

MAKING A PIPE DREAM A REALITY: THE LEGISLATION ESTATE PLANNERS NEED TO GET MARIJUANA BASED ASSETS OUT OF LIMBO

Comment

by Sergio Herrera*

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I. INTRODUCTION

“If you build it, [they] will come.”¹ That seems to have been the mindset of the members of the 84th Session of the Texas Legislature who voted on the passage of Senate Bill 339, known as the Compassionate Use Act, which

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1. FIELD OF DREAMS (Universal Pictures 1989).

proposes to allow epilepsy patients to purchase and use low-THC cannabis.² If S.B. 339 becomes law, then Texas will become the 30th state to legalize some form of marijuana over the course of the past twenty-years.³ However, even though over half of the United States allows for citizens to start and engage in businesses within this newly legalized industry, none of these states are enacting legislation that deals with the certainty that every person, in and affected by the marijuana industry, faces—death.⁴

Heavy regulations, specifically, the requirement that any persons involved in the marijuana industry be licensed, are creating serious obstacles for estate planners with clients who want to pass marijuana based assets to their heirs and devisees.⁵ Moreover, many states define ownership in such a way that people, not directly involved in the business, are considered to be owners in the business.⁶ For example, in Colorado, if you receive any benefit from the business, then you are considered an owner, and therefore need a license.⁷

This comment will examine the nature of the legalized marijuana industry and how this industry is affecting estate planners.⁸ This comment aims to shine a light on what estate planners and legislators alike can do to make sure that estate planning legislation grows as the marijuana industry grows.⁹

First, this comment will discuss how marijuana laws have, in contrast to stagnant federal laws, evolved amongst the different states.¹⁰ This history will help show the direction, over the past two decades, that marijuana laws evolved at the state level.¹¹

Second, this comment will discuss the threshold question of whether lawyers in Texas may advise clients engaged in the marijuana industry.¹² While the Federal Government has stated that the prosecution of state legalized marijuana operations is not a priority, the cultivation, sale, and possession of marijuana is still a federal crime in the United States.¹³ It does not make sense for states to neglect to update and offer guidance in their

2. Liz Farmer, *Small Town North of Dallas Could Become Hub of Medical Cannabis Industry*, THE DALLAS MORNING NEWS (Aug. 9, 2016) <http://www.dallasnews.com/business/health-care/2016/08/09-small-town-north-of-dallas-could-become-hub-of-medical-cannabis-industry.ece> (last visited Sep. 14, 2016).

3. Gerry W. Beyer & Brooke Dacus, *Puff, the Magic Dragon, and the Estate Planner*, 3 TEX. A&M J. OF PROP. L. 1, 33–34 (2016).

4. Joel D. Russman, *Marijuana in Colorado: Estate Planning Issues* (Nov. 3, 2015).

5. *Id.*

6. *Id.*

7. *Id.*

8. *See id.*

9. *See generally id.* (addressing hole identified by Russman).

10. *See Representing Clients in the Marijuana Industry: Navigating State and Federal Rules*, Vol. 43 THE COLORADO LAWYER No. 8 (Aug. 2015).

11. *See id.*

12. *See id.*

13. *See id.*

respective rules of professional conduct, so that lawyers may know the extent to which they may advise their clients.¹⁴ Colorado's Comment 14 to their Rule 1.2(d) will be used as an example of how Texas can help its estate planning attorneys.¹⁵

Third, this comment will briefly examine the assets an estate planner can expect licensed members of the marijuana industry to want to include in their wills.¹⁶ While this section of the comment will discuss operator's needs to purchase and invest in equipment such as lights, hydroponic growing machines, and planting equipment, it will also try to explain how the low-THC requirement will affect the cost of investment for licensed operators in Texas.¹⁷

Fourth, this comment will walk through different hypotheticals to illustrate common scenarios members of the marijuana industry might face and need legal assistance with.¹⁸ The first hypothetical will show how Colorado's Rules of Professional Conduct treat attorneys providing advice to clients in the marijuana industry.¹⁹ Specifically, this hypothetical will examine how serving as a personal representative affects all parties involved.²⁰ The second hypothetical will consist of two sub-hypotheticals concerning a decedent dispensary operator, who owns marijuana plant inventory, and who has setup his or her operation as an LLC.²¹ The first sub-hypothetical will discuss when the lawyer serves as a personal representative and the heir/devisee is an in-state resident.²² The second sub-hypothetical will discuss when the lawyer serves as the personal representative and the heir/devisee is an out-of-state resident.²³ The second sub-hypothetical will also involve the dispensary operator/owner, who has a minor child and wants to pass down the business to the minor-child.²⁴

Last, this comment will offer proposed legislative language that will provide state representatives with some guidance on how to update the Texas Estates Code so that the Code reflects the effects of S.B. 339's proposals.²⁵ Currently, the Texas Estates Code does not mention or deal with how marijuana-based assets, such as dispensing organizations, are to be handled upon the death of a licensee.²⁶ The Texas Estates Code only references drugs

14. *See id.*

15. *See id.*

16. *See infra* Part II.E.

17. *See* Farmer, *supra* note 2.

18. *See* Russman, *supra* note 4.

19. *See infra* Part III.A.

20. *See infra* Part III.A.

21. *See infra* Part III.B.

22. *See infra* Part III.B.

23. *See infra* Part III.B.

24. *See infra* Part III.B.

25. *See infra* Part IV.

26. *See generally* TEX. EST. CODE ANN. (West 2017) (searching the Code does not produce any results on marijuana-based assets).

in section 251.001; however, section 251.001 only deals with a testator's capacity during the will making process.²⁷

II. BACKGROUND

The marijuana industry is one of the most heavily regulated industries in the United States, and yet, the constantly growing number of license applications from people wanting to grow marijuana, dispense it, or both, evinces the number of people that are willing to jump through the regulatory hoops.²⁸ However, while the regulations of state-sanctioned marijuana industries are rapidly changing in response to the nature of the industry, the state legislatures have done nothing regarding how this regulated industry affects the laws concerning wills and estates.²⁹

A. *The Controlled Substances Act of 1970*

In 2016, California marked the twentieth anniversary of becoming the first state in the United States to defy the Controlled Substances Act of 1970 (CSA) by passing Proposition 215—commonly known as the Compassionate Use Act of 1996.³⁰ Since 1996, the following states have followed California's lead: Alaska, Arizona, Arkansas, Colorado, Connecticut, the District of Columbia, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington.³¹ If the Texas Department of Public Safety (DPS) licenses at least three dispensing organizations by September 1, 2017, Texas can expect to join this list.³²

The aforementioned CSA is the major impediment that members of the respective states' legalized marijuana industries face.³³ "Shortly after taking office in 1969, President Nixon declared a national 'war on drugs.'"³⁴ As a part of the initial campaign of the war on drugs, Congress "set out to enact

27. See TEX. EST. CODE ANN. § 251.001 (West 2017).

28. See Bradley Steinman, *The Medical Use of Marijuana v. The Use of Marijuana for Medical Purposes*, A.B.A., https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/health-law/medical-use-marijuana-versus-use-marijuana-medical-purposes.html (last visited Oct. 20, 2016).

