IN THE COURT OF APPEALS OF ARKANSAS

[redacted] APPELLANT

VS. No. CA 09-496

[redacted] APPELLEES

APPEAL FROM THE
CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

COLLINS KILGORE

APPELLANT'S BRIEF AND ABSTRACT

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Ark. Code Ann. § 9-15-102(a)(1).

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STATEMENT OF THE CASE

In this appeal, [redacted] seeks reversal of the circuit court's October 15, 2008 final order denying her petition for a protective order against her then-husband [redacted].

On March 10, 2008, [redacted] filed a Petition for an Order of Protection on the grounds that [redacted] committed domestic abuse against both her and the [redacted] eight year-old son [redacted] on March 7, 2008,[1] and because [redacted] abused [redacted] in the past. Add. 1-5. Circuit Judge Mackie M. Pierce promptly entered a Temporary Order of Protection, finding "sufficient evidence to establish that there is an immediate and present danger of domestic abuse . . . ." Add. 7. Shortly thereafter, the matter was transferred to Circuit Judge Collins Kilgore, who had presided over three prior divorce actions by [redacted]. [redacted] against [redacted] and was "familiar with these parties, and the facts and circumstances surrounding the prior allegations of abuse . . . ." Add. 9-13.

Judge Kilgore held a hearing on [redacted] petition over three days in April and May 2008. At the hearing, both parties as well as several other fact and expert witnesses testified regarding the events of March 7, 2008. It was undisputed that [redacted] had been drinking alcohol and that an argument and altercation ensued between [redacted] [redacted] contended that [redacted] committed domestic abuse under Arkansas Code section 9-15-102(a)(1) because his threatening behavior caused her to fear for her

[1] In a separate action, the circuit court denied the petition of domestic violence prevention coordinator Angela McGraw, who sought a protective order on behalf of the [redacted] children, including based on reports that [redacted] slapped [redacted] on March 7, 2008. Abs. 252-254.

immediate safety. [redacted] disputed that his behavior toward his wife that day rose to the level of domestic abuse. [redacted] also contended that [redacted] slapped [redacted] during this incident, which [redacted] denied.

Also testifying at the hearing was Dr. Paul DeYoub, a forensic psychiatrist who had examined [redacted] and the children two years earlier in connection with one of [redacted] prior divorce actions against [redacted]. Abs. 157. Dr. DeYoub opined in April 2006 that [redacted] suffered, at that time, from a purported psychological condition known as Parental Alienation Syndrome ("PAS"). Abs. 30, 157-158; Add. 101-102. [redacted] counsel objected to the admission of Dr. DeYoub's testimony in this proceeding because he did not examine the parties or children following the March 7, 2008 incident at issue, Abs. 161-162, and because Dr. DeYoub himself stated that such examination would be necessary for him to testify reliably on the incident. Abs. 158, 164. The court overruled this objection and permitted [redacted] counsel to describe at length to Dr. DeYoub the supposed events of March 7, 2008 as well as various other interactions between the parties since April 2006. Abs. 162-167. Based on this recitation by [redacted] counsel, Dr. DeYoub opined that [redacted] did not commit domestic abuse on March 7, 2008. Abs. 170. At the conclusion of the hearing, Judge Kilgore stated that he would deny [redacted] petition for a protective order. Abs. 253-254.

On October 15, 2008, the court issued a final order denying [redacted] petition on the ground that [redacted] did not commit domestic abuse on March 7, 2008. Add. 21. In particular, the court stated that "[i]t is Dr. DeYoub's opinion, and the opinion of the Court, that the March 7, 2008 [incident] was not domestic abuse and that neither the children nor [redacted] are in danger." Add. 28. The court refused to "condone" [redacted]

[redacted] behavior that day, but concluded that it "does not rise to the level of domestic abuse" because [redacted] did not "inflict[] the fear of imminent physical harm or bodily injury on [redacted] or the children." Add. 29-30. The court explained that it gave "a lot of weight to Dr. DeYoub's testimony," concluding that "[t]he March 7, 2008 incident was an instance of [redacted] attempting to alienate the children from their father . . . ." *Id.* The court also found that [redacted] did not slap [redacted], reasoning that "[redacted] admission that he was slapped came many days after the alleged incident and the Court questions whether [redacted] admission was the result of alienation by his mother." Add. 30.

On November 13, 2008, [redacted] filed her notice of appeal from the circuit court's October 15, 2008 order denying her petition. Add. 31-32. On July 1, 2009, this Court denied [redacted] motion to consolidate this appeal with her parallel appeal from the court's custody ruling in the parties' separate divorce action.

STATEMENT OF FACTS

It is undisputed that [redacted] abused [redacted] during their marriage. In the parties' separate divorce action, for instance, [redacted] admitted (and the circuit court found) that he committed domestic abuse against [redacted] (1) in 1997, when, while intoxicated, he smashed a chair and punched his fist through a wall; and (2) in March 2005, when he grabbed and hit [redacted] *See* Br. of Appellant, [redacted] *v.* [redacted], No. CA 09-498, at Arg. 1 (Aug. 28, 2009). The court also heard testimony regarding numerous other complaints of domestic abuse -- many of which were disputed by [redacted] -- including that, over a period of more than six years, [redacted] grabbed, kicked, and slapped [redacted] and the [redacted] eldest son [redacted], and also that [redacted] intimidated, strangled, and raped [redacted] among other incidents. *Id.* at Arg. 1-2.

