



CALIFORNIA NATIONAL ORGANIZATION FOR WOMEN
FAMILY COURT REPORT
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REPORT SUMMARY

1 DECLARATION

After significant research, CA NOW finds the present family court system in California to be crippled, incompetent, and corrupt. The bias in the system results in pathologizing, punishing, and discriminating against women. The system leaves decisions which should be made on facts in a courtroom to extrajudicial public and private personnel. The system precludes the parties, particularly the mother, from her rights to due process, including a trial, long cause hearing, or adjudication, to which she is entitled, much less an appeal of these decisions. Mothers are coerced into stipulations through the rubber stamping of definitive evaluations and reports which become the court's ruling. The present family law system in California exists to enrich attorneys and allied mental health and mental health professionals. This system allows mothers to be taken to court time after time, challenging what is in "the best interests of the child," therefore subjecting them to a system that has no end for them or their children. *In the most egregious cases, perfectly fit mothers who were the primary caretakers of their children loose custody to the fathers who are motivated by evading support obligations, and are often known abusers.* In response to this crisis the CA NOW Family Law Taskforce has proposed a Legislative, Judicial, Executive and Grassroots strategies to reform the Family Law Courts.

2 BACKGROUND

From the founding of the women's movement, feminists have worked for equity in divorce, child support and custody. The struggle to move women and children from the status of men's property to citizens in their own right continues today. This report focuses on the period from the late 1980's to the present. Specifically, the backlash from the advances the women's movement made in the increases in child support with the Family Support Act which turned out to be the driving motivation for the creation of the Father's Rights movement. The Father's Rights movement, has a "stated" goal of ensuring the rights of fathers, however, we believe their true agenda is to challenge the rights of mothers who were the primary caretakers in order to evade increased child support payments. The Father's Rights movement has catapulted us into an epidemic of mothers who report experiencing rampant injustice in the family courts today. By the mid 1990s California NOW began receiving and increase in letters and phone calls from mothers throughout the state who were being victimized by judges, lawyers, mediators, evaluators and attorneys for children in the Family Court system. Some women were being cheated in the process of dividing marital property and assets, while other women were unable to get the court's assistance with child support collection. The vast majority of communication, however, came from women who were fit mothers and the primary caretakers of their children who had custody revoked from them and given to the father. Too often the communications came from constituents whose children had made allegations of abuse against their fathers, although a smaller number from situations came from those experiencing domestic violence and those for whom joint custody was simply unworkable. It appeared from the volume of communications that the problems, *loss of custody through*

gender bias, denial of due process, fraud and corruption and alleged syndromes such as parental alienation, were occurring throughout the state, and that it was not being addressed effectively, if at all, by any branch of government. More recently, women who have experienced this have become organized at the grassroots level for the purpose of shedding light on this growing problem. These groups turned to CA NOW for assistance. The increasing communications from these constituents have demanded action from CA NOW to address the lack of governmental response and initiate reform in the Family Court system.

This summary reports the problems identified by case analysis of the testimonials of our respondents; the report itself provides the background and research that substantiates their claims.

3 QUESTIONNAIRES AND RESEARCH

In response to the demand for action in the family law arena and to study the problem for the purpose of ascertaining viable solutions, CA NOW called for individually prepared case histories from constituents and posted a detailed questionnaire on the Internet. The questionnaire includes specific details about the cases which assisted CA NOW in ascertaining the scope of the problems faced by women in Family Court throughout the state. At the time we prepared this report we had a total of nearly three hundred questionnaires and case studies that had been emailed and mailed to our office. We continue to get calls from women who are experiencing this crisis in the Family Courts in California daily.

As feedback from the constituents began to reveal the magnitude of the problem, CA NOW conducted research into the legislative history of the relevant laws governing Family Court and into the background of the individuals and parties who put these laws into effect. The results of the research is startling. CA NOW's findings suggest that *the sole agenda of these organizations is to strip women of their custodial and other rights within Family Court by supplanting regular legal due process with procedures that are now "customary practice" and absolute judicial discretion within Family Court.* The "fluidity" of the California Family Code leaves most issues almost completely to this judicial discretion and suggests that the resulting negative impact on women was intentionally designed, and brings a great deal of wealth to those involved in the machine of Family Law Court at the expense of women and their children.

In addition, a review of some of the often bizarre practices of the judges reported on the questionnaires, practices which often defy reasoning, such as putting children under the sole care and custody of men who have severe criminal records and simultaneously putting the protective mother under supervised visitation, suggests to CA NOW a problem. *It appears to CA NOW that of the judges that were researched, many were not elected properly nor officially commissioned by the Governor.*

4 FINDINGS

An analysis of the response to the questionnaires has led to the following findings and is confirmed by research.

A. DYNAMICS OF THE PROBLEM

The findings suggest that women who are victims of domestic violence, whose children make allegations of abuse against their fathers, are particularly at risk of losing custody of their children to the perpetrator. Mothers who are primary caregivers of children are also adversely affected by the following dynamics within the Family Court system:

1. Gender Bias

- a. Mediators and evaluators perpetuate false sexist syndromes and side with the father, especially when abuse is an issue.
- b. Counsel are appointed to represent the children in violation of the mother's parenting rights who, at best, do not represent the children adequately and, at worst, side with fathers by supporting sexist theories described in mediation and evaluation reports. Once a false syndrome is used by a reporter, the child's counsel almost never argues against the use of the syndrome and instead advocates that the father must be the better parent, despite evidence to the contrary.
- c. Women report being openly insulted and emotionally abused by judges and opposing counsel on the record. This tactic has the effect of wearing women down to the point of giving up custodial rights in order to avoid further court appearances and suggests overt bias against women on the part of judges who use it.
- d. The quality of representation is better for fathers, partially due to greater economic security enjoyed by men and partially due to the failure of attorneys to adequately represent mothers once false syndromes and/or judicial bias against women appears in the case.
- e. Judges are given broad discretionary powers by the "fluidity" of the Family Code, allowing judges to make rulings with overt sexism by favoring the father despite evidence supporting the mother's position.
- f. Traditional gender roles are manipulated to accommodate the father, as for example, when a stay at home mother loses credibility for not having worked, while a working mother is found at fault for not having stayed at home.

- g. The present system takes children from fit mothers who have been sole or primary caregivers because of false “parity” with the father as soon as separation occurs. In essence, this system pathologizes mothers as soon as they seek a divorce in order to deem them unqualified for sole custody. This loss of the status quo for children at separation is extremely detrimental.

2. Due Process Violations

- a. Lack of procedural and evidentiary due process, since the Family Code was separated from the Code of Civil Procedure and the Evidence Code in 1994.
- b. Attorneys quit prematurely in violation of procedural and ethical laws.
- c. Orders issued after ex parte hearings an/or in chambers meetings or upon the judge’s discretion without proper notice and evidentiary hearing.
- d. Removal of testimony from the court (where it should be) under the guise of mediation and evaluation. There is no control over the mediation and evaluation processes, no public debate of the issues, and no record of evidence. Once an evaluation report is issued, the court makes few discretionary decisions and rubber stamps the report.
- e. Presumption that the parents are “equal” upon dissolution in spite of evidence to the contrary.

3. Corruption and Fraud

- a. Many judges are not elected according to statute and officially commissioned by the governor, suggesting a lack of control over judicial selection processes and allowing members of a political “machine” to take over the process without public awareness of the problem.
- b. Corporate fraud perpetuated by organizations purporting to provide non-profit continuing education and support services but which maintain an ulterior agenda of perpetuating sexist and corrupt court “practices” in lieu of law. “Family Law” courts have developed into full employment programs for private mediators, psychologists, psychiatrists, counselors, “educators” and attorneys who know and refer to each other with the participation of the judiciary.
- c. Advocacy, lobbying and influence by such organizations in the Judicial Council and the legislature.

- d. Farming out of mediation and evaluation and “supervised visitation” to persons placed on a select list who have completed courses which perpetuate sexist practices.
- e. Mediators, evaluators, children’s attorneys and judges who all are enriched by the current entrenched program.
- f. Women report concern with the conflict of interest involved when there was contact, or an existing relationship between, legal personnel and parties in the case.
- G. Women report concern with the financial incentive of extrajudicial personnel to stay involved in the case, as well as their connection to outside funding groups.

B. CASE SIMILARITIES

Review of the questionnaires revealed the following similarities:

1. Mediation and Evaluation are Expensive, Biased, and Indisputable

The parties begin the process by giving testimony to a court-appointed mediator, which may be county employed or private, instead of a judge. The parties are then ordered into an onerously expensive evaluation where they give further testimony to a psychologist. There is no record of parties exchanges in the mediation and evaluation processes. Therefore, the recommendations are indisputable. The judges “rubber stamp” the findings of evaluation and mediators in almost every case. The result of these two procedures is that there is no record of testimony and the biases of the mediators and evaluators prevail in the proceedings.

2. Use of sexist false syndromes.

In virtually all of the cases involving allegations of abuse, and in many not involving abuse issues, the “experts” labeled the mother as “overprotective” or “alienating” and on such basis recommended changing custody to the father, regardless of evidence proving sexual or physical abuse, criminal history, domestic violence or substance abuse against the father. CA NOW’s research into these syndromes indicates that they have been invented for the sole purpose of targeting women in custody disputes, and that they are never used against men under reversed conditions.

3. Suppression of evidence.

In virtually all of the cases involving abuse, the evidence of abuse is suppressed and no standard rules of evidence are followed. Since both the mother’s testimony and the relevant evidence have been withheld from the record, there is nothing in the file to suggest that a mistake has been made

in judging the case. A judge is free to reject, for example, evidence of abuse of the child in a medical report.

4. The mother's attorney quits prematurely.

Despite existence of procedural and ethical laws which prohibit attorneys from dropping clients before a trial has been concluded, and the customary family law practice of allocating attorney's fees at the conclusion of a trial, the questionnaires indicate that the mother's attorney usually quits after the retainer and most of the mother's financial resources are used up. After the attorney drops the case, the mother is left to represent herself with little knowledge of how to manage a legal case and no protection under the Family Code.

5. Judicial orders are given without notice or hearing (ex parte).

Custody has been changed in virtually all cases through ex parte hearings and orders, disallowing the mother or her attorney, if any, to prepare an opposition or set up the case for appeal.

6. In chambers meetings.

In many cases, important orders were made, or mothers were advised to settle, after a meeting off the record in the judge's chambers, leaving no record for appeal and no trail of accountability.

7. Attorneys were appointed for the children.

In every case in which allegations of abuse were involved, attorneys were appointed to represent the children. These attorneys often sided overtly with the father, interfered with the mother's parental rights and failed to adequately represent the children's interests and to protect them from potential abuse. Attorneys for the children are being "recommended" more and more by mediators and other extrajudicial personnel.

8. Proceeding are initiated against the mother after she files for support.

In many cases, the father was given visitation or custodial rights only after the mother filed for support. After receiving the order for child support, the economic impact of paying support impels the father to fight for joint or sole custody to avoid the financial burden of being the non-custodial parent. The father then files for and, due to the above practices, often receives sole custody. "Custody switches" are increasing, despite "mandatory" joint-custody laws, which are motivated by economics rather than the child's welfare.

9. The distress of the child is ignored.

No matter what evidence is offered to show that the child is in distress in a joint custody situation, the evidence is disregarded both by evaluators and the courts, and court-ordered "counseling" can go on forever.

10. Proceedings are Conducted by Special Masters, Commissioners, and Visiting Judges.

These extrajudicial personnel make orders and hand them to a judge who rubber-stamps them. Generally these personnel are attorneys, family therapists, or social workers, not judges, and are commissioned to preside over the proceedings. Sometimes a judge visiting from other areas of the law with no background in family law are asked to preside over the Family Court. In the case of special masters, evaluators often coerce parties to agree to use special masters to decide issues. All of the above disadvantage the proceedings because these personnel do not have a comprehensive understanding of the case or expertise in the legal proceedings.

11. Proceedings Only End When Child Turns 18

A litigious parent can continue to use the extrajudicial system to reopen the case endlessly. Therefore the proceedings only end when the child turns eighteen and is no longer under the jurisdiction of the family court.

5 PRELIMINARY SOLUTIONS

Based upon these findings, the following solutions are proposed:

A. Legislative Solutions

1. Ex parte hearings and orders should be eliminated or severely curtailed under the Family Code.
2. In chambers meetings should be eliminated or severely curtailed by statute under the family code.
3. The Family Code should be amended so that it is again linked with the Evidence Code and the Code of Civil Procedure.
4. Procedural and ethical laws that prevent attorneys from withdrawing before trial should be strictly enforced by the court.
5. Abolish considering mandatory joint custody as always in the best interests of the child. This is a false presumption with no support in reality. Joint custody should be voluntary, with sole custody default to the primary caregiver at separation.
6. Visitation time should be completely detached from child support calculations to reduce the incidence of fathers seeking half and sole joint custody to avoid child support payments. As other jurisdictions do, the primary caregiver at separation is established, and then the non-custodial parent pays a specific percentage of earnings.

7. Only a serious change in circumstances should warrant a change in custody arrangements.
8. Provisions for counsel to represent the child should be deleted from the Family Code and the Judicial Council Rules to protect the parental rights of mothers. Counsel for the child will be unnecessary if custody remains with the primary caregiver. Counsel for the child should only be necessary if deemed so by the Juvenile Court in cases involving abuse.
9. Evaluations should be eliminated or governed by specific statutes and should only be used in cases lacking investigation by the police or CPS. Factual investigations should replace psychological evaluations. ALL evaluations should go back to Family Court Services and to eliminate the onerously expensive and conflict of interest ridden "private mediator" system.
10. The use of false syndromes (such as PAS) should be made illegal under the Family Code.
11. Abuse should be defined specifically via fact finding and not left to discretion.
12. Cases involving child abuse allegations should be tried in the non-adversarial Juvenile Court.
13. Protections for underrepresented parties should be written into the Family Code.
14. Family court should set up an administrative proceeding with controls on attorneys fees, similar to the Workers' Compensation Appeals Board, so that families are not bankrupted.

B. Judicial Solutions

1. Identify the parties responsible for the perpetuation of problems related to false syndromes, "fluid" joint custody laws, evaluations and counsel for children and establish the connection with fraudulent non-profit continuing education and support organizations to sue under statutes for RICO vis a vis conspiracy to violate the rights of women.
2. Along with damages suit, sue for declaratory relief, making Parental Alienation Syndrome, mandatory joint custody, mandatory psychological evaluations and mandatory mediation unconstitutional. Challenge the constitutionality of the Family Law Act as amended in 1994 due to lack of procedural due process protections and other constitutional violations, including the false presumption that physical and/or legal joint custody is in the best interests of the child

C. Executive Solutions

1. A statewide audit of the judiciary for lack of compliance with the Elections and Government Codes in the “election” and “appointment” of judges, especially family law judges.
2. A statewide audit and investigation by the Attorney General of fraudulent non-profit continuing education and support organizations participating in family law processes.
3. An immediate statewide conference on the present status of Family Courts.

D. Grassroots Solutions

1. Local Family Law Taskforces to bring together community leaders who can work to ensure court reform.
2. Local Court Watch Programs to ensure that citizen's are tracking the court proceedings.
3. Local media attention to highlight the status of the Family Law Courts.

The Family Law Court System in California

THE FAMILY LAW ACT IN CALIFORNIA

A BRIEF HISTORY OF FAMILY LAW

In the West, dating as far back as the Romans and subsequently maintained by the English, the father traditionally had absolute control over his children:

“This paternal right allowed him to sell his children if he desired; he could even kill them without threat of legal accountability. The father’s right to custody was based on the presumption that he was better able to care for the children of the marriage when the parents separated. Not only would he provide economically for the physical requirements of the child, such as food, clothing and shelter, but in turn, he needed the assistance of his children, especially sons, to work with him on the land under the management and direction of the manor lord.

During the middle ages, women and children in the nuclear family unit were considered the possessions of the father, just as the man’s other property. The English tradition provided that the father was the natural guardian of his children; as guardian, he controlled their education and religious training, if any.¹

Paternal dominance in English custody cases began to shift as early as 1817, when the initial stages of the Industrial Revolution brought more men into cities away from the families they used to dominate, thus beginning the downfall of exclusive paternal dominance over the custody of children.

In 1839, British Parliament passed a series of statutes favoring the mother over the father as sole custodian for children under the age of seven years, which was later amended in 1873 to include “infants of any age.” This “tender years” doctrine ushered in the era in which custody was presumed in favor of the mother for nursing infants and young children. In 1925, the Guardianship of Infants Act provided for equality between mothers and fathers in custody matters. In the United States, child custody law followed the British model, and although the tender years doctrine began to gain greater hold in the United States, nevertheless, economic and “moral guidance” factors held sway, and fathers generally obtained custody of children over the age of seven.

In the early 1900’s, mothers began to receive awards of child support, allowing them to retain economic and therefore, custodial control over their children. Thereafter, the courts began to rely upon the tender years doctrine, and later another doctrine, “the best interests of the child,” was used to justify continuing the maternal custodial relationship beyond the tender years, it being presumed that it was in the best interests of the children to be cared for by their mothers.

More recently, these two doctrines have been challenged by father’s rights advocates who maintain that the doctrines are relics of a nineteenth century era of transition from an agrarian to an

industrial society.

Viewed in light of our changing economic life, from an agrarian to an industrial society, these past patterns were generally appropriate. Men were the primary income earners. Women, who were not given parity in the marketplace for jobs or careers, were expected to remain in the home. Men worked long hours at urban jobs, isolated from the family. Under these circumstances, the courts were well advised to grant custody of the child to the parent most likely to be available and accessible to the child—the mother.²

Thus in employing the “tender years” and the “best interests of the child” doctrines, the father’s rights advocates maintain that the courts gave “to the mother the upper hand in custody matters.”³

THE FAMILY LAW ACT IN CALIFORNIA THROUGH THE MID 1980S

The situation began to change in 1970 when California enacted the Family Law Act⁴, the so-called “no fault” divorce legislation. Until the Family Law Act, a divorce was granted only upon the showing of “fault.” Since the showing of fault was not standardized, each case presented unique and often ridiculous “facts” which attempted to fix the blame for the failure of the marriage on one party. Before 1970, private investigators were often hired to drum up “evidence” of infidelity or cruelty.

The sponsors of the Family Law Act of 1970 in California, Donald Grumsky in the Senate and James Hayes in the Assembly, apparently attempted to eliminate the fault system, making it no longer necessary to present testimony concerning wrongful conduct, since the Act focused on whether the marriage had irretrievably broken down, as opposed to the fault or behavior or the parties. The drafters also attempted to remove the financial incentive to allocating blame, which if proven, would result in the unequal distribution of the marital assets and alimony in favor of the “innocent” party, generally the wife. The statute mandated an equal division of community property while spousal support (formerly “alimony”) was to be based solely on the needs and the circumstances of the parties.⁵

It was hoped that the new law would alleviate some of the burdens placed on the courts by eliminating the sensational fault testimony, giving the courts more time to concentrate on serious custody matters, as distinguished from custody requests which were used as threats to obtain an advantage in property division or alimony.⁶

As the nation’s first “pure” no-fault divorce law, the Family Law Act removed consideration of marital fault from the grounds for divorce, from the award of spousal support, and from the division of property. The Act retained fault as a relevant factor... only...to prove the existence of... irreconcilable differences that had caused the breakdown...of the marriage...and on the question of child custody, to show that parental custody would be detrimental to the child.⁷

Although removing fault from divorce is what the Family law act is best know for, and was a significant practical step in the evolution of family law in California, the act put into to law what was becoming common practice in the courtroom. More significantly, the no-fault provision was the attempt at creating equality between the parties.

When our divorce law was originally drawn, women's role in society was almost totally that of the mother and homemaker. She could not even vote. Today, increasing numbers of married women are employed, even in the professions. In addition, they have long been accorded full civil rights. Their approaching equality with the male should be reflected in the law governing marriage dissolution and in the decisions of courts with respect to matters incident to dissolution.⁸

Although the reform efforts leading up to the Family Law Act had not emphasized or even mentioned achieving equality between the sexes as one of its goals⁹, leading some to believe that the new law did not reflect the reality of married life and was therefore a generation ahead of its time,¹⁰ nevertheless, the equality reforms occurred within the context of women gaining *legal* and *societal* equality with men in areas other than the family, such as in employment law and civil rights legislation.¹¹ Thus, there was to be equal division of property, support could be ordered for either spouse depending upon need, and either parent could obtain sole custody of the children, according to their best interests.

Despite the provision allowing either parent to obtain sole custody, however, in practice, it was usually the mother who received the custody award, since the Act provided that custody should be determined according to the best interests of the child, and the preferred interpretation of the best interests doctrine at that time favored maternal sole custody . Mothers were in almost all cases the caretakers of the children as well. In the case of illegitimacy, the mother also received sole custody, since the new law did not abolish the common law practice of denying the father parental rights over his illegitimate children unless he married the mother.¹⁴

If the parents were married, a "fitness" hearing was generally held to justify excluding one parent, generally the father, from the custodial relationship, and if a father desired sole custody, he had to overcome the almost insurmountable feat of proving at such a hearing that his ex-wife was an "emotional cripple or a moral leper, and, should he wish to maximize his chances, preferably both."¹³ Alternatives to maternal sole custody, such as joint custody, were rarely if ever experimented with. Even if a divorcing couple could agree to a joint custody order, the courts were reluctant to grant it, *it being the logical perception that the problems leading to the divorce would continue within a joint custody relationship to the detriment of the children.*¹⁶

Once the law was put into practice, several "studies" began to emerge challenging maternal sole custody. Theories denigrating the role of the maternal custodian, such as those espoused by psychologists Judith Wallerstein and Joan Kelly of Marin County, California and New Jersey psychiatrist Richard Gardner, purported that children suffered irreparable damage to their development as a result of sole maternal custody.¹⁷ With the publication of the ideas of these experts, the fathers' rights advocate movement began aggressively asserting that a presumption in favor of sole

maternal custody was irrational:

Industrialization, which splits the wage labor of men and the private labor of women, is behind the exaltation of motherhood and the invention of maternal instinct. That is, maternal instinct comes along precisely when it is required, making a virtue of what seemed to be a necessity, Its enshrinement parallels the development of a new – not God-given – family form which we've come to call the nuclear family...As our culture became both urban and industrialized, the father moved away from the house and this left raising children for all practical purposes, in the hands of the mother...

There is no—I repeat no—scientific data nor rationale for the presumption in favor of the mother beyond an amorphous but strong conviction that women are by nature nurturant [sic] creatures, and by instinct, filled with love for their children. Yet what is “instinctual” or “natural” in humans is invariably tied to what a particular culture requires of them...

When one remembers that [the special policies of the courts and the legislatures] are built upon sand—a mere mystique about motherhood (and its corollary in the tender years doctrine), one is dumbfounded, especially since there is quite striking proof that the society that required the exaltation of motherhood has radically changed.

The nuclear family...is already a nostalgic dream. It simply doesn't make sense to favor the mother in custody cases when she too is in the labor force and increasingly, she wants and expects to remain there.

It was also perceived by some advocating in favor of paternal custodial rights that mothers manipulated the court system in order to effect revenge against their spouses for hurts caused during the marriage, and so maternal custody took a further beating from divorced fathers. In 1975, maternal sole custody in cases involving illegitimate children was nullified when California adopted the Uniform Parentage Act abolishing the legal status of illegitimacy and, in general, equalizing the legal control exercised by both natural parents over their children.²⁰

Toward the late 1970's, divorced fathers began advocating for joint custody as a logical extension of the no-fault philosophy.²¹ In 1980, the Family Law Act was amended with several provisions for voluntary joint custody and counseling services. The amendments were made in response to an increasingly vociferous father's rights movement, which espoused the viewpoint that sole maternal custody was an unsatisfactory arrangement. As the “non-custodial” parents in a sole custodial arrangement, the fathers began to voice that they felt excluded from the lives of their children, a feeling which has been exacerbating...by a growing interest among fathers in actively parenting their children.²²

In addition to the notion that maternal sole custody was somehow bad for the children, father's rights advocates promoted the notion that because maternal sole custody made the fathers feel badly about themselves, laws should be passed to assuage their bad feelings:

Too often, an award granting to one parent or another custody of the children causes the noncustodial parent to view the judgment as a loss. Likewise, the custodial parent frequently views the judgment as a victory over the other parent.

The very nature of such a conflict creates difficulties for the loser. The typical court order provides for limited visitation. The noncustodial parent, usually the father, views the support obligation with bitterness. This view may stem as much from the corresponding decrease in access to one's children as from the requirement of periodically forwarding money to the former spouse.²³

The main objective of the 1980 amendments was to provide "creative solutions" to the "problems" above: the scientifically unsupported hypothesis that children of divorce are psychologically damaged while in the sole care and custody of their mothers; the phenomenon of fathers feeling bad about "losing" a custody award to their children's mothers; the perceived abuse of the courts by women seeking revenge against their husbands, and the fathers' bitterness about being required to pay child support.

The amendments to the Family Law Act were sponsored by Charles Imbrecht of Ventura County, who submitted them to the California Legislature in March of 1979, as Assembly Bill 1480, signed into law January of 1980. The purpose of the amendment, as stated in the law's policy statement, was that the state intended to assure minor children of separated parents "frequent and continuing contact" with both parents and to effect this policy by "encouraging parents to share the rights and responsibilities of childrearing."²⁴ In other words, the law was supposed to insure that divorced fathers were given more time with their children and that mothers would cooperate with "sharing" parental rights and responsibilities.

The bill included amendments to Civil Code section 4600 by adding the policy section asserting the "frequent and continuing contact" dictum and providing for broad judicial discretion in determining child custody, allowing the court to consider which parent is more tolerant of frequent and continuing contact in making a sole custody decision and mandating that the court ignore gender in selecting the preferred custodian. Section 4600.5 was added, allowing for a parent to apply for joint custody and permitting the court to "direct that an investigation be conducted" and to determine whether or not joint custody is appropriate.²⁵

Although the 1980 amendments were a significant victory for father's rights advocates, the provisions for joint custody were voluntary and provided the courts with an alternative to maternal sole custody but did not mandate shared parenting, the ultimate goal of the father's rights movement. It was anticipated that the option of maternal sole custody would encourage litigation as both parties sought to be named sole custodian.

[A]s long as the court had an equal opportunity to make a sole custody award, each parent might fear that such an award would be made to the other. Such a situation could lead to mutual attacks on the fitness of the other to be sole guardian.²⁶

In order to stabilize the potential unrest between the parties over custody issues, section 4600(b)(1) was added which allowed the court to award custody to the parent “more likely to allow the child...frequent and continuing contact with the non-custodial parent, which is to say, fathers could obtain custody if mothers advocated too strongly in favor of maternal custody, and the threat of removing custody from the mother could be used to coerce the mother into a joint custody arrangement. This particular provision has been touted by nationally known father’s rights activist James Cook as potentially one of the most significant and influential criteria in evaluating the suitability of the sole guardian.²⁷

The “voluntary” arrangements for joint custody which are supposed to be encouraged by the courts, counselors and attorneys have been described as a “compromise settlement between the parents” for the purposes of avoiding a contested proceeding in which “one parent will necessarily be found less fit than the other.” However, in actual practice, the “frequent and continuing contact” doctrine is a form of extortion whereby the court is allowed to dangle before the mother the possibility of an award of sole custody to the father, in the event that she does not cooperate with entering into a “voluntary” joint custody order.

...[I]f all parties agree, the court’s intervention is not necessary. In such circumstances, there is no conflict to resolve, but even in conflict situations, the court should lean to joint custody orders. Once the principals learn to expect joint custody orders (or sole custody to the parent “more likely to allow the child or children frequent and continuing contact with the noncustodial parent”), the parties will most likely develop their own arrangement which would be most compatible with the needs and the desires of all concerned.

