Denver Law Review

Volume 74 | Issue 1 Article 5

January 1996

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CHILD SEXUAL ABUSE ALLEGATIONS AGAINST A LESBIAN OR GAY PARENT IN A CUSTODY OR VISITATION DISPUTE: BATTLING THE OVERT AND INSIDIOUS BIAS OF EXPERTS AND JUDGES

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> The world of veiled human events is often a world of unconfirmable truths. Communities past and present have faced difficult dilemmas concerning the assessment of individual behavior from the standpoints of morality and custom. The contemporary preoccupation with child sexual abuse surely has many parallels with the preoccupations of other times, such as witchcraft and heresies. . . .
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> . . . As we do today, they had to rely on what experts, using their special devices, told them were the signs of the very private phenomena they sought to regulate and suppress. In our opinion, our means of discerning the portents are no better than they have ever been, relative to prevailing moral standards, in the history of human affairs.[1]

I. INTRODUCTION

Empirical data demonstrates that gay men and lesbians are the *least* likely persons to sexually abuse children.[2] These scientific conclusions have not, however, dissuaded the public and the courts from automatically condemning a gay or lesbian person accused of child sexual abuse prior to application of even the most rudimentary principles of fairness and due process of law.

Lamentably, accusations of child sexual abuse are becoming more prevalent in custody and visitation battles regardless of the accused parent's sexual orientation.[3] The mere allegation of such an unspeakable act,[4] raised in

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1. Thomas M. Horner & Melvin J. Guyer, *Prediction, Prevention, and Clinical Expertise in Child Custody Cases in Which Allegations of Child Sexual Abuse Have Been Made: I. Predictable Rates of Diagnostic Error in Relation to Various Clinical Decisionmaking Strategies*, 25 FAM. L.Q. 217, 251-52 (1991) [hereinafter Horner & Guyer I].

2. *E.g.*, Robert L. Barret & Bryan E. Robinson, *Gay Dads, in* REDEFINING FAMILIES: IMPLICATIONS FOR CHILDREN'S DEVELOPMENT 157, 161 (Adele Eskeles Gottfried & Allen W. Gottfried eds., 1994) (stating that "at this time it appears that children living with heterosexual parents are more at risk of incest than children living with gay fathers"); Patricia J. Falk, *The Gap Between Psychosocial Assumptions and Empirical Research in Lesbian-Mother Child Custody Cases, in* REDEFINING FAMILIES: IMPLICATIONS FOR CHILDREN'S DEVELOPMENT 131, 142-43 (Adele Eskeles Gottfried & Allen W. Gottfried eds., 1994) (noting that child sexual abuse in the United States has been committed overwhelmingly by heterosexual males); Carole Jenny et al., *Are Children at Risk for Sexual Abuse by Homosexuals?*, 94 PEDIATRICS 41, 44 (1994) (concluding that a heterosexual is 100 times more likely to abuse a child than is a homosexual).

3. *E.g.*, Gordon J. Blush & Karol L. Ross, *Sexual Allegations in Divorce: The SAID Syndrome*, 25 CONCILIATION CTS. REV. 1, 1 (1987) (noting that "[m]ore and more reports of sexually abused children are being made" and warning that "an entirely different set of dynamics and variables may exist" when allegations are made in the context of a family which "has become dysfunctional" due to the divorce process); Gerald Cooke & Margaret Cooke, *Dealing with Sexual Abuse Allegations in the Context of Custody Evaluations*, 9 AM. J. FORENSIC PSYCHOL. 55, 65 (1991) (concluding that clinical experience indicates a rising number of sexual abuse allegations during custody evaluations).

4. The devastation caused by sexual abuse of a child is often viewed as irreparable. *See, e.g.*, Sarah E. Romans et al., *Sexual Abuse in Childhood and Deliberate Self-Harm*, 152 AM. J. PSYCHIATRY 1336 (1995) (discussing a study which found a clear statistical correlation between child sexual abuse and deliberate self harm as an adult, including involvement in further abusive relationships); Kenneth R. Silk et al., *Borderline Personality Disorder Symptoms and Severity of Sexual Abuse*, 152 AM. J. PSYCHIATRY 1059, 1062 (1995) (reporting that persons sexually abused as children often experience "chronic feelings of hopelessness and worthlessness," are unable to

initial divorce and custody proceedings or in subsequent actions to modify custody and visitation orders, immediately reverses the "innocent until proven guilty" principle. Stated differently, "[t]he field of child sexual abuse assessment has become sensationalized, creating a climate wherein allegations alone are quickly raised to the status of evidence signifying abuse. Through this bootstrap transformation allegations are then used to establish culpability."[5]

In this sensationalized climate, the allegations of sexual abuse alone cause a de facto shifting of the burden of proof to the accused in both civil and criminal cases.[6] The difficulties inherent in proving a negative—that is, in proving that the accused did *not* do the specific act or acts on which the sexual abuse allegations are based—further inflate the accused's evidentiary burden to a nearly insurmountable level.[7] But the bar is raised even higher when the sexual orientation of the accused parent is non-heterosexual.[8] In this scenario, the accused must disprove not only the specific acts alleged but also overcome the stereotypes of homosexuals as perverts, sexual deviants, and child molesters.[9] These widely held erroneous views, by themselves, may

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attach to other persons "in satisfying and safe ways," and develop a firm "belief in a malevolent object world" where people seek only to satisfy their own needs at the expense to others); Vicky Veitch Wolfe et al., *The Impact of Sexual Abuse on Children: A PTSD Formulation*, 20 BEHAV. THERAPY 215, 226 (1989) (concluding that "sexually abused children display both global adjustment problems and problems specific to the sexual abuse, including sex-associated fears and intrusive thoughts").

5. Thomas M. Horner & Melvin J. Guyer, *Prediction, Prevention, and Clinical Expertise in Child Custody Cases in Which Allegations of Child Sexual Abuse Have Been Made: II. Prevalence Rates of Child Sexual Abuse and the Precision of "Tests" Constructed to Diagnose It*, 25 FAM. L.Q. 381, 387 (1991) [hereinafter Horner & Guyer II]. *See generally* HOLLIDA WAKEFIELD ET AL., ACCUSATIONS OF CHILD SEXUAL ABUSE 121-52 (1988) (discussing the justice system and accusations of child sexual abuse and concluding that societal condemnation of persons accused of child sexual abuse creates a substantial risk of persons being falsely accused and convicted).

6. This article deals primarily with civil cases, although many of the principles discussed are equally applicable to criminal complaints. For an excellent overview of concerns regarding expert witnesses in criminal prosecutions for child sexual abuse, see Lisa R. Askowitz & Michael H. Graham, *The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions*, 15 CARDOZO L. REV. 2027 (1994), and Diana Younts, Note, *Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions*, 41 DUKE L.J. 691 (1991). *See also* DANIEL W. SHUMAN, PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE §§ 13.06-.10 (2d ed. 1994) (addressing sexual and general child abuse); Robert G. Marks, Note, *Should We Believe the People Who Believe the Children?: The Need For A New Sexual Abuse Tender Years Hearsay Exception Statute*, 32 HARV. J. ON LEGIS. 207 (1995).

7. This burden is arguably impossible to satisfy. "Because it is always *possible* that a given individual—even one randomly drawn from the general or a specific population—has sexually molested a child, an incontrovertible *proof* that that individual has *not* molested a child is impossible." Thomas M. Horner et al., *Prediction, Prevention, and Clinical Expertise in Child Custody Cases in Which Allegations of Child Sexual Abuse Have Been Made: III. Studies of Expert Opinion Formation*, 26 FAM. L.Q. 141, 170 (1992) (emphasis in original) [hereinafter Horner et al.].

8. Such is the case with gay, lesbian, and possibly bisexual and transgendered parents. Since the "homosexual" aspect of a bisexual parent's life is more controversial than the heterosexual aspect, most of the analysis herein regarding biases against a homosexual parent also applies to a bisexual parent. Specific biases that may stem from being transgendered or bisexual, however, are outside the scope of this article.

9. For an interesting discussion of the stereotypes of gay individuals as child molesters and sex-crazed maniacs, see RICHARD D. MOHR, A MORE PERFECT UNION 1-4 (1994). These stereotypes are born of the myth "that gays and lesbians are predators and defilers of America's youth," Doug Arey, *Gay Males and Sexual Child Abuse*, *in* SEXUAL ABUSE IN NINE NORTH AMERICAN

seem adequate grounds for condemnation regardless of the actual evidence of record.[10]

While tilting at windmills on the legal battlefield, the accused is also trying to nurture her parental relationship with the child at the center of the controversy. This goal is virtually unachievable due to the immediate and severe restrictions imposed upon an accused parent's contact with her child, restrictions which "inevitably alter the child-parent relationship to a degree that can, in many cases," irreparably damage the relationship.[11]

This article examines the critical role played by experts in the legal battles which erupt when child sexual abuse is alleged. In light of the courts' reliance on expert testimony to determine the veracity of the charges, additional safeguards must be utilized to test the qualifications of a proffered expert and the admissibility of the expert's opinions. As more thoroughly explained throughout this article, such safeguards are especially critical when the accusations are leveled against a gay or lesbian parent. Indeed, many of the safeguards proposed herein are designed to detect the existence and corresponding impact, if any, of an expert's anti-gay animus on the opinions she offers to the trier of fact. Some of the suggestions, such as requiring that the expert have sufficient familiarity with the empirical data on lesbian and gay parents, are aimed at eliminating heterosexual partisanship[12] which may inappropriately influence an expert's decision even absent a specific anti-gay bias.[13]

CULTURES 200, 209 (Lisa Aronson Fontes ed., 1995), and are "promiscuous by nature," Kim I. Mills, *Security Clearance OK'd for Gays*, PLAIN DEALER, Aug. 5, 1995, at A7 (quoting statements made by U.S. Rep. Bob Dornan of California in opposition to security clearances for gay and lesbian government employees). *See also* Elvia R. Arriola, *Faeries, Marimachas, Queens, and Lezzies: The Construction of Homosexuality Before the 1969 Stonewall Riots*, 5 COLUM. J. GENDER & L. 33 (1995) (discussing the historical discrimination against homosexuals before the Stonewall Riots of 1969); Judith G. Fowler, *Homosexual Parents: Implications for Custody Cases*, 33 FAM. & CONCILIATION CTS. REV. 361 (1995) (discussing impact of negative stereotyping on gay and lesbian parents seeking custody of their children); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995) (presenting a framework for examining legal and social conceptions of sex, gender and sexual orientation).

10. *See e.g.*, People v. Mercado, 592 N.Y.S.2d 75, 77 (N.Y. 1992) (finding that evidence which inferred that defendant had been expelled from military school due to an alleged homosexual encounter was intended to and may have in fact led the jury to believe that defendant "had a propensity for child abuse"). In dissenting from the denial of defendant's leave to appeal his conviction for sexually abusing his daughter and son and arguing for reversible prosecutorial misconduct where the prosecutor asked defendant if he was a homosexual, Judge Cavanagh observed: "It would require unconvincing naivete not to recognize this innuendo as a deliberate appeal to the widespread prejudice in our society that homosexuals are generally more likely to sexually molest children." People v. Kosters, 467 N.W.2d 311, 315-16 (Mich. 1991) (Cavanagh, J., dissenting).

11. Horner & Guyer II, *supra* note 5, at 386. For a thoughtful discussion of the impact of custody litigation on a family, see Martha L. Deed, *Court-Ordered Child Custody Evaluations: Helping or Victimizing Vulnerable Families*, 28 PSYCHOTHERAPY 76, 78-79 (1991).

12. The "heterosexual norm" through which many people view the world is founded in ancient religious and cultural beliefs that a family unit consisting of a man, a woman, and their offspring is "the foundation of all human community." The Ramsey Colloquium, *The Homosexual Movement*, *in* HOMOSEXUALITY: DEBATING THE ISSUES 31, 35 (Robert M. Baird & M. Katherine Baird eds., 1995).

13. Although the author is not convinced that pro-gay bias is a problem in such cases, implementation of the safeguards should also detect any pro-gay bias which may have caused the

The author does not take the position that allegations of sexual abuse against gay or lesbian parents are always false. This article is premised, however, on four firmly-held convictions.

First, the proliferation of false allegations of child sexual abuse in custody and visitation disputes demands extremely close scrutiny of the source and content of such allegations.[14] As one court opined regarding false allegations of sexual abuse:

> The introduction of sexual abuse charges into bitterly contested custody actions seems to have become epidemic. Yet, as one expert in this case testified, such allegations are unsubstantiated in as many as eight of ten times. We do not know in how many of these instances one party has falsely raised these allegations to gain an advantage. We do know that such a deed speaks mightily to the character of one responsible for it.[15]

Second, any person—including a mental health professional[16] or judge—who plays a role in convincing a child that her parent has sexually abused her when no such abuse has occurred is herself causing severe emotional abuse to the child and must be stopped.[17]

Third, while gay and lesbian parents have made tremendous strides in the last decade in being recognized as heading legitimate family units,[18] they still experience significant discrimination in visitation and custody matters.[19] The

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expert to inappropriately manipulate, intentionally or inadvertently, her gathering of factual data and professional analysis in the case.

14. *See* RICHARD M. GARDNER, THE PARENTAL ALIENATION SYNDROME 126 (1992) ("Many of these accusations are conscious and deliberate, and the accuser knows quite well that the spouse did not in any way sexually molest the child."); Horner & Guyer I, *supra* note 1, at 220-21 (reporting that about 80% of allegations of sexual abuse in the context of domestic relations cases are unsubstantiated); Rosalyn Schultz, *Evaluating the Expert Witness: The Mental Health Expert in Child Sexual Abuse Cases*, 9 AM. J. FAM. L. 1, 2-3 (1995) (explaining that many reports of child sexual abuse are true, but that allegations made by adults in the context of custody determinations are especially difficult to evaluate). *But cf.* Nancy Thoennes & Patricia G. Tjaden, *The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes*, 14 CHILD ABUSE & NEGLECT 151, 161 (1990) (concluding that false sexual abuse allegations are not disportionately high in custody and visitation cases).

15. Kohlman v. Kohlman, No. 920T046, 1993 Ohio App. LEXIS 4481, at *16 (Ohio Ct. App. Sept. 24, 1993).

16. "Mental health professionals may create or help perpetuate false allegations because of their biases, assumptions, and poor interviewing procedures, all of which can lead to misinterpretation of their findings." Schultz, *supra* note 14, at 2.

17. *See* Kathleen M. Quinn et al., *Resolved: Child Sex Abuse is Overdiagnosed*, 29 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 789 (1989) (suggesting that sexual abuse is overdiagnosed due to inadequate investigations by experts).

18. In cases where non-biological parents have been allowed to adopt the children of their same-sex partners, for example, the courts have described lesbian-headed households in extremely positive terms. *See generally* Robert M. Horowitz & Hiromi Maruyama, *Issues in Gay and Lesbian Adoption*, 15 CHILDREN'S LEGAL RTS. J. 2 (1994-95) (discussing state adoption laws affecting adoptions by gays and lesbians). *See, e.g.*, Adoption of Tammy, 619 N.E.2d 315, 317 (Mass. 1993) (stating that more than a dozen witnesses testified that the mother and her lesbian partner participated equally in raising Tammy "and that the three form a healthy, happy, and stable family unit"); *In re* Adoption of Evan, 583 N.Y.S.2d 997, 998 (N.Y. 1992) (finding that adoption was in child's best interests because the child "is part of a family unit that has been functioning successfully for the past six years," and because having another legally-recognized parent would significantly increase the child's level of emotional and financial support).

19. In jurisdictions which do not expressly condemn homosexual parents, the gay or lesbian

discrimination is found not only in the courts' express moral condemnation of the parents' "chosen lifestyle," but also in the insidious discrimination disguised as "exercises of discretion" by the courts on evidentiary rulings, credibility determinations, and fact finding regarding the relative fitness of the parents.[20]

Fourth, expert witnesses play a critical role in custody and visitation matters. And while there is no such thing as a completely "neutral" expert witness, modern evidentiary standards demand that courts take very seriously the task of identifying expert witness bias. The tremendous discretion afforded trial courts regarding fact and expert witness testimony creates the opportunity, as well as the temptation, for the court to abuse its discretion by accrediting the particular "expert" who agrees with the court's personal opinion and rejecting experts who do not.[21] Judicial discretion is especially broad in domestic relations cases:

> Divorce law has traditionally relied on judicial wisdom to achieve fair results. Instead of bright-line rules, legislatures have typically given judges in the divorce court almost unlimited discretion, bounded only by indeterminate standards or lists of factors that may be considered. Judicial discretion has also been enhanced by the rarity of jury trials in divorce cases; in almost all divorce actions the judge both determines the facts and interprets the law.[22]

In sum, the role of the courts and the experts is to safeguard the rights of the parents to enjoy a meaningful relationship with their children and to protect the children from abuse of any nature. No just society can tolerate

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parent will not be denied custody or experience restricted visitation unless there is a "nexus" between the parent's sexual orientation and harm to the child. *See, e.g.*, Teegarden v. Teegarden, 642 N.E.2d 1007, 1008, 1010 (Ind. Ct. App. 1994) (overruling the trial court's grant of custody to lesbian mother conditioned upon her "not co-habitating with women with whom she is maintaining a homosexual relationship" and "not engaging in homosexual activity in the presence of the children" due to lack of evidence that mother's behavior would adversely effect her sons); Van Driel v. Van Driel, 525 N.W.2d 37, 39 (S.D. 1994) (holding that absent a showing of "some harmful effect on the children," mother's cohabitation with another women was not sufficient to deny custody); *In re* Marriage of Cabalquinto, 669 P.2d 886, 888 (Wash. 1983) (stating that the best interest of the child remains paramount and that "homosexuality in and of itself is not a bar to custody or to reasonable rights of visitation"). In theory, the burden of proof is on the person asserting the claimed harm; in reality, once the parent's sexual orientation is at issue, a significant burden shifts to the homosexual parent to show that his or her sexual orientation will not harm the child. *See generally* Robert G. Bagnall et al., Comment, *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497 (1984); David P. Russman, Note, *Alternative Families: In Whose Best Interests*, 27 SUFFOLK U. L. REV. 31 (1993).

20. *See* discussion of court's presumptions regarding gay and lesbian parents *infra* Part II.D.

21. The author is not the only one to hold this view. *See, e.g.*, Horner et al., *supra* note 7, at 166.

22. Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 403-04 (1996). Garrison observes that "[i]f any single thing is apparent from this inquiry . . . , it is that the results of discretionary decision making are by no means uniform." *Id.* at 505. Garrison also concludes that one of the "consistent themes" revealed by her research is that the judges' individual values and the social climate in which the decisions are rendered affect the judges' decrees regarding property division, alimony, and child support issues. *Id.* at 511. Garrison did not analyze child custody and visitation decisions.

discrimination, whether blatant or insidious, against any class of parents or children, especially when such discrimination discourages individuals from seeking redress in the courts to vindicate their rights.[23] As one family law judge opined, "[w]hen managing child abuse cases, we must always keep in mind that an erroneous finding of guilt can be almost as damaging to the child and her family as an erroneous dismissal."[24]

On one level, this article serves as a litigation primer for attorneys representing gay or lesbian parents accused of sexual abuse.[25] More importantly, however, it is an appeal to judges and persons retained as experts in such cases to acknowledge and, if necessary, to reconsider their views on sexual orientation and the undue influence that these views may have on the outcome of their opinions when child sexual abuse is alleged.[26]

Section II of this article sets forth the legal standards for determining whether a proffered witness is qualified to offer an expert opinion, whether the proffered expert's testimony should be admitted, and, if properly admitted, whether the expert's testimony should be deemed credible. Section II also identifies presumptions and prejudices which courts may possess regarding homosexual parents and acknowledges the controversy surrounding the correct methodology for diagnosing child sexual abuse and the impact this discord has on a court's evidentiary decisions regarding experts. Section III presents a case study of *Hertzler v. Hertzler*,[27] which illustrates the travesty resulting from a trial court's failure to set aside its own prejudices and presumptions and to adhere to the proper evidentiary standards. Section IV compares the evidentiary standards articulated in Section II and the lessons learned in *Hertzler*, urging that heightened standards should be used for expert witnesses when a gay or lesbian parent is accused of child sexual abuse; it also proposes additional safeguards for insuring relevant and reliable expert testimony in such cases. A brief conclusion is set forth in Section V.

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23. Anecdotal evidence from the author's legal practice and from other attorneys' experiences strongly indicates that gay and lesbian parents often concede custody or agree to substantially limited visitation to avoid a lengthy legal battle in a system which they perceive as substantially biased against them. This conclusion is difficult if not impossible to verify empirically because there is no objective method for ascertaining the motivations of parents who quietly consented to custody and visitation arrangements rather than openly dispute the matters in court.

24. Jeffry H. Gallet, *Judicial Management of Child Sexual Abuse Cases*, 23 FAM. L.Q. 477, 478 (1989).

25. Many of the observations and recommendations, however, may apply to cases involving allegations of sexual abuse against a heterosexual parent.

26. No one is totally free of biases. The key to fair adjudication of legal disputes is recognizing those biases and working to overcome them. "There is no doubt that none of us, judges included, are able to refrain absolutely from introducing our own outlook and value system into decisions or opinions. However, we must be aware of this and strive to make [as] objective an analysis as possible of the facts before us." Judge Saviona Rotlevy, *Expert Evidence: The Court's Expectations, in* ETHICS & CHILD MENTAL HEALTH 272, 277 (Jocelyn Y. Hattab ed., 1994); *see also* Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1 (1994) (discussing the effect of judges' personal biases on their decision making process and the judicial system). Judge Nugent believes that it is difficult, if not impossible, for a judge to set aside all internal and external influences when adjudicating cases, *id.* at 6, especially child custody cases, *id.* at 40-41, and that judges bear responsibility for being sensitive to their biases and obtaining the education necessary to overcome them, *id.* at 58-59.

27. 908 P.2d 946 (Wyo. 1995).

II. THE CRUCIAL ROLE OF EXPERT WITNESSES IN ADJUDICATING CHILD SEXUAL ABUSE ALLEGATIONS

The role of expert witnesses in our adversarial system has long been the subject of debate.[28] Some view experts as barking seals or hired guns who will perform as commanded by the party who retained them.[29] Others perceive experts as critical actors in the search for truth, especially when technical, scientific, medical, or other issues arise which are beyond the ken of juries and judges.[30] Regardless of one's perception of experts, they have become a permanent point of reference in our legal landscape.[31]

Cases involving allegations of child sexual abuse set the stage for a classic battle of the experts. Disagreement among professionals regarding the proper theories and methodology for diagnosing sexual abuse allows for diametrically opposed—yet apparently well-founded—expert opinions in a given case. Moreover, the judge's discretionary decisions on the admissibility and relative credibility of the expert testimony will forever alter the lives of the litigants and the alleged victim.[32] Thus, especially keen attention must be paid by trial and appellate courts to the evidentiary standards which govern expert testimony. As two experts in the area of child sexual abuse and the law warned:

> The clinician-expert constitutes the thirteenth juror or phantom judge in any tried case of child sexual abuse. Privileged by the rules of evidence that admit their opinions, experts give free-ranging and often unreasoned opinions based on biases, prejudices, and assessment heuristics that are merely idiosyncratic. Frequently, they present their data selectively so as to make their opinions seem inevitable, when in fact they are not.[33]

A. *The Requisite Qualifications for Expert Witnesses*

Federal Rule of Evidence 702, which allows a witness to qualify as an expert based on "knowledge, skill, experience, training, or education,"[34]

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28. Anthony Champagne et al., *An Empirical Examination of the Use of Expert Witnesses in American Courts*, 31 JURIMETRICS J. 375, 376-77 (1991).

29. *Id.* at 376 (describing expert witnesses as "well-paid prostitutes"); *see also* Eymard v. Pan Am. World Airways, 795 F.2d 1230, 1234 (5th Cir. 1986) ("[E]xperts whose opinions are available to the highest bidder have no place testifying in a court of law.").

30. Champagne, *supra* note 28, at 376.

31. *See generally* Daniel W. Shuman et al., *An Empirical Examination of the Use of Expert Witnesses in the Courts—Part II: A Three City Study*, 34 JURIMETRICS J. 193 (1994).

32. "The decision to accept expert testimony in custody and visitation proceedings is generally within the discretion of the trial judge. The discretion extends to the qualification of experts, the number of experts, and the admissibility of testimony. . . . " SHUMAN, *supra* note 6, at 13-11.

33. Horner & Guyer II, *supra* note 5, at 406.

34. FED. R. EVID. 702 reads in its entirety: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

reflects the general rule used in all state codes of evidence.[35] A trial judge has extremely broad discretion in determining whether a particular witness qualifies as an expert, based on one or more of these five factors.[36] The result of such discretion is that the judge's decision regarding a particular witness, while not completely unfettered, will rarely be reversed on appeal.[37]

"One unique aspect of child custody and visitation litigation is that there is a broader range of categories of witnesses courts will recognize . . . than in many other types of cases."[38] This phenomenon is especially true when allegations of child sexual abuse have been raised. Medical doctors, psychiatrists, psychologists, social workers, nurses, and others representing a wide range of clinical and academic experience have been allowed to offer expert opinions on the veracity of child sexual abuse claims.[39]

B. *The Standards Governing Admissibility of Expert Witness Testimony*

After qualifying a witness as an expert on child sexual abuse, the court must independently determine the admissibility of the substance of the expert's opinions. State courts primarily use two approaches to determine admissibility of expert scientific testimony.[40]

The older standard, based on a 1923 District of Columbia opinion, *Frye v. United States*,[41] requires a threshold finding that the science and methodology on which the expert bases her opinion are generally accepted in the expert's particular discipline.[42] The alternative approach, articulated in the Supreme Court's 1993 decision, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[43] purports to reject the *Frye* standard in favor of what is commonly termed a "more liberal" avenue for the admission of expert testimony.[44] Closer

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35. FAUST F. ROSSI, EXPERT WITNESSES 6 (1991).

36. The trial court's broad discretion has been respected in this country for more than a century. Stillwell Mfg. Co. v. Phelps, 130 U.S. 520, 527 (1889) (stating that the qualification of a witness is a preliminary question for the judge and it is conclusive "unless clearly shown to be erroneous"); *accord* Hamling v. United States, 418 U.S. 87, 108 (1974) ("[T]he District Court has wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony.").

37. ROSSI, *supra* note 35, at 8.

38. SHUMAN, *supra* note 6, at § 13-5.

39. Horner et. al, *supra* note 7, at 142-43; John E. B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 10-12 (1989).

40. Custody and visitation disputes are resolved by state courts because federal courts traditionally refuse to accept jurisdiction over domestic relations cases, even when diversity or other federal court jurisdictional requirements are met. *See generally* Michael Ashley Stein, *The Domestic Relations Exception to Federal Jurisdiction: Rethinking an Unsettled Federal Courts Doctrine*, 36 B.C. L. REV. 669 (1995) (examining the domestic relations exception to federal jurisdiction).

41. 293 F. 1013 (D.C. Cir. 1923).

42. *Frye*, 293 F. at 1014.

43. 509 U.S. 579 (1993).

44. *Daubert*, 509 U.S. at 589 (rejecting the *Frye* standard). A number of courts have referred to *Daubert* as being more lenient than *Frye* regarding the admission of expert testimony. *See also* Lisa M. Agrimonti, Note, *The Limitations of Daubert and its Misapplication to Quasi-Scientific Experts: A Two-Year Case Review of* Daubert v. Merrell Dow Pharm., Inc., 35 WASHBURN L.J. 134, 135 (1995) (concluding that *Daubert* "increased the number of ways by which scientific experts could qualify"). *See, e.g.*, Borawick v. Shay, 68 F.3d 597, 610 (2d Cir. 1995) ("[B]y loosening the strictures on scientific evidence set by *Frye*, *Daubert* reinforces the idea that there should

examination of the *Frye* and *Daubert* standards, however, reveals significant similarities and suggests that reliability and relevance are the threshold requirements of admission of expert testimony regardless of the standard used.[45] Moreover, characterization of *Daubert* as creating a "more liberal" or "easier" test than *Frye* is at least misleading if not altogether erroneous.[46]

1. The *Frye* Standard

The *Frye* decision affirmed a trial court's exclusion of expert testimony offered to establish the truthfulness of a defendant being prosecuted for murder.[47] The testimony was based on the results of a systolic blood pressure test.[48] The court held that the lack of the test's general acceptance in the particular field from whence it came was fatal to the admissibility of the test results.[49] The *Frye* court readily conceded that its standard did not establish a bright line test for admissibility:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.[50]

The *Frye* "general acceptance" requirement has been and is still being applied to various psychological methodologies and theories, including rape trauma syndrome, the psychological profiles of sexual offenders, and post traumatic stress disorder.[51] Admissibility of an expert's diagnosis of child

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be a presumption of admissibility of evidence."); State v. Foret, 628 So. 2d 1116, 1123 (La. 1993) ("It is not lost upon us that this new standard serves to remove some of the barriers in the admission of expert testimony in many fields, including child sexual abuse cases.").

45. Divergent views have been offered on the impact of *Daubert*. Some have warned that *Daubert* will result in courts and juries being inundated with "junk science." *See, e.g.*, Charles R. Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Civil and Criminal Jury Trials*, 154 F.R.D. 537, 547-50 (1994). Others prophesied that the decision will have minimal impact due to the incorporation of the elements of *Frye* into the *Daubert* standard. *See, e.g., The Supreme Court, 1992 Term—Leading Cases: Federal Jurisdiction and Procedure*, 107 HARV. L. REV. 254, 258 (1993). Another concern is that *Daubert* is being used more broadly than the Supreme Court intended due to courts "misapplication of the decision to quasi-scientific experts" such as attorneys, police officers, and accountants. Agrimonti, *supra* note 44, at 140-56.

46. *Daubert* did not create an easier test than *Frye*. Rather, *Daubert* "is more lenient in that it allows more, and more novel, science into evidence, but it can be much more difficult in that, absent judicial notice, it requires a much more difficult, expensive, and time consuming foundation" for admission of expert testimony. G. Michael Fenner, *Evidence Review: The Past Year in the Eighth Circuit, Plus* Daubert, 28 CREIGHTON L. REV. 611, 641 (1995).

47. *Frye*, 293 F. at 1013-14.

48. *Id.*

49. *Id.*

50. *Id.* at 1014.

