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## Marijuana Legalization: Child-Centered Considerations in Texas Family Law Matters

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## COMMENT

### MARIJUANA LEGALIZATION: CHILD-CENTERED CONSIDERATIONS IN TEXAS FAMILY LAW MATTERS

JULIE M. WHITSON\*

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## I. INTRODUCTION

A dramatic change is sweeping through the United States: the legalization of marijuana. While the federal government still classifies marijuana as a Schedule I illegal drug,<sup>1</sup> thirty-six states and the District of Columbia currently have adopted comprehensive medical marijuana laws.<sup>2</sup> Of those, eighteen states and the District of Columbia also legalized its use for recreational purposes.<sup>3</sup> Yet eleven other states, including Texas, are taking a more reserved approach of moving toward legalization by first enacting programs that allow individuals with certain illnesses access to low-THC oils or extracts.<sup>4</sup> With its neighboring states' approval of comprehensive medical marijuana,<sup>5</sup> it may seem arbitrary for Texas to tightly limit THC for medical purposes to a small number of illnesses. This Comment suggests marijuana legalization presents practical and logistical issues in the family law context that should be considered prior to adopting broader legal approval of marijuana.

Part II will briefly describe marijuana and its history in the United States and Texas. After discussing the legal history of marijuana, Part III will provide a broad overview of child custody considerations in Texas. Texas has so far only legalized low-THC cannabis products to treat a relatively small number of illnesses, and permits hemp and CBD products. Part IV of this Comment will analyze Texas's current law related to hemp and CBD products to determine the possible impact on family law cases. With the seemingly inevitable move toward federal and nationwide state legalization, Part V will consider the future legalization of marijuana in Texas. It will identify several issues that should be considered prior to Texas joining the growing group of states that have approved broader marijuana use. The problems identified are child-centered considerations that may appear in Texas family law cases. For example, in some states, the lawmakers considered child custody cases when drafting marijuana legislation,

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1. 21 U.S.C. § 812.

2. *State Medical Cannabis Laws*, NCSL (Jan. 4, 2022), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/2AQW-L6M8>]; *see also* Appendix A (compiling data of permitted marijuana use by state).

3. *See State Medical Cannabis Laws*, *supra* note 2 (identifying states that have approved recreational and medical use). Recreational use is also referred to as adult-use.

4. *See id.* (listing states that only approve the use of low-THC or CBD); *see also* Appendix A (describing the type of permitted marijuana use by state).

5. *See State Medical Cannabis Laws*, *supra* note 2 (showing breakdown of legalization status per state).

including a particular provision to prevent discrimination against parents who consume it legally. This Comment will analyze those provisions to determine if such a statute provides enough protection for Texas children if Texas chooses to legalize medical marijuana. This Comment will discuss the problem with treating marijuana like alcohol, the need for age-specific guidelines for family law judges, and proposed solutions.

## II. BACKGROUND OF MARIJUANA & HISTORY OF THE LAW IN THE U.S. AND TEXAS<sup>6</sup>

Marijuana is a drug that is commonly ingested by smoking the flower or bud of the plant, vaping, and consuming infused food and drink products.<sup>7</sup> Throughout this Comment, references to marijuana or cannabis shall include any form. People choose to use the drug for many reasons, with some reporting that it relaxes them, some who say it helps with varying medical issues, and some who like that they can enjoy it socially.<sup>8</sup> Marijuana derives from the cannabis plant, and its taxonomy is identified in the federal and Texas statutes as *Cannabis sativa* L.<sup>9</sup> Specifically, the genus is cannabis, and the specific epithet is sativa.<sup>10</sup> The L. recognizes the botanist, Carl Linnaeus, who discovered it.<sup>11</sup> “Marijuana” is a slang word that has become popularized into everyday language.<sup>12</sup> Because they come from the same source, marijuana and hemp have the same taxonomy: *Cannabis sativa* L.<sup>13</sup> In today's culture, people often use the words marijuana, cannabis, and

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6. This Comment only provides a brief overview of the background of marijuana and historical development of related law in the United States and Texas. Marijuana has existed for a much longer time than discussed here. A recent study suggests the plant was domesticated in East Asia and was being used twelve thousand years ago as a “multipurpose crop.” See Mike Ives, *Where Does Weed Come From? A New Study Suggests East Asia*, NY TIMES (July 18, 2021), <https://www.nytimes.com/2021/07/18/science/asia-marijuana-cannabis-weed.html> [<https://perma.cc/WJZ6-23N7>] (discussing the origins of the marijuana plant).

7. See, e.g., MARK K. OSBECK & HOWARD BROMBERG, MARIJUANA LAW IN A NUTSHELL 24–25 (2017) (describing typical ingestion methods).

8. See *id.* (outlining various reasons people use marijuana).

9. 21 U.S.C. § 802(16)(A); TEX. HEALTH & SAFETY CODE ANN. § 481.002(26).

10. See Bruce Stein et al., *An Evaluation of Drug Testing Procedures Used by Forensic Laboratories and the Qualifications of Their Analysts*, 1973 WIS. L. REV. 727, 767 (1973) (identifying marijuana's “botanical taxonomical classification”).

11. *Id.*

12. See *id.* at 767 (explaining “marihuana” is a colloquial term).

13. See Aaron Roussell, Comment, *The Forensic Identification of Marijuana: Suspicion, Moral Danger, and the Creation of Non-Psychoactive THC*, 22 ALB. L.J. SCI. & TECH. 103, 116, 121 (2012) (categorizing hemp and marijuana).

hemp interchangeably, although hemp also refers to goods made from the fibers of the cannabis plant.<sup>14</sup> The ingredient in marijuana that produces the “high” effect is tetrahydrocannabinol (THC).<sup>15</sup> THC is one of many cannabinoids in marijuana, which combine in various ways to alter the drug’s effects; therefore, each production of marijuana may produce a different experience for the consumer.<sup>16</sup> As a result, there are many different strands produced, each having different strengths.<sup>17</sup>

In the United States, hemp and marijuana were unregulated until 1906 when Congress passed the “Pure Food and Drug Act,” which required labels on medications to notify customers that cannabis was an ingredient.<sup>18</sup> Then, the conclusion of “the Mexican Revolution of 1910” brought immigrants across the border into the United States, and with them, they brought recreational marijuana.<sup>19</sup> Americans began to associate marijuana with preconceived views about immigrants, which led to the association of marijuana with crime, ultimately resting on racial bias.<sup>20</sup> Even today, it is common to find the spelling “marihuana” in laws that address marijuana.<sup>21</sup> Both terms are Mexican Spanish, and some suggest the use of the slang words was intentional to make the drug sound more ominous and link the drug with the anti-immigrant sentiment<sup>22</sup> (rather than using the term

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14. See OSBECK & BROMBERG, *supra* note 7, at 18 (describing hemp’s uses).

15. *Id.* at 21.

16. See *id.* (explaining combinations of cannabinoids can cause different effects).

17. See Roussell, *supra* note 13, at 112 (describing the complications in testing relating to variations of cannabinoids).

18. See *Marijuana Timeline*, PBS (Dec. 7, 2020), <https://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html> [<https://perma.cc/HRS8-WHMQ>] (reporting government encouragement of hemp production between 1600 and the 1890s).

19. *Id.*

20. See *id.* (pointing out a connection between bias toward immigrants and the belief marijuana causes crime).

21. See 21 U.S.C. § 812 (placing “[m]arihuana” on Schedule I of the Controlled Substances Act); H.R. 3884, 116th Cong. § 11 (2d Sess. 2020) (advocating the replacement of “marihuana” for “cannabis” in existing United States statutes).

22. See Jacquie Miller, *Here’s Why You Shouldn’t Use the Word Marijuana Anymore*, OTTAWA CITIZEN, (Nov. 3, 2017), <https://ottawacitizen.com/news/local-news/word-marijuana-has-racist-past-say-those-who-want-it-banished-from-the-lexicon/> [<https://perma.cc/SE3P-VEHF>] (discussing the anti-Mexican initiative of the word in comparison with the drug’s name); Meredith Clark, *Marijuana or Cannabis? How Racism, Immigration Shaped History of Drug War in N.Y., U.S.*, (July 2, 2020), <https://www.democratandchronicle.com/story/news/2020/07/02/how-racism-and-immigration-shaped-history-marijuana-drug-war-ny/5320692002/> [<https://perma.cc/WG5D-NC4K>] (timelining the racist intentions of United States politics with the rise of the war on drugs, specifically marijuana).

cannabis).<sup>23</sup> In 1932, after research results connected marijuana and crime, “the Federal Bureau of Narcotics,” established in 1930, recommended states adopt laws to deal with marijuana.<sup>24</sup> However, the federal government stepped in and passed the Marihuana Tax Act in 1937, imposing a tax and prohibiting marijuana use, except for specific purposes.<sup>25</sup> Thereafter, in the 1950s, the federal penalties on marijuana crimes increased due to the establishment of mandatory sentences, many of which Congress later repealed in 1970.<sup>26</sup> That same year, Congress included marijuana as a Schedule I drug in the Controlled Substances Act of 1970, subject to the highest level of regulation.<sup>27</sup> Schedule I consists of drugs that lawmakers believe have “high potential for abuse” and “no currently accepted medical use.”<sup>28</sup> Two acts were passed in the 1980s, reinstating mandatory sentences and increasing the penalties related to marijuana crimes.<sup>29</sup> The current state of the federal law concerning marijuana sets federal penalties for dispensing, distributing, or manufacturing marijuana based on the weight of the drug in question.<sup>30</sup> Sentences for possession of marijuana may be increased based on prior conviction history<sup>31</sup> and activities identified under federal sentencing guidelines.<sup>32</sup> Yet, in 2018, Congress passed the Agriculture Improvements Act (a.k.a., the “Farm Bill”), allowing the production of hemp,<sup>33</sup> which the Act defines as having 0.3% or less

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23. Although the word may have offensive origins, the author primarily refers to the drug as marijuana throughout this Comment because marijuana is the more commonly used term. With marijuana legislation on the rise, the use of the term cannabis is becoming increasingly popular, but many modern and historical laws still use the term marijuana.

24. See *Marijuana Timeline*, *supra* note 18 (expressing the federal government’s encouragement of the “Uniform State Narcotic Act” to address marijuana within the states).

25. *Id.*

26. See *id.* (showing the progression from stricter mandatory sentences to more lenient penalties).

27. See Lewis A. Grossman, *Life, Liberty, [and the Pursuit of Happiness]: Medical Marijuana Regulation in Historical Context*, 74 FOOD & DRUG L.J. 280, 290–91 (2019) (detailing the legal and medicinal history of marijuana).

28. See *id.* (quoting 21 U.S.C. § 812(b)(1) (describing Schedule I drugs)); see also 21 U.S.C. § 812(b)(1) (outlining the required findings for each Schedule).

29. See *Marijuana Timeline*, *supra* note 18 (relating provisions of marijuana legislation).

30. 21 U.S.C. § 841.

31. *Id.* § 844.

32. See 18 U.S.C. § 3553 (describing factors for the court to consider when imposing a sentence).

33. Agriculture Improvements Act of 2018, 7 U.S.C. § 1639q.

concentration of THC,<sup>34</sup> and removing it from the definition of marijuana.<sup>35</sup>

Texas has a similar history with marijuana and Mexico. Just across the border from El Paso, Texas, a man who was reportedly under the influence of marijuana went on a rampage in Juarez, Mexico, in 1913.<sup>36</sup> The man chased and threatened two American tourists with a knife, stabbed several horses, and killed a police officer who attempted to stop him.<sup>37</sup> This incident frightened the Deputy Sheriff in El Paso, causing him to pursue legislation against marijuana.<sup>38</sup> In 1915, El Paso became the first city in the United States to independently outlaw marijuana, although statewide bans already existed in California and Utah.<sup>39</sup> It was not until 1931 that Texas criminalized marijuana statewide.<sup>40</sup> Today, many in Texas remain steadfastly against marijuana, and Governor Abbott made the following statement in 2015 after signing the bill approving low-THC cannabis use for epilepsy patients: “I remain convinced that Texas should not legalize marijuana, nor should Texas open the door for conventional marijuana to be used for medicinal purposes. As governor, I will not allow it.”<sup>41</sup> More recently, in 2019, Governor Abbott urged Texas attorneys to continue to prosecute marijuana offenses after confusion about the impact of a new law.<sup>42</sup>

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34. *See id.* § 1639o(1).

35. 21 U.S.C. § 802(16)(B)(i).

36. *See* Isaac Campos, *Mexicans and the Origins of Marijuana Prohibition in the United States: A Reassessment*, 32 SOC. HIST. ALCOHOL & DRUGS 6, 20 (2018) (explaining what prompted marijuana legislation in Texas).

37. *Id.*

38. *Id.*

39. *See* Nick Johnson, *American Weed: A History of Cannabis Cultivation in the United States*, 48 ECHOGÉO 1, 5 (2019) (discussing the unclear origins of American marijuana); Trish Long, *1915: El Paso Becomes First City in United States to Outlaw Marijuana*, EL PASO TIMES (Nov. 16, 2019, 3:22 PM), <https://www.elpasotimes.com/story/news/2019/11/14/el-paso-history-pot-possession-first-city-outlaw-weed-tbt/2579079001/> [<https://perma.cc/YA2B-X465>] (discussing El Paso’s marijuana history).

40. *Texas Cannabis Law Timeline*, TEX. NORML, <https://www.texasnorml.org/> [<https://perma.cc/B5ZB-H38F>] (providing a Texas legislation timeline).

41. *See* Lauren Males, *Current Trends in Marijuana Regulation*, 6 HOUS. L. REV. 185, 196 (2016) (discussing the development of marijuana regulation in Texas).

42. *See* Letter from Governor Greg Abbott to Texas District and County Attorneys (July 18, 2019) (available at [https://gov.texas.gov/uploads/files/press/Letter\\_to\\_DAs.pdf](https://gov.texas.gov/uploads/files/press/Letter_to_DAs.pdf)) (explaining how the law may be enforced).



