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Rebecca Naeder

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“I Know My Client Would Never Hurt His Daughter, But How Can I Prove It?”

A LAWYER’S GUIDE TO DEFENDING AGAINST CHILD SEXUAL ASSAULT ACCOMMODATION SYNDROME EVIDENCE

Mr. Smith¹ settles into work on a Monday morning, completely content after sharing a wonderful weekend with his daughter Jane.² Although his divorce might be frustrating, he could not be happier that he has custody of his eight-year-old daughter on the weekend. Just then, his phone rings; his divorce attorney is on the line. Apparently, his soon-to-be ex-wife has called child protective services and has accused him of sexually abusing his daughter during their last weekend visit. Shocked, he does not respond. The attorney continues, saying, “Your daughter told a caseworker, ‘[Daddy] hurt my private place with his private place.’”³ Defeated, Mr. Smith hangs up the phone and his mind begins to race with all sorts of

¹ This note will refer to the accuser as female and the accused as male, as these gender choices represent the more common way these issues arise—when a mother accuses her soon-to-be-ex-husband of sexually abusing their child. See RICHARD A. GARDNER, M.D., TRUE AND FALSE ACCUSATIONS OF CHILD SEX ABUSE 183 (1992) (“Because mothers, much more commonly than fathers, are likely to initiate such accusations, I will refer to the accuser as the mother.”). Please note that the issues presented in this note could apply in situations involving both heterosexual and homosexual couples, and the parents could be of either gender. Allegations of sexual abuse of a child in custody and visitation cases can also be made against step-parents and other cohabitants of the biological parents.

² This note will refer to the child victim as female because Dr. Summit, in his paper, *The Child Sexual Abuse Accommodation Syndrome*, refers to the child as female. See Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177, 180 (1983) (internal citations omitted) (“In the current state of the art most of the victims available for study are young females molested by adult males entrusted with their care.”). This is not to ignore the fact that both young girls and boys are victims of sexual abuse. *Child Sexual Abuse Statistics*, NAT’L CTR. OF VICTIMS OF CRIME, <http://www.victimsofcrime.org/media/reporting-on-child-sexual-abuse/child-sexual-abuse-statistics> (last visited Jan. 30, 2015) (“1 in 5 girls and 1 in 20 boys is a victim of child sexual abuse.”).

³ TERENCE W. CAMPBELL, SMOKE AND MIRRORS: THE DEVASTATING EFFECT OF FALSE SEXUAL ABUSE CLAIMS 31 (1998) (internal quotation marks omitted).

questions. How could he possibly defend himself? Will he ever be able to spend time with his daughter again? Two days later Mr. Smith receives another phone call from his attorney—Jane has recanted her allegations, but her mother intends to use the allegations as a basis for sole custody. Now what?

INTRODUCTION

Allegations of child sexual abuse⁴ are often made by one parent against another during divorce proceedings, especially during custody disputes.⁵ In fact, these allegations are “widespread”⁶ and parents make these allegations in about 2% of cases.⁷ Although there is much debate over the veracity of sexual abuse allegations made during custody disputes, studies show that allegations made during divorce disputes are often unfounded.⁸ Most of these allegations are “reported following a

⁴ There is no one definition of child sexual abuse. “Definitions vary considerably and legal definitions found in state laws vary from state to state . . . However, most experts agree on certain elements of the definition: exploitation of the child; use of coercion, gentle though it may be; and some level of gratification gained by the adult.” KAREN KINNEAR, *CHILDHOOD SEXUAL ABUSE: A REFERENCE HANDBOOK 2* (1995). The Child Abuse Prevention and Treatment Act first passed in 1974 defines “sexual abuse” as:

(A) the employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or assist any other person to engage in, any sexually explicit conduct or simulation of such conduct for the purpose of producing a visual depiction of such conduct; or (B) the rape, and in cases of caretaker or inter-familial relationships, statutory rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children.

42 U.S.C. § 5106g(4)(A)-(B) (2012).

⁵ MODERN FAMILY LAW 854 (Weisberg & Appleton eds., 4th ed. 2010).

⁶ GARDNER, *supra* note 1, at 300 (“Because a sex-abuse accusation is an extremely powerful vengeance and exclusionary maneuver, such accusations have become increasingly widespread in recent years.”); MELVIN G. GOLDZBAND, *CUSTODY CASES AND EXPERT WITNESSES: A MANUAL FOR ATTORNEYS* 33 (2d ed. 1988) (“There is a widespread, currently flagrant, nationwide epidemic of allegations of sexual abuse committed against a child by one contesting parent in custody or visitation battles.”).

⁷ MODERN FAMILY LAW, *supra* note 5, at 854 (citing Kathleen Coulborn Faller, *Child Maltreatment and Endangerment in the Context of Divorce*, 22 U. ARK. LITTLE ROCK L. REV. 429, 430 (2000)); see Catherine Paquette, Note, *Handling Sexual Abuse Allegations in Child Custody Cases*, 25 NEW ENG. L. REV. 1415, 1415 n.2 (1991) (citing Thoennes & Pearson, *Summary of Findings from the Sexual Abuse Allegations Project*, in *SEXUAL ABUSE ALLEGATIONS IN DIVORCE CASES* 135, 135 (1988)) (“In most states, two to ten percent of all family court cases involving custody or visitation include an allegation of sexual abuse.”).

