

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

CARL OLSEN, LADD HUFFMAN, :  
ALAN KOSLOW, and ROBERT :  
MANKE, :  
Petitioners, : NO. CV8682  
vs. : RULING  
STATE OF IOWA, :  
Respondent. :\_\_:

**BE IT REMEMBERED**, on this 23<sup>rd</sup> day of September, 2011 the above matter came before the undersigned, Judge of the Fifth Judicial District of Iowa, on the Defendant's Motion to Dismiss. The Petitioners, Carl Olsen and Robert Manke, appeared personally, pro se. The Respondent appeared by Assistant Attorney General Scott A. Galenbeck. The Court has reviewed the file and considered the arguments of the litigants and issues the following Ruling.

The Petition for Declaratory Judgment filed herein seeks a determination that marijuana has accepted medical use in treatment in the United States as a matter of law, and that classification of marijuana as a Schedule I controlled substance within the meaning of Iowa Code Chapter 124 is no longer valid because of that accepted medical use. In seeking dismissal of the Petition Respondent urges that the relief requested in the Petition is not an appropriate controversy for a declaratory judgment proceeding. In addition, Respondent argues that for the Court to rule on the Petition would constitute improper judicial legislation in violation of the separation of powers doctrine. Finally, Respondent argues that the issue has previously been adjudicated in other litigation involving the same parties.

A motion to dismiss must generally fail or succeed based solely on matters alleged in the petition.<sup>1</sup> Such a motion admits the well-pleaded facts for the purpose of testing whether they are legally sufficient to state a claim upon which relief may be granted as a matter of law.<sup>2</sup> In ruling on a motion to dismiss all reasonable inferences which may be drawn from the petition must be viewed in a light most favorable to the plaintiff.<sup>3</sup> All of the foregoing principles are applicable to motions to dismiss filed in declaratory judgment proceedings.<sup>4</sup>

Declaratory judgment actions are designed to declare the rights, status, or other legal relationships of the parties.<sup>5</sup> “The purpose of the declaratory judgment is to resolve uncertainties and controversies before obligations are repudiated, rights are invaded, or wrongs are committed.”<sup>6</sup>

Rules related to declaratory judgments are to be applied liberally.<sup>7</sup> Notwithstanding the liberal approach, however, a justiciable controversy, as opposed to simply an abstract question, must exist.<sup>8</sup> Unfortunately, that distinction is often difficult to make. “The basic question is said to be whether the facts alleged show there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant a declaratory judgment”.<sup>9</sup> “There must be sufficient facts pleaded to show that the issue is concrete and that particular legal rights and powers will be or are affected.”<sup>10</sup>

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<sup>1</sup> *Reidiger v. Marrland Development Corp.*, 253 N.W.2d 915, 916 (Iowa 1977).

<sup>2</sup> *Berger v. General United Group, Inc.*, 268 N.W.2d 630, 634 (Iowa 1978).

<sup>3</sup> *Wright v. Thompson*, 254 Iowa 342, 117 N.W.2d 520, 523 (1962).

<sup>4</sup> *Hartford Accident & Indemnity Co. v. O'Connor-Regenwether Post No. 3633, Veterans of Foreign Wars*, 247 Iowa 168, 173, 73 N.W.2d 12, 14 (1955).

<sup>5</sup> Iowa R. Civ. P. 1.1101.

<sup>6</sup> *Dubuque Policeman's Protective Assn. v. City of Dubuque*, 553 N.W.2d 603, 607 (Iowa 1996), quoting 22 Am.Jur.2d Declaratory Judgments §1, at 670 (1988).

<sup>7</sup> *Gradisching v. Polk County, Iowa*, 164 N.W.2d 104 (Iowa).

<sup>8</sup> *McCarl v. Fernberg*, 256 Iowa 93, 126 N.W.2d 427 (1964).

<sup>9</sup> *Katz Investment Co. v. Lynch*, 242 Iowa 640, 648, 47 N.W.2d 800, 805 (1951).

<sup>10</sup> *Bechtel v. City of Des Moines*, 225 N.W.2d 326, 331 (Iowa 1975).

As noted by the court in *Grains of Iowa L.C. v. Iowa Department of Agriculture and Land Stewardship*<sup>11</sup>, in determining a case was not “justiciable”,

“[w]e conclude this case is not adjudicable or fully ripened for it seeks to determine abstract questions not resting upon existing or determinable facts or rights. In many respects it is ‘advisory’, for the judgment sought would not constitute specific relief to a litigant or effect legal relations, nor would the judgment be sufficiently conclusive. This controversy does not involve an actual, genuine, live controversy, nor does it affect existing legal relations”.