## III. OVERVIEW OF CHILD CUSTODY CONSIDERATIONS IN TEXAS

In family law cases, conservatorship<sup>43</sup> and possession issues commonly arise as a result of divorce, separation of unmarried parents, and modification of prior orders.<sup>44</sup> Like other states,<sup>45</sup> the “best interest of the child” is a Texas court’s primary concern.<sup>46</sup>

Typically, for conservatorship, each parent is given certain rights and duties related to their child. For example, while the child is with the parent, the parent has the duty to protect and discipline the child, and the right to consent to non-invasive medical procedures.<sup>47</sup> At all times, the parent has the right to access the child’s medical records.<sup>48</sup> Those rights apply whether the parents are named joint managing conservators or if one parent is a sole managing conservator and the other a possessory conservator.<sup>49</sup> The Texas Family Code lists another set of rights that it deems “exclusive” and awards to a sole managing conservator.<sup>50</sup> For example, the sole managing conservator designates the child’s primary residence, can apply for a child’s passport, and can consent to invasive medical procedures.<sup>51</sup> Generally, joint managing conservatorship means that the parents have agreed to share most of the sole managing conservator rights subject to the other parent’s agreement (jointly) instead of exclusively.<sup>52</sup> The Texas Family Code establishes a rebuttable presumption that the child’s best interests will be served if the parents are named joint managing conservators.<sup>53</sup> However,

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43. In Texas, the assignment of rights and duties is called “conservatorship.” *See* TEX. FAM. CODE ANN. § 153.133 (detailing joint managing conservatorship). Many jurisdictions use the term “custody” instead. In this Comment, conservatorship and custody are used interchangeably.

44. *Id.*

45. NATIONAL COUNCIL ON DISABILITY, ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN 138 (2012).

46. *See* TEX. FAM. CODE ANN. § 153.002 (“The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.”).

47. *Id.* §§ 153.074(1), (3).

48. *See id.* § 153.073(3) (“[The right] of access to medical, dental, psychological, and educational records of the child . . .”).

49. *See id.* § 153.073 (“Rights of Parent at All Times”); *Id.* § 153.074 (“Rights and Duties During Period of Possession”); *Id.* § 153.076 (“Duty to Provide Information”).

50. *Id.* § 153.132.

51. *Id.* §§ 153.132(1), (2), (10).

52. *See* § 153.071 (requiring the court to specify how rights will be exercised); *id.* § 153.133(4) (explaining joint managing conservatorship must allocate rights between the parents).

53. *Id.* § 153.131(b).

the court may limit the rights and duties of a parent<sup>54</sup> upon proper evidence at trial.<sup>55</sup>

Possession refers to the actual time a parent spends with the child. The Texas Family Code sets forth a “standard possession order,”<sup>56</sup> which identifies each day and time a designated parent has possession of the child throughout any given year, including holiday provisions.<sup>57</sup> The other parent has possession of the child at all other times. The rebuttable presumption is that the standard possession order will serve the child’s best interests.<sup>58</sup> However, the court may order less time for one parent if the parties agree or the evidence at trial demonstrates less time with the parent is in the child’s best interest.<sup>59</sup> The appointment of parents as joint managing conservators does not necessarily mean the parents are entitled to equal periods of possession.<sup>60</sup>

The best interest standard has the drawback of being subjective.<sup>61</sup> To help remedy this issue, the legislature and courts developed several sets of factors. In considering whether to appoint parents as joint managing conservators, Texas courts may consider a list of factors specified in the Family Code.<sup>62</sup> When awarding a parent possession that does not comply with the standard possession order, Texas courts may look to a different set of factors specified in the Family Code.<sup>63</sup> Similarly, in considering the child’s best interests, the Texas Supreme Court identified a separate list of factors in *Holley v. Adams*.<sup>64</sup> Texas is familiar with providing family law judges with factors to aid in their decision making.

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54. See *id.* §§ 153.132, 153.073–.074 (providing for parental rights and duties except as limited by a court order).

55. See *id.* § 153.072 (advancing the “best interest of the child” standard to limit a parent’s rights and duties).

56. The Texas Family Code views the standard possession order as the minimum amount of possession that should be awarded. *Id.* § 153.251.

57. See *id.* §§ 153.3101–.317 (promulgating the standard possession order terms).

58. See *id.* § 153.252 (stating the rebuttable presumption allows for “reasonable minimum possession of a child” and is in the child’s best interest).

59. *Id.* § 153.255.

60. See *id.* § 153.135 (explaining joint managing conservatorship is not the same as equal physical possession).

61. See Alice Kwak, *Medical Marijuana and Child Custody: The Need to Protect Patients and Their Families from Discrimination*, 28 HASTINGS WOMEN’S L.J. 123, 138 (2017) (“Reasonable minds differ . . . about what the child’s best interests are for a custody battle.”).

62. TEX. FAM. CODE ANN. § 153.134(a).

63. *Id.* § 153.256.

64. See *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976) (promulgating a non-exhaustive list of factors to assist the courts in deciding best interest).

## IV. WHAT IS CURRENTLY LEGAL IN TEXAS

In Texas, marijuana is a controlled substance.<sup>65</sup> However, the Texas legislature recently took significant steps towards legalization. In 2015, Governor Greg Abbott signed the Texas Compassionate-Use Act (TCUA)<sup>66</sup> into law, allowing epilepsy patients to use low-THC cannabis containing up to 0.5% THC for treatment.<sup>67</sup> The TCUA permits low-THC use under supervision with a valid prescription monitored through a registry that keeps track of the dispensed dosages.<sup>68</sup> The TCUA does not permit ingestion of low-THC cannabis by smoking.<sup>69</sup> As a corollary to permitting this use, cities and counties cannot enforce laws prohibiting possession of low-THC cannabis against persons entitled to medicinal use under the TCUA.<sup>70</sup> It is not a criminal offense to deliver or possess marijuana or paraphernalia for a qualified and registered patient, including a child-patient with a legal guardian.<sup>71</sup> Prescription THC products will contain label information that allows law enforcement to verify that the prescription is valid.<sup>72</sup> The registry must be available to law enforcement and dispensaries to confirm a person's prescription and fill eligibility.<sup>73</sup> Later, in 2019, Governor Abbott expanded the illnesses eligible for low-THC cannabis treatment.<sup>74</sup> In 2021, the list of illnesses was expanded again to include post-traumatic stress disorder, remove the qualification that cancer be

65. *Schedules of Controlled Substances*, Texas DSHS (2021) <https://www.dshs.state.tx.us/uploadedFiles/Content/Regulatory/drugs/PDF/2021%20Schedules%20of%20Controlled%20substances.pdf> [https://perma.cc/2R9V-7UUN]. Because it is illegal, a parent's use or possession of marijuana is a clear factor in family law cases. Even if there are no concerns of addiction or abuse of the drug, and even if the parent does not use the drug while caring for the child, mere possession, especially of large quantities, is a problem because it can result in criminal penalties. See TEX. HEALTH & SAFETY CODE ANN. § 481.121 (providing it is a crime to possess marijuana).

66. This is also referred to as the Texas Compassionate Use Program, or TCUP. *Compassionate Use Program*, TEX. DEP'T PUB. SAFETY, <https://www.dps.texas.gov/rsd/CUP/index.htm> [https://perma.cc/U77D-PNKB].

67. See TEX. OCC. CODE ANN. § 169.001 (defining "low-THC cannabis" as having a THC concentration of 0.5% or lower in 2015); TEX. OCC. CODE ANN. § 169.003 (listing epilepsy as the illness eligible for Low-THC cannabis treatment in 2015).

68. TEX. HEALTH & SAFETY CODE ANN. § 487.054.

69. See TEX. OCC. CODE ANN. § 169.001 (defining "medical use")

70. TEX. HEALTH & SAFETY CODE ANN. § 487.201.

71. *Id.* § 481.111(e)(1).

72. *Compassionate Use Program*, *supra* note 66.

73. TEX. HEALTH & SAFETY CODE ANN. § 487.054(b)(2).

74. See TEX. OCC. CODE ANN. § 169.003 (itemizing the additional illnesses eligible for low-THC cannabis treatment in 2019).

terminal,<sup>75</sup> and to increase the THC content threshold to one-percent.<sup>76</sup> Although it provides for medical use of THC, the TCUA is not considered a medical marijuana program because it is restrictive and not comprehensive.<sup>77</sup>

The next development in Texas after the TCUA, was the 2019 legalization of the manufacture and sale of hemp-based products, such as cannabidiol (CBD) oils, containing no more than 0.3% THC.<sup>78</sup> This regulation does not require a prescription or medical need.<sup>79</sup> The law defined hemp as any part of the *Cannabis sativa* L. plant, including all derivatives, having a THC concentration of 0.3% or less.<sup>80</sup> Texas's revised legal definition of marijuana does not include hemp.<sup>81</sup> The Texas definitions mirror the language enacted in 2018 in the federal laws.<sup>82</sup>

These definitions had an unexpected result for Texas law enforcement. Apparently, marijuana containing greater than 0.3% THC and hemp containing less than 0.3% THC are indistinguishable without a lab to confirm the potency, and most labs in Texas did not have the technology to

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75. *Id.* § 169.003; *see also* Iain Oldman, *Recent Expansions to Open Door for Thousands of New Medical Cannabis Patients in Texas*, COMMUNITY IMPACT (June 27, 2021, 2:40 PM), <https://communityimpact.com/austin/northwest-austin/health-care/2021/06/27/recent-expansions-to-open-door-for-thousands-of-new-medical-cannabis-patients-in-texas/> [<http://perma.cc/5WFE-EV3N>] (discussing the progression of the allowed illnesses in the versions of the law and the impact has had on the number of eligible patients).

76. *See* TEX. OCC. CODE ANN. § 169.001 (defining “low-THC cannabis” as having a THC concentration of one-percent or lower, differing from the 2015 and 2019 legislation that kept the THC concentration at 0.5%).

77. *See State Medical Cannabis Laws*, NCSL *supra* note 2 (“Low-THC programs are not counted as comprehensive medical cannabis programs.”); *Legal Medical Marijuana States and DC*, BRITANNICA PROCON.ORG (June 22, 2021), <https://medicalmarijuana.procon.org/legal-medical-marijuana-states-and-dc/> [<https://perma.cc/J6GB-44F9>] (excluding Texas from the list of states with a medical marijuana program); *see also* Lindsey Carnett, *Most Marijuana Reform Bills Go Up in Smoke at Texas Legislature*, SAN ANTONIO REPORT (June 4, 2021), <https://sanantonioreport.org/most-marijuana-reform-bills-go-up-in-smoke-at-texas-legislature/> [<https://perma.cc/NH3V-NL3X>] (identifying Texas as a state that has yet to legalize marijuana or THC); Iain Oldman, *supra* note 75 (“As of June, 36 states across the [United States] have comprehensive medical cannabis programs, meaning they do not limit prescriptions to low-THC doses . . .”).

78. TEX. AGRIC. CODE ANN. § 122.202(a); TEX. HEALTH & SAFETY CODE ANN. § 443.201(a).

79. *See* TEX. AGRIC. CODE ANN. § 122.202(a) (stating products containing 0.3% or less THC are permitted to be sold and used for any legal purpose).

80. *Id.* § 121.001.

81. TEX. HEALTH & SAFETY CODE ANN. § 481.002(26), (26)(F).

82. *Cf.* 7 U.S.C. § 1639o(1) (defining “hemp” as the *Cannabis sativa* L. plant and derivatives containing 0.3% or less THC); 21 U.S.C. § 802(16)(B)(i) (removing hemp from the definition of “marihuana”).

perform that testing when the law went into effect.<sup>83</sup> This led to Texas prosecutors dropping hundreds of drug charges due to a lack of conclusive proof the defendants possessed an illegal substance.<sup>84</sup> When technology at Texas labs caught up to the new law, the Department of Public Safety stated it would not use the testing in misdemeanor cases.<sup>85</sup> Data subsequently emerged confirming that arrests for low-level drug cases have decreased since the law's enactment.<sup>86</sup> If law enforcement and prosecutors are no longer pursuing criminal action against individuals for low-level marijuana offenses, should family courts consider these lack of prosecutions in their decisions?

The market for hemp-based products, such as CBD oil, quickly boomed after legalization.<sup>87</sup> Many companies claim their CBD oils have miraculous healing power,<sup>88</sup> and clients seem to agree.<sup>89</sup> However, the science on CBD's effectiveness and potential side effects has not been as quick to

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83. *Interim Update: Hemp*, TEX. DIST. & CNTY. ATT'YS ASS'N (June 24, 2019), <https://www.tdcaa.com/legislative/interim-update-hemp/> [<https://perma.cc/7KLB-GSLR>].

84. Jolie McCullough & Alex Samuels, *This Year, Texas Passed a Law Legalizing Hemp. It Also Has Prosecutors Dropping Hundreds of Marijuana Cases.*, TEX. TRIB. (July 3, 2019, 6:00 PM), <https://www.texastribune.org/2019/07/03/texas-marijuana-hemp-testing-prosecution/> [<https://perma.cc/T8HW-R3NM>].

85. Jolie McCullough, *Texas State Crime Labs Won't Test Suspected Marijuana in Low-Level Cases*, TEX. TRIB. (Feb. 26, 2020, 6:00 PM), <https://www.texastribune.org/2020/02/26/texas-marijuana-misdemeanor-cases-wont-go-to-dps-crime-labs/> [<https://perma.cc/PNQ9-V4S7>].

86. *See* OFF. CT. ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY FISCAL YEAR 2019 iii, 16 (2019) (reporting the number of filed misdemeanor drug cases dropped fourteen percent from the 2018 fiscal year to the 2019 fiscal year).

87. *See* Amy Norton, *Pure CBD Won't Make You Fail a Drug Test, But...*, WEBMD (Aug. 9, 2019), <https://www.webmd.com/mental-health/addiction/news/20190809/pure-cbd-wont-make-you-fail-a-drug-test-but#1> [<https://perma.cc/AEX9-P499>] (stating CBD products became more prominent after the federal hemp ban was lifted in 2018).

