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Secondhand Smoke and Family Courts: The Role of Smoke Exposure in Custody and Visitation Decisions

Kathleen Hoke Dachille and Kristine Callahan

Family courts address a multitude of issues when determining the rules of a child's life after his or her parents divorce or otherwise seek court intervention on custody and visitation arrangements. Most states have enacted statutes setting parameters for custody and visitation determinations. However, the nature of these cases requires that trial courts retain significant discretion in weighing the various factors and crafting orders reflecting the best interests of the children before them.

With the abundance of scientific evidence describing the dangers of exposure to secondhand smoke or environmental tobacco smoke (secondhand smoke), particularly for children, and the increasing public awareness and understanding of these dangers, the issue of a child's exposure to secondhand smoke is being raised more frequently in custody and visitation cases. Although there is nothing novel about a family court considering factors that affect a child's health, the impact that secondhand smoke has on children generally and on a particular child in a custody proceeding are relatively new issues for most trial courts and family law attorneys. This Synopsis is designed to assist courts, practitioners and lay people who are faced with a custody or visitation proceeding in which a child's exposure to secondhand smoke has been or may be raised.¹

Section I presents a summary of the adverse health effects suffered by children who are exposed to secondhand smoke. Section II provides a general overview of the process by which family courts draft custody and visitation orders, and how this process permits consideration of secondhand smoke exposure. Section III discusses specific cases that involve the use of secondhand smoke exposure as a factor in custody or visitation decisions. Cases regarding children who are particularly susceptible to secondhand smoke exposure, as well as those concerning healthy children, are considered. Section IV discusses the use of judicial notice to introduce scientific data regarding the adverse health effects of secondhand smoke exposure. Section V explains why the consideration of parental smoking in custody and visitation disputes does not infringe upon the right to parental autonomy.

Section I — Serious Health Risks Accompany Exposure to Secondhand Smoke, Especially for Children

There is substantial, reliable scientific research demonstrating that secondhand smoke causes significant adverse health effects to those exposed. The impact of exposure to secondhand smoke is particularly detrimental to children, increasing the likelihood, frequency and severity of common childhood illnesses and imposing higher risk for more serious, long-term diseases.

Secondhand smoke is comprised of side-stream smoke from the lit tobacco product and exhaled smoke from the smoker's mouth and nose, and can best be described as "toxic soup."² The more than 4,000 chemical compounds found in secondhand smoke include no fewer than 60 known or probable carcinogens.³ The U.S. Environmental Protection Agency classifies secondhand smoke as a Group

Key Points

- Family courts are properly considering exposure to secondhand smoke when making decisions regarding custody or visitation arrangements.
- Exposure to secondhand smoke is a particularly important and controlling factor when a child suffers from illnesses that are aggravated by the exposure.
- Even healthy children are increasingly protected from secondhand smoke exposure in custody and visitation orders.
- Divorcing parents interested in a court order protecting their children from secondhand smoke can and should raise the issue in the pleadings and through a motion for judicial notice.
- Although parents have privacy rights and parental autonomy rights curtailed by orders prohibiting smoking in the home or in the presence of the child, those rights do not trump the child's right to a safe and healthy environment or the state's authority to ensure the same.

This synopsis 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. Laws cited are current as of June 1, 2005. The Tobacco Control Legal Consortium 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.

A carcinogen—a substance that causes cancer in humans.⁴ In addition to the increased cancer risk, exposure to secondhand smoke causes long-term cardiovascular and respiratory diseases.⁵ The negative health consequences from exposure to secondhand smoke are not only these profound, long-term diseases, however. Those exposed, especially children, suffer immediately and chronically.

Children exposed to secondhand smoke are more likely to suffer from respiratory and related ailments, including lower respiratory infections, middle ear infections, bronchitis, coughing, wheezing, and asthma.⁶ In fact, children exposed to cigarette smoke in the home are twice as likely to develop and suffer persistently from asthma.⁷ The Environmental Protection Agency estimates that between 8,000 and 26,000 children develop asthma every year, and between 200,000 and 1,000,000 children suffer aggravation of asthma symptoms, due to exposure to secondhand smoke.⁸

Undoubtedly, secondhand smoke makes children sick. Unlike most adults, however, children have little to no control over their exposure to secondhand smoke—it is truly involuntary. This Synopsis addresses when and how family courts have considered a child's exposure to secondhand smoke when making custody and visitation decisions.⁹

Section II — The General Standard for Crafting Custody and Visitation Orders Allows for Consideration of Parental Smoking

Courts considering a child's exposure to secondhand smoke in a proceeding concerning custody or visitation must do so within the framework of the state's marriage and divorce act, most of which are modeled after the Uniform Marriage and Divorce Act (UMDA). The primary focus of the court is the best interests of the child, a standard that requires significant fact-finding and weighing of evidence.¹⁰ Because of the intensive factual bases in these decisions, family courts are vested with significant discretion in drafting custody and visitation orders.

Typically, the family court's first step in resolving custody issues is to encourage parents to mediate their dispute and resolve the matter without need for a trial.¹¹ If settlement does not occur, the court

will likely appoint an attorney, or *guardian ad litem*, to represent the child or children involved.¹² Depending on the facts, the court may also require that all parties meet with a psychologist, psychiatrist or social worker, who will serve as an advisor or expert for the court.¹³ If a child's health is at issue, the court may seek input from a physician or depend on the parties to secure testimony from the child's pediatrician.¹⁴ Before trial, the court may seek the recommendation of the child's lawyer, physician or court-appointed evaluator as to the best custody and visitation arrangement.¹⁵

Child custody cases are among the most difficult for judges because of the malleability of the best interests standard and the gravity of the issue presented.¹⁶ Courts are counseled to allow the parties a full and fair opportunity, without undue interruption, to present their testimony.¹⁷ The rules of evidence, while applicable, may be relaxed somewhat to allow for the introduction of all evidence the parties deem relevant.¹⁸ Once the trial has concluded and the judge has evaluated all of the evidence, the judge must decide on the child's placement, as well as parental requirements and prohibitions.

The final decision will likely govern the child's placement until he or she turns eighteen, as trial courts are rarely overturned in custody matters. Further, court rules severely limit a parent's ability to seek a change or modification in custody or visitation arrangements or conditions. The finality of a court's decision is important so that the family can adjust and thrive without additional intervention of the courts.¹⁹

Section III — Smoking as a Factor in Child Custody and Visitation Decisions

When applying the "best interest of the child" standard in custody cases, the welfare of the child is paramount. In that analysis, courts will consider evidence of the smoking habits of individuals residing in the child's home. Exposure to secondhand smoke is typically considered as part of a "health" or "safety" factor in the custody analysis.²⁰ The weight placed upon evidence of exposure to secondhand smoke in a custody proceeding varies greatly. Inevitably, the weight given to smoking as a factor is also dependent upon a judge's personal beliefs about smoking and its effects.²¹ Custody determinations are by definition fact-

specific analyses, with both the factual determination as well as the weight placed upon each factor a matter of judicial discretion.

