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**PARENTAL ALIENATION SYNDROME IN NEW  
ZEALAND**

**LLB(HONS) RESEARCH PAPER**

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**GENEVIEVE POIRIER**

Parental Alienation Syndrome is a condition which occurs in children who have experienced post-separation conflict. Commonly the child aligns with the custodial parent and expresses strong wishes to sever all contact with the non-custodial parent. These strong wishes may include false allegations of neglect or abuse. It is believed that this behaviour is caused by the indoctrinating actions of the custodial parent. If the child's wishes are followed, one parent may be denied access altogether. There is much controversy surrounding the Syndrome in both the legal and medical forums. It is neither accepted nor ruled upon with any great consistency. This paper canvasses the formulation of the syndrome, its criticisms, and its treatment in

## **PARENTAL ALIENATION SYNDROME IN NEW ZEALAND**

New Zealand cases in which the Syndrome was argued. Recommendations include: caution when allowing argument on the syndrome, ensuring that the judiciary does not simply defer to the opinion of the psychological expert, and making consistent orders when Parental Alienation Syndrome is found to be an operative factor.

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## *I INTRODUCTION*

In recent years the interests of children and respect for their wishes have been accorded increasingly greater recognition in the law. Particularly in the context of divorce and separation, it is progressively seen as a child's right to make their views on custody and access heard. What of the situation however, where the view expressed is a vehemently held wish to sever ties with one parent? This type of view causes concern because of its incompatibility with conventional wisdom on the subject. It is generally considered important for a child to have a relationship with both parents, to the extent that contact will be promoted even where one parent has proved themselves to be less than fit.

Parental interaction on even the most basic level is regarded as serving a child's best interests. However it is also in the child's best interests to respect their choices as rational actors. The inquiry which then arises, is whether there is a danger that the wish expressed is not the true desire of the child but the internalisation of a disaffected parent's views. This is the realm of Parental Alienation Syndrome.

Parental Alienation Syndrome (PAS) denotes a relatively new diagnosis, and describes a set of behaviours exhibited by some children in high-conflict separations. It appears that there is little consensus either theoretically or in practice as to what constitutes PAS, how it is to be diagnosed or treated, or to what degree the law should take notice of it. Even without agreement on these issues however, instances of PAS are currently being alleged in custody disputes in many jurisdictions including New Zealand. The result of this has been necessarily inconsistent. While the syndrome remains very much in debate, inconsistency is further fuelled by a judicial reluctance to recognise or even name the diagnosis although it is ostensibly informing custody decisions. The result is that PAS is making little progress in either becoming legally accepted or discredited.

It is patent that if PAS is going to continue to be employed in custody and access cases there should be a degree of uniformity in its judicial treatment. To determine what this treatment should entail, several issues must be discussed. First, a discussion of the origins and general symptomology of PAS must be described. Second, a careful examination of the controversy forestalling acceptance of the syndrome. This background can then be used to examine how PAS has been treated in the legal sphere and lead finally to the relevance of PAS to access and custody litigation in New Zealand.

## **II PAS – A BACKGROUND**

The Parental Alienation Syndrome (PAS) is regarded as a phenomena of post-separation conflict. In basic terms it describes a situation in which a child refuses contact with the non-custodial parent (the target parent), due to a strongly felt fear or hatred of that parent. Upon closer examination however, it is revealed that this negative perception is poorly founded and that the child's wishes are merely a response to a campaign of deprecation orchestrated by the custodial (alienating) parent.

### **A PAS Defined**

Richard Gardner, a child psychologist, is credited with the discovery of PAS. In 1985 he noted the aspects of the syndrome while he was working on custody cases concerning false allegations of child abuse.<sup>1</sup> Earlier researchers had noted similar patterns of behaviour.<sup>2</sup> Professionals involved in custody disputes embraced the designation of this syndrome, recognizing PAS as a refinement on a group of events previously regarded as parental 'brainwashing'.

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<sup>1</sup> Richard Gardner "Recent Trends in Divorce and Custody Litigation" (1985) American Academy of Psychoanalysis. <<http://www.rgardner.com/refs>> (last accessed 15 July 2002)

<sup>2</sup> For example, the medea complex described by Wallerstein and Kelly in the late 1970s



Parental Alienation Syndrome, as Gardner describes it, is a childhood disorder that arises almost exclusively in the context of custody disputes. Its primary manifestation is a child's campaign of unfair criticism against one parent. It is brought on by the indoctrinating behaviour of the alienating parent. The behaviour of the alienating parent may range from negative and influencing comments about how hurtful it is when the child enjoys time in the other parent's company, to extreme cases involving falsified allegations of neglect or abuse. It is important here to note that when true parental abuse or neglect is present, the child's animosity will be justified; therefore PAS will not be a relevant consideration. A PAS child will have complaints that are directly *at variance* with the child's previous experiences; conversely a child who has been neglected or abused would have a reason to attack or avoid their abuser. The key in determining the existence of PAS is the recognition that the child's aversion to the alienated parent is completely without justification.

The following 6 symptoms proposed by Byrne<sup>3</sup> appear to be those most widely accepted by courts and practitioners as indicators of PAS, and have been included in both the reference works *Family Law in New Zealand*<sup>4</sup>, and in the Australian Publication *Expert Evidence*<sup>5</sup>:

- 1) The child shows a complex lack of ambivalence. One parent is described almost entirely negatively, the other almost entirely positively;
- 2) The reasons given for the child's dislike of one parent may appear to be justified but investigation shows them to be flimsy and exaggerated;
- 3) The child proffers the opinion of wanting less contact with one parent in a way that requires little or no prompting. The complaints have a quality of being rehearsed or practised;
- 4) The child seems to show little or no concern for the feelings of the parent being complained about;

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<sup>3</sup> Kenneth Byrne "Brainwashing in Custody Cases: The Parental Alienation Syndrome" (1989) 4(3) Australian F Lawyer 1, 4.

<sup>4</sup>Dick Webb and others *Family Law in New Zealand vol 1* (3 ed, Butterworths, Wellington, 2001) 483.

<sup>5</sup> Ian Freckelton and Hugh Selby *Expert Evidence* (loseleaf, The Law Book Company, Sydney, 1993) para 13.395 (last updated July 2002)

- 5) The alienating parent, while seemingly acting in the best interests of the children, is actually working to destroy the relationship between them and the other parent. It is not uncommon for this to be further fuelled by new spouses or de factos;
- 6) While the child will verbally denigrate one parent, he retains an unspoken closeness and affection for that parent. However, if the syndrome is allowed to develop unchecked, this can be all but erased by the alienating parent.

In New Zealand, Gardner's expanded version of the above symptoms involving 14 criteria, as compiled by Dunne and Hendrick, has also been used.<sup>6</sup>

To understand how PAS might affect a child is relatively intuitive. Children are generally eager to please their parents – particularly those whom

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<sup>6</sup> Dunne and Hedrick "The Parental Alienation Syndrome: An analysis of sixteen selected cases" (1994) 21 J Divorce Remarriage 24, 33.

1. Child is preoccupied with depreciation and criticism of the parent that is unjustified and/or exaggerated.
2. Conscious, subconscious, and unconscious factors within the alienating parent contribute to the child's alienation from the other.
3. Denigration of the parent has the quality of a litany, a rehearsed quality. There is phraseology not usually used by the child.
4. Child justifies the alienation with memories of minor altercations experienced in the relationship with the parent which are trivial and which most children would have forgotten. When asked, the child is unable to give more compelling reasons.
5. The alienating parent will concur with the children and support their belief that these reasons justify the alienation.
6. Hatred of the parent is most intense when the alienating parent and the child are in the presence of the alienated parent. However, when the child is alone with the alienated parent, the child may exhibit hatred, neutrality, or expressions of affection.
7. If the child begins to enjoy him/herself with the alienated parent, there may be episodes of "stiffening up" and resuming withdrawal and animosity, as though they have done something wrong. Alternatively, the child may ask the alienated parent not to reveal his/her affection to the other parent.
8. The degree of animosity in the child's behaviour and verbalizations may vary with the degree of proximity to the alienating parent.
9. Hatred of the parent often extends to include the alienated parent's extended family, with even less justification by the child.
10. The alienating parent is generally unconcerned with the psychological effects on the child of the rejection of parent and extended family.
11. The child's hatred of the alienated parent is often impervious to evidence which contradicts his/her position.
12. The child's position seemingly lacks ambivalence. The alienated parent is "all bad," the alienating parent is "all good."
13. The child is apt to exhibit a guiltless disregard for the feelings of the alienated parent.
14. The child fears the loss of the love of the alienating parent.

the child may (rightly) feel are dependent on them. In this endeavour, they are attuned to any small desire the parent might express, including that for solidarity against a common enemy. Both conscious and subconscious efforts of the custodial (alienating) parent will affect the child's perception of their relationship and loyalty to the non-custodial parent. From these instinctive feelings, the alienating parent might begin a pattern of criticism with the child in a number of ways. One technique plays on the emerging psyche of children already struggling to differentiate between reality and 'make-believe': generalizing one or two instances of conflict into a global experience.<sup>7</sup> For example, the child might be reminded of a time when mother was cross with him (justifiably) but the memory is generalised as part of a bigger conclusion: "Mum is really out of control – you know how she yells at you all the time." Once a pattern of criticism is established, PAS children frequently add their own scenarios to the campaign as they recognise, in a Skinnerian conditioning sense, that their complementary contributions are desired and rewarded. Although many children – even the very young – can differentiate between the truth and a lie, their memory and more importantly their view of the world is easily influenced.

Mia Kelmer Pringle stated in her 1975 study that children are aided in life by knowing what is expected of them, what the rules are, and whether these are in their interests or in the interests of others.<sup>8</sup> The rules for a child affected by PAS seem to be that love is contingent on their acquiescence regarding, or active participation in, the denigration of the target parent. In this, the child further loses the sense of whose interest they are serving, mistaking their own desires for those of the parent who they want to appease. This pattern becomes self-reinforcing and the result is a spiralling campaign:<sup>9</sup> As the child is allowed

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<sup>7</sup> A list of techniques such as generalization can be found in Kenneth H Waldron, David E Joanis "Understanding and Collaboratively Treating Parental Alienation Syndrome" (1996) 10 American JFL 121.

<sup>8</sup> Mia Kellmer Pringle *The Needs of Children* (Hutchinson, New York, 1975) 151.

<sup>9</sup> Kenneth H Waldron and David E Joanis "Understanding and Collaboratively Treating Parental Alienation Syndrome" (1996) 10 American JFL 121, 121.

to avoid contact, the avoidance becomes a self-fulfilling prophecy: the child begins to see the absent parent as a disagreeable stranger.

The psychological damage to a PAS child is threefold: their beliefs and ordinary attachments are being manipulated by the alienating parent; their psychological bond with the other parent is being disrupted; and most disconcerting is that they begin to believe the allegations they themselves make. This belief in their own falsified allegations creates what is often referred to as a *folie à deux*, where the child and the alienating parent both operate under the delusion that the negative traits of the target parent are indeed real.

### **B PAS Solutions**

In an extreme situation of PAS Gardner suggests a complete reversal of custody in order to break the psychological pattern. Gardner has emphasised that a parent who promotes such a negative pattern of behaviour in their child is perpetrating a form of emotional abuse, the result of which might "not only produce lifelong alienation from a loving parent but a lifelong psychiatric disturbance in the child."<sup>10</sup> It is evident that a parent who cultivates a falsified hatred in their child has, at best, a complete disregard for the value of the other parent's role in child rearing and that, at the very least, this influence should be modified. In New Zealand, although it is preferable to maintain some kind of routine for children with separated parents there is no presumption in continuing whatever routine that might be.<sup>11</sup> On the other hand, if the child's aversion to the target parent is indeed justified, a dramatic change in custody has the potential to be traumatic.

<sup>10</sup> Richard Gardner, *The Parental Alienation Syndrome* 2<sup>nd</sup> ed. (Creative Therapeutics, Cresskill, New Jersey, 1987) xxi.

<sup>11</sup> *Clapham v Clapham* [1993] NZFLR 408.

A panel of experts involved in the NZLS Seminar on Family law and the rights of children and youth<sup>12</sup> suggested alternatives to a custody swap as remedies to Parental Alienation (syndrome).<sup>13</sup> The panel felt that as the behaviour of the alienating parent is what primarily aligns the child, modification of that behaviour is the first step in halting the cycle. Simply removing the child from custody it was felt, was not the preferred option and at the very least should not be the lone solution.

The Panel suggested that orders should include healing steps from as early on in the conflict as possible, including an attempt to keep lawyers from getting overly adversarial and therefore exacerbating the alignment. At trial, counsel for the child and an impartial court appointed expert would aid in this. In terms of orders made by the finder of fact, it seems obvious that the child, who has now been recognised as a victim of emotional abuse, should be given some sort of ongoing counselling. Education, and child parenting classes including education about the needs of the child, were suggested for both the alienating and target parents. If possible it was encouraged for either the psychological expert or the judge to develop a behavioural plan to intervene in the alienation process. Such a plan would include such things as permitting access for a period of time, not making any disparaging remarks about the other parent for a period of time, and actively encouraging the child to make positive remarks about time spent with the target parent.<sup>14</sup> Emphasised as crucial by the panel was the fact that any plan must be followed through with teeth from the court.<sup>15</sup> Warrants to enforce access might have been envisaged. The custody swap is reserved, even by Gardner, for the most serious of cases. A more measured approach would be to reintroduce the target parent slowly, and allow

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<sup>12</sup> Joan Kelly "Family Law and the Rights of Children and Youth"(NZLS seminar, Auckland, September 1997) 217.

