

Michigan Law Review

Volume 112 | Issue 4

2014

Toward a Child-Centered Approach to Evaluating Claims of Alienation in High-Conflict Custody Disputes

Allison M. Nichols

University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Evidence Commons](#), [Family Law Commons](#), [Juvenile Law Commons](#), and the [Litigation Commons](#)

Recommended Citation

Allison M. Nichols, *Toward a Child-Centered Approach to Evaluating Claims of Alienation in High-Conflict Custody Disputes*, 112 MICH. L. REV. 663 (2014).

Available at: <https://repository.law.umich.edu/mlr/vol112/iss4/4>

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

NOTE

TOWARD A CHILD-CENTERED APPROACH TO EVALUATING CLAIMS OF ALIENATION IN HIGH-CONFLICT CUSTODY DISPUTES

Allison M. Nichols*

Theories of parental alienation abound in high-conflict custody cases. The image of one parent brainwashing a child against the other parent fits with what we think we know about family dynamics during divorce. The concept of a diagnosable “Parental Alienation Syndrome” (“PAS”) developed as an attempt to explain this phenomenon, but it has been widely discredited by mental health professionals and thus fails the standard for evidentiary admissibility. Nevertheless, PAS and related theories continue to influence the decisions of family courts, and even in jurisdictions that explicitly reject such theories, judges still face the daunting task of resolving these volatile cases. In the midst of this highly adversarial process, children deserve independent representation to ensure that their interests remain front and center. Mandating the appointment of guardians ad litem in cases involving allegations of abuse or alienation will assist courts in conducting individualized, fact-specific investigations into such allegations to craft custody orders that serve the best interests of children.

TABLE OF CONTENTS

INTRODUCTION	664
I. THE EVIDENTIARY ADMISSIBILITY OF PAS TESTIMONY	666
A. <i>The “Syndrome” and Its Controversy</i>	666
B. <i>The Daubert–Frye Divide: From General Acceptance to Reliability</i>	669
C. <i>Inadmissible Under Either Standard</i>	671
1. <i>Not Generally Accepted Under Frye</i>	671
2. <i>Insufficiently Reliable Under Daubert</i>	673
II. REFOCUSING THE DISPUTE: THE ROLE OF THE GUARDIAN AD LITEM	679
A. <i>The Need for Independent Representation</i>	680
B. <i>Proposed Statutory Framework</i>	682
C. <i>Critiques and a Response</i>	684
III. GALs IN ACTION: SAMPLE SCENARIOS	686
CONCLUSION	688

* J.D., May 2013, University of Michigan Law School. Many thanks to my editors, Becca Klein, Maggie Mettler, Stephen Mayer, and Robbie Manhas, and to the rest of the *MLR* Notes Office for their support. I am grateful to Professor Joshua Kay for his valuable feedback and mentorship, and to Professor Kathleen Coulborn Faller for inspiring my interest in this field.

INTRODUCTION

Sixty-five percent of divorces in the United States involve families with minor children,¹ affecting about one million children per year.² Most custody arrangements in these cases are settled privately or through mediation, but 10 percent proceed to litigation before family courts.³ Due to the adversarial nature of the court system and the intensely emotional nature of divorce, child custody battles can turn vicious, and some experts argue that divorce may be “the single most traumatic experience” of a child’s life, with the potential to cause long-term psychological damage.⁴ High-conflict custody cases are more likely to involve allegations of child abuse or domestic violence,⁵ and even when that is not the case, children can be used as pawns in a struggle between warring parents. Popular culture is filled with stories of parents brainwashing their children in an attempt to manipulate the legal system for their own personal gain. In particular, the image of the scorned and vindictive mother, one who will do anything to prevent her children from seeing their father, has become an all-too-familiar archetype.

Child psychiatrist Richard Gardner coined the term “Parental Alienation Syndrome” (“PAS”) in 1985 to describe the breakdown of a parent–child relationship during high-conflict custody disputes.⁶ According to Gardner,

The parental alienation syndrome (PAS) is a childhood disorder that arises almost exclusively in the context of child-custody disputes. Its primary manifestation is the child’s campaign of denigration against a parent, a campaign that has no justification. It results from the combination of a

1. Kathleen Coulborn Faller, Essay, *Child Maltreatment and Endangerment in the Context of Divorce*, 22 U. ARK. LITTLE ROCK L. REV. 429, 429 (2000).

2. George J. Cohen, Comm. on Psychosocial Aspects of Child & Family Health, *Helping Children and Families Deal with Divorce and Separation*, 110 PEDIATRICS 1019, 1019 (2002).

3. Stephanie J. Dallam & Joyanna L. Silberg, *Myths That Place Children at Risk During Custody Disputes*, 9 SEXUAL ASSAULT REP. 33, 33 (2006), available at <http://www.leadershipcouncil.org/docs/Dallam&Silberg.pdf>.

4. Faller, *supra* note 1, at 429.

5. See Dallam & Silberg, *supra* note 3. One panel of experts defines the concept of “high-conflict” custody disputes as follows:

High-conflict custody cases are marked by a lack of trust between the parents, a high level of anger and a willingness to engage in repetitive litigation. . . . High conflict cases can arise when parents, attorneys or mental health professionals become invested in the conflict or when parents are in a dysfunctional relationship, have mental disorders, are engaged in criminal or quasi-criminal conduct, substance abuse or there are allegations of domestic violence, or child abuse or neglect.

High-Conflict Custody Cases: Reforming the System for Children—Conference Report and Action Plan, 34 FAM. L.Q. 589, 590 (2001), quoted in Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 500 (2001).

6. Richard A. Gardner, *Recent Trends in Divorce and Custody Litigation*, ACAD. F., Summer 1985, at 3, 3. For a general critique of Gardner’s methods and views, see, for example, Joan S. Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, 6 J. CHILD CUSTODY 232, 237–38 (2009).

programming (brainwashing) parent's indoctrinations and the child's own contributions to the vilification of the target parent.⁷

Gardner claims that this behavior deserves classification as a psychological syndrome due to a cluster of eight proposed symptoms, which he has identified through his clinical experience counseling parents and children during divorce and custody proceedings.⁸ Gardner's conception of PAS attempts to explain the increased incidence of child sexual abuse allegations beginning in the 1980s. Gardner argues that a vindictive parent frequently uses intentionally false allegations of child abuse—particularly sexual abuse—as an “extremely effective weapon” to turn a child against the other parent and thereby gain sole custody.⁹ This characterization of family dynamics during divorce has prompted harsh criticism from psychologists, legal scholars, and domestic violence survivors' and children's advocates alike, yet Gardner's theory has gained some traction (as well as significant attention) in family courts since its inception thirty years ago.¹⁰

The controversy surrounding allegations of parental alienation is multifaceted. On the one hand, various debunked mental health theories continue to exert inappropriate influence over the decisions of family courts. Yet the problem is certainly not confined to this issue, and once we look beyond admissibility concerns, there are few clear rules to guide family court judges in divining the best interests of a child who rejects a parent. Fortunately, judges do not have to issue orders while blindfolded; guardians ad litem serve a crucial function in fact-finding for the court, as well as providing independent representation for the child. Part I of this Note addresses the admissibility issue and concludes that testimony regarding PAS and related theories is inadmissible under the relevant evidentiary standards. Part II recommends that states adopt legislation requiring the appointment of guardians ad litem in all contested custody cases involving allegations of abuse, domestic violence, or alienation to assist courts in grappling with the complex legal and factual issues that these cases pose. Finally, Part III offers

7. Richard A. Gardner, *Parental Alienation Syndrome vs. Parental Alienation: Which Diagnosis Should Evaluators Use in Child-Custody Disputes?*, 30 AM. J. FAM. THERAPY 93, 95 (2002) [hereinafter Gardner, *PAS vs. Parental Alienation*]; see also RICHARD A. GARDNER, *THE PARENTAL ALIENATION SYNDROME: A GUIDE FOR MENTAL HEALTH AND LEGAL PROFESSIONALS* 73–74 (2d ed. 1998) [hereinafter GARDNER, *PAS GUIDE*] (“The disorder refers to a situation in which the parental programming is combined with the child's own scenarios of denigration of the allegedly hated parent.”).

8. These symptoms include (1) “a campaign of denigration” by the child; (2) “[w]eak, absurd, or frivolous rationalizations for the deprecation”; (3) a “lack of ambivalence” in hostility; (4) “the ‘independent-thinker’ phenomenon”; (5) “[r]eflexive support” of the favored parent; (6) a lack of guilt over behavior toward the target parent; (7) recounting “borrowed scenarios” as justification for the hostility; and (8) a “[s]pread of the animosity” to the extended family and friends of the target parent. Gardner, *PAS vs. Parental Alienation*, *supra* note 7, at 97; see also GARDNER *PAS GUIDE*, *supra* note 7, at 76–109.

9. Gardner, *PAS vs. Parental Alienation*, *supra* note 7, at 106.

10. See *infra* Section I.A.

several examples of ways in which guardians ad litem can promote outcomes that serve the best interests of children.

I. THE EVIDENTIARY ADMISSIBILITY OF PAS TESTIMONY

State law governs the admissibility of expert witness testimony in child custody cases,¹¹ but most states have adopted one of two rules set forth in cases interpreting the federal standards for admissibility. Nine states and the District of Columbia follow the *Frye* rule, while thirty-four states adhere to the more recent *Daubert* standard.¹² The remaining seven states use their own unique approaches.¹³ Section I.A outlines the criticisms of PAS as a scientific theory. Section I.B traces the evolution of the *Frye* and *Daubert* standards for the admissibility of expert witness testimony. Section I.C applies each standard to PAS testimony and concludes that such evidence is inadmissible under either standard.

