

NO. 00895

IN THE
COURT OF SPECIAL APPEALS OF
MARYLAND
JANUARY TERM 2001

PAULA LINVILLE

Appellant

vs.

JAMES LINVILLE

Appellee

Appeal from the
Circuit Court of Anne Arundel County

AMICUS CURIAE BRIEF

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Richard A. Gardner, Letters to the Editor, “Parental Alienation Syndrome,” APA Psychiatric News, November 3, 2000 2, 9

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QUESTION PRESENTED

- I. IS EVIDENCE OF PARENTAL ALIENATION SYNDROME RELIABLE AND RELEVANT IN CHILD CUSTODY CASES?

STATEMENT OF THE CASE

When psychiatric testimony is ideology rather than science, should it be admitted in court as “expert testimony?” In the case of “Parental Alienation Syndrome” (PAS), an alleged syndrome which results when a “vengeful” parent systematically alienates his or her child from the other parent using false allegations of abuse, the answer is a resounding “no.” Not only is PAS illegitimate science; it is dangerous science. The consequence of a PAS diagnosis is that the “alienated” child’s allegations of abuse against a parent will be disbelieved or severely discredited. For abused children this is a devastating result, worsened by PAS’s “cures,” which are the possibility of full custody with the abuser, a complete separation between the “alienating” parent and the child, and threats of incarceration against the “alienating” parent.

Scientific syndrome testimony has special power in courts. Battered women’s syndrome, post-traumatic stress syndrome, and rape trauma syndrome are all examples of syndromes that have been routinely introduced in courts to explain abuse victims’ actions and motivations, and to otherwise influence fact finders. When based upon a reliable scientific foundation, psychological/psychiatric syndrome evidence can have a positive impact, but when it is not, its prejudicial impact is profound. Syndrome evidence should not be admitted when it is irrelevant and unreliable as a means of assessing the truth of abuse allegations. Maryland (as well as many other jurisdictions) has adopted a general acceptance test to ensure that any scientific expert testimony is legitimate before it is presented to the fact finder. In no context is this more important than when an abused child’s right to safety is at stake. This Court should find that PAS evidence should not

have been admitted in the lower court because it has not been generally accepted, and is inherently irrelevant, unreliable, and prejudicial.

STATEMENT OF FACTS

For purposes of this amicus filing, amicus curiae Justice for Children adopts the Statement of Facts set forth in Appellant's brief.

ARGUMENTS AND AUTHORITIES

I. PARENTAL ALIENATION SYNDROME (PAS) EVIDENCE MUST MEET MARYLAND'S RELIABILITY AND RELEVANCY TESTS FOR ADMISSIBILITY.

PAS is essentially the creation of one man, Richard Gardner, M.D., a child psychiatrist who "discovered" the syndrome in approximately 1985. According to Gardner:

PAS is a disorder that arises primarily in the context of child-custody disputes. Its primary manifestation is the child's campaign of denigration against a parent . . . [which results from] the combination of a programming parent's indoctrination and the child's own contribution to the vilification of the target parent. Richard A. Gardner, Letters to the Editor, "Parental Alienation Syndrome," APA Psychiatric News, November 3, 2000.¹

¹ The primary symptoms include: 1) a campaign of denigration against one parent; 2) weak, frivolous and absurd rationalization for the deprecation of the target parent; 3) reflexive support of the alienating parent in the parental conflict; 4) lack of ambivalence on the part of the child; 5) absence of guilt over cruelty to and/or exploitation of the alienated parent; 6) presence of borrowed scenarios; and 7) spread of the animosity to the extended family of the alienated parent. Id.

Gardner claims that PAS is a disorder in which one parent (usually the mother) programs the child to hate the other parent (usually the father). Such programming can take many forms including calling the father names, blaming the father for the marital demise, obtaining restraining orders as a result of complaints about violence, choosing persons other than the father as babysitters, letting the child decide whether to visit the father, or calling the child while he or she is at the father's house during the visitation.²

According to Gardner, women have found false allegations, including false sexual abuse allegations, to be powerful weapons against "despised" husbands.³ Indeed, Gardner believes that the vast majority of sexual abuse allegations in divorce and custody cases are false. Faller, supra, at 104. Consequently, a diagnosis of PAS often leads to a recommendation that the father should have custody of the children, or worse, that there be a complete severance of the mother/child relationship including the possibility of incarceration for non-compliant mothers.⁴ Dallum, supra, at 3.

