Parental Alienation Syndrome and Alienated Children – getting it wrong in child custody cases*

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This article examines mental health and legal responses when children resist visits with noncustodial parents. In Parental Alienation Syndrome and Alienated Children, it finds a lack of rigorous analysis that endangers children. The author concludes by suggesting better ways to evaluate new theories from the social sciences. Citation conventions are based in part on The Bluebook: A Uniform System of Citation *(Harvard Law Review Assoc, 17th ed 2001).*

INTRODUCTION

As courts and legislatures continue their enthusiastic ventures into family law reform, they make frequent use of theories and research from the social sciences. This essay focuses on developments in child custody law stemming from Parental Alienation Syndrome (PAS), a theory propounded in 1985 that became widely used (sometimes in a form called Parental Alienation) despite its lack of scientific foundations. The discussion highlights theoretical and practical problems with PAS, provides a similar discussion of more recent proposals concerning Alienated Children (AC), and concludes with recommendations for lawyers and judges who must evaluate these and similar developments.

PAS AND ITS CRITICS

The PAS Doctrine

Child psychiatrist Richard Gardner coined the term Parental Alienation Syndrome in 1985 to describe his clinical impressions of cases he believed involved false allegations of child sexual abuse.[1] The essence of PAS, in his view, is a child's campaign of denigration against a parent that results from 'programming ("brainwashing") of the child by one parent to denigrate the other parent [and] self-created contributions by the child in support of the alienating parent's campaign.'[2] Dr Gardner first stated that PAS was present in approximately 90% of the children whose families were involved in custody litigation but provided no research findings to substantiate his assertions about the syndrome, its frequency, or its setting. In fact, his initial

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1 Richard A. Gardner, *Recent Trends in Divorce and Custody Litigation*, ACADEMY F, vol 29, no 2, at 3 (American Academy of Psychoanalysis, 1985).

2 RICHARD A. GARDNER, THE PARENTAL ALIENATION SYNDROME xix (Creative Therapeutics, 2d ed 1998) [hereafter GARDNER (2d ed)], *quoted in* Introductory Comments on the PAS, *formerly available at* http://www.rgardner.com/refs/ [hereafter *Gardner's* website]; the current iteration has been lightly reworded and is found on *Gardner's* website (last updated 31 May 2001 and last visited 16 September 2001) under the title 'Basic Facts about the Parental Alienation Syndrome.' Precise reading and careful comparisons between sources are required when Gardner articulates his theories; often, revised wording entails no change in substance.

estimates appear to have been dramatically overstated, particularly as to the frequency of false sexual abuse allegations,[3] and his revised estimates have been far more circumspect.[4]

In recent years, use of the term PAS has been extended dramatically to include cases of all types in which a child refuses to visit the noncustodial parent, whether or not the child's objections entail abuse allegations. Although Dr Gardner sometimes states that his analysis does not apply to cases of actual abuse,[5] the focus of his attention is directed at discerning whether the beloved parent and child are lying, not whether the target parent is untruthful or has behaved in a way that might explain the child's aversion.[6] His recommended treatment for serious cases is to transfer custody of the child from the beloved custodial parent to the rejected parent for deprogramming. This may entail institutional care for a transitional period, and all contact, even telephone calls, with the primary caregiver must be terminated for 'at least a few weeks.' Only after reverse-brainwashing may the child slowly be reintroduced to the earlier custodian through supervised visitation.[7]

The Setting in Which PAS Is Said to Occur

High conflict families are disproportionately represented, of course, among the population of those contesting custody and visitation.[8]

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[3] As to frequency of cases involving sexual abuse, see the careful, comprehensive reports of a major research effort, Nancy Thoennes and Patricia G. Tjaden, *The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes*, 14 CHILD ABUSE AND NEGLECT 151, at p 160 (1990) ('Less than 2% of the approximately 9,000 families with *custody and visitation disputes* served by 8 domestic relations courts included in th[is] study involved an allegation of sexual abuse.') (emphasis added).

See also DEBRA WHITCOMB, WHEN THE VICTIM IS A CHILD 7 (US DEPT OF JUSTICE, OFFICE OF DEVELOPMENT, TESTING AND DISSEMINATION, 2d ed 1992) ('As an alternative way of framing the magnitude of this problem, sexual abuse allegations occurred in the range of approximately 2 to 1 per 1,000 *divorce filings* among the courts [in seven jurisdictions] that were studied') (emphasis added). *See also* an analysis of Gardner's work by a University of Michigan professor of social work with degrees in social work and psychology, Kathleen Coulbourn Faller, *The Parental Alienation Syndrome – What Is It and What Data Support It?* 3 CHILD MALTREATMENT 110–115 (1998).

[4] *Compare* RICHARD GARDNER, THE PARENTAL ALIENATION SYNDROME 59 (Creative Therapeutics 1992) (90% figure) [hereafter GARDNER (1992)] *with* GARDNER (2d ed), op cit, n 2, at pp xxix–xxxi (stating that no estimates for PAS can be made, but mentioning reports of alignments [a different, much broader phenomenon] in up to 40% of high-conflict custody disputes).

[5] Indeed, the PAS definition on his website no longer mentions sex abuse allegations (perhaps in response to critiques challenging Gardner's assertions about the frequency with which unsubstantiated allegations of sexual abuse occur). *See Gardner's* website; n 2 above; and nn 21 and 46–48 below. Gardner also now acknowledges that 'some abusive neglectful parents are using the PAS explanation … as a coverup and diversionary maneuver.' Publications and lectures that he promotes as assisting those who need to distinguish true from false allegations of abuse or neglect are, however, strongly reminiscent of his earlier, discredited Sex Abuse Legitimacy Scale (SALS) work, described below. *See* Richard A. Gardner, *Differentiating Between Parental Alienation Syndrome and Bona Fide Abuse-Neglect*, 27 AM J FAM THERAPY 97 (1998); nn 21and 46–48 below.

[6] Two examples are his efforts to distinguish true from false allegations and his blanket advice to judges that they should refrain from taking abuse allegations seriously, even when supported by a therapist who has seen the child. *Compare, eg*, Richard A. Gardner, *Legal and Psychotherapeutic Approaches to the Three Types of Parental Alienation Syndrome Families—When Psychiatry and the Law Join Forces*, 28(1) CT REV 14, at p 18 (Spring 1991) [hereafter Gardner, CT REV] ('The court's therapist should have a thick skin and be able to tolerate the children's shrieks and claims of maltreatment. … To take the allegations of maltreatment seriously … may result in … [lengthy or lifelong] alienation.'), *with* the authorities discussed in nn 16, 21 and 46–48 below and accompanying text (questioning his methodology and discussing the incidence of false allegations).

[7] Ibid, at pp 16–17 (where his language, although not the substance of his recommendations, has been softened somewhat).

[8] ELEANOR E. MACCOBY AND ROBERT H. MNOOKIN, DIVIDING THE CHILD – SOCIAL AND LEGAL DILEMMAS OF CUSTODY 132–161 (HARVARD UNIV PRESS 1992). Approximately 25% of families experience substantial legal conflict; 'in these families, the parents – the fathers in particular – harbor especially high levels of hostility toward the former spouse.' Ibid, at p 159.

These cases commonly involve domestic violence, child abuse, and substance abuse.[9] Many parents are angry, and a broad range of visitation problems occurs. Dr Gardner's description of PAS may well remind parents, therapists, lawyers, mediators, and judges of these frequently encountered emotions, and this may help to explain why his audience has often accepted PAS without question. The overwhelming absence of careful analysis and attention to scientific rigor these professionals demonstrate, however, is deeply troubling. As the following discussion reveals, this carelessness has permitted what is popularly termed junk science (pseudo science) to influence custody cases in ways that are likely to harm children.

The Flaws in PAS Theory

The deficiencies in PAS theory are multiple. Some have already been identified in social science literature and child custody judicial opinions; still others are now emerging. First, Gardner confounds a child's developmentally related reaction to divorce and high parental conflict (including violence)[10] with psychosis. In doing so, he fails to recognise parents' and children's angry, often inappropriate, and totally predictable behaviour following separation. This error leads him to claim that PAS constitutes a frequent example of *folie à deux* or *folie à trois*, Shared Psychotic Disorders that the American Psychiatric Association and scholarly studies report occur only rarely.[11] His assertion that these disorders occur primarily in young

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[9] ADMINISTRATIVE OFFICE OF THE COURTS, FAMILY COURT SERVICES SNAPSHOT STUDY REPORT 1 – OVERVIEW OF CALIFORNIA FAMILY COURT SERVICES MEDIATION 1991: FAMILIES, CASES AND CLIENT FEEDBACK 8–12 (1992), *available at* www.courtinfo.ca.gov/programs/cfcc/pdffiles/r01rpt.pdf. In California, mediation is mandatory for all contested custody cases. In this statewide study of most custody mediation sessions conducted by court personnel on a single day, serious issues of child abuse, family violence and substance abuse were raised by the parties in 42% of all mediating families, with an additional 24% raising one of these issues alone. In a review of five federally funded demonstration projects to resolve child access and visitation problems, researchers report, 'Nearly half of the access denial cases at every site involve allegations of the child's imperiled safety. Most allegations are made by the residential parent, regardless of sex, against the nonresidential parent and the other people in his/her household. Violent behavior is the only allegation that is consistently leveled with greater frequency against men.' Jessica Pearson and Jean Anhalt, *Enforcing Visitation Rights—Innovative Programs in Five State Courts May Provide Answers to This Difficult Problem*, 33(2) JUDGES' JOURNAL 3, at pp 40–41 (Spring 1994) (citing four additional studies which also indicate 'that safety concerns feature prominently in many visitation disputes').

[10] *See* JUDITH S. WALLERSTEIN AND JOAN BERLIN KELLY, SURVIVING THE BREAKUP – HOW CHILDREN AND PARENTS COPE WITH DIVORCE 77–80 (special vulnerability of 9- to 12-year-olds to alignments, for whom this coping behaviour at divorce wards off loneliness, sadness, and more serious depression), 99, 145–46 and 233–34 (only a weak correlation between children's anger and parents' quarrelling), 237 and 253 (BASIC BOOKS 1980); JUDITH S. WALLERSTEIN, JULIE M. LEWIS AND SANDRA BLAKESLEE, THE UNEXPECTED LEGACY OF DIVORCE – A 25 YEAR LANDMARK STUDY 115–117, 125 (HYPERION 2000) *(alliances* usually involve pre-adolescents or young adolescents in high-conflict cases or when 'enmity overshadows good sense'); Janet R. Johnston, *Children of Divorce Who Refuse Visitation*, in NONRESIDENTIAL PARENTING 109–135, at p 124 (SAGE, Charlene E. Depner and James H. Bray eds 1993) [hereafter Johnston, *Children Who Refuse Visits*].