A. The “Syndrome” and Its Controversy

Since its inception nearly thirty years ago, the idea of a parental alienation “syndrome” as a diagnosable, pathological condition has provoked harsh reactions from critics for various reasons. Gardner based the theory of PAS in part on his belief that false allegations of child sexual abuse are rampant in high-conflict custody battles,¹⁴ but many professionals believe that false abuse allegations in custody disputes are actually rare.¹⁵ One frequently cited study examined 9,000 contested custody cases and identified only 2% involving allegations of sexual abuse, of which half were substantiated.¹⁶ In other words, at most, only 1% of the custody cases involved false allegations of child sexual abuse, and it is unclear how many of these were intentionally false as opposed to false allegations made in good faith. Other studies have found that child sexual abuse claims were validated in a significant majority of cases.¹⁷

11. State rules of evidence apply, as state courts initially handle custody disputes.

12. Maggie Tamburro, *Daubert, Frye . . . or Both? Tracking Florida’s Buy-In*, BULLSEYE (Mar. 12, 2012), <http://www.ims-expertservices.com/blog/2012/daubert-frye-or-both/>; see also *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), *superseded by rule*, FED. R. EVID. 702, as recognized in *Daubert*, 509 U.S. at 588–89.

13. Tamburro, *supra* note 12.

14. Meier, *supra* note 6, at 237.

15. See, e.g., Nicholas Bala & John Schuman, *Allegations of Sexual Abuse When Parents Have Separated*, 17 CANADIAN FAM. L.Q. 191, 199 (2000); Meier, *supra* note 6, at 237.

16. Nancy Thoennes & Patricia G. Tjaden, *The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes*, 14 CHILD ABUSE & NEGLECT 151, 160–61 (1990), cited in Meier, *supra* note 6, at 237.

17. Kathleen Coulborn Faller, *The Parental Alienation Syndrome: What Is It and What Data Support It?*, 3 CHILD MALTREATMENT 100, 107 (1998) (summarizing the findings of numerous studies and focusing on two studies that found that about 70% of sexual abuse allegations in custody disputes were “likely”); cf. Bala & Schuman, *supra* note 15, at 196–97 (citing a

Gardner's theory has also faced sharp criticism from women's advocates. On its face, the current formulation of PAS and its symptoms appears gender neutral, but Gardner originally claimed that custodial mothers were responsible for causing up to 90% of PAS cases.¹⁸ As recently as 2002, Gardner wrote that alleging child sexual abuse "is probably one of the most powerful vengeance maneuvers ever utilized by a woman whose husband has left her."¹⁹ In another work, he repeatedly characterized mothers as vindictive and irate, adding that "[some feminists] have jumped on the sex abuse bandwagon because it provides a predictable vehicle for venting hostility toward men."²⁰ Empirical research, however, refutes this characterization of vindictive mothers.²¹ A 1998 Canadian study revealed that custodial parents (usually mothers) are in fact least likely to make intentionally false allegations of child abuse or neglect, while noncustodial parents and other relatives or acquaintances are responsible for the majority of intentionally false reports.²²

Moreover, domestic violence survivors' and children's advocates argue that Gardner's theory obscures legitimate sources of estrangement between parents and children, such as abuse, neglect, or even a child's sense of abandonment caused by divorce itself. In the words of one family law expert, "Gardner confounds a child's developmentally related reaction to divorce and high parental conflict (including violence) with psychosis."²³ These advocates fear that allowing "diagnoses" of PAS to influence the resolution of custody cases could result in courts placing children with their abusers.²⁴ Gardner and his supporters have maintained that a diagnosis of PAS is only

study that found that only 1.3% of physical and sexual abuse allegations made by custodial mothers and 21% of those made by noncustodial fathers were intentionally false).

18. See Gardner, *PAS vs. Parental Alienation*, *supra* note 7, at 105. He later revised this estimate to 50%, apparently to reflect the greater number of custodial fathers with increased opportunity to induce PAS. See *id.* at 105.

19. *Id.* at 106.

20. RICHARD A. GARDNER, *SEX ABUSE HYSTERIA* 24, 87 (1991); see also Michele A. Adams, *Framing Contests in Child Custody Disputes: Parental Alienation Syndrome, Child Abuse, Gender, and Fathers' Rights*, 40 *FAM. L.Q.* 315, 330–31 (2006).

21. See Joan S. Meier, *Parental Alienation Syndrome and Parental Alienation: Research Reviews*, *VAWNET.ORG*, 3 (Jan. 2009), http://www.vawnet.org/Assoc_Files_VAWnet/AR_PAS.pdf.

22. See *id.* The researchers found that 12% of child abuse or neglect allegations made during contested custody cases were false. Custodial parents accounted for 14% of those reports. By contrast, noncustodial parents (usually fathers) made 43% of the deliberately false reports, and 19% came from other relatives, neighbors, or acquaintances. *Id.*

23. Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, 35 *FAM. L.Q.* 527, 530 (2001) (footnote omitted).

24. See, e.g., Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 *AM. U. J. GENDER SOC. POL'Y & LAW* 657, 679–80 (2003); see also Stephanie Dallam, *Are "Good Enough" Parents Losing Custody to Abusive Ex-Partners?*, *LEADERSHIP COUNCIL ON CHILD ABUSE & INTERPERSONAL VIOLENCE* (2008), <http://www.leadershipcouncil.org/1/pas/dv.html> (summarizing empirical research and reports indicating that "too often custody decisions are based on bad science, misinterpretation of fact, and evaluator bias").

appropriate in cases of *false* allegations of abuse; in other words, if there is abuse, there can be no PAS.²⁵ But given the point-counterpoint nature of custody cases—abuse allegation by one parent quickly countered by PAS allegation by the other—“application of ‘parental alienation syndrome’ . . . in cases with abuse allegations[] seems intrinsically to deny the likelihood that some children appropriately want and need their exposure to [abusive parents] . . . to be limited.”²⁶

Perhaps in part due to the controversy surrounding PAS, some of the theory’s supporters have shifted to using the term “Parental Alienation Disorder” (“PAD”) to describe the same phenomenon.²⁷ The proposed diagnostic criteria for PAD are virtually identical to those outlined in Gardner’s PAS framework.²⁸ Similarly, many cases, courts, and custody evaluators refer to the more generic-sounding “parental alienation” instead.²⁹ Gardner himself distinguished “parental alienation” from PAS by defining the former as “the wide variety of symptoms that may result from or be associated with a child’s alienation from a parent,” with potential causes including but not limited to physical or emotional abuse, abandonment, ongoing acrimony within the family, impaired parenting, or denunciations by one parent toward the other.³⁰ Other experts, however, use the terms virtually interchangeably.³¹ Many attorneys and judges have likewise adopted this last approach.³² Regardless of the precise terminology used, the claim that one

25. Richard A. Gardner, *Differentiating Between Parental Alienation Syndrome and Bona Fide Abuse–Neglect*, 27 AM. J. FAM. THERAPY 97, 97 (1999).

26. Meier, *supra* note 24, at 679–80.

27. See Timothy M. Houchin et al., *The Parental Alienation Debate Belongs in the Courtroom, Not in DSM-5*, 40 J. AM. ACAD. PSYCHIATRY & LAW 127, 127 (2012) (“[R]ecently, parental alienation supporters have renamed PAS as PAD . . .”). In this context, the distinction between “syndrome” and “disorder” is merely semantic. See *id.*

28. See Lenore E. Walker & David L. Shapiro, *Parental Alienation Disorder: Why Label Children with a Mental Diagnosis?*, 7 J. CHILD CUSTODY 266, 267–68, 275–76 (2010).

29. See, e.g., *Sueiro v. Gallardo*, 105 So. 3d 585, 587–88 (Fla. Dist. Ct. App. 2012) (holding that the mother did not engage in “parental alienation”); *Rooney v. Rooney*, No. 2009CA00256, 2010-Ohio-2439, at ¶¶ 8–11, 2010 WL 2186026, at *2–3 (Ohio Ct. App. June 1, 2010) (discussing experts’ opinions that the mother engaged in “parental alienation”); *Saleh v. Parsadmehr*, No. 49859-2-I, 2003 WL 21321829, at *4 (Wash. Ct. App. June 9, 2003) (unpublished opinion) (noting that the father engaged in “parental alienation” and failed to participate in “parental-alienation counseling” as ordered).

30. Gardner, *PAS vs. Parental Alienation*, *supra* note 7, at 94–95.

31. *Id.* at 98 (rejecting this conflation). This Note uses the term “parental alienation syndrome” or “PAS” to refer to any theory of alienation that purports to diagnose a child with a mental health condition that is caused by one parent’s interference in the relationship between the child and the other parent. This Note uses the terms “alienation” and “estrangement” to refer to the experience of a breakdown in the relationship between parent and child, regardless of its cause.

32. See, e.g., *Bond v. MacLeod*, 921 N.Y.S. 2d 671, 673–74 (N.Y. App. Div. 2011) (referring to “parental alienation” but describing estrangement provoked by the father); *Buxton v. Storm* (*In re* Custody of D.T.J.S.–B), 238 P.3d 30, 36 (Or. Ct. App. 2010) (describing behavior that was indicative of possible alienation without characterizing the behavior as a syndrome or a disorder); see also *In re* Karen “PP” v. Clyde “QQ,” 602 N.Y.S.2d 709 (App. Div. 1993)

parent has intentionally alienated a child from the other parent continues to influence the decisions of family court judges.³³ The influence of inappropriate expert witness testimony exacerbates this problem.

