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The Parental Alienation Syndrome: A Dangerous Aura of Reliability

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THE PARENTAL ALIENATION SYNDROME: A DANGEROUS AURA OF RELIABILITY

Upon returning home from visitation with her father, a little girl named Mandi told her mother, in explicit detail, how her father had sexually molested her. After various social service agency workers and psychologists interviewed the child, the case went to court. The judge determined that since the four-year-old’s story was not always consistent, her mother must have “programmed” her to say such things about her father. Consequently, the court not only gave custody of the child to the accused father, but also denied the child all contact with her mother. The court’s leap of reasoning was based on a theory known as the Parental Alienation Syndrome.¹

I. INTRODUCTION

The Parental Alienation Syndrome (PAS)² theory states that when children demonstrate ill, or even ambivalent, feelings toward their fathers³ or report during divorce proceedings that their fathers abuse them, it is most often the mother’s doing.⁴ Depending on the perceived severity of the syndrome’s presence, the theory also states that these children should be removed from the custody of their mothers.⁵ Because of PAS theory, children like Mandi face the possibility of not only living with an abusive parent, but of having no one to tell.

Dr. Richard Gardner, the founder and purveyor of PAS, has also influenced the legal system by his willingness to testify in civil and criminal cases as to his theories about PAS and the invalidity of child sexual


³ Most often, the parent Dr. Gardner refers to is the mother seeking to alienate “her” child from “her” spouse. See infra notes 27, 37, 39-52 and accompanying text. Therefore, solely for the purpose of explaining Dr. Gardner’s theory, this Author may refer to the alienating parent as the mother.

⁴ See infra notes 27, 37, 39-52 and accompanying text.

⁵ GARDNER, supra note 2, at 270-73; see also Rorie Sherman, Gardner’s Law, NAT’L L.J., Aug. 16, 1993, at 1, 46 (reporting that Dr. Gardner believes children with severe PAS should be taken from brainwashing mother until they can be deprogrammed).
abuse charges. Dr. Gardner espouses these theories in his self-published books, the most recent being *The Parental Alienation Syndrome*. Ironically, while PAS has been admitted in courts, it has not been accepted by experts in the field: psychologists, child abuse evidentiary experts, or child advocates.

This Comment argues that evidence of PAS should not be admissible in court. Notwithstanding the causation problems inherent in holding one parent liable for the alienation of a child's affection from the other parent after a divorce, PAS theory has not gained acceptance among experts within the field. Under the *Frye v. United States* "general acceptance" standard, this evidence would not be properly admitted; however, the United States Supreme Court has recently relaxed the standard for admitting scientific testimony in the landmark *Daubert v. Merrell Dow Pharmaceuticals* decision. This Comment analyzes the difficulties in sorting out causation in an area recognized by psychologists to be complex. Further, it analyzes the implications of allowing a judge, in an adversarial arena, the discretion to admit evidence that may sound appealing but that in fact would not be accepted by experts in the particular field.

This Comment first considers the Parental Alienation Syndrome theory, Mandi's case, and other PAS cases that have had disturbing, notorious, and widely inconsistent outcomes. Then, it discusses the causation problem inherent in assigning blame for the alienation solely to the mother by analyzing PAS in light of the nearly extinct tort of alienation

6. GARDNER, supra note 2, at 327-34; Sherman, supra note 5, at 45.
7. See GARDNER, supra note 2. In fact, Dr. Gardner has authored more than 250 books and articles advising mental health professionals and the legal community on child custody issues. Sherman, supra note 5, at 45. In the reference section of *The Parental Alienation Syndrome*, Dr. Gardner lists 18 such publications. GARDNER, supra note 2, at 336-37. Thirty books are listed prior to the table of contents under the heading "Other Books by Richard A. Gardner." Id. at vi. Although this seems like an impressive number of publications, Dr. Gardner's works are published by Creative Therapeutics, his own private publishing company, which boasts a 56-page mail-order catalog and provides an 800 number for sales in the United States and Canada. Sherman, supra note 5, at 45; see GARDNER, supra note 2. The inherent problem with such self-published work is the lack of peer review. See infra notes 22, 23, 58, 369.
8. See infra part II.A.
10. See infra part IV.C.2 (explaining that *Frye* standard ensures that scientific principle or theory is first accepted by relevant scientific community prior to its admission in court).
11. 113 S. Ct. 2786.
12. See infra part II.A.
13. See infra part II.B.
14. See infra part II.C.
of affection.\textsuperscript{15} Next, this Comment explores the evidentiary problems with PAS through a discussion of the \textit{Daubert} opinion and the \textit{Frye} standard.\textsuperscript{16} This Comment examines the admissibility of psychological theory and syndrome testimony in general\textsuperscript{17} and considers the admissibility of PAS testimony in light of \textit{Daubert} and \textit{Frye}.\textsuperscript{18} Further, this Comment recommends that evidence of PAS be excluded because of its causation problems, its unreliability under \textit{Daubert}, and its lack of general acceptance under \textit{Frye}.\textsuperscript{19} Finally, this Comment concludes that because admitting this evidence endangers children,\textsuperscript{20} PAS must first gain the acceptance of child advocates, psychologists, and child abuse evidentiary experts—not family law attorneys who have latched onto the theory hoping to use it as an effective custody battle weapon or a defense to child abuse allegations.\textsuperscript{21}

II. THE PARENTAL ALIENATION SYNDROME

A. The Theory

Dr. Richard Gardner developed the PAS theory\textsuperscript{22} through his personal observations of his own patients.\textsuperscript{23} Dr. Gardner describes PAS as a

\textsuperscript{15} See infra part III.
\textsuperscript{16} See infra part IV.A.
\textsuperscript{17} See infra part IV.B.
\textsuperscript{18} See infra part IV.C.
\textsuperscript{19} See infra part V.
\textsuperscript{20} See infra part II.
\textsuperscript{21} See infra part VI.
\textsuperscript{22} Dr. Gardner prefers that the Parental Alienation Syndrome be referred to as a "disorder" rather than a theory. See \textit{Gardner, supra} note 2, at 59; Richard A. Gardner, M.D., \textit{Dr. Gardner Responds}, N.J. L.J., Jan. 18, 1994, at 20; Richard A. Gardner, \textit{Dr. Gardner Defends Work on Sex Abuse}, NAT'L L.J., Sept. 6, 1993, at 16 [hereinafter Gardner, \textit{Defends}]. In fact Dr. Gardner contends that referring to the PAS as a "theory" implies that PAS is just "a figment of [his] imagination." See Richard A. Gardner, M.D., \textit{Evaluate Child Sex Abuse in Context}, N.J. L.J., May 10, 1993, at 16 [hereinafter Gardner, \textit{Evaluate}]. However, Dr. Gardner's critics have said and Dr. Gardner acknowledges that there is no research to confirm the existence of PAS or its description of its causes, see infra notes 23, 58 and accompanying text; infra text accompanying notes 63, 65-67, nor is PAS listed in the \textit{American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders} (3d ed. rev. 1987) (commonly referred to as the \textit{DSM-III-R}—the third revised of four editions first appearing in 1957). Sherman, supra note 5, at 45. Dr. Gardner, however, expresses confidence that someday PAS will be included. \textit{Id.} The \textit{DSM-III-R} is the "official manual of mental disorders [that] contain[s] a glossary of descriptions of the diagnostic categories of mental disorders." Reginald A. Hirsch, \textit{Expert Witnesses in Child Custody Cases}, 29 Fam. L.Q. 207, 218 (1985) (referring to the \textit{DSM-III}); see also Sherman, supra note 5, at 45 (describing \textit{DSM-III} as "mental health professionals' guidebook of accepted diagnoses").

\textsuperscript{23} See \textit{Gardner, supra} note 2, at 59. Dr. Gardner's other works, including the problematic Sex Abuse Legitimacy (SAL) Scale, see infra part II.A, are similarly based solely upon his own observations of patients from his private practice. See infra note 58; infra text accom-
disturbance in which children are not merely systematically and consciously "brainwashed" but are also subconsciously and unconsciously "programmed" by one parent against the other.  

Because Dr. Gardner believes that this "combination" effect is going on, he disfavors the terms "brainwashing" and "programming" used in conjunction with his theory; thus, he applies the term PAS. However, Dr. Gardner uses both terms synonymously throughout his books and other writings when referring to the conscious effort of a parent to alienate his or her child from his or her spouse. Dr. Gardner explains that "PAS is a disorder of children, arising almost exclusively in child-custody disputes, in which one parent (usually the mother) programs the child to hate the other parent (usually the father)."

Dr. Gardner asserts that PAS is a "relatively new disorder, having evolved primarily from recent changes in the criteria by which primary custodial placement is decided." The changes Dr. Gardner refers to are the product of the shift to the best-interest-of-the-child presumption and the increased popularity of joint custodial arrangements.

Critics have emphasized the difficulty in developing a general theory, that is meant to be applied broadly, from such a narrow perspective. See infra notes 47, 54-56, 58. See also, e.g., Roland Summit, M.D., The Child Sexual Abuse Accommodation Syndrome, 7 CHILD ABUSE & NEGLECT 177, 180 (1983) ("A syndrome should not be viewed as a procrustean bed which defines and dictates a narrow perception of something as complex as child sexual abuse."). In particular, the SAL Scale has been directly criticized for its lack of objectivity. See, e.g., Lucy Berliner & Jon R. Conte, Sexual Abuse Evaluations: Conceptual and Empirical Obstacles, 17 CHILD ABUSE & NEGLECT 111, 114 (1993). "The SAL Scale suffers many [unique problems]. It is based entirely on the author's personal observations of an unknown number of cases seen in a specialized forensic practice. Although reference is made [by Dr. Gardner] to studies carried out 'between 1982 and 1987' . . . these are unpublished, not described, and are of unknown value." Id. (citations omitted). For a more complete discussion of psychologists' criticisms of the SAL Scale, see infra note 58.

24. GARDNER, supra note 2, at 59-60.
25. Id. at 60.
26. Id.
27. According to Dr. Gardner, in 90% of the cases it is only the mother who attempts to alienate the children from the father. Id. at 62, 106; see Gardner, Defends, supra note 22, at 16; supra notes 39-52 and accompanying text.
28. GARDNER, supra note 2, at 83; Gardner, Defends, supra note 22, at 16.
30. Note that PAS theory was a creation of Dr. Gardner's existing prior to his book, The Parental Alienation Syndrome. See supra note 7; infra notes 55, 58, 69 and accompanying text.
31. GARDNER, supra note 2, at 61.
Prior to the adoption of this presumption in the 1970s, courts embraced the tender-years presumption, which held that young children were better off with their mothers. In adopting the best-interest approach, joint custody also became favored because designating one parent as the custodian and one parent as the visitor was seen as "inegalitarian." According to Dr. Gardner, because these developments have had the effect of making custodial arrangements "unpredictable and precarious," parents—most often mothers—are "brainwashing their children in order


33. GARDNER, supra note 2, at 61.
34. Id.; see also Hirsch, supra note 22, at 211 (stating that tender-years presumption has been brushed aside for best-interest standard).
35. GARDNER, supra note 2, at 61. Some courts have recognized that although a joint custody arrangement may offer many benefits to families, it cannot work without parental agreement. See, e.g., Braiman v. Braiman, 378 N.E.2d 1019, 1021 (N.Y. 1978) (stating that imposing court-ordered joint custody arrangement on embattled parents unable to manage common problems can only enhance familial chaos).
36. GARDNER, supra note 2, at 61.
37. GARDNER, supra note 2, at 62 (stating that mother is alienating parent in 90% of PAS cases); Gardner, Defends, supra note 22, at 16 (stating that alienating parent is usually mother). While Dr. Gardner's personal observation that 90% of the time the mother is the alienating parent smacks of gender bias, there have been other indications of his bias as well. See Sherman, supra note 5, at 46. For example, it was reported that Dr. Gardner presented himself to Dr. Joyce Wallace, a Manhattan physician noted for pioneering AIDS research, as a therapist who would help her and her ex-husband get along better during a fairly routine custody battle. Id. Later, Dr. Wallace determined that Dr. Gardner had actually been hired by her ex-husband. Id. Dr. Gardner found Dr. Wallace fit to raise her nine-year-old daughter, but nevertheless decided to recommend a custody change. Id. According to Dr. Wallace, "[Dr. Gardner] said it was about time men got custody, and I was going to be his landmark case." Id. (quoting Dr. Joyce Wallace). Although the custody suit was ultimately dismissed, Dr. Wallace sued Dr. Gardner and got a $25,000 settlement in 1988. Id. In response to the publication of the facts of Dr. Wallace's suit, Dr. Gardner acknowledged that he has "seen in print many misrepresentations made by former patients" but that confidentiality precludes him from commenting. Gardner, Defends, supra note 22, at 16. Though Dr. Gardner indicates that he "often consults with knowledgeable attorneys to ensure that [he is] working 'within the system,'" id., he might check with one to see whether the patient-litigant exception to the psychotherapist-patient privilege applies in any of the jurisdictions where cases like Dr. Wallace's were filed. This exception allows disclosure of those matters which the patient has chosen to reveal by tendering them in litigation. See, e.g., CAL. EVID. CODE § 1016 (1966). It is the patient who holds the privilege, not the psychotherapist. Id. § 1013; see also In re Lifschutz, 2 Cal. 3d 415, 430, 467 P.2d 557, 566, 85 Cal. Rptr. 829, 838 (1970) (indicating that psychotherapist cannot claim privilege). Moreover, the privilege only extends to communications that the patient intended to be kept confidential—though the exception is to be construed narrowly—once those issues are brought out in a lawsuit by the patient they are no longer confidential. Id. at 433, 467 P.2d at 569, 85 Cal. Rptr. at 841 (finding "no constitutional infirmity" in patient-litigant exception by reasoning that "in cases in which the patient's own action initiates the exposure, 'intrusion' into a patient's privacy remains essentially under the patient's control"). By initiating a lawsuit, the patient has waived the privilege—and because the patient is the holder of the privilege—the confidential privilege cannot be asserted by
to ensure 'victory' in custody/visitation litigation."\textsuperscript{38}

Notably, Dr. Gardner devotes over twenty-two pages in his book exclusively to discussing the programming mother\textsuperscript{39} and a mere nine pages to discussing the programming father.\textsuperscript{40} Throughout the remainder of the book, Dr. Gardner refers to the programming parent in either the female gender or as the mother outright.\textsuperscript{41} Dr. Gardner says this is "for simplicity of presentation."\textsuperscript{42}

Why, according to Dr. Gardner, are women programming their children against the children's fathers in nine out of ten cases\textsuperscript{43} where PAS is present? Dr. Gardner explains by quoting William Congreve: "Heaven has no rage, like love to hatred turned. Nor hell a fury, like a woman scorn'd."\textsuperscript{44} Women separated from their husbands cannot retaliate directly against them and therefore attempt to "wreak vengeance"\textsuperscript{45} through their children.\textsuperscript{46} And why does this "thirst for vengeance" phenomenon occur primarily in women against men?\textsuperscript{47} Dr. Gardner's long list of reasons includes the following: (1) Men have more opportunity to find new partners; (2) men are less frustrated; (3) men are less angry; (4) women suffer more economic privation than men in divorce; (5) the economic disparity suffered by women often results in men having a legal advantage in being able to hire more competent lawyers; and (6) women

the psychotherapist. \textit{Id.} (stating that "in all fairness, a patient should not be permitted to establish a claim while simultaneously foreclosing inquiry into relevant matters").

