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Evaluating and monitoring drug and alcohol use during child custody disputes

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Assess substance use, recommend treatment, prepare a monitoring plan

Alcohol or drug use is frequently reported as a factor in divorce; 10.6% of divorcing couples list it as a precipitant for the marriage dissolution, surpassed by infidelity (21.6%) and incompatibility (19.2%).[1] An effective drug and alcohol evaluation and monitoring plan during a child custody dispute safeguards the well-being of the minor children and protects—as much as possible—the parenting time of drug- or alcohol-involved parents. The evaluation maneuvers discussed in this article most likely will produce a complete, fair, and transparent evaluation and monitoring plan.

An evaluator—usually a clinician trained in diagnosing and treating a substance use disorder (SUD) and other psychiatric illnesses—performs a comprehensive alcohol/drug evaluation, prepares a monitoring program, or both. The evaluation and monitoring plan should be fair and transparent to all parties. Specific evaluation maneuvers, such as forensic-quality testing, detailed interviews with collateral informants, and ongoing collaboration with attorneys, are likely to yield a thorough evaluation and an effective and fair monitoring program. The evaluating clinician should strive for objectivity, accuracy, and practical workability when constructing these reports and monitoring plans. However, the evaluator should—in most cases—not provide treatment because this likely would represent a boundary violation between clinical treatment and forensic evaluation.

Disclosure
The author reports no financial relationship with any company whose products are mentioned in this article or with manufacturers of competing products.

Addiction-specific evaluation maneuvers

As in all forensic matters, the evaluator's report must answer the court's "psycholegal question as objectively as possible"[2] rather than benefit the subject of that report. (Describing the individual being examined as the "subject" rather than "patient" emphasizes the forensic rather than clinical nature of the evaluation and the absence of a doctor–patient relationship.) Similarly, a monitoring program for drug/alcohol use should be designed to flag use of banned substances and protect the well-being of the minor child, not the parents.

Acting more as a detective than a clinician, the evaluator should maintain a skeptical—although not cynical or disrespectful—attitude when interviewing individuals who might have knowledge of the subject's drug or alcohol use, including friends, co-workers, therapists, physicians, and even the soon-to-be-ex spouse. These collateral informants will have their own preferences or loyalties, and the examining clinician must consider these biases in the final report. A spouse often is biased and could exaggerate, emphasize, or invent addictive behaviors committed by the subject.

Examine available medical and psychotherapy records to discover any latent drug or alcohol use, as well as patterns of slips, relapses, or binges, to determine a likely prognosis. Any potentially useful collateral informants or records that are *not* provided to the evaluator should be noted in the final evaluation report, because they might contain relevant information that could change the report's recommendations for a monitoring program. ***Table 1*** provides addiction-specific maneuvers to employ in a child custody dispute.

Collaboration among attorneys and evaluators/monitors

A strong collaboration between the judge and the attorney requesting a drug/alcohol evaluation or monitoring plan likely will result in a better outcome. This collaboration must begin with a clear delineation of the report's purpose:

Table 1

Steps for assessing drug or alcohol use during a child custody dispute

Interview all relevant adult parties
Collaborate with treating clinicians, monitors, and attorneys
Review all medical records
Use forensic-quality chain of custody testing

- Is the court appointing the evaluator to help gauge a drug/alcohol-involved parent's ongoing ability to care for a child?
- Is an attorney looking for advice on how to best present the matter to the court?
- Is the evaluator expected to present and maintain a position in a court proceeding against another evaluator in a "battle of the experts?"
- Is the evaluator to consider only drug use? Only illicit drug use?
- Is the subject banned from using the substance at all times or just when she (he) is caring for the child?

A clear understanding of the evaluator's mission is important, in part because the subject must fully comprehend the plan to consent to having the results disseminated.

To foster an effective collaboration with legal personnel the evaluator should frame the final report, testimony, and monitoring plan using clinical rather than colloquial language. To best describe the subject's situation, diagnosis, and likely prognosis, these clinical terms often will require explanation or clarification. For example, urine drug screens (UDS) should be described as "positive for the cocaine metabolite benzoylecgonine" rather than "dirty," and the subject might be described as "meeting criteria for alcohol use disorder" rather than an "alcoholic" or "abuser." Using DSM-5 terminology allows for a respectful, reasonably reproducible diagnostic assessment that promotes civil discussion about disagreements, rather than name-calling in the courtroom. Professional third-party evaluation and monitoring programs in custody dispute proceedings can de-escalate the tension between the parents around issues

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A monitoring program should be designed to flag use of substances and protect the well-being of the child, not the parents

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of substance use. The conversation becomes professional, dispassionate, and focused on the best interests of the child.

Use of appropriate language allows the evaluator to expand the parameters of the report or recommend an expansion of it. If a drug/alcohol evaluation finds a relevant mental illness—in addition to a SUD—or finds another caregiver who seems incompetent, the evaluator might be professionally obligated to bring up these points, even if they are outside the purview of the requested report and monitoring plan.

