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Puff, The Magic Dragon, and the Estate Planner

Gerry W. Beyer
Texas Tech University School of Law

Brooke Dacus
Texas Tech University School of Law

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PUFF, THE MAGIC DRAGON, AND THE ESTATE PLANNER*

Gerry W. Beyer[†]
Brooke Dacus[‡]

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* PETER, PAUL, & MARY, PUFF, THE MAGIC DRAGON (Warner Music Group 1963). Starting in 1964, the debate has raged whether this musical selection was a reference to marijuana smoking. Compare Jordan Wouk, *Magic Dragon's Not-So-Innocuous Puff*, NY TIMES (Oct. 11, 1984), <http://www.nytimes.com/1984/10/11/opinion/l-magic-dragon-s-not-so-innocuous-puff-002871.html> (asserting song was about drug use), with David Mikkelson, *Puff: Is 'Puff, the Magic Dragon' a song about marijuana?*, SNOPEs, <http://www.snopes.com/music/songs/puff.asp> (last updated May 25, 2007) (quoting singer Peter Yarrow as stating, “[a]s the principal writer of the song, I can assure you it’s a song about innocence lost.”).

† Governor Preston E. Smith Regents Professor of Law, Texas Tech University School of Law. B.A., Eastern Michigan University; J.D., Ohio State University; LL.M. & J.S.D., University of Illinois.

‡ B.A., California Lutheran University; J.D., Texas Tech University School of Law.

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ABSTRACT

With the legalization of medical and recreational marijuana in almost half of the states, 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. After bringing readers current with the history of legalized marijuana, the Article focuses on how marijuana use may impact a user’s capacity to execute a will and other estate planning documents. The Article then examines other estate planning concerns such as will and trust provisions conditioning benefits on the non-use of “illegal drugs” and the impact of marijuana use on life insurance policies. The Article wraps up with a discussion of how an estate planner may deal with marijuana-based assets when planning an estate and how to value those assets after the owner has died.

I. INTRODUCTION

On January 1, 2014, Colorado became the first state to legalize marijuana dispensaries and allow them to sell cannabis for recreational use.¹ Across the state, many rang in the New Year by lining up outside licensed retailers to buy artisanal marijuana sporting inventive names such as “Pineapple Express” and “Alaskan Thunderbolt.”²

Since 1996, when California enacted the first statewide medical marijuana laws, the number of Americans with legal access to what many deem a pleasurable drug has been gradually growing.³ Currently, twenty-four states and the District of Columbia permit comprehensive public medical marijuana and cannabis programs.⁴ In November 2012, Washington and Colorado became the first states to pass legislation regulating the recreational use, manufacture, and sale of marijuana.⁵ Recently, Oregon, Alaska, and D.C. passed similar laws.⁶

1. COLO. CONST. art. XVIII, amended by COLO. CONST. art. XVIII, § 16; Matt Ferner, *Colorado First State In U.S. To Adopt Rules For Legal, Recreational Marijuana*, HUFFINGTON POST (Sept. 10, 2013, 7:08 PM), http://www.huffingtonpost.com/2013/09/10/colorado-first-state-rules-marijuana_n_3902602.html.

2. Stephen Siff, *The Illegalization of Marijuana: A Brief History*, ORIGINS (May 2014), <http://origins.osu.edu/article/illegalization-marijuana-brief-history>.

3. CAL. CONST. art. II § 8, amended by CAL. HEALTH & SAFETY CODE § 11362.5 (West 2015). Tanya Basu, *Marijuana Use in America Has Doubled in the Past Decade, Study Says*, TIME (Oct. 21, 2015), <http://time.com/4082683/us-marijuana-use-increase/>.

4. *24 Legal Medical Marijuana States and DC*, PROCON, <http://www.medicalmarijuana.procon.org/view.resource.php?resourceID=000881#details> (last updated Jan. 7, 2016); see Index 1 (showing Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington permit medical marijuana use).

5. COLO. CONST. Art. XVIII, amended by COLO. CONST. art. XVIII, § 16; Wash. Initiative 502 (2012).

6. Or. Measure 91 (2014); Ala. Ballot Measure 2 (2014); Wash. D.C. Initiative 71 (2014).

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Today, the internet and movies provide a modern medium for information about marijuana.⁷ Enter the terms “how to grow marijuana” in quotes on Google, and your search will yield more than 288,000 results.⁸ For Cher Neuffer, a sixty-five-year-old retired teacher, socializing is synonymous with smoking marijuana.⁹ When guests stop by Cher’s home in Ohio, she offers them a joint, and when it is someone’s birthday, she prepares a bong.¹⁰ No longer do we live in an age where marijuana is a taboo issue. Many grassroots organizations such as “Grannies for Grass” and “Moms for Marijuana International” have become involved in working to amend marijuana laws because “[s]o many people value the drug and how it makes them feel.”¹¹

Despite the healing effects cannabis is alleged to embody, use of this drug is highly contested. The federal government views marijuana as having no medical viability—categorizing it as a Schedule I controlled substance along with heroin, cocaine, and methamphetamines.¹² Drug Enforcement Administration (“DEA”) Chief Chuck Rosenberg has even labeled medicinal marijuana as “a joke.”¹³ Various voices in the medical community also adamantly oppose the notion that regards marijuana as medicine.¹⁴ Moreover, existing evidence links marijuana to limited cognitive functions, memory loss, and psychosis.¹⁵

A. A Brief Background

Marijuana’s popularity as medicine goes back as early as 2737 B.C., when the Emperor of China was prescribing the drug for gout, malaria, and poor memory.¹⁶ Fast forward to the 19th and early 20th centuries, cannabis (like opiates and cocaine) was freely available at drug

7. *Non-Medical Marijuana III: Rite of Passage or Russian Roulette*, CASA (June 2008), <http://www.casacolumbia.org/addiction-research/reports/non-medical-marijuana-rite-of-passage-or-russian-roulette-2008>.

8. Search last ran on Jan. 20, 2016.

9. Alyson Krueger, *Shuffleboard? Oh, Maybe Let’s Get High Instead*, N.Y. TIMES (Mar. 22, 2013), http://www.nytimes.com/2013/03/24/fashion/more-older-americans-use-marijuana.html?pagewanted=all&_r=0.

10. *Id.*

11. *Id.*

12. DRUG ENFORCEMENT ADMIN., U.S. DEP’T OF JUSTICE, THE DEA POSITION ON MARIJUANA 2 (Apr. 2013), http://www.dea.gov/docs/marijuana_position_2011.pdf.

13. Mollie Reilly, *Thousands Demand Firing of DEA Chief After He Calls Medical Marijuana A ‘Joke’*, HUFFINGTON POST (Nov. 12, 2015, 4:22 PM), http://www.huffingtonpost.com/entry/dea-chief-medical-marijuana-petition_5644dd09e4b08cda3487e2c1.

14. U.S. DEP’T OF JUSTICE, *supra* note 12, at 2–4 (explaining that the American Medical Association, American Cancer Society, and American Academy of Pediatrics do not advocate the use of inhaled marijuana or the legalization of marijuana as its medical effects have not yet been proven).

15. *See infra* Part II.

16. Patrick Stack, *A Brief History of Medical Marijuana*, TIME (Oct. 21, 2009), <http://content.time.com/time/health/article/0,8599,1931247,00.html>.

stores as it was a common ingredient in medicines and over-the-counter concoctions.¹⁷

Mexican immigrants introduced the practice of smoking the marijuana leaf in cigarettes and pipes to the United States, bringing about the first attempt at federal regulation of marijuana in 1906.¹⁸ The Pure Food and Drug Act included cannabis among the various substances that medicine companies were required to list on their labels to warn worried customers.¹⁹ Between 1914 and 1925, twenty-six states passed laws prohibiting the plant.²⁰ Through the 1950s, lawmakers and journalists made little to no distinction amongst illegal drugs. Heroin, cocaine, or marijuana was categorized as “dope: dangerous, addicting, frightening, and bad.”²¹

Views of drugs drastically changed in the mid-1960s, but the pronounced expansion of marijuana use among American youth was linked to no single cause.²² For many, smoking pot seemed like harmless fun.²³ The mild pleasures of the drug refuted the logic of the laws behind it.

President Richard Nixon’s election in 1968 signaled a major shift in American Drug Policy. In 1970, Congress enacted laws against marijuana based in part on its conclusion that marijuana had no scientifically proven medical value.²⁴ Likewise, the Food and Drug Administration declined to approve marijuana for any condition or disease noting: “[T]here is currently sound evidence that smoked marijuana is harmful,” and no “scientific studies support medical use of marijuana for treatment in the United States.”²⁵

During the Reagan administration, the White House cultivated an extensive anti-drug media campaign that non-profit and independent groups joined.²⁶ Programs such as Drug Abuse Resistance Education (“DARE”) and Partnership for a Drug-Free America, sought to educate the public about the harmful effects of drugs.²⁷

Today’s liberalization efforts have largely succeeded in redefining marijuana as medicine, in turn focusing on the economic and social costs of incarceration due to the criminal penalties associated with marijuana.²⁸ Twenty-four states and the District of Columbia currently

17. Siff, *supra* note 2.

18. *See id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *See id.*

23. *See Siff, supra* note 2.

24. *See U.S. DEP’T OF JUSTICE, supra* note 12, at 2.

