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Raising the Standard for Expert Testimony: An Unwarranted Obstacle in Proving Claims of Child Sexual Abuse in Dependency Hearings

Matthew J. Dulka

RAISING THE STANDARD FOR EXPERT TESTIMONY: AN UNWARRANTED OBSTACLE IN PROVING CLAIMS OF CHILD SEXUAL ABUSE IN DEPENDENCY HEARINGS

I. INTRODUCTION

In the past 10 years, there has been a dramatic increase in awareness of the problem of child sexual abuse,[1] which has led to an increase in the number of reported cases.[2] The investigations of these reported cases frequently indicate that legal intervention is necessary to protect the physical and emotional health of the child at risk. Child advocates have found themselves enmeshed in an evidentiary quagmire regarding the admissibility of testimony of expert witnesses who offer their opinions of whether or not the alleged abuse actually occurred.

How the courts would choose to characterize this testimony—that is, whether it constituted "expert opinion" or "scientific evidence"—would ultimately determine its admissibility. And, given the difficulties inherent in proving claims of child sexual abuse,[3] any characterization which would preclude or sig-

1. Sexual abuse includes both sexual assault and sexual exploitation of minors. The abuse can involve many incidents over a long period of time or a single act. Sexual assault includes: rape, incest, sodomy, lewd or lascivious acts, oral copulation, and penetration of a genital or anal opening by a foreign object. J. VAN DE KAMP, CHILD ABUSE PREVENTION HANDBOOK 9 (1985).

2. ASSEMBLY OFFICE OF RESEARCH, SEXUAL ABUSE: A LIFELONG LEGACY (1986). "The Department of Justice reports that 23,663 cases of sexual abuse were investigated in 1985, more than twice as many as in 1982." *Id.* at 2. Researchers do not believe that there has been a significant increase in the incidence of child sexual abuse. D. EDWARDS, BREAKING THE CYCLE, ASSESSMENT AND TREATMENT OF CHILD ABUSE AND NEGLECT 3-4 (1986). Rather it is believed that heightened awareness has led to an increase in the number of cases reported to authorities who investigate such reports. *Id. See also* S. FORWARD & C. BUCK, BETRAYAL OF INNOCENCE, INCEST AND ITS DEVASTATION 3 (1978). The increase is due in part to California law which requires that professionals working with children who either know or have reason to suspect that a child is a victim of abuse must report this information. CAL. PENAL CODE § 11166(a) (West Supp. 1988).

3. J. VAN DE KAMP, *supra* note 1, at 55. *See* AMERICAN BAR ASSOCIATION, NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, CHILD SEXUAL ABUSE

nificantly hamper admissibility would also drastically impede the goals of legal intervention.

The issue of how to characterize the testimony of experts was addressed by the court in *In Re Amber B.*[4] and its extension, *In Re Christine C.*[5] The county alleged that the father had sexually abused three-year old Amber and that her sister, one-year old Teela, was at risk. At a dependency hearing, the court granted the county's petition to have the child declared a dependent of the court. The primary evidence was offered by a court-appointed psychologist who provided expert testimony that Amber had been sexually abused.[6] The opinion of the psychologist was based on the nature of Amber's disclosure of abuse, the ways in which she described the instances of abuse, and observations of Amber with anatomical dolls.

In an earlier case, this type of testimony had been admissible as expert opinion to determine whether or not the child had been sexually abused.[7] However, the appellate court in *Amber B.* held that the evidence was scientific evidence and not admissible as expert opinion.[8] As scientific evidence, the proponent of the evidence must establish that the scientific process has been generally accepted as reliable within the scientific community from which it was developed.[9] As expert opinion, the evidence only has to be of the type that experts would reasonably rely upon in forming such an opinion.[10] The *Amber* court raised the standard

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AND THE LAW 166 (1982) (general resource guide on legal issues encountered in child sexual abuse cases).

4. 191 Cal. App. 3d 682, 236 Cal. Rptr. 623 (1987), *rev. denied* (July 30, 1987).

5. 191 Cal. App. 3d. 676, 236 Cal. Rptr. 630 (1987), *rev. denied* (July 30, 1987). The decision in *Christine C.* was based on the court's holding in *Amber B.* and, therefore, this note will concentrate on the court's holding and reasoning in *Amber B.* and the impact it will have on dependency hearings in California.

6. The court-appointed psychologist based his opinion on: three one-hour sessions with Amber, during which Amber "stuck her fingers 'vigorously' inside the doll's vagina and anus, and twisted her fingers back and forth. . .;" an interview of Amber's mother; a review of the police report; the dependency petition and the assessment report. Brief for Respondent at 4, *Amber B.*, 191 Cal. App. 3d 682, 236 Cal. Rptr. 623.

7. In re Cheryl H., 153 Cal. App. 3d 1098, 200 Cal. Rptr. 789 (1984).

8. *Amber B.*, 191 Cal. App. 3d. at 691, 236 Cal. Rptr. at 629.

9. *Id.* at 686, 236 Cal. Rptr. at 625-26. This standard of general acceptance is known as the *Kelly-Frye* test. People v. Kelly, 17 Cal. 3d 24, 30-31, 549 P.2d 1240, 1244, 130 Cal. Rptr. 144, 148 (1976); Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

10. CAL. EVID. CODE § 801(b) (West 1966); *see infra* notes 59-60 and accompanying text (discussion of statute stating requirements for expert witnesses).

of admissibility, increasing the already difficult task of proving claims of child sexual abuse.

Evidentiary problems are aggravated by the nature of child sexual abuse. The perpetrator is often a family member;[11] often there is no physical evidence;[12] and the child may be too young[13] or traumatized to testify.[14] As a result, mental health professionals have come to play an increasingly important role as expert witnesses in these cases.[15] In detecting and validating claims of child sexual abuse, mental health professionals often observe the child with anatomical dolls and analyze any reports of abuse that the child makes.[16] They utilize this information in their testimony.

This comment will examine the *Amber B.* court's decision to characterize this evidence provided by the mental health professionals as scientific evidence and not as expert opinion. Secondly, this comment will explore the desirability of imposing the scientific evidence standard, usually applied in criminal cases, to dependency hearings. Finally, this comment will discuss the implications of the *Amber B.* decision in light of the already present evidentiary difficulties of proving child sexual abuse claims and the social policy of protecting the welfare of the abused child.

II. ROLE OF MENTAL HEALTH PROFESSIONALS IN PROVING CLAIMS OF CHILD SEXUL ABUSE

Each case of suspected child sexual abuse which is reported must be investigated by local law enforcement agencies or by

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11. D. EDWARDS, *supra* note 2, at 96 "[R]esearch has indicated that up to 50% of all reported cases of child sexual abuse involve sexual activity between family members. . . ."

12. THE SEXUAL VICTIMOLOGY OF YOUTH (L. Schultz ed. 1980) [hereinafter Schultz] "[N]o more than 5 to 10 percent of sexual abuse involves physical injury. . . ." *Id.* at 40.

13. *See infra* notes 24-27 and accompanying text (discussion of competence of young children as witnesses).

14. Yates, *Should Young Children Testify in Cases of Sexual Abuse?*, 144 AM. J. OF PSYCHIATRY 476, 478 (1987) (trauma to the child witness may be the result of guilt over the harm the testimony does to a family member, guilt of having participated in a crime, fear of being jailed or otherwise punished and the horror of reliving the events).

15. *See infra* notes 32-34 and accompanying text.

16. An anatomical doll set typically includes adult male and female dolls and boy and girl dolls, with genitalia including penetrable body orifices such as the mouth, vagina and anus.

county child protective service agencies.[17] Because of the increase in the number of abuse cases reported, the task of validating claims of child sexual abuse is frequently delegated to mental health professionals.[18]

The information obtained by mental health professionals is then used in the legal proceedings which follow. If it is determined that the child is in danger of further abuse in the family setting,[19] civil proceedings[20] can be brought to have the child declared a dependent of the court under section 300 of the California Welfare and Institutions Code.[21] Once the child has been declared a dependent of the court, the court has a range of options

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17. J. VAN DE KAMP, *supra* note 1, at 2.

