

Parental Alienation Syndrome: Junk Science in Child Custody Determinations

Carol S. Bruch*

A. Introduction

As American courts and legislatures continue their enthusiastic ventures into family law reform, they frequently make use of theories and research from the social sciences. This essay focuses on a development in child custody law that may be of particular interest to colleagues abroad: increasing scholarly and judicial criticism of the so-called 'Parental Alienation Syndrome' (PAS), a theory propounded in 1985 that became widely used despite an absence of scientific foundations. The discussion below highlights the theoretical and practical problems with PAS and identifies analyses now being advanced in its stead.

B. PAS and Its Critics

I. PAS Doctrine

Richard Gardner, a psychiatrist, coined the term 'Parental Alienation Syndrome (PAS)' 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 a child by one parent to denigrate the other parent [and] self-created contributions by the child in support of the alienating parent's

* Carol S. Bruch, Professor of Law and Chair, Doctoral Programme in Human Development, University of California, Davis, the US. For their generous and skilled assistance, the author of this article wishes to thank reference librarians Peg Durkin, Erin Murphy and Susan Llano of the UC Davis Law Library. The author is also grateful to Tony Tanke, Esq., Beth Tanke, PhD, and her colleague, Professor Floyd Feeney, for helping her to refine her thinking. Errors or omissions are, of course, the author's own.

¹ R.A. Gardner, *Recent Trends in Divorce and Custody Litigation*, *Academy Forum* (American Academy of Psychoanalysis, 1985) at pp. 3-7.

campaign'.² Gardner has estimated that PAS arises in approximately 90 per cent of litigated child custody cases, but provides no research findings to substantiate his assertions about the syndrome, its frequency or its setting. In fact, his original estimates appear to have been completely overstated, as scientific literature reports that allegations of sexual abuse are comparatively rare.³

In recent years, use of the term PAS has been extended dramatically to include cases of all types where a child refuses to visit the non-custodial parent, whether or not the child's objections entail abuse allegations. Although Gardner sometimes states that his analysis does not apply to cases of actual abuse,⁴ 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 to him.⁵ His recommended treatment for serious cases is to transfer custody of the child from the 'beloved' custodial parent to the 'hated' parent for deprogramming. This may entail institutional care for a transitional

² Gardner, Introductory Comments on the PAS (excerpted from R.A. Gardner, *The Parental Alienation Syndrome* (1998, 2d ed.) formerly available at < <http://www.rgardner.com/refs/> > (hereafter: 'Gardner's website'); the current iteration has been slightly reworded and is found on Gardner's website (last updated 31 May 2001 and last visited 1 September 2001) under the title Basic Facts About the Parental Alienation Syndrome. Gardner has expressed his views in somewhat differing form at different times and different places, particularly in response to criticism. When he does so, close attention to his precise language and careful comparisons between sources are required.

³ See the careful, comprehensive report of a major research effort, Thoennes and Tjaden, 'The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes' in (1990) *Child Abuse & Neglect*, pp.151–163, at p. 160 ('Less than 2 per cent 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'); Whitcomb, *US Department of Justice, When the Victim is a Child* (1992, 2d ed.) at p. 7 ('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'). See also the analysis of Gardner's work by a University of Michigan professor of social welfare, Faller, *The Parental Alienation Syndrome: What Is It and What Data Support It? Child Maltreatment* (1998) at pp. 100–115.

⁴ Indeed (perhaps in response to critiques challenging Gardner's assertions about the frequency with which unsubstantiated allegations of sexual abuse occur) the PAS definition on his website no longer mentions sex abuse allegations. See Gardner's website, *supra* note 2. Gardner also now acknowledges that 'some abusive neglectful parents are using the PAS explanation as a coverup and diversionary maneuver'. Publications and lectures that are promoted as assisting those who need to distinguish true from false allegations are, however, strongly reminiscent of his earlier, discredited Sex Abuse Legitimacy Scale (SALS) work, described below. See Gardner, 'Differentiating Between Parental Alienation Syndrome and Bona Fide Abuse-Neglect' in (1998) *American Journal of Family Therapy*, at pp. 97–107.

⁵ See his advice to judges that they should refrain from taking abuse allegations seriously. Gardner, *Legal and Psychotherapeutic Approaches to the Three Types of Parental Alienation Syndrome Families: When Psychiatry and the Law Join Forces, Court Review* (1991) at pp. 14–21, at p. 18 (quotation set forth below).

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.⁶

II. 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.⁷ These cases commonly involve domestic violence, child abuse and substance abuse.⁸ Many parents are angry, and a broad range of visitation problems occur. 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 rigour demonstrated by these professionals, 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.

III. 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)⁹ with psychosis. In doing so,

⁶ *Ibid.*, at pp. 16–17 (where his language, although not the substance of his recommendations, has been somewhat softened).

⁷ Maccoby and Mnookin, *Dividing the Child, Social and Legal Dilemmas of Custody* (1992) at pp. 132–161 (summarized at p. 159: approximately 25 per cent of families experience substantial legal conflict; 'in these families, the parents – the fathers in particular – harbour especially high levels of hostility toward the former spouse').

⁸ State of California, Administrative Office of the Courts, 'California Family Court Services Snapshot Study Report 1 – Overview of California Family Court Services Mediation 1991: Families, Cases and Client Feedback, January 1992' at <<http://www.courtinfo.ca.gov/courtadmin/aoc/familycourtservices/usrs/report01/r01rpt.htm>>, at pp. 8–12. In California, mediation is mandatory for all contested custody cases. In this statewide study of most mediation sessions by court personnel on a single day, serious issues of child abuse, family violence and substance abuse were raised by the parties in 42 per cent of all mediating families, with an additional 24 per cent 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'. Pearson and Anhalt, 'Enforcing Visitation Rights' in (1994) *Judges' Journal*, pp. 3–7 and 39–42, at p.41 (citing four additional studies which also indicate 'that safety concerns feature prominently in many visitation disputes').

