

# Smokers losing child custody cases a growing trend | Washington Times Communities

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February 21, 2012 – If you smoke cigarettes, by now you have heard all the reasons you should quit: the harm to your health, the expense, the limits on where you can indulge your habit.

How about the possibility of losing custody of your

children? Would that motivate you to quit?

If you are involved in a child custody dispute and you are a cigarette smoker, your chance of getting full or even joint custody might go up in smoke.

States are increasingly factoring in cigarette smoking in making decisions about who gets custody of minor children. The group Action on Smoking and Health, an anti-tobacco advocacy group, surveyed custody issues involving cigarettes and tobacco use.

- In at least 18 states, courts have ruled that subjecting a child to tobacco smoke is a factor which should be considered in deciding custody.
- No judge and no court has ever ruled that subjecting a child to tobacco smoke should be ignored in deciding custody.
- In thousands of cases, courts have issued orders prohibiting smoking in the presence of a child, especially in vehicles.
- In some cases the orders prohibit smoking in a home 24 (or even 48) hours before the child arrives.
- In some cases, parents have lost custody or had visitation reduced because they subjected a child to tobacco smoke.
- Existing court orders regarding custody, visitation, etc. can often be modified if a child is being subjected to tobacco smoke.
- Courts sometimes consider the smoking habits of others who may have contact with the child, such as grandparents, friends, and “significant others” when making custody decisions.

Better kick the habit if you're seeking custody of your children.

So it's no surprise that the issue of smoking is an effective threat for a nonsmoking parent to gain leverage in custody and visitation battles. An upstate New York judge ordered a woman to stop smoking in her home and in her car if



she wanted to maintain her visitation rights with her 13-year-old son, who lives with his father.

In a Georgia case, the mother was addicted to smoking and after divorce it was found that her child had asthma. The court found that this mother was smoking in the presence of her child, which it said implied that she had insufficient concern for her child. This reason was considered strong enough for a change in custody.

Just as you don't want your child endangering his well-being by reckless behavior such as riding a bicycle into traffic, secondhand smoke's effects are by now well known and a legitimate concern for parents. Courts are sympathetic to this concern, especially if a child already has respiratory problems or allergies

Some parents quit smoking knowing a custody battle is ahead. While it won't hurt, it might not help all that much. Judges are skeptical about whether a parent is simply going to start smoking again once their case is settled. If you continue to smoke, help your case by smoking only outdoors, and never in a vehicle. Don't allow others to smoke in the presence of your children, even if you don't smoke.

Civil libertarians and parents may argue that the state may expand its intrusion into other family affairs if it is allowed to limit the right of a private citizen to smoke as a condition of being a parent. What if the child drinks too many sugary sodas, or plays violent video games? Most people bristle at the thought the state can monitor what a child eats, even though most people understand that a high fat, high sugar diet can lead to serious medical problems such as obesity and diabetes. If the state can control smoking by parents, couldn't the state also control the type of diet a parent provides their children? It's doubtful we will slide down this slippery slope, since the consequences of second hand smoke are well documented scientifically, giving the state an interest.

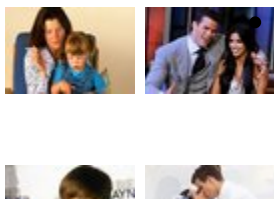
But this argument might as well be saved. Many courts have already decided that smoking should be a factor in custody decisions. Judge William F. Chinnock, visiting Judge to the Ohio Supreme Court, said in a law review article that a "considered analysis of family law across the United States leads to this inescapable conclusion: a family court that does not issue court orders restraining persons from smoking in the presence of children under the court's care fails those children whom the law has entrusted to its care."

Maybe losing custody of your children should be added to the warnings on packs of cigarettes. It might finally motivate many smokers to kick the habit.

Myra Chack Fleischer founded Fleischer & Associates in 2001 and serves as Lead Counsel with a focus on divorce, property, custody and support, settlement agreements, mediation, asset division and family law appeals. Read more Legally Speaking in the Communities at The Washington Times. Follow Fleischer & Associates on Facebook and on Twitter @

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