29. Joel D. Russman, *Marijuana in Colorado: Estate Planning Issues* (Nov. 3, 2015) (during a Colorado CLE held in 2015, two estate-planning attorneys had no real answer concerning how to transfer marijuana-based assets due to the law's silence on the matter).

30. See Steinmann, *supra* note 28.

31. See Gerry W. Beyer & Brooke Dacus, *Puff, the Magic Dragon, and the Estate Planner*, 3 TEX. A&M J. OF PROP. L. 1, 33–34 (2016).

32. Compassionate Use Program, TEXAS DPS, <https://www.dps.texas.gov/rsd/CUP/index.htm> (last visited Oct. 18, 2016). In between the time the author wrote this comment and its publication, the Texas DPS officially licensed three companies to manufacture CBD oil in Texas.

33. See Steinman, *supra* note 28.

34. *Gonzalez v. Raich*, 545 U.S. 1, 10 (2005).

legislation that would consolidate various drug laws on the books into a comprehensive statute.”³⁵ This comprehensive statute resulted in the enactment of the CSA, which aims at combatting the “recognized the danger involved in the manufacture, distribution, and use of certain psychotropic substances for nonscientific and nonmedical purposes.”³⁶ Moreover, under the CSA, drugs are classified under five different “Schedules,” with Schedule I being the most tightly controlled.³⁷ If the FDA decides that a drug has “no currently accepted medical use in treatment,” a “high potential for abuse,” and “lack[s] accepted safety for use under medical supervision,” then the DEA lists that drug as a Schedule I drug; the DEA currently classifies marijuana as a Schedule I drug.³⁸ Consequently, federal law does not distinguish between the medical and recreational distribution and use of marijuana by criminally treating all marijuana-related activity.³⁹

B. *The CSA in the Twenty-First Century*

As the twenty-first century nears the completion of its second decade, the CSA continues to be emblematic of the draconian drug laws promulgated by the federal government.⁴⁰ Beyond the problems with the prison sentencing for drug makers, drug dealers, and drug smugglers, what makes the CSA harsh is the federal government’s apparent inability or unwillingness to communicate a clear-cut plan for the future.⁴¹ Since 1996, the federal government has continued to leave state lawmakers unsure of their exact position regarding the individual states legalizing marijuana.⁴² With Liberal and Conservative lawmakers alike demonstrating a continuous trend towards a willingness to completely legalize marijuana in the not so distant future, the federal government has reached a point in time where if it wants legal clarity, it must act now.⁴³ What must the federal government do? The Trump Administration must issue a memo that either confirms that the Department of Justice will continue to maintain the stance on state legalized marijuana the Cole Memo articulated, or provide the states with a new memo outlining

35. *Id.* at 10.

36. *Controlled Substances Act*, U.S. FOOD & DRUG ADMINISTRATION <http://www.fda.gov/RegulatoryInformation/LawsEnforcedbyFDA/ucm148726.htm> (last visited Oct. 20, 2016).

37. *See id.*

38. *See Steinman, supra* note 28.

39. *See id.*

40. *See generally*, Jenn Gildman, *Now a Schedule 1 drug: CBD hemp oil*, FOX NEWS HEALTH (Dec. 20, 2016), <http://www.foxnews.com/health/2016/12/20/now-schedule-1-drug-cbd-hemp-oil.html> (reporting the news of the DEA’s decision to list CBD as a Schedule 1 drug and illustrating that the use of CBD by thousands of patients is still not enough to qualify as serving a medical purpose).

41. *See Gage Peake, Trump’s AG Nominee Continues to Waffle on Cannabis*, LEAFLY (Jan. 24, 2017), <https://www.leafly.com/news/politics/sessions-responds-cannabis-questions>.

42. *See id.*

43. *See id.*

how the Department of Justice plans to oversee the enforcement of the CSA going forward.⁴⁴

1. *Gonzalez v. Raich*

In 2005, over a decade after California's passage of Proposition 215, the Supreme Court's decision in *Gonzales v. Raich* affirmed that the CSA preempts state marijuana laws under the Supremacy Clause.⁴⁵ Specifically, the Court held that a state may not exempt purely local products from federal regulation.⁴⁶ While *Raich* concerned individuals that were criminally punished for their production and use of homegrown marijuana for medical purposes, *Raich* reminds the state governments that the federal government maintains control over marijuana laws in the United States.⁴⁷

2. *The Cole Memo*

On August 29, 2013, the Deputy Attorney General, James Cole, issued a memorandum aimed at guiding federal prosecutors in their enforcement of marijuana under the CSA.⁴⁸ In this memo, Cole asserts that while the Department of Justice would continue to enforce the CSA, it is most concerned with the distribution of marijuana to minors, marijuana revenues going to criminal enterprises, allowing marijuana to cross state lines, and violence stemming from "the use of firearms in the cultivation and distribution of marijuana."⁴⁹ Moreover, the DOJ would continue to delegate the handling of small amounts of marijuana to the respective state authorities.⁵⁰ Thus, while the Cole Memo served as all but a nod and a wink to the states and their intrastate treatment of marijuana, the federal government continues to assert that it is not yet willing to leave the regulation and prosecution of marijuana activity to the states entirely.⁵¹

3. *Civil Forfeiture Provisions*

While the Cole Memo alleviated the marijuana industry's fear of criminal prosecution, the fear that the "[DOJ] may choose to rely on the civil forfeiture provisions of the CSA to disrupt the operation of marijuana

44. James M. Cole, *Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement*, (Aug. 29, 2013) <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

45. See *Gonzalez v. Raich*, 545 U.S. 1, 1 (2005).

46. *Id.* at 34.

47. See *id.*

48. See Cole, *supra* note 44.

49. See *id.*

50. See *id.*

51. See Steinman, *supra* note 28.

dispensaries and production facilities” is still very much alive.⁵² The availability of civil forfeiture provisions held by the DOJ illustrates how important it is “that estate-planning professionals understand the consequences their clients face before preparing estate-planning documents dealing with marijuana-based assets.”⁵³ State and federal authorities commonly use asset forfeiture “to confiscate cash or property acquired through illegal means and siphon[] the proceeds directly to the government.”⁵⁴ Examples of such siphoning occurred in Tulsa, Oklahoma, where the police used a confiscated Cadillac Escalade to warn other criminals of what could result of ill-gotten cash and property.⁵⁵ The police in Monroe, North Carolina are currently using a surveillance drone purchased with “forty-four thousand dollars in confiscated drug money.”⁵⁶ The biggest concern with asset forfeiture is that some states allow the police to claim a person’s assets with the mere threshold of “suspicion on a par with ‘probable cause.’”⁵⁷

The DOJ’s ability to seize forfeited assets from members of the marijuana industry is a major concern when the amount of money generated from this industry continues to increase every year.⁵⁸ In 2015, the medical and recreational marijuana industry recorded sales of \$3 billion in sales of marijuana alone.⁵⁹ When they factor in the amount of money spent on ancillary services—such as plant harvesting equipment manufacturers, attorneys, CPAs, and business advisors—then experts believe that this figure jumps somewhere closer to the \$9.6 to \$11 billion range.⁶⁰ This is a twofold increase from the \$5.7 billion revenue figure recorded in 2013.⁶¹

C. Marijuana Based Assets

Just like any other business, for example, a law firm, operators of dispensing organizations will accumulate assets that become a part of their

52. Gerry W. Beyer & Brooke Dacus, *Puff, the Magic Dragon, and the Estate Planner*, 3 TEX. A&M J. OF PROP. L. 1, 22 (2016).

