Under the Microscope: The Admissibility of Parental Alienation Syndrome

by
Kimberley J. Joyce*

I. Introduction

Call it the Theory of A-B-C: a controversial model of parental alienation which has at its center a very specific causal relationship between systematic programming by a "favored" parent (the "A") and manifestations of that programming in a child's behaviors (the "B"), with a judicially-imposed remedy (the "C")[1] of transferring custody from the "targeted" parent and isolating the child from the "favored" parent.[2] The argument that paren-

* Kimberley Joyce is a family law trial attorney in Wellesley, Massachusetts, and is admitted to practice in Massachusetts state courts and before the U.S. District Court, the First Circuit Court of Appeals, and the U.S. Supreme Court. Ms. Joyce is a member of the Family Law sections of both the Massachusetts and Boston Bar Associations and is Chair of the MBA's Family Law Section Council.

1 The conceptual use of a Theory of A-B-C is drawn from psychologist Albert Ellis who developed a cognitive-behavioral theory that explains emotional disturbance (hence the metaphor) structured in an ABC format: "Typically, the emotional and behavioral Consequence (C) is what an individual seeks assistance for and they often assume that the Activating event (A) which had preceded the (C) actually caused it." Mark D. Terjesen, et al. *Rational Emotive Behavior Therapy (REBT) with Children and Adolescents: Theory, Applications, and Research*, 20 NYS PSYCHOL. 13, 13 (2009).

2 Use of the terms such as "favored" and "targeted" throughout this article are drawn from arguments in favor of Parental Alienation Syndrome for purposes of convenience only and does not represent endorsement of any aspect of these arguments. For a review of these terms and core fallacies, see Richard A. Warshak, *Ten Parental Alienation Fallacies that Compromise Decisions in Court and in Therapy*, 46 PROF. PSYCHOL.: RES. & PRAC. 235, 235 (2015) ("This article identifies 10 prevalent and strongly held assumptions and myths about parental alienation found in reports by therapists, custody evaluators, and child representatives (such as guardians ad litem), in case law, and in professional articles. Ideas were determined to be fallacies if they are contradicted by the weight of empirical research, by specific case outcomes, or by the

tal alienation has a direct "cause and effect" [A-B-C] is a tactical weapon with a devastating impact in the world of child custody litigation. One serious consequence of this A-B-C model, as it is argued by proponents, is the ability to confuse lawyers and judges by claiming that this causation is a series of direct connections easily explained as true by the observing "expert" without reference to any of the limits that scientists must ethically draw in social science research.[3]

What can be observed is that the selective use of alienation allegations by parents with the resources to hire these experts may increasingly clog court dockets and support a cottage industry of "experts" whose role is to take the facts of a chosen case and manipulate them, purposefully, to meet the theory's criteria.[4] It provides a means for a disgruntled parent to both avoid accountability for conduct which may explain the child's reaction,

---

author's more than three decades of experience evaluating, treating, and consulting on cases with parental alienation claims. The following discussion pertains to the pathological variant of parental alienation and not to situations in which a child's rejection of a parent is proportional to the parent's treatment of the child.").

[3] If the reader moves away from the PAS industry, social scientists in family research and child custody are much more modest about the limits of the research and the variables that may influence outcomes; though there is contentious debate about the efficacy of research applied to child custody. *See* Robert Bauserman, *A Meta-Analysis of Parental Satisfaction, Adjustment, and Conflict in Joint Custody and Sole Custody Following Divorce*, 53 J. DIVORCE & REMARRIAGE 464, 465 (2012) ("An even more critical problem is the *impossibility of demonstrating causality with observational data*, even when likely moderator or mediator variables are statistically controlled.") (emphasis added); Carol S. Bruch, *Sound Research or Wishful Thinking in Child Custody Cases-Lessons from Relocation Law*, 40 FAM. L.Q. 281, 297 (2006) ("Many recent articles on the topic of child custody law in legal, interdisciplinary, and even scientific journals contain serious misstatements of the research literature. Unfortunately, the judges, lawyers and legislators who are their intended audience often lack statistical or scientific training and are unfamiliar with the scientific literature. They are, accordingly, ill-equipped to judge the quality of empirical studies or of review articles, which summarize and evaluate the work of others in the field. These difficulties may be exploited by those who 'spin' the literature.").

[4] For articles in this Journal exploring what is often called "confirmation bias" in the literature, see Linda Nielsen, *Shared Physical Custody: Does it Benefit Most Children*, 28 J. AM. ACAD. MATRIM. LAW. 79 (2015); Dana E. Prescott & Diane A. Tennies, *Bias Is a Reciprocal Relationship: Forensic Mental Health Professionals and Lawyers in the Family Court Bottle*, 31 J. AM. ACAD. MATRIM. LAW. 427 (2018).

and create an environment where a court may make a specific causal leap backwards from a child's resistance to contact without any reliable foundation or connection for that leap, making it one of ideology rather than science. And it is now a cottage industry for those with resources and motivation.[5]

This article will explore the author's experiences and observations in child custody litigation when parental alienation[6] has been proffered by "experts" to establish a lack of parental fitness and change custody to the other parent. The purpose of this article is not to stand on any side in the debates surrounding alienation theories. Rather, its purpose is to provide lawyers, judges, and mental health professionals with a framework for recognizing, objecting to and preventing the misuse of science in the courtroom; to expose fallacious arguments disguised as science; to prevent hijacking of the legal process by experts; and to ensure that evidence admitted in complex child custody matters is reliable. In Part II, this article will touch upon the threshold requirements for admissibility of expert testimony. In Part III, it will present an approach to impose those threshold requirements on an expert and, further, challenge the reliability of the testimony. It will go on in Part IV to shine a light through the shifting terminology used by experts and expose the theory's easily identifiable structure so practitioners may recognize it for what it is and know the dangers that come from allowing it to slide past evidentiary challenge. Finally, in Part V this article will demonstrate that the theory lacks the required reliability for admissibility.

---

[5] *See* Kendall Coffey, *Inherent Judicial Authority and the Expert Disqualification Doctrine*, 56 FLA. L. REV. 195, 195 (2004) ("With its explosion across America's litigation landscape, expert witnessing has become a foundation for decision-making in virtually all significant cases. Described by some courts as a 'cottage industry,' it has also become more lucrative than the usual day job for many professionals. With litigants and their counsel shopping relentlessly for key specialists, and the experts themselves pursuing engagements aggressively, the growth of expert consultations has spawned a proliferation of allegations concerning conflicts of interest.").

[6] Read further to see that Parental Alienation Syndrome, the particular theory that is the subject of this article, comes packaged with different, less controversial – but misleading – labels.

II. Foundations for Practitioners

In complicated custody cases mired in the emotional and physical minutia of disintegrating families, it might be easy to overlook the basic and well-established legal requirement that a causal leap between A and B be supported by reliable scientific method and opinion.[7] Expert testimony which provides the required bridge for that gap is only admissible, in all federal and state courts, if it will assist the trier of fact by providing information that is beyond the common knowledge of the factfinder *and* meets legal standards for admissibility.[8] These important foundational requirements have a long history in common law systems and should be strictly maintained to ensure that decisions regarding children's best interests avoid harmful speculation. Of particular concern, and rarely explored in the legal or social science literature related to parental alienation, these arguments are often about homogenous populations and lack the rigor of cultural competence from testing to evaluation.[9]

In child custody matters, observable parental behavior and reasonable inferences can form the basis of well-informed custody determinations. Expert testimony is not necessary to have a trier of fact understand the common sense notion that inappro-

---

[7] *See*, *e.g., In re* Detention of New, 992 N.E.2d 519 (Ill. App. Ct. 2013)("a prerequisite for a diagnosis is scientific evidence that such a mental condition exists."); Zafran v. Zafran, 740 N.Y.S. 2d 506 (2002). That expert testimony is regarding the "soft" or "social" does not grant a pass to cut this evidentiary corner.

[8] *See* Mary McCurley, et al., *Protecting Children from Incompetent Forensic Evaluations and Expert Testimony*, 19 J. AM. ACAD. MATRIM. LAW. 277, 284 (2004) (The literature related to the requirements for admissible expert testimony is vast. "To determine whether testimony about scientific knowledge will assist the trier of fact in assessing a controverted issue, *Daubert* requires that the judge ask two questions: (1) whether the reasoning or methodology underlying the testimony is scientifically valid, and (2) whether that reasoning or methodology can be properly applied to the facts in issue.").

[9] *See* Michael L. Perlin & Valerie McClain, *"Where Souls Are Forgotten": Cultural Competencies, Forensic Evaluations, and International Human Rights*, 15 PSYCHOL., PUB. POL'Y & L. 257, 259 (2009) ("Here, we refer to the need for cultural competency both on the part of lawyers and on the part of expert witnesses working with them in this array of cases."). For another argument regarding bias and application of parental alienation, see Madelyn Simring Milchman, *Misogynistic Cultural Argument in Parental Alienation Versus Child Sexual Abuse Cases*, 14 J. CHILD CUSTODY 211 (2017).

priate parental conduct can have a broad and detrimental impact on children.[10] Such testimony is only necessary to provide an excuse or means to establish a favored parent's conduct as the cause of a child's contact resistance where that causal relationship is not apparent from observable conduct or subject to reasonable inference. The argument then is that the level of parental (mis)conduct requires judicial imposition of clinical treatment and the child's isolation from that parent.[11]

This A-B-C construct is what parental alienation "experts" are peddling to influence triers of fact to draw significant direct causation or causal inferences between A and B and assign blame for contact resistance to the favored parent in circumstances where the evidence otherwise might not permit it.[12] Without this underlying scheme, expert testimony would not be needed or helpful, and thus it would be inadmissible under decades of federal and state law. It is readily understood by family lawyers that standards for expert admissibility are much lower in

---

10 In *People v. Sullivan*, Nos. H023715, H025386, 2003 WL 1785921 at 14 (Santa Clara Cty. Sup. Ct. Cal. Apr. 3, 2003), a very perceptive court, in holding that parental alienation syndrome theory did not pass the *Kelly-Frye* rule, noted, "I can't help but think that this is really quite common sense kind of perceptions. . . couched in a scientific aura" and that expert testimony about why a child might make false allegations would not assist the trier of fact.