51. *See also* United States v. St. Pierre, 812 F.2d 417, 420 (8th Cir. 1987) (holding that the trial court properly denied criminal defendant's request to have an expert examine him to determine if he met the profile of a sex offender because neither courts not scientific community had

sexual abuse in a jurisdiction which uses *Frye* depends on the level of general acceptance of the various methodologies, theories, and syndromes on which the expert relied in reaching that diagnosis.[52] The requisite general acceptance can be established through peer-reviewed publications in the relevant disciplines, previous judicial recognition, protocols established by professional associations, and testimony by the experts on their peers' attitude regarding the methodology or theory at issue.[53]

Critics of the *Frye* general acceptance test claim that it is too restrictive. Many critics argue that this common law standard was superseded by the adoption of the Federal Rules of Evidence in 1975[54] and the subsequent adoption of similar rules in a majority of the states.[55] The Supreme Court agreed with these arguments in its 1993 *Daubert* opinion, and rejected the single-factor *Frye* general acceptance test in federal courts.[56] Although state courts which previously followed *Frye* are not bound by *Daubert*,[57] a number of them have adopted it,[58] while others have explicitly rejected it in favor of

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accepted profile as valid diagnostic technique); United States v. McBride, 786 F.2d 45, 49-50 (2d Cir. 1986) (holding that psychiatric testimony regarding mental facility of the defendant satisfied Frye standard because it was generally accepted); Spencer v. General Elec. Co., 688 F. Supp. 1072, 1077-78 (E.D. Va. 1988) (holding that testimony of expert based on post traumatic stress disorder and rape trauma syndrome was not admissible to prove that alleged rape occurred because, inter alia, the conditions were not accepted in scientific community as proof that an event occurred, but rather were accepted only as tools for diagnosis and treatment of patients), *aff'd*, 894 F.2d 651 (4th Cir. 1990). *See generally* JOHN WILLIAM STRONG ET AL., MCCORMICK ON EVIDENCE § 203, at 363 (4th ed. 1992); Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States, *a Half Century Later*, 80 COLUM. L. REV. 1197 (1980).

52. For an extensive discussion and critique of the application of *Frye* to expert testimony in child sexual abuse cases, see Myers et al., *supra* note 39, at 23-29.

53. Giannelli, *supra* note 51, at 1205-07; Myers et al., *supra* note 39, at 23-29.

54. In *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985), for example, the court wrestled with the admissibility of expert testimony on the reliability of eyewitness identification. The court concluded that the literal language and spirit of the Federal Rules of Evidence, paired with the difficulties encountered by courts in applying the *Frye* standard, compelled rejection of the general acceptance test in favor of a more flexible standard. *Id.* at 1237. The test articulated in *Downing* required a multi-step analysis which relegated general acceptance to a permitted but not required inquiry for determining the reliability of the evidence. *Id.* The *Downing* decision influenced the Supreme Court in *Daubert*. *See Daubert*, 509 U.S. at 595 & n.12.

55. States with provisions governing expert witness testimony that are similar to FED. R. EVID. 702 are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Louisiana, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming. GREGORY D. JOSEPH, ET AL., EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES § 51.5 (1994).

56. *Daubert*, 509 U.S. at 589.

57. There are at least two reasons why state courts are free to adopt or reject *Daubert*. First, 14 states, including 10 which adopted *Frye*, do not have an evidentiary rule directly analogous to FED. R. EVID. 702. *See* JOSEPH, ET AL., *supra* note 55, at § 51.5. Thus, a Supreme Court ruling specifically interpreting Rule 702 is arguably irrelevant. Second, even where a state's evidentiary code is modeled after the federal rules, the Supreme Court's interpretation of a rule of evidence is not binding unless grounded in constitutional principles, which the *Daubert* decision is not. *See, e.g.*, State v. Bible, 858 P.2d 1152, 1182-83 (Ariz. 1993) (noting that states are not bound by the Supreme Court's "non-constitutional construction of the Federal Rules of Evidence").

58. Jurisdictions which utilize the *Daubert* standard include: Arkansas, *see* Jones v. State, 862 S.W.2d 242, 245 (Ark. 1993); Delaware, *see* Nelson v. State, 628 A.2d 69, 74 (Del. 1993); District of Columbia, *see* Taylor v. United States, 661 A.2d 636, 652 (D.C. 1995); Iowa, *see* Hutchison v. American Family Mut. Ins. Co., 514 N.W.2d 882, 887 (Iowa 1994); Kentucky, *see*

retaining the *Frye* standard.[59]

2. The *Daubert* Factors

The *Daubert* plaintiffs alleged that prenatal ingestion of the prescription drug Bendectin caused serious birth defects for which the drug manufacturer should be held liable.[60] Defendant's motion for summary judgment was supported by the affidavit of a "well-credentialed expert," physician and epidemiologist Dr. Steven H. Lamm.[61] Dr. Lamm supported his conclusion that Bendectin is not a cause of birth defects in humans with extensive citations to published epidemiological studies.[62] Plaintiffs countered with affidavits from eight experts, "each of whom also possessed impressive credentials."[63] The conclusions of plaintiffs' experts that Bendectin could cause human birth defects were based on studies linking Bendectin to malformation in animals, analyses of chemical structure of Bendectin compared to other substances known to cause human birth defects, and the "re-analysis" of previously published epidemiological studies.[64]

The trial court found plaintiffs' proof insufficient to withstand defendant's motion for summary judgment because the methodology employed by plaintiffs' experts was not, in the court's opinion, generally accepted in the discipline to which it belonged.[65] The trial court reasoned that since epidemiological study was the method most widely accepted by the scientific community for proving causation, and because the peer-reviewed and published epidemiological studies cited by defense expert, Dr. Lamm, all negated a finding of causation between Bendectin and human birth defects, plaintiffs' evidence based on re-analysis of such data was not admissible.[66] Relying on *Frye* and its progeny, the Ninth Circuit Court of Appeals affirmed the exclusion of plaintiffs' evidence for lack of general acceptance in the relevant scientific

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Cecil v. Commonwealth, 888 S.W.2d 669, 675 (Ky. 1994); Louisiana, *see* State v. Foret, 628 So. 2d 1116, 1123 (La. 1993); Montana, *see* Hart-Albin Co. v. McLees Inc., 870 P.2d 51, 56 (Mont. 1994); New Mexico, *see* State v. Alberico, 861 P.2d 192, 203 (N.M. 1993); Oklahoma, *see* Taylor v. State, 889 P.2d 319, 328-29 (Okla. Crim. App. 1995); South Carolina, *see* State v. Dinkins, 462 S.E.2d 59, 60 (S.C. 1995); South Dakota, *see* Department of Soc. Servs. v. McCarty, 506 N.W.2d 144, 147 (S.D. 1993); Texas, *see* E.I. duPont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 556 (Tex. 1995); Vermont, *see* State v. Brooks, 643 A.2d 226, 229 (Vt. 1993); West Virginia, *see* Wilt v. Buracker, 443 S.E.2d 196, 203 (W. Va. 1993); and Wyoming, *see* Springfield v. State, 860 P.2d 435, 442 (Wyo. 1993). Wisconsin adheres to a standard virtually identical to *Daubert* which was articulated in *State v. Walstad*, 351 N.W.2d 469, 485-86 (Wis. 1984).

59. States which continue to adhere to *Frye* include Arizona, *see* State v. Bible, 858 P.2d 1152, 1182-83 (Ariz. 1993); Florida, *see* Flanagan v. State, 625 So. 2d 827, 829 n.2 (Fla. 1993); Maryland, *see* Keene Corp. v. Hall, 626 A.2d 997, 1004 n.2 (Md. Ct. Spec. App. 1993); Nebraska, *see* State v. Dean, 523 N.W.2d 681, 692 (Neb. 1994); New York, *see* People v. Wesley, 633 N.E.2d 451, 454 (N.Y. 1994); and Washington, *see* State v. Riker, 869 P.2d 43, 48 n.1 (Wash. 1994). *See generally* JOSEPH ET AL., *supra* note 55, at § 51.5.

60. *Daubert*, 509 U.S. at 582.

61. *Id.*

62. *Id.*

63. *Id.* at 583.

64. *Id.*

65. *Id.*

66. *Id.* at 583-84.

community.[67] The Supreme Court vacated the Ninth Circuit's decision, stating that the "austere" general acceptance standard of *Frye* was "absent from and incompatible with the Federal Rules of Evidence."[68]

On remand, the Supreme Court instructed the Ninth Circuit to replace *Frye* with a multifaceted approach designed to insure the relevancy and reliability of the proffered expert evidence.[69] While acknowledging that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence,"[70] the *Daubert* Court directed inferior courts to undertake additional gatekeeping measures to exclude specious and potentially misleading expert testimony.[71] Simply stated, the Court sought to draw the line between "shaky but admissible" and inadmissible expert testimony.

The first step in the *Daubert* line-drawing exercise is determining the relevance of the proffered expert testimony to the issues in the case.[72] Relevancy is established, the Court explained, if there is a "fit" between the expert scientific testimony and the issues in the case.[73] No fit exists, however, unless the scientific testimony is based on valid scientific methodology and data.[74] The Court further explained the relationship between relevance and scientific validity as follows:

> The study of the phases of the moon, for example, may provide valid scientific "knowledge" about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact [and is thus relevant and admissible]. However (absent credible grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night [and thus is not relevant and not admissible].[75]

The Court declined to provide a "definitive checklist or test" in favor of offering "general observations" for determining scientific validity of an expert's testimony.[76] The proper focus, the *Daubert* Court cautioned, "must be solely on principles and methodology [employed by the expert], not on the conclusions that they generate."[77] A key inquiry identified by the Court is

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67. *Id.* at 584.
68. *Id.* at 589.
69. *Id.* at 589-90.
70. *Id.* at 596 (citing Rock v. Arkansas, 483 U.S. 44, 61 (1987)).
71. *Id. See generally* Linda Sandstrom Simard & William G. Young, Daubert's *Gatekeeper: The Role of the District Judge in Admitting Expert Testimony*, 68 TUL. L. REV. 1457 (1994) (stating that district courts' role as "gatekeepers" will limit the expansion of opinion testimony).
72. The *Daubert* relevance requirement is based on the general provisions of FED. R. EVID. 401 and 402, which allow admission of relevant evidence and exclude irrelevant material, and on FED. R. EVID. 702, which permits expert testimony if it will "assist the trier of fact to understand the evidence or to determine a fact in issue." *Daubert*, 509 U.S at 587-91.
73. *Id.* at 591.
74. *Id.*
75. *Id.* (bracketed materials added).
76. *Id.* at 593.
77. *Id.* at 595 (bracketed materials added).

whether the methodology or theory employed by the expert can and has been tested,[78] a factor referred to by social scientists as "falsifiability."[79] Publication of the theory or methodology in a peer-reviewed journal, identification of the known or potential rate of error of the technique employed by the expert, and consideration of the general level of acceptance of the theory or methodology in the relevant discipline also bear on the reliability inquiry.[80] Thus, the *Daubert* Court did not reject the *Frye* "general acceptance" standard wholesale; rather, it described general acceptance as "an important factor in ruling particular evidence admissible."[81] The Court further explained that a technique known to the relevant scientific community, but which has only garnered minimal support, "may properly be viewed with skepticism."[82]

Application of the *Daubert* standard to expert testimony in a case involving child sexual abuse thus demands a highly nuanced inquiry into the methodology employed by the proffered experts, with the general level of the methodology's acceptance—which would serve as determinative under *Frye*—being only one of several important criteria of admissibility. The expert's skill and integrity in the selection, execution, and application of her chosen method of diagnosing sexual abuse must also be closely scrutinized before the evidence is deemed sufficiently reliable and thus admissible.

The question has been raised as to whether *Daubert* should apply to the "soft" sciences such as behavioral and social science data offered in child sexual abuse cases, or only to the "hard" sciences which were actually at issue in *Daubert*.[83] Others have cautioned that if *Daubert* applies to all cases in-

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78. *Id.* at 593. The testing requirement is based on the work of two philosophers of science, Sir Karl Popper and Professor Carl Hempel, who identified "falsibility"—that is, the ability to test and the actual testing of a theory—as the factor which "distinguishes science from other fields of human inquiry." *Id.*

79. *See generally* James T. Richardson et al., *The Problems of Applying Daubert to Psychological Syndrome Evidence*, 79 JUDICATURE 10, 12-14 (1995); Ralph Underwager & Hollida Wakefield, *A Paradigm Shift for Expert Witnesses*, 5 ISSUES CHILD ABUSE ACCUSATIONS 156, 158-60 (1993).

80. *Daubert*, 509 U.S. at 593-94.

81. *Id.* at 594. Incorporation of the *Frye* general acceptance standard into the *Daubert* criteria for applying the Federal Rules of Evidence to expert testimony arguably creates an internal inconsistency, since the *Daubert* Court specifically held that "the *Frye* test was superseded by the adoption of the Federal Rules of Evidence." *Id.* at 587. Unlike the *Frye* test, however, the determination of admissibility under *Daubert* is not limited to the single criterion of general acceptance. In applying the *Daubert* criteria on remand, for example, the Ninth Circuit examined each of the *Daubert* criteria, but affirmed its earlier ruling made under *Frye* that the expert testimony offered by plaintiffs to establish the causal link between Bendectin and birth defects was inadmissible. Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311 (9th Cir. 1995). The Ninth Circuit interpreted the Supreme Court's pronouncements as follows:

> [T]he proponent of expert scientific testimony may attempt to satisfy its burden through the testimony of its own experts. For such a showing to be sufficient, the experts must explain precisely how they went about reaching their conclusions and point to some objective source—a learned treatise, the policy statement of a professional association, a published article in a reputable scientific journal or the like—to show that they have followed the scientific method, as it is practiced by (at least) a recognized minority of scientists in their field.

Id. at 1319. *See generally* John S. Mills, Case Comment, Daubert v. Merrell Dow Pharmaceuticals, Inc. *on Remand: The Ninth Circuit Loses Its Way in the "Brave New World,"* 29 GA. L. REV. 849 (1995) (discussing the application of *Daubert* on remand).

82. *Daubert*, 509 U.S. at 594.

83. *See* C. Robert Showalter, *Distinguishing Science from Pseudo-Science in Psychiatry:*

volving experts, "criticisms of the use of expert testimony by psychiatrists and psychologists will become more aggressive," especially on grounds of reliability (or lack thereof).[84]

Courts have recognized, however, that the gatekeeping function of the trial judge established by *Daubert* is readily applicable to all expert testimony, and is not limited to expert evidence grounded in the hard sciences.[85] For many reasons parsed throughout this article, the author believes that the judge's gatekeeping role as established in *Daubert* is workable and indeed necessary to screen for credibility and bias in expert testimony regarding child abuse allegations.[86]

3. The Commonality of *Frye* and *Daubert* Criteria

The differences between the *Frye* and *Daubert* standards for the admissibility of expert testimony can and have been debated at length.[87] Both standards, however, require a threshold showing that some agreement exists among the relevant discipline's members regarding the particular methodology and theories used by the expert before that expert's opinion is deemed admissible. Under *Daubert*, further examination of the expert's data and methodology is required to uncover potential cracks in the dam through which a stream of unreliability may seep. In addition, the courts must apply other evidentiary standards to expert testimony, including the requirement that even reliable, relevant evidence should "be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."[88]

Expert Testimony in the Post-Daubert *Era*, 2 VA. J. SOC. POL'Y & L. 211, 227 (1995); Agrimonti, *supra* note 44, at 136.

84. Showalter, *supra* note 83, at 226.

85. *See generally* Krista L. Duncan, Note, *"Lies, Damned Lies, and Statistics"? Psychological Syndrome Evidence in the Courtroom After* Daubert, 71 IND. L.J. 753 (1996) (addressing application of *Daubert* standard to combat-related post-traumatic stress disorder, rape trauma syndrome, battered woman syndrome, and battered child syndrome). *See, e.g.*, Berry v. Detroit, 25 F.3d 1342, 1350 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 902 (1995).

86. For the view that the *Daubert* criteria are not sufficient to guide a court's determination of the admissibility of expert psychiatric testimony, see Showalter, *supra* note 83. Showalter proposes a series of specific "gatekeeping" functions for the trial court when this type of expert evidence is proffered. The series parallels the suggestions made in this article, such as increased scrutiny of the expert's qualifications, an in-depth analysis of the facts on which the expert based her opinion, and an intense review of the methodology employed by the expert. *Id.* at 236-37. The primary difference between Showalter and this author is that this author believes *Daubert* already mandates each of these steps. *See, e.g.*, Gier v. Educational Serv. Unit No. 16, 845 F. Supp. 1342 (D. Neb. 1994) (applying *Daubert* criteria to testimony of psychiatrists and psychologists offered in civil case alleging that the plaintiffs, seven mentally retarded individuals, were physically, emotionally, and sexually abused by their teachers), *aff'd*, 66 F.3d 940 (8th Cir. 1995).

87. *See, e.g.*, Gordon J. Beggs, *Novel Expert Evidence in Federal Civil Rights Litigation*, 45 AM. U. L. REV. 1, 36 (1995) (concluding that "*Daubert* did not contemplate a revolutionary change in the practice of the federal courts"); Margaret A. Berger, *Procedural Paradigms for Applying the* Daubert *Test*, 78 MINN. L. REV. 1345 (1994); Nancy A. Miller, Daubert *and Junk Science: Have Admissibility Standards Changed?*, 61 DEF. COUNS. J. 501 (1994); Joseph Sanders, *Scientific Validity, Admissibility, and Mass Torts After* Daubert, 78 MINN. L. REV. 1387 (1994); Simard & Young, *supra* note 71, at 1457.

88. FED. R. EVID. 403. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

Regardless of the evidentiary standard applied, the trial judge undertakes a significant burden in determining the validity of an expert opinion predicated on scientific analysis. The judge may be particularly tempted to abandon careful review of scientific principles in favor of crediting the expert's conclusions which coincide with the judge's personal beliefs. Professor Shelia Jasanoff, Chair of the Department of Science and Technology Studies at Cornell University, aptly observed that courts evaluating scientific testimony "inescapably give up the role of dispassionate observer to become participants in a particular construction . . . of scientific facts."[89] She further cautioned that judges faced with complex scientific evidence may "shape an image of reality that is colored in part by their own preferences and prejudices about how the world should work."[90] As more fully illustrated through the textual treatment of the *Hertzler* case, the reshaping of reality is a distinct possibility in cases involving allegations of sexual abuse by a gay or lesbian parent.[91]

C. *The Standards for Determining the Credibility of Expert Witness Testimony*

After a court has qualified an expert as a witness, the court must independently assess the credibility of the expert's testimony regarding the allegations of sexual abuse. As one judge explained:

> The Court eventually decides on the basis of facts stated by ordinary witnesses and, where necessary, on the basis of the conclusions of expert witnesses. From this it becomes apparent that the expert witness' conclusion, like every other fact, is not unequivocal proof, and it may be contradicted by other evidence. Even as far as the expert evidence is concerned, the Judge evaluates it according to criteria of veracity and credibility, including the professional ability of the witness, the manner in which his opinion is drafted and the Court's impression of the witness in the witness box.[92]

In determining the expert witness's credibility, either in isolation or in comparison to the testimony of other expert and lay witnesses, the court's exercise of discretion is even broader than its initial determination regarding admissibility of the expert's testimony.[93] Authority for this deference is found, inter alia, in Federal Rule of Civil Procedure 52 and its state law counterparts, which provide in relevant part that in cases tried to the bench, "[f]indings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credi-

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89. Sheila Jasanoff, *What Judges Should Know About the Sociology of Science*, 77 JUDICATURE 77, 82 (1993).

90. *Id.*

91. *See* discussion of *Hertzler*, *infra* Part III.

92. Rotlevy, *supra* note 26, at 274. Although Rotlevy was commenting on the Israeli court system, his words apply equally to the U.S. civil system.

93. *See, e.g.*, People v. Zimmerman, 189 N.W.2d 259, 285 (Mich. 1971) (holding that the trial court has properly exercised its discretion regarding expert testimony when, after carefully reviewing the expert's qualification and skills, the court utilizes "good judicial common sense as to whether the witness's testifying would be in the best interest of justice").

bility of the witnesses."[94] Indeed, appellate courts traditionally give almost total deference to the trial court's assessment of the relative credibility of any witnesses,[95] including experts.[96] This rationale for vesting trial courts with such a high degree of discretion regarding credibility determinations was eloquently explained by the Wisconsin Supreme Court more than a century ago:

> The judge before whom the cause was tried heard the testimony, observed the appearance and bearing of the witnesses and their manner of testifying, and was much better qualified to pass upon the credibility and weight of their testimony than this court can be. There are many comparatively trifling appearances and incidents, lights and shadows, which are not preserved in the record, which may well have affected the mind of the judge . . . in forming opinions of the weight of the evidence, the character and credibility of the witnesses, and of the very right and justice of the case.[97]

But while the reasons for allowing deference to the trial court's credibility may be sound, this "hands-off" standard of review also offers an invitation for the trial court to base its credibility evaluation of an expert on whether the expert's opinion is consistent with that reached by the judge herself.[98] In *J.P. v. P.W.*,[99] for example, the Missouri Court of Appeals held that the trial court had complete authority to determine that the social science evidence indicating no significant difference between heterosexual and homosexual parents was not credible, even though no contradictory evidence was adduced on that issue.[100] In Professor Jasanoff's words, the judge's determination as to which expert provides the most credible opinion on the sexual abuse allegations may be based on the judges "own preferences and prejudices" regarding gay parents rather than the relative strength of the scientific methodology underlying the experts' opinions.[101]

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94. FED. R. CIV. P. 52.

95. *See, e.g., In re* Marriage of Diehl, 582 N.E.2d 281, 291 (Ill. Ct. App. 1992) (noting that trial court judge is in the best position "to observe and judge the witnesses' demeanor and credibility"); Pennington v. Pennington, 596 N.E.2d 305, 306 (Ind. Ct. App. 1991) ("We will not reweigh evidence or reassess the credibility of witnesses."); Adams v. Adams, 357 So. 2d 881, 882 (La. Ct. App.) ("The factual findings of the trial court, particularly where those findings are based on an evaluation of the credibility of witnesses, are entitled to great weight and will not be disturbed unless clearly erroneous."). Interestingly, a New York court of appeals had no compunction summarily reversing a trial court's credibility assessments where the lower court's credibility determinations vindicated rather than condemned the gay parent accused of sexually molesting his children. *In re* Michael C., 566 N.Y.S.2d 153, 154 (N.Y. App. Div. 1991).

96. As one court observed: "The trial court was simply not required to accept the opinions of experts. . . . There was evidence intrinsic to this record and the knowledge of the trial court which would seriously damage the credibility of the witnesses [including that of the experts]." J.L.P. v. D.J.P., 643 S.W.2d 865, 868 (Mo. Ct. App. 1982).

97. McLimans v. City of Lancaster, 15 N.W. 194, 195 (Wis. 1883).

98. For a compelling statistical demonstration as to why a judge relying on her own conclusions can never be more accurate than an expert's opinion on the veracity of sexual abuse allegations, see Horner & Guyer I, *supra* note 1, at 241-44.

99. 772 S.W.2d 786 (Mo. Ct. App. 1989).

100. *J.P.*, 772 S.W.2d at 793.

101. Jasanoff, *supra* note 89, at 82. Examples of the "preferences and prejudices" often displayed by courts regarding gay and lesbian parents are discussed immediately *infra* Part II.D.

D. *Assumptions made by Courts Regarding Gay and Lesbian Parents*

A parent's gay or lesbian orientation often results in denial of custody and severe restrictions of visitation rights.[102] Although modern courts have been more respectful of the constitutional rights of gay and lesbian parents to associate with their children, a non-heterosexual parent's sexual orientation still takes center stage under the rubric of the "best interest of the child" determination.[103] Moreover, the best interests standard "gives substantial discretion to a judge to make his own implicit predictions and impose his own value judgments about which parent might better serve the child's needs or interests."[104] *Bottoms v. Bottoms*[105] is a case in point.[106]

Sharon Bottoms' mother, Kay, challenged Sharon for custody of Sharon's two-year-old son.[107] In her petition for custody, Kay claimed that Sharon had abused her son by once hitting him hard enough to leave a mark on his leg, had neglected him, and was endangering his well-being by living in a lesbian relationship.[108] The trial court granted Kay's petition, holding that Sharon's lesbian relationship constituted illegal and immoral conduct which automatically rendered her an unfit parent.[109]

The intermediate appellate court reversed due to the absence of evidence sufficient to rebut the presumption favoring parental custody.[110] Contrary to the trial court's interpretation of the law and facts, the intermediate appeals court found significant evidence in the record that the boy was well-adjusted and happy and that Sharon was a good mother.[111] Moreover, significant social science data presented at trial supported the conclusion that the boy would not suffer future emotional or psychological harm because of his mother's sexual orientation.[112] Sharon's victory, however, was short-lived.

The Virginia Supreme Court reinstated the award of custody to the child's grandmother.[113] The four-to-three majority repeatedly denied that it was jud-

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102. *See generally* Rhonda R. Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties—Part 2*, 11 U. DAYTON L. REV. 275, 327-71 (1986) (discussing custody cases involving gay and lesbian parents); Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623 (1996) (examining the relevance of sexual identity and conduct in determining custody and visitation rights).

103. *See* Fowler, *supra* note 9, at 362-63.

104. ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 282 (1992). The uncertainty of the judge's application of the best interests standard also "provides an uncertain backdrop for out-of-court negotiations." *Id.* The author is aware of a number of instances in which a gay or lesbian parent has conceded custody to a former spouse for fear that the court will deny all custody and visitation to the non-heterosexual parent under the "best interests of the child" rubric.

105. 444 S.E.2d 276, 279 (Va. Ct. App. 1994), *rev'd*, 457 S.E.2d 102 (Va. 1995).

106. *See generally* Amy D. Ronner, Bottoms v. Bottoms: *The Lesbian Mother and the Judicial Perpetuation of Damaging Stereotypes*, 7 YALE J.L. & FEMINISM 341 (1995) (discussing the Virginia Supreme Court's decision regarding a lesbian mother's right to custody).

107. *Bottoms*, 444 S.E.2d at 279.

108. *Id.*

109. *Id.*

110. *Id.* at 280-81.

111. *Id.* at 281.

112. *Id.* at 283-84.

113. Bottoms v. Bottoms, 457 S.E.2d 102 (Va. 1995).

ging Sharon based on her sexual orientation per se.[114] But there is little else to explain its evaluation of the evidence of record and all of its inferences drawn therefrom as negatively as possible toward Sharon, nor to explain its willingness to overlook the fact that Kay was, until the time of trial, cohabitating with a man who had repeatedly sexually abused Sharon.[115] The Virginia Supreme Court also refused to consider the social science evidence admitted at trial regarding the parenting abilities of lesbian mothers. Instead, the court reaffirmed the position taken a decade earlier "that living daily under conditions stemming from active lesbianism practiced in the home may impose a burden upon a child" due to the social stigma involved.[116]

The dissenting justices noted that there was no evidence of record in *Bottoms* showing that the mother's homosexual conduct harmed the child, and that "the majority improperly presumes that its own perception of societal opinion and the mother's homosexual conduct are germane to the issue whether the mother is an unfit parent."[117] This perspective was echoed by Charlotte Patterson, the University of Virginia psychology professor who, as an expert at the *Bottoms* trial, presented significant empirical data on gay and lesbian parents which directly contradicted the majority's conclusions.[118] If the courts won't pay heed to the evidence, Professor Patterson asked, "with what are we left?"[119]

As the *Bottoms* case illustrates, because of society's general stereotyping of homosexuals as per se negative influences on children, "lesbian and gay parents face judicial scrutiny that is more rigorous than that experienced by heterosexual individuals in similar circumstances. In fact, their claims are sometimes peremptorily dismissed by presumptions which a priori reject homosexuals as custodial parents."[120]

Substantial empirical data on homosexual parents demonstrates that many common assumptions courts make regarding such parents and their children are simply false.[121] As Professor Patricia Falk points out in her comprehen-

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114. *Id.* at 108.

115. *Bottoms*, 444 S.E.2d at 278-79.

116. *Bottoms*, 457 S.E.2d at 108 (citing Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985)).

117. *Id.* at 109 (Keenan, J., dissenting). Similar suggestions of anti-gay bias are found by comparing the majority decision with the dissent in *White v. Thompson*, 569 So.2d 1181 (Miss. 1990), where another young lesbian mother lost custody of her children to their paternal grandparents, and in the internally inconsistent *Hertzler* decision, discussed *infra* Part III. *See also* Note, *Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis*, 102 HARV. L. REV. 617, 618-621 (1989) (providing an explanation of cases predicating determination of custody on parent's sexual orientation).

118. Chris Bull, *Losing the War: The Courts Disregard Evidence in Denying a Lesbian Mother Custody of Her Son*, ADVOCATE, May 30, 1995, at 33-35.

119. *Id.* at 33 (quoting Charlotte Patterson).

120. David K. Flaks, *Gay and Lesbian Families: Judicial Assumptions, Scientific Realities*, 3 WM. & MARY BILL RTS. J. 345, 346 (1994). In J.P. v. P.W., 772 S.W.2d 786 (Mo. Ct. App. 1989), for example, the court boldly stated that "it is established that expert testimony is not a necessary basis for a determination that exposure to a homosexual influence will adversely affect a child." *Id.* at 793. The court cited similar authority from Virginia, North Dakota, Kentucky, and Pennsylvania for the proposition that the court could take the equivalent of judicial notice that any exposure to homosexuality harms children. *Id.; see also* Fowler, *supra* note 9, at 363 (discussing courts' per se approach to homosexuality as an absolute bar to custody).

121. *See, e.g.*, Falk, *supra* note 2.

sive collection and analyses of these data, lesbian mothers enjoy the same or higher degree of emotional stability and mental health than their heterosexual counterparts,[122] and possess similar if not superior parenting skills.[123] Children living with a lesbian mother are no more likely to experience mental or emotional difficulties than other children[124] and do not suffer gender identity crises.[125] Moreover, children of lesbian mothers are no more likely to be homosexual than other children[126] and are not socially stigmatized by their mother's sexual orientation.[127] Although the research on gay fathers is not as voluminous as that available on lesbian mothers, the same results have been indicated.[128] Children living with homosexual parents are not at an increased risk to contract AIDS, even if the parent is HIV-positive.[129] In addition, as previously noted, children are much more likely to be sexually abused by heterosexuals than homosexuals.[130]

Despite this growing body of scientific proof that gay and lesbian parents are as competent, if not more so, as heterosexual parents, courts still tend to focus on a parent's homosexuality and exclude consideration of other factors relevant to a child's best interest when deciding custody and visitation disputes.[131] "Also, the courts tend to base their decisions more on the attitudes or stereotypes of gay individuals than on the facts in any particular case."[132] After studying a number of custody and visitation cases involving gay and lesbian parents, one legal scholar concluded that "[t]he image that materializes in judicial decisions is a composite of two separate stereotypes of homosexuals: the first, as an emblem of dangerous malum in se criminality, and the second, as someone with a life-style devoid of any marital or familial attributes."[133] A parent's sexual orientation should be an issue only where there is a proven nexus between the orientation and harm to the child.[134] But even when courts "find" the requisite harm to the child, such findings are often based "on general assumptions and not on expert testimony or empirical research findings."[135]

The courts' aversion to gay and lesbian parents reflects a fundamental

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122. Falk, *supra* note 2, at 137-38. The American Psychiatric Association removed homosexuality from its list of approved mental disorders in 1973. Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFF. L. REV. 691, 726 (1976).

