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THE IMPACT OF PARENTAL MARIJUANA USE IN DEPARTMENT OF SOCIAL SERVICES CHILD ABUSE AND NEGLECT CASES

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I. INTRODUCTION

Marijuana is the most widely used illicit drug in the United States.[1] While the stereotypes of passive hippies smoking marijuana and rebellious teenagers using marijuana still linger decades after Woodstock and *Fast Times at Ridgemont High*, marijuana use among middle-aged Americans and even baby boomers has surpassed teen use.[2] The legalization of marijuana in some states, beginning more than two decades ago, has contributed to the use of marijuana by 55 million adults annually.[3] Sixteen million of those marijuana users have children under the age of eighteen.[4] These cultural and legal shifts concerning marijuana in the United States have outgrown the traditional approaches that courts use to analyze the intersection of parental marijuana and child neglect, leading to widely inconsistent outcomes.

In May of 2011, a concerned third party asked the California Department of Child and Family Services (DCFS) to visit the residence of nine-month-old Drake because his parents allegedly used marijuana.[5] When DCFS questioned Drake's father, Paul, about his marijuana use, he provided proof that he had received a physician's recommendation to use medical marijuana, as allowed under state law.[6] Paul clarified that he smoked marijuana only in a detached garage without Drake present and that he locked his marijuana in a toolbox

1. Close to 35 million American adults are "regular users," people who use marijuana at least once or twice a month. Christopher Ingraham, *11 Charts That Show Marijuana Has Truly Gone Mainstream*, WASH. POST (Apr. 19, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/04/19/11-charts-that-show-marijuana-has-truly-gone-mainstream/ [https://perma.cc/B9B4-E3HL].

2. *See* Christopher Ingraham, *Marijuana Use Is Now As Common Among Baby Boomers As It Is Among Teens, Federal Data Shows*, WASH. POST (Sept. 20, 2018), https://www.washingtonpost.com/business/2018/09/20/marijuana-use-is-now-common-among-baby-boomers-it-is-among-teens-federal-data-show/ [https://perma.cc/3XT7-5C4D].

3. *See* Ingraham, *supra* note 1.

4. *Id.*

5. *See In re* Drake M., 149 Cal. Rptr. 3d 875, 878–79 (Ct. App. 2012). Courts referencing this case have distinguished it from their sets of facts.

6. *See id.* at 880.

out of Drake's reach.[7] Paul also stated that, although he smoked marijuana most days of the week, a minimum of four hours passed between when he smoked and when he cared for Drake.[8] DCFS argued that with only four hours between smoking marijuana and caring for Drake, it was "ridiculous" to assume anything less than Paul was under the influence when caring for his child.[9] Although the trial court agreed with DCFS and ordered Paul to submit to random drug tests, attend parenting courses, and participate in drug counseling sessions, the court allowed Drake to remain in his father's care under DCFS supervision.[10]

Appealing the court's order, Paul argued there was insufficient evidence to support a finding that his marijuana use caused Drake to suffer or be at a substantial risk of suffering harm.[11] Finding in favor of Paul, the appellate court stated that "both DCFS and the trial court apparently confused the meanings of the terms 'substance use' and 'substance abuse.'"[12] It clarified that evidence must show a parent currently abuses a substance, not merely uses it, for the court to find dependency jurisdiction.[13] It further elaborated that a finding of substance abuse requires sufficient evidence to determine either that a medical professional diagnosed the parent as currently having a substance abuse problem or that the parent's behavior satisfies the American Psychiatric Association's definition of substance abuse, which requires "clinically significant impairment or distress, as manifested by . . . a failure to fulfill major role obligations[,] . . . use in situations where it is physically hazardous[,] . . . recurrent substance-related legal problems [or] . . . social or interpersonal problems caused [by] . . . the substance."[14] Not only did the court find no evidence that Paul had a substance abuse problem that affected his ability to parent, but it also held that medical marijuana use alone, without any evidence that "such usage has caused serious physical harm or illness or places a child at substantial risk of incurring serious physical harm[,]" did not constitute child abuse or neglect.[15] Failing to find a nexus between Paul's marijuana use and any potential harm to Drake, the court acknowledged that Paul held steady employment, was capable of providing for his son's basic

7. *Id.* at 881. If Paul went to smoke marijuana while Drake was home, Drake was watched by his mother, grandmother, or adult half-sister. *See id.* at 879.

8. *See id.* at 881.

9. *See id.*

10. *See id.* at 881–82.

11. *Id.* at 882.

12. *Id.* at 883–84, 888–89.

13. *See id.* at 884 (first quoting *In re* Alexis E., 90 Cal. Rptr. 3d 44, 56 (Ct. App. 2009); then quoting *In re* Destiny S., 148 Cal. Rptr. 3d 800, 803 (Ct. App. 2012)). Dependency jurisdiction is the family court's jurisdiction over child abuse and neglect cases. *See id.*

14. *Id.*

15. *Id.* at 885.

needs, and amply cared for Drake.[16] Thus, the appellate court reversed the trial court's judgment.[17]

In another case addressing similar legal questions, an Alabama court reached a different result. In that case, the Henry County Department of Human Resources (DHR) investigated a report claiming that a parent had neglected her nearly three-month-old child, N.K.[18] The report alleged that the mother, A.K., lacked basic parenting knowledge, failed to follow medical recommendations for N.K., and regularly consumed alcohol and marijuana while partying.[19] Soon after the investigation, DHR placed N.K. in foster care and developed an individualized service plan (ISP) for the mother.[20] In order to regain custody of N.K., the mother needed to complete nine goals outlined in the ISP, which included attending counseling, obtaining employment, securing safe housing, and ceasing criminal activity and drug use.[21]

Over a year after DHR placed N.K. in foster care, it petitioned the court to terminate A.K.'s parental rights after reasonable efforts had failed to rehabilitate her.[22] At the subsequent hearing, DHR presented evidence that A.K. failed to consistently attend scheduled visits with her child, neglected to enroll in parenting classes, was unemployed, and lacked safe housing.[23] Furthermore, she incurred four additional arrests, failed multiple drug tests, and admitted to smoking marijuana.[24] Following DHR's conclusion that A.K. could not provide for her child's basic needs and lacked parenting skills, the trial court terminated her parental rights.[25]

On appeal, A.K. argued that DHR did not present clear and convincing evidence sufficient to support the trial court's decision because N.K. was never in danger and because the ISP goals were impossible for her to fulfill.[26] Affirming the termination of parental rights (TPR), the appellate court found that the mother lacked several critical parenting qualities and failed to meet any goals of the ISP.[27] Despite this, the court specified that the "most compelling evidence" supporting the juvenile court's decision was "evidence of the mother's drug use."[28] It further stated that the mother continued to use

16. *Id.* at 886, 888–89.
17. *Id.* at 889.
18. *See* A.K. v. Henry Cty. Dep't of Human Res., 84 So. 3d 68, 68–69 (Ala. Civ. App. 2011).
19. *Id.* at 71.
20. *See id.*
21. *Id.*
22. *See id.*
23. *Id.* at 72–73.
24. *Id.* at 74.
25. *See id.* at 69.
26. *See id.*
27 *Id.* at 76.
28. *Id.*

illegal marijuana and had failed four out of six drug tests, which the court "viewed adversely against her in a bid to regain custody of her child."[29]

The previous two cases illustrate the diverse legal status of marijuana and the wide-ranging approaches courts take when evaluating its impact. Although South Carolina remains on the protective end of the spectrum, the recent legalization of hemp, including the cannabidiol (CBD) oil derived from it,[30] and a pending medical marijuana bill,[31] currently in the state senate, demonstrate that the attitudes toward and legal consequences of marijuana are changing in the Palmetto State. In order for South Carolina to be proactive, rather than reactive, regarding parental marijuana use, it is important for government officials to be aware of the issues and potential policies that accompany the fast-paced growth of marijuana legalization.[32] The uncertainty surrounding when marijuana use is evidence of parental unfitness in state-initiated child protection cases requires clarification. This Note proposes clarifying what constitutes drug abuse or drug use, suggests a list of factors for family court judges to consider when assessing the fitness of a parent who uses marijuana, and recommends a statute specifying how to evaluate a parent's marijuana use when determining child abuse or neglect.

Part II of this Note outlines the constitutional right to parent one's children and its limitations. Part III discusses federal marijuana laws, the current standing of state marijuana laws, and the conflicts between the two. Part IV examines the effects of parental marijuana use on both the parent and the child and the difficulty of studying those effects. Part V examines the current South Carolina statutes affecting child neglect cases and how courts have applied those statutes to parental marijuana usage in such cases. Part VI offers recommendations both for examining the effects of marijuana use on a parent's fitness and for protecting the best interests of the child.

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29. *Id.*

30. *See* S. 839, 120th Gen. Assemb., Reg. Sess. (S.C. 2014); Peter Grinspoon, *Cannabidiol (CBD)–What We Know and What We Don't*, HARV. HEALTH PUBL'G: HARV. HEALTH BLOG (Aug. 24, 2018, 6:30 AM), https://www.health.harvard.edu/blog/cannabidiol-cbd-what-we-know-and-what-we-dont-2018082414476 [https://perma.cc/7S4C-L7UU].

31. *See generally Conservative South Carolina Is Ready to Make Money in the Marijuana Business*, GREENVILLE NEWS (Apr. 4, 2019), https://www.greenvilleonline.com/story/news/2019/04/04/conservative-sc-ready-make-money-marijuana-business/3366152002/ [https://perma.cc/23DA-G2TN].

32. *See* Amy Kawata, *'We're Growing Exponentially:' S.C. Hemp Industry Booming; Local Farmer Says It's Just the Beginning*, WMBF NEWS (June 27, 2019, 9:08 AM), https://www.wmbfnews.com/2019/06/27/were-growing-exponentially-sc-hemp-industry-booming-local-farmer-says-its-just-beginning/ [https://perma.cc/FFJ3-5DZF] ("In just its second year growing hemp, S.C. farmers are projecting a 1,200 percent increase in acres . . . .").

II. THE CONSTITUTIONAL RIGHT TO PARENT AND ITS LIMITATIONS

For decades, the U.S. Supreme Court has recognized that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[33] To safeguard family autonomy from government infringement, the Court has gradually recognized the rights of parents under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[34] The commonly referenced constitutional "right to parent" encompasses the fundamental right of parents to control the upbringing of their children and the right of parents to the custody and care of their children.[35]

A. The Right of Parents to Control the Upbringing of Their Children

In 1923, the Supreme Court first recognized that parents have constitutional rights to parent their children.[36] In *Meyer v. Nebraska*, Meyer, a teacher, was convicted of violating a Nebraska statute that made it illegal to teach foreign languages to elementary school students.[37] On Meyer's appeal, the Court found that the state statute unreasonably infringed on the liberty that the Fourteenth Amendment guaranteed to parents because it limited parents' decisions regarding the education of their children.[38] The Court asserted that liberty not only includes "freedom from bodily restraint but also the right of the individual to contract, . . . to marry, establish a home and bring up children . . . ."[39] Focusing on the established doctrine that limits states from invading parental rights, the Court stated that "liberty may not be interfered with, under the guise of protecting the public interest," by arbitrary concerns without reasonable relation to a legitimate state interest.[40] Applying these principles, the Supreme Court acknowledged, for the first time, the fundamental right of parents to control their children's education.[41] Ultimately, the Court reversed Meyer's conviction, holding that Nebraska's

33. Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977).