88. *See Best Hemp Oil Extract for Pain Relief, Stress, Sleep (PURE & ORGANIC)—1000 mg*, SCOTTSDALE WHOLESALERS, <https://scottsdalewholesalers.com/products/pure-hemp-oil-extract-2-pack-usda-organic-all-natural-1oz> [<https://perma.cc/3KS2-LG5B>] (promoting “restful sleep,” increase in memory and “overall brain function,” and reduced inflammation and anxiety, and displaying seventeen out of eighteen five-star customer reviews); *see also Rest CBD Oil*, MISSION FARMS CBD, <https://missionfarmscbd.com/rest-cbd-oil/> [<https://perma.cc/58CM-S7DF>] (promoting “restorative sleep” and displaying a 4.8 out of five product review rating).

89. *See* Lisa L. Gill, *CBD Goes Mainstream*, CONSUMER REPS. (Apr. 11, 2019), <https://www.consumerreports.org/cbd/cbd-goes-mainstream/> [<https://perma.cc/3CJV-CZEW>] [hereinafter *CBD Goes Mainstream*] (asserting about seventy-five percent of consumers reported CBD was “at least moderately effective” and just under fifty percent reported it was “very or extremely effective”).

emerge;<sup>90</sup> in fact, several class-action suits questioning CBD oil's efficacy and the potentially misleading nature of its labeling are pending.<sup>91</sup>

Even the U.S. Food and Drug Administration (FDA), the federal agency responsible for ensuring food safety,<sup>92</sup> does not have the answers. Its website displays the message: "The FDA is working to answer questions about the science, safety, and quality of products containing cannabis and cannabis-derived compounds, particularly CBD."<sup>93</sup> It has authorized, after several clinical trials, only one prescription CBD product.<sup>94</sup> Although CBD products must comply with general FDA regulations for food, drugs, and cosmetics,<sup>95</sup> and the FDA does have authority to regulate cannabis products, the FDA has yet to develop a regulatory framework for federal oversight of cannabis products.<sup>96</sup> Packaging of many CBD oil products indicates how many milligrams of CBD is in a serving but not whether the THC level is below 0.3%.<sup>97</sup> Products are labeled and marketed as dietary supplements, even though the FDA explicitly states such marketing is not

90. See Scott Shannon et al., *Cannabidiol in Anxiety and Sleep: A Large Case Series*, PERMANENTE J., Jan. 7, 2019, at 21, 23–24 (relating positive results of a study of CBD on anxiety, while acknowledging a lack of necessary clinical studies); Amber Dance, *As CBD Skyrockets in Popularity, Scientists Scramble to Understand How It's Metabolized*, SCI. AM. (Nov. 14, 2019), <https://www.scientificamerican.com/article/as-cbd-skyrockets-in-popularity-scientists-scramble-to-understand-how-its-metabolized/> [<https://perma.cc/YS7K-P4TK>] (mentioning it is strange there has not been more research given CBD's popularity).

91. E.g., *Colette v. CV Scis., Inc.*, No. 2:19-cv-10227-VAP-JEM(x), 2020 WL 2739861, at \*1, \*4 (C.D. Cal. May 22, 2020) (discussing the claims of the plaintiffs at issue, but mentioning several similar cases are pending; staying the case until rules regarding CBD are established by the FDA).

92. See, e.g., 21 U.S.C. § 393(a), (b) (identifying the mission and duties of the FDA).

93. *What You Need to Know (and What We're Working to Find Out) About Products Containing Cannabis or Cannabis-Derived Compounds, Including CBD*, FOOD & DRUG ADMIN., <https://www.fda.gov/consumers/consumer-updates/what-you-need-know-and-what-were-working-find-out-about-products-containing-cannabis-or-cannabis> [<https://perma.cc/H7YE-85RI>] [hereinafter *What You Need to Know*].

94. See *id.* (acknowledging only one approved prescription CBD product, which is to treat rare forms of epilepsy).

95. See, e.g., 21 U.S.C. § 331(a)–(g) (enumerating specifically prohibited acts concerning food, drugs, and cosmetics).

96. See Press Announcement, Scott Gottlieb, FDA Commissioner, *Statement from FDA Commissioner Scott Gottlieb, M.D., on New Steps to Advance Agency's Continued Evaluation of Potential Regulatory Pathways for Cannabis-Containing and Cannabis-Derived Products* (Apr. 2, 2019), <https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-new-steps-advance-agencys-continued-evaluation> [<https://perma.cc/LU3X-ZY33>] (discussing the FDA's commitment to developing a plan for regulating cannabis products).

97. Lisa L. Gill, *How to Shop for CBD*, CONSUMER REPS. (Sept. 27, 2018), <https://www.consumerreports.org/cbd/how-to-shop-for-cbd/> [<https://perma.cc/WKP8-M3M7>] [hereinafter *How to Shop for CBD*].

legal.<sup>98</sup> Some companies even make unsubstantiated claims by marketing their product as a treatment or cure for illnesses.<sup>99</sup> A few companies even claimed their CBD oil would treat COVID-19.<sup>100</sup> Without federal industry regulation, some products may contain more or less CBD than identified on the label.<sup>101</sup> Consequently, consumers may inadvertently use a greater amount of THC than allowed by law.<sup>102</sup>

Texas retail stores may not sell CBD products containing more than 0.3% THC concentration.<sup>103</sup> The agency charged with overseeing manufacturer licensure, retail registration, and random testing of CBD products at the state level is the Texas Department of State Health Services of the Texas Health and Human Services Commission.<sup>104</sup> The established requirements for packaging of hemp products provide that the label must include, among other things, a certification that the product concentration of THC is 0.3% or less, and a URL where a certificate of analysis or ingredients will be

98. See *What You Need to Know*, *supra* note 93 (pointing out CBD has not been approved as a dietary supplement).

99. See *id.* (stressing tests done by the FDA show mislabeling of CBD chemical content in some samples).

100. See Donald D. Ashley & Richard A. Quaresima, *Warning Letter: CBD Gaze*, FOOD & DRUG ADMIN. (May 26, 2020), <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/cbd-gaze-607299-05262020> [<https://perma.cc/S2SP-GQX5>] (instructing the company to correct claims made on their website); Donald D. Ashley & Richard A. Quaresima, *Warning Letter: AgroTerra, Ltd. dba Patriot Hemp Company*, FOOD & DRUG ADMIN. (May 7, 2020), <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/agroterra-ltd-dba-patriot-hemp-company-606086-05072020> [<https://perma.cc/W8WG-7FRH>] (directing the company to correct a list of violations).

101. See Norton, *supra* note 87 (stating a 2017 study found that “seven out of 10 CBD products did not contain the amount of cannabidiol stated on the label”).

102. See Report to the U.S. House Committee on Appropriations and the U.S. Senate Committee on Appropriations, *Sampling Study of the Current Cannabidiol Marketplace to Determine the Extent that Products are Mislabeled or Adulterated 4-6*, FOOD & DRUG ADMIN. (2020), <https://files.constantcontact.com/0ac3ac29601/07fb4b7e-2a70-4190-ba6b-9bb8f9f2264c.pdf> [<https://perma.cc/QGU9-R3RU>] (presenting results from several FDA studies that showed 48% of the CBD products tested contained THC, and many products did not accurately reflect the amount of CBD on the label); Mike Pomranz, *Nearly Half of CBD Products Contained THC in Random FDA Tests*, FOOD & WINE (July 10, 2020), <https://www.foodandwine.com/news/cbd-products-fda-tests-cbd> [<https://perma.cc/2R8T-HRUD>] (reporting on the FDA study); Lillianna Byington, *FDA Study Finds Some CBD Products Are Mislabeled*, FOOD DIVE (July 9, 2020), <https://www.fooddive.com/news/fda-study-finds-some-cbd-products-are-mislabeled> [<https://perma.cc/R9BX-8DMA>] (suggesting the study might further the FDA efforts to regulate CBD).

103. TEX. HEALTH & SAFETY CODE ANN. § 443.152(a).

104. See *id.* § 443.051 (setting forth the Executive Commissioner's duties and authority); *Id.* § 443.001(2), (4) (defining “Executive commissioner” and “Department”).

displayed.<sup>105</sup> Instead of printing the information directly on the packaging, labels may provide a scannable QR code containing the required information.<sup>106</sup>

Many consumers are unaware that some CBD products contain THC.<sup>107</sup> While web technology is an innovative method of distributing significant amounts of product information to prospective buyers in one click, not all consumers have cell phones<sup>108</sup> that can read a QR code<sup>109</sup> or access the internet.<sup>110</sup> Additionally, customers may not own a computer<sup>111</sup> or may not know how to use the internet to visit the URL.<sup>112</sup> Consumers may not realize they should take this critical step because they may feel comfortable that the product contains safe and legal ingredients if it is available for sale.<sup>113</sup>

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105. *Id.* § 443.205(a)(4), (6).

106. *Id.* § 443.205(b)(2).

107. See, e.g., Johns Hopkins Medicine, *Some CBD Products May Yield Cannabis-Positive Urine Drug Tests*, SCI. DAILY (Nov. 4, 2019), <https://www.sciencedaily.com/releases/2019/11/191104141650.htm> [<https://perma.cc/9TA8-UY7Y>] (stating one researcher's finding that consumers do not know CBD can produce a positive drug test).

108. See Kyle Taylor & Laura Silver, *Smartphone Ownership Is Growing Rapidly Around the World, but Not Always Equally*, PEW RSCH. CTR. 5 (Feb. 5, 2019), [https://www.pewresearch.org/global/wp-content/uploads/sites/2/2019/02/Pew-Research-Center\\_Global-Technology-Use-2018-2019-02-05.pdf](https://www.pewresearch.org/global/wp-content/uploads/sites/2/2019/02/Pew-Research-Center_Global-Technology-Use-2018-2019-02-05.pdf) [<https://perma.cc/JES3-8VX3>] (finding older Americans are less likely than younger Americans to own smartphones).

109. See John McCann, *How to Scan QR Codes on Your iPhone or iPad*, TECHRADAR (May 27, 2020), <https://www.techradar.com/how-to/phone-and-communications/mobile-phones/how-to-scan-qr-codes-from-your-iphone-or-ipad-1308841> [<https://perma.cc/B6U5-DY95>] (explaining internet connection is required to use QR codes and some devices require users to download an application).

110. See *What's the Difference Between Wi-Fi Data and Cellular Data?*, VERIZON WIRELESS, <https://www.verizon.com/articles/whats-the-difference-between-wifi-data-and-cellular-data/> [<https://perma.cc/7DE6-F6VF>] (clarifying cellular data, when purchased, is available in any covered area, whereas Wi-Fi requires proximity to a router).

111. See *Mobile Fact Sheet*, PEW RSCH. CTR. (June 12, 2019), <https://www.pewresearch.org/internet/fact-sheet/mobile/> [<https://perma.cc/355R-XDNE>] (reporting less than seventy-five percent of American adults own computers).

112. See Monica Anderson et al., *10% of Americans Don't Use the Internet. Who Are They?*, PEW RSCH. CTR. (Apr. 22, 2019), <https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they/> [<https://perma.cc/E43Z-MDJJ>] (describing several reasons people refrain from internet use).

113. *What You Need to Know*, *supra* note 93.



A. *CBD Products May Play a Role in Texas Family Law Cases*

At least one person in Texas has alleged at a criminal trial that his positive marijuana test resulted from CBD oil use.<sup>114</sup> Parties asserted the same claim in family law courts in West Virginia<sup>115</sup> and Tennessee.<sup>116</sup> The difficulty is that if the CBD oil ingested does contain THC, it is almost impossible to differentiate between the product and illegal marijuana through an accessible drug test in Texas.<sup>117</sup> Furthermore, without the FDA's assistance or enforcement by Texas officials regulating the accurate labeling of CBD products, consumers must completely rely on the product manufacturer's statements about whether the product they have purchased is within the legal limit or ensure the manufacturer provides a certificate of analysis.<sup>118</sup> Research shows that pure CBD generally does not cause a person's drug test to show positive for THC.<sup>119</sup> However, not all CBD is in pure form. Pure CBD is created by isolating CBD from the plant so that there are no other compounds, like THC, in the product.<sup>120</sup> Other forms, such as full spectrum CBD, may contain additional compounds from the

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114. *See Cessac v. Texas*, No. 13-17-00640-CR, 2018 WL 3583744, at \*3 (Tex. App.—Corpus Christi July 26, 2018, no pet.) (mem. op., not designated for publication) (holding the trial court could disbelieve defendant's testimony that THC in his system unintentionally came from CBD oil).

115. *See In re L.G.*, No. 19-0497, 2020 WL 598275, at \*2 n.3 (W. Va. Feb. 7, 2020) (describing petitioner's testimony that he tested positive for marijuana due to use of CBD oil); *In re A.M. & K.M.*, No. 20-0821, 2021 WL 2272664, at \*2 (W. Va. June 3, 2021) (stating both parents reported positive drug tests were the result of CBD oil use).

116. *See In re Kash F.*, No. E2019-02123-COA-R3-PT, 2020 WL 5269228, at \*2 n.3 (Tenn. Ct. App. Sept. 4, 2020) (alleging positive THC drug test was the result of ingesting a CBD oil product); *In re Sebastian K.*, No. E2020-01439-COA-R3-PT, 2021 WL 5071966, at \*4 (Tenn. Ct. App. Nov. 2, 2021) (expressing the mother's belief that CBD oil caused her positive drug test result).

117. *See Interim Update: Hemp*, *supra* note 83 (noting labs need new equipment to produce evidence of the THC level in a substance); *see also* Mark Thiessen, *THC vs. CBD: Can Police Really Tell the Difference?*, THIESSEN LAW FIRM BLOG (Oct. 13, 2021), <https://www.thetexasattorney.com/blog/marijuana-vs-cbd/> [<https://perma.cc/R9RW-NYDH>] (detailing the issues with current testing capabilities); Ted Oberg, *Pot Cases Down, Confusion up After Pot Law Change*, ABC 13 (Apr. 14, 2021), <https://abc13.com/harris-county-pot-marijuana-prosecution-law-texas-hemp/10512797/> [<https://perma.cc/U9TT-B8AE>] (describing problems associated with testing edibles and lack of funding for lab testing).

118. *How to Shop for CBD*, *supra* note 97.

119. *See Norton*, *supra* note 87 (discussing findings of a small test study of pure CBD).

