

APAAC DRAFT MEMO September 2012
RE: MEDICAL MARIJUANA IN A CHILDCARE FACILITY

BACKGROUND:

There are, ostensibly, two ways to be charged with possession of “medical marijuana” in a child care facility:

First, the criminal code prohibits the possession of marijuana under ARS §13-3405. In an amount less than 2 pounds it is a class 6 felony.

Second, ARS § 36-894, effective August 2, 2012, prohibits possession of any marijuana, even for a medical marijuana cardholder, in a child care facility. This provision is located within the statute governing the licensure of child care programs. See, ARS § 36-881, *et. seq.*

Licensing violations in the child care article (ARS § 36-881, *et. seq.*) constitute class 2 misdemeanors, unless otherwise stated “in the article.” (ARS §36-892) The article also contains civil penalties for specified licensing violations (ARS §36-891) and other criminal penalties such as a class 1 misdemeanor for operating a child care facility without a license. (ARS §36-886). These penalty provisions have been in statute for decades. Because it is not expressly stated otherwise in the child care licensing article, a violation of ARS § 36-894 would at first blush appear to be a class 2 misdemeanor.

In the 1980 case *State v. Weiner*, the Arizona Court of Appeals considered statutes closely analogous to those at issue here. In *Weiner*, the defendant had been caught selling vehicles with “rolled back” odometers, and charged with two separate crimes. The first crime, based on the felony statute “fraudulent schemes and artifices,” was based on the defendant obtaining or attempting to obtain “money, property or things of value by means of false or fraudulent pretenses...” The second charge was based on a misdemeanor law specifically prohibiting the sale or attempted sale of “a motor vehicle on which the odometer does not register the true mileage.” Because the two statutes had different elements, the court found that they did not conflict. *State v. Weiner*, 126 Ariz. 454, 456 (Ariz. Ct. App. 1980) (one statute required a “scheme or artifice to defraud,” and the other required an incorrect odometer).

Here, ARS 13-3405 requires the unlawful possession of marijuana. ARS 36-894, however, requires the presence of a person with marijuana inside a child care facility. The two statutes have different elements and, based on the *Weiner* criteria, a person could be charged with both crimes for carrying unlawfully possessed marijuana into a child care facility.

However, the language of Arizona's recently approved Medical Marijuana Act creates some confusion when ARS 36-894 is applied to a registered cardholder. ARS §36-2811(b), Arizona's Medical Marijuana Act, states:

B. A registered qualifying patient or registered designated caregiver is not subject to arrest, prosecution or penalty in any manner, or denial of any right or privilege, including any civil penalty or disciplinary action by a court or occupational or professional licensing board or bureau:

1. for the registered qualifying patient's medical use of marijuana pursuant to this chapter, if the registered qualifying patient does not possess more than the allowable amount of marijuana.

ARS § 36-894 was intended to complement the AMMA. According to the Senate Fact Sheet accompanying HB2349, which created ARS § 36-894 during the second legislative session after the AMMA's adoption, the purpose of the provision is to: "[a]dd[s] to the possession and use limitations of the Arizona Medical Marijuana Act," thus furthering the purpose of the AMMA provision which denies possession and/or use on school grounds, *inter alia*. See, ARS §36-2802.B. <http://www.azleg.gov/legtext/50leg/2r/summary/s.2349ed.pdf>. Similarly, the House HEIR Committee fact sheet recaps the AMMA history as the predicate for the day care prohibition, again indicating the complimentary intent. http://www.azleg.gov/legtext/50leg/2r/summary/h.hb2349_01-23-12_heir.pdf.

HISTORY

The Arizona Department of Health Services (ADHS) is required to establish a licensing program for day care centers, imposing penalties for violations of the regulations and a criminal consequence for operating without a license. See, ARS § 36-881 et. seq.

In November of 2010, Arizona voters passed Proposition 203, the Arizona Medical Marijuana Act (AMMA), which allows a patient who has a debilitating medical condition to obtain a specified amount of marijuana from a nonprofit medical marijuana dispensary and to use and possess the marijuana for debilitating medical conditions. The AMMA provides exceptions for locations where marijuana may not be possessed or used.