⁸ See *State v. Herrera*, 307 P.3d 103, 117-18 (Ariz. Ct. App. 2013) (“Wendy Button, a forensic interviewer, testified for the state as an expert on the behavior and characteristics of child sexual abuse victims. On direct examination, Button stated that false allegations occur most commonly when the purported victims are either ‘younger children whose parents are involved in a high-conflict divorce or custody dispute’ or ‘adolescent females.’”); see also GARDNER, *supra* note 1, at xxv (“There is no question

visit with the non-custodial parent.”⁹ These false allegations are often “invented by mothers to stop fathers from seeing their children.”¹⁰ Many of these women know that an allegation of sexual abuse is one method of “completely shutting [their] husbands out of the child’s life.”¹¹

Children may also be responsible for false allegations of sexual abuse.¹² They may purposefully make false allegations to “take control over the custody determination by alleging sexual abuse by the parent with whom the child does not want to live.”¹³ Other times, children eager to please an adult “unintentionally”¹⁴ accuse a parent of sexual abuse in response to suggestive questioning by the other parent.¹⁵

Once an allegation is made to the family court, the judge must consider it, which may result in the accused’s complete loss of custody or even a loss of visitation time with his child.¹⁶ In many of these cases that involve such allegations, expert testimony of Child Sexual Abuse Accommodation Syndrome (CSAAS) is introduced against the accused parent.¹⁷ CSAAS is a nondiagnostic tool used “to explain how children who

that many accusations of child sex abuse are true . . . [h]owever, there is no question, as well, that many of the accusations are false, especially in child custody disputes (where the vengeance element and the opportunity for exclusion of a hated spouse is operative”); GOLDZBAND, *supra* note 6, at 33 (“[M]any allegations are patently false and based upon manipulative attempts to prevent custody by the other parent, or upon anxiety-provoked misconceptions by battling parents.”); O’Donohue, W. et al., *Analyzing Child Sexual Abuse Allegations*, 13 FORENSIC PSYCHOL. PRAC. 296, 301 (2004); Paquette, *supra* note 7, at 1420 (internal citation omitted) (“[F]alse allegations . . . occur, most typically in divorce or custody cases.”); *but see 10 Custody Myths and How to Counter Them*, ABA COMMISSION ON DOMESTIC VIOLENCE, (Quarterly E-Newsletter, Vol. 4), July 2006, available at http://www.americanbar.org/content/dam/aba/publishing/cdv_enewsletter/custodymythsandcounter.authcheckdam.pdf (internal citation omitted) (“[T]he majority of allegations are substantiated . . .”).

⁹ Paquette, *supra* note 7, at 1420 (internal citation omitted).

¹⁰ Harriet Alexander, *False Abuse Claims are the New Court Weapon, Retiring Judge Says*, SYDNEY MORNING HERALD (July 6, 2013), <http://www.smh.com.au/national/false-abuse-claims-are-the-new-court-weapon-retiring-judge-says-20130705-2phao.html>; *see* Paquette, *supra* note 7, at 1420 (internal citations omitted) (“In some of these instances, the parents may have created the sexual abuse occurrence in order to terminate custody rights or prevent visitation.”); *but see 10 Custody Myths and How to Counter Them*, *supra* note 8, at 2 (“Among false allegations, fathers are far more likely than mothers to make intentionally false accusations . . .”) (internal citations omitted).

¹¹ Alexander, *supra* note 10.

¹² Paquette, *supra* note 7, at 1421 (internal citation omitted).

¹³ *Id.* (internal citation omitted) (internal quotation mark omitted).

¹⁴ *Id.* (internal citation omitted).

¹⁵ O’Donohue, W., et al., *supra* note 8, at 302 (internal citation omitted).

¹⁶ Alexander, *supra* note 10.

¹⁷ *State v. Davis*, 581 N.E.2d 604, 609 (Ohio 1989) (warning that the term “syndrome” may mislead the fact-finder: “[T]he term ‘syndrome’ is a misnomer since symptoms or traits cannot by themselves be used as a test for sexual abuse, for the simple reason that CSAAS is not probative of sexual abuse”).

are abused react to their maltreatment.”¹⁸ Particularly, CSAAS is used to explain why children may delay disclosing their abuse and why they may recant their allegations of abuse.¹⁹ CSAAS evidence however, has many flaws. This note seeks to enlighten attorneys who represent parents accused of abusing their children to the weaknesses of CSAAS evidence, and propose meaningful steps to take when representing their clients in custody hearings in family court.²⁰ Part I of this note discusses the history of CSAAS, the reasons for the syndrome, and examines each of the elements of the syndrome. Part II explains how, and for what purpose, CSAAS evidence is admitted into court. Part III presents a survey of the nation’s major cases involving CSAAS evidence. Part IV highlights the weaknesses of CSAAS testimony and recommends sample objections attorneys can make when arguing in favor of their motion to exclude the expert testimony. Finally, Part V recommends sample questions and answers attorneys for the clients accused of sexually abusing their child can use when examining expert witnesses to highlight the weaknesses of CSAAS testimony, even if the judge permits the testimony into evidence.

I. CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME

Based on child victim’s reports and complaints from “sexual abuse treatment centers,”²¹ CSAAS was first identified in 1983 by Dr. Roland Summit in his article, *The Child Sexual Abuse Accommodation Syndrome*.²² Not only does CSAAS

¹⁸ John E. B. Myers, *Special Evidentiary Issues*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 305, 309 (Ventrell & Duquette eds., 2005).

¹⁹ State v. J.Q., 617 A.2d 1196, 1209 (N.J. 1993) (internal citations omitted).

²⁰ This note relies on the term “accused” to describe the parent against whom allegations of child sexual abuse are made. The term “defendant” is only appropriate when the state decides to bring criminal charges (and hold a jury trial) against the accused. If the state does not bring criminal charges against the accused, the Family Court judge will make all determinations about the allegations. See generally Jennifer L. Thompson, *Allegations of Criminal Child Abuse in Divorce Cases*, 28 A.B.A. SEC. PUB. GPSOLO 6 (2011) (explaining the difference between criminal trials that occur after allegations have been made in Family Court and the custody hearings taking place).