<sup>13</sup> The focus was on 'Parental Alienation' but it is clear that the syndrome was intended.

<sup>14</sup> Kelly, above, 217.

<sup>15</sup> Joan Kelly "Family Law and the Rights of Children and Youth"(NZLS seminar, Auckland, September 1997) 217.

the child time to re-develop the relationship with the target parent within an organised and supportive framework.

### **C     *Introductory Summary***

Parental Alienation Syndrome has been outlined and studied in a rudimentary manner, with various similar hypotheses of symptoms and treatment emerging. Many courts in various jurisdictions have responded to this and allowed argument based on PAS. However, for every similarity and congruence of thought, there is an equal and opposite contention. This is the reason that PAS has not gained complete and full acceptance. Some criticisms of PAS will be discussed in the following section.

### **III    *ARGUMENTS AGAINST PAS***

Parental Alienation Syndrome is a controversial diagnosis, in part because it is used in custody litigation where tensions and accusations often run high, and any examination of the parties is clouded by circumstance. However, several cogent attacks have been launched against the recognition of this disorder. The following primary criticisms will be canvassed, and counter arguments discussed: First, the contention that Gardner himself as the self-proclaimed 'founder' of PAS is an imprudent and poorly researched scholar, particularly in light of his cavalier attitude towards allegations of abuse. Second, the lack of recognition of PAS by the scientific community, which will lead to a comparison of another similarly 'unproven' syndrome. Finally, the last section will address the criticism that PAS is no more than the ordinary reaction of families attempting to cope with separation, to which a confusion within the syndrome will be highlighted.

*A Robert Gardner*

Parental Alienation Syndrome finds both its genesis and its downfall in Dr. Gardner. There is much concern that his work has not been peer-reviewed and that there has been little research into the psychological issues. Indeed, the fact that PAS is a syndrome arising in the context of custody disputes has led to very few articles being written about the subject in non-legal journals. It is contended that his discovery of the syndrome was based on a small sample from his own practice and his personal observations. Other criticisms include that Gardner publishes his own work, and that he is something of a hired gun for custody proceedings. Although he maintains that he is not affiliated with any advocacy groups, he and his cause have been championed by various fathers' associations. This is not surprising as in 1998 he maintained (after nearly 20 years of study) that in 85-90 per cent of the cases he had observed, the mother was the alienating parent. Perhaps revealing his limited research methods or limited study size however, in 2000 he revised this statement and in an addendum to his book noted that the past two years had demonstrated a shift that put the gender ratio of alienating parents at 50:50.<sup>16</sup>

Simply because Gardner has debatable history as a researcher, or because his research methods are poor, does not mean that PAS itself should be dismissed. Other professionals at other times have recognised similar patterns of behaviour – and others have conducted more thorough inquiries. Whether or not the syndrome exists in the exact form that Gardner states is less important than recognising that there is an undeniable similarity in alleged PAS cases. If the syndrome is to be discredited, it must be on a stronger basis than that its founder was poor at formulating.

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<sup>16</sup> Basic Facts about the Parental Alienation Syndrome <<http://www.rgardner.com/refs>> (last accessed 15 July 2002)

### *1 PAS and abuse*

A specific complaint with PAS is that it acts as a counter to allegations of abuse, and that a successful contention of the syndrome could result in custody decisions adverse to a child's welfare. There is a concern that where valid allegations of physical or sexual abuse are made, a successful argument of PAS will put an abuser back into contact with the victimised child. Gardner has been somewhat cavalier about statements concerning child abuse stating that the "vast majority" of sexual abuse allegations made during custody disputes are false.<sup>17</sup> There is a genuine concern that the syndrome as Gardner formulates it might place an abused child in the sole custody of the abuser, or even in the less extreme, that a clear demonstration of the 'syndrome' will obscure the fact that the child has a legitimate reason to avoid contact. Along this vein is Gardner's suggestion that a severe case of PAS warrants a complete change of custody to facilitate the child's 'deprogramming'. In a case of actual abuse however, it is evident that such a drastic measure will result in the worst of consequences: not only will the child be placed into the care of the abuser, but they will be cut off from the only other adult who might act as protector.

### *B PAS and the Scientific Community*

It is suggested that expert testimony based on PAS lacks an adequate scientific foundation for admissibility and that it oversimplifies the aetiology of the symptoms it includes.<sup>18</sup> Part of this problem lies in the fact that the syndrome is not rigorously defined. The form of PAS originally tendered by Gardner was one specifically related to false allegations of sexual abuse. However, it has slowly come to encompass all situations where a child resists access. The problem with research in this area is that only recently have studies emerged comparing children of divorce to a control group of children in intact

<sup>17</sup> Kathleen Colbern Faller "The Parental Alienation Syndrome – What is It and What Data Support It?" (1998) 3 Child Maltreatment 98, 103.

<sup>18</sup> Richard Warshak "Remarriage As A Trigger Of Parental Alienation Syndrome" (2000) 28 American JF Therapy 2, 29.



families. It is unhelpful that studies continue to be conducted on children in the custody of their mothers and visiting their fathers – which is a substantial deficiency.<sup>19</sup> Also noted is that these kinds of studies are necessarily voluntary and are generally conducted on white upper middle class families. While increased study and improved formulations of the syndrome should be welcomed, poor quality of study has led to misleading conclusions and imprecision in diagnosis. Kelly and Johnston<sup>20</sup> have promoted a view of the syndrome that extends the causative factors to include both those within the child and within the alienating parent. Cartwright<sup>21</sup> widens the inquiry, postulating that persons other than the parents can be responsible for alienation. There seem to be many theories that extend from Gardner's PAS but few that attempt to refine and consolidate it.

#### 1 *The DSM-IV and ICD-10*

When courts have refused to admit testimony on PAS the reason cited has often been related to its non-acceptance by the scientific community. The standard for such acceptance is the inclusion within a catalogue of disorders such as either the World Health Organisation's ICD-10 or the Diagnostic and Statistical Manual of Psychiatric Disorders (DSM-IV). Neither of these contain a listing on PAS. Further, according to the chair of the American Psychiatric Association's DSM-IV work group on 'Disorders Usually First Diagnosed During Infancy, Childhood or Adolescence', PAS has not been proposed to any DSM committee.<sup>22</sup>

<sup>19</sup> Joan Kelly "Family Law and the Rights of Children and Youth" (NZLS seminar, Auckland, September 1997) 212.

<sup>20</sup> JB Kelly and JR Johnston "The Alienated Child: A reformulation of Parental Alienation Syndrome" (2001) 39 F Court Rev 249.

<sup>21</sup> GF Cartwright "Expanding the Parameters of Parent Alienation Syndrome" (1993) 27 American JF Therapy 205.

<sup>22</sup> Richard Warshak "Remarriage As A Trigger Of Parental Alienation Syndrome" (2000) 28 American JF Therapy 2, 29.

The counter to these arguments is that PAS does exist, whether it is recognised or not. It is noted that many syndromes take time to work themselves into the catalogues, and often require pressure from lobby groups for acceptance. Additionally, other syndromes, although unrecognised by the DSM-IV, are accepted in courts of law.<sup>23</sup> Battered Women's Syndrome (BWS) is the prime example – well known and widely used as a partial defence in several jurisdictions, but not listed in the DSM-IV. Post Traumatic Stress Disorder (previously syndrome) is another example which was only formally recognised recently. For the two above conditions, and arguably for PAS, even without professional vetting, clinicians can recognise a predictable symptom pattern which, while perhaps not 'official', can aid in courtroom findings.

## 2 *PAS, BWS, and syndromes in general*

The use and relative level of acceptance for Battered Women's Syndrome makes a strong argument for the acceptance of an 'unrecognised' syndrome such as PAS. BWS is not recognised in the DSM-IV or ICD-10. As is the case with PAS, agreement has not been reached as to whether BWS constitutes a distinct psychiatric diagnosis. However, this has not impeded clinicians or the legal system from acknowledging that BWS exists, whatever weight they might attach to it.<sup>24</sup> Although the theories that underpin both syndromes remain uncertain, this is not uncommon for psychiatric disorders. Both syndromes have an (arguably) predictable symptom pattern. Another factor to consider is the possibility that both will eventually be incorporated into one of the mainstream psychiatric classifications. If PAS is regarded as being in a process of acceptance then the next step is obviously to clarify and refine the definition of the syndrome in order to speed that acceptance and to make best use of it now.

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<sup>23</sup> Tony Hobbs "Parental Alienation Syndrome and UK Family Courts, Part I" [2002] Family L 182, 185.

<sup>24</sup> Hobbs, above 185.

Neither of the syndromes have been corroborated by rigorous scientific testing and yet BWS's existence is not in question. In many ways it would be unethical to scientifically test for the effects of domestic abuse<sup>25</sup> as it would be to test brainwashing by parents. Certainly, further study of divorcing families could be undertaken – but as with many of these voluntary studies it is unlikely that an appropriate cross section would volunteer as subjects.

Waiting on scientific testing may indeed be unnecessary. In general, psychological expertise is principally based on clinical experience rather than on theories subject to scientific testing. Therefore for both PAS and BWS it may be enough for an expert to detail what he believes in a certain case rather than waiting for the academic literature to amass.

One criticism levelled against PAS is its stated aetiology: that the symptoms are caused almost exclusively by the alienating parent. Yet research in this area shows that in high-conflict divorces many parents engage in indoctrinating behaviours and relatively few children become alienated; “[h]ence, alienating behaviour by a parent is neither a sufficient or necessary condition for a child to become alienated.”<sup>26</sup> In much the same way, there are many battering relationships where battered women do not attack their partners with lethal force. Indeed one necessary condition for the syndrome – learned helplessness – would actually suggest that these women would be the least likely to act out. What causes a woman to ‘snap’ or a child to become alienated is certainly due to some indefinable internal factor but arguably neither would be triggered without the external pressures of high-conflict relationship breakdowns or battering relationships.

Part of the concern in using either of these syndromes judicially is that legal tests are premised on requirements which are difficult to satisfy in every

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<sup>25</sup> Elisabeth McDonald “No Defense of Battered Women’s syndrome” (1998) 507 Law Talk 33, 33.

<sup>26</sup> JB Kelly and Johnston JR “The Alienated Child: A Reformulation of Parental Alienation Syndrome” (2001) 39 F Court Rev 249, 253.

case, for instance: the imminence of harm and necessity requisite for BWS, or perhaps with PAS: the evidence of programming. Another danger in attempting to use either syndrome in the courts is the concern that such use will further pathologise and medicalise the behaviour of abused women and abused children. The standard established by the syndrome – for instance: ‘learned helplessness’ or a ‘campaign of denigration’ is a standard for the ideal candidate, but these standards can not properly accommodate those who do not exhibit the requisite symptoms on a regular basis.<sup>27</sup>

There is a danger that in being too closely defined a syndrome will come to be too rigidly applied by the courts. It is a bizarre fate of ‘syndromes’ that they must first be medicalised to gain acceptance, and then demedicalised by dropping the title ‘syndrome’ to allow expert explanations in terms of practical reality rather than individual pathology. This has been, in many ways, the route taken by BWS. As Justice Thomas stated in *Ruka*<sup>28</sup>

while the syndrome represents an acute form of the battering relationship... it is probably preferable to speak simply of the battering relationship and its effects on the mind and the will of women in such relationships... it is not, therefore simply a matter of ascertaining whether a woman is suffering from battered women's syndrome and, if so, treat that as an exculpatory factor. What is important is that the evidence establish that the battered woman is suffering from symptoms or characteristics which are relevant to the particular case.

If PAS were to follow BWS's lead, it seems that reducing the syndrome to a series of symptoms and requirements to ‘tick’ would be of minimal value since the real issues will eventually return to wider considerations of what is fair and just, having regard to the peculiarities of the particular case. To echo the above judgement, it is not a matter of ascertaining whether the child is suffering from PAS, but that in suffering, the child is increasingly unable to see where their interests or welfare lies. Seeing PAS in the context of the entire

<sup>27</sup> McDonald, above, 34.

<sup>28</sup> *Ruka v DSW* [1997] 1 NZLR 154, 173 (HC) Thomas J.

case will further help to determine what is right for this child in this set of circumstances, taking into consideration the effect of PAS.

### **C PAS as Part of the Break-up**

One explanation for alienation is that family systems simply change upon family break-up. A new system means some adjustment and possibly some sadness. Changes or interruptions to the family unit, cause children in particular to recognise their own vulnerability and the fragility of their relationships.<sup>29</sup> A host of responses to these feelings can be brought out in a child depending on their age and maturity. One study noted that the age and developmental stage of children played a major role in their reaction to parental separation – of particular note to this discussion was the reaction of 9 - 10 year olds who tended to openly express anger and to commonly align with one parent against the other.<sup>30</sup> A more recent study undertaken by Johnston<sup>31</sup> found that refusals of visitation appeared frequently in high-conflict custody disputes with three-fourths of children of the 9 - 12 age group, in alignments more than two to three years post separation. It is also important to note that a child's primary attachment can alternate between parents at different stages of development, and that their inherited personality characteristics may well make them feel more affinity for one parent than the other at any given time.<sup>32</sup> An explanation for what is seen as PAS then might really be no more than a natural insecurity on the part of the child when faced with certain circumstantial and developmental factors.

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<sup>29</sup> Goldstein, Freud and Solnit *Beyond the Best Interests of the Child* (Harper and Rowe, Chicago, 1973) 18.

