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Alayne Katz

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# **Junk Science v. Novel Scientific Evidence: Parental Alienation Syndrome, Getting It Wrong in Custody Cases**

**Alayne Katz\***

Before making my remarks, I must alert the audience to my bias. I am biased in favor of children. I have spent my entire career as an attorney representing countless children. I believe them, even when I have to give them some time and some help to communicate what they need to say.

The State of New York is the home of Dr. Gardner and his Parental Alienation Syndrome.<sup>1</sup> In New York, we use the *Frye* test to determine the admissibility of novel scientific expert evidence such as Parental Alienation Syndrome. According to the *Frye* test delineated in *Frye v. U.S.*,<sup>2</sup> a proponent of the evidence must show the generally accepted reliability of such procedure

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\* Alayne Katz is an attorney in private practice with her principle office in Westchester County. Her practice is limited to issues of Family Law with a concentration in Child Advocacy.

Ms. Katz' strong commitment to families and children began with her representing New York City's indigent children for the Legal Aide Society's Juvenile Rights Division in 1987. She continued that commitment and focus in her next position as counsel to a New York City Foster Care Agency, St. Joseph's Services for Children and Families.

Today in addition to her private practice, she shares her time and talent with several organizations. She is a Children's Rights Committee member of the Women's Bar Association of the State of New York. She is a Vice President of and co-chairs the Family Court Committee of the Westchester Women's Bar Association. She also lectures for the Pace Women Justice Center and bar association committees. Ms. Katz generously donates her time and accepts referrals from the Coalition For Family Justice, Westchester/Putnam Legal Services, Pace University Women's Justice Center and Law Guardian appointments from Westchester and Rockland Counties' Supreme and Family Courts.

Ms. Katz received her Bachelor of Arts in liberal arts and Masters of Science in Urban and Policy Sciences from the State University of New York at Stony Brook (1980). She received her Juris Doctorate from George Washington University's National Law Center in 1985.

1. See RICHARD A. GARDNER, M.D., *THE PARENTAL ALIENATION SYNDROME: A GUIDE FOR MENTAL HEALTH AND LEGAL PROFESSIONALS* (Creative Therapeutics 2d ed., 1998).

2. 293 F. 1013 (D.C. Cir. 1923).

in the relevant scientific community through judicial opinions, scientific or legal writings or expert opinion other than the proffered expert.<sup>3</sup> In *People v. Fortin*,<sup>4</sup> the court determined that the defendant had failed to meet the burden that the Parental Alienation Syndrome was generally accepted in the relevant scientific community.<sup>5</sup> Recently in the same judicial department in *Zafran v. Zafran*,<sup>6</sup> the court ordered yet another *Frye*-type hearing on Parental Alienation Syndrome,<sup>7</sup> and we do not have a record of that hearing at this time.<sup>8</sup>

Parental Alienation Syndrome arises in the context of custody litigation. In New York, the standard for custody determinations is the best interest of the children based on a multi-factor analysis, including a parent's ability to encourage the relationship between the non-custodial parent and a child.<sup>9</sup> Other factors include parental guidance, providing for a child's emotional-intellectual needs, financial, overall fitness, and the emotional bond.<sup>10</sup> Domestic violence is the only statutory factor.<sup>11</sup> Since *Eschbach v. Eschbach*, case law has elevated the interference factor to a fitness factor, finding that interference with the non-custodial parent and child's relationship is so inconsistent with the best interests of a child, that it raises a strong probability that the custodial parent is unfit.<sup>12</sup>

I would like to focus on two important points. Firstly, Parental Alienation Syndrome shifts attention away from the dangerous behavior of the parent alleging the Parental Alienation Syndrome. Secondly, a child's reluctance or refusal to visit a parent alleging Parental Alienation Syndrome may be better explained by that non-custodial parent's behavior, by the child's

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3. *Id.* at 1014.

4. 735 N.Y.S.2d 813 (App. Div. 2001).

5. *Id.*

6. 740 N.Y.S.2d 596 (Sup. Ct. 2002).

7. *Id.* at 597-98.

8. The appellate court affirmed the lower court's decision to award custody to the mother. The lower court relied on the determination that the mother had been the primary caretaker and that the father had alienated other children (not subject to the instant litigation) from the mother. *Zafran v. Zafran*, 761 N.Y.S.2d 317 (App. Div. 2003).

