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Child Custody and Smoking: Legal Issues

Numerous studies have proven that secondhand smoke can have life-threatening effects on growing children. The courts have a duty to protect the children that appear before them in custody-related matters and Ohio courts are increasingly issuing orders that prohibit parental smoking in the home when children are present.¹ These orders are based on sound legal principles and survive counter-arguments raised by smokers.

Parens Patriae Doctrine – The State as Parent

- Courts are empowered and expected to protect the health of children within their care.²
- The Parens Patriae Doctrine is the foundation of the family court and juvenile justice systems.³ The Doctrine is based on the premise that the state is the “ultimate parent.”
- The U.S. Supreme Court has found that, “Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor **and in many other ways.**”⁴
- In order to protect innocent children from the harmful effects of secondhand smoke, at least five states have laws restricting smoking in foster homes and vehicles when children are present.⁵

Parental Autonomy and Liberty Interest

- The right to “establish a home and bring up children” has been recognized as a fundamental liberty interest protected by the United States Constitution.⁶
- However, the Supreme Court has found that the family is not beyond regulation in the public interest.⁷
 - For example, the law clearly does not permit parents to abuse, neglect or cause other serious harm to their children. Secondhand smoke causes over 1,000,000 illnesses and 280 deaths in children in the U.S. every year and some courts have compared parental smoking to child abuse or neglect.⁸

Smoking as a Privacy Interest

- The Supreme Court has never found that there is a “right to smoke” included under the right to privacy (or anywhere else).⁹

This information is provided for educational purposes only and is not to be construed as a legal opinion or as a substitute for obtaining legal advice from an attorney. The Tobacco Public Policy Center provides legal information and education about tobacco and health, but does not provide legal representation. Readers with questions about the application of the law to specific facts are encouraged to consult legal counsel familiar with the laws of their jurisdictions.

- Even if a right to smoke *was* declared a constitutionally protected right by the Supreme Court, child custody orders prohibiting smoking in the home, do not forbid parents from smoking altogether – smoking *in the presence of a child* is usually the focus of such custody orders.¹⁰

¹ *In re Julie Anne*, 780 N.E.2d 635 (Ohio Comm. Pl. 2002); *Day v. Day*, 2005 Ohio App. LEXIS 3940 (Ct. App.-5th Aug. 22, 2005).

² *Lassiter v. Dep't of Soc. Services of Durham Cnty.*, 452 U.S. 18, 27 (1981); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

³ William J. Chinnock, *The Family Courts' Mandatory Duty to Restrain Parents and Other Persons from Smoking Around Children*, 45 ARIZ. L. REV. 801, 814 (2003). See *Meyer v. Nebraska*, 262 U.S. 390, (1923); *Sturges v. Burn*, 231 U.S. 320, (1913); *Muller v. Oregon*, 208 U.S. 412 (1908); *Interstate C.S.R. Co. v. Massachusetts*, 207 U.S. 79 (1907).

⁴ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

⁵ Lisa Rathke, *Rule Would Shield Foster Children from Secondhand Smoke*, BARRE MONTPELIER TIMES ARGUS, August 19, 2005, <http://www.timesargus.com/apps/pbcs.dll/article?AID=/20050819/NEWS/508190345/1003/NEWS02>. See, e.g. WASH. ADMIN. CODE 388-148-0185 (Lexis 2005); 10-148-016 ME. CODE R. (Weil 2005).

⁶ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *In re Adoption of V.N.M.*, 2005 Ohio App. LEXIS 2421, at *26 (Ct. App.-5th May 23, 2005).

⁷ *Prince*, 321 U.S. at 166; *Crowley v. Christensen*, 137 U.S. 86, 89 (1890) (“The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. **Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will.**”) (emphasis added).

⁸ *Skidmore-Shafer v. Shafer*, 770 So. 2d 1097, 1100 (Ala. Civ. App. 1999) (writing that where mother was heavy smoker and child suffered from respiratory problems, “to do this to a child is no less child abuse than if you had deprived him of food or medical treatment”); *In re Julie Anne*, 780 N.E.2d 635 (Ohio Comm. Pl. 2002).

⁹ SAMANTHA K. GRAFF, TOBACCO CONTROL LEGAL CONSORTIUM, THERE IS NO CONSTITUTIONAL RIGHT TO SMOKE 3 (2005), available at <http://www.wmitchell.edu/tobaccolaw/resources/no+constitutional+right+to+smoke.pdf>.

¹⁰ *Gilbert v. Gilbert*, 1996 Conn. Super. LEXIS 2153 (Super. Ct. Aug. 15, 1996); *Day v. Day*, 2005 Ohio App. LEXIS 3940 (Ct. App. -5th Aug. 22, 2005).