25. *Id.*

26. Siff, *supra* note 2.

27. *Id.*

28. *See Todd Garvey & Brian Yeh, State Legalization of Recreational Marijuana: Selected Legal Issues*, CONG. RESEARCH SERV. 1–2 (Jan. 13, 2014), <http://www.fas.org/>

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exempt qualified users of medicinal marijuana from penalties imposed under state law.²⁹ Additionally, Colorado, Washington, D.C., Oregon, and Alaska legalize, regulate, and tax small amounts of marijuana for non-medicinal (“recreational”) uses by individuals over the age of twenty-one.³⁰ Regardless, the federal Controlled Substances Act (“CSA”) continues to prohibit the cultivation, distribution, and possession of marijuana other than to conduct federally approved research.³¹ Thus, the current legal status of marijuana seems to be contradictory and in a state of flux: as a matter of federal law, marijuana related activities are prohibited and punishable by criminal penalties, but at the state level, certain marijuana use is permitted. Consequently, individuals and businesses engaging in marijuana activities that are legal at the state level remain subject to federal prosecution or other consequences under federal law.³²

B. *Catch-22*

Supreme Court Justice Louis Brandeis applauded America’s sovereign powers that encourage states to “serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”³³ However, various constitutional limitations inhibit this legislative freedom, including the Supremacy Clause, which states that federal law “shall be the supreme Law of the Land.”³⁴ Thus, any state law in conflict with federal law is considered preempted and void. While simple in theory, determining whether a state law conflicts with federal law can be a daunting task.³⁵

When California legalized medical cannabis, the Oakland Cannabis Buyers’ Cooperative was created to provide seriously ill patients with a safe and reliable source of medical cannabis, information, and patient support.³⁶ In January 1998, the United States Government sued

sgp/crs/misc/R43034.pdf; *Drug War Statistics*, DRUG POL’Y ALLIANCE (2015), <http://www.drugpolicy.org/drug-war-statistics>.

29. *24 Legal Medical Marijuana States and DC*, *supra* note 4.

30. COLO. CONST. art. XVIII, § 16; Wash. Initiative, *supra* note 5 § 1; Or. Measure, *supra* note 6.

31. Garvey & Yeh, *supra* note 28, at 7.

32. Garvey & Yeh, *supra* note 28, at 2.

33. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

34. U.S. CONST. art. VI, cl. 2.

35. *See* Garvey & Yeh, *supra* note 28, at 12 (explaining, the fact that the federal government criminalizes conduct does not mean the state must also criminalize the same conduct). “If prohibiting certain conduct under federal law had the effect of barring any state attempt to permit that same conduct, the result would be a legal environment in which states were compelled to adopt criminal measures that mirrored federal law. The Tenth Amendment prohibits such a requirement.” *Id.*

36. *U.S. v. Oakland Cannabis Buyers’ Co-op*, 532 U.S. 483, 485 (2001); *contra* *Jenks v. State*, 582 So. 2d 676, 680 (Fla. Dist. Ct. App. 1991) (holding a husband and wife charged with cultivation of marijuana established sufficient evidence to use the medical necessity defense. The Court reasoned that the medical necessity defense

Oakland Cannabis Buyers' Cooperative for violating federal laws under the CSA of 1970.³⁷ On May 14, 2001, the United States Supreme Court ruled in *United States v. Oakland Cannabis Buyers' Coop* that federal anti-drug laws did not authorize an exclusion for medical marijuana and rejected a medical necessity defense to crimes enacted under the CSA because Congress concluded cannabis had "no currently accepted medical use" when the Act was passed in 1970.³⁸

The United States Supreme Court once again declined to carve out an exception for marijuana under a theory of medical sustainability.³⁹ In *Gonzales v. Raich*, the Court held that even where persons are cultivating, possessing, or distributing cannabis in accordance with state laws, the Commerce Clause of the United States Constitution permits prosecution of such persons in violation of federal marijuana laws.⁴⁰

On October 13, 2010, Attorney General Holder affirmed the Department of Justice's position.⁴¹ In addressing concerns for the possible passing of Proposition 19 in California, a ballot initiative for the legalization of marijuana, he stated:

[R]egardless of the passage of this or similar legislation, the Department of Justice will remain firmly committed to enforcing the CSA in all states. Prosecution of those who manufacture, distribute, or possess any illegal drugs, including marijuana, and the disruption of drug trafficking organizations is a core priority of the Department. Accordingly, we will vigorously enforce the CSA against those individuals and organizations that possess, manufacture, or distribute marijuana for recreational use, even if such activities are permitted under state law.⁴²

Because of the dangers associated with marijuana use, organizations such as the American Cancer Society, the American Glaucoma Society, and the American Academy of Pediatrics, challenge marijuana's medical practicality and "do not advocate the use of inhaled marijuana or the legalization of marijuana."⁴³ The American Medical Association has rejected pleas to endorse marijuana as medicine, and instead urges that marijuana remain a prohibited substance until more research is done.⁴⁴

should not be barred purely because marijuana is classified as a schedule I substance).
Id.

37. *Oakland Cannabis Buyers' Coop.*, 532 U.S. at 48–87.

38. *Id.* at 493.

39. *Gonzales v. Raich*, 545 U.S. 1, 2 (2005).

40. *Id.*

41. John Hoeffel, *Holder Vows Fight Over Prop. 19*, L.A. TIMES (Oct. 16, 2010), <http://articles.latimes.com/2010/oct/16/local/la-me-marijuana-holder-20101016> (referencing letter to Former Administrators of Drug Enforcement Administration in response to their concerns about Proposition 19 and the legalization of marijuana).

42. *Id.*

43. *Medical Use of Marijuana: ACS Position*, AM. CANCER SOC'Y 3 (2013), <http://medicalmarijuana.procon.org/sourcefiles/american-cancer-society-position.pdf>.

44. See U.S. DEP'T OF JUSTICE, *supra* note 12, at 2–3.

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Notwithstanding the tireless efforts to criminalize marijuana, many states have, or are looking to implement legislation to legalize marijuana.⁴⁵ Organizations such as the Marijuana Policy Project (“MPP”) and the National Organization for the Reform of Marijuana Laws (“NORML”) provide funding and assistance to states to promote medicinal marijuana initiatives and legislation.⁴⁶ In 2014, voter initiatives appeared on ballots and numerous states introduced full legalization bills; additional voter initiatives are expected to appear across state ballots in 2016.⁴⁷ Still, not all states have agreed with such legislation, illustrating the polarizing views deeply rooted in society.

Yet, because state laws legalizing marijuana have no effect on federal laws, which continue to outlaw the production, sale, and possession of marijuana, those using marijuana are in a difficult legal position: their activities are legal under state law, yet illegal under federal law.⁴⁸ Under the Supremacy Clause, federal law preempts any conflicting state law.⁴⁹ This gridlock between federal and state policies concerning marijuana leaves open many unanswered legal questions, including those arising for estate planners, which provides the focus of this article.

II. IMPACT ON TESTAMENTARY 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.”⁵⁰*

A. A Budding Problem

Opinions on the impact of marijuana on a person’s mental state and consequently testamentary capacity vary greatly. On one hand, we have the dire warnings such as:

Its first effect is sudden, violent, uncontrollable laughter; then come dangerous hallucinations - space expands - time slows down, almost stands still - fixed ideas come next, conjuring up monstrous

45. Bradley Steinman, *The Medical Use of Marijuana v. The Use of Marijuana for Medical Purposes*, A.B.A., <http://www.americanbar.org/publications/tyl/topics/health-law/medical-use-marijuana-versus-use-marijuana-medical-purposes.html> (last visited Jan. 20, 2016).

46. *About Us*, MARIJUANA POLICY PROJECT, <http://www.mpp.org/about/> (last visited Sept. 29, 2013).

47. See Phillip Smith, *An Overview of the 2016 Marijuana Legalization Initiatives*, WEED BLOG (July 31, 2015, 8:00 AM), <http://www.theweedblog.com/an-overview-of-the-2016-marijuana-legalization-initiatives/>.

48. See U.S. CONST. art. VI, cl. 2; see also *Gibbons v. Ogden*, 22 U.S. 1, 42 (1824).

49. U.S. CONST. art. VI, cl. 2.

50. CHEECH & CHONG, *Let’s Make a Dope Deal*, on BIG BAMBU (Ode Records/Warner Bros. Records/WEA 1972).

extravagances - followed by emotional disturbances, the total inability to direct thoughts, the loss of all power to resist physical emotions leading finally to acts of shocking violence ending often in incurable insanity.⁵¹

On the other hand, another segment of society, including United States President Barack Obama, views the impact of marijuana on capacity to be the same as or less than the reasonable consumption of beer, wine, or liquor.⁵²

Because our nation lacks a clear understanding of the mental and physical effects of marijuana, the federal government, along with other medical organizations, categorize marijuana as a Schedule I substance.⁵³ Absolute legalization could come at the expense of children and public safety, as numerous studies indicate that marijuana creates dependency issues, causes impaired health, and leads to intoxicated drivers.⁵⁴

Marijuana today is much different than it was forty years ago.⁵⁵ The average amount of tetrahydrocannabinol (“THC”), marijuana’s active ingredient, in seized marijuana samples is an overwhelming 15.1%; compared to levels in 1983, which averaged below 4%.⁵⁶ This denotes “more than a tripling . . . [in marijuana] potency”⁵⁷ Antonio Maria Costa, Executive Director of the United Nations Office on Drugs and Crime, contends that we must dispute the growing *laissez-faire* outlook regarding cannabis.⁵⁸ “Evidence of the damage to mental health caused by cannabis use—from loss of concentration to paranoia, aggressiveness and outright psychosis—is mounting and cannot be ignored. Emergency-room admissions involving cannabis is

51. REEFER MADNESS (Motion Pictures Ventures 1936); *see also* MARIHUANA (Roadshow Attractions 1936) (“Marihuana gives the user false courage, and destroys conscience, thereby making crime alluring”).

52. Jen Christensen & Jacque Wilson, *Is marijuana as safe as-or safer than-alcohol?*, CNN, <http://www.cnn.com/2014/01/20/health/marijuana-versus-alcohol/#> (last updated Jan. 22, 2014, 11:19 AM) (quoting President Obama as stating, “As has been well-documented, I smoked pot as a kid, and I view it as a bad habit and a vice, not very different from the cigarettes that I smoked as a young person up through a big chunk of my adult life . . . I don’t think it is more dangerous than alcohol.”).

53. Garvey & Yeh, *supra* note 28, at 6–7 (showing Schedule I substances are deemed to have no currently accepted medical use in treatment and can only be used in very limited circumstances, compared to Schedule II, III, IV, and V substances that have recognized medical uses).

