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REJECTING ‘UNJUSTIFIED’ REJECTION: WHY FAMILY COURTS SHOULD EXCLUDE PARENTAL ALIENATION EXPERTS

Abstract: Parental alienation is a controversial and disputed proposed mental disorder whereby children unjustifiably reject one parent because of the other parent’s influence. One parent often raises parental alienation in family court when the other parent makes an accusation of domestic abuse. Despite appearing in the legal discourse, no professional organization officially recognizes either parental alienation or the related concept of parental alienation syndrome, the original anti-feminist theory from which parental alienation derives. Domestic violence advocates staunchly criticize both “disorders” because the theories can undercut legitimate and concerning abuse allegations. Nonetheless, courts invite such experts into the courtroom to aid in making custody determinations. This Note argues that parental alienation expert testimony does not meet state evidentiary standards for admissibility. This Note also suggests that courts should be cautious when considering abuse allegations, as the consequences of a mistaken court decision can be dangerous for children and survivors of domestic violence.

INTRODUCTION

When ten-year-old Ana Ionescu walked into a New Jersey Family Court in the midst of her parents’ high-conflict divorce, she was determined to convince the judge that she and her brother, Alex, should live with their father because her mother had physically abused them.¹ Instead of following the children’s request, the judge, in following the advice of a psychologist, granted sole custody of the children to their mother, the parent facing abuse allegations.² He then ordered the Ionescu children to a family therapy camp with their mother where therapists worked to convince the children that the abuse never happened.³ The judge made these determinations based on expert testi-

¹ Reveal, *Bitter Custody*, CTR. FOR INVESTIGATIVE REPORTING & PRX (Mar. 9, 2019), <https://revealnews.org/podcast/bitter-custody/> [<https://perma.cc/ZV7P-PGGS>] (detailing how a family court judge used parental alienation syndrome as a justification for separating the Ionescu children from their preferred custodial parent). The *Bitter Custody* podcast tells the story of the Ionescu children from the perspective of Ana Ionescu, now an adult, who maintains that her mother was abusive toward her and her brother. *Id.*

² *Id.* Ana and her brother alleged that their mother often refused to feed them, broke their belongings when she was angry, and yelled at them inappropriately. *Id.* Ana also accused her mother of trying to strangle her. *Id.* Both Ionescu children told the judge that they were afraid of their mother and emphasized that they wanted to live with their father because of their mother’s abuse. *Id.*

³ *Id.* The program to which the judge sent the Ionescu children and their mother, Family Bridges, costs \$20,000. *Id.* While they were at Family Bridges, the children did not have access to their cell

mony that the Ionescu children were suffering from parental alienation syndrome at the hands of their father.⁴

Parental alienation syndrome is a controversial proposed psychological disorder whereby one parent manipulates a child into denigrating and genuinely fearing the other parent without justification.⁵ Despite parental alienation syndrome's existence in the psychological discourse for decades, it has yet to gain acceptance by any major scientific organizations, including the American Psychiatric Association (APA) and World Health Organization.⁶ The drafters of the most recent versions of the *Diagnostic and Statistical Manual of Mental Diseases (DSM-5)* and the *International Classification of Diseases (ICD-11)* declined to include parental alienation syndrome in either of these highly-respected and highly-utilized diagnostic tools, notwithstanding proposals by the syndrome's advocates.⁷

phones and were not permitted to speak with their father. *Id.* The psychologists administering the program told the children that they could not leave until they agreed that their father indoctrinated them. *Id.*

⁴ *Id.*

⁵ Richard A. Gardner, *Parental Alienation Syndrome vs. Parental Alienation: Which Diagnosis Should Evaluators Use in Child-Custody Disputes?*, 30 AM. J. FAM. THERAPY 93, 95 (2002); see Kelly Schwartz, Note, *The Kids Are Not All Right: Using the Best Interest Standard to Prevent Parental Alienation and a Therapeutic Intervention Approach to Provide Relief*, 56 B.C. L. REV. 803, 806–10 (2015) (explaining the history and controversy underlying parental alienation syndrome). Dr. Richard Gardner proposed parental alienation syndrome in 1985 to explain accusations of parental abuse in child-custody disputes. Gardner, *supra*, at 95. He defined parental alienation syndrome as:

[A] childhood disorder that arises almost exclusively in the context of child-custody disputes. Its primary manifestation is the child's campaign of denigration against a parent, a campaign that has no justification. It results from the combination of a programming (brainwashing) parent's indoctrinations and the child's own contributions to the vilification of the target parent.

Id. Parental alienation is an offshoot of parental alienation syndrome. *Id.* at 98. Gardner, one of many parental alienation theorists, differentiates the two by positing that parental alienation syndrome is a mental disorder that manifests in the child, whereas parental alienation is a set of behaviors that a parent displays to alienate the child from the other parent. *Id.* at 94–96.

⁶ *APA Board of Trustees Approves DSM-5*, AM. PSYCHIATRIC ASS'N (Dec. 1, 2012), <http://alert.psychnews.org/2012/12/apa-board-of-trustees-approves-dsm-5.html> [<https://perma.cc/PS9J-94BL>] (announcing the rejection of parental alienation syndrome in the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* by the American Psychiatric Association (*DSM-5*)); see Richard A. Gardner, *Recent Trends in Divorce and Custody Litigation*, 29 ACAD. F. 3, 3–7 (1985) (articulating, for the first time, the concept of parental alienation syndrome). The American Psychiatric Association (APA) is the leading professional community for American mental health. *About APA*, AM. PSYCHIATRIC ASS'N, <https://www.apa.org/about/> [<https://perma.cc/B8G2-U4EF>].

⁷ See WILLIAM BERNET, PARENTAL ALIENATION, DSM-5, AND ICD-11, at 3–7 (2010) (articulating that the purpose of this proposal is to garner parental alienation's inclusion in the *DSM-5* and the *International Classification of Diseases (ICD-11)*); see also *ICD v. DSM*, 40 MONITOR ON PSYCH., Oct. 2009, at 63, <https://www.apa.org/monitor/2009/10/icd-dsm> [<https://perma.cc/6TZP-62MV>] (explaining that both the *ICD* and the *DSM* are respected diagnostic systems in the United States and globally). The APA rejected this proposal in 2012. *APA Board of Trustees Approves DSM-5*, *supra* note 6. The APA publishes the *Diagnostic and Statistical Manual of Mental Diseases (DSM)*, the

Even though the disorder has been excluded from diagnostic tools such as the *DSM-5* and *ICD-11*, litigants in high-conflict divorce and child custody cases often reference parental alienation syndrome and the more modern construction of such symptomology, parental alienation.⁸ Though similar, parental alienation syndrome and parental alienation are distinct concepts.⁹ Simply put, parental alienation syndrome focuses on the problematic and antagonizing behavior of the parent that leads children to reject the other, non-alienating parent.¹⁰ Alternatively, parental alienation, some theorists suggest, looks only at the behavior of the so-called alienated child and how that child reacts to the non-alienating, alienated parent.¹¹

standard tool used in the United States by mental health professionals on a “periodic[]” basis. *DSM-5: Frequently Asked Questions*, AM. PSYCHIATRIC ASS’N, <https://www.psychiatry.org/psychiatrists/practice/dsm/feedback-and-questions/frequently-asked-questions> [<https://perma.cc/FJ7G-8X4L>] (explaining that the *DSM* has gone through several revisions since its inception in 1952); *The Diagnostic and Statistical Manual of Mental Health Disorders*, AM. PSYCHIATRIC ASS’N, https://www.apaservices.org/practice/reimbursement/icd-diagnostic/dsm-5?_ga=2.3103152.1232791211.1579566596-283699059.1575261566 [<https://perma.cc/TX24-566Q>]. The international mental health community, overseen by the World Health Organization (WHO), publishes the *International Classification of Diseases (ICD)*, which, like the *DSM-5*, is a classification system used to diagnose mental disorders. See *WHO Releases New International Classification of Diseases (ICD-11)*, WORLD HEALTH ORG. (June 18, 2018), [https://www.who.int/news-room/detail/18-06-2018-who-releases-new-international-classification-of-diseases-\(icd-11\)](https://www.who.int/news-room/detail/18-06-2018-who-releases-new-international-classification-of-diseases-(icd-11)) [<https://perma.cc/K5AE-7NWX>]. The *ICD* is used for statistical and billing information in the United States and internationally. WORLD HEALTH ORG., FAQ’S FOR ICD-11, <https://www.who.int/classifications/icd/revision/icd11/faqs.pdf> [<https://perma.cc/NLM9-LL4R>]. One hundred-seventeen countries use the *ICD* in some capacity. *Id.*

⁸ See, e.g., *Gladwin v. Gilbert*, No. D197102, 2001 Cal. SUPER. LEXIS 418, at *20–24 (Super. Ct. Feb. 22, 2001) (changing an existing custody order because of evidence of parental alienation); *M.A. v. A.I.*, No. A-4021-11T1, 2014 N.J. Super. Unpub. LEXIS 2887, at *5 (Super. Ct. App. Div. Dec. 15, 2014) (changing an existing custody order because of evidence of parental alienation syndrome); *In re F.S.-P. v. A.H.R.*, 844 N.Y.S.2d 644, 646 (Fam. Ct. 2007) (holding that parental alienation can be raised as an affirmative defense to establishing a child support order).

⁹ See *infra* notes 24–74 and accompanying text (highlighting the differences between parental alienation syndrome and parental alienation); see, e.g., Gardner, *supra* note 5, at 112–13 (summarizing the differences between parental alienation syndrome and parental alienation for use of both concepts in court). Dr. Richard Gardner, the creator of parental alienation syndrome, posited that testimony about both parental alienation syndrome and parental alienation could strengthen parents’ positions in child custody disputes. Gardner, *supra* note 5, at 93. He suggested that experts testifying in court should discuss parental alienation syndrome when working with families where one parent alienated the children. *Id.* at 112–13.

¹⁰ Gardner, *supra* note 5, at 95 (“[Parental alienation syndrome] results from the combination of a programming (brainwashing) parent’s indoctrinations and the child’s own contributions to the vilification of the target parent.”).

¹¹ See *infra* notes 63–74 and accompanying text. By focusing on the behavior of the child and not on the behavior of the parent, those who advocate for parental alienation are able to suggest that it is, in fact, a disorder worthy of inclusion in diagnostic classifications like the *DSM*. See BERNET, *supra* note 7, at 4 (explaining that the definition was crafted with the format of the *DSM-5* in mind; thus, the disorder only looks at the behavior of the child and not the quality of the relationship).

Parental alienation syndrome is more controversial than parental alienation because of its alleged gender bias.¹² Early proponents of the syndrome hypothesized that only mothers induced parental alienation syndrome in their children. Furthermore, because it proscribes to be a mental disorder, despite its focus on relational issues, parental alienation syndrome has lent itself to controversy.¹³ Finally, parental alienation syndrome also has close ties to Dr. Richard Gardner, who proposed its existence based on personal experience and not on scientific data.¹⁴ Because of the inherent controversy surrounding parental alienation syndrome, parents seeking custody today are more likely to raise parental alienation in family law cases, but they may also raise parental alienation syndrome.¹⁵

In child custody cases, especially where there is an allegation of domestic violence, sexual assault, or child abuse, courts may need to consider the admissibility of the two controversial proposed diagnoses.¹⁶ Whether such evidence

¹² See, e.g., Gardner, *supra* note 5, 104–06 (discussing, from the perspective of Gardner, the accusation that parental alienation syndrome has a gender bias). Gardner denies that his diagnosis of parental alienation syndrome is “sexist.” *Id.* He points out that parental alienation syndrome is more controversial than parental alienation, in part, because of the syndrome’s association with him. *Id.* at 111–12.

¹³ See, e.g., Hanson v. Spolnik, 685 N.E.2d 71, 84 (Ind. Ct. App. 1997) (Chezem, J., dissenting and concurring in result) (recognizing the existence of parental alienation but doubting the existence of parental alienation syndrome based on Gardner’s gender bias, concluding: “This gender-biased generalization is ludicrous and an affront to all reasonable women and men”); see also Sandi S. Varnado, *Inappropriate Parental Influence: A New App for Tort Law and Upgraded Relief for Alienated Parents*, 61 DEPAUL L. REV. 113, 117 n.12 (2011) (indicating that parental alienation syndrome focuses on the relationship between the parent and child, whereas parental alienation concerns only the parent). A mental disorder is a set of behaviors, emotions, or cognitions that result in psychological, biological, or developmental distress. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 20 (5th ed. 2013) [hereinafter *DSM-5*]. Although relationship issues may be areas for clinical attention, the APA does not consider them mental disorders. *Id.* at 22 (explaining that relational problems are included in a chapter on potential focuses of clinical attention but not in the catalogue of mental disorders).

¹⁴ See *infra* notes 33–62 and accompanying text (providing an overview of the underlying theory and controversy of parental alienation syndrome); see also RICHARD A. GARDNER, SEX ABUSE Hysteria: SALEM WITCH TRIALS 2 (1991) (recognizing his own “paucity of references to other publications” in his book).

¹⁵ See J.F. v. D.F., No. 2012/01795, 2018 N.Y. Misc. LEXIS 5991, at *10 (Sup. Ct. Dec. 6, 2018) (providing an overview of parental alienation in New York family courts). Compare *Mastrangelo v. Mastrangelo*, No. NNHFA054012782S, 2012 WL 6901161, at *9 (Conn. Super. Ct. Dec. 20, 2012) (holding that parental alienation syndrome is not admissible under state evidentiary standards), with *Zafran v. Zafran*, 740 N.Y.S.2d 596, 600 (Sup. Ct. 2002) (allowing an evidentiary hearing to argue for the admissibility of parental alienation syndrome evidence), *aff’d*, 761 N.Y.S.2d 317 (App. Div. 2003).

¹⁶ See *In re Karen B. v. Clyde M.*, 574 N.Y.S.2d 267, 271–72 (Fam. Ct. 1991) (examining the admissibility of parental alienation syndrome raised by a father after a mother accused him of sexually abusing their daughter), *aff’d sub nom.* *Karen PP v. Clyde QQ*, 602 N.Y.S.2d 709, 709 (App. Div. 1993); Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 J. GENDER SOC. POL’Y & L. 657, 679 (2003) (emphasizing that men accused of abuse by female partners often raise parental alienation syndrome as a defense to that allegation in family law cases). In family court, parents may also raise parental alienation

is admissible, or should be relied upon, is highly debated in the legal and psychological spaces.¹⁷ Part I of this Note discusses the history, theory, controversy, and critiques of both parental alienation syndrome, as posited by Gardner, and its more modern construction, parental alienation.¹⁸ Part I also explores the basic mechanics of custody proceedings and the role of expert testimony in the family court setting.¹⁹ Part II of this Note provides an overview of the ways in which family courts have used evidence of parental alienation syndrome and parental alienation in their decisions.²⁰ Part II also details the arguments in favor of and against the admission of evidence of both theories in family law courts.²¹ Part III then argues that admission of evidence of parental alienation syndrome and parental alienation does not meet the evidentiary standards necessary for expert opinion evidence to be admissible in family court.²² Part III also contends that admission of such evidence undercuts allegations of abuse in these cases.²³

tion as a defense to paying child support. *See, e.g.*, *Usack v. Usack*, 793 N.Y.S.2d 223, 225 (App. Div. 2005) (holding that evidence of parental alienation is admissible as an affirmative defense to a custodial parent's complaint for child support). In 2005 in *Usack v. Usack*, the Supreme Court of New York, Appellate Division held that "parental estrangement" was a valid reason to suspend child support payments to the alienating parent. *Id.* at 224–25. Lower courts in New York interpreted the *Usack* holding to mean that, if one party demonstrates parental alienation, the court can suspend that party's child support payments. *See In re F.S.-P. v. A.H.R.*, 844 N.Y.S.2d 644, 645–46 (Fam. Ct. 2007) (referencing *Usack* to hold that parental alienation can be raised as a defense to child support, even before a child support order is granted).

Even outside of the courtroom, parental alienation syndrome and parental alienation are controversial in the legal field. *Compare* Schwartz, *supra* note 5, at 827–29 (arguing that parental alienation is a serious problem that should be handled in family court), *with* Meier, *supra*, at 679, 688–90 (suggesting that application of parental alienation in family law cases undermines allegations of domestic and child abuse, particularly because both were "invented to rebut mothers' claims of child abuse").

¹⁷ *See infra* notes 75–89 and accompanying text.

¹⁸ *See infra* notes 33–74 and accompanying text.

¹⁹ *See infra* notes 90–128 and accompanying text.

²⁰ *See infra* notes 130–158 and accompanying text. One student Comment has argued that parental alienation syndrome does not meet the *Daubert* or *Frye* standards. Cheri L. Wood, Comment, *The Parental Alienation Syndrome: A Dangerous Aura of Reliability*, 27 *LOY. L.A. L. REV.* 1367, 1368 (1994). This Note argues that parental alienation, too, does not meet the *Daubert* or *Frye* standards. *See infra* notes 130–158 and accompanying text.

