

<sup>87</sup> *Id.* at 15.

<sup>88</sup> U.S. CONST. art. I, § 8, cl. 3. (Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]").

<sup>89</sup> *Raich*, 545 U.S. at 19.

<sup>90</sup> *Id.* at 22.



*B. Lack of Federal Enforcement*

Despite its authority to do so, the Justice Department has said it will not currently sue Washington State to prevent it from allowing recreational cannabis use by adults.<sup>91</sup> In the summer of 2013, then Attorney General Eric Holder called Washington Governor Jay Inslee to say that federal authorities will not pre-empt I-520 as long as the state develops a “sound, workable regulatory structure.”<sup>92</sup> President Barack Obama weighed in on the issue, saying it was not a “top priority” for his administration to prosecute users of recreational cannabis in states where it has been made legal.<sup>93</sup> However, the Justice Department did issue a list of eight priorities for federal prosecutors who enforce cannabis laws (since it is still illegal under federal law).<sup>94</sup> Those priorities would still target offenses like the distribution of cannabis to minors, the use of violence or firearms in the distribution of the drug, and the use of cannabis on public lands.<sup>95</sup> The decision not to prosecute could be looked at as a move by the federal government to inch toward decriminalizing cannabis altogether. However, until that day comes, states that choose to legalize cannabis, like Washington, need specific guidelines for how to assess a parent’s cannabis use when evaluating child custody and visitation disputes.

## V. BENEFITS AND NEGATIVE SIDE EFFECTS OF CANNABIS

Most people would not bat an eye if a parent stated that he or she enjoys a glass of wine or a bottle of beer at the end of the day, but the stigma likely changes if that same parent were to say that he or she enjoys a little

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<sup>91</sup> Andrew Gross & Carrie Dann, *DOJ Won’t Challenge Wash., Colo. Marijuana Laws*, NBC NEWS, Aug. 29, 2013, 12:00 PM, <http://www.nbcnews.com/news/other/doj-wont-challenge-wash-colo-marijuana-laws-f8C11034054>.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Memorandum from James M. Cole, Deputy Att’y Gen., to all United States Attorneys (Aug., 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

cannabis at the end of the day. Yet, it appears more and more parents are turning to cannabis to relax.<sup>96</sup> Some parents even say that using cannabis helps them to better care for their children.<sup>97</sup> One mom summed up the benefits of her cannabis use as follows: “Sometimes I feel like I can’t complete one thought, let alone the 25 requests my kids have just made. Pot has the same effect on me as 20 minutes of yoga, but I don’t have time for 20 minutes of yoga.”<sup>98</sup>

While relaxation may be one of the perceived benefits of cannabis, there are also many negative side effects to using the drug. Cannabis physically affects the human body because it contains more than 400 chemicals, 60 of which are chemicals known as cannabinoids.<sup>99</sup> Delta-9-tetrahydrocannabinol (THC) is the most active and thoroughly researched of these cannabinoids and is responsible for most of the pharmacological activity of cannabis.<sup>100</sup> Scientists are continually learning about how THC both positively and negatively affects the brain and body, which could provide important evidence for family law commissioners and judges as they determine whether a parent who uses cannabis (hereinafter cannabis-using parent) is also a safe parent.

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<sup>96</sup> Jessica Baumgardner, *I’m a Parent who Smokes Pot*, REDBOOK (Feb. 9, 2012, 7:00 PM), <http://www.redbookmag.com/kids-family/advice/pot-parents>.

<sup>97</sup> *Id.*; David Moye, *‘Marijuana Moms’ Say Smoking Weed Makes Them Better Parents*, HUFFINGTON POST, June 18, 2013, 8:07 PM, [http://www.huffingtonpost.com/2013/06/18/marijuana-moms-smoking-pot\\_n\\_3462020.html](http://www.huffingtonpost.com/2013/06/18/marijuana-moms-smoking-pot_n_3462020.html).

<sup>98</sup> Baumgardner, *supra* note 96.

<sup>99</sup> Nora D. Volkow, *Marijuana and Medicine: The Need for a Science-Based Approach*, in PROFESSIONAL PERSPECTIVES ON ADDICTION MEDICINE 24, 24 (Mark Stanford & Donald Avoy eds., 2009).

<sup>100</sup> *Id.*

*A. The Medical Benefits Attributed to Cannabis Use*

Parents who are users or proponents of cannabis often argue that the drug is less harmful than many prescription drugs, and they may be right.<sup>101</sup> In the last decade, prescription drug overdoses killed more people in the United States than heroin and cocaine combined.<sup>102</sup> In fact, prescription drug overdoses account for about 45 deaths each day.<sup>103</sup> However, in the 10 thousand years that humans have been known to use cannabis, not one overdose death has been attributed to its use.<sup>104</sup> Cannabis researchers say that a person would have to smoke 15 thousand joints (cannabis cigarettes) in roughly 20 minutes to get a toxic level of THC,<sup>105</sup>—a realistically impossible feat. While few would call cannabis “healthy,” research shows some health benefits associated with cannabis use.<sup>106</sup> The drug is recognized as an effective way to treat more than 200 medical conditions such as Alzheimer’s disease, cancer symptoms, glaucoma, HIV/AIDS symptoms, multiple sclerosis, and even morning sickness.<sup>107</sup> A recent study also shows that smoking cannabis is associated with lowered waist circumference, lower body mass index and fasting insulin levels, and improved blood sugar control and insulin sensitivity.<sup>108</sup> The key word in the study’s conclusion is “associated.” While the study is promising, the

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<sup>101</sup> Joseph Serna, *Fatal Drug Overdoses in U.S. Increase for 11th Consecutive Year*, L.A. TIMES, Feb. 19, 2013, <http://articles.latimes.com/2013/feb/19/news/la-heb-drug-overdoses-increase-20130219>.

<sup>102</sup> *Id.*

<sup>103</sup> Mark Koba, *Deadly Epidemic: Prescription Drug Overdoses*, USA TODAY, Jul. 28, 2013, <http://www.usatoday.com/story/money/business/2013/07/28/deadly-epidemic-prescription-drug-overdoses/2584117/>.