34. *See* Stanley v. Illinois, 405 U.S. 645, 650 (1972).

35. *See id.* at 648–50; Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534–35 (1925).

36. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (stating that the Due Process Clause of the Fourteenth Amendment denotes the right to bring up children).

37. *See id.* at 396–97.

38. *See id.* at 401, 403.

39. *Id.* at 399 (first citing Slaughter-House Cases, 83 U.S. (16 Wall) 36 (1872); then citing Butchers' Union v. Crescent Live-Stock Landing & Slaughter-House Co., 111 U.S. 746 (1884); then citing Yick Wo v. Hopkins, 118 U.S. 356 (1886); then citing Minnesota v. Barber, 136 U.S. 313 (1890); and then citing Allgeyer v. Louisiana, 165 U.S. 578 (1897)).

40. *See id.* at 399–400, 403.

41. *See id.* at 400.

goal of having a population fluent in English was an insufficient state interest to support the statute's infringement on the rights of parents.[42]

Two years after deciding *Meyer*, the Supreme Court, again examining the right of parents to make educational decisions for their children, expanded the liberty of parents to raise their children when it decided *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*.[43] Two private schools, the Society of Sisters and Hill Military Academy, sought injunctive relief to prevent the state of Oregon from enforcing the Compulsory Education Act, which required parents to send their children to public school.[44] In hopes of protecting their own interests, the two schools derivatively asserted the right of parents to choose which school their children should attend.[45] The Court found that "[u]nder the doctrine of *Meyer v. Nebraska*," the Oregon statute interfered with the "liberty of parents and guardians to direct the upbringing and education of [their] children."[46]

B. The Right of Parents to the Custody and Care of Their Children

In *Stanley v. Illinois*, the Supreme Court held that the Constitution not only protects the right of parents to the custody of their children but also requires proof that parents are unfit before they lose custody of their children because there is a presumption of parental fitness.[47] Joan and Peter Stanley lived together for eighteen years and had three children together before Joan died.[48] Upon her death, Illinois instituted a dependency proceeding because Peter Stanley was now an unwed father.[49] Specifically, the state was able to circumvent a neglect proceeding because, under state law, unwed fathers had the presumption of being unfit to raise their children.[50] After confirmation of Stanley's unwed status, the court declared his children wards of the state and placed them with court-appointed guardians.[51] Stanley appealed the court's decision, arguing that the state statute violated his equal protection rights because he was never shown to be an unfit parent.[52] The Court began its

42. *See id.* at 398, 403.
43. *See* Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534–35 (1925).
44. *See id.* at 529–33.
45. *See id.* at 532.
46. *Id.* at 534–35.
47. *See* Stanley v. Illinois, 405 U.S. 645, 658 (1972).
48. *See id.* at 646.
49. *See id.*
50. *See id.*
51. *Id.*
52. *Id.* Unlike married parents, divorced parents, and unwed mothers, under Illinois law, only unwed fathers were assumed unfit and were not entitled to a hearing determining their fitness as a parent. *See id.* at 647.

analysis by recognizing the natural "interest of a parent in the companionship, care, custody, and management of his or her children."[53] Contrary to the statute's presumption that unwed fathers are unfit, the state produced no evidence that all unmarried fathers were unfit to parent; some, such as Stanley, are more than capable.[54] Reversing the Illinois ruling, the Supreme Court found that denying parental fitness hearings to unwed fathers violated the Equal Protection Clause.[55] Most notably, the Court stated that under the Due Process Clause, "parents are constitutionally entitled to a hearing of their fitness before their children are removed from their custody."[56]

C. State Limitations on the Right to Parent

As illustrated in *Stanley*, parents' fundamental right to the custody of their children is not absolute, and the court can invade that right when the state proves a parent unfit.[57] Although *Stanley* does not specify the standard of proof required in abuse and neglect cases, it is well settled that the Due Process Clause requires the state to prove parental unfitness by clear and convincing evidence in TPR cases.[58] The Court first articulated the requisite standard of proof in *Santosky v. Kramer*, where the Department of Social Services (DSS) had initiated a neglect proceeding against the Santoskys and removed their children from the home.[59] Ultimately, DSS petitioned the family court to terminate the Santoskys' parental rights, alleging that under New York law, they neglected their children.[60] The Santoskys challenged the constitutionality of the statute because it required proof by only a "fair preponderance of the evidence" that a child was permanently neglected to terminate the rights of parents.[61] Rejecting the parents' constitutional challenge, the family court found that it was in the three children's best interests to terminate the parents' custody.[62]

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53. *Id.* at 651. The Court also found that "Stanley's interest in retaining custody of his children is cognizable and substantial." *Id.* at 652.

54. *See id.* at 654–55.

55. *See id.* at 658–59.

56. *Id.* at 658.

57. *See id.*

58. *See* Santosky v. Kramer, 455 U.S. 745, 747–48, 769–70 (1982) (holding that the provisions of the New York Family Court Act used as the basis for removal and TPR violate the Due Process Clause of the Fourteenth Amendment and also holding that states are still able to increase the standard of proof necessary to beyond a reasonable doubt). *See generally Stanley*, 405 U.S. 645 (omitting any discussion of the standard of proof).

59. *See Santosky*, 455 U.S. at 751–52.

60. *Id.*

61. *See id.* at 747, 751.

62. *See id.* at 751–52.

On appeal, the U. S. Supreme Court recognized that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their children does not evaporate simply because they have not been model parents or have lost temporary custody of their children to the state."[63] Articulating the importance of safeguarding this liberty interest, the Court recognized parents' right to a hearing before terminating their parental rights and stated that "persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs."[64] Acknowledging that TPR not only infringed on but also completely extinguished the right to parent, the Court balanced three factors: private interests, the risk of error, and the government's interest.[65]

The Court found that the combination of a parent's significant interest and the substantial risk of an erroneous decision outweighed any alleged government interest, and thus, applying the preponderance of the evidence standard in TPR cases violates due process.[66] The balancing test only becomes more lopsided when considering that the government's substantial resources "dwarf[] the parents' ability" to defend their rights, increasing the risk of error in TPR cases.[67] Correspondingly, the Court held that the state is required to support its allegations of parental unfitness by clear and convincing evidence.[68] Significantly, the Court noted, "[U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."[69] Consequently, only once this mutual interest is severed by clear and convincing evidence of parental unfitness can the court consider the divergent and independent best interests of the child.[70]

In addition to the government's interference with parents' custody of their children, the inherent right of parents to direct the upbringing of their children is also subject to limitations.[71] In *Prince v. Massachusetts*, Sarah Prince was charged with violating several Massachusetts labor laws after she allowed nine-year-old Betty, of whom Prince had legal custody, to sell religious

63. *Id.* at 753. The Supreme Court also stated that "[t]ermination denies the natural parents physical custody, as well as the rights ever to visit, communicate with, or regain custody of the child." *Id.* at 749.

64. *Id.* at 753.

65. *See id.* at 754 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

66. *See id.* at 758.

67. *See id.* at 763–64.

68. *See id.* at 747–48.

69. *Id.* at 760.

70. *See id.*

71. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

material at an intersection.[72] In her defense, Prince asserted that the Fourteenth Amendment allowed her to parent Betty however she pleased; therefore, she argued, the state's interference infringed on her constitutional rights.[73] In its analysis, the Court recognized that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents."[74] However, the Court noted that "the family itself is not beyond regulation in the public interest" when the government is "[a]cting to guard the general interest in youth's well being."[75] The Court listed instances where the state may restrict a parent's control—requiring school attendance and prohibiting the child's labor—in the interest of a child's health and welfare.[76] Clarifying that "[t]he state's authority over children's activities is broader than over like actions of adults," the Supreme Court affirmed Prince's conviction.[77]

D. The Uncertain Right of Parents to Counsel

After cementing the right to parent, the Supreme Court, when considering whether due process entitles parents at risk of TPR state-appointed counsel, struck a blow to parents' constitutional protections by holding that they are not guaranteed the assistance of counsel.[78] In *Lassiter v. Department of Social Services of Durham County*, the North Carolina Court of Appeals upheld the termination of a mother's parental rights and rejected the argument that the state's failure to provide her counsel violated her constitutional rights.[79] The Supreme Court noted that a defendant is traditionally entitled to appointed counsel when his or her physical liberty is at stake.[80] To evaluate what due process requires, the Court balanced the same three factors it followed in *Santosky*.[81] The Court began by once again recognizing the parent's right to "the companionship, care, custody and management of his or her children."[82] However, this right must be balanced against the State's "urgent interest in

72. *Id.* at 159–62. The trial court found that Sarah Prince was guilty of providing an infant with magazines knowing that she intended to unlawfully sell them on the street. *See id.* at 159–60.

73. *See id.* at 164.

74. *Id.* at 166.

75. *Id.*

76. *Id.*

77. *See id.* at 168, 171.

78. Lassiter v. Dep't of Soc. Servs. of Durham Cty., 452 U.S. 18, 31 (1981).

79. *See id.* at 24 (quoting *In re* Lassiter, 259 S.E.2d 336, 337 (N.C. App. 1979)).

80. *Id.* at 25.

81. *See id.* at 27 (examining the factors: the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

82. *Lassiter*, 452 U.S. at 27 (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)).

the welfare of the child."[83] Articulating the premise of the adversarial system, achieving "accurate and just results" through "equal contest of opposed interests," the Court admitted that the parent and the State—as a party acting on the child's behalf—may better ensure the child's welfare when both parties are represented by counsel.[84]

Notwithstanding the benefits of the adversarial system, the State argued that sufficient procedural safeguards were in place to limit the risk of an erroneous TPR.[85] Regardless of the judicial precautions in TPR cases, "courts have generally held that the State must appoint counsel for indigent parents at termination proceedings."[86] The Supreme Court concluded that the Due Process Clause of the Fourteenth Amendment does not require the appointment of counsel in every case where a parent is at risk of TPR, and it left the decision of whether due process required the appointment of counsel in TPR proceedings to the trial court because the variations of facts and circumstances are virtually infinite.[87] However, the Court stated that a "wise public policy . . . may require that higher standards be adopted than those minimally tolerable under the Constitution" and that "[i]nformed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings but also in

83. *Id.*

84. *Id.* at 28.

85. *See id.* at 28–29. The alleged procedural safeguards included:

> A petition to terminate parental rights may be filed only by a parent seeking the termination of the other parent's rights, by a county department of social services or licensed child-placing agency with custody of the child, or by a person with whom the child has lived continuously for the two years preceding the petition. § 7A–289.24. A petition must describe facts sufficient to warrant a finding that one of the grounds for termination exists, § 7A–289.25(6), and the parent must be notified of the petition and given 30 days in which to file a written answer to it, § 7A–289.27. If that answer denies a material allegation, the court must, as has been noted, appoint a lawyer as the child's guardian *ad litem* and must conduct a special hearing to resolve the issues raised by the petition and the answer. § 7A–289.29. If the parent files no answer, "the court shall issue an order terminating all parental and custodial rights . . .; provided the court shall order a hearing on the petition and may examine the petitioner or others on the facts alleged in the petition." § 7A–289.28. Findings of fact are made by a court sitting without a jury and must "be based on clear, cogent, and convincing evidence." § 7A–289.30. Any party may appeal who gives notice of appeal within 10 days after the hearing. § 7A–289.34.

