

# Drug and Alcohol Testing in Child Custody Cases: Implementation of Family Code Section 3041.5

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FINAL REPORT TO THE CALIFORNIA  
LEGISLATURE

JULY 2007



ADMINISTRATIVE OFFICE  
OF THE COURTS

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CENTER FOR FAMILIES, CHILDREN  
& THE COURTS

Judicial Council of California  
Administrative Office of the Courts  
Center for Families, Children & the Courts  
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San Francisco, CA 94102-3688

This report has been submitted to the California Legislature pursuant to Assembly Bill 1108 (2003).

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OF CALIFORNIA

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ADMINISTRATIVE OFFICE  
OF THE COURTS

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# Drug and Alcohol Testing in Child Custody Cases: Implementation of Family Code Section 3041.5 Final Report to the California Legislature

## Introduction

This report is submitted to the Legislature in compliance with Assembly Bill 1108 (2003) (AB 1108) which requires the Judicial Council to study and report on the implementation of California Family Code section 3041.5. That Code section allows courts to order persons seeking custody of, or visitation with, a child in a child custody proceeding to undergo drug or alcohol testing under specified circumstances. An interim report on this study (also required by AB1108) was filed with the legislature on June 30, 2005, detailing the plans for data collection. This final report describes the background to the legislation and findings on four areas of inquiry the Judicial Council was instructed to address by the Legislature. This report also explains the methodology used to gather data: A statewide survey of family law judicial officers, family law commissioners and child support commissioners and a series of focus groups of family court services personnel, judicial officers, and family law attorneys.

## Background

### **Brief history of drug and alcohol testing in child custody cases**

It is the public policy of the State of California that the health, safety, and welfare of children be the court's primary concern in determining the best interests of children when making orders regarding physical or legal custody or visitation of children.<sup>1</sup> Unless it conflicts with the protection of a child's health, safety, and welfare, it is also public policy to assure frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing.<sup>2</sup>

In making the "best interest" determination, trial courts need to consider specified factors, including either parent's substance abuse. Family Code section 3011(d) directs a court to consider

[t]he habitual or continual illegal use of controlled substances or habitual or continual abuse of alcohol by either parent. Before considering these allegations, the court may first require independent corroboration, including, but not limited to, written reports from law enforcement agencies, courts, probation departments, social welfare agencies, medical facilities, rehabilitation facilities, or other public agencies or nonprofit organizations providing drug and alcohol abuse services.

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<sup>1</sup> Fam. Code § 3020(a).

<sup>2</sup> Fam. Code § 3020(b).

This subdivision was previously interpreted by courts as allowing for the authorization of court-ordered testing of parents involved in child custody disputes who were suspected of abusing drugs or alcohol. This practice was challenged and prohibited by a California appellate court decision, *Wainwright v. Superior Court* (hereafter *Wainwright*).<sup>3</sup>

In *Wainwright*, the mother alleged that the father regularly used illegal drugs, and she requested that the court order him to submit to testing. The father denied her allegations and objected to the testing. The trial court found that Family Code section 3011(d) authorizes tests and that the best interest of a child outweigh the privacy interest of a parent suspected of drug use. The court ordered the father to submit to a hair drug analysis.<sup>4</sup>

The father petitioned the appellate court, which found that section 3011(d) did not authorize the family court to order the father to submit to testing:

We conclude that the Family Code provision, devoid of any substantive or procedural safeguards, does not authorize court-ordered drug testing. . . . We conclude that the general language of section 3011, subdivision (d), empowering family courts to demand independent corroboration before considering allegations of a parent's drug abuse, does not authorize court-ordered drug testing.<sup>5</sup>

The appellate court noted a number of concerns about the authorization of mandatory testing under section 3011. The first concern centered on the level of evidence of parental drug use needed by the trial court before it could order a test. The appellate court found problematic the fact that in the *Wainwright* case, the result of the test would itself be deemed the “independent corroboration” required under section 3011 for authorization of testing orders.<sup>6</sup> Furthermore, the court noted that allowing mandated tests in child custody cases raised constitutional concerns, given that there were no substantive or procedural guidelines for the testing (such as a mandate for confidentiality of test results, or a testing method or procedures to be followed):

The provision would permit parental drug testing upon a bare allegation of drug use and without any statutory limitations on the type of test (blood, urine, or hair), the manner of administering the test, or the disclosure of test results. . . . But section 3011, subdivision (d), does not mandate confidentiality, nor any other procedures to achieve a proper balance between a parent's privacy interests, the degree of intrusion, and the state's interest in protecting child welfare.<sup>7</sup>

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<sup>3</sup> (2000) 84 Cal.App.4th 262.

<sup>4</sup> *Wainwright, supra*, 84 Cal.App.4th at 264–266.

<sup>5</sup> *Wainwright, supra*, 84 Cal.App.4th at 269.

<sup>6</sup> *Wainwright, supra*, 84 Cal.App.4th at 266–267.

<sup>7</sup> *Id.* at 268.

In 2004, Assembly Bill 1108 was passed creating Family Code section 3041.5. The new code section was written to address the constitutional and procedural concerns described in *Wainwright*. Section 3041.5 authorizes the courts, until January 1, 2008:

In any custody or visitation proceeding . . . or any guardianship proceeding . . . the court may order any person who is seeking custody of, or visitation with, a child who is the subject of the proceeding to undergo testing for the illegal use of controlled substances and the use of alcohol if there is a judicial determination based upon a preponderance of evidence that there is the habitual, frequent, or continual illegal use of controlled substances or the habitual or continual abuse of alcohol by the parent, legal custodian, person seeking guardianship, or person seeking visitation in a guardianship. This evidence may include, but may not be limited to, a conviction within the last five years for the illegal use of or possession of a controlled substance.<sup>8</sup>

Family Code section 3041.5 also presents conditions intended to address the concerns noted in *Wainwright* regarding the lack of substantive or procedural guidelines for court-ordered testing:<sup>9</sup>

1. *Testing method*: Testing must be performed in accordance with the U.S. Department of Health and Human Services procedures for drug testing of federal employees.<sup>10</sup> In addition, courts must order the “least intrusive” method of testing.
2. *Confidentiality of test results*: The results of a test are confidential and must be maintained as a sealed record in the court file. These results may be released only to specified, authorized personnel. Breaches of confidentiality are punishable by civil sanctions.
3. *Use of test results*: The use of test results is limited to adjudication of custody and visitation matters. Test results may not be used for any other purpose (such as in a criminal, civil, or administrative proceeding).
4. *Effect of positive test results*: A parent, legal custodian, person seeking guardianship, or person seeking visitation in a guardianship who has undergone drug testing may request an opportunity to challenge a positive test result. A positive test by itself does not constitute grounds for an adverse custody decision.

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<sup>8</sup> Fam. Code, § 3041.5(a).

<sup>9</sup> Fam. Code, § 3041.5(a).

<sup>10</sup> These currently only allow for urine testing. *See, Deborah M. v. Superior Court* (2005) 128 Cal. App. 4<sup>th</sup> 1181, 1191–1194 (holding that statute requires testing to conform to Department of Health and Human Services guidelines, which presently only allow urine testing, thereby preventing court from requiring hair follicle testing).

## Study requirement

In addition to enacting Family Code section 3041.5, AB 1108 requires the Judicial Council to study the implementation of the act and report to the Legislature no later than July 1, 2007. Four areas of inquiry are mandated by AB 1108:<sup>11</sup>

1. The number and percentage of custody cases in which drug or alcohol testing is ordered;
2. The rate of compliance with those orders, and the procedures that are followed if a parent fails to comply with an order;
3. The percentage of cases in which testing is ordered *and* the parent tests positive for the use of drugs or alcohol; and
4. The impact of a positive test result on the court's decision to grant or deny custody or visitation.