Accordingly, educating the court and others involved in custody determinations should be a priority for concerned parents or guardians. Often, whether a child has a health problem that makes him or her susceptible to the adverse health effects of smoking determines the relative weight placed upon smoking as a factor in the custody decision. Courts readily consider and give heightened importance to parental smoking when evidence is introduced showing that the child suffers from a respiratory condition, such as asthma, that is exacerbated by exposure to secondhand smoke. Assuming all other factors are equal, the non-smoking parent may be awarded custody solely on the basis of the child's exposure to secondhand smoke when in the presence of the smoking parent.²² The vast scientific evidence demonstrating the adverse health effects of exposure to secondhand smoke, coupled with the testimony or opinion of the pediatrician for the child, allows the court to base the custody decision on parental smoking.

The more difficult custody determinations involve a child who does not suffer from any particular ailment exacerbated by smoking. In these cases, courts typically consider exposure to secondhand smoke as only one of many equally important factors. Parents and guardians should take care to educate themselves and the court about the myriad short- and long-term adverse health effects suffered by even relatively healthy children who are exposed to secondhand smoke. When informed, courts are more likely to find the presence of cigarette smoke in a child's home to be a "pivotal issue," even though the child is relatively healthy.²³

A. Parental Smoking is a Significant Factor in Determining Custody or Visitation of a Child with Illnesses Exacerbated by Exposure to Secondhand Smoke

When faced with determining custody and visitation for a sick child, courts have placed great weight on parental smoking and willingness either to stop smoking completely or to refrain from smoking in the presence of the child. This is especially the case when the ailment that the child suffers from renders the

child particularly susceptible to the effects of exposure to secondhand smoke. Often, a parent's willingness to curtail a sick child's exposure to secondhand smoke demonstrates to the court that the parent is acting in a manner that gives priority to the child's health and welfare. Alternatively, refusal to adhere to medical advice recommending that the child avoid exposure to secondhand smoke can and often does signal to the court that the parent is blatantly disregarding the best interests of the child.²⁴ In these instances, smoking can be, and often is, a decisive factor in child custody disputes.

A case decided almost exclusively on the effect of secondhand smoke on two minor children is *Unger v. Unger*.²⁵ This case demonstrates that courts can and will consider exposure to secondhand smoke as a health or safety factor in a best interest of the child analysis as part of a custody determination in appropriate circumstances. The court considered the effect of secondhand smoke following the husband's motion to reconsider custody of the children and modification of the original consent order to ensure a "totally smoke free environment."²⁶ As part of the initial custody trial, the court found that the wife smoked "excessively," about one to one and a half packs of cigarettes a day.²⁷ In spite of the wife's smoking habit, two psychologists who evaluated the family for the initial custody trial recommended joint custody, with the wife having primary physical custody.²⁸ Neither of these evaluations considered the respiratory problems experienced by the children, and in fact one of the evaluations stated that secondhand smoke was not a determinative factor in the recommendation because the children were in good health despite the smoking.²⁹

Nevertheless, subsequent medical evaluations and testimony indicated that one of the children experienced a persistent, productive cough most likely indicative of chronic bronchitis, and both children had frequent respiratory complaints and physician visits.³⁰ With this additional information, the court evaluated whether secondhand smoke exposure should be considered as a valid factor in a custody dispute, and concluded:

Clearly the effect of secondhand smoke is a factor that may be considered by a court in its custody determination as it affects the safety and health of the children. Similarly,

the fact that a parent smokes cigarettes is a permissible parental habit to consider when determining what is in the best interests of the children because it may affect their health and safety.³¹

The judge directed the court-appointed psychologist to reevaluate custody, and to consider the effects of secondhand smoke, along with other relevant factors in this reevaluation.³² The directive given by the court was to “weigh secondhand smoke as a health and safety factor as . . . any other health and safety factor.”³³ Pending the recommendation of the psychologist, the court further ordered a modification of the parties’ consent order and stated: “The best interests of the children in this matter dictate that there be no smoking in their home or vehicle when the children are present and that any smoking in the family home or vehicle is to be ceased at least ten hours before the children are present.”³⁴ Thus, the *Unger* court not only considered parental smoking a significant health and safety factor warranting reevaluation of the previous custody decision, but it also imposed a court order requiring an in-home smoking ban during the reevaluation period.

In *Lizzio v. Lizzio*, the trial court considered the mother and stepfather’s smoking as a determinative issue when modifying the custody arrangement for two children.³⁵ One of the children suffered from asthma, had a history of pulmonary difficulties, and was so allergic to cigarette smoke that exposure to secondhand smoke triggered his severe asthma attacks.³⁶ Reversing the original order, the trial court awarded physical custody to the father and the stepmother based exclusively on the fact that theirs was a non-smoking home, and that the father took “steps to protect his children’s health” when he and his wife quit smoking.³⁷ The court explained:

While the Law Guardian finds that the mother and stepfather’s smoking habits are injurious to the children and that, to date, [the mother] has not recognized the serious threat that smoking poses to her son, he stops short of recommending a custodial change and hopes that the mother will come to her senses and will stop jeopardizing her child’s life.

The court is not as optimistic as the Law Guardian [n]or can it permit a child to be exposed to imminent danger upon the supposition that a mother who has ignored medical advice for many years will now see the light and do the right thing to protect her children.

We are at a point in time when, in the opinion of this judge, a parent or guardian could be prosecuted successfully for neglecting his or her child as a result of subjecting the infant to an atmosphere contaminated with health-destructive tobacco smoke.³⁸

The *Lizzio* decision makes clear that courts may consider continued secondhand smoke exposure as a reflection of a lack of parental concern for the health, safety, and general welfare of their children in the midst of a custody dispute. The lower court commended the father’s decision to quit smoking and reprimanded the mother for her decision to continue smoking. Ultimately, the court placed the health and welfare of the child paramount according to the best interest of the child standard and maintained the smoking ban in both households.³⁹

In the case of *Gilbert v. Gilbert*, the court granted the father’s motion to modify custody almost exclusively on the basis of the mother and stepfather’s smoking in the presence of an asthmatic child.⁴⁰ The court did so in spite of the mother’s testimony that she did not smoke in the presence of the child or while traveling in a car with him.⁴¹ The court reiterated that custody decisions require consideration of all aspects of a child’s physical and emotional well-being.⁴² Most illustrative, the court considered the weight placed upon secondhand smoke exposure as a factor and stated:

When most of the other factors that would affect a custody determination between two parents are comparable, and one factor clearly relates to the physical health of one of the children, this court believes that it may base its determination as to the proper custodial parent for that child primarily on that factor.⁴³

