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SUBSTANTIVE LAW

Estate Planning for Mary Jane and Other Marijuana Users

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An estate planner is more likely to encounter a client who regularly uses marijuana than a client who needs estate and gift tax planning, given that 55 million Americans are current users. Christopher Ingraham, *How Many Americans Regularly Use Pot: The Number Is, errr, Higher Than You Think*, Wash. Post, Apr. 20, 2018. At least 32 states and the District of Columbia currently exempt qualified users of medicinal marijuana from penalties imposed under state law. Additionally, ten states, Alaska, California, Colorado, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, Washington, and the District of Columbia authorize purely recreational use. See *Legal Recreational Marijuana States and DC*, ProCon.org (last visited Nov. 11, 2018). Accordingly, practitioners need to be aware of the interface between marijuana and estate planning.

This article provides a discussion of the major issues that arise in this context including: (1) impact of marijuana use on capacity; (2) interpretation of clauses conditioning benefits on the non-use of illegal drugs; (3) life insurance issues; and (4) marijuana-based assets in a decedent's estate or trust.

Impact on Capacity

> *Game show host: "And here's your first question, Bob: What is your name? You have sixty seconds."*
>
> *Bob: "Uhhh . . . I knew it when I came in here.*

Cheech & Chong, *Let's Make a Dope Deal*, on Big Bambu (Ode Records/Warner Bros. Records/WEA 1972).

Opinions vary greatly concerning the effect of marijuana use on a person's capacity to execute a will and other estate planning documents. On one hand, we have dire warnings from the hit Motion Pictures Ventures 1936 film, *Reefer Madness*, which said that marijuana use is followed by "the loss of all power to resist physical emotions leading finally to acts of shocking violence ending often in incurable insanity." On the other hand, another segment of society, including former United States President Barack Obama, views the impact of marijuana on an individual's capacity to be the same as or less than the reasonable consumption of beer, wine, or liquor. See Jen Christensen & Jacque Wilson, *Is Marijuana As-Safe-As or Safer than Alcohol?*, CNN (Jan. 20, 2014).

Recent research indicates that cannabis users who begin smoking the drug at an early age show a significant decline in IQ, memory, and the ability to think quickly; and other cognitive functions worsen over time with marijuana use in all ages. See Fran Lowry, *Cannabis Use in Teens Linked to Irreparable Drop in IQ*, Medscape Multispecialty (Apr. 26, 2013). Not only does marijuana threaten to impair cognitive functioning, but evidence of the drug's physical harm is also accumulating rapidly. See generally *Highlights of the 2011 Drug Abuse Warning Network Findings on Drug-Related Emergency Department Visits*, DAWN Report 2 (2013) (finding a 15 percent increase in medical emergency visits resulting from marijuana use).

Whether a will or other estate document can be invalidated for lacking the requisite capacity because the client used marijuana is a question courts have yet to address. Despite nonexistent direct precedent, parallel cases address the creation of a will while the testator was under the influence of intoxicants or mind-altering substances. See *In re Estate of Byrd,* 749 So. 2d 1214 (Miss. Ct. App. 1999) (concerning the use of antipsychotic drugs); *In re Estate of Coles*, 205 So. 2d 554 (Fla. Dist. Ct. App. 1968) (concerning a pain reducing narcotic); *McGrail v. Schmitt*, 357 S.W.2d 111 (Mo. 1962) (concerning excessive use of alcohol); *Naylor v. McRuer,* 154 S.W. 772 (1913) (concerning the use of morphine and other narcotics).

When determining whether a decedent had the capacity to make a will, the court places weight on the mindset and knowledge of the testator at the time of the will's execution. Courts strongly favor the notion that habitual drug use does little to impair capacity; however, the effects of long-term past exposure to an intoxicant such as marijuana, alcohol, or other drugs and medications can be an important factor when assessing capacity. *See* D.E. Buckner, Annotation, *Testamentary Capacity as Affected by Use of Intoxicating Liquor or Drugs,* 9 A.L.R.3d 15 (1966).

The crucial time-frame regarding capacity is the moment when the client executed the will or other document. If a testator used intoxicants on the day of the will's execution, the validity of the will may come into question. *In re Estate of Coles* illustrates a scenario where a testatrix was injected with pain-reducing narcotics a few hours before signing her will and thus the will was invalidated. And, in *In re Estate of Byrd*, the court ruled that the testator lacked capacity when heavily sedated with an anti-psychotic drug on the date of the will execution.