11 Richard Gardner's proposed remedy for the disorder is a mandatory transfer of custody of the child from the favored parent to the targeted parent, which provides the child with a "face-saving alibi," and isolation of the children from the targeted parent to disrupt and end the programming. He postulates that without this court-imposed remedy, a child will not only suffer "total and complete" alienation, but potentially also impaired personality development and psychopathological reactions. For a current discussion of the use of isolation or forced re-programming "therapies" see Stephanie Dallam & Joyanna L. Silberg, *Recommended Treatments for "Parental Alienation Syndrome" (PAS) May Cause Children Foreseeable and Lasting Psychological Harm*, 13 J. CHILD CUSTODY 134 (2016); Jean Mercer, *Are Intensive Parental Alienation Treatments Effective and Safe for Children and Adolescents?*, 15 J. CHILD CUSTODY 1 (2019).

12 The literature on this point is beyond this paper. *See* Michael Rutter, *Proceeding from Observed Correlation to Causal Inference: The Use of Natural Experiments*, 2 PERSPECTIVES PSYCHOL. SCI. 377, 377 (2007) ("From an early point in their training, all behavioral scientists are taught that statistically significant correlations do not necessarily mean any kind of causative effect. Nevertheless, the literature is full of studies with findings that are exclusively based on correlational evidence.").

family courts and lawyers may not have the client resources or time to mount a pretrial challenge.[13]

III. Strategies and Case Management

The term "parental alienation" as it is used in child custody litigation means (and is intended to mean) very different things to different people.[14] An often-applied definition of "parental alienation," and the one that is the subject of this article, was introduced by Richard A. Gardner, in the late 1980's, which he named "The Parental Alienation Syndrome," often referred to in shorthand fashion as "PAS." It was a controversial theory at its inception, and it remains controversial today more than thirty years after Gardner first wrote about it. By itself his argument was, at best, a hypothesis, but from that inception it has now evolved into a controversial remedy of removal and isolation from one parent, which PAS "experts" present as necessary and

---

[13] For a discussion of this point in the area of business valuations, see Andrew Z. Soshnick, *Challenging Expert Valuation Opinions in Divorce Cases: An Oasis or Mirage in the Trial Desert*, 30 J. Am. Acad. Matrim. Law. 455 (2017).

[14] The argument is rather craftily placed on its head by arguing that, "[N]ot all legal and mental health professionals understand what parental alienation is." Amy J.L. Baker, J. Michael Bone & Brian Ludmer, The High Conflict Custody Battle: Protect Yourself & Your Kids from a Toxic Divorce, False Accusations & Parental Alienation (2014). *See also, e.g.,* Mastrangelo v. Mastrangelo, No. NNHFA054012782S, 2012 WL 6901161 *7 (Conn. Super. Ct., Dec. 20, 2012) ("the concept of 'parental alienation' and the concept of 'parental alienation syndrome,' while sharing some similar traits and observations and frequently used interchangeably, are seen as distinctly different in crucial degrees"); also (courts have blurred the distinction between PAS and mere parental alienation, with the terms being used interchangeably though the concepts are "distinctly different in crucial degrees" with parental alienation focusing on both parents and the child and PAS focusing solely on the child's behavior); Parental Alienation: The Handbook for Mental Health and Legal Professionals (Demosthenes Lorondos, William Bernet & S. Richard Sauber, eds. 2013); American Professional Society on the Abuse of Children, *Allegations of Child Maltreatment and Intimate Partner Violence in Divorce/Parental Relationship Dissolution* (2017), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwjVsMq-je_jAhUFIKwKHcWvDGUQFjABegQIARAC&url=https%3A%2F%2Fgini-manndeibert-j4ek.squarespace.com%2Fs%2Fapsac-position-paper-revised-13-final.pdf&usg=AOvVaw3OllweJ8-968RChD7tbXeU).

which can only be implemented with the complicity of family court judges.[15]

The continuing controversy relative to Gardner's theory has caused many PAS experts to make subtle changes in the nomenclature over time, altering the label or attaching it to longstanding accepted theories of estrangement to shield its controversial identity and roots.[16] However, efforts to surreptitiously cloak the theory in the disguise of something benign cannot hide the theory's syllogistic components and nature. Whether the label is mere "parental alienation" or "alienation" or "parental alienation disorder" or some other term, the best interests of children and the interests of justice require that lawyers, judges, and other legal professionals look behind the label being used and determine exactly what version of "parental alienation" is being applied. The label is fluid because it allows the expert to reason backwards to any intersection of the facts that fits the outcome sought by the client.[17] It is only through a clear understanding of the substance behind the label that a court can recognize that what is actually being alleged is the causal relationship of A-B-C, and how its evidentiary gatekeeping role must be properly executed.

When litigating a child custody matter in which the theory of PAS, in whatever cloak, is being applied, evidentiary standards regarding the admissibility of expert testimony should be at the forefront. Just because the matter is being litigated in the pro-

---

15 *See supra* note 11.

16 Gardner's roots in Freud and a view of children as "polymorphous perverse" and the "pedophilic nature of all of us" and his own extrapolation about human sexuality has been too often ignored. *See* Kathleen Coulborn Faller, *The Parental Alienation Syndrome: What Is It and What Data Support It?*, 3 CHILD MALTREATMENT 100 (1998). Given his view that female therapists are "manhaters or paranoids" makes the enthusiastic adoption by women professionals employing parental alienation as experts especially odd considering Gardner's beliefs about women as mothers or professionals. *Id*. at 106.

17 The language from Joiner is very useful for judges because it is very clear on this point. *See* Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) ("Conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence . . . connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."). *See also infra* note 34.

bate and family court does not mean that important, long-standing evidentiary policies and standards – imposed vigorously in other federal and state settings – should escape rigorous legal and scientific analysis. These standards have evolved over decades or even centuries, and they are based on the need for legal adjudications to be made on evidence with indicia of truthfulness and reliability.[18]

A legal professional facing potential allegations of PAS, whether identified clearly or in disguise, must challenge the theory in depth because expert opponents will be well prepared and relentless in proselytizing and using language that sounds like research or evidence-based studies. Begin with expert interrogatories and pay close attention to the details of overblown and rambling answers and the articles attached to them which are rarely in genuinely recognized peer-reviewed journals.[19] Strip away the verbosity and misuse of seemingly data-driven or methodological verbiage[20] and expose the A-B-C framework to expose the PAS theory, which is hiding in there somewhere.[21]

---

[18] *See, e.g.,* State v. Favoccia, 51 A.3d 1002, 1009 (Conn. 2012) ("Adopting the Appellate Court's syllogistic reasoning, the defendant posits that permitting an expert witness to make that connection, but not opine directly on a complainant's credibility or diagnosis, is the logical equivalent of permitting an expert to testify that the bird acts, walks and quacks like a duck, but then precluding that expert from opining that a particular bird is, in fact, a duck.").

[19] *See* Ellipsis, Inc. v. Color Works, Inc., 428 F. Supp. 2d 752, 760 (W.D. Tenn. 2006) (An expert opinion that lacks scientific reliability may "be excluded if it is fundamentally flawed or unsupported" because an expert who relies on "a number of guesstimations and speculations" allows the court to conclude that "like a house of cards, once those foundations are disproved, the whole analysis collapses.").

[20] In *Sloane v. Sloane*, No. FST-FA-07-4010840-S, the Connecticut Superior Court of Stamford/Norwalk found that the testimony of Amy J.L. Baker, Ph.D. was "extraordinarily idiosyncratic" and that she was evasive in answering "ordinary questions in an ordinary manner, quibbling with definitions and generally attempting to deflect any criticism." In the matter of *Ellis v. Lasic*, Norfolk Probate and Family Court Docket No. 15D-0119-DR (Mass. 2018), at a hearing on Defendant's Motion *In Limine* challenging admissibility of PAS theory and in answering a question about her own studies whether the term "narcissist" was used by any study participant, Dr. Baker's answer was evasive: "Some might have but certainly not all and maybe none, I don't remember." Transcript in the author's possession.

[21] Experts should be required to provide an "objective summary of the scientific information relevant to the matter before the court." Robert F. Kelly

Understand why the causal nature of the theory is problematic from an evidentiary standpoint. Review studies,[22] and carefully critique them. Depose the experts. Do not take for granted that their research approaches are comprehensive and valid. Point out the weaknesses in the research and have them explain how it might nevertheless be reliable to show the A-B-C cause, effect, and remedy and why the information is beyond the common knowledge of the factfinder.[23] This is, after all, the movant's burden as to foundation and admissibility. Question the experts until the scientific foundations of their opinions are uncovered and PAS, if it is their theory, is exposed and shown to be unhelpful, unreliable, and thus inadmissible from an evidentiary standpoint.

Most of all, do not wait to begin the challenge at trial, or the clock will run out. These experts are very good, and underestimating their ability to shadow box convincingly in court is something to avoid for the client. Do the necessary discovery early and schedule a motion *in limine* to take place well before the commencement of trial. It is difficult to be in the position of hav-

---

& Sarah H. Ramsey, *Standards for Social Science Amicus Briefs in Family and Child Law Cases*, 13 J. GENDER, RACE & JUST. 81, 84 (2009).

22 Extreme caution is urged in relying on others' summaries or representations of PAS studies. These are often anecdotal or case studies by the author and lack rigorous sampling or statistical measures. While it is only one example, see Amy L. Baker, *The Long-Term Effects of Parental Alienation on Adult Children: A Qualitative Research Study*, 33 AM. J. FAM. THERAPY 289, 290-91 (2005) ("A qualitative retrospective study was launched in the Fall of 2004. Subjects were recruited from word of mouth and from postings on the Internet. A message was posted on over 100 Internet message boards inviting people to respond if they believed that as a child they were turned against one parent by the other parent"). The article contains no discussion of self-selection or limitations. Readers are encouraged to have these two books on their shelves as a means to access standards for qualitative research. *See* JOHN W. CRESWELL & J. DAVID CRESWELL, RESEARCH DESIGN: QUALITATIVE, QUANTITATIVE, AND MIXED METHODS APPROACHES (2017); JOHN W. CRESWELL & CHERYL N. POTH, QUALITATIVE INQUIRY AND RESEARCH DESIGN: CHOOSING AMONG FIVE APPROACHES (2017).