(As we will see, *infra*, however, this is contrary to the finding that when parents are conflicted, joint custody is *not* appropriate; apparently, the children’s real needs are left out of the formulation.) In addition, the 1980 amendments included no specific definitions to guide the parents or the court as to what “joint custody” actually meant, and the legislature did not provide guidelines as to the rights and duties of the parents, requiring the parents to turn to the courts for intervention in determining their rights and responsibilities. The case law which subsequently developed out of the 1980 amendments emphasized that the party with the de facto physical custody of the child was the party who held decision making authority over the child’s life. Since mothers were most often awarded physical custody of the children because they were the primary caregivers, it was they who held control over the child’s life and they who made the decisions as to residence, schooling, health care, religion, etc.³⁰

Despite problems in applying the 1980 amendments to the Family Law Act, the law was at least clear regarding the voluntary nature of joint custody, and standards of practice did emphasize the rejection of joint custody under circumstances of significant opposition, animosity, logistic problems, conflicting parenting problems or scheduling conflicts.³¹

Anticipating the resistance of mothers against the joint custody ideal, the legislature provided for mandatory mediation and counseling where parents could not agree among themselves. It was also

anticipated that enacting joint custody orders would be difficult even for families that would voluntarily assume joint custody, and that therefore, the state would be required to intervene to assist such families:

Since the legislature has not chosen to specify which matters are to be the result of joint decision making, for its successful implementation the statute will require the aid of [jurists, counselors and attorneys], not only to encourage parents to attempt joint custody, but to assist them in working out precise formulations of their plans.³²

The state would provide counselors through the “conciliation court” program under Civil Code section 4600.5(f) in the event the divorced couple were unable to work out the details of their joint custody “plan”:

Even the most carefully prepared scheme for joint legal custody, including arrangements for joint physical custody, may prove inadequate. Unforeseen circumstances, unanticipated during the marriage, may develop. The parents may have included no provisions for that particular situation in their joint custody plan. In such an event, if the parents are unable to reach accord in the matter, the conciliation court is available as a mediator.³³

Although the “conciliation court” was not given statutory jurisdiction over disputed custody cases, nevertheless, in practice they were regarded as a “branch of the state superior court” having “jurisdiction over divorce cases involving custody and visitation” and the process was viewed as “[t]aking divorce cases out of the courts...” The perceived goal of the conciliation courts in actual practice was to

...change [divorce bargaining between the parties’ attorneys] by moving lawyers and judges aside and bringing both partners to the bargaining table where, aided by an impartial third party trained in problem solving, the divorcing people can work out their own settlement.³⁵

The Family Law Act was again amended in 1981 under SB 961, which provided more particulars for the role of “conciliation courts” and “mediation.” The law specified that every divorce case involving children or domestic violence must go first to the conciliation court, where the couple would work together to arrive at an agreement or an impasse. The role of the mediator purportedly was to help the divorcing couple talk over agreements and disagreements so that avenues of compromise could be explored. This began the never-ending reality of ongoing “mediation.”

Although the programs were defined under statute as “conciliation courts,” in everyday practice, it was understood that the mediators were not attempting to effect reconciliation, but rather, that *the mediation process freed family law judges from the burden of actually doing their job*, since, it was understood from practical experience, judges just don’t seem to like to deal with domestic relations cases. The programs were touted as successes in saving the court time. A study done in Los Angeles County Conciliation Court purported to show that those who went through mediation were three times less apt to bring their problem back into court later on.³⁶

FAMILY LAW IN CALIFORNIA FROM 1985 TO PRESENT

Despite its altruistic goals, the Family Law Act had a negative economic impact on the lives of women and children. In 1985, Lenore Weitzman published findings from a ten-year study of the effects of the Family Law Act,³⁷ which demonstrated the unintentional result of no-fault divorce: women and children in their custody were being placed in a decidedly compromised economic position relative to men. She concluded that, despite its promise of equality for woman and men, the no-fault divorce law disadvantaged women by failing to take account of their unequal situation during marriage. As a result of the Weitzman study, some feminist commentators

have noted that while broad societal changes supplied the pressure for a change in divorce law, the actual mechanics of achieving change were not neutral. One writer has put the point this way: the Act was passed at the behest of male interest lobbying groups by a male-dominated legislature under the guidance of a divorcing man (Assembly Hayes) who had a personal interest in reducing the negotiating power of married woman.³⁸

Despite the Weitzman study, the father's rights movement, combined with changes in welfare laws beginning with the Family Support Act of 1986 pressed on to add layer upon layer of mental health experts to make decisions which should be within the purview of the courts, whose job it is to decide issues by evaluating evidence. When the presumption was put in place in favor of "joint" custody, the "mediation" set in place by this system was not mediation; if parents could not agree to their own "physical shared parenting plan," the "mediator" would make a "recommendation," which the court would then rubber-stamp.

Unbelievably, it was Judith Wallerstein's single small study of 130 upper class, white children of divorce which was key in shaping elaborate extrajudicial decision-making remedies of evaluation and mediation as fathers demanded their "rights" to children, since her study pointed to exactly the opposite. There was simply no evidence or research, other than the notion of perhaps male "ownership" of children, to support this process or theory. In 1989, the California Law Revision Commission was directed to pull all of the statutes from different California Codes into a new Family Code. By the time the complete Family Code was put into use in 1994, joint custody, which meant joint legal *and* physical custody, was still supposed to be voluntary, and when "voluntary," presumed to be in the best interest of children:

(a) Custody should be granted in the following order of preference according to the best interest of the child as provided in Sections 3011 and 3020:

(1) To both parents jointly pursuant to Chapter 4 (commencing with Section 3080) or to either parent. . . .³⁹

Family Code Section 3080 states that there is a "burden of presumption" however, affecting the burden of proof, that joint custody is in the best interests of the minor child. . . . ***where the parents have agreed to joint custody or so agree in open court...*** What happened in reality is that the courts and the myriad personnel deciding custody issues effectively negated the "agree-

ment” aspect of the joint custody statutes. Specifically, when parents did not “agree,” mediators and evaluators were given the power to literally force an “agreement.”

There were also provisions added related to the Domestic Violence Prevention Act. The development of the Family Code was based on the results of a questionnaire sent to 4000 individuals, mostly lawyers and judges, but also social workers involved in family law matters. Only 600 responses were received, and the project was undertaken with 83 percent of those 600 respondents desirous of a new Family Code, 12 percent of all people polled. As we shall see, those correspondents who objected to this project due to their concern that the Family Code project was part of plan to establish a new family court system were proved correct.⁴⁰

Several fictions propounded by mental health experts, such as Joan Kelly, a mediator and counselor in Marin County, California, abounded and continue to be used to justify the present system. One fiction is that

gender roles within families began to shift, as larger numbers of fathers participated more fully in child-rearing responsibilities, particularly in dual career families. At divorce, many such fathers insisted on a greater role in their children's lives after divorce.... Debate continues, however, regarding the appropriateness of joint custody for some parents, and whether it has a deleterious or positive effect on the economic and psychological well-being of children.

The fiction that fathers participate more fully now in child-rearing responsibilities has been debunked by several studies. E. Mavis Heatherington's Virginia Longitudinal Study noted that while 70 percent of women with children worked in the 1990's, the contribution of men to household chores and childrearing remained almost constant, from ten hours of weekly participation by men in 1973 to fifteen hours in the 2000, as opposed to women's contribution remaining constant at thirty-eight hours. Heatherington noted that these findings are supported by the research of Berkeley psychologist, Arlie Hochschild, who titled this disparity of sharing child rearing and domestic duties women's “Second Shift.” The notion that there is equality in child rearing or any domestic duties even in a two working parent household is truly a myth:

Apparently, a generation of feminist rhetoric and wifely exhortation about the “second shift” has failed to penetrate the male world view: which is that men work and women keep house – everything else woman do, including work, represents “in addition to.”⁴²

Therefore, it is highly likely that the primary caretaker of the children when the marriage dissolves will be the children's mother.

Further, the two major studies that are available (Heatherington and Wallerstein - see Wallerstein's comments on NPR, *infra*.) **conclude the strength of the mother-child relationship is the greatest factor in the child's positive development and adjustment after divorce.** However, publicly funded joint custody programs to include grants for mediation and training and father's access to children are justified by the myth of parenting equality and the limited research

of Wallerstein.

Both Wallerstein's Center for the Family in Transition and Kelly's Northern California Mediation Center, both in California's Marin County, are income tax exempt and provide mediation training and services for judges, attorneys, mediators and other participants in what has become a giant family law perpetual cash machine enabled by a myth that mandatory joint custody is "in the best interests of the child." The conflicts of interest abound in this scenario, and there has been no follow-up research as to how children caught in conflicted, generally 50/50 timeshare mandatory physical custody fare, particularly in the last ten years.

Wallerstein's Center for the Family in Transition offers "A Multidisciplinary Conference" for "family law practitioners, counselors and therapists, mediators, educators and policy makers." Kelly offers training programs including "Parental Alienation in Post-Divorce Parent-Child Relationships," "Interviewing Children in Mediation – Techniques and Cautions," "Divorce Mediation and Conflict Resolution," "Child Development Research and Concepts: Developing Effective Parenting Plans," "conducting Child Custody Evaluations," "The Use of the Special Master in Custody and Parenting Disputes" and "Marital Conflict, Divorce and Children's Adjustment: Implications for Practice." These courses can be used for MCLE, MCEP, BBS and CFLS continuing education credits for lawyers, educators and counselors. The prices for these courses range from \$85.00 to \$950.00. What one will find is that the family court system is rife with conflict of interest and financial gain. The statutory scheme based on the myth of joint physical custody in *all cases* as being in the best interests of children will ensure that the giant family law perpetual cash machine will roll on intact. The court appoints an evaluator or mediator, and then that person refers to other "services" in the system, including attorneys for children.

When fathers realize that their child support can be reduced drastically by obtaining half of the physical time with the children, custody becomes disputed. Kelly admits that the quest for joint custody by fathers is related to the sliding scale of support based on the time share of the non-custodial parent:

With the recent adoption of child support guidelines that directly tie the amount of child support to the time that the nonresidential parent spends with the child, these two issues have become inextricably linked.⁴³

The Family Support Act of 1988 (P.L. 100-485) established a mandate that all states adopt guideline formulae to standardize child support orders. Prior to adoption of that Act, child support order amounts were left to judicial discretion. The resulting inequities led to a movement amongst feminist and parent groups and the creation and subsequent adoption of the Family Support Act.

The child support guideline formulae that were adopted by most states include a calculation that factors parental income and custodial time. It was not long after the adoption of the Family Support Act of 1988 that non-custodial parents began to realize that if they fought for increased visitation time, then child support payments would be lowered.

The backlash of established support guidelines has resulted in an increase in bitter custody bat-

tles. Junk science has created "syndromes" to bolster the conflict and increase the chances of success in custody fights which are motivated by a desire to pay less child support. In addition, each state must review the guideline formula used every three or four years-fanning the flames of discord and encouraging non-custodial parent groups to continue the battle to tip the scales of equity in favor of lowered support.

Today, we are experiencing an influx in the creation of groups of mothers who have lost custody of their children to fathers who do not want to pay support but then do not properly care for the children. Some mothers of children who have been sexually abused have lost their children to the abusive parent as the result of child support/custody battles prompted by the fight to manipulate the guideline child support formula.

The giant family law perpetual cash machine that now comprises "family court" consists of a county's Family Court Services division, marriage and family counselors who function as "mediators," "special masters" and counselors, attorneys employed as guardians ad litem and special masters and psychologists and psychiatrists often recommended by mediators. Including judges, all know each other, refer to each other, market each other and all are, apparently, necessary to make joint custody, ***which was not mandatory, but treated as though it was***, "work."

Family Court Services (FCS) are county employed social workers who were first employed to attempt to mediate a parenting schedule with the divorcing parents. In the 1980's, the court was mandated to send parents to see a family court services mediator to fashion the custody issues, and the court would subsequently "adopt" the recommendation in the event that the parents did not reach agreement. The cost of FCS was relatively low. The courts generally rubber-stamped the recommendation. The court now is able to direct parents to private mediators from a "court approved" mediator list, which will set the parents back up to \$150 dollars per hour, averaging perhaps \$1500 per *each* mediation. The catch is that one parent, often an abusive one, can continue drag the other back for more mediation or counseling for purported "changed circumstances" or the nebulous "best interest of the child." This scheme has become every bit as financially draining as litigation. The judges are also quite willing to order psychiatric evaluations under Evidence Code Section 730 at a party's request or at the recommendation of a mediator, particularly when a mother suspects or knows of child abuse or domestic violence is involved. These evaluations can cost up to and in excess of \$3000 and are rubber-stamped by the court. The evaluators are always within the family court system.

Further, the courts routinely order parents to attend "parenting classes," which are in reality couples counseling, for approximately \$150 per session for ten to twelve sessions. Family Code Section 3190 allows the court to order counseling, and the mediators and evaluators recommend it routinely. One practitioner in Sacramento, whose mediator wife recommends his "Shared Parenting Support Program," indicates that his program has had "positive results reported by the participating parents," but states in 1999 that his data from "a brief outcome study presented at a 1994 convention are based on a small sample and should not be generalized. However, the results can be viewed as a trend." ⁴⁴

This type of “research” simply does not support the routine order of these extraordinarily costly “services.” Causing a parent debt or financial ruin can never be in a child’s best interests.

Tax-exempt companies train judges, attorneys and myriad mental health professionals that wish to enrich themselves at the trough of the giant family law perpetual cash machine. The process engenders blatant conflicts of interest as noted above. While mandatory mediation is touted to decrease the need for “litigation,” it is likely that a divorcing mother will be tapped out by counselors, mediators, special masters, guardians ad item and psychiatrists before she can proceed, if ever, to court. This quasi-judicial “team” approach, as Kelly terms it, is not only onerously expensive, but likely an unconstitutional delegation of judicial authority⁴⁵ and a denial of due process. If parents cannot agree upon specifics of parenting plans, they may be coerced to take each issue to a “special master,” who is a family law attorney or counselor, who actually makes legal orders for a family law judge. In “high conflict” cases, Kelly’s approach would recommend enough therapy to keep the local psychologists and family counselors in business forever. Says Carol Bruch, research professor at University of California Davis School of Law:

“You have a therapist for mom, a therapist for dad, a therapist for the child. In addition they recommend that there be a special master who is entitled to make a great number of judicial decisions with no attorneys present. It’s a highly intrusive, highly coercive, very costly scheme. [The parents] can be spending \$500 a week without blinking. You can end up with no property left afterwards, and not necessarily gotten anything for your money.”

Since mandatory mediation and joint physical custody have been in place through the 1990’s, one would think that there would be a follow-up study with the children of divorce who have spent their childhoods going back and forth to different households pursuant the intrusion of joint physical custody schemes and therapists, **despite the fact that joint custody is not technically mandated by any law.** To date, there are no such studies, but more mental health professionals continue to be added to the state and federally administered family law systems, based on the likes of the recommendations of experts such as Kelly and Wallerstein. Disturbingly, half of the parents in the Wallerstein study of 131 children had significant mental difficulties and it was impossible to separate out the effect of the divorce on the children versus the pre-existing problems,⁴⁷ but this study and the speculation of Kelly continue to be used to justify the system.

E. Mavis Heatherington’s study, significantly more in depth than Wallerstein’s, follows up over 1400 families and 2500 children over for three decades. This study, The Virginia Longitudinal Study (VLS), found that eighty percent of the children in the study were found to be as well adjusted as children in intact, non-conflicted families. All experts agree that the worst case scenario is children staying in an intact, conflict-ridden family. (Wallerstein, however, is now apparently a proponent of the new “saving marriage” movement because of her follow up results, which will no doubt lead to *more* mental health practitioners and attorneys involved in dissolutions in California.) Heatherington debunks the myth of the absence of a father being the greatest post divorce risks to children:

Fathers do contribute vitally to the financial, social and emotional well-being of a child. But the contribution is not made through a man's sheer physical presence. A child does not automatically become psychologically well-adjusted or a competent student just because he or she lives with Dad. Qualities like stability and competency in children have to be nurtured carefully and patiently by active engaging fathering. In fact, we found that if a man was psychologically absent before the divorce and a custodial mother is reasonably well adjusted and parents competently following divorce, ***single family life often has little enduring negative developmental impact on a child, particularly if that child is a girl. An involved, supportive firm custodial mother often is able to counter adverse effects of both the lack of a father and poverty.*** (Emphasis ours) ⁴⁸

Heatherington's VLS found that an involved, competent custodial parent was the most effective buffer a young child could have against post-divorce stress and that an irritable punitive, uncaring or disengaged parent put the child at great risk.⁴⁹ Insofar as joint custody is concerned, children can thrive, so long as there is little conflict in the joint custody situation.⁵⁰ **Otherwise, as the court sagely predicted many years ago, joint custody is simply a continuation of the embattled family of origin.** In the present scheme, children not only have to adjust to a divorce, but are mandatorily entrenched in a custody situation which can be a literal continuation of the conflict that the child lived in during the intact marriage, save perhaps now the child is ordered his or her own counselor and attorney.

Heatherington, on the other hand, found that children who were completely removed from conflict were better off. Most of the parents who did share custody in the VLS practiced what Heatherington termed "parallel co-parenting," which is when parents ignore each other, engaging in no communication about the child's activities. Heatherington warns that although this may work when a child is younger, this is not to the child's benefit when the child is older and neither parent knows what the child is really doing.⁵¹ Even though the costly mediation and parenting education schemes purport to do away with conflict, there is no evidence that they do.

The present system also flies in the face of what all experts agree upon: that children need stability. Paul Amato, social scientist of the University of Nebraska, Mavis Heatherington, and Judith Wallerstein and Andrew Churlin, researcher from Johns Hopkins and other researchers confirmed this during an appearance on National Public Radio. Churlin pointed out that the picture is not as grim as Wallerstein presents it to be and that many of the children had problems prior to divorce. Amato maintains, as do most experts, that the worst outcome for children is an intact, continuously conflicted family. Most striking is that Wallerstein herself conceded that

[Of the children that I saw], those who did well had good mother-child relationships that really helped them.

Mothers, Wallerstein and others have found, who were consistent and reliable in their love and support had children who weathered the divorce. Psychologist Ann Peterson of the National Science

Foundation has extended this finding to teenagers whose parents have just divorced. In addition, Eleanor Macaby, researcher at Stanford University states that joint custody can be either the best or the worst arrangement for children

depending on whether the parents can be civilized and do business together, because if parents are in conflict, it is harmful for the children to be caught in the middle of two parents.⁵³

In California, the amendments and modifications of the Family Code appear to be infinite in an effort to prop up the present scheme to **force “voluntary” joint custody**, to the detriment of children and the enrichment of the mental health community. In 1998, there were changes which would appear to involve common sense in society's commitment and care of children. For example, in the case that there are allegations of abuse and the court orders sole or joint custody to the abusive parent, the Code now requires the court to state its reasons, and there is a rebuttable presumption that a perpetrator of domestic is an unfit parent.⁵⁴ The abuser can overcome the presumption by completing a “batterer's class” or “parenting classes.” A similar bill did not pass in the 1995-1996 session. In the later sessions, there were objections by the Judicial Council and California Judge's Association as being concerned that this legislation would interfere with judges' complete “discretion”.⁵⁵ Apparently, the existing policy of the state had been to allow a batterer to obtain custody of his children by arguing the for the court's bias toward “voluntary” joint physical custody/frequent and continuing contact rule. Frighteningly, research has shown that abusers are highly successful in gaining custody of their children.⁵⁶

Even with supposed safeguards, the present family court system has made it impossible to protect the child from an abusing parent. If a parent raises the issue of abuse in the family court setting, the accusing parent is frequently pathologized by a mediator or psychiatric evaluator and labeled an “alienating parent.” This leads the parent, usually the mother, to frequently lose custody of her children or be relegated to “supervised visitation” , which adds a further financial burden. (See Richard Gardner and “The Parental Alienation Syndrome” and Joan Kelly “The Alienated Child.”) Legislation has recently been passed to require the Judicial Council to standardize these supervised visitation facilities, funded by grants, which are “cropping up around the state”. Even though enacted safeguards should prevent a parent reporting child abuse to being ordered supervised visitation⁵⁹, mothers' actual experience with the system prove otherwise.⁶⁰

Legislation has finally modified the Code to state that it is in the best interests of the child to have frequent and continuing contact with both parents, *with the stipulation that the health, safety and welfare of the children are the court's primary concern when making any orders regarding custody or visitation*, and that the court will formulate its custody orders around restraining orders and other domestic violence orders. The court is also to find that perpetration of child abuse or domestic violence in a household where a child resides is “detrimental” to the child.⁶¹ Unbelievably, mediation is mandatory, even when domestic violence is involved.⁶²

The Code was also recently amended to prohibit the court from awarding child custody or unsupervised visitation to sex offenders, and a convicted rapist is now prevented from being awarded

custody or visitation with any child conceived as a result of the rape.⁶³

The Code has also been amended to require yet more training for extrajudicial evaluators and mediators for assessing domestic violence and sexual abuse^{62.1}, two areas which should not be in the purview of a custody evaluator, but by criminal investigation or in an appropriate criminal proceeding. Worse, the Judicial Council has been authorized by the Legislature to adopt guidelines allowing custody investigators to testify by electronic means in these cases so that they need not even be present in court for cross examination should a parent even get to court to challenge a "recommendation."^{62.2} Taken as a whole, this illustrates how truly dangerous it is for mothers to rely on a family court system for the protection of children.

Mothers who have been caught in the cycle of this **never ending** process have begun to question and protest the unbridled power given to private mediators and psychological and psychiatric evaluators, including social workers making psychiatric diagnoses and sending mothers to psychiatrists to pathologize them as "alienating" parents. Six women in and around Sacramento have submitted formal complaints to the California Board of Behavioral Sciences, which licenses social workers and family counselors, against a private mediator making such diagnoses.⁶⁴

CONCLUSIONS – THE TAIL WAGS THE DOG

Family law conciliation courts have in place vast machinery to facilitate mandatory joint custody outside of the court system, **even though joint custody is supposedly "voluntary" according to serpentine statutory language.** There are extensive government funds involved to entrench women in the system and enrich practitioners. The cost to parents, particularly mothers, are harshly onerous, and the mediation and evaluation system is as expensive and time consuming as litigation, with no practical way to appeal. Mediators and evaluators in the system are not mediators; they are delegated enormous power to make decisions which **are likely nondel-egable powers in the purview of a judge, thus depriving parties in family court of true due process.**

When parents do not "agree" to joint custody arrangements, a mediator or evaluator will make a "recommendation" to the court, which is rubber-stamped by a family law judge. In addition, the mediator is allowed to appoint an attorney for the child, subject the parties to psychiatric evaluations under Evidence Code 730 and refer to their many cohorts for additional "services." These mediators and evaluators are trained through tax exempt entities, though the mediators and evaluators themselves charge thousands of dollars for their services. All of this should raise a skeptical eyebrow in the appropriate usage of federal grant moneys which fuel this system. The cost to parents, particularly mothers, is devastating.

Time the child spends with each parent directly affects the amount of child support the non-custodial parent pays, and therefore, the actual hours the child spends with each parent is often the source of conflict. The mother in almost every case finds herself in a no-win situation; if she was

a working mother, she was bad and is labeled “uncaring,” and if she was a stay-at-home mother, she was equally bad and is frequently labeled “overprotective.” When these cases are scrutinized, one will find that on the most egregious end of the spectrum, batterers or abusers are easily able to obtain custody of their children, and at the most benign end, one will often find children at home alone after school at their father’s, for example, when the mother, who has always been available after school, is now unavailable to the child because of the father’s “rights” to his “parenting time.” ***Rather than being in the child’s best interest, it is a veritable resurrection of the “child as property” concept.***

All experts agree on one thing: children fare better with stable familial care following a divorce and that the contribution of fathers to households for support of household chores and child-rearing remains minimal. Studies to include the VLS logically support custody given the “primary caregiver at separation,” however, the consultants, experts and evaluators would then become obsolete and the giant family law perpetual cash machine would come grinding to a halt. California’s, and other jurisdictions’, maintenance of the amorphous frequent and continuing contact test as being the “best interests of the child” ensures that the machine will continue to churn through parental and public dollars, while children and mothers are entrapped in a perpetual system of counselors, psychiatrists, special masters, mediators, guardians ad litem and “parent educators.” Childhoods and lives are wasted in this system. Ironically, the private and public dollars would best be spent on a real research follow-up on children over the age of eighteen who can enlighten us with the reality of childhoods spent in this conflicted manner. As one child, Alanna Krause, now age eighteen, put it for the *San Francisco Daily Journal* in 2000:

Children are not parties in divorce proceedings—we are property to be divided.⁶⁵

The “best interests of the child” has lost out to a system riddled by moral and financial conflicts of interest in a distinctly separate court system which, ultimately, is accountable for nothing. The evolution of this system is a remarkable result of gender bias at the federal governmental level, carried out through the state courts.

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- 65 Letting Children Speak For Themselves, Alanna Krause, San Francisco Daily Journal, July 17, 2000

A BRIEF HISTORY OF THE FATHER'S RIGHTS MOVEMENT

The father's right's groups that are the subject of this research are *backlash father's right's groups, which should not be confused with other men's groups, which are supportive of women.* As distinguished from the mythopoetic movement, pro-feminist men's groups, and men's recovery groups, these men's right's groups wish to turn back all progress made by the women's movement¹, and in the arena of child custody, have no concern for the impact of their actions on their children. Quite often they are abusers in their former marriages.

The backlash Men's Rights Movements began in the 1960s, the earliest group which has been documented being the United States Divorce Reform, founded in Sacramento, California, by Ruben Kidd and George Partis in 1960. By 1977, MEN (Men's Equality Now) International was founded and held three conventions between 1977 and 1980. In 1976, Herb Goldberg published "The Hazards of Being Male: Surviving the Myth of Male Privilege." It captured the imagination of four men in Columbia, Maryland, who in 1977 founded Free Men, Inc. In 1977 there were seventy-nine groups listed in twenty-five states and the District of Columbia. Richard Haddad produced a manifesto in 1979 entitled "The Men's Liberation Movement: A Perspective," which crystallized Free Men's position in the movement.

In 1980 a meeting was held in Utica, New York. Those present were: Joseph and Mimi Babier of Fathers United for Equal Rights, New Jersey; Tom Alexander of Male Parents for Equal Rights, Delaware; and Bruce Gerling, John Rossler, and Jim Taylor of Equal Rights for Fathers, New York. They decided to form the National Congress for Men and used the Single Dad's Lifestyle directory of men's organizations to call a convention the following year. The first convention was held in Houston, Texas, in June 1981. A second was held in Detroit, Michigan, August, 1982. James Cook of the Joint Custody Association in Los Angeles was elected the first president. The general feeling in the National Congress for Men, and in several smaller groups across the country, was that men were being left out of equal rights consideration. This prompted a number of men's groups in Boston to stage the first equal rights for men rally on Father's Day, June 1982. The rally was sponsored by men's rights groups including the Boston Chapter of the Coalition of Free Men, Father's United for Equal Justice, Children of Divorce, and the newly formed National Congress for Men under the leadership of Men's Rights, Inc.

By 1981, the number of groups listed in the Single Dad's Lifestyle "directory" had grown to 195 organizations in thirty-three states.

By 1984 the National Congress for Men (NCM) was the most active organization. The National Council for Children's Rights was founded in late 1984, as a children's advocacy group in divorce. Renamed the Children's Rights Council (CRC) in 1992, it is a strong national organization with yearly conferences, many local chapters and support of right wing women. Although not a men's rights organization per se, father's rights leaders are heavily represented and father's rights issues make up most of its agenda.