Similarly, in *Daniel v. Daniel*, the court upheld a custody modification granting a change in custody to the father because the mother continued to smoke in the presence of an asthmatic child.⁴⁴ The appellate court held that the fact that the child was diagnosed with asthma after the divorce was a clear change in circumstances.⁴⁵ The mother's smoking, therefore, became a factor for consideration relating to the welfare of the child.⁴⁶ In the analysis following the changed circumstances, the most weight appeared to be placed on the mother's continuing to smoke in the presence of the child for three years following the asthma diagnosis, despite the trial court's advice to quit smoking at the temporary custody hearing one year prior.⁴⁷ Most damaging to the mother, the court stated:

Moreover, the fact that the mother continued to smoke inside the apartment for almost three years after the child was diagnosed suggests that she was not adequately concerned about the child's health.⁴⁸

Therefore, the exposure to secondhand smoke coupled with the mother's unwillingness to quit smoking led the appellate court to find that there were reasonable grounds for the trial court to conclude that the child's best interests were served by a modification of the custody arrangement.⁴⁹

Court consideration of continued exposure to secondhand smoke and parental unwillingness to curtail smoking is not limited to initial custody determinations and modifications. Such evidence is also relevant for court decisions as to visitation. A court reduced a father's visitation schedule with his 20-month-old child, who suffered from bronchial asthma and experienced repeated upper respiratory infections, because the father and his family members continued to smoke in the child's presence, despite knowing that secondhand smoke was dangerous to the child.⁵⁰ In *Badeaux v. Badeaux*, the appellate court upheld the trial court's strict modification of the visitation schedule, concluding that the cigarette smoking and the detrimental effect upon the child's health justified the limits placed upon visitation.⁵¹

Even in cases involving important factors that outweigh exposure to secondhand smoke, courts have authority to protect the child from secondhand smoke when the smoking parent is granted primary or

sole physical custody. The court granted a smoking mother sole custody of her disabled child in the case of *Laura B. v. Jeffrey B.*, with the "condition precedent" that the mother not smoke.⁵² The court indicated that the mother had expressed a willingness to comply with the condition and that the "[c]ourt will hold her to her promise."⁵³ Although the court did not specify the nature of the child's disability, it did indicate that the child was particularly susceptible to secondhand smoke when it added:

It is difficult for this Judge to understand why both adults [the mother and stepfather] have not actively sought to break their addiction mindful of the adverse effect that smoking of a passive nature may have upon a child, especially this child.⁵⁴

A parent or guardian's concern as to a child's exposure to secondhand smoke should be presented to the court in a timely manner for consideration at trial. While custody or visitation decisions can be modified based on exposure to secondhand smoke, in some instances such modifications have been overturned on appeal because a legal technicality deprived the trial court of the authority to act. For example, the appellate court returned custody to the smoking parent in the *Lizzio* case discussed earlier due to a technicality. The court determined that there had been no change in circumstances to allow for a modification of the original custody order – the mother had always been a smoker and the child had always suffered adverse health effects as a result of the secondhand smoke.⁵⁵ There was no evidence that the child's health had deteriorated since the original hearing.⁵⁶ However, the appellate court considered the smoking issue significant, upholding the lower court's order prohibiting either party from exposing the children to secondhand smoke.⁵⁷

Similarly, in *Moody v. Moody*, the father filed a contempt motion against the mother on the basis that she had violated a court order by smoking in the presence of the children. Although there were other matters in dispute between the parties,⁵⁸ the trial judge stated that the most important concern was the secondhand smoke exposure of the children, one of whom was asthmatic.⁵⁹ The judge found the wife in contempt for exposing the children to secondhand smoke⁶⁰ and transferred custody of the

asthmatic child to the husband.⁶¹ The appellate court reversed, finding that custody cannot be transferred as a punishment in a proceeding for contempt regardless of the court's obvious concern about exposure to secondhand smoke.⁶²

An appellate court also reversed a modification order granting temporary custody of an asthmatic child to the father as a result of exposure to smoking by the mother's new husband and mother-in-law in *Thomas v. Harris*.⁶³ The appellate court held that the lower court could not base a change in custody upon an issue not properly presented to the court.⁶⁴ In this case, the original motion for a change in custody was based upon the child's deteriorating school performance, not exposure to secondhand smoke in the mother's home.⁶⁵ Of interest, however, is the appellate court's footnote:

We do, however, note that there may very well exist, upon a proper showing substantiated by medical evidence, circumstances wherein a smoking environment may be determined to be detrimental to, and not in the best interests of, the welfare of a child.⁶⁶

Therefore, the court acknowledged the possibility that exposure to secondhand smoke could be the basis for a change in custody when properly before the court.

The issues in those cases that prevented secondhand smoke from being a decisive factor were procedural, not substantive. The overriding consensus is that secondhand smoke exposure is a proper health or safety factor for consideration in custody decisions, either initial determinations or modifications, when the children at issue suffer from illnesses that are aggravated by exposure to secondhand smoke. Courts can and do regularly consider exposure to secondhand smoke when the children suffer direct and documented consequences from that exposure.

B. Exposure to Secondhand Smoke May Also Be Considered in a Custody or Visitation Analysis for Healthy Children

While exposure to secondhand smoke is a significant and sometimes dispositive factor in custody cases concerning children with health conditions clearly exacerbated by exposure to secondhand

smoke, the issue takes a lesser role in cases involving healthy children. Nevertheless, courts have authority to consider — and many have considered — a healthy child's exposure to secondhand smoke when making custody decisions or describing conditions of custody or visitation. Some courts have found persuasive evidence of the numerous possible adverse health effects of exposure to secondhand smoke even among relatively healthy children.

In the landmark case of *Johnita M.D. v. David D.D.*, a court first considered a child's motion for a protective order to be free from secondhand smoke while visiting his mother, a smoker.⁶⁷ A thirteen-year-old healthy child lived primarily with his father, but complained of exposure to secondhand smoke during visits with his mother.⁶⁸ In its discussion of the state's role as *parens patriae*, the court considered that previous decisions granting protection from secondhand smoke exposure had not concerned healthy children, nor had those motions been filed by the affected children themselves.⁶⁹ The court took judicial notice of many medical and scientific studies and evaluations, and concluded that secondhand smoke exposure significantly increased the child's risk of developing asthma, coronary artery disease, lung cancer, and chronic respiratory disorders.⁷⁰ As a result of these materials, the court concluded:

[I]t is in the best interest of the child that the Defendant and the Plaintiff should be ordered not to smoke or allow smoking of any type either at home or in the car at any time so that Nicholas may occupy both free of secondhand smoke exposure or risks. Nicholas' exposure to secondhand smoke based upon his description and his mother's acknowledged smoking habit is unacceptable in any parental residence or vehicle or other indoor situations.⁷¹

Following the decision, the mother requested a hearing to refute the materials that were introduced through judicial notice.⁷² The court held that judicial notice was appropriate for several of the original conclusions, and declined to take judicial notice of others.⁷³ The court continued to hold that the best interests of the minor child were served by limiting his exposure to secondhand smoke.⁷⁴ Further, the court

ordered that the mother not smoke in her residence for a period of twenty-four hours prior to a scheduled visitation.⁷⁵

Yet, in other custody decisions involving healthy children, courts have placed less weight on exposure to secondhand smoke. For example, in *Helm v. Helm*, the non-smoking mother appealed a custody determination in favor of the smoking father. The appeal raised a few issues, the most substantive of which was that the father smoked.⁷⁶ The court, in upholding the custody determination in favor of the father, noted that although exposure to secondhand smoke is a factor for consideration according to the “best interest of the child standard,” it is “one of many factors to be considered, and is not necessarily the dominant or decisive consideration.”⁷⁷ Although the healthy child’s exposure to secondhand smoke was considered, the issue did not dominate as it does in cases concerning sick children.