18. San Jose Mercury News, May 18, 1987, at 12A, col. 1. Mental health professionals, as used in this comment refer to psychiatrists, psychologists, licensed clinical social workers and licensed marriage, family, and child counselors.

19. Distinction should be made between incest (sexual activity between persons who are blood-related) and intrafamilial contact (sexual activity between family members not related by blood). Rape is considered forced oral, anal or vaginal penetration, usually by an unknown perpetrator. J. VAN DE KAMP, *supra* note 1, at 11.

20. Petition is usually filed by the county child welfare department, and in some counties by the probation department. The probation officer or social worker filing the claim is often appointed guardian *ad litem* to represent the interests of the child. *Id.* at 46.

21. CAL. WELF. & INST. CODE § 300 (West Supp. 1987) (operative until Jan. 1, 1989), which applied in *Amber B.*, provided that minors under the following descriptions could be declared dependents of the court:

> (d) Whose home is an unfit place for him or her by reason of neglect, cruelty, depravity, or physical abuse of either of his or her parents, or of his or her guardian or other person in whose custody or care he or she is.
>
> (e) Who is under the age of three and whose home is an unfit place for him or her as a result of severe physical abuse of the minor by a parent, or by any person known by the parent. . . . For the purpose of this section, "severe physical abuse" means any of the following. . .any single act of sexual abuse which causes significant bleeding, deep bruising, or significant external or internal swelling. . . .

Section 300 (operative Jan. 1, 1989) and section 300 (operative Jan. 1, 1990) include a statement of Legislative intent to provide maximum protection for children who are sexually abused and specifically incorporates into the description of minors who may be declared dependents of the court:

> (d) The minor has been sexually abused, or there is a substantial risk that the minor will be sexually abused, as defined in subdivision (b) of Section 11165 of the Penal Code. . .or the parent or guardian has failed to adequately protect the minor from sexual abuse when the parent or guardian knew or reasonably should have known that the minor was in danger of sexual abuse.

to protect the child: from removing the child from the home to leaving the child in the parents' care under court supervision.[22] In addition to civil proceedings, the information obtained may be used if criminal charges are brought against an alleged perpetrator.[23]

There are many difficulties encountered in proving claims of child sexual abuse. The child victim is frequently the only witness to the abuse.[24] As a witness, the competency of the child is often a major issue, although California courts have given liberal interpretation to Evidence Code section 701, which governs the competency of witnesses.[25] Generally the child is only disqualified as incompetent if he or she is incapable of expressing himself or herself or incapable of understanding the duty of the witness to tell the truth.[26] Even if the child is competent, his or her credibility as a witness is still suspect, especially if the child is very young.[27]

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22. The dependency hearing involve two stages. At the jurisdictional stage, the court determines by a preponderance of the evidence, whether the child comes within one of the categories of § 300. The second stage is the the dispositional phase and requires clear and convincing evidence to remove the child from the custody of the parent. In re Cheryl H., 153 Cal. App. 3d 1098, 1112, 200 Cal. Rptr. 789, 797 (1984). Short of removing the child from the parent, the court can order the dependent child to remain at home under the supervision of the child welfare services or probation department. J. VAN DE KAMP, *supra* note 1, at 46; *see also* CAL. WELF. & INST. CODE § 361 (West Supp. 1988) (removal of child from home) and CAL. WELF. & INST. CODE § 360(a) (West Supp. 1988) (supervised custody).

23. CAL. PENAL CODE § 11166(g) (West Supp. 1988) requires cross reports from the child protection agency to the district attorney. *See also* CAL. PENAL CODE § 11165.1 (West Supp. 1988) which defines sexual abuse as sexual assault (rape, incest, sodomy, lewd or lascivious acts, oral copulation, penetration of a genital or anal opening by a foreign object, intentional touching of the child's genitals or clothing covering them, and masturbation in the presence of a child) and sexual exploitation (child pornography and prostitution).

24. J. HERMAN, FATHER-DAUGHTER INCEST 164-65 (1981).

25. CAL. EVID. CODE § 701(a) (West Supp. 1988) states:

> A person is disqualified to be a witness if he or she is: (1) Incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or (2) Incapable of understanding the duty of a witness to tell the truth.

26. *Id.*

27. *See* Myers, *The Child Witness: Techniques for Direct Examination, Cross Examination and Impeachment*, 18 PAC. L.J. 801 (1987) (comprehensive article on children witnesses with specific techniques for supporting and attacking their credibility, including a section on cross examining a child who has testified using anatomical dolls); YATES, *supra* note 14, at 478 (author states that it is not known whether the child can distinguish his or her own thoughts about another person's actions from that person's real

In addition, the experience of testifying can be very traumatic for the child.[28] In cases of intrafamilial sexual abuse, the incidents of abuse are likely to be shrouded in secrecy and involve a family member.[29] Recent legislation has been enacted in an attempt to protect the child witness.[30] But even with these legislative protections, the testimony of the child is often inadequate in proving that the abuse occurred. Furthermore, because there is often a substantial time lag between the incidence of abuse and disclosure, there is seldom sufficient physical evidence to support the claim of sexual abuse.[31]

The lack of direct evidence and the absence of corroborating physical evidence makes the role played by the mental health professional crucial in validating claims of child sexual abuse. This is especially true when the child is very young and unable to testify.[32] In factual situations like *Amber B.*, the testimony of the expert may be the only significant evidence available.[33] Even when the child is able to testify, testimony by the expert has been useful to validate and give credibility to the child's testimony, as well as to dispel any misconceptions and myths the court and jury might have about child sexual abuse.[34]

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actions, particularly when an oedipal-age child attributes sexual intent to a parent).

28. *See supra* note 14. *See also* Tedesco & Schnell, *Children's Reactions to Sex Abuse Investigations and Litigation*, 11 CHILD ABUSE & NEGLECT 267, 271 (children required to testify in court viewed process as harmful).

29. D. EDWARDS, *supra* note 2, at 12, 91 (between 75-85% of child abusers are known to their victims prior to the first incidence of abuse).

30. *See* CAL. PENAL CODE § 861.5 (postponement of preliminary hearing to accommodate child witness); § 868.5 (family member may accompany child to the witness stand); § 868.6 (nonthreatening environment for minor witness); § 868.8 (special precautions for child molestation victims) (West Supp. 1988).

31. *See* SHULTZ, *supra* note 12, at 40.

32. "Toddlers and school-age children have difficulty verbalizing fears and concerns. They are likely, however, to present physical and behavioral signs and symptoms." *Id.* at 47.

33. In re Amber B., 191 Cal. App. 3d 682, 691-92, 236 Cal. Rptr. 623, 629-30 (1987).

34. Expert testimony has been admitted regarding Child Sexual Abuse Accommodation Syndrome [hereinafter CSAAS]. The syndrome describes the supposed typical behavior of sexually abused children involving one or more of five elements: secrecy, helplessness, entrapment and accommodation, delayed disclosure and retraction. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177 (1983). *See* People v. Gray, 187 Cal. App. 3d 213, 231 Cal. Rptr. 658 (1986) (expert testimony regarding CSAAS delayed reporting admissible, and *Kelly-Frye* not applied, as long as purpose was not to prove that abuse had in fact occurred, but to rehabilitate claimant's credibility and to educate the jury about widely held misconceptions about child sexual abuse); People v. Roscoe, 168 Cal. App. 3d 1093, 215 Cal. Rptr. 45 (1985) (court permitted testimony based on CSAAS to rehabilitate the victim's credibility and

Anatomical dolls are recently developed tools which assist mental health professionals in validating claims of child sexual abuse.[35] The dolls are used as a means of aiding children in accurately relating their sexual knowledge and experience.[36] The premise behind the use of these dolls is that the child will use them in making a spontaneous disclosure of an abuse experience with minimal direction and encouragement.[37] The dolls are particularly useful with very young children who lack verbal skills to relate their sexual knowledge and experiences.[38]