123. Falk, *supra* note 2, at 138-40.

124. *Id.* at 140-42.

125. *Id.* at 143-46.

126. *Id.* at 146-47.

127. *Id.* at 147-51 (stating that "the majority of children were not conscious of society's attitudes toward their mothers").

128. For a compilation of this research, see Barret & Robinson, *supra* note 2, at 157-69.

129. Flaks, *supra* note 120, at 361.

130. Barret & Robinson, *supra* note 2, at 161-62; Falk, *supra* note 2, at 142-43; Flaks, *supra* note 120, at 359-61; Jenny et al., *supra* note 2, at 44.

131. Falk, *supra* note 2, at 136; Fowler, *supra* note 9, at 362-63 (noting that homosexual parents in Canada experience same bias as their counterparts in the United States).

132. Falk, *supra* note 2, at 136.

133. Ronner, *supra* note 106, at 345.

134. *See* cases cited *supra* note 19; *see also* Fowler, *supra* note 9, at 364-65 (discussing the "nexus" test).

135. Falk, *supra* note 2, at 136; Fowler, *supra* note 9, at 365-71.

misunderstanding of what homosexuals do and who they are. Much of the misunderstanding is a result of categorizing persons solely as "homo*sexuals*" and use of terms such as "*sexual* orientation." The "sexual" emphasis of this language reduces every member of this radically diverse group to a one-dimensional character defined by the type of sexual behaviors in which others assume he or she engages.[136] The terms also imply that sexual behavior is *the* most important aspect of their existence, a misconception which has significant negative ramifications when a gay or lesbian parent is accused of child sexual abuse.

In fact, the diversity within the gay and lesbian population is at least as broad as that found in society as a whole.[137] Unfortunately, the chronic mischaracterization of homosexuals as single-minded sexual predators is further fueled by the invisibility of the vast majority of gay and lesbian people. Courts, and many others in our society, think of homosexuals as flaming hair dressers or motorcycle dykes living decadent, separatist lives in the gay ghettos of San Francisco, West Hollywood, New York City, Provincetown, or Key West.[138] In reality, gay and lesbian persons are so diverse that they remain virtually unnoticed as they go about their lives, working hard, paying their taxes, and taking care of their families of origin and families of choice.[139] Many gay and lesbian persons choose to remain invisible to avoid just the kind of prejudice that the courts and others display when sexual orientation is revealed.[140] Ironically, their invisibility further perpetuates the courts' misconceptions as to who homosexuals are.

As the *Hertzler* case illustrates, judicial reliance on assumptions as to who gay and lesbian persons are and what they do is especially malapropos when a homosexual parent is accused of child sexual abuse.[141]

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136. *See, e.g.*, RICHARD A. POSNER, SEX & REASON 293 (1992) (while discussing the numerous legal disadvantages encountered by homosexuals, Posner defines homosexuals as "persons who have a strong and basically lifelong preference for sexual relations with persons of their own sex").

137. An author who has long studied lesbian "culture" explains: "Ask a hundred different lesbians about identities and acts, and there will be a thousand different answers. We are not reducible to any identity captured by the category *lesbian*, nor are we reducible to our sexual activities." RUTHANN ROBSON, LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW 83 (1992) (emphasis in the original).

138. One gay activist observes "that there is no such thing as a separate homosexual community; that gay men's lives can be as ordinary, dull or exciting as anyone else's." Nick Cohen, *Secret World of 'Outing' Group that Seeks Publicity for Others*, INDEPENDENT, July 30, 1991, Home News Page Section, at 3 (quoting Michael Cashman).

139. The reality is that homosexuals "are your friends, your minister, your teacher, your bank teller, your doctor, your mail carrier, your office-mate, your roommate, your congressional representative, your sibling, parent, spouse. They are everywhere, virtually all ordinary, virtually all unknown." Richard D. Mohr, *Gay Basics: Some Questions, Facts, and Values*, *in* BIGOTRY, PREJUDICE AND HATRED: DEFINITIONS, CAUSES & SOLUTIONS 167 (Robert M. Baird & Stuart E. Rosenbaum eds., 1992).

140. *Id.*

141. *See* discussion of *Hertzler*, *infra* Part III.

E. *The Discord Among Experts Regarding the Diagnosis of Child Sexual Abuse and Its Implications for the Admissibility and Credibility of Expert Testimony*

Like the courts,[142] the mental health and medical communities strive to advance the "best interests of the child" when making evaluations for custody and visitation purposes.[143] This hyper-elastic standard allows the experts and the courts tremendous discretion in rendering an opinion as to the proper boundaries of the relationship between a particular child and parent. Due in part to this almost unfettered discretion afforded the experts, commentators have argued that expert testimony—routinely offered by psychiatrists, psychologists, and other mental health professionals—is not necessary in most custody and visitation matters.[144] Critics claim "that no empirical data exist to demonstrate the usefulness of psychological theory in child custody determinations, that ambiguous psychological theories are often used as excuses for bad legal decisions, and that, at best, testimony based on psychological theory is simply common sense and a superfluous use of experts."[145] Others contend that since experts can only make recommendations based on present circumstances, "experts are generally no better equipped or positioned than ordinary participants in the judicial system" to predict the future results of any given custody or visitation determination.[146]

In response, advocates of expert testimony in custody and visitation cases counter that experts provide a wealth of information that courts would not receive but for the expert testimony.[147] Information that might escape the court's notice includes "the feelings, attitudes, and personality traits of the relevant parties; the communication of emotions the parties are themselves unable to communicate to the court directly; and the highlighting of significant portions of the evidence that might otherwise go unnoticed or unappreciated."[148]

The debate regarding the need for experts is greatly diminished in cases

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142. The statutory or case law standard of "the best interests of the child" is used in all U.S. jurisdictions to determine child custody and visitation matters. "The simplicity and flexibility of this standard" which precludes "generalizations about its meaning or content" requires application on a case-by-case basis and does not allow precision in predicting results in any given case. SHUMAN, *supra* note 6, at § 13-2. For the roles which expert witnesses play in the "best interests" determination, see JOSEPH GOLDSTEIN ET AL., IN THE BEST INTERESTS OF THE CHILD (1986).

143. The premier guideline adopted by the American Psychological Association in its *Guidelines for Child Custody Evaluations in Divorce Proceedings*, for example, states that "[t]he primary purpose of the evaluation is to assess the best psychological interests of the child." Marc J. Ackerman, *American Psychological Association Guidelines for Child Custody Evaluations in Divorce Proceedings*, 8 AM. J. FAM. L. 129, 129-30, app. at 132 (1994). The second guideline reaffirms that "[t]he child's interests and well-being are paramount." *Id. See generally* JOSEPH GOLDSTEIN ET AL., *supra* note 142 (discussing, inter alia, the conflicts inherent in the custody recommendations made by child care professionals); Horner & Guyer I, *supra* note 1, at 247-50.

144. *See, e.g.*, SHUMAN, *supra* note 6, at § 13-5; Horner & Guyer I, *supra* note 1, at 247-48.

145. SHUMAN, *supra* note 6, at § 13-5.

146. Horner & Guyer I, *supra* note 1, at 247-48.

147. SHUMAN, *supra* note 6, at § 13-5.

148. *Id.; see also* Sanford S. Dranoff & Mitchell Y. Cohen, *Psychiatrists, Psychologists, and Social Workers: Getting the Most Out of Experts*, 10 FAM. ADVOC. 20, 21 (1987) (contending that "the nature of custody litigation requires expert testimony").

where sexual abuse of a child is alleged.[149] Indeed, the value of competent expert testimony is almost universally recognized by the medical and legal communities.[150] As one family law judge explained, "[b]ecause so many sexual abuse cases involve children whose ability to recall, report, or evaluate events is in question, there is an unusually high incidence of, and need for, reliance on expert testimony."[151]

Unfortunately, the experts to whom the courts turn for guidance are divided about the proper methodology for determining whether a child has been sexually abused and for identifying the perpetrator.[152] Disagreement among medical and mental health experts on a reliable method for diagnosing sexual abuse of children has caused various theories and methodology to wax and wane in popularity over the years. As a result, behaviors or characteristics viewed by one mental health professional as indicative of sexual abuse will be viewed by another as counter-indicative of abuse.[153] Indeed, "almost any circumstance, behavior or observation can be rationalized as supporting the conclusion that sexual abuse occurred."[154] The one point on which experts agree is that the diagnosis of child sexual abuse is an extremely controversial and inexact science,[155] especially in the context of custody and visitation disputes.[156] As several experts explained in a collaborative piece:

> The diagnosis of child sexual abuse is difficult for several reasons. There is often little or no clear history of abuse. Sexual abuse is usually committed secretly and incidents are rarely witnessed. Young children with limited verbal skills might be unable to describe their experience or their account might be questionable. Even when it ap-

149. *See also* Horner & Guyer II, *supra* note 5, at 402-03 (discussing the role of experts in sex abuse cases). *Cf.* Horner & Guyer I, *supra* note 1, at 249-50 (arguing "that experts have no special insights to offer beyond those of the ordinary person" when presented with the ambiguities inherent in child sexual abuse allegations in the divorce context).

150. *See generally* Myers et al., *supra* note 39 (discussing scientific and legal standards and conflicts which come into play when child sexual abuse is at issue). *See, e.g.*, INGER J. SAGATUN & LEONARD P. EDWARDS, CHILD ABUSE AND THE LEGAL SYSTEM 210 (1995) (stating that "[a] significant means of proving that child abuse has occurred is through the testimony of an expert witness").

151. Gallet, *supra* note 24, at 480.

152. *See, e.g.*, Underwager & Wakefield, *supra* note 79, at 160-62.

153. *Id.* (stating that a number of inconsistent behaviors are all construed as being "consistent with" sexual abuse).

154. *Id.* at 161.

155. In one study, 129 child abuse specialists were each asked to estimate the probability that a mother's allegations of child sexual abuse against the child's father were true. Thomas M. Horner et al., *The Biases of Child Sexual Abuse Experts: Believing Is Seeing*, 21 BULL. AM. ACAD. PSYCHIATRY L. 281, 288 (1993). Participants were provided with extensive data about the child and parents including videotaped presentations of the child interacting with both parents. *Id.* The extremely wide range of probability estimates offered by the experts led the authors of the study to conclude that while some of the experts were probably more accurate than others, it was impossible to determine which, if any, of the experts were correct. *Id.*

156. In fact, "[t]he issue of sexual-abuse allegations in custody and visitation (access) disputes is perhaps one of the most controversial issues in Forensic Child Psychiatry." George A. Awad & Hanna McDonough, *Therapeutic Management of Sexual Abuse Allegations in Custody and Visitation Disputes*, 45 AM. J. PSYCHOTHERAPY 113, 113 (1991). Awad and McDonough suggest that the judicial model for determining the veracity of the allegations should be replaced with a long-term therapeutic management of all the parties involved. *Id.* at 120.

pears that children are describing abuse, doubts might persist about the veracity of their statements, particularly in the context of an acrimonious custody dispute.[157]

Experts have identified a number of behavioral problems in children as indicative of sexual molestation, with age-inappropriate sexual behavior seen as a primary predictor of sexual abuse.[158] Common sense, as well as psychological data, seem to support the connection between sexual abuse and sexual activity, but the association between the two is far from certain.[159] One of the drawbacks to making this link is defining "abnormal" sexual activities or knowledge.[160] For example, masturbation is common in children; thus, the issue arises as to when masturbation is so excessive as to indicate sexual abuse.[161] Moreover, a child's heightened sexual activity may result from stimulus other than sexual abuse, such as clandestinely observing parents or others engaging in sexual activity.[162] "In addition, highly sexualized behavior is sometimes seen in children who are not thought to have been abused."[163]

Sexually abused children also display a commonality of psychological traits including aggression, high levels of anxiety and fear, depression, low self-esteem and psychosomatic disorders such as enuresis.[164] But since none of these problems is unique to sexually abused children, the existence of one or more of these traits does not automatically support a finding of abuse.[165]

Finally, even evidence obtained during a medical examination of an alleged victim is subject to debate among experts.[166] This uncertainty stems from investigators' disagreement as to what constitutes "normal" childhood anatomy, and is exacerbated further by disagreement as to what constitutes "abnormal" anatomy.[167] Even when evaluators agree that a particular physical characteristic is abnormal, they disagree as to whether that characteristic is caused by sexual abuse.[168] Physical abnormalities may also be due to causes other than sexual abuse.[169]

The discord among child sexual abuse experts regarding the accuracy of various diagnostic tools should not, however, serve as an excuse for the judge to disregard a qualified and credible expert's testimony and decide the case

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157. Howard Dubowitz et al., *The Diagnosis of Child Sexual Abuse*, 146 AM. J. DISEASES CHILDREN 688, 688 (1992).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *See* Myers et al., *supra* note 39, at 34-51; Schultz, *supra* note 14, at 6-7.

167. Dubowitz et al., *supra* note 157, at 688-89; *see generally* David M. Paul, *The Pitfalls Which May Be Encountered During an Examination for Signs of Sexual Abuse*, 30 MED. SCI. L. 3 (1990).

168. Dubowitz et al., *supra* note 157, at 689.

169. "For example, unusual vaginal irritations or discharges can result from overly zealous cleaning, poor hygiene, or self-stimulation; genital redness may be due to bubble baths or diaper rash; and anal discoloration may be due to hard stools." Schultz, *supra* note 14, at 7.

based on his layman's perspective on the subject or, even worse, on a "gut feeling" that the abuse did or did not occur. In view of the serious ramifications of child sexual abuse allegations and the general duty imposed on the court as an impartial trier of fact, the court, with the aid of the respective parties' counsel, must ensure that expert testimony admitted and deemed credible in the case is offered by competent professionals whose diagnoses are grounded in solid scientific principles and not in the experts' bias against the gay or lesbian parent. Accordingly, the qualifications of experts and the relevance and reliability of the methodologies and theories underlying the experts' opinions must be subject to vigorous review pursuant to the evidentiary principles of *Frye*, *Daubert*, and the rules of evidence previously discussed.

The *Hertzler* case, discussed immediately below, illustrates the injustice which results when the court refuses to set aside its anti-gay bias and appropriately scrutinize the proffered expert's testimony according to the proper standards.

III. THE *HERTZLER V. HERTZLER*[170] LITIGATION

A. *The Divorce and Initial Custody Agreement*

Pamela and Dean Hertzler were married in 1976 and resided on the Hertzler farm in Veteran, Wyoming.[171] During their marriage they adopted two children, Joshua and Miriam,[172] immediately after the children's births.[173] Shortly after the second child arrived, tensions in the marriage became acute.[174] Pamela initiated divorce proceedings and moved away from the Hertzler farm with Joshua and Miriam in January, 1991.[175]

In the spring of 1991, Pamela, who had been questioning her sexual orientation for some time, determined that she is a lesbian.[176] Dean did not contest the divorce, but just before the divorce decree was finalized in July 1991, Pamela lied to Dean about her sexual orientation so she could keep her children.[177] By agreement of the parties, Pamela became the custodial parent and Dean was provided with seasonal visitation rights.[178]

In October 1991, while living in Morrill, Nebraska, Pamela became romantically involved with Peggy Keating of Lakewood, Ohio.[179] Pamela's

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170. 908 P.2d 946 (Wyo. 1995).

171. Transcript of Trial Proceedings at 13, 14, 17, 780, Hertzler v. Hertzler, No. 24-269 (Dist. Ct. Goshen Cty., Wyo. 1992) (all trial and hearing transcripts, exhibits and court orders referenced are on file with the author) [hereinafter Tr.].

172. *Id.* at 780-82, 784-85.

173. *Id.* at 781-85.

174. *Id.* at 790-91.

175. *Id.* at 793. Dean was not angered by this situation; in fact, he offered to help Pamela pack. *Id.*

176. *Id.* at 18-19.

177. *Id.* at 19, 793-94. Dean vowed to fight for custody if Pamela was a lesbian. *Id.*

178. Decree of July 30, 1991, at 1-2, *Hertzler*, No. 24-269.

179. Tr. at 19, 775-76. Peggy was a licensed social worker and certified child care worker with a Master of Arts Degree in Psychology and 13 years of experience working with severely emotionally disturbed children and adolescents. *Id.* at 553-62.

brother told their parents that Pamela is a lesbian[180] and, on the day after Christmas, 1991, Pamela's parents informed Dean that Pamela was in a relationship with Peggy.[181] Dean immediately confronted Pamela and threatened to sue to obtain custody of the children unless she voluntarily granted him custody.[182]

B. *Modification of the Original Custodial Agreement*

When Pamela acknowledged her sexual orientation to Dean and explained that she was contemplating moving with her children to Ohio to live with Peggy, he presented her with two "choices:" (1) she could fight to retain custody, knowing that the court might deny her any contact with the children due to her sexual orientation; or (2) she could stipulate to a reversal of the custody and visitation rights established by the existing court order.[183]

Feeling betrayed and abandoned by her family, Pamela sought legal counsel. She was further discouraged by legal advice that a custody dispute would likely center on her sexual orientation, would be a lengthy and perhaps devastating process for everyone involved, and that her likelihood of success was extremely slim in such a conservative jurisdiction.[184] Following an agonizing period of debating the two "choices" presented in Dean's ultimatum, Pamela concluded that it was in the children's and her best interests to stipulate to the modification.[185]

With the court's approval,[186] Dean became custodial parent and Pamela secured the right to unsupervised visits with Joshua and Miriam every other weekend from 7 P.M. Friday until 7 P.M. Sunday, two months visitation during the summer, visitation on holidays including Christmas and the children's birthdays, and any other visitation to which the parties agreed.[187]

Pamela relocated to Lakewood, Ohio, and began living with Peggy.[188] She secured a job as a nurse with a nonprofit agency serving the needs of the terminally ill and their families, and became a deacon and a choir member of her church.[189] Back in Wyoming, Dean continued to operate the family farm and work part-time as an emergency medical technician (E.M.T.).[190] His parents, Betty Jo and M.L. "Bud" Hertzler, and others provided child care for Miriam and Joshua six days a week.[191]

After her move, Pamela maintained contact with her children through

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180. *Id.* at 798.
181. *Id.* at 20-21, 56.
182. *Id.* at 56-57, 799.
183. *Id.* at 57, 107, 799-800. Dean stood by his ultimatum even when Pamela offered to terminate her relationship with Peggy. *Id.* at 802.
184. *Id.* at 801-03.
185. *Id.* at 21, 801-03.
186. Order of Feb. 26, 1992, *Hertzler*, No. 24-269.
187. *Id.*
188. Tr. at 22, 572.
189. *Id.* at 13, 777-78.
190. *Id.* at 54.
191. *Id.* at 112, 325.

letters, photo albums, packages, biweekly phone calls, and personal visits.[192] In the summer of 1992, Joshua and Miriam spent eleven weeks at Pamela and Peggy's Lakewood home.[193] Joshua and Miriam made friends with a number of other children in the neighborhood, including the four Durkalski children,[194] and enjoyed their summer in Lakewood.[195]

C. *Dean's Marriage to Christine*

In October 1992, Dean met Christine Thompson of Wilmington, Ohio, through "Country Connections" mail order dating service.[196] Christine visited Dean at his farm in Veteran during the Thanksgiving 1992 weekend, and they became engaged in early 1993.[197]

During a visit with Dean around Easter 1993, Christine concluded that Joshua and Miriam needed additional structure and discipline and that she would be the person to provide these things.[198] Christine also decided, with Dean's approval, that she would be the children's mother and that Pamela should no longer be considered their mother.[199]

Prior to the children's 1993 summer visit with Pamela and Peggy, Dean instructed seven-year-old Joshua that his mother and Peggy (whom he referred to as "faggots") were in a lesbian relationship, that lesbians are women who have sex with other women, that neither Dean nor Christine approved of the relationship, that Pamela had left Joshua to live a life of sin, and that Pamela did not want to take care of him anymore.[200]

That same summer the children attended Pamela and Peggy's Commitment Ceremony at the Archwood United Church of Christ. The ceremony consisted of songs, readings from the Bible, a message by the church pastor, and blessings offered by friends and family.[201]

Dean and Christine were making final arrangements for their wedding when Joshua and Miriam returned from the summer with their mother.[202] During this period and after their honeymoon, Dean and Christine reportedly observed behaviors in the children—including masturbation by Miriam, general unruliness, use of "foul" language by both children, and the licking of "Go Fish" cards and an ice tea pitcher by Miriam—which allegedly alerted them to the possibility that the children had been sexually abused while with

192. *Id.* at 301-02, 804-05.
193. *Id.* at 115, 809.
194. *Id.* at 171-72, 520, 525-26.
195. *Id.* at 118-19.
196. *Id.* at 121, 306, 311.
197. *Id.* at 121-22, 312, 317.
198. *Id.* at 319-25.
199. *Id.* at 127-28, 163-64, 326, 333-34.
200. *Id.* at 126-27, 158-65. Joshua called his mother a "faggot" at the commencement of the summer 1993 visit. *Id.* at 532, 811. Joshua ceased using this word when Pamela explained that it was hurtful, but reverted to this term after visiting with Christine for a weekend. *Id.* at 595, 811-12.
201. *Id.* at 27-28, 597-98.
202. *Id.* at 340-41.

Pamela.[203] Interestingly, the children's paternal grandparents did not observe such behaviors when they cared for Joshua and Miriam during Dean and Christine's honeymoon.[204]

D. *Gathering of Sexual Abuse "Evidence" by Dean and Christine*

In the fall of 1993, Pamela resumed regular contact with her children through letters, phone calls, packages, and personal visits. During the Thanksgiving holiday, Pamela and Peggy spent a few days with the children at a ranch in Wyoming. When the children returned from that visit, Joshua had a wash-off Mario decal on each forearm and Miriam had a Bugs Bunny decal on her chest.[205] Dean and Christine concluded that Miriam's decal was "evidence" of sexual abuse but did not report their conclusion to civil or criminal authorities (even though Dean, as an E.M.T., was admittedly required by law to report any suspicion of child abuse). The couple did not seek medical or psychological evaluations of the children to confirm or repudiate their suspicions or to help the children cope with this alleged trauma.[206] Instead, Dean and Christine took a picture of Miriam's decal and started gathering other "evidence" to support their allegations against Pamela.[207] Toward that end, Dean and Christine began listening to Pamela's phone conversations with her children.[208]

Around Christmas 1993, Dean and Christine began intercepting cards and packages Pamela sent to Joshua and Miriam and refusing to answer the phone when Pamela telephoned her children at scheduled times.[209] Dean and Christine continued to revile Pamela to her children,[210] telling them that she was "an evil person living an evil life."[211]

According to Dean and Christine, Miriam's masturbation became chronic to the point that her labia were red and sore.[212] They told her that it was a "private" matter but did not tell her to stop this behavior;[213] they did not take Miriam to a medical doctor, even though Christine was frequently at the doctor's office for a variety of illnesses during this period;[214] and they did not consult a physician or mental health professional until May of 1994.[215]

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203. *Id.* at 64-66, 80-83, 284, 341-42.
204. *Id.* at 234-35, 265-66.
205. *Id.* at 69-70, 362.
206. *Id.* at 150-52, 174-75, 364-65.
207. *Id.* at 152, 282, 364.
208. *Id.* at 153-54.
209. *Id.* at 172-73. When allowed to talk, the children were very anxious about time limits and were often distracted by movies, games, or other activities that continued despite Pamela's repeated requests that Dean suspend such activities during the children's telephone visits with her. *Id.* at 807-08.
210. *Id.* at 160-64, 333-34.
211. *Id.* at 168. They also had Joshua look up the word "abomination" in the dictionary so he could understand the Bible's view of homosexuality. *Id.* at 328-29. Christine also repeatedly referred to Pamela as "WW" (meaning "wicked witch") in front of the children. *Id.* at 343.
212. *Id.* at 355.
213. *Id.* at 137, 354, 357.
214. *Id.* at 143, 147-48, 152, 358-60.
215. *Id.* at 369-70.

Instead, Christine repeatedly rubbed nonprescription Desitin or hydrocortisone on Miriam's labia.[216]

Pamela, Peggy, and other child care providers never saw Miriam masturbate,[217] and Miriam's paternal grandmother, who spent significant amounts of time with both children, only witnessed this behavior once in early 1994.[218] When her grandmother told Miriam to stop, she did.[219]

Long after Dean had allegedly concluded that Pamela had sexually abused her children[220] and was "a detriment to their very souls,"[221] he agreed to Pamela's request for an extended three-day weekend visit in mid-February, 1994.[222] In late February, 1994, Dean and Christine terminated all telephone contact with no explanation to Pamela or the children.[223] Christine also began repeated interrogations of Miriam, not yet four years old, as to whether anyone had touched her "business," meaning her genital area.[224] As discussed more fully below, Christine's interrogations, which occurred while she was rubbing ointment on Miriam's labia, yielded a variety of implausible and inconsistent answers.[225]

E. *The Temporary Restraining Order*

On March 7, 1994, Dean again refused to allow Pamela to speak with her children at the pre-scheduled time; Pamela left a message on Dean's answering machine that she would resort to legal action, if necessary, to reinstate her right to speak with her children.[226] Immediately thereafter, Pamela's counsel faxed a letter to Dean's attorney enumerating Dean's violations of the custody and visitation agreement and order and asked that Dean cease and desist such violations.[227]

Neither Dean nor his counsel responded to the letter. When Pamela's legal counsel finally reached Dean's counsel by telephone, counsel learned of Dean's plan to file a petition for a temporary restraining order (T.R.O.) the next morning.[228] Dean sought to bar all contact between Pamela and her chil-

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216. *Id.* at 142, 357, 360-61.
217. *Id.* at 533-34, 603, 809.
218. *Id.* at 235.
219. *Id.*
220. *Id.* at 150, 154.
221. *Id.* at 168.
222. *Id.* at 156, 821-22.
223. *Id.* at 170, 172-73, 828. Dean and Christine did not let Pamela talk to Joshua on his birthday in February, 1994 and did not tell Joshua that she had called. *Id.* at 172-73, 828.
224. *Id.* at 374-75.
225. *See infra* Part III.G.
226. Tr. at 173-74.
227. Letter from Susan J. Becker, Attorney for Ms. Hertzler, to James A. Eddington, Attorney for Mr. Hertzler (March 2, 1994) (on file with the author).
228. Tr. at 174. Since the motion for a T.R.O. and the motion to modify custody and visitation sought to modify an existing order stemming from the original divorce decree, Pamela continued to be designated as "Plaintiff" and Dean as "Defendant" during the litigation of the sexual abuse allegations, even though Pamela was clearly placed in the defensive posture throughout. *See* Defendant Dean Hertzler's Motion for Temporary Restraining Order, *Hertzler*, No. 24-269 (Mar. 11, 1994). To avoid confusion, the parties are referred to by their first names throughout this

dren, claiming that she had sexually abused them.[229]

The petition informed the court of Pamela's sexual orientation and her relationship with Peggy. The "evidence" of sexual abuse cited by Dean was the Bugs Bunny decal Miriam had on her chest when she returned from the Thanksgiving visit, Miriam's purported chronic masturbation, the children's supposed use of inappropriate language, Miriam's licking of objects such as "Go Fish" cards and the ice tea pitcher, and other unruly behavior by Joshua and Miriam.[230]

The petition was supported solely by affidavits from Dean and Christine. Noticeably absent were any affidavits from a medical or mental health professional supporting Dean's allegations that Miriam and Joshua had been sexually abused or that the behaviors alleged in the petition were indicative of sexual abuse.[231]

Pamela had never witnessed the behaviors listed in Dean's petition and was devastated by Dean's allegations.[232] She and her legal counsel[233] appeared at the T.R.O. hearing via telephone and Dean and Christine appeared in person with their testimony consisting of a reading of the allegations in the petition.

Based solely on Dean and Christine's allegations, the trial court issued a verbal T.R.O. on March 11, 1994, allowing Pamela extremely limited, supervised visitation with her children, one phone call per week, and barring all contact between Peggy and the children.[234] The court also indicated its intent to hold a full hearing on the matter at the earliest possible time. In the corresponding written order issued by the court on March 23, 1994, the court mandated that "neither party, spouse, companion, friends or relatives shall discuss this matter with the minor children nor shall they attempt to influence the children in any way."[235]

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discussion of the litigation.

229. Tr. at 174.

230. *Id.*

231. *See* Defendant Dean Hertzler's Affidavit in Support of Motion for Temporary Restraining Order, *Hertzler*, No. 24-269 (Mar. 11, 1994). This glaring omission occurred because no doctors had yet examined the children, even though Dean filed the petition many months after he and Christine had concluded that Pamela had sexually abused her children and had started "gathering evidence" to support their claims. *See supra* text accompanying notes 202-203

232. Tr. at 830.

233. Pamela was provided pro bono representation by the author and Susan Laser-Bair of Cheyenne, Wyoming.

234. Tr. at 830.

235. Temporary Restraining Order at 1-2, *Hertzler*, No. 24-269. Between the entry of the T.R.O. and trial, Dean and Christine continued, in direct contravention of this order, to instruct the children that homosexuality was a sin, that their mother was a sinner who was worse than a thief or a liar or a prostitute, and that Plaintiff no longer wanted to care for them. *Id.* at 85-86, 167-69, 333. Retracted Diaries of Christine Hertzler, Ex. 3 at Apr. 30, 1994, *Hertzler*, No. 24-269 [hereinafter Ex. 3].

F. *The Court's Refusal to Appoint an Expert*

In an effort to expedite the resolution of the sexual abuse allegations, with the minimum amount of trauma to then eight-year-old Joshua and four-year-old Miriam, Pamela's counsel proposed that the court appoint a single expert to evaluate the children and the parties. Initially Dean agreed. Pamela also moved the court for the appointment of a specific expert, Dr. Marilyn Tkachut.[236] The court set a deadline for Dean's counsel to agree to the appointment or to file objections. Dean did not propose any other counselors and did not file an objection to Dr. Tkachut's appointment until after the court-imposed deadline. Dean offered no basis for his tardy objection to Dr. Tkachut, merely stating that "a court-appointed psychologist is unnecessary because the parties will select their own experts."[237]

Despite Pamela's protest that multiple experts would unnecessarily disrupt the children's and the parents' lives, dramatically and unnecessarily increase the experts' fees incurred by the parties, and delay the trial date,[238] the court refused to appoint an expert. As more fully explained below, the court's failure to appoint a single expert exacted the dire consequences foretold by Pamela's counsel.

G. *The Repeated Interrogations of Miriam and Resulting "Disclosure"*

On twelve to fifteen occasions between February and May 1994, Christine questioned Miriam as to whether anyone had been touching her "business."[239] This inquisition occurred while Christine was applying ointment to Miriam's labia.[240] Miriam's responses, recorded in Christine's diary, primarily implicated her brother Joshua.[241]

Miriam's grandmother Hertzler also questioned Miriam once in January or February of 1994. Miriam asked Mrs. Hertzler, "Aren't you going to look at my business?"[242] Mrs. Hertzler noticed that Miriam's labia were quite red. When asked what caused the redness, Miriam responded quickly, "Josh did it," which sounded like a prepared response to Mrs. Hertzler.[243] Mrs. Hertzler told Miriam that she should not let anyone touch her and if they did she should "scream and holler" and tell them to "stop it, stop it."[244]

On Tuesday, May 17, 1994, Christine talked with Mr. Lynn Rhodes, the

236. Plaintiff's Response to Defendant's Objection to Appointment of Psychologist ¶ 1, *Hertzler*, No. 24-269. Dr. Tkachut, a psychologist practicing in Cheyenne, Wyoming, had extensive training and experience with abused children. (Dr. Tkachut's resume is on file with the author).