² Kathleen Coulbourn Faller, The Parental Alienation Syndrome: What Is It And What Data Support It? in 3 Child Maltreatment 101 (1998).

³ See Richard A. Gardner, The Parental Alienation Syndrome 59 (1992) cited in Stephanie J. Dallum, Parental Alienation Syndrome: Is It Scientific? in Expose: The Failure of Family Courts to Protect Children From Abuse Disputes 2 (St. Charles & L. Crook, eds. 1999).

⁴ In one PAS case that made headlines, Dr. Gardner testified that a father Marc Friedlander, should receive custody of his two sons because his wife Zitta was "brainwashing" the children against him. During the custody battle, Mr. Friedlander appeared in the parking lot of his wife's place of work and shot her thirteen times with a semiautomatic weapon. At the murder trial, Dr. Gardner testified on behalf of Mr. Friedlander, stating: "I believe that . . . after mounting frustration and suppressed fury, Mr. Friedlander became acutely psychotic and murdered his wife." The judge, however, upheld the jury's recommended sentence of forty-two years in prison. Cheri L. Wood, Note and Comment, The Parental Alienation Syndrome: A Dangerous Aura of Reliability, 27 Loy. L.A. L. Rev. 1367, 1383 (1994).

In Maryland, for any evidence to be admissible, including PAS evidence, it must first be relevant under the circumstances of the case. See State v. Allewalt, 308 Md. 89, 100 (1986) (it is “an elementary rule that evidence, to be admissible, must be relevant to the issues and must tend either to establish or disprove them”). Because PAS purports to be a psychiatric diagnosis, it must also be based upon reliable science in order to be admissible. See e.g., Hutton v. State, 339 Md. 480, 495 n.10 (1995) (reiterating the Frye-Reed test in a post traumatic stress disorder case); Bloodworth v. State, 307 Md. 164, 184 (1986) (citing California’s application of the Frye test to rape trauma syndrome); People v. Bledsoe, 36 Cal. 3d 236, 245 (1984); (Frye test applied to rape trauma syndrome); People v. Bowker, 203 Cal. App. 3d 385 (1988) (Frye test applied to child sexual abuse syndrome); John E. B. Meyers, Expert Testimony Describing Psychological Syndromes, 24 Pacific L. J. 1450, 1459-1463 (1993). See also authorities cited infra at 14-16.

Reliable science is science that has been generally accepted in the relevant scientific community. Reed v. State, 283 Md. 374, 389 (1978) (adopting the Frye standard in Maryland); Frye v. United States, 293 F.1013, 1014 (D.C. Cir. 1923). According to the Reed court:

Before a scientific opinion will be received as evidence at trial, the basis of that opinion must be shown to be generally accepted as reliable within the expert’s particular scientific field. Thus, according to the Frye standard, if a new scientific technique’s validity is in controversy in the relevant scientific community or if it is generally regarded as an experimental technique, then expert testimony based upon its validity cannot be admitted into evidence. Reed, 283 Md. at 381-382.

Members of the relevant community will include “ those whose scientific background and training are sufficient to allow them to comprehend and understand the process and form a judgment about

it.” Id. at 382.⁵

On July 1, 1994, the Court of Appeals of Maryland adopted the Maryland Rules of Evidence patterned after the federal rules, including a counterpart to Federal Rule of Evidence 702 (which governs the admission of expert testimony). Md. R. Evid. 5-702. However, as the committee note makes clear, the adoption of Rule 5-702 “is not intended to overrule Reed . . . and other cases adopting the principles enunciated in Frye The required scientific foundation for the admission of novel scientific techniques is left to development through case law.” Hutton, 339 Md. at 495 n.10.

Notwithstanding the Frye-Reed test for admissibility, syndrome testimony must also have some probative value other than as a comment on a witness’ credibility. As was stated in Hutton, “no matter how learned in his or her field of expertise, no expert is in a better position to assess the credibility of a witness than is the jury.” Id. at 503; See also Bohnert v. State, 312 Md. 266, 277 (1988) (stating that an expert witness’ opinion to the effect that another witness is telling the truth or lying is inadmissible as a matter of law.)