23 *See In re* Marriage of Blake, No. A115669, 2007 WL 1154057 (Cal. Ct. App. Apr. 19, 2007) (evidence of an induced syndrome in children required expert testimony); Coleman v. Coleman, No. FA020174562, 2004 WL 1966083 (Conn. Super. Ct. Aug. 5, 2004), *aff'd sub nom.* Jillian C. v. William C., 899 A.2d 71 (Conn. App. Ct. 2006) (father did not call as a witness any expert to testify to the validity of PAS, and custody was determined on the basis of observable conduct).

ing this time-consuming and complex challenge take place at the start of a trial when the expert is sitting there ready and waiting to go. The prejudice of having the evidentiary challenge come initially at trial could be compounded by judicial inclination to let the expert be of some use since he or she is already there, and by a judicial urge to avoid having the cost of the expert's attendance be rendered useless to the targeted parent.

If an expert presents in testimony that the parental alienation is a "relational issue" or otherwise focuses on the favored parent's conduct and not PAS, analyze whether the expert's statements have become dizzyingly circular or even incoherent. If an expert is necessary, it is because the information he or she has to convey is beyond the common knowledge. If it is beyond the common knowledge, it can only be so because what is being proffered is a *specific cause and effect* relationship between A and B that is not apparent to the ordinary person. The lack of a clear cause and effect, so the argument is made, requires an expert to "bridge" the gap. A judge can make custody determinations based on that observable (or unobservable) parental conduct without expert testimony. Yet there enters the expert, whose testimony is that the court needs an expert (him or her) to understand how the observable conduct is the cause of the manifestations in the child who can only be saved by removal and isolation (in some form). If the expert's testimony results in the situation that something is fitting only one set of facts (the "targeted parent" was violent, abusive, or engaged in rigid and authoritarian behaviors toward a parent or child but that is *not* relevant), then you will need to expose the expert's circular and selective arguments. The expert's *only role*, then, is to link Gardner's eight manifestations[24] (or variations on that now in vogue) to the favored parent and create that "bridge" which establishes *that cause and effect.*

Challenging talented and verbally agile experts can be daunting. Do not be intimidated: when expert rhetoric begins to affect the judge, focus on the essentials of what the proponent needs to prove as foundation and admissibility (no ipse dixit). Be flexible: recognize the theory's critical cause and effect (A-B) relationship and recognize when the label for that relationship con-

---

24 *See* Faller, *supra* note 16.

tinues to shift to avoid ongoing controversy. Disregard the PAS expert's tendency to garrulousness in testimony: one-sentence run-on paragraphs deliberately loaded with scientific-sounding jargon, unsubstantiated propositions, convenient soundbites or introduction of buzz phrases, and non-responsive "noise" are designed to deflect attention from the gaping holes in research and absence of substance. Letting the PAS expert ramble down extraneous and deflecting pathways in the guise of "getting to" a responsive statement is highly prejudicial to a judge's understanding. Study the interplay of the laws regarding admissibility of this kind of expert testimony in the relevant jurisdiction. Educate the court before trial on why PAS theory is unreliable and, thus, inadmissible. Draw the court's attention to the basic premise that much of the case law already shows: it does not take an expert to understand that a parent's interference in the relationship between a child and the child's other parent is contrary to the child's interests or, at its extreme, evidence of parental unfitness.

IV. The Details of Nomenclature: What Is Parental Alienation?

A. *Defining Parental Alienation Syndrome in Litigation*

In his 1987 self-published book, *The Parental Alienation Syndrome and the Differentiation Between Fabricated and Genuine Child Sex Abuse*, Richard Gardner defines "the parental alienation syndrome" as a disorder and disturbance arising primarily *in children*[25] in situations of custody litigation. A child

---

[25] Richard Gardner, The Parental Alienation Syndrome and the Differentiation Between Fabricated and Genuine Child Sex Abuse 67 (1987). That the alleged disorder arises in children is a critical distinction. The *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (American Psychiatric Association, 2013) (the "DSM-5") defines "syndrome" as "[a] grouping of signs and symptoms, based on their frequent co-occurrence that may suggest a common underlying pathogenesis, course, familial pattern, or treatment selection." DSM-5, at 830. This definition is unchanged from that contained in the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition* (American Psychiatric Association, 1994) ("DSM-4"). DSM-4, at 771. This illustrates the nature of the eight manifestations in a child (the disorder) as being caused by a favored parent's programming (the etiology and cause). *See* J.F. v. D.F., 61 Misc.3d 1226(A) (N.Y. Sup. Ct. 2018) (the subject of Dr. Baker's

suffering this alleged disorder[26] is "brainwashed" through conscious and unconscious programming by a "favored" parent, to engage, to the point of preoccupation, in an unjust "campaign" of denigration of the other, "targeted" parent, while idolizing the favored parent.[27] Gardner eventually identified specific "typical" manifestations of PAS in a child which have morphed into a list of the eight manifestations in the child, namely: a campaign of denigration; weak, frivolous and absurd reasons for the denigration; a lack of ambivalence toward both parents; the "independent thinker" phenomenon; a lack of guilt over poor treatment of the rejected parent; reflexive support for the favored parent; use of "borrowed scenarios"; and animosity toward the rejected parent' friends and family.[28]

Gardner's PAS manifestations were based solely on anecdotal evidence obtained by him through his personal observations as a child psychiatrist and adult psychoanalyst. His 1987 book, in which he is identified as "one of the leading innovators in the field,"[29] does not contain any citation to a single research study

---

theory *originates in the children*") (emphasis in original); K.T. v. H.T., No. 454 WDA 2015, 2015 WL 6395449 (Pa. Super. Ct. Oct. 19, 2015) (the expert testified that the child's behaviors are consistent with behaviors exhibited by a child suffering from PA).

26 Despite intense lobbying efforts by PAS theory proponents, the American Psychiatric Association declined to accept the concept of PAS as a disorder, which it defines as manifesting *in the individual*, for inclusion in the DSM-5. For a review of efforts to use the DSM as a tool in custody cases, see Normand Carrey, *Coasting to DSM-5-Parental Alienation Syndrome and Child Psychiatric Syndromes: We Are What and Who We Define*, 20 J. CAN. ACAD. CHILD & ADOLESC. PSYCHIATRY 163 (2011); Timothy M. Houchin, et al., *The Parental Alienation Debate Belongs in the Courtroom, not in DSM-5,* 40 J. AM. ACAD. PSYCHIATRY & L. ONLINE 127 (2012); Brianna M. Pepiton, et al. *Is Parental Alienation Disorder a Valid Concept? Not According to Scientific Evidence. A Review of Parental Alienation, DSM-5 and ICD-11 by William Bernet*, 21 J. CHILD SEXUAL ABUSE 244 (2012).

27 GARDNER, *supra* note 25, at 67-70.

28 For a current review of these factors and new variations, see A. Siracusano, et al., *Parental Alienation Syndrome or Alienating Parental Relational Behaviour Disorder: A Critical Overview*, 21 J. PSYCHOPATHOLOGY 231, 232 (2015) ("The independent thinker phenomena: the child claims to be independent in making decisions and judgments about the alienated parent, rejecting accusations of being a weak and passive person.").

29 This is not intended to be a criticism of a professional's positive self-identification. Rather, it is a cautionary note that characterization of a profes-

or literature supporting the existence of any disorder. He makes factual and statistical claims that are without foundation, and broad, unsupported statements about indicators of PAS and child sexual abuse.[30] His single most cited source is himself. Though he is not a legal practitioner, he recommends that in custody actions courts take into consideration the psychological impact of a custody order *on a parent*, a recommendation that flies in the face of every state's focus on the *child's* best interests.[31] He predicts that this change in standards would significantly reduce custody litigation.[32]

From Gardner's 1987 notion of PAS theory comes the critical relationship of cause and effect. PAS encapsulates a theory that the occurrence of certain "typical" manifestations in a child has the common cause of a favored parent's conscious or unconscious "brainwashing." These are its integral components, and the manifestations in the child are the primary symptom of the theory.[33] It is a disorder that excludes other factors that might impact the parent-child relationship, and attributes responsibility

---

sional as a "leading" expert or "world renowned" expert does not grant reliability to the expert's underlying theory or testimony. This kind of labeling plagues the world of PAS experts and grants an unwarranted legitimacy to the theory. If the legal practitioner is not careful to limit these characterizations to ones that are reasonably legitimate, the risk of repeated such characterizations giving a sense of reliability where there is none, and resulting prejudice, is increased. The reliability of a theory must stand on its own and not depend upon characterizations.

30 For example, in his 1987 book Gardner claims that 90% of children in custody conflicts show manifestations of PAS, among many other claims. *See* Faller, *supra* note 16.

31 GARDNER, *supra* note 25, at 265-266.

32 His prediction has not been borne out: child custody litigation has increased, and become more intense, assisted, in part, by PAS experts. *See, e.g.,* M.S. v. R.D, No. G049068, 2015 WL 5697777 (Cal. Ct. App. Sept. 29, 2015) ("[t]he trial court described this 'epic and toxic custody battle' as 'litigation on steroids."). Judges face situations where valuable court time is spent refereeing arguments over "hair styles, brushing teeth, applying ointments, watching television" and other points of dispute that should never hit a court docket. *See J.F.*, 61 Misc.3d 1226(A). Perpetuating custody litigation is not in children's best interests. *See, e.g.,* Matthew P. v. Gail S., 354 P.3d 1044 (Alaska 2015); *In re* Lee, 411 S.W.3d 445 (Tex. 2013).

33 William Bernet et al., *Parental Alienation, DSM-5, and ICD-11*, Draft Report for Submission to the DSM5 Task Force Disorders of Child and Adolescence Work Group, at 12 (Jan. 15, 2010).

exclusively to the favored parent. *This* is the underlying structure of the theory: a *backwards-looking* theory of cause and effect (i.e. when you see the effect, you can look backwards and infer the cause) that has not changed over the more than thirty years since Gardner's 1987 book was first published.[34]

Since 1992, Amy J.L. Baker, Ph.D., has added to Gardner's theory her own hypotheses in an attempt to identify a "favored" parent's specific programming strategies which result in Gardner's eight manifestations in a child. These seventeen "strategies of an alienating parent"[35] together with the eight manifestations comprise two of the five "factors" in Baker's so-called "5-Factor Model."[36] This combination of the eight manifestations and seventeen strategies (*these* behaviors in a child that have been caused by a "favored" parent's use of *those* strategies) constitute what is now considered PAS theory.

