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Second Hand Smoke and Child Custody Determinations—A Relevant Factor or a Smoke Screen?

Merril Sobie*

Thomas Hobbes is credited with the oft-quoted statement: "The life of man, solitary, poor, nasty, brutish, and short." Custody litigation follows a similar Hobbesian lifestyle; nasty, brutish, and often rendering the contestants poorer and solitary. But, alas, litigation is not short. Given the range of relevant evidence, from housing arrangements to psychological deconstruction of the parties, the need or desire for expert testimony may persist for years, in light of custody battles indeterminate nature, nasty and brutish as they are.

In any custody proceeding multiple factors must be considered. These include: (1) the existing custodial arrangement, particularly if a parent is seeking a modification;[1] (2) the ability of a parent or other party to provide a stable home for the child;[2] (3) psychological bonding;[3] and (4) the child's preference.[4] The overarching and subjective standard is the child's best interest.[5]

In recent years, one additional factor has been added to the mix: Smoking by a parent and the resulting risk or harm to the child occasioned by exposure to second-hand or passive smoke. The issue was non-existent until the late 1980s when scientific studies revealed that some harm might accrue to children who reside in close proximity to parents who smoke cigarettes. To date, the case law is both sparse and contradictory, at least

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1. *See* Alan C. v. Jones G., 104 A.D.2d 147, 482 N.Y.S.2d 272 (1st Dep't. 1984).

2. *See* Kessler v. Kessler, 10 N.Y.2d 445, 180 N.E.2d 402, 225 N.Y.S.2d 1 (1962).

3. *See* Joseph P.B. v. Margaret O.D., 161 A.D.2d 545, 556 N.Y.S.2d 49 (1st Dep't. 1990).

4. *See* Hughes v. Hughes, 37 A.D.2d 606, 323 N.Y.S.2d 621 (2d Dep't. 1971).

5. *See* Eschbach v. Eschbach, 56 N.Y.2d 167, 436 N.E.2d 1260, 451 N.Y.S.2d 658 (1982); *see also* Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 432 N.E.2d 765, 447 N.Y.S.2d 893 (1982).

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when the involved child or children are not asthmatic or otherwise especially vulnerable to second-hand smoke.

The thesis of this brief article is simply that the tobacco habits of a parent are relevant and worthy of consideration when a child is asthmatic, or suffers from some other definable medical condition which would be exacerbated by passive smoke. However, when the child is healthy and there exists no definitive short-term medical risk, the issue should be irrelevant. In other words, the court should consider those factors, and only those factors, which are of significant importance to the child, such as stability, caretaker skills, home environment and the child's wishes.

Concededly, second-hand smoke is harmful even to a healthy child, or for that matter a healthy adult. But the risk is no greater than a multitude of potential harms every youngster faces, ranging from unbuckled automobile seatbelts to the consumption of junk food. Courts should focus exclusively on those factors which are important to every child, such as bonding and stability, as well as those factors which are important to the case specific child, such as explicit health or educational needs. Any other consideration intensifies the emotional and often nasty course of litigation, and diverts the court from more essential issues.

The Risk of Second-Hand Smoke

Passive smoke is harmful to persons who are in close proximity to the smoker, or at least is harmful when the non-smoker is subjected to second-hand smoke for lengthy periods of time. Studies centering on the home and the workplace have so concluded.[6] Harmful effects may include aggravation of respiratory ailments and, over prolonged periods of time, a somewhat increased risk of lung cancer and perhaps cardiac problems.[7]

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6. *See* Gorman v. Moody, 710 F. Supp. 1256, 1261 (N.D. Ind. 1989) (citing PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING (1986)).

7. *See* Operation Badlaw, Inc. v. Licking County Gen. Health Dist. Bd. of Health, 866 F. Supp. 1059, 1066 (S.D. Ohio 1992). *See also* Graham E. Kelder, Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL'Y REV. 63, 64-65 (1997).