Id.

86. *Id.* at 30.

87. *See id.* at 31–32.

dependency and neglect proceedings as well."[88] Despite the lack of counsel in *Lassiter*, the Supreme Court affirmed the mother's TPR.[89]

The Court's decision demonstrates the vital distinction between constitutional questions and matters of sound public policy.[90] Although it held that the Constitution does not require state-appointed counsel in all TPR cases, the Court did note that a majority of states, nevertheless, statutorily guarantee counsel, highlighting the shift in public policy.[91] Forty-five states, including South Carolina, guarantee the right to counsel in TPR cases.[92] Furthermore, in South Carolina and thirty-nine other states, parents have a statutory right to counsel in state-initiated abuse and neglect proceedings.[93] The overwhelming support for increasing parents' due process protections should inform policy development relating to parental marijuana use.

E. Parental Unfitness: When Can the State Get Involved?

Although the Supreme Court in *Stanley* held that courts must find parents to be unfit before they can lose custody of their children, it declined to articulate how to assess fitness.[94] However, in cases involving alleged parental drug use, courts presume a parent is fit unless there is both sufficient evidence of a parent's drug use and sufficient evidence that the child was harmed or at risk of harm because of that drug use.[95] Notably, the legality of a parent's drug use is generally not relevant.[96] This nexus between legal or illegal parental drug use and harm or risk of harm to the child is required for a finding of child abuse or neglect.[97]

In *Nassau County Department of Social Services ex rel. Dante M. v. Denise J.*, the New York Court of Appeals held that the presence of a controlled substance in a newborn child's toxicology report without evidence that the child was impaired or was in imminent danger of being impaired

88. *Id.* at 33–34.

89. *Id.* at 34.

90. *Id.* at 31–34 (describing in dicta that public policy, as compared to the Constitution, may impose on states higher standards to ensure fairness in judicial proceedings).

91. *Id.* at 33–34.

92. VIVEK SANKARAN & JOHN POLLOCK, NAT'L COALITION FOR CIV. RIGHT TO COUNS. A NATIONAL SURVEY ON A PARENT'S RIGHT TO COUNSEL IN STATE-INITIATED DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS CASES 1, 29–30, http://civilrighttocounsel.org/uploaded_files/219/Table_of_parents__RTC_in_dependency_and_TPR_cases_FINAL.pdf [https://perma.cc/NX45-ZR5H].

93. *Id.* at 1, 29.

94. *See* Stanley v. Illinois, 405 U.S. 645 (1972).

95. *See id.* at 658; Nassau Cty. Dep't of Soc. Servs. *ex rel.* Dante M. v. Denise J., 661 N.E.2d 138 (N.Y. 1995).

96. *See infra* pp. 877–878.

97. *Nassau Cty.*, 661 N.E.2d at 138.

failed to establish the nexus required to constitute abuse or neglect.[98] The Nassau County DSS brought a child protective proceeding against Denise, the mother of Dante and Dantia, after toxicology reports revealed that Dante tested positive for cocaine and that Denise tested positive for cocaine and opiates.[99] The family court found that Dante's positive drug test, without any other evidence, was sufficient proof of neglect.[100]

On appeal, the court declared that a child's positive toxicology for a controlled substance, standing alone, does not constitute neglect because it "fails to make the necessary causative connection to all the surrounding circumstances that may or may not produce impairment or imminent risk of impairment in the newborn child."[101] Noting that the family court found no connection between Dante testing positive for cocaine and any physical impairment, the appellate court relied on other evidence demonstrating that the "children were placed in imminent danger of impairment by appellant's drug use."[102] The court concluded that Denise's use of cocaine during her pregnancy, which caused Dante to be treated by a neonatal intensive care unit at a high-risk clinic, "in conjunction with her prior, demonstrated inability to adequately care for her children while misusing drugs" was sufficient evidence to conclude that Dante was in imminent danger of impairment.[103] The appellate court held that this conduct, in addition to an exhibited lack of judgment, provided sufficient evidence for the family court to find that Denise neglected both Dante and Dantia.[104]

Similarly, title 63 of the South Carolina Code of Laws (South Carolina Children's Code) statutorily incorporates a nexus requirement in the definition of child abuse and neglect.[105] Specifically, child abuse or neglect occurs when a parent or guardian "inflicts or allows to be inflicted upon the child physical or mental injury or engages in acts of omission which present a substantial risk of physical or mental injury to a child."[106] This statute clearly requires a nexus between a parent's "acts or omissions," such as a parent's use of marijuana, and "injury" or "substantial risk of . . . injury" to a child.[107] Thus, a parent's marijuana use alone is not sufficient to establish child abuse or neglect.

98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *See id.*
103. *Id.*
104. *Id.*
105. *See* S.C. CODE ANN. § 63-7-20(6)(a) (Supp. 2016).
106. *Id.*
107. *Id.*

The South Carolina Court of Appeals addressed this nexus requirement in *South Carolina Department of Social Services v. Miles*.[108] Based on Ronald, the father, testing positive for cocaine and marijuana and providing discreditable testimony about his drug use, the family court found that Ronald neglected his son and ordered the removal of the child.[109] The family court also granted DSS custody of the child because it found that placing the child in Ronald's home would expose him to an unreasonable risk of harm.[110] On appeal, Ronald argued there was no evidence of neglect.[111] Agreeing with Ronald, the court of appeals found that DSS failed to present evidence that Ronald "engage[d] in acts or omissions which present[ed] a substantial risk of . . . injury" to his son.[112] However, the court did imply that if Ronald used drugs in his son's presence, that use would likely pose a substantial risk to his son.[113] Absent such evidence of a nexus, the appellate court reversed the finding that Ronald physically neglected his son.[114] Despite its reversal, the court agreed with the family court's determination that Ronald's drug use prevented him from receiving full custody of his child because it would put the child at an unreasonable risk of harm.[115]

III. MARIJUANA LAWS

The rapid pace of marijuana legalization has outpaced the ability of state legislatures to develop comprehensive marijuana policy and has led to conflicting laws within various jurisdictions. Although the federal government continues to stand firm on the illegality of marijuana under federal law, more than half of states have legalized marijuana for recreational or medicinal use.[116] As the 2020 legislative session began, there were twenty bills pending nationwide seeking to legalize recreational marijuana and twelve bills seeking to legalize medical marijuana.[117] With looming changes to state

108. *See* S.C. Dep't of Soc. Servs. v. Miles, No. 2017-000422, 2017 WL 4804666, at *1 (S.C. Ct. App. Aug. 31, 2017).

109. *Id.*

110. *Id.*

111. *Id.* More specifically, the Father argued there was no evidence showing he "harmed" the child as defined by § 63-7-20 of the South Carolina Code, which defines both "child abuse or neglect" and "harm."

112. *Id.* (providing when "'child abuse or neglect' or 'harm' occurs" based on a parent's conduct).

113. *See id.*

114. *See id.*

115. *Id.*

116. *See infra* notes 137, 144, and accompanying text.

117. *See 2020 Marijuana Policy Reform Legislation*, MARIJUANA POL'Y PROJECT, https://www.mpp.org/issues/legislation/key-marijuana-policy-reform/ [https://perma.cc/72UQ-F9HZ].

law regarding marijuana, it is important for policymakers to consider how the potential shifts in marijuana's legality will change how courts view parental marijuana use in child abuse and neglect cases before any statutory changes occur. National trends in marijuana enforcement and common state statutes can serve as guideposts when evaluating South Carolina's current approach to parental marijuana use.

A. Federal Laws Prohibiting Marijuana

In 1970, Congress passed the Controlled Substances Act (CSA) pursuant to its power to regulate interstate commerce under the U.S. Constitution.[118] In order to police the distribution of controlled substances, the CSA organized all federally regulated substances into Schedules ranging from I to V.[119] The classification of a substance is based on its "medical use, potential for abuse, and safety or dependence liability."[120] Schedule I drugs "are considered the most dangerous"[121] because there is a "high potential for abuse," "no currently accepted medical use," and "a lack of accepted safety for use of the drug or other substance under medical supervision."[122] The CSA classifies marijuana, along with heroin, as a Schedule I substance, and drugs, such as methamphetamine, morphine, and cocaine, as Schedule II substances.[123] Substances with the smallest potential for abuse, such as cough medicine with codeine, are labeled Schedule V substances.[124] Under authority from the U.S. Attorney General, the Administrator of the Drug Enforcement Administration (DEA) has the power to reschedule or even remove a substance regulated under the CSA.[125] Nonetheless, in the face of accumulating data on the medical benefits of marijuana,[126] it remains a Schedule I controlled substance under federal law.[127]

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118. 21 U.S.C. § 801 (2018).

119. DRUG ENF'T ADMIN. & U.S. DEP'T OF JUSTICE, A DEA RESOURCE GUIDE: DRUGS OF ABUSE 8, 11 (2017) https://www.dea.gov/sites/default/files/drug_of_abuse.pdf [https://perma.cc/H3UE-A7T2].

120. *Id.* at 8.

121. *War on Drugs*, HISTORY (May 31, 2017), https://www.history.com/topics/crime/the-war-on-drugs [https://perma.cc/9C3N-ZAKB].

122. DRUG ENF'T ADMIN. & U.S. DEP'T OF JUSTICE, *supra* note 119, at 9.

123. *Id.*

124. *Id.* at 10. Although the CSA primarily uses the potential for abuse as the primary factor to distinguish between Schedules, this metric is arbitrary and allows significant discretion by the DEA. *See id.* at 8.

125. *Id.* at 8.

126. *See* Peter Grinspoon, *Medical Marijuana*, HARV. HEALTH PUB.: HARV, HEALTH BLOG (Jan. 15, 2018, 10:30 AM), https://www.health.harvard.edu/blog/medical-marijuana-2018011513085 [https://perma.cc/NGZ4-MX29].

127. DRUG ENF'T ADMIN. & U.S. DEP'T OF JUSTICE, *supra* note 119, at 9.

Although the Executive Branch has refused to materially change its policy regarding marijuana for decades, the Legislative Branch took a symbolic first step by passing the 2018 Farm Bill.[128] The Bill legalized hemp nationwide by removing it from the CSA's list of substances and reclassifying it as an agricultural product.[129] Hemp and marijuana are similar in that they are both produced from a species of cannabis plant and contain tetrahydrocannabinol (THC).[130] "THC is the main psychoactive compound in marijuana that gives the high sensation."[131] Hemp and marijuana are distinguishable by their concentration of THC.[132] Cannabis plants that contain less than 0.3% THC are hemp, and those containing greater than 0.3% are marijuana.[133] With hemp's removal from the CSA, states are now free to enact the legislation and regulations necessary to establish a successful hemp industry.[134] However, the lack of meaningful federal change concerning marijuana has spurred significant state actions.

