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**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE**

SEGALIT McROBERTS,
Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent;

STEVEN LESSERSON,
Real Party in Interest.

After a Decision by the Los Angeles County Superior Court
Honorable David F. Cunningham
Case No. BD450081

**COMBINED APPLICATION FOR
PERMISSION TO FILE AMICUS BRIEF AND
PROPOSED AMICUS BRIEF OF
DOMESTIC VIOLENCE LEGAL EMPOWERMENT
AND APPEALS PROJECT, ET AL.**

Erica L. Reilley (State Bar No. 211615)
Katie A. Richardson (State Bar No. 238260)

JONES DAY

555 South Flower Street, Fiftieth Floor

Los Angeles, CA 90071-2300

Telephone: (213) 489-3939

Facsimile: (213) 243-2539

Counsel for Amicus Curiae

DOMESTIC VIOLENCE LEGAL EMPOWERMENT
AND APPEALS PROJECT (DV LEAP)

[Additional Amici Curiae Listed on Next Page]

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THE LEADERSHIP COUNCIL ON CHILD ABUSE AND
INTERPERSONAL VIOLENCE

JUSTICE FOR CHILDREN

THE CALIFORNIA PARTNERSHIP TO END DOMESTIC VIOLENCE

THE CALIFORNIA PROTECTIVE PARENTS ASSOCIATION

SHEILA JAMES KUEHL

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**APPLICATION FOR PERMISSION
TO FILE AMICUS BRIEF**

The Domestic Violence Legal Empowerment and Appeals Project (DV LEAP), *Domestic Violence Report (DVR)*, Leadership Council on Child Abuse and Interpersonal Violence (“Leadership Council”), Justice for Children, the California Partnership to End Domestic Violence (“the Partnership”), the California Protective Parents Association (“CPPA”), and former California Senator Sheila James Kuehl respectfully request leave to file the accompanying amicus curiae brief in support of Petitioner Segalit McRoberts. Amici make this request pursuant to California Rules of Court, rule 8.200(c).

Amici are non-profit organizations or individuals specializing in appellate advocacy, legislative development, and training and education on behalf of abused women and children. DV LEAP specializes in custody and abuse, with special emphasis on family courts’ reliance on quasi-scientific theories; *DVR* publishes information on the policies and law related to a broad spectrum of domestic violence issues, and has particular concern for the safety of children involved in family court proceedings; the Leadership Council is an organization of scientific and professional researchers and scholars committed to the ethical application of psychological science to human welfare; Justice for Children is a national child advocacy organization that provides a variety of legal, educational, and health services to neglected and abused children; the Partnership is a domestic violence coalition aimed at advancing the battered women’s movement by, among other things, advocating and sponsoring legislation to ensure safety and justice for domestic violence survivors and their children; CPPA assists and advocates on behalf of non-abusive parents in custody disputes; and Sheila James Kuehl is a former California Senator and Assemblywoman whose efforts, both during her time in the legislature and

as current President of Kuehl Consulting, have been focused on a wide array of public policy issues, including those affecting children and victims of domestic violence.

In working to eliminate domestic violence and promote safe family environments for battered mothers and children alike, Amici are concerned about the trial court decision in this case, which relies on the highly criticized theory of “parental alienation syndrome” (PAS)—or its counterpart “parental alienation”—to refute allegations of child abuse in a custody case. Amici submit that their significant experience in domestic violence, child abuse, and custody litigation will assist this Court in resolving the issues before it.

I. AS EDUCATORS, REPRESENTATIVES, AND ADVOCATES OF THOUSANDS OF DOMESTIC VIOLENCE AND CHILD ABUSE VICTIMS NATIONWIDE, AMICI HAVE A SIGNIFICANT INTEREST IN THE OUTCOME OF THIS CASE.

A. DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT

Established in 2003, DV LEAP was founded by one of the nation’s leading domestic violence lawyers and law professors to advance safety and justice for abused women and children through appellate litigation. Despite numerous legislative and policy reforms designed to protect victims of domestic violence, DV LEAP has found that many abused women and children are deprived of legal protections and rights in court. Appellate review has frequently proven successful in correcting trial court errors, but appeals are rare due to both their expense and the need for scarce appellate and domestic violence expertise. DV LEAP fills this vacuum for victims of abuse by providing *pro bono* appeals, as well as training and strategic assistance to lawyers and courts. DV LEAP has particular expertise in custody and parental alienation syndrome, having conducted litigation,

submitted amicus briefs, delivered trainings, and published scholarly papers on the subject.

While DV LEAP prioritizes cases from the District of Columbia, it also accepts cases of substantial importance from other states. DV LEAP also organizes and spearheads the domestic violence community's advocacy in Supreme Court domestic violence litigation. DV LEAP is a partnership of the George Washington University Law School and a network of participating law firms.

B. *DOMESTIC VIOLENCE REPORT*

Domestic Violence Report (DVR) is a multi-disciplinary newsletter that is widely distributed throughout the nation to 2,000 domestic violence programs and advocates, judges, lawyers, therapists, doctors, clergy, academics, law enforcement officials, and others interested in ending domestic violence. *DVR* assists its readers in keeping current on new developments in research, law, and policy concerning domestic violence, with the aim of enhancing the safety of battered women and children. *DVR*'s editors, contributors, and advisory board include lawyers, psychologists, nurses and other healthcare providers, criminologists, law enforcement officers, scholars, researchers, and battered women's advocates, all of whom work with and train policymakers throughout the country about domestic violence. *DVR* has published on a regular bi-monthly basis since October 1995, and its publications cover a broad spectrum of domestic violence related topics geared toward promoting the safety of domestic violence victims and the children living in homes where domestic violence occurs. One of *DVR*'s principle concerns has been to maintain the safety of children involved in family court proceedings.