[11] See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV § 297.3: Shared Psychotic Disorder (*Folie à Deux*) (4th ed 1994) ('This disorder [in which a second or further person in a close relationship with a primary person comes to share delusional beliefs of the primary person, who already had a Psychotic Disorder, most commonly Schizophrenia,] is rare in clinical settings, although it has been argued that some cases go unrecognised'); Jorg M Fegert, *Parental Alienation oder Parental Accusation Syndrome?—Part 1*, KIND-PRAX 1/2001, p 3 [hereafter Fegert, *Part 1*]; ibid, *Part 2*, at KIND-PRAX 2/2001, p 39, at pp 41–42 [hereafter Fegert, *Part 2*] (citing a literature search by the Würzburger Klinik of the period from 1877 through 1995 that produced only 69 case reports of children and youth that match the description of *folie à deux*); Jose M. Silveria and Mary V. Seeman, *Shared Psychotic Disorder: A Critical Review of the Literature*, 40 CANADIAN J. PSYCHIATRY 380, at pp 390–391 (1995) (reporting a literature search covering 51 years, from 1942 through 1993, that produced 123 cases, of which only 75 met the tests for a shared psychotic disorder under DSM-IV; of these only 61 involved two people, of which 31.1% [19 cases] involved parents and children, with only 5 of these involving children 18 years old or younger). Silveria and Seeman note that whether published case reports provide a representative sample or reflect frequency is unknown, but they, Fegert (op cit, n 11), and the DSM (above this note) all describe the phenomenon as rare. *See also* WORLD HEALTH ORGANIZATION, INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES AND RELATED HEALTH PROBLEMS [ICD-10], Disorder F24: Induced Delusional Disorder (*Folie à deux*), at p 331 (10th ed 1992).

children is also contrary to the literature,[12] probably also due to a misreading of typical developmental responses to divorce on the part of young children.[13]

Second, possibly as a consequence of these errors and his tail-of-the-elephant view,[14] Gardner vastly overstates the frequency of cases in which children and custodial parents manufacture false allegations or collude to destroy the parent–child relationship. Taken together, these assertions have the practical effect of impugning all abuse allegations, allegations which Gardner asserts are usually false in the divorce context.[15] Here, too, Gardner cites no evidence in support of his personal view, and the relevant literature reports the contrary—that such allegations are usually well founded.[16]

Third, in this fashion, PAS shifts attention away from the perhaps dangerous behaviour of the parent seeking custody to that of the custodial parent. This person, who may be attempting to protect the child, is instead presumed to be lying and poisoning the child. Indeed, for Gardner, the concerned custodial parent's steps to obtain professional assistance in diagnosing, treating, and protecting the child constitute evidence of false allegations.[17] Worse yet, if therapists agree that danger exists, Gardner asserts that they are almost always man-hating women who have entered into a *folie à trois* with the complaining child and concerned parent.[18] Indeed, he warns judges not to take abuse allegations seriously in the divorce court setting in

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[12] Silveria and Seeman, op cit, n 11, at pp 390 and 392 report, 'Age ranges were similar for both the secondaries (10 to 81 years) and the primaries (9 to 81 years).' There were also no differences in the average ages for primaries and secondaries. Instead, 'the age distribution is more in keeping with the expected distribution of age of onset for other non-organic psychotic disorders in general, which is relatively rare in the very young and the very old.' Ibid.

[13] 'Resistance to visitation among young children, for example, is a developmentally expectable divorce-specific separation anxiety, which is made more intense by overt conflict between parents' and is unrelated to emotional disturbance of either parents or children. Johnston, *Children Who Refuse Visits*, op cit, n 10, at p 118. For typical responses to chronically disputing parents at the developmental stages Johnston studied, see ibid, at p 120: 'temporary reactions (2- [to] 4-year-olds), shifting allegiances (4- [to] 7-year-olds), loyalty conflicts (7- [to] 10-year-olds), and alignments (9- [to] 12-year-olds).'

[14] The reference is, of course, to the story of several blind men, each attempting to describe an elephant. One holds the tail, another the trunk, the third a tusk, and the fourth a leg. Because each describes only his own perceptions, no one provides an accurate description.

[15] As Faller points out, Gardner does not attempt to explain why he believes that 'perhaps 95% or more' of all allegations of child sexual abuse are true but 'the vast majority of allegations in [divorce custody cases] are false.' Faller, op cit, n 3, at pp 103–104.

[16] As to the frequency of unsubstantiated abuse allegations, see the literature collected and analysed in JOHN E.B. MYERS, A MOTHER'S NIGHTMARE — INCEST: A PRACTICAL LEGAL GUIDE FOR PARENTS AND PROFESSIONALS 133–135 and 198–210 (SAGE 1997); *see also* ibid, at pp 144–145 (innocent misperceptions of innocent behaviour); Cheri L. Wood, *The Parental Alienation Syndrome: A Dangerous Aura of Reliability*, 27 LOYOLA LA L REV 1367, at pp 1373–1374 and 1391–1394 (1994).

[17] Gardner once identified a public prosecutor in a criminal child sex-abuse prosecution, for example, as a mother's 'hired gun.' He accordingly rated the defendant less likely to be guilty than if the woman had not sought legal assistance. The prosecutor later pointed out the absurdity of Gardner's reasoning, saying, 'If you believe your child has been sexually abused, shouldn't you be going to an attorney and seeking medical advice?' Rorie Sherman, *A Controversial Psychiatrist and Influential Witness Leads the Backlash against Child Sex Abuse "Hysteria"* 15 NAT'L LJ, 16 August 1993, at p 1. The custodial parent, of course, is left in an untenable position under Gardner's approach. If he or she fails to act in the face of possible abuse, the custodial parent may be guilty of a failure to protect the child, passivity that may lead to a child dependency action or, even, to criminal charges.

[18] *Compare* GARDNER (1992), op cit, n 4, at pp 146–147 (such *folies à trois* with therapists are 'a widespread phenomenon') and Gardner, CT REV, op cit, n 6, at p 18, *with* Faller, op cit, n 3, at pp 102–103 (collecting and critiquing relevant passages from Gardner's work) *and* Fegert, *Part 2*, op cit, n 11, at p 41 (reports of a *folie à deux* or *trois* are extremely rare). Further, Gardner asserts that when sexual abuse is alleged, these custodial parents and therapists may take personal sexual pleasure in visualising the alleged activity between the non-custodial parent and the child. *See* Faller, op cit, n 3, at pp 103, 104 and 110–111 (collecting quotations and providing research literature to the contrary); *see also* Gardner, CT REV, op cit, n 6, at p 16 (attributing allegations to mothers' sexual fantasies). A trial court judge who sat as a family court judge for one year after several years on the criminal law bench is reported as noting PAS in 'most of the family law cases he heard' and as cautioning family law judges 'to be aware that in addition to the child, professionals upon whom the court relies may also be "brainwashed" by the alienating parent.' *Judge Nakahara on PAS and the Role of the Court in Family Law*, PAS-NEWSLETTER, January 1999, at unnumbered pp 2–3 (News for Subscribers), *available at* http://www.vev.ch/en/pas/bw199901.htm (last visited 30 October 2002).

high conflict cases (severe PAS cases). Neither Gardner nor those who accept his views acknowledge the logical difficulties when Gardner asserts that abuse allegations which are believed by therapists constitute evidence of alienation by the protective parent.

Fourth, Gardner believes that, particularly in serious cases, the relationship of an alienated child with the rejected parent will be irreparably damaged, probably ending for all time,[19] unless immediate, drastic measures (custody transfer, isolation from the loved parent, and deprogramming) are taken. Here, too, reliable sources reveal that his theory is exaggerated, with all but unusual cases (for example, those appearing in violent families) resolving themselves as the children mature.[20]

Fifth, as these sources suggest, Gardner's proposed remedy for extreme cases is unsupported and endangers children.[21] In his admitted decision to err on the side of under-identifying abusers, Gardner appears to have overlooked the policy differences between criminal law and child custody law and also to have misunderstood the distinction between the burdens of proof in criminal and civil cases in the United States. To the extent that PAS results in placing children with a parent who is, in fact, abusive, the youngsters will be bereft of contact with the parent who might help them. Parent groups and investigative reporting describe, for example, numerous cases in which trial courts have transferred children's custody to known or likely abusers and custodial parents have been denied contact with the children they have been trying to protect.[22] In less extreme cases, too, children are likely to suffer from such a sudden dislocation in their home life and relationship with the parent they trust. Even therapists who

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[19] *See* Richard A. Gardner, March 2000 Addendum (to GARDNER (2d ed), op cit, n 2), *available at* http://www.rgardner.com/refs/addendum2.html (last visited 30 September 2001).

[20] In 1993 Professor Janet Johnston, a specialist in high-conflict custody disputes with advanced degrees in social work and sociology, gave initial findings from two studies of high-conflict disputes referred to her research projects by the courts. Refusals to visit appeared frequently, especially among a subset of older children who had been exposed to serious abuse or domestic violence. Almost one-third of the total sample of children were in alignments more than 2 to 3 years post-separation, with three-fourths of the 9- to 12-year olds involved in such behaviour. Johnston concluded that 'when conflicts are overt and involve the children, and when the disputes are intense and prolonged, the children are more likely to submit to this alignment mode of defending and coping' and predicted that 'it is highly likely that children will move into alignments as they approach early adolescence, if the parental conflict is ongoing.' She contrasted these findings to far more benign findings in a community study of 131 children of recently separated parents. Johnston, *Children Who Refuse Visits*, op cit, n 10 , at p 124. In that less-troubled population, 20% of the children were in alignments (most of them in the 9- to 12-year-old group), but *every* case resolved itself before the child reached 18, with most resolving within one or two years when the children regretted their earlier behaviour. Telephone conversation with Dr Judith Wallerstein (10 April 2001). A further report by Johnston concerning children from all these groups (the two court-referred groups and the community study) will appear shortly. *See* Janet R. Johnston, *Parental Alignments and Rejection: An Empirical Study of Alienation in Children of Divorce*, J AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW (forthcoming) (assessing the impact of 'alienating' behaviours by mothers and fathers and finding that rejected parents are frequently the 'architects' of their difficulties with their children).

[21] Gardner acknowledges that his SALS was weighted to find some perpetrators innocent who were in fact guilty. Sherman, op cit, n 17. Although Gardner now disavows responsibility for these applications of his work, he continues to recommend attention to the same factors his early work endorsed. *See generally* Faller, op cit, n 3, *passim*.

