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Update

Parental Alienation Syndrome: What Professionals Need to Know Part 2 of 2

By Hope Fields¹ & Erika Rivera Ragland²

Introduction

Parental Alienation Syndrome (PAS) has created obstacles for child abuse prosecutors. It is crucial for child abuse prosecutors to understand the theory of PAS, and know how to best challenge its legitimacy in court. Part 1 of this article addressed the PAS theory and its inherent flaws.³ We now turn to the courts' approaches to PAS, and propose arguments and methods to suppress this unreliable evidence.

Case Law Status

PAS has been received differently by criminal and civil courts. However, defendants draw from both civil and criminal opinions in crafting arguments for admitting PAS as scientific evidence in child abuse cases. Therefore, it is important for prosecutors to be aware of both criminal and civil law when preparing a suppression argument. PAS has been addressed in a few criminal cases and approximately fifty civil cases in courts of record.

*Criminal Case Law*⁴

In 1995, the Ohio Court of Appeals allowed evidence of PAS in a sexual abuse case.⁵ The defendant was convicted by the trial court of three counts of rape and one of sexual battery, all against his own children. The trial court allowed the defendant to present an expert who testified about PAS and the potential effects it can

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by the defense. The court did not discuss the admissibility of PAS evidence in its decision.

New York courts have consistently refused to admit evidence of PAS in criminal cases. In *People v. Loomis*⁶, the defendant, who faced charges of sexual abuse, moved the court to have the victims and their mother examined by Dr. Richard Gardner, the doctor who created and coined PAS, to determine if allegations of abuse were fabricated. The court denied defendant's motion, holding that

New York practice does not allow experts to offer an opinion on the ultimate issue of fact as to whether sexual abuse occurred. The issue is strictly reserved to the trier of fact... The defendant's expert purports to make such a determination by determining if a particular accusation has the criteria of a truthful or a false accusation.

In a later case, another New York court refused to admit PAS evidence.⁷ The court held that PAS failed to meet the Frye standard because defendant failed to show that it was generally accepted in relevant scientific communities.

California is the only other state to have discussed the admissibility of PAS in a criminal context. In an unpublished opinion earlier this year, the California Court of Appeals held that the defendant, convicted of sexual assault and lewd and lascivious acts on a child, had not been deprived of his due process rights by the trial court's refusal to allow his expert to testify regarding PAS.⁸ Among the reasons for affirming the trial court's decision was the determination that an understanding of the PAS theory was not beyond common experience and that PAS evidence is not scientific enough to meet the Kelly-Frye evidentiary standard.

Civil Case Law

Evidence of Parental Alienation Syndrome is admitted more frequently in civil cases than in criminal court. PAS evidence has been admitted in cases involving custody determinations and is usually introduced in an attempt to show that one parent, in denigrating the other parent in the presence of the child, has caused that child to express distaste and/or hatred for that other parent.⁹

States' approaches to PAS evidence vary. A few states have allowed PAS evidence to be admitted in civil custody cases.¹⁰ Other courts, when confronted with PAS, have discussed it or allowed some evidence of it while emphasizing that such discussion did not comprise an evaluation of the legitimacy of PAS theory.¹¹

Challenging PAS Evidence

*Daubert*¹² and *Frye*¹³ are the most prominent cases dealing with admissibility of scientific evidence and expert testimony. While different jurisdictions employ different admissibility standards, there are a number of factors that can contribute relevant information to any admissibility evaluation. First, evidence of a scientific theory is more likely to be admitted in court if the techniques underlying that theory have been tested and if an error rate has been determined. The theory of PAS

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theory has not been rigorously studied and verified. Second, the reliability of scientific evidence is more easily evaluated when it has been subject to peer review. As previously indicated, Gardner published his own work and his writings were not frequently subjected to scientific peer reviews.

