



THE ADMISSIBILITY OF ALCOHOL TEST RESULTS FROM THE SOBERLINK DEVICE IN FAMILY LAW CASES

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EXECUTIVE SUMMARY

This paper explores the evidentiary standards regarding the admissibility of the Soberlink portable fuel cell alcohol testing device in family law cases involving contested custody and visitation. Our research establishes that the test results are admissible as evidence of alcohol use in such proceedings.

Evidence produced by fuel cell based portable breathalyzers are most commonly used in criminal cases. Family law cases are different. The state is not a party and no allegation of wrongdoing by a parent is required to initiate a case. Nevertheless, concerns about alcohol or other drug use impacting upon the safety of a child frequently arise. Soberlink seeks to address this concern as it relates to alcohol use by making reliable alcohol testing possible at home and at low cost.

The admission of technological evidence in a court proceeding, in the majority of states, is controlled by the United States Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). However, a minority of states still follow the earlier court decision in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). These two standards provide guidelines for determining the admissibility scientific evidence.

With the improvements in both computer and fuel cell technology state courts have recognized that portable fuel cell alcohol testing devices meet both *Daubert* and *Frye* standards. In recent years, an increasing number of appellate courts have upheld the admission of portable fuel cell test results in numerous proceedings

Soberlink is a comprehensive alcohol monitoring system that combines a handheld breath alcohol instrument with wireless connectivity for real-time results and reports. The device has innovative technology which includes facial recognition to confirm identity, along with tamper resistant sensors to ensure the integrity of the breath tests.

The use of the Soberlink device is common in family law courts across the United States. A recent case, *Murphy v. Murphy* 2018 WL 1475587 (2018), found that it has authority to order Soberlink alcohol testing over the objections of a parent as Connecticut law required it in the best interest of the child.

Our research establishes that the Soberlink device is a reliable measurement instrument admissible under both *Frye* and *Daubert* standards that can accurately detect the presence of alcohol so long as the proper foundation is established.

INTRODUCTION

The purpose of this paper is to examine the admissibility of Soberlink technology in family law cases involving contested custody and visitation. The Soberlink device is a small handheld fuel cell apparatus that measures breath alcohol.¹

Evidence produced by fuel cell based portable breathalyzers are most commonly used in criminal cases including in probation violations hearings.² These breathalyzers are widely used by law enforcement officials to perform preliminary testing as part of field sobriety tests when there has been a stop for suspected driving while impaired (DUI/DWI).³ More recently, portable breathalyzers have been used to monitor alcohol use in juvenile dependency cases as part of reunification plans.⁴ They are increasingly being used in family courts.⁵

Family law cases are different. The state is not a party and no allegation of wrongdoing by a parent is required to initiate a case.⁶ Nevertheless, concerns of one parent about the safety of children while in the care of the other parent frequently arise in family court and often involve allegations of abuse of alcohol and/or other drugs (AOD).⁷

Family court judges routinely carry huge inventories of cases and need to manage overcrowded calendars. There is often very limited time for hearings or trials⁸ and judges have few facts to go on other than the testimony of the opposing parties, most of whom are pro se.⁹ It is not surprising that family law judges seek some additional factual data upon which they can determine if a parent's AOD use is really a problem, or if an existing order restricting AOD use by a parent is being obeyed.

Families with substance abuse issues may be involved in multiple proceedings including family law, dependency, and criminal cases. In those instances, parents may be referred to multiple services and family courts may end up having a role to play in alcohol assessment and monitoring, albeit different from the criminal or dependency courts.¹⁰

Some states include specific reference to AOD use or misuse in their family law best interest framework. For example, California Family Code §3011 specifically requires the court, "in making a determination of best interest," to consider "the habitual or continual illegal use of controlled substances, the habitual or continual abuse of alcohol, or the habitual or continual abuse of prescribed controlled substances by either parent."¹¹ New York's Family Court Act section 1046 provides guidance in this area that focuses more on the connections between AOD misuse and potential child abuse and neglect.¹²

It is not surprising that family law judges seek some additional factual data upon which they can determine if a parent's AOD use is really a problem.