²¹ *See infra* notes 130–158 and accompanying text.

²² *See infra* notes 159–183 and accompanying text. The available case law for this Note is somewhat limited because most family law cases are handled at the trial level in unpublished opinions, and litigants rarely appeal the decisions. *See The Problem*, DV LEAP, <https://www.dvleap.org/problem> [<https://perma.cc/SX3E-7D8Z>] (stating that appeals in family law cases are an effective but rarely used tool for rectifying unjust family court decisions).

²³ *See infra* notes 184–223 and accompanying text.

I. SAME, BUT DIFFERENT: PARENTAL ALIENATION SYNDROME AND PARENTAL ALIENATION

Researchers suggest that parental alienation syndrome and parental alienation have profoundly negative long-term impacts on children and parents.²⁴ Such concerns have led to courts' admitting evidence of both of these

²⁴ Amy J.L. Baker, *The Long-Term Effects of Parental Alienation on Adult Children: A Qualitative Research Study*, 33 AM. J. FAM. THERAPY 289, 293 (2005) (summarizing the negative effects of parental alienation found in a qualitative study conducted on adults who reported experiencing parental alienation as children). Alienation may lead to self-esteem problems, self-harm, anxiety, depression, guilt, or fear. *Id.* at 301. In fact, Dr. Amy Baker, who spearheaded the study, found that those who participated and reported being alienated as children often had drug and alcohol problems and found themselves alienated from their own children. *Id.* A child who bases future relationships on alienating relationships learned from a parent may also have long-term relational troubles. *See id.* at 300–01; *see also* Elisabeth Godbout & Claudine Parent, *The Life Paths and Lived Experiences of Adults Who Have Experienced Parental Alienation: A Retrospective Study*, 53 J. DIVORCE & REMARRIAGE 34, 46 (2012) (illustrating that participants in a qualitative study often felt like they needed therapy to fully come to terms with their experience with parental alienation). Proponents of parental alienation syndrome and parental alienation also consider both to be child abuse. *See, e.g.*, Jennifer J. Harman et al., *Prevalence of Parental Alienation Drawn from a Representative Poll*, 66 CHILD. & YOUTH SERVS. REV. 62, 62 (2016) (suggesting that parental alienation is a form of child abuse because it is an intentional behavior that harms the child). Some professionals propose that parental alienation can have a traumatic impact on children in their adult lives. *Id.* State and federal laws define child abuse statutorily. *E.g.*, 42 U.S.C. § 5106(g) (2006) (defining “child abuse and neglect” as “at a minimum, any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm”); ALASKA STAT. § 47.17.290 (West 2019) (defining, in Alaska, “child abuse and neglect” as the physical or mental harming, neglect, sexual abuse, or maltreatment of a person under the age of 18); *see also* U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD. BU-REAU, CHILD WELFARE INFO. GATEWAY, DEFINITIONS OF CHILD ABUSE AND NEGLECT (2019), <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/define/> [<https://perma.cc/6NR3-MWTQ>] (providing an overview of state and federal laws defining child abuse).

Researchers supporting either concept suggest that the alienating parent sometimes takes drastic actions—destroying pictures of the non-alienating parent, blaming the non-alienating parent for financial problems, and encouraging conflict between the non-alienating parent and the child—that some consider psychological violence. LINDA J. GOTTLIEB, *THE PARENTAL ALIENATION SYNDROME: A FAMILY THERAPY AND COLLABORATIVE SYSTEMS APPROACH TO AMELIORATION* 113–15 (2012) (describing the various behaviors that parental alienation syndrome alienators undertake according to the theory’s supporters); Varnado, *supra* note 13, at 120–22 (same). Although modern researchers still focus on the alienating parent, they do so with concern for the alienating parent as well as the child. *See* GOTTLIEB, *supra*, at 115 (noting that alienating parents too, are part of a family system that children need). Moreover, modern proponents of parental alienation syndrome believe that alienating parents can and should be rehabilitated. *See id.*

Theorists propose that alienated parents, too, suffer because of alienation. *See* Ricky Finzi-Dottan et al., *The Experience of Motherhood for Alienated Mothers*, 17 CHILD & FAM. SOC. WORK 316, 321–23 (2012) (highlighting the trauma mothers experience when they have been alienated from their children). The loss of a relationship with a child may result in a parent’s becoming overly aggressive or withdrawn in the pursuit of a relationship with the now-alienated child. *Id.* at 317 (noting that an alienated parent’s loss of contact with the child might exacerbate the alienation as mothers react in a variety of sometimes contradictory ways when contact with a child is lost).

theories into custody and divorce cases.²⁵ Before examining the propriety of such testimony, however, it is first essential to understand parental alienation syndrome, its reformulation in parental alienation, and the reception each has received in the psychological community.²⁶ It is also important to consider how both syndromes can enter family law cases in the first place.²⁷ Section A of this Part discusses parental alienation syndrome.²⁸ Section B then discusses the related concept of parental alienation.²⁹ Criticisms of both theories are highlighted in Section C.³⁰ Section D then explains the mechanics of family court,³¹ and Section E reviews the most common evidentiary standards for expert testimony.³²

A. Parental Alienation Syndrome

The founder of parental alienation syndrome, Dr. Richard Gardner, defined the syndrome as:

[A] childhood disorder that arises almost exclusively in the context of child-custody disputes. Its primary manifestation is the child's campaign of denigration against a parent, a campaign that has no justification. It results from the combination of a programming (brainwashing) parent's indoctrinations and the child's own contributions to the vilification of the target parent.³³

He based this conclusion on his personal observations as a psychiatrist and, notably, not on scientific research.³⁴ In numerous publications, Gardner stated, without evidence, that mothers feared that they were less likely to be guaranteed custody as family court litigation increased.³⁵ As such, he suggested that women, in response to their anger, must have been doing something to ensure

²⁵ *E.g.*, *Gladwin v. Gilbert*, No. D197102, 2001 Cal. SUPER. LEXIS 418, at *27 (Super. Ct. Feb. 22, 2001) (modifying an existing custody after expert testimony alleging parental alienation). *See generally* *Hanson v. Spolnik*, 685 N.E.2d 71 (Ind. Ct. App. 1997) (discussing parental alienation in the context of a divorce appeal).

²⁶ *See infra* notes 33–89 and accompanying text (providing background information on parental alienation syndrome and parental alienation).

²⁷ *See infra* notes 90–129 and accompanying text.

²⁸ *See infra* notes 33–62 and accompanying text.

²⁹ *See infra* notes 63–74 and accompanying text.

³⁰ *See infra* notes 75–89 and accompanying text.

³¹ *See infra* notes 90–102 and accompanying text.

³² *See infra* notes 103–129 and accompanying text.

³³ Gardner, *supra* note 5, at 95.

³⁴ *See* GARDNER, *supra* note 14, at 1–2 (stating that his research was based on his own observations as a psychiatrist); Gardner, *supra* note 5, at 93–94 (citing only himself in his assertions of the causes of increased child custody litigation in the 1980s).

³⁵ *E.g.*, GARDNER, *supra* note 14, at 23; Richard A. Gardner, *Denial of the Parental Alienation Syndrome Also Harms Women*, 30 AM. J. FAM. THERAPY 191, 192 (2002); Gardner, *supra* note 5, at 93–94.

that they would not lose custody of their children.³⁶ He then proposed that mothers induced parental alienation syndrome in their children.³⁷

Against the backdrop of increased child-custody litigation in the 1980s, Gardner characterized parental alienation syndrome based on what he observed as eight clusters of symptoms he saw in children involved in high-conflict custody disputes.³⁸ These symptoms included: (1) “[a] campaign of denigration”; (2) silly reasons for the campaign of denigration; (3) strong feelings for the preferred parent; (4) “[t]he ‘independent-thinker’ phenomenon”; (5) an instinctive support of the alienating parent in the parental conflict; (6) an absence of guilt over cruelty to and or exploitation of the parent; (7) “[t]he presence of ‘borrowed scenarios’”; and (8) spreading “animosity to the friends and/or extended family of the alienated parent.”³⁹ He used these eight symptoms to classify parental alienation syndrome as mild, medium, or severe.⁴⁰ In milder cases of parental alienation syndrome, Gardner theorized that only some of the symptoms manifested in the child, whereas in more severe cases, the child manifested all of the eight clusters of symptoms.⁴¹ He identified the underlying cause of the syndrome as the programming behavior of the alienating parent.⁴²

³⁶ Richard Gardner, *The Parental Alienation Syndrome and the Corruptive Power of Anger*, in THE INTERNATIONAL HANDBOOK OF PARENTAL ALIENATION SYNDROME: CONCEPTUAL, CLINICAL AND LEGAL CONSIDERATIONS 33, 35–36 (Richard Gardner et al. eds., 2006). Gardner suggested that both women and men induce parental alienation syndrome in their children to exert power over the other spouse, but his justifications of why they do this were much harsher for women than men. See *id.* at 36, 42. He proposed that women used parental alienation syndrome to harm their husbands because it was a socially acceptable way to “murder the husbands who abandoned them.” *Id.* at 36. Men, he said, used their social and financial power to release anger at wives who rejected them. *Id.* at 41.

³⁷ *Id.* at 35–36.

³⁸ Gardner, *supra* note 5, at 97.

³⁹ *Id.* According to Gardner, when children engage in a campaign of denigration, they inexplicably begin loathing and fearing the targeted parent. Amy J.L. Baker & Douglass C. Damall, *A Construct Study of the Eight Symptoms of Severe Parental Alienation Syndrome*, 47 J. DIVORCE & REMARRIAGE 55, 56 (2007). Children demonstrating the second of Gardner’s symptoms—silly reasons for denigration—will use simple or ridiculous justifications for the fear or anger they feel toward the non-alienating, targeted parent. *Id.* These children will be unable to say anything bad about the alienating parent. *Id.* at 56–57. The “[i]ndependent [t]hinker” phenomenon is evidenced when a child insists that the choice to denigrate the other parent is their own and not that of the alienating parent. *Id.* at 57. The alienated child will reflexively prefer the alienating parent, and the child will not feel bad about the denigration of the other parent. *Id.* Children suffering from parental alienation syndrome will also “borrow[] scenarios,” meaning that they use the language of the alienating parent when accusing the alienated parent. *Id.* Finally, parental alienation syndrome children, according to Gardner, generalize the irrational rejection of the alienated parent to those associated with the alienated parent. *Id.*

⁴⁰ Baker & Damall, *supra* note 39, at 57. The classification of severity, according to Gardner, is contingent on the number of symptoms identified. Gardner, *supra* note 5, at 97.

⁴¹ Richard A. Gardner, *Introduction*, in THE INTERNATIONAL HANDBOOK OF PARENTAL ALIENATION SYNDROME, *supra* note 36, at 5, 9–10.

⁴² Gardner, *supra* note 5, at 97–98.

In his examination of the child's level of alienation, Gardner considered the behavior of the alienating parent as an integral factor of the syndrome.⁴³ Alienating parents, Gardner posited, overprotect the child and scapegoat the other parent in order to induce parental alienation syndrome.⁴⁴ This shifts the focus of the syndrome from exclusively pertaining to the child's psychological state to also including the child's relationship with the alienating parent.⁴⁵ Under Gardner's theory, the source of the relational trouble comes from the alienating parent, whom, Gardner suggested, is more frequently the mother.⁴⁶

Gardner suggested that mothers are more likely to alienate because, in his personal experience, women tend to be angrier than men in the face of divorce.⁴⁷ Anger, he believed, drives alienating behavior.⁴⁸ He hypothesized that a parent's anger is transposed onto the child so that the child comes to identify

⁴³ See Gardner, *supra* note 41, at 9 tbl.1.2 (identifying the parental factors that can contribute to parental alienation syndrome). These factors include assessments of numerous parental behaviors that allow for the categorization of the alienator's symptom level, including the parent's own mental health, complaints to law enforcement and child services, and the frequency of "programming thoughts," "programming verbalizations," and "exclusionary maneuvers." *Id.* Gardner defined "exclusionary maneuvers" as behaviors of the alienating parent that block the non-alienating parent's access to the child and the child's providers. *Id.* at 9 tbl.1.2 & n.2.

⁴⁴ Gardner, *supra* note 36, at 38–39. In explaining the types of problematic parental behavior, Gardner points to the "diversionary maneuver" of the parent. *Id.* at 38. He suggests that both the mother and father may turn to alienation to redirect the child's attention away from parental separation and toward the other parent. See generally *id.* at 34–42. He emphasizes that mothers, but notably not fathers, may engage in overprotection to begin alienating. See *id.* at 38–42. The alienating mother exerts her unwarranted concerns onto the child so that the child irrationally fears the father. *Id.* at 38–39. Scapegoatism is another behavior that parents engage in to alienate their children. *Id.* at 39. This behavior involves blaming the other parent for problems that an alienating parent is experiencing. *Id.* Again, Gardner differentiates the scapegoating behavior of the mother and the father. *Id.* at 39–42. He suggests that a scapegoating mother does so over finances and material possessions, whereas the father does so because of the emotional harm that he feels. *Id.*

⁴⁵ See BERNET, *supra* note 7, at 4 (summarizing Gardner's proposal that the difference between parental alienation syndrome and parental alienation is the involvement of the parent).

⁴⁶ See Gardner, *supra* note 35, at 193–94 (emphasizing the role of the alienating parent in the development of parental alienation syndrome in the child and noting, without evidence, that the alienator is almost exclusively the mother). But see Joan B. Kelly & Janet R. Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 FAM. CT. REV. 249, 251 (2001) (proposing an approach to parental alienation syndrome that focuses on the child's behavior, and not on the alienating parent's behavior).

⁴⁷ See Gardner, *supra* note 36, at 34–35 (suggesting that fathers are more likely to find new partners which is why they are less angry than mothers).

⁴⁸ *Id.* at 34–35 (noting that parental alienation syndrome is one way in which women can express their anger at their partners or spouses). Gardner's claims about the anger of the alienating parent are deeply gendered, and he offers no proof for his conclusions. See Meier, *supra* note 16, at 689 (suggesting that parental alienation syndrome is used almost exclusively against mothers, despite the reality that fathers engage in what Gardner would consider an alienating behavior, especially in the context of an abusive marital relationship). In fact, in his discussion of the behavior of fathers as "alienators," Gardner makes several controversial suppositions, including that women are more likely than men to be enraged after the dissolution of a marriage, and that women are more likely than men to fly into a jealous rage upon seeing their ex-spouse with a new partner. Gardner, *supra* note 36, at 41–42.

with that parent's negative feelings toward the alienated parent—often the father.⁴⁹ The child's anger, in turn, becomes a desire for the protection of the alienator and a campaign of denigration against the non-alienating parent.⁵⁰ As a consequence of this dynamic, Gardner suggested, children will launch false allegations of physical and sexual abuse against an innocent parent.⁵¹

Gardner's theory arose at a time when, he believed, the number of child-custody disputes was increasing at a historic level.⁵² Without empirical evidence, he proposed that, because women were afraid of losing the time they had with their children, they began programming their children to denigrate their fathers.⁵³ His views originated in misconceived notions of divorcing mothers as angry "scorned women."⁵⁴ This stereotype, beyond being offensive to women and mothers, has no foundation in data or science.⁵⁵ Consequently, recent approaches to parental alienation syndrome have sought to separate the theory from Gardner's gendered approach.⁵⁶

⁴⁹ See Gardner, *supra* note 36, at 44–45 (suggesting that, because of the alienating parent's behavior, the child will manifest the same anger toward the non-alienating parent).

⁵⁰ *Id.* at 45–46 (arguing that the alienating parent can convince a child that they are in dangerous situations when the non-alienating parent is near). This proposition led Gardner to hypothesize that child abuse accusations are far less common than statistics suggest, because children have been "programmed" to target the non-alienating parent with false accusations to affect court proceedings. *Id.* at 44. See generally GARDNER, *supra* note 14 (proposing that child sexual abuse is overblown and over-identified).

⁵¹ GARDNER, *supra* note 14, at 3–4 (positing that, particularly in the context of a custody dispute, sex abuse allegations are likely to be false). The premise that mothers are more likely to alienate their children than fathers garnered staunch criticism from feminists and strong support from fathers' rights organizations. Compare Meier, *supra* note 16, at 659 (critiquing Gardner's theory from a feminist lens because of its gendered assertions), with Katie Davis, *Parental Alienation & Its Impact on Fathers*, MEN'S RTS., <https://mensrights.com/parental-alienation-its-impact-on-fathers/> [<https://perma.cc/M463-LLC8>] (criticizing those who question parental alienation by stating, without proof, that "[m]any psychologists and law professors now consider this type of alienation . . . to be a condition").

⁵² Gardner, *supra* note 41, at 5.

