

Introduction

Every parent's worst nightmare is discovering that their child has been abused. The statistics suggest that over 90% of child abuse happens in the home and the abuser is often a family member or a friend known to the child victim. The nightmare only gets worse if the abuser is the other parent. The Australian Family Law Council in their 2002 Report: 'Family Law and Child Protection' identified that if parents are separated then child protection is seen by State child protection agencies as a private matter which must be pursued by a parent through the Family Court with little or no support or involvement from the agencies themselves. This was identified by the Council as a key problem for child protection in Australia as it was recognised that many private litigants in the Family Court lack the financial and legal capabilities to effectively fight to protect their child from abuse through private legal channels. A further problem for child protection is the pro-contact culture that has developed in the Australian Family Court. A significant body of research has suggested that the 1995 Family Law Reform Act heralded a paradigm shift from prioritising child protection to prioritising child contact. Recent findings by Kaspiew suggest that in the Family Court, fathers' claims now carry greater legitimacy than mothers' claims at a number of levels^[1]. According to his findings, family violence "must be of an extreme nature and have a very firm evidential basis, before it can be argued to be a 'disqualifying' factor in residence or contact applications"^[2].

It is against this background in the Family Court that Parental Alienation Syndrome (or "PAS") - a scientifically discredited theory of disgraced American psychiatrist Dr Richard Gardner has emerged and flourished. The theory has helped numerous paedophiles successfully fight for custody of their child victims in the Australian Family Court.

The theory asserts that children are frequently 'brainwashed' or 'programmed' by their mothers into making false allegations of abuse against their fathers for the purpose of gaining an advantage in custody litigation. According to the theory the only remedy for PAS is to put the child with the alleged abuser and to severely curtail or totally prohibit the child's contact with the 'alienating' parent'.

PAS has become a weapon of choice for fathers' rights groups in Australia and amongst Family Court lawyers in cases where child abuse is alleged. The PAS paradigm endorses the idea that children cannot properly articulate their experiences of abuse and are prone to coaching, manipulation and lying. The paradigm privileges the accused parent's right to enforce a relationship with the child. Dr McInnes has argued: "PAS is a winner with violent parents because (a) it enables the abuser to occupy the role of the victim and (b) assists and legitimizes their continuing access for abuse". A further incentive in arguing PAS for an abusive parent is that the Court's focus is diverted from the alleged abuse to the character and personality of the mother. In the light of an accusation of PAS, the mother's mental health can be examined and attacked and her attempt to protect the child can be framed as prima facie evidence of her alienation against the father.

The use of PAS or PAS based reasoning by Family Court judges and workers to decide cases of alleged child abuse is a consequence of a lack of education and understanding about child abuse in the Court. In many cases the views of mental health professionals with decades of experience of working with abused children have been dismissed by a Family Court, zealously in its belief in the universal benefits of contact.

Criticisms of the PAS Theory

PAS is a theory whose widespread use and admission in international family law courts including the Australian Family Court has never been matched by widespread acceptance within the international scientific community. The theory has been criticised in numerous publications. Below are some of the most frequent criticisms of the theory.

- PAS is not in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders IV^[3] (DSM IV) or earlier versions.
- Dr Gardner's work has never been published in a peer-reviewed journal and his books are self-published.
- Not a single study has confirmed that mental health professionals can reliably diagnose PAS.
- The Diagnostic criteria suggested by Dr Gardner are similar to those for his now widely discredited test for fabricating allegations of sexual abuse – the Sex Abuse Legitimacy Scale (SAL).
- The fundamental assumption at the heart of PAS - i.e. that children frequently lie about sexual abuse - is contradicted by all the major research in the area^[4].
- The idea that false allegations of child sexual abuse increase in custodial litigation has been contradicted by research conducted both within Australia and internationally^[5].
- The PAS theory is blatantly sexist and targeted against mothers.
- PAS is not applicable if there has been actual abuse i.e. if the accusations are truthful (which studies suggest they generally are).
- Dr Gardner's suggested remedy of placing the child with the alienated parent risks handing an abused child over to an abuser while removing the protection of the other parent.
- Several American Courts have rejected PAS as scientifically baseless and disallowed its admission as evidence^[6].
- Dr Gardner has made comments in his books which are sympathetic and supportive of paedophiles^[7].

Why the use of PAS by the Australian Family Court is a violation of children's rights under the Convention on the Rights of the Child

The use of PAS by the Family Court to dismiss children's disclosures of abuse increases the risk that the child will be exposed to continuing abuse. This is clearly not in the child's best interests. Family Court lawyers and judges

have used PAS as a justification for taking children away from their primary caregiver and for handing them over to the alleged abuser. A child's best interests are never served by a willingness to sacrifice the child's relationship with his or her primary caregiver to facilitate a relationship with a secondary caregiver. This is a core principle of developmental psychology. A young child's relationship with their primary caregiver is absolutely fundamental to their best interests and should never be jeopardized or put at risk.

For abused children this principle is even more pertinent. If they disclose abuse to a protective parent, they will rely on that parent to protect them from the perpetrator. An abused child will fear future contact and anger from the other parent and will come to identify almost totally with their protective parent. PAS encourages the Courts to view this natural reaction of an abused child as prima facie evidence of "alienation". The PAS theory is very dangerous because by its very logic, PAS does not acknowledge cases in which abuse has actually occurred, instead portraying the normal reactions of an abused child towards their protective parent as pathological. The adoption of the PAS paradigm by the Family Court therefore carries with it enormous risks that children's actual disclosures of abuse will be dismissed as 'coaching' and will not be believed. The acceptance of the theory by judges in the Family Court is absolutely contrary to the best interests of abused children.

