

PAS Testimony Allowed Under *Frye* Test

An expert's testimony regarding parental alienation syndrome (PAS) in a custody modification proceeding was approved by the Illinois Supreme Court. *Marriage of Bates*, 819 N.E.2d 714 (Ill. 20040) involved a lengthy hearing with extensive testimony from various mental health experts. The father sought sole custody of the child by modifying the prior joint custody arrangement with primary physical custody in the mother.

PAS DEFINED BY EXPERTS

As the proponent of the PAS testimony, the father proffered three expert witnesses and 136 articles from peer-reviewed publications as exhibits. The mother proffered no witnesses and no exhibits.

Dr. R. Christopher Barden, an attorney and a psychologist licensed in Minnesota and Texas, testified that he was familiar with PAS and that he believed everyone in the social sciences field was familiar with the term. He characterized PAS as a useful and clear description of a set of symptoms or clusters, commonly seen in child custody proceedings, when one parent was actively involved in turning a child against the other parent. He testified that PAS was generally accepted in the relevant scientific community. He based

his opinion on his clinical experience and on his extensive perusal of peer-review publications referencing the syndrome. He identified several peer-reviewed articles submitted by Dr. Richard Gardner and other authors describing and authenticating PAS. Copies of these articles were admitted in evidence. In Dr. Barden's opinion, the concept of PAS was not novel, having been first referenced in 1994 by the American Psychological Association. Although PAS was not described in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), published by the American Psychiatric Association in 1994, Dr. Barden did not believe that fact indicated rejection of the syndrome, noting that another revision of the DSM was expected in 2010.

Dr. Richard Gardner, a board-certified psychiatrist and a clinical professor of child psychiatry, also testified. He referenced several books on PAS and an index of 59 articles on PAS written by his peers. He had written 13 published articles on PAS. He described PAS as a disorder arising primarily, if not exclusively, in the context of child custody disputes. It resulted from the combination of one parent's "programming or brainwashing" a child into a "campaign of denigration" against the other parent, and the "undue indoctrination of the

child by the programming parent with his or her own inflated 'contributions.'" He testified that PAS was generally accepted in the relevant psychiatric and psychological communities.

Dr. Robert B. Shapiro, a clinical psychologist licensed in Illinois and a member of the Board of Evaluators used by the local courts to evaluate families in custody disputes, also testified that PAS was generally accepted by the relevant psychological community, observing that "I don't know anybody who doesn't accept it." Dr. Shapiro himself had diagnosed PAS many times and testified often in court on the subject.

The trial court found "that the principle of Parental Alienation Syndrome is sufficiently established to have gained general acceptance in the particular field," and allowed the testimony into evidence.

APPLYING *FRYE*

On appeal, the mother argued that Dr. Gardner's testimony did not satisfy the reliability requirements in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) and, thus, should have been barred. Frye observed that,

Just when a scientific principle or discovery crosses the line between

the experimental and demonstrable states is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

According to the appellate court, evidence at trial established that the PAS had been described in peer-reviewed literature dating from the late 1980s; was not a novel principle, being first referenced by the American Psychological Association in 1994; and that PAS was a recognized condition and generally accepted in the field of psychology. As to the question of whether PAS remained a new or novel concept several years after it was first described in the literature, the only evidence the trial court heard was that it was generally accepted in the field of psychology.

The appellate court noted that

Dr. Gardner and PAS has been harshly criticized by some scholars. However, no PAS critics testified at the Frye hearing in this case, nor was any other testimony presented in opposition to the general acceptance of PAS. But, even though the trial court found PAS generally accepted in the relevant scientific community, Dr. Gardner's PAS testimony was not a basis for the trial court's judgment granting sole custody to the father. Instead, the trial court relied on the statutory standards, finding that the mother had interfered with the child's ability to build a close and continuing relationship with the father.