B. Shifting State Marijuana Laws

Twenty-six years after the CSA was enacted, California voters passed Proposition 215, the Compassionate Use Act of 1996, making California the first state to legalize medical marijuana.[135] Since then, thirty-two other states and the District of Columbia have followed California's example and passed medical marijuana laws.[136] Despite being federally illegal, the medical marijuana market has grown to be valued at over $5 billion and is expected to reach $12.5 billion by 2025.[137]

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128. *Our Government: The Executive Branch*, WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/the-executive-branch/ [https://perma.cc/6BP4-YELF]; *State Industrial Hemp Statutes*, NAT'L CONF. ST. LEGISLATURES (Aug. 2, 2019), http://www.ncsl.org/research/agriculture-and-rural-development/state-industrial-hemp-statutes.aspx [https://perma.cc/G3PD-G6QX].

129. *State Industrial Hemp Statutes*, *supra* note 128.

130. *Id.*

131. Kimberly Holland, *CBD vs. THC: What's the Difference?*, HEALTHLINE (May 20, 2019), https://www.healthline.com/health/cbd-vs-thc [https://perma.cc/7TB4-A4JW].

132. *See id.*

133. *Id.*

134. *See State Industrial Hemp Statutes*, *supra* note 128.

135. *See State Medical Marijuana Laws*, NAT'L CONF. ST. LEGISLATURES (Oct. 19, 2019), http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx [https://perma.cc/LS7Y-WYZP]; CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996).

136. *See State Medical Marijuana Laws*, *supra* note 135.

137. *Industry Overview: Legal Cannabis Is the Fastest-growing Industry in the United States*, MED. MARIJUANA, INC., https://www.medicalmarijuanainc.com/marijuana-industry-overview/ [https://perma.cc/8EFN-Z9G8]. These figures are from 2017, and it seems that overall, marijuana sales are out pacing predictions. However, it is difficult to find data breaking down medical, recreational, and hemp separately.

In order to legally use medical marijuana, nearly all states require patients follow a widely accepted process and receive what is commonly referred to as a "medical marijuana card."[138] Patients must first receive a physician's approval by demonstrating that they suffer from one of the approved medical conditions listed in the statute.[139] Although all legalized medical marijuana states include cancer, HIV, and either seizures or epilepsy on their lists of approved medical conditions, some states take a more expansive approach and permit medical marijuana to treat anxiety or insomnia.[140] If approved, a patient must provide proof of state residency and register with the state medical marijuana registry.[141] The two-pronged goal of this process is to allow access to medical marijuana for patients and to protect members of the medical community from criminal drug prosecution under state law.[142]

In 2012, Colorado and Washington, through the process of ballot initiatives, became the first states to legalize recreational marijuana use.[143] With the addition of Illinois in 2019, eleven states and the District of Columbia have legalized recreational use.[144] Illinois is the first state to legalize the sale and possession of marijuana by a legislative bill rather than by a ballot initiative.[145] In all states where marijuana is completely legal, purchasers must be over twenty-one years old and can usually possess only up to an ounce at a time.[146] Even though it was less than a decade ago when the first U.S. state legalized the recreational use of marijuana, the marijuana

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138. *See* Brian O'Connell, *How to Get a Medical Marijuana Card*, THESTREET (May 22, 2019, 4:36 PM), https://www.thestreet.com/how-to/how-to-get-medical-marijuana-card-14643518 [https://perma.cc/4PWN-CLAJ].

139. *See id.*

140. *See Qualifying Conditions for Medical Marijuana by State*, LEAFLY (Jan. 29, 2020), https://www.leafly.com/news/health/qualifying-conditions-for-medical-marijuana-by-state [https://perma.cc/X7JB-HBCJ].

141. *See* O'Connell, *supra* note 138.

142. *See id.*

143. *Marijuana Overview*, NAT'L CONF. ST. LEGISLATURES (Oct. 17, 2019), http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx [https://perma.cc/7LHV-3RRX].

144. Sarah Rense, *Here Are All the States That Have Legalized Weed in the U.S.*, ESQUIRE (Feb. 7, 2020), https://www.esquire.com/lifestyle/a21719186/all-states-that-legalized-weed-in-us/ [https://perma.cc/4B9Z-9V67].

145. Amber Phillips, *How Illinois Became the First State Legislature to Legalize Marijuana Sales*, WASH. POST (June 4, 2019, 10:09 AM), https://www.washingtonpost.com/politics/2019/06/04/how-illinois-became-first-state-legislature-legalize-marijuana-sales/ [https://perma.cc/T57K-CFLA].

146. *See* Rense, *supra* note 144. In Michigan, Maine, and the District of Columbia an adult over twenty-one can purchase and possess two or more ounces of marijuana. *Id.* Illinois allows a legal adult to possess thirty grams if he or she is a resident and fifteen grams if he or she is a non-Illinois resident. *Id.*

industry is now a $3 billion industry and is expected to exceed $12 billion within the next five years.[147]

Instead of removing all criminal penalties by completely legalizing recreational marijuana, some states have chosen to decriminalize personal marijuana possession.[148] Decriminalization does not change the legality of marijuana, but it does impose lesser penalties upon those convicted of possessing marijuana paraphernalia or a personal amount of marijuana.[149] Generally, decriminalization statutes reduce marijuana possession from a state crime to a civil or local crime, typically carrying no jail time and resulting in a fine.[150]

South Carolina is in the minority of states that has not legalized either recreational or medical marijuana use and that still has not passed legislation decriminalizing possession of an amount limited to personal consumption.[151] Notwithstanding its steadfast stance against revising marijuana legislation, South Carolina has carved out an extremely narrow medical marijuana exception known as Julian's Law.[152] Julian's Law allows healthcare professionals to use a specific form of medical marijuana to treat severe epilepsy when alternative treatments would be inadequate.[153] In addition to this exception, South Carolina allows the farming and cultivation of hemp.[154] In 2019, just one year after the South Carolina Department of Agriculture permitted hemp farming, the number of acres farmed for hemp was expected to increase more than tenfold.[155]

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147. *Industry Overview: Legal Cannabis Is the Fastest-growing Industry in the United States*, *supra* note 137.

148. *See Marijuana Overview*, *supra* note 143.

149. *See id.*

150. *See id.*

151. *See supra* notes 135–136 and accompanying text; *South Carolina Marijuana Laws*, MARIJUANA & L., https://www.marijuanaandthelaw.com/state-laws/south-carolina/ [https://perma.cc/7SRB-4CG9].

152. *See* S.C. CODE ANN. §§ 44-53-1810 to 1840 (2018).

153. *South Carolina Legal Information*, AM. FOR SAFE ACCESS, https://www.safeaccessnow.org/south_carolina_legal_information [https://perma.cc/3TW3-LUT4]; *Becoming a Patient in South Carolina*, AM. FOR SAFE ACCESS, https://www.safeaccessnow.org/becoming_a_patient_in_south_carolina [https://perma.cc/QT43-G8RV].

154. *See* Brodie Hart, *Farmers on Lowcountry Island Say Hemp Grow Is the Largest in South Carolina History*, ABC 4 NEWS (June 27, 2019), https://abcnews4.com/news/local/farmers-on-lowcountry-island-say-hemp-grow-is-the-largest-in-south-carolina-history [https://perma.cc/D4E7-TGZE].

155. *See* Jessica Holdman, *SC Hemp farming Could Top 3,000 Acres as States Scramble for a Piece of the Booming Market*, POST & COURIER (June 23, 2019), https://www.postandcourier.com/business/sc-hemp-farming-could-top-acres-as-states-scramble-for/article_0352043e-8895-11e9-a24f-9791a9ec5497.html [https://perma.cc/38M9-RV7A].

C. Illegally Legal: Federal Law Versus State Law

Under federal law, the CSA prohibits the use of marijuana for any purpose. Consequently, state-sanctioned medical and recreational marijuana use is technically both illegal and legal.[156] It is well established under the Supremacy Clause that federal laws preempt, expressly or impliedly, conflicting state laws.[157] Effectively, this means that although states have the power to repeal or amend state criminal statutes, users of marijuana are still subject to federal prosecution.

Despite conflicting federal and state laws, the Supreme Court upheld the regulation of marijuana under federal criminal law in *Gonzales v. Raich*.[158] California residents Angel Raich and Diane Monson legally used physician-recommended marijuana in accordance with California's Compassionate Use Act to treat serious medical conditions.[159] After U.S. Food and Drug Administration (FDA) agents seized and destroyed all six of Monson's marijuana plants, Raich and Monson filed suit against the U.S. Attorney General, seeking injunctive and declaratory relief to prevent the enforcement of the CSA to the extent that it prohibited their medical marijuana use.[160] They argued that enforcing the CSA against their completely intrastate marijuana use violated the Commerce Clause and other constitutional protections.[161] The Supreme Court disagreed.[162] Reasoning that Congress can regulate purely intrastate activities that "have a substantial effect on interstate commerce," the Court concluded that Congress's enactment of the CSA was a valid exercise of power under the Commerce Clause.[163] This holding demonstrates that the legality of marijuana, including for medical and recreational use, is still under the federal government's jurisdiction.

Notwithstanding this power, the modern trend for creating and enforcing marijuana regulations has been toward increased state sovereignty. The U.S. Attorney General has significant influence over federal prosecutors'

156. German Lopez, *Marijuana Is Illegal Under Federal Law Even in States That Legalize It*, VOX (Nov. 14, 2018, 4:14 PM), https://www.vox.com/identities/2018/8/20/17938372/marijuana-legalization-federal-prohibition-drug-scheduling-system [https://perma.cc/5H5W-FG36].

157. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 451 (Rachel E. Barkow et al. eds., 5th ed. 2017).

158. Gonzales v. Raich, 545 U.S. 1 (2005).

159. *Id.* at 6–7.

160. *Id.* at 7.

161. *Id.* at 8.

162. *See id.* at 32–33.

163. *Id.* at 17.

zealousness in seeking enforcement of the CSA as it applies to marijuana.[164] Building on President Obama's nonenforcement policy, the Trump Administration stated that it would continue to allow states to make their own decisions surrounding marijuana legalization.[165] In June of 2019, Congress also signaled its bipartisan support of a nonenforcement policy when it approved an amendment that prevents the Department of Justice from interfering with businesses providing legal marijuana.[166] Although this is important to keep in mind when discussing criminal penalties, the risk of conflict between federal marijuana laws and state laws concerning child abuse and neglect adjudication is minimal because foster care systems are state-operated.[167]

D. State Statutes Regarding Marijuana and Child Neglect Cases

As marijuana's legalization status changes in states across the country, so do opinions about the impact that parental marijuana use should have on child abuse and neglect cases. Although the presumption of parental fitness and the nexus requirement are clear, some states have codified these protections in their medical and recreational marijuana statutes in an effort to standardize family court outcomes.[168] These statutes contain specific provisions to protect against predisposed parental unfitness, state-monitored service plans, and negative implications from a failed drug test. For example, this all-encompassing Massachusetts statute demonstrates the gold standard:

> 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

164. *See State Marijuana Regulation Laws Are Not Preempted by Federal Law*, MARIJUANA POL'Y PROJECT, https://www.mpp.org/issues/legalization/state-marijuana-regulation-laws-are-not-preempted-by-federal-law/ [https://perma.cc/7N4N-YS3F] (last visited Dec. 10, 2019).