---

[34] This "backwards-looking" aspect of the A-B-C nature of PAS theory, where one draws backwards from B the inference for A, was surprisingly illuminated by one confident expert's recent remarkable trial testimony that she "believe[s] that the children's feelings and love for their father have been undermined and destroyed. *I don't see any evidence* . . . I have to be able to reason backwards." *J.F.*, 61 Misc.3d at *24 n.52 (emphasis added). That court, in detailed discussion of this and other expert testimony in the case, properly rejected that premise on the basis that a court must do the opposite and "examin[e] evidence and reaso[n] forward." *Id.*

[35] After collection of 1,300 examples of alienating parental conduct, Baker categorized them to develop a list of seventeen strategies that favored parents used to program their children to reject the other parent. These strategies are: bad-mouthing the other parent; telling the child the other parent does not love them; creating in the child the impression that the other parent is dangerous; limiting the child's contact with the other parent; interfering in the child's communications with the other parent; interfering with the symbolic communications of the other parent; withholding love and approval to promote rejection of the other parent; allowing or forcing the child to choose between parents; confiding in the child; forcing the child to reject the other parent; asking the child to spy on the other parent; asking the child to keep secrets from the other parent; referring to the other parent by his or her first name to the child; referring to a stepparent as "mom" or "dad"; withholding medical, social or academic information from the other parent; changing the children's name to remove association with the other parent; and undermining the other parent's authority.

[36] The remaining factors are a "favored" parent's intentional misrepresentations to professionals about the "targeted" parent; a prior close relationship between the child and the "targeted" parent; and an absence of abuse or neglect by the "targeted" parent.

Determinations of reliability and admissibility require that legal professionals and judges first clearly understand what evidence is being offered, because one needs to know *what* is being evaluated before *that* thing can be evaluated for admissibility. In instances of PAS theory, it is crucial that lawyers ensure that judges understand that what is being offered is not *conduct* (i.e. "mere" parental alienation which does not require expert testimony), but a theory of *cause and effect*.[37] This is especially so when PAS theory is being subtly introduced under different labels such as Parental Alienation Disorder. Gardner's PAS theory, as it has been built upon with Baker's seventeen strategies and regardless of the label, should be discernible by its structure in the expert's testimony. Once it is identified, it is reasonably easy to follow its path through expert-imposed modifications in nomenclature and incorporation into larger constructs, and a court can then clearly understand that what is being presented is PAS ipse dixit argument and evaluate its admissibility from there.

B. *A Rose by Any Other Name Is Still a Rose: Walking Along the Garden Path of Labels*

By 1992, Gardner's theory had evolved. In his self-published book, *The Parental Alienation Syndrome*, he added concepts of mild, moderate, and severe forms of PAS.[38] By this time, too, his theory was beginning to spread through courts, and litigants and judges began to be confused about exactly what was meant by "parental alienation." In his dissenting opinion in *Cloutier v. Bowers*,[39] Justice Dooley raised a large flag of caution in knowing how parental alienation was being defined.[40]

For example, in *Jennifer H. v. Paul H.*,[41] an expert testified regarding "parental alienation," without use of the word "syndrome." However, the expert referenced "brainwashing" (the "B") and "a conscious or unconscious attempt to alienate a child from a parent" (the "A") which are highly indicative that PAS, and not "mere" alienation, was the theory being applied. Simi-

---

37 *See supra* note 24.

38 RICHARD GARDNER, THE PARENTAL ALIENATION SYNDROME (1992).

39 783 A.2d 961 (Vt. 2001).

40 *See also* Addison v. Addison, 463 S.W.3d 755 (Ky. 2015); England v. England, 223 So. 3d 582 (La. 2017).

41 800 N.Y.S.2d 348 (Fam. Ct., Suffolk Cnty., N.Y. 2004).

larly, in the matter of *In Re Marriage of Daniel*,[42] stated allegations were of "mere" parental alienation but use of the term "brainwashing" strongly suggests that PAS theory was being applied.

In *P.M. v. S.M.*,[43] again PAS theory was introduced under the benign term "parental alienation." PAS can be identified as the theory in that case through use of "buzz" words such as "programming" and "campaign of denigration" and reference to "the child's own contributions that dovetail and compliment the contributions of the programming parent" (a concept which comes directly from Gardner)[44] to describe what was occurring.[45] In *Walsh v. Walsh*,[46] the confusion is apparent, with PAS being identified as being "most often referred to as parental alienation," and also as Gardner's PAS theory.

The above decisions and others like them illustrate the serious consequences of not recognizing that PAS and its construct of a presumed causal chain are being introduced without challenge. In these decisions, litigants involved did not challenge the theory's admissibility, resulting in PAS being granted an aura of acceptance in the complete absence of actual evaluation from an evidentiary standpoint.[47] Other cases indicate the same: that failure to recognize and challenge the theory, its reliability, and expert qualifications to testify about it has led to it being slipped into the records of American jurisprudence without proper eval-

---

42 No. B174755, 2005 WL 1515414 (Cal. Ct. App. June 28, 2005).

43 851 N.Y.S.2d 71 (Nassau Cnty. Super. Ct. N.Y. 2007).

44 GARDNER, *supra* note 25, at 67-68, 75-76, 89-90.

45 851 N.Y.S.2d 71.

46 No. FBTFA094027973, 2011 WL 8199263 (Conn. Super. Ct. Dec. 23, 2011).

47 In *Walsh v. Walsh*, 2011 WL 8199263 *2, the court noted that PAS theory was not generally accepted and was not found in mental health diagnostic manuals, including the DSM-4. *See also Detention of New*, 992 N.E.2d at 530 (holding that evidentiary standards regarding admissibility of expert testimony are "meant to exclude methods new to science that undeservedly create a perception of certainty when the basis for the evidence or opinion is actually invalid. It is not the purview of the courts to exclude entire fields of study from the general acceptance test because those sciences are "softer," while allowing experts in those fields to present opinions that create a perception of scientific certainty. Creating these exceptions opens the justice system to abuse.").

uation of admissibility.[48] Compounding this failure is the occasional trier of fact applying PAS theory without it being offered into evidence and without litigants apparently understanding that their right to challenge admissibility was effectively being waived.[49]

In 2012, the Connecticut Superior Court rendered its decision in the matter of *Mastrangelo v. Mastrangelo*.[50] The favored parent challenged the reliability of PAS theory. Dr. Baker provided expert testimony in favor of admissibility,[51] and Benjamin D. Garber, Ph.D., provided expert testimony against admissibility. As part of her expert testimony, Baker defined "syndrome"

---

48 *See, e.g.,* Grabowski v. Grabowski, No. FA104053233S, 2013 WL 593920 (Conn. Super. Ct. Jan. 23, 2013); Balaska v. Balaska, 25 A.3d 680 (Conn. App. Ct. 2011) (trial judge conducted her own significant research regarding PAS and considered evidence of the theory not offered by either party); Dean v. Valinho, No. FA044012513, 2011 WL 8204118 *11-*17 (Conn. Super. Ct. July 6, 2011) (finding that the Family Bridges program recommended by the expert as a PAS remedy had never been subjected to peer review and the only study of the program was one it had done itself, referencing an article describing the program as "extreme and intensive intervention," and concluding that a psychologist recommending it might be violating a duty to do no harm); Chatman v. Palmer, 761 S.E. 2d 616 (Ga. Ct. App. 2014) (expert testimony of a diagnosis of PAS); *In re* Marriage of Stegeman, No. 4–15–0396, 2015 WL 5883130 (Ill. App. Ct. Oct. 6, 2015) (child suffered from "mind-made-up syndrome" caused by PAS); Pollack v. Pollack, No. A-5037-09T3, 2011 WL 589593 (N.J. Super. Ct. App. Div. Feb. 22, 2011) (noting that a non-clinician expert opined a PAS diagnosis without meeting the child); S.B. v. S.S., 201 A.3d 774 (Pa. 2018) (mother appealed imposition of isolation remedy and delegation of decision-making authority to controversial program); Matter of Marriage v. Riley, 200 Wash. App. 1026 (Wash. Ct. App. 2017) (isolation remedy imposed with the children ordered to attend Family Bridges and the father's visitation set to resume only based on his and the children's cooperation with the program and the "aftercare professional"); Finster v. Finster, 670 N.W.2d 557 (Wis. 2003) (court finding that mother engaged in PAS reflects issues addressed in earlier proceedings).

49 *See Balaska*, 25 A.3d at 687 (noting that the trial judge applied her own research regarding PAS theory where neither party sought to introduce it).

50 *Mastrangelo*, 2012 WL 6901161.

51 The parties in *Mastrangelo* had stipulated that Dr. Baker would be permitted to testify as to alienating strategies that might cause contact resistance (i.e. conduct, and not cause and effect). Because it was admitted by stipulation, issues of whether the information was beyond the common knowledge and helpful – specific hurdles of admissibility – were not examined. Baker was not permitted to testify regarding PAS theory. *Id.*

as "a collection of systems or behaviors that have a common etiology and represent a distinct psychological experience that exists *within a child*."[52] She further defined PAS as a term used to describe children who exhibit Dr. Gardner's eight manifestations and unjustifiably reject a parent as a result of the other parent's alienating "strategies."[53]

Dr. Garber testified regarding the lack of reliable basis for PAS theory, including the theory's lack of falsifiability; difficulties in determining an error rate for testing the theory; the attribution of unilateral blame on one parent; and lack of general acceptance.[54] After noting the "overwhelming legal and scientific precedents and objections to the scientific validity" of PAS theory, the *Mastrangelo* court found that because the allegations at bar related to the so-called favored parent *and* the children, and not only the children, the theory did not meet the relevant standards for admissibility.[55]

C. *Introducing PAS Theory as Mere "Alienation" or "Parental Alienation"*

The *Mastrangelo* decision and the American Psychiatric Association's decision not to include PAS theory as a diagnosis in the DSM-5 stand as pivotal events in the controversial existence of PAS theory. With both the *Mastrangelo* court and the APA clarifying that PAS, by whatever name, is focused on symptoms *in the child* and relates to a theory lacking in reliability and diag-

---

52 This is an important definitional clause. The specification that PAS is something that arises *in the child* is consistent with the DSM definition of "syndrome" and indicates a common underlying cause for children's manifestation of behaviors described by Dr. Gardner. It is also consistent with Dr. Garber's testimony in *Mastrangelo* that use of the word "syndrome" signifies the presence of illness within *the child*, and not in the family dynamics, and likewise confirms the A-B-C cause and effect structure postulated under PAS theory. *See Mastrangelo*, 2012 WL 6901161 at 7 ("As both Dr. Baker and Dr. Garber testified, 'parental alienation' focuses on the aligned parent, rejected parent and child or children's behavior, while 'parental alienation syndrome' focuses solely on the child, or children's, behavior.").

