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# When it Comes to Custody Issues, Smoking Pot is Not Necessarily a Smoking Gun

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*Greenbaum, Rowe, Smith & Davis LLP Client Alert*

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In an August 2, 2021 published decision by the Superior Court of New Jersey, Appellate Division, the Court held that a parent's recreational marijuana usage cannot suffice as the sole or primary reason to terminate that parent's rights under Title 30 – a New Jersey statute that addresses guardianship matters including those related to substance abuse – unless the Division of Child Protection and Permanency (Division) also proves with competent, case-specific evidence that the marijuana usage endangers the health, safety or welfare of the child.

Although parental rights are fundamental and thus constitutionally protected, they are not absolute and are tempered by the State's *parens patriae* ("parent of the people") responsibility to protect the welfare of children when their physical or mental health is jeopardized. In New Jersey, the balance between parental rights and the State's interest in the welfare of children is achieved through the best interest of the child standard – the four prongs of which are: (1) the child's safety, health, or development has been or will continue to be endangered by the parental relationship; (2) the parent is unwilling or unable to eliminate the harm facing the child or is unable or unwilling to provide a safe and stable home for the child and the delay of permanent placement will add to the harm; (3) the Division has made reasonable efforts to provide services to help the parent correct the circumstances which led to the child's placement outside the home and the court has considered alternatives to termination; and (4) termination will not do more harm than good. Each of these prongs must be proven by clear and convincing evidence to warrant termination of parental rights, and termination should only be ordered when it is the least harmful and/or detrimental alternative.

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### Case Overview

In *New Jersey Division of Child Protection and Permanency v. D.H.*, the unmarried biological parents had their child removed from their custody immediately after birth (in February 2016) based on prior substance abuse issues, as well as the mother's ongoing mental health issues that had resulted in the prior termination of her parental rights of children she shared with a separate individual. Two days after birth, however, the child was returned to parental custody on the premise/understanding that the father would provide stability and oversight to compensate for the mother's limitations. The child then lived with both parents for the year, however the mother's substance abuse and mental health issues disqualified her from primary parenting.

The father subsequently tested positive for marijuana, and the court lost confidence in his commitment to the conditions on which it had returned the child – namely, his ability and willingness to supervise the mother's contacts with the child to ensure safety. Indeed, the father admitted he was a frequent marijuana smoker, and on an unspecified number of occasions he had even smoked marijuana with the mother while caring for the child. The mother confirmed the same and also acknowledged her own daily marijuana usage. It was further revealed that after the birth of the child, the father resisted drug testing and treatment, failed to show at court-ordered assessments, and presented no plan to care for the child on his own without the mother. The mother likewise was non-compliant with her mental health and substance abuse obligations. Accordingly, the Division placed the child in temporary foster care and initiated termination proceedings.

At trial, the Division presented unopposed expert testimony explaining the risks of harm associated with the parents' usage of marijuana, especially while caring for their child. The trial court ultimately agreed and in a well-reasoned 35-page opinion, made detailed factual findings elaborating how the Division met its burden on all four criteria for termination.

On appeal, the parents argued that the trial court improperly weighted their recreational marijuana usage in contravention of public policy, namely constitutional amendments and enabling statutes recently enacted by public referendum that legalizes the use of non-medical marijuana in New Jersey. The parents also argued that the Division failed to meet its burden on each prong for evaluating a petition to involuntarily terminate parental rights.

The Appellate Division affirmed the trial court's termination order. Although the Court agreed that marijuana usage alone cannot support *per se* termination of parental rights, when coupled with competent evidence that the marijuana usage is endangering the health, safety or welfare of a child, the usage can support termination of rights. The Court noted that such holding is consistent with usage of other drugs (both legal and illegal).

In *D.H.*, it was entirely undisputed that both parents used marijuana on multiple occasions while actively watching their child. The Court further noted that the Division's expert provided rebutted testimony regarding the risks of a parent using marijuana while actively watching/caring for their child, and that the trial court had substantial evidence, including the mother's mental health issues and the father's failure to

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comply with the Division's services, to support finding by clear and convincing evidence that each of the four criteria for termination of parental rights were met.

### Key Takeaway

Similar to drinking alcohol or taking other drugs, a parent's fundamental right to care for their child is not necessarily infringed upon by his or her decision to smoke marijuana. That said, the best interests of the child eclipses fundamental parental rights, and those rights will be forfeited if it is determined that parental marijuana usage endangers the health, safety and welfare of the child.

Please contact the author of this Alert, **Barry S. Sobel**, with questions or to discuss your individual circumstances. Mr. Sobel is a member of the firm's **Family Law Department**.