THE UNTHINKABLE CHOICE: THE CONSTITUTIONAL DUE PROCESS RIGHT TO PARENT OR THE LEGAL RIGHT TO USE MEDICAL MARIJUANA

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"When courts consider a parent's medicinal marijuana status as a factor [in] deciding child custody matters, [without more] it forces upon the parent an 'untenable choice' of either giving up [the] legal use of marijuana or risk losing custody of his or her child."[1]

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[1] David Malleis, Note & Comment, *The High Price of Parenting High: Medical Marijuana and Its Effects on Child Custody Matters*, 33 U. LA VERNE L. REV. 357, 377 (2012).

I. INTRODUCTION

For a six-week period in 2013, Steve and Maria Green temporarily lost custody of their six-month-old daughter, Bree, after officials from Child Protective Services ("CPS") petitioned the Ingham County Probate Court to remove Bree from their home because marijuana was found in the house.[2] The father, a resident of Lansing, Michigan, was a medical marijuana patient who qualified to use marijuana pursuant to state law.[3] Notwithstanding the lawful possession of the substance, the court granted CPS's petition.[4] While the Greens eventually regained custody of their daughter, they were forced to fight for custody, take parenting classes for thirty days, and submit the child to regular drug-testing.[5]

Two years earlier in the same city and state, Livingston Thompson, Jr., a resident and state-registered medical marijuana patient who suffered from epilepsy, was subjected to similar treatment.[6] Despite Thompson's legal use of marijuana, he was forced to fight to maintain custody of his child.[7] A county judge ordered Thompson to stop using marijuana and, after he tested positive for the drug, sentenced him to three days in jail.[8]

The Green and Thompson child custody cases are not unique to the state of Michigan, one of several states that have enacted medical marijuana statutes. Similar child custody cases against parents who have a legal right to use medical marijuana, known as "qualified parents," have arisen in other states,[9] and the modern movement of states adopting laws permitting the use of marijuana

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[2] Ashley Woods, *Baby Bree Green Returned To Parents, Medical Marijuana Patients, After Custody Seizure*, HUFFINGTON POST (Oct. 29, 2013), http://www.huffingtonpost.com/2013/10/28/baby-bree-green-medical-marijuana_n_4169654.html.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Andy Balaskovitz, *Cannabis or Custody?*, CITYPULSE, (Jul. 6, 2011), http://lansingcitypulse.com/article-6051-cannabis-or-custody-.html; Charmie Gholson, *TAC: Medical Marijuana Parents Association Formed; Defends Ingham County Single Father with Epilepsy*, THE COMPASSION CHRONICLES (Sept. 22, 2013), http://thecompassionchronicles.com/2013/09/22/tac-medical-marijuana-parents-association-formed-defends-ingham-county-single-father-with-epilepsy/.

[7] *Id.*

[8] *Id.*

[9] *See, e.g.*, *In re* Drake M. v. Paul M., 149 Cal. Rptr. 3d 875, 888 (Cal. Ct. App. 2012) ("Although father uses medical marijuana pursuant to a physician's recommendation, there is nothing in the record to indicate that he has a substance abuse problem. Additionally, there is nothing in the record to indicate that his use of medical marijuana led to the finding of dependency jurisdiction as we have found the record does not support count b–3 against him."); *In re* Marriage of Parr, 240 P.3d 509, 513 (Colo. App. 2010) (holding that the district court erred in requiring the father's parenting time to be supervised because the district court made no finding under Colorado Revised Statute Section 14-10-129(1)(b)(I) that the father's medical marijuana use "endangered the child physically or impaired her emotional development").

for medical purposes will likely increase child custody litigation involving qualified parents.[10] There are no clear answers. Consequently, qualified parents have been forced to choose between parenting without the use and medical benefits of medical marijuana and potentially losing custody of their children if they are found using the drug.[11]

This article addresses the unimaginable choice that many parents must make. It first discusses the United States Supreme Court's interpretation of the constitutional due process right to parent. Next, the article focuses on state medical marijuana laws generally, as well as their application in child custody cases involving qualified parents. The article then analyzes the impact of state medical marijuana laws on the federal constitutional due process right to parent. Finally, the article concludes with the position that a parent's lawful use of medical marijuana should not factor into child custody cases unless the qualified parent's use of the drug poses an unreasonable risk to the child or is not in the best interest of the child.

II. THE CONSTITUTIONAL DUE PROCESS RIGHT TO PARENT

When parents lose or are subject to losing custodial or visitation rights to their children solely because they exercised their legal right to use medical marijuana, the parent(s)' constitutional due process rights are implicated. The United States Supreme Court "has traditionally and continuously upheld the principle that parents have the fundamental right to direct the . . . upbringing of their children."[12] For example, in *Meyer v. Nebraska*, the Court stated that the

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[10] *See* Edra J. Pollin, *Medical Marijuana Lights Up Child Custody Court*, HUFFINGTON POST (Sept. 26, 2011), http://www.huffingtonpost.com/edra-j-pollin/medical-marijuana-lights-_b_974848.html ("The explosion in medical marijuana has caused a corresponding relaxation in the national attitude about use of this drug with or without an MM license. All of this poses new questions and challenges for the courts in cases where one parent's allegation of substance abuse is solely related to marijuana."); *Medical Marijuana Can Cost Parents Custody*, CBS NEWS (Jun. 21, 2010), http://www.cbsnews.com/news/medical-marijuana-can-cost-parents-custody/ (describing Nicholas Pouch, a medical marijuana patient who spent $35,000 over a four-year period hoping to persuade the court to grant him partial or even primary custody after the children's mother won full custody of his sons due to of Pouch's marijuana use); *Medical Cannabis Can Cost Parents in Custody Disputes; Does it Endanger Kids?*, FOX NEWS (Jun. 21, 2010), http://www.foxnews.com/us/2010/06/21/medical-cannabis-cost-parents-custody-disputes-does-endanger-kids.html; Jim Camden, *Medical Marijuana Patient Can Get Custody of Daughter*, THE SPOKESMAN REVIEW (Jan. 29, 2014), http://www.spokesman.com/stories/2014/jan/29/medical-marijuana-patient-can-get-custody-of/ ("Billy Fisher doesn't have to choose between his 16-month-old daughter and the medical marijuana he takes to manage his chronic back pain.").

[11] *See generally In re* Drake M. v. Paul M., 149 Cal. Rptr. 3d 875 (Cal. Ct. App. 2012).

[12] Christopher Klicka, *Decisions of the United States Supreme Court Upholding Parental Rights as "Fundamental,"* HOME SCHOOL LEGAL DEFENSE ASSOCIATION (Oct. 27, 2003), http://www.hslda.org/docs/nche/000000/00000075.asp. *See also* Meyer v. Nebraska, 262

liberty guaranteed under the Fourteenth Amendment "denotes not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children."[13]

Similarly, in *Prince v. Massachusetts*, the Court specifically addressed the right of parents to maintain custody of their children:

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.[14]

But, the Court also recognized that the rights of parenthood are not beyond limitations.[15] The Court added that by "[a]cting to guard the general interest in youth's well-being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways."[16]

A. *The Parental Right to Custody and Control of Children*

This parental right to care for and have custody of one's child has been addressed in cases involving both single parents and two-parent households. In *Stanley v. Illinois*, an unwed father was presumed unfit to care for his child.[17] The petitioner, Stanley, lived with his children's mother for eighteen years.[18] Upon her death, their children were declared wards of the state and placed with court-appointed guardians under the presumption that Stanley, an unwed father, was unfit to be a parent.[19] The father appealed the custody determination and claimed that he had never been shown to be an unfit parent, and that since married fathers and unwed mothers could not be deprived of their children

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U.S. 390, 400 (1923) (holding that the liberties guaranteed by the Fourteenth Amendment protected a teacher's right to teach and a parent's right to control the education of their children).

[13] *Id.* at 399.

[14] Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 166 (1944) (holding that the State had the right to protect children against the dangers associated with preaching and selling religious materials on the highway).

[15] *Id.* at 166–67.

[16] *Id.*

[17] Stanley v. Illinois, 405 U.S. 645, 647 (1972). *See also* Lehr v. Robertson, 463 U.S. 248 (1983) (holding that a state procedure allowing a child's stepfather to adopt the child against his natural father's wishes did not unconstitutionally infringe upon a father's interest in his relationship with his child); Caban v. Mohammed, 441 U.S. 380, 397 (1979) ("Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.").

[18] *Stanley*, 405 U.S. at 645.