As a result, issues of AOD in contested custody cases routinely get referred to ancillary resources such as custody mediators, psychological evaluators, or AOD treatment providers in the community. Orders based on resulting agreements of the parties or recommendations from such ancillary resources can result in orders that are vague and unenforceable.¹³ Some states¹⁴ have enacted statutes that allow AOD testing

of parents in family law; however, it is not uncommon for such statutory authority to impose serious restrictions.¹⁵ Even when testing is legally permissible, it can often be costly and inconvenient.¹⁶ Consequently, many parents find it difficult to comply with testing orders.

Soberlink seeks to address this issue as it relates to alcohol use by making reliable alcohol testing possible at home and at low cost.

ADMISSIBILITY OF EXPERT EVIDENCE

The use of experts in the courtroom roughly coincides with the scientific revolution and was not present in any form prior to the seventeenth century.¹⁷ A lay witness was allowed only to provide testimony about matters that they have experienced directly, but an established expert could offer an opinion to a court.¹⁸

The only criteria for accepting an opinion from an expert was the reputation and qualifications of that expert.¹⁹ This simple criterion persisted throughout the nineteenth century.²⁰ In response to rapid advancements in scientific research in the early twentieth century, the standards for admissibility of expert evidence²¹ began to change radically resulting in 1923 in the decision in *Frye v. United States*.²²

THE FRYE STANDARD

With *Frye*, courts recognized the necessity of going beyond the qualifications of the expert, and inquiring into the quality of the underlying science.²³ The issue in *Frye* pertained to polygraph test results. While there was no question that the witness was a qualified expert in administration

and interpretation of polygraphs, the court determined that the reliability of polygraph results had not been sufficiently established in the scientific community to warrant its admissibility as expert evidence. In making this ruling the court required that the substance of the expert's testimony must be derived from a well-recognized scientific principle which is sufficiently established to have gained general acceptance in the particular field to which it belongs. Seventy years later, in 1993, the U.S. Supreme Court set out a more rigorous standard for the admissibility of scientific evidence in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*²⁴

THE DAUBERT STANDARD

The court in *Daubert* recognized that the body of scientific research had become enormous in almost all fields. By expanding the standard of admissibility, scientific evidence could be admissible even though it had not met the "general acceptance" criteria of *Frye*.²⁵ The court made it clear that "general acceptance" was not a precondition of admissibility. In so doing, however, a rigorous standard of analysis was established in an effort to ensure the validity and reliability of the proffered evidence.

The Soberlink device has been found to be more accurate than EtG testing, with a higher testing compliance rate.

This analysis is to be conducted by trial judges acting as gatekeepers to ensure that expert testimony is truly scientific – that is, derived through the scientific method.

Factors judges can consider in making that determination are:²⁶

1. Whether the evidence generally accepted in the scientific community;
2. Whether it has been in a peer-reviewed publication;
3. Whether it has been tested;
4. Whether an error rate has been established and is acceptable;
5. Whether research has been conducted independently of the litigation, or anticipation of the litigation.

Daubert established that reliability is foundational to admissibility, and therefore could not be left to the trier of fact simply as a matter of weight. Two other U.S. Supreme Court Cases followed addressing expert testimony.

In *G.E. v. Joiner*,²⁷ the court reviewed the erroneous admission of expert testimony and held that when there is no connection between the science relied on by the expert and the conclusion of the expert, it cannot be admitted. The court held that if scientific testimony is erroneously admitted the standard of review is abuse of discretion.

In *Kumho v. Carmichael*,²⁸ the court held that although *Daubert* dealt specifically with scientific testimony, the gatekeeping function of the judge applies to all expert testimony, whether scientific or non-scientific.