[22] *See, eg*, Gina Keating, *Disputed Theory Used in Custody Cases: Children Often Victims in Parental Alienation Syndrome Strategy*, PASADENA STAR-NEWS, 23 April 2000; MOTHERS OF LOST CHILDREN, SAMPLE OF CALIFORNIA FAMILY LAW CASES: CHILDREN TAKEN AWAY FROM SAFE PARENTS, FORCED TO LIVE WITH ABUSIVE PARENTS (2000), *available from* Mothers of Lost Children, P.O. Box 1803, Davis, CA 95617; KAREN WINNER, PLACING CHILDREN AT RISK: QUESTIONABLE PSYCHOLOGISTS AND THERAPISTS IN THE SACRAMENTO FAMILY COURT AND SURROUNDING COUNTIES (THE JUSTICE SEEKERS 2000) (study commissioned by California Protective Parents Association). *See also* Christine Lehmann, *Controversial Syndrome Arises in Child-Custody Battles*, PSYCHIATRIC NEWS, 1 September 2000, at unnumbered p 2, *available at* http://www.psych.org/pnews/00-09-01/controversial.html. Paul Fink, MD, past president of the American Psychiatric Association agrees, stating, 'I am very concerned about the influence Gardner and his pseudo-science is having on the courts …. Once the judge accepts PAS, it is easy to conclude that the abuse allegations are false, and the courts award custody to alleged or proven perpetrators. ... Gardner … undermines the seriousness of sexual abuse allegations.' Ibid. *See generally* MYERS, op cit, n 16, at pp 8 and 135–138.

accept PAS theory have advised against custody transfers to no avail in some reported cases in which it seems judges have implemented Gardner's views on their own initiative.[23]

In sum, children's reluctance or refusal to visit noncustodial parents can probably be better explained without resorting to Gardner's theory. Studies that followed families over several years, for example, report that visits may cease or be resisted when a variety of reasons cause custodial parents and children to be angry or uncomfortable with the other parent. Often the noncustodial parent's behaviour and the child's developmental stage play decisive roles. Alignments or alliances that are somewhat reminiscent of Gardner's construct are much less frequent than he suggests, and even in extreme cases, these scholars agree that PAS theory calls for inappropriate and harmful responses that intensify the problem.[24]

THE MERCHANDISING OF PAS IN CHILD CUSTODY CASES

How, then, did such a seriously misconceived, overstated, and harmful view gain widespread acceptance? What would inspire judges to order custody transfers against the uniform advice of expert witnesses in a case?[25] First, Gardner is broadly (but mistakenly) believed to be a full professor at a prestigious university.[26] Because this aura of expertise accompanies his work, few suspect that it is mostly self-published,[27] that it lacks scientific rigor,[28] and that his books

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[23] *See Karen "PP" v Clyde "QQ"* 602 NYS2d 709 (App Div 1993) (the trial court's reference to a book on PAS that was neither entered into evidence nor referred to by any witness provided no ground for reversal of custody transfer to father and termination of mother's contact with daughter in case where trial court held mother's sex abuse allegation fabricated and child programmed, the trial court's reference to a book on PAS that was neither entered into evidence nor referred to by any witness provided no ground for reversal of custody transfer to father and termination of mother's contact with daughter; mother's challenge to termination of contact treated as moot because subsequent trial order permitted visitation; no mention by appellate court of expert testimony, if any). *See also Karen B v Clyde M*, 574 NYS2d 267 (Fam Ct 1991), the deeply troubling trial court opinion in the case.

[24] *See, eg*, Fegert, *Part 2*, op cit, n 11, at pp 40–42; Johnston, *Children Who Refuse Visits*, op cit, n 10, at pp 132–133.

[25] *See Krebsbach v Gallagher*, 181 AD2d 363 (NY App Div 1992) (trial court's order transferring custody against recommendation of psychologist and Law Guardian reversed for lack of support in record).

[26] *See, eg*, Justice R. James Williams, *Should Judges Close the Gate on PAS and PA?* 39 FAM CT REV 267, at p 267 (2001) (referring to 'Dr. Richard Gardner, a psychiatrist at Columbia University'); Rola J. Yamini, *Note: Repressed and Recovered Memories of Child Sexual Abuse*, 47 HASTINGS LJ 551, at p 557, n 58 (1996) (referring to 'Dr. Richard Gardner, professor of psychiatry at Columbia University'); Joseph Berger, *Recanting a Sex Abuse Charge; Family Needs to Heal, but Which Statement Is the Lie?* NY TIMES, 10 July 1998, at p B1 (referring to 'Dr. Richard A. Gardner, professor of child psychiatry at Columbia University Medical School'); Jon Meacham, *Trials and Troubles in Happy Valley*, NEWSWEEK (US EDITION), 8 May 1995, at p 58 (referring to 'Richard A. Gardner, a professor of child psychiatry at Columbia University medical school'). Gardner identifies himself by the courtesy academic title he holds from Columbia University (Clinical Professor of Medicine), a title that U.S. medical schools provide to doctors who permit students to observe their practice. Unlike the title Professor of Clinical Medicine, however, the title Gardner enjoys indicates neither full faculty membership nor research accomplishment. *See People v Fortin*, 706 NYS2d 611, at p 612 (Crim Ct 2000), reporting Gardner's testimony that his academic appointment is unpaid, and that 'at present [Gardner's] therapeutic work actively takes approximately 1 to 2% of his time and the remainder of his time and income are accounted for by forensic analysis and testimony [that increasingly concerns PAS].' (*Fortin* was a criminal sex abuse case in which Dr Gardner offered to testify concerning PAS and the credibility of the complaining witness. The court refused to permit his testimony because of a failure to establish general acceptance of PAS within the professional community.)

[27] Creative Therapeutics of Cresskill, NJ, is the publishing firm that Gardner established to publish his works. *People v Fortin*, 706 NYS2d 611, at p 612 (Crim Ct 2000) (reporting that Gardner's company had published and marketed all but one of his books since 1978).

[28] Seeking to refute criticism about the absence of scientifically rigorous reports on PAS, Gardner recently published a report of cases from his own practice and consulting work in which he concluded that PAS was present; the case summaries concern 99 children. Richard A. Gardner, *Should Courts Order PAS Children to Visit/Reside With the Alienated Parent? A Follow-up Study*, 19(3) AM J FORENSIC PSYCHOL 61 (2001). The article is unsuccessful, however, because in it Gardner confounds criminal, family law, and personal injury cases; omits essential information (for example, the children's ages and information on the nature of any abuse allegations); includes cases in which he had no direct contact with the child; and treats highly disparate factual and legal issues as equivalents. For example, Gardner tallies criminal and personal injury decisions (where courts were without power to adjust custody orders) as cases in which custody or visitation was not adjusted to account for PAS.

on PAS are not even held by most university and research libraries.[29] Next, Gardner promotes his writing and services as an expert through his own website,[30] receives referrals from the websites of fathers' organisations,[31] and provides packaged continuing education courses for professionals.[32] Finally, he often inaccurately represents or suggests that PAS is consistent with or endorsed by the accepted work of others.[33]

An eight-page article in the journal of the American Judges Association provides a typical example.[34] Gardner is identified by his courtesy title alone,[35] and the article provides only ten sources (nine of his own writings and one piece by Sigmund Freud) to support his dramatic, even hyperbolic, assertions.[36]

In any event, over the years since Gardner first announced his theory, the term PAS has entered into public usage. The media, parents, therapists, lawyers, mediators, and judges now often refer to PAS, many apparently assuming that it is a scientifically established and useful mental health diagnosis.[37] Accordingly, in practice, whenever child sexual abuse allegations or disrupted visitation patterns arise in the United States, one must now be prepared to confront a claim asserting that PAS is at work, not abuse or other difficulties.[38]

An electronic search for all reported US cases between 1985 and February 2001 employing the term 'parental alienation syndrome' revealed numerous mental health professionals in addition to Gardner who have testified that PAS was present, although far fewer were willing to recommend that custody be transferred and that contact with the primary custodian be terminated. The search produced 48 cases from 20 states, including the highest courts in six states. The degree to which PAS has been invoked by expert witnesses, attorneys, or judges in these cases and the almost total absence of inquiries into its scientific validity is profoundly

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[29] An April 2001 electronic search of the Research Libraries Information Network (RLIN), a database that includes the holdings of over 160 major reference libraries, revealed that only 9 of these libraries hold one or both editions of Gardner's book, THE PARENTAL ALIENATION SYNDROME.

[30] *See Gardner's* website, n 2 above, for a listing of his appearances. *See generally* Sherman, op cit, n 17.

[31] *See generally* Williams, op cit, n 26, at p 269 and n 21 (concerning the websites of fathers' groups).

[32] *See Gardner's* website, n 2 above, for a listing of such appearances.

[33] See, for example, the publications and cases listed on his website. The website identifies negative publications as supporting PAS, claims that discussions of entirely distinct phenomena (such as alignments) are about PAS, claims that cases in which any reference to PAS is made constitute decisions that the syndrome is scientifically and legally accepted, and claims that articles in peer-reviewed law or mediation journals (which do not provide substantive review of his scientific claims) establish the scientific merit of PAS.

[34] *See* Gardner, CT REV, op cit, n 6.

[35] Ibid. ('Richard A. Gardner, M.D., is clinical professor of child psychiatry at Columbia University, College of Physicians and Surgeons.')

[36] Specifically, Sigmund Freud, *Three Contributions to the Theory of Sex: II – Infantile Sexuality*, in THE BASIC WRITING OF SIGMUND FREUD 592–593 (THE MODERN LIBRARY, A. A. Brill ed 1938), is cited to support Gardner's statement concerning cases in which sexual abuse is alleged: 'I agree with Freud that children are "polymorphous perverse," and thereby provide [their] mothers with ample supply of material to serve as nuclei for [the mothers' projection of their own inclinations to paedophilia] onto the father.' Additional dangerous hyperbole is typified by Gardner's statement that a child's hatred for one parent is 'superficial' and his warning to judges that 'tak[ing] the allegations of maltreatment seriously may help entrench the parental alienation syndrome and may result in years of, if not lifelong, alienation.' Gardner, CT REV, op cit, n 6. Compare the views of reputable scholars set forth in nn 15–18 above.

[37] A recent friend-of-the-court brief provides an example. *See* Amici Curiae Brief of Leslie Ellen Shear et al, *Montenegro v Diaz*, Supreme Court of California No S090699 (2001). Written on behalf of mediators, therapists and California attorneys who have passed a specialist's examination in family law, the brief's arguments in favour of easier custody modification standards (including transfers in custody) include reliance on PAS. Ibid, at pp 26–30. Judges have also endorsed PAS. *See, eg,* the remarks of Judge Aviva Bobb, Presiding Judge of the Los Angeles Superior Court Family Court, *quoted in* Keating, op cit, n 22:

> '[Just because PAS is not supported by scientific evidence] does not mean that it does not exist. One parent is being successful in undermining the child's relationships with the other parent. That is so serious that the child will not be able to bond [sic] with the other parent. … And unless that parent stops that behavior, that parent should be monitored by a third party.'