<sup>104</sup> Dave Smith, *‘Medical’ Marijuana: 10 Health Benefits that Legitimize Legalization*, INT’L BUSINESS TIMES, Aug. 8, 2012, <http://www.ibtimes.com/%E2%80%98medical-%E2%80%99-marijuana-10-healthbenefits-legitimize-legalization-742456>.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Elizabeth A. Penner et al., *The Impact of Marijuana Use on Glucose, Insulin, and Insulin Resistance among U.S. Adults*, 126 AM. J. MED. 583, 586 (2013) (discussing how cannabis may lower waist circumference, body mass index, and fasting insulin levels).

researchers point out that it does not prove that cannabis use brings these health benefits, only that it is *associated with* these benefits.<sup>109</sup> However, through these studies, one can infer that cannabis provides real medical benefits for the treatment of many different medical illnesses and conditions.

*B. Negative Side Effects Caused by Cannabis That Could Be a Risk to Children*

Despite the benefits mentioned above, cannabis may cause a number of negative side effects that could create substantial risks to children. Cannabis can cause slowed reaction time, disruptions in judgment, impaired short-term memory, mood alterations, and potential addiction.<sup>110</sup> To determine whether a parent's recreational cannabis use could be a detrimental factor in child custody and visitation decisions, courts should look closely at these negative effects to see whether they could create a substantial risk that a child could suffer serious physical harm or illness.

Cannabis impairs a user's cognitive abilities and negatively affects short-term memory,<sup>111</sup> which could have an impact on one's ability to parent. Research shows that THC diminishes working memory by activating a form of synaptic plasticity that weakens neuronal connections.<sup>112</sup> The concept of working memory developed from the concept known as short-term memory, and it is defined as the brain system that "provides temporary storage and manipulation of the information necessary for such complex

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<sup>109</sup> *Id.* at 583.

<sup>110</sup> Cathy Payne & Michelle Healy, *Marijuana's Health Effects: Memory Problems, Addiction*, USA TODAY, Dec. 7, 2012, <http://www.usatoday.com/story/news/nation/2012/12/06/nih-marijuana-effects/1751011/>; Volkow, *supra* note 99, at 24.

<sup>111</sup> Payne & Healy, *supra* note 110.

<sup>112</sup> Mo Costandi, *How Marijuana Impairs Memory*, THE GUARDIAN (Mar. 2, 2012), <http://www.theguardian.com/science/neurophilosophy/2012/mar/02/how-marijuana-impairs-memory>.

cognitive tasks as language comprehension, learning, and reasoning.”<sup>113</sup> It requires the simultaneous storage and processing of information in the brain.<sup>114</sup> Heavy cannabis users report longer lasting memory defects, but those defects tend to diminish following a period of abstinence from cannabis.<sup>115</sup> However, it is not just heavy cannabis users who experience these problems; almost everyone who has smoked cannabis has experienced a problem with short-term or working memory.<sup>116</sup> This usually takes the form of a cannabis user forgetting the topic of a sentence before he or she has finished that sentence.<sup>117</sup> Therefore, temporary memory or cognitive impairment in a cannabis-using parent could pose a risk to a child in that parent’s custody (e.g., a parent forgets to pick up his or her child).

Cannabis users may also experience impaired motor functions.<sup>118</sup> Motor control is impaired when cannabis interacts with the high concentrations of endocannabinoid receptors in the basal ganglia and cerebellum, which are areas of the brain central to motor control.<sup>119</sup> In research studies, the impairments are most easily seen in the user’s decreased decision-making ability and increased stop-reaction time while doing tasks that require attention.<sup>120</sup> In a recent review of studies analyzing the effects of cannabis, researchers found that drivers who use cannabis are more than twice as likely to be involved in an automobile crash.<sup>121</sup> One such study noted that

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<sup>113</sup> Alan Baddeley, *Working Memory*, 255 SCIENCE 556, 556 (1992) (defining the concept of working memory).

<sup>114</sup> *Id.*

<sup>115</sup> Volkow, *supra* note 99, at 24.

<sup>116</sup> Timmen L. Cermak, *Medical Marijuana*, in 2 PROFESSIONAL PERSPECTIVES ON ADDICTION MEDICINE 59, 62 (Mark Stanford & Donald Avoy eds., 2009).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 63

<sup>119</sup> *Id.*

<sup>120</sup> Johannes G Ramaekers et al., *High-Potency Marijuana Impairs Executive Function and Inhibitory Motor Control*, 31 NEUROPSYCHOPHARMACOLOGY 2296, 2296 (2006) (discussing how cannabis impacts attention required tasks).

<sup>121</sup> Mu-Chen Li et al., *Marijuana Use and Motor Vehicle Crashes*, 34 EPIDEMIOLOGIC REV. 65, 69 (2012) (reviewing studies on cannabis related car crashes).

“marijuana causes impairment in every performance area that can reasonably be connected with safe driving of a vehicle such as tracking, motor coordination, visual functions, and particularly complex tasks that require divided attention.”<sup>122</sup> Cannabis also increases the risk that the user will be responsible for a fatal car accident; however, this risk is significantly less than the risk created by alcohol.<sup>123</sup> Performance impairments associated with cannabis use are at their maximum within an hour but can last up to four hours.<sup>124</sup> This presents a concern because, though a parent may use cannabis hours before he or she would need to drop off or pick up his or her child, the drug could still be active in his or her system.

Secondhand cannabis smoke may also create risks for children. Smoking cannabis is one of the most common ways of delivering the drug to the user.<sup>125</sup> Once they are inhaled, cannabinoids are absorbed by the lungs then passed into the bloodstream and carried to the brain.<sup>126</sup> Some doctors suspect that smoking cannabis could lead to the same risks of head, neck, and lung cancer as smoking tobacco.<sup>127</sup> Cannabis smoke and tobacco smoke share many of the same carcinogens, yet the levels found in cannabis smoke are usually higher than the levels found in most cigarettes.<sup>128</sup> Secondhand tobacco smoke causes a number of health problems in children, including more frequent and severe asthma attacks, respiratory infections, ear

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<sup>122</sup> R. Andrew Sewell et al., *The Effect of Cannabis Compared with Alcohol on Driving*, 18 AM. J. ON ADDICTION 185, 186 (2009) (discussing the impact of cannabis on a person’s ability to drive).