9. *Friederwitzer v. Friederwitzer*, 447 N.Y.S.2d 893 (1982).

10. *See Eschbach v. Eschbach*, 56 N.Y.2d 167 (1982).

11. N.Y. DOM. REL. LAW § 240(1) (McKinney 2003).

12. *See Notley v. Schmeid*, 632 N.Y.S.2d 195 (App. Div. 1995).

developmental stage and the child's reaction to divorce and parental conflict than by the Parental Alienation Syndrome. I submit that in seventeen years representing thousands of children, those factors, and not the Parental Alienation Syndrome, most often describe a child's relationship with the non-custodial parent, including their willingness or non-willingness to engage in visitation. I ask the social scientists, the psychologists and the judiciary to first consider these factors in assessing the problem in the non-custodial parent/child relationship. Explore the nature of a non-custodial parent and child's relationship, prior to the separation. Assess a non-custodial parent's fitness: i.e., untreated substance abuse, domestic violence and mental health issues. Measure the degree of parental conflict prior to and during the divorce and during the current custody litigation. Consider a child's developmental needs. I believe that these factors determine a child's responsiveness to a relationship with their non-custodial parent.

In submitting my short biography, I neglected to add that I have a Masters of Science in Urban and Policy Sciences enabling me to foray into the field of social science. I performed an anecdotal study this morning of my current caseload. I have twenty-nine cases involving significant children's issues and twenty-one of those cases (close to 70%) have allegations of parental interference. There are no false allegations of child sexual abuse. I believe that in two of those cases there are valid accusations of parental interference. With respect to the remaining twenty cases, one of the cases is being counted twice because although there *were* valid allegations of parental interference, the problem has been ameliorated and the relationship restored.

With respect to the twenty cases, in seven cases there is a limited relationship between the child and the non-custodial parent and in the other thirteen, I do not believe that there is any effect on the relationship. In all seven cases where there is indeed a limited relationship, there was a limited relationship prior to commencing any domestic litigation. Focusing on these seven cases, four involved significant substance abuse, and three involved significant domestic violence.

The circumstances of the other cases are interesting in that, in spite of allegations of parental interference, there is no

effect on the child-parent relationship. Based on my interviews with these children, they like their custodial parent, they like their non-custodial parent, and they like visiting their non-custodial parent. To the extent that there is interference, it has not affected the child's relationship with their parent. In all thirteen cases, I found a significant similarity: there was a good parent-child relationship prior to the domestic litigation. I have found that in six of those thirteen cases, there was substance abuse; however, in all of those six cases, the substance abuse was in remission. There was no current use of alcohol or drugs. In the five cases where domestic violence was present, four had current Orders of Protection, and out of those four, three of the batterers were in significant therapeutic programs. In two of the thirteen cases there were mental health issues, but in both cases the parties were in meaningful treatment. Finally, in seven out of the thirteen cases, the children were in meaningful treatment and in nine out of thirteen cases, the parents were in meaningful treatment.

Although it is not a fitness factor, adultery is a common thread in many of these cases. I believe that the prevalence of adultery (four out of thirteen of the aforementioned cases) evidences the fact that a "wronged spouse" is more likely to project their feelings of abandonment and mistrust upon their children, hence "interfering" in the relationship between the children and the adulterous parent. However, in my experiences, a good pre-separation parent-child relationship is a successful antidote to this interference.

I know that this is anecdotal. I know that it's only my current caseload, but my cases are precisely the type that Parental Alienation Syndrome was developed to deal with—the small population involved in domestic litigation. And even in that very difficult segment of the divorce population, my anecdotal study and seventeen years of representing children shows that children's pre-separation relationships are the factor which is determinative of the child's post-divorce relationship with each parent. Even in instances where there is a lack of encouragement of the non-custodial parental relationship, the good pre-separation parent-child relationship will overcome any lack of encouragement. So, I would submit that when conducting research regarding a child's refusal or reluctance to visit a non-

custodial parent; good social science and psychological research should focus on the non-custodial parent's behavior, untreated domestic violence, untreated substance abuse, untreated mental health and continuing parental conflict, and *not on Parental Alienation Syndrome*.