APPENDIX C

"THE ENGLISH AUTHORITIES"

from
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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