165. Kyle Jaeger, *President Trump Reiterates His Administration Will Let States Legalize Marijuana*, MARIJUANA MOMENT (Aug. 30, 2019), https://www.marijuanamoment.net/president-trump-reiterates-his-administration-will-let-states-legalize-marijuana/ [https://perma.cc/83U4-3JA7].

166. *Id.*

167. *See State vs. County Administration of Welfare Services*, CHILD WELFARE INFO. GATEWAY, https://www.childwelfare.gov/pubs/factsheets/services/ [https://perma.cc/QH26-ANQ8].

168. *See* ARIZ. REV. STAT. ANN. § 36-2813 (2010); MASS. GEN. LAWS ch. 94G, § 7(d) (2016).

> 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.[169]

Similarly, Arizona's medical marijuana statute succinctly states, "No person may be denied custody of or visitation or parenting time with a minor, and there is no presumption of neglect or child abuse . . . unless the person's behavior creates an unreasonable danger to the safety of the minor as established by clear and convincing evidence."[170] Provisions similar to these in a handful of states are the only statutes specifically addressing parental marijuana use.[171]

The arrival of these protective statutes suggests that several state legislatures, including Arizona and Massachusetts, sought to restore consistency regarding how courts apply the current common law nexus requirement. With that goal in mind, the legislatures clarified that before the state interjects itself between a parent and his or her children, the state must first show that the parent's marijuana use negatively affects the children. At face value, this clarification nearly reiterates the respective states' common law—the appropriate standard of proof, a nexus requirement, and a presumption of parental fitness—as it applies to state-legal marijuana use.[172] Although these statutes expand the protections of parents by safeguarding visitation and limiting service plans, legislatures would have had little reason to clarify the impact of parental marijuana use on child abuse and neglect in the absence of conflicting decisions among courts following the nexus analysis.

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169. MASS. GEN. LAWS ch. 94G, § 7(d) (2016).

170. ARIZ. REV. STAT. ANN. § 36-2813(D) (2010).

171. *Cf.* Miriam Mack & Elizabeth Tuttle Newman, *Parents Threatened with Losing Children Over Cannabis Use*, BRONX DEFENDERS (Sept. 9, 2019), https://www.bronxdefenders.org/the-appeal-parents-threatened-with-losing-children-over-cannabis-use/#:~:text=The%20Appeal%3A%20Parents%20Threatened%20With%20Losing%20Children%20Over%20Cannabis%20Use,-September%209%2C%202019&text=So%20when%20a%20child%20protective,legal%20in%20many%20other%20states [https://perma.cc/QUH6-DWYQ] (suggesting states need laws addressing parental marijuana use).

172. *See* MASS. GEN. LAWS ch. 94G, § 7(d) (2016).

IV. THE EFFECTS OF MARIJUANA RELEVANT TO CHILD CUSTODY

A. The Benefits of Marijuana

Proponents of marijuana legalization often argue that adults should be able to use marijuana, just as they can drink alcohol or smoke tobacco.[173] Specifically, many advocates assert that parents who use marijuana responsibly, akin to having a glass of wine, do not present a risk of harm to a child.[174] Some parents even claim that their children noticed the positive effects of marijuana, such as stress relief.[175] However, there is also limited evidence that parental marijuana use, particularly irresponsible use, has a negative impact on the child.[176] Nonetheless, quickly summarizing some of the medicinal uses associated with marijuana helps outline some potential benefits of parental marijuana use.

In the United States, the most common use of medical marijuana is pain control.[177] Marijuana is an attractive option for pain control because it is an alternative to highly addictive opiates.[178] Additionally, marijuana has been successful in managing seizures and epilepsy.[179] Furthermore, medical marijuana is used to treat post-traumatic stress disorder, nausea, weight loss, HIV, and Parkinson's disease.[180] These examples are nonexclusive and serve to reinforce the assertion that marijuana use has far-reaching medical applications beyond the calming and de-stressing effects associated with recreational use.[181]

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173. *See* Jack Brewer, *3 Reasons Recreational Marijuana Should Be Legal in All 50 States*, BUS. J. (July 10, 2014, 2:02 PM), https://www.bizjournals.com/bizjournals/how-to/growth-strategies/2014/07/3-reasons-recreational-marijuana-should-be-legal.html [https://perma.cc/3RW7-47MQ].

174. *See* Jennifer Goldberg, *Parents Who Smoke Pot*, TODAY'S PARENT (Apr. 20, 2018), https://www.todaysparent.com/family/parenting/parents-who-smoke-pot/ [https://perma.cc/9TE5-ZSH3].

175. *See id.*

176. *See infra* pp. 888–889.

177. Grinspoon, *supra* note 126.

178. *Id.*

179. *Id.*

180. *Id.*

181. *See id.*

B. The Potential Harm to Children

Just as there is evidence of the benefits of marijuana, there is rebuttal evidence that marijuana negatively affects the person using it.[182] In addition to the possibility that a child's exposure to marijuana could create an unreasonable risk to a child's welfare, a child could also be at risk of harm when a parent is under the influence of marijuana.[183] The weight a family court should place on a parent's marijuana use when making custody decisions should depend on the child's risk of either physical or emotional harm.

The effects of marijuana can be examined through two separate lenses: one focuses on duration and the other on capacity.[184] As for duration, marijuana can have short-term effects, which typically last less than twenty-four hours, and long-term effects, which can last weeks or months.[185] Also, marijuana use can affect a person's capacity both mentally and physically.[186]

Short-term effects of marijuana can generally be described as the impairment of fine motor skills.[187] The THC in marijuana can reduce coordination, delay physical reactions, and impede reflexes.[188] Additionally, marijuana can have short-term effects on the cardiovascular system.[189] Common symptoms are decreased blood pressure, which can lead to fainting, and an increased heart rate, which may endanger those with preexisting heart conditions.[190] If marijuana is smoked regularly, it can also damage the respiratory system by causing bronchitis, lung infections, chronic cough, and excess mucus buildup.[191]

Nevertheless, courts should cautiously analyze whether a parent's marijuana use puts his or her child at risk because the evidence relating to short-term effects can be misleading. Specifically, a consumer of marijuana

182. *See Health Effects of Cannabis*, GOV'T CAN., https://www.canada.ca/content/dam/hc-sc/documents/services/campaigns/27-16-1808-Factsheet-Health-Effects-eng-web.pdf [https://perma.cc/SXG7-DT8C] (last visited Oct. 24, 2019). The publication recognizes that in addition to possible harmful effects, marijuana can be used for "therapeutic purposes." *Id.*

183. *See infra* note 195.

184. *See Health Effects of Cannabis*, *supra* note 182.

185. *See id.*

186. *Id.*

187. *See id.*

188. *See id.*

189. *See id.*

190. *Id.*

191. *Id.*

can test positive even though its short-term effects have worn off.[192] For example, due to the impairment of fine motor skills caused by ingesting marijuana, it is often argued that marijuana and alcohol create similar risks when the user is driving.[193] The lack of a roadside test for accurately evaluating marijuana impairment, similar to a breathalyzer for alcohol intoxication, has resulted in many false positives of marijuana impairment, leading skeptics to believe that marijuana users drive under the influence more often than they truly do.[194] This premise has been extended to assume that parents who use marijuana will expose their children to an increased risk of harm by driving while under its influence and with their children in the car.[195]

However, even though more drivers test positive for marijuana than alcohol at traffic stops, alcohol can be detected by a breathalyzer only within twenty-four hours of consumption.[196] On the other hand, while the noticeable effects of smoked marijuana last from one to three hours, a regular marijuana user can test positive several weeks after use.[197] Thus, testing positive for marijuana is not reliable evidence of a driver's impairment. Moreover, evidence suggests that a driver who has recently used marijuana is significantly less likely to cause an accident than a distracted or drunk driver.[198] Specifically, studies suggest that the likelihood of a car accident increases by 22% when a driver is under the influence of marijuana, nearly doubles when a driver is distracted, and roughly triples when a driver is intoxicated.[199]

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192. *Marijuana Drug Information*, REDWOOD TOXICOLOGY LABORATORY, https://www.redwoodtoxicology.com/resources/drug_info/marijuana [https://perma.cc/T25U-ZG39].

193. *See Background on: Marijuana Impaired Driving*, INS. INFO. INST. (Mar. 29, 2019), https://www.iii.org/article/background-on-marijuana-and-impaired-driving [https://perma.cc/QG9X-933Z].

194. *See id.* Initial tests have been promising and some companies are expecting to have an accurate marijuana breathalyzer available in 2020. *See* Steven Reinberg, *Coming Soon: A 'Pot Breathalyzer'?*, WEBMD (Sept. 3, 2019), https://www.webmd.com/mental-health/addiction/news/20190903/coming-soon-a-pot-breathalyzer#1 [https://perma.cc/TR33-ABW3].

195. Amy Norton, *Many Driving on Pot, Even with Kids in the Car*, HEALTHDAY REP. (Apr. 25, 2019), https://www.webmd.com/mental-health/addiction/news/20190425/many-driving-on-pot-even-with-kids-in-car#1 [https://perma.cc/66S3-PYY2].

196. *See id.*; *How Long Does Alcohol Stay in Your System?*, AM. ADDICTION CTR., https://americanaddictioncenters.org/alcoholism-treatment/how-long-in-system [https://perma.cc/733V-QGR7].

197. *What Are Marijuana's Effects?*, NAT'L INST. ON DRUG ABUSE, https://www.drugabuse.gov/publications/research-reports/marijuana/what-are-marijuana-effects [https://perma.cc/THA7-5RFX]; *Marijuana Drug Information*, *supra* note 192.

198. *See Background on: Marijuana Impaired Driving*, *supra* note 193.

199. *Id.*; *see Crash Risk of Cell Phone Use While Driving: A Case-Crossover Analysis of Naturalistic Driving Data*, AAA FOUND. (Jan. 2018), https://aaafoundation.org/wp-

The short-term effects of marijuana on the brain usually relate to reduced cognitive ability.[200] The THC in marijuana can cause the user to feel fatigued, which then impairs short-term memory, the ability to concentrate, and reaction time.[201] Long-term marijuana use can increase memory loss, reduce one's intelligence quotient (IQ), and impair one's ability to concentrate.[202] Although these consequences will not have a direct, negative effect on a child, temporary impairment could pose a danger when a parent is supervising children.

In addition to the possibility that parental marijuana use might indirectly place children at unreasonable risk of harm, the direct consumption of marijuana by children poses the greatest risk. Specifically, in cases where children directly consumed marijuana, it typically occurred either through the inhalation of secondhand smoke or through the ingestion of cannabis-infused food items, also known as edibles.[203] Although there is little known about the long-term effects of acute marijuana exposure on children, children who consume edible marijuana, such as gummy bears or cookies, typically require hospital admission.[204]

Because smoking marijuana is the most common method of consumption, there is a risk that children could be exposed to secondhand smoke.[205] Notably, unlike cigarette smokers, cannabis users normally smoke indoors.[206] In a study where researchers placed air particle monitors in 298 homes of parents who smoked tobacco, marijuana, or both, they found that "children living in homes with cannabis smoke had eighty-three percent higher odds of adverse health outcomes compared to children in homes with no indoor cannabis smoking."[207] Yet, when analyzing the results of the study, the authors admitted that their findings demonstrated a "relatively strong though not statistically significant association" and that "the less than ideal

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content/uploads/2018/01/18-0105_AAAFTS-AAAFTS-Cell-Phone-Crash-Risk-Fact-Sheet_FNL.pdf [https://perma.cc/2GH7-MRJU]; Christopher Ingraham, *How Just a Couple Drinks Make Your Odds of a Car Crash Skyrocket*, WASH. POST (Feb. 9, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/02/09/how-just-a-couple-drinks-make-your-odds-of-a-car-crash-skyrocket/ [https://perma.cc/FAT2-ULWE].

