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Child Sexual Abuse in Custody and Visitation Disputes: Problems, Progress, and Prospects

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CHILD SEXUAL ABUSE IN CUSTODY AND VISITATION DISPUTES: PROBLEMS, PROGRESS, AND PROSPECTS

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I. INTRODUCTION

Child sexual abuse[1] is not a new societal phenomenon in the United States. During the past decade, however, the number of

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1. CAL. PENAL CODE § 288(a) (West Supp. 1990) defines child sexual abuse as follows:

> Any person who shall willfully and lewdly commit any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child, shall be guilty of a felony . . . .

N.Y. FAM. CT. ACT § 1012(e) (McKinney 1983 & Supp. 1990) provides:

> "Abused child" means a child less than eighteen years of age whose parent or other person legally responsible for his care
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> (i) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or
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> (ii) creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or
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> (iii) commits, or allows to be committed, a sex offense against such child, as defined in the penal law; . . . .

reported cases has increased dramatically.[2] Experts differ about the reasons,[3] but in general there is an environment today that allows this problem to come to public attention as never before; it is talked about in the press, and people feel free to bring sexual problems to professionals.[4]

This Comment will focus on cases involving allegations of child sexual abuse made during divorce proceedings or during post-judgment custody and visitation disputes.[5] California law is the primary focus. New York cases, statutes and procedures are compared and contrasted.[6]

The Comment first discusses studies of the veracity of allegations of sexual abuse arising in custody and visitation cases. Secondly, it addresses the methods used in the investigation and assessment of child sexual abuse charges. Finally, it explores which court is best able to decide these cases.

II. BACKGROUND: STUDIES OF THE VERACITY OF CHILD SEXUAL ABUSE ALLEGATIONS

The likelihood that an allegation of child sexual abuse will be false has not been accurately calculated. However, these allegations have become a focus of the courts in the last few years because a divorce or custody proceeding can come to a halt until

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2. In 1976, the American Humane Association confirmed 6,000 reports of child sexual abuse. In 1984, the figure was 100,000; by 1986, 132,000. Szegedy-Maszak, *Who's to Judge*, N.Y. Times, May 21, 1989, § 6 (Sunday Magazine), at 28, 89.

All states today have reporting statutes which require professionals who have contact with children to report suspected cases of abuse. Morris, *Sexually Abused Children of Divorce*, 5 J. AM. ACAD. MATRIMONIAL LAW. 24, 45 (1989).

3. One writer attributes the increase in public attention to an actual increase in bona fide incidents of child sexual abuse, which he believes is due to a general deterioration of societal values. Gardner, *Differentiating Between Bona Fide and Fabricated Allegations of Sexual Abuse of Children*, 5 J. AM. ACAD. MATRIMONIAL LAW. 1, 1 (1989).

4. *See* Finkelhor, *Sexual Abuse: A Sociological Perspective*, 6 CHILD ABUSE & NEGLECT 95, 99 (1982).

5. For articles on a variety of issues in this area, see SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES (E. Nicholson ed. 1988) [hereinafter Nicholson]. This volume was compiled under the auspices of the American Bar Association National Legal Resource Center for Child Advocacy and Protection.

6. Both states have had a significant amount of litigation in this area, and the similarities and differences in the way their courts have handled the cases are likely to indicate trends in the law.

the truth or falsehood of the abuse allegation can be determined.[7]

An extensive research study on child sexual abuse is being completed by Theonnes and Pearson, through the Abuse Allegations Project in Denver, Colorado.[8] The study tracked the number and nature of abuse allegations heard by court mediators and investigators in twelve courts throughout the country, and conducted in-depth interviews at five court sites.[9]

The information gathered in this project indicates that in most courts "approximately two percent to ten percent of all family court cases involving custody and/or visitation disputes also involve a charge of sexual abuse."[10] Deliberately false allegations did occur, but they were found to be exceedingly rare.[11]

Two other psychologist-researchers, Jones and McGraw,[12] reviewed 576 consecutive referrals of sexual abuse to the Denver Department of Social Services in 1983.[13] Only eight percent of all reports were determined to be "fictitious."[14] Seventy percent of the reports were reliable and twenty-two percent were cases of unsubstantiated suspicion.[15] An important aspect of this

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7. Sink, *Studies of True and False Allegations: A Critical Review*, in Nicholson, *supra* note 5, at 37.

8. Theonnes & Pearson, *Summary of Findings from the Sexual Abuse Allegations Project*, in Nicholson, *supra* note 5, at 2. The project contacted 25 large domestic relations courts throughout the country and received nearly 300 completed questionnaires from members of the National Council on Juvenile and Family Court Judges and the Association of Family and Conciliation Courts.

9. *Id.* The court sites were Denver, Los Angeles, Seattle, Madison, and Cambridge. Court mediators, evaluators, and administrators, court clinical staff, domestic relations and juvenile court judges, referees, guardians ad litem, court appointed special advocates, child protective services workers, private custody evaluators, private family law practitioners and private clinicians were interviewed.

10. *Id.* at 4.

11. *Id.* at 14.

12. Jones & McGraw, *Reliable and Fictitious Accounts of Sexual Abuse to Children*, 2 J. INTERPERSONAL VIOLENCE 27 (1987).

13. *Id.* at 28. This sample is comprehensive and appears reliable since it included all the reports of abuse made to the local child abuse services in that year.

14. *Id.* at 31.

15. *Id.*

study is that Jones and McGraw differentiated between "fictitious" allegations, "unsubstantiated suspicions" and "insufficient information" reports.[16]

Horowitz, Salt, Gomes-Schwartz, and Sauzier[17] reported on 181 cases referred to a sexual abuse evaluation and treatment project in a Boston medical center.[18] Fictitious accounts represented less than five percent of the total number of referrals.[19]

Studies which have concluded that most of the allegations during custody disputes are false have relied on small samples.[20] Benedek and Schetky, with a sample group of only eighteen cases, determined that ten (fifty-five percent) of the allegations were false.[21]

Green, a psychiatrist at Presbyterian Hospital in New York City, reported on a clinical study in which four (thirty-six percent) of the eleven allegations of sexual abuse made during custody proceedings were false.[22] While emphasizing that rarely would a child falsely disclose abuse, Green concluded that some children may be influenced by a vindictive or delusional parent to tell fabricated stories.[23]

Dr. David Corwin, a California psychiatrist who has clinically interviewed many sexually abused children, rebuts Green,

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16. *Id.* at 29. "Fictitious" allegations included deliberate falsifications, misperceptions, and accounts by children who had been coached by adults to speak falsely. "Unsubstantiated suspicions" were suspicions of abuse reported without malice by adults who accepted the conclusion of social services that the abuse had not occurred. "Insufficient information" reports were those for which social services did not have enough data to conclude whether abuse had occurred.

17. *See* Sink, *supra* note 7, at 41.

18. *Id.* Cases were referred to the project by protective investigative services, courts, and other community agencies.

19. *Id.* False reports were made both in situations of divorce and by angry retaliatory adolescents.

20. *Id.* at 40-42.

21. *Id.* at 41. All the allegations they found to be false were brought by parents, not children.

22. Green, *True and False Allegations of Sexual Abuse in Child Custody Disputes*, 25 J. AM. ACAD. CHILD PSYCHIATRY 449, 449 (1986). In Green's study, too, the false allegations were made by parents.

23. *Id.* at 451.

accusing him of mistakenly equating "unsubstantiated" claims with "false" claims.[24]

In sum, these small scale studies are of limited analytic value. The cases reported are often used for clinical rather than for research purposes. Large scale studies best address the questions of the frequency of sexual abuse allegations and the relative frequency of those that are substantiated. The more comprehensive studies support the conclusion that false reports from children are the exception. As these allegations affect the evaluation of families and the decision as to which custodial arrangement is best for the children, it is important that these studies not be misinterpreted. Both protection of the child from abuse and protection of the parent's right to a relationship with the child are fundamental and must be weighed with great care.

III. INVESTIGATION AND ASSESSMENT OF CHILD SEXUAL ABUSE ALLEGATIONS

A. Validation of the Charges

Child sexual abuse is a secretive crime; the abuser rarely identifies himself or asks for help. Medical evidence is often hard to evaluate unless accompanied by venereal disease or pregnancy.[25] Consequently, procedures must be established to validate claims of sexual abuse.[26] To a great extent, validation depends on the validator's ability to interpret the credibility of the child's statements, understand the child's behavioral and physical symptoms, and derive information from investigative interviews (using anatomical dolls and other diagnostic tools), as well as the ability to conduct a general interview and medical examination.[27]

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24. Corwin, Berliner, Goodman, Goodwin & White, *Child Sexual Abuse and Custody Disputes: No Easy Answers*, 2 J. Interpersonal Violence 91, 94-95 (1987). The authors assert that "unsubstantiated" or "unfounded" does not mean "false." It only means that one cannot be confident of the allegation due to insufficient or inconsistent evidence.

25. Berliner, *Deciding Whether a Child Has Been Sexually Abused*, in Nicholson, *supra* note 5, at 48, 53.

26. Sgroi, Porter & Blick, *Validation of Sexual Abuse*, in Nicholson, *supra* note 5, at 71.

27. *Id.* at 72.