The AMMA establishes an ADHS-based regulatory system for the distribution of marijuana for medical use including a system for approving, renewing, and revoking a cardholder's registration. It precludes "prosecution or penalty in any manner" "for the registered qualifying patient's medical use of marijuana pursuant to this chapter" so long as that patient does not possess more marijuana than the AMMA allows. ARS § 36-2811.B.

The statute defines cardholder as a qualified patient, designated caregiver or nonprofit dispensary agent who has been issued and possesses a valid registry identification card.

The AMMA limits medical marijuana use in areas primarily populated by children, including schools and school buses. *See*, ARS §36-2802 (prohibits a person from possessing or engaging in the medical use of marijuana on a school bus, on the grounds of any preschool, primary or secondary school, or in any correctional facility).

Passed in a single citizen initiative, the AMMA appears to have been intended as a full expression of the law governing medical marijuana. This is reinforced by the language used in ARS § 36-2811(b), protecting all use "pursuant to this chapter." The clear intent of Chapter 28.1 is to exempt medical marijuana users from any criminal or civil liability not created in the text of the AMMA, and to make Chapter 28.1 the exclusive regulation of medical marijuana.

In the 2012 session, the legislature passed HB2349 which created ARS §36-894 within the article regulating day care facilities, prohibiting possession or use of medical marijuana at a day care center (possession or use of non-medical marijuana already being a felony under the Criminal Code, ARS §13-3405). ARS § 36-894 furthers the AMMA limitation on use around children by putting day care facilities on equivalent footing.

ISSUE:

The placement of the ARS §36-892 in the day care facility statutes rather than the AMMA begs the question as to the consequence for a violation. The penalties in the day care licensing provisions, if applicable, are inconsistent with the criminal code's felony classification.

APPLICABLE RULES:

The predicate step in determining whether the offense classification in the criminal code applies to a violation of 36-894 is to look at the legislative intent.

The rules of statutory construction hold that when courts construe a statute, the primary goal is to fulfill the intent of the legislature.... *State v. Peek*, 219 Ariz. 182, 184, 195 P.3d 641, 643 (2008); *State v. Jernigan*, 221 Ariz. 17, ¶ 9, 209 P.3d 153, 155 (App. 2009). The best and most reliable index of the legislature's intent is the statute's language and, when the language is clear and unequivocal, that language determines the statute's construction. *Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 296, ¶ 8, 152 P.3d 490, 493 (2007); *City of Phoenix v. Johnson*, 220 Ariz. 189, 191, ¶ 9, 204 P.3d 447, 449 (App. 2009). "The clear language of a statute is given its usual meaning unless an absurd or impossible consequence would result." *State v. Superior Court*, 190 Ariz. 203, 206, 945 P.2d 1334, 1337 (App. 1997).

If, however, the legislative intent is not clear from the plain language of the statute, courts do consider other factors such as the statute's context, subject matter, historical context, effects and consequences, and spirit and purpose. *Watson v. Apache County*, 218 Ariz. 512, 516, ¶ 17, 189 P.3d 1085, 1089 (App. 2008); *Sanderson Lincoln Mercury, Inc. v. Ford Motor Co.*, 205 Ariz. 202, 205, ¶ 11, 68 P.3d 428, 431 (App. 2003) citing *Wyatt v. Wehmuller*, 167 Ariz. 281, 284, 806 P.2d 870, 873 (1991).

Courts are required to construe two apparently conflicting statutes in harmony, whenever that is possible. If the statutes are so inconsistent they cannot be harmonized, the more recent statute controls. *UNUM Life Ins. Co. of America v. Craig*, 200 Ariz. 327, 333, ¶ 28-29, 26 P.3d 510, 516 (2001);

Rueschenberg v. Rueschenberg, 219 Ariz. 249, 252, ¶ 12, 196 P.3d 852, 855 (App. 2008); *State v. Box*, 205 Ariz. 492, 496, ¶ 12, 73 P.3d 623, 627 (App. 2003). Determining the legislature’s intent considers the statute as a whole and, when possible, must give effect to every part of the statute. *State v. Vogel*, 207 Ariz. 280, 284, 85 P.3d 497, 501 (App. 2004).

