



P A C E

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Parental Alienation Syndrome: Introducing Expert Testimony in Ohio Courts

Few people doubt that some parents—especially divorced or divorcing parents—engage in behavior that results in alienating the children from their other parent. Sometimes this behavior is conscious, intentional and pre-meditated; sometimes it is not. It is, though, always damaging to the children, as well as to the "target" parent.

While the existence of alienating behavior and alienated children is undeniable, there has been a question of the medical and legal status of what has been called Parental Alienation Syndrome (PAS). It is one thing to admit that a parent acts in ways that tend to alienate the children from the other parent and that sometimes the children are, in fact, alienated from the other parent by these actions. It is yet another to hold that the resulting condition of the children constitutes a scientifically credible psychological *syndrome*.

Now, for the first time, a trial court declared that the diagnosis of PAS has satisfied the criteria required for being legally recognized. On November 22 of this year, in the case of *Kilgore v Boyd*, the 13th Circuit Court, Hillsborough County, Florida, (Case No. 94-7573), concluded that PAS satisfied the Frye test for legal admissibility. *Frye v United States*, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923).

While there are over 100 scientific papers—published in peer-reviewed journals—documenting PAS, and the diagnosis has, in fact, been recognized in at least 38 court cases, this is the first time a court has explicitly ruled that the diagnosis of PAS passes the Frye test.

The Frye test for the admissibility of scientific evidence requires that novel scientific evidence be generally accepted in the relevant scientific community as accurate and reliable. Specifically, under Frye, it must be shown that a scientific principle or test is "sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye*, 293 F. at 1014. This ensures a jury will not be misled

by experimental scientific methods which may ultimately prove to be unsound.

Prior to 1993, all federal courts and most state courts followed the Frye test to determine the admissibility of scientific evidence. However, in 1993, the U.S. Supreme Court ruled that the Federal Rules of Evidence—in particular, Fed. R. Evid. 702—superseded the Frye test. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

The Frye test is not employed in Ohio, either, to determine the admissibility of scientific evidence. In *Ohio v. Miller*, the Supreme Court said, "we refuse to engage in scientific nose-counting for the purpose of deciding whether evidence based on newly ascertained or applied scientific principles is admissible." *Ohio v. Miller*, 4 Ohio St. 3d 53 (1983). Instead, Ohio Evid. R. 702(C) is employed to determine the admissibility of scientific evidence.

But passage of the Frye test is clearly *relevant* to the admissibility of scientific evidence in either federal or Ohio state courts. Because of the likely venue for review of diagnoses of PAS, the following will focus on Ohio law.

The *Miller* decision designated four factors to be considered in evaluating the reliability of scientific evidence:

1. whether the theory or technique has been tested;
2. whether it has been subjected to peer review;
3. whether there is a known or potential rate of error; and,
4. whether the methodology has gained general acceptance.

Ohio v. Nemeth, 82 Ohio St. 3d 202 (1998).

The last of these four factors is clearly simply the Frye test. Furthermore, typically the evidence introduced to show that a scientific principle, technique or diagnosis passes the Frye test speaks to other factors outlined in *Miller*. For example, widespread publication in peer-reviewed journals is one of

the ways in which general acceptance is demonstrated.

Most importantly for Ohio law, though, is this point. *Nemeth* clearly indicates that the main thrust of the *Miller* decision is to indicate that general acceptance is not *necessary* for the admissibility of scientific evidence—not that it is not *sufficient* for admissibility:

Though it is not necessary to show general acceptance to pass the threshold of reliability for the admission of expert testimony, the behavioral and psychological effects of prolonged child abuse on the child have been generally accepted in the medical and psychiatric communities and therefore unquestionably meet the requisite level of reliability for admission as the subject of expert testimony.

Ohio v. Nemeth, op. cit. at 23-24 (emphasis added).

Parental alienation can be blatant and the syndrome that results from it obvious. However, it can also be subtle and insidious. In these cases, the resultant syndrome may only be diagnosable by a psychologist or psychiatrist trained to detect and treat it. PAS is not simply the normal conflict that children of divorced parents feel as a result of overhearing a few thoughtless, disparaging comments that one parent makes about the other. It results from an intentional or unintentional campaign of alienation. It has life-long detrimental effects on its victims. Ohio law provides the tools for introducing evidence of PAS and, thereby, laying the foundation for altering custodial arrangements so as to minimize the damage.

For more information on the issues raised in this *PACE Bulletin*, please visit the PACE web site at:

www.PACEgroup.org

Also, see Dr. Richard Gardner's PAS research web site at:

www.rgardner.com/refs/

—Don Hubin, *Bulletin* editor

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