[19] *Id.* at 646.

without such a showing, his equal protection rights had been violated.[20]

Without an actual fitness determination, the Illinois Supreme Court rejected the father's equal protection claim and held that the father could properly be separated from his children because he and the dead mother had not been married.[21] Reversing the Illinois Supreme Court's decision, the United States Supreme Court recognized that there was nothing in the record to indicate that this father had neglected his children.[22] In reaching its conclusion, the Court observed that it "has frequently emphasized the importance of the family" and reiterated that "[t]he rights to conceive and to raise one's children have been deemed 'essential,' . . . 'basic civil rights of man,' . . . and '[r]ights far more precious . . . than property rights.'"[23] The Court went on to state that all Illinois parents are constitutionally entitled to a hearing about their fitness before their children are removed from their custody, thus establishing a due process opportunity and a new avenue of relief for all Illinois parents facing similar child custody issues.[24]

The parental right to care and have custody of a child has also been litigated in situations where a governmental entity, such as the Department of Social Services, attempted to terminate the rights of both parents.[25] In *Santosky v. Kramer*, the petitioners were the natural parents of two minor children—a son and a daughter.[26] They brought the claim against the commissioner of the Ulster County Department of Social Services in New York after the agency initiated a neglect proceeding under Section 1022 of the New York Family

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[20] *Id.*

[21] *Id.*

[22] *Id.* at 654–55.

[23] *Id.* at 651 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923); then quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); and then quoting May v. Anderson, 345 U.S. 528, 533 (1953)).

[24] *Id.* at 658.

[25] *See* Santosky v. Kramer, 455 U.S. 745 (1982) (holding that before a state could completely and irrevocably sever the rights of parents in their natural child, due process required that the state support its allegations by at least clear and convincing evidence); *In re* Adoption of A.M.H., 215 S.W.3d 793, 812 (Tenn. 2007) ("Under the superior rights doctrine, a natural parent may only be deprived of custody of a child upon a showing of substantial harm to the child."); *In re* Guardianship & Custody of Terrance G., 731 N.Y.S.2d 832, 839 (N.Y. Fam. Ct. 2001) ("[T]he Due Process Clause of the Fourteenth Amendment of the United States Constitution demands that before a State (specifically New York) may sever completely and irrevocably the rights of parents in their natural child, the State must support its determination to terminate such rights by at least clear and convincing evidence."); *see also In re* Welfare of M.R.H., 188 P.3d 510, 517 (Wash. App. 2008) ("Parents have a fundamental right to the care and custody of their children, and a trial court asked to interfere with that right should employ great care."); *In re* Welfare of S.J., 256 P.3d 470, 473 (Wash. App. 2011) ("[T]ermination of parental rights should be allowed 'only for the most powerful [of] reasons.'").

[26] *Santosky*, 455 U.S. 751 (1982).

Court Act.[27] At the time of the neglect proceedings, the state statute allowed the agency to terminate the rights of parents upon a finding that their child was "permanently neglected."[28] To support a finding of "permanently neglected," Section 622 of the New York Family Care Act only requires the court to apply a "fair preponderance of the evidence" standard.[29]

Approximately ten months after removing the female child, the commissioner removed her brother from the home and placed him with foster parents.[30] On the same day, the mother gave birth to a second son (her third child).[31] When he was only three days old, the baby boy was also removed from the parent's custody and placed in a foster home "on the grounds that immediate removal was necessary to avoid imminent danger to his life or health."[32]

Ultimately, the commissioner petitioned the Ulster County Family Court to terminate the petitioners' parental rights for all three children.[33] In response, the parents challenged the constitutionality of the "fair preponderance of the evidence" standard specified in section 622 of the New York Family Court Act.[34] The Family Court rejected the parents' constitutional challenge and found that it was in the best interest of the children to terminate the parents' custody."[35]

After an unsuccessful appeal to the New York Supreme Court, Appellate Division,[36] the parents appealed to the United States Supreme Court.[37] The Court addressed the due process rights of the parents and clearly articulated that "state intervention to terminate the relationship between a parent and the child must be accomplished by procedures meeting the requisites of the Due Process Clause."[38] The Court also stated that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."[39] Further, the Court held that before a state could completely and irrevocably sever the rights of parents in their natural child, due process required that the state support its allegations by at least clear and convincing evidence instead of by a "fair preponderance of the evidence."[40]

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[27] *Id.* at 747 (citing N.Y. Soc. Serv. Law §§ 384-b.4.(d), 384-b.7.(a) (McKinney Supp. 1981–1982)).

[28] *Id.*

[29] N.Y. Soc. Serv. Law §§ 384-b.4.(d), 384-b.7.(a) (McKinney Supp. 1981–1982).

[30] *Santosky*, 455 U.S. at 752.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.* at 751–52.

[36] *Id.*

[37] *Id.* at 752.

[38] *Id.* at 753 (quoting Lassiter v. Department of Social Services, 452 U.S. 18, 21 (1981)).

[39] *Id.*

[40] *Id.* at 758.

B. *The Best Interest Standard*

Although a parent's control over the child is pervasive, it is not absolute.[41] Generally, in settling custody disputes of children, courts "consider all facts relevant to the best interest of the child," commonly called the "best interest standard."[42] The factors relevant to determining the best interest of the child vary depending on the state in which the custody dispute arises.[43] In *Quilloin v. Walcott*, the Supreme Court had little doubt that the due process clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."[44] However, a natural parent's constitutional due process right to "the companionship, custody, care, and control of his or her child" may not exist if the parent's conduct is inconsistent with the presumption that he or she will act in the best interest of the child or if he or she fails to shoulder the responsibilities of rearing a child.[45]

Essentially, natural parents are not always found to have a constitutional due

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[41] Olff v. East Side Union High School District, 404 U.S. 1042, 1042 (1972).

[42] Jason J. Reed, Comment, *The Façade of the Best Interest Standard: Moving Past the Presumption to Ensure Decisions are Made for the Right Reasons*, 29 WIS. J.L. GENDER & SOC'Y 149, 155 (2014); *In re* Guardianship & Custody of Terrance G., 731 N.Y.S.2d 832, 839 (N.Y. Fam. Ct. 2001) ("Custody is dominated by concern for the best interest of the child.").

[43] *See, e.g.*, MICH. COMP. LAWS ANN. § 722.23 (West 2015) (In Michigan, the court considers the following factors to in determining the "best interests of the child": "(a) The love, affection, and other emotional ties existing between the parties involved and the child; (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any; (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs; (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity; (e) The permanence, as a family unit, of the existing or proposed custodial home or homes; (f) The moral fitness of the parties involved; (g) The mental and physical health of the parties involved; (h) The home, school, and community record of the child; (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference; (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents; (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child; and (l) Any other factor considered by the court to be relevant to a particular child custody dispute."); MINN. STAT. ANN. § 257.025 (West 2015); WIS. STAT. ANN. § 767.41 (West 2015).

[44] Quilloin v. Walcott, 434 U.S. 246, 255 (1977).

[45] Stacy v. Price, 484 S.E.2d 528, 534 (N.C. 1997); Lehr v. Robertson, 463 U.S. 248 (1983).

process right to parent.[46] For example, in *Lehr v. Robertson*, the trial court denied an unmarried father's petition to vacate the adoption order of his natural child by the child's stepfather on the grounds that it violated his constitutional rights.[47] The natural father never supported the child and did not enter his name in New York's putative father registry, which would have entitled him to receive notice of the adoption proceeding.[48] The Court of Appeals of New York affirmed the ruling.[49]

On appeal, the United States Supreme Court stated, "the mere existence of a biological link does not merit equivalent constitutional protection."[50] Instead, the Court determined that the significance of the familial relationship "to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in '[promoting] a way of life' through the instruction of children . . . as well as from the fact of blood relationship."[51] As a result, the Court held that the natural father's rights under the due process and equal protection clauses were not violated by a lack of notice or an opportunity to be heard before his child was adopted, since the father never had any significant "custodial, personal, or financial relationship with [the child]."[52]

III. MEDICAL MARIJUANA LAWS

When evaluating the relationship between a parent's constitutional due process right to custody of his or her child and the parent's legal right to use medical marijuana, it is important to focus on the essential nature and purpose of state medical marijuana laws. Proponents of medical marijuana laws argue that marijuana is a safe drug, which has significant medical benefits.[53] Contemporary research has discovered marijuana's value in the treatment of pain relief – particularly of neuropathic pain (pain from nerve damage) – including in cases of nausea, spasticity, glaucoma, and movement disorders.[54] Marijuana is

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[46] *See, e.g.*, *Lehr*, 463 U.S. at 248; *Quilloin*, 434 U.S. at 255 (holding that the State did not violate the father's equal protection rights when it denied him veto authority in his child's adoption because he had never had the responsibility of custody of his child).

[47] *Lehr*, 463 U.S. at 250.

[48] *Id.*

[49] *Id.* at 254.

[50] *Id.* at 261.

[51] *Id.* (quoting Smith v. Org. of Foster Families for Equality and Reform, 431 U.S. 816, 844 (1977)).

[52] *Id.* at 267.