⁹ See Wallerstein and Kelly, *Surviving the Breakup, How Children and Parents Cope with Divorce* (1980) at pp. 77–80 (special vulnerability of 9- to 12-year olds to alignments, for

he fails to recognize 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.¹⁰ His assertion that these disorders occur primarily in young children is also contrary to the literature,¹¹ probably also due to a misreading of typical developmental responses to divorce, this time on the part of young children.¹²

cont.

whom this coping behaviour at divorce wards off loneliness, sadness, and more serious depression), p. 99, pp. 145–146, pp. 233–234 (only a weak correlation between children's anger and parents' quarreling), p. 237, p. 253; Wallerstein, Lewis and Blakeslee, *The Unexpected Legacy of Divorce, a 25 Year Landmark Study* (2000) at pp. 115–117 ('alliances', usually involve pre-adolescents or young adolescents, in high conflict cases or where 'enmity overshadows good sense'), p. 125; Johnston, 'Children of Divorce Who Refuse Visitation' in *Nonresidential Parenting: New Vistas in Family Living* (Depner and Bray (eds)) (1993) at pp. 109–135, at p. 124.

¹⁰ See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (1994, 4th ed: DSM-IV) at § 297.3: 'Shared Psychotic Disorder (Folie à Deux)' at p. 305 ('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 unrecognized'); Fegert, Parental Alienation oder Parental Accusation Syndrome? *Kind-Prax* 1/2001, pp. 3–6 (Part 1), and *Kind-Prax* 2/2001, pp. 39–42 (Part 2), at pp. 41–42 (citing a literature search between 1877 and 1995 undertaken by the Würzburger Klinik that produced only 69 case reports of children and youth that match the description of *folie à deux*); Silveria and Seeman, 'Shared Psychotic Disorder: A Critical Review of the Literature' in (1995) *Canadian Journal of Psychiatry*, pp. 380–395, at pp. 390–391 (reporting a literature search covering 51 years, from 1942 through 1993, 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 per cent (19 cases) involved parents and children, with only five of these involving children 18 years old or younger). Silveria and Seeman note that whether published cases reports provide a representative sample or reflect frequency is unknown, but they, Fegert and the DSM all describe the phenomenon as rare. See also World Health Organization, *International Statistical Classification of Diseases and Related Health Problems* (1992, 10th ed.) (ICD-10) at p. 331, 'Disorder F24, Induced Delusional Disorder (Folie à Deux)'.

¹¹ Silveria and Seeman, 'Shared Psychotic Disorder: A Critical Review of the Literature' in (1995) *Canadian Journal of Psychiatry*, pp. 380–395, at pp. 390, 392 report that '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 nonorganic psychotic disorders in general, which is relatively rare in the very young and the very old'. *Ibid.*

¹² '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, *supra* note 9, 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-

Secondly, possibly as a consequence of these errors and his ‘tail-of-the-elephant’ view,¹³ 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 that Gardner asserts are usually false in the divorce context.¹⁴ 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.¹⁵

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.¹⁶ 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.¹⁷

cont.

year olds), shifting allegiances (4 to 7-year olds), loyalty conflicts (7 to 10-year olds), and alignments (9 to 12-year olds).

- ¹³ 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.
- ¹⁴ As Professor Faller points out, Gardner does not attempt to explain why he believes that ‘perhaps 95 per cent or more’ of all allegations of child sexual abuse are true but ‘the vast majority of allegations in [divorce custody cases] are false’. Faller, *supra* note 3, at pp. 103–104.
- ¹⁵ As to the frequency of unsubstantiated abuse allegations, see the literature collected and analyzed in Myers, *A Mother’s Nightmare – Incest: A Practical Legal Guide for Parents and Professionals* (1997) at pp. 133–135, 198–210. See also *ibid.*, pp. at 144–145 (innocent misperceptions of innocent behaviour); Wood, ‘The Parental Alienation Syndrome: A Dangerous Aura of Reliability’ in (1994) *Loyola Los Angeles Law Review*, pp. 1367–1415, at pp. 1373–1374, and pp. 1391–1394.
- ¹⁶ 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?’ Sherman, ‘A Controversial Psychiatrist and Influential Witness Leads the Backlash Against Child Sex Abuse “Hysteria”’ in (1993) *The National Law Journal*, August 16, at p. 1 col. 2. 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.
- ¹⁷ Compare Gardner, *The Parental Alienation Syndrome, A Guide for Mental Health and Legal Professionals* (1992) at pp. 146–147 (such *folies à trois* with therapists are ‘a widespread phenomenon’) and Gardner, *supra* note 5, at p. 18, with Faller, *supra* note 3, at pp. 102, 103 (collecting and critiquing relevant passages from Gardner’s work) and Fegert,

Indeed, he warns judges not to take abuse allegations seriously in high conflict cases (severe PAS cases) in the divorce court setting. Neither Gardner nor those who accept his views acknowledge the logical difficulties when Gardner asserts that such substantiated abuse allegations constitute evidence of parental alienation by the protective parent.

Fourthly, Gardner believes that, particularly in serious cases, the relationship of an 'alienated' child with the 'hated' parent will be irreparably damaged, probably ending for all time¹⁸ unless immediate, drastic measures (custody transfer, isolation from loved parent, and 'deprogramming') are taken. Here, too, reliable sources reveal that his theory is exaggerated, with all but unusual cases (e.g., those appearing in violent families) resolving themselves the children mature.¹⁹

Fifthly, as these sources suggest, Gardner's proposed remedy for extreme cases is unsupported and endangers children.²⁰ In his admitted decision to err on the side of

cont.