In directing that these areas be addressed, the Legislature granted the Judicial Council access to confidential testing results “until completion of its authorized study of the testing process.”<sup>12</sup> This study was developed and carried out by The Center for Families, Children & the Courts (CFCC), a division of the Judicial Council's Administrative Office of the Courts.

## Methodology

### Design considerations

To address the legislatively mandated areas of inquiry, researchers first sought a source for accurate enumeration of cases in which drug/alcohol testing is ordered. There are no statewide administrative databases containing statistics on testing orders. Compiling statewide court data is prohibitive because most court systems do not have computerized records of family law proceedings. As an alternative source, a case file review was piloted on 1,000 cases in four sample counties. The pilot is described in Appendix B. The case review method was ruled out because it proved subject to a high rate of error. Variation across courts in the documentation and location of testing information made it difficult to accurately identify all cases with testing orders. Another limitation of the method was that it would not yield statewide data.

After ruling out case file review, CFCC researchers decided on a two-part data collection process designed to address all aspects of the legislative areas of inquiry. This process consisted of:

- Family Law Judicial Officer Survey (FLJO), a statewide survey of all family court judicial officers (Described in Appendix C); and
- A series of seven focus groups made up of family court judicial officers, family court services counselors, and private family law attorneys (Described in Appendix D).

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<sup>11</sup> Assem. Bill 1108 (2003).

<sup>12</sup> *Ibid.*



The statewide survey of all family court judicial officers was chosen because it provides information on the statewide implementation of AB 1108 and the survey questions allow for expert estimation of the numerical data required by the legislation. Focus groups allow for an in-depth evaluation of the context surrounding judicial decision-making in drug testing cases, the process by which decisions are made in these cases, and the reasons for those decisions. The focus groups also captured the perspectives of attorneys and family court services mediators and evaluators who were not represented in the survey and who have a sense of the impact of this legislative change.

### **Data sources and limitations**

All questions asked of study participants call for estimates, opinions, or recollections. As discussed above, there is no statewide, case level database with which to verify the accuracy of these estimates.

## **Results**

### **Circumstances under which drug or alcohol abuse allegations arise**

Focus group participants indicated that the testing issue may come up when one party says the other party is abusing drugs or alcohol. Mutual allegations of substance abuse were not uncommon.

Open-ended responses to a FLJO survey question, along with focus group participant statements, showed that issues of drug or alcohol abuse may be raised (and thereby come to the attention of the court if the court is made aware of them) in:

- Pleadings and motions;
- Court hearings;
- Mediation sessions;
- Evaluation assessments;
- Reports by minor's counsel;
- Child Protective Services reports;
- Department of Motor Vehicle reports; and
- Criminal prosecutions.

In addition, in an apparently small minority of cases, the court may have direct indications of a substance abuse problem by way of the appearance and behavior of the party in court.

### **Context out of which testing orders arise**

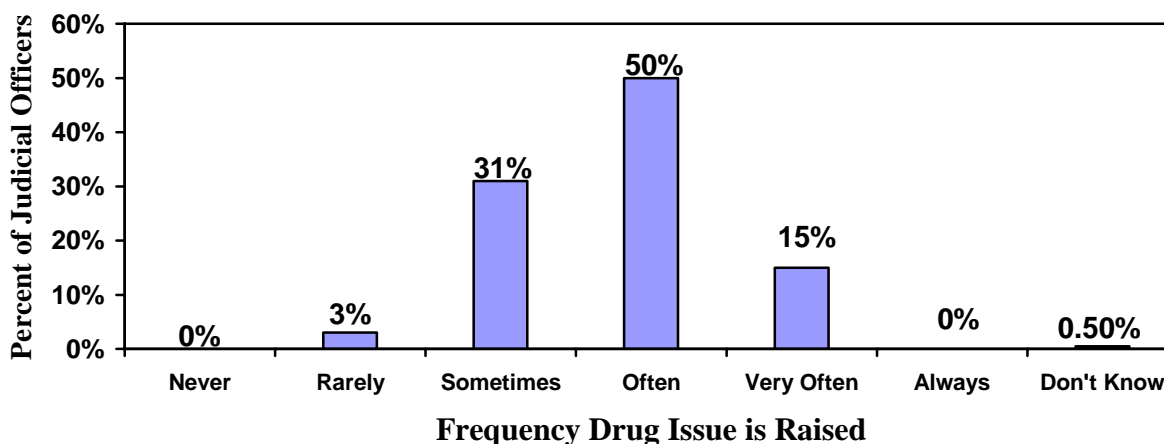
As quoted in the Background section, above, California Family Code section 3041.5(a) allows a court in a child custody, visitation, or guardianship proceeding to order any person who is seeking custody or visitation to undergo drug or alcohol testing. Before ordering the test, the court must determine that the person is a habitual, frequent, or continual illegal user of controlled substances, or a habitual or continual abuser of alcohol. That finding must be supported by a preponderance of the evidence, which may include a conviction for the illegal use or possession of a controlled substance within the past five years.

Focus group participants explained that once the issue of substance abuse is raised, parties may stipulate to testing out of concern that the failure to do so could “look bad” or have some unknown negative effect on the custody or visitation decision. It was also felt that people might agree to testing in order to get the issue off the table.

### Substance abuse issues in child custody disputes

No precise figures exist regarding the frequency of substance abuse among all child custody cases. Estimates drawn from subgroups within the universe of all child custody cases suggest that the rate of substance abuse is substantial. Family law attorneys in the focus groups estimated half of their cases involved substance abuse issues with one or both parents. A statewide study of contested custody and visitation cases in mediation found that drug or alcohol abuse is an issue in 27 percent of those cases.<sup>13</sup> For custody and visitation disputes not resolved in mediation, judicial officers indicated that drug or alcohol issues were raised fairly frequently. Sixty-five percent of judicial officers responded that drug/alcohol issues were raised often or very often, while approximately one-third of them indicated these issues were raised only sometimes.<sup>14</sup> (See figure 1.)

**Figure 1. When hearing cases that involve child custody and visitation issues, how often are drug or alcohol issues raised?**



<sup>13</sup> Statewide Uniform Statistical Reporting System, 2003. This statistic is drawn from a statewide census survey of mediators and parents in child custody mediation. The unit of analysis for these purposes is the mediation session. The issue may have been noted by the mediator, either parent, or any combination thereof. For further details, see [www.courtinfo.ca.gov/programs/cfcc/pdffiles/Snapshot2003.pdf](http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/Snapshot2003.pdf).

<sup>14</sup> Scale points were anchored with the following percentage ranges: never = 0%, rarely = 1-9%, sometimes = 10-39%, often = 40-69%, very often = 70-99%, always = 100%.

## Legislative Area of Inquiry One: Number and Percentage of Custody Cases in Which Drug Testing Is Ordered <sup>15</sup>

### **Definition of an order**

Both in the survey and in the focus groups, participants were told to include all types of orders in their subsequent discussion of the issues, whether they were arrived at through stipulated agreements or contested hearings. Consequently, in reporting the data below, we make no representations regarding the proportion of orders based on stipulations versus ex parte or contested hearings.