[53] *See More Doctors Than Consumers Say Medical Marijuana Should be Legal: Survey*, CBS NEWS, http://www.cbsnews.com/news/more-doctors-than-consumers-say-medical-marijuana-should-be-legal-survey/ (last updated on May 8, 2016); Kim Ann Zimmermann, *Benefits Risks & State Laws*, LIVESCIENCE (Jan. 14, 2015), http://www.livescience.com/24554-medical-marijuana.html.

[54] Dave Smith, *Medical Marijuana: 10 Health Benefits that Legitimize Legalization*, IBT

also a powerful appetite stimulant, specifically for patients suffering from HIV and dementia.[55] Indeed, one of "the most common medical application[s] of marijuana is for the reduction of nausea—the extreme nausea caused by cancer chemotherapy and AIDS treatment . . . ."[56] Through the use of medical marijuana, patients undergoing chemotherapy or treated for AIDS "are able to eat and keep the food down which helps combat weight loss and muscle wasting."[57] Medical marijuana has also been known to soothe the tremors associated with Parkinson's disease and lessen the pain associated with multiple sclerosis and Crohn's disease.[58]

Opponents of medical marijuana laws contend that marijuana is a dangerous drug that is addictive and can serve as a gateway to the use of more dangerous drugs.[59] Perhaps this accounts for marijuana's long-standing classification as an illegal Schedule I drug under federal law, despite its medical benefits.[60] Schedule I drugs and substances are defined "as drugs with no currently accepted medical use" and "a high potential for abuse."[61] Drugs classified as Schedule I

(Aug. 8, 2012), http://www.ibtimes.com/%E2%80%98medical%E2%80%99-marijuana-10-health-benefits-legitimize-legalization-742456 (last visited May 9, 2016).

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *See id.*; Jennifer Welsh & Kevin Loria, *23 Health Benefits of Marijuana*, BUSINESS INSIDER (Apr. 20, 2014, 3:03 PM), http://www.businessinsider.com/health-benefits-of-medical-marijuana-2014-4?op=1.

[59] *Should Medical Marijuana be a Medical Option*, PROCON.ORG, http://medicalmajijuana.procon.org/ (last updated on November 9, 2015); Charles D. Stimson, *Legalizing Marijuana: Why Citizens Should Just Say No*, Legal Memorandum, No. 56, THE HERITAGE FOUNDATION (2010), *available at* http://www.heritage.org/research/reports/2010/09/legalizing-marijuana-why-citizens-should-just-say-no (last visited Sept. 24, 2015) ("Citizens also should not overlook what may be the greatest harms of marijuana legalization: increased addiction to and use of harder drugs. In addition to marijuana's harmful effects on the body and relationship to criminal conduct, it is a gateway drug that can lead users to more dangerous drugs.").

[60] DEA, DRUG SCHEDULES, *available at* http://www.dea.gov/druginfo/ds.shtml (last visited Jul. 29, 2015); FDA, THE CONTROLLED SUBSTANCE ACT, *available at* http://www.fda.gov/RegulatoryInformation/Legislation/ucm148726.htm (last visited Jul. 30, 2015).

[61] DEA, *supra* note 60. *See* Gonzales v. Raich, 545 U.S. 1 (2005) (holding that the regulation of marijuana under the Controlled Substances Act was squarely within Congress' commerce power because production of marijuana meant for home consumption had a substantial effect on supply and demand in the national market); Matthew B. Hodroff, Note and Comment, *The Controlled Substances Act: Time to Reevaluate Marijuana*, 36 WHITTIER L. REV. 117, 122–23 (2014) ("Under the CSA, marijuana is currently classified as a Schedule I substance. Thus, according to the CSA, marijuana currently has no medically-accepted use and has a high potential for abuse. In addition, there is a lack of safety for use of the drug, even under medical supervision. Listed alongside marijuana under Schedule I are substances such as peyote, mescaline, lysergic acid diethylamide (LSD), psilocybin and psilocyn (hallu-

are considered to be "the most dangerous class of drugs with . . . potentially severe psychological and/or physical dependence."[62]

Notwithstanding the current federal classification of marijuana as an illegal Schedule I drug, many states have enacted laws that allow qualifying individuals to use marijuana for medical purposes.[63] Currently, twenty-three states and the District of Columbia have laws allowing their citizens to use marijuana for medical purposes.[64]

A. *Medical Marijuana Use*

Although medical marijuana use includes, by definition, "the use, possession, and/or cultivation of marijuana for medical purposes,"[65] each state statute has a specific definition of what constitutes the term "medical marijuana" and its use.[66] For example, under Arizona's medical marijuana statute, the term marijuana "means all parts of any plant of the genus cannabis whether growing or not, and the seeds of such plant."[67] Similarly, under Michigan's medical

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cinogenic mushrooms), various isomers and forms of speed, and the most potent opiates (heroine) and opiate derivatives.").

[62] DEA, *supra* note 60.

[63] *See infra* note 66.

[64] The twenty three states that have medical marijuana laws are: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont & Washington. *See* ALASKA STAT. §§ 17.37.10 – 17.37.80 (2014); ARIZ. REV. STAT. § 36-2801 (2014); CAL. HEALTH & SAFETY. CODE §§ 11362.7 – 11362.83 (2014); COLO. REV. STAT. § 25-1.5-106 (2014); CONN. GEN. STAT. § 21a-240 (2014); DEL. CODE. ANN. tit. 16 § 4904A (2014); HAW. REV. STAT. ANN. § 329-122(a) (2014); 410 ILL. COMP. STAT. 130/1 (2014); ME. REV. STAT. tit. 22 §§ 2383-B, 2426 (2014); MD. CODE ANN., CRIM. LAW § 5-601(c)(3)(II) (2014); An Act for the Humanitarian Use of Marijuana 2012 Mass. Legis. Serv. Ch. 369 (2012), *available at* https://malegislature.gov/Laws/SessionLaws/Acts/2012/Chapter369 (last visited Sept. 1, 2015); MICH. COMP. LAWS ANN. §§ 333.26421, 333.26424 (2014); MINN. STAT. ANN. § 152.21 (West 2016); MONT. CODE ANN. § 50-46-319 (2014); NEV. REV. STAT. §§ 453A.200, 453A.310, 453A.510, 453A.800 (2014); N.H. REV. STAT. ANN. § 126-X (2015); N.J. STAT. ANN. §§ 2C:35-18, 24:61-3, 24:61-6, 24:61-8, 24:61-14 (2014); N.M. STAT. ANN. §§ 26-2B-3 to -5 (2014); N.Y. PUB. HEALTH LAW §§ 3360 – 3369-E (Mckinney 2016); OR. REV. STAT. §§ 475.302-.346 (2014); R.I. GEN. LAWS §§ 21-28.6-3, 21-28.6-4, 21-28.6-7, 21-28.6-8 (2014); VT. STAT. ANN. tit. 18, §§ 4472, 4474b, 4474c (2014); WASH. REV. CODE ANN. §§ 69.51A.010, 69.51A.040, 69.51A.060 (2014); D.C. STAT. § 7-1671.02 (2010).

[65] *Medical Marijuana — An Overview*, FINDLAW, http://criminal.findlaw.com/criminal-charges/medical-marijuana-an-overview.html/ (last visited May 8, 2016).

[66] *See supra* note 64.

[67] ARIZ. REV. STAT. § 36-2801(8) (2014); MONT. CODE ANN. § 50-32-101(18) (2014), *available at* http://leg.mt.gov/bills/mca/50/32/50-32-101.htm (last visited Jul. 29, 2015) ("'Marijuana (marihuana)' means all plant material from the genus Cannabis containing tetrahydrocannabinol (THC) or seeds of the genus capable of germination.").

marijuana statute, marijuana "means the dried leaves and flowers of the marihuana plant, and any mixture or preparation thereof, but does not include the seeds, stalks, and roots of the plant."[68]

By contrast, medical use can mean "the acquisition, possession, cultivation, manufacture, use, administration, delivery, transfer or transportation of marijuana or paraphernalia relating to the administration of marijuana . . . ."[69] But, this term can also refer solely to "the acquisition; administration; delivery; possession; transfer; transportation; or use of cannabis . . . ."[70] In essence, medical marijuana use may or may not include cultivation of the drug.[71]

Indeed, for an individual to be classified as a qualified medical marijuana user, they must have some serious medical condition for which a doctor recommends the use of marijuana.[72] Under Connecticut's medical marijuana law, a "debilitating medical condition" is defined as:

> cancer, glaucoma, positive status for human immunodeficiency virus or acquired immune deficiency syndrome, Parkinson's disease, multiple sclerosis, damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity, epilepsy, cachexia, wasting syndrome, Crohn's disease, posttraumatic stress disorder, or any medical condition, medical treatment or disease approved by the Department of Consumer Protection pursuant to regulations adopted under section 21a-408m.[73]

The respective state's statute dictates who is considered a "qualifying patient" under state law.[74] For example, in Connecticut, a qualifying patient "means a person who is eighteen years of age or older, is a resident of Connecticut and has been diagnosed by a physician as having a debilitating medical condition."[75] Thus, minors are not qualified medical marijuana users in Connecticut.[76] Conversely, Colorado's medical marijuana statute defines a qualified patient as a person who has a "debilitating medical condition."[77] Consequently,

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[68] MICH. COMP. LAWS ANN. § 333.26423(k) (2014).