C. Courts May Occasionally Initiate Consideration of Secondhand Smoke in a Custody or Visitation Dispute

In most cases, it is the non-smoking spouse who raises the issue of secondhand smoke exposure. Generally, the non-smoking parent raises the issue to influence the initial custody decision, as a ground for a custody modification, or to support a request for reducing a visitation schedule. Rarely does the court raise the issue on its own, or *sua sponte*. However, in the controversial case of *In re Julie Anne*, that is precisely what happened when the judge, invoking the doctrine of *parens patriae*, raised the issue of exposure to secondhand smoke on his own motion on behalf of the child.⁷⁸

In the case of *In re Julie Anne*, the court considered at length the detrimental effects of exposure to secondhand smoke to a healthy child.⁷⁹ Both parents admitted to smoking in the presence of the child during a custody and visitation hearing.⁸⁰ Apparently, this admission by the parents instigated the trial judge to conduct thorough research on the secondhand smoke issue. The court’s exhaustive review of the available literature resulted in its conclusion that the causal relationship between smoking and serious disease in smokers, non-smokers, and particularly children was well established.⁸¹ The court took judicial notice⁸² of the extensive body of scientific evidence

to support its conclusions,⁸³ and made a finding of fact that “secondhand smoke constitutes a real and substantial danger to the health of children because it causes and aggravates serious diseases in children.”⁸⁴ The court further found that the danger to the health and safety of children posed by secondhand smoke exposure exists regardless of parental knowledge or awareness, motion by one of the parties, or the health of the child.⁸⁵ The court discussed the authority and duty of family courts to intervene in order to protect children from secondhand smoke exposure.⁸⁶ In very strong language, the opinion stated:

A considered analysis of the facts and law of this case leads to the inescapable conclusion that a family court that fails to issue court orders restricting persons from smoking in the presence of children under its care is failing the children whom the law has entrusted to its care.⁸⁷

Ultimately, the court concluded that the minor child’s best interests dictated that the parents be restrained from smoking, or allowing anyone else to smoke, in the presence of the child.⁸⁸

Section IV — Parents May Request That the Court Take Judicial Notice of the Negative Impact of Secondhand Smoke Exposure on Children

A court has discretion to take judicial notice of evidence that is either within the court’s general knowledge or the general knowledge of the community. Judicial notice may also be taken of information that is readily ascertainable from authoritative sources. Typically, judicial notice is taken of evidence following a motion by one of the parties, but a court also has the ability to initiate the use of judicial notice on its own accord.⁸⁹

The use of judicial notice can be a valuable tool in custody cases in which a party intends to raise concerns about a child’s exposure to secondhand smoke. A court may be persuaded to take judicial notice of the fact that exposure to secondhand smoke presents a health risk to children generally. Such a finding could be based not only on the general knowledge of the community, but

also on significant government sources including the Environmental Protection Agency Reports, numerous Surgeon General Reports,⁹⁰ as well as the opinions and statements of respected medical organizations, such as the American Medical Association and the American Academy of Pediatrics.⁹¹ Because of the nature of judicial notice, the finding would be a general one as to all children and not specific to the child or children at issue in the case.⁹² The benefit of obtaining judicial notice is that evidence need not be presented during trial for matters deemed accepted through the process of judicial notice. This alleviates the need for expert testimony about the reliable scientific data available to substantiate the argument that exposure to secondhand smoke is in fact detrimental to health, and particularly to the health of children.

If a motion for judicial notice would be proper under the rules governing a custody or visitation case, the party concerned about the child's exposure to secondhand smoke should consider filing such a motion. This allows the moving party to present persuasive information to the court in a concise and non-emotional manner and requires the court to consider the issue separate from the many possible issues raised by embattled parents. This may be the optimum scenario for an earnest consideration of the secondhand smoke issue.

An Appendix to this Synopsis contains authoritative sources documenting the negative health consequences of secondhand smoke exposure. Admittedly not exhaustive, the Appendix is designed to aid practitioners in the crafting of judicial notice motions and memoranda.

Section V — Right to Privacy Issues Raised by Consideration of Secondhand Smoke in a Custody and Visitation Proceeding

Supreme Court privacy jurisprudence and lower court cases considering the constitutionality of smoking restrictions support the conclusion that there is no fundamental right to smoke.⁹³ Therefore, restrictions placed upon smoking are subject only to rational basis judicial review, the lowest level of scrutiny applied by courts.⁹⁴ Due process and equal protection challenges to smoking restrictions

have often failed, allowing many communities and states to prohibit smoking in all public places and workplaces.⁹⁵ The community or state need only show that prohibiting smoking is rationally related to protecting public health.

Whether stated as a privacy right or a liberty interest, the Constitution provides particular protections for activities occurring within one's home. Most notably, Fourth Amendment search and seizure cases require that a higher threshold be met for intrusions into the home. In some cases, activities have been protected within the home that may not have been allowed outside of the home.⁹⁶ The privacy and liberty interests present in the home are by no means absolute, however.⁹⁷ Whether a right to smoke in one's home exists depends on the classification of the action (smoking) and the impact that the action has on the health and safety of, in our case, the parents' children. Restrictions placed upon parental smoking in the home will be analyzed to determine whether the state's interest in protecting children from secondhand smoke at home is legitimate and whether the challenged restriction is rationally related to that legitimate interest. Given the low level of scrutiny afforded smoking restrictions, and the significance of the negative health effects of exposure to secondhand smoke, a state court decision restricting smoking even in a child's home should prevail in a privacy challenge.

Although the "Right to Privacy" itself is not a concept found in the United States Constitution,⁹⁸ the Supreme Court has recognized a right of privacy, or certain guarantees regarding "zones of privacy." Most often, this right has been recognized in circumstances involving procreation, contraception, family relationships, and child rearing.⁹⁹ That right is not absolute, however, and state regulation may override a privacy interest when such regulation is necessary to safeguard health or protect life.¹⁰⁰ Much like the right to privacy, the right to raise one's children free from governmental interference is not stated in the Constitution but has been found to exist as an extension of constitutional principles of liberty. The right is strongest when the challenged intrusion interferes with the exercise of religious freedom and weakest when the intrusion seeks to protect the health and safety of a child. Because the value of protecting children from exposure to secondhand smoke in the home is significant, a court decision providing

informed smoking restrictions on a parent or granting custody to the non-smoking parent should survive legal challenge.

