

Comments on to HB 272 Utah House  
Judiciary Committee  
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*This article alerts professionals to the emergence of oversimplified approaches to the complex problem of alleged child sexual abuse in the context of custody disputes. We argue that reliance on such methods is likely to result in misdiagnosis and failure to protect children who are both sexually abused and caught in custody battles. We specifically take issue with Green's (1986) recent formulation for distinguishing between true and false accusations of incest in child custody disputes because that formulation is based on an inadequate data base, biased sample, and unsupported conclusions. In addition, we discuss the limits of clinical impression, the difference between unfounded or unsubstantiated and false accusations of abuse, and the high prevalence of actual child sexual abuse in the setting of marital dissolution.*

## ***Child Sexual Abuse and Custody Disputes No Easy Answers***

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***Increased awareness and reporting*** of suspected child sexual abuse has been accompanied by a surge of such allegations between separated parents. Overwhelmed clinical and legal professionals struggling to cope with the demands of these complex and challenging cases are searching for ways to handle this epidemic. In their need,

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Authors' Note: Reprints of this article may be requested from David L. Corwin, 11 Moraga Way, No. 3, Orinda, CA 94563.

# Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide



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## Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide

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## Determine Whether to Admit the Report into Evidence

Unless admissibility is stipulated by counsel for each party, the Court must subject both the evaluation report and the expert testimony derived from the evaluation to critical scrutiny, assessing carefully the validity and reliability of each before determining whether they are admissible as evidence.<sup>51</sup>

### Parental Alienation and the *Daubert* Standard: on Syndromes and Behaviors

In contested custody cases, children may indeed express fear of, be concerned about, have distaste for, or be angry at one of their parents. Unfortunately, an all too common practice in such cases is for evaluators to diagnose children who exhibit a very strong bond and alignment with one parent and, simultaneously, a strong rejection of the other parent, as suffering from “parental alienation syndrome” or “PAS”.<sup>52</sup> Under relevant evidentiary standards, the court should not accept this testimony.

The theory positing the existence of “PAS” has been discredited by the scientific community.<sup>53</sup> In *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court ruled that even expert testimony based in the “soft sciences” must meet the standard set in the *Daubert*<sup>54</sup> case. *Daubert*, in which the Court re-examined the standard it had earlier articulated in the *Frye*<sup>55</sup> case, requires application of a multi-factor test, including peer review, publication, testability, rate of error, and general acceptance. “Parental Alienation Syndrome” does not pass this test. Any testimony that a party to a custody case suffers from the syndrome or “parental alienation” should therefore be ruled inadmissible and/or stricken from the evaluation report under both the standard established in *Daubert* and the earlier *Frye* standard.<sup>56</sup>

The discredited “diagnosis” of “PAS” (or allegation of “parental alienation”), quite apart from its scientific invalidity, inappropriately asks the court to assume that the children’s behaviors and attitudes toward the parent who claims to be “alienated” have no grounding in reality. It also diverts attention away from the behaviors of the abusive parent, who may have directly influenced the children’s responses by acting in violent, disrespectful, intimidating, humiliating and/or discrediting ways toward the children themselves, or the children’s other parent. The task for the court is to distinguish between situations in which children are critical of one parent because they have been inappropriately manipulated by the other (taking care not to rely solely on subtle indications), and situations in which children have their own legitimate grounds for criticism or fear of a parent, which will likely be the case when that parent has perpetrated domestic violence. Those grounds do not

51 See e.g., Shuman, *supra* note 38, at 150, 160 (asking “How can the law be a critical consumer of mental health practitioner expertise if it ignores the scientific community’s critiques of proffered expert testimony and fails to apply discriminating threshold standards of admissibility of expert evidence derived from these tests?”; further arguing that qualifications alone do not provide any guarantees that expert opinions are based on reliable methods and procedures).