For a discussion regarding the dangers of basing a theory on one's own clinical observations, see \textit{supra} note 23; \textit{infra} note 369.

\textsuperscript{38} GARDNER, \textit{supra} note 2, at 61-62.

\textsuperscript{39} See \textit{id.} at 82-106.

\textsuperscript{40} \textit{See id.} at 106-15. Notably, unless referring to a specific incident, Dr. Gardner uses the gender-neutral terms "parent" or "his (her)" in the discussion regarding the "programming father." See \textit{id.} at 106-07.

\textsuperscript{41} \textit{Id.} passim.

\textsuperscript{42} \textit{Id.} at 62. Interestingly, it is common and has been the historical practice for authors to use masculine pronouns for simplicity, even though this practice has been widely criticized by linguists, feminists, and others. \textit{See, e.g.,} Carol Sanger, \textit{Feminism and Disciplinarity: The Curl of the Petals, 27} \textit{Loy. L.A. L. Rev.} 225, 247 n.87 (1994) (labeling practice "crucial mechanism for [promoting] conceptual invisibility of women").

\textsuperscript{43} \textit{See GARDNER, \textit{supra} note 2, at 62, 106.}

\textsuperscript{44} \textit{Id.} at 122.

\textsuperscript{45} \textit{Id.}

\textsuperscript{46} \textit{Id.} \textit{Contra infra} notes 198-99 and accompanying text.

\textsuperscript{47} One author has not only noted that fathers brainwash their children during divorce, but described how in the chapter of her book entitled "Paternal Brainwashing." \textit{PHYLIS CHESLER, MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY} 171-89 (1986). Paternal brainwashing methods include: (1) using physical force or the mere threat of it; (2) using economic seduction and manipulation; (3) paying attention to previously paternally neglected children; (4) smothering with paternal neediness; (5) devaluing the mother; (6) replacing the mother with mother competitors. \textit{Id.} at 174-84.
project their own real behaviors and fantasies on men.\textsuperscript{48}

Reason number six—projection—merits a closer look because Dr. Gardner links it to false allegations of sexual abuse which he says are a common pattern in PAS cases.\textsuperscript{49} Although many accusations are conscious and deliberate—thus conforming to the "frustrated" and "angry" characteristics identified by Dr. Gardner—projection is a subconscious and unconscious operation.\textsuperscript{50} Dr. Gardner says that "[t]he mother's own suppressed and repressed sexual fantasies are projected onto the child and father. By visualizing the father having a sexual experience with the child, the mother is satisfying vicariously her own desires to be the recipient of such overtures and activities."\textsuperscript{51} Thus, Dr. Gardner says that an accusation of sexual abuse considered to be unlikely "must be viewed as a product of the mother's own mind—having no basis in reality—and is therefore likely to have within it an element of projection."\textsuperscript{52}

Whether conscious and deliberate or from projection, false allegations of sexual abuse also merit further discussion because Dr. Gardner maintains that the frequency of false allegations of sexual abuse in custody disputes are "quite high."\textsuperscript{53} Contrary to his assertions—which have caught on in the mass media—child abuse and evidentiary experts have shown that these situations represent but a small minority of cases.\textsuperscript{54}

\textsuperscript{48} Gardner, supra note 2, at 122-27.

\textsuperscript{49} Id. at 126.

\textsuperscript{50} Id.

\textsuperscript{51} Id.

\textsuperscript{52} Id. at 126-27.

\textsuperscript{53} Id. at 126.

\textsuperscript{54} Results from a two-year study funded by the National Center on Child Abuse and Neglect showed that in over 9000 families with custody-visitation disputes, less than 2% involved an abuse allegation. Nancy Thoennes & Patricia G. Tjaden, The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes, 14 Child Abuse & Neglect 151, 152-53 (1990). Belying Dr. Gardner's notion that allegations of sexual abuse in custody disputes are typically brought by the mother against the father, the study showed that mothers accused the father in less than half (48%) of the already small percentage of cases. Id. at 154. In the remaining cases the accused persons were third parties such as the mother's new partner, stepfathers, or others. Id.; see also Lucy Berliner, The Child Witness: The Progress and Emerging Limitations, 40 U. Miami L. Rev. 167, 177 (1985) (stating that media's publicizing of mother's brainwashing children lacks authoritative support); Berliner & Conte, supra note 23, at 112 ("Even in clinical series which involve complex, disputed custody or visitation cases, a substantial percentage [of cases] are considered to involve actual abuse." (emphasis added)); Jon R. Conte, Has This Child Been Sexually Abused?: Dilemmas for the Mental Health Professional Who Seeks the Answer, 19 CRIM. JUST. & BEHAV. 54, 62 (1992) ("As of the writing of this article, I am aware of not a single empirical study that has documented that in fact false cases of sexual abuse are more likely to arise in divorce/custody cases."); Meredith Sherman Fahn, Allegations of Child Sexual Abuse in Custody Disputes: Getting to the Truth of the Matter, 25 Fam. L.Q. 193, 199 (1991) ("Experts disagree as to the specific percentage of allegations that are fictitious, but most acknowledge that this occurs
One such expert has responded directly to Dr. Gardner's assertion that "'the vast majority of children who profess sexual abuse are fabricators,'" by declaring:

There is no systematic evidence, however, that the number of allegations [arising during custody litigation] has reached flood stage. Nor is there convincing evidence that a substantial portion of the allegations are fabricated. In fact, the research that exists points the other way. Allegations of child sexual abuse occur in a small but increasing number of custody cases. Allegations occur in approximately two to four percent of cases.\(^5\)

The PAS theory has other problems as well. The criteria Dr. Gardner uses to determine whether PAS is present\(^5\) are essentially borrowed from and built upon his earlier—and now widely discredited—objective.

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\(^{5}\) Id. at 21 (footnotes omitted).


\(^{56}\) See Berliner & Conte, supra note 23, at 114 (citing multiple problems with SAL Scale and concluding that Scale lacks predictive value to determine validity of child sexual abuse allegations); Conte, supra note 54, at 68-69 (criticizing Gardner's evaluation procedure of viewing child in presence of offender and noting that no data currently available identifies method for discriminating between nonabusive child-adult dyads and abusive child-adult dyads); Jon R. Conte et al., Evaluating Children's Reports of Sexual Abuse: Results from a Survey of Professionals, 61 Am. J. Orthopsychiatry 428, 434 (1991) (criticizing Gardner's suggestion that "[t]he child who is fabricating sexual abuse generally does not describe fear of the perpetrator and is usually free from tension in the perpetrator's presence," and pointing out that no criteria for discriminating between "true" and "false" cases has been empirically validated (quoting Gardner, supra note 55, at 115)); Jill Waterman & Robert Lusk, Psychological Testing in Evaluation of Child Sexual Abuse, 17 Child Abuse & Neglect 145, 152-53
tive test for determining whether children were fabricating allegations of sexual abuse, the "Sex Abuse Legitimacy Scale" (SAL Scale). Dr. Gardner believes that PAS arises almost exclusively in the context of child custody disputes, and he also asserts that false allegations of sexual abuse arise under these same circumstances.

The only appellate court to rule on the admissibility of the SAL Scale held it inadmissible because there was no showing that it had "some reasonable degree of recognition and acceptability among the spectrum of scientific or medical experts [in the field]."

Two experts referring to the SAL Scale and PAS stated:
There are no studies which have determined if the scale can be coded reliably. Many of the criteria are poorly defined. There have been no scientific tests of the ability of the SAL Scale to discriminate among cases. There is no evidence that the numerical scores have any real meaning. Indeed, to our knowledge, the entire scale and parent alienation syndrome upon which it is based have never been subjected to any kind of peer review or empirical test. In sum, there is no demonstrated ability of this scale to make valid predictions based on the identified criteria.

In a recent submission to a psychiatric journal, a multidisciplinary group of experts noted that an "overwhelming majority of professionals" do not agree with Dr. Gardner's interviewing methods. Moreover, referring to PAS and the SAL Scale they assert that "the fact remains that no validation criteria or criteria for discriminating between 'true' and 'false' cases have yet been empirically validated."

Professor Jon Conte of the University of Chicago's School of Social Service Administration, who also edits the Journal of Interpersonal Violence, strenuously objects to "the fact that [Dr. Gardner] presumes to go into court and help triers of fact with ideas that have not passed the test of science and time."

(1993) (citing SAL Scale as example of test without research findings or empirical backing that is "useless in validating child sexual abuse at best, and dangerous at worst").

59. See GARDNER, supra note 55; Sherman, supra note 5, at 46.
60. GARDNER, supra note 2, at 61.
61. Id. at 126. Contra sources cited supra note 54-56 and accompanying text.
63. Berliner & Conte, supra note 23, at 114.
64. Conte et al., supra note 58, at 434.
65. Id.
66. Id.
67. Sherman, supra note 5, at 45 (alteration in original) (quoting Professor Jon Conte). Sherman aptly notes that Professor Conte's statement is "an echo of the larger debate cur-
among his colleagues for saying that Dr. Gardner's SAL Scale is "‘[p]robably the most unscientific piece of garbage I've seen in the field in all my time.'" 68 Even Dr. Gardner himself has withdrawn the SAL test from the market, 69 but the heart of the discredited SAL Scale beats on in his promotion of PAS theory. 70 Says one child advocate, "‘It's


69. Gardner, Evaluate, supra note 22, at 16; Sherman, supra note 5, at 45. However, it appears that Dr. Gardner does not make this fact widely known. Id. at 46. Dr. Gardner states that he discontinued use of the scale because of its "wide-spread misuse." Gardner, Evaluate, supra note 22, at 16. But cf. sources cited supra note 58; supra text accompanying notes 63, 66 (stating that SAL Scale has no value due to its lack of scientific basis or research). In particular, Dr. Gardner claims that the scale was withdrawn because of "the misuse of the assignment of numerical values for each criterion that was often used to justify a bias in one direction or another." Gardner, Evaluate, supra note 22, at 16, 36. Yet, Dr. Gardner's own use of the scale has been questionable as well. While working as a prosecutor, Deputy District Attorney Christopher H. Gardner—not related to Dr. Gardner—agreed to a defense request to have Dr. Gardner evaluate all parties in a child sexual abuse case. Sherman, supra note 5, at 46. During the course of his evaluation, Dr. Gardner responded to the SAL Scale question of whether the mother has sought a "hired gun" or mental health professional by identifying the prosecutor as the mother's "hired gun." Id. This characterization of the prosecutor made it more likely to find a false allegation of abuse. Id. "‘If you believe your child has been sexually abused, shouldn't you be going to an attorney and seeking medical advice?'" Id. (quoting Deputy District Attorney Christopher H. Gardner). Note also that Dr. Gardner's recent publications do not directly refer to his previously self-touted SAL Scale, yet the Scale is embodied within them. See supra notes 7, 63 and accompanying text; infra note 70 and accompanying text.

70. Not only does the PAS theory contain similar criteria to the SAL Scale for identifying false allegations of sexual abuse—in fact, the discredited scale is based on PAS, see Berliner & Conte, supra note 23, at 114—but the SAL Scale still lurks within other works of Dr. Gardner. See Sherman, supra note 5, at 46 (revealing that though SAL Scale is “dead,” Dr. Gardner “subsumed” criteria in longer list in his book True and False Accusations of Child Sex Abuse). True and False Accusations of Child Sex Abuse appears on the list of his self-published books under the heading “Other Books by Richard A. Gardner” in The Parental Alienation Syndrome. Gardner, supra note 2, at vi.

It is noteworthy that True and False Accusations of Child Sex Abuse has been reported to contain criteria not necessarily derived directly from the SAL Scale but which, according to Dr. Gardner's experience, are indicators of false accusations of child sexual abuse by women. See Sherman, supra note 5, at 46. The indicators quoted include the following:

She is aggressive: "[M]others who promulgate false accusations are more likely to be self-assertive. They are the ones who are more likely to make a commotion over the alleged abuse . . . ."

She is outgoing: "[M]others of children who provide false accusations are more likely to be outgoing, assertive and argumentative. They are very independent types who are less likely to have been constrained in their speech or movements by a domineering husband."

She is impulsive: "Typically, they do not call first the child's father, the person who might give them some information regarding whether or not the abuse took place. Rather, they quickly call a lawyer, child protection services, or other external authority."
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placing a lot of kids in jeopardy.' ”

B. Mandi's Case

Mandi M. was born on September 7, 1986. On August 15, 1990, when Mandi was nearly four years old, her parents separated. Just prior to their separation, Mandi's mother and father had worked out a comprehensive joint and split custodial arrangement whereby each would have custody of Mandi for approximately one-half of every week. In September 1990 Mandi's mother filed a petition with the Family Court of New York in Fulton County to modify that arrangement so that she would “retain all custody and visitation [would] be supervised, if at all” because Mandi had disclosed that her father had sexually abused her.

Following Mandi's disclosure to her mother that her father put his finger in her “peer” and that her Daddy's “dinkie” got bigger and “stuff came out,” her mother called on a friend, Jan Carter. Ms. Carter, employed by Community Maternity Services, came to their home and spoke to Mandi. Based on Mandi's telling Ms. Carter that her Daddy put his “peer” on her “peer” and that she told him to stop, and it hurt, and she cried, Ms. Carter placed a call to the New York State Central Register for Child Abuse and Maltreatment and reported the incident. As a result of this call, Sally Conkling, a caseworker with the Fulton County Department of Social Services, conducted an investigation during which Mandi told Ms. Conkling that Mandi's father had put his finger in her vagina.

*Id.* (alteration in original) (quoting RICHARD A. GARDNER, TRUE AND FALSE ALLEGATIONS OF CHILD SEX ABUSE (1992)).

According to one prominent child advocate, “[n]o matter what a woman would do, under [Dr. Gardner's] writings, she is going to do something wrong unless she disbelieves her child.” *Id.* (quoting Joan Pennington, founder of The National Center for Protective Parents in Civil Child Sex Abuse Cases in Trenton, New Jersey).