Another question concerns whether testamentary capacity was affected by the testator's long-term use of intoxicants prior to will execution. Many courts generally hold that unless the long-term effects of intoxicants so permanently damage the mind that it is not capable of producing the judgment that the law requires, then testamentary capacity will be deemed to exist. Accordingly, in *McGrail v. Schmitt*, the court stated: "[A] person is incompetent to make a will where due to the excessive use of intoxicating liquor his mind is so impaired and enfeebled as to produce unsoundness of mind sufficient to degree to affect testamentary capacity."

When evaluating the client's capacity, an estate attorney must be cognizant of a client's use of intoxicants, including marijuana. Because courts look to when the will or other document was executed in relation to when the client was impaired, it is important that the attorney ascertain the last time the client used marijuana. If used within the past few months, the attorney should document that the client understood the documents and their ramifications. If possible, the attorney should not have the client execute documents until at least 24 hours have elapsed since the client last used marijuana as the mental "impairment" marijuana causes can last for over six hours depending on a host of factors including the client's age, height, weight, and type of marijuana used.

Provisions Conditioning Benefits on Non-Use of "Illegal" Drugs

> *I was gonna go to class before I got high, I coulda cheated and I coulda passed but I got high, I am taking it next semester and I know why, 'Cause I got high.*

Afroman, Because I Got High (Columbia T-Bones 2001).

Assume that a testator or settlor includes a provision that in some way limits or restricts distributions to the beneficiary if the beneficiary uses "illegal drugs." How is the clause to be interpreted or applied?

The first issue is to determine the point in time at which to ascertain whether marijuana is an illegal drug. Here are some possible interpretations: (1) the law when the testator or settlor wrote the will or trust; (2) the law when the testator or settlor dies; (3) the law when the beneficiary first accepted trust benefits; and (4) current law.

The second issue to determine is whether illegality is based on state law or federal law. If state law is applied, is legality based on medical or recreational use in the states where both types of uses are authorized? If federal law is used, then marijuana use would always be illegal and thus disqualify the beneficiary from receiving benefits.

If state law is applied, a third issue arises—which state's law is applicable. For example, would the court apply the state law where (1) the testator/settlor lived when the will/trust was written, (2) testator/settlor lived when he died, (3) the beneficiary lived when he first accepted benefits, or (4) the beneficiary currently lives?

Although there are no will or trust cases directly on point, courts are beginning to grapple with situations where companies deny employee benefits for legal marijuana use. *Coats v. Dish Network, LLC*, 303 P.3d 147 (Colo. App. 2013), is a relevant case from the Colorado Supreme Court, wherein a quadriplegic licensed to use marijuana was pitted against his employer. Here, the court held that the state's "lawful activities statute," which bars employers from firing employees for engaging in lawful activities off the job, applied only to activities lawful under both Colorado and federal law. Because marijuana is illegal under federal law, its use is unlawful and can therefore be a lawful basis for termination or conviction.

Courts have found that a company may terminate an employee for marijuana use regardless of its legality under state law. In *Beinor v. Industrial Claim Appeals Office*, 262 P.3d 970 (Colo. App. 2011), the court found that registered medical marijuana use did not fall under the meaning of "medically prescribed controlled substances," thereby governing disqualification from unemployment benefits. On the other hand, the court in *Braska v. Challenge Mfg. Co.*, 861 N.W.2d 289 (Mich. Ct. App. 2014), held that registered, marijuana-using employees under the Michigan Medical Marijuana Act who were fired for failing a drug test were entitled to unemployment compensation benefits.

Another instructive issue is the interface between marijuana use and the ability to receive an organ donation. In 2015, California enacted a statute that prohibits a person from being excluded

as an organ donee merely because that person is a user of medical marijuana. Cal. Health & Safety Code § 7151.36 (West Supp. 2015).

To resolve these and related concerns, a person who includes a provision regarding drug use should specifically address each of the issues discussed above.