⁵³ *Id.*

⁵⁴ Gardner, *supra* note 36, at 35–36 (referencing the term "malicious mother syndrome" to characterize mothers inducing parental alienation syndrome in their children to highlight the idea that women seek to ruin their ex-spouses by using their children).

⁵⁵ See generally *id.* (referencing several of Gardner's own works and only three others to support his conclusions).

⁵⁶ See GOTTLIEB, *supra* note 24, at xi (illustrating that Gardner's initial approach to parental alienation syndrome made women the exclusive perpetrators). Professionals in the field have now explicitly clarified, based on their own limited data, that fathers are just as likely as mothers to engage in alienating behavior toward their children. *Id.* (suggesting that parental alienation syndrome is an "opportunistic" syndrome, and not one that is inherently dependent on gender).

Despite the credit that modern theorists give to Gardner for first labelling and diagnosing parental alienation syndrome, psychologists who recognize it as a legitimate syndrome are still critical of his methodology and theoretical framework. See, e.g., Kelly & Johnston, *supra* note 46, at 249–50 (offering a reformulation of parental alienation syndrome because of Gardner's controversial propositions). Some modern theorists now use the term parental alienation disorder to refer to a child with parental alienation who manifests some or all of Gardner's eight characteristic behaviors. BERNET, *supra* note 7, at 4. Those who proposed a change to the newest version of the *DSM* referred to parental alienation

Modern definitions of parental alienation syndrome reflect aspects of Gardner's original theory, but differ on some important points.⁵⁷ First, those studying parental alienation syndrome now reject Gardner's theory that a mother is more likely to alienate than a father.⁵⁸ In fact, modern research indicates that mothers are no more likely than fathers to alienate their children.⁵⁹ Theorists also focus their modelling on the well-known family systems model of the social sciences, by which mental health professionals understand the individual in the context of the family.⁶⁰ Additionally, parental alienation syndrome theorists now focus their attention on the behavior of the child and less on the behavior of the alienating parent.⁶¹ This reflects the changing standards of the social sciences, as the fields of social work and psychology have begun responding to the critiques that historical theories and models stigmatize women.⁶²

disorder instead of parental alienation syndrome to reflect the structure of the then-in progress *DSM-5*. *Id.* at 5.

The *DSM* has been updated numerous times since its inception in 1952. AM. PSYCHIATRIC ASS'N, FROM PLANNING TO PUBLICATION: DEVELOPING *DSM-5*, at 1 (2013), https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-Development-of-DSM-5.pdf [<https://perma.cc/LBE4-XHWZ>]. The APA began working on the *DSM-5* in 1999 and examined issues with the previous version of the *DSM*—the *DSM Fourth Edition (DSM-IV)*—with respect to gender, culture, and changes across the lifespan. *Id.* Over the next thirteen years, the drafters of the *DSM-5* collaborated with mental health professionals to propose diagnostic criteria with the input from experts with diverse perspectives in a variety of specialized fields. *Id.* at 1–3. The APA approved the *DSM-5* in December 2012. *Id.* at 3.

⁵⁷ BERNET, *supra* note 7, at app. A (defining the diagnostic criteria for parental alienation disorder as a proposal submitted to the APA). The definition of parental alienation disorder is more nuanced than Gardner's proposed parental alienation syndrome as it specifies a duration of the symptoms and requires that the disturbance cause "clinically significant distress or impairment." *Id.*

⁵⁸ GOTTLIEB, *supra* note 24, at xi.

⁵⁹ *E.g., id.*

⁶⁰ *Id.* at 10–11 (describing parental alienation syndrome as an extreme form of the family systems concept of triangulation). Under the theory developed by Salvador Minuchin, the famed family therapist who spearheaded family systems theory, dysfunctional relationships and communication "triads" often manifest in behavioral problems of the child. SALVADOR MINUCHIN, FAMILIES AND FAMILY THERAPY 89–102 (1974) (defining triangulation as a communication pattern in which both parents try to ally the child with themselves instead of with the other parent).

⁶¹ See Kelly & Johnston, *supra* note 46, at 251 (proposing a model that focuses on the child, not the alienating parent); see also GOTTLIEB, *supra* note 24, at 57 (highlighting the behavior of the children suffering from parental alienation syndrome as that of children with a "laundry list of vague injustices . . . which were allegedly inflicted upon them by their targeted parent"). Linda Gottlieb, a Licensed Clinical Social Worker and staunch defender of parental alienation syndrome, is cautious in her characterization of the alienating parent, noting that parents effectuating the syndrome might not be doing so intentionally. *Id.* at 114.

⁶² See GOTTLIEB, *supra* note 24, at xi–xii (stating that the author does not believe in the proposition that women are more likely to partake in alienating behavior because of gender). In fact, Gottlieb discussed that even Gardner revised his belief about women's tendency to alienate. *Id.* at xi.

B. Parental Alienation

Despite the modernization of parental alienation syndrome, some researchers support the phenomenon of parental alienation without advocating for its place as an actual syndrome.⁶³ They argue that parental alienation cannot be considered a syndrome because, unlike other syndromes, it is not a problem of individual development.⁶⁴ Rather, parental alienation is inherently a relationship issue.⁶⁵ As such, many mental health professionals and researchers distinguish between parental alienation syndrome and parental alienation by suggesting that parental alienation is a more modern formulation of the original syndrome.⁶⁶

A more commonly accepted definition of parental alienation focuses on the alienated child instead of on the behavior of the parent.⁶⁷ Under this more modern formulation, parental alienation exists when the alienated child expresses unreasonably negative feelings toward a parent that are disproportionate to the actual experience.⁶⁸ These children are found to respond in a “phobic-like” manner to the non-alienating parent.⁶⁹ The model builds on the be-

⁶³ See, e.g., JANET JOHNSTON ET AL., IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE 362 (2d ed. 2009) (suggesting that parental alienation syndrome focuses too much on the alienating parent and not enough on the child); Kelly & Johnston, *supra* note 46, at 249–50 (providing several reasons that parental alienation syndrome should be reformulated as parental alienation).

⁶⁴ Kelly & Johnston, *supra* note 46, at 251. Critics indicate that parental alienation cannot be considered a “syndrome” under the definition common to psychiatric nomenclature of a syndrome. JOHNSTON ET AL., *supra* note 63, at 363 (arguing that parental alienation cannot be a syndrome because there are not any “commonly recognized, or empirically verified pathogenesis, course, familial pattern, or treatment selection for the condition”). Per the *DSM-5*, a syndrome is “[a] grouping of signs and symptoms, based on their frequent co-occurrence that may suggest a common underlying pathogenesis, course, familial pattern, or treatment selection.” *DSM-5*, *supra* note 13, at 830. Critics that advocate for parental alienation but not for its status as a syndrome suggest that it does not have a unique cause, set of symptoms, pattern of family dynamics, or accepted treatment modality associated with it and thus does not warrant being labeled a syndrome. JOHNSTON ET AL., *supra* note 63, at 363.

⁶⁵ JOHNSTON ET AL., *supra* note 63, at 363 (proposing that the parent is not always the cause of a child’s parental alienation).

⁶⁶ E.g., BERNET, *supra* note 7, at 4–5 (distinguishing between parental alienation—a more general diagnosis—and parental alienation syndrome, a specific subset of parental alienation). Some, including Gardner, see parental alienation as a coexisting and sometimes complementary concept. *Id.* at 5. Others criticize parental alienation syndrome while recognizing the validity of parental alienation. E.g., JOHNSTON ET AL., *supra* note 63, at 363.

⁶⁷ Kelly & Johnston, *supra* note 46, at 251 (“This formulation proposes to focus on the alienated child rather than on parental alienation.”). Not all researchers accept Kelly and Johnston’s criticisms. GOTTLIEB, *supra* note 24, at 7–11 (critiquing Kelly and Johnston’s theory of parental alienation for, what Gottlieb identifies as, vague assertions and inconsistent conclusions).

⁶⁸ Kelly & Johnston, *supra* note 46, at 251.

⁶⁹ JOHNSTON ET AL., *supra* note 63, at 363–64 (explaining, under the Kelly and Johnston model, that alienating children respond to the “fear[ed]” parent by rejecting without ambivalence).

havioral characteristics proposed by Gardner but departs from evaluating the conduct and motivations of the so-called alienating parent.⁷⁰

Using this model, a variety of factors can be found to contribute to the alienation, outside of the behavior of the parent.⁷¹ These factors include highly contentious marriages, embarrassing custody proceedings, the psychological predisposition of the parents, the child's age, cognitive abilities and temperament, the role of siblings, new parental partners, and the relationships with extended family members.⁷² The family law proceedings themselves can lead to concerning behavior when children come to view court officers, judges, and psychologists as enemies or as friends.⁷³ This newer model, although more widely accepted in the social science communities than the original parental alienation syndrome, is still not without its criticisms.⁷⁴

C. Criticisms of Parental Alienation and Parental Alienation Syndrome

Despite the stronger support of this newer theory of parental alienation, other mental health professionals remain opposed to the concept.⁷⁵ This is

⁷⁰ *Id.*

⁷¹ *Id.* at 367. This model of parental alienation is careful to distinguish normal preferences, alignments, and estrangement—all of which are, to a certain extent, normal in the context of a divorce—from alienation. *Id.* at 364–67. According to some theorists, drawing this distinction is important when designing therapeutic interventions for children. *Id.* at 366.

⁷² *Id.* at 367. Children are also more likely to become alienated when they have witnessed a substantial amount of marital conflict. *Id.*

⁷³ *Id.* Furthermore, vulnerable children tend to be more susceptible when they are eight to fifteen years old, particularly because they are easily pressured. *Id.* at 369. The parent with whom the child aligns often has narcissistic tendencies and feels that the divorce and custody process is particularly embarrassing. *Id.* at 367. Alienating parents, especially those who batter, use children as tools for revenge. *Id.* at 368.

Another modern definition of parental alienation is parental alienation disorder, proposed to the APA for inclusion in the *DSM-5*. BERNET, *supra* note 7, at 5. In his proposal, Dr. William Bernet provided twenty reasons that the disorder should be included in the *DSM-5*. *Id.* at 9–10. Chief among them was that parental alienation is a concept that has been recognized as valid by at least six researchers. *Id.* In defending the validity of the diagnosis, Bernet explained that the phenomenon of parental alienation was described even prior to Gardner's work. *Id.* at 9. He also noted that parental alienation is conceptually valid because: (1) it has been thoroughly researched; (2) it has been described by different groups of researchers; (3) researchers have applied it to their own clients and patients; (4) it has been studied in different countries; (5) it is highly accepted by mental health professionals who work with children in contentious divorces; and (6) other research on related topics suggests the existence of parental alienation. *Id.* at 24–96. Furthermore, Bernet suggested that the diagnosis has been found to be reliable. *Id.* at 91–96.

⁷⁴ See Lenore E. Walker & David L. Shapiro, *Parental Alienation Disorder: Why Label Children with a Mental Diagnosis?*, 7 J. CHILD CUSTODY 266, 267–68 (2010) (critiquing parental alienation disorder for its lack of scientific data); *infra* notes 75–89 and accompanying text.

⁷⁵ Walker & Shapiro, *supra* note 74, at 267–68. Dr. Lenore Walker is a clinical psychologist who is known for her work in the domestic violence field. *About Dr. Lenore E. Walker*, DR. LENORE E. WALKER, <https://www.drlenoreewalker.com/about/> [<https://perma.cc/9K4P-PJZN>]. Her article critiquing parental alienation disorder, co-written with law professor David L. Shapiro, highlights the psychological impacts of mislabeling children with an unnecessary and inappropriate diagnosis. Walker

largely due to the absence of empirical studies on unjustified parental rejection.⁷⁶ Some claim that, after examining the literature surrounding parental alienation syndrome and parental alienation, neither is valid because no peer-reviewed journals have published studies on either theory.⁷⁷ The few studies that do exist contain too few study participants, and thus, critics suggest, there is no proof that parental alienation should be an accepted diagnosis.⁷⁸ Critics also highlight the definitional problems in the proposed diagnoses; proponents insist that the rejection takes place without any “rational” justification, but they fail to define what a “rational” justification for the child’s rejection might be.⁷⁹ A related problem is that literature on parental alienation contains no definition of what precisely constitutes domestic violence, making it difficult to distinguish between rejection that might be justified—rejecting an abusive parent—and rejection that is unjustified under theories of parental alienation.⁸⁰ Furthermore, application of parental alienation syndrome and parental alienation may unnecessarily label a child with a mental disorder, when that child may simply be having a natural reaction to a contentious divorce.⁸¹

& Shapiro, *supra* note 74, at 266. She also explains the difficulty practitioners will have in making a differential diagnosis. *Id.* at 276–79. For mental health practitioners, differential diagnosis is an important step in identifying the appropriate diagnosis for an individual and distinguishing that diagnosis from “possible competing diagnoses.” Chad E. Cook & Simon Décarý, *Higher Order Thinking About Differential Diagnosis*, 24 BRAZILIAN J. PHYSICAL THERAPY 1, 1 (2020) (defining differential diagnosis).

⁷⁶ Timothy M. Houchin et al., *The Parental Alienation Debate Belongs in the Courtroom, Not in DSM-5*, 40 J. AM. ACAD. PSYCHIATRY L. 127, 129 (2012) (indicating that studies done on parental alienation syndrome are limited and do not lend themselves well to statistically significant conclusions).

⁷⁷ *Id.* at 129–30. For example, Gardner published his own works instead of submitting them to respected, peer-reviewed journals for publication. *Id.* at 130.

⁷⁸ *Id.* at 129–30.

⁷⁹ Walker & Shapiro, *supra* note 74, at 270. The “rational[ity]” remains totally subjective to the evaluator, and thus makes it particularly difficult to identify or study empirically. *Id.* at 270–71.

⁸⁰ *See id.* at 272 (questioning how much abuse is needed before the domestic violence becomes “real” enough to warrant parental rejection). State and federal legislatures define “domestic violence” differently. *See, e.g.*, 34 U.S.C. § 12291(a)(8) (defining domestic violence as a felony or misdemeanor committed by the victim’s intimate partner); N.C. GEN. STAT. § 50B-1 (2020) (defining domestic violence as an attempt to physically harm or actually physically harming someone with whom the perpetrator has a personal relationship, or threatening to harm that person in a way that causes the victim to feel “substantial emotional distress”). North Carolina defines a “personal relationship” as one with the opposite sex, ruling out the possibility of domestic violence between homosexual partners. N.C. GEN. STAT. § 50B-1(b)(6) (2020). Domestic violence advocates propose a definition of domestic violence that is much broader than statutory definitions. *E.g.*, *Abuse Defined*, NAT’L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/is-this-abuse/abuse-defined/> [<https://perma.cc/P6CE-K3C3>] (defining domestic violence as behavior used by an intimate partner to maintain power and control over the victim). Unlike the North Carolina statute, the National Domestic Violence Hotline definition makes it clear that anyone can be defined as a victim, regardless of sexuality. *Compare* N.C. GEN. STAT. § 50B-1, with *Abuse Defined*, *supra*.

⁸¹ Walker & Shapiro, *supra* note 74, at 268–69. Critics also suggest that inclusion of a parental alienation theory in the *DSM-5* would create a problem where there is none. *Id.* at 269 (pointing out

Perhaps the most resounding rejection by the scientific community of both theories came from the APA.⁸² In 2013, the APA Board of Trustees announced it once again would exclude parental alienation syndrome from the latest version of the *Diagnostic and Statistical Manual of Mental Diseases*, the *DSM-5*.⁸³ Instead, the APA added an issue similar to parental alienation that clinicians may see in their work: the Parent-Child Relational Problem.⁸⁴ This category of behavioral problem exists when there are relationship issues between the child and the parent, but it is importantly not a psychological disorder, according to the APA.⁸⁵

Outside of the scientific community, feminist researchers and domestic violence advocates are also particularly critical of parental alienation syndrome and parental alienation.⁸⁶ According to feminist researchers and domestic violence advocates, the theories come from a troubled past, and largely impact women and children because they can, and have been, applied in an inappropriately gen-

that inclusion of parental alienation disorder in the DSM may “reify[y]” it instead of clarifying it). Those who advocated for the concepts’ inclusion in the *DSM-5* believed that clarifying the criteria for the disorder would bring more data to the diagnosis. *Id.* at 279–80 (referencing the proposition of BERNET, *supra* note 7, that inclusion in the *DSM-5* could generate the requisite data to justify the disorder). That data, though, could be used to confirm the beliefs of alienation proponents without appropriately justifying the disorder itself. *Id.* at 280 (“[I]f the diagnostic category is put in the [*DSM-5*] to encourage gathering the necessary data, it may be used to justify the use of an otherwise insufficient diagnosis.”).

⁸² See *APA Board of Trustees Approves DSM-5*, *supra* note 6 (announcing in a press release that parental alienation syndrome would not be included in the *DSM-5*).

