

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2013-014852

03/21/2014

HONORABLE KATHERINE COOPER

CLERK OF THE COURT
D. Harding
Deputy

JACOB WELTON, et al.

DANIEL J POCHODA

v.

STATE OF ARIZONA, et al.

J KENNETH MANGUM
JOSEPH N ROTH

MINUTE ENTRY

The Court has reviewed the following:

- Plaintiffs' Motion for Preliminary Injunction, filed November 13, 2013;
- Defendant William Montgomery's Response to Plaintiffs' Motion for Preliminary Injunction and Motion for Judgment on the Pleadings per Ariz. R. Civ. P. 12(C), filed December 2, 2013;
- Plaintiffs' Response to Defendant Montgomery's Motion for Judgment on the Pleadings and Reply in Support of Plaintiffs' Application for Preliminary Injunction, filed January 7, 2014; and
- Defendant William Montgomery's Reply in Support of Motion for Judgment on the Pleadings per Ariz. R. Civ. P. 12(C), filed January 28, 2014.

On February 14, 2014, the Court heard oral argument and took under advisement Plaintiffs' claim for declaratory judgment.^[1] The issue is one of statutory interpretation: Does Arizona's Medical Marijuana Act ("AMMA") allow medical marijuana to be consumed in extract form? As set forth below, the Court concludes it does and that Plaintiffs are entitled to an

^[1] The Court denied Defendant's Motion for Judgment on the Pleadings on February 14, 2014.
Docket Code 926

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order that decriminalization of marijuana for medicinal purposes includes extracts adapted from marijuana.

Having reached this conclusion, the Court believes that Plaintiffs' request for injunctive relief is moot. Pursuant to the Court's declaratory judgment in favor of Plaintiffs, they are now protected from arrest and prosecution for giving their son, Zander, CBD oil, a marijuana extract. Unless Plaintiffs have a basis for fearing that Defendant Montgomery may prosecute them regardless of the Court's ruling, an injunction against Defendant is not warranted.

Declaratory Judgment Action

Plaintiffs seek an order pursuant to Arizona's Declaratory Judgment Act, A.R.S. § 12-1832. The Act provides that "[a]ny person...whose rights, status or other legal relations are affected by a statute...may have determined any question of construction or validity arising under the [statute] and obtain a declaration of rights, status or other legal relations thereunder." It is a remedial statute intended to "settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." *Planned Parenthood Ctr. of Tucson, Inc. v. Marks*, 17 Ariz. App. 308, 310, 497 P.2d 534, 536 (1972). Declaratory judgment must be based on an actual controversy. *Id.*

A real, justiciable controversy requiring clarity exists here. Plaintiff's Complaint and Application for Preliminary Injunction present a prima facie case for the medical treatment of nine-year-old Zander with medical marijuana administered in a form of plant material combined with extracted CBD in oil form. The State contends that the AMMA did not decriminalize plant extracts which, therefore, are still unlawful under state law.

The controversy is ripe. The law does not require Plaintiffs to be arrested and to face criminal prosecution to obtain declaratory relief. *Planned Parenthood*, 17 Ariz. App. at 312, 497 P.2d at 538 ("To require statutory violation and exposure to grave legal sanctions; to force parties down the prosecution path, in effect compelling them to pull the trigger to discover if the gun is loaded, divests them of the forewarning which the law, through the Uniform Declaratory Judgments Act, has promised.") Whether or not the County Attorney intends to prosecute Plaintiffs is not the issue. Plaintiffs are entitled to a determination of their rights under the AMMA.

Statutory Interpretation

In interpreting a voter initiative, the court's "primary purpose is to effectuate the intent of those who framed it and the electorate that adopted it." *State ex rel. Montgomery v. Woodburn ex rel. County of Maricopa*, 231 Ariz. 215, 216, 292 P.3d 201, 202 (App. 2012)

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(citations omitted). The court first considers the statutory language, “the best and most reliable index of a statute's meaning.” *Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991); *see also Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). “[W]here the language is plain and unambiguous, courts generally must follow the text as written.” *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co.*, 177 Ariz. 526, 529, 869 P.2d 500, 503 (1994). Courts give effect to each word or phrase and apply the “usual and commonly understood meaning.” *Bilke v. State*, 206 Ariz. 462, 464–65, 80 P.3d 269, 271–72 (2003). Unless clear indication of legislative intent to the contrary exists, courts do not “construe the words of a statute to mean something other than what they plainly state.” *Canon Sch. Dist. No. 50*, 177 Ariz. at 529, 869 P.2d at 503.