B. The Establishment and Role of Child Protective Services in California

In 1968, the California legislature established a statewide child protective service system[28] to provide a broad scope of services. The legislature charged the system, recently renamed "child welfare services," with

> (a) protecting and promoting the welfare of all children . . . (b) preventing or remedying, or assisting in the solution of problems which may result in, the neglect, abuse, exploitation, or delinquency of children; (c) preventing the unnecessary separation of children from their families . . . (d) restoring to their families children who have been removed, by the provision of services to the child and the families . . . .[29]

Each county is to maintain a twenty-four hour a day response system to report neglected, exploited, or abused children.[30] Probation officers and social workers are empowered to file a petition under Welfare and Institutions Code section 300[31] to make the child a dependent of the court.[32] As soon as an allegation of child sexual abuse is reported, court proceedings are suspended until child protective services verifies or dismisses the report.[33]

An allegation of sexual abuse usually subjects the child to a series of interviews.[34] Children may be traumatized psychologically by repeating over and over what occurred to them.[35] The California Child Victim Witness Judicial Advisory Committee

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28. *See* Cal. Welf. & Inst. Code § 16500 (West Supp. 1990), which provides in part: "The state, through the department and county welfare departments, shall establish and support a public system of statewide child welfare services to be developed as rapidly as possible and to be available in each county of the state."

Similarly, New York established procedures to protect children from abuse in Article 10 of the Family Court Act. N.Y. Fam. Ct. Act §§ 1011-1084 (McKinney 1983 & Supp. 1990).

29. Cal. Welf. & Inst. Code § 16501 (West Supp. 1990).

30. *Id.* § 16504 (West Supp. 1990).

31. *See infra* note 150 for the pertinent text of the section.

32. *See* Cal. Welf. & Inst. Code §§ 325, 215.

33. Theonnes & Pearson, *supra* note 8, at 5.

34. California Attorney General's Office, California Child Victim Witness Judicial Advisory Committee Final Report 5 (Oct. 1988) [hereinafter A.G. Report].

35. *Id.* at 20.

suggests minimizing the repetition by using a trained Child Interview Specialist[36] to conduct one comprehensive interview with the child, using a uniform child interview protocol.

This author has found no indication of a uniform protocol. The validity of the interview depends on the level of training and expertise of the interviewer. There is a tremendous need to develop a nationally used protocol and train workers to use it effectively. Memorialization of the comprehensive interview may avoid the need for subsequent interviews or even court testimony by the child.[37]

C. Validation Methodology

The following methods are used to corroborate the child's out-of-court statements to a case worker, parent, or doctor: the child's testimony, the expert testimony of mental health professionals using such tools as the "child sexual abuse accommodation syndrome" and anatomical dolls, and medical evidence.

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36. This specialist should be trained and certified in child development issues and forensic interview techniques. The Child Interview Specialist should be required to meet certain standards of expertise by completing a formal training program. *Id.* at 24-26.

37. Videotaping as a method of memorializing the comprehensive interview is recommended by the California Child Victim Witness Judicial Advisory Committee. *Id.* at 27-29.

Congress has begun recently to search for ways to lessen the trauma children experience in court while still insuring the defendant's right to a fair trial. A new bill would allow a witness under age 18 who refuses to take the stand, or would be traumatized by confronting the defendant, to testify by a two-way closed circuit television away from the courtroom. A videotaped deposition could also be substituted for courtroom testimony. The importance of the bill is that it would create a national uniform standard to allow the witness to testify outside of the defendant's immediate presence. S. 1923, 101st Cong., 1st Sess., 135 Cong. Rec. S16,223-24 (1989) ("Federal Child Victim's Bill of Rights"), *discussed in* Wiehl, *National Rules for Child Witnesses?*, N.Y. Times, Jan. 12, 1990, at B12, col. 4.

The bill's sponsor, Senator Harry Reid, said in introducing it:

> My legislation would ease the process of testifying by allowing a child to give testimony via two-way closed circuit video, by allowing the use of anatomical dolls to describe acts of abuse, and by allowing the child to have a child attendant — someone who sees the child's emotional needs. These are just a few of the protections offered to children by my bill.

135 Cong. Rec. at S16,224.

One concern of this author in regard to videotaping a child's interview is maintaining the child's right to privacy. There must be some vehicle to destroy the tape once the case is concluded so that this evidence does not haunt the child later in life.

1. *The Child's Testimony*

Since the crime of sexual abuse is a private one, and the child is often the only eyewitness,[38] proof may turn on the child's testimony.[39] Much literature exists on the competency of a child to testify in court.[40] However, a child may be unable to testify effectively in court, especially in front of the abuser.[41]

Many authorities recommend creating an exception to the hearsay rule for out-of-court statements made by the child, especially if she would suffer severe emotional harm by being required to testify in open court.[42] Most states have recently made the recommended reforms, but California has yet to follow suit.

A less stressful way to validate out-of-court allegations of sexual abuse is to take the child's testimony in the judge's chambers. Both California and New York permit *in camera* examination. A California court in *In re Christine C.*[43] concluded on the basis of the children's *in camera* testimony that the children

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38. "Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim." Pennsylvania v. Ritchie, 480 U.S. 39 (1987).

39. A.G. REPORT, *supra* note 34, at 76.

40. *See, e.g.*, Saywitz, *The Credibility of Child Witnesses*, 10 FAM. ADVOC. 38 (1988); Myers, *The Testimonial Competence of Children*, 25 J. FAM. LAW 287 (1986-87).

41. *See, e.g.*, Seering v. Department of Social Servs., 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1987). In this case, which involved allegations of sexual abuse in a day care center, the child's psychiatrist, Dr. David Corwin, said that to require the child to testify in the physical presence of the abuser would create " 'a risk that she would incur additional injury' " and would " 'likely raise her level of fear.' " *Id.* at 303, 239 Cal. Rptr. at 424.

Consequently, the court permitted the alleged abuser to watch the testimony on live, closed circuit television and to confer with counsel prior to cross-examination of the child. *Id.*, 239 Cal. Rptr. at 425. The court of appeal held that the abuser was not thereby denied his right to confront the child witness. *Id.* at 304-05, 239 Cal. Rptr. at 426-27.

42. The California Child Victim Witness Judicial Advisory Committee has urged the legislature to enact an exception to the hearsay rule in dependency proceedings for statements by children describing acts of sexual abuse, whether or not the child is available as a witness. The Committee urges that "unavailable as a witness" be broadly defined to include instances where testifying would cause the child substantial distress. A.G. REPORT, *supra* note 34, at 76-79.

See also UNIF. R. EVID. 807(a), Child Victims or Witnesses, *reprinted in* A.G. REPORT, *supra* note 34, at 208.

43. 191 Cal. App. 3d 676, 236 Cal. Rptr. 630 (1987).

had been sexually abused.[44] The court specifically relied on the children's statements rather than the testimony of the expert witness.[45]

In *In re Katrina L.*,[46] a California court held that the child's unsworn testimony in chambers had been properly admitted, as there is no constitutional requirement that this testimony be sworn.[47] The court concluded unsworn testimony is not necessarily unreliable.[48] The trial court judge had been able to observe the demeanor of the child and find her a reliable witness.[49]

In New York, the child's *in camera* testimony or out-of-court statements are admissible if corroborated by other evidence.[50] Expert testimony or medical evidence may be used, although the standards are not stringent and there is no need to identify the abuser.[51]

It is important to distinguish procedures required in dependency cases from those in criminal proceedings, in which special care must be taken to protect the defendant's constitutional

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44. *Id.* at 680, 236 Cal. Rptr. at 632. The court found the son's description of anal intercourse and the daughter's description of fellatio and vaginal and digital intercourse "believable."

45. *Id.* at 680-81, 236 Cal. Rptr. at 632.

46. 200 Cal. App. 3d 1288, 247 Cal. Rptr. 754 (1988).

47. *Id.* at 1299, 247 Cal. Rptr. 760.

48. *Id.*

49. *Id.*

50. *See* Deutch, *Child Sexual Abuse Cases Revisited*, N.Y.L.J., Dec. 23, 1986, at 2, col. 3. *See also In re* Tina H., 123 A.D.2d 864, 507 N.Y.S.2d 653 (1986) (unsworn testimony of the child sufficient to corroborate her out-of-court description and demonstration of sexual abuse).

51. *See* N.Y. FAM. CT. ACT. § 1046(a)(vi) (McKinney Supp. 1990). Out-of-court statements are sufficient if corroborated by "any other evidence tending to support their reliability . . . ." *See also In re* Nicole V., 123 A.D.2d 97, 510 N.Y.S.2d 567, *aff'd*, 71 N.Y.2d 112, 51 N.E.2d 914, 524 N.Y.S.2d 19 (1987).

> It is not necessary that specific evidence, outside of the child's statement exist as to the identity of the abuser, as long as the totality of the evidence provides strong confirmation of the credibility of the child's statements concerning commission of the act and the identity of the abuser.

Id. at 105, 510 N.Y.S.2d at 573.

