

The NACC envisions a justice system that protects the rights of children by ensuring their voices are heard through the assistance of well-trained, well-resourced, independent lawyers.

## Parents, Kids and Cannabis: Best Practices for Attorneys



Cannabis as medicine is gaining acceptance nationally and worldwide.

Cannabis has been legalized in 23 states and many countries.<sup>1</sup> In states where medical cannabis is legal, parents who are medical

cannabis patients have a defense to criminal prosecution, but their children remain very much at risk. As more and more activate medical cannabis programs, practitioners will need to understand the interplay between Child Protective Services and medical cannabis use in order to ensure that child welfare goals are met, as opposed to ignored, in the name of “child protection.”

California’s Compassionate Use Act authorizes cannabis use for medicinal purposes.<sup>2</sup> Where agency policy fails to keep up with legislative recognition of cannabis as medicine, practitioners need to be ready to defend against the unnecessary separation of parent and child in medical cannabis cases. As the California court in *People v. Beaty*

1. <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881>  
2. “Proposition 215” is now known as the “Compassionate Use Act of 1996” and codified in California’s Health & Safety Code, § 11362.5.

explained, and as applicable by analogy to juvenile dependency cases, “the possession and cultivation of marijuana is no more criminal — so long as conditions [of CA Health and Safety Code 11362.5] are satisfied — than the possession and acquisition of any prescription drug with a physician’s prescription.”<sup>3</sup> If a parent uses cannabis pursuant to a licensed physician’s recommendation and in a manner consistent with parenting, then a parent’s cannabis use should no more play a role in child welfare cases.

*...practitioners need to be ready to defend against the unnecessary separation of parent and child in medical cannabis cases.*

For a child, protection from harm necessarily includes protection from involuntary separation from their family. In most cannabis-related juvenile dependency cases, the evidence is insufficient to justify the court’s assumption of jurisdiction over the children. The allegations of the petition will fail to allege a current substantial risk the children will suffer serious physical harm as a result of their parents’ inability to supervise, protect or care

3. *People v. Beaty*, 181 Cal. App. 4th 644.



### About the Author

**Jennifer Ani, JD, CWLS** is the principal of the Law Offices of Jennifer Ani, in San Rafael, CA. She has been an attorney in private practice for more than 20 years. Since 2006,

she has successfully represented parents in child welfare (CPS) cases throughout the State. Jennifer believes cannabis is significantly safer than CPS, and zealously defends the right of Qualified Patients to also be parents, and to be free from unnecessary State intervention. She is a member of the National Association of Counsel for Children and speaks regularly on child welfare and civil rights matters. In 2009, she was honored by the Legal Aid Society of California with the “Outstanding Family Attorney of the Year” award, and in 2010 was awarded the San Francisco Bar Association’s highest honor for Outstanding Family Law services. Ms. Ani received her B.A. from the University of California at Davis in 1989, and her J.D. from University of the Pacific, McGeorge School of Law in 1992. Jennifer lives with her husband, 10-year-old daughter, and rottweiler “Hero” in Marin County, CA.

for them. Yet, petitions are sustained and children removed because of cannabis use and cultivation. In an otherwise functional home, this is an unnecessary intervention. As renowned forensic pediatrician Dr. James Crawford-Jacubiak puts it, "Another knee-jerk cannabis case."

Defending a family's rights can be very difficult, especially because many people in the system, including Child Protective Services workers, attorneys, and judges can be biased against parents who are also cannabis patients. The more knowledge a practitioner has about medical cannabis, the more likely his or her arguments will be persuasive to a court.

This article hopes to provide tools to use in juvenile dependency cases where children have been removed as a result of medical cannabis use by a parent.

### What are Cannabinoids?

One word that belongs in every juvenile dependency practitioner's vocabulary is cannabinoid. Cannabinoids (e.g., THC and CBD) are the chemical compounds secreted by cannabis flowers that provide relief to an array of symptoms including pain, nausea, and inflammation. They work by imitating compounds our bodies naturally produce, called endocannabinoids, which activate to maintain internal stability and health. To put a complex system simply, they facilitate communication between cells. When deficiencies within our endocannabinoid system occur, physical complications follow. Cannabis acts to relieve these complications.

Cannabis contains at least 85 types of cannabinoids, many of which have documented medical

value. When cannabis is consumed, cannabinoids bind to receptor sites throughout our brain (receptors called CB-1) and body (CB-2). Different cannabinoids have different effects depending on which receptors they bind to. For example, THC binds to receptors in the brain whereas CBN (cannabinol) has a strong affinity for CB-2 receptors located throughout the body. Matching the right cannabi-

*Cannabis contains at least 85 types of cannabinoids, many of which have documented medical value. ... Different cannabinoids have different effects...*

noid at the right receptors will yield different types of relief, and a licensed physician is best suited to know which strain will help which medical condition. The results are so promising that cannabinoids have been synthesized. Some synthetic cannabinoid medications include Marinol, Nabilone, and Rimonabant. While these synthetic forms are effective, research shows that the natural plant has much more therapeutic effects. The choice should be left to the treating physician and the patient where two drugs offer similar remedies to a medical condition.