[69] ARIZ. REV. STAT. § 36-2801(9) (2014). *See* MICH. COMP. LAWS ANN. § 333.2643(f) (2014) ("Medical use means the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition.").

[70] 410 ILL. COMP. STAT. 130/1 (2014).

[71] *See supra* notes 69 & 70.

[72] *See* CONN. GEN. STAT. § 21a-240 (2014).

[73] *Id.*

[74] *See id.*

[75] *Id.* § 21a-408(10) ("'Qualifying patient' does not include an inmate confined in a correctional institution or facility under the supervision of the Department of Correction.").

[76] *Id.*

[77] COLO. CONST. ART. XVIII, SECTION 14 (2015) (Under Colorado's statute, a "debilitat-

minors in Colorado are not restricted by definition from becoming qualified users of medical marijuana.[78]

There are also quantity restrictions to consider. Most states limit the amount of marijuana that a qualifying patient may use over a period of time.[79] In Illinois, for example, the medical marijuana statute provides that the adequate supply of medical marijuana allowed by a qualifying individual shall be "2.5 ounces of usable cannabis during a period of 14 days."[80] In contrast, a qualifying patient in Montana may possess "up to 4 mature plants, 12 seedlings, and 1 ounce of usable marijuana."[81]

If not for state medical marijuana statutes, qualifying individuals would face criminal prosecution for use of a Schedule I drug.[82] The protective language of these state statutes is clear and straightforward. In New Mexico, for example, the medical marijuana statute reads:

> A person is not subject to arrest, prosecution, civil or criminal penalty or denial of any right or privilege for manufacturing, possessing or administering marijuana or for the certification of a patient's condition for the purpose of qualifying the patient for participation in the program if the person is registered with the department as a participating practitioner in the program.[83]

Comparable straightforward language is also found in Alaska's medical ma-

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ing medical condition" means: "(I) Cancer, glaucoma, positive status for human immunodeficiency virus, or acquired immune deficiency syndrome, or treatment for such conditions; (II) A chronic or debilitating disease or medical condition, or treatment for such conditions, which produces, for a specific patient, one or more of the following, and for which, in the professional opinion of the patient's physician, such condition or conditions reasonably may be alleviated by the medical use of marijuana: cachexia; severe pain; severe nausea; seizures, including those that are characteristic of epilepsy; or persistent muscle spasms, including those that are characteristic of multiple sclerosis; or (III) Any other medical condition, or treatment for such condition, approved by the state health agency, pursuant to its rule making authority or its approval of any petition submitted by a patient or physician as provided in this section.").

[78] *Id.*

[79] *See, e.g.*, ALASKA STAT. ANN. § 17.37.040 (West 2015) (A medical marijuana patient may not "possess in the aggregate more than . . . one ounce of marijuana in usable form; and . . . six marijuana plants, with no more than three mature and flowering plants producing usable marijuana at any one time."); OR. REV. STAT. § 475.320 (West 2016) ("A registry identification cardholder and the designated primary caregiver of the registry identification cardholder may jointly possess six or fewer mature marijuana plants.").

[80] 410 ILL. COMP. STAT. 130/10 (West 2016) ("This subsection may not be construed to authorize the possession of more than 2.5 ounces at any time without authority from the Department of Public Health.").

[81] MONT. CODE ANN. § 50-46-319 (West 2015).

[82] *See infra* notes 86 & 87.

[83] N.M. STAT. ANN § 26-2Bb (2016).

rijuana statute, which provides "an affirmative defense to a criminal prosecution" for qualifying patients using marijuana for medical purposes.[84]

B. *Specific Statutory Provisions Regarding Child Custody Cases*

Most state medical marijuana statutes do not contain specific, protective provisions for qualifying parents.[85] Fortunately, seven states do: Arizona, Delaware, Illinois, Maine, Minnesota, New Hampshire and Washington.[86] Maine's statute provides an illustration:

> A person may not be denied parental rights and responsibilities with respect to or contact with a minor child as a result of acting in accordance with this chapter, unless the person's conduct is contrary to the best interests of the minor child as set out in Title 19-A, section 1653, subsection 3.[87]

Likewise, under Arizona's medical marijuana statute, a parent cannot be "denied custody of or visitation or parenting time with a minor, and there is no presumption of neglect or child endangerment" for legal use of marijuana "unless the person's behavior creates an unreasonable danger to the safety of the minor as established by clear and convincing evidence."[88] The statutory provisions in the other five states have similar language[89] and four of the seven states

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[84] ALASKA STAT. ANN. § 17.37.030 (West 2015); OR. REV. STAT. ANN. § 475.319 (West 2015) (A qualifying individual has "an affirmative defense to a criminal charge of possession or production of marijuana, or any other criminal offense in which possession or production of marijuana is an element."); 410 ILL. COMP. STAT. 130/25 (West 2016) ("A registered qualifying patient is not subject to arrest, prosecution, or denial of any right or privilege, including but not limited to civil penalty or disciplinary action by an occupational or professional licensing board, for the medical use of cannabis in accordance with this Act.").

[85] *See, e.g.*, *In re* Drake M. v. Paul M., 149 Cal. Rptr. 3d 875, 888 (Cal. Ct. App. 2012) ("Although father uses medical marijuana pursuant to a physician's recommendation, there is nothing in the record to indicate that he has a substance abuse problem. Additionally, there is nothing in the record to indicate that his use of medical marijuana led to the finding of dependency jurisdiction as we have found the record does not support count b–3 against him."); *In re* Marriage of Parr, 240 P.3d 509, 512 (Colo. App. 2010) (holding the district court erred in requiring supervision of father's parenting time as there was no finding that the father's medical marijuana use endangered the child physically or impaired her emotional development as required under Colorado Revised Statute Section 14-10-129(1)(b)(I)).

[86] *See* ARIZ. REV. STAT. ANN. § 36-2813 (West 2014); DEL. CODE. ANN. tit. 16, § 4905A(b) (West 2014); 410 ILL. COMP. STAT. ANN. 130/40 (West 2014); MICH. COMP. LAWS ANN. § 333.26424(c) (West 2014); MINN. STAT. ANN. § 152.32 Subd. 3(e) (West 2016); N.H. REV. STAT. ANN. § 126-X:2 (2015); WASH. REV. CODE ANN. § 69.51A.120 (West 2014).

[87] ME. REV. STAT. ANN. tit. 22, § 2423-E(2) (2015).

[88] ARIZ. REV. STAT. ANN. § 36-2813 (West 2014).

[89] *See supra* note 86.

have established a clear and convincing evidence standard of review for these unique child custody cases.[90]

On its face, the law appears to be clear: in order for a qualifying patient to lose custody, visitation or other parental rights, the state must show that either the specific medical marijuana use poses an unreasonable danger to the child or that the parent's medical marijuana use is contrary to the best interest of the child.[91]

IV. APPLICATION OF CHILD CUSTODY CASES INVOLVING MEDICAL MARIJUANA

Various previously litigated child custody cases may provide guidance as to how other courts might rule in similar child custody cases.[92] This section discusses the application of the laws in three states: California, Colorado and Washington.

A. *The California State Court*

Several cases have been adjudicated in the California court system.[93] California was the first state to adopt medical marijuana laws, which permit the legal use of marijuana for medical purposes.[94] In 1996, voters passed Compassionate Use Act of 1996, commonly known as Proposition 215.[95] Unlike most states, California does not require a qualifying patient to have a specific "serious" or "debilitating medical condition," as defined by the medical marijuana statute, or a specific condition approved by the governmental department given the authority to oversee the medical marijuana program.[96] In California, a qualify-

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[90] The three other states that use the clear and convincing standard in medical marijuana statutes are: (1) Delaware; (2) Illinois; and (3) Minnesota. *See* DEL. CODE. ANN. tit. 16, § 4905A(b) (West 2014); 410 ILL. COMP. STAT. ANN. 130/40 (West 2014); MINN. STAT. ANN. § 152.32 Subd. 3(e) (West 2016).

[91] *See supra* note 86.