<sup>123</sup> *Id.*

<sup>124</sup> J.G. Ramaekers et al., *Neurocognitive Performance During Acute THC Intoxication in Heavy and Occasional Cannabis Users*, 23 J. OF PSYCHOPHARMACOLOGY 266, 266 (2009) (discussing how long cannabis stays in one’s system).

<sup>125</sup> DSM-5, *supra* note 2, at 511.

<sup>126</sup> Volkow, *supra* note 99, at 24.

<sup>127</sup> Julien Berthiller et al., *Marijuana Smoking and the Risk of Head and Neck Cancer: Pooled Analysis in the INHANCE Consortium*, 18 CANCER EPIDEMIOLOGY BIOMARKERS & PREVENTION 1544, 1544 (2009); Suma Singh, *Toward a New Pain Medicine*, in 2 PROF’L PERSPECTIVES ON ADDICTION MEDI. 80, 80 (Mark Stanford & Donald Avoy eds., 2009).

<sup>128</sup> Berthiller et al., *supra* note 127.

infections, and sudden infant death syndrome (SIDS).<sup>129</sup> Therefore, it is reasonable to infer that secondhand cannabis smoke could have a similar effect on children.

A 2011 study found that THC was detected in saliva samples from non-cannabis smokers who spent time in the vicinity of cannabis smokers.<sup>130</sup> During the study, adults spent a total of three hours at two different coffee shops in the Netherlands,<sup>131</sup> a country known for its legalized cannabis. The number of cannabis smokers in each coffee shop ranged from zero to six.<sup>132</sup> The participants tested negative for cannabis before entering each coffee shop.<sup>133</sup> Researchers then measured the THC levels of the participants after 20 minutes, 40 minutes, 60 minutes, 120 minutes, and 180 minutes of passive cannabis exposure in each shop.<sup>134</sup> In the first coffee shop, which had more active cannabis smokers, the samples from all the participants tested positive for THC at each time interval.<sup>135</sup> In the second coffee shop, which had fewer active cannabis smokers, no THC was detected in the participants during the first few time intervals.<sup>136</sup> However, at the three-hour mark, several of the participants tested positive for a relatively high amount of THC.<sup>137</sup> Overall the study found that the volunteers, when exposed to passive or secondhand cannabis smoke, absorbed THC.<sup>138</sup> While this study was done with adult volunteers, one could surmise that the THC absorption

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<sup>129</sup> *Health Effects of Secondhand Smoke*, CENTERS FOR DISEASE CONTROL & PREVENTION, [http://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/secondhand\\_smoke/health\\_effects/](http://www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/health_effects/) (last visited Apr. 10, 2014).

<sup>130</sup> Christine Moore et al., *Cannabinoids in Oral Fluid Following Passive Exposure to Marijuana Smoke*, 212 FORENSIC SCI. INT'L 227, 227 (Oct. 2011) (studying the effects of secondhand cannabis smoke).

<sup>131</sup> *Id.* at 228.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 229.

<sup>134</sup> *Id.* at 228.

<sup>135</sup> *Id.* at 229.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 230.

levels would be the same for children exposed to secondhand cannabis smoke for similar amounts of time. This should be a concern for family law commissioners and judges as they assess how and where a parent seeking custody or visitation uses cannabis.

#### VI. HOW MUCH IS TOO MUCH CANNABIS?

So just how much cannabis can a parent have before it is considered too much to parent safely? Without specific guidelines, family law commissioners and judges wrestle with this question. For the first time in Washington State, the new cannabis law sets a legal impairment level for THC.<sup>139</sup> The level is set at five nanograms of active THC per milliliter of whole blood—that roughly equates to about 0.05 percent blood alcohol level, which is less than the state limit for DUI standards.<sup>140</sup> However, there are no handy charts showing how much cannabis it takes to reach that level, because cannabis varies in strength and affects novice and seasoned users differently.<sup>141</sup> The five nanogram level is based on tests for active THC, which usually dissipates within hours of use.<sup>142</sup> Another cannabis compound, carboxy-THC—stored in fat cells for 30 days or more, often tripping up users in workplace drug tests—is not counted under I-502 as a basis for impairment.<sup>143</sup>

The five nanogram per milliliter limit does not really indicate just how much is too much cannabis. Cannabinoids have diverse effects on the brain.<sup>144</sup> The cannabis available today varies significantly in the potency of

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<sup>139</sup> Jonathan Martin, *I-502 Raises Questions About How Much Pot Is Too Much for Drivers*, SEATTLE TIMES, Oct. 28, 2012, [http://seattletimes.com/html/politics/2019541405\\_potdui28m.html](http://seattletimes.com/html/politics/2019541405_potdui28m.html).

<sup>140</sup> Driving Under the Influence, WASH. REV. CODE § 46.61.502(1)(b) (2012); Persons Under Influence of Intoxicating Liquor or Drug, WASH. REV. CODE § 46.61.506; Martin, *supra* note 139.

<sup>141</sup> Martin, *supra* note 139.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> DSM-5, *supra* note 2, at 511.



THC levels, ranging from 1 percent to approximately 15 percent in typical cannabis plant material and 10 to 20 percent in hashish.<sup>145</sup> During the past two decades, there has been a steady increase in the potency of cannabis.<sup>146</sup> The potency of cannabis can also depend on how it is ingested. Cannabis is most commonly smoked, but the drug can also be ingested orally, most commonly by mixing it into food.<sup>147</sup> Recently, devices have been developed that vaporize cannabis for inhalation.<sup>148</sup> Smoking and or inhaling the vapors of cannabis typically produce a more rapid onset and a more intense experience of the drug.<sup>149</sup> Thus, family law commissioners and judges should inquire how parents who are seeking custody or visitation ingest cannabis because the high from the drug could be more or less intense depending on whether the drug is smoked, inhaled through vapors, or eaten. Even with this inquiry, it could be difficult for family law commissioners and judges to assess whether a parent's cannabis use would make him or her an unsafe parent. Below are two categories defined in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) that could aid family law commissioners and judges in their assessment.