⁸³ *Id.*

⁸⁴ *DSM-5*, *supra* note 13, at 715, 875.

⁸⁵ *Id.* at 875. The Parent-Child Relational Problem can become evident to a clinician as the presenting problem requiring treatment or in the context of treatment of another mental health disorder. *Id.* The problem is often associated with poor functioning in the behavioral, cognitive, and affective domains. *Id.* Proponents of parental alienation disorder appreciate that relational problems have been included in *DSM-5*; they suggest, however, that parental alienation disorder and parent-child relational problems are not synonymous. BERNET, *supra* note 7, at 12–13. Bernet distinguishes between the two by illustrating that parental alienation disorder is more persistent and severe than more general parent-child relational problems. *Id.* at app. A (defining parent-child relational problem and parental alienation disorder).

⁸⁶ *E.g.*, Meier, *supra* note 16, at 679–80; see BERNET, *supra* note 7, at 271–75 (explaining the criticism that parental alienation draws from feminists and domestic violence advocates). Domestic violence advocates and researchers are not opposed to all new mental disorders, though. See, *e.g.*, Lenore E.A. Walker, *Battered Woman Syndrome: Empirical Findings*, 1087 ANNALS N.Y. ACAD. SCI. 142, 143 (2006) [hereinafter Walker, *Empirical Findings*] (explaining how feminists and domestic violence advocates adapted battered woman syndrome soon after its proposal). For example, battered woman syndrome, proposed a few years after parental alienation, gained acceptance in the psychological community relatively quickly, as elements of the disorder appeared in the definition of posttraumatic stress disorder (PTSD) in the precursor to the *DSM-5*, the *DSM Fourth Edition Text Revision (DSM-IV-TR)*, as well as the *DSM-5*. Lenore E. Walker, *Battered Woman Syndrome*, PSYCHIATRIC TIMES (July 8, 2009), <https://www.psychiatrictimes.com/view/battered-woman-syndrome> [<https://perma.cc/SX82-WSHD>] [hereinafter Walker, *Battered Woman Syndrome*] (providing an overview of the *DSM-IV-TR*’s acceptance of battered woman syndrome as a subcategory of PTSD); see *DSM-5*, *supra* note 13, at 274 (acknowledging the importance of gender when examining PTSD).

dered way.⁸⁷ These researchers argue that parental alienation as a mental disorder does not exist.⁸⁸ Instead, they suggest that parental alienation is a tool used by batterers and child abusers in court to defend their abusive behavior.⁸⁹

D. An Overview of Family Law: Explaining the Most Common Child Custody Standards

When a couple ends their relationship—through divorce or separation—the parties, many of whom are unrepresented, often fight bitterly over child custody in the family court.⁹⁰ It is in this context that parents may raise parental alienation.⁹¹

In every case involving children, judges must make formal court orders and decisions regarding custody arrangements.⁹² Most frequently, judges will order one of two custody arrangements: sole custody or joint custody.⁹³ An order of joint custody is a more recent phenomenon in which children split their time by living evenly, more or less, with both parents.⁹⁴ Judges can also

⁸⁷ See Meier, *supra* note 16, at 679–80.

⁸⁸ *Id.* at 671.

⁸⁹ *Id.* at 679–80; see Jennifer Baker, *Parental Alienation Syndrome: Calling Moms Nazis*, PSYCH. TODAY (Aug. 10, 2016), <https://www.psychologytoday.com/us/blog/the-love-wisdom/201608/parental-alienation-syndrome-calling-moms-nazis> [<https://perma.cc/VLU2-XYDN>] (calling parental alienation syndrome “domestic violence by proxy”); Marisa Endicott, *How Parental Alienation Syndrome Is Changing Custody Cases Across the U.S.*, HUFFINGTON POST (June 9, 2017), https://www.huffpost.com/entry/how-parental-alienation-syndrome-is-changing-custody_b_5939d367e4b094fa859f1719 [<https://perma.cc/J4EB-PHNK>] (reporting that parental alienation can be used as a handy tool for batterers to use to continue to abuse a child).

⁹⁰ JUDITH AREEN ET AL., *FAMILY LAW: CASES AND MATERIALS* 768 (6th ed. 2012).

⁹¹ *Id.* When two parties share a child, regardless of their marital status, both parties have rights and responsibilities with respect to that child. *E.g.*, UNIF. PARENTAGE ACT § 202 (NAT’L CONF. OF COMM’RS ON UNIF. STATE . L. 2017) (proposing that states adopt language granting the same rights to unmarried and married parents). The National Conference of Commissioners on Uniform State Laws, also called the Uniform Law Commission, is a non-partisan organization that provides sample uniform laws for states to enact. *About Us*, UNIFORM LAW COMMISSION, <https://www.uniformlaws.org/aboutulc/overview> [<https://perma.cc/44ZS-C452>].

⁹² KATHARINE K. BAKER & KATHARINE B. SILBAUGH, *ESSENTIALS: FAMILY LAW* 159 (2009).

⁹³ Jay Folberg et al., § 13.04 *Recognized Forms of Custody*, in 2 *CHILD CUSTODY & VISITATION* (rev. ed. 2019) (explaining four permissible kinds of custody, but specifying that split custody and divided custody are more uncommon).

⁹⁴ BAKER & SILBAUGH, *supra* note 92, at 164–65 (defining joint custody as an arrangement that requires sharing responsibility of the children). In seeking to establish more equality in the sexes’ responsibilities and rights with respect to their children, judges began ordering joint custody. *Id.* Although this is seemingly better for both parents, it is unclear if joint custody is healthy for children. *Id.* at 163. To address this concern, some courts have ordered “birds nest” co-parenting arrangements in which the child remains in the home and the parents cycle in and out of the home. Edward Kruk, “*Bird’s Nest*” *Co-parenting Arrangements*, PSYCH. TODAY (July 16, 2013), <https://www.psychologytoday.com/us/blog/co-parenting-after-divorce/201307/birds-nest-co-parenting-arrangements> [<https://perma.cc/ZNU4-KCZU>]. Though inconvenient for the adults, it is a more child-centered way to deal with joint custody and places the needs of the children at the forefront. *Id.*; see BAKER & SILBAUGH, *supra* note 92, at 163.

order sole custody with parenting time or visitation.⁹⁵ The child in this circumstance lives primarily with one parent and has periodic scheduled visits with the other.⁹⁶

Judges tend to determine the amount of visitation with the “best interest of the child” as the guiding standard.⁹⁷ Although the standard is extremely flexible as applied, it requires judges to consider the needs and interests of the child when determining custody.⁹⁸ Factors that speak to a child’s needs and

⁹⁵ BAKER & SILBAUGH, *supra* note 92, at 171. A judge may also order sole custody with no visitation, whereby a child lives with one parent, and the other parent has no legal right to see that child. *Id.* at 164–65. In families where one parent has alleged domestic violence, the alleged abuser is not inherently precluded from having joint custody if it is in the best interest of the child. *Id.* at 165.

⁹⁶ *Id.* at 171.

⁹⁷ See *Hollon v. Hollon*, No. 2000-CA-00141-SCT (¶ 35) (Miss. 2001) (listing a variety of factors that should be considered to determine what custody arrangement is in the best interest of the child); AREEN ET AL., *supra* note 90, at 768. These factors can include, but are not limited to, the child’s age, sex, gender, and preferences, the parents’ preferences, the quality of the relationship that the child has with each parent, and the presence of domestic violence. See, e.g., *Hollon*, No. 2000-CA-00141-SCT (¶ 12) (quoting *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983)). Different states define “best interest of the child” with differing levels of specificity. Compare, e.g., D.C. CODE § 16-914 (2020) (listing seventeen factors that courts should consider in determining custody “in the best interest of the child”), with MASS. GEN. LAWS ch. 208 § 18 (2020) (declining to explicitly mention the “best interest of the child”).

⁹⁸ BAKER & SILBAUGH, *supra* note 92, at 160. Though the “best interest of the child” is the dominating standard in modern family courts across the United States, some states use alternative approaches to determine child custody. *Id.* (providing an overview of the historical development of the best interest of the child standard). In the 1960s, courts frequently granted custody to the mother under the “tender years” presumption, reflecting a gendered judicial bias that the mother was inherently the better parent because of her maternal instincts. See *Pusey v. Pusey*, 728 P.2d 117, 120–21 (Utah 1986) (articulating reasons to reject the tender-years presumption, and instead arguing for one that looks to “function-related factors”). Courts have also justified custody orders through the “primary caretaker” presumption, which requires the judge to order custody to the person who is the primary caretaker of the children. See, e.g., *Garska v. McCoy*, 278 S.E.2d 357, 362–63 (W.Va. 1981) (stating that custody in West Virginia is presumed to go to the primary caretaker of the child, regardless of that caretaker’s gender).

The Uniform Marriage and Divorce Act articulates an example best interest of the child standard:

The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

- (1) the wishes of the child’s parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child’s best interest;
- (4) the child’s adjustment to his home, school, and community; and
- (5) the mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

UNIF. MARRIAGE & DIVORCE ACT § 402 (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 1974). This language highlights the importance of looking at a variety of factors when determining what is truly in the child’s best interest. *Id.* § 402 cmt.

interests include the age of the child, the emotional ties that child has with a parent, and the preference of the child.⁹⁹

Once a judge orders a custody arrangement, the judge is obligated to reevaluate the custody arrangement upon request of either of the parties to ensure the arrangement is still in the best interest of the child.¹⁰⁰ Oftentimes, to induce a judge to reevaluate a custody arrangement, one parent may claim parental alienation is occurring in the home of the other parent.¹⁰¹ Subsequent changes in custody, however, can endanger and traumatize children.¹⁰²

E. Experts on Family: How Judges Use Expert Testimony in the Courtroom

Because family courts deal with so many legal issues, ranging from divorce to custody to property division, the parties or the judge may request expert testimony to assist the judge in fact-finding.¹⁰³ In the context of a child custody dispute, judges or the parties most frequently request a mental health professional to weigh in on what custody arrangement will really be in the best interest of the child.¹⁰⁴

⁹⁹ See, e.g., *Hollon*, No. 2000-CA-00141-SCT (¶ 35) (annunciating eleven different factors that Mississippi courts must balance in custody cases) (“The polestar consideration in child custody cases is the best interest and welfare of the child.”). Not all states require judges to consider domestic violence when determining the best interest of the child. See *In re Vaughn*, 664 N.E.2d 434, 439–440 (Mass. 1996), *aff’g* *R.H. v. B.F.*, 653 N.E.2d 195 (Mass. App. Ct. 1995) (mandating, for the first time in Massachusetts, that a trial court explicitly consider domestic violence in the context of a child custody case).

¹⁰⁰ *BAKER & SILBAUGH*, *supra* note 92, at 167 (outlining the amorphous nature of the best interest of the child standard).

¹⁰¹ *M.A. v. A.I.*, No. A-4021-11T1, 2014 N.J. Super. Unpub. LEXIS 2887, at *5 (Super. Ct. App. Div. Dec. 15, 2014) (ordering an immediate modification of custody to address the judge’s concerns of parental alienation syndrome). *M.A. v. A.I.* is the appeal of the *Ionescu* case examined in the podcast, *Reveal*, by the Center for Investigative Reporting. *Id.*; *Reveal*, *Bitter Custody*, *supra* note 1 (narrating the facts of the *Ionescu* case from the perspective of Ana Ionescu). In *M.A. v. A.I.*, the plaintiff mother alleged that the defendant father, who had physical custody of the two children, was alienating them. 2014 N.J. Super. Unpub. LEXIS 2887, at *4. Following this allegation and expert testimony on the matter, the judge ordered that the children attend a rehabilitation program with their mother, the parent they had accused of abuse. *Id.*

¹⁰² See *R.H. v. B.H.*, 653 N.E.2d 195, 202 (Mass. App. Ct. 1995) (explaining that granting child custody to a potential batterer can put that child’s safety at risk). Another young woman interviewed for *Reveal*’s *Bitter Custody* story, Melanie Cole, says that her mother abused her but that the judge ordered custody to her mother because of the parental alienation defense. *Reveal*, *Bitter Custody*, *supra* note 1. Melanie reported that her mother’s abuse made her suicidal and said that she had experienced deep emotional trauma because of the change in custody. *Id.* Studies show that conflict between parents is associated with poor mental health outcomes for children, and that such conflict increases during the separation and divorce processes. Irwin Sandler et al., *Effects of Father and Mother Parenting on Children’s Mental Health in High- and Low-Conflict Divorces*, 46 *FAM. CT. REV.* 282, 284 (2008).

¹⁰³ *AREEN ET AL.*, *supra* note 90, at 1–4.

¹⁰⁴ *BAKER & SILBAUGH*, *supra* note 92, at 166 (stating that courts appoint guardians *ad litem* (GAL) and mental health professionals to help make custody decisions).

Such experts will generally interview the parties and the child when making their evaluations.¹⁰⁵ Experts employed by the court, such as guardians *ad litem*, will likewise observe the parties' interactions with the child and may also interview third parties such as the child's teachers or health care providers.¹⁰⁶ After making their observations, experts may then write a report.¹⁰⁷ Either party can request before trial that this expert be allowed to testify.¹⁰⁸ Upon an objection from one party declaring expert testimony inadmissible, the judge must examine the theoretical framework underlying the expert's conclusions to ensure that the science employed is sound.¹⁰⁹

Judges are not themselves experts on psychological concepts, so they frequently welcome expert testimony into the courtroom to explain parental alienation syndrome and parental alienation.¹¹⁰ Procedural rules and state common law govern the standard for the admission of expert testimony.¹¹¹ Most states follow one of two standards—the *Frye v. United States* test of general acceptance or the *Daubert v. Merrell Dow Pharmaceuticals, Inc.* multifactorial test—though some states articulate their own rules for the admission of expert

¹⁰⁵ Am. Psych. Ass'n, *Guidelines for Custody Evaluations in Family Court Proceedings*, 65 AM. PSYCH. 863, 866 (2010) (enumerating best practices for psychologists participating as experts in family court proceedings). The guidelines articulated by the APA are a list of principles; they do not include specific requirements of how psychologists adhere to the guidelines so long as they behave in accordance with the Association's code of ethics. *Id.* at 863.

¹⁰⁶ *Id.* at 865. A GAL is a court appointed attorney who investigates the best interest of the child. *See, e.g.,* Roxanne Mennes, *Introduction to Service as a Family Law GAL*, in WASH. STATE ADMIN. OFF. OF THE CTS., WASHINGTON STATE TITLE 26 FAMILY LAW GUARDIAN AD LITEM GUIDEBOOK 2, 2 (2008), <http://www.courts.wa.gov/content/manuals/domviol/appendix.pdf> [<https://perma.cc/3M6Q-D8BD>] (outlining GAL procedures in Washington). A GAL is supposed to represent the interest of the child, not of the parents, and theoretically receives extensive training on the needs of children. *Id.* Involving a GAL does require payment from the parties, so lower-income families may avoid the appointment to avoid the associated costs. *See* NW. JUST. PROJECT, YOUR FAMILY LAW CASE: IF YOU CANNOT AFFORD THE GAL FEE 1 (2016), https://www.washingtonlawhelp.org/files/C9D2EA3F-0350-D9AF-ACAE-BF37E9BC9FFA/attachments/C6B477EA-2DB6-42F7-8C89-1E393702224F/3117en_cannot-afford-gal-fee.pdf [<https://perma.cc/UB66-KWF5>] (explaining the options available in Washington if a party cannot afford the \$1,000-to-\$3,000 GAL fee).

¹⁰⁷ Am. Psych. Ass'n, *supra* note 105, at 867; *see What You Need to Know About Child Custody Evaluations*, OUR FAM. WIZARD: BLOG, <https://www.ourfamilywizard.com/blog/child-custody-evaluation> [<https://perma.cc/2KJ7-E6CY>] (explaining the custody evaluation process for parents in the family court system).

¹⁰⁸ *See, e.g.,* ARIZ. R. FAM. L. P. 49(j) (2020) (requiring the disclosure of expert witnesses to the other party prior to trial); MASS. R. DOMESTIC RELS. P. 26 (2020) (describing the procedure for using expert witnesses at trial).

¹⁰⁹ John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 23 (1989) (explaining that either party or the judge can call an expert's reliability into question).

¹¹⁰ BAKER & SILBAUGH, *supra* note 92, at 4.