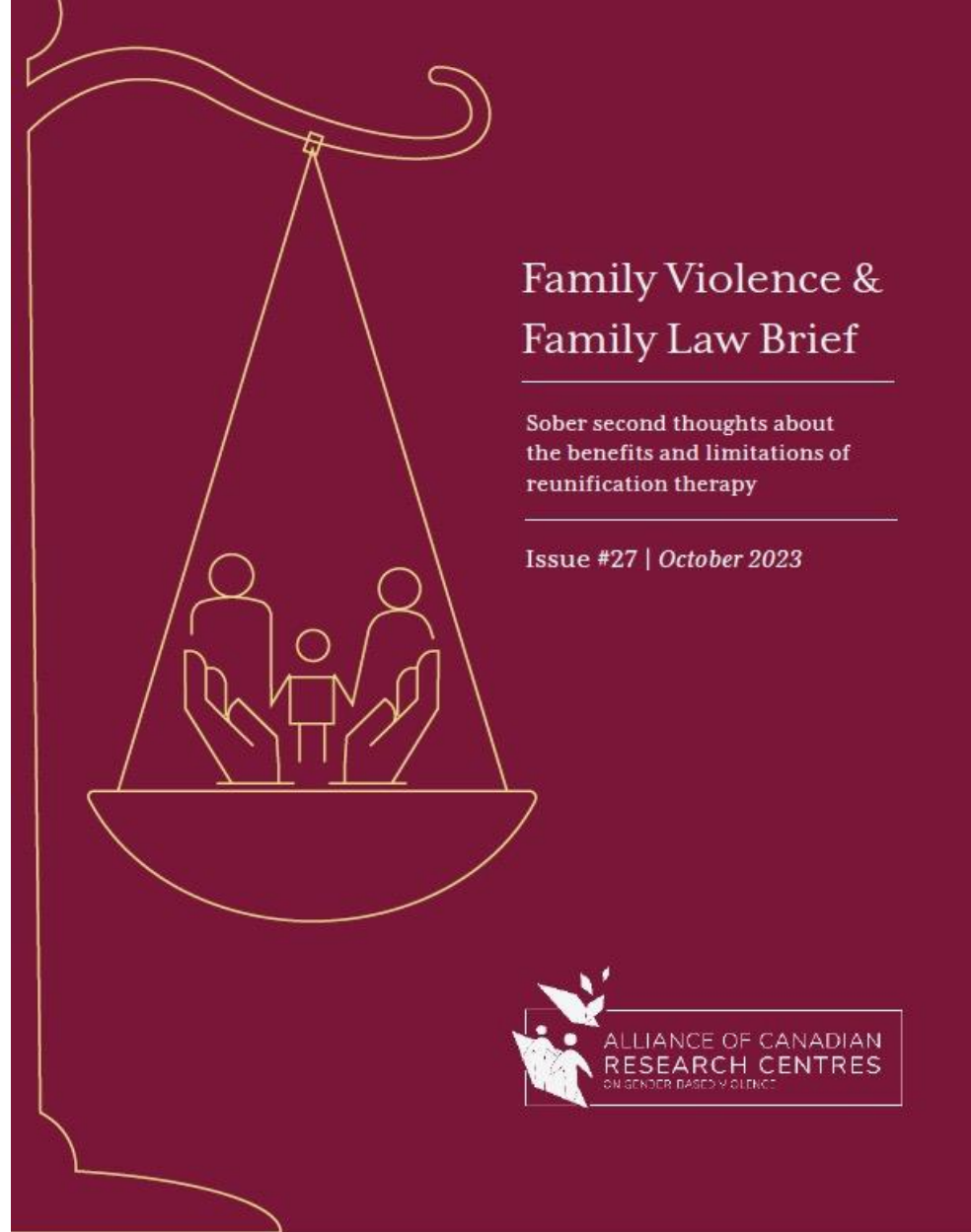
52 “Parental alienation syndrome” was introduced by Richard Gardner and was primarily associated with child sexual abuse allegations in the context of contested child custody cases. For more information, see Bruch, *supra* note 28.

53 According to the American Psychological Association, “... there are no data to support the phenomenon called parental alienation syndrome ...” AM. PSYCHOL. ASS’N., *supra* note 2, at 40.

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

55 *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923).

56 These are federal standards, but many states adhere to them at least generally and should still exclude any proffered evidence of “PAS”.



<https://fvfl-vfdf.ca/briefs/Briefs%20PDF/Brief-27-EN.pdf>

# Have the reasons for a child's reluctance/resistance been properly assessed?

Unfortunately, it is too often the case that reunification interventions are recommended or ordered without a clear assessment of the reason for parent-child relationship problems, and critically, without clarifying estrangement, protectiveness from alienation, and from coercive control. Instead, a recommendation or order to attend reunification therapy often comes with the implication or assumption that one parent is intentionally manipulating the child or that a course of therapy might be helpful regardless and, even if not helpful, will not have cause harm. There are, however, significant problems with these assumptions and conflating the child's resistance/rejection of their parent with attempts by the preferred parent to deliberately alienate the child from that parent without proper assessment is fraught with problems.

Especially in cases of family violence, courts have a duty to listen to children's recounts of their experiences and prioritize their physical and emotional safety above all else. This requires that decisions regarding decision-making and parenting time are well-informed and based on the behaviours of both parents and children, as well as familial, partner and individual contextual factors (Fidler & Bala, 2010). If children's views are ignored, or only partially considered, the risk of children being re-exposed to harm amplifies.

P. 9 paragraphs 2 and 3