B. *The Daubert–Frye Divide: From General Acceptance to Reliability*

For seventy years, the D.C. Circuit’s ruling in *Frye v. United States* governed the admissibility of expert witness testimony in federal courts.³⁴ The court held in *Frye* that the basis for an expert opinion must hold “general acceptance in the particular field in which it belongs” for testimony on the subject to pass the standard for admissibility.³⁵ The purpose of the *Frye* test was to ensure that courts enter into evidence only objectively valid scientific testimony. The decision recognized that although opposing parties hire expert witnesses in many cases, “a scientist who becomes the alter ego of a lawyer is no longer a scientist.”³⁶ Experts are meant to provide information and draw inferences that would otherwise remain beyond the competence of the trier of fact. They are not meant to serve as “hired guns.”³⁷ Thus, by requiring expert testimony to be generally accepted within the relevant field, courts could exclude truly partisan and potentially misleading testimony. Nonetheless, the general acceptance requirement could also lead to the exclusion of relevant, probative evidence, such as information derived from cutting-edge technologies or theories.

The general acceptance test served as the prevailing standard for determining the admissibility of scientific evidence until the Supreme Court’s decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*³⁸ In resolving a circuit split, the Court held that the Federal Rules of Evidence superseded the

(affirming that “programm[ing]” had occurred, despite family court’s reliance on a book about PAS that had not been entered into evidence or referenced by any witnesses), *affg In re Karen B. v. Clyde M.*, 574 N.Y.S.2d 267 (Fam. Ct. 1991).

33. See, e.g., *In re Miller*, 20 A.3d 854, 864 (N.H. 2011) (citing the Vermont Supreme Court for its refusal to “condone[] a parent’s willful alienation of a child from the other parent” (quoting *Begins v. Begins*, 721 A.2d 469, 472 (Vt. 1998))); *Bond*, 921 N.Y.S.2d at 674 (relying on the family court’s finding that “some degree of parental alienation by the father had occurred”); *Woodward v. Woodward*, 776 N.W.2d 567, 571 (N.D. 2009) (affirming the trial court’s order requiring the mother to undergo a parental alienation evaluation); *Buxton*, 238 P.3d at 36 (noting the psychologist’s testimony that the child’s behavior indicated alienation and granting custody to the target parent).

34. 293 F. 1013 (D.C. Cir. 1923), *superseded by rule*, FED. R. EVID. 702, *as recognized in* *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 588–89 (1993).

35. *Frye*, 293 F. at 1014.

36. Henry F. Fradella et al., *The Impact of Daubert on the Admissibility of Behavioral Science Testimony*, 30 PEPP. L. REV. 403, 406 (2003) (quoting Peter Huber, *Junk Science in the Courtroom*, 26 VAL. U. L. REV. 723, 742 (1992)) (internal quotation marks omitted).

37. *Id.*

38. 509 U.S. 579 (1993).

Frye standard.³⁹ It rejected the notion that Rule 702 incorporated *Frye*,⁴⁰ noting that “a rigid ‘general acceptance’ requirement would be at odds with the ‘liberal thrust’ of the Federal Rules.”⁴¹ The Court then interpreted Rule 702 to clarify the standard for admissibility of expert testimony. It concluded that trial judges serve as gatekeepers for evidentiary matters, responsible for ensuring that expert testimony is both reliable and relevant to the question at issue.⁴² Once a court qualified a witness as an expert, *Daubert* outlined four factors for trial courts to consider in determining whether scientific evidence is reliable: (1) whether the theory or technique “can be (and has been) tested”; (2) whether the theory or technique “has been subjected to peer review and publication”; (3) whether “the known or potential rate of error” is acceptable; and (4) whether the theory or technique has gained “[w]idespread acceptance.”⁴³

The *Daubert* Court also addressed two concerns regarding the standard for admission of expert testimony. First, it rejected the respondent’s argument that abandoning the general acceptance standard would lead to a “‘free-for-all’ in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions.”⁴⁴ The Court concluded that cross-examination, presentation of contrary evidence, jury instructions on the burden of proof, and, if necessary, summary judgment or directed verdicts are the appropriate means to balance the weight ultimately afforded to questionable scientific evidence that is nevertheless admissible under Rule 702.⁴⁵ Second, the Court addressed the opposing concern—that the *Daubert* gatekeeping

39. *Daubert*, 509 U.S. at 585, 587. The Federal Rules of Evidence were originally adopted in 1975, more than fifty years after the D.C. Circuit decided *Frye*.

40. FED. R. EVID. 702 (1975) (amended 2000 and 2011). The 2000 amendment to Rule 702 added a nonexclusive list of factors to consider in determining the reliability of expert testimony; however, there are no substantive differences between the original and amended versions of the Rule for the purposes of this Note’s analysis. The 2011 amendment was limited to stylistic changes.

41. *Daubert*, 509 U.S. at 588–89 (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)).

42. See *id.* at 589–92. The Court arrived at this conclusion by parsing the language of Rule 702. The original version of the Rule required that expert testimony be based on scientific knowledge, which the Court interpreted as establishing a standard of “evidentiary reliability.” *Id.* at 589–90. Rule 702 also required that the proffered evidence “assist the trier of fact to understand the evidence or to determine a fact in issue,” FED. R. EVID. 702 (1975) (amended 2000 and 2011), which the Court determined referred to the requisite relevance of the evidence. *Daubert*, 509 U.S. at 591.

43. *Daubert*, 509 U.S. at 592–94. The Court included the caveat that these factors are “general observations,” not a “definitive checklist.” *Id.* at 593. The Court extended its *Daubert* holding to all expert testimony involving scientific, technical, or other specialized knowledge in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). The *Kumho Tire* Court based its holding in part on the fact that the language of Rule 702 does not distinguish between scientific and other forms of expert testimony, and it found no convincing need to create such a distinction. *Id.* at 147–50. Thus, the *Daubert* standard now applies to testimony from experts in the social and behavioral sciences, including psychiatrists and psychologists.

44. *Daubert*, 509 U.S. at 595–96.

45. *Id.*

scheme would limit the admissibility of scientific evidence too severely by excluding testimony based on innovative theories or techniques. Writing for the majority, Justice Blackmun reasoned that “there are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory.”⁴⁶ He noted that the scientific process of hypothesis and experimentation does not always lend itself easily to the legal task of issuing efficient and binding judgments and that any sort of admissibility standard may occasionally exclude scientific evidence that later proves to be valid or even determinative.⁴⁷ Nevertheless, he determined that “the balance that is struck by [the] Rules of Evidence [is] designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.”⁴⁸

C. Inadmissible Under Either Standard

This Section examines expert testimony regarding PAS under both *Frye* and *Daubert*. It concludes that such testimony is inadmissible under either standard because it is neither generally accepted within the mental health field nor supported by reliable empirical evidence.

1. Not Generally Accepted Under *Frye*

For the ten jurisdictions that adhere to the *Frye* regime,⁴⁹ the relevant standard for admissibility asks whether the basis for the expert’s testimony is generally accepted by the particular field to which it belongs. *Frye* did not provide guidance on how courts should define a “particular field,” nor did it indicate what level of agreement is necessary to constitute general acceptance.⁵⁰ In considering the latter question, one federal district court looked to the plain meaning of the word “general” and concluded that such agreement must be “common to many, or the greatest number; widespread; prevalent; extensive though not universal.”⁵¹ Another federal court held that a “substantial section of the scientific community concerned” must recognize the method or procedure.⁵² Finally, a state supreme court noted that “the issue

46. *Id.* at 596–97.

47. *Id.* at 597.

48. *Id.*

49. Namely, California, Florida, Illinois, Kansas, Maryland, Minnesota, New York, Pennsylvania, and Washington, plus the District of Columbia. Tamburro, *supra* note 12.

50. See generally *supra* note 35 and accompanying text. For the purposes of this analysis, this Note defines the “field” in broad strokes as American mental health professionals, including psychiatrists, clinical psychologists, and clinical social workers.

51. *United States v. Zeiger*, 350 F. Supp. 685, 688 (D.D.C. 1972) (quoting *Platt v. Craig*, 63 N.E. 594, 595 (Ohio 1902)) (internal quotation marks omitted), *rev’d* 475 F.2d 1280 (D.C. Cir. 1972).

52. *United States v. Williams*, 443 F. Supp. 269, 273 (S.D.N.Y. 1977).

is consensus versus controversy over a particular technique,” and “[a] technique . . . is not ‘generally accepted’ if it is experimental or of dubious validity.”⁵³

Regardless of precisely how courts define these terms, PAS cannot be considered generally accepted, and it is therefore inadmissible under *Frye*. Theories of parental alienation—especially the concept of a diagnosable parental alienation syndrome or disorder—are highly controversial among mental health professionals and commentators.⁵⁴ A former president of the American Psychiatric Association described PAS as “junk science,”⁵⁵ and the American Psychological Association highlighted the lack of data supporting the “so-called ‘parental alienation syndrome’”⁵⁶ while cautioning its members about the ethical implications of using unproven diagnoses in their practices.⁵⁷

Most recently, the American Psychiatric Association declined to include PAD in the fifth and latest edition of the *Diagnostic and Statistical Manual of Mental Disorders* (“*DSM*”).⁵⁸ The *DSM*, sometimes called the “bible of psychiatry,” serves as the primary diagnostic manual for mental health professionals and includes every psychiatric disorder recognized by the field.⁵⁹ The previous edition of the *DSM*, released in 1994, did not directly confront the

53. *Donaldson v. Cent. Ill. Pub. Serv. Co.*, 767 N.E.2d 314, 324 (Ill. 2002), *abrogated by In re Commitment of Simons*, 621 N.E.2d 1184 (Ill. 2004).

54. See, e.g., Adams, *supra* note 20, at 327–32 (discounting the “scorned woman” stereotype underlying PAS); Faller, *supra* note 17, at 111 (concluding that PAS must be classified as a nondiagnostic syndrome that cannot be used to determine whether a child has been abused); Barbara Jo Fidler & Nicholas Bala, *Children Resisting Postseparation Contact with a Parent: Concepts, Controversies, and Conundrums*, 48 F.A.M. CT. REV. 10, 13 (2010) (noting the controversy among mental health professionals regarding the validity of PAS as a diagnosis); Janet R. Johnston, *Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child*, 38 F.A.M. L.Q. 757, 758 (2005) (referencing the “ideological battle” surrounding PAS and calling for a reformulation of the concept of alienation).