Part 2, supra note 10, at p. 41 (reports of a *folie à deux* or *trois* are extremely rare). Further, Gardner asserts that these custodial parents and therapists, when sexual abuse is alleged, may take personal sexual pleasure in visualizing the alleged activity between the non-custodial parent and the child. Faller, *supra* note 3, at pp. 103, 104, 110–111 (collecting quotations); see also Gardner, *supra* note 5, 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'. Unattributed, 'Judge Nakahara on PAS and the Role of the Court in Family Law' in PAS Newsletter, News for Subscribers January 1999 <<http://www.vev.ch/en/pas/bw199901.htm>> (last visited 8 April 2001).

¹⁸ See Gardner, *The Parental Alienation Syndrome, Addendum 1* (1999).

¹⁹ Professor Janet Johnston, a specialist in high-conflict custody disputes with advanced degrees in social work and sociology, has given initial findings from two studies of high-conflict disputes referred to her research projects by the courts. In these cases, 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 two to three years post separation, with three-fourths of the 9 to 12-year olds involved in such behaviour. Johnston concludes 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 predicts that 'it is highly likely that children will move into alignments as they approach early adolescence, if the parental conflict is ongoing'. She contrasts these findings to far more benign findings in a community study of 131 children of recently separated parents. Johnston, *supra* note 10, at p. 124. In that less-troubled population, 20 per cent 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. Author's telephone conversation with Dr Judith Wallerstein on 10 April 2001.

²⁰ Gardner acknowledges that his SALS was weighted to find some perpetrators innocent who were in fact guilty. Sherman, 'A Controversial Psychiatrist and Influential Witness Leads the Backlash Against Child Sex Abuse "Hysteria"' in (1993) *The National Law*

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 US. 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 California 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.²¹ Even in less extreme cases, children are also likely to suffer from such a sudden dislocation in their home life and relationship with the parent they trust. Even therapists who accept PAS theory have advised against custody transfers to no avail in some reported cases, where it seems judges have implemented Gardner's views on their own initiative.²²

In sum, children's reluctance or refusal to visit non-custodial parents can probably be better explained without resort 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 non-custodial parent's behaviour and the child's developmental stage play decisive roles. Alignments or alliances that

cont.

Journal, August 16, at p. 1 col. 2. 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, *supra* note 3, *passim*.

- ²¹ See, e.g., Keating, 'Disputed Theory Used in Custody Cases: Children Often Victims in Parental Alienation Syndrome Strategy' in (2000) *Pasadena Star News*, available at <http://www.canow.org/NOWintheNews/familylaw_news_text.html> (last visited 8 April 2001); Mothers of Lost Children, 'Sample of California Family Law Cases: Children Taken Away from Safe Parents, Forced to Live With Abusive Parents' in (2000); Winner, 'Placing Children at Risk: Questionable Psychologists and Therapists in the Sacramento Family Court and Surrounding Counties' May 2000 (study commissioned by California Protective Parents Association). See also Lehmann, 'Controversial Syndrome Arises in Child-Custody Battles' in (2000) *Psychiatric News*, unnumbered pp. 1-3, at p. 2. Paul Fink, M.D., 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's undermines the seriousness of sexual abuse allegations'. *Ibid.* See generally Myers, *A Mother's Nightmare – Incest: A Practical Legal Guide for Parents and Professionals* (1997) at pp. 8 and 138-138.
- ²² See *Karen 'PP' v. Clyde 'QQ'* 602 N.Y.S.2d 709 (N.Y. 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; 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 N.Y.S.2d 267 (N.Y. Fam. Ct. 1991), the deeply troubling trial court opinion in the case.

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.²³

C. The Merchandizing 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?²⁴ Surely Gardner's marketing skills, which take full advantage of the professional sloppiness already identified, have been key. Further, he has employed professionals to arrange media exposure and continuing education courses for professionals, uses websites, lectures and direct marketing to full advantage,²⁵ and distorts scholarship to achieve his goals.²⁶ An eight page article in the journal of the American Judges Association provides a typical example.²⁷ It fails to mention that Gardner is a private practitioner, that he self-publishes the vast majority of his work, that he now receives most of his income as an expert witness in PAS cases,²⁸ and that he holds

²³ See, e.g., Fegert, *Part 2*, *supra* note 10, at pp. 40–42 (Part 2); Johnston, *supra* note 9, at pp. 132–133.

²⁴ See *Krebsbach v. Gallagher* 181 A.D.2d 363 (N.Y. App. Div. 1992) (trial court's order transferring custody against recommendation of psychologist and Law Guardian reversed for lack of support in record); see also the *Alaska* case reversing because no one found evidence

²⁵ 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 six held the first edition and six the second edition of Gardner's book, *The Parental Alienation Syndrome*. In total only nine of these libraries hold one, the other, or both editions. If major libraries do not hold the book, yet therapists, judges and lawyers across the country are citing Gardner's work, it also seems likely that Gardner has spread his ideas and promoted book sales through his own website (*supra* note 2) his public and professional appearances and, perhaps, also through direct mailings to professionals. See Gardner's website, *supra* note 2, for a listing of his appearances. See generally Sherman, 'A Controversial Psychiatrist and Influential Witness Leads the Backlash Against Child Sex Abuse "Hysteria"' in (1993) *The National Law Journal*, August 16, at p. 1 col. 2.

