PROTECTING FOSTER CHILDREN FROM THE DANGERS OF SECONDHAND SMOKE

As innumerable scientific studies have shown, secondhand smoke posses a serious threat to the health of those who inhale it. Tobacco smoke is insidious, making it extremely difficult, if not impossible, for children to avoid secondhand smoke when a parent or guardian is smoking at home or allows others to smoke in the home. As a result, children of smokers face an unnecessary health risk that often results in serious illness requiring treatment and hospitalization. In the interest of minimizing this preventable harm to foster children, several states have adopted regulations restricting foster parents from smoking and from allowing others to smoke in the presence of their foster children. The Maryland Department of Human Resources should join these states and promulgate similar regulations to protect the children entrusted to the care of the State.

I. ENVIRONMENTAL TOBACCO SMOKE IS EXTREMELY HARMFUL TO CHILDREN

Secondhand smoke, also known as Environmental Tobacco Smoke (ETS), includes both the smoke given off by the burning end of a cigarette or other lighted tobacco product and the smoke exhaled by the smoker into the air. According to the Environmental Protection Agency (EPA), ETS contains in excess of 4,000 substances, more than 40 of which are known carcinogens. The EPA has classified ETS as a Group A carcinogen, meaning that it is a known cause of cancer in humans. The inhalation of ETS by a nonsmoker is called “passive smoking,” and is estimated to cause approximately 3,000 lung cancer death in nonsmokers each year.

The EPA published a seminal study of the dangers of ETS with respect to children in 1992. According to the EPA, “infants and young children whose parents smoke are among the most seriously affected by exposure to secondhand smoke, being at increased

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2 Id.
4 “What You Can Do About Secondhand Smoke as Parents, Decision-Makers, and Building Occupants,” supra note 1.
5 “Respiratory Health Effects of Passive Smoking,” supra note 3.
risk of lower respiratory tract infections such as pneumonia and bronchitis.”

Passive smoking causes an estimated 150,000 to 300,000 lower respiratory tract infections in children under 18 months of age each year leading to 7,500 to 15,000 hospitalizations annually. The EPA found that “children exposed to secondhand smoke are... more likely to have reduced lung function and symptoms of respiratory irritation like cough, excess mucus, and wheeze.” Children with asthma are particularly at risk, and the EPA estimates that “between 200,000 and 1,000,000 asthmatic children have their condition made worse by exposure to secondhand smoke.” Moreover, the EPA estimates that “passive smoking may cause thousands of non-asthmatic children to develop the condition each year.”

In addition to respiratory problems, ETS “can lead to the buildup of fluid in the middle ear,” which the EPA notes is “the most common cause of hospitalization of children for an operation.” Finally, the EPA notes that “some studies have linked exposure to secondhand smoke with the onset of chest pain,” demonstrating detrimental effects of ETS on the cardiovascular system.

To deal with the dangerous effects of ETS on children, the EPA concluded its study with the recommendation that “every organization dealing with children have a smoking policy that effectively protects children from exposure to environmental tobacco smoke.”

The Surgeon General’s report on the consequences of passive smoking also addressed the dangers of ETS on nonsmokers, generally finding that “exposure to environmental tobacco smoke can cause disease, including lung cancer, in nonsmokers.” In particular, the Surgeon General found “evidence that the chemical composition of sidestream smoke [smoke from the burning end of a lighted tobacco product] is qualitatively similar to mainstream smoke inhaled by the active smoker, and that both mainstream and sidestream smoke act as carcinogens in bioassay systems.”

As a result, the report states that “it is... clear that simple separation of smokers and nonsmokers within the same airspace may reduce but cannot eliminate nonsmoker exposure to environmental tobacco smoke.”

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7 “Respiratory Health Effects of Passive Smoking,” (supra).
8 Id.
9 Id.
10 Id.
11 Id.
12 Id.
13 Id. (emphasis added).
15 Id.
16 Id.
smoking parents have reduced lung function when compared with children of nonsmoking parents since the sharing of smoke-polluted airspace between parents and children endangers children of smokers.\textsuperscript{17} The Surgeon General thus concluded with an admonition to parents: "As parents and adults we must protect the health of our children by not exposing them to environmental tobacco smoke."\textsuperscript{18}