[38] Even Gardner now concedes that this is a frequent pattern. Keating, op cit, n 22 (quoting Gardner: 'Now that PAS is a widespread diagnosis, many abusers are claiming they are innocent victims of PAS').

disturbing.[39] In only a handful of cases did the trial or appellate court specifically consider whether the supposed syndrome was admissible under the accepted precedents that test either acceptance in the scientific community or acceptable scientific methodology,[40] and in several of these, the court determined that it did not need to reach the admissibility question, often because no alienation had been shown.[41] On more than one occasion, however, appellate courts nevertheless took the occasion to alert trial courts to the fact that Gardner's work is seriously disputed.[42]

In the few reported cases in which Gardner's proffered testimony was challenged or the validity of PAS was otherwise questioned, courts usually exclude his testimony and reliance on PAS. These cases reveal two areas of concern. First, courts are consistent in refusing to permit Gardner to testify on the truth or falsity of witnesses, noting that this question is reserved to the trier of fact.[43] Second, most US courts considering the question agree that PAS has not been generally accepted by professionals and does not meet the applicable test for scientific reliability.[44] These conclusions are echoed by a Canadian jurist in an article discussing

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[39] Most of the cases listed as admitting PAS on *Gardner's* website fit into this category, and the list is therefore misleading. When PAS is mentioned by a party, an expert or a judge, but no challenge to admissibility or decision on point has occurred, no conclusion concerning admissibility can be drawn; the issue has simply been waived. *See, eg, In re Violetta B*, 568 NE2d 1345 (Ill Ct App 1991) (PAS mentioned by one witness, but not discussed and irrelevant to decision); *Crews v McKenna k/a Kuchta*, 1998 Minn App LEXIS 793 (7 July 1998) ('kernel of authenticity' to 11-year-old's fears, but 'some' of child's behaviour evidenced PAS); *Truax v Truax k/a Briley*, 874 P2d 10 (Nev 1994); *Loll v Loll*, 561 NW2d 625 (ND 1997) (state supreme court upheld trial court's decision that alienation had not been shown; it noted but did not respond to the mother's objection that the son's therapist was 'unaware that [the child] … was suffering from parental alienation syndrome').

[40] In the United States, reliable expert testimony on scientific, technical or other specialised knowledge is generally permitted if it will assist the trier of fact understand the evidence or determine a fact that is in issue. The general-acceptance-in-a-particular-field test first articulated for the federal courts in *Frye v United States*, 293 F 1013, at p 1014 (DC Cir 1923) became the test in most state courts as well. PAUL C. GIANNELLI AND EDWARD J. IMWINKELRIED, 1 SCIENTIFIC EVIDENCE § 1–5 (LEXIS LAW PUB, 3d ed 1999). The US Supreme Court ruled that the Federal Rules of Evidence (adopted in 1975) displaced the *Frye* test in *Daubert v Merrell Dow Pharm Inc*, 509 US 579 (1993). Most states have also replaced *Frye* with *Daubert*, the new test that considers many factors to determine scientific reliability. Ibid, §§ 1–7 to 1–8 (comparing the standards). *See also* ibid, § 9–5 (on opinion evidence).

[41] *See eg, In the Interest of TMW*, 553 So 2d 260, at p 261 (Fla Dist Ct App 1989) (court's power to order psychological examination at issue, not merits of father's PAS argument or its relevance to adoption case); *Bowles v Bowles*, No 356104, 1997 Conn Super LEXIS 2721 (Conn Super Ct 7 August 1997) (court makes orders without regard to PAS theory); *In re Marriage of Rosenfeld*, 524 NW2d 212, at p 215 (Iowa Ct App 1994) (same). *See also Pearson v Pearson*, 5 P3d 239, at p 243 (Alaska 2000), where the father's PAS assertions were heard at trial and the mother apparently did not challenge admissibility on appeal. The state supreme court upheld the trial court's finding that no alienation was present.

[42] *See, eg, In the Interest of TMW*, 553 So 2d 260, at p 261 n 3 (Fla Dist Ct App 1989); *Hanson v Spolnik*, 685 NE2d 71, at p 84 n 10 (Ind Ct App 1997). A powerful concurrence and dissent in *Hanson* by Judge Chezem details the deficiencies of PAS as a theory and as implemented in this case. The appellate court upheld the trial court's order of a custody transfer (with complete termination of the mother's contact with her 6-year-old daughter for two months) on the basis of testimony provided by a psychologist. The psychologist had not interviewed either parent or the child, but based his analysis instead on notes made by a therapist who, in turn, had never met the father. Judge Chezem's opinion points out that although the father was unable to work due to an emotional disability, neither psychologist had any way of knowing whether the mother's assertions about the father's behaviour (she suspected sexual abuse) were true. By one year after the transfer order, the mother was being permitted a 6-hour visit once every 2 weeks. *See also Pearson v Pearson*, 5 P3d 239, at p 243 (Alaska 2000), where the state supreme court volunteered that PAS (which both parties' experts accepted) is 'not universally accepted.'

[43] *See, eg, Tungate v Commonwealth*, 901 SW2d 41 (Ky 1995) (refusing Gardner's proposed testimony on 'indicators for pedophilia' in criminal case because it went to ultimate issue of guilt or innocence and 'lacked sufficient scientific basis for the opinions offered').

[44] *See, eg, People v Fortin*, 706 NYS2d 611 (NY Crim. Ct 2000); *Husband Is Entitled to Divorce Based on Cruel and Inhuman Treatment: Oliver V v Kelly V*, 224 NY LJ, 27 November 2000, at p 25 (noting that no testimony was offered to validate PAS and therefore declining to make such a finding). The *Fortin* court refused to hear Gardner's PAS testimony for the defendant in a criminal case, holding that the defendant 'has not established general acceptance of Parental Alienation Syndrome within the professional community which would provide a foundation for its admission at trial.' In support of its holding, the court cited a concurring opinion of Chief Judge Kaye of the New York Court of Appeal and several articles, including Wood, op cit, n 16. It also quoted

admissibility issues under both US and Canadian law[45] and by other prominent professionals. Dr Paul J. Fink, a past president of the American Psychiatric Association and president of the Leadership Council on Mental Health, Justice, and the Media, for example, has stated quite bluntly, 'PAS as a scientific theory has been excoriated by legitimate researchers across the nation. Judged solely on his merits, Dr. Gardner should be a rather pathetic footnote or an example of poor scientific standards.'[46]

Following considerable scientific criticism, Gardner withdrew the test he had constructed to determine whether sexual abuse had taken place.[47] Yet, as Faller's close examination reveals, this set of questions was simply replaced by other publications with new titles that largely replicate his earlier content and methodology.[48]

Despite the good work of most of the courts that have considered the scientific probity of PAS, there is little to celebrate. The vast majority of the cases mentioning PAS reveal that one or more of the experts evaluated the case in light of PAS, and there is nothing to suggest that anyone—expert, attorney or judge—thought to question whether the theory is well founded or leads to sound recommendations or orders.[49] A similar lack of rigor is now also seen elsewhere.[50]

Gardner's view that 'the concept of scientific proof … is not applicable in the field of psychology; especially with regard to issues being dealt with in such areas as child custody disputes, and sex abuse allegations,' citing Gardner's own writings (on which he was cross-examined). *See also Wiederholt v Fischer*, 485 NW2d 442 (Wis Ct App 1992) (appellate court, although not discussing validity of PAS, upheld trial court's refusal to transfer custody of 'alienated' children to father as his expert urged because only 'limited research data' supported theory that removal would provide cure, expert conceded cure was controversial and carried uncertain risks, and testimony from parents and children supported trial court's finding that transfer would not succeed and was unreasonable). *But see Kilgore v Boyd*, Case no 94-7573 (13th Jud Cir, Fla 22 November 2000) (transcript of hearing permitting Gardner's PAS testimony), *available at* http://www.rgardner.com/pages/kg_excerpt.html.

45 Williams, op cit, n 26, at pp 275–278.

46 Gina Keating, *Critics Say Family Court System Often Amounts to Justice for Sale*, PASADENA STAR-NEWS, 24 April 2000. A similarly outspoken assessment by a well-regarded scholar appears in the American Bar Association's Journal; referring to Gardner's withdrawn Sex Abuse Legitimacy Scale (SALS, the basis for Gardner's PAS theory), Professor Jon R. Conte of the University of Washington Social Welfare Doctoral Faculty remarked, SALS is '[p]robably the most unscientific piece of garbage I've seen in the field in all my time. To base social policy on something as flimsy as this is exceedingly dangerous.' Debra Cassens Moss, *Abuse Scale*, 74 ABA J, 1 December 1998, at p 26. Gardner's views on paedophilia and what he calls a wave of hysteria concerning child abuse allegations have been received with equally harsh appraisals elsewhere. *See, eg,* Jerome H. Poliacoff and Cynthia L. Greene, *Parental Alienation Syndrome: Frye v Gardner in the Family Courts*, *available at* http://www.gate.net/~liz/liz/poliacoff.htm (a revised version of an article by the same name that originally appeared in the FAMILY LAW SECTION, FLORIDA BAR ASSOCIATION, COMMENTATOR, vol 25, no 4, June 1999).

47 *See, eg,* Lucy Berliner and Jon R. Conte, *Sexual Abuse Evaluations: Conceptual and Empirical Obstacles,* 17 CHILD ABUSE AND NEGLECT 111, at p 114 (1993):

'[The Sexual Abuse Legitimacy Scale (SALS)] is based entirely on the author's personal observations of an unknown number of cases seen in a specialised forensic practice. Although reference is made to studies [by Gardner] these are unpublished, not described, and are of unknown value. … Indeed, to our knowledge, the entire scale and parent[al] alienation syndrome upon which it is based have never been subjected to any kind of peer review or empirical test. In sum, there is no demonstrated ability of this scale to make valid predictions based on the identified criteria.'

In addition, Faller notes that Gardner's work makes reference to none of the works on false allegations of sexual abuse in divorce that predate his publications. Faller, op cit, n 3, at pp 106–108 (analysing Gardner's work in light of the relevant literature and finding it wanting).

48 As Faller puts it, Gardner has repudiated the numbers produced by his scale, but not the factors. Although the SALS is no longer listed as a separate publication by Gardner's press, Creative Therapeutics, Faller examines Gardner's more recent *Protocols* and concludes that 'virtually all SALS factors are included in the Protocols, and the parental alienation syndrome figures prominently in the Protocols as a signal that the allegation of sexual abuse is false.' Faller, op cit, n 3, at pp 105–106.

49 *See, eg, Metza v Metza*, 1998 Conn Super LEXIS 2727 (Conn Super Ct 1998) (mother's disparaging remarks 'can lead to the Parental Alienation Syndrome'); *Blosser v Blosser*, 707 So 2d 778, at p 780 (Fla Dist Ct App 1998) (parties stipulated to admission of psychologist's report that included conclusion that 'child did not exhibit any parental alienation syndrome'); *In re Marriage of Condon*, 73 Cal Rptr 2d 33, at p 39 n 9 (Ct App 1998) (mentioning but not discussing father's 'declaration and supporting materials [from a psychologist] regarding

THE ENGLISH AUTHORITIES

In England and Wales, the Court of Appeal has twice heard claims based on PAS: *Re L (Contact: Domestic Violence); Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H (Contact: Domestic Violence)*[51] and *Re C (Prohibition on Further Applications)*.[52] Each time it has expressed serious doubt about the syndrome.