²⁶ The publications and cases listed on his website are examples in point. They identify negative publications as supporting PAS, claim that discussions of entirely distinct phenomena (such as alignments) are about PAS, claim that cases in which any reference to PAS is made constitute decisions that the syndrome is scientifically and legally accepted, and claim 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.

²⁷ See Gardner, *supra* note 6.

²⁸ [A]t present [Gardner's] therapeutic work actively takes approximately 1 to 2 per cent of his time and the remained of his time and income are accounted for by forensic analysis and testimony [increasingly regarding PAS].

only a courtesy academic title.²⁹ Further the article lists only ten sources (nine of his own writings and one piece by Sigmund Freud) to support his dramatic, even hyperbolic assertions.³⁰

In any event, over the years since Gardner first announced his theory, the term Parental Alienation Syndrome 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.³¹

cont.

People v. Fortin 706 N.Y.S.2d 611 (N.Y. Crim. Ct. 2000) (describing Gardner's testimony in a criminal sex abuse case in which he offered to testify concerning PAS and the credibility of the complaining witness; his testimony was refused because of a failure to establish general acceptance of PAS within the professional community that would permit admission at trial).

²⁹ Instead, the attribution reads:

Richard A. Gardner, MD, is clinical professor of child psychiatry at Columbia university, College of Physicians and Surgeons. This article is taken from his book, *Family Evaluation in Child Custody Mediation, Arbitration, and Litigation*, published in 1989 by Creative Therapeutics of Cresskill, NJ.

Gardner's Columbia appointment is to a title commonly provided by US medical schools to doctors who permit students to observe their practice; Clinical Professor of Medicine does not imply full faculty membership, in contrast to a title of Professor of Clinical Medicine. Non-academics often assume incorrectly that Gardner's title signifies a salaried full-time teaching and research appointment. See *People v. Fortin* 706 N.Y.S.2d 611 (N.Y. Crim. Ct. 2000) (reporting Gardner's testimony that his academic appointment is unpaid).

³⁰ S. Freud, 'Three Contributions to the Theory of Sex: II-Infantile Sexuality (1905)' in *The Basic Writings of Sigmund Freud* (A.A. Brill ed.) (1938) at pp. 592-93 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 inclination to pedophilia] 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'.

³¹ A friend of the court brief recently filed with the California Supreme Court provides an example. *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, e.g., the remarks of Judge Aviva Bobb, Presiding Judge of the Los Angeles Superior Court Family Court, quoted in Keating, 'Disputed Theory Used in Custody Cases: Children Often Victims in parental Alienation Syndrome Strategy' <http://www.canow.org/NOWintheNews/familylaw_news_text.html>, Pasadena Star-News 2000:

[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

Accordingly, in practice, whenever child sexual abuse allegations or disrupted visitation patterns arise in the US, one must now be prepared to confront a counter-claim asserting that PAS is at work, not abuse or other difficulties.³²

A recent electronic search for all US reported cases since 1985 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 contact with the primary custodian be terminated.

This search produced 48 cases from 20 states, including the highest courts in 6 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 disturbing.³³ In only a handful of cases did the trial or appellate court specifically consider whether the supposed syndrome is admissible under the accepted precedents that test either acceptance in the scientific community or acceptable scientific methodology,³⁴ and in several of these the court determined

cont.

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 behaviour, that parent should be monitored by a third party.

³² Even Gardner now concedes that this is a frequent pattern. Keating, 'Disputed Theory Used in Custody Cases: Children Often Victims in Parental Alienation Syndrome Strategy' <http://www.canow.org/NOWintheNews/familylaw_news_text.html>, Pasadena Star-News, 23 April 2000, (last visited 8 April 2001) (quoting Gardner: 'Now that PAS is a widespread diagnosis, many abusers are claiming they are innocent victims of PAS').

³³ Most of the cases listed as admitting PAS on Gardner's website, *supra* note 2, 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, e.g., *In re Violetta B* 568 N.E.2d 1345 (III Ct. App. 1991) (PAS mentioned by one witness but not discussed and irrelevant to decision); *Crews v. McKenna k/a Kuchta* (Minn. App. 1998) LEXIS 793 (7 July 1998) ('kernal of authenticity' to 11-year old's fears, but 'some' of child's behaviour evidenced PAS); *Truax v. Truax k/a Briley* 874 P.2d 10 (Nev. 1994); *Loll v. Loll* 561 N.W.2d 625 (N.D. 1997) (state supreme court upheld the 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'').

³⁴ In the US, reliable expert testimony on scientific, technical or other specialized 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 the particular field' test first articulated for the federal courts in *Frye v. United States* 293 F. 1913, 1014 (D.C. Cir. 1923) became the test in most state courts as well. Giannelli and Imwinkelried, *Scientific Evidence* (1999, 3d ed.) Vol. 1, at §§ 1–5. The US Supreme Court ruled that the Federal Rules of Evidence (adopted in 1975) displaced the *Frye* test in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993). Most states have also replaced '*Frye*' with '*Daubert*', the new test that considers many factors to determine scientific reliability. *Ibid.* at §§ 1–7 to 1–8 (comparing the standards). See also *ibid.* at §§ 9–5 on opinion evidence.

that it need not reach the admissibility question, often because no 'alienation' had been shown.³⁵ On more than one occasion, however, appellate courts nevertheless took the occasion to alert trial courts that Dr Gardner's work is seriously disputed.³⁶

In the few reported cases in which Dr Gardner's proffered testimony was challenged or the validity of PAS was otherwise questioned, courts usually excluded his testimony or reliance on PAS.³⁷ These cases reveal two areas of concern. First, courts are consistent in refusing to permit Gardner to testify on the truth or falsity of

³⁵ E.g., *In the Interest of TMW* 553 So.2d 260, 261 (Fla. 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* (Conn. Super. 1997) LEXIS 2721 (7 August 1997) (court makes orders without regard to PAS theory); *In re Marriage of Rosenfeld* 524 N.W.2d 212, 215 (1994) (same). See also *Pearson v. Pearson* 5 P.3d 239, 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.