In 2000, one year after the decision in *Kumho v. Carmichael*, the Federal Rules of Evidence (FRE) were amended to codify the holdings of the three *Daubert* cases. It was amended again in 2011 to further clarify the requirements.²⁹

Under FRE 702³⁰ an expert's opinion must be of a scientific, technical or specialized subject that requires specialized knowledge. The opinion must be based on sufficient facts or data, shown to be the product of reliable principles and methods, and that the expert relied on these principles and methods to reach the opinion.

The majority of states have accepted the *Daubert* standard. Only a minority³¹ still apply some form of the *Frye* standard.

PORTABLE FUEL CELL BREATHALYZER TECHNOLOGY

With the rise of automotive travel in the United States, traffic crashes caused by individuals who were impaired became an increasing problem.³² Partly in response, Emil Bogen developed a device to test for breathalcohol in 1927.³³ By 1954 technological advances led to the development of the first breathalyzer.³⁴ However, widespread use of breathalyzers, along with the admission of their results, did not emerge until decades later.³⁵

In 1970, a New York trial court in *People v. Morris* admitted results of an early breathalyzer.³⁶ In order to reach this result, the prosecution offered expert testimony in support of the accuracy of the device.³⁷ This laborious and costly trial process quickly drove a legislative response which created a regulatory process that allowed for the admission of breath testing results without the requirement of an expert witness.³⁸ These regulatory schemes generally consisted of requirements that the breathalyzer model was approved by a state agency, have certification of calibration, a trained operator and an adherence to proper machine maintenance and testing.³⁹

As a result, portable fuel cells did not see the regulatory requirement to test for Breath

Alcohol Concentration (BrAC)⁴⁰ and the results were initially limited to preliminary testing conducted in the field by law enforcement.⁴¹ In fact Preliminary Breath Test (PBT) results were banned from being used as evidence of BrAC in a criminal trial by statute in most states.⁴²

Soberlink is a comprehensive alcohol monitoring system that combines a handheld breath alcohol instrument and a digital imager, with wireless connectivity for real-time results and reports.

For example, in 1996, the court in *Commonwealth v. Allen*⁴³ stated that while results of the preliminary breath tests were admissible to show probable cause in a DWI, the device did not measure with certainty the amount of alcohol consumed. The court said the PBT would only be admissible if it was conducted by a qualified person on an approved device.⁴⁴ Many other state courts imposed a variety of restrictions on the admissibility of BrAC results based upon state legislation.⁴⁵

With the improvements in both computer and fuel cell technology these legislative restrictions became limited to impaired driving cases. In a 1994 case, the *City of Westland v. Okopski*,⁴⁶ the court held that the results of a fuel cell PBT test were admissible for the limited purpose of impeaching defendant's testimony about alcohol use.

In *State v. Beaver*,⁴⁷ the court held that Wisconsin law did not bar admissibility of PBT results in trial for sexual assault. The court said that the statutory bar on the evidentiary use of PBT results was limited to violations of the motor vehicle code.

In 2009, the North Dakota Supreme Court in *State v. Lemley*,⁴⁸ relying on expert testimony, held that a fuel cell device (from an ankle bracelet) established that the *Daubert* standards for reliability and the results of the test were admissible in a probation violation hearing.⁴⁹ The court noted that the device did not measure the amount of alcohol consumed, only the presence of alcohol.⁵⁰

More recently, courts have made findings that portable fuel cell technology is admissible to establish BrAC under *Daubert*. In 2011, a Federal District Court in *Fischer v. Ozaukee*⁵¹ issued a Writ of Habeas Corpus, finding that the Wisconsin Supreme Court had erred in finding the results of PBTs inadmissible at trial.

In a 2018, another Federal District Court in *United States v McAdams*,⁵² found a law enforcement officer's handheld PBT results admissible to establish the defendants BrAC in an impaired driving case in Yosemite National Park under *Daubert*.