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Of course the risk to the non-smoker who resides or is employed in a smoking environment is significantly less than the risk to the smoker. In fact, the harm is of an entirely different magnitude.[8] Exposure to passive cigarette smoke is simply not lethal, or, more accurately, a risk is present, but is only a small fraction of the risk associated with smoking, and the risk presumably varies in accordance with each particular situation and environment. Traveling in an automobile with three heavy smokers and the windows closed is different from occupying a ballroom in which one guest smokes. Exposure to second-hand smoke while visiting friends is far less risky than sharing an apartment with a smoker. Accordingly, evaluating the specific risk to a specific child in a custody or visitation proceeding is complicated and uncertain, subject to multiple variables ranging from the physical environment, to the daily proximity of the smoking parent to the child.

The possibility or probability of harm is also related to the specific health of an individual. A few people are allergic to smoke. Others are asthmatic or suffer a similar respiratory condition which could be greatly compounded by passive smoke. Most people are not directly or immediately affected by second-hand smoke. The risk, albeit relatively small, is that one's health may be adversely affected by long term exposure.

Needless to say, children are not exempt from risk. An asthmatic or bronchial child will be directly affected by passive smoke. A non-asthmatic or non-bronchial child will not be directly affected, but may face some long term risk if subjected to second-hand smoke on a continuing basis.

As noted, passive smoke is not the only potential harm that children (or adults) confront. In fact, children must cope with a wide array of risks, varying from family to family and child to child. Some children have diets rich in "junk" food, while others enjoy, or at least benefit from healthy diets. Some children play the risky game of football, while others practice the more sedate sport of tennis. Some live on streets which are saturated with

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8. *See* Fagan v. Axelrod, 146 Misc. 2d 286, 294, 550 N.Y.S.2d 552, 557 (Sup. Ct. Albany County 1990); *see also* Carolyn Cliff, *Limited Relief for Federal Employees Hypersensitive to Tobacco Smoke: Federal Employers Who'd Rather Fight May Have to Switch,* 59 WASH. L. REV. 305 (1984); Jeff I. Richards, *Politicizing Cigarette Advertising,* 45 CATH. U. L. REV. 1147, 1174 n.115 (1996).

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traffic, rendering street crossing risky, while others reside on bucolic cul de sacs. Some grow up in violent neighborhoods while others never witness street violence.

In short, growing up is a risky business. Most children surmount the multiple potential pitfalls, including passive smoke. Most parents make choices which, whether intelligent or not, affect their children and, unless sufficiently egregious to constitute abuse or neglect, the state does not and cannot intervene.[9] Even today, the great majority of parents, thank God, do not go through custody proceedings which open their personal lives to possible judicial scrutiny and control. Somehow their offspring attain majority without permanent injury.

Custody And The Especially Vulnerable Child

Given the undisputed scientific fact that passive smoke causes direct and immediate harm to the asthmatic or otherwise medically vulnerable child, it is understandable that in the past decade smoking by a parent has become a significant factor in determining such child's custodial arrangement.[10] Such cases often involve expert medical testimony proving specific harm.[11] Clearly, a parent should not subject his or her asthmatic child to smoke and courts should consider heavily the conduct of the parent and its harmful effect when determining custody.

However, even in cases involving the asthmatic or allergic child, passive smoke is but one factor and may be superseded by other more important considerations. For example, in *Heck v. Reed,*[12] the father, who had perpetrated domestic violence against the mother, sought custody of their children. He was a non-smoker, whereas the mother smoked. The child had asthma and was severely affected by second-hand smoke. Re-

9. *See* Baltimore City Dep't of Soc. Serv. v. Bouknight, 493 U.S. 549, 571 (1990) (Marshall, J., dissenting); *see also* Franz v. United States, 707 F.2d 582, 597 (D.C. Cir. 1983) (citing Meyer v. Nebraska, 262 U.S. 390, 402 (1923)).

10. *See* Unger v. Unger, 274 N.J. Super. 532, 644 A.2d 691 (1994); *see also* Badeaux v. Badeaux, 541 So. 2d 301 (La. App. 1989); Pizzitola v. Pizzitola, 748 S.W.2d 568 (Tex. App. 1988).

11. *See, e.g., Unger*, 274 N.J. Super. at 533, 644 A.2d at 691 (medical expert testified that a child suffered respiratory problems due to passive smoke).

12. 529 N.W.2d 155 (N.D. 1995).