³⁶ See, e.g., *In the Interest of TMW* 553 So.2d 260, 261 n.3 (Fla. Ct. App. 1989); *Hanson v. Spolnik* 685 N.E.2d 71, 84 n.10 (Ind. Ct. App. 1997). A powerful dissent and concurrence 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 'expert' testimony provided by a psychologist. He 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. One year after the transfer order, the mother's visitation had gradually been restored, now being six hour visits once every two weeks. See also *Pearson v. Pearson* 5 P.3d 239, 243 (Alaska 2000), where the state supreme court volunteered that PAS (which both parties' experts accepted) is 'not universally accepted'.

³⁷ See, e.g., *People v. Fortin* 706 N.Y.S.2d 611 (N.Y. Crim. Ct. 2000); *Oliver V v. Kelly V* (2000) *New York Law Journal*, 27 November, (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, 'The Parental Alienation Syndrome: A Dangerous Aura of Reliability' in (1994) *Loyola of Los Angeles Law Review*, at pp. 1367-1415. It also cited Dr Gardner's own writings (as to which he was cross-examined), which state his 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'. See also *Wiederholt v. Fischer* 485 N.W.2d 442, 532 (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).

witnesses, noting that this question is reserved to the trier of fact.³⁸ Secondly, most courts considering the question agree that PAS has not been generally accepted by professionals³⁹ and does not meet the applicable test for scientific reliability.⁴⁰ These conclusions are echoed by 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, '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'.⁴¹

Following considerable scientific criticism, Gardner withdrew the test he had constructed to determine whether sexual abuse has taken place.⁴² Yet, as Professor 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.⁴³

³⁸ See, e.g., *Tungate v. Commonwealth* 901 S.W.2d 41 (Ky. 1995) (refusing Gardner's proposed testimony on 'indicators for pedophilia' in criminal case because went to ultimate issue of guilt or innocence and 'lacked sufficient scientific basis for the opinions offered').

³⁹ See *Frye v. United States*, *supra* note 34.

⁴⁰ See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, *supra* note 34.

⁴¹ Keating, 'Critics Say Family Court System Often Amounts to Justice for Sale' <http://www.canow.org/NOWintheNews/familylaw_news_text.html>, Pasadena Star-News, 24 April 2000 (last visited 8 April 2001). 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'. American Bar Association, 'Abuse Scale' in (1988) *ABA Journal*, 1 December, 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, e.g., Poliacoff and Greene, 'Parental Alienation Syndrome: *Frye v. Gardner* in the Family Courts' (1999).

⁴² See, e.g., Berliner and Conte, 'Sexual Abuse Evaluations: Conceptual and Empirical Obstacles' in (1999) 17 *Child Abuse & Neglect*, pp. 111–125, at p. 114:

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

In 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, *supra* note 3, at pp. 106–108 (analyzing Gardner's work in light of the relevant literature and finding it wanting).

⁴³ As she 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

Despite the good work of those few courts that have considered the scientific probity of PAS, there is little to celebrate. The vast majority of the cases mentioning PAS that were reviewed reveal that one or more 'experts' evaluated the case in light of PAS, and there is nothing to suggest that anyone – therapist, attorney or judge – thought to question whether the theory is well-founded or leads to sound recommendations or orders.⁴⁴ A similar lack of rigour is now also seen in foreign sources.⁴⁵

In practice, PAS has provided litigational advantages to non-custodial parents with sufficient resources to hire attorneys and experts.⁴⁶ It is possible that many

cont.

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, *supra* note 3, at pp. 105–106.

⁴⁴ See, e.g., *Metza v. Metza* (Conn. Super. 1998) LEXIS 2727 (25 September 1998) (mother's disparaging remarks 'can lead to the Parental Alienation Syndrome'); *Blosser v. Blosser* 707 So. 2d 778, 780 (Fla. 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, 39 n.9 (Cal. Ct. App. 1998) (mentioning but not discussing father's 'a declaration and supporting materials [from a psychologist] regarding 'Parental Alienation Syndrome';' quotation marks, however, suggest skepticism); *In re John W* 48 Cal. Rptr. 2d 899 902 (Cal. Ct. App. 1996) (father given custody without discussing expert's reasoning that mother's good faith belief that father had molested child was product of her subtle, unconscious PAS); *White v. White* 655 No.E.2d 23 (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 N.W.2d 442, 532 (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* (Conn. Super. 1997) LEXIS 2721 (7 August 1997) (court refuses to order custody transfer to father because 'it would be unrealistic and counter-productive').

A similar pattern seems to be developing in other countries and institutions. Cases that Gardner's website, *supra* note 2, lists as examples of PAS's admissibility, however, whether domestic or foreign, rarely address the scientific sufficiency question. See, e.g., *Johnson v. Johnson* (1997) No. AD6182 of 1993, Family Court of Australia (Full Court) (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 relevancy of PAS but argued unsuccessfully that questions had already been put under another label); *Elsholz v. Germany* [2000] 8 ECHR, 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 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.* paras 33–35, 43–53, 62–66.

⁴⁵ Australian and German cases.