### Stereotypes and Fear of the Unknown

Social workers can be misguided when confronted with a parent who uses medical cannabis. Unless they have had training they will be unaware of the endocannabinoid system and the effects of cannabinoids on human health. Social workers are required to follow agency policy. Agencies fail to keep up with legislation and policy that recognize cannabis as legitimate medicine.

For example, one does not ordinarily get a "contact high" from second hand cannabis smoke unless trapped in a small enclosed area. That is myth. When was the last time a criminal defendant was able to explain away a positive drug test by using the "contact high" theory? We also do not remove for second-hand tobacco smoke, despite the clear evidence that second-hand tobacco smoke is responsible for 400,000 deaths each year. No deaths have ever been attributed to cannabis.<sup>4</sup>

As another example of fear of the unknown, no one will die or become sick from eating raw cannabis flower. The cannabis plant in its raw form is inert and must be heated, cooked, or otherwise undergo decarboxylation<sup>5</sup> to produce the psychoactive effects that give rise to concerns. A child simply will not be able to accomplish this task in most cases. →

- 4. No recorded cases of overdose deaths from cannabis have been found in extensive literature reviews, see for example Gable, Robert S., "The Toxicity of Recreational Drugs," American Scientist (Research Triangle Park, NC: Sigma Xi, The Scientific Research Society, May-June 2006) Vol. 94, No. 3, p. 207. See more at: [http://www.drugwarfacts.org/cms/Causes\\_of\\_Death#sthash.IOemHjLG.dpuf](http://www.drugwarfacts.org/cms/Causes_of_Death#sthash.IOemHjLG.dpuf)
- 5. A reaction involving the removal of a molecule of carbon dioxide from a carboxylic acid

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### Where is the Risk?

In order for the Department to state an adequate cause of action under WIC 300(b), the Department must set forth sufficient facts to show that the child "has suffered or there is a substantial risk that the minor will suffer serious physical harm or illness" as a result of various described causes. (In re Rocco M. (1991) 1 Cal.App.4th 814, 823, and §300(b), emphasis added.)

In *Rocco M.*, the court explained there are three elements to a section 300 (b) finding: 1) neglectful conduct by the parent in one of the specified forms 2) causation and 3) a specific risk of serious physical harm or illness to the child (*Rocco M.*, *supra*, at 814).

Assumption of jurisdiction in cases where parents are Qualified Patients pursuant to the Compassionate Use Act as codified in the Health & Safety Code and where, as here, there is no other evidence of conduct incompatible with parenthood is not warranted or justified.

Case law confirms Qualified Patients can also be parents. In *Alexis E.*, the court held that "[a] parent's use of marijuana, "without more," does not bring a minor within the jurisdiction of the dependency court. (*In re Alexis E.*, 171 CA4th at 453.)

Specific allegations are required to prove substance abuse as compared to substance use and where there is merely evidence of substance use, assumption of dependency jurisdiction is not warranted. See *In re Drake M.* (2012) 211 CA4th 754, 762. In fact, the same is true of harder drugs and alcohol. (See, e.g., *In re Destiny S.* (2012).

There must be risk to both set forth a cause of action, and sustain a petition. Social workers are →

## Best Practices

- ✓ When residing in a house with a child, possess, cultivate and use as little as your condition allows.
- ✓ Keep all cannabis out of plain sight, ideally in clearly labeled child-proof medicinal jars out of reach of children.
- ✓ If you cultivate outdoors, surround your garden surrounded with an impermeable fence that will deny access to children.
- ✓ If you cultivate indoors, do not include lamps or other fire hazards, and secure the garden in a locked room or devise another way to deny access to children.
- ✓ If you cook with cannabis, clearly label any resultant food products as medicinal, and keep them far away from any children's food.
- ✓ Use discretion when medicating, and do not do so when your child is present. Specifically, think about medicating when you have several hours open before any interaction with the child or after he/she is already in bed.
- ✓ If your child can understand, specifically explain to her/him that the marijuana is your medicine and that it is not for her/him (much like any other prescription medication).
- ✓ In a dual-patient-parent household, try to work out a routine with your partner where one parent is always un-medicated in case any unexpected issues arise.
- ✓ Never drive with your children in the car after medicating.
- ✓ Consider keeping notes for yourself regarding the precautions you have taken, so that you are prepared to inform the court about them if asked.
- ✓ Have your lawyer raise your condition and medical marijuana issues directly to oppose any discriminatory elements of the case plan (AA meetings, unnecessary drug therapy courses, mandatory drug tests), even while you complete them.
- ✓ You can also discuss with your attorney various compromise proposals that demonstrate your fitness as a parent while still allowing you to use your medicine, such as pledging to the court to refrain from medicating for 6 hours before seeing the child or children, or offering to try to test under a certain nanogram level that is set high enough to allow the use of some marijuana, but low enough to discourage lesser usage. You should also consider trying to solicit letters from people who would have personal knowledge (friends, neighbors, colleagues, teachers, etc.) attesting to your caring nature, thoughtful parenting, and strong bond with your children.

not trained on the effects (or non-effects, as with CBD only strains) of cannabis on patients. When asked to articulate the risk of harm likely to come to a child as a result of a parent's medical cannabis use, the response given by a social worker who has detained a child due to the presence of cannabis in the home, a typical response is "[the child] might die." This concern is unfounded and not based in science. There is a complete absence of any peer review article or scientific evidence that cannabis consumption causes death or other illness.