The record establishes that [redacted] abused alcohol throughout his marriage to [redacted] *See, e.g.*, Abs. 10-11 ([redacted] testifying he was arrested for drunk driving in 1992); Abs. 212 ([redacted] father testifying that [redacted] has had problems with alcohol); Abs. 243-244 ([redacted] testifying that he was intoxicated during several prior altercations with [redacted]); 167 (Dr. DeYoub stating that "[t]here have been periods of alcohol abuse in [redacted]"). *Id.*

At the hearing before Judge Kilgore, [redacted] admitted that he was intoxicated on March 7, 2008 after drinking a bottle of alcohol in the [redacted] garage by himself to try to "escape." Abs. 8-9, 25-26, 236-237. He admitted that, when he returned inside, an argument ensued and he yelled obscenities at [redacted] Abs. 9, 227, 240. He admitted that he blocked [redacted] in the narrow space behind the breakfast bar in their kitchen and that she may have felt trapped, but stated that he did not intend to corner her. Abs. 9, 227. [redacted] also admitted that he closed the window blinds but stated that this, too, was not intended to intimidate [redacted] Abs. 9. He admitted that he pulled the telephone out of the wall to prevent [redacted]

from calling the police, Abs. 9, 227, and that, after she fled the house with the children, he ransacked her closet and threw many of her personal items in the toilet, Abs. 227-228, including her church magazines, Bible card, and the children's toothbrushes. Abs. 4.

[redacted] testified that this threatening behavior by [redacted] when he was intoxicated caused her to fear for her safety, in particular because, as described above, [redacted] abused her in the past. Abs. 3, 4, 6. Because of [redacted] threatening behavior, [redacted] gathered the children and fled to the home of neighbor [redacted], who testified that [redacted] at the time appeared scared. Abs. 47-48, 50. Shortly after the incident, [redacted] also telephoned Angela McGraw, a coordinator at the certified domestic violence counseling center where [redacted] had attended counseling. Abs. 70-71. Ms. McGraw testified that [redacted] sounded scared and even hysterical over the phone. Abs. 72-73.

Other witnesses testified that [redacted] slapped [redacted] in the course of this incident on March 7, 2008. [redacted], the [redacted] neighbor, testified that [redacted] reported to her shortly after the incident that [redacted] slapped [redacted] Abs. 51-52. [redacted], a licensed clinical psychologist, testified regarding her multiple examinations of the [redacted] children shortly after the incident. Abs. 29-30. According to [redacted], [redacted] reported that [redacted] grabbed him, pulled him into a room, yelled obscenities about [redacted], and slapped him. Abs. 32. [redacted] also reported that he previously observed [redacted] slap[redacted]. Abs. 32. [redacted] likewise reported to [redacted] that his father was violent with him. Abs. 31, *see also* Abs. 29. [redacted] provided her expert opinion that the [redacted] children are victims of domestic abuse and remain in physical danger as long as they remain in [redacted] custody. Abs. 32. Ms. McGraw likewise testified that the [redacted] children exhibit violent and erratic behavior that is consistent with domestic abuse. Abs. 25-26, 28

ARGUMENT

I. Standard of Review

This Court reviews cases involving child custody and related matters *de novo*. *Hodge v. Hodge*, 97 Ark. App. 217, 219 (2006). The circuit court's factual findings may be reversed if they are clearly erroneous, and "a trial court's conclusion on a question of law is given no deference on appeal." *Id.* Judicial interpretation of a statute is such a question of law. *Miss. River Transmission Corp. v. Weiss*, 347 Ark.543, 550 (2002).

II. [redacted] Admitted Actions of March 7, 2008 Constitute "Domestic Abuse"

The trial court erred as a matter of law by denying [redacted] petition for a protective order because [redacted] admitted actions plainly satisfy the statutory definition of domestic abuse. Under the Arkansas Domestic Abuse Act, Ark. Code Ann. §§ 9-15-101 *et seq.*, a victim of domestic abuse is entitled to a protective order. Ark. Code Ann. § 9-15-205(a). The Act defines domestic abuse to mean "physical harm, bodily injury, assault, *or the infliction of fear of imminent physical harm, bodily injury, or assault* between family or household members . . . ." Ark. Code Ann. § 9-15-103(a)(2) (emphasis added).

"The purpose of the [Domestic Abuse] Act is 'to provide an adequate mechanism whereby the State of Arkansas can protect the general health, welfare, and safety of its citizens by intervening when abuse of a member of a household by another member of a household occurs or is threatened to occur, thus preventing further violence.'" *Simmons v. Dixon*, 96 Ark. App. 260, 263 (2006) (citation omitted). This Court has read the Act broadly in recognition of its "broad parameters" and "broad purpose . . . to prevent domestic violence." *Id.* at 266. Disregarding this broad purpose, the circuit court here construed the Act exceedingly narrowly to conclude, incorrectly, that [redacted] did not commit domestic abuse against [redacted] on March 7, 2008.