73. *Id.*

74. *Id.*

75. *Id.* (quoting Mandi's mother's petition).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*
Thereafter, Bette Malachowski of the Family Counseling Center interviewed Mandi to determine whether the allegation of sexual abuse could be validated. Ms. Malachowski has a Master's degree in Psychology and identified herself as a child sexual abuse therapist. At that time she stated that she had interviewed approximately two hundred children and she had determined that fifty of the children's allegations were fabricated. According to Ms. Malachowski during her questioning of Mandi, when she asked whether Mandi was having "any kind of touching troubles" or whether she was "making believe," Mandi stated she was "making believe." Ms. Malachowski also reported that Mandi

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80. Id.
81. Id.
82. Id. at 269. Contrast Ms. Malachowski's finding that 25% of the children she interviewed made false allegations with the statistics cited supra notes 54-56. See also Summit, supra note 23, at 190 ("Very few children, no more than two or three per thousand, have ever been found to exaggerate or to invent claims of sexual molestation.").
83. Mandi's interview with Ms. Malachowski suggests that the questions were leading. The following pertinent part of the dialogue between Mandi and Ms. Malachowski is quoted from the court's published opinion:

Therapist: Q. "Mandi, did any kind of touching troubles happen with your pepe, boobies or your butt? Or, are you making believe?"
Mandi: A. "Making believe. He didn't do it."
Therapist: Q. "He didn't do it?"
Mandi: A. "No."
Therapist: Q. "Who didn't do it?"
Mandi: A. "My father; I was just joking about it."
Therapist: Q. "You were just joking about it. So Daddy really didn't do anything. You were only making believe about it?"
Mandi: A. "Yes."
Therapist: Q. "How come you were only making believe about it?"
Mandi: A. "I was joking."
Therapist: Q. "How come you were just joking about it?"
Mandi: A. "I don't know."
Therapist: Q. "Did anybody tell you to make a joke about it?"
Mandi: A. "Yes."
Therapist: Q. "Who told you to make a joke about it?"
Mandi: A. "I don't know."
Therapist: Q. "You don't know. Alright, I think then we are done talking, okay? Is there anything else you want to talk about?"
Mandi: A. "No."

Karen B. 574 N.Y.S.2d at 269 (emphasis added).
84. Id. It appears, however, that children commonly retract sexual abuse allegations in substantiated cases. Summit, supra note 23, at 188. According to Dr. Summit, the conflict of loyalty, the fear of consequences, and the victim's sense that he or she may bear the responsibility for the chaotic aftermath of disclosure can "likely" lead to such retractions. Id. "Whatever a child says about sexual abuse, she is likely to reverse it." Id. A group of experts have written:

Following disclosure, powerful forces [feelings of guilt and personal responsibility combined with feelings of loss and grieving for the emotional warmth the abuser provided—although at a price] may work to convince the child to change the facts or to recant altogether. Such forces are particularly strong in intrafamilial abuse cases, where the perpetrator, with or without the cooperation of the nonabusing parent,
never used the word "dink" when describing the penis.\textsuperscript{85} Ms. Malachowski concluded that because Mandi's mother had a vested interest in the outcome of the case—that is, she wanted full custody—and because Ms. Malachowski had observed no outward signs of emotion when Mandi's mother spoke,\textsuperscript{86} there was no information that would indicate that Mandi had been sexually abused by her father.\textsuperscript{87} In addition, Mandi's pediatrician, Lawrence Horowitz, D.O., performed a physical examination of Mandi during the same time period as Ms. Malachowski's evaluation; the physical examination revealed nothing.\textsuperscript{88} The De-

seeks to persuade the child to change or deny prior allegations. There may be ample opportunity to instill fear, guilt, and ambivalence.

John E.B. Myers et al., \textit{Expert Testimony in Child Sexual Abuse Litigation}, 68 NEB. L. REV. 1, 87 (1989) (footnote omitted); see also id. at 87 n.370 (describing abused child's feelings that elicit retraction). "\textit{Unless there is special support for the child and immediate intervention to force responsibility on the father, the girl will follow the 'normal' course and retract her complaint.}" Summit, \textit{supra} note 23, at 188. "Because children face a conflict over whether to tell when they are sexually abused by a family member, they sometimes later retract their allegations." Fahn, \textit{supra} note 54, at 204. In fact, the majority of courts allow expert testimony to explain why children recant their allegations of sexual abuse. Myers, \textit{supra} note 55, at 18.

85. \textit{Karen B.}, 574 N.Y.S.2d at 269. The fact that Mandi did not refer to the penis as a "dink" during her interview with Ms. Malachowski would not be considered an inconsistency leading to a conclusion of fabrication by experts. \textit{See, e.g.}, Myers, \textit{supra} note 55, at 18-19; Myers et al., \textit{supra} note 84, at 88; Summit, \textit{supra} note 23, at 186. In fact, experts have said:

\begin{quote}
Children who disclose sexual abuse are sometimes inconsistent in their descriptions of what happened. Inconsistency occurs for many reasons, three of which are particularly relevant to the present discussion [regarding credibility of the allegation]. First, when a child is repeatedly abused for months or years, individual molestations blur together. If the child is asked to describe particular episodes, the child may become confused, and such confusion may lead to inconsistent versions of events. Second, the ambivalence experienced by many victims sometimes causes them to offer inconsistent accounts of abuse. Such inconsistency is found in children of all ages. Third, with young children, inconsistency in describing past events may be a product of developmental immaturity. Young children are particularly prone to inconsistency regarding the peripheral details of events they have experienced.
\end{quote}

Myers et al., \textit{supra} note 84, at 88. According to Dr. Summit, disclosures of sexual abuse in substantiated cases may be delayed, conflicted, and unconvincing. Summit, \textit{supra} note 23, at 186. Moreover, according to Professor Myers, the majority of courts allow expert testimony to explain why children's descriptions of abuse are sometimes inconsistent. Myers, \textit{supra} note 55, at 18-19.

86. \textit{Karen B.}, 574 N.Y.S.2d at 269. According to Professor Myers, however, \textit{	extcolor{red}{[it is important to guard against misinterpreting the behavior of parents who make accusations of child sexual abuse. Such parents are under extraordinary, sometimes disabling, stress. . . . Desperate to protect their children, such parents may act in ways that appear irrational. . . . The supercharged atmosphere surrounding allegations of child sexual abuse sometimes breeds unusual and even bizarre behavior in parents. The professionals involved in such cases must step back and evaluate parental action with an understanding of the pressure experienced by both parents.}}}


88. \textit{Id.} Physical or laboratory evidence of child sexual abuse is commonly \textit{not} found in the majority of cases. Myers et al., \textit{supra} note 84, at 34-35, 37 & nn.120-22. "One myth is that
partment of Social Services concluded that the allegations of sexual abuse were unfounded. 89

In February 1991 Mandi's mother once again contacted the Department of Social Services stating that Mandi revealed to her that additional sexual abuse had occurred. 90

According to Loren Dybas, another Department of Social Services caseworker, Mandi disclosed to her that the "secret touch made her uncomfortable," that Mandi placed her hand on her Dad's "dinkie," and that she touched Dad's "electric dinkie" to her Dad's "dinkie." 91 She said that her underpants were on and her Dad's clothes were off. 92 She also said during the same interview that when her Dad touched her with the "electric dinkie" her panties were off. 93

Dr. M. Frank Sack, Ph.D, interviewed Mandi in April 1991 and

didn't find any physical evidence of abuse. The truth is that most young children are molested by fondling . . . ." Moss, supra note 71, at 25. "Often, there is no physical evidence of abuse." Romer, supra note 54, at 667.

90. Karen B., 574 N.Y.S.2d at 270.
91. Id.
92. Id.
93. Id.

Unsubstantiated means that the evidence was insufficient to affirmatively conclude that the child was sexually abused. Corwin et al., supra, at 94-95; Fahn, supra note 54, at 197; Myers, supra note 55, at 23. This may be a result of many factors, which include the following: (1) Sexual abuse disclosures which are typically conflicted, delayed, and unconvincing refute the accurate and consistent evidence required of a court case; (2) budget constraints burden all aspects of the child-protection system; (3) heavy caseloads delay investigations; (4) caseworkers' interpretations of allegations and evaluations are subjective at best; and (5) high caseworker turnover, low salaries, and lack of adequate training programs plague effective case management. See, e.g., Katherine L. Armstrong, How to Avoid Burnout: A Study of the Relationship Between Burnout and Worker, Organizational and Management Characteristics in Eleven Abuse and Neglect Projects, 3 CHILD ABUSE & NEGLECT 145 (1979); Corwin et al., supra, at 94-95; Fahn, supra note 54, at 197-200; Myers, supra note 55, at 22-25; Summit, supra note 23, at 186-88.
concluded that Mandi's father sexually abused her.\textsuperscript{94} Dr. Sack, like Ms. Malachowski, has a Master's degree in Psychology; however, Dr. Sack also possesses a Doctorate in Behavioral Science.\textsuperscript{95} Though Dr. Sack did not purport, like Ms. Malachowski, to be a "child sexual abuse therapist," he is a Master Expert Polygraphist who, at that time, had conducted thousands of interviews with and without a polygraph device to determine veracity; of those interviews, approximately one thousand were related to sexual abuse.\textsuperscript{96} Dr. Sack stated that Mandi told him that she played "secret touch" with her father, and that while playing, her father put her on a bed with her clothes off and touched her "peep" with his hands.\textsuperscript{97} Mandi also said that her father told her not to tell anybody what had happened, and that when Mandi told her father to stop touching her he said, "I'll do what I want."\textsuperscript{98}

During this period of alleged abuse, Mandi's preschool teacher and a certified social worker testified that they did not observe Mandi expressing any fear of her father.\textsuperscript{99}

In reviewing both of Mandi's parent's petitions for sole custody, the Family Court of Fulton County, New York, found the following factors to be significant: Ms. Malachowski's conclusion that no abuse had taken

\begin{itemize}
\item \textsuperscript{94} \textit{Id.}
\item \textsuperscript{95} \textit{Id.}
\item \textsuperscript{96} \textit{Id.} Recall, Ms. Malachowski had interviewed approximately two hundred children. \textit{See supra} note 82 and accompanying text.
\item \textsuperscript{97} \textit{Karen B.}, 574 N.Y.S.2d at 270.
\item \textsuperscript{98} \textit{Id.}
\item \textsuperscript{99} \textit{Id.} It is commonly thought, and at first blush it would seem logical, that a child who is abused would be fearful of the abuser. However, experts agree that this often is not the case, particularly when the abuser is also the child's parent. \textit{See Conte et al.}, \textit{supra} note 58, at 434.
\end{itemize}

A child who has been sexually abused, perhaps over much of his or her life, by an adult with whom the child has an otherwise positive relationship may show no fear because fear has not been induced by the experience or because the child has learned that abuse does not take place while other adults . . . are present. \textit{Id.} The notion that a child will show anxiety or fear in the presence of the alleged offender "ignores the fact that many children accommodate to abuse and learn over time to show no manifestation (symptoms) of abuse. . . . [The] ongoing relationship with the offender father . . . may have many positive aspects." Conte, \textit{supra} note 54, at 68. "That sexually abused children often display affection for the parents who have abused them is acknowledged by many professionals working with incestuous families." Corwin et al., \textit{supra} note 88, at 98. "Even though a child is harmed by sexual abuse, he may feel torn by loyalty toward his abuser. The child still desires affection from the parent . . . ," Fahn, \textit{supra} note 54, at 203. "It is not uncommon for abused children to want to live with and demonstrate affection toward the abusing parent." Myers et al., \textit{supra} note 84, at 88. "Children may be given permission to avoid the attentions of strangers, but they are required to be obedient and affectionate with any adult entrusted with their care." Summit, \textit{supra} note 23, at 182. "The only healthy option left for the child is to learn to accept the situation and to survive. There is no way out, no place to run. The healthy, normal, emotionally resilient child will learn to accommodate to the reality of continuing sexual abuse." \textit{Id.} at 184.
place, and her suspension of the mother's motivation. Relying on Dr. Richard Gardner's Parental Alienation Syndrome theory, the court determined that Mandi's allegations were consistent with those that Dr. Gardner would describe as the type made by a fabricator. Thus, the court concluded that because Mandi's mother must have "programmed" her daughter to accuse her father of sexually abusing her, she was not fit to continue in the role of Mandi's parent. Consequently, the court placed Mandi in the custody of her father. The court further ordered that, because it had no assurance that Mandi's mother would not continue to "brainwash" or "program" Mandi, Mandi's mother would be allowed no visitation or contact with her daughter.

The application of PAS to this case created an extremely disturbing result. The court invoked the PAS theory sua sponte as the basis for determining that Mandi's mother probably programmed her daughter, that she should therefore be denied all contact with Mandi, and that custody should be awarded to Mandi's father. Dr. Gardner's belief that we are experiencing a "third great wave of hysteria in the United States" explains the extreme potential for injustice inherent in PAS cases. "In the interest of justice to the accused," Dr. Gardner purports that the criteria he uses to determine whether an allegation of sexual abuse is fabricated should err on the side of finding innocent some men who are in fact guilty of child molestation.

100. Karen B., 574 N.Y.S.2d at 270.
101. Id. at 271-72 (citing GARDNER, supra note 55, throughout this portion of the opinion). Remarkably, this book—which the court relied on—contains the PAS theory as well as the SAL Scale, which experts have noted is extremely problematic. See supra notes 58-71 and accompanying text. The court's citation to this book also substantiates that Dr. Gardner's withdrawal of the Scale is not widely known, see supra note 69, and that the criteria used in the Scale still exists in the PAS theory, see supra notes 7, 63, 70 and accompanying text.
103. Id.
104. Id.
105. Id. at 271-72.
106. Gardner, Defends, supra note 22, at 16. The first wave of hysteria was the Salem witch trials and wave two was McCarthyism. Id. However, Professor John Myers quips that the assertion that there is a "wave of fabricated allegations," is "the allegation most likely to be false." Myers, supra note 55, at 25 (emphasis added).
107. Sherman, supra note 5, at 46. Compare Karen B., 574 N.Y.S.2d at 272 (acknowledging potentially enormous consequences for child of erroneous finding as compared to "tremendous injustice" to father; awarding custody of child to accused father) with In re Nicole V., 510 N.Y.S.2d 567, 572 (App. Div.), aff'd, 518 N.E.2d 914 (N.Y. 1987) (declaring that erroneous finding is more detrimental to child than parent; approving finding of sexual abuse).
108. See Sherman, supra note 5, at 46.
C. Other PAS Cases

The disturbing result in Mandi’s case is not unique with regard to PAS cases. Other courts have applied PAS, resulting in decisions that have been newsworthy, constitutionally questionable, and at best inconsistent.