The use of anatomical dolls in proving claims of child sexual abuse was examined by the court in *Amber B.* The court held that the testimony of mental health professionals based on their observation of the child with the anatomical dolls and their analysis of the child's reporting of abuse was not merely evidence offered as expert opinion.[39] Instead, the court found their observations and analyses to be the result of scientific processes, and therefore, required stricter scrutiny before being admitted as evidence.[40]

III. APPLYING THE *KELLY-FRYE* TEST IN CHILD SEXUAL ABUSE CASES

On appeal, the primary issue in *Amber B.* was whether the

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did not apply *Kelly-Frye*); In re Cheryl H., 153 Cal. App. 3d 1098, 200 Cal. Rptr. 789 (1984) (although specific evidence based on CSAAS was not offered, expert was permitted to testify generally on symptoms of sexually abused children); People v. Dunnahoo, 152 Cal. App. 3d 561, 199 Cal. Rptr. 796 (1984) (experts permitted to testify to bolster victims' credibility). *But see* cases cited *infra* note 90 (testimony based on CSAAS inadmissible when offered for purposes other than to rehabilitate the credibility of the victim).

35. Anatomical dolls were originally created in 1976 by Marsha Morgan and Virginia Friedemann. Telephone interview with Marsha Morgan (October 30, 1987); *see* B. BOAT & M. EVERSON, USING ANATOMICAL DOLLS: GUIDELINES FOR INTERVIEWING YOUNG CHILDREN IN SEXUAL ABUSE INVESTIGATIONS (1986) (training manual for the use of anatomical dolls); V. FRIEDEMANN, INTERVIEWING SEXUAL ABUSE VICTIMS USING ANATOMICAL DOLLS: THE PROFESSIONAL GUIDEBOOK (1983) (training manual for the use of anatomical dolls); CHILD GUIDANCE CENTER, YOUNG SEXUAL ABUSE VICTIMS: AN INTERVIEW PROTOCOL (1986) (video and guidebook training for interviewing children with anatomical dolls, available by contacting P.O. Box 45145, Cleveland, OH 44145).

36. B. BOAT & M. EVERSON, *supra* note 35, at 3.

37. The methods used in employing anatomical dolls vary, but generally include several sessions with the child in which the professional builds rapport with the child, assesses the child's understanding and observes the child at play with the dolls. *Id.* at 3.

38. *Id.* at 1.

39. In re Amber B., 191 Cal. App. 3d. 682, 691, 236 Cal. Rptr. 623, 629 (1987).

40. *Id.*

techniques employed by the psychologist in detecting child sexual abuse were admissible as expert testimony or were new scientific methods of proof which would have to satisfy the *Kelly-Frye* test of admissibility.[41] The *Kelly-Frye* rule as stated by the *Amber B.* court requires that "evidence based on a new scientific method of proof is admissible only upon a showing that the procedure has been generally accepted as reliable in the scientific community in which it was developed."[42] In addition to showing that the process has been generally accepted, proponents must also show that the process was conducted using the correct scientific procedures and that the person administering the test was properly qualified.[43]

The *Kelly-Frye* test focuses on the reliability of the method in the community in which it was developed. The reliability is established by a showing of general acceptance in the community.[44] General acceptance of the method can be demonstrated by the amount of research conducted in the field, the scientific literature on the subject and the existence of cases in which testimony based on the new theory has been admitted.[45] The burden of establishing the reliability of the method and the proper qualifications of the witness rests on the party offering the evi-

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41. *See* cases cited *supra* note 9.

42. *Amber B.*, 191 Cal. App. 3d at 686, 236 Cal. Rptr. at 625-26.

43. *See* People v. Kelly, 17 Cal. 3d 24, 30, 549 P.2d 1240, 1244, 130 Cal. Rptr. 144, 148 (1976) (court held scientific evidence must meet three part test: 1) method generally accepted as reliable, 2) expert witness properly qualified, and 3) correct procedure used by expert witness); *see also* People v. Dellinger, 163 Cal. App. 3d 284, 293-95, 209 Cal. Rptr. 503, 508-09 (1984) (admission of evidence relating to anthropomorthic dummy in a criminal case to prove the child did not sustain fatal injuries from falling down stairs held to be prejudicial error because it failed to meet the three-prong *Kelly-Frye* test); *see generally* WITKIN, CALIFORNIA EVIDENCE, §§ 864-900 (3d ed. 1986 & Supp. 1987).

44. *Kelly*, 17 Cal. 3d at 30, 549 P.2d at 1244, 130 Cal. Rptr. at 148 (the court's task is not to determine accuracy of the proffered scientific technique but to show a scientific consensus supporting the use).

45. People v. Brown, 40 Cal. 3d 512, 530, 726 P. 2d 516, 523, 230 Cal. Rptr. 834, 841 (1985) (court may look beyond the trial record and examine California precedent, cases from other jurisdictions and scientific literature to determine whether the evidence meets the *Kelly-Frye* test); People v. Shirley, 31 Cal. 3d 18, 56, 641 P.2d 775, 797, 181 Cal. Rptr. 243, 267 (1982) (in meeting the *Kelly-Frye* test, scientists are permitted to speak to the court through published writing such as treatises and journals as evidence of a technique's general acceptance as reliable); *see also* United States v. Brown, 557 F.2d 541, 555 (1977) (amount of research conducted in field); United States v. Baller, 519 F.2d 463, 465-66 (1975) (number of cases that admitted testimony based on new theory); United States v. Stifel, 433 F.2d 431, 441 (1970) (number of articles written on the subject).

dence.[46] A single expert witness would not be sufficient to represent the views of the scientific community regarding reliability.[47]

If evidence based on the use of anatomical dolls is offered as the product of a scientific process, it is doubtful that such evidence will pass the *Kelly-Frye* test. Although the use of such dolls is already widespread within the mental health community,[48] their use is relatively new. There are not, as yet, standardized guidelines by which to use anatomical dolls, nor is there definitive data regarding the interpretation of the information obtained from a child's interaction with the dolls.[49] Another problem in meeting the *Kelly-Frye* test as a scientific process exists in determining who would be qualified to administer the process. There is no consensus among mental health professionals as to the level of training and professional education which should be required of someone utilizing anatomical dolls.[50] The dolls have been used by a range of professionals, such as police officers, nurses, social workers, psychologists and psychiatrists. Many are not properly trained in the use of the dolls.[51] Although there are several training manuals that provide guidelines for the use of anatomical dolls, there is no generally accepted scien-

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46. People v. Kelly, 17 Cal. 3d 24, 36-40, 549 P.2d 1240, 1248-50, 130 Cal. Rptr. 144, 152-54 (1976); *see also Shirley*, 31 Cal. 3d at 54, 641 P.2d at 796, 181 Cal. Rptr. at 265; People v. Roehler, 167 Cal. App. 3d 353, 213 Cal. Rptr. 353 (1985).

47. *Kelly*, 17 Cal. 3d at 37, 549 P.2d at 1248, 130 Cal. Rptr. at 152. To ensure impartiality, the proponent of the evidence should use different experts to establish that the scientific method is generally accepted than those experts that are used to testify regarding the application of the technique in that particular case. *Brown*, 40 Cal. 3d at 533, 726 P. 2d at 525, 230 Cal. Rptr. at 843 (credentialed forensic technicians who offered evidence regarding genetic analyses of dried fluid and stain samples from victim's body in rape case were not qualified to give the view of relevant community of *impartial* scientists because of their affiliation with law enforcement officials in the case).

48. B. BOAT & M. EVERSON, *supra* note 35, at 1.

49. *Id.* at 29. *See* Jampole and Weber, *An Assessment of Behavior of Sexually Abused Children with Anatomically Correct Dolls*, 11 CHILD ABUSE & NEGLECT 187-88 (1987) (article notes common use of anatomical dolls but cautions the need to cross-check any interpretation of a child's behavior with the dolls with other observational data since empirical research regarding anatomical dolls is new and limited).