²¹ Susan Romer, *Child Sexual Abuse in Custody and Visitation Disputes: Problems, Progress, and Prospects*, 20 GOLDEN GATE U. L. REV. 647, 658 (1990); see Kenneth J. Weiss & Julia Curcio Alexander, *Sex, Lies, and Statistics: Inferences from the Child Sexual Abuse Accommodation Syndrome*, 41 J. AM. ACAD. PSYCHIATRY L. 412, 414 (2013) (“Summit’s [work was based on] statistically supported assumptions emerging from clinical work; four years of testing in the author’s practice; strong endorsements from victims, offenders, and family members; and consensus derived from hundreds of training symposia.”).

²² Summit, *supra* note 2, at 177.

“describe how children react (accommodate) to ongoing sexual abuse,”²³ but it also helps to identify children who may be suffering from the effects of sexual abuse in order to provide them with the treatment they need.²⁴ Essentially, Dr. “Summit’s goal was to enhance our understanding of victims, to give them a voice, and to provide a context for understanding their coping behavior within the family and systems of child protection and criminal justice.”²⁵

CSAAS is a nondiagnostic tool used solely “to explain how children who are abused react to their maltreatment;” but CSAAS is not used “to prove that abuse occurred.”²⁶ To accomplish its goal, CSAAS identifies common characteristics and their presence in abused children.²⁷ The presence of these common characteristics in a child, however, is not evidence of whether a child has been sexually abused.²⁸ In fact, because “[t]he accommodation syndrome is neither an illness nor a diagnosis,” it cannot “measure whether or not a child has been sexually abused.”²⁹ Therefore, because CSAAS “does not detect sexual abuse,”³⁰ it “is not probative of sexual abuse.”³¹ Instead “the syndrome assumes that abuse has occurred and helps explain the child’s reaction to it.”³² For example, a child may tell a social worker one day that her father sexually abused her, but may tell her social worker the next day that her father has never touched her inappropriately. CSAAS assumes that the child was in fact sexually assaulted and explains why she may have recanted her

²³ Myers, *supra* note 18, at 308 (internal citation omitted).

²⁴ See Romer, *supra* note 21 (internal citation omitted) (discussing the field of child sexual assault and the role it plays in custody and visitation disputes).

²⁵ Weiss & Alexander, *supra* note 21, at 413.

²⁶ Myers, *supra* note 18; see State v. Davis, 581 N.E.2d 604, 609 (Ohio 1989) (“In effect, CSAAS does not diagnose or detect sexual abuse, but instead, *assumes* the presence of such abuse and seeks to explain the child’s reaction to it.”).

²⁷ Davis, 581 N.E.2d at 609 (internal citation omitted); Summit, *supra* note 3 (explaining that CSAAS evidence was intended to present “a common denominator of the most frequently observed victim behaviors”).

²⁸ Davis, 581 N.E.2d at 609 (internal citation omitted).

²⁹ Myers, *supra* note 18 (quoting Mary B. Meinig, *Profile of Roland Summit*, 1 VIOLENCE UPDATE 6, 6 (1991)); Hall v. State, 611 So. 2d 915, 919 (Miss. 1992) (“[CSAAS] was not meant to be used as a diagnostic device to show that abuse had, in fact, occurred.”).

³⁰ Steward v. State, 652 N.E.2d 490 (Ind. 1995) (citing John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 67 (1989)); Myers, *supra* note 18, at 318.

³¹ Davis, 581 N.E.2d at 609.

³² Myers, *supra* note 18, at 318; see Steward, 652 N.E.2d at 490 (“[T]he syndrome was designed for purposes of treating child victims and offering them more effective assistance within the family and within the systems of child protection and criminal justice . . . and helps to explain reactions—such as recanting or delayed reporting—of children assumed to have experienced abuse.”) (internal citations and quotations omitted).

story.³³ CSAAS evidence, however, does not confirm that she has been assaulted because she has recanted her story.³⁴ Thus, a suggestion that a child was abused because children who have been sexually abused often recant their stories “is an improper usage of Dr. Summit’s theory.”³⁵

Dr. Summit “classified the typical reactions of sexually abused children into five categories” known as the five elements of CSAAS: “(1) secrecy, (2) helplessness, (3) entrapment and accommodation, (4) delayed, conflicted, and unconvincing disclosure, and (5) retraction” or recantation.³⁶ It is imperative for attorneys defending those accused of sexual abuse of a child to understand the elements of CSAAS in preparing a defense against it. For example, questions about the child’s inconsistent statements are generally asked by the accused’s attorney on cross examination of the accusing parent, social worker, or the independent child psychologist appointed by the court in a sexual abuse case.³⁷ The accusing parent’s attorney, however, will most likely utilize an expert witness to testify about CSAAS and explain why the child has made inconsistent statements.³⁸ Consequently, attorneys defending alleged abusers must understand the elements of CSAAS in order to prepare the best defense for their clients.

A. *Secrecy*

The first element of CSAAS, secrecy, is a “basic childhood vulnerability” and a “precondition to the occurrence of sexual abuse” of a child.³⁹ “Preconditions are understood to set the stage for the initiation and continuation of sexual

³³ See Davis, 581 N.E.2d at 609; Summit, *supra* note 2, at 190.

³⁴ See Davis, 581 N.E.2d at 609 (“In effect, CSAAS does not diagnose or detect sexual abuse, but instead, *assumes* the presence of such abuse and seeks to explain the child’s reaction to it.”).

