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Parental Alienation Syndrome: Fact or Fiction? The Problem with Its Use in Child Custody Cases

Holly Smith

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ABSTRACT

Parental alienation syndrome is an alleged disorder that was first coined by Dr. Richard Gardner in 1985. Dr. Gardner defined this alleged syndrome as one that arises primarily in the context of child-custody disputes and involves a child's unjustified denigration against a parent. Although more than thirty years have passed since parental alienation syndrome was first introduced by Dr. Gardner, it is yet to be recognized or accepted in the medical community. Moreover, there are also legitimate questions concerning the alleged syndrome's admissibility and reliability as evidence in family law proceedings, and the negative effects parental alienation syndrome poses on child custody cases are undeniable. This Note argues that parental alienation syndrome should not be recognized in Massachusetts child custody disputes because it is not a medically recognized syndrome, nor does it pass either of the evidentiary reliability standards used in the Commonwealth. This Note proposes that parties involved in child custody disputes should be educated on the junk science of parental alienation syndrome and informed of the laws available to assist them when issues arise concerning parental behavior that may negatively impact a child.

AUTHOR NOTE

Holly Smith is a third year law student at the University of Massachusetts School of Law. She graduated Summa Cum Laude from Kaplan University in 2010 and expects to receive her J.D. in May 2016. The author would like to thank Justine Dunlap for her unwavering mentorship through the note writing process, family and friends for constant encouragement, and several family law professionals for guidance along the scholarly writing journey. The author would also like to extend a special thank you to Alex Rovzar, Editor-in-Chief of the UMass Law Review, for the time, dedication, and guidance he provided in completing this Note, as well as the rest of the law review staff for their contributions. The author finally thanks her daughter, Emily, for steadfast patience and understanding, through the countless hours of rigorous research and writing.

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I. INTRODUCTION

Parental alienation syndrome was first identified by Dr. Richard Gardner in 1985.¹ Dr. Gardner, who published many books and articles on the subject,² studied the behavior of parents involved in custody disputes and theorized that some cases bordered on a disorder, or syndrome affecting one or both parents.³ Parental alienation syndrome has gained notoriety in the family law realm of the legal profession over the last few decades in high conflict custody cases.⁴ Specifically, the debate over whether this “syndrome” is one that is recognized and should be permitted in child custody cases has garnered considerable attention. Not only has parental alienation syndrome not been recognized and accepted by the medical community,⁵ the fabricated disorder also raises questions of evidentiary admissibility and reliability, and can have severe negative implications if used in child custody cases.⁶ Although parental

¹ Ann M. Haralambie, *Handling Child Custody, Abuse and Adoption Cases*, § 4:15 (database updated Nov. 2014).

² See e.g., Richard A. Gardner, *Should Courts Order PAS Children to Visit/Reside with the Alienated Parent?*, 19(3) AM. J. OF FORENSIC PSYCHOL. 61-106 (2001); Richard A. Gardner, *Recent Trends in Divorce and Custody Litigation*, 29(2) ACAD. F. 3-7 (1985); Richard A. Gardner, *Recommendations for Dealing with Parents who Induce a Parental Alienation Syndrome in Their Children*, 28(3/4) J. OF DIVORCE AND REMARRIAGE 1-23 (1998); Richard A. Gardner, *Legal and Psychotherapeutic Approaches to the Three Types of Parental Alienation Syndrome Families*, 28(1) CT. REV. 14-21 (1991); Richard A. Gardner, *Judges Interviewing Children in Custody/Visitation Litigation*, 7(2) N.J. FAM. LAW. 26 (1987).

³ Haralambie, *supra* note 1, at 1.

⁴ See Ira Turkat, *Parental Alienation Syndrome: A Review of Critical Issues*, 18 AM. ACAD. MATRIM. LAW. 131, 132 (2002) (parental alienation and parental alienation syndrome are often inappropriately used interchangeably; Dr. Richard A. Gardner coined parental alienation syndrome in 1985 after studying the behavior of parents involved in custody disputes—he defined parental alienation as a child who has been alienated from a parent, whether it is justified or not). By contrast, parental alienation syndrome refers to the presence of the eight criteria described by Gardner. It is parental alienation syndrome and its lack of validity that is the focus of this Note.

⁵ Allison M. Nichols, *Toward a Child-Centered Approach to Evaluating Claims of Alienation in High-Conflict Custody Disputes*, 112 MICH. L. REV. 663, 672 (2014).

⁶ *Id.* at 672-73.

alienation syndrome has been mentioned in cases in other jurisdictions, it has not been mentioned in any Massachusetts cases. In cases where parental alienation syndrome has been mentioned, it has not been validated.⁷ In the one case where parental alienation syndrome played a role in a custody determination, the determination was later overturned on appeal.⁸ This Note does not aimlessly claim that parents do not engage in behavior that may alienate children, nor does the Note suggest that such alienating behavior does not offend the best interests of children. What this Note intends to emphasize are the numerous laws that the Commonwealth has enacted to address parental behavior that runs contrary to the best interests of the child standard.⁹ Moreover, the Note highlights the importance that all parties involved in high conflict custody cases not only be educated on the “junk science” of parental alienation syndrome, but also that they learn to recognize parental behavior that hinders the best interests of children.

Dr. Gardner defined parental alienation syndrome as:

*The parental alienation syndrome (PAS) is a disorder that arises primarily in the context of child-custody disputes. Its primary manifestation is the child's campaign of denigration against a parent, a campaign that has no justification. It results from the combination of a programming (brainwashing) parent's indoctrinations and the child's own contributions to the vilification of the target parent. When true parental abuse and/or neglect is present, the child's animosity may be justified, and so the parental alienation syndrome explanation for the child's hostility is not applicable.*¹⁰

⁷ See *Pearson v. Pearson*, 5 P.3d 239, 243 (Alaska 2000) (citing that the syndrome is not universally accepted); see also *Palazzolo v. Mire*, 10 So. 3d 748 (La. App. 4th Cir. 2009) (discussing parental alienation syndrome because it was alleged by one parent, but stating that the paramount consideration for determining child custody is the best interest of the child).

⁸ See *M.A. v. A.I.*, No. FM-20-973-09, 2014 WL 7010813, at *5 (N.J. Super. Ct. App. Div. Dec. 15, 2014) (holding that the trial court erred by basing its custody determination in part upon the eight PAS criteria, as neither the scientific reliability nor general acceptance of PAS was established).

⁹ See e.g., MASS. GEN. LAWS ch. 208, § 31 (1998); MASS. GEN. LAWS ch. 215, § 56A (1978); S.J.C. Rule 1:18, as amended, 442 Mass. 1301 (2004).

¹⁰ Gardner, *Should Courts Order PAS Children to Visit/Reside with the Alienated Parent?*, *supra* note 2, at 61.

Dr. Gardner claimed that parental alienation syndrome was a relatively new disorder at the time due to the displacement of the tender years presumption with the best interest of the child presumption.¹¹ Dr. Gardner was of the view that because custody was now so unpredictable, parents were brainwashing their children in order to ensure they were awarded custody.¹² Controversially noteworthy, Dr. Gardner believed that mothers tended to alienate their children more often than fathers.¹³ Although Dr. Gardner first stated that parental alienation syndrome was limited to situations involving claims of sexual abuse, he later expanded the scope of the disorder to include high conflict divorce cases absent allegations of sexual abuse.¹⁴ According to Dr. Gardner, the syndrome tends to appear almost exclusively in the context of child custody litigation.¹⁵

All states, including Massachusetts, use the best interest of the child standard in determining child custody.¹⁶ The Massachusetts statute lists some factors to be considered when making a custody determination, however, the list is not exhaustive and all relevant factors are to be considered.¹⁷ The statute affords consideration to the happiness and welfare of the child, as well as the past and present living conditions that may adversely affect the physical, mental, moral, or emotional health of the child.¹⁸ This broad language provides a family court judge a great deal of discretion in both the examination of evidence and the tailoring of appropriate custody arrangements to fulfill the best interest of the child.¹⁹

¹¹ Gardner, *Legal and Psychotherapeutic Approaches to the Three Types of Parental Alienation Syndrome Families*, *supra* note 2, at 14. See Cheri L. Wood, *The Parental Alienation Syndrome: A Dangerous Aura of Reliability*, 27 *LOY. L.A. L. REV.* 1367, 1370 (1994).

¹² See Gardner, *Legal and Psychotherapeutic Approaches to the Three Types of Parental Alienation Syndrome Families*, *supra* note 2, at 14-15.

¹³ Gardner, *Recommendations for Dealing with Parents who Induce a Parental Alienation Syndrome in Their Children*, *supra* note 2, at 1. See *infra* Part II.B.

¹⁴ *Id.* at 2.

¹⁵ *Id.* at 1.