50. B. BOAT & M. EVERSON, *supra* note 35 at 29.

51. "It is therefore imperative that individuals using anatomical dolls in child sexual abuse investigations obtain adequate training." *Id.* at 3; *see* Pinkney v. Clay County, 635 F. Supp. 1079 (D. Minn. 1986) (in a civil rights action arising from investigation and prosecution of child sexual abuse claims, court found law enforcement officials not properly trained with anatomical dolls to offer expert testimony based on their observations).

tific procedure to be followed.[52] Furthermore, many experts in the field do not view the dolls as a scientific process, but instead, as tools utilized by the clinician to facilitate a better understanding of their child clients.[53]

The inadmissibility of this evidence will have a significant impact on the ability to place young children, who cannot testify, under the protection of the court. In both *Amber B.* and *Christine C.*, the admission of testimony by the expert was considered by the court to be erroneous because the expert utilized anatomical dolls in forming his opinion. This error was found to be harmless in *Christine C.* because the children testified and their testimony was believable.[54] In *Amber B.*, the error was not harmless. Three-year old Amber was unable to testify and there was no other significant evidence besides the testimony of the psychologist.[55] On remand, the district attorney dismissed the dependency petition and Amber and her sister were returned to the sole custody of their parents.[56] Prior to *Amber B.*, the courts allowed this evidence as expert opinion. Why did the court find it necessary to redefine this evidence as the product of a scientific process and, as a result, categorically exclude this important evidence?

IV. THE DISTINCTION BETWEEN EXPERT OPINION AND SCIENTIFIC PROCESS

Prior to *Amber B.*, expert opinion that a child had been sexually abused was admitted, following the court's holding in *In re Cheryl H.*[57] *Cheryl H.* was a dependency hearing in which a psychiatrist offered her opinion that the child had been abused. The court found that the psychiatrist's education, knowledge and experience qualified her to draw inferences about whether or not the child had been sexually abused.[58] This expertise, be-

52. *See* B. BOAT & M. EVERSON, *supra* note 35, at 29.

53. Telephone interview with Barbara Boat, Ph.D. (October 30, 1987); *see* B. BOAT & M. EVERSON, *supra* note 35, at 29.

54. In re Christine C., 191 Cal. App. 3d 676, 680, 236 Cal. Rptr. 630, 632 (1987).

55. In re Amber B., 191 Cal. App. 3d 682, 691, 236 Cal. Rptr. 623, 629 (1987).

56. Telephone interview with Thomas H. Gordinier, Attorney for Plaintiff and Respondent in *Amber B.* (Aug. 27, 1987).

57. 153 Cal. App. 3d 1098, 200 Cal. Rptr. 789 (1984).

58. The court limited the testimony to the issue of whether or not the child had been abused and not whether a particular individual had committed the acts. *Id.* at 1116, 200 Cal. Rptr. at 799-800. The court excluded the opinion of the psychiatrist that the

ing beyond common experience that would assist the trier of fact, allowed the witness to offer her opinion as an expert under the Evidence Code section 801.[59] Section 801(b) requires that the expert opinion be:

> [b]ased on matter (including his special knowledge, skill, experience, training and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates. . . .[60]

The psychiatrist in *Cheryl H.* based her opinion on: 1) observing the child with anatomical dolls, 2) the manner in which the child disclosed the abuse by using new slang terms for genitalia, and 3) observing behavior which demonstrated anxiety symptoms characteristic of sexually abused children.[61] The court found that the data used by the expert witness was proper matter on which to base such an opinion.[62] By allowing the testi-

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father had committed the abuse because it was considered to be an impermissible inference about the conduct of a third party based on hearsay. *Id. See* In re Christina T., 184 Cal. App. 3d 630, 640, 229 Cal. Rptr. 247, 253 (1986) (court held that although the identity of the perpetrator was relevant to the placement of the child, it was not relevant to whether the court should invoke jurisdiction to protect the child, and, therefore, the court could declare the child a dependent of the court without identifying the perpetrator).

59. CAL. EVID. CODE § 801(a) (West 1966).

60. CAL. EVID. CODE § 801(b) (West 1966); *see Cheryl H.*, 153 Cal. App. 3d at 1118, 200 Cal. Rptr. at 801 (It is not enough that an inference be beyond common experience; the expert opinion must assist the trier of fact.)

61. *Cheryl H.*, 153 Cal. App. 3d at 1116-18, 200 Cal. Rptr. at 800-01; *see supra* note 34 for discussion of CSAAS.

62. The court found that the expert's testimony regarding Cheryl's statements and conduct with the anatomical dolls was not hearsay, because her statements were not offered for the truth of the matter asserted, but as the basis for the expert's opinion. *Cheryl H.*, 153 Cal. App. 3d at 1118, 200 Cal. Rptr. at 801. The court also held that most of the conduct and statements on which the expert opinions were based were independently admissible. The conduct by the child was considered to be nonassertive and, therefore, not hearsay. The evidence concerning the anatomical dolls was relevant to infer that the child had been exposed to inappropriate sexual conduct. *Id.* at 1126, 200 Cal. Rptr. at 807. Other jurisdictions have dealt with the hearsay issue of admitting expert testimony of the child's reports of sexual abuse and have admitted testimony of the child's conduct and statements while using the anatomical dolls without applying the *Kelly-Frye* test. *See* In re C. L., 397 N.W.2d 81 (S.D. 1986) (court held that the spontaneous reaction of a six-year old to anatomical dolls and maneuvering of the dolls to

mony under section 801 as expert opinion, the *Cheryl H.* court used a standard of admissibility that required that the manner utilized in basing the opinion be of a type that may be reasonably relied upon in forming such an opinion. The *Amber B.* court modified the *Cheryl H.* holding by labeling the basis of such opinions as scientific processes requiring *Kelly-Frye*.[63] This characterization replaced the reasonable reliance standard with a much stricter standard of general acceptance in the scientific community.

The *Amber B.* court decided that the *Cheryl H.* holding had to be reconsidered primarily because of the subsequent criminal case, *People v. Bledsoe*.[64] In *Bledsoe*, the court applied the *Kelly-Frye* test to evidence of Rape Trauma Syndrome.[65] The *Amber B.* court found *Bledsoe* to be analogous because both cases involved expert testimony based on psychological analysis of behavior.[66] The *Bledsoe* court did not provide any analysis of why Rape Trauma Syndrome was considered a scientific process but simply relied on *People v. Shirley*.[67] In *Shirley*, testimony based on the use of hypnotically aided recall was subjected to

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perform sexual acts was not hearsay but relevant and admissible evidence); In re M.E., 715 S.W.2d 572 (Mo. Ct. App. 1986) (court held that testimony of Family Services staff regarding observations of children with anatomical dolls was not hearsay, but admissible to show unusually superior sexual knowledge to infer some sort of sexual abuse had occurred but not necessarily to identify perpetrator); In re Penelope B., 104 Wash. 2d 643, 709 P. 2d 1185 (1985) (court held that testimony of therapists as to their observation of the child's conduct and demeanor during play with anatomical dolls was admissible as nonassertive conduct and not hearsay and therefore appropriate for inclusion in hypothetical question given to psychiatric expert); D.A.H. v. G.A.H., 371 N.W.2d 1 (Minn. Ct. App. 1985) (court held that psychologist's testimony of child's statement made in a session using anatomical dolls and psychologist's testimony based on an abuse counselor's report were admissible under the "catch-all" exception to hearsay rule because of the guarantee of reliability and trustworthiness of the testimony).

63. In re Amber B., 191 Cal. App. 3d. 682, 691, 236 Cal. Rptr. 623, 629 (1987).

64. People v. Bledsoe, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984) (in a criminal case where the defendant was convicted of forcibly raping a 14-year-old girl, court held that evidence offered by the prosecution regarding Rape Trauma Syndrome was erroneously admitted).