C. THE LEADERSHIP COUNCIL ON CHILD ABUSE AND INTERPERSONAL VIOLENCE

The Leadership Council on Child Abuse and Interpersonal Violence (formerly the Leadership Council on Mental Health, Justice, and the Media) was founded in 1998 by professionals concerned with the ethical application of psychological science to human welfare. The Leadership Council is a 501(c)(3) organization, located at 191 Presidential Boulevard, Bala Cynwyd, PA. The Leadership Council is a nonprofit scientific and professional organization consisting of internationally recognized researchers and scholars within the scientific and legal communities. The Leadership Council's mission is to provide professionals, officers of the court, and policy makers with the latest and most accurate scientific information on issues related to interpersonal violence. As part of its mission, the Leadership Council disseminates high quality scientific and medical research concerning the prevalence and consequences of child abuse, domestic violence, and other forms of interpersonal violence in the general population.

The Leadership Council has previously filed amicus briefs in both state and federal court cases, including cases in California. The Leadership Council has participated in and hosted academic conferences and has provided testimony before Congress and state legislatures. It also has supported peer-reviewed research and hosted academic conferences. Collectively, its board members have published hundreds of articles in peer-reviewed journals on the effects of trauma on children and adults. Advisory board members include internationally known forensic experts, clinical care providers for trauma victims, editors and reviewers for major journals, and leaders in both the American Psychological Association and the American Psychiatric Association.

D. JUSTICE FOR CHILDREN

Justice for Children is a national child advocacy organization composed of concerned citizens who share the belief that communities must act together to protect abused and neglected children from further abuse, and to defend every child's right to grow up in a safe and loving environment. The organization's mission is to provide legal advocacy for neglected and abused children, and to develop and implement collaborative solutions to entrenched problems impeding the quality of life for these children. Justice for Children also works to raise awareness about the failure of government agencies to protect victims of child abuse.

Justice for Children works together with Children's Protective Services and related agencies to provide a full range of services for abused and neglected children, including legal advocacy, public policy monitoring, mental health services, research, and education. When appropriate, Justice for Children also opposes court or agency action that threatens the interests of these victimized children. Justice for Children has appeared as amicus curiae in numerous cases throughout the country. Its advocacy is recognized and valued by local and national media, legal and medical professionals, child abuse experts, and various other children's rights organizations.

E. THE CALIFORNIA PARTNERSHIP TO END DOMESTIC VIOLENCE

The California Partnership to End Domestic Violence is the federally recognized State Domestic Violence Coalition for California. Like other domestic violence coalitions throughout the United States and territories, the Partnership is rooted in the battered women's movement and the values that define this movement, including social justice, self-determination, and ending the oppression of all persons. The Partnership has a 30-year history of providing statewide leadership, and has successfully passed over 100

pieces of legislation to ensure safety and justice for domestic violence survivors and their children. The Partnership believes that by sharing expertise, advocates, policy makers, and allies can end domestic violence.

The Partnership's mission and work are focused on protecting the safety of domestic violence victims, and on promoting the safety and well-being of all California families. As a result, the Partnership is deeply concerned about the admissibility of evidence regarding "parental Alienation Syndrome, or non-syndromal "parental alienation," in custody cases to refute claims of abuse. There is a marked lack of scientific support for the existence of PAS, and it has been argued that it lacks the requisite "general acceptance" within the scientific community to satisfy the *Kelly/Frye* test of admissibility.

F. CALIFORNIA PROTECTIVE PARENTS ASSOCIATION

California Protective Parents Association is a non-profit organization dedicated to assisting and advocating on behalf of non-abusive parents seeking to protect their children in custody disputes. CPPA's mission is to protect children from incest and family violence through research, education, and advocacy. CPPA provides information and referrals to protective parents both in California and nationally; it collaborates on research to identify issues arising in cases involving children's disclosure of abuse in the context of parental separation and divorce; and it supports self-represented parents by accompanying them to court proceedings whenever possible.

By providing courts, the California Judicial Council, and policy makers with possible solutions to the widespread problem of domestic and child abuse, and by assisting in the education and training of professionals who make custody recommendations to courts, California Protective

Parents Association is an agent for social change, ensuring that children are physically and sexually safe in their homes.

G. SHEILA JAMES KUEHL

Sheila James Kuehl is a former California Senator and Assemblywoman who, after serving eight years in the State Senate and six years in the State Assembly, left the legislature in 2008 under California's term limits statute. During her fourteen years in the State Legislature, Sen. Kuehl authored 171 bills that were signed into law, including several major pieces of legislation protecting domestic violence victims and their children, as well as legislation to overhaul California's child support system. In 1996, Sen. Kuehl was selected to address the Democratic National Convention on the issue of family violence. Sen. Kuehl also founded and chaired for 17 years the Advisory Board to the Sojourn Shelter for Battered Women and Their Children, and was a member of the board of the National Woman Abuse Prevention Project. As a member of the Gender Bias Task Force of the California Courts, Sen. Kuehl also wrote the section of recommended changes in the area of domestic violence and assisted the National Council of Juvenile and Family Court Judges in drafting the model state code on domestic violence.

Consistent with her active history in the legislature, and as the founder of Kuehl Consulting, Sen. Kuehl continues to focus on a wide array of public policy issues, particularly including those affecting children and victims of domestic violence.

II. THIS AMICUS CURIAE BRIEF WILL ASSIST THE COURT IN DECIDING THIS CASE.

Among the issues to be decided in this case is whether the trial court properly admitted and considered expert testimony regarding the "parental alienation syndrome" (PAS), sometimes referred to as its non-syndrome

counterpart “parental alienation,” in transferring sole custody of three children from their mother, Petitioner Segalit McRoberts, to their father for a period of thirty days, and precluding any contact between mother and children during that time notwithstanding documentary and testimonial evidence of paternal molestation of one child, and allegations of sexual abuse of another.

