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Parental Alienation in Family Court: Attacking Expert Testimony

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Cover Page Footnote

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Parental Alienation in Family Court: Attacking Expert Testimony

John E.B. Myers and Jean Mercer***

ABSTRACT

In child custody litigation, when a parent raises the possibility of child abuse, the accused parent may respond that the parent who has raised the possibility of abuse is alienating the child in an effort to gain an unfair advantage in court. The parent accused of abuse may offer expert testimony on parental alienation. A voluminous and contentious social science literature exists on parental alienation. Family law attorneys often lack ready access to social science literature. The purpose of this article is to give family law attorneys information from the parental alienation literature that can be used to cross-examine experts who testify on parental alienation.

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INTRODUCTION

Professionals who participate in or preside over child custody litigation understand the stress of such cases. Emotions run high in all contested custody cases, but when one parent accuses the other parent of child abuse; levels of stress, fear, anger, and recrimination increase significantly. Typically, the accused parent angrily denies the allegation¹ and may counterclaim that the accusing parent is alienating the children to gain custody.² Today, claims of parental alienation (hereinafter "PA") are

¹ While the accused could admit the accusation, in our experience the accused denies the accusation whether it is true or false.

² A Google search of "Parental Alienation" will return a substantial amount of online information, including books. Psychologist Madelyn Milchman writes, "many practitioners do not read scientific journals. The sources that are likely to be most accessible to them are commercial books. However, since many widely disseminated commercial books are heavily slanted toward pro-alienation advocacy, even if they mention alternative explanations, they can mislead practitioners who do not have the expertise to assess the scientific limits of the advocacy claims." Madelyn Simring Milchman, *Oversimplified Beliefs about Alienation Rebuttals of Child Abuse Allegations in Custody Cases—Practice Issues*, *Journal of Family Trauma, Child Custody, and Child Development* (in press).

Three books stand out as slanted toward pro-alienation advocacy. In 2013, Stanley Clawar and Brynne Rivlin published the second edition of their book, *Children Held Hostage*. Stanley S. Clawar & Brynne V. Rivlin, *CHILDREN HELD HOSTAGE: IDENTIFYING BRAINWASHED CHILDREN, PRESENTING A CASE, AND CRAFTING SOLUTIONS* (ABA 2d ed. 2013). This book is published by the American Bar Association, giving it a measure of credibility among lawyers. We find the book very biased. There is nothing wrong with advocating one position and downplaying others, so long as the author does not portray the work as balanced. Make no mistake, Clawar and Rivlin's book is biased. Clawar and Rivlin have charts describing behaviors that they claim provide evidence of "brainwashing." See *id.* at 17-19. Analysis of the behaviors in these charts point toward or away from true or fabricated allegations of abuse. Clawar and Rivlin write there is an "epidemic proportion of incest allegations in contested custody or access disputes." *Id.* at 88. They cite no authority for their "epidemic," and the research cited elsewhere in this article (see *infra* notes 6-7 and accompanying text) indicates there is no epidemic. It is clear Clawar and Rivlin are primarily concerned with fabricated allegations. *Id.* at 89. They write, "Those responsible for such attacks are usually obsessed with destructive goals and will do anything to achieve their objectives, including making false allegations of sexual (or other) abuse, often a last, desperate, vengeful effort to

common in family court.³ In most family court cases involving accusations of child abuse, the accusing parent is a woman. For that reason, this article refers to the accuser as “mother” and the accused as “father,” realizing the roles are sometimes reversed.

The term PA is potentially confusing. Frequently, PA is used in reference to custody cases where a child rejects a parent and does so because of allegedly unjustified persuasion by the other, preferred parent. Children who avoid a parent for reasons other than the preferred parent’s alleged improper actions (*e.g.*, the child was abused) are referred to as estranged rather than alienated. Occasionally, the term PA is used to describe a child’s rejection of a parent whether or not the preferred parent

devastate the target parent.” *Id.* at 90. We find Clawar and Rivlin’s book to be an example of biased advocacy for one side of a complicated issue.

The second book is by psychologist Craig A. Childress, titled CRAIG A. CHILDRESS, *Foundations: An Attachment-Based Model of Parental Alienation* (Oakson Press 2015). All we care to say about this book is that if you encounter it or its author, be in touch with us.

The third book is Demonthenes Lorandos & William Bernet (Eds.), *Parental Alienation: Science and Law* (2020), by two of PA’s biggest advocates. The book is an advocacy piece for PA. Michael Saini and Leslie Drozd review the book: Michael Saini & Leslie Drozd (Book Review). *Parental Alienation: Science and Law*. Edited by Demonthenes Lorandos and William Bernet, 59 *Family Court Review* 828 (2021). The abstract of the book review provides:

Parental Alienation: Science and Law is a book that brings together known supporters of parental alienation theory to review the definitions, prevalence, consequences, and interventions for treating cases where parental alienation has been identified as the dominant cause of parent-child contact problems. The book provides a review of published literature that favors parental alienation theory and highlights topics and issues that are central to the promotion of parental alienation in the family courts. The book is purposefully written with the aim to educate about parental alienation and to debunk the detractors

³ See Joan S. Meier, *U.S. Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations: What Do the Data Show?*, 42 J. OF SOC. WELFARE & FAM. L., Jan. 2020, at 92, 93 (“When children reject contact, the concept of alienation is still regularly used to focus blame on the preferred parent”); Madelyn Simring Milchman, *How Far Has Parental Alienation Research Progressed Toward Achieving Scientific Validity?*, 16 J. OF CHILD CUSTODY, Apr. 2019, at 115, 117 (“PA remains a politically and legally powerful concept that is often used by accused parents to defend against abuse allegations in family courts”).

took steps to cause the rift. When an expert uses PA terminology, it is useful to clarify the precise meaning attributed to the term.

Claiming PA can be a winning strategy. Under the PA rubric, the accused parent is the "innocent" parent, while the accusing parent is the "bad" parent. Psychologists Lenore Walker and David Shapiro note that an accusation of PA "will inevitably put the [accused] parent in the position of being the 'good' injured party while the alienating parent is seen as the 'bad' party. In fact, research has shown that the [accused] parent is often not so innocent, and the issues are far more complex."⁴ Psychologists Janet Johnson and Joan Kelly observe:

There are many reasons that [PA] may have gained such widespread attention, primarily that it provides custody litigants and their attorneys with a 'powerful weapon they can . . . use in a court of law to defend themselves.' . . . Allegations of [PA] thrive within the traditional adversarial legal system because they promise simple, clear-cut answers as to who is right and who is wrong."⁵

There is no denying that some accusations of child abuse are deliberate lies intended to alienate children from parents and gain advantage in court.⁶ Michael Saini, Taina Laajasalo, and Stacey Platt

⁴ Lenore E. Walker & David L. Shapiro, *Parental Alienation Disorder: Why Label Children with a Mental Diagnosis*, 7 J. OF CHILD CUSTODY, no. 4, 2010, at 266, 269.

⁵ Janet R. Johnston & Joan B. Kelly, *Rejoinder to Gardner's "Commentary on Kelly and Johnson's 'The Alienated Child: A Reformulation of Parental Alienation Syndrome,'"* 42 FAM. CT. REV., Oct. 2004, at 262 (quoting Richard Gardner).

⁶ See Madelyn Simring Milchman, *Oversimplified Beliefs about Alienation Rebuttals of Child Abuse Allegations in Custody Cases – Practice Issues*, Journal of Family Trauma, Child Custody, and Child Development (in press) ("It is a reality that some parents narcissistically manipulate their children into family alliances that cause unjustified favoritism toward them and rejection of the other parent." p. 8); Nico Trocme & Nicholas Bala, *False Allegations of Abuse and Neglect When Parents Separate*, 29 CHILD ABUSE & NEGLECT, 1333, 1334 (2005) (providing the results of a nationwide study in Canada of intentionally fabricated allegations of child abuse in 7,600 child welfare cases. "There is a widespread misperception that there is a high incidence of intentionally false allegations of child abuse made by mothers in the context of parental separation and divorce in order to gain a tactical advantage or to seek revenge from their estranged partners." John E.B. Myers, "Testifying" in Family Court, 46 MCGEORGE L. REV., Jan. 2014, at 499, 500, n. 2 ("The rate of intentionally false allegations is relatively low, though it is somewhat higher in

summarize the literature on fabrication: "While malicious rates of fabricated allegations are somewhat higher in child custody disputes than in investigations not involving custody disputes, the rates of malicious allegations are nowhere near the reported rates originally presented with the theory of alienation by Gardner and others in the last century."⁷ Intentional fabrication is reprehensible and is powerful evidence of parental fault bearing on children's best interests.

When a father is accused of child abuse and counterclaims that the mother engaged in PA, father's claim usually amounts to an express charge of deliberate fabrication. Occasionally, the counterclaim does not assert that mother is lying. Rather, father claims mother misinterpreted innocent behavior or statements as evidence of abuse.⁸ Sometimes, the counterclaim amounts to an assertion the mother is mentally unstable.⁹ In the past, it was common to argue that women who accused men of domestic violence or child abuse were mentally unstable.¹⁰ Psychologist Madelyn Milchman observes:

The concept of parental alienation originated with [psychiatrist] Richard Gardner who proposed the Parental Alienation Syndrome ("PAS") more than [thirty] years ago, in the heated context of

cases of parental separation than in other contexts.'" (quoting Nico Trocme' & Nicholas Bala, *False Allegations of Abuse and Neglect When Parents Separate*, 29 CHILD ABUSE & NEGLECT 1333, 1334 (2005)).

⁷ Michael Saini, Taina Laajasalo & Stacey Platt, *Gatekeeping By Allegations: An Examination of Verified, Unfounded, and Fabricated Allegations of Child Maltreatment Within the Context of Resist and Refusal Dynamics*, 58 FAM. CT. REV., Apr. 2020, at 417, 427-28.

⁸ In the authors' experience, such misperception is common. See John E.B. Myers, *A MOTHER'S NIGHTMARE—INCEST: A PRACTICAL LEGAL GUIDE FOR PARENTS AND PROFESSIONALS* 143-46 (1997); John E.B. Myers, *LEGAL ISSUES IN CLINICAL PRACTICE WITH VICTIMS OF VIOLENCE*, 272-73 (2017); See Saini, *supra* note 7 at 431. ("Among cases that are unfounded, it is important to determine whether the reports was made on a reasonable basis and in good faith, or whether it was maliciously made or reflective of the distorted perceptions of the reporting parent, perhaps due to their own history of trauma, a personality disorder or mental health issues." *Id.* at 418. "Legal professionals must try to make distinctions between false allegations that are deliberately or recklessly made to gain a tactical advantage in a custody or access dispute, unfounded allegations, and allegations that cannot be conclusively proven." *Id.* at 426).

⁹ *A MOTHER'S NIGHTMARE*, *supra* note 8 at 143-46.

¹⁰ See *People v. Barnes*, 721 P.2d 110 (1986); John E.B. Myers, Susan Diedrich, Devon Lee, Kelly McClanahan Ficher & Rachel Stern, *Professional Writing on Child Sexual Abuse from 1900 to 1975: Dominant Themes and Impact on Prosecution*, 4 CHILD MALTREATMENT, Aug. 1999, at 201.

feminist demands for recognition of child sexual abuse (CSA) and incest (along with other sexual coercions). It gave the imprimatur of medical authority to time-worn Western myths about the dangerousness of the female sex. As a result, it became a useful tool for "fathers' rights" advocates in child custody cases, particularly when sexual abuse allegations against them were raised. The PAS provoked strong opposition from feminist advocates on behalf of mothers who brought children's CSA allegations to the attention of family courts. While few today would explicitly endorse its misogynistic beliefs, they can still operate implicitly, biasing forensic practice and decision making in favor of fathers in child custody cases.¹¹

When an accusation of child abuse is met with a claim of PA, father may offer expert testimony on alienation. Mother's attorney must cross-examine. The purpose of this article is to help mother's counsel undermine expert testimony on alienation. We make no pretense of objectivity or balance. Our goal is to help lawyers undermine the credibility of PA experts who testify for parents accused of child abuse. We leave to others the task of defending such experts. Before discussing methods to attack expert testimony on alienation, an introduction to the history and current status of PA is useful.