[92] *See generally In re* Drake M. v. Paul M, 149 Cal. Rptr. 3d 875 (Cal. Ct. App. 2012); *In re* Alexis E., 90 Cal. Rptr. 3d 44 (Cal. Ct. App. 2009); *In re* Marriage of Parr, 240 P.3d 509 (Colo. App. 2010); *In re* Marriage of Wieldraayer, 147 Wash. App. 1048 (2008).

[93] *See generally In re Drake*, 149 Cal. Rptr. 3d at 875; *In re Alexis E.*, 90 Cal. Rptr. 3d at 44.

[94] *State Medical Marijuana Laws*, NCSL NAT'L CONF. OF ST. LEGISLATURES (NCSL Aug. 11, 2015), http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx ("In 1996, California voters passed Proposition 215, making the Golden State the first in the union to allow for the medical use of marijuana.").

[95] *See also* CAL. HEALTH & SAFETY CODE 11362.5 (West 2016).

[96] *See* CAL. HEALTH & SAFETY. CODE § 11362.7 (West 2016); *cf.* OR. REV. STAT. ANN. § 475.302(3) (West 2014) ("Debilitating medical condition" means: (a) Cancer, glaucoma, positive status for human immunodeficiency virus or acquired immune deficiency syndrome, or treatment for these conditions; (b) A medical condition or treatment for a medical condition that produces, for a specific patient, one or more of the following: (A) Cachexia; (B)

ing patient needs only a physician's recommendation stating that "the patient's health would benefit from the use of marijuana in the treatment of . . . any . . . illness for which marijuana provides relief."[97] Additionally, an individual may obtain an exemption from the allowable marijuana limit of six mature or twelve immature plants, or eight ounces of dried marijuana,[98] with the written statement of a physician indicating that the qualifying patient needs more than the allowable limit.[99]

1. *In re Drake M. v. Paul M.*

The first California child custody case involving medical marijuana laws arose in the 2012 case of *In re Drake M. v. Paul M.*, decided by the Court of Appeals of California.[100] Drake was only nine months old when his case was referred to the Department of Children and Family Services ("DCFS"),[101] alleging that: (1) both parents used marijuana; (2) the mother had a history of drug abuse and (3) the party who reported the case to DCFS was concerned for Drake's safety and well-being.[102]

Notwithstanding the allegations, the DCFS social worker described baby Drake as "'clean without marks or bruises'" and noted that he appeared "to be reaching developmental milestones.'"[103] During a May 11, 2011 interview, Drake's father admitted that he used marijuana "three times a week for his

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Severe pain; (C) Severe nausea; (D) Seizures, including but not limited to seizures caused by epilepsy; or (E) Persistent muscle spasms, including but not limited to spasms caused by multiple sclerosis; (c) Post-traumatic stress disorder; or (d) Any other medical condition or side effect related to the treatment of a medical condition adopted by the Oregon Health Authority by rule or approved by the authority pursuant to a petition . . . .").

[97] CAL. HEALTH & SAFETY. CODE § 11362.5(b)(1)(A) (West 2016) (The purpose of the California Compassionate Use Act is to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.").

[98] CAL. HEALTH & SAFETY CODE § 11362.77(a) (2016) ("A qualified patient or primary caregiver may possess no more than eight ounces of dried marijuana per qualified patient. In addition, a qualified patient or primary caregiver may also maintain no more than six mature or 12 immature marijuana plants per qualified patient.").

[99] CAL. HEALTH & SAFETY. CODE, § 11362.77(b) (2014) ("If a qualified patient or primary caregiver has a doctor's recommendation that this quantity does not meet the qualified patient's medical needs, the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient's needs.").

[100] *See generally In re* Drake M. v. Paul M. 149 Cal. Rptr. 3d 875 (Cal. Ct. App. 2009).

[101] *Id.* at 878.

[102] *Id.* at 878–89.

[103] *Id.*

arthritis and pain in his body,"[104] but made it clear that the minor child was not exposed to marijuana in any way nor did he have any previous history with DCFS.[105] The father agreed to take on-demand drug screens, which tested positive for cannabinoids[106] but negative for all other drugs.[107] Overall, DCFS' assessment observed several strengths within the family unit, including baby Drake's healthy condition, evidence of family support, and the father's active employment status.[108]

Nonetheless, DCFS filed a petition alleging, among other things, that baby Drake's father "is a current user of legal marijuana which on occasion renders the father incapable of providing regular care and supervision of the child" and that the "father's drug use endangers the child's physical health, safety and well-being and creates a detrimental home environment and places the child at risk of physical harm and damage."[109] DCFS alleged that Drake's mother had a history of "illicit drug use including amphetamines and marijuana" which caused the mother to be "periodically incapable of providing regular care and supervision of the child"[110] as well as having a history of mental and emotional problems.[111] Directing the detention order exclusively against the mother, the California juvenile court found that DCFS made *a prima facie* case for detaining baby Drake from his mother and for placing the child with the father.[112] A short time later, DCFS interviewed the father again regarding his marijuana use.[113] He stated that, in accordance with California state law, "he always used the drug to manage his pain and had obtained a medical marijuana recommendation in February 2011" from his physician.[114]

During the final juvenile court hearing, the father testified and admitted to using marijuana four or five times a week several hours before he picked up his child.[115] The DCFS argued that this substantiated their claim that the father was under the influence of marijuana while caring for Drake.[116] Notwithstanding DCFS' argument, the juvenile court ordered Drake placed with the father.[117] However, the juvenile court ordered the father to stop using marijuana while caring for Drake and required him to attend parenting courses, drug-counseling

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[104] *Id.* at 879.
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.* at 887.
[109] *Id.* at 879.
[110] *Id.* at 880.
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.* at 881.
[116] *Id.*
[117] *Id.*

sessions and submit to random drug testing.[118]

On appeal to the California Court of Appeals, the father successfully argued that there was insufficient evidence to support the finding that he "was incapable of providing regular care and supervision for Drake" due to his legal marijuana use.[119] The question before the appellate court was whether there was a substantial risk that the child would suffer serious or physical harm.[120] DCFS claimed that the juvenile court's findings were supported by substantial evidence of a risk to the child because the father had not overcome his substance abuse problem.[121] In response to this claim, the appellate court determined that there was no evidence showing that the father was a substance abuser and that DCFS failed to show that the father was unable to provide regular care for Drake due to his substance abuse.[122] The court also stated, "without more, the mere usage of drugs by a parent is not a sufficient basis on which dependency jurisdiction can be found."[123] In effect, the court ruled that a parent who uses marijuana for medical reasons with a doctor's approval is not necessarily a drug abuser.[124] Moreover, the appellate court found that there was no evidence that the father failed to, or was unable to, adequately supervise or protect Drake.[125]

2. *Alexis E. v. Patrick E.*

In *In re Alexis E. v. Patrick E.*, the court came to a different result.[126] Three minor children, Alexis, age twelve, Samantha, age nine, and Elijah, age eight, alleged that their father emotionally abused them.[127] The juvenile court found that it had jurisdiction over the three children because, among other things, the father, a medical marijuana patient, had a history of substance abuse, and his current use of medical marijuana placed the children at risk of harm.[128] The juvenile court ordered age-appropriate therapy for the children and monitored weekly visitation with the father.[129]

The record demonstrated that on two occasions the father and his female companion engaged in violent physical altercations in the presence of the minor children, which resulted in the father's arrest for domestic violence.[130] The father had been convicted of domestic violence and battery and also had a history

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[118] *Id.* at 881–82.
[119] *Id.* at 882–83.
[120] *Id.* at 884.
[121] *Id.*
[122] *Id.*
[123] *Id.* (citing *In re* Alexis E., 90 Cal. Rptr. 3d 44 (Cal. Ct. App. 2009)).
[124] *Id.* at 884–85.
[125] *Id.* at 886–87.
[126] *In re* Alexis E., 90 Cal. Rptr. 3d 44 (Cal. Ct. App. 2009).
[127] *Id.* at 53.
[128] *Id.* at 54.
[129] *Id.* at 50.
[130] *Id.* at 52–53.

of domestic violence against the mother, in which he threatened to kill her.[131] The father also had a history of substance abuse and, on prior occasions, had been under the influence of drugs while the children were in his care.[132] The record also showed that the father used marijuana in high school, long before his physician recommended it for medical use.[133]

The juvenile court, when considering the father's marijuana use, found that the children had tried to convince their father to stop using the drug and had been exposed to "a significant amount of trauma and stress" because of their concerns for his health.[134] When the children stayed at their father's home, the father and his girlfriend would smoke the drug; the children could smell the smoke and the court found that their exposure to the smoke had a negative effect on them.[135] Consequently, the juvenile court concluded that "[t]he father is a current user of marijuana" and his use of the drug "renders him incapable of providing regular care and supervision of the children."[136]

On appeal, the father challenged the juvenile court's finding that his current medical use of marijuana presented a risk to the minor children.[137] Specifically, he claimed that "the court's decision undermines the protections afforded by California's sanction of medical marijuana use, because it forces parents to either refrain from using marijuana in a medical context, which can be the most effective substance to treat their medical condition, or give up the possibility of reuniting with their children."[138]

In addressing the father's claim, the appellate court noted that the doctor's recommendation occurred after the father began using marijuana, which meant that he self-medicated prior to the recommendation.[139] Thus, the court found

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[131] *Id.* at 53–54.