This Court's precedents under the Domestic Abuse Act firmly establish that the facts of this case meet the definition of domestic abuse contained in section 9-15-103(a)(2). In *Pablo v. Crowder*, 95 Ark. App. 268, 269 (2006), for instance, a woman filed a petition for a protective order, alleging that her ex-boyfriend caused her to fear for her immediate safety when she tried to end the relationship. Specifically, she testified that he grabbed her, burst a beer bottle, and "screamed obscenities in her face." *Id.* at 270. According to the petitioner, he "resumed yelling in [her] face, when she threatened to call the police." *Id.* The circuit court issued the protective order because "[a]lthough [the ex-boyfriend] did not literally say, 'I'm going to hurt you,' [the petitioner] was very afraid and thought he was going to physically hurt her." *Id.* The ex-boyfriend appealed, arguing that he did not commit domestic abuse under section 9-15-103(a)(2) because "he never specifically threatened to hurt [the petitioner]." *Id.* at 272. But this Court affirmed, reasoning that the ex-boyfriend "committed domestic abuse under the statute by inflicting fear of imminent physical harm, bodily injury, or assault." *Id.* at 273.

Likewise in *Simmons*, 96 Ark. App. at 261, the petitioner alleged that her ex-boyfriend sent text messages calling her a "lying whore" and threatening to harm her. She also stated that he previously was "physically abusive when he drank." *Id.* The circuit court issued the protective order, finding that the ex-boyfriend inflicted on the petitioner a "fear of physical assault." *Id.* at 263. On appeal, this Court affirmed, reasoning that the petitioner "was in fear of 'imminent' harm *as contemplated by the broad purpose of the Act—to prevent domestic violence*." *Id.* at 266 (emphasis added). Specifically, the petitioner testified that she was "afraid" when she received the threatening text messages, and the Court found that this "clearly" satisfied the statutory requirement of an infliction of fear of imminent physical harm, bodily injury, or assault. *Id.*

By contrast, in *Newton v. Tidd*, 94 Ark. App. 368, 369-70 (2006), the petitioner alleged that a neighbor committed domestic abuse against the petitioner's mother. The circuit court issued the protective order but this Court reversed, finding that "there was *no evidence* that [the neighbor] committed domestic abuse." *Id.* at 369 (emphasis added). Rather, "[the petitioner] herself stated at the hearing that she had not seen [the neighbor] do anything to her mother other than being 'verbally controlling,'" and there was no evidence the petitioner's mother ever feared any harm from the neighbor. *Id.* As the Court explained, "[t]his does not constitute 'physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault' . . . ." *Id.* (quoting Ark. Code. Ann. § 9-15-103(a)(2)).

This case is closely analogous to *Pablo* and *Simmons* and bears no resemblance to *Newton* because [redacted] admitted to threatening behavior that caused [redacted] to fear for her immediate safety. *Compare* Abs. 4-6 *with Simmons*, 96 Ark. App. at 267 (stating that the evidence was "clearly sufficient to show the infliction of imminent physical harm" where the respondent admitted to threatening behavior and the petitioner "claims she was afraid"). Like the petitioner in *Pablo*, [redacted] was very afraid for her safety and thought [redacted] was going to physically hurt her. *Compare* Abs. 3-6 *with Pablo*, 95 Ark. App. at 270. As in *Simmons*, moreover, [redacted] fear was particularly reasonable because [redacted] admittedly abused her in the past, including on other occasions when he was intoxicated. *Compare* Abs. 4 *with Simmons*, 96 Ark. App. at 261 (stating that the ex-boyfriend previously "became physically abusive when he drank"). *Newton* is clearly distinguishable because, there, the petitioner introduced "no evidence" that her mother, the alleged victim, ever feared any harm from the neighbor, nor that she had any reason to. 94 Ark. App. 368. The facts here are just the opposite. *See, e.g.*, Abs. 3-6, 9, 225-228.

[redacted] repeated statements that he did not intend to frighten or intimidate [redacted] provide no defense to [redacted] claim of domestic abuse and, therefore, the Court should disregard his testimony to this effect. In particular, [redacted] stated that he did not intend to corner [redacted] behind the breakfast bar or to intimidate her by closing the window blinds. *See* Abs. 9. The abuser's intent, however, is irrelevant under the Domestic Abuse Act, which requires only the "infliction of fear" of imminent harm. Ark. Code. Ann. § 9-15-103(a)(2); *Pablo*, 95 Ark. App. at 270; *Simmons*, 96 Ark. App. at 261. [redacted] moreover, admitted that he engaged in threatening behavior, even if he did not specifically intend to threaten [redacted] *See, e.g.*, Abs. 9, 225-228. Importantly, [redacted] did not dispute -- and there is no evidence to controvert -- that [redacted] was actually frightened by her then-husband.