PSYCHIATRIST RICHARD GARDNER COINED THE TERM PARENTAL
ALIENATION SYNDROME IN 1987 AND GAVE THE IDEA A VENEER OF
SCIENTIFIC RESPECTABILITY

Allegations of child abuse in custody cases are not new. It has always been difficult to distinguish between allegations that are deliberate lies, allegations based on real child abuse, and allegations where a parent honestly, but mistakenly, believes abuse happened.¹² In 1987, psychiatrist

¹¹ Milchman, *supra* note 3, at 115-166. See Meier, *supra* note 3 at 92-105 ("the experiences of myriad lawyers, advocates, and litigants in custody/abuse cases is that courts and ancillary professionals frequently react to mothers' claims of parental abuse—particularly child abuse—with hostility and criticism."); John E.B. Myers, Susan Diedrich, Devon Lee, Kelly McClanahan Ficher & Rachel Stern, *Professional Writing on Child Sexual Abuse from 1900 to 1975: Dominant Themes and Impact on Prosecution*, 4 CHILD MALTREATMENT, 201-216 (1999) (The authors reviewed law review articles, notes, and comments discussing rape and child sexual abuse from the 1870s to 1975; law review authors during this period often described woman as deliberate liars and/or as crazy.).

¹² Child sexual abuse is particularly difficult to prove. In *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987), the Supreme Court observes, "[c]hild abuse is

Richard Gardner self-published a book that promised to simplify decision-making.¹³ Gardner titled his book *Parental Alienation Syndrome and the Differentiation Between Fabricated and Genuine Child Sexual Abuse*.¹⁴ Thus was born the term Parental Alienation Syndrome (hereinafter “PAS”). Gardner’s book had the veneer of medical science—it contained charts and scoring systems to evaluate accusations of child abuse in custody cases.¹⁵ The book, however, had little scientific underpinning. Gardner’s ideas were drawn from his clinical experience, not from the systematic investigation and hypothesis-testing that science requires. Nevertheless, the book promised to simplify a complex subject. It was written by a psychiatrist with self-described ties to Columbia University, and it carried the imprimatur of medicine, including the beguiling word “syndrome.”¹⁶ Gardner’s PAS spread across the country and around the globe, finding its way into training for judges, attorneys, custody evaluators, and other professionals. PAS was the talk of the town in family law circles.

Not only did PAS stand on a shaky scientific footing, the first edition of Gardner’s book perpetuated the deeply ingrained skepticism of women who accuse men of impropriety, as mentioned above.¹⁷ To his credit, in later versions of his book, Gardner emphasized that when a child is abused by a parent, the child *should* feel alienated. Gardner toned down the sexist rhetoric. Nevertheless, the damage was done to mothers’ credibility.

one of the most difficult crimes to detect and prosecute, in large part because there are not witnesses except the victim.” See also, *In re Nicole*, 518 N.E.2d 914, 915 (1987).

¹³ Richard A. Gardner, *THE PARENTAL ALIENATION SYNDROME AND THE DIFFERENTIATION BETWEEN FABRICATED AND GENUINE CHILD SEXUAL ABUSE* (1987).

¹⁴ *Id.*

¹⁵ Gardner called his test the Sex Abuse Legitimacy Scale. *Id.*

¹⁶ For analysis of the uses and misuses of the word “syndrome,” particularly in court, see John E.B. Myers, *Myers on Evidence of Interpersonal Violence: Child Maltreatment, Intimate Partner Violence, Rape, Stalking, and Elder Abuse* ¶¶ 6.15 – 6.19 (6th ed. 2016).

¹⁷ See Meier, *supra* note 3, at 93 (“Although PAS itself—which Gardner defined as a mother’s false claim of child sexual abuse to ‘alienate’ the child from the father—has been largely rejected by most credible professionals, alienation theory writ large continues to be the subject of a growing body of literature, and is frequently relied on in U.S. family court cases. Gardner’s ‘parental alienation syndrome’ treated mothers’ abuse claims as specious and illegitimate.” (citations omitted)).

PARENTAL ALIENATION WAS CONTROVERSIAL FROM THE OUTSET

Gardner's PAS spawned intense and sustained criticism.¹⁸ Social work professor Kathleen Faller comments, "a fundamental flaw in the syndrome, as described by Gardner, is that it fails to take into account alternative explanations for the child's and mother's behavior, including the veracity of the allegations or that the mother has made an honest mistake."¹⁹ Law professor Carol Bruch writes, "PAS as developed and purveyed by Richard Gardner has neither a logical nor a scientific basis. It is rejected by responsible social scientists and lacks solid grounding in psychological theory or research."²⁰ Psychologist Rebecca Thomas and sociologist James Richardson write:

Despite having been introduced 30 years ago, there remains no credible scientific evidence supporting parental alienation syndrome The concept has not gained general acceptance in the scientific field, and there remains no test, no data, or any experiment to support claims made concerning PAS. Because of this lack of scientific credibility, many organizations—scientific, medical, and legal—continue to reject its use and acceptance.²¹

As criticism of PAS mounted, proponents of Gardner's ideas changed the moniker by dropping the word "syndrome." Today, PAS is referred to as Parental Alienation Disorder (PAD) or simply as PA.²² The idea is not new: Just the packaging.

RECENT EMPIRICAL RESEARCH ON PARENTAL ALIENATION IN THE COURTS

Two recent and largely conflicting empirical studies of alienation claims in family court are a must-read for anyone wishing to understand this issue.

¹⁸ *Id.*

¹⁹ Kathleen Coulborn Faller, *The Parental Alienation Syndrome: What It Is and What Data Support It?* 3 CHILD MALTREATMENT, May 1998, at 100, 112.

²⁰ Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, 35 FAM. L. Q., 527, 550 (2001).

²¹ Rebecca M. Thomas & James T. Richardson, *Parental Alienation Syndrome: 30 Years On and Still Junk Science*, 54 JUDGE'S J., Summer 2015, at 22, 22.

²² See Madelyn S. Milchman, Robert Geffner & Joan S. Meier, *Ideology and Rhetoric Replace Science and Reason in Some Parental Alienation Literature and Advocacy: A Critique*, 58 FAM. CT. REV., Apr. 2020, at 340, 346 ("When PAS was discredited as a medical syndrome, the 'S' was dropped, and advocates adopted the term PAD to replace it." (citation omitted)).

A. Joan Meier's 2020 Study

In 2020, law professor Joan Meier published empirical work in the *Journal of Social Welfare and Family Law*.²³ Professor Meier is the leading legal expert on PA in child custody proceedings. Meier's research was supported by a grant from the National Institute of Justice. Meier writes:

Protective parents and domestic violence professionals have long asserted that courts dealing with child custody and their affiliated professionals frequently deny true claims of . . . child abuse and instead punish parents (usually mothers) who allege . . . child physical or sexual abuse, or seek to limit the other parent's child access for any reason. Anecdotal reports have suggested that . . . many mothers alleging abuse . . . are losing custody to the allegedly abusive father.²⁴

Meier and her colleagues studied a large sample of electronically published court decisions from 2005 to 2014.²⁵ While the majority were appellate decisions, several hundred trial court opinions were included. Meier acknowledges that by examining court decisions, her study cannot determine the ground truth of accusations of child abuse.²⁶ That said, Meier's study found:

[W]omen who allege abuse—particularly child abuse—by a father are at significant risk (over 1 in 4) of losing custody to the alleged abuser.²⁷ . . . [C]ourts are even less likely to credit abuse claims when fathers invoke parental alienation. . . . Child sexual abuse, in particular, appears to be virtually impossible to prove (only 1 case out of 51 was believed) when a father defends with an alienation claim.²⁸ . . . [F]athers' alienation cross-claims significantly increase the rate of courts' removals of custody from mothers.²⁹ . . . [W]hen fathers claim alienation, the rate at which mothers lose custody shoots up from 26% to 50% for any abuse allegations. That is, *fathers' alienation claims roughly double mothers' rates of losing custody*³⁰

In the Final Report to NIJ, Meier writes:

²³ Meier, *supra* note 3 at 92-105.

²⁴ *Id.* at 92.

²⁵ *Id.* at 94.

²⁶ *Id.* at 95.

²⁷ *Id.* at 93.

²⁸ *Id.* at 97.

²⁹ *Id.* at 98.

³⁰ *Id.* (emphasis in original).

In custody disputes across the country, protective parents . . . have long asserted that family courts frequently deny true claims of . . . child abuse and instead punish protective parents who seek to protect children from a dangerous other parent. . . .³¹

[F]ather's alienation claims are remarkably effective in undermining (discrediting) mothers' allegations of child abuse. When a father claims a mother is alienating the children from him, a mother's abuse claim is 2.3 times less likely to be credited than when he doesn't.³²

Given that parental alienation syndrome was created specifically as a rationale for rejecting child sexual abuse claims, it is perhaps not surprising that alienation theory continues to be particularly powerful in application to precisely those cases. Current proponents of the concept of alienation, however, have asserted that it is different from PAS and should not be used in the same way. These data make clear that the operation of the theory has not changed. Neither courts nor professionals who inform the courts seem to have received that message.³³

If we assume Meier's findings are correct, that fathers' alienation claims often are effective in undermining mothers' credibility, there are several explanations. First, in some cases, fathers are correct. Father's evidence establishes intentional alienation. Second, in other cases, the claim of alienation causes professionals to incorrectly discount the mother's evidence. Each case needs to be evaluated on the merits, without prejudgment or bias.

B. Jennifer Harman and Demosthenes Lorandos's 2021 Study

Jennifer Harman and Demosthenes Lorandos are psychologists and proponents of PA.³⁴ They define PA as "a mental condition in which a

³¹ Joan S. Meier, Sean Dickson, Chris O'Sullivan, Leora Rosen & Jeffrey Hayes, *Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations*, GEO. WASH. L. FACULTY PUBL'NS & OTHER WORKS, 4 (2019), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2712&context=faculty_publications.

³² *Id.* at 15.

³³ *Id.*

³⁴ If you Google Jennifer Harman and Demosthenes Lorandos you will find videos in which they discuss their views of the PA debate. *See also*, PARENTAL ALIENATION: SCIENCE AND LAW (Demosthenes Lorandos & William Bernet eds., 2020).

child allies strongly with one parent and rejects a relationship with the other parent without legitimate justification.”³⁵

In 2021, in the journal *Psychology, Public Policy and Law*, Harman and Lorandos published a stinging critique of Meier’s research and findings.³⁶ In the same article, Harman and Lorandos report on their own research on PA in family court. Harman and Lorandos are unrelenting in their criticism of Meier and her research team’s methods and findings.³⁷ At the same time, Harman and Lorandos are supremely confident that their own methods and findings are beyond reproach. While Harman and Lorandos do not come right out and accuse Meier of lying, their accusations leave little to the imagination. They accuse Meier of “many inaccurate and misleading statements”³⁸ and with pushing a political agenda based on inadequate data.³⁹ Turning from their assault on Meier to their own research on appellate cases, Harman and Lorandos did not report replication of Meier’s findings of gendered outcomes in alienation cases.⁴⁰ Harman and Lorandos write, “regardless of the gender of the parent, a known rather than alleged alienating parent had an 88% greater probability . . . of losing than gaining parenting time.”⁴¹ Harman and Lorandos found no support for the claim that abusive parents gain custody.⁴²

³⁵ Jennifer J. Harman & Demosthenes Lorandos, *Allegations of Family Violence in Court: How Parental Alienation Affects Judicial Outcomes*, 27 PSYCH., PUB. POL’Y, & L. 184, 184 (2021).

³⁶ *Id.*

³⁷ *Id.* at 185 (“Meier et al. (2019) made many inaccurate and misleading statements.”); *Id.* at 190 (Harman and Lorandos accuse Meier of manipulating data “to support her hypotheses.”); *Id.* at 191 (Harman and Lorandos accuse Meier of “cherry-picking of data and biased definitions of codes.”).