53. *Id.*

54. *Id.* See also Sarah Stillman, *Taken: Under Civil Forfeiture, Americans Who Haven’t Been Charged with Wrongdoing can be Stripped of Their Cash, Cars, and Even Homes. Is That All We’re Losing?*, NEW YORKER (Aug. 12, 2013) <http://www.newyorker.com/magazine/2013/08/12/taken>.

55. Sarah Stillman, *Taken: Under Civil Forfeiture, Americans Who Haven’t Been Charged with Wrongdoing can be Stripped of Their Cash, Cars, and Even Homes. Is That All We’re Losing?*, NEW YORKER (Aug. 12, 2013) <http://www.newyorker.com/magazine/2013/08/12/taken>.

56. *Id.*

57. *Id.*

58. See generally *id.* (applying asset forfeiture concerns to the expanding marijuana industry).

59. Molly Triffin, *How to Make Money from the Growing Marijuana Industry*, DAILY WORTH (May 18, 2015), <https://www.dailyworth.com/posts/3564-how-to-make-money-from-the-growing-marijuana-industry>.

60. *Id.*

61. See *id.*

estate.⁶² However, instead of mahogany conference tables, these assets will consist of expensive grow lamps, automated water timers, hydroponic equipment, and office equipment.⁶³ While Texas does not have any of these dispensary organizations up and running yet, it is reported that individuals wanting to enter the industry in other states must be ready to invest at least \$500,000 to have the chance of running a mildly profitable business, and around \$1,000,000 if they want to have a better chance at competing with the rest of the industry.⁶⁴ As an effort to ensure the tax revenue, many states are starting to require that applicants pay non-refundable application fees, which can cost as much as \$30,000.⁶⁵ Moreover, state licensing boards have stringent financial standards for each applicant.⁶⁶ Massachusetts rejected an applicant for “failure to incorporate as a non-profit organization and failure to show liquid assets more than \$500,000.”⁶⁷ Elsewhere, Arizona requires applicants to have at least \$150,000 in startup capital, and Nevada “requires proof of \$250,000 in liquid assets before [the applicant] can even apply for [a] permit.”⁶⁸

At the moment, the Texas DPS proposes a two-year license fee of \$488,520.⁶⁹ The amount started at \$6,000 and subsequently went as high as \$1,300,000.⁷⁰ On December 30, 2016, concerned groups such as CannOrganics of Texas and the Texas Cannabis Industry Association voiced their concern in Subchapter B’s comments to the Proposed Administrative Rule Amendments to S.B. 339.⁷¹ Collectively, these aforementioned groups expressed their desire for the Texas DPS to set the licensing fee cost to become a dispensing organization at an amount comparable to other states’ compassionate use act licensing fees.⁷² The DPS explained its reason for setting the cost of a two-year license fee at \$488,520 by explaining that it must generate enough money to cover the cost of administering the Compassionate Use Program.⁷³ Additionally, the Texas DPS currently proposes that the biennial renewal of the dispensing organization license cost

62. See Elise Reuter, *How to Open a Marijuana Dispensary in Colorado*, SUMMIT DAILY (Aug. 15, 2015) <http://www.summitdaily.com/news/how-to-open-a-marijuana-dispensary-in-colorado/>.

63. *Id.*

64. *See id.*

65. Russ Belville, *The High Cost of a Marijuana Dispensary*, THE WEED BLOG (Oct. 19, 2013), <https://www.theweedblog.com/the-high-cost-of-a-marijuana-dispensary/>.

66. *Id.*

67. *Id.*

68. *Id.*

69. S.B. 339, 84th Leg., R.S., ch. 487 (Tex. 2015).

70. Alan Brochstein, *Texas Medical Cannabis Program Threatened by Proposed \$1.3mm License Fee*, NEW CANNABIS VENTURES (Oct. 26, 2016), <https://www.newcannabisventures.com/texas-medical-cannabis-program-threatened-by-proposed-1-3mm-license-fee/>.

71. 42 Tex. Reg. 33, 55 (2017) (adopted by 42 Tex. Reg. 1065, 1139 (2017) (to be codified as an amendment to 37 TEX. ADMIN. CODE § 12.11, 12.14, 12.15) (Tex. Dept. of Pub. Safety)).

72. *Id.*

73. *Id.*

\$318,511, and the original and renewal registrations fees cost \$530 each.⁷⁴ The Texas DPS currently approximates that three licenses will be granted, with each dispensing organization employing 37 people on average.⁷⁵

D. *The Impact of the 2016 Presidential Election*

On the eve of November 8, 2016, the marijuana industry likely felt safe that the status quo of their relationship with the federal government would remain undisturbed.⁷⁶ However, as the world woke up on November 9, 2016, the status quo of American government as a whole remains to be forever altered.⁷⁷ The election of Donald Trump creates serious questions of concern for citizens of the twenty-eight states and the District of Columbia where marijuana is legal in some form.⁷⁸ The question of greatest concern is how much the next Attorney General Senator Jeff Sessions's "long and antagonistic attitude toward marijuana" will influence the DOJ's position on state legalized marijuana.⁷⁹

1. *Recreational and Medicinal Marijuana Ballot Initiatives*

During the November 2016 elections, the United States witnessed California, Nevada, and Massachusetts pass ballot initiatives legalizing the recreational use of marijuana.⁸⁰ In addition, Arkansas, Florida, Montana, and North Dakota all passed medical marijuana initiatives.⁸¹ The addition of these three states meant "the percentage of Americans living in states where [recreational] marijuana use is legal for adults rose above 20 percent, from 5 percent."⁸² Consequently, 65 million Americans now live in states that authorize the adult use of recreational marijuana.⁸³ Half of Americans now

74. *Id.*

75. *Id.* (basing these estimates off analysis conducted on other states' compassionate use programs, the number of Texans suffering from intractable epilepsy, and the Texas Health and Safety Code's requirement that the Texas DPS issue at least three licenses).

76. See generally Ben Wolfgang, *Hillary Clinton Blows Chance to Win Over Millennials with Slow Evolution on Pot*, THE WASHINGTON TIMES (Oct. 8, 2016), <http://www.washingtontimes.com/news/2016/oct/6/hillary-clintons-marijuana-legalization-stance-ali/>.