<sup>30</sup> J Wallerstein and J Kelly "The Effects of Parental Divorce" (1975) 14 *J American Academy Child Psychiatry* 600, 614.

<sup>31</sup> Janet R Johnston "Children of Divorce Who Refuse Visitation" in Charlene E Depner and James H Bray (eds) *Nonresidential Parenting* (Sage Publications, Thousand Oaks, California, 1993) 120, 124.

<sup>32</sup> Dick Webb and others *Family Law in NZ Tenth Edition* vol 1 (Butterworths, Wellington, 2001) 465

As a group, children of divorce do have a lower level of well-being as measured by psychological adjustment measures.<sup>33</sup> Individual differences may seem small, but significant statistical differences of divorced children and intact families have shown children of divorce to have "more aggressive acting-out behaviours, impulsive and anti-social behaviours, more problems with relationships with their parents, more negative self-concepts and more academic achievement problems."<sup>34</sup> Therefore, much of what might appear symptomatic of PAS is also symptomatic of divorce. Children of a high conflict marriage which has ended in separation are likely to have observed hostile interactions between their parents. It is not surprising then to see these behaviours incorporated into the child's personal repertoire of conduct.<sup>35</sup> There may be no need for the alienating parent to brainwash a child as they are already primed to act out and to deal with the target parent in the same way they have seen them dealt with in the past.

### *1 Justified alienation*

Ongoing parental acrimony, especially when associated with physical violence, could lead to justified alienation. Some behaviours such as narcissism, alcoholism, and other antisocial tendencies when exhibited by a parent would be alienating in any marital context. Parents who embroil their children in the middle of their conflict in particular affect the adjustment of the child to the divorce situation. An American study<sup>36</sup> investigating the way parents involve their children in their separation has a noticeable similarity to some of the factors recognised as symptoms of PAS:

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<sup>33</sup> Joan Kelly "Family Law and the Rights of Children and Youth" (NZLS seminar, Auckland, September 1997) 212

<sup>34</sup> Kelly, above, 212.

<sup>35</sup> Kelly, above, 213.

<sup>36</sup> Buchanan, Dornvosh, McCobity as quoted in L Trinder "Competing constructions of childhood: children's rights and children's wishes in divorce" (1997) 19 J Social Welfare FL 291, 301.

- 1) **Children asked to carry a hostile message to the other parent:** "Tell your mother I'm not buying you those shoes because I already sent her plenty of money, I don't know what she does with it" (this may affect the child's perception of the target parent)
- 2) **Children asked intrusive questions about the other parent:** "Where did Mum's boyfriend sleep this weekend?" (this may cause the child to question the actions of their caregiver)
- 3) **Creating in the child a need to hide information about the other parent and thus compartmentalize their lives** (this could explain the child more closely identifying with that one relationship that is more constant - the bigger compartment)
- 4) **Creating in the child a need to hide their feelings about the other parent** (a sense that it will not be acceptable for the child to return from access and say that he or she had a nice time, or to say "I love Mum, can I go see her for a few hours?")

Parents who cannot distance their children from their own anxieties about separation certainly do them a disservice, but it would be ridiculous if such a common wrong was then termed a medical syndrome.

## 2 *Parental Alienation and PAS*

Taking into account normal reactions to separation, it is evident that many familiar parental behaviours can elicit an alienated reaction. A child might become alienated because of feelings of abandonment, because of frustration at a change in routine or because the child is angry at the parent who initiated the divorce. Further, alienating a parent may be the way a child attempts to exercise control over the situation, or the way feelings of confusion can be expressed. Neither of these behaviours can justifiably be considered PAS.<sup>37</sup> 'Parental Alienation' is a general designation. PAS, by contrast is a very specific subtype of parental alienation which, as detailed above, involves both the child and a parent in active, unfounded denigration of the target parent.

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<sup>37</sup> Richard Gardner "The Parental Alienation Syndrome" <<http://www.rgardner.com/refs>> (last accessed 15 July 2002)

PAS is meant to go much further than any ordinary alignment or affinity. Darnell, defines 'Parental Alienation' as "any constellation of behaviours, whether conscious or unconscious, that could evoke a disturbance in the relationship between a child and a targeted parent."<sup>38</sup> This imprecise definition defines behaviour, but could not define a syndrome

In a case where PAS is at issue, other alienating factors may remove the court's focus from the alienator and redirect attention to what might be only minor parental deficiencies exhibited by the target parent. Using the term PAS in an inappropriate context both dilutes the meaning of the syndrome and calls its validity into question. Certainly there is nothing unusual about a child clinging to the parent with whom he or she has most contact – but to conclude that this is PAS without more evidence would be irresponsible, both as regards the parties and as regards the diagnosis.

Another possibility is that desperate parents in a particularly difficult divorce may falsely allege abuse or neglect on the part of one parent. In a tit for tat kind of way PAS offers a counter – instead of denial the other parent can be on the offensive, alleging a different kind of abuse which is just as difficult to prove. The line between accidentally involving a child in the separation, and using that separation to alter the child is a fine one. While the courts contend with two falsified claims, the fate of PAS as a diagnosis may be called into dispute.

Any tool that is used to determine PAS in the courts then will need to be flexible enough to differentiate between normal alienated responses to divorce, alienated responses arising out of something more sinister than divorce, and alienated responses arising out of PAS.

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<sup>38</sup> D Darnell "Parental Alienation: Not in the Best Interests of the Children" (1999) 75 North Dakota L Rev 323, 329.



### **D Criticisms in Summary**

Without further investigation it is impossible to state whether PAS is valid and therefore *should* be accepted in a court of law. However, none of the criticisms levelled against PAS are without their counter: Discredit of the syndrome does not necessarily follow from discredit of its pioneering founder; Scientific acceptance of the syndrome is important, but in light of the recognition of BWS, exclusion from reference toms is not insurmountable; Finally, the similarity between PAS and ordinary alienating processes requires care in investigation, which should be the objective in any case.

If a court is prepared to hear argument on PAS, and make judgements based on its effect, then the finder of fact must also be prepared to accept it in light of all the arguments detailed above. Fortunately this endeavour is not one that a Judge has to undertake alone. As outlined in the following section, experts in the field will also aid in deciding how to utilise PAS in the court.

## **IV FORENSIC PSYCHIATRY**

PAS requires Judges and lawyers to deal with the difficult task of evaluating the mental state of a child and their interactions with family. This is not strictly a legal professional's area of expertise. The realm of forensic psychiatry allows opinion of an expert in the area of disorders of the mind to inform a legal determination.<sup>39</sup>

### **A Law v Medicine**

The number of possible syndromes, their corresponding symptomology, and theoretical bases require constant scrutiny in order to chart modifications and extensions. That scrutiny must be done by one who can devote a substantial amount of time to understanding those developments. Without this expert, the

<sup>39</sup> Alan P Wilkinson "Forensic Psychiatry: the Making- and Breaking - of Expert Opinion Testimony" [1997] J Psychiatry L 51, 53.

nature of case law is such that changes may occur in a line of diagnosis before the law has had time to directly consider a given issue at all. Additionally, many clinical and therapeutic tests do not map well onto the legal/ forensic arena.<sup>40</sup> The medical field is concerned with treatment, the legal with facts. If some treatment course might work, based on some evidence, a clinician may initiate it. A legal determination requires much more certainty. In a legal forum, the pathologisation of a set of circumstances by the mention of tests; statistical analysis; and the daunting terms: 'syndrome' and 'disorder' may appear as absolute facts, obscuring behaviours' merely hypothetical basis.

Currently, without recognition in the DSM or ICD, PAS must be recognised by medical and legal personnel as a non-diagnostic syndrome with no clearly verified pattern, cause, or treatment. However, as discussed above, even disorders included in the DSM have often undefined patterns, origin, and effects. Even when a syndrome is accepted, it represents only a "common denominator of the most frequently observed...behaviours."<sup>41</sup> As discussed above an individual's behaviour may not fit neatly into the class of behaviours 'most frequently observed' and without some adjustment might fall outside both legal and mental health categories.

### ***B The Bias Of The Unbiased Expert***

Section 29A of the Guardianship Act, and section 178 of the Children Young Persons and Families Act<sup>42</sup> provide for the appointment of a neutral expert to give opinion on the medical and psychological status of the parties involved in a custody dispute. This is well as the nature of forensic psychiatry is not the same as clinical psychiatry: "In a therapist empathy is good, in an

<sup>40</sup> Ian Freckelton "Evaluating Parental Alienation and Child Sexual Abuse Accommodation Evidence" (2002) Butterworths FLJ 57,57.

<sup>41</sup> RC Summit "The Child Sexual Abuse Accommodation Syndrome" (1983) 7 Child Abuse and Neglect 177, 180.

<sup>42</sup> to be discussed in section VI

evaluator it may be an impediment to accuracy and objectivity."<sup>43</sup> However, it is the nature of the legal atmosphere that even the most neutral expert will be tempted to frame opinions in the most persuasive way possible. Once a decision is made on the existence or absence of PAS it will be inevitable that the expert will want to ensure that justice is done for the child. Inevitably a determination on PAS will favour one party or another in a custody or access case, in this way it may be a concern that "altruism strengthens partisanship and objectivity suffers."<sup>44</sup>

It must be recognised that even a neutral expert is not plucked from some uniform stock of experts. The nature of psychiatry is that it is the realm of the educated guess, and further the guess of an expert who may be informed by any range of factors. As Newman states: "expert witnesses make choices about which psychological theories and tactics to believe in and practice, ... theoretical orientations and beliefs vitally influence expert's recommendations."<sup>45</sup> One simple example of a neutral expert's theoretical bias might be their belief as to whether to match a child with a parent by gender. While this would not be a *legally* acceptable basis on which to make a determination, it may be made nonetheless under the guise of expert opinion. In addition, since forensic psychiatry is not a strictly therapeutic endeavour, unless the expert continues on as therapist for the parties it may never become apparent as to how their prior recommendations have fared. Thus a therapist could conceivably make incorrect determination after incorrect determination (of PAS for example) and become entrenched in a flawed line of analysis.

### **C Evaluation**

In cases involving children, the integrity of the fact finding process gains an extended significance. There is arguably even less room for error.

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<sup>43</sup> Stephen Newman "Assessing The Quality Of Expert Testimony In Cases Involving Children" [1994] *Jof Psychiatry and L* 181, 216.

<sup>44</sup> Newman, above, 204.

<sup>45</sup> Newman, above, 189.

Therefore it must be made clear that the expert has enough time and experience to truly determine whether a syndrome such as PAS is a factor. There is the danger that a neutral expert, who may not have had ongoing interaction with the child, will not have the time to examine the situation carefully. A brief evaluation made expressly for the legal proceedings may "overemphasise first impressions, and produce poorly substantiated conclusions."<sup>46</sup> A similar error that the fact-finder must be wary of is the 'snapshot effect' where a brief look at a family may be based on behaviours and moods that later change. Parents in a custody battle in particular may behave atypically badly or atypically well in the evaluation process. Newman notes: "as their anxiety increases, parents may lie, become provocative and insulting, or even appear close to psychosis. On the other hand some parents handle the anxiety with denial and seem to be reasonable or calm."<sup>47</sup> One would hope that a professional in this field would be alert to the perils of incomplete analysis. However, factors such as time constraints and the calculated avoidance of assessment by both parents and children may make extended evaluations impossible. The finder of fact should be aware of such dangers and prepared to question whether they exist.

#### ***D Temptation to Defer***

Evidence of 'specialized knowledge' only permits an expert to testify as to personal expertise, observation, and skill. It is for the finder of fact to weigh the evidence. There is concern however, that in a situation where the specialized knowledge of children, relationships, or psychology in general is so far beyond the expertise of the Judge that it will be tempting to simply defer, blindly trusting in the expert's evidence as fact. A medical diagnosis, however uncertain, may have the right resonance of integrity. This is not acceptable. A judge should feel free to take an expert's advice but to also take into

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<sup>46</sup> Michael Günter "Induction, Identification or Folie à Deux? Psychodynamics and Genesis of Munchausen Syndromes By Proxy and False Allegations of Sexual Abuse in Adolescents" (1998) 17 Med L 359, 369.

<sup>47</sup> Stephen Newman "Assessing The Quality Of Expert Testimony In Cases Involving Children" [1994] Jof Psychiatry and L 181, 187.

consideration that, particularly in the case of syndromes, diagnosis may be based on theoretical preferences, or beliefs derived from the expert's unique set of past clinical cases, and may not reflect the accepted practice or wisdom of a body of practitioners. A fact finder should not be under the misapprehension that 'clinical opinion' has the purity or force of a scientifically tested theory behind it. Ian Freckelton takes account of all of this in his recent statement that:<sup>48</sup>

It is important that decision makers bring...a healthy preparedness to question assumptions and contentions. It is likewise important that advocates facilitate the capacity of decision makers to evaluate the probative value of facts and new theories by assisting courts to test rigorously the bases, reasoning processes and opinions of experts.

It is the court's obligation to come to a decision on the whole of the evidence, including the statements of the parties and, where possible, on the basis of discussion with the child. The views of the experts must play their part but finally the court has to decide the issue for itself based on the paramount consideration of the child's well-being and views. If all of the evidence leads the court to a view which is different from that of the expert, or if the requirements of the law dictate an alternative conclusion, that conclusion is the court's duty to express. Stephen Newman suggests that:<sup>49</sup>

It is well to remember that even in the modern age, the ideal decision maker in family matters is not the scientist, but the wise man. It is not the knowledge of an Einstein or a Freud that we desire in the most troublesome cases, but the wisdom of a Solomon.