³⁸ *Id.* at 185.

³⁹ *Id.*

⁴⁰ See generally *Id.* Professor Meier notes that Harman and Lorandos did not collect relevant cases that could test Meier’s findings. Personal Communication from Professor Meier on July 18, 2021.

⁴¹ Harman & Lorandos, *supra* note 35, at 197.

⁴² *Id.* at 206. There is no generally accepted way to “know” which children have been deliberately manipulated by a preferred parent. This determination needs to be based on admissible evidence, and in this regard PA terminology is not helpful.

C. Meier Punches Back

Meier and her team responded to Harman and Lorandos.⁴³ Meier writes that the Harman and Lorandos study is weak, non-transparent, and fails to test Meier's hypotheses. Meier concludes:

Harman and Lorandos's study is neither a "direct and thorough" test of Meier et al.'s research, nor is it a credible analysis of the issues both studies seek to address. Not only the statistical but the non-statistical problems detailed herein are easily overlooked by those who are not steeped in social science research methodology or who are lulled by their confident tone and technical presentation. Even knowledgeable and expert readers might not make the considerable effort we did to dig through their assertions and contradictions to parse every table, or to pore over the technical material on OFC to check coding procedures, etc. Our deconstruction of their sampling method, coding, and analyses and interpretations of both their own and our results reveals fundamental problems at every stage.⁴⁴

The clash between Meier on one side and Harman and Lorandos on the other typifies the debate over parental alienation: smart people advocating passionately for what they believe is right, with little room for compromise. Based on our experience with parents in actual cases, we think Meier is closer to the mark.

IMPEACH THE EXPERT WITH LEARNED TREATISES

The literature pro⁴⁵ and con⁴⁶ on PA is voluminous. No effort is made here to present a comprehensive review of the literature. Our goal is more

⁴³ Joan Meier, Sean Dickson, Chris O'Sullivan & Leora Rosen, *The Trouble with Harman and Lorandos's Attempted Refutation of the Meier et al, Family Court Study*, J. OF FAM. TRAUMA, CHILD CUSTODY & CHILD DEV., (Feb. 28, 2022) doi: 10.1080/26904586.2022.2036286.

⁴⁴ *Id.*

⁴⁵ See, e.g., Ashish Joshi, *Parental Alienation is Real: Exposing the Myth of the Woozle*, 47 LITIGATION 8 (2021).

⁴⁶ See, e.g., Alyssa G. Rao, Note, *Rejecting "Unjustified" Rejection: Why Family Courts Should Exclude Parental Alienation Experts*, 62 BOS. COLL. L. REV. 1759, 1796 (2021); Janet R. Johnston & Matthew J. Sullivan, *Parental Alienation: In Search of Common Ground for a More Differentiated Theory*, 58 FAM. CT. REV. 270, 292 (2020) ("This common conception of 'parental alienation' [PA] appears to be thriving alongside continuing controversy among researchers, professional organizations, family justice practitioners, advocates and parents as to the legitimate existence of the phenomena. . . . [Strong]

limited and concrete. We seek to equip lawyers with quotes from the literature—learned treatises—to attack expert witnesses who testify on PA.⁴⁷ Our article contains lengthy quotes from relevant literature, emphasizing the April 2020 special issue of *Family Court Review*, which focused on PA. The *Family Court Review* is a journal published by the American Association of Family and Conciliation Courts. Articles in *Family Court Review* are available on Westlaw and LexisNexis.

Learned treatises are used for one or both of two purposes: (1) to impeach an expert,⁴⁸ and/or (2) to prove the truth of matters contained in the treatise. When a learned treatise is offered to prove the truth of passages in the treatise, the treatise is hearsay. When a learned treatise is offered not for its truth but for the limited purpose of impeachment, the treatise is not hearsay.⁴⁹

States have a hearsay exception for learned treatises. Most states have adopted the Federal Rules of Evidence exception, FRE 803(18), which states:

The following are not excluded by the rule against hearsay . . . A statement contained in a treatise, periodical, or pamphlet if: (A) the statement is called to the attention of an expert on cross-examination or relied on by the expert on direct examination; and (B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.⁵⁰

The authority of a learned treatise is established four ways: (1) the expert relied on the treatise during the expert's direct examination, (2) the

proponents and strong opponents of the ideas remain stalemated over the value of PA. . . . Despite universal agreement that family violence and child abuse preclude a finding of PA, virtually no common criteria exist to ensure these distinctions have been made.”); Aaron Robb, *Methodological Challenges in Social Science: Making Sense of Polarized and Competing Research Claims*, 58 FAM. CT. REV. 308, 321 (2020) (“Despite a long history of being described in professional literature, research into resist-refusal dynamics is still in its infancy.”).

⁴⁷ See Milfred D. Dale, Jonathan Gould & Alyssa Levine, *Cross-Examining Experts in Child Custody: The Necessary Theories and Models . . . With Instructions*, 33 J. AM. ACAD. MATRIMONIAL LAW. 327, 390 (2021).

⁴⁸ See *Clark v. Commonwealth*, 63 S.W. 740 (Ky. 1901).

⁴⁹ See Edward J. Imwinkelried, *Rationalization and Limitation: The Use of Learned Treatises to Impeach Opposing Expert Witnesses*, 36 VT. L. REV. 63, 80 (2011).

⁵⁰ FED. R. EVID. 803(18).

expert admits on cross-examination that the treatise is authoritative, (3) if the expert being cross-examined refuses to admit the treatise is authoritative, another expert testifies to establish authority, and (4) in rare cases, a treatise is so widely acknowledged as reliable—e.g., *Grey's Anatomy*—that the judge takes judicial notice of the treatise's authority.

If an expert relied on a treatise during the expert's direct examination, Rule 803(18) is satisfied and the treatise can be used for the truth of the matter asserted and impeachment. Suppose the expert did not rely on the treatise during direct examination. In that case, the attorney conducting cross-examination may ask: "Q: Doctor, do you recognize [name of the treatise or the author] as a reliable authority on this subject?" If the expert acknowledges the treatise or author as an authority, Rule 803(18) is satisfied. Occasionally, an expert refuses to acknowledge the authority of a treatise in order to prevent counsel from using the treatise for impeachment. In such cases, it is necessary for the cross-examiner to provide the treatise to the examiner's own expert so the cross-examiner's expert can establish the authority of the treatise.

Prior to trial, some attorneys send opposing experts a packet of articles along with a cover letter requesting that the expert read the materials and acknowledge each as a reliable authority. If the expert obliges, Rule 803(18) is satisfied. Sometimes, questioning at trial takes the following form:

Q: Prior to trial, did you receive a packet of articles from me?

A: Yes.

Q: Were the articles accompanied by a cover letter asking you to read the articles?

A: Yes.

Q: Did you read the articles?

A: No.

Q: So, you refused to read the articles you were asked to review. Is that right?

A: Yes.

The lawyer is satisfied with the expert's responses because the answers make the expert appear unreasonable. The trier of fact may think, "Why wouldn't the expert look at the material? What is he afraid of?"

An additional pretrial technique is to depose the opposing expert. Due to the relative informality of a deposition, experts are often willing to discuss articles and books in their field. The lawyer nonchalantly puts articles or books on the table and asks the expert to help the lawyer

understand the material. After some discussion, the lawyer asks if the journal, book, or author is an authority. Frequently, experts don't realize the attorney's real goal is to get the expert to endorse the material as authoritative. If the expert makes the commitment in a deposition, it will be difficult to defend a different position at trial.

We turn now to the main goal of this article: equipping family law attorneys with analysis and quotes from learned treatises to impeach PA experts.

THE EXPERT TESTIFIES THERE IS CONSENSUS ON THE MEANING OF PA

There is no agreed-upon definition of PA. In an article in the 2020 *Family Court Review* special issue, psychologist Barbara Fidler and law professor Nicholas Bala write, "[t]here remains a lack of consensus on a precise definition of alienation"⁵¹ Mercer adds, "because there is as yet no established method for identifying children who show evidence of parental alienation, the ideas associated with the parental alienation concept can best be considered as a loosely-connected and poorly-evaluated belief system."⁵²

Authorities who write about alienation often offer their own definition. Psychologists Joan Kelly and Janet Johnston published an article titled "The Alienated Child: A Reformulation of Parental Alienation Syndrome."⁵³ Kelly and Johnston write, "an alienated child is defined here as one who expresses, freely and persistently, unreasonable negative feelings and beliefs (such as anger, hatred, rejection, and/or fear) toward a parent that are significantly disproportionate to the child's actual experience with that parent."⁵⁴ Psychiatrist William Bernet is a leading proponent of PA.⁵⁵ Bernet defines PA as a "mental condition in which a child—usually one whose parents are engaged in a high-conflict

⁵¹ Barbara Jo Fidler & Nicholas Bala, *Concepts, Controversies and Conundrums of "Alienation: Lessons Learned in a Decade and Reflections on Challenges Ahead*, 58 FAM. CT. REV. 576, 603 (2020).

⁵² Jean Mercer, *Critiquing Assumptions About Parental Alienation: Part 2. Causes of Psychological Harms*, 18 J. OF FAM. TRAUMA, CHILD CUSTODY & CHILD DEV. 201, 201 (2021).

⁵³ Joan Kelly & Janet Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 FAM. CT. REV. 249, 266 (2001).

⁵⁴ *Id.* at 251.

⁵⁵ See William Bernet, *Parental Alienation and Misinformation Proliferation*, 58 FAM. CT. REV. 293, 297 (2020); See also, William Bernet, *Recurrent Misinformation Regarding Parental Alienation Theory*, THE AM. J. OF FAM. THERAPY (September 24, 2021), <https://doi.org/10.1080/01926187.2021.1972494>.

separation or divorce—allies himself or herself strongly with an alienating parent and rejects a relationship with the target parent without legitimate justification.”⁵⁶ In another article, Bernet offers a simpler definition, “[A] child’s rejection of a parent without a good reason.”⁵⁷ Psychologist Richard Warshak writes:

This article uses the terms parental alienation and alienated child to refer only to a disturbance in which the child’s rejection of a parent is disproportionate to the rejected parent’s behavior. If the child’s experience of the parent reasonably justifies the child’s rejection—for example, the child is reacting to abuse, gross mistreatment, severe mental illness, witnessing domestic violence, or volatile, erratic behavior due to substance abuse—the term parental alienation does not apply⁵⁸

An expert who claims there is a consensus on the definition of PA is subject to critique. It is important to note that although the definitions quoted appear to be carefully crafted, words like “unreasonable,” “legitimate justification,” and “disproportionate” remain without an operational definition and imply subjective judgments rather than valid and reliable protocols for identification of PA.⁵⁹

PARENTAL ALIENATION IS A CONCLUSION NOT AN ANALYSIS

When a parent raises the possibility of abuse, a careful analysis of the evidence should follow. The analysis can be performed by mental

⁵⁶ William Bernet, *Response to “Ideology and Rhetoric Replace Science and Reason in Some Parental Alienation Literature and Advocacy: A Critique,”* By Milchman, Geffner and Meier, 58 FAM. CT. REV. 362, 367 (2020).

⁵⁷ William Bernet, Nilgun Gregory, Ronald, P. Rohner & Kathleen M. Reay, *Measuring the Difference Between Parental Alienation and Parental Estrangement: The PARQ-Gap*, 65 J. FORENSIC SCI. 1225, 1225 (2020) (Dr. Bernet and his colleagues write: “The two most important reasons for contact refusal are estrangement and alienation. Estrangement refers to a child’s rejection of a parent for good cause, for example, because that parent had a history of neglecting or abusing the child. On the other hand, parental alienation (PA) refers to a child’s rejection of a parent without good reason.”).

⁵⁸ Richard A. Warshak, *When Evaluators Get It Wrong: False Positive IDs and Parental Alienation*, 26 PSYCH. PUB. POL. & L. 54, 57 (2020).