Despite [redacted] admissions that he engaged in threatening behavior and [redacted] uncontroverted testimony that this caused her to fear for her immediate safety, the circuit court denied her petition for a protective order on the ground that [redacted] did not commit domestic abuse. This was reversible error that contradicted the plain meaning of the Domestic Abuse Act and seriously undermined that statute's broad purpose to prevent domestic abuse.

III. Dr. DeYoub's Outdated Opinions from April 2006 Are Irrelevant to Whether [redacted] Committed "Domestic Abuse" on March 7, 2008

The circuit court erroneously relied on forensic psychiatrist Dr. Paul DeYoub's outdated opinions from April 2006 to conclude that [redacted] conduct of March 7, 2008 did not constitute "domestic abuse" under the Act. Arkansas Rule of Evidence 702, which governs expert testimony, states that if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." In *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 592-93

(1993), the United States Supreme Court held that, under the equivalent federal Rule 702, expert testimony is admissible only where "the reasoning or methodology underlying the testimony is scientifically valid and . . . that reasoning or methodology properly can be applied to the facts in issue." Courts serve this "gatekeeping" function to "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999).

In *Farm Bureau Mutual Insurance Co. v. Foote*, 341 Ark. 105, 115 (Ark. 2000), the Arkansas Supreme Court adopted the *Daubert* standard that expert testimony must be reliable and relevant. *See also Green v. Alpharma, Inc.*, 373 Ark. 378, 398-99 (2008). In particular, expert testimony must be "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *Daubert*, 509 U.S. at 591. That is, "the 'fit' between the testimony and an issue in the case" is critical to establish that the testimony is admissible.[1] *Daubert*, 43 F.3d 1311, 1315 (9th Cir.), *cert denied*, 516 U.S. 869 (1995); *see also Sera v. State*, 341 Ark. 415, 444 (2000) (expert testimony must be "sufficiently related to the facts of the case to aid the trier of fact in resolving the dispute"). Here, Dr. DeYoub's opinions did not fit the issues in the case because he examined the parties and children *only in April 2006* and did not reexamine them after the March 7, 2008 incident at issue.

Courts have routinely held, in similar circumstances, that expert testimony does not "fit" the issues in the case when the expert's opinion is stale or outdated. For instance, *O'Neill v.*

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[1] The proponent of expert testimony -- here, [redacted] -- bears the burden to establish its relevance. *Daubert*, 509 U.S. at 592 n.10.

O'Neill, 536 A.2d 978 (Conn. App. Ct. 1988), is closely analogous to this case. There, the trial court dissolved the parties' marriage and awarded sole custody of their children to the father, relying heavily on a "family relations case study report which was written ***thirteen months prior*** to the court's determination of custody" and which recommended custody to the father. *Id.* at 979 (emphasis added). The state appellate court reversed, holding that it was reversible error to rely on this report to determine custody because the report was "thirteen months old at the time of its introduction into evidence." *Id.* at 980. Further, the trial court "compound[ed] its error in relying on outdated evidence which is not probative of present parenting abilities [by] admitt[ing] that it placed great weight on the written report . . . ." *Id.* The court of appeals emphasized that the author, after completing the report, "had no contact with the parties or the minor child except for one meeting," and he admitted that "*due to the passage of time he could not competently testify*" regarding the relevant issues in the case. *Id.* (emphasis added).

Likewise in *In re Daniel Aaron D.*, 403 N.E.2d 451 (N.Y. 1980), the trial court terminated a mother's parental rights, relying on the testimony of a psychologist who had examined the mother ten months earlier. The state high court reversed, reasoning that "the doctor had last examined the mother ***10 months prior*** and could not render with assurance any positive opinion as to her present condition." *Id.* at 452 (emphasis added).

Here, as in *O'Neill* and *Daniel Aaron D.*, Dr. DeYoub's opinions were significantly outdated and thus did not fit the issues in this action involving only [redacted] conduct of March 7, 2008. In fact, Dr. DeYoub's ***two-year-old*** opinions were even more outdated than the evidence that was improperly admitted in those cases. *See O'Neill*, 536 A.2d at 979 (trial court erred in admitting thirteen month-old report); *Daniel Aaron D.*, 403 N.E.2d at 452 (trial court erred in admitting testimony of psychologist based on ten month-old examination). In particular,

Dr. DeYoub had no contact with [redacted] or the children after his examination in April 2006, and, critically, he did not reexamine the parties or children after the March 7, 2008 incident at issue. For this reason alone, the circuit court should not have permitted Dr. DeYoub to offer expert testimony regarding whether [redacted] committed domestic abuse on that date.

Further, Dr. DeYoub himself admitted that he could not testify reliably on the March 7, 2008 incident because he had not examined the parties or children since April 2006. He repeatedly testified, including on direct examination, that it would be "necessary" for him to reexamine the parties to update his two-year old opinions based on recent events. *Compare* Abs. 158-159 *with O'Neill*, 536 A.2d at 980 (emphasizing the author's own testimony that "due to the passage of time he could not competently testify"). The circuit court should have excluded Dr. DeYoub's purported expert testimony for this reason as well.