The AMMA

In November, 2010, Arizona voters passed the AMMA for “the purpose of . . . protect[ing] patients with debilitating medical conditions, as well as their physicians and providers, from arrest and prosecution, criminal and other penalties and property forfeiture if such patients engage in the medical use of marijuana.” Prop. 203 § 2(G) (codified at A.R.S. § 36-2801 et seq.). The AMMA decriminalizes, under state law, certain activities associated with the medical use of marijuana for patients and caregivers to whom ADHS has issued identification cards. It also decriminalizes activities associated with cultivating, packaging, and selling medical marijuana for individuals to whom ADHS has issued appropriate licenses. *Id.*

The AMMA defines “marijuana” as “all parts of any plant of the genus cannabis whether growing or not, and the seeds of such plant.” A.R.S. § 36-2801(8). It defines “[u]sable marijuana” as “the dried flowers of the marijuana plant, *and any mixture or preparation thereof*, but does not include the seeds, stalks and roots of the plant and does not include the weight of any non-marijuana ingredients combined with marijuana and prepared for consumption as food or drink.” A.R.S. § 36-2801(15). (Emphasis added.)

In applying the plain language of the statute to the rules of statutory interpretation, the Court concludes that nothing in the statute limits the form in which patients may use medical marijuana. The AMMA applies equally to the plant and to CBD oil.

First, the definition of “usable marijuana” does not limit the medicine to just the dried flowers. It includes “any mixture or preparation” of the dried flowers of the marijuana plant. The plain and ordinary meaning of the AMMA’s text is reflected in the Merriam-Webster Dictionary definitions of these words:

- “Usable” is defined as “a convenient or practicable use.” <http://www.merriam-webster.com/dictionary/usable>.

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- “Any” is all-inclusive and defined as “every; one, some, or all of indiscriminate quantity.” <http://www.merriam-webster.com/dictionary/any>.
- “Mixture” is the “combination of different things.” <http://www.merriam-webster.com/dictionary/mixture>.
- Importantly in this case, “preparation” means “the activity or process of making something ready or to become ready for something;” <http://www.merriam-webster.com/dictionary/preparation>; “[t]hat which is prepared, made, or compounded by a certain process or for a particular purpose; a combination” including “a medicinal substance made ready for use.” <http://www.webster-dictionary.net/definition/preparation>.
- “Prepared” is to be “made fit or suitable; adapted.” <http://www.webster-dictionary.net/definition/Prepared>.

The effect of these words is to allow patients to employ “certain process[es]” to “adapt[]” marijuana “for a particular purpose” and a “convenient and practicable use.”

Second, the drafters included the phrase “and any mixture or preparation thereof.” These words expand the allowable manipulation of the plant. To conclude that patients can only use unmanipulated plant material would render the phrase meaningless. Basic statutory interpretation prohibits such a result. Each word and phrase is given meaning. *Bilke, supra*. See *Williams v. Thude*, 188 Ariz. 257, 259, 934 P.2d 1349, 1351 (1997) (when interpreting a statute, a court presumes the legislature intended each word and clause to have meaning). Had the drafters wanted to limit legal use to the plant form only, they did not need this phrase and would have omitted it.

Third, the statute provides that medical marijuana can be prepared “for consumption as food or drink.” Marijuana preparations that are consumed as food or drink may involve marijuana extracts. Ex. 2 to Plaintiffs’ Application, ¶ 9. An extract is a method of removing material from the plant, usually cannabinoids. Extractions facilitate proper dosing and, in some cases, make it feasible for patients who cannot consume the medicine in plant form to receive it another way. *Id.* at 11. Again, the statute itself contemplates patients preparing marijuana in a manner, including extract form to meet their medical needs.

Defendant Montgomery acknowledges that the AMMA means that “flowers can be crushed or ground up and added to other foods to be consumed” (Response, p. 9). However, he contends that there is a “prohibition on concentrating the chemicals in the marijuana flower” in the AMMA. (Response, p. 10.) Where? The Court finds no such “prohibition” in the statute.