⁵⁹ In science, “valid” means that a protocol or test accurately measures what it is intended to measure. Thus, a valid intelligence test accurately measures intelligence. The word “reliable” means the protocol or test yields consistent results across multiple administrations. Courts often refer to both validity and reliability with the word reliable. *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 590 fn. 9 (1993).

health professionals, police officers, child protection social workers, and lawyers. What is important is experience and expertise, not a particular diploma. It is true that different professionals bring different skills to the analytical process, but in the final analysis no profession has cornered the market on analytic competence.

A problem with the words "parental alienation" is that the words have nothing to do with the analysis of evidence that is needed to determine whether alienation occurred. PA is a conclusion—an after-the-fact label—not an analysis. PA is not a test or tool that aids the analysis. Yet, when the words "parental alienation" are uttered, people often mistakenly jump to the conclusion the necessary analysis has occurred. To make matters worse, the words "parental alienation" are pejorative. Mere mention of "parental alienation" causes some people to conclude that alienation occurred. The term PA takes on a life of its own, becoming a substitute for analysis. Learned Hand observed on the different topic, "the subject seems to gather mist which discussion serves only to thicken"⁶⁰ The term "parental alienation" creates a mist of confusion that obscures meaningful analysis.

To clarify why PA is a conclusion and not an analysis, an analogy is useful. Lawyers know that on appeal, some errors by the trial judge are harmless while other errors are reversible.⁶¹ The terms "harmless error" and "reversible error" provide no insight into whether a particular trial court error is harmless or reversible. The appellate judge evaluates the error in the context of the entire appellate record to determine the effect of the error. If the appellate judge determines the error likely influenced the outcome in the trial court, the appellate judge labels the error reversible. On the other hand, if the appellate judge determines the error probably did not influence the outcome below, the appellate judge labels the error harmless. The point is that the terms "harmless error" and "reversible error" are conclusions. The hard work is the analysis leading to the conclusion. Similarly, PA is a conclusion and not an analysis.

Upon proper objection under Federal Rules of Evidence, Rule 403, the trial judge balances the probative value of relevant evidence against the dangers of unfair prejudice and/or confusion of issues.⁶² PA has no probative value in determining whether accusations of abuse are true. For

⁶⁰ *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932).

⁶¹ FED. R. EVID. 103.

⁶² FED. R. OF EVID. 403 provides: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

this reason, expert testimony on PA should be excluded under Rule 403. Even if PA has some modicum of probative value—it doesn't—the mist of confusion it causes is sufficient reason to exclude PA evidence under Rule 403.

THE EXPERT “DIAGNOSED” PARENTAL ALIENATION

The word “diagnosis” is a label attached to an illness or disease.⁶³ The concept of “diagnosis” is misapplied regarding alleged PA.⁶⁴ Whether or not alienation occurred is a question of fact requiring analysis of evidence, not a psychological disorder that can be diagnosed. Mercer writes, “[t]here is no established protocol for identifying PA in children.”⁶⁵ Elsewhere, Mercer writes, “[p]arental alienation is not an identified psychiatric diagnosis, but is a term used to describe some events during and after divorce.”⁶⁶ Timothy Houchin, John Ranseen, Phillip Hash, and

⁶³ Online dictionary.

⁶⁴ Some proponents of PA believe alienation is a diagnosable condition. See William Bernet & Amy J.L. Baker, *Parental Alienation, DSM-5, and ICD-11: Response to Critics*, 41 J. AM. ACAD. PSYCH. & LAW 98, 98 (2013). Dr. Bernet writes, “[T]he concept of PA was expressed in DSM-5, but not the actual words.” Bernet, *supra* note 57, at 364. Well, maybe. The fact is the professionals who wrote DSM-5 rejected PA as a diagnosis. See Madelyn L. Milchman, Robert Geffner, & Joan S. Meier, *Putting Science and Reasoning Back Into the “Parental Alienation” Discussion: Reply to Bernet, Robb, Lorandos, and Garber*, 58 FAM. CT. REV. 375, 378 (2020), where the authors write that Bernet “goes on to claim, ‘PA is an example of the novel diagnosis, child affected by parental relationship distress.’ There are several problems with Bernet’s assertion that DSM-5 includes PA as an example of this new ‘diagnosis.’ First, while DSM-5 includes a new section titled ‘Child Affected by Parental Relationship Distress’, it is in the chapter titled ‘Other Conditions That May Be a Focus of Clinical Attention.’ The introduction to this chapter pointedly states ‘the conditions and problems listed in this chapter are not mental disorders.’ If they are not mental disorders, they are not diagnoses. That is why they were put in a separate section. ‘Parental Relationship Distress’ is not a novel diagnosis—it is not a diagnosis at all.”

⁶⁵ Jean Mercer, *Rejecting the Idea of Rejection as a Measure of Parental Alienation: Comment on Bernet, Gregory, and Rohner, and Reay* (2020), 18 J. OF FAM. TRAUMA, CHILD CUSTODY & CHILD DEV. 201, 205 (2020). doi: 10.1080/26904586.2020.1806770.

⁶⁶ Jean Mercer, *Critiquing Assumptions About Parental Alienation: Part 1. The Analogy With Family Violence*, 19 J. FAM. TRAUMA, CHILD CUSTODY & CHILD DEV. 81, 83 (2022).

Daniel Bartnicki write, “there remains a paucity of scientific evidence that PAS or PAD should be a psychiatric diagnosis.”⁶⁷

The American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders* (“DSM”) is the leading source for psychiatric diagnosis.⁶⁸ Proponents of PA tried and failed to have PA—they called it Parental Alienation Disorder (PAD)—included as a diagnosable mental disorder in the DSM-5.⁶⁹ It is true that some children in high conflict custody disputes demonstrate diagnosable psychological symptoms such as stress, anxiety, and depression.⁷⁰ It is logical to assume such symptoms are caused by *something*; however, there is no diagnosable psychological symptom or group of symptoms that points to alienation as the cause of stress, anxiety, or depression.

⁶⁷ Timothy M. Houchin, John Ranseen, Phillip A. Hash & Daniel J. Bartnicki, *The Parental Alienation Debate Belongs in the Courtroom, Not in DSM-5*, 40 J. AM. ACAD. PSYCHIATRY & L. 127, 128 (2012).

⁶⁸ AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS DSM-5* (5th ed. 2013).

⁶⁹ Jean Mercer, Are Intensive Parental Alienation Treatments Effective and Safe for Children and Adolescents? *Journal of Child Custody*, doi: 10.1080/15379418.2018.1557578 (“A group of PA proponents campaigned unsuccessfully to have PA included as a diagnostic category in the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5; American Psychiatric Association, 2013)”; Madelyn S. Milchman, Robert Geffner & Joan S. Meier, *Ideology and Rhetoric Replace Science and Reason in Some Parental Alienation Literature and Advocacy: A Critique*, 58 FAM. CT. REV. 340, 344 (2020) (“The concept of parental alienation in every form that advocates proposed . . . was rejected for inclusion in DSM-5.”); Milchman, *supra* note 65, at 378 (The authors write, Bernet “goes on to claim, ‘PA is an example of the novel diagnosis, child affected by parental relationship distress.’ There are several problems with Bernet’s assertion that DSM-5 includes PA as an example of this new ‘diagnosis.’ First, while DSM-5 includes a new section titled ‘Child Affected by Parental Relationship Distress,’ it is in the chapter titled ‘Other Conditions That May Be a Focus of Clinical Attention.’ The introduction to this chapter pointedly states ‘the conditions and problems listed in this chapter are not mental disorders.’ If they are not mental disorders, they are not diagnoses. That is why they were put in a separate section. ‘Parental Relationship Distress’ is not a novel diagnosis—it is not a diagnosis at all.”).

⁷⁰ See Gary B. Melton, John Petrila, Norman G. Poythress & Christopher Slobogin, 550 *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* (3d ed. 2007).

Psychologist Benjamin Garber writes that the medical model--of which diagnosis is a part--is ill suited to discovering whether alienation occurred:

I fear that we are trying to tape or glue together a workable structure on an essentially flawed foundation. That foundation is the medical model of individual illness, diagnosis, and intervention that psychology inherited from its physician parents . . .

It is the medical model that prompts us to even consider whether "alienation" should be codified as a "syndrome," a "disorder," or a lower-case description of behaviors. It is the medical model that prompts us to try to impute family law meaning to clinically designed methods. It is the medical model that prompts so many custody evaluators, attorneys, and courts to incorrectly believe that an assessment of mother, father, and child is the same as an assessment of the system that they make together. . . . [F]amily law questions are about relationships, not individuals. The work that we do is about dynamics, not diagnoses.

There is no Diagnostic and Statistical Manual ("DSM") for relationships. The DSM and ICD are catalogs of individual pathologies. Applying those nosologies to family law matters is a bit like trying to measure time with a tape measure.⁷¹

The American Academy of Child and Adolescent Psychiatry published *Practice Parameters for Child Custody Evaluation*, which state:⁷²

It is not necessary to render a DSM-IV diagnosis in a custody dispute. The process is an evaluation of parenting, not a psychiatric evaluation. . . . DSM-IV diagnoses are not necessary. (If parties are given diagnoses, the clinician should explain the ramifications (if any) of the diagnosis for custody. Otherwise, providing a diagnosis confuses the court and provides fodder for attorneys.⁷³

Milchman, Geffner, and Meier write:

[I]t is important to note that it is problematic to use diagnoses or evaluative labels such as [PA] in child custody cases when

⁷¹ Benjamin D. Garber, *Dynamics, Not Diagnoses*, 58 FAM. CT. REV. 368, 368-70 (2020).

⁷² American Academy of Child and Adolescent Psychiatry, *Practice Parameters for Child Custody Evaluation*, 36 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 57S, 57S (1997).

⁷³ *Id.* at 65S-66S.

resistance or rejection of a parent by a child occurs, rather than observable behaviors and evidence to describe the functioning of all parties.⁷⁴

[A] behavior is not a condition or a diagnosis⁷⁵

Turning a child's rejection of a parent or a parent's denigration of the other parent, which are observable behaviors, into a condition or diagnosis simply by referring to them with a proper name, PA, implies that the *diagnosis*, not just the behaviors, exists; yet the absence of any validated criteria to identify it specifically or to make a differential diagnosis are significant problems that contradict this usage.⁷⁶

[Using the label PA] changes a behavioral description of one type of poor parenting into a specific mental disorder. Once again, this is precisely what PA advocates had proposed, unsuccessfully, to DSM-5⁷⁷

In short, in our view, labeling a behavior problem as if it were a scientifically validated diagnosis, with specific implications for children, families, and their treatment in the absence of the necessary empirical research--is premature at best and destructively misleading at worst.⁷⁸

In 2008, the American Psychological Association issued the following statement on PAS: "an APA 1996 Presidential Task Force on Violence and the Family noted the lack of data to support so-called 'parental alienation syndrome' and raised concern about the term's use. However, we have no official position on the purported syndrome."⁷⁹ Psychologist Richard Warshak writes, "no reliable data exist to allow a comparison of the prevalence of false positive versus false negative findings of alienating behavior. Nor are there reliable data on the prevalence of false positive versus false negative findings that the rejected parent is primarily responsible for the child's estrangement."⁸⁰ Psychiatrist Timothy Houchin and his colleagues observe: "politicians

⁷⁴ Milchman et al., *supra* note 70, at 355.

⁷⁵ *Id.* at 345.

⁷⁶ *Id.* (emphasis in original).

⁷⁷ *Id.*

⁷⁸ *Id.* at 346.

⁷⁹ *Parental Alienation Syndrome*, AM. PSYCH. ASS'N, <https://dictionary.apa.org/parental-alienation-syndrome> (last visited Aug. 18, 2021).