⁴⁶ As a general matter, custodial households are at a financial disadvantage in the US, and custodial parents are less likely than non-custodial parents to be represented in custody

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 professionals truly do not know how to evaluate new psychological theories.⁴⁷ This latter possibility may explain why an annual essay prize from the American Bar Association's Section on Alternate Dispute Resolution went to a remarkably unevaluative, hence inadequate, piece on PAS,⁴⁸ and why articles on PAS that seriously misstate the research literature have appeared even in juried journals.⁴⁹

D. Improved Analysis

Faced with such widespread misinformation and the harm that it may be causing in custody cases, leading scholars are now refining the area. In addition to their written works, they 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 miscited by proponents of PAS, several professionals who

cont.

litigation. Myers, *A Mother's Nightmare – Incest: A Practical Legal Guide for Parents and Professionals* (1997) at p. 8 vividly describes the costs to the custodial parent and the tactical advantages to the non-custodial 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'.

⁴⁷ 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 supporting custody recommendations from mediators. 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.

⁴⁸ See Vestal, 'Mediation and Parental Alienation Syndrome: Considerations for an Intervention Model' in (1999) *Family and Conciliation Courts Review*, pp. 487–503.

⁴⁹ See, e.g., Rand, 'The Spectrum of Parental Alienation Syndrome' in (1997) 15:3 *American Journal of Forensic Psychology*, pp. 23–47 (Part I) and (1997) 15:4 *American Journal of Forensic Psychology*, pp. 39–92 (Part II), which is replete with inaccurate characterizations of the findings and views of many scholars, including, for example, Judith Wallerstein, Janet Johnston and Dorothy Huntington. Works are frequently cited 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. Author's telephone conversation with Dr Judith Wallerstein on 10 April 2001.

have been lecturing broadly on the topic of 'Alienation' will soon publish a collection of related articles.⁵⁰

In their lectures, they distinguish themselves sharply from Gardner and PAS in several respects.⁵¹ First, they directly criticize his theory, its lack of scientific foundations, and its treatment recommendations. Next, they now distinguish 'alienation' from 'estrangement' (although these terms have been synonyms in ordinary usage) and point out that there are many possible reasons for objections to or interference with visitation. They employ their new term 'estrangement' to refer to difficulties in the non-custodial parent's relationship with the child that can be traced to that parent's characteristics or behaviour. 'Alienation' in their usage refers to difficulties stemming from the child or the custodial parent's behaviour or unsupported beliefs. By righting the skewed rationales and conclusions promoted by Gardner's work, they reopen a broad inquiry into causation, recognize that many factors may be at work together, and vary their recommended responses to the disrupted parent-child relationship accordingly.

Specifically disapproved is Gardner's recommendation that children, even those who are supposedly engaged in a *folie à deux* with their custodial parents, 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 non-custodial parent at an appropriate time and in a manner that will not frighten the child unduly.

Even less intervention is recommended in the report of a 25-year follow-up to a

⁵⁰ In May 2001, for example, a national conference on 'Conflict Resolution, Children and the Courts' will include a half-day institute entitled '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 forthcoming July 2001 issue of *Family Court Review* will also contain several papers on related topics. As described by the editors, the purpose is to 'review the psychological and legal difficulties with PAS, and develop a more complex and useful understanding of situations in which children strongly and unexpectedly reject a parent during or after divorce'. Johnston and Kelly, 'Editorial Notes' in (2000) *Family Court Review*, (forthcoming). In their joint contribution to the issue, Professor Janet Johnston and Dr Joan Berlin 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.* This author has not yet had an opportunity to review these articles and cannot, therefore, express the degree to which she will agree with their specific content, although she welcomes this effort at refining the field.

⁵¹ Because their in-press work is not yet available, this summary reflects some earlier lecture materials. The forthcoming articles may, of course, contain revisions and differences in opinion among the authors.

pioneering study of 131 children from divorcing California families. The original work, *Surviving the Breakup*,⁵² revealed differences related to their developmental stage in children's responses to their parents' separation. The authors, Drs Judith Wallerstein and Joan Kelly, noted distinctive, angry behaviour by children aged 9–12, who often placed blame on the parent they believed caused the divorce, and formed alignments with the parent they deemed innocent.⁵³ As suggested above, it is, of course, possible that professionals who have observed behaviour of this sort may adopt Gardner's theories without examining them closely simply because they seem to describe familiar patterns. Dr Wallerstein's work suggests, however, that Gardner has made seriously mistaken assumptions about the incidence,⁵⁴ causes and consequences of such parent-child alignments and, hence, has made inappropriate recommendations concerning responses to them.

Most dramatically, Dr Wallerstein reveals that these alignments were transient, with *every* child later abandoning his or her harsh position, mostly within one or two years, and all before age 18.⁵⁵ 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 Dr 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 . . .

In following these alliances over the years, it is submitted 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

⁵² Wallerstein and Kelly, *Surviving the Breakup* (1980).

⁵³ *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.

⁵⁴ Gardner, as noted above, believes that PAS is present, albeit in varying severity, in 90 per cent of all contested custody cases. Wallerstein's 20 per cent overall figure largely reflects the subset of 9 to 12 year olds in a sample of divorcing couples, not all of whom were disputing custody, and notes that the anger and alignments of this age group distinguish it from other age ranges.

⁵⁵ Telephone conversation with Dr Judith Wallerstein on 10 April 2001.

time they are likely to turn against the parent who encouraged them to misbehave⁵⁶

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 mobilizes the immune system and generates antibodies. It is not a fulminant cancer requiring radical surgery or limb amputation, especially by poorly trained surgeons.⁵⁷

Professor Johnston, in speaking of the apparently intractable cases she observed in her studies of high-conflict custody disputes, goes further:

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.⁵⁸

Speaking to what is probably the heart of the matter, Johnston questions whether children should be asked to move back and forth between households in such hostile circumstances. She notes that the literature does not yet clarify the circumstances under which visitation works and when it fails. Johnston concludes:

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.⁵⁹

Her point is well taken.⁶⁰ The PAS debacle makes 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. Their chances for healthy development require that judges and related professionals face the realities of their situations. These adults need to recognize that dispute resolution techniques, therapy, and legal

⁵⁶ Wallerstein, Lewis and Blakeslee, *The Unexpected Legacy of Divorce* (2000) at pp. 115–116.