¹⁶ Child Welfare Information Gateway, *Determining the Best Interests of the Child*, (September 25, 2015 12:00 PM), http://www.childwelfare.gov/pubPDFs/best_interest.pdf.

¹⁷ MASS. GEN. LAWS ch. 208, § 31 (1998).

¹⁸ *Id.*

¹⁹ See *id.*

This Note argues that parental alienation syndrome should not be recognized in child custody disputes in Massachusetts. Part II discusses parental alienation syndrome and analyzes why the so-called disorder should not be permitted in child custody cases. Part III examines ways in which courts from other jurisdictions have addressed allegations of parental alienation syndrome in child custody cases, confirming its lack of acceptance. Part IV recommends that parties and attorneys involved in custody disputes be educated on the “junk science” of parental alienation as a syndrome, and that they be informed of the laws available in circumstances where a child is negatively impacted by his or her parent’s actions and behavior.

II. PARENTAL ALIENATION SYNDROME WITHIN CHILD CUSTODY CASES

A. Symptoms of Parental Alienation Syndrome

The theory of parental alienation syndrome, coined by Dr. Gardner, was developed solely through personal observations he made as a psychiatrist in private practice.²⁰ Dr. Gardner originally defined eight behaviors or symptoms for the diagnosis of parental alienation syndrome.²¹ Each of the following eight symptoms must be present to make a valid diagnosis of parental alienation syndrome.²²

1. A campaign of denigration against the parent.²³ This symptom is said to occur when “the parent targeted for alienation from his or her children is the recipient of ongoing animosity from both the parent instituting the alienation and their mutual offspring.²⁴ The message of denigration may come in the form of direct and indirect criticisms, sarcasm, distorted communication, and other modes of personal attack.”²⁵

2. An inadequate rationale for the denigration.²⁶ Signs of such inadequate rationalization come to the surface when the child offers “weak, frivolous, or even absurd rationalizations for his or

²⁰ Haralambie, *supra* note 1.

²¹ Gardner, *supra* note 13, at 2.

²² *See id.*

²³ Turkat, *supra* note 4, at 134.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

her hatred of the targeted parent.²⁷ This symptom commonly exposes itself when the child refuses to visit with the other parent for no apparent valid reason.²⁸

3. A lack of ambivalence.²⁹ This behavior exists when the child views the alienated parent as universally bad, as opposed to viewing said parent with mixed emotions, which marks the norm in interpersonal relationships.³⁰

4. The independent thinker phenomenon.³¹ This symptom manifests when a parent, who has unjustly alienated his or her child against the other parent, encourages the child to claim that his or her views of the other parent are a product of the child's own free will and independent thinking.

5. Reflexive support of the preferred parent in the parental conflict.³² This can be seen in instances where the child is manipulated to despise the other parent, and as a result, aligns unconditionally with the alienating parent.³³

6. Absence of guilt over cruelty to and/or exploitation of the alienated parent.³⁴ This is a symptom that arises when children, who are manipulated into denigrating the other parent fail to display appropriate feelings of guilt about their behavior towards the alienated parent.³⁵

7. Presence of borrowed scenarios is the name given to the symptom where the child recites stories, constructed by the alienating parent, to articulate the other parent's paternal deficiencies and the child's reasons for despising him or her.³⁶ This symptom can often be detected when a child uses topics or words that are beyond the level of functioning and knowledge appropriate for the child's age.³⁷

²⁷ *Id.*

²⁸ *Id.* at 135.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 135-36.

³⁵ *Id.*

³⁶ *Id.* at 136.

³⁷ *Id.*

8. The spread of animosity to the alienated parent's extended family is a frequent occurrence in parental induced campaigns of denigration against the other parent.³⁸

According to the parental alienation syndrome theory, there are many techniques that an alienating parent may employ to alienate the child from the other parent.³⁹ These techniques can be helpful in determining whether the eight symptoms of parental alienation syndrome are present.⁴⁰ Techniques include:

1. destroying photographs of the alienated parent;
2. not relaying telephone messages to the child;
3. refusing to acknowledge any positive experiences with the other parent;
4. attacking the other parent's family;
5. forcing a child to take sides by discussing issues that should only be discussed with the other parent;
6. changing the child's schedule so that the child cannot see the other parent;
7. excluding the other parent from information about the other child that is important;
8. insisting the child make decisions about contact;
9. refusing to hear positive comments about the other parent and discounting those comments;

³⁸ *Id.*

³⁹ REBECCA E. HATCH, PROOF OF PARENTAL ALIENATION IN ACTION FOR MODIFICATION OF CUSTODY OF A CHILD, 237 AM. JUR. 3D *Proof of Facts* (2012). The techniques listed are not ones identified by Dr. Gardner, but by other supporters of parental alienation syndrome. When listing techniques that alienating parents use, Hatch cites CHAIM STEINBERGER, *Father? What Father? Parental Alienation and Its Effect on Children*, 38 NYSBA FAM. L. REV. 12 (2006). Steinberger receives his information from STANLEY CLAWAR & BRYNNE RIVLIN, *CHILDREN HELD HOSTAGE: DEALING WITH PROGRAMMED AND BRAINWASHED CHILDREN* (2003), which provides methods for establishing that a child has been brainwashed by one parent against another.

⁴⁰ HATCH, *supra* note 39.

10. setting few limits or is strict about rules, routines, and expectations;
11. refusing permission for the other parent to attend school events and activities;
12. believing there is no need for the child to have a relationship with the other parent;
13. exaggerating the negative and omitting anything positive regarding the other parent;
14. repeating false statements to the child about the other parent and that parent's participation in the child's life;
15. allowing the child to behave defiantly towards the other parent, but not permitting the child to behave in this manner with others;
16. making false or fabricated allegations of sexual, physical, or emotional abuse;
17. exaggerating flaws of the other parent to the child;
18. involving the child in adult matters and litigation; and
19. displaying an extreme lack of courtesy to the other parent.⁴¹

Once parental alienation syndrome is diagnosed, Dr. Gardner divides it into three categories: severe, moderate, and mild.⁴² He makes note of the fact that many cases do not fit into just one classification, but emphasizes the importance of differentiating between types when possible, due to the varying psychotherapeutic and legal approaches designated for each category.⁴³ In severe cases, Dr. Gardner theorizes that mothers are often fanatic, will obstruct visitation, and are obsessed with hatred of their husbands.⁴⁴ He also states that mothers with severe cases often project their own negative

⁴¹ *Id.*

⁴² Gardner, *supra* note 2, at 16.

⁴³ *Id.*

⁴⁴ *Id.* Gardner originally stated that it was almost always mothers who alienated fathers. Although he later changed this to be gender neutral because of all the criticism that was received, much of his work is gender specific.

qualities onto their husbands.⁴⁵ Frequently, the child of a parent with severe parental alienation syndrome will act fanatic, in a manner similar to that of his or her parent.⁴⁶ The child may become panic stricken over the possibility of having to visit with his or her father,⁴⁷ and if placed in the father's home, the child is inclined to run away or require removal from the home.⁴⁸ Dr. Gardner argues that traditional therapy is usually not an option in severe cases of parental alienation syndrome because the mother is not willing to recognize her psychiatric problems.⁴⁹ Dr. Gardner recommends the proper remedy for severe cases requires that children be removed from the mother's home and placed in the father's home.⁵⁰ It is essential, according to Dr. Gardner, that the mother have no contact with the child for a certain period of time.⁵¹ Dr. Gardner views this separation period as critical to successful rehabilitation because it may be the child's only chance to reestablish a relationship with the alienated father.⁵²

Dr. Gardner differentiates moderate cases from severe cases by recognizing that a mother in the moderate category might have a healthy psychological bond with her child, but this bond is nevertheless compromised by her rage.⁵³ In moderate cases, mothers tend not to be as fanatic as mothers falling within the severe category.⁵⁴ Dr. Gardner states "the rage of the rejected woman is more important than paranoid projection, and a campaign of deprecation and a significant desire to wreak vengeance on the father by alienating the children from him is present."⁵⁵ Mothers become creative in the excuses they employ to withhold visitation.⁵⁶ Mothers may even disregard court orders, notwithstanding of the fact they will often

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 17.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

comply after the court threatens sanctions.⁵⁷ The children are also less fanatic than children in the severe category.⁵⁸ Younger children may need the support of an older sibling in order to maintain the momentum of the campaign because these children are much more likely to “dispense with their scenarios” when alone with their father.⁵⁹ In moderate cases, the child’s desire to maintain a healthy psychological bond with his or her mother is commonly the primary motivating factor behind his or her behavior toward the father.⁶⁰ Dr. Gardner recommends a court ordered therapist for the entire family as the most effective rehabilitation measure for moderate cases of parental alienation syndrome.⁶¹ He claims that individual therapists for individual family members will further reduce communication and will inevitably erect sub-systems within the family.⁶² Dr. Gardner strongly suggests that the family therapist provide direct input to the judge.⁶³ According to Dr. Gardner, the therapist’s office is a safe place for the child to transition smoothly from the mother to the father.⁶⁴

Dr. Gardner classifies mild parental alienation syndrome cases as those in which a mother participates in mild degrees of programming the child against his or her father.⁶⁵ Although signs of paranoia and extreme rage are not present in mild cases, a certain degree of anger and some desire for vengeance are present in these cases.⁶⁶ The children in this category develop their own scenarios with only a slight influence from the mother.⁶⁷ The primary motive of a child mildly alienated from his or her father is to strengthen the mother’s position in a custody dispute in order to maintain the psychological bond with the mother.⁶⁸ In this situation, Dr. Gardner recommends therapy and a final court order that confirms the child will continue living primarily

⁵⁷ *Id.*

⁵⁸ *Id.* at 18.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 19.