237. Plaintiff's Response to Defendant's Objection to Appointment of Psychologist ¶ 5, *Hertzler*, No. 24-269.

238. *Id.* ¶¶ 3-5.

239. Tr. at 374.

240. *Id.* at 142, 372.

241. *Id.* at 372-75; Ex. 3 at Mar. 2 and Apr. 24, 1994. Miriam made these accusations during a time when she frequently blamed others, her brother Joshua, and even ghosts to avoid getting into trouble. Tr. at 176, 237, 385.

242. Tr. at 235.

243. *Id.*

244. *Id.* at 236, 238.

"expert" retained by Dean.[245] Mr. Rhodes had twice interviewed the children and found no evidence of sexual abuse. Christine and Mr. Rhodes talked about the need for a "breakthrough" in the case.[246]

That same evening, Miriam complained about her "business" being sore.[247] Christine asked Miriam why her "business" hurt, and Miriam responded, "I guess I played with it."[248] Christine asked Miriam if she understood that her "business" wouldn't get sore if she didn't play with it and that she shouldn't play with it, and Miriam said she understood.[249] Miriam asked to have medicine put on her labia.[250]

Christine reported in her diary that the following exchange occurred while Christine was applying Desitin to Miriam's labia on May 17, 1994:

> I asked why it was hurting, she said because I played with it. I asked when, she said a lot. I asked her if anyone ever played with her business, she said "not anymore." She said "Josh used to." I asked if anyone else did and she said "Mary from Ohio." I asked why did Mary do it, she said "because I let her." I asked if Pam or Peggy ever played with her business, she said "Yes all the time." I said are you sure they played with it or just put medicine on it. She said "PLAYED WITH IT" in an angry tone. I asked Miriam what she said to Pam & Peggy when they did this, she said "I told them to stop it, STOP IT, STOP IT & they laughed at me and did it again." "I don't like it when they play with my business." "I used to fondle their breasts too." This story was repeated to me 3 times (concerning Pam & Peggy) over a 1/2 hr. time period.[251]

Christine admittedly spanked Miriam for behaviors Christine considered inappropriate.[252] When this "breakthrough" occurred, however, Christine hugged Miriam and instructed her: "You need to tell Mr. Rhodes what has happened to you."[253] Christine then said a special prayer with Miriam[254] and hugged her again.[255] Miriam thrice repeated the story implicating Pamela and Peggy at Christine's urging, and each time Christine told Miriam "that she needed to tell that to Mr. Rhodes."[256] Christine reported the "breakthrough" to Mr. Rhodes the next morning and another appointment was scheduled.[257] Christine also provided Mr. Rhodes with a copy of her diary entries describing

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245. *Id.* at 376, 378-79.
246. *Id.* at 294, 378-79.
247. *Id.* at 294, 380.
248. *Id.* at 294, 381.
249. *Id.* at 294.
250. *Id.*
251. Ex. 3, at May 17, 1994; *see also* Tr. at 295, 380-84.
252. Tr. at 324.
253. *Id.* at 295-96, 387-89.
254. Christine prayed "God to please be with Miriam" and "help her through this time because obviously she's been traumatized by something and to please watch over her, you know, and reassure her that she's a very special girl and I love her very much and I'm very sorry that something like that would ever happen to her." *Id.* at 296, 388-89.
255. *Id.*
256. *Id.* at 389.
257. *Id.* 297, 388-89, 391.

Miriam's "disclosure."[258]

H. *Evaluation of the Children by Mr. Rhodes*

At the time Mr. Rhodes evaluated the children, the parties, and their respective partners in this case, he had been working as a counselor for less than two years and had extremely limited training, education, and experience regarding allegations of sexual abuse of young children.[259] His twenty-seven years as a minister strengthened his personal views that homosexuality is morally wrong and admittedly affected his "professional" opinion rendered in the case.[260] In fact, Dean confirmed that Mr. Rhodes had an anti-gay bias before retaining him to evaluate the children.[261]

Mr. Rhodes interviewed Joshua, Miriam, Dean and Christine on May 7, 1994 and interviewed the children again on May 17.[262] When Mr. Rhodes asked the children about sexual abuse, Miriam again blamed Joshua for "touching her business" but did not mention Pamela or Peggy.[263] Joshua reported that his father and Christine fought a lot[264] and that Christine spanked Miriam frequently[265]—reports that did not surprise Christine.[266] Joshua stated that neither he nor anyone else had been touching Miriam's "business."[267]

Mr. Rhodes's third, post-"breakthrough" interview of Miriam, on May 20, 1994, was recorded on both audio[268] and video tape.[269] The audio tape reveals that as soon as Mr. Rhodes greeted Miriam, Miriam began repeating, almost verbatim, the story she had told to Christine which implicated Pamela and Peggy.[270]

Mr. Rhodes switched on the video camera and urged Miriam to tell him again what "Pam and Peggy" did.[271] After significant prompting, Miriam repeated the story, again almost verbatim.[272] Miriam was distracted and used a sing-song voice suggesting that her story was rehearsed and she was tired of telling it.[273]

While Mr. Rhodes attempted to use anatomically correct dolls to ascertain what Pamela and Peggy supposedly did, Miriam volunteered several times that "they haven't been touching my business."[274] When asked if anyone else had

258. *Id.* at 391-93.
259. *Id.* at 407-11.
260. *Id.* at 398, 476-79.
261. *Id.* at 472-73.
262. *See* Report of J. Lynn Rhodes, Ex. 8, *Hertzler*, No. 24-269 [hereinafter Ex. 8].
263. Tr. at 440; Ex. 8, at 10-11.
264. Tr. at 456-57.
265. *Id.* at 458.
266. *Id.* at 345.
267. Ex. 8, at 8-9.
268. Interview by J. Lynn Rhodes with Mariam Hertzler (audio tape of May 20, 1994), Ex. Q, *Hertzler*, No. 24-269 [hereinafter Ex. Q].
269. Interview by J. Lynn Rhodes with Mariam Hertzler (video tape of May 20, 1994), Ex. E, *Hertzler*, No. 24-269 [hereinafter Ex. E].
270. Tr. at 426, 449; Ex. Q; Ex. 8, at 12.
271. Tr. at 426, 731-32; Ex. E; Ex. Q.
272. Tr. at 731-32; Ex. E.
273. Ex. E; Ex. Q; Tr. at 731-32.
274. Ex. 8, at 12-13; Ex. E; Ex. Q. Mr. Rhodes ignored these statements during the interview,

played with her business, Miriam rambled off the names of Charlotte, John, little John, Mary, and Joshua (Durkalski), friends and neighbors of her mother in Lakewood.[275] Mr. Rhodes ignored these accusations.[276]

Mr. Rhodes conducted a third interview of Joshua on May 22, 1994.[277] In this videotaped meeting,[278] Mr. Rhodes assured Joshua that he would not get in trouble for anything he said and Joshua agreed to tell the truth.[279] Joshua again repeatedly denied that anyone had sexually abused him or Miriam.[280] Mr. Rhodes "found" this videotape in his drawer during his deposition and explained that he had not produced it in response to previous requests because he did not believe it contained anything significant.[281]

Based primarily upon Miriam's "disclosure" during the taped May 20 interview[282] and upon information supplied by Dean and Christine,[283] Mr. Rhodes concluded that Miriam and Joshua had been "eroticized" and Miriam had possibly been sexually abused; that even absent abuse, continued contact between the children and their mother would be detrimental because it might influence the children's sexual orientation; that further contact with Peggy should be barred; and that contact with their mother be terminated or limited to supervised visits.[284]

I. *Evaluation of Miriam and Joshua by Other Experts*

The children were both examined by Pamela's expert witnesses, Dr. Larry Bloom and Dr. Carole Jenny.[285] Dean's family physician and witness, Dr. Karen Brungardt, examined Miriam.[286] None of these experts confirmed Mr. Rhodes's theory that the children had been sexually abused or that the sexual orientation of a parent is determinative of the children's best interest when visitation is at issue.[287] In fact, Drs. Bloom and Jenny independently repudiated Mr. Rhodes's methodologies and conclusions, and even Dean's own witness, Dr. Brungardt, readily conceded that her conclusion that Miriam had been sexually abused should be reconsidered because it was based on mis-

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but, after they were brought to his attention during his deposition, he hypothesized that Miriam was talking about the dolls when she made the disclaimers. Tr. at 446-47.

275. Ex. E; Tr. at 430-31. Miriam also incorrectly told Mr. Rhodes that each person she had just accused of sexually abusing her was, except for baby Joshua, an adult like him. Ex. E.

276. Tr. at 448.

277. Ex. 8, at 9.

278. Interview by J. Lynn Rhodes with Joshua Hertzler (video tape of May 22, 1994), Ex. 18, *Hertzler*, No. 24-269 [hereinafter Ex. 18].

279. *Id.*

280. *Id.*

281. Tr. at 464-65; Ex. 8, at 9.

282. Tr. at 435.

283. *Id.* at 463.

284. Ex. 8, at 23-25.

285. Report of Larry J. Bloom, Ex. 17, *Hertzler*, No. 24-269 [hereinafter Ex. 17]; Report of Carole Jenny, Ex. 15, *Hertzler*, No. 24-269 [hereinafter Ex. 15].

286. Tr. at 177-92.

287. *See, e.g.*, Ex. 17, at 14-17 (questioning the validity of Rhodes's interview); Ex. 15, at 7-10 (stating that there was no objective evidence of sexual abuse).

leading and incomplete information provided by Dean.[288]

1. Dr. Larry L. Bloom

When retained as an expert in the *Hertzler* case, Dr. Bloom was a licensed clinical psychologist and professor of psychology at Colorado State University with almost twenty years of experience in evaluating family dynamics and seventeen years of experience identifying sexually abused children.[289] Dr. Bloom was also familiar with the empirical data and literature relating to lesbian and gay parents.[290] Dr. Bloom conducted comprehensive evaluations of Pamela, Peggy, Miriam, Joshua, Dean, and Christine over a two-day period shortly after Miriam's "disclosure" to Christine and Mr. Rhodes.[291] In response to Dr. Bloom's inquiries, both Miriam and Joshua denied that anyone had been touching or playing with their genital areas.[292] Dr. Bloom's testing of Miriam established that she is a highly suggestible child who strives to please adults.[293] Dr. Bloom met separately with the adults and observed the children interacting with their parents and the parents' partners.[294] Dr. Bloom also studied the audio and video tapes of the May 20, 1994, interview in which Miriam "disclosed" to Mr. Rhodes that Pamela and Peggy had been "touching her business."[295] Dr. Bloom found this disclosure unconvincing due to the fatally flawed methodology employed by Mr. Rhodes, including his failure to test for suggestibility, his failure to explore Miriam's inconsistent statements regarding sexual abuse made during the "disclosure" and previous interviews, and his use of leading rather than nondirective questions.[296] Dr. Bloom determined that Miriam's "disclosure" immediately upon entering the room was the result of preparation by an adult whom Miriam was striving to please.[297]

Dr. Bloom further concluded that: (1) absolutely no credible evidence existed to corroborate Dean's allegations of sexual abuse; (2) Pamela and Peggy encouraged and facilitated the relationship between Dean, Christine, and the children while Dean and Christine caused parental alienation between the children and their mother; (3) the children benefitted by spending significant amounts of (unsupervised) time with their mother; and (4) Dean and Christine should obtain professional counseling to put aside their own needs and biases

288. *See* Ex 15; Ex 17; Tr. at 202 (cross examination of Dr. Brungardt).

289. Tr. at 607, 612, 649; Curriculum vitae of Larry Jay Bloom, Ex. 16, *Hertzler*, No. 24-269 [hereinafter Ex. 16].

290. Tr. at 611-12.

291. Ex. 17; Tr. at 613.

292. Tr. at 637, 653; Ex. 17, at 7-8.

293. For example, Miriam readily agreed with Dr. Bloom's suggestions that Pamela and Peggy are sisters and later agreed that they are mother and daughter. Tr. at 640-42; Ex. 17, at 8.

294. Tr. at 614-16. During Dr. Bloom's observations of the children with their mother and Peggy, Dean hovered nearby. *Id.* at 646-47. When asked why, Dean said his diligence was necessary to prevent Pamela from kidnapping her children. *Id.* at 617-18. Dr. Bloom was not able to persuade Dean that kidnapping was not a possibility in the clinical setting. *Id.* at 618. Dean had also told Joshua that his mother might try to kidnap Joshua and his sister. Ex. 17, at 14.

295. Tr. at 615, 648-49.

296. *Id.* at 651-53.

297. *Id.* at 649-51.

and focus instead on the needs of the children to value and appreciate their mother and Peggy.[298]

2. Dr. Carole Jenny

Carole Jenny, M.D., is a board-certified pediatrician who had served as the Director of The Child Advocacy and Protection Team at the Denver Children's Hospital for four years when she became involved in this case.[299] She personally examined four or five children per week where sexual abuse was suspected and twenty to thirty cases of emotional abuse per year.[300] She taught at the University of Colorado School of Medicine, conducted empirical and clinical research, and has published in the field of child abuse.[301] Her peer-reviewed, published research included work on the prevalence of child sexual abuse by gay men and lesbians.[302]

Dr. Jenny interviewed both children, physically examined Miriam, and provided a comprehensive report of her findings and observations.[303] Both children reported that Dean and Christine told them that their mother was wrong to live in a lesbian relationship, that Christine often spanked Miriam, and that they wanted to see Pamela frequently.[304]

Dr. Jenny talked with Dean at length but found Christine "rude and immature" and hostile. Dr. Jenny based these conclusions on Christine's rebuff of Miriam's pleas to play with her in the waiting room and her refusal to comfort Miriam during the physical examination.[305] After Dr. Jenny's interview with Miriam, Miriam ran up to Christine and spontaneously reported: "I didn't tell her about my business, we talked about other stuff."[306] Dr. Jenny interpreted this remark as evidence that Christine, who appeared embarrassed by Miriam's statement, had been coaching Miriam and that Miriam was "checking in" with Christine to see if she had met Christine's expectations.[307] Dr. Jenny found further evidence of Christine's coaching in Miriam's hurried "disclosure" to

298. Ex. 17, at 15-17.

299. Tr. at 716, 718. The Team is a joint program of the Children's Hospital and the C. Henry Kempe National Center, a child abuse research and treatment center sponsored by the University of Colorado. *Id.* at 716. Dr. Jenny had worked as a pediatrician and served as the medical director of the Harborview Sexual Assault Center at the University of Washington for six years prior to heading the Kempe Center. *Id.* at 716-17. Her curriculum vitae was introduced as Ex. 14. *Id.* at 720.

300. *Id.* at 718, 764.

301. *Id.* at 716-18.

302. *See* Jenny et al., *supra* note 2, at 41. Pamela was not aware of Dr. Jenny's research on this topic when she retained her to evaluate Miriam.

303. Ex. 15, at 8; Tr. at 721-23. Prior to compiling her report, Dr. Jenny reviewed depositions collected in the case, Christine's redacted diaries, Dean's T.R.O. Petition and his Petition to Modify Decree, answers to interrogatories, Mr. Rhodes's report, and the audio and video tapes of Miriam's May 20 interview by Mr. Rhodes. Tr. at 721-23. After examining the children, Dr. Jenny also reviewed Dr. Bloom's report and the medical record submitted by Dr. Brungardt. Tr. at 722. Dr. Jenny did not communicate with Pamela or Peggy.

304. Ex. 15, at 3-4. Joshua told Dr. Jenny he wanted to spend half the year in Wyoming with his father and the other half in Ohio with his mother. *Id.* at 4.

305. Tr. at 724-25, 754-55; Ex. 15, at 5.

306. Tr. at 729.

307. *Id.* at 730-31, 770.

Mr. Rhodes on May 20, 1994.[308] Dr. Jenny's expert opinions include the following:

- An extensive physical examination of Miriam showed no evidence of sexual abuse or infection or inflammation in her genitals or anus.[309]

- Joshua and Miriam were outgoing, "healthy and happy," and showed none of the hypersensitivity to new people and environments indicative of sexually-abused children; they did not suffer from post traumatic stress disorder.[310]

- Miriam's "disclosures" that Pamela and Peggy "played with her business" lacked credibility due to the use of leading questions, Christine's coaching, and the attendant rewards Miriam received only for implicating Pamela and Peggy.[311]

- Christine and Dean's attempts to alienate the children's affection for their mother and convince them that they had been sexually abused "cause[d] tremendous emotional abuse and correlate[d] with a bad long-term outcome in terms of the child's mental health and the development of mental illness,"[312] including schizophrenia.[313]

- Miriam's masturbation may have been due to an intermittent medical condition which compelled her to rub her already inflamed genitals, such as strep infection in the vagina, pinworms, or an allergy.[314]

- Other behaviors which Dean and Christine deemed indicative of sexual abuse were in fact behaviors that are age and gender appropriate for Miriam and Joshua.[315]

- Frequent masturbation is not a specific sexual abuse behavior, but it is common in children who are not getting their emotional needs met and feel isolated, frustrated, lonely or bored.[316]

- As recorded in her diary, Christine's act of telling Miriam that Pamela moved to Ohio because Pamela did not want to care for Miriam anymore was an abusive act, as were other acts where Dean and Christine denigrated Pam-

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308. *Id.* at 729-30.
309. *Id.* at 723-26.
310. *Id.* at 726-28.
311. *Id.* at 727-31.
312. *Id.* at 735.
313. *Id.* at 734-37, 745.
314. *Id.* at 768-69.
315. Ex. 15, at 5-6.
316. Tr. at 762.

ela to the children.[317]

- There was no evidence in the medical or psychological literature that children of lesbian parents suffer psychological dysfunction or gender confusion.[318]

- Peer-reviewed, published, empirical data compiled by Dr. Jenny and her husband, Dr. Thomas Roesler, proved that a child is over 100 times more likely to be abused by a parent's heterosexual partner than by someone identified as a homosexual.[319]

- Children can do very well going between two diverse environments as long as they understand the different expectations and as long as the caretakers in each home encourage the children to respect the rules in both environments.[320]

Based upon these and other findings, Dr. Jenny recommended that Joshua and Miriam be allowed and encouraged to maintain unsupervised contact with their mother and Peggy.[321] Dr. Jenny further cautioned that Dean and Christine would injure the children's mental health and happiness if they continued their campaign to alienate the children from their mother[322]—a possibility that Mr. Rhodes also acknowledged.[323]

3. Dr. Karen Brungardt

Just a few weeks before trial, Dean had Miriam examined by Dr. Karen Brungardt, a Doctor of Osteopathy (D.O.) from Torrington, Wyoming. Dr. Brungardt is board-certified in family practice and examines three or four alleged victims of sexual abuse per year.[324] Consistent with Dr. Jenny's findings, Dr. Brungardt found no physical abnormalities indicative of sexual abuse.[325] During this examination, however, Miriam repeated her story that "Peggy and Pam" had been touching her business, but this time expanded the touching to include her anus. Based on information supplied by Dean and Miriam's "disclosure" during the examination, Dr. Brungardt found a "probability" that Miriam had been abused.[326]

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317. *Id.* at 735-43.
318. *Id.* at 737-38; Ex. 15, at 8.
319. Tr. at 739; Ex. 15, at 9.
320. Tr. at 740-41, 745; Ex. 15, at 9.
321. Tr. at 739-41, 744-46; Ex. 15, at 9.
322. Tr. at 745; Ex. 15, at 9.
323. Tr. at 466-69.
324. *Id.* at 179.
325. *Id.* at 185; Exhibit C: Report of Dr. Brungardt, *Hertzler*, No. 24-269 [hereinafter Ex. C]. Dr. Brungardt noted some redness and irritation of Miriam's vagina, Tr. at 185; Ex. C, but testified that Miriam's own "small finger" would "typically not" cause this type of irritation. Tr. at 187. Dr. Brungardt's conclusion was consistent with Dr. Jenny's concern that Miriam's genital irritation could be caused by pinworms or other intermittent medical condition. Tr. at 769.
326. Tr. at 191.

J. *The Trial*

A four-day trial was held during July 1994 in Torrington, Wyoming. In addition to the expert opinions of Drs. Jenny, Bloom, Brungardt, and Mr. Rhodes,[327] testimony was elicited from ten fact witnesses. These witnesses included the parties, their partners and the children's paternal grandparents. Joshua and Miriam did not testify. Pamela and Peggy called several character witnesses and Mrs. Charlotte Durkalski, a close friend and neighbor of Pamela and Peggy. Mrs. Durkalski, along with her husband and four children, spent significant time with Joshua and Miriam during their summers in Lakewood. All witnesses, including Dean, Christine and Dean's parents, testified that Pamela had been a good parent, that she loved her children,[328] and that the children loved her.[329]

Witnesses traveled from Ohio to testify as to Pamela and Peggy's integrity and also testified concerning their own observations of the children's behavior and the interactions of Pamela and Peggy with the children while in Lakewood.[330] None of these witnesses observed any inappropriate behavior or anything they considered indicative of sexual abuse.[331]

In addition to the substantial evidence exculpating Pamela from the sexual abuse allegations, Dean's expert, Mr. Rhodes, admitted that he held significant anti-gay bias which affected his "expert" evaluation in this case. Indeed, the following exchange occurred between Pamela's counsel and Mr. Rhodes in open court:

> Q. * * * I'm just trying to separate out here what part of this report is your conclusions and your recommendations that Pamela Hertzler no longer have contact with her children and her partner, Peggy Keating, no longer have any kind of contact with the children that they have cared about and loved. . . . I'm trying to figure out is it your professional judgment that leads you to these conclusions or is it your moral judgment that leads you to these conclusions.
>
> A. I believe I made that clear in the report, that if indeed there is sexual abuse taking place, then there should not be any contact and I base that on the sexual abuse and then I added the other possibility, and I label that as my value system. I made that very clear that I was speaking from my value system around the homosexuality. You see, I don't see the homosexual issue as being the primary issue here. I see that as a side issue and I think the sexual abuse is the primary issue in the recommendation that I made.

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327. The court rejected the motions and arguments of Pamela's counsel, made prior to and during trial, that Mr. Rhodes should not be qualified as an expert witness due to his lack of qualifications and admitted anti-gay bias. *See* Tr. at 88-99.

328. Tr. at 101-02, 225, 256.

329. *Id.* at 225, 393, 540.

330. *Id.* at 507-09, 516-17.

331. *Id.* at 509, 517, 527-28. The witnesses also stated that they would have no reservations whatsoever entrusting Pamela and Peggy with their own young children or grandchildren. *Id.* at 498, 519, 529, 540-41.

Q. I agree with you.

A. It is an issue, the homosexuality is an issue, but it's not the primary issue. It's a secondary issue.

Q. As an issue in this case, Mr. Rhodes, if homosexuality is an issue in this case, then the recommendations that you gave to this Court are not expert recommendations, but the recommendations of a layman; isn't that correct?

A. Well, you see, in the realm of morality and a religion, I'm supposed to be an expert there, too.

Q. That's not what you were retained for, was it, Mr. Rhodes?

A. That's correct, and that's why I labeled that as my opinion.

Q. So let me get this straight. Your recommendations of sexual abuse are based on your professional judgment?

A. Um-hum.

Q. Your recommendations on the termination of contact between Pamela Hertzler and Peggy Keating and those children based on their homosexuality is based on your moral judgment?

A. Partially.

* * *

Q. So you can't tell us what weight—what weight your professional judgment and what weight your moral judgment had in that conclusion?

A. I hadn't thought about it in those terms.

Q. So that's a no?

A. Given some time, I probably could.

Q. Can you do so now?

A. In terms of homosexuality, the greater weight would go to the moral issue simply because there is in the professional area so much confusion around the effects of homosexuality and how people become homosexual, what happens when kids are exposed to it, there's a lot of confusion there, so it's tough to make a professional, absolute determination there.[332]

Just as Mr. Rhodes readily acknowledged his anti-gay bias, Dean's other expert, Dr. Brungardt, admitted during trial that she had not been given sufficient information with which to make a diagnosis that Miriam had been sexually abused.[333] The information Dean supplied to Dr. Brungardt was that Miriam had been masturbating frequently and that Miriam had disclosed to a family counselor in Greeley that Pamela and Peggy had sexually abused her.[334] Dean did not, however, inform Dr. Brungardt of many factors which she considered important in determining the veracity of sexual abuse allega-

332. *Id.* at 476-79.
333. *Id.* at 193-95.
334. *Id.* at 193-95.

tions. For example, Dr. Brungardt did not know that Miriam had been questioned about sexual abuse twelve to fifteen times prior to the "disclosure" while Christine was applying medication to Miriam's vaginal area.[335] Dr. Brungardt said her awareness of some of these facts compelled her to want to re-interview or re-evaluate her conclusion that a "probability" of sexual abuse existed.[336]

K. *The Trial Court's Decision*

Despite the overwhelming weight of evidence favoring Pamela's innocence and fitness as a mother and Mr. Rhodes's admitted bias against Pamela, the trial court relied almost exclusively on Mr. Rhodes's "expert" opinions in finding[337] that "eroticization"[338] of the children had occurred during visits with Pamela. The court further concluded that the children were "subjected to inappropriate sexual behavior while visiting" Pamela and Peggy Keating.[339] The court's conclusion credited the testimony of Dean, Christine, and Mr. Rhodes as to the behaviors in which Joshua and Miriam allegedly engaged and the purported causal relation between those behaviors and sexual abuse.

The court rejected the testimony of Pamela's experts, Drs. Jenny and Bloom, stating that it was not "useful or credible."[340] The court claimed that Dr. Jenny "simply disregarded any evidence which conflicted with her conclusion that there had been no inappropriate behavior"[341] and that she failed to consider the statements Miriam made to Dr. Brungardt.[342] The trial court similarly rejected Dr. Bloom's expert opinions, stating that "Dr. Bloom initially failed to consider the intensity of the conduct of Miriam following visitation, but then admitted that such conduct could be an indicator of sexual abuse. He also admitted to making over-statements and inaccurate quotations in what I found to be important portions of his report."[343] The trial court also opined that Drs. Jenny and Bloom "focused extensively on what they believed to be deficiencies in how the Defendant [Dean] responded to the

335. *Id.* at 198-99. Other information that Dean did not share with Dr. Brungardt was that Dean had raised the sexual abuse allegations in the context of a domestic relations dispute, *id.* at 196, that he and Christine had been gathering "evidence" against Pamela since Thanksgiving 1993, *id.* at 197, that Miriam's "disclosures" had been made to a counselor retained by Dean specifically to evaluate Dean's allegations of sexual abuse, *id.* at 195, that Miriam also "disclosed" the names of her brother and an Ohio family to her counselor, *id.* at 198, and that Miriam had medication applied to her labia approximately 30 times before Dean contacted a doctor, *id.* at 201-02.

336. *Id.* at 202.

337. These findings were set forth in a Decision Letter issued by the court on July 21, 1994, and subsequently incorporated into an Order dated Sept. 8, 1994. *See* Decision Letter, *Hertzler*, No. 24-269 (July 21, 1994) [hereinafter Decision Letter]; Court Order, *Hertzler*, No. 24-269 (Sept. 8, 1994) [hereinafter Court Order I].

338. Decision Letter at 2. The term "eroticization" was never defined by Mr. Rhodes or the court.

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

situation."[344]

Other than criticizing Dr. Jenny for failing to credit Miriam's statements to Dr. Brungardt, the court did not discuss Dr. Brungardt's testimony in its findings.

Based upon its conclusion that the children experienced "eroticization" and had been exposed to "inappropriate sexual behavior" while in Pamela's care, the court restricted Pamela's visitation with her children to six supervised Saturday and Sunday visits per year (no overnight visits), and one phone call per week, and prohibited Peggy from all contact with the children.[345] The court ordered the parties to jointly select a counsellor and further directed that "both parties and the children participate in counseling regarding the children's sexual expressions, the Defendant's [Dean's] attitude toward the Plaintiff [Pamela] as portrayed to the children, the children's relationship with each parent and future visitation."[346] The court ordered the parties and the counsellor to file a report by January 1, 1995, "indicating the parties' compliance with this order and any recommendations or conclusions reached."[347]

The court further addressed "the impact of the Plaintiff's [Pamela's] lifestyle on her visitation with the children."[348] The court opined that "[h]omosexuality is inherently inconsistent with families, with the relationships and values which perpetuate families,"[349] and continued:

> The moral climate in which children are raised is an important factor in child custody and visitation. The Plaintiff's open homosexual relationship creates much of the moral climate surrounding her life. The moral climate is probable to have an effect on the children's development of values and character which is inconsistent with that supported by the Defendant or society.
>
> Because the Plaintiff's open homosexuality has and is likely to create confusion and difficulty for the children, and because her lifestyle is likely to negatively affect the development of the children's moral values, and because the State has an interest in supporting conventional marriages and families, the Court would find it appropriate to reduce the Plaintiff's visitation with the children even if the issues of sexual abuse or eroticization were resolved.[350]

Pamela filed a timely appeal of the court's decision with the Wyoming Supreme Court.[351]

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344. *Id.*
345. *Id.* at 3.
346. *Id.* at 4.
347. *Id.*
348. *Id.*
349. *Id.* at 5.
350. *Id.*
351. Wyoming has no intermediate appellate courts. WYO. CONST. art. 5, § 18.

L. *Evaluation by Dr. Rachael Moriarty and the Ensuing Post-trial Proceedings*

In compliance with the trial court's mandate that the parties and the children obtain counseling, Pamela agreed to a counselor suggested by Dean—Dr. Rachael Moriarty of Fort Collins, Colorado.[352] In her report to the trial court dated December 20, 1994,[353] Dr. Moriarty concluded that the children had not, as the trial court found, been sexually abused, and that Dean's unrelenting efforts to convince them otherwise constituted severe emotional abuse which would cause serious long term harm if not terminated.[354] Dr. Moriarty recommended that full visitation be restored to Pamela, that the therapy continue for the parties and the children, and that custody be changed to Pamela if Dean did not cease his attempts to alienate the children from their mother.[355] Braced with Dr. Moriarty's report, Pamela petitioned the trial court for full restoration of her visitation rights as established in the February 26, 1992, order,[356] and sought a T.R.O. enjoining Dean from continuing to alienate the children joined with a motion to show cause why Dean should not be held in contempt for violating the previous court orders forbidding such conduct.[357]

On January 31, 1995, the trial court held a five-and-one half hour hearing on Pamela's motions.[358] Dr. Moriarty testified, as did Pamela and two of the social workers who had supervised her visits with Joshua and Miriam.[359] Pamela's counsel also called Dean and Christine to the witness stand.