³⁵ Hall v. State, 611 So. 2d 915, 919 (Miss. 1992).

³⁶ Elaine R. Cacciola, *The Admissibility of Expert Testimony in Inframily Child Sexual Abuse Cases*, 34 UCLA L. REV. 175, 184 (1986).

³⁷ See JEAN GRAM HALL & DOUGLAS F. MARTIN, CHILD ABUSE: PROCEDURE AND EVIDENCE 186 (1993) (“Under cross-examination, a witness may be asked about statements he made prior to his appearance in the court, which are inconsistent with his present evidence. If he admits that he made a previous statement which is inconsistent with the evidence he is now giving, that statement is admissible to discredit the truth of his evidence.”).

³⁸ Myers, *supra* note 18, at 318 (“Expert testimony on CSAAS is admissible to rehabilitate a child’s credibility following impeachment focused on delayed reporting, inconsistency, or recantation. Such rehabilitation is appropriate because jurors may not understand that delayed reporting, recantation, and inconsistency are relatively common among sexually abused children.”).

³⁹ Summit, *supra* note 2 at 181.

abuse.”⁴⁰ The secrecy aspect “is an intrinsic characteristic” because child sexual abuse generally occurs when the offender is secluded with the child.⁴¹

For obvious reasons, the abuser must ensure that the illicit encounters with the child are kept completely secret from society, especially from other adults and the police. In order to ensure secrecy, the abuser uses intimidation tactics to scare the child into silence.⁴² For example, the abuser may say, “If you tell anyone our secret, I will hurt you.”⁴³ These threats “make[] it clear to the child that this is something bad and dangerous” so the secrecy acts as “both the source of fear and the promise of safety” for the child.⁴⁴ Because the child is lead to believe that she is doing something bad, the child believes her abuser when he says, “Everything will be all right if you just don’t tell.”⁴⁵

The secrecy element of child sexual abuse stories is extremely common; the “majority of the victims in [Summit’s] surveys had never told anyone” about their childhood abuse.⁴⁶ This plays out in practice as many abused children keep their abuse a secret because they are afraid of the repercussions.⁴⁷ Many fear that they would face blame for their actions, that their parents would not believe them, or that their parents would be upset with them for not immediately disclosing the abuse to them.⁴⁸

B. Helplessness

Helplessness is the second “childhood vulnerability” that serves as a “precondition to the occurrence of sexual abuse” of a child, especially when the abuse comes from a familiar (non-stranger) adult.⁴⁹ “Helplessness . . . refers to the power imbalance between children and adult perpetrators and is a factor in both the initiation of sexual assault and maintenance of secrecy.”⁵⁰ Children do not share equal power with adults, both physically and socially.⁵¹ Because the abuser

⁴⁰ Weiss & Alexander, *supra* note 21, at 413.

⁴¹ *Id.*

⁴² Summit, *supra* note 2 at 181.

⁴³ *See id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Summit, *supra* note 2 at 182.

⁴⁷ *Id.* (internal citation omitted).

⁴⁸ *Id.*

⁴⁹ *Id.* at 177.

⁵⁰ Weiss & Alexander, *supra* note 21, at 413.

⁵¹ Summit, *supra* note 2, at 182.

is often someone the child loves and trusts, the power imbalance increases and the child's helplessness is further underscored.⁵² The imbalance of power intensifies when the abuser is a parent because the parent is "in control of material resources," can influence other people important to the child, and has decision-making power over the child.⁵³ Because of this imbalance of power, the majority of victims are forced to endure their abuse.⁵⁴ Unlike adult victims who can fight back, scream for help, or try to escape, children feel helpless against this adult figure against whom they are physically powerless.⁵⁵

C. *Entrapment and Accommodation*

Entrapment and accommodation is the first of three characteristics that are contingent upon the abuse having taken place.⁵⁶ Summit argues that until these helpless children break the secret and seek assistance from another adult or the police, the child is forced "to learn to accept the situation and to survive."⁵⁷ This means a "healthy, normal, emotionally resilient child will learn to accommodate to the reality of continuing sexual abuse."⁵⁸

Because children have a hard time differentiating between a trusted adult who is caring and a trusted adult who is callous, child victims think they have "provoked the painful encounters" and believe that by accommodating the sexual demands of their abusers and keeping the secret, they "can earn love and acceptance" from their abusers whom they are already wired to trust.⁵⁹ Because child victims feel they must protect their abusive parents—from getting caught, going to jail, and sending them and their siblings to foster care—they

⁵² *Id.*

⁵³ Weiss & Alexander, *supra* note 21, at 413.

⁵⁴ Summit, *supra* note 2, at 183.

⁵⁵ *Id.* at 182. Summit points out the common reasons why children do not speak out against trusted adults who are sexually abusing them. He specifically condemns the work of judges and attorneys who question children who did not report their abuse. He writes, "It is sad to hear children attacked by attorneys and discredited by juries because they claimed to be molested yet admitted they had made no protest or outcry." *Id.* at 183. While it is essential for the attorney of an accused parent to cross-examine a child to discover why the child did not report the abuse, this author acknowledges that the child is further attacked both by these questions in the court room, and later on. It is for this reason that this note provides ways to use CSAAS evidence to produce an acquittal, without the need for further harm to the child.

⁵⁶ *Id.* at 177.

⁵⁷ *Id.* at 184.

