

## The impact of drug and alcohol testing on child custody evaluations

Elisa Reiter and Daniel Pollack | October 23 2024



Drug and alcohol testing have become common practice in a variety of settings, including child custody evaluations. Parents sometimes accuse each other of not only drug use, but of suffering from addictions that impair parenting ability. Understanding the mechanics of drug testing, dispelling common myths about the (in)ability to circumvent such tests, and recognizing how drug test results can influence custody cases is crucial. Some cases merit monitoring via immediate and/or ongoing random testing, and there are instances where such demands prove

unnecessary. In these cases, the accuser's actions can have significant repercussions regarding custody of minor children. It is essential to examine the role of drug and alcohol testing in custody evaluations, its implications, and the potential consequences on the parties involved.

### *The Mechanics of Drug and Alcohol Testing*

Drug and alcohol testing involve analyzing biological samples to detect the presence of substances or their metabolites. Several testing methods are commonly used:

#### *Urine Testing*

[Urine testing](#) is one of the most frequently used methods due to its relative ease and low cost. It can detect recent drug use, typically within the past few days for most substances. The process involves collecting a sample and subjecting it to screening tests, often employing immunoassay techniques. Positive results are then confirmed using more specific methods such as [gas chromatography](#) and/or [mass spectrometry](#) (GC/MS). Evaluators must be cognizant that there are testing facilities that may not monitor all aspects of collecting the sample, and that there are nefarious people who may attempt to smuggle [synthetic urine](#) or a sample provided by a friend. If a positive result comes from that bogus sample, that's when the errant party's attorney hears something like, "But she told me she was clean!" Moreover, if [creatinine levels](#) are "off," it is prudent to question whether the person being tested has flooded their system with water, seeking to skew the test results.

### *Hair Follicle Testing*

[Hair follicle testing](#) can detect drug use over a longer period, typically up to 90 days. This method involves analyzing a small hair sample, usually taken from the scalp. Hair testing is particularly useful for detecting patterns of chronic drug use.

### *Toenail Testing*

[Toenail testing](#) is less common but can provide an even longer detection window, potentially up to 12 months. This method is particularly useful for detecting long-term substance abuse patterns. If the person presenting for a sample suddenly has fake nails, or has trimmed their toenails as low as possible, this may be a yellow flag.

### *PEth Testing*

[PEth testing](#) is a direct biomarker of alcohol consumption that forms in the blood only when ethanol is present. A PEth blood test measures the level of phosphatidyl ethanol, which bonds to red blood cell membranes after ingesting alcohol. [PEth](#) is a more sensitive test than other common screening techniques, and can detect alcohol use for up to four weeks after consumption. PEth is not affected by age, gender, liver disease or other health conditions, and involves taking only a small blood sample.

### *Myths About Beating Tests*

Despite numerous claims about foolproof methods to beat drug tests, most of these myths do not hold true:

*Myth 1:* Drinking excessive amounts of water will dilute urine and mask drug use.

*Reality:* While dilution can lower drug concentrations, lab tests include testing for diluted samples, and may consider diluted samples invalid. Good evaluators and lawyers should know what [“normal” creatinine levels](#) are in order to cross examine and or deflect criticism of results.

*Myth 2:* Using detox products can cleanse the body of drugs.

*Reality:* Most detox products are ineffective and fail to remove drug metabolites from hair or nails. There will still be those who surf “the dark web” for [detox products](#), purchase and ingest detox products in an effort to beat drug tests.

*Myth 3:* Secondhand marijuana smoke can cause a positive test result.

*Reality:* While [potentially conceivable](#), the amount of exposure required to produce a positive result is extremely rare.

### *Impact on Child Custody Evaluations*

Drug and alcohol test results may significantly influence child custody evaluations. Courts prioritize the best interests of the child when making custody determinations. Evidence of substance abuse can raise serious concerns about a parent’s ability to provide a safe and stable environment for their child(ren). Because marijuana is legal in an increasing number of states, judges hold differing opinions about the impact of marijuana use. A single positive drug or alcohol test may lead to temporary restrictions on custody of or access to and possession of

children. Courts will consider patterns of use as well as a parent's willingness to address substance abuse issues when making long-term custody decisions.

### *Case Studies/Law Modernizing*

In Re L.J.B.: In 2020, the Pennsylvania Supreme Court held that Children & Youth agencies cannot compel a parent to submit to a drug screen as part of a child welfare investigation. Interviewing the child, the child's parents and/or caretakers are certainly part of the process, but the Pennsylvania legislature may not have contemplated mandatory drug screening as part of that investigative process. Particular focus was placed on pregnant women using opioids during pregnancy. From the majority opinion:

We address here ... whether a woman's use of opioids while pregnant, which results in a child born suffering from neonatal abstinence syndrome ("NAS"), constitutes "child abuse" as defined. We conclude, based on the relevant statutory language, that a mother cannot be found to be a perpetrator of child abuse against her newly born child for drug use while pregnant. We therefore reverse the decision of the Superior Court and remand the matter for reinstatement of the trial court's order...

Moreover, once labeled as a perpetrator of child abuse, the likelihood that a new mother will be able to assimilate into the workplace and participate in activities of the child's life would be diminished. This would contravene the laudatory goal of preserving family unity and a supportive environment for the child.

In the case of [In Re D.R.](#), the Supreme Court of Pennsylvania (Western District) held that: “the Agency’s authority to investigate does not include the authority to obtain an involuntary urine sample from the subject of the investigation.”

By contrast, in 2023, the [Supreme Court of Washington](#) held that it was not an error for the trial court to “draw a negative inference from the mother’s refusal to answer specific questions about her drug use.”

A legislative update to the [Texas Family Code in 2021](#) prevents the Department of Family and Protective Services from removing a child solely based on a parent testing positive for marijuana. The ratification of this provision reflects a societal shift toward a more lenient approach to evidence of marijuana use in custody cases. However, where a parent’s marijuana use “causes significant impairment to the child’s physical or mental health or emotional development,” removal can still be considered.

Extracting something out of someone’s body – like a urine or blood sample – potentially encroaches on that individual’s [Fourth Amendment](#) rights. These cases and legislation help highlight the need for balancing child safety with protecting parents from unfair accusations or invasions of privacy. The use of substances such as [Delta 8](#) and [Delta 9](#) also compound issues related to testing.

### *Best Practices*

To ensure fair and effective use of drug and alcohol testing in custody cases, several best practices should be considered:

1. Use testing only when there is reasonable suspicion of substance abuse that could impact child welfare.
2. Employ reliable, scientifically validated testing methods.
3. Interpret results in the context of overall parenting abilities and child safety and well-being.
4. Provide opportunities for rehabilitation and demonstrating changed behavior.
5. Protect the privacy and dignity of all involved.

### *Conclusion*

Drug and alcohol testing can play a crucial role in child custody evaluations, providing objective evidence of substance use that may impact a parent's ability to care for their child. However, it is essential to approach testing with caution, recognizing the limitations of testing and the potential misuse of testing. Although myths about beating drug and alcohol testing persist, most are ineffective or are easily detectable. Courts, child custody evaluators, and attorneys must rely on scientifically valid testing methods and interpret results in the broader view of parenting ability and child welfare. The goal of drug and alcohol testing should be to protect the personal safety and emotional development of children while assuring that parents are treated fairly.

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