If the evidence shows that the child has been abused, but no evidence identifies the parent as the abuser, the burden shifts to the parent to prove he is not culpable. Gallet, *Judicial Management of Child Sexual Abuse Cases*, 23 FAM. L.Q. 477, 478 (citing N.Y. FAM. CT. ACT § 1046(a)(ii) (McKinney Supp. 1990)).

rights.[52] The New York cases discussed here are dependency cases, where standards of corroboration are not so strict.[53]

2. *Expert Opinion Testimony*

Expert opinion may be offered to corroborate or refute a child's allegations of sexual abuse.[54] Such testimony is often critically important. For example, in *In re Nicole V.*,[55] New York's highest court permitted expert testimony to be used as the *sole* form of evidence corroborating the child's out-of-court statement.[56]

The admissibility of the expert witness's testimony may depend on how the court characterizes it. It may be deemed "expert opinion" as in *Nicole V.*, or the court may consider it "scientific" evidence that must meet the *Frye* test, referred to in California as the *Kelly-Frye* test.[57]

Expert opinion, as defined in California Evidence Code section 801, is opinion limited to a subject beyond common experience, so as to be helpful to the trier of fact. The expert must have special knowledge, skill, experience and training to qualify her as an expert on the subject of her testimony. Admissible testimony includes that which is based on facts made known to her that are the type an expert usually relies upon in forming her opinion.[58]

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52. Even dependency court, however, must preserve "a parent's constitutional rights to due process and the protection against government interference with raising one's children . . . while avoiding causing additional harm to an already traumatized child — no mean task." Gallet, *supra* note 51, at 480.

53. *See Nicole V.*, 71 N.Y.2d at 118, 51 N.E.2d at 916, 524 N.Y.S.2d at 21.

Judge Gallet believes that the recent Supreme Court ruling that prohibited placing a screen in the courtroom between the criminal defendant and the alleged victim of child sexual abuse should not apply to dependency proceedings. Gallet, *supra* note 51, at 484 n.23 (citing Coy v. Iowa, 487 U.S. 1012 (1988)).

54. Gallet, *supra* note 51, at 481.

55. 71 N.Y. 2d 112, 51 N.E. 2d 914, 524 N.Y.S.2d 19 (1987).

56. *See* J. Fink, Testimony Regarding Procedures and Standards in Child Sexual Abuse Cases, before the New York State Assembly Committee on Judiciary and New York State Senate Committee on Child Care 13 (May 18, 1989) (available at Legal Aid Society, Juvenile Rights Div., 15 Park Row, New York, N.Y. 10038).

57. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); People v. Kelly, 17 Cal. 3d 24, 549 P. 2d 1240, 130 Cal. Rptr. 144 (1976).

58. CAL. EVID. CODE § 801 (West 1966).

This statutory expert opinion standard differs from the standard for admissibility of "scientific" evidence that has developed through case law.[59] The *Kelly-Frye* test permits novel scientific evidence to be admitted only if the expert can show that the methods used to obtain the evidence are generally accepted as reliable within the relevant scientific community.[60] Consequently, a stricter standard for admissibility is applied to evidence which the court deems to be based on a new scientific method of proof than to expert opinion.[61]

Differentiating between expert opinion and scientific evidence when a mental health expert gives psychological testimony regarding child sexual abuse can be difficult. The California appellate courts have not defined "general acceptance" or "relevant scientific community."[62] Yet despite the ambiguities, the courts have maintained the *Kelly-Frye* standard.[63] Experts in the field must testify to the scientific community's acceptance.[64] The expert's own opinion must be supplemented with evidence from other witnesses, with literature in the field describing studies on the reliability of the scientific technique, or with judicial opinions that this particular type of expert testimony has been generally accepted.[65]

Although California courts have expressed concern that jurors would see in scientific evidence a greater " 'aura of infallibility' "[66] than in an expert's personal opinion, the concern appears unfounded, at least as to dependency hearings. There, the factfinder is a judge, who through the experience of hearing

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59. Carter, *Admissibility of Expert Testimony in Child Sexual Abuse Cases in California: Retire Kelly-Frye and Return to a Traditional Analysis*, 22 LOY. L.A.L. REV. 1103, 1107 (1989).

60. *Id.* Since *Kelly*, The California Supreme Court has applied the test to psychological testimony based on, for example, the Rape Trauma Syndrome. *Id.* at 1108. *See also infra* note 83, discussion of People v. Bledsoe.

61. Comment, *Raising the Standard for Expert Testimony: An Unwarranted Obstacle in Proving Claims of Child Sexual Abuse in Dependency Hearings*, 18 GOLDEN GATE U.L. REV. 443, 454 (1988).

62. *See* Carter, *supra* note 59, at 1108-09.

63. *Id.* at 1109.

64. *Id.*

65. *Id.* at 1110.

66. *In re* Amber B., 191 Cal. App. 3d 682, 690, 236 Cal. Rptr. 623, 629 (1987)(quoting People v. McDonald, 37 Cal. 3d 351, 372-73, 690 P.2d 709, 723-24, 208 Cal. Rptr. 236, 250-51 (1984)).

many expert witnesses, is less likely to be overawed than would a lay juror.[67]

a. *Diagnostic Tools of Mental Health Experts*

Mental health experts base their opinions about the validity of child sexual abuse allegations on a variety of diagnostic tools, including the Child Sexual Abuse Accommodation Syndrome (CSAAS),[68] anatomical dolls[69] and general interview techniques. These are only a few of the tools used to determine whether abuse has taken place.[70] The characterization of these methods as "expert opinion" or "scientific evidence" usually determines their admissibility.[71]

i. Child Sexual Abuse Accommodation Syndrome (CSAAS)

CSAAS was originally described to provide an explanation for the peculiar behavior pattern, or syndrome, of the child sexual abuse victim and to help diagnose and treat these children.[72] Dr. Roland Summit, in 1983, first described this syndrome of secrecy, helplessness, entrapment and accommodation, delayed and unconvincing disclosure, and retraction.[73] He based his theory on the collective experience of dozens of sexual abuse treatment centers which have dealt with thousands of reports or complaints of child victims.[74]

In many recent cases, expert testimony has utilized the CSAAS in determining whether or not a child has been sexually abused. However, the admissibility of the evidence has often depended on how the expert presented the information.

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67. *See* Comment, *supra* note 61, at 464-65.

68. *See* Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177 (1983) where the syndrome was first described.

69. Anatomically correct dolls were created in 1976 by Marsha Morgan and Virginia Friedemann to be used as a tool in interviewing children who had been sexually abused. Comment, *supra* note 61, at 449. Use of the dolls will be discussed below.

70. There are other diagnostic tools to determine child sexual abuse, such as use of puppets, drawings and, clay, but these will not be discussed in this Comment.

71. *See* Comment, *supra* note 61, at 444.

72. *See* Summit, *supra* note 68.

73. *Id.* at 181-88.

74. *Id.* at 190.

One of the first California cases to deal with the admissibility of the CSAAS was *In re Cheryl H.*,[75] decided a year after publication of Dr. Summit's paper. Here, a court-appointed psychiatrist testified that three year old Cheryl's conduct was typical of behavior exhibited by other young sexually abused children.[76] The expert's opinion was based on observation of Cheryl's play at personal interviews, which included play with anatomical dolls.[77]

The *Cheryl H.* court did not use the terms "CSAAS" or "syndrome," yet the doctor's testimony described the symptoms of the CSAAS.[78] Since the court classified the testimony as expert opinion rather than a new scientific method of proof, the *Kelly-Frye* standard was held not to apply, and the evidence was admissible.[79]

In a California case decided the following year, *People v. Gray*,[80] the expert witness testified that the "child sexual abuse accommodation syndrome" is not a diagnosis, but an attempt to identify traits and characteristics common to child sexual abuse victims. He did not use the CSAAS to diagnose whether the particular child in this case had been abused.[81] The court characterized his testimony as "akin" to expert opinion. Therefore, the *Kelly-Frye* test was found unnecessary and the evidence admissible.[82]

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75. 153 Cal. App. 3d 1098, 200 Cal. Rptr. 789 (1984). *See* Comment, *The Admissibility of Child Sexual Abuse Accommodation Syndrome in California Criminal Courts*, 17 PAC. L.J. 1361, 1362 (1986) (discussing *Cheryl H.* and advocating admissibility of CSAAS).

76. *Cheryl H.*, 153 Cal. App. 3d at 1109-10, 200 Cal. Rptr. at 795.

77. *Id.* at 1117, 200 Cal. Rptr. at 800. The court stated: "The child played with male and female dolls in a way only children who have been sexually abused ordinarily do. She also used words and demonstrated anxiety symptoms characteristic of those who have been sexually abused." *Id.* The court held that her conduct with the dolls was admissible independent of the expert's opinion because the conduct was nonassertive and therefore not hearsay. *Id.* at 1126-27, 200 Cal. Rptr. at 807-08.

78. Comment, *supra* note 75, at 1362 n.10 (citing *Cheryl H.*, 153 Cal. App. 3d at 1109-10, 200 Cal. Rptr. at 795).

79. *See* Comment, *supra* note 61, at 453-54. *But see infra* notes 99-110 and accompanying text. *Cheryl H.* was later modified by the *Amber B.* court to require *Kelly-Frye*. Comment, *supra* note 61, at 454.

80. 187 Cal. App. 3d 213, 231 Cal. Rptr. 658 (1986).

81. *Id.* at 216-18, 231 Cal. Rptr. at 659-61.