⁵⁷ *Ibid.*, at pp. 116–117.

⁵⁸ Johnston, *supra* note 9, at p. 132.

⁵⁹ *Ibid.*

⁶⁰ See generally Bruch, 'The Effects of Ideology and Mediation on Child Custody Law and Children's Well-Being in the United States' in (1988) *International Journal of Law and the Family*, pp. 106–126; Bruch, 'Taking Ourselves Seriously Enough to be Cautious: A Response to Hugh McIsaac' in (1991) *International Journal of Law and the Family*, pp. 82–85; Bruch and Bowermaster, 'The Relocation of Children and Custodial Parents: Public Policy, Past and Present' in (1996) *Family Law Quarterly*, pp. 245–303, at pp. 262–269.

mandates sometimes hold no effective remedy or no remedy speedy enough to permit the child's healthy development. When that is the case, attention is properly directed to child protection in its broadest sense, and children should be given a safe harbour in which to grow.

E. Conclusion

Children whose parents do not agree or co-operate concerning their care are placed in the middle of loyalty conflicts that can only stress and, sometimes, break them.⁶¹ We do not yet 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 our courts. A growing body of research documents the harsh and sometimes violent world that a large percentage of children in high-conflict custody disputes seek 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. Lawyers, judges and mental health professionals who deal with child custody issues should think carefully and react vigorously when claims based on PAS 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, as with PAS, 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.

⁶¹ This author was first told of PAS by a psychologist who was called for assistance when an 8-year old girl became suicidal while institutionalized. 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 'Parental Alienation Syndrome', according to investigative reporter Karen Winner, who was commissioned by a parents' organization to investigate family law practices in the Sacramento, California courts. Psychologist Dr Vivienne Roseby of the Judith Wallerstein Centre 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. Interview with Vivienne Roseby, PhD, 6 May 2001, in Davis, California, US.

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 or the World Health Organization's ICD-10.⁶² 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.⁶³ But their probity and limitations should be clearly understood. This can be accomplished by inquiries into the sample (if any) upon 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.⁶⁴

The challenge is to bring professional skills and standards to the task: an unbiased

⁶² World Health Organization, *International Statistical Classification of Diseases and Related Health Problems* (1992, 10th ed.) (ICD-10).

⁶³ 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 overlooked, 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 suggestion concerning joint physical custody). Compare Bruch, 'Parenting At and After Divorce: A Search for New Models' in (1981) *Michigan Law Review*, pp. 708–727, at pp. 708–710 (discussing methodology), pp. 722–725 (questioning joint custody conclusion) with Wallerstein, Lewis and Blakeslee, *The Unexpected Legacy of Divorce* (2000) at pp. 212–219 (significantly narrowing and refining position on joint custody).

⁶⁴ 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 N.Y.S.2d 611, 614 (N.Y. 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 N.E.2d 451, 461 at 462 n.4 (N.Y. 1994). See also *Chambers v. Chambers* (Ark. App. 2000) LEXIS 476 (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 of the child', and held that '[t]he chancellor correctly refused to inflict the threat of that harm'.

mind, healthy skepticism, 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. It is surmised that, although such efforts will fall far short of perfection, they will, by no means, go wholly unrewarded.⁶⁵

Selected Bibliography

- American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (Washington DC, 1994, 4th ed.: DSM-IV)
- L. Berliner and J.R. Conte, 'Sexual Abuse Evaluations: Conceptual and Empirical Obstacles' in (1993) 17 *Child Abuse & Neglect*, 111
- C.S. Bruch, 'The Effects of Ideology and Mediation on Child Custody Law and Children's Well-Being in the United States' in (1988) 2 *International Journal of Law and the Family* 106
- C.S. Bruch, 'Parenting At and After Divorce: A Search for New Models' in (1981) 79 *Michigan Law Review* 708
- C.S. Bruch, 'Taking Ourselves Seriously Enough to be Cautious: A Response to Hugh McIsaac' in (1991) 5 *International Journal of Law and the Family* 82
- C.S. Bruch, and J.M. Bowermaster, 'The Relocation of Children and Custodial Parents: Public Policy, Past and Present' in (1996) 30:2 *Family Law Quarterly* pp. 245-303
- K.C. Faller, 'The Parental Alienation Syndrome: What Is It and What Data Support It?' in (1998) 3:2 *Child Maltreatment* pp. 100-115
- J.M. Fegert, 'Parental Alienation oder Parental Accusation Syndrome? (Parts 1 and 2)' in (2001) 1 *Kind-Prax* pp. 3-6, and at pp. 39-42
- J. Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton, 1949)
- R.A. Gardner, Basic Facts About the Parental Alienation Syndrome (excerpted from R.A.Gardner, *The Parental Alienation Syndrome* (Cresskill, 1998, 2nd ed.), available at <<http://www.rgardner.com/refs/>> (last visited 7 May 2001)
- R.A. Gardner, 'Recent Trends in Divorce and Custody Litigation, Academy Forum' in (1985) 29:2 *Academy Forum* (American Academy of Psychoanalysts) pp. 3-7

⁶⁵ Frank, *Court on Trial* (1949) at p. 79.