Child welfare laws uniformly require more than a social worker's concern or speculation as to risk. Practitioners must educate themselves on the effects of various cannabinoids, understand how psychoactive effect is produced, if at all, and understand that a child is unlikely to be attracted to raw cannabis flower, which is itself non-toxic.

### Current Risk Must Exist at the Jurisdiction Hearing

Welfare and Institutions Code Section 300, subdivision (b), further provides that "[t]he child shall continue to be a dependent child ... only so long as is necessary to protect the child from risk of suffering serious physical harm or illness." (WIC § 300, subd. (b).)

Hence, a jurisdictional finding under section 300, subdivision (b), requires evidence of: 1) neglectful conduct by the parent showing an inability to supervise and protect the child; 2) "serious physical harm or illness" or a "substantial risk" thereof; and 3) causation, a link between the parental conduct and the risk of harm. (*In re James R.* (2009) 176 Cal. App.4th 129, 135; *In re Rocco M.* (1991) 1 Cal.App.4th 814, 819.) Substantial risk of serious physical harm is

a term that "means what it says." (*Rocco M., supra*, 1 Cal.App.4th at p. 824). Furthermore, the pivotal question under section 300, subdivision (b) "is whether circumstances at the time of the hearing" make the child susceptible to the defined risk of harm. (*In re Rocco M.*, 1 Cal.App.4th at p. 824; accord *In re David M.* (2005) 134 Cal.App.4th 822, 829.) There must be evidence a parent engaged in neglectful conduct involving a failure or inability to supervise, protect or provide regular care for his or her children, and evidence of serious physical harm or illness that may be attributed to the parent.

Admittedly, evidence of past conduct can be probative of current conditions indicating that a risk of harm exists. (*In re J.N.* (2010) 181 Cal.App.4th 1010, 1025; *In re David M.*, 134 Cal.App.4th at p. 831.) However, where past conduct forms the basis of the jurisdictional allegations, before jurisdiction can be taken pursuant to section 300, subdivision (b), the juvenile court must be presented with evidence which establishes that there is reason to believe that the alleged neglectful acts will reoccur in the future. (*Ibid*; *In re Savannah M.* (2005) 131 Cal. App.4th 1387, 1393, 1396.)

A parent's history of marijuana use, without more, does not state a cause of action because allegations in the petition under 300(b) must place the child at current risk of serious physical harm. Moreover, as parent's history of substance abuse is not enough to make out a prima facie case, a history of substance use is clearly an inadequate basis for a court to assume dependency jurisdiction over any minor. Thus, the allegation that mother is a "current user of marijuana" without more, fails to state a cause of action in that it fails to allege facts that show how using marijuana places any minor at "substantial risk of serious physical harm

*A parent's history of marijuana use, ... does not state a cause of action because allegations in the petition ... must place the child at current risk of serious physical harm.*

or illness". This allegation also fails under the reasoning set forth in *Drake M., supra.*, because there is no substantial evidence as required by the opinion in *Drake M.* of substance abuse. (*In re Drake M.* (2012) 211 CA4th 754, 762.)

Regardless of evidence of history or past conduct, there must be a showing that, at the time of jurisdictional hearing, the children are subject to a "substantial risk" of "serious physical harm." (*In re Rocco M.*, 1 Cal.App.4th at p. 823.)

### Access to Cannabis

Where an allegation states that a home was found to contain marijuana that was accessible to a child, this statement, even if true, does not establish a basis for juvenile court jurisdiction unless there is evidence that the child was harmed or even at a risk of harm. Cannabis is not toxic unless decarboxylated.

To mitigate any perceived harm, the parent should obtain a lock box to store their medicine, and treat cannabis as they would any other medicine. Just as a reasonable parent would not leave prescription Percocet pills in reach of their infant, a parent should keep all medicine, including cannabis, in a child-proof container out of the reach of children. This "best practice" goes a long way to abate any perceived risk from parents who use medical cannabis. Use of a lock box will also ensure that there will be no evidence a similar situation would occur in the future.

Under 300(b), even if the home was found to contain marijuana, hash oil, pipes, a lighter,



joints, and marijuana particles in the home which a child, who was crawling and pulling up on objects, could have had access to, unless a child has actually been harmed, jurisdiction does not properly lie.