Planning a monitoring program

If the evaluation determines a monitoring plan is indicated and the court orders a testing program, the evaluator must design a program that accomplishes the specific goals established by the court order. The evaluator might help the court draft that plan, but the evaluator must accommodate the final court order. ***Table 2*** lists vital aspects of a monitoring program in a child custody dispute.

Describe goals. A court-ordered monitoring program includes:

- a clear description of goals
- what specific substances are being tested for
- how and when they are being tested for
- who pays for the testing
- what will happen after a positive or missed test.

The situation will determine whether random, scheduled, or for-cause testing is indicated.

A frequent sticking point is the decision as to whether an individual can use alcohol or other substances while he (she) is not caring for the child. A person who does not meet criteria for a SUD could argue that abstinence from alcohol or any sort of testing is unwarranted when another person is taking care of the child. The evaluator should provide input, but the court will determine the outcome.

Develop a testing program. The evaluator should develop a testing program that accomplishes the goals set out by the court, usually to protect the child from possible harm caused by a parent who uses alcohol or drugs. However, this narrow goal often is expanded to allow testing for drugs/alcohol at all times, because the parent's slip or relapse could harm the child in the long or short term.

Table 2

Essential elements of a child custody drug- and alcohol-monitoring program

Define the relevant substances
Construct a workable and effective testing protocol
Select random, scheduled, or for-cause testing
Define the consequences of a positive or missed test

Describe consequences. A carefully structured definition of the consequences of a positive or missed test is an important aspect of the monitoring program. In protecting the best interests of the child, the consequences usually include the immediate transfer of the child to a safe environment. This often involves the person who receives the positive test result—usually with a physician monitoring the testing—notifying the other parent or the other parent's attorney of the positive test result.

Testing

Although an important part of evaluation and monitoring, drug and alcohol testing alone does not diagnose a SUD or even misuse.[3] Adults often use alcohol with no consequence to their children, and illicit drug use is not a *prima facie* bar to parenthood or taking care of a child. Also, the results of a thorough alcohol or drug evaluation cannot determine the ideal custody arrangement. The court's final decision is based on a more wide-ranging evaluation of the family system as a whole, with the drug/alcohol issue as 1 component. In addition, the court could use the results of a forensic examiner's assessment to advocate or mandate the appropriate treatment.

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Although addiction clinicians usually request a full screen, in the legal sphere, often only the problematic substances are tested for

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Using DSM-5 terminology allows for a respectful diagnostic assessment rather than name-calling in the courtroom

Table 3

Estimated duration of detectability of drugs and alcohol by technique[a]

Substance tested	Time
Blood	
Cocaine	24 hours
Opioids	24 hours
Breath	
Alcohol	2 to 12 hours
Hair	
Cannabis	3 months
Benzoylecgonine (cocaine)	3 months
Opioids	3 months
THC	3 months
Saliva	
Alcohol	Minutes to hours
Cannabis	Minutes to hours
Benzoylecgonine	Minutes to hours
Opioids	Minutes to hours
THC	Minutes to hours
Transdermal	
Alcohol	Continuous
Urine	
Amphetamine	48 hours
Androgenic anabolic steroids	2 weeks to 18 months
Benzodiazepines	3 days
Benzoylecgonine	2 to 3 days
Cannabinoids	3 to 80 days
Alcohol biomarker (EtG)	1 to 3 days
Morphine	48 hours
Phenobarbital	≥7 days

[a]These limits vary based on the subject's physical characteristics, the selected level of detection in the laboratory, and the testing technology

EtG: ethyl glucuronide; THC: tetrahydrocannabinol

Source: References 4-7

With that caveat, the specific tests used and the timing of those tests are important in the context of a child custody dispute. Once the parties have agreed on the time frame of the testing (ongoing or only during visits with the child), the specific substances that are tested for must be listed. Forensic quality testing—often called "employment testing" in clinical laboratories—decreases but does not eliminate the possibility of evasion of the test. Although addiction clinicians usually request a full screen for drugs of abuse for their patients, in the legal sphere, often only the problematic substances are tested for, which are listed in the court order. The evaluator should request substances that are clinically relevant or appear likely to be used by the subject be tested; however, the final list of substances often is determined by negotiations between lawyers rather than the judgment of a clinician. Whatever tests are chosen, the monitor should know the detectability time for each substance in the relevant tissue (***Table 3***),[4-7] which varies based on the laboratory or device's predetermined level of detection, the technology used for the test, and physical variables of the testee.

UDS, the most common test, is non-invasive, although awkward and intrusive for the subject when done with the strictest "observed" protocol. Most testing protocols do not require a "directly observed" urine collection unless there is a suspicion that the testee has substituted her (his) urine for a sample from someone else. Breath testing, although similarly non-invasive, is only useful for alcohol testing and can detect use only several hours before the test.