#### A. Cannabis Use Disorder

Parents with cannabis use disorder may use cannabis many times a day over a period of months or years, and as a result they may spend several hours a day under the influence.<sup>150</sup> Other parents may use less often, but their use could cause repeated problems when it comes to family, work, and other important activities.<sup>151</sup> Experienced cannabis users may develop a behavioral and or pharmacological tolerance to the drug so that it can be

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

difficult to detect when they are under the influence.<sup>152</sup> Furthermore, parents who have built up this tolerance may perceive themselves as not spending excessive amounts of time under the influence of cannabis.<sup>153</sup> To aid family law commissioners and judges in determining whether a parent has the disorder, the DSM-5 lists cannabis use disorder as a problematic pattern of cannabis use leading to clinically significant impairment or distress as manifested by *at least two of the following, occurring within a 12-month period*:

1. Cannabis is often taken in larger amounts or over a longer period than was intended.
2. There is a persistent desire or unsuccessful efforts to cut down or control cannabis use.
3. A great deal of time is spent in activities necessary to obtain cannabis, use cannabis, or recover from its effects.
4. Craving, or a strong desire or urge to use cannabis.
5. Recurrent cannabis use resulting in a failure to fulfill major role obligations at work, school, or home.
6. Continued cannabis use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of cannabis.
7. Important social, occupational, or recreational activities are given up or reduced because of cannabis use.
8. Recurrent cannabis use in situations in which it is physically hazardous.
9. Cannabis use is continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by cannabis.
10. Tolerance, as defined by either of the following:

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<sup>152</sup> *Id.* at 512.

<sup>153</sup> *Id.*

- a. A need for markedly increased amounts of cannabis to achieve intoxication or desired effect.
- b. Markedly diminished effect with continued use of the same amount of cannabis.

11. Withdrawal as manifested by either of the following:

- a. The characteristic withdrawal syndrome for cannabis.
- b. Cannabis (or a closely related substance) is taken to relieve or avoid withdrawal symptoms.<sup>154</sup>

Many adults with cannabis use disorder have experienced a repeated desire to stop or have failed repeated attempts to stop using cannabis.<sup>155</sup> Milder adult usage may resemble typical teenage usage, in that cannabis use is not as frequent or heavy, but continues despite potential significant consequences of sustained use.<sup>156</sup> The list of symptoms above may help family law commissioners and judges better assess when a parent has a distinct cannabis problem, but an area of concern remains for parents who use cannabis less frequently or for the occasional high associated with cannabis intoxication.

*B. Cannabis Intoxication*

Cannabis intoxication typically begins with a “high” feeling followed by symptoms that include euphoria with inappropriate laughter and grandiosity, sedation, lethargy, impairment in short-term memory, difficulty carrying out complex mental processes, impaired judgment, distorted sensory perceptions, impaired motor performance, and the sensation that time is passing slowly.<sup>157</sup> Intoxication typically develops within minutes if the cannabis is smoked; however, it may take as long as a few hours to

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<sup>154</sup> *Id.* at 509–10 (emphasis added).

<sup>155</sup> *Id.* at 513.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 516.

develop the high if the cannabis is ingested orally.<sup>158</sup> The effects of cannabis intoxication usually last three to four hours, but can last longer for those who eat the drug.<sup>159</sup> The length of time to produce a high and the duration of the high associated with orally ingesting cannabis can be a concern for parents who are novice users because they may not realize how much they are ingesting because they do not immediately feel the effects.<sup>160</sup>

One mother, Wendy Sachs, wrote an article for CNN about her legal cannabis experience while on a family skiing vacation in Colorado.<sup>161</sup> Mrs. Sachs wanted a way to relax after a day on the slopes, and decided to give legal cannabis a try instead of her customary cocktail or glass of wine.<sup>162</sup> She bought a cannabis-laced cookie and cannabis-laced chocolate truffles to enjoy with her husband after the kids went to bed.<sup>163</sup> The “budtender” who sold her the cookie warned her about how much to eat,<sup>164</sup> but things didn’t go quite as planned. She recalled in the article, “Earlier, my budtender warned me to only eat a quarter of the cookie, but I must have consumed more than was recommended because the next eight hours turned into a heart-racing, chest-thumping, head-spinning trip. The potency of edibles is apparently unreliable, and they can pack a punch. Who knew?”<sup>165</sup>

The potency of edibles that Mrs. Sachs wrote about is precisely the concern shared by family law commissioners and judges as they try to determine whether or not a parent using cannabis is still able to parent safely.<sup>166</sup> While Mrs. Sachs was with her husband in a plush Vail resort,<sup>167</sup>

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<sup>158</sup> *Id.* at 517.

<sup>159</sup> *Id.*

<sup>160</sup> Interview with Roger Roffman, Professor Emeritus, University of Washington, in Seattle, Wash. (Mar. 13, 2014).

<sup>161</sup> Wendy Sachs, *Rocky Mountain High, or How I Spent My Family Vacation*, CNN, Apr. 3, 2014, 12:01 PM, [http://www.cnn.com/2014/04/03/living/weed-colorado-family-vacation/index.html?hpt=hp\\_c4](http://www.cnn.com/2014/04/03/living/weed-colorado-family-vacation/index.html?hpt=hp_c4).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> Ponomarchuk Interview, *supra* note 14.

those parents who are single parents and novice cannabis users could find themselves in a dangerous parenting situation if they ingest too much cannabis at home. For instance, a novice user in this situation may not know how to handle a sudden parenting emergency, such as a child suddenly becoming ill.<sup>168</sup> While family law attorneys customarily advise their clients not to use any legal or illegal substances, such as cannabis, alcohol, or illegal drugs during custody proceedings, there are concerns about the standard of review family law commissioners or judges could use in light of past or current use.

## VII. CURRENT STANDARDS OF REVIEW TO DETERMINE CHILD CUSTODY

Family law attorneys will sometimes joke that family law judges and commissioners are all fair, just, and equitable; they just have different ideas of what that means.<sup>169</sup> That joke may prove to be an unfortunate reality when family law judges and commissioners must take Washington State's new recreational cannabis law into account when deciding child custody and visitation issues. Before recommending a checklist of objective questions that commissioners and judges should ask to evaluate whether parents who use recreational cannabis are parenting safely, it is important to know the current standard.

### *A. Best Interest of the Child Standard*

The law of parenthood and child custody has evolved from a common law tradition, where children were viewed as parental property—namely the

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<sup>167</sup> *Id.*

<sup>168</sup> Roffman Interview, *supra* note 160.