82. *Id.* at 219, 231 Cal. Rptr. at 661. The court of appeal added that even if the trial court had erred, admission of the testimony was not reversible error. *Id.* at 215, 220, 231 Cal. Rptr. at 658-59, 661-62.

In subsequent cases where experts used the term CSAAS, some courts of appeal have disallowed the evidence because it did not meet the "scientific" standard of *Kelly-Frye*.[83] However, in *People v. Bergschneider*,[84] decided in 1989, the expert witness was allowed to describe the five stages of the CSAAS, using the syndrome as a framework to explain why abused children sometimes behave in ways which to adults seem inconsistent with their having been abused.[85] The same court of appeal which had found CSAAS testimony inadmissible in three prior cases affirmed admission of the testimony in this case.[86]

New York courts recognize evidence of the CSAAS offered by mental health experts as a component of expert opinion and do not apply the *Frye* standard of admissibility when the syndrome is named as a method used to determine whether a child has been sexually abused.

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83. *See, e.g.*, Seering v. Department of Social Servs., 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1987). Only Dr. David Corwin testified regarding the validity of CSAAS. The court held that the evidence did not demonstrate acceptance of the theory throughout the professional scientific community and was therefore inadmissible. *Id.* at 313, 239 Cal. Rptr. at 431-32. *See also In re* Sara M., 194 Cal. App. 3d 585, 239 Cal. Rptr. 605 (1987). Here, the court held that the syndrome was not admissible as a truth-seeking procedure but is rather a therapeutic tool. *Id.* at 594, 239 Cal. Rptr. at 610-11. It could not be used to prove that a molestation had occurred. *Id.* at 594, 239 Cal.Rptr. at 611.

But see People v. Luna, 204 Cal. App. 3d 726, 250 Cal. Rptr. 878 (1988). As in *Gray*, the expert testimony regarding the syndrome was admissible because it related to victims as a class and not to the particular victim in the case. *Id.* at 736-37, 250 Cal. Rptr. at 883-84.

The California Supreme Court has not yet ruled on the admissibility of the CSAAS. However, a closely related decision is People v. Bledsoe, 36 Cal. 3d 236, 203 Cal. Rptr. 450 (1984), a criminal case in which the defendant was convicted of forcibly raping a 14 year old girl. The high court held that evidence offered by the prosecution regarding the Rape Trauma Syndrome had been erroneously admitted. The court concluded that this syndrome failed the *Kelly-Frye* test since it was not a generally accepted means of determining whether a rape had occurred, but rather a therapeutic tool to assist counselors. *Id.* at 249-50, 204 Cal. Rptr. at 459.

84. 211 Cal. App. 3d 144, 259 Cal. Rptr. 219 (1989).

85. *Id.* at 158-59, 259 Cal. Rptr. at 226-27.

86. *Id.* at 159-60, 259 Cal. Rptr. at 227. The prior cases are People v. Bowker, 203 Cal. App. 3d 385, 249 Cal. Rptr. 886 (1988) (setting out guidelines for CSAAS admissibility); People v. Bothuel, 205 Cal. App. 3d 581, 252 Cal. Rptr. 596 (1988); and People v. Sanchez, 208 Cal. App. 3d 721, 256 Cal. Rptr. 446 (1989). In each case, the inadmissibility of the CSAAS testimony had been found not to warrant reversal. *Bergschneider*, 211 Cal. App. 3d at 159, 259 Cal. Rptr. at 227.

In *In re Nicole V.*,[87] New York's highest court unanimously affirmed admission of the evidence provided by Nicole's therapist that the child's behavior was consistent with the behavioral patterns typical of an abused child.[88] In *In re Ryan D.*,[89] a five year old boy was sexually abused by his father.[90] The child refused to tell a psychiatric social worker, just two weeks after he had made his first disclosure to a caseworker, that his father had abused him. The psychiatric expert's testimony was held admissible to explain that such retractions are consistent with the CSAAS and are not inconsistent with abuse.[91]

Thus, in New York, expert testimony identifying the child sexual abuse accommodation syndrome is sufficient to corroborate a child's out-of-court statement of abuse. The CSAAS may even be used to diagnose abuse in a particular child.[92]

In California, on the other hand, many courts of appeal do not acknowledge that the CSAAS is accepted by the scientific community and, therefore, rule it inadmissible in determining whether a child has been abused. Setting such a high standard of admissibility may leave many children unprotected from an

87. 71 N.Y.2d 112, 518 N.E.2d 914, 524 N.Y.S.2d 19 (1987).

88. *Id.* at 119-22, 518 N.E.2d at 916-19, 524 N.Y.S.2d at 22-24. The therapist's opinion was based on 10 therapy sessions, conducted over four months. She described Nicole as uncommunicative, withdrawn, and demonstrating severe temper tantrums inappropriate for a child her age, as well as knowledge of sexual activity far beyond the norm for a three and a half year old child. *Id.* at 121, 518 N.E.2d at 918, 524 N.Y.S.2d at 23.

89. 125 A.D.2d 160, 512 N.Y.S.2d 601 (1987).

90. *Id.* at 161, 512 N.Y.S.2d at 602. Ryan told the first caseworker who interviewed him that his father would lower both of their pants and touch penises and kiss him on the lips, and would lie down on the bed on top of Ryan, telling him to keep this secret. *Id.* A psychiatric social worker saw Ryan after the Department of Social Services had filed a petition against the respondent father. Even though Ryan refused to repeat his secret, the psychiatric expert's testimony was found to corroborate Ryan's earlier out-of-court statement. *Id.* at 165, 512 N.Y.S.2d at 604. The expert testified that children are very reluctant to disclose abuse when the parent is the perpetrator. *Id.* at 164, 512 N.Y.S.2d at 604. The child, fearful of offending the parent, often retracts an earlier statement. *Id.*

91. *Id.*

92. *Nicole V.*, 71 N.Y.2d at 120-21, 518 N.E.2d at 917-18, 524 N.Y.S.2d at 23. *See also In re* Donna K., 132 A.D.2d 1004, 518 N.Y.S.2d 289 (1987). Unanimously affirming the trial court, the appellate court stated: "The opinion of an expert on 'intrafamilial child abuse syndrome' was admissible on the issue of whether the child had, in fact, been sexually abused and to corroborate the child's previous out-of-court statements." *Id.* at 1005, 518 N.Y.S.2d at 290 (citations omitted).

abusing parent. New York's more liberal policy for the admissibility of CSAAS testimony alleviates the evidentiary problem of lack of corroborative evidence and enables the trier of fact to judge whether sexual abuse has occurred.

ii. Use of Anatomically Correct Dolls as a "Scientific" Technique to Assess Child Sexual Abuse

Mental health experts are often brought into a case to evaluate whether or not a child has been sexually abused, usually after an initial investigation by police or child protection workers.[93] Although mental health experts use a variety of tools when they interview children, anatomically correct dolls are used more and more to detect and validate child sexual abuse. When expert testimony involves the use of anatomically correct dolls as a diagnostic tool, the California courts of appeal have consistently characterized such evidence as "scientific" and applied the *Kelly-Frye* test for admissibility.[94]

Anatomical dolls are dolls that contain sexual body parts:[95] a penis and testicles for the males, a vaginal opening and breasts for the females. All dolls have oral and anal openings and the adult dolls have pubic hair.[96] The dolls should be used by a trained professional,[97] giving the child minimal direction and encouragement, to help elicit experiences that may be difficult for the child to talk about. Using dolls in the interview can aid in

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93. Hall, *The Role of Psychologists as Experts in Cases Involving Allegations of Child Sexual Abuse*, 23 FAM. L.Q. 451, 459 (1989).

94. *See* Carter, *supra* note 59, at 1155-56. *See also* Morris, *supra* note 2, at 40-41.

95. V. FRIEDEMANN & M. MORGAN, INTERVIEWING SEXUAL ABUSE VICTIMS USING ANATOMICAL DOLLS: THE PROFESSIONAL'S GUIDEBOOK at iv (1985). In 1976, Friedemann, a police detective handling crimes against children, and Morgan, director of a rape victim assistance program, created these dolls to help children explain what happened to them if they were suspected of having been sexually abused.

96. *Id.*

97. White & Santilli, *A Review of Clinical Practices and Research Data on Anatomical Dolls*, 3 J. INTERPERSONAL VIOLENCE 430, 431-32 (1988). In surveys of doll users, social workers were found to be the primary users. Others included therapists, investigators and psychologists, as well as child protection workers, law enforcement officers, mental health practitioners, and physicians. Training varied from workshops to discussions with colleagues or a supervisor. With the exception of mental health professionals, less than 50% of users surveyed said they received specific training on doll use. Guidelines for doll use were available for 20% of the protective service workers and mental health workers, 8% of the physicians, and none of the law enforcement officers.

gathering information about the abuse and about the conditions under which it occurred.[98]

Recent California cases applying the *Kelly-Frye* test to anatomical doll play include the companion cases of *In re Amber B.*[99] and *In re Christine C.*[100] The court explicitly found that doll play constitutes a new scientific method of proof and that its admissibility cannot be tested by the less stringent expert opinion standards.[101] The court disallowed the evidence for failure to meet the higher *Kelly-Frye* standard.[102]

There is little basis for designating the analysis of doll play a scientific process because the dolls are not a standardized test which produces quantifiable results.[103] The dolls are tools of clinicians which provide indications upon which experts can base their opinions.[104] Although many caseworkers and other mental health professionals use the dolls, they are often untrained and may not follow a set protocol.[105]

Nevertheless, the California courts of appeal continue to apply the *Kelly-Frye* test, which may determine the outcome of the case. In *Christine C.*, the court held that the admission of

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98. V. FRIEDEMANN & M. MORGAN, *supra* note 95, at 20. *See also* Jampole & Weber, *An Assessment of the Behavior of Sexually Abused and Nonsexually Abused Children with Anatomically Correct Dolls*, 11 CHILD ABUSE & NEGLECT 187 (1987). Studies in which children have been left alone to play with anatomical dolls have shown abused children to repeatedly perform sexual acts with the dolls, use words to describe sexual organs, and show anger and aggression. Non-abused children will take a doll, poke fingers in all of its openings, dress the doll, and look for something else to play with. They do explore the doll with interest, but then move on to something else.