54. *See* U.S. DEP’T OF JUSTICE, *supra* note 12, at 25.

55. *See generally* MAHMOUD EL-SOHLI, NAT’L INSTITUTE ON DRUG ABUSE, QUARTERLY REPORT POTENCY MONITORING PROJECT REPORT 104, at 4 (2009), https://www.ncjrs.gov/pdffiles1/ondcp/mpmp_report_104.pdf.

56. *See* U.S. DEP’T OF JUSTICE, *supra* note 12, at 26.

57. *Id.*

58. Antonio Maria Costa, *Cannabis. . . call it anything but ‘soft’: The debate over the drug is no longer about liberty. It’s about health*, INDEPENDENT (Mar. 24, 2007), <http://www.independent.co.uk/news/uk/crime/antonio-maria-costa-cannabis-call-it-anything-but-soft-5332548.html>.

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rising, as is demand for rehabilitation treatment It is time to explode the myth of cannabis as a ‘soft’ drug.”⁵⁹

Recent research indicates that cannabis users who begin smoking the drug at an early age show a significant decline in IQ.⁶⁰ National Institute on Drug Abuse Director Nora D. Volkow, M.D., states, “THC, a key ingredient in marijuana, alters the ability of the hippocampus, a brain area related to learning and memory, to communicate effectively with other brain regions.”⁶¹ Beyond lowering IQ, Dr. Volkow explains that regular marijuana use among adolescents is correlated to damaging behaviors that may alter the trajectory of a young person’s life.⁶² A major study published in the *Proceedings of the National Academy of Sciences* found that long-term marijuana use has a negative effect on intellectual function.⁶³ Researchers found that five different cognitive areas were significantly affected, especially executive function and processing speed.⁶⁴ Not only does marijuana impair and slow brain activity, but according to the Office of National Drug Control Policy, teen marijuana use is linked to school dropout, depression, anxiety, and even suicide.⁶⁵

Marijuana does not only adversely affect adolescents.⁶⁶ Memory, the ability to think quickly, and other cognitive functions worsen over time with marijuana use in all ages.⁶⁷ In a study published by the American Academy of Neurology, frequent marijuana users were found to perform worse than non-users on tests of cognitive abilities, including divided attention and verbal fluency.⁶⁸ Moreover, marijuana has been linked to psychosis and memory loss in various studies. “[R]esearchers from the Human Neuropsychopharmacology group at the Biomedical Research Institute of Hospital de Sant Pau and from the Autonomous University of Barcelona explored cognitive function in . . . marijuana smokers and their ability to distinguish between real

59. *Id.*

60. Fran Lowty, *Cannabis Use in Teens Linked to Irreparable Drop in IQ*, MEDSCAPE MULTISPECIALTY (Apr. 26, 2013), <http://www.medscape.com/viewarticle/803197>.

61. *Regular marijuana use by teens continues to be a concern*, NAT’L INSTITUTE OF DRUG ABUSE (Dec. 19, 2012), <https://www.drugabuse.gov/news-events/news-releases/2012/12/regular-marijuana-use-by-teens-continues-to-be-concern>.

62. *Id.*

63. Sarah Glynn, *Marijuana Can Lower IQ In Teens*, MEDICAL NEWS TODAY (Sept. 19, 2012), <http://www.medicalnewstoday.com/articles/250404.php>.

64. *Id.*

65. *Teen Marijuana Use Worsens Depression: An Analysis of Recent Data Shows “Self-Medicating” Could Actually Make Things Worse*, OFFICE OF NAT’L DRUG CONTROL POLICY (May 2008) https://www.ncjrs.gov/ondcppubs/publications/pdf/marij_mental_hlth.pdf.

66. *See generally Memory, Speed of Thinking and Other Cognitive Abilities Get Worse Over Time With Marijuana Use*, NEWS MEDICAL (Mar. 15, 2015), <http://www.news-medical.net>.

67. *Id.*

68. *Id.*

and false memories.”⁶⁹ The results showed a “subtle compromise of brain mechanisms” in marijuana smokers, including a “diminished ability to tell true from false.”⁷⁰ Marijuana’s prolonged effect on the brain points towards structural and functional changes, which “may have [both] medical and legal implications.”⁷¹

Not only does marijuana threaten to impair cognitive functioning, but evidence of the drug’s physical harm is rapidly accumulating.⁷² According to the Drug Abuse Warning Network (“DAWN”), in 2011 there were 1,252,000 emergency department visits involving an illicit drug.⁷³ Marijuana was involved in 455,668 of these visits, second only to cocaine.⁷⁴ Moreover, children often suffer the consequences of actions engaged in by parents or guardians involved with marijuana.⁷⁵ In Bradenton, Florida, a Highway Patrol officer tried to stop a man speeding on I-75.⁷⁶ Police were finally able to apprehend the driver after he drove onto a median and crashed into a construction barrel.⁷⁷ Upon opening the car door, officers stood aghast when they discovered three small children, forty pounds of marijuana, and several thousand dollars in cash.⁷⁸

Crime involving marijuana is also becoming increasingly rampant. Massachusetts District Attorney Gerard T. Leone Jr., says he fears that “decriminalization has created a booming ‘cottage industry’ for dope dealers to target youths no longer fearing the stigma of arrest or how getting high could affect their already dicey driving.”⁷⁹ “What we’re seeing now is an unfortunate and predictable outcome.”⁸⁰ A Deputy Police Chief explained, “[T]he whole thing is a mess . . . Most of the drug-related violence you see now – the shootings, murders – is about weed.”⁸¹ Law enforcement officials link several 2010 high-pro-

69. Lizette Borreli, *MRI Scans Show Smoking Weed Lowers Hippocampus Activity, Creating False Memories*, MEDICAL DAILY (Apr. 24, 2015, 3:32 PM), <http://www.medicaldaily.com/mri-scans-show-smoking-weed-lowers-hippocampus-activity-creating-false-memories-330630>.

70. *Id.*

71. *Id.*

72. See generally *Highlights of the 2011 Drug Abuse Warning Network Findings on Drug-Related Emergency Department Visits*, DAWN REPORT 2 (2013), <http://www.samhsa.gov/data/2k13/DAWN127/sr127-DAWN-highlights.pdf>.

73. *Id.*

74. *Id.* at 3.

75. See DEP’T OF JUSTICE, *supra* note 12, at 44.

76. *FHP: Man Led Trooper on Chase with Kids—and Pot—in Car*, BAY NEWS 9 (Feb. 3, 2011), http://www.baynews9.com/content/news/baynews9/news/article.html/content/news/articles/ot/both/2011/02/03/FHP_Man_led_trooper_on_chase_with_kids_and_pot_in_car.html.

77. *Id.*

78. *Id.*

79. Laurel Sweet, *New Pot Law Blamed as Violence Escalates*, BOS. HERALD (Nov. 15, 2010), http://bostonherald.com/news_opinion/local_politics/2010/11/new_pot_law_blamed_violence_escalates.

80. *Id.*

81. *Id.*

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file killings to the increased marijuana market, including the fatal shooting of a twenty-one-year-old inside his Harvard University dorm, allegedly in an effort to rob him of his pot and cash.⁸²

B. *Testamentary Capacity*⁸³

A prerequisite to a valid will is that the testator had testamentary capacity when the testator executed the will.⁸⁴ Testamentary capacity is the minimum level of mental competence necessary to make a will.⁸⁵ State legislatures rarely detail how a person achieves testamentary capacity other than to state that a testator must be of “sound mind.”⁸⁶ Thus, courts have had the responsibility of defining the elements of testamentary capacity. Although courts vary in how they evaluate the soundness of a person’s mind, it is typical for testamentary capacity to encompass that the testator “(1) comprehended the action being taken and its effect, (2) knew the nature and extent of the testator’s property, (3) recognized the natural objects of the testator’s bounty, and (4) simultaneously held these three elements in the testator’s mind long enough to make a reasoned judgment regarding property disposition.”⁸⁷ The testator only needs testamentary capacity at the time the will is executed, modified, or revoked. If the testator’s mental capacity varies over time, but has lucid intervals, then the testator is deemed to possess testamentary capacity if the will is executed, modified, or revoked during his lucid time.⁸⁸

Testamentary capacity is one of the most cited reasons for challenging the validity of a will during probate.⁸⁹ A testator’s capacity may come into question for various reasons, one of them being the use of mind-altering substances.

82. *Id.*

83. Although this Section focuses on the capacity to execute a will, the capacity to execute other estate planning documents such as powers of attorney, directives to physicians, and body disposition documents, are impacted in a similar way by the client’s use of marijuana.

84. See Peter K. Kelly, *Testamentary Capacity: Testator’s Knowledge of Her Assets*, LEXISNEXIS (June 6, 2011), <http://www.lexisnexis.com/legalnewsroom/estate-elder/bl/estate-elder-blog/archive/2011/06/06/testamentary-capacity-testator-s-knowledge-of-her-assets.aspx>.

85. *Id.*

86. See UNIF. PROBATE CODE § 2-501 (2008).

87. See GERRY W. BEYER, *WILLS, TRUSTS, AND ESTATES: EXAMPLES & EXPLANATIONS* § 5.2 (6th ed. 2015).

88. See Thomas G. Gutheil, *Common Pitfalls in the Evaluation of Testamentary Capacity*, 35 J. AM. ACAD. PSYCHIATRY LAW 514, 514 (2007), <http://www.jaapl.org/content/35/4/514.full>.

89. See Joyce Moore, *Will Contests: From Start to Finish*, 44 ST. MARY’S L. J. 97, 104–108 (2012).

C. *Capacity's Blurry Line*

Whether a will can be invalidated for lacking the requisite testamentary capacity because the testator used marijuana is a question courts have yet to address. Despite nonexistent direct precedent, parallel cases address the creation of a will while under the influence of intoxicants or mind-altering substances.⁹⁰

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.⁹¹

When determining the capacity of the testator, the crucial timeframe is the moment when the testator executed the will.⁹² If the testator used intoxicants on the day of the will's execution, the validity of the will may come into question.⁹³ *In re Coles' Estate* illustrates a scenario where a testatrix was injected with pain reducing narcotics two hours before signing her will.⁹⁴ The court found that her decision to give 95% of her estate to a church she had only recently joined was made without testamentary capacity.