There are myriad backlash father's rights groups, and they have been adamant about demanding "equality." The term "shared parental responsibility" is the new doublespeak for joint physical custody by "father's rights" groups. While many of these fathers may have had working wives, most of the time the mother was the primary caregiver during the marriage and running the household in addition to working. Upon separation, one of the driving factors for "shared parenting" and equality is a corresponding reduction in child support. Although the mother would be logically be the sole custodian after divorce, according to several studies, when there is a custody dispute, fathers win custody in the majority of disputed cases.²

In addition to the desire to reduce support, the dispute for custody, regardless of the effect that it may have on the child, is frequently a continuation of a power issue which existed within the former marriage, particularly in the cases involving domestic violence. The American Psychological Association's Presidential Task Force on Violence and the Family found that fathers who battered the mother are twice as likely to seek sole custody of their children than non-violent fathers.³ Additionally, nearly half of the men who abuse their female partners also abuse their children.⁴

Forced joint custody is also a top legislative priority of father's rights groups nationwide. These groups argue that courts are biased, and that sole custody awards to mothers deny fathers their right to parent. They allege that, in most cases, mothers are awarded sole custody, with fathers granted visitation rights. The men cite this as proof of bias against fathers. They had significant impact in shaping programs for what is essentially federal funding for non-custodial parents in the 1980s. Since there is also significant private money to be made by mediators and counselors in trying to make joint custody "workable" through counseling, supervised visitation and other services, they have been quite successful in gaining support from the Family Court system.

The fathers' rights groups which are the supporters and policy makers of the "shared parenting" agenda are now engaging in siphoning and diverting fund for the **Violence Against Women Act (VAWA)** just as they are concurrently doing with Access to Visitation, Child Support Enforcement, TANF and other program Grants *which were enacted to protect women who were in situations of domestic violence.*

Says the National Alliance for Family Court Justice, The National Congress for Fathers and Children is a group connected to both Warren Farrell, who has espoused questionable views on incest, and disbarred attorney, Bob Hirschfeld from Arizona. Hirschfeld's motto as a practicing family attorney was "**I Dismember Mamas.**" Though disbarred, Hirschfeld runs an Internet site advising men how to pursue their "rights."

These men and groups, who have been so active in obtaining "rights for fathers" intend to get obtain funds in "equal" amounts to what is provided for women's shelters and programs.⁵ The National Alliance for Family Court Justice says one tactic is to recruit men even though they may be molesters batterers or worse, with promises of child support abatements, free legal services and similar services. Once the fathers have "custodial" or "single" father status, they then obtain more grant moneys that they misuse on other programs, with such as so-called "men's shelters," run by the likes of George Gilliland, who runs a "Battered Men's" program in Minneapolis.

This agenda is illustrated in a press release from The National Congress for Fathers and Men, announcing the opening of a new state office in Venus, Texas. They indicate that the purpose of their office is twofold:

"A. In counties where no fathers group exist, the National Congress for Fathers and Children (NCFC) will assist fathers in the start up of new chapters to increase awareness of father's rights and to help set up **support groups for father's [sic] going through the system.** *[emphasis ours]*

B. In all counties, NCFC will establish men's shelters. These shelters will house men that have been victims of family violence and/or to shelter homeless men that have children. NCFC will help apply for assistance funds for these shelters from Federal and State sources, **including equal funds from VAWA, equal to the amount spent on Women's Shelters.** *[emphasis ours].....*

David Allen Shelton has been appointed the director of the Texas Headquarters of the National Congress for Fathers and Children. Mr. Shelton has been active and a mainstay of the fathers' movement in Texas for the past thirteen years, and is a past elected member to the National group. As director of the Dallas based Fathers for Equal Rights (FER), he built one of the largest independent fathers' group in the United States. He increased the membership of FER from 200 members to over 1200 members in just 2 years. He created programs to help members learn the laws of Texas concerning Family law and the values of fatherhood to children. **The members of Fathers for Equal Rights have a very high percentage rate of winning in Family Court.** *[emphasis ours]*

Mr. Shelton has also served as President of the Texas Father's Alliance (TFA) since 1992. The TFA has been the driving force behind the changing family laws in Texas. **The TFA was the primary reason that Texas went to Joint Managing Conservatorship in 1995.**⁶ *[emphasis ours]*

These groups have positioned themselves as representatives of the mainstream men's and father's rights movement. In 1997 Fathers for Equal Rights and the National Congress for Fathers and Children signed on to the 1995 "Fathers' Manifesto," a particularly egregious father's rights umbrella organization available on the internet. Its home base is in Orange County, California. John Knight is the founder of Fathers' Manifesto (also known as the American Institute for Men). Knight was incarcerated for not paying child support. Another signatory of the Reaffirmation and Declaration of the Manifesto, Robert Lindsay Cheney, Jr., has also been jailed for refusing to pay child support. Other signatories include leaders and members of major father's rights groups such as the American Father's Coalition, Fathers for Equal Rights, Fathers United for Equal Rights, The Men's Internetwork, The Children's Rights Council, Fathers Rights and Equality Exchange, and The American Coalition for Fathers and Children. Representatives of these groups testified in the 1995 public hearings for the U.S Commission on Child and Family Welfare. The World Wide Web site for Kids Campaign, supported by the White House, cites the following fathers' rights groups

as participants: Children's Rights Council, Father's Rights and Equality Exchange, National Congress for Fathers of America, The American Fathers Alliance, and United Fathers of America. All these groups have representatives who are signatories of Fathers' Manifesto.⁷

The Fathers' Manifesto "Reaffirmation and Declaration" reads as follows:

We signatories to the Fathers' Manifesto, responding to natural and Biblical laws, in defense of our nation and our families, hereby declare and assert our patriarchal role in society. America is an experiment in freedom, and the feminist experiment in freedom, under the guise of "equality," unleashed a panoply of social ills which have become a cancer on our land, led to the moral and economic destruction of our nation, made America a house divided unto itself, created a vast underclass with a bleak and bankrupt future, and is the greatest national disaster we have ever faced.

Recognizing patriarchy to be the greatest creator of wealth, prosperity, and stability civilization has ever known, we hereby demand that our children, homes, lives, liberty, and property be unconditionally restored to us. We hereby demand replacement of the doctrine of Parens Patria with the Biblical doctrines upon which this nation was founded. We hereby recognize and reaffirm that patriarchy is the order established under God and under His Natural Law.⁸

Fathers' rights groups do not support any one kind of child custody, although all versions benefit the father to the detriment of the mother and children. The Fathers' Manifesto itself lobbies for total and full child custody to the father with no exceptions whatsoever.⁹

Fathers' Manifesto supports abolishment of welfare, social security, AFDC, food stamps, HUD, alimony, child support, and "all other transfers of assets which encourage or support fatherlessness." Fathers' Manifesto goes so far as urging for the repeal of women's right to vote! Feminism, and the "matriarchy" they say it created, is blamed for everything from teen suicide, low S.A.T scores, child abuse, unemployment, divorce, and low marriage rates. The Fathers' Manifesto describes itself as "striving to fight feminism, end Affirmative Action, and restore responsible fatherhood." It states that the Manifesto is "against feminism, Affirmative Action, blacks, Jews, and other elements of society."¹⁰

By influencing the courts, and diverting funds to promote their agenda, fathers' rights groups are contributing to the corruption, gender bias, and denial of due process of law in family courts. Their agenda is to avoid child support, impoverish women, and perpetuate a patriarchal suprastructure by which women and children are subjugated to property status.

More information about the father's rights group can be found at www.gate.net/~liz/fathers. Or check father's rights sites such as the Father's Rights Foundation's "Father's Rights Page." These resources specifically advise men how to be "physically conditioned for war to stop a divorce" and "how to minimize child support." The site advertises a multi-state guide to father's rights for \$25.00:

"A comprehensive guide to fathers rights and divorce tactics including several case excerpts used successfully by the author, a Fathers Rights Attorney [sic] to obtain custody and extensive visitation for fathers. Updated to include multi state cases and uniform multi state acts. After reading this you may know more than your attorney!

Send a copy to your favorite Judge!" ¹¹ [emphasis ours]

Another book on the site gives these tips:

"CONTENTS: Tactics That Win

- The Truth about Domestic Violence
 - Deceptive practices used by women and women's centers to obtain bogus protective orders.
 - The Criminalizing of divorce [sic]
 - Steps to protect and defend yourself
 - Making bogus protective orders and false allegations backfire in custody litigation
 - Using Discovery as a defense/offense
- Attack, Attack, Attack—Tactics that win!"¹²

"Attacking" and preparing for "war" are not tactics congenial to parenting or shared custody. However, this is precisely the mindset of these groups which have not only influenced and changed legislation, but exemplify an attitude which permeates "shared parenting" or "shared custody" with conflict. **Backlash father's rights groups do not have an altruistic agenda for their children, and they have been extremely influential in shaping forced shared custody statutes nationwide.**

1 Baumli, Francis, PhD., and Wilson, Tom, "History of the Men's Movement," www.amazoncastle.com/feminism/menhist/html (1997)

2 "Divorces from Justice: The Abuse of Women and Children by Divorce Lawyers and Judges," Winner, Karen, 1996

3 "Statistics and Facts Ignored by Family Courts", www.smalljustic.com/links.html

4 Winner, Karen, supra

5 National Alliance for Family Court Justice, <http://www.nafcj.org>

6 Ibid.

7 "American Fathers: Equality or Patriarchy?" Trish Wilson, *feminista.com* (San Francisco), vol.1 no.3, 1999.

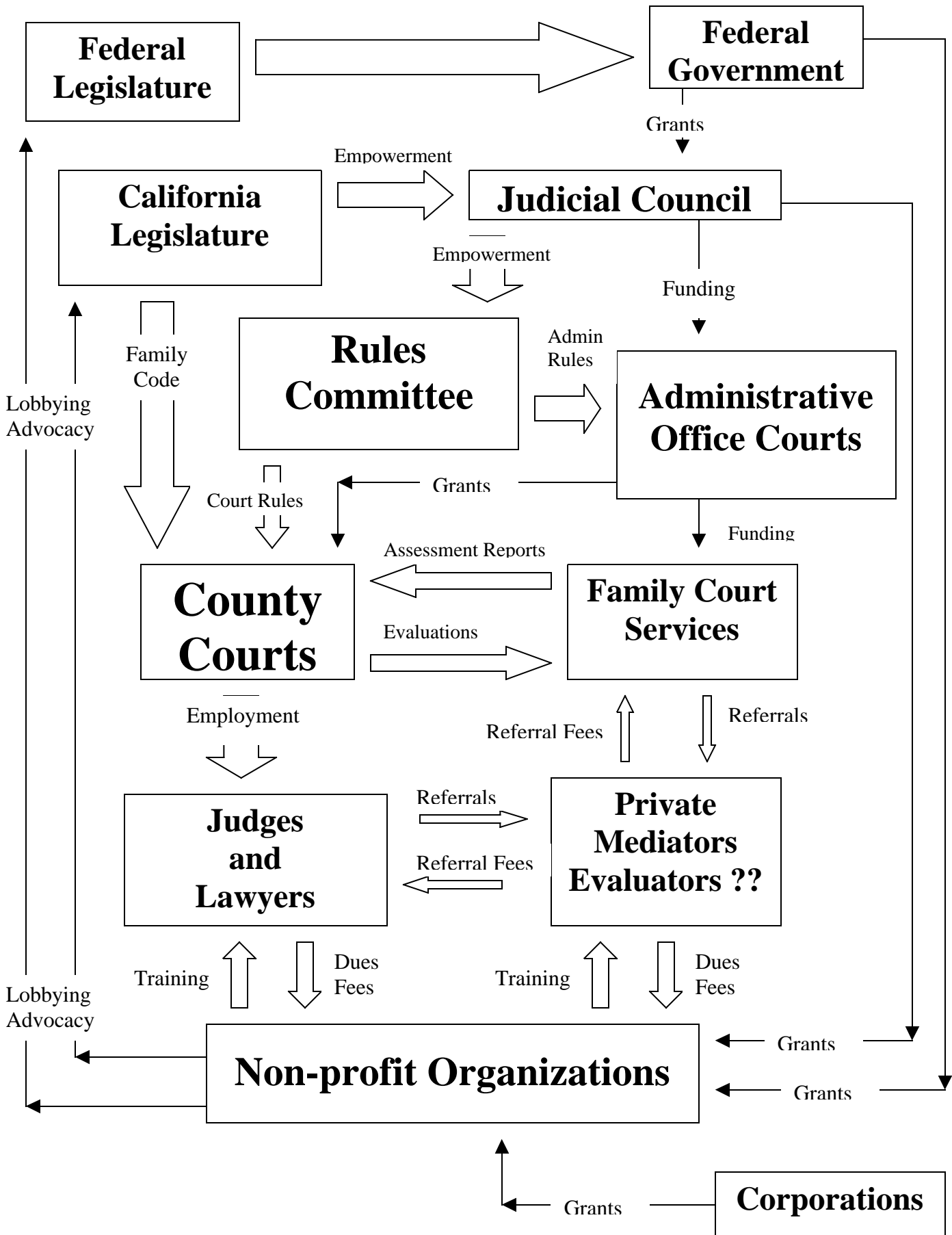
8 See website at christianparty.net.

9 Wilson, "American Fathers."

10 Christianparty.net/home.htm

11 www.fathers-rights.com/

12 Ibid.



WHEN CUSTODY OR VISITATION IS DISPUTED DURING A FAMILY LAW CASE: A CASE FLOW ANALYSIS

1. Whether working outside the home or not, in almost all dissolution cases, it is the mother that provides the day to day child care, regardless of the age of the child or the full time or part time work status of the mother. Most mothers, when consulting a family law attorney, are amazed when they find that custody will be disputed, since they have always been their children's primary caregivers. This is because the share of the father's time with the children reduces his child support "burden."
2. In all family law cases, if there is an issue of custody and/or visitation, the case is referred to either Family Court Services (FCS) or a private mediator. Generally, the attorneys will agree upon a private mediator whose prices are from \$100 to \$175 per hour, to be split equally between the parties. If a party wishes to go to FCS, an Order to Show Cause is often set, and the judge will refer the parties to FCS. However, many counties, if not all now, allow the judge to refer the parties to private mediators. All of these people know each other and refer to each other.
3. The parties meet together with the "mediator." Whether FCS or private, these evaluators are not true mediators. If the couples fail to come to an "agreed parenting plan," the "mediator" will make a recommendation, and this will be adopted by the judge, even if a party does not agree with it.
4. The parties put forth their own ideas for "parenting plans." The mother, who has been the child or children's primary caregiver throughout their lives finds that her status as primary caregiver means nothing; the parties are deemed "equal" when the marriage is dissolved. If the party sees an FCS mediator, a great deal of written information is obtained from the parties. The FCS mediator may or may not read it and may or may not call potential witnesses or others involved with the children, such as teachers or caregivers. Private mediators generally do not do this; they will obtain the information from the couples in the session, since they charge a high hourly rate and it may take more time to take down the information in person.
5. Even though the mother has been the primary caregiver and the children are doing well, the parties are told that they will be "working toward 50 percent equally shared physical custody," because this is "in the best interests of the children," or it will be immediately ordered, depending upon the age of the child. The father is generally in favor of 50/50 custody or more to reduce his child support obligation.

6. The mediator has the power to “recommend” a Labor Code § 730 psychological or psychiatric evaluation, and/or an attorney for the child, especially if the mother resists 50/50 custody. The mother is also very frequently told that she is too “overprotective” of the child and must “let go.” “Parenting classes” are almost always recommended to “assist” the parents “communicate in a businesslike fashion” about their children’s needs. In spite of a mother having clear evidence that the children are doing well and she has always been the primary caregiver, that the father is continuing control of her and the children through mediation and frequently through companion litigation, evidence of this is simply ignored and the mother is told that she is to work it out, or is labeled an “alienating parent.” In the event that an attorney for the child is ordered by the court because the mediator feels the parties cannot “communicate,” the parties each pay half, as well as half of any other counseling, “classes” or services which are ordered, adding to the mother’s continuing expense load.
7. If the mother wants to go to “trial” wherein the “mediator” is cross-examined and witnesses can be called, the cost is prohibitive, since family law attorney’s hourly charges are from \$200 to \$400 per hour. Additionally, the judge is often biased against the party who does not agree to the report, because the judge recommends these same evaluators. The attorney tells the mother that there is no reason to go to trial because the judge will simply “rubber-stamp” the report, and it’s best to go ahead with the “recommendations.”
8. The parties begin the recommended custody arrangements, which is always shared physical custody. When the arrangement breaks down or problems are encountered by the child, the parties are sent back to the “mediator” again, or in the case of FCS, the parties will see a different mediator.
9. If the parents have completed the “parenting classes” and the mother presents evidence to the mediator that the arrangement is not working and the child or is in distress, the mediator ignores it, or implies that it is the mother’s problem. Problems are often encountered by children who have routinely been with their mothers after school, for example, and now are left with relatives or other caregivers during the father’s “time” even when the mother is available for care. The mother is specifically told that it is the father’s “time,” despite the fact that the child may want to be with her and may be better off with her. If a father goes out of town or fails to see the children, he can demand “make-up time,” which is part of some boilerplate provisions in “parenting agreements.” In this vein, some boilerplate provisions state that “the other parent shall have the option of caring for the child if the other is out of town” or otherwise unable to parent. There are countless boilerplate provisions enacted to give the parties false “parity.”

10. If the child continues having difficulty adjusting to going back and forth for “shared parenting,” the parents must go back and pay the mediator for more sessions. The child is often put into counseling and pathologized. The mediators rarely, if ever, make a decision where a child would best be on a regular basis due to the faulty legal presumption that joint physical custody is in the best interest of the child. The mediators often refer the child for a stigmatizing psychological or psychiatric examination when the child simply needs stability.
11. Ongoing requests for mediation can be used by the father for years to increase his parenting time in order to reduce his child support obligation, deplete the mother’s resources to pay for attorneys, mediators, counseling and other mental health clinicians and maintain “control,” since the presumption of joint physical custody is in his favor.
12. Because the “needs of the child are subject to change,” a child and mother can spend their lives in this system until the child is eighteen.

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WHEN PATERNAL INCEST OR ABUSE IS ALLEGED DURING A FAMILY LAW CASE:

A CASE FLOW ANALYSIS

1. A child makes an allegation of sexual or physical abuse against his or her father, either to a mandated reporter (therapist, physician, teacher, etc.) or to a lay person (mother, friend etc.). The abuse may also be alleged against another adult, such as an uncle or family friend.
2. Child Protective Services (CPS) or the police are notified.
3. If CPS is notified by a mandated reporter, an emergency response worker interviews the child within a relatively short period of time, sometimes within 24 hours of the receipt of the report. If a layperson makes the report, several weeks may elapse before the worker interviews the child.
4. After the interview, CPS issues a report and the abuse is either deemed substantiated or unsubstantiated. Substantiated reports are more likely when the allegation was documented by a mandated reporter and almost never are when documented by a layperson.
5. If the abuse is substantiated, the worker is supposed to instruct the mother to protect the child from the perpetrator by obtaining stay away orders or by physically removing the child from the home, however, these instructions often appear to be vague, and the mother may be determined to be “unprotective” by not having followed instruction. Restraining orders are often denied when the CPS report is unsubstantiated.
6. The mother can “protect” the child by moving away from the alleged perpetrator or by obtaining stay-away orders from Family Court. Sometimes, a CPS agent will file a petition on the child’s behalf in Juvenile Court and a hearing or trial is held, providing the mother with a restraining order against the perpetrator. However, Juvenile Court restraining orders can be challenged in Family Court and usually are. If a trial is held, the mother cannot subsequently use the evidence of abuse in Family Court. Either way, once the child is “protected”, CPS and Juvenile Court abruptly drop the case and the child’s protection is thereafter under the jurisdiction of the Family Court.
7. If the mother is found to be “unprotective” by not having moved or obtained stay-away orders, the case is referred to a dependency investigator who petitions Juvenile Court for dependency proceedings ending with the child being placed in foster care.

8. At any stage in this process, the police may or may not have been notified. If they have been notified, a police officer interviews the mother an/or the child and issues as report. Restraining orders are often denied when police reports are lacking.
9. The child is often interviewed at the DA's office if recommended by either the police or CPS. However, as a matter of general statewide policy, the DA rarely prosecutes the suspected perpetrator in incest cases, even if charges are pressed.
10. In the rare instances where the DA prosecutes, the case often is not prosecuted in full, or the verdict returns as "not guilty" despite physical evidence of abuse due to the difficulties of presenting child witnesses and convincing jurors that incest has occurred.
11. If the child was not protected by juvenile or criminal court proceedings, the mother then turns to Family Court to secure sole custody, restraining orders and supervised visitation between the father and the child. If Juvenile court issued restraining orders, the father often initiates proceedings alleging parental alienation against the mother in Family Court.
12. The mother then pays several thousand dollars to retain a family law attorney who will bill for services at \$200 to \$400 per hour, depending upon her financial circumstances. Sometimes, a mother with few financial resources is able to obtain low cost legal services, but such services are scarce as government funding has been curtailed. In general, due to changes in family law practice, family law attorneys are not skilled in managing a full scale trial of the facts of a case.
13. The mother's attorney files an Order to Show Cause (OSC) granting temporary sole custody and restraining orders and if her papers are in order and there are adequate police and/ or CPS reports, she may review them. The orders may be retained only until a hearing has been held on the OSC, and notice of the OSC is then given to the father. The mother's attorney sets an OSC hearing date and instructs the mother to make an appointment for mediation with Family Court Services (FCS) before the hearing date.
14. Upon being served the OSC and notice of hearing date, the alleged perpetrator father often hires a criminal attorney or a family lawyer trained in domestic violence defense. The tactics used by these attorneys are generally aggressive and easily overwhelm the average family law sole practitioner.
15. The mother attends the "mediation" session at FCS with the father, and both parties disclose their positions on the abuse issue. The father will sometimes accuse the mother of alienating the child from him, although that

accusation can happen later in the proceeding or can actually be initiated by the mediator his or herself.

16. The mediator issues a report, generally recommending a psychological evaluation under Evidence Code §730, although other recommendations are sometimes made, such as counseling. If the mediator suspects abuse, supervised visitation can be recommended for the suspected perpetrator father.
17. The OSC hearing is held. Rather than a presentation of evidence, the mediator's "recommendations" are presented and generally upheld. The parties are then ordered to present lists of prospective psychological evaluators in preparation for the recommended Evidence Code §730 evaluation. This process often occurs off the record in the judge's chambers to "protect the privacy" of the parties and the child.
18. A motion is then made by either attorney to appoint counsel to represent the minor child and the attorney then present lists of preferred candidates for the job, often friends or associates of the attorneys, personnel or even the judges involved in the case.
19. Another hearing is then held at which the attorneys present lists of preferred Evidence Code §730 evaluators and a proposed witness list for each party. The judge chooses and orders an evaluator and counsel for the child.
20. At this point in many counties, the parties are required to sign a form waiving all rights to present evidence at a standard trial and agree to pay the Evidence Code §730 psychologist or psychiatrist a given sum of money. Sometimes a monetary deposit "securing" the services of the evaluator is required along with the signed form.
21. A motion is often made to examine the partiality and qualifications (voir dire) of the Evidence Code §730 psychologist or psychiatrist and/or the minor's counsel after the appointment, which may or may not be granted by the court.
22. Voir dire hearings are then held if granted, and evaluators and counsel for the child are questioned on their qualifications but they are not required to give evidence of their qualifications. Qualifications are generally not verified, and the attorneys generally approve the evaluator and the counsel for the child chosen by the court. All of these people generally know each other well in this system.
23. Parties pay the Evidence Code §730 evaluator a lump sum at the beginning of the evaluation and attend evaluation session for standardized testing and other evaluation tools. They also give testimony to the evaluator of the

abuse and/or alienation during these sessions.

24. The evaluator "investigates" the case by the "screening" of prospective witnesses and the presented evidence. The screening of witnesses occurs over the phone with no transcription or record of any kind.
25. The evaluator then issues a report substantiating either abuse or "alienation". A neutral report in favor of both parties is rarely given, since the "evaluation" functions as an informal "lie detector test" determining which party is telling the truth, rather than "erring" on the side of the protection of the child.
26. The mother, generally the lesser employed of the parties often runs out of money at this point from paying her attorney, the evaluator and half of the child's attorney's fees. Her attorney, if unsuccessful at obtaining an order requiring the father to pay attorney's fees, generally quits when the mother is no longer able to pay any more fees. The mother's fees and costs can easily exceed \$20,000 by now.
27. If the evaluator substantiates abuse, the restraining orders remain intact and the perpetrator father continues with supervised visitation until the "trial".
28. If, on the other hand, the evaluator substantiates "parental alienation", an ex parte hearing is held, often without the mother's attorney present, and the judge issues orders immediately changing custody to the father until the "trial".
29. A "trial" is held at which most of the time is spent reviewing the evaluation reports for possible errors and only the witnesses and evidence screened by the evaluator are admitted for testimony. If the case has previously been heard in Juvenile Court, the evidence of the abuse is not allowed, having already been adjudicated by that court system. The child's counsel generally sides with whichever party "prevails" in the evaluation. Often, only those witnesses who support the "prevailing" party are allowed to be heard.
30. Again, to "protect the privacy" of the parties and the child, much of the trial may occur in chambers and proceedings may be closed to the public.
31. Orders made as a result of the "trial" are generally issued consistent with the evaluation report, although in some cases, judges have ruled in favor of "parental alienation" on the part of the mother despite evaluation reports to the contrary, suggesting gender bias on the part of these judges.
32. No judgment is ever entered closing the case, and the case remains vulnerable to repeated motions requesting action from the court, generally a

change in custody or visitation arrangements. The child's attorney often initiates these later motions and always participates in the hearings despite the conclusion of the "abuse" issue and both parties pay equally for the child's attorney.

33. This tactic of repeated motions is frequently used by fathers against mothers and is intended to reduce the mother's savings every six months or so to preclude her from recovering financially. In the event of "trials" that substantiate abuse, the perpetrator father may or may not undergo "treatment", but generally thereafter begins a process of filing motions to suspend supervised visitation within approximately six months after the "trial". This process is repeated until supervised visitation is ended and his visitation is increased to the point where he can justify requesting joint custody. Many fathers who start with joint custody use this process to obtain sole custody even when there are no allegations of abuse.

Court Watch Evaluation

CALIFORNIA NATIONAL ORGANIZATION FOR WOMEN

Date: _____ County: _____

Name of Judge Commissioner Special Master (check one) _____

Case #: _____ Case Name: _____ V _____

WHAT ISSUES DOES THIS CASE INVOLVE: (check)

- Divorce
- Property Division
- Spousal Support
- Child Support
- Child Custody
- Visitation Fees
- Family Violence (Battery, Sexual abuse or Assault)
- Attorney's Fees
- Other

GENDER BIAS:

- 1) Did the Judge/Commissioner/Special Master appear to show favoritism or prejudice toward one of the parties? Yes No
- 2) Which party? Female Male
- 3) Note any comments made by the Judge/Commissioner/Special Master to support your conclusion of gender bias. _____

DUE PROCESS:

- 1) Did either party attempt to speak to the Judge/Commissioner/Special Master and was denied? Yes No
- 2) If yes, which side was denied? Female Male
- 3) Did either party offer evidence that the Judge/Commissioner/Special Master refused to admit? Yes No
- 4) If yes, which side was refused? Female Male
- 5) Did either party attempt to introduce testimony from the witness and was refused? Yes No
- 6) If yes, which side was refused? Female Male
- 7) Was either party denied the opportunity to cross-examine a witness? Yes No
- 8) If yes, which side was denied? Female Male
- 9) Were there any meetings in the Judge/Commissioner/Special Master Chambers? Yes No
- 10) If yes, were both parties and their attorneys invited into that meeting?