99. 191 Cal. App. 3d 682, 236 Cal. Rptr. 623 (1987).

100. 191 Cal. App. 3d 676, 236 Cal. Rptr. 630 (1987).

101. *Amber B.*, 191 Cal. App. 3d at 690-91, 236 Cal. Rptr. at 628-29. The court observed that case law provides little guidance for determining at what point evidence transcends expert testimony and becomes scientific proof.

See also Comment, *supra* note 61, which deals extensively with courts' decisions to characterize doll play evidence as scientific rather than as expert opinion.

102. *Amber B.*, 191 Cal. App. 3d at 691, 236 Cal. Rptr. at 629. Because the technique appears "scientific," the court reasoned that the trier of fact would ascribe a high degree of certainty to it. Failure to apply *Kelly-Frye* was reversible error, the court of appeal ruled, and it reversed the trial court's order which had removed three year old Amber and her one year old sister from the home of their allegedly abusive father.

103. Comment, *supra* note 61, at 457.

104. *Id.* at 457-58.

105. *See supra* note 97.

doll play evidence was harmless error.[106] There, the children had testified *in camera* and the trial court had found the children to be believable.[107] Another court of appeal, in *In re Christie D.*,[108] also found that the trial court had erred in admitting evidence relating to the child's behavior with anatomically correct dolls. Following *Amber B.*, however, this court concluded that the error was prejudicial, as there had not been sufficient evidence apart from the doll play on which to base a finding.[109]

New York has not applied the *Frye* test to expert testimony that utilized anatomically correct dolls. In *In re Michael G.*,[110] a three year old boy was allegedly abused by his father.[111] The court found that the child's out-of-court statements were sufficiently corroborated[112] by the testimony of a caseworker who used anatomically correct dolls when interviewing Michael.[113]

The expert testimony was used as one means to corroborate the child's statements and was admissible to prove that the act alleged by the child in his out-of-court statement was actually committed.[114] No mention was made of meeting the *Frye* test for admission of this evidence.

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106. *Christine C.*, 191 Cal. App. 3d at 679-80, 236 Cal. Rptr. at 630.

107. *Id.* at 680, 236 Cal. Rptr. at 632. The court had found the same error in the companion case, *Amber B.* There, however, the child had not testified, *id.*, and the error resulted in reversal of the dependency order. *See supra* note 102.

108. 206 Cal. App. 3d 469, 253 Cal. Rptr. 619 (1988).

109. *Id.* at 480-81, 253 Cal. Rptr. at 626-27.

110. 129 Misc. 2d 186, 492 N.Y.S.2d 993 (1985).

111. *Id.* at 186, 492 N.Y.S.2d at 994.

112. Under the New York Family Court Act, in a dependency proceeding no particular kind of corroboration is required. Abuse can be validated by a parent, an expert witness or medical evidence. The corroboration standard is flexible. In 1985, the legislature added the following language to the Act: "Any other evidence tending to support the reliability of the [child's] previous statements . . . shall be sufficient corroboration." N.Y. FAM. CT. ACT § 1046(a)(vi) (McKinney Supp. 1990).

113. *Michael G.*, 129 Misc. 2d at 187, 492 N.Y.S.2d at 994. The witness described the child's play with the dolls: "Mikey placed the dolls face to face, rolled the baby doll's penis and hit the daddy doll's penis. He became very excited, spread the baby doll's legs and told the interviewer that 'Daddy's penis got big,' and that they 'played games.' " *Id.* *Cf. In re* Dara R., 119 A.D.2d 579, 500 N.Y.S.2d 747 (1986) (child's use of anatomical dolls to testify at hearing supported finding of child sexual abuse, though evidence not sufficient to identify abuser).

114. *Michael G.*, 129 Misc.2d at 187, 492 N.Y.S.2d at 995.

A New York court's analysis in *In re E.M.*[115] comes closest to the California court's analysis in *Amber B.* The validation testimony offered by a clinical psychologist included use of anatomically correct dolls, as well as her interview protocol.[116]

The court agreed with Jampole and Weber that "care should be taken to cross-check any interpretation of a child's behavior in doll-play with other observational data and validation evidence, since empirical research on interpreting doll-play behavior in young children suspected of being abused is new and limited."[117] The court cautioned that the most important point to remember is that child protective proceedings are civil, not criminal, and it is more appropriate to err on the side of admissibility when it comes to the introduction of evidence derived from new clinical testing techniques.[118]

b. *Medical Evidence to Corroborate Child's Testimony*

Medical evidence is strong corroboration of a child's out-of-court statements that the child has been molested.[119] The examining physician should take a medical history followed by a

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115. 137 Misc. 2d 197, 520 N.Y.S.2d 327 (1987).

116. *Id.* at 199, 520 N.Y.S.2d at 328. The court observed:

> Because it is only relatively recently that validation testimony has become the subject of judicial proceedings, it is curious that its admissibility has not been discussed in the language courts often employ when considering the admissability of novel scientific testing. The so-called "*Frye*" rule which permits new scientific evidence to be admitted if the procedure and results, if not the underlying theory, are "generally accepted as reliable in the scientific community" appears to be the general standard of admissibility in New York.

Id. at 204, 520 N.Y.S.2d at 331 (citations omitted).

117. *Id.* at 205, 520 N.Y.S.2d at 332 (citing Jampole & Weber, *supra* note 98).

118. *Id.* at 205-06, 520 N.Y.S.2d at 332.

119. See, for example, the following New York cases: *In re* Nicole V., 71 N.Y.2d 112, 518 N.E.2d 914, 524 N.Y.S.2d 19 (1987) (certified medical report stated that Nicole's hymen had been ruptured); *In re* Dara R., 119 A.D.2d 579, 500 N.Y.S.2d 747 (1986) (examination revealed presence of scars in the child's vagina); *In re* Kimberly K., 123 A.D.2d 865, 507 N.Y.S.2d 654 (1986) (medical evidence showed an enlarged introitus); *In re* Jennifer Maria G., 112 A.D.2d 755, 492 N.Y.S.2d 254 (1985) (evidence indicated three year old child was afflicted with a sexually transmitted disease); *In re* Joli M., 131 Misc. 2d 1088, 502 N.Y.S.2d 653 (1986) (evidence showed that an 11 year old child had become pregnant and had had an abortion); *In re* Michael G., 129 Misc. 2d 186, 492 N.Y.S.2d 993 (1985) (pediatrician's examination revealed a swollen, irritated penis and trauma to the anus).

physical examination.[120] In order to obtain a thorough medical history, the physician should spend time with the child establishing rapport.[121] Use of art materials, puppets, toys and anatomically correct dolls will facilitate the interview and help establish the child's terminology for the parts of her body.[122] The physician should look as well at behavioral indicators of abuse.[123]

After obtaining a thorough medical and behavioral history, the physician should conduct a thorough physical examination.[124] Both general and genital examinations are essential.[125] The general examination should look for injuries that show evidence of force.[126] The genital examination should look for both genital and extra-genital trauma.[127] Cultures of all body orifices to test for gonorrhea, chlamydia, and syphilis, and a pregnancy test may be appropriate.[128] At all times, the physician should be sensitive to the impact of the examination on the child.

Since the medical record often becomes part of the legal process, it must be carefully documented.[129] All findings should be recorded with drawings or traumagrams, including all evidence of physical abuse.[130] Photographs are helpful.[131] Complete records may prevent the need for a re-examination of the child,

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120. Heger, *Child Sexual Abuse: The Medical Evaluation*, in Nicholson, *supra* note 5, at 106, 110. Dr. Heger's methodology is also described at length in People v. Mendibles, 199 Cal. App. 3d 1277, 1292-98, 245 Cal. Rptr. 553, 561-65 (1988).

121. Heger, *supra* note 120, at 111.

122. *Id.*

123. *See supra* text accompanying note 73 for Dr. Summit's behavioral indicators of the CSAAS.

124. Heger, *supra* note 120, at 114.

125. *Id.* at 115.

126. *Id.* There may be bruising, hair loss, lacerations, bite marks, trauma to the oral cavity or sucking bruises or "hickies."

127. *Id.* The examiner needs an excellent source of light and, if available, a magnifying apparatus, such as a magnifying glass or colposcope, to ascertain the type of scarring that may have occurred. *Id.* at 115-17.

128. *Id.* at 116.

129. *Id.* at 117.