On the first occasion, the court, which has the power to direct that an expert report be prepared on matters relevant to a case before it, exercised this option. The result, a paper setting forth psychiatric and developmental principles to guide courts in visitation cases, was prepared and later published by two highly regarded psychiatrists, Drs Claire Sturge and Danya Glaser.[53] Responding to questions, the report identifies the relevant literature and the potential advantages and disadvantages of visitation in general, then discusses domestic violence and other difficult cases. The authors specifically address PAS, which they find unhelpful.[54] Objecting to PAS' assumptions concerning causation and its prescribed interventions, the experts recommend a case-specific approach instead.[55]

The Court of Appeal expressly accepted the tenor and conclusions of the report and, in her discussion of the third joined appeal, *Re M*, Dame Elizabeth Butler-Sloss P made further reference to it. She noted the PAS diagnosis of the trial court expert in the case, Dr L.F. Lowenstein, and his recommendation that he provide therapy for at least six sessions, then submit a further report.[56] Stating that even alienation of a child by one parent 'is a long way from a recognized syndrome requiring mental health professionals to play an expert role,' the President remarked not only that Dr Lowenstein 'is at one end of a broad spectrum of mental health professionals,' but also that it was 'unfortunate' that the parents' lawyers had been 'unable to find an expert in the main stream of mental health expertise.'

In *Re C*, the Court of Appeal again indicated its scepticism of a litigant's PAS claim, but this time the court's focus was less on PAS itself and more on other, far more plausible,

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"Parental Alienation Syndrome"'; quotation marks, however, suggest scepticism); *In re John W*, 48 Cal Rptr 2d 899, at p 902 (Ct App 1996) (father given custody without discussing expert's reasoning that mother's good faith belief that father had molested child was produced by subtle, unconscious PAS); *White v White*, 655 NE2d 523 (Ind Ct App 1995) (mother sought to introduce evidence to rebut father's factual assertions but did not question PAS theory). *But see Wiederholt v Fischer*, 485 NW2d 442 (Wis Ct App 1992) (appellate court upheld trial court's refusal to transfer custody of 'alienated' children to father as his expert urged, in part because transfer carried uncertain risks, and testimony from the parents and children supported trial court's finding that transfer was unreasonable); *Bowles v Bowles*, 1997 Conn Super LEXIS 2721 (Conn Super Ct 1997) (court refuses to order custody transfer to father because 'it would be unrealistic and counter-productive'). Cases that *Gardner's* website lists as examples of PAS's admissibility, however, whether domestic or foreign, rarely address the scientific sufficiency question. *See* n 50 below, and accompanying text.

50 *See, eg, Johnson v Johnson*, No AD6182, Appeal No SA1 of 1997, Family Court of Australia (Full Court) (7 July 1997), *available at* http://www.austlii.edu.au/au/cases/cth/family_ct/ (trial court erred in not allowing father to recall expert witness in order to put questions on PAS; no discussion of PAS' scientific sufficiency; mother's counsel conceded relevance of PAS but argued unsuccessfully that questions had already been put under another label); *Elsholz v Germany*, 8 EUR CT HR 2000, at para 53 (deciding that the German courts' refusal to order an independent psychological report on the child's wishes and the absence of a hearing before the Regional Court constituted an insufficient involvement of the applicant in the decision-making process, thereby violating the applicant's rights under Arts 8 and 6 §1 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms). PAS appears only in the father's arguments, not in the court's findings or reasoning. *See* ibid, at paras 33–35, 43–53 and 62–66.

51 [2000] 2 FLR 334.

52 [2002] 1 FLR 1136.

53 *See* Claire Sturge in consultation with Danya Glaser, 'Contact and Domestic Violence – The Experts' Court Report' [2000] Fam Law 615.

54 Ibid, at pp 622–623.

55 Ibid (citing Faller's 'elegant rebuttal' of PAS as consistent with their own and reasoning that because there are many possible explanations for cases entailing 'implacable hostility,' appropriate responses depend upon the 'nature and [individual circumstances] of each case').

56 The roles of evaluator and therapist are distinct and there is, of course, always a danger of self-serving behaviour if an evaluator recommends that he or she be employed to conduct any therapy that he or she is recommending. It is unfortunate that this conflict of interest went without comment from the court.

explanations for the child's refusal to see her father.[57] The President's opinion clearly expressed continuing displeasure with PAS analysis.[58]

The Court has not, however, yet pointed out that arguments based on PAS should be admitted into evidence only if the theory meets the appropriate evidentiary test for new scientific theories. By making clear that PAS failed the test in *Re* L *(Contact: Domestic Violence)* and that *Re C (Prohibition on Further Applications)* is not to the contrary, the Court could put to rest tenuous but vehement assertions that *Re C* recognizes the legitimacy of PAS.[59]

In practice, PAS has provided litigational advantages to noncustodial parents with sufficient resources to hire attorneys and experts.[60] It is possible that many attorneys and mental health professionals have simply seized on a new revenue source—a way to 'do something for the father when he hires me,' as one practitioner puts it. For those who focus on children's well-being, it hardly matters whether PAS is one more example of a 'street myth' that has been too willingly embraced by the media and those involved in child custody litigation, or whether attorneys and mental health professionals truly do not know how to evaluate new psychological theories.[61] This latter possibility may, however, explain why an annual essay prize from the American Bar Association's Section on Alternate Dispute Resolution went to a remarkably

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[57] Dame Elizabeth Butler-Sloss P indicated that the father, who appeared *in propria persona*, failed to grasp the importance of his own behaviour in causing his youngest daughter's antipathy to visits. (The man had twice left his wife and four daughters for his secretary, whom he ultimately married.) The President remarked, 'I would say to Mr C that his view of the significance of parental alienation syndrome may have obscured other more obvious indicators that [his daughter] herself is giving.' [2002] 1 FLR 1136, at para [13].

[58] The President said, for example, 'I do ... warn [the father] that if he continues to make applications for residence or shared residence without any real basis ... he may well find himself with an application by the mother, which will be sympathetically entertained by the High Court judge who hears it. … At the moment ... evidence [that would support the father's requested order] does not exist in the voluminous papers that have been presented to us.' Ibid. Further, in appointing Children and Family Court Advisory and Support Service (CAFCASS) as guardian for the child and for a sister who was also still a minor, the President stated that, should the father mount another application, 'CAFCASS Legal should have leave to instruct a mental health expert, either a psychiatrist or psychologist, *if so advised*, (that would be a matter for CAFCASS Legal *with no impetus from this court*[)] ... to see whether there is any way out of the problems *and not to concentrate upon the issue of parental alienation syndrome*.' Ibid (emphasis added).

[59] Coming so soon after the Court's decision in *Re L (Contact: Domestic Violence)*, Dame Elizabeth Butler-Sloss P's view of the case and her warnings to the father are probably best understood as further nails in the coffin of PAS. Unfortunately, however, perhaps in an extemporaneous effort to soften the unrepresented father's losses, the President added to the remarks set forth in note 58 above that the father's PAS assertion 'will of course take its place in any consideration but not to obscure the other matters that may need to be looked at.' Tony Hobbs argues that this remark recognizes the existence of PAS, while Catherine Williams believes to the contrary that the President 'is simply acknowledging the father's views ... and saying that any mental health expert appointed will have to consider all the issues put before him.' *Compare* Tony Hobbs, 'Parental Alienation Syndrome and UK Family Courts, Part I' [2002] Fam Law 182, at p 182 [hereafter Hobbs, 'Part I'] (asserting that 'PAS has now been proven to respond to appropriate psychological treatment,' but citing no support); Tony Hobbs, 'Parental Alienation Syndrome and UK Family Courts – The Dilemma' [2002] Fam Law 381, at p 385 [hereafter Hobbs, 'The Dilemma'], *with* Catherine Williams, Newsline: 'Parental Alienation Syndrome' [2002] Fam Law 410, at p 411. As an alternative to the analysis suggested in the text accompanying this note, if the Court of Appeal again confronts an allegation of PAS that has not been tested below for scientific reliability, it could undertake that review itself. *See generally R v Gilfoyle* [2001] Crim LR 312*; Strudwick and Merry* (1994) 99 Cr App Rep 326; and n 40 above (articulating varying tests).

[60] As a general matter, custodial households are at a financial disadvantage in the United States, and custodial parents are less likely than noncustodial parents to be represented in custody litigation. MYERS, op cit, n 16, at p 8 vividly describes, for example, the costs to the custodial parent and the tactical advantages to the noncustodial parent of pre-trial discovery to 'keep … [the protective parent and counsel] off balance and distract them from the important work of getting ready for court.'

[61] Similar analytical sloppiness has accompanied other recent fads in American custody law – theories favouring joint physical custody over the objections of a parent, opposing relocation of custodial households, enforcing frequent visitation in high-conflict (even physically abusive) cases, and permitting dispositional recommendations from mediators to courts. In each of these areas, a great many troubling trial court decisions had been entered before leading scholars and practitioners pointed out their flawed reasoning. For a critical assessment of one such more recent innovation see the textual discussion below of so-called special masters.

non-evaluative, hence inadequate, piece on PAS,[62] and why articles on PAS that seriously misstate the research literature have appeared even in refereed journals.[63]

Sturge and Glaser's report has already proved important in England and will undoubtedly have a favorable impact elsewhere as it becomes more widely known. Because it accurately reflects leading research and scholarship in the field,[64] it stands in contrast to the literature that seeks to advance the acceptance of PAS. There, too often the scientific literature and the case law are omitted from discussion[65] or, if discussed, either misunderstood or misstated.[66]

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[62] *See* Anita Vestal, *Mediation and Parental Alienation Syndrome: Considerations for an Intervention Model*, 37 FAM AND CONCILIATION COURTS REV 487 (1999).

[63] *See, eg,* Deirdre Conway Rand, *The Spectrum of Parental Alienation Syndrome*, AM J FORENSIC PSYCHOL, vol 15, 1997, no 3, at p 23 (Part I) and No 4, at p 39 (Part II), which is replete with inaccurate characterisations of the findings and views of many scholars, including those of Judith Wallerstein, Janet Johnston and Dorothy Huntington. Rand frequently cites works as dealing with PAS although they discuss distinct matters that Rand and others confound with PAS in ways similar to Gardner, as discussed in this article. *Accord* telephone conversation with Dr Judith Wallerstein, 10 April 2001.