53 This is consistent with the "reason backwards to A" pattern of A-B-C. *See supra* text at note 5.

54 For a review by Dr. Garber with alternative conceptual frameworks and paradigms, see Benjamin D. Garber, *The Chameleon Child: Children as Actors in the High Conflict Divorce Drama*, 11 J. CHILD CUSTODY 25 (2014).

55 *See Mastrangelo*, 2012 WL 6901161 at *9.

nostic criteria, Baker and others have quietly and seemingly consciously dropped the word "syndrome" from their writings and opinions. They have distanced themselves from it. However, abandoning the controversial term did not change the controversial theory. PAS theory proponents began to take advantage of already existing confusion in terminology, and PAS theory began to be passed off as "mere" parental alienation, using the shorthand form "PA."[56] Thus, the confusion continued. Indeed, it worsened with increasing numbers of subsequently litigated child custody cases using the "parental alienation" label in situations where PAS theory was the construct being alleged.[57]

In his Foreword to *Working with Alienated Children and Families: A Clinical Guidebook*, William Bernet, M.D., references "controversies regarding PA," whether "PA" should be a mental health diagnosis, whether "PA" actually exists, and

---

56 *See* Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, 35 FAM. L.Q. 527, 550 (2001) ("PAS as developed and purveyed by Richard Gardner has neither a logical nor a scientific basis. It is rejected by responsible social scientists and lacks solid grounding in psychological theory or research. PA, although more refined in its understanding of child-parent difficulties, entails intrusive, coercive, unsubstantiated remedies of its own."). Another author referred to the change this way: "As a template for this argument, Parental Alienation Syndrome (PAS or now PA since the S was lost in a recent divorce) provides a means for exploring these issues." Dana E. Prescott, *Forensic Experts and Family Courts: Science or Privilege-by-License*, 28 J. AM. ACAD. MATRIM. LAW. 701, 706 (2015).

57 *See, e.g.,* Cowart v. Burnham, 204 So.3d 880 (Ala. 2015); Broadway v. Broadway, 184 So.3d 376 (Ala, 2013) (using descriptive terms consistent with PAS theory); *In re:* Marriage of A.S. & C.A., No. G052341, 2017 WL 1506755 (Cal. Ct. App. Apr. 27, 2017); *In re* M.M., No. B259253, 2015 WL 8770107 (Cal. Ct. App. Dec. 14, 2015); Kramer v. Kramer, 22 N.Y.S.3d 137 (N.Y. Super. Ct. 2015); Mary E. v. Usher E., 967 N.Y.S.2d 868 (N.Y. Super. Ct. 2013) (applying theory with Dr. Gardner's eight manifestations and remarking on expert testimony that the subject child "meets the *diagnostic* criteria for a dynamic of severe alienation") (emphasis added); V.P.V. v. S.V., No. 629 WDA 2017, 2017 WL 5054301 (Pa. Super. Ct. Nov. 3, 2017); *K.T.*, 2015 WL 6395449 (Douglas Darnell, Ph.D., testifying that the subject child's behaviors were consistent with behaviors exhibited by a child experiencing "parental alienation"); M.B. v. M.K., No. 657 WDA 2013, 2013 WL 11251544 (Pa. Super. Ct. Nov. 13, 2013); Duke v. Duke, No. M2013-00624-COA-R3CV, 2014 WL 4966902 (Tenn. Ct. App. Oct. 3, 2014); Matter of Marriage of Koenig, No. 14-16-00319-CV, 2017 WL 2704081 (Tex. App. June 22, 2017) (a good example of the A-B-C of PAS theory being disguised as mere parental alienation).

whether "PA" was invented to protect abusers.[58] In this post-*Mastrangelo*, post-DSM-5 landscape, he stays away from the word "syndrome," although based on his own description, PAS theory is what he is referencing.

Baker acknowledges that in the past she has used the term "parental alienation" to refer to Gardner's eight behavioral manifestations in a child, and that these behaviors under PAS theory signify conduct on the part of an alienating parent.[59] Though she has previously used the word "syndrome" in connection with the eight manifestations and seventeen programming strategies, she suggests that using that word had not been her "choice," instead attributing that word choice to her publisher, and says that she has stopped using it since the *Mastrangelo* decision was issued because the term is "not necessary."[60] She acknowledges that use of the term created a "lightning rod of controversy" that impacted her use. However, leaving the word behind did not change her understanding of the concept she intended to convey or the cause and effect relationship that it entails: even under the title of PA, she intends it to refer to a syndrome that is induced in a child by third parties – a "shorthand for describing what's going on."[61] By this, Baker knowingly leaves behind a key but controversial theory term without changing the import behind it. As she uses it, the title, but not the substance, is what has changed.

Another "expert" is more direct. This expert openly acknowledges that she has stopped using the word "syndrome" be-

---

58 WORKING WITH ALIENATED CHILDREN AND FAMILIES: A CLINICAL GUIDEBOOK vii-ix (Amy J.L. Baker & S. Richard Sauber 2012).

59 *See Ellis*, No. 15D-0119-DR, hearing on Defendant's Motion *in Limine* challenging admissibility of PAS theory, May 2, 2018. Transcript in the author's possession.

60 *See id.*; Sloane v. Sloane, FST-FA-07-4010840-S, Connecticut Superior Court, J.D. of Stamford/Norwalk (Aug. 10, 2017), deposition of Amy J.L. Baker, Ph.D. Transcripts in the author's possession.

61 Dr. Baker walks a careful testimonial line. She has testified that *Mastrangelo* has not changed her understanding of what alienation is, and that it only changed whether she used the word "syndrome." What she now refers to as PA is what she previously referred to as PAS. *See Sloane*, Connecticut Superior Court, J.D. of Stamford/Norwalk, deposition of Amy J.L. Baker, Ph.D. However, she has also testified that she doesn't use the terms interchangeably. *See Ellis*, No. 15D-0119-DR, hearing on Defendant's Motion *In Limine*. She has also testified to separate and distinct definitions for PAS and PA. *See, e.g., Mastrangelo*, 2012 WL 6901161. Transcripts in the author's possession.

cause "it's controversial." Omitting the word "softens the effect" and avoids "raising hackles" among legal professionals and judges. She instructs others to also avoid using the word due to its controversy. She admits that she has one curriculum vitae in which she identifies herself as a PAS expert, and a separate one in which she identifies herself as a "family therapist expert" because if the "other side" sees the word "alienation," then "forget it."[62] She needs to have the controversy fall away without changing what it is that she is referencing because in the absence of PAS theory, "courts mostly get it wrong."[63]

V. Passing Muster: Evidentiary Standards for Admissibility

PAS has for years been proffered as a theory explaining contact resistance.[64] In some instances, the theory has been challenged.[65] In other instances, the theory was challenged but the

---

62 *See* FIT TV Show (Mar. 2013), *Linda Gottleib (sic) with Host Chris Dimaggio Discussing Parental Alienation*, https://www.youtube.com/watch?v=gPLG6buipsg; Linda Gottlieb, *PAS Workshop2*, https://www.youtube.com/watch?v=iBbL8FIV830 (Aug. 26, 2019).

63 *See Ellis*, No. 15D-0119-DR (Sept. 27, 2017), deposition of Linda Gottlieb. Transcript in the author's possession.

64 For a conceptualizing of this resistance which does not require negative labels or blame/shame language, see Benjamin D. Garber, *Conceptualizing Visitation Resistance and Refusal in the Context of Parental Conflict, Separation, and Divorce*, 45 FAM. CT. REV. 588 (2007).

65 *See, e.g.,* C.J.L. v. M.W.B., 879 S.2d 1169 (Ala. 2003) (finding that PAS theory is not generally accepted); Bolat v. Bolat, No. FA104042065S, 2014 WL 4099355 (Conn. Super. Ct. July 15, 2014); *Mastrangelo*, 2012 WL 6901161 (PAS focuses solely on the child and expert testimony is inadmissible when the allegation are as to the parent *and* child and so was irrelevant and inadmissible); Beam v. Beam, 310 P.3d 1047 (Hawaii 2010); *In re* Marriage of Townsend, No. 0-351, 2000 WL 1027811 (Iowa Ct. App. July 26, 2000) (upholding the exclusion of PAS theory); Palazzolo v. Mire, 10 So.3d 748 (La. 2009) (expert did not base her recommendation on PAS but in the specific facts of the case so the theory was not relevant); M.A. v. A.I., No. A-4021-11T1, 2014 WL 7010813 (N.J. Super. Ct. App. Div. Dec. 15, 2014) (holding that PAS was not admissible where it was not recognized as a disorder in the DSM-5, and its scientific reliability and general acceptance were not established); Suzanne Q.Q. v. Ben R.R., 75 N.Y.S.3d 697 (N.Y. Sup. Ct. 2018) (trial court determined that it did not need an expert to understand whether the mother's conduct was alienation); People v. Fortin, 706 N.Y.S.2d 611 (Nassau Cnty., N.Y. 2000) (noting that Gardner

challenge was side-stepped through judicial dispositions on other grounds.[66] In still further instances, there was a failure to timely challenge the theory, resulting in the right to challenge on appeal being lost.[67] Sadly, there are instances where the theory could have been challenged but it was not,[68] and in some of those instances, the failure of challenge gave rise to what could be significant harm.[69] Unfortunately, as this article discusses, there have been cases where PAS seems to have been misunderstood as

---

published all but one of his own books, and determining that PAS theory is not admissible under *Frye* because it is not generally accepted).