### *E PAS or Parental Alienation?*

The difficulty with syndrome evidence, and particularly disputed syndrome evidence, is that it is very easy to argue that the theory has been discredited or that the condition has never existed. It may be possible to attack

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<sup>48</sup> Ian Freckelton "Evaluating Parental Alienation and Child Sexual Abuse Accommodation Evidence" (2002) 4 Butterworths FLJ 57, 64.

<sup>49</sup> Stephen Newman "Assessing The Quality Of Expert Testimony In Cases Involving Children" [1994] Jof Psychiatry and L 181, 183.

the probative value of PAS evidence for the reasons discussed above, most notably because it is not empirically supported. However if the issue of PAS needs to be raised, that debate must be confronted. One commentator suggests:<sup>50</sup>

When considering the theory of expert testimony...it is vitally important to avoid confusion engendered by reference to syndromes....Use of the word syndrome leads only to confusion and to unwarranted and unworkable comparisons ... The best course is to avoid any mention of syndromes.

It appears that the issue of 'Parental Alienation' might be raised where it is felt that PAS would be too contentious. This course allows counsel, the report writer and the fact finder to sidestep inquiries into the syndrome's validity. There is a danger in faint-heartedness at this late stage. If a belief in PAS is genuinely held, the word syndrome should not be omitted. As noted above, such an omission may dilute acceptance and recognition of the true syndrome. If parental alienation encompasses both general situations of alienation and the specific situation of PAS it is inevitable that the definition of PAS will further blur. If the syndrome is valid, clinicians and legal personnel have an obligation not to confuse or obscure it. In a true instance of Battered Women's Syndrome, the 'syndrome' is not dropped in order to avoid potentially difficult questions. Only when such questions are competently met will PAS gain acceptance in the legal community.

#### ***F Section Summary***

The evidence of an expert is essential to an investigation of PAS, however equally essential is the attention and diligence of the fact finder. Syndrome evidence must be recognised as a grey area, and one which by nature does not fit well with the law. It must then be dealt with accordingly, without numb deference to the expert or avoidance of the issues.

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<sup>50</sup> Myers "Expert Testimony in Child Sexual Abuse Litigation" [1989] Nebraska L Rev 68, 69.

## V *PAS OVERSEAS*

Parental Alienation Syndrome was first noted in 1985. The syndrome is no longer novel, however for the reasons canvassed in the previous sections, in the context of custody disputes it is far from a known quantity. PAS has been considered in many jurisdictions with varying degrees of acknowledgement and acceptance. No jurisdiction appears to have a clear plan on how to deal with the syndrome when it is raised. The following provides a sample of recent developments in various jurisdictions to which New Zealand courts might look for guidance:

### A *United Kingdom*

In the United Kingdom there is a paucity of case law on PAS and research is mainly descriptive.<sup>51</sup> Until the recent case of *Re C (Prohibition on Further Applications)*<sup>52</sup> it was not an accepted entity in either the law or in psychiatric practice. This case involved an applicant father who alleged PAS in respect of his 14 and 15 year old daughters, one of whom had been refusing access since the age of 10. It was decided that a Children and Family Courts Advisory and Support Service (CAFCASS) guardian should be appointed for the two children with leave for that guardian to instruct a psychologist. Principal Family Court Judge Butler-Sloss then stated that CAFCASS Legal should approach such a case:<sup>53</sup>

<sup>51</sup> Tony Hobbs "Parental Alienation Syndrome and UK Family Courts – The Dilemma" [2002] Family L 381, 381.

<sup>52</sup> [2002] EWCA Civ 292.

<sup>53</sup> *Re C (Prohibition on Further Applications)* [2002] EWCA Civ 292 para 13.

with a view to looking at the entire family to see whether there is any way out of the problems and not to concentrate upon the issue of parental alienation syndrome. [PAS] will of course take its place in any consideration but not to obscure the other matters that may need to be looked at.

While commentators such as Tony Hobbs believe this points to an endorsement of PAS, other commentators do not see that as a reasonable conclusion. Catherine Williams states that to regard the comments made by Butler-Sloss as an acknowledgement of the existence of PAS would be a “very tendentious conclusion”<sup>54</sup> Williams believes that Butler-Sloss is merely taking note of the allegations of the father in this particular case. Hobbs apparently ignores the comment made by Butler-Sloss that she “would say to Mr C that his view of the significance of parental alienation syndrome may have obscured other more obvious indicators that M herself is giving.”<sup>55</sup>

Of note is the fact that two years prior to the judgment in *re C*, the most prominent decision regarding PAS was that of the Court of Appeal in *L v M and H (Children)*<sup>56</sup> Butler-Sloss also sat on this case and said that:<sup>57</sup>

the existence of the syndrome is not universally accepted. There is, of course, no doubt that some parents... are responsible for alienating their children... That unhappy state of affairs, well known in the family courts, is a long way from a recognised syndrome...

One wonders, in the two years lapse, if the Principal Family Court Judge had the change of view on the subject that Hobbs proposes, or if the syndrome has earned this new recognition. Like the state of PAS the answer to that question is uncertain.

<sup>54</sup> Catherine Williams “Parental Alienation Syndrome” [2002] Family Law 410, 411.

<sup>55</sup> *Re C (Prohibition on Further Applications)* [2002] EWCA Civ 292, para 12.

<sup>56</sup> [2000] EWCA Civ 194.

<sup>57</sup> [2000] EWCA Civ 194, 199.



## **B**      *Australia*

Ian Freckelton regards the most significant decision on PAS in Australia as the decision by the Federal Court in *Johnson v Johnson*.<sup>58</sup> This decision focussed on whether a parent could raise the issue and call evidence of PAS, not on whether it was a valid entity. The symptoms of PAS noted in that case draw from the Kenneth Byrne formulation.<sup>59</sup> On the basis of these, the court did conclude that PAS “must be a relevant consideration” in cases where there were contact difficulties between the parents. In addition, the court had “...no doubt that [PAS was] a very real psychological phenomenon which the husband was entitled to investigate”<sup>60</sup>

Freckelton is doubtful about the precedential value of this case, and appears to think that it sends a misleading message about Australia’s acceptance of PAS which he feels is far from confirmed.<sup>61</sup>

## **C**      *Europe*

In Europe, *Elsholz v Germany*<sup>62</sup> held that a miscarriage of justice had occurred in a case where expert evidence and identifiable signs of PAS were ignored. Repeated denial of applications for access had led to an eight year lapse in custody of the appellant’s child. The courts had previously and repeatedly reached the conclusion that since the child had adopted his mother’s objections to his father, this was proof that contact could not be in the interests of his well-being. Further, they held that if forced to take up contact contrary to his mother’s will then the child’s development would be endangered.<sup>63</sup>

<sup>58</sup> *Johnson v Johnson* (7 July 1997) Full Court of Family Court of Australia— as noted in Ian Freckelton “Evaluating Parental Alienation and Child Sexual Abuse Accommodation Evidence” (2002) 4 Butterworths FLJ 57, 59.

<sup>59</sup> As described in section II

<sup>60</sup> *Johnson v Johnson*, above, 59.

<sup>61</sup> Ian Freckelton and Hugh Selby *Expert Evidence* (looseleaf, The Law Book Company, Sydney, 1993) para 13.395 (last updated July 2002)

<sup>62</sup> [2000] 2 FLR 486

<sup>63</sup> [2000] 2 FLR 486, 489.

Ignorance or aversion to a diagnosis of PAS is obvious. Only after appealing to the European Court of Human Rights was it held that the German judiciary had “interfered with one of the most fundamental rights, namely, that of respect for family life”<sup>64</sup> and the man was permitted access to his children.

#### **D USA**

The United States, birthplace of PAS and a notorious jurisdiction for sensationalized and difficult custody disputes has accepted PAS as a valid entity in many jurisdictions.<sup>65</sup> Much of the work done on the syndrome in terms of psychological studies and legal research has come out of America. This does not appear however, to have lead to a unified treatment or response to the syndrome. Although accepted, many of the cases mentioning PAS show a lack of rigour, and do not suggest that “anyone – expert, attorney, or judge...[have] question[ed] whether the theory is well founded or leads to sound recommendations or orders.”<sup>66</sup> The value of many of the American judgments then, is that they at least subject new syndromes to the ‘*Frye* general-acceptance-in-a-particular-field-test.’<sup>67</sup> This standard requires that: novel techniques be accepted by the scientific community as providing a sufficient basis for accurate and reliable opinion. *Kilgore v Boyd*<sup>68</sup> recently demonstrated that PAS did indeed meet the *Frye* test standard. The *Frye* test has arguably been replaced by the less rigorous *Daubert*<sup>69</sup> test, however this, being a lesser standard, has no bearing on the acceptance of PAS.

<sup>64</sup> [2000] 2 FLR 586, 501.

<sup>65</sup> Tony Hobbs “Parental Alienation Syndrome and UK Family Courts, Part I” [2002] FL 182, 185.

<sup>66</sup> Carol S Bruch “Parental Alienation Syndrome and Parental Alienation: Getting it Wrong in Child Custody Cases”(2001) 35 FL Quarterly 527, 544.

<sup>67</sup> *Frye v United States* (1923) 293 F 1013.

<sup>68</sup> (2000) Circuit Court of 13<sup>th</sup> Judicial Circuit of State of Florida, Hillsborough County, Family law division, Case No 99D958, Div D.

<sup>69</sup> *Daubert v Merrell Dow Pharmaceuticals* (1993) 125 L Ed 2d 469. The test states that the techniques used to gather expert evidence must have been tested, or at least testable and that actual or potential error rates have been considered.

### *E Summary*

While overseas decisions on the existence or validity of PAS may not be decisive, New Zealand must be careful to not get out of step with other jurisdictions – particularly in the event that PAS is at some point validated by inclusion in a compendium such as the DSM. It will be more difficult to justify treatment of PAS as merely part of the background if it is recognised as a disorder of similar severity to disorders such as Post-Traumatic Stress Disorder. If other legal systems are altering judicial practice to incorporate PAS, New Zealand should be careful to continue to modify its own recognition and use of the syndrome as well as continuing to question its validity. Perhaps an inquiry into the syndrome conducted here would help New Zealand to stay abreast of developments and formulate its own plan in light of potentially unique situations here.

## *VI PAS IN NEW ZEALAND - STATUES*

In New Zealand, the traditional sole-custody-plus-liberal-access arrangement is the most common of all care arrangements. Where custody or access is at issue, the governing legislation is the Guardianship Act 1968. Further, where the child is endangered in some way, The Children Young Persons and their Families Act 1993 (CYPF Act) is of use. Both will be discussed in turn. In addition, while PAS has the potential to touch on several areas of the law, the areas of most interest to this discussion are those related to child welfare and the child's wishes, which will also be investigated.

### *A Children Young Persons and their Families Act 1993*

The general principle of this act is to promote the well being of children and their families,<sup>70</sup> which encompasses all aspects of a child and family

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<sup>70</sup> Section 4

group's functioning. By virtue of section six however, the welfare of the child is the first and paramount consideration.

The most significant section of the act is section 14 which questions whether the child is 'in need of care and protection' because they are, or are likely to be harmed physically, emotionally, or sexually. The 'need' for protection is set at a relatively low standard: whether without protection there would result "sufficient harm."<sup>71</sup> Previous cases have held that exposing a child to "the insecurity of life outside the appropriate realms of a 9-year old"<sup>72</sup> was sufficient emotional harm, as was a situation in which the mother could not maintain normal relationships with others.<sup>73</sup> Parental alienation syndrome fits clearly within the ambit of emotional harm if these cases are any example. Surely using a child as a pawn against the other parent in a custody dispute could be said to subjecting them to an 'adult situation clearly outside of the appropriate realm.' Additionally, although the syndrome is not generally characterised as a disorder of the parent, the inability to maintain any semblance of a normal relationship with the only other central figure in a child's life would have an understandably detrimental emotional effect on that child, and therefore be rightly termed sufficient emotional harm.

### **B      Guardianship Act 1968**

The situation in New Zealand as regards custody and access is largely governed by the Guardianship Act 1968 (amended 1995). Under section 23(1) the court has a plain duty to "regard the welfare of the child as the first and paramount consideration". With that overriding thought in mind, the starting point of any custody dispute should be, that both parents have equal rights of guardianship and that these rights have an entrenched status.<sup>74</sup>

<sup>71</sup> *D-GSW v S* [1992] NZFLR 309, 312 McGechan J

<sup>72</sup> Dick Webb and others *Family Law in NZ Tenth Edition Vol 1* (Butterworths, Wellington, 2001) 1010.

<sup>73</sup> *Re W* (5 March 1999) District Court Timaru CYPF 076/36-37/4 Somerville J.

<sup>74</sup> By virtue of sections three, six and 10 of the Act.

Section 29A of the Guardianship Act allows the court to request an independent specialist's report on the child or the family, and is heralded as a move away from the strictly adversary system – the specialists are not partisan to any of the parties and can allow the welfare of the child to be their guide. A similar power is included in section 178 of the CYPF Act. A specialist retained under either Act, is particularly valuable in the area of PAS where it is thought that an expert obtained by one of the adult parties might not only be biased, but is in danger of missing the signs of PAS and being manipulated by the alienating parent. Interestingly, although the sections ask for a specialist report 'on' the child, they do not explicitly require that the child's views be ascertained.