Another question concerns whether testamentary capacity was impacted by the testator's long-term use of intoxicants, days, months, or years prior to will execution. Many courts generally hold that unless the long-term effects of intoxicants so permanently damages the mind that it is not capable of producing the judgment that the law requires, then testamentary capacity will be deemed to exist.⁹⁵ 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

90. See *In re Estate of Byrd*, 749 So.2d 1214 (Miss. Ct. App. 1999) (concerning the use of antipsychotic drugs); see also *In re Estate of Coles*, 205 So.2d 554 (Fla. Dist. Ct. App. 1968) (concerning a pain reducing narcotic); see also *McGrail v. Schmitt*, 357 S.W.2d 111 (Mo. 1962) (concerning excessive use of alcohol); see also *Naylor v. McRuer*, 154 S.W. 772 (1913) (concerning the use of morphine and other narcotics).

91. D.E. Buckner, Annotation, *Testamentary Capacity As Affected By Use of Intoxicating Liquor or Drugs*, 9 A.L.R.3d 15 (1966).

92. *Id.*

93. See *In re Estate of Coles*, 205 So.2d at 555 (ruling that testatrix lacked the capacity when signing the will two hours after being injected with a pain reducing narcotic); see also *In re Estate of Byrd*, 749 So.2d at 1217-18 (ruling that the testator lacked capacity when heavily sedated with anti-psychotic drug on the date of execution).

94. *In re Estate of Coles*, 205 So.2d at 555.

95. See Sharon Glisson Bradley, *Testamentary Capacity: Is the Alcoholic Incapacitated?*, 46 MO. L. REV. 2, 437-40 (1985).

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to degree to affect testamentary capacity.”⁹⁶ Similarly, *In re Underhill* involved a decedent who was addicted to morphine and cocaine.⁹⁷ The decedent used these drugs up to the day he executed the will and thereafter.⁹⁸ Although the decedent was experiencing hallucinations, the hallucinations failed to manifest on the date of the will’s execution.⁹⁹ The court found that the hallucinations and illusions were the product of a diseased mind created by the excessive use of cocaine, and consequently, testamentary capacity did not exist.¹⁰⁰

Under a hypothetical pertaining to marijuana use, courts would need to undertake an adequate assessment of the long-term effects marijuana has on the mind. Though still in the early stages of research, marijuana generally has a sedative, euphoric effect in small doses similar to that of alcohol and anti-anxiety medications.¹⁰¹ In large doses, marijuana is linked to hallucinogenic properties, and long-term data suggests that marijuana impairs the ability to process information efficiently.¹⁰² Thus, the concern becomes whether the testator had the ability to form testamentary capacity having used marijuana.

Estate planning professionals must be cognizant of a client’s marijuana use when evaluating a client’s testamentary capacity if that client uses marijuana. Because courts often look to when the will was executed in relation to when the testator 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 what a will does (that is, dispose of property at death), appreciated what property the client owned, and knew the client’s family members. If possible, the attorney should not have the client execute the will until at least one week has elapsed since the client has last used marijuana.

III. 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*¹⁰³

96. 357 S.W.2d 111, 119 (Mo. 1962) (citing *Naylor v. McRuer*, 154 S.W. 772, 784 (Mo. 1913)) (finding mental unsoundness such as will constitute testamentary incapacity may be produced by excessive use of narcotics and morphine).

97. 10 Ohio Dec. Reprint 487, 488 (1889).

98. *Id.*

99. *Id.*

100. *Id.* at 488–89.

101. Annaliese Smith, *Marijuana as a Schedule I Substance: Political Ploy or Accepted Science?*, 40 SANTA CLARA L. REV. 1137, 1143 (2000).

102. *Id.* at 1142.

103. AFROMAN, BECAUSE I GOT HIGH (Columbia T-Bones 2001).

Conditional trusts are hardly a new phenomenon. For decades, parents have sought to influence the behavior of their children through financial rewards. An incentive trust imposes conditions that encourage positive behavior. Incentive trusts can be used to promote a sober, family-oriented lifestyle and discourage substance abuse.¹⁰⁴ Settlers may also require drug testing or counseling as a condition of receiving trust income.¹⁰⁵

A. *The Key Issues*

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 when to ascertain whether marijuana is an illegal drug. Here are some possible interpretations:

- The law when the testator or settlor wrote the will or trust.
- The law when the testator or settlor dies.
- The law when the beneficiary first accepted trust benefits.
- The law as it exists now.

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, that is, which state’s law is applicable. For example, would the court apply the state law:

- Where the testator/settlor lived when the will/trust was written?
- Where the testator/settlor lived when he or she died?
- Where the beneficiary lived when he or she first accepted benefits?
- Where the beneficiary currently lives?

Trust use may become an issue even if there is no applicable will or trust provision. A representative from California, Linda Sanchez, believes that children who want to inherit from their parents should have to submit to drug testing, even if their parent’s will or trust does not

104. See generally Nancy G. Henderson, *Managing the Benefits and Burdens of New Wealth with Incentive Trusts (Part 2) (With Sample Provisions)*, 47 NO. 7 PRAC. LAW. 11, 12 (2001) (“A trust may be drafted to cut off benefits to a beneficiary who has substance abuse problems, other than those benefits necessary to secure treatment and to insure that basic living needs are met”); William J. Berrall, *Trust Funds*, PARENTS TALK, http://www.parentstalk.com/expertsadvice/ea_fp_0007.html (last visited Dec. 3, 2015) (suggesting that incentive trusts could stipulate that “no funds are to be paid from the trust if the young person is involved in drugs”).

105. *Incentive Trusts—Keeping a Steady Hand on the Tiller*, STEVENS GROUP (Feb. 12, 2014), <http://choosesteve.com/incentive-trusts-keeping-a-steady-hand-on-the-tiller/>.

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contain such a condition.¹⁰⁶ She thinks it is unfair that a single parent who wants governmental assistance to purchase food needs to be drug-tested, but that a child who may inherit a million dollars or more does not need to be drug-tested.¹⁰⁷

B. Analogous Cases

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. The following cases may be useful by analogy. *Coats v. Dish Network* is a relevant case from the Colorado Supreme Court, wherein a quadriplegic licensed to use marijuana was pitted against his employer.¹⁰⁸ 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.¹⁰⁹ Because marijuana is illegal under federal law, its use is unlawful, and can therefore be a lawful basis for termination.¹¹⁰

Courts have been consistent in finding that a company may terminate an employee for marijuana use regardless of its legality under state law.¹¹¹ In *Beinor v. Industrial Claim Appeals Office*,¹¹² 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.¹¹³ The court went on to describe that the "medical marijuana amendment does not give medical marijuana users the unfettered right to violate employers' policies and practices regarding use of controlled substances," and the employee was found to have violated the zero-tolerance policy of the company.¹¹⁴

106. See Rachel Stoltzfoos, *Dem Suggests Kids Should Be Drug-Tested Before They Can Inherit From Their Parents*, DAILY CALLER (Mar. 18, 2015), <http://dailycaller.com/2015/03/18/dem-says-kids-should-be-drug-tested-before-they-can-inherit-from-their-parents/>.

107. *Id.*

108. *Coats v. Dish Network, L.L.C.*, 303 P.3d 147 (Colo. App. 2013).

109. *Id.*

110. *Id.*; see also G.M. Filisko, *Weed-Wacked: Employers and Workers Grapple With Laws Permitting Recreational and Medical Marijuana Use*, A.B.A. J. (Dec. 1, 2015, 5:30 AM), http://www.abajournal.com/magazine/article/employers_and_workers_grapple_with_laws_allowing_marijuana_use.

111. See *Steele v. Stallion Rockies Ltd.*, 106 F. Supp. 3d 1205, 1222 (D. Colo. 2015); see also *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus.*, 230 P.3d 518 (Or. 2010); see also *Coats*, 303 P.3d 147.

112. *Beinor v. Indus. Claim Appeals Office*, 262 P.3d 970 (Colo. App. 2011); *contra* *Braska v. Challenge Mfg. Co.*, 307 Mich. App. 340 (2014) (Court of Appeals held that several registered, marijuana-using employees under the Michigan Medical Marijuana Act that were fired for failing a drug test were entitled to unemployment compensation benefits).

113. See *Beinor*, 262 P.3d at 977.

114. *Id.* at 975.

In *Steele v. Stallion Rockies Ltd.*, an employee suffering from a medical condition self-medicated with marijuana.¹¹⁵ The employee's violations against the defendant's drug and alcohol policies led to his termination, which the court upheld.¹¹⁶ Additionally, in *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, an employee's termination was upheld because the Federal CSA preempted the Oregon Medical Marijuana Act.¹¹⁷ The court held that "exclusion from the definition of 'illegal use of drugs' for the 'use of a drug taken under supervision of a licensed health care profession' refers to those medical and research uses that the Controlled Substances Act authorizes."¹¹⁸ Likewise, in California, an employee can be terminated for failing a drug test. "The state's Compassionate Use Act doesn't require employers to accommodate possession, use or influence of marijuana in the workplace."¹¹⁹

Troubles arise when employers fail to put their employees on notice of their marijuana policies. Todd R. Wulffson, a partner at Carothers DiSante & Freudenberger in Irvine, California, says that medical marijuana issues can blindside employees.¹²⁰ As Mr. Wulffson explained, "[i]t invariably happens that an employee is using medical marijuana and a company policy says employees can't abuse illegal drugs. Nobody bothers to tell the employee that medical marijuana is still an illegal drug."¹²¹ This communication break-down causes problems that may lead to an employee's immediate termination. Employers must implement language indicating that marijuana is an illegal substance and shall be treated the same as cocaine and heroin, thereby explicitly implementing a zero-tolerance policy.¹²²

On the other hand, by analogy, 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.¹²³

C. Recommendation

Applied in the context of estate planning, a testator or settlor may deny benefits to a beneficiary for reasons mirroring the standard policies of a company, or for federal law preemption of state marijuana laws. Whether a beneficiary can inherit in spite of marijuana use, will largely boil down to the intent of the settlor. Thus, a person who in-

115. *Steele*, 106 F. Supp. 3d at 1208.

