

Hot Tip:

Because I Got High: The Collision of Medical Marijuana and Parenting

John M. Dohner, JD (Akron, OH)



I was gonna go to court before I got high
I was gonna pay my child support, but then I got high
They took my whole paycheck and I know why
'Cause I got high, because I got high
Because I got high

Because I Got High (2000) Joseph Afroman Foreman

10 Songs to Listen to While Reading R.C. Chapter 3796

1. *The Reefer Man* (1932) Cab Calloway
<https://www.youtube.com/watch?v=UCUDxgYMdxI>
2. *Don't Bogart That Joint* (1969) Fraternity of Man
<https://www.youtube.com/watch?v=J-ifjIAoleI>
3. *Shanty* (1971) Jonathan Edwards
<https://www.youtube.com/watch?v=PoXmtD9U3W4>
4. *One Toke Over the Line* (1971) Brewer & Shipley
https://www.youtube.com/watch?v=L9HXClusp_E
5. *Smoke, Smoke, Smoke (that Cigarette)* (1977) The Commander Cody Band
<https://www.youtube.com/watch?v=F-h0MDpnKIE>
6. *Illegal Smile* (1978) John Prine
<https://www.youtube.com/watch?v=MmjnQjRvPUQ>
7. *One Draw* (1981) Rita Marley
<https://www.youtube.com/watch?v=TOT322nAt2A>
8. *You Don't Know How It Feels* (1994) Tom Petty
<https://www.youtube.com/watch?v=9TIBTPITo1I>
9. *Because I Got High* (2000) *Afroman*
<https://www.youtube.com/watch?v=WeYsTmlzjkw>
10. *Roll Me Up & Smoke Me When I Die* (2012) Willie Nelson, Snoop Dogg
& Kris Kristofferson
<https://www.youtube.com/watch?v=raND-7ODiNo>

The 1936 movie *Reefer Madness* begins with this word scroll:

“The motion picture you are about to see may startle you. It would not be possible, otherwise, to sufficiently emphasize the frightful toll of the new drug menace which is destroying the youth of America in alarmingly increasing numbers. **Marihuana** is that drug – a violent narcotic – an unspeakable scourge – **The Real Public Enemy Number One!** It’s 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 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.”
(emphasis is in the movie scroll)

- In 1992 Bill Clinton admitted smoking pot “a time or two” while at Oxford, but was quick to add: “I didn’t inhale,” and “I didn’t like it.”
- In 2008, Barack Obama said, “When I was a kid, I inhaled, frequently. That was the point.”
- In 1973 Ohio passed HB 300 which decriminalized marijuana.
- In 2011, 2012, 2013, and 2015, amendments to the Ohio Constitution were proposed ranging from permitting medical cannabis to legalizing marijuana. None of them passed.

Medical Marijuana Passes in Ohio

In 2016 Sub. HB 523 passed, and from that came R.C. Chapter 3796, the Medical Marijuana Control Program. This permits the use of certain delivery methods of marijuana for medical reasons.

R.C. 3796.06 and OAC Rule 8-2-01(A) provide “approved medical marijuana products include the following forms and routes of administration:

- (1) Oil, tincture, capsule, or edible form for oral administration;
- (2) Metered oil or solid preparation for vaporization;
- (3) Patches for transdermal administration or lotions, creams, or ointments for topical administration; and
- (4) Plant material for administration with the use of vaporizing devices.

In order to legally access marijuana in Ohio you must possess a valid medical marijuana card, and purchase your products at a licensed marijuana dispensary.

Qualifying conditions.

§ 3796.22 Registration.

(A)(1) A patient seeking to use medical marijuana or a caregiver seeking to assist a patient in the use or administration of medical marijuana shall apply to the state board of pharmacy for registration. The physician who holds a certificate to recommend issued by the state medical board and is treating the patient or the physician's delegate shall submit the application on the patient's or caregiver's behalf in the manner established in rules adopted under section 3796.04 of the Revised Code.

(2) The application shall include all of the following:

(a) A statement from the physician certifying all of the following:

(i) That a bona fide physician-patient relationship exists between the physician and patient;

(ii) That the patient has been diagnosed with a qualifying medical condition;

(iii) That the physician or physician delegate has requested from the drug database a report of information related to the patient that covers at least the twelve months immediately preceding the date of the report;

(iv) That the physician has informed the patient of the risks and benefits of medical marijuana as it pertains to the patient's qualifying medical condition and medical history.

§ 3796.01(A)(6) defines those **qualifying conditions:**

(6) "Qualifying medical condition" means any of the following:

- (a) Acquired immune deficiency syndrome;
- (b) Alzheimer's disease;
- (c) Amyotrophic lateral sclerosis;
- (d) Cancer;
- (e) Chronic traumatic encephalopathy;
- (f) Crohn's disease;
- (g) Epilepsy or another seizure disorder;
- (h) Fibromyalgia;
- (i) Glaucoma;
- (j) Hepatitis C;
- (k) Inflammatory bowel disease;
- (l) Multiple sclerosis;
- (m) Pain that is either of the following:
 - (i) Chronic and severe;
 - (ii) Intractable.

