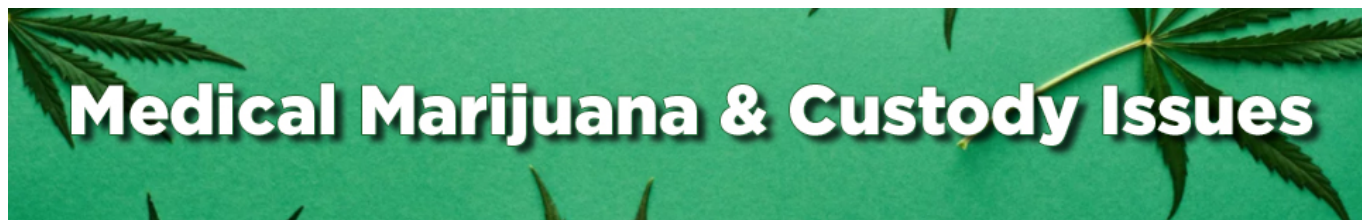


# Oklahoma medical marijuana license holders could face custody issues



On June 26, 2018, Oklahoma voters approved State Question 788, legalizing cultivation, use, and possession of medical marijuana. Almost three years after passing with 57% of voter support, our state struggles to manage the competing interests surrounding a legal concept colored with controversial opinions, long standing prejudices, and discriminatory undertones that linger in the air every bit as noticeable as the smell of marijuana smoke, itself.

Far from a settled issue, the debate surrounding the medicinal value of the marijuana plant carries hundreds of years of societal and legal baggage, which complicates the implementation of Oklahoma's newest industry.

Anticipating the gamut of opinions surrounding this controversial plant, anti-discrimination laws approved both by voters in the original ballot initiative and again by lawmakers in the [Oklahoma Medical Marijuana Use and Patient Protection Act](#) (more commonly known as the Unity Bill), aim to protect patients and license holders from foreseen prejudices. However, when bumping up against 120 years of court decisions regarding marijuana as a dangerous Schedule 1 drug, akin to the likes of heroin, frankly, the reality of our state's anti-discrimination protections should make Oklahoma patient card holders, especially those with families and children, nervous.

The Oklahoma Public Health Code, 63 O.S. § 42(D), reads “No medical marijuana license holder may be denied custody of or visitation or parenting time with a minor, and there is no presumption of neglect or child endangerment for conduct allowed under this law unless the persons behavior creates an unreasonable danger to the safety of the minor.”

Our family law practice handles medicinal marijuana issues on a weekly basis now. The impact of holding a medical marijuana card varies according to every situation, and multiple factors affect the extent that a patient card can complicate a custody decision.

Judges vary in their attitudes towards medical marijuana. Some attribute its uses to the likes of any other legal prescription. Others take a stricter stance, opposing its use by any person providing care for children, regardless of prescription. Clients should be fully informed that marijuana consumption during these early years of implementing its legality can disadvantage a marijuana patient if he or she comes up against judicial disfavor.

I have heard attorneys openly warned from the bench that, regardless of how the law reads, any consumption of marijuana by a parent will be enough for that judge to presume the parent is under the influence while parenting a child, and therefore endangering the child. While this may seem to cut directly against 63 O.S. 42D, judges are ultimately charged with determining the best interests of children during custody decisions, and the deference awarded to their judicial determination provides wide latitude.

One straight-shooting guardian ad litem candidly told me that if their office learns a client has a marijuana card and that client resides in certain rural jurisdictions, the first piece of advice given to those parents is to surrender their prescription and forfeit their medical marijuana license because they will instantly be disfavored by the court.

The more moderate and more widely held attitude towards medicinal marijuana use and child custody decisions examines the facts of a case and looks for a nexus between a parties' marijuana use and activity that threatens to harm the child. Is a parent exposing the child to marijuana? Is the child able to access it? Are the parents subjecting the child to secondhand exposure? Practicing in family law requires understanding that multiple global perceptions shape custody decisions and, as in all custody considerations, the specific facts at hand will affect the outcome of the case.

When a parent finds themselves googling "marijuana and child custody decisions," litigation is already at an increased risk of conflict, and understanding that complication starts with understanding how to frame the divisive issues at hand and the rules of the Oklahoma Medical Marijuana Authority (OMMA). Attorneys in this field should know how to craft their case when marijuana issues are present, and, remarkably, this area of law often gets glanced over by attorneys declining to study this nuance.

It surprises me how few family law attorneys have studied the OMMA regulations and are admittedly unfamiliar with the impact that they have on child custody issues. A common example is Okla. Admin. Code § 310:681-5-17, amended last fall, authorizing non-licensed minors to enter a licensed cannabis premise when accompanied by a parent or legal guardian.

Besides a thorough knowledge of cannabis laws, many attorneys have yet to dive into the evidentiary nuances that arise in these cases. For example, drug testing has been accepted for years amongst courts as forensic evidence, but a good attorney knows the limits of these tests. When the purpose of a drug test is to provide forensic evidence in a court of law, shockingly, the FDA does not regulate or review the processes and procedures for drug testing facilities providing forensic results. This surprises people to hear and causes a good

attorney to slow down and learn a little cannabis chemistry.

Having a relationship with experts who can support or discredit a disputed drug test can crucially benefit your client's case. Most of our local courts require education in understanding the limitations of a drug test. Understanding laboratory inconsistencies, chain of custody arguments, and scholarly research illuminating faulty processes helps sort through blatantly false results which, disappointingly, circulate in courtrooms everywhere.

As soon as a prospective client shares that they hold a medicinal marijuana license, or that opposing party holds a license, the attorney should recognize this complication and advise their client of the additional work that could likely accompany their case. With the Oklahoma cannabis industry blazing ahead into what many people consider a twenty-first century land rush, the accompanying fallout affecting family law should not be taken lightly.

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