Focus group respondents also described another type of drug or alcohol testing order, one that can be applied by a party as a condition of visitation. In other words, continuing visitation is contingent on taking the test, in accordance with the order, at the request of the nontesting party, usually at or around the time of the child exchange. The testing party effectively has the option of not testing, and the immediate result is that he or she does not see the child (at least for that visit). This process was described by one focus group participant:

The parenting plan that's ordered by the court says upon one party's request, the other party has [the] four hours to do it. So if I suspect that my ex is using and he's got a visitation for let's say this weekend, I might call him at noon or at 8 a.m. on Friday and say test by noon for me. So I'll have the results back to see if they're . . . because if they're positive then I, if it's in my order, can deny him that visit that weekend.

### **Frequency of drug or alcohol testing orders**

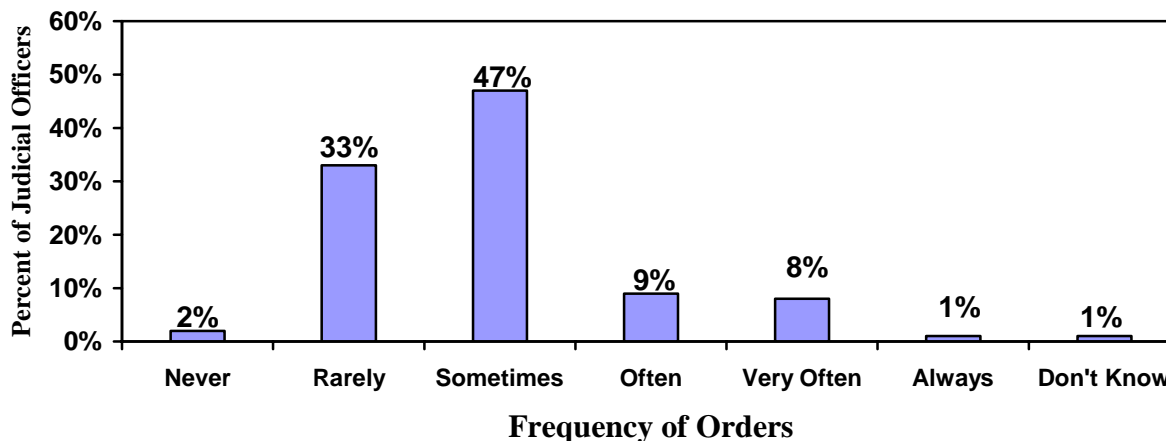
Judicial officers were asked to provide an estimate of the frequency with which they order drug testing in child custody cases that involve drug or alcohol issues. Frequency was assessed using a six-point Likert Scale. Scale points were anchored with frequency ranges in order to standardize the responses categories. Response options included: “never” (0 percent of cases), “rarely” (1–9 percent), “sometimes” (10–39 percent), “often” (40–69 percent), “very often” (70–99%), and “always” (100 percent). This scale and the corresponding anchor points were also used for all other close-ended survey questions.

According to the results of the FLJO survey, most judicial officers do not frequently order testing in child custody cases that involve drug or alcohol issues. Most judicial officers order tests in less than 40 percent of these cases. Almost half (47 percent) of judicial officers indicated that they only sometimes ordered testing, and 33 percent said they rarely ordered testing. Only 18 percent of judicial officers said that they ordered testing often, very often, or always. (See figure 2.)

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<sup>15</sup> “Order” was defined to include stipulations incorporated into court orders, ex parte orders, and orders resulting from contested hearings.

**Figure 2. How frequently have you ordered drug or alcohol testing (including stipulations) for at least one of the parties in these cases?**



Focus group participants explained that in making a decision whether to order testing, the judicial officer weighs a wide variety of factors and makes a decision based on the best interests of the child while protecting the child's safety.

#### **Types of information considered when deciding whether to order testing**

Judicial officers reported, in answers to an open-ended question on the FLJO survey, factors they considered before entering an order for testing. These revealed case-specific factors not tied to overall differences between judges. In listing this compilation of their responses, no representation is made regarding the frequency with which these factors are considered or the weight they are given if considered.

#### **Credibility of testimony or other allegations**

In deciding whether to order testing, judicial officers may have only the testimony of the parties before them in making their decision. Therefore, it is crucial to evaluate the credibility of the testimony before them and look at the context of other allegations that are being made.

#### **Whether party admits to substance abuse**

If a party admits to substance abuse, some might presume the issue of testing becomes moot. While this is true to the extent that the fact of past substance abuse is now established, it does not end consideration of testing to monitor usage in the future. Particularly if visitation is contingent on not using drugs or alcohol, the court may wish to order testing precisely because the party has admitted to abuse in the past.

#### **Whether party stipulates to testing**

If a party stipulates (agrees) to testing, the testing is likely to be ordered.

#### **History**

History can be an important source of information, if available, regarding whether testing should be ordered. The participants in the focus groups agreed that past arrests for drug offenses and

“driving under the influence” in particular tended to be red flags indicating a serious substance abuse problem that might endanger children. Family Code section 3041.5(a) specifically includes “a conviction within the last five years for the illegal use or possession of a controlled substance” as evidence that may be considered in ordering drug testing.

## **Reports**

Reports from medical personnel, family court services, social services, and police may also be used to corroborate allegations of substance abuse.

## **Drug type and extent of current drug problem**

Judicial officers answering the FLJO survey indicated that the type of substance and the extent of current abuse could also weigh in their decision about whether to order testing. Focus group participants explained that not all substance abuse problems were of equal severity or posed an equal danger to the child. Although a few focus group participants took the position that any substance abuse (or in some cases use) was bad for the child, the general consensus seemed to be that the type of drug, its abuse and addiction potential, and in particular its potential for posing a danger to the child (either directly or indirectly through parental neglect) were all factors to be considered before ordering testing.

## **Impact of testing on the party**

FLJO survey respondents listed the impact of testing on the tested party as a factor to be considered before ordering testing. Focus group participants confirmed that impact on parties, particularly the logistics and cost of testing should be kept in mind when writing the order. For example, the work schedule of the party must be balanced with the availability of transportation and the hours of operation of the testing facility.

## **Direct observation of parties in the courtroom**

Both in answers to the FLJO survey and in focus groups, judicial officers reported that direct observation of courtroom behavior, specifically whether someone appeared to be under the influence, could be a factor in a testing order.

## **Risk to and relationship with the child**

The likely effect of any substance use on the child, based on the types of information described above, was also listed as a consideration in determining whether testing was appropriate in particular cases. Whether the substance use posed a danger to the safety or health of the child was of primary concern according to most focus group participants. Other factors, such as the age of the child and his or her relationship to the parent, might also be considered.

## **Testing limitations**

Many focus group participants stated that urine screenings (which are the only tests allowed under the statute) were of limited utility in establishing or tracking substance abuse. Participants in several groups explained that some commonly abused substances are not detectable using urine screenings within a fairly short period of time following ingestion. This makes scheduling prompt, and usually random, screenings essential. In addition to the time factor, they also reported that many ways of sabotaging or beating the test are widely available, often on the Internet. As one attorney put it, “It’s difficult to prove that the person is using, for example, a

[tampering device], unless you have some witness who's going to come forward and tell you and tell the judge that in fact I know this [substance abuse is going on]. So sometimes they'll come back with a clean test and [you] discover [there was tampering] after the fact, when you have to figure out how are we going to get this evidence before the court?"