65. Evidence of Rape Trauma Syndrome—a spectrum of physical, psychological and emotional reactions of rape victims was offered by the prosecution to prove a rape occurred. *Id.* at 247-48, 681 P.2d at 298-99, 203 Cal. Rptr at 457-58. The court applied the *Kelly-Frye* standard and then concluded that Rape Trauma Syndrome failed the test because it was not generally accepted as a means of determining whether a rape occurred, but as a therapeutic tool to assist counselors. *Id.* at 249-50, 681 P.2d at 300, 203 Cal. Rptr at 459.

66. *Amber B.*, 191 Cal. App. 3d at 687-88, 236 Cal. Rptr. at 627.

67. People v. Shirley, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982).

the *Kelly-Frye* test.[68]

Shirley and *Bledsoe* did not define scientific process; nor did these cases set forth guidelines for determining when *Kelly-Frye* would apply to psychological evidence.[69] While the *Amber B.* court found *Shirley* and *Bledsoe* to be persuasive, it admitted that the answer to the question of whether the psychologist simply provided expert testimony or utilized a scientific process was "elusive."[70] The court stated that there was little guidance for determining at what point evidence transcends expert testimony and becomes scientific proof.[71] The court further noted that the task is particularly difficult when it involves psychological analysis of behavior.[72] The court rejected the idea that the determination should be made upon factors pertaining to the nature of the challenged procedure.[73] Instead, the court decided that the underlying purpose behind *Kelly-Frye* should determine whether the test is required or not.[74] The court quoted *People v. McDonald* in stating that the underlying purpose was to prevent the factfinder "from being misled by the 'aura of infallibility' that may surround unproven scientific methods."[75] As a result, the *Amber B.* court held that the *Kelly-Frye* test applied to psychological evidence whenever the factfinder would tend to ascribe an inordinately high degree of certainty to the evidence.[76]

In *McDonald*, however, the court did not take such a broad approach in applying *Kelly-Frye*, but instead recognized the importance of distinguishing between expert testimony and scientific evidence.[77] In addressing the issue of whether *Kelly-Frye*

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68. *Id.* at 53, 641 P.2d at 795, 181 Cal. Rptr. at 264. The court stated without elaboration, "[w]e do not doubt that if testimony based on a new scientific process operating on purely psychological evidence were to be offered in our courts, it would likewise be subjected to the *Frye* standard of admissibility." *Id.* Evidence based on hypnotically aided recall did not meet the test because of what the court considered to be a lack of consensus within scientific literature on the subject. *Id.*

69. *Amber B.*, 191 Cal. App. 3d at 688, 236 Cal. Rptr. at 627.

70. *Id.* at 690, 236 Cal. Rptr. at 628.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*, 236 Cal. Rptr. at 629 (quoting People v. McDonald, 37 Cal. 3d 351, 372, 690 P.2d 709, 723-24, 208 Cal. Rptr. 236, 250-51 (1984)).

76. *Amber B.*, 191 Cal. App. 3d at 690-91, 236 Cal. Rptr. at 629.

77. People v. McDonald, 37 Cal. 3d at 372, 690 P.2d at 723-24, 208 Cal. Rptr. 250-51.

should be applied to psychological evidence involving cross-racial identification in line-ups, the court stated that expert testimony can be tempered by healthy skepticism, but that "the opposite may be true when the evidence is produced by a machine:. . .apparently 'scientific' mechanism, instrument, or procedure."[78] The court in *McDonald* was not persuaded that *Kelly-Frye* would apply.[79]

The *Amber B.* court acknowledged that the *Kelly-Frye* test has been used primarily for "novel devices or processes involving the manipulation of physical evidence, such as lie detectors, experimental systems of blood typing, voiceprints, identification by human bite marks. . . ."[80] The court noted that the few cases that did apply the test to psychological evidence gave little guidance for determining "at what point evidence based upon a psychological analysis of behavior transcends expert testimony and becomes scientific evidence."[81] But, the court side-stepped the issue by failing to determine what constitutes "scientific evidence."[82] Instead of clarifying the distinctions between scientific processes and expert opinion, the court tended to blur them together.

The court should have made a clear distinction between expert opinion and scientific process. The court decided not to take the direct approach of determining "the presence of a 'new scientific method of proof' based upon factors pertaining to the nature of the challenged procedure. . . ."[83] If the court had, it would have had a difficult time labeling the use of anatomical

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78. *Id.*

79. *Id.* at 373, 690 P.2d at 724, 208 Cal. Rptr. at 251. The court stated:

> We have never applied the *Kelly-Frye* rule to expert medical testimony, even when the witness is a psychiatrist and the subject matter is as esoteric as the reconstitution of a past state of mind or the prediction of future dangerousness, or even the diagnosis of an unusual form of mental illnes not listed in the diagnostic manual of the American Psychiatric Association.

Id. See People v. Gray, 187 Cal. App. 3d 213, 231 Cal. Rptr. 658 (1986) (the court, following *McDonald*, held that expert testimony regarding CSAAS did not need to meet *Kelly-Frye* when offered to rehabilitate claimant's testimony).

80. *Amber B.*, 191 Cal. App. 3d at 686, 236 Cal. Rptr. at 625-26.

81. *Id.* at 690, 236 Cal. Rptr. at 628.

82. *Id.* at 691, 236 Cal. Rptr. at 629.

83. *Id.* at 690, 236 Cal. Rptr. at 629.

dolls and analysis of the child's report of abuse as scientific processes requiring *Kelly-Frye*. By failing to determine whether a scientific process exists, but instead focusing on whether the factfinder would tend to ascribe an inordinately high degree of certainty to the evidence, the court creates a test that is ambiguous and tends to beg the question. Expert testimony is traditionally utilized because the subject matter is beyond the common experience of the factfinder.[84] The court does not indicate at what point, beyond that of common experience, the factfinder would tend to ascribe an inordinately high degree of certainty to the expert testimony.

Experts' opinions based on observing children with anatomical dolls cannot be considered a scientific process in the same manner as voiceprints or polygraphs. The dictionary defines the word "scientific" as "systematic or accurate in the manner of an exact science."[85] The use of devices that physically manipulate pieces of data and give quantifiable results fall more clearly into this definition of scientific process. The use of anatomical dolls and the analysis of the child's reporting do not. The experts' opinions in these cases are based on their training, knowledge and general experience in working with children who have been sexually abused.[86] The dolls are not a standardized test which produce quantifiable results. They are the working tools of clinicians which provide relevant insight upon which experts can base their opinions.[87] As one manual for the use of anatomical

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84. *See supra* notes 59-61 and accompanying text.

85. RANDOM HOUSE COLLEGE DICTIONARY 1179 (rev. ed. 1975). *Accord* STEDMAN'S MEDICAL DICTIONARY 867 & 1140 (5th ed. 1982), which defines "method" as a mode or manner or orderly sequence of events of a process and defines "process" as a method used in attainment of a certain result.

86. In re Cheryl H., 153 Cal. App. 3d 1098, 1116, 200 Cal. Rptr. 789, 800 (1984) (psychiatrist's education, knowledge and experience made her familiar with the behavior typical of children who have been subjected to sexual abuse and allowed her to draw inferences that were beyond common experience; therefore, of assistance to the finder of fact).