77. See David Remnick, *An American Tragedy*, THE NEW YORKER (Nov. 9, 2016) <http://www.newyorker.com/news/news-desk/an-american-tragedy-2> (changing the status quo will largely stem from having a president in office that has never governed before and who has also never articulated how his administration will work with the other two branches of government and state and local governments).

78. James Higdon, *Jeff Sessions' Coming War on Legal Marijuana: There's Little to Stop the Attorney General Nominee from Ignoring the Will of Millions of Pro-Pot Voters*, POLITICO (Dec. 5, 2016) <http://www.politico.com/magazine/story/2016/12/jeff-sessions-coming-war-on-legal-marijuana-214501>.

79. *Id.*

80. Thomas Fuller, *Californians Legalize Marijuana in Vote That Could Echo Nationally*, THE NEW YORK TIMES (Nov. 9, 2016) <http://www.nytimes.com/2016/11/09/us/politics/marijuana-legalization.html>.

81. See *id.*

82. See *id.*

83. See Higdon, *supra* note 78.

have access to medical marijuana, and most of the rest of the citizenry live in a state that permits the use of CBD to treat epilepsy patients.⁸⁴ And, while some news outlets report that the vote in California to legalize recreational marijuana “could echo nationally,” the marijuana industry was simultaneously dealt an unexpected wild card—the election of Donald Trump as the 45th President of the United States.⁸⁵ The marijuana industry now faces great uncertainty as to how the Trump Administration will handle legalized marijuana.⁸⁶

2. *Will the New Attorney General Please Stand Up*

On February 8, 2017 Jeff Sessions survived his tumultuous confirmation hearing and senate vote to become the 84th Attorney General of the United States.⁸⁷ Given Mr. Sessions’s previous statements regarding marijuana reform, Mr. Sessions will likely remain the biggest question mark for the legal marijuana industry.⁸⁸ Specifically, the marijuana industry must remain concerned about a new administration led by a president who lends a larger ear to those who demonstrate greater degrees of loyalty, which President Trump exemplified by nominating Sessions who recently stated, “good people don’t smoke marijuana,” and considers marijuana reform to be a “tragic mistake.”⁸⁹

E. *Texas’s Compassionate Use Act of 2015*

With the number of states considering legalizing marijuana continuing to grow, certain state legislatures have interpreted the Cole Memo as an all clear rather than a warning to cease and desist.⁹⁰ With Texas being one of those states, and the state in focus for the purposes of this comment, a discussion on the type of marijuana that Texas wants to legalize under S.B. 339 is necessary.⁹¹ S.B. 339 intends to allow for Texans suffering from severe forms of epilepsy to cultivate and use non-psychoactive cannabis as

84. *See id.*

85. *See Fuller, supra* note 80.

86. *See* Christopher Ingraham, *What the Future of Marijuana Legalization Could Look Like Under President Trump*, THE WASHINGTON POST (Nov. 9, 2016) https://www.washingtonpost.com/news/wonk/wp/2016/11/09/what-the-future-of-marijuana-legalization-could-look-like-under-president-trump/?utm_term=.8660193d73cb.

87. *See* Eric Lichtblau & Matt Flegenheimer, *Jeff Sessions Confirmed as Attorney General, Capping Bitter Battle*, NYTIMES (Feb. 8, 2017) https://www.nytimes.com/2017/02/08/us/politics/jeff-sessions-attorney-general-confirmation.html?_r=0.

88. *See Peake, supra* note 41.

89. *See Higdon, supra* note 78.

90. *See Peake, supra* note 41.

91. S.B. 339, 84th Leg., R.S., ch. 487 (Tex. 2015).

an alternative form of treatment.⁹² Non-psychoactive cannabis means that the plant will have extremely low levels of tetrahydrocannabinol, or THC, and thus lacks the key ingredient that allows people to get high.⁹³ Consequently, in Texas, plants with low THC levels are considered cannabis rather than marijuana, which Texas defines as a plant containing higher levels of THC.⁹⁴ The cannabis plants that S.B. 339 proposes approval of are engineered to not only “have extremely low levels of THC,” but are also “rich in cannabidiol, or CBD, a non-psychoactive chemical that could help reduce seizures in some people.”⁹⁵ Currently, hundreds of thousands of patients across the United States use CBD for a variety of medical purposes.⁹⁶ In order for these patients to be able to use CBD oil, they must obtain a doctor’s prescription.⁹⁷

CBD’s hemp base contains no more than between 0.3% and 1% THC; accordingly, companies currently selling CBD were, up until recently, operating under an assumption of presumed legality.⁹⁸ However, as of December 20, 2016, the DEA designated CBD as a Schedule 1 drug.⁹⁹ While Texas may face uncertainty legalizing marijuana-based treatments in light of the new CBD classification, the uncertainty estate planning attorneys face remains the same.¹⁰⁰ Estate planners do exactly what their title entails, they plan, and without the requisite guidance from the state Attorney General and adoptions to the language in Texas Estates Code, planning will remain difficult.

Note, the focus of this comment is not on marijuana or cannabis, but rather how the legalization affects the transfer of assets accumulated by those in the industry.¹⁰¹ Nevertheless, it is important to know what exactly Texans will be growing, because these dispensing organizations will not merely be a regulated version of your stoner buddy’s failed growing operation in college.¹⁰² Instead, CBD is highly engineered and can be expensive and complicated to cultivate; meaning that any licensed director of a dispensing organization will have to invest in expensive equipment, real estate, and of course, attorney’s fees.¹⁰³

92. See Farmer, *supra* note 2.

93. See *id.*

94. See *id.*

95. See *id.*

96. Jenn Gidman, *Now a Schedule 1 Drug: CBD hemp oil*, FOX NEWS (Dec. 20, 2016) <http://www.foxnews.com/health/2016/12/20/now-schedule-1-drug-cbd-hemp-oil.html>.

97. See Farmer, *supra* note 2.

98. See Gidman, *supra* note 96.

99. See *id.*

100. See *id.* See also Thomas H. Clarke, *Texas Governor Signs ‘Unworkable’ Medical Marijuana Bill*, THE DAILY CHRONIC (June 1, 2015) <http://www.thedailychronic.net/2015/43734/texas-governor-signs-medical-unworkable-medical-marijuana-bill/>.

101. See Russman, *supra* note 4.

102. See Farmer, *supra* note 2.

103. See *id.*

Even though applicants must have substantial startup capital to enter the marijuana industry, the supply of qualified professionals, such as attorneys, bankers, and CPAs is quite small; because many professionals are afraid of being disciplined by their respective disciplinary board.¹⁰⁴ Currently, Rule 1.02(c) of the Texas Disciplinary Rules of Professional Conduct states:

(1) A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning or application of the law.¹⁰⁵

Thus, Texas Bar has left attorneys in the dark concerning how their involvement with the marijuana industry, under the authority of S.B. 339, potentially affects their ability to continue to practice in Texas.¹⁰⁶ While estate-planning attorneys are largely still in the dark regarding whether they may legally and “ethically assist a client in drafting a will or trust concerning illegal assets,” a handful of states provide some degree of guidance to the legal community “by taking widely varying approaches.”¹⁰⁷ Arizona issued an ethics opinion that permits attorneys to “assist clients wishing to start businesses or engage in other actions permitted under the Arizona Medical Marijuana Act.”¹⁰⁸ Alternatively, Connecticut issued an ethics opinion that attorneys “may advise and represent a client as to state requirements for licensing and regulation of marijuana businesses,” however, the attorney must inform the client of pertinent federal laws and the “lawyer may not assist the client in criminal conduct.”¹⁰⁹ Colorado issued a clarifying comment to the legal profession when it published Comment 14 to the Colorado Rules of Professional Conduct Rule 1.2(d).¹¹⁰ Rule 1.2(d) states:

A lawyer may not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and

104. See Russman, *supra* note 4 (recognizing states that have not issued official commentary to their rules of professional conduct leave many attorneys fearful that involvement in the marijuana industry could result in disciplinary actions).

105. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(c)(1), *reprinted* in TEX. GOV'T CODE ANN. tit. 2, subtit. G, app. A (West 2017) (Tex. State Bar R. art. X, § 9).

106. See Russman, *supra* note 4.

107. See Gerry W. Beyer and Brook Dacus, *Joint Wills and Pot Trusts: Marijuana and the Estate Planner*, ESTATE PLANNING STUDIES (Apr. 2016).

108. See Beyer & Dacus, *supra* note 107.

109. See Beyer & Dacus, *supra* note 107.

110. See *infra* note 111.

may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.¹¹¹

Additionally, Comment 14 to Rule 1.2(d) states:

[A lawyer may] assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions [Amendment 64, §§ 14 and 16] and the statutes, regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.¹¹²

Estate planning attorneys must be ready and willing to take the risks associated with counseling clients engaged in an enterprise that is still illegal under the CSA.¹¹³ However, this lack of guidance further demonstrates that legislators and state bar associations need to offer clarifying memos and comments, much like the Cole Memo and Comment 14, so that attorneys and members of the marijuana industry know exactly where they stand regarding their legal counsel.¹¹⁴

As Texas attempts to pack its bowls in the legalized marijuana industry for the first time, it would behoove the Texas State Bar Association to issue a memorandum opinion to all attorneys explaining how S.B. 339 affects current rules and legislation.¹¹⁵ Specifically, a comment similar to that issued by the Colorado Bar Association would help guide lawyers and the lawmakers in Austin.¹¹⁶ Below is a proposed comment to Rule 1.02(c) of the Texas Disciplinary Rules of Professional Conduct:

A lawyer may assist and counsel a client in conduct that the lawyer reasonably believes is permitted under the Texas Constitution and the statutes, regulations, orders, and other state or local provisions implementing them. The lawyer shall reasonably believe that the clients' conduct is entirely intrastate in nature and the lawyer shall also advise the client regarding related federal law and policy.¹¹⁷

111. See *Representing Clients in the Marijuana Industry: Navigating State and Federal Rules*, Vol. 43 THE COLORADO LAWYER No. 8 (Aug. 2015).

112. See *id.*

113. See Russman, *supra* note 4.

114. See *id.*

115. See *id.*

116. See *Representing Clients in the Marijuana Industry: Navigating State and Federal Rules*, Vol. 43 THE COLORADO LAWYER No. 8 (Aug. 2015).

117. See *generally id.* (lawyers must know that the only risk they run is with the federal government and that the state in which they practice condones their counseling of clients with marijuana based assets).

III. HYPOTHETICALS

The following hypotheticals are all acting under the assumption that the Rules of Professional Conduct have condoned lawyers counseling clients with marijuana assets.¹¹⁸

A. Attorney Serves as Personal Representative to an Estate

If an attorney serves as a personal representative to an estate and discovers that the decedent was growing marijuana and has both plants and harvested marijuana, then the first thing that the attorney must do is determine whether the decedent had a valid will.¹¹⁹ If the heir/devisee is a resident of the state and has reached the age of majority, then it is arguable that the attorney can transfer the legally allowable amount of plants and/or harvested marijuana to the heir/devisee.¹²⁰ However, this scenario changes if the heir/devisee is an out-of-state resident.¹²¹ If the heir/devisee is an out-of-state resident, then it is likely that the marijuana will get stuck in probate and ultimately become property of the state.¹²² Under this latter scenario, attorneys will not be disciplined so long as they do not attempt to counsel the out-of-state resident on how to take possession of the marijuana.¹²³

B. Decedent Has an LLC Dispensary Operation with Marijuana Inventory

1. In-State Heir/Devisee

Now, the decedent in this hypothetical set up a dispensary operation as an LLC and was the sole shareholder of the LLC.¹²⁴ A decedent, as the sole shareholder of an LLC, presents a difficult problem for any heirs/devisees because any person that not only inherits a dispensary operation but also receives a benefit from the business, is usually considered to be an owner.¹²⁵ In Colorado, for example, if the decedent transfers ownership or benefits prior to the heir/devisee receiving a license from the Marijuana Enforcement Division, then the heir/devisee will forfeit his or her right to the license.¹²⁶ Currently, Texas has not defined who qualifies as an owner.¹²⁷ However, it

118. See Russman, *supra* note 4.

119. See *id.*

120. See *id.*

121. See *id.*

122. See *id.*

123. See *id.*

124. See *id.*

125. See *id.*

126. See *id.*

127. TEXAS DEPARTMENT OF PUBLIC SAFETY, <https://www.txdps.state.tx.us/rsd/CUP/index.htm> (last visited Nov. 9, 2016).

is clear that any person who wants to operate a dispensary organization must receive a license from the Texas DPS.¹²⁸ Under this set of circumstances, it would be smart for the estate planner to advise the heir/devisees (assuming they've reached the age of majority) to apply for a license in anticipation of testator's execution of the will.¹²⁹ Once the heirs/devisees receive their license, then they can likely inherit the marijuana as inventory of the LLC.¹³⁰ Because the marijuana industry is so heavily regulated, communication and planning on both the attorney's side and on the client's side are crucial.¹³¹

2. Out-of-State Heir/Devisee

If the testator knows that the heirs/devisees live out-of-state, then it is advisable that either the testator or the estate planner contact the heir/devisee and see if he or she would be willing to change residency to the testator's state of residency.¹³² While this may take several years, it again proves how crucial long-term planning is in this area of estate planning.¹³³ However, if the heirs/devisees are not willing to move, then the testator must find a new heir/devisee.¹³⁴ While there is no case law concerning whether heirs/devisees living in a state that prohibits marijuana could inherit a marijuana dispensary, there is case law where a man inherited an antique gun when his status as a convicted felon prohibited him from legally owning any firearms.¹³⁵

In *United States v. Davis*, Davis received and then stored an unregistered firearm from his father.¹³⁶ When the police subsequently discovered the firearm, Davis was charged and convicted of possession of a non-registered firearm by a felon.¹³⁷ On appeal, the Seventh Circuit upheld the conviction because Davis admitted that he inherited the gun.¹³⁸ While this does not do much to clarify how this situation would unfold if Davis had inherited a dispensary or grow operation, it does illustrate that heirs/devisees must be vigilant about making sure what they inherit is legal.¹³⁹

128. *See id.*

129. *See* Russman, *supra* note 4.

