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Endangered by Junk Science: How the New Zealand Family Court's Admission of Unreliable Expert Evidence Places Children at Risk

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Sir Belvedere: There are ways of telling whether she is a witch!
Villagers: Are there? What? Tell us, then! Tell us!
Sir Belvedere: Tell me. What do you do with witches?
Villagers: BUUUURN!!! BUUUUUURRRRNN!!! You BURN them!!!!
Sir Belvedere: And what do you burn apart from witches?
Villager: More Witches!
Villager: Wood.
Sir Belvedere: So, why do witches burn?
Villager: Because they're made of . . . wood?
Sir Belvedere: Good! So, how do we tell whether she is made of wood?
Villager: Build a bridge out of her!
Sir Belvedere: Ah, but can you not also make bridges out of stone?
Villagers: Oh, yeah. Oh, umm . . . .
Sir Belvedere: Does wood sink in water?
Villager: No, no, it floats!
Sir Belvedere: What also floats in water?
Villager: Bread!
Villager: Apples!
Villager: Very small rocks!
Villager: Gravy!
Villager: Lead!
King Arthur: A Duck!
Sir Belvedere: Exactly! So, logically . . .
Villager: If . . . she . . . weighs the same as a duck, . . . she's made of wood.
Sir Belvedere: And therefore . . . .
Villagers: A Witch! A WITCH!

--- *Monty Python and the Holy Grail*

I. INTRODUCTION

The New Zealand Family Court's failure to respond appropriately to family violence ("FV") is well documented.[1] A common criticism of the court personnel is that they lack specialized expertise in family dynamics, FV, and children's participation. This lack of expertise extends not only to the judges, lawyers, and registrars; but also, to the psychologists who perform court evaluations.

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[1] *See* Vivienne Elizabeth et al., *". . . He's Just Swapped His Fists for the System": The Governance of Gender Through Custody Law,* 26 GENDER & SOCIETY 239 (2012).

Social scientists have documented the court's "pro-contact ideology," which causes it to prioritize children's contact with both parents regardless of their safety or their views.[1] The New Zealand Psychological Society ("NZPS") notes that "a majority of Family Court judges give priority to ruling that fathers should have ongoing contact with children at virtually all cost and regardless of the threat to the safety of the women and children."[2]

In 2018, in response to pervasive criticisms of the court's inadequate responses to FV, the Minister of Justice appointed an Independent Panel to investigate the Family Court.[3] In 2019, the Panel issued its report, which documented common criticisms of the court, including that "children's views are often not heard or taken into account when considering contact where violence has been alleged or established," the Court does not "fully underst[an]d or acknowledge[] the harm caused to children and their carers by family violence," and "contact with a violent parent was prioritized over considerations of children's and their parent's safety."[4] The Panel noted: "Amongst the issues most often raised was the Family Court's response to allegations of family violence and its relevance to children's safety."[5] The report explained: "Some studies show that children are believed when they say they want contact with a violent parent, but they are more likely to be ignored or over-ruled if they say they do not want contact."[6] The Panel's "key findings" included: "Knowledge of family violence in all its forms is still not widespread and its impact on children, including on their safety, is still poorly understood."[7] The Panel admonished: "It's important that children's views about contact with a parent where there has been family violence are heard and inform decisions about that contact."[8] Similar failures are well documented in American family courts.[9]

This Article explores one mechanism for these chronic failures. The article explains how pseudo-scientific theories have provided the scaffolding for the court's pro-contact ideology, which fixates on the imagined "damage" to children from separation from violent fathers. It posits that the Family Court relies upon "expert" evidence in custody cases offered by psychologists who lack appropriate qualifications to perform forensic evaluations. Due to their lack of forensic qualifications, their opinions are based on psychodynamic theories, forensic methods,

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[1] *See* Julia Tolmie, et al., *Raising Questions About the Importance of Father Contact Within Current Family Law Practices*, 4 N. Z. L. Rev., 659 (2009).
[2] The New Zealand Psychological Society, *Submission on the Review of Family Violence Law* 1, 17 (2015). [hereinafter *NZPS Submission*].
[3] MINISTRY OF JUSTICE TE KOROWAI TURE Ā-WHĀNAU: THE FINAL REPORT OF THE INDEPENDENT PANEL EXAMINING THE 2014 FAMILY JUSTICE REFORMS, 2 (2019). [hereinafter *Ministerial Panel Report*]
[4] *Id.* at ¶¶ 99, 120, at page 49-53.
[5] *Id.* ¶ 103, at 51.
[6] *Id.* ¶ 121, at 53.
[7] *Id.* at 7.
[8] *Id.* ¶ 38, at 36.
[9] *See generally* Joan S. Meier & Sean Dickson, *Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation,* 35 MINN. J. L. & INEQ. 311 (2017); *See generally* Joan S. Meier & Vivek Sankaran, *Breaking Down the Silos That Harm Children: A Call to Child Welfare, Domestic Violence, and Family Court Professionals,* 28 VA. J. SOC. POL'Y & L. 275 (2021).

and fallacious statistical reasoning that lack both foundational and as-applied validity in the context of determining children's best interests.[10] Additionally, this Article argues that this evidence should be inadmissible as unreliable expert scientific testimony and that the court's chronic failure to recognize its unreliability has led to miscarriages of justice, particularly in cases involving the care of children who have experienced FV. It concludes that the court's reliance on psychological theories that lack scientific validation or reliable forensic application has led to the creation of entrenched, pseudo-scientific mythologies that endanger children, immunize violent parents, and silence children's voices, particularly when they seek protection from further violence rather than recognizing the harm from exposure to additional violence.

II. BACKGROUND

A. Syndrome Fever

When reliably applied, valid science enhances judicial decision making. On the other hand, invalid science or valid science unreliably applied distorts decision making and engenders miscarriages of justice. This double-edged relationship between scientific evidence and court adjudication reached its peak – or perhaps its nadir – during the 1980s with the explosion in "syndrome" evidence and the accompanying fallacious probabilistic reasoning. If the 1970s were the disco era, the 1980s were the era of the professional expert witnesses. During the 1980s, all manner of ordinarily occurring phenomena were pathologized and pop psychologized, and judges and lawyers were not immune from this new fascination with syndromes.

Syndrome evidence, as the phrase is used in this Article, consists of a quasi-diagnostic process. Syndromes are characterized by a cluster of symptoms believed to correlate with an underlying cause. It does not matter whether the proponents of a syndrome use the terminology "syndrome" or "symptoms". The crucial defining factors are that an underlying pathological cause is divined from a cluster of observable characteristics, which is known to have other causes. What makes syndrome evidence complicated is that, while the symptoms of the syndrome may correlate with a particular cause, they may also exist independent of that cause. The determination that an individual is suffering from a "syndrome" entails at least an

[10] "Forensic", as used in this Article, refers to the application of knowledge derived from a discipline other than law to legal questions. "Forensic psychology" refers to the application of psychological principles in assessments that inform legal decision making. American Board of Professional Psychology, "Forensic Psychology," available at: abpp.org/Applicant-Information/Specialty-Boards/Forensic-Psychology.aspx> (last visited Nov. 26, 2022); Jane Tyler Ward, "What is Forensic Psychology?," American Psychological Association, available at: www.apa.org/ed/precollege/psn/2013/09/forensic-psychology> (last visited Nov. 26, 2022). It is irrelevant whether Court evaluators identify themselves as "forensic psychologists". When they apply psychological knowledge and training to offer expert opinions about legal issues, they are engaging in forensic psychology, as opposed to research, educational, or clinical psychology. If psychologists who perform court evaluations do not conceive of themselves as "forensic psychologists", this is likely a result of their lack of the specialized expertise required to apply scientific principles in forensic settings.

implicit determination that the symptoms were not caused by an alternate trigger or occurred at random.

Most syndromes were originally recognized for therapeutic purposes, as constructs to assist clinicians in treating patients, before lawyers got ahold of them. Syndrome evidence rapidly became the star player in new causes of action and case theories in the late 1980s and early 1990s. For example, in sexual abuse cases involving daycares and preschools, prosecutors bolstered otherwise problematic testimony of small children with evidence from psychologists that they showed symptoms of "child sexual assault syndrome" to corroborate what, in many cases, were fantastical claims of abuse in response to suggestive interview techniques.[11] In homicide cases involving suspicious deaths of infants from brain injuries, pediatric neurologists offered expert evidence that the head injuries could only have been caused by "shaken baby syndrome," even though it is now clear that there can be other causes of the syndrome's symptoms.[12] In child protection cases, children were removed from parents because they had suspicious medical conditions, based on the conclusion that a parent had Munchausen Syndrome by Proxy, even though the symptoms could not be reliably determined to have been caused by child abuse.[13] In hindsight, expert opinions based on these syndrome theories are acknowledged to have been unreliable, but these realizations did not occur until after the unreliable evidence caused miscarriages of justice in civil, criminal, and family-court systems.[14] Ian Freckelton explains:

> [M]uch of the information sought to be conveyed was neither medical nor scientific. By assuming the nomenclature of pathology, wrong messages were given in an attempt to secure evidentiary admissibility. By asserting empirical validation, again misimpressions were created to bolster the insights sought to be communicated. In the translation of working hypotheses that had a practical utility in the therapeutic context into the forensic milieu, each of the syndromes in due course was betrayed as lacking proper scientific credentials.[15]

The correlations that underlie some of these "syndromes" have been scientifically validated, while others have not. The primary problem with the use of these

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[11] *See* IAN HACKING, REWRITING THE SOUL (1995); ELIZABETH LOFTUS & KATHERINE KETCHAM, THE MYTH OF REPRESSED MEMORY: FALSE MEMORIES AND ALLEGATIONS OF SEXUAL ABUSE, 61 (1994).
[12] *See* Keith A. Findley et al., *Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting It Right*, 12 HOUS. J. HEALTH L. & POL. 209, 214 (2012); *See* Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts,* 87 WASH. L. REV. 1, 11-12 (2009).
[13] *See* Fiona E. Raitt & M. Suzanne Zeedyk, *Mothers on Trial: Discourses of Cot Death and Munchausen's Syndrome by Proxy*,12 FEMINIST LEGAL STUD. 257, 261-262 (2004). Munchausen's by Proxy is a disorder in which a caretaker intentionally inflicts illness or injury on the person in their care as a means to garnering attention and sympathy for themselves. *See id.*
[14] *See* Ian Freckelton, *Child Sexual Abuse Accommodation Evidence: The Travails of Counter-Intuitive Evidence in Australia and New Zealand*, 15 BEHAV. SCIENCES & L. 247, 282-283 (1997).
[15] Ian Freckelton, *The Syndrome Evidence Phenomenon: Time to Move On*?, in PSYCHOLOGY IN THE COURTS (Ronald Roesch, et al., eds., 2013) 155.

syndromes in court proceedings is not the validation of the foundational correlations; rather, the problem occurs when syndrome evidence is employed in forensic contexts to demonstrate proximate causation. Factual evidence relating to the "symptoms" of the syndrome is the basis for the expert opinion that the sufferer has the syndrome even though there are other causes for the symptoms and no direct evidence of the cause. The expert is at least implicitly ruling out other possible causes for the symptoms. In reality, there is no way to know whether the suspected syndrome has caused the observed phenomena in a particular case. That human behavior is consistent with one cause is irrelevant unless alternate causes can be conclusively ruled out.[16] Any behavioral construct that is advanced, not only to describe an effect, but also, to establish a cause must be viewed with special concern. Discussing the unreliable forensic application of "rape trauma syndrome", the Washington Supreme Court explained:

> The courts which have admitted rape trauma syndrome testimony believe it sufficient that the myriad of symptoms encompassed therein are "generally accepted to be a common reaction to sexual assault." We find, however, that this is not the relevant question. The issue is not whether rape victims may display certain symptoms; the issue is whether the presence of various symptoms, denominated together as "rape trauma syndrome", is a scientifically reliable method admissible in evidence and probative of the issue of whether an alleged victim was raped. The literature on the subject demonstrates that it is not.[17]

This is what led Roland Summit, the originator of "child sexual abuse accommodation syndrome", to recant the forensic use of the syndrome. Summit acknowledged that the syndrome was not diagnostic, and that the presence or absence of its indicia could not indicate whether a child had been sexually abused.[18] He criticized lawyers for using the syndrome as a forensic weapon.[19]

Evidence about "parental alienation" (PA) fits this pattern. The observed symptoms are a child's rejection of a relationship or contact with a parent. By opining that the child has been "alienated" by the other parent's conduct based solely on evidence of the child's reaction to the rejected parent, the psychologist asserts that the rejection is not the result of some other plausible cause, such as the conduct of the rejected parent or a neutral cause like personality clash, lack of commonality, or ordinary adolescent development.[20] Dropping the word "syndrome" from "parental alienation syndrome" (PAS) does not change its fundamental nature as a syndrome; it merely obscures the inferences that underlie it.

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[16] *See* Susan Glazebrook, *Miscarriage By Expert*, 49 VICT. U. WELLINGTON L. REV. 245, 250 (2018).
[17] State v. Black, 745 P.2d 12, 17-18 (Wash. 1987).
[18] *See* Roland C. Summit, *Abuse of the Child Sexual Abuse Accommodation Syndrome*, 1 J. CHILD SEXUAL ABUSE 153, 157 (1992).
[19] *See Id.*
[20] *See infra* Section III (A).

PAS was a child of the 80s syndrome era. Coined by Dr. Richard Gardner, a clinician with no experience in research methodology or forensic psychiatry. The theory was that when children exhibited certain "symptoms" (in Gardner's formulation, rejection of one parent without a valid reason), the rejection *had to be* caused by the encouragement of the other parent.[21] The assumption that an evaluator can identify the "alienating" parent's behavior as the sole or primary cause of the child's rejection of the other parent is implicit in the forensic application of the syndrome.