- 11) If no, who did not get to go into chambers?
_ Female _ Her Attorney _ Male _ His Attorney
- 12) Were both parties present in court? _Yes _ No
- 13) If no, who was not present? _ Female _ Male
- 14) Did both parties have legal representation?
- 15) If no, who was not represented by an attorney? _Female _ Male
- 16) Did the child(ren) have a court appointed attorney? _Yes _ No

FAMILY VIOLENCE

- 1) Were family violence issues raised in this case? _Yes _ No
- 2) If yes please explain. _____

MEDIATION:

- 1) Was there a Mediator involved in this case? _Yes _ No
- 2) Was there a report introduced? _Yes _No
- 3) Was there a discussion or debate over the findings of the report? _Yes _ No
- 4) Did the Judge/Commissioner/Special Master approve the report as submitted? _Yes _ No

EVALUATION:

- 1) Was there an Evaluator involved in this case? _Yes _ No
- 2) Was there a report introduced? _Yes _No
- 3) Was there a discussion or debate over the findings of the report? _Yes _ No
- 4) Did the Judge/Commissioner/Special Master approve the report as submitted? _Yes _ No

QUESTIONABLE RELATIONSHIPS:

- 1) Was it apparent that any court personnel had a relationship with either of the parties?
_ Yes _ No
- 2) If yes, please explain. _____

OTHER:

- 1) Were there any other comments in the proceedings that are notable? _Yes _ No
- 2) If yes, please explain. _____

OUTCOME OF COURT PROCEEDING:

- 1) What was the outcome of the court proceeding in this case?

- 2) Did you find it fair and reasonable? _Yes _ No
- 3) If no, please explain. _____

GENDER BIAS IN THE COURTS

REPORT POINTS TO NEEDS AND RESOLUTIONS FOR FAMILY COURTS

In order to understand gender bias in the courts today, one must look at the key legislative decisions that are the foundation upon which today's courts rest. This document will provide a legislative and historical analysis that will inform the discussion of gender bias in the courts. It will look at the systemic nature of gender bias and the ways it manifests in the courtroom.

A 1996 report, "Achieving Equal Justice for Women and Men in the California Courts," done by the Judicial Council of California Advisory Committee on Gender Bias in the Courts, showed deep seeded gender bias and sexism in the California courts system and called for specific solutions to rectify the bias.

The report looked at the areas of Family Law, Domestic Violence, Juvenile and Criminal Law, Court Administration, Civil Litigation and Courtroom Demeanor, Implementation, Judicial Education, and Race and Ethnic Bias. The committee used surveys of California judges, public hearings, site visits of jails, focus-group discussions at the State Bar, conversations with domestic violence advocates, interviews, literature and case law searches, and other techniques, to assess the state's courts and how they treat women. Even with the corroboration of the Judicial Council, little has been done since 1996 to effectively reform the family courts. It is however important to look at the committee's findings and suggestions as they mirror the findings of California NOW.

The committee found many judges and attorneys, as well as other court employees including mediators, clerks and evaluators, operated under sexist doctrines, pathologized women, and restricted women's access to due process. The committee advised that due to gender bias, a fairness manual for judges and court employees be issued and the use of gender neutral language be implemented. It suggested that judges get training and education on the issues of custody, support, and abuse. The committee's report also suggested that judges' and attorneys' membership in discriminatory clubs be addressed.¹

The report discussed the interpretation and enforcement of family law codes and pointed to the issue of custody and child abuse as a "special problem" that needed immediate attention.²

In the area of domestic violence, the council's report showed that there were significant problems with abused women getting the restraining orders they needed to stay safe, as well as barriers to protection for non-English speaking victims, and barriers to economically disadvantaged victims of domestic violence.

The report addressed the issue of judges' impartiality due to their own divorce, spousal support, or loss of custody in family law court as an area of concern.³ It also made recommendations pertaining to mediation which included requiring mediators to be educated on gender stereotypes and the power balance between the parent and the mediator. In addition, the committee "urged that recommendations from mediators be in writing and that bench officers state the reasons for relying on a mediator's report in making orders."⁴ It also called on the Judicial Council's Family Law

Advisory Committee and the Statewide Office of Family Court Services to jointly study the custody evaluation process and recommend ways to improve it.

Because 95 percent of victims of domestic violence are women, the judicial system's inadequate treatment and understanding of the issues "raised serious issues of gender bias."⁵ The report states:

The evidence gathered by the committee demonstrated that when domestic violence victims seek protection from the court, they are often further victimized by the process and by their experiences within the judicial system. The committee found that legislative efforts to protect victims of domestic violence have not been adequately enforced.⁶

The family court system, which often operates with gender stereotypes and sex roles as its guide, subjugates, belittles, and often outwardly discriminates against women. Perhaps this is due to the institutional support attained in part to the political connections between family law and father's rights groups, who explicitly believe in the power of patriarchy and the need to reverse the gains made in women's rights.

In 1996, House of Representatives Bill 3734, entitled the "Personal Responsibility and Work Opportunity Reconciliation Act," and popularly known as the Welfare Reform Act, was passed into law under Title 42 of the United States Code. The bill amended AFDC, child support enforcement, and other similar federal programs affecting low income families throughout the United States. The provisions of the Act are under the direction of the Department of Health and Human Services, and, under Title III of the Act, interstate child support regulations are delegated to the Office of Child Support Enforcement under the Administration for Children and Families. Under Title III, the Administration for Children and Families provides funding and technical support to states and private child support collection companies for collecting child support from "deadbeat dads." The purpose of Title III is to offset the rather harsh amendments to the old welfare system by establishing regular child support to single parents (e.g. unwed mothers) in lieu of regular welfare payments. Title III is a significant part of welfare reform, allowing Congress to justify its drastic reduction in public support to single parent families, since, in theory, recalcitrant fathers themselves, rather than the federal government, will be required to provide for the upbringing of their families.

Child support enforcement funds are disbursed to the states which then use the funds for administration and to contract with private enforcement (e.g. collection) companies which track down deadbeat dads and attach their wages.

Tacked on to Title III is Section I (eye) which provides for grants to states for "access and visitation programs." Section I appears in public law as 42 USC 669b, and reads as part of the amendments to the child support enforcement programs. It provides hundreds of millions of dollars to each state to:

Establish and administer programs to support and facilitate noncustodial parents' access to and visitation of their children, by means of activities including

mediation (both voluntary and mandatory), counseling, education, development of parenting plans, visitation enforcement (including monitoring, supervision and neutral drop-off and pickup), and development of guidelines for visitation and alternative custody arrangements.

Federal funding of these access/visitation grants began well before 1996, however, when Congress enacted the Family Support Act of 1988 (P.L. 100-485). The first of the major welfare amendment laws, the Family Support Act amended all previous welfare legislation for the purpose of 1) replacing AFDC with a Family Support program which would emphasize “work, child support, and need-based family support supplements”; 2) amending title IV of the Social Security Act to assist needy children and parents to “obtain education, training, and employment needed to avoid long term welfare dependence;” and 3) making improvements to assure that the new program will be more effective in achieving its objectives.” The legislation was part of a Reagan-era reform effort intended to wean welfare recipients from public support by enabling unwed and divorced mothers to collect adequate child support from the fathers of their children. The legislation authorized changes to improve the efficiency of the child support enforcement program established in the previous decade.

The legislation under the Family Support Act of 1988 included authorization under Title V for “Demonstration Projects to Address Child Access Problems.” Under Title V, Congress authorized the distribution of up to four million dollars to any state interested in conducting demonstration projects under 42 USC 1315 (the general public welfare “demonstration project” statute put into effect decades ago) under which the states were given flexibility to develop their own programs, as long as the programs were designed 1) to develop activities to increase compliance with child access provisions of court orders; 2) to develop systematic procedures for enforcing access provisions of court orders, establishing special staff to deal with and mediate disputes involving access and disseminating information to parents, and 3) to improve either the financial well-being of families with children or the operation of the program. In addition, no such demonstration project could withhold aid to families pending visitation nor modify any program to have a negative effect on needy children.

The Secretary of Health and Human Services would regulate the program and in July, 1992, would submit to Congress a report on the effectiveness demonstrated in 1) decreasing the time required for the resolution of disputes related to child access; 2) reducing litigation relating to access disputes; and 3) improving compliance with court –ordered child support payments. The Secretary eventually reported the demonstration projects as successful, and Congress went to work to authorize grant funding to all the states, which it finally did under the “Welfare Reform Act” of 1996.

CONSTITUTIONALITY ISSUES

When the Family Support Act was signed into law on October 13, 1988, it met with some skepticism as to its constitutionality. To assuage any opposition which might have arisen as to the constitutionality of federal funds supporting “family law” programs solely under the jurisdiction of the states, the Subcommittee on Human Resources included a constitutional defense of the Family Support Act in a document published on December 5, 1989, entitled, “Child Support Enforcement

Program Policy and Practice.” The document stated that although Congress does not have general authority to pass or enact laws dealing with family law issues, it may do so if there is a “nexus” between such legislation and one of the areas in which it is authorized to act. The “nexus” justifying federal funding of the child support and access/visitation program ostensibly was the purported connection between the failure on the part of fathers to pay child support and the growth in the number of “female single-parent” families receiving federal AFDC benefits. The Subcommittee justified the child support enforcement programs in one broad sweeping statement: “These programs do not violate the Constitution because state participation is voluntary”.¹

Voluntary participation, however, is not the issue with the access/visitation funding, since assisting “non-custodial” parents in having access to their children is strictly outside the constitutional realm of powers granted to Congress. The Subcommittee itself appears to have been aware of the weaknesses in the constitutionality of assisting with child support enforcement in its comment that:

Some observers...maintain that by requiring States to use specified procedures to enforce child support, the Congress has already inserted itself into matter of family law to such a degree that it may be obligated by political forces and by a sense of fairness to respond to demands of noncustodial parents for action in the areas of visitation and custody.²

The access/visitation funding may be characterized as just such an obligatory response to the “political forces” and “demands” of noncustodial parents [i.e. fathers] who actively sought federal action to improve their position on custody and visitation.

Noncustodial parents argue that it is unfair to look at the child support issue only from the viewpoint of the custodial parent. Traditionally, they argue, courts have sided with mothers in awarding custody, and have paid insufficient attention to enforcing the visitation rights of fathers. As a result, they say, the mothers have had the rewards and obligations connected with rearing children, while fathers have sometimes had no share in the rewards, but have the continuing obligation to pay support. To be fair, it is argued, laws and procedures should be reformed not only with respect to enforcement of the child support obligation, but also with respect to visitation and custody rights.”³

How did Congress arrive at such a constitutionally tenuous position as authorizing and appropriating funding for programs to assist fathers with visitation? The answer to this question lies in the hearing transcripts of the congressional subcommittees responsible for initiating the legislation. As early as 1983, Representative Barbara Kennelly (CT) of the Ways and Means Committee's Subcommittee on Public Assistance and Unemployment Compensation (now the Subcommittee on Human Resources) and Senator Russell B. Long (LA) of the Senate Finance Committee, the originators of federal child support legislation, shepherded changes to the old welfare legislation through the House and Senate. On January 24 and 26, 1984, a Senate Finance Committee hearing was held under the chairmanship of Bob Dole (KS) at which testimony was received from Alan

Lebow, president of the National Congress for Men, and James A. Cook, president of the Joint Custody Association. Lebow and Cook advocated changes to the child support programs which would encourage mandatory visitation and joint custody for fathers. Cook outlines a program consisting of 23 changes to the then-current child support programs, most of which changes were subsequently absorbed into the Family Support Act. Among the changes was a pilot program established in Travis County, Texas, in which family law litigants were ordered to resolve custody disputes with the help of court-appointed counselors instead of judges.⁴

The record does not show any subsequent hearing on the access/visitation issue until June 19, 1986, at which time a hearing was held in the House committee on Children, Youth, and Families entitled "Divorce: The Impact on Children and Families," the purpose of which was to study "the problems of female single-parents." Among the witnesses, were Judith S. Wallerstein, executive director of the Center for the Family in Transition, located in Marin county, California, and David L. Levy, president of the National Council for Children's Rights, now the Children's Rights Council.⁵

On March 2, 1987, the Senate Finance Committee's Subcommittee on Social Security and Family Policy, chaired by Senator Daniel Patrick Moynihan (NY) held another hearing in which access/visitation issues were discussed. During the course of the hearing, which focused on changes to enhance the child support collection procedures, Jack Kammer, executive director of the National Congress for Men, and David Levy, president of the National Council for Children's Rights, were brought forward as witnesses proposing enhancements to the child support enforcement program that encouraged and supported fathers accessing their children in custodial arrangements:

The National Council for Children's Rights is proposing that Congress pass an Access (Visitation) Law this year. We think such a law will not only help a child get access to both parents, but may also be the single most important bill you could pass this year to improve child support payments.⁶

The purported goal of doing so was to increase the effectiveness of the states' child support enforcement efforts by assisting fathers, as noncustodial parents, to obtain greater access to their children and thereby increase their motivation to make child support payments:

We are trying here today to discover the most efficient means for assuring that our nation's youth are supported financially. There has been talk of laws and computer systems and reciprocal agreements and administrative procedures and staff increases all designed to do one thing – to force a person [to] do what he does not otherwise feel motivated to do...How sad it is that we make fathers want to run and hide. How sad it is that if we can prove a man "guilty of fatherhood" we will saddle him with the burdens of parenthood and grant him none of the joys and dignities. Let us embrace the principle that the most effective device for getting fathers to pay child support is fatherhood itself.⁷

Despite the rhetoric claiming that the goal of this proposal was to assist with child support payment, the true goal was simply to assist noncustodial fathers in obtaining access to their children

and, ultimately, in obtaining joint custody:

We have a very sexist view toward custody in this country. If there were any other area in this country in which one sex was getting something as important as custody by a 9 to 1 ratio, we would howl in protest, but that is what happens... Now, perhaps we need an affirmative action program for fathers for custody, although we don't suggest that, because our National Council does not favor sole custody. We favor the right of the child to have two parents.⁸

The pro-father agenda did not end with joint custody, however. Kammer went so far as to suggest that the proposed legislative changes would "revitalize fatherhood" and contribute ultimately to "male happiness":

In addition to the program my friend David Levy will outline for you, Mr. Chairman, I can suggest an exciting initiative you may choose to champion. Imagine how we could revitalize fatherhood if a mere 1% of the federal Child Support budget were redirected to fatherhood enhancement, to support encouragement, to a campaign that celebrates fatherhood not as a mother's option, nor as a child's financial entitlement, but rather as a magnificent joy for children and as a noble and enduring opportunity for male happiness.⁹

Although these issues are well beyond the jurisdiction of the United States Senate, it is clear from the hearing transcript that Levy and Kammer received special attention on these issues off the record:

Senator Moynihan: I am going to have to say that this is an issue of great interest, but it is somewhat beyond the jurisdiction of the Subcommittee on Social Security and Family Policy.

Mr. Kammer: Mr. Chairman, I think Mr. Levy and I would be happy to talk with you about it over lunch or any time that would be convenient.

Senator Moynihan: That is a very pleasant invitation. I am thanking you all for very interesting testimony and very important suggestions. I will now declare this series of hearings concluded...

On February 23 and 25 and March 2, 1988, the House Committee on Ways and Means, Subcommittee on Public Assistance and Unemployment Compensation (now the Subcommittee on Human Resources) held hearings on the child support program changes, including a proposal initiated again by David Levy and the National Council for Children's Rights which sought federal funding of programs to assist fathers in the divorce process to have access (i.e. visitation rights) to their children. In his statement to the Subcommittee, Levy presented arguments that the proposed legislative changes should include, among other items benefiting support paying parents (i.e. divorced fathers), provisions encouraging the adoption of a "Michigan-type 'Friend of the Court' system" which he describes as a system which "help[s] parents informally resolve custody, support

and visitation problems out of court”¹⁰ and which handle [s] complaints relating to access (visitation) and custody problems”.¹¹ Levy further described the Michigan system as providing a “balanced family law legislation- joint custody, mediation, makeup of visitation” and attributes Michigan’s success in child support collection – “\$8.33 for every dollar spent to collect” – to the Friend of the Court staff and the “balanced family law legislation”.¹²

GENDER BIAS

Significant to the rights of women in custody and visitation cases, Levy’s proposal also contained several gender-biased statements. In his opening paragraph, he states that “[i]f favoring a child’s right to two parents makes one a fathers’ group, and if favoring a child’s right to only one parent makes one a mothers’ group, then we are a fathers’ group”.¹³ In attempting to explain how the proposed legislation “seems intent on propping up the single-parent family at the enormous disparity of the child’s right to two parents,” Levy states that

[w]omen in this country are divided between those women who want to emphasize the two-parent family as much as possible and those who do not. Those who wish to emphasize two parents – for the maximum amount of financial and emotional support for the child – include divorced mothers, stepmothers, grandmothers, daughters. They are joined by mental health professionals who have seen the mountain of research that children with two parents generally do better than children with one parent. Do better how? Children of two parents generally have fewer problems in school and fewer problems with the law, including less drug abuse than children with a one-parent family.¹⁴

Unfortunately, none of Levy’s pessimistic opinions about the “one-parent” or “single-parent” family, or in other words, his pessimism about single mothers, is supported by any facts: no statistics on the broad categories of women favoring the “two-parent family,” no “mountains of research” that children do better with two parents, no statistics on drug abuse among children raised only by their mothers (Indeed, on the contrary, the most recent research indicates that the best adjusted children had a strong mother-child relationship.) Further, his bias was not limited to single mothers; he also condemned “some women’s groups who seem to want to make certain that children have only their mothers. They want to prop up the single maternal homes which make up 90% of all single families”.¹⁵

The motive behind this gender bias was Levy’s “War Against Family Breakdown,” echoing the familiar Reagan-era “War Against Drugs,” which amounted to an attempt at preventing what was perceived to be the breakdown of the institution of marriage:

Where the parents realize they must still deal with each other, there may be less incentive for divorce. Where parents falsely believe that they may control or

even exterminate the other parent's involvement with their children, they may be encouraged to seek a divorce. From the perspective of the ex-spouse, the ideal situation may seem never to have to deal with the other parent again.¹⁶

It doesn't take much imagination, however, to envision Levy's "War Against Family Breakdown" as a war against women divorcing their husbands and as a war against spreading the higher income of fathers between two households. He stated sweepingly that

[t]he American economy is set up for the two-parent, two-job family. We can't support our children nearly so well in most cases in divorce, because we now have two incomes spread over maintaining two households. No amount of child support can rectify the fact that two households are now being maintained instead of one.¹⁷

CONCLUSIONS

It may be concluded from this analysis that although the language authorizing access/visitation grant funding was carefully designed to describe the beneficiaries of the program as the gender neutral "noncustodial parent," the facts surrounding the creation of the legislation clearly show that the legislation put in place at the request, and for the benefit, of men—divorced fathers—as a reaction to the heavy child support obligations thrust upon them by federally funded child support enforcement programs.

The issues to be confronted, therefore, are first, the constitutionality of providing federal funds to family law programs falling under the exclusive jurisdiction of the states; and second, the constitutionality of authorizing federal funds for programs initiated with such an overt gender bias.

The law in California implementing this mandate which originated at the behest of father's rights groups is detrimental to children.

THE ACCESS/VISITATION PROGRAM IN CALIFORNIA AND THE CONCILIATION COURTS

In California, from 1996 to 1999, the funds were administered through the California Department of Child Support Service in Sacramento, which then disbursed the funds to the Judicial Council of California in San Francisco, the administrative arm of the California Courts. As of January of 2000, however, with the passage in 1999 of A.B. 673 (Family Code 3024), the funds pass directly from the federal Office of child Support Enforcement to the Judicial Council.

THE JUDICIAL COUNCIL OF CALIFORNIA

The Judicial Council of California exists under the authority of California Constitution Article VI, Section 6, which establishes that Council membership consists of: the Chief Justice and one other

Supreme Court Justice; three appellate judges, five superior court judges, five municipal court judges, at least two nonvoting administrator, four state bar members, one state senator, and one state assembly member. The Council is responsible for appointing an Administrative Director of the Courts, who "serves at its pleasure" and performs any tasks delegated to him or her through the staff of the Administrative Office of the Courts, other than the adopting the rules of court administration, practice and procedures, a task reserved for the Council proper.

Since Article VI Section 6 was originally amended to the California Constitution, the Judicial Council has functioned as the controlling body of local county court judges and is responsible for the assignment of judges to their various county courts and report to the Council "as the Chief Justice directs concerning the condition of judicial business in their courts". After the passage in 1998 of Proposition 220, the Trial Court Unification Amendment to the California Constitution, the powers of the Judicial Council have become expansive, since the local county courts are no longer independent entities, but function as satellite offices of the Judicial Council and conduct business under its supervision much as if the Council were a corporate administrative office.

Although there is no specific legal basis upon which the Judicial Council may lobby on its own behalf, it has been given the authority to "make recommendations annually to the Governor and Legislature." However, they do adopt rules for court administration, practice and procedure, and perform other functions prescribed by statute. "Access and visitation grants" under 42 USC 669b, are received by the Judicial Council, therefore, it is the courts in California who are carrying out the "affirmative action" scheme described by Levy via mandatory mediation and various "non-litigious" programs.

1 "Achieving Equal Justice for Women and Men in the California Courts: Final Report of the Judicial Council of California, Advisory Committee on Gender Bias in the Courts," edited by Gay Danforth, Bobbie Welling, and Susan Mather, 1996: pg 123-187.

2 "Achieving Equal Justice," 149.

3 "Achieving Equal Justice," 25.

4 "Achieving Equal Justice," 9.

5 Ibid, 11.

6 Ibid, 11.

7 Ibid.

11 "The Child Support Enforcement Program: Policy and Practice", Subcommittee on Human Resources of the Committee on Ways and Means, U.S. House of Representatives, December 5, 1989, CIS No. 89-H782-67, p.55.

2 Ibid. p. 94

3 Ibid. p.95

4 Hearing Transcripts were unavailable at the time of printing

5 Hearing transcripts were unavailable at the time of printing

6 "Statement of David L. Levy, Esq., President, National Council for Children's Rights, Washington, DC" Welfare: Reform or Replacement (Short-term v. Long-term Dependency, CIS No. 88-S361-28, p. 148

7 Jack Kammer, "Testimony Presented before the Senate Finance Committee Subcommittee on Social Security and Family Policy, "Welfare: Reform of Replacement (Short-term v. Lon-term Dependency, CIS No 88-S361-28, 00. 141-143.

8 Ibid., p.153

9 Ibid.

10 Statement of David L. Levy, Esq., President of the National Council for Children's Rights, before the Subcommittee on Public Assistance and Unemployment Compensation, House Ways and Means, on March 2, 1988. CIS-NoH781-24, p. 521.

11 Ibid., p. 517

12 Ibid.

13 Ibid., p. 516

14 Ibid.

15 Ibid.

16 Ibid.

17 Ibid.

LOSS OF DUE PROCESS

The move to streamline family courts by engaging extrajudicial professionals to assist the judge in assessing cases has resulted in a loss of due process.

When “studies” began to emerge challenging maternal sole custody, theories denigrating the role of the maternal custodian, such as those espoused by psychologists Judith Wallerstein and Joan Kelly of Marin County, California and New Jersey psychiatrist Richard Gardner, they purported that children suffered irreparable damage to their development as a result of sole maternal custody. With the publication of the ideas of these experts, the fathers’ rights advocacy movement began aggressively asserting that a presumption in favor of sole maternal custody was irrational and “unfair”. In the mid 1980’s, it was the father’s rights movement that was instrumental in driving toward the presumption that it was in the child’s best interests to have “frequent and continuing contact” with each parent after divorce and that both parents were magically “equal” upon dissolution, vis a vis parenting. It was at that time that father’s rights movements were successful in getting put into place access and visitation moneys to help them gain custody of children.

The main objective of the 1980s California family law amendments was to provide “creative solutions” to the following problems: the (scientifically unsupported) hypothesis that children of divorce are psychologically damaged while in the sole care and custody of their mothers; the phenomenon of fathers feeling bad about “losing” a custody award to their children’s mothers; the perceived abuse of the courts by women seeking revenge against their husbands; and the fathers’ bitterness about being required to pay child support.

Civil Code section 4600 was amended by adding the policy section asserting the “frequent and continuing contact” dictum and providing for broad judicial discretion in determining child custody, allowing the court to consider which parent is more tolerant of frequent and continuing contact in making a sole custody decision and mandating that the court ignore gender in selecting the preferred custodian. Section 4600.5 was added, allowing for a parent to apply for joint custody and permitting the court to “direct that an investigation be conducted” to determine whether or not joint custody is appropriate.

The Family Law Act was again amended in 1981 under SB 961, which provided more particulars for the role of “conciliation courts” and “mediation”. The law specified that every divorce case involving children or domestic violence must go first to the conciliation court, where the couple would work together to arrive at an agreement or an impasse. The role of the mediator purportedly was to help the divorcing couple talk over agreements and disagreements so that avenues of compromise could be explored. This began the never-ending reality of ongoing “mediation”.

The mediation process freed family law judges from the burden of actually doing their job, since, it was understood from practical experience, judges just don’t like to deal with domestic relations cases. The programs were touted as successes in saving the court time. A study done in Los Angeles County Conciliation Court purported to show that those who went through mediation were three times less apt to bring their problem back into court later on. On the mothers’ parts,

this was generally because it was a grueling experience, and fathers had the coercive “frequent and continuing contact” language in their favor. Additionally, the court would likely always side with the report. The initial and most serious loss of due process was in the turning over of what should be judicial decisions, based on fact finding, to extrajudicial personnel. When the presumption was put in place in favor of “joint” custody, the “mediation” set in place by this system was not mediation, but an edict made by a counselor or a psychologist as to who should have custody and how it should be arranged, waiting for the court, with its judicial discretion, to rubber-stamp what is called a “recommendation.” Mandatory mediation and evaluation are onerously expensive for the individual litigants and often diminish the mother’s finances, which are already generally unmatched with her ex-husband’s. The process itself is often tenuous for women who sometimes face the perpetrator of their abuse in these sessions. Although the mediation and evaluation processes are not comprehensive, often concluding after only one short session, they are presented as indisputable, with no due process to refute the presumption made.

. The development of the Family Code by the California Law Revision Commission, put into effect in 1994 may be the most egregious denial of due process. It dismantled the family law issues from the codes of evidence and civil procedure entirely. It was based on the results of a questionnaire sent to 4000 individuals, mostly lawyers and judges, but also social workers involved in family law matters. Only 600 responses were received, and the project was undertaken with 83 percent of those 600 respondents desirous of a new Family Code, 12 percent of all people polled. There were correspondents who objected to this project due to their concern that the Family Code project was part of plan to establish a new family court system, which it did.

What has happened is that between the latitude given the court for complete judicial discretion, and an eager private mediation and evaluation industry worth millions of dollars, custody decisions are not made by judges. Although a party has a technical “right” through the Family Code to a “long cause hearing” (trial), it will likely not occur if there is a mediation or evaluation report, which there always is.

Another example of loss of due process is the quasi-judicial “team” approach put forth by family law mental health experts, such as Joan Kelly who operates a non-profit mediation center. It is not only onerously expensive, but likely an unconstitutional delegation of judicial authority and a denial of due process. If parents cannot agree upon specifics of parenting plans, they may now be coerced to take each issue to a “special master,” who is a family law attorney or counselor, who actually makes legal orders for a family law judge. In “high conflict” cases, (which is any time a mother, who was generally the primary caregiver of the children, challenges joint physical custody or when a child reports abuse by a father), Carol Bruch, research professor at University of California Davis School of Law, writes:

You have a therapist for mom, a therapist for dad, and a therapist for the child. In addition, they recommend that there be a special master who is entitled to make a great number of judicial decisions with no attorneys present. It’s a highly intrusive, highly coercive, very costly scheme.