130. *Id.*

131. *Id.*

which can be invasive and abusive,[132] and possibly as traumatic as the abuse itself.[133]

The doctor's responsibility is to determine whether there is historical information and physical evidence consistent with sexual abuse.[134] Often, there is no *physical* evidence of abuse.[135] In the event of a history of abuse without physical evidence, the doctor may conclude that " 'the physical evaluation neither confirms nor denies the history of sexual abuse.' "[136]

California, like New York, admits expert medical testimony into evidence. Historically, an expert medical witness has been allowed to offer an opinion regarding the cause of a particular injury on the basis of the expert's conclusion drawn from the appearance of the injury itself.[137] The court of appeal in *People v. Mendibles* observed: "Such a diagnosis need not be based on certainty, but may be based on probability; the lack of absolute scientific certainty does not deprive the opinion of evidentiary value."[138] In *In re Christina T.*,[139] the medical expert examined the child and testified that the physical findings were compatible with a child who has been sexually abused.[140]

In *Mendibles*, the defendant claimed that the trial court had erred in admitting the expert's testimony, as the report was based on the use of a colposcopic binocular device.[141] The defendant contended that this examination was a new scientific technique requiring proof of reliability and acceptance in the

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132. A.G. REPORT, *supra* note 34, at 32.

133. In People v. Nokes, 183 Cal. App. 3d 468, 228 Cal. Rptr. 119 (1986), the court permitted the child to forgo a medical exam because the child was afraid that the exam would make him think of what he had gone through before.

134. *See* Heger, *supra* note 120, at 117.

135. *Id.* at 109. *See also* Szegedy-Maszak, *supra* note 2, at 119. "The evidence that might seem irrefutable — physical evidence — is present in only about 25 percent of sexual abuse cases, and even then the experts often disagree."

136. Heger, *supra* note 120, at 117.

137. People v. Mendibles, 199 Cal. App. 3d 1277, 1293, 245 Cal. Rptr. 553, 562 (1988) (citing People v. Bledsoe, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984)).

138. *Id.*

139. 184 Cal. App. 3d 630, 229 Cal. Rptr. 247 (1986).

140. *Id.* at 635, 229 Cal. Rptr. at 250. The doctor found an abnormally large vaginal opening, an absent hymen, and a dilated anus.

141. *Mendibles*, 199 Cal. App. 3d at 1292, 245 Cal. Rptr. at 561. The doctor examined the victim's external genitalia with her naked eye and with a high-powered and focused source of light and used a microscopic colposcope with 15 power magnification.

relevant scientific community, and thus subject to *Kelly-Frye*.[142] The court held that the colposcope is not a novel device but an instrument in general use that does nothing more than provide binocular magnification. Therefore, the court did not require the prosecution to prove its reliability and general acceptance.[143]

Generally, courts accept medical opinion as corroboration of a child's out-of-court statements of sexual abuse without testing it as scientific evidence. To find it competent as expert opinion, however, courts should determine that testifying physicians have expertise and experience in detecting signs of child abuse.[144]

IV. CASE MANAGEMENT: FINDING THE APPROPRIATE COURT

A. The General Problem

When a sexual abuse allegation arises during divorce or post-divorce proceedings, the same case may be heard in more than one court at the same time — in the matrimonial court, dependency court, or the criminal court.[145] The focus of each court is different.[146]

Id. at 1294, 245 Cal. Rptr. at 563. The purpose was to look for certain patterns of scarring, deformities and other changes that can be observed in girls who have been subjected to sexual abuse. *Id.*

142. *Id.* at 1292, 245 Cal. Rptr. at 561.

143. *Id.* at 1295, 245 Cal. Rptr. at 563. The court stated that the colposcope is "nothing more than a weak microscope — an instrument long accepted as scientifically reliable." *Id.*

The *Mendibles* court also held that the methodology of Dr. Heger, *see supra* notes 120-36 and accompanying text, was not subject to *Kelly-Frye*. *Mendibles*, 199 Cal. App. 3d at 1295, 245 Cal. Rptr. at 563. The court noted that Dr. Heger had examined over 400 children who complained of sexual abuse. *Id.* at 1294, 245 Cal. Rptr. at 563.

144. In *Mendibles*, several of the doctors who examined the children for the defense had neither training nor experience in detecting sexual abuse of children and were unable to recognize signs that a doctor with greater expertise would have identified. *See id.* at 1288-89, 245 Cal. Rptr. at 559.

145. In California, matrimonial proceedings such as divorce take place in superior court (family court). Dependency proceedings, including child sexual abuse cases, take place in juvenile court. In New York, matrimonial proceedings take place in supreme court, and dependency proceedings in family court. To avoid confusion, this Comment refers to matrimonial proceedings as taking place in "matrimonial court," and dependency or abuse proceedings in "dependency court." Criminal court will not be discussed.

Court procedures outlined here are primarily those of California courts. Some significant differences between procedures in California and New York are noted.

146. A comprehensive work comparing the California courts' approach toward child sexual abuse cases is Edwards, *The Relationship of Family and Juvenile Courts in*

The primary focus of a matrimonial proceeding is on the rights of the parents.[147] The matrimonial court provides the parents with an arena for private dispute settlement; it presumes the parents can make decisions in the best interest of their children without state intervention.[148]

Child Abuse Cases, 27 SANTA CLARA L. REV. 201 (1987). The author is Superior Court Judge Leonard Edwards, sitting at Santa Clara, California.

California law provides:

> When the juvenile court terminates its jurisdiction over a minor who has been adjudged a dependent child of the juvenile court prior to the minor's attainment of the age of 18 years, and proceedings for the declaration of the nullity or dissolution of the marriage, or for legal separation, of the minor's parents, or proceedings to establish the paternity of the minor child . . . are pending in the superior court of any county, or an order has been entered with regard to the custody of that minor, the juvenile court on its own motion, may issue an order directed to either of the parents . . . determining the custody of, or visitation with, the child.
>
> Any order issued pursuant to this section shall continue until modified or terminated by a subsequent order of the superior court. The order of the juvenile court shall be filed in the proceeding for nullity, dissolution, or legal separation, or in the proceeding to establish paternity, at the time the juvenile court terminates its jurisdiction over the minor, and shall become a part thereof.
>
> If no action is filed or pending relating to the custody of the minor in the superior court of any county, the juvenile court order may be used as the sole basis for opening a file in the superior court of the county in which the parent, who has been given custody, resides. The court may direct the parent or the clerk of the juvenile court to transmit the order to the clerk of the superior court of the county in which the order is to be filed. The clerk of the superior court shall, immediately upon receipt, open a file, without a filing fee, and assign a case number.
>
> The clerk of the superior court shall, upon the filing of any juvenile court custody order, send by first-class mail a copy of the order with the case number to the juvenile court and to the parents at the address listed on the order.
>
> The Judicial Council shall adopt forms for any custody or restraining order issued under this section. These form orders shall not be confidential.

CAL. WELF. & INST. CODE § 362.4 (West Supp. 1990) (last three paragraphs added in 1989).

147. Edwards, *supra* note 146, at 205.

148. *Id.* Judge Edwards points to an observation by a California court that " 'our system, for better or for worse presumes that parents are the best judges of their children's best interests.' " *Id.* at 205 n.21 (quoting *In re* Jennifer P., 174 Cal. App. 3d 322, 327, 219 Cal. Rptr. 909, 912 (1985)).

Dependency court proceedings focus on child protection.[149] This court acquires jurisdiction when a child has been sexually abused.[150] Dependency court may restrict parental behavior,[151] order parents to participate in a counseling or education program,[152] and, if necessary, remove the child from the parents' custody.[153] It may make the child a dependent child of the court.[154]

1. *Procedural Differences*

Matrimonial proceedings usually begin with a petition by one of the parents for dissolution of marriage. During the proceedings one of the parents may complain that the other parent has sexually abused the child. The parents may be able to reach an agreement about custody and visitation that protects the child from further abuse. If custody is disputed, the court may issue an ex parte order and temporarily prevent the abusing party from seeing the child.[155]

Proceedings in matrimonial court can be protracted. In California, a couple in a contested custody case must first complete

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149. *Id.* at 205-06. CAL. WELF. & INST. CODE § 202(b) (West Supp. 1990) provides in part:

> Minors under the jurisdiction of the juvenile court who are in need of protective services shall receive care, treatment and guidance consistent with their best interest and the best interest of the public.

150. CAL. WELF. & INST. CODE § 300 (West Supp. 1990) provides in part:

> Any minor who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court:
>
> . . . .
>
> (d) The minor has been sexually abused, or there is a substantial risk that the minor will be sexually abused, . . . by his or her parent or guardian or a member of his or her household, 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.

In New York, children are protected under the Family Court Act. *See supra* note 1. An "abused child" includes a child whose parent or other legally responsible person committed an act of incest against the child. N.Y. FAM. CT. ACT § 1012(e)(iii) (McKinney Supp. 1990).

151. CAL. WELF. & INST. CODE § 361 (West Supp. 1990).

152. *Id.* § 362(c) (West Supp. 1990).

153. *Id.* § 202(a) (West Supp. 1990).

154. *Id.* § 300 (West Supp. 1990).