Other highly respected medical journals have published studies demonstrating the detrimental effects of ETS on children. A study published in the \textit{Archives of Pediatrics and Adolescent Medicine} reports that at least 6,200 children are killed annually by ETS, which is greater than the number killed by all other unintentional injuries combined.\textsuperscript{19} The study authors also calculated medical expenses caused by ETS at an astonishing $4.6 billion each year.\textsuperscript{20} Even more startling is a recent study published by the \textit{Society of Actuaries} which estimated the total economic cost of ETS exposure in the United States at over $5 billion in direct medical costs and over $5 billion in indirect costs.\textsuperscript{21} Similarly, a study in the journal \textit{Pediatrics} listed the consequences of children’s exposure to ETS: 135 to 212 deaths in children under five years old from lower respiratory tract infections; 354,000 to 2.2 million middle ear infections; 14,000 to 21,000 tonsillectomies and/or adenoidectomies; 529,000 physician visits for asthma; 1.3 to 2 million physician visits for coughs; 260,000 to 436,000 cases of bronchitis in children under five years old; and 15,000 to 19,000 cases of pneumonia in children under five years old.\textsuperscript{22}

\section*{II. COURTS ROUTINELY CONSIDER EXPOSURE TO ETS IN CUSTODY PROCEEDINGS}

Courts throughout the nation often consider exposure to secondhand smoke when making custody determinations based on the “best interest of the child.” For example in \textit{Unger v. Unger}, the major factor in the court’s custody determination was the mother’s “excessive” smoking habit.\textsuperscript{23} In light of evidence that at least one of the children suffered from chronic bronchitis as a result of his exposure to secondhand smoke, the trial judge ordered the court-appointed psychologist to consider the consequences of continued exposure to secondhand smoke in making a custody recommendation.\textsuperscript{24} The court

\begin{itemize}
  \item \textsuperscript{17} \textit{Id.}
  \item \textsuperscript{18} \textit{Id.} (emphasis added)
  \item \textsuperscript{19} Tobacco and children. An economic evaluation of the medical effects of parental smoking, C.A. Aligne and J.J. Stoddard, \textit{Arch Pediatr Adolesc Med}, July 1997; 151 648-653.
  \item \textsuperscript{20} \textit{Id.}
  \item \textsuperscript{22} Morbidity and mortality in children associated with the use of tobacco products by other people, JR DiFranza and RA Lew, \textit{Pediatrics}, April 1, 1996, 97(4): 560-568.
  \item \textsuperscript{23} \textit{Unger v. Unger}, 274 N.J.Super. 532, 533 (1994).
  \item \textsuperscript{24} \textit{Id.} at 538.
\end{itemize}
concluded that until it received the psychologist’s recommendation, “[t]he best interest of the children in this matter dictate that there be no smoking in their home or vehicle when the children are present and that any smoking in the family home or vehicle is to be ceased at least ten hours before the children are present.”

Other courts have also taken the position that it is their responsibility to protect children from exposure to secondhand smoke. In Lizzio v. Lizzio, the court rejected the Law Guardian’s suggestion that the smoking mother of an asthmatic son would “come to her senses and will stop jeopardizing her child’s life.” Less optimistic than the Law Guardian, the court could not “permit a child to be exposed to imminent danger upon the supposition that a mother who has ignored medical advice for many years will now see the light and do the right thing to protect her children.” The court continued in even stronger language, opining that “a parent or guardian could be prosecuted successfully for neglecting his or her child as a result of subjecting the infant to an atmosphere contaminated with health-destructive smoke.” Similarly, in Laura B. v. Jeffrey B., the court granted a smoking mother sole custody of her child but imposed the “condition precedent” that she quit smoking.

Courts have also limited visitation rights based on concern for a child’s health when one of the parents is a smoker. In Badeaux v. Badeaux, the court reduced a smoking father’s visitation rights upon finding that the three smokers in his home contributed to his 20-month old child’s bronchial asthma and repeated respiratory infections. The Court found that the unwillingness of the father to accommodate his child’s illness despite acknowledging that exposure to ETS was “harmful…, justified imposing strict limitations on his visitation rights.”

Additionally, courts have raised the issue of parental smoking habits and the resultant effects of secondhand smoke exposure on the child sua sponte. Most notably, in In re Julie Anne, an Ohio judge took judicial notice of the scientific evidence supporting the detrimental effects of ETS on children. The court imposed restrictions on the parents of an otherwise healthy child by prohibiting them from smoking or allowing others to smoke in the child’s presence. In issuing this order, the court concluded that “a family court that fails to issue court orders restricting persons from smoking in the

25 Id. at 541.
26 Lizzio v. Lizzio, 618 N.Y.S.2d 934, 937 (Family Ct., Fulton County, N.Y. 1994)
27 Id.
28 Id. Although the appellate court disagreed with the custody determination made by the lower court, it upheld the lower court’s order prohibiting either party from exposing the children to secondhand smoke. Lizzio v. Jackson, 226 A.D.2d760 (N.Y.1996).
30 Badeaux v. Badeaux, 541 So.2d 301, 302-03 (Ct. of Appeal of LA 1989).
31 Id. at 302.
33 Id. at 659.
presence of children under its care is failing children whom the law has entrusted to its care.”