Let's take a look at some of the more common allegations in petitions regarding cannabis use by a parent, and appropriate responses that practitioners can employ to defeat or defuse them:

### The "Smell" of Cannabis

There is no risk at all from the smell of cannabis. Cannabis smell derives from its terpenes.<sup>6</sup> Terpenes are also found in orange peel, pine needles, and other plants. Terpenes are not toxic. The smell of marijuana is not dangerous to anyone in any way. Therefore, even though it may be true that a home smells of marijuana, a true finding on a petition cannot be supported because there is no evidence that a child is harmed or is at a risk of future harm from smelling marijuana.

### Cannabis Smoke

An allegation that "[t]he parents have smoked while in the presence of [child] exposing him to second hand smoke" is not substantial evidence to sustain a petition or remove a child from a parent. There must first be direct evidence to support such a claim. Where parents testify that they smoke outside, use a vaporizer, or consume edibles, such an allegation necessarily fails. A social worker's speculation is not substantial evidence because it is not based on any reliable evidence. Although one case, *In re Alexis E.* (2009) 171 Cal.App.4th 438, 452, found a risk to children from second hand marijuana smoke, it was

6. See for example, <https://www.leafly.com/news/cannabis-101/terpenes-the-flavors-of-cannabis-aromatherapy>

*A social worker's speculation is not substantial evidence because it is not based on any reliable evidence.*

part and parcel of the finding that the children were at risk from the father's marijuana use and involved proof that the father actually smoked in front of the children and became irritable and mean when he smoked. If, by the time of the jurisdiction hearing, no evidence exists that a parent smokes near the child, this allegation fails. Even parents who had smoked in the presence of the child can argue at jurisdiction that they had committed to changing their ways and to would not smoke medical marijuana inside their home, or use in a manner that does not produce smoke. Thus, no basis for jurisdiction exists as this problem is mitigated.

### Messy Homes

Some people have messy homes. This may or may not have anything to do with medical cannabis. Moreover, evidence of a chronically messy and dirty home, by itself, is insufficient to justify dependency jurisdiction apart from other evidence that the condition of the home placed the children at risk of serious physical harm or illness. (*In re Paul E.* (1995) 39 Cal.App.4th 996, 1005 & fn. 8, citing *In re Susan M.* (1975) 53 Cal.App.3d 300, 306 ["The absence of ill effects is a way of distinguishing a loving-but-dirty-home case from a case of real neglect."]; *In re James C.* (2002) 104 Cal.App.4th 470, 482-483.) Even if at the time of removal the home was messy at that time, without more, there is no evidence that a child is at a risk of future harm where the home has been cleaned and straightened up and is appropriate.

### Substance Use v. Abuse

A parent's substance abuse may present a substantial risk of severe physical harm, warranting the exercise of dependency jurisdiction, when there is an absence of adequate supervision and care. *In re Kristin H.* (1996) 46 CA4th 1635, 1650. However, there must be facts alleged to prove any type of substance abuse. The social services agency must show evidence of a specific, non-speculative and substantial risk to the child of serious harm based on the parent's substance abuse. *In re David M.* (2005) 134 CA4th 822, 830. The social worker must be required to specifically identify the risk of serious physical harm that has come to or is likely to come to the child as a result of the medical cannabis use pursuant to their recommendations for cannabis from licensed physicians.

Positive toxicology screens for marijuana do not subject any minor to any risk of harm. Being under the influence of cannabis does not create a per se substantial risk of serious physical harm any more than being under the influence of any other narcotic medicine if used in a manner consistent with the physician's recommendations. If it were true that being under the influence of a substance created substantial risk of serious physical harm or illness, then the minor children of every parent prescribed narcotics, opiates, stimulants, and even synthetically-produced medications designed to replicate and intensify the effects of THC, would be subject to dependency jurisdiction.

### Real Problems

If a medical cannabis patient had used in a manner inconsistent with parenthood, for example, was under the influence and heavily sedated while caring for their child, as long as they are able to →

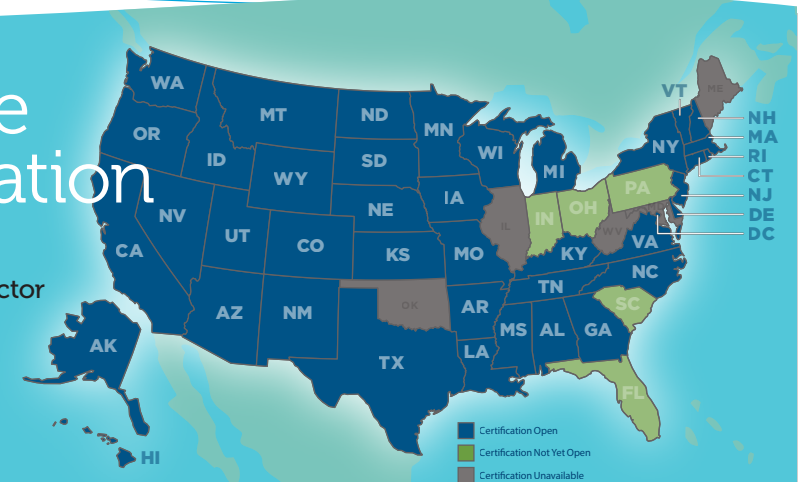
recognize and change their ways prior to jurisdiction, the state need not intervene, certainly, need not separate the otherwise loving, appropriate parent from an unharmed child. The law allows for mistakes made by a parent, even serious mistakes, and these do not warrant juvenile court jurisdiction under section 300, subdivision (b) unless there is evidence that those same mistakes are likely to reoccur in the future and that a repeated mistake would present a risk of serious physical harm to the child. (*In re J.N.*, 181 Cal.App.4th 1010, 1023-1025; *In re David M.*, 134 Cal.App.4th 822, 829; *In re Savannah M.*, 131 Cal.App.4th 1387, 1397; *Nicholas B.* (2001) 88 Cal.App.4th 1126, 1134; *In re Rocco M.*, 1 Cal.App.4th 814, 824.)