¹¹¹ *Id.* at 15–17 (listing the different sources for family law in general). *See generally* MATTHIEN, WICKERT & LEHRER, S.C., ADMISSIBILITY OF EXPERT TESTIMONY IN ALL 50 STATES (2021) (articulating the evidentiary origins of expert testimony in each state).

testimony.¹¹² Subsection 1 provides an explanation of the *Frye* test for the admissibility,¹¹³ and subsection 2 highlights the *Daubert* multi-factorial test.¹¹⁴

¹¹² *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579, 593–94 (1993) (articulating the *Daubert* test); *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (establishing the *Frye* test). See generally ARIZ. REV. STAT. ANN. § 12-2203 (2020) (applying *Daubert*), *invalidated by* *Lear v. Fields*, 245 P.3d 911 (Ariz. Ct. App. 2011); *State v. Coon*, 974 P.2d 386 (Alaska 1999) (applying *Daubert*), *abrogated by* *State v. Sharpe*, 435 P.3d 887 (Alaska 2019); *Donaldson v. Cent. Ill. Pub. Serv. Co.*, 767 N.E.2d 314 (Ill. 2002) (applying *Frye*), *abrogated by* *In re Commitment of Simons*, 821 N.E.2d 1184 (2004); *Alsheik v. Guerrero (Alsheik I)*, 956 N.E.2d 1115 (Ind. Ct. App. 2011) (rejecting adaptation of any test), *rev'd on other grounds*, 979 N.E.2d 151 (Ind. 2012). The *Daubert* test has been expanded to include non-scientific evidence. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 138 (1999) (holding that the *Daubert* factors can also be applied to non-scientific expert testimony like that of an engineer).

Although the *Daubert* and *Frye* approaches to expert testimony are certainly the most common, some states have chosen to develop their own standards for the admission of expert testimony. *E.g.*, *Alsheik I*, 956 N.E.2d at 1127 (stating that there is no particular standard for the admissibility of expert testimony); *Searles v. Fleetwood Homes of Pa., Inc.*, 2005 ME 94, ¶¶ 17–29, 878 A.2d 509, 515–18 (providing an overview of the test that Maine uses to determine the admissibility of expert testimony); *State v. Mack*, 292 N.W.2d 764, 772 (Minn. 1980) (generating a two-part test that modifies the *Frye* test in Minnesota). Minnesota stands out by adhering to its own *Frye-Mack* test. Zach Alter, Note, *Unpacking Frye-Mack: A Critical Analysis of Minnesota's Frye-Mack Standard for Admitting Scientific Evidence*, 43 MITCHELL HAMLINE L. REV. 626, 627–28 (2017) (differentiating Minnesota from the majority of states that are using *Daubert*). In 1980 in *State v. Mack*, the Minnesota Supreme Court was faced with a question regarding the admissibility of expert testimony. 292 N.W.2d at 765–66. The court decided that expert testimony based on hypnotically refreshed memories was inadmissible under Minnesota law. *Id.* The court decided to exclude the testimony about hypnosis under *Frye*, but added an additional threshold: the proposed testimony must meet “ordinary standards of reliability for admission.” *Id.* at 772. In Minnesota, then, evidence must: (1) be generally accepted in its relevant scientific community and (2) have foundational reliability. See *State v. Moore*, 458 N.W.2d 90, 97–98 (Minn. 1990) (applying the *Frye-Mack* test to blood splatter analysis). Foundational reliability requires the party offering the scientific evidence to prove that the theoretical basis is reliable and has conformed in a reliable way, in the context of the particular case. *Id.* at 98 (opining that foundational reliability is a crucial aspect of the *Frye-Mack* test); see also Alter, *supra*, at 659. Minnesota courts have further required parties to show that the expert’s conclusion applies to the facts of the case at hand. Alter, *supra*, at 660 (suggesting, based on an overview of Minnesota cases, that parties in Minnesota have a high burden to demonstrate foundational reliability).

By creating its own standard, Minnesota judges follow a more objective rule. *Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn. 2000) (highlighting the potential for a lack of uniformity in lower court decisions). Minnesota addressed the concern that *Frye* was too restrictive by generating the *Frye-Mack* test. *Id.* (highlighting the Minnesota Supreme Court’s concern that *Daubert* allows judges to have too much discretion in their gatekeeping functions). The Minnesota Supreme Court was concerned, when it decided *Goeb v. Tharaldson* in 2000, that *Daubert* would result in too many inconsistent rulings; thus, it upheld the *Frye-Mack* standard. *Id.* The codification of the *Frye-Mack* test in Minnesota Rule of Evidence 702 also represents a compromise between *Frye* and *Daubert* because it blends general acceptance with reliability. Alter, *supra*, at 662 (suggesting that the modern *Frye-Mack* standard is a move away from *Frye* general acceptance and toward a *Daubert* multifactorial test).

In contrast, the Indiana Rules of Evidence grant courts significant discretion. See IND. R. EVID. 702(b) (2020) (“Expert scientific testimony is admissible only if the court is satisfied that the expert testimony rests upon reliable scientific principles”). The Indiana Supreme Court was concerned with liberalizing the admission of reliable scientific evidence because it wanted judges to have significant gatekeeping abilities. *Lytle v. Ford Motor Co.*, 814 N.E.2d 301, 309 (Ind. Ct. App. 2004) (stating that judges have vast gatekeeping abilities under Indiana Rule of Evidence 702). The result is a lack of any

1. The *Frye* Standard for the Admissibility of Expert Testimony

The *Frye* test is the more restrictive test for the admission of expert testimony.¹¹⁵ In 1923, the United States Court of Appeals for the District of Columbia Circuit held in *Frye* that the standard for admission of expert testimony is “general acceptance” of the expert’s methodology in the relevant scientific community.¹¹⁶ To satisfy this burden, those proposing scientific testimony from a more controversial, theoretical framework must bring forward experts to justify their position.¹¹⁷ This standard emphasizes the importance of the validity and

standard in Indiana; trial judges are encouraged but not required to use the *Daubert* factors in making their admissibility determinations. See *Alsheik I*, 956 N.E.2d at 1127 (“Though we may consider the *Daubert* factors in determining reliability, there is no specific test or set of prongs which must be considered in order to satisfy Indiana Evidence Rule 702(b).”). In *Alsheik v. Guerrero (Alsheik I)* in 2011, the Indiana Court of Appeals opined that Indiana does not have a particular standard for expert testimony. 956 N.E.2d at 1127. On appeal, the Supreme Court of Indiana applauded the Appeals Court’s analysis with respect to the expert testimony and reversed on other grounds. *Alsheik v. Guerrero (Alsheik II)*, 979 N.E.2d 151, 153–54 (Ind. 2012) (accepting the lower court’s analysis with respect to expert testimony). Thus the rule articulated in *Alsheik I* is the governing law of Indiana state courts. *Alsheik II*, 979 N.E.2d at 153. Instead of adhering to a malleable or inflexible rule, judges in Indiana are told to use their gatekeeping capacities to avoid arduous processes in the lower courts. *Alsheik I*, 956 N.E.2d at 1125.

¹¹³ See *infra* notes 115–119 and accompanying text.

¹¹⁴ See *infra* notes 120–129 and accompanying text.

¹¹⁵ Heather G. Hamilton, Note, *The Movement from Frye to Daubert: Where Do the States Stand?*, 38 JURIMETRICS 201, 209 (1998).

¹¹⁶ *Frye*, 293 F. at 1014. In doing so, the court articulated a standard of admissibility that would be used by state and federal courts for nearly seventy years. *Daubert*, 509 U.S. at 579. In fact, even though *Daubert* has now overturned the standard of *Frye* in federal cases, in state family law courts, *Frye* is still the governing law in the District of Columbia, California, Illinois, Maryland, New Jersey, New York, Pennsylvania, and Washington. MATTHIESEN, WICKERT & LEHRER, S.C., *supra* note 111, at 3–8. Hawaii also uses the *Frye* test to determine admissibility, but requires that the expert meet the evidentiary standards laid out in Hawaii Rules of Evidence 702 and 703 as well. *State v. Montalbo*, 828 P.2d 1274, 1280–81 (Haw. 1992).

In 1923, in *Frye v. United States*, the Supreme Court heard challenges to an expert’s methodology. 293 F. at 1013. Defendant *Frye* was subjected to a lie-detector test that measured his systolic blood pressure, allegedly to show that he was lying. *Id.* Defendant’s counsel objected to the admission of the systolic blood pressure test, but the objection was overruled. *Id.* at 1014. Defendant was convicted of murder, and he appealed to the D.C. Circuit. *Id.* The court overturned the conviction, holding that a systolic blood pressure deception test had not gained general acceptance and thus was not admissible. *Id.*

¹¹⁷ See, e.g., M.A. v. A.I., No. A-4021-11T1, 2014 N.J. Super. Unpub. LEXIS 2887, at *4 (Super. Ct. App. Div. Dec. 15, 2014) (listing the variety of experts who came forward to testify in the *Ionescu* case); Anjelica Cappellino, *Admitting Expert Testimony Under the Frye Standard: The Ultimate Guide*, EXPERT INST. (June 25, 2020), <https://www.expertinstitute.com/resources/insights/admitting-expert-testimony-under-the-frye-standard-the-ultimate-guide/> [<https://perma.cc/GSL4-CG72>] (providing an overview of the ways in which an expert’s theoretical framework can be shown to have attained “general acceptance”). General acceptance can be shown “by surveying scientific publications, judicial decisions, or practical applications, or by presenting testimony from scientists as to the attitudes of their fellow scientists.” CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 203.1 (Robert P. Mosteller et al. eds., 4th ed. 1992), Westlaw (emphasis added) (citations omitted).

reliability of the science at issue.¹¹⁸ State courts choosing to adhere to *Frye* have done so largely because of their hesitation in requiring trial court judges to make determinations about whether something is scientifically acceptable or not.¹¹⁹

2. The *Daubert* Standard for the Admissibility of Expert Testimony

The *Daubert* standard is a more flexible test than *Frye*.¹²⁰ In 1992, the Supreme Court decided in *Daubert* that the Federal Rules of Evidence superseded *Frye*, and the Court generated a multifactorial test for the admissibility of expert testimony.¹²¹ Relevant to the *Daubert* case was Federal Rule of Evidence 702, which governs expert testimony and requires that such evidence help the trier of fact.¹²²

The Court ultimately held that Rule 702 superseded the general acceptance test articulated in *Frye*.¹²³ To be admissible under *Daubert*, a court should consider whether the theory: (1) is testable; (2) has been subject to peer review and publication; (3) has a known or potential rate of error; and (4) has achieved general acceptance in the relevant scientific community.¹²⁴ The ex-

¹¹⁸ See Hamilton, *supra* note 115, at 204 (explaining that the ease at which the *Frye* test can be administered emphasizes the validity of a scientific method).

¹¹⁹ See *State v. Copeland*, 922 P.2d 1304, 1314–15 (Wash. 1996) (highlighting the difficulty judges face when evaluating testimony that is far beyond their own knowledge and experience); see also Daniel E. Fisher, Note, *Daubert v. Merrell Dow Pharmaceuticals: The Supreme Court Gives Federal Judges the Keys to the Gate of Admissibility of Expert Scientific Testimony*, 39 S.D. L. REV. 141, 155 (1994) (noting that district court judges are often given responsibility and authority beyond the knowledge and abilities of the court in many cases); Hamilton, *supra* note 115, at 204 (listing five reasons that the *Frye* test is particularly helpful to a trial court). Legal scholars consider the *Frye* test to be far more conservative than the *Daubert* standard. 1 SCIENTIFIC EVIDENCE § 1.06, Lexis (6th ed. 2020).

¹²⁰ 1 SCIENTIFIC EVIDENCE § 1.09 (“There is much language present in the *Daubert* opinion that points to a relaxed standard.”); Hamilton, *supra* note 115, at 209.

¹²¹ *Daubert*, 509 U.S. at 579. In a product liability suit, the plaintiffs wanted to have an expert testify, but the expert’s methodology did not satisfy the *Frye* test. *Id.* The plaintiffs asserted that the defendant’s drug, Bendectin, had caused severe birth defects in children and wanted the court to admit testimony of experts who tested carcinogens *in vitro* and *in vivo*. *Id.* at 582. At the time, the *Frye* test had been debated in scope and application. *Id.* at 585–86 (describing the controversy surrounding the *Frye* decision).

¹²² FED. R. EVID. 702(a).

¹²³ *Daubert*, 509 U.S. at 588. The U.S. Supreme Court reasoned that, because there was no mention of general acceptance or *Frye* in Rule 702 itself, it was clear that the drafters of the Federal Rules of Evidence did not want to incorporate the general acceptance test. *Id.* at 589. The Advisory Committee Notes accompanying Rule 702 also noted that the Committee did incorporate the holding of *Daubert* in the 2000 Amendment. FED. R. EVID. 702 advisory committee’s note to 2000 amendment.

¹²⁴ *Daubert*, 509 U.S. at 593–94. In making its new standard, the *Daubert* Court illustrated that expert testimony must meet Federal Rule of Evidence 104(a), requiring the testimony be both scientific knowledge and helpful in determining a fact. *Id.* at 592. These factors, although related to Rule 702, are actually addressing preliminary issues under Rule 104(a). *Id.* In deciding that testability is important to an inquiry of admissibility, the Court demonstrated that modern science is based on testing and modifying hypotheses. *Id.* at 593. Peer review and publication are similarly indicative of modern science, though the Court recognized that some theories are unlikely to be published because

amination under the multifactorial *Daubert* test is fluid; a theory need not meet all of these articulated requirements to be admissible under Rule 702.¹²⁵

In applying and analyzing the *Daubert* factors, federal courts have highlighted the importance of a trial judge's "gatekeeping" function in that judges must determine whether the testimony is both reliable and relevant.¹²⁶ As such, the trial judges have great discretion when deciding whether to admit evidence under *Daubert*.¹²⁷ State courts that have adopted these factors have also highlighted their flexibility.¹²⁸ Nonetheless, these courts still require the basis of expert testimony to have some foundation in science.¹²⁹

II. HOW STATE COURTS TREAT PARENTAL ALIENATION AND PARENTAL ALIENATION SYNDROME

Because of their varying evidentiary standards, different state courts have addressed questions surrounding the admissibility of expert testimony related to parental alienation syndrome and parental alienation in a variety of ways.¹³⁰

they are too new or too niche. *Id.* As a result, the Court recognized that publication and peer review are relevant but are not dispositive to admissibility. *Id.* at 593–94. The Court also noted that the error rate can indicate the reliability of a particular method, as can a theory's general acceptance. *Id.* In considering widespread acceptance of a theory, the Court said that acceptance can be helpful but does not explicitly permit admissibility. *Id.* at 594–95.

¹²⁵ See *id.* at 592–94 ("The inquiry envisioned by Rule 702 is, we emphasize, a flexible one."); *id.* (highlighting the importance of the newly relaxed requirements for expert testimony).

¹²⁶ See, e.g., *Thorpe v. Davol, Inc.*, No. 008-463ML, 2011 U.S. Dist. LEXIS 11836, at *49, *89–91 (D.R.I. Feb. 4, 2011) (reasoning that the *Daubert* factors are helpful but not definitive nor exhaustive in determining the admissibility of certain expert testimony). Notably, not all of the *Daubert* factors apply to every proposed expert's testimony. See 2 FEDERAL EVIDENCE TACTICS § 7.02 (2020).

¹²⁷ *Thorpe*, 2011 U.S. Dist. LEXIS 11836, at *51 ("The trial court must have the same kind of latitude in deciding how to test an expert's reliability . . . as it enjoys when it decides whether that expert's relevant testimony is reliable. (emphasis omitted) (quoting *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999))). Determining whether testimony meets *Daubert*, though, can be difficult for judges who do not have an underlying expertise in the proffered testimony or scientific training. See 2 FEDERAL EVIDENCE PRACTICE GUIDE § 11.18 (updated March 2021).

¹²⁸ See, e.g., *Miller v. Eldridge*, 146 S.W.3d 909, 919 (Ky. 2004) (criticizing the trial court for applying too mechanistic of a methodology in applying the *Daubert* factors). For example, in a 2004 case, *Miller v. Eldridge*, the Kentucky Supreme Court opined that the problems in the plaintiff's expert's methodology—his qualifications, his use of science, and his application of his methodology to the facts of the case—were "fertile ground for a robust cross-examination" but still were not a reason to exclude the testimony altogether. *Id.* at 922.

¹²⁹ See *Kemp v. State*, 280 So. 3d 81, 88–91 (Fla. Dist. Ct. App. 2019) (holding that a so-called expert's methodology of eyeballing the shape of crash damage on a vehicle did not come from a solid foundation in science); see also *Miller*, 146 S.W.3d at 922 (warning of the "pseudoscientific quackery" that *Daubert* is intended to keep out of a trial).