These cases are not limited to the majority of states following the *Daubert* standard. States applying the *Frye* standard have also found handheld fuel cell devices to be admissible.

In *People v. Halsey*,⁵³ a case involving the unlawful consumption of alcohol by a minor, the court acknowledged that while the PBT results would be inadmissible under the Illinois Vehicle Code, the restriction only applied to offenses under that section and not other types of proceedings. The Court stated: "We hold that PBT results are admissible in evidence.... Thus, the trial court erred in suppressing evidence of defendant's PBT results. While PBT devices are less regulated than evidential devices ... no suggestion has been made that they

are inherently unreliable. Evidence that is relevant to an issue in a case should be admitted, provided a proper foundation is laid for its admission, unless its admission would contravene statutory law or some established rule of evidence.”⁵⁴

In *People v Jones*⁵⁵ a New York trial court also found that the results of a fuel cell PBT device met the *Frye* standard for admissibility as to BrAC. In reaching this decision the court expressly rejected earlier rulings that excluded BrAC evidence. The court found that once a portable breathalyzer was identified on the National Highway Traffic Safety Administration’s (NHTSA) list of approved breath testing devices, it was unnecessary for the prosecution to lay a foundation to establish the device’s accuracy and reliability.

Adopting the reasoning of *Jones*, the court in *People v. Hargobind*⁵⁶ held that the inclusion of a portable breath-testing device on the NHTSA approved list leaves no question as to its scientific accuracy.

The California Supreme Court in *People v. Williams*⁵⁷ allowed results of portable breath tests to establish BrAC into evidence. The court held the portable breath test was admissible as the machine was properly functioning and administered correctly by a qualified individual.

In *People v. Wilson*⁵⁸ another court, following *Williams*, held that portable breath test results were admissible if the prosecution could meet the foundational requirements. The court noted although a portable breath test may not be the equivalent of a chemical test in an impaired driving case, it could be utilized to prove a defendant’s guilt.

SOBERLINK DEVICE

Soberlink is a comprehensive alcohol monitoring system that combines a handheld breath alcohol instrument and a digital imager with wireless connectivity for real-time results and reports.⁵⁹ The device has innovative technology which includes facial recognition to confirm identity, along with tamper resistant sensors to ensure the integrity of the breath tests.⁶⁰

These sensors can detect if a breath sample is consistent with human breath. Inconsistencies are flagged for further human review to determine if tampering has occurred.⁶¹

The use of the Soberlink device is common in family law courts across the United States.

The facial recognition technology is used to confirm an individual’s identity during each breath test.⁶² If the software cannot identify the person then the image is sent to a 24/7 monitoring station for review.⁶³ If the identity still cannot be confirmed, then the identity is declined for that test and alerts will be sent out.⁶⁴

The Soberlink device also has a patented retest system that allows up to seven data points to evaluate a single drinking incident.⁶⁵ In the event of a positive test, the monitored individual is prompted to retest every 15 minutes until either there is no longer a positive test or six retests have been submitted.⁶⁶ The device locks down so it cannot be used for 15 minutes after each positive test.⁶⁷ This prevents a positive test result due to incidental exposure to alcohol (i.e., mouthwash). Mouth alcohol

will dissipate during the 15-minute waiting period and prevent a report of a positive test.⁶⁸

Test results are wirelessly transmitted in real-time to Soberlink's cloud-based web portal.⁶⁹ The web portal also can be used to create custom testing schedules, as well as providing specific testing notification and automated report settings.⁷⁰

In 2016, the Soberlink Cellular Device was cleared by the Food and Drug Administration (FDA) as a Class 1, substantially equivalent, medical breathalyzer device.⁷¹ In order to be cleared as a medical device it had to be manufactured under a quality assurance program, be suitable for the intended use, be adequately packaged and properly labeled, and have establishment registration and device listing forms on file with the FDA.⁷²