Admitting Dr. DeYoub's opinion through an exceptionally long and complicated hypothetical question by [redacted] counsel also was improper and supports reversal. In *Logan v. State*, 299 Ark. 255, 256 (1989), the Supreme Court reversed a defendant's rape conviction in part because "[t]he hypotheticals [posed by the State to its expert psychologist and neurologist] were ***so long and complicated*** that it is most unlikely that the jury could have followed them. (The one posed to [redacted] occupies two pages of the record; the one directed to [redacted] runs to four pages.)" *Id.* (emphasis added).

Here, the single hypothetical question posed by [redacted] counsel to Dr. DeYoub spans ***more than six full pages of the record***. Abs. 162-166. Indeed, in this single question, [redacted] counsel purported to describe to Dr. DeYoub not only the events of March 7, 2008, but also the testimony of other witnesses about that incident, as well as other unrelated interactions between the parties since Dr. DeYoub last saw them in April 2006, including the parties' effort

to reconcile in late 2007 and a recent dispute over visiting the children at school. *See id.* Based solely on this long and complicated recitation, Dr. DeYoub offered his opinion that [redacted] did not commit domestic abuse on March 7, 2008. Abs. 213. The hypothetical question posed by [redacted] counsel was incoherent and improper.

Further, as in *O'Neill*, the circuit court compounded its error in admitting Dr. DeYoub's outdated opinions by placing great weight on his testimony. *See O'Neill*, 536 A.2d at 981 (stating that trial court compounded its "error in relying on outdated evidence [by placing] great weight" on that evidence). In particular, the court explained that it gave "a lot of weight to Dr. Deyoub's testimony," and that it agreed with and adopted "*Dr. Deyoub's opinion* . . . that the March 7, 2008 [incident] was not domestic abuse . . . ." Add. 28 (emphasis added). Indeed, the court relied on Dr. DeYoub's testimony to discredit all of [redacted] fact and expert witnesses, including [redacted] herself as well as (i) [redacted], the neighbor who observed [redacted] and the children shortly after the March 7, 2008 incident, Abs. 47-48; (ii) Ms. McGraw, the domestic violence prevention coordinator who spoke to [redacted] shortly after the incident, Abs. 25-26, 71-72; and (iii) [redacted], the expert psychologist who examined the children on multiple occasions shortly after the incident. Abs. 32. It was reversible error for the circuit court to place such great weight on Dr. DeYoub's outdated opinions, particularly where Dr. DeYoub expressly stated that he could not testify reliably regarding the March 7, 2008 incident without reexamining the parties and children.

IV. Expert Opinion Testimony on the Discredited Psychological Theory of "Parental Alienation Syndrome" Should Have Been Excluded as Unreliable

In addition to being outdated, Dr. DeYoub's testimony should have been excluded from evidence because his opinions were based on the widely discredited psychological theory of Parental Alienation Syndrome ("PAS"). As noted above, under Arkansas Rule of Evidence 702,

the proponent of expert testimony must establish that such testimony satisfies the *Daubert-Foote* standard for reliability, including with respect to "whether the theory or technique has been subjected to peer review and publication, the potential rate of error, and the existence and maintenance of standards controlling the technique's operation." *Foote*, 341 Ark. at 116. In addition, "general acceptance in the scientific community can have a bearing on the inquiry." *Id.* Conversely, general *rejection* by the scientific community strongly suggests that a theory is unreliable and should not be admitted. Here, the circuit court committed reversible error by admitting Dr. DeYoub's testimony because his opinions were based on PAS.

A. History of PAS Theory

Child psychiatrist Richard Gardner coined the term "Parental Alienation Syndrome" in the mid-1980s to describe his clinical impressions of cases he believed involved false complaints of child sexual abuse. Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, 35 Fam. L.Q. 527, 527-28 (2001) (hereinafter "Bruch, *Getting It Wrong*"). Gardner's theory of PAS essentially is that children's complaints of abuse in custody litigation are usually the result of a mother's campaign of denigration against the father, accomplished through "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 . . . ." *Id.* at 528 (quoting Richard A. Gardner, The Parental Alienation Syndrome, at xix (2d ed. 1998)). Based solely on his own clinical practice, Gardner initially asserted that PAS was present in roughly ninety percent of children involved in custody litigation, but he revised this estimate after compelling evidence demonstrated it was false. *Id.*

For serious PAS cases, Gardner recommended the draconian remedy of transferring custody of the child from the beloved custodial parent to the rejected parent for "deprogramming." *Id.* Dr. DeYoub echoed Gardner's approach in this case, stating that "[t]he

most effective way to deal with parental alienation syndrome, now present in [redacted] is to not allow the child any choice [in visitation and custody]." Add. 102. In addition, because PAS theory necessarily involves disregarding a child's complaints of abuse by a parent -- and, then, transferring custody to that parent -- Gardner noted that PAS evaluators "must have a thick skin and be able to tolerate the shrieks and claims of impending maltreatment that PAS children often profess. . . . To take the allegations of maltreatment seriously, is a terrible disservice to the PAS children." Richard A. Gardner, *Family Therapy of the Moderate Type of Parental Alienation Syndrome*, 27 Am. J. Fam. Therapy 195, 201-02 (1999). Stated differently, Gardner explicitly advocated that evaluators should disregard children's pleas for help when they complain of abuse at the hands of a parent.