The likelihood that a party will ever get to trial, at least a mother with few resources, is extremely low. Even if the case goes to trial or “long cause hearing” as it is termed, the issues discussed will be what the mediator or evaluating psychologist said, not the facts of the case. The complete judicial discretion afforded family law judges allows them to discard or use whatever evidence they wish. This loss of due process is unappealable, since the process has been in the “discretion” of the court. While “abuse of discretion” can be a basis for appeal, courts are not likely to overturn family law custody case findings, since “best interests of the child” test is so vague. Additionally, because family law attorneys practice in front of the same judges, it is unlikely that a case will go up on reconsideration or appeal. By the time a case reaches this point, the mother will likely be tapped out of funds and property.

There are no actors in family law court who are in reality accountable. Attorneys frequently hold in chambers meetings and bring issues to judges ex parte. Mediators and evaluators have reports rubber stamped, with the overseeing Board of Behavioral Sciences at the state level taking the position that a mediator or an evaluator is not rendering “treatment”, and that reprisal for malpractice should be with the presiding judge of the family court.

Family law attorneys are not accountable to stay on a case if it is proceeding to trial, nor are they exposed to legal malpractice, unless the case may involve substantial property value. The courts’ processes take so long that mothers often run out of money, or their child(ren) turn eighteen.

The fundamental requisite of due process of law is the opportunity to be heard. Today, Family Law Courts are run in a way that deprives mothers and children that right.

COURT CANCER METASTASIZES

Metamorphosis of the Conference of Conciliation Courts into the Association of Family Conciliation Courts

A Guide to Destroying Children

BY MARV BRYER

1939 Judges, lawyers and mental health professionals got State law passed (SB 737).

The 53rd Session of Legislature.

The court became a lobby group.

Each and every county would pay for marital counseling to help unclog the court system from divorce cases.

The Family Law code

- Section 1740 et seq formed The Children's Courts of Conciliation, which was later repealed.
- Section 1760 Article III Whenever any controversy exists, disruption of household with a minor child, the Court of Conciliation takes jurisdiction: to create a reconciliation.

Evidence: Senate Bill and Family Law Code Lukewarm reception

1955 A Los Angeles judge formed the first Conciliation Court as per this law in Los Angeles.

1958 The Los Angeles County courthouse at 111 Hill Street was dedicated.

1962 The Conference of Conciliation Courts (CCC) established a bank account at Security First National Bank (which later became Security Pacific Bank)

Evidence: CCC 1968 Financial Statement. A balance from 5th Annual Conference is described. This indicates the account probably began 6 years before in 1962.

1963 Conference of Conciliation Courts, a private organization, was formed. The address of record was 111 N Hill Street, Room 241, which is the LA County public courthouse.

No incorporation documents on file, and no registration with Secretary of State, Franchise Tax Board or IRS.

Evidence: Statement from IRS that there is no such entity and corporation papers in 1969.

The founders of CCC were Los Angeles judge Roger Pfaff and Meyer Elkin. Six (6) California counties were involved

- Los Angeles County
- Imperial County
- San Mateo County
- San Bernardino County
- Sacramento County - Albert H. Mundt, Phillip Schleimer
- San Diego County 339 W Broadway

The incomes of Blacks, Hispanics, Orientals, Caucasians were profiled.

Evidence: Publication of first CA Conciliation Courts Quarterly

1965 **Tried to get Family Law bill passed.**

1965 **The CCC has other states involved**

- Arizona

California was dropped from their publication name.

1967 **CCC became a national organization.**

Treasurers in Missouri and Michigan

Still no incorporation documents filed; still no Secretary of State, FTB or IRS registration

- President Lauren Henderson from Phoenix, AZ
- VP Hugh Page from San Luis Obispo, CA
- Treasurer William Shields (where from?)

CCC expanded to include

- Alameda County
- San Luis Obispo County

1968 **CCC became international.**

Still no formal incorporation status, despite being an international group with a money flow.

Treasurer: from San Luis Obispo

In the seminar business, began giving Family Law Symposiums in Los Angeles Combined with Bar Association (marriage between attorneys and court)
Have a legislative committee

CCC expanded to include

- San Luis Obispo
- Phoenix, AZ
- Chicago, ILL
- Detroit, MICH
- Missouri
- AUSTRALIA

Evidence: CC Quarterly

Money began flowing in from everywhere, despite no incorporation status, no registration with FTB or IRS

- Income of \$2716.64. Into this unincorporated entity, which did not pay taxes, flowed dollars from membership dues and conference registration fees.
- Expenses of \$208.64. Out flowed dollars for stamps, a rubber stamp, check imprinting, Holiday Inn meeting rooms, a refund to Conner Cole for conference registration, Hills Stationery Ledger Papers, and a mysterious entry: reimbursement to the County of San Luis Obispo for stationery.

NOTE: the treasurer is from San Luis Obispo

Evidence: CCC Financial Report (through May 21, 1968)

After May 21, 1968, the CCC, an unincorporated entity paying no taxes, anticipated they would have:

- Income of \$700 from Registration, and \$300 from County of S.L.O.

NOTE: the treasurer is from San Luis Obispo

- Expenses of \$2433.64 for banquet, luncheon, breakfast and cocktail party
- Expenses to Drs. Stembr, Sures, Steller, Muhrich, Transcription costs, flowers, music and Expenses to President Meyer Elkin for publications.

Evidence: CCC Anticipated Income and Expense Report (after May 21, 1968)

1969 **The national CCC finally filed to incorporate as a domestic non-profit CA corporation with Secretary of State.** Michael Aaronson, attorney from San Carlos, filed these papers.

- Filed seven years after establishing the original bank account at SPNB.
- The address of this corporation was Room 241, Courthouse, 111 N. Hill Street, Los Angeles 90012, which is the LA County public courthouse address.
- Stated on the form filed with Secretary of State that CCC is not incorporated, is now being incorporated, and is not an outgrowth of another unincorporated predecessor (despite the fact that they have maintained a bank account for seven years under that name)
- Stated on the form filed with Secretary of State that that they have not applied for an exemption with the federal government, nor filed federal tax returns (despite money flowing in and out of their account).
- Defines the specific purpose: "To improve marriage counseling procedures so as to provide greater assistance to parties having marital difficulties. To attempt to improve the professional and ethical standards of professional family counseling so as to help preserve family relationships."
- Defines major activities: Conduct meetings and seminars with the various judges, handling domestic, relations and with marriage counselors and court commissioners for the purpose of disseminating knowledge and information that will be direct benefit to marriage counselors and thus benefit the families which are counseled by them.
- Sources of income: dues and contributions
- Purpose use of funds: "Cost of meeting halls and speakers, costs of reference books, telephone and clerical and stenographic services."

Evidence: documents filed with Secretary of State

NOTHING EVER ON FILE WITH IRS

FTB contacted them because they had left off part of their articles: they didn't name or give addresses of the incorporators. Correction filed by Michael Aaronson in San Mateo.

Judge Victor J Baum of Michigan
Edward Staniec of Michigan
Franklin Bailey of Los Angeles

Mailing Address: James E. Frick, 3100 S Central Ave, Chicago, Ill 60650 (Cook County)
Corporation # CO376876

Evidence: Secretary of State Status Inquiry

1974 FTB contacts the corporation again because they had not named statements of officers.

Judge Solie Ringold of Washington State filed a document and said he was president of CCC.

In their documents the Conference of Conciliation Courts states that it is also known as the Association of Family Conciliation Court Services

1975 Association of Family and Conciliation Courts of Law was incorporated in Illinois

Registered with IRS and Secretary of State in Illinois, but claimed they were a charity and were brand new. But Meyer Elkin takes charge shortly after their incorporation. (NOTE: he is the co-founder of the CCC) Shortly afterwards they changed to Association of Family and Conciliation Courts (dropped Law) (Not supposed to use a misleading name, claiming they are a court, but are not.)

At the same time the Conference of Conciliation Courts was still operating in California and was not registered with the IRS.

1978 Child Custody Colloquium had their first conference.

1979 Conference of Conciliation Courts was suspended by Franchise Tax Board

Evidence: Secretary of State Status Inquiry

1981 The Association of Family Conciliation Courts was established as a foreign non-profit corporation

Located at 111 N. Hill Street, LA (no room number, but in courthouse)

Headquarters in Cook County, Illinois

They are an Illinois corporation doing business in California

- Margaret Little is a custody evaluator since 1986 until now she is the child

custody evaluator and the head of family court services in LA, and is the local agent/president, corporation head of the AFCC)

- Jessica Pierson is also an agent and incorporator outside of CA in Colorado

Evidence: Secretary of State corporation papers filed in California

No IRS papers filed.

1989 Association of Family Conciliation Courts surrenders their intrastate license to do business in California

No longer supposed to be doing business in CA

Evidence: Corporation papers

1990 Gregory Pentoney began working as an accountant for LA Municipal Court, 110 N. Grand, LA (same building as 111 N. Hill St., LA)

1990 Judges Miscellaneous Expense Fund bank statements indicate an account was established at Security Pacific National Bank Address was Room 1198, 111 N. Hill Street, LA. This room is the Finance Department of the LA County Courthouse. Can't tell exactly when it was established, since bank records destroyed after 7 years (and these records were requested in 1997)

Evidence: Bank Statements

Current BofA bank statements state that JMEF has been a customer since 1962.

Curiously, that was the approximate date of the establishment of the Conference of Conciliation Courts which was also located at 111 N. Hill Street.

1991 The County Functional Listing directory of phone numbers and addresses does not show any entry for Judges Miscellaneous Expense Fund in Room 1198

- BUT there are two entries in LA and Norwalk for a Judges Trust Fund Accounting.
- Judges wrote checks out of Judges Miscellaneous Expense Fund for cash. (Kelly O'Meara article)
- A check made out to Family Court Services Special Fund was deposited into the Judges Miscellaneous Expense Fund.
- A check from a District Attorney and his judge wife, David and Sally Disco, was made payable to Judges Trust Fund, and was deposited into the Judges

Miscellaneous Expense Fund.

- This is called “diversion of funds” because one can’t cash or deposit checks made out to one entity into the account of another entity. (Penal Code 487 Grand Theft Larceny, or Penal Code 484 if under \$400 or Penal Code 242 Theft of Public Funds.)

1992 AI Schonbach began working for LA Superior Court, Manager of the Finance Department (Revenue and Pace-Professional And Court Accounting Expenditures handles all Court money from every part of LA)

1992 Judges Trust Fund Accounting was listed in the County Directory

1992 14th Child Custody Colloquium

This book states that the LA Superior Court Judges Association created the Association of Family Conciliation Courts, which was formerly the Conference of Conciliation Courts founded in 1963.

How conflict resolved. Judiciary and attorneys redefined roles, to learn and celebrate interdependence.

Grown in stature, work together, cooperative judges, attorneys, mental health

Promotes Richard Gardner and PAS.

Thanked Pat Higgins especially.

She collected money from lawyers to take the classes which were created and taught by judges and psychiatrists, free tickets were given to evaluators.

Calderon (legislator) and Lionel Margolin (evaluator) were part of the colloquium.

1992 April 22, 1992 Security Pacific National Bank merged into Bank of America.

BofA is now the bank of record for the Judges Miscellaneous Expense Fund.

The bank had to convert all the accounts from SPNB to BofA which took a year-it is a complex process.

1993 April 23, 1993 Bank of America/Security Pacific National Bank conversion completed.

All SPNB account numbers all had to be transferred and assigned a new BofA account number.

Not only was the Judges Miscellaneous Expense Fund given a new BofA account number, but it also received a new name. It is now the LA Superior Court Judges Association.

Evidence: a signature card with the old and new account numbers and date of conversion.

Neither JMEF or LASCJA is registered with the Secretary of State, FTB or IRS.

There is between \$60,000 and over \$100,000 in the account, and one transaction was \$30,000

1993 LA Superior Court Judges Association, an unincorporated, non-profit, non-business

Evidence: On their business card.

1993 Marvin Bryer's daughter filed disqualifications on Presiding Judge Richard Denner (his Judicial Profile states his court is sexist) and head of Family Law Judge Kenneth Black in December due to fraud. At first both denied, then Kenneth Black disqualified himself.

1994 January, Richard Denner becomes head of Family Law and is out of the case. Sacramento Judge Ford rules that since Black disqualified himself, no hearing needs to be held.

1994 Citizen Marvin Bryer reported possible financial fraud and wanted a criminal investigation in LA to

Christopher Darden, Bureau of Special Operations (CID) in LA District Attorney's office. . May 23, Christopher Darden declined to investigate. (Darden is trustee of the LA County Bar)

1994 Also in May, Gregory Pentoney transferred from LA Municipal Court to the Superior Court, Finance Dept

Al Schoenback was his boss.

- In June, Marvin Bryer contacted Pentoney and asked for copies all donations from lawyers and judges to the court.
- July 19, Bryer received a letter from Schonbach, composed by Pentoney identifying donation, 2 of which were anonymous to the Colloquium. Has copies of checks, which were to Family Court Services Special Fund from the County Bar \$3,848 Aug 1991, and the other was to Family Court Service April 1992 from LA County Bar \$2,902.
- Pentenoy said he never heard of the LA Superior Court Judges Association,

but all the checks went through him for the whole county court system.

- Pentenoy was later and convicted of a felony.

1995 LA Judge Richard Denner started a Child Custody Visitation Center, to train and license monitors for supervised visitation.

- One check was made out to Family Court Services Special Fund ended up in the LA Superior Court Judges Association account.

1995 In May, Melissa Morris registered to set up a business called Morris and Associates Bookkeeping Services, 7336 Quill Drive #66 in Downey, CA , a building complex owned by Gregory Pentenoy.

1995 On October 10, Tax Collector puts Pentenoy and Schonbach under criminal investigation due to the 12 checks which never were deposited in the LA County Treasurer. Total \$6,750

- Starting in December 1995 to Nov 1, 1996 Pentenoy takes \$463,465 from attorney Robert Fenton (bribery) while he was under investigation.
- All the checks were made to Morris and Associates. Pentenoy is later convicted of bribery, after pleading no contest in Year 2000.

1996 Suddenly Judges Trust Fund Accounting was removed from the County phone directory

1996 In May, Marv received a letter from DA (same Bureau) thanking him for delivering evidence, and they would consider turning the evidence over to the AG.

- Also in May, Deputy Executive Officer to Auditor Judy Call (who is on the signature card for the LASCA and person who signed the checks to cash and to judges) sent a letter to Tyler McCauley, LA County Auditor-Controller (who is doing the audit). The letter stated that Judy wanted all the money transferred from the (Subject: transmission of administrative responsibility for the LA Superior Court Judges Account) to transfer LASCA account to the judges.
- LASCJA is still not registered at IRS or FTB or city. The only identity belonging to the account is the Auditor-Controller because the tax number is for LA County. None of the money has been reported to IRS. (just like if I used Marv's SSN and opened an account...and then got a job using Marv's SSN. He would be reported to IRS if he didn't report taxes after cutting the W-2. If I don't pay taxes, they will come after the ID and Marv) a Federal crime

- Also in May, a letter saying Confidential from Tyler McCauley to John Clark, admitting that there was an attempt to charge Marv \$2000 which Marv called extortion. Admitted that the checks that Pentenoy gave Marv should have gone into the Court revenue, not into the private fund for judges.
- Marv's daughter subpoenaed the Auditor's investigation file. The Auditor admits they are doing an investigation but refused to give the file to her.

1996 August 6, Marv sued Pentenoy and Patricia Higgins for fraud and lying about court money.

1996 DA raided the court with a search warrant and shut down work in Finance Dept.

- November 1, DA raided Pentenoy's office, car, home (which is the same as Morris and Associates) and Judy Call's office, locked up the computers and home Robert Fenton in Encino (who was bribing Pentenoy) and hid evidence. (Marv was busily suing and now could not get to the evidence.)
- November 7, DA made another raid on Finance Dept and took a package marked "Marvin Bryer", Pentenoy had notes on Marv. (Unconstitutional because no new search warrant...still don't know what first search warrant said)
- Dec 10, the Daily Journal reported the raid.

(Since 1900, LA has been stealing money from the public. Pentenoy had lists of all the money that was stolen in Eminent Domain (when take people's money) and Interpleader Accounts. He and Al Schonbach take it to the dumpster, but Pentenoy went to the dumpster later and retrieved it.)

1997 Marv Bryer subpoenaed all bank statements.

The LA Superior Court Judges Association bank statements state they have been a customer since 1962.

1998 LA Superior Court Judges Association corporation incorporated Jan 1, 1998

Registered with IRS and Secty of State/FTB with a new EIN # after Marv subpoenaed the bank statements.

2000 Hypothesis: CCC became the AFCC which became the JMEF which became the LASCJA.

Honorable Sheila Kuehl,
Capitol Building #4032
Sacramento, CA 95814

August 3, 2001

Honorable Sheila Kuehl,

We are requesting that you assist us in calling for an audit of the LA Superior Court Judges Association and the Superior Court Judges Miscellaneous Expense Fund. It appears from documents included with this letter that the Superior Court Judges Association maintained a checking account, yet neither the IRS nor the County of Los Angeles claim any knowledge of this account. It appears that the Judges Association put on seminars and co-sponsored events with the Los Angeles County Bar Association, and registration fees from these events went into this above-mentioned fund.

There is a possibility of impropriety that needs to be investigated because the attorneys attending these functions regularly appear in front of these judges, and the checking account seemed to be used for purposes unrelated to court administration. Bank records show that this account reached almost \$80,000 in August of 1991. Several of the copies of cancelled checks included with the attached material are for "Cash," and the amounts are not trivial. The small number of checks for cash that CA NOW was able to obtain total over \$4,000. In addition, there are checks to country clubs and jewelry stores. Further questions are raised by numerous checks by Los Angeles attorney made out directly to the "Judges Trust Fund." Given that the account appears to have been used for personal reasons, it seems highly improper for practicing attorneys to be paying money into this checking account.

In 1997, after Insight Magazine published an expose on the checking account, the Judges filed articles of incorporation. The address of the nonprofit, however, is the Central Courthouse in Los Angeles. CA NOW questions whether it is appropriate for the judges of the Superior Court to be operating a private nonprofit corporation out of a county government building. The name on the articles of incorporation and the checking account is the LA Superior Court Judges Association. It appears, however, that this account may be a continuation of the Miscellaneous Expense Fund, since the Bank of America records indicate that the Association has been a member since 1962, despite being incorporated in 1997.

Regardless of whether this account is the same as the Miscellaneous Expense Fund, the use that this account was put to raises even more questions. It appears from the attached documents that attorneys wishing to be employed as Child Visitation Monitors were required to complete a class offered by the Court. Attorneys attending these classes made out checks to the "Family Court Services Spec. Fund" but the checks were deposited into the LA Superior Court Judges Association checking account.

In an effort to gather as much information as possible, the various administrative departments in Los Angeles County were asked to identify any records they had of the LA Superior Court Judges

Association. The County Counsel for Los Angeles responded that there were no records transferring the right to use the County tax payer ID number to the LA Superior Court Judges Association, nor is there any record of a fictitious name state having been filed. It appears that the County of Los Angeles has no knowledge of the LA Superior Court Judges Association.

Obviously, this is a complex matter. CA NOW does not have the resources to fully investigate this matter, and is hesitant to make allegations. The appearance, however, is that a group of judges within the Los Angeles Superior Court are operating a checking account and a business that is essentially "off the books," with no oversight from any regulatory agency, and receiving money from attorneys who are practicing in their courtrooms. To those of us on the outside, this appears highly improper, if not illegal. For these reasons, we respectfully ask for your help seeking an audit.

Here are the documents we have attached and our analysis of what they indicate:

- #1) A page out of LA County Directory showing the official address of the County Court and the Finance and Pace Management Room 119A. As stated above, the County Court should not be the official address for this non-profit, nor should the official address on this non-profit checking account be 111 Hill Street Room 119A.
- #2) Documents indicate that the LA County Bar Association offered annual Family Law Workshops and "The Child Custody Colloquium," to its members. The fees of which had been diverted into accounts purportedly held by the LA County Superior Court, but which in fact, are not under the jurisdiction of the County.
- #3) Documents indicate the existence of account # 0106021263 at Security Pacific under the name of Superior Court Judges Miscellaneous Expense Fund. Into this account checks were deposited in 1991/1992 from attendees for the "Child Custody Colloquium" and out of this account checks were drawn to pay for expenses for this event and other unknown expenses. The deposited checks were payable to either "The Family Court Services Special Fund," or the "Judges Trust Fund" neither of these purported accounts are legally incorporated. In fact, as of October 9th 1997 the expense fund had not registered a fictitious business name with the LA County Recorder.
- #4) Documents indicate the existence of account #00211-80052 at Bank of America under the name of LA Superior Court Judges Association. Into this account checks were deposited from attendees for the 1995 "Superior Court Child Visitation Monitor Training Workshop." The deposited checks were payable to "The Family Court Services Special Fund," this purported account is not legally incorporated. Additional documents indicate that an entity The Los Angeles Superior Court Judges Association, incorporated December 1997, is using the address at 111 North Hill Street, LA CA which is the offi-

cial Los Angeles County Court address as mentioned in #1 above. Additional documents indicate that as of October 9th 1997 the Judges Association had not filed a fictitious business name with the LA County Recorder.

#5) Documents indicate that the Bank of America account was using LA County tax identification number 95-6000927 and that neither the IRS nor the County of Los Angeles can confirm the legal relationship between this account and this tax identification number. In addition, the attorneys for the recently incorporated Judges Association denied knowledge of the Association's use of the tax identification number.

#6) Documents indicate the non-existence of the Judges Trust Fund, Family Court Services and The Family Court Services Special Fund as legal entities.

If you have any questions regarding this matter, contact at 916 442-3414 or ed@canow.org.

Sincerely,

Helen Grieco
CA NOW Executive Director

Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*

CAROL S. BRUCH**

35 Family Law Quarterly 527 (2001)

Pagination of the published version is indicated in this text by star numbers using the ¶ format.

I. Introduction

As American courts and legislatures continue their enthusiastic ventures into family law reform, they make frequent use of theories and research from the social sciences. This essay focuses on developments in child custody law stemming from Parental Alienation Syndrome (PAS), a theory propounded in 1985 that became widely used despite its lack of scientific foundations. The discussion highlights theoretical and practical problems with PAS, provides a similar discussion of more recent proposals labeled Parental Alienation (PA), and concludes with recommendations for lawyers and judges who must evaluate these and similar developments.

II. PAS and Its Critics

A. The PAS Doctrine

Child psychiatrist Richard Gardner coined the term Parental Alienation Syndrome in 1985 to describe his clinical impressions of cases ¶528 he believed involved false allegations of

* © 2001 by Carol S. Bruch. This article incorporates, with permission, materials first published in Carol S. Bruch, *Parental Alienation Syndrome: June Science in Child Custody Determinations*, 3 EUROPEAN J.L. REFORM 383 (2001).

** Research Professor of Law, University of California Davis. For their generous and skilled assistance, the author thanks reference librarians Margaret Durkin, Erin Murphy, and Susan Llano of the UC Davis Law Library. She is also grateful to Tony Tanke, Esq., Beth Tanke, Ph.D., and her colleagues, Professors Floyd F. Feeney and Edward J. Imwinkelried, for helping her refine her thinking. Errors or omissions are her own.

child sexual abuse.¹ The essence of PAS, in his view, is a child's campaign of denigration against a parent that results from "programming ("brainwashing") of the child by one parent to denigrate the other parent [and] self-created contributions by the child in support of the alienating parent's campaign. . . ."² Dr. Gardner first stated that PAS was present in approximately ninety percent of the children whose families were involved in custody litigation but provided no research findings to substantiate his assertions about the syndrome, its frequency, or its setting. In fact, his initial estimates appear to have been dramatically overstated, particularly as to the frequency of false sexual abuse allegations,³ and his revised estimates have been far more circumspect.⁴

¹ Richard A. Gardner, *Recent Trends in Divorce and Custody Litigation*, ACADEMY F., vol. 29, no. 2, at 3 (American Academy of Psychoanalysis, 1985).

² RICHARD A. GARDNER, *THE PARENTAL ALIENATION SYNDROME* xix (2d ed. 1998) [hereafter GARDNER (2D ED.)], *quoted in* Introductory Comments on the PAS, formerly available at <http://www.rgardner.com/refs/> (hereafter: *Gardner's website*); the current iteration has been lightly reworded and is found on *Gardner's website* (last updated May 31, 2001 and last visited September 16, 2001) under the title "Basic Facts about the Parental Alienation Syndrome." Precise reading and careful comparisons between sources are required when Gardner articulates his theories; often revised wording entails no change in substance.

³ As to frequency of cases involving sexual abuse, see the careful, comprehensive reports of a major research effort, Nancy Thoennes & Patricia G. Tjaden, *The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes*, 14 CHILD ABUSE & NEGLECT 151, 160 (1990) ("Less than 2% of the approximately 9,000 families with *custody and visitation disputes* served by 8 domestic relations courts included in th[is] study involved an allegation of sexual abuse.") (emphasis added). See also DEBRA WHITCOMB, U.S. DEPARTMENT OF JUSTICE, *WHEN THE VICTIM IS A CHILD* 7 (2d ed. 1992) ("As an alternative way of framing the magnitude of this problem, sexual abuse allegations occurred in the range of approximately 2 to 1 per 1,000 *divorce filings* among the courts [in seven jurisdictions] that were studied") (emphasis added). See also an analysis of Gardner's work by a University of Michigan professor of social welfare, Kathleen Coulbourn Faller, *The Parental Alienation Syndrome -- What Is It and What Data Support It?* 3 CHILD MALTREATMENT 110–15 (1998).

⁴ Compare RICHARD GARDNER, *THE PARENTAL ALIENATION SYNDROME* 59 (1992) (90% figure) [hereafter GARDNER (1992)] with GARDNER (2D ED.), *supra* note 2, at xxix–xxxi (stating that no estimates for PAS can be made, but mentioning reports of alignments [a different, much

In recent years, use of the term PAS has been extended dramatically to include cases of all types in which a child refuses to visit the non-custodial parent, whether or not the child's objections entail abuse allegations. Although Dr. Gardner sometimes states that his analysis does not apply to cases of actual abuse,⁵ the focus of his attention is directed 1529 at discerning whether the beloved parent and child are lying, not whether the target parent is untruthful or has behaved in a way that might explain the child's aversion.⁶ His recommended treatment for serious cases is to transfer custody of the child from the beloved custodial parent to the rejected parent for deprogramming. This may entail institutional care for a transitional period, and all contact, even telephone calls, with the primary caregiver must be terminated for "at least a few weeks." Only after reverse-brainwashing may the child slowly be reintroduced to the earlier

broader phenomenon] in up to 40% of high-conflict custody disputes).

⁵ Indeed, the PAS definition on his website no longer mentions sex abuse allegations (perhaps in response to critiques challenging Gardner's assertions about the frequency with which unsubstantiated allegations of sexual abuse occur). See *Gardner's* website; note 3 *supra*; notes 21 & 46-48 *infra*. Gardner also now acknowledges that "some abusive neglectful parents are using the PAS explanation . . . as a coverup and diversionary maneuver." Publications and lectures that he promotes as assisting those who need to distinguish true from false allegations of abuse or neglect are, however, strongly reminiscent of his earlier, discredited Sex Abuse Legitimacy Scale (SALS) work, described below. See Richard A. Gardner, *Differentiating Between Parental Alienation Syndrome and Bona Fide Abuse-Neglect*, 27 AM. J. FAM. THERAPY 97 (1998); notes 21 & 46-48 *infra*.