The right to raise children free from governmental intrusion was first recognized by the Supreme Court in a pair of cases concerning the education of children. In *Meyer v. Nebraska*,¹⁰¹ the Court explained that the liberties contained within the Fourteenth Amendment Due Process Clause included “the right of the individual . . . to marry, establish a home and bring up children. . . .”¹⁰² Hence, a state law prohibiting parents from teaching their children a foreign language at an early age was unconstitutional, unduly infringing on the fundamental right of parents to obtain an education for their children.¹⁰³ Just two years later, the Court reiterated the right of parents to “direct the upbringing and education” of their children in *Pierce v. Society of Sisters*,¹⁰⁴ finding that an Oregon Act requiring public school attendance was an unreasonable intrusion on parents’ rights to raise and educate their children free from governmental interference.¹⁰⁵

This right to parental control and autonomy was later found to extend to issues implicating the free exercise of religion. *Prince v. Massachusetts* arose as a result of a mother’s conviction for violating a Massachusetts labor law when she allowed her child, a Jehovah’s Witness, to sell religious pamphlets and engage in religious preaching on a public roadway.¹⁰⁶ Recognizing the concepts set forth in *Pierce v. Society of Sisters* and voiding the conviction, the Court explained that parents are responsible for and entitled to control over the care and well-being of their children without undue governmental interference, particularly where such interference implicates religious freedom.¹⁰⁷ As with the privacy interests, however, the Court made clear that the right to parental autonomy is not absolute or beyond state regulation; rather, the state acting in its role as *parens patriae* may in certain circumstances restrict parental control and freedom.¹⁰⁸

The Supreme Court added to the discussion of the interplay between the state’s and the parents’ role in children’s lives in *Parham v. J.R.*¹⁰⁹ The statute challenged in *Parham* allowed for a child to be committed to a mental institution upon petition of his parents. The Court upheld the statute but placed heavy reliance on the process in place in Georgia by which the parents’ request or decision is subject to rather intensive factual review by neutral

medical professionals.¹¹⁰ The Court recognized that the natural affection parents share for their children results in parents ordinarily acting in the best interests of their children; however, the Court noted that this ideal notion is not always a reality, and that in fact there are times where parents may act contrary to the best interests of their children.¹¹¹ Considering this fact, the Court concluded that, “a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.”¹¹²

The most recent cases addressing parental autonomy concern situations in which parents refuse necessary medical care for a child due to religious objection or procure unsafe medical procedures for a sick child. Although these state court decisions acknowledge the right of parents to raise their children without state interference, they also recognize the need for the state to take control when the parents are not acting in the child’s best interests such that the child faces serious and imminent harm. For example, in *Custody of a Minor*, the court, at the state’s request, prohibited the parents from subjecting their 3-year-old son, who was diagnosed with leukemia, to metabolic therapy, a course of treatment deemed both ineffective and unsafe by the court.¹¹³ The court explained: “[W]here a child’s well-being is placed in issue, it is not the rights of parents that are chiefly to be considered. The first and paramount duty is to consult the welfare of the child.”¹¹⁴ Similarly, in *In re McCauley*, the parents’ refusal on religious grounds to allow a blood transfusion for their child was overruled when on petition of the state the court ordered the life-saving procedure.¹¹⁵

These cases translate into what most people likely believe the law is and should be: Parents have a constitutional right to raise their children free of governmental interference except when the parents’ actions or inactions place the child at real risk of serious harm. The state’s interference will be scrutinized closely but upheld if, on balance, the best interests of the child demand court intervention.

A parent who chooses to expose his or her child to the detrimental health effects of secondhand smoke is placing that child’s health and safety at risk. Exposure to secondhand smoke jeopardizes the physical health of a child, and when parents choose to smoke in the presence of their child, they are acting in a manner that is contrary to the best interests of their child.

The threat of harm is real and serious. A state that has jurisdiction to decide the conditions of a child's custody and visitation arrangements, acts lawfully when it imposes reasonable limitations on a parent's conduct to protect the health of the child. An order prohibiting parents from smoking in the presence of their child, even in the home, does not unreasonably interfere with the parental right to raise a child without governmental interference.

Conclusion

Every day family courts are asked to intervene in a family's life and decide with whom, and under what conditions, a child shall live and visit. Although most often these courts defer to the parents' agreement on the custody and visitation arrangement, reviewing the agreement only for egregious problems, in many instances parents cannot come to a resolution and must ask the court to make the custody and visitation decisions. Guided by the best interests of the child, family courts construct the parameters of a family's life after divorce. More frequently, non-smoking parents are asking the courts to grant them custody based on the child's exposure to secondhand smoke when with the smoking parent. Courts have also raised the issue *sua sponte*, or on their own, in response to the growing public knowledge that childhood exposure to secondhand smoke is detrimental to a child's health and well-being. Regardless of how the matter is raised, courts are increasingly willing to craft custody and visitation orders that protect children from exposure to secondhand smoke, particularly when the child at issue suffers illnesses exacerbated by secondhand smoke. Although parents have a broad right of privacy, especially in the home, and a significant right of autonomy in raising children free of governmental intrusion, these rights do not outweigh the best interests of the child. And there is no doubt that it is in the best interest of every child to live in an environment free from secondhand smoke.

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APPENDIX

Authoritative Sources Documenting the Health Effects of Exposure to Secondhand Smoke

Office on Smoking and Health, U.S. Department of Health and Human Services, The Health Consequences of Involuntary Smoking: A Report of the U.S. Surgeon General (1986), *available at* http://www.cdc.gov/tobacco/sgr/sgr_1986/index.htm.

Office on Smoking and Health, U.S. Department of Health and Human Services, The Health Consequences of Smoking: Chronic Obstructive Lung Disease: A Report of the Surgeon General (1984).

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U.S. Environmental Protection Agency, Office of Research and Development, Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders (1992), *available at* <http://cfpub2.epa.gov/ncea/cfm/recordisplay.cfm?deid=2835>.

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The American Academy of Pediatrics, Committee on Environmental Health, Environmental Tobacco Smoke: A Hazard to Children (1997), *available at* <http://aappolicy.aappublications.org/cgi/reprint/pediatrics;99/4/639.pdf>.

Campaign for Tobacco-Free Kids, What is in Secondhand Smoke?, *available at* http://www.tobaccofreekids.org/research/factsheets/secondhand_smoke/pdf/0253.pdf.

Tobacco Information and Prevention Source, CDC, Secondhand Smoke: Fact Sheet (Feb. 2004), *available at* http://www.cdc.gov/tobacco/factsheets/secondhand_smoke/secondhand_smoke_factsheet.htm.