120. *See Sherry Christiansen*, *Will CBD Oil Result in a Positive Drug Test?*, VERY WELL HEALTH (Oct. 26, 2021), <https://www.verywellhealth.com/cbd-oil-and-failing-drug-tests-4580277> [<https://perma.cc/P6YD-QP58>] (explaining the differences in purity).

plant, including THC.<sup>121</sup> A consumer may not know to look for pure CBD, or consumers may unknowingly purchase CBD products with an illegal concentration of THC due to incorrect labeling.<sup>122</sup> For these reasons, it may be possible for a person using CBD to innocently fail a drug test.<sup>123</sup> Another explanation for a positive result is that repeat users may experience a buildup of THC in their body, which can be detectable for many days.<sup>124</sup> Therefore, even consumers purchasing products with accurate labeling and legal amounts of THC may produce a positive drug test.<sup>125</sup>

If a parent produced a positive drug test during a custody case, whether the ingestion was on purpose or by accident, it could lead to negative consequences. In some cases, the child's other parent may use the alleged drug use against the parent in a case involving conservatorship and possession.<sup>126</sup> If the court is concerned the parent's unlawful THC use is negatively affecting the ability to parent in the child's best interest, the court may restrict that parent's periods of possession by ordering that parent's possession be supervised or may order less than the standard possession order<sup>127</sup> to limit the parent's time with the child to when the parent is less likely to use the drug, if possible. The court may look to the list of factors already in place, including the parent's circumstances or "any other relevant factor."<sup>128</sup> Parents who choose to use CBD should make all reasonable efforts to ensure the product they choose contains no more than the

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121. See Alena Hall, *Best CBD Oil Of 2022*, FORBES HEALTH (Jan. 20, 2022, 10:58 AM), <https://www.forbes.com/health/body/best-cbd-oil/> [<https://perma.cc/5XH5-WNJ5>] (identifying categories of CBD).

122. See Norton, *supra* note 87 ("A 2017 study found that about seven out of [ten] CBD products did not contain the amount of cannabidiol stated on the label. And about one in five contained THC.").

123. See Christiansen, *supra* note 120 (identifying the presence of THC in a CBD product as one reason people fail drug tests and confirming ingredient claims may not be correct).

124. See, e.g., Danielle Kosecki, *Why Using CBD Might Make You Fail a Drug Test*, CNET WELLNESS (Sept. 13, 2021, 4:00 PM), <https://www.cnet.com/health/nutrition/can-cbd-make-you-fail-a-drug-test/> [<https://perma.cc/3XQS-THAH>] (setting forth ways CBD use could cause a positive drug test result).

125. See Johns Hopkins Medicine, *supra* note 107 (stating, based on one researcher's finding, that consumers do not know CBD can produce a positive drug test).

126. See *In re A.J.*, No. 02-15-00329-CV, 2016 WL 7010925, at \*6 (Tex. App.—Fort Worth Dec. 1, 2016, no pet.) (mem. op.) (relating father's concern about mother's marijuana use in his supporting affidavit).

127. See Tex. FAM. CODE ANN. § 153.193 (suggesting there may be times a court may order less than standard possession).

128. See *id.* § 153.256 (stating factors to consider in awarding a schedule different from a standard possession order).

allowable 0.3% THC, and should research the manufacturer's claims prior to purchase.<sup>129</sup>

Perhaps a more troubling aspect of CBD's uncertainty is that it is legal for use by children.<sup>130</sup> While an adult may be capable of evaluating and weighing the risks of using a substance that is not approved by the FDA, a child may not be.<sup>131</sup> As mentioned, those risks include, among others, the CBD product containing unlawful amounts of THC, or the buildup of THC over time causing a positive test result. Although a product is technically legal, that does not necessarily mean it is suitable for a child. Yet, minors may legally purchase CBD products, and parents may provide it to children of any age.<sup>132</sup> Whether a couple is together or separated in any parenting situation, the parents may disagree on their child's medical treatments. A parent may decide to provide their child with generally accessible CBD. What happens if the other parent disagrees? If the parents are separated, and under a court order, that order likely provides terms for the child's conservatorship, or rights and duties.<sup>133</sup> Unless limited by the court, parents generally have "the right to consent" to medical treatments that do not include invasive procedures and the duty to provide such medical treatments.<sup>134</sup> While in possession of the child, parents also have the duty of general care of the child.<sup>135</sup>

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129. See *How to Shop for CBD*, *supra* note 97 (suggesting things to look for in a CBD product).

130. CBD that is legal in Texas does not contain more than 0.3% THC. See TEX. HEALTH & SAFETY CODE ANN. § 481.122 (stating it is illegal to deliver marijuana to a child); *Id.* § 481.002 (defining "marihuana" as excluding hemp); TEX. AGRIC. CODE ANN. § 121.001 (setting forth the definition of "hemp").

131. See Petronella Grootens-Wiegers et al., *Medical Decision-Making in Children and Adolescents: Developmental and Neuroscientific Aspects*, BMC PEDIATRICS, 2017, at 1, 7 (identifying twelve as the approximate age a child may be capable of making competent medical decisions, but explaining adolescence complicates that competency around the same age).

132. See TEX. HEALTH & SAFETY CODE ANN. § 443.201 (providing "a person may possess . . . a consumable hemp product" without qualifying "person" with an age); *cf. id.* § 481.122(a) (prohibiting the delivery of a controlled substance or marijuana to a child); *Id.* § 481.002(5), (26)(F) (excluding hemp from the definitions of controlled substances and marijuana); TEX. AGRIC. CODE ANN. § 121.001 (defining hemp as containing a concentration of 0.3 or less THC).

133. See TEX. FAM. CODE ANN. § 153.071 (stating "the court shall specify the rights and duties of a parent").

134. *Id.* § 153.074(2), (3).

135. See *id.* § 153.074(1) (identifying parental duties during possession).

The issue is not a new one. Parents tend to struggle with this conflict about immunizations,<sup>136</sup> ADHD, and psychological treatment.<sup>137</sup> However, parents in these situations can meet with a physician, review pamphlets provided by the pharmaceutical company, and examine and evaluate data to back up their desire to administer the medication—or their resistance to doing so. Parents wishing to administer their child CBD treatments have limited resources. While CBD may be legal, it has not yet completed the rigorous approval process of FDA-approved drugs.<sup>138</sup> The FDA’s evaluation process includes testing the drug to determine if it is safe for the purpose intended, and drugs are approved only when the risks are outweighed by the benefits.<sup>139</sup> More studies on the effects of CBD use on children may take place in the future. However, comprehensive data may not be available for some time. Potential negative consequences of CBD have been identified, such as liver damage, mood changes, and interactions with other drugs, and there are some reports of products containing unsafe contaminants.<sup>140</sup> Simultaneously, the emerging positive results of CBD use by children are promising,<sup>141</sup> but still largely unsubstantiated due to lack of available studies.<sup>142</sup> Until the FDA or the State of Texas conduct more studies to evaluate CBD’s efficacy for serious and non-serious illnesses, and

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136. See *Garcia-Udall v. Udall*, 141 S.W.3d 323, 326 (Tex. App.—Dallas 2004, no pet.) (agreeing to litigate any disagreements about immunizations).

137. See *In re B.N.G.*, No. 05-18-00091-CV, 2019 WL 3729506, at \*6–9 (Tex. App.—Dallas Aug. 8, 2019, no pet.) (mem. op.) (arguing about the need for evaluation of children for ADHD and anxiety).

138. See *FDA Warns Companies Illegally Selling Over-the-Counter CBD Products for Pain Relief*, FOOD & DRUG ADMIN. (Mar. 22, 2021), <https://www.fda.gov/news-events/press-announcements/fda-warns-companies-illegally-selling-over-counter-cbd-products-pain-relief> [https://perma.cc/5AW3-WE5W] (confirming there is no FDA-approved CBD over the counter drug).

139. See *Development & Approval Process | Drugs*, FOOD & DRUG ADMIN. (Oct. 28, 2019), <https://www.fda.gov/drugs/development-approval-process-drugs> [https://perma.cc/ZX32-7HL9] (describing the FDA’s drug approval process).

140. *What You Need to Know*, *supra* note 93.

141. The famous case of Charlotte Figi illustrates the positive results CBD can have on a medical illness. Beginning at a very early age, Charlotte suffered from constant seizures, cognitive, and behavioral issues. Charlotte did not respond to prescribed medications. For a time, doctors eventually placed her in “a medically induced coma” to allow her time to heal. Her parents found help from two brothers in Colorado who provided Charlotte with “high-CBD, low-THC” oil, and her seizures virtually stopped. The brothers renamed the CBD oil “Charlotte’s Web.” Shelly B. DeAdder, *The Legal Status of Cannabidiol Oil and the Need for Congressional Action*, 9 N.C. BIOTECH. & PHARM. L. REV. 68, 70–72 (2016).

142. See Christopher T. Campbell et al., *Cannabinoids in Pediatrics*, 22 J. PEDIATRIC PHARMACOLOGY & THERAPEUTICS 176, 180–83 (2017) (concluding there is not enough research to allow pediatricians to recommend CBD use in children, even though positive reports exist).

for everyday use, the question will remain.<sup>143</sup> Of note, the research still needs to be completed to determine the side effects and negative consequences of CBD use,<sup>144</sup> especially for children. If the court is concerned the parent's decision to provide CBD to a child could harm the child's best interest, the court may limit that parent's conservatorship rights and duties,<sup>145</sup> possibly giving the other parent the exclusive right to make those decisions<sup>146</sup> or restricting that parent's right to provide the child with CBD. The court could use the already-established factors to decide whether the parent should be appointed "a joint managing conservator" of the child, such as if the appointment would benefit the child's physical needs.<sup>147</sup> A strong argument exists for the proposition that until the FDA regulates CBD with its specific qualities, particular uses, and enforceable labeling requirements, parents should not expose children to the product as medical treatment. Without more scientific evidence, any arguments at the courthouse are going to be uncertain either way.

This is a developing area of law that will become clearer over time as research is performed and regulations are imposed. With law enforcement not prosecuting low-level marijuana charges and CBD cases, and the government slow to initiate more measures to ensure products only contain a legal amount of THC, consumers will become accustomed to purchasing without worry. However, negative trends associated with the lack of enforcement, such as positive drug tests and an increased number of injuries due to higher THC concentrations in CBD,<sup>148</sup> may support a more immediate need for regulation.

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143. See *FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD)*, FOOD & DRUG ADMIN. (Jan. 22, 2021), <https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd> [<https://perma.cc/C6NA-NZ62>] (acknowledging more clinical trials are necessary).

144. See Public Hearing Notice, 84 Fed. Reg. 12969-01, 12970 (Apr. 3, 2019) (explaining there is a "need for additional research" about health risks and identifying certain "safety concerns").

145. See TEX. FAM. CODE ANN. § 153.074(2), (3) (allowing limitation of a parent's rights and duties to consent to noninvasive medical care); *Id.* § 153.132(2) (permitting the court to limit a sole managing conservator's right as to invasive procedures).

146. *Id.* § 153.071 (requiring the court to describe how the parents will exercise their rights, for example, exclusively).

147. See *id.* § 153.134(a)(1) (listing the "physical, psychological, or emotional needs and development of the child" as a factor in appointing a parent as a joint managing conservator).

148. See *National Poison Data System, Cannabidiol (CBD)*, AM. ASS'N OF POISON CONTROL CTRS., <https://aapcc.org/CBD-Alert> [<https://perma.cc/7UDN-KSSY>] (reporting sharp increase in calls to poison control centers regarding CBD use). You can reach your local poison control center by calling

## V. FUTURE LEGALIZATION IN TEXAS

The trend suggests that Texas may eventually be open to broader legalization of marijuana. That trend in Texas began with the 2015 TCUA<sup>149</sup> and continued with the 2019 hemp bill that created enforcement problems for law enforcement and limited options for prosecutors.<sup>150</sup> During the 87th Texas Legislative Session, which began in January 2021, there were at least sixty bills addressing marijuana up for review.<sup>151</sup> Two bills passed the House and the Senate and have since become law.<sup>152</sup> Nationwide, even more recent changes are moving the needle toward legalization and may add pressure for Texas to legalize marijuana. Hemp was legalized federally in 2018.<sup>153</sup> In addition to the thirty-three states with some form of legal marijuana by June 2019,<sup>154</sup> five states broadened marijuana use within their borders in November 2020.<sup>155</sup> In December 2020, the United States House of Representatives passed legislation called

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the Poison Help hotline: 1-800-222-1222. To save the number in your mobile phone, text POISON to 797979.

149. See Tex. OCC. CODE ANN. § 169.003 (permitting low-THC cannabis for patients with a prescription).

150. See TEX. AGRIC. CODE ANN. § 122.202(a) (permitting sale and use of products containing 0.3% or less THC); TEX. HEALTH & SAFETY CODE ANN. § 443.201(a) (allowing possession and sale of consumable hemp).

151. Some of the marijuana bills filed for the 2021 legislative session include: 2021 Texas House Bills 447, 441, 43, 94, 99, 169, 439, and 307, 2021 Texas Senate Bills 140, 90, and 151, and 2021 Texas House Joint Resolutions 11 and 13. Of these, S.B. 140, H.B. 447, S.B. 90, and H.B. 94 each have a parent-protection provision to be considered. Some of the proposed bills are for recreational use, some expand medical marijuana use, some reduce or remove penalties, one protects those who purchase marijuana believing it to be legal hemp, and the House Joint Resolutions propose amendments to the Texas Constitution. For a more comprehensive list, see *Tracking: Texas Marijuana Policy | 87th Legislative Session*, TEXANS FOR RESPONSIBLE MARIJUANA POL'Y, <https://www.texasmarijuanapolicy.org/txmj21/> [<https://perma.cc/GP3U-YR5B>].