With the aid of transcriptions Pamela obtained of her telephone conversations with her children,[360] the testimony of Dr. Moriarty,[361] and the testimony of the visitation supervisors,[362] Pamela unequivocally discredited

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352. Dr. Moriarty is board certified in clinical psychology with more than 15 years experience as a therapist and extensive training and experience in the diagnosis and treatment of sexually abused children. Transcript of Motions Hearing, at 6-7, *Hertzler*, No. 24-269 (Jan. 31, 1995) [hereinafter Motions Tr.].

353. Dr. Rachel Moriarty, Ed.D., Psychological Report on the Hertzler Family, *Hertzler*, No. 24-269 (Dec. 20, 1994) [hereinafter Moriarty Report].

354. *Id.* at 2.

355. *Id.* at 4.

356. Plaintiff's Motion for Relief from Judgment, *Hertzler*, No. 24-269 (Jan. 10, 1995).

357. Plaintiff's Motion for a T.R.O. and to Show Cause, *Hertzler*, No. 24-269 (Jan. 10, 1995).

358. Testimony from the Jan. 31, 1995 Hearing and Accompanying Exhibits, *Hertzler*, No. 24-269 [hereinafter Tr. II and Tr. II Ex.].

359. Christine supplied extensive written reports to the court about what purportedly happened during the phone calls with Pamela and during supervised visits. Tr. II Ex. 4. Her accounts were based upon the information obtained from Joshua and Miriam when she questioned them after each visit with Pamela. Tr. II at 123-24. For example, Christine reported that on a supervised visit on October 16, 1994, "Pam and Miriam slept in a waterbed beneath the covers while behind a closed bedroom door." *See* Tr. II at 137-38 (discussing trial Exhibit 6). The supervisor testified that this conduct never occurred and that, in fact, Pamela was never alone with the children during this visit. Tr. II at 137-38.

360. Tr. II at 100-29, 142-71; Tr. II Exs. 6, 7, 8. Christine testified that her reports to the court, including numerous quotes from conversations between Pamela and her children which supposedly upset the children, were completely accurate. Tr. II at 103, 114-15, 118. Actual transcripts of the taped conversations introduced into evidence by Pamela's counsel revealed that Christine's "verbatim" accounts were largely fictional. Tr. II Ex. 8.

361. Tr. II at 6-94, 180-88.

362. The supervisors for Pamela's visitation, Dora Zamora and Rob Branhan, were social

Dean's and Christine's representations that any contact with Pamela, even under supervised conditions, caused the children to act out in sexually or other inappropriate ways.

Moreover, after being recognized by the court as an expert witness,[363] Dr. Moriarty testified at length about the basis for the conclusions in her report.[364] Dr. Moriarty also explained, as Drs. Jenny and Bloom had at the initial trial, the flaws in the methodology used by Dean's trial expert, Mr. Rhodes, in concluding that the children had been "eroticized."[365]

Dr. Moriarty specifically reported on a conversation with Mr. Rhodes after the case had been referred to her. In that conversation, Mr. Rhodes conceded that he was not aware that Miriam had been coached by Christine to tell him that Peggy and Pamela had sexually abused her.[366] Mr. Rhodes also told Dr. Moriarty that his conclusions were ultimately based on "a gut feeling" that the children had been eroticized and that Peggy was somehow responsible for this condition.[367] Dean tried to discredit the conclusions reached by Dr. Moriarty, the counsellor he had selected.[368]

At the conclusion of the hearing on January 31, 1995,[369] and in subsequent writings,[370] the court expressed disappointment that Dr. Moriarty's counseling failed to address the children's "eroticization." The court stated:

> The Court further finds that counselling [sic] did not address the eroticization which the Court found to have occurred in its Order of September 8, 1994, and no progress has been made in assuring that future visitation is not accompanied by eroticization or inappropriate sexual expression by the children. Plaintiff [Pamela] continues to deny that the children were eroticized or exposed to any inappropriate sexual behavior while in her care. There is no indication that the Plaintiff recognizes any concern about the sexual activity of the children which previously accompanied visitation, and there is no indication that the parties will work together to prevent or address such activity.[371]

The court directed continued counseling with Dr. Moriarty, although Dean was allowed to select a different counselor for himself provided that the person he selected was willing to work with Dr. Moriarty.[372] The court also recognized that Dean had violated previous court orders by continuing to

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workers employed by the Wyoming Department of Family Services. *Id.* at 129-41.

363. *Id.* at 9.

364. *Id.* at 6-94; Tr. II Ex. 2.

365. Tr. II at 20-21, 58-60.

366. *Id.* 59-60.

367. *Id.*

368. *Id.* at 63-87.

369. *Id.* at 182-86.

370. Letter from District Judge Keith Kautz to Counsel, *Hertzler*, No. 24-269 (Feb. 13, 1995); Court Order, *Hertzler*, No. 24-269 (Mar. 6, 1995) [hereinafter Court Order II].

371. Court Order II at 2.

372. *Id.* (requiring that a "report on the results of such counseling" be filed by the end of 1995).

exhibit "his extremely negative attitude" toward Pamela in front of her children, but imposed no sanctions for Dean's behavior other than again ordering him to cease monitoring the children's phone conversations with Pamela.[373] The court recognized Pamela's parents as appropriate supervisors for her visits with her children and marginally expanded her visitation schedule to include one week in June and one in August, three weekends, and the five days preceding New Year's Day.[374] The court continued to bar all contact between the children and Peggy.[375]

In short, the trial court's ruling on Pamela's motions did not alter its previous findings that: (1) the children had been exposed to inappropriate sexual behavior or "eroticized" while in Pamela's care; (2) that homosexuality renders a parent per se immoral and unfit; (3) that Pamela's visitations with her children should continue to be supervised and severely curtailed; and (4) that the children could have no contact with Pamela's life-partner, Peggy.

M. *Appeal to the Wyoming Supreme Court*

Pamela's consolidated challenge to the trial court's Orders of September 8, 1994, and March 6, 1995,[376] was three-fold. Pamela first argued that there was no credible factual evidence of record that Joshua or Miriam had been sexually abused; second, that there was no credible expert evidence supporting a finding of sexual abuse; and, finally, that there was no evidence to support the trial court's determination that Pamela's sexual orientation alone provided sufficient grounds to reduce her visitation to a de minimus level[377] or that Peggy should be excluded from the children's lives.[378]

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373. *Id.* at 1-2.

374. *Id.* at 3.

375. *Id.*

376. Pamela appealed the court's March 6, 1995, order and moved to consolidate it with the pending appeal of the September 8, 1994, decision. The Wyoming Supreme Court denied Pamela's motion to consolidate but subsequently granted her motion to supplement the record in her existing appeal with the testimony and exhibits from the January 31, 1995, hearing. Thus, Dr. Moriarty's findings and the record of the January 31, 1995, proceedings were before the Wyoming Supreme Court but were not fully briefed by the parties.

377. *See* Brief of Plaintiff-Appellant Pamela M. Hertzler, Hertzler v. Hertzler, 908 P.2d 946 (Wyo. 1995) (No. 94-262) [hereinafter Br. of Plaintiff-Appellant].

378. As Pamela explained in her brief, courts have long recognized that children are not harmed by maintaining a close relationship with a gay or lesbian parent. *See, e.g., In re* Marriage of Ashling, 599 P.2d 475 (Or. Ct. App. 1979) (reversing the trial court's order that a lesbian mother could not have other lesbians in her home when her three children visited). In *Ashling*, the appeals court noted that the three children were aware of their mother's sexual preference, that the mother had sexual relations in her home when the children were staying there but not in their presence, and that the mother behaved affectionately toward other women in front of the children. *Id.* at 476. In striking down the no-other-lesbians condition on visitation, the court stated:

> We find nothing in the present record to justify such a restrictive provision. So long as the mother's sexual practices remain discreet a requirement whatever the sexual preferences of the parties might be . . . and the presence of lesbians in the home from time to time does not of itself create difficulties for the children of a greater magnitude than that suggested by this record, the restriction is inappropriate.

Id. (citation omitted); *see also In re* Marriage of Birdsall, 243 Cal. Rptr. 287 (Cal. Ct. App. 1988) (refusing to limit gay father's visitation rights when evidence did not indicate that contact with homosexuals caused any detrimental effects to child); Pleasant v. Pleasant, 628 N.E.2d 633 (Ill.

To facilitate the argument that Dean and Christine's factual reports about the children's behaviors lacked credibility, Pamela explained in the text of her brief[379] and illustrated in a time-line graphic included in her appendix[380] that the behaviors of Dean and Christine were totally inconsistent with those of parents who believed their children were being sexually abused.[381] Pamela also pointed out, as had the testimony of Drs. Bloom and Jenny and empirical data presented to the trial court in her trial and post-trial briefs, that gay and lesbian parents are just as capable of raising healthy, well-adjusted children as are their heterosexual counterparts.[382] The primary thrust of Pamela's appeal, however, was that the trial court abused its discretion[383] in recognizing Mr. Rhodes as an expert and in crediting his "expert" opinions over the testimony of Drs. Bloom, Jenny, and Moriarty.

As to Mr. Rhodes, Pamela argued that his qualifications fell far short of the standards required of witnesses qualified by Wyoming courts as "child

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App. Ct. 1993) (reinstating lesbian mother's right to unsupervised overnight visitation with her son at the home she shared with her partner and finding that son's attendance at a gay/lesbian pride parade and his exposure to hugs and kisses between his mother and her partner were not detrimental); *In re* Marriage of Walsh, 451 N.W.2d 492 (Iowa 1990) (striking down visitation restriction on gay father prohibiting the presence of any "unrelated adult" when evidence showed father to be a good, loving, and responsible parent); Bezio v. Patenaude, 410 N.E.2d 1207 (Mass. 1980) (stating that, in the absence of evidence to the contrary, mother's homosexuality alone bore no relevance to parental fitness); Johnson v. Schlotman, 502 N.W.2d 831 (N.D. 1993) (allowing regularly scheduled, unsupervised, overnight visitation with children in the home lesbian mother shared with her partner); Large v. Large, No. 93AP-735, 1993 Ohio App. LEXIS 5810 (Ohio Ct. App. Dec. 2, 1993) (holding that mother's involvement in a lesbian relationship is merely one factor to consider when assessing the children's best interest in a custody or visitation dispute and stating that even if the lesbian relationship imposed some difficulties on the children, expert testimony demonstrating that a loving and supportive environment, combined with a good explanation of the situation, would allow the children to adjust to any negative situation they might encounter due to the relationship); Blew v. Verta, 617 A.2d 31 (Pa. Super. Ct. 1992) (overturning visitation limitations because of a lack of evidence linking parental sexual orientation to child's disruptive behavior); Barron v. Barron, 594 A.2d 682 (Pa. Super. Ct. 1991) (upholding trial court's order allowing extensive visitation rights for lesbian mother and refusing to limit contact with mother's partner); Stroman v. Williams, 353 S.E.2d 704 (S.C. Ct. App. 1987) (finding that mother's homosexuality did not justify change in custody when evidence did not show that mother's sexual preference harmed the child); *In re* Marriage of Cabalquinto, 718 P.2d 7, 8 (Wash. Ct. App. 1986) (striking down restriction on gay father that would have allowed visitation only when the father's male companion was not present).

379. Br. of Plaintiff-Appellant at 38-40, *Hertzler*, 908 P.2d 946 (Wyo. 1995) (No. 94-262).

380. *Id.* tbl. 1, at app.

381. *Id.*

382. *Id.* at 58-64. Pamela's position was strongly supported by amicus briefs submitted by various organizations, including the American Psychological Association, the American Civil Liberties Union, and several gay and lesbian legal advocacy groups. *See generally* M.P. v. S.P., 404 A.2d 1256, 1263 (N.J. Super Ct. App. Div. 1979) (suggesting that exposure to others' adverse reactions to gay parents might actually better prepare children for developing their own moral standards); *Blew*, 617 A.2d at 31 (noting that other people's reactions to a parent's homosexuality should not affect child custody determination and that "[o]f primary importance to the child's well-being is the child's full and realistic knowledge of his parents, except *where it can be shown* that exposure to the parent is harmful to the child") (emphasis added).

383. In Wyoming, as in many jurisdictions, the trial court has broad discretion in determining whether a witness is qualified to provide expert testimony. *See generally* Betzle v. State, 847 P.2d 1010 (Wyo. 1993); Montoya v. State, 822 P.2d 363 (Wyo. 1991). In Wyoming, a court abuses its discretion when "it acts in a manner which exceeds the bounds of reason under the circumstances," with the ultimate question being "[w]hether or not the court could reasonably conclude as it did." State v. DDM, 877 P.2d 259, 262 (Wyo. 1994).

sexual abuse experts,"[384] and that the error in qualifying Mr. Rhodes as an expert was compounded by his bias against homosexuality which admittedly affected his "expert" opinions in this case.[385] Allowing Mr. Rhodes to mask his private anti-gay bias behind the guise of expert opinion, Pamela reasoned, was directly contrary to both the literal language and the spirit of the applicable rules of evidence.[386]

Pamela also argued that the substantive testimony offered by Mr. Rhodes did not satisfy the criteria for admissibility under Wyoming Rule of Evidence 702[387] and *Daubert*.[388] Pamela urged that the relevance, and hence admissibility, of a proffered expert's testimony hinges upon the reliability of the expert's opinion,[389] and that reliability, in turn, "[is] based on whether the underlying theory is scientifically valid and pertains to the facts of the case."[390] Aside from the aforementioned anti-gay bias which should have rendered the testimony per se unreliable, Pamela argued that the fatal flaws in the methodology Mr. Rhodes employed to diagnose sexual abuse, which included his failure to consider the inconsistencies in Miriam's statements regarding sexual abuse[391] and the impact of Christine's coaching on Miriam's "disclosures,"[392] independently rendered his testimony unreliable.

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384. *See generally* MMOE v. MJE, 841 P.2d 820, 826 (Wyo. 1992) (recognizing "expert" status in person with a Ph.D. and over 30 years experience treating over 1000 children for sexual abuse); Griego v. State, 761 P.2d 973, 978 (Wyo. 1988) (admitting "expert" testimony by the coordinator of a sexual assault service agency who had extensive education, training, and experience in counseling abuse victims). Mr. Rhodes, in contrast, merely had a B.A. in Bible and spent 27 years as a minister with the Church of Christ. He had obtained his M.A. in counseling in 1992 and had only examined five or six children for the purpose of determining sexual abuse when he did the evaluations in this case. He was not yet licensed as a counselor and still had to be supervised by a licensed counselor, but his supervisor did not directly review Mr. Rhodes's methodology or conclusions in this case. Tr. at 88-89, 408-11.

385. Mr. Rhodes's report stated that he saw no characteristics in Pamela, other than lesbianism, that would make her an unfit mother. Ex. 8, at 15.

386. *See* Turpin v. Merrell Dow Pharm., Inc., 959 F.2d 1349, 1360 (6th Cir. 1992) (holding expert opinion inadmissible to the extent that it is personal opinion); Viterbo v. Dow Chem. Co., 826 F.2d 420, 423-24 (5th Cir. 1987) (holding physician's personal opinion of causation inadmissible); Staggs v. Commonwealth, 877 S.W.2d 604, 606 (Ky. 1993) (finding expert witness's personal opinion irrelevant and far more prejudicial than probative when the testimony did not aid the trier of fact in understanding the evidence).

387. Identical to its federal counterpart, Wyoming evidence law allows expert testimony "if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." WYO. R. EVID. 702.

388. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 580 (1993). The Wyoming Supreme Court adopted this position in Springfield v. State, 860 P.2d 435, 443 (Wyo. 1993).

389. *Springfield*, 860 P.2d at 443 (citing *Daubert*, 509 U.S. at 580).

390. *Id.*

391. *See* B.L.E. v. V.A.E., 791 S.W.2d 427, 430 (Mo. Ct. App. 1990) (finding "fragmentary and unrevealing" audiotapes of child's statement insufficient to support allegations of sexual abuse against father); Jane P. v. John P., 515 N.Y.S.2d 365, 368-69 (N.Y. Sup. Ct. 1987) (finding no credibility in statements of three-year-old twin girls regarding alleged sexual abuse by their father where the statements ranged from claims that the "touching" occurred "lots of times" in "all the rooms" of the father's house to statements completely denying any "touching" by the father).

392. *See B.L.E.*, 791 S.W.2d at 430 (finding no evidence of sexual abuse where child's statements could have been the result of coaching by the mother and the influence which may have resulted from the mother's reward of hugs and kisses any time the child made statements implicating the father as an abuser); O.J.G. v. G.W.G., 770 S.W.2d 372, 372 (Mo. Ct. App. 1989) (upholding joint award of custody where evidence indicated that statements by child that father had sexually abused her were prompted by the mother); Swift v. Swift, 557 N.Y.S.2d 695, 697 (N.Y.

Pamela further demonstrated that the trial court's characterization of Dr. Jenny's testimony was completely contrary to her lengthy written report and trial testimony in which she addressed each of the behaviors of which Dean and Christine complained and explained why such behaviors did not indicate sexual abuse.[393] Pamela also challenged the trial court's concern that Dr. Jenny failed to consider Miriam's statements to Dr. Brungardt on two levels. First, Pamela argued, the trial court's finding was factually incorrect; Dr. Jenny had considered Miriam's statements but found this "evidence" suffered from the same flaws—primarily the repeated coaching of Miriam—which rendered Miriam's "disclosures" to Mr. Rhodes invalid.[394] Second, Pamela pointed out that the court's finding was inconsistent because Dr. Brungardt readily conceded that she would have to reconsider her own crediting of Miriam's statements in light of the facts that were withheld from her during her examination of Miriam.[395]

Pamela challenged the trial court's dismissal of Dr. Bloom's conclusions by demonstrating the direct contradiction between the trial court's characterization of Dr. Bloom's testimony, which included a charge that Dr Bloom admitted "making overstatements and inaccurate quotations," and Dr. Bloom's actual testimony at trial.[396]

Due to the procedural posture of the case, Dr. Moriarty's testimony was not fully briefed to the court.[397] In her Reply Brief to her original appeal, however, Pamela summarized how Dr. Moriarty, who was Dean's chosen expert, had independently confirmed the findings of Drs. Bloom and Jenny that no sexual abuse had occurred and that the actions of Dean and Christine were harming the children.[398] Pamela also noted Dr. Moriarty's criticism of the methodology employed by Mr. Rhodes in concluding that the children had been eroticized.[399]

Finally, Pamela focused on the lower court's own language as proof that the court improperly substituted its own judgment for that of the competent

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App. Div. 1990) (invalidating claims of abuse based on a showing at trial of mother's strong motivation to influence her three-year-old daughter that her father had sexually abused her).

393. *See* Dr. Jenny's report, Plaintiff's Exhibit 15, at 6, *Hertzler*, No. 24-269 (July 6, 1994); Tr. at 716-74 (Dr. Jenny's direct and cross examination).

394. Tr. at 747-52.

395. *Id.* at 193-202.

396. Br. of Plaintiff-Appellant at 47-49. Pamela pointed out, for example, that Dr. Bloom did not admit (nor was he ever asked to admit) to making any "overstatements," and that while he conceded to mistakenly placing a few words in quotes regarding the number of persons Miriam accused of molesting her during Mr. Rhodes's videotaped interview, the content of the statement was correct despite the errant quotation marks. *Id.* at 48 (citing Tr. at 680).

397. As previously noted, the Wyoming Supreme Court granted Pamela's Motion to Supplement the record of her pending appeal with the transcript and exhibits of the January 31, 1995, hearing. *See supra* note 376. Since the court did not order additional briefing regarding Dr. Moriarty's findings or the proceedings of January 31, 1995, the only textual treatment on those topics is contained in Pamela's Motion to Supplement and her Reply Brief submitted in the original appeal. *See* Appellant's Motion to Supplement at 2-3, *Hertzler*, 908 P.2d 946 (Wyo. 1995) (No. 94-262); Appellant's Reply Brief at 2-5, *Hertzler*, 908 P.2d 946 (Wyo. 1995) (No. 94-262) [hereinafter Appellant's Reply Br.].

398. Appellant's Reply Br. at 4.

399. *Id.*

expert testimony on the subject of sexual abuse. The trial court stated: "*Beyond the testimony of experts,* I find that it has been demonstrated by a preponderance of the evidence that Miriam and Joshua have been exposed to sexual behavior inappropriate to their ages while visiting with Plaintiff."[400] Pamela argued:

> When the court's statement is read in light of its condemnation of gay and lesbian parents in the second half of its Decision Letter, two things become readily apparent. First, the judge erred in rejecting the compelling evidence presented by Plaintiff's experts who possess decades of experience in the delicate area of child sexual abuse in favor of his own amateur analysis. Second, all conclusions reached by the trial judge were tainted by his belief that *any* exposure to a gay or lesbian parent constitutes exposure to "inappropriate sexual behavior." A review of the record in this case established that the only way the court could independently conclude that Plaintiff had exposed her children to "inappropriate sexual behavior" is if, perhaps even unconsciously, the court embraced the stereotypes of homosexuals as sexual perverts and child molesters which have long been disproven by solid empirical data.[401]

N. *The Wyoming Supreme Court's Decision*

By a 3-2 decision, the Wyoming Supreme Court affirmed the trial court's restrictions on Pamela's visitation.[402] In an opinion devoted primarily to vilifying both Pamela and Dean for their continued attempts "to reduce the children to mere proselytes of conflicting lifestyles"[403]—a castigation unwarranted of Pamela based on the record before the court—the supreme court held that the trial court erred as a matter of law by qualifying Mr. Rhodes as an expert and erred in its factual findings based on the testimony of Mr. Rhodes, Dean, and Christine that the children had been "eroticized" while in Pamela's care.[404]

In addition to these errors of law and fact, the supreme court found that the trial court's diatribe about homosexuality and family values constituted an inappropriate indulgence in "an essentially personal viewpoint in derogation of Pamela's lifestyle."[405] The trial court's views on homosexuality were not supported by the "expert" testimony of Mr. Rhodes, the supreme court determined, since Rhodes's "acknowledged homophobic bias vitiate[d] any value his testimony might have [had] as a factual basis for the district court's cri-

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400. Decision Letter at 3 (emphasis added).

401. Appellant's Reply Br. at 9. *See generally* GAY AND LESBIAN PARENTS (Fredrick W. Bozett ed., 1987); Charlotte J. Patterson, *Children of Lesbians and Gay Parent,* 63 CHILD DEV. 1025 (1992); Julie Schwartz Gottman, *Children of Gay and Lesbian Parents,* 14 MARRIAGE & FAM. REV. 177 (1989).

402. Hertzler v. Hertzler, 908 P.2d 946, 952 (Wyo. 1995).

403. *Id.* at 952.

404. *Id.* at 950-51.

405. *Id.* at 951.

tique of homosexuality."[406]

Despite these major flaws in the trial court's decision, the supreme court found no error in the trial court's summary rejection of the evidence presented by Pamela's experts. The supreme court itself dismissed the quality and quantity of this expert evidence in two short paragraphs:

> Dean and Pamela both called expert witnesses to bolster their cases. The district court rejected testimony of Pamela's experts, finding it neither particularly useful nor credible. Our deference to that decision cannot be extended to the district court's inappropriate reliance on the testimony of Dean's expert, Mr. Rhodes. Mr. Rhodes' categorical bias against homosexuality, compounded by his truncated professional experience, necessarily relegate his views to the dubious stature reserved by the district court for the opinions of Pamela's experts.
>
> Entirely discounting the "expert" testimony, we nonetheless discern a substantial basis in the record upon which to sustain the district court. Searching the record for abuse of discretion, we cannot say, under the circumstances revealed, that the district court's decision was either arbitrary or capricious.[407]

The supreme court's wholesale rejection of expert testimony in deference to the trial court is ironic at best and dangerous at worst. As previously discussed, the supreme court renounced the trial court's reliance on Mr. Rhodes due not only to Mr. Rhodes's lack of qualifications but also because of his bias; the court further recognized that the trial court's personal bias improperly influenced its decision. Despite the finding, the court gave complete deference to the trial court's conclusory rejection of Pamela's compelling expert evidence without addressing the need for experts in a case involving child sexual abuse, the standards for expert witnesses, or the admissibility and weight that should have been afforded Pamela's trial experts Drs. Bloom and Jenny. Also conspicuously absent is any discussion of the testimony of Dean's chosen counselor and child sexual abuse expert, Dr. Moriarty, which was presented at the hearing held six months after the trial court issued its initial ruling. The dangerous message conveyed through this opinion is that judges can disregard credible expert testimony and decide cases based on their own personal beliefs without fear of reversal on appeal.

The supreme court justified its affirmance of the specious trial court opinion by repeatedly retreating to the degree of "discretion" afforded the trial court in visitation and custody matters.[408] Indeed, the supreme court specifically held that the trial court's blanket condemnation of homosexuality did not present "indices of malice or prejudice sufficient to cast doubt upon the court's capacity to remain 'open to the conviction which evidence might produce.'"[409] It concluded by stating that "although we cannot condone the dis-

406. *Id.* at 950.
407. *Id.*
408. *Id.*
409. *Id.* at 951 (citations omitted).

trict court's indulgence of a personal viewpoint, we likewise cannot reverse a discretionary decision which is reasonable and benefits from substantial support in the record."[410]

The majority opinion begs the question of what "support" there is in the record—much less "substantial support"—for the severe restriction of Pamela's visitation rights other than the (now-discredited) testimony of Mr. Rhodes and the trial judge's own conclusions based largely on his personal bias.

The two dissenting justices answered this fundamental question by observing simply that there was no evidence to support the majority's affirmation of the trial court's restrictions. Specifically, the dissent opined that the personal bias of the judge and the "categorical bias" of Mr. Rhodes, Dean, and Christine mandate "that the district court's decision must be reversed and this matter remanded for a new trial presided over by a judge who does not hold such views."[411] Moreover, the dissent criticized the majority for exceeding its review function by engaging in fact finding, and then finding "facts" not supported in the record:

> As I understand the evidence, the cause of the children's inappropriate behavior is found in the father's and Christine's "zealous machinations," not the mother's.
>
> The record quite clearly reveals that the father and Christine worked long and hard at alienating these children from their mother. They should have been held in contempt for what they have done; instead, they are, despite the spin placed on it by the majority, rewarded for their outrageous behavior.[412]

In addition to the inherent flaws in the majority's reasoning illuminated by the dissent, there is yet another irony underlying the *Hertzler* decision. The majority's recitation of the "facts," including the statements that Pamela was trying to indoctrinate the children to her lifestyle and that this supposed indoctrination was harming the children, finds little support in the record except for the testimony and report of Mr. Rhodes. Thus, while purporting to reject all expert testimony in this case, the majority relies upon—and thus gives credence to—the one "expert" they found uniquely unqualified to render an opinion in this case.

IV. SUGGESTIONS FOR HEIGHTENED SCRUTINY OF EXPERT TESTIMONY IN CHILD SEXUAL ABUSE CASES

> It is evident, from the kinds of testimony given by experts in the mental health and medical fields, and from the untested and therefore undocumented reliability and validity of the evaluative techniques, that few safeguards exist for people, whether parents or surrogate care providers, who are wrongly but vigorously accused of having molest-

410. *Id.* at 952.
411. *Id.* at 953.
412. *Id.* at 954.

ed a child under their care or supervision.[413]

A comparison of the general evidentiary standards governing expert witnesses with the particularly flawed application of those standards by the Wyoming courts in *Hertzler* suggests that a three-tiered examination of a proffered expert testimony is necessary in cases where gay or lesbian parents are accused of child sexual abuse. At each level of evaluation, the trial court must be sensitive to the corrupting impact that anti-gay bias may have had on the information obtained by the expert and the conclusions gleaned by the expert from the information. This author advocates that any degree of bias should be sufficient to prevent a witness from being qualified as an expert; at a minimum, demonstrations of bias should substantially undermine the credibility of the expert witness.

First, it must be established that the proffered expert possesses significant experience in diagnosing sexual abuse *and* is familiar with the empirical data regarding gay and lesbian parents. Second, the expert's sources of factual information must be carefully examined for reliability in light of the emotionally charged atmosphere in which the allegations are made and investigated. Third, the methodologies and theories which the expert applied to the factual information must be compared to the accepted practices in the expert's field.

It is, of course, highly unlikely that any witness will readily admit personal bias or concede the possible impact of bias on his testimony. Thus, a court reviewing proffered expert testimony must look for indicia of bias which materialize, for example, "in testimony that is emotionally delivered, resistant to change in light of new facts, or delivered with absolute certainty."[414] Subtle distortions of fact, inappropriate emphasis on minor details, and demonstrations of either overt hostility or excessive leniency toward a party also suggest that the expert "may be acting out of personal beliefs and attitudes rather than professional expertise."[415] Due to the importance of this screening process for assuring full and fair adjudication of child sexual abuse allegations made against a gay or lesbian parent, each tier is discussed more fully below.

A. *Heightened Scrutiny of the Expert's Qualifications*

Qualifying an expert on the basis of "knowledge, skill, experience, training or education"[416] allows a significant range of witnesses—from medical doctors to social workers—to qualify as "experts" on the issue of child sexual abuse in any given case.[417] But as Mississippi's highest court advised, "[c]ourts should proceed cautiously when considering the admissibility of expert testimony on child sexual abuse. It is vitally important that profession-

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413. Horner & Guyer II, *supra* note 5, at 382.

414. Stephen A. Newman, *Assessing the Quality of Expert Testimony in Cases Involving Children*, J. PSYCHIATRY & L., Summer 1994, at 181, 205.

415. *Id.*

416. FED. R. EVID. 702; *see also* discussion *supra* Part II.A.

417. *See* discussion *supra* Part II.A.; *see also* Newman, *supra* note 414, at 184-86 (cautioning that many so-called experts on child sexual abuse do not possess the requisite experience and other qualifications necessary to make competent determinations).

als offering such testimony be highly qualified. Courts should insist on a thorough showing of expertise before permitting individuals to testify as experts."[418] Some courts have taken this admonition to heart by recognizing, for example, that the "mere fact that one is a licensed and practicing physician hardly suggests expertise in child sexual abuse."[419]

More specifically, courts should require a proffered child sexual abuse expert to demonstrate competency in at least two categories.[420] The first category, "technical expertise," requires a showing that the expert possesses specialized skills in eliciting accurate information from the accused and the child; principle tools of expertise include, for example, proper interviewing techniques[421] and the proper use of anatomically correct dolls.[422] The other category, "cognate expertise," is satisfied by a showing that the expert possesses extensive knowledge in the areas of child development, sexuality and related relevant topics.[423]

In addition to ascertaining an appropriate degree of theoretical and practical experience in the field,[424] courts should make several additional threshold inquiries of a witness proffered as an expert when a gay or lesbian parent is accused of child sexual abuse. First, the witness should be extensively voir dired to ascertain the extent of any personal bias he has against gay and lesbian parents in general and the accused in particular. This is critically important because an expert's attitude about a targeted individual may well be framed by

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418. Goodson v. Mississippi, 566 So. 2d 1142, 1145 (Miss. 1990). For a list of appropriate voir dire questions for child abuse experts, see Schultz, *supra* note 14, at 2.