55. See Jamie Talan, *The Debate Rages on . . . In Death, Can He Survive?*, LEADERSHIP COUNCIL ON CHILD ABUSE & INTERPERSONAL VIOLENCE (July 1, 2003), <http://www.leadershipcouncil.org/1/pas/talan.html>.

56. *Statement on Parental Alienation Syndrome*, AM. PSYCHOL. ASS’N (Jan. 1, 2008), <http://www.apa.org/news/press/releases/2008/01/pas-syndrome.aspx> (noting that the American Psychological Association currently has “no official position on the purported syndrome”).

57. See Walker & Shapiro, *supra* note 28, at 276.

58. David Crary, *Parental Alienation Not on List of Disorders*, WASHINGTON TIMES (Sept. 23, 2012), <http://www.washingtontimes.com/news/2012/sep/23/parental-alienation-not-on-list-of-disorders/?page=1>; see also AMERICAN PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) [hereinafter *DSM-V*]. The vice chairman of the drafting task force for the fifth edition of the *DSM* explained that parental alienation is “a relationship problem—parent–child or parent–parent. Relationship problems per se are not mental disorders.” Crary, *supra* (internal quotation marks omitted).

59. The American Psychiatric Association defines this field as “the U.S. healthcare system.” See *About DSM-5*, AM. PSYCHIATRIC ASS’N, <http://www.dsm5.org/about/Pages/Default.aspx> (last visited Oct. 4, 2013).

issue of whether to include a diagnosable condition of parental alienation.⁶⁰ Thus, the American Psychiatric Association's rejection of the proposed disorder—especially in light of the most intense lobbying campaign conducted for any diagnosis proposed for the new edition⁶¹—perceptibly strengthens the argument that PAS and PAD are not generally accepted within the American medical community.⁶²

A proponent of expert witness testimony bears the burden of proving its admissibility, meaning that under the *Frye* standard, the proponent must demonstrate that mental health professionals generally accept his witness's reliance on the PAS (or PAD) pathology. At the very least, the American Psychiatric Association's explicit rejection of PAD, in light of the significant lobbying effort by some professionals advocating its acceptance, indicates a lack of consensus; at most, the rejection demonstrates that the debate is settled, and PAD is not generally accepted in the field of psychiatry. Regardless which of these is true, the proponent of such testimony will be unable to meet the *Frye* standard, and a court should rule the evidence inadmissible.

2. Insufficiently Reliable Under *Daubert*

The *Daubert* Court identified a nonexhaustive list of factors to consider in determining whether proposed expert witness testimony is sufficiently reliable to be admitted into evidence. As one of the four factors it highlighted,⁶³ the *Daubert* Court described widespread acceptance as incorporating the same considerations previously articulated in *Frye*,⁶⁴ and

60. Cf. Crary, *supra* note 58.

61. See Houchin, *supra* note 27, at 127.

62. Notably, the National Institute of Mental Health, a federal agency dedicated to research on mental illnesses, recently called into question the validity of the *DSM*. The Institute's director, Dr. Insel, distinguished between the *DSM*'s usefulness as a "clinical tool" and its ability to guide research on complex mental disorders that may "cut across" the manual's diagnostic categories. Pam Belluck & Benedict Carey, *Psychiatry's New Guide Falls Short, Experts Say*, N.Y. TIMES (May 7, 2013), at A13, available at <http://www.nytimes.com/2013/05/07/health/psychiatrys-new-guide-falls-short-experts-say.html?partner=rss&emc=rss&r=2&>. This criticism does not undermine the American Psychiatric Association's decision to exclude PAD from the latest edition of the *DSM*, which remains the central authority for recognized psychiatric conditions. But it does highlight disagreement within the field over the distinction between recognition (or rejection) by the *DSM* and the validity of underlying research methodologies.

63. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–94 (1993); see also *supra* text accompanying note 43. Subsequent cases have also considered factors such as whether the expert accounted for alternative explanations for a phenomenon. See, e.g., *Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 502 (9th Cir. 1994) (excluding testimony where the expert did not account for other, obvious potential causes for the plaintiff's injury). But see *Ambrosini v. Labarraque*, 101 F.3d 129, 140 (D.C. Cir. 1996) (characterizing this issue as a question of weight, rather than admissibility). Other courts have considered whether the methodology underlying the testimony is scientifically valid. See, e.g., *Moore v. Ashland Chem. Inc.*, 151 F.3d 269 (5th Cir. 1998) (excluding testimony where the expert's opinion was not grounded in independently validated scientific methodology).

64. See *Daubert*, 509 U.S. at 585–89, 594 (“[G]eneral acceptance’ can . . . be an important factor in ruling particular evidence admissible . . .”).

therefore PAS fails this factor under *Daubert* as well. The remainder of this Section considers each of the remaining *Daubert* factors and concludes that theories of parental alienation fail to fulfill any of these criteria.

First, as many PAS opponents have already noted, the theory has yet to be adequately tested using recognized empirical methods.⁶⁵ Since the mid-1980s, mental health practitioners have published dozens of reports of clinical studies that purport to diagnose PAS. These reports include a long-term study of sixty divorced families;⁶⁶ general conclusions regarding PAS drawn from clinical observations of several hundred children;⁶⁷ evaluations of the Minnesota Multiphasic Personality Inventory-2 (“MMPI-2”) results of allegedly alienating parents;⁶⁸ and small-scale diagnostic studies based on Gardner’s proposed symptoms.⁶⁹ All these studies, however, are based on clinical observations rather than statistically significant empirical data. As one psychologist explains, “[W]e all have to recognize and admit that clinical experience, including case studies, *prove nothing*. . . . To put the point more formally, case studies are valuable for generating hypotheses but not for confirming hypotheses.”⁷⁰

Until recently, opponents of PAS have cited an utter lack of empirical research as support for the inadmissibility of alienation testimony.⁷¹ As of

65. See, e.g., Jennifer Hoult, *The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy*, CHILD. LEGAL RTS. J., Spring 2006, at 1, 10–12; Meier, *supra* note 21, at 4; Walker & Shapiro, *supra* note 28, at 268.

66. See JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 77–80 (1980) (identifying twenty-five out of 131 children as forming “alignment” relationships with one parent against the other). Interestingly, Wallerstein and Kelly also note that nearly all the children who initially formed “alignments” had resumed “reasonable” relationships with the target parent within five years of the divorce. *Id.* at 233–34.

67. STANLEY S. CLAWAR & BRYNNE V. RIVLIN, CHILDREN HELD HOSTAGE: DEALING WITH PROGRAMMED AND BRAINWASHED CHILDREN app. 173, 180 tbl.17 (1991) (finding evidence of programming in 80 percent of the 700 cases observed); Leona M. Kopetski, *Identifying Cases of Parental Alienation Syndrome—Part I*, COLO. LAW., Feb. 1998, at 65, 65 (finding parental alienation dynamics in 20 percent of 413 families studied).

68. Robert M. Gordon et al., *MMPI-2 Findings of Primitive Defenses in Alienating Parents*, 36 AM. J. FAM. THERAPY 211 (2008) (comparing the results of the MMPI-2, a common psychological assessment, to classification as an alienating or target parent); Jeffrey C. Siegel & Joseph S. Langford, *MMPI-2 Validity Scales and Suspected Parental Alienation Syndrome*, AM. J. FORENSIC PSYCHOL., no. 4, 1998, at 5 (1998) (analyzing the MMPI-2 profile of parents exhibiting characteristics of PAS).

69. John Dunne & Marsha Hedrick, *The Parental Alienation Syndrome: An Analysis of Sixteen Selected Cases*, J. DIVORCE & REMARRIAGE, no. 3–4, 1994, at 21; Kristen Carey, *Exploring Long-Term Outcomes of the Parental Alienation Syndrome* 39 (Jan. 2003) (unpublished Ph.D. dissertation, California School of Professional Psychology) (available through ProQuest) (diagnosing with PAS eight out of the ten children studied).

70. Robert E. Emery, Reader Commentary, *Parental Alienation Syndrome: Proponents Bear the Burden of Proof*, 43 FAM. CT. REV. 8, 9 (2005); see also Meier, *supra* note 21, at 10 (“And of course, clinical observations do not constitute empirical evidence.”).

71. E.g., Hoult, *supra* note 65, at 1; Meier, *supra* note 21, at 3.

this publication, however, two statistical studies have attempted to empirically verify the existence of PAS. Both studies analyze the inter-rater reliability of the proposed diagnosis—that is, the ability of practitioners to consistently identify PAS. Although these studies may seem to provide an avenue for proponents of PAS to lay claim to empirical support, both attempts ultimately fail the *Daubert* standard.

Carlos Rueda published the first study in 2004.⁷² Rueda notes that this work was his doctoral dissertation, which Gardner “sanctioned” and which Dr. Warshak, another prominent PAS supporter, has cited.⁷³ Rueda adopts Gardner’s diagnostic criteria, and he asked survey participants to evaluate five case scenarios and identify whether they reflected the symptoms. Out of fifty-eight solicited participants, only fourteen completed the survey.⁷⁴ Rueda claims high levels of agreement among respondents for each of the five case scenarios regarding the presence (or absence) of PAS symptoms.⁷⁵

The study fails to provide conclusive support for the reliability of diagnosing PAS due to several shortcomings. First, the small sample size calls into question the probative value of the results. Second, Rueda suggests that some of the solicited participants declined to respond either due to lack of interest or “philosophical opposition to the concept of PAS.”⁷⁶ Thus, as one critic notes, it seems that the study “presumed rather than proved the key question” of whether PAS is a valid diagnosis due to self-selection among the respondents.⁷⁷ Finally, although Rueda identifies agreement among participants regarding the presence or absence of PAS symptoms, he ultimately concludes that the study “failed to firmly differentiate PAS from parental alienation.”⁷⁸ In other words, the study participants were unable to resolve the key issue of whether one parent caused a child’s estrangement from the other parent.