In a PAS case that made headlines, Dr. Gardner testified that a father, Marc Friedlander, should receive custody of his two sons because his wife Zitta was “brainwashing” the children against him. During the custody battle, Mr. Friedlander appeared in the parking lot of his wife’s place of work and shot her thirteen times with a semiautomatic weapon. At the murder trial, Dr. Gardner testified on behalf of Mr. Friedlander, stating: “I believe that after . . . mounting frustration and suppressed fury, [Mr. Friedlander] became acutely psychotic and murdered his wife.” The judge, however, upheld the jury’s recommended sentence of forty-two years in prison. Marc Friedlander will be eligible for parole in 1996.

The introduction of PAS evidence raised First Amendment concerns in a case that was heard by the Florida Supreme Court. In Schutz v. Schutz, Dr. Michael Epstein, a psychologist testifying with regard to visitation and support issues, stated that a mild form of PAS contributed to the children’s desire not to visit their father. The trial

109. Id.; see Patricia Davis, Jury Finds Friedlander Guilty in Wife’s Death, WASH. POST, May 10, 1989, at D5 [hereinafter Davis, Friedlander Guilty]. Zitta Friedlander did not, however, conform to Dr. Gardner’s model of the economically depressed and frustrated woman. See supra text accompanying note 47. Instead, Zitta possessed a Doctorate in Physics and was employed as a scientist making $70,000 per year. Patricia Davis, Trial of Husband Opens in Scientist’s Slaying, WASH. POST, May 2, 1989, at A8 [hereinafter Davis, Trial Opens].

110. See Davis, Trial Opens, supra note 109, at A8; Thomas Heath, Gaithersburg Physicist to Fight Extradition in Slaying of Wife, WASH. POST, July 8, 1988, at D1; Physicist Sentenced to 42 Years in Wife’s Slaying in McClean, WASH. POST, July 22, 1989, at B5 [hereinafter Physicist Sentenced]. Mr. Friedlander first attempted to fight extradition to Virginia to stand trial for murder, then denied killing his wife, and even sought a court order for doctors to administer truth serum in order to prove his innocence. See Heath, supra, at D1; Thomas Heath, Truth Serum Requested, WASH. POST, Oct. 10, 1988, at C7.

111. Sherman, supra note 2, at 46 (quoting Dr. Gardner); see also Davis, Friedlander Guilty, supra note 109, at D5 (reporting that defense attempted to make jury understand Friedlander’s “mental torture” over deprivation of his children).


113. See Physicist Sentenced, supra note 110, at B5.


115. Id.

court ordered the mother "to do everything in her power to create in the minds of [the children] a loving, caring feeling toward the father... [and] to convince the children that it is the mother's desire that they see their father and love their father." The Florida Supreme Court found that in making the order, the trial court had not abused its discretion. Further, the court held that any burden on the mother's First Amendment rights was merely "incidental" and must be balanced against the state's *parens patriae* interest in assuring the well-being of the parties' minor children. The court said that there was no requirement that the mother express opinions that she did not hold, as such an order would violate the First Amendment. Yet, according to the court, the order was consistent with Florida law which requires that the custodial parent "encourage and nurture the relationship between the child and the non-custodial parent."

While Florida law may embrace the notion of a custodial parent's affirmative obligation to encourage the child's relationship with the non-custodial parent, in *Schutz*, the trial court did not order the mother to *encourage* the children to make phone calls, write letters, and go on vis-

117. *Schutz*, 581 So. 2d at 1292 (alteration in original) (emphasis added) (quoting order of trial court). The writings of Dr. Gardner indicate that he would clearly support the order of the trial court. For example, in *The Parental Alienation Syndrome* he states that "[t]he parent who expresses neutrality... is essentially communicating criticism of the father... Under the guise of neutrality, such a parent can engender and foster alienation." GARDNER, supra note 2, at 100. Note that Dr. Gardner characterizes the hypothetical "parent" expressing neutrality as the mother, since the neutrality communicates criticism of the father. These inferences against the mother appear throughout the book. See supra notes 27, 37, 39-52 and accompanying text.

118. *Schutz*, 581 So. 2d at 1293.

119. According to the court, "[t]he burden is 'incidental' because the state interests which are furthered by the order are 'unrelated to the suppression of free expression.'" *Id.* at 1292 n.2 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)). For a complete discussion on the *Schutz* court's misapplication of the *O'Brien* test and analysis, see Ferguson, supra note 116, at 949.

120. "'Parens patriae' refers... to [the] role of [the] state as... guardian of persons under legal disability, such as juveniles... in child custody determinations, when acting on behalf of the state to protect the interests of the child. It is the principle that the state must care for those who cannot take care of themselves..." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). For a discussion regarding the problems with the traditional concept of *parens patriae*, see Shannan L. Wilber, *Independent Counsel for Children*, 27 Fam. L. Q. 349, 350 (1993) (explaining that judges cannot simultaneously act as advocate for child and impartial arbiter in case).

121. *Schutz*, 581 So. 2d at 1292-93.

122. *Id.* at 1292 (citing West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (declaring that state cannot "prescribe... matters of opinion or force citizens to confess by word or act their faith therein").

123. *Id.*
its. \textsuperscript{124} Instead, the court ordered the mother to \textit{convince} her daughters she held an opinion that she clearly did not hold, \textsuperscript{125} an enlargement of the state law requirement that arguably rises to a constitutional violation. \textsuperscript{126} Moreover, in a practical sense, although ordering a mother to \textit{encourage} her daughters to go on visits is something the mother could conceivably control, ordering her to \textit{convince} her daughters that it was \textit{her own desire} that they see and love their father is unreasonable. At the time of the order the children were fifteen and thirteen years old. \textsuperscript{127} Practically speaking, even if the court had the authority—as it assumed it did—to require the mother to convince her daughters that it was \textit{her} desire that they visit, it is doubtful whether two teenagers are capable of being so convinced. \textsuperscript{128}

Generally, courts have ruled inconsistently when applying PAS testimony. \textsuperscript{129} In one case, a psychologist testified on behalf of the father\textsuperscript{130} that the children were severely suffering from PAS caused by the mother and, in fact, had one of the worst cases he had ever seen in doing this kind of work. \textsuperscript{131} Notwithstanding this testimony, the court held that the children would remain with the mother. \textsuperscript{132} Compare this result, and the

\textsuperscript{124} See \textit{id.}
\textsuperscript{125} \textit{Id.}; see Ferguson, \textit{supra} note 116, at 938.
\textsuperscript{126} Ferguson, \textit{supra} note 116, at 939.
\textsuperscript{127} \textit{Id.} at 952.
\textsuperscript{128} \textit{Id.} Arguably, requiring the mother to \textit{convince} her daughters—rather than \textit{encourage} them—goes beyond the affirmative obligation seemingly envisioned by state law, and actually makes the mother responsible for the daughters' state of mind, as opposed to their conduct. Other courts have recognized the problem in holding the mother responsible even for the child's conduct. \textit{See}, e.g., Coursey v. Superior Court, 194 Cal. App. 3d 147, 239 Cal. Rptr. 365 (1987) (reversing contempt order against mother based on daughter's refusal to visit father since mother herself could not comply with order by compelling teenage daughter to visit her father). In \textit{Coursey}, a therapist testified that the daughter was suffering from PAS. \textit{Id.} at 150, 239 Cal. Rptr. at 366.
\textsuperscript{129} Compare \textit{Coursey}, 194 Cal. App. 3d 147, 239 Cal. Rptr. 365 (reversing contempt order previously entered against mother because mother could not comply) with \textit{Schutz}, 581 So. 2d 1290 (ordering mother to convince her daughters that mother wanted daughters to see father).
\textsuperscript{130} Notably, this Author was unable to find a single reported case where PAS testimony was introduced on behalf of the mother.
\textsuperscript{132} \textit{Id.} at 444-45. The court noted the "limited research data" that supported, "as a successful cure" for children suffering from severe PAS, the removal of such children from their mother's custody among its reasons for affirming the trial court's refusal to transfer custody to the father. \textit{Id.} Although it might be argued that this court properly ignored the PAS testimony, the problem is that the court even admitted it at all. The mere admission of unreliable and untested testimony, see \textit{supra} note 58; \textit{supra} text accompanying notes 63, 65-67, into evidence in the first place means that other courts admitting evidence of this theory may rule on it differently, creating results that range from potentially very dangerous, see \textit{Karen B.}, 574 N.Y.S.2d 267, to inconsistent, see \textit{supra} notes 128-29; \textit{infra} notes 133-36 and accompanying text.
result in Schutz, with the notorious Steve and Cyndy Garvey custody dispute.\textsuperscript{133} In that case a psychiatrist testified that the Garveys' teen-aged children, who said they did not want to see their father, were suffering from PAS.\textsuperscript{134} Cyndy Garvey served time in prison for violating an order that gave Steve Garvey the right to visit his daughters.\textsuperscript{135} Compare also the result in Mandi's case.\textsuperscript{136} These inconsistent results demonstrate the problems with PAS theory. More particularly, these results underscore the problems with admitting PAS testimony in court.

III. Causation Problems with PAS

In order to justify removal of a child from his or her mother's custody,\textsuperscript{137} or even to make a determination that a mother has alienated her child from the father, the alienation must be attributed to the mother; that is, the mother must be the cause of the alienation. Blaming the mother, however, fails to address several basic causation problems. One problem is that the various attributes of the custody dispute itself, absent any alienating behavior of a mother alone, have multifarious effects on the children involved.\textsuperscript{138} Another problem arises from Dr. Gardner's assumption that when an allegation of child sexual abuse first arises during a dissolution proceeding, it is probably a false one. When such an allegation does arise, it is usually for reasons other than the mother's—conscious or subconscious—deployment of the allegation as a weapon.\textsuperscript{139} This is particularly problematic because in reality sexual abuse allegations, which Dr. Gardner feels are a common addition in PAS situations, rarely arise in custody litigation.\textsuperscript{140}

In fact, in spousal alienation of affection cases, courts have recognized that causation probably cannot be sorted out.\textsuperscript{141} There is a strong

\textsuperscript{133} See Rick Reilly, America's Sweetheart, SPORTS ILLUSTRATED, Nov. 27, 1989, at 93.
\textsuperscript{134} Id. at 94. Apparently, after Steve Garvey reportedly had affairs with three women, had gotten two women pregnant, and had married a fourth, his daughters—aged 13 and 15—refused to visit him. See id.
\textsuperscript{135} Id. at 103.
\textsuperscript{136} See supra part II.B.
\textsuperscript{137} Or, even ordering a mother into therapy as Dr. Gardner recommends in cases of moderate PAS. GARDNER, supra note 2, at 233. However, Dr. Gardner points out that the court must order the mother to see the court's therapist since the mother usually "chooses a woman as a therapist—especially a woman who is herself antagonistic toward men." Id.
\textsuperscript{138} See infra part III.A. Of course, assigning responsibility for alienating behavior mostly to the mother ignores that "paternal brainwashing" during a custody dispute occurs as well. See CHESLER, supra note 47, at 171-89; see also supra notes 198-99 and accompanying text (indicating that angry fathers retaliate by using child).
\textsuperscript{139} See infra part III.B.
\textsuperscript{140} See supra notes 54-56 and accompanying text.
\textsuperscript{141} See infra part III.A.
similarity between PAS and spousal alienation. Although the causes of action and the parties differ, the causation analysis in parental alienation and spousal alienation is essentially the same.

A. Comparing the Causation Requirement in the Alienation of Affection Action

The alienation of affection cause of action was a creation of United States courts derived from the early common-law action for abduction of the wife.\textsuperscript{142} In its earlier form, the mere removal of the wife gave rise to the presumption that a causal connection existed between the wife's abduction and the alienation of her affection because the wife was the husband's property and thus she could not consent to her own removal.\textsuperscript{143}

In time, the removal requirement was eliminated in the alienation of affection action; thus, in order to recover damages, the plaintiff was required to show the causal connection between the defendant's acts and the alienation.\textsuperscript{144} Courts recognized that factors other than the defendant's conduct could contribute to the alienation of a spouse's affection.\textsuperscript{145} Consequently, courts in different jurisdictions applied various causation standards to actions for alienation of affection—attesting to the difficulty in sorting out causation and basing liability thereon.\textsuperscript{146} At one end of the

\begin{footnotesize}
\begin{enumerate}
\item[143.] Nelson, 669 P.2d at 1223. In that respect, having a cause of action for the abduction of the wife recognized the husband's damages for interference with his contractual rights. \textit{id.} at 1224.
\item[144.] Nelson, 669 P.2d at 1124; Steffensen, \textit{supra} note 142, at 886.
\item[146.] Steffensen, \textit{supra} note 142, at 888; see, e.g., Nelson, 669 P.2d at 1218-19. In Nelson, the court "conced[ed] the difficulty of proving causation," \textit{id.} at 1218, discussed the justification for its employment of a controlling cause standard, \textit{id.} at 1218-19, and noted that some courts have raised the plaintiff's burden of proof in an effort to improve fairness, \textit{id.} at 1218. The court also noted that two jurisdictions have "redefined the element of causation to make it practically impossible for a plaintiff to sustain the necessary burden of proof." \textit{id.} at 1218 n.11
\end{enumerate}
\end{footnotesize}
spectrum, a few jurisdictions adopted a "contributory cause" standard whereby a defendant would be liable if his or her conduct merely contributed to the alienation. 147 This standard was particularly tough on the defendant because any wrongful conduct on the defendant’s part would render the defendant liable. 148 The other end of the spectrum espoused the "sole cause" standard—the plaintiff had to show that the defendant was the only cause of the alienation—which made the burden of proof nearly impossible for the plaintiff to meet. 149 The majority of jurisdictions applied the "controlling cause" approach. 150 Controlling cause "means that the causal effect of the defendant’s conduct must have outweighed the combined effect of all other causes, including the conduct of the plaintiff spouse and the alienated spouse." 151 Leading to the abolition or restriction of the alienation of affection cause of action in a majority of states was the view that this standard was "simplistic and inadequate to help [the trier of fact] sort out causation in an area where psychologists have asserted that causation cannot be sorted out." 152 Thus, the potential for abuse existed in that the trier of fact could hold a defendant responsible “because his or her conduct had been ‘wrongful’ or morally reprehensible.” 153

The same problem is inherent in parental alienation cases. Where causation is difficult—if not impossible—to sort out, the trier of fact may

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(citing Long, 499 P.2d at 1067, and Hunt v. Chang, 594 P.2d 118 (Haw. 1979)). In Long, the court held that the plaintiff must establish that he or she was not at fault in causing the other spouse’s affection to stray, and that the defendant willfully and maliciously influenced the wayward spouse and was the procuring cause of the loss of affection which the wayward spouse formerly held for the plaintiff. Long, 449 P.2d at 1067.