Having met all the requirements, the Soberlink device received 510(k) premarket clearance from the FDA for medical use, quantitatively measuring alcohol in human breath.⁷³

The FDA clearance itself discusses a clinical study, reported in the U.S. Library of Medicine, on the effectiveness of Soberlink devices.⁷⁴ In the clearance, the FDA compared the Soberlink device to a professional portable fuel cell breathalyzer that meets the requirements of the Department of Transportation (DOT)/NHTSA for a personal breath alcohol screening device.⁷⁵ The FDA stated the study was "to determine if intended [lay] users – untrained study participants - who had consumed alcohol could correctly use and interpret the device using only the supplied instructions.(P)articipants took their breath alcohol reading with the candidate device and recorded the result. Immediately afterward, the participants were administered a breath

alcohol test using the...device."⁷⁶ The FDA found the Soberlink device was statistically equivalent to the professional portable fuel cell breathalyzer.⁷⁷

The FDA then looked at DOT comparisons between another predicate⁷⁸ device and the Soberlink device. It found: "DOT Testing was conducted in accordance to the NHTSA Docket No. 2008-0030 published in 73 FR 16956. This testing included accuracy and repeatability of the Soberlink Cellular Device in comparison to the predicate device.... The Soberlink Cellular Device passed all testing stated above as shown by the acceptable results obtained."⁷⁹

The Soberlink Device uses a professional grade fuel cell sensor made by Dart Sensors.⁸⁰ Dart Sensors is the largest original equipment manufacturer of fuel-cell technology and is used widely in law enforcement testing.⁸¹ Dart Fuel Cell sensors meet approval standards at all levels including police use and for interlocks.⁸² The Dart manufactured Soberlink's Fuel-Cell Sensor has an Accuracy Tolerance: +/- .005 and does not need to be recalibrated until 1,500 tests are submitted.⁸³

The Soberlink device has been found to be more accurate than ethyl glucuronide (EtG) testing, with a higher testing compliance rate and results that are available immediately.⁸⁴ The results of testing are included in an email and/or text message which is sent to whomever the court or parties designate to receive the information.⁸⁵ The message includes the person's breath alcohol content along with date and times.⁸⁶

FAMILY LAW CASES

The use of the Soberlink device is common in family law courts across the United States.⁸⁷ In 2018, the trial court in *Murphy v. Murphy*⁸⁸

ordered the father to abstain from alcohol prior to visitation with the children and ordered testing using Soberlink to monitor for the presence of alcohol. The court found that it has authority to order Soberlink alcohol testing over the objections of a parent under Connecticut General Statutes §46B-56C allowing drug screening to be ordered if it is in the best interests of the children.

Soberlink is a reliable measurement instrument admissible under both Frye and Daubert standards that can accurately detect the presence of alcohol.

The trial court in *K.M.M. v. K.E.W.*⁸⁹ allowed a party seeking custody to enter previous Soberlink testing results into evidence at trial to establish she was not a problem drinker.

In *Miler v. Nery*,⁹⁰ the Supreme Court of Maine upheld the trial court's order requiring the father in a contested custody case to monitor alcohol use with the Soberlink device.

Soberlink employs fuel cell technology that has been used in preliminary tests by police officers in DWI cases and can be admitted

as evidence in probation violation hearings. These results can also be admitted into evidence at a hearing or trial in a family law case when a proper foundation is laid.

The beneficial use of fuel cell breathalyzers such as Soberlink in the diagnosis and treatment of alcohol use disorder (AUD) has been well documented and enthusiastically accepted in the substance use disorder treatment community.⁹¹

CONCLUSION

The technology underlying the Soberlink device has gained acceptance in the field of research on alcohol use detection. The results from its fuel cell sensor is accepted in impaired driving and juvenile dependency cases with courts ruling that it is admissible under *Frye* and *Daubert* standards. Soberlink is increasingly accepted for use in family courts in contested custody cases. The reliability of the accuracy fuel cell breathalyzer technology used by Soberlink has been established through repeated testing and publication in peer reviewed journals.⁹² Reported error rates are within an acceptable +/- .005 range.⁹³ Published research by forensic experts supports evidentiary use of fuel cell breathalyzers.⁹⁴ Soberlink is a reliable measurement instrument admissible under both *Frye* and *Daubert* standards that can accurately detect the presence of alcohol so long as the proper foundation is established.