Life Insurance

While some life insurance carriers may treat marijuana smokers as traditional cigarette or cigar smokers and merely impose higher premiums, other carriers may refuse coverage for marijuana users altogether. There is no simple guideline as to how life insurance companies classify marijuana users. Different companies employ different standards, with some being more lenient than others. How an insurance company rates an individual typically depends on the frequency of marijuana use. Naturally, smoking marijuana regularly is likely to disqualify insureds from receiving preferred non-smoker rates. What matters most is the degree of usage, although the manner of marijuana use, such as smoking or ingesting, may also matter. If an applicant is a good overall health risk, the effect of marijuana usage will have less impact.

While medicinal users could obtain life insurance penalty-free, insurers may deny coverage for pre-existing conditions. Consequently, medical marijuana is a double-edged sword: the substance treats debilitating conditions, yet, if a condition is not serious enough to necessitate a prescription, an individual will likely pay higher insurance rates. If the condition is serious and a prescription is warranted, the underlying medical condition itself may be the cause of rate increases or uninsurability.

It is imperative that clients are honest with insurance companies regarding their marijuana use. If a life insurance company discovers that an insured has misrepresented his or her marijuana use and dies within the contestability period (typically two years), the company may deny payment to the insured's beneficiaries. Note that health privacy laws protect users who disclose so that the company cannot report marijuana use to the authorities.

With marijuana laws changing the legal landscape, lines become blurred in determining whether marijuana is an "illicit" drug requiring disclosure. In *West Coast Life Ins. Co. v. Hoar*, 558 F. 3d 1151, 1154 (10th Cir. 2009), a case focused on whether the insured revealed an activity that could be consider a "hazardous hobby," the court used a reasonable person standard, that is, "whether a

reasonable person, with the applicant's physical or mental characteristics, under all the circumstances, would understand that the question calls for disclosure of specific information."

When determining whether an applicant answered reasonably when not disclosing marijuana use, this standard could guide both courts and insurance companies. This would require a determination as to what a reasonable person should expect when reading questions pertaining to drug use and then applying that standard to the facts of a case. While decisions would vary among states, the federal illegality of marijuana could lead courts to hold that a reasonable person would understand that marijuana use must be disclosed in response to a question about "illicit" drug use.

Aside from insurance law, existing cases might inform a court when deliberating on whether coverage should be provided to an applicant who failed to disclose marijuana use. In several cases involving deaths caused by use of federal Schedule 1 substances which includes not only heroin and LSD, but also marijuana, courts have opined that paying insurance proceeds to the beneficiaries of individuals who died as a result of using Schedule 1 drugs would be against public policy. See generally *State Farm Fire and Cas. Co. v. Baer*, 745 F. Supp. 595 (N.D. California 1990) (holding that statute and public policy were against contracts having a violation of law as their object and precluded coverage); *State Farm Fire and Cas. Co. v. Schwich*, 749 N.W.2d 108 (Minn. Ct. App. 2008) (holding the insurer had no duty to pay insured because of Schedule 1 drug use).

Estates Containing Marijuana-Based Assets

How should an attorney handle a client who owns marijuana-based assets—ranging from a full-fledged farming or dispensary business to a small stash—who wants to control where this property goes upon death? See generally Dunstan H. Barnes, *So Your Client Wants to Open an Illinois Cannabis Dispensary?*, Ill. B.J., Oct. 2017, at 26. Broad legalization efforts stand in stark contrast to federal law, which make the cultivation, distribution, or possession of any amount of marijuana a criminal offense. 21 U.S.C.A. §§ 841(a), 844(a) (2010). The constitutional question of whether the federal government can preempt states' laws decriminalizing the intrastate cultivation, processing, selling and use of medicinal and recreational marijuana remains unsettled. It is uncertain the extent to which federal authorities will seek to prosecute individuals owning marijuana-based assets or utilize civil forfeiture provisions of the Controlled Substances Act to disrupt marijuana dispensaries and production facilities operating in compliance with state laws. Given these uncertainties, it becomes pertinent that estate-planning professionals understand the

potential consequences their clients and potential fiduciaries and beneficiaries may face before preparing estate-planning documents dealing with marijuana-based assets.