66 *See*, e.g., Goetsch v. Goetsch, 990 So.2d 403 (Ala/ 2008) (noting that the custody determination was made on the basis of parental fitness and not alienation); *In re* Marriage of Bates, 819 N.E.2d 714 (Ill. 2004) (trial court disclaimed any reliance on PAS theory); *Coleman*, 2004 WL 1966083 (noting that Connecticut had not yet passed on the question of the validity of a "syndrome" and made the determination based on conduct); Ruggerio v. Ruggerio, 819 A.2d 814 (Conn. App. Ct. 2003) (distinguishing a claim of PA from PAS and making factual findings relative to alienation as a result of observable conduct and not a syndrome); Idelle C. v. Ovando C., No. B146948, 2002 WL 1764181 (Cal. Ct. App. July 31, 2002) (judge noted he didn't know if PAS "even exists" and made his determination on the issue of parental conduct); *In re* Spenceley, No. 219801, 2000 WL 33519710 (Mich. Ct. App. Apr. 7, 2000) (finding that the trial court did not rest its decision on PAS, so it was not an issue on appeal).

67 *See, e.g.,* Grove v. Grove, 86 S,W,3d 603 (Ark. Ct. App. 2011); *In re:* Marriage of Rubin, No. B282793, 2018 WL 2731627 (Cal. Ct. App. June 7, 2018); *Marriage of A.S. & C.A.,* 2017 WL 1506755; *Montoya*, 66 N.Y.S.3d 350; Geary v. Geary, 27 N.E.3d 877 (Ohio 2015); J.F.D. v. M.A.D., No. 3200 EDA 2017, 2018 WL 3045140 (Pa. Super. Ct. June 13, 2018); Townsend v. Vasquez, 569 S.W.3d 796 (Tex. 2018).

68 *See, e.g.,* Dean v. Valinho, No. FA044012513, 2011 WL 8204118 (Conn. Super. Ct. July 6, 2011) (Family Bridges was recommended by Richard Warshak, the expert witness); Chatman v. Palmer, 761 S.E.2d 616 (Ga. Ct. App. 2014); *In re* Marriage of Stegeman, No. 4-15-0396, 2015 WL 5883130 (Ill. App. Ct. Oct. 6, 2015); Wiley v. Wiley, No. 52,800-CV, 2019 WL 2202563 (La. Ct. App. May 22, 2019); Messner v. Hadju-Nemeth, No. A-5607-16T1, 2019 WL 692149 (N.J. Super. Ct. App. Div. Feb. 20, 2019); Pollock v. Pollock, No. A-5037-09T3, 2011 WL 589593 (N.J. Super. Ct. App. Div. Feb. 22, 2011); Habo v. Khattab, No. 2012–P–0117, 2013 WL 6869804 (Ohio Ct. App. Dec. 31, 2013); Curie v. Curie, No. 2006-A-0028, 2006 WL 3350734 (Ohio Ct. App. Nov. 17, 2006).

69 *See, e.g.,* S.B. v. S.S., 201 A.3d 774 (Pa. 2018) (imposition of isolation and the Family Bridges program); Matter of Marriage of Riley, No. 75259–6–I, 2017 WL 3600564 (Wash. Ct. App. Aug. 21, 2017) (requiring transfer and isolation of the children and that the children and father attend the Family Bridges program).

"mere" parental alienation and admitted in that disguise without challenge.[70] That there are so many of these cases, and that PAS proponents point to them as evidence of general acceptance or reliability, supports the contention that great care must be taken to recognize PAS theory in child custody cases.

The purpose of expert testimony is to help find the truth, and a judge stands as the ultimate gatekeeper in ensuring that admitted evidence has appropriate indicia of truth. While an expert might be able to "understand and interpret complex human behavior, it does not necessarily follow that [he or she] can offer . . . conclusions in court under the guise of expert testimony when those views lack any scientific foundation."[71] Deliberately presenting a scientific theory with the controversial heart of it

---

[70] *See, e.g.*, Cowart v. Burnham, 204 So.3d 880 (Ala. 2015); Broadway v. Broadway, 184 So.3d 376 (Ala. 2013); Evans v. McKinney, 440 S.W.3d 357 (Ark. Ct. App. 2014); *Marriage of A.S. & C.A*., 2017 WL 1506755; *In re* M.M., No. B259253, 2015 WL 8770107 (Cal. Ct. App. Dec. 14, 2015); *In re* Marriage of Daniel, No. B174755, 2005 WL 1515414 (Cal. Ct. App. June 28, 2005); Walsh v. Walsh, No. FBTFA094027973, 2011 WL 8199263 (Conn. Super. Ct. Dec. 23, 2011); Hilkirk v. Johnson, 183 So.3d 731 (La. 2015); Hendren v. Lee, Mass. Probate & Fam. Ct., No. MI05-1313-DV1; Krieger v. Kreiger, No. 210139, 1999 WL 33453292 (Mich. Ct. App. Mar. 26, 1999); Breitenfeldt v. Nickles-Breitenfeldt, No. C3-02-1569, 2003 WL 1908070 (Minn. Ct. App. Apr. 22, 2003); C.S. v. A.L., 58 N.Y.S.3d 873 (Bronx Cnty. N.Y. Fam. Ct. 2017); Montoya v. Davis, 66 N.Y.S.3d 350 (N.Y. App. Div. 2017); Kramer v. Kramer, 22 N.Y.S.3d 137; *Mary E.*, 967 N.Y.S.2d 868; Herbert L. v. Maria L., 934 N.Y.S.2d 34 (N.Y. Sup. Ct. 2011); McMahan v. McMahan, 32 Misc.3d 1024(A) (N.Y. Sup. Ct. 2011); P.M. v. S.M., 851 N.Y.S.2d 71 (N.Y. Sup. Ct. 2007); F.S.-P. v. A.H.R., 844 N.Y.S.2d 644 (Nassau Cnty. N.Y. Fam. Ct. 2007); Jennifer H. v. Paul F., 800 N.Y.S.2d 348 (Suffolk Cnty. N.Y. Fam. Ct. 2004); Rooney v. Rooney, No. 2009CA00256., 2010 WL 2186026 (Ohio Ct. App. June 1, 2010); *In re* T.M., 831 N.E.2d 526 (Ohio Ct. App. 2005); V.P.V. v. S.V., No. 629 WDA 2017, 2017 WL 5054301 (Pa. Super. Ct. Nov. 3, 2017); A.D.H. v. M.H., No. 2458 EDA 2016, 2017 WL 943255 (Pa. Super. Ct. Mar. 9, 2017); *K.T.*., 2015 WL 6395449; M.B. v. M.K., No. 657 WDA 2013, 2013 WL 11251544 (Pa. Super. Ct. Nov. 13, 2013); McLain v. McLain, 539 S.W.3d 170 (Tenn. Ct. App. 2017); Duke v. Duke, No. M2013-00624-COA-R3CV, 2014 WL 4966902 (Tenn. Ct. App. Oct. 3, 2014); Cone v. Cone, No. M200802303COAR3CV, 2010 WL 1730129 (Tenn. Ct. App. Apr. 29, 2010); *Marriage of Koenig*, 2017 WL 2704081; Knutsen v. Cegalis, 137 A.3d 734 (Vt. 2016); Rhodes v. Harrisonburg Rockingham Soc. Servs. Dist., No. 2221-14-3, 2015 WL 6690098 (Va. Ct. App. Nov. 3, 2015).

[71] *See*, *e.g.*, Snyder v. Cedar, No. NNHCV010454296, 2006 WL 539130 (Conn. Super. Ct. Feb. 16, 2006); State v. Adams, 161 A.3d 1182, 1195-1196 (R.I. 2017). *See also Grabowski*, 2013 WL 593920; *Balaska*, 25 A.3d 680 (judge

hidden in the nomenclature is the opposite of truth. It cannot be overstated: PAS theory must be vigorous challenged, as was intended by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[72] "Lawyers and judges are trained to ask the hard questions, and that skill should be employed here."[73] Most, though not all, states have either adopted the language of Rule 702 of the Federal Rules of Evidence regarding expert testimony,[74] or incorporated through their case law those standards for admissibility of expert testimony as are set forth in *Frye v. United States*,[75] or *Daubert*, which itself incorporates the language of Rule 702.[76]

A. *From* Frye *to* Daubert*: Standards of Admissibility*

In *Frye v. United States*, the Court of Appeals of the District of Columbia set forth what has become a well-known standard for admissibility of expert testimony:

> Just when a scientific principal or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principal or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.[77]

The "general acceptance" test under *Frye* is not one that requires unanimous endorsement, but merely general acceptance within the relevant scientific community.[78]

Daubert v. Merrell Dow Pharmaceuticals, Inc., departed from *Frye's* austere "general acceptance" standard to incorporate the provisions of Rule 702 of the Federal Rules of Evidence and

---

conducted her own significant research regarding PAS theory to consider information which should have been subject to a *Daubert-Porter* hearing.).

72 509 U.S. 579, 595-96 (1993).

73 *J.F.*, 61 Misc.3d 1226(A).

74 *See, e.g.,* ARIZ. R. EVID. 702.

75 293 F. 1013 (D.C. Cir. 1923).

76 509 U.S. 579 (1993). *See, e.g.,* People v. Kelly, 549 P.2d 1240, 1244 (Cal. 1976); State v. Porter, 698 A.2d 739 (Conn. 1997); Com. v. Lanigan, 641 N.E.2d 1342, 1348-1349 (Mass. 1994).

77 *Frye,* 293 F. 1013.

78 *See, e.g.,* State v. Harris, 12 N.Y.S.3d 762 (N.Y. Sup. Ct. 2015); Zafran v. Zafran, 740 N.Y.S.2d 596 (N.Y. Sup. Ct. 2002).

establish a new standard for admissibility of expert testimony.[79] The *Daubert* Court, in compliance with Rule 702 of the Federal Rules of Civil Procedure, held that "[i]f scientific, technical, or otherwise specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto."[80] Each of these components must be examined separately.

Reliability is a central feature of admissibility. Lack of reliability indicates that the probative value of proposed expert testimony is outweighed by the danger of unfair prejudice. The balance of "weight versus admissibility" was not intended to replace that gatekeeping focus in determining reliability, and the risk of unfair prejudice cannot be remedied by balancing the weight granted to expert testimony. Inadmissible testimony is just that: *inadmissible testimony*. Admissibility is the threshold question. It is only *after* admissibility is determined that defects in the testimony go to its weight.[81]

The first foundational requirement for expert testimony is that the anticipated testimony must convey "scientific, technical or otherwise specialized knowledge."[82] The second foundational requirement is that the anticipated testimony will assist the trier of fact to understand or determine a fact in issue that is beyond the common knowledge.[83] Expert testimony cannot assist a trier of fact unless it is reliable.