419. *Goodson*, 566 So. 2d at 1145 n.2.

420. *See* Horner et al., *supra* note 7, at 142-44.

421. Common errors in interviews for determining whether a child was sexually abused include "using peer pressure and rewards, suggesting answers, supplying sexual knowledge and vocabulary, offering information from other child interviews, and forcing children to continue unwanted interviews." Newman, *supra* note 414, at 202-03.

422. Horner et al., *supra* note 7, at 143. The use of anatomical dolls is one type of "play therapy" used to help children of tender years communicate with a therapist or interviewer. The interviewer asks the child questions about the dolls, observes the child's physical handling of them, and then draws conclusions as to whether the child has been sexually abused. Use of the dolls has proven controversial due to the physical construct of the dolls which may include exaggerated sexual organs and the subjectivity inherent in the interviewer's interpretation of the child's play with the dolls. *See* Newman, *supra* note 414, at 198-201; Judy S. DeLoache, *The Use of Dolls in Interviewing Young Children, in* MEMORY AND TESTIMONY IN THE CHILD WITNESS 160, 160-78 (Maria S. Zaragoza et al. eds., 1995) (concluding that little empirical data exists showing that the dolls are effective in determining whether a child has been sexually abused); *see also* discussion of dolls *infra* Part IV.B.1.b.

423. Horner et al., *supra* note 7, at 143. Empirical studies, however, reveal that even when an expert satisfies both categories of expertise, there remains in any given case a significant likelihood of a false-positive finding of child sexual abuse. *Id.* at 144.

424. Although actual experience may be relevant in determining whether a particular individual meets the legal criteria for an expert witness, there is "a considerable and consistent body of research that runs contrary to the belief that experience improves clinicians' diagnostic or predictive accuracy." David Faust, *Use and Then Prove, or Prove and Then Use? Some Thoughts on the Ethics of Mental Health Professionals' Courtroom Involvement*, 3 ETHICS & BEHAV. 359, 373 (1993). The counter-intuitive finding that experience does not necessarily correlate with competence stems from the lack of feedback regarding a clinician's judgments, biases caused by self-fulfilling prophesies, and systematic errors in a clinician's practice that are never uncovered. *Id.* Psychologist Faust concludes that "given the current conditions under which we practice in the mental health field, there are strong empirical and theoretical reasons to question the stereotype that experience is the best teacher or even an effective one." *Id.*

the expert's attitude toward the individual's defined population.[425] Second, the witness should be questioned as to whether the parent's sexual orientation affected the selection and execution of a diagnostic methodology or influenced his ultimate opinions in the case. Third, the witness should be required to demonstrate significant familiarity with empirical data regarding the parenting skills of gay and lesbian parents. No witness should be deemed an expert if the responses to these lines of inquiry reveal, as they did in *Hertzler*, that the professional opinions are contaminated by personal bias against gay or lesbian parents or are otherwise inherently unreliable due to insufficient knowledge.[426]

Some may argue that these areas of inquiry are inappropriate for determining expert status of a witness because a witness's bias affects only the credibility—and not the admissibility—of the witness's testimony. The more compelling argument, however, is that an expert's opinion contaminated by his personal beliefs is not, as required by federal and state evidentiary rules and the case law interpreting those rules, an opinion based on "scientific, technical or other specialized knowledge [which] will assist the trier of fact to understand the evidence or to determine a fact in issue."[427] Moreover, a biased opinion is arguably irrelevant,[428] and, even if relevant, properly excluded as being more prejudicial than probative.[429] And, as the Supreme Court has recognized, "[p]rivate biases might be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[430] Allowing an individual to provide "expert" testimony contaminated by personal anti-gay animus legitimizes that bias in direct contravention of the Supreme Court's mandate and

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425. Horner & Guyer II, *supra* note 5, at 395.

426. Several courts have rejected "expert" evidence where the witness did not have the requisite knowledge regarding homosexuals to offer a credible opinion in the case. *See, e.g.*, Baker v. Wade, 553 F. Supp. 1121, 1131 (N.D. Tex. 1982) (discounting testimony of psychologist who favored retaining Texas sodomy statute because expert's opinions were neither based on his independent research nor supported by literature in his field regarding the attributes of homosexuals), *rev'd on other grounds*, 769 F.2d 289 (5th Cir. 1985); Doe v. Doe, 452 N.E.2d 293, 296 n.2 (Mass. 1983) (finding that because of expert psychiatrist's personal experience regarding his theories and the lack of supporting medical literature, his testimony that mere association between minor child and homosexual parent would harm child was not credible).

427. FED. R. EVID. 702. *See, e.g.*, Turpin v. Merrell Dow Pharm., Inc., 959 F.2d 1349, 1360 (6th Cir. 1992) (stating that an expert opinion is inadmissible to the extent that it is a personal opinion); Viterbo v. Dow Chem. Co., 826 F.2d 420, 424 (5th Cir. 1987) (holding a physician's unsupported personal opinion of causation inadmissible); Staggs v. Commonwealth, 877 S.W.2d 604, 606 (Ky. 1993) (finding expert witness's personal opinion was irrelevant and far more prejudicial than probative because the testimony did not aid the finder of fact in understanding the evidence).

428. The Supreme Court, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, reiterated that relevancy is the threshold requirement for all evidentiary determinations including the admissibility of a proffered expert's testimony. 509 U.S. 579, 586-93 (1993).

429. FED. R. EVID. 402 and its state law counterparts provide that, in general, relevant evidence is admissible and irrelevant evidence is inadmissible, while FED. R. EVID. 401 and many of its state law counterparts define relevant evidence as that which makes an important fact more or less probable than it would be without the evidence. FED. R. EVID. 403 and its state law counterparts provide that even relevant evidence may be excluded for a variety of reasons, including unfair prejudice and confusion of the issues. Under these standards, an expert's attempt to cloak his personal biases in the guise of a professional opinion renders that opinion irrelevant, and even if deemed relevant, make it more prejudicial than probative.

430. Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

numerous rules of evidence.

Such contaminated testimony is also forbidden pursuant to the ethical constraints adopted by the many disciplines from which experts on child sexual abuse are routinely selected.[431] For example, the "Guidelines for Child Custody Evaluations in Divorce Proceedings," adopted by the American Psychological Association (APA) in 1994,[432] caution "psychologists to be aware of personal and societal biases"[433] relating to sexual orientation and further mandate that psychologists "must not rely on their own bias or unsupported beliefs when rendering opinions."[434] A psychologist who cannot overcome his bias is instructed to withdraw from the evaluation.[435] Although the APA guidelines are described by their drafters as "being aspirational in intent,"[436] psychologists "who do not follow them will be operating outside the standard of practice as set forth by the parent organization" which governs their profession.[437]

Similar guidelines apply to social workers, counselors, and others who are among the 60,000 members of the American Counseling Association (ACA). A position paper authored by the ACA's Human Rights Committee states that members should "engage in [an] ongoing examination of his/her own attitudes, feelings, stereotypic views, perceptions and behaviors that might have prejudicial or limiting impact on . . . gay/lesbian persons,"[438] and should be active in trying to educate others and eliminate discrimination against gay and lesbian individuals.[439]

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431. For an excellent overview of the ethical constraints on the role of the mental health and other expert witnesses, see *Special Issue: The Ethics of Expert Witnessing*, 3 ETHICS & BEHAV. 223 (1993); *see also* Diane H. Schetky, *Ethical Issues in Forensic Psychiatry*, *in* ETHICS & CHILD MENTAL HEALTH 265, 266 (Jocelyn Y. Hattab ed., 1994) ("The psychiatrist needs to consider whether her own strong personal beliefs preclude involvement in a particular case. Homophobia or bias towards mothers having custody would preclude an objective assessment of a gay father seeking custody of his child."); Sari H. Dworkin & Fernando Gutierrez, *Counselors Be Aware: Clients Come in Every Size, Shape, Color, and Sexual Orientation*, 68 J. COUNSELING & DEV. 6, 7 (1989) (noting that many therapists lack knowledge about their gay, lesbian and bisexual patients in direct violation of their ethical standards as members of the American Association for Counseling and Development).

432. *See generally* MATHILDA B. CANTER ET AL., ETHICS FOR PSYCHOLOGISTS—A COMMENTARY ON THE APA ETHICS CODE (1994) (explaining, among other things, the importance of Standard 1.08, which requires respect for human differences including those based on sexual orientation; Standard 1.10, which mandates nondiscrimination on the basis of sexual orientation among other factors; and Standard 7.01, defining professionalism as including knowledge and competence for expert witnesses especially where specialized knowledge of a specific population is required).

433. Ackerman, *supra* note 143, at 130, app. at 133. The APA revoked the membership of a psychiatrist for violating its ethical principles when the psychiatrist misrepresented the empirical data regarding homosexuality in a variety of forums. *See* Patricia J. Falk, *The Prevalence of Social Science in Gay Rights Cases: The Synergistic Influences of Historical Context, Justificatory Citations, and Dissemination Efforts*, 41 WAYNE L. REV. 1, 65 n.247 (1994) [hereinafter Falk, *Prevalence of Social Science*].

434. Ackerman, *supra* note 143, at 131, app. at 133.

435. *Id.* app. at 133.

436. *Id.* at 129.

437. *Id.*

438. Position Paper of the Human Rights Committee of the American Association for Counseling and Development 1 (1987), *quoted in* Dworkin & Gutierrez, *supra* note 431, at 6. The ACA previously operated under the name of the American Association of Counseling and Development.

439. *Id.*

In sum, the failure of an otherwise qualified expert to follow the standards of ethics and professionalism established by her own discipline provides sufficient grounds for excluding her proffered testimony because such testimony fails to satisfy the "generally accepted" criterion of *Frye* and *Daubert*.

The third line of suggested inquiry before qualifying a witness as an expert—i.e. whether the expert is familiar with the empirical data on gay and lesbian parents—is also critical. Knowledge of this data indicates an appropriate sophistication regarding the overall atmosphere in which the allegations of sexual abuse have been raised. Moreover, the witness will undoubtedly be asked to comment on whether the parent's sexual orientation, even absent the allegations of sexual abuse, is harmful to the child. A witness unfamiliar with the data on gay and lesbian parents does not possess the knowledge base necessary to form a credible opinion on that issue. In this respect, requiring familiarity with empirical data on gay and lesbian parents is simply a logical extension of the "cognitive expertise" prerequisite for qualification as an expert witness.

B. *Heightened Scrutiny of the Sources of Factual Information Upon Which a Proffered Expert's Opinion is Based*

Expert opinion is based upon facts. Inaccurate facts "directly lead to erroneous opinions."[440] Unfortunately, the procedures commonly used by experts and others to gather the facts surrounding allegations of child sexual abuse are commonly rife with opportunities for inaccuracy. As one family law judge with substantial experience in child sexual abuse cases concluded: "[e]xperts, with the best of intentions, often come to their conclusions using incompetent and incomplete evidence, without regard for even the most basic due process safeguards."[441]

Civil cases in which allegations of child sexual abuse are raised often share a common sequence of events.[442] The child first makes a statement suggesting inappropriate sexual behavior by the accused. The child's statements may be spontaneous, but more frequently are given in response to probing and potentially coercive questioning by the accuser or other adult. The following scenario is not uncommon:

> Mistrustful and/or sexually preoccupied parents might misperceive innocent bathing or toileting of the child by the estranged spouse as evidence of sexual molestation. Washing, powdering, or drying of the genital or anal area may be viewed as genital or anal fondling. In these situations, the child might respond positively to the question, "did Daddy touch your private parts?"[443]

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440. Rotlevy, *supra* note 26, at 274.

441. Gallet, *supra* note 24, at 480.

442. *See generally* Ralph Underwager et al., *Interrogation as a Learning Process*, *in* ACCUSATIONS OF CHILD SEXUAL ABUSE 19, 19-30 (Hollida Wakefield & Ralph Underwager eds., 1988).

443. Arthur H. Green, *Factors Contributing to False Allegations of Child Sexual Abuse in Custody Disputes*, 15 CHILD & YOUTH SERVICES 177, 179 (1991).

Next, the adult to whom the information is revealed—often a person who is not an expert on sexual abuse—interprets the information as evidence of sexual abuse. The accuser's attorney then rephrases and reinterprets the statements to support allegations in civil pleadings. After litigation is commenced, the child undergoes extensive physical and psychological evaluations by professionals retained as experts by the parties. Finally, the experts offer conflicting opinions as to whether the child's statements and behavior confirm or negate the veracity of the allegations.

Throughout this process, the child is encouraged to tell and retell the story as remolded by a series of interpreters. Ultimately, the retelling and reinterpretation of the child's original statement and previous and subsequent behaviors yields a result about as reliable as the child's game of "telephone," where a message is whispered from player to player until the communication made to the last player lacks even a remote resemblance to the content or import of the initial statement. An expert's reliance on this potentially distorted message from the child is further suspect due to its nature as classic hearsay.[444]

This "tell and interpret/retell and interpret" process is further complicated when the accused is a gay or lesbian parent. The child may be receiving contradictory information from the accuser and other adults regarding the meaning of the parent's sexual orientation and the definition of inappropriate "sexual" conduct. For example, the child may be told that two women holding hands, hugging, or engaging in other innocuous demonstrations of affection are engaging in homosexual conduct, with the emphasis on the "sexual" aspect of the behavior.[445] Thus, the child may answer in the affirmative when asked if his lesbian mother engages in "sexual" conduct with him, even though the only contact between the child and mother was holding hands and hugging.

The potential for miscommunication and the resultant metamorphosis of wholly innocuous conduct into allegations of child sexual abuse requires extremely close examination of the sources of factual information on which the witness relied in forming his expert opinions and the methods the expert employed to harvest those facts. Sources of particular concern are the child alleged to be the victim of sexual abuse, the accuser, the accused, and other fact witnesses. An expert's "[f]ailure to utilize these appropriate sources reduces

444. In the context of a criminal conviction for child sexual abuse where Confrontation Clause rights are implicated, the U.S. Supreme Court warned that trial courts have a duty to ascertain the reliability of a child's hearsay statement which forms the basis for an expert's opinion that the abuse occurred; the reliability is to be assessed based upon the totality of the circumstances surrounding the making of the statement which "render the declarant particularly worthy of belief." Idaho v. Wright, 497 U.S. 805, 819 (1990). *See generally* Clay Edwards, Note, *The Reliability of Out-Of-Court Statements by Child Victims of Sexual Abuse: Evaluating Consistency Via the Process of Disclosure*, 33 J. FAM. L. 685 (1994-95) (presenting a thorough discussion of the hearsay and other evidentiary rules governing a child's statements).

445. For homosexuals as well as heterosexuals, "[m]isinterpretation of normal caretaking practices involving physical or affectionate contact between parent and child during bathing, toileting, dressing, hugging, or kissing is often at the core of the abuse allegation." Green, *supra* note 443, at 177.

the value of any resulting opinion" considerably.[446] On the other hand, eliciting accurate facts from these sources requires skill, patience, and the ability to be a gatherer and observer of objective information rather than a reconstructionist seeking to build a factual base to support preconceived conclusions.[447] The failure of an investigator to look for explanations other than sexual abuse for the child's statements and behaviors is one of many shortcomings indicating potential bias and incompetence of the expert.[448]

1. The Child

"Despite problems associated with children's disclosure, experts in the field of child maltreatment agree that the history obtained from the child is usually the most important evidence in diagnosing sexual abuse."[449] But while social scientists agree that information received directly from the child may be the most important information available in any given case, it may also be the most unreliable.[450] The unreliability is not predicated on lack of faith in a child's veracity per se, but rather the child's "vulnerability, immaturity, and impressionability."[451] Reversing a nursery school teacher's convictions for child sexual abuse in the extremely high profile case of *New Jersey v. Michaels*, the New Jersey Supreme Court stated:[452]

> Woven into our consideration of this case is the question of a child's susceptibility to influence through coercive or suggestive questioning. As the Appellate Division noted, there is a constantly broadening body of scholarly authority [which] exists on the question of children's susceptibility to improper interrogation. The expanse of that literature encompasses a variety of views and conclusions. Among the varying perspectives, however, the Appellate Division found a consistent and recurrent concern over the capacity of the interviewer and the interview process to distort a child's recollection through unduly slanted interrogation techniques. The Appellate Division concluded that certain interview practices are sufficiently coer-

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446. SHUMAN, *supra* note 6, at 13-7.

447. *See* Newman, *supra* note 414, at 214-17 (explaining, inter alia, the importance of fact finding and the difficulties inherent in determining past events).

448. *See* Schultz, *supra* note 14, at 4.

449. Dubowitz et al., *supra* note 157, at 688; *see also* Chery Hysjulien et al., *Child Custody Evaluations: A Review of Methods Used in Litigation and Alternative Dispute Resolution*, 32 FAM. & CONCILIATION CTS. REV. 466, 473 (1994) (stating that the interview is "one of the most important methods used in child custody evaluations").

450. *See* Goodson v. Mississippi, 566 So. 2d 1142, 1146-47 (Miss. 1990) (excluding doctor's testimony about allegedly "sexually traumatized" victim when doctor lacked specialized knowledge and evidence did not support reliability of expert opinions regarding sexual abuse).

451. State v. Michaels, 642 A.2d at 1372, 1376 (N.J. 1994). For an excellent overview of the social science and legal challenges to determining the reliability, and hence admissibility, of child testimony, see LUCY S. MCGOUGH, CHILD WITNESSES: FRAGILE VOICES IN THE AMERICAN LEGAL SYSTEM (1994).

452. For a detailed description of the prosecution of Margaret Michael Kelly for child sexual abuse, see Robert Rosenthal, State of New Jersey v. Margaret Kelly Michaels: *An Overview*, 1 PSYCHOL. PUB. POL'Y. & L. 246 (1995). The same volume of this publication also contains the amicus brief presented by the "Committee of Concerned Social Scientists" and a number of related articles on the use of expert testimony in the prosecution of Michaels.

cive or suggestive to alter irremediably the perceptions of the child victim.[453]

The manner in which an expert questions a child regarding sexual abuse allegations is of utmost concern in evaluating the reliability of the expert's opinions based upon those interviews. "Recent research clearly shows that the skill of the interviewer directly influences whether a child related a true memory, discusses a false belief, affirms details suggested by others, embellishes fantasies, or provides no information at all."[454] Based on this scientific evidence and courtroom experience, courts have also concluded that improper child interview techniques can cause "memory" to be created for events which never occurred and "that once tainted the distortion of the child's memory is irremediable."[455]

Accordingly, information provided directly by the child to the expert must be carefully evaluated for contamination by persons who may have, intentionally or inadvertently, coached the child into saying—and possibly believing—that certain events occurred. An effective evaluation "requires a highly nuanced inquiry into the totality of the circumstances surrounding those interviews. Like confessions and identifications, the inculpatory capacity of statements indicating the occurrence of sexual abuse and the anticipated testimony about those occurrences requires that special care be taken to ensure their reliability."[456]

a. *Common Interview Errors*

Asking the same question repeatedly is among the most common and most serious interview errors. "When a child is asked a question and gives an answer, and the question is immediately asked again, the child's normal reac-

453. *Michaels*, 642 A.2d at 1376 (citations omitted). Margaret Kelly Michaels was sentenced to 47 years in prison after a jury convicted her of 115 counts of sexual assault on twenty children entrusted to her care as a nursery school teacher. The intermediate appellate court reversed the convictions and remanded for retrial, inter alia, because the techniques used to interrogate the alleged victims were extremely coercive and suggestive. *See* State v. Michaels, 625 A.2d 489, 517 (N.J. Super. 1993). The appellate court also held that if the state decided to retry Michaels, it would first have to hold a pretrial "taint hearing" in which the testimony of the alleged victims would be examined to determine whether the interrogation itself distorted the children's memories and caused them to fabricate their "memories" of sexual misconduct by the defendant. *Id.* at 516. The New Jersey Supreme Court unanimously upheld the appellate court's finding regarding the impropriety of the techniques used to interview the children and the necessity of a "taint" hearing prior to a retrial. *Michaels*, 642 A.2d at 1380. On December 2, 1994, the state announced its decision not to retry Michaels. The announcement came almost 10 years after the initial indictment was returned and after Michaels had already spent five years in prison. *See* Evelyn Nieves, *Prosecutors Drop Charges in Abuse Case from Mid-80s*, N.Y. TIMES, Dec. 3, 1994, at 25.

454. Nancy E. Walker & Matthew Nguyen, *Interviewing the Child Witness: The Do's and the Don'ts, the How's and the Why's*, 29 CREIGHTON L. REV. 1587, 1588 (1996).

455. *Michaels*, 642 A.2d at 1378. In an impassioned dissent in *Maryland v. Craig*, 497 U.S. 836 (1990), Justice Scalia, joined by Justices Brennan, Marshall, and Stevens, urged courts to protect innocent persons charged with sexually abusing children and provided a lengthy overview of the problems which stem from children's suggestibility regarding sexual abuse allegations. *Id.* at 867-70 (Scalia, J., dissenting); *see also* Carol B. Cole & Elizabeth F. Loftus, *The Memory of Children*, *in* CHILDREN'S EYEWITNESS MEMORY 178, 190-99 (Stephen J. Ceci et al. eds., 1987) (reporting that it is possible to create a memory in a child through improper interview techniques).

456. *Michaels*, 642 A.2d at 1375. *See generally* Walker & Nguyen, *supra* note 454.

tion is to assume that the first answer was wrong or displeasing to the adult questioner."[457] Additionally, "[t]he insidious effects of repeated questioning are even more pronounced when the questions themselves over time suggest information to the children."[458] Leading questions also render responses inherently unreliable,[459] as does lack of neutrality by the interviewer.[460]

The interviewer's bias regarding the facts of the case provides another common source of interview error:

> The bias results in the interrogator more readily picking up information that supports his beliefs and ignoring or not responding to details which suggest a different direction or falsity of the assumptions. . . . Statements that contradict or do not fit into his beliefs will be seen as lies or evasions or confusions. This is particularly evident in the interrogation of children when a child says that nothing happened. The interviewers almost universally just keep on plowing ahead, repeating the question, asking other questions about the hypothesized, believed-in event, and finally eliciting from the child the desired response.[461]

These bias-based flaws were well-documented in Mr. Rhodes's videotaped interview of Miriam in the *Hertzler* case.[462] Moreover, a highly nuanced inquiry into the *Hertzler* case suggests that an expert's anti-gay bias can taint the interview process in several other important respects. The interviewer may focus only on responses which tend to inculpate an accused gay or lesbian parent and disregard exculpatory information.[463] Ambiguous information may be construed as supporting the interviewer's preordained conclusions. The interviewer may also overlook important messages that the child is trying to convey—for example, that the accuser instilled the child's answers or that someone other than the parent sexually abused the child.

To determine whether the interview was contaminated due to the expert's anti-gay bias, a proffered expert should be voir dired extensively to determine whether she adequately tested the child for suggestibility and coaching or, as Mr. Rhodes erred in the *Hertzler* case, simply accepted the child's inculpatory statements as true and ignored the child's exculpatory comments.[464] Addi-

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457. *Michaels*, 642 A.2d at 1377 (citing Debra A. Poole & Lawrence T. White, *Effects of Question Repetition on the Eyewitness Testimony of Children and Adults*, 27 DEVELOPMENTAL PSYCHOL. 975 (1991)). *See generally* Jean Montoya, *Something Not so Funny Happened on the Way to Conviction: The Pretrial Interrogation of Child Witnesses*, 35 ARIZ. L. REV. 927 (1993) (documenting the numerous errors made during interviews of children where sexual abuse was suspected).

458. *Michaels*, 642 A.2d at 1377.

459. Idaho v. Wright, 497 U.S. 805, 813 (1990).

460. "Neutrality is crucial to ensure the evaluator remain as impartial and objective in providing information to the courts, which will guarantee the best-interest-of-the-child standard is met." Hysjulien et al., *supra* note 449, at 473-74 (citations omitted).

461. Underwager et al., *supra* note 442, at 31.

462. *See supra* notes 268-273 and accompanying text.

463. The *Michaels* court recognized that "an interviewer's bias with respect to a suspected person's guilt or innocence can have a marked effect on the accuracy of a child's statement." *Michaels*, 642 A.2d at 1377 (citations omitted). The Supreme Court has also accepted this reality. *See Wright*, 497 U.S. at 813.

464. *See supra* notes 274-276 and accompanying text.

tional specific inquiry should be made as to whether the expert explored the child's understanding of the accused parent's sexual orientation, the sources of information as to the parent's homosexuality, and the child's interpretation of the impact of the parent's sexual orientation on the child. An expert's failure to test the child's capacity for veracity and failure to gather information on the child's perspective on the parent's sexual orientation should render the witness unqualified to offer expert testimony based upon information received from the child. Moreover, the court should substantially discount the reliability of an expert's conclusions unless the expert videotaped the child's interview and can show that appropriate questions were asked and the child's responses were accurately reported.[465]

b. *Use of Anatomically Correct Dolls*

An expert's use of anatomically correct dolls to elicit information from the child must be closely scrutinized by the trial court. In this controversial method of diagnosing sexual abuse, the expert observes the child playing with anatomically correct dolls.[466] A display of age-inappropriate sexual knowledge is interpreted as indicative of sexual abuse.

Substantial "[d]isagreement exists among researchers both as to the representative characteristic of the dolls and conclusions that may be drawn from children's play with them."[467] Critics claim that the use of dolls is highly suggestive[468] and that the dolls are at best therapeutic tools which do not meet the criteria for scientific proof.[469] Other commentators note that the dolls are used for at least seven different functions ranging from "Icebreaker" or "Comforter" to "Diagnostic Test"[470] and that "any critique of the dolls must take into account the specific function or role that the dolls serve in a particular evaluation and the skills of the individual interviewer."[471] A few courts have excluded testimony based on use of the dolls, but many courts have deemed this evidence reliable.[472] The American Professional Society on the Abuse of Children advises that aberrant behavior with the dolls might suggest that additional investigation is needed, but should not be considered a

465. *See Wright*, 497 U.S. at 812-13.

466. For an excellent discussion of presentation the effectiveness and pitfalls of using dolls in diagnosing child sexual abuse, see Younts, *supra* note 6, at 708-20.

467. SHUMAN, *supra* note 6, at 13-21. *See generally* Mark D. Everson & Barbara W. Boat, *Putting the Anatomical Doll Controversy in Perspective: An Examination of the Major Uses and Criticisms of the Dolls in Child Sexual Abuse Evaluations*, 18 CHILD ABUSE & NEGLECT 113 (1994).

468. David C. Raskin & Phillip W. Esplin, *Statement Validity Assessment: Interview Procedures and Content Analysis of Children's Statements of Sexual Abuse*, 13 BEHAV. ASSESSMENT 265, 270 (1991) (stating that dolls, puppets, drawings, and other techniques used to elicit information during an interview with a child "frequently distract the child from the task of providing complete and accurate descriptions, and they can be suggestive, provoke fantasy, and lack a scientific basis").

469. SHUMAN, *supra* note 6, at 13-21; Schultz, *supra* note 14, at 5.

470. Everson & Boat, *supra* note 467, at 115-18.

471. *Id.* at 126.

472. *See* Margaret Bull Kovera et. al, *Expert Testimony in Child Sexual Abuse Cases: Effects of Expert Evidence Type and Cross-Examination*, 18 L. & HUM. BEHAV. 653, 655 (1994).

conclusive diagnosis of sexual abuse.[473] As one expert explained:

> The principal misuse of dolls occurs when ambiguous or equivocal doll play behavior is the basis for a diagnosis of child abuse. In essence, a clinician attempts to translate the child's behaviors into a verbal account of an experience. Even the foremost proponents of the utility of anatomically detailed dolls concede that the risk of interviewer error when using doll play as a diagnostic test is unacceptably high.[474]

As demonstrated by Mr. Rhodes's use of dolls during a videotaped interview with Miriam in the *Hertzler* case,[475] there is an added twist to unreliability when a gay or lesbian parent is at issue. While the variety of human sexual activities belies defining a particular sexual act as "gay" or "straight," experts who utilize the dolls generally focus on any increased sexual knowledge demonstrated by the child as evidence of sexual abuse. Simply put, the fact that a child might be able to demonstrate how a male and female doll would have sex does not indicate that they have learned this information from a homosexual. If anything, it should tend to alert the evaluator that the heterosexual parent should also be considered a source of the child's sexual knowledge.

2. The Accuser

The individual alleging child sexual abuse obviously offers key information for the expert retained to evaluate such allegations of sexual abuse. Quite frequently accusations come from a former spouse with unresolved feelings of anger and rejection stemming from the separation or divorce. "[T]he frequency of false accusations under these circumstances is quite high, especially because of the vengeance and exclusionary benefits to be derived from such an accusation."[476] Feelings of anger may be especially intense when the spouse who decided to end the marriage has entered a new same-sex relationship.

The expert's evaluation of the accuser may reveal, among other things, "any gross psychopathy, ulterior reasons for seeking custody such as punishing the other parent or resolving unmet needs from some unrelated situation, or unrealistic expectations about parenting."[477] In very rare instances, a thorough evaluation will reveal that the accuser is suffering from Delusional Disorder or another mental illness which prevents her from distinguishing reality from fiction[478] and that the delusional parent has transferred her beliefs to the child.[479] In most cases, however, the "mistaken or false allegations are

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473. *See* Newman, *supra* note 414, at 201, 228 n.67.

474. MCGOUGH, *supra* note 451, at 246 (citing Everson & Boat, *supra* note 467).

475. *See supra* notes 268-273 and accompanying text.

476. GARDNER, *supra* note 14, at 126.

477. SHUMAN, *supra* note 6, at 13-8 (citations omitted).

478. *See* Martha L. Rogers, *Delusional Disorder and the Evolution of Mistaken Sexual Allegations in Child Custody Cases*, 10 AM. J. FORENSIC PSYCHOL. 47, 47-48 (1992) (reporting that "Delusional Disorder leading to accusations of sexual molestation is not a new or recent phenomenon," and that other mental conditions of the accuser which should be considered include Affective Disorders, Schizophrenia, Brief Reactive Psychosis, and Paranoid Personality Disorder).

479. The child's dependence and intimate involvement with a parent who suffers from a delu-

initiated by a parent who, rather than being psychotic, may have had overvalued ideas or may have evidenced less severe perceptional distortions that led to a mistaken view of what transpired."[480]

It is tempting to paint the accuser as a vindictive villain willing to sacrifice the welfare of his children and to commit perjury to wreak vengeance on his former spouse. The problem with such labeling is the paradox that the accuser may be making the false allegations in good faith. The accuser may be convinced, based on archaic stereotypes, previously unexamined religious or moral tenets, or other sources of misinformation, that exposure to a gay or lesbian parent causes sexual harm to the child. The accuser may believe, for example, that a gay or lesbian parent is incapable of refraining from having sexual contact with a child, especially a child of the same sex. The accuser might also believe that the child's exposure to the gay or lesbian parent's "lifestyle" will cause the child to become homosexual.