Sexual and physical abuse are dealt with under s 16B, a section which provides that even where a parent has committed violence or sexual abuse, supervised access may still be appropriate. This indicates the importance attached to maintaining a relationship with both parents, even in extreme circumstances. Naturally however, this section is subject to the overriding best interests of the child. The true issue in a custody dispute then, is the degree to which the parent's guardianship rights, and the importance of maintaining such relationships need to be modified so as to ensure that the child's welfare is promoted.<sup>75</sup> Judge Inglis in *W v C*<sup>76</sup> has stated that when parents separate, their duties remain with the child and that their "primary obligation to their child [is] to consider the means by which they can continue to preserve for their child the advantages of the joint parenting and nurturing".<sup>77</sup>

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<sup>75</sup> Dick Webb and others *Family Law in NZ Tenth Edition Vol 1* (Butterworths, Wellington, 2001) 481.

<sup>76</sup> [2000] NZFLR 471.

<sup>77</sup> [2000] NZFLR 471, 474.

### *C Wishes of the Child*

A complicating factor in terms of modifying guardianship rights and the existence of PAS is the direction in s 23(2) of the Guardianship Act, which obliges the court to ascertain the wishes of the child where possible. Wishes also enter into the guidance principles in section 5 of the CYPF Act 1989. As discussed previously, wishes of a PAS child are likely to be emphatic, and may also appear lucid and mature, obscuring the reality of the situation. Fortunately under both of the above sections, the court has a wide discretion to decide the weight to attach to expressed wishes. Particularly relevant to the PAS situation is Judge Inglis' comment that "a child's welfare cannot always responsibly be regulated by what the child wants at a particular time"<sup>78</sup> appropriately stated in a case where an 11 year old's wishes were disregarded because they were influenced by strong tension between the parents.

There is a two-step process regarding the reasoning process under section 23(2): First, to ascertain the wishes of a child. In doing this, the court must be alert to influences on those wishes although these will not necessarily invalidate the wish. It is noted that all people, not just children, are influenced by their surroundings and beliefs in some way. Secondly, the court is to give weight to the wishes having regard to the child's age and maturity and overall best interests.<sup>79</sup> This second step is in line with New Zealand's obligations to Article 12 of the UN Convention on the Rights of the Child.<sup>80</sup>

Respecting the child as an active and valid participant in the divorce process necessarily involves ascertaining his or her views. This does not mean that children must be abandoned to their rights, but respect for the child and their view does require that the child be made aware that they have been

<sup>78</sup> *Re Hughes (wardship)* (21 April 1999) Family Court, Wanganui (FP 083/282/92).

<sup>79</sup> Dick Webb and others *Family Law in NZ Tenth Edition Vol 1* (Butterworths, Wellington, 2001) 481.

<sup>80</sup> Article 12 states that a child has the "right to express...views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child"

listened to, and that an explanation is given if their view is not to be given effect.<sup>81</sup> Also clear from the Convention is that an obvious interest of the child will be to maintain a relationship with both parents.<sup>82</sup> However it is also in that child's interest to be protected from abuse – whether alleged physical or alleged mental from PAS.

### 1 The Trouble With 'Wishes'

The Children's Issues Centre at the University of Otago has criticised the current wording of s 23(2) as archaic, particularly with respect to the use of the word 'wishes'. As a future-oriented aspiration, it is argued, the desires that the court must have regard to are not "grounded in the current experience and concerns of children. Children often "wish" for their parents to get back together... The difficulty is that once this "wish" is expressed there may be no further inquiry into other concerns the child may have."<sup>83</sup> The notion of wish also relates to the following complaints: That 'wish' suggests that the child will wish to choose between parents, or that it encourages a "one-off inquiry and undermines any idea of an ongoing partnership with the child into their views and feelings."<sup>84</sup>

The word 'views' has been suggested by proposed draft legislation as a term less laden with the above connotations including issues of preference. Also in the draft legislation is a proposal to remove the reference to 'age and maturity of the child' as a factor in assessing the weight to be given to wishes or views. The concern is that this phrase makes it too easy to dismiss young children's views as immature without carefully examining whether the views

<sup>81</sup> Tapp "Use of the UN Convention on the Rights of the Child in the Family Court" in *Conference Papers – The NZLS family Law Conference* (1998), 276.

<sup>82</sup> Articles 9 and 8.1

<sup>83</sup> Mark Henaghan and Bill Atkin, *Family Law Policy in New Zealand* (2 ed, Butterworths, Wellington, 2002) 294.

<sup>84</sup> Henaghan and Atkin, above, 294.

expressed are in fact significant.<sup>85</sup> Perceived maturity should not be allowed to eclipse sincerely held views. Freeman emphasises that while children should be protected from irrationality in a choice which would undermine future life choices or impair interests in an irreparable way, mistakes must be tolerated. In order to respect the obligations under the Convention he states: "We would not be taking rights seriously if we only respected autonomy when we considered the agent was doing the right thing."<sup>86</sup> Therefore, the decision to disregard a child's wishes should not be related to their maturity per se, but to their protection in the case of a choice so irrational that it will cause future damage.

## 2 *PAS and irrational choice*

In the case of PAS, a child's wish is arguably formed under duress-like circumstances. Without recognition of the syndrome, that compulsion will go unrecognised. If a child refuses contact with a parent without justification, it will arguably meet Freeman's standard as a choice of potentially unforeseen future consequences. If the parents themselves actively promote, or cannot see the danger in just such a mistake, the court must step in.

The realm of PAS requires that courts take care in ensuring that the child's expressed views are not so influenced or coached by a parent as to be other than child's true views. In *H v H*<sup>87</sup> it was held that an eight year old child was influenced by his mother's attitude to take whatever steps she could to avoid contact. In the view of the court this had made it "impossible for the child to express any view other than his apparent stated preference not to have contact with his father." And further: "To express a wish to see his father [would] only lead him into conflict with his mother who is his primary caregiver. This would not be an avenue that is open to the child."<sup>88</sup> In this

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<sup>85</sup> Henaghan and Atkin, above, 295.

<sup>86</sup> [1993] Manitoba LJ 307, 324.

<sup>87</sup> (August 7, 1992) Family Court, Nelson FP042/107/91

<sup>88</sup> (August 7, 1992) Family Court, Nelson, 5 FP042/107/91.



context the PAS is described more as a coping mechanism, but it is one that the court was alert to.

Section 23 provides enough room for PAS to be considered and to be dealt with appropriately. The Court may recognise the gravity of a child's desires, but still be justified in disregarding such wishes in the promotion of his or her best interests.

#### **D Additional factors**

Wishes of the child alone do not constitute the range of considerations relevant to that child's best interests.

In *D v W*<sup>89</sup> Fisher J set out a list of factors additional to wishes of a child that might be taken into consideration when best interests were at issue. These include:<sup>90</sup>

- 1) welfare of the child as the paramount consideration
- 2) an entitlement to love and security including consistent and dependent attitudes and behaviour, familiar surroundings, and a known routine
- 3) opportunity for personal growth including appropriate role models
- 4) wider family and connections (including new partners, extended family)
- 5) wishes of the child

Arguably in a PAS situation all of the above criteria will be relevant:

(1) If the child's welfare is best promoted by having access to both parents PAS is a barrier.

(2) If in a PAS situation a child learns that love is contingent upon denigration of the target parent, there is no sense of true entitlement to love – in fact, this is replaced by a loyalty bind. In terms of attitude and behaviour, alienating parents appear to be unable to appropriately regulate these, and the child learns by example. The second portion of this limb – for familiarity and routine is only

<sup>89</sup> [1995] 13 FRNZ 336.

<sup>90</sup> [1995] 13 FRNZ 336.

advisable if that familiarity and routine are healthy – that is if they coincide with the rest of the criteria.

(3) If the only constant caretaker in the child's life is disparaging of the absent caretaker – likely the most significant other person in the child's life – this is not a positive role model. A role model who can not be objective about those in the child's life or who directs their opinions about those people is not allowing the child to form his own opinions and make sense of his own world.

(4) Naturally, cutting a child off from one parent likely involves removing or weakening ties with that parent's family removing sources of additional support and heritage.

(5) Finally, the wishes of a child will be affected by the wishes of those around them, if their wishes are overridden by an alienating parent then their wishes are not indicative of their own true feelings and therefore have little bearing on best interests.

### *E Section Summary*

Parental Alienation Syndrome is most likely to influence and be influenced by the above provisions in both the Guardianship and CYPF Acts. Its treatment in terms of both best interests and child's wishes will inevitably shape the way the syndrome is formulated and either accepted or refused in custody and access cases in New Zealand.

## *VII PAS IN NEW ZEALAND - CASE STUDIES*

A primary investigation of PAS as it is actually treated in New Zealand is the most important part of any research on the subject. It is easy to forget that the literature and study is played out in the unfortunate and real forum of the Family Court. Hypothesis is unhelpful when the status and future of real children in difficult situations are at stake. What the courts actually do with the theories and controversies becomes the reality for these children. To help

elucidate the practical status of PAS then, five cases will be examined in chronological order, demonstrating similarities and progressions where possible.

**A P v P 1995**<sup>91</sup>

The child in this case was AL, aged four and a half years. She was living with her mother at the time of proceedings. In March 1994 an order was made to allow the father (S) supervised access to AL. This was so that allegations relating to possible sexual abuse of the girl could be observed by a psychologist and a report under s 29A of the Guardianship Act could be prepared. In the six months prior to this hearing, and due to the actions of both AL and her mother, this supervised access was made impossible. On this basis allegations were made against the mother which related to her “deliberately or unintentionally influencing the child in a way which has resulted in the expression of fear of seeing her father”<sup>92</sup>

Parental Alienation – notably not parental alienation syndrome – was suggested based on the following: First, that the mother had charged the father with indecent assault on the girl – this was eventually withdrawn and costs awarded in the father’s favour. Second, the psychologist’s view that the child’s fear was unsubstantiated, and did not arise for many months subsequent to the occurrence of the alleged abuse.

Submissions made by the psychologist supporting the claim of alienation included:

- 1) Telephone conversations taped a month after access ceased showed that AL was “happy and unreserved in her conversation and indicating that she want[ed] to spend time with [her father]”<sup>93</sup>

<sup>91</sup> *P v P* (16 March 1995) DC North Shore FP 621/94 Green J.

<sup>92</sup> *P v P*, above, 2.

<sup>93</sup> *P v P*, above, 2.

2) That the child had a fear of her father akin to what would be expected in the event of a major trauma and therefore “out of all proportion to any events which might have occurred”

3) That the fear was “extreme, irrational, and disabling for her.”<sup>94</sup>

The psychologist in her evidence agreed with the father’s counsel that “someone must be saying things to AL to have this level of fear a year later” and that this was “possibly her mother”.<sup>95</sup>

One telling occasion which was brought up at trial involved a planned meeting with the AL, the mother, the father, and the psychologist. AL had agreed to go, but after a matter of moments out of the psychologist’s observance, she became very distressed. When the psychologist went to comfort her she found the mother’s de facto partner’s child repeating the words: “S won’t get you, S won’t get you.” After this, the following interchange was recorded by the psychologist:<sup>96</sup>

I sat down with AL and asked her what she was scared of. She said: “I’m scared of S.” I asked her what she thought S would do, she said “S will touch me.”

I said, “Who told you S will touch you?” She said, “Mummy.”

[The mother] immediately said: “But what has S done?”

Implying that she was justified in telling AL that S would touch her.

In light of all of the evidence, Judge Green accepted the psychologist’s assessment of Parental Alienation and agreed with her that the only way to remedy the situation was to allow for access to occur so that the child could experience the fact that her fears would not be realised. Careful not to mention the syndrome, the Judge also notes the fact of ‘internalisation’ by the child, of the mother’s views. The Judge was concerned that “one of the major, long term effects of parental alienation is said to be the lack of proper perception of

<sup>94</sup> *P v P* (16 March 1995) DC North Shore FP 621/94, 3 Green J.

<sup>95</sup> *P v P*, above, 7.

<sup>96</sup> *P v P*, above, 3.

reality.”<sup>97</sup> This suggests that the court was indeed looking at this case as one of PAS. Situations and groups of factors are not generally linked to a ‘major long term effect’ in the way that syndromes are. Supporting the likelihood that the court believed it was dealing with PAS, the actions of the parties as reported in this case seem somewhat more severe than ordinary alienation in the course of a difficult divorce. There seems to be a reluctance in terms of stating the ‘s’ word, yet even in terms of Gardner’s formulation the case seems clear: the child has a severe aversion to one parent, out of step even with the alleged abuse. The child appears to interact well with the target parent in the times when they have been permitted to be alone. The Mother too fits the description of alienator – she typically, almost to the point of a text-book case, takes exception to the psychologist’s findings, and in terms of access states that she is “not prepared to force” the girl to see her father. Not only will she permit unsupervised access but she will not even support a meeting with herself present in order that the psychologist can get a clearer picture of the true interaction of the allegedly abusive parent. Counsel for the child did not express confidence in the mother’s ability to prepare the child for access in a neutral non-pejorative terms such as “you will be fine with dad, you will have fun.” As a result, an order was made for strictly monitored access so that the father could be observed interacting with his daughter, and then weekly monitored access unless the psychologist determined otherwise. The mother was threatened with the issue of a warrant to enforce this access if such action became necessary. No comment was made as to the severity of the alienation, nor as to more drastic possibilities such as a switch in custody.

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<sup>97</sup> *P v P* (16 March 1995) DC North Shore FP 621/94, 4 Green J.