ENDNOTES

1. Soberlink Court Validation <https://www.soberlink.com>
2. Sorbello, Jacob, Devilly, Grant, Allen, Corey, Hughes, Lee, Brown, Kathleen, "Fuel-cell breathalyser use for field research on alcohol intoxication: an independent psychometric evaluation," US National Library of Medicine, National Institutes of Health (2018). See also, Workman, Thomas, "The Science Behind Breath Testing for Ethanol," University of Massachusetts Law Review (March 2014).

3. *Id.*
4. Grossmann, David, Hon., Portley, Maurice, Hon., “Juvenile Delinquency Guidelines: Improving Court Practice In Juvenile Delinquency Cases,” National Council of Juvenile and Family Court Judges (2005). For example: *In re Haylee G.* CA2/7, B262771 (Cal. Ct. App. 2015).
5. For example, see: *State of Louisiana in the Interests of C.K.*, 2016 CJ 0305, Louisiana Court of Appeals, First Circuit (2016); *Whorley v. Whorley*, 29A05-1611-DR-2637, Court of Appeals Indiana (2017); *In re: Interest of Breanna*, A-17-003 through A-17-007, Court of Appeals Nebraska (2018); *In re: Interest of S.H.* 05-17-00336-CV, Court of Appeals of Texas, Fort Worth (2017).
6. With the exception of requests for domestic violence orders of protection.
7. Based on data from the combined 2009 to 2014 National Surveys on Drug Use and Health, about 1 in 8 children (8.7 million) aged 17 or younger lived in households with at least one parent who had a past year substance use disorder (SUD). SUDs are characterized by recurrent use of alcohol or other drugs (or both) that results in significant impairment. About 1 in 10 children (7.5 million) lived in households with at least one parent who had a past year alcohol use disorder. About 1 in 35 children (2.1 million) lived in households with at least one parent who had a past year illicit drug use disorder.
8. Resource Guidelines for CA family courts - Judicial Council of California.
9. Deborah J. Chase, *Pro Se Justice and Unified Family Courts*, 37 FLQ 403 (2003).
10. See *Heidi S. v. David S.* 1 Cal.App.5th 1150 (2016): “Our Supreme Court has explained that the juvenile court and the family court have different purposes and that different rules and statutes govern each court. (*In re Chantal S.*, supra, 13 Cal.4th at pp. 206, 208, 210.) *In Chantal S.*, the Supreme Court held that the juvenile court had the authority to issue an exit order indefinitely requiring the parent to participate in a counseling program even though the matter subsequently proceeded to the family court, which only had the authority to require counseling limited to one year. (*Id.* at pp.200, 208.) Relevant to this case, the Supreme Court explained, “Courts are often placed in the position of enforcing orders of other courts, even though the enforcing court could not have made the order in the first instance, or would not have present authority to issue the precise order.”
11. CAL. FAM. CODE §3011: In making a determination of the best interest of the child in a proceeding described in Section 3021, the court shall, among any other factors it finds relevant, consider all of the following:
 - (d) The habitual or continual illegal use of controlled substances, the habitual or continual abuse of alcohol, or the habitual or continual abuse of prescribed controlled substances by either parent. Before considering these allegations, the court may first require independent corroboration, including, but not limited to, written reports from law enforcement agencies, courts, probation departments, social welfare agencies, medical facilities, rehabilitation facilities, or other public agencies or nonprofit organizations providing drug and alcohol abuse services. As used in this subdivision, “controlled substances” has the same meaning

as defined in the California Uniform Controlled Substances Act, Division 10 (commencing with Section 11000) of the Health and Safety Code.