130. *See id.*

131. *See* Beyer & Dacus, *supra* note 107.

132. *See* Russman, *supra* note 4.

133. *See id.*

134. *See id.*

135. *See* Beyer & Dacus, *supra* note 107.

136. *United States v. Davis*, 15 F.3d 1393, 1397 (7th Cir. 1994).

137. *Id.*

138. *Id.*

139. *See id.*

C. Decedent Owns Licensed Grow Operation

1. Minor Children at Time of Execution of Will

If the testator has children that are minors at the time he or she executes the will, then those minor children will be ineligible to receive any benefits or ownership shares in the dispensing organization because every director and employee must be at least 21 years old.¹⁴⁰ The testator could not even grant an interest in the dispensing organization for a term of years to a person who has reached the age of majority with plans of granting a future interest to his or her minor child.¹⁴¹ States such as Colorado consider individuals that receive future interest in a marijuana business to be owners at the time the interest is granted and not when the interest vests.¹⁴² In Texas, S.B. 339 currently proposes that all employees must be twenty-one years of age, and defines “employee” to mean “an individual engaged by or contracting with a licensee to assist with any regulated function, whether or not compensated by salary or wage.”¹⁴³ Therefore, the testator will have to hope that he or she stays alive until his or her children reach twenty-one years of age.¹⁴⁴

IV. MARIJUANA AND CANNABIS IN ESTATE CODES

Currently, the terms “marijuana” and “cannabis” do not appear anywhere in the Texas Estates Code. A Boolean word search for “marijuana” and “cannabis” provides you with zero results in the Estates Code on Westlaw. Similarly, a Boolean word search for the same terms provides you with the following results in states that have legalized some form of marijuana use:

- Alaska: zero results.¹⁴⁵
- Arizona: zero results.¹⁴⁶
- Arkansas: zero results.¹⁴⁷
- California: two results, but both results only deal with whether a guardian caught smoking marijuana within the decedent’s house may

140. 37 TEX. ADMIN CODE § 12.2 (2016) (Tex. Dep’t of Public Safety).

141. See Russman, *supra* note 4.

142. See *id.*

143. 37 TEX. ADMIN CODE § 12.1 (2016) (Tex. Dep’t of Public Safety).

144. See Russman, *supra* note 4.

145. See generally ALASKA STAT. ANN. (West 2016) (searching for “marijuana” and “cannabis” in the search pertaining to Title 13, Decedent’s Estates, Guardianships, Transfers, Trusts, and Decisions produced no results).

146. See generally ARIZ. REV. STAT. ANN. § 14 (West 2017) (searching for “marijuana” and “cannabis” in the search pertaining to the Trusts, Estates, and Protective Proceedings produced no results).

147. See generally ARK. CODE ANN. § 28 (West 2017) (searching for “marijuana” and “cannabis” in the search pertaining to the Wills, Estates, and Fiduciary Relationships section produced no results).

- still be compensated.¹⁴⁸
- Colorado: zero results.¹⁴⁹
 - Connecticut: one result, but it does not concern legalized marijuana, but instead only relates to the termination of parental rights.¹⁵⁰
 - Delaware: zero results.¹⁵¹
 - Florida: zero results.¹⁵²
 - Hawaii: five results, but the results pertain to treatment that a landlord can display upon a tenant's use of medical marijuana.¹⁵³
 - Illinois: zero results.¹⁵⁴
 - Louisiana: zero results.¹⁵⁵
 - Maine: one result, but it pertains to the courts' ability to appoint a guardian to a minor whose parent used alcohol and marijuana.¹⁵⁶
 - Maryland: zero results.¹⁵⁷
 - Massachusetts: zero results.¹⁵⁸
 - Michigan: zero results.¹⁵⁹
 - Minnesota: zero results.¹⁶⁰
 - Montana: zero results.¹⁶¹

148. *See generally* CAL. PROB. CODE (West 2016) (searching for “marijuana” and “cannabis” in the search pertaining to the probate code produced no results relevant so subject matter).

149. *See generally* COLO. REV. STAT. ANN. § 15 (West 2016) (searching for “marijuana” and “cannabis” in the search pertaining to the probate code produced no results).

150. *See generally* CONN. GEN. STAT. ANN. § 45a (West 2017) (searching for “marijuana” and “cannabis” in the search pertaining to the Probate Courts and Procedure title produced one results that does not relate to the topic of this article).

151. *See generally* DEL. CODE ANN. tit. 12 (West 2017) (searching for “marijuana” and “cannabis” in the search pertaining to the Decedents' Estates and Fiduciary Relations title produced no results).

152. *See generally* FLA. STAT. ANN. § 17 (West 2017) (searching for “marijuana” and “cannabis” in the search pertaining to the Estates and Trusts code produced no results).

153. *See generally* HAW. REV. STAT. ANN. § 3 (West 2017) (searching for “marijuana” and “cannabis” in the search pertaining to the Property; Family division produced no results).

154. *See generally* Ch. 755 Ill., COMP. STAT. ANN. (West 2017) (searching for “marijuana” and “cannabis” in the search pertaining to Chapter 755 Estates produced no results).

155. *See generally* LA. CIV. CODE ANN. (West 2017) (searching for “marijuana” and “cannabis” in the search pertaining to Things and the Different Modifications of Ownership produced no results).

156. *See generally* ME. REV. STAT. ANN. tit. 18a-20 (West 2017) (searching for “marijuana” and “cannabis” in the search pertaining to Probate Court, Decedents' Estates, and Trusts produced zero results).

157. *See generally* MD. CODE ANN. EST. & TRUSTS (West 2017) (searching for “marijuana” and “cannabis” in the search pertaining to Estates and Trusts produced zero results).

158. *See generally* MASS. GEN. LAWS ANN. ch's. 190–206 (West 2016) (searching for “marijuana” and “cannabis” in the search pertaining to Title II produced no results).

159. *See generally* MICH. COMP. LAWS ANN. § 720 (West 2017) (searching for “marijuana” and “cannabis” produced no results in the search pertaining to the Probate and Estates and Protected Individuals chapters).

160. *See generally* MINN. STAT. ANN. §§ 524–539 (West 2017) (searching for “marijuana” and “cannabis” produced no results in the search pertaining to the Probate; Property; Estates; Guardianship; Anatomical Gifts chapters).

161. *See generally* MONT. CODE ANN. § 72 (West 2017) (searching for “marijuana” and “cannabis” produced no results in the search pertaining to the Estates, Trusts, and Fiduciary Relationships title).