Baker v. Everill[22] demonstrates the illogical and unreliable nature of PA reasoning. Child, who was almost thirteen, lived with Father and Stepmother and had supervised contact with Mother.[23] Mother applied for joint custody.[24] Child was opposed to the change in custody, and Father was concerned that Child was unsafe in Mother's unsupervised custody because of Mother's history of physical and psychological abuse.[25]

When Child was twelve, she returned from contact with Mother "visibly upset" and reported that, when she refused to eat breakfast, Mother "placed one hand across her mouth and nose so that she could not breathe and gripped her neck with the other" and "kicked her in the shin".[26] Mother told Child that she wished that she was dead.[27] Child saw a doctor the following day who recorded a large bruise on her shin.[28] She told the doctor that Mother kicked her in the shin and held her "round the face and neck in an uncomfortable position by force and against her will".[29]

Child's psychologist also observed the bruise and noted that it was concerningly large.[30] She opined that the impact of Mother's emotionally abusive statements were more profound than the physical abuse.[31] Child could not stop thinking about her mother's words and did not want to see her mother again.[32] She opined that Mother should not have contact with Child because of her inability to control her anger or prioritize Child's needs.[33]

Child's behavior deteriorated, and she had nightmares and threatened self-harm.[34] Child also reported that Mother swore at her and threatened to put her cat to sleep or

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[21] *See* JULIE DOUGHTY & MARGARET DREW, CHALLENGING PARENTAL ALIENATION: NEW DIRECTIONS FOR PROFESSIONALS AND PARENTS 24-30 (Jean Mercer & Margaret Drew eds., 2022).
[22] [2015] N.Z.F.C. 11036.
[23] *See id.* at ¶¶ 1-2.
[24] *See id.* at ¶ 3.
[25] *See id.*
[26] *Id.* at ¶ 6.
[27] *See id.* at ¶ 71.
[28] *See id.* at ¶ 67.
[29] *Id.*
[30] *See id.* at ¶ 71.
[31] *See id.* at ¶ 72.
[32] *See id.*
[33] *See id.* at ¶ 92.
[34] *See id.* at ¶ 70.

sell her things on the internet.[35] Mother denied the abuse, making the self-serving claim that she only placed her hand over Child's mouth to stop her from yelling.[36]

Stepmother was a teacher and claimed that Child disclosed physical and emotional abuse by Mother over the years, and she notified Child Youth and Family Services (CYFS) because she was trained to do so.[37] Mother denied the abuse and claimed that Child's views were the result of the "negative influence" of Father and Stepmother.[38]

The court psychologist, Sushila Deo, criticized Stepmother for "involving" Child in her reports to CYFS and Police, claiming that it disrupted her attachment to her mother.[39] She opined that discussing Mother breaking Child's arm was "psychological abuse."[40] She suggested that Stepmother's "repeated notifications were both unnecessary and inflammatory" and that the appropriate course would have been for her to communicate her concerns directly to Mother.[41] The Family Court agreed, describing Child's disclosure of Mother's abuse as "parenting issues."[42] This finding is contrary to social-science evidence and official Government policy regarding child abuse and neglect (CAN).[43] Relaying a child's reports of abuse to her abuser is dangerous and an inappropriate response to disclosures, but court personnel penalized Stepmother for reporting her concerns to professionals trained to investigate and respond to abuse. The court's characterization of Child's reports of abuse as "parenting issues" is reminiscent of the outdated belief that FV was "domestic" and should be kept private within the family. Ms. Deo criticized Child's psychologist, claiming that her concerns for Child's safety were "neither therapeutic nor helpful."[44]

Ms. Deo opined that Child "was displaying symptoms of parental alienation" by denigrating Mother, having consistently positive views of Father and Stepmother and negative views of Mother, and not being concerned about hurting Mother's feelings.[45] Ms. Deo "attributed" Child's behavior to Stepmother.[46] She testified that "this alienating behaviour, whether intentional or otherwise, if unchecked will cause irreparable harm to [Child's] relationship with her mother and will in turn cause serious psychological damage."[47] She recommended unsupervised contact with Mother escalating to joint custody.[48]

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[35] *See id.* at ¶ 83.
[36] *See id.* at ¶ 64.
[37] *See id.* at ¶¶ 36-37.
[38] *Id.* at ¶ 4.
[39] *Id.* at ¶ 42.
[40] *Id.* at ¶ 46.
[41] *See id.* at ¶ 51.
[42] *Id.*
[43] *See* Te Kupenga Whakaoti Mahi Patunga / National Network of Family Violence Services, "*Our Special Responsibility*," available at: https://nnfvs.org.nz/about/ (last visited Nov. 26, 2022).
[44] *Baker,* [2015] N.Z.F.C. 11036, at ¶ 96.
[45] *Id.* at ¶ 56.
[46] *Id.* at ¶ 57.
[47] *Id.* at ¶ 58.
[48] *See id.* at ¶ [96].

Under this PA construct, the "evidence" that Stepmother undermined Child's relationship with Mother was the "symptom" that Child had negative views of Mother. The court psychologist reached this conclusion even though Mother had a lengthy history not only of violence against Child but of denying the violence. Ms. Deo's opinion that the primary cause of Child's rejection of Mother was the protective action by Stepmother rather than Mother's violence is not only not based on scientifically valid principles or reliable evaluation techniques but also preposterous. Her implicit finding that Child faced a greater risk of long-term psychological damage from losing her relationship with Mother than from Mother's violence lacks foundational or as-applied validity. The Court did not require Ms. Deo to offer any evidence of the reliability of her opinions. Presumably, her inference that Stepmother's "alienation" of Child could be deduced from Child's rejection of Mother stemmed from correlational studies purporting to show a correlation between "alienating behaviors" and parental rejection.[49] It is not methodologically appropriate to reverse infer the existence of a stimulus from evidence of a response that bears some statistical relationship to it. This critique generously assumes that methodological failure was the cause of the psychologist's unreliable opinion. Since the court did not require Ms. Deo to provide an explanation of the basis or methodology by which she reached her conclusions, it is possible that it was based solely on intuition.

Similarly, presumably, Ms. Deo's opinion that disruption to her relationship with Mother would cause more harm to Child than exposure to Mother's violence (or the emotional harm even if the violence did not repeat) was based on a misapplication of studies demonstrating that, in the aggregate, children do better in joint custody. These studies do not control for FV or CAN. They cannot be generalized to situations in which the choice is between joint custody when one parent is an abuse perpetrator and sole custody to the protective parent. Ms. Deo's lack of understanding of scientific validity not only demonstrates the logical fallacy underlying her opinion, but it also demonstrates her lack of qualifications to render expert forensic evidence.[50]

The Court found that Mother was physically and psychologically abusive to Child and posed an ongoing safety risk. Inexplicably, however, the court also found that Stepmother "alienated" Child.[51] Despite safety concerns, the court ordered unsupervised contact, explaining that it would give Mother the "opportunity" to "demonstrate her willingness and ability to address the issues of concern."[52]

B. Admissibility of Expert Evidence: Reliability and Gatekeeping

Rising concerns about the quality of expert evidence in the 1990s resulted in a tightening of legal rules relating to admissibility.[53] Expert evidence must be based on valid scientific principles applied reliably, and the expert must be qualified to render

[49] *See infra* Section III (A).
[50] *See infra* Section III (B).
[51] *Baker,* [2015] N.Z.F.C. 11036, at ¶ 118.
[52] *Id.* at ¶ 124.
[53] *See* Daubert v Merrell Dow Pharm., 509 U.S. 579 (1993).

the opinion.[54] To establish validity and reliability, the proponent must demonstrate that: (1) the theory and techniques underlying the expert's opinion have standardized protocols that have been tested and validated, (2) were published and subject to peer review, (3) have a known (and permissibly low) rate of error, and (4) are generally accepted in the relevant scientific community.[55] Falsifiability is a crucial component of establishing reliability.[56] McDonald and Tinsley note that it is a "truism that expert evidence must be based on reason as opposed to conclusions incapable of being tested in any meaningful manner."[57]

The judge is meant to be the gatekeeper of scientific evidence. To be admissible, expert evidence must be "substantially helpful" to understanding other evidence or determining a material fact.[58] With scientific evidence, substantial helpfulness requires that three prerequisites are met: (1) the expert possesses sufficient expertise to offer the opinion (qualifications); (2) the opinion is based on scientifically valid principles (foundational validity); and (3) the opinion is the result of a reliable application of those principles (applied validity).[59] While the Family Court can admit any evidence that would assist in determining the proceeding, regardless of its admissibility under the rules of evidence,[60] unreliable "expert" evidence, by definition, cannot be helpful.

The opinion evidence derived from PA theories meets none of these requirements.[61] Court psychologists claim to be basing their opinions on psychological research, but they lack sufficient knowledge or skill to understand or apply research in a forensic context. Their opinions– that a child's resistance to contact with one parent must be caused by the invisible behaviors of the other parent – are not testable or falsifiable. If a psychologist falsely identifies a child as alienated, there is no mechanism to detect the false positive.

The heightened requirements for admissibility of scientific evidence were first established by the Supreme Court in *Daubert v. Merrill Dow Pharmaceuticals*, which has persuasive authority in New Zealand.[62] The Supreme Court held that the rules governing expert evidence required judges to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."[63] The Court explained that, when expert testimony purported to be based on "scientific knowledge," evidentiary reliability had to be "based upon scientific validity."[64]

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[54] *See* Evidence Act 2006, §25, (N.Z.).
[55] *See Daubert*, 509 U.S. at 593-94.
[56] *See id.* at 593.
[57] Elisabeth McDonald & Yvette Tinsley, *Evidence Issues*, 17 CANTERBURY L. REV. 123, 130 (2011).
[58] Evidence Act 2006, § 25 (1), (N.Z.).
[59] *See Daubert*, 509 U.S. at 590 n9.
[60] *See* Family Court Act 1980, §12A(4), (N.Z.) ("FCA").
[61] *See* Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting it Wrong in Child Custody Cases,* 35 FAMILY L. QUARTERLY 527, 536 (2001).
[62] *See* Lundy v. R [2018] N.Z.C.A. 410, at 241; New Zealand Law Commission, Evidence (N.Z.L.C. No. R55, 1999), Vol. 2, ¶ C100.
[63] *Daubert*, 509 U.S. at 589.
[64] *Id.* at 590-91.

The *Daubert* standards become problematic in the context of forensic evidence based on psychodynamic theories because psychodynamic constructs are resistant to empirical testing.[65] Paul Appelbaum explains: "Questions about testimony based on psychodynamic theory can be raised with regard both to the legitimacy of the underlying constructs . . . and to the techniques by which the examiner can know that such a mechanism came into play in a particular case."[66] He explains the need for "caution in a wholesale embrace of psychodynamic theories" because "persuasive empirical demonstrations of either the concepts themselves or their application in particular cases is unlikely, their speculative—even if plausible—nature should be recognized."[67] He notes:

> From the development of Freud's theories in the late nineteenth and early twentieth centuries until the present, many mental health professionals have based their clinical approaches on psychoanalytically inspired concepts. Some of these concepts have been confirmed scientifically (eg, the existence of unconscious mental states), whereas others have not (eg, dreams always represent the fantasied fulfilment of wishes). . . . Regardless of the possible utility of these theories from a clinical perspective, which is controversial and may depend on the condition being treated, they are arguably more problematic when they serve as the basis for conclusions offered as part of legal proceedings. Nor are psychoanalytical theories the only ones that mental health professionals use; alternative approaches may be based on theories that have a greater or lesser degree of empirical support.[68]

He concludes: "To the extent that expert opinions are introduced to inform the judgments of legal factfinders, it is important for them to be based, insofar as possible, on empirically validated conclusions rather than on untested or untestable theories."[69]

Courts have reigned in these unreliable behavioural-science inferences in criminal cases. For example, in *R v. Accused*,[70] Accused was convicted of indecent assault on his fourteen-year-old daughter.[71] His defense was that his daughter was fabricating her claims to avoid discipline for her misbehavior.[72] To rebut this defense, the prosecution offered expert evidence from a child psychologist that Daughter was displaying behavioral characteristics consistent with child sexual abuse (CSA), even though the characteristics were known to occur in children who had not experienced

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[65] *See* Paul S. Appelbaum, *Reference Guide on Mental Health Evidence in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 813, 865 (National Research Council, 3d ed., 2011) [hereinafter "SCIENTIFIC EVIDENCE"] (noting that many of the concepts have been resistant to empirical testing).
[66] *Id.* at 866.
[67] *Id.* at 867.
[68] *Id.* at 891.
[69] *Id.*
[70] *R v. Accused* [1989] 4 CRNZ 193 (CA).
[71] *See id.* at 194 (explaining that he was charged with two counts of indecent assault).
[72] *Id.* at 195.

CSA.[73] The Court of Appeal held that the trial court should not have admitted the evidence.[74] The Court reasoned:

> Always assuming that the psychologist in the present case was properly qualified to give evidence in this field . . . it was not properly established in the evidence that . . . children subject to sexual abuse demonstrate certain characteristics or act in peculiar ways which are so clear and unmistakable that they can be said to be concomitants of sexual abuse . . . .
>
> While the characteristics mentioned by the psychologist were said to be consistent with those the witness had come to know as the characteristics of sexually abused children, some at least of those characteristics . . . may very well occur in children who have problems other than sexual abuse.[75]

The Court reached a similar conclusion in *Tuhura v. R*.[76] Tuhura was convicted of sexual assault.[77] His defense was that the sexual activity was consensual.[78] To rebut this claim, the prosecution offered medical evidence that the complainant had vaginal lacerations that were unlikely to have come from consensual sex, although the expert conceded that it was possible that they did.[79] She clarified that traumatic injuries were "much less common with consenting sex" than non-consenting sex.[80]An independent medical expert took issue with her findings, explaining:

> It has not been found possible to identify clinical findings which would be accurate and reliable indicators that vaginal and/or anal penetration was non-consensual as opposed to consensual.
>
> There is no information in the medical literature regarding the rate of genital injury in the sexually active population who practise consenting vaginal or anal sexual intercourse. Injury is known to occur in consenting intercourse, and the absence of injury is found common[ly] in cases of non-consensual sexual intercourse. It is not possible to comment on the presence or absence of consent based on the injuries in this case.[81]

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[73] *Id.* at 196-99.
[74] *Id.* at 200.
[75] *Id.* at 199.
[76] *Tuhura v. R* [2010] NZCA 246 .
[77] *See id.* at ¶ 1 (noting that appellant was sentenced to ten years imprisonment).
[78] *See id.* at ¶ 15 (explaining his side of the story as to the events that took place that night).
[79] *See id.* at ¶¶ 19-20 (noting that there is very little information about what injuries can be sustained after consensual intercourse).
[80] *Id.* at ¶ 22.
[81] *Id.* at ¶ 25.

The Court of Appeal concluded that a miscarriage of justice occurred in the admission of the evidence.[82] The Court explained: "There is a real risk that if an expert suggests that injuries are indicative of non-consensual sexual activity, jurors may decide the case on the false understanding that the fact that the complainant suffered injuries makes it more likely that the associated sexual contact was non-consensual."[83] The Court found that, even without the inference that the prosecutor drew– that the evidence indicated that the sexual activity had been non-consensual – which "did not have a proper evidential base", the evidence should not have been admitted.[84]

In *Falwasser v. R*,[85] the Court addressed the use of defense expert evidence based on syndrome reasoning. Stowell and Falwasser were convicted of aggravated assault.[86] The prosecution's star witness, Broughton, witnessed the assault.[87] Broughton was addicted to methamphetamine and consumed methamphetamine shortly before the assault.[88] In closing instructions, the trial judge instructed the jury not to be "sidelined" by Broughton's methamphetamine use because there was no evidence that it affected his ability to see or remember events.[89]

On appeal, Stowell and Falwasser sought to introduce expert psychological evidence about the detrimental effects of long-term, heavy use of methamphetamine on cognition and memory.[90] The testimony was based on peer-reviewed scientific research that established that subjects who used methamphetamine performed significantly worse on a range of cognitive tasks than non-users.[91]

The Court declined to admit the evidence finding that it was not substantially helpful.[92] The Court noted: "This evidence is plainly insufficient to enable any accurate assessment of how Mr Broughton would compare with the study group who, on average, had been using the drug for more than 11 years, with heavy use for over six years."[93]

The expert evidence in these cases did not use the term "syndrome" to describe its processes of inference, but it employed syndrome reasoning, which was the basis for the Court of Appeal's decisions to exclude it. The experts were attempting to divine an underlying cause (sexual assault and memory impairments) from observable "symptoms" (behavioral issues, physical injuries, and

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[82] *Id.* at ¶ 3.
[83] *Id.* at ¶ 56.
[84] *Id.* at ¶ 58.
[85] *Falwasser v. R* [2018] NZCA 79.
[86] *See id.* at ¶ 1 (noting they were found guilty of wounding the complainant with intent to cause him grievous bodily harm).
[87] *See id.* at ¶ 2 (questing the reliability of the witness).
[88] *Id.*
[89] *Id*.
[90] *See id.* at ¶ 3 (noting they apply to introduce Susan Schenk, a professor of psychology).
[91] *See id.* at ¶ 21(noting that the subject group was composed of individuals who were addicted to methamphetamine).
[92] *See id*. at ¶ 23 (explaining that for an expert's opinion to be admissible it has to be of substantial help to the fact-finder in understanding other evidence).
[93] *Id.* at ¶ 26.

methamphetamine addiction). The symptoms had plausible causes other than the one that the evidence was offered to bolster or in which there was a general correlation between the observed characteristics and underlying cause but no evidence specific to the individual whose characteristics were at issue.

C. Adversarial Failures

In the Family Court, the failure of lawyers representing parents accused of "alienation" to raise the lack of scientific validity of the evidence has been a barrier to reliable judicial decision making. Instead, lawyers have conceded that their clients "alienated" their children without challenging the reliability of the PA construct.[94]

Even in cases in which lawyers have attempted to challenge "expert" PA evidence, they have failed to challenge it on the correct grounds – the unreliability of the forensic application of the construct because of the lack of tested, replicable, objective standards, validation studies with known rates of error, peer reviews and publication of assessment methodologies, and general acceptance in psychology. For example, in *CTB v. PRH*,[95] the court psychologist opined that Father was "willing to engage in alienating behaviour."[96] Father challenged the psychologist's opinion, but the basis for the challenge was that the psychologist did not specialize "in theories and behaviours involving parental alienation syndrome."[97] This is the equivalent of challenging expert evidence from a psychic on the ground that the psychic does not specialize in Tarot card readings, rather than on the ground that psychic evidence lacks foundational or as-applied validity. Counsel's framing of the challenge was even more baffling given that the academic article he offered in support was about the uncritical acceptance by the Family Court of unreliable evidence, with PAS as an example.