<sup>169</sup> Bellevue Family Law Attorney, Guest Lecturer in Family Law course at Seattle University School of Law (Mar. 27, 2014).

property of the father—to recognition that children have their own rights.<sup>170</sup> As courts rejected claims that parents have a property right to their children, they began to evaluate custody decisions on what is determined to be in the best interest of the child, which places the highest priority on the child’s interest.<sup>171</sup> Although there is no standard definition of the best interest of the child, “[b]est interests’ determinations are generally made by considering a number of factors related to the child’s circumstances and capacity to parent, with the child’s ultimate safety and well-being the paramount concern.”<sup>172</sup>

As a consequence of the widespread variations in the best interest of the child standard from jurisdiction to jurisdiction, there are a multitude of best interest of the child standards.<sup>173</sup> In Washington State, “the best interests of the child are served by a parenting arrangement that best maintains a child’s emotional growth, health and stability, and physical care.”<sup>174</sup> Further, the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.<sup>175</sup>

In addition, “[w]hen the rights of basic nurture, physical and mental health, and safety of the child and the legal rights of the parents are in

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<sup>170</sup> Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 848–49 (2004) (discussing how the law of parenthood has shifted from viewing children as “chattels” to viewing them as persons).

<sup>171</sup> *Id.* at 849.

<sup>172</sup> CHILD WELFARE INFORMATION GATEWAY, DETERMINING THE BEST INTEREST OF THE CHILD: SUMMARY OF STATE LAWS, U.S. DEPT. OF HEALTH & HUMAN SERVICES 2 (2012), available at [https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/best\\_interest.pdf](https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.pdf).

<sup>173</sup> Daniel A. Krauss & Bruce D. Sales, *Legal Standards, Expertise, and Experts in the Resolution of Contests Child Custody Cases*, 6 PSYCH. PUB. POL’Y. & L. 843, 848 (2000) (proposing modifications to the best interest of the child standard).

<sup>174</sup> WASH. REV. CODE § 26.09.002 (2007).

<sup>175</sup> *Id.*

conflict, the rights and safety of the child should prevail.”<sup>176</sup> “The right of a child to basic nurturing includes the right to a safe, stable, and permanent home”<sup>177</sup> The child’s health and safety are of paramount concern to the court.<sup>178</sup> Therefore, in Washington State, the best interests of the child standard controls the decision of the court when determining who will parent a child daily.<sup>179</sup>

*B. Guidelines Regarding Legal Substance Use and Secondhand Smoke in Child Custody and Visitation*

Courts turn to the best interests of the child standard when evaluating legal activities such as alcohol use, prescription drug use, and tobacco use in custody disputes.<sup>180</sup> In Washington State, courts view the best interest of the child standard as a “highly fact-specific inquiry that cannot be reduced to a mathematical equation.”<sup>181</sup> In assessing these facts, courts typically do not consider a parent’s responsible use of alcohol or prescription drugs to be a negative factor when making child custody decisions.<sup>182</sup> Washington State law dictates that it is not until a parent consumes alcohol or drugs to the point of abuse such that it interferes with the performance of parenting functions that it is used to inform child custody decisions.<sup>183</sup>

The issue of secondhand tobacco smoke is being raised more frequently in child custody and visitation cases.<sup>184</sup> As mentioned above in Part V, Section B, exposure to secondhand smoke can cause respiratory ailments

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<sup>176</sup> Rights of Child, WASH. REV. CODE § 13.34.020 (1998).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *In re Parentage of J.H.*, 49 P.3d 154, 157 (2002).

<sup>180</sup> Ponomarchuk Interview, *supra* note 14.

<sup>181</sup> *Dep’t of Soc. & Health Services v. Paulos*, 270 P.3d 607, 614 (Wash. 2012).

<sup>182</sup> Ponomarchuk Interview, *supra* note 14.

<sup>183</sup> *Id.*; Restrictions in Temporary or Permanent Parenting Plans, WASH. REV. CODE § 26.09.191(3)(c).

<sup>184</sup> Kathleen Hoke Dachille & Kristine Callahan, *Secondhand Smoke and Family Courts: The Role of Smoke Exposure in Custody and Visitation Decisions*, TOBACCO CONTROL LEGAL CONSORTIUM 1, 1 (2005).

and other health problems.<sup>185</sup> To put it bluntly, secondhand smoke can make a child sick.<sup>186</sup> As a result, in their effort to protect the welfare of the child under the best interest of the child standard, courts are looking more closely at the smoking habits of adults in the child's home.<sup>187</sup>

Often the amount of weight a family law judge or commissioner gives to the issue of smoking tobacco in custody or visitation decisions depends upon whether the child has existing health problems.<sup>188</sup> In *Unger v. Unger*, the court considered the exposure of two minor children as a safety factor in the best interest of the child analysis in a custody determination.<sup>189</sup> In that case, the mother smoked a pack and a half of cigarettes a day, and the children had persistent coughs possibly associated with chronic bronchitis and they visited the doctor frequently with complaints of respiratory problems.<sup>190</sup> The court stated, "Clearly, the effect of [secondhand smoke] is a factor that may be considered by a court in its custody determination as it affects the safety and health of the children."<sup>191</sup> The court went on to find that the fact that a parent smokes cigarettes is a permissible parental habit to consider when determining what is in the best interests of the children because it may affect their health and safety.<sup>192</sup>

The court in *Daniel v. Daniel* also placed great weight on the child's health when granting a change in custody to a father because the mother continued to smoke around the asthmatic child.<sup>193</sup> The mother's continued smoking, despite the child's illness, became a factor for consideration in

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<sup>185</sup> CENTERS FOR DISEASE CONTROL & PREVENTION, *supra* note 129; Dachille & Callahan, *supra* note 184, at 2.

<sup>186</sup> Dachille & Callahan, *supra* note 184, at 2.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 3

<sup>189</sup> *Id.*; *Unger v. Unger*, 644 A.2d 691 (N.J. Super. Ct. 1994).

<sup>190</sup> *Unger*, 644 A.2d at 691-93.

<sup>191</sup> *Id.* at 694.