Amici are intimately familiar with both litigation and scholarship concerning parental alienation syndrome, and believe that additional briefing will assist this Court in addressing the legal and practical significance of the trial court’s decision. Specifically, the accompanying brief provides an overview of PAS, including its lack of scientific validity, its false empirical premises, and its ultimate rejection by the scientific community at large (including the American Psychological Association) as well as a leading judicial body, the National Council of Juvenile and Family Court Judges. The brief then concludes that, based on the lack of scientific validity of PAS, *or* parental alienation as applied to refute abuse claims, such evidence is inadmissible and the trial court’s reliance on the theory as a basis for its custody determination was erroneous, and hence, an abuse of the court’s discretion.

CONCLUSION

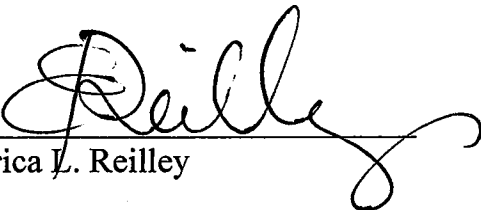
For these reasons, Amici respectfully request the Court’s permission to file the accompanying amicus brief. Pursuant to California Rules of Court, rule 8.200(c)(3), DV LEAP, DVR, Leadership Council, Justice for Children, the Partnership, the CPPA, and Sheila James Kuehl are the only parties who authored the proposed brief in whole or in part and no entity

other than Amici and its counsel made a monetary contribution to fund the preparation or submission of this brief.

Dated: November 22, 2011

Respectfully submitted,

JONES DAY

By: 
Erica L. Reilley

Counsel for Amicus Curiae
DOMESTIC VIOLENCE LEGAL
EMPOWERMENT
AND APPEALS PROJECT (DV
LEAP)

Additional Amici Curiae:


Dated: November 22, 2011

DOMESTIC VIOLENCE REPORT

By: 
Joan Zorza, Esq.
Founding Editor

Dated: November 22, 2011

LEADERSHIP COUNCIL ON
CHILD ABUSE AND
INTERPERSONAL VIOLENCE

By: 
Paul Fink, M.D.
President

Dated: November 22, 2011

JUSTICE FOR CHILDREN

By: Randy Burton/er
Randy Burton, Esq.
Founder

Eileen King
Regional Director

Dated: November 22, 2011

CALIFORNIA PARTNERSHIP
TO END DOMESTIC VIOLENCE

By: Tara Shabazz/er
Tara Shabazz
Executive Director

Dated: November 22, 2011

CALIFORNIA PROTECTIVE
PARENTS ASSOCIATION

By: Karen Anderson/er
Karen Anderson
Executive Director

Dated: November 22, 2011

SHEILA JAMES KUEHL

By: Sheila James Kuehl/er
Sheila James Kuehl

AMICUS BRIEF IN SUPPORT OF
PETITIONER SEGALIT MCROBERTS

INTRODUCTION

The thrust of this appeal concerns a custody order transferring legal custody of four children (and physical custody of three) from the children's mother, Petitioner Segalit McRoberts ("McRoberts"), to their father, Real Party in Interest Steven Lesserson ("Lesserson"), for a period of thirty days, and precluding any and all contact between McRoberts and her three removed children during that time. A central issue to be decided by this Court is the validity and admissibility of evidence concerning "parental alienation syndrome" (PAS) as a basis for a trial court's custody determination. That issue is one of substantial precedential importance, both in California and across the country.

PAS is a highly criticized, scientifically unsupported theory that frequently is applied by courts in a manner that tends to discredit allegations of child or spousal abuse, thereby increasing the risk of continued abuse. Surprisingly often, the result is that children are removed from the homes of caring, protective parents and placed in the care of dangerous or abusive parents. Because PAS lacks general acceptance in the scientific community, it should not be admitted in custody cases under established evidentiary standards set forth in *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, 1014 and *People v. Kelly* (1976) 17 Cal. 3d 24,¹ as well as California Evidence Code sections 720 and 801. (See also Clare Dalton et al., *Navigating Custody and Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide*, Nat'l Council of Juvenile & Fam. Ct.

¹ See *People v. Leahy* (1994) 8 Cal.4th 587, 593-594, 604 [reaffirming what has since become known as the "Kelly/Frye test" for determining admissibility of scientific evidence, and rejecting the *Daubert* standard].

Judges & State Justice Inst., 2004 & 2006 at 24, at <http://www.ncjfcj.org/images/stories/dept/fvd/pdf/navigating_cust.pdf> [as if Nov. 22, 2011] [discussing lack of PAS acceptance within scientific community and concluding that “[a]ny testimony that a party to a custody case suffers from the syndrome or ‘parental alienation’ should therefore be ruled inadmissible . . . under both the standard established in *Daubert* and the earlier *Frye* standard.”].)²

Although the trial court in this case did not refer to PAS specifically in reaching its custody determination, the theory of “alienation” on which it relied (by way of evidence adduced and rulings made during a prior custody hearing before a different judge) is effectively that of PAS. Specifically, the court focused on McRoberts’ purported “intentional alienation” of Lesserson by means of allegations of child abuse. (See 4/1/09 Hr’g Tr. at 27:3-11; 7/28/11 Hr’g Tr. at 7:28-8:14; see also Joan S. Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, J. Child Custody, 6:232, 235 (2009) (hereafter “*A Historical Perspective on PAS and PA*”) [noting that PAS inventor described the “syndrome” as one in which “mothers employ child abuse allegations as a ‘powerful weapon’ to punish the ex and ensure custody to themselves”].) Moreover, the custody evaluator’s testimony, on which the trial court’s custody determination is largely based, relied on the criteria for both “alienation [and] alienation syndrome” in arriving at his recommendation. (4/1/09 Hr’g Tr. at 42:3-7; see 7/28/11 Hr’g Tr. at 7:28-8:14; cf. *Hanson v. Spolnik* (Ind.Ct.App. 1997) 685 N.E.2d 71, 84 (dis. opn. of Chezem, J.) [recognizing that trial court never specifically used the term PAS, but it was clear from language in its findings that it relied heavily on

² Due to the number and volume of secondary sources cited throughout this brief, Amici have not appended copies of the materials with this filing. However, if the Court so requests, Amici will timely provide copies of those materials.

the testimony of expert psychologist regarding the “syndrome” and “all but used the term ‘PAS’ when stating its findings of fact and conclusions of law”). “[T]he reality is that whatever some researchers may say about the differences between PAS and PA, in practice, PA is rarely understood to be different. Indeed, some proponents of alienation theory simply cite to both PAS and PA without distinction.” (Meier, *A Historical Perspective on PAS and PA* at 247; see also Dalton et al. at 24.)