Judges and lawyers have stamped their imprimatur of legitimacy on this dangerously unreliable construct without ever meaningfully engaging with its foundations. At no time in the more than twenty years that this unscientific construct has dominated expert evidence in the New Zealand Family Court did a judge ever lean over and simply ask an evaluator:

> How can you tell this child has been "alienated" and how do you know that the estrangement does not have another cause? Where is the proof that you (or any evaluator) can distinguish an "alienated" child from a child who rejects a parent for some other reason with accuracy? How can you demonstrate the reliability of your conclusion? Where are the validation studies that demonstrate that this type of assessment reaches an accurate result with a known and acceptably low rate of error? Were they published and peer reviewed?

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[94] *See, e.g.,* Finn v. Poole [2015] NZHC 1362, ¶ 41
[95] [2012] N.Z.F.C. 4516.
[96] *Id.* at ¶ 37.
[97] *Id.* at ¶ 38.

This is particularly troubling given that the answers to these questions are: speculation; I have none; I cannot; they do not exist; and no, because they do not exist.

III. CRACKS BECOME A CHASM: THE PSEUDO-SCIENCE OF "ALIENATION"

A. The Junk Science of PA

Proponents of PA lobbied ferociously in the early 2000s for its inclusion in the Fifth Edition of the American Psychiatric Association's ("the Association") *Diagnostic and Statistical Manual of Mental Disorders (DSM-V)*,[98] but the Association rejected the proposal because the diagnosis lacked scientific validation.[99] Paul Fink, former president of the Association, explains: "PAS has not been recognized by the American Psychiatric Association, the American Medical Association, or the American Psychological Association as a legitimately researched, evidence-based condition."[100] He also notes: "PAS as a scientific theory has been excoriated by legitimate researchers across the nation. Judged solely on his merits, Dr. Gardner should be a rather pathetic footnote or an example of poor scientific standards."[101]

The Family Court not only regularly admits but relies on these pseudo-scientific theories. The social science literature documents the Court's tendency to characterize protective mothers as "hostile" and "alienating" when they attempt to protect children from violent fathers.[102] The American Psychological Association (APA) explains:

> Psychological evaluators not trained in domestic violence may contribute to this process by ignoring or minimizing the violence and by giving inappropriate pathological labels to women's responses to chronic victimization. Terms such as "parental alienation" may be used to blame the women for the children's reasonable fear of or anger toward their violent father.[103]

The PA theory relies on two asserted but unvalidated correlations. The first is a purported correlation between the attitudes or behaviors of one parent (the "aligned" parent) and the child's negative response to the other parent ("alienation"). The

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[98] *See* Barbara Jo Fidler & Nicholas Bala, *Children Resisting Postseparation Contact with a Parent: Concepts, Controversies, and Conundrums*, 48 FAM. CT. REV. 10, 13 (2010).
[99] *See* Mercer & Drew, *supra* note 22, at 34-35.
[100] Paul Fink, *Parental Alienation Syndrome,* in DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY (Mo Therese Hannah & Barry Goldstein, eds., 2010).
[101] Bruch, *supra* note 62, at 539.
[102] Vivienne Elizabeth et al, *Between a Rock and a Hard Place: Resident Mothers and the Moral Dilemmas they Face During Custody Disputes*, 18 FEMINIST L. STUDIES 253 (2010).
[103] APA PRESIDENTIAL TASK FORCE ON VIOLENCE IN THE FAMILY, VIOLENCE AND THE FAMILY 100 (1996).

second is a purported correlation between the child's "alienation" and long-term psychological damage.

The first correlation is not established by identifying concrete behaviors by the "aligned" parent and tracing them to the child's "alienation." Instead, consistent with forensic syndrome evidence generally, the theory asserts that when children show certain characteristics (i.e., signs of alienation), the characteristics are evidence that they have been subjected to "alienating behaviors" by one parent targeting their other parent, even though the behaviors are not directly observed. In this way, the untested *correlation* morphs into a baseless theory of *causation*.[104]

The theory also asserts that, uncorrected PA will have devastating psycho-social consequences for the child – again, conflating a correlation between estrangement and poor adult outcomes with causation. This conflation is particularly concerning since there are obvious confounding variables at play in the correlation between childhood estrangement and adult outcomes. For example, if rejected parents are more likely to have drug and alcohol problems, serious mental-health issues, engage in poor parenting, or commit FV, then those characteristics would have to be eliminated as causes for the subsequent dysfunction before any causal relationship between the other parent's behavior and the dysfunction could be reliably established.

There is a third, non-articulated, assertion that underlies this "expert" evidence: that evaluators can identify PA accurately. Even if the correlation between alienating behaviors and parental rejection were sufficiently validated, whether any given psychologist could determine that a particular child was "alienated" is a different question. This conclusion involves drawing a reverse inference from the suspected correlation – divining the existence of cause from evidence of result. For example, in *Mann v. Armstrong*,[105] the evaluator opined that Child was "aware of his Mother's antipathy toward his Father"; Mother had "a big influence on Child" and could "influence his feeling towards one of the most important persons in his life", and Mother was "alienating" Child from Father all based on Child saying that he did not want to see Father because he did not want to upset Mother.[106]

There has *never* been a study validating the claim that evaluators can accurately identify PA. There has *never* been a double-blind experiment in which psychologists are given case-specific information and asked to determine whether children were "alienated" to establish accuracy rates. The little research that has been done demonstrates the opposite, that "[p]ractitioners who apply parent-alienation syndrome (PAS) or parent-alienation disorder formulations tend to automatically label a parent as an 'alienator' without a thorough investigation of the allegations."[107]

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[104] *See infra* Section III (B) (1).
[105] *Armstrong v. Mann* [2020] NZFC.1319.
[106] *Id.* at ¶ 95.
[107] DANIEL G. SAUNDERS, et al., CHILD CUSTODY EVALUATORS' BELIEFS ABOUT DOMESTIC ABUSE ALLEGATIONS: THEIR RELATIONSHIP TO EVALUATOR DEMOGRAPHICS, BACKGROUND, DOMESTIC VIOLENCE KNOWLEDGE AND CUSTODY-VISITATION RECOMMENDATIONS 23 (2011).

The sensitivity of these findings – the rate at which evaluators commit attribution errors and falsely identify "alienation" – is unknown (and possibly unknowable), although even Richard Warshak, a leading proponent of PA theory, recently conceded that it is likely high.[108] He concedes that "critics have raised valid concerns that expert witnesses make false positive identifications of parental alienation."[109] He concedes that "evaluators wield[] the concept of parental alienation like a blunt sword."[110] He explains: "False positive identifications related to parental alienation can take three forms: erroneously concluding that a child is alienated, . . . failing to recognize that a child's rejection of a parent is a justifiable response, and wrongly concluding that the parent has engaged in a campaign of alienating behavior."[111] He cautions: "It is a mistake to leap to the conclusion, without considering reasonable alternative explanations, that a child's rejection of a parent is irrational, or that the parent with whom the child is aligned has perpetrated the child's alienation."[112] He also notes that "no study has documented the prevalence and source of false positive identifications of parental alienation."[113] This is unacceptable in a system in which the proponent of purportedly expert evidence is supposed to show its validity and reliability before it is admissible.

While Warshak's concessions are refreshing, they only partially acknowledge the scope of the reliability problem. Forensic practitioners attempt to distinguish between methodological error and practitioner error.[114] When a particular forensic technique has high rates of error or has been shown to correlate with large numbers of miscarriages of justice, practitioners tend to blame the problem on a handful of unqualified technicians rather than acknowledging the error inherent in the lack of as-applied validity of the technique.[115] The suggestion then follows that, if unacceptably high error rates are the result of practitioner error, the solution is regulating the qualifications and practice of individual practitioners. This is essentially Warshak's solution for the devastating failures of evaluators who subscribe to his untestable PA theories.

Methodological error, on the other hand, derives from a technique or process being inherently prone to error because it lacks objective standards or testability, so that even the most proficient practitioner will commit high rates of error because error is inherent in the subjective nature of the technique. The problem with PA is not that certain evaluators are incompetent in its application, but that its forensic application has no standardized protocols, and its results are fundamentally non-testable and non-falsifiable. The types of "alienating behaviors" identified include vague and conclusory characterizations like allowing the child to make decisions regarding

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[108] *See* Richard A. Warshak, *When Evaluators Get It Wrong: False Positive IDs and Parental Alienation*, 26 J. PSYCH., PUB. POL'Y, & L 54, 64 (2020).
[109] *Id. at 54.*
[110] *Id.* at 63.
[111] *Id.* at 62.
[112] *Id.* at 60.
[113] *Id.* at 55.
[114] *See* Jonathan J. Koehler, *Fingerprint Error Rates and Proficiency Tests: What They are and Why They Matter*, 59 HASTINGS L.J. 1077, 1090 (2008).
[115] *See* Simon A. Cole, *Grandfathering Evidence: Fingerprint Admissibility Rulings from* Jennings *to* Llera Plaza *and Back Again*, 41 AMER. CRIM. L. REV. 1189, 1231 (2004).

contact with the other parent, exaggerating the other parent's flaws, considering the other parent's attempts at contact harassing, being "obsessed with the moral values" of the other parent, and having "righteous indignation" about the other parent.[116] These characteristics are impermissibly subjective. What is the distinction between allowing a child to "make decisions" regarding contact and hearing and giving weight to a child's views? Where is the line between honestly recognizing the other parent's flaws and "exaggerating" them? What if the other parent's attempts at contact *are* harassing? Using contact rights to harass victims is a common tactic of FV perpetrators. What is the distinction between having concerns about a co-parent's moral failings (e.g., the parent is a drug dealer or exposes the children to pornography) and being "obsessed" with them? What is "righteous indignation," and how does it differ from situational anger, legitimate disappointment, or having a bad day? What standards govern these determinations? Many of these factors are not inherently binary. They could exist on a continuum, but no consideration is given to severity, and no algorithm exists to weigh them. There is no way to distinguish a false positive from a true positive. Forensic evaluations that are not testable cannot have known rates of error (and therefore cannot demonstrate the foundational validity derived from low error rates) because error rates can only be derived from testing.[117] That is a form of attribution error that cannot be cured simply by tightening the level of practice. It is the quintessential type of error that *Daubert* should not tolerate.

Finally, there is the "cure" – the "remedy" for PA suggested by these "experts": stripping the child from the "alienating" parent and forcing them into the care of the "alienated" parent for "deprogramming".[118] Just like with the claimed correlation between maternal and child attitudes, there is no scientific validation for the proposition that this draconian solution to a mythological problem is effective.

One indicator of the subjective and amorphous nature of PA is that evaluators do not agree on its "symptoms." Some evaluators identify a child as "alienated" if they express fear, distrust, or dislike of a parent. Others identify a child as "alienated" if they refuse contact with a parent (regardless of the conduct of the rejected parent). Others identify a child as "alienated" if they express love for a parent but simply object to a particular form of contact (unsupervised contact, overnight contact, shared care). Warshak notes: "Some parents and custody evaluators mistakenly conclude that any expression of preference to live primarily with a parent means that the child is becoming alienated from the less preferred parent."[119]

As "alienation" is subjective, existing in the eye of the beholder, it is flexible, standardless, and unregulated enough to fit almost any scenario in which an evaluator is primed to find that a child has been "poisoned" by one parent. There are no agreed-upon standards for identifying when or whether a child is "alienated," let alone whether the feelings, rejection, or estrangement were caused by the behavior of the favored parent, the rejected parent, neither, or both. In sum, there is no empirical

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[116] *J v M*, [2004] 23 FRNZ 1019 at ¶ 102.
[117] *See* Paul C Giannelli, et al., *Reference Guide on Forensic Identification Expertise*, in SCIENTIFIC EVIDENCE 55, 64 (noting that error rates are derived from testing).
[118] *Watkins v. Watkins*, [2020] NZFC 9832 at ¶ 65.
[119] Warshak, *supra* note 109, at 59.

evidence supporting evaluators' assertions that one parent's behavior is the primary cause of a rupture in a child's relationship with the other, that any given "alienated" child will suffer long-term damage, or that an evaluator can rule out other causes of estrangement.[120] As a result, several countries have prohibited the use of PA evidence in their courts.[121]

Even when the Court rejects a finding of PA, it does so after an application of the same subjective, standardless analysis that it applies when it finds PA. For example, in *Quick v. Quick*,[122] Mother had custody of Children, and Father had supervised contact progressing to unsupervised contact on alternating weekends.[123] Children expressed that they wanted to spend less time with Father and subsequently Father claimed that Mother "actively alienated the children from him."[124] The court psychologist testified that PA was "represented by a spectrum of behaviors, ranging from a deliberate cynical campaign of alienation, through a pattern of behaviors by one or both parents which contribute to the weakening of a relationship between the children and a parent."[125] The Court found that Mother's "behaviour lacks the intensity or 'campaign' style which arises in many cases where alienating behaviours arise" because she kept photos of Father in her home and referred to him as "Daddy."[126] The Court concluded:

> [I]nsofar as the children's lives are concerned, I do not find evidence of deliberate or sustained behaviours by [Mother] aimed at sabotaging the girls' relationship with their father. Rather, the girls' affiliation to their mother is a consequence of her better attunement to their emotional needs, largely due to their stage of development, as they emerge into or toward puberty and the wondrous turmoil of teenage.[127]

While it is reassuring to see Mother dodge the fatal bullet of a PA finding, it is disconcerting that the Court rejected Father's allegations not because they were amorphous, conclusory, and derived without objective, testable standards but rather because the Court believed that the amorphous, conclusory, and subjective evidence tipped toward a lack of PA.

Janet Johnston's research has found that children who reject a parent have multiple reasons for rejection. They include negative behaviors by the rejected parent, such as CAN or inadequate parenting, or the child's development or personality characteristics.[128] Doughty et al. (2020) conclude: "No reliable mechanism for

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[120] *See* J. Teoh, et al., *Parental Alienation Syndrome: Is it Valid?,* 30 SINGAPORE ACADEMY L.J. 727 (2018).
[121] *See* Mercer & Drew, *supra* note 22, at 33.
[122] [2013] NZFC 5910.
[123] S*ee id.* at ¶¶ [8]-[10].
[124] *Id.* at ¶ 44.
[125] *Id.* at ¶ 52.
[126] *Id.* at ¶ 59.
[127] *Id.* at ¶ 62.
[128] *See* Janet R. Johnston, *Children of Divorce who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child*, 38 FAM. L.Q. 757 (2005); Janet R.

identifying parental alienation was found to exist."[129] They explain: "The tools that do exist are unhelpful, poorly validated and serve to undermine the focus on the child. There is a risk that the assessments, and debates about them, might serve to mislead the court and practice generally."[130] As Fidler and Bala succinctly note: "A child may resist or reject a parent for many reasons."[131]

Even leading proponents of PA concede its lack of scientific validity.[132] Johnston and Kelly, long-time holdouts on the reliability of PA, admit that there are no systematic long-term data on the adjustment and well-being of alienated compared to non-alienated children so that long-term prognostications are merely speculative.[133] It has simply become an article of faith among evaluators, lawyers, and judges that PA causes disastrous psychological harm to children. The evaluators who espouse the validity of PA have changed their diagnostic criteria, moving away from a model that emphasized "alienating" behavior of a favored parent to a model that acknowledges the complex nature of parent/child estrangement requiring differential diagnosis to distinguish "alienation" from other types of alignment, rejection, and estrangement.[134] They fail to understand that the shift in framework does not resolve the reliability issues with the forensic application of PA. For example, in *M & K.T. v. PJE*,[135] the Court laid out the purported distinction between estrangement, alignment, and alienation. The court noted that the parties disagreed as to whether Child was estranged or alienated from Father and concluded that Child was estranged.[136] The problem with this more "modern" formulation, acknowledging that there can be multiple causes of children's rejection of parents, is that it does not enhance the reliability of the ultimate determination. There remains no validation for the proposition that psychologists or judges can distinguish the three causes of rejection with objectivity or reliability. There still are no validation studies to show that picking one of these three identified options can be tested, replicated across evaluators, or done with an established and permissibly low rate of error.