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versing the trial court award of custody to the father, the North Dakota Supreme Court noted:

> We do not disagree with the trial court's consideration of the potential deleterious health effects of tobacco smoke on an asthmatic child; however, we do not believe that the legislature intended that the presumption against awarding custody of children to a perpetrator of domestic violence be trumped by the fact that the victim parent smokes.[13]

Other courts have declined to consider smoking as a factor when the issue was not raised on a timely basis, even though the child was asthmatic. In *Cooley v. Cooley*,[14] for example, a parent sought a modification of custody based on smoking. The court refused, noting that "the record is void of evidence that [the parent] did not smoke cigarettes at the time of the stipulated judgment."[15] Thus, the non-custodial parent failed to prove a change in circumstances.

Finally, a specific potential harm may be addressed without denying custody. As one should expect, many parents of an asthmatic or allergic child will refrain from smoking in that child's presence. Most parents act in accord with their children's medical needs and presumably do so even in the absence of custody litigation or a court decree. (Luckily, the vast majority of asthmatic children are undoubtedly reared in intact families, or alternatively, are not the subject of dispute when their parents split.) There is no reason to believe that a post-divorce parent cannot or will not similarly protect their child's vital health interests. As the concurring opinion noted in *Heck,* where custody of the asthmatic child was awarded to the smoking parent, "a judge's order should not be necessary to create an obligation to stop smoking in the child's presence."[16]

Reluctant to rely solely on the parent's moral responsibility, other courts have expressly conditioned custody by ordering the parent to refrain from smoking in the child's presence.[17] However, for unexplainable reasons, at least one trial court modified custody even when the custodial parent of an asth-

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13. *Id.* at 165.
14. 643 So. 2d 408 (La. Ct. App. 1994).
15. *Id.* at 411.
16. *Heck*, 529 N.W.2d at 167 (Sandstrom, J., concurring).
17. *See* Badeaux v. Badeaux, 541 So. 2d 301 (La. Ct. App. 1989).

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matic youngster agreed to refrain from smoking in the child's presence.[18] A voluntary restriction or, if necessary, a court order may be particularly appropriate when visitation is at issue; after all, even the smoking non-custodial parent possesses visitation rights.

In sum, courts have generally reacted reasonably when determining custody of the especially vulnerable child. The consensus thus far is that smoking constitutes one important factor, albeit not necessarily the determinative factor. Where the issue is not determinative, the courts rely on voluntary or court ordered abstinence in the presence of the ill child.

Passive Smoke And The Healthy Child

Most of the case law to date involves the especially vulnerable child. Litigation involving the far more prevalent healthy child who may be subjected to passive smoke is embryonic, but sure to increase in light of the growing public health issue surrounding second-hand smoke.

Several courts have held that passive smoke is one minor consideration in determining custody of the healthy child, but at least in the reported cases the "passive smoke" factor was outweighed by other considerations.[19] In other cases the parent voluntarily agreed to avoid smoking in the child's presence, thereby defusing the potential controversy.[20]

The most troublesome case is *Smith v. Smith,*[21] a Tennessee case involving visitation. In *Smith*, the mother had previously won a judgment of custody; the father, a smoker, had biweekly visitation, with the condition that he not smoke or permit smoking in the child's presence. Within days of entry of the custody decree, the mother filed a contempt action alleging violations and requesting that visitation be terminated or suspended. Although the testimony conflicted, the trial court found

18. *See* Lizzio v. Lizzio, 162 Misc. 2d 701, 618 N.Y.S.2d 934 (Family Ct. Fulton County 1994).

19. *See In re* Marriage of Stanley, 411 N.W.2d 698 (Iowa Ct. App. 1987); *see also* Helm v. Helm, 1993 WL 21983 (Tenn. Ct. App. Feb. 3, 1993) (where the non-smoking mother's "chaotic" supervision of the child was the determining factor).

20. *See* Roofeh v. Roofeh, 138 Misc. 2d 889, 525 N.Y.S.2d 767 (Sup. Ct. Nassau County 1988).

21. 1996 WL 591181 (Tenn. Ct. App. Oct. 11, 1996).