87. *See also* In re Rinesmith, 144 Mich. App. 475, 477, 376 N.W.2d 139, 141 (1985) (a Michigan court rejected the argument that expert testimony based on observations of the child with anatomical dolls must first meet the *Frye* standard to be admissible as a foundation for the expert's opinion that the child was sexually abused because the dolls were not calculated to elicit a particular result but as tools to permit children to communicate ideas which they are unable to express verbally); In re E.M., 520 N.Y.S.2d 327, 332 (N.Y. Fam. Ct. 1987) (a New York court permitted expert testimony based on anatomical dolls to corroborate child's out-of-court statements, but noted that empirical research is new and limited, and therefore more weight should be given to the experts who

dolls states:

> Anatomical dolls are not magical. Using them in a sexual abuse investigation does not ensure disclosure nor provide a failsafe method of obtaining the truth. Instead, they are a highly valuable tool for facilitating a meaningful exchange with children about their sexual knowledge and experience. . . . The effectiveness of any tool is contingent upon the skill of the user.[88]

In *Amber B.* the psychologist's opinion was also based upon Amber's disclosure of the abuse.[89] It is likely that the expert based this opinion upon his knowledge of general theories of child development and his expertise in the assessment and treatment of sexually abused children tailored to the unique situation of this particular child. But, the court characterized this testimony, not as expert opinion, but as a scientific process requiring the *Kelly-Frye* standard of general acceptance.[90] Mental health professionals might agree that a psychologist could reasonably rely on the nature of the reporting in forming an *opinion* that

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are professionally qualified in clinical disciplines and have had experience in diagnostic assessment of child sexual abuse victims).

88. B. BOAT & M. EVERSON, *supra* note 35, at 3. *See also* Jampole & Weber *supra* note 49, at 192 (the study compared the behavior of sexually abused children and children not sexually abused at play with anatomical dolls and concluded that "anatomical dolls are a useful instrument in child abuse investigations.")

89. In re Amber B., 191 Cal. App. 3d 682, 685, 236 Cal. Rptr. 623, 625 (1987).

90. *Id.* at 691, 236 Cal. Rptr. at 629. The *Amber* court distinguished the expert's analysis of the child's report of abuse from Child Sexual Abuse Accommodation Syndrome because the witness did not specifically mention the syndrome or its elements. But the court suggests that evidence based on the syndrome would also be considered a scientific process and therefore subject to *Kelly-Frye*. *Id.* at 690 n.3, 236 Cal. Rptr. at 628 n.3. *See also* In re Sara M., 194 Cal. App. 3d 585, 239 Cal. Rptr. 605 (1987) (court held that expert testimony based on "child molest syndrome" must meet the *Kelly-Frye* test unless offered for the sole purpose of rehabilitating the victim's credibility and that the evidence failed to meet the test); Seering v. Department of Social Serv., 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1987) (testimony of psychiatrist based on child sexual abuse accommodation syndrome inadmissible for failing to meet *Kelly-Frye* test); *but see* Myers, *supra* note 27, at 801 (author states that CSAAS is the proper subject for expert testimony that the child had been abused and to bolster credibility of the victim); Comment, *Child Sexual Abuse in California: Legislative and Judicial Responses*, 15 GOLDEN GATE U.L. REV. 437 (1985) (overview of child sexual abuse legislation); Comment, *The Admissibility of "Child Sexual Abuse Accommodation Syndrome" in California Criminal Courts*, 17 PAC. L.J. 1361 (1986) (advocates the admissibility of CSAAS in criminal cases and argues that CSAAS should be able to meet the *Kelly-Frye* test); *see also* cases cited *supra* note 34 (CSAAS admissible to rehabilitate credibility of victim).

the child had been sexually abused. But it is doubtful that they would agree that this particular psychologist's analysis of the child's reporting was generally acceptable as a reliable *scientific process* of diagnosing sexual abuse.

A subsequent case, *Seering v. Department of Social Services*,[91] recognized the difference between an expert's personal opinion based on his or her own experience and an opinion that was based upon a scientific process.[92] The *Seering* court, in rejecting the *Amber B.* court's broad language, held that subjecting all expert testimony based upon analyses of the child's reports of child sexual abuse to the *Kelly-Frye* test would severely limit the ability of experts to present their opinions.[93] The court reasoned that in most cases it would be impossible to show that the expert's own personal opinion would be generally accepted in the relevant scientific community.[94]

The *Amber B.* court labels such testimony as a scientific process based solely on the tendency of the factfinder to be awed by the evidence. The court's determination is done without examining the nature of the evidence and without even considering whether the community which developed the evidence considers it to be a scientific process. Once labeled as scientific process, the court will not admit the evidence unless it is shown that the community from which it was developed generally accepts it as a reliable scientific process. If that community does not in the first place consider the evidence to be a scientific process, the evidence can never pass a test of being generally accepted as a reliable scientific method. Therefore, by the court's not considering the nature of the evidence but instead focusing on the probable effect it might have on influencing a factfinder, the court categorically excludes the evidence. If the court is going to look to the scientific community for reliability, it should also look to that community to determine initially whether the evidence can be defined as a scientific process.

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91. 194 Cal. App. 3d 298, 314, 239 Cal. Rptr. 422, 432 (1987).

92. Although testimony of the psychiatrist's own opinion was admitted as expert opinion, the court adopted the *Amber B.* analysis in finding that testimony based on CSAAS must meet the *Kelly-Frye* test. *Id.* at 307, 239 Cal. Rptr. at 428.

93. *Id.* at 314, 239 Cal. Rptr. at 432.

94. *Id.*

The court would have been correct in excluding the evidence based on the anatomical dolls and the analysis of the child's report if it had been offered as the result of a *scientific process* to prove that an abuse had occurred.[95] But the evidence was not offered for that purpose. It was offered as an explanation of how the expert utilized his knowledge, skill, training and experience in forming his opinion that the child had been sexually abused.[96]

The court was motivated to impose *Kelly-Frye* out of its concern that the factfinder would be unduly impressed by expert opinion based upon unreliable matters.[97] But, concerns about the reliability and trustworthiness of experts' opinions were sufficiently addressed by *Cheryl H.*[98] and the application of Evidence Code section 801(b).[99] This statute, which models the Federal Rules of Evidence,[100] requires that the matter relied upon by the expert in forming his or her opinion be of a type that reasonably may be relied upon by experts in forming an opinion upon the subject to which the testimony relates.[101] As the Law Revision Commission comment following the statute states: "In a large measure, this assures the reliability and trustworthiness of the information used by experts in forming their opinion."[102] The statute provides adequate safeguards without the additional requirements of *Kelly-Frye*.

V. APPLYING *KELLY-FRYE* TO DEPENDENCY HEARINGS

In addition to its failure to adequately define scientific process, the *Amber B.* court applied *Kelly-Frye* to dependency hearings without fully considering the distinction between dependency hearings and criminal trials.[103] In determining that the

95. *Id.*

96. *See supra* notes 57-59 and accompanying text.

97. In re Amber B., 191 Cal. App. 3d 682, 686, 236 Cal. Rptr. 623, 626 (1987).

98. *See supra* note 60 and accompanying text.

99. *See supra* notes 57-63 and accompanying text.

100. FED. R. EVID. 703 ("If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.")

101. CAL. EVID. CODE § 801(b) (West 1966).

102. CAL. EVID. CODE § 801 Cal. Law Rev. Commission's comment (West 1966).

103. *See supra* notes 19-23 and accompanying text and *infra* notes 113-14 and ac-

holding in *Cheryl H.* needed to be reconsidered, the *Amber B.* court relied heavily upon *Bledsoe* and *Shirley*.[104] *Cheryl H.*, however, was a dependency hearing, while both *Bledsoe* and *Shirley* were criminal cases.

In *Bledsoe*, the court's main concern was whether the evidence of Rape Trauma Syndrome was reliable in determining whether "a rape in a legal sense has, in fact, occurred."[105] Although *Bledsoe* did not specifically lay out the reasons for applying the *Kelly-Frye* standard,[106] its application and necessity for judicial restraint were generally in line with *People v. Kelly*.[107]

The *Kelly* court applied the *Frye* general acceptance standard of admissibility to evidence based on voiceprints. In applying the standard, the court stated that the criticism of the *Frye* standard was that the test was "too conservative, often resulting in the prevention of the admission of relevant evidence."[108] The *Kelly* court found the conservative nature of the test to be its primary advantage in criminal cases and that the "[e]xercise of restraint is especially warranted when the identification technique is offered to identify the perpetrator of a crime."[109]

Following *Bledsoe*, several criminal cases did allow expert testimony regarding child sexual abuse and these cases did not require *Kelly-Frye*.[110] The *Amber B.* court distinguished these cases from *Bledsoe* based on the fact that the evidence was limited to a discussion of the victims as a class and not as evidence of the commission of a crime or the identification of the perpetrator.[111] The court went on to say that the issue could not be avoided in *Amber B.* because the expert gave a direct opinion that Amber had been molested.[112] At this point, the court

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companying text.