Endnotes

- ¹ Although many of the issues discussed in this Synopsis are relevant to other circumstances such as guardianship, foster care, and termination of parental rights proceedings, it is outside the scope of this paper to address all of these legal scenarios. Rather, the focus of this Synopsis is exclusively child custody and visitation proceedings.
- ² OFFICE ON SMOKING AND HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING: A REPORT OF THE U.S. SURGEON GENERAL ix (1986), *available at* http://www.cdc.gov/tobacco/sgr/sgr_1986/index.htm (hereinafter SURGEON GENERAL REPORT (1986)) (last visited June 22, 2005); CAMPAIGN FOR TOBACCO-FREE KIDS, WHAT IS IN SECONDHAND SMOKE?, *available at* [http://www.tobaccofreekids.org/research/factsheets/secondhand smoke/pdf/0253.pdf](http://www.tobaccofreekids.org/research/factsheets/secondhand%20smoke/pdf/0253.pdf) (hereinafter TFK-SECONDHAND SMOKE) (last visited June 22, 2005); *see also* NATIONAL CANCER INSTITUTE, U.S. DEP'T OF HEALTH AND HUMAN SERVS., RISKS ASSOCIATED WITH SMOKING CIGARETTES WITH LOW MACHINE-MEASURED YIELDS OF TAR AND NICOTINE, SMOKING AND TOBACCO CONTROL MONOGRAPH No. 13 (2001), *available at* <http://cancercontrol.cancer.gov/tcrb/monographs/13/index.html> (hereinafter NCI MONOGRAPH 13) (last visited June 22, 2005).
- ³ *See* SURGEON GENERAL REPORT (1986), *supra* note 2; TFK-SECONDHAND SMOKE, *supra* note 2; NCI MONOGRAPH 13, *supra* note 2.
- ⁴ U.S. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF RESEARCH AND DEVELOPMENT, RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISORDERS (1992), *available at* <http://cfpub2.epa.gov/ncea/cfm/recordisplay.cfm?deid=2835> (hereinafter EPA REPORT (1992)) (last visited June 22, 2005).
- ⁵ OFFICE ON SMOKING AND HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING: CHRONIC OBSTRUCTIVE LUNG DISEASE: A REPORT OF THE SURGEON GENERAL (1984) (hereinafter SURGEON GENERAL REPORT (1984)); *see also* U.S. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF RADIATION AND INDOOR AIR, SETTING THE RECORD STRAIGHT: SECONDHAND SMOKE IS A PREVENTABLE HEALTH RISK (1994), *available at* www.epa.gov/smokefree/pubs/strfs.html (hereinafter EPA REPORT (1994)) (last visited June 22, 2005).
- ⁶ *See* EPA REPORT (1992), *supra* note 4; SURGEON GENERAL REPORT (1984), *supra* note 5; OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT, CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY, HEALTH EFFECTS OF EXPOSURE TO ENVIRONMENTAL TOBACCO SMOKE (1997), *available at* <http://www.cancercontrol.cancer.gov/tcrb/monographs/10/index.html> (last visited June 22, 2005); SURGEON GENERAL REPORT (1986), *supra* note 2; NATIONAL RESEARCH COUNCIL, ENVIRONMENTAL TOBACCO SMOKE: MEASURING EXPOSURES AND ASSESSING HEALTH RISKS (1986), *available at* <http://www.nap.edu/books/0309037301/html/> (last visited June 22, 2005); J. DiFranza et al., *Prenatal and Postnatal Environmental Tobacco Smoke Exposure and Children's Health*, PEDIATRICS 113 (4 Supp.) 1007-15 (April 2004) (analyzing 173 scientific and medical journal articles and texts on secondhand smoke); J. DiFranza & R. Lew, *Morbidity and Mortality in Children Associated with the Use of Tobacco Products by Other People*, PEDIATRICS 97 (4 Supp.) 560-68 (April 1996).
- ⁷ EPA REPORT (1992), *supra* note 4; TOBACCO INFORMATION AND PREVENTION SOURCE, CENTERS FOR DISEASE CONTROL, SECONDHAND SMOKE: FACT SHEET (Feb. 2004), *available at* [http://www.cdc.gov/tobacco/factsheets/secondhand smoke/secondhand_smoke_factsheet.htm](http://www.cdc.gov/tobacco/factsheets/secondhand%20smoke/secondhand_smoke_factsheet.htm) (last visited June 22, 2005); Samet, J., *Risk Assessment and Child Health*, PEDIATRICS 113 (4 Supp.) 952-56 (April 2004).
- ⁸ EPA REPORT (1992), *supra* note 4.
- ⁹ There are many reasons why a family or other court may be faced with the issue of a child's exposure to secondhand smoke—in a case to terminate or restrict parental rights, in an abuse or neglect case, in a criminal case against a parent, in juvenile matters concerning the child, in foster care decisions, and more. Although many of the issues raised in the various types of cases overlap, this Synopsis addresses only the custody and visitation scenario.
- ¹⁰ The UMDA describes the best interest factors as including:
 - (1) The wishes of the child's parent or parents as to his custody;
 - (2) The wishes of the child as to his custodian;
 - (3) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
 - (4) The child's adjustment to his home, school and community; and
 - (5) The mental and physical health of all individuals involved.
 UMDA § 402. Commentary to § 402 explains that the listed factors are those most commonly referred to in appellate decisions but that a trial judge "need not be limited to the factors specified."
- ¹¹ A JUDGE'S GUIDE: MAKING CHILD-CENTERED DECISIONS IN CUSTODY CASES, AMERICAN BAR ASSOCIATION 19-20 (2001) (hereinafter ABA JUDGE'S GUIDE); A. SCHEPARD, CHILDREN, COURTS AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 4, 180 (2004).
- ¹² ABA JUDGE'S GUIDE, *supra* note 11, at 11-13; SCHEPARD, *supra* note 11, at 142-47.
- ¹³ ABA JUDGE'S GUIDE, *supra* note 11, at 81-91; SCHEPARD, *supra* note 11, at 152-61.
- ¹⁴ *See generally* SCHEPARD, *supra* note 11.