B. The Scientific Community Has Uniformly Rejected PAS Theory

PAS theory fails the *Daubert-Foote* standard for reliability because it has not gained "general acceptance in the scientific community . . . ." *Foote*, 341 Ark. at 116. In fact, as shown below, the scientific community has overwhelming rejected even the basic notion of a syndrome related to alienation by a parent, as well as the supposed connection between alienation and false abuse complaints by children. Dr. DeYoub's purported expert testimony based on PAS theory should have been excluded for this reason alone.

There is virtual consensus within the scientific community that "the scientific status of PAS is, to be blunt, nil." Robert E. Emery et al., *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6 Psychological Sci. in the Pub. Interest 1-29, July 2005, at p. 10; *accord* R. 287 (attorney *ad litem* correctly stating that "Parental Alienation Syndrome is not recognized by the mental health community as a clinical diagnosis"). As Dr. Paul Fink, former President of the American Psychiatric Association, has explained, "PAS as a scientific theory has been excoriated by legitimate researchers across the nation" and

should be cited only as a "pathetic footnote or an example of poor scientific standards." Bruch, *Getting It Wrong*, at 539 (quoting Gina Keating, *Critics Say Family Court System Often Amounts to Justice for Sale*, Pasadena Star-News, Apr. 24, 2000). Dr. Fink also has described PAS theory as "junk science" that was "invented . . . and talked about as if it were proven science. It's not." Jamie Talan, *The Debate Rages On... In Death, Can He Survive?*, Newsday.com, July 1, 2003, *available at* www.leadershipcouncil.org/1/pas/talan.html (last viewed Aug. 23, 2009) (hereinafter "Talan, *The Debate Rages On*").

Leading national legal organizations have recognized the scientific community's consensus rejection of PAS theory. For instance, the National Council of Juvenile and Family Court Judges has published guidelines for family courts to confirm that the "theory positing the existence of 'parental alienation syndrome' or 'PAS' has been discredited by the scientific community. ***Testimony that a party to a custody case suffers from the syndrome should therefore be ruled inadmissible*** . . . ." Dalton, C. et al., *Navigating Custody and Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide*, National Council of Juvenile & Family Court Judges & State Justice Institute (2004 & 2006) (emphasis added).

The American Prosecutors Research Institute has stated that "PAS is an unproven theory that can threaten the integrity of the criminal justice system and the safety of abused children." Erika R. Ragland et al., *Parental Alienation Syndrome: What Professionals Need to Know*, National Center for Prosecution of Child Abuse Update Newsletter, 16(6) & (7) (2003), *at* http://www.ndaa.org/publications/newsletters/update_volume_16_number_6_2003.html (hereinafter "Ragland, *What Professionals Need to Know*"). As the authors explain, PAS theory was "the product of anecdotal evidence gathered from Dr. Gardner's own practice [and was]

based primarily upon two notions, neither of which has a foundation in empirical research . . . ." *Id.*

Because the scientific community has rejected even the basic notion of a so-called "Parental Alienation Syndrome," Dr. DeYoub's opinion testimony based on PAS theory should have been excluded as unreliable under Ark. R. Evid. 702 and *Foote*, 341 Ark. at 116.

C. PAS Theory Fails Each of the *Daubert-Foote* Criteria for Reliability

In addition to the scientific community's consensus view on the issue, Dr. DeYoub's expert testimony based on PAS theory should have been excluded for the further reason that the theory fails each of the *Daubert-Foote* criteria for reliability.

PAS theory has not been subjected to peer review. Gardner's musings on Parental Alienation Syndrome were mostly self-published. Bruch, *Getting It Wrong*, at 535; *People v. Fortin*, 706 N.Y.S.2d 611, 614 (N.Y. Co. Ct. 2000). Review of Gardner's work on PAS by psychiatrists at Columbia University revealed that he "didn't do formal research." Talan, *The debate rages on.*

PAS theory is also methodologically and scientifically invalid; its flaws are well documented in the literature. *See generally* Bruch, *Getting It Wrong*, at 530-34 and nn.10-24; Jennifer Hoult, *The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law and Policy*, 26 Child. Legal Rts. J. 1-61, 9 (2006); Jonathan Gould, Conducting Scientifically Crafted Child Custody Evaluations, 2nd Ed. (Professional Resource Press: Sarasota, FL 2006); Janet Johnston et al., *Rejoinder to Gardner's "Commentary on Kelly and Johnston's 'The alienated child: A reformulation of Parental Alienation Syndrome"*, Family Court Review, 42(4), 622–628 (2004); Joan S. Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, 6(3) J. Child Cust. 232 (2009).

