

# PARENTS WRANGLE AT THEIR OWN RISK

BY RONALD S. GRANBERG

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**C**ourt: I call the case of Mom vs. Dad, on Mom's motion that Dad be ordered to submit to a hair follicle drug test.

**Mom's Lawyer ("ML"):** This case concerns the parties' custody and visitation rights regarding their daughter Katie. Evidence Mom has presented indicates that Dad may be using cocaine, an allegation Dad denies. The court can determine the truth with a hair follicle drug test, a test that is neither expensive nor invasive. The truth will assist the court in furthering Katie's best interests.

**Dad's Lawyer ("DL"):** The court may not order Dad to submit to a drug test. Holding that Family Code section 3011 doesn't empower a family court to order parental drug testing in a child custody dispute, *Wainwright v. Superior Court (Sinkler)* (2000) 84 Cal.App.4th 262, 267 states: "Interpreting section 3011, subdivision (d) to permit court-compelled drug testing in child custody disputes would present serious constitutional concerns. Governmentally compelled drug testing implicates the federal and state right to be free of unreasonable searches and seizures, and the state right of privacy."

**ML:** The *Wainwright* court found parental constitutional rights where none exist. An investigative procedure which is minimally intrusive and which reveals only the presence or absence of contraband is not a search. Examples of procedures which aren't Fourth Amendment "searches" include a dog sniff (*United States v. Place* (1983) 462 U.S. 696, 707), a field drug test (*U.S. v. Jacobsen* (1984) 466 U.S. 109, 125), and the hair follicle test the *Wainwright* court considered.

**ML:** The *Wainwright* court admitted in footnot 2 that its decision didn't encompass Code of Civil Procedure section 2032, under which a court may order a physical examination, on noticed motion and for good cause shown, where a party's physical condition is in controversy in the action.

**Court:** The 2032 issue isn't before me.

**ML:** Even if the court can't order Dad to take a drug test, the court can condition Dad's right to visit Katie on his tak-

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ing the test. Mom requests the court do so. If Dad were on criminal probation, for example, the court could condition his remaining out of jail on his completing the test.

**DL:** My client has committed no crime, and his Fourth Amendment rights remain intact.

**ML:** He fathered a child, Your Honor.

**DL:** Fathering Katie wasn't a crime.

**ML:** But now Dad is wrangling with Mom over Katie's best interests. Although the government has little power over an intact family, once the family collapses and a family member invokes court assistance, the government acquires great power over the family. The family court exercises that power.

**Court (to ML):** Your position is that Dad's fathering Katie and his wrangling with Mom empower the court to condition his visitation upon his completion of a drug test?

**ML:** Those are two of the bases of the court's power. The third basis is the court's responsibility to Katie.

**DL:** It would be unfair to punish Dad for wrangling with Mom. The law can't presume that the wrangling is Dad's fault.

**ML:** It doesn't matter whose fault the wrangling is. The fact is that Katie's parents no longer agree on her best interests, so now the law must determine those interests.

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**DL:** It would be unfair for the law to impose "wrangling strict liability" on Dad. How can Dad be expected, at the time of conception, to have foreseen whether he and Mom would someday wrangle over Katie?

**ML:** Dad's participation in procreation has consequences to him. Many of those consequences are unintended, but Dad remains responsible for them, intended or not. Drug testing will help the court protect Katie.

**DL:** But, Your Honor, what would happen to Dad's Fourth Amendment rights?

**Court:** They will take a back seat here. I find Mom's position reasonable, and rule in her favor. I don't order Dad to submit to a hair follicle test. I do, however, order that he shall not see Katie until he has done so.

**DL:** On the issue of the degree of Dad's responsibility, has the court recalled that Katie was conceived during a one-night stand?

**Court:** Maybe Dad should have remained standing. Next case.

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