12. NY Family Court Act §1046 (iii): “proof that a person repeatedly misuses a drug or drugs or alcoholic beverages, to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality, shall be prima facie evidence that a child of or who is the legal responsibility of such person is a neglected child except that such drug or alcoholic beverage misuse shall not be prima facie evidence of neglect when such person is voluntarily and regularly participating in a recognized rehabilitative program.”

13. Examples are:

“Either parent may deny the other parent access to the minor child if that parent is under the influence of drugs or alcohol and constitutes a threat to the safety and well-being of the child when they arrive for visitation.”

“Father must not consume alcoholic beverages, narcotics, or restricted dangerous drugs within 24 hours prior to or during periods of time with the child.”

“Neither parent shall drink excessively during their custody period.”

“Neither parent shall permit any third party to consume alcoholic beverages, narcotics, or restricted dangerous drugs (except by prescription) in the presence of the child.”

14. For example see: Cal. Fam. Code §3041.5; see also California Administrative Office of the Courts, Center for Family, Children & the Courts, Drug and Alcohol Testing in Child Custody Cases: Implementation of Family Code Section 3041.5/Final Report To The California Legislature, (July 2007).

15. For example, see Cal. Fam. Code §3041.5 which mandates that no alcohol testing in a family court case be ordered except upon a judicial determination by a preponderance of evidence, that the parent to be tested has engaged in habitual and continued abuse of alcohol. If drug testing is ordered, it must be by the least intrusive method, and must be in conformance with the procedures and standards established by the United State Department of Health and Human Services (DHHS). These guidelines do not apply to alcohol testing. See also, *Deborah M. v. Superior Court* 128 Cal. App.4th,1181, (2005), finding that DHHS only allows for urine testing for drug use. Under FC3041.5, any alcohol testing results are strictly confidential and fines are authorized for unpermitted dissemination. Further, FC3041.5 states that “a positive test result, even if challenged and upheld, shall not, by itself, constitute grounds for an adverse custody or guardianship decision. See *Heidi S. v. David H.*, 1 Cal. App. 5th, 1150 (2016), holding that FC section 3041.5 “contains no restrictions on the court’s power to alter visitation, as opposed to custody or guardianship, based on positive test result.

16. The parent being tested is often required to pay for testing, and the testing itself can be inconvenient. Examples of family law orders for alcohol testing are:

“Mother shall submit to 12 random alcohol tests at times determined by the testing provider.”

“Father shall submit to random alcohol testing for a period of 3 months, times to be determined by the tester.”

17. Shuman, D.W. The origins of the physician-patient privilege and professional secret. 39 *Southwest Law Journal*, 39, 661-669 (1985). See also, Golan, Tal, “The History of Scientific Expert Testimony in the English Courtroom,” *Science in Context* , pp 7-32 (1999).

18. *Id.*

19. *Id.*

20. Shuman, D.W. & Sales, B., Admissibility of expert testimony based upon clinical judgment and scientific research. *Psychology, Public Policy and Law*, 4, 1226-1252 (1998).

21. *Frye* decision reflected views held by legal realists of the time such as Karl Llewellyn and Jerome Frank in its attention to science and empirical investigation.

22. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)

23. *Id.*

24. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)

25. *Id.*

26. *Id.*

27. *General Electric Co. v. Joiner*, 522 U.S. 136 (1997)

28. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)

29. https://www.law.cornell.edu/rules/fre/rule_702

30. <https://www.rulesofevidence.org/article-vii/rule-702/>

31. California, Illinois, Maryland, Minnesota, New Jersey, Pennsylvania, New York and Washington.

32. Okorochoa, Okorie, “Alcohol Breath Testing: Is there Reasonable Doubt?” *Syracuse Journal of Science and Technology Law*, (February 2013). <https://www.researchgate.net/publication/235417097>