In the case *In re J.N.*, *supra*, 181 Cal.App.4th at p. 1014-1015, the dependency petition was based on a one time incident where the father drove while under the influence of alcohol (.20 BAC) with the mother and children in the car, was involved in an accident where one of the three children was injured, and both parents were arrested for child endangerment. Prior to the jurisdictional hearing, the children were released to the mother and both parents expressed remorse for their actions and professed they would never make the same mistake again. (*Id.* at pp. 1015, 1019.) The juvenile court sustained the petition and the parents appealed. (*Id.* at p. 1021.) The Court of Appeal reversed. (*Id.* at pp. 1021-1027.) In doing so, the Court of Appeal focused on the lack of evidence of future risk in that there was no evidence the parents had any substance abuse problem or lacked appropriate parenting skills and the evidence that they were remorseful, understood their mistakes and committed to changing their behavior. The Court . at pp. 1025-1027.)

# Child Welfare Law Certification



by Daniel Trujillo,  
Certification Director



## Civility Promise Winner – Tuscany Trip



After an exhaustive review of 39 outstanding applicants, we have selected Nick Soter as our winner! Nick is a San Francisco based solo practitioner doing dependency work for 21 years representing both parents and children in courts around the Bay Area. He does a monthly case law update for his fellow panel attorneys, and he has given trainings on paternity issues in the juvenile court. He is helping to promote new legislation in California to allow for more recognition and participation by fathers in the dependency system. Those asked to submit a letter of recommendation for Nick clearly thought the world of his commitment, professionalism, and hard work. In October, he'll be attending Civility Promise and enjoying Tuscany with his wife Dora where they plan to extend the trip to further explore the wonders of Italy. We'll see more of Nick in future *Guardian* issues and webinars reporting back on how awesome the trip was – oh, and I'm sure on what he learns at the seminar.

## Open in Minnesota!

We just received word that our application to the Minnesota Board of Legal Specialization was approved. We will be open for Minnesota applicants starting in August!

## We'd like to congratulate our two newest CWLS!



**Angela Mueller**  
Mueller Law Office,  
Jackson, TN



**Amanda Fischer**  
Law Office of Amanda Fischer,  
San Francisco, CA

In a similar case, *In re Savannah M.*, *supra*, 131 Cal. App.4th at pp. 1390-1393, the petition was based on a one time incident where the parents, who had been drinking, left their twin daughters with a friend who sexually abused one of the girls. The juvenile court sustained the petition, finding that Savannah was a child described by section 300, subdivision (b), and her sister, Sierra, was a child described by section 300, subdivision (j), and the mother appealed. (*Id.* at pp. 1392-1393.) The Court of Appeal reversed and held that there was insufficient evidence to support a finding that the children were at a substantial risk of future serious harm at the time of the jurisdictional hearing. (*Id.* at pp. 1393-1400.) In doing so, the Court of Appeal found that, although the parents' alcohol use may have contributed to their negligence on the night Savannah was abused, it was pure speculation that future alcohol use might result in future negligence in light of the very protective stance they had taken since the incident. (*Id.* at pp. 1396-1398.)

In the case *In re David M.*, *supra*, 134 Cal.App.4th at pp. 825-826, the petition alleged substance abuse, mental health problems and prior neglect of a half sibling as the basis for jurisdiction. The petition was sustained and both parents appealed. (*Id.* at p. 828.) The court found that there was sufficient evidence the mother had a substance abuse problem with marijuana and that both the mother and the father had mental health issues. (*Id.* at p. 830.) Regardless, the Court of Appeal reversed the jurisdictional findings because the agency had failed to present any concrete evidence showing how the children would be harmed in the future by either parent's problems. (*Id.* at pp. 830-832.) In doing so, the Court of Appeal focused on the evidence that the children were

healthy, well cared for and never actually harmed or even endangered and that the mother and father were providing an appropriate home. (*Ibid.*) The court noted, "Certainly, it is possible to identify many possible harms that could come to pass. But without...evidence...such harms are merely speculative." (*In re David M.*, *supra*, 134 Cal.App.4th at p. 830.) Speculative concerns are by definition not based on any credible evidence, and cannot support assumption of dependency jurisdiction.