In every focus group, the topic of hair follicle screening was raised. There was wide agreement that this was a superior method of testing for the purpose of establishing drug use. A frequently heard sentiment went, "I think probably we all would like to see hair follicle in the statute. We'd love to see that because it would be more reliable. There are so many cute little tools that I've only learned about because on the other side they're using them to beat the tests . . . and hair follicle's kind of a little bit more difficult to beat." In addition to reduced opportunities for tampering, hair follicle testing was thought to allow testing to happen at any time, provided a history over months about substance use, and was in the end less expensive for the parties, at least if a series of urine tests was the alternative.

## Legislative Area of Inquiry Two: Rate of Compliance With Testing Orders and Procedures That Are Followed if Parent Fails to Comply With Order

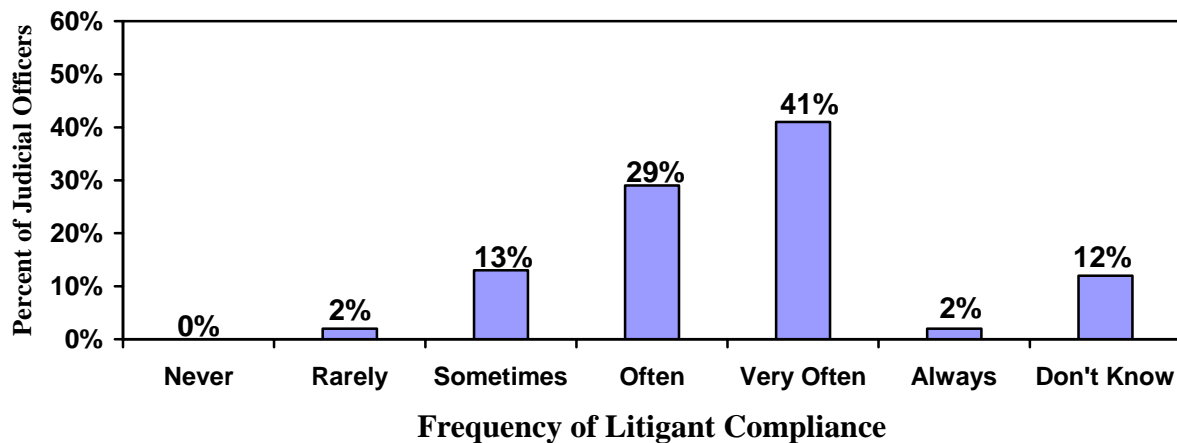
### **Definition of compliance**

Compliance was defined as "the party obtains a valid drug test (free of tampering) within a reasonable time frame after the order is made." Focus group participants explained that what is reasonable depends on the local practice, available testing circumstances, type of drug used, and the circumstances of the party.

### **Rate of compliance**

Most judicial officers responding to the FLJO survey agreed that parents ordered to undergo testing generally complied with the order. In the FLJO survey, 41 percent of judicial officers responded that litigants who are ordered to test very often comply with the order. An additional 29 percent responded that litigants comply with the order often. Only 15 percent indicated that litigants sometimes or rarely complied with the testing order. Finally, 12 percent of those responding to the survey indicated they did not know the rate of compliance with the testing orders. (See figure 3.)

**Figure 3. Of the litigants who are ordered to test or stipulate to test, how often do they comply with the drug/alcohol testing?**



#### **Focus group participants corroborated the high rate of compliance**

When asked whether parties ordered to undergo testing comply with the order, all of the focus group participants indicated general agreement that they do. As explained by one participant, “My experience . . . is that, with the exception of those people that say, ‘I didn’t get the notice,’ the people who say, ‘I got the notice, I knew I was supposed to test and I didn’t test for x-reason,’ that’s a relatively small percentage of the people who don’t test.”

#### **Caveat to compliance data**

A number of focus group participants pointed out that courts will not know the outcome of testing if the parties do not return to court. In addition, if testing is ordered as a condition of continued visits, the court may not be aware of compliance problems or positive results of ongoing tests unless the nontesting party brings the matter back to court for a hearing.

#### **Factors that influence rate of compliance**

##### **Cost**

When asked about the price of a single urine screening in their county, focus group participants reported figures from \$30 to \$40. Most participants agreed that the amount paid for the testing was not much of an issue affecting compliance if only a single drug test was at issue. If multiple tests were ordered, however, most agreed that the cost of testing could become more of an impediment for some people.

Pointing out the need for alternative sources of funding when the cost is prohibitive to parties, one participant stated, “There have been cases where I’ve had to say, ‘You know if you can’t pay for it, it’s not going to happen.’ There’ve been cases where a person said, ‘Well, I can’t pay the \$35.’” To which another participant added, “[I]t’s very frustrating to a person who doesn’t have any money and they already feel like they’re fighting the odds.”

### **Availability of testing facilities**

The availability and requirements of the testing facility can impact compliance. Among the factors mentioned in the focus groups were the distances people had to travel to get tested, the logistics of arranging to pay for the testing, and the hours the testing facilities were open. Lack of transportation, whether personal or public, could also be a serious impediment to compliance.

### **Awareness of consequences/clarity of court order**

Most focus group participants felt the parties were adequately informed, usually in writing, of the consequences of noncompliance. Focus group participants felt compliance was enhanced when the parties were clearly informed about the consequences of noncompliance and the details of testing requirements. In order to make sure the orders are as clear as possible, one participant suggested that “the order ought to be as specific as possible with respect to testing time, testing protocol, and consequences.”

In addition to the terms of the order being clear as a general matter, parties may need language services to fully comprehend the order: “The other situation is when . . . there’s a language barrier, even though they say . . . ‘Yes, I understand the orders,’ [it] doesn’t necessarily really mean they understood.”

Lack of specific consequences was thought to negatively influence the rate of compliance. However, in most cases it was felt that by the time a nonstipulated order was issued, parties were well aware that there would be serious consequences for noncompliance:

I think by the time that you get to the point of making a nonstipulated order, even with such a long discussion with the parties about what’s going on, that in my court you’d be pretty thick if you didn’t understand there would be severe consequences for failure to comply . . . because you have to jump through so many hoops to even get to the point where you order somebody to undertake drug testing under the statute, in my view. So there’s a lot of discussion about what’s going on and what the consequences are.

### **Disputes about notice**

The issue of notice about when the parent is supposed to take the test often came up in focus group discussions about compliance: “The big factual issue is whether or not they actually got notice or whether they got notice when they said they did.” Especially in the context of ex parte orders, disagreement over whether notice of testing was properly given can arise:

But one of the bigger problems, I think, is when you get the dispute over whether there was a test. If somebody knows that they’re looking to give them notice, they won’t answer their phone or the answering machine is off . . . and then they try to serve the person and they can never find them and then they get them served and the person says, “No, I wasn’t there,” or “I didn’t get [it] in time,” and it’s really a he-said she-said . . .



Participants noted, however, that once a party became aware of the requirement, “usually those people will then go at the earliest possible time after that. So they can at least come into court and show a test and give a reason why they didn’t go within that [prescribed] period.”

### **Consequences of noncompliance**

Consequences vary according to the facts of the case. There is no one response to a failure to comply with a testing order. While some focus group participants expressed concern that there should be consequences for noncompliance with a court order, most focused on the implications of noncompliance for child custody and visitation. Several judicial officers in the focus groups explained that the fact of disobeying a court order was a problem because it negatively affected their view of the credibility and trustworthiness of the parent.

### **Hearing**

One response to non-compliance was that a hearing could be scheduled for the judicial officer to determine whether the parent had a legitimate excuse for not complying with the testing order. If an adequate excuse was established, another testing opportunity would be arranged.

### **New order**

In a minority of cases, when the party in question did not understand the order, the results as explained by one participant, are to “go back to square one, just start the test over; so I will be able to improve the order and say we’ll do these three additional things so this doesn’t happen again.”