147. Steffensen, supra note 142. At least six states, Alabama, Colorado, Florida, Georgia, Ohio, and Oklahoma, have at one time or another adopted the contributory cause standard—although all of those states have statutorily abolished or restricted the cause of action. Id. at 888 n.21, 891 n.50.

148. Id. at 888.


150. Steffensen, supra note 142, at 888. For a list of jurisdictions that employ or had employed the controlling cause standard, see W.R. Habeeb, Annotation, Element of Causation in Alienation of Affection Action, 19 A.L.R. 2d 471, 500-01 (1951).


152. Steffensen, supra note 142, at 891 (emphasis added); see In re T.M.W., 553 So. 2d 260, 262 n.3 (Fla. Dist. Ct. App. 1989) (pointing out that causation problem in alienation of affection actions extends to PAS).

153. Steffensen, supra note 142, at 891; see also id. at 888 (noting difficulty in sorting out causation and making finding of liability). Assigning blame to the mother could occur because the trier of fact presumes that her actions were “wrongful” or “morally reprehensible” based upon the character of the allegations. See infra text accompanying notes 312, 322 (noting that nature of child sexual abuse allegations in custody disputes may elicit judicial bias and improperly heighten burden of proof).
erroneously assign responsibility for the alienated affections of a child solely to the child’s mother—leaving in its wake an unprotected child like Mandi\textsuperscript{154} or even an unprotected mother like Zitta Friedlander.\textsuperscript{155}

\section*{B. Children’s Actions and Reactions in the Aftermath of Divorce}

\subsection*{1. Psychological and social stressors}

It is commonly known that children are distressed by their parents’ decision to divorce.\textsuperscript{156} Depending on the age of the child, reactions may vary widely.\textsuperscript{157} For example, preschool-aged children may have great difficulty in separating from the custodial parent, stemming from their perception that the noncustodial parent has already disappeared.\textsuperscript{158} A young child’s understanding of time and distance concepts is limited.\textsuperscript{159} Thus, these children are not truly able to comprehend that they will return home on a certain day—or that they will even return home at all—from the noncustodial parent’s new and unfamiliar house.\textsuperscript{160} This, rather than anything the child’s mother is doing, may cause the child to worry\textsuperscript{161}—and perhaps wish not to go—and may cause the child’s apprehension.

Early school-aged children, ages five to eight, are likely to be filled with feelings of loss, rejection, guilt, and loyalty conflicts.\textsuperscript{162} These children may see the divorce as a battle in which they themselves must take sides;\textsuperscript{163} this is distinct from a mother’s behavior fostering that perception in her children.

Children of later school age, ages nine to twelve, may become in-

\begin{itemize}
\item \textsuperscript{154} See supra part II.B.
\item \textsuperscript{155} See supra part II.C.
\item \textsuperscript{157} Wallerstein, \textit{supra} note 156, at 26.
\item \textsuperscript{158} Id. In 90% of all cases the primary custodial parent is the mother. Monica J. Allen, \textit{Child-State Jurisdiction: A Due Process Invitation to Reconsider Some Basic Family Law Assumptions}, 26 FAM. L.Q. 293, 293 n.2 (1992). Considering that children resist separating from the custodial parent, and that the primary custodial parent is most often the mother, it follows that children are more likely to resist separating from their mothers.
\item \textsuperscript{159} Wallerstein, \textit{supra} note 156, at 26.
\item \textsuperscript{160} Id.
\item \textsuperscript{161} Id.
\item \textsuperscript{162} Id. at 27.
\item \textsuperscript{163} Id.
\end{itemize}
tensely angry at their parents for breaking up the family. The parent perceived by the child as having caused the divorce may be the recipient of the lion's share of that intense anger. This might explain why in the average divorce, children are apt to express their anger more toward the father—the parent most likely to have moved out of the family home.

Finally, adolescents become anxious when faced with evidence of their parents' vulnerabilities and may be uncomfortable with the notion that their parents have sexual feelings. Thus, if the father establishes a new relationship sooner than the mother, this can alienate adolescents from their fathers. In short, the psychological stressors resulting from divorce demonstrate that children's ill feelings toward either parent are often a natural part of the dissolution process. The list of explanations—which is illustrative rather than exhaustive—that provides reasons for children having such feelings furnishes some credible alternatives to the PAS theory that when the children have ill feelings toward their fathers, their mother must be the cause.

2. Legal-system stressors

In addition to the emotional problems commonly found in children after a divorce, the adversarial nature of the legal process itself is harmful to families in custody disputes. One commentator observed that "[t]he emotional problems commonly found in children after a divorce, the adversarial nature of the legal process itself is harmful to families in custody disputes."

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164. Id.
165. Id.
166. If the father is perceived by the children to have caused the divorce—and he may be the perceived cause particularly if he is the noncustodial and disappearing parent, see id; see also supra note 158 (noting that in 90% of cases mother has primary custody)—he may also be blamed by the children for some of the other consequences of divorce. For instance, the financial implications of divorce may result in the children having to move, and the father may be blamed for this as well as for all of the disruptions that a child experiences as a result of moving. The economic effects of divorce on families have been studied showing "that on average, divorced women and their children experienced a 73 percent decrease in their standard of living after divorce while divorced fathers experienced a 42 percent increase." Allen, supra note 158, at 293 (referring to study by Lenore J. Weitzman discussed in her book, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985)). "As a result, divorced mothers often feel an extreme pressure to earn money and have significantly less time to spend with their children." Id. "In addition, diminished financial resources often compel a residential move which disrupts the children's friendships, education and neighborhood life." Id. While the mother's attitude about these factors may affect the children, it is equally or more likely that these factors will affect the children directly, absent the mother's own feelings about the situation.
167. Allen, supra note 158, at 293.
168. At least according to Dr. Gardner, fathers more often than mothers have the opportunity to find new partners. GARDNER, supra note 2, at 122.
169. For an example of this effect, see supra notes, 133-35 and accompanying text.
170. E.g., Richard Wolman & Keith Taylor, Psychological Effects of Custody Disputes on Children, 9 BEHAVIORAL SCI. & L. 399, 406 (1991); see also, e.g., Elster, supra note 32, at 1-2
adversarial viewpoint presumes a zero-sum game mentality according to which one parent ‘wins,’ one parent ‘loses,’ and the child loses a parent in the process."171 When parents enter the legal process they often do so without realizing that their personal lives will become public record, that their decision-making power will be relegated to strangers, and that the associated legal fees may leave them in financial as well as emotional distress.172 Moreover, "once the legal machinery has been set in motion, it is extremely difficult to arrest."173 Thus, even if parents had second thoughts about resolving their disputes amicably, having started the adversarial process, they may be unable to stop it.

Unfortunately, the conflicts between parents who dispute custody naturally affect their relationships with their children—since child custody is the very reason for the conflict.174 "The contested child often becomes an unwitting participant in the parental battle, as information gatherer, messenger or witness for one parent."175 Children subject to a custody dispute also live in limbo: The disputes may drag on for years and can be reopened upon petition by either party.176 This brings up the prospect of moving, changing schools, and separating from friends.177 These and other stressors could easily cause a child to feel alienated from either or both parents.

C. Sexual Abuse Allegations During Custody Disputes

First, it is clear that although Dr. Gardner believes that there have been an abundance of sexual abuse allegations launched during custody disputes, child abuse experts and researchers do not agree with him.178 Dr. Gardner asserts that we have recently witnessed "a rash of fabricated sex-abuse allegations [that serve] as an extremely effective weapon in [custody] disputes."179 Further, he claims that "the frequency of false accusations under these circumstances is quite high, especially because of

(noting that most agonizing of legal situations are custody disputes, that disputes feed on other conflicts, generate uncertainty for child, and always result in loss of regular family life); Stephen D. Sugarman, "Family Law for the Next Century": Background and Overview of the Conference, 27 Fam. L.Q. 175, 184-85 (1993) (arguing that distress suffered by many children of divorced couples could be diminished by changes in legal system).

171. Wolman & Taylor, supra note 170, at 406.
172. Id.
173. Id.
174. See id. at 406-07.
175. Id. at 407.
176. Id.
177. Id.
178. See supra notes 54-56 and accompanying text.
179. Gardner, supra note 2, at xv.
the vengeance and exclusionary benefits to be derived from such an accusation.\textsuperscript{180} Although the mass media has popularized Dr. Gardner's assertions, experts believe that the occurrence of this type of false allegation is rare.\textsuperscript{181}

Regarding cases where allegations have first arisen during dissolution and custody proceedings, experts have studied, documented, and articulated numerous explanations.\textsuperscript{182} While Dr. Gardner concludes that allegations of sexual abuse are a "common" weapon of alienation in the mother's arsenal during custody proceedings,\textsuperscript{183} he overlooks the reasons that have been identified by experts for the allegation appearing during this time.\textsuperscript{184} In explaining allegations of abuse in the marital dissolution setting, experts have distinguished between why children may first disclose during this time and why the abuse may first occur during this time.\textsuperscript{185}

1. Disclosures first made during dissolution proceedings

There are several reasons that abused children may be more likely to disclose abuse by one parent and be believed by the other parent following separation or divorce. The abusing parent has less power to enforce secrecy because the child has increased opportunity to disclose the abuse in the absence of the offending parent.\textsuperscript{186} Additionally, the separation itself may create for the child the perception that he or she now has the opportunity to disclose the abuse.\textsuperscript{187} The child who had been intimidated into silence may be more free to speak up after the abuser has left.\textsuperscript{188} The child who had feared that he or she would not be believed

\textsuperscript{180} Id. at 126.
\textsuperscript{181} See supra notes 54-56 and accompanying text.
\textsuperscript{182} See, e.g., Fahn, supra note 54, at 203-04 (listing numerous reasons in article under heading "Reasons Why the Allegations Would Arise in the Context of a Custody Dispute," which are explored in detail infra notes 186-202 and accompanying text); see also Faller, supra note 54, at 86 (exploring range of dynamics leading to allegations of sexual abuse in context of divorce); Myers, supra note 55, at 24 ("[T]he fact that allegations of abuse arise for the first time when a family breaks up does not mean the allegations are false. Mental health professionals confirm that many children first disclose or experience sexual abuse when their parents divorce."); Summit, supra note 23, at 181-86 (providing numerous reasons for delayed allegations of abuse as including secrecy, helplessness, entrapment, and accommodation).
\textsuperscript{183} GARDNER, supra note 2, at 126.
\textsuperscript{184} See supra part III.C.1-2.
\textsuperscript{185} See, e.g., Corwin et al., supra note 88, at 102.
\textsuperscript{186} Id.; Faller, supra note 53, at 88.
\textsuperscript{187} Fahn, supra note 54, at 203; Faller, supra note 54, at 88; Myers et al., supra note 84, at 87; Summit, supra note 23, at 182.
\textsuperscript{188} Fahn, supra note 54, at 203; Faller, supra note 54, at 88; see Myers et al., supra note 84, at 87; Summit, supra note 23, at 182-83.
may now sense that someone will indeed listen. Children, especially abused children, sometimes feel it is their responsibility to keep the family together; once the family separates and the breakup relieves the child's feeling of responsibility, the dynamic adjusts and the child is often able to confide in the nonoffending parent.

The timing of abuse disclosures may occur for other reasons as well. For example, the passive parent who refused to acknowledge the abuse before separation may no longer have the need to "continue to selectively perceive what ha[d] been going on." Decreased dependency and increased distrust between parents increases the willingness to suspect child abuse by the other parent.

2. Abuse that first occurs during dissolution proceedings

A possible reason that sexual abuse develops after parents separate is that a parent may feel "lonely for emotional and sexual companionship" and enter into an abusive relationship with the child. The fact that the child becomes more "vulnerable and accessible," and that the parent may be more likely to abuse substances during this time, increases the possibility of an abusive relationship developing after separation.

Experts have identified other reasons that might motivate the abuser to initiate a postseparation abusive relationship. For example, it has been noted:

189. Fahn, supra note 54, at 203; see Corwin et al., supra note 88, at 102.
190. E.g., Fahn, supra note 54, at 203.
191. Id.
192. Id.; see also Faller, supra note 54, at 88 ("[T]he mother may have consciously or unconsciously avoided looking into possibly indicative behavior during the marriage, but as the marriage dissolves she is able or willing to consider the implications of that behavior.").
193. Corwin et al., supra note 88, at 102; see also Faller, supra note 54, at 88 ("[T]he mother may have known about the sexual abuse during the marriage, but been fearful of making it known or chosen to tolerate it because the marriage had beneficial aspects.").
194. Fahn, supra note 54, at 203; see Corwin et al., supra note 88, at 102; see also Faller, supra note 54, at 88 ("[T]he offending parent . . . is often bewildered and overwhelmed by the marital demise . . . . In this vulnerable psychological state, the parent turns to the child for emotional support, and . . . the relationship becomes sexual.").
195. Fahn, supra note 54, at 203; see also Faller, supra note 54, at 88 ("One of the consequences of divorce is the loss of family structure. Often, there is no longer another adult present to monitor a parent's behavior during unsupervised visitation or custody. Rules which regulate where children and parents sleep, when they go to sleep, and with whom they bathe may no longer exist. Such a situation may lead to the expression of sexual feelings toward children.").
196. Corwin et al., supra note 88, at 102.
The losses, stresses, and overall negative impact of separation and divorce may precipitate regressive "acting out" by parents, including child sexual abuse. It is possible that the adult character traits and behavior problems frequently associated with the sexual abuse of children are more common in people whose marriages break up. Included in this list are narcissistic traits, paranoid ideation, antisocial tendencies, impulsivity, sexual difficulties, and substance abuse.\(^\text{197}\)

Still another motivator is anger:

The parent who becomes an abuser [—whom Dr. Faller notes is most likely the father\(^\text{198}\)—] is often very angry at the spouse for destroying the marriage and for other perceived or actual transgressions. Direct expression of that anger may be impossible or insufficient for satisfactory retaliation. The child then becomes the vehicle for that expression or retaliation.\(^\text{199}\)

In summary, Dr. Gardner's theory that the sexual abuse allegations commonly made during a custody dispute are caused by the mother's desire to win custody fails for two fundamental reasons: (1) Allegations of sexual abuse rarely arise during custody disputes;\(^\text{200}\) and (2) if they do, the theory fails to address the fact that the allegations may be caused by a myriad of reasons other than the mother and her desire to win custody.\(^\text{201}\) To comprehend the potentially serious ramifications of Dr. Gardner's broad and erroneous assertions, one only has to look at Mandi's fate as an example of what children may face.\(^\text{202}\)

IV. EVIDENTIARY PROBLEMS WITH PAS

A. Frye's "General Acceptance" Standard Jeopardized in State Courts:
The Reliability of Scientific and Expert Testimony Is Endangered

1. The Supreme Court's new rule

A seventy-year-old legal standard has changed. That standard restricted the admission of expert testimony and scientific evidence to that which was "sufficiently established to have gained general acceptance in..."
the particular field in which it belongs. In announcing the "general acceptance" test, the Court of Appeals for the District of Columbia in its brief two-page Frye v. United States opinion cited no authority and did not explain its reasoning. The Frye test became the controlling precedent in the majority of jurisdictions, dominating the admissibility of scientific evidence. Thus, only after a principle or discovery had been accepted within its field did it receive judicial recognition. For example, in the case of Mandi, since PAS has not been accepted within its field, subjecting it to the Frye standard would have rendered it inadmissible.