104. *See supra* notes 64-67 and accompanying text.

105. People v. Bledsoe, 36 Cal. 3d 236, 248, 681 P.2d 291, 299, 203 Cal. Rptr. 450, 458 (1984).

106. *Id.* at 247 n.7, 681 P.2d at 298 n.7, 203 Cal. Rptr. at 457 n.7.

107. People v. Kelly, 17 Cal. 3d 24, 30, 549 P.2d 1240, 1244, 130 Cal. Rptr. 144, 148 (1976).

108. *Id.*

109. *Id.* at 32, 549 P.2d at 1245, 130 Cal. Rptr. at 149.

110. *See* cases cited *supra* note 34.

111. In re Amber B., 191 Cal. App. 3d 682, 689-90, 236 Cal. Rptr. 623, 627-28 (1987).

112. *Id.* at 689, 236 Cal. Rptr. at 628.

equated a determination of abuse in a dependency hearing with the identification and commission of a crime in a criminal case. They are not the same. A determination of abuse in a dependency hearing results in the child being placed under court protection,[113] while the identification of a perpetrator in a criminal trial can subject that person to imprisonment.[114]

In one of the criminal cases, *People v. Roscoe*,[115] the court noted that "[l]ess strict rules of admissibility apply where child abuse is an issue in noncriminal cases, such as Welfare and Institutions Code section 300 dependency proceedings."[116] The *Amber B.* court pointed out that *Roscoe* did not cite any authority and, therefore, it did not survive scrutiny.[117] In stating that *Kelly-Frye* applied in dependency hearings, the *Amber B.* court's reasoning was short and simple: 1) Welfare and Institutions Code section 355[118] requires evidence legally admissible in trial of civil cases; 2) *Kelly-Frye* has been applied in civil trials;[119] therefore, *Kelly-Frye* applies in dependency hearings.[120] The court's cursory analysis fails to take into consideration that statutes and case law have made evidentiary exceptions in dependency hearings and that the *Kelly-Frye* test has been historically applied in criminal trials. In fact, the case which the court cites to support its argument that *Kelly-Frye* has been applied in civil cases is a paternity suit, more akin to a criminal trial in that the purpose is to identify a person responsible for an act.[121]

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113. *See supra* notes 19-22 and accompanying text.

114. *See supra* note 23 and accompanying text.

115. 168 Cal. App. 3d 1093, 215 Cal. Rptr. 45 (1985).

116. *Id.* at 1100 n.4, 215 Cal. Rptr. at 50 n.4.

117. *Amber B.*, 191 Cal. App. 3d at 689, 236 Cal. Rptr. at 628.

118. CAL. WELF. & INST. CODE § 355 (West Supp. 1988). The statute states:

> [A]ny matter or information relevant and material to the circumstances or acts which are alleged to bring [the child] within the jurisdiction of the juvenile court is admissible and may be received in evidence. However, proof by a preponderance of evidence, legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person described by § 300.

Section 701 additionally provides that "[t]he admission and exclusion of evidence shall be pursuant to the rules of evidence established by the Evidence Code and by judicial decision." (West 1984).

119. Huntingdon v. Crowley, 64 Cal. 2d 647, 414 P.2d 382, 51 Cal. Rptr. 254 (1966) (court held that evidence regarding blood grouping in paternity proceedings must meet the *Kelly-Frye* test to be admissible).

120. *Amber B.*, 191 Cal. App. 3d at 689, 236 Cal. Rptr. at 628.

121. *Huntingdon*, 64 Cal. 2d. 647, 414 P.2d 382, 51 Cal. Rptr. 254.

Despite *Roscoe's* lack of citing authorities, support can be found elsewhere for the idea that the conservative and stricter criterion of admissibility required by *Kelly-Frye* might be necessary in criminal proceedings[122] but unwarranted in dependency hearings.[123] In dependency hearings, the safety and welfare of the child is paramount.[124] Statutes and judicial decisions have recognized this important social policy by creating exceptions in the rules of admissibility for dependency hearings.

The Evidence Code generally prohibits the admission of character evidence.[125] In dependency hearings, however, a statutory exception has been created allowing evidence that a parent or guardian abused another minor.[126] Another exception allows the hearsay reports of probation officers.[127] In addition, the

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122. See People v. Gray, 187 Cal. App. 3d 213, 231 Cal. Rptr. 658 (1986) in which the court held that expert testimony regarding CSAAS did not need to meet the *Kelly-Frye* test when offered to rehabilitate the credibility of the claimant witness. The court's reasoning for not applying *Kelly-Frye* in this criminal case was that the evidence was not being offered to prove the commission of a crime or identify the perpetrator. Had it been, the court would have imposed the test.

123. See In re E.M., 520 N.Y.S.2d 327 (N.Y. Fam. Ct. 1987) in which a New York court held admissible testimony of an expert regarding child's conduct with anatomical dolls to corroborate child's out-of-court statements. *Id.* at 327. In discussing whether this evidence would meet the *Frye* standard, the court stated that "an overriding point to remember [was] that Family Court child protective proceedings were civil, rather than criminal, in nature and that it is therefore appropriate to err on the side of admissibility. . .when it comes to the introduction of evidence derived from new clinical testing techniques. . . ." *Id.* at 332.

124. *See* In re Mary S., 186 Cal. App. 3d 414, 230 Cal. Rptr. 726 (1986) (in dependency hearings evidence code should be interpreted in light of paramount purpose to protect welfare of the child); Collins v. Superior Court, 74 Cal. App. 3d 47, 141 Cal. Rptr. 273 (1977) (purpose to protect and promote welfare of child); In re Raya, 255 Cal. App. 2d 260, 63 Cal. Rptr. 252 (1967) (welfare of child paramount concern); People v. Fifield, 136 Cal. App. 2d 741, 289 P.2d 303 (1955) (juvenile proceedings are not criminal trials but in nature of guardian proceedings). *See also* CAL. WELF. & INST. CODE section 300 (West Supp. 1988) (operative Jan. 1, 1988 & operative Jan. 1, 1990) (the intent of the Legislature in enacting section 300 is to provide maximum protection for children who are sexually abused.

125. CAL. EVID. CODE § 1101 (West Supp. 1988) ("evidence of a person's character. . .is inadmissible when offered to prove his or her conduct on a specified occasion.")

126. CAL. WELF. & INST. CODE § 355.1(b) (West Supp. 1988); *see* In re Dorothy I., 162 Cal. App. 3d 1154, 209 Cal. Rptr. 5 (1984) (in a dependency hearing, psychiatrist permitted to testify that there was substantial danger posed to the child as result of abusive conduct of the father toward minor's sibling, regardless of Evidence Code section 1101, which prohibits character evidence); In re Marianne R., 113 Cal. App. 3d 423, 169 Cal. Rptr. 848 (1980) (in a proceeding to maintain placement of the child in foster care, evidence concerning the father's prior sexual conduct with his stepdaughter held admissible, regardless of the admissibility of this evidence in a criminal trial).