In its submission in response to the Government's 2015 discussion document regarding FV law, the NZPS described PA as lacking research validation and insisted that it should not be applied by psychologists, judges, and lawyers. It explained:

> It is a deep concern and a major threat to the safety of women and children that the New Zealand Family Court continues to apply the doctrine of Parental Alienation Syndrome, which

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Johnston, et al., *Is it Alienating Parenting, Role Reversal or Child Abuse? A Study of Children's Rejection of a Parent in Child Custody Disputes*, 5 J. CHILD CUSTODY 191, 211 (2005).

[129] Julie Doughty et al., *Professional Responses to "Parental Alienation": Research-Informed Practice*, 42 J. SOC. WELFARE & FAM. L. 68, 73 (2020).

[130] *Id.* at 73.

[131] Fidler & Bala, *supra* note 99, at 14.

[132] *See* Janet R. Johnston & Joan B. Kelly, *Rejoinder to Gardner's "Commentary on Kelly and Johnston's 'The Alienated Child: a Reformulation of Parental Alienation Syndrome,'"* 42 FAM. CT. REV. 622, 626 (2004).

[133] *Id.* at 84.

[134] *See* Mercer & Drew, *supra* note 22, at 28.

[135] Reserved Judgment, FAM-2006-004-002520, March 31, 2010 (FC Auckland).

[136] *See id.* at ¶¶ 28, 66-68, 71-73.

> has long been discredited in the United States, from where it originated. It is now accepted in the United States that there is no scientific evidential basis for Parental Alienation Syndrome. No research conducted in the United States has ever been able to produce valid evidence of Parental Alienation Syndrome.[137]

The guidelines of the National Council of Juvenile and Family Court Judges (NCJFCJ) state: "Any testimony that a party to a custody case suffers from 'parental alienation' should 'be ruled inadmissible and/or stricken from the evaluation report.'"[138]

B. Qualifications

One cause of the prevalence of pseudo-psychological myths in Family Court is the incompetence of court evaluators at understanding research methodology and applying academic research forensically. Forensic psychology requires a specialised skill set. The ability to apply academic research reliably in individual situations involves an understanding of concepts like the difference between correlation and causation, confounding, generalisability, and ecological validity. It also requires an understanding of attribution error, also known in forensic psychiatry as the "G2i" problem – the epistemological challenge inherent in applying behavioural-science knowledge in evaluations.[139]

i. Correlation, Causation, and Confounding Variables

Psychological research typically involves measuring the relationship between two variables. Researchers identify a dependent variable (sometimes called an outcome or response variable) and attempt to measure its relationship to an independent variable (sometimes called a stimulus, risk factor, or predictor). If the correlation is validated, it has internal validity.[140] For example, studies have shown that there are correlations between cursing and intelligence,[141] and breast cancer and wealth.[142] These are correlations; they do not demonstrate causal connections. An intelligent person will not lose IQ points if they swear less often. Similarly, a lottery winner would be ill-advised to give away their winnings to avoid the carcinogenic effect. To posit a causal connection between two variables, researchers must look for alternative explanations for the association.[143] The size of the correlation is a crucial

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[137] *NZPS Submission, supra* note 3, at 17-18.
[138] NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES (NCJFCJ), A JUDICIAL GUIDE TO CHILD SAFETY IN CUSTODY CASES 12 (2008).
[139] *See infra* Section III (B) (1).
[140] *See* Jonathan J. Koehler & John B. Meixner Jr., *An Empirical Research Agenda for the Forensic Sciences*, 106 J. CRIM. L. & CRIMINOLOGY 1, 9 (2016).
[141] *See* Rachel Dicker, *People Who Curse Are Smarter Than People Who Don't*, US NEWS AND WORLD REPORT, (Dec. 17, 2015), https://www.usnews.com/news/articles/2015-12-17/study-people-who-swear-more-are-smarter-have-larger-vocabulary.
[142] *See* Steven Lehrer et al., *Affluence and Breast Cancer*, 22 BREAST J. 564, 565 (2016).
[143] Michael D. Green, et al., *Reference Guide on Epidemiology, in* SCIENTIFIC EVIDENCE 549, 598.

factor. The higher the relative risk, the stronger the association and the greater the likelihood that the relationship is causal.[144]

Scientifically valid studies also control for confounding. For example, having grey hair bears a strong statistical relationship to death, but there is an obvious confounding variable: age. Hair colour is not the independent variable driving the dependent variable (death). Age is the independent variable driving two dependent variables: grey hair and age. To determine whether hair colour has a correlational relationship with death outside of age, a researcher would have to control for age – i.e., test whether grey haired people of a certain age were more likely to die than other people of the same age. Kaye and Freedman explain:

> Confounding remains a problem to reckon with, even for the best observational research. For example, women with herpes are more likely to develop cervical cancer than other women. Some investigators concluded that herpes caused cancer: In other words, they thought the association was causal. Later research showed that the primary cause of cervical cancer was human papilloma virus (HPV). Herpes was a marker of sexual activity. Women who had multiple sexual partners were more likely to be exposed not only to herpes but also to HPV. The association between herpes and cervical cancer was due to other variables.[145]

PA theory is an example of the crucial importance of the distinction between correlation and causation and the need to control for confounding. If psychologists wanted to validate PA theory internally, they would need to collect data relating to the dependent variables (parental rejection, long-term psychosocial damage) and demonstrate a statistical relationship with the independent variable ("alienating behavior" by the other parent). One way would be to gather data from adults measuring: (1) their performance across a host of factors relating to psychosocial wellbeing; (2) the strength of their relationships with their parents; and (3) whether they were subjected to "alienating behaviors" as children.

The PA validation study would sort test subjects into two groups: individuals who experienced significant alienating behavior as children (the experimental group) and individuals who did not (the control group). Researchers would measure whether adults in the experimental group were more likely to reject a relationship with a parent as adults and, more importantly, whether they fared worse psychosocially than adults in the control group. Even if research conclusively established a correlation between the independent and dependent variables, correlation is not causation. It is possible that some other third variable is simultaneously causing the two correlated variables. The study would, therefore, have to control for factors like whether the rejected parent engaged in poor parenting or FV.

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[144] *See id.* at 602 (noting that a higher risk can mean it is more likely that the relationship is causal).
[145] David H. Kaye & David A. Freedman, *Reference Guide on Statistics, in* SCIENTIFIC EVIDENCE 211, 219 (2011).

It is extremely unlikely that the correlation would be perfect. There would still be subjects in the control group who were not exposed to "alienating behaviors" but nonetheless rejected a relationship with a parent, as well as subjects in the experimental group who were exposed to "alienating behaviors" but did not become alienated. Warshak concedes: "A parent can engage in alienating behaviors, such as persistently disparaging the other parent, without the child becoming alienated from the parent who is the target of denigration. Conversely, a child's alienation from a parent can arise from factors independent of, or in combination with, the favored parent's behavior."[146] Similarly, there would be subjects in the control group who were not estranged from either parent but were nonetheless psychosocially damaged and subjects in the experimental group who were estranged from a parent but were happy, healthy, and functional. So, even if a causal relationship between childhood exposure to alienating behaviors and adult dysfunction were proven, it would not follow that all adults who reject parents were "alienated" or that all "alienated" children end up dysfunctional.

Causal relationships are even harder to establish, particularly between objective events and subsequent emotional responses – what behaviorists call "stimulus" and "response". To find PA is to find that "alienating behaviors" caused the child's resistance to a particular form of contact with the other parent. Few causal links in human psychology are that simple, and simple assumptions about causal relationships are generally wrong. To establish a likely causal relationship from a correlational one, not only would researchers have to control for confounding variables, but the correlation between the independent and dependent variables would also have to be stronger than the correlation between any confounding variable and the dependent variable, and any alternate theory of confounding causation would need to be less likely than the proposed causal link.[147] This seems unlikely in the context of PA, given that studies of adult child/parent estrangement indicate that mistreatment is the largest driver.[148] They suggest that mistreatment by the rejected parent has a much stronger causal relationship to rejection than the conduct of the protective parent.

This is one reason why the American Psychiatric Association refused to include PAS in the *DSM-V*. It is also the reason why the Court of Appeal rejected the expert evidence in *Accused* and *Tuhura.*[149] While there may be correlations between behavioral issues and CSA or vaginal injuries and non-consensual sex, there is no reliable way to divine causation from the correlates. Kaye and Freedman explain:

> [S]ome children who live near power lines develop leukemia. Does exposure to electrical and magnetic fields cause this

[146] Warshak, *supra* note 109, at 57.
[147] *See* ALFRED S. EVANS, CAUSATION AND DISEASE: A CHRONOLOGICAL JOURNEY 187 (1993).
[148] *See* Kylie Agllias, *Disconnection and Decision-Making: Adult Children Explain Their Reasons for Estranging from Parents*, 69 AUSTL. SOC. WORK 92, 95 (2016); K.M. Scharp et al., *"It Was the Straw That Broke the Camel's Back": Exploring the Distancing Processes Communicatively Constructed in Parent-Child Estrangement Backstories*, 15 J. FAMILY COMMUNICATION 330, 339 (2015).
[149] *See infra* Section II (A).

> disease? The anecdotal evidence is not compelling because leukemia also occurs among children without exposure. . . .
>
> Exposed and unexposed people may differ in ways other than the exposure they have experienced. For example, children who live near power lines could come from poorer families and be more at risk from other environmental hazards. Such differences can create the appearance of a cause-and-effect relationship. Other differences can mask a real relationship. Cause-and-effect relationships often are quite subtle, and carefully designed studies are needed to draw valid conclusions.[150]

ii. Generalizability, Ecological Validity, and Sampling Bias

A significant restriction on the validity of applying research to real-world situations involves the related concepts of generalizability, ecological validity, and sampling bias. Ecological validity refers to the extent to which study results can be replicated in the real-world environment in which they will be applied.[151] Generalizability describes the extent to which research results on a particular set of subjects can be extrapolated to a broader population.[152] Sampling bias refers to the difference between conclusions drawn from the subsample of test subjects and conclusions that would result from complete information from the entire study population.[153] Research results have external validity if they can be generalized to situations and people beyond the study.[154] If subjects of even a large, internally validated study are not representative of the group to whom the results will be applied, the study lacks external validity.[155] "Confidence in the appropriateness of an extrapolation cannot come from the experiment itself. It comes from knowledge about outside factors that would or would not affect the outcome."[156]

There is an ecological-validity problem that lurks behind much research that court evaluators cite in support of their opinions, including those relating to PA. The studies on which they rely are based on the effect of parental separation, post-separation conflict, and custody arrangements on children, but they do not consider court processes, poor parenting, child mistreatment, or FV. The parents in these studies agreed on children's post-separation custody, and the studies did not control

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[150] Kaye & Freedman, *supra* note 145, at 218.
[151] *See* Carrie Leonetti, *Abracadabra, Hocus Pocus, Same Song, Different Chorus: the Newest Iteration of the 'Science' of Lie Detection*, 24 RICHMOND J. L. & TECH. 1, 22 (2017) [hereinafter "Leonetti, *Lie Detection*"].
[152] *See* Gillian S. Macdonald, *Domestic Violence and Private Family Court Proceedings: Promoting Child Welfare or Promoting Contact?,* 22 VIOLENCE AGAINST WOMEN 832, 847 (2016).
[153] BEN A. WENDER, COMMITTEE ON APPLIED AND THEORETICAL STATISTICS, NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, REFINING THE CONCEPT OF SCIENTIFIC INFERENCE WHEN WORKING WITH BIG DATA: PROCEEDINGS OF A WORKSHOP, 38-39 (2017).
[154] *See* Koehler & Meixner, *supra* note 141, at 9.
[155] *See* Kaye & Freedman, *supra* note 145, at 222 (noting that unrepresentative group subjects will have high internal validity but low external validity).
[156] *Id.* at 223.

for parental conflict or FV. Studies that purport to validate PA are based on samples of people estranged from a parent who may or may not have been victims of FV.

Research demonstrates that families who end up in Family Court are not a cross-section of families who separate. Only about five percent of parents have custody determined by a court, rather than by agreement[157]. Studies suggest that approximately seventy percent of those families have experienced violence.[158] They almost all qualify as high conflict.[159] The results of studies focused on "normal" families – families who've agreed about custody of the children after separation, few of which have experienced violence – cannot be generalized to the small subset of families with histories of violence and conflict who litigate custody. This is a form of selection bias and a massive impediment to generalizing the results of these studies in court.[160] Because the studies analyzed families who agreed about custody, they did not consider the effect that litigation and court orders themselves have on family dynamics or child outcomes. One cannot reliably assume that the effect of a parent voluntarily ceasing or continuing contact with a child after separation will be the same as the effect of a court ordering joint custody or limited contact with one parent. One cannot reliably assume that a child's reaction to a care arrangement negotiated by cooperating parents is the same as a child's reaction to a custody order or to one parent seeking one in the context of inter-parent conflict or FV. This is a significant ecological-validity problem. This problem is why the Court of Appeal rejected the psychological evidence in *Falwasser*. There was no basis to conclude that the particular methamphetamine user who was an eyewitness had the same pattern of usage as the test subjects in the research on which the expert's opinion was based. If Broughton's usage history differed significantly from that of the addicts in the studies, the study results were not generalizable to his eyewitness evidence.[161]

iii. The G2i Problem

One of the most challenging issues facing any forensic practitioner is the G2i problem.[162] Researchers generate aggregate data and detect correlations across large numbers of study participants, and the results of psychological studies are based on

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[157] *See* Debra Pogrund Stark, *et al., Properly Accounting for Domestic Violence in Child Custody Cases: An Evidence-Based Analysis and Reform Proposal*, 26 MICHIGAN J. GENDER & L. 1, 43 (2019).
[158] Vivienne Elizabeth, *The Affective Burden of Separated Mothers in PA(S) Inflected Custody Law Systems: A New Zealand Case Study*, 42 J. SOC. WELFARE & FAM. L. 118, 122 (2020) [hereinafter "Elizabeth, *Affective Burden*"].
[159] *See* Stark, *supra* note 158, at 43.
[160] Lucy Blake, *Parents and Children Who Are Estranged in Adulthood*, 9 J. FAM. THEORY & REV. 521, 533 (2017).
[161] *See supra* Section II (A).
[162] David L. Faigman et al., *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81 U. CHI. L. REV. 417, 421 (2014); Carl E. Fisher et al., *Toward a Jurisprudence of Psychiatric Evidence: Examining the Challenges of Reasoning from Group Data in Psychiatry to Individual Decisions in the Law,* 69 MIAMI L. REV. 685, 687 (2015).

averages. The imputed relationship occurs at the group level but cannot indicate causation in an individual subject.[163]

Court proceedings, on the other hand, are about determining the actions of one discrete individual or set of individuals. There is an inherent mismatch between probabilistic data generated by research and the individualized determinations required in court judgments. Robin Feldman explains: "Part of the problem when legal actors try to apply this type of research lies in understanding the difference between finding a statistically significant result and finding a result that will hold true in all cases or even almost all cases."[164] She notes: "A frequent error in social science is to confuse finding a statistically significant difference with finding that the difference is important. If social scientists fall prey to this error, one should not be surprised to see the problem magnified when social science research reaches the courts."[165]

This mismatch creates a serious epistemological conundrum in which the issue in a particular case cannot be determined based on aggregate data. Imagine that 75% of people who are allergic to peanuts are also allergic to peaches. If an individual is allergic to peanuts, are they allergic to peaches? Maybe or maybe not. Probabilistically, it is likely that they are, but they could also be in the 25% of peanut allergy sufferers who are not. This is part of the problem with using syndrome evidence in court. Even if there is strong evidence of a correlation between symptoms and an underlying cause, there is no way to know whether the syndrome caused any given sufferer's symptoms. Probabilities drawn from group data cannot predict the behavior of a given individual.