From its inception scholars and practitioners have debated the merits of the Frye standard, giving rise to a burgeoning array of scholarship on its proper scope and application. Since 1975 the federal circuits have split over whether the Federal Rules of Evidence supersede the Frye standard. Recently, the United States Supreme Court ended that con-


204. See id. at 1013-14.


207. See supra part II.A; see also In re T.M.W., 553 So. 2d 260, 262 n.3 (Fla. Dist. Ct. App. 1989) (noting "cautionary words" of current commentators regarding admission of Parental Alienation Syndrome testimony that "'experts have not achieved consensus on the existence of a psychological syndrome that can detect child sexual abuse'" (quoting Myers et al., supra note 84, at 69)); supra note 58; supra text accompanying notes 63, 65-67 (discussing widespread rejection of Dr. Gardner's theories by experts within field).

208. See, e.g., Becker & Orenstein, supra note 206; Giannelli, supra note 205; Imwinkelreid, supra note 205; Fredric I. Lederer, Resolving the Frye Dilemma—A Reliability Approach, 26 JURIMETRICS J. 240, 240 (1986); McCormick, supra note 205; Starrs, supra note 205.

trovery, holding in a landmark decision that the Federal Rules of Evidence supersede Frye’s “general acceptance” test.\footnote{Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2792-93 (1993).}

The Court stated in \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc.}\footnote{113 S. Ct. 2786.} that “[n]either Federal [n]or the Rules as a whole were intended to incorporate a ‘general acceptance’ standard.”\footnote{Id. at 2794.} The Court also noted that the drafting history of the Rules did not mention the Frye “general acceptance” standard.\footnote{Id. at 2792.} Moreover, according to the Court, adhering to the “general acceptance” requirement would be at odds with the ‘liberal thrust’ of the Federal Rules and their ‘general approach of relaxing the traditional barriers to “opinion” testimony.’\footnote{Id. (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988)).}

Federal Rule of Evidence 702 states that “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . an expert . . . may testify thereto.”\footnote{FED. R. EVID. 702.} This Rule, as construed by the Court in \textit{Daubert}, means that the federal district court judge is the gatekeeper in determining whether scientific evidence should be admitted.\footnote{See Daubert, 113 S. Ct. at 2795-96.} In dissent Chief Justice Rehnquist and Justice Stevens expressed concern over the majority’s confidence in the ability of federal judges to determine the validity of scientific evidence.\footnote{Id. at 2799 (Rehnquist, C.J., dissenting) (“[D]efinitions of scientific knowledge, scientific method, scientific validity, and peer review [are] matters far afield from the expertise of judges.”).} “Rule 702 confides to the judge some gatekeeping responsibility . . . . But it imposes [neither] the obligation [n]or the authority to become amateur scientists in order to perform that role.”\footnote{Id. at 2800 (Rehnquist, C.J., dissenting).}

The \textit{Daubert} opinion controls only the federal courts, but it will undoubtedly influence many state court decisions as well, since over twenty states have modeled their own rules of evidence after the Federal Rules.\footnote{Giannelli, supra note 205, at 1228 & n.241 (listing 22 jurisdictions that have adopted various forms of the Rules); Lacey, supra note 205, at 257 n.6 (“The Rules are now in effect in over twenty American jurisdictions. . . . Frye may soon become a minority view.”).}

Furthermore, numerous state courts have employed the Frye...
standard for the past seventy years when considering the admissibility of a vast array of evidence, from voiceprints\textsuperscript{220} to bitemark comparisons\textsuperscript{221} to psychological theories.\textsuperscript{222} Thus, the \textit{Daubert} holding, relaxing the traditional barriers to scientific and expert opinion testimony, will now influence the admissibility of evidence in these as well as a multitude of other areas—including PAS.\textsuperscript{223}

2. The Supreme Court's reasoning

At issue in \textit{Daubert} was whether the adoption of the Federal Rules of Evidence superseded the \textit{Frye} test.\textsuperscript{224} The United States Supreme Court held that it did.\textsuperscript{225} The Supreme Court interpreted the legislatively enacted Federal Rules of Evidence\textsuperscript{226} as it would any statute, giving them precedence over the common-law \textit{Frye} test.\textsuperscript{227} The Court

\begin{itemize}
\item \textsuperscript{220} See People v. Kelly, 17 Cal. 3d 24, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976) (circumscribing admission of voiceprint evidence until general acceptance of technique in relevant scientific community is demonstrated).
\item \textsuperscript{221} See People v. Slone, 76 Cal. App. 3d 611, 625, 143 Cal. Rptr. 61, 69 (1978) ("[T]he bite-mark-identification technique had gained general acceptance in the scientific community of dentistry—the relevant scientific community involved.").
\item \textsuperscript{222} Frye Hearing is Extended to Psychological Theories, N.Y. L.J., Feb. 1, 1990, at 21 [hereinafter Frye Hearing] (summarizing New York court decision granting motion for \textit{Frye} hearing prior to admission of expert testimony in area of new or recent psychological theories in addition to scientific theories).
\item \textsuperscript{223} See infra part IV.C.
\item \textsuperscript{224} Daubert, 113 S. Ct. at 2793.
\item \textsuperscript{225} Id.
\item \textsuperscript{227} Daubert, 113 S. Ct. at 2793 (citing Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988)).
\end{itemize}

Previously, the Court considered the appropriateness of applying the common law when interpreting the Rules of Evidence. In United States v. Abel, 469 U.S. 45 (1984), the Court noted that the Rules occupy the field, but indicated that the common law could serve as an aid to their application. \textit{Id.} at 51-52. At issue in \textit{Abel} was whether the Federal Rules of Evidence permitted impeachment of a witness by showing the witness's bias although the Rules expressly did not deal with impeachment for bias. \textit{Id.} at 49-52. Rule 402 provides that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." Relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. Since a successful showing of a witness's bias would tend to make the facts to which that witness testified less probable, the Court reasoned that the common-law principle at issue in \textit{Abel} was consistent with Rule 402's general requirement of admissibility. \textit{Abel}, 469 U.S. at 50-51. However, in Bourjaily v. United States, 483 U.S. 171 (1987), the Supreme Court found that the Rules did not include the common-law requirement of independent evidence of conspiracy. \textit{Id.} at 178-79. Thus, the Court departed from the common-law doctrine disallowing admissions of a coconspirator's statements to
summarized its repudiation of Frye by saying that "Frye made 'general acceptance' the exclusive test for admitting expert scientific testimony. That austere standard, absent from and incompatible with the Federal Rules of Evidence, should not be applied in federal trials."228

The Court explained that under the Federal Rules of Evidence the trial judge must "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."229 The Court noted that the trial judge will have "gatekeeping responsibility"230 but acknowledged that the opinion does not specify how a trial judge should manage this task.231 Instead, the Court avoided answering this question by asserting that it is "better [for the trial judge] to note the nature and source of the duty."232

The Court stumbled through a discussion of what qualifies as "scientific knowledge": "[I]n order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—i.e., 'good grounds,' based on what is known."233 The Court declared that "the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability."234 The Court acknowledged that scientists typically distinguish between "validity" and "reliability" and announced that "in a case involving scientific evidence, evidentiary reliability will be based upon scientific validity."235

Thus, the trial judge must initially determine whether the expert is proposing to testify to scientific knowledge that will assist the trier of fact to understand or determine a fact in issue.236 According to the Court, this determination requires a preliminary assessment of (1) the scientific validity underlying the reasoning or methodology of the proffered testimony, and (2) whether that reasoning or methodology can be properly applied to the material facts in a particular case.237 The Court acknowledged that "[e]xpert evidence can be both powerful and quite mislead-
ing because of the difficulty in evaluating it,'”238 but remained “confident that federal judges possess the capacity to undertake this re-
view.”239 The Court reasoned, without explaining how a judge is to manage it, that “[t]he focus . . . must be solely on principles and method-
ology, not on the conclusions that they generate.”240 The Court summa-
rized its holding in Daubert as follows:

“[G]eneral acceptance” is not a necessary precondition to the admissibility of scientific evidence [but the Rules] do assign to the trial judge the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.241

Chief Justice Rehnquist, concurring in part and dissenting in part, agreed with the majority that Frye did not survive the enactment of the Federal Rules of Evidence.242 However, he noted that construing the Rules generally, vaguely, or abstractly is a serious flaw, especially “in a case such as this, where the ultimate legal question depends on an appreci-
ation of one or more bodies of knowledge not judicially noticeable, and subject to different interpretations in the briefs of the parties and their amici.”243 Cases such as this do not deal with mainstream judicial considerations—that is, case law or statutory language interpretations—rather, “they deal with definitions of scientific knowledge, scientific method, scientific validity, and peer review—in short, matters far afield from the expertise of judges.”244 The Chief Justice warned that in deciding what expert materials are useful and necessary, judges must “proceed with great caution in deciding more than [they] have to, because [their] reach can so easily exceed [their] grasp.”245 Chief Justice Rehnquist stated that he is “at a loss to know what is meant when it is said that the scientific status of a theory depends on its ‘falsifiability,’ and [he] sus-
pect[s] [that other judges] will be, too.”246

The Daubert majority and dissent both recognized that rather than settling the “general acceptance” debate—or even clarifying it—the

239. Id. at 2796.
240. Id. at 2797.
241. Id. at 2799.
242. Id. at 2799 (Rehnquist, C.J., concurring).
243. Id. (Rehnquist, C.J., dissenting).
244. Id. (Rehnquist, C.J., dissenting) (emphasis added).
245. Id. (Rehnquist, C.J., dissenting).
246. Id. at 2800 (Rehnquist, C.J., dissenting).
opinion does not define for the trial judge just how he or she is to make a determination of a scientific principle's validity.247

B. The Evidentiary Problem Applied to Syndrome Testimony

Generally

Although the law and psychology are uneasy bedfellows, they are sometimes forced to sleep together.248

Syndrome testimony requires the use of a psychological expert.249 Rules of evidence, permitting broad judicial discretion, invite confusion and the uneven use of that discretion when judges, who lack a psychological background, must determine whether proffered psychological evidence is reliable.250 Additionally, syndrome evidence may arouse a variety of personal biases or fears,251 thereby exacerbating the problems of uneven use of judicial discretion.252

The law has tended to mistrust psychological testimony for various reasons.253 Psychological testimony involves the use of statistical and probability data,254 and “[m]ost attorneys and judges are not scientists and statisticians.”255 Often, lawyers and judges consider psychological studies and clinical findings to be at odds with the subjective legal deci-

247. See supra notes 231, 244-46 and accompanying text.


During the last decade the introduction, or the attempted introduction, of syndrome evidence has flourished in the courts. See McCord, supra note 248, at 24. Examples of such syndrome testimony include rape trauma syndrome, battered woman syndrome, pathological gambler's syndrome, Vietnam veterans' syndrome, child abuse accommodation syndrome, and XYY chromosome syndrome. See id.; Summit, supra note 23; Susan Horan, Comment, The XYY Supermale and the Criminal Justice System: A Square Peg in a Round Hole, 25 LoY. L.A. L. REV. 1343 (1992). Note that the battered woman syndrome was originally referred to as "battered wife syndrome." McCord, supra note 248, at 48 n.113. The new designation is broader, recognizing that the syndrome occurs in women who are battered by men to whom they are not married. Id.

250. Myers, supra note 55, at 6 n.7; Wallace, supra note 249, at 1043; see also In re T.M.W., 553 So. 2d 260, 261 n.3 (Fla. Dist. Ct. App. 1989) (noting that "best course is to avoid any mention of syndromes").

251. Wallace, supra note 249, at 1045; see infra text accompanying notes 321-22 (discussing bias that arises when judges evaluate syndrome evidence generally and in custody disputes involving abuse allegations).

252. See Wallace, supra note 249, at 1043.


254. Wallace, supra note 249, at 1045.

sion-making process and, perhaps for this reason, may prefer not to rely upon the scientific community to set methods for determining reliability of such evidence in deciding admissibility. Additionally, psychological testimony does not utilize machines or formulas that result in calculated and tangible findings; therefore, it may be met with more distrust, subjectivity, and uneven use of discretion.

The reliability of psychological testimony has been analyzed by first categorizing scientific evidence as either "soft" or "hard" science. The Frye test was originally formulated to deal with hard scientific evidence, and has been criticized even in that context. The criticism of the Frye screening device of hard scientific evidence—which is also relevant to the admission of PAS evidence—is that requiring general acceptance may deprive the court of relevant evidence. Yet, as noted earlier, judges, lacking scientific expertise in a particular field, are left with no method for discerning what evidence is reliable and thus relevant; therefore, they have relatively unfettered discretion to admit the evidence.