⁸⁰ Richard A. Warshak, *Risks and Realities of Working with Alienated Children*, 58 FAM. CT. REV. 432, 434 (2020).

frequently engage in alienation tactics to win elections, yet there is little thought to labeling this process as a diagnosis.”⁸¹

Psychologists Joan Kelly and Janet Johnston discuss psychiatrist Richard Gardner’s original formulation of PAS:

Gardner has formulated a definition of PAS that includes its hypothesized etiological agents (i.e., an alienating parent and a receptive child). This renders his theory of the causes of PAS unfalsifiable because it is tautological (i.e., true by definition). . . . [B]ecause there is no ‘commonly recognized, or empirically verified pathogenesis, course, familial pattern, or treatment selection’ of the problem of PAS, it cannot properly be considered a diagnostic syndrome Hence, the term PAS does not add any information that would enlighten the court, the clinician, or their clients⁸²

Lenore Walker and David Shapiro write, “there is no . . . body of scientific, empirical, or clinical literature to support the construct of PAD. . . . It is the authors’ contention that adding PAD to the diagnostic categories will cause more harm than benefit to divorcing families.”⁸³

The DSM-5 sets forth diagnosable mental disorders. In addition to diagnosable disorders, DSM-5 contains a chapter titled “Other Conditions That May Be a Focus of Clinical Attention.”⁸⁴ The other conditions are called V codes.⁸⁵ The V codes describe a wide range of social factors that can impact mental health.⁸⁶ It is important to note that V codes are *not*

⁸¹ Houchin et al., *supra* note 68, at 127.

⁸² Joan B. Kelly & Janet R. Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 FAM. CT. REV. 249, 249-50 (2001).

⁸³ Lenore E. Walker & David L. Shapiro, *Parental Alienation Disorder: Why Label Children with a Mental Diagnosis?*, 7 J. CHILD CUSTODY 266, 267, 279 (2010).

⁸⁴ AM. PSYCHIATRIC ASS’N, *supra* note 69, at 715.

⁸⁵ The “Other Conditions” are called V codes so the reader can coordinate the DSM-5 “Other Conditions” with V and Z codes contained in the International Classification of Diseases published by the World Health Organization. Each DSM-5 “Other Condition” is preceded by the letter “V” and several numbers. For example, V61.20 is the V code for “Parent-Child Relational Problems.” *Id.*

⁸⁶ *Id.*

mental disorders.⁸⁷ The V codes include homelessness,⁸⁸ extreme poverty,⁸⁹ victim of terrorism,⁹⁰ victim of discrimination,⁹¹ and others.

V code 61.29 is titled "Child Affected by Parental Relational Distress," and V code 61.03 is titled "Disruption of Family by Separation or Divorce."⁹² As mentioned above, PA proponents failed to get PAD included in DSM-5 as a diagnosable mental disorder. Not only is PA not a diagnosable mental disorder, PA is not a V code in DSM-5. Some PA proponents try to smuggle PA into DSM-5 by arguing it falls within the V code for "Child Affected by Parental Distress," and is for that reason a diagnosable condition in DSM-5.⁹³ This is a flawed argument. First, the American Psychiatric Association rejected PAD as a mental disorder worthy of inclusion in DSM-5. Second, V codes are not mental disorders. Thus, even if PAD somehow fits into a V code, it would not thereby become a diagnosable disorder. There are V codes for homelessness and victim of discrimination, but we do not diagnose a person with a mental disorder because the person is homeless or a victim of discrimination. V codes are social conditions that impact mental health, not mental disorders. With this knowledge, the cross-examiner can effectively challenge the argument that PA is a diagnosable disorder in DSM-5.

THE EXPERT TESTIFIES PARENTAL ALIENATION IS GENERALLY
ACCEPTED IN THE SCIENTIFIC COMMUNITY

There is general acceptance that some children are estranged from a parent. Johnson and Kelly write, "the fact that a small percentage of children develop strong negative attitudes and reject one of their parents after divorce is agreed upon."⁹⁴ There is also general acceptance that some

⁸⁷ *Id.* ("The conditions and problems listed in this chapter are not mental disorders.").

⁸⁸ *Id.* at 723.

⁸⁹ *Id.* at 724.

⁹⁰ AM. PSYCHIATRIC ASS'N, *supra* note 69, at 725.

⁹¹ *Id.* at 724.

⁹² *Id.* at 716.

⁹³ See Ramon Vilalta & Maxime Winberg Nodal, *On the Myth of Parental Alienation Syndrome (PAS) and the DSM-5*, 38 PSYCH. PAPERS 224, 228 (2017).

⁹⁴ Janet R. Johnston & Joan B. Kelly, Rejoinder to Gardner's "Commentary on Kelly and Johnston's 'The Alienated Child: A Reformulation of Parental Alienation Syndrome,'" 42 FAM. CT. REV. 622, 622 (2004).

parents deliberately alienate children from other parents.⁹⁵ Warshak writes, “denying the reality of parental alienation runs counter to generally accepted findings that a parent can manipulate a child to reject the other parent.”⁹⁶ There is *not* general acceptance that there is a reliable/valid psychological condition called PA that can be used to determine the cause of a child’s avoidance of a parent.⁹⁷ Indeed, there remains tremendous disagreement among mental health professionals about the existence of PA. Mercer writes:

[M]uch, if not all, of the work on PA by Bernet and others, is ‘not scientific’ (scientific evidence being evidence that has been obtained through systematic investigation following established rules). Just as importantly, however, discussions of PA are in fact pseudoscientific, as they claim systematic scientific support without having such support.”⁹⁸

Milchman, Geffner, and Meier write:

[T]he deeper problems are the lack of logic and a scientific basis for the theory of [PA]⁹⁹

A rhetorical strategy we find often within certain writers’ publications is the assertion of world-wide consensus in favor of alienation as a diagnostic, scientific, or psycho-legal concept without acknowledging the controversy about this consensus (Bernet, 2008, 2013, 2020; Brockhausen, 2013; Dum, 2013;

⁹⁵ See Madelyn Simring Milchman, *Oversimplified Beliefs about Alienation Rebuttals of Child Abuse Allegations in Custody Cases—Practice Issues*, *Journal of Family Trauma, Child Custody, and Child Development* (in press) (“It is a reality that some parents narcissistically manipulate their children into family alliances that cause unjustified favoritism towards them and rejection of the other parent. It is a reality that such manipulation might cause some children to be unreasonably angry at one parent and therefore incapable of seeing any good in anything that parent does. It is a reality that some children, especially older ones, might invent or exaggerate an abuse or CSA allegation. It is a reality that a narcissistically manipulative parent and an unreasonably angry child could form an alliance that is toxic to the child’s development mental health.”).

⁹⁶ Warshak, *supra* note 59, at 56.

⁹⁷ Although there is a small literature on deliberately fabricated allegations, there is little information available on the proportion of cases in the population involving deliberate lies. For that reason, it is not possible to calculate the probability that a particular case involves deliberate lies.

⁹⁸ Mercer, *supra* note 66, at 2 (2021).

⁹⁹ Madelyn S. Milchman, Robert Geffner & Joan S. Meier, *Ideology and Rhetoric Replace Science and Reason in Some Parental Alienation Literature and Advocacy: A Critique*, 58 *FAMILY COURT REVIEW* 340, 340 (2020).

Lorandos, 2013, 2020). However, this 'consensus' is achieved by ignoring, dismissing, or trivializing significant opposition. While misleading alienation rhetoric may indeed have contributed to world-wide acceptance of the alienation concept among some groups and organizations, at the same time opposition from many people representing many professions has increased globally in response to the failure of such proponents to provide solid, credible research proving the concept's fundamental premises despite 30 years of attempts to do so.¹⁰⁰

There is less consensus than many advocates assert.¹⁰¹

Opposition to the acceptance of the alienation concept based on concerns about its lack of scientific foundation and its misuse in court have also been expressed internationally.¹⁰²

No association representing the professions of law, psychology, psychiatry, or pediatrics in the U.S. recognizes [PA].¹⁰³

In the short article in *The Judge's Journal*, quoted earlier, Thomas and Richardson stated:

[D]espite having been introduced 30 years ago, there remains no credible scientific evidence supporting parental alienation syndrome (PAS, also called parental alienation (PA) and parental alienation disorder (PAD)). The concept has not gained general acceptance in the scientific field, and there remains no test, no data, or any experiment to support claims made concerning PAS.¹⁰⁴

Fidler and Bala write:

There remains a lack of consensus on a precise definition of alienation, etiology, and prevalence, and at this point there are no valid empirical assessment protocols or tools that can reliably measure or establish the presence of alienation as differentiated from other types of PCCP's [parent-child contact problems], including realistic estrangement or justified rejection.¹⁰⁵

Milchman, Geffner and Meier critique research supporting the existence of PA, writing:

¹⁰⁰ *Id.* at 343.

¹⁰¹ *Id.*

¹⁰² *Id.* at 344.

¹⁰³ *Id.* at 351.

¹⁰⁴ Thomas & Richardson, *supra* note 21 at 22.

¹⁰⁵ Fidler & Bala, *supra* note 52 at 581.

Their research designs are not consistent with standards for scientific validity research. They use scientific language but have not conducted the kinds of empirical studies needed to support their scientific claims. . . . [T]o date, the empirical research studies on alienation are methodologically flawed and no one has found scientifically validated criteria to identify "alienated" children and differentiate them from abused or otherwise psychologically injured or traumatized children. This differentiation is termed "discriminant validity," and it is ground zero for accurately identifying the category into which cases should be classified. To date, there is no empirical evidence demonstrating discriminant validity for alienation cases.¹⁰⁶

The cross-examiner should be aware of a 2013 article by two leading proponents of PA, William Bernet and Amy Baker, titled *Parental Alienation, DSM-5, and ICD-11: Response to Critics*.¹⁰⁷ In this article, Bernet and Baker claim there is plenty of science to support PA. The cross-examiner can point to the article by Milchman, Geffner and Meier, and to the following statement by the American Psychological Association: "The American Psychological Association has no official position on 'parental alienation syndrome' . . . There is no evidence within the psychological literature of a diagnosable parental alienation syndrome."¹⁰⁸ Warshak writes, "[t]ypical for a field at this stage, the majority of empirical studies that explicitly address parental alienation have used cross-sectional designs, convenience samples, and retrospective reporting from alienated parents and adult children."¹⁰⁹ Walker and Shapiro write "since there is no such body of scientific, empirical, or clinical literature to support the construct of PAD, a psychologist who renders such a conclusion is immediately involved in ethically questionable behavior."¹¹⁰ Milchman explains:

The anecdotal evidence that PA advocates believe is sufficient to support an international consensus that PA exists and can be readily identified consists largely of clinical examples and expert opinions. . . . [T]his kind of evidence intrinsically cannot identify PA as a distinct phenomenon that can be differentiated from other similar appearing phenomena. . . . [O]verall, the research designs

¹⁰⁶ Milchman, *supra* note 70, at 341, 345.

¹⁰⁷ Bernet & Baker, *supra* note 65, at 98.

¹⁰⁸ See generally, *Statement on Parental Alienation Syndrome*, AM. PSYCH. ASS'N, <https://www.apa.org/news/press/releases/2008/01/pas-syndrome> (last visited Aug. 18, 2021).

¹⁰⁹ WARSHAK, *supra* note 59, at 55.

¹¹⁰ WALKER, *supra* note 84, at 279.

in PA studies to date have been shown to have serious, even fatal, methodological flaws. These include inadequate assessment instruments, biased selection of subjects, lack of adequate comparison groups, inadequate statistical analyses, and circular reasoning.¹¹¹

Finally, Milchman writes: “scientific research that claims to validate alienation, and therefore to make identifying alienation cases reliable, is methodologically weak. Rather than testing alternative hypotheses, which is the scientific enterprise, it is largely aimed at seeking corroborating evidence, which is an ideological enterprise.”¹¹²

THE EXPERT TESTIFIES THAT PSYCHOLOGICAL TESTS SUPPORT A
FINDING OF PARENTAL ALIENATION

There is no psychological test that reveals whether alienation occurred.¹¹³ Psychologists Benjamin Garber and Robert Simon write, “assessing people in the midst of crisis tends not to capture their typical functioning. The intense social, emotional, and financial pressures associated with contested custody litigation can induce or exacerbate, acute and reactive anxiety, anger, and regression among otherwise healthy and high functioning adults.”¹¹⁴ Although Garber and Simon recognize that most psychologists utilize psychological tests, they “argue that child custody evaluations that rely upon test data risk misleading the court, breaching relevant ethical rules, creating unnecessary, time-consuming

¹¹¹ Milchman, *supra* note 3 at 115-39.