Most notably, PAS theory embodies a circular conclusion that is inconsistent with the search for truth in cases involving child abuse allegations. *See* Bruch, *Getting It Wrong*, at 530. That is, the presence of PAS is offered to try to show a child's complaints of abuse are false, and at the same time the child's complaints of abuse are used to show the child suffers from PAS. Using this circular reasoning, PAS evaluators point to abuse complaints as evidence of PAS, rather than actually assessing whether abuse in fact occurred.[2] For instance, Dr. DeYoub testified that [redacted] statement in 2006 to a counselor -- "[m]y biggest worry is my father killing me and saying my mother did it" -- was simply a manifestation of PAS. Abs. 358. As occurred here, PAS, both in theory and practice, is used to refute a child's abuse complaints automatically, and to reframe those complaints as evidence the child suffers from PAS.

In addition, PAS theory wrongly conflates a child's predicable and understandable anger in high conflict divorce cases with pathology, and vastly overstates the frequency of fabricated abuse allegations, which peer-reviewed research has shown are infrequent. *See* Ragland, *What Professionals Need to Know* ("available research suggests that false allegation rates are not significantly high"; collecting authorities); Bruch, *Getting It Wrong*, at 530. Gardner's PAS theory also wrongly presumes that the child's relationship with the alienated parent will be irreparably damaged unless drastic steps are taken to remove the child from the mother's custody. In fact, peer-reviewed research shows that children generally outgrow anger toward the noncustodial parent in high conflict divorces. *See* Bruch, *Getting It Wrong*, at 530-34.

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[2] *See* Richard A. Gardner, The Parental Alienation Syndrome and the Differentiation Between Fabricated and Genuine Child Sex Abuse 109 (Cresskill, N.J.: Creative Therapeutics, 1987).

In sum, PAS theory is precisely the sort of invalid psuedo-science that the *Daubert-Foote* criteria were designed to exclude from judicial proceedings, where it can have devastating effects. *See* Ragland, *What Professionals Need to Know* ("PAS is an untested theory that, unchallenged, can have far-reaching consequences for children seeking protection and legal vindication in courts of law").

D. Courts to Address the Issue Have Held that PAS Theory Is Unreliable and Inadmissible

Courts that have directly addressed the question of admissibility uniformly hold that PAS theory is inadmissible because it lacks any scientific validity. For instance, in *Snyder v. Cedar*, a daughter complained of abuse by her father, and he sought to introduce expert opinion testimony that the daughter "displays all of the characteristics of a severe victim of 'parental alienation syndrome'" which caused her to fabricate the abuse complaints. No. NNHCV010454296, 2006 WL 539130, at *8 (Conn. Super. Ct. Feb. 16, 2006). The trial court held that such expert testimony was inadmissible because "***'parental alienation syndrome' has no scientific validity at this time***." *Id.* at *9 (emphasis added). In particular, the court concluded that PAS theory has not been "recognized within any of the mental health professions" and lacks "any methodological underpinning." *Id.*

Likewise in *People v. Fortin*, 706 N.Y.S.2d 611 (N.Y. Crim. Ct. 2000), the state trial court, after holding a *Daubert* hearing, excluded evidence of PAS theory in a child sexual abuse prosecution on the ground that the theory is not generally accepted in the scientific community. And in *NK v MK*, No. XX07, 2007 WL 3244980, at *64 (N.Y. Super. Ct. 2007), the court explained that there is no "generally accepted diagnostic determination or syndrome known as 'parental alienation syndrome.'"

One recent decision demonstrates that PAS theory is not science at all, but simply an improper comment on the credibility of witnesses. In *People v. Sullivan*, Nos. HO23715 and HO23586, 2003 WL 1785921 (Cal. Ct. App. Apr. 3, 2003), the state trial court excluded expert opinion testimony based on PAS theory in a sexual assault case. The court of appeals affirmed, stating that the issue whether abuse complaints were fabricated was not beyond common experience so as to require expert testimony, and that the PAS theory was not scientific within the meaning of the *Daubert* rule:

> As the [trial] court noted, "I can't help but think that this is really quite common sense kind of perceptions...couched in a scientific aura." The concept that a parent would encourage a child to lie in a divorce proceeding is commonly understood. Dr. Rand's proffered testimony that there are demonstrable reasons why a child might make a false accusation and that the promptness of a parent's report may be unrelated to the truth, would not have added to the juror's common fund of information . . . . The court correctly excluded the evidence under section 801.

Sullivan, 2003 WL 1785921, at *9; *see also People v. Loomis*, 658 N.Y.S.2d 787, 789 (N.Y. Co. Ct. 1997) (excluding Gardner's proposed testimony regarding PAS because "New York practice does not allow experts to offer an opinion on the ultimate issue of fact as to whether sexual abuse has occurred"). The Arkansas Supreme Court likewise has held that expert testimony on the credibility of witnesses is inadmissible under Ark. R. Evid. 702. *See e.g.*, *Buford v. State*, 368 Ark. 87, 90-91 (2006) (error for circuit court to admit expert forensic interviewer's opinion that alleged child rape victim was telling the truth); *Logan*, 299 Ark. at 257 (reversing for prejudicial error because "[t]he doctor should not have been allowed to testify that the [alleged child abuse] victim was telling the truth").