The second inter-rater reliability study is another doctoral dissertation, this one submitted by Stephen Morrison in 2006.⁷⁹ Morrison replicated

72. Carlos A. Rueda, *An Inter-Rater Reliability Study of Parental Alienation Syndrome*, 32 AM. J. FAM. THERAPY 391 (2004).

73. Carlos A. Rueda, Curriculum Vitae, WINTER PARK RECOVERY CTR., 1, http://yourliferecovery.com/vitae/rueda_vitae.pdf (last visited Oct. 4, 2013); see also *Divorce and Parental Alienation Resources*, DR. RICHARD A. WARSHAK: BUILDING FAMILY BRIDGES, www.warshak.com (last visited Oct. 4, 2013) (describing Warshak’s work in this area).

74. Rueda, *supra* note 72, at 393, 400.

75. Approximately 86% of respondents agreed that PAS symptoms were present in Case 1, 79% in Case 3, 71% in Case 4, and 93% in Case 5. Only 21% of respondents believed that PAS symptoms were present in Case 2, suggesting concurrence in disagreement as well. *Id.* at 399.

76. *Id.* at 393.

77. Meier, *supra* note 21, at 4.

78. Rueda, *supra* note 72, at 399–400. Meier argues that this conclusion “essentially negates the usefulness of the study.” Meier, *supra* note 21, at 4.

79. Stephen Lee Morrison, *Parental Alienation Syndrome: An Inter-Rater Reliability Study* (Dec. 2006) (unpublished Ph.D. dissertation, University of Southern Mississippi) (available through ProQuest).

Rueda's study from two years earlier, apparently at Warshak's suggestion.⁸⁰ He distributed 300 surveys and received twenty usable responses.⁸¹ Morrison also reports high levels of agreement among respondents,⁸² although his study reveals a significantly lower level of agreement than Rueda's results on one of the vignettes.⁸³ Interestingly, for one case study, Rueda found that 57 percent of respondents believed that PAS was not present, whereas 60 percent of the participants in Morrison's study believed that it was.⁸⁴

Morrison's study fails to resolve the concerns raised by Rueda's attempt two years earlier. The Morrison study suffers from the same problem regarding the probative value of such a small sample size. Morrison echoes the concern about self-selection when he hypothesizes that the low response rate might be due to the controversial nature of PAS.⁸⁵ In fact, one solicited participant, who happened to be the head of a university psychology department, contacted Morrison's institutional review board because she believed that the project was overly ideological and "unworthy of doctoral level research."⁸⁶ Finally, although Morrison does not directly address Rueda's failure to differentiate PAS from parental alienation, he notes that his study "revealed unresolved issues" related to the use of the term "syndrome" in connection with theories of parental alienation.⁸⁷ In summary, neither of these inter-rater reliability studies provides the type of consistent empirical support that courts seek under the *Daubert* standard.

Second, the error rate associated with diagnosing PAS remains unknown, and it is likely unacceptably high. The Morrison and Rueda studies measure whether psychologists can consistently identify the presence of Gardner's proposed PAS symptoms. The studies do not, however, measure whether those symptoms accurately diagnose the condition. In fact, there are no published studies that measure the error rate of diagnosing PAS. Some authors suggest that the error rate is likely to be unacceptably high due to the nature of Gardner's diagnostic criteria, which do not explain how an evaluator may distinguish between justified estrangement and intentional alienation.⁸⁸ One

80. *Id.* at iii.

81. *Id.* at 112.

82. Of those who responded to each respective question, 85% identified PAS symptoms in Case 1, 60% in Case 2, 65% in Case 3, 70% in Case 4, and 95% in Case 5. *Id.* at 128, 131–32, 136, 140, 144.

83. Compare Rueda, *supra* note 72, at 399 (revealing agreement of 79% for Case 3), with Morrison, *supra* note 79, at 131–32, 136 (revealing agreement of 65% for Case 3).

84. Compare Rueda, *supra* note 72, at 397, with Morrison, *supra* note 79, at 131–32.

85. Morrison, *supra* note 79, at 155.

86. *Id.* at 192, 223.

87. *Id.* at 215.

88. See Hault, *supra* note 65, at 9–10 (noting that Gardner's proposed symptoms "tautologically presume their diagnostic conclusion that alienation is pathological and unjustified"); Walker & Shapiro, *supra* note 28, at 276–78 (noting that "there is no reliable or valid way of making these distinctions" between a child who is alienated due to intentional interference by the other parent and a child who becomes estranged from a parent for other reasons).

expert describes this as “the most egregious part” of the proposed PAS diagnosis because it is impossible to make a differential diagnosis based solely on the child’s symptoms without reference to the behavior of one or both parents.⁸⁹

Third, and finally, the treatment of PAS in peer-reviewed publications does not advance its reliability. Contrary to the assertions of many early PAS critics,⁹⁰ a number of articles published in peer-reviewed journals discuss the theory. One prominent PAS proponent has compiled a list of close to 150 articles advocating the theory.⁹¹ Most of those articles appeared in peer-reviewed publications.⁹² Nevertheless, peer review contributes to the *Daubert* reliability analysis only if it is itself reliable. The current canon of PAS literature thus raises two key concerns: first, it does not include the type of empirical research that peer review typically validates, and second, the review process itself is not transparent.

The purpose of the peer-review process is to assess the “scientific merit” of research prior to publication.⁹³ Once researchers submit an article to a journal for consideration, the journal sends copies to reviewers with expertise in the field who are charged with evaluating the methodology of the study, the standards for analysis, and the validity of the results.⁹⁴ Reviewers may also consider whether the study has been replicated under similar circumstances with consistent results.⁹⁵ This system is designed to gauge the validity of *empirical* research, a type of research that is currently lacking in the realm of PAS.⁹⁶ It is arguably less suited to reliably reviewing *qualitative* or anecdotal research based on clinical observations or case studies, since

89. Walker & Shapiro, *supra* note 28, at 276.

90. See, e.g., Rita Smith & Pamela Coukos, *Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations*, JUDGES’ J., Fall 1997, at 38, 54; Cheri L. Wood, Comment, *The Parental Alienation Syndrome: A Dangerous Aura of Reliability*, 27 LOY. L.A. L. REV. 1367, 1375–76 (1994).

91. *References Relevant to Parental Alienation Syndrome*, RICHARD A. WARSHAK: BUILDING FAMILY BRIDGES, <http://www.warshak.com/alienation/pa-references/pasarticles.html> (last visited Oct. 4, 2013).

92. I verified the status for each of the American journal publications included on Warshak’s bibliography by performing a search for each publication on Ulrich’s. ULRICHSWEB, <http://www.ulrichsweb.com> (last visited Oct. 4, 2013). Ulrich’s is a database that catalogs the peer-review status (whether a publication is “refereed”) for over 300,000 periodicals. *Frequently Asked Questions (FAQs)*, ULRICHWEB, <http://www.ulrichsweb.com/ulrichsweb/faqs.asp> (last visited Oct. 4, 2013). Aside from the articles in bar journals, which Ulrich’s does not classify as peer reviewed, only three of the articles (published in DIVORCE LITIGATION, THE MEDICO-LEGAL JOURNAL, and JUSTICE OF THE PEACE) were not peer reviewed.

93. Sarah H. Ramsey & Robert F. Kelly, *Social Science Knowledge in Family Law Cases: Judicial Gate-Keeping in the Daubert Era*, 59 U. MIAMI L. REV. 1, 73 (2004).

94. *Id.*

95. *Id.* at 74 (“As a general rule, peer reviewers and the scientific community give greater credence to research findings that have been replicated . . .”).

96. Rueda’s inter-rater reliability study is currently the only empirical research on PAS published in a peer-reviewed journal. Morrison’s dissertation, although approved by his dissertation committee, has not been published as of this Note’s writing. See generally *supra* notes 71–72, 79 and accompanying text.

this type of research is not characterized by the factors—methodology, statistical analysis of results, and replication—that reviewers are typically supposed to evaluate.