### **Treatment as a positive result**

If there is no good reason for the noncompliance, participants explained that the failure may be treated as a positive or “dirty” test. In some courts, litigants are instructed that failure to comply to the testing can be treated as a positive result.

### **Test as soon as possible**

Another possible result is that the noncompliant party will be required to take the test right away, although as this exchange illustrates, that scenario can raise doubts:

Interviewer: When they do show up, you get them into the test right away?

Participant 1: Right. But then the other side argues, well, since the three days has elapsed and that’s out of their system . . .

Participant 2: Right. It’s pretty suspicious if they were unavailable or didn’t get the message until three days later that it’s going to be out of their system if it’s a urine test.

### **Visitation suspended**

In cases in which the testing is a condition of visitation, one possible outcome suggested in the focus groups is that the party in question does not see the children that time. That may or may not have an effect on subsequent visitation, depending on the circumstances of the case.

## Supervised visitation

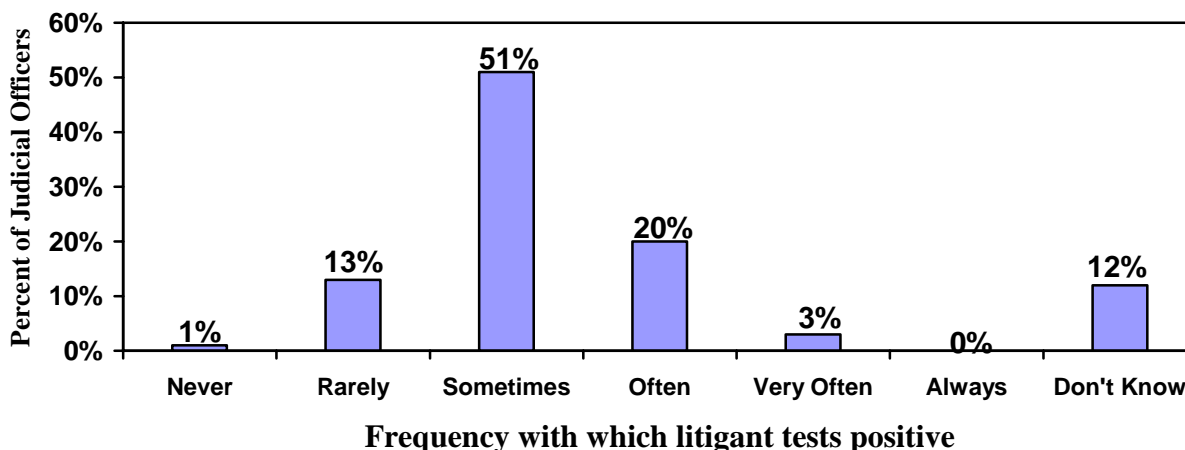
Supervised visitation<sup>16</sup> may also be an outcome of noncompliance, which itself may or may not be a change from the pretesting arrangements. “[If the party] doesn’t go and take the test or comes back dirty, just continue the monitored visitation;<sup>17</sup> he’ll never get unmonitored or overnights. So nothing may change from the temporary order.”

Legislative Area of Inquiry Three: Percentage of Cases in Which Testing Is Ordered and the Parent Tests Positive for the Use of Drugs or Alcohol

### Percentage of positive test results

Only 20 percent of the judicial officers answering the FLJO survey said that parents often test positive for the use of drugs or alcohol. Most judicial officers estimated that litigants tested positive for drugs only sometimes. The “sometimes” category is a broad range; as described in the methodology section, it means that judges estimate that tests are positive from 10 to 39% of cases. Finally, 13 percent of judges said that litigants test positive only rarely. (See figure 4.)

**Figure 4. Of the litigants who are ordered to test or stipulate to test, how often do they test positive for the use of drugs or alcohol?**



Why aren’t positive tests more common? The low rate might validate concerns about tampering or the limited precision of the test. Alternatively, as mentioned earlier in this report, focus group participants added that testing may exonerate parties who are not using drugs or alcohol; those litigants who are not using may agree to the testing to get the issue off the table.

It should also be noted that the proportion of FLJO respondents who answered “don’t know” to this question was higher than on any other question on the survey. Focus group respondents pointed out that there are circumstances when judicial officers may not know the outcomes of tests (e.g., when parties do not comply or do not return to court following a test). In addition, results of a series of tests that are a condition of visitation often would not come back to the

<sup>16</sup> “Supervised visitation is contact between a noncustodial party and one or more children in the presence of a neutral third person.” Cal. Stds. Jud. Admin., std. 5.20(b).

<sup>17</sup> When speaking of supervised visitation, many focus group participants used the term “monitored visitation.”

attention of a judge unless there was a request for a change in the conditional order. In these cases the orders are not used so much to determine custody as to give the non-testing party a tool to protect children from a potential substance-abusing party.

## **Legislative Area of Inquiry Four: Impact of a Positive Test Result on the Court's Decision to Grant or Deny Custody or Visitation**

### **Impact of positive test results and the “best interest of the child” standard**

The California Family Code section 3041.5(a) provides that

The parent, legal custodian, person seeking guardianship, or person seeking visitation in a guardianship who has undergone testing shall have the right to a hearing, if requested, to challenge a positive test result. A positive test result, even if challenged and upheld, shall not, by itself, constitute grounds for an adverse custody or guardianship decision. Determining the best interests of the child requires weighing all relevant factors.

All focus group participants seemed to agree that once a problem with substance abuse has been identified, the question of what to do next is driven by what is in the best interest of the child. As Baron explained in his 2003 article, the Family Code gives special emphasis to “habitual or continual alcohol or illicit drug abuse” by a parent, along with the history of parent-child contact and domestic violence concerns, in determining what is in the child’s best interest.<sup>18</sup> Most of the focus group participants seem to agree with the sentiment expressed by one participant who said, “I don’t think that . . . you can just assume because a person has some positive tests that therefore they are incapable of parenting . . . you really have to evaluate what’s the degree of the problem and how is it impacting the children.”

The focus group participants generally agreed that the impact of a positive test result depends on the facts of each case, as stated by one participant, “There’s no standard consequence in this county; and the statute also says you can’t have a standard consequence because you have to weigh the consequence of a dirty test with all the other factors.” The decision-making process was illustrated by another participant who explained, “I evaluate in the context of what did I order, what were my expectations at the time, what is the relationship between this parent and the child, what’s the age of the child, how much was the visitation before, what’s the proposed change in visitation now, and so on.”

Efforts to weigh parental contact against child safety was described by a focus group participant:

The consequences are always sort of a sliding scale: [from] zero contact to monitored contact with a professional agency that you have to pay for to monitored by a third party that you might trust to unmonitored visitation. And as people test dirty or fail to comply, they go down the scale, the ruler, if you will, and as they comply and develop trust they go forward. And I think, at least in my

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<sup>18</sup> S. Baron, “The Scope of Family Court Intervention” (2003) 5 *Journal of the Center for Families, Children & the Courts* 115–129, p. 118.

courtroom, it's explained that that's the whole, that's the game, that's what we're here about, that what we're doing is trying to ensure that safe contact between parent and child, and once we've gotten into the safe area then we're back to normalizing relations.

In a very general sense, focus group participants reported that positive results often lead to some restriction in the tested party's ability to see the children, but this depends on other factors that must be considered in the case. One possible scenario is a conditional order. The nontesting party is aware of the positive result, or failure to test, and denies visitation at that point, in accordance with that party's prerogative under the court order.