33. *Id.*
34. *Id.*
35. King, Josephine and Tipperman, Mark, "The Offense of Driving While Intoxicated: The Development of Statutory and Case Law in New York," *Hofstra Law Review*, Vol. 3 No. 3 (1975).
36. *Id.*
37. *Id.*
38. *Id.*
39. Giangrande, Mark and Peters, Angela, *Breath Alcohol Machines: Evidence Foundation Requirements in Illinois*, 22 *J. Marshall L. Rev.* 1 (1988).
40. Breath Alcohol Concentration (BrAC) should be equivalent to Blood Alcohol Concentration (BAC).
41. Giangrande, Mark, *Supra.*
42. *Id.*
43. *Commonwealth v. Allen*, 454 Pa. Superior Ct. 73 (1996)
44. *Id.*
45. *City of Westland v. Okopski*, 527 N.W.2d 780 (Mich. Ct. App. 1994)
46. *Id.*
47. *State v. Beaver*, 181 Wis.2d 959, 970 & n. 5, 512 N.W.2d 254 (Ct.App.1994)
48. *State v. Lemley*, 774 N.W.2d 272 (2009)
49. *Id.* See also *Mogg v. State*, 918 N.E.2d 750, 755 (Ind. Ct. App. 2009) where the court held that the fuel cell technology used in a bracelet device was admissible under *Daubert* in a probation violation hearing to show the presence of alcohol.
50. *Id.*
51. *Fischer v. Ozaukee County Circuit Court*, 741 F. Supp. 2d 944 (D. Wis. 2011)
52. *United States v McAdams*, No. 6:16-MJ-0063-MJS (E.D. Cal. Apr. 16, 2018)
53. *People v. Halsey*, 652 N.E.2d 434 (Ill App Ct. 1995)
54. *Id.*
55. *People v Jones*, 2011 NY Slip Op 21250 (33 Misc 3d 1810, July 18, 2011)

56. *People v. Hargobind*, 908 N.Y.S.2d at 806 (2012). But see *People v. Aliaj*, 946 N.Y.S.2d 430 (Sup. Ct. 2012). The court acknowledged that other trial courts in New York have been applying different standards regarding the admissibility of PBT tests, and proposed a variety of factors that should be considered before such portable test results may be admissible. The court said, with the proper foundation a PBT test result would be admissible however the officer's testimony was insufficient.

57. *People v. Williams*, 49 P.3d 203 (Cal. 2002)

58. *People v. Wilson*, 8 Cal. Rptr. 3d 167 (2003)

59. Soberlink Court Validation, *Supra*.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. See United States Department of Health and Human Services, Food and Drug Administration, k160613 Trade/Device Name: Soberlink Cellular Device Regulation Number: 21 CFR 862.3050 Regulation Name: Breath alcohol test system Regulatory Class: I, Reserved Product Code: DJZ (July 2016).

72. *Id.*

73. *Id.*

74. U.S. Library of Medicine, Study: NCT02544581, Preliminary Analysis of the Soberlink Alcohol Breath Analyzer System's (SABA) Clinical Utility During Aftercare.

75. See: <https://www.bactrack.com/products/bactrack-s80-pro-breathalyzer>

76. FDA. k160613 *supra*.
77. *Id.*
78. For purposes of determining substantial equivalence, the legally marketed device is commonly referred to as the “predicate device” or “predicate.”
79. *Id.*
80. Soberlink Court Validation, *Supra*. The Dart 11 mm premium sensor is created for frequent use. <https://www.dart-sensors.com/wp/wp-content/uploads/2014/10/BA-R-Sensor-Datasheet.pdf>
81. *Id.*
82. *Id.*
83. *Id.*
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87. For example, see footnote 5.
88. *Murphy v. Murphy*, 2018 WL 1475587 (2018). Superior Court of Connecticut Judicial District of Stamford-Norwalk at Stamford, (Feb. 2018)
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