[64] The Lord Chancellor's Advisory Board on Family Law: Children Act Sub-Committee (CASC) Report, *Making Contact Work: A Report to the Lord Chancellor on the Facilitation of Arrangements for Contact between Children and their Non-residential Parents and the Enforcement of Court Orders for Contact* 17 (February 2002), for example, states that 148 of 167 respondents to CASC's broadly disseminated questionnaire agreed that 'the principles set out by Dr Sturge and Dr Glaser … represent a generally accepted professional view.' Among those responding in the affirmative, 'the overwhelming majority … [also] made it quite clear that they agreed with the two doctors' analysis.' Ibid. The 19 respondents who disagreed with or qualified the experts' views were primarily men and men's organizations expressing two concerns: (1) that PAS should have been accepted, and (2) that requiring a noncustodial parent to prove that contact benefits the child in every visitation dispute would impose an inappropriate burden of proof. Ibid, quoting Tony Coe on behalf of the Equal Parenting Council regarding the burden-of-proof issue. Mr Coe is president of the Council and is also now affiliated with Family Law Training & Education Limited, incorporated on 19 April 2002, for which the Kensington-Institute.org is a service mark. *See* http://www.kensington-institute.org/ (last visited 5 October 2002); http://www.companieshouse.gov.uk/info/ (specify 'family law training' in search box) (last visited 5 October 2002); http://www.lawzone.co.uk/cgi-bin/forum.cgi?forum=6&comment=90 (last visited 5 October 2002).

[65] English legal publications on PAS, for example, often provide no references to scientific source materials or named experts. *See, eg,* Caroline Willbourne and Lesley-Anne Cull, 'The Emerging Problem of Parental Alienation' [1997] Fam Law 807 (referring merely to 'parental alienation – a phenomenon recognised by American psychologists and increasingly finding recognition amongst doctors in the UK'); Dr Susan Maidment, 'Parental Alienation Syndrome – A Judicial Response?' [1998] Fam Law 264, at pp 264–265 (discussing English cases involving visitation difficulties that the author concludes justify an order changing the child's residence or the institution of care proceedings, but citing no research literature or mental health expertise beyond unnamed 'expert psychiatric opinion in the USA [that] is beginning to be adopted in the UK by some psychiatrists'); L.F. Lowenstein, 'Parental Alienation Syndrome' (1999) 163 Justice of the Peace 47 (*passim*); Hobbs, 'Part I', op cit, n 59, at 182 (asserting that 'PAS has now been proven to respond to appropriate psychological treatment,' but citing no support); Hobbs, 'The Dilemma', op cit, n 59, at 385 (asserting that '[i]n the US a body of knowledge is accruing on the successful management of PAS,' but again providing no support).

[66] *See, eg,* n 63 above (discussing the work of Rand), and the articles by Hobbs, who is both a justice of the peace and a psychologist. *Compare, eg,* Hobbs, 'Part I', op cit, n 59 (citing the Australian case of *Johnson v Johnson,* and the Florida case of *Kilgore v Boyd* as demonstrating that 'effective treatment [for severely entrenched PAS] may be able to commence only when robustly supported by collaborative judicial action') *with* nn 44 and 50 above (concerning these cases). Hobbs also cites the trial court case of *Berg-Perlow v Perlow* for the same proposition, but the appellate report (affirming the trial court) does not indicate whether the child, who had become violent at home and at school during the divorce, had ever been influenced by alienating behavior, nor whether the child's behavior had improved due to treatment. Rather, the father's behavior was clearly very disturbed, and his access appears to have been restricted for reasons independent of any possible efforts to alienate the child. *See Perlow v Berg-Perlow* 816 So 2d 210, 2002 Fla App LEXIS 6179 (8 May 2002). *See also* Hobbs' citations of *Johnson* and *Elsholz v Germany,* a decision of the European Court of Human Rights, for the proposition that 'judicial willingness to acknowledge PAS … must initially be kick-started by the highest court with jurisdiction over the land.' As note 50 above reveals, neither of these cases supports Hobbs' proposition; they concern instead procedural rights, not an endorsement of PAS by the courts. PAS was entered into evidence without objection in *Johnson* and was not even mentioned in the *Elsholz* court's reasoning. Imprecision also occurs in Hobbs' reliance on *R v Gilfoyle* [2001] Crim LR 312; the quotation he provides on English evidence law does not appear in the case. Further, his unsupported assertion that Sturge and Glaser's views on PAS do not reflect 'the profession's most commonly held views and practice' (ibid, at p 189) has been effectively rebutted by the CASC survey reported in *Making Contact Work*, which appeared, however, only after Hobbs' article was drafted. *See* n 64 above. Similar difficulties can be found in Hobbs, 'The Dilemma', op cit, n 59, for example, in the discussions of *Re C (Prohibition on Further Applications)* and of *Sahin v Germany* [2002] 2 FLR 119, a

IMPROVED SCIENCE BUT MORE BAD POLICY

Faced with such widespread misinformation and the harm that it may be causing in custody cases, leading scholars are now attempting to refine the area. In addition to their written works, some are now responding to Gardner on his own turf by presenting papers at professional meetings and continuing education courses for judges, attorneys and mental health professionals. In Northern California, which has been the site of much of the research now being erroneously cited by proponents of PAS, several professionals who have been lecturing broadly on the topic of alienation recently published a collection of related articles.[67]

These professionals distinguish themselves sharply from Gardner and PAS in several important respects.[68] First, they directly criticise his theory, its lack of scientific foundations, and its treatment recommendations. Next, they distinguish 'alienation' from 'estrangement' (although these terms have been synonymous in ordinary usage) and point out that there are many possible reasons for objections to, or interference with, visitation. They employ the term 'estrangement' to refer to difficulties in a noncustodial parent's relationship with a child that can be traced to that parent's characteristics or behaviour. 'Alienation' in their usage refers to difficulties stemming from the child's disproportionate, persistent, and unreasonable negative feelings and beliefs toward a parent.[69] By addressing the skewed rationales and conclusions promoted by Gardner's work, they reopen a broad inquiry into causation and recognise that many factors may be at work collectively.

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decision of the European Court of Human Rights that involved procedural rights and equal treatment for married and unwed fathers, but did not turn on PAS.

[67] In May 2001, for example, a national conference on Conflict Resolution, Children and the Courts included both a half-day institute titled 'The ABC's of High Conflict Families and Alienated Children' and a panel devoted to 'Restoring Relationships Between Alienated Children and their Parents.' AFCC 38th Annual Conference, 9-12 May 2001. The July 2001 issue of Family Court Review contains a symposium on AC. As described by the editors, the purpose is 'to review the psychological and legal difficulties with Parental Alienation Syndrome … and to develop a more complex and useful understanding of situations in which children strongly and unexpectedly reject a parent during or after divorce.' Janet R. Johnston and Joan B. Kelly, *Guest Editorial Notes*, 39 FAM CT REV 246, at p 246 (2001) [hereafter Johnston and Kelly, *Ed Notes*]. In their joint article for the issue, Johnston and Kelly argue for a new formulation that would distinguish alienated children 'from other children who also resist contact with a parent after separation but for a variety of normal developmentally expectable reasons (including realistic estrangement from violent, neglectful, or abusive parents).' Ibid, summarising Joan B. Kelly and Janet R. Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 FAM CT REV 249 (2001) [hereafter Kelly and Johnston, *The Alienated Child*].

[68] The following summary is based largely on Kelly and Johnston, *The Alienated Child*, op cit, n 67. Disagreement with Gardner concerning custody changes, however, appears in a companion piece, Janet R. Johnston et al, *Therapeutic Work with Alienated Children and Their Families*, 39 FAM CT REV 316, at p 316 (2001):

> 'The therapeutic approach to alienated children and their families described in this article stands in marked contrast to others that are largely coercive and punitive in nature (for example, Gardner [2d ed, op cit, n 2] prescribed primarily court sanctions in mild and moderate cases and change of custody in severe ones). It draws on two decades of specialised knowledge and skill derived from more humane methods of educating, mediating, and counseling. …'

Johnston and her co-authors do, however, accept what they term 'judicious and coordinate use of legal constraints and case management together with these therapeutic interventions,' and adopt certain coercive recommendations from a companion piece by Sullivan and Kelly. Ibid, at pp 316 and 330–332, setting forth their own more moderate approach, but relying in part on Matthew J. Sullivan and Joan B. Kelly, *Legal and Psychological Management of Cases With an Alienated Child*, 39 FAM CT REV 299 (2001).

[69] The definition of *alienated child* used in the Family Court Review symposium is:

> 'one who expressed freely and persistently, unreasonable negative feelings and beliefs (such as anger, hatred, rejection, and/or/fear) toward a parent that are significantly disproportionate to the child's actual experience with that parent. From this viewpoint, the pernicious behaviors of a "programming" parent are no longer the starting point. Rather, the problem of the alienated child begins with a primary focus on the child, his or her observable behaviours, and parent-child relationships.'

Andrew Schepard, *Editorial Notes*, 39 FAM CT REV 243, at p 243 (2001), citing Kelly and Johnston, *The Alienated Child*, op cit, n 67, at p 251. *See generally* Williams, op cit, n 26, at pp 271–273 (discussing others' varying definitions of 'parental alienation').

Specifically disapproved is Gardner's recommendation that children, even those who are supposedly engaged in a *folie à deux* with their custodial parent, be removed immediately and cut off from all contact with that parent pending reverse brain-washing or deprogramming. In line with more general psychological theory, these children are to be protected from the trauma of an abrupt termination of their primary relationship. Therapy for the child and the custodial parent may be recommended instead to loosen unhealthy aspects of their bond, supplemented by professional assistance in re-establishing the child's relationship with the noncustodial parent at an appropriate time and in a manner that will not unduly frighten the child. These authors are careful in their references to research literature and usually qualify their claims appropriately. In addition, to varying degrees, they provide helpful clinical insights for the use of therapists whose work includes families with child-parent antipathies or other visitation difficulties. To this extent, their insights, although not yet scientifically proven, are an important step forward.

Unfortunately, however, these mental health specialists, like Gardner before them, go far beyond their data as they craft recommendations for extended, coercive, highly intrusive judicial responses. They recommend a court-appointed 'special master' (that is, a lawyer or mental health professional) to lead a team consisting potentially of therapists for each family member, a co-parent counsellor, and attorneys for the parties and child. As articulated by Sullivan and Kelly, the special master assumes a quasi-judicial role 'including child-specific decision making, case management, further assessments ... structural interventions that are legally binding, and immediate conflict resolution ... .' [70] Other important recommendations are that courts order parties to waive significant rights to confidentiality (privileges),[71] and that courts order parents to share the potentially onerous costs equally.[72]

Some of these specific proposals are clearly contrary to current law. California constitutional, statutory, and case law, for example, make clear that the scheme Sullivan and Kelly propose (which apparently would authorise a special master over one or both parents' objections) constitutes an impermissible delegation of judicial authority.[73] Similarly, their

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[70] Sullivan and Kelly, op cit, n 68, at p 314, Appendix. *See also* ibid, at pp 300 and 308 (role of special masters regarding counselling for child), 309, 310 (sample order compelling parties to sign waivers of confidentiality and to agree to share costs, and sample order referring disputed custody issues to special master and prohibiting parents from obtaining attorney-drafted 'letters or filed motions' until after special master has held meeting), 311 (referring to delegated authority to a team leader to 'codify' decisions as court orders), 315 ('If authorised by the court, the special master can take on …. interventions that are legally binding …'). *Compare* ibid, at p 303, the authors' only reference to a stipulation, one authorising 'a time-limited special master while an evaluation is going on'.