Amici urge the Court to take this opportunity to give meaningful consideration to the validity and admissibility of PAS (whether referred to as PAS or parental alienation) in custody cases where abuse is alleged. There is a significant public interest in this important question. This Court’s review of that question is critical to the proper development and consistent application of the law relating to how allegations of abuse (whether asserted by parent or child) are treated by family courts in resolving custody disputes, and, in particular, regarding the use or misuse of PAS or parental alienation as a basis for rebutting abuse claims.

ARGUMENT

I. PARENTAL ALIENATION SYNDROME HAS BEEN WIDELY DISCREDITED AND IS NOT GENERALLY ACCEPTED WITHIN THE PSYCHOLOGICAL COMMUNITY

The trial court’s decision below was decidedly influenced by theories of PAS and parental alienation espoused by custody evaluator Dr. Stan J. Katz, Ph.D., during a custody evaluation hearing. (See 7/28/11 Hr’g Tr. at 8:4-14; 4/1/09 Hr’g Tr. at 26:1-27:15, 41:26-42:7.) However, PAS—or “parental alienation” as applied to refute substantial abuse allegations—is scientifically unsupported and inadmissible as evidence in custody proceedings. Amici urge this Court to address the validity and

admissibility of PAS/PA under the *Kelly/Frye* standard, so that misapplied claims of alienation do not overshadow or negate valid claims of abuse.

A. PAS IS A THEORY *CREATED* TO NEGATE ABUSE CLAIMS.

Psychiatrist Richard Gardner coined the term “parental alienation syndrome” to describe a “syndrome” he purportedly observed in the course of his own clinical work, whereby mothers allegedly employed child abuse allegations as a “powerful weapon” to penalize fathers and ensure custody for themselves. (Richard A. Gardner, *The Parental Alienation Syndrome: A Guide for Mental Health and Legal Professionals* (1992) (hereafter “Gardner 1992a”).) Gardner theorized that these mothers enlisted their children in their “campaign of denigration” and “vilification” of the father; that they often “brainwashed” or “programmed” the children to believe false claims of abuse by the father; and that the children then fabricated and contributed their own allegations of abuse. (Gardner, Richard A., *True and False Accusations of Child Sex Abuse*, 162, 193 (1992) (hereafter “Gardner 1992b”).)

PAS posits that when children reject their father and they or their mother make abuse allegations, that behavior is most likely the product of a mother’s alienating tactics rather than actual experiences of abuse. PAS propagates the belief that children’s allegations of abuse, when rendered in the course of custody litigation, are highly suspect, and that investigation into alienation, rather than abuse, is the appropriate course. (See Meier, *A Historical Perspective on PAS and PA* at 236, 241-242 [describing conclusory nature of PAS theory and cases in which PAS label was used to deny abuse claims].) PAS thus directs attention away from abuse claims, and focuses attention on mothers’ suspected reasons for seeking to restrict a father’s access to his children. The unfortunate result is that protective parents’ and children’s claims of abuse, neglect, and fear in the context of

custody litigation are often discounted or negated. (Carol Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting it Wrong in Child Custody Cases*, 35 Fam. L. Q. 527, 530-532 (2001); Joan S. Meier, *Parental Alienation Syndrome and Parental Alienation: Research Reviews*, VAWnet pp. 5-6 (2009), at <http://www.vawnet.org/Assoc_Files_VAWnet/AR_PAS.pdf> [as of Nov. 22, 2011].)

The PAS theory developed exclusively from Gardner's individual interpretation of his own clinical experience, and his publications on the subject were almost entirely self-published. (Bruch at 535-536.) At bottom, the theory is premised on a verifiably *false* assumption: that women and children frequently and falsely allege abuse to prevent fathers from gaining custody. In fact, credible research across multiple jurisdictions reveals that only 12% of all child abuse or neglect allegations in custody litigation are knowingly false, with only 2% of these made by children, and 14% of these made by custodial parents (mostly mothers). (Niko Trocme & Nicolas Bala, *False Allegations of Abuse and Neglect When Parents Separate*, Child Abuse & Neglect 29, 1333-1345 (2005).) In striking contrast, 43% of knowingly false allegations are made by noncustodial parents (mostly fathers).³ (*Ibid.*) Thus, the paradigm on which PAS is based—that of a vengeful or pathological mother—is directly refuted by the empirical research.

That PAS was created to negate abuse claims is evident when one considers the circular reasoning behind the theory's method for differentiating between true and false claims of abuse: Gardner identifies "the presence of PAS" as *itself* an "extremely valuable differentiating

³ The remaining 41% of knowingly false abuse or neglect allegations are typically made by third parties, such as neighbors relatives, acquaintances, and others, including anonymous reporters. (Niko Trocme & Nicolas Bala, *False Allegations of Abuse and Neglect When Parents Separate*, Child Abuse & Neglect 29, 1342 (2005).)

[criterion]” for determining that child abuse allegations are false; yet to determine the presence of PAS, one must first determine whether the abuse claims are valid. (Gardner, Richard A., *The Parental Alienation Syndrome and the Differentiation Between Fabricated and Genuine Child Sex Abuse* 109 (1987)). This circularity is widely recognized. (See, e.g., Meier, *A Historical Perspective on PAS and PA* at 236 [describing Gardner’s reasoning for PAS as “self-referential and conclusory”]; 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, 760 (2005) (hereafter “*Children of Divorce*”) [“Gardner’s proposition as to the cause of PAS is rendered tautological” by its “circular reasoning.”]; Bruch at 532 [“Neither Gardner nor those who accept his views acknowledge the logical difficulties when Gardner asserts that abuse allegations which are believed by therapists constitute evidence of PA by the protective parent.”].)