<sup>192</sup> *Id.*

<sup>193</sup> *Daniel v. Daniel*, 509 S.E.2d 117, 119 (Ga. Ct. App. 1998); Dachille & Callahan, *supra* note 184, at 5.



evaluating the welfare of the child.<sup>194</sup> In a strongly worded opinion, the court stated, “Moreover, the fact that the mother continued to smoke inside the apartment for almost three years after the child was diagnosed [with asthma] suggests that she was not adequately concerned about the child’s health.”<sup>195</sup> Courts have not limited their consideration of secondhand smoke to just custody; it is also a factor in visitation rights.<sup>196</sup> Courts have said that cigarette smoking and its adverse effects on a child’s existing health problems justified placing limits on a parent’s visitation.<sup>197</sup>

Courts are also considering a healthy child’s exposure to secondhand smoke when determining custody or visitation.<sup>198</sup> In *Johnita M.D. v. David D.D.*, a court considered a child’s motion for a protective order to be free from secondhand smoke while visiting his mother who was a smoker.<sup>199</sup> The court evaluated scientific and medical studies and concluded that exposure to secondhand smoke increased the child’s risk of asthma, lung cancer, and respiratory illnesses.<sup>200</sup> The court held that the mother was banned from smoking or allowing others to smoke in her home or automobile, and she was required to maintain a smoke-free environment.<sup>201</sup>

When it comes to secondhand cannabis smoke, Washington courts also consider whether it would be detrimental to the child(ren).<sup>202</sup> In *McDaniel v. McDaniel*, a mother sought review of an order modifying a divorce decree, which awarded the custody of her two minor children to their father.<sup>203</sup> The court upheld the modification in part because the children

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<sup>194</sup> Dachille & Callahan, *supra* note 184, at 5.

<sup>195</sup> *Daniel*, 509 S.E.2d at 120.

<sup>196</sup> Dachille & Callahan, *supra* note 184, at 5.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 6.

<sup>199</sup> See generally *Johnita M.D. v. David D.D.*, 740 N.Y.S.2d 811 (Sup. Ct. 2002).

<sup>200</sup> Dachille & Callahan, *supra* note 184, at 6.

<sup>201</sup> *David D.D.*, 740 N.Y.S.2d at 813.

<sup>202</sup> *McDaniel v. McDaniel*, 539 P.2d 699, 702 (Wash. 1975).

<sup>203</sup> *Id.* at 700.

were exposed to “marijuana smoking.”<sup>204</sup> It found the environment provided by the mother was detrimental to the children.<sup>205</sup> The court stated, “although [the mother] does not lack basic parental fitness in the sense that she would be unable to provide an adequate home if [the father’s] home was not available, the granting of this petition will significantly promote the children’s physical, mental and emotional health.”<sup>206</sup> While a parent may possess basic parenting skills, the court will look more explicitly at which parent will foster a child’s mental, physical, and emotional health in considering custody placement.

These cases show that more and more frequently non-smoking parents are asking courts to grant them custody to prevent a child’s exposure to secondhand smoke from the smoking parent, and courts are responding. While Washington State law mandates that medical cannabis use cannot be the sole reason a parent loses custody or visitation time,<sup>207</sup> the issue of secondhand smoke could open a backdoor that would make it harder for *all* cannabis-using parents in custody and visitation disputes. Thus, Washington courts need more specific guidelines as to how to deal with this issue.

#### VIII. PROPOSAL FOR CHANGE: OBJECTIVE CHECKLIST OF QUESTIONS FOR ASSESSING RECREATIONAL CANNABIS USE IN DETERMINING CHILD CUSTODY OR VISITATION RIGHTS

Family law commissioners and judges wield an enormous amount of power when making child custody and visitation decisions. And though we like to think of them as completely impartial, they too have personal biases,<sup>208</sup> which can negatively affect the outcome of a trial.<sup>209</sup> Most family

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<sup>204</sup> *Id.* at 702.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> WASH. REV. CODE § 69.51A.120 (2011).

<sup>208</sup> Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 5 (1994) (discussing inevitable biases in the American court system).

<sup>209</sup> *Id.*

law commissioners and judges work to rigorously exclude personal bias when making decisions; in fact, they are typically appalled if their impartiality is called into question.<sup>210</sup> However, personal bias does exist. A Washington State judge revealed personal bias by calling the state's Medical Use of Cannabis Act "an absolute joke[,]” as well as “an excuse to be loaded all the time.”<sup>211</sup>

Another Washington State judge noted while deciding visitation for a father who was a medical cannabis user,

I would comment that I do hope that [the father] is mindful of the serious problem that marijuana use is particularly as it relates to caring for children. I fully recognize that people of this state have decided to pass this medical marijuana law and that's the law of the state of Washington. On the other hand, the Court cannot countenance a situation where a person is using marijuana, under the influence of marijuana and is caring for children. That just cannot happen.<sup>212</sup>

These personal biases are not all that surprising. As mentioned above, Congress designated cannabis as a Schedule I drug, the most restrictive schedule.<sup>213</sup> In essence Congress has said that cannabis has no accepted medical use in treatment in the United States and that it has a high potential for abuse.<sup>214</sup> The drug has also been a central fixture in the War on Drugs for decades.<sup>215</sup> While the laws regarding cannabis are changing, sometimes laws can change faster than the public's perception.

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<sup>210</sup> *Id.*

<sup>211</sup> Gene Johnson, *Medical Pot Can Cost Child Custody*, NBC NEWS (June 21, 2010, 1:37 PM), [http://www.nbcnews.com/id/37822194/ns/health-childrens\\_health/t/medical-pot-can-cost-child-custody/#.U0tfCseKTgo](http://www.nbcnews.com/id/37822194/ns/health-childrens_health/t/medical-pot-can-cost-child-custody/#.U0tfCseKTgo).

<sup>212</sup> *In the Matter of the Marriage of Desire Wieldraayer*, 2008 Wash. App. LEXIS 2916, 3–4 (Wash Ct. App. Dec. 22, 2008).

<sup>213</sup> 21 U.S.C § 801 (2012).

<sup>214</sup> Peter J. Cohen, *Medical Marijuana: The Conflict Between Scientific Evidence and Political Ideology*, 35 UTAH L. REV. 37, 88 (2009) (describing how the CSA defines scheduled drugs).

<sup>215</sup> Anti-Drug Abuse Act of 1986, H.R. 5729, 99th Cong. (1986); Dan Eggen, *Marijuana Becomes Focus of Drug War*, WASH. POST (May 4, 2005), <http://www.washingtonpost.com>.