152. See H.B. 1535, 87th Reg. Sess. (Tex. 2021) (expanding the TCUA to include additional illnesses and increase THC content, as reflected in sections 169.003 and 169.001(3) of the Texas Occupations Code, respectively); H.B. 567, 87th Reg. Sess. (Tex. 2021) (prohibiting the “Department of Family and Protective Services” from removing a child based on a parent’s positive marijuana test without proof of significant impairment, reflected in section 262.116(a)(7) of the Texas Family Code; confirming the fact a parent legally provides the child with low-THC is not sufficient evidence in a termination suit, reflected in section 161.001(c)(4) of the Texas Family Code).

153. 7 U.S.C. § 1639o(1).

154. See Daniel G. Orenstein & Stanton A. Glantz, *Cannabis Legalization in State Legislatures: Public Health Opportunity and Risk*, 103 MARQ. L. REV. 1313, 1316 (2020) (listing locations that have legalized marijuana for medical and recreational use as of June 2019).

155. See Appendix A (outlining each state’s laws regarding marijuana and hemp); *State Medical Marijuana Laws*, *supra* note 2 (noting recreational use now allowed in “Arizona, Montana, New Jersey, and South Dakota,” and medical use in Mississippi).

the MORE Act, which would decriminalize marijuana use federally, though it did not pass in the Senate.<sup>156</sup> Legislation with the same name and purpose was recently introduced in the first session of the 117th Congress.<sup>157</sup>

With the momentum eventually leaning toward nationwide legalization of marijuana, it is only natural to consider what that might look like in the Lone Star State. In doing so, Texas must remain cognizant of the hurdles that still exist with marijuana and how they affect children in particular. This Comment next discusses potential problems and proposes child-centered solutions.

A. *A Child-Centered View of Texas's Proposed Anti-Discrimination Language*

One problem that exists with legalizing marijuana is removing the stigma associated with its use.<sup>158</sup> Given that it has been illegal nationally for over eighty years<sup>159</sup> and in Texas over ninety years,<sup>160</sup> some in the community—and some judges—may have long-standing negative associations with the drug.<sup>161</sup> The fact that marijuana is still illegal on the federal level<sup>162</sup> can make it difficult to reconcile the concurrent fact that several states have legalized its use, especially for judges who have a duty to uphold the law.<sup>163</sup> To combat the urge to treat parents who use state-approved marijuana unfairly, as of December 2020 just under half the states that passed cannabis or marijuana legislation included “anti-discrimination” statutes to protect parents who legally use marijuana under state law.<sup>164</sup> Of the states that allow both medical and recreational use, the majority protect medical marijuana use, while a minority protect recreational marijuana

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156. Deirdre Walsh, *House Approves Decriminalizing Marijuana; Bill to Stall in Senate*, NPR (Dec. 4, 2020, 1:36 PM), <https://www.npr.org/2020/12/04/942949288> [<https://perma.cc/ZB2F-YRCE>].

157. H.R. 3617, 117th Cong. (1st Sess. 2021).

158. See Kwak, *supra* note 61, at 127–129 (describing the development of negative public opinion of marijuana that still lingers).

159. See *Marijuana Timeline*, *supra* note 18 (discussing federal prohibition in 1937).

160. *Texas Cannabis Law Timeline*, *supra* note 40 (listing Texas statewide prohibition in 1931).

161. See Emily Gelmann, *Drink a Pint Smoke a Joint*, 50 MD. BAR J. 19, 20 (2017) (discussing history and lingering existence of marijuana stigma in Maryland courtrooms).

162. 21 U.S.C. § 812.

163. TEX. CODE JUD. CONDUCT, Canon 3(B)(2), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. B (“A judge should be faithful to the law and shall maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.”).

164. See Appendix A (noting states with statutory marijuana anti-discrimination language).

use.<sup>165</sup> In the case of medical marijuana, protecting parents also protects children because marijuana is used to treat an underlying illness, which may also affect the ability to care for a child properly.<sup>166</sup> In that sense, marijuana should be seen as any other drug prescribed by a physician and used as directed, and parental use should be protected from discrimination. Courts overseeing a case involving parental medical marijuana use and an anti-discrimination statute must determine if the parent's protected use outweighs the alleged harm to the child in that particular situation.<sup>167</sup>

Arizona is one state that has adopted an anti-discrimination statute; its law under the Medical Marijuana Act includes the following provision:

No person 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 chapter, unless the person's behavior creates an unreasonable danger to the safety of the minor as established by clear and convincing evidence.<sup>168</sup>

Approximately half the states with anti-discrimination provisions use language similar to this, stating that parenting rights cannot be restricted unless the child is in unreasonable danger under a clear and convincing standard.<sup>169</sup> Hawaii uses essentially the same language but sets a lower burden of proof requiring only "a preponderance of the evidence," and does not require the danger to the child to be unreasonable.<sup>170</sup> Arguably, any drug in a home with children presents a danger to children, including legal prescription drugs and alcohol. Many common household items, such as cleaning products, sharp edges on furniture, and light sockets/outlets, are

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165. See Appendix A (compiling states with anti-discrimination language to the right of columns showing states with medical and recreational use).

166. See Kristen S. Higgins et al., *Offspring of Parents with Chronic Pain: A Systematic Review and Meta-Analysis of Pain, Health, Psychological, and Family Outcomes*, 156 PAIN 2256, 2268 (2015) (reporting children of parents with chronic pain suffer problems that children with healthy parents do not).

167. See Kwak, *supra* note 61, at 136–39 (providing examples of courts ignoring a parent's needs and examples of courts balancing needs).

168. ARIZ. REV. STAT. ANN. § 36-2813(D) (2020).

169. In addition to Arizona, these states include Delaware, Illinois (medical marijuana), Michigan, Minnesota, and South Dakota. Ohio's language, while close, does not use the phrase "unreasonable danger."

170. HAW. REV. STAT. § 329-125.5(c) (2018), [http://www.capitol.hawaii.gov/hrscurrent/Vol06\\_Ch0321-0344/HRS0329/HRS\\_0329-0125\\_0005.htm](http://www.capitol.hawaii.gov/hrscurrent/Vol06_Ch0321-0344/HRS0329/HRS_0329-0125_0005.htm) [<https://perma.cc/5YVS-G4CW>].



also dangerous for children.<sup>171</sup> Therefore, qualifying the danger by requiring that it be unreasonable is appropriate. Hawaii's burden of proof is fitting. Preponderance of the evidence requires only "[t]he greater weight of the evidence,"<sup>172</sup> while clear and convincing evidence requires showing the result is "highly probable or reasonably certain."<sup>173</sup> The clear and convincing burden places children at a disadvantage because the complaining party has a higher burden to show it is reasonably certain, rather than more likely than not, that the child is at risk of unreasonable danger. If an unreasonable danger to a child exists, it should be easier, not harder, for a parent to get relief from the court. Therefore, the burden of proof in these cases should be set at the lower threshold of a preponderance of the evidence, to provide the most protection for children.

Maine and Pennsylvania specifically mention the child's best interest standard instead of setting a burden of proof.<sup>174</sup> This makes sense, yet it does not provide parents or judges any additional guidance. Without an anti-discrimination statute, Texas courts would look to the child's best interests to decide the case.<sup>175</sup> Courts already have the non-exhaustive *Holley* factors at their disposal to evaluate the child's best interest, including "the emotional and physical danger to the child now and in the future; the parental abilities of the individuals seeking custody" and "the programs available to assist these individuals to promote the best interest of the child."<sup>176</sup> Several of the anti-discrimination statutes specify that a parent's marijuana use cannot be the sole factor in deciding parenting issues,<sup>177</sup> so courts would still likely look to the child's best interests in those cases because they would need to consider other factors. Determining whether the child is in unreasonable danger may, on its own, require evaluation of

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171. See *Tips for Keeping Children Safe: A Developmental Guide – Mobile Infants*, HEAD START | ECLKC, <https://eclkc.ohs.acf.hhs.gov/safety-practices/article/tips-keeping-children-safe-developmental-guide-mobile-infants> [<https://perma.cc/KC5G-YXQ8>] (outlining tips to keep cleaning products and wall outlets safe).

172. *Preponderance of the Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019) (providing the definition of "preponderance of the evidence").

173. *Clear and Convincing Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "clear and convincing evidence").

174. ME. REV. STAT. ANN. tit. 22, § 2430-C(4) (2020); 35 PA. CONS. STAT. § 10231.2103(c) (2018).

175. See TEX. FAM. CODE ANN. § 153.002 (setting the expectation that the child's best interest is the primary issue in custody cases).

176. *Holley v. Adams*, 544 S.W.2d 367, 372 (Tex. 1976).

177. These states include Arkansas, Minnesota, New Hampshire, South Dakota, and Washington.

best interests because each child and each circumstance is different. Anti-discrimination provisions further protect children, but the provision should set expectations for both the public and the courts. The best interest standard does not help set expectations because it is already the baseline for evaluating child-related issues.<sup>178</sup> Therefore, the provision should include a specific burden of proof beyond the child's best interest.

At least four of the bills the Texas Legislature considered in 2021 included parental anti-discrimination language. Two of the four sampled proposed Texas bills related to medical marijuana provided:

Sec. 487.022. NO PRESUMPTION OF CHILD ABUSE, NEGLECT, OR ENDANGERMENT. A person [protected under the medical cannabis statute] may not be presumed to have engaged in conduct constituting child abuse, neglect, or endangerment solely because the person engaged in conduct involving medical use that is authorized under this chapter . . . .

Sec. 487.023. NO DENIAL OF PARENTAL RIGHTS. The fact that a person [protected under the medical cannabis statute] engages in conduct authorized under this chapter, . . . does not in itself constitute grounds for denying, limiting, or restricting conservatorship or possession of or access to a child under Title 5, Family Code.<sup>179</sup>

Texas considered the same anti-discrimination language for medical use in 2019 during the prior legislative session, but the laws did not pass the senate.<sup>180</sup> In evaluating such provisions, Texas must balance the need to protect parents from discrimination by the courts based solely on state-sanctioned marijuana use, and the need to protect children from parents who are unable to keep them safe while under the influence. The language should not restrict a judge's ability to consider marijuana use as a factor in child custody cases.

One shortfall with Texas's proposed language is that most skilled attorneys can come up with some other reason for bringing the lawsuit such that it does not "solely" rest upon a parent's marijuana use "in itself." Parties are likely to rely on arguments about how the parent consuming marijuana has negatively impacted the child's best interests. The proposed

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178. See TEX. FAM. CODE ANN. § 153.002 (mandating the "primary consideration" for conservatorship and possession issues be the child's best interest).

179. Tex. S.B. 90, 87th Leg., R.S. (2021); Tex. H.B. 94, 87th Leg., R.S. (2021).

180. See Tex. H.B. 1365, 86th Leg., R.S. (2019) (attempting to expand medical cannabis use).

language does not provide the court with any additional guidance on the issue. The provision as granted begs the question, “what more do you need”? Worse, it may lead some individuals, and possibly some on the bench, to believe legal marijuana use cannot be considered at all in child custody cases, which would not protect children. To have any real teeth, the statute should identify what it would take to restrict the right to conservatorship or possession based on a parent’s state-sanctioned use. Adding that behavior exposing the child’s safety to unreasonable danger will allow the court to consider a parent’s legal marijuana use as a factor places all on notice of the threshold.

When Texas is ready to legalize medical marijuana,<sup>181</sup> the legislature should adopt a provision with language such as the following:

NO PRESUMPTION OF CHILD ABUSE, NEGLECT, OR ENDANGERMENT. A person [protected under the medical cannabis statute] may not be presumed to have engaged in conduct constituting child abuse, neglect, or endangerment, because the person engaged in conduct allowed under this chapter, *unless* the person’s behavior creates an *unreasonable danger* to the safety of the minor as established by a *preponderance of the evidence*.

NO DENIAL OF PARENTAL RIGHTS. The fact that a person described by [the medical cannabis statute] engages in conduct authorized under this chapter does not constitute grounds for denying, limiting, or restricting conservatorship or possession of or access to a child under Title 5, Family Code, *unless* the person’s behavior creates an *unreasonable danger* to the safety of the minor as established by a *preponderance of the evidence*.<sup>182</sup>

This language is intended to allow a lawsuit based on the use or possession of medical marijuana if it is more likely than not the cause of behavior that poses an unreasonable danger to the child’s safety. The most common interpretation would implicate the risk of physical injury, but safety should also be interpreted to include the risk of emotional harm. A parent whose temperament changes dramatically when under the influence—say they

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181. Cf. Sami Sparber & Aria Jones, *Texas’ Medical Marijuana Program is One of the Most Restrictive in the Country. Advocates Hope the Legislature will Change That.*, TEXAS TRIBUNE (Jan. 4, 2021, 5:00 AM), <https://www.texastribune.org/2021/01/04/texas-medical-marijuana-2021/> [<https://perma.cc/V3DE-BN4J>] (explaining TCUA is considered an act legalizing low-THC cannabis, not medical marijuana).

182. Adapted from the proposed Texas bills and the Arizona and Hawaii laws described *infra* notes 168, 170.

become mean or paranoid—may have serious negative effects on a child’s condition.<sup>183</sup> When a parent acts to cause the child unreasonable danger, cases could be brought under these provisions.

At least two states have anti-discrimination language for recreational use: Illinois and Massachusetts.<sup>184</sup> While the language used is more detailed than typical language for medical marijuana, both states (1) maintain the clear and convincing burden of proof; (2) require an unreasonable danger to the child (or, in Illinois, proof the parent is not competent); and (3) add that, in addition to conduct permitted by the statute, cannabinoids found in a person cannot be the sole basis for custody or possession decisions.<sup>185</sup> Massachusetts provides:

Absent clear, convincing and articulable evidence that the person’s actions related to marijuana have created an unreasonable danger to the safety of a minor child, neither the presence of cannabinoid components or metabolites in a person’s bodily fluids nor conduct permitted under this chapter related to the possession, consumption, transfer, cultivation, manufacture or sale of marijuana, marijuana products or marijuana accessories by a person charged with the well-being of a child shall form the sole or primary basis for substantiation, service plans, removal or termination or for denial of custody, visitation or any other parental right or responsibility.<sup>186</sup>

This language certainly protects parents and other guardians who use legal marijuana, but it does not protect children. The bills related to recreational marijuana submitted for review by the 2021 Texas Legislature provide:

Sec. 491.053. PROTECTION FROM LEGAL ACTION FOR AUTHORIZED CONDUCT. (b) The fact that a person engages in conduct authorized by [personal use and retail cannabis statutes] does not in itself

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183. See *Alexis E. v. Patrick E.*, 90 Cal. Rptr. 3d 44, 55 (Cal. App. 2d Dist. Jan. 23, 2009) (describing ways the children were affected by the negative changes in the father’s demeanor while under the influence).