In the context of soft science—that is, psychological or syndrome testimony—courts have applied the Frye test as well. As in the hard science context, its application has been criticized. Professor David McCord notes that psychological evidence is not "locked up in some mysterious nonhuman device or process," and is thus less likely to

256. See id. at 25 & n.16.
257. Id. at 21 n.2, 83.
258. See id. at 21 n.2.
259. See, e.g., id. at 82-88. "Hard" science refers to "scientific evidence utilizing machines or other nonhuman indicators." Id. at 83. "Soft" science refers to evidence such as psychological evidence, that is, evidence that requires subjective interpretation of results. Id. at 83 & n.304. Evidence may be partially "hard" and partially "soft." Id. at 83 n.304. This would be true of the admission of polygraph results—the issue litigated in Frye. Id.
260. Id. at 83.
261. Id.
262. Id. at 83-84.
263. See supra part IV.A.2.
264. See supra note 250 and accompanying text.
266. See, e.g., McCord, supra note 248, at 84-85 (stating that Frye standard should govern admissions of "soft" science for same reasons it should not apply to "hard" science, and additional reason that "soft" science is not as scientific as "hard" science; thus trier of fact can more easily discern reliability with "soft" science than with "hard" science).
267. Id. at 85.
elicit unquestioning acceptance by the trier of fact.268 On the other hand, Professor McCord appreciates that rejection of the Frye test leaves the major concern behind Frye, reliability of evidence, unaddressed.269 Professor McCord concedes that, even with respect to psychological evidence, some inquiry into reliability is necessary in order for the probative value of the evidence to be determined.270 Additionally, the inquiry into reliability would be necessary in order to balance the probative value against the prejudicial impact of the evidence.271

In contrast with Professor McCord's view, one court noted that within the realm of soft science, the risk of admitting untrustworthy evidence is deemed unacceptably high because the trier of fact can be misled with an “aura of certainty, glossed by a psychiatric diploma and the facade of superior knowledge to overestimate its probative value and obscure its merely conjectural nature.”272 Thus, Professor McCord's view that psychological evidence is less likely to be unquestioningly accepted by the trier of fact does not address the problem that the trier of fact may be influenced as strongly by psychological testimony as by hard scientific evidence. Further, psychological testimony could be more influential in court because of the variety of fears and biases that such evidence may trigger in the evaluator.273 To complicate the problem even more, inconsistent outcomes would result from uneven use of judicial discretion in admitting the evidence.274 Professor McCord has, however, aptly noted that “[b]ecause the legal system is ill-equipped to deal with this type of evidence, the law concerning its admissibility has become a quagmire.”275

C. The Evidentiary Problem Applied to PAS

The question whether to admit psychological testimony is more critical than whether to admit hard scientific evidence: Recall Mandi's fate

268. Id. at 85-86.
269. Id. at 86.
270. Id.
271. See supra part III.B.
273. Wallace, supra note 249, at 1045; see also Fahn, supra note 48, at 205-07 (discussing judicial bias that arises in child sexual abuse cases particularly those taking place during custody litigation).
274. See supra part III.C.
in *Karen B. v. Clyde M.* 276 Clearly, the decision to admit psychological testimony in child custody cases carries with it serious ramifications. 277 The *Karen B.* court, basing its decision on the PAS to not only take Mandi away from her mother, but to limit all contact with her, acknowledged that

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\text{[t]he consequences of this Court's decision to Mandi are potentially enormous. If she is placed with her mother, and the father . . . in fact . . . has done her no harm, then a tremendous injustice results. If custody is placed with the father, and he has sexually abused her, an equal injustice with a potential for future harm ensues. 278}
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Moreover, because of the broad judicial discretion allowed in qualifying experts 279 and determining witness demeanor, 280 and due to the length of time it takes to get a case heard on appeal, 281 the consequences of an erroneous admission become even more serious. The Supreme Court of New York, hearing the *Karen B.* case on appeal, 282 refused to reverse the trial court and granted it great deference because (1) it had the advantage of viewing the witnesses and hearing their testimony firsthand; (2) it properly had discretion to weigh the conflicting testimony; and (3) it did not commit reversible error by referring to PAS in its opin-

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277. See, e.g., supra part II.B.


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\text{the worst result of an erroneous finding against a parent will be the temporary loss of custody for no more than 18 months, during which time supervised visitation is possible. However, the result of an erroneous fact-finding in favor of a parent is to permit a helpless, abused child to remain in or be returned to the custody of an abusive parent . . . Such a result society cannot tolerate. Id. at 572 (emphasis added).}
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279. See, e.g., United States v. Azure, 801 F.2d 336, 339-40 (8th Cir. 1986) ("The decision whether to permit expert testimony ordinarily lies within the discretion of the trial court and will not be reversed absent an abuse of discretion."); Alef v. Alta Bates Hosp., 5 Cal. App. 4th 208, 6 Cal. Rptr. 2d 900 (1992) (stating that judge's determination of whether proffered expert opinion evidence is within witness's area of expertise will be subject to abuse of discretion). For a discussion regarding the struggle between rules and a judge's discretion in family law, see Schneider, supra note 32.

280. See infra note 283 and accompanying text.

281. See, e.g., *Karen "PP"*, 602 N.Y.S.2d 709. Note that the appeal was decided on October 21, 1993, over two years after the trial court's decision in July 1991. The effect of a two-year wait to have a court's decision reviewed is obvious—if a decision were erroneously made the child would be in danger for this period of time. Moreover, in order to be reversed, many trial court decisions must rise to an abuse of discretion; trial court decisions are granted great deference on review; the likelihood of reversal is rare. See, e.g., id. at 710.

ion, even when the book regarding the PAS was neither entered into evidence nor referred to by any witness. Thus, determining whether psychological evidence is reliable enough to be used in child custody cases carries with it perhaps the most significant—and potentially irreversible—burden with which a judge could be faced: responsibility for ensuring a child's safety.

1. The dangers of PAS under Daubert

Since the Federal Rules of Evidence under Daubert supersede the Frye standard, "'general acceptance' is not a necessary precondition to the admissibility of scientific evidence." According to the Supreme Court, the Rules require the trial judge to ensure that the expert's testimony is reliable, relevant, and based on scientifically valid principles. Absent Frye's general acceptance standard, the trial judge must determine, with little—if any—true guidance from the Daubert Court, what scientific, technical, or specialized knowledge is admissible. Thus, Daubert leaves unaddressed the very problem that Frye's general acceptance standard was devised to solve: establishing a method for ensuring that scientific evidence—that which is not readily understood by a judge—is reliable prior to its admission, in order that the testimony not unduly prejudice the party against whom it is admitted. Prior to Daubert, commentators criticized the Frye standard and predicted its demise; and some discussed how a trial judge, absent a general acceptance standard, would determine whether the scientific evidence at issue should be admitted. Since the Daubert Court's opinion fails to answer this question, or to suggest a particular method, these discussions may provide an understanding of how judges will go about assessing the reliability of evidence like PAS.

a. reliability and relevancy under the Rules

Federal Rule of Evidence 401 states that evidence is relevant when it has "any tendency" to make a material fact more or less probable than it would be absent the evidence. This first step necessarily requires an evaluation of the evidence's probative value. The way in which the proba-

283. Id. at 110.
285. See supra part IV.A.
286. See supra note 208 and accompanying text.
287. See, e.g., Giannelli, supra note 205, at 1231.
288. See Becker & Orenstein, supra note 206; Giannelli, supra note 205; Lacey, supra note 205; Lederer, supra note 208.
289. Giannelli, supra note 205, at 1235; Lederer, supra note 208, at 242.
The probative value of scientific evidence is evaluated is fundamentally problematic with respect to the relevancy approach. Relevance corresponds to the reliability of evidence; if the evidence is not reliable it is not relevant. Because the judge, in cases where scientific evidence is at issue, cannot resort to logic and experience—the tools upon which judges rely to evaluate the probabilities upon which relevancy turns—he or she must turn to science. The judge, who probably lacks a scientific background in the particular area, will generally be forced to determine whether evidence is reliable on the basis of an expert’s testimony. "[T]he court [is] dependent upon the expert's assertions. Overstatements by experts about the conclusions that can be drawn . . . are not uncommon." Thus, "unreliable evidence could be admitted because of the meager demands of logical relevancy." Even more disconcerting, "the trial judge is given considerable leeway in determining the qualifications of experts, and his [or her] decision will be reversed only for an abuse of discretion." Additionally, if the trial judge is not knowledgeable about a certain technique or theory, he or she cannot appreciate the extent to which the evidence may become misleading once it has been determined admissible.

In theory, once it is established that evidence has probative value, the evidence is relevant and admissible under Federal Rule of Evidence 402’s “all relevant evidence is admissible” standard, and is subject only to Federal Rule of Evidence 403. Evidence is excluded under Rule 403 when its “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” Assessing the probative value of scientific evidence and its potential for prejudicial impact may result in reliance on one expert’s testimony. This means that the trier of fact may rely on one expert’s opinion in deciding whether to admit PAS testimony—when in fact PAS has not been ac-

290. Giannelli, supra note 205, at 1237.
291. See id. at 1203-04, 1235.
292. Id. at 1235.
293. Id.
294. Id. at 1236.
295. Id. at 1238.
296. Lederer, supra note 208, at 242.
298. See Giannelli, supra note 205, at 1238.
299. Lederer, supra note 208, at 242; see Fed. R. Evid. 403 (excluding evidence where probative value substantially outweighed by prejudicial impact on jury).
300. See Giannelli, supra note 205, at 1237-38.
accepted by experts in the field.\textsuperscript{301} Rule 403's requirement that the prejudicial impact \textit{substantially} outweigh the probative value before exclusion is mandated may complicate this problem.\textsuperscript{302} "Moreover, appellate courts will defer to the trial court's discretion when reviewing this issue."\textsuperscript{303} Thus, the trier of fact's discretion over the admission of expert testimony is broad and virtually unchecked.

It bears mention that Rule 702's requirement that the scientific evidence "will assist the trier of fact" merely replaces with a helpfulness standard the "common law requirement that an expert may only testify where the subject matter of the testimony otherwise would be incomprehensible to the lay factfinder."\textsuperscript{304} Rule 702 does not clarify any standard for admitting scientific evidence.\textsuperscript{305}

\textbf{b. ramifications}

Under the Rules a judge who likely has little of the particular scientific background at issue will (1) determine the probative value of the evidence based upon an expert's testimony; (2) identify the reliability of the evidence based upon an expert's testimony; and (3) balance the probative value of the evidence against possible prejudicial impact.\textsuperscript{306} As mentioned earlier, although the \textit{Daubert} case is controlling only in federal courts, some twenty states have adopted the Federal Rules of Evidence.\textsuperscript{307} Thus, the relaxed standard is potentially an approach state courts—the likely forum where PAS evidence would be admitted—will use.\textsuperscript{308} If a consensus of experts within the field would not otherwise accept the expert testimony—in this case PAS—but the judge nonetheless admits it, the result may be the misuse of unreliable evidence, which in turn could result in grave consequences for some.\textsuperscript{309} In cases where the alleged PAS is said to contain a false allegation of sexual abuse, the implications of admitting this unreliable testimony are even more severe.

"Defendants and advocates for accused parents virtually always attribute the falseness of the charges to the fact that they arose in a custody

\textsuperscript{301} See supra part II.B.
\textsuperscript{302} Giannelli, supra note 205, at 1239.
\textsuperscript{303} Id.; see also Karen "PP", 602 N.Y.S.2d at 710 (noting trial court's discretion to weigh evidence).
\textsuperscript{304} Becker & Orenstein, supra note 206, at 876.
\textsuperscript{305} Id. at 877.
\textsuperscript{306} See Giannelli, supra note 205, at 1235-39.
\textsuperscript{307} Id. at 1230 n.257.
\textsuperscript{308} See, e.g., cases cited supra part II.B-C.
\textsuperscript{309} See Giannelli, supra note 205, at 1245; Lederer, supra note 208, at 242. See the discussion of Mandi's case, supra part II.B.
suit; in addition, they attribute the child's confirmation to fantasy or to brainwashing by the mother. There are at least a few problems with these arguments.\textsuperscript{310} One such problem is that the nature of PAS testimony in civil cases is that in reality it may heighten and shift the burden of proof.\textsuperscript{311} "[T]he inflammatory character of a charge of child sexual abuse, as well as the fact that the parent's right to maintain a relationship with his child is at stake, renders the actual standard of proof to be more like that of a criminal case."\textsuperscript{312} It has been observed that

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\text{[i]f the accuser fails to meet her burden of proof, the alleged abuser is presumed to be innocent of the civil charges. Because burdens of proof are . . . shifted[,] . . . a failure to prove . . . operates . . . like a vindication of the charge. Consequently, the court relinquishes the father's rights to custody or visitation, and in so doing fails to protect some children from further sexual abuse.}\]

\textsuperscript{313}

2. The merits of \textit{Frye}'s general acceptance standard

Prior to \textit{Daubert} and the Federal Rules of Evidence, the \textit{Frye} standard provided a guideline for judges, who generally lack the scientific expertise required to assess the reliability of scientific evidence to be admitted.\textsuperscript{314} In the absence of \textit{Frye}'s general acceptance standard, the trial judge is responsible for ensuring that the scientific evidence sought to be admitted is reliable.\textsuperscript{315} In order to determine reliability, the trial judge must first determine whether the evidence is scientifically valid.\textsuperscript{316} To evaluate the validity of the scientific evidence in the absence of a general acceptance standard, judicial understanding of scientific evidence is required; heretofore, this was left to experts in the particular field.\textsuperscript{317} Moreover, the effect of admitting scientific testimony into evidence may

\textsuperscript{310} Fahn, supra note 54, at 201-02 (footnotes omitted).

\textsuperscript{311} Id. at 200.

\textsuperscript{312} Id. It has been noted that "[t]he application of the criminal standard of proof in a custody dispute" poses still another problem. Id. at 207. Applying a heightened standard of proof would be an abuse of discretion—an appealable error. Id. "But because there is no jury in a custody dispute and, hence, no instructions to the fact finder pertaining to the appropriate standard of proof, it would be difficult to show that such impropriety was indeed operating." Id. See infra text accompanying note 320.

\textsuperscript{313} Fahn, supra note 54, at 200.

\textsuperscript{314} See supra note 203 and accompanying text.

\textsuperscript{315} See supra note 206 and accompanying text.

\textsuperscript{316} See supra part IV.A; supra note 306. But see infra text accompanying note 334.

\textsuperscript{317} See supra note 206 and accompanying text; infra note 323.
be powerful—and, if admitted in error, powerfully misleading.318

Ruling on the validity and admissibility of psychological evidence can be particularly misleading since it is so easy to presume one's understanding of human nature.319 It can also be powerfully misleading because "the analysis of a particular syndrome may arouse personal biases or fears."320 It has been noted that

[s]yndromes frequently involve important social or moral issues. A judge assessing the reliability of . . . syndrome evidence may be influenced, consciously or subconsciously, by . . . traditional myths . . . . The admissibility . . . may turn, in part, upon the judge's perception of the . . . public awareness of the issue. . . .

Calculating the full effect of the judges' personal perceptions regarding the substance is difficult.321

In the context of PAS cases, the judicial biases that may affect the decision to admit the evidence are critical because the decision carries with it the most serious of implications—keeping a child safe from further abuse. In discussing custody disputes that involve allegations of child sexual abuse, one author, reviewing surveys, studies, and research has observed that

[w]hen a judge is confronted with a custody dispute involving allegations of child sexual abuse, he [or she] has to make a difficult judgment . . . . By the nature of the problem, absolute proof cannot be established.

The deeply embedded taboo against incest negatively affects the unbelievability of an actual case. . . . [I]t is [particularly difficult to believe] if the alleged abuser is the child's parent. Judges, too, are at least somewhat reluctant to believe that a child has been sexually abused.