Such unfounded but emotionally charged fears may cause a parent to become hypervigilant. An accuser who has no accurate knowledge of behaviors indicative of child sexual abuse might begin seeing "evidence" of sexual abuse in every good-bye hug or kiss or other innocuous physical contact between the gay or lesbian parent and the child.[481] In the *Hertzler* case, for example, a washable Bugs Bunny tattoo was perceived as concrete evidence of sexual abuse by the accusers.[482] Behaviors common in a child experiencing a family breakup, such as crying, throwing tantrums, or otherwise acting out when the child leaves one parent to be with the other, are also interpreted as indicating that something awful must be responsible for the child's behavior. Thus, it may be ignorance and overzealousness, rather than evil intent, that motivate the accuser to level sexual abuse allegations against the gay or lesbian parent. Such accusers rarely reconsider these conclusions even when faced with compelling expert evidence that the child has not been sexually abused.

On the other hand, the accuser may intentionally raise false allegations of sexual abuse to punish the other parent and to play into the possible bias and prejudice of an expert or judge against gay and lesbian parents. Accusers in this category have rightfully been the object of judicial scorn:

> A parent who will deliberately use such means to further selfish interests is acting in his or her interests, and not in the child's interest. Civilized people abhor and condemn sexual child abuse. Bringing false charges of parental sexual abuse of children, and the deliberate use of children as pawns to try to validate the charges, is equally despicable and condemnable.[483]

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sional or similar disorder may cause the child to believe the accusation that the other parent has been sexually molesting her. *Id.* at 48-49.

480. *Id.* at 48.

481. A New York state family court judge reported his observations that while sometimes the allegations of sexual abuse are manufactured by a parent or child, there are numerous cases where the accusers are not lying but rather have misconstrued the facts. Gallet, *supra* note 24, at 482-83.

482. *See supra* notes 205-207 and accompanying text.

483. Becker v. Becker, 613 So. 2d 275, 279 (La. Ct. App. 1993) (the parties are not related to the author) (finding the mother's false allegations of sexual abuse so detrimental that "the result-

While attempting to assess the accuser's motivations for bringing the sexual abuse allegations, the expert must carefully assess the extent to which an anti-gay animus or other improper motivation has colored the accuser's perceptions. The court should not qualify a witness as an expert where the witness has unquestionably relied on the accuser's view of the facts without seeking collaboration of the facts from other credible sources.[484]

3. The Accused

Allegations of child sexual abuse devastate the accused's life from the very moment the accusations are uttered. The accused may lose current employment and career opportunities. The accused may also be subject to scorn and ostracism by family, friends, and acquaintances, incur substantial legal expenses, and find herself defending against criminal charges while embroiled in the civil custody or visitation litigation.[485] In addition, the lesbian or gay parent must deal with the consequences of having his or her sexual orientation made public. Even if the accused is ultimately vindicated, the damage caused by the accusation will never fully be repaired.[486] The most serious long-term

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ing damage" to the children was "incalculable"). The court further concluded that the mother's use of the children as pawns in her battle against her former husband warranted termination of her domiciliary custody. *Id.*; *see also* Hartman v. Hartman, 621 N.E.2d 917, 920 (Ill. App. Ct. 1993) (holding that the trial court did not abuse its discretion in awarding custody to father where the mother falsely alleged that the father had sexually abused their child); Mullins v. Mullins, 490 N.E.2d 1375, 1390-91 (Ill. App. Ct. 1986) (holding that the permanent custody of parties' two children was properly transferred to father where mother had made false allegations of sexual abuse and where mother attempted to alienate children from their father by, inter alia, requiring them to call their new stepfather "daddy" and their birth father by his surname). In an extreme case, a parent who falsely accuses his co-parent of sexually-abusing their child may be found civilly liable for damages under the theory of intentional infliction of emotional distress. *See* Richard R. Orsinger, *Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress in Connection with Divorce*, 25 ST. MARY'S L.J. 1253, 1254-55 (1994) (describing a recent Texas case which could set a trend for other jurisdictions). A false accuser could also be prosecuted for perjury, or even be sanctioned for tampering with witnesses. *See* Victor I. Vieth, *Broken Promises: A Call for Witness Tampering Sanctions in Cases of Child and Domestic Abuse*, 18 HAMLINE L. REV. 181 (1994) (advocating prosecution of accused persons who attempt to improperly influence child's testimony and noting the same standard could be used for accusers). The growing body of potential sanctions for the "despicable" act of making false allegations of child sexual abuse has also been expanded by state legislative action. For example, Minnesota law mandates that the court specifically consider, when determining the child's best interest, evidence that a parent has made false allegations of sexual abuse. MINN. STAT. ANN. § 518.17 (1)(a) (West 1990). California allows an award of costs against a party raising false allegations of child abuse or neglect. CAL. FAM. CODE § 3027 (West Supp. 1996).

484. In a number of cases where no corroboration existed on the allegations of abuse, courts have ordered a psychiatric examination of the accuser to test the accuser's veracity on the subject. *See* SHUMAN *supra* note 6, at 13-25 and cases cited therein.

485. Once the allegations of child sexual abuse are made in one forum, such as a domestic relations court, the accused may have to simultaneously defend herself against criminal charges, disciplinary proceedings brought by professional licensing and disciplinary boards, and investigations by social services agencies.

486. For example, a person charged with sexual or other abuse of a child may be listed as a "suspected" child abuser in a state child abuse registry even if the charges are found to be unsubstantiated. This registration could affect the accused's ability to obtain or maintain professional licenses and to obtain employment. *See* Jill D. Moore, Comment, *Charting a Course Between Scylla and Charybdis: Child Abuse Registries and Procedural Due Process*, 73 N.C. L. REV.

effect may be the damage to the relationship between the accused and her child. To protect the child while the case is pending, the court will often allow limited, supervised visitation.[487]

The short duration of these visits and the requirement that a "supervisor" be present communicates to the child that the parent has done something wrong and must be watched. In worst case scenarios, this message is amplified by the custodial parent who routinely maligns the accused in the child's presence.[488]

Not surprisingly, a person accused of child sexual abuse may display a high degree of righteous indignation and even hostility toward the accuser, the court, and everyone associated with the legal proceedings, including the experts retained to evaluate the sexual abuse allegations. While such reactions are certainly understandable, they can also be misread by the expert as being overly-defensive and thus indicative of guilt. Conversely, an accused whose innocence causes him to appear nonchalant about the charges may also be perceived by the expert as reacting inappropriately, and thus not credible in his denial of guilt. The accused is faced with a classic catch twenty-two situation regarding any emotional display. Again, a court should view with extreme skepticism any expert who condemns the accused based upon the accused's negative reaction to the expert.[489]

4. Other Fact Witnesses

Relatives, friends, neighbors, employers, pastors, social workers, investigators, co-workers, acquaintances, and other individuals with varying degrees of loyalty to one or both parties often play critical roles in custody and visitation litigation both inside and outside of the courtroom. Those who had ample opportunity to observe the accuser and/or the accused with the child may provide information to the expert about what they saw and heard, and may also offer inferences or conclusions they drew from their observations.

Any witness's recounting of past events is, of course, always suspect due to the unreliability of human memory.[490] As the Texas Supreme Court re-

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2063, 2111-20 (1995); Michael R. Phillips, Note, *The Constitutionality of Employer-Accessible Child Abuse Registries: Due Process Implications of Governmental Occupational Blacklisting*, 92 MICH. L. REV. 139, 140-41 (1993).

487. Visitation is usually supervised by social workers or other child care workers approved by the court, who often charge an hourly rate paid by the accused. The supervised visitation protects the accused (as well as the children) from additional allegations of inappropriate conduct stemming from the supervised visitation, but also sends the message to the child that she is unsafe in the presence of the accused.

488. This type of destructive behavior has come to be known as the "Parental Alienation Syndrome." *See generally* Cheri L. Wood, Comment, *The Parental Alienation Syndrome: A Dangerous Aura of Reliability*, 27 LOY. L.A. L. REV. 136 (1994).

489. For a discussion of the impropriety of an expert relying on "evidence" that the accused meets the "profile" of a sexual abuser, see *infra* notes 547-562 and accompanying text.

490. *See generally* ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL (2d ed. 1992) (explaining that memories of a particular event are inaccurate reports and are highly vulnerable to revision and distortion due to after-acquired information); ELIZABTH F. LOFTUS & KATHERINE KETCHAM, WITNESS FOR THE DEFENSE: THE ACCUSED, THE EYEWITNESS, AND THE EXPERT WHO PUTS MEMORY ON TRIAL (1991) (documenting numerous cases where persons convicted of crimes based on eyewitness testimony were later fully exonerat-

cently observed:

> Memory is a multifarious, complex, usually reconstructive process. It does not retrieve information the way a video recorder or computer does. Everything sensed is not stored; recall of picture perfect images is not automatic. A variety of social, psychological, and developmental factors commonly cause distortions at each stage of the process.[491]

The inherent inability of each witness to relate past events accurately may be compounded if the individual was surprised, disappointed, or disgusted by the revelation of the accused's sexual orientation. Indeed, the accused's failure to reveal her sexual orientation prior to the allegations may be interpreted as indicative of a lack of integrity. Persons who might have otherwise provided extremely positive information about the accused's parenting style may start questioning whether they really knew the accused at all. Others may view the sexual orientation itself as a fatal flaw which renders the accused per se unfit to be in the company of her own child. Still others may seek to distance themselves from the accused based on fear of guilt by association with a gay or lesbian individual and/or with an accused child sexual abuser.

Accordingly, rampant homophobia and the guilty-until-proven-innocent aspect of child sexual abuse allegations may significantly distort the information provided by fact witnesses to the expert. Any expert who fails to demonstrate a high degree of awareness of the potential for such distortion as she ascertains the "facts" on which to base her expert opinion should not be allowed to offer those opinions at trial.

In addition, the expert's technique in interviewing the fact witnesses can suffer from the same defects which distort the interview of the child.[492] Thus, the expert should be thoroughly examined regarding the content of these interviews.

5. Conclusions Regarding the Expert's Sources of Factual Data

Experts must exercise discretion and judgment in determining which facts should inform their expert opinions. Nothing in this article is intended to suggest that the judge should attempt to re-evaluate every credibility determination made by an expert in a particular case. On the other hand, a court does not adequately perform its gatekeeping function regarding expert testimony unless it closely assesses the sources of the expert's factual information and the methodology used by the expert to elicit that information, especially when the source is the child. And in cases where the "facts" on which the expert relies are—as in the *Hertzler* case—provided by individuals with demonstrated anti-gay bias and a child who has been repeatedly coached by the accuser, any

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ed for the crimes).

491. S.V. v. R.V., No. 94-0856, 1996 Tex. LEXIS 30, at *51 (Tex. March 14, 1996) (citations omitted).

492. *See generally* Stephan Landsman, *Reforming Adversary Procedure: A Proposal Concerning the Psychiatry of Memory and the Testimony of Disinterested Witnesses*, 45 U. PITT. L. REV. 547 (1984) (discussing various problems involving distortions of witness recollections).

expert opinion based thereon fails to pass the threshold test for reliability. Accordingly, the witness who forms opinions based on unreliable factual information should not be qualified as an expert.

C. *Heightened Scrutiny of the Expert's Interpretation of the Factual Data*

Experts presented with the same factual basis for child sexual abuse allegations in a particular instance offer a wide range of opinions as to the probability of child sexual abuse.[493] This reality mandates that courts adopt "an extremely cautious stance toward expert *interpretation* of material generated by the fact-finding process,"[494] even if the process itself is deemed competent.

Obviously, an expert's "interpretation" of factual data is inextricably intertwined with the expert's method of gathering data. One need look no further than the *Hertzler* case where Mr. Rhodes disregarded the children's exculpatory statements and selectively relied upon their inconsistent inculpatory statements as verification of an interconnection between data gathering and interpretation of that data.

Nonetheless, scrutiny of an expert's interpretation of data is necessary to screen for anti-gay bias and to assure the proper evidentiary standards of trustworthiness as demanded by *Frye* and *Daubert*. Caution is required because "[d]eterminations of whether a child has been sexually abused can be flawed not only by mental health professionals' biases or assumptions, but also by their use of unreliable assessment procedures. This leads them to misinterpret their findings, which clearly can have significant repercussions for everyone involved."[495]

Pursuant to *Daubert*, careful screening of the expert's assessment procedures "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether it can be applied to the facts at issue."[496] As the attorney who argued the *Daubert* plaintiffs' case before the Supreme Court deduced, "the *Daubert* opinion requires that the focus in determining reliability be on the methodology employed by experts, not the conclusions they have reached."[497] In *Frye* parlance, the court must make sure that the expert's selection of a methodology and ensuing application follow the generally accepted practices in the relevant discipline.

Methodologies with the greatest potential for abuse due to the expert's preconceived, subjective view of the allegations of sexual abuse, include inappropriate interviewing techniques and use of anatomically correct dolls, both discussed previously.[498] The use of expert testimony regarding a child's ve-

493. Horner & Guyer II, *supra* note 5, at 402.
494. *Id.* (emphasis in original).
495. Schultz, *supra* note 14, at 1.
496. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592-93 (1993).
497. Michael H. Gottesman, *Admissibility of Expert Testimony After* Daubert*: The "Prestige" Factor*, 43 EMORY L.J. 867, 869 (1994).
498. For a discussion of the interviewing process, see *supra* Part IV.B.1.a. For a discussion of

racity, reliance on psychological "syndromes" as a method for diagnosing child sexual abuse, and the use of a personality "profile" to determine an accused's guilt or innocence deserve additional attention.[499]

1. Expert Opinion of a Child's Veracity

When the child testifies, experts are sometimes offered to evaluate children's ability and propensity for telling the truth.[500] An exhaustive analysis of the issues surrounding the testimony of the child[501] is outside the scope of this article, but a brief discussion is provided below regarding expert testimony concerning the child's veracity.

Expert opinions on the veracity of any witness's statements are suspect, inter alia, because they invade the province of the finder of fact—whether it be the judge or the jury—to independently assess the credibility of each witness.[502] Some argue that courts' reluctance to allow an expert to opine on children's veracity is firmly (but misguidedly) based in the archaic rule that witnesses could not testify on the "ultimate issue" in a case.[503] In civil cases, Federal Rule of Evidence 704 and many state rules expressly reject this position and provide that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."[504]

Under modern rules of evidence, an experts' testimony regarding children's propensity for truthfulness might be admissible if the expert relied upon a methodology that had attained general acceptance in the relevant social science community, and if the testimony otherwise satisfied any required evidentiary standards in the particular jurisdiction. The "if" part of this scenario cannot be satisfied at present, since "there is as yet no widespread agreement among researchers that an empirically valid test exists for determining the truthfulness of a particular child."[505]

Evidentiary reliability is particularly suspect when children's statements regarding sexual abuse are being evaluated.[506] However, a set of protocols known as "statement validity assessment" (SVA) is showing some degree of reliability for evaluation of children's statements of sexual abuse.[507]

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the use of anatomically correct dolls, see *supra* Part IV.B.1.b.

499. For a comprehensive analysis of the complications inherent in applying the Daubert standards to psychological syndromes, see Richardson et al., *supra* note 79, at 10 n.3.

500. *See generally* MCGOUGH, *supra* note 451, at 233-67.

501. The multitude of evidentiary problems surrounding the admissibility and credibility of a child's testimony in sexual abuse and other cases are exhaustively addressed in MCGOUGH, *supra* note 451, at 23-188 and in MEMORY AND TESTIMONY IN THE CHILD WITNESS (Maria S. Zaragoza et al. eds., 1995). For an extensive collection of publications addressing the legal and psychological issues associated with children's testimony, see generally CHILD WITNESSES BIBLIOGRAPHY (Tarlton Legal Bibliography Series No. 38, Kristin A. Cheney ed., 1993).

502. MCGOUGH, *supra* note 451, at 239; *see* Gallet, *supra* note 24, at 483 & n.15; United States v. Whitted, 11 F.3d 782, 785-86 (8th Cir. 1993).

503. MCGOUGH, *supra* note 451, at 236-40.

504. FED. R. EVID. 704; *see also Whitted*, 11 F.3d at 785 (stating that expert's opinion is not inadmissible merely because it contains conclusions on the ultimate issue).

505. MCGOUGH, *supra* note 451, at 249-50.

506. *Id.* at 250-52.

507. *Id.* at 252. The precursor of SVA, Statement Reality Analysis, was used in Germany for

"Statement analysis is based on the premise that descriptions of events that were actually experienced differ in content, quality, and expression from those that are invented."[508] SVA involves a three phase analysis of the statements to the interviewer which were made by the alleged victim.[509]

In the first phase, the interviewer gathers as much information as possible about the victim, the accused, the family's history and current situation, and previous allegations of sexual abuse.[510] The interviewer uses this information to develop various hypotheses such as (1) the allegations are basically true; (2) the allegations are true, but the child has identified the wrong perpetrator; or (3) the child has been coached by another to make an entirely false accusations.[511] Developing these hypotheses helps avoid "problems of self-fulfilling expectations that arise when an investigator has only one hypothesis."[512] After the hypotheses are framed, the "trained and skilled investigative interviewer"[513] conducts a videotaped session with the child during which the abuse issue is explored in a non-suggestive and age-appropriate manner.[514]

In phase two, the interviewer performs a "Criteria-Based Content Analysis" (CBCA) from the transcript of the child's statements during the videotaped interview.[515] The 18 criteria are grouped into three categories: "general characteristics," such as logical structure of the child's statements and quantity of details as to time, place and other aspects of the alleged abuse; "specific contents," including the reproduction of speech—i.e., quoting the accused—using language not appropriate for a child, unusual but realistic details, and description of the child's feelings or thoughts during the incident; and "motivation-related contents," such as spontaneous corrections or additions and admissions of lack of memory or knowledge.[516]

In the third phase, the evaluator systematically addresses each point on a "Validity Checklist" which is designed to prevent "premature conclusions based on bias or preconceived notions"[517] and to foster "a systematic consideration of all necessary and available information that may contribute to a fully informed and reasoned conclusion."[518] The points which the interviewer must consider further to validate a child's statements and his own hypothesis of the case include the cognitive and emotional limits of the child, the child's

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years before being imported to the United States and other countries. Raskin & Esplin, *supra* note 468, at 267.

508. *See, e.g.*, David C. Raskin & John C. Yuille, *Problems in Evaluating Interviews of Children in Sexual Abuse Cases*, *in* PERSPECTIVES ON CHILDREN'S TESTIMONY 184, 195 (Stephen C. Ceci et al. eds., 1989).

509. Raskin & Esplin, *supra* note 468, at 268; *see also* Charles R. Honts, *Assessing Children's Credibility: Scientific and Legal Issues in 1994*, 70 N.D. L. REV. 879 (1994) (discussing SVA in light of modern evidentiary concerns).

510. Raskin & Esplin, *supra* note 468, at 271.

511. *Id.* at 272.

512. Honts, *supra* note 509, at 889.

513. Raskin & Esplin, *supra* note 468, at 269.

514. *Id.* at 270-71, 273-78; Honts, *supra* note 509, at 889.

515. Raskin & Esplin, *supra* note 468, at 278.

516. *Id.* at 279, tbl. 1.

517. *Id.* at 286.

518. *Id.*

affect during the interview, level of suggestibility, motivations for reporting, influence by others, the quality of the interview itself based on accepted standards, and contradictory evidence from other sources.[519]

The reliability, and hence admissibility, of SVA evidence has been exhaustively addressed elsewhere and need not be repeated here.[520] What is evident, even from this abbreviated explanation, is that many of the factors and criteria applied to the child's statements, such as the appropriateness of the level of detail or the child's general cognitive and emotional states, are not objectively quantifiable. Thus, despite the laudable goal of SVA to remove biases and preconceived notions of the evaluator, there is still sufficient room for subjective interpretations—and thus conclusions—in any given case. At a minimum, however, SVA provides a useful guide for courts to determine whether appropriate techniques were used by an expert in interviewing the child, gathering information from other sources, and analyzing the data.

Additionally, an expert often lacks sufficient information to apply whatever criteria is chosen. As one author explained:

> [W]hen a clinician purports to "diagnose" truthfulness, he or she is often relying on the absence of recantation, inconsistency, or other obvious hallmarks of falsity during the evaluation session. The expert, however, usually lacks critical information necessary for a thorough assessment of the impact of prior suggestive interviewing of the child or other contaminants of the child's account.[521]

In sum, expert testimony which purports to gauge the truthfulness of a child's statements of sexual abuse must be carefully screened for trustworthiness as required by *Daubert*, *Frye*, and other evidentiary benchmarks. Any bias in an expert, including anti-gay sentiment, which would compound the weakness inherent in his testimony must also be exposed through voir dire to determine whether the partisanship affected his proffered opinion of the child's veracity.

2. Reliance on Syndromes as a Diagnostic Tool

The proliferation of allegations of sexual abuse in domestic relation disputes has itself been described as a "syndrome."[522] But even more frightening is a display of a phenomena aptly dubbed the "syndrome syndrome,"[523] in which a number of characteristics and behaviors of the alleged victim and the accused have been grouped into various syndromes and disorders which purportedly prove or disprove that sexual abuse occurred. These include Parental Alienation Syndrome (PAS),[524] Sexually Abused Child Syndrome

519. *Id.* at 287, tbl. 2.

520. *See generally* Raskin & Esplin, *supra* note 468; Honts, *supra* note 509.

521. MCGOUGH, *supra* note 451, at 250.

522. The phrase coined for such cases is the "Sexual Abuse Allegations in Divorce Cases Syndrome" or the "SAID Syndrome." *See, e.g.*, Horner & Guyer I, *supra* note 1, at 219-20 & n.9.

523. *See generally* David Wallace, *The Syndrome Syndrome: Problems Concerning the Admissibility of Expert Testimony on Psychological Profiles*, 37 U. FLA. L. REV. 1035, 1036-37 (1985).

524. Parental Alienation Syndrome (PAS) is a disorder identified by Richard Gardner, M.D., a

(SACS),[525] Child Sexual Abuse Accommodation Syndrome (CSAAS),[526] and Posttraumatic Stress Disorder (or Syndrome) (PTSD).[527]

A "syndrome" is "a cluster of symptoms that appear together regularly enough to be considered associated. Unlike diseases, syndromes have no speci-

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clinical professor of child psychology. *See generally* GARDNER, *supra* note 14. PAS is characterized by a child's preoccupation "with deprecation and criticism of a parent . . . that is unjustified and/or exaggerated." *Id.* at 59. The syndrome is the result of "brainwashing" and "programming" of the child by one parent against the other parent and other situational factors. *Id.* at 59-60. Allegations of sexual abuse have become "a common addition" in such cases. *Id.* at 126. As one court observed, "explicit vilification or criticism of the person charged with wrongdoing is another factor that can induce a child to believe abuse has occurred" when in fact it has not. State v. Michaels, 642 A.2d 1372, 1377 (N.J. 1994) (citations omitted). For an interesting discussion of the difference in admissibility of PAS under *Frye* as compared to *Daubert*, see Wood, *supra* note 488, at 1394-97.

525. *See* Schultz, *supra* note 14, at 7. Child behaviors associated with this syndrome "include excessive masturbation, fears, depression, pseudomaturity, inappropriate sexual play, sleep disturbances, and bed wetting." *Id.* As Schultz and others point out, "[c]hildren's behavioral symptoms alone are not sufficient grounds for deciding that they have been sexually abused." *Id.* (citations omitted).

526. Dr. Roland Summit defined CSAAS as consisting of five behaviors which, if present, indicate that a child has been sexually abused: helplessness; secrecy; entrapment and accommodation; delayed, conflicted and unconvincing disclosure of abuse; and retraction of the disclosure. Roland C. Summit, M.D., *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177, 181-88 (1983). Among the many flaws critics find in CSAAS is that it was developed as a way to provide therapy for children and not as a tool to diagnose sexual abuse. *See generally* Rosemary L. Flint, Note, *Child Sexual Abuse Accomodation Syndrome: Admissibility Requirements*, 23 AM. J. CRIM. L. 171 (1995); Robert J. Levy, *Using "Scientific" Testimony to Prove Child Sexual Abuse*, 23 FAM. L.Q. 383 (1989) (discussing CSAAS and problems with its use); Myers et al., *supra* note 39, at 67-69 (same); Schultz, *supra* note 14, at 7-8 (suggesting that CSAAS is helpful but only in limited situations and not as a general tool for diagnosing sexual abuse); Underwager & Wakefield, *supra* note 79, at 162 (arguing that evidence of CSAAS is inadmissible under *Daubert*). *See also* K.A. Kendall-Tackett et al., *Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies* 113 PSYCH. BULL. 164 (1993) (noting that certain behaviors relied upon for CSAAS are frequently found in nonabused children as well as abused children); Newman, *supra* note 414, at 193-97 (describing Dr. Summit's responses to criticisms of CSAAS). Courts have been hesitant to recognize CSAAS as proof that sexual abuse occurred. *See* Kovera et al., *supra* note 472, at 654; SAGATUN & LEONARD, *supra* note 150, at 222 (discussing cases in which the syndrome testimony was admitted and rejected); *see also* Steward v. State, 652 N.E.2d 490, 491-97 (Ind. 1995) (discussing the admissibility of CSAAS in various jurisdictions). The use of expert testimony based on CSAAS was viewed by an intermediate appellate court as an independently sufficient reason for reversing the conviction of Margaret Kelly Michaels, a case discussed *supra* at notes 452-458 and accompanying text. *See generally* Mary Ann Mason, *The Child Sexual Abuse Syndrome: The Other Major Issue in* State of New Jersey v. Margaret Kelly Michaels, 1 PSYCHOL. PUB. POL'Y & L. 399 (1995).

527. Posttraumatic Stress Disorder is the only one of the aforementioned syndromes recognized in DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) [hereinafter DSM-IV] which is the bible of mental health professionals. "The essential feature of Posttraumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity." DSM-IV at 424. Frequent reexperiencing of the traumatic event, avoidance of stimuli associated with the event and numbing of general responsiveness, and persistent increased arousal are characteristic symptoms of this disorder. *Id.* Children's responses to the event also "must include disorganized or agitated behavior," *id.*, and may also include repetitive play reenacting the traumatic event. *Id.* at 426. Since the diagnostic criteria for PTSD is premised on the knowledge that the traumatic event did in fact occur, *id.* at 427, the mere existence of some of the PTSD symptoms cannot be cited to prove the occurrence of the event. S.V. v. R.V., No. 94-0856, 1996 Tex. LEXIS 30, at *61 (Tex. Mar. 14, 1996) ("Obviously, a PTSD diagnosis cannot establish the occurrence of a trauma that it presupposes" or prove who caused it if one did occur.).

fied temporal course, nor is a pathological nature necessarily clear. Therefore, syndromes vary in the certainty with which they allow inferences about etiology."[528]

By definition, a "syndrome" does not provide information about *the cause* of the symptoms or behaviors comprising the syndrome.[529] Grouping a series of behaviors under the rubric of a "syndrome" may create a helpful tool for designing an appropriate treatment milieu for a child demonstrating the behaviors, but the collection should not be used as a post hoc certification as to the cause of the behaviors. Accordingly, an expert's testimony that a child's behavior is "consistent with" sexual abuse should be a red flag to any lawyer or judge evaluating syndrome testimony. Simply put, a syndrome-based correlation between a certain behavior and sexual abuse does not mean that sexual abuse occurred.[530] One commentator offered this apt analogy: "The symptom of headache is consistent with being hit over the head with a blunt instrument, but blunt instruments do not cause most people's headaches."[531] And, as New Hampshire's highest court explained in rejecting the use of CSAAS evidence to prove that a child had been abused, "[m]any of the symptoms considered to be indicators of sexual abuse, such as nightmares, forgetfulness, and over-eating, could just as easily be the result of some other problem, or simply may be appearing in the natural course of the children's development."[532]

Moreover, the proliferation of syndromes makes any syndrome-based diagnosis of sexual abuse vulnerable to attack by comparison to a syndrome not used by the testifying expert. Direct conflicts between certain syndromes prove especially troublesome. While one syndrome cites a particular symptom as highly indicative of abuse, another syndrome relies on the same symptom as evidence that no abuse occurred. For example, an expert making a diagnosis based on CSAAS criteria perceives a child's delayed and unconvincing disclosure of abuse and a subsequent retraction as proof that sexual abuse occurred; in contrast, an expert relying on PAS syndrome views those same behaviors as evidence that the accusing parent has brainwashed the child to make false sexual abuse allegations against the other parent.[533] In short, se-

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528. Richardson et al., *supra* note 79, at 11.

529. "Some judges, . . . perhaps mislead by testifying experts, persist in calling the syndrome an accepted *diagnosis*. And courts in child protective proceedings sometimes allow this testimony to be used to help prove abuse occurred . . . ." Newman, *supra* note 414, at 195 (emphasis in original).

530. United States v. Whitted, 11 F.3d 782, 785-86 (8th Cir. 1993) (explaining numerous courts' observations regarding the inadmissibility of a physician's diagnosis of sexual abuse).

531. Newman, *supra* note 414, at 196.

532. State v. Cressey, 628 A.2d 696, 700 (N.H. 1993); *see also* State v. Foret, 628 So. 2d 1116, 1125 (La. 1993) (rejecting CSAAS evidence due to the impossibility of testing its accuracy, the court opined: "This untestability comes from its very nature as an opinion as to the causes of human behavior, and the fact that the methods for testing the results of psychoanalysis are rife with the potential for inaccuracy.").

533. Such conflicting interpretations of behavior permeate other areas of child sexual abuse evaluations including the physical examination of the child.

> For instance, calmness of a child during genital examination is sometimes taken as evidence that he or she is used to having his or her genitals handled, whereas in other cases a child may struggle during a genital exam, which is sometimes interpreted to mean that the child has experienced genital trauma through sexual abuse.

lection of a particular syndrome can dictate the result of whether abuse did or did not occur.[534]

An expert's reliance on a cluster of symptoms to support a syndrome indicating child sexual abuse may also insulate the expert from effective cross examination. Even if a party discredits several of the "symptoms" relied on by the expert, the expert "can easily dismiss the critique by saying that her evaluation relies on no one symptom or indicator and that her conclusions still hold true in light of all the other available factors and her expertise in the field."[535]

Another consequence of the geometric growth of psychological syndromes is that this vast and often conflicting body of scientific evidence allows a judge to validate expert testimony based on her own personal bias. Commentators have recently echoed Professor Jasanoff's concern[536] that personal biases may overtake reasoned conclusions in cases where syndrome evidence takes center stage:

> With new syndromes being offered regularly, . . . the courts have at times sought refuge in *Frye*-like general acceptance principles to create order out of what appears to be a chaotic situation. But court decisions have also been influenced by strong personal feelings and opinions, media attention to certain topics, and public opinion about emotionally loaded charges such as child sexual abuse.[537]

The malleability of syndrome evidence thus allows experts and judges to hide their own "strong personal feelings and opinions"[538] behind a mask of scientific evidence. The papier-mache like layers of evidence forming the mask may include significant anti-gay bias. And yet, like papier-mache, the mask as a whole projects structural integrity established by the expert's application of "objective" factual findings to credible scientific theory.