In 1998, Arizona Voters passed proposition 105, the Voter Protection Act. Prop. 105 limited the legislature’s power over measures passed through the initiative process. As amended, Article IV, Part I Section I (6)(B)(C) of the Arizona Constitution prevents the legislature from repealing citizen initiatives, and requires any amendment to both further that initiative’s purpose and be passed by a 3/4th vote in each house of the legislature.¹

ANALYSIS:

Under ARS §36-2802 the consequences of possession or use of medical marijuana at the specified prohibited locations defaults to the criminal code, thus resulting in a felony classification under ARS §13-3405.

The day care center provision would presumably do the same, but for its placement in a section that contains criminal penalties, namely a class 2 misdemeanor for “violating the provisions of the applicable law, or regulations...unless another classification is specifically prescribed in this article.” ARS §36-892.ⁱ

Given that the clear intent of the legislature was to bring the day care facilities into a similar position as the AMMA, it would be an anomalous result to suggest that one possessing or using medical marijuana at a day care facility would be subject to a misdemeanor while one doing so at a school would be subject to a felony, particularly when the children in day care are an even younger and more vulnerable age than school students, who themselves are vulnerable.

Therefore, consistent with rules of construction, we must turn to the task of harmonizing this conflict. This turns on the impact of the final clause in ARS §36-892, “unless another classification is specifically prescribed in this

¹ When the Arizona Legislature passed ARS 36-894, it did so under the belief that ARS 36-894 was an amendment to the AMMA. The bill was passed with the approval of 3/4th of the votes in each house.

article.” Clearly the entirety of this section is a default provision for classification of violations of the applicable law or regulations regarding operation of a day care center. Originally adopted in 1966 along with the day care law, this section is intended to cover any regulatory requirements for which a specific penalty was not included and to encompass subsequent administrative regulations and other “applicable laws.”

Obviously, the regulatory scheme in the day care article (excepting §36-894) is directed at the day care center operator. Use of medical marijuana at a day care facility may or may not be by the facility operator. If the violator was not the operator could he successfully make the argument that because ARS §36-894 is directed to the operator the law is not applicable to him? We think not, particularly given the intent of the provision to bring day care centers in line with other schools under the AMMA.

Inasmuch as the medical marijuana provision was adopted some 45 years after the bulk of this regulatory article, including ARS §36-892, it would not be a huge leap to harmonize the new statute with the AMMA and default to the criminal code classification consistent with the AMMA.

Moreover, ARS §36-886 establishes a class 1 misdemeanor for operating a day care center without a license. While this administrative provision is certainly underlain by a valid concern for the health and welfare of the children, on its face it is a paperwork violation unless or until a health or safety issue was found. But the violation would warrant class 1 misdemeanor status under the statute, regardless of any other problem, while the use of medical marijuana in such a facility would only be a class 2 misdemeanor. Surely the legislature would not intend that the administrative crime would trigger greater consequence than the clear health threat of exposing an infant to marijuana. That would clearly be an absurd result.

Despite the fact that the day care provision is the most recent statute, it does not control because as the analysis shows the two statutes can be harmonized based upon legislative intent. The medical marijuana provision must be read to coalesce with the AMMA rather than the day care regulatory scheme; otherwise it creates a clearly unintended result.

Finally, because the AMMA was intended to be the exclusive regulation of medical marijuana, all provisions relating to medical marijuana must be

harmonized with it, regardless of their location in the statute. Therefore, treating day care centers the same as other schools is consistent within the AMMA regulatory framework.

CONCLUSION:

The conduct described in ARS § 36-894, possession or use of medical marijuana in a day care facility, would be punishable under ARS §13-3405, just as it would be for any marijuana use or possession in that location by a non-cardholder, or at any school.

¹ Operating without a license is a Class 1 misdemeanor. See, ARS §36-886.