The other key issue concerns the legitimacy of peer review itself. An ideal review panel is composed of experts with balanced viewpoints and without financial or ideological conflicts of interest. Nonetheless, “well-reputed” publications maintain the anonymity of their reviewers, resulting in a lack of transparency.⁹⁷ Similarly, although standard practice holds that reviewers must be given a “mandate” outlining their responsibilities, the mandates remain confidential; the standards they establish are not publicly available.⁹⁸ Finally, even peer-reviewed publications may adopt an ideological slant. For example, the *American Journal of Family Therapy*, the leading publication for articles on PAS,⁹⁹ counts over half a dozen prominent PAS advocates among its editorial board members.¹⁰⁰ While this certainly does

97. Hoult, *supra* note 65, at 12.

98. *Id.*

99. The journal is the most prolific source of pieces in support of PAS. See, e.g., Amy J.L. Baker, *The Long-Term Effects of Parental Alienation on Adult Children: A Qualitative Research Study*, 33 AM. J. FAM. THERAPY 289 (2005); Amy J.L. Baker, *Patterns of Parental Alienation Syndrome: A Qualitative Study of Adults Who Were Alienated from a Parent as a Child*, 34 AM. J. FAM. THERAPY 63 (2006); Amy J.L. Baker, *The Power of Stories/Stories About Power: Why Therapists and Clients Should Read Stories About the Parental Alienation Syndrome*, 34 AM. J. FAM. THERAPY 191 (2006); William Bernet et al., *Parental Alienation, DSM-V, and ICD-11*, 38 AM. J. FAM. THERAPY 76 (2010); Terence W. Campbell, *Why Doesn't Parental Alienation Occur More Frequently? The Significance of Role Discrimination*, 33 AM. J. FAM. THERAPY 365 (2005); Glenn F. Cartwright, *Expanding the Parameters of Parental Alienation Syndrome*, 21 AM. J. FAM. THERAPY 205 (1993); Douglas Darnall & Barbara F. Steinberg, *Motivational Models for Spontaneous Reunification with the Alienated Child: Part I*, 36 AM. J. FAM. THERAPY 107 (2008); Douglas Darnall & Barbara F. Steinberg, *Motivational Models for Spontaneous Reunification with the Alienated Child: Part II*, 36 AM. J. FAM. THERAPY 253 (2008); Elizabeth M. Ellis, *Help for the Alienated Parent*, 33 AM. J. FAM. THERAPY 415 (2005); Richard A. Gardner, *Denial of the Parental Alienation Syndrome Also Harms Women*, 30 AM. J. FAM. THERAPY 191 (2002); Gardner, *supra* note 25; Richard A. Gardner, *Does DSM-IV Have Equivalents for the Parental Alienation Syndrome (PAS) Diagnosis?*, 31 AM. J. FAM. THERAPY 1 (2003); Gardner, *PAS vs. Parental Alienation*, *supra* note 7; Richard A. Gardner, *The Relationship Between the Parental Alienation Syndrome (PAS) and the False Memory Syndrome (FMS)*, 32 AM. J. FAM. THERAPY 79 (2004); David L. Levy, Book Review, 20 AM. J. FAM. THERAPY 276 (1992) (reviewing GARDNER, *PAS GUIDE*, *supra* note 7); Ron Meister, Book Review, 31 AM. J. FAM. THERAPY 321 (2003) (reviewing RICHARD A. GARDNER, *THERAPEUTIC INTERVENTIONS FOR CHILDREN WITH PARENTAL ALIENATION SYNDROME* (2001)); Nancy Rainey Palmer, *Legal Recognition of the Parental Alienation Syndrome*, 16 AM. J. FAM. THERAPY 361 (1988); Rueda, *supra* note 72; Ed Spruijt et al., *Parental Alienation Syndrome (PAS) in the Netherlands*, 33 AM. J. FAM. THERAPY 303 (2005); Despina Vassiliou & Glenn F. Cartwright, *The Lost Parents' Perspective on Parental Alienation Syndrome*, 29 AM. J. FAM. THERAPY 181 (2001); Richard A. Warshak, *Remarriage as a Trigger of Parental Alienation Syndrome*, 28 AM. J. FAM. THERAPY 229 (2000).

100. See *The American Journal of Family Therapy: Editorial Board*, TAYLOR & FRANCIS ONLINE, <http://www.tandfonline.com/action/aboutThisJournal?show=editorialBoard&journalCode=uaft20> (last visited Oct. 4, 2013) (listing S. Richard Sauber (editor-in-chief), Amy Baker, William Bernet, Barry Bricklin, Douglas Darnall, Demosthenes Lorandos, L.F. Lowenstein, and Richard Warshak as part of the editorial board). For a sampling of PAS-related works and resources with which these individuals are involved, see *THE INTERNATIONAL HANDBOOK OF PARENTAL ALIENATION SYNDROME* (Richard A. Gardner, S. Richard Sauber & Demosthenes

not preclude the possibility of objective review, it does raise questions about the methods and criteria used in accepting pieces for publication.¹⁰¹

This is not to suggest that peer review is irrelevant to a court's determination of whether proffered expert testimony is reliable. Rather, judges should take seriously the *Daubert* Court's conclusion that "publication (or lack thereof) in a peer reviewed journal thus will be a relevant, *though not dispositive*, consideration" in determining the admissibility of scientific or other technical evidence.¹⁰² In other words, peer-review status is not merely a box for judges to check—after all, the *Daubert* Court explicitly noted that it did not "presume to set out a definitive checklist" of factors for admissibility.¹⁰³ Whether or not peer-reviewed publication helps courts determine the reliability of proposed expert testimony will depend in part on the nature of the review itself.

One can easily imagine why family court judges find expert witness testimony appealing. Custody cases are inherently messy, and the stakes are never higher than when abuse is alleged—the wrong decision could sentence a child to years of continued torment or deny him the benefit of a loving (though currently rejected) parent. Given the complex issues involved in these cases, it is understandable why judges might wish to rely on the advice of mental health professionals. Yet the law charges courts, not psychologists, with issuing custody orders, and *Daubert* and *Frye* stand for the proposition that judges may only call on experts to assist them in their duties if the testimony offered by those experts is valid. As testimony regarding PAS cannot meet that standard under either test, it has no place in the courtroom.

II. REFOCUSING THE DISPUTE: THE ROLE OF THE GUARDIAN AD LITEM

Despite this Note's conclusion that testimony about PAS should be inadmissible, some family courts continue to issue custody orders based on PAS and related theories.¹⁰⁴ There are two potential explanations for this reality.

Lorandos eds., 2006) [hereinafter *THE INTERNATIONAL HANDBOOK OF PAS*]; AMY J.L. BAKER, *ADULT CHILDREN OF PARENTAL ALIENATION SYNDROME* (2007); William Bernet, *Parental Alienation Disorder and DSM-V*, 36 *AM. J. FAM. THERAPY* 349 (2008); Barry Bricklin & Gail Elliott, *Psychological Test-Assisted Detection of the Parental Alienation Syndrome*, in *THE INTERNATIONAL HANDBOOK OF PAS*, *supra*, at 264; *Parental Alienation and Parental Alienation Syndrome*, PsyCARE, www.parentalalienation.org (last updated Oct. 30, 2012) (website run by Douglas Darnall); *PARENTAL ALIENATION*, www.parental-alienation.info (last visited Oct. 4, 2013) (website run by L.F. Lowenstein); and *Divorce and Parental Alienation Resources*, *supra* note 73 (website run by Richard A. Warshak).

101. A more detailed analysis of the intricacies and controversies of the peer-review system is beyond the scope of this Note. For a general primer on some common criticisms, see Richard Smith, *Peer Review: A Flawed Process at the Heart of Science and Journals*, 99 *J. ROYAL SOC'Y MED.* 178 (2006).

102. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594 (1993) (emphasis added).

103. *Id.* at 593. This is a relevant factor for consideration during an evidentiary hearing. In the case of alienation testimony, courts might benefit from the assistance of guardians ad litem to provide a nonadversary evaluation of the proposed evidence. See *infra* Part II.

104. See cases cited *supra* notes 32–33.

First, the admissibility of expert testimony is not contested in many cases.¹⁰⁵ Second, *Frye* and *Daubert* only govern testimony of witnesses offering opinions based on scientific or technical expertise. Expert witnesses may offer testimony strongly reminiscent of PAS without uttering the word “syndrome,” instead relying on the more innocuous sounding but ultimately misleading “parental alienation.”¹⁰⁶ Similarly, lay witnesses may introduce comparable evidence through testimony based on personal knowledge.¹⁰⁷ Thus, even in jurisdictions that prohibit testimony based on PAS, judges still face a perplexing dilemma: How are they to evaluate conflicting claims of abuse and alienation when a child rejects a parent during divorce? Section II.A argues that in the midst of a highly adversarial process, the child deserves independent representation to advocate for his best interests. Section II.B suggests that a court-appointed lawyer-guardian ad litem is best suited to fulfill this need, and it proposes a statutory framework outlining the powers and duties of that position. Section II.C anticipates potential sources of resistance to this proposal and offers a response.

A. *The Need for Independent Representation*

All fifty states require custody decisions to be based on the best interests of the child.¹⁰⁸ Some state statutes delineate specific factors for courts to consider, such as the capacity of each parent to provide a safe and stable home environment, the child’s relationship with each parent, the ability of each parent to foster a positive relationship between the child and the other parent (often called a “friendly parent” provision), and the presence of domestic violence in each parent’s home.¹⁰⁹ But the fact remains that contested custody cases are inherently adversarial, with each parent lobbying the judge to adopt his or her interpretation of the child’s best interests. In the best-case scenario, either parent would offer the child a safe and loving home, and the parents’ dispute is the result of a good-faith disagreement; in less ideal circumstances, the parents may use custody proceedings as a vehicle to control or retaliate against one another, or an abusive parent may see them as an opportunity to maintain access to her victim.

Despite the child’s role as the “party in interest,” he is not considered a party to the custody proceeding.¹¹⁰ When parents’ attorneys present their

105. For example, it does not appear that the admissibility of expert testimony was contested in any of the cases cited *supra* in notes 32–33.

106. See *supra* notes 27–32 and accompanying text.

107. See FED. R. EVID. 602.

108. Child Welfare Info. Gateway, U.S. Dep’t of Health & Human Servs., *Determining the Best Interests of the Child*, CHILD WELFARE INFO. GATEWAY, 1 (2013), https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.pdf.

109. *Id.* at 3–5; see also Am. Bar Ass’n Comm’n on Domestic & Sexual Violence, *Child Custody and Domestic Violence by State*, AM. BAR ASS’N (Feb. 2008), <http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/Custody.authcheckdam.pdf> (noting which states include domestic violence and friendly parent provisions in their best interests factors).