¹¹² Madelyn Milchman, *Empirical Results Relevant to Core Theoretical Assumptions About Parental Alienation* 5 (Aug. 2021) (unpublished manuscript) (on file with author).

¹¹³ See Benjamin D. Garber & Robert A. Simon, *Individual Adult Psychometric Testing and Child Custody Evaluation: If the Shoe Doesn't Fit, Don't Wear It*, 30 J. OF THE AM. ACAD. OF MATRIM. LAW. 325, 330 (2018) (“[U]nless and until this population is better understood and instruments are developed that represent its normative thinking, feeling, and behavior, it is simply misleading to make statements about a custody litigation by comparison to the responses of other entirely distinct normative groups. . . . We do not know, however, whether any particular test is reliable among custody litigants.”); Mary Johanna McCurley, Kathryn J. Murphy & Jonathan W. Gould, *Protecting Children from Incompetent Forensic Evaluations and Expert Testimony*, 19 J. OF THE AM. ACAD. OF MATRIM. LAW. 277, 299-300 (2005) (“[I]t is important to note that no personality tests measure parenting competency, nor has any constellation of personality traits been linked to skill as a caregiver. It is impossible to determine from test results alone if a parent’s measured response patterns are related, either directly or indirectly, to parenting competencies.”).

¹¹⁴ Garber & Simon, *supra* note 114, at 330.

and expensive legal straw-men, and doing harm to families and to the vulnerable children whose best interests the court must serve."¹¹⁵ Although psychological testing can suggest diagnostic categories, Garber and Simon write, "[p]sychiatric diagnoses have no clear meaning for parenting or co-parenting capacity."¹¹⁶

Other experts agree. Mary Johanna McCurley and her colleagues write, "it is important to note that no personality tests measure parenting competency, nor has any constellation of personality traits been linked to skill as a caregiver. It is impossible to determine from test results alone if a parent's measured response patterns are related, either directly or indirectly, to parenting competencies."¹¹⁷ Rachel Birnbaum and her colleagues write, "no psychological tests have predictive validity relating to parenting capacity . . ."¹¹⁸ Virginia Luftman writes, "[t]raditional psychological tests do not address parenting ability, the nature of the parent-child relationship, and the parent's abilities to communicate or foster the child's relationship with the other parent."¹¹⁹ Psychologist Gary Melton and his colleagues wrote one of America's leading textbooks on forensic psychology—*Psychological Evaluations for the Courts*. Melton and his colleagues write, "It is our contention that psychological tests assessing clinical constructs (e.g., intelligence, depression, personality, academic achievement) are frequently unnecessary and often used inappropriately. Tests of intellectual capacity, achievement, personality style, and psychopathy assess constructs that are linked only indirectly, at best, to the key issues concerning custody and visitation."¹²⁰ The American Academy of Child and Adolescent Psychiatry published *Practice Parameters for Child Custody Evaluation*. The Parameters provide:

In most cases, psychological testing of the parents is not required. Psychological tests, such as the Minnesota Multiphasic Personality Inventory, the Thematic Apperception Test, or the Rorschach, were not designed for use in parenting evaluations. The introduction into a legal process leads to professionals battling

¹¹⁵ *Id.* at 327.

¹¹⁶ *Id.* at 335.

¹¹⁷ McCurley, Murphy & Gould, *supra* note 114, at 277, 299-300.

¹¹⁸ Barbara Jo Fidler et al., *Child Custody Assessments: A Resource Guide for Legal and Mental Health Professionals* 62 (2008).

¹¹⁹ Virginia H. Luftman, *Practice Guidelines in Child Custody Evaluations for Licensed Clinical Social Workers*, 33 CLINICAL SOC. WORK J. 327, 350 (2005).

¹²⁰ Melton et al., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 552 (3rd ed. 2007).

over the meaning of raw data and attorneys making the most of findings of 'psychopathology' but may have little use in assessing parenting.¹²¹

Parental alienation proponent William Bernet and his colleagues describe a psychological instrument they call the Parental Acceptance-Rejection Questionnaire ("PARQ") which they claim identifies "splitting" in children. Splitting is a child's polarization of attitude toward parents.¹²² Proponents of PA believe splitting helps distinguish alienation from estrangement.¹²³ An attorney who encounters an expert relying on the PARQ may wish to consult Mercer's critique of the instrument, where she writes: "as careful as journal editors and reviewers may be, an occasional article slips through to publication although it is fraught with errors of logic and critical thinking. This appears to be the case with a recent research report discussing the relevance for PA detection of the PARQ."¹²⁴ Mercer calls the PARQ pseudoscience and points out seven flaws in the instrument.¹²⁵ Milchman adds:

PA advocates and one of the test's authors, Rohner, assert that the PARQ is "an objective measure of splitting in parental alienation." The PARQ, which is derived from Parental Acceptance-Rejection Theory is a validated test. However, it is not a test for splitting in PA. The relationship between the PARQ test and PA has been misinterpreted. The items contained in the PARQ clearly indicate

¹²¹ Herman et al., *Am. Acad. of Child & Adolescent Psychiatry: Practice Parameters for Child Custody Evaluation*, 36 J. OF THE AM. ACA. OF CHILD & ADOLESCENT PSYCHIATRY 57S, 65S (1997).

¹²² Mercer, *supra* note 66, at 4 (2021).

¹²³ See William Bernet et al., *Measuring the Difference Between Parental Alienation and Parental Estrangement: The PARQ-Gap*, 65 J. OF FORENSIC SCI. 1225 (2020); see also, William Bernet et al., *An Objective Measure of Splitting in Parental Alienation: The Parental Acceptance-Rejection Questionnaire*, 63 J. OF FORENSIC SCI. 9 (2017). PA proponents use the phrase PA when they conclude the accusing parent is alienating the child. They use the word estrangement when there is abuse.

¹²⁴ Mercer, *supra* note 66, at 1 (2021).

¹²⁵ See William Bernet, Ronald P. Rohner & Kathleen M. Reay, Comment, *Rejecting the Rejection of Parental Alienation: Comment on Mercer*, J. OF FAM. TRAUMA, CHILD CUSTODY & CHILD DEV. 202 (2021); Jean Mercer, *Responses to Kleinman and to Bernet, Rohner, and Reay*, J. OF FAM. TRAUMA, CHILD CUSTODY & CHILD DEV. (PAGES NOT YET AVAILABLE) (2021).

that this claim is wrong. There is *no* item on the PARQ that assesses *any* of the behavioral criteria proposed for PA.¹²⁶

The Statistical Package for the Social Sciences ("SPSS") is a software package used by social scientists to perform statistical analysis of research data. Not everyone with access to the SPSS software knows how to use it. If a cross-examiner encounters an expert or research paper reliant on the SPSS, it may be necessary to consult a social scientist who can dig into the statistics. Several studies by PA proponents demonstrate erroneous use of statistics.¹²⁷ PA proponents often employ questionnaires that involve a "Likert Scale", a method in which study participants are asked to rate events or people on a scale from one through five or ten. The Likert Scale seems simple, but proper use of the technique requires considerable work to analyze results. Using a "Likert Scale" limits statistical analysis to a small number of statistical tests called nonparametric tests, and precludes use of common statistical tests such as Pearson's correlation coefficient, the *t* test, or analysis of variance.

THE EXPERT TESTIFIES TO A CAUSAL RELATIONSHIP BETWEEN A CHILD'S BEHAVIOR AND PARENTAL ALIENATION

The label PA does not help determine whether a parent alienated a child. The label does not assist in understanding the cause of a child's behavior. As discussed earlier, PA is a label, not an analysis. Milchman, Geffner, and Meier write, "we strongly object to using the label 'alienation' as a diagnostic, scientific, or psycho-legal construct in place of an objective and comprehensive causal assessment. . . ."¹²⁸ Psychologists Lenore Walker and David Shapiro add, "[t]he obvious question, then, which the PAD proponents do not address, is how to differentiate real from false allegations of abuse."¹²⁹

A person who believes PA is a cognizable psychological condition is prone to confirmation bias, that is, bias in favor of finding PA. The person may jump too quickly to the conclusion that PA is the explanation for a

¹²⁶ Madelyn Simring Milchman, *How Far has Parental Alienation Research Progressed Toward Achieving Scientific Validity?*, J. OF CHILD CUSTODY, doi: 10.1080/15379418.2019.1614511. P. 127.

¹²⁷ See Harman & Lorandos, *supra* note 35, at 184-208.

¹²⁸ Madelyn S. Milchman, Robert Geffner & Jon S. Meier, *Ideology and Rhetoric Replace Science and Reason in Some Parental Alienation Literature and Advocacy: A Critique*, 58 FAMILY CT. REV. 340, 342 (2020).

¹²⁹ Lenore E. Walker & David L. Shapiro, *Parental Alienation Disorder: Why Label Children with a Mental Diagnosis*, 7 FAM. J. OF CHILD CUSTODY 266, 278 (2010).

child's conduct, at the risk of failing to properly analyze alternative hypotheses. Milchman, Geffner, and Meier explain,

[E]rrors also are frequently made by those who are predisposed to assume that improper parental alienation by the child's preferred parent is the explanation for a child's rejection or resistance to the other parent. Ironically, as new data suggest, interpreting a case as an alienation case even when supporting evidence is lacking is especially common and particularly powerful when it is most dangerous: when there are allegations of either domestic abuse or child maltreatment.¹³⁰

Milchman, Geffner, and Meier continue:

Applying a label such a "parental alienation" to a child's contact resistance or rejection misleads decision-makers into believing that "alienation" (*i.e.*, blameworthy conduct by a preferred parent) has been directly observed as an objective fact. It masks the reality that it is a conclusory opinion, which depends on an interpretation of the facts. . . .¹³¹

For those asserting that alienation contributes to parent resistance or rejection in a particular case, the critical requirement is to demonstrate with sufficient factual evidence that a child's parental rejection is unjustified and that the preferred parent is at fault and to blame for that rejection.¹³²

The logical fallacy called affirming the consequent is present in the thinking of some PA experts. If it is known that A causes B, a person who makes this error asserts then when B is present, A must be present. The error is in overlooking the possibility there can be multiple causes of B. In the PA context, the expert asserts that because a child avoids one parent, the other parent must have engaged in deliberate alienation. Of course, avoidance is caused by many factors.

Unless an expert witnessed alienation or conducted an investigation that is sufficient to opine on alienation, the literature does not support a conclusion that experts can testify to a reasonable degree of certainty—or indeed any degree of certainty—that a child's behavior is causally related to PA.

¹³⁰ Milchman, *supra* note 129, at 341-42.

¹³¹ Madelyn S. Milchman, Robert Geffner & Joan S. Meier, *Putting Science and Reasoning Back Into the "Parental Alienation" Discussion: Reply to Bernet, Robb, Lorandos, and Garber*, 58 FAM. CT. REV. 375, 377 (2020).

¹³² *Id.*

THE EXPERT TESTIFIES PARENTAL ALIENATION IS A FORM OF VIOLENCE
OR PSYCHOLOGICAL MALTREATMENT

In a 2018 article in *Psychological Bulletin*, Harman, Kruk, and Hines argue PA constitutes family violence, calling for a response from child protection.¹³³ No one disputes that intentional alienation is reprehensible. Yet, analogizing alienation to psychological child abuse that triggers intervention by child protective services is a bridge too far. Mercer criticizes Harman, Kruk and Hines' analogy between psychological maltreatment and PA, writing "[a]llowing this exaggeration to pass unchallenged facilitates its use in family courts to argue for custody decisions that may not be appropriate or even safe for children."¹³⁴ Mercer reviewed the literature on psychological maltreatment and concluded "[t]he assertion that parental alienating behaviors are psychological maltreatment is not correct, although in a given family both could occur simultaneously. . . . The titular equation of parental alienating behavior with violence does not appear to be supported, and the analogy is a highly questionable one."¹³⁵

THE EXPERT TESTIFIES PARENTAL ALIENATION IS AN ADVERSE
CHILDHOOD EXPERIENCE

A voluminous literature exists on Adverse Childhood Experiences ("ACE").¹³⁶ ACEs include child abuse, witnessing domestic violence, and a parent who abuses substances. ACEs are correlated with psychological and medical problems in adults.¹³⁷ Mercer observes, "advocates of the

¹³³ Jennifer J. Harman et al., *Parental Alienating Behaviors: An Unacknowledged Form of Family Violence*, 144 PSYCH. BULL. 1275 (2018).