- (n) Parkinson’s disease;
- (o) Positive status for HIV;
- (p) Post-traumatic stress disorder;
- (q) Sickle cell anemia;
- (r) Spinal cord disease or injury;
- (s) Tourette’s syndrome;
- (t) Traumatic brain injury;
- (u) Ulcerative colitis;
- (v) Any other disease or condition added by the state medical board under section 4731.302 of the Revised Code.

The Ohio Medical Board is charged with adding underlying medical conditions which allow you to obtain a medical marijuana card. They have not exactly done so.

The Penumbra of Conditions.

With deference to Justice William O. Douglas’ majority opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965)¹, the Medical Marijuana law in Ohio, too, appears to have penumbras. That is, medical conditions not specifically enumerated in the law but which, nonetheless, qualify a person for a medical marijuana card.

The Ohio Medical Board, which is charged with reviewing the qualifying medical conditions, made these comments on the following conditions. Even though these do not appear in the statute, they are reasons for granting the Medical Marijuana Card. The Medical Board technically did not add these as new conditions, but determined that each is “pain that is either chronic or intractable” R.C. 3796.01(A)(6)(m):

- Arthritis (Feb. 2021)
- Chronic Migraines (Feb. 2021)
- Complex Regional Pain Syndrome (Feb. 2021)
- Degenerative Disc Disease (Feb. 2022)
- Lupus, where pain is present (Feb. 2022).

¹ “The Connecticut statute forbidding use of contraceptives violates the right of marital privacy which is within the penumbra of specific guarantees of the Bill of Rights. Pp. 381 U.S. 481-486.” Id. Syllabus 2. “The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.” Id. p. 484.

37 Minutes: \$230

Obtaining a medical marijuana card is simple, provided you have one of the enumerated medical conditions or one of the penumbra of other conditions not specifically enumerated in the statute, but which still may qualify you for obtaining a medical marijuana card.

1. Go online to any one of the websites that guide you through the process. Fill out your information, set up a virtual appointment time with a doctor (you will not know the doctor assigned until the actual appointment), and pay the company a fee of \$230 (less a \$50 discount!). (This takes about 12-13 minutes).
2. Submit those portions of your medical records which prove you have a qualifying medical condition. For example, if your health care providers use Epoch software, then you can upload the select records from your My Chart account. (About 5 minutes).
3. Attend your video or phone medical appointment; discuss your condition with the doctor and learn some things about medical marijuana. (about 13-15 minutes).
4. Watch your email for a link to the State of Ohio Medical Marijuana website. Set up your log-in credentials, log-in, pay a \$50 fee, and print out your medical marijuana card. (5 minutes).

What a Medical Marijuana Card Permits

§ 3796.22 Permissible activities for registered patients.

(A) Notwithstanding any conflicting provision of the Revised Code, a patient registered under this chapter who obtains medical marijuana from a retail dispensary licensed under this chapter may do both of the following:

- (1) Use medical marijuana;
- (2) Possess medical marijuana, subject to division (B) of this section;
- (3) Possess any paraphernalia or accessories specified in rules adopted under section 3796.04 of the Revised Code.

(B) The amount of medical marijuana possessed by a registered patient shall not exceed a ninety-day supply, as specified in rules adopted under section 3796.04 of the Revised Code.

(C) A registered patient shall not be subject to arrest or criminal prosecution for doing any of the following in accordance with this chapter:

- (1) Obtaining, using, or possessing medical marijuana;
- (2) Possessing any paraphernalia or accessories specified in rules adopted under section 3796.04 of the Revised Code.

(D) This section does not authorize a registered patient to operate a vehicle, streetcar, trackless trolley, watercraft, or aircraft while under the influence of medical marijuana.

Where You Can Go.

There are presently 58 approved marijuana dispensaries in Ohio. The Pharmacy Board is working on approving 73 more dispensaries to better meet their goal of having dispensaries easily accessible to all card holders.

For the most part the existing dispensaries are in urban settings and/or close to the interstate highway system.

Comparison - Current vs. Proposed



By the Numbers²

According to the State of Ohio, between January 2019, when the first four marijuana dispensaries opened in Ohio, and August 22, 2022, medical marijuana sales totaled \$963.6 million dollars. There were 7,287,128 purchase transactions during that time, which averages to \$132.23 per transaction.

There are presently 293,579 registered medical marijuana patients in Ohio, and 271,561 of them have used their medical marijuana card to purchase cannabis products. That is 3.2% of Ohio's adult population. To put it another way, the next time you are at an Ohio State home football game, know that on average there are 3,360 fans at the game who have a Medical Marijuana Card.

Why Family Law Practitioners Should Care

§ 3796.24 Use or possession of medical marijuana as grounds for other actions.