### A. Objective Checklist of Questions

While no methodology can completely remove personal bias from decisions concerning parental recreational cannabis use, Washington State courts need a specific checklist of questions to develop a baseline standard for how parental cannabis use should be assessed when considering custody disputes and visitation rights. The checklist below differs from the DSM-V guidelines discussed in Part VI, Section A, which characterize the symptoms of cannabis use disorder.<sup>216</sup> This checklist is meant to address the gray area of recreational cannabis use that does not constitute a disorder, but that could still pose safety risks to children. It is important to note that this checklist is in no way meant to be absolute. Instead it is meant to help create a baseline standard that family law commissioners and judges can use in their evaluations of a parent's legal recreational cannabis use as it pertains to child custody or visitation. The six questions included in the checklist are derived from the case law, studies, and research discussed above, and they are not necessarily listed in order of importance.

#### **1. Is the Parent a Novice Cannabis User or an Experienced Cannabis User?**

This is an important distinction because experienced cannabis users may actually be better able to handle parenting emergencies that could arise after cannabis use.<sup>217</sup> Again, it is worth distinguishing an “experienced user” from someone who has cannabis use disorder. An experienced user in this context is not someone who uses cannabis daily to a detrimental effect; instead, it is someone who has used it often enough to have built up a slight tolerance and knows his or her limit.

Research has shown that accuracy in working memory tasks were “not significantly altered” in participants who were experienced cannabis

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com/wp-dyn/content/article/2005/05/03/AR2005050301638.html.

<sup>216</sup> DSM-5, *supra* note 2, at 509–10.

<sup>217</sup> Roffman Interview, *supra* note 160.

users.<sup>218</sup> Driving studies have also found that experienced cannabis users tend to be more cautious drivers and do not initiate risk-taking behaviors on the road.<sup>219</sup> This should not be construed as suggesting that it is safe to drive under the influence of cannabis. However, the research could suggest that experienced cannabis users could have more cognitive function than novice users. As the mother's story recalled in Part VI, Section B, a novice cannabis user may have no idea how much cannabis he or she can safely ingest and how her or his body will react to the drug.<sup>220</sup> Her experience led to an eight-hour "heart-racing, chest-thumping, head-spinning trip."<sup>221</sup> Therefore, it may be important for the court to consider whether an experienced or novice cannabis user may be able to better handle a parenting situation.

## **2. How Is the Cannabis Ingested? (i.e., Is It Smoked or Eaten in an Edible?)**

Cannabis is most often smoked,<sup>222</sup> but more and more cannabis users are beginning to turn to edibles.<sup>223</sup> There are important risks associated with each type of use. The harmful effects of cannabis smoke and secondhand smoke are detailed in Part V, Section B of this article. While cannabis smoke can present risks to the user and possible children in the vicinity of the user, edibles are no less dangerous.<sup>224</sup> Once an edible is ingested it can take anywhere from 20 minutes to over an hour for the full effects to be felt,

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<sup>218</sup> *Experienced Marijuana Consumers Exhibit Virtually No Change in Cognitive Task Performance After Smoking, Study Says*, NORML (Jul. 8, 2010), <http://norml.org/news/2010/07/08/experienced-marijuana-consumers-exhibit-virtually-no-change-in-cognitive-task-performance-after-smoking-study-says>.

<sup>219</sup> Ramaekers et al., *supra* note 120, at 2296.

<sup>220</sup> Sachs, *supra* note 161.

<sup>221</sup> *Id.*

<sup>222</sup> DSM-5, *supra* note 2, at 511.

<sup>223</sup> Naggles, *Beginner's Guide to Medical Cannabis: Using Edibles*, BERKELEY PATIENTS CARE COLLECTIVE, <http://berkeleypatientscare.com/2011/05/18/beginners-guide-to-medical-cannabis-using-edibles/> (last visited Apr. 14, 2014).

<sup>224</sup> *Id.*

and the resulting “high” is often stronger and lasts longer.<sup>225</sup> A user’s tolerance level can also be different between smoking cannabis and eating it in an edible.<sup>226</sup> Many users who report a high tolerance to smoking cannabis find they have a strange lack of tolerance to edibles.<sup>227</sup> Thus, the way a parent uses cannabis could be an important distinction for family law commissioners and judges as they assess whether that parent is able to parent their child safely.

### 3. Where Does the Parent Use Cannabis? (i.e., Inside or Outside the Home?)

Most cannabis-using parents are quick to say that they do not use the drug around their children.<sup>228</sup> The key to the inquiry by family law commissioners and judges is what “around” means. The mother on the Colorado ski vacation, for example, did not use the cannabis in the same room as her kids.<sup>229</sup> For the father in *In re Drake M.*, it meant smoking cannabis in a detached garage where his son was not allowed.<sup>230</sup> The location where the parent uses the cannabis could pose risks to the child(ren) in his or her care. For instance, a parent may think he or she is being a responsible cannabis user by smoking the drug inside the home after the child has gone to sleep. However, depending on the size of the home,<sup>231</sup>

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<sup>225</sup> DSM-5, *supra* note 2, at 517.

<sup>226</sup> Naggles, *supra* note 223.

<sup>227</sup> *Id.*

<sup>228</sup> *In re Drake M.*, 149 Cal. Rptr. 3d 875, 879 (2012) (providing the father’s testimony, “None of us use drugs in front of our child.”); Camden, *supra* note 45 (noting that the father stated he never smoked around his daughter); Sachs, *supra* note 161 (providing that the mother wrote, “At night after the kids were asleep, my husband and I nibbled on the jumbo cookie.”).

<sup>229</sup> Sachs, *supra* note 161.

<sup>230</sup> *In re Drake M.*, 149 Cal. Rptr. 3d at 881.

<sup>231</sup> This in no way should be construed as an income or class distinction to discriminate against a cannabis-using parent who cannot afford a large home. Instead it should be viewed as factor to recommend that a cannabis-using parent not smoke cannabis inside his or her home, or at least not smoke in a room close to where the children might be sleeping or playing.

the parent could be exposing the child to THC through secondhand smoke similar to the way the adult volunteers were exposed to THC while sitting in Dutch coffee shops.<sup>232</sup> While the location of the cannabis use should not necessarily bar the parent from custody or visitation rights, it could encourage the court to recommend that the parent use the drug elsewhere when children are in the home.