III. OTHER STATES HAVE PROMULGATED REGULATIONS TO PROTECT FOSTER CHILDREN FROM EXPOSURE TO SECONDHAND SMOKE

A number of states have promulgated regulations addressing smoking in foster homes. Most comprehensively, Washington, Oklahoma and Maine have adopted regulations that restrict foster parents from smoking or permitting others to smoke in the presence of foster children. In addition to these regulations, some additional states, such as Florida and Vermont, have pending regulations addressing the exposure of foster children to secondhand smoke. These regulations provide an excellent example of the way administrative agencies can, and should, act to minimize children’s exposure to secondhand smoke.

Oklahoma adopted regulations to limit the exposure of foster children to secondhand smoke pursuant to statutory authority that had been in place for a decade. After discovering that statutory authority existed for regulations to protect children in this manner, the Oklahoma Department of Human Services enacted emergency regulations upon a finding “that compelling public interest exists to comply with state law, and preserve the public health, safety, and well-being of children.” To this effect, the foster family home regulations provide that,

[W]hen children are in care, smoking is prohibited inside the home and when transporting children.

Thus, in Oklahoma, foster parents are prohibited from smoking around children, both in their homes and while they transport their foster children. In addition, the legislature drafted the regulation broadly so as to include not only foster parents, but also anyone else who is around the foster children.

Similarly, Maine has enacted regulations to protect children from the harm caused by exposure to secondhand smoke. Maine’s regulations, however, go further than Oklahoma’s in restricting the smoking activities of foster parents. The Maine regulations provides:

Foster parents shall protect foster children from exposure to second hand tobacco smoke:
   a) Smoking is prohibited in a foster home when a foster child is in placement.
   b) When a foster child is absent from the foster home, smoking is prohibited within 12 hours prior to their expected return.

34 Id. at 641.
35 22. Okla. Reg. 35. (September 15, 2004)
c) Smoking is prohibited in a foster home when a foster child is placed in a foster home providing respite care and within 12 hours prior to a child’s expected respite placement.

d) Smoking is prohibited in a foster parents’ motor vehicle within 12 hours prior to transporting a foster child and whenever the foster child is present in the vehicle.

Smoking includes carrying or having in one’s possession a lighted cigarette, cigar, pipe or other object giving off tobacco smoke.37

The Maine regulations recognize that the dangerous effects of secondhand tobacco smoke remain long after smoking ceases and includes a buffer period before the arrival of a foster child to the home. Like Oklahoma’s regulation, the Maine regulations are drafted broadly to include not only the foster parents, but also others whom the foster parents might invite into the foster home.

Washington state has also enacted regulations that restrict foster parents from smoking around foster children. The Washington regulations require that parents prohibit smoking in the living space of any home or facility caring for children and in motor vehicles while transporting children. The regulations permit adults to smoke outdoors away from the foster children.38 Although the Washington regulations are not as broad as those passed by Maine or Oklahoma, the regulations are consistent with a trend of a growing number of states that foster children need to be protected from the hazards of secondhand smoke. Additional states have also proposed legislation or regulations to protect foster children from secondhand smoke in foster homes.39

IV. MARYLAND SHOULD JOIN THE GROWING TREND AMONG OTHER STATES TO PROHIBIT FOSTER PARENTS FROM EXPOSING THEIR FOSTER CHILDREN TO SECONDHAND SMOKE.

In light of the damning scientific evidence demonstrating the detrimental effects secondhand smoke has on children, Maryland should join her sister states in enacting regulations to protect against this preventable harm. Under the doctrine of parens patriae, the state is the ‘ultimate parent’ of children within the care of the juvenile court, including the foster care system and has an “urgent interest” in the health and welfare of the child, as well as a “duty of the highest order to protect the child.”40 Some even see the involuntary harmful exposure of children to secondhand smoke as a human rights

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37 CODE ME. R. §16(9)(K)(2004)
39 Similar legislation has been proposed by Vermont. See, e.g., 2005 Reg. Lexis 19976 (regulation that will ensure that foster homes and the vehicles used to transport foster children shall be smoke free environments);
violation, as the United Nations Convention on the Rights of the Child obligates signatory nations including the United States to ensure the “highest attainable standard of health for children.”

The Maryland Department of Human Resources should thus follow the example of Maine, Oklahoma and Washington and adopt regulations to protect foster children from exposure to secondhand smoke. Proposed regulations annexed to this report provide suggestions for changes that the agency could make to effectuate such a policy. By prohibiting foster parents and others from smoking in the presence of foster children, both indoors and in a vehicle, the Department of Human Resources can protect the health of the children who have been entrusted to its care by minimizing their exposure to secondhand smoke. Reduced exposure to secondhand smoke will result in fewer doctor visits for the children, which means fewer sick days and medical expenses, as well as a better quality of life for foster children.

\footnote{Id. at 813.}