⁶ Two examples are his efforts to distinguish true from false allegations and his blanket advice to judges that they should refrain from taking abuse allegations seriously, even when supported by a therapist who has seen the child. Compare, e.g., Richard A. Gardner, *Legal and Psychotherapeutic Approaches to the Three Types of Parental Alienation Syndrome Families – When Psychiatry and the Law Join Forces*, 28(1) CT. REV. 14, 18 (Spring 1991) [hereafter Gardner, CT. REV.] ("The court's therapist should have a thick skin and be able to tolerate the children's shrieks and claims of maltreatment. . . . To take the allegations of maltreatment seriously . . . may result in . . . [lengthy or lifelong] alienation."), with the authorities discussed in notes 16, 21 & 46-48 *infra* and accompanying text (questioning his methodology and discussing the incidence of false allegations).

custodian through supervised visitation.⁷

B. The Setting in Which PAS Is Said to Occur

High conflict families are disproportionately represented, of course, among the population of those contesting custody and visitation.⁸ These cases commonly involve domestic violence, child abuse, and substance abuse.⁹ Many parents are angry, and a broad range of visitation problems occur. Dr. Gardner's description of PAS may well remind parents, therapists, lawyers, mediators, and judges of these frequently encountered emotions, and this may help to explain why his audience has often accepted PAS without question. The overwhelming absence of careful analysis and attention to scientific rigor these professionals demonstrate, however, is deeply troubling. As the following discussion reveals, this carelessness

⁷ *Id.* at 16–17 (where his language, although not the substance of his recommendations, has been softened somewhat).

⁸ ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD – SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 132–61 (1992). Approximately 25% of families experience substantial legal conflict; “in these families, the parents—the fathers in particular—harbor especially high levels of hostility toward the former spouse.” *Id.* at 159.

⁹ ADMINISTRATIVE OFFICE OF THE COURTS, *FAMILY COURT SERVICES SNAPSHOT STUDY REPORT 1 – OVERVIEW OF CALIFORNIA FAMILY COURT SERVICES MEDIATION 1991: FAMILIES, CASES AND CLIENT FEEDBACK* 8–12 (1992), at <http://www.courtinfo.ca.gov/courtadmin/aoc/familycourtservices/ursr/report01/r01rpt.htm>. In California, mediation is mandatory for all contested custody cases. In this statewide study of most custody mediation sessions conducted by court personnel on a single day, serious issues of child abuse, family violence and substance abuse were raised by the parties in 42% of all mediating families, with an additional 24% raising one of these issues alone. In a review of five federally funded demonstration projects to resolve child access and visitation problems, researchers report, “Nearly half of the access denial cases at every site involve allegations of the child's imperiled safety. Most allegations are made by the residential parent, regardless of sex, against the nonresidential parent and the other people in his/her household. Violent behavior is the only allegation that is consistently leveled with greater frequency against men.” Jessica Pearson & Jean Anhalt, *Enforcing Visitation Rights – Innovative Programs in Five State Courts May Provide Answers to This Difficult Problem*, 33(2) *JUDGES' J.* at 3, 40–41 (Spring 1994) (citing four additional studies which also indicate “that safety concerns feature prominently in many visitation disputes”).

has permitted what is popularly termed junk science (pseudo science) to influence custody cases in ways that are likely to harm children.

C. *The Flaws in PAS Theory*

The deficiencies in PAS theory are multiple. Some have already been identified in social science literature and child custody judicial opinions; still others are now emerging. First, Gardner confounds a child's developmentally related reaction to divorce and high parental conflict (including violence)¹⁰ with psychosis. In doing so, he fails to recognize parents' and children's angry, often inappropriate, and totally predictable behavior following separation. This error leads him to claim that PAS constitutes a frequent example of *folie à deux* or *folie à trois*, Shared Psychotic Disorders that the American Psychiatric Association and scholarly studies report occur only rarely.¹¹ His assertion that these 1531 disorders occur primarily in young

¹⁰ See JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, SURVIVING THE BREAKUP – HOW CHILDREN AND PARENTS COPE WITH DIVORCE 77–80 (1980) (special vulnerability of 9- to 12-year-olds to alignments, for whom this coping behavior at divorce wards off loneliness, sadness, and more serious depression), 99, 145–46, 233–34 (only a weak correlation between children's anger and parents' quarreling), 237, 253; JUDITH S. WALLERSTEIN, JULIE M. LEWIS & SANDRA BLAKESLEE, THE UNEXPECTED LEGACY OF DIVORCE – A 25 YEAR LANDMARK STUDY 115–17, 125 (2000) (*alliances* usually involve pre-adolescents or young adolescents in high-conflict cases or when “enmity overshadows good sense”); Janet R. Johnston, *Children of Divorce Who Refuse Visitation*, in NONRESIDENTIAL PARENTING 109–35, at 124 (Charlene E. Depner & James H. Bray eds., 1993) [hereafter Johnston, *Children Who Refuse Visits*].

¹¹ See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM IV § 297.3: Shared Psychotic Disorder (Folie à Deux) (4th ed. 1994) (“This disorder [in which a second or further person in a close relationship with a primary person comes to share delusional beliefs of the primary person, who already had a Psychotic Disorder, most commonly Schizophrenia,] is rare in clinical settings, although it has been argued that some cases go unrecognized”); Jorg M. Fegert, *Parental Alienation oder Parental Accusation Syndrome? -- Part 1*, KIND-PRAX 1/2001, at 3 (hereafter: Fegert, *Part 1*); *id.* *Part 2*, at KIND-PRAX 2/2001, at 39, 41–42 (hereafter: Fegert, *Part 2*) (citing a literature search by the Würzburger Klinik of the period from 1877 through 1995 that produced only 69 case reports of children and youth that match the description of *folie à deux*); Jose M. Silveria & Mary V. Seeman, *Shared Psychotic Disorder: A Critical Review of the Literature*, 40 CANADIAN J. PSYCHIATRY 380, 390-91 (1995) (reporting a literature search covering 51 years, from 1942

children is also contrary to the literature,¹² probably also due to a misreading of typical developmental responses to divorce on the part of young children.¹³

Second, possibly as a consequence of these errors and his tail-of-the-elephant view,¹⁴ Gardner vastly overstates the frequency of cases in which children and custodial parents manufacture false allegations or collude to destroy the parent-child relationship. Taken together, these assertions have the practical effect of impugning all abuse allegations, allegations which Gardner asserts are usually false in the divorce context.¹⁵ Here, too, Gardner cites no evidence in support of his personal view, and the relevant literature reports the contrary—that such

through 1993, that produced 123 cases, of which only 75 met the tests for a shared psychotic disorder under DSM-IV; of these only 61 involved two people, of which 31.1% [19 cases] involved parents and children, with only 5 of these involving children 18 years old or younger). Silveria and Seeman note that whether published cases reports provide a representative sample or reflect frequency is unknown, but they, Fegert (*supra* note 11), and the DSM (*supra* this note) all describe the phenomenon as rare. *See also* WORLD HEALTH ORGANIZATION, INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES AND RELATED HEALTH PROBLEMS [ICD-10], Disorder F24: Induced Delusional Disorder (Folie à deux), at 331 (10th ed. 1992).

¹² Silveria and Seeman, *supra* note 11, at 390, 392, report, “Age ranges were similar for both the secondaries (10 to 81 years) and the primaries (9 to 81 years).” There were also no differences in the average ages for primaries and secondaries. Instead, “the age distribution is more in keeping with the expected distribution of age of onset for other nonorganic psychotic disorders in general, which is relatively rare in the very young and the very old.” *Id.*

¹³ “Resistance to visitation among young children, for example, is a developmentally expectable divorce-specific separation anxiety, which is made more intense by overt conflict between parents” and is unrelated to emotional disturbance of either parents or children. Johnston, *Children Who Refuse Visits*, *supra* note 10, at 118. For typical responses to chronically disputing parents at the developmental stages Johnston studied, see *id.* at 120: “temporary reactions (2- [to] 4-year-olds), shifting allegiances (4- [to] 7-year-olds), loyalty conflicts (7-[to] 10-year-olds), and alignments (9- [to] 12-year-olds).”

¹⁴ The reference is, of course, to the story of several blind men, each attempting to describe an elephant. One holds the tail, another the trunk, the third a tusk, and the fourth a leg. Because each describes only his own perceptions, no one provides an accurate description.

¹⁵ As Faller points out, Gardner does not attempt to explain why he believes that “perhaps 95% or more” of all allegations of child sexual abuse are true but “the vast majority of

allegations are usually well founded.¹⁶

¶532 Third, in this fashion, PAS shifts attention away from the perhaps dangerous behavior of the parent seeking custody to that of the custodial parent. This person, who may be attempting to protect the child, is instead presumed to be lying and poisoning the child. Indeed, for Gardner, the concerned custodial parent's steps to obtain professional assistance in diagnosing, treating, and protecting the child constitute evidence of false allegations.¹⁷ Worse yet, if therapists agree that danger exists, Gardner asserts that they are almost always man-hating women who have entered into a *folie à trois* with the complaining child and concerned parent.¹⁸

allegations in [divorce custody cases] are false.” Faller, *supra* note 3, at 103–04.

¹⁶ As to the frequency of unsubstantiated abuse allegations, see the literature collected and analyzed in JOHN E.B. MYERS, A MOTHER'S NIGHTMARE – INCEST: A PRACTICAL LEGAL GUIDE FOR PARENTS AND PROFESSIONALS 133-35, 198–210 (1997); *see also id.* at 144–45 (innocent misperceptions of innocent behavior); Cheri L. Wood, *The Parental Alienation Syndrome: A Dangerous Aura of Reliability*, 27 LOY. L.A. L. REV. 1367, 1373–74, 1391–94 (1994).

¹⁷ Gardner once identified a public prosecutor in a criminal child sex-abuse prosecution, for example, as a mother's “hired gun.” He accordingly rated the defendant less likely to be guilty than if the woman had not sought legal assistance. The prosecutor later pointed out the absurdity of Gardner's reasoning, saying, “If you believe your child has been sexually abused, shouldn't you be going to an attorney and seeking medical advice?” Rorie Sherman, *A Controversial Psychiatrist and Influential Witness Leads the Backlash against Child Sex Abuse “Hysteria,”* 15 NAT'L L.J., August 16, 1993, at p. 1. The custodial parent, of course, is left in an untenable position under Gardner's approach. If he or she fails to act in the face of possible abuse, the custodial parent may be guilty of a failure to protect the child, passivity that may lead to a child dependency action or, even, to criminal charges.

¹⁸ Compare GARDNER (1992), *supra* note 4, at 146–47 (such *folies à trois* with therapists are “a widespread phenomenon”) and Gardner, CT. REV., *supra* note 6, at 18, with Faller, *supra* note 3, at 102–03 (collecting and critiquing relevant passages from Gardner's work) and Fegert, Part 2, *supra* note 11, at 41 (reports of a *folie à deux* or *trois* are extremely rare). Further, Gardner asserts that when sexual abuse is alleged, these custodial parents and therapists may take personal sexual pleasure in visualizing the alleged activity between the noncustodial parent and the child. *See* Faller, *supra* note 3, at 103, 104, 110–11 (collecting quotations and providing research literature to the contrary); *see also* Gardner, CT. REV., *supra* note 6, at 16 (attributing allegations to mothers' sexual fantasies). A trial court judge who sat as a family court judge for one year after several years on the criminal law bench is reported as noting PAS in “most of the

Indeed, he warns judges not to take abuse allegations seriously in the divorce court setting in high conflict cases (severe PAS cases). Neither Gardner nor those who accept his views acknowledge the logical difficulties when Gardner asserts that abuse allegations which are believed by therapists constitute evidence of PA by the protective parent.

Fourth, Gardner believes that, particularly in serious cases, the relationship of an alienated child with the rejected parent will be irreparably damaged, probably ending for all time,¹⁹ unless immediate, drastic measures (custody transfer, isolation from the loved parent, and deprogram- 1533 ming) are taken. Here, too, reliable sources reveal that his theory is exaggerated, with all but unusual cases (for example, those appearing in violent families) resolving themselves as the children mature.²⁰

family law cases he heard” and as cautioning family law judges “to be aware that in addition to the child, professionals upon whom the court relies may also be ‘brainwashed’ by the alienating parent.” *Judge Nakahara on PAS and the Role of the Court in Family Law*, PAS-NEWSLETTER, January 1999, at unnumbered 2–3 (News for Subscribers), at <http://www.vev.ch/en/pas/bw199901.htm> (last visited April 8, 2001).

¹⁹ See Richard A. Gardner, March 2000 Addendum (to GARDNER (2D ED.), *supra* note 2), at <http://www.rgardner.com/refs/addendum2.html> (last visited September 30, 2001).

²⁰ In 1993 Professor Janet Johnston, a specialist in high-conflict custody disputes with advanced degrees in social work and sociology, gave initial findings from two studies of high-conflict disputes referred to her research projects by the courts. Refusals to visit appeared frequently, especially among a subset of older children who had been exposed to serious abuse or domestic violence. Almost one-third of the total sample of children were in alignments more than 2 to 3 years post-separation, with three-fourths of the 9- to 12-year olds involved in such behavior. Johnston concluded that “when conflicts are overt and involve the children, and when the disputes are intense and prolonged, the children are more likely to submit to this alignment mode of defending and coping” and predicted that “it is highly likely that children will move into alignments as they approach early adolescence, if the parental conflict is ongoing.” She contrasted these findings to far more benign findings in a community study of 131 children of recently separated parents. Johnston, *Children Who Refuse Visits*, *supra* note 10, at 124. In that less-troubled population, 20% of the children were in alignments (most of them in the 9- to 12-year-old group), but *every* case resolved itself before the child reached 18, with most resolving within one or two years when the children regretted their earlier behavior. Telephone conversation with Dr. Judith Wallerstein (April 10, 2001). A further report by Johnston

Fifth, as these sources suggest, Gardner's proposed remedy for extreme cases is unsupported and endangers children.²¹ In his admitted decision to err on the side of under-identifying abusers, Gardner appears to have overlooked the policy differences between criminal law and child custody law and also to have misunderstood the distinction between the burdens of proof in criminal and civil cases in the United States. To the extent that PAS results in placing children with a parent who is, in fact, abusive, the youngsters will be bereft of contact with the parent who might help them. Parent groups and investigative reporting describe, for example, numerous cases in which trial courts have transferred children's custody to known or likely abusers and custodial parents have been denied contact with the children they have been trying to protect.²² In less extreme cases, too, children are likely to suffer from such a sudden

concerning children from all these groups (the two court-referred groups and the community study) will appear shortly. See Janet R. Johnston, *Parental Alignments and Rejection: An Empirical Study of Alienation in Children of Divorce*, ____ (forthcoming).

²¹ Gardner acknowledges that his SALS was weighted to find some perpetrators innocent who were in fact guilty. Sherman, *supra* note 17. Although Gardner now disavows responsibility for these applications of his work, he continues to recommend attention to the same factors his early work endorsed. See generally Faller, *supra* note 3 *passim*.

²² See, e.g., Gina Keating, *Disputed Theory Used in Custody Cases: Children Often Victims in Parental Alienation Syndrome Strategy*, PASADENA STAR-NEWS, April 23, 2000, at http://www.canow.org/NOWintheNews/familylaw_news_text.html (last visited April 8, 2001); MOTHERS OF LOST CHILDREN, SAMPLE OF CALIFORNIA FAMILY LAW CASES: CHILDREN TAKEN AWAY FROM SAFE PARENTS, FORCED TO LIVE WITH ABUSIVE PARENTS (2000), available from Mothers of Lost Children, P.O. Box 1803, Davis, CA 95617; KAREN WINNER, PLACING CHILDREN AT RISK: QUESTIONABLE PSYCHOLOGISTS AND THERAPISTS IN THE SACRAMENTO FAMILY COURT AND SURROUNDING COUNTIES (2000) (study commissioned by California Protective Parents Association). See also Christine Lehmann, *Controversial Syndrome Arises in Child-Custody Battles*, PSYCHIATRIC NEWS, September 1, 2000, at unnumbered 2, at <http://www.psych.org/pnews/00-09-01/controversial.html>. Paul Fink, M.D., past president of the American Psychiatric Association agrees, stating, "I am very concerned about the influence Gardner and his pseudo-science is having on the courts Once the judge accepts PAS, it is easy to conclude that the abuse allegations are false, and the courts award custody to alleged or proven perpetrators. . . . Gardner . . . undermines the seriousness of sexual abuse allegations." *Id.* See generally MYERS, *supra* note 16, at 8, 135–38.

dislocation in their home life and relationship with the parent they trust. Even therapists who accept PAS theory have advised against custody transfers to no avail in some reported cases in which it seems judges have implemented Gardner's views on their own initiative.²³

In sum, children's reluctance or refusal to visit noncustodial parents can probably be better explained without resorting to Gardner's theory. Studies that followed families over several years, for example, report that visits may cease or be resisted when a variety of reasons cause custodial parents and children to be angry or uncomfortable with the other parent. Often the noncustodial parent's behavior and the child's developmental stage play decisive roles. Alignments or alliances that are somewhat reminiscent of Gardner's construct are much less frequent than he suggests, and even in extreme cases, these scholars agree that PAS theory calls for inappropriate and harmful responses that intensify the problem.²⁴

III. The Merchandising of PAS in Child Custody Cases

How, then, did such a seriously misconceived, overstated, and harmful view gain widespread acceptance? What would inspire judges to order custody transfers against the uniform advice of expert witnesses in a case?²⁵ First, Gardner is broadly (but mistakenly)

²³ See *Karen "PP" v. Clyde "QQ,"* 602 N.Y.S.2d 709 (App. Div. 1993) (the trial court's reference to a book on PAS that was neither entered into evidence nor referred to by any witness provided no ground for reversal of custody transfer to father and termination of mother's contact with daughter in case where trial court held mother's sex abuse allegation fabricated and child programmed; mother's challenge to termination of contact treated as moot because subsequent trial order permitted visitation; no mention by appellate court of expert testimony, if any). See also *Karen B. v. Clyde M.,* 574 N.Y.S.2d 267 (Fam. Ct. 1991), the deeply troubling trial court opinion in the case.

²⁴ See, e.g., Fegert, *Part 2, supra* note 11, at 40-42; Johnston, *Children Who Refuse Visits, supra* note 10, at 132-33.

²⁵ See *Krebsbach v. Gallagher,* 181 A.D.2d 363 (N.Y. App. Div. 1992) (trial court's order transferring custody against recommendation of psychologist and Law Guardian reversed for lack of support in record).

believed to be a full professor at a prestigious university.²⁶ Because this aura of expertise accompanies his work, few suspect that it is mostly self-published,²⁷ that it lacks scientific rigor,²⁸ and that his books on PAS are not even held by most university and research libraries.²⁹

²⁶ See, e.g., Justice R. James Williams, *Should Judges Close the Gate on PAS and PA?* 39 FAM. CT. REV. 267, 267 (2001) (referring to “Dr. Richard Gardner, a psychiatrist at Columbia University”); Rola J. Yamini, *Note: Repressed and Recovered Memories of Child Sexual Abuse*, 47 HASTINGS L.J. 551, 557 n.58 (1996) (referring to “Dr. Richard Gardner, professor of psychiatry at Columbia University”); Joseph Berger, *Recanting a Sex Abuse Charge; Family Needs to Heal, but Which Statement Is the Lie?* N.Y. TIMES, July 10, 1998, at B1 (referring to “Dr. Richard A. Gardner, professor of child psychiatry at Columbia University Medical School”); Jon Meacham, *Trials and Troubles in Happy Valley*, NEWSWEEK (US EDITION), May 8, 1995, at 58 (referring to “Richard A. Gardner, a professor of child psychiatry at Columbia University medical school”). Gardner identifies himself by the courtesy academic title he holds from Columbia University (Clinical Professor of Medicine), a title that U.S. medical schools provide to doctors who permit students to observe their practice. Unlike the title Professor of Clinical Medicine, however, the title Gardner enjoys indicates neither full faculty membership nor research accomplishment. See *People v. Fortin*, 706 N.Y.S.2d 611, 612 (Crim. Ct. 2000), reporting Gardner’s testimony that his academic appointment is unpaid, and that “at present [Gardner’s] therapeutic work actively takes approximately 1 to 2% of his time and the remainder of his time and income are accounted for by forensic analysis and testimony [that increasingly concerns PAS].”

(*Fortin* was a criminal sex abuse case in which Dr. Gardner offered to testify concerning PAS and the credibility of the complaining witness. The court refused to permit his testimony because of a failure to establish general acceptance of PAS within the professional community.)

²⁷ Creative Therapeutics of Cresskill, N.J., is the publishing firm that Gardner established to publish his works. *People v. Fortin*, 706 N.Y.S.2d 611, 612 (Crim. Ct. 2000) (reporting that Gardner's company had published and marketed all but one of his books since 1978).

²⁸ Seeking to refute criticism about the absence of scientifically rigorous reports on PAS, Gardner recently published a report of cases from his own practice and consulting work in which he concluded that PAS was present; the case summaries concern 99 children. Richard A. Gardner, *Should Courts Order PAS Children to Visit/Reside With the Alienated Parent? A Follow-up Study*, 19(3) AM. J. FORENSIC PSYCHOL.61 (2001). The article is unsuccessful, however, because in it Gardner confounds criminal, family law, and personal injury cases; omits essential information (e.g., the children's ages and information on the nature of any abuse allegations); includes cases in which he had no direct contact with the child; and treats highly disparate factual and legal issues as equivalents. For example, Gardner tallies criminal and personal injury decisions (where courts were without power to adjust custody orders) as cases in which custody or visitation was not adjusted to account for PAS.

Next, Gardner promotes his writing and services as an expert through his own website,³⁰ receives referrals from the websites of fathers' organizations,³¹ and provides packaged continuing education courses for professionals.³² Finally, he often inaccurately represents or suggests that PAS is consistent with or endorsed by the accepted work of others.³³

An eight-page article in the journal of the American Judges Association provides a typical example.³⁴ Gardner is identified by his courtesy title alone,³⁵ and the article provides only ten sources (nine of his own writings and one piece by Sigmund Freud) to support his dramatic, even hyperbolic, assertions.³⁶

²⁹ An April 2001 electronic search of the Research Libraries Information Network (RLIN), a database that includes the holdings of over 160 major reference libraries, revealed that only 9 of these libraries hold one or both editions of Gardner's book, *THE PARENTAL ALIENATION SYNDROME*.

³⁰ See *Gardner's* website for a listing of his appearances. See generally Sherman, *supra* note 17.

³¹ See generally Williams, *supra* note 26, at 269 and n.21 (concerning the websites of fathers' groups).

³² See *Gardner's* website, *supra* note 2, for a listing of such appearances.

³³ See, e.g., the publications and cases listed on his website. The website identifies negative publications as supporting PAS, claims that discussions of entirely distinct phenomena (such as alignments) are about PAS, claims that cases in which any reference to PAS is made constitute decisions that the syndrome is scientifically and legally accepted, and claims that articles in peer-reviewed law or mediation journals (which do not provide substantive review of his scientific claims) establish the scientific merit of PAS.

³⁴ See Gardner, CT. REV., *supra* note 6.

³⁵ *Id.* ("Richard A. Gardner, M.D., is clinical professor of child psychiatry at Columbia University, College of Physicians and Surgeons.")

³⁶ Specifically, Sigmund Freud, *Three Contributions to the Theory of Sex: II – Infantile Sexuality*, in *THE BASIC WRITING OF SIGMUND FREUD* 592–93 (A.A. Brill ed., 1938), is cited to support Gardner's statement concerning cases in which sexual abuse is alleged: "I agree with Freud that children are 'polymorphous perverse,' and thereby provide [their] mothers with ample supply of material to serve as nuclei for [the mothers' projection of their own inclinations to

In any event, over the years since Gardner first announced his theory, the term PAS has entered into public usage. The media, parents, therapists, lawyers, mediators, and judges now often refer to PAS, many apparently assuming that it is a scientifically established and useful mental health diagnosis.³⁷ Accordingly, in practice, whenever child sexual abuse allegations or disrupted visitation patterns arise in the United States, one must now be prepared to confront a claim asserting that PAS is at work, not abuse or other difficulties.³⁸

1537 An electronic search for all reported U.S. cases between 1985 and February 2001 employing the term “parental alienation syndrome” revealed numerous mental health professionals in addition to Gardner who have testified that PAS was present, although far fewer were willing to recommend that custody be transferred and contact with the primary custodian be terminated. The search produced forty-eight cases from twenty states, including the highest

pedophilia] onto the father.” Additional dangerous hyperbole is typified by Gardner’s statement that a child’s hatred for one parent is “superficial” and his warning to judges that “tak[ing] the allegations of maltreatment seriously may help entrench the parental alienation syndrome and may result in years of, if not lifelong, alienation.” Gardner, CT. REV., *supra* note 6. Compare the views of reputable scholars set forth in notes 15–18 *supra*.

³⁷ A recent friend-of-the-court brief provides an example. *See* Amici Curiae Brief of Leslie Ellen Shear, et al., *Montenegro v. Diaz*, Supreme Court of California No. S090699 (2001). Written on behalf of mediators, therapists and California attorneys who have passed a specialist’s examination in family law, the brief’s arguments in favor of easier custody modification standards (including transfers in custody) include reliance on PAS. *Id.* at 26–30. Judges have also endorsed PAS. *See, e.g.*, the remarks of Judge Aviva Bobb, Presiding Judge of the Los Angeles Superior Court Family Court, *quoted in* Keating, *supra* note 22:

[Just because PAS is not supported by scientific evidence] does not mean that it does not exist. One parent is being successful in undermining the child’s relationships with the other parent. That is so serious that the child will not be able to bond [sic] with the other parent. . . . And unless that parent stops that behavior, that parent should be monitored by a third party.

³⁸ Even Gardner now concedes that this is a frequent pattern. Keating, *supra* note 22 (quoting Gardner: “Now that PAS is a widespread diagnosis, many abusers are claiming they are innocent victims of PAS”).

courts in six states. The degree to which PAS has been invoked by expert witnesses, attorneys, or judges in these cases and the almost total absence of inquiries into its scientific validity is profoundly disturbing.³⁹ In only a handful of cases did the trial or appellate court specifically consider whether the supposed syndrome was admissible under the accepted precedents that test either acceptance in the scientific community or acceptable scientific methodology,⁴⁰ and in several of these, the court determined that it did not need to reach the admissibility question, often because no alienation had been shown.⁴¹ On more than one occasion, however, appellate

³⁹ Most of the cases listed as admitting PAS on *Gardner's* website fit into this category, and the list is therefore misleading. When PAS is mentioned by a party, an expert or a judge, but no challenge to admissibility or decision on point has occurred, no conclusion concerning admissibility can be drawn; the issue has simply been waived. *See, e.g., In re Violetta B.*, 568 N.E.2d 1345 (Ill. Ct. App. 1991) (PAS mentioned by one witness, but not discussed and irrelevant to decision); *Crews v. McKenna k/a Kuchta*, 1998 Minn. App. LEXIS 793 (July 7, 1998) (“kernel of authenticity” to 11-year-old’s fears, but “some” of child’s behavior evidenced PAS); *Truax v. Truax k/a Briley*, 874 P.2d 10 (Nev. 1994); *Loll v. Loll*, 561 N.W.2d 625 (N.D. 1997) (state supreme court upheld the trial court’s decision that alienation had not been shown; it noted but did not respond to the mother’s objection that the son’s therapist was “unaware that [the child] . . . was suffering from parental alienation syndrome”).