184. See 410 ILL. COMP. STAT. 705/10-30 (2019), [<https://perma.cc/5UGW-UQD6>] (requiring protection for parents using recreational marijuana); MASS. GEN. LAWS ch. 94G, § 7(d) (2019), [<https://perma.cc/JD73-GU2C>] (setting forth language to protect users of personal marijuana).

185. See 410 ILL. COMP. STAT. 705/10-30 (2019), [<https://perma.cc/5UGW-UQD6>] (detailing parental protections for recreational marijuana use); cf. MASS. GEN. LAWS ch. 94G, § 7(d) (2019), [<https://perma.cc/JD73-GU2C>] (providing protection for personal marijuana use).

186. MASS. GEN. LAWS ch. 94G, § 7(d) (2019), [<https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXV/Chapter94G/Section7>] [<https://perma.cc/JD73-GU2C>].

constitute grounds for denying, limiting, or restricting conservatorship or possession of or access to a child under Title 5, Family Code.<sup>187</sup>

When Arizona voters said “yes” to medical marijuana, they agreed with the associated findings that it should be viewed differently than non-medical use, and that patients should be protected.<sup>188</sup> It seems that sentiment is felt in several other states, because only a minority have anti-discrimination language for recreational marijuana use.<sup>189</sup> While a parent’s right to take legally-obtained medication as prescribed should be protected from discrimination in the child-custody context, a parent’s desire to consume an unnecessary drug for enjoyment should not command the same immunity. Effectively, a parent using a recreational drug while in the presence of their child is choosing personal intoxication over fully engaging in parenting. That position serves no public policy. On the other hand, the state does have an interest in protecting public health and safety.<sup>190</sup> When the TCUA was adopted, it set in motion a regulatory framework to allow its functioning, enacted provisions set the standards for physician qualifications,<sup>191</sup> identified the agency in charge of regulating dispensaries and maintaining the registry,<sup>192</sup> and required patient treatment plans.<sup>193</sup> If Texas legalizes medical marijuana, it would be expected to enact additional regulatory laws as appropriate. Undoubtedly, the patient’s medical condition hinders the patient in some way, and marijuana helps the patient overcome the illness or its symptoms. For example, marijuana may help those suffering from cancer because it reduces nausea.<sup>194</sup> By establishing

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187. Tex. S.B. 140, 87th Leg., R.S. (2021); Tex. H.B. 447, 87th Leg., R.S. (2021).

188. Arizona Medical Marijuana Act, Proposition 203 § 2(G), 49th Leg., 2d Reg. Sess. (Ariz. 2010) [https://apps.azsos.gov/election/2010/info/PubPamphlet/Sun\\_Sounds/english/prop203.htm](https://apps.azsos.gov/election/2010/info/PubPamphlet/Sun_Sounds/english/prop203.htm) [<https://perma.cc/U3NU-HJNV>].

189. See Appendix A (citing statutes that protect recreational use or medical use).

190. *E.g.*, Chicago, B. & Q. Ry. Co. v. Illinois, 200 U.S. 561, 592 (1906) (“We hold that the police power of a state embraces . . . regulations designed to promote the public health, the public morals, or the public safety.”).

191. See TEX. OCC. CODE ANN. § 169.002 (identifying conditions for physicians who may give patients low-THC cannabis).

192. See TEX. HEALTH & SAFETY CODE ANN. § 487.001 (defining “department” as the “Department of Public Safety”); *id.* at § 487.054 (establishing the department’s obligations as to the registry); *id.* at § 487.104 (promulgating duties regarding dispensary licensure).

193. TEX. OCC. CODE ANN. § 169.005.

194. See Marka B. Fleming & Gwendolyn McFadden-Wade, *The Unthinkable Choice: The Constitutional Due Process Right to Parent or the Legal Right to Use Medical Marijuana*, 25 B.U. PUB. INT. L.J. 299, 307 (2016).

regulatory guidelines, the state is certainly attempting to protect citizens seeking to alleviate a medical condition. Furthermore, by protecting a parent's right to use a legally-prescribed drug, children have the benefit of a parent who is not suffering, which in turn may improve their parenting. Taking medical marijuana may be the most responsible act some parents can do to protect their children. For those parents, taking the drug may even be seen as a caring, loving act.

In a practical sense, parties in cases involving medical marijuana will likely have the same burden at the courthouse as parties in cases involving recreational marijuana, if both are legal. The concerned party will need to show the drug impairs the other parent's behavior such that the other parent is unable to act in the child's best interest while under the influence.<sup>195</sup> Nevertheless, the state need not offer the same protection to recreational users because its interest is in its residents' health and safety, not in their enjoyment.

B. *The Common Theory that Marijuana Should be Treated Like Alcohol Does Not Work*

An argument exists that courts should treat marijuana use like alcohol use in child custody cases.<sup>196</sup> Along with that is the idea that courts should differentiate marijuana use from marijuana abuse in custody cases.<sup>197</sup> This argument has merit. As a society, we have accepted that adults are lawfully permitted to drink alcohol.<sup>198</sup> Parents are not shunned if they have a glass of wine with dinner or enjoy a beer during a football game,<sup>199</sup> even if their children are present. But in clear situations of alcohol abuse,<sup>200</sup> and when parents are unable to control their behavior or to protect their children adequately, parental alcohol use becomes a problem for society.<sup>201</sup> The

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195. See TEX. FAM. CODE ANN. § 153.002 (providing the main consideration is the child's best interest).

196. David Malleis, Comment, *The High Price of Parenting High: Medical Marijuana and Its Effects on Child Custody Matters*, 33 U. LA VERNE L. REV. 357, 382 (2012).

197. See Gelmann, *supra* note 161, at 23 (arguing marijuana use should only be a factor in child custody situations when the parent abuses the drug, like alcohol).

198. See, e.g., TEX. ALCO. BEV. CODE ANN. § 106.01 (defining "minor" as someone under twenty-one years old); *id.* § 106.04 (declaring alcohol consumption by a minor is an offense).

199. See Gelmann, *supra* note 161, at 23 (explaining a parent is not unfit solely for having alcohol with a meal).

200. See Malleis, *supra* note 196, at 382.

201. Allison E. Korn, Article, *Detoxing the Child Welfare System*, 23 VA. J. SOC. POL'Y & L. 293, 321 (2016).

argument follows that if society has agreed that marijuana is also an acceptable legal substance, parents should be able to enjoy it in the presence of their children as long as it does not affect their ability to care for their children.<sup>202</sup> This argument is reasonable and appeals to common sense.

However, there are reasons alcohol and marijuana cannot be treated equally in the child-custody context. Behavior is not always the best indicator. Some people may appear sober when they are not.<sup>203</sup> Some people choose to drink in the home where the behavior is not visible and where only the child would know there is no supervision. In cases involving allegations that a parent is drunk while caring for the child, judges have the power to order alcohol testing, whether it is a single test or ongoing testing.<sup>204</sup> With marijuana, there is a practical problem: the human body does not process marijuana in the same manner as alcohol, and technology to monitor marijuana use effectively does not exist as it does with alcohol.<sup>205</sup> For example, each alcohol container displays the product's alcohol content so that a consumer is aware of how much alcohol the drink contains.<sup>206</sup> Data and information obtained through scientific research have been reduced to a table explaining the effects of alcohol on a person by body weight.<sup>207</sup> That information allows the public to understand how many alcoholic drinks they can have before they are intoxicated.<sup>208</sup> Breathalyzers and blood tests can confirm how much alcohol is in a person's bloodstream at the time of the test.<sup>209</sup>

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202. Malleis, *supra* note 196, at 387.

203. See *What is End Stage Alcoholism?*, THE RECOVERY VILLAGE (Dec. 21, 2020), <https://www.therecoveryvillage.com/alcohol-abuse/faq/what-is-end-stage-alcoholism/> [https://perma.cc/2FKT-QYWV] (stating alcohol tolerance lessens a person's outward signs of intoxication).

204. See *Newell v. Newell*, 349 S.W.3d 717, 722 (Tex. App.—Fort Worth 2011, no pet.) (“Clearly, the trial court has discretion to order alcohol testing on appropriate facts.”).

205. See Michael McWaters, Comment, *The High Road: An Analysis of Marijuana as an Impairing Substance and Why Marijuana Laws Fail to Adhere to the Framework of DUI Alcohol Legislation*, 1 U. CENT. FLA. DEP'T LEGAL STUD. L.J. 51, 62, 64 (2018) (explaining differences in how the two drugs work in the body, and that there is not a breath test available for marijuana).

206. 27 C.F.R. § 7.71(b) (2019).

207. Alex Davies, *Here's How Much You Can Legally Drink Before Driving if the Blood Alcohol Limit is Lowered to .05*, BUS. INSIDER (May 13, 2013, 6:14 PM), <https://www.businessinsider.com/drinks-before-driving-if-bac-is-05-2013-5> [https://perma.cc/KSM2-7KFM].

208. See *id.* (suggesting the charts aid people in estimating whether they can drive after drinking).

209. NAT'L ACADS. OF SCIS. ENG'G MED., GETTING TO ZERO ALCOHOL-IMPAIRED DRIVING FATALITIES 177 (Steven M. Teutsch et al. eds., 2018).

Marijuana is not the same. Doses have not yet been standardized across the medical marijuana industry.<sup>210</sup> No indication exists of the capability to chart the data uniformly on a table per body weight.<sup>211</sup> Users cannot be sure how much they can take before they are high.<sup>212</sup> Each strand of marijuana has varying potency and may react differently in different people.<sup>213</sup> Moreover, the breathalyzer technology is not yet sophisticated enough to confirm whether someone is under the influence at the moment of the sample's collection—only that they have smoke on their breath.<sup>214</sup> A similar problem exists with other testing methods available for marijuana

210. Malleis, *supra* note 196, at 378–79; see Kyle Jaeger, *Feds Announce New Standard THC Dose to be Used in Marijuana Research, Effective Immediately*, MARIJUANA MOMENT (May 7, 2021), <https://www.marijuanamoment.net/feds-announce-new-standard-thc-dose-to-be-used-in-marijuana-research-effective-immediately/> [<https://perma.cc/4HP6-NHSA>] (reporting a new standard of five milligrams of THC for research programs); see also *State Cannabis Sales Limits Leave Potency Unregulated*, BU SCH. PUB. HEALTH (Mar. 24, 2021), <https://www.bu.edu/sph/news/articles/2021/state-cannabis-sales-limits-leave-potency-unregulated/> [<https://perma.cc/KL3W-BEA7>] (explaining the importance of regulation standardizing THC dosage for potency instead of dosing by weight). Another interesting reason cannabis should not be treated the same as alcohol in child custody cases is that cannabis is available in forms appealing to children, such as candy, whereas alcohol generally is not, and the doses may have a far greater impact on a small child. See Paul J. Larkin, *Marijuana Edibles and “Gummy Bears”*, 66 BUFF. L. REV. 313, 328–36 (2018) (advancing the concern about children consuming edible cannabis).

211. See U.S. GOV'T ACCOUNTABILITY OFF., *DRUG-IMPAIRED DRIVING 15* (2015) (“[I]dentifying a link between impairment and drug concentrations in the body, similar to the 0.08 BAC threshold established for alcohol, is complex and . . . possibly infeasible.”).

212. Malleis, *supra* note 196, at 379; see Daniel G. Barrus et al., *Tasty THC: Promises and Challenges of Cannabis Edibles*, RTI PRESS, Nov. 2016, at 1, 7 (contending certain factors, like a person's weight and gender, affect intoxication onset and length from edible cannabis); see also Emily Guarnotta, *How do I Gauge What's the Right (and Safe) Dosage of THC?*, GOODRX HEALTH (Aug. 24, 2021), <https://www.goodrx.com/marinol/how-much-thc-dosage> [<https://perma.cc/6WZU-2MJS>] (“Some hemp-derived pre-rolled cigarettes (joints) have as little as 0.1% THC, whereas most dispensary pre-rolls have 20% to 30% THC by weight.”); see also Robert L. Page II et al., *Medical Marijuana, Recreational Cannabis, and Cardiovascular Health*, 142 AHA CIRCULATION e131, e134 (2020), <https://www.ahajournals.org/doi/epub/10.1161/CIR.0000000000000883> [<https://perma.cc/KS4W-UXQD>] (describing the factors determining how cannabis affects the body).

213. McWaters, *supra* note 205, at 64.

214. See Alicia Wallace, *Testing Drivers for Cannabis is Hard. Here's Why*, CNN BUS. (Jan. 2, 2020, 4:50 PM), <https://www.cnn.com/2020/01/02/business/cannabis-breathalyzers-are-coming-to-market/index.html> [<https://perma.cc/28HK-XUCY>] (exploring possibilities and drawbacks of potential new technology); Chris Roberts, *Study: Sure Looks Like ‘Marijuana Breathalyzers’ Don't Work—And May Never Work*, FORBES (Dec. 21, 2021, 4:29 PM), <https://www.forbes.com/sites/chrisroberts/2021/12/31/study-sure-looks-like-marijuana-breathalyzers-dont-work-and-may-never-work> [<https://perma.cc/9V3B-VJDU>] (suggesting breathalyzers will not be possible and even if they are, they will not detect all types of ingestion or the degree of impairment).



use; the tests only indicate the drug was ingested within a certain number of days (depending on the method of ingestion) and do not disclose whether a person is intoxicated at or near the time of testing.<sup>215</sup>

Lack of accessible, instant testing poses a unique problem in child custody cases. When there is a basis for concern that a parent is abusing alcohol, the court has the option to order alcohol testing prior to and during the parent's possession of the child.<sup>216</sup> Companies such as Soberlink provide testing equipment for a parent to take home and perform periodic breath tests.<sup>217</sup> The court orders specific time windows when the parent must produce a negative test, for example, one hour prior to the start of a period of possession and three times each day during possession.<sup>218</sup> The device records the sample's date, time, results, and captures a photo of the person providing the sample.<sup>219</sup> Data is transmitted to Soberlink, the other parent, and the attorneys in real-time.<sup>220</sup> If a parent produces a positive test prior to a visit, the order may state they forfeit that visit;<sup>221</sup> if they produce a positive test during a visit, the order could state they forfeit the remainder of the visit and must surrender the child to the other parent immediately. This type of testing reassures all parties that the individual is truly not intoxicated while caring for the child.<sup>222</sup> Testing measures such as these respect the societal norm of only restricting a parent's alcohol use when they have possession of their child, or, in extreme cases, at all times in order to protect the child.<sup>223</sup> Further, it provides the court with a tool to assess the parent's ability to manage alcohol use for lengthier periods while

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215. *How Long Can Marijuana be Detected in Drug Tests?*, HOUND LABS (Dec. 9, 2020), <https://houndlabs.com/2018/09/06/how-long-can-marijuana-be-detected-in-drug-tests/> [https://perma.cc/3YHQ-D7EM].