- ¹⁵ ABA JUDGE'S GUIDE, *supra* note 11, at 81-91.
- ¹⁶ *Id.* at xiii ("Child custody and visitation disputes are among the most difficult for judges to decide."); J. FADER & R. GILBERT, MARYLAND FAMILY LAW 193 (1995) ("Trial courts frequently comment that where two parents are fit and all other factors balance, granting custody is one of the most difficult aspects of their judicial duties.")
- ¹⁷ ABA JUDGE'S GUIDE, *supra* note 11, at 4-9. The ABA Judge's Guide also recommends swift resolution to avoid having a child and his or her parents in "limbo" for extensive time. *Id.*
- ¹⁸ See generally ABA JUDGE'S GUIDE, *supra* note 11.
- ¹⁹ ABA JUDGE'S GUIDE, *supra* note 11, at xiii ("To a child, therefore, the need for the trial judge to 'get it right' is all the more important, since reversal on appeal is unlikely."). Section 409 of the UMDA strictly limits modifications, allowing for imposition of attorneys fees and costs for modification requests that are vexatious and constitute harassment. Commentary to that section explains: "[M]ost experts who have spoken to the problems of post-divorce adjustment of children believe that insuring the decree's finality is more important than determining which parent should be the custodian." See also FADER & GILBERT, *supra* note 16, at 245 ("[T]he best interests of the child are presumed to be a continuation of custody unless factors exist that have a sufficiently adverse impact on the welfare of the child.")
- ²⁰ See *Unger v. Unger*, 274 N.J.Super. 532, 538 (1994) (stating that the effects of secondhand smoke may be considered by a court in a custody decision because of the affect on both the health and safety of children).
- ²¹ Michael Moorby, Note and Comment, *Smoking Parents, Their Children, and the Home: Do the Courts Have the Authority to Clear the Air?*, 12 PACE ENVTL. L. REV. 827, 835 (1995).
- ²² See, e.g., *Gilbert v. Gilbert*, 1996 Conn. Super. LEXIS 2153 (1996).
- ²³ See, e.g., *Lizzio v. Lizzio*, 618 N.Y.S.2d 934 (Fam. Ct., Fulton County 1994).
- ²⁴ See, e.g., *Skidmore-Shafer v. Shafer*, 770 So.2d 1097 (Ala. Civ. App. 1999); *Lizzio*, 618 N.Y.S.2d 934.
- ²⁵ *Unger*, 274 N.J.Super. 532.
- ²⁶ *Id.* at 534-35. The parties' original custody consent order provided:
Both parties are restrained from allowing smoking of tobacco in the presence of the children at any location and any enclosed areas such as homes or automobiles and to prevent the effect of secondary inhalation of tobacco smoke. The wife shall designate her bedroom as the only area where she will smoke or anyone else will smoke if the children are present in her home. The wife shall be permitted to smoke in the living area if the children are not present with the understanding that she will purchase, at her own expense, an air purifier which shall be a sufficient air purifier which shall be operated at all times when she is smoking in such area.
- ²⁷ *Id.* at 533.
- ²⁸ *Id.* at 533-34.
- ²⁹ *Id.*
- ³⁰ *Id.*
- ³¹ *Id.* at 538.
- ³² *Id.*
- ³³ *Id.*
- ³⁴ *Id.* at 541.
- ³⁵ 618 N.Y.S.2d 934, 937 (Fam. Ct., Fulton County 1994).
- ³⁶ *Id.* at 936.
- ³⁷ *Id.* at 937.
- ³⁸ *Id.*
- ³⁹ *Lizzio v. Jackson*, 226 A.D. 2d 760,761 (N.Y. 1996) The lower court order prohibited smoking in either household, and required strict adherence to the instructions of the child's allergist. *Id.*
- ⁴⁰ 1996 Conn. Super. LEXIS 2153 (1996).
- ⁴¹ *Id.* at *8.
- ⁴² *Id.* at *8-9.
- ⁴³ *Id.* at *9.
- ⁴⁴ *Daniel v. Daniel*, 509 S.E.2d 117 (Ga. Ct. App. 1998).
- ⁴⁵ *Id.* at 119.
- ⁴⁶ *Id.*
- ⁴⁷ *Id.* at 120.
- ⁴⁸ *Id.*
- ⁴⁹ *Id.*
- ⁵⁰ *Badeaux v. Badeaux*, 541 So.2d 301 (La. Ct. App. 1989).
- ⁵¹ *Id.* at 302-03. In this case, not only was the father a smoker, but his mother and stepfather with whom the father resided smoked as well. The child was therefore exposed to three smokers while visiting with the father. There is no mention in the brief opinion of any indication or willingness on the part of the father to quit smoking, or to encourage his family members to do so on behalf of his minor child.

52 1995 Del. Fam. Ct. LEXIS 40, *2-3 (1995).

53 *Id.* at *3.

54 *Id.* at *3-4.

55 *Lizzio v. Jackson*, 226 A.D.2d 760, 760-61 (N.Y. 1996); *see also* n.19 *supra*.

56 *Lizzio v. Jackson*, 226 A.D.2d at 761.

57 *Id.*

58 721 So.2d 731 (Fla. Dist. Ct. App. 1998). The husband also claimed that the wife had denied him visitation, and the wife's contempt motion argued that the husband had failed to pay child support and that he had attempted to hit her with his automobile. *Id.* at 732.

59 *Id.* at 733.

60 *Id.* The court also found the wife in contempt for denying the husband visitation. Although the wife acknowledged denying the husband visitation on two separate occasions, the wife claims that she did so because the husband was drunk, and that on each occasion she offered him the opportunity for visitation on the next day.

61 *Id.* There was also some dispute as to whether the wife was actually smoking in the presence of the children. The husband's mother testified that the wife had arrived to pick up the children with a friend and was smoking in the car at the time. However, the wife and the wife's friend both testified that the wife was not smoking in the car on that occasion.

62 *Id.* The court also concluded that the wife's due process rights required that change of custody be sought by the parties as part of their notice of hearing. This was not the case as neither the wife nor the husband's motions of contempt requested a change in custody.

63 *Thomas v. Harris*, 634 So.2d 1136 (Fla. Dist. Ct. App. 1994).

64 *Id.* at 1136.

65 *Id.*

66 *Id.* at 1137 n.2.

67 191 Misc.2d 301 (Supreme Ct., NY 2002).

68 *Id.* at 302-03.

69 *Id.* at 308.

70 *Id.* at 310-12. The court took judicial notice providing the opportunity for the parties to object in writing and request a hearing within 30 days to dispute the use of the scientific journals or their contents, or the conclusions based upon these materials.

71 *Id.* at 316.

72 *DeMatteo v. DeMatteo*, 194 Misc.2d 640 (N.Y. Supreme Ct., Oneida County 2002).

73 *Id.* The Court took judicial notice that environmental tobacco smoke is a carcinogen and causes lung cancer in otherwise healthy non-smokers and that the children of smoking parents suffer a higher incidence of respiratory infections and smaller rates of increase in lung functions. The Court declined to take judicial notice of any other questions presented.

74 *Id.* at 650.

75 *Id.*

76 *Helm v. Helm*, 1993 Tenn. App. LEXIS 109 (Tenn. Ct. App. 1993).

77 *Id.*

78 *In re Julie Anne*, 780 N.E.2d 635 (Ohio C.P. 2002).

79 *Id.* at 641 and n.1. In his opinion, Judge Chinnock extensively reviewed medical and scientific literature demonstrating the causal relationship between secondhand smoke and disease, particularly in children. The court took judicial notice of the fact that "[S]econdhand Smoke is a Real and Substantial Danger to the Health of Children Because It Causes and Aggravates Serious Diseases in Children." *Id.* at 652. *See also* Judge William F. Chinnock, *No Smoking Around Children: The Family Courts' Mandatory Duty to Restrain Parents and Other Persons from Smoking Around Children*, 45 ARIZ. L. REV. 801 (2003).

80 *In re Julie Anne*, 780 N.E.2d at 640.

81 *Id.* at 644, 647, and 652.