Montgomery further contends that the AMMA does not permit extracts because “any mixture or preparation thereof” simply means that plant material may be mixed with food. As

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Plaintiffs' Reply states, this argument collapses "mixture" with "preparation" into a single definition, i.e., mixed with food. With this view, the meaning of the word "preparation" disappears. That is not what the statute says. It broadly states "mixture or preparation," not "mixture or preparation as long as it remains in plant form and then only when mixed with food." "Mixture" is separate and distinct from "preparation." The drafters included both terms. Statutory construction requires that the Court construe the law as it is written: "usable marijuana" includes "any mixture or preparation" made from the dried plant flowers. A.R.S. § 36-2801(15).

Protective Purpose

It is undisputed that medical marijuana is intended to be used by patients to treat chronic, debilitating, and/or painful conditions. The statute identifies them: cancer, glaucoma, positive status for human immuno-deficiency virus, acquired immune deficiency syndrome, hepatitis C, amyotrophic lateral sclerosis (ALS), Crohn's disease, agitation of Alzheimer's disease, and chronic or debilitating medical conditions or treatments that produce cachexia or wasting syndrome, severe and chronic pain, severe nausea, seizures, including those characteristic of epilepsy, or severe and persistent muscle spasms, including those characteristic of multiple sclerosis. A.R.S. § 36-2801(3).

It makes no sense to interpret the AMMA as allowing people with these conditions to use medical marijuana but only if they take it in one particular form. Such an interpretation reduces, if not eliminates, medical marijuana as a treatment option for those who cannot take it in plant form, or who could receive a greater benefit from an alternative form.

Constraining patients' medical marijuana options contradicts the stated purpose of the AMMA -- to "protect patients with debilitating medical conditions . . . from arrest and prosecution, criminal and other penalties and property forfeiture if such patients engage in the medical use of marijuana." Prop. 203 § 2(G).

Proponents' and Voters' Intent

A statutory interpretation permitting the use of extracts is consistent with voters' intent in enacting the AMMA. Ballot materials demonstrate that proponents and voters did not intend patients to be prosecuted for using medical marijuana in the form that is the most beneficial to them. For example:

- The Descriptive Title voters read before casting their vote on the AMMA stated that the law "allows the use of marijuana for people with debilitating medical conditions who obtain a written certification from a physician and [it] establishes

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a regulatory system governed by the Arizona Department of Health Services for establishing and licensing medical marijuana dispensaries.”

- The November 2, 2010 ballot further stated that “[a] ‘yes’ vote shall have the effect of authorizing the use of marijuana for people with debilitating medical conditions who obtain a written certifications from a physician and [of] establishing a regulatory system governed by the Arizona Department of Health Services for establishing and licensing medical marijuana dispensaries. A ‘no’ vote shall have the effect of retaining current law regarding the use of marijuana.”

Nothing in these materials suggests that patients should or would be limited to using un-manipulated plant material for their medical needs.

Conclusion

Defendant Montgomery’s concern that an order in this case will impact his ability to prosecute people for using other types of extracts is irrelevant. The Court is solely concerned with the interpretation of the AMMA as written. The language of the AMMA and its ballot materials make clear that proponents and votes intended the AMMA to provide access to medicine for debilitating medical conditions without fear of criminal prosecution. The AMMA does not limit the form in which that medicine can be administered. Nor does it prohibit the use of extracts, such as CBD oil.

Accordingly,

IT IS HEREBY ORDERED that the AMMA authorizes qualifying patients to use extracts, including CBD oil, prepared from the marijuana plant.

IT IS FURTHER ORDERED vacating the evidentiary hearing on Plaintiffs’ Application for Preliminary Injunction on April 21, 2014. As stated above, this Declaratory Judgment Order means that Plaintiffs may treat Zander with medical marijuana in extract form and are entitled to the same protections under the AMMA that other medical marijuana patients enjoy. An injunction precluding prosecution is no longer warranted absent a showing that Defendant may attempt to prosecute in spite of this ruling.

The Court did receive Plaintiffs’ request for a telephonic conference to address the April 21, 2014 hearing. In view of the foregoing, the Court declines to set a status conference at this time.