116. *Id.* at 1208, 1213.

117. 348 Or. 159 (2010).

118. *Id.*

119. Filisko, *supra* note 107.

120. *Id.*

121. *Id.*

122. *See id.*

123. CAL. HEALTH & SAFETY CODE § 7151.36 (West Supp. 2015).

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cludes a provision regarding drug use should specifically address each of the issues discussed above.

IV. LIFE INSURANCE

Life insurance is a key retirement-planning tool that may be used to protect a loved one's savings for his or her family upon death or to reduce financial liability for inheritance and estate taxes for one's beneficiaries. With states adopting widely divergent approaches, insurance companies are still trying to determine how to treat marijuana use for insurance premium purposes.

A. *Insurability*

With twenty-four states and the District of Columbia having legalized marijuana for medicinal use, insurance companies contemplate whether (and how) they should penalize customers.¹²⁴ Because marijuana has yet to be scientifically proven to treat illness, many life insurance companies are hesitant in providing full coverage to a marijuana smoker.¹²⁵ While some life insurance carriers may treat marijuana smokers as traditional cigarette or cigar smokers and merely impose higher premiums, other insurance carriers may refuse coverage for marijuana users altogether.¹²⁶ However, the disparities between a "smoker" and "non-smoker" may get blurry beyond that of a standard cigarette.¹²⁷ "Even in a single insurance company, the rules for who is and isn't a smoker might be different, depending on the type and amount of insurance you want to buy."¹²⁸

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.¹²⁹ According to underwriters, as with tobacco, the less an insured smokes, the better the insured's health classification will be and the lower the premiums. P.J. Thompson, a Massachusetts-based life insurance agent, said that in several cases, his clients that use mari-

124. Adam Cecil, *Getting high on insurance: how marijuana impacts life insurance rates*, POLICYGENIUS (Mar. 23, 2015), <https://www.policygenius.com/blog/how-marijuana-impacts-life-insurance-rates>; 24 *Legal Medical Marijuana States and DC*, *supra* note 4.

125. See Barbara Marquand, *When the smoke clears, will your life insurance quotes be high?*, INSURE, <http://www.insure.com/articles/lifeinsurance/high-life-insurance-quotes.html> (last updated Feb. 23, 2012).

126. *Id.*

127. *Id.*

128. *Id.*

129. Cecil, *supra* note 124. Additional issues may arise if the user does not smoke the marijuana but instead bakes it into brownies, cookies, or other edibles.

juana have been rated as non-smokers, similar to the “celebratory cigar” smokers’ status.¹³⁰

B. Rates—Recreational User

Smoking marijuana regularly is likely to disqualify insureds from receiving preferred non-smoker rates.¹³¹ What matters more than anything else is the degree of usage.¹³² As is the case with all health concerns associated with applying for life insurance, a company will examine the risks surrounding each applicant.¹³³ Thus, if an applicant is a good overall health risk, the effect of marijuana usage will have less impact.

Each insurer has distinct guidelines and underwriting rules; therefore, each company views marijuana usage differently.¹³⁴ Various examples of differing insurance company classifications include: (1) applicants may be considered as a “standard” smoker with the occasional use of marijuana, but with daily use they may be rated as a “substandard B” smoker; (2) an applicant who is twenty-five or older and uses marijuana intermittently may be able to obtain a standard smoker rate.¹³⁵ Marijuana users who participate in more moderate usage are likely to obtain a table 2 rating, and those who use on a heavier basis may have their application for coverage declined; (3) if an applicant uses marijuana eight times per month or less, they may be classified as a standard smoker and receive such rates.¹³⁶ However, if an applicant uses marijuana more than eight times per month, he or she may be considered at a substandard smoker premium rate.¹³⁷

C. Rates—Medical User

If an applicant’s medical records and application for coverage indicate marijuana usage with a prescription, some insurance companies classify the applicant as a non-smoker, and no penalty is applied.¹³⁸ Other insurance companies treat medical marijuana users as smokers, thereby increasing rates two to three times than that of non-smokers.¹³⁹

130. *Id.*

131. See *Life Insurance for Marijuana Smokers*, HUNTLEY WEALTH INS. SERVS., <http://www.insuranceblogbychris.com/life-insurance-for-smokers/life-insurance-for-marijuana-smokers/> (last visited Dec. 11, 2015).

132. *Id.*

133. *Id.*

134. Brad Cummins, *The effects of marijuana use on life insurance rates*, LIFE HEALTH PRO (Jun. 19, 2013), <http://www.lifehealthpro.com/2013/06/19/exploring-the-effects-of-marijuana-use-on-life-ins>.

135. *Id.*

136. *Id.*

137. *Id.*

138. See *Life Insurance for Marijuana Smokers*, *supra* note 131.

139. See *id.*

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While medicinal users could obtain life insurance penalty-free, insurers may deny coverage for any 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 smoker's insurance rates.¹⁴⁰ But, if the condition is serious and a prescription is warranted, the medical condition itself may be the cause of rate increases or uninsurability.¹⁴¹

D. *Failure to Disclose*

It is imperative that clients forego the urge to lie to their insurance companies regarding their marijuana use. Failure to disclose marijuana use on a life insurance application is fraud and a small lie may lead to outright rejection by all insurance carriers. If a life insurance company discovers that an insured has misrepresented his or her marijuana use, that person will be reported to the Medical Information Bureau (“MIB”).¹⁴² Moreover, if the insured dies within the contestability period (typically two years) and the company discovers marijuana use, the company may deny payment to the insured's beneficiaries.¹⁴³

Note that health privacy laws protect users who disclose so that a company cannot report marijuana use to the authorities.¹⁴⁴ Underwriters are concerned about how much to charge—not about making police reports.

1. Fraudulent Statements

With marijuana laws changing the legal landscape, lines become blurred in determining whether marijuana is an “illicit” drug. In *West Coast Life Ins. Co. v. Hoar*, the court looked at an insured's fraudulent statements in the context of hazardous hobbies.¹⁴⁵ In this Tenth Circuit case, the court analyzed the facts using Colorado law to see if the deceased policyholder's statements were material misrepresentations.¹⁴⁶ To determine if an applicant made a false statement, a court “must look beyond the applicant's mere knowledge she engaged in the activity which was allegedly required to be disclosed in the open-ended insurance question,” which means the standard a court must

140. See Cecil, *supra* note 124.

141. *Id.*

142. See *id.*

143. *Life Insurance for Marijuana Smokers*, *supra* note 131.

144. See Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936; see U.S. DEP'T OF HEALTH & HUMAN SERVS., SUMMARY OF THE HIPAA PRIVACY RULE, <http://www.hhs.gov/sites/default/files/privacysummary.pdf> (last revised May 2003).

145. See *West Coast Life Ins. Co. v. Hoar*, 558 F.3d 1151, 1154 (10th Cir. 2009).

146. See *id.* at 1157.

use is a reasonable person standard.¹⁴⁷ This standard 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.”¹⁴⁸

In *Hoar*, the insured answered a question about hazardous hobbies in the negative, despite the fact he participated in heli-skiing.¹⁴⁹ The court asked if a reasonable person in the insured’s position would know if heli-skiing would constitute a hazardous activity and held that a reasonable person would have reported their heli-skiing activities to the insurance company.¹⁵⁰ The court further explained that the applicant’s belief that heli-skiing was a non-hazardous activity was contradicted by the applicant’s knowledge of the significant risks, specialized training, waivers he signed, and specialized equipment used in heli-skiing.¹⁵¹ Thus, the court found that the applicant made a false statement as a matter of law.¹⁵²

When determining whether an applicant answered reasonably when 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 particular case. While decisions would vary between states, the federal illegality of marijuana would likely lead courts to hold that a reasonable person would disclose his or her marijuana usage.

2. Material Misrepresentation and Insurer Reliance

The second step to a court’s analysis is a subjective one.¹⁵³ The insurance company must show that knowledge of the misrepresented facts would have caused the insurer to forego issuing the same policy at a similar premium.¹⁵⁴ This means that for a misrepresentation to matter depends heavily on the underwriting procedures of the insurance company.¹⁵⁵ A court would need to ask what effect, if any, the answer to the illegal-drug question would have on the applicant.¹⁵⁶

147. *Id.*

148. *Id.*

149. *Id.* at 1158.

150. *Id.*

151. *Hoar*, 558 F.3d at 1159.

152. *Id.*

153. See ALLAN D. WINDT, *INSURANCE CLAIMS AND DISPUTES: REPRESENTATION OF INSURANCE COMPANIES & INSUREDS* § 2:26 (6th ed. 2015).

154. *Id.*; see *Hoar*, 558 F.3d at 1155 (disclosing the heli-skiing would have tripled the premiums on the life insurance); see also TEX. INS. CODE ANN. § 1201.272 (West 2005) (allowing avoidance only when the insurer is materially affected by a false statement).

155. See *Hoar*, 558 F.3d 1154–55.

156. See generally WINDT, *supra* note 152; see generally *Syncora Guarantee Inc. v. Countrywide Home Loans, Inc.*, 935 N.Y.S.2d 858, 868–69 (N.Y. Sup. Ct. 2012) (discussing causation requirements for insurance companies).

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The materiality is not limited to the disclosure of any specific fact; it covers any information that might have flowed from the disclosure of the fact.¹⁵⁷ This requirement would depend heavily on the facts of the case, but as long as the insurer can establish material reliance then there is a possibility to avoid paying the insurance policy.