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(B) Unless there is clear and convincing evidence that a child is unsafe, the use, possession, or administration of medical marijuana in accordance with this chapter shall not be the sole or primary basis for any of the following:

- (1) An adjudication under section 2151.28 of the Revised Code determining that a child is an abused, neglected, or dependent child;**
- (2) An allocation of parental rights and responsibilities under section 3109.04 of the Revised Code;**
- (3) A parenting time order under section 3109.051 or 3109.12 of the Revised Code.”**

- The word “unsafe” does not appear in Sections 3109.04, 3109.151, or 3109.12 of the Revised Code.
- A child’s best interests are determined by a preponderance of the evidence.
- If a parent is using – or misusing medical marijuana, and that is the primary or sole basis for determining a custody or parenting time order, it must be shown by clear and convincing evidence that the marijuana use has made the child “unsafe”.

Contrast this with *In re Perales* (1977), 52 Ohio St.2d 89, which provides: “[P]arents may be denied custody only if a preponderance of the evidence indicates abandonment, contractual relinquishment of custody, total inability to provide care or support, or that the parent is otherwise unsuitable that is, that an award of custody would be detrimental to the child.”

The Court’s have generally frowned on a parent using marijuana near or around their children, or under the influence of marijuana while caring for their children. But medical marijuana is beginning its slow creep into the law.

² <https://www.medicalmarijuana.ohio.gov>

No Mention of a Medical Marijuana Card.

In *Whitson v. Whitson*, Fifth Dist. No. 19CA32, 2019-Ohio-4235 (Richland Co.), the children's father lived with the children in the home of the paternal grandmother. Mother was incarcerated. Father frequently used marijuana in the home. In declining to give custody to grandmother, the court found her complicit in allowing the marijuana use in her home and in the presence of the children.

I Thought I Might Have a Medical Marijuana Card.

In *In re Lu.B.*, Fourth Dist. No. 21CA1, 2021-Ohio-4479 (Hocking Co.), the child Lu.B. was found to be dependent. The social services caseworker testified that mother "always tested positive for THC" and that the caseworker did not believe she had a medical marijuana card. Id. at P7. Mother asserted she "might have had a medical marijuana card," a point not well taken by the trial court. P17.

I Am Going To Get A Medical Marijuana Card.

In *C.L. v. S.M.*, Sixth Dist. No. L-17-1271, 2018-Ohio-5281 (Lucas Co.), the mother who is a licensed social worker and workers' compensation case manager, lived with the father of her two children and with his two children from a prior relationship. A photograph was presented to mother standing in front of her dresser which had a marijuana bowl sitting on top. She denied it was hers, and denied smoking marijuana. However, she admitted to recently obtaining a medical marijuana card but had not yet used it, and intended only to use it for medical marijuana edibles, and only after the children were asleep. P17. The guardian ad litem expressed concern with mother's potential use of medical marijuana, and recommended against it. P21.

Do You Know There Is A Statute That Covers This?

So far *In re K.J.*, Third Dist. Nos. 5-19-31 and 5-19-32, 2020-Ohio-3918 (Hancock Co.), is the only reported case which mentions R.C. 3796.24. The children were removed from the parents, but the state failed to prove by clear and convincing evidence that the children were abused, neglected or dependent. In the case plan, used during the case there was a provision that the parents' home be drug free. The Court wrote:

“[*P15] Having determined that the Agency failed to present clear and convincing evidence that the children were dependent or neglected, we need not address the remaining assignments of error. App.R. 12(A)(1)(c). However, this Court notes that this case raised an interesting issue about the effect of permission to possess and use marijuana via a state issued medical marijuana card on a case plan requirement that a home be completely drug free. The Court notes the existence of new statutory language stating "[u]nless there is clear and convincing evidence that a child is unsafe, the use, possession or administration of medical marijuana in accordance with this chapter shall not be the sole or primary basis for any of the following: (1) an adjudication under section 2151.28 of the revised code determining that a child is an abused, neglected, or dependent child . . ." R.C. 3796.24. How this will affect future case plans remains undetermined. At this point in time, the question is not addressed by this court.”

Possession and Use of Marijuana are Illegal Under Federal Law

See 21 U.S. Code Sec. 841 – Prohibited Acts A

In 2009, President Obama announced that his administration would not prosecute medical marijuana users and suppliers. Under previous administrations raids on medical marijuana dispensaries was routine.

President Trump announced his administration would enforce the law once again.

Ohio Rules of Professional Conduct

R. 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER.

R. 1.2(d)(1) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client in making a good faith effort to determine the validity, scope, meaning, or application of the law.

R. 1.2(d)(1) is substantially similar to the Model Rules.

Can You Counsel Your Client to Engage in Illegal Conduct under Federal Law?

Ohio added **R. 1.2(d)(2)**, which is NOT a part of the Model Rules. It reads:

R. 1.2(d)(2) A lawyer may counsel or assist a client regarding conduct expressly permitted under Sub. H.B. 523 of the 131st General Assembly authorizing the use of marijuana for medical purposes and any state statutes, rules, orders, or other provisions implementing the act. In these circumstances, the lawyer shall advise the client regarding related federal law.