¹³⁴ Jean Mercer, *Critiquing Assumptions About Parental Alienation: Part 1. The Analogy with Family Violence*, 19 J. OF FAM. TRAUMA, CHILD CUSTODY & CHILD DEV. 81, 84 (2021).

¹³⁵ *Id.* at 84, 90.

¹³⁶ Vincent Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. OF PREVENTIVE MED. 245-58 (1998) (this is the classic study that launched thousands of subsequent articles in the literature).

¹³⁷ Ernestine C. Briggs et al., *All Adverse Childhood Experiences Are Not Equal: The Contribution of Synergy to Adverse Childhood Experience Scores*, 76 AM. PSYCH. 243, 248 (2021) ("A number of authorities have cautioned against using cumulative ACE scores for clinical decision making. A coauthor of the original ACE study, Robert Anda, strongly warns against using an ACE score as an index of risk or as a threshold of eligibility for services. . . . ACE questionnaires

parental alienation belief system like Harman et al. have generalized from work on adverse childhood experiences to situations in which child avoidant behavior occurs, and have claimed that these situations are equivalent to psychological or emotional ACEs.”¹³⁸ Mercer analyzed the comparison of alienation to ACEs and found the analogy weak, writing, “the assertion that parental encouragement of child avoidance is equivalent to recognized forms of psychological or emotional child abuse is thus made without a convincing rationale by authors using the parental alienation approach. . . . The child protection claim made by parental alienation proponents cannot be sustained logically or empirically.”¹³⁹

DID THE EXPERT RULE OUT ALTERNATIVES TO PA?

A hallmark of competent mental health evaluation is consideration of alternative hypotheses to explain behavior. Proponents of PA agree. Bernet writes, “[e]very competent writer on this topic knows that PA is one possible explanation for a child’s contact refusal, but not the only possibility.”¹⁴⁰ Lorandos writes, “[w]e must examine numerous competing hypotheses to avoid false PA positives as well as false PA negatives.”¹⁴¹ An expert who fails to explore alternatives to PA can be impeached.

In Gardner’s book on PAS, he listed eight behaviors in children that Gardner believed provide evidence of Parental Alienation.¹⁴² Regarding Gardner’s behaviors, Milchman writes, “the eight behaviors that define PA in children have not changed since they were originally conceptualized in PAS” by Gardner.¹⁴³ Gardner’s eight child behaviors are: (1) the child

or similar measures may be useful to introduce this sensitive subject to clients, but reliance on a simple cumulative score misses much of psychological and developmental variance and larger contexts of such experiences.”). Be leery of an “expert” who says it is possible to predict future psychopathology based entirely or largely on an ACE score. An ACE score is not a diagnosis. Nor is an ACE score a mental disorder.

¹³⁸ Jean Mercer, *Critiquing Assumptions About Parental Alienation: Part 2. Causes of Psychological Harms*, J. OF FAM. TRAUMA, CHILD CUSTODY & CHILD DEV., p. 3(2021). doi: 10.1080/26904586.2021.1957058.

¹³⁹ *Id.* at 7.

¹⁴⁰ See Bernet, *supra* note 56, at 297.

¹⁴¹ Demosthenes Lorandos, *Response to Milchman, Gefner, and Meier Ideology and Rhetoric Replace Science and Reason in Some Parental Alienation Literature and Advocacy: A Critique*, 58 FAM. CT. REV. 371, 371 (2020).

¹⁴² Madelyn Simring Milchman, *How Far Has Parental Alienation Research Progressed Toward Achieving Scientific Validity*, 16 J. of Child Custody 115, 120 (2019) doi: 10.1080/15379418.2019.1614511.

¹⁴³ *Id.* at 119.

engages in a campaign of denigration of the accused parent, (2) the child offers frivolous excuses for criticism of the accused parent, (3) the child lacks ambivalence about the accused parent, (4) the child denies the alienating parent's influence ("independent thinker" phenomenon), (5) the child unthinkingly favors the alienating parent, (6) the child has no guilt over the harm done the accused parent, (7) the child demonstrates coaching by the alienating parent (the child borrows scenarios from the alienating parent), and (8) the child's unwarranted dislike of the accused parent spreads to the accused parent's extended family.¹⁴⁴ In addition to the eight behaviors observed in children, Gardner suggested seven behaviors in alienating parents: (1) brainwashing the child; (2) constant criticism of the accused parent; (3) seeking revenge; (4) the alienating parent interferes with the accused parent's time with the child; (5) the alienating parent lies about the accused parent, (6) the alienating parent violates the law; and (7) the alienating parent has no mental condition that could explain alienating behavior.¹⁴⁵

When a PA expert relied on some or all of the foregoing behaviors to support an opinion on alienation, the cross-examiner can confront the expert with innocent explanations. Regarding the eight behaviors allegedly seen in children, if the child was abused, it is understandable the child would criticize the abuser. If the child was abused, the child's ill feelings toward the abuser are based in reality and are not frivolous excuses to criticize the abusive parent. It is not surprising that an abused child would lack ambivalence about the conduct of an abusive parent. As for the so-called "independent thinker phenomenon," if abuse occurred then the non-abusive parent did not influence the child against the abuser; the abuser earned the child's fear and anger. When a child is abused by one parent, is it surprising the child turns for safety and comfort to the other parent? If a child was abused, the child is not the one who should feel guilt. Regarding so-called "borrowed scenarios" as evidence of coaching, one has to examine closely the origins of a child's statements. Coaching is only one possibility. If abuse occurred, the abuser's extended family may come to his defense to accuse the child or the non-abusive parent of lying. When this happens, it is not surprising that some of the child's fear, anger, and ambivalence extends to the family.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 120.

Turning to Gardner's seven behaviors allegedly demonstrated by alienating parents, the first is programming.¹⁴⁶ The cross-examiner points out that one cannot conclude a parent programmed a child without evidence. What is the expert's evidence? Was the expert present in the home to observe programming? Since the answer is no, the expert must have relied on inferences from other conduct to conclude programming occurred. The cross-examiner points out innocent explanations for the other conduct, undermining the conclusion of programming. If abuse occurred, it is reasonable for the non-abusive parent to be angry and to take steps to protect the child, including going to family court. The non-abusive parent's conduct is not evidence of vilification or revenge. In cases where abuse did *not* occur, but a parent honestly—albeit mistakenly—believes it did, the parent's anger and protective measures are rational.

In the authors' experience, it is not uncommon for one parent to honestly but erroneously fear that the other parent abused their child. When this occurs, steps taken by the fearful parent should not be characterized as alienation or a fabrication. If abuse occurred, the non-abusive parent should not be blamed for taking steps to protect the child, including limiting or curtailing parenting time with the abusive parent. Indeed, if a non-abusive parent does nothing, she is likely to be accused of failing to protect the child. Lying is like programming. What is the expert's evidence of lying? If abuse occurred, or the parent honestly but mistakenly believes it occurred, the parent's statements are true, not lies.

As for violating the law, the most common complaint is that a mother failed to follow court orders granting a father time with the child. One must ask, if a father abused the child, is it surprising a mother might cut off visitation despite a court order? Regarding conduct by the accusing parent, Milchman observes, "PA advocates also assume that these supposedly alienating parental behaviors can be assessed in a straightforward manner. However, like children's purported PA behaviors, they cannot. They are actually difficult to discriminate from protective parental behaviors."¹⁴⁷

Janet Johnston and Matthew Sullivan discuss the complexity of analyzing alternative hypotheses:

Most commonly PA refers to family situations where a child, for no adequate or justifiable reason expresses negative attitudes, beliefs and behavior toward one of his/her parents primarily due

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* Dr. Milchman's article is must-reading for any attorney seeking to cross-examine a PA expert.

to the preferred parent's denigrating attitudes, beliefs and sabotaging behaviors. We refer to this widely promulgated view of PA as the dominant Single-Factor model or theory of PA.¹⁴⁸

The dominant Single factor theory of PA asserts a primary causal relationship between PA behavior of the preferred parent and a PA child, i.e. PA Behavior → PA children. To identify a primary causal relationship requires the PA proponent to show that: (1) all other factors that potentially contribute to the child's negative stance have been considered and, if not ruled out, their combined contribution is exceeded by the contribution of the single factor – PA behavior; (2) PA Behavior precedes a PA child in time; and (3) a consistent direct empirical relationship exists between PA Behavior and the PA child's characteristics.¹⁴⁹

We argue that these criteria are difficult to satisfy or are not supported by available data.¹⁵⁰

* * * *

Until such time that suitable data becomes available (e.g. from longitudinal or large-scale studies of representative populations), assertions or implications of causal relationships between PA behaviors and the consequent short or long-term effects on children or adults are speculative and premature.¹⁵¹

* * * *

The worry is that PA seems to be becoming an increasingly influential "all-purpose" or generic legal strategy in family litigation. Its uncritical admission in expert testimony in court can potentially bolster petitions for substantial changes in custody and orders to participate in unwanted treatments without ensuring due investigation into the multiple factors that contribute to the severity, longevity, etiology, prognosis, nature and effects of children's resistance or refusal of contact with a parent.¹⁵²

Joan Kelly and Janet Johnston add to the importance of considering alternative explanations:

¹⁴⁸ Janet R. Johnston & Matthew J. Sullivan, *Parental Alienation: In Search of Common Ground for a More Differentiated Theory*, 58 FAM. CT. REV. 270, 277 (2020).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 278.

¹⁵² *Id.* at 286.

It is critical to differentiate the alienated child (who persistently refuses and rejects visitation because of unreasonable negative views and feelings) from other children who also resist contact with a parent after separation but for a variety of normal realistic, and/or developmentally expectable reasons. Too often in divorce situations, all youngsters resisting visits with a parent are improperly labeled *alienated*. And frequently, parents who question the value of visitation in these situations are quickly labeled *alienating parents*.¹⁵³

There are multiple reasons that children resist visitation, and only in very specific circumstances does this behavior qualify as alienation. These reasons include resistance rooted in normal developmental processes (e.g., normal separation anxieties in the very young child), resistance rooted primarily in the high-conflict marriage and divorce (e.g., fear or inability to cope with the high-conflict transition), resistance in response to a parent's parenting style (e.g., rigidity, anger, or insensitivity to the child), resistance arising from the child's concern about an emotionally fragile custodial parent (e.g., fear of leaving this parent alone), and resistance arising from the remarriage of a parent (e.g., behaviors of the parent or stepparent that alter willingness to visit).¹⁵⁴

A MENTAL HEALTH PROFESSIONAL WHO CROSSES THE LINE SEPARATING CLINICAL AND FORENSIC ROLES

In mental health practice there is a distinction between clinical and forensic practice. A mental health professional who mixes forensic and clinical practice treads on thin ethical ice. In our experience, some PA experts blur this line, and if this happens the cross-examiner can use the materials in this section to ask whether the expert violated ethical standards.

The American Psychological Association's (APA) *Specialty Guidelines for Forensic Psychology* define forensic practice as: "forensic psychology refers to professional practice by a psychologist working within any subdiscipline of psychology (e.g., clinical, developmental, social, cognitive) when applying the scientific, technical, or specialized knowledge of psychology to the law to assist in addressing legal, contractual, and administrative matters."¹⁵⁵ Conducting a child custody

¹⁵³ Joan B. Kelly & Janet R. Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 FAM. CT. REV. 249-66, 251 (2001).