⁶⁵ *Id.* at 20.

⁶⁶ *Id.* at 20.

⁶⁷ *Id.*

⁶⁸ *Id.*

with the mother, and reassures the mother that there will not be a change in custody to the father.⁶⁹ Dr. Gardner contends that this usually “cures” mild parental alienation syndrome.⁷⁰

B. Criticism of Parental Alienation Syndrome

Parental alienation syndrome has received a great deal of criticism for a number of reasons. First, it is not accepted by the American Psychiatric Association, the American Psychological Association, or any other reputable mental health organization.⁷¹ The American Psychiatric Association (APA) is a national medical society specializing in the diagnosis treatment, prevention, and research of mental illness.⁷² The APA publishes the Diagnostic and Statistical Manual of Mental Disorders (DSM), which serves as a guide to diagnosing mental disorders for health care professionals worldwide.⁷³ The most recent edition, DSM-5, was published in May of 2013.⁷⁴

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ The American Psychiatric Association publishes the Diagnostic and Statistical Manual of Mental Disorders, which is used by all mental health practitioners to determine whether a patient has a mental disorder. Parental Alienation Syndrome was not included in the most recent edition. New York Law of Domestic Violence, 2 NY Law of Domestic Violence § 4:14 3d ed. (2014); AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS (Am. Psychiatric Ass'n, 5th ed. 2013).

⁷² See APA's Vision, Mission, Values, and Goals, <http://www.psychiatry.org/about-apa/vision-mission-values-goals> (last visited Nov. 20, 2015).

⁷³ Am. Psychiatric Ass'n, <http://www.psychiatry.org/dsm5> (last visited April 26, 2015).

⁷⁴ *Id.* See Am. Psychiatric Ass'n, *The People Behind DSM-5*, AM. PSYCHIATRIC ASS'N 1-2 (2013), <http://www.psychiatry.org/psychiatrists/practice/dsm/dsm-5> (In 1999 the APA recruited diverse and internationally recognized clinicians, scientific researchers, and organizations to work on DSM-5. The process also involved experts with backgrounds in psychology, social work, psychiatric nursing, pediatrics, and neurology. The group that worked on DSM-5 consisted of more than 160 mental health and medical professional who were leaders in their fields. The members represented more than 90 academic and mental health institutions throughout the world, with approximately 30 percent of professionals being international. Between 1999 and 2002 conferences were sponsored by the APA to develop a research agenda. The conferences included participants from the National Institute of Mental Health, the World Health Organization (WHO) and the World Psychiatric Association. Between 2004 and 2009 additional conferences were held that involved nearly 400 participants from 39 countries. As a result hundreds of articles were published regarding the

Although Dr. Gardner first coined parental alienation syndrome in 1985, he did not submit it for inclusion in the DSM-IV published in 1994⁷⁵ because the literature on parental alienation syndrome was quite limited at the time.⁷⁶ However, by the time the DSM-5 was underway in 1999, Dr. Gardner believed that sufficient literature existed to support its inclusion.⁷⁷ Despite Dr. Gardner's passing in 2003, parental alienation syndrome was submitted for inclusion in the DSM-5.⁷⁸ The original proposal for inclusion was quickly prepared by a small group of mental health professionals and was published in October 2008.⁷⁹ In March 2010, a group of seventy authors published a book containing a second proposal for the inclusion of parental alienation syndrome in the DSM-5 into a book.⁸⁰ Both proposals were submitted to the DSM-5 Task Force of the APA.⁸¹ A news release published on December 1, 2012 by the APA specifically listed parental alienation syndrome as a disorder not accepted for inclusion in the DSM-5.⁸² Furthermore, when asked why parental alienation syndrome was not included, Dr. Darrel Regier, vice chair of the task force that

current state of knowledge and recommendations for additional research in specified fields. Two independent panels were appointed to review the proposed content of DSM-5. There was a scientific review committee of experts in mental health that provided guidance on the strength of evidence supporting the proposed changes. The purpose of this was to ensure that only the most scientifically valid information was included in the DSM-5. A clinical and public health committee reviewed evidence based on revisions that were proposed to address difficulties experienced with the clinical utility, consistency, and public health impact of DSM-IV criteria. The Board of Trustees approved the final DSM-5 criteria in December 2012 and the APA published DSM-5 in May 2013 after a 14 year revision process. Parental Alienation Syndrome was not included.)

⁷⁵ Turkat, *supra* note 4, at 150.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ William Bernet & Amy J.L. Baker, *Parental Alienation, DSM-5, and ICD-11: Response to Critics*, 41(1) J. AM. ACAD. PSYCHIATRY LAW 98, 98 (2013).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See Barbara Kay, *Teaching children to hate the ex*, NAT'L POST, May 23, 2013, <http://news.nationalpost.com/full-comment/barbara-kay-teaching-children-to-hate-the-ex> ("PAS is now almost logged in as an official disorder. I say "almost" because those exact words are not in the DSM-5 (this was a deliberate and much-discussed decision).").

drafted the DSM-5, stated, “the bottom line is, it is not a disorder within one individual, it’s a relationship problem, parent-child or parent-parent. Relationship problems per se are not mental disorders.”⁸³

Parental alienation syndrome has also been criticized because Dr. Gardner originally claimed that mothers were primarily the alienators.⁸⁴ He originally stated that false allegations of child sexual abuse were primarily claimed by the mother against the father in custody proceedings.⁸⁵ He also claimed that abuse allegations made against fathers where the accusatory mother was effected by parental alienation syndrome, tend to be false accusations.⁸⁶ Although Dr. Gardner later changed the gender classification of the disorder to reflect gender neutrality on the part of the alienator, most supporters of the theory still look at the mother as the alienator.⁸⁷ The characterization of mothers as the primary alienators caught the attention of women’s advocacy groups,⁸⁸ as well as domestic violence survivors and child advocates.⁸⁹ These groups believe that Gardner’s theory masks legitimate reasons why there may be estrangement between parents and children.⁹⁰ These groups believe that permitting the introduction of parental alienation syndrome to custody proceedings could ultimately result in children being placed with abusive parents.⁹¹

⁸³ David Crary, *Parental Alienation not a Mental Disorder*, *American Psychiatric Ass’n Says*, HUFFINGTON POST (Sept. 21, 2012), http://www.huffingtonpost.com/2012/09/21/parental-alienation-is-no_n_1904310.html.

⁸⁴ Nichols, *supra* note 5, at 667.

⁸⁵ Michele A. Adams, *Framing Contests in Child Custody Disputes: Parental Alienation Syndrome, Child Abuse, Gender, and Fathers’ Rights*, 40 *FAM. L.Q.* 315, 325 (2006).

⁸⁶ *Id.* at 325.

⁸⁷ *Id.* at 332.

⁸⁸ Nichols, *supra* note 5, at 667.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See, e.g., Stephanie Dallam, *Are “Good Enough” Parents Losing Custody to Abusive Ex-Partners?*, Leadership Council on Child Abuse and Interpersonal Violence (2008), <http://www.leadershipcouncil.org/1/pas/dv.html>; Nichols, *supra* note 5, at 667.

C. Admissibility of Parental Alienation Syndrome in Massachusetts

For expert testimony to be used at trial, it must be admissible. Rule 702 of the Federal Rules of Evidence governs experts in federal cases. Massachusetts adopted the language of rule 702 of the Federal Rules of Evidence. It reads:

. . . 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 if the testimony is based on sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.⁹²

The majority of states have adopted the Frye test, the Daubert test, or a combination of the two to assess whether expert testimony is reliable in cases falling under state law.⁹³ The traditional Frye test looks at whether the principle or method is generally accepted in the relevant scientific community.⁹⁴ A Daubert analysis considers whether there is an ability to test the theory, existence of peer-reviewed publications supporting it, existence of standards for controlling or maintaining it, and known or potential error rates.⁹⁵

Massachusetts uses a combination of the two tests to determine the reliability of expert testimony in state cases.⁹⁶ In order to establish the requisite reliability for admission in Massachusetts, the Frye test requires that the principle or method have general acceptance in the relevant scientific community.⁹⁷ “Where general acceptance is not established by the party offering the expert testimony, a full Daubert analysis provides an alternate method of establishing reliability.”⁹⁸ In determining reliability “[a] judge may also look to his own common

⁹² MASS. R. EVID. § 702.