When the alleged abuser is a middle- or upper-class man and a respected professional, other similarly situated people may identify with him and feel defensive on his behalf. . . . The father conveys to the judge that he cares deeply about his children's welfare and would never harm them. On the surface, it

318. See Starrs, supra note 205, at 250; see also supra note 238 and accompanying text (warning that expert evidence is both powerful and misleading because of difficulty in evaluating it).
319. See supra text accompanying notes 267-68.
320. Wallace, supra note 249, at 1045-46.
321. Id. at 1047-48 (footnotes omitted).
is indeed hard to believe that this man could do such a terrible thing to his child.

Like everyone else, outside the courtroom the judge is exposed to the overpublicized image of mothers maliciously raising fictitious allegations. The thought arises that the allegations were raised in the context of a custody dispute and therefore should be considered suspect. Finally, even a subconscious identification with the father would arouse the judge's anger toward the mother for stooping so low to accuse him of such an awful thing.

It is submitted that in many cases, a judicial bias operates against the accusing mother and the child.\textsuperscript{322}

Thus, absent any clear standard, it is easy to see how PAS testimony gets admitted.

Professor Paul Giannelli contends that whereas the Frye test serves many purposes,\textsuperscript{323} its principal justification "is that it establishes a method for ensuring the reliability of scientific evidence."\textsuperscript{324} In \textit{United States v. Addison},\textsuperscript{325} the court aptly stated that "[t]he requirement of general acceptance in the scientific community assures that those most qualified to assess the general validity of a scientific method will have the determinative voice."\textsuperscript{326} Frye's method of ensuring reliability takes the responsibility of determining the validity of a scientific principle away from the trial judge, leaving that determination to experts who know most about it; thus, the trier of fact does not even hear scientific evidence

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323. Other supporting rationale for the Frye test as articulated by Professor Giannelli include: (1) the general acceptance standard guarantees that experts would be critically examining the validity of a scientific determination in a particular case; (2) Frye would ensure more uniformity in decision; and (3) the Frye test eliminates court hearings on the validity of novel scientific techniques and theories. Giannelli, \textit{supra} note 205, at 1207.
324. \textit{Id.}; see also Ibn-Tamas v. United States, 455 A.2d 893, 894 (D.C. 1983) (Gallagher, J., concurring) (stating that essential meaning of Frye "is that where expert testimony . . . is being proffered in evidence the court should require a showing of substantial support from the appropriate field of science").
325. 498 F.2d 741 (D.C. Cir. 1974).
326. \textit{Id.} at 743-44.
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that is not generally accepted. When left to the experts who know most about it—child abuse experts, rather than family law attorneys—PAS is not considered to be reliable evidence. One court observed the following:

A courtroom is not a research laboratory. The fate of [one party] should not hang on his ability to successfully rebut scientific evidence which bears an "aura of special reliability and trustworthiness," although, in reality the witness is testifying on the basis of an unproved hypothesis in an isolated experiment which has yet to gain general acceptance in its field.

The Florida District Court of Appeal, in determining whether a trial court's order complied with rules governing psychological examinations, spoke to the issue of admitting PAS testimony. Noting that the issue was not "[w]hether the father's alleged abandonment [of the child could] be legally excused by the presence of [PAS]," the court went to the trouble to state that

"[n]o determination was made in the order or on the record as to general professional acceptance of the 'parental alienation syndrome' as a diagnostic tool. . . . [W]e note the cautionary words of other current commentators: . . . [E]xperts have not achieved consensus on the existence of a psychological syndrome that can detect child sexual abuse." In other words, the court implied that even if the issue was whether a parent's behavior was consistent with PAS, PAS would be subject to the Frye standard and would probably not be admitted. Considering the outcome in some of the cases where PAS has been admitted, the Frye standard may be the only barrier between PAS and the safety of abused children.

Dr. Gardner himself best summed up whether PAS should be properly admitted when he wrote: "[PAS] is an initial offering and cannot have pre-existing scientific validity."
V. Recommendation

The court in *In re T.M.W.*\(^{335}\) suggested that PAS evidence ought to fall—or perhaps be shoved—by the wayside much like the tort of spousal alienation of affection.\(^{336}\) The court noted that “the few jurisdictions which preserve alienation of affection actions as to spouses have recognized the view of psychologists that causation probably cannot be sorted out, and require proof that the alleged alienating conduct ‘is so significant as to outweigh the combined effect of all other causes.’ ”\(^{337}\) Thus, the court suggested that the same rationale should be applied to PAS.\(^{338}\)

Since causation in PAS probably cannot be sorted out, holding one parent more responsible than the other would require proving that the culpable parent’s conduct is the primary cause of PAS, to the exclusion of other contributing factors. The problems inherent in how any expert—including Dr. Gardner or a judge—would go about sorting out causation are well demonstrated by the Friedlander case.\(^{339}\) Although Dr. Gardner testified that Zitta Friedlander was the cause of her children’s alienation of affection from their father, consider the facts surrounding Zitta’s demise.\(^{340}\) The personal instability that precipitated Mr. Friedlander’s firing thirteen shots into his wife’s body is a fairly good indication that something else may have caused or contributed to his children’s alienation from him.\(^{341}\) In light of the Friedlander example, can we really expect PAS to sort out complex issues of causation in more subtle cases? PAS should not be admissible on the issue of causation alone.

Additionally, PAS testimony should not even pass muster under *Daubert*. *Daubert* allows the trier of fact to rule on admissibility based upon one expert’s opinion as to whether or not the evidence is reliable and thus relevant, but also, “the trial judge . . . pursuant to Rule 104(a) . . . [must make] a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid.”\(^{342}\) In assessing the validity of the proffered evidence, the judge may consider whether the theory has been tested, whether it has been subjected to peer review and publication, and whether it has attracted widespread accept-

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336. *Id.* at 262 n.3; see *supra* part III.A.
337. *Id.* (quoting Steffensen, *supra* note 142, at 900).
338. *Id.*
339. See *supra* notes 109-13 and accompanying text.
340. See *supra* note 110 and accompanying text.
341. See *supra* note 110 and accompanying text.
ance within a relevant scientific community. In the case of PAS, Dr. Gardner has based his theory entirely upon his own observations of his own patients; it is for the most part self-published, which circumvents peer review, and it has attracted anything but widespread acceptance. However, the Daubert Court also stated that “[t]he inquiry [is] a flexible one,” and declared that cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof—rather than wholesale exclusion under an uncompromising general acceptance standard—is the appropriate means by which evidence based on valid principles should be challenged. The problem with this in the context of a PAS case is that the mere admission of PAS means that the trier of fact will be influenced by self-serving testimony that carries with it an “aura of special reliability and trustworthiness.” This false aura of reliability coupled with the variety of biases that such evidence may trigger in the evaluator renders the consideration of PAS under the Daubert standard especially precarious. Given the problems recognized by the Daubert Court with regard to a judge determining the reliability of scientific testimony, Daubert should be reversed. Absent reversal, Daubert should be construed narrowly and limited to its facts. In so doing, only evidence dealing with medical science that is considered to be “hard” would fall under its rule. Thus, Daubert’s relaxed rule would not apply to psychological or syndrome testimony—testimony that carries with it the most potential for misuse and the most serious of consequences.

To the extent that a court would still entertain admitting such evi-

343. Id. at 2796-97.
344. See supra note 23 and accompanying text; supra text accompanying notes 63, 67.
345. Dr. Gardner’s works have appeared from time to time in various family law publications. See, e.g., sources cited supra note 22. However, the point of peer review is that the work be evaluated by experts within the particular field. Therefore, meaningful publication and review of Dr. Gardner’s work would be by child abuse experts. Recall, such experts have already questioned Dr. Gardner’s assumptions, see supra notes 54-56, and criticized his theories, see supra part II.A.
346. See, e.g., supra part II.A.
347. Daubert, 113 S. Ct. at 2790.
348. Id.
350. United States v. Brown, 557 F.2d 541, 556 (6th Cir. 1977); see supra note 272 and accompanying text.
351. See supra notes 321-22 and accompanying text.
352. See supra notes 318-22, 329, 332 and accompanying text.
353. See supra part II.B-C.
ence, at a minimum PAS should be subjected to the *Frye* standard.354 Prior to *Daubert*, one court expressly did just that.355 A defendant criminally charged with sexually abusing his daughter brought a motion before the court that she be examined by an expert to determine whether PAS existed.356 The court denied defendant’s motion but alternatively ruled that defendant could have a pretrial hearing to determine the admissibility of PAS testimony under the *Frye* standard.357 The court stated that *Frye* naturally extends to psychological theories.358 Because PAS has failed to gain general acceptance among experts359 in the psychological field,360 it should not be held admissible. Considering what has happened in some of the cases where PAS has been admitted, justice would be served by its exclusion.

VI. CONCLUSION

PAS testimony should not be admitted in court because of the causation361 and evidentiary362 problems with the theory. Because of the dangerous aura of reliability and trustworthiness extant in Dr. Gardner’s self-published theory, admission of PAS is inevitable and particularly dis-

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354. The *T.M.W.* court, citing one expert, noted that it may be best to exclude all syndrome testimony. In *re T.M.W.*, 553 So. 2d 260, 262 n.3 (Fla. Dist. Ct. App. 1989) (citing Myers et al., *supra* note 84). In certain circumstances, such as when a particular syndrome has gained acceptance by experts within the particular field, or when the syndrome’s use in courts is limited to a specific purpose, judicial recognition of a syndrome may be valuable. For example, battered woman syndrome evidence has often gone through the *Frye* test. See Ibn-Tamas v. United States, 455 A.2d 893, 894 (1983) (Gallagher, J., concurring) (stating that battered woman syndrome falls within *Frye’s* standard). Evidence of the battered woman syndrome has been admitted in courts. See, e.g., Rogers v. State, 616 So. 2d 1098, 1099 (Fla. Dist. Ct. App. 1993) (holding evidence of battered woman’s syndrome admissible because it “has now gained general acceptance in the relevant scientific community, i.e., the psychological community.”). Similarly, “[i]n child sexual abuse litigation, the child sexual abuse accommodation syndrome is useful to rehabilitate child victims’ impeached credibility.” *Myers, supra* note 55, at 14 n.73 (referring to work by Dr. Roland Summit, see *Summit, supra* note 23).

355. See *Frye Hearing, supra* note 222, at 21.

356. See id.

357. See id.

358. Id.


360. See *supra* notes 23, 54-56, 58; *supra* text accompanying notes 63, 65-66.

361. See *supra* part III.

362. See *supra* part IV.
The deceptive aura of reliability is one of the problems that Professor John Myers, a sexual abuse evidentiary expert, has with syndrome evidence generally. He says that the "aura of scientific respectability [gives] the evidence more value than it really deserves." PAS, he explains, is just "a fancy-sounding name for something that everyone has known forever"—that some parents will use their children as weapons in bitter custody fights. There are no easy answers to the difficult question of how or where to draw a line when the effects of parents' actions toward their children during any spousal dispute—while always damaging—become emotionally abusive to the children and thus require outside intervention. It is clear, however, that PAS is not one of the potential answers—at least not without an overhaul by a community of experts in the field. Nonetheless, because it is inevitable that some family law attorneys will be offering PAS testimony into evidence, and on the surface this evidence will seem reliable and thus relevant, judges and children's advocates should take note of the problems with PAS theory. Not only could an erroneous decision based upon PAS testimony place a child with an abusive parent, but it would leave the child with no one to tell. In order to protect children from abuse, the acceptance of PAS should not be by family law attorneys, but rather by child abuse experts. All psychological evidence upon which a child's safety will turn

363. See supra part II.B-C.
364. John E.B. Myers is a Professor of Law at the McGeorge School of Law in Sacramento, California, who has contributed written work in the area of child sexual abuse evidence. See, e.g., Myers, supra note 48; Myers et al., supra note 84.
366. Freinkel, supra note 365 (quoting Professor Myers); see also supra text accompanying note 174 (noting that it is recognized that children are aware of and may become involved in conflicts between their divorced or divorcing parents).
367. A Cambridge, Massachusetts, lawyer said of Dr. Gardner, "[He was] our critical evidence because . . . it [was] clear when he [began] to testify that [he was] an expert in the field." Sherman, supra note 5, at 45. For a recent example of an article supporting admission of PAS evidence which, notably, was coauthored by a family law attorney, see Peggie Ward & J. Campbell Harvey, Family Wars: The Alienation of Children, N.H. B.J., Mar. 1993, at 30.
368. One commentator, while discussing the work of a well-known researcher and author in the area of the effects of divorce on children, asked appropriate questions which could be applied here: "Is a little learning a dangerous thing? Should the legal profession be dabbling in child psychology and social science, picking up a smattering of research work here, the odd seminar there?" Elizabeth Walsh, The Wallerstein Experience, Fam. L., Feb. 1991, at 49, 50. She comments further that when ideas relating to child psychology are "plausibly and eloquently" expressed, there are "few lawyers in the audience . . . sufficiently versed in the subject to contradict [when] contradiction [is] necessary." Id. (emphasis added).
must be subjected to meaningful peer review, publication, or empirical testing.

Cheri L. Wood*

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369. "Central to professional practice is periodic review of professional work by other professionals [which involves] the essential activity of having an external, objective second party analysis of one's work." Berliner & Conte, supra note 23, at 122. "[M]ental health professionals have long supported supervision, consultation, and external review as core aspects of professionalism." Conte, supra note 54, at 71.

"[M]aintenance of objectivity in the evaluation [process] is a critical aspect of practice." Id. at 70. Dr. Gardner's self-published works and his untested, discredited, and widely opposed theories may be particularly vulnerable to what Professor Conte explains as a primary reason that peer review is essential to mental health professionals: "It would not be surprising to find that personal factors in the mental health professional, including history, personality, life experiences, or unresolved intrapersonal or interpersonal issues do influence practice." Id. at 71. This point may be relevant in considering the discussion supra note 37.

370. PAS surely should not be tested by publication in such self-published works as are Dr. Gardner's, see supra note 2, nor by publication in family law journals or other legal periodicals. Rather, acceptance should be tested by publication in the type of journal cited supra notes 23, 54-55, 58. This would ensure that acceptance is by the relevant scientific community. See Giannelli, supra note 205, at 1208 (explaining that acceptance requires two steps: (1) identifying field in which principle falls, and (2) determining whether principle has been accepted by members in identified field); see also People v. Collins, 405 N.Y.S.2d 365, 368 (Sup. Ct. 1978) ("At the threshold of determining whether the technique meets the test of acceptance in the scientific community, is the question of defining that community.").

371. Empirical testing or studies and observations by others must occur rather than be limited to one practitioner's clinical observations of his own private practice patients. Gardner, supra note 2, at 59. See supra note 58 and accompanying text (noting expert's criticism of Dr. Gardner's lack of empirical testing).

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