If facing a parent who has made a clear error in judgment, then, by analogy to *In re J.N.*, *supra*, 181 Cal.App.4th at pp. 1025-1027, practitioners should establish that the parents have quickly recognized they made a mistake, have gained insight into how their conduct presented an unacceptable risk of harm to the child, and as a result, have taken corrective action and committed to changing their ways and are good parents. Remorsefulness that is genuine can go a long way towards convincing the court that future risk has been abated. In an otherwise appropriate home, one-time mistakes do not warrant intervention or involuntary separation.<sup>7</sup>

### Conclusion

Mere marijuana use, without more, does not support dependency jurisdiction. (*In re Alexis E.*, *supra*, 171 Cal.App.4th 438, 452; *In re David M.*, *supra*, 134 Cal. App.4th 822, 829-830; *Jennifer A. v. Superior Court*, *supra*, 117 Cal.App.4th 1322, 1345-1346.) If allegations are not contested then parents succumb to the jurisdiction of the court through "submission." A family should not be in they system unless their conduct warrants state intervention. In the case of medical cannabis patients who are parents, practi-

7. See for example, "Best Practices" provided by Americans for Safe Access <http://www.safeaccessnow.org>

tioners should fight to keep families together absent good reasons not to do so. Medical cannabis is not a good reason for state intervention. Removing a child from his or her home is far more traumatic than a parent's responsible medical cannabis use.

Use of experts such as a forensic pediatrician familiar with cannabis can strengthen your case. Unlike statements of counsel, direct evidence from a qualified expert is properly considered by the court as evidence. Good sources of information can be found on the websites of Americans for Safe Access, LEAP, and your states' branch of NORML. These organizations advocate for an end to prohibition of the use of responsible use of medical cannabis. ■

### Here are several Court of Appeal cases that are unpublished (and therefore instructive, but not binding legal precedent):

- In re: Michelle M. et al 2007 WL 1041372 (Cal. App. 2 Dist.)
- In re Alysha A. (1996) 51 Cal. App. 4th 393, 397
- In re K. P. et al. 2008 WL 5063857 (Cal. App. 5 Dist.)
- G.R. v. Superior Court 2008 WL 2445215 (Cal. App. 1 Dist.)
- In re D.L. 2008 WL 762011 (Cal. App. 1 Dist.)
- In re Turina J. 2006 WL 1545534 (Cal. App. 5 Dist.)
- In re Sean B. 2006 WL 1101626 (Cal. App. 3 Dist.)

# Case



## **State of Washington v. S.J.C.**

by Leah Tingley,  
NACC Summer Law Clerk

The Supreme Court of Washington considered the issue of whether article I, section 10 of the Washington Constitution requires the court to apply the *Ishikawa* factors<sup>1</sup> when a former juvenile offender has satisfied the statutory requirements of former RCW 13.50.050 (2011) to seal his or her juvenile court record.<sup>2</sup> The juvenile court held that *Ishikawa* does not apply and granted S.J.C.'s motion to vacate his adjudication and seal his juvenile record under former RCW 13.50.050.<sup>3</sup> The State appealed the juvenile court decision arguing that article I, section 10 also required the juvenile to show that sealing of his or her juvenile records was justified under an *Ishikawa* analysis.<sup>4</sup> The Supreme Court applied the experience and logic test<sup>5</sup> to conclude

1. *Ishikawa* states that a party seeking to seal court records must: (1) "make some showing of the need therefor"; (2) "anyone present when the closure motion is made must be given an opportunity to object"; (3) courts and parties must "analyze whether the requested method for curtailing access would be both the least restrictive means available and effective in protecting the interests threatened"; (4) "the court must weigh the competing interests of the [party] and the public and it must consider alternative methods to protect the interest"; (5) the must be no broader than necessary to protect the interest. See *Seattle Times Co. v. Ishikawa*, 640 P.2d 716 (1982).

2. *State v. S.J.C.*, No. 90355-7, 2015 WL 3643480, at \*3 (Wash. June 11, 2015).

3. *Id.* at \*1.

4. *Id.*

5. To determine whether the experience prong is met, the court must determine whether the "place and process have historically been open to the press and general public". To determine if the logic prong is met, the court must determine whether public access "plays a significant positive role in the functioning of the particular process in question." *Id.* at \*5, \*12.

article I, section 10 does not apply.<sup>6</sup> Thus, an *Ishikawa* analysis is not needed when sealing juvenile court records pursuant to a specific statutory provision.