To apply this concept to PA, imagine that there are controlled psychological experiments that show that 60% of children who reject a relationship with one parent were "alienated" by the other. To be clear, this is a hypothetical scenario. The relationship between "alienating behaviors" and parental rejection has never been measured or validated in this way. If it were, given what is known generally from social-science studies about family dynamics, it is unlikely that a correlation of that magnitude would be established. Even in the hypothetical situation where a strong correlation was demonstrated, however, the G2i problem would still frustrate its use in court. Imagine that a child who is the subject of custody proceedings is rejecting a relationship with one parent. Has the child been "alienated"? There is no way to know. Even assuming that PA were a validated phenomenon with a high degree of correlation between alienating behaviours and rejection, there would still be children who rejected a parent who were not alienated – i.e., the child in question could be in the 40%.

Ironically, this faulty statistical reasoning is not used *in favor of* victims of FV. For example, there is a strong statistical relationship between intimate partner violence (IPV) and CAN. As a group, fathers who use violence against partners have

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[163] Bruce G. Charlton, *Attribution of Causation in Epidemiology: Chain or Mosaic?,* 49 J. CLINICAL EPIDEMIOLOGY 105 (1999).
[164] ROBIN FELDMAN, THE ROLE OF SCIENCE IN LAW 143-44 (2009).
[165] *Id.* at 144.

a high statistical likelihood of inflicting violence on their children after separation, even if they have never done so before.[166] The Court never reasons that the mere fact that a father inflicted IPV on a mother allows it to deduce that the father poses an unacceptable risk of danger to the child, and they are correct not to deploy this reasoning. While 60% of men who inflict violence on partners also inflict violence on their children, 40% do not, and there is no reliable basis to conclude that any given man who inflicted IPV on a partner will necessarily use violence against a child. Even under the lower threshold of evidence rules governing relevance and unfair prejudice, the evidence is simply logically irrelevant.

C. Unquestioning Acceptance of Pseudo-Psychology

Courts continue to embrace invalid PA evidence from experts who are not qualified to offer reliable opinions about the application of academic research to legal decision making. Despite the consensus of mainstream psychologists opposing the use of PA in Family Court, court evaluators cherry-pick the handful of "studies" that they claim support the construct while ignoring the weight of evidence in the field. They support their conclusions with reference to psychological literature that is not generalizable to decisions involving child custody, demonstrating a lack of understanding of ecological validity, the difference between correlation and causation, controlling for confounding, and the G2i problem. For example, evaluators rely on the work of Marilyn Freeman, who studies the effect of parental abduction on child wellbeing, to support their opinions around the "long-term damage" that children experience from PA.[167] Research about abduction is not generalizable to custody determinations or children's resistance to contact with a violent parent.

The courts' unquestioning acceptance of the junk science of PA was on display in *Finn v. Poole*. *Finn* involved a custody dispute between the parents of twelve-year-old Child.[168] From 2014, Child was subject to an order for joint custody, issued by consent of his parents.[169] Eight months later, Child refused to go to Father's home.[170] Mother filed a complaint with Police after Father assaulted Child.[171]

Father sought to vary the custody order so that Child was placed in his sole custody.[172] He claimed that he was "alienated from him" because of Mother's "hostility" and "antipathy" and the only way to "reverse the alienation" was for the court to force Child into his custody.[173] He claimed that Mother's "undermining tactics" placed Child in a "loyalty bind."[174] Father sought a guardianship order placing Child at boarding school – in other words, Father did not want Child to live

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[166] A.J. Zolotor et al., *Intimate Partner Violence and Child Maltreatment: Overlapping Risk*, 7 BRIEF TREATMENT & CRISIS INTERVENTION 305, 316 (2007).
[167] *See* Sarah Calvert, *What Happens to Children in High Conflict Parenting Disputes. How Should We Think of Their "Voice"?,* 22 JUDGES' NEWSLETTER 16, 17-18 (2018).
[168] *See Finn,* [2015] N.Z.H.C. at ¶ 1.
[169] *See id.* at ¶ 5.
[170] *See id.* at ¶ ¶ 5-7.
[171] *See id*. at ¶ 97.
[172] *See id.* at ¶ 6.
[173] *See id.* at ¶ 7.
[174] *Id.* at ¶ 21.

with him; he wanted Child not to live with Mother.[175] Mother shared Father's concern about his deteriorating relationship with Child but believed that it was the result of Father's aggression, which, given the facts, was a plausible explanation.[176]

Child was adamantly opposed to either a change in care or being sent to boarding school.[177] Child expressed that one reason that he did not like being at Father's house was because Father "hurt" him, and Police got involved – an obvious alternate explanation for Child's resistance to staying at Father's.[178]

The court evaluator opined that Child was "exhibiting behavior consistent with parental alienation."[179] Father offered "expert" testimony from a second psychologist who opined, based on her anecdotal experience, that "she had never seen a more obvious or blatant example of alienation."[180]

Father offered no direct evidence that Mother had done anything to undermine his relationship with Child – for example, witnesses who observed Mother denigrating Father or encouraging Child not to have a relationship with him. Instead, the "evidence" of Mother's "alienating behaviors" was derived entirely from the syndrome construct: because Child rejected contact with Father, Mother *must have* done something to cause the rejection.

When the Family Court declined to make a PA finding and left joint custody in place, Father appealed to the High Court, arguing that the Family Court failed to give sufficient weight to the PA evidence.[181] Child continued to express hostility toward Father, refusing to get into Father's car at changeovers and walking along the highway to get away.[182]

On appeal, the High Court canvassed what it characterized as "psychological indicia of alienation."[183] This is the first asserted correlation that underlies PA theory: that Mother's "alienating behavior" was causing Child's rejection of Father. All indicia were subjective, and no standardized protocols for identifying them or testing the accuracy of the identifications were used. The indicia included factors like a "child's strident rejection of a parent, usually accompanied by resistance or refusal to visit that parent"; a "fusion of thinking in which the child and the aligned parent think alike"; "[s]uperficial or trumped up or exaggerated complaints about the rejected

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[175] *See id.* at ¶ 10.
[176] *See id.* at ¶ 23.
[177] *See id.* at ¶ 71.
[178] *Id.*
[179] *Id.* at ¶ 24.
[180] *Id*. (The evidence was concerning for a second reason. The psychologist was originally retained by Father to provide counselling to the Children. There is an important distinction between a therapeutic relationship with a patient and an evaluative relationship that an expert witness has with an assessment subject. By offering a forensic assessment of children after a prior therapeutic relationship, this psychologist violated principals relating to fiduciary obligations, conflicts of interest, and objectivity); *See generally* Stuart A. Greenberg & Daniel W. Shuman, *Irreconcilable Conflict Between Therapeutic and Forensic Roles*, 28 PRO. PSYCH.: RSCH. & PRAC. 50 (1997).
[181] *See Finn,* [2015] N.Z.H.C., at ¶ 33.
[182] *See id.* at ¶ 84.
[183] *Id.* at ¶ 35.

parent with little or no substance"; a "strong tendency to become over-involved in the adult issues of divorce", including "go[ing] out of their way to look at court papers" and "listen[ing] in on phone conversations between adults"; giving "vague reasons" for rejecting a parent and staying "focused" on exaggerated complaints about them; using "the same phrases or expressions as the aligned parent"; and seeing the world "in rigid and all-or-nothing ways."[184] There was no basis offered for how the Court distinguished between "strident" and less-than-strident rejection, identified "resistance" to visitation that fell short of "refusal to visit"; distinguished "thinking fusion" from a parent and child simultaneously but independently reaching the same opinion; distinguished a "superficial", fabricated, or "exaggerated" complaint from a genuine one; distinguished a "strong" tendency to become involved in adult issues from a weak one; distinguished over-involvement in adult issues from typical or under-involvement in them; or distinguished a child "going out of their way" to gain information about adult issues from ordinary childhood curiosity. The indicia also included factors that one would expect any child to exhibit to some extent, with no indication of how to distinguish typical from pathological behaviors. The Court described "inconsistent and contradictory statements and behaviours," rejecting a parent sometimes but being "friendly and positive" at others, having a "vague" reason for rejecting a parent rather than a sufficiently specific one,"exaggerated" complaints rather than reasonable ones, the "sameness" of language between the child and accused parent,[185] or having pathologically rigid thinking rather than having a strong opinion based on sufficient grounds.[186]

The absence of standardized protocols or even meaningful definitions for these determinations is why this evidence should never be admitted. These determinations are license for speculation, and *Finn* demonstrates the danger of this hubristic exercise. The case included evidence that Father had poor parenting skills, expressed animosity to Child about Mother, and had a history of fraught interactions with Child since before the parties' separation, but the evaluators gave no basis for ruling out this behavior as the primary cause of the estrangement, let alone evidence that their process of differentiation was reliable.

The High Court claimed that "the literature" established that: when children become "alienated," the "emotional response can be devastating" and "the impact is never benign," the distortion to their relationship with the rejected parent is "potentially the most damaging effect," they are "at risk of developing disturbances in many of their relationships," they "often become manipulative and feel overly powerful," and "there is a strong likelihood they will develop a disturbance in their growing identity."[187] The Justice claimed that there was "a consensus" that it was "central to every child's well-being and development that they have a positive paternal relationship" with both parents.[188] He claimed that "[e]veryone agrees" that respecting

[184] *Id.*
[185] The Court did not acknowledge that children generally learn language from adults in their life and mirror their language.
[186] The Court did not recognize that children typically engage in black-or-white thinking as an ordinary characteristic of immaturity.
[187] *Id.* at ¶ 36.
[188] *Id.* at ¶ 102.

Child's request not to have forced contact with Father was "[p]lainly undesirable".[189] The language that the Court used in describing the purported correlations between parental rejection and long-term psychological damage demonstrates its lack of scientific validity. Scientifically valid research establishes statistical correlations between two variables. It would define and measure "alienation," define and quantify "emotional damage," and precisely state the statistical relationship between two variables. The language of "can be," "never," "potentially the most," "many," "often," "may be," "strong likelihood," and "every" is not the language of science. It is the language of generalization. There is no indication that researchers have (or could have): defined "relationship disturbances" and distinguished them from non-pathological relationship developments; defined "manipulation" and distinguished pathological manipulation from children's ordinary attempts to manipulate; distinguished pathological "resistance to authority" from typical resistance to authority that is a normal (and even desirable) part of child development; or defined "acting out" and distinguished it from any non-alienation-based unwanted behavior. The decision contained no references to the psychological literature on which it relied, let alone a description of the design, methodology, or study results.

The Justice stated that he had "no hesitation in concluding that [Child] is alienated from his father."[190] He acknowledged: "It cannot be assumed that [Mother] or the maternal environment is necessarily the sole or even the primary cause."[191] He noted that Child had a difficult relationship with Father since before the parties' separation.[192] Inexplicably, he concluded: "Despite these reservations I am satisfied there are aspects of the maternal domestic environment which have in the past and continue to contribute to [Child]'s alienation from his father . . ."[193] He never acknowledged, let alone considered, Father's history of child abuse, other than a passing finding that [Child] "falsely alleges assault" against Father, offering no basis for his finding that Child's claims of assault were "false."[194]

The Court ordered that Child be removed from Mother's care and forced into boarding school.[195] The Justice cited psychodynamic literature that conceded that there was no empirical support for reversing care or placing a child in the care of a third party as a remedy for PA.[196] The Justice claimed that "research has indicated that many children secretly wish that someone would call their bluff and insist they have a relationship with the parent they claim to fear or hate."[197] Once again, "many" is not the language of science, and this vague claim contains no indication that an evaluator could reliably identify a child harboring such a "secret" wish.

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[189] *Id.* at ¶ 104.
[190] *Id.* at ¶ 85.
[191] *Id.* at ¶ 99.
[192] *See id.* at ¶ 45.
[193] *Id.* at ¶ 100.
[194] *Id.* at ¶ 120.
[195] *See id.* at ¶ 144.
[196] *See id.* at ¶ ¶ 107-09.
[197] *Id.* at ¶ 108.

D. Dangerous Consequences

The false attribution of a child's rejection of an abusive parent to their protective parent is dangerous. CAN is likely to be the primary reason for the rejection, irrelevant of the protective parent's actions. The protective parent is likely to be concerned for the child's safety and seek to protect them from further abuse.[198] Warshak concedes:

> Children who are chronically mistreated by a parent may welcome their parents' separation as an opportunity to escape the mistreatment. When these children know they no longer have to spend time with an aversive parent and do not fear retaliation if they reject that parent, they may resist or refuse contact.
>
> When reacting to a sustained pattern of abuse by one parent or witnessing a parent's violence toward the other parent, the justification for the child's rejection is apparent.[199]

The Family Court's entrenched, ideological belief in PA folklore results in protective parents being stripped of custody, custody being awarded to violent parents, and children's voices being ignored. The Court often takes the drastic steps of reversing care to strip protective parents of contact with children, sending them to live with abusive parents,[200] ordering counseling for protective parents to "treat" their "alienating behaviors",[201] ordering reunification and "deprogramming" interventions for children,[202] and issuing arrest warrants to force children into the custody of violent parents.[203]

Validated research demonstrates that children who are exposed to violence suffer from adverse physical, psychological, and cognitive impacts later in life.[204] Trauma accumulates over the course of childhood, so its impact is cumulative and

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[198] *See* Julia Galántai, et al., *Children Exposed to Violence: Child Custody and Its Effects on Children in Intimate Partner Violence Related Cases in Hungary*, 34 J. FAM. VIOLENCE 399, 405 (2019).
[199] *See* Warshak, *supra* note 109, at 61.
[200] *See Haye v. Psych. Bd*., [1998] 1 N.Z.L.R. 591, 597; *Daviau v. Desrosiers,* [2015] N.Z.F.C. 7922, ¶¶ 155-59.
[201] *See L v. H*, [2004] N.Z.F.L.R. 1025 (F.C.), ¶ 64.
[202] *See KP v. AZ*, [2020] NZHC 1340, ¶ ¶ 56-38.
[203] *Malone v. Auckland Fam. Ct.*, [2014] NZHC 1290, ¶¶ 14-15; *Armstrong v. Mann*, [2020] NZFC, at ¶ 174.
[204] *See* Emily A. Greenfield, *Child Abuse as a Life-Course Determinant of Adult Health,* 66 MATURITAS 51, 52 (2010); B.B. Robbie Rossman, *Longer Term Effects of Children's Exposure to Domestic Violence*, in DOMESTIC VIOLENCE IN THE LIVES OF CHILD.: THE FUTURE OF RESCH, INTERVENTION, AND SOC. POL'Y (S.A. Graham-Bermann & J.L. Edleson, eds., 2001) at 35. They include flashbacks, nightmares, hyper-reactivity, arousal, vigilance, aggression, irritability, social withdrawal, and behavioral issues. *See generally* Miriam K. Ehrensaft, et al., *Intergenerational Transmission of Partner Violence: A20 Year Prospective Study*, 71 J. CONSULTING & CLINICAL PSYCH. 741, 742 (2003).

dose specific.[205] The more exposure that children have to traumatic events and/or the more severe the trauma, the greater the impact on well-being. When a child has experienced violence, either in the form of direct CAN or by experiencing IPV against a parent, preventing additional exposure to violence, in both severity and incidence, increases the likelihood of avoiding the worst long-term consequences of traumatic exposures.