216. *See In re S.H.*, No. 02-16-00095-CV, 2017 WL 710635, at \*1-2 (Tex. App.—Fort Worth Feb. 23, 2017, no pet.) (mem. op.) (providing an example of alcohol testing provisions in a court order).

217. *See* SOBERLINK HEALTHCARE LLC, SOBERLINK EXPERTS IN REMOTE ALCOHOL MONITORING 2 (2020) [hereinafter SOBERLINK] (stating the monitored client can submit required tests anywhere).

218. *Id.* at 7-8.

219. *Id.* at 4.

220. *Id.* at 1.

221. *In re S.H.*, 2017 WL 710635, at \*1-2.

222. *See* SOBERLINK, *supra* note 217, at 1 (explaining proper testing schedules provide accountability).

223. *See* Kaelyn Guinty, Comment, *Addressing the Consequences of Addiction in Developing Parenting Plans*, 32 J. AM. ACAD. MATRIM. LAW. 215, 227-28 (2019) (illustrating the ways practitioners can address substance abuse problems in court orders, including limiting a parent's consumption while in possession of the child, or at all times).

simultaneously protecting the children.<sup>224</sup> Addiction is a disease often requiring long-term treatment.<sup>225</sup> A court could require Soberlink testing for a number of months and schedule a status hearing so it could determine whether ongoing testing is necessary.<sup>226</sup>

Conversely, if the court is concerned that a parent has marijuana dependency that may affect parenting skills, there is currently no available testing method to determine if the parent can manage to stay sober during visits with the child.<sup>227</sup> In states where it is legal, a parent may consume THC while caring for their child and yet not be intoxicated according to a marijuana test.<sup>228</sup> Alternatively, a parent may ingest THC outside of the child's presence and test positive while in possession of the child, even though they are completely sober at the time of the test.<sup>229</sup> For example, a Texas resident may travel to Colorado without his child, ingest recreational marijuana there legally, return to Texas, and test positive for THC in a custody case. In either situation, there is no proof the parent was intoxicated (or not) while caring for the child. The court has no assurance that the parent can manage their drug use while in possession of the child. Marijuana use does not necessarily indicate an addiction that may affect parenting skills.<sup>230</sup> However, an ability to abstain for periods of time or consume an amount that does not cause impairment, like with alcohol, may support the parent's argument they do not have a problem that needs to be addressed in a custody case.<sup>231</sup>

These are grave concerns. Texas already finds itself in an unenviable position of not enforcing laws it intended to retain because it passed the 2019 hemp bill without available testing and had to drop criminal marijuana cases.<sup>232</sup> The problems created by the lack of testing technology prior to passing the hemp bill should be a lesson for future legislation. If a parent's

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224. See SOBERLINK, *supra* note 217, at 28 (identifying the need for a schedule that can be managed long-term).

225. See NORA D. VOLKOW, PRINCIPLES OF DRUG ADDICTION TREATMENT: A RESEARCH-BASED GUIDE 3 (3d ed. 2018) (answering drug treatment questions).

226. Guinty, *supra* note 223, at 228.

227. McWaters, *supra* note 205, at 64.

228. See *id.* (asserting some users test negative while impaired).

229. See *id.* (stating THC levels in blood may remain high in some users for many days).

230. See Malleis, *supra* note 196, at 377 (“[T]he likelihood of the risk created is dependent on the circumstances involved.”).

231. VOLKOW, *supra* note 225, at 6.

232. McCullough & Samuels, *supra* note 84 (stating police cannot prove if a substance is illegal, so some cases cannot proceed).

impairment creates a risk to their child and Texas does not yet have a tool to prove the parent was impaired during possession, this may cause issues in family law cases similar to the issue that led to prosecutors dropping marijuana cases.<sup>233</sup> Parents who pose a risk to their children cannot be ordered to comply with testing protocols simply because science has not yet caught up to provide those devices.<sup>234</sup> From a child-centered viewpoint in family law cases, availability of testing for marijuana intoxication should be considered in the broader legalization discussion.

C. *No Clear Guidelines Exist for Judges to Follow*

One author argues for adopting “an objective checklist of questions” to assist judges in making decisions in cases involving parental marijuana use.<sup>235</sup> She suggests the following questions be answered: whether the parent is an experienced user of the drug, how the drug is ingested, where and when is it used, how it is stored, and the child’s age.<sup>236</sup> Answering these questions should, in theory, aid the judge in allocating parental rights and duties and awarding an appropriate possession schedule.<sup>237</sup> This argument also has merit. Because each case presents different facts, judges have broad discretion to award conservatorship and possession of children, and because of human bias, the results of the same family law case may vary greatly depending on the particular judge assigned to hear the case.<sup>238</sup> Providing judges with a questions checklist or factors to consider in every marijuana case may produce more uniform outcomes.<sup>239</sup> This proposal is sound. However, the factors should be organized by the age of the child. The American Bar Association promulgated the idea of courts making decisions based on the child’s development, and an opinion by one Texas judge suggests it may be a better approach than applying the *Holley* factors

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233. The author recognizes that the criminal law burden of proof is higher than the burden of proof in family law cases but draws this comparison to suggest that availability of testing may be one topic to review when considering broader legalization from a child-centered perspective.

234. See McWaters, *supra* note 205, at 64 (identifying difficulties in testing for THC intoxication).

235. Dana Petersen, Article, *High Society: Washington State’s Recreational Cannabis Law and Its Effects on Child Custody and Visitation Rights*, 13 SEATTLE J. SOC. JUST. 973, 975 (2015).

236. *Id.* at 975.

237. *Id.* at 1012.

238. Kwak, *supra* note 61, at 138–39.

239. See Petersen, *supra* note 235, at 985 (arguing court decisions may be inconsistent without a standard question checklist).

to arrive at the child's best interest in some cases.<sup>240</sup> This recommendation applies the “developmental approach”<sup>241</sup> concept to marijuana use in child custody cases.

As published by the ABA, the National Family Resiliency Center (NFRC) identified six stages of children's lives: infancy, toddler-preschooler, early elementary school, older elementary school, middle school, and adolescent/high school.<sup>242</sup> These stages help formulate factors for a court's consideration because children of different ages have different needs and pose different hurdles.<sup>243</sup> This Comment combines several of the stages to create three categories. Each category lists several considerations for judges to evaluate when overseeing marijuana cases involving children of those ages.

Children 0 – 5 (infants, toddlers, and preschoolers): Parents must provide all basic needs and constant supervision for an infant.<sup>244</sup> Harmful substances and medications must be stored in locked cabinets.<sup>245</sup> Parents must protect infants from secondhand smoke and choking hazards.<sup>246</sup> Parents must continue to monitor toddlers closely as they grow and begin climbing, reaching areas higher off the ground and putting things they find along the way in their mouths.<sup>247</sup> Preschool-age children must be cared for in many of the same ways but are developing language skills that allow basic conversations about safety.<sup>248</sup>

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240. Donald Dowd, *Best Interest Using the Holley Factors in Child Custody Cases*, 79 TEX. BAR J. 810, 810 (2016) (explaining the difficulty of applying the *Holley* factors in cases with suitable parents and laying out the key questions per age group identified in the ABA publication).

241. CHILD CUSTODY & ADOPTION PRO BONO PROJECT, A.B.A., A JUDGE'S GUIDE: MAKING CHILD-CENTERED DECISIONS IN CUSTODY CASES 45 (Diane Boyd Rauber ed., 2d ed. 2008) [hereinafter JUDGE'S GUIDE].

242. *Id.* at 50–78.

243. See *Positive Parenting Tips*, CDC, <https://www.cdc.gov/ncbddd/childdevelopment/positive-parenting/> [<https://perma.cc/3PTZ-W6BD>] (asserting “parenting is a process” and giving tips for each stage of development).

244. See JUDGE'S GUIDE, *supra* note 241, at 51 (advocating “twenty-four hour protection” for infants and identifying needs); *Tips for Keeping Children Safe: A Developmental Guide—Young Infants*, *supra* note 171 (describing the needs of infants).

245. *Tips for Keeping Children Safe: A Developmental Guide—Mobile Infants*, *supra* note 171.

246. See *Positive Parenting Tips for Healthy Child Development Infants (0-1 year of age)*, *supra* note 243 (setting forth ways to put safety first).

247. *Tips for Keeping Children Safe: A Developmental Guide—Toddlers*, *supra* note 171; see JUDGE'S GUIDE, *supra* note 241, at 56–57 (advising childproofing is needed).

248. *Tips for Keeping Children Safe: A Developmental Guide—Preschoolers*, *supra* note 171.

Infants and small children do not understand emergencies and cannot extract themselves if one arises.<sup>249</sup> A parent must be cognitively present to care for the child's every need and react if a dangerous or emergency situation arises.<sup>250</sup> They must also be mentally present to advance the child's development by interacting with the child.<sup>251</sup> If a parent ingests cannabis by smoking, the parent should not expose the child to smoke.<sup>252</sup> With any type of marijuana, whether in plant, edible, or liquid form, parents must keep the drug away from the child.<sup>253</sup> Marijuana should be stored out of reach of infants and young children in locked containers on high shelves.<sup>254</sup> Having another responsible adult present who will not be under the influence of drugs or alcohol and who will remain present through the duration of the consuming parent's intoxication may be viewed as alleviating concern about the child's welfare during those times.<sup>255</sup> This Comment proposes judges should be most strict in applying protection for children between the ages of zero and five by limiting or restricting parental use of marijuana while in possession of the child or within the hours prior to possession, when necessary. The checklist of considerations for this age group includes the effect the drug has on the parent, the parent's understanding of how marijuana use may affect the child and plans for managing the effect, the method of ingestion, location of the marijuana, and presence of sober adults in the household.

Children 6 – 13 (elementary and middle school): In this age group, children become more independent, yet they still must be supervised.<sup>256</sup> However, children of this age are attending school<sup>257</sup> and performing tasks

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249. JUDGE'S GUIDE, *supra* note 241, at 51.

250. *Id.*

251. See Clare Huntington, *Early Childhood Development and the Law*, 90 S. CAL. L. REV. 755, 768–69 (2017) (detailing how parents are instrumental in the child's development from infancy; interacting with babies strengthens their language skills and creates emotional stability).

252. See *Positive Parenting Tips for Healthy Child Development Infants (0-1 year of age)*, *supra* note 243 (encouraging parents to keep infants away from secondhand smoke).

253. See generally Brad A. Roberts, *Legalized Cannabis in Colorado Emergency Departments: A Cautionary Review of Negative Health and Safety Effects*, 20 W.J. EMERGENCY MED. 557, 565–566 (2019) (reporting instances of children admitted to the hospital after ingesting cannabis).

254. See *Tips for Keeping Children Safe: A Developmental Guide—Mobile Infants*, *supra* note 171 (urging people to lock toxic products in cabinets).

255. See JUDGE'S GUIDE, *supra* note 241, at 54 (stating one consideration for courts is the number of caretakers for the infant).

256. *Id.* at 60.

257. *Id.* at 59.

like opening refrigerators and cabinets.<sup>258</sup> Children can better understand rules and consequences,<sup>259</sup> so talking with the child about behavior expectations may be more appropriate. Older children in this age group attend other activities and spend more time with friends.<sup>260</sup>

Because school-age children can help themselves to food in pantries and refrigerators, parents storing marijuana in these places should be extra careful to use a locked container.<sup>261</sup> This concern is especially true for edibles.<sup>262</sup> Often, edibles look like candy or snacks that are appealing to children.<sup>263</sup> It may be advisable for parents to consume such products outside the child's presence, so the idea of enticing treats does not tempt the child.<sup>264</sup> Friends of the child may go to the parent's home to spend time with the child, so the marijuana should certainly be safely stored away from the reach of any visitors.<sup>265</sup> Children may be curious about their parent's marijuana use and may ask questions.<sup>266</sup> Depending on the child's age and maturity, the parent may decide to communicate with the child about the dangers and legality of childhood use of marijuana and to set expectations that the child should not touch the parent's marijuana.<sup>267</sup> Finally, and importantly, parents must plan how the child will get to and from school and extracurricular activities.<sup>268</sup> Even if parental marijuana use is legal, when the parent must transport the child during periods of possession, the parent may not be intoxicated at those times because it will still be illegal to drive under the influence.<sup>269</sup> Judges should still be strict in applying protection for children by limiting or restricting parental use of

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258. *Id.* at 59.

259. *See id.* at 60 (“[T]his age group exhibits more self-control and tends to follow through with established rules and consequences.”).

260. *Id.* at 67, 69.

261. *Safe Storage*, COLO. MARIJUANA, <https://www.colorado.gov/pacific/marijuana/safe-storage> [<https://perma.cc/96NY-6LBQ>].

262. Steve P. Calandrillo & Katelyn Fulton, “High” Standards: *The Wave of Marijuana Legalization Sweeping America Ignores the Hidden Risks of Edibles*, 80 OHIO STATE L.J. 201, 243 (2019).

263. *Id.* at 205.

264. Larkin, *supra* note 210, at 332; *see Safe Storage*, *supra* note 261 (advising parents to put the locked container outside of the child's eyesight).