[71] *See* ibid, at p 310 (sample order compelling parties to sign waivers of confidentiality). The authors acknowledge in passing, without explanation, that their recommendation may come under legal or ethical scrutiny. Ibid.

[72] References to expense appear, for example, in Johnston et al, op cit, n 68, at pp 330–331 and in Sullivan and Kelly, op cit, n 68, at pp 300–311 (concerning cases in which a family's needs far exceed available resources), and 314 (listing a special master, child's therapist, parents' therapists, co-parent counsellor, parents' attorneys, and child's attorney or guardian ad litem as potential 'collaborative team' members). Sullivan and Kelly recommend orders splitting all uninsured costs equally between the parties throughout their article. *See also* n 76 below.

[73] Sullivan and Kelly may have confounded voluntary stipulations with court orders following litigation. Their use of language throughout, particularly in their sample orders, incorrectly suggests that courts may order a person to agree to matters that the law leaves to an individual's choice. *See Ruisi v Thieriot*, 62 Cal Rptr 2d 766, at pp 771–775 (Ct App 1997), which reversed the trial court's order (adopting the recommendation of Dr Margaret Lee) that a special master be appointed over the objection of one parent and also reversed an order excusing the special master from requirements that the proceedings be reported. Ibid, at p 772. The appellate court held:

> '[T]he authority of the trial court to [designate a separate forum to resolve family law disputes] is constrained by the basic [state] constitutional principle that judicial power may not be delegated.
>
> 'The trial court has no authority to assign matters to a referee or special master for decision without explicit statutory authorisation. An invalid reference constitutes jurisdictional error which cannot be waived.
>
> …

recommended court-ordered waivers ('limited confidentiality' in their terminology) would require that courts act contrary to controlling legal mandates.[74] Finally, although their proposal that parties share costs equally is not contrary to law, it is (for no apparent reason) potentially punitive to the less affluent spouse.

Despite case law emphasising the legal distinction between consensual and nonconsensual orders, several authors in the symposium (including one whose recommendation for a special master was overturned in the controlling case law) endorse Sullivan and Kelly's recommendations.[75] It is, however, unlikely that California's appellate courts would ignore the distinction between judicial coercion and voluntary agreements. The failure of these leading forensic specialists to address this issue leaves unclear whether they do not understand the distinction, or whether it is simply unimportant to them. In either case, the possibility that quasi-judicial decisions might be entered by those who do not find such distinctions dispositive is troubling at best.

Even if they were lawful, the authors concede that their proposed remedies are extremely costly.[76] Further, they provide no reasonable assurance that these recommendations will either serve the child's interests[77] or even improve the situation that would exist without judicial intervention.[78] As Sullivan and Kelly acknowledge:

> 'Contrary to what is often asserted by child custody experts and parental alienation advocacy groups, there is little empirical research evidence to support any specific intervention, such as changing custody, in the severe, chronic cases. Furthermore, there is no empirical data that indicates whether entrenched alienation and total permanent rejection of a biological parent has long-term deleterious effects on children's psychological development. … Similarly, there is clinical support but no empirical

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'When, as here, the parties do *not* consent to a reference, the authority of the trial court to direct a special reference is limited to particular issues. The trial court has no power to refer issues other than those explicitly specified by statute. …'

Ibid, at pp 772–773 (citations omitted). As the court also pointed out, the case did not involve the appointment of a court commissioner. Ibid, at p 772, n 9. Nor did it involve the court's power, *upon agreement by the parties*, to order a reference to try 'any or all of the issues in an action or proceeding, whether or fact or of law.' Ibid, at p 773, n 13.

(Reversal was also granted in *Ruisi v Thieriot* on a second issue as to which the trial court accepted a recommendation from Dr Lee, who had testified that it would harm an 8-year-old boy's development to move anywhere at all with his mother, even to a nearby county. The child lived with his mother and saw his father on weekends. On remand, in light of *In re Marriage of Burgess*, 913 P2d 473 (Cal 1996), which articulated a new standard for relocation cases, the mother and child were permitted to relocate to the East Coast. *See generally*, Carol S. Bruch and Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM LQ 245 (1996).)

[74] California evidence law, for example, requires that judges recognise privileges such as patient–therapist confidentiality on the motion of any party or, indeed, *sua sponte*, unless a specific exception applies. CAL EVID CODE § 916. Sullivan and Kelly's suggestions that courts order parties to waive such confidentiality asks, at least in the California context in which they practice, that judges violate their statutory duties.

[75] *See, eg,* S. Margaret Lee and Nancy W. Olesen, *Assessing for Alienation in Child Custody and Access Evaluations*, 39 FAM CT REV 282, at pp 295–296 (2001) (Dr Lee was the expert who recommended the appointment of a special master in *Ruisi*). *See also* n 73 above.

[76] *See, eg,* references to parties' abilities to pay in Johnston et al, op cit, n 68, at pp 330–331; Sullivan and Kelly, op cit, n 68, at pp 300, 311 (concerning cases in which the family's needs far exceed available resources), and 314 (listing the special master, child's therapist, parents' therapists, co-parent counsellor, parents' attorneys, and child's attorney or guardian ad litem as potential 'collaborative team' members). Sullivan and Kelly repeatedly recommend orders splitting all uninsured costs equally between the parties; this recommendation is likely to cause serious hardship for the lower-earning parent, and it is puzzling that they do not account for that difficulty. *See also* n 72 above and accompanying text.

[77] Sullivan and Kelly, op cit, n 68, at p 309: '[S]anctions [imposed on an uncooperative parent] that involve the child or custody (sometimes as extreme as hospitalization or incarceration) are rarely based on the best interests of the child.'

[78] *See* nn 81–89 below and accompanying text.

> research demonstrating that by letting go of the relationship, the rejected parent and child will at some later time reconcile and restore the relationship.'[79]

As Johnston puts it, 'The long-term outcomes [of therapeutic work with alienated children and their families] are a matter of conjecture and currently unknown'.[80]

As this discussion suggests, these authors share unexamined assumptions about the roles of courts and mental health professionals in inter-parental child custody disputes.[81] They employ a medical model, one that assumes that all serious interpersonal difficulties can and should be remedied by mental health interventions. As a consequence, they ask courts to order parties who are neither abusive nor neglectful to employ and cooperate with intrusive, costly teams of professionals, even when there is no assurance that improvement will be achieved before the family's resources are exhausted or that the results will be appreciably better than what is likely to occur without intervention.

Their belief that such intervention is appropriate may spring in part from the shift to the best-interests-of-the-child custody standard and from enhanced roles for noncustodial parents. Each of these well-intended developments has brought with it increased litigiousness in child custody cases and an expanded role for mediators and evaluators. Parents who were once assumed or even presumed to be the proper custodians for their children (and to be capable of making sound decisions for them) are now subject to close monitoring and to parenting orders that require extensive cooperation and contact between a child's parents. This, in turn, has extended custody mediation and evaluations to increasingly less-troubled and less-affluent families. The incremental nature of these changes, however, has masked the degree to which post-divorce or post-separation parenting is treated more intrusively than parenting in other settings.

Although parental separation may, of course, cause or exacerbate intra-familial difficulties, the degree to which these difficulties justify public intervention is a question of policy and law. Some difficulties, although extremely unfortunate, are appropriately left to families and individuals to address as a private matter, if at all. When a parent dies, for example, no current family law doctrine imposes grief counselling on a minor child or surviving spouse, absent behaviour (such as neglect, abuse, or other criminal conduct) that provides an independent basis for coercive intervention. There is reason to question whether a different response is justified when emotional difficulties occur instead in the context of separation or divorce. The presence of two parents with differing desires is relevant, of course, but perhaps to a far lesser degree than current practice suggests.

Indeed, restraint of this sort is recommended for the custody context in the report of a 25-year follow-up to a pioneering study of 131 children of divorcing California families. The original work, *Surviving the Breakup*,[82] revealed differences in children's responses to their parents' separation that reflected the children's developmental stages. The authors, Drs Judith Wallerstein and Joan Kelly, noted distinctive, angry behaviour by children aged nine to twelve, who often placed blame on the parent they believed caused the divorce and formed alignments with the parent they deemed innocent.[83] Gardner's reliance on this work demonstrates mistaken

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[79] Sullivan and Kelly, op cit, n 68, at pp 313–334.

[80] Johnston et al, op cit, n 68, at p 329.

[81] The works reviewed here from the Family Court Review July 2001 symposium and a recent friend-of-the-court brief indicate that many mental health professionals hope to do far more than counsel parties. They seek quasi-judicial roles that will authorise them to prescribe the details of life for many parents and children. Most troubling of all is that they wish to do so in a framework that lacks due process projections such as a record, evidentiary privileges, and full access to the courts. *See* Amici Curiae Brief, op cit, n 37.

[82] WALLERSTEIN AND KELLY, op cit, n 10.

[83] Ibid, at pp 74–75:

> 'The single feeling that most clearly distinguished this group from the younger children was a fully conscious, intense anger. … Approximately half of the children … were angry at their mothers, the other half at their fathers, and a goodly number were angry at both. In the main children were angry at the parent whom they blamed for the divorce.'

assumptions about the incidence,[84] causes and consequences of such parent–child alignments, and Gardner has hence made inappropriate recommendations concerning responses to them. It appears that the proponents of AC may have overreacted as well.

Most dramatically, Wallerstein reveals that these children's alignments were transient, with every child later abandoning his or her harsh position, mostly within one or two years and all before the age of 18.[85] She reports that the children remained with their primary caregivers throughout, yet were profusely apologetic to the parents they had previously treated so badly. This is dramatically different from Gardner's untested prediction that, absent immediate and dramatic intervention, the disfavoured parent may well be permanently cut out of the child's life. As Wallerstein reports the chronology,

> 'In these situations [which involved one-fifth of the children in the study], the child is usually a preadolescent or young adolescent and the targeted parent is the one who sought the divorce. ... The child … seeks to restore the family or help the sorrowful parent. ... The mischief wrought by presumably well-bred children was astonishing. ...
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> 'In following these alliances over the years, I find that the vast majority are short-lived and can even boomerang. Children … soon become bored or ashamed of their mischief. Not one alliance lasted through adolescence and most crumbled within a year or two. … [M]ost children find their way back to age-appropriate activities as they enter adolescence ... . With time they are likely to turn against the parent who encouraged them to misbehave. …'[86]

In what seems a thinly veiled reference to those who advocate Gardner's PAS theory, she concludes,

> 'There is great advantage in allowing natural maturation to take its course and to avoid overzealous intervention to break these alliances, which are usually strengthened by efforts to separate the allies. In this, the alliance may be akin to a moderate case of flu that mobilises the immune system and generates antibodies. It is not a fulminant cancer requiring radical surgery or limb amputation, especially by poorly trained surgeons.'[87]

Wallerstein's concern about overzealous intervention, although authored in the context of custody transfers, seems equally applicable to the broad range of coercive interventions proposed only a year later by Johnston, Kelly, Sullivan, and their co-authors.

