

RESOLUTION 10-08-2008

DIGEST

Family Law: Drug and Alcohol Testing

Amends Family Code section 3041.5 to modify existing law to assure privacy regarding drug and alcohol testing results in court ordered custody and visitation plans.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Family Code section 3041.5 to modify existing law to assure privacy regarding drug and alcohol testing results in court ordered custody and visitation plans. This resolution should be approved in principle because it prevents the state of law from reverting to a prohibition of court-ordered testing.

Family Code section 3011, subdivision (d) requires the court to consider the use of illegal drugs or abuse of alcohol by a parent when making a custody and visitation order. Under that statute the court may require independent corroboration of such conduct, which often resulted in court-ordered drug testing, and no provision for the protection of the privacy of the subject parent is mentioned in section 3011, subdivision (d).

The Court of Appeal in *Wainwright v. Superior Court* [(2000) 84 Cal.App.4th 262] stated that the “independent corroboration” required by statute (Family Code section 3011, subdivision (d)) may not include court-ordered drug or alcohol testing. In response to *Wainwright* the Legislature adopted Family Code section 3041.5 which effectively empowered courts with the ability to order drug and alcohol testing with added privacy safeguards. However, section 3041.5 included a sunset provision slated for January 1, 2008. Senate Bill 403 extended the sunset provision of section 3041.5 to January 1, 2009. Without modification, the state of law for drug and alcohol testing will likely revert to that enunciated in *Wainwright*, prohibiting court-ordered testing.

SECTION/COMMITTEE REPORTS

FAMILY LAW SECTION

DISAPPROVE

The Family Law Section Executive Committee disapproves this resolution as the proposed resolution precludes alcohol testing and limits the Court’s authority to order an alcohol assessment relating to child access during a custody proceeding. This Committee considers alcohol assessment by a professional third party or self-assessment not particularly useful to either of the parties or the Court. This Committee recommends that the resolution be carefully redrafted to provide that there be separate paragraphs to cover testing and assessment for both

drugs and alcohol so that the Court will have two options when it considers an appropriate custody or parenting plan.

This position is only that of the Family Law Section of the State Bar of California. This position has not been adopted by either the State Bar Board of Governors or overall membership and is not to be construed as representing the position of the State Bar of California.

Membership in the Family Law Section is voluntary, and funding for section activities, including all legislative activities, is obtained entirely from voluntary services.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Family Code section 3041.5 to read as follows:

- 1 § 3041.5
2 (a) In any custody or visitation proceeding brought under this part, as described in
3 Section 3021, or any guardianship proceeding brought under the Probate Code, the court
4 may order any person who is seeking custody of, or visitation with, a child who is the
5 subject of the proceeding to undergo testing for the illegal use of controlled substances and
6 the use of alcohol (hereafter “alcohol assessment”) if there is a judicial determination
7 based upon a preponderance of evidence that there is the habitual, frequent, or continual
8 illegal use of controlled substances or the habitual or continual abuse of alcohol by the
9 ~~parent, legal custodian, person seeking contact with child(ren) guardianship, or person~~
10 ~~seeking visitation in a guardianship~~. This evidence may include, but may not be limited to,
11 a conviction within the last five years for the illegal use or possession of a controlled
12 substance.
- 13 (b) The court shall order the least intrusive method of drug testing or alcohol
14 assessment. ~~If drug testing for the illegal use of controlled substances or the habitual or~~
15 ~~continual abuse of alcohol by either or both parents, the legal custodian, person seeking~~
16 ~~guardianship, or person seeking visitation in a guardianship~~. ~~If substance abuse testing is~~
17 ~~ordered by the court~~, the testing shall be performed in conformance with procedures and
18 standards established by the United States Department of Health and Human Services for
19 drug testing of federal employees.
- 20 (c) ~~The parent, legal custodian, person seeking contact with the~~
21 child(ren) guardianship, or person seeking visitation in a guardianship who has undergone
22 drug testing or alcohol assessment shall have the right to a hearing, if requested, to
23 challenge a positive test or assessment result. A positive test or assessment result, even if
24 challenged and upheld, shall not, by itself, constitute grounds for an adverse custody or
25 guardianship decision. Determining the best interests of the child requires weighing all
26 relevant factors. The court shall also consider any reports provided to the court pursuant to
27 the Probate Code.
- 28 (d) ~~The results of this~~ drug testing or alcohol assessment undergone pursuant to this
29 section shall be confidential, shall be maintained as a sealed record in the court file, and
30 may not be released to any person except the court, the parties, their attorneys, the Judicial

31 Council (until completion of its authorized study of the testing process) and any person to
32 whom the court expressly grants access by written order made with prior notice to all
33 parties. Any person who has access to the test results may not disseminate copies or
34 disclose information about the test results to any person other than a person who is
35 authorized to receive the test results pursuant to this section. Any breach of the
36 confidentiality of the test results shall be punishable by civil sanctions not to exceed two
37 thousand five hundred dollars (\$2,500).

38 (e) The results of the testing may not be used for any purpose, including any
39 criminal, civil, or administrative proceeding, except to assist the court in determining, for
40 purposes of the proceeding, the best interest of the child pursuant to Section 3011, and the
41 content of the order or judgment determining custody or visitation.

42 (f) The court may order either party, or both parties, to pay the costs of the drug
43 testing or alcohol ~~testing~~ assessment ordered pursuant to this section. As used in this
44 section, "controlled substances" has the same meaning as defined in the California
45 Uniform Controlled Substances Act, Division 10 (commencing with Section 11000) of the
46 Health and Safety Code.

47 ~~(b) This section shall remain in effect only until January 1, 2009, and as of that date~~
48 ~~is repealed, unless a later enacted statute, that is enacted before January 1, 2009, deletes or~~
49 ~~extends that date.~~

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS:

Existing Law: Family Code section 3041.5 authorizes drug and alcohol testing in family law and probate code cases where a party is seeking custody, guardianship, or visitation. The section seeks to make such testing pass constitutional muster by setting out restrictions on drug testing, ensuring confidentiality of test results, and other provisions.

This Resolution: Would modify existing law to clarify that both drug testing and alcohol assessment may be ordered by a court and that the privacy protections and other provisions of the statute apply to *both*.

The Problem: The section's current language is confusing because the initial discussion is about both drug and alcohol testing, then the statute states that drug testing must be performed in accordance with federal procedures (U.S. Department of Health and Human Services for drug testing of federal employees), and then goes on to set out privacy rights and methods to challenge negative *drug test* results. Thus, it is unclear if the privacy protections apply to alcohol assessment, and whether a testee can challenge negative results of an alcohol assessment, etc. It is also unclear what standards govern alcohol testing (which is not included in the DHH drug testing protocols). This ambiguous language will lead to confusion in the application of this statute, and could lead to a challenge that the alcohol testing provided for by the statute is unconstitutional because the stated protections for the testee do not apply to alcohol testing, or that alcohol testing is not permitted at all.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

AUTHOR AND/OR PERMANENT CONTACT: Michelene Insalaco, Sucherman • Insalaco LLP, One Market Plaza, Stuart Tower Suite 1275, San Francisco CA 94105. Telephone (415) 3575050; Fax (415) 357-5051; e-mail MI@Sucherman-Insalaco.com

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