⁹³ Leo H. Whinery, *Expert Testimony Trends in State Practice and the Uniform Rules of Evidence*, SF78 A.L.I.-A.B.A 149, 176 (2001).

⁹⁴ Frye v. United States, 293 F.102 1013, 1013 (D.C. Cir. 1923).

⁹⁵ Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 580 (1993).

⁹⁶ MASS. R. EVID. § 702.

⁹⁷ Commonwealth v. Patterson, 840 N.E.2d 12, 23 (2005).

⁹⁸ MASS. R. EVID. § 702.

sense, as well as the depth and quality of the proffered expert's education, training, experience, and appearance in other courts to determine reliability.⁹⁹ Therefore, it is important to assess whether expert testimony regarding parental alienation syndrome is allowed under either test.

There are no cases in Massachusetts that have addressed the question as to whether parental alienation syndrome would be admissible at trial under the Frye or Daubert standard. But, other jurisdictions have conducted hearings to address whether parental alienation syndrome is consistent with the Frye standard, and had found that general acceptance of parental alienation syndrome had not been established.¹⁰⁰ Massachusetts should look to court decisions in other states for guidance in determining reliability.¹⁰¹ Other courts have found that the theory of parental alienation syndrome is unreliable, so Massachusetts ought to follow suit and find it unreliable as well.

In *People v. Fortin*, the defense sought to introduce testimony regarding parental alienation syndrome.¹⁰² Such testimony had never been the subject of a Frye hearing, so a hearing was conducted to test its admissibility.¹⁰³ Dr. Gardner was the only witness called to testify.¹⁰⁴ While testifying to his credentials, Dr. Gardner revealed that all but one of the forty three books he had written on parental alienation had been published through his own corporation.¹⁰⁵ The court also looked at a number of articles that reviewed the current status of parental alienation syndrome in the psychiatric field, and concluded that the syndrome had not been accepted by experts in the field.¹⁰⁶ To further discredit the trustworthiness and reliability of parental alienation syndrome as a legitimate disorder, Dr. Gardner's own statements in some of his published work classify psychodynamic

⁹⁹ Commonwealth v. Pasteur, 850 N.E.2d 1118, 1132 (2006) (quoting Commonwealth v. Goodman, 765 N.E.2d 792 (2002)). See MASS. R. EVID. § 702.

¹⁰⁰ See *People v. Fortin*, 706 N.Y.S.2d 611, 614 (2000).

¹⁰¹ See *Patterson*, 840 N.E.2d at 23.

¹⁰² *Fortin*, 706 N.Y.S.2d at 612.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 613.

psychiatry as more of an art than a science.¹⁰⁷ The court held that the defendant had not established general acceptance of parental alienation syndrome within the professional community, and therefore the expert testimony regarding parental alienation syndrome was excluded at trial.¹⁰⁸ Because an evidentiary offering of parental alienation syndrome will not pass the Frye test as it is not generally accepted in the medical community, expert testimony regarding parental alienation syndrome should not be permitted in custody disputes.

Further in support of jettisoning the alleged disorder, parental alienation syndrome does not pass a Daubert analysis. In *Daubert v. Merrell Dow Pharm., Inc.*, the United States Supreme Court recognized that the Frye test, which measures the general acceptance of proffered evidence within the scientific community, was a relevant factor in determining the admissibility of expert testimony, but was not the sole factor.¹⁰⁹ The list of specific factors laid out in *Daubert* do not necessarily apply to all experts in every case, nor do the factors constitute a definitive checklist.¹¹⁰ Aside from looking at whether the proffered evidence is generally accepted within the scientific community, the court considered the availability of empirical research to test the theory, existence of peer reviewed publications supporting it, and the known or potential error rates of the particular theory.¹¹¹

As applied to parental alienation syndrome, the *Daubert* factor requiring support of empirical research to test the theory, is not met.¹¹² Although there have been two recent studies conducted in an attempt to validate the existence of the alleged syndrome,¹¹³ the studies fail to

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 614.

¹⁰⁹ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 579 (1993), *superseded by statute*, FED. R. EVID. 702. *See* MASS. R. EVID. § 702.

¹¹⁰ *Daubert*, 509 U.S. at 592-93.

¹¹¹ *Id.* at 593-94.

¹¹² Nichols, *supra* note 5, at 674-75.

¹¹³ *See* Nichols, *supra* note 5, at 674-76. As of February, 2014 there had only been one study published in a peer-reviewed journal that included empirical research on parental alienation syndrome. Rueda concludes that the study failed to firmly differentiate parental alienation syndrome from parental alienation (citing Carlos A. Rueda, *An Inter-Rater Reliability Study of Parental Alienation Syndrome*, 32 AM. J. FAM. THERAPY 391, 400 (2004)). The other study was approved by the author's dissertation committee, but had not yet been published. Morrison's study fails to resolve the same concerns raised by Rueda's study two years earlier (citing Stephen Lee Morrison, *Parental Alienation Syndrome: An Inter-*

provide support for the reliability of parental alienation syndrome under the *Daubert* test.¹¹⁴ The sample sizes of the studies were small, which calls into question the accuracy of the results.¹¹⁵ Furthermore, some of the people who participated in the surveys declined to respond, either because of their opposition to the concept of parental alienation syndrome, or for other reasons.¹¹⁶ Therefore, this factor does not weigh in favor of admissibility.

Because peer-reviewed publications supporting parental alienation syndrome are virtually non-existent, another *Daubert* consideration is lacking. Peer review only supports reliability of a theory if the review itself is reliable.¹¹⁷ The peer-review process is meant to assess the scientific merit of research prior to publication.¹¹⁸ However, the parental alienation syndrome literature does not include the type of validating empirical research that peer research typically validates.¹¹⁹ The parental alienation syndrome literature lacks research that is verifiable by observation rather than theory.¹²⁰ There are also possible concerns regarding the legitimacy of the peer review.¹²¹ The American Journal of Family Therapy, which is the leading publication for articles on parental alienation syndrome, has a number of parental alienation syndrome advocates on its editorial board, including the Journal's founding editor.¹²² Although this does not necessarily preclude an objective review, it ought to be disclosed when determining the existence of valid peer-reviewed publications.¹²³

Rater Reliability Study. Alienating Behaviors – Related Justice System Issues (Dec. 2006) (unpublished Ph.D. dissertation, University of Southern Mississippi) (on file with the University of Southern Mississippi Library).

¹¹⁴ Nichols, *supra* note 5, at 675.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 677.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 677-78.

¹²¹ *Id.* at 678.

¹²² *Id.* at 678-79. See AM. J. FAM. THERAPY: EDITORIAL BOARD, <http://www.tandfonline.com/action/aboutThisJournal?show=editorialBoard&journalCode=uaft20> (last visited April 26, 2015).

¹²³ *Id.*

A third consideration under *Daubert* falls short as well because the known or potential error rate involved in diagnosing parental alienation syndrome has not been established.¹²⁴ The diagnostic criteria for diagnosing the alleged syndrome do not distinguish between intentional alienation on the part of one parent and other possible justification for the child's anti-social behavior.¹²⁵ Because the known or potential error rate is has not yet been estimated, this factor also weighs against the admission of testimony regarding parental alienation syndrome in custody disputes.

Evidence of parental alienation syndrome will not pass the *Daubert* test because each factor disfavors admitting such testimony. Hence, expert testimony regarding parental alienation syndrome should not be allowed.

D. Causal Link between Parental Alienation Syndrome and a Child's Rejection of a Parent

Dr. Gardner's recommendation that children should be removed from an alienating parent and placed with the target parent presents problems.¹²⁶ A child may reject his or her parent for numerous reasons.¹²⁷ Children often become distressed by their parents' decision to divorce and, depending on the child's age, reactions will often vary significantly.¹²⁸ Numerous factors may cause a child to develop hostile feelings towards his or her parents.¹²⁹ A child may blame one parent for causing the divorce, and may decide to boycott visitations with that parent.¹³⁰ A child may behave erratically as a result of the stress and drastic change imposed by the divorce.¹³¹ Furthermore, a child may be treated poorly by a parent, or the child may feel as though he or she is treated in such a way.¹³²

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Cheri L. Wood, *The Parental Alienation Syndrome: A Dangerous Aura of Reliability*, 27 LOY. L.A. L. REV. 1367, 1367 (1994).