Social science literature also documents that PA claims are frequently misused by abusive fathers.[206] It cautions that the concept can be dangerous when it causes children's views to be rejected or is used to support changes to custody.[207] In Australia, Sandra Berns has documented how fathers use PA claims as a tactic to continue coercive control over mothers.[208] Johnston reached a similar conclusion in her study of post-separation PA in the United States, noting that PA allegations have become a legal strategy by with a rejected parent vilify the aligned parent and seek coercive and punitive custody orders.[209]

Fidler and Bala note a similar phenomenon in Canada, explaining that abusive men alienate their children from their victim mothers then allege attempted alieantion by the victim as "a smokescreen to their own abusive behavior," even though victims rights attempt to protect their children from abusive men.[210] Drodz and Olesen note that mothers are blamed for sabotaging their children's relationships with their fathers through "alienating behaviors" when their intent is protection not revenge.[211] They note:

> We find ourselves greatly concerned that there is a group of colleagues who are engaged in the practice of child custody evaluations who do not understand how to competently assess the dynamics of and the effects upon children of domestic violence. Many of these colleagues are offering opinions to the Court about family functioning without a thorough understanding of the role of domestic violence. This has led, at worst, to the removal of children from mothers who were already victimized. Efforts to protect children have led to

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[205] *See* Sherry Hamby, et al., *Recognizing the Cumulative Burden of Childhood Adversities Transforms Science and Practice for Trauma and Resilience*, 76 AMER. PSYCH. 230, 232 (2021).
[206] Michelle Bemiller, *When Battered Mothers Lose Custody: a Qualitative Study of Abuse at Home and in the Courts,* 5 J. CHILD CUSTODY 228, 231 (2008); Joan Meier, *U.S. Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations: What Do the Data Show?,* 42 J. SOC. WELFARE & FAM. L. 92 (2020).
[207] *See* Bruch, *supra* note 62 at 530.
[208] *See* Sandra Berns, *Parents Behaving Badly: Parental Alienation Syndrome in the Family Court — Magic Bullet or Poisoned Chalice*, 15 AUST L. J. FAM. L. 15, 16 (2001).
[209] Johnston, *supra* note 130, at 759.
[210] Fidler & Bala, *supra* note 99, at 10-11.
[211] Leslie M. Drodz & Nancy Williams Olesen, *Is it Abuse, Alienation, and/or Estrangement: A Decision Tree,* J. OF CHILD CUSTODY, 65, 96-97 (Oct. 20, 2008).

> some children being placed in the custody of manipulative and violent parents.[212]

Vivienne Elizabeth recently conducted a case study of how PA claims in New Zealand prevent women from protecting children from CAN, which found that most mothers governed by New Zealand's PA-inflected custody system were DV victims.[213]

In 2021, a group of more than seventy academics and DV experts sent an open letter to Prime Minister Jacinda Ardern about the now-notorious "Mrs. P" case, in which a DV victim who sought the Family Court's protection was instead "bullied" by the judge, who disbelieved her "stack of evidence" about her former partner's abuse.[214] The Family Court ultimately referred her for criminal prosecution for what the Court of Appeal would eventually find not to have been a crime. The letter notes:

> We continue to be deeply troubled by stories that mothers involved in the Family Court system risk being treated as vindictive and "alienating" if they disclose violence and abuse they or their children suffer. Many of us have heard from women desperate because they have been warned that if they don't stop raising concerns related to abuse of their children, they risk losing their children.[215]

The threat of being labeled "alienating" is omnipresent in the Family Court. Evaluators criticize DV survivors for reporting violence to Police, applying for protection orders, making reports of concern to CYFS, or taking children to health professionals after they report CAN during contact with violent parents.[216] The Court's punitive response to parents who are labelled "alienating" and the resulting heightened danger that children face coerces them not to raise claims of abuse or seek protection for themselves or their children.

Christine Harrison documents how threats of "alienation" operate in England and Wales to coerce protective parents' "agreement" to placing children in some risk to avoid greater risk. She explains that women had to jeopardize their own interests and agree to supervised contact between violent fathers and their children because attempting to secure full protection placed them at greater risk of being labeled "implacably hostile" and losing their children.[217]

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[212] *Id.* at 68.
[213] *See* Elizabeth, *Affective Burden*, *supra* note 159, at 122.
[214] "Open Letter to the Prime Minister About Mrs. P and the Safety of Our Courts" available at: https://www.scribd.com/document/504042816/Open-Letter-to-the-Prime-Minister-About-Mrs-P-and-the-Safety-of-Our-Courts (last visited November 4, 2022).
[215] *Id.*
[216] *See C v. B*, [2018] NZCA. 322, ¶ 32,; *RMJ v. BJG*, [2017] NZHC 1159, ¶ 454.
[217] Christine Harrison, *Implacably Hostile or Appropriately Protective?,* 14 VIOLENCE AGAINST WOMEN 381, 396 (2008).

Similarly, Elizabeth found that the use of PA(S)n in custody cases in New Zealand framed mothers' resistance to father's demands for care-time as pathological. She explains:

> It's a delicate dance in which mothers run the risk of being regarded as obstructive, hostile and alienating if they speak up about violent and/or coercively controlling behaviours directed at them, make claims about violence and abuse against their children or otherwise suggest that fathers are ill-equipped to assume the role of carer for any length of time.[218]

The Court's folkloric belief in PA puts parents who are concerned for children's safety in a double bind. If they make their concerns known, they risk being labelled "hostile" and "alienating." If they withhold their concerns, the Court never sees the evidence of CAN that supports them. Doughty et al. note: "Some participants reported being advised by lawyers that they would be perceived as alienators if they raised their concerns about their child's safety or did not hide how upset they were in taking a distressed child to a contact visit."[219] Perhaps, unsurprisingly considering the effectiveness of tactical PA claims by abusive parents, their study of PA allegations in England and Wales documents "a recent increase in allegations being made by fathers," which "tended to be made subsequent to the mother raising the issue of abuse as a reason for a child resisting contact."[220]

The NCJFCJ warns against application of PA theory, particularly in cases involving FV:

> The discredited "diagnosis" of "PAS" (or allegation of "parental alienation"), quite apart from its scientific invalidity, inappropriately asks the court to assume that the children's behaviors and attitudes toward the parent who claims to be alienated have no grounding in reality. It also diverts attention away from the behaviors of the rejected parent, who may have directly influenced the children's responses by acting in violent, disrespectful, intimidating, humiliating and/or discrediting ways towards the children themselves, or the children's other parent.[221]

E. Silencing Children's Voices

PA allegations have been used to silence children who reject contact with a parent. New Zealand's custody legislation requires the Family Court to consider children's views in determining custody.[222] The United Nations Convention on the

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[218] *See* Elizabeth, *Affective Burden, supra* note 159, at 118-19.
[219] Doughty et al., *supra* note 130, at 69.
[220] *Id.*
[221] NCJFCJ, *supra* note 139.
[222] *See* Care of Children Act 2004, § 6 (N.Z.).

Rights of the Child (UNCRC) requires the Court to give children's views due weight.[223]

The Court credits evidence from evaluators who espouse PA theories to determine that the views of children are inauthentic and therefore do not need to be given weight. If the Court determines that a child has been "alienated," it will decline to consider their views.[224] In *Daviau v. Desrosiers,* the Court placed "little weight" on Child's views (that she was afraid to have unsupervised contact with Father because of his FV) because it found that "her relationship with her father has deteriorated due to alienation factors."[225]

Harrison documents this phenomenon in England and Wales, explaining:

> Although the concepts of "parental alienation" and "implacable hostility" are substantially challenged by the weight of research evidence, they were used to preclude taking account of the impact on children of domestic violence. Mothers' accounts of their children's needs were rendered inadmissible, exacerbating the marginalization of children's perspectives that is characteristic generally of the divorce field. A presumption that contact was invariably beneficial led to a selective approach to children—who were believed if they said that they wanted contact but overruled if they did not.[226]

In Scotland, Morrison et al. document: "When a child's views are considered to have been manipulated or unduly influenced, courts tend not to weigh their accounts heavily, and may even see offering an opportunity to the child to speak out about their experiences and preferences as running counter to the child's best interests."[227] They continue:

> While borders between the child and the parental dispute may originate from a desire to protect children, these have unintended and serious consequences for children's participation rights. Rather than protecting children from manipulation, the law's attempt to separate the child's views from the dispute leaves children's views *vulnerable* to adult manipulation.[228]

The loose psychoanalyzing of PA and related concepts is circular and self-referential. To determine whether a child's views are authentic, the evaluator assesses whether the child is aligned with one parent. To determine whether a child is aligned with one

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[223] UNCRC, Article 12.1 (1989).
[224] *See Daviau,* [2015] NZFC, at ¶ 50; *D. v. W.*, (1995) 12 FRNZ 336 (HC).
[225] *Daviau*, [2015] NZFC, at ¶162.
[226] Harrison, *supra* note 218, at 399.
[227] Fiona Morrison, et al., *Manipulation and Domestic Abuse in Contested Contact – Threats to Children's Participation Rights*, 58 FAM. CT. REV. 403, 405 (2020).
[228] *Id.* at 409.

parent, the evaluator assesses whether the child shares the protective parent's concerns about the danger posed by the abusive one. The result is that no child could ever have legitimate, autonomous views if they happen to coincide with those of their protective parent, including if both parent and child believe, based on shared experience, that an abusive parent remains unsafe. The Court simply presumes that the child's rejection is pathological and the result of the other parent's (invisible) behavior.

The court's preferred "cure" for PA extends to court-ordered "deprogramming" of children whom it deems alienated.[229] This involves ordering young people – many of whom have decision-making capacity[230] and all of whom have human rights relating to freedom of thought and refusing medical treatment – into intervention programs pressure them to "realize" that their rejected parents are loving, and their preferred parents are abusive. This deprogramming is the gay-conversion therapy of child custody.

IV. CASE ILLUSTRATIONS

A. C. v. B.[231]

The court of appeal case *C. v. B.* demonstrates the Family Court's ongoing use of unlabeled PA concepts and the higher courts' failure to scrutinize it. The parties separated in 2010.[232] They had two children, Son and Daughter, who were three and one years old, respectively.[233]

In 2012, Mother sought a modification of custody, alleging that Father had been abusive toward Children.[234] Instead, the Court ordered joint custody.[235] The Court found that Mother was an "an excellent mother with an unrivalled capacity to parent her children" but expressed concern that she was unable "to support the children's relationship with their father."[236] This language about the "inability to support the children's relationship with their father" is concerning for two reasons. First, it is a *sub silentio* PA finding without the transparency of PA terminology. Second, it conflates a parent's support for a "relationship" between their children and another parent with support for unsupervised contact with a FV perpetrator. This is a false equivalency. Mother believed that joint custody was unsafe. In a realistic assessment, informed by an understanding of family dynamics and FV, Mother's desire to limit Father's contact to supervision so that he could not inflict violence on Children would be viewed as supporting a safe relationship. Instead, the Court ignored the source of Mother's resistance to unsupervised contact – her belief that Father would abuse Children again.

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[229] *See KP,* [2020] NZHC 1340, at ¶¶ 56-58 ; *Watkins*, [2020] NZFC 9832, at ¶ 65.
[230] *See Moore v. Moore,* [2014] NZHC 3213; *Gillick v. Health Authority*, [1986] AC 112.
[231] [2018] NZCA 322.
[232] *See id.* at ¶ 1.
[233] *See id.*
[234] *See id.* at ¶ 10.
[235] *See id.*
[236] *Id.* at ¶ 19.

In 2012, A disclosed that Father sexually abused him to Mother, a church counsellor, and a teacher.[237] The teacher reported Son's disclosure to CYFS. Mother applied for sole custody. The Court initially issued interim orders restricting Father's contact with Son to supervision, but later found that the sexual abuse was "unproven" and that "there was no real risk to the children's safety" in Father's custody.[238] The Judge found that Mother was sending "unspoken messages" to Children about Father, reinstating joint custody and threatening Mother in none-to-subtle terms: "The critical issue is whether the point had been reached where a change in care for the children is necessary in their welfare and best interests, so that they can have a meaningful relationship with their father untrammeled by [Mother]'s view of [Father] as a person and a parent."[239] The Court's factual finding – that Mother was telegraphing unconscious messages of disapproval to Children – was a PA finding masked by the sleight of hand of ambiguous language. The Court offered no evidential basis for this finding, describing it as if it were a matter of logical inference, intuition, or common sense.

In 2016, Mother again sought custody with supervised contact for Father, claiming that Father was continuing to abuse Children physically and sexually.[240] Father denied the allegations and sought sole custody on the ground that Mother was emotionally abusing Children by continuing to make abuse allegations.[241]

The Court again found that that the abuse was "not proved."[242] The Judge found that both parents had emotionally abused Children and that the primary cause was Mother's "attitude and actions toward" Father.[243] She found that Mother was "psychologically and emotionally" abusing Children by continuing to believe that Father was abusing them and by her "negativity" toward him.[244] She found that: (1) Mother did not "accept" the Court's earlier finding that Father had not abused Children; (2) she "clearly" must have made Son "aware" of the court proceedings; and (3) it was "likely" that Mother told Son that his earlier disclosure was "not believed."[245] She made these findings without identifying any evidentiary basis and presented them as if they were a matter of deductive reasoning. She made these findings –blaming Mother for harming Children – even though she found that Father's response to the abuse allegations was "forceful and somewhat intimidating."[246] She scolded Mother for getting counselling for Son, apparently in violation of a court order, noting: "In taking [Son] to Family Works she has provided an opportunity for [Son] to repeat his disclosure, in [Mother]'s presence."[247] The Judge offered no explanation for why she would prohibit Mother from getting counselling for a child about whose psychological and emotional wellbeing she

[237] *See id.* at ¶ ¶ 11, 32.
[238] *Id.* at ¶ 9.
[239] *Id.*
[240] *See id.* at ¶ 11.
[241] *See id.*
[242] *Id.* at ¶ 22.
[243] *Id.* at ¶ 9.
[244] *Id.* at ¶ 23.
[245] *Id.* at ¶ 32.
[246] *Id.* at ¶ 23.
[247] *Id.* at ¶ 32.

expressed concern or why she deemed Mother taking Son to a reputable counselling service where he might repeat his claims to a third party inappropriate. It is as if the Court's priority is covering up its failure to respond to Son's disclosures rather than an appropriate investigation of those disclosures.

The Judge made good on the earlier threat, granted custody to Father, and restricted Mother's contact to alternating weekends, finding that Children had to be "removed" from "the conflict which is emotionally abusive of them."[248]

One concerning aspect of *C. v. B.* is the disconnect between the problem identified (Children caught in parental conflict) and the remedy ("removing" Children from the conflict by stripping them from the custody of their protective parent and granting custody to the allegedly abusive one). The Court's order removed Children from their primary caretaker, despite the statutory requirement that the Court consider "continuity of care" in deciding custody.[249] The Judge described her order in neutral terms – characterizing it as removing Children from conflict – when, even on her interpretation, she removed Children from the custody of one combatant and handed them to another. The only explanation for such a one-sided solution is PA. The Judge's order can only be understood if she is implicitly finding that the conflict is Mother's "fault" – that she was "alienating" Children.

Another disturbing aspect of the decision is the Judge's belief that Mother discussed the proceedings with Son – as if it were self-evident that, if she had, it would have been scandalously inappropriate. Under the UNCRC, children have a right to participate in decisions that affect them.[250] The only concerning aspect about Mother discussing the custody proceedings with Children is that she was apparently the first person to do so. If so, her discussions with them are evidence that the Court violated Children's rights under the UNCRC, but instead the Court treated Mother keeping Children informed of the events in their custody proceedings as unquestionable evidence of psychological abuse. Recognizing children's participation rights is not psychologically damaging but rather empowers and protects them by reducing their risk of future violence.[251]

In 2017, the Court made final orders, awarding sole custody to Father and severely limiting Mother's contact. The Judge found:

> I cannot be satisfied that the alleged disclosures by the children to [Mother] are reliable evidence. I am satisfied that the children continue to be safe in the care of [Father] and I acknowledge that they would like to have more contact with their mother. I am concerned that the children are put in a

[248] *Id.* at ¶¶ 9, 23.
[249] *See* CoCA § 5 (d).
[250] *See* UNCRC, Art. 12.
[251] *See* Emily Buss, "*You're my What?" The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. 1699, 1704 (1996); Jeanette Cossar, et al., *"You've Got to Trust Her and She's Got to Trust You": Children's Views on Participation in the Child Protection System*, 21 CHILD & FAM. SOC. WORK 103, 103-04 (2016).