Prosecutors should diligently question any case law or article that is cited as supporting PAS theory. Some Web sites that discuss PAS refer to case law as supporting the reliability of PAS theory, but the opinions in these cited cases are often not adequately explained or they prove to be less supportive of PAS theory than argued. Prosecutors reviewing literature that is referenced as positive on PAS should scrutinize it carefully.¹⁴

Procedural Arguments

The strongest procedural argument against admission of PAS evidence via a *vis expert* testimony is that it invades the province of the jury. Most states do not allow experts "to offer an opinion on the ultimate issue of fact as to whether the sexual abuse has occurred."¹⁵ In those states, prosecutors should argue that allowing a PAS expert to testify that the allegations arose out of a sour relationship between parents permits that expert to testify as to the ultimate issue of the case.

Prosecutors in jurisdictions that have adopted the Federal Rules of Evidence can argue for exclusion of PAS evidence under two rules. First, under rule 104(a), a trial judge must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid."¹⁶ PAS is not based on an easily articulable methodology that can be assessed for scientific validity and, consequently, prosecutors should argue that it fails even to pass the preliminary assessment for validity.

Second, rule 403 states that evidence should be excluded when the probative value is outweighed by the danger of unfair prejudice.¹⁷ There is a possibility that the jury will see the court's acceptance of defendant's PAS expert as a determination that the testimony presented by the expert represents some scientific truth. Prosecutors should argue that it is within the common experience of jurors to contemplate the possibility that the non-accused parent planted ideas in the child's head. Qualifying an expert to testify about PAS creates the risk that the jury will place too much emphasis and reliance on PAS evidence.

Substantive Arguments

A syndrome is a group of symptoms that appear to occur together.¹⁸ However, the cause of the symptoms is "often unknown or poorly understood," while the cause of a disease, by contrast, is usually known.¹⁹ It is possible for a syndrome to indicate a strong relationship between a cause and a set of symptoms, but each syndrome falls in a different place along the continuum of certainty. The continuum is a concept that explains the strength and reliability of the supposed relationship.²⁰

Some syndromes are nondiagnostic, which means that they do not point to particular causes. PAS is a nondiagnostic syndrome.²¹ Thus, while an expert can

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acutely aware of how the evidence is being presented. If the expert is offering an opinion regarding the cause of the "syndrome," prosecutors should object to the improper use of the evidence.

Quick Tips for Challenging PAS Evidence

There are many things that prosecutors can do to challenge PAS evidence in child abuse cases:

- *Challenge under Daubert/Frye.* Argue that PAS evidence does not meet the evidentiary standard in your jurisdiction.
- *Know statistics and studies.* Statistics about false reporting are available through the National Center for the Prosecution of Child Abuse (NCPCA) or from the National Clearinghouse on Child Abuse and Neglect Information at <http://nccanch.acf.hhs.gov>.
- *Know psychological dynamics of child abuse.* Arm yourself with information about child abuse disclosures. Learn the psychological process of disclosure, the significance in the timing of disclosures, recantation, and proper procedures for conducting forensic interviews.²²
- *Share information.* Share your motions, briefs, and transcripts with other prosecutors. Create central files in the office so other prosecutors do not have to reinvent the wheel.
- *Write the APA.* Send a letter to the American Psychiatric Association²³ to discourage inclusion of PAS in the DSM-V.
- *Prepare your experts.* Meet with your experts before trial to prepare them for the defense expert and what you anticipate his or her testimony will be.
- *Contact the National Center for Prosecution of Child Abuse (NCPCA).* Call or E-mail the NCPCA with questions about child abuse or expert testimony.

Conclusion

PAS is an unproven theory that can threaten the integrity of the criminal justice system and the safety of abused children. Prosecutors should educate themselves about PAS and be prepared to argue against its admission in court. In cases where PAS testimony is admitted, it is a prosecutor's responsibility to educate the judge and jury about the shortfalls of this theory. As more criminal courts refuse to admit PAS evidence, more protection will be afforded to victims of sexual abuse in our court system.

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³ See Ragland, Erika and Fields, Hope, Parental Alienation Syndrome: What Professionals Need to Know, Update, Vol. 16, No. 5, Nov. 2003.

