Focus FAMILY LAW

Court can compel drug and alcohol testing

New partners should be properly vetted and screened if concerns are raised over children

Michael Stangarone

The potential for child abuse by known and unknown parties is high during this age of social media, and counsel and the courts must be proactive in combating such potential abuse.

All parties involved in a child's life, including new partners, should be properly vetted, screened and tested for illegal substances if concerns are raised. Alcohol and drug abuse by parents and stepparents remain significant contributory factors to the maltreatment of children in Canada.

According to the 2008 Canadian Incidence Study of Reported Child Abuse and Neglect, primary caregiver alcohol abuse was identified in 21 per cent of substantiated maltreatment investigations, while drug/solvent abuse was identified in 17 per cent.

The court has the authority to order drug and alcohol testing of parents and third parties. Section 16(6) of Canada's *Divorce Act* provides the court with the broad power to craft case-specific custody and access orders against parties to corollary or variation proceedings under the act. Section 16(9) provides that the court may consider the past conduct of a person if that is relevant to his or her ability to care for the child. In such circumstances, the court may exercise its authority under s. 16(6) to compel one or both parties to undergo alcohol or drug testing.

In the case of *Schloegl v. McCroary* [2012] B.C.J. No. 2286, Justice Nathan H. Smith, in deciding the issue of the father's access to the child, applied the principles set out in s. 16 of the *Divorce Act* and ordered the father to undergo random drug and alcohol testing in light of the mother's concerns that the father had previously used marijuana and was a binge drinker.

Section 28(1)(c)(ii) of the *Children's Law Reform Act* (CLRA) permits the court to make orders prohibiting a party or other person [third party] from engaging in specified conduct in the presence of the child or at any time when the person is responsible for the care of the child. This provision provides the court with the ability to make orders to protect children from the effects of alcohol/drug abusing caregivers.

Subsections 24(3)(4)(5) of the CLRA provide that, in assessing a person's ability to act as a parent, the court shall consider whether the person has at any time committed violence or abuse against his or her spouse or the child. In situations where there is concern about a party's ability to appropriately care for a child because of drug and/or alcohol use, the court will order that person to undergo mandatory testing.

In *Knott v. Pemberton* [2011] O.J. No. 614, the court reinforced an order granted by Justice Casimir Herold on a motion for the respondent mother to undergo GGT testing, which is used to screen for chronic alcohol abuse. The order granted the respondent unsupervised access with her children if the respondent's GGT results showed she was not abusing alcohol and would not put her children at risk.

The recent decision of the Superior Court of Justice in *Ridehalgh v. De Melo* [2012] O.J. No. 3385 highlights the statutory principle that past conduct of a caregiver, including drug and alcohol use, will be considered if the court believes that it poses a threat of harm to the child. In that case, the court acknowledged the father's marijuana use. However, the court found that he did not have a drug problem that impacted on the welfare of the children and ordered that he have access.

The *Courts of Justice Act* (CJA) provides the authority to order parents or other caregivers seeking custody and/or access to a child to undergo drug or alcohol testing. Specifically, s. 105(2) of the CJA authorizes the court to order a party in a proceeding to undergo a physical or mental examination by one or more health practitioners, if the physical or mental condition of that party is in question. Before the court will grant such an order, any allegation made by another individual relating to a party's physical or mental condition must be shown to be relevant to a material issue in the proceeding and there must be good reason to believe that there is substance to the allegation (CJA, s. 105(3)).

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In *Tobin v. Collings* [1996] O.J. No. 2579, Justice Louisette Duchesneau-McLachlan ordered hair follicle drug testing of both the applicant and respondent pursuant to s. 105 of the CJA. Justice Duchesneau-McLachlan determined that, since both parties sought custody of the children, or as much access as possible, the drug habits of the parents were a relevant consideration in determining the children's best interests.

Before exercising the court's authority to order the parties to undergo drug testing, the judge stated that a secondary test must be satisfied, which is whether the information sought could be obtained by other means. Both parents had admitted past drug use to the Office of the Children's Lawyer and as such, Justice Duchesneau-McLachlan found that evidence of past drug usage would therefore not require the intrusive measure sought. However, since the matter of present drug usage by the parties was disputed, she ordered hair drug testing of the applicant and respondent for the preceding three months.

On March 1, 2010, the *Children's Law Reform Act* and the *Family Law Rules* were amended to require anyone requesting an order for the custody of, or access to, a child to submit a sworn form 35.1 affidavit to the court along with the application, answer or motion-to-change materials.

The affidavit allows the person seeking custody or access to advise the court what his or her plan is to care for the child and why it is an effective one. It also helps to ensure that pertinent information about potential caregivers is disclosed to the court at the outset of custody and access proceedings. That way, third parties seeking custody or access are identified at the outset of the proceedings and can be properly vetted before any determination is made by the court.

Non-parents seeking a custody or access order must complete parts B and C of the form 35.1 affidavit, which require:

- non-parents to file a recent police records check with the court;
- non-parents to submit a request to every children's aid society for a report as to whether they have any records relating to the person and the dates any files were opened or closed; and
- the clerk of the court to provide to the court and the parties written information about any other family proceedings in which the person was involved.

The relatively new requirement of filing a form 35.1, together with an application for custody and/or access, reflects the legislature's desire to extend the court's ability to investigate and consider relevant past conduct beyond those who are parents of a child in order to determine custody and access arrangements in the best interests of the child.

It is fundamental to the safety of children that all parents and caregivers seeking custody and access by the courts be properly vetted, screened and tested for drugs and alcohol abuse if there is concern of maltreatment. The court has the authority to order such testing (on a non-voluntary basis) of parties and non-parties to protect children. The courts and counsel must be proactive in addressing these issues at the outset of cases to stop high-risk behaviour and to ensure the physical and emotional safety of children.

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