If the company entered into an insurance contract with the individual and later learned of the insured's use of marijuana in a state where such use is legal, then the insurance company may have the option to rescind the policy or deny coverage.¹⁵⁸ For example, in Texas an insurance company may avoid liability based on misrepresentation if it can prove the following: "(1) the making of the representation; (2) the falsity of the representation; (3) reliance [] on [the statement] by the insurer; (4) the intent to deceive on the part of the insured . . . ; and (5) the materiality of the representation."¹⁵⁹ This standard is similar in other states.¹⁶⁰

3. Policy Considerations

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 the use of Schedule I substances, courts have opined that paying insurance proceeds to the beneficiaries of individuals who died as a result of using Schedule I drugs would be against public policy.¹⁶¹

The Interstate Insurance Product Regulation Commission has promulgated forms to standardize insurance policy language. The Commission's form is for "Group Term Life Insurance Uniform Standards for Accidental Death Benefits." The relevant section is located in the exclusions, which limit coverage for the following: "(1) death caused or contributed to by committing or attempting to commit a felony; (2) death caused or materially contributed to by voluntary intake or use by any means of: any drug, unless prescribed by a physi-

157. See *Syncora*, 935 N.Y.S.2d at 868–69.

158. See generally *WINDT*, *supra* note 152.

159. *Banner Life Ins. Co. v. Pacheco*, 154 S.W.3d 822, 830 n.7 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

160. *E.g.*, *Hollinger v. Mut. Benefit Life Ins. Co.*, 560 P.2d 824, 827 (Colo. 1977) (“(1) the applicant made a false statement of fact or concealed a fact in his application for insurance; (2) the applicant knowingly made the false statement or knowingly concealed the fact; (3) the false statement of fact or the concealed fact materially affected either the acceptance of the risk or the hazard assumed by the insurer; (4) the insurer was ignorant of the false statement of fact or concealment of fact and is not chargeable with knowledge of the fact; (5) the insurer relied, to its detriment, on the false statement of fact or concealment of fact in issuing the policy.”).

161. 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); see generally *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 I drug use).

cian . . . or over the counter drug . . . ; and (3) death caused or materially contributed to by participation in an illegal occupation or activity.”¹⁶² These exclusions are relevant to show that insurance companies may have a strong interest in discovering whether a potential applicant is prone to behavior that would trigger these exclusion provisions.

Life insurance predicated upon marijuana use will be a fact-dependent issue to determine if the applicant made a material misrepresentation that the insurance company relied upon when issuing the policy. The strong federal stance against marijuana will provide insurance companies with a strong foundation for avoidance; yet, there will still be other considerations to determine the outcome of a particular case.

V. DRAFTING DOCUMENTS IF ESTATE CONTAINS MARIJUANA-BASED ASSETS

How should an attorney handle a client who owns marijuana-based assets—ranging from a full-fledged growing or dispensary business to a small stash—who wants to control where this property goes upon death? The conflicting policies regarding marijuana exemplify the confusion associated with the states’ ability to pursue policies that deviate from those advanced by the federal government. 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.¹⁶³ Given the federal government’s ability to enforce its own prohibition, it cannot be said that states legalizing marijuana create a true right to grow, sell, or use the substance. The extent to which federal authorities will seek to prosecute individuals owning marijuana-based assets remains uncertain. Yet, either in addition to, or in lieu of bringing criminal prosecutions, the Department of Justice (“DOJ”) may choose to rely on the civil forfeiture provisions of the CSA to disrupt the operation of marijuana dispensaries and production facilities. Thus, it becomes pertinent that estate-planning professionals understand the consequences their clients face before preparing estate-planning documents dealing with marijuana-based assets.

A. *Cash For Freedom Deals*

Asset forfeiture is a tool commonly used by state and federal authorities to confiscate cash or property acquired through illegal means and siphons the proceeds directly to the government.¹⁶⁴ For example,

162. *Group Term Life Insurance Uniform Standards for Accidental Benefits*, INTERSTATE INS. PROD. REG. COMM’N (Feb. 19, 2013), http://www.insurancecompact.org/documents/130225_mgmt_cmte_gtl_accidental_death.pdf.

163. 21 U.S.C.A. §§ 841(a), 844(a) (2010).

164. Sarah Stillman, *Taken*, NEW YORKER (Aug. 12, 2013), http://www.newyorker.com/reporting/2013/08/12/130812fa_fact_stillman.

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in Tulsa, Oklahoma, police drive a Cadillac Escalade with the words stenciled, “This used to be a drug dealer’s car, now it’s ours!”¹⁶⁵ In Monroe, North Carolina, the police department proposed using forty thousand dollars in seized drug money to purchase surveillance drones.¹⁶⁶

As states increasingly decriminalize marijuana use, civil asset forfeiture pertaining to marijuana has become increasingly prevalent.¹⁶⁷ The potential of asset forfeiture and criminal prosecutions against marijuana dispensary owners, and their operators, have shut down more than six hundred dispensaries across the state of California.¹⁶⁸ Not only are dispensaries targeted, but individuals risk asset forfeiture as well.¹⁶⁹ In Eugene and Portland, Oregon, Michael Sandsness and his wife Christine owned and operated two gardening stores called “Rain and Shine.”¹⁷⁰ Among the many items they sold were metal halide grow lights that help plants grow indoors.¹⁷¹ Because the lights could be used to assist in growing marijuana, the DEA seized the gardening store and corresponding bank accounts, which in turn crumbled the Sandsness’ business.¹⁷²

The fact that an individual need not be found guilty for his or her assets to be seized may be startling to estate planners. For couples such as the Sandsness, the assets they lost in relation to the alleged crime greatly disadvantaged them in terms of estate planning.¹⁷³ First, their business assets are no longer transferable at death to their desired beneficiaries because they no longer own them. Second, the reduced amount of income earned by the couple after forfeiture is likely to affect the ability to pay for health care costs, life and long-term insurance plans, and support family members now and after death. Thus, it becomes crucial that when clients consult their estate planning attorneys, any information concerning federally illegal activity, such as marijuana-based assets, should be disclosed.

165. *Id.*

166. *Id.*

167. Kris Hermes, *DOJ Abandons Some But Not All Medical Marijuana Forfeiture Cases in California*, AMERICANS FOR SAFE ACCESS (Oct. 16, 2013), http://www.safeaccessnow.org/doj_abandons_some_but_not_all_medical_marijuana_forfeiture_cases_in_california. One of California’s oldest medical marijuana dispensaries, Berkley Patient’s Group, was served with a lawsuit in May 2013 in an attempt to seize the property and shut the facility down. *Id.* The DOJ has pursued lawsuits against several other major dispensaries in an attempt to seize assets. *Id.*

168. *Id.*

169. *See id.*

170. HENRY HYDE, *FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE?* 13 (Cato Institute 1995).

171. *Id.*

172. *Id.*

173. *See* 21 U.S.C.A. § 853 (West 2014).

B. *Asset Forfeiture and Client Considerations*

Unfortunately, for clients presented with such an impasse, estate-planning professionals cannot assist them with certainty and are limited to giving them the best advice possible under the circumstances.¹⁷⁴ An individual facing asset forfeiture has no sure way to protect his or her assets because the federal government's access to bank accounts, trusts, and the like is virtually boundless.¹⁷⁵ Even if assets are moved to offshore accounts, the government has the ability to reach them through a mutual legal assistance treaty ("MLAT").¹⁷⁶ An MLAT is an agreement between two countries for the purpose of gathering and exchanging information in an effort to enforce public and criminal laws.¹⁷⁷ The assistance in an MLAT may take the form of examining and identifying people, places, and things; custodial transfers; or providing the immobilization of illegal activity.¹⁷⁸ Although MLAT agreements vary from country to country, hiding assets to evade the federal government raises ethical questions every estate-planning attorney must consider.¹⁷⁹

Though many people who comply with state laws need not worry about the DEA knocking at their doors, there are precautions anyone owning marijuana-based assets should take to reduce the risk of forfeiture.¹⁸⁰ Mark Rech, former Internal Revenue Service ("IRS") agent and now DEA agent for thirty years, recommends that despite what state law may prescribe: cultivating, growing, or selling marijuana always raises concerns at the DEA and other federal agencies.¹⁸¹ Hence, if a client is a marijuana user, either recreationally or medically (as contrasted with a client who owns a marijuana-based business), it is better for the client to go to dispensaries rather than growing his or her own.¹⁸² The client should not cultivate recreational or medicinal marijuana within the confines of his or her property despite what state law may prescribe.¹⁸³ The client should keep only reasonable user amounts of marijuana at home.¹⁸⁴ A large quantity of marijuana could appear as a "distribution amount," especially if it is in

174. Telephone Interview with Mark Rech, Group Supervisor, Drug Enforcement Administration (Jan. 13, 2014). (notes on file with author).

175. *Id.*

176. See Kenneth Rubinstein & Asher Rubinstein, *On The Trail of Madoff's Money*, RUBINSTEIN & RUBINSTEIN, <http://www.assetlawyer.com/what-we-do/asset-protection/madoff-issues/on-the-trail-of-madoffs-money/> (last visited Feb. 22, 2016).

177. *MLATS and International Cooperation for Law Enforcement Purposes*, INTERNATIONAL CHAMBER OF COMMERCE, <http://cis-india.org/internet-governance/blog/presentation-on-mlats.pdf> (last visited Dec. 16, 2015).

178. *Id.*

179. See *id.*

180. See Telephone Interview with Mark Rech, *supra* note 174.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

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the presence of drug trafficking tools such as plastic bags, scales, and labels.¹⁸⁵ Because rental property owners are also at risk of forfeiture, they should have a clause in their rental contract that disallows marijuana cultivation.¹⁸⁶ Federal forfeiture statutes are austere, and owners could lose their properties if the government proves they had knowledge of the marijuana-based activities on the property.¹⁸⁷

C. *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.¹⁸⁸ 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.¹⁸⁹ 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.”¹⁹⁰

Accordingly, attorneys actually have little direction when confronted with estate planning issues relating to marijuana-related assets. By analogy, cases that concern the bequeathing of items legal in the decedent’s estate and illegal in the hands of the beneficiary may be instructive, such as the inheritance of a gun by a registered felon.