⁵⁸ *Id.*

⁵⁹ *Id.*

must find a way to escape reality and deal with the abuse.⁶⁰ Some children may develop an imaginary friend, create multiple personalities, or disassociate themselves from the body being abused.⁶¹

If child victims cannot accommodate the abuse as described, they will express their helplessness and rage in other ways.⁶² For example, these emotions “often lead[] to self-destruction and reinforcement of self-hate[,] self-mutilation, suicidal behavior, promiscuous sexual activity and repeated runaways”⁶³ Daughters being sexually abused by their fathers will seek gifts and privileges for being exploited.⁶⁴ Abused children will also express their emotions by fighting with their parents (especially the mother whom the child blames for being abused and allowing the abuse to continue).⁶⁵ “The failure of the mother-daughter bond reinforces the young woman’s distrust of herself as a female and makes her all the more dependent on the pathetic hope of gaining acceptance and protection with an abusive male.”⁶⁶ Many victims also turn to substance abuse to help them escape the realities of their abuse or to experience the emotions that they are suppressing.⁶⁷

D. *Delayed, Conflicted, and Unconvincing Disclosure*

The majority of children who are sexually abused never disclose their painful experiences.⁶⁸ As the child grows up, an abusive father may become jealous of his child’s relationships, and may try to control the child’s involvement with others.⁶⁹ Particularly with young girls, to cope, the children often rebel against their fathers, as described above.⁷⁰ As a result, they may face punishment by their parents.⁷¹ In a typical case, an abused girl may become enraged after a particularly “punishing family fight and a belittling showdown of authority by the father” and may tell her secret to the police.⁷² Police

⁶⁰ *Id.* at 185.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 185-86 (internal citation omitted).

⁶⁸ *Id.* at 186 (internal citations omitted).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

authorities, however, may assume her claims are fictional, especially in cases where she may have waited years to disclose her story.⁷³ The police may also “assume she has invented the story in retaliation against the father’s attempts to achieve reasonable control and discipline;” the more intense the punishment is, the more likely they are to assume she is trying to “falsely incriminat[e] her father.”⁷⁴

Because all abused children accommodate their abuse differently, they may face diverse disclosure difficulties.⁷⁵ For example, some children are able to completely hide their abuse by excelling in school or achieving popularity; they are “eager to please both teachers and peers.”⁷⁶ These children often face skeptical adults who are unable to believe their disclosures of abuse because the children have excelled at school and their extra-curricular activities and appear to be unaffected.⁷⁷

Summit explains that children generally, regardless of how they deal with their abuse, “face[] an unbelieving audience when [they] complain of ongoing sexual abuse” and risk “not only disbelief, but scapegoating, humiliation and punishment as well.”⁷⁸ As a result, abused children often see no reason to voice the complaint.⁷⁹ “Whether the child is delinquent, hypersexual, countersexual, suicidal, hysterical, psychotic, or perfectly well-adjusted, and whether the child is angry, evasive or serene” the parents will ignore “the immediate affect and the adjustment pattern of the child” and will try to explain away the child’s allegations.⁸⁰

E. Retraction

Unfortunately, when children disclose their abuse, generally the threats made by their abusers become true: the child is called a liar, the child’s family is broken apart, and/or the child is taken away from the family home.⁸¹ Often the mother guilts the child into retracting the statements about the abuse as a result of the disruption caused to the family.⁸² “Once

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 187.

⁷⁸ *Id.* at 186.

⁷⁹ *Id.* at 187.

⁸⁰ *Id.*

⁸¹ *Id.* at 188.

⁸² *Id.*

again, the child bears the responsibility of either preserving or destroying the family.”⁸³ Telling the truth no longer seems the best choice, but instead the child must lie and recant, in order to preserve the family.⁸⁴ “Unless there is special support for the child and immediate intervention to force responsibility on the [abuser], the [child] will follow the ‘normal’ course and retract [the] complaint.”⁸⁵ The child will pretend the story was initially fabricated and give an excuse for initially fibbing; the adults will then believe this false version of events.⁸⁶

II. ADMITTANCE OF CSAAS EVIDENCE IN COURTS

Summit did not intend for CSAAS testimony “to prove that abuse occurred.”⁸⁷ Instead, he intended for it “to explain how children who are abused react to their maltreatment.”⁸⁸ By identifying prototypical behaviors, he aimed to provide therapists with a nondiagnostic tool, and not “a device for establishing the truth of a child’s statement.”⁸⁹ This intention, however, was not clear from his initial article, and both prosecutors and defense attorneys alike were exploiting Summit’s 1983 article to advance their own legal arguments.⁹⁰ Consequently, in 1992, in his article entitled “Abuse of the Child Sexual Abuse Accommodation Syndrome” Summit “attempted . . . to clear up some of the confusion surrounding [CSAAS’s] proper use and reliability.”⁹¹

Following the publishing of his 1983 article, CSAAS was used against criminal defendants on trial for child sexual assault and in family courts. Some prosecutors and experts argued that CSAAS was “akin to a diagnosis”⁹² and argued that if children exhibited the “prototypical behaviors” of victims “a

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Myers, *supra* note 18, at 309.

⁸⁸ *Id.*

⁸⁹ Lucy Berliner, *The Use of Expert Testimony in Child Sexual Abuse Cases*, in *EXPERT WITNESSES IN CHILD ABUSE CASES: WHAT CAN AND SHOULD BE SAID IN COURT* 11, 17 (Stephen J. Ceci & Helene Hembrooke eds., 1998).

⁹⁰ See generally Roland C. Summit, *Abuse of the Child Sexual Abuse Accommodation Syndrome*, 1 *J. CHILD SEXUAL ABUSE* 153 (1992); Weiss & Alexander, *supra* note 21, at 414.