> position of telling their mother what she wants to hear. I do not accept [Mother]'s assertion that the children feel that they cannot tell anyone about their concerns or that nobody is listening to them.[252]

She based her findings on her belief that Children's "demeanour" did not indicate "concerns for their safety" with Father.[253] She noted that Children's disclosures occurred when they were anxious before handovers to Father.[254] These findings are concerningly pseudo-scientific. The judge gave no basis for her obvious assumptions that there is a "normal" demeanor for children who have experienced violence and Children's behavior was outside that norm or that Children anxiously reporting abuse immediately before being handed over to an abuser was suspicious rather than a natural and expected act of attempted self-protection.

Unfortunately, *C. v. B.* not only exemplifies the Family Court's reliance on unreliable pseudo-psychology, but also demonstrates why appeals to higher courts cannot correct these failures. Mother appealed to the High Court, and the Justice found no error in the Family Court's legal or factual findings.[255]

Shortly after the High Court decision, Mother refused to return Children to Father after they disclosed additional episodes of physical and sexual violence.[256] Following its standard practice, the Family Court issued a warrant authorizing the arrest of Children to effectuate their "return" to Father.[257] The Court modified its custody order to permit Mother only supervised contact.[258]

Mother applied again for custody and advised the Court that Daughter told friends that Father hit her, and Son told friends that Father touched him inappropriately and he felt unsafe in his care.[259] The Court referred the new allegations to CYFS.[260] Staff at CYFS decided, without interviewing Children, that their reports of abuse were unreliable.[261] The Court denied Mother's application, finding that the "further alleged disclosure of abuse by the father is a continuation of the matters that have previously been investigated and determined by the Court."[262]

One concerning aspect of this decision is the finding that Mother's claims that Father committed *additional* violence were foreclosed by the Court's previous rejection of her claims of *past* violence. At best, this is nonsensical – the fact that the Court found that evidence of violence in 2012 and 2016 was insufficient was irrelevant to whether violence occurred in 2018. At worst, the Court was unwilling to

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[252] *C. v. B.,* [2018] NZCA 322, at ¶ 9.
[253] *Id.*
[254] *See id*. at ¶ 34.
[255] *See id.* at ¶10.
[256] *See id.* at ¶ 12.
[257] *Id.*
[258] *See id.* at ¶ 13.
[259] *See id.* at ¶14.
[260] *See id.*
[261] *See id.* at ¶ 15.
[262] *Id.* at ¶ 16.

hear Mother's evidence that new acts of violence occurred in 2018 because it showed that the Court's earlier safety findings in 2012 and 2016 were wrong – and resulted in harm to Children.

Another concerning aspect of *C. v. B.* is how the courts treated Mother's appeals, renewed applications, and additional evidence of violence as psychological abuse of Children. In 2018, Mother applied for leave to appeal to the Court of Appeal.[263] She argued that the Family Court was punishing her good faith attempts to protect Children from what she believed to be child abuse.[264] Mother's submission eloquently argued:

> It is my submission that the definition of abuse in the Domestic Violence Act was never meant to be used against parents who are acting protectively for their children, and that decisions such as in this case, have in fact gone against both the wording and intent of the definition in the Domestic Violence Act, and set a dangerous precedent by it's inappropriate use in the Family Court. It is my submission that the Family Court has inappropriately apportioned the "emotional/psychological abuse" label on protective parents to punish them for bringing proceedings before the court, and to prevent further proceedings from being brought before the family court.[265]

Denying Mother's appeal, the court of appeal characterized the Family Court's decisions as stemming from concern about "the impact on the children of their exposure to their parents' conflict" and not whether "that conflict constituted emotional or psychological abuse by the parents of each other."[266] The Court described them as finding that "conflict *as played out by both the parents* had resulted in emotional and psychological abuse of the children."[267] This characterization is hard to fathom. It portrayed the Family Court's decision making as neutral – as if the Court were concerned with the "parents' conflict" – when its orders evidenced only disapproval of Mother. The orders were clearly not neutral – they resulted in Father having sole custody of Children and Mother being stripped of any unsupervised contact. A court concerned with mutual conflict would issue mutually binding orders, not orders that increasingly privilege one parent's contact while restricting the others. This solution was not consistent with a coin toss. It was a punishment for Mother and reward for Father. The only occurrence that such a solution was sure to stop was Children's ability to make future reports of abuse to Mother – or realistically anyone else. That solution was not neutral. It was designed to keep the Court from having to hear Mother's safety concerns again, let alone admitting that its initial risk assessment

[263] *See id.* at ¶ 3.
[264] *See id.* at ¶ 28.
[265] *Id.* at ¶ 26.
[266] *Id.* at ¶ ¶ 18, 31.
[267] *Id.* at ¶ 38 (emphasis added).

may have been erroneous. The court of appeal's recharacterization of it as value neutral was disingenuous.

There is no way to know whether Children were physically and sexually abused, partly because private conduct is never perfectly knowable and partly because the factfinding in *C. v. B.* was hopelessly contaminated by the Court's unreliable evidentiary and inferential processes. The unknowability proves the dangerous risk that the PA construct creates. The basis for the Court's initial finding morphed over time from a failure of proof to evidence of Mother's pathology. The unspoken mechanism for this morphing was PA, even though there was no basis for finding that Mother alienated Children other than her belief that Children were being abused, which the Court rejected.

The mechanism by which the courts resolved the supposed "conflict" is concerning for its apparent dishonesty. The court of appeal's decision revealed the courts' true reasoning when it concluded that the evidence of "[Mother]'s attitude to [Father]" was her "ongoing allegations of sexual abuse."[268] This is a classic articulation of PAS, with the words "parental alienation" excised. The only way that the remainder of the Family Court's findings make sense is if the "attitude" that the Court was referencing was "alienation". The lesson that the courts in New Zealand appear to have learned from the debunking of PA pseudo-science is not that it is junk science but rather that PA concepts should be hidden while nonetheless followed in secret application. By avoiding the terminology of PA while employing its principles, courts continue to harm and endanger children exposed to violence while simultaneously insulating themselves from scrutiny and accountability for poorly theorized and dangerous decision making based on junk psychology.

B. R.M.J. v. B.J.G.

The High Court case of *R.M.J. v. B.J.G.* is another disturbing example of these phenomena. Mother offered substantial evidence that Father physically and sexually abused both her and Child and posed a risk of future abuse to Child.[269] Child made consistent, explicit disclosures to several people, including family members, a teacher, a CYFS caseworker, the lawyer for the child, a neighbor, and the Judge.[270] Nonetheless, the Court repeatedly rejected Mother's concerns and made adverse findings about her credibility.

In September 2011, the Judge found that Mother had a "pernicious attitude towards the father" and a "woeful inability to promote the father in [Child]'s life."[271] He found that the risk to Child was Mother's steadfast belief in Father's abuse.[272]

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[268] *Id.*
[269] *See R.M.J.,* [2017] NZHC at ¶ 22.
[270] *See id.* at ¶ 164.
[271] *R.M.J. v. B.J.G.*, FAM-2010-003-000151 (F.C. Ashburton), September 29, 2011 at ¶ 284.
[272] *See R.M.J.,* [2017] NZHC at ¶ 141.

In April 2014, Child told Mother: "Daddy put his finger up my bottom."[273] Mother took Child to her doctor, where she spontaneously repeated her disclosure of CSA, telling her that Father touched her bottom with his finger and it was sore.[274] The doctor made a report of concern to CYFS.[275] CYFS advised Mother to suspend unsupervised contact.[276] Father sought sole custody of Child with limited contact to Mother based on Mother's "unshakeable view" that he abused Child.[277] Father alleged that Mother's concerns were "alienating" Child.[278]

In February 2015, Child told a second teacher that she had to wear long clothes to visits or Father would put his finger in her bottom and other places.[279] In March 2015, CYFS concluded that "there was no evidence the father had sexually abused [Child], and that the mother had a vendetta against the father."[280] There was no indication of the basis for these conclusions, which defy logic, given that Child's reports of abuse were "evidence."

A psychiatrist testified that Mother "experienced no serious impairment" and "was psychiatrically well", "there was no evidence of personality disorder or of psychopathy", Mother's "view that the father posed a serious risk was not delusional", and her concerns "were reasonable and logical."[281]

A CYFS social worker testified on Father's behalf, expressing concern at the "frequent notifications made by the mother and maternal family."[282] The social worker had not met Mother or Father or conducted any investigation into Mother's reports, and Police had not completed their investigation.[283] The social worker's "concerns" contradicted CYFS's policy, which recommends that people report concerns even if they are uncertain, want advice, or "just to talk things through."[284] They urge: "Trust your instincts, and don't just hope someone else will speak up. It's everyone's job to keep children safe."[285]

The court psychologist mistakenly believed that Child made her reports of abuse in response to questioning by maternal family rather than spontaneously to a teacher.[286] She opined that "the mother's allegations that [Child] had been assaulted

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[273] *Id.* at ¶ 234.
[274] *See id.* at ¶ 236.
[275] *See id.* at ¶ 269.
[276] *See id.*
[277] *Id.* at ¶ 59.
[278] *Id.* at ¶ 68.
[279] *See id.* at ¶ 164.
[280] *Id.* at ¶ 252.
[281] *Id.* at ¶ 66.
[282] *Id.* at ¶ 64.
[283] *See id.*
[284] Oranga Tamariki, *Worried About a Child?,* www.orangatamariki.govt.nz/worried-about-a-child-tell-us/ (last visited Nov., 27, 2022).
[285] *Id.*
[286] *See R.M.J.,* [2017] NZHC, at ¶¶ 256.

by the father" resulted in [Child] believing that he had and that Child's belief that Father assaulted her undermined her "feelings of safety with him."[287]

These conclusions are deeply concerning. The psychologist was essentially engaging in a process of differential diagnosis but one that was unreliable and ill-informed. She admitted that she could not reliably determine whether Child had been sexually abused. She was not so forthcoming in relation to her ability to reliably determine the cause of Child's fear. If Child felt unsafe with Father, there were at least three plausible explanations: (1) Father was not safe; (2) Father was safe, but Child nonetheless felt unsafe with him for rational reasons; or (3) Father was safe, and Mother "planted" fear in Child. The third scenario was possible but so were the first two, and the psychologist offered no basis for why she found Mother's behavior to be the cause of Child's fear or how she ruled out CAN or poor parenting by Father as equally likely causes, particularly when she could not rule out CSA. This type of differential diagnosis is why the pediatrician could not conclude that Child's anal fissure was caused by CSA. The fissure could have been caused either by CSA or constipation, and the doctor could not rule out one to diagnose the other.

The psychologist opined that continuing supervised contact was ill-advised because it would "confirm for [Child]" that Mother believed that Father was "violent and sexually deviant."[288] This conclusion was also unsupported by social-science evidence. According to the NCJFCJ's *Judicial Guide to Child Safety in Custody Cases:*

> At-risk parents may advocate for limited or supervised contact between the abusive parent and the child; their reasons may not be clearly or easily articulated. Any allegations of abuse, whether made by the at-risk parent or the child, should be taken seriously. Often when viewed through the lens of abuse and coercive control, though, the case comes into focus. It is important that abusive parents' access to their children occur only in safe environments or when safety of both the child and the at-risk parent can be ensured.[289]

In November 2015, a second judge disbelieved Child's disclosures, finding that "there was no indication of sexual abuse" and Mother had not "factually proved that the father sexually abused" Child.[290] She explained: "The reports from [Child] about touching were not *necessarily* indicative of abuse, but the maternal family treated them as such."[291]

The Judge relied on the debunked PA construct, albeit by deploying the Court's preferred obfuscating language relating to "subconscious messaging", "influence", and "indoctrination." She engaged in armchair psychoanalysis of Mother,

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[287] *Id.* at ¶ 72.
[288] *Id.*
[289] NCJFCJ, *supra* note 139, at 7.
[290] *R.M.J.,* [2017] NZHC, at ¶¶ 90, 95.
[291] *Id.* at ¶ 96.

noting: "I am concerned that the strength with which the mother, aunt and [maternal Grandmother] hold their views, and their desire to protect [Child] has, possibly, subconsciously, led to each of them at times to be less than accurate in their recall or to misinterpret actions and words."[292] She made these findings despite expert testimony from a psychiatrist indicating the opposite. She found that Mother had "inadvertently influenced" Child.[293] She found that "the mother's views of the father have influenced her to create an atmosphere of fear, suspicion and distrust around the father" and "mother had encouraged [Child] to complain about the father, and to believe he is capable of bad things."[294]

The courts' use of this debunked construct is concerning, but its use of obfuscating language to pretend that it was not deploying the PA construct was dishonest. The case reads as if the judge recently attended a training about how PA was unreliable and harmful but failed to understand (or acknowledge) that "indoctrination," "creating an atmosphere of distrust," and "encouraging Child to distrust Father" were code words for the syndrome.

The Judge found that Mother abused Child by believing and acting on her disclosures and that it was "abusive to act in such a way as to cause a child to fear and distrust the other parent."[295] She made these findings even though it was uncontested that "the relationship between [Child] and the mother was warm, supportive and loving," Child was "settled and happy at home," and she was "well provided for and nurtured."[296]

The High Court upheld these findings, reasoning:

> Such conviction by the maternal family that the father was a sexual abuser, and the allegations of physical abuse, ***must*** in my view have been known to [A]. They ***must*** have been discussed within the maternal family as the concerns are so deeply held, and expressed. It is an insidious and powerful influence, and ***likely*** not to be recognised as such by the maternal family. Beyond that, it is clear that there was a degree of consensus among the experts that [A] has been influenced by the comments made about her father. It is ***inevitable*** that [A] will have been affected by the extreme negativity towards the prospect of any unsupervised contact between [A] and her father. It could not have escaped her notice.[297]

[292] *R.M.J.,* [2015] N.Z.F.C., at ¶ 214.
[293] *R.M.J.,* [2017] N.Z.H.C., at ¶ 98.
[294] *Id.* at ¶ 104.
[295] *Id.* at ¶ 454.
[296] *Id.* at ¶ 107.
[297] *Id.* at ¶ 295 (emphasis added).

"Must," "likely," and "inevitable" are not scientific terminology. They are the terminology of speculation and intuition masquerading as an understanding of family dynamics.

V. LEGISLATIVE REFORM

A. Regulating Psychological Evidence in Family Court

In 2009, the Center for Judicial Excellence sponsored Assembly Bill 612 in the California State Assembly with the support of ten other DV and child-abuse advocacy organizations, seeking to ban PA evidence in California family courts.[298] The Bill would have required that any evaluation that included evidence relating to PA be inadmissible in custody proceedings.[299] It would have prohibited courts from refusing to give weight to children's reports of child abuse based on PA theory.[300]

The proposed ban in California was sweeping in scope and, if enacted, could have had unintended adverse consequences, particularly for DV victims whose perpetrators attempted to disrupt and undermine their relationships with their children. Nonetheless, the purpose behind the proposed Bill was laudable. Legislatures should adopt prohibitions, not against the introduction of evidence of "alienating behaviors" but rather by directly addressing the unreliable inferences that are drawn by courts who use PA and its renamed iterations. This would not prohibit courts from considering *direct evidence* that one parent engaged in psychological abuse of a child by serious denigration of that child's other parent or tangible interference in their relationship. The American Psychiatric Association acknowledged in the *DSM-V* that "non-accidental verbal or symbolic acts by a child's parental caregiver that result, or have reasonable potential to result, in significant psychological harm to the child" could constitute "psychological abuse."[301]

The problem with PA is not the recognition that this type of conduct is abusive. If it is repetitive and harmful, this behavior could and often would constitute psychological abuse. The problem is its nature and use as syndrome evidence – the premise that one parent's "alienating behaviors" can be *detected from* the behavior of the child *in the absence of* direct evidence of the "alienating" behaviors. Even Warshak acknowledges that PA should never be used this way, noting: "In some instances, parents, child representatives . . . and expert witnesses incorrectly label a child as alienated based on the child's negative behavior toward a parent."[302]

This is the aspect of PA evidence that lacks foundational or as-applied validity and that has run amok in the Family Court and caused harm to victims. In *Finn*, Father's evidence of Mother's "alienation" was that Children were "exhibiting

[298] Bill Analysis, AB 612 (2007).
[299] *See id.*
[300] *See id.*
[301] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL FOR MENTAL DISORDERS (5th ed. 2013) at 719.
[302] Warshak, *supra* note 109, at 58.

behaviour consistent with alienating behaviour."[303] In *Daviau,* the evidence of Mother's "alienation" was that Child said that she only wanted limited contact with Father because of his history of FV. [304] In *R.M.J.,* the evidence of Mother's "alienation" was that Child kept making reports of Father's abuse.[305] These allegedly abusive fathers did not offer direct evidence that mothers were engaging in conduct that obstructed their relationship with their children. Instead, they relied on the pseudo-science of PA as circumstantial evidence that such conduct occurred, and the inferred conduct was often as amorphous and undefined as "anxiety," "fear," "attitudes," "influence," or "unwillingness to support" their relationships with the children.