Another outcome that was frequently described in the focus groups is when the tested party has been having some contact with the children, and a positive test results in professional or nonprofessional supervised visitation.

Beyond these scenarios, both the FLJO survey and the focus groups revealed some of the factors that are taken into consideration in determining the next steps to take.

### **Factors and information considered in determining next steps in child custody and visitation decisions**

This compilation of factors considered in determining how to proceed in a case in which a positive test result has been obtained is drawn from open-ended responses in the FLJO survey and participant comments in focus groups. The focus group method does not make it possible to estimate when or how often particular factors are applied. However, the focus group participants did make it clear, that the object of their consideration is protection of the best interest (in particular, safety) of the child, and given that, continuing contact of some sort with the substance-abusing parent.

### **Nature and effect of substance abuse**

One of the most commonly mentioned factors to be considered was the history of the party in question, particularly his or her history of substance abuse. In addition to substance abuse history, participants explained that the type of substance being used tended to affect the consequences, with the effects and use patterns of some substances being seen as more likely to endanger the child than others.

As implied above, the amount and frequency of the substance being abused can also be a factor. This may be of particular relevance if the substance in question is not being used while the child is around. Finally, willingness of the substance abuser to participate in substance abuse treatment programs, or drug court if available, may have some influence on the court's decision, providing the child's safety is adequately protected.

This last point is key, since the primary consideration as expressed by the focus group participants was the protection of the health, safety, and welfare of the child. To that end, depending on the substance, whether the parent was using around the child was important. Furthermore, whether the use affected the ability of the parent to keep the child safe was also considered. Even among parents who were using, if some method of safeguarding the child was

available, such as supervised visitation, that option would at least be considered. Finally, the ability to parent the child effectively was also mentioned, regardless of the type of contact.

### **Status of child**

In addition to the characteristics of the substance-abusing parent, the circumstances of the child were also mentioned as being important considerations. Information about how the child was doing in school and his or her interpersonal relationships could be considered if available.

Of course, the age of the child involved also seemed to affect how the substance abuse issue was treated. According to one participant, “Younger kids I think get more attention from us in terms of fashioning very restrictive orders and all that. When they get to be 15 or 16, or even 14, at some point they’re going to call, they’re going to blow the whistle on Dad or Mom to the other parent.”

### **Access arrangements**

The particular custody or visitation arrangements could also help determine the impact of a positive test result. For example, the frequency and duration of the visits could substantially mitigate the impact of the substance use if the parent was not using during his or her time with the child, and if old enough to offer an opinion, the wishes of the child could be taken into consideration. One focus group participant related a case in which the child was a teenager and well aware of the parent’s substance abuse problem and the issues that it entailed but wanted to spend some time with that parent anyway.

### **Parent-child relationship**

The nature of the parent-child relationship could also affect the impact of a positive test. As mentioned in the previous section, the child may be equipped to work around the parent’s problem sufficiently to allow continued contact. The history of the parent-child relationship, previous custody or visitation orders, and the impact of altering those are all issues that could be considered by the court.

### **Factors that may affect parenting capacity of each parent**

Looking at the entire situation of the parties was something that came up repeatedly in the focus groups. Factors such as the stability of the parents’ living situation, their employment history, and the social support system available to them were all mentioned as being worthy of consideration. In addition, the overall ability of the parent to care for and raise the child (commensurate with the degree of contact), the general life circumstances of the parent, and the ability of the parent to function in the world could be considered.

Criminal or law enforcement history was also mentioned as a potentially important consideration, as was the parent’s driving record. Finally, the relationship between the parents themselves, the degree of acrimony or cooperation, could affect the impact of the substance abuse problem, and hence the court decision.

### **Options or alternatives available to the present situation**

A final set of important considerations was the actual alternatives available to the present situation. The substance abuse issue may not be the most salient factor in the custody/visitation

decision, particularly if there are other serious problems, such as mental health issues, with the other parent. The availability of drug court and/or substance abuse treatment programs, along with the willingness of the abusing parent to attend them, could also influence the decision. The availability and cost of supervised visitation were also factors mentioned as influencing the custody or visitation decision.

### **Possible consequences or next steps for child custody or visitation determination**

As described above, focus group participants emphasized that the consequences of a positive test are driven by the best interest of the child, and in particular regarding substance abuse problems, concerns about child safety. Following that, judicial officers and focus group participants generally expressed a reluctance to prevent contact between parents and children because of a substance abuse problem. Given adequate protections for child safety, most expressed a preference for continuing contact, albeit of a more limited and often supervised nature.

### **Specific considerations governing custody and visitation**

Some distinction was made between custody and visitation decisions. As one bench officer explained it, if a custodial parent has a drug problem, it is either in the past or is a less serious problem than whatever is being faced by the other parent—otherwise they wouldn't have custody in the first place. Consequently, a positive test result would not automatically result in a change of custody because "clearly there's got to be something, some reason not to give custody to the other parent, either that they [also have] a drug issue, or they just don't have any idea how to care for the child, or the child is emotionally damaged by placing the child there . . . 99 percent of the time the reason that person has the child is [that] despite the drug issue, the other parent is worse."

The focus groups indicated that visitation, on the other hand, is more commonly denied on the basis of a positive result. Most participants indicated that there would usually be some kind of supervised visitation, or perhaps suspension of visitation, if there was a positive test result: "I would say more often than not, the person has a positive test, I either suspend visitation or ratchet it back to a supervised until somebody comes into court and explains it to me."

Participants told us that often, because of the cost, nonprofessional supervision was the first choice if supervised visitation was needed: "Litigants can't afford to pay for supervised visitation. So in a lot of cases what we'll do, as [to] the custodial parents, we'll generally have [them] approve of the supervisor [and] if they can't agree on anybody then we'll go to the . . . paid supervisor."

Those who deal primarily with indigent parents face major struggles if professional supervised visitation is called for: "All my clients are indigent and . . . the supervised visitation issue is huge because there is no option of having a paid supervisor."

Most courts have few if any funds to subsidize professional supervised visitation. While it is not clear how often the requirement of payment effectively results in the tested party being unable to see the child because of a lack of money, all focus groups acknowledged that it does happen.

### **Treatment for substance abuse in order to foster stable placement**

Judicial officers participating in the focus groups recognized that it is sometimes the custodial parent who has a substance abuse problem. One judicial officer explained that a parent who has lost custody because of a substance abuse problem is either ordered or strongly encouraged to enroll in a treatment program. The intent in such cases is to get the parent to address the substance abuse problem so that the child can return to the original custodial arrangement as soon as possible, within the limits of the need to protect the child's safety and best interests.

### **Graduated visitation plans**

If the drug issue is with a noncustodial parent who has visitation, focus group participants explained that a positive test rarely results in no contact with the child. More common is for there to be a move from unsupervised to supervised visitation. Often these also include some kind of step plan that either calls for a certain number of clean tests, or for each clean result, some increase in time or decrease in supervision: "I agree that we have escalating visits as long as everything is clean."

### **Motion to change custody**

Another potential impact of a positive test is that it allows the nontesting party to come back into court to argue for a change of custody or visitation: "Currently most of the order[s] say it becomes a basis for an argument to change custody or visitation and then the party has to come back into court and say, 'So-and-so tested positive and that should be grounds for a change [of] visitation orders.'"