B. PAS DOES NOT SATISFY THE “GENERAL ACCEPTANCE” STANDARD MANDATED BY *KELLY/FRYE*.

In *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, the D.C. Circuit announced a standard for evaluating the admissibility of expert testimony predicated on the use of novel scientific theories. In excluding evidence of lie detector test results, the court held that scientific evidence is admissible only when it is “sufficiently established to have gained general acceptance in the particular field in which it belongs. (*Id.* at p. 1014.) In *People v. Kelly* (1976) 17 Cal. 3d 24, the California Supreme Court affirmed *Frye*’s “general acceptance” standard for use in state judicial proceedings. (*Id.* at p. 30 [“We have expressly adopted the foregoing *Frye* test and California courts, when faced with a novel method of proof, have

required a preliminary showing of general acceptance of the new technique in the relevant scientific community.”].)

The reasoning behind *Kelly/Frye*'s general acceptance standard is that it “assures that those most qualified to assess the general validity of a scientific method will have the determinative voice.” (*Id.* at p. 31, quoting *United States v. Addison* (D.C. Cir. 1974) 498 F.2d 741, 743-744.) Moreover, adherence to the *Kelly/Frye* standard serves to “promote a degree of uniformity of decision. Individual judges whose particular conclusions may differ regarding the reliability of particular scientific evidence, may discover substantial agreement and consensus in the scientific community.” (*Id.* at p. 31.) Logic and common sense likewise counsel careful adherence to the *Kelly/Frye* standard. As the Supreme Court explained, there is a “misleading aura of certainty which often envelopes a new scientific process, obscuring its currently experimental nature.” (*Id.* at p. 32.) Family courts’ heavy reliance on PAS exemplifies this growing concern.

Here, PAS cannot satisfy the *Kelly/Frye* standard. Indeed, due to its lack of empirical support, PAS has been overwhelmingly rejected by the psychiatric and related social science communities, which are in general agreement that “the scientific status of PAS is, to be blunt, nil.” (See Robert E. Emery et al., *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6 Psychological Sci. in the Pub. Interest 1, 10 (July 2005).)⁴ In fact, as a scientific theory, PAS

⁴ See also Jennifer Hoult, *The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy*, 26 Child. Legal Rts. J. 1, 5 (2006) [explaining that “[a]ll generally recognized psychiatric syndromes are compiled in the American Psychiatric Association’s Diagnostic and Statistical Manual (“DSM”);” that “[i]nclusion in DSM occurs after scientific testing has proven the existence of the syndrome and the reliability and replicability of its diagnostic criteria;” and that “PAS is not included in the DSM”].)

“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.” (Bruch at 539, quoting Paul Fink, past President of the American Psychiatric Association, citation omitted.) Moreover, the Sexual Abuse Legitimacy Scale (SALS), on which PAS largely is based, has been called “probably the most unscientific piece of garbage I’ve seen in the field in all my time. To base social policy on something as flimsy as this is exceedingly dangerous.” (*Id.* at 539, fn. 46, quoting expert Professor Jon Conte, University of Washington, citation omitted.)

Echoing the scientific consensus, a leading judicial body, the National Council of Juvenile and Family Court Judges (NCJFCJ), has published guidelines for family courts strongly cautioning against the scientific validity of PAS:

The theory positing the existence of “PAS” has been discredited by the scientific community . . . Any testimony that a party to a custody case suffers from the syndrome or “parental alienation” should therefore be ruled inadmissible

(Dalton et al. at 24.) And various other legal experts have voiced similar concerns:

[A]lthough PAS may be hailed as a “syndrome” . . . in fact it is the product of anecdotal evidence gathered from Dr. Gardner’s own practice PAS is based primarily on two notions, neither of which has a foundation in empirical research . . . PAS is an unproven theory that can threaten the integrity of the criminal justice system and the safety of abused children.

(Erika Ragland & Hope Field, *Parental Alienation Syndrome: What Professionals Need to Know*, 16:6 Nat'l Ctr. for Prosecution of Child Abuse (NCPCA) Update Newsletter, 2003, p.1.)

Thus, PAS has been largely discredited among psychiatrists, psychologists, and related scientific communities. It has therefore failed to garner the requisite “general acceptance” necessary under the *Kelly/Frye* standard for admissibility, and this Court should likewise find it inadmissible. To hold otherwise would undermine the very benefit *Kelly/Frye* was intended to promote—uniformity of decision based on the presence of credible scientific support sufficient to justify the admission of scientific evidence.

C. THE FEW COURTS TO CONSIDER PAS UNDER THE *KELLY/FRYE* STANDARD HAVE GENERALLY REJECTED IT.

For the reasons just noted, it should be no surprise that the few courts to have directly addressed the scientific validity and admissibility of PAS have generally rejected it.

At least one California appellate court has excluded evidence of PAS in the criminal context based on its failure to satisfy the *Kelly/Frye* standard. In *People v. Sullivan* (Cal.Ct.App. Apr. 3, 2003) Nos. H023715 & H025386, 2003 WL 1785921, at p. *5, a defendant convicted of sexual assault and lewd or lascivious acts on a child challenged his convictions on the ground, among others, that the trial court erred in excluding expert testimony on PAS. The trial court had excluded the testimony for several reasons, including that it was not “scientific enough to satisfy the ‘*Kelly-Frye*’ rule.” (*Id.* at p. *13.) The Sixth Appellate District held the trial court’s exclusion of the expert testimony was not an abuse of discretion. (*Id.* at p. *14; see also *Hanson, supra*, 685 N.E.2d at pp. 84-85 (dis. opn. of Chezem, J.) [condemning majority’s implicit validation of trial court’s

reliance on PAS evidence, likening the theory to “‘cult’ theories like the ‘Peter Pan Syndrome’ or the ‘Cinderella Complex’” that are “more suitable in a pop psychology venue rather than a court of law”].)