[132] *Id.* at 53.

[133] *Id.* at 50.

[134] *Id.* at 53.

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.* Notably, the father did not challenge the juvenile court's finding that it had jurisdiction over the minors because of the father's history of domestic violence. Rather, he only challenged "the findings that he has a history of substance abuse, and that his current use of marijuana presents a risk to the minors." *Id.* at 54. In response, the appellate court stated that when "a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court's jurisdiction, a reviewing court can affirm the juvenile court's finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence." *Id.* In this regard, the court noted that there was substantial evidence to support the juvenile court's jurisdictional finding based on the father's history of domestic violence. *Id.* As a result, the court was not required to address the father's claim that there was insufficient evidence to support the juvenile court's finding that it had jurisdiction over the minor children because of the father's use of medical marijuana. *Id.*

[139] *Id.*

facts supporting a finding of a history of substance abuse.[140]

Next, the appellate court accessed the father's use of marijuana when his children were in his home.[141] One of the children stated, "My dad sucks drugs; he does them all the time. It looks like daddy's going to set a fire on the house and it stinks."[142] The court noted that the trial court could have reasonably found that the father's marijuana use constituted a risk of harm to the minors because he failed to protect them from marijuana smoke.[143]

The court also found that "while it is true that the mere use of marijuana by a parent will not support a finding of risk to minors, the risk here is not speculative [and involves exposing] . . . the children of the negative effects of second-hand marijuana smoke."[144] When enacting the state medical marijuana law, the California legislature did not intend that "the negative effects on children from marijuana smoke would be unacceptable if it were being smoked outside the medical marijuana law, but acceptable if the person smoking the substance in their home were doing it legally."[145] Thus, the court found that legal marijuana use could be abused if it poses a risk of harm to minors.[146]

B. *The Colorado State Court*

Colorado adopted its medical marijuana law in 2000 and defines the term "medical use" as "the acquisition, possession, production, use, or transportation of marijuana or paraphernalia."[147] "Usable marijuana" in the state includes, "the seeds, leaves, buds, and flowers of the plant (genus) cannabis, and any mixture or preparation thereof, which are appropriate for medical use as provided in this section, but excludes the plant's stalks, stems, and roots."[148] The legal limit on the quantity of marijuana a qualified individual may possess in Colorado is "[n]o more than two ounces of a usable form of marijuana; and . . . [n]o more than six marijuana plants, with three or fewer being mature, flowering plants that are producing a usable form of marijuana."[149] Further, a "debilitating medical condition" must be one expressly listed in the medical marijuana

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[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.* at 54–55.

[145] *Id.*

[146] *Id.*

[147] COLO. CONST. Art. XVIII, Section 14 (2015); *see* COLO. REV. STAT. ANN. § 25-1.5-106 (West 2014). *See also Statement of Basis and Purpose — Colorado Rules Governing Medical Marijuana,* COLORADO DEPARTMENT MARIJUANA ENFORCEMENT DIVISION, https://www.colorado.gov/pacific/sites/default/files/Medical%20Marijuana%20Rules%20-%20ADOPTED%20090913%2C%20Effective%2010152013_0.pdf (last visited May 9, 2016).

[148] COLO. REV. STAT. ANN. § 25-1.5-106.5(6) (2016); COLO. CONST. art. 18, § 14.

[149] *Id.* ("For quantities of marijuana in excess of these amounts, a patient or his or her primary care-giver may raise as an affirmative defense to charges of violation of state law

statute or one approved by the state health agency.[150]

In 2010, the case of *In re Marriage of Parr* came before the Colorado Court of Appeals.[151] The case involved the modification of a parenting plan for a minor child pursuant to a divorce decree.[152] The original parenting plan detailed gradually increasing the father's visitation over a seven month period from short, supervised visits to unsupervised, alternating overnight weekend visits with the child.[153] The parenting plan also provided that in order for the father to be entitled to visitation with the child, the father was required to undergo ongoing urinalysis tests and drug screening.[154] The same day the court incorporated the parenting plan into decree, the father learned he had been approved for listing on the State of Colorado Medical Marijuana Registry.[155] The father used medical marijuana because of his debilitating back and knee pain resulting from a motorcycle accident.[156] As a result, the father requested that the magistrate waive the portion of the parenting plan regarding urinalysis testing.[157]

Since the father voluntarily and knowingly agreed to the parenting plan, the magistrate denied his motion to waive the required urinalysis testing, and instead ordered the father to continue with such testing until further court order.[158] Thereafter, the father petitioned for review of the magistrate's order, arguing, among other things, that the urinalysis testing violated his constitutional right to use medical marijuana under Article XVII, Section 14 of the Colorado Constitution.[159]

Five months after the father filed his petition, the mother filed a *pro se* motion to restrict the father's parenting time, claiming that he had not provided proof of clean drug screens and had asked the child to keep his drug use secret.[160] The district court denied the father's petition for review and affirmed and adopted the magistrate's order.[161] The district court added additional provisions to the magistrate's order, stating that a person acceptable to the mother should supervise the father's parenting time "until such time as he demonstrates to this Court by clear and convincing evidence that his use of medical marijua-

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that such greater amounts were medically necessary to address the patient's debilitating medical condition.").

150 *Id. See supra* note 81.

151 *In re* Marriage of Parr, 240 P.3d 509, 510 (Colo. App. 2010).

152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.*

159 *Id.*

160 *Id.*

161 *Id.* at 511.

na is not detrimental to the child."[162] Further, the district court indicated that the father could not consume marijuana while with the child and that he could petition the court for unsupervised visitation after submitting to the court and the mother a clean hair follicle test.[163] Finally, the court ordered the father to submit weekly clean urinalysis tests after his clean hair follicle test.[164] The father appealed the district court's order.[165]

On appeal to the Colorado Court of Appeals, the father contended that the district court erred by adding the additional provisions to the magistrate's initial order.[166] He argued that the district court erred in ordering supervised parenting time without a finding that the child had been physically endangered or that her emotional development had been significantly impaired.[167]

The appellate court agreed with the father and held that the district court erred in requiring the father's parenting time to be supervised because there was no evidence to support a finding that the "father's conduct endangered the child physically or impaired her emotional development."[168] Regarding the father's medical marijuana use, the appellate court stated: "[w]hile we recognize that what constitutes endangerment to a particular child's physical or emotional health is a highly individualized determination[,] . . . it appears here that the sole basis for the restriction was father's admitted use of medical marijuana."[169]

Furthermore, the appellate court indicated that absent an evidentiary hearing, the record did not show that father's use of medical marijuana presented any risk to the child.[170] The court emphasized that it was not expressing an opinion "as to whether medical marijuana use may constitute endangerment," but merely concluded that endangerment was not shown in this case.[171] As a result, the appellate court refused to sustain the district court's order restricting the father's parenting time.[172]

C. *The Washington State Court*

The Washington state court has also dealt with the issue of parental use of medical marijuana in a child custody case.[173] Washington enacted its medical

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[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.* at 513.
[172] *Id.*
[173] *See In re* Marriage of Wieldraayer, No. 59429, 2008 Wash. App. LEXIS 2916, at *1 (Wash. Ct. App. Dec. 22, 2008).

marijuana law in 1998.[174] Under the law, "medical use of marijuana" refers to "the manufacture, production, possession . . . or administration of marijuana . . . for the exclusive benefit of a qualifying patient in the treatment of his or her terminal or debilitating medical condition."[175] The term "marijuana" is defined as "all parts of the plant Cannabis, whether growing or not, with a THC concentration greater than 0.3 percent on a dry weight basis; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin."[176] Under the law, the specific "terminal or debilitating illness" must be one expressly listed in the medical marijuana statute or one approved by the Washington state medical quality assurance commission.[177] Further, the lawful limit of usable marijuana in the state is "no more than fifteen cannabis plants and . . . [n]o more than twenty-four ounces of useable cannabis."[178]

The unpublished case of *In re Marriage of Wieldraayer* centers on a child custody issue involving a divorced couple and their two minor children.[179] When the couple divorced in 2005, the mother requested that the children reside with her the majority of time.[180] She asked that the father be given supervised visitation because of her concern about his marijuana use.[181] The father denied that he had a drug problem and indicated that he was a qualified medical

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[174] *See* WASH. REV. CODE ANN. § 69.51A.005 (West 2014).

[175] *Id.* § 69.51A.010 (West 2014).