These vague, conclusory characterizations are often modified by adjectives like "unconscious" or "unintentional." For example, in *C. v. B.,* the Court inferred that Mother was sending "unspoken messages" of "negativity" and "disapproval" to Child.[306] In *R.M.J.,* the Court found that Mother had a "pernicious attitude" and created an "atmosphere of distrust" toward Father because she believed Child's reports of abuse.[307] In these cases, the behavior that was inferred circumstantially, even if it could be established reliably, would not constitute psychological abuse.

Legislatures can regulate this syndrome inference in the same way that they regulate the inferences drawn about the character, veracity, and propensities of parties and witnesses and the inferences that can and cannot be drawn from evidence of a rape complainant's sexual history. The rule of evidence governing other bad acts generally prohibits using evidence of a defendant's prior acts, omissions, events, or circumstances to demonstrate their propensity to act in a particular way or have a particular state of mind. The rape shield generally prohibits evidence of the complainant's sexual experience or disposition unless it is directly relevant to the facts at issue – for example, evidence that the complainant made a prior false complaint of sexual abuse, which is relevant to the credibility of the current complaint,[308] or evidence of a prior incident of sexual abuse to support a defense of transference or attribution.[309]

The legislative history to the rape shield is relevant to the issue of PA evidence in the Family Court. The rape shield was enacted to prevent sexual-history evidence from being used to support erroneous assumptions about complainants. [310] Those erroneous assumptions stemmed from longstanding gender biases and "rape myths" about women's sexuality and credibility, which were contrary to social-science evidence – for example, that women with particular sexual histories were

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[303] *Finn,* [2015] N.Z.H.C. at ¶ 24.
[304] *Daviau*, [2015] NZFC, at ¶162.
[305] *R.M.J.,* [2017] NZHC, at ¶ 72.
[306] *C. v. B*, [2018] NZCA. 322, at ¶ ¶ 20, 23.
[307] *R.M.J.,* [2017] NZHC 1159, at ¶¶ 41, 104.
[308] *See R. v. C.*, 391/07, NZCA 439 (Oct. 12, 2007).
[309] *See Terrence Patrick Noble v. R.*, 128/2010 NZCA 291 (July 7, 2010).; *See R. v. Charles William Morrice*, 66/2008 NZCA 261 (June 26, 2008).
[310] *See B. v. R.*, 12/2013 NZSC 151, ¶ 53 (Aug. 15, 2013); Ministry of Justice, *Government Response to Law Commission Report: The Second Review of the Evidence Act 2006 Te Arotake Tuarua i te Evidence Act 2006,* November 27, 2019, pg. 4 (last visited June 27, 2022).

more likely to have consented to sexual activity on a particular occasion or were less worthy of belief.[311] Historically, defendants used cross-examination to suggest that complainants were too morally flawed to deserve juries' sympathy.[312] The evidence of sexual history was used to demonstrate that complainants belonged to a class of complainants thought to be more likely to consent or make false allegations of rape (such as sex workers and promiscuous women) without requiring evidence of consent or false allegations in the particular case. This history bears obvious parallels to the use of PA evidence in the Family Court.

The rape shield arose from social-science evidence that showed that admission of evidence concerning a complainant's sexual history made it more likely that the factfinder would falsely attribute blame to the complainant, less likely that they would consider the accused's conduct to be criminal, and that the admission of sexual-history evidence was historically not appropriately controlled.[313] Similar rationales exist for regulating PA evidence, given the demonstrated problems with the Family Court blaming women for father/child estrangements that are more likely the result of poor paternal parenting, deploying gender stereotypes and misconceptions about women's character and behavior, and failing appropriately to regulate unreliable PA evidence under the existing rules governing expert testimony.

Legislatures should, therefore, amend their evidence codes to prohibit the introduction of evidence that a child is rejecting or resisting contact with one parent as proof that the other parent is engaging in alienating behaviors. They should permit courts to consider direct evidence of disparaging or obstructing behavior, but they should not permit them to hear or consider "expert" evidence in which the expert opines that a parent is engaging in "alienating behaviors" based on the behavior or beliefs of the child. It should clarify that the rules of evidence governing scientific evidence apply to evidence offered by Family Court evaluators and that courts must not admit evidence offered by evaluators who lack forensic expertise or fail to demonstrate the foundational validity and as-applied reliability of their opinions.

Legislatures should also prohibit the use of reports of concern to Police or CYFS as evidence that a parent is attempting to undermine a child's relationship with another parent. Police and CYFS are competent to handle unsupported claims of abuse, and drawing an inference that making a report of concern about a child's welfare is child abuse is contrary to public policy regarding the importance of reporting suspected CAN.

B. Reforming Family Law

The New Zealand custody statute requires the Family Court to consider a child's needs to "to have a relationship with both . . . parents" and have their family

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[311] *See id.* at para. 25; ELISABETH MCDONALD, et al., RAPE MYTHS AS BARRIERS TO FAIR TRAIL PROCESS: COMPARING ADULT RAPE TRIALS WITH THOSE IN THE AOTEAROA SEXUAL VIOLENCE COURT PILOT 128 (2020).
[312] McDonald & Tinsley, *supra* note 58.
[313] T. Brettel Dawson, *Sexual Assault Law and Past Sexual Conduct of the Primary Witness: The Construction of Relevance*, 2 CANADIAN J. WOMEN & L. 313, 328 (1987).

relationships "preserved and strengthened" in assessing their welfare and best interests.[314] This provision is the source of much of the court's pro-contact ideology. When the Court finds that one parent is "alienating" a child from the other, these are typically the statutory factors to which the decision refers. When the Court prioritizes contact over safety, these are the statutory justifications for that priority. The pseudo-psychology of PA is the link between the two concepts: preserving and strengthening the child's relationship with the "rejected" parent and the child's best interests.

Legislatures should amend custody statutes to clarify that "strengthening" a child's relationship with a violent parent occurs when the child is protected from further violence, not forced into unsafe custody arrangements. It should do this with regard specifically to the Family Court's history of using the discredited PA theory as a mechanism for finding that protective parents who seek to prevent violent parents from inflicting CAN are "alienating" children and causing them harm. Legislatures should add a statutory section clarifying that courts cannot consider the need to increase unsupervised contact with a parent who has inflicted FV as a mechanism for preserving and strengthening the child's relationship with that parent. They should also clarify that courts cannot find that one parent is interfering with or obstructing another parent's contact with a child, if their objections to joint custody or unsupervised contact stem from good-faith, subjective concerns for their or the child's safety, regardless of whether the Court shares those concerns.

C. Meaningful Appellate Review

Legislative changes alone will not guarantee that Family Court Judges appropriately respond to the protective actions of parents who seek prioritization of children's safety in custody arrangements because, to a large extent, the Court's failures are cultural and ideological. What these changes will ensure, however, is that appeals courts can better detect and correct Family Court failures. Amending evidence law would assist higher courts in evaluating the Court's unreliable inferential reasoning using constructs with which they are already familiar – logical relevance and scientific reliability. This is critical because the higher courts currently defer to the Family Court's ideological decision making and its folksy wisdom of specialized experience rather than scrutinizing its unreliable application of psychodynamic theories. Clarifying that attempts to protect a child from unsafe contact with a violent parent do not constitute interference with the child's relationship with that parent will give appellate courts a clear statutory framework within to assess the otherwise largely discretionary application and relative weighing of the best-interests factors contained in custody statutes.

VI. CONCLUSION

The New Zealand Family Court's gatekeeping failure with PA evidence is part of a broader phenomenon of gatekeeping failures, which occurs across judicial systems.[315] Studies of miscarriages of justice in the criminal-justice system are replete

[314] Care of Children Act § 5 (e).
[315] *See* Leonetti, *Lie Detection, supra* note 152, at 32-35.

with examples of entrenched junk science being admitted *en masse* to terrible results without meaningful gatekeeping by trial judges. For example, beginning in the late 1950s, the Federal Bureau of Investigation ("FBI") pioneered a new form of pattern-matching forensic analysis called microscopic hair comparison. In thousands of cases from the 1950s through the 2000s, FBI-trained analysts compared forensically significant hairs from crime scenes with samples from suspects and found that they "matched."[316] The analysts testified, based on the "match," that the defendant was the source of the crime-scene hair.[317]

There was no science to validate these claims. While hairs share class characteristics – width, color, texture, chemical treatment – a hair with evidentiary significance cannot reliably be compared to an exemplar to determine whether they came from the same source. Hairs do not contain cells with nuclei (unless they have skin cells attached at the follicle), so nuclear DNA analysis cannot be performed.

In the 1970s, academic researchers began to sound the alarm about the subjectivity and lack of reliability of hair comparisons.[318] Nonetheless, FBI "experts" continued for decades to offer discredited testimony. The factors that contributed to analysts declaring these "matches" without a scientific basis included the absence of standardized protocols for match determination, the subjective nature of the determination, and the analysts' weak scientific qualifications.

It was not until forensic mitochondrial DNA testing became ubiquitous in the early 2000s that reliable scientific testing could determine whether two hairs likely came from the same source or definitively did not. There was a wave of exonerations of defendants convicted based on the FBI-developed hair comparisons. In cases in which FBI-trained analysts testified that defendants were the source of a crime-scene hair, mitochondrial DNA testing conclusively proved that they could not have been. In an internal audit, conducted by the FBI in 2002, of 170 cases in which their analysts had testified to hair "matches," mitochondrial DNA testing conclusively

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[316] Spencer S. Hsu, *Convicted Defendants Left Uninformed of Forensic Flaws Found by Justice Dept.,* WASH. POST (April 16, 2012), available at: https://www.washingtonpost.com/local/crime/convicted-defendants-left-uninformed-of-forensic-flaws-found-by-justice-dept/2012/04/16/gIQAWTcgMT_story.html.

[317] Clive A. Stafford Smith & Patrick D. Goodman, *Forensic Hair Comparison Analysis: Nineteenth Century Science or Twentieth Century Snake Oil?,* 27 COLUMBIA HUM. RTS. L. REV. 227, 273 (1996).

[318] *See, e.g.,* P.D. Barnett & R.R. Ogle, *Probabilities and Human Hair Comparison* 27 J. FORENSIC SCIENCES 272 (1982); R.E. Bisbing & M.F. Wolner, *Microscopical Discrimination of Twins' Head Hair,* 29 J. FORENSIC SCIENCES 780 (1984); B.D. Gaudette. *Some Further Thoughts on Probabilities and Human Hair Comparisons*, 23 J. FORENSIC SCIENCES 758, 761-62 (1978); B.D. Gaudette & E.S. Keeping, *An Attempt at Determining Probabilities in Human Scalp Hair Comparison*, 19 J. FORENSIC SCIENCES 599 (1974); Paul C. Giannelli & E. West, *Hair Comparison Evidence*, 37 CRIM. L. BULL. 514 (2001); L.S. Miller, *Procedural Bias in Forensic Examinations of Human Hair,* 11 L. & HUMAN BEHAV. 157 (1987); R.A. Wickenheiser & D.G. Hepworth, *Further Evaluation of Probabilities in Human Scalp Hair Comparisons*, 35 J. FORENSIC SCIENCES 1323 (1990); *see generally* President's Council of Advisors on Science and Technology, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* at 13 (Sept. 2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf (last visited November 4, 2022) [hereinafter "PCAST Report"].

ruled out the defendant as the source in a significant number of the cases.[319] In one high-profile murder case, FBI analysts offered evidence that the defendant was the source of hairs that were later determined not to be human.[320] Incredibly, however, forensic analysts continued to offer the discredited testimony at criminal trials, and prosecutors failed to disclose the results of the audit to defense lawyers – even lawyers representing some of the 250 defendants whose cases had been reviewed. It was only finally in 2012, after an intrepid reporter at the *Washington Post* wrote a series of articles highlighting the miscarriages of justice engendered by the unreliable testimony, that the FBI finally admitted the unreliability of its technique and took steps to halt its use.[321] Unfortunately, by then, dozens of innocent defendants had spent hundreds of years in prison. The FBI initiated a long-term review of its analysts' testimony.[322] To date, the review has found that FBI analysts committed "errors" in their testimony a stunning ninety-five percent of the time.[323]

Very few unreliable "sciences" can be conclusively debunked by DNA. Certainly, invalid forensic psychology cannot. There will never be a "smoking gun" conclusively proving that mothers accused of PA were wrongfully "convicted," and there should not need to be. The burden is on the proponent of expert evidence to establish that it is based on valid scientific principles applied reliably in a particular case and that the expert offering an opinion based on a particular theory or technique is qualified to do so. The identification of PA shares the same central characteristics as other forms of scientific evidence that have been proven to have played a significant role in miscarriages of justice. There are no standardized protocols for determining whether PA has occurred in a particular case, or even a standardized definition of the alleged phenomenon. The determination is subjective. The evaluators who traffic in the theory lack specialized training in forensic psychology – the application of general psychological principles to specific cases. There is no way to distinguish with any reliability between an identification (PA) and an elimination (other cause of estrangement). Secret processes limit accountability and shield abuses. That we do not know whether PA is a real phenomenon, how reliably to prove or disprove its occurrence, or how to test the conclusions of experts who claim to identify it are all reasons why those opinions should be inadmissible and should not underlie judicial decision making.

PA is an anachronism. It is a holdover from the syndrome era of the 1980s. While the PA specter has haunted family courts internationally for decades, despite being disavowed as non-scientific by psychological societies and research studies around the world, the New Zealand Family Court appears to be particularly

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[319] PCAST Report, *supra* note 319, at 13, 28, 121, 139-40.
[320] *See id.* at 28, 121.
[321] *See Report: DOJ, FBI Admit Years of Flawed Testimony From Forensic Unit*, NBC NEWS (Apr. 20, 2015), https://www.nbcnews.com/news/us-news/report-doj-fbi-admit-years-flawed-testimony-forensic-unit-n344401 (last visited November 4, 2022) [hereinafter "DOJ Report"].
[322] *See* FBI, *FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review* (Apr. 20, 2015), https://www.fbi.gov/news/press-releases/press-releases/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-percent-of-cases-in-ongoing-review (last visited November 4, 2022).
[323] *See id.;* DOJ Report, *supra* note 322.

committed to using this discredited construct to pathologize protective parents and ignore children's views, despite statutory obligations to prioritize children's safety and take their views into account. By continuing to admit evidence relating to PA and base decisions on it, the Court has failed at its gatekeeping function and its statutory obligation to protect victims of FV from further victimization. The Court has not only labelled claims of CAN "false" with no reliable basis, but it has also labelled protective parents psychologically abusive for attempting to protect their children, stripped children from their protective parents, and handed them over to abusers with the clear signal that there will be no consequences for abuse.