E. The Court Should Address the Admissibility of PAS Theory in this Case

The Arkansas appellate courts have never ruled on the admissibility of PAS theory under the *Daubert-Foote* standards. In fact, in *Linder v. Johnson*, No. CA 06-033, 2006 WL 3425021,

at *5 n.3 (Ark. Ct. App. Nov. 29, 2006), this Court expressly declined to consider the "acceptability of [PAS] theory as a diagnostic theory" or to "base [the Court's] decision . . . on this theory." Other Arkansas cases involving factual allegations of alienation likewise do not address the admissibility of PAS theory. *E.g.*, *Turner v. Benson*, 59 Ark. App. 108 (1997); *Sharp v. Keeler*, 99 Ark. App. 42 (2007).

This Court should address the admissibility of PAS theory here -- that is, whether expert opinion testimony based on the discredited psychological theory of Parental Alienation Syndrome is sufficiently reliable under *Foote* to be admitted as evidence in judicial proceedings. Dr. DeYoub's report and testimony in this case were unquestionably based on PAS theory. He stated that (1) "[t]he parental alienation syndrome has gone too far with [redacted] even at this point"; (2) "[t]he threat is that it [redacted PAS] will spread to the other children"; and (3) "the most effective way to deal with parental alienation syndrome, now present in [redacted], is to not allow the child any choice [with respect to visitation and custody]." Add. 109. Dr. DeYoub's testimony in the prior divorce action also relies heavily on PAS theory. *See, e.g.*, Abs. 294, 302, 304, 308, 357-362, 315, 318, 323, 330-334, 344-347.

Critically, the circuit court expressly stated that it gave "a lot of weight" to Dr. DeYoub's opinions. Add. 28. The court, moreover, explained that "[i]t is *Dr. DeYoub's opinion*, and the opinion of the Court, that the March 7, 2008 [incident] was not was domestic abuse [but rather] an instance of [redacted] attempting to alienate the children from their father . . . ." Add. 28. (emphasis added). Because the court relied heavily on Dr. DeYoub to conclude that no abuse occurred, the court's conclusions cannot be separated from the PAS analysis that Dr. DeYoub presented. Accordingly, this Court should reach the admissibility question to conclude there is

no recognized Parental Alienation Syndrome, and that Dr. DeYoub's testimony in this case should have been excluded under Arkansas Rule of Evidence 702 and *Foote*.

CONCLUSION

The circuit court's order denying [redacted] petition for a protective order should be reversed. [redacted] admitted to engaging in threatening behavior on March 7, 2008, and [redacted] testified (and her testimony was uncontroverted) that [redacted] behavior caused her to fear for her safety. This plainly established that [redacted] committed domestic abuse.

Further, the court erred in admitting and relying on Dr. DeYoub's expert opinion testimony that [redacted] did not commit domestic abuse. Dr. DeYoub's opinions were outdated because he examined the parties and children only in April 2006, and Dr. DeYoub himself stated that he would need to conduct reexaminations to testify reliably on the events of March 7, 2008. Dr. DeYoub's testimony also should have been excluded because it was based solely on the widely discredited psychological theory of Parental Alienation Syndrome. This Court should resolve the question left opinion in *Linder*, 2006 WL 3425021, at *5 n.3, and hold that PAS theory is insufficiently reliable to admit in judicial proceedings under Ark. R. Evid. 702.

This Court should reverse.

Respectfully submitted,

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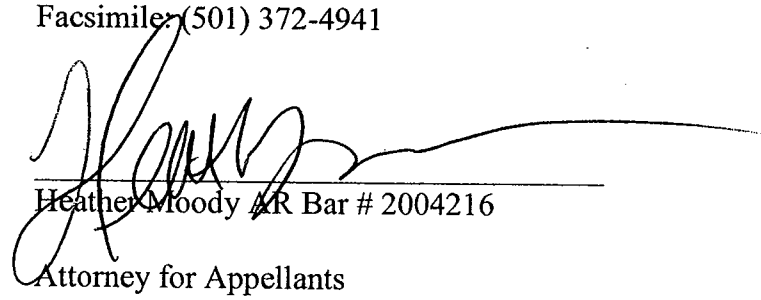

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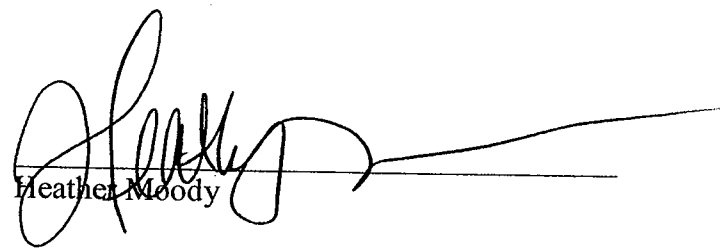
CERTIFICATE OF SERVICE

I, Denise R. Hoggard, hereby state that a copy of the foregoing pleading was served on the parties of record by U.S. Mail, postage prepaid, on this 28 day of August , 2009.



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