[176] *Id.* § 69.50.101 (West 2014) (But, the "term does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination.").

[177] *Id.* § 69.51A.010 (West 2014) ("Terminal or debilitating medical condition" means: "(a) Cancer, human immunodeficiency virus (HIV), multiple sclerosis, epilepsy or other seizure disorder, or spasticity disorders; or (b) Intractable pain, limited for the purpose of this chapter to mean pain unrelieved by standard medical treatments and medications; or (c) Glaucoma, either acute or chronic, limited for the purpose of this chapter to mean increased intraocular pressure unrelieved by standard treatments and medications; or (d) Crohn's disease with debilitating symptoms unrelieved by standard treatments or medications; or (e) Hepatitis C with debilitating nausea or intractable pain unrelieved by standard treatments or medications; or (f) Diseases, including anorexia, which result in nausea, vomiting, wasting, appetite loss, cramping, seizures, muscle spasms, or spasticity, when these symptoms are unrelieved by standard treatments or medications; or (g) Any other medical condition duly approved by the Washington state medical quality assurance commission in consultation with the board of osteopathic medicine and surgery as directed in this chapter.").

[178] *Id.* § 69.51A.040 (West 2014).

[179] *In re* Marriage of Wieldraayer, No. 59429, 2008 Wash. App. LEXIS 2916, at *1 (Wash. Ct. App. Dec. 22, 2008).

[180] *Id.*

[181] *Id.* at *1–2.

marijuana patient.[182] The superior court ruled that the father's visits with his children must be monitored because of his medical marijuana use.[183]

On appeal, the father contended that that the superior court's decision violated Washington's medical marijuana statute, Revised Code of Washington § 69.51A.040, by restricting his unsupervised contact with his children based on his use of medical marijuana.[184] The statute provides qualifying medical marijuana patients with an affirmative defense to criminal prosecution and states that qualifying patients "shall not be penalized in any manner, or denied any right or privilege" for using medical marijuana.[185] In response to the father's claim, the appellate court stated, "[w]e do not read the statutory language so broadly. Nothing in RCW 69.51A.040(1) creates any new legally protected right or interests for the medical marijuana user in the area of family law."[186] Additionally, the court stated that the dangers that exist in using marijuana "do not turn on whether or not the use is sanctioned by the State."[187]

The father's entitlement to use marijuana under the state's medical marijuana statute did not mean that the use was not detrimental to his children.[188] Further, the court stated that "[i]n the family law setting, the best interests of the child are of paramount importance."[189] Thus, the court observed that it did not follow that the father was entitled as a matter of right to unsupervised visits with his children.[190] In reaching this conclusion, the court noted that the father had a history of using marijuana long before he became a medical marijuana user.[191] The court noted the following trial evidence: (1) the father allowed his elder daughter, who was four, "to sniff the glass while he was smoking marijuana;" (2) the father stated on at least one occasion that he picked up the children after smoking marijuana; and (3) the father boasted on an occasion that he could do whatever he wanted once he passed the urinalysis drug test.[192] As a result, the appellate court held that it could not conclude that the trial court abused its discretion in requiring the father to have supervised visits with his children.[193]

Interestingly, after the decision in *In re Marriage of Wieldraayer*, the Washington state legislature adopted Revised Code of Washington § 69.51A.120, governing parental rights of individuals allowed to use medical marijuana.[194]

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[182] *Id.* at *2–3.
[183] *Id.* at *5–6.
[184] *Id.* at *8–9.
[185] *Id.*
[186] *Id.* at *9.
[187] *Id.*
[188] *Id.*
[189] *Id.* at *9–10.
[190] *Id.*
[191] *Id.* at *10–11.
[192] *Id.* at *11.
[193] *Id.* at *11–12.
[194] WASH. REV. CODE ANN. § 69.51A.01001 (West 2014).

This statute states:

> "[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 RCW 26.09.004."[195]

It specifically protects a parent who has a legal right to use medical marijuana from having his or her parental rights restricted solely because of this legal use of the drug.[196] If this statute was enacted prior to the decision in *In re Marriage of Wieldraayer*, the appellate court's decision would have probably been very different. Specifically, it is very likely that the appellate court would have found that the trial court abused its discretion in mandating that the father's visits with his children be supervised. This is because under the Revised Code of Washington § 69.51A.120, in order for a parent's parental rights to be restricted due to medical marijuana, there must be evidence of long-term impairment from the drug that interferes with the parent's ability to take care of the child. Here, no such evidence existed.[197]

V. LEGAL RAMIFICATIONS OF MEDICAL MARIJUANA LAWS ON THE CONSTITUTIONAL DUE PROCESS RIGHT TO PARENT

A dearth of state court cases address the right of the state to withhold parental rights to the custody of a child when the parent is using marijuana for medical purposes. Nevertheless, these cases provide some direction as to how other state courts might rule in these matters.

A. *Potential Impact of Existing Court Cases on Future Court Cases*

The courts' decisions seem to turn on the facts and circumstances. A thorough reading of the cases leads to the supposition that parents are more likely to prevail if the evidence supports a conclusion that the child is not harmed or likely to be harmed by the marijuana use.

For instance, in *In re Drake*, the California Court of Appeals held that there was no evidence demonstrating that the father "failed to or was unable to adequately supervise or protect" the minor child.[198] However, a different outcome occurred in both *In re Alexis* and *In re Marriage of Wieldraayer.* In both cases, the state courts held there was sufficient evidence to support a finding that the fathers' medical marijuana use put their minor children at risk.[199]

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[195] *Id.*

[196] *Id.*

[197] *In re* Marriage of Wieldraayer, No. 59429, 2008 Wash. App. LEXIS 2916, at *10–11.

[198] *See In re* Drake M. v. Paul M., 149 Cal. Rptr. 3d 875, 887 (Cal. Ct. App. 2012).

[199] *See In re* Alexis E. v. Patrick E., 90 Cal. Rptr. 3d 44 (Cal. Ct. App. 2009); *In re*

In the case of *In re Drake*, the evidence supported a finding that the father was not a substance abuser.[200] The evidence also established that the child was not affected by the father's marijuana use because the father: (1) never used the drug in front of the child; and (2) was never under the drug's influence when he took care of the minor child.[201] Conversely, the evidence in the record in *In re Alexis* and *In re Marriage of Wieldraayer* demonstrated that both fathers had a history of substance abuse.[202] Additionally, in both cases, there was evidence that the fathers used marijuana in front of their children and were, on occasions, under the influence of the drug while taking care of their children.[203]

In re Drake and *In re Marriage of Parr* are also comparable. The appellate courts in both cases overruled the juvenile courts' holding that the fathers' use of medical marijuana endangered their children physically or emotionally.[204] However, the courts' rationale for their decisions differed. The juvenile court in *In re Drake* made specific findings based on the evidence in the record.[205] Specifically, the juvenile court found that: (1) the father was a substance abuser; and (2) the father failed to adequately supervise or protect the child.[206] However, the appellate court determined that the evidence was insufficient to support the finding of the juvenile court.[207] The juvenile court in *In re Marriage Parr*, however, did not conduct an evidentiary hearing, and thus the appellate court concluded that there was no evidence in the record to support the juvenile court's findings.[208] Stated plainly, the juvenile court failed to make any evidentiary findings that "the child would have been physically endangered or her emotional development would have been significantly impaired."[209]

Regardless of the conclusions reached by the appellate courts in the four cases discussed above, they all reached the same conclusion: in order for a juvenile court to restrict parental rights because of a parent's legal medical marijuana use, there must be a finding that this drug use endangers the child.[210]

Marriage of Wieldraayer, No. 59429, 2008 Wash. App. LEXIS 2916 (Wash. Ct. App., Dec. 22, 2008).

[200] *In re Drake*, 149 Cal. Rptr. 3d at 884.

[201] *See id.* at 879–86.

[202] *See In re Alexis E.*,90 Cal. Rptr. 3d 44; *In re Marriage of Wieldraayer*, No. 59429, 2008 Wash. App. LEXIS 2916.

[203] *See In re Alexis E.*, 90 Cal. Rptr. 3d 44; *In re Marriage of Wieldraayer*, No. 59429, 2008 Wash. App. LEXIS 2916.

[204] *See In re Drake*, 149 Cal. Rptr. 3d at 884; *In re Marriage of Parr*, 240 P.3d 509 (Colo. App. 2010).

[205] *See In re Drake*, 149 Cal. Rptr. 3d at 884.

[206] *See id.*

[207] *See id.* at 890.

[208] *See In re Marriage of Parr*, 240 P.3d at 513.

[209] *See id.*

[210] *See generally In re Drake*, 149 Cal. Rptr. 3d at 875; *In re Alexis E.*, 90 Cal. Rptr. 3d at 44; *In re Marriage of Parr*, 240 P.3d at 509.