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a violation and ordered that all visits be suspended, and the appellate court affirmed.[22]

In *Smith*, there was no medical or other expert evidence to indicate that the child was or might be especially vulnerable.[23] There were no allegations that the child suffered from asthma or had any other medical problem. Of greater significance, the lengthy appellate decision never addressed essential custody factors, such as the relationship between the parent and the child. The effect of severing the parent-child relationship is unknown; it may be that the child was devastated by the result. There is no mention of the child's wishes or needs, nor any mention of the benefits (or for that matter of the harm) of maintaining if not nurturing the parent-child relationship. Instead, the court suspended all visitation based solely on the fact that an apparently healthy child had been in the presence of a smoker two weekends each month, i.e., four days out of thirty.[24]

Fortunately, *Smith* is the only case to date which resulted in a Draconian and inappropriate remedy. But, for reasons which have previously been noted, litigation is bound to increase. What, then, should be the rule when the custodial or non-custodial parent smokes?

In my opinion, smoking should be irrelevant unless the expert evidence indicates that the child is asthmatic or otherwise especially vulnerable. Although passive smoke represents some risk to the healthy child, it does not rise to a level which merits consideration. As has been mentioned, all children face the innumerable risks of contemporary life. Feeding Johnny high cholesterol foods, such as red meat, may be unhealthy. Yet few would argue that the parent who practices a more healthy diet should be granted custody for that reason. The exception is

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22. *See id.* at *2.

23. *See id.* at *4. Mrs. Smith had testified that the child had a "runny nose" and sinus problems, but there was no medical evidence that exposure to second-hand smoke, which occurred at most twice a month, had contributed to the problem. *Id.*

24. *See id.* It is unclear whether the father smoked in the presence of the child each and every visiting day. Mr. Smith had concededly violated a court order barring smoking in the child's presence. Regardless of the appropriateness of that order, however, a violation could have been punished by a warning, a fine, or even brief incarceration. Severing the parent-child relationship could thereby have been avoided. *See id.*

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where a child may suffer from abnormally high cholesterol levels, as a few do (much like the asthmatic child and passive smoke). Some parents frequently consume alcohol socially, which may decrease their ability to supervise and surely presents a poor role model, while other parents are teetotalers. Yet alcohol consumption has justifiably been considered a factor in custody proceedings only when the parent is alcoholic or otherwise dependent on alcohol.[25] Some grant their children excessive freedom while others enforce strict discipline. Yet discipline is a factor only when it crosses the boundary into child abuse. In short, parents are never perfect and may act in ways that impose potential harm on their children. Unless egregious to the point of imminent danger (such as alcoholism, physical abuse or drug addiction), society does not and should not intervene.

Judges who determine custody disputes address important considerations affecting the very lives of children and their parents. Of paramount importance are the relationships between the parents and the child, the parenting ability of each spouse, the child's stability, the child's essential health and educational needs, and the child's wishes. Divining the best interests of the child is not a facile exercise. Litigating a host of lesser factors, such as the effect of passive smoke on the healthy child, needlessly prolongs and complicates litigation, and encourages the court and the parties to focus on side issues.

Further, the overwhelming majority of children do not grow up under court order, or at least their custody has never been disputed. Almost all manage to attain adulthood without significant injury, even when residing in homes where one or both parents smoke. It makes little sense to impose judicial rules, even as one factor, which affect only a tiny minority of the child population. It makes little sense to further prolong the nasty and brutish course of custody litigation by devoting hours of testimony to the details of a parent's smoking habits, with the inevitable conflicts as to where, how often, and the specific conditions in which parents light up.

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25. *See* Lauderdale County of Dept. of Human Serv. v. T.H.G. and L.D.G., 614 So. 2d 377, 385 (Miss. 1992) (quoting MISS. CODE ANN. § 93-15-103(3) (Supp. 1992)); *see also* M.C. v. L.B., 607 So. 2d 1267 (Ala. Civ. App. 1992).

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This is not to say that passive smoke is harmless. Parents should not smoke, both for their own sake, as well as for the sake of their children. If that is not possible, parents should refrain from smoking in the immediate presence of even their non-asthmatic children. Parents should also ensure that their children eat well, exercise, read, do their homework, respect their teachers, and refrain from watching violent television programs. But those laudable proscriptions do not warrant judicial oversight in the absence of evidence that the child is especially vulnerable, nor should we expect the courts to micro manage even divorced families. Passive smoke may not be healthy, but that fact should have no bearing on crucial custody decisions.

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