⁴⁰ In the United States, reliable expert testimony on scientific, technical or other specialized knowledge is generally permitted if it will assist the trier of fact understand the evidence or determine a fact that is in issue. The general-acceptance-in-a-particular-field test first articulated for the federal courts in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) became the test in most state courts as well. PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, 1 SCIENTIFIC EVIDENCE § 1-5 (3d ed. 1999). The U.S. Supreme Court ruled that the Federal Rules of Evidence (adopted in 1975) displaced the *Frye* test in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Most states have also replaced *Frye* with *Daubert*, the new test that considers many factors to determine scientific reliability. *Id.* §§ 1-7 to 1-8 (comparing the standards). *See also id.* § 9-5 (on opinion evidence).

⁴¹ *See e.g., In the Interest of T.M.W.*, 553 So. 2d 260, 261 (Fla. Dist. Ct. App. 1989) (court’s power to order psychological examination at issue, not merits of father’s PAS argument or its relevance to adoption case); *Bowles v. Bowles*, No. 356104, 1997 Conn. Super. LEXIS 2721 (Conn. Super. Ct. Aug. 7, 1997) (court makes orders without regard to PAS theory); *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 215 (Iowa Ct. App. 1994) (same). *See also Pearson v. Pearson*, 5 P.3d 239, 243 (Alaska 2000), where the father’s PAS assertions were heard at trial and the mother apparently did not challenge admissibility on appeal. The state supreme court upheld the trial court’s finding that no alienation was present.

1538 courts nevertheless took the occasion to alert trial courts to the fact that Gardner's work is seriously disputed.⁴²

In the few reported cases in which Gardner's proffered testimony was challenged or the validity of PAS was otherwise questioned, courts usually exclude his testimony and reliance on PAS. These cases reveal two areas of concern. First, courts are consistent in refusing to permit Gardner to testify on the truth or falsity of witnesses, noting that this question is reserved to the trier of fact.⁴³ Second, most U.S. courts considering the question agree that PAS has not been generally accepted by professionals and does not meet the applicable test for scientific reliability.⁴⁴ These conclusions are echoed by a Canadian jurist in an article discussing

⁴² See, e.g., *In the Interest of T.M.W.*, 553 So. 2d 260, 261 n.3 (Fla. Dist. Ct. App. 1989); *Hanson v. Spolnik*, 685 N.E.2d 71, 84 n.10 (Ind. Ct. App. 1997). A powerful concurrence and dissent in *Hanson* by Judge Chezem details the deficiencies of PAS as a theory and as implemented in this case. The appellate court upheld the trial court's order of a custody transfer (with complete termination of the mother's contact with her 6-year-old daughter for two months) on the basis of testimony provided by a psychologist. The psychologist had not interviewed either parent or the child, but based his analysis instead on notes made by a therapist who, in turn, had never met the father. Judge Chezem's opinion points out that although the father was unable to work due to an emotional disability, neither psychologist had any way of knowing whether the mother's assertions about the father's behavior (she suspected sexual abuse) were true. By one year after the transfer order, the mother was being permitted a six-hour visit once every two weeks. See also *Pearson v. Pearson*, 5 P.3d 239, 243 (Alaska 2000), where the state supreme court volunteered that PAS (which both parties' experts accepted) is "not universally accepted.?"

⁴³ See, e.g., *Tungate v. Commonwealth*, 901 S.W.2d 41 (Ky. 1995) (refusing Gardner's proposed testimony on "indicators for pedophilia" in criminal case because it went to ultimate issue of guilt or innocence and "lacked sufficient scientific basis for the opinions offered").

⁴⁴ See, e.g., *People v. Fortin*, 706 N.Y.S.2d 611 (N.Y. Crim. Ct. 2000); *Husband Is Entitled to Divorce Based on Cruel and Inhuman Treatment: Oliver V. v. Kelly V.*, 224 N.Y. L. J., Nov. 27, 2000, at 25 (noting that no testimony was offered to validate PAS and therefore declining to make such a finding). The *Fortin* court refused to hear Gardner's PAS testimony for the defendant in a criminal case, holding that the defendant "has not established general acceptance of Parental Alienation Syndrome within the professional community which would provide a foundation for its admission at trial." In support of its holding, the court cited a concurring opinion of Chief Judge Kaye of the New York Court of Appeal and several articles, including

admissibility issues under both U.S. and Canadian law⁴⁵ and by other prominent professionals. Dr. Paul J. Fink, a past president of the American Psychiatric Association and president of the Leadership Council on Mental Health, Justice, and the Media, for example, has stated quite bluntly, “PAS as a scientific theory has been excoriated by legitimate researchers across the nation. Judged solely on his merits, Dr. Gardner should be a rather pathetic footnote or an example of poor scientific standards.”⁴⁶

Following considerable scientific criticism, Gardner withdrew the test he had constructed

Wood, *supra* note 16. It also quoted Gardner’s view that “the concept of scientific proof . . . is not applicable in the field of psychology; especially with regard to issues being dealt with in such areas as child custody disputes, and sex abuse allegations,” citing Gardner’s own writings (on which he was cross-examined). *See also* *Wiederholt v. Fischer*, 485 N.W.2d 442 (Wis. Ct. App. 1992) (appellate court, although not discussing validity of PAS, upheld trial court’s refusal to transfer custody of “alienated” children to father as his expert urged because only “limited research data” supported theory that removal would provide cure, expert conceded cure was controversial and carried uncertain risks, and testimony from parents and children supported trial court’s finding that transfer would not succeed and was unreasonable). *But see* *Kilgore v. Boyd*, Case no. 94-7573 (13th Jud. Cir., Fla. Nov. 22, 2000) (transcript of hearing permitting Gardner’s PAS testimony), at <http://www.rgardner.com/pages/kg.excerpt.html>.

⁴⁵ Williams, *supra* note 26, at 275–78.

⁴⁶ Gina Keating, *Critics Say Family Court System Often Amounts to Justice for Sale*, PASADENA STAR-NEWS, April 24, 2000, at http://www.canow.org/NOWintheNews/familylaw_news_text.html (last visited 8 April 2001). A similarly outspoken assessment by a well-regarded scholar appears in the American Bar Association’s Journal; referring to Gardner’s withdrawn Sex Abuse Legitimacy Scale (SALS, the basis for Gardner’s PAS theory), Professor Jon R. Conte of the University of Washington Social Welfare Doctoral Faculty remarked, SALS is “[p]robably the most unscientific piece of garbage I’ve seen in the field in all my time. To base social policy on something as flimsy as this is exceedingly dangerous.” Debra Cassens Moss, *Abuse Scale*, 74 A.B.A. J., Dec. 1, 1998, at 26. Gardner’s views on pedophilia and what he calls a wave of hysteria concerning child abuse allegations have been received with equally harsh appraisals elsewhere. *See, e.g.*, Jerome H. Poliacoff & Cynthia L. Greene, *Parental Alienation Syndrome: Frye v. Gardner in the Family Courts*, at <http://www.gate.net/~liz/liz/poliacoff.htm> (a revised version of an article by the same name that originally appeared in the FAMILY LAW SECTION, FLORIDA BAR ASSOCIATION, COMMENTATOR, vol. 25, no.4, June 1999).

to determine whether sexual abuse had taken place.⁴⁷ Yet, as Faller's close examination reveals, this set of questions was simply replaced by other publications with new titles that largely replicate his earlier content and methodology.⁴⁸

Despite the good work of most of the courts that have considered the scientific probity of PAS, there is little to celebrate. The vast majority of the cases mentioning PAS reveal that one or more of the experts evaluated the case in light of PAS, and there is nothing to suggest that anyone—expert, attorney or judge—thought to question whether the theory is well founded or leads to sound recommendations or orders.⁴⁹ A similar lack of rigor is now also seen in foreign

⁴⁷ See, e.g., Lucy Berliner & Jon R. Conte, *Sexual Abuse Evaluations: Conceptual and Empirical Obstacles*, 17 CHILD ABUSE & NEGLECT 111, 114 (1993):

[The Sexual Abuse Legitimacy Scale (SALS)] is based entirely on the author's personal observations of an unknown number of cases seen in a specialized forensic practice. Although reference is made to studies [by Gardner] these are unpublished, not described, and are of unknown value. . . . Indeed, to our knowledge, the entire scale and parent[al] alienation syndrome upon which it is based have never been subjected to any kind of peer review or empirical test. In sum, there is no demonstrated ability of this scale to make valid predictions based on the identified criteria.

In addition, Faller notes that Gardner's work makes reference to none of the works on false allegations of sexual abuse in divorce that predate his publications. Faller, *supra* note 3, at 106–08 (analyzing Gardner's work in light of the relevant literature and finding it wanting).

⁴⁸ As Faller puts it, Gardner has repudiated the numbers produced by his scale, but not the factors. Although the SALS is no longer listed as a separate publication by Gardner's press, Creative Therapeutics, Faller examines Gardner's more recent *Protocols* and concludes that “virtually all SALS factors are included in the Protocols, and the parental alienation syndrome figures prominently in the Protocols as a signal that the allegation of sexual abuse is false.” Faller, *supra* note 3, at 105–06.

⁴⁹ See, e.g., *Metza v. Metza*, 1998 Conn. Super. LEXIS 2727 (Conn. Super. Ct. 1998) (mother's disparaging remarks “can lead to the Parental Alienation Syndrome”); *Blosser v. Blosser*, 707 So. 2d 778, 780 (Fla. Dist. Ct. App. 1998) (parties stipulated to admission of psychologist's report that included conclusion that “child did not exhibit any parental alienation syndrome”); *In re Marriage of Condon*, 73 Cal. Rptr. 2d 33, 39 n.9 (Ct. App. 1998) (mentioning but not discussing father's “declaration and supporting materials [from a psychologist] regarding

sources.⁵⁰

In practice, PAS has provided litigational advantages to noncustodial parents with sufficient resources to hire attorneys and experts.⁵¹ It is possible that many attorneys and mental health professionals have simply seized on a new revenue source—a way to “do something for the father when he hires me,” as one practitioner puts it. For those who focus on children’s well-being, it hardly matters whether PAS is one more example of a “street myth” that has been

‘Parental Alienation Syndrome’; however, suggest skepticism); *In re John W.*, 48 Cal. Rptr. 2d 899, 902 (Ct. App. 1996) (father given custody without discussing expert’s reasoning that mother’s good faith belief that father had molested child was produced by subtle, unconscious PAS); *White v. White*, 655 N.E.2d 523 (Ind. Ct. App. 1995) (mother sought to introduce evidence to rebut father’s factual assertions but did not question PAS theory). *But see* *Wiederholt v. Fischer*, 485 N.W.2d 442 (Wis. Ct. App. 1992) (appellate court upheld trial court’s refusal to transfer custody of “alienated” children to father as his expert urged, in part because transfer carried uncertain risks, and testimony from the parents and children supported trial court’s finding that transfer was unreasonable); *Bowles v. Bowles*, 1997 Conn. Super. LEXIS 2721 (Conn. Super. Ct. 1997) (court refuses to order custody transfer to father because “it would be unrealistic and counter-productive”). Cases that *Gardner’s* website lists as examples of PAS’s admissibility, however, whether domestic or foreign, rarely address the scientific sufficiency question. *See infra* note 50 and accompanying text.

⁵⁰ *See, e.g.*, *Johnson v. Johnson*, No. AD6182, Appeal No. SA1 of 1997, Family Court of Australia (Full Court) (July 7, 1997), at http://www.austlii.edu.au/au/cases/cth/family_ct/ (trial court erred in not allowing father to recall expert witness in order to put questions on PAS; no discussion of PAS’ scientific sufficiency; mother’s counsel conceded relevance of PAS but argued unsuccessfully that questions had already been put under another label); *Elsholz v. Germany*, 8 EUR. CT. H.R. 2000, at para. 53 (deciding that the German courts’ refusal to order an independent psychological report on the child’s wishes and the absence of a hearing before the Regional Court constituted an insufficient involvement of the applicant in the decision-making process, thereby violating the applicant’s rights under Articles 8 and 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms). PAS appears only in the father’s arguments, not in the Court’s findings or reasoning. *See id.* paras. 33–35, 43–53, 62–66.

⁵¹ As a general matter, custodial households are at a financial disadvantage in the United States, and custodial parents are less likely than noncustodial parents to be represented in custody litigation. MYERS, *supra* note 16, at 8, vividly describes the costs to the custodial parent and the tactical advantages to the noncustodial parent of pretrial discovery to “keep . . . [the protective parent and counsel] off balance and distract them from the important work of getting ready for court.”

too willingly embraced by the media and those involved in child custody litigation, or whether attorneys and mental health professionals truly do not know how to evaluate new psychological theories.⁵² This latter possibility may, however, explain why an annual essay prize from the American Bar Association's Section on Alternate Dispute Resolution went to a remarkably non-evaluative, hence inadequate, piece on PAS,⁵³ and why articles on PAS that seriously misstate the research literature have appeared even in refereed journals.⁵⁴

IV. Improved Science but More Bad Policy

Faced with such widespread misinformation and the harm that it may be causing in custody cases, leading scholars are now attempting to refine the area. In addition to their written works, some are now responding to Gardner on his own turf by presenting papers at professional meetings and continuing education courses for judges, attorneys and mental health professionals. In Northern California, which has been the site of much of the research now being erroneously cited by proponents of PAS, several professionals who have been lecturing broadly on the topic

⁵² Similar analytical sloppiness has accompanied other recent fads in American custody law—theories favoring joint physical custody over the objections of a parent, opposing relocation of custodial households, enforcing frequent visitation in high conflict (even physically abusive) cases, and permitting dispositional recommendations from mediators to courts. In each of these areas, a great many troubling trial court decisions had been entered before leading scholars and practitioners pointed out their flawed reasoning. For a critical assessment of one such more recent innovation see the textual discussion below of so-called special masters.

⁵³ See Anita Vestal, *Mediation and Parental Alienation Syndrome: Considerations for an Intervention Model*, 37 FAM. & CONCILIATION COURTS REV. 487 (1999).

⁵⁴ See, e.g., Deirdre Conway Rand, *The Spectrum of Parental Alienation Syndrome*, AM. J. FORENSIC PSYCHOL., vol. 15, 1997, no. 3, at 23 (Part I) and No. 4, at 39 (Part II), which is replete with inaccurate characterizations of the findings and views of many scholars, including those of Judith Wallerstein, Janet Johnston and Dorothy Huntington. Rand frequently cites works as dealing with PAS although they discuss distinct matters that Rand and others confound with PAS in ways similar to Gardner, as discussed in this article. *Accord*, telephone conversation with Dr. Judith Wallerstein, April 10, 2001.

of alienation recently published a collection of related articles.⁵⁵

1542 These professionals distinguish themselves sharply from Gardner and PAS in several important respects.⁵⁶ First, they directly criticize his theory, its lack of scientific foundations, and its treatment recommendations. Next, they distinguish “alienation” from “estrangement” (although these terms have been synonymous in ordinary usage) and point out

⁵⁵ In May 2001, for example, a national conference on Conflict Resolution, Children and the Courts included both a half-day institute titled “The ABC’s of High Conflict Families and Alienated Children” and a panel devoted to “Restoring Relationships Between Alienated Children and their Parents.” AFCC 38th Annual Conference, May 9–12, 2001. The July 2001 issue of Family Court Review contains a symposium on PA. As described by the editors, the purpose is “to review the psychological and legal difficulties with Parental Alienation Syndrome . . . and to develop a more complex and useful understanding of situations in which children strongly and unexpectedly reject a parent during or after divorce.” Janet R. Johnston & Joan B. Kelly, *Guest Editorial Notes*, 39 FAM. CT. REV. 246, 246 (2001) [hereafter Johnston & Kelly, *Ed. Notes*]. In their joint article for the issue, Johnston and Kelly argue for a new formulation that would distinguish alienated children “from other children who also resist contact with a parent after separation but for a variety of normal developmentally expectable reasons (including realistic estrangement from violent, neglectful, or abusive parents).” *Id.*, summarizing Joan B. Kelly & Janet R. Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 FAM. CT. REV. 249 (2001) [hereafter Kelly & Johnston, *The Alienated Child*].

⁵⁶ The following summary is based largely on Kelly & Johnston, *The Alienated Child*, *supra* note 55. Disagreement with Gardner concerning custody changes, however, appears in a companion piece, Janet R. Johnston et al., *Therapeutic Work With Alienated Children and Their Families*, 39 FAM. CT. REV. 316, 316 (2001):

The therapeutic approach to alienated children and their families described in this article stands in marked contrast to others that are largely coercive and punitive in nature (e.g., Gardner [2d ed., *supra* note 2] prescribed primarily court sanctions in mild and moderate cases and change of custody in severe ones). It draws on two decades of specialized knowledge and skill derived from more humane methods of educating, mediating, and counseling. . . .

Johnston and her co-authors do, however, accept what they term “judicious and coordinate use of legal constraints and case management together with these therapeutic interventions,” and adopt certain coercive recommendations from a companion piece by Sullivan and Kelly. *Id.* at 316, 330–32, setting forth their own more moderate approach, but relying in part on Matthew J. Sullivan & Joan B. Kelly, *Legal and Psychological Management of Cases With an Alienated Child*, 39 FAM. CT. REV. 299 (2001).

that there are many possible reasons for objections to or interference with visitation. They employ the term “estrangement” to refer to difficulties in a noncustodial parent’s relationship with a child that can be traced to that parent’s characteristics or behavior. “Alienation” in their usage refers to difficulties stemming from the child’s disproportionate, persistent, and unreasonable negative feelings and beliefs toward a parent.⁵⁷ By addressing the skewed rationales and conclusions promoted by Gardner’s work, they reopen a broad inquiry into causation and recognize that many factors may be at work collectively.

⌊543 Specifically disapproved is Gardner’s recommendation that children, even those who are supposedly engaged in a *folie à deux* with their custodial parent, be removed immediately and cut off from all contact with that parent pending reverse brain-washing or deprogramming. In line with more general psychological theory, these children are to be protected from the trauma of an abrupt termination of their primary relationship. Therapy for the child and the custodial parent may be recommended instead to loosen unhealthy aspects of their bond, supplemented by professional assistance in reestablishing the child’s relationship with the noncustodial parent at an appropriate time and in a manner that will not unduly frighten the child. These authors are careful in their references to research literature and usually qualify their

⁵⁷ The definition of *alienated child* used in the Family Court Review symposium is:

one who expressed freely and persistently, unreasonable negative feelings and beliefs (such as anger, hatred, rejection, and/or/fear) toward a parent that are significantly disproportionate to the child's actual experience with that parent. From this viewpoint, the pernicious behaviors of a “programming” parent are no longer the starting point. Rather, the problem of the alienated child begins with a primary focus on the child, his or her observable behaviors, and parent-child relationships.

Andrew Schepard, *Editorial Notes*, 39 FAM. CT. REV. 243, 243 (2001), citing Kelly & Johnston, *The Alienated Child*, *supra* note 55, at 251. *See generally* Williams, *supra* note 26, at 271–73 (discussing others’ varying definitions of *parental alienation*).

claims appropriately. In addition, to varying degrees they provide helpful clinical insights for the use of therapists whose work with families includes child-parent antipathies. To this extent, their insights, although not yet scientifically proven, are an important step forward.

Unfortunately, however, these mental health specialists, like Gardner before them, go far beyond their data as they craft recommendations for extended, coercive, highly intrusive judicial interventions. They recommend a court-appointed “special master” (that is, a lawyer or mental health professional) to lead a team consisting potentially of therapists for each family member, a co-parent counselor, and attorneys for the parties and child. As articulated by Sullivan and Kelly, the special master assumes a quasi-judicial role “including child-specific decision making, case management, further assessments . . . structural interventions that are legally binding, and immediate conflict resolution. . . .”⁵⁸ Other important recommendations are that courts order parties to waive significant rights to confidentiality (privileges),⁵⁹ and that courts order parents to share the potentially onerous costs equally.⁶⁰

⁵⁸ Sullivan & Kelly, *supra* note 56, at 314, Appendix. *See also id.* at 300, 308 (role of special masters regarding counseling for child), 309, 310 (sample order compelling parties to sign waivers of confidentiality and agree to share costs, and sample order referring disputed custody issues to special master and prohibiting parents from obtaining attorney-drafted “letters or file motions” until after special master has held meeting), 311 (referring to delegated authority to a team leader to “codify” decisions as court orders), 315 (“If authorized by the court, the special master can take on . . . interventions that are legally binding . . .”). Compare *id.* at 303, the authors’ only reference to a stipulation, one authorizing “a time-limited special master while an evaluation is going on.”

⁵⁹ *See id.* at 310 (sample order compelling parties to sign waivers of confidentiality). The authors acknowledge in passing, without explanation, that their recommendation may come under legal or ethical scrutiny. *Id.*

⁶⁰ References to expense appear, for example, in Johnston et al., *supra*, note 56, at 330–31 and Sullivan & Kelly, *supra* note 56, at 300, 311 (concerning cases in which a family’s needs far exceed available resources), and 314 (listing a special master, child’s therapist, parents’ therapists, co-parent counselor, parents’ attorneys, and child’s attorney or guardian ad litem as potential “collaborative team” members). Sullivan and Kelly recommend orders splitting all

1544 Some of these specific proposals are clearly contrary to current law. California constitutional, statutory, and case law, for example, make clear that the scheme Sullivan and Kelly propose (which apparently would authorize a special master over one or both parents' objections) constitutes an impermissible delegation of judicial authority.⁶¹ Similarly, their recommended court-ordered waivers ("limited confidentiality" in their terminology) would

uninsured costs equally between the parties throughout their article.

⁶¹ Sullivan and Kelly may have confounded voluntary stipulations with court orders following litigation. Their use of language throughout, particularly in their sample orders, incorrectly suggests that courts may order a person to agree to matters that the law leaves to an individual's choice. *See Ruisi v. Thieriot*, 62 Cal. Rptr. 2d 766, 771–75 (Ct. App. 1997), which reversed the trial court's order (adopting the recommendation of Dr. Margaret Lee) that a special master be appointed over the objection of one parent and also reversed an order excusing the special master from requirements that the proceedings be reported. *Id.* at 772. The appellate court held,

[T]he authority of the trial court to [designate a separate forum to resolve family law disputes] is constrained by the basic [state] constitutional principle that judicial power may not be delegated.

The trial court has no authority to assign matters to a referee or special master for decision without explicit statutory decision. An invalid reference constitutes jurisdictional error which cannot be waived.

...
When, as here, the parties do *not* consent to a reference, the authority of the trial court to direct a special reference is limited to particular issues. The trial court has no power to refer issues other than those explicitly specified by statute. .

..
Id. at 772–73 (citations omitted). As the court also pointed out, the case did not involve the appointment of a court commissioner. *Id.* at 772 n.9. Nor did it involve the court's power, *upon agreement by the parties*, to order a reference to try "any or all of the issues in an action or proceeding, whether or fact or of law." *Id.* at 773 n.13.

(Reversal was also granted in *Ruisi v. Thieriot* on a second issue as to which the trial court accepted a recommendation from Dr. Lee, who had testified that it would harm an 8-year-old boy's development to move anywhere at all with his mother, even to a nearby county. The child lived with his mother and saw his father on weekends. On remand, in light of *In re Marriage of Burgess*, 913 P.2d 473 (Cal. 1996), which articulated a new standard for relocation cases, the mother and child were permitted to relocate to the East Coast. *See generally*, Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L.Q. 245 (1996).)

require that courts act contrary to controlling legal mandates.⁶² Finally, although their proposal that parties share costs equally is not contrary to law, it is (for no apparent reason) potentially punitive to the less affluent spouse.

1545 Despite case law emphasizing the legal distinction between consensual and nonconsensual orders, several authors in a recent symposium (including one whose recommendation for a special master was overturned in the controlling case law) endorse Sullivan and Kelly's recommendations.⁶³ It is, however, unlikely that California's appellate courts would ignore the distinction between judicial coercion and voluntary agreements. The failure of these leading forensic specialists to address this issue leaves unclear whether they do not understand the distinction, or whether it is simply unimportant to them. In either case, the possibility that quasi-judicial decisions might be entered by those who do not find such distinctions dispositive is troubling at best.

Even if they were lawful, the authors concede that their proposed remedies are extremely costly.⁶⁴ Further, they provide no reasonable assurance that these recommendations will either

⁶² California evidence law, for example, requires that judges recognize privileges such as patient therapist confidentiality on the motion of any party or, indeed, *sua sponte*, unless a specific exception applies. CAL. EVID. CODE § 916. Sullivan and Kelly's suggestions that courts order parties to waive such confidentiality asks, at least in the California context in which they practice, that judges violate their statutory duties.

⁶³ See, e.g., S. Margaret Lee & Nancy W. Olesen, *Assessing for Alienation in Chld Custody and Access Evaluations*, 39 FAM. CT. REV. 282, 295–96 (2001) (Dr. Lee was the expert who recommended the appointment of a special master in *Ruisi*). See also note 61 *supra*.

⁶⁴ See, e.g., references to parties' abilities to pay in Johnston et al., *supra* note 56, at 330–31; Sullivan & Kelly, *supra* note 56, at 300, 311 (concerning cases in which the family's needs far exceed available resources), 314 (listing the special master, child's therapist, parents' therapists, co-parent counselor, parents' attorneys, and child's attorney or guardian ad litem as potential "collaborative team" members). Sullivan and Kelly repeatedly recommend orders splitting all uninsured costs equally between the parties; this recommendation is likely to cause serious

serve the child's interests⁶⁵ or even improve the situation that would exist without judicial intervention.⁶⁶ As Sullivan and Kelly acknowledge,

Contrary to what is often asserted by child custody experts and parental alienation advocacy groups, there is little empirical research evidence to support any specific intervention, such as changing custody, in the severe, chronic cases. Furthermore, there is no empirical data that indicates whether entrenched alienation and total permanent rejection of a biological parent has long-term deleterious effects on children's psychological development. . . . Similarly, there is clinical support but no empirical research demonstrating that by letting go of the relationship, the rejected parent and child will at some later time reconcile and restore the relationship.⁶⁷

As Johnston puts it, "The long-term outcomes [of therapeutic work with alienated children and their families] are a matter of conjecture and currently unknown."⁶⁸

⌊546 As this discussion suggests, these authors share unexamined assumptions about the roles of courts and mental health professionals in inter-parental child custody disputes.⁶⁹ They employ a medical model, one that assumes that all serious interpersonal difficulties can and

hardship for the lower-earning parent, and it is puzzling that they do not account for that difficulty.

⁶⁵ Sullivan & Kelly, *supra* note 56, at 309: "[S]anctions [of an uncooperative parent] that involve the child or custody (sometimes as extreme as hospitalization or incarceration) are rarely based on the best interests of the child."

⁶⁶ See notes 68–77 *infra* and accompanying text.

⁶⁷ Sullivan & Kelly, *supra* note 56, at 313–34.

⁶⁸ Johnston et al., *supra* note 56, at 329.

⁶⁹ The works reviewed here from the Family Court Review July 2001 symposium and a recent friend-of-the court brief indicate that many mental health professionals hope to do far more than counsel parties. They seek quasi-judicial roles that will authorize them to prescribe the details of life for many parents and children. Most troubling of all is that they wish to do so in a framework that lacks due process protections such as a record, evidentiary privileges, and full access to the courts. See *Amici Curiae Brief*, *supra* note 37.

should be remedied by mental health interventions. As a consequence, they ask courts to order parties who are neither abusive nor neglectful to employ and cooperate with intrusive, costly teams of professionals, even when there is no assurance that improvement will be achieved before the family's resources are exhausted or that the results will be appreciably better than what is likely to occur without intervention.