¹³⁰ See *infra* notes 133–158 and accompanying text. Many appellate courts have also declined to address the admissibility of parental alienation syndrome and parental alienation because the issues were not properly preserved for appeal. E.g., *Grove v. Grove*, 386 S.W.3d 603, 606 (denying one party a *Daubert* hearing because the appellant failed to preserve the evidentiary issue for appeal). Similarly, the Illinois Supreme Court in 2004 declined to address the admissibility issue by holding

Section A of this Part discusses how and why courts have allowed testimony regarding parental alienation.¹³¹ Section B then highlights the reasons that courts have excluded such evidence.¹³²

A. Embracing the Rejection: When States Accept Evidence of Parental Alienation Syndrome and Parental Alienation in Family Court

Some states allow testimony about both parental alienation syndrome and parental alienation into the courtroom with little hesitation.¹³³ For instance, New York, which employs the *Frye v. United States* test for admissibility of expert evidence, has a relatively long history of recognizing parental alienation in its family courtrooms.¹³⁴ The concept was first introduced to New York State courts in 1991 when a parent was accused and found guilty of programming a child to make a false accusation of sexual abuse.¹³⁵ As parental alienation syndrome and parental alienation continued to arise in New York cases, the state courts began to require evidence that a party intentionally engaged in alienating behaviors solely for the purpose of programming the child.¹³⁶

that the testimony about parental alienation syndrome was not the basis for the lower court's ruling in *In re Marriage of de Bates*, 819 N.E.2d 714, 731 (Ill. 2004).

¹³¹ See *infra* notes 133–142 and accompanying text.

¹³² See *infra* notes 143–158 and accompanying text.

¹³³ See *infra* notes 133–142 and accompanying text (outlining the practices of several New York and Connecticut courts, which often admit testimony of both concepts).

¹³⁴ See *J.F. v. D.F.*, No. 2012/01795, 2018 N.Y. Misc. LEXIS 5991, at *9–22 (Sup. Ct. Dec. 6, 2018) (providing a historical overview of parental alienation in New York).

¹³⁵ *In re Karen B. v. Clyde M.*, 574 N.Y.S.2d 267, 271–72 (Fam. Ct. 1991), *aff'd sub nom. Karen PP v. Clyde QQ*, 602 N.Y.S.2d 709, 709 (App. Div. 1993). In 1991, the Fulton County Family Court held that evidence of parental alienation syndrome was admissible when a mother accused a child's father of sexually assaulting the child in *In re Karen B. v. Clyde M.* 574 N.Y.S.2d at 268. According to the mother, the child disclosed sexual abuse in 1990. *Id.* The mother told a family friend who then spoke to the child and called Family Services in New York. *Id.* The child was interviewed by a series of social workers who ultimately determined that the child, Mandi, was not sexually abused by her father. *Id.* at 270. In rendering its decision, the Family Court referred to the works of Gardner to explain why a child may lie about sexual abuse. *Id.* at 271–72. Though the court did not explicitly state that Mandi was suffering from parental alienation syndrome, it did describe the programming and brainwashing that the child experienced, blaming her mother. *Id.* at 272. Consequently, the court modified the visitation agreement and removed custody of the child from her mother, and granted custody to Mandi's father. *Id.*

¹³⁶ *E.g., In re Smith v. Bombard*, 714 N.Y.S.2d 336, 338 (App. Div. 2002) (stating on appeal that the father's argument that the mother made statements about him for the "sole purpose" of "intentionally" alienating the child was inconsistent with the trial record). In 2002, a New York appeals court held, in *In re Smith v. Bombard*, that a father had not successfully demonstrated evidence of parental alienation syndrome to justify his refusal to pay child support. *Id.*

Another New York court even suggested that parental alienation syndrome deserved a *Frye* hearing. See *Zafran v. Zafran (Zafran I)*, 740 N.Y.S.2d 596, 599–600 (Sup. Ct. 2002) (granting a motion for a *Frye* hearing on parental alienation syndrome), *aff'd*, 761 N.Y.S.2d 317 (App. Div. 2003). In 2002, in *Zafran I*, a New York trial court examined, as a matter of first impression, whether parental alienation syndrome should be admissible as expert testimony. *Id.* at 600. At the time, the parties' two sons were exclusively residing with the father and had no contact with their mother, and the parties'

One New York trial court, seeking to clarify what is necessary for admission of parental alienation testimony, drew a comparison with the tort of intentional infliction of emotional distress.¹³⁷ When analyzed from this lens, parental alienation then requires that the alleged alienating conduct: (1) be directed by the favored parent, without any other legitimate justification; (2) be performed with the intention of damaging the reputation of the other parent in the child's eyes or disregarding a substantial possibility of causing such damage; (3) proximately cause a diminished interest of the child in spending time with the non-favored parent and; (4) result in the child's refusing to spend time with the targeted parent, either in person or via other forms of communication.¹³⁸

Courts in other states have admitted expert testimony about parental alienation using the *Daubert v. Merrell Dow Pharmaceuticals, Inc.* factors.¹³⁹ For example, in 2017 in *J.H. v. J.D.*, a Delaware Family Court allowed testimony about parental alienation in a custody battle between a biological mother and an adoptive father.¹⁴⁰ In its decision, the court looked at the credentials of the testifying expert, a clinical psychologist, and said that he "offered relevant evidence based upon reliable methods."¹⁴¹

daughter resided exclusively with her mother and had no contact with her father. *Zafran v. Zafran (Zafran II)*, 761 N.Y.S.2d 317, 318–19 (App. Div. 2003) (explaining the original custody arrangement when the trial court decided the *Frye* issue). The court ultimately ordered permanent custody of the daughter to the mother, pointing to the alienating behavior of the father as the reason for the custody modification. *Id.* at 319.

¹³⁷ *J.F.*, 2018 N.Y. Misc. LEXIS 5991, at *19–21. Intentional infliction of emotional distress is a civil tort imposing liability on those who engage in offensive conduct resulting in serious emotional distress. *Howell v. N.Y. Post Co.*, 612 N.E.2d 699, 702 (N.Y. 1993). The tort in New York has four elements: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and injury; and (4) severe emotional distress. *Id.*

¹³⁸ *J.F.*, 2018 N.Y. Misc. LEXIS 5991, at *22. In creating a new "test" for parental alienation, the *J.F. v. D.F.* court rejected parental alienation as applied to the facts of the case. *Id.* at *12. The court's formal recognition of the concept, however, is significant. *Id.* at *89; see also *In re E.S. v. S.S.*, 2019 N.Y. Misc. LEXIS 1183, at *17–18 (Fam. Ct. Mar. 18, 2019) (demonstrating that New York courts have attempted to embrace parental alienation as a concept without accepting it as a syndrome).

¹³⁹ *E.g.*, *J.H. v. J.D.*, No. CN16-33191, 2017 WL 4403331, at *7 (Del. Fam. Ct. Aug. 17, 2017) (examining an expert's testimony about parental alienation using the *Daubert* factors). At no point, though, did the court explain how it actually evaluated the proposed theoretical framework, as should be required under *Daubert*. See generally *id.* (stating that testimony was admissible under *Daubert* without applying the *Daubert* factors to the expert testimony at issue). But see *Bowen v. E.I. DuPont de Nemours & Co.*, 906 A.2d 787, 795 (Del. 2006) (explaining the multifactorial test that Delaware courts must undergo when examining methodology). Instead, the court relied on the expert's testimony about "bad parenting practices" without examining the underlying theoretical framework of parental alienation. See *J.H.*, 2017 WL 4403331, at *8.

¹⁴⁰ 2017 WL 4403331, at *7.

¹⁴¹ *Id.*

Some commentators laud the decision to allow evidence of parental alienation syndrome and parental alienation into the courtroom because, they argue, it goes hand in hand with the best interest of the child standard.¹⁴²

B. Rejecting Rejection: When States Do Not Accept Evidence of Parental Alienation and Parental Alienation Syndrome in Family Court

Other states, though, when given the opportunity to hear testimony about parental alienation syndrome and parental alienation, have rejected it.¹⁴³ For instance, several state courts have rejected both theories by using the *Frye* test for admissibility.¹⁴⁴ A New York criminal court, for example, found that parental alienation syndrome had not achieved general acceptance as required by the state's evidentiary rules.¹⁴⁵ This stands in contrast with the holding of other New York family courts with respect to whether parental alienation syndrome has achieved general acceptance in the scientific community.¹⁴⁶

Furthermore, not all family courts in New York have been willing to recognize parental alienation as a valid concept worthy of testimony in family courts.¹⁴⁷ For example, in 2017, in *In re Montoya v. Davis*, the Appellate Division of the New York Supreme Court expressed skepticism of parental alienation when it rejected a forensic evaluator's testimony about the mother's alleg-

¹⁴² E.g., Richard A. Warshak, *When Evaluators Get It Wrong: False Positive IDs and Parental Alienation*, 26 PSYCH. PUB. POL'Y & L. 54, 64 (2020) (providing suggestions for evaluators to improve research on parental alienation so that such evidence can be used more frequently in the courtroom). See generally Schwartz, *supra* note 5 (arguing that parental alienation fits within or should be incorporated into the best interest of the child standard). One student Note, cited by several state courts, even suggested that family law is the best legal space to address parental alienation. *Id.* at 826–29; see, e.g., *Baker v. Jefferson*, No. B279226, 2017 Cal. App. Unpub. LEXIS 7679, at *13–14 (Nov. 7, 2017) (citing Schwartz, *supra* note 5, as evidence that family court is the proper venue for parental alienation); *Martínez v. Vega*, No. KLAN201800835, 2019 PR App. LEXIS 1479, at *44 (Ct. App. May 31, 2019) (referencing Schwartz, *supra* note 5, to draw a parallel to jurisdictions where parental alienation is sometimes used as a tort). The student author suggests that the best interest standard should explicitly bar a parent from engaging in parental alienation. Schwartz, *supra* note 5, at 833–36. The author believes that doing so will be a preventative way to address the problem of parental alienation. *Id.* at 833–34.

¹⁴³ See *infra* notes 143–158 and accompanying text; see also, e.g., *Traux v. Traux*, 874 P.2d 10, 11 (Nev. 1994) (upholding a trial court's decision to reject testimony about parental alienation syndrome). For example, in 1994 in *Traux v. Traux*, the Nevada Supreme Court highlighted the discretion of the family court mediator to determine what testimony was credible. *Id.* It did so after the report of a court-appointed special advocate and a third expert testified that there was actual parental abuse by the non-custodial parent and opined that there was no evidence of parental alienation syndrome. *Id.* Because two experts disagreed with the opinion of one expert arguing for parental alienation syndrome, the court felt comfortable rejecting that testimony. *Id.*

¹⁴⁴ E.g., *People v. Fortin*, 706 N.Y.S.2d 611, 613–14 (Nassau Cnty. Ct. 2000).

¹⁴⁵ *Id.*

¹⁴⁶ Compare *id.* (barring parental alienation syndrome testimony), with *Zafran v. Zafran*, 740 N.Y.S.2d 596, 600 (Sup. Ct. 2002) (allowing consideration of parental alienation syndrome testimony), *aff'd*, 761 N.Y.S.2d 317 (App. Div. 2003).

¹⁴⁷ E.g., *In re Montoya v. Davis*, 66 N.Y.S.3d 350, 353 (App. Div. 2017).

edly problematic alienating behavior.¹⁴⁸ In so doing, the court indicated that parental alienation had not received “general[] accept[ance]” in the scientific community, as required under *Frye*, and that this was demonstrated in part by the fact that it had not been accepted by the APA’s *DSM-5*.¹⁴⁹

Some *Daubert* states have also rejected expert testimony about parental alienation syndrome and parental alienation.¹⁵⁰ For example, in 2012, the Connecticut Supreme Court in *Mastrangelo v. Mastrangelo* conducted a hearing to examine testimony about parental alienation syndrome and parental alienation.¹⁵¹ Two experts testified, and although both agreed that parental alienation may be a behavior of one parent, one expert staunchly advocated for parental alienation syndrome, and one expert strongly denied the existence of the syndrome.¹⁵² Because the experts were not in disagreement about parental alienation’s existence as a phenomenon, the *Mastrangelo* court did not examine the issue, but it did conduct a hearing on the admissibility of parental alienation syndrome evidence.¹⁵³ Furthermore, because the theory had been “soundly rejected” by many in the scientific and legal fields, the Connecticut court held that parental alienation syndrome did not pass the state’s version of the *Daubert* test.¹⁵⁴

Legal scholars, too, have been critical of the admissibility of testimony about parental alienation.¹⁵⁵ These critics accuse the theory of being a pseudo-science used by professionals and abusive parents to undermine abuse allega-

¹⁴⁸ *Id.* In discrediting the report of the forensic evaluator, the *Montoya v. Davis* court, in 2017, found that the evaluator had a strong bias toward the father. *Id.* at 353–54. For example, the evaluator repeatedly denigrated the mother without cause but praised the father on multiple occasions. *Id.* at 353. The evaluator recommended a change in custody from the mother to the father because of parental alienation. *Id.* at 354. This decision was ultimately overturned on appeal. *Id.* at 358–59 (modifying the parenting schedule to return custody of the child to the mother with visitation rights to the father).

¹⁴⁹ *Id.* at 353 n.5 (“[T]he Court is concerned about the forensic evaluator having been deemed an expert in ‘parental alienation,’ which is not a diagnosis included in the Fifth Edition of the *Diagnostic and Statistical Manual of Mental Disorders*.”). The court also pointed out that parental alienation has been explicitly rejected in the New York criminal justice system. *Id.*; see also *Fortin*, 874 P.2d at 613–14 (applying the *Frye* test to parental alienation syndrome and determining that it did not meet the standard for admissibility).

¹⁵⁰ *E.g.*, *Mastrangelo v. Mastrangelo*, No. NNHFA054012782S, 2012 WL 6901161, at *9 (Conn. Super. Ct. Dec. 20, 2012).

¹⁵¹ *Id.* at *2.

¹⁵² *Id.* at *5–6.

¹⁵³ *Id.* at *8.

¹⁵⁴ *Id.* at *8–9.

¹⁵⁵ See generally Meier, *supra* note 16; see also Emmaline Campbell, Note, *How Domestic Violence Batterers Use Court Proceedings in Family Courts to Abuse Victims, and How Courts Can Put a Stop to It*, 24 UCLA WOMEN’S L.J. 41, 46–47 (2017) (suggesting that parental alienation is still used in family courts despite the fact that it has generally been discredited by the scientific community).

tions.¹⁵⁶ A recent study found that courts were less likely to credit abuse allegations made by women against men when the man raised parental alienation as a defense.¹⁵⁷ Critics are particularly concerned about the use of parental alienation against survivors of domestic violence and encourage courts to reject parental alienation as a valid concept for testimony.¹⁵⁸

III. A CRITICAL ANALYSIS OF THE EVIDENTIARY STANDARDS FOR ADMISSIBILITY OF PARENTAL ALIENATION

With an understanding of how state courts have handled parental alienation in the past, this Part employs a critical analysis of the admissibility of parental alienation as a concept.¹⁵⁹ Because parental alienation is a more liberal and recent construction of parental alienation syndrome, this Part assumes that if parental alienation cannot survive evidentiary scrutiny, nor can the syndrome.¹⁶⁰ Section A of this Part examines why parental alienation, if allowed, should always require expert testimony.¹⁶¹ Section B then addresses the admissibility of such expert testimony under the *Frye v. United States* and *Daubert v. Merrell Dow Pharmaceuticals, Inc.* standards.¹⁶² Section C highlights the public policy reasons that the term “parental alienation” and the related concepts should be excluded from family court discourse altogether.¹⁶³

A. Courts Should Require Expert Testimony in Cases Involving Parental Alienation

The majority of family law courts, similar to Federal Rule of Evidence 702(a), require that expert testimony be helpful to the factfinder.¹⁶⁴ With paren-

¹⁵⁶ JOAN S. MEIER ET AL., GEO. WASH. UNIV. L. SCH. PUB. L. RSCH. & GEO. WASH. UNIV. LEGAL STUDS. RSCH., PAPER NO. 2019-56, CHILD CUSTODY OUTCOMES IN CASES INVOLVING PARENTAL ALIENATION AND ABUSE ALLEGATIONS 3 (2019), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2712&context=faculty_publications [<https://perma.cc/CAU5-HFEM>].

¹⁵⁷ *Id.* at 13–14. This study found that courts were more likely to discredit child abuse and partner abuse when men raised parental alienation cross-claims against women. *Id.* Courts were likely to credit allegations of domestic abuse without parental alienation in only 45% of cases; with parental alienation, this percentage was even lower. *Id.* at 12–14.

¹⁵⁸ Campbell, *supra* note 155, at 46–47 (arguing that parental alienation is a means for batterers to manipulate the courts and hold against domestic violence survivors). This student Note completely rejects the concept of parental alienation as “discredited.” *Id.* at 47.

¹⁵⁹ See *infra* notes 160–223 and accompanying text.

¹⁶⁰ See *infra* notes 160–223 and accompanying text.

¹⁶¹ See *infra* notes 164–171 and accompanying text.

¹⁶² See *infra* notes 172–183 and accompanying text.

¹⁶³ See *infra* notes 210–223 and accompanying text.