110. Elrod, *supra* note 5, at 526 (internal quotation marks omitted).

cases before a judge, their duty is to provide zealous advocacy on behalf of their clients, not the child. In fact, parents' attorneys are not even required to consider the child's interests in developing their case strategies.¹¹¹ Even a loving parent's legal and financial interests may diverge from her child's, and if this happens, the attorney's duty is clear. Consequently, the adversarial court system is not adequately protective of the child's interests, despite the fact that these interests are the central inquiry in disputed custody cases. The nature of high-conflict cases involving allegations of abuse, domestic violence, or alienation reveals a dire need for independent legal representation for the children in the midst of these disputes.

It may be difficult for a court to determine why a child rejects a parent. The two poles of the PAS debate offer two conflicting explanations: (1) physical or sexual abuse perpetrated by the target parent or (2) brainwashing conducted by the favored parent. Other potential factors include parental disinterest, feelings of abandonment due to the divorce itself, insufficient bonding prior to the divorce, and a temporary sense of detachment resulting from a combination of the child's personality, gender, or developmental stage.¹¹² The National Council of Juvenile and Family Court Judges ("NCJFCJ") recognized this dilemma and published a bench book to assist courts in making custody determinations for families with a history of domestic violence.¹¹³ It cautions that abusive parents may blame their ex-spouses for the child's rejection because they refuse to take responsibility for their own behavior.¹¹⁴ It also observes that it is appropriate for a parent to try to protect a child from abuse by limiting his contact with the abuser, which makes it important for evaluators to carefully investigate each parent's motivation.¹¹⁵ Finally, the NCJFCJ notes that the opposite phenomenon is also possible; the child may actually align with the abusive parent as a defense mechanism, in an attempt to avoid suffering abuse himself.¹¹⁶

The NCJFCJ also offers general guidelines for dealing with allegations of alienation. It notes that there may be competing explanations for a child's relationship with one of his parents, and therefore custody evaluators should explore the basis for the child's concerns, as well as the role each parent has played in shaping the child's opinion of the other.¹¹⁷ The NCJFCJ concludes

111. *Id.* at 539. Presumably a parent and her attorney will discuss the child's interests at some point, given that these are the facts at issue in the court's resolution of the case. The parent's attorney, however, is not required to promote or even consider the child's welfare in developing a case strategy, including deciding whether to file motions for protective orders or psychological evaluations, whether to call potentially hostile individuals as witnesses, and even whether to appeal the court's order after it is issued. *Id.*

112. *See id.* at 511–12; *see also* Bruch, *supra* note 23, at 530–31.

113. CLAIRE DALTON ET AL., NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, NAVIGATING CUSTODY & VISITATION EVALUATIONS IN CASES WITH DOMESTIC VIOLENCE (rev. ed. 2006).

114. *Id.* at 25.

115. *Id.*

116. *Id.*

117. *Id.* at 24–25.

that a “careful fact-based inquiry, unlike applying the ‘PAS’ label, is likely to yield testimony that is more accurate and relevant.”¹¹⁸ This recommendation underscores the importance of providing independent representation for the child at the center of these conflicts. A party representing the child’s, rather than the parent’s, interests will be better able to conduct a party-neutral investigation and provide an objective recommendation to the court based on the child’s best interests.

B. Proposed Statutory Framework

Child welfare law already contemplates a mechanism for providing independent representation for children involved in court proceedings: the guardian ad litem (“GAL”), an advocate charged with representing the best interests of the child.¹¹⁹ Since its enactment in 1974, the federal Child Abuse Prevention and Treatment Act (“CAPTA”) has required states to appoint GALs to represent children in abuse and neglect proceedings in order to remain eligible for grant funding.¹²⁰ Most states also allow for the appointment of GALs in private custody disputes, but that determination is usually left to the judge’s discretion.¹²¹ A GAL’s identity and the scope of his representation vary from state to state by statute. Some states require an attorney to fill the position, whereas others permit a variety of individuals with special training, including social workers or mental health professionals, to serve as GALs.¹²² Although the call to appoint GALs in private custody cases is certainly not new,¹²³ this Note offers two specific proposals to refine the existing, more general recommendation.

First, states should pass legislation mandating the appointment of GALs in contested custody cases involving allegations of abuse, domestic violence, or alienation. This requirement would bring the private custody system in line with the expectations that CAPTA created in the child welfare context. This parallel is particularly apt because high-conflict divorces often present some of the same issues as abuse and neglect cases, as reflected by the point-counterpoint nature of abuse and alienation allegations. Requiring GALs would also ensure an independent perspective in the midst of a highly

118. *Id.* at 25.

119. See LINDA D. ELROD, *CHILD CUSTODY PRACTICE AND PROCEDURE* § 12:7 (rev. ed. 2013).

120. 42 U.S.C. § 5106a(b)(2)(B)(xiii) (2006) (“[I]n every case involving a victim of child abuse or neglect which results in a judicial proceeding, a guardian ad litem . . . shall be appointed to represent the child in such proceedings . . . to obtain first-hand, a clear understanding of the situation and the needs of the child; and . . . to make recommendations to the court concerning the best interests of the child . . .”).

121. See *Appointment Laws in Divorce Cases*, AM. BAR ASS’N (Jan. 2007), http://www.americanbar.org/content/dam/aba/migrated/legalservices/probono/childcustody/divorce_chart_with_role.authcheckdam.pdf; see also, e.g., CAL. FAM. CODE § 3150 (West 2013) (allowing the appointment of counsel to represent the child’s interests in custody proceedings).

122. See *Appointment Laws in Divorce Cases*, *supra* note 121.

123. See, e.g., Elrod, *supra* note 5, at 525.

adversarial process. As discussed in Section II.A, the he-said-she-said nature of custody proceedings may impede a court's ability to discern the child's true interests—which are, after all, the heart of the matter. Bringing in a neutral party helps redefine the terms of the dispute to achieve the “careful fact-based inquiry” advocated by the NCJFCJ.¹²⁴ Finally, appointing a GAL gives the child a voice. In a high-conflict custody battle, where the child may feel like a pawn caught between warring parents, having his own advocate can preserve some sense of autonomy and control during a very unsettling experience.

Second, states should require GALs serving in custody cases to be licensed attorneys. Any number of professionals could conceivably serve as GALs—psychologists, social workers, specially trained volunteers, and so forth—and in many states, they do. But this Note envisions a particular role for GALs in disputed custody cases, one in which the representative's duty is to his client (i.e., the child) rather than the court. A GAL should stand as a full participant to the proceeding, not merely a court officer in an advisory capacity. Based on this conception of the GAL, attorneys are better suited than other potential candidates to cope with issues that the adversarial court system raises. Lawyers are trained to develop factual records, craft legal theories, submit motions, present and cross-examine witnesses, and object to inadmissible testimony or other evidence. Compared to the potential alternatives, they are also best equipped to handle the evidentiary issues relating to alienation testimony raised earlier in this Note. And finally, attorneys are advocates for their clients, a quality at the very heart of the GAL's role.

What might this independent, legally trained GAL look like? Michigan's statute provides a sample framework in its lawyer-guardian ad litem (“L-GAL”) statute.¹²⁵ An L-GAL in Michigan is to serve as the “independent representative of the child's best interests,”¹²⁶ and the law specifies that the attorney's “duty is to the child, and not the court.”¹²⁷ This means, in part, that attorney-client privilege attaches to the relationship, and the L-GAL cannot be called as a witness during the proceeding.¹²⁸ The L-GAL is charged with actively participating in all aspects of the litigation,¹²⁹ which in the context of a child custody case includes all hearings and mediation sessions. The L-GAL is also expected to conduct an independent investigation into the facts of the case,¹³⁰ which may include interviewing the child and his family members, observing the home environment and the child's interactions with both parents, reviewing reports from the child's school and any

124. See *supra* notes 117–118 and accompanying text.

125. MICH. COMP. LAWS Ann. § 722.24(2) (West 2013) (allowing for the appointment of an L-GAL in private custody cases if the court finds that the child's interests are not adequately represented); see also *id.* § 712A.17d (outlining the L-GAL's duties and powers).

126. *Id.* § 712A.17d(1)(b).

127. *Id.* § 712A.17d(1).

128. *Id.* § 712A.17d(1)(a), (3).

129. *Id.* § 712A.17d(1)(b).

130. *Id.* § 712A.17d(1)(c).

social workers or other mental health professionals involved, and discussing the child's wishes with him.¹³¹

C. Critiques and a Response

Some commentators may disagree with this Note's recommendations. For example, Professor Ducote advocates the elimination of GALs in private custody cases altogether, arguing that lack of training and poorly defined statutory responsibilities often lead GALs to thwart the very interests they are meant to protect.¹³² This argument ignores the potential benefit GALs provide when their job is "done right." Although those who advocate removing GALs from custody proceedings claim that "no laws . . . govern[] [GALs], and no training course is required,"¹³³ a Michigan L-GAL's responsibilities are clearly set forth by statute, and L-GALs are required to participate in training in child development.¹³⁴ In contrast to Ducote's conception of GALs,¹³⁵ an L-GAL in Michigan is not an expert witness, and in fact he is prohibited from testifying regarding matters related to the case.¹³⁶ Finally, a GAL is never a substitute for a full evidentiary adjudication¹³⁷—on the contrary, a GAL can serve a valuable function by assisting the court in developing the facts of the case and ensuring that the appropriate legal standards are imposed.¹³⁸

Ducote also suggests that GALs are prone to credit diagnoses of PAS "despite substantial evidence of abuse," thus causing GALs to recommend that the child be placed in the custody of his abuser.¹³⁹ The basis for this assumption is unclear and ultimately unpersuasive. It is certainly possible that a GAL, who under current state laws may or may not be a mental health professional, could consider PAS a credible explanation for a child's estranged relationship with his parent—just as family court judges accept this explanation with unfortunate frequency.¹⁴⁰ This possibility points to the continued need for education regarding child development, family relationship dynamics, and social science testimony for professionals involved in custody proceedings. It does not support the proposition that all GALs

131. *Id.* § 712A.17d(1)(c), (2). In the event that the child's wishes differ from the L-GAL's evaluation of his best interests, the L-GAL must communicate this to the court. The court may then appoint a second attorney to represent the child's wishes, if it considers this course of action appropriate under the circumstances. *Id.* § 712A.17d(2).