Similarly, a New York court excluded evidence of PAS in a criminal matter where the defendant was charged with various counts of sexual assault of his wife’s teenage niece. In *People v. Fortin* (N.Y.Crim.Ct. 2000) 706 N.Y.S.2d 611, 612, the defendant sought to introduce expert testimony from Richard Gardner on PAS to support his claim that the niece fabricated the allegations of sexual assault against him due to “inter-familial discord.” After a *Frye* hearing on the admissibility of PAS evidence, the trial court rejected Dr. Gardner’s testimony, holding that “the defendant ha[d] not established general acceptance of Parental Alienation Syndrome within the professional community which would provide a foundation for its admission at trial.” (*Id.* at p. 614.)

Courts have likewise rejected the admissibility of PAS in the context of civil custody disputes. In *Snyder v. Cedar* (Conn. Super. Feb. 16, 2006) No. NNHCV010454296, 2006 WL 539130, at p. *5, a father involved in a hotly contested custody dispute maintained that sexual allegations asserted against him by his child originated not with the child but with her mother, in an effort to turn the child against her father. As evidence of his theory, the father proffered the expert testimony of the child’s former psychotherapist. (*Ibid.*) The expert testified that the child suffered from PAS. (*Ibid.*) Although the trial court ultimately found the allegations of sexual abuse meritless, it nevertheless rejected the expert testimony of PAS as inadmissible. (*Id.* at p. *8.) Specifically, the court found that PAS lacked “any scientific basis” and had not been subjected to credible scientific studies. (*Ibid.*; see also *id.* at p. *9 [“There is no credible evidence that ‘parental alienation syndrome’ as defined by [the expert] . . . has been recognized within any of the mental health professions.”].) The

trial court also found that PAS “lack[ed] any methodological underpinning” and, consequently, was “incapable of helping the fact finder determine a fact in dispute.” (*Id.* at p. *9.) The evidence was therefore held inadmissible for failure to satisfy the state’s competent evidence standard. (*Ibid.*)

And in *NK v. MK* (N.Y.Sup.Ct. Oct. 1, 2007) No. XX07, 2007 WL 3244980, at p. *1, a New York trial court confronted the issue of alienation in the context of a dispute between former spouses over equitable distribution of the marital estate as well as child custody related matters. The mother cited a long history of domestic violence by the father, and the father alleged that the wife engaged in conduct resulting in the alienation of one of their children from him. (*Ibid.*) In refusing to grant the father economic relief, the court concluded that there is no “generally accepted diagnostic determination or syndrome known as ‘parental alienation syndrome.’” (*Id.* at p. *64.) Indeed, citing scientific literature, the court stated that “[t]erminology such as inappropriate parental influence would be far more appropriate.” (*Ibid.*, fn. 20.) The court also recognized that courts “cannot just accept the opinion of an expert and must evaluate it and then determine its efficacy or application to the case before it . . . especially [in cases] where there are allegations of domestic violence which must be considered in the context of a custody dispute.” (*Ibid.*)

For the many reasons identified by these courts and others, most significantly the failure of PAS evidence to satisfy the *Kelly/Frye* standard due to its lack of general acceptance within the scientific community, this Court should also hold that PAS lacks sufficient scientific acceptance and is therefore inadmissible in custody and related proceedings.

D. USING PARENTAL ALIENATION THEORY TO REFUTE ABUSE CLAIMS ALSO IS SCIENTIFICALLY UNSUPPORTED.

“[B]ecause the differences between ‘alienation’ and PAS are not firmly established, many discussions of parental alienation still necessarily draw on PAS theory and scholarship, and, at least in practice, invocations of PA appear often to be simply ‘old wine in new bottles.’” (Meier, *A Historical Perspective on PAS and PA* at 246.) Amici recognize that parents involved in custody disputes often denigrate one another to the children. However, that practical reality—that many parents engage in derogatory behavior—does not and cannot support the notion that such conduct results in children’s false abuse allegations, and/or pathological fear and hostility toward the abusive parent.

Indeed, as PAS and parental alienation have become ubiquitous in family courts, a growing population of psychological researchers has focused on discovering more about the theory of parental alienation and its effects on children, as well as its relationship to abuse and abuse claims. This research, led by Janet Johnston, Ph.D.—a professor in the Administration of Justice Department at San Jose State University—has consistently found that while many divorcing parents do denigrate one another in front of their children, such behavior only rarely has a significant effect on the children. (See Janet R. Johnston & Joan B. Kelly, *Commentary on Walker, Brantley, and Rigsbee’s (2004) ‘A Critical Analysis of Parental Alienation Syndrome and Its Admissibility in Family Court,’* 1:4 J. Child Custody 77, 81 (2004) (hereafter “*Commentary*”) [reporting that in study reflecting “alienating” behavior by both parents, “only about one fifth of the children [studied] had rejected a parent”].)

Johnston’s research indicates that, while most parents in the study made derogatory remarks about each other to the children, only 6% of the

children demonstrated “extremely rejecting” behavior toward the parent who was the subject of derogatory statements—and *all* those children had additional reasons for their hostility based on the disfavored parent’s *own* behavior. (Janet R. Johnston, Marjorie G. Walters & Nancy W. Olesen, *Is it Alienating Parenting, Role Reversal, or Child Abuse? A Study of Children’s Rejection of a Parent in Child Custody Disputes*, 5 J. Emotional Abuse 191, 206 (2005) [“It is remarkable that so few children were rejecting of a parent, especially in the face of the parents’ negative attitudes and behaviors toward one another. These findings support commonly held views that pre-adolescent children’s ties to both their parents are remarkably resilient in the context of family conflict and divorce.”].)

More significantly, the research likewise reflects that, contrary to common assumptions, one parent’s alienating conduct toward the other parent *has little to do with false abuse allegations*. (See *id.* at 207-208 [explaining that alienated children are almost always hostile for reasons stemming, at least in part, from the disfavored parent’s own conduct, including neglect, abuse, or lack of warm, involved parenting]; see also Johnston, *Children of Divorce*, at 765-766 [“[C]hildren’s rejection of a parent had multiple determinants with both the aligned parent and the rejected parent implicated in the problem, in addition to vulnerabilities within the children themselves.”].)