200. *See Health Effects of Cannabis*, *supra* note 182.

201. *See id.*

202. *See id.*

203. *Acute Marijuana Intoxication*, CHILD. HOSP. COLO., https://www.childrenscolorado.org/conditions-and-advice/conditions-and-symptoms/conditions/acute-marijuana-intoxication/ [https://perma.cc/L9L9-P6NN].

204. *Id.*

205. Alexander Posis et al., *Indoor Cannabis Smoke and Children's Health*, U.S. NAT'L LIBR. MED. (Mar. 16, 2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6441784/ [https://perma.cc/63WV-MXST].

206. *Id.*

207. *Id.* The adverse health effects considered in the study consisted of emergency department visits, ear infections, cases of bronchitis, asthma irritation, and skin conditions. *Id.*

characteristics of [their] study . . . warrant further research."[208] The authors believed that this was the first study analyzing the relationship between indoor marijuana smoke and its health effects on children.[209] The conclusion of these researchers reflects the general sentiment of the scientific community: there needs to be further research.[210] While the effects of marijuana on adults and children are fundamental considerations when developing marijuana policy, the glaring need for credible research should limit the weight courts place on any alleged risk of mental or physical harm to a child resulting from parental marijuana use.

C. Limited Evidence: The Circular Problem with Studying Marijuana

Although there are numerous claimed benefits and side effects of marijuana use, these claims appear speculative because marijuana has undergone far less thorough clinical trials compared to other commercially available drugs.[211] While this lack of research generally refers to the direct effects of marijuana on the user, the underlying premise is exponentially true regarding its secondhand effects, especially concerning children. The simple explanation for this is that potential clarification of the effects of marijuana is not worth the risk of violating the CSA.[212] Marijuana's Schedule I classification not only handcuffs further research but even discourages it in some cases.[213] This creates a circular problem: legal restrictions prevent medical professionals from conducting the rigorous research required for legalization. In order to settle this stalemate between the state legislatures that mandate empirical evidence of marijuana's benefits and the medical community that is unable to provide it, voters have legalized marijuana with little or no hard evidence of its side effects.

208. *Id.*

209. *Id.*

210. *See* Marisa Taylor & Melissa Bailey, *Medical Marijuana's 'Catch-22': Limits on Research Hinder Patient Relief*, NPR (Apr. 7, 2018, 7:00 AM), https://www.npr.org/sections/health-shots/2018/04/07/600209754/medical-marijuanas-catch-22-limits-on-research-hinders-patient-relief [https://perma.cc/RV6J-5RQ8].

211. Samuel T. Wilkinson, *More Reasons States Should Not Legalize Marijuana: Medical and Recreational Marijuana: Commentary and Review of the Literature*, MO. MED. (Nov. 2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6179811/ [https://perma.cc/MN2H-88QT].

212. *See* Taylor & Bailey, *supra* note 210.

213. *Id.*

V. HOW COURTS HANDLE PARENTAL MARIJUANA USE IN CHILD ABUSE AND NEGLECT CASES

A. How Wide Is the Spectrum?

The varying approaches family courts have taken in child custody cases involving parental marijuana use has led to inconsistent outcomes. However, the majority of cases seem to turn on two key factors: the legality of a parent's marijuana use in a particular jurisdiction and the risk that a parent's marijuana use will harm the child. Generally, the weight courts have assigned to the risk of a parent's marijuana use has correlated to its legality under state law.[214] In *In re Drake M.*, for example, the California court granted significant deference to the father insofar as he asserted that his marijuana use did not occur in the presence of the child and that, if he had used marijuana earlier in the day, he was not under the influence at the time he supervised his son.[215] Conversely, in *A.K. v. Henry County Department of Human Resources*, the Alabama court found that the most compelling evidence supporting a mother's TPR was her illegal use of marijuana.[216] However, the court never identified any evidence that it harmed the child and admittedly placed greater weight on her marijuana use than on its conclusions that she lacked basic parenting skills, housing, and the ability to financially support the child.[217] Significantly, the analysis of whether parental marijuana use constituted child abuse or neglect in *In re Drake M.* was consistent with the nexus requirement, whereas *A.K. v. Henry County* was not.[218] When courts fail to analyze whether a nexus exists between parental drug use and harm or risk of harm to a child, this failure allows subjective testimony to significantly influence the outcome of child abuse and neglect cases.

B. South Carolina's Approach

In South Carolina, DSS-initiated child abuse and neglect cases involving parental marijuana use frequently arise from common circumstances. They often begin with a court finding one or both parents neglectful because their marijuana use poses a risk of harm to their child.[219] The child is then removed

214. *See In re* Drake M., 149 Cal. Rptr. 3d 875, 882–84 (Ct. App. 2012); A.K. v. Henry Cty. Dep't of Human Res., 84 So. 3d 68, 70 (Ala. Civ. Ct. App. 2011).

215. *See In re Drake M.*, 149 Cal. Rptr. 3d at 885–89.

216. *A.K.*, 84 So. 3d at 76.

217. *Id.* at 75–76.

218. *See In re Drake M.*, 149 Cal. Rptr. 3d at 888; *A.K.*, 84 So. 3d at 76.

219. S.C. FAMILY COURT BENCH BAR SUBCOMM., BEST LEGAL PRACTICES IN CHILD ABUSE AND NEGLECT CASES 22 (2018), https://www.sc.edu/study/colleges_schools/law/

from the home, and the parents are given an opportunity to "remedy the conditions."[220] Often, parents who admit to using or test positive for drugs will have to pass several drug tests as part of remedying the conditions.[221] If the court finds by clear and convincing evidence both that the parents have failed to remedy the conditions that led to neglect and that terminating the parents' rights would be in the best interests of the child, the court will terminate the parents' constitutional right[222] to the upbringing of their child.[223]

Because child neglect and TPR cases are inherently fact-specific and "employ imprecise substantive standards that leave determinations usually open to the subjective values of the judge," they permit a great deal of judicial discretion.[224] This broad discretion has led to inconsistency among family courts in South Carolina as to what constitutes drug abuse or addiction and when a parent's drug use poses a substantial risk to the child, thus satisfying the nexus required by the statutory definition of child neglect.[225]

In *South Carolina Department of Social Services v. Youngblood*, the South Carolina Court of Appeals demonstrated the framework commonly followed in a removal action instituted after allegations of child abuse and neglect.[226] In July 2016, DSS received reports that Danielle Youngblood, the mother, was smoking marijuana around her children.[227] Pursuant to an agreement between DSS and the parents, the family court issued a removal order and determined that the mother and father physically neglected their children.[228] The family court then placed the children in the temporary custody of their grandparents because it found that returning the children to their home presented an unreasonable risk of harm due to Danielle's drug abuse.[229] The court also ordered the parents to complete a drug and alcohol assessment, follow all recommendations of counselors, and submit to random drug testing for six months.[230]

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centers/childrens_law/docs_generalcp_best_legal _practices.pdf [https://perma.cc/FJ5T-UHJZ] (last visited Sept. 26, 2019); *see* S.C. Dep't of Soc. Servs. v. Deal, No. 2016-001026, 2017 WL 5499389, at *3 (S.C. Ct. App. Nov. 16, 2017) (demonstrating the impact of marijuana in the court's finding of neglect).

220. S.C. FAMILY COURT BENCH BAR SUBCOMM., *supra* note 219, at 23.

221. *See* S.C. Dep't of Soc. Servs. v. Youngblood, No. 2016-002325, 2017 WL 4805521, at *1 (S.C. Ct. App. Sept. 8, 2017).

222. *See* Santosky v. Kramer, 455 U.S. 745, 748–50 (1982).

223. *See* S.C. FAMILY COURT BENCH BAR SUBCOMM., *supra* note 219, at 40–42.

224. *Santosky*, 455 U.S. at 762.

225 *See* S.C. CODE ANN. § 63-7-20(6)(a) (Supp. 2016).

226. *See Youngblood*, 2017 WL 4805521, at *1.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

After Danielle completed a twenty-eight-day inpatient drug treatment program, a DSS caseworker testified that Danielle had complied with the required treatment and passed all random drug tests.[231] The caseworker further stated that she did not have any concerns with returning the children to the mother and father's home.[232] However, she also stated that the children originally did not want to return home and enjoyed staying with their grandparents.[233] A guardian ad litem (GAL) also testified that the children repeatedly said they wanted to stay with their grandparents.[234] The GAL believed that the home was in an area associated with drug use, and she explained how the daughter did not believe the mother would stay clean from marijuana.[235] Notably, the GAL admitted she neither observed visits between the mother and children nor spoke directly to the father.[236]

The family court found that the parents completed their respective court-ordered programs and tested negative for marijuana.[237] Despite this finding, the family court held that returning the children to their home and to the custody of their mother and father would place them at an unreasonable risk of harm.[238] The family court stated that it was not satisfied that the mother had "rectified her drug abuse problems" and granted the grandparents legal and physical custody of the children, while allowing their mother and father only "alternate weekend visitation."[239] Subsequently, Danielle appealed the family court's ruling.[240]

The appellate court began its review by referencing the South Carolina statutes applicable to removal of a child from his or her parents' custody. Under the South Carolina Children's Code, the family court can remove a child from a parent's custody if it finds that the allegations "are supported by

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231. *Id.* at *2.

232. *Id.*

233. *Id.* (testifying that that the children each had their own bedroom at the grandparents' house rather than sharing one like they did at home).

234. The GAL alleged that the reasons the children wished to stay with their grandparents are as follows:

> (1) They are not hungry because their grandma cooks for them. (2) They are not worried about being left alone. (3) They are not in a home where someone may be drinking, doing drugs or yelling at each other. (4) They do not believe that their parents will stay off drugs. (5) They state they do not trust their parents, they say one thing and do something else. (6) They are scared that their parents will not let them see their grandparents anymore. (7) They are scared of the repercussion from their parents when/if they do go home.

Id. at *2–3.

235. *Id.* at *2.

236. *Id.*

237. *Id.* at *3.