132. See Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106 (2002).

133. *Id.* at 111 (quoting Josh Gelinis, *Group Calls for Oversight of Guardians*, AUGUSTA CHRON., July 20, 2001, at C2).

134. See *supra* notes 125–131 and accompanying text.

135. See *id.* at 129.

136. § 712A.17d(3).

137. See Ducote, *supra* note 132, at 150–51.

138. See *supra* notes 125–131 and accompanying text.

139. Ducote, *supra* note 132, at 140–42.

140. *Cf. supra* note 33 and accompanying text.

should be “[d]ecommission[ed]”¹⁴¹ but rather highlights the importance of independent, competent representation of the child’s best interests.

Critics may also object to the expense associated with mandating the appointment of GALs, especially those who are attorneys.¹⁴² But this concern is not fatal. Almost every state already has provisions requiring parents to assume the cost of court-appointed representatives for their children.¹⁴³ A future legislature might conclude that it is unreasonable to expect families to pay for a third attorney during an already costly divorce process. In that case, the same legislature could preserve the GAL mandate while allowing for the appointment of nonlawyer-GALs. This arrangement is not ideal for the reasons discussed above—including the benefits conveyed through attorney–client privilege, legal expertise in handling evidentiary issues, and experience in basic litigation processes—but with additional specialized training in certain areas, nonlawyers could serve as competent and less expensive alternatives to L-GALs.

Finally, some critics might contest the need for independent representation in the first place.¹⁴⁴ They might argue that the court itself is already charged with serving the best interests of the child, and judges are free to ask court officers, such as child custody evaluators, friends of the court, or mediators, to offer custody recommendations. Why appoint a GAL at all, when his efforts will be duplicative? The answer lies in the specific framework that this Note recommends. Under some current state statutes, which provide that nonattorney GALs owe a duty to the court rather than the child,¹⁴⁵ there may be little functional difference between the role of a GAL and that of any of the other officers of the court. But an L-GAL with a statutorily defined duty to the child is a different animal altogether. By shifting the L-GAL’s duty from the court to the client, this framework repositions the child as an equal participant in custody proceedings, rather than a mere “party in interest” subject to secondhand representation by warring parents or a recommendation written for the benefit of the judge rather than the child.

141. Ducote, *supra* note 132, at 111.

142. *Cf. id.* at 149–50 (criticizing the financial burden that fees for GALs place on parents).

143. See *Appointment Laws in Divorce Cases*, *supra* note 121 (noting that every state but Pennsylvania includes a statutory provision for assessing fees to the parties—i.e., the parents).

144. See, e.g., Ducote, *supra* note 132, at 151 (“The same goals articulated in the GAL’s *raison d’être* can be obtained through . . . [the use of] family court judges . . .”).

145. See, e.g., 750 ILL. COMP. STAT. 5/506(a)(2) (2012) (providing that the responsibility of the GAL is to offer testimony or a written report regarding the child’s best interests). In Illinois, the role of “guardian ad litem” is crafted as an advisor to the court. See *id.* Illinois law does not provide for a direct equivalent to the Michigan L-GAL, but the statutory definition of the “child representative” is closer to the framework proposed in this Note, although the child representative is not explicitly required to be an attorney. See *id.* 5/506(a)(3).

III. GALs IN ACTION: SAMPLE SCENARIOS

This Part offers a few examples of how the proposed GAL framework can promote the best interests of children and assist courts in resolving high-conflict custody cases.

Scenario One: The Battle of the Experts. As discussed in Part I, high-conflict custody cases with allegations of parental alienation may include testimony from expert witnesses. In fact, much of the debate surrounding the admissibility of alienation testimony boils down to a “battle of the experts,” with each parent jockeying to win the court’s approval of his or her theory of the case. This is exactly the type of “hired gun” mentality that *Frye* and *Daubert* sought to combat, and a tangled battle of unproven, he-said-she-said theories ultimately does not help a court to formulate a concrete custody order. As an objective third party, a GAL can serve two valuable roles in these circumstances. First, he can ensure that the court admits only admissible evidence by objecting to any testimony that does not comply with the relevant evidentiary standards.¹⁴⁶ And second, when the GAL presents his case to the court, he can offer a party-neutral evaluation of the child’s interests, and the child’s interests alone, based on his independent investigation of the facts of the case.

Scenario Two: Evaluating Counterallegations. A GAL may also serve a vital function in a case of point-counterpoint allegations of abuse and PAS. As previously noted, Gardner and his supporters insist that pathological alienation only exists in cases where the child does not have a rational reason for rejecting a parent; in other words, if there is genuine abuse, then the case falls outside the parameters of PAS.¹⁴⁷ However, given that the majority of families involved in high-conflict custody disputes report a history of child abuse or domestic violence,¹⁴⁸ and over 58,000 children each year are placed in unsupervised contact with abusive parents,¹⁴⁹ domestic violence survivors’ and children’s advocates argue that courts often ignore or undervalue this caveat, and parties’ attorneys use false claims of PAS and parental alienation

146. Granted, the opposing party is currently free to do this as well. But given that inadmissible testimony goes uncontested with some frequency, *see supra* note 105 and accompanying text, it certainly could not hurt to have an additional watchdog. Also, it is possible that the GAL, as a nonadversary, may have more credibility in the eyes of the court when making such an objection.

147. Gardner, *supra* note 25.

148. S.J. Dallam & J.L. Silberg, *Myths That Place Children at Risk During Custody Litigation*, LEADERSHIP COUNCIL ON CHILD ABUSE & INTERPERSONAL VIOLENCE, http://www.leadershipcouncil.org/1/res/cust_myths.html (last visited Oct. 4, 2013).

149. Paula J. Caplan, “Parental Alienation Syndrome:” *Another Alarming DSM-5 Proposal*, PSYCHOL. TODAY (June 6, 2011) (updated July 15, 2011), <http://www.psychologytoday.com/blog/science-isnt-golden/201106/parental-alienation-syndrome-another-alarming-dsm-5-proposal> (quoting Julie R. Ancis, *Parental Alienation Syndrome*, ASS’N FOR WOMEN PSYCHOLOGY, http://awpsych.org/index.php?option=com_content&view=article&id=110&catid=74&Itemid=126 (last visited Oct. 4, 2013)). Batterers win joint or sole custody in 70 percent of contested custody cases. *Domestic Violence & the Courtroom*, AM. JUDGES ASS’N, <http://aja.ncsc.dni.us/domviol/page5.html> (last visited Oct. 4, 2013).

as a defense against legitimate abuse allegations.¹⁵⁰ In these cases, the advocates argue, the court's focus shifts from the alleged child abuse or domestic violence to the claim of PAS and the aligned parent's behavior.¹⁵¹ Advocates also argue that courts often erroneously assume that children have positive prior relationships with both parents and that joint custody is thus in their best interests.¹⁵²

In these circumstances, a GAL can serve the same function envisioned in CAPTA by assisting the court in conducting a thorough and independent investigation into the facts of the case.¹⁵³ This will likely include interviewing the child, his family members, and his neighbors or teachers; observing the dynamics of the child's interactions with each of his parents and other family members, such as siblings, step-parents, and step-siblings; interviewing any mental health professionals who have evaluated the family; and reviewing these mental health professionals' reports. As the NCJFCJ recognizes, it may be difficult to distinguish between cases of abuse and alienation,¹⁵⁴ but L-GALs—attorneys with legal expertise and special training in child development—are best suited to assist family courts with this task.

Scenario Three: An Individualized Assessment. A child may experience estrangement from a parent during divorce for a variety of reasons, including abuse, neglect, personality conflicts, or a sense of resentment or abandonment caused by the stress of separation, and allowing adversarial parents to represent their child's interests by proxy may stifle the nuances of a complicated situation. For example, within the same family, children may react differently to the consequences of divorce. One child may resent a parent for "ruining" the family by moving out, while his brother may enjoy the opportunity for one-on-one attention during visitation. If their parents attempt to fold these divergent reactions into a single theory regarding the proper custody arrangement, they are likely to lose something in the process. Allowing a GAL to intervene will help the court to preserve these important, individual interests. Even if the GAL represents multiple children in the same family, he must still advocate for the particular interests of each child. Depending on the circumstances, this could mean eliminating all visitation for one child while supporting equal parenting time for the other—as long as the arrangement serves each child's individual best interests.

150. Caplan, *supra* note 149.

151. See Meier, *supra* note 24, at 688–91 (discussing the allegation–counterallegation phenomenon and the role of demeanor in assessing competing claims).

152. See *id.* at 679 (“[A]pplication of ‘parental alienation syndrome’ . . . in cases with abuse allegations, seems intrinsically to deny the likelihood that some children appropriately want and need their exposure to fathers who abuse their mothers or themselves to be limited. . . . [J]oint legal and physical custody is frequently imposed despite mothers’ claims of domestic violence.”).

153. See *supra* note 120 and accompanying text.

154. See *supra* notes 113–116 and accompanying text.

CONCLUSION

Evidence regarding a diagnosable “Parental Alienation Syndrome” or a “Parental Alienation Disorder” distracts a court from the urgent task of identifying and protecting a child’s best interests. Expert testimony on this subject fails both the *Frye* and *Daubert* standards for admissibility, and the parental rights framework that it promotes is at odds with the court’s assessment of the best interests of the child. By excluding expert testimony on PAS and appointing an independent representative of the child’s interests, courts will enhance their ability to make custody determinations that properly address the child’s safety, stability, and happiness.