- Nevada: zero results.¹⁶²
- New Hampshire: zero results.¹⁶³
- New Jersey: zero results.¹⁶⁴
- New Mexico: zero results.¹⁶⁵
- New York: one result, pertaining to family law rights.¹⁶⁶
- North Dakota: zero results.¹⁶⁷
- Ohio: zero results.¹⁶⁸
- Oregon: zero results.¹⁶⁹
- Pennsylvania: zero results.¹⁷⁰
- Vermont: zero results.¹⁷¹
- Washington: zero results.¹⁷²
- District of Columbia: zero results.¹⁷³

V. SOLUTION

The fact that none of the above states' estates, probate, or wills and trusts codes deal with marijuana based assets illustrates the urgency with which state lawmakers must act.¹⁷⁴ Currently, more than half of the United States

162. See generally NEV. REV. STAT. ANN. § 3 (West 2016) (searching for “marijuana” and “cannabis” in the search pertaining to the decedent’s estates and fiduciary relations produced no results).

163. See generally N.H. REV. STAT. ANN. § 56 (West 2017) (searching for “marijuana” and “cannabis” in the search pertaining to New Hampshire Probate Courts and Decedents’ Estates title).

164. See generally N.J. STAT. ANN. § 3b (West 2017) (searching for “marijuana” and “cannabis” in the search pertaining to New Jersey Administration of Estates—Decedents and Others produced no results).

165. See generally N.M. STAT. ANN. §§ 45, 46A (West 2017) (searching for “marijuana” and “cannabis” in the search pertaining to New Mexico Uniform Probate and Uniform Trusts Code produced no results).

166. See generally N.Y. EST. POWERS & TRUSTS LAW (West 2017) (searching for “marijuana” and “cannabis” in the search pertaining to New York Estates Powers and Trusts code produced no results).

167. See generally N.D. CENT. CODE ANN. § 30, 59 (West 2017) (searching for “marijuana” and “cannabis” in the search pertaining to North Dakota Uniform Probate Code and Trusts titles).

168. See generally OHIO REV. CODE ANN. § 58 (West 2017) (searching for “marijuana” and “cannabis” in the search pertaining to Ohio Trusts title produced no results).

169. See generally OR. REV. STAT. ANN. §§ 111.005–121.370 (West 2016) (searching for “marijuana” and “cannabis” in the search pertaining to Oregon probate law produced no results).

170. See generally 20 PA. STAT. AND CONS. STAT. ANN. (West 2017) (searching for “marijuana” and “cannabis” in the search pertaining to Pennsylvania Decedents, Estates and Fiduciaries title produced no results).

171. See generally VT. STAT. ANN. tit. 14 (West 2017) (searching for “marijuana” and “cannabis” in the search pertaining to Vermont Decedents’ Estates and Fiduciary Relations title produced no results).

172. See generally WASH. REV. CODE ANN. §§ 11.02.001–11.120.901 (West 2016) (searching for “marijuana” and “cannabis” in the search pertaining to Oregon probate law produced no results).

173. D.C. CODE ANN. §§ 18-101–21-2405.03 (West 2016) (searching for “marijuana” and “cannabis” in the search pertaining to Decedent’s Estates and Fiduciary Relations under Division III).

174. *State Marijuana Laws in 2017 Map*, GOVERNING, <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html> (last visited Jan. 27, 2017). See also Gage Peake, *Trump’s AG Nominee Continues to Waffle on Cannabis*, LEAFLY (Jan. 24, 2017), <https://www.leafly.com/news/politics/sessions-responds-cannabis-questions>.

allows for the sale of some form of marijuana and/or cannabis, yet the same lawmakers who passed laws legalizing marijuana have failed to amend the language in their estate codes to make sure that members of the marijuana community can transfer their assets like others engaged in commerce can transfer the assets of their business.¹⁷⁵

Today, it is nearly impossible to will a marijuana business, or even profits from a marijuana business, to your minor child because most states consider being included in the will as benefiting from the business, thus making that devisee an owner.¹⁷⁶ However, minors can currently benefit from wine and vineyard trusts, yet it is still illegal for minor children to drink wine.¹⁷⁷

Colorado is still guilty of not amending its estate code; however, Colorado has recently proposed a law that allows for members of the marijuana industry to receive funding from out-of-state banks.¹⁷⁸ Colorado acknowledged the burden that limiting funding to marijuana operations to intrastate funding places on the industry as a whole.¹⁷⁹ Moreover, the Colorado legislature asserts that providing Colorado marijuana businesses with access to legitimate out-of-state capital would help prevent illegal sources of capital from entering the industry.¹⁸⁰ While the federal government has not stated whether it will take action against Colorado citizens who utilize out-of-state sources of funding, Colorado's funding approach will be a litmus test for laws that reflect the realities of the legal marijuana industry's needs.¹⁸¹ If the DOJ allows Colorado's marijuana businesses to obtain out-of-state funding, then it would appear that the federal government is fine with the industry continuing to grow so long as the product and the revenues stay in state.¹⁸²

Texas should embrace Colorado's recent acknowledgment of the realities of the marijuana industry by amending the Texas Estates Code to

175. *State Marijuana Laws in 2017 Map*, GOVERNING, <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html> (last visited Jan. 27, 2017). *See also* Gage Peake, *Trump's AG Nominee Continues to Waffle on Cannabis*, LEAFLY (Jan. 24, 2017), <https://www.leafly.com/news/politics/sessions-responds-cannabis-questions>.

176. *See* Russman, *supra* note 4 (explaining that a person who, through a will, receives a future benefit is considered an owner and therefore must be licensed, however, people who have not reached the age of majority are ineligible to even apply for a license).

177. *See generally* John Whiting, *Tips for Trustees of Family Trusts*, WINE BUSINESS MONTHLY (July 2016), <https://www.winebusiness.com/wbm/?go=getDigitalIssue&issueId=8505&dataId=170205&recentArticleRedirect=true> (explaining that wine and vineyard trusts allow proceeds from the trust to go to beneficiaries who are minors at the time they receive the benefit).

178. S.B. 16-040, 70th Gen. Assemb., 2nd Reg. Sess. (Co. 2016).

179. *Id.* at § 12-43.3-307.5.

180. *Id.*

181. *See* Peake, *supra* note 41.

182. *See id.* (considering Jess Sessions's historically harsh stance on marijuana reform, it seems unlikely that the DOJ will allow states to test the waters of making legalized marijuana quasi-interstate; therefore, if the DOJ does not act on states allowing this new source of funding the DOJ will have passed this litmus test).

treat marijuana based assets like all other assets currently in the Estates Code.¹⁸³ The Texas DPS recently deleted the proposal under § 12.2(y) of S.B. 339 that licensees comply with federal law, to instead requiring “licensees acknowledge federal laws governing marijuana and its interstate transportation.”¹⁸⁴ The deletion of § 12.2(y) is a step in the right direction and shows some promise that the Texas legislature is capable of making a similar change to the Texas Estates Code.¹⁸⁵ The following paragraphs discuss the necessary changes the Texas legislature must make to the Texas Estates Code in order for estate planning attorneys to help Texans with marijuana based assets.¹⁸⁶

First, if Texas wants to start its venture into the legalized marijuana industry correctly, then it will issue the following clarifying comments to the Texas Estates Code:

Marijuana based assets are those assets that are derived and utilized in the business of marijuana and cannabis cultivation, production, preparation, and sale to individuals who have reached the age of majority.