II. PAS EVIDENCE FAILS MARYLAND’S RELIABILITY AND RELEVANCY TESTS

⁵ With the Daubert v. Merrell Dow Pharmaceuticals decision, which was adopted by the federal courts and in turn was adopted by or relied upon by many state courts, the general acceptance test was abandoned in federal courts as the exclusive test for admissibility, although reliability criteria were maintained. 113 S. Ct. 2786 (1993). Under the Daubert standard, scientific evidence would have to meet the following requirements: 1) Is the theory or technique at issue testable, and has it been tested?; 2) Has the theory or technique been subjected to peer review and publication?; 3) In the case of scientific techniques, what is the known or potential error rate and are there standards controlling the technique’s operation?; and 4) Does the technique enjoy general acceptance within the scientific community? Id.

FOR ADMISSIBILITY.

PAS has not been generally accepted in accordance with the Frye-Reed test. Moreover, the inherent unreliability of PAS also proves that it has no probative value for determining the truth or falsity of abuse allegations.

A. PAS HAS NOT BEEN PEER REVIEWED.

Richard Gardner, PAS' founder, has generally avoided peer review by publishing his books through his own private publishing company, Creative Therapeutics, and by publishing in non peer reviewed journals. As noted by one New York court that refused to admit Gardner's testimony on PAS, "Gardner has written approximately forty-three books which have been published, and all but one of those which have been printed since 1978 have been published and marketed through his own corporation, Creative Therapeutics."⁶ People v. Fortin, 184 Misc.2d 10, 11 (N.Y. Co. Ct. 2000).

At his website, (http://rgardner.com/refs/PAS_PeerReviewArticles.html, April 23, 2001), Gardner includes a list of articles that he has written which he claims have been peer reviewed. On the list, five of the articles are listed as "in press" or "in preparation." Two of the articles listed were published in legal publications rather than in peer reviewed psychiatric or psychological journals.⁷ As legal publications focus on legal theories and are reviewed by attorneys, publication in these journals is no indication that Gardner's theories have been "generally accepted in the relevant

⁶ The court also noted that Dr. Gardner's therapeutic work accounts for one to two percent of his current work and the remainder of his time and income are accounted for by forensic analysis and testimony. Id.

⁷ These articles were published in the New Jersey Family Lawyer and Court Review.

community.” The Frye-Reed test requires that the work be evaluated by experts in the appropriate field. See Reed, 283 Md. at 382. Therefore, child psychologists and child psychiatrists should be reviewing Gardner’s work, not attorneys.

Of the remaining articles, none have been appropriately peer reviewed. Some of the articles are actually chapters in books. Journals usually invite authors to submit chapters from books, but the submissions are not usually peer reviewed. Dallum, supra, at 20-21. Two other articles appear in The Academy Forum, which is not a peer reviewed journal but a quarterly news publication published by the American Association of Psychoanalysis (AAP).⁸ The official peer reviewed journal of the AAP is the Journal of the Academy of Psychoanalysis, in which Gardner has not published. Id. Gardner also publishes his articles in a little known journal titled Issues in Child Abuse Accusations. This journal is not peer reviewed, but is run out of the office of Ralph Underwager and Hollinda Wakefield, who frankly stated in the first issue that “[t]his journal has a point of view, ours.”⁹ Id. at 26 n. 11.

Even articles that Gardner has published in a peer reviewed journal, such as those published in the American Journal of Family Therapy, take the form of opinion-based analysis that is based upon Gardner’s clinical practice and his work as an expert witness. He does not cite any relevant

⁸ According to AAP’s website, (<http://aapsa.org>), The Academy Forum “provides an opportunity for members to present their views on issues pertaining to practice, society and change, literary criticism, the arts, book reviews and the state of the world.”

⁹ Underwager gained considerable notoriety with his statement to a Dutch journalist that "Pedophiles need to become more positive and make the claim that pedophilia is an acceptable expression of God's will for love and unity among all human beings." Id.

research to support his conclusions; in fact, the majority of the works that he cites are his own. Id. at 20-21. No syndrome can be reliably tested under such circumstances, and even Gardner has admitted that empirical testing or studies and observations by others must occur rather than be limited to one practitioner's clinical observations of his own private patients. Id.; See also In the Interest of T.M.W., 553 So.2d 260 (Fla. 1st DCA 1989)(impliedly criticizing diagnosis of PAS because of the reliance on the texts of a single author, Richard A. Gardner).