⁹¹ Cara Gitlin, Note, *Expert Testimony on Child Sexual Abuse Accommodation Syndrome: How Proper Screening Should Severely Limit its Admission*, 26 *QUINNIPIAC L. REV.* 497, 515 n.120 (2008) (citing Summit, *supra* note 90).

⁹² *Id.*

psychologist [could] infer that abuse ha[d] occurred.”⁹³ Accordingly, judges generally allowed CSAAS testimony to be admitted into evidence as proof that child sexual abuse had occurred.⁹⁴ For example, in *Bussey v. Commonwealth of Kentucky*, one of the earliest cases to evaluate CSAAS evidence by name, there was no dispute that CSAAS evidence was proof of abuse.⁹⁵ Rather, the dispute centered on whether CSAAS evidence could be admitted against the defendant, the victim’s father, when it was a proven fact that the victim was previously sexually abused by her uncles.⁹⁶

Today, the majority of state courts (“the majority states”) to address the admissibility of CSAAS evidence have barred it as proof that abuse has occurred.⁹⁷ Most of these courts, however, do permit CSAAS testimony for other purposes.⁹⁸ “For example, if the facts of a particular case show that the victim delayed reporting the abuse, recanted the allegations, kept the abuse secretive, or was accommodating to the abuse, then testimony

⁹³ Margaret Bull Kovera & Eugene Borgida, *Expert Scientific Testimony on Child Witnesses in the Age of Dalbert*, in *EXPERT WITNESSES IN CHILD ABUSE CASES: WHAT CAN AND SHOULD BE SAID IN COURT* 185, 197 (Stephen J. Ceci & Helene Hembrooke eds., 1998).

⁹⁴ Michael D. Stanger, *Throwing the Baby Out with the Bathwater: Why Child Sexual Abuse Accommodation Syndrome Should Be Allowed As A Rehabilitative Tool in the Florida Courts*, 55 U. MIAMI L. REV. 561, 581 (2001) (collecting cases).

⁹⁵ *Bussey v. Commonwealth*, 697 S.W.2d 139, 140 (Ky. 1985).

⁹⁶ *Id.*

⁹⁷ Stanger, *supra* note 94, at 570 (citing *State v. York*, 564 A.2d 389 (Me. 1989); *State v. Chamberlain*, 628 A.2d 704 (N.H. 1993); *State v. Schimpf*, 782 S.W.2d 186 (Tenn. Crim. App. 1989); *State v. Rimmasch*, 775 P.2d 388 (Utah 1989); *State v. Gokey* 574 A.2d 766 (Vt. 1990); *State v. Jones*, 863 P.2d 85 (Wash. Ct. App. 1993); *State v. Jensen*, 415 N.W.2d 519 (Wis. Ct. App. 1987)).

⁹⁸ *People v. Spicola*, 947 N.E.2d 620, 635 (N.Y. 2011) (“[T]he majority of states ‘permit expert testimony to explain delayed reporting, recantation, and inconsistency,’ as well as ‘to explain why some abused children are angry, why some children want to live with the person who abused them, why a victim might appear “emotionally flat” following sexual assault, why a child might run away from home, and for other purposes.” (quoting 1 MYERS, EVIDENCE § 6.24, at 416-22)); *see People v. Sandoval*, 79 Cal. Rptr. 3d 634, 639 (Cal. Ct. App. 2008) (“Such expert testimony is needed to disabuse jurors of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children’s seemingly self-impeaching behavior.”) (internal citations and quotations omitted); *see also, e.g., W.R.C. v. State*, 69 So. 3d 933, 937-39 (Ala. Crim. App. 2010); *State v. Moran*, 728 P.2d 248, 253-54 (Ariz. 1986); *People v. Bowker*, 249 Cal.Rptr. 886, 891 (Cal. Ct. App. 1988); *People v. Beckley*, 456 N.W.2d 391, 409-10 (Mich. 1990); *State v. Schnabel*, 952 A.2d 452, 462 (N.J. 2008); *Frenzel v. State*, 849 P.2d 741, 749 (Wyo. 1993); *but see, e.g., Hadden v. State*, 690 So. 2d 573, 580 n.5 (Fla. 1997) (finding CSAAS evidence inadmissible because such evidence does not satisfy the *Frye* test); *Sanderson v. Commonwealth*, 291 S.W.3d 610, 614 (Ky. 2009) (finding CSAAS testimony to never be admissible under Kentucky law); *State v. Doan*, 498 N.W.2d 804, 812 (Neb. 1993) (finding CSAAS evidence to be inadmissible because it takes the credibility determination away from the trier of fact in violation of Nebraska law); *Commonwealth v. Dunkle*, 602 A.2d 830, 836 (Pa. 1992) (finding CSAAS testimony to be too speculative to be properly admitted to a jury in a criminal trial).

about that particular characteristic of CSAAS would be admissible to dispel any myths the [trier of fact] may hold concerning that behavior.”⁹⁹ Because CSAAS is admitted only for these limited reasons, experts who testify about CSAAS often take the witness stand without ever having met the child and with no knowledge of the case; his or her testimony only conveys to the court the common characteristics of children who have been sexually abused to rehabilitate the child’s testimony.¹⁰⁰ Some courts also allow CSAAS evidence to be admitted to imply that the child’s behavior is consistent with that of an abused child, but this implication evidence is still only permitted as long as the expert “refrains from giving an explicit opinion on whether the abuse occurred” in that particular case¹⁰¹

Even under these limitations, CSAAS may still be misleading to the fact-finder.¹⁰² Although today CSAAS expert testimony is generally not introduced into evidence as proof of abuse, the general message of this testimony is that the fact-finder, “should believe the initial accusations made by a child and disbelieve the recantation.”¹⁰³ This is particularly troublesome in criminal proceedings where lay members of the jury will interpret this testimony to mean that the expert believes the accusations to be true, taking away the credibility determination from the jury.¹⁰⁴ Judges generally give a limiting instruction¹⁰⁵ in criminal proceedings explaining that “such

⁹⁹ *Frenzel*, 849 P.2d at 749.