265. JUDGE'S GUIDE, *supra* note 241, at 69; *Safe Storage*, *supra* note 261 (stating the need to securely store cannabis products away from children).

266. JUDGE'S GUIDE, *supra* note 241, at 64.

267. *Id.* at 64.

268. *Id.* at 67.

269. *See, e.g.*, COLO. REV. STAT. ANN. § 42-4-1301(1)(a) (2020) (setting forth the criminal offenses associated with driving while impaired by drugs, which is not permitted even if marijuana is medically prescribed).

marijuana when necessary. In addition to the factors listed for children zero to five years old, the checklist of considerations in this age group includes the type of marijuana used, days and times consumed, the child's maturity and comprehension about marijuana safety, and availability of and plan for transportation of the child.

Children 14 – 18 (adolescent/high school): Older children better understand what is permissible behavior and what is off-limits.<sup>270</sup> However, while grieving (for example, during a divorce) and without supervision, they are more vulnerable to behavior like using drugs and alcohol.<sup>271</sup> Adolescents are more advanced cognitively,<sup>272</sup> so they are more likely to recognize an emergency. Teens are stronger than younger children and more adept at gaining entry to storage containers.<sup>273</sup>

Parents may give teens more autonomy, and they may be better able to understand that discipline will follow if they break the rules, such as going through a parent's personal belongings.<sup>274</sup> Parents can develop a safety plan the children can use in an emergency, such as a house fire or injury, in case the parent is unable to react in time.<sup>275</sup> The plan may include emergency contact phone numbers and addresses, practiced escape routes, the name of a trusted adult friend outside the home who has been briefed and can take the child if needed, a first aid kit, and a ready-to-go bag with necessities for the child.<sup>276</sup> By this age, many children have cell phones<sup>277</sup> and understand when to call 911<sup>278</sup> or leave the house and go to a neighbor for help. Older teens may even have access to a vehicle to use to escape

270. See Judge's Guide, *supra* note 241, at 74 ("They need to be active participants in the discipline process and included in family discussions of rules and limit setting.").

271. *Id.* at 74.

272. *Id.* at 73.

273. See *Safe Storage*, *supra* note 261 ("Safe storage around young children may not stop older children or teens.").

274. JUDGE'S GUIDE, *supra* note 241, at 73.

275. Safety plans are used in a variety of different circumstances. Here, the recommendation is an adaptation that addresses concerns if a parent cannot act in an emergency due to cannabis intoxication.

276. *Safety Planning Requirements*, SAFE CHILDREN COALITION (Jan. 27, 2020), <https://sccfl.org/safechildrencoalition-blog/2017/4/20/safety-planning-requirements-yzttny-7ylsarhw3e> [<https://perma.cc/EKK8-YGKS>].

277. See *Kids Cell Phone Use Survey 2019 – Truth About Kids & Phones*, SELLCELL.COM BLOG (July 15, 2019), <https://www.sellcell.com/blog/kids-cell-phone-use-survey-2019> [<https://perma.cc/9WZA-WMCL>] (asserting sixty-five percent of children own a cell phone before the age thirteen).

278. Adrienne Farr, *How and When to Teach Your Child to Dial 911*, PARENTS (Nov. 10, 2020), <https://www.parents.com/toddlers-preschoolers/safety/when-should-i-teach-my-child-to-call-911> [<https://perma.cc/2PRW-CZYA>].

danger.<sup>279</sup> The manner of storage is still an issue, however, because teens will find it easier to get into the marijuana container.<sup>280</sup> Therefore, parents may need to take additional precautions to prevent children from accessing marijuana.<sup>281</sup> Here, judges may decide to order fewer restrictions on parental marijuana use, if appropriate. In addition to the factors listed for children zero to eleven years old, the checklist of considerations in this age group includes proximity to neighbors, whether the child has a cell phone or a vehicle, and the child's previous interactions with drugs or alcohol.

Prior to legalizing marijuana, Texas could order a study that compiles data from states that have legalized to develop categories of questions based on marijuana-specific information in these (or other) age brackets. The judge can use the questions not only in evaluating testimony during hearings and trials, but also in writing the court's ruling. For example, the judge could explicitly order the parent not to smoke marijuana in the house, to store it in a specific location, or not to purchase cannabis candies, depending on the specific facts before the court. Of course, there is still no one-size-fits-all solution for every child custody case, but a questions checklist based on child development may offer the court some guideposts for evaluating individual cases.<sup>282</sup> Finding age-appropriate techniques for addressing safety concerns would benefit Texas children in family law cases.

## VI. CONCLUSION

Although CBD is legal, Texas parents must be cautious when consuming CBD products. Currently, there is no stringent regulation and, with one exception, the FDA has not approved CBD for medical or over the counter use.<sup>283</sup> The lack of oversight means there may be issues with labeling and packaging, and, more importantly, the precise THC content in the products may be underestimated.<sup>284</sup> In parts of the country, courts have already heard arguments from parents testing positive for THC that say they only

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279. TEX. TRANSP. CODE ANN. § 521.222(a).

280. *Safe Storage*, *supra* note 261.

281. *Id.* (promulgating guidelines from the State of Colorado for safely storing marijuana to protect children).

282. Petersen, *supra* note 235, at 985.

283. *See What You Need to Know*, *supra* note 94 (confirming the FDA's approval of one prescription epilepsy drug).

284. Johns Hopkins Medicine, *supra* note 107.



consumed CBD.<sup>285</sup> These facts suggest the safest course of action is for parents to abstain from CBD use, at a minimum, during a child custody case. Additionally, while CBD may have healing properties, more studies are needed to confirm the presence of any harmful side effects of the drug, including physical and psychological risks, as well as interactions with other medications.<sup>286</sup> The unknown risks of CBD strongly support the recommendation that parents not medicate children with CBD products.

While it seems inevitable Texas will legalize marijuana, there exist child-centered problems in doing so, which are exacerbated if done in haste. Parents should be permitted to partake in state-approved substances. The saying goes that a person must take care of themselves before they can properly care for another. Low-THC cannabis and medical marijuana, therefore, should particularly be protected under the law for those who need it. However, because parents have an obligation to care for and protect their children,<sup>287</sup> the State of Texas must ensure that they do so. If the child's safety is at risk, the court should assist in enforcing that obligation, even if it must place reasonable restrictions on a parent's otherwise legal rights.<sup>288</sup> Therefore, if medical marijuana is legalized, Texas should adopt a statute that provides a parent cannot be discriminated against in a child custody case due to medical marijuana use, except when that use causes behavior that presents an unreasonable danger to the child, proven by a preponderance of the evidence.

From a child-centered perspective, we cannot treat marijuana like alcohol in the child custody context because there is no proven method of testing for intoxication.<sup>289</sup> Ideally, Texas should wait until more scientifically proven testing is developed—and readily available to courts and parents—to prove then-existing marijuana intoxication. Until then, family law courts will not have the tool of testing at their disposal when the court believes the child needs protection. At a minimum, availability of marijuana intoxication testing is one factor to consider in the context of broader legalization.

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285. See *In re L.G.*, No. 19-0497, 2020 WL 598275, at 5 n.3 (W. Va. Feb. 7, 2020) (discussing testimony at trial); see also *In re Kash F.*, No. E2019-02123-COA-R3-PT, 2020 WL 5269228, at 2 n.3 (Tenn. Ct. App. Sept. 4, 2020) (relating the allegation that the presence of THC on drug test was due to CBD oil).

286. Campbell et al., *supra* note 142, at 178–182.

287. TEX. FAM. CODE ANN. § 153.074(1).

288. See *id.* § 153.072 (permitting the court to limit a parent's rights and duties); *Id.* § 153.193 (stating when the court may order less than standard possession).

289. McWaters, *supra* note 205, at 62, 64.

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Texas could adopt a questions checklist for judges to consider at the developmental stages of a child's life. The questions checklist would aim to address factors most impactful to the child involved in the lawsuit, and that option may provide judges a tool to utilize instead of or in addition to testing.

The State of Texas must ensure it has considered the problems surrounding legal marijuana in child custody cases prior to joining the states who have already legalized it. If a parent's marijuana use poses an unreasonable danger to a child's safety, the courts should be permitted to consider that use in child custody cases and should have the means to tailor conservatorship and possession as needed. Texas should not rush to legalize marijuana but should spend the time necessary to evaluate potential dangers and use data from its neighbors to protect those who may not be able to protect themselves. In doing so, it would be evaluating the child-centered considerations in Texas family law matters.

APPENDIX A<sup>290</sup>

## BREAKDOWN OF WHAT IS PERMITTED IN EACH U.S. STATE

	Medical Marijuana	Recreational Marijuana	CBD/ Hemp Products Only	Non- Discrim. Clause
Alabama			X	
Alaska	X	X		
Arizona	X	X		X <sup>291</sup>
Arkansas	X			X <sup>292</sup>
California	X	X		X <sup>293</sup>
Colorado	X	X		
Connecticut	X			
Delaware	X			X <sup>294</sup>
District of Columbia	X	X		
Florida	X			
Georgia			X	

290. Data in this chart is as of approximately December 31, 2020. Data in the first three columns is found in the following source: *See State Medical Marijuana Laws*, *supra* note 2 (providing state-by-state data as of Nov. 10, 2020, reflected in columns 1, 2, and 3). Data in the final column was compiled in 2020 from each state's laws.

291. ARIZ. REV. STAT. ANN. § 36-2813(D) (2020), <https://www.azleg.gov/ars/36/02813.htm> [<https://perma.cc/5V69-ZER4>].

292. ARK. CONST. amend. 98, § 3(g), <https://codes.findlaw.com/ar/arkansas-constitution-of-1874/ar-const-amend-98-sect-3.html> [<https://perma.cc/J998-5QYS>].

293. *See* CAL. HEALTH & SAFETY CODE § 11362.84 (2020) (stating parental rights cannot be restricted based on medical cannabis use alone).

294. DEL. CODE ANN. tit. 16, § 4905A(b) (2020).

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	Medical Marijuana	Recreational Marijuana	CBD/ Hemp Products Only	Non- Discrim. Clause
Hawaii	X			X <sup>295</sup>
Illinois	X	X		X <sup>296</sup>
Indiana			X	
Iowa			X	
Kentucky			X	
Louisiana	X			
Maine	X	X		X <sup>297</sup>
Maryland	X			
Massachusetts	X	X		X <sup>298</sup>
Michigan	X	X		X <sup>299</sup>
Minnesota	X			X <sup>300</sup>
Mississippi	X			
Missouri	X			
Montana	X	X		

295. HAW. REV. STAT. § 329-125.5(c) (2018), [http://www.capitol.hawaii.gov/hrscurrent/Vol06\\_Ch0321-0344/HRS0329/HRS\\_0329-0125\\_0005.htm](http://www.capitol.hawaii.gov/hrscurrent/Vol06_Ch0321-0344/HRS0329/HRS_0329-0125_0005.htm) [https://perma.cc/5YVS-G4CW].

296. 410 ILL. COMP. STAT. 705/10-30 (2019), <https://www.ilga.gov/legislation/ilcs/ilcs4.asp?DocName=041007050HArt%2E+10&ActID=3992&ChapterID=35&SeqStart=2000000&SeqEnd=3000000&Print=True> [https://perma.cc/5UGW-UQD6]; 410 ILL. COMP. STAT. 130/40(b) (2019), <https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=3503&ChapterID=35&Print=True> [https://perma.cc/5A22-5W4Z].

297. ME. REV. STAT. ANN. tit. 22, § 2430-C(4) (2020).

298. MASS. GEN. LAWS ch. 94G, § 7(d) (2019), <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXV/Chapter94G/Section7> [https://perma.cc/JD73-GU2C].

299. MICH. COMP. LAWS § 333.26424(4)(d) (2020); MICH. COMP. LAWS § 333.27955(5)(3) (2020).

300. MINN. STAT. § 152.32(2)(a)(1) (2020).

	Medical Marijuana	Recreational Marijuana	CBD/ Hemp Products Only	Non- Discrim. Clause
Nevada	X	X		
New Hampshire	X			X <sup>301</sup>
New Jersey	X	X		
New Mexico	X			X <sup>302</sup>
New York	X			
North Carolina			X	
North Dakota	X			
Ohio	X			X <sup>303</sup>
Oklahoma	X			
Oregon	X	X		
Pennsylvania	X			X <sup>304</sup>
Rhode Island	X			
South Carolina			X	
South Dakota	X	X		X <sup>305</sup>

301. N.H. REV. STAT. ANN. § 126-X:2(VI) (2020), <http://www.gencourt.state.nh.us/rsa/html/X/126-X/126-X-2.htm> [<https://perma.cc/9MKY-S4J6>].

302. N.M. STAT. ANN. § 32A-3A-15(a)-(b) (2020).

303. OHIO REV. CODE ANN. § 3796.24(B) (2020), <https://codes.ohio.gov/orc/3796.24v1> [<https://perma.cc/VB2D-ELEA>].

304. 35 PA. CONS. STAT. § 10231.2103(c) (2018), <https://codes.findlaw.com/pa/title-35-ps-health-and-safety/pa-st-sect-35-10231-2103.html> [<https://perma.cc/XNR4-PNUE>].

305. S.D. CODIFIED LAWS § 34-20G-21 (2021), <https://sdlegislature.gov/api/Statutes/2078858.html?all=true> [<https://perma.cc/Z3ZZ-ZJMU>].

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COMMENT

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	Medical Marijuana	Recreational Marijuana	CBD/ Hemp Products Only	Non- Discrim. Clause
Tennessee			X	
Texas			X	
Utah	X			
Vermont	X	X		
Virginia	X			
Washington	X	X		X <sup>306</sup>
West Virginia	X			
Wisconsin			X	
Wyoming			X	

States that do not permit marijuana in any form: Idaho, Nebraska, Kansas.

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306. *See* WASH. REV. CODE § 69.51A.120 (2020)  
<https://app.leg.wa.gov/RCW/default.aspx?cite=69.51A.120> [<https://perma.cc/5S3A-MZSN>]  
(restricting the ability to limit parenting time due to medical cannabis use).