To meet the requirement of reliability, the proponent of the expert testimony must show that the reasoning or methodology underlying the expert's testimony is scientifically valid and can be properly applied to the relevant facts. Factors that may be considered are whether the theory or technique can be and has been empirically tested and whether it can be falsified; whether it has been subjected to peer review and publication; the known or

---

79 509 U.S. 579.

80 *Id.* at 588.

81 *Daubert*, 509 U.S. at 594; Kumho Tire Co., Ltd. v. Carmichael, 528 U.S. 137, 137 (1999); State v. White, 676 S.E.2d 684, 686-687 (S.C. 2009); State v. Davidson, 509 S.W.3d 156, 198 (Tenn. 2016).

82 *See, e.g.*, *Daubert*, 509 U.S. at 588-90.

83 *Id*, at 588-89.

potential error rate; and whether the theory or proffered expert opinion has achieved widespread acceptance.[84]

B. *PAS Fails the Tests of Admissibility*

In determining admissibility, it is critical to keep at the forefront the notion of exactly what scientific or technical knowledge a PAS expert intends to impart. Such an expert is not intending to testify simply to favored parental conduct that could have a negative impact on a child and that child's relationship with the targeted parent. Such testimony is within the common knowledge. A judge does not need an expert to understand it.[85] Because it will not assist a judge in understanding the facts, the testimony is inadmissible without even reaching the question of reliability. What a PAS expert seeks to introduce through testimony is the controversial theory of A-B-C with its backwards-looking cause and effect relationship between A and B.[86] This is the gap that must be bridged. This is the crux of the testimony, and it must pass evidentiary standards for admissibility.

1. *A Cautionary Tale About Judicial Acceptance*

Some PAS proponents suggest that PAS theory has "passed" *Frye* and *Daubert* challenges to admissibility. Such suggestions require scrutiny. In *Hendren v. Lee*,[87] a court-appointed special master conducted a *Daubert-Lanigan* hearing on the *qualifications* of Amy J.L. Baker, Ph.D., to give expert testimony on "parental alienation." Based only on Dr. Baker's curriculum vitae and uncontroverted testimony, the special master found that "parental alienation" was "generally accepted" by the "relevant

---

84 *Id*. at 594; *Kumho Tire Co.*, 528 U.S. at 137.

85 *See, e.g.*, People v. Sullivan, Nos. H023715, H025386, 2003 WL 1785921 at 14 (Santa Clara Cty. Sup. Ct. Cal. Apr. 3, 2003).

86 In a *Daubert/Lanigan* hearing which took place in the matter of *Ellis*, No. 15D-0119-DR, Amy J.L. Baker, Ph.D., testified that her testimony would be helpful in that a judge who is not familiar with her "17 strategies" might not see "the pattern" that "these things are all related." Though she deliberately tiptoes around it, the "pattern" she references is the A-B-C theory that is PAS. By suggesting that her focus is her "17 strategies," she suggests that she is not seeking to introduce the cause and effect dynamic that is the A-B-C and the heart of PAS theory, when that is exactly what she is doing. Transcript in the author's possession.

87 No. MI05-1313-DV1.

mental health community."[88] However, the special master's report begs the question: what "parental alienation" was being challenged? PAS? "Mere" parental alienation? The report specifies that clinical studies were not within Dr. Baker's "expertise." It does not appear that PAS theory had undergone any evaluation in this case. Practitioners and judges should distinguish exactly what it was that "passed" a *Daubert* challenge before relying on a prior court's evaluation under *Daubert*.

Other cases illustrate the critical importance of clarifying exactly what "passed" a *Daubert* challenge. In 2012, in the matter of *Mastrangelo v. Mastrangelo*, the court evaluated PAS theory for its admissibility under *Daubert* and *Porter*.[89] However, because PAS focuses only on the child, while the allegations in the case were as to the favored parent *and* the child, the theory didn't pass the initial threshold inquiry of relevance. The court never reached the question of whether PAS theory was admissible under *Daubert* and *Porter*. The only expert testimony offered and considered was testimony that the parties stipulated Dr. Baker could provide testimony regarding parental alienation strategies.[90] Dr. Baker's more recent curriculum vitae asserts that she "passed" the *Porter* hearing in this case. In fact, the *Mastrangelo* court found that PAS theory did *not* meet the relevant standards under *Porter*.

In the matter of *Sloane v. Sloane*, aware that PAS theory was found inadmissible in *Mastrangelo* and aware that she had not passed a *Porter* hearing in *Mastrangelo*, Dr. Baker nevertheless continued to suggest that the theory had "passed" that hearing. In *Sloane*, the court gave Dr. Baker's opinion no weight whatsoever.[91] The *Porter* hearing which had taken place in that matter was related to her qualifications to testify as an expert, and not the admissibility of PAS theory. In the matter of *Ellis v. Lasic*,

---

88 Exactly what "relevant mental health community" had "generally accepted" whatever theory was at issue was not defined. *See Hendren*, No. MI05-1313-DV1, undated Report of Beverly W. Boorstein, Special Master.

89 *Daubert* was incorporated in Connecticut law through the matter of *State v. Porter*, 698 A.2d 739 (1997).

90 As is otherwise described herein, since the *Mastrangelo* case was decided Dr. Baker has attempted to shift focus from the child-centered issue in PAS theory to the favored parent's conduct. By this, the true nature of what is being proffered is obscured.

91 *Sloane*, Connecticut Superior Court, J.D. of Stamford/Norwalk.

Dr. Baker provided a curriculum vitae in which she referenced having passed *Daubert* challenges in *Hendren v. Lee* and *Sloane*, without noting that those challenges related to her expert qualifications and not PAS.[92] In *Ellis*, Dr. Baker asserted that she passed a *Porter* hearing in *Mastrangelo*, when she had not.[93] Thus, next section illustrates the care that must be taken in scrutinizing any expert's representations and the testimony they intend to submit.

2. *Foundational Studies of PAS*

PAS theory establishes a significant backward causal leap: when observers see the eight manifestations in a child, then under the theory, a favored parent's seventeen strategies are behind those manifestations. This kind of cause and effect allegation requires a scientific basis to provide reliability for purposes of *Frye* and *Daubert*. Courts have repeatedly held, as did the Alaska Supreme Court, "[W]e limit our application of *Daubert* to expert testimony based on scientific theory, as opposed to testimony based upon the expert's personal experience."[94] By virtue of this alone, Gardner's observations and his formulation of his eight manifestations fail to meet *Daubert* standards for admissibility. Dr. Baker has conducted the following studies to bring forward Gardner's flawed eight manifestations and add to PAS theory:[95]

- In or about 2006,[96] she conducted a study of 97 participants who self-identified as being a targeted parent. The study participants were asked to make an "exhaustive" list everything they believed[97] the other parent was doing to alienate their children. These limitless lists produced approximately 1,300 specific behaviors. These were cate-

92 *See Ellis*, No. 15D-0119-DR. Transcript in the author's possession.

93 *Id*.

94 Marron v. Stromstad, 123 P.2d 992, 1004 (Alaska 2005).

95 *See, e.g.,* PARENTING PLAN EVALUATIONS (Leslie Drozd, Michael Saini & Nancy Olesen, eds. 2016); *Ellis*, No. 15D-0119-DR. Transcript in the author's possession.

96 It can be unclear when a study was conducted, as the literature relating to them might not be published for several years.

97 There is no indication whether a participant's belief that the other parent was engaging in conduct was objectively accurate.

gorized to comprise eight programming "strategies" used by favored parents. This study begs the question whether any negative conduct by any parent can easily be fit into this model. The study was single-sourced; that is, the allegedly alienating parent and the child were not part of the study, so the parent who felt alienated's beliefs were considered determinative of whether alienation had occurred, with no attempt to consider the views of the alleged alienator.

- In or about 2005, she conducted a study of 40 participants who self-identified as having been alienated as a child.[98] Again, this study uses a small sample size of self-selecting participants. Additionally, the participants' reporting was retrospective in nature. Regarding this study, Dr. Baker reports that it would be falsifiable "if no one responded to the flyers or if everyone who responded reported that alienation had not negatively affected them." In other words, "if nobody said yes, I was manipulated by a parent," then that would be the falsification of her hypothesis that there are people who believe they were manipulated by a parent.[99] However, belief by a participant that he or she was manipulated by a parent was one of the criteria for participation in the study. She admits this was a self-selecting group. From this study, Dr. Baker identified the common behaviors in an alienating parent, and reduced them to 12 different categories.

Based on the two foregoing studies, and after adjustment for overlapping categories, Dr. Baker compiled her list of seventeen strategic "programming" behaviors in a favored parent which were intended to interfere in the relationship between the child and the targeted parent. The results from these two studies were later used by Dr. Baker in at least nine other studies on the longitudinal impacts of PAS. However, that nine studies were conducted using the measure from these studies does not bestow any reliability on them. Studies based on unreliable hypotheses can-

---

98 *See* Baker, *supra* note 22.

99 *Ellis*, No. 15D-0119-DR. Transcript in the author's possession.

not themselves be reliable. As a result, the above studies and all of the studies based on them are materially flawed.

- In 2007, Dr. Baker conducted another study, this one consisting of 68 parents who also self-identified as targets of alienation. They were recruited through a PAS website. To participate in this study, the respondents only had to believe that the other parent was turning their child against them. That parent was the sole informant; neither the child nor the other parent was part of the study. It focused only on "severe" instances of alienation, using a survey about the children's behavior using Gardner's eight manifestations. Dr. Baker has acknowledged that the participants for this study might have been responding based on their knowledge of PAS theory rather than their actual experience. She also acknowledged that the sample might be biased due to its nature as a self-selecting group.[100] This study begs the question whether in this instance the confirmation bias was taking place prior to the study even beginning. When an investigator starts with a sample of participants who already believe their children are being alienated and have knowledge of PAS theory, there is risk that their responses already will fit what they knew into the theory themselves, so that their responses would support the theory, which makes the study unreliable.
- In approximately 2010, Dr. Baker conducted a similar, if not essentially methodological identical self-selected sample, study of 40 children, 20 of whom were already deemed alienated by a court and the rest of whom were referred to an intervention program due to parent/child conflict. Dr. Baker studied whether Gardner's "classic" eight manifestations were present in the children who had been deemed alienated. It is uncertain what criteria were used to determine that 20 of the children were already "alienated." This study sample was so limited (looking to groups of children already categorized as

---

100 PARENTAL ALIENATION: THE HANDBOOK FOR MENTAL HEALTH AND LEGAL PROFESSIONALS 338 (Demosthenes Lorondos, William Bernet & S. Richard Sauber, eds. 2013).