¹²⁷ See Janet R. Johnston, *Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child*, 38 FAM. L.Q. 757, 764-65 (2005).

¹²⁸ Wood, *supra* note 126, at 1389.

¹²⁹ Haralambie, *supra* note 1, at 4.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

The presence of domestic violence comprises another reason why a child might reject his or her parent.¹³³ The National Council of Juvenile and Family Court Judges (NCJFCJ) published a bench book to assist courts in making custody determinations where there has been a history of domestic violence.¹³⁴ In the book, the council points out that abusive parents often refuse to take responsibility for their own behavior and are quick to pin the blame on an ex-spouse.¹³⁵ Alleging parental alienation syndrome can be used as a means to deflect attention away from the child rearing inadequacies of the parent making such accusations.¹³⁶ The council also observes that a parent may limit a child's contact with an abusive parent to protect the child.¹³⁷ On the other hand, the child may align with the abusive parent in an attempt to avoid being abused.¹³⁸ The council highlights the importance of determining whether domestic violence is present in each case where a parental alienation syndrome accusation is made.¹³⁹ The NCJFCJ concludes by stating that "a careful fact-based inquiry, unlike applying the PAS label, is likely to yield testimony that is more accurate and relevant."¹⁴⁰ This reiterates the crucial aspect of looking at all relevant facts when determining child custody.

A child's developmental stage may have a profound effect on the relationship between the child and a non-custodial parent.¹⁴¹ Untreated substance abuse and untreated mental health are other reasons cited for a child's rejection of a parent.¹⁴² There are many possible explanations for a child's rejection of a parent other than the presence of parental

¹³³ Clare Dalton et al., *Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judges Guide*, 18 (Nat'l Council of Juvenile & Family Court Judges, 2006), <http://www.ncdsv.org/images/navigatingCustodyVisitationEvaluations.pdf>.

¹³⁴ Dalton, *supra* note 133, at 3.

¹³⁵ *Id.* at 18.

¹³⁶ See Dalton, *supra* note 133, at 20; see also Alayne Katz, *Junk Science v. Novel Scientific Evidence: Parental Alienation Syndrome, Getting it Wrong in Custody Cases*, 24 PACE L. REV. 239, 240 (2004).

¹³⁷ See Dalton, *supra* note 133, at 15; see also Nichols, *supra* note 5, at 681.

¹³⁸ Dalton, *supra* note 133, at 25.

¹³⁹ *Id.* at 25.

¹⁴⁰ *Id.*

¹⁴¹ Katz, *supra* note 136, at 240-41.

¹⁴² *Id.* at 242-43.

alienation syndrome, again illustrating the critical need to examine all possibilities in custody disputes.

E. Support of Parental Alienation Syndrome

Fathers' rights groups embraced parental alienation syndrome because the alleged disorder aligned with many of the views fostered by fathers' rights movements.¹⁴³ In certain high conflict custody disputes, fathers have asserted the alleged syndrome much like an affirmative defense to disclaim a mother's allegation.¹⁴⁴ Jeffrey Leving, an attorney and advocate for fathers' rights, wrote "the programming techniques that Dr. Gardner examines in his book, *The Parental Alienation Syndrome*, are important ingredients in the assembly of the most powerful, and most despicable, weapon employed by vengeful, angry mothers: false child-abuse allegations."¹⁴⁵

An example of the strong support for parental alienation syndrome held by fathers' rights groups occurred in 2006 when many of these groups adamantly protested the PBS broadcast *Breaking the Silence: Children's Stories*, which challenged fathers' allegations of parental alienation syndrome in custody proceedings.¹⁴⁶ The broadcast presented stories mothers, who after separating themselves and their children from abusive fathers, became the objects of parental alienation allegations.¹⁴⁷ Fathers' rights advocates firmly objected to the documentary's message that abusive fathers were being granted custody based on false allegations that mothers are affected by some type of parental alienation syndrome.¹⁴⁸ The crux of the protests claimed that the documentary was biased and conveyed incorrect

¹⁴³ Adams, *supra* note 85, at 331-32. Parental alienation syndrome aligned with the stance that fathers' rights groups had taken, because originally Dr. Gardner stated that the mother was usually almost always the perpetrator and claims of abuse against the father were usually almost always false if made by the mother.

¹⁴⁴ *Id.* at 332. Whether fathers' in child custody disputes assert the alleged syndrome, and to what extent, is unknown as family law cases at the trial court level are not reported.

¹⁴⁵ *Id.* (quoting Jeffrey Leving with Kenneth A. Dachman, *Fathers' Rights*, 44 (1997)).

¹⁴⁶ *Id.* at 315.

¹⁴⁷ *Id.* at 332.

¹⁴⁸ *Id.* at 315.

statistical implications.¹⁴⁹ In response to the protest, the Corporation for Public Broadcasting and PBS issued letters admitting that the broadcast was improperly balanced and guaranteed that PBS would air a counter documentary.¹⁵⁰

Although parental alienation syndrome has not been widely accepted, it does have some support in the mental health field. Amy Baker is a researcher, author, expert, and coach in the field of parental alienation syndrome.¹⁵¹ She is the author or co-author of five books and over twenty peer reviewed articles on parental alienation syndrome.¹⁵² Baker says, “children who reject one parent to please the other parent are referred to as alienated or as having the parental alienation syndrome. [These children] will express most if not all of the eight behavioral manifestations.”¹⁵³ Baker states that although parental alienation syndrome is not in the APA’s Manual of Diagnoses (DSM-5), it does meet the APA’s definition of a syndrome.¹⁵⁴ Baker does not, however, demonstrate how it meets the definition of a syndrome. Baker was part of the team of authors that submitted proposals to the APA for the inclusion of parental alienation syndrome in the DSM-5.¹⁵⁵ Her efforts, however, were unsuccessful as parental alienation syndrome was not included in the DSM-5.¹⁵⁶

Dr. Richard Warshak is another well-known supporter of the alleged syndrome. Warshak, who has conducted extensive research in the field of family law,¹⁵⁷ has examined parental alienation, and shared

¹⁴⁹ *Id.* at 332-33.

¹⁵⁰ See statement issued by Ken A. Bode, Ombudsman, Corp. for Pub. Broad. (Nov. 29, 2005), <http://www.cpb.org/ombudsman/display.php?id=10>.

¹⁵¹ Amy J.L. Baker, *About Parental Alienation Syndrome*, <http://www.amyjl baker.com/parental-alienation-syndrome.html> (last visited Sept. 18, 2015).

¹⁵² See *id.*

¹⁵³ Amy J.L. Baker, *About Parental Alienation Syndrome*, <http://www.amyjl baker.com/parental-alienation-syndrome.html> (last visited, Sept. 18, 2015). The eight behavioral manifestations mentioned are the eight as defined by Dr. Gardner.

¹⁵⁴ *Id.*

¹⁵⁵ Bernet & Baker, *supra* note 78.

¹⁵⁶ See News Release, AM. PSYCHIATRY ASS’N (Dec. 1, 2012), <http://www.psychiatry.org> (stating that parental alienation syndrome is listed as a disorder not accepted for section 2 or 3 of the DSM-5).

¹⁵⁷ Dr. Richard Warshak, DR. RICHARD A. WARSHAK: PSYCHOLOGIST-AUTHOR, <http://www.warshak.com/author/index.html> (last visited April 27, 2015).

his views on the concept in his scholarly publications and presentations.¹⁵⁸ Although Warshak refers to parental alienation as a concept far more frequently than a syndrome, he has published a number of books and articles on parental alienation syndrome.¹⁵⁹ On his website, Warshak provides reference lists for parental alienation syndrome that were originally maintained on Dr. Gardner's website.¹⁶⁰ Despite his support of parental alienation syndrome, Dr. Warshak's views on appropriate remedial measures do not parallel those of Dr. Gardner. Warshak believes that repairing the relationship with the severely alienated parent is important, and recommends re-unification programs whenever possible.¹⁶¹

Although parental alienation syndrome has gained some support, the majority of the mental health community has rejected its principles. Further, many of the alleged syndrome's supporters define it differently and provide different treatment recommendations. This non-uniformity alone will likely prevent the alleged disorder from ever gaining enough momentum to gain legitimate recognition in the mental health and legal professions.

III. CURRENT LAW

A. Case Law Involving Parental Alienation Syndrome

There have not been any published cases in Massachusetts that reference or recognize parental alienation syndrome.¹⁶² Other states have mentioned parental alienation syndrome in case law because the

¹⁵⁸ *Id.*

¹⁵⁹ See, e.g., *What Is Parental Alienation?*, DR. RICHARD A. WARSHAK: PSYCHOLOGIST – AUTHOR, <http://www.warshak.com/publications/what-is-parental-alienation.html> (last visited April 27, 2015). Warshak discusses parental alienation versus estrangement; however, he never actually refers to parental alienation syndrome but a number of his publications include the term "parental alienation syndrome."