In January 2008, S.J.C. pleaded guilty to two counts of fourth degree assault with sexual motivation for offenses he committed at age 13.<sup>7</sup> In December 2011, S.J.C. moved to vacate his adjudication and seal his juvenile record under former RCW 13.50.050.<sup>8</sup> At the time of the motion, S.J.C. had completed all the conditions of his sentence including: two years of community supervision, regular school attendance, sexual deviancy treatment, and payment of a victim penalty assessment.<sup>9</sup> Under Washington law, the "official juvenile court file of any alleged or proven juvenile offender shall be open to public inspection, unless sealed pursuant to subsection (12)" of Former RCW 13.50.050.<sup>10</sup> Former RCW 13.50.050(12) provided:

- (b) The court shall not grant any motion to seal records for class B, C, gross misdemeanor and misdemeanor offenses and diversions made under subsection (11) of this section unless:
- (i) Since the date of last release from confinement, including full-time residential treatment, if any, entry of disposition, or completion of the diversion agreement, the person has spent two consecutive years in the community without being convicted of any offense or crime;

6. *Id.* at \*2.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

- (ii) No proceeding is pending against the moving party seeking the conviction of a juvenile offense or a criminal offense;
- (iii) No proceeding is pending seeking the formation of a diversion agreement with that person;
- (iv) The person is no longer required to register as a sex offender under RCW 9A.44.130 or has been relieved of the duty to register under RCW 9A.44.143 if the person was convicted of a sex offense; and
- (v) Full restitution has been paid.

The Supreme Court applied the experience and logic test to determine whether article I, section 10 applied and whether an *Ishikawa* analysis is necessary or if the satisfied statutory requirements were enough to seal S.J.C.'s juvenile record. First, the Supreme Court examined the history of juvenile justice and decided that requiring an individualized showing under the *Ishikawa* factors would be directly contrary to the court's entire history regarding juvenile courts.<sup>11</sup> Historically, juvenile court records that met statutory sealing requirements have not been open to press and the general public.<sup>12</sup> Juvenile court records have always been treated as distinctive and as deserving of more confidentiality than other types of records by the legislature when they created the juvenile court as a separate division of superior court.<sup>13</sup> Additionally, the Supreme Court has always respected the legislature's judgment regarding the openness of juvenile court records and thus have never held

11. *Id.* at \*8.

12. *Id.* at \*4-\*5.

13. *Id.* at \*5.



article I, section 10 to apply to juvenile records.<sup>14</sup> Furthermore, requiring a separate *Ishikawa* analysis for the statutory sealing of juvenile records is unsupported by not only Washington history, but also by national experience and the views of professional organizations.<sup>15</sup> Therefore, the experience prong of the experience and logic test is not met.<sup>16</sup>

The Court then applied the logic prong of the experience and logic test. When considering sealing a juvenile record the court must weigh the need for the juvenile's confidentiality against the need for public safety and oversight.<sup>17</sup> The Court found that both needs are amply provided for in Former RCW 13.50.050 and related statutes.<sup>18</sup> Juvenile records are only sealed after the former juvenile demonstrates that they have been rehabilitated and have preformed the necessary restitution.<sup>19</sup> Some serious offenses cannot ever be sealed.<sup>20</sup> These measures help to ensure the protection of public safety. Additionally, open juvenile court records have very real and objectively negative consequences, including denial of housing, employment, and educational opportunities for the offender.<sup>21</sup> Thus, when all statutory sealing requirements are met, public access to juvenile court records is "detrimental to the rehabilitative purpose of juvenile courts and does not enhance the competing concerns of public safety and accountability."<sup>22</sup>

14. *Id.* at \*7.  
15. *Id.* at \*11.  
16. *Id.* at \*12.  
17. *Id.* at \*14.  
18. *Id.*  
19. *Id.*  
20. *Id.*  
21. *Id.* at \*13.  
22. *Id.* at \*15.

Therefore, the logic prong of the experience and logic test is not met.<sup>23</sup>

In conclusion, the Supreme Court of Washington affirms the juvenile court decision that article I, section 10 does not apply and therefore, an *Ishikawa* analysis is not needed in order to seal juvenile court records. ■

23. *Id.*

## Amicus Curiae

### **Montgomery v Louisiana**

by Leah Tingley,  
NACC Summer Law Clerk

The NACC joined an amicus curiae brief drafted by the Northwestern University School of Law's Children and Family Justice Center/Center on Wrongful Convictions of Youth in support of the appellee Henry Montgomery.<sup>1</sup> The brief asks the Supreme Court of the United States to decide that the ruling in *Miller v. Alabama*<sup>2</sup> apply retroactively.<sup>3</sup> The *amici* argue that the Court made a substantive transformation in law, practice, and constitutional jurisprudence relating to the ways in which juvenile offenders are punished when they decided, "children are different" in *Miller*.<sup>4</sup> Therefore, the new law must be applied retroactively to juvenile offenders

1. Amicus Brief of Northwestern University School of Law's Children and Family Justice Center and Center on Wrongful Convictions of Youth, et al., *Montgomery v. Louisiana*, 135 S.Ct. 1546, (2015).  
2. *Miller v. Alabama*, 133 L. Ed. 2d 407 (2012). (holding that mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments)  
3. Amicus Brief, *Montgomery*, 235 S.Ct. 1546, at 7.  
4. *Id.* at 8.

currently serving a sentence of life without the possibility of parole.