The urine test for the alcohol metabolites ethyl glucuronide (EtG) and ethyl sulfate (EtS) points toward alcohol use in the previous 3 days, but the test is plagued with false-positives at the lower cutoff values.[8] EtG can be accurately assayed in human hair.[9]

Other tests. Dried blood spot testing for phosphatidylethanol is accurate in finding moderate to heavy alcohol use up to 3 weeks before the test.[10] Saliva tests also can be useful for point-of-service testing, but the dearth of studies for this methodology makes it less useful in a courtroom setting. Newer technologies using handheld breathalyzers connected to a device with facial recognition software[11,12] allow for random and "for-cause" alcohol testing, and can be useful in child custody negotiations. Hair sample testing, which can detect drug use over the 3 months before the test, is becoming more acceptable in the legal setting. However, hair testing cannot identify drug use 7 to 10 days before the test and does not test for alcohol[13]; and some ques-

Table 4

Drug and alcohol testing methods for child custody disputes

Technology	Pros	Cons
Urine drug screens	Widely available Not physically invasive	Easily evaded
EtG/EtS (metabolites of alcohol)	Can detect use over 3 days	False positives at low levels of use
Remote alcohol breathalyzer testing	Can be scheduled or random	Intrusive: Testee must be alert for a random test
Hair testing	Can detect wide range of drugs	Scientific data is sparse although improving
Point-of-service testing (saliva, breath, sweat)	Immediate results	Expensive to get a tester to the testee quickly
Ignition lock	Can prevent drunk driving	Does not monitor testee when she (he) is not driving

EtG: ethyl glucuronide; EtS: ethyl sulfate

tions remain regarding its reliability for different ethnic groups.[14]

Table 4 summarizes some of the most productive testing methods for child custody disputes. Selecting the best tissue, method, and timing for testing will depend on the clinical scenario, as well as the court's requirements. For example, negotiations between parties could result in a testing protocol that uses both random and for-cause testing of urine, breath, and hair to prove that the individual does not use any illicit substances. In a less serious clinical circumstance—or less contentious legal situation—the testing protocol may necessitate only occasional UDS to make sure that the subject is not using prohibited substances.

Practical considerations

It is important to remember that drug/alcohol evaluation and testing does not provide a clear-cut answer in child custody proceedings. Any drug or alcohol use must be evaluated under the standard used in child custody disputes: "the best interests of the child." However, what is in the child's best interests can be disputed in a courtroom. One California judge understood this as a process to identify the parent who can best provide the child with "… the ethical, emotional, and intellectual guidance the parent gives the child throughout his formative years, and beyond …."[15] However, in determining child custody the need for assuring the child's physical and emotional safety overrules these long-term goals, and the parents' emotional needs are disregarded. In a custody dispute, the conflict between parents vying for custody of their child is matched by a corresponding tension between the state's interest in protecting a minor child while preserving an adult's right to parent her child.

The Montana custody dispute described in *Stout v Stout*[16] demonstrates some aspects typical of these cases. In deciding to grant custody of a then 3-year-old girl to the father, the presiding judge noted that, although the mother had completed an inpatient alcohol treatment program, her apparent unwillingness or inability to stop drinking or enroll in outpatient treatment, combined with a driving under the influence arrest while the child was in her care, were too worrisome to allow her to have physical custody of the child. The judge mentioned other factors that supported granting custody to the father, but a deciding factor was that "the evidence shows that her drinking adversely affects her parenting ability." The judge's ruling demonstrates his judgment in balancing the mother's legal but harmful alcohol use with potential catastrophic effects for the child.

Although a thorough drug/alcohol evaluation, an evidence-based set of treatment recommendations, and a well-planned

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Selecting the best tissue, method, and timing for tests will depend on the clinical scenario and the court's requirements

Related Resource

- Stahl PM. Conducting child custody evaluations: from basics to complex issues. Thousand Oaks, CA: Sage Publications; 2011.

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monitoring program all promote progress in a child custody dispute, the reality is that the clinical situation could change and all 3 aspects would have to be modified.

Manualized diagnostic rubrics and formal psychological testing, although often used in general forensic assessments, usually are not central to the drug/alcohol evaluation in a child custody dispute,[17] because confirming a SUD diagnosis might not be relevant to the task of attending to the child's best interest. Rather, the danger—or potential danger—of the subject's substance use to the minor child is paramount, regardless of the diagnosis. Of course, an established diagnosis of a SUD might be relevant to the parent being examined, and might necessitate modifications in the testing protocol, the tissues examined, and the monitor's overall level of skepticism about testing results.

The evaluator and monitor should be prepared to respond quickly to a slip or relapse, while remaining vigilant for exaggerated, inaccurate, or even deceitful accusations about the subject from the co-parent or others. The evaluator should assess all the relevant sources of information when performing an evaluation and use careful interviewing and testing techniques during the monitoring process. Even with this sort of deliberate evaluation and monitoring the evaluator should never assert that any testing regimen is incapable of error, and always keep in mind that the primary goal—and presumably the interest of all parties involved—is to protect the child's well-being.

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Bottom Line

Effective drug/alcohol evaluators in child custody disputes focus on the questions relevant to the matter at hand, employ forensic interview and testing techniques, and use standard psychiatric definitions and terms.