¹⁶⁰ Dr. Richard A. Warshak, *Psychologist, Author*, <http://www.warshak.com/alienation/pa-references.html> (last visited April 27, 2015).

¹⁶¹ Richard Warshak, 28 J. AM. ACAD. MATRIM. LAW. 181, 236 (2015).

¹⁶² Referring to published cases. This does not include the possibility of parental alienation syndrome being used in cases that have not been published or appealed.

syndrome has been alleged by a party to the suit.¹⁶³ In many of these cases, the courts did not base their decisions findings on parental alienation syndrome.¹⁶⁴

The only case that ordered a change of custody based on parental alienation syndrome was later reversed on appeal.¹⁶⁵ In *M.A. v. A.I.*, the trial court ordered a change of custody based on a finding of parental alienation syndrome.¹⁶⁶ The court granted the mother's motion to enroll the family in Family Bridges,¹⁶⁷ awarded the mother sole custody of the children, suspended the father's parenting time, and barred the father from having any contact with the children for ninety days.¹⁶⁸ The court made detailed findings that the father had engaged in a course of conduct that amounted to alienation.¹⁶⁹ In support of its decision, the trial court referenced evidence of parental alienation syndrome and relied upon the eight criteria of parental alienation syndrome.¹⁷⁰ It stated:

In New Jersey, while there are several cases attempting to deal with the problem, there is no definitive analysis as to what actually constitutes parental alienation. This court now holds that in order

¹⁶³ See *M.A. v. A.I.*, No. FM-20-973-09, 2014 WL 7010813, at *2 (N.J. Super. Ct. App. Div. Dec. 15, 2014); see also *Pearson v. Pearson*, 5 P.3d 239, 243 (Alaska, 2000); *Palazzolo v. Mire*, 10 So. 3d 748, 771 (La. App. 4th Cir. 2009).

¹⁶⁴ See, e.g., *Pearson*, 5 P.3d at 243, *Palazzolo*, 10 So. 3d at 775.

¹⁶⁵ *M.A.*, 2014 WL 7010813, at *6.

¹⁶⁶ *Id.* at *3.

¹⁶⁷ *Id.* at *2. See also *Family Bridges: A Workshop for Troubled and Alienated Parent-Child Relationships*, DR. RICHARD A. WARSHAK: PSYCHOLOGIST – AUTHOR, <http://www.warshak.com/services/family-bridges.html> (last visited April 27, 2015) (“[F]amily Bridges is an educational program that Dr. Warshak claims helps severely and unreasonably alienated children adjust to living with a parent they claim to hate or fear.”).

¹⁶⁸ *M.A.*, 2014 WL 7010813 at *2.

¹⁶⁹ *Id.* at *3.

¹⁷⁰ *Id.* The trial court, without citing its source, identified the eight criteria as: 1) a campaign of denigration of the parent; 2) weak rationalizations for the deprecation; 3) lack of ambivalence; 4) insistence that the rejection is the child's own idea; 5) reflexive support for the alienating parent in the parental conflict; 6) the absence of guilt or remorse over cruelty to the alienated parent; 7) the presence of borrow scenarios; and 8) the spread of rejection to extended family and friends of the alienated parent. *Id.* at *3, n. 3.

*for a parent to sustain a claim that the other parent has alienated their child, the proponent must prove the presence of eight criteria in the child.*¹⁷¹

Although the court mentioned the best interest factors listed in the statute, it stated that the eight criteria of parental alienation syndrome are “more probative, relevant, and significant in determining whether there is alienation and what to do about it.”¹⁷²

On appeal, the father argued that the trial court erred in awarding sole custody to the mother because it erroneously adopted the theory of parental alienation syndrome.¹⁷³ The appellate court held that the trial judge erred by basing its custody determination in part upon the eight parental alienation syndrome criteria, which the judge drew from literature and testimony.¹⁷⁴ The appellate court reasoned that parental alienation syndrome was not recognized as a syndrome in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).¹⁷⁵ Furthermore, neither the courts of New Jersey nor the United States Supreme Court had recognized parental alienation syndrome as a scientifically reliable or generally accepted theory.¹⁷⁶ The appellate court concluded that since the theory of parental alienation syndrome is still the subject of considerable controversy, it should not have played a part in the trial court’s ruling.¹⁷⁷

Another custody case mentions parental alienation syndrome, although the custody determination was not solely based on its finding.¹⁷⁸ In *Palazzolo v. Mire*, the adoptive mother sued the birth mother for custody and visitation of a child who was adopted during their same-sex relationship.¹⁷⁹ The district court awarded sole custody to the birth mother, and terminated the adoptive mother’s visitation rights.¹⁸⁰ On appeal, the adoptive mother contended that because the

¹⁷¹ *Id.* at *3.

¹⁷² *Id.*

¹⁷³ *Id.* at *4.

¹⁷⁴ *Id.* at *5.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at *5.

¹⁷⁸ See *Palazzolo*, 10 So. 3d at 748.

¹⁷⁹ *Id.* at 749-50.

¹⁸⁰ *Id.* at 750.

child was an “alienated child,” the trial court erred in awarding sole custody to the birth mother.¹⁸¹ The appellate court believed it was necessary to outline briefly the concept of parental alienation syndrome to address the adoptive mother’s claim that she should be awarded custody because the birth mother was affected with parental alienation syndrome.¹⁸²

The trial court defined parental alienation as a child’s mere dislike for one or the other parent.¹⁸³ In contrast, parental alienation syndrome is the concept coined by Dr. Gardner to describe instances where one parent causes the parental alienation.¹⁸⁴ The appellate court discussed the eight specific symptoms of parental alienation syndrome as identified by Dr. Gardner:¹⁸⁵ a campaign of denigration, weak rationalization for the denigration, lack of ambivalence, the independent thinker phenomenon, reflexive support of the alienating parent, absence of guilt, presence of borrowed scenarios, and animosity toward the extended family of the alienated parent.¹⁸⁶

The appellate court also noted parental alienation syndrome’s controversial reputation in the mental health field.¹⁸⁷ The court stated that parental alienation syndrome has been criticized as lacking an adequate scientific basis for admissibility.¹⁸⁸ One of the doctors, a qualified expert in clinical psychology, criticized parental alienation syndrome because it focused almost solely on the alienating parent as the source of the child’s alienation, rather than alternative theories.¹⁸⁹ The appellate court acknowledged that parental alienation has not been recognized as a true psychological syndrome, while noting it’s recognition as a psychological condition that can impair a child’s emotional development.¹⁹⁰

At the trial level, the expert psychologist testified that the degree of alienation was severe and recommended, in line with theories of Dr.

¹⁸¹ *Id.* at 771.

¹⁸² *Id.* at 771-72.

¹⁸³ *Id.* at 771.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 772.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 773.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 756, 773.

¹⁹⁰ *Id.* at 774.

Gardner, that the court award sole custody to the alienated parent.¹⁹¹ The expert psychologist rationalized her recommendation not on the grounds of parental alienation syndrome, but rather on the unique facts of the particular case taking into account the non-traditional structure of the family.¹⁹² The other qualified expert psychologist involved in the case agreed that the child's outward expressions of hatred and intense dislike towards one parent indicated that the child was in fact alienated.¹⁹³ However, this expert reasoned that the child was not alienated solely by the influence of one parent, but rather, had a multitude of factors causing her to feel such disdain for one parent.¹⁹⁴ Both psychological experts agreed, albeit for different reasons, that the child was alienated, and that sole custody in one parent was warranted.¹⁹⁵

The appellate court turned to the issue of whether the alienating mother met her burden of establishing that her receipt of sole custody was in the best interest of the child.¹⁹⁶ Louisiana, like Massachusetts, abides by the best interest of the child standard in child custody disputes.¹⁹⁷ Louisiana courts analyze twelve factors to determine the best interest of the child.¹⁹⁸ After considering all the factors, as well as

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 774-75.

¹⁹⁴ *Id.* at 775.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* See LA. CIV. CODE ANN. art. 131 (2014).