And, according to the courts, without such a finding of endangerment, a decision to restrict parental rights because of a parent's use of medical marijuana cannot be upheld.[211]

Based on these cases, it can be surmised that in future court decisions in states where protection for a qualified parent exists, the parental rights of the qualified parent cannot be restricted if it can be shown that his or her use of marijuana does not "endanger the child's physical health or emotional development."[212] On the contrary, if no such protective statute exists, the decision of a juvenile court's decision is uncertain. Without a protective statute, it is likely that a qualified parent may face difficulty in maintaining custody of the child because the other parent may only have to show marijuana use by the qualified parent. Unfortunately, in these cases, the qualified parent may be forced to "do a cost/benefit analysis of the situation and 'Just say' no to future marijuana use."[213] If this is not a viable option, then the qualified parent must "be ready to show a strong pattern of competent, child-focused parenting along with evidence that [his or her] consumption of marijuana has never endangered [the] child."[214]

B. *The Legal Framework that Courts Should Apply in Custody Cases*

In his Note and Comment entitled *The High Price of Parenting High: Medical Marijuana and its Effects on Child Custody Matters*, David Malleis describes a "hybrid standard," a legal standard establishing that medical marijuana patients shall not be denied parental rights or responsibilities "unless the person's conduct creates an unreasonable danger" to their child.[215] This "hybrid standard" can be derived from state statutes, as in the case of the seven states mentioned above, all of which have specific statutory provisions protecting parenting rights of a parent who uses medical marijuana.[216] Similarly, the "hybrid standard" can also be derived from case law as in the cases of: *In re Drake*, *In re Alexis*; *In re Marriage Parr*, and *In re Marriage of Wieldraayer*.[217]

A finding of child endangerment is the common thread in other cases where

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[211] *See generally In re Drake*, 149 Cal. Rptr. 3d at 875; *In re Alexis E.*, 90 Cal. Rptr. 3d at 44; *In re Marriage of Parr*, 240 P.3d at 509.

[212] Pollin, *supra* note 10.

[213] *Id.*

[214] *Id.*

[215] Malleis, *supra* note 1, at 380.

[216] *See* ARIZ. REV. STAT. ANN. § 36-2813 (West 2014); DEL. CODE. ANN. tit. 16, § 4905A(b) (West 2014); 410 ILL. COMP. STAT. ANN. 130/40 (West 2014); MICH. COMP. LAWS ANN. § 333.26424 (c) (West 2014); MINN. STAT. ANN. § 152.32 Subd. 3(e) (West 2016); WASH. REV. CODE ANN. § 69.51A.120 (West 2014).

[217] *See generally In re* Drake, 149 Cal. Rptr. 3d 875; *In re* Marriage of Parr, 240 P.3d at 509; *In re* Marriage of Wieldraayer, No. 59429, LEXIS 2916 (Wash. Ct. App. Dec. 22, 2008).

medical marijuana is not involved.[218] Courts have held that parenting time and parental rights may not be restricted without a finding of endangerment, despite a parent's lifestyle or specific habits.[219] For instance, the court in *In re Marriage of Dorworth* held that parenting time may not be restricted solely because of a parent's sexual orientation.[220] Likewise, the court in *In re Finer* held that a trial court abused its discretion in ordering both parents of a minor child to refrain from drinking alcoholic beverages or smoking in the presence of the child since smoking and drinking were not issues in the custody case between the parents and neither parent smoked or abused alcohol.[221]

Child custody cases involving medical marijuana can also be compared to those cases where a parent's smoking impacted the custody determination of his or her child.[222] Generally, a "[c]ourt will . . . give considerable weight to parental smoking when the smoke is exacerbating a child's existing health problems."[223] For example, in *Lizzio v. Lizzio*, the court granted the non-smoking father primary and physical custody of the children because the mother continued to smoke, despite the pediatrician's warning that there was an imminent risk to the health of one of the two boys if he was exposed to cigarette smoke.[224] Courts have also reduced a parent's visitation time with a child when smoking poses an imminent risk of health to the child and have ordered parents to refrain from smoking around a child when doing so poses a health risk to the child.[225]

According to Malleis, when this "hybrid standard" is used for custody cases involving a parent who has a legal right to use medical marijuana, the parents are protected "against the undue influence of personal bias by requiring courts to clearly articulate and sustain the parental conduct that is the basis of a child

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[218] *See infra* notes 219–221.

[219] *See, e.g.*, *In re* Marriage of Dorworth, 33 P.3d 1260, 1262 (Colo. App. 2001); *In re* Marriage of Jarman, 752 P.2d 1068, 1069 (Colo. App. 1988) (holding that parenting time may not be restricted solely on the basis of a parent's instability without a finding that the instability was so severe it endangered the child physically or impaired his emotional development).

[220] *Dorworth*, 33 P.3d at 1262.

[221] *In re* Marriage of Finer, 920 P.2d 325, 333 (Colo. App. 1996).

[222] *See* Malleis, *supra* note 1, at 381 (citing Mitchell v. Mitchell, 1991 WL 63674, at *1 (Tenn. Ct. App. Apr. 26, 1991) (finding that a mother's refusal to stop smoking in the presence of her asthmatic child was not in the best interest of the child)).

[223] Jeannet Igbenebor, Comment, *Smoking as a Factor in Child Custody Cases*, 18 J. AM. ACAD. MATRIM. LAW 235, 239 (2002).

[224] *Id.*

[225] *See, e.g.*, Badeaux v. Badeaux, 541 So.2d 301 (La. Ct. App. 1989) (noting that the effect of cigarette smoke on the child's health was a reason for a juvenile court's limitation of a father's visitation rights); Smith v. Smith, No. 65563, 1996 Tenn. Ct. App. LEXIS 655 (Tenn. Ct. App. Oct. 11, 1996) (suspending a father's visitation of his child because his cigarette smoking jeopardized the child's physical condition).

custody decision."[226] Also, the "hybrid standard" protects children "from any risks created by the negative side effects of marijuana," while "focusing on parental conduct in these custody determinations."[227]

However, since only seven states have specific statutory provisions protecting qualifying parents, there is no guarantee that the states without statutory protection will follow the hybrid standard used in *In re Drake*, *In re Alexis*, *In re Marriage Parr*, and *In re Marriage of Wieldraayer*. Instead, courts in states without statutory protection may apply a standard of limiting parental time or custodial rights without a finding that marijuana use endangers the child or poses an unreasonable risk to the child.

In *The High Price of Parenting High: Medical Marijuana and its Effects on Child Custody Matters*, Malleis also identifies a "per se probative standard" where courts consider a qualified patient's marijuana use – regardless of its legality under state law – as a factor in child custody cases.[228] He describes this "per se probative standard" as "over-inclusive [in that] it sweeps up every qualified medical marijuana patient regardless of their illness or the steps they take to compensate for the negative side effects of marijuana."[229]

When a court is confronted with child custody cases involving a qualified parent, the court can choose to use either the "hybrid standard" or the "per se probative standard." In comparing the two standards, the "hybrid standard," which requires a finding that a parent's use of medical marijuana endangers the child before his or her parental rights can be restricted, does not appear to unfairly affect the constitutional due process right to parent. As a matter of fact, this standard seems to protect both the parent's constitutional due process right to parent, while also protecting the child.[230]

In contrast, the use of the "per se probative standard," which is where the court assumes that a parent's use of medical marijuana endangers a child without such a finding, appears to adversely infringe upon a parent's constitutional due process right to custody, care and control of his or her child. In effect, a parent's parental rights will be restricted without a showing that this restriction is in the best interest of the child.[231] In so doing, a parent's fundamental and constitutional right to parent is violated.[232] In order to avoid this result, when courts are confronted with a custody case involving a qualified parent, they should not consider the parent's marijuana use unless it poses an unreasonable risk to the child or is not in the child's best interest. In other words, when courts are confronted with a child custody case involving a qualified parent, the court

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[226] Malleis, *supra* note 1, at 388–92.

[227] *Id.*

[228] *Id.* at 382–83.

[229] *Id.* at 387.

[230] *See id.* at 382–83.

[231] *See* Quilloin v. Walcott 434 U.S. 248, 254–55 (1977).

[232] *See* Prince v. Massachusetts, 321 U.S. 158, 164–67 (1944).

should apply the "hybrid standard" as opposed to the "per se probative standard" to avoid potentially violating the qualified parent's constitutional due process right to parent.

VI. Conclusion

Currently, there are only a small number of states that have specific laws protecting parents who use medical marijuana from having their parental rights restricted solely because of their legal status as a medical marijuana user. As a result, many parents who have a legal right to use medical marijuana are subject to having their parental rights restricted merely for using medical marijuana. Accordingly, many of these parents have had their constitutional due process right to parent violated because this right is being taken away without sufficient evidence that the parent's marijuana use endangers the child's health or safety.