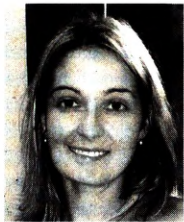


# Drug testing and family law



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## Introduction

We most commonly associate testing for the presence of illicit substances with elite athletes and the competitive world of sport.

Court orders can be, and often are, made in both the Family Court and Federal Magistrates Court for drug testing of either one or more parties to a family law case. Parties are often surprised to find that such an order can be made requiring them to submit themselves for random testing, often on a supervised basis. In addition, orders can be made restraining a party from the use of illicit substances either during the period of time in which a child is under their care or responsibility, or for a period of time prior to the party's care for a child.

## The Family Law Act 1975

Section 65D(1), s67ZC, s68B or s114 of the *Family Law Act 1975* provide the statutory basis for the Court to make an order or orders requiring a party or parties to attend for the purpose of submitting themselves to a drug test or restraining them from drug use.

A court will exercise its discretion in making such orders in the context of having regard to the best interests of the child as the paramount consideration (s67ZC(2)). It is important to note that an order restraining a person from drug use or requiring them to submit to a drug test must be linked to a condition of contact or residence. In the case of *L v T* 1999 FLC 92-875, the Full Court recognised, at page 86,392, that: "it would not be, [ . . . ] a proper exercise of the welfare power for a Court to place limits on a parent's conduct unless it could be demonstrated that those limits are necessary for the welfare of the child. Even then, careful consideration would need to be given to the right of the parents to conduct their lives as they see fit".

Therefore, a party cannot be required to cease cigarette smoking, the consumption of alcohol or even the use of illicit substances while a child is not in their care. It is only when a party is responsible for the care, welfare and development of a child in their care that the Court is able to order that a party must refrain from the use of illegal drugs or substances, or must not consume alcohol to excess.

David Edney, of C E Family Lawyers, remarks that: "There should always be consideration of the person's parenting ability in the context of their drug use and any illegal activity that may be associated with that drug use".

Parties commonly agree to submit to a drug test in an attempt to refute allegations made against them that they are using illegal and/or illicit substances, especially in cases where there may be a previous history of drug addiction or abuse. Where this occurs a provision should be included stating that the parties do not admit the necessity for such an order. In some cases Orders for contact can be made where testing and providing a negative drug test are preconditions of contact occurring.

## Wording of orders

There are several types of orders the court is entitled to make in order to restrain parties from the use of illicit

drugs or to submit to drug testing. Some of these include:

- that without admitting the necessity for same, each party be restrained from using illicit drugs for 12 hours before and during all periods when the children are in that party's care;
- for 24 hours immediately prior to the commencement of any period of contact (including any period during which the said child shall be residing with her/him) and during all periods of contact (including all periods during which the said child is residing with her/him), the husband/wife/father/mother be restrained by injunction from ingesting, consuming or using, or otherwise being under the influence of alcohol, and/or any legal or illegal drug or substance;
- that without admitting the necessity for such an order, each of the parties undergo a random urine drug screen at the request of the child representative (or the parties themselves if there is no child representative) and provide a copy to the other or the child representative forthwith;
- that the father's/mother's contact be subject to the father/mother providing clear urine tests.

## Types of testing

Testing for the presence of drugs is most commonly conducted by collecting a urine sample. Orders often require the sample to be collected under supervision, which can be quite uncomfortable for parties, as supervision is conducted by a stranger (sometimes a nurse or other medical/pathology staff member). A party can either attend a doctor who collects a specimen and sends to a laboratory for results, or attend a pathology centre for the results to be collected immediately.

In cases where the result of the test must be provided either forthwith or within 24 hours, the party required to undergo the test should advise either their treating doctor or the pathology centre that the results are required quickly after their release and provide the contact details of the person to whom the results should be forwarded. There can be a delay between collection, analysis and distribution of results and it is important to comply with court order time requirements wherever possible.

Other forms of testing include collecting blood samples. This is obviously a far more invasive process than collecting a urine sample. Breath analysis is used for the detection of the presence of alcohol. Saliva analysis is another method of testing but is not yet widely used in family law proceedings.

Once a urine sample has been collected and analysed, a report will be generated which commonly provides the following information:

- date and time specimen was collected, together with name of party and treating doctor;
- urine creatinine level; and
- screening results for: sympathomimetic amine class, barbiturate class, benzodiazepine class, cannabinoids, cocaine metabolite, opiate class and methadone metabolite class.

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