Starting with the assumption that the decedent’s possession of a firearm is legal under state and federal law, the decedent then bequeaths the firearm to a felon who under state and, or federal law may not legally possess the weapon. In *United States v. Davis*, Davis was

185. *Id.*

186. See Telephone Interview with Mark Rech, *supra* note 174.

187. See *id.*

188. Ariz. Comm. on Prof’l Ethics, Formal Op. 11-01 (2011), <http://www.azbar.org/Ethics/RulesofProfessionalConduct/ViewRule?id=4>.

189. Conn. Comm. on Prof’l Ethics, Informal Op. 2013-02 (2013), http://c.ymcdn.com/sites/ctbar.site-ym.com/resource/resmgr/Ethics_Opinions/Informal_Opinion_2013-02.pdf.

190. ILL. SUP. CT. R. PROF’L CONDUCT, R. 1.2(d)(3) (2016).

convicted of possession of a non-registered firearm and possession of a firearm by a felon.¹⁹¹ Davis received the firearm from his father's estate and kept it in his closet where officers subsequently discovered the weapon.¹⁹² On appeal, the Seventh Circuit found that possession of the weapon in his residence and under his control violated the law. His admittance that the gun was an inheritance only bolstered evidence that the weapon was in his possession.¹⁹³

An Ohio court reached a similar conclusion in *Bernad v. City of Lakewood*.¹⁹⁴ As a felon, Bernad could not possess a firearm; yet, police seized his inherited antique firearms.¹⁹⁵ Bernad later expunged the felony conviction and filed a writ of replevin action to retrieve his inheritance.¹⁹⁶ Bernad retrieved his belongings after proving he was no longer under the disability. However, owning firearms as a felon is illegal regardless of their status as inherited goods.¹⁹⁷

The viewpoints of other areas of law concerning marijuana may assist in developing theories of how courts would rule on the given issue. For instance, tax law finds the legality of marijuana irrelevant for ownership and taxation.¹⁹⁸ Illegal drugs possessed at death are considered part of the estate and taxable regardless of "legal" title.¹⁹⁹ In Colorado, "the established conflicts-of-law rule is that the transfer at death of movables, tangible or intangible, is governed by the law of the decedent's last domicile. . . however it must be recognized that the situs state has the power. . . to apply its own apportionment rule."²⁰⁰ If viewed similar to tax, the transfer is governed by the decedent's state, which might mean the marijuana is legal. However, the situs is the state where the beneficiary resides, then, that state's laws will apply once he or she has possession.²⁰¹

Some federal laws may play a factor. For instance, the "innocent owner" provision of the federal forfeiture statute may apply to a beneficiary who "innocently" possesses marijuana after an inheritance without knowledge of its illegality.²⁰² Also, sending marijuana through the mail is prohibited,²⁰³ and state marijuana laws limit possession to

191. United States v. Davis, 15 F.3d 1393, 1397 (7th Cir. 1994).

192. *Id.* at 1398.

193. *Id.*

194. See *Bernad v. City of Lakewood*, 747 N.E.2d 838 (Ohio Ct. App. 2000) (This case is instructive in that it illustrates how an asset may be legal in the hands of a testator, but become illegal once it is bequeathed.).

195. *Id.* at 839.

196. *Id.*

197. See *id.*

198. MYRON KOVE & JAMES M. KOSAKOW, 1 HANDLING FED. EST. & GIFT TAXES § 2:116 (6th ed. 2013).

199. *Id.*

200. DAVID K. JOHNS ET AL., COLO. EST. PLANNING HANDBOOKS § 39.5.2 (2014).

201. *Id.*

202. See 21 U.S.C.A. § 881(a)(6) (West 2002).

203. United States v. Hayes, 603 Fed. Appx. 74 (3rd Cir. 2014).

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one ounce,²⁰⁴ posing the question of how a beneficiary would transfer a substantially large inheritance out of state.

Finally, a recent case to watch is *Nebraska and Oklahoma v. Colorado*, filed in December 2014.²⁰⁵ The complaint states,

[i]n passing and enforcing Amendment 64, the State of Colorado has created a dangerous gap in the federal drug control system enacted by the United States Congress. Marijuana flows from this gap into neighboring states, undermining Plaintiff States' own marijuana bans, draining their treasuries, and placing stress on their criminal justice systems.²⁰⁶

This complaint represents the viewpoint of the state in which the beneficiary lives. It is likely the state would do everything in its power to maintain the illegality of marijuana, despite it being inherited goods.

D. *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. A cautious fiduciary may decline to serve because there is no clear answer as to fiduciary liability.

An analogous bankruptcy case is instructive. In *In re Arenas*, a Colorado marijuana farmer and his wife filed for bankruptcy.²⁰⁷ They petitioned to convert the case from one under Chapter 7 to Chapter 13.²⁰⁸ The court denied the motion explaining:

In this case, the debtors are unfortunately caught between pursuing a business that the people of Colorado have declared to be legal and beneficial, but which the laws of the United States—laws that every United States Judge swears to uphold—proscribe and subject to criminal sanction. Because of that, neither a Chapter 7 nor 13 trustee can administer the most valuable assets in this estate. Without those assets or the marijuana based income stream, the debtors cannot fund a plan without breaking the law, and are therefore ineligible for relief under Chapter 13 Administering the debtors' Chapter 7 estate would require the Trustee to either violate federal law by possessing and selling the marijuana assets or abandon them. If he did the former, the Trustee would be at risk of prosecution; if

204. COLO. CONST. art. XVIII, § 16(3)(a) (2012).

205. Petition for Writ of Certiorari, *Nebraska and Oklahoma v. Colorado*, 2014 WL 7474136 (2014).

206. *Id.* at *3–4.

207. 535 B.R. 845 (2015).

208. *Id.* at 847.

he did the latter, the creditors would receive nothing while the debtors would retain all of their assets and receive a discharge as well.²⁰⁹

Likewise, an analogous banking situation is pending at the time this Article is being written. The Fourth Corner Credit Union was formed in Colorado to provide banking services to the marijuana businesses that are legal under Colorado law.²¹⁰ However, the Federal Reserve Bank of Kansas City has refused to issue a master account and United States District Court Judge R. Brooke Jackson heard an appeal of the Reserve's decision.²¹¹ After a hearing in late December 2015, Judge Jackson has not yet issued a formal ruling, but he is reported as saying, "I would be forcing the reserve bank to give a master license to a credit union that serves illegal businesses."²¹² In some states, marijuana banking is done by institutions that are not federally chartered to avoid the conflict.²¹³

VI. ESTATE TAX ISSUES

Although an item may be illegal to own, a "market" may nevertheless exist in which to measure the value of that property.²¹⁴ For example, in *Estate of Sonnabend*, estate appraisers valued an iconic Rauschenberg with an attached rare stuffed bald eagle at zero.²¹⁵ The IRS and the Art Advisory Council took a different view of the painting, valuing the piece at \$65 million, thereby demanding a \$29.2 million estate tax payment.²¹⁶ Although no legal market for this art work existed, there may be an "extralegal avenue," taking into consideration the true intrinsic value of the art compared to its stunning quality.

While Rauschenbergs are a rarity, estate tax issues surround items that seemingly have no legal market, including marijuana-based assets. Despite marijuana's illegality on the federal level, the IRS may seek to establish ownership and value for purposes of taxation. Thus, the IRS might require the asset to be valued even though that asset is illegal.

209. *Id.* at 854; see also Vivian Cheng, Comment, *Medical Marijuana Dispensaries in Chapter 11 Bankruptcy*, 30 EMORY BANKR. DEV. J. 105 (2013).

210. Bruce Barcott, *Shh! Here's How Cannabis Companies are Banking Legally on the Down Low*, LEAFLY (Dec. 30, 2015), <https://www.leafly.com/news/headlines/shh-heres-how-cannabis-companies-are-banking-legally-on-the-down>.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Publicker v. Comm'r*, 206 F.2d 250 (3rd Cir. 1953); see also *Jarre v. Comm'r*, 64 T.C. 183 (1975) (stating that "the fact that there may be a limited market does not prevent the property from having substantial value").

215. Patricia Cohen, *Art's Sale Value? Zero. The Tax Bill? \$29 Million.*, N.Y. TIMES (July 22, 2012), http://www.nytimes.com/2012/07/22/arts/design/a-catch-22-of-art-and-taxes-starring-a-stuffed-eagle.html?_r=0.

216. *Id.*

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For income tax purposes, courts consistently hold that gains acquired by a taxpayer from illicit drugs are includible in the taxpayer's gross income.²¹⁷ The basis for the illegally obtained gain in gross income derives from *James v. United States*.²¹⁸ In this case, the Court considered whether cash that the taxpayer obtained through embezzlement could be taxed as income. "[T]he obvious intent of . . . Congress [was] to tax income derived from both legal and illegal sources, to remove the incongruity of having the gains of the honest laborer taxed and the gains of the dishonest immune."²¹⁹

States that have legalized recreational marijuana may impose a substantial excise tax on marijuana sales. In Colorado, the tax is levied on the sales of marijuana by cultivation facilities, product manufacturing facilities, and retail stores.²²⁰ Similarly, Washington imposes a 25% tax on each transaction within the distribution chain.²²¹ Although little precedent exists relating to state imposed taxes on marijuana, case law suggests these taxes are permissible.

The Supreme Court has held that a state may "legitimately tax criminal activities."²²² In *Department of Revenue of Montana v. Ranch*, the Court specifically suggested (albeit in dicta), that it was within Montana's authority to tax the possession of marijuana.²²³ The Court made clear that "the unlawfulness of an activity does not prevent its taxation."²²⁴

In addition, many states already tax marijuana and other controlled substances.²²⁵ For example, in 2005, Tennessee passed the "crack tax," which was applied to illegal substances including cocaine, marijuana, and moonshine.²²⁶ Under this law, drug dealers were required to pay anonymously at the state revenue office, where they received a stamp

217. *Wood v. United States*, 863 F.2d 417 (5th Cir. 1989); *Gambina v. Comm'r*, 91 T.C. 826 (1988); *Vasta v. Comm'r*, 58 T.C.M. (CCH) 263 (1989).

218. 366 U.S. 213 (1961).

219. *Id.* at 218.

220. COLO. CONST. art. XVIII, § 5(d).

221. Wash. Initiative 502 § 27(1).

222. *Dep't of Revenue of Mont. v. Ranch*, 511 U.S. 767, 775 n.13 (1994) (citing *Marchetti v. United States*, 390 U.S. 39, 44 (1968)).

223. *Id.* at 778 (noting that, "Montana no doubt could collect its tax on the possession of marijuana . . . if it had not previously punished the taxpayer for the same offense.").

224. *Id.*

225. Anne Barnard, *In Taxing Illegal Drugs, the Trouble Comes in Collecting*, N.Y. TIMES (Jan. 24, 2008), http://www.nytimes.com/2008/01/24/nyregion/24drugs.html?_r=0.

226. Brian Haas, *2,772 people could be eligible for 'crack tax' refunds in TN Class-action lawsuit could benefit those who paid drug levy*, THE TENNESSEAN (Sept. 28, 2010), http://www.hollinslegal.com/wp-content/uploads/2012/03/class-action_lawsuit_could_benefit_those_who_paid_drug_levy_sept_28_2010.pdf; see *Tax Stamps*, NORML, <http://norml.org/legal/tax-stamps> (State Tax Stamp Data) (last visited January 20, 2016); see generally Robert A. Mikos, *State Taxation of Marijuana Distribution and Other Federal Crimes*, 2010 U. CHI. LEGAL F. 223 (2010) (supporting taxing illicit drugs).

to prove their payment. If a drug dealer was arrested without having a stamp, the state would seek the taxes owed. Though this law was later found unconstitutional, other states require the possessors of illicit drugs to purchase “tax stamps.”²²⁷

It would appear that by imposing a tax on marijuana, these states have authorized conduct prohibited under federal law and imposed an obstacle to the achievement of federal objectives. Taxes are generally imposed to raise revenue, deter conduct, or both. For example, taxes on cigarettes exist to both raise revenue and deter smoking. The excise taxes states impose on recreational marijuana are motivated by a desire to raise revenue to pay for the regulatory and licensing controls on marijuana and to contribute to other budgetary needs. Furthermore, Washington law states that the Liquor Control Board is authorized to make recommendations to adjust the tax levels “that would further the goal of discouraging use while undercutting illegal market prices.”²²⁸ Though the Colorado law does not explicitly reference any goal of deterring marijuana use, the tax may also have that effect. Hence, the state tax is more accurately characterized as an “interposing and economic impediment to the activity” as opposed to authorizing the activity.²²⁹

Because marijuana-based assets must be included in the gross estate, a value must also be assigned to them. The Internal Revenue Code section 2031(a) provides that the value of the gross estate is determined by including the value at the time of death of all property wherever situated.²³⁰ Section 2031(b) provides that the value of every item of property includible in the decedent’s gross estate is the fair market value at the time of the decedent’s death.²³¹

In determining the value of illicit drugs held by a taxpayer, the IRS is entitled to use any reasonable means to establish the grade of the drugs held by the decedent at his death and the market in which the drugs would have been sold.²³² In *Caffery v. Commissioner*, 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.²³³ Similarly, in *Jones v. Commissioner*, the IRS reconstructed the taxpayer’s income based on the “street market”

227. Barnard, *supra* note 225.

228. Wash. Initiative 502 § 27(5).

229. Garvey & Yeh, *supra* note 28, at 20.

230. I.R.C. § 2031(a) (2014).

231. *Id.*

232. *Jones v. Comm’r*, 61 T.C.M. (CCH) 1721 (1991); *Graff v. Comm’r*, 52 T.C.M. (CCH) 1025 (1986) (court stated that when determining the value of narcotics sold by the taxpayer, in order to reconstruct the income that the taxpayer failed to report, the Commissioner is under no obligation to assume the lowest price supported by the evidence).

233. *Caffery v. Comm’r*, 60 T.C.M. (CCH) 807 (1990).

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and the “retail street value” of “uncut” cocaine upon discovering that the taxpayer sold forty-two kilos of cocaine to drug dealers.²³⁴

Section 2053(a) of the Internal Revenue Code provides, in part, that for purposes of estate tax, the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts for administration expenses and claims against the estate as are allowable by the laws of the jurisdiction under which the estate is administered.²³⁵ The courts, holding that the allowance of an income tax deduction for the confiscation of drugs and the proceeds of drug dealing would frustrate a sharply defined public policy against drug trafficking, have consistently denied any income tax deduction for the loss.²³⁶ In *Wood v. United States*, the court held the drug smuggling proceeds that the taxpayer had forfeited constituted taxable income, thereby denying an income tax deduction for the forfeiture.²³⁷ The court stated that allowing a deduction would violate our nation’s public policy against drug trafficking.²³⁸ Thus, the value of marijuana-based assets is unlikely to be impacted by the possibility that those assets may later be confiscated.

VII. 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 even consider marijuana laws in selecting the state in which to retire.²³⁹ Prudent attorneys, especially those living in states where marijuana is legal, must start inquiring about the client’s marijuana use and marijuana-based assets.²⁴⁰ If the client is a user, be it as a patient or a stoner, 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 pay the fiduciary 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

234. *Jones*, 61 T.C.M. (CCH) 1721.

235. I.R.C. § 2053(a) (2015).

236. *Smith v. Comm’r*, 1991 U.S. App. LEXIS 18741 (4th Cir. Aug. 15, 1991).

237. *Wood v. United States*, 863 F.2d 417 (5th Cir. 1989).

238. *Id.* at 421.

239. Chris Taylor, *Seniors Are Seeking Out States Where Marijuana is Legal*, MONEY (July 22, 2015), <http://time.com/money/3967757/seniors-retire-marijuana-legal-states/> (“Many of the health afflictions of older Americans push them to seek out dispensaries for relief.”).

240. 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, 6:30 AM), http://www.abajournal.com/magazine/article/law_school_offers_a_marijuana_law_class (reporting that a course entitled *Representing the Marijuana Client* is being offered at the University of Denver Sturm College of Law).

careful inquiry and planning, may the client's intent be carried out to the maximum amount allowed under current law.

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APPENDIX²⁴¹

State	Passed	Use (Medical and/or Recreational)	How Passed	Possession Limit
Alaska	1998	Medical	Ballot Measure 8 by 58% of voters	1 oz usable; 6 plants (3 mature)
	2014	Recreational	Measure 2	Removes penalties for adults who possess, use and grow a limited amount of marijuana
Arizona	2010	Medical	Ballot Proposition 203 by 50.13% of voters	2.5 oz in 14 day period; 12 plants if <25 mi from dispensary
California	1996	Medical	Ballot Proposition 215 by 56% of voters	8 oz; 6 mature plants or 12 immature plants. Larger amounts permitted by Rx
Colorado	2001	Medical	Ballot Amendment 20 by 54% of voters	2 oz usable; 6 plants (3 mature)
	2012	Recreational	Amendment 64 by 55% of voters	6 plants (3 mature), 1 oz while traveling
Connecticut	2012	Medical	House Bill 5389	Amount usable reasonably necessary to ensure uninterrupted availability for a period of one month
D.C.	2010	Medical	Amendment Act B18- 622	2 oz per month
	2014	Recreational	Ballot Initiative 71 by 70% of voters	2 oz; 3 plants
Delaware	2011	Medical	Senate Bill 17	6 oz; no home cultivation
Hawaii	2000	Medical	Senate Bill 862	Adequate supply, not to exceed 7 plants or 4 oz
Illinois	2013	Medical	House Bill 1	2.5 oz during 14 day period
Maine	1999	Medical	Ballot Question 2 by 66% of voters	2.5 oz usable; 6 plants (3 mature)
Maryland	2014	Medical	House Bill 881	30 day supply

241. 24 *Legal Medical Marijuana States and DC*, *supra* note 4.

State	Passed	Use (Medical and/or Recreational)	How Passed	Possession Limit
Massachusetts	2012	Medical	Ballot Question 3 by 63% of voters	No more than necessary for personal, medical use, not exceeding 60 day supply
Michigan	2008	Medical	Proposal 1 by 63% of voters	2.5 oz usable; 12 plants if patient has caregiver to cultivate
Minnesota	2014	Medical	SF 2470	30 day supply
Montana	2004	Medical	Initiative 148 by 62% of voters	1 oz usable; 4 plants
Nevada	2000	Medical	Ballot Question 9 by 65% of voters	1 oz usable; 3 mature plants, 4 immature plants
New Hampshire	2013	Medical	House Bill 573	2 oz during 10 day period
New Jersey	2010	Medical	Senate Bill 119	2 oz for 30 day period
New Mexico	2007	Medical	Senate Bill 523	6 oz usable; 4 mature plants, 12 seedlings
New York	2014	Medical	Assembly Bill 6357	30 day supply determined by health commissioner or physician
Oregon	1998	Medical	Ballot Measure 67 by 55% of voters	24 oz usable; 6 mature plants, 18 seedlings
	2014	Recreational	Measure 91 by 56% of voters	Legalizes private use, possession and cultivation of small amounts of marijuana
Pennsylvania	2016	Medical	Senate Bill 3 (149-46H; 42-75)	30-day supply
Rhode Island	2007	Medical	Senate Bill 0710	2.5 oz; 12 plants
Vermont	2004	Medical	Senate Bill 76	2 oz usable; 2 mature plants, 7 immature plants
Washington	1998	Medical	Ballot Initiative 692 by 59% of voters	24 oz usable; 15 plants
	2012	Recreational	Initiative 502 by 56% of voters	Legalizes small amounts of marijuana related products