#### **4. How Is the Cannabis Stored Inside the Home?**

Whether or not a cannabis-using parent uses the drug inside the home, he or she still likely stores it inside the home. Once cannabis was legalized in Colorado, the number of children who were accidentally poisoned by the drug increased significantly.<sup>233</sup> In about half of the cases, the kids had found cannabis-laced cookies, brownies, or candy.<sup>234</sup> Edibles can have high amounts of cannabis, and if a child eats them the symptoms can be severe.<sup>235</sup> Therefore, family law commissioners and judges should look for express evidence that the cannabis-using parent stores the drug responsibly. For example, a court may view as responsible storage in a locked safe or in a building apart from the house such as a garage or shed as opposed to storage in a cupboard or closet.

#### **5. What Time of Day Does the Parent Typically Use Cannabis?**

The time of day a parent uses cannabis could be an important factor in determining whether that parent parents safely. As mentioned above, cannabis intoxication can impair motor function,<sup>236</sup> and the effects can last at least three to four hours, if not longer.<sup>237</sup> Also discussed above, impaired

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<sup>232</sup> Moore et al., *supra* note 130, at 227.

<sup>233</sup> Steven Reinberg, *Kids Poisoned by Medical Marijuana, Study Finds*, U.S. NEWS & WORLD REP., May 27, 2013, <http://health.usnews.com/health-news/news/articles/2013/05/27/kids-poisoned-by-medical-marijuana-study-finds>.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> DSM-5, *supra* note 2, at 516.

<sup>237</sup> *Id.* at 517.

motor function can decrease a user's decision-making ability and increase a user's stop-reaction time.<sup>238</sup> This could be a concern because researchers have found that drivers who use cannabis are more than twice as likely to be involved in an automobile crash.<sup>239</sup> Therefore, if a parent admits to using cannabis during the day, the court should further inquire whether that parent may also be transporting children at some point during the day.

#### 6. What Are the Ages of the Children in the Home?

Research has found that most cannabis users do not want their children to use cannabis.<sup>240</sup> However, children often acquire substance-using behaviors by modeling their parents' substance-using behavior.<sup>241</sup> In fact, the odds of a child using cannabis are two times higher if he or she has a parent who uses cannabis.<sup>242</sup> While arguably parents should not use cannabis around children of any age, the older the child, the more vulnerable he or she may be to also using cannabis.<sup>243</sup> Cannabis use is most common in adolescence and generally declines before the mid-twenties.<sup>244</sup> Therefore, the age of the child exposed to cannabis use may factor into the court's best interest of the child analysis in order to try to limit the child's exposure to factors that could increase the odds he or she will use cannabis in the future.

It is important to again note that these questions are not designed to elicit a right or wrong answer. The answers to the questions are meant to serve as

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<sup>238</sup> Ramaekers et al., *supra* note 120.

<sup>239</sup> Li et al., *supra* note 121.

<sup>240</sup> Christian Thurstone et al., *Medical Marijuana Use: A Qualitative Study*, 3 ADOLESCENT PSYCHIATRY 190, 191 (2013) (discussing concerns about how medical cannabis use may affect parenting).

<sup>241</sup> Julie B. Kaplow et al., *Child, Parent, and Peer Predictors of Early-Onset Substance Use: A Multisite Longitudinal Study*, 30 J. OF ABNORMAL CHILD PSYCHOL. 199, 201 (2002) (discussing how children are exposed to substance use).

<sup>242</sup> Richard Nauert, Ph.D., *Kids Tend to Pick up Parents' Alcohol, Drug Habits*, PSYCHCENTRAL (Mar. 21, 2014), <http://psychcentral.com/news/2014/03/21/is-drugalcohol-use-an-inheritable-trait/67422.html>.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*



the basis of an objective baseline test that family law commissioners and judges can use in their assessment of whether a parent who uses legal cannabis recreationally can parent safely.

*B. How the Objective Checklist of Questions Works*

The objective checklist of questions gives the court wide discretion, while still maintaining limits on judicial consideration. The objective checklist of questions gives family law commissioners and judges an educated lens through which to view a parent's legal recreational cannabis conduct. Because many of the risks created by cannabis's negative side effects may be lessened through careful planning and action, the objective checklist of questions provides the court the opportunity to be proactive rather than reactive to child safety risks associated with a parent's legal recreational cannabis use.

Furthermore, educating the court on risky cannabis-using conduct through the objective checklist of questions helps eliminate personal bias around recreational cannabis use and allows the court to potentially use a less heavy-handed approach in its assessment of the activity in question. This would encourage the court to recommend alternative conduct that could help a parent maintain custody or visitation, without necessarily abstaining from using cannabis. In addition, because the court would have to articulate its reasoned assessment to each of the questions, adversely affected parents will have a clear statement of the risk expressed in the court's findings to challenge on appeal. Therefore, in situations where a family law commissioner's or judge's personal bias improperly influenced the outcome of the custody or visitation decision, a parent will have a better chance of getting that decision overturned on appeal.

IX. CONCLUSION

Washington State has an opportunity to eliminate the confusion around how to deal with its new recreational cannabis law as it factors in to child

custody and visitation decisions. The new cannabis law does not give any guidance as to how courts should evaluate a parent's recreational use of cannabis in light of the best interest of the child standard.<sup>245</sup> Rather than complacently allowing family law commissioners and judges to develop their own, potentially contrasting, rules, this is a unique opportunity to develop an objective checklist of questions that will educate the courts and lead the country in creating a baseline standard for how to evaluate recreational cannabis use as it pertains to custody and visitation disputes.

Given the inconsistencies in rulings on cases involving cannabis-using parents, this issue requires immediate attention of the legal community and the public at large. By adhering to the objective checklist of questions, courts would view the totality of a parent's cannabis conduct, not just the act of using cannabis. Furthermore, it would provide full protection for children by focusing on the parent's specific conduct that creates the risk of harm. Finally, it would provide the parent with a reasoned assessment as to why his or her use may create a risk for a child, and it would give the court the opportunity to mitigate that risk without removing custody or visitation rights.

Most importantly, the objective checklist of questions fully protects the health and well-being of children by focusing on specific parental conduct that could be harmful to children. Thus, by adopting the objective checklist of questions, Washington State can ensure the protection of children while affording parents the right to choose to use recreational cannabis legally and responsibly under state law.

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<sup>245</sup> Holcomb Interview, *supra* note 68.