Parents who try to protect their abused children from abuse in the Family Court are at risk of being confronted by a system that is suspicious of their motives and is doubtful of their accusations and willing to use PAS or PAS related reasoning to punish them for alleging abuse. This is not a system that operates in the best interests of abused children.

Several of Australia's foremost experts in child abuse now counsel parents not to raise accusations of sexual abuse in Family Court litigation. According to these experts the alleging parent will most likely be "discredited" and will face an increased risk of losing custody of the abused child. A system where parents cannot speak up about abuse in order to protect their own children for fear of losing them is not a system prioritising the best interests of the child.

Evidence of PAS in the Australian Family Court

Case Study (*E v R*, 2001)^[6]

• Facts

Sarah (mother) and Terry (father) were married for twelve months. In this period a child Joe was conceived. Sarah stated that she left the relationship because of Terry's violence toward her. Sarah and Terry negotiated an informal custody agreement whereby Sarah was to have primary residence of Joe and Terry was to have regular contact. Beginning in 1997, Sarah began to notice that Joe was being returned from his father with regular bruising. One day in 1997, the child was returned after a two-hour contact with a very sore, inflamed and weeping penis head. The father offered no explanation. In 1998, Joe began to frequently complain of having a sore bottom after visitation with his father. In 2000, the child told his mother that his father "had been naughty" and had pinched his penis and "it hurt". Police decided that due to the child's young age they would not charge Terry with 'indecent dealing with a child'. Sarah sought a Family Court order limiting Terry to supervised contact with Joe.

• The Court Outcome

The Court-appointed child representative described the mother in her report to the Court as "honest" and her accusations of sexual abuse as "honestly documented". The report further noted that at contact handover time with his father, Joe was "crying hysterically and wetting himself" and that the representative had never encountered such an extreme reaction from a child in such circumstances. The children's representative further noted that Joe had mentioned that he was afraid of his dad because "he hurts me". **At the hearing the child's disclosures of abuse went unchallenged. The children's representative however made reference in a report to perceived "alienation" and the mother's inability to contain her "emotional reactions" when discussing her alleged abuse of her child.** Counsel for the father argued PAS. In his Reasons for Judgment, the Judge stated "it may well be that the concept of Parental Alienation Syndrome is the subject of ongoing debate between psychologists...whether or not there is or is not a syndrome described as PAS is not the critical issue. **The critical issue is whether the wife, consciously or unconsciously has alienated the child from the husband".** After ignoring the child's wish to live with his mother and to have limited contact with his father, the Judge **ordered that the child's primary residency be reversed and that the child should reside with the father. Joe's further contact with his mother was to be limited to supervised contact.**

• Criticism of The Family Court's Response

The child was disclosing and alleging sexual abuse and this was not disputed. What the child wanted was considered inconsequential. The mother's attempts at protecting her child from being sexually abused (e.g. alleging abuse, seeking to reduce the father's contact, carefully documenting the child's complaints, going to the police etc) were viewed by the court and court workers as prima facie evidence of alienation by the mother against the father. The father's counsel endorsed this view, as did the children's representative. Using this "evidence" the judge decided to reverse custody. The court claimed not to be applying PAS but from its comments it is clear that it did. The mother's attempt at utilizing the Family Court to protect her child from sexual abuse proved not just futile, but absolutely disastrous, with primary residency being reversed. She went from primary caregiver to being allowed only supervised contact. The

child, thanks to the Family Court order, is now at permanent risk of being sexually abused. Jenkins states "it remains difficult to accept the rationale that the best interests of the child can be met through a willingness to sacrifice the child's relationship with his/her primary caregiver, given what is known about the importance of the relationship, in order to facilitate a relationship with a secondary carer"^[9].

^[1] Kaspiew, R. (2005) 'Violence in contested children's cases: An empirical exploration' 19 Australian Journal of Family Law p 132.

^[2] Ibid at 114.

^[3] The DSM IV (published in 1994) is the accepted international standard for psychiatric disorders.

^[4] See supra note 4.

^[5] In two Australian studies, the rate of unsubstantiated allegations of sexual abuse, as assessed by state child protection workers, was no higher among couples involved in Family Court disputes than in the general population – Hume, M 'Child Sexual Abuse Allegations and the Family Court' and Brown, T. 'Child Abuse In The Context Of Parental Alienation and Divorce'. A large US study reached the same conclusions – see Macdonald note 4.

^[6] See for example *In the Interest of T.M.W.*, 553 So.2d 260 (Florida District Court of Appeals)

^[7] In a 1992 book - 'True and False Accusations of Child Sex Abuse' – "paedophilia... is a widespread and accepted practice among literally billions of people". In another book Gardner wrote "what I am against is the excessively moralistic and punitive reaction that many members of our society have toward paedophiles...(going) far beyond what I consider to be the gravity of the crime" – *Salem Witch Trials Revisited* (1992).

^[8] An unreported decision of the Family Court of Western Australia

^[9] Jenkins, S. 'Are Children protected in the Family Court? A perspective from Western Australia' ANZJFT Vol 23 No 3 (2002) p 146.