Bequeathing Marijuana-Based Assets

Whether a lawyer may ethically assist a client in drafting a will or trust concerning illegal assets is an issue of great concern for estate planners in states that have legalized medical or recreational marijuana. Although no state has yet directly addressed the marijuana-estate-planning interface, several states have dealt with the general attorney-marijuana situation by taking widely varying approaches. For example, an Arizona ethics opinion states that it is permissible for a lawyer to assist clients wishing to start businesses or engage in other actions permitted under the Arizona Medical Marijuana Act. Ariz. Comm. On Prof'l Ethics, Formal Op. 11-01 (2011). However, a Connecticut ethics opinion explains that, although a lawyer may advise and represent a client as to state requirements for licensing and regulation of marijuana businesses, the attorney must inform the client that such businesses violate federal criminal statutes and that the lawyer may not assist the client in criminal conduct. Conn. Comm. on Prof'l Ethics, Informal Op. 2013-02 (2013). Illinois recently amended its professional responsibility rules to state that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may . . . counsel or assist a client in conduct expressly permitted by Illinois law that may violate or conflict with federal or other law, as long as the lawyer advises the client about that federal or other law and its potential consequences." Ill. Sup. Ct. R. Prof'l Conduct, R. 1.2(d)(3) (2016). Accordingly, attorneys have little direction when confronted with estate planning issues relating to marijuana-related assets.

Administering Marijuana-Based Assets

Another potential problem is the exposure to civil and criminal liability of the client's fiduciaries, such as the executor or administrator of an estate, property management agent, or trustee, if the person's property includes marijuana-based assets. The client may find it difficult to saddle a family member, friend, or professional fiduciary with this property. States with legalized marijuana industries closely regulate who may be involved in the ownership or operation of a marijuana business and the fiduciary may be required to undergo an application and approval process to be allowed to take control of marijuana assets. A cautious fiduciary may decline to serve because there is no clear answer as to fiduciary liability.

On the other hand, a fiduciary who is bound to invest in the same manner as a prudent investor under the Uniform Prudent Investor Act effective in over 40 states, may find it difficult to ascertain whether a prudent investor would invest in marijuana assets, which may reap huge profits but which have a degree of risk the reasonableness of which is uncertain.

Estate Tax Issues

Although an item may be illegal to own, a market may nevertheless exist to measure the value of that property. For example, after Ileana Sonnabend died, estate appraisers valued an iconic Rauschenberg composite artwork with an attached stuffed bald eagle at zero because federal law makes it illegal to sell. However, the IRS valued the piece at $65 million, thereby demanding a $29.2 million estate tax payment. See Patricia Cohen, *Art's Sale Value? Zero. The Tax Bill? $29 Million.*, N.Y. Times (July 22, 2012). Luckily for the estate, the IRS later dropped its claim because the artwork was donated to the Museum of Modern Art. Joseph C. Mahon, *Sonnabend Case* Settles, weathmangement.com (Nov. 28, 2012).

Likewise, despite marijuana's illegality on the federal level, the IRS may seek to establish ownership and value for purposes of estate taxation. Although no estate tax case was located, there are many analogous income tax cases. For example, in *Caffery v. Commissioner*, 60 T.C.M. (CCH) 807 (1990), the taxpayer was engaged in the importation and distribution of marijuana. In reconstructing the taxpayer's income earned from his drug activities, the IRS computed the unreported income based on the "street value" of the marijuana. And, in *Jones v. Commissioner*, 61 T.C.M. (CCH) 1721(1991), the IRS reconstructed the taxpayer's income based on the "street market" of "uncut" cocaine upon discovering that the taxpayer sold 42 kilos of cocaine to drug dealers.

Conclusion

Legalized medical and recreational marijuana is having a widespread impact on society and the area of estate planning is no exception. Evidence exists that clients consider marijuana laws in selecting the state in which to retire. See Chris Taylor, *Seniors Are Seeking Out States Where Marijuana is Legal*, Money (July 22, 2015). Prudent attorneys, especially those living in states where marijuana is legal, must start inquiring about the client's marijuana use and marijuana-based assets. At least one law school is already teaching a course on marijuana law. See Lorelei Laird, *Law School Offers a Marijuana Law Class*, A.B.A. J. (May 1, 2015). If the client is a user, be it medicinal or recreational, such use must be evaluated when determining the client's capacity to execute a will and other estate planning documents. In addition, the use may impact the client's

ability to obtain life insurance and the premiums paid for coverage. If the client has a marijuana business, the ability of the client to transfer that business to the desired beneficiaries may be hindered. Even if the client is neither a marijuana user nor a business owner, the client may wish to limit the marijuana use of beneficiaries. Only by careful inquiry and planning may the client's intent be carried out to the maximum extent allowed under current law.

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