¹⁹⁸ *Palazzolo*, 10 So. 3d at 775 (The court shall consider all relevant factors in determining the best interest of the child. Such factors may include: (1) the love, affection, and other emotional ties between each party and the child; (2) the capacity and disposition of each party to give the child love, affection, and spiritual guidance and to continue the education and rearing of the child; (3) the capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs; (4) the length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment; (5) the permanence, as a family unit, of the existing or proposed custodial home or homes; (6) the moral fitness of each party, insofar as it affects the welfare of the child; (7) the mental and physical health of each party; (8) the home, school, and community history of the child; (9) the reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference; (10) the willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party; (11) the distance between the respective residences of the

the particular circumstances involved in the case, the appellate court found no error in the trial court's finding that the birth mother met her burden in establishing that she was entitled to sole custody.¹⁹⁹ Although the court discussed parental alienation syndrome, it was merely a part of the twelve factor test applied by the court.²⁰⁰ The court discussed parental alienation syndrome only because the adoptive mother raised the argument.²⁰¹ The appellate court explained, after applying the twelve factors to the case, that two of the factors are suggestive of parental alienation.²⁰² Specifically, factor six, which relates to "[t]he moral fitness of each party, insofar as it affects the welfare of the child,"²⁰³ is relevant because moral fitness encompasses the attitudes one parent outwardly manifests towards the other parent in front of the child.²⁰⁴ Factor ten, which relates to "[t]he willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party,"²⁰⁵ becomes an issue when one parent intentionally degrades the other parent in the child's presence. Upon consideration of all the factors, the appellate court found that these two factors weighed in favor of the non-alienating mother.²⁰⁶ However, six factors weighed in favor of the alienating mother, and the three remaining factors were neutral.²⁰⁷ Therefore, the appellate court held that the trial court did not err in finding that the alienating mother was entitled to sole custody.²⁰⁸

In an Alaska custody case addressing allegations of parental alienation syndrome, the Supreme Court of Alaska refused to validate the alleged syndrome, and appropriately arrived at a custody determination based on the best interest of the child.²⁰⁹ In *Pearson v.*

parties; and (12) the responsibility for the care and rearing of the child previously exercised by each party). *See* LA. CIV. CODE ANN. art. 134 (2014).

¹⁹⁹ *Palazzolo*, 10 So. 3d at 777.

²⁰⁰ *Id.* at 775.

²⁰¹ *Id.* at 771.

²⁰² *Id.* at 775.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 775-77.

²⁰⁸ *Id.* at 777.

²⁰⁹ *See Pearson v. Pearson*, 5 P.3d 239, 242-43 (Alaska 2000).

Pearson, the father appealed from a trial court order denying the father's motion to modify custody.²¹⁰ Although the court did not modify the custody arrangement, it did modify the father's visitation schedule.²¹¹ On appeal, the father contended that the trial court erroneously disregarded evidence of parental alienation syndrome, citing cases that admitted evidence of the alleged syndrome.²¹² The appellate court rejected the father's argument on appeal because the trial court did in fact admit the evidence of parental alienation syndrome.²¹³ The court, in reaching its decision, reminded the appellant that the trial court allowed expert testimony from two proponents of parental alienation syndrome, despite the syndrome's non-acceptance in the mental health community.²¹⁴ In its affirmance opinion, the court stated that the trial court determination that the mother retain custody was made because she was the appropriate parent to facilitate a loving relationship with the other parent; parental alienation syndrome was not the basis for the custody order.²¹⁵

²¹⁰ *Id.* at 239.

²¹¹ *Id.*

²¹² *Id.* at 243. *See, e.g.,* Blosser v. Blosser, 707 So.2d 778 (Fla. Supp. 1998) (testimony from psychologist stating that no significant psychological problems existed and the children did not exhibit parental alienation syndrome; however parental alienation syndrome was not discussed or addressed because the father did not meet the burden of proof for a change of circumstances required for a modification); Case v. Richardson, 1996 WL434281 (Conn. Super. Ct. July 16, 1996) (psychologist testified that he observed parental alienation syndrome; however it was father's testimony that was crucial in determining that the best interest of the child was with father. Furthermore, this case has received negative treatment by *People v. Loomis*, 658 N.Y.S. 2d 787 (Suffolk County Ct. 2005), that stated it should not have been admitted because no cases in New York have been found allowing for the admission of testimony concerning parental alienation syndrome and in *Page v. Zordan*, 564 So.2d 500, Fla. Dist. Ct. App.(1990), applying the Frye rule the court held that it was not generally accepted and was inadmissible.); *In re John W.*, 48 Cal. Rptr. 2d 899 (Cal. Ct. App. 1996) (psychologist wrote that abuse allegations are a result of subtle parental alienation syndrome by the mother, but concluded that the mother was sincere in her belief that the allegations occurred. The juvenile court judge granted shared custody reasoning that there was no evidence that one parent was better or worse than the other.).

²¹³ *Pearson*, 5 P.3d at 243.

²¹⁴ *Id.*

²¹⁵ *Id.*

In Illinois, a trial court admitted testimony of parental alienation syndrome, but similarly to Pearson, the syndrome was not a basis for the trial court's judgment, nor was its validity as evidence addressed on appeal.²¹⁶ In another Illinois case, *In re Marriage of Bates*, the father filed a petition to modify custody.²¹⁷ The trial court allowed evidence of parental alienation syndrome finding that the principle of the syndrome is sufficiently established to have gained general acceptance in the field, and the mother failed to offer any evidence to the contrary.²¹⁸ At the conclusion of trial the trial court found that the child's present environment endangered her physical, mental, moral, or emotional health and it was in the child's best interest to award sole custody to the father.²¹⁹ The trial court said it would throw out the words parental alienation syndrome, basing its finding on the standard set out in the statute, namely, "the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the parents and child."²²⁰

On appeal, the mother argued that the trial court erred in allowing Dr. Gardner's testimony regarding parental alienation syndrome because it did not meet the reliability requirements of Frye.²²¹ The Supreme Court of Illinois clarified that the only evidence admitted at trial concerned parental alienation syndrome's recent movement toward gaining general acceptance.²²² The court also alluded to the fact that the mother did not present any evidence to refute the introduction of the alleged syndrome.²²³ The Supreme Court of Illinois ruled that it need not determine the evidentiary validity of the syndrome because parental alienation syndrome testimony was not a basis for the trial court's judgment.²²⁴

Although some trial courts have allowed expert testimony on parental alienation syndrome, these courts have not based their decision on the alleged syndrome, nor have they validated its

²¹⁶ *In re Marriage of Bates*, 212 Ill.2d 489, 521 (2004); *Pearson*, 5 P.3d at 242.

²¹⁷ *Bates*, 212 Ill.2d 489 at 521.

²¹⁸ *Id.* at 519.

²¹⁹ *Id.* at 506.

²²⁰ *Id.* at 507.

²²¹ *Id.* at 518.

²²² *Id.* at 519.

²²³ *Id.*

²²⁴ *Id.* at 521.

reliability.²²⁵ Moreover, the only case that did order a change of custody on a finding of parental alienation syndrome was overturned on appeal.²²⁶ The fact that these courts are refusing to budge on this issue illustrates another reason why parental alienation syndrome should not be recognized in Massachusetts child custody cases.

B. Statutory Law

No state statute controlling custody disputes currently recognizes parental alienation syndrome. On the other hand, all states have enacted some type of best interest of the child statute.²²⁷ These statutes provide judges with guidance in determining what is in the best interest of a child. Additionally, these statutes provide redress for parties to disputes concerning parental behavior that negatively effects a child.

All fifty states cater to the best interest of the child, as it appears in the relevant statute, when making custody determinations.²²⁸ Approximately twenty one of these statutes list specific factors for courts to consider.²²⁹ Of the twenty one states that list such factors, seven require that all factors listed in the statute be considered in evaluating the best interest of the child.²³⁰ In the remaining fourteen states, courts are directed to consider all factors relevant to the best interest of the child, not only those specifically listed in the statute.²³¹ The remaining twenty nine states provide general guidance in the best interests of the child statute and give a greater degree of discretion to the courts to make the proper determinations.²³²

Massachusetts is one of the twenty nine states that afford the court greater discretion when making custody determinations.²³³ The statute regards shared legal custody as the default stating “in making an order

²²⁵ *See id.* at 519.

²²⁶ *M.A.*, 2014 WL 7010813 at *3.

²²⁷ *Determining the Best Interests of the Child*, CHILD INFO. GATEWAY, CHILDREN’S BUREAU (Apr. 26, 2015), http://www.childwelfare.gov/pubPDFs/best_interest.pdf.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *See id.*

²³¹ *Id.*

²³² *Id.*

²³³ MASS. GEN. LAWS ch. 208, § 31 (1998).

or judgment relative to the custody of children, the rights of the parents shall, in the absence of misconduct, be held to be equal, and the happiness and welfare of the children shall determine their custody.”²³⁴ The statute further provides that “when considering the happiness and welfare of the child, the court shall consider whether or not the child’s present or past living conditions adversely affect his physical, mental, moral or emotional health.”²³⁵ Furthermore, “in determining whether shared legal custody would not be in the best interest of the child, the court shall consider all relevant facts including, but not limited to, whether any member of the family abuses alcohol or other drugs or has deserted the child and whether the parties have a history of being able and willing to cooperate in matters concerning the child.”²³⁶

The statute provides that a court shall consider all relevant facts, but does not contain an exhaustive list. Judges therefore have wide discretion to determine the relevant facts and whether these facts will adversely affect the child’s well-being. The court is, therefore, free to consider any negative parental behavior that may have a negative effect on a child.