### **No change in custody or visitation**

As mentioned above, California Family Code section 3041.5(a) provides that "[a] positive test result, even if challenged and upheld, shall not, by itself, constitute grounds for an adverse custody or guardianship decision. Determining the best interests of the child requires weighing all relevant factors." Emphasizing the effects on children, some participants explained that even a positive test may not affect custody or visitation: "[S]ometimes I'll have a dirty test that will have no consequences because . . . the facts indicate it was a time when the children weren't involved, and mere usage of illegal drugs doesn't have . . . an automatic negative effect for me, it's how it affects the children."

An initial concern when developing Family Code section 3041.5 was that positive drug or alcohol test results would be used, on their own, to deny a parent contact with a child. This finding illustrates, however, that the positive test result is used in conjunction with other factors to determine a custody or visitation arrangement that is in the child's best interest. As mentioned above, the parent with the positive test might be the better parent under the circumstances, thereby requiring no change in custody or visitation arrangements. It may also be the case that a non-custodial parent testing positive is already using supervised visitation, or has some other restricted or supervised time with the child, that adequately protects the child from the danger posed by the substance abuse.

## Summary

Assembly Bill 1108 required the Judicial Council to study the implementation of the act creating Family Code section 3041.5 by addressing four specific areas of inquiry. Our findings are as follows:

- Most judicial officers said they ordered drug tests only “sometimes” or “rarely” in the child custody cases in which drug/alcohol issues were involved.
- The majority of judicial officers stated that parties complied with drug testing orders “often” or “very often”. The consequences of noncompliance depended on the facts of the case.
- Half of judicial officers report that parties ordered to test “sometimes” test positive for drugs/alcohol.
- A positive test result is considered in the context of a range of best interest criteria in determining custody and visitation.

Judicial officers value the availability of testing for drug or alcohol use. According to judges, they need this authority to make decisions in the best interest of the child, particularly if there is a dispute between parties about whether substance abuse exists. The low rate of representation in child custody cases further reduces the information available to judges. The latest statewide data on child custody and visitation disputes show that in more than 7 cases in 10, one or both parties are unrepresented.

The data demonstrate that the legislation is being utilized conservatively when compared to how often the issue of substance abuse is raised in a courtroom or in a mediation session. It is used in less than half of the cases in which drug or alcohol issues are involved. There are a number of reasons that drug testing may not be ordered, even if substance use is an issue. Testing may not be needed to verify substance use in cases where either there is already sufficient information that there is a drug or alcohol problem or the party admits to substance use. In other cases, drug testing may already be occurring, such as through probation or drug treatment court. Under such circumstances, ordering drug or alcohol testing would not give judges additional useful information. Focus group participants mentioned that the existence of the testing option, even if the option is not invoked, may motivate parties who were abusing drugs or alcohol to stop using in order to see their children.

Judges, attorneys, and court personnel also expressed appropriate concern about the validity of the test, explaining that urine tests can be easily manipulated to produce a positive result and that some commonly abused substances are not detectable using urine screenings within a fairly short period of time following ingestion. The need for hair follicle testing in addition to urine testing was mentioned for these reasons.

Once the testing order was entered, compliance with it was high. Bench officers and court personnel who participated in the focus groups mentioned factors that impacted compliance, including transportation problems, the cost of testing, and the need for language services to help clarify the conditions of the orders to litigants. Court personnel advised that compliance increases with the clarity of orders, such as including a time-limit on the conditional orders (e.g.,



an end date for parties ordered to undergo a series of randomized tests), being explicit about when results needed to be returned to the court, and defining the consequences of non-compliance with the order. The combination of high compliance with the testing order and the large number of litigants who test negative, implies that there is a high number of cases in which the issue of drug or alcohol abuse is put to rest as a result of Family Code section 3041.5.

Regarding the impact of a positive test result, focus group participants explained that a positive test does not, in and of itself, result in loss of access to children. Judicial officers explained that there are competing considerations in deciding how to act on a positive result. The overall finding, however, is that the test results are used in conjunction with other factors to determine a custody and visitation schedule that is in the best interests of the child, with an emphasis on protecting the safety of the child. It is also important to note that sometimes counties have limited options in addressing substance abuse issues. Courts may have knowledge of substance abuse within a family, yet there are no community resources to address it. In California, for example, there are only two family law drug courts to address substance abuse issues for families with active family law cases.

The lack of resources in family law impacts how the courts are able to implement Family Code section 3041.5. Programs that are proven effective at keeping children safe and in contact with parents, such as supervised visitation or family law drug court, are limited or non-existent in many counties. While it is clear that increasing these services may be resource intensive, special attention should be given to how courts can improve the implementation of section 3041.5. In particular, increasing the number of supervised visitation programs, family law drug courts, and the expansion of other drug courts to include family law, could provide vital tools to help the court address problems identified with implementing section 3041.5. Lastly, providing court resources for reviews and to allow for the monitoring of child custody cases ordered to drug or alcohol testing would be beneficial to the families served by this piece of legislation.

APPENDIX A

**Assembly Bill 1108**

BILL NUMBER: AB 1108 CHAPTERED BILL TEXT

CHAPTER 19

FILED WITH SECRETARY OF STATE FEBRUARY 23, 2004

APPROVED BY GOVERNOR FEBRUARY 20, 2004

An act to add and repeal Section 3041.5 of the Family Code, relating to family law, and declaring the urgency thereof, to take effect immediately.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 3041.5 is added to the Family Code, to read:

3041.5. (a) In any custody or visitation proceeding brought under this part, as described in Section 3021, the court may order any parent who is seeking custody of, or visitation with, a child who is the subject of the proceeding to undergo testing for the illegal use of controlled substances and the use of alcohol if there is a judicial determination based upon a preponderance of evidence that there is the habitual, frequent, or continual illegal use of controlled substances or the habitual or continual abuse of alcohol by the parent or legal custodian. This evidence may include, but may not be limited to, a conviction within the last five years for the illegal use or possession of a controlled substance. The court shall order the least intrusive method of testing for the illegal use of controlled substances or the habitual or continual abuse of alcohol by either or both parents or the legal custodian. If substance abuse testing is ordered by the court, the testing shall be performed in conformance with procedures and standards established by the United States Department of Health and Human Services for drug testing of federal employees. The parent or legal custodian who has undergone drug testing shall have the right to a hearing, if requested, to challenge a positive test result. A positive test result, even if challenged and upheld, shall not, by itself, constitute grounds for an adverse custody decision. Determining the best interests of the child requires weighing all relevant factors. The results of this testing shall be confidential, shall be maintained as a sealed record in the court file, and may not be released to any person except the court, the parties, their attorneys, the Judicial Council (until completion of its authorized study of the testing process) and any person to whom the court expressly grants access by written order made with prior notice to all parties. Any person who has access to the test results may not disseminate copies or disclose information about the test results to any person other than a person who is authorized to receive the test results pursuant to this section. Any breach of the confidentiality of the test results shall be punishable by civil sanctions not to exceed two thousand five hundred dollars (\$2,500). The results of the testing may not be used for any purpose, including any criminal, civil, or administrative proceeding, except to assist the court in determining, for purposes of the proceeding, the best interest of the child pursuant to Section 3011, and the content of the order or judgment determining custody or visitation. The court may order either party, or both parties, to pay the costs of the drug or alcohol testing ordered pursuant to this section. As used in this section, "controlled substances" has the same

meaning as defined in the California Uniform Controlled Substances Act, Division 10 (commencing with Section 11000) of the Health and Safety Code.

(b) This section shall remain in effect only until January 1, 2008, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2008, deletes or extends that date.