¹⁵⁴ *Id.*

¹⁵⁵ Am. Psych. Ass'n, *Specialty Guidelines for Forensic Psychology*, 68 AM. PSYCH. 7, 7 (2013) (Guideline 4.02.01).

evaluation for use in court is forensic practice. Psychologists Samuel Knapp and Leon VandeCreek write, "[a]ny time psychologists write letters recommending custody or visitation arrangements, they are making a custody recommendation."¹⁵⁶ Knapp and VandeCreek discuss the divide between clinical and forensic practice, "[p]sychologists should avoid mixing treatment and forensic relationships."¹⁵⁷ The APA *Specialty Guidelines for Forensic Psychology* state, "providing forensic and therapeutic psychological services to the same individual or closely related individuals involves multiple relationships that may impair objectivity and/or cause exploitation or other harm."¹⁵⁸ Ofer Zur defines multiple or dual relationship as "any situation in which multiple roles exist between a therapist and a client."¹⁵⁹ The APA *Code of Ethics* states, "A multiple relationship occurs when a psychologist is in a professional role with a person and (1) at the same time is in another role with the same person . . . Examples of dual relationships include . . . switching from a therapeutic to a forensic role."¹⁶⁰

A therapist can go astray by writing a letter or declaration to the court recommending particular custody arrangements or opining that a case involves PA. So too, a line is crossed when a therapist makes custody recommendations. On cross-examination, the therapist can be confronted with the fact that they are involved in an improper multiple relationship.

What is *not* forensic practice? A therapist's awareness of the forensic implications of therapy does not transform the therapist into a forensic practitioner. Nor does testifying, unless the testimony focuses squarely on psycho-legal issues. Reporting suspected child abuse is not forensic practice. The fact that a client has been ordered into therapy by a judge does not render therapy forensic. A professional tasked to perform a custody evaluation assumes a dual role if the professional engages the child or parents in treatment.

CRITIQUE OF THREE PA PUBLICATIONS

This section critiques three publications by proponents of PA.

¹⁵⁶ SAMUEL J. KNAPP & LEON D. VANDECREEK, PRACTICAL ETHICS FOR PSYCHOLOGISTS: A POSITIVE APPROACH 167 (Am. Psych. Ass'n 2006).

¹⁵⁷ *Id.* at 166.

¹⁵⁸ AM. PSYCH. ASS'N, *supra* note 156, at 11.

¹⁵⁹ OFER ZUR, BOUNDARIES IN PSYCHOTHERAPY: ETHICAL AND CLINICAL EXPLORATIONS 21 (2007).

¹⁶⁰ APA, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT ES 3.05(A) (AM. PSYCH. ASS'N 2010).

A. William Bernet, Nilgun Gregory, Ronald P. Rohner & Kathleen M. Reay, *Measuring the Difference Between Parental Alienation and Parental Estrangement: The PARQ-Gap*, *J. of Forensic Scis.* (2020).

William Bernet is a leading proponent of PA. In Bernet and his colleagues' article in the *Journal of Forensic Sciences*, the authors distinguish estrangement, in which a child avoids a parent for good reason, usually abuse or neglect by the avoided parent, from alienation, in which a child avoids a parent without good reason, due to alienating behavior by the favored parent.¹⁶¹ Bernet and his colleagues understand the importance of distinguishing estrangement from alienation. The authors suggest that a psychological instrument—the PARQ—can assist in distinguishing estrangement from alienation. Bernet compared scores on the PARQ for children in intact families, divorced families where the children continued seeing both parents, families where one parent was neglectful and was not a regular part of the child's life, and children identified as alienated.

The most obvious weakness of the Bernet and his colleagues' study is the method by which the researchers selected children they characterized as alienated. The children were drawn from children court ordered into a treatment program for alienated children. Before being ordered to the program, the children were evaluated by mental health professionals who determined the children were alienated. Bernet does not provide information on the competence, bias, or knowledge of the mental health professionals who opined that the children were alienated. Bernet is careful to note that the PARQ does not, on its own, determine the cause of a child's difficulty with a parent. Bernet writes, "[o]f course, the PARQ should not be used in isolation to determine whether a child is alienated or estranged. When it is used during child custody evaluation, the PARQ—like any psychological test—should be only one part of a comprehensive psychiatric or psychological assessment of the family."¹⁶²

When an expert relies on Bernet's writing, the cross-examiner should refer to the following articles: Madelyn S. Milchman, Robert Geffner & Joan S. Meier, *Ideology and Rhetoric Replace Science and Reason in Some Parental Alienation Literature and Advocacy: A Critique*, 58 *Fam. Ct. Rev.* 340-361 (2020) and Madelyn S. Milchman, Robert Geffner & Joan S. Meier, Putting Science and Reasoning Back into the "Parental Alienation" Discussion: Reply to Bernet, Robb, Lorandos, and Garber, 58 *Family Court Review* 375-385 (2020). In the second article, Milchman,

¹⁶¹ See generally *Measuring the Difference*, *supra* note 124.

¹⁶² *Measuring the Difference*, *supra* note 124, at 1233.

Geffner and Meier write, "Applying a label such as 'parental alienation' to a child's contact resistance or rejection misleads decision-makers into believing that 'alienation' (i.e., blameworthy conduct by a preferred parent) has been directly observed as an objective fact. It masks the reality that it is a conclusory opinion, which depends on an interpretation of facts."¹⁶³

B. Psychologist Amy Baker's Contributions to the Literature

Amy Baker is a proponent of PA. Her work is cited several times throughout this article.

1. Amy J.L. Baker, Reliability and Validity of the Four-Factor Model of Parental Alienation, 42 Journal of Family Therapy 100-118 (2020)

In an article in the *Journal of Family Therapy*, Baker purports to offer scientific evidence that her four-factor model can distinguish alienated children from estranged children.¹⁶⁴ The article falls short. We do not disagree that Baker's four factors are relevant. The factors are: (1) a prior, positive relationship between the child and the now rejected parent, (2) the absence of maltreatment or seriously deficient parenting by the rejected parent, (3) alienating conduct by the favored parent, and (4) behavior in the child that supports a finding of alienation. The problem with Baker's article is that her factors are *conclusions*. The factors tell us *nothing* about what caused any of the four factors. An additional problem with Baker's study is that all the professional participants in the study were drawn from the Parental Alienation Study Group, an organization that it is fair to say believes parental alienation is common. Baker herself views alienation as "all too common."¹⁶⁵ This is not to say members of the Study Group are biased any more than members of the National Rifle Association are biased. Each study participant received one of sixteen vignettes created by Baker. Baker's article contains only one of the vignettes, but anyone who reads the vignette would almost certainly conclude alienation occurred. The vignette pulls so strongly for alienation that a visitor from another planet who had the good fortune never to hear the word alienation would say, "Wow, that behavior is off the scale. I think

¹⁶³ MILCHMAN, GEFFNER & MEIER, *supra* note 132, at 377.

¹⁶⁴ Amy J.L. Baker, *Reliability and Validity of the Four-Factor Model of Parental Alienation*, 42 J. OF FAM. THERAPY 100 (2020).

¹⁶⁵ Amy Baker, *How to Select an Expert in Parental Alienation*, <https://www.amyjl baker.com/How-to-Find-an-Expert-in-Parental-Alienation.pdf> (last visited Feb. 9, 2022).

I'll call it alienation!" Baker asked people to assess the vignettes according to the categories Baker provided, but Baker jumped to the unwarranted conclusion that her method can identify alienation.

2. Amy Baker & Jaclyn Chambers, *Adult Recall of Childhood Exposure to Parental Conflict: Unpacking the Black Box of Parental Alienation*, 52 *Journal of Divorce and Remarriage* 55-76 (2011)

Baker and Chambers describe a questionnaire designed to evaluate adult memory of parental alienation experienced years earlier, during childhood.¹⁶⁶ The questionnaire is called the Baker Strategies Questionnaire ("BSQ"). The BSQ cannot be used to evaluate whether a child in a current case is experiencing alienation, and the BSQ has no place in such cases. Milchman writes, "the BSQ . . . has not been validated against any independent measures of parenting behavior and so it cannot discriminate between PA, abuse, or bad parenting."¹⁶⁷ Mercer examined the statistical foundation of the BSC and found it wanting, writing:¹⁶⁸

The BSQ is being used to support arguments that lead to judicial decisions about parental alienation and child custody. This is despite the fact that the BSQ is not an evidence-based method of identifying children whose avoidance of a parent has been encouraged by the other parent. . . . [The BSQ] was not developed for purposes of clinical assessment of either adults or children. . . . [I]t is currently a research instrument for investigating the background of parental alienation cases rather than for research on children currently alleged to have been exposed to parental alienating behaviors. . . . There is currently no published work that could establish criterion-based validity for the BSQ with respect to objectively demonstrated childhood events Published information about the BSQ leads to the conclusion that the instrument is currently in its early stages of development and is not yet reliable or valid enough to be used for drawing conclusions in court.¹⁶⁹

¹⁶⁶ Amy Baker & Jaclyn Chambers, *Adult Recall of Childhood Exposure to Parental Conflict: Unpacking the Black Box of Parental Alienation*, 52 *J. OF DIVORCE & REMARRIAGE* 55 (2011).

¹⁶⁷ Milchman, *supra* note 3, at 126.

¹⁶⁸ Jean Mercer, *The Baker Strategies Questionnaire and Decisions about Reunification*, *J. OF FAM. TRAUMA, CHILD CUSTODY & CHILD DEV.* (AUG. 23, 2021) doi: 10.1080/26904586.2021.1960231.

¹⁶⁹ *Id.* at 3-4, 6, 14.

PA TREATMENT PROGRAMS

Proponents of PA sometimes recommend specialized treatment programs for children believed to be alienated from an innocent parent. With some of these programs, children can be taken away from their preferred parent and sent off—sometimes in handcuffs—to a camp where the effects of alienation are “removed.”¹⁷⁰ The following are PA treatment programs: Family Bridges, Overcoming Barriers Family Camp, Family Reflections Reunification Program, High Roads, Multi-Modal Family Intervention, Restoring Family Connections, Transitioning Families Therapeutic Reunification Model, Multi-Modal Family Intervention, and Turning Points for Families.¹⁷¹ Mercer examined the small amount of research on such PA treatment programs and found lack of rigorous research on the effectiveness of the programs.¹⁷² Mercer writes:

If there was clear evidence supporting the claims of PA proponents that PA can be diagnosed by looking at child symptoms, that children's symptoms are precursors of mental illness or personality disorders, and that empirical evidence shows that [PA treatments] are effective treatments that prevent later problems, a certain level of potential for harm might be acceptable. . . . However, at present the potential for harm inherent in PA principles and practices, as well as the implications of implausible assumptions associated with PA, outweigh the limited evidence for benefits of [PA treatments], and suggest that family court have been mistaken in accepting PA views and ordering [PA treatments] Family courts should thus not order [PA treatments], nor should testimony based on ideas associated with [PA treatments] be admitted unless the weaknesses of these principles and practices are also considered.¹⁷³

¹⁷⁰ The second author has been informed by other experts of the occasional use of handcuffs.

¹⁷¹ Regarding Turning Points for Families, therapist Linda J. Gottlieb, LMFT, is the leading proponent. See Ms. Gottlieb's self-styled amicus brief intended to persuade family court judges to approve Gottlieb's Turning Points for Families treatment program. See Ms. Gottlieb's website. The website is Turning Points for Families.

¹⁷² Jean Mercer, *Are Intensive Parental Alienation Treatments Effective and Safe for Children and Adolescents?*, J. OF CHILD CUSTODY 1, 36, doi: 10.1080/15379418.2018.1557578.

¹⁷³ *Id.* at 102.

CONCLUSION

An expert who testifies regarding PA can be cross-examined with learned treatises. The purpose of this article is to equip lawyers with literature to attack PA experts. Readers may take offense at the word "attack," but we are talking about the adversary system. The word is not out of place. When an expert gets on the stand and testifies PA exists, the expert should be ready for what comes next.