PAS is also not recognized in the Fourth Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), or any earlier version. Child psychologists and child psychiatrists routinely use the DSM-IV in clinical practice, and Gardner has not submitted PAS for inclusion despite the fact that he discovered his syndrome in 1985. Including only disorders that have been subjected to extensive peer review, the DSM-IV's introduction states that, "the utility and credibility of DSM-IV requires that it focus on its clinical, research, and educational purposes and be supported by an extensive empirical foundation." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders xv (4th ed. 1994).

B. PAS IS UNRELIABLE SCIENTIFIC EVIDENCE.

PAS is flawed because it is illogical, based upon disproven and discredited assumptions and theories, and because it is the work of a biased psychiatrist.

First and foremost, PAS is founded upon circular logic. Its existence is offered to show that abuse did not occur, yet it assumes what it seeks to prove—that allegations of child abuse are false. Similarly, Gardner argues that the vast majority of abuse allegations that arise in child custody

disputes are false, yet one of Gardner's heavily weighted criteria for determining that an accusation is false is the fact that it was first raised in a child custody dispute. Rorie Sherman, Gardner's Law, National L.J., Aug. 16, 1993, at 45; Dallum, supra, at 6-7; Faller, supra, at 101. Gardner acknowledges that if the child really has been abused, it is not PAS, but something else. Faller, supra, at 101; see also Richard A. Gardner, Letters to the Editor, supra. However, despite this admission, Gardner diagnoses PAS based on a variety of symptoms, including "alienating" acts of the mother and the fact that the child shows animosity toward the father, and then assumes that his diagnosis forecloses the possibility of abuse. As several commentators have observed, PAS only explains the behavior of a child and the mother if the child has not been abused. If the child has been abused, the child's animosity toward the father, and the mother's attempts to obstruct visitation would not only be warranted, but would be expected. Faller, supra, at 111-112.

PAS is also closely related to other Gardner theories that have been discredited by the courts. PAS was a prominent basis for Gardner's Sex Abuse Legitimacy Scale (SALS), which attempted to distinguish between true and false accusations of child sexual abuse during custody disputes. A diagnosis of PAS is a factor that indicates that an allegation is false, according to the SALS.

The SALS was rejected by the only court to consider its admissibility. Page v. Zordan, 564 So.2d 500, 502 (Fla. 2nd DCA 1990) (stating that there was no reasonable degree of recognition among scientific or medical experts). Gardner's peers have been far less kind. Jon Conte, professor of social work at the University of Washington, asserts that SALS is "probably 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." Dallum, supra, at 19. While Gardner has withdrawn SALS from the market as a diagnostic tool, he has not modified his PAS theory upon which it is based. Indeed, many of the "alienating acts" of the mother that are used to diagnose PAS were factors that weighed in favor of a false allegation of child sexual abuse according to the SALS. Faller, supra, at 101, 105.

In addition to having allegedly discovered PAS, Gardner also claims to be an expert regarding pedophilia and to have isolated certain factors with which he can determine whether an accused is, or is not, a pedophile. In Tungate v. Kentucky, 901 S.W.2d 41 (Ky. 1995), Gardner claimed to have identified twenty-four indicators for pedophilia. His testimony in that case was being offered to show that the defendant was "unlikely to have engaged in the alleged acts of child sexual abuse based upon [Gardner's] 'indicators for pedophilia.'" Id. at 42. The Kentucky Supreme Court noted numerous discrepancies and illogic in Gardner's proposed testimony, such as the following:

- C Gardner testified that there is no reliable profile of a pedophile even though he had determined indicators which he believed identified pedophilic tendencies;
- C Gardner's indicators are "complex, sometimes contradictory, and can only be properly evaluated by a competent psychiatrist;" and
- C Gardner was willing to testify that it was unlikely that the defendant was inclined to commit pedophilic acts, even though he admitted "that whether a person may have these indications or not, no one can conclusively determine whether or not someone has committed a particular pedophilic act, based solely on psychiatric evaluation."

Id. at 42-43. The court upheld the trial court's ruling that Gardner's testimony was inadmissible citing with approval the trial court's finding that "the proffered testimony and conclusions lacked sufficient scientific basis for the opinions offered." Id. at 43.