Henry Montgomery is currently serving a life sentence for a crime he committed on November 13, 1963- just a month past his seventeenth birthday.<sup>5</sup> Over the fifty-two years that Mr. Montgomery has spent serving time in the Louisiana Department of Corrections, the United States has changed in ways we had never imagined in the 1960's. Likewise, Mr. Montgomery has grown and deserves an opportunity to prove in court that he has learned beyond the misguided impulsivities of his youth.<sup>6</sup>

*Miller v. Alabama* was the latest transformative step by the Court in juvenile law by redefining even the most serious child offenders as fundamentally redeemable.<sup>7</sup> Previously, the Court had placed categorical limits on the severity of punishments that may be imposed on children under the age of 18 with decisions in *Roper*<sup>8</sup> and *Graham*.<sup>9</sup> The combination of this trio of cases has established that "children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking."<sup>10</sup> Additionally, children are more vulnerable to negative influences and outside pressures, including from their family and peers.<sup>11</sup> Finally, a child's character is not as well formed as an adult.<sup>12</sup> Consequently, the recognition

5. *Id.* at 28.  
6. *Id.*  
7. *Id.* at 15.  
8. *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the death penalty for individuals who were under the age of 18 at the time of their capital crimes is prohibited by the Eighth and Fourteenth Amendments)  
9. *Graham v. Florida*, 560 U.S. 48 (2010), as modified (July 6, 2010) (holding that imposing life without parole sentence on juvenile offenders who did not commit homicide is a violation of the Eighth Amendment)  
10. Amicus Brief, *Montgomery*, 235 S.Ct. 1546, at 18.  
11. *Id.* at 19.  
12. *Id.* at 20.

of these three major differences between children and adults marks a transformative moment in juvenile justice that now recognizes that almost no child warrants life without parole—even when that child has killed another person.<sup>13</sup> Children are entitled to different consideration because they are less culpable and more capable of rehabilitation than adult defendants.<sup>14</sup>

As the third stage in a substantive shift in juvenile law, *Miller* should be applied retroactively.<sup>15</sup> *Roper* and *Graham* have been held to be substantive and applied retroactively by state courts across the country.<sup>16</sup> *Miller* is grounded in the same Eighth Amendment proportionality jurisprudence and premised upon the same scientific and common sense principles regarding juveniles' reduced culpability and greater capacity for rehabilitation.<sup>17</sup> Therefore, it should be held substantive and retroactive for the same reasons.

Based on the principles of "evenhanded justice", the argument that Mr. Montgomery should be denied his right to what this Court has required, not because of his own culpability but simply because he committed his crime before our understanding of juvenile offenders had evolved, would fail.<sup>18</sup> Mr. Montgomery is now sixty-nine years old, and has spent the past fifty-two years incarcerated.<sup>19</sup> With the Court's decision in *Miller*, Mr. Montgomery's hope that he will be able to ask a court to consider mitigating factors with an eye towards release has

13. *Id.* at 21.

14. *Id.* at 22.

15. *Id.* at 23.

16. Amicus Brief, *Montgomery*, 235 S.Ct. 1546, at 24.

17. *Id.*

18. *Id.* at 35.

19. *Id.* at 28.

been restored. But because Mr. Montgomery lives in a state that has not held *Miller* retroactively, he must wait until the Supreme Court decides on the issue. *Miller* is the rare case in which non-retroactivity would wholly subvert the core principle of the constitutional right in question.<sup>20</sup> A Court decision to prevent lower courts from revisiting

20. *Id.* at 35.

the past of inmates sentenced as children to life without parole would reduce *Miller's* main purpose to nothing more than a half-truth.<sup>21</sup> Therefore, the *Amici* respectfully request that the United States Supreme Court hold that *Miller v. Alabama* applies retroactively. ■

21. *Id.*



## Membership Matters

by Sara Whalen, NACC Membership Director

PLATINUM  
LIFETIME

GOLD

SILVER

BRONZE



### NACC Featured Member : Jennifer Mertus

**Jennifer Mertus** is an attorney and the Director of the Center for Children's Rights at Whittier Law School in Costa Mesa, California. In her pre-academia practice, Jennifer provided pro-bono representation for clients in guardianship and adoption matters. She has continued her passion for child advocacy since becoming Director of the Center for Children's Rights in 2011, training the next generation of child advocates in classes such as Adoption Law, International Adoption Law, International Children's Rights, and Comparative Family Law. She is also actively involved in child welfare policy advocacy both domestically and abroad.

Check out Jennifer's brief bio on our [homepage](#) or login to view her full profile.

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As a multidisciplinary membership organization, we work to strengthen legal advocacy for children and families by:

- Ensuring that children and families are provided with well resourced, high quality legal advocates when their rights are at stake
- Implementing best practices by providing certification, training, education, and technical assistance to promote specialized high quality legal advocacy
- Advancing systemic improvement in child-serving agencies, institutions and court systems
- Promoting a safe and nurturing childhood through legal and policy advocacy for the rights and interests of children and families

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