¹⁶⁴ See, e.g., FED. R. EVID. 702(a) (articulating that an expert may testify to her opinion if the testimony is helpful to the trier of fact); 7.01 *Opinion of Expert Witness*, N.Y. UNIFIED CT. SYS. GUIDE TO N.Y. EVIDENCE, <https://www.nycourts.gov/JUDGES/evidence/7-OPINION/ARTICLE-7->

tal alienation, proponents suggest that the child's rejection behavior is irrational, and often inconsistent with the child's actual experience and relationship with the accused parent.¹⁶⁵ Consequently, the insight that an "expert" could provide on a child's behavior would absolutely be helpful to a fact-finding judge.¹⁶⁶ If the testimony is simply about the alienating parent's behavior, then an expert is not necessary, but the term "parental alienation" should not be used because it comes with several loaded and varying definitions.¹⁶⁷

Parental alienation advocates generally agree with the proposition that the testimony does, in fact, require an expert.¹⁶⁸ Frequently, therefore, judges acting without the guidance of psychologists and other experts must make a decision for which they are unqualified.¹⁶⁹ Consideration of expert testimony would alleviate some of the responsibility of judges by putting the responsibility of interpreting and explaining the "scientific" evidence on the proposed expert.¹⁷⁰ Just because certain testimony should be considered in the context of an expert, it does not make it admissible in a family court.¹⁷¹

RULES.pdf [https://perma.cc/44S9-EPLV] (requiring evidence to help the factfinder in subsection (1)(b)).

¹⁶⁵ GOTTLIEB, *supra* note 24, at 217 (stating that attorneys and judges need the testimony of experts when it comes to parental alienation). Gottlieb characterizes parental alienation syndrome as "baffling" to the legal system. *Id.* One court employee even told Gottlieb that mental health expert testimony is crucial to family law cases. *Id.* Other court employees agreed that expert testimony can inform judges of the seemingly irrational behavior of children. *Id.* at 217–47 (providing a series of anecdotes from court employees, mental health practitioners, and lawyers about cases where testimony about parental alienation was important to the outcome of the legal case).

¹⁶⁶ *Id.* at 217.

¹⁶⁷ BERNET, *supra* note 7, at 3–7 (explaining the definitional inconsistencies that advocates of parental alienation syndrome and parental alienation have used since the concepts' inception); *id.* at 5 ("We are explaining these definitions in detail because we realize that some authors have given other meanings to 'parental alienation' . . ."). Some scholars, Bernet notes, have used parental alienation to describe the parent and have used parental alienation syndrome to describe the child. *Id.* at 5. Others have used parental alienation to describe any relational problem, justified or not, between the parent and child, and used parental alienation syndrome to describe the unjustified rejection of the parent. *Id.* Because of the definitional inconsistency, Bernet proposed his own definition for "parental alienation disorder" to clarify any confusion. *Id.* When there is definitional inconsistency among mental health professionals, certainly there will be confusion among judges who lack the nuanced understanding of mental disorders. *See* GOTTLIEB, *supra* note 24, at 218 ("If the mental health professional is unaware of what the [parental alienation syndrome] is, then how is . . . the judge going to be made aware of its presence . . .?") (quoting an interview with a family law attorney)). *But see In re Suzanne QQ. v. Ben RR.*, 75 N.Y.S.3d 697, 699 (App. Div. 2018) (holding that a trial court need not admit an expert's testimony to consider the concept of parental alienation).

¹⁶⁸ *See* GOTTLIEB, *supra* note 24, at 218.

¹⁶⁹ *See* *Floray v. State*, 720 A.2d 1132, 1135 (Del. 1998) (highlighting that expert testimony is useful, especially when a child behaves in a way that is inconsistent with a factfinder's expectations).

¹⁷⁰ GOTTLIEB, *supra* note 24, at 218–19.

¹⁷¹ *See infra* notes 174–223 and accompanying text (discussing the inadmissibility of parental alienation under different state rules for the admission of expert testimony). For example, handwriting analysis is often influential in criminal cases. *See, e.g., Pettus v. United States*, 37 A.3d 213, 215 (D.C. Cir. 2012) (describing how handwriting testimony assisted the jury in convicting a defendant of

B. Expert Testimony About Parental Alienation Is Not Admissible Under the Most Common Expert Testimony Standards

In fact, as currently proposed, parental alienation is not admissible under *Daubert* or *Frye*, and parental alienation syndrome, as a more controversial version of parental alienation, is certainly not either.¹⁷² Subsection 1 analyzes

felony-murder, sexual assault, and theft). Handwriting experts, though, are controversial. Mark Page et al., *Forensic Identification Science Evidence Since Daubert: Part II—Judicial Reasoning in Decisions to Exclude Forensic Identification Evidence on Grounds of Reliability*, 56 J. FORENSIC SCIS. 913, 914 (2011) (“From examination of the 81 cases where forensic identification science [including handwriting testimony] was excluded, 50 of these cited a reason characterized as one of ‘reliability.’”). Courts that do not accept handwriting experts disregard how helpful the testimony would be and focus on the theoretical framework itself. See, e.g., *Almeciga v. Ctr. for Investigative Reporting, Inc.*, 185 F. Supp. 3d 401, 407–08, 420 (S.D.N.Y. 2016) (explaining that “handwriting analysis in general is unlikely to meet the admissibility requirements of Federal Rule of Evidence 702” and providing four reasons that such analysis fails the *Daubert* inquiry).

¹⁷² See *infra* notes 174–183 and accompanying text. Because parental alienation is a more liberal and recent construction of parental alienation syndrome, this Part assumes that if parental alienation cannot survive evidentiary scrutiny, neither can the syndrome. See *supra* notes 160–171 and accompanying text; *infra* notes 173–223 and accompanying text.

Parental alienation is also not admissible when using state-generated rules for the admission of expert testimony. See *Alsheik v. Guerrero*, 956 N.E.2d 1115, 1127 (Ind. Ct. App. 2011), *rev'd on other grounds*, 979 N.E.2d 151 (Ind. 2012); *State v. Mack*, 292 N.W.2d 764, 772 (Minn. 1980). Minnesota, for example, uses a particularly stringent standard for expert testimony. *Mack*, 292 N.W.2d at 772. In *State v. Mack*, decided by the Supreme Court of Minnesota in 1980, the court added an additional threshold to the already more stringent *Frye* standard. *Id.* This creates a rule that is even more critical of an expert’s methodology. *Id.*; see *Alter*, *supra* note 112, at 659 (explaining that, under the Minnesota test, a theory must be generally accepted and have accuracy with respect to the fact pattern to which it is being applied). Under the *Frye-Mack* test, individuals proposing an expert must meet two prongs: (1) evidence must be generally accepted in its relevant scientific community and (2) the theory must have foundational reliability. See *State v. Moore*, 458 N.W.2d 90, 97–98 (Minn. 1990) (explaining the *Frye-Mack* test in greater detail); see also *Alter*, *supra* note 112, at 659. As discussed in the general acceptance analysis under *Frye*, parental alienation does not meet the first prong of the *Frye-Mack* test. See *infra* notes 174–183 and accompanying text. Even ignoring the general acceptance prong, testimony on parental alienation does not have foundational reliability, as required by this test. *Doe v. Archdiocese of St. Paul & Minneapolis*, 17 N.W.2d 150, 168–71 (Minn. 2012). Minnesota courts have held that a theory has foundational reliability when it is found in a diagnostic tool. See *Rush v. Jostock*, 710 N.W.2d 570, 575 (Minn. Ct. App. 2006) (holding that a test was reliable because it was present in the *DSM-IV*). For example, in 2006 in *Rush v. Jostock*, a Minnesota court of appeals held that an orthopedist could testify to a diagnosis present in the *DSM-IV-TR* because of his medical experience and the reliability of the diagnostic tool. *Id.* at 573–77. More recently, Minnesota has defined foundational reliability as based upon reliable scientific principles and independent validation. *Doe*, 817 N.W.2d at 168–71 (holding that a theory of repressed memories did not meet the *Frye-Mack* standard). The theory that memories of trauma are repressed to the point of inaccessibility is controversial, similar to parental alienation. See David J. Ley, *Forget Me Not: The Persistent Myth of Repressed Memories*, PSYCH. TODAY (Oct. 6, 2019), <https://www.psychologytoday.com/us/blog/women-who-stray/201910/forget-me-not-the-persistent-myth-repressed-memories> [<https://perma.cc/L5F2-ZHQ8>] (discussing the controversy surrounding repressed memories). In the 1990s, therapists began encouraging people to tap into their “[r]epressed [m]emories,” resulting in numerous accusations of sexual abuse and Satanic cults. *Id.* The FBI, though, could find no evidence of organized cults of Satanic child abusers, and memory researchers found that the techniques used to uncover “[r]epressed [m]emories” also worked very well to implant false memories of things that never happened. *Id.* Pa-

parental alienation under the *Frye* standard, and subsection 2 looks at the concept under the multifactor test articulated in *Daubert*.¹⁷³

1. A Lack of General Acceptance: A Lack of Admissibility

Parental alienation is not admissible under the *Frye* standard because it fails the “general admissibility” test.¹⁷⁴ When examining whether expert evidence is admissible under the *Frye* standard, the question is relatively simple: has the proposed theory achieved “general acceptance” in the relevant professional community?¹⁷⁵ This test questions the underlying scientific principles that support an expert’s conclusion; it does not address the conclusion itself.¹⁷⁶ The purpose of using the *Frye* standard to evaluate evidence is to ensure that courts exclude a method that purports to be certain when that evidence is new, novel, or invalid.¹⁷⁷

Parental alienation has not achieved general acceptance in the mental health community and, therefore, should not be the basis for admissible expert testimony under *Frye*.¹⁷⁸ It draws criticism from the scientific and legal communities alike.¹⁷⁹ Notably, the *DSM-5* rejected parental alienation despite proposals from the theory’s supporters.¹⁸⁰ Although the *DSM-5* is not the exclusive indicator of general acceptance in the mental health field, its rejection of parental alienation is significant, particularly because the newest version of the diagnostic tool made other significant changes to diagnoses to reflect gender biases.¹⁸¹ Furthermore,

rental alienation is not found in any diagnostic tools, nor is it based on scientific hypotheses or been subjected consistently to peer review. See Warshak, *supra* note 142, at 55 (calling for more extensive research into parental alienation).

¹⁷³ See *infra* notes 184–209 and accompanying text.

¹⁷⁴ See *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); *infra* notes 175–183 and accompanying text.

¹⁷⁵ *Frye*, 293 F. at 1014.

¹⁷⁶ *Id.*

¹⁷⁷ *People v. New*, 2014 IL 116306, ¶ 26 (explaining that *Frye* is intended to protect the jury from unhelpful and invalid scientific testimony). The *DSM* itself also cautions that psychiatry is not an exact science. *DSM-5*, *supra* note 13, at 25.

¹⁷⁸ See *Frye*, 293 F. at 1014 (opining that scientific evidence is not admissible in a court unless it has achieved general acceptance in the relevant field).

¹⁷⁹ See Schwartz, *supra* note 5, at 806–14 (providing the history and controversy of parental alienation syndrome and parental alienation); Wood, *supra* note 20, at 1369–77 (summarizing the controversy surrounding parental alienation syndrome). Compare MEIER ET AL., *supra* note 156, at 3 (critiquing parental alienation from a legal and feminist perspective), and Walker & Shapiro, *supra* note 74, at 267–68 (critiquing parental alienation disorder from a mental health perspective), with BERNET, *supra* note 7, at 9–10 (articulating twenty reasons that parental alienation should be included in the *DSM-5* from a mental health perspective), and Schwartz, *supra* note 5, at 840 (advocating for parental alienation from a legal perspective).

¹⁸⁰ See APA Board of Trustees Approves *DSM-5*, *supra* note 6.

¹⁸¹ *Id.* The *DSM-5* made significant changes to its structure and diagnoses. See, e.g., *DSM-5*, *supra* note 13, at 451–59 (removing “gender dysphoria,” where one’s experienced gender does not match the gender attributed to that person by others, as a mental health diagnosis); *id.* at 50–59 (com-

no professional organization whatsoever has recognized the existence of parental alienation.¹⁸² Consequently, parental alienation is not admissible under *Frye* because it has not achieved general acceptance in the scientific community.¹⁸³

2. Under *Daubert*

Under the *Daubert* standard, too, parental alienation testimony is inadmissible.¹⁸⁴ When applying the *Daubert* standard, judges must consider a variety of factors to determine the admissibility of an expert's methodology.¹⁸⁵ The first *Daubert* factor concerns testability.¹⁸⁶ Proponents of the theory have not designed studies to measure the validity and salience of parental alienation.¹⁸⁷ Instead, theorists rely on surveys and personal experiences, thus making parental alienation virtually untestable.¹⁸⁸

pounding three former diagnoses—Autistic Disorder, Asperger's Disorder, and Pervasive Developmental Disorder not Otherwise Specified—into one diagnosis, Autism Spectrum Disorder); *see also* *DSM-5, AUTISM SOCIETY*, <https://www.autism-society.org/what-is/diagnosis/diagnostic-classifications/> [<https://perma.cc/R5QL-9RUF>] (explaining that the *DSM-5* redefined the diagnosis of autism).

¹⁸² *Mastrangelo v. Mastrangelo*, No. NNHFA054012782S, 2012 WL 6901161, at *7 (Conn. Super. Ct. Dec. 20, 2012) (recounting Gardner's concession that parental alienation syndrome had not been generally accepted by the scientific community).

¹⁸³ *See, e.g., People v. Fortin*, 706 N.Y.S.2d 611, 614 (Nassau Cnty. Ct. 2000) (holding that parental alienation syndrome does not meet the standard laid out in *Frye*, and thus testimony regarding the syndrome should not have been allowed in a criminal trial). Although *People v. Fortin*, decided in 2000 by a New York county court, is a criminal case addressing parental alienation syndrome and not parental alienation, its holding should be extended in *Frye* states to cover parental alienation as well. *See id.* Parental alienation stems from the arguments of Gardner, whose proposal of the theory was deeply tied to his own belief that the increase in child accusations of sexual abuse in the context of a divorce had a "high likelihood of being false." GARDNER, *supra* note 14, at 4. As a result, it has been influenced by the agenda of Gardner, and it is difficult to extricate parental alienation from parental alienation syndrome. Meier, *supra* note 16, at 679–80 (accusing parental alienation of being a "thinly veiled instrument" for the perpetuation of parental abuse and a direct bias against mothers); *see* Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106, 141 (2002) (accusing parental alienation of being a non-existent disorder used as a tool against domestic violence survivors); Wood, *supra* note 20, at 1373–75, 1382 (citing studies that discredit Gardner's claims about sex abuse "hysteria").

¹⁸⁴ *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593–94 (1993); *infra* notes 185–209 and accompanying text.

¹⁸⁵ *See Daubert*, 509 U.S. at 593–94 (suggesting that judges consider the following, non-exhaustive factors in assessing an expert's reliability: (1) testability; (2) subjection to peer review and publication; (3) a known or potential rate of error; and, potentially, (4) general acceptance).

¹⁸⁶ *Id.* at 593.

¹⁸⁷ *See* BERNET, *supra* note 7, at 119 (acknowledging that research on parental alienation theories has been "delayed and compromised" because of definitional inconsistencies); *see also infra* note 190 and accompanying text (providing an overview of the lack of parental alienation studies published in peer-reviewed journals).

¹⁸⁸ *See* Richard A. Warshak, *Ten Parental Alienation Fallacies That Compromise Decisions in Court and in Therapy*, 46 PROF'L PSYCH.: RSCH. & PRAC. 235, 235–46 (2015) (outlining common misconceptions about parental alienation based on surveys and the author's professional experience); *see also* Baker & Damall, *supra* note 39, at 61–62 (highlighting the methodological concern about the researchers' inability to differentiate between parental alienation syndrome and estrangement for legit-

Parental alienation also does not meet the second *Daubert* factor, which requires peer review, because no nationwide and representative study of the proposed diagnosis has been published in a peer-reviewed journal.¹⁸⁹ This means that no study has been conducted to assess the frequency of this alleged behavior by parents directed at children.¹⁹⁰ Peer-reviewed journals also generally do not publish research on parental alienation.¹⁹¹ Furthermore, mental health professionals cannot assert a known rate of error in parental alienation—a third *Daubert* factor—because no representative studies exist.¹⁹² Finally, the scientific community has not necessarily accepted parental alienation theories, the final factor courts should consider.¹⁹³ Based on the explicit *Daubert* factors, then, courts employing that test should not accept parental alienation testimony.¹⁹⁴

The *Daubert* Court also advised that the explicit factors provided by the Court were not the only ones that should be considered in evaluating a scientific theory.¹⁹⁵ More specifically, the *Daubert* Court cautioned against shutting

imate reasons). See generally BERNET, *supra* note 7 (explaining the reasons that parental alienation should be admitted to the *DSM-5* and *ICD-11* based on the personal experiences of practitioners).