127. CAL. WELF. & INST. CODE § 281 (West 1984).

fourth amendment exclusionary rule relating to unlawfully seized evidence has been determined to be inapplicable in dependency hearings because of the potential harm to children in allowing them to remain in an unhealthy environment.[128] Furthermore, the sixth amendment right to confront the witness is not considered absolute in civil cases and in particular, dependency hearings. Because the child's welfare is paramount, confrontation of the minor witness by the parent's counsel may be done in the judge's chambers, outside the presence of the parents.[129] The legislature has also created a legal presumption that certain children come within the jurisdiction of Welfare and Institutions Code section 300.[130] This presumption establishes a prima facie case for dependency when the court finds, upon competent professional evidence, that an injury or detrimental condition exists, that is of such a nature as would not be ordinarily sustained except through abuse.[131]

Another difference between dependency hearings and other civil proceedings and criminal trials is that dependency hearings, as a function of the court's equitable jurisdiction, are not heard in the presence of a jury. The *Amber B.* court states that the underlying purpose of the *Kelly-Frye* test is to prevent the factfinder from being misled by the "aura of infallibility" that may surround unproven scientific methods.[132] This may be necessary in a criminal or civil proceeding when the factfinder is

128. In re Christopher B., 82 Cal. App. 3d 608, 147 Cal. Rptr. 390 (1978).

129. Seering v. Department of Social Serv., 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1987) (in administrative hearing regarding suspension of day care license, victim allowed to testify in chambers because of trauma and fear of testifying in front of alleged perpetrator, held not to violate statutory and due process rights to confront witness); In re Mary S., 186 Cal. App. 3d 414, 419, 230 Cal. Rptr. 726, 729 (1986) (father's right to confrontation adequately protected by counsel's cross examination in chambers, outside presence of father); *See* CAL. WELF. & INST. CODE § 350(b) (West Supp. 1988) (testimony of the child may be taken in chambers, outside the presence of the parents if the court determines it is necessary to ensure truthfulness, if the minor is intimidated by the court setting, or the child is afraid to testify in front of the parents).

130. CAL. WELF. & INST. CODE § 355.1(a) (West Supp. 1988). The presumption is one affecting the burden of proof, not a presumption affecting the production of evidence. *Id.* at § 355.1(c). This statute replaced an earlier statute which one court interpreted as only affecting the production of evidence. *See* In re James B., 166 Cal. App. 3d 934, 212 Cal. Rptr. 778 (1985) (presumption only survived until the parents presented rebuttal evidence).

131. CAL. WELF. & INST. CODE § 355.1(a) (West Supp. 1988). The statute also states that testimony by a parent in a section 300 proceeding is inadmissible as evidence in other actions. *Id.* at § 355.1(d).

132. In re Amber B., 191 Cal. App. 3d 682, 690, 236 Cal. Rptr. 623, 629 (1987).

typically a jury. With a jury, there may be a greater possibility of abuse relative to the weight of evidence than there would be if a judge were the trier of fact.[133] But, in dependency hearings, the factfinder is always a judge[134] who, through his or her experience of hearing numerous expert witnesses, would tend to be less impressed with the opinion of the expert than a lay juror. The *Kelly-Frye* test removes the question of the evidence's reliability from the discretion of the judge.[135]

The *Kelly-Frye* standard of admissibility has been criticized by commentators for preventing the admission of relevant evidence.[136] The critics state that the goals of the test, such as providing uniformity and shielding the factfinder from the tendency to treat the evidence as infallible, can be obtained through other alternatives.[137] Some jurisdictions have modified the test by adopting a substantial acceptance test rather than the general acceptance test.[138] Others allow evidence regarding the general acceptance for purposes of determining the weight of the evidence but not for the purpose of exclusion.[139] Several jurisdictions have rejected the test completely and rely on traditional

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133. C. McCORMICK, McCORMICK ON EVIDENCE § 60 (3d ed. 1984) ("[judges'] professional experience in valuing evidence greatly lessens the need for exclusionary rules.")

134. McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (no federal constitutional right to jury trial in juvenile court cases).

135. *See supra* notes 108-09 and accompanying text.

136. People v. Kelly, 17 Cal. 3d 24, 30-31, 549 P.2d 1240, 1244, 130 Cal. Rptr. 144, 148 (1976); *Amber B.*, 191 Cal. App. 3d at 690 n.4, 236 Cal. Rptr. at 629 n.4; *see* McCORMICK, *supra* note 133 at §§ 203-06; Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197 (1980) (article details the lengthy and controversial history of the *Frye* test and the author accepts the premise of *Frye*, at least in criminal cases, but rejects the standard as unworkable).

137. *See*, McCORMICK, *supra* note 133, at § 203 at 608 (author states that the *Frye* standard should be substituted with a substantial acceptance test which would allow any relevant conclusions supported by qualified expert witness to be admitted unless there are distinct reasons for exclusion, such as unfair prejudice); Giannelli *supra* note 136, at 1248 (author advocates a procedure in which the proponent would be required to establish the validity of a novel scientific technique beyond a reasonable doubt in criminal trials and by a preponderance of the evidence in a civil trial).

138. McCORMICK, *supra* note 133, at § 203 at 606.

139. *Id. See* People v. Marx, 54 Cal. App. 3d 100, 126 Cal. Rptr. 350 (1975). The court agreed generally with the purpose of the *Kelly-Frye* standard, but in holding that the trial court did not err in not applying the standard, the court stated, "[w]e do not believe that under all the circumstances of this case the standard of 'general acceptance by recognized experts in the field' is determinative of the admissibility—as distinguished from weight—of the evidence in this case." *Id.* at 109-10, 126 Cal. Rptr. at 355.

standards of relevance and expertise.[140]

Cheryl H. recognized the need to protect the child and permitted expert testimony to address the issue of whether the child had been abused and needed court protection.[141] The court did not allow this evidence to prove the commission of a crime or to identify the actual perpetrator.[142] By limiting the evidence solely to the determination of whether the child was in danger and in need of protection, the judicial restraint of *Kelly* was not required. Under *Cheryl H.*, the judge had adequate safeguards to limit or exclude the evidence if necessary. The evidence could be excluded if irrelevant,[143] or if the probative value was substantially outweighed by the danger of unfair prejudice or confusion of the issues.[144]

VI. CONCLUSION

As the *Amber B.* court states, it is particularly difficult to determine at what point evidence of psychological analysis of behavior transcends expert testimony and becomes scientific evidence. To this elusive question, the court offers little clarification. It imposes a test based on how likely the factfinder is to be awed by the evidence. Had the court defined scientific process based on the nature of the evidence, it is doubtful that the use of anatomical dolls or the analysis of the child's report of abuse would be considered scientific processes requiring *Kelly-Frye.* The dolls are a tool to facilitate a meaningful exchange between the therapist and child, and they aid the therapist in forming his or her opinion as to whether the child has been abused. They are not a scientific process whereby data is inserted and quantifiable results emerge.

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140. McCormick, *supra* note 133 at § 203 at 607. *See* Giannelli *supra* note 136. The author states that the current status of the *Frye* test is difficult to assess and the adoption of Federal Rules of Evidence, although adopted by twenty-two jurisdictions adds no clarity, because the Rules, the Advisory Committee's Notes and legislative history are silent on whether the Rules supersede or incorporate the *Frye* standard. *Id.* at 1228-30. The author further reports that jurisdictions are split but that it is likely that more courts will reject the *Frye* standard in favor of alternative approaches. *Id.* at 1231.

141. In re Cheryl H., 153 Cal. App. 3d 1098, 1116-18, 200 Cal. Rptr. 789, 800-01 (1984).

142. *Id.* at 1118, 200 Cal. Rptr. at 801.

143. Cal. Evid. Code §§ 350-351 (West 1966).

144. Cal. Evid. Code § 352 (West 1966).

In dependency hearings, the ultimate goal is the welfare and safety of the child. The social policy of preventing continued and future harm to the child demands that all relevant evidence be presented and that the judge be given a wide latitude of discretion in determining what evidence is admissible. The additional requirement of reliability as imposed by the *Kelly-Frye* standard may be necessary in criminal cases before juries, but is unwarranted in dependency hearings. The previous safeguards of *Cheryl H.*[145] prevented the evidence from being used to identify the perpetrator, but allowed the evidence to determine whether an abuse had occurred for the limited purpose of determining whether the child was in danger. Unfortunately, the *Amber B.* court has chosen to erect yet another barrier in the already difficult task of protecting sexually abused children.

*Matthew J. Dulka**

145. *Cheryl H.*, 153 Cal. App. 3d 1098, 200 Cal. Rptr. 789.

* Golden Gate University School of Law, class of 1989.