> alienated to see if they manifest symptoms of alienation) and the process so circular, it raises issues of credibility and confirmation bias. This is particularly so when by this time Dr. Baker had conducted other studies whose reliability depended upon the reliability of the eight manifestations.

None of the foregoing studies bridge the causal gap in cause and effect that is a central problem to PAS theory and its A-B-C construct. PAS proponents give the impression of vast numbers of reliable studies supporting the core issue of causation. Those studies do not exist. And if the research by the same authors was eliminated there is little objective, grant-funded research overseen by academic Institutional Review Boards.[101] Further muddying the waters is the concept of "counterintuitivity." This is yet another basis for the PAS proponent's argument that expert testimony can assist the trier of fact. In essence, this concept incorporates the argument that in instances of PAS, the parents' and child's behaviors do not work the way they should and expert testimony is needed to show that the behaviors are consistent with PAS. This concept requires its own evaluation for admissibility under *Frye* and *Daubert*. Such evaluation will expose it, too, as being without any reliable foundation.[102]

---

101 Lawyers should familiarize themselves with the literature concerning ethical research and the role of IRBs. The PAS proponents have little to show in this regard because they would have substantial difficulty meeting the duties which the federal government and academia would impose on research related to vulnerable populations like parents and children; let alone methodologies that would not pass muster in any peer review setting. *See* Sarah Flicker, et al., *Ethical Dilemmas in Community-Based Participatory Research: Recommendations for Institutional Review Boards*, 84 J. URBAN HEALTH 478 (2007) ("Still, ethical problems continue in health research. In particular, a focus on "individual ethics" has left some communities vulnerable to risks such as research conducted to advance academic careers at the expense of communities; wasting resources by selecting community-inappropriate methodologies; communities feeling overresearched, coerced, or misled; researchers stigmatizing communities by releasing sensitive data without prior consultation; and communities feeling further marginalized by research."). For lawyers looking for an example of what an IRB may require, see Harvard University, *Committee on the Use of Human Subjects*, https://cuhs.harvard.edu/ (last visited Aug. 23, 2019).

102 For the sub-theory of counterintuitivity, some PAS experts look to Steven G. Miller. *See* Steven G. Miller, *Clinical Reasoning and Decision-Making in Cases of Child Alignment: Diagnostic and Therapeutic Issues, in* WORK-

The Problem of Peer Review

There is no standard definition or procedure for peer review. There is no definition of who is a "peer." Is it someone doing the same research, or using the same methodology, or writing in the same field? What is a "review"? Is it an in-depth critical evaluation, or just a "sign-off" on a colleague's work? Is there independent feedback from the reviewer to the author? Does the reviewer make any call for supporting raw data? Is there any pushback on methodology or sample selection or whether the research in fact supports the hypothesis from a scientifically valid measure? Peer review grants an aura of reliability that is unwarranted in the field of PAS, with many of the articles supporting the reliability of the theory being written by professionals who derive an economic benefit from providing expert witness and reunification services, or both.[103]

It's like the old shampoo commercial: if expert A does a study with 15 self-selecting participants and writes about his or

---

ING WITH ALIENATED CHILDREN AND FAMILIES: A CLINICAL GUIDEBOOK, *supra* note 58, at 8-46. Dr. Miller suggests that PAS involves severe mental illness and severe personality disorders, and that mental health practitioners lack the sophisticated understanding of clinical reasoning that is required to recognize PAS. In an article published in 2013, Miller asserts that conventional therapy can make PAS "catastrophically" worse; that alienating parents have learned to manipulate professionals; that reversal of custody is necessary to achieve a good outcome; that children suffering from PAS require "de-programming"; and that favored parents are "disturbed" and "delusional." He uses interesting and eye-catching terms such as "fundamental attribution errors," "metacognition," "severe cognitive distortions," "shared delusions," "psychotic or quasi-psychotic thinking," "profound emotional dysregulation," "serious co-morbid psychopathy," and "clinical heuristics." Dr. Miller does not offer any clear foundation for his application of these terms in child custody disputes. He suggests a method of determining the mathematical probability for the presence of alienation in a given case. *See id.* at 13-39. In support of this, he cites to, among other things, his own table comprised of assumptions from "expert input" without any citation to what that "expert input" could be. He cites to Dr. Baker as authority for his assertion of an increased prevalence of personality disorders, such as antisocial and borderline personality disorders, *see id.* at 15, apparently missing the fact that Dr. Baker is not a clinician. In one broad stroke, he asserts that favored parents are practically untreatable. *See id.* at 15-16. Should any expert base his/her testimony, in whole or in part, on Dr. Miller's work, that testimony itself should be viewed as a ripe area of challenge.

103 Richard Smith, *Peer Review: A Flawed Process at the Heart of Science and Journals*, 99 J. ROYAL SOC'Y MED. (2006).

her findings 5 times, and then A's close colleague expert B cites to that study in 5 articles and includes the study information in an educational panel, and then another close colleague, expert C, writes another 5 articles and does a study using the measures derived from A's study, observers are left with a lot of nothing, and certainly no reliable science. Duplicative articles submitted by different people that espouse the same theory on the same foundations cannot grant reliability to the theory. Regurgitation of hypotheses and cross-citation among colleagues boosts publication numbers and lend an illusory aura of reliability without saying anything new.[104] Such regurgitation and cross-citation does not grant any indicia of reliability. Under these circumstances, the concept of "peer review" is devoid of any practical meaning and does not meet what was clearly intended by the *Daubert* as "peer review" of a type that supports reliability of a theory.

3. *General Acceptance*

While the reality of "mere" parental alienation might be generally accepted, PAS theory unequivocally is not. Case law does not support any assertion of general acceptance of PAS.[105] The American Psychiatric Association declined to accept PAS as a diagnosis in the DSM-5. The American Professional Society on the Abuse of Children, has not accepted it as a syndrome. This is a theory that has minimal support, and should be viewed with skepticism.[106]

---

104 *See, e.g.,* Katheleen M. Reay, *Family Reflections: A Promising Therapeutic Program Designed to Treat Severely Alienated Children and Their Family System*, 43 AM. J. FAM. THERAPY 197 (2015). Ms. Reay regurgitates PAS theory and references general acceptance. She cites to others who have written similar articles. None of this contains new research. She refers to the "vision" and work and "research" of a "founder" without revealing whether that "founder" is her.

105 *See, e.g., C.J.L.*, 879 So.2d 1169; Pearson v. Pearson, 5 P.3d 239 (Alaska 2000); *In Re Marriage of Idelle C. & Ovando C.*, 2002 WL 1764181; *Mastrangelo*, 2012 WL 6901161; *Walsh*, 2011 WL 8199263; *In re* Marriage of Moore, No. 3–17–0279, 2018 WL 650631 (Ill. App. Ct. Jan. 30, 2018); *In re* Marriage of Schmidt, 851 N.W. 2d 854 (Iowa 2014); Gillespie v. Gillespie, No. 1849 Sept.Term 2015, 2016 WL 1622890 (Md. Ct. Spec. App. Apr. 25, 2016); Rasheem S. v. State, 68 N.Y.S.3d 694 (N.Y. 2018); Montoya v. Davis, 66 N.Y.S.3d 350 (N.Y. App. Div. 2017); NK v. MK, 851 N.Y.S.2d 71 (N.Y. Sup. Ct. 2007); People v. Fortin, 706 N.Y.S.2d 611 (Nassau Cnty., N.Y. 2000).

106 *Kumho Tire Co., Ltd.*, 528 U.S. at 138, 147.

PAS proponents, having failed to have PAS accepted as a diagnostic condition, are now seeking to have it included in the International Classification of Diseases 11th Revision (ICD-11). A Collective Memo of Concern has been prepared for submission to the World Health Organization. This memo is endorsed by at least 339 experts and organizations from 35 countries, and it requests removal of the PAS concept from the ICD-11 due to its lack of scientific research; its propensity to deflect attention from analysis of best interests factors and family dynamics in favor of focus on primary-care parental blame; evidence that the PAS remedy of custody transfer and isolation are harming children; and its negative effect on evidence and legal responsibilities in assessing best interests.[107]

V. Conclusion

PAS is an unreliable theory, and it imposes a remedy that could be devastating to children and families.[108] Judges can consider and understand conduct and draw reasonable inferences from them, without the need for an expert. It is incumbent upon legal practitioners and judges to know when the A-B-C theory of PAS is what they are facing, and judges should take the position that any party espousing the theory must prove its reliability. The law does not permit the inferential leap that proponents have thus far failed to support.

---

107 Concerned Family Law Academics, Family Violence Experts, Family Violence Research Institutes, Child Development and Child Abuse Experts, Children's Rights Networks and Associations, *Collective Memo of Concern to: World Health Organization About "Parental Alienation"* (July 10, 2019), www .learningtoendabuse.ca/docs/WHO-July-10-2019.pdf.

108 For an example of the remedy PAS proponents look to impose, see *McClain v. McClain*, 539 S.W.3d 170 (Tenn. 2017). Custody of the McClain children was transferred to the mother. The mother was given authority to bring the children to attend a $28,000, four-day program at Family Bridges in California. The father was ordered to pay the cost for the program. The father was ordered not to have contact with the children for at least 90 days, and the future of his parenting time depended upon the father's and the children's compliance with the Family Bridges program, including its after-care program. The court further ordered that the mother would not have to work for at least 90 days following her and the children's attendance at the Family Bridges program. This order was based upon expert testimony regarding PAS and its long-term impact.

There is an increasing number of professionals who have an economic or political interest in continuing to push this theory in courtrooms and at seminars for audiences willing to listen, and they do so without continuing with responsible studies to support their opinions. Failing to face this theory head-on will lead to an erosion in probate and family court evidentiary standards and the integrity of custody determinations. It erodes the best interests standard and replaces it with "after-care" program of professionals who impose treatment based on attribution to blame to a parent. These cases wind slowly and laboriously through the court system, and children suffer.