82 Generally, a court may take judicial notice of evidence that is within the general knowledge of the court or the community at-large. A court may also take judicial notice of information that is readily ascertainable from authoritative and reliable sources. Frequently, government reports serve as the basis for judicial notice. *See generally* G. WEISSENBERGER, FEDERAL EVIDENCE (4th ed. 2001) at §§ 201.3 and 201.9.

83 *In re Julie Anne*, 780 N.E.2d at 640-41.

84 *Id.* at 640.

85 *Id.* at 641.

86 *Id.* at 652.

87 *Id.* at 641.

88 *Id.* at 659.

89 WEISSENBERGER, *supra* note 82, at §§ 201.3 and 201.9.

- ⁹⁰ See Appendix.
- ⁹¹ See, e.g., THE AMERICAN ACADEMY OF PEDIATRICS, COMMITTEE ON ENVIRONMENTAL HEALTH, ENVIRONMENTAL TOBACCO SMOKE: A HAZARD TO CHILDREN (1997), available at <http://aappolicy.aappublications.org/cgi/reprint/pediatrics;99/4/639.pdf>. (last visited June 22, 2005).
- ⁹² See, e.g., *In re Julie Anne*, 780 N.E.2d 635 at 640-41; *Johnita M.D. v. David D.D.*, 191 Misc.2d 301, 310-12 (N.Y. Supreme Ct., Oneida County 2002).
- ⁹³ See *Grusendorf v. City of Oklahoma City*, 816 F.2d 539, 540-41 (10th Cir. 1987) (finding that a smoking restriction placed upon firefighter trainees both on and off duty was a restriction of liberty, but did not concern a fundamental right); *Webber v. Crabtree*, 158 F.3d 460, 460 (9th Cir. 1998) (stating that prisoners failed to show that smoking is a fundamental right); *Operation Badlaw, Inc. v. Licking County Gen. Health Dist. Bd. of Health*, 866 F. Supp. 1059 (S.D. Ohio 1992) (finding that the right to smoke is not a fundamental right with respect to both an equal protection and due process challenge); *City of North Miami v. Kurtz*, 653 So.2d 1025, 1026 (Fla. 1995) (finding that a government job applicant's privacy rights had not been infringed by a regulation requiring an affidavit stating that the applicant had not used tobacco products for one year prior to the application because the "right to smoke" is not included within the fundamental rights protected by the U.S. Constitution); Seena K. Foster, *Validity, Construction, and Application of Restrictions on Use or Possession of Tobacco Products in Correctional Facilities*, 66 A.L.R. 5th 237 (discussing cases recognizing that restrictions on smoking in correctional facilities do not impair a fundamental right because there is no recognized fundamental right to smoke).
- ⁹⁴ See Jeanette Igbenebor, Comment, *Smoking as a Factor in Child Custody Cases*, 18 J. AM. ACAD. MATRIM. LAW 235, 245-46 (2003).
- ⁹⁵ See, e.g., *Operation Badlaw*, 866 F. Supp. at 1063. The federal district court concluded "that the right to smoke is not a fundamental right" and that there exists "no protected liberty interest in smoking." *Id.* at 1064-66 (citing *Grusendorf*).
- ⁹⁶ For instance, the viewing of obscene materials in the privacy of the home was held to be outside the scope of state intrusion in *Stanley v. Georgia*, 394 U.S. 557 (1969).
 Whatever may be the justifications for other statutes regarding obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.
Id. at 565.
- ⁹⁷ In *Bowers v. Hardwick*, the Court upheld a law that prohibited voluntary homosexual conduct, even though the conduct at issue in the case occurred within the defendant's home. *Bowers v. Hardwick*, 478 U.S. 186 (1986). Although the conduct in both *Stanley* and *Bowers* occurred within the confines of the home, the Court ruled the otherwise illegal conduct in *Stanley* permissible because that conduct was also a fundamental right protected by the First Amendment. *Id.* at 195. The conduct in *Bowers*, the majority found, was not similarly protected by the text of the Fourteenth Amendment. *Id.* However, Justice Blackmun's dissent argued that the majority mistakenly placed its reliance upon *Stanley*'s basis in First Amendment protection. *Id.* at 208. Rather, Justice Blackmun argues that *Stanley* was grounded on the basis of the Fourth Amendment, a basis that he found similarly compelling with respect to *Bowers*. *Id.*
- ⁹⁸ See *Roe v. Wade*, 410 U.S. 113, 152 (1973) ("The Constitution does not explicitly mention any right of privacy.").
- ⁹⁹ See, e.g., *Carey v. Population Servs. Int'l.*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).
- ¹⁰⁰ *Roe*, 410 U.S. at 154.
- ¹⁰¹ 262 U.S. 390, 399 (1923).
- ¹⁰² *Id.* The oft-quoted language by the Court stated:
 Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.
- ¹⁰³ *Id.* The Court held that a Nebraska statute that forbade the instruction of any language other than English to students who had not yet completed the eighth grade was arbitrary and not rationally related to a legitimate state interest. *Id.* at 403. Further, the Court also found that the liberty interest contained within in the Fourteenth Amendment's Due Process Clause protected the teacher's right to teach German to a ten-year-old child. *Id.*
- ¹⁰⁴ 268 U.S. 510, 534-35 (1925).
- ¹⁰⁵ *Id.* The Compulsory Education Act required that all normal children ages 8 to 16 years old attend public schools. The constitutionality of the Act was challenged by private elementary schools in the state. *Id.*
- ¹⁰⁶ *Prince v. Massachusetts*, 321 U.S. 158 (1944).
- ¹⁰⁷ *Id.* at 166.
- ¹⁰⁸ *Id.* See also *Wisconsin v. Yoder*, 405 U.S. 205 (1972) (allowing for the possibility of lawful state interference with

parental autonomy under the *parens patriae* doctrine while striking down a compulsory attendance law challenged on religious grounds by the Amish).

¹⁰⁹ 442 U.S. 584 (1979).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 602.

¹¹² *Id.* at 603.

¹¹³ *Custody of a Minor*, 378 Mass. 732, 744 (1979).

¹¹⁴ *Id.* at 744 (citing *Purinton v. Jamrock*, 195 Mass. 187, 199 (1907)).

¹¹⁵ *In the Matter of Cauley*, 409 Mass. 134 (1991).



About the Tobacco Control Legal Consortium

The Tobacco Control Legal Consortium is a national network of legal programs supporting tobacco control policy change by giving advocates better access to legal expertise. The Consortium's coordinating office, located at William Mitchell College of Law in St. Paul, Minnesota, fields requests for legal technical assistance and coordinates the delivery of services by the collaborating legal resource centers. Legal technical assistance includes help with legislative drafting; legal research, analysis and strategy; training and presentations; preparation of friend-of-the-court legal briefs; and litigation support. Drawing on the expertise of its collaborating legal centers, the Consortium works to assist communities with urgent legal needs and to increase the legal resources available to the tobacco control movement.