- R.A. Gardner, 'Legal and Psychotherapeutic Approaches to the Three Types of Parental Alienation Syndrome Families: When Psychiatry and the Law Join Forces' in (1991) 14:1 *Court Review*, Spring pp. 14–21
- R.A. Gardner, 'Introductory Comments on the PAS' (excerpted from R.A. Gardner, *The Parental Alienation Syndrome* (Cresskill, 1998, 2nd ed.), formerly available at < <http://www.rgardner.com/refs/> > (last updated 3 May 2001; last visited 7 May 2001)
- R.A. Gardner, *The Parental Alienation Syndrome* (Cresskill, 1998, 2nd ed.) at Addendum II 2000, available at < <http://www.rgardner.com/refs/> > (last visited 7 May 2001)
- R.A. Gardner, 'Differentiating Between Parental Alienation Syndrome and Bona Fide Abuse-Neglect,' in (1998) 27:2 *American Journal of Family Therapy* pp. 97–107
- P.C. Giannelli and E.J. Imwinkelried, *Scientific Evidence*, Vol 1 (Charlottesville, 1999, 3rd ed.)
- J.R. Johnston, 'Children of Divorce Who Refuse Visitation' in *Non-residential Parenting: New Vistas in Family Living* (Depner and Bray (eds)) (Newbury Park, 1993)
- J.R. Johnston and J.B. Kelly, 'Editorial Notes' in (2000) 39:3 *Family Court Review* (forthcoming)
- G. Keating, 'Critics Say Family Court System Often Amounts to Justice for Sale' in (2000) *Pasadena Star-News*, April 24, available at < http://www.canow.org/NOWintheNews/familylaw_news_text.html > (last visited 8 April 2001)
- G. Keating, 'Disputed Theory Used in Custody Cases: Children Often Victims in Parental Alienation Syndrome Strategy' in (2000) *Pasadena Star-News*, April 23, available at < http://www.canow.org/NOWintheNews/familylaw_news_text.html > (last visited 8 April 2001)
- C. Lehmann, 'Controversial Syndrome Arises in Child-Custody Battles' in (2000) *Psychiatric News*, September 01, unnumbered pp. 1–3, available at < <http://www.psych.org/pnews/00-09-01/controversial.html> > (last visited 7 May 2001)
- E.E. Maccoby and R.H. Mnookin, *Dividing the Child, Social and Legal Dilemmas of Custody* (Cambridge and London, 1992)
- D.C. Moss, 'Abuse Scale' in (1988) 74 *ABA Journal*, 1 December, at p. 26
- Mothers of Lost Children, 'Sample of California Family Law Cases: Children Taken Away from Safe Parents, Forced to Live With Abusive Parents' apparently 2000, available from Mothers of Lost Children, PO Box 1803, Davis, CA 95617
- J.E.B. Myers, *A Mother's Nightmare – Incest: A Practical Legal Guide for Parents and Professionals* (Thousand Oaks, 1997)
- 'Oliver V. v. Kelly V.' in (2000) *New York Law Journal*, 27 November
- J. Pearson and J. Anhalt, 'Enforcing Visitation Rights, Innovative Programs in Five State Courts May Provide Answers to This Difficult Problem' in (1994) 33:2 *Judges' Journal*, Spring, pp. 3–7 and pp. 39–42
- J. Poliacoff and C.L. Greene, 'Parental Alienation Syndrome: *Frye v. Gardner* in the Family Courts' available at < <http://www.gate.net/~liz/liz/poliacoff.htm> > (last

- visited 7 May 2001) (a revised version of an article by the same name that originally appeared in the Florida Bar Association, Family Law Section, (2000) 25:4 Commentator, June)
- D.C. Rand, 'The Spectrum of Parental Alienation Syndrome' in (1997) 15:3 *American Journal of Forensic Psychology* pp. 23–47 (Part I) and (1997) 15:4 *American Journal of Forensic Psychology* pp. 39–92 (Part II)
- R. Sherman, 'A Controversial Psychiatrist and Influential Witness Leads the Backlash Against Child Sex Abuse "Hysteria"' in (1993) 15:50 *The National Law Journal*, 16 August, p. 1, col. 2
- State of California, Administrative Office of the Courts, 'California Family Court Services Snapshot Study Report I – Overview of California Family Court Services Mediation 1991: Families, Cases and Client Feedback, San Francisco January 1992' available at <<http://www.courtinfo.ca.gov/courtadmin/aoc/familycourtservices/usrs/report01/r01rpt.htm>> (last visited 7 May 2001)
- N. Thoennes and P.G. Tjaden, 'The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes' in (1990) 14 *Child Abuse & Neglect* pp.151–163
- Unattributed, 'Judge Nakahara on PAS and the Role of the Court in Family Law' PAS – Newsletter, News for Subscribers, January 1999, unnumbered pp. 2–3, available at <<http://www.vev.ch/en/pas/bw199901.htm>> (last visited 7 May 2001)
- A. Vestal, 'Mediation and Parental Alienation Syndrome: Considerations for an Intervention Model' in (1999) 37 *Family and Conciliation Courts Review* pp. 487–503
- D. Whitcomb, *US Department of Justice, When the Victim is a Child* (Washington DC, 1992, 2nd ed.)
- K. Winner, 'Placing Children at Risk: Questionable Psychologists and Therapists in the Sacramento Family Court and Surrounding Counties' May 2000 (study commissioned by California Protective Parents Association, PO Box 15284, Sacramento, CA 95851–0284)
- C.L. Wood, 'The Parental Alienation Syndrome: A Dangerous Aura of Reliability' in (1994) 27 *Loyola of Los Angeles Law Review* pp. 1367–1415
- World Health Organization, *International Statistical Classification of Diseases and Related Health Problems* (Geneva, 1992, 10th ed.) at ICD–10