Pursuant to the provisions of Iowa R. Civ. P. 1.1105, “the court may refuse to render a declaratory judgment or decree where it would not, if rendered, terminate the uncertainty or controversy giving rise to the proceeding”. Sustaining a Motion to Dismiss in reliance upon this provision, however, is generally inappropriate, as it is typically necessary to consider the evidence presented at trial before making such a determination.<sup>12</sup>

Iowa’s statutory scheme related to controlled substances classifies substances into one of five different schedules. Schedule I controlled substances, by definition, have a high potential for abuse and “no accepted medical use in treatment in the United States”.<sup>13</sup> Schedule II controlled substances, by definition, have high potential for abuse, “currently accepted medical use in treatment in the United States”, and abuse of the substance may lead to severe psychic or physical dependence.<sup>14</sup>

By statute, the Iowa Board of Pharmacy Examiners generally makes “recommendations” to the general assembly as to the placement of substances on particular schedules. The Code directs the Board to make recommendations for placement on a particular schedule if it is not already on that schedule, and also directs

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<sup>11</sup> 562 N.W.2d 441, 446 (Iowa 1997)

<sup>12</sup> *Ewurs v. Irving*, 344 N.W.2d 273, 276 (Iowa App. 1983).

<sup>13</sup> Iowa Code §124.203(1).

<sup>14</sup> Iowa Code §124.205.

the Board to recommend removal or reclassification of a substance if the Board does not believe a substance fits the criteria for the schedule it is on.<sup>15</sup>

Both parties recognize that Iowa's statutory scheme generally vests the decision-making determination as to schedule assignment to the general assembly. The Board of Pharmacy Examiners is generally limited to making recommendations, which the general assembly may then choose to accept or reject.

While most controlled substances appear on a single schedule, marijuana is identified as both a schedule I and a schedule II controlled substance. Iowa Code §124.204(3)(m) lists marijuana as a schedule I controlled substance "except as otherwise provided by rules of the board for medicinal purposes". Iowa Code §124.206(7)(a) identifies marijuana as a schedule II controlled substance "when used for medicinal purposes pursuant to rules of the board."

Thus, in the case of marijuana, the Iowa legislature has legislatively determined that the Iowa Board of Pharmacy may promulgate rules providing for the use of marijuana for medicinal purposes. Marijuana is ordinarily a schedule I controlled substance "except as otherwise provided by rules of the board for medicinal purposes", in which case it is a schedule II controlled substance "when used for medicinal purposes pursuant to rules of the board".<sup>16</sup>

As noted by the Iowa Supreme Court in *State v. Bonjour*<sup>17</sup>, "the legislature has recognized that marijuana may have medical value. . . . These statutes [Iowa Code §§124.204(4)(m) & 124,206(7)(a)] show that our legislature has foreseen the potential

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<sup>15</sup> Compare Iowa Code §124.203(1) and Iowa Code §124.203(2).

<sup>16</sup> Petitioner argues it is inconsistent for marijuana to be listed on both Schedule I and Schedule II. While there is inconsistency with the general definition between the two schedules, the legislature has specifically qualified its inclusion of marijuana on both schedules. Specific statutory provisions generally prevail over general provisions. *See*, Iowa Code §4.7.

<sup>17</sup> 694 N.W.2d 511, 513 (Iowa 2005)

medical uses for marijuana but has deferred on the issue until the Board of Pharmacy Examiners has acted.”

On February 17, 2010 the Iowa Board of Pharmacy Examiners recommended to the legislature that marijuana be reclassified as a controlled substance under Iowa Code Chapter 124. Implicit in that recommendation was a determination by the Board that marijuana has potential use for medical purposes.

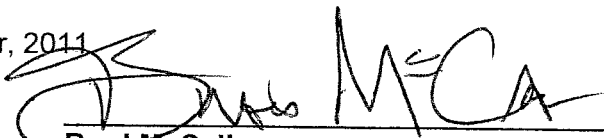
When the instant declaratory judgment proceeding is viewed in the context of the existing statutory scheme, the pronouncements of the Iowa Supreme Court in *Bonjour*, and the Iowa Board of Pharmacy Examiners recommendations to the legislature, it is apparent that the questions posed are merely abstract in nature and do not constitute a justiciable controversy. There is already acknowledgement by the courts and by the legislature as to the potential medical uses for marijuana. Marijuana is already classified as a schedule II controlled substance “when used for medicinal purposes pursuant to rules of the board”. There is insufficient real and immediate controversy between the parties to warrant a declaratory judgment.

Furthermore, although it is typically not appropriate to sustain a Motion to Dismiss based upon the provisions of Iowa R. Civ. P. 1.1105, it is apparent from the face of the Petition, read in conjunction with the clear provisions of Chapter 124, that rendering a declaratory ruling on the questions posed would not “terminate the uncertainty or controversy giving rise to the proceeding”.

For the foregoing reasons, the Motion to Dismiss must be granted.

**IT IS THEREFORE ORDERED** that the Motion to Dismiss is granted. The above matter is hereby dismissed, with costs assessed against the Petitioners.

Dated this 11 day of October, 2011

  
Brad McCall  
Judge – Fifth Judicial District

Original Filed

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