¹⁰⁰ *See generally Spicola*, 947 N.E.2d at 635 (finding the judge did not abuse his discretion in admitting CSAAS testimony by an expert who did not know the facts of the case and explained general information about CSAAS).

¹⁰¹ *Stanger*, *supra* note 94, at 570 (citing *United States v. Bighead*, 128 F.3d 1329 (9th Cir. 1997); *United States v. St. Pierre*, 812 F.2d 417 (8th Cir. 1987); *Rodriguez v. State*, 741 P.2d 1200 (Alaska Ct. App. 1987); *State v. Reser*, 767 P.2d 1277 (Kan. 1989); *State v. Edelman*, 593 N.W.2d 419, (S.D. 1999); *State v. Bachman*, 446 N.W.2d 271 (S.D. 1989); *Gokey*, 574 A.2d at 766).

¹⁰² *Weiss & Alexander*, *supra* note 21, at 412-13 (“A clinician testifying that an evaluatee has one of these conditions and that the only explanation for it is the criminal conduct of the defendant would tend to prejudice a jury . . . Overall, however, evidence of syndromes in court proceedings has been criticized as a major source of confusion, especially in sexual assault cases. This problem is particularly true of child sexual abuse and CSAAS testimony.”) (internal citations omitted); *see Berliner*, *supra* note 89, at 17 (“Unfortunately, in some cases, prosecutors offered and clinical experts testified that this syndrome was akin to a diagnosis and its presence was proof of a sexual abuse history. In part, the use of the term *syndrome* contributed to the confusion . . .”).

¹⁰³ *Newkirk v. Commonwealth*, 937 S.W.2d 690, 693 (Ky. 1996).

¹⁰⁴ *See id.* at 694.

¹⁰⁵ *See Frenzel v. State*, 849 P.2d 741, 749 (Wyo. 1993).

testimony is admitted only to explain victim behavior and is inadmissible on the issue of guilt.”¹⁰⁶

Because CSAAS testimony may mislead the jury, courts in criminal trials “struggle with balancing testimony on CSAAS-related behaviors against the implication that the child was, in fact, abused” and admittance of this evidence is often in the face of many strong objections by defense counsel.¹⁰⁷ This balancing can be so difficult that “as a result of . . . the failure of some courts to distinguish proper and improper use of the syndrome, testimony that relies on or refers to CSAAS has been virtually banned in some jurisdictions,”¹⁰⁸ including Florida, Kentucky, Pennsylvania,¹⁰⁹ and Nebraska¹¹⁰ (“the minority states”).

In the majority states, experienced attorneys defending those accused of child sexual abuse often challenge the admittance of CSAAS testimony into evidence under the state equivalent of Rule 703 of the Federal Rules of Evidence, which governs the admittance of expert testimony.¹¹¹ In *Daubert v. Merrell Dow Pharmaceuticals*,¹¹² the United States Supreme Court rejected the previously established “*Frye* test,”¹¹³ which regulated expert testimony, finding that it was replaced by Rule 703.¹¹⁴ The Supreme Court in *Daubert* established a two-part test for judges to employ to interpret Rule 703 accurately—the testimony must be “scientific knowledge” and

¹⁰⁶ Weiss & Alexander, *supra* note 21, at 412-13 (internal citation omitted).

¹⁰⁷ *Id.* at 414-15 (internal citation omitted).

¹⁰⁸ Berliner, *supra* note 89, at 17 (internal citation omitted). This note, thus, is meant to aid attorneys in jurisdictions where CSAAS has not been banned.

¹⁰⁹ Stanger *supra* note 94, at 572 (citing *Hester v. Commonwealth*, 734 S.W.2d 457 (Ky. 1987); *Commonwealth v. Dunkle*, 602 A.2d 830 (Pa. 1992)); see *Hadden v. State*, 690 So. 2d 573 (Fla. 1997).

¹¹⁰ *State v. Doan*, 498 N.W.2d 804, 812 (Neb. 1993).

¹¹¹ Weiss & Alexander, *supra* note 21, at 415 (citing FED. R. EVID. 703). Rule 703 reads, “An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.” FED. R. EVID. 703.

¹¹² 509 U.S. 579, 570 (1993).

¹¹³ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The *Frye* test requires expert testimony be “generally accepted in the scientific community.” David McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray Into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1, 10 (1986) (internal citation omitted).

¹¹⁴ Dana G. Deaton, *The Daubert Challenge to the Admissibility of Scientific Evidence*, 60 AM. JUR. TRIALS 17-18 (1996) (internal citation omitted).

must “logically advance[] a material aspect of the case.”¹¹⁵ The trial court judges, in applying this two-part test, must act as “gatekeepers” and determine, at the beginning of the trial, whether the testimony will be admitted.¹¹⁶

A “*Daubert* hearing is an ideal venue to test the validity and reliability of the syndrome.”¹¹⁷ *Daubert* hearings “allow [for an] inquiry into whether the syndrome is diagnostic or nondiagnostic.”¹¹⁸ If the court determines “the syndrome is nondiagnostic,” as Summit intended, evidence of the syndrome cannot be admitted as substantive evidence of abuse against the accused.¹¹⁹ “If the syndrome is diagnostic, the hearing affords an opportunity to locate the syndrome along the continuum of diagnostic certainty.”¹²⁰

