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Protecting Children from Secondhand Smoke When Parents Divorce or Separate

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A. What Should Parents Do?

When parents disagree about how to protect a child exposed to secondhand smoke, the concerned parent should seek to negotiate an agreement that limits exposure. The concerned parent could ask the family doctor to discuss the dangers of secondhand smoke with the smoking parent. If the disagreement is based in part on one parent's lack of understanding of the dangers of secondhand smoke, useful resources are available from:

- Americans for Nonsmokers' Rights at www.no-smoke.org;
- BREATH, the California Smoke-free Bars, Workplaces and Communities Program, 800-622-2829 in California, 916-739-8925 outside California and www.breath-ala.org;
- Center for Disease Control at www.cdc.gov/tobacco/data_statistics/sgr/index.htm.

If a cooperative agreement is difficult to obtain, a parent concerned about a child's exposure to secondhand smoke should document both the exposure and the attempts to devise a solution. The concerned parent should ensure that any connection between the child's health problems and smoking is documented, preferably by the family doctor or medical professional.¹ Should the parents find themselves in a custody dispute, a concerned parent that consistently raises the issue of smoking from the very beginning of the dispute likely stands the best chance of protecting his or her children from passive smoking.

B. Judicial Considerations of Secondhand Smoke in Custody Disputes

Courts involved in custody disputes in California must decide in the "best interests of the child" when making custody determinations.² This is a broad standard, giving the courts a great deal of discretion in considering the factors to use in making a custody determination. Courts have considered, among other things, the health, safety and welfare of the child; any history of abuse by the person seeking custody; and the use of drugs or alcohol by the person seeking custody.³

Nothing *requires* a court to consider the risk of secondhand smoke when making custody determinations.⁴ Indeed, there are no published cases addressing the issue in California.⁵ Nearly all the court cases where secondhand smoke was considered as a factor in a custody determination are decisions of trial courts outside California, so they do not necessarily apply in California. Nevertheless, they give some sense of how courts might take the dangers of secondhand smoke into account in disputes over initial child custody awards, visitation rights, and modification of child custody decrees.

Based on the existing state of the law, courts are more likely to consider exposure to secondhand smoke as a factor in a child custody dispute if 1) the child has a health condition exacerbated by

exposure, 2) the child (even if otherwise healthy) may be harmed by secondhand smoke, or 3) there is no other factor that is considered by the court to be more important.

1. Health Condition Exacerbated by Exposure

So far, nearly all the cases in which a court has based its decision on the risks of secondhand smoke involve children with special health problems, like asthma. For example, custody of an asthmatic child was granted to the nonsmoker father because previous smoking by the mother in front of the child, despite the recommendation of the child's doctor, showed "lack of proper concern for the welfare of the child."⁶

Courts have been reluctant to base custody decisions on secondhand smoke for otherwise healthy children; in fact, before acting on this issue, courts are likely to require that the child have health problems exacerbated by secondhand smoke. For example, a father who did not smoke gained custody of only a younger child with extreme allergies to smoke, while the mother who smoked retained custody of a healthy older child.⁷

2. Child May Be Harmed by Secondhand Smoke

In some cases, a child could be harmed by exposure to secondhand smoke even if she does not have a special health problem. In these cases, courts have not required that a parent show that the smoking of the other parent *caused* the child's illness or hardship, but only that the other parent's smoking merely *harmed* the child, or, in some cases, *could* harm the child.⁸ Testimony or recommendations made by the child's pediatrician as to harm actually caused by secondhand smoke can be persuasive.⁹ However, unsupported claims of causation or harm may be rejected by a court.¹⁰

Even with an otherwise healthy child, the court may consider exposure to secondhand smoke as a factor in determining parental custody.¹¹ In one such case, the court awarded custody to the non-smoking parent, despite evidence that the child was not presently allergic to smoke, because "the health risks of smoking and secondhand smoke were common knowledge and medical records showing that a child was not yet suffering ill effects due to smoke was not proof that the child would not suffer ill effects due to smoke."¹² As an alternative to limiting custody or visitation, courts may take the lesser step of issuing an order prohibiting smoking in certain circumstances to protect otherwise healthy children. In one case, a judicial order prohibited a parent from smoking in the presence of a child, even though the child was healthy, after taking judicial notice of the existing medical literature on secondhand smoke's significant health risks to children.¹³

3. No More Important Factor

Even when secondhand smoke exposure is a concern, other factors considered by the court in deciding the best interest of the child may outweigh the dangers of secondhand smoke. Courts have acknowledged the importance of smoking in designing custody agreements, but in some instances have awarded custody to smoking parents instead of to parents who are former drug users or perpetrators of domestic violence.¹⁴

C. Modification of the Initial Custody Determination

It may be difficult to modify an existing custody order based on a parent's smoking because most jurisdictions, including California, allow a change in permanent custody decisions only under the "changed circumstance rule."¹⁵ Under this rule, the applicant must show 1) the change is in the child's best interest, and 2) there has been a "material" or "significant" change in circumstances since, or unknown at the time of, the initial decree.¹⁶ Under this standard, a concerned parent could seek a modification by showing a change in smoking status, for example, if the other parent began smoking after the original custody decree.¹⁷ In addition, a concerned parent citing the child's health as a reason for custody modification would have to demonstrate that the child's health problem developed or worsened after the initial determination, which can be difficult to do.¹⁸

Courts that are reluctant to base an outright denial of visitation rights on a parent's smoking may prefer to allow continued parental contact so long as certain conditions are met, such as quitting smoking or refraining from smoking in the home or around the children.¹⁹ For example, a court ordered a smoking father to refrain from smoking in the presence of his children and in his home for at least forty-eight hours prior to the children's visits.²⁰

D. Additional Resources

A parent involved in a custody dispute who is concerned about a child's exposure to secondhand smoke should discuss this issue with his or her attorney and may share this fact sheet with the attorney. For assistance in finding an attorney who specializes in child custody and family law, please consult the local chapter of the State Bar of California Certified Lawyer Referral Services, which can be found in the phone book under your county's bar association. These local referral agencies will, for a nominal fee, arrange a half-hour consultation with an attorney if one is available and willing to meet with you. After the consultation, it is up to you and the attorney to decide whether to bring a case.

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- ¹ *Lizzio v. Lizzio*, 618 N.Y.S.2d 934, 936 (N.Y. Fam. Ct. 1994) (testimony of child’s physician established causation); *In the Matter of the Marriage of Aubuchon*, 913 P.2d 221, 223 (1996) (three doctors testified that secondhand smoke aggravated health problems of the children).
- ² Under California Family Code section 3040, the court may exercise broad discretion in choosing a custody plan tailored to “the best interest of the child.”
- ³ Cal. Fam. Code § 3011 (West 2010).
- ⁴ In contrast, Ohio law requires the court to consider limiting the child’s exposure to secondhand smoke as part of determining the “best interest of the child.” See *In re Julie Ann*, 780 N.E.2d 635 (2002).
- ⁵ According to news reports of an unpublished California case, a Sacramento judge revoked custody from a smoking mother who had defied a court order prohibiting her from smoking around a child who suffered an asthma attack. Tamar Lewin, *Smokers Find Mark Against Them in Fight for Custody of Their Childrens*, N.Y. Times, Oct. 16, 1993. Available at: www.nytimes.com/1993/10/16/us/smokers-find-mark-against-them-in-fight-for-custody-of-their-children.html?pagewanted=1
- ⁶ *Mitchell v. Mitchell*, No. 01-A-9012-CV-00442 1991 WL 63674 (Tenn. Ct. App. April 26, 1991). See also *Adams v. Franklin*, 779 N.Y.S.2d 295 (2004) (finding a mother unfit for custody for various factors including smoking in front of an asthmatic child).
- ⁷ *Pizzitola v. Pizzitola*, 748 S.W.2d 568 (Tex. App. 1st Dist. 1988).
- ⁸ *In the Matter of the Marriage of Aubuchon*, 22 Kan. App. 2d 181 (1996) (trial court’s finding that mother’s smoking harmed the children, but did not necessarily cause illness, was sufficient to justify change in custody).
- ⁹ *Lizzio v. Lizzio*, 618 N.Y.S.2d 934, 936 (N.Y. Fam. Ct. 1994) (pediatrician was on record that exposure to tobacco smoke posed imminent risk to child’s health). See also *Polley v. Allen*, 132 S.W.3d 223 (Tex.Ct. App. 2002) (court awarded mother custody of child after father failed to follow pediatrician’s advice regarding limiting exposure to smoke and animal hair).
- ¹⁰ *In the Matter of the Marriage of Hueberger*, 963 P.2d 153 (Or. Ct. App. 1998) (court declined to change custody agreement because no evidence of a causal link between a mother’s smoking and a child’s health problems).
- ¹¹ *Johnita M.D. v. David D.D.*, 740 N.Y.S.2d 811 (2002).
- ¹² *Pierce v. Pierce*, 860 N.E.2d 1087, 1091 (2006).
- ¹³ *Johnita M.D. v. David D.D.*, 740 N.Y.S.2d 811, 818 (2002) (“Even though [the boy] does not presently have asthma, exposure to Environmental Tobacco Smoke apparently significantly increases his risks of developing, either as a child or as an adult, asthma, coronary artery disease, lung cancer, and certain chronic respiratory disorder[s]”).
- ¹⁴ *Satalino v. Satalino*, No. 11440-86 (N.Y. Sup. Ct.); *Heck v. Reed*, 529 N.W. 2d 155 (N.D. 1995).
- ¹⁵ *Montenegro v. Diaz*, 26 Cal. 4th 249, 256 (2001).
- ¹⁶ *In re Marriage of Burgess*, 13 Cal. 4th 25, 39 (1996).
- ¹⁷ *Lizzio v. Lizzio*, 618 N.Y.S.2d 934, 937 (N.Y. Fam. Ct. 1994) (changed circumstance existed when a mother and new husband continually smoked near the children and the father and new wife quit smoking after the original custody agreement was made).
- ¹⁸ *Helm v. Helm*, 1993 WL 21983 (Tenn Ct. App. Feb. 3, 1993). (no change in custody because no change in harm to otherwise healthy son); *In re Marriage of Diddens*, 255 Ill. App. 3d 850 (1993) (mother’s limited smoking in the home of asthmatic children did not constitute changed circumstances despite pediatrician’s recommendation that child be placed with nonsmoker father); *Cooley v. Cooley*, 643 So. 2d 408 (La. Ct.

App., 1994) (mother's smoking did not constitute changed circumstances where there was no evidence that mother did not smoke around asthmatic child at time of original agreement).

¹⁹ *Badeaux v. Badeaux*, 541 So. 2d 301 (La. Ct. App. 1989) (nonsmoking mother of an asthmatic child won a reduction of the smoker father's visitation rights based in part on the father's smoking habits).

²⁰ *Strathman v. Foster*, No. 4663-A-1990 (C.P. Erie County, Pa. 1991). See also *Unger v. Unger*, 644 A.2d 691, 694 (N.J. Super. Ct. Ch. Div. 1994) (both parents must prevent smoking in the presence of their children at any location and any enclosed areas such as the home or car).