238. *Id.*

239. *Id.*

240. *Id.* at *1.

a preponderance of evidence including a finding that the child is . . . abused or neglected" and that returning the child home would "place the child at unreasonable risk of harm affecting the child's life, physical health or safety, or mental well-being."[241] Child abuse or neglect occurs when a parent or guardian "inflicts or allows to be inflicted upon the child physical or mental injury or engages in acts or omissions which present a substantial risk of physical or mental injury to the child."[242] Typically, if the parent has made the home safe by remedying the cause for original removal, the court may order the child returned to the parent's home.[243] However, the South Carolina Children's Code requires that if the child was removed because of parental drug use, "a drug test must be administered to the parent or both parents . . . and the results must be considered with all other evidence in determining whether the child should be returned to the parents' care."[244] Additionally, the court will consider whether the parents substantially completed a placement plan, similar to the drug and alcohol assessment required of Danielle Youngblood, when it considers all the evidence.[245]

The appellate court determined that the evidence did not support the family court's finding that Danielle had failed to rectify her drug addiction.[246] The appellate court recognized that the mother had passed random drug tests for several months, and it relied on the caseworker's opinion that the children were fine to return home.[247] Regarding the GAL's testimony, the appellate court noted that the GAL based her opinions on facts that occurred prior to the children's removal, and her own reports stated that the mother had not tested positive for marijuana in over eighteen months.[248] Given the unsupported finding relating to Danielle's drug addiction, the appellate court reversed the family court's order, holding that no evidence "support[ed] the finding that returning the children to the home would place them at an unreasonable risk of harm."[249]

Youngblood illustrates the risk, which the Alabama court in *A.K. v. Henry County* explicitly succumbed to, that South Carolina family courts will find child abuse or neglect by relying on the illegality of parents' marijuana use rather than by adequately assessing whether the children are at a substantial risk of harm.[250]

241. S.C. CODE ANN. § 63-7-1660(E) (Supp. 2016).

242. *Id.* § 63-7-20(6)(a)(i).

243. *See id.* § 63-7-1700(D).

244. Id.

245. *See id.*

246. *See* S.C. Dep't of Soc. Servs. v. Youngblood, No. 2016-002325, 2017 WL 4805521, at *4 (S.C. Ct. App. Sept. 8, 2017).

247. *Id.*

248. *Id.*

249. *Id.*

250. *See id.* at *1–4; A.K. v. Henry Cty. Dep't of Human Res., 84 So. 3d 68, 76 (Ct. App. 2011).

Although parents are entitled to a presumption of fitness, once the state establishes illegal parental marijuana use by a preponderance of the evidence, courts often find that parents' marijuana use at home presents a substantial risk to the children and that until the parents are drug-free, the children will never be safe at home.[251] For example, at the permanency hearing in *Youngblood*, the DSS caseworker testified that "the children were removed based on [their m]other's marijuana use."[252] However, the section of the South Carolina Children's Code that defines neglect and abuse unambiguously requires a nexus between a parent's "acts or omissions" and the "substantial risk of physical or mental injury to the child."[253] Despite this requirement, the trial court in *Youngblood* seemed to conflate the two-prong nexus standard by referencing the mother's prior drug addiction and failing to analyze other potential risks.[254] While marijuana is illegal in South Carolina, the legality of marijuana should not prejudice a court's analysis of the risks, if any, that its prior use poses to a child.

Moreover, it appears that both the trial court and appellate court in *Youngblood* placed significant weight on whether the mother had remedied her drug addiction.[255] The appellate court seemingly implied that if DSS had presented evidence showing that the mother did not stop smoking marijuana, and thus, failed to rectify her drug addiction, it could support the finding that her children would be at an unreasonable risk of harm if they returned home.[256] Specifically, the appellate court stated, "In the absence of the family court's finding that [the m]other did not rectify her drug addiction . . . we do not see any other evidence that would support the finding that returning the children to the home would place them at an unreasonable risk of harm."[257] Based on that language, the court reached its conclusion without defining drug abuse or drug addiction and without articulating a nexus between drug addiction and unreasonable risk of harm.[258]

Notably, under the South Carolina Children's Code, a court can order "removal of a child upon . . . proof of alcohol or drug abuse or addiction by the parent . . . who has harmed the child."[259] The definition of "harm" includes "acts or omissions which present a substantial risk of physical or mental injury to the child."[260] The legislature's explicit reference to drug abuse and drug addiction suggests it intended for parents who abuse or are addicted to drugs, rather than ones who use a drug, to be the primary focus of

251. *See Youngblood*, 2017 WL 4805521, at *4.
252. *Id.* at *1.
253. S.C. CODE ANN. § 63-7-20(6)(a)(i) (Supp. 2016).
254. *See Youngblood*, 2017 WL 4805521, at *2–4.
255. *See id.* at *4.
256. *Id.*
257 *Id.*
258. *Id.* at *2–4.
259. S.C. CODE ANN. § 63-7-1660(F)(1)(d)(2) (Supp. 2016).
260. *Id.* § 63-7-20(6) (Supp. 2016).

state-initiated removal proceedings. In addition to removal, the South Carolina Children's Code also references a parent's drug addiction or abuse in the context of TPR and state efforts to reunify the family.[261] Specifically, if a parent's "drug addiction" is "unlikely to change within a reasonable time . . . and the condition makes the parent unable or unlikely to provide minimally acceptable care of the child," the family court has the discretion not only to order DSS to forego efforts to reunify or preserve the family but also to terminate a parent's rights if in the child's best interests.[262] The drastic consequences and explicit statutory references to drug abuse and drug addiction insinuate that they should be considered differently than mere drug use.

In sum, an imprecise statute has muddled the water regarding the impact of parental marijuana use as opposed to abuse, the evaluation of risks posed to a child by a parent's marijuana use, and the nexus requirement. In the absence of formal definitions for outcome-determinative terms—namely drug use, drug abuse, and drug addiction—family court judges lack foundational guidance to properly find a nexus.[263] First, it is necessary to ascertain a precise definition of drug use, drug abuse, and drug addiction. Only then can the statutory references to a parent's drug addiction or drug use be properly applied. Additionally, an objective series of factors would help family courts identify which facts to consider when examining the risks associated with parental marijuana usage. An overall objective approach will help eliminate situations like *Youngblood*, which illustrated how the fundamental right to the custody and control of one's children is at risk when subjective testimony, rather than the finding of a nexus, serves as the basis of an order due to the lack of more definitive guidelines.

VI. RECOMMENDATIONS FOR HANDLING PARENTAL MARIJUANA USE IN SOUTH CAROLINA

A. Defining Drug Addiction and Drug Abuse

Although drug abuse and drug addiction are commonly used interchangeably, they differ in two aspects: the user's dependence on the drug and the extent of the drug's adverse effects on a person's life.[264] Drug abuse is a condition where users maintain control over their lives; on the other hand, drug addiction is a disease where users are chemically dependent on the drug

261. *Id.* § 63-7-2570(6)(a); § 63-7-1640(c)(7).

262. § 63-7-2570(6)(a); § 63-7-1640(c)(7).

263. *See* §§ 63-7-10 to -2570.

264. *Substance Abuse vs Addiction?*, BRADFORD HEALTH SERVS., https://bradfordhealth.com/substance-abuse-vs-addiction/ [https://perma.cc/7RUA-QJHH].

and this dependence impacts most, if not all, aspects of their lives.[265] This distinction is important for family courts not only when their findings of child abuse or neglect depend on whether there is drug abuse or addiction by the parents, but also when the difference between drug use, abuse, and addiction controls whether they find it is safe for children to return home.

When a court finds that parents suffering from drug addiction are both unlikely to change within a reasonable amount of time and unable to provide minimally acceptable care for their children, the family court can forego reunification efforts and terminate the parents' rights if it is in the best interest of the children.[266] To support a finding of addiction, however, the evidence must show that the individuals have a chemical dependency, and typically, courts also require proof that the addicted individuals had "endanger[ed] their families physically or financially."[267] Consequently, parents forfeit statutory protections afforded to them when the courts determine that they suffer from addiction. Nevertheless, the parents' constitutional rights to the custody of their children, can find some protection under the heightened standard of clear and convincing evidence required in a TPR proceeding.[268] Because determining chemical dependence requires specialized knowledge and because its implications on the constitutional right to parent are severe, evaluation from a medical professional is logically the best practice. However, when there is no current diagnosis of marijuana addiction or previous history of drug addiction, the court should evaluate whether a parent is abusing marijuana.

The American Psychiatric Association's definition of abuse provides an appropriate standard.[269] As followed in *In re Drake M.*, a parent suffers from drug abuse if he or she experiences "clinically significant impairment or distress as manifested by . . . a failure to fulfill major role obligations," uses substances "in situations where it is physically hazardous," faces "recurrent substance-related legal problems," or experiences substance-related "social or interpersonal problems."[270] This definition provides much-needed clarity as to what constitutes marijuana abuse and will hopefully prevent cases, such as *Youngblood*, where the court used the terms "abuse" and "addiction" interchangeably.[271] Importantly, in South Carolina, if DSS presents sufficient

265. *Id.*

266. § 63-7-2570(6)(a); § 63-7-1640(c)(7).

267. *Substance Abuse vs Addiction?*, *supra* note 264.

268. *See* Stanley v. Illinois, 405 U.S. 645, 658 (1972); S.C. Dep't of Soc. Servs. v. Roe, 371 S.C. 450, 454, 639 S.E.2d 165, 168 (Ct. App. 2006).

269. *See In re* Drake M., 149 Cal. Rptr. 3d 875, 879 (Ct. App. 2012).

270. *Id.* at 885; *see* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 199 (4th ed. text rev. 2000)).

271. S.C. Dep't of Soc. Servs. v. Youngblood, No. 2016-002325, 2017 WL 4805521, at *2–4 (S.C. Ct. App. Sept. 8, 2017).

proof to support a court's finding of drug addiction or abuse, the court can order parents to submit to random drug testing for an extended period of time before and after reunification with their child.[272] This is a significant barrier when contrasted to the single drug test that is administered when children are removed due to a parent's drug use.[273]

When a parent's marijuana use fails to satisfy the definition of addiction or abuse, South Carolina's current removal statute requires the parent's marijuana use not only to inflict injury or present a substantial risk of injury to a child but also to create an unreasonable risk of harm affecting the child's home.[274] It is important for the court to consider separately whether parental drug use poses specific risks to a child and whether those risks, stemming from marijuana, present particular risks to the child's home. Moreover, even when a parent stops using marijuana and passes state-required drug tests, the court must "consider[] all other evidence in determining whether the child should be returned to the parents' care."[275] Establishing a baseline set of factors for courts to consider when evaluating both the substantial and unreasonable risk of harm should lead to more consistent judicial findings.

B. Factors for Courts to Consider

Even the most experienced judge finds challenges in serving as the eyes, ears, and mouth of the court. Unique to state-initiated child custody cases, children and parents are not adversaries, but rather, they share the same interests until there is sufficient evidence of parental unfitness.[276] In analyzing child abuse and neglect cases, a judge must often rely on testimony from DSS caseworkers, GALs, and parents.[277] As noted by the Court in *Santosky*, this fact-intensive analysis is inherently subject to personal opinions and reasonable differences in perception.[278] Moreover, state investigators often have a similar factual basis for their decisions but focus on different details in the case narrative.[279] For example, in *Youngblood*, the DSS caseworker focused on the parents' compliance with court-ordered actions occurring after the removal of their children, the GAL heavily relied on the mother's conduct prior to state involvement and the alleged opinions of the child, and the judge

272. S.C. CODE ANN. § 63-7-1690(A)(3).
273. § 63-7-1700(D).
274. *Id.*; § 63-7-1660(E).
275. § 63-7-1700(D).
276. *See* Santosky v. Kramer, 455 U.S. 745, 760 (1982).
277. S.C. Dep't of Soc. Servs. v. Youngblood, No. 2016-002325, 2017 WL 4805521, at *2–4 (S.C. Ct. App. Sept. 8, 2017).
278. *See Santosky*, 455 U.S. at 762.
279. *Youngblood*, 2017 WL 4805521, at *2–4.

determined that eighteen months of sobriety from marijuana was insufficient proof to find that the mother had overcome her marijuana addiction.[280]

Although there is no standard approach that will provide the court with the whole picture regarding the alleged circumstances causing and following the state's involvement, a routine set of considerations will assist in standardizing outcomes. Regardless of the standard of proof required to prove child abuse or neglect, this non-exhaustive list of factors should serve as an objective preliminary starting point for judges and members of government agencies when examining the potential risks of a parent's marijuana use on the child.