155. *See* Edwards, *supra* note 146, at 213.

mandatory mediation before a hearing is scheduled.[156] Although contested custody cases receive preference over most other civil cases, a final decision may take months.[157]

In dependency cases, the state initiates the legal proceedings by filing a petition to bring the child under the dependency court's jurisdiction.[158] It is customary for the child protective agency to have investigated the allegation prior to the filing of the petition.[159] The social services caseworker or the investigating probation officer must have considered whether the child has been abused and whether either parent can protect the child.[160] The state will initiate proceedings only when there is no protective parent, or when the parent, or another interested party, asks the police or child protective agency to commence proceedings in the dependency court.[161]

Dependency proceedings require and receive fast action.[162] For example, if there is a need to remove a child from her home, a detention hearing takes place in California within twenty-four hours after the petition to bring the child under dependency court jurisdiction has been filed.[163] The jurisdictional hearing takes place within fifteen court days of the detention hearing, and a dispositional hearing is held within ten court days of that time.[164] These strict time limits apply only when a child is removed from the home.[165] Even when the child is left in the home

156. *Id.*

157. *Id.*

158. *Id.* at 211.

159. *Id.* In New York, complaints are investigated by a child protective caseworker and reviewed by an agency lawyer before the case can go to court. Gallet, *supra* note 51, at 478.

160. Edwards, *supra* note 146, at 211.

161. *Id.* at 211-12. *But cf.* Gallet, *supra* note 51, at 478. The author, Family Court Judge Jeffrey H. Gallet, sitting at New York City, says that in New York: "Only child protective agencies, and persons specifically authorized to do so by a judge, may institute a child protective proceeding. A private litigant may not prosecute a protective case without prior court authorization." This rule prevents parents who might use the proceedings in a vindictive manner against a spouse from bringing the issue to court.

162. "[I]f it cannot be settled, a child abuse case should be tried quickly." Gallet, *supra* note 51, at 479.

163. Edwards, *supra* note 146, at 213-14.

164. *Id.* at 214.

165. *Id.* at 214-15.

with a protective parent, the case may be heard quickly if the alleged offending parent demands a hearing.[166]

2. *Evidentiary Considerations*

It is easier to have evidence of abuse admitted in dependency proceedings than in matrimonial court.[167] In California, a social report is prepared for each dependency hearing.[168] Although the report contains hearsay evidence, it is admissible in court as long as the preparer is present for cross examination.[169] In matrimonial court, although a custody investigation report and recommendation containing hearsay may be prepared and submitted to the court, it cannot be admitted into evidence unless stipulated to by both parties.[170]

Testimony of the child may often be the decisive factor in the outcome of a sexual abuse case. In a dependency hearing, the child is allowed to testify in chambers, thereby avoiding testifying in front of his or her parents.[171] In a custody battle in matrimonial court, however, a parent accused of sexual abuse may insist that he have the opportunity to cross-examine the child.[172]

3. *Services Available*

One of the major differences between the two court systems is the scope of services available to the parent and child while the case is pending. The only services provided for parents in matrimonial court are counseling, mediation and evaluation of

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166. *Id.* at 215.

167. *Id.* at 218.

168. *Id.* at 219. The report, which contains facts gathered by the social worker or probation officer, includes statements from other people.

169. *Id.*

170. *Id.* Either party may move to strike hearsay evidence from the report.

171. *Id.* at 221. The child's testimony may not be needed at all in dependency court because of the admissibility of the child's out-of-court statements in the social report.

172. *Id.* at 220. Congress is considering a bill to permit the child to testify via two-way closed circuit video. *See supra* note 37. If enacted, the bill would apply directly to federal courts and serve as model legislation for the states.

the child custody dispute.[173] The hiring by each parent of a different custody evaluator can prompt a battle of the experts.[174] The court may limit visitation or order supervised visitation. The court may deny visitation altogether only if visitation would be both contrary to the child's best interest and a detriment to the child.[175] A new California statute permits the court to order both parents and child to participate in counseling.[176]

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173. Edwards, *supra* note 146, at 224. The matrimonial court evaluator will attempt to determine the truth of the abuse allegation, but he or she does not have the power to remove the child from the home. *Id.* at 225-26.

174. *See id.* at 221.

175. *Id.* at 227.

176. Effective January 1, 1990, CAL. CIV. CODE § 4608.1 (West Supp. 1990) provides:

> (a) In any proceeding under this part where custody of, or visitation with, a minor child is at issue, the court may require the parents of the child who are involved in the custody or visitation dispute, and the minor child to participate in outpatient counseling with a licensed mental health professional, or through other community programs and services that provide appropriate counseling, including, but not limited to, mental health or substance abuse services, for not more than six months if the court finds that the dispute between the parents or between a parent and the child poses a substantial danger to the best interests of the child and that the counseling is in the best interests of the minor child. The court shall fix the cost and shall order the entire cost of the services to be borne by the parties in the proportion as the court deems reasonable. The court, in its finding, shall set forth reasons why it has found the dispute poses a substantial danger to the best interests of the child and the counseling is in the best interest of the minor child, and that the financial burden created by the court order for counseling does not otherwise jeopardize a party's other financial obligations. The court shall not order the parties to return to court upon the completion of counseling. Either party may file a new order to show cause or motion after counseling has been completed, and the court may again order counseling consistent with the provisions of this section.
>
> The counseling shall be specifically designed to facilitate communication between the parties regarding their minor child's best interest, to reduce conflict regarding visitation or custody, and to improve the quality of parenting skills of each parent.
>
> (b) In any proceeding in which counseling is ordered pursuant to subdivision (a), where there has been a history of domestic violence between the parties . . . and where an order is in effect . . . at the request of the party protected by the order the parties shall meet with the mental health professional, or attend other community programs or services, separately at separate times. This subdivision shall only be operative until January 1, 1992.

In dependency proceedings numerous agencies are involved in detecting, investigating, evaluating, supporting and supervising families with allegations of sexual abuse.[177] Both California and New York dependency courts have close working relationships with the states' respective child protective agencies and can coordinate investigative efforts.[178] A California dependency court can, at no cost to the parents, provide experts to evaluate and treat the child.[179] Perhaps more importantly, the dependency court has the resources to supervise and enforce the orders it makes.[180] The supervising worker can bring any violation immediately to the court's attention.[181] In contrast, it is the protective parent who must return to matrimonial court to report a violation.[182]

B. Jurisdictional Issues Between the Courts

Occasionally, both the matrimonial and the dependency court are involved simultaneously with a child sexual abuse case. The question arises as to which court should have jurisdiction.

If it appears that one parent can sufficiently protect the abused child, the case may remain in matrimonial court.[183] However, when a parent cannot protect the child from the abusive parent and provide the child with a fit home environment, then the dependency court should assume jurisdiction over the child.[184] Sometimes both courts attempt to assert jurisdiction

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177. Edwards, *supra* note 146, at 226.

178. *See id.* at 226; Gallet, *supra* note 51, at 478.

179. Edwards, *supra* note 146, at 226-27.

180. An assigned worker from the welfare or probation department verifies whether parents comply with the order. *Id.* at 234-35.

181. *Id.* at 235.

182. *Id.* at 234.

183. *See, e.g., In re* Jennifer P., 174 Cal. App. 3d 322, 219 Cal. Rptr. 909 (1985). The mother succeeded in removing the case from dependency court by proving she was able to protect her daughter. She had pursued criminal action against the father, obtained a temporary restraining order and was seeking to modify the divorce decree to give her sole custody of the child. Thus, dependency court intervention was neither necessary nor permissible.

184. *See, e.g., In re* Christina T., 184 Cal. App. 3d 630, 229 Cal. Rptr. 247 (1986). The court of appeal ruled that the trial court had abused its discretion in dismissing a dependency petition. The trial court, having determined the child had been sexually molested, erroneously dismissed the petition because it could not be certain that the father was the abuser. In such a case, dependency jurisdiction is compelled.

See also Edwards, *supra* note 146, at 241-47 for a discussion of *Jennifer P.* and *Christina T.*

over the same custody question. Such a case might begin as a dissolution in matrimonial court, but when the issue of abuse arises one of the parents may turn to dependency court to resolve that issue. At present, there is no absolute answer to the question of which court should retain jurisdiction.[185]

Schneider v. Schneider,[186] a New York case, illustrates the problems of court jurisdiction when there is an allegation of sexual abuse in a custody dispute. The father had commenced a divorce action in matrimonial court, and the mother had filed a cross complaint for divorce.[187] Although each party sought exclusive pendente lite custody of their three year old daughter Jessica, the matrimonial court granted them joint custody.[188]

While that court was in recess pending a psychiatric evaluation of the family, the mother's concern about the possibility of

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185. *See* Edwards, *supra* note 146, at 258-68 for a detailed comparison of two California cases that address the relationship between matrimonial and dependency courts when they simultaneously assert jurisdiction over the same custody questions.

In *In re* William T., 172 Cal. App. 3d 790, 218 Cal. Rptr. 420 (1985), during a custody modification hearing, the matrimonial court ordered joint custody with primary physical custody to the father. During the hearing, the father alleged that the mother had abused their daughter. Several months later, the father complained to child protective authorities, who filed a dependency petition. Dependency court ordered the mother and grandmother to have no contact with the child. Two months later, after a six day hearing on the custody issues, the matrimonial court granted the mother and grandmother limited visitation rights. Later in the year, the dependency court found the child a dependent child of the court. The father was held in contempt by the matrimonial court because he prevented visitation. His writ of habeus corpus brought the case to the court of appeal. *Id.* at 793-97, 18 Cal. Rptr. at 421-23.