Devisees who have not reached the age of majority at the time a will is executed may receive financial benefits from a marijuana or cannabis related business that is sanctioned and regulated under the Constitution and laws of Texas so long as a trustee, who is of the age of majority, manages the funds until said devisee reaches the age of majority. Once said devisee reaches the age of majority he or she must become licensed and abide by all regulations set forth by the Texas Department of Public Safety.

The language in this comment would allow estate planners to start helping the individuals that own and are employed by dispensing organizations.¹⁸⁷ A comment will likely take less time to put in place than the amount of time it will take to enact a version of S.B. 339 that will account for the needs of estate planners.¹⁸⁸ The language in the comment will allow the individuals involved in dispensary organizations to setup wills that devise assets that were either purchased or used for the cultivation of marijuana.¹⁸⁹ This commentary language would allow the minor child in the third hypothetical to be written into the will prior to turning twenty-one years old and would

183. See Thomas H. Clarke, *Texas Governor Signs ‘Unworkable’ Medical Marijuana Bill*, The Daily Chronic (June 1, 2015), <http://www.thedailychronic.net/2015/43734/texas-governor-signs-medical-unworkable-medical-marijuana-bill/> (failing to amend S.B. 339 will leave the standard unworkable for estate planners).

184. 41 Tex. Reg. 8520 (2016), amended by 42 Tex. Reg. 1139 (2017) (to be codified as an amendment to 37 § 12.2) (Tex. Dep’t of Public Safety).

185. See *id.* TEX. ADMIN CODE.

186. See *id.*

187. See Clarke, *supra* note 183 (enacting may take longer than anticipated because of the different parties unhappy with S.B. 339).

188. See *supra* note 177.

189. See generally TEX. EST. CODE ANN. § 22 (West 2017) (failing to define marijuana based asset, estate planners are left without guidance on how to transfer such assets).

eliminate the risk of the testator dying before his or her minor child turning twenty-one.¹⁹⁰

Second, estate planners must lobby the legislature to include the following definition of “Marijuana Based Asset” under § 22 of the Texas Estates Code to include:

- a) All marijuana-based plants used to produce CBD oil as allowed under the laws and Constitution of Texas;
- b) All equipment used to cultivate, manufacture, and harvest cannabis plants used for the production of CBD oil;
- c) All monies used to finance the equipment used to cultivate, manufacture, and harvest cannabis plants used for the production of CBD oil;
- d) All profits derived from the sale of CBD oil;
- e) All profits derived from the sale of equipment to other licensed producers of CBD oil;
- f) All other personal property used to cultivate, manufacture, and harvest cannabis plants used for the production of CBD oil;
- g) All real and personal property purchased with profits derived from the sale of CBD oil as allowed under the laws and Constitution of Texas.¹⁹¹

Third, the Texas legislature should add the term “marijuana-based asset” within § 22.028 of the Texas Estates Code’s definition of personal property.¹⁹²

Lastly, under § 33 of the Texas Estates Code, a specific venue for marijuana based assets should be established, so that a specific venue possessing the requisite specialized knowledge in this area of the law can help estate planning attorneys and their clients with handling estates that include marijuana based assets.¹⁹³ This additional venue would not require the state to add new courtrooms or facilities for these proceedings because probate proceedings are already under the control of county courts in Texas.¹⁹⁴ Moreover, estate-planning attorneys could serve the parties appearing before these courts with little additional legal training because marijuana based assets would be treated like any other asset estate planners currently handle for their clients.¹⁹⁵ Marijuana-based assets would require attorneys to ensure that their clients obtained their marijuana-based assets in accordance with Texas state laws and regulations.¹⁹⁶ The addition of a

190. *See supra* note 133.

191. *See generally* TEX. EST. CODE ANN. § 22 (West 2017) (amending definitions to include marijuana-based assets).

192. *See supra* note 180.

193. *See generally* TEX. EST. CODE ANN. § 33 (West 2017) (amending for specific venue for marijuana-based assets).

194. *See* TEX. EST. CODE ANN. § 34.001 (West 2017).

195. *See supra* note 180.

196. *See* S.B. 339, 84th Leg., R.S. ch. 487 (Tex. 2015).

specific venue would also allow the Texas DPS to more easily monitor the employees and directors of dispensing organizations.¹⁹⁷ This special court proceeding would enable the DPS to better ensure that directors and employees of dispensing organizations are not devising marijuana-based assets to out of state individuals; a result that would appease the goals of both S.B. 339 and the 2013 Cole Memo.¹⁹⁸

VI. CONCLUSION

Marijuana legalization, and the consequent creation of the marijuana industry, is one of the great social-political triumphs of this century.¹⁹⁹ Not because Americans get to get high, but because state legislatures finally realized that the war on drugs does more harm to the citizenry than it does good.²⁰⁰ Moreover, states all across this country have realized the enormous tax revenues that come with regulating and taxing a vice—much like cigarettes and alcohol.²⁰¹ However, the tension that still exists between the states and the federal government has hindered the states from fully committing to their efforts in legalizing marijuana.²⁰²

The election of Donald Trump will continue to represent the biggest unknown for the marijuana industry, however, states must continue to move forward and offer clarifying comments to their estate codes so that estate planners at least have the option to begin helping their clients with their marijuana assets.²⁰³ State legislatures must have the backbone to accept the reality that they helped create—that the stroke of a pen created a multibillion-dollar marijuana industry in this country.²⁰⁴

Communication between legislatures and the legal community, much like between attorney and client, will prove crucial for estate planners to be capable of knowing where to start when their clients come seeking help.²⁰⁵

State legislatures, Texas' especially, must not stand in fear of how the federal government is going to act.²⁰⁶ Currently, citizens are taking the risk every day that the federal government is going to reverse their position on how they will enforce the CSA.²⁰⁷ However, that is the nature of this

197. *See id.* (requiring that dispensary organizations tightly monitor their employees, products, and waste products, so if every person involved in the industry is going before a particular court for these matters it seems like the goal of monitoring would be more easily achieved).

198. *See supra* notes 41 and 186.

199. *Drug War Statistics*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/drug-war-statistics> (last visited Feb. 10, 2017).

200. *Id.*

201. *Id.*

202. *See supra* note 15.

203. *See supra* note 80.

204. *See supra* note 22.

205. *See Clarke, supra* note 183.

206. *See supra* note 80.

207. *See supra* note 20.

industry. What should not remain is the pile up of cash and other assets that cannot be spent because a bank, accountant, and estate planner is too afraid to help find an institution that will deposit the money out of fear from prosecution by the federal government.²⁰⁸ It is un-American to validate members of the marijuana industry as they enter their business venture, only to criminalize them as they attempt to transfer the fruits of their labor as they exit the business venture. The transfer of assets has long been a hallmark of American capitalism. The marijuana industry embodies that same capitalist spirit—now let estate planners help the citizens, who benefit their state economies, take full advantage of those gains.

208. *See supra* note 20.