1. What Are the Ages of the Children in the Home?

The common concerns are with two age groups: young children and teenagers. The court in *In re Drake M.* articulated that a substantial risk of physical harm was often recognized when children were of "such tender years that the absence of adequate supervision and care poses an inherent risk to their physical health and safety."[281] Thus, a young child could be at substantial risk of harm when the sole supervising parent consistently leaves the child alone for extended periods of time or when the parent, if present, is unable to care for the child.[282] However, when multiple adults are supervising, this risk is drastically reduced.[283]

On the other hand, teenagers are impressionable and, thus, are more likely to smoke marijuana if their parents do.[284] Specifically, one study found that sixteen-year-old children are more likely to smoke marijuana if their mothers smoke marijuana.[285] To illustrate how a child's age impacts a court's analysis, where a parent stores his or her marijuana should change based on whether his or her children are curious teenagers or innocent toddlers. Specifically, while placing marijuana on a shelf is likely sufficient when only small children are present in the home, storing marijuana in a locked cabinet may be required when children are in high school. Another example is that parents with small children may pose increased risks if they consume edibles rather

280. *Id.*

281. *See In re* Drake M., 149 Cal. Rptr. 3d 875, 885–86 (Ct. App. 2012) (citing *In re* Rocco M., Cal. Rptr. 2d 429, 435 (Cal. Ct. App. 1991)).

282. *Id.*

283. *See id.*

284. Joshua A. Krisch, *Kids of Parents Who Smoke Marijuana Wind Up Vaping Weed*, FATHERLY (Oct. 8, 2018, 11:16 AM), https://www.fatherly.com/health-science/weed-smoking-parents-marijuana-kids/ [https://perma.cc/ZT6K-3Z8A].

285. *Id.*

than smoke marijuana.[286] Crucially, the age of the children in the home should change when and where a parent consumes marijuana.

2. When and Where Is the Marijuana Consumed?

When and where a parent consumes marijuana correlates directly with the unreasonable risk of harm to a child. The equation is common sense: the physical and temporal proximity between consuming marijuana and supervising a child creates a greater likelihood of harm. This factor represents the concerns expressed by the state in *In re Drake M.*—that the father smoked marijuana before supervising his son and that he smoked marijuana at his son's home.[287] However, the court was satisfied that the father smoked marijuana in a detached garage and that four hours usually passed between his marijuana consumption and supervision of his son.[288] In South Carolina, family courts have found parental marijuana use in the presence of a child to be seemingly determinative of abuse or neglect.[289] Because courts appear to frown upon marijuana use in the family home, parents may feel compelled to consume marijuana at another location. Consequently, parents may drive impaired, which increases the risk of an accident and possible further legal consequences.[290]

3. Has the Child Tested Positive for Marijuana?

One central factor for analyzing the potential risks to a child is whether the child tests positive for marijuana. Under current South Carolina law, a newborn child is presumed abused or neglected if the child tests positive for any unprescribed controlled substance.[291] The rationale underlying this statute can easily be extended to argue there is little difference between a newborn or a small child being exposed to marijuana. In addition to the potential yet unknown effects of secondhand marijuana smoke on children, their direct consumption of marijuana poses serious health risks often requiring hospitalization.[292] Moreover, if a child tests positive for marijuana, it can be assumed that a parent is not responsibly using marijuana.

286. *See Acute Marijuana Intoxication*, *supra* note 203.

287. *See In re* Drake M., 149 Cal. Rptr. 3d 875, 881–83 (Ct. App. 2012)

288. *Id.*

289. *See, e.g.*, S.C. Dep't of Soc. Servs. v. Miles, No. 2017-000422, 2017 WL 4804666, at *1 (S.C. Ct. App. Aug. 31, 2017).

290. *Id.*; *see also Background on: Marijuana Impaired Driving*, *supra* note 193.

291. S.C. CODE ANN. § 63-7-1660(F)(1)(a) (2010).

292. *See Acute Marijuana Intoxication*, *supra* note 203.

C. *Considerations to Avoid*

When examining the risks of parental marijuana use, courts may be tempted to consider factors that have little or no impact on the nexus analysis. For example, although the possibility of legal repercussions stemming from illegal marijuana is naturally a concern for the judicial system, when examining parental fitness, the court's focus should be on the child's safety and the ability of the parent to be a quality caregiver.[293] Importantly, the legality of a parent's marijuana use should not affect how courts evaluate the risk of harm to a child.[294] The court in *Youngblood* mentioned an additional pitfall where the GAL was concerned that the parents lived in an area allegedly known for drug use.[295] Considering the area where a family home is located often unnecessarily implicates race and poverty biases.[296] Consideration of these factors detracts from the focus of the parental fitness analysis—whether a nexus exists between a parent's marijuana use and a substantial risk of injury to a child.[297]

D. *Statutory Proposal*

The simplest and most concise method to clarify the impact of parental marijuana use in child custody cases is by state statute. Using the laws passed by Massachusetts and Arizona as examples, South Carolina could codify a protection for parents that would expand and clarify the current nexus requirement. Such a statute would not only prevent courts from shortchanging the investigation into a parent's marijuana use and its potential risks on a child, but also prevent parenting plans that require parents to complete a court-ordered list of goals without evidence that those goals will benefit the child.[298] The standard of proof for parental unfitness could continue to be the preponderance of the evidence as the South Carolina statute currently prescribes, or the legislature could choose to follow the lead of other states and reduce the risk of error by requiring clear and convincing evidence.[299]

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293. *See In re* Drake M., 149 Cal. Rptr. 3d 875, 886–88 (Ct. App. 2012).

294. *See Miles*, 2017 WL 4804666, at *1; Nassau Cty. Dep't of Soc. Servs. *ex rel.* Dante M. v. Denise J., 661 N.E.2d 138, 138 (1995).

295. S.C. Dep't of Soc. Servs. v. Youngblood, No. 2016-002325, 2017 WL 4805521, at *2 (S.C. Ct. App. Sept. 8, 2017).

296. *See Economic Status and Abuse*, FOUNDS. RECOVERY NETWORK, https://dualdiagnosis.org/drug-addiction/economic-status/ [https://perma.cc/VWY5-35PA].

297. *See* S.C. CODE ANN. § 63-7-20(6)(a) (Supp. 2016).

298. *See, e.g.*, MASS. GEN. LAWS ch. 94G, § 7(d) (2016); ARIZ. REV. STAT. ANN. § 36-2813 (2010).

299. MASS. GEN. LAWS ch. 94G, § 7(d); ARIZ. REV. STAT. ANN. § 36-2813; S.C. CODE ANN. § 63-7-1660(E).

Combining language from South Carolina's definition of neglect and Massachusetts's protection statute, a possible South Carolina parental rights protection statute would read as follows: Absent clear and convincing evidence that a parent or guardian's use of marijuana has placed the child at an unreasonable risk of harm affecting the child's health or safety, the use of marijuana shall not be the primary basis for parent plans, removal, denial of custody, termination of parental rights, or any other parental right. A statute similar to this proposed provision would not only protect the rights of parents, but also contribute to standardized practices by giving state agencies explicit, black-letter guidelines.

Significantly, this statute would apply only to parental marijuana use and not to marijuana abuse or addiction. Simply put, the elements discussed above in the proposed definition for abuse—failure to fulfill major role obligations because of marijuana use; marijuana use in physically hazardous situations; recurrent legal problems caused by marijuana—would present clear and convincing evidence of an unreasonable risk of harm to a child.[300] Additional examples of what constitutes an unreasonable risk of harm to a child include clear and convincing evidence that marijuana is readily accessible to the child and that a child tested positive for marijuana.

E. Legal Framework

If the legislature is reluctant to recognize the importance of clarifying the standard of review for parental marijuana use, the South Carolina judiciary can take action to eliminate this vagueness. In his note titled *The High Price of Parenting High: Medical Marijuana and Its Effects on Child Custody Matters*, David Malleis described a "hybrid conduct standard," which is an approach that focuses on parental conduct and is comparable to the statutory protection discussed above.[301] Notably, this standard resembles the approach that the court took in *In re Drake M.*[302] Instead of the substantial risk currently required under South Carolina law, the state can infringe on the rights of parents who use marijuana only if the parents' "conduct creates an unreasonable danger."[303]

Although the "hybrid conduct standard" was derived from protections concerning the use of medical marijuana, the state interest in illegal marijuana use is the same: protecting children from harm or a substantial risk of harm.[304]

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300. *See In re* Drake M., 149 Cal. Rptr. 3d 875, 875 (Ct. App. 2012).

301. David Malleis, Note, *The High Price of Parenting High: Medical Marijuana and Its Effects on Child Custody Matters*, 33 U. LA VERNE L. REV. 357, 361, 380 (2012).

302. *See In re Drake M.*, 149 Cal. Rptr. 3d at 875–81.

303. Malleis, *supra* note 301, at 380; S.C. CODE ANN. § 63-7-20(6)(a)(i).

304. Malleis, *supra* note 301, at 381.

Contrary to the common perception in child neglect and abuse cases that the state is acting on the children's behalf and the parents act to protect their rights, the court in *Santosky* noted that both children and parents have a vital interest in "preventing erroneous termination of their natural interest."[305] The foundation of this interest holds that both children and parents also have an interest in preventing erroneous removal and separation orders. If South Carolina courts were to adopt a "hybrid conduct standard," it would not only protect children from "any risks created by the negative effects of marijuana" but also protect parents "against the undue influence or personal bias by requiring courts to clearly articulate and sustain the parental conduct that is the basis of a child custody decision."[306]

VII. CONCLUSION

With over half of states legalizing marijuana's medicinal use and one-fifth of states legalizing its recreational use, questions surrounding parental marijuana use as it relates to parental fitness have no clear answer.[307] Although South Carolina has not yet recognized any form of legal marijuana use, growing national and state pressure for legalization suggests some form of marijuana legalization will eventually occur. However, the constitutional rights of both parents and children are no different in South Carolina than in any state with legalized marijuana. The goal is and always has been to protect the best interests of the child by preventing a substantial risk of harm, but until there is evidence of abuse or neglect, both parents and children "share a vital interest in preventing erroneous termination of their natural relationship."[308] In this spirit, clarifying statutory terms, establishing an objective set of foundational factors to consider, and requiring courts to substantiate a nexus between a parent's marijuana use and the risk of harm to a child stemming from it would help South Carolina family courts achieve greater consistency.

305. *See* Santosky v. Kramer, 455 U.S. 745, 760 (1982).
306. Malleis, *supra* note 301, at 388–91.
307. *See State Medical Marijuana Laws*, *supra* note 135; Rense, *supra* note 144.
308. Santosky v. Kramer, 455 U.S. 745, 760 (1982).

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