The Leadership Council on Child Abuse and Interpersonal Violence is currently conducting research on cases around the country in which courts initially awarded custody of a child to an abuser, and subsequently reversed the decision to protect the child from abuse. The Leadership Council’s preliminary analysis of these “turn-around” cases has shown that PAS (or parental alienation)—erroneously diagnosed in custody evaluations—was a primary reason for the initial judicial decision awarding

custody to a parent later confirmed to be a danger to the child, as the mother had originally alleged.

For example, in one California case, a family court judge reversed an earlier custody determination (made by a different judge) awarding custody of the children to their father. (*Orme v. Nelson*, Ventura County Superior Court Case No. D259613, Oct. 18, 2007 Hr'g Tr. 9:10-18.) After two years with the father, the judge reversed course, awarding sole physical and legal custody of the children to their mother based on the children's credible allegations of sexual abuse by the father. (*Id.* at 10:14-11:27.) Specifically, the trial court, having reviewed prior deposition testimony offered by the custody evaluator before the original custody determination, recognized that the custody evaluator "does kind of a cursory evaluation of the whole thing [the child abuse allegations] because already, according to his own deposition testimony, he's bought into parental alienation syndrome throughout the course, so he's open to that, and he puts a stamp of approval on it" (*Id.* at 8:19-24.) The court concluded that during the two years the children had been with the father, they had "progressively deteriorated" both mentally and emotionally. (*Id.* at 5:11-20.) The custody evaluator's "cursory evaluation" of the abuse evidence in the case, based on parental alienation theories (*id.* at 8:19-24), is a major factor contributing to initial harmful custody decisions in these "turn-around" cases.

Thus, in conducting custody evaluations, it is imperative that courts decouple their analysis of alienation from their assessment of abuse to ensure that the abuse allegations are not improperly rejected based on an unfounded "alienation" hypothesis. This is best accomplished by ensuring that abuse allegations are independently assessed by abuse experts (not custody evaluators) *before* a court considers whether alienation is the dominant problem. (See Joan S. Meier, *Getting Real About Abuse and Alienation: A Critique of Drozd and Olesen's Decision Tree*, 7 J. Child

Custody 219, 225-227(2010).) This is especially important given that there is *no* empirical support for any direct correlation between parental alienation and false abuse allegations. Indeed, the credible research on alienation consistently identifies multiple factors contributing to children's alienation, including the disfavored parent's own conduct. (See Johnston & Kelly, *Commentary* at 81-82; Janet R. Johnston, *Children of Divorce* at 764-766.) That research does *not*, however, identify false abuse allegations as a contributing factor. (*Ibid.*) Rather, the research demonstrates that abused women are no more prone to alienating their children from their batterers than other parents. (See Johnston, *Children of Divorce* at 765.)

Likewise, there is no scientific support for the idea that a favored parent's alienating or denigrating conduct toward a disfavored parent necessarily produces symptoms commonly found among abused children, such as fear, rage or distress toward the disfavored parent. To the contrary, children's fear, post traumatic stress symptoms and regression are considered by child abuse experts to be reflective of the *veracity* of abuse claims. (Kathleen C. Faller, *Maltreatment in Early Childhood: Tools for Research-Based Intervention* (1999); Sue Righthand et al., *Child Maltreatment Risk Assessments: An Evaluation Guide* (2003).) In short, the empirical research demonstrates that the most common use of alienation theory by evaluators to refute abuse allegations—and to discount children's expressions of distress toward a disfavored parent—is scientifically invalid and unsupported.

For that reason, leading mental health and legal professionals have concluded that parental alienation (apart from PAS) is “an inappropriate pathological label”⁵ that is too often used to discredit women and children alleging abuse in custody cases. The American Psychological

⁵ Am. Psychological Ass'n., *Violence and the Family: Report of the APA Presidential Task Force on Violence and the Family* 40, 100 (1996).

Association's Presidential Task Force on Violence in the Family has recognized this problem:

When children reject their abusive fathers, it is common for the batterer and others to blame the mother for alienating the children. They often do not understand the legitimate fears of the child . . . Terms such as 'parental alienation' may be used to blame the women for the children's reasonable fear or anger toward their violent father.

(Am. Psychological Ass'n., *Violence and the Family: Report of the APA Presidential Task Force on Violence and the Family* 40, 100 (1996).) The National Council of Juvenile & Family Court Judges has similarly warned of the dangers of relying on parental alienation in cases involving abuse claims:

In contested custody cases, children may indeed express fear of, be concerned about, have distaste for, or be angry at one of their parents. Unfortunately, an all too common practice in such cases is for evaluators to diagnose children who exhibit a very strong bond and alignment with one parent and, simultaneously, a strong rejection of the other parent, as suffering from 'parental alienation syndrome' or 'PAS' 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 an abusive parent, who may have directly influenced the children's responses by acting in violent, disrespectful, intimidating, humiliating and/or discrediting ways toward the children themselves, or the children's other parent.

(Dalton et al. at 24.)

For all these reasons, Amici urge this Court to hold that evidence of PAS is inadmissible because it fails to satisfy the *Kelly/Frye* general acceptance standard, and that evidence of parental alienation—which similarly lacks scientific support as a basis for refuting the validity of substantial child abuse claims—should likewise be held inadmissible in custody cases involving claims of child abuse.

II. TRIAL COURTS’ HEAVY RELIANCE ON THE TESTIMONY OF CUSTODY EVALUATORS—THOSE LIKELY TO INVOKE PAS OR PARENTAL ALIENATION THEORIES—UNDERScores THE NEED FOR REVIEW OF THIS ISSUE.