SEC. 2. (a) The Judicial Council shall study the implementation of this act and shall report to the Legislature regarding that implementation. The study shall evaluate all of the following:

- (1) The number and percentage of custody cases in which drug or alcohol testing is ordered.
- (2) The rate of compliance with those orders and the procedures that are followed if a parent fails to comply with the order.
- (3) The percentage of cases in which testing is ordered and the parent tests positive for the illegal use of drugs or the use of alcohol.
- (4) The impacts of those positive test results on the court's decision to grant or deny custody or visitation.

(b) The Judicial Council shall submit an interim report to the Legislature no later than July 1, 2005, and shall submit a final report to the Legislature no later than July 1, 2007.

SEC. 3. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to ensure the safety of children who are the subject of custody and visitation proceedings as soon as possible, it is necessary that this act take effect immediately.

## APPENDIX B

### **Pilot Test of Case Review Method**

The pilot involved examining family law cases that had child custody or visitation issues to identify cases in which at least one party had been ordered to undergo testing. In order to align the review period with the date of the legislation change and to allow sufficient time for any changes in practice to appear, reviews were conducted on only those cases dated between February 2004 and April 2005.

In one county, a computerized search of all family law cases involving child custody or visitation issues was conducted for mention of drug or alcohol orders. In the additional three counties, paper copies of the minute orders or family law case files from the time period of interest were provided by court staff and were then reviewed by CFCC researchers.

Using these methods, approximately 1,000 family law cases across the four counties were reviewed for information related to drug or alcohol orders. Forty-five of these reviewed cases included mention of drug or alcohol testing. Twenty of the cases were selected for more in-depth analysis regarding the documentation of testing results and the impact on custody decisions.

The pilot case file review demonstrated that a case file review would not be an effective method of addressing the mandated areas of inquiry. It is very likely that a file review approach would fail to capture cases that contained a testing order and would therefore yield an inaccurate count. Identifying cases with a drug testing order was challenging for several reasons. Most counties do not have electronic case management systems for tracking family law case information. Even for those counties who do have case management databases, there is no uniform statewide method for flagging orders for drug or alcohol testing. Due to the variation across counties in the documentation and location of testing information, it was difficult to identify cases with testing orders. In addition, not all litigants for whom testing is ordered return to court for review hearings, therefore information regarding compliance and testing outcomes may not be present in the case file. This would potentially yield inaccurate data regarding compliance rates and rates of positive drug tests. Since the remaining areas of inquiry are based on the total number of drug testing orders, all resulting data would be affected by these problems.

## APPENDIX C

### **Methods: Family Law Judicial Officer (FLJO) Survey**

#### **Survey development and description**

The Family Law Judicial Officer (FLJO) survey was an omnibus survey designed to collect information from all judicial officers hearing family law cases. Researchers worked in collaboration with attorneys and program managers working in family law to develop the survey; the Judicial Council's Family and Juvenile Law Advisory Committee reviewed and provided feedback prior to the survey's dissemination. Addressing the legislatively mandated areas of inquiry from AB 1108 was one of the goals of the survey. Survey respondents were asked to estimate the frequency with which they ordered drug testing, the rates of compliance with the testing order, and the frequency of positive testing results.

The survey also included a variety of additional topics and issues relevant to practice in the family courts. These topics included self-represented litigants, case management, domestic violence, supervised visitation, training/education, and case coordination.

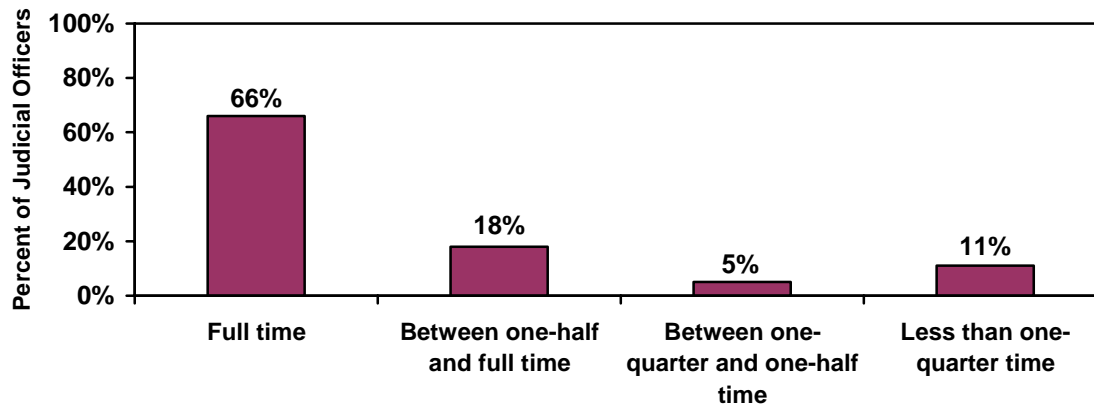
The survey was first pilot-tested with eight judicial officers from seven different counties. The pilot counties selected were diverse in terms of population size and geographical location. Feedback from the pilot counties was then incorporated into the final draft of the survey. The revised survey was disseminated between November 2005 and January 2006 to 255 family law judicial officers and child support commissioners, in other words, to all judicial officers who heard family law matters in California in 2005. Participation in the survey was voluntary, and survey respondents were assured that their responses would be confidential.

#### **Survey respondents**

Responses received are quite representative based on geography and county size. The overall response rate to the survey was 78 percent. Surveys were received from 199 judicial officers, including 108 judges and 91 commissioners. Survey respondents represented 55 of 58 California counties. Response rates were similar across most county size groupings, with the exception of the smallest counties (population less than 100,000), which had a slightly lower response rate (65 percent) than other county size groupings (78 to 86 percent).

Sixty-six percent of the responding judicial officers were assigned to family law matters on a full-time basis. (See figure 5.)

**Figure 5. Judicial Officer Time Spent on Family Law Matters**



Of the 199 judicial officers who completed the survey, 17 indicated that they do not hear cases involving child custody and visitation; these respondents were directed not to complete the questions related to drug testing in child custody cases. Only those judicial officers who indicated they heard family law cases involving child custody and visitation issues were included in the analysis of the legislatively mandated AB 1108 areas of inquiry.

## APPENDIX D

### **Methods: Focus Groups**

Following completion of the Family Law Judicial Officer survey, a series of focus groups was convened to provide more detailed data on the mandated areas of inquiry, particularly the procedures to be followed if a parent fails to comply with a testing order and the impact of a positive test result on a court's custody or visitation decision. A total of seven groups from six different counties were held, ranging in size from 5 to approximately 30 participants. The groups were tape-recorded, and the recordings were transcribed for analysis. Participation in the groups was strictly voluntary, and participants were assured that neither their names nor any personally identifying information would be used in this report. Five of the groups contained a mix of judicial officers, family court services mediators and evaluators, and private family law attorneys. One group consisted only of family court services personnel, and another group consisted only of judicial officers.

The data from these groups is presented in a composite fashion as there was a high level of agreement on answers to the questions asked. Slight variations in local practice are noted where relevant. In addition to covering the aforementioned job categories, the groups also represented a reasonable, though by no means comprehensive, cross-section of counties in California. Specifically, representatives of southern, mid-state, far north, and central valley counties were included. The groups also covered a range of small, medium, and large counties, with representatives from both urban and rural areas.

Although they do not provide a representative sample of practices across the state, the groups did allow for a more thorough explanation of the processes and practices surrounding the use of testing in child custody cases than was possible through the survey. In addition, the use of focus groups allowed a deeper understanding of the meaning given to positive tests and the overall context in which testing occurs in these cases, which complements the quantitative data provided by the FLJO survey.