Finally, Gardner demonstrates his bias repeatedly, as well as his willingness to form opinions

based upon limited information. Gardner has posted on his website⁷ the following regarding Elian Gonzalez (“Elian”), the Cuban child who achieved international fame last year when he was rescued off the coast of Florida as the sole survivor of a group of persons fleeing Cuba. Without having interviewed or treated Elian, Elian’s uncle, or Elian’s father, Gardner nevertheless diagnoses Elian with PAS:

A final note on the Elian Gonzalez case. In early 2000 the world’s attention was turned to Elian Gonzalez, a boy who was basically held hostage by his uncle in order to prevent him from returning to his father in Cuba, where his father was seeking custody. Although the test was not used in the media, *Elian was clearly being indoctrinated into a PAS*. The videotape in which the boy was waving an American flag and claiming that he did not want to return to Cuba demonstrates the kind of programming one sees in the PAS. *This case is very important for those of us who work with PAS children because of the speed with which Elian exhibited loving and affectionate feelings for his father when reunited with him*. Those who were involved with the transfer attest to the speed with which the boy jumped into his father’s arms and his immediate reconciliation with him – in spite of the programming he had been subjected to in the preceding months. *Elian’s case provides clear confirmation of my experience that it is only in the most severe PAS cases that reconciliation cannot be quickly accomplished once the programmer’s access to the child is restricted*.

(emphasis added). That Gardner is willing to exploit Elian’s experience by claiming it is proof supporting the existence of PAS is disturbing, at best, and unethical, at worst.

C. MARYLAND HAS REFUSED TO ADMIT SYNDROME EVIDENCE THAT IS MUCH MORE RELIABLE THAN PAS.

While Maryland courts have not addressed the admissibility of PAS under the Frye-Reed

⁷ <http://rgardner.com>.

test,⁸ they have refused to admit much more reliable syndrome testimony. For example, in Hutton v. State, 339 Md. 480 (1995), the Maryland Court of Appeals examined whether evidence of post traumatic stress disorder (PTSD) was admissible to establish that child sexual abuse occurred. Although the court acknowledged that PTSD was a recognized anxiety disorder of the American Psychiatric Association (and is listed in the DSM-IV) and generally accepted in the psychiatric community, it did not find that its reliability extended to establishing that sexual abuse occurred in any particular case. Since PTSD could occur due to a variety of stressors, only one of which was sexual abuse, the court reasoned that any expert who opined that sexual abuse had occurred because PTSD had been observed, was actually commenting on the victim's credibility, not offering a bona fide expert opinion. See id. at 488-499, 502-506; See also Bohnert, 312 Md. at 277 (an expert witness' opinion to the effect that another witness is telling the truth or lying is inadmissible as a matter of law). Indeed, Maryland courts have recognized the danger of admitting any "syndrome testimony" that is purely a comment on a witness' credibility, rather than probative expert testimony, because of its aura of reliability. As the Hutton court stated in evaluating the reliability of PTSD in the sexual abuse context:

⁸ In Barton v. Hirshberg, 137 Md.App. 1, 12 (2001), the Maryland Court of Special Appeals in its opinion noted that the court appointed Custody Evaluator, Dr. J. Burke Mealy, testified during the underlying trial that the child at issue "suffered from 'Parental Alienation Syndrome. . .'" The opinion, however, does not indicate whether there was any objection to this testimony, whether the testimony was subjected to the Frye-Reed analysis or for what purpose the PAS testimony was being offered. Interestingly, despite Dr. Mealy's finding of PAS, he recommended that the mother and father share joint legal custody of the child and that the mother, the alleged alienator, have primary physical custody.

Our use of the terms “Rape Trauma Syndrome” and “Child Sexual Abuse Accommodation Syndrome” is not intended to endorse their use by experts testifying in criminal trials, when the charged offense is rape or child abuse, sexual or physical. The use of such terms themselves may be prejudicial.” Id. at 492 n.9.

Therefore, while the Hutton court acknowledged that PTSD could be reliable evidence in certain contexts, PTSD testimony had no probative value with respect to establishing that sexual abuse occurred. Similarly, PAS, although inherently more unreliable than PTSD, would have no probative value in determining if abuse allegations were true or false in a custody case. One of the predominant weaknesses in PAS theory is that it assumes what it seeks to prove -- that allegations of abuse are false. To make an a priori determination of the truth or falsity of an allegation, a PAS expert would have to assess the credibility of the mother and the child, a proposition that is impermissible under Maryland law. See Bohnert, 312 Md. at 277.