The potential for bias does not mean that all syndrome evidence offered for any purpose should be rejected. For example, in some cases syndrome evidence may be helpful to explain to the trier of fact that certain of the child's behaviors which may seem counterindicative of sexual abuse, such as failing to reveal the abuse for a long period of time or recanting the allegations, are not unusual for sexually abused children.[539] On the other hand, syndromes should not be relied upon for rendering an absolute determination that sexual abuse has or has not occurred.[540] Thus, rather than being blindly

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Richardson et al., *supra* note 79, at 13.

534. The actual impact of syndrome evidence on the trier of fact is unknown. Limited experimentation has indicated that jurors are somewhat skeptical about an expert's opinion on alleged sexual abuse if that opinion is based on syndrome evidence. *See* Kovera et al., *supra* note 472, at 664. The experiment did not, however, test the impact of the evidence in a case tried to a judge. *Id.*

535. *Cressey*, 628 A.2d at 701.

536. *See* Jasanoff, *supra* note 89, at 82.

537. Richardson et al., *supra* note 79, at 11.

538. *Id.*

539. *See* David McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 OR. L. REV. 19, 43-44 (1987).

540. *Id.* at 41 (noting that "research has indicated that children react in incredibly diverse

accepted or automatically rejected, syndrome evidence, as well as resulting expert opinions, should be carefully screened to determine whether it meets the threshold requirements of reliability and trustworthiness as required by *Frye*, *Daubert*, and the most rudimentary rules applicable to all categories of evidence. Properly done, this screening will reveal any anti-gay bias as well as scientific shortcomings of syndromes as a diagnostic tool.

The heightened scrutiny of syndrome evidence begins by questioning whether the "syndrome" actually exists in the scientific arena from which it purportedly comes.[541] This inquiry is partially answered by the amount of text (or lack thereof) devoted to the syndrome in scientific journals and treatises and the content of the texts. The potential error rate associated with application of the syndrome must also be revealed.[542] If the potential for errors (measured by the numbers of false positives and false negatives predictably produced through application of the syndrome) has not or cannot be calculated, the court should seriously question the scientific validity of the evidence.[543] Other key questions for testing the validity of a syndrome are whether the data on which the syndrome is based was "gathered in ways that allowed researcher preferences to influence the results,"[544] and whether there have "been inadequate replications of the findings"[545] compared to a claim of a syndrome culled from a very narrow data base.[546] Of course, a showing must also be made that the syndrome has achieved some degree of general acceptance in the relevant discipline. Most important, courts must be extremely wary of experts who rely on syndrome evidence as the definitive diagnostic tool for determining whether the sexual abuse occurred.

If the court is satisfied that the syndrome itself meets the basic requirements for credible scientific evidence, it must further review the expert testimony for potential trouble spots in the application of the syndrome to the facts of the case at issue. For example, an expert who ignores the presence or the omission of certain behaviors inconsistent with the syndrome cannot have made a credible scientific determination based on the syndrome.

3. Expert Opinion Based on Psychological Tests and Profiles

A battery of psychological tests is routinely used by mental health professionals to ascertain whether an individual suffers from a particular disorder and to help identify an appropriate course of treatment.[547] Like syndrome evidence, these tests have not been validated as an accurate means of determining whether a child has been sexually abused or whether the accused was

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ways to sexual abuse" and that mental health professionals have been unsuccessful in their efforts to identify specific reactions common to all sexually abused children).

541. Richardson et al., *supra* note 79, at 15.

542. This is specifically demanded by *Daubert* and the general rules of evidence which require exclusion of untrustworthy evidence. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 594-95 (1993).

543. *See generally* Richardson et al., *supra* note 79, at 14-15.

544. *Id.* at 15.

545. *Id.*

546. *Id.*

547. Schultz, *supra* note 14, at 5-6.

the perpetrator. In an article cautioning evaluators charged with determining the veracity of sexual abuse allegations raised in custody battles, two experts explained:

> When using psychological testing in custody and/or sexual abuse evaluations, it is essential to recognize their limitations and communicate those limitations to the court or official agency involved. It must be clearly stated that there is no one-to-one correspondence between test results and the tendency to commit inappropriate sexual acts. No test has demonstrated sufficient reliability and validity in that area.[548]

Despite such caveats which arguably render expert testimony based on these tests inadmissible under both the *Frye* and *Daubert* standards, some experts still attempt to rely upon results of tests such as the Multiphasic Sex Inventory II, the Sexual Abuse Legitimacy Scale, the Minnesota Multiphasic Personality Inventory (MMPI), and even the psychological interpretation of the alleged victim's art work[549] as proof that specific child sexual abuse allegations are true or false.[550] In addition, comparisons of personality traits exhibited by the accused to traits associated with pedophiles have also been offered not only to prove that the abuse occurred but that the accused was or was not the perpetrator.[551] Experts have also claimed that they can use MMPI results and other data to identify personality traits of persons likely to make false allegations of sexual abuse.[552]

Courts have been appropriately suspicious of expert testimony predicated on this type of data.[553] For example, in *State v. Foret*,[554] the Louisiana Su-

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548. Cooke & Cooke, *supra* note 3, at 59.

549. Schultz, *supra* note 14, at 5-6.

550. *Id.* at 5; *see also* Sandra Morris, *From Marital Ruins, Unthinkable Torment for Young Innocents*, LEGAL TIMES, Aug. 1, 1988, at 16 (written by an attorney who defends the use of MMPI and profile evidence in childhood sexual abuse cases); S.V. v. R.V., No. 94-0856, 1996 Tex. LEXIS 30, at *37 (Tex. Mar. 14, 1996) (admitting expert testimony regarding MMPI results of alleged victim of childhood sexual abuse and alleged accuser in repressed memory case).

551. For example, Blush and Ross suggest that personality profiles of the accuser, accused, and child can help determine the veracity of sexual abuse allegations made in the context of divorce proceedings. *See* Blush & Ross, *supra* note 3, at 6-8; *see also* Catherine M. Brooks & Madelyn S. Milchman, *Child Sexual Abuse Allegations During Custody Litigation: Conflicts Between Mental Health Expert Witnesses and the Law*, 9 BEHAV. SCI. & L. 21, 25 (1991) (reporting that a psychiatrist who testified that the accused could not have abused his son because he did not match a pedophile profile was among the seven child sexual abuse experts who testified in one case); Myers et al., *supra* note 39, at 127-44 (providing comprehensive discussion of psychiatric literature and data on pedophiles, psychological methods for assessing and treating sexual offenders, and the largely unsuccessful efforts by prosecutors and others to admit profile evidence to establish guilt of person accused of sexually abusing a child).

552. Hollida Wakefield & Ralph Underwager, *Personality Characteristics of Parents Making False Accusations of Sexual Abuse in Custody Disputes*, 2 ISSUES CHILD ABUSE ACCUSATIONS 121, 121-36 (1990).

553. *See, e.g.*, United States v. St. Pierre, 812 F.2d 417, 420 (8th Cir. 1987) (noting that no judicial decision or scientific treatise had accepted the use of sex offender profile evidence to determine whether sexual abuse had occurred); State v. Elbert, 831 S.W.2d 646, 648 (Mo. App. 1992) (holding inadmissible the expert evidence proffered by the defendant that he could not be guilty of child sexual abuse because his MMPI results did not fit the profile of a sex offender); State v. Cavallo, 443 A.2d 1020, 1026 (N.J. 1982) (excluding expert testimony proffered by criminal defendant that he did not match the profile of a rapist); Minn v. Loebach, 310 N.W.2d 58, 64

preme Court applied the *Daubert* standards to overturn a conviction for attempted molestation of a juvenile. An expert's opinion that the child had been sexually abused was based on the result of certain unspecified "emotional tests" done on the daughter and the fit between "dynamics" revealed by the tests and the factors of CSAAS.[555] The *Foret* court faulted the trial and intermediate appellate courts for failing to consider "the significant problems that this type of testimony has created in other jurisdictions"[556] due to the "fear of prejudice resulting from [its] potential inaccuracy"[557] and further cautioned:

> [T]he introduction of expert opinion testimony as to the psychological characteristics of the victim or her testimony is fraught with serious res nova constitutional and evidentiary problems. While this type of evidence is absolutely not admissible for some purposes . . . but might be admissible for others, it should be allowed only after careful study and under strict control by the trial court . . . .[558]

Psychological testing of the accused is especially troubling. A psychological profile based on the results of an MMPI, Rorschach and even phallometric assessment[559] could be offered to bootstrap conclusions not only that abuse occurred but also that the accused was the perpetrator. Such evidentiary gymnastics are highly inappropriate because "[t]he question of determining whether or not a person has committed a sexual offence is not one that clinical assessment can address. There are no psychological tests or techniques that indicate whether someone has engaged in sexual behaviors with children . . . ."[560]

Moreover, as is the case with syndrome evidence, virtually any behavior or personality trait demonstrated by the accused can be interpreted as fitting the profile of a child molester.[561] If the accused is tearful and highly emo-

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(Minn. 1981) (rejecting evidence based on "battering parent profile").

554. 628 So. 2d 1116 (La. 1993).

555. *Foret*, 628 So. 2d at 1119-24.

556. *Id.* at 1120-21.

557. *Id.*

558. *Id.* at 1121 (quoting concurrence in State v. Brossette, 599 So. 2d 1092 (La. 1992)) (ellipses in original).

559. For a discussion of the psychological and physiological tests used to assess suspected child molesters and the deficiencies in each, see Judith V. Becker & Vernon L. Quinsey, *Assessing Suspected Child Molesters*, 17 CHILD ABUSE & NEGLECT 169 (1993). *See also S.V.*, 1996 Tex. LEXIS 30, at *37-38 (explaining expert testimony based on MMPI, Millon Clinical Multiaxial Inventory, and penile plethysmograph tests in case focusing on allegedly repressed memory of childhood sexual abuse).

560. Becker & Quinsey, *supra* note 559, at 169; *see also St. Pierre*, 812 F.2d at 417; *S.V.*, 1996 Tex. LEXIS 30, at *46 (noting that while the accused "had many of the characteristics of a sex abuser, he did not match a characteristic profile, and even if he had, it would not prove that he abused" his daughter); McCord, *supra* note 539, at 55-57 (explaining that profile evidence is generally prohibited in criminal cases); Myers et al., *supra* note 39, at 142 ("[T]here is no psychological test or device that reliably detects persons who have or will sexually abuse children.").

561. *See* Blush & Ross, *supra* note 3, at 7-8; *S.V.*, 1996 Tex. LEXIS 30 at *37 (noting that psychological tests given to defendant "showed traits similar to those of sexual offenders: narcissistic traits like self-centeredness, overvaluation of self, high need for recognition, and a high need for control; reality distortion; and problems in his ability to express emotions, especially negative ones").

tive, for example, those behaviors are judged indicative of guilt; conversely, the accused's projection of a deep sense of calm throughout the interrogation may be interpreted as classic denial or sociopathic behavior.[562] In short, psychological "profiles" may be the subject of legitimate curiosity and study in the mental health field, but they are not sufficiently determinative of child sexual abuse to meet the legal standards for reliability and general acceptance required by *Frye* or *Daubert*.

4. Conclusions Regarding the Expert's Interpretation of Factual Data

In a perfect world, objectively harvested facts could be fed into a scientifically validated computer program to test the truth of allegations of child sexual abuse and, if necessary, identify the perpetrator. Neither the sciences nor the law have produced such a system, and the dissonance within the two disciplines as well as the conflict between them suggests that infallibility, while a laudable goal, is unrealistic. Thus, we must operate with the system we have, being ever alert to its shortcomings and pitfalls.

Another harsh reality is that courts—already overcrowded, possessing misconceptions about child sexual abuse, and possibly retaining bias against gay or lesbian parents based on long-disproved myths—may resist undertaking the comprehensive examinations of expert witness evidence suggested in this article. Nevertheless, the heightened evidentiary scrutiny proposed herein neither requires a high degree of scientific sophistication nor poses an unduly onerous burden on the court, especially when contrasted against the burden on the accused to prove her innocence. Effective screening merely requires the court to make the types of determinations already required of it by the rules of evidence governing expert testimony and to apply the standards of justice required by federal and state constitutions.

Moreover, the court does not shoulder this burden alone. Virtually all questions concerning an expert's qualifications and methodologies should be raised by counsel in a motion for summary judgment or motion in limine.[563] Thus, the parties' legal counsel play a significant role in educating the court regarding applicable evidentiary standards and the reasons why the specific expert evidence at issue meets or falls short of those standards. Other options available to the court to reduce its burdens when handling expert witness testimony in child sexual abuse cases are presented immediately below.[564]

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562. Richardson et al., *supra* note 79, at 13.

563. A summary judgment motion filed by the accused, for example, might argue that the sexual abuse allegations should be rejected as a matter of law because the accuser does not have sufficient expert testimony to prove the allegations. A motion in limine would similarly challenge the expert's qualifications and validity of his expert opinions offered in the case. Through these pretrial vehicles, many of the issues outlined in this article could be resolved prior to trial.

564. Critics of the current practice of using experts retained by litigants have also suggested that judges with significant expertise in various disciplines should be recruited to preside over specialized courts, thereby eliminating the need for expert testimony to assist the finder of fact. *See, e.g.*, Edward V. DiLello, *Fighting Fire with Firefighters: A Proposal for Expert Judges at the Trial Level*, 93 COLUM. L. REV. 473, 473 (1993). While this proposal has many attractive aspects, one obvious shortcoming is that, unlike the use of "outside" experts who can be voir dired and cross examined at length, it provides no mechanism for determining the biases and prejudices

D. *The Use of A Court-Appointed Expert*

Federal Rule of Evidence 706 and analogous state rules empower a court to appoint an expert witness sua sponte or upon the request of a party.[565] Despite the liberal attitude expressed in the rules regarding this procedure, courts historically have declined to employ this option. Practical reasons for this reluctance include the courts' perception that parties will not fully cooperate and that communication between the court and the expert may be strained due to ex parte concerns.[566] On a philosophical basis, "[j]udges' devotion to the adversarial presentation of evidence causes them to reserve this procedure for those rare cases in which the adversarial system fails to provide information necessary for a reasoned and principled decision."[567]

In the context of a heated custody or visitation dispute, an appointed expert can be helpful in assessing "the family and [can] provide the courts, the parents, and the attorneys with *objective* information and recommendations."[568] Such objective findings are especially useful when the parties' own experts offer "extreme variation" of opinions and thus do not serve to clarify complex issues.[569]

In theory, a court-appointed expert offers objectivity because she approaches the case from a different perspective than does an expert retained by a litigant. While the individually retained expert aids the litigant's attorney in preparing a case for trial and testifying on the litigant's behalf, the court-appointed expert is, as previously noted, charged with providing an "objective" report assessing the child's best interests.[570] Appointment of an expert is, however, hardly a guarantee of neutrality. "Truly neutral experts are difficult, if not impossible, to find; though they will have no commitment to any party, they do not come to the case free of experience and opinions that will predispose (even if only subconsciously) . . . them in some fashion on disputed

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which the expert/judge/finder of fact may bring to a particular case.

565. FED. R. EVID. 706 provides that "[t]he court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection." Rule 706 also requires the court to fully inform the expert as to his specific duties and the expert must advise the parties of his findings. In civil actions the court determines a reasonable fee for the expert and apportions the costs to the parties. FED. R. EVID. 706. Appointment of an expert by the court does not preclude the parties from selecting their own experts. FED. R. EVID. 706(d).

566. Joe S. Cecil & Thomas E. Willging, *The Use of Court-Appointed Experts in Federal Courts*, 78 JUDICATURE 41, 46 (1994).

567. *Id.*

568. *Association of Family and Conciliation Courts Model Standards of Practice for Child Custody Evaluation*, 32 FAM. & CONCILIATION CTS. REV. 504, 504 (Jan. 1994) (emphasis added) [hereinafter *Standards of Practice*].

569. Joe S. Cecil & Thomas E. Willging, *Accepting Daubert's Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity*, 43 EMORY L.J. 995, 999-1000, 1010 (1994) [hereinafter Cecil & Willging, *Accepting Daubert's Invitation*]. The article also contains empirical data demonstrating that court appointment of experts is not uncommon and that federal judges have generally been satisfied with the work of the experts they have appointed. *Id.* at 1004-1008.

570. *See generally* SHUMAN *supra* note 6, at 13-6, 13-7; Cooke & Cooke, *supra* note 3, at 56 ("The evaluator should be independent and objective and serve as an advocate for the child rather than for either parent.").

issues relevant to the case."[571]

When a single expert is appointed in lieu of the parties retaining their own experts, the expert is vested with tremendous power in deciding the fate of the parties and the child. This awesome responsibility led one mental health expert to conclude that "[r]arely in psychological practice is the potential for harm as great as in court-ordered custody evaluations."[572]

Like any witness, an expert appointed by the court must be examined for potential bias toward or against a party or a particular issue.[573] One commentator suggests that a single court-appointed evaluator is inappropriate in cases "in which the court is being asked to reach a decision outside the community norm," because a single expert will not be able to present a fully balanced view of the situation.[574] A situation in which a homosexual parent charged with sexually abusing the child is seeking visitation or custody arguably presents the paradigm of "outside the community norm."[575] But other than stating that privately-retained experts "may be helpful in assuaging the judge's or jury's reaction to a nontraditional result,"[576] the commentator offers no further rationale for avoiding a court-appointed expert in nontraditional cases.

The potential value of a court-appointed expert should not be readily dismissed, even in a case as "nontraditional" as one involving a homosexual parent charged with child sexual abuse. The advantages are obvious: the child and parents may be subjected to evaluation by a single source, the expenses are relatively contained, and the resolution of the litigation is not delayed—as it was in the *Hertzler* case—while the litigants retain multiple experts to conduct a series of interviews and evaluations.

On the other hand, the "nontraditional" case may involve many issues about which a single expert may be unqualified to testify.[577] For example, a medical doctor who has conducted hundreds of forensic evaluations of children where sexual abuse was suspected[578] may not possess the requisite experience to evaluate a parent's relative parenting skills and may have no familiarity with the general empirical data on gay and lesbian parents. Conversely, a psychologist competent to testify about the parent's skill and the impact (if

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571. MANUAL FOR COMPLEX LITIGATION 110 (3d ed. 1995).

572. Deed, *supra* note 11, at 76.

573. Cecil & Willging, *Accepting Daubert's Invitation*, *supra* note 569, at 1000 (citing Gates v. United States, 707 F.2d 1141, 1144 (10th Cir. 1983)).

574. SHUMAN, *supra* note 6, at 13-7.

575. *Id.*

576. *Id.*

577. The Standards of Practice for Child Custody Evaluation promulgated by the Association of Family and Conciliation Courts suggests the level of education, training, and knowledge which should be required of a court-appointed evaluator. *See Standards of Practice*, *supra* note 568, at 506. Obviously, more than one expert might need to be appointed to satisfy the requirement that the evaluator have "an understanding of the many issues, legal, social, familial, and cultural involved in custody and visitation." *Id.*

578. A physical examination of children would seem the most competent, objective evidence of sexual abuse; unfortunately, it is often as inconclusive as the psychological evaluations. *See generally* EVALUATION OF THE SEXUALLY ABUSED CHILD: A MEDICAL TEXTBOOK AND PHOTOGRAPHIC ATLAS (Astrid Heger & S. Jean Emans eds., 1992); Jan E. Paradise, *The Medical Evaluation of the Sexually Abused Child*, 37 PEDIATRIC CLINICS N. AM. 839 (1990).

any) on the child from the parent's sexual orientation might not be qualified to conduct a forensic interview or to offer an expert opinion based on the forensic data gathered by others. In a worst-case scenario, a single, court-appointed expert may be called upon to provide expert evidence on issues outside her areas of expertise.[579]

In addition, appointment of a single evaluator does not necessarily mean that the work can be completed quickly. Multiple sessions may be required before a proper rapport is established between the child and evaluator,[580] and additional sessions are required with the adults involved.[581] Another major drawback to having a single evaluator is that no other expert is involved to expose the potential flaws in the court-appointed expert's methodology and conclusion which may stem from incompetence or the expert's preconceived notions about gay and lesbian parents.

Due to the multitude of variables inherent in "nontraditional" visitation and custody disputes, it is impossible to determine the appropriateness of a court-appointed expert in every case where a homosexual parent is accused of sexually abusing a child.[582]

Three general rules, however, are appropriate when a court-appointed expert is being considered. First, the qualifications of the proposed expert must be broad enough to encompass *all* of the issues upon which she will be called to testify. Second, the parties participating in the evaluation must be informed, by both the court and the expert, of the expert's role and the relationship between the expert, the court, and the parties.[583] Third, any hint of anti-gay bias should disqualify the proposed expert from appointment.

The difficulty in finding a single, non-biased expert with sufficiently broad expertise to address all of the issues raised in cases where a homosexual parent is charged with child sexual abuse strongly militates in favor of the team-oriented evaluation approach discussed immediately below.

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579. In *United States v. Whitted*, for example, the court held that a nurse/physician's assistant and a medical doctor were unqualified to give expert psychiatric testimony regarding child sexual abuse. 11 F.3d 782, 782 (8th Cir. 1993).

580. Cooke & Cooke, *supra* note 3, at 57.

581. *Id.* at 58-60.

582. In the *Hertzler* case for example, the trial court's denial of Pamela's request for a single, court-appointed expert resulted in the parties retaining four experts to evaluate the children and testify at trial. The cost, both financial and emotional, was significant. After the trial, the court ordered the parties to jointly select yet another expert to counsel the children and report back to the court. When that expert reported that the children had not been sexually abused, the court rejected the expert's conclusion in favor of its own determination of the issue. *See supra* Part III. Thus, even with the wisdom provided by hindsight, it is very difficult to conclude whether the initial appointment of a single expert would have resulted in an earlier and more accurate adjudication of the sexual abuse allegations in the *Hertzler* case.

583. Parents who agree to the use of a single expert must be informed that they:

> lose the right to voluntary choice of psychologist, the right to initiate or to terminate the relationship with the evaluator, or the right to determine the goals of their involvement with the psychologist. They also lose their right to determine the direction of the sessions, to explore issues of their choice, or to avoid areas they would rather not discuss. They also lose, for the duration of their court-ordered involvement, any right to confidentiality between themselves and the court.

Deed, *supra* note 11, at 76.

E. *The Value of a Team-Oriented Expert Evaluation*

A determination of child sexual abuse generally requires physical and psychological examinations and it is difficult to find a single expert competent to perform both aspects of the evaluation. On the other hand, taking a child to a series of experts—such as Drs. Jenny, Bloom, Brungardt, Moriarty and Mr. Rhodes in the *Hertzler* case—involves tremendous repetition of effort and expense and tremendously increases the stress on the parents and child. In contrast, utilization of a well-qualified and coordinated team of experts, whether retained by an individual litigant or appointed by a court, minimizes the disruption in the child's life while providing important data regarding the allegations from a variety of disciplines and perspectives.[584] The collaboration of several mental health professionals may also help lessen the individual discomfort experienced by these professionals who are asked to determine the objective truth when, as therapists, they base their evaluations on the subjective reality presented to them by their patients.[585]

One team-oriented model which proved quite viable, for example, consisted of a social worker who interviewed the parents, a child psychologist who conducted an extensive psychological evaluation of the alleged victim, a pediatrician who secured a medical history and conducted a medical examination of the child, and a nurse, all of whom were associated with a single clinic.[586] The team then rated the likelihood of abuse in each case as "low," "possible," "moderate," or "high" based upon their collective findings."[587]

Due to the ambiguous nature of much of the "evidence" of sexual abuse, there is no way to gauge whether the team approach resulted in more accurate diagnoses.[588] It is probable, however, that any errors in judgment or evaluation made by individual team members were detected by other team members. Moreover, the opportunity to fully integrate "the social, psychological, and medical information needed to make accurate diagnoses"[589] suggests that "a skilled interdisciplinary assessment is probably the optimal approach to diagnosing sexual abuse."[590]

The team approach could also help neutralize the impact of any anti-gay bias held by a single member of the team. It is possible, of course, that most or even all members of a court-appointed team would possess anti-gay bias, but appropriate gatekeeping by the trial court to screen proposed experts for bias should negate such an occurrence.

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584. *See generally* Dubowitz et al., *supra* note 157, at 689 (discussing the benefits of a team-oriented evaluation).

585. Underwager et al., *supra* note 442, at 54-55.

586. Dubowitz et al., *supra* note 157, at 689.

587. *Id.* at 690.

588. There is also a concern that the hierarchical nature of the medical profession may drive team members to defer diagnosis to the individual with the highest credentials, such as a psychiatrist or other medical doctor, rather than acting independently.

589. Dubowitz et al., *supra* note 157, at 693.

590. *Id.* at 692.

F. *Allowing Expert Witnesses to Educate the Court Regarding Gay and Lesbian Parents*

It is beyond dispute that "[t]o affect change in a system that treats homosexuals as second-class citizens, counsel for gay and lesbian parents must take an active role in educating the court, by introducing expert testimony that rebuts the myths and assumptions made about homosexuals."[591] Undoubtedly, experts play a critical role in educating the trial judge on subjects, such as the competency of gay and lesbian parents[592] and the falsity of stereotypes, on which the court may have limited or incorrect information. But all of these evidentiary efforts are for naught if the court will not allow itself to be educated on these subjects.[593] The courts' selective use of the expert testimony before them in cases involving gay and lesbian litigants is well-documented.[594]

Simply stated, a judge charged with determining a child's best interests is not free to reject the empirically sound insights offered by competent experts in favor of a ruling which correlates with the judge's own instincts and predispositions.[595] Rather, in addition to carefully screening proffered experts for competency and credibility, a court must be receptive to the information being conveyed by the experts, regardless of whether it corresponds with whatever personal feelings the judge may have about gay and lesbian parents.[596]

Judges do not satisfy their responsibility for education, however, simply by being open to the information provided by counsel and experts.[597] The numerous publications cited in this article are readily available to help guide a court through the complexities of a case involving child sexual abuse allegations.[598] Judges should also take advantage of bar association seminars and

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591. Fowler, *supra* note 9, at 373.

592. A comprehensive summary of relevant empirical data with an annotated bibliography has been published by the American Psychological Association (APA) in LESBIAN AND GAY PARENTING: A RESOURCE FOR PSYCHOLOGISTS (1995). The APA has also provided amicus curiae briefs on this topic to numerous courts, as have Lambda Legal Defense and Education Fund, American Civil Liberties Union, National Center for Lesbian Rights and the state counterparts of these entities.

593. Nugent, *supra* note 26, at 58-59; *see also* Joshua Dressler, *Judicial Homophobia: Gay Rights Biggest Roadblock*, 5 CIV. LIB. REV. 19, 26 (1979).

594. *See generally* Falk, *Prevalence of Social Science*, *supra* note 433.

595. *See generally* Goldstein et al., *supra* note 142, at 21-31; Nugent, *supra* note 26, at 40-41; *see also* Hertzler v. Hertzler, 908 P.2d 946, 951 (Wyo. 1995) (holding that the trial judge erred in allowing his own anti-gay bias to impact his decision); Van Driel v. Van Driel, 525 N.W.2d 37, 39 (S.D. 1994) (recognizing that the evidence of record, rather than the court's "[p]ersonal conceptions of morality," must serve as the basis for resolution of a custody dispute).

596. The ABA Model Code of Judicial Conduct directs that "A judge shall perform the duties of judicial office impartially and diligently," and further states that a judge is prohibited from manifesting "by words or conduct" bias based on sexual orientation when performing his official duties. MODEL CODE OF JUDICIAL CONDUCT Canon 3, Rule B(5) (1990).

597. A judge's education also includes information received outside of the courtroom. *See* Jack B. Weinstein, *Limits on Judges Learning, Speaking and Acting—Part I—Tentative First Thoughts: How May Judges Learn?*, 36 ARIZ. L. REV. 539, 540-41 (1994).

598. Many of the medical as well as legal publications cited herein are available on Lexis and Westlaw. *See also* AMERICAN BAR ASSOCIATION'S CENTER ON CHILDREN AND THE LAW, A JUDICIAL PRIMER ON CHILD SEXUAL ABUSE (Josephine Bulkley & Claire Sandt eds., 1994) (discussing judicial treatment of child sexual abuse).

judicial college courses which spotlight the inherent myths underlying many biases.[599] And, "[i]n addition to actively seeking education, judges should also perform a self-inventory of potential bias."[600] After compiling a mental list of potential biases, judges must ask themselves, in every case, whether any of these might affect their decision.[601] As a state judge recently appointed to the federal bench advises, "[i]f a bias could potentially infect their decision-making process, they should make a conscious effort to set that bias aside."[602] If a judge cannot set aside a bias, judicial ethics demand that she recuse herself from the case.[603]

V. CONCLUSION

Cases involving allegations of sexual abuse of a child are incredibly complex due to family dynamics and the inexactness of medical and psychological techniques for determining whether the abuse occurred and, if so, identifying the perpetrator. When the sexual orientation of a party is brought to the fore, the impeccable sense of balance needed to resolve these cases is further disrupted. The suggestions outlined in this article are offered to help re-establish the balance demanded by fairness, due process, the rules of evidence and derivative case law, and basic respect for human dignity.

"Bias is nearly inevitable, for all psychologists, lawyers and judges have first been members of families. The challenge is to recognize and to neutralize bias . . . ."[604] Accordingly, one of the most important steps to assuring accurate adjudication of the sexual abuse allegations is not directly governed by rules of procedure or evidence. Rather, it requires personal commitments by judges and experts to examine their own biases regarding gay and lesbian parents.

To foster the best interests of the child, judges and experts must recognize and set aside personal prejudices and preconceived notions about gay and lesbian parents and examine the actual, credible evidence of record. This focus requires sensitivity to the many insidious ways that anti-gay bias can taint the gathering and analyzing of information surrounding the many complicated questions posed by allegations of child sexual abuse. Failure to do this results, as in the *Hertzler* case, in a legally-sanctioned form of gay-bashing. In this instance, however, the blood on the hands of biased experts and judges is not only that of the accused, but of the children as well.

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599. Nugent, *supra* note 26, at 58.
600. *Id.*
601. *Id.*
602. *Id.* at 58-59. Judge Nugent served as an Ohio common pleas judge for eight years and Ohio court of appeals judge for three before being elevated to the federal district court in 1995. *Id.* at 59 n.2.
603. MODEL CODE OF JUDICIAL CONDUCT Canon 3, Rule E(1)(a) (1990) (a judge must disqualify herself where her impartiality may be compromised by "a personal bias or prejudice concerning a party").
604. Deed, *supra* note 11, at 80.