Ordinarily when concurrent jurisdiction exists, the first court to assume jurisdiction retains it. However, when dependency court acquires jurisdiction and assumes custody, "its jurisdiction is paramount even if acquired later in time." *Id.* at 797, 218 Cal. Rptr. at 424. The majority held that as the purpose of the dependency proceedings is to protect the child, dependency court orders supersede matrimonial court orders. *Id.*

In *In re* Brendan P., 184 Cal. App. 3d 910, 230 Cal. Rptr. 720 (1986), the court held that the first court to assume and exercise jurisdiction over a custody matter — here, the matrimonial court — acquires exclusive jurisdiction, unless the child's welfare requires control by another court. Edwards, *supra* note 146, at 263.

Judge Edwards urges closer contact and cooperation between dependency and matrimonial courts to avoid unnecessarily taxing the litigants, the courts, and most of all the child. *Id.* at 264-68.

186. 127 A.D.2d 491, 511 N.Y.S.2d 847 (1987).

187. *Id.* at 492, 511 N.Y.S.2d at 848.

188. *Id.*

sexual abuse by the father came to the attention of a child welfare caseworker.[189] Jessica was removed from her home, and a child abuse proceeding was commenced in dependency court.[190]

Before the conclusion of the preliminary dependency hearing and while Jessica was undergoing a physical examination to discover any medical evidence of abuse, the father brought a writ of habeas corpus in matrimonial court to produce Jessica.[191] The matrimonial court consolidated the actions, stayed the dependency court proceedings, and ordered that the medical examinations of Jessica cease.[192] The dependency court subsequently made a finding of neglect against the father; but rather than communicating directly with the matrimonial court, the dependency court merely required that the mother's attorney make the matrimonial court aware of its order.[193]

The law guardian[194] opposed consolidation, emphasizing the distinctions between neglect proceedings in dependency court and custody proceedings in matrimonial court, and urged that the needs of the child could better be served in dependency court.[195] The law guardian argued that dependency court has powers that matrimonial court lacks.[196] The guardian was concerned that the child's best interest would not be served by

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189. *Id.* Earlier, when the mother was interviewed by the psychiatrist, who had been appointed by the matrimonial court, she told him that her husband had "exposed himself in the nude to Jessica in her presence and that Jessica touched his penis several times." The doctor made no reference to her statement in his report.

See also Rosenfeld, *Determining Incestuous Contact between Parent and Child: Frequency of Children Touching Parents' Genitals in a Nonclinical Population*, 25 J. AM. ACAD. CHILD PSYCHIATRY 481 (1986). A questionnaire study of 576 children aged 2 to 10 showed that children's touching of their parents' genitals is a common occurrence. Over 30% of parents questioned reported daughters touching fathers' genitals. *Id.* at 483. The authors concluded that these behaviors alone are not evidence of abuse.

190. *Schneider*, 127 A.D.2d at 493, 511 N.Y.S. 2d at 848-49.

191. *Id.* at 492-93, 511 N.Y.S.2d at 849.

192. *Id.* at 493, 511 N.Y.S.2d at 849.

193. *Id.*

194. A law guardian is an attorney who is appointed by the court to advocate for the child's rights during legal proceedings. This is an important resource, and training more child advocates for the courts should be encouraged. *See* A.G. REPORT, *supra* note 34, at 64-73 for detailed recommendations regarding law guardians.

195. Law Guardian's Brief on Behalf of the Child Jessica Schneider at 7 (argued by Patricia Nevergold, Legal Aid Society).

196. *Id.* Dependency court has unique rules of evidence, provisions for speedy adjudications and expedited appeals, even from interim orders, and special services available to the parties.

" 'unsupervised visitation with the father without even periodic checkups that a [child care] agency might be able to make.' "[197] The dependency court had heard the evidence in the sexual abuse proceeding, and the law guardian argued that it was the court best able to make an appropriate disposition.[198]

The matrimonial court asserted jurisdiction to determine custody as part of the matrimonial action, taking into account the dependency court's neglect finding.[199] The appellate court affirmed the consolidation, observing: "This procedure was necessary to deter the parents from racing between courts to maneuver for custody of and visitation with Jessica."[200] However, the question remains as to whether the child was adequately protected through the matrimonial court.

C. The Future

Consolidation of family relations civil proceedings may be a better way to address allegations of child sexual abuse within the family. The California Child Victim Witness Judicial Advisory Committee Final Report recommends restructuring the trial courts to create a family relations division that would handle "all civil child, family and human relations oriented legal actions . . . ."[201] Both dependency and matrimonial courts would be part of this division. Supervising judges and judicial officers would be selected to sit in the division based upon interest and ability and would serve for a substantial period of time.[202] Ideally, they should be educated not only in all the legal proceedings which would arise in this division, but in family dynamics and child development as well.[203] The trial courts should adopt procedures which enable one judge to hear all actions in the

197. *Id.* at 12.

198. *Id.* at 13.

199. *Schneider*, 127 A.D.2d at 496, 511 N.Y.S.2d at 851.

200. *Id.*

201. A.G. Report, *supra* note 34, at 38. *But see* Jordan, *One Big Family Court?*, Cal. Law., Jan. 1990, at 36. First District Court of Appeal Justice Donald King, co-chair of the Senate Task Force on Family Relations Court, is concerned that such a division may diminish the status of family law. "If you take two courts with the least resources and the least desirability and combine them, I'm not sure that would raise the status." *Id.*

202. A.G. Report, *supra* note 34, at 41.

203. *Id.* at 42.

family relations division relating to an allegedly abused or neglected child.[204] Federal and state laws should be modified to ensure that information is exchanged among courts and investigative and supervisory agencies that serve the courts. Further, investigations should be carried out by multidisciplinary teams.[205]

Restructuring the courts to provide a family relations division may be the best way to expedite case management of alleged sexual abuse cases. One court would carry out the investigation and determine custody in the best interest of the child. Other alternatives should be investigated as well to address the problems of a court system in which two different courts now deal with child sexual abuse.

V. CONCLUSION

Since the enactment in every state of laws requiring certain professionals to report suspected cases, statistics demonstrate a dramatic increase in reports of child sexual abuse. When such an allegation arises in divorce proceedings, it often is considered to be false, a weapon used by a parent to get sole custody of the children. However, the most comprehensive study of child sexual abuse allegations in custody disputes indicates that only a small percentage appear to be the result of fabrication. It is essential to maintain a careful balance between the rights of the child and the rights of the accused parent when analyzing these cases.

Child sexual abuse is an interdisciplinary problem. It involves expertise in the law and in psychology. Neither field alone is sufficient to handle the complexities. Psychologists must develop national guidelines and protocols that are consistent and measurable to test whether or not the abuse occurred. They must show empirically that the Child Sexual Abuse Accommodation Syndrome is reliable as an indicator of abuse in order to establish its admissibility as evidence. Mental health professionals who utilize play diagnosis and therapy, especially with anatomically correct dolls, must develop protocols that can be consistently followed, and train those who use these tools. However,

204. *Id.* at 43.
205. *Id.* at 47.

these clinical methods may never be so "measurable" and "scientific" as to satisfy the *Kelly-Frye* test; they cannot produce the certainty of fingerprint analysis.

The *Kelly-Frye* standard should not be used to determine the admissibility of psychological evidence in dependency cases, as this evidence is based on clinical methods that depend very much on the experience, skill, and "art" of the mental health professional. The professional's testimony should be treated like that of any expert. It should be admitted, as it is in New York, to corroborate the out-of-court statements of a child.

Management of child sexual abuse cases is a complicated issue. Cases that originate in matrimonial court may later appear concurrently in dependency court. An immediate goal should be coordination between the courts, be it interviews by caseworkers or medical examinations by physicians, to avoid repetition that may traumatize the child. The recommendation of the California Child Victim Witness Judicial Advisory Committee to restructure the trial courts, creating a family relations division where all dependency and matrimonial cases could be heard under one jurisdiction, deserves serious deliberation.

Lawyers and judges specializing in family law must be thoroughly educated about child sexual abuse so that they can intelligently and perceptively analyze the information presented to them. They must not abdicate the ultimate decisions in these cases to "experts" but must be able to analyze the evidence before them, protecting the child and, whenever possible, maintaining and strengthening the parent-child relationship.

In recent years the public has demonstrated distrust for the present legal approach to child sexual abuse cases.[206] A streamlined and focused legal approach, paired with a more uniform and systematic approach by mental health professionals to help

206. Szegedy-Maszak, *supra* note 2, at 88. Dr. Elizabeth Morgan was willing to spend two years in prison for hiding her allegedly abused four year old daughter in order to prevent unsupervised visitation between father and daughter. *Id. See* Morgan v. Foretich, 528 A.2d 425 (D.C. App. 1987). Closely connected subsequent cases are Morgan v. Foretich, 546 A.2d 407 (D.C. App. 1988) and Morgan v. Foretich, 564 A.2d 1 (D.C. App. 1989) (ordering Dr. Morgan released pursuant to act of Congress).

determine whether abuse has occurred, would go a long way toward healing public confidence in this important area of the law.