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Township Law *E-Letter*

Medical Marijuana Update: The Puzzle Begins to Unfold

The Michigan Medical Marijuana Act (MMMA) continued to produce more new developments in the courts this past month. Here's a summary of the most recent cases, together with an explanation about what these court battles mean for township officials and your residents.

The New Court Cases

The courts are grappling with the criminal aspects of Medical Marijuana, as well as individual patients' and caregivers' challenges and arguments about the MMMA. We are getting glimpses of a narrowing interpretation of the claimed privileges and protections. Clearly, the trend of the courts so far has been to view the rights and privileges of patients and caregivers very strictly. Since there is a slippery slope between drug abuse and the use of marijuana to control pain in chronically ill patients, the courts' cautious approach is understandable.

What is an Enclosed, Locked Facility?

The MMMA requires that marijuana plants be kept in an "enclosed, locked facility." One defendant arrested for illegally growing marijuana argued he was protected by the MMMA because he was a qualified, registered patient who grew his marijuana in a "closed, locked facility." One of his growing areas was within a six-foot high dog kennel, partially covered with black plastic but with an open top. His other growing area was an unlocked living room closet in his house.

The Court determined that the purpose of the "enclosed, locked facility" requirement is to ensure that medical marijuana is inaccessible to anyone other than a registered caregiver or qualifying patient. Therefore, an open chain-link kennel or an unlocked closet do not satisfy the

MMMA's strict requirements. *Michigan v King* (Court of Appeals, February 3, 2011).

Timing of a Physician's Certification

What happens if a claimed patient does not possess a valid registry identification card at the time of an arrest for possession of marijuana? A patient may still be protected by the MMMA from prosecution even if he does not yet have a card, as long as he has previously obtained a physician's certification and approval for medical marijuana. But if the patient waits until after the arrest to see a physician to get a certification, he is too late and will be subject to prosecution, even if he might otherwise be qualified.

How Much Marijuana?

Section 4 of the MMMA allows the possession of 12 plants and 2.5 ounces of usable marijuana per qualifying patient. But Section 8 of the MMMA permits the possession of a quantity of marijuana "not more than reasonably necessary to ensure the uninterrupted availability of marijuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition." This raises some potentially serious issues of proof in medical marijuana cases involving the amount of marijuana. The actual amount allowed may possibly be more than or less than 12 plants and 2.5 ounces. *People v Walburg* (Court of Appeals, February 10, 2011).

Employment Issues

It was only a matter of time before an employee would claim protection by the MMMA from discharge based on the consumption of medical marijuana as a registered patient. As it turns out, however, the MMMA does not protect employment rights at all.

An employee was fired under the employer’s drug policy after testing positive for marijuana, and then sued for wrongful discharge. He was an at-will employee with a good work record for 5 years prior to being fired. He admitted using marijuana, but claimed that because he was a qualified and registered medical marijuana patient, he could not be fired for testing positive.

The Court noted that the MMMA does not mention employee rights or protection from discipline or discharge, and the Michigan voters thus could not have intended to enact private employment regulation in the MMMA. There are no employee rights or entitlements under the MMMA to use marijuana under any circumstances. *Casias v Wal-Mart* (Western Dist of Michigan, February 11, 2011).

Marijuana Dispensaries

The MMMA does not say anything about the establishment of dispensaries, and one case out of Isabella County bears further watching on this issue.

A registered qualifying patient and a registered primary caregiver started a business in a warehouse that leases lockers for medical marijuana storage purposes to other registered qualifying patients and primary caregivers that become “members” of the business upon approved application. Members pay a membership fee, receive a membership number, may lease a locker to store medical marijuana, and supposedly can sell or purchase marijuana to and from other members, at a price set by the members. The warehouse business does not own, purchase, or sell any marijuana, but it does collect locker

rental fees, membership fees, receives 20% of the sales price per transfer, and pays a state sales tax per transfer.

The Circuit Court determined that the owners and operators of the warehouse did not violate the MMMA by possessing or growing more marijuana than is permissible, because they did not own the marijuana that was stored in the lockers or transferred on the property. Further, the warehouse did not constitute a public nuisance because the owners operated under the strict terms of the MMMA. The Court further noted that the MMMA permits patient-to-patient marijuana transfers, even through or at the hands of primary caregivers, because it is a medical use of marijuana.

The result reached by the Circuit Court in this case seems to contradict the opinion written by Court of Appeals Judge O’Connell in the *Redden* case last year. So we will carefully watch the results of this most recent case as it works its way through the Court of Appeals. *Michigan v McQueen* (Isabella Circuit Court, December 16, 2010).

Putting All the Pieces Together

As we move forward and continue to track the progress of the future MMMA cases, one thing is clear: well-meaning townships remain caught in the middle.

There are risks. If your township opts to regulate medical marijuana by limiting where and how caregivers or patients may grow, store, or provide marijuana, there is a risk that caregivers or patients may claim your regulations are preempted by the MMMA. A similar but much greater risk exists if your Township elects to totally ban the use of medical marijuana.

If your Township instead chooses not to regulate medical marijuana at all, you run a perhaps higher risk of permitting or encouraging conduct that goes beyond the medical, palliative purpose of the MMMA, to exploit the gray

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areas of medical marihuana use by setting up dispensaries in your township, or encouraging or facilitating the sale and use of large quantities of marihuana.

Looking Forward

2 1/2 years after the MMMA became law, courts are still sorting out many issues, but some things are becoming clearer. Courts are recognizing that the MMMA does not create a special class of civil protections for medical marihuana users. Strict interpretation of the greater policy and purpose of the MMMA will likely lead to stricter and more uniform interpretation of the MMMA's protections.

Also acknowledge that it is very likely, despite this

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strict construction of the MMMA, that many proper, legal operations can be created by which patients or caregivers, acting in full compliance with the law, may meet their palliative needs. It is wise to familiarize yourself with the agendas and propaganda of interest groups on both sides of the law, to better understand what may lie ahead for you in your township.

Appreciate that courts do not frame this legal puzzle as a question of whether marihuana should be a controlled substance. Rather, the correct question is how to do so properly, within the bounds of the MMMA, which was so broadly supported by the electorate in 2008. — *Helen Mills*



Featured Lawyer

Helen E. R. Mills is the most recent addition to Fahey Schultz Burzych Rhodes PLC, joining us in 2010 after graduating second in her law school class, *magna cum laude*. While in law school, she earned 11 Certificates of Merit—the highest honor for academic performance. In 2010, Helen was awarded one of the inaugural "book award" scholarships given by the Real Property Law Section of the State Bar for excellence in advanced property law courses. She handles general township law, specializing in labor and employment, real property, Freedom of Information and drain issues. Helen's outstanding legal writing and advocacy skills, attention to detail and knowledge serve townships very well. hmills@fsblawyers.com

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