IV. SOLUTION

Thirty years have passed since Dr. Gardner first coined the phrase parental alienation syndrome. Over the course of these years, many articles have been written on the topic and the alleged syndrome has gained some attention in case law.²³⁷ A great deal of the literature that focused on parental alienation syndrome was originally written and published by Dr. Gardner, and more current literature on the topic has widely criticized Gardner’s opinions.²³⁸ Neither the Massachusetts legislature, nor the judicial system have addressed the question of parental alienation syndrome in the realm of family law.²³⁹ The alleged syndrome is not generally accepted in the medical field, or recognized

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ See discussion *supra* Sections II. E., III. A.

²³⁸ Carol Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, 35 FAM. L.Q. 527, 536 (2001).

²³⁹ See Haralambie, *supra* note 1; Bernet & Baker, *supra* note 79; Nichols, *supra* note 5, at 675, 678-79.

by courts in other jurisdictions.²⁴⁰ A significant reason why parental alienation syndrome has gone unrecognized lies in its lack of APA support.²⁴¹ When the DSM-IV was released in 1994, the exclusion of parental alienation syndrome was insignificant because the supposed syndrome was a relatively recent development and there had not been enough research conducted on the topic to support its inclusion.²⁴² However, the next edition of the DSM was published almost twenty years later and again parental alienation syndrome was not included.

A. Proposal

The Commonwealth should provide some type of uniformity and education in the junk science that belies parental alienation syndrome in order to accurately inform family law attorneys and others involved in child custody litigation. Parties to custody disputes should also be alerted to the laws available to assist them in determining the best interest of the child. Currently, Massachusetts has a number of laws in place to assist the trier of fact in determining child custody.²⁴³ First, the statute setting forth the best interest of the child permits a judge to view all relevant facts to determine whether present or past living conditions adversely affect a child's physical, mental, moral, or emotional health, and whether the parents are able and willing to cooperate in matters concerning the child.²⁴⁴ This statutory language allows a judge to consider parental behavior that could negatively

²⁴⁰ The American Psychiatric Association has no information on Parental Alienation Syndrome on its website. Nor does it mention Parental Alienation Syndrome on its list of psychiatric disorders. *See* <http://www.dsm5.org> (last visited April 27, 2015); *see also* M.A. v. A.I., No. FM-20-973-09, 2014 WL 7010813, at *2 (N.J. Super. Ct. App. Div. Dec. 15, 2014); *Pearson v. Pearson*, 5 P.3d 239, 243 (Alaska 2000); *Palazzolo v. Mire*, 10 So. 3d 748, 771 (La. App. 4th Cir. 2009).

²⁴¹ *See* AMERICAN PSYCHIATRIC ASS'N, <http://www.psychiatry.org/dsm5>, The American Psychiatric Association publishes the Diagnostic and Statistical Manual of Mental Disorders, which is used by all mental health practitioners to determine whether a patient has a mental disorder. Parental Alienation Syndrome was not included in the most recent edition. *New York Law of Domestic Violence*, 2 NY Law of Domestic Violence § 4:14 3d ed. (2014).

²⁴² *See generally* AM. PSYCHIATRIC ASS'N, www.psychiatry.org/dsm5 (last visited April 27, 2015). This condition is still not listed on the American Psychiatric Association's website, due to lack of recognition in the field; *see also* Nichols, *supra* note 5, at 672.

²⁴³ *See* *Bower v. Bournay-Bower*, 15 N.E.3d 745 (2014).

²⁴⁴ MASS. GEN. LAWS ch. 208, § 31 (1998).

impact a child. Under the Massachusetts statute, third parties, such as parent coordinators and guardians ad litem, enter into the picture when allegations of negative parental behavior arise.²⁴⁵ Furthermore, judges are granted the authority to include language in custody judgments that specifically forbid negative behavior.²⁴⁶ Although this may not prevent a parent from engaging in negative behavior, it will enable the other parent to file for contempt if such behavior is present.

Parent coordinators in child custody cases are becoming increasingly popular in Massachusetts.²⁴⁷ A parent coordinator generally serves as a third party neutral and assists in resolving conflicts that arise during the implementation of custody and visitation arrangements.²⁴⁸ Although specific functions, including duties, necessary qualifications, and scope of authority have not been set forth by statute or court rule, Massachusetts statutes and court rules do recognize various types of alternative dispute resolution practices.²⁴⁹ In *Bower v. Bournay-Bower*, the Supreme Judicial Court held that judges in the probate and family court possess the inherent authority to appoint parent coordinators in appropriate circumstances.²⁵⁰ This authority can be viewed as one tool to assist parents in day to day decisions that affect the child. A parent coordinator can assist the parents in arriving at a solution when one parent alleges that the other parent's behavior is negatively impacting the child. Although a parent coordinator generally plays a neutral role, he or she may nevertheless introduce pre-conceived notions, opinions, or beliefs about different matters. Hence, it is essential that parties are aware of other available options if a parent coordinator is unable to resolve parental behavior that may have a negative effect on a child.

The use of a Guardian Ad Litem is another option for parties when parental fitness or custody issues arise. By statute, Massachusetts provides "any judge of a probate and family court may appoint a guardian ad litem to investigate the facts of any proceeding pending in said court relating to or involving questions as to the care, custody or

²⁴⁵ See MASS. GEN. LAWS ch. 215, § 56A (1978); see also Turkat, *supra* note 4, at 135.

²⁴⁶ See MASS. GEN. LAWS ch. 208, § 31 (1998).

²⁴⁷ *Bower*, 15 N.E.3d at 749.

²⁴⁸ *Id.* at 694.

²⁴⁹ *Id.* at 695.

²⁵⁰ *Id.* at 695-98.

maintenance of minor children.”²⁵¹ A guardian ad litem is a neutral third party that can assist the court in determining what is in the best interest of the child.²⁵² Again, as with parent coordinators, a guardian ad litem may also bring his or her opinions and beliefs to the table.²⁵³ However, the guardian ad litem is indeed another available route and can be used to ensure that the best interest of the child is fulfilled.

Parties can also request that language be added to court judgments to discourage a parent from disparaging the other parent. Although many would consider this to be common sense, including the language in the judgment may discourage a parent with little to no common sense from engaging in the degradation of the other parent. An example of language to recommend would be:

Both parents are prohibited from insulting, disparaging or otherwise denigrating each other or any member of the child’s immediate or extended family to the child or to any other person while the child is in his or her care. It is the responsibility of both parents to enforce this provision and ensure that all friends and/or family who may be in the company of the child during his/her parenting time respect the child and the love and affection she has for all members of his/her family.

B. Foreseeable Opposition to Proposal

Supporters of parental alienation syndrome, such as fathers’ rights groups as well as some mental health professionals, will likely oppose the non-recognition of parental alienation as a syndrome, and may protest its exclusion in child custody matters. These supporters believe, that recognition of parental alienation as a syndrome, and punishing those who suffer from it, will serve as a deterrent to parents who program their children against the other parent. Because supporters of parental alienation syndrome are concerned with the negative impacts on a child, they should be enlightened and informed of all factors that could have a negative effect on a child. In situations where parental alienation syndrome is alleged and a court does not look to other causes for a child’s rejection of a parent, there is a strong

²⁵¹ MASS. GEN. LAWS ch. 215, § 56A (1978).

²⁵² *Id.* See MASS. CT. SYSTEMS, *Standards for Category F Guardian Ad Litem Investigators* 2-3, <http://www.mass.gov/courts/docs/courts-and-judges/courts/probate-and-family-court/galstandards012405.pdf> (last visited Oct. 28, 2015).

²⁵³ See MASS. CT. SYSTEMS, *supra* note 252, at 2-3.

possibility that the true problem causing the behavior will continue to adversely affect the child.

V. CONCLUSION

The use of parental alienation as a “syndrome” has not been widely accepted in the medical field, nor has it gained much recognition in child custody cases. Expert testimony on the issue of this alleged syndrome fails both the Frye and Daubert tests for evidentiary admissibility. Furthermore, the rather weak theoretical foundation on which Dr. Gardner constructed parental alienation syndrome, paves the way for a high possibility of error both in diagnosing parental alienation syndrome, and making custody determinations based on such diagnoses. The current rules and statutes in place to determine the best interest of a child adequately address parental behavior that can negatively impact a child. In high conflict cases involving custody of children, it is essential to consider all relevant factors and custody determinations should be made on a case by case basis catering to the best interest of the child. Parental alienation syndrome is not a validated mental health disorder. Just as it has been deemed junk science with no place in the psychiatric field, parental alienation syndrome is an unwelcome guest in the legal profession as well.