Their belief that such intervention is appropriate may spring in part from the shift to the best-interests-of-the-child custody standard and from enhanced roles for non-custodial parents. Each of these well-intended developments has brought with it increased litigiousness in child custody cases and an expanded role for mediators and evaluators. Parents who were once assumed or even presumed to be the proper custodians for their children (and to be capable of making sound decisions for them) are now subject to close monitoring and to parenting orders that require extensive cooperation and contact between a child's parents. This, in turn, has extended custody mediation and evaluations to increasingly less-troubled and less-affluent families. The incremental nature of these changes, however, has masked the degree to which post-divorce or post-separation parenting is treated more intrusively than parenting in other settings.

Although parental separation may, of course, cause or exacerbate intra-familial difficulties, the degree to which these difficulties justify public intervention is a question of policy and law. Some difficulties, although extremely unfortunate, are appropriately left to families and individuals to address as a private matter, if at all. When a parent dies, for example, no current family law doctrine imposes grief counseling on a minor child or surviving spouse absent behavior that provides an independent basis for coercive intervention (such as those imposed by laws regulating neglect, abuse, and criminal behavior). There is reason to question

whether a different response is justified when emotional difficulties occur instead in the context of separation or divorce. The presence of two parents with differing desires is relevant, of course, but perhaps to a far lesser degree than current practice suggests.

Indeed, restraint of this sort is recommended for the custody context in the report of a twenty-five-year follow-up to a pioneering study of 131 children of divorcing California families. The original work, *Surviving the Breakup*,⁷⁰ revealed differences in children's responses to their parents' separation that reflected the children's developmental stages. The authors, Drs. Judith Wallerstein and Joan Kelly, noted distinctive, angry behavior by children aged nine to twelve, who often placed blame on the parent they believed caused the divorce and formed alignments with the parent they deemed innocent.⁷¹ Gardner's reliance on this work demonstrates mistaken assumptions about the incidence,⁷² causes and consequences of such parent-child alignments, and Gardner has hence made inappropriate recommendations concerning responses to them. It appears that the proponents of PA may have overreacted as

⁷⁰ WALLERSTEIN & KELLY, *supra* note 10.

⁷¹ *Id.* at 74–75:

The single feeling that most clearly distinguished this group from the younger children was a fully conscious, intense anger. . . . Approximately half of the children . . . were angry at their mothers, the other half at their fathers, and a goodly number were angry at both. In the main children were angry at the parent whom they blamed for the divorce.

⁷² Gardner has suggested that PAS may be present, albeit in varying severity, in perhaps 40% to 90% of all contested custody cases. Note 4 *supra* and accompanying text. Wallerstein and Kelly's 20% overall figure deals with alliances rather than PAS and largely reflects the subset of 9- to 12-year olds in a sample of divorcing couples, not all of whom were disputing custody. They note that the anger and alignments of this age group distinguish it from other age ranges.

well.

Most dramatically, Wallerstein reveals that these children's alignments were transient, with *every* child later abandoning his or her harsh position, mostly within one or two years and all before the age of eighteen.⁷³ She reports that the children remained with their primary caregivers throughout, yet were profusely apologetic to the parents they had previously treated so badly. This is dramatically different from Gardner's untested prediction that, absent immediate and dramatic intervention, the disfavored parent may well be permanently cut out of the child's life. As Wallerstein reports the chronology,

In these situations [which involved one-fifth of the children in the study], the child is usually a preadolescent or young adolescent and the targeted parent is the one who sought the divorce. . . . The child . . . seeks to restore the family or help the sorrowful parent. . . . The mischief wrought by presumably well-bred children was astonishing. . . .

¶548 In following these alliances over the years, I find that the vast majority are short-lived and can even boomerang. Children . . . soon become bored or ashamed of their mischief. Not one alliance lasted through adolescence and most crumbled within a year or two. . . . [M]ost children find their way back to age-appropriate activities as they enter adolescence With time they are likely to turn against the parent who encouraged them to misbehave. . . .⁷⁴

In what seems a thinly veiled reference to those who advocate Gardner's PAS theory, she concludes,

There is great advantage in allowing natural maturation to take its course and to avoid overzealous intervention to break these alliances, which are usually strengthened by efforts to separate the allies. In this, the alliance may be akin to a moderate case of flu that mobilizes the immune system and generates antibodies. It is not a fulminant cancer requiring radical surgery or limb amputation, especially by poorly trained surgeons.⁷⁵

⁷³ Telephone conversation with Dr. Judith Wallerstein, April 10, 2001.

⁷⁴ WALLERSTEIN, LEWIS & BLAKESLEE, *supra* note 10, at 115–16.

⁷⁵ *Id.* at 116–17.

Wallerstein's concern about overzealous intervention, although authored in the context of custody transfers, seems equally applicable to the broad range of coercive interventions proposed only a year later by Johnston, Kelly, Sullivan, and their co-authors.

Johnston's work is less easily reconciled. In writing about the apparently intractable cases she observed in her studies of high-conflict custody disputes, she initially went further than Wallerstein in expressly criticizing Gardner's recommendations:

It has been our experience that forcibly removing . . . children from the aligned parent and placing them in the custody of the rejected parent, as recommended by Gardner (1987), is a misguided resolution; it is likely to be not only ineffective but actually punitive and harmful because it usually intensifies the problem.⁷⁶

Indeed, Johnston questioned whether children should even be asked to visit the rejected parent in such hostile circumstances. Noting that the literature did not clarify the circumstances under which visitation benefits children, she concluded,

Despite the fact that mental health professionals are recommending and courts are ordering visitation arrangements for thousands of children daily, there is yet a meager knowledge base to justify their decisions.⁷⁷

⌊549 In more recent publications, Johnston points out that “profound alienation . . . most often occurs in high-conflict custody disputes [and] is an infrequent occurrence among the larger population of divorcing children.”⁷⁸ She also recommends against frequent transitions between

⁷⁶ Johnston, *Children Who Refuse Visits*, *supra* note 10, at 132.

⁷⁷ *Id.*

⁷⁸ Kelly & Johnston, *The Alienated Child*, *supra* note 55, at 254.

parents if children show continued stress reactions to them.⁷⁹ Her points are well taken.⁸⁰ Given these insights, however, it is puzzling that Johnston expressly endorses many coercive aspects of Sullivan and Kelly's legal framework.⁸¹ Until she provides further clarification, Johnston's apparent support for forced contact between the members of high-conflict families should be construed narrowly, given her many publications questioning the wisdom of or need for such approaches.

The PAS debacle and the troubling recent PA recommendations make clear that the time has come for deep thinking about realistic family law goals. Children ought not to be asked to function under circumstances that would challenge or overwhelm even the strongest adults.⁸² A child's chance for healthy development requires that parents, judges, and mental health professionals face the realities of the child's situation. This includes a realistic understanding of the limitations of dispute resolution techniques, therapy, and legal compulsion in high-conflict cases. Overly ambitious efforts with only small chances of success should be shunned in favor of

⁷⁹ JANET R. JOHNSTON, HIGH-CONFLICT AND VIOLENT PARENTS IN FAMILY COURT: FINDINGS ON CHILDREN'S ADJUSTMENT, AND PROPOSED GUIDELINES FOR THE RESOLUTION OF CUSTODY AND VISITATION DISPUTES, Access/Visitation: General Principles No. 2 & n.2, at <http://www.courtinfo.ca.gov/programs/cfcc/resources/publications%20folder/hcvpfcs.pdf>.

⁸⁰ See generally Carol S. Bruch, *The Effects of Ideology and Mediation on Child Custody Law and Children's Well-Being in the United States*, 2 INT'L J.L. & FAM. 106 (1988); Carol S. Bruch, *Taking Ourselves Seriously Enough to be Cautious: A Response to Hugh McIsaac*, 5 INT'L J.L. & FAM. 82 (1991); Bruch & Bowermaster, *supra* note 61, at 262–69.

⁸¹ A case in point is Sullivan and Kelly's recommended order in high-conflict cases that would literally require children to pass through a no-man's land each time they leave or return from a visit. Sullivan and Kelly, who display helpful insight into the dynamics of alienation cases, are far less convincing when they suggest legal responses. See notes 58–69 *supra* and accompanying text.

⁸² Kelly and Johnston suggest, for example, that children who evidence PA may have already endured unbearable pressures. Kelly & Johnston, *The Alienated Child*, *supra* note 55, at 255.

reducing the child's emotional burdens, respecting the child's fears, and enhancing the child's emotional stability.

V. Recommendations and Conclusion

Children whose parents do not agree or cooperate concerning their care are placed in the middle of loyalty conflicts that can only stress ± 50 and sometimes break them.⁸³ We do not yet know enough about how children develop loyalties and antipathies or resolve them as they mature, whether in intact or divided households. Until we do, caution should guide therapists and courts. A growing body of research documents the harsh and sometimes violent world that a large percentage of children in high-conflict custody disputes seeks to escape.

PAS as developed and purveyed by Richard Gardner has neither a logical nor a scientific basis. It is rejected by responsible social scientists and lacks solid grounding in psychological theory or research. PA, although more refined in its understanding of child-parent difficulties, entails intrusive, coercive, unsubstantiated remedies of its own. Lawyers, judges, and mental health professionals who deal with child custody issues should think carefully and respond judiciously when claims based on either theory are advanced.

More generally, far greater interdisciplinary training and competence in scientific

⁸³ The author of this article first learned of PAS from a psychologist who was called for assistance when an 8-year-old girl became suicidal while institutionalized. The child had been totally cut off from her mother by a court that followed the recommendation of a custody evaluator who applies Gardner's principles rigorously. This evaluator and his partner continue to apply Gardner's principles fully, even in the face of serious abuse concerns, although now referring to "a parental alienation matter" rather than PAS, according to investigative reporter Karen Winner, who was commissioned by a parents' organization to investigate family law practices in the Sacramento, California courts. *See Winner, supra* note 22. Psychologist Vivienne Roseby of the Judith Wallerstein Center for the Family in Transition in Corte Madera, California reports that she and her colleagues have confronted similar difficulties with PAS-inspired custody transfers, including a case in which a 12-year-old boy died when he hanged himself on the day his custody was to be transferred. Telephone conversation with Dr. Vivienne Roseby, May 6, 2001, in Davis, California.

methodology are needed. These should be brought to bear whenever a new assertion is made that, if accepted, will shape the interpretation or application of family law principles (for example, the concept of a child's best interest). Although the use of expert testimony is often useful, decision-makers need to do their homework rather than rely uncritically on experts' views. This is particularly true in fields such as psychology and psychiatry, where even experts have a wide range of differing views and professionals, whether by accident or design, sometimes offer opinions beyond their expertise. Lawyers and judges are trained to ask the hard questions, and that skill should be employed here.

The first question is whether scientific sufficiency has been indicated by respected professional vetting, for example, inclusion in the American Psychiatric Association's DSM-IV⁸⁴ or the World Health Organization's ICD-10.⁸⁵ Where no such imprimatur exists, one must ask whether approval has been sought and denied or whether submission would be premature. Insights that are too new, or for which no established gold standard exists, may nonetheless be valuable,⁸⁶ but their probity and limitations should be clearly understood. This can be

⁸⁴ AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 11.

⁸⁵ WORLD HEALTH ORGANIZATION, *supra* note 11.

⁸⁶ An outstanding example is the series of publications by Wallerstein and her colleagues over the course of what developed into a 25-year project. Initially designed as exploratory research to help define questions for later studies, the sample (which was neither randomly selected nor scientifically controlled) has nevertheless provided major advances in knowledge. Many of Wallerstein and Kelly's initial clinical insights (for example, that children respond to their parents' divorce differently according to their developmental stage) brought to light connections that had been uniformly overlooked, but seemed obvious once pointed out. Subsequent, controlled studies by others have borne out that insight, while other suggestions have required refinement or retrenchment in the years since (such as their early suggestion concerning joint physical custody). *Compare, e.g.,* Carol S. Bruch, *Parenting At and After Divorce: A Search for* Bruch

accomplished by inquiries into the sample (if any) on which the theory is based, the methodology and assumptions affecting the collection of data, how conclusions have been drawn from the data, the likelihood that fair extrapolations can be drawn, the degree to which assertions are internally consistent and compatible with established knowledge, and the balance of potential benefits and harms if the insight later proves unsound.⁸⁷

The challenge is to bring professional skills and standards to the task: an unbiased mind, healthy skepticism, rigorous thinking, and sound policy analysis, but just as the responsibility is great, so too is the opportunity. As the noted legal philosopher Jerome Frank put it,

⌊552 Some wishes, of course, no matter how hard we work on them, never come true. But it is always open to us to substitute for neurotic “wishful thinking” what Neurath happily called “thoughtful wishing.” Let us thus use the wish that the administration of justice may be improved. If we do, we will. . . . admit that [trial courts’] fact-finding frequently results in grave injustices. We will then seek to discover in what ways that job can be done better. I surmise that, although such efforts will fall far short of perfection, they will, by no means, go wholly

New Models, 79 MICH. L. REV. 708, 708–10 (1981) (discussing methodology) and 722–25 (questioning joint custody conclusion) with WALLERSTEIN, LEWIS & BLAKESLEE, *supra* note 10, at 212–19 (significantly narrowing and refining position on joint custody).

⁸⁷ In its decision refusing to hear testimony from Gardner on PAS, the *Fortin* court indicated that it was being guided in part by a concurring opinion of Chief Judge Kaye of the New York Court of Appeal in a case examining the admissibility of DNA evidence. *People v. Fortin*, 706 N.Y.S.2d 611, 614 (N.Y. Crim. Ct. 2000). The cited language in Judge Kaye's opinion reads, “It is not for a court to take pioneering risks on promising new scientific techniques, because premature admission both prejudices litigants and short-circuits debate necessary to determination of the accuracy of a technique.” *People v. Wesley*, 633 N.E.2d 451, 462 n.4 (N.Y. 1994). *See also* *Chambers v. Chambers*, No. CA99-688, 2000 Ark. App. LEXIS 476 (Ark. Ct. App. June 21, 2000): On de novo review, the appellate court affirmed the trial court’s refusal to force visitation and be prepared to transfer custody, an order the father's expert witness said he fully expected the court would have to implement because the child would refuse to comply. The expert, an adolescent and child psychiatrist, testified that the steps he was recommending “will almost certainly be traumatic and painful [for the child].” The appellate court concluded that “even [the father’s expert] swore that the result [the father] sought posed a substantial risk of damage to the child,” and held that “[t]he chancellor correctly refused to inflict the threat of that harm.”

unrewarded.⁸⁸

⁸⁸ JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 79 (1949).

The Parental Alienation Syndrome in the Family Courts

BY PARIÁ KOOKLAN, CALIFORNIA NOW

In 1987, psychologist Richard Gardner coined the term “parental alienation syndrome” (PAS) to explain what he thought was a psychological disorder in children involved in custody disputes.

“Parental alienation syndrome” is not supported by empirical data, not listed in the Diagnostic and Statistical Manual of Mental Disorders, has never been recognized by the American Psychiatric Association and is not considered valid by most mental health professionals.

Nevertheless, “parental alienation syndrome” has gained popularity in family courts, and more and more women are losing custody battles because of claims that they are inducing this “syndrome” in their children.

Unless “parental alienation syndrome” is revealed for what it truly is- a theory that is not only totally unsubstantiated by any evidence, but inherently biased against women and carefully arranged to be used against mothers in custody battles – its use in the courts as a weapon against women will continue.

BACKGROUND ON THE “PARENTAL ALIENATION SYNDROME”

In his book *The Parental Alienation Syndrome: A Guide for Mental Health and Legal Professionals*, Gardner characterizes PAS as a situation in which one parent “programs” a child against the other parent. The “programmed” child then adds his or her own “self-created contributions” against the alienated parent (76). Gardner claims that there are “eight cardinal symptoms” of PAS, including a “campaign of denigration” against the alienated parent, “weak, frivolous and absurd rationalizations” for the denigration, “reflexive” support of the indoctrinating parent and an “absence of guilt” over cruelty toward the “victimized” parent (76-7). Gardner also distinguishes between three graded of PA—mild, moderate and severe.

Gardner also claims that the “parental alienation syndrome” is an overwhelming female phenomenon—that it is almost always women who induce it in their children (127). He attributes this in part to a mother’s “maternal instinct” to retain custody, and to the “fury of the scorned woman” (as in the saying “hell hath no fury like a woman scorned”), which apparently leads mothers to use their children as weapons with which to punish their ex-husbands (168). Gardner claims that “if the ex-husband has become involved with a new woman friend—either before or after the separation- the rage so engendered in the rejected woman may be even greater” (168-9). He further states that “these mothers are always on the attack with an array of tactics, including relentless litigation. Programming the children against their father, and thereby getting the children to join forces with her against him, is yet another weapon. Lying and deception are also routine.” The legal system, Gardner claims, serves as a “useful tool for enabling such women to vent their rage on their estranged husbands” (169). Dr. Gardner’s portrayal of these “PAS-inducing” mothers is

clearly based more on his own stereotypical and largely misogynistic view of women than on fact.

Dr. Gardner also claims that PAS-inducing mothers often use allegations of sexual abuse as a weapon in battles (178). He says that mothers often project “noxious qualities that actually exist within themselves” onto their husbands. In the case of sexual abuse allegations, they are probably “projecting their own secret inclinations” onto him. In addition, Dr. Gardner feels that “children normally entertain sexual fantasies, often of the most bizarre form.” He writes, “I am in agreement with Freud that children are ‘polymorphous perverse’ and they thereby provide their mothers with an ample supply of material to serve as a nuclei for their projections and accusations.” Gardner states that in PAS, children often join together with their mothers to “share in her paranoid fantasies about their father” (207). In other words, mothers and children who accuse a father of sexual abuse are delusional.

However extreme these views appear (and indeed, are), they are not unusual for Dr. Gardner; in his 1991 book *Sex Abuse Hysteria: Salem Witch Trials Revisited*, he indicated that America is in the throes of a “mass hysteria” over child sexual abuse, and goes so far as to say “there is a bit of pedophilia in every one of us” (118).

GARDNER'S GUIDELINES FOR THE COURTS

PAS is specifically designed for use in a court setting. In *The Parental Alienation Syndrome: A Guide for Mental Health Professionals*, Gardner outlines his recommended course of action for judges, attorneys, and court-appointed officials in custody cases involving “parental alienation syndrome.” He advocates court intervention and claims that without it, it would be “extremely unlikely, if not impossible, to treat children with PAS (376). The primary “treatment” for PAS is immediate transfer from the home of the “programmer” (the mother) the home of the “victimized parent” (the father). In many cases, Gardner claims, further restrictions of the mother’s access to the children is required- she should be limited to supervised visits (382-3).

Judges, Gardner claims, must appoint therapists and guardians ad litem who are “thoroughly familiar with PAS.” They must choose therapists who will not “respect” a child’s wishes when he or she prefers not to interact with an alienated parent, who “have a thick skin” and are able to tolerate the shrieks and claims of maltreatment that these children will provide.” These therapists must further be “comfortable with authoritarian and dictatorial approaches,” including “threat therapy” (377). Judges must also choose guardians as litem who will not “reflexively support their child clients’ requests,” but who are of the opinion that “children often need just the opposite of what they claim they want (ibid). In other words, when children “diagnosed” with PAS demonstrate a preference to live with their mother, the courts are encouraged to totally disregard their wishes.

Gardner also recommends that judges not hesitate to impose strict sanctions – such as fines, reduction in support/alimony payments, loss of custody, and even jail – upon mothers who do not cooperate with the court-appointed officials (ibid). He feels that placing an allegedly PAS-inducing mother into treatment is too lenient a course of action because “the order to go into therapy is

just what alienator wishes for, and the treatment becomes yet another stalling maneuver” (384). “Judges who order therapy,” writes Gardner, “often do not appreciate that they are being manipulated by cunning programmers” (ibid). In addition, Gardner claims that a mother’s involvement with her therapist is often “pathological” because the therapist is supporting the alienation of the children from their father. This “pathological” relationship between the mother, the children and the therapist is most likely to occur when sexual abuse allegations have been made against the father. The best solution for this problem is to “assign the targeted parent [the father] primary custodial status” and to give him “primary decision-making power regarding the selection of a therapist” (384). In other words, Gardner recommends granting custody of the children to the alleged abuser, and then allowing him to choose a new therapist- one who does not believe the allegations against him.

As for attorneys, Gardner states that the “attorney who supports the programming parent...is doing the whole family...a terrible disservice” (368). Bust most attorneys, Gardner believes, will not be troubled by their destructive role in custody cases “lawyers are taught to be psychopaths in law school.” This is apparently evidenced by the “lies of omission” that are “the name of the game” in the legal practice, and by the fact that lawyers, like psychopaths, “have little, if any, shame or guilt.” Furthermore, “cunning manipulation of others, one of the hallmarks of psychopathy, is what makes the difference between a ‘good lawyer’ and a ‘bad lawyer’” (370). There are, however, a few lawyers who Gardner feels are able to “rise above the system” and act in an ethical fashion- “especially if they happen to be on the side of the victimized parent in a PAS” (371). The “ethical lawyer,” says Gardner, will always support the “treatment program” (i.e. transfer of custody to the father) in a PAS case (ibid).

In sum, Dr. Gardner recommends that judges, court-appointed officials and attorneys all buy wholeheartedly into his theory and act accordingly. He wants judges to use punishment rather than treatment when confronted with a “PAS-inducing” mother; he wants court-appointed officials to discount any claims of abuse, including sexual abuse, made by the children against their father; he wants attorneys (including the mother’s own attorney) to act in an “ethical fashion” by supporting transfer of custody to the father. Gardner’s guidelines are clearly set up so that as soon as allegations of PAS are made against the mother, the only possible outcome of the case is court support of the PAS diagnosis and subsequent transfer of custody to the father. Any attorney who fights the PAS diagnosis is a “psychopath.” Any therapist or guardian ad litem who supports the mother’s or children’s allegations of abuse is locked in a “pathological” relationship with the client. Any judge who orders therapy rather than imposing sanctions on the mother is being hoodwinked. Any disagreement with the PAS diagnosis and Gardner’s recommended “treatment” is therefore automatically invalidated and the ultimate goal of the PAS diagnosis is realized: the father wins the custody battle.

COURTS USE OF THE PAS “DIAGNOSIS”

“Parental alienation syndrome” is not listed in the current Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), and is not expected to be listed in the Fifth Edition

(DSM-V). Nor is it in any other way recognized by the American Psychiatric Association or any other formal body of the mental health profession. In fact, Gardner's theory is not backed by any empirical data and has never been published for peer review. It is based solely on Dr. Gardner's own observations and speculations. Gardner even uses his own publishing company, Creative Therapeutics to publish all of his work.

Some mental health professionals have noted that the criteria Gardner uses to diagnosis PAS are essentially borrowed from his earlier- and now widely discredited- "Sex Abuse Legitimacy Scale," a test he created to determine whether children alleging sexual abuse were lying (Myers).

Despite all this, testimony on "parental alienation syndrome" has increasingly been accepted as evidence in family courts. The prolific writing and public appearances of Dr. Gardner have enhanced the popularity of these "diagnoses" and many California courts have blindly accepted Gardner and the validity of Gardner's theory, even though it does not meet the usual legal standards (the Kelly/Frye test or the Federal Rules of Evidence) for the admission of medical or psychological testimony (Poliacoff).

Karen Anderson lost custody of her three children in an Amador County court battle in 1996 thanks to the introduction of a "parental alienation syndrome" claim by her ex-husband's lawyer (Wilson). The children had alleged that their father had sexually molested them. They told a court-appointed therapist that their father would creep into bed with Kami, the youngest, in the middle of the night, when he thought the other children were sleeping. Kami told Child Protective Services that she "hated" what her father did to her. When she started reenacting oral copulation with her dolls and instructing her sister on how to perform oral sex, Karen called the court-appointed evaluator. But the evaluator, in line with Dr. Gardner's recommendation that therapists "have a thick skin," minimized Kami's claim. Kami refused repeatedly to see her father, screaming, "I don't want to come. He did bad things to me," but she was forced to go. Furthermore, the evaluator accused Karen of inducing the outburst. The court subsequently ruled that Kami had been "programmed" by her mother and that sex abuse allegations were false. Custody of the children was awarded to the abusive father and Karen was permitted only one hour of visitation a week.

Maralee McLain had a similar experience (ibid). At age two, her daughter began complaining of sexual abuse perpetrated by her father. Documented physical evidence of the abuse was found, and several of the child's teachers and babysitters testified in court that the father was an unfit parent. The father's attorneys, however, retaliated by accusing Maralee of inducing "parental alienation syndrome" in her daughter and, despite the overwhelming evidence against him, the father was granted primary custody. Maralee and her daughter now only see each other during brief supervised visits.

Most of the available data regarding child abuse and child custody contradict Gardner's theory rather than support it. A recent report entitled "Issues and Dilemmas in Family Violence," by the American Psychological Association's Presidential Task Force on Violence in the Family states that "some professionals assume that accusations of physical or sexual abuse of children during divorce or custody disputes are likely to be false, but the empirical research to date shows no such

increase in false reporting at that time.” In addition, “an abusive man is much more likely than a nonviolent father to seek sole physical custody of his children and may be just as likely (or even more likely) to be awarded custody as the mother. Often fathers win because men generally have greater financial resources and can continue the court battles with more legal assistance over a longer period of time.”

No numerical data are available on the frequency of PAS allegations in custody trials, but many mental health and legal professionals believe that it is fairly prevalent. The National Coalition Against Domestic Violence states that “today’s mothers are constantly being demonized while court-appointed evaluators label mothers with the diagnosis of the week, such as the “parental alienation syndrome’” (Wilson). University of Miami clinical psychologist and author Jerome H. Poliacoff writes that “too many of the mental health professionals upon whom they rely have blithely accepted in total Gardner’s theoretical writings without the critical examination requisite under the law or the ethical standards of professional psychological practice” (Poliacoff).

CONCLUSION

Unless the “parental alienation syndrome” is revealed for what it is—a misogynistic and bogus theory unsubstantiated by any real evidence—it will continue to be used unjustly against women and children in California and throughout the country.

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Helen Greico, President
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Sacramento, CA 95814

Dear Ms Greico:

I received a request from one of your staff members, Paria Kooklan, to provide information on parental alienation syndrome (PAS). PAS is not recognized as a mental disorder in the American Psychiatric Association (APA)'s Diagnostic and Statistical Manual, 4th edition (DSM-IV, 1994), and it is my understanding that it was not considered for inclusion in the DSM-IV. Although PAS has been brought to the attention of the APA over the past two or three years, the APA has not addressed the scientific validity of any research that has been done on this syndrome.

Ms Kooklan also requested information on DSM-V. The projected date for publishing DSM-V is 2010. We expect that workgroups to review the research literature on proposed new syndromes will be formed by 2004. We do not know at this time which new syndromes will be proposed and reviewed. Of course, any proposed diagnosis must conform to the definition of "mental disorder" set forth in the DSM (DSM-IV, pp. xxi-xxii). Further, the developers of DSM-IV decided that, "in general, new diagnoses should be included in the system only after research ha(d) established that they should be included rather than being included to stimulate that research...The increased marginal utility, clarity, and coverage provided by each newly proposed diagnosis (was) balanced against the cumulative cumbersomeness imposed on the whole system, the paucity of empirical documentation, and the possible misdiagnosis or misuse that might result" (DSM-IV, p. xx).

I hope this information is helpful to you. Please let me know if you have any further questions. Thank you.

Sincerely yours,



William E. Narrow, M.D., M.P.H.
Associate Director, Nosology and
Classification
Office of Research

cc: Darrel A. Regier, M.D., M.P.H.
Tina Marshall, Ph.D.
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