D. OTHER JURISDICTIONS HAVE REFUSED TO RELY UPON PAS EVIDENCE, AND SO SHOULD MARYLAND.

Courts in other jurisdictions have refused to admit evidence of PAS because it is not generally accepted in the relevant scientific community and is unreliable. So should Maryland. In People v. Fortin, 184 Misc.2d 10, 14 (N.Y. Co. Ct. 2000), the County Court of Nassau County, New York, after conducting a Frye hearing, held that the defendant in that case had “not established general acceptance of Parental Alienation Syndrome within the professional community which would provide a foundation for its admission at trial.” The opinion discusses at great length Gardner’s failure to have PAS subject to legitimate peer review, and also noted Gardner’s having made the following incredible statements in his writings:

1) Psycho dynamic psychiatry, to an even greater extent, psychoanalysis, is probably the most speculative of all the alleged scientific disciplines. In fact, it is reasonable to say that it is much more an art than a science. We spin off the most fantastic explanations for human behavior and often come to believe our own delusions.

2) Although the concept of scientific proof may be of importance in such fields as chemistry, physics and biology, the concept is not as applicable in the field of psychology; especially with regard to issues being dealt with in such areas as child custody disputes, and sex abuse accusations.

Id. at 12.

A separate county court in New York refused to allow Gardner to examine and interview a mother and her children for the purposes of determining whether the children’s claims of sexual abuse by their father were false and motivated by PAS. People v. Loomis, 172 Misc.2d 265 (N.Y. Co. Ct. 1997). The decision was based, in part, upon the fact that “New York practice does not allow

experts to offer an opinion on the ultimate issue of fact as to whether sexual abuse has occurred. The issue is strictly reserved to the trier of fact.” Id. at 268.

Other courts have also raised concerns about the underlying reliability of PAS evidence. The Wisconsin Court of Appeals addressed PAS in the context of reviewing a lower court’s refusal to transfer custody to the father in order to cure his children of PAS. Wiederholt v. Fischer, 169 Wis.2d 524 (1992). Upholding the lower court’s assessment that the psychological impact on the children of such a cure was risky and uncertain, the appellate court held that the lower court was not obliged to accept the opinion of the father’s expert, Dr. Wellen, who advocated that only a transfer of custody would cure the PAS. Id. at 533-534. As the court stated:

A court is not obliged to adopt uncontradicted testimony if there is other evidence in the case that renders it unreasonable. As summarized above, Wellens’ testimony indicated that the cure was controversial, there is limited research data, and there are uncertain risks. Furthermore, the testimony of both parents and the children was other evidence that the cure advocated by Wellens would not be successful and was unreasonable. Therefore, we cannot find error in the court’s refusal to accept Wellen’s opinion. Id.

A District Court of Appeals in Florida, also articulated concerns with respect to the reliability of PAS, although the admissibility of PAS testimony was not specifically ruled upon, when it determined that a lower court’s ruling compelling a psychological examination of a nonconsenting child (by an expert who suspected PAS) was deficient. In the Interest of T.M.W., 553 So.2d 260 (Fla. 1st DCA 1989). The court stated:

Dr. Krop described a condition known to mental health professionals as the “parental alienation syndrome,” which he said may be present in this case. That syndrome is the subject of at least one reported Florida case, Schultz v. State, 522 So.2d 874 (Fla. 3d DCA 1988). . . . We note that the syndrome in question is not the subject of the

Schultz opinion, but instead was the subject of a footnote to a footnote therein which quotes a Florida Bar Journal Article. . . . Neither the order nor record in the present case. . . contains any further reference to authority with respect to the syndrome, other than Dr. Krop’s reliance on texts by a single author, Richard A. Gardner, M.D. . . . No determination was made in the order or on the record as to general professional acceptance of the “parental alienation syndrome” as a diagnostic tool. In the same (unrelated) context as the above cited Gardner treatise, i.e. child sex abuse, we note the cautionary words of other current commentators [who state that] it is vitally important to avoid the confusion engendered by reference to syndromes. . . . At the present time experts have not achieved consensus on the existence of a psychological syndrome that can detect child abuse. . . . Id. at 262-263 (citations omitted).

Maryland courts should follow the examples of the above cited courts and refuse to allow PAS testimony to be admitted.

CONCLUSION

Whenever custody of a child is in dispute, the decision maker must wade through emotion and hyperbole to deduce the evidence that will indicate what is in the child’s best interests. When allegations of child abuse are also intermixed with the custody dispute, the stakes become even higher. Until it has been subjected to rigorous and legitimate peer review and empirical studies, PAS should not be taken into consideration in making custody determinations.

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