¹⁸⁹ See Warshak, *supra* note 142, at 55 (conceding that critics have called parental alienation research “weak”).

¹⁹⁰ *Id.* Instead, proponents of parental alienation publish and cite their own research and studies. See generally GARDNER, *supra* note 14 (offering no scientific research to support his argument); Warshak, *supra* note 188, at 246–49 (referencing thirteen of the own author’s works to support the existence of parental alienation). Gardner published most of his books through Creative Therapeutics, Inc., his own publishing company. *Creative Therapeutics*, OPEN LIBR., https://openlibrary.org/publishers/Creative_Therapeutics [<https://perma.cc/7CZM-H4UA>] (listing the thirty books that Creative Therapeutics has published, all of them authored by Gardner); see RICHARD A. GARDNER, MISPERCEPTIONS VERSUS FACTS ABOUT RICHARD A. GARDNER, M.D., (June 9, 1999), <http://www.fact.on.ca/Info/pas/misperce.htm> [<https://perma.cc/U8JL-GA8N>] (acknowledging a “misperception” that Gardner publishes his books through his own company).

¹⁹¹ See Houchin et al., *supra* note 76, at 129 (pointing to a lack of peer-reviewed empirical studies on parental alienation). See generally Warshak, *supra* note 188, at 246–49. By not subjecting their research to the peer review process, parental alienation theorists miss out on meaningful critique. Wood, *supra* note 20, at 1412 n.345.

¹⁹² See Houchin et al., *supra* note 76, at 129.

¹⁹³ See *supra* notes 174–183 and accompanying text (explaining the reasons that parental alienation has not been accepted by the general scientific community and thus does not survive *Frye* scrutiny).

¹⁹⁴ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593–94 (1993) (detailing the explicit factors to be considered in evaluating expert testimony under *Daubert*).

¹⁹⁵ *Id.* at 594 (stating that the *Daubert* test is a flexible one). State courts, too, have cautioned against an overly mechanical application of these factors. *Miller v. Eldridge*, 146 S.W.3d 909, 918 (Ky. 2004) (criticizing the lower court for applying too “mechanistic” of a *Daubert* analysis because “[r]igid application of the *Daubert* factors . . . simply lumps methodologies like the ones used by [blood flow expert] in with the likes of magic and snake-oil cures simply because the methodologies are novel”). The Kentucky Supreme Court in *Miller v. Eldridge* was highly critical of the lower court’s rejection of the blood flow expert’s testimony, reasoning that the application of *Daubert* by the Kentucky Court of Appeals did not allow for the flexibility intended by the standard. *Id.* at 918–19.

out innovation in scientific methodology from the courtroom.¹⁹⁶ Therefore, it also bears consideration whether parental alienation is novel at all.¹⁹⁷ In evaluating whether parental alienation is a novel innovation, it is instructive to examine another relatively recently proposed syndrome: battered person syndrome (formerly battered woman syndrome).¹⁹⁸

Battered woman syndrome first emerged as a legal defense to explain why domestic violence victims murdered their intimate partners.¹⁹⁹ Mental health professionals and legal advocates observed numerous victims of domestic violence who had lashed out against their spouses when there seemingly was no imminent threat as a result of the trauma.²⁰⁰ It has been considered a subcategory of the post-traumatic stress disorder (PTSD) diagnosis in the *DSM* since the inception of the *DSM Fourth Edition Text Revision (DSM-IV-TR)*, the precursor to the *DSM-5*.²⁰¹ Furthermore, battered woman syndrome has been the subject of numerous peer-reviewed and representative studies in addition to case studies.²⁰²

¹⁹⁶ *Daubert*, 509 U.S. at 593–94.

¹⁹⁷ *E.g., id.* (calling for an approach that respects the novelty of some scientific theories and methodologies). Merriam Webster's Dictionary defines "innovation" as "a new idea, method, or device," and "novelty" as something "new or unusual." *Innovation*, MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/innovation> [<https://perma.cc/2MFK-WHAV>]; *Novelty*, MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/novelty> [<https://perma.cc/J9LE-3T4E>].

¹⁹⁸ *See generally* Walker, *Empirical Findings*, *supra* note 86 (providing a conceptual overview of battered woman syndrome). Battered woman syndrome is a category of PTSD under the *DSM-IV-TR* that explains that women who have experienced domestic violence engage in behaviors of "learned helplessness." *Id.* at 145 (referencing Martin Seligman's studies of learned helplessness whereby animals, when repeatedly exposed to aversive stimuli, eventually accepted the punishment and did not take steps to save themselves, even when they could). Walker's theory of battered woman syndrome built on this theory: survivors of domestic violence who were repeatedly exposed to abuse would not take steps to help themselves because they learned that acceptance ultimately resulted in a cessation of the violence. *Id.* at 145–46. In 2002, Walker's battered woman syndrome symptomology included: (1) PTSD criteria of "[r]e-experiencing the event," "[n]umbing of responsiveness," and "[h]yperarousal"; and (2) additional effects of "[d]isrupted interpersonal relationships," "[d]ifficulties with body image/somatic concerns," and "[s]exual and intimacy problems." *Id.* at 147.

¹⁹⁹ Noel Rivers-Schutte, Note, *History of the Battered Woman Syndrome—A Fallen Attempt to Redefine the Reasonable Person Standard in Domestic Violence Cases*, SETON HALL U. EREPOSITORY, 2013, at 1–5, https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1618&context=student_scholarship [<https://perma.cc/4S3U-5K9R>] (providing a history of battered woman syndrome).

²⁰⁰ Walker, *Battered Woman Syndrome*, *supra* note 86.

²⁰¹ *Id.* (stating the criteria of battered woman syndrome that have been included in the *DSM-IV-TR*). In one of her seminal works, Walker articulated how the symptoms of battered woman syndrome could be "subsumed" by a diagnosis of PTSD. LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 123–25 (1984). The *DSM-IV-TR* included the behaviors critical to Walker's definition of battered woman syndrome, including symptoms like reexperiencing "recurrent and intrusive . . . recollections [and] . . . dreams," "[p]ersistent avoidance of stimuli," including "feeling of detachment or estrangement from others," and "restricted range of affect." *DSM-5, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 468 (4th ed. text rev. 2000).

²⁰² Walker, *Battered Woman Syndrome*, *supra* note 86.

Although it has its share of critics, battered woman syndrome achieved general acceptance relatively quickly over the course of twenty years.²⁰³

In comparison, parental alienation has been a concept since 1984 and still has not achieved general acceptance in the legal or psychological community.²⁰⁴ Although the theory may have been new in the 1990s when it first was proposed in legal cases, it certainly is not now, thirty-six years later.²⁰⁵ Consequently, the theory is no longer a novel or innovative way of understanding the relationship between children and their parents.²⁰⁶

In the interest of considering other factors under *Daubert*, courts should also consider the possible ramifications of allowing expert testimony on parental alienation.²⁰⁷ Because it is often raised when there is an allegation of abuse by one parent, a finding of parental alienation is functionally saying that a child is lying about the abuse.²⁰⁸ Ignoring these allegations, or finding them non-credible on the basis of a controversial theory, puts courts at risk of becoming culpable in the perpetuation of child abuse.²⁰⁹

C. Testimony About Parental Alienation Is Also Inadmissible for Public Policy Reasons

Although there are certainly evidentiary reasons to exclude testimony about parental alienation under almost every evidentiary standard, there are

²⁰³ See Wendy McElroy, *Battered Women's Syndrome: Science or Sham*, INDEP. INST. (Oct. 28, 2002), <https://www.independent.org/news/article.asp?id=11> [<https://perma.cc/XS76-UPCR>] (suggesting that battered woman syndrome is an anti-feminist way to excuse women's behavior). Battered woman syndrome was first theorized in 1979, and by 2000, it had achieved recognition by the psychological and psychiatric community, as evidenced through its presence in the *DSM-IV-TR*. Walker, *Battered Woman Syndrome*, *supra* note 86. Battered woman syndrome has also been used in court cases in the context of self-defense and culpable negligence. See *Mott v. Stewart*, No. 98-CV-239, 2002 WL 31017646, at *6 (D. Ariz. Aug. 30, 2002) (holding that the defendant should have been allowed to bring in testimony on battered woman syndrome to negate her culpability in a child abuse case); *Pickle v. State*, 635 S.E.2d 197, 201, 203-04 (Ga. Ct. App. 2006) (holding that testimony about battered person syndrome was admissible to rebut a mens rea, or knowledge, element); *State v. Stewart*, 719 S.E.2d 876, 885 (W. Va. 2011) (allowing an expert to testify on the theory of battered woman syndrome).

²⁰⁴ See *supra* notes 174-183 and accompanying text (arguing that parental alienation has not achieved general acceptance in the psychological community).

²⁰⁵ Walker, *Empirical Findings*, *supra* note 86 (implying that battered woman syndrome is no longer a new concept).

²⁰⁶ See *id.*

²⁰⁷ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 594 (1993) (highlighting the flexibility of the *Daubert* factors); see *infra* notes 210-223 and accompanying text (pointing to the danger that comes with admission of parental alienation expert testimony).

²⁰⁸ GARDNER, *supra* note 14, at 3 (suggesting that many children lie about sex abuse because of a variety of influences inherent to a child custody dispute).

²⁰⁹ See generally MEIER ET AL., *supra* note 156 (articulating findings that parental alienation lessens the likelihood that a court will find an allegation of domestic violence or child abuse to be credible).

also public policy reasons to do so.²¹⁰ First, labelling a child with parental alienation problematizes what can be a very normal behavior.²¹¹ In the past, when a child was acting out or appeared to have a conduct disorder, mental health professionals always considered the home environment as a possible “cause” for the behavior.²¹² Under a theory of parental alienation, the focus shifts from the home and environment to the alleged mental disorder of the child.²¹³ Furthermore, diagnoses, whether from a psychologist or the court, can have a profound impact on children by stigmatizing them as mentally ill.²¹⁴ To accept parental alienation as a legitimate and applicable theory, then, may harm children more than it helps them, especially when the cause of the problematic behavior is likely complicated.²¹⁵

Second, parties often raise parental alienation in cases involving domestic violence.²¹⁶ Proponents of the theory generally agree that domestic violence in the home is an acceptable reason for rejection of one parent, but they do not begin to address how to determine when domestic violence is “real” and when it is not.²¹⁷ The proposed symptoms of parental alienation are also strikingly similar to PTSD, suggesting that perhaps parental alienation behaviors come from an exposure to trauma in the home.²¹⁸

²¹⁰ See Walker & Shapiro, *supra* note 74, at 266 (highlighting the ways in which a parental alienation diagnosis may negatively impact children). Although public policy concerns may not fit into a determination of whether a theory is valid scientific evidence, they may be instructive in deciding how helpful the testimony actually is in the first place. See *Daubert*, 509 U.S. at 592–94 (holding that the factors described in *Daubert* are not exhaustive).

²¹¹ Walker & Shapiro, *supra* note 74, at 267.

²¹² *Id.*

²¹³ *Id.*; see Kate Allsop et al., *Heterogeneity in Psychiatric Diagnostic Classification*, 279 PSYCHIATRY RSCH. 15, 21 (2019) (concluding that the *DSM-5*, in creating diagnostic categories, oversimplifies individual experiences of stress).

²¹⁴ Walker & Shapiro, *supra* note 74, at 270.

²¹⁵ *Id.* at 267–70; Craig Anne Heflinger & Stephen P. Hinshaw, *Stigma in Child and Adolescent Mental Health Services Research: Understanding Professional and Institutional Stigmatization of Youth with Mental Health Problems and Their Families*, 37 ADMIN. POL’Y MENTAL HEALTH 61, 64–67 (2010) (applying “existing stigma frameworks” to analyze the ways in which stigma surrounding child mental health diagnoses can be harmful to children and their families).

²¹⁶ Walker & Shapiro, *supra* note 74, at 272; see MEIER ET AL., *supra* note 156, at 5 (examining the relationship between domestic violence, parental alienation, and “wins” and “losses” in family court).

²¹⁷ Walker & Shapiro, *supra* note 74, at 272.

²¹⁸ *DSM-5*, *supra* note 13, at 271–74. The *DSM-5* definition of PTSD requires exposure to a trauma—such as witnessing domestic violence—and one of the following symptoms: (1) distressing memories; (2) distressing dreams; (3) flashbacks; (4) psychological distress at exposure to a resemblance of the traumatic event; or (5) physical reactions. *Id.* A child who refuses to visit a parent out of a stated fear could be demonstrating a symptom of PTSD or of parental alienation as proposed by Bernet. *Id.*; see BERNET, *supra* note 7, at app. A (explaining that a child who meets the diagnostic criteria for parental alienation disorder will avoid the parent). The treatment for the two behaviors, however, is very different. Walker & Shapiro, *supra* note 74, at 273. Parental alienation suggests that exposure to the feared parent will solve the rejection, whereas exposure can further exacerbate the symptoms of a child with PTSD. *Id.*

Finally, many consider parental alienation as a way to undercut genuine abuse allegations.²¹⁹ Parental alienation is normally raised in cases where women have accused men of being abusive, and it has a uniquely gendered component dating back to its inception by Dr. Richard Gardner, despite the gender-neutral terminology used.²²⁰ A finding that involves parental alienation often results in a change in custody, solely to the parent who has been accused of abuse.²²¹ Such changes in custody frequently are traumatic for children who already experience serious fear surrounding the rejected parent.²²² Furthermore, if the abuse allegation is true, placing the child with the abusive parent can put the child in an incredibly dangerous position.²²³

CONCLUSION

Although people can comprehend the existence of child abuse in the abstract, when confronted with a concrete accusation of abuse, it may be difficult to believe. In the context of a heated and contentious divorce where emotions are high and custody is at stake, some people will discredit these allegations of abuse because they see an incentive for a parent to lie. Parental alienation is one way to rationalize allegations of child abuse and domestic violence in a way that incorporates these “incentives.”

Attempting to better explain what he saw as an increase in unwarranted allegations of child abuse, Dr. Richard Gardner proposed parental alienation syndrome. His original theory of parental alienation syndrome, resting in part upon gender stereotypes, posited that one parent—most typically the mother—

²¹⁹ MEIER ET AL., *supra* note 156, at 3.

²²⁰ Walker & Shapiro, *supra* note 74, at 275. Feminist theorists often see parental alienation as a way to blame mothers, shifting accusations away from the father’s abuse. *Id.* Absent domestic abuse, true joint custody with shared responsibilities is preferable because it better achieves equality of the sexes. *Id.* Women seeking shared responsibility for children, then, have no reason to fabricate abuse allegations as Gardner suggested because doing so would result in sole custody. *See id.* *But see* GARDNER, *supra* note 14, at 23–24.

²²¹ *See, e.g.,* M.A. v. A.I., No. A-4021-11T1, 2014 N.J. Super. Unpub. LEXIS 2887, at *5 (Sup. Ct. App. Div. Dec. 15, 2014); *see also* Reveal, *Bitter Custody*, *supra* note 1 (describing the abuse that the Ionescu children suffered at the hands of their mother even as they were transferred to her custody).

²²² Walker & Shapiro, *supra* note 74, at 275; *see* Reveal, *Bitter Custody*, *supra* note 1 (detailing the emotional difficulty faced by Ana Ionescu and her brother due to acts of parental alienation).

²²³ *See U.S. Divorce Child Murder Data, U.S. Child Murder & Divorce: A Snapshot*, CTR. FOR JUD. EXCELLENCE, <http://www.centerforjudicialexcellence.org/cje-projects-initiatives/child-murder-data/> [<https://perma.cc/N2VR-6E3H>] (providing an overview of children murdered by their parental abusers in the context of high-conflict divorces); *see also* 58 *Children Murdered by A Parent Who Could Have Been Saved: Filicide in U.S. Family Courts: A Snapshot Released by Judicial Watchdog*, CTR. FOR JUD. EXCELLENCE (Dec. 5, 2016), <http://www.centerforjudicialexcellence.org/wp-content/uploads/2016/12/12516-Child-Murder-Release-for-website.pdf> [<https://perma.cc/MW4B-QRTV>] (examining fifty-eight cases in which courts placed children in contact with parents who ultimately murdered them).

takes steps to alienate her child from the other parent. The syndrome remains incredibly controversial even after it has undergone numerous modifications. Family courts allow expert evidence of parental alienation syndrome and its more modern iteration, parental alienation, even though there is no consensus at this time on whether these experts should be permitted to testify. Under the *Frye v. United States* and *Daubert v. Merrell Dow Pharmaceuticals, Inc.* standards, as well as state-based formulations, expert testimony regarding parental alienation does not appear to meet the test either standard requires for admissibility. Furthermore, mistaken acceptance of parental alienation carries a serious concern for the safety and well-being of children and survivors of domestic violence. As a result, the theory regarding “unjustified” rejection should, itself, be rejected by the legal community and kept out of the family courtroom once and for all.

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