**B** *Thomas v Thomas* 1996<sup>98</sup>

In this case the issue was whether the two girls in question should be declared as children 'in need of care and protection' under section 14(a)(b) and (h) of the Children Young Persons and their Families Act 1989.

Subsection (a) maintains that a child is in need if they are being or are likely to be harmed (whether physically emotionally or sexually), ill-treated, abused or seriously deprived.

Subsection (b) concerns whether the child or young person's development or physical, or mental, or emotional well-being is being or is likely to be impaired or neglected, and that impairment or neglect is, or is likely to be, serious and avoidable.

Finally, section(h) inquires whether serious differences exist between a parent, guardian or other person having the care of the child or young person and any other parent, guardian or other person having the care of the child or young person to such an extent that the physical, or mental, or emotional well-being of the child or young person is being seriously impaired.

Prior to this hearing, in 1992 Mr. Thomas was granted custody of his two daughters, born in 1985 (11 years old at the time of this hearing) and 1987 (nine years old). In 1993 custody was confirmed, but Mr. Thomas was cautioned that he must make an effort to: "improve his relationship as it involves the children with Mrs. Thomas to foster access and turn the children's view of their mother around. Failure to do this could result in a reassessment of custody."<sup>99</sup>

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<sup>98</sup> *Thomas v Thomas* (28 March 1996) DC Christchurch FP 009/92/90 Bisphan J.

<sup>99</sup> *Thomas v Thomas*, above, 3.

It appears that the judge at that earlier date accepted the diagnosis of PAS. If this was the case though, perhaps it was not wise to use PAS as threat of reassessment of custody. If the judge did accept PAS it would likely have been better at that time to do something concrete. If PAS is caused by an alienating parent, simply requesting them to stop makes little sense. Again the question is 'if' this truly is an example of the syndrome, it is unlikely for the alienator to change tack— and as the case demonstrates Mr Thomas was unable to do so. This points to the need to formulate what should happen if a diagnosis of PAS is accepted. Certainly an order as to counselling for some if not all of the parties should have been made at that earlier time.

In the intervening time between the current hearing and the one in 1993 the children showed resistance to access to their mother. On various occasions they ran away from school, and on one occasion ran away from their mother's home in the night and went to a police station. There were also denials of access by Mr Thomas. Both the father and his children explained their resistance to time with Mrs Thomas with reference to the following factors: she smoked, she swore at the children, and that she would physically beat them. In response to these allegations the mother replied that she "tries not to smoke in the presence of the children, that her swearing is...of little consequence and that she does not now beat them physically."<sup>100</sup> It is necessary here to remind the reader that PAS stresses that the alienation or avoidance be unwarranted. But it is not difficult to imagine why the children in this case might seek to avoid this parent. While there is evidence of alienation on Mr Thomas' part, it seems that his concerns about his ex-wife are substantiated. The danger of accepting PAS without giving full consideration to other possibilities risks punishing a concerned parent for his valid views.

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<sup>100</sup> *Thomas v Thomas*, above, 4.

In an assessment of Mr Thomas, and the resulting proposal of PAS the Judge summarises the court report writer's report including following observations:

- 1) Mr Thomas has created a narcissistic family...wherein the two children have no option but to fall in with Mr Thomas' agenda
- 2) Mr Thomas is fearful of losing the children because of matters in his background.
- 3) Mr Thomas has extreme dependency on the children and keeping them in his custody.
- 4) He carries deep feelings of hurt and resentment against Mrs Thomas.
- 5) That his complaints against Mrs Thomas although real, are insubstantial and are covering up the real issues. He has no insight into the fact that he is causative of many of the problems in this access dispute.
- 6) He has no insight as to how his behaviour impacts on the children.
- 7) The family dynamic has caused a 'splitting' whereby the children perceive their father as all good and their mother as all bad.

In many ways this report is very good, touching on all of the issues that one might expect in a PAS discussion. However there seems to be a disproportionate emphasis on the alleged alienator and less on the children. The terms used to describe Mr Thomas including narcissistic, lack of insight, "fear" due to matters in his background, as well as 'splitting' to describe the children's reactions, all point to an analysis informed by the work of Dr Kopetski of the Family and Children's Evaluation Team in Chicago. His extension on Gardner's approach was to identify particular familial and personality characteristics of alienating parents which in summary include<sup>101</sup>:

- 1) Narcissistic and paranoid relationships
- 2) Externalisation of painful feelings and responsibility, turning inner conflict into interpersonal conflict
- 3) Anger instead of sadness in reaction to the loss of a marital partner

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<sup>101</sup> Paraphrased from LM Kopetski "Identifying Cases of Parent Alienation Syndrome: Part I and Part II" [1998] Colorado Lawyer 61, 65.



- 4) A family history in which splitting (or externalising) is a prominent feature, perhaps being raised in a family where there is unresolved or unacknowledged grief.

There should be some concern when a judgment begins to read like a model case. This suggests perhaps that the situation is being 'fitted' to what the experts regard as the right criteria. Since the requirements for PAS have not been formalised this sets a dangerous precedent and may elevate one of many studies on the subject to the status of definitive study on the subject.

Under the above sections in the CYPF Act the enquiry is one into a condition or state of affairs. Under declaration proceedings the enquiry is not one of why a condition exists or who is responsible. The use of PAS therefore is to demonstrate that Mr Thomas is an unfit parent and does not add much to the inquiry of how PAS is affecting the children.

Counsel for Mr Thomas challenged the Doctor's report and submitted that PAS had been discredited. The Judge stated that he "was not aware of this from any other source and there was certainly no expert evidence to that effect."<sup>102</sup> The judge implies that he believes PAS does exist and that it is a creditable theory. However, following this, Judge Bisphan states that there is "[d]anger in placing too much emphasis on theories" and "[i]n attaching too much significance to labels. Because a certain pattern of behaviour is labelled by psychologists that does not convert the conduct into a form of definable and/or treatable illness." He continues to assert that he prefers "to look at the reality of what is happening in the family and regard the theories or stated syndromes as simply tags by which the conduct can be conveniently identified."<sup>103</sup> In light of the background of this paper, and the interests of doing justice in the particular case this seems like a sensible pronouncement. But if PAS is going to gain acceptance or be relegated to the annals of pseudo-science

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<sup>102</sup> *Thomas v Thomas* (28 March 1996) DC Christchurch FP 009/92/90, 5 Bisphan J.

<sup>103</sup> *Thomas v Thomas*, above, 5.

one wonders if a decision should be made one way or the other. This judgment states that PAS is recognised but that not much weight will be attached to theories. Confusingly however the theory of PAS is what confirms its existence in this case, and PAS in turn is what confirms that “the children are suffering abuse in the current circumstances of their family life.”<sup>104</sup>

Having seen no change in the parties since the 1993 hearing Judge Bisphan decided that a declaration was necessary. Caught between an irresponsible mother and a father with emotional problems, the children were held to be in need of care and protection. There was no real discussion of Mr Thomas’ emotional condition other than PAS, which was then sidelined as a ‘tag’ for conduct. With something as serious as the removal of his children one might have thought a ‘tag’ would be insufficient.

The focus of an inquiry under section 14 (h) is on the caregivers and it is therefore right that there should be more inquiry into the parent’s states than there would be under section 23 of the Guardianship Act. However, from the judgment and what it details of the report made by the Doctor there is very little delving into the state of the children. It is noted that they “see their mother in a bad light and all blame is shifted to her for the problems concerning access,”<sup>105</sup> and that stress has resulted in their suffering psychosomatic and somatic illnesses. But the fact that their aversion is justified should call into question the diagnosis of PAS. It may be that Mr Thomas is a poor father with little insight into the well-being of his children, it may also be that he has difficulty dealing with the loss of his marriage, however these things do not make PAS. It is well that the case did not turn on this diagnosis – but it is stressed heavily in the judgment and one wonders if it was treated as more than a tag in a case where it did not accurately describe the situation.

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<sup>104</sup> *Thomas v Thomas*, above, 7.

<sup>105</sup> *Thomas v Thomas* (28 March 1996) DC Christchurch FP 009/92/90, 5 Bisphan J.

C *L v S* 1997<sup>106</sup>

In *L v S* the disputed custody involved a child: J, who was 12 at the time the case went to trial. The wishes of the child involved remaining in the sole care of her father with no access to her mother. PAS was alleged against the father and was held to have been "clearly established". This finding went toward the decision of how best to accommodate the child's wishes in light of her father's influence.

The facts of the separation and custody included an emigration of the family to New Zealand from Taiwan in 1994 – after which the mother returned to Taiwan for a period of six months. Upon her return, the marriage broke down and the children remained in the custody of their father. There was domestic violence alleged on both sides and the father was indeed convicted of male assaults female in New Zealand. The fact that the mother had left her children in the care of their father for six months however, was seen as confirmation that the mother had no true concerns as to their safety with him.

A detailed discussion of PAS was undertaken in this case. The expert evidence confirming the diagnosis of PAS hinged on the factors that: J had expressed antipathy towards the mother and had denigrated her, and that J's sentiments were more than the usual deep feelings that would flow from the strain of custody and access. These were taken into consideration having regard to the Dunne and Hedrick criteria mentioned in section II of this paper. Although PAS was accepted as a factor influencing the child's expressed wishes, Judge Bisphan remained unconvinced of the gravity of such a finding. Sceptical of the syndrome he noted that there was "some danger in...creating a catch phrase for a state of affairs and then elevating it into a recognised psychological or psychiatric condition."<sup>107</sup>

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<sup>106</sup> 15 FRNZ 408.

<sup>107</sup> *L v S* 15 FRNZ 408, 412.

The absence of the mother, her own violence, and cultural factors relating to the norm of filio piety in Taiwan were also raised as possible causes of the demonstrated alienation. Still, after examining all of the evidence, Judge Bisphan said that he accepted the diagnosis of PAS “regardless of how it occurred.”<sup>108</sup> This seems at odds with the true analysis of the ‘syndrome.’ As discussed above, the syndrome specifically requires that the alienation and denigration of the target parent be caused by actions on the part of the alienating parent. Further, any alienation expressed is to be causally *unfounded*. In this case, the fact of a long absence of one parent, particularly after the unsettling effects of emigration, would of itself seem an obvious situation for alienation to occur. The danger discussed above – that PAS and Parental Alienation might be confused – appears to have arisen here. The syndrome, while accepted, has perhaps been accepted for the wrong reasons. It appears from the tenor of the judgment that the syndrome is not truly understood by the finder of fact. Judge Bisphan is dubious of the existence of PAS, yet he accepts all the alienation present as demonstration of the syndrome.

PAS in this case was established for the purposes of determining what should happen to J in terms of custody. Based on a report which analysed 16 separate cases of PAS, the court recognised that ultimately “each case [was] to be evaluated on its own merits and the identification of a parental alienation syndrome [was] not sufficient in and of itself to justify changes in custody.”<sup>109</sup> Contrary to the expert’s opinion in this case, and although it was felt that J was affected by parental alienation syndrome, a ‘deprogramming’ switch of custody was held by Judge Bisphan to not be warranted. As an explanation for this Judge Bisphan stated that there was “no consensus...as to how the problem c[ould] be remedied” and that “the research and studies are not sufficient to give the Court confidence that a change in custody in this particular case

<sup>108</sup> *L v S* 15 FRNZ 408, 414.

<sup>109</sup> Dunne and Hedrick “The Parental Alienation Syndrome: An Analysis of Sixteen Selected Cases” (1994) 21 *J of Divorce and Remarriage* 21, 36.

[would be] warranted.”<sup>110</sup> Instead, with regard to J’s best interests it was felt that access to the mother should be resumed. Custody remained with J’s father in the stabilizing home and surroundings she had known for two years. Counselling was suggested.

It is likely that this decision satisfied J’s best interests, however to believe that is to place no belief in the syndrome. If PAS does indeed exist, and did indeed play a role in this case, it seems inappropriate to first acknowledge it and then to leave J in the custody of someone who arguably causes her psychological damage. The potential that a diagnosis of PAS has been *inappropriately* made in this case however is concerning. Certainly whether the disorder exists or not is a matter for the opinion of the psychological expert, but the way it is utilised by the finder of fact has serious implications, particularly as to this case’s future use as precedent. The scepticism that Judge Bisphan shows for the syndrome is prudent, particularly in light of the facts in this circumstance. However, his reluctance to fully endorse the syndrome appears to be caused more by his scepticism of Gardner’s radical-custody-swap-remedy than in the diagnosis itself.

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<sup>110</sup> *L v S* 15 FRNZ 408, 416.

**D** *Baker v Stuhlmann* 2001<sup>111</sup>

This case involved an application for access. The children: R 9½ years old, and N aged 12 lived with their father. The mother was only pursuing access to R, having given up on any reconciliation with her daughter. The background to this application included the parents separation in 1993 after which the mother had custody with access to the father. There were difficulties over access, culminating with an allegation in 1999 by R that he had been sexually assaulted by the father's new wife. These allegations were retracted, then re-retracted, and custody was changed to the father with access to the mother. This access provision was not successful.

All parties other than the mother accepted that no abuse had occurred. The mother however would only go as far as to accept that the abuse would never be proven one way or the other. Despite her adamant belief that abuse did occur, the father believed that the allegations were part of a malicious campaign by the mother and suggested PAS.