In jurisdictions that allow for CSAAS evidence to be admitted, judges must determine in what capacity this testimony may be admitted against the accused. For example, in 1993 the New Jersey Supreme Court in *State v. J.Q.* held “that CSAAS has a sufficiently reliable scientific basis to allow an expert witness to describe traits found in victims of such abuse to aid jurors in evaluating specific defenses.”¹²¹ Although the New Jersey Supreme Court found CSAAS testimony to be reliable, the court also found the lower court had erred in admitting the CSAAS testimony against that defendant.¹²² The court stated that the expert’s testimony “included opinions on commonplace issues, such as credibility assessments derived from conflicting versions of an event and not-yet scientifically established opinions” which were the ultimate issues the fact-finder was to resolve.¹²³

III. CSAAS ACROSS THE COUNTRY

There are few, if any, published family court judicial opinions that rely on CSAAS testimony in custody and visitation determinations; rather, published cases discussing CSAAS testimony generally take place in child sexual abuse criminal

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Myers, *supra* note 18, at 309.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *State v. J.Q.*, 617 A.2d 1196, 1197 (N.J. 1993).

¹²² *Id.*

¹²³ *Id.* at 1197-98.

proceedings.¹²⁴ Although there is vast difference between criminal proceedings and family court proceedings—the burden of proof, the stakes, the parties, the trier of fact—criminal proceedings involving CSAAS can serve as a learning tool for attorneys representing parents against whom CSAAS may be admitted. These attorneys must keep in mind, however, that family court and criminal court operate by completely different rules and that family courts may treat CSAAS evidence differently than criminal courts. The following cases outline the three main avenues courts can take when determining whether to admit CSAAS testimony.

A. *New Jersey: State v. J.Q.*¹²⁵

State v. J.Q. is a child-sexual-abuse criminal case in which two young girls, Connie and Norma, accused their father of sexually abusing them.¹²⁶ The girls' parents, Karen and John, met in the early 1970s and began a relationship.¹²⁷ The couple did not marry, but gave birth to their daughters in 1977 and 1979.¹²⁸ Due to financial issues and allegations of unfaithfulness, Karen and John separated in 1984.¹²⁹ The couple officially ended their relationship shortly thereafter when Connie was eight years old and Norma was six years old.¹³⁰ After the breakup, John would spend time on the weekends with his daughters at his one-room apartment he shared with a woman he later married in 1987.¹³¹

Two years later, “Karen learned that Norma, during play, had attempted to pull down her younger sister’s underwear and touch her buttocks.”¹³² After being questioned by her mother, Norma identified her father as the person who taught her to behave in that manner.¹³³ Although incredulous to her

¹²⁴ *E.g., id.* at 1197; *W.R.C. v. State*, 69 So. 3d 933 (Ala. Crim. App. 2010); *Sanderson v. Commonwealth*, 291 S.W.3d 610 (Ky. 2009).

¹²⁵ Under New Jersey law, child sexual abuse opinions should be written using initials, rather than the parties' names in order to protect the identities of the parties. The Supreme Court of New Jersey decided to “use fictitious names to describe the parents and children involved . . . refer[ing] to the mother as ‘Karen,’ the father as ‘John,’ and the two children as ‘Connie’ and ‘Norma.’” *J.Q.*, 617 A.2d at 1198.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

daughter's allegations initially, Norma eventually contacted a counselor and the police.¹³⁴

At John's trial, Dr. Milchman, a psychologist, testified "as an expert witness on child sexual abuse" about CSAAS.¹³⁵ She described CSAAS "as a pattern of behavior that is found to occur again and again in children who are victims of incest."¹³⁶ Dr. Milchman described the elements of CSAAS and testified to their relevance in the cases of Connie and Norma.¹³⁷ Dr. Milchman testified that "in her expert opinion, Connie and Norma had been sexually abused."¹³⁸

John was convicted "of multiple counts of first-degree aggravated sexual assault on Connie and Norma for various acts of penetration and oral sex, and of two counts of endangering the welfare of a child . . . [and] sentenced . . . to thirty years' imprisonment, with ten years of parole ineligibility."¹³⁹ The conviction was reversed, however, when the Appellate Division found the trial court had admitted CSAAS evidence to "establish the credibility" of the children rather than to rehabilitate them, such as to explain why disclosure of abuse was delayed.¹⁴⁰

In affirming the decision, the Supreme Court of New Jersey embarked on a lengthy discussion of the use of behavioral science in child sexual abuse cases.¹⁴¹ Despite an abundance of both legal and medical literature in favor of using behavioral science evidence, the court stated that "most courts do not approve such testimony as substantive evidence of abuse."¹⁴² Instead, the court found that many states permit behavioral science testimony to be admitted for other purposes such as "to rehabilitate" the victim after the defense argues the victim is untrustworthy since she has recanted her story or delayed in reporting her abuse.¹⁴³

The court next considered whether behavioral science could be used by an expert witness to state whether in his or her expert opinion a child was sexually abused.¹⁴⁴ Although

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* (internal quotation marks omitted).

¹³⁷ *Id.* at 1199.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* (citing *State v. J.Q.*, 599 A.2d 172 (1991)).

¹⁴¹ *Id.* at 1200-03.

¹⁴² *Id.* at 1201 (internal quotation marks omitted).

¹⁴³ *Id.* (internal quotation marks omitted).

¹⁴⁴ *Id.*

only citing two occasions where other courts allowed behavioral science testimony to be used in this way,¹⁴⁵ the court left open “the possibility that a qualified behavioral-science expert could demonstrate a sufficiently reliable scientific opinion to aid a jury in determining the ultimate issue that the abuse had occurred” under the right circumