

Forum

LOS ANGELES DAILY JOURNAL • MONDAY, NOVEMBER 27, 2000 • PAGE 6

Now Drug-Using Parents Can Get Custody of Kids

By Fred Silberberg

One group that desperately needs access to justice is children. And one way to ensure this access is by giving courts the tools to prevent a custody determination in favor of a drug-using parent.

One of the tools most often used by litigants and courts to protect children from substance-abusing parents has been recently taken away by the 1st District Court of Appeal. Unless the decision is overturned, drug testing in custody cases will be virtually obliterated and children will be left unprotected.

Wainwright v. Superior Court of Humboldt County, decided on Oct. 20, 2000, obliterated the trial court's ability to protect minors from a very common and potentially dangerous problem. The decision holds that a family law court can not order drug testing in a contested custody proceeding. Not only does this decision place thousands of California children at risk of grave harm, it also clearly flies in the face of one of the only ways to verify whether or not a custodial parent is a habitual drug user.

Drug abuse in our society is common, but it also is usually private. And while these allegations sometimes have merit, other times they are merely the result of a vindictive former spouse who will stop at nothing. It seems incomprehensible that

the use of the most basic method of determining the truthfulness of these allegations will now be prohibited.

The decision in *Wainwright* raised constitutional issues, said the Court of Appeal. The rights of privacy and protection against unreasonable searches and seizures were at risk

of being infringed on. As we all remember from law school, in order to allow this, the state must establish a compelling governmental interest. In the opinion of this court, therefore, the state has no compelling interest in the welfare of its minor children, the very people who need protection when a parent isn't fit to provide it.

The court applied the traditional "balancing test," weighing the rights of individual parents as set forth in the Fourth Amendment against the state's interest in ordering drug testing. In applying this test, the court acknowledged that the California Supreme Court has authorized drug testing of student athletes and city job applicants. Purportedly, the individuals in those groups do not have an expectation of privacy which would justify not performing the drug test.

I would argue that someone who pet-

tions a court for custody of a child has a reduced expectation of privacy. Family law attorneys and judges frequently warn parents that they are "under a microscope" when they become involved in a custody dispute.

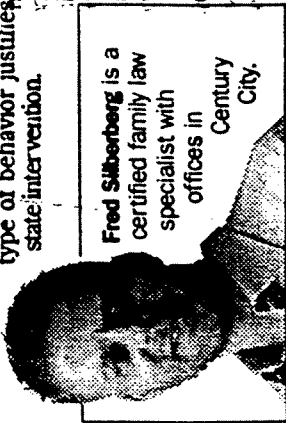
Based on a purported lack of substantive or procedural guidelines, the court concluded that Section 3011 of the Family Code did not pass constitutional muster. And the court split hairs in order to justify its decision. But if that wasn't enough, the court went so far as to state that the Legislature didn't intend to allow drug testing under that Family Code section, which is peculiar considering that Section 3011(d) provides that the use of controlled substances may be considered in a custody award after independent corroboration.

The statute on its face includes, as possible sources of independent corroboration, reports from "medical facilities" or "organizations providing drug- and alcohol-abuse services." It seems quite a stretch to exclude a drug-testing laboratory from either of these definitions.

The *Wainwright* court has failed the chil-

dren of California. By interpreting Section 3011 in this manner, the hands of our judges are tied if a parent objects to a drug test. It is unlikely that one would find witnesses who would testify as to having seen actual drug use by a parent. This means that unless there is an existing history of abuse, such as records of admission to rehabilitation programs or arrests for possession or driving while intoxicated, it will be nearly impossible to substantiate the existence of drug abuse by a parent. Not only does this place children in a situation of possible danger, it also sends a message to them that drug abuse is acceptable conduct.

Until a reversal or legislative action, we should all pray that something horrendous doesn't happen to one of these children whose welfare the court has subordinated to that of a parent. If drug abuse isn't a compelling reason to override a parent's right of privacy, one must wonder what type of behavior justifies state intervention.



Fred Silberberg is a certified family law specialist with offices in Century City.