At that previous hearing, The judge found that "probably the mother did not deliberately coach R to make the statements and it is more probable that they emanated from the parental conflict..."<sup>112</sup> Nevertheless, Parental Alienation (note: not syndrome) was accepted as a factor, and it seems that Gardner's text-book shift in custody was implemented at that time. It is not clear from the judgment whether R – although he had made the allegations, was in any way fearful of or resistant to access to his father. The change in custody seems somewhat extreme in the situation as it is reported, and one wonders if the rationale of the change had a punitive purpose related to the false allegations of abuse.

During the current application, the reverse of the previous situation was alleged. Counsel submitted that there had been both overt and covert parental

<sup>111</sup> *Baker v Stuhlmann* ( 6 Aug 2001) FC Auckland FP 1763 –D/01, Judge Bisphan.

<sup>112</sup> *Baker v Stuhlmann*, above, 4.

alienation of R by the father. A statement from the father made his disinterest in access clear. He maintained that:<sup>113</sup>

the dominant factor which ha[d] undermined any possibility of access between the applicant and the children is a deep-seated hatred of me and my household...Until I can be satisfied that the children will not be exposed to that...I simply cannot accept that any access would be in their interests

The expert evidence stated that R was believed to be “two thirds of the way down the alienation continuum”<sup>114</sup> while his sister had reached 100 per cent. Alienation in this context was explained by Dr Smith as meaning, not that emotional ties with his mother were broken but “that R’s view of his mother is negatively focussed at this time”<sup>115</sup> This seems then, not really a demonstration of the syndrome as such and thus perhaps rightly referred to as bare Parental Alienation. Dr Smith stated that:<sup>116</sup>

There are a number of factors that could be interpreted as supporting a hypothesis of parental alienation but to do so would require the rejection of equally plausible explanations for the behaviour. For example, N and R do indeed display a rapid deterioration in their relationship with their mother following the change of custody and increased contact with their father. However at the same time they were faced with intense parental conflict...a resumption in court proceedings and unresolved issues in respect of the statements made by R.

The confusion in terms is clear here. Were the doctor talking about reserving comment on the existence of PAS the above statement would be appropriate, but bare alienation can come from any cause including intense parental conflict as listed above. The Doctor’s reservations about the syndrome are justified but it is not helpful that she uses the terms PAS and Parental Alienation interchangeably concluding: “that it is simply not possible to make direct causal

<sup>113</sup> *Baker v Stuhlmann*, above, 7.

<sup>114</sup> *Baker v Stuhlmann* (6 Aug 2001) FC Auckland FP 1763 –D/01,5 Judge Bisphan.

<sup>115</sup> *Baker v Stuhlmann*, above, 5.

<sup>116</sup> *Baker v Stuhlmann*, above, 5.

links to PAS...as there are sets of alternative plausible explanations for the behaviour and attitudes.”<sup>117</sup>

Judge Bisphan echoed the therapist’s report and was satisfied that “it [was] more important to assess the fact of parental alienation rather than the causes of it although the causes cannot be ignored.”<sup>118</sup> This perhaps reflects the inquiry under section 23, notably different to that under section 14 of the CYPF Act. While he does not make any statement on the presence or absence of PAS, Judge Bisphan does find that R has been ‘alienated’ and that the significance of that finding is to treat alienation as a factor which must “impinge on the weight to be attached to R’s wishes not to see his mother. It is a factor which may be overriding his true feelings”<sup>119</sup> This appears a sensible course, though not one entirely related to the presence or absence of PAS.

The boy’s wishes were to neither live with his mother nor to have access to her. However these were recognised to be of recent origin and had apparently strengthened with his confusion over why his mother has abandoned a claim to his sister but persisted in her claim to himself. Dr Smith reported that:<sup>120</sup>

R is adamant at least at surface level about his wish to live with his father and not see his mother. However other statements and actions made by R present a less clear picture. For example he indicated that ‘when this is over and I am still living with Dad I might ask [ to see his mother]’

This hearkens back to one of the criteria used for the diagnosis of PAS: that while the child might scorn one parent, he retains an unspoken closeness and affection for that parent.

<sup>117</sup> *Baker v Stuhlmann* (6 Aug 2001) FC Auckland FP 1763 –D/01,5-6 Judge Bisphan.

<sup>118</sup> *Baker v Stuhlmann*, above, 5.

<sup>119</sup> *Baker v Stuhlmann*, above, 6.

<sup>120</sup> *Baker v Stuhlmann* (6 Aug 2001) FC Auckland FP 1763 –D/01,7-8 Judge Bisphan.



The Doctor notes that rather than reflecting his own experience, R's reasoning originates with his father or N. Her advice was not to disregard what "R is trying to say to the court, but rather that consideration needs to be given as to which parts of the information are accurate" Her opinion was that R's expressed wishes might simply reflect a desire to end his 'loyalty bind'. This advice was embraced by Judge Bisphan and reflected in his decision to hear R's views with caution: "R's views must be taken into account. It would be impossible to ignore them. His views at present coincide with what is in fact happening – that he is not seeing his mother."<sup>121</sup>

The Judge felt R's maturity was at a level of a normal nine and a half year old. There was at this point no mention of the potentially contributing factor that 9-10 year olds in divorce tend to openly express anger and to commonly align with one parent.<sup>122</sup> However, age and maturity were certainly not ignored in the proceedings. Judge Bisphan made it clear that he recognised R as being "at an age where he needs direction. The influences on his wishes...including a component of parental alienation, lead me to the view that R's expressed wishes are not necessarily his true wishes, and that his wishes are not necessarily consonant with his best interests"<sup>123</sup> and later: "I find, bearing in mind his age and maturity, that R's wishes are to be taken into account but are not decisive. They have been influenced by many factors and are not representative of his true wishes. They do not accord with his best interests."<sup>124</sup>

The consequences of following R's wishes and allowing this situation to continue were canvassed by Dr. Smith and reiterated by Judge Bisphan: "if R is denied a relationship with his mother, she may become an object of myth and fantasy. He may begin to see his father as all good and his mother as all bad."<sup>125</sup> The Judge, while considering the other influences in his life felt that R's

<sup>121</sup> *Baker v Stuhlmann*, above, 9.

<sup>122</sup> J Wallerstein, J Kelly, "The Effects of Parental Divorce"(1975)14 *American Academy Child Psychiatry* 600, 616.

<sup>123</sup> *Baker v Stuhlmann* (6 Aug 2001) FC Auckland FP 1763 –D/01,9-10 Judge Bisphan.

<sup>124</sup> *Baker v Stuhlmann*, above, 13.

<sup>125</sup> *Baker v Stuhlmann*, above, 11.

negative view was “not objectively justified.”<sup>126</sup> He held that there was “some element of parental alienation emanating from the father and his household”<sup>127</sup> and that the risks of reinstating access to the mother outweighed the risks in refusing all access. Still looking at R’s wishes, the judge recognised the possibility that “R w[ould] be disappointed and even upset by my decision but, ...he is still of an age and maturity where he must learn that some crucially important decisions still have to be made for him” and that: “R’s wishes are only one aspect (albeit important) of the assessment of what is in his best interests.”<sup>128</sup>

It is evident that Judge Bisphan made a concerted effort to take the child’s interests into account and although he did not follow them, they were not simply dismissed on the fact of immaturity. The concern that his choices could have caused any relationship with his mother to terminate seems to be severe enough to have warranted his wishes ‘irrational’ and therefore allowed the court to override those wishes.

On the suggestion of Dr. Smith, a measured approach to access was taken. Custody was to remain with father with access to the mother of increasing frequency and duration. Further counselling for all of the parties was ordered. Any contact initiated by R was to be encouraged. The court felt – contrary to views of Gardner – that a subtle change in access would be less harmful than a drastic one. Since it was only Parental Alienation, and not PAS found in this case, the orders appear valid.

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<sup>126</sup> *Baker v Stuhlmann* (6 Aug 2001) FC Auckland FP 1763 –D/01,14 Judge Bisphan.

<sup>127</sup> *Baker v Stuhlmann*, above, 13.

<sup>128</sup> *Baker v Stuhlmann*, above, 15.

*E Kenrick v Sheridan 2001*<sup>129</sup>

This case concerned a cross application for custody of three children of a de facto relationship. The children were: S aged 7, M aged 4 and K aged 2. The last separation of the parties was in March of 2001. The children had been in the care of their father in the family home for five months up to the time of this hearing. The eldest child was the focus of much of the hearing. Post-separation, S became resistant to access in the extreme. He accused his mother of physical abuse. When he had to go access, he would physically lash out at his mother, scream for help from neighbours and police, and call his mother names.<sup>130</sup> He would also accuse her, saying: "Dad says you've left me and Dad said you stole me, stop stealing me."<sup>131</sup>

The name calling and the content of the outbursts coincide with a study of children with so-called brainwashing parents.<sup>132</sup> Detection of brainwashing parents included the appearance of statements such as those made by S, including: inappropriate and unnecessary information, demonstrated in 85% of cases; unchildlike statements (30%); character assault (60%); and scripted views such as the view that the mother was 'stealing him' in 45% of cases. The above observations also coincide with a study by Waldron,<sup>133</sup> who stated that PAS usually follows three stages: First, the theme of the alienation is chosen, for instance abandonment or the threat of kidnapping (emphasis on stealing). This is followed by 'mood induction' which involves techniques such as guilt, playing the victim, and sympathy seeking – all which are implicit in the above statement. Finally the reward/ punishment stage where the child's contributions

<sup>129</sup> *Kenrick v Sheridan* (7 September 2001) FC Rotorua FP 063/7/99 Judge Annis E Sommerville.

<sup>130</sup> "lazy bitch, stupid idiot, dumb mum, fucking bitch..." *Kenrick v Sheridan* (7 September 2001) FC Rotorua FP 063/7/99, 2 Judge Annis E Sommerville.

<sup>131</sup> *Kenrick v Sheridan* (7 September 2001) FC Rotorua FP 063/7/99, 2 Judge Annis E Sommerville.

<sup>132</sup> Stanley S Clawar and others *Children Held Hostage. Dealing with Programmed and Brainwashed Children*. (American Bar Association, Chicago, 1991) 174.

<sup>133</sup> Waldron, Kenneth H, David E Joanis "Understanding and Collaboratively Treating Parental Alienation Syndrome" (1996) 10 *American JFL* 121, 127-128

are rewarded or punished to the extent that they coincide with the alienating parents' desires.

Relevant to the upheaval at access is to recognise that these would have been some of the very few times when both parents were in contact with their children. In the extended list of PAS symptoms observed by Dunne and Hedrick, it is noted that "Hatred of the parent is most intense when the alienating parent and the child are in the presence of the alienated parent."<sup>134</sup> It was apparent that the father's influence at these times was not muted. In various botched access changeovers, often where the father had anticipated a reconciliation with his ex-partner, the man had flown into a rage, sobbed and ranted, called his ex-partner names, called the police when she brought family members along, and generally acted-out his distress in front of the children.

The father believed that the mother was abusive. On one occasion S returned from access with a red eye and a bandage on his arm. S stated that his mother had given him a 'blood eye,' that she had hit him with an open hand, and that she had broken his arm. A doctor who examined S in his father's presence found that the boy had mild conjunctivitis, no obvious bruising or swelling, and his arm was not broken. Despite this report the father would not be swayed from the idea that the mother had abused the child. The Judge found that "although the evidence from S is inconsistent and changes with different stories to different people Mr. Kenrick is not deterred."<sup>135</sup> When giving oral evidence, the father stated on three separate occasions that he knows "100 per cent that S was abused by his mother and that physically forcing the child to go on access [was] abusive."<sup>136</sup> Despite this, the father related to his psychologist that he was "supportive of the children's relationship with their mother but that

<sup>134</sup> Dunne, Hedrick "The Parental Alienation Syndrome: An analysis of sixteen selected cases" (1994) 21 J of Divorce and Remarriage 24, 33.

<sup>135</sup> *Kenrick v Sheridan* (7 September 2001) FC Rotorua FP 063/7/99, 4 Judge Annis E Sommerville.

<sup>136</sup> *Kenrick v Sheridan*, above, 4.

the mother is not supportive of the children and their needs.”<sup>137</sup> The mother’s explanation for the bandage on the arm was that S had complained it was sore after a tire fell on him at his father’s home. The mother gave him a bandage as a panacea.

Judge Somerville regarded the access issue as extremely serious. In relation to the best interests test he said: “There is no way a child should be put in a situation where he is fearful of a parent or...where his safety is jeopardised in any way”<sup>138</sup> However with the aid of a section 29A report, it was found that when S was with his mother alone there was no indication that he was fearful of her. Occasionally he would threaten<sup>139</sup> to go back to his Dad if he did not get his way, but otherwise he was “well behaved, and when he dropped his guard, was seen to enjoy engaging with her.”<sup>140</sup> The theme of retaining an unspoken affection for the target parent is accepted as one of the symptoms to look for when making a diagnosis of PAS as noted above.

There had been past allegations of spousal violence on both sides of the parental divide. A temporary protection order against the father involving an allegation that he had threatened to “take [his wife’s] life” if the children were taken from him, was instated and then discharged. On several occasions the father had been reported by third parties as being verbally abusive to the mother in the presence of the children. The judge held however that the children would be physically safe in either of their parents’ care.

Judge Somerville recognised that “there [would be] no opportunity for personal growth of the children if they [were] held back by parent’s behaviour and attitudes. By the father supporting S’s continuing behaviour he [was]

<sup>137</sup> *Kenrick v Sheridan*, above, 4.

<sup>138</sup> *Kenrick v Sheridan* (7 September 2001) FC Rotorua FP 063/7/99, 5 Judge Annis E Sommerville.