⁴ The earliest criminal opinion that addressed PAS was handed down in Wyoming in 1994.

In *McCoy v. State*, defendant was convicted of sexual assault and taking indecent liberties with a minor. During the trial, the state called an expert to testify about PAS. The state's expert provided an overall explanation of PAS and concluded that the allegations of sexual assault were not fabricated, based on his sessions with the sexual abuse victim as well as the theory of PAS. The defendant appealed, claiming ineffective assistance and arguing that his attorney should have called his own PAS witness. The court disagreed and affirmed the convictions on all counts. This case is unusual in that the prosecutor, rather than the defendant, introduced the PAS evidence. However, practitioners should be aware of this

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9 In reviewing civil case law dealing with PAS, it is important to recognize that there exists a theory that is similar to, but distinguishable from, PAS. Parental Alienation is a related theory that focuses on parental behavior that could lead to some change in the child's relationship with the other parent. PAS is distinguishable in that it focuses on the behavior of the child in denigrating the other parent without justification. Darnall, Douglas. Parental Alienation: Not In the Best Interest of the Children. 75 N. Dak. L. Rev. 323 (1999).

10 See generally, Pearson v. Pearson, 5 P.3d 239 (Alaska 2000) (PAS evidence admitted by trial court); Chambers v. Chambers, 2000 Ark. App. LEXIS 476; Kirk v. Kirk, 759 N.E.2d 265 (Ind. Ct. App. 2001); In re Marriage of Rosenfeld, 524 N.W.2d 212 (Iowa Ct. App. 1994); White v. Kimrey, 2003 La. App. LEXIS 1411; Barton v. Hirschberg, 137 Md. App. 1 (2001); In re S.G., 2003 Ohio 161; Cabot v. Cabot, 166 Vt. 485 (1997); In re Marriage of Shen, 2002 Wash. App. LEXIS 1075; Conde v. Krueger, 2003 Wisc. App. LEXIS 638.

11 See C.J.L. v. M.W.B., 2003 Ala. Civ. App. LEXIS 100 (while PAS admitted at trial, appellate court indicated that it may have been inadmissible under Frye); Perlow v. Berg-Perlow, 816 So. 2d 210 (Fla. Dist. Ct. App. 2002) (objection to admission of PAS in lower court not preserved for appeal); In Interest of T.M.W., 553 So. 2d 260 (Fla. Dist. Ct. App. 1989) (PAS discussed by court, but not accepted as a diagnostic tool); Perez v. DeBates, 2003 Ill. App. LEXIS 879 (court changed language describing behavior to avoid idea of PAS); Ellis v. Ellis, 840 So. 2d 806 (Miss. 2003)(PAS evidence admitted only with a limited definition); J.F. v. L.F., 694 N.Y.S.2d 592 (1999)(court held that while NY family courts discuss PAS in terms of whether a child was programmed to disfavor one parent, courts do not discuss the acceptability of PAS as a theory).

12 Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993).

13 Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (1923).

14 Articles on PAS that have been published in peer reviewed journals are listed on the website of Creative Therapeutics, the publisher of many texts on PAS by Dr. Gardner, at www.rgardner.com/refs/pas_peerreviewarticles.html.

15 See, e.g., People v. Loomis, 658 N.Y.S.2d 787, 789 (1997).

16 Daubert.

17 Fed. R. Evid. 403

18 Myers, John E. B. Evidence in Child Abuse and Neglect Cases, Third Edition, Vol. 1. John Wiley & Sons, Inc. New York, 1997.

19 Id. at 542.

20 Id. at 544.

21 Id. at 548.

22 Inquire with the Center about Finding Words, an intensive, week-long training for Multi-Disciplinary Teams addressing these and other issues related to interacting with children in sex abuse cases. Finding Words is offered nationally once per year, and periodically throughout the year in states that have developed their own Finding Words course.

23 The American Psychiatric Association can be reached at 1000 Wilson Boulevard, Suite 1825, Arlington, Virginia 22209-3901, or via e-mail at apa@psych.org.