The pernicious effect that unsubstantiated scientific theories such as PAS can have on custody determinations is particularly acute given the heavy credence some custody evaluators give PAS and parental alienation, and the equally heavy—if not heavier—reliance that trial courts generally place on the testimony of those evaluators. (See Hoult, *The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy*, 26 Child. Legal Rts. J. 1, 3 (2006) [“Given the rarity of written decisions and appellate review of family court decisions, these numbers [referencing PAS in 64 precedent bearing cases in 25 states and in 112 law review articles] indicate PAS’s substantial influence in American courts.”].)

The law in this area demonstrates the extent to which trial courts consider and rely upon the opinions of custody evaluators in rendering custody rulings. (See, e.g., *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1079-1085 [detailing the appointed custody evaluator’s extensive written and oral testimony relied upon by the trial court]; *Niko v. Foreman* (2006) 144 Cal.App.4th 344, 366 [explaining trial court appointed an expert custody evaluator to determine what was in child’s best interest as concerned a mother’s move-away request].) Indeed, that is precisely what

occurred in this case. (See 7/28/11 Hr'g Tr. at 8:4-9:4; 4/1/09 Hr'g Tr. at 8:15-23, 26:1-27:23, 30:17-19, 41:26-42:7.)

Yet, despite the theory having been discredited by numerous professional associations, custody evaluators in cases involving claims of abuse nevertheless “consistently list parental alienation as a main factor in their recommendations.” (Megan L. Haselschwerdt et al., *Custody Evaluators' Beliefs About Domestic Violence Allegations During Divorce: Feminist and Family Violence Perspectives*, 26 J. Interpers. Violence 8, 1694, 1698 (2011).)

Given trial courts' heavy reliance on the testimony of custody evaluators, and custody evaluators' widespread reliance on parental alienation theory in cases involving abuse, judicial guidance on the admissibility of PAS testimony is critical to ensuring both the safety of children who are the subject of custody disputes, and the legitimacy of custody determinations based at least in part on the psychological and other expert testimony of custody evaluators.

III. THIS COURT SHOULD USE THIS CASE TO ADDRESS THE (IN)ADMISSIBILITY OF PAS.

One of the reasons PAS has continued to gain undue momentum in family courts is that, to Amici's knowledge, no precedential appellate ruling yet has been issued *in a custody case* regarding its admissibility. (See Hoult at 5 [“Since PAS appears primarily in family courts where written decisions often are not issued and few decisions are published, its appearance in precedent-bearing decisions may underestimate its influence in American courts.”].) Some courts of appeals have come close to reaching the issue but ultimately declined to do so, either deciding the case on other grounds (see, e.g., *Palazzolo v. Mire* (La.Ct.App. 2009) 10 So.3d 748, 771-777), or concluding that the record otherwise supported the trial court's findings (see, e.g., *Linder v. Johnson* (Ark.Ct.App. Nov. 29, 2006)

No. CA 06-033, 2006 WL 3425021, at pp. **3-5, 10-12). But this theory has a very real and powerful potential to distort the way family courts interpret facts and construe allegations of abuse, by making abuse claims inherently suspect and suggesting that they are explainable simply as the product of “alienation.” This Court should take the opportunity to directly consider the admissibility of PAS and parental alienation where used to refute abuse claims. At a minimum, the Court should require that the scientific validity and admissibility of such evidence be thoroughly vetted in a *Kelly/Frye* hearing before the trial court.

CONCLUSION

The California Supreme Court has clearly dictated the standard by which courts must assess the admissibility of scientific evidence. That evidence must be reliable and relevant—the former criterion determined by a showing that the evidence is “generally accepted” in the particular field to which it belongs. PAS completely fails to satisfy this fundamental requirement, and should be held inadmissible in custody and related family court proceedings. Mindful that the goal in custody disputes is to further the best interests of the child, making custody determinations on the basis of a scientifically unsupported theory such as PAS—especially when used to defeat potentially serious abuse allegations—obstructs that goal, and does not advance it.

Dated: November 22, 2011

Respectfully submitted,

JONES DAY

By: 

Erica I. Reilley

Counsel for Amicus Curiae
DOMESTIC VIOLENCE LEGAL
EMPOWERMENT AND
APPEALS PROJECT (DV LEAP)

Additional Amicus Curiae:

Dated: November 22, 2011

DOMESTIC VIOLENCE REPORT

By: Joan Zorza
Joan Zorza, Esq.
Founding Editor

Dated: November 22, 2011

LEADERSHIP COUNCIL ON
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JUSTICE FOR CHILDREN

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Randy Burton, Esq.
Founder

Eileen King
Regional Director

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TO END DOMESTIC VIOLENCE

By: Tara Shabazz
Tara Shabazz
Executive Director

Dated: November 22, 2011

CALIFORNIA PROTECTIVE
PARENTS ASSOCIATION

By: Karen Anderson
Karen Anderson
Executive Director

Dated: November 22, 2011

SHEILA JAMES KUEHL

By: Sheila James Kuehl/er
Sheila James Kuehl

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies, pursuant to California Rules of Court, rule 8.520, subdivision (c), that the enclosed brief was produced using 13-point type, including footnotes, and contains approximately 8,679 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: November 22, 2011

Respectfully submitted,

JONES DAY

By: 

Erica L. Reilley

Counsel for Amicus Curiae
DOMESTIC VIOLENCE LEGAL
EMPOWERMENT AND
APPEALS PROJECT (DV LEAP)

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350 McAllister Street
San Francisco, CA 94102-7303

Four Copies

The Superior Court of Los Angeles County
Attn: John A. Clarke, Executive
Officer/Clerk
111 North Hill Street
Los Angeles, CA 90012

Patricia J. Barry, Esq.
634 South Spring Street
Suite 823
Los Angeles, CA 90014
Telephone: (213) 995-0734
Facsimile: (213) 995-0735
patbarrylegal@yahoo.com

Joel S. Seidel, CFLS
9939 Louise Ave.
Northridge, CA 91325
Telephone: (818) 832-7850
Facsimile: (818) 832-7889
Seidellaw@aol.com

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