<sup>139</sup> Another indicator of a brainwashing parent found in 8% of cases studied by Stanely Clawar and others *Children Held Hostage. Dealing with Programmed and Brainwashed Children*. (American Bar Association, Chicago, 1991) 174.

<sup>140</sup> *Kenrick v Sheridan* (7 September 2001) FC Rotorua FP 063/7/99, 5 Judge Annis E Sommerville.

causing the child to become alienated from the mother.”<sup>141</sup> Dr. Parsonson considered that this was already occurring stating that: “S’s behaviour suggest[ed] that some of his behaviour may be modelled from his father”<sup>142</sup>

It was apparent at access changeovers that S wished not to leave with his mother. However this aversion did not seem to carry over into the rest of his behaviour. Indeed, in his interview with Judge Somerville, it was noted that S did not mention ill-treatment from his mother. His only complaint was that he did not want to stay at her new house. He would not say anything positive about either parent and the judge noted that he preferred to not talk about his situation if he could possibly avoid it.

The judge inquired as to whether there has been Parental Alienation. He omitted to say syndrome, but uses the Byrne list of symptoms as a guide. Without actually stating his belief in the syndrome, Judge Somerville determined that the criterion of verbal denigration yet unspoken closeness (which S clearly demonstrated) was “the most important aspect of alienation.”<sup>143</sup> Although ‘syndrome’ remains unmentioned, the way that the Doctor describes alienation throughout the case made it clear that he too was discussing the syndrome, stating that the ultimate effect of parental alienation will be that “the child simply has no contact with the other parent, completely isolates, denies the existence of [them] and will not have any contact.”<sup>144</sup>

The Judge noted that he looked to *L v S*<sup>145</sup> for guidance in the area of parental alienation. This is an improvement on the method of blindly following only the recommendations of the assembled experts. However, if the court is going to make steps to use precedent on the issue, they must be careful of how narrowly or widely they construe the syndrome. Looking to *L v S* suggests that

<sup>141</sup> *Kenrick v Sheridan*, above, 11.

<sup>142</sup> *Kenrick v Sheridan*, above, 11.

<sup>143</sup> *Kenrick v Sheridan* (7 September 2001) FC Rotorua FP 063/7/99, 13 Judge Annis E Sommerville.

<sup>144</sup> *Kenrick v Sheridan*, above, 13.

<sup>145</sup> 15 FRNZ 408.

there is a body of precedent forming in New Zealand, and that courts are now going to begin to take seriously the way they define PAS.

There is confusion in the judgment as the judge recommends a change in custody because it is “early days and intervention at this point of time is essential [to remedy the alienation]”<sup>146</sup> but one paragraph later he states that “S is on the verge of being alienated from his mother unless the situation changes.”<sup>147</sup> The ‘verge’ is an unfortunate choice of words implying that the syndrome is not yet affecting the child –even though his outbursts at access and his father’s beliefs are in the extreme. One would imagine Judge Sommerville was implying that S was on the verge of being ‘100% alienated’ along the lines of the ‘alienation continuum’ proposed in *Baker v Stuhlmann*.

It was held that the mother should have custody of all three children. Access was explicitly spelt out for the following year including the amount and dates of access and telephone communication. Some discretion and flexibility remained for the parents on holidays, but the Judge emphasised that if there were “difficulties with S on access then the holidays are to be strictly adhered to as per the order.”<sup>148</sup> The father was to attend an anger management programme. Both parents were ordered to attend a positive parenting course with a view to learning how to control S. S himself was ordered to attend counselling “to learn appropriate coping strategies”.<sup>149</sup>

### **F Summary of the Case Law**

It is unwise to make any bold statements about the treatment of PAS in New Zealand based only on the examination of a small number of cases. However it is potentially valuable to flag the similarities and trends that have been demonstrated even in this small sample. To this end, three comparisons

<sup>146</sup> *Kenrick v Sheridan* (7 September 2001) FC Rotorua FP 063/7/99, 14 Judge Annis E Sommerville.

<sup>147</sup> *Kenrick v Sheridan*, above, 14.

<sup>148</sup> *Kenrick v Sheridan*, above, 21.

<sup>149</sup> *Kenrick v Sheridan* (7 September 2001) FC Rotorua FP 063/7/99, 21 Judge Annis E Sommerville.

will be undertaken. First, an observation of the peculiarities of the cases as a group. Second, the concurrence of syndrome criteria and exhibited behaviours. Finally, the trends in judicial treatment of PAS throughout the cases.

### *1 Observations on the cases as a group*

Interestingly four of the five cases involved children in the primary custody of their fathers against whom PAS was alleged. This is contrary to the majority of cases<sup>150</sup> in New Zealand, where children of the relationship continue to live in the primary custody of their mother after separation.<sup>151</sup> This sample size is too small to come to any conclusion on that fact, however it is merely noted that this seems not to coincide with Gardner's original opinion that the mother is the alienating parent in 90 per cent of cases, or even with his recent contention that the split between alienating parents is equal.

Other than the four and a half year old in *P v P*, the children involved in the above cases were between the ages of seven and 12 with separation occurring roughly between the ages of seven and nine.<sup>152</sup> The developmental stage of children in this age group was not addressed in any of the cases other than as regards maturity, but as discussed earlier,<sup>153</sup> alignment is common in this group without the need for any action on the part of the parents. This should be taken into account along with the other factors<sup>154</sup> that make a conclusive determination of PAS uncertain.

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<sup>150</sup> 70-80% of the time

<sup>151</sup> A Lee *A Survey of Parents Who Obtained a Dissolution*, (Dept of Justice 1990)

<sup>152</sup> Except for R in *Baker v Stuhlmann* who was only two at the time of separation, but was seven when he made the first allegation of abuse.

<sup>153</sup> At page 15.

<sup>154</sup> Such as the litigation, the fact of divorce, previous abuse, absence of parent.



## 2 Syndrome criteria

The cases of *Kenrick v Sheridan* and *L v S* looked to the checklists compiled by Byrne, and Dunne and Hedrick<sup>155</sup> when discussing those symptoms that would support a finding of PAS. As stated above, this is an expansion on the Byrne criteria outlined in at least two current reference publications. An examination of the cases shows symptoms of PAS as they are recorded in one or both of the lists. Exhibited more frequently were the following:

- (a) The child's aversion appears to be justified but is flimsy and exaggerated.

This was suggested in *Thomas v Thomas* in terms of the children's aversion to their mother, which the court found to be out of step with their experiences. It was also evident in *P v P* where the young child exhibited a fear of her father which was found to be "extreme and irrational."<sup>156</sup> In *Kenrick v Sheridan* the child had an extreme reaction to access, and had made allegations of abuse, both which appeared to be baseless.

- (b) The child will verbally denigrate one parent but retains an unspoken closeness and affection for that parent.<sup>157</sup>

In *P v P*, AL appeared to be in great fear of her father, yet conversations and interactions alone were observed to be normal and loving. R in *Baker v Stuhlmann* was adamant about not having contact with his mother, yet he revealed that once the litigation process was over he did have an interest in seeing her. In *Kenrick v Sheridan* it was found that the extreme behaviour at

<sup>155</sup> At page 4.

<sup>156</sup> *P v P* (16 March 1995) DC North Shore FP 621/94, 3 Green J.

<sup>157</sup> Or alternatively: *Hatred of the parent is most incense when the alienating parent and the child are in the presence of the alienated parent. However, when the child is alone with the alienated parent, the child may exhibit hatred, neutrality, or expressions of affection.*

access changeovers all but disappeared when the mother and her son were alone. This contrast led Judge Somerville to conclude that this factor was “the most important aspect of alienation.”

- (c) The alienating parent, while seemingly acting in the best interests of the children, is actually working to destroy the relationship between them and the other parent.<sup>158</sup>

Comments made to this effect included the mother’s assertion in *P v P* that she was hamstrung by the clear wishes of her child and would not “force” AL to see her father. In *Thomas v Thomas*, the complaints of the mother’s unfitness were echoed by both the children and the father, who summarised with the statement that the mother was not “supportive of their needs”. In *Baker v Stuhlmann* the father could not accept that contact would be in his children’s best interests. Finally, in *Kenrick v Sheridan* the father stated numerous times that he thought the mother was violent, and even when faced with evidence to the contrary he maintained that forcing the child to go on access was abusive.

### 3 Trends of judicial treatment

The above cases demonstrate that while PAS is not absolutely accepted as operative factor in custody litigation, neither is its basis or validity rigorously tested. It is clear that the experts and finders of fact are open to argument based on the syndrome. What is not clear however, is what it means when the courts determine that PAS is a factor or is proven. In some cases PAS had been held to be “clearly established,”<sup>159</sup> but the ensuing orders did little to address it. In other cases a child has been held to be only “on the verge” of bare Parental Alienation, yet this has justified a change in custody. Looking at the decisions as a whole seems to suggest that PAS continues to be treated not only on a case

<sup>158</sup> Or alternatively: *The alienating parent will concur with the children and support their belief that these reasons justify the alienation.*

<sup>159</sup> *L v S* 15 FRNZ 408, 414.

by case basis but in an ad hoc manner. What is clear is that the courts are reluctant to both make the bold statement that PAS exists and then to state an appropriate response.

Arguably all of the cases have had a just result. In most cases access arrangements have been enforced or reinstated, and in all cases it has been ordered that the child in question is to have contact with both parents. Even in the case of *Thomas v Thomas*<sup>160</sup> where, although neither parent had custody of the children, a decision on care and protection was made essentially because a relationship with both parents could not be otherwise promoted. Despite the above outcomes however, correct results do not mean correct reasoning. The fact that PAS or bare Parental Alienation was established, or not established did not seem to correlate with the decisions made. This does not demonstrate a true acceptance of PAS. Without judicial acknowledgement a correct response to PAS will not be formulated.

In all of the cases the terminology and analysis of the syndrome makes it clear that the voice of the expert has heavily informed the judgement. In only one of the cases (*L v S*) did the Judge differ from the expert's opinion on the orders to be made. The heavy dependence on the expert opinion however, has led to inconsistencies in the judgements, particularly where the experts themselves confused the terms 'PAS' and 'Parental Alienation'. Such conflicting pronouncements made it difficult to determine exactly what the decision in some of the cases meant. In addition, confusion of terms allowed the finders of fact to accept PAS, and then to back-track on their faith of its existence. For example, in *Thomas v Thomas*<sup>161</sup> it was stated that the existence of PAS was "clear" and then later that the syndrome was no more than a "tag

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<sup>160</sup> *Thomas v Thomas* (28 March 1996) DC Christchurch FP 009/92/90, Bisphan J.

<sup>161</sup> *Thomas v Thomas* (28 March 1996) DC Christchurch FP 009/92/90, 5 Bisphan J.

for conduct". In *L v S*<sup>162</sup> as well, PAS was held to be "clearly established" but shortly it was relegated to the status of "catch phrase for a state of affairs."

The earlier judgements in particular seemed to demonstrate less concern with the weight that a finding of PAS might carry. In these cases, even where PAS had been found, major changes in the access arrangements were not undertaken. In addition, the earlier cases make recommendations of counselling, but not with the seriousness that one would expect from an effective determination of emotional abuse. The most recent cases took a more proactive approach to orders on counselling and access arrangements. Perhaps this demonstrates an increasing recognition of the level of conflict inherent in alienation cases, and the nature of the problem, which would make changes devised by the parties alone futile. Also improved was the correlation between the finding and the orders made: In *Baker v Stuhlmann* PAS was found to not have been conclusively proven, therefore efforts were made to remedy the alienation with very little disruption of the current access situation. In *Kenrick v Sheridan* PAS was found and a corresponding switch in custody was made. The two most recent cases also take a more careful view of the syndrome. In *Baker v Stuhlmann* there was an investigation of other factors which might have caused alienation, and in *Kenrick v Sheridan* there was a nod both to precedent and to theoretical syndrome criteria to aid in the judgement.

### VIII CONCLUSION

Without a strong understanding of the Parental Alienation Syndrome, there is little hope for an appropriate finding. Until the syndrome is more clearly defined, it will be difficult to regard it as an appropriate basis on which to found allegations of emotional abuse or a change in custody. Certainly the thought of PAS as a cause of action in its own right seems unlikely. The area where PAS may be of most value, and where it has hitherto had the most

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<sup>162</sup> *L v S* 15 FRNZ 408, 416.

impact, is where 'wishes' of the child are at issue. It is this area where PAS has tended to, simplify matters instead of making them more complex.

Judges must be informed enough on the syndrome to look at it critically as a factor and avoid simply rubber-stamping the views of the psychiatric expert. Further, if the courts accept the syndrome they must be clear and differentiate their finding from bare Parental Alienation. If the court does not believe in the basis for a diagnosis it seems unwise to accept that diagnosis under a different name.

There is a healthy scepticism in New Zealand regarding the Parental Alienation syndrome. It appears in many ways too like a persuasive theory of behaviour, and not enough than a psychiatric condition. However the similarities of symptoms and the literature on the subject cannot be entirely ignored. If New Zealand courts are going to continue to hear argument on the syndrome, it would be prudent to continue to move in the direction of the most recent case law: questioning more seriously what a finding of PAS means in terms of the well-being of the child, and what options for custody such a finding implies.

To conclude, the appropriate approach to PAS should be one of more caution, but one also one of more faith. The syndrome should be questioned undoubtedly, but when a positive determination is made, the time for questioning should end and the focus should turn to formulating an appropriate response.

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