Johnston's work is less easily reconciled. In writing about the apparently intractable cases she observed in her studies of high-conflict custody disputes, she initially went further than Wallerstein in expressly criticising Gardner's recommendations:

> 'It has been our experience that forcibly removing … children from the aligned parent and placing them in the custody of the rejected parent, as recommended by Gardner (1987), is a misguided resolution; it is likely to be not only ineffective but actually punitive and harmful because it usually intensifies the problem.'[88]

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[84] Gardner has suggested that PAS may be present, albeit in varying severity, in perhaps 40%–90% of all contested custody cases. See n 4 above and accompanying text. Wallerstein and Kelly's 20% overall figure deals with alliances rather than PAS and largely reflects the subset of 9- to 12-year olds in a sample of divorcing couples, not all of whom were disputing custody. They note that the anger and alignments of this age group distinguish it from other age ranges.

[85] Telephone conversation with Dr Judith Wallerstein, 10 April 2001.

[86] WALLERSTEIN, LEWIS AND BLAKESLEE, op cit, n 10, at pp 115–116.

[87] Ibid, at pp 116–117.

[88] Johnston, *Children Who Refuse Visits*, op cit, n 10, at p 132.

Indeed, Johnston questioned whether children should even be asked to visit the rejected parent in such hostile circumstances. Noting that the literature did not clarify the circumstances under which visitation benefits children, she concluded,

> 'Despite the fact that mental health professionals are recommending and courts are ordering visitation arrangements for thousands of children daily, there is yet a meagre knowledge base to justify their decisions.'[89]

In more recent publications, Johnston points out that 'profound alienation … most often occurs in high-conflict custody disputes [and] is an infrequent occurrence among the larger population of divorcing children.'[90] She also recommends against frequent transitions between parents if children show continued stress reactions to them.[91] Her points are well taken.[92] Given these insights, however, it is puzzling that Johnston expressly endorses many coercive aspects of Sullivan and Kelly's legal framework.[93] Until she provides further clarification, Johnston's apparent support for forced contact between the members of high-conflict families should be construed narrowly, given her many publications questioning the wisdom of or need for such approaches.

The PAS debacle and the troubling recent AC recommendations make clear that the time has come for deep thinking about realistic family law goals. Children ought not to be asked to function under circumstances that would challenge or overwhelm even the strongest adults.[94] A child's chance for healthy development requires that parents, judges, and mental health professionals face the realities of the child's situation. This includes a realistic understanding of the limitations of dispute resolution techniques, therapy, and legal compulsion in high-conflict cases. Overly ambitious efforts with only small chances of success should be shunned in favour of reducing the child's emotional burdens, respecting the child's fears, and enhancing the child's emotional stability.

RECOMMENDATIONS AND CONCLUSION

Children whose parents do not agree or cooperate concerning their care are placed in the middle of loyalty conflicts that can only stress and sometimes break them.[95] We do not yet

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89 Ibid.

90 Kelly and Johnston, *The Alienated Child,* op cit, n 67, at p 254.

91 JANET R. JOHNSTON, HIGH-CONFLICT AND VIOLENT PARENTS IN FAMILY COURT: FINDINGS ON CHILDREN'S ADJUSTMENT, AND PROPOSED GUIDELINES FOR THE RESOLUTION OF CUSTODY AND VISITATION DISPUTES, Access/Visitation: General Principles No 2 and n 2, *available at* http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/hcvpfcs.pdf.

92 *See generally* Carol S. Bruch, *And How Are the Children? The Effects of Ideology and Mediation on Child Custody Law and Children's Well-Being in the United States*, 2 INT'L J LAW AND FAM 106 (1988); Carol S. Bruch, *Taking Ourselves Seriously Enough to be Cautious: A Response to Hugh McIsaac*, 5 INT'L J LAW AND FAM 82 (1991); Bruch and Bowermaster, op cit, n 73, at pp 262–269.

93 A case in point is Sullivan and Kelly's recommended order in high-conflict cases that would literally require children to pass through a no-man's land each time they leave or return from a visit. Sullivan and Kelly, who display helpful insight into the dynamics of alienation cases, are far less convincing when they suggest legal responses. *See* nn 70–81 above and accompanying text.

94 Kelly and Johnston suggest, for example, that children who evidence alienation may have already faced unbearable pressures. Kelly and Johnston, *The Alienated Child,* op cit, n 67, at p 255.

95 The author of this article first learned of PAS from a psychologist who was called for assistance when an 8-year-old girl became suicidal while institutionalised. The child had been totally cut off from her mother by a court that followed the recommendation of a custody evaluator who applies Gardner's principles rigorously. This evaluator and his partner continue to apply Gardner's principles fully, even in the face of serious abuse concerns, although now referring to 'a parental alienation matter' rather than PAS, according to investigative reporter Karen Winner, who was commissioned by a parents' organisation to investigate family law practices in the Sacramento, California courts. *See* Winner, op cit, n 22. Psychologist Vivienne Roseby of the Judith Wallerstein Center for the Family in Transition in Corte Madera, California reports that she and her colleagues have confronted similar difficulties with PAS-inspired custody transfers, including a case in which a 12-year-old boy died when he hanged himself on the day his custody was to be transferred. Telephone conversation with Dr Vivienne Roseby, 6 May 2001, in Davis, California.

know enough about how children develop loyalties and antipathies or resolve them as they mature, whether in intact or divided households. Until we do, caution should guide therapists and courts. A growing body of research documents the harsh and sometimes violent world that a large percentage of children in high-conflict custody disputes seeks to escape.

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. AC, although more refined in its understanding of child–parent difficulties, entails intrusive, coercive, unsubstantiated remedies of its own. Lawyers, judges, and mental health professionals who deal with child custody issues should think carefully and respond judiciously when claims based on either theory are advanced.

More generally, far greater interdisciplinary training and competence in scientific methodology are needed. These should be brought to bear whenever a new assertion is made that, if accepted, will shape the interpretation or application of family law principles (for example, the concept of a child's best interest). Although the use of expert testimony is often useful, decision-makers need to do their homework rather than rely uncritically on experts' views. This is particularly true in fields such as psychology and psychiatry, where even experts have a wide range of differing views, and professionals, whether by accident or design, sometimes offer opinions beyond their expertise. Lawyers and judges are trained to ask the hard questions, and that skill should be employed here.

The first question is whether scientific sufficiency has been indicated by respected professional vetting, for example, inclusion in the American Psychiatric Association's DSM-IV[96] or the World Health Organisation's ICD-10.[97] Where no such imprimatur exists, one must ask whether approval has been sought and denied or whether submission would be premature. Insights that are too new, or for which no established gold standard exists, may nonetheless be valuable,[98] but their probity and limitations should be clearly understood. This can be accomplished by inquiries into the sample (if any) on which the theory is based, the methodology and assumptions affecting the collection of data, how conclusions have been drawn from the data, the likelihood that fair extrapolations can be drawn, the degree to which assertions are internally consistent and compatible with established knowledge, and the balance of potential benefits and harms if the insight later proves unsound.[99]

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[96] AMERICAN PSYCHIATRIC ASSOCIATION, op cit, n 11.

[97] WORLD HEALTH ORGANIZATION, op cit, n 11.

[98] An outstanding example is the series of publications by Wallerstein and her colleagues over the course of what developed into a 25-year project. Initially designed as exploratory research to help define questions for later studies, the sample (which was neither randomly selected nor scientifically controlled) has nevertheless provided major advances in knowledge. Many of Wallerstein and Kelly's initial clinical insights (for example, that children respond to their parents' divorce differently according to their developmental stage) brought to light connections that had been uniformly over-looked, but seemed obvious once pointed out. Subsequent, controlled studies by others have borne out that insight, while other suggestions have required refinement or retrenchment in the years since (such as their early suggestion concerning joint physical custody). *Compare, eg,* Carol S. Bruch, *Parenting At and After Divorce: A Search for New Models*, 79 MICH L REV 708, at pp 708–710 (1981) (discussing methodology) and 722–725 (questioning joint custody conclusion) *with* WALLERSTEIN, LEWIS AND BLAKESLEE, op cit, n 10, at pp 212–219 (significantly narrowing and refining position on joint custody).

[99] In its decision refusing to hear testimony from Gardner on PAS, the *Fortin* court indicated that it was being guided in part by a concurring opinion of Chief Judge Kaye of the New York Court of Appeal in a case examining the admissibility of DNA evidence. *People v Fortin*, 706 NYS2d 611, at p 614 (NY Crim Ct 2000). The cited language in Judge Kaye's opinion reads, 'It is not for a court to take pioneering risks on promising new scientific techniques, because premature admission both prejudices litigants and short-circuits debate necessary to determination of the accuracy of a technique.' *People v Wesley*, 633 NE2d 451, at p 462 n 4 (N Y 1994). *See also Chambers v Chambers*, No CA99–688, 2000 Ark App LEXIS 476 (Ark Ct App 21 June 2000): On *de novo* review, the appellate court affirmed the trial court's refusal to force visitation and be prepared to transfer custody, an order the father's expert witness said he fully expected the court would have to implement because the child would refuse to comply. The expert, an adolescent and child psychiatrist, testified that the steps he was recommending 'will almost certainly be traumatic and painful [for the child].' The appellate court concluded that 'even [the father's expert] swore that the result [the father] sought posed a substantial risk of damage to the child,' and held that '[t]he chancellor correctly refused to inflict the threat of that harm.'

The challenge is to bring professional skills and standards to the task: an unbiased mind, healthy scepticism, rigorous thinking, and sound policy analysis. But just as the responsibility is great, so too is the opportunity. As the noted legal philosopher Jerome Frank put it:

> 'Some wishes, of course, no matter how hard we work on them, never come true. But it is always open to us to substitute for neurotic "wishful thinking" what Neurath happily called "thinkful wishing". Let us thus use the wish that the administration of justice may be improved. If we do, we will .... admit that [trial courts'] fact-finding frequently results in grave injustices. We will then seek to discover in what ways that job can be done better. I surmise that, although such efforts will fall far short of perfection, they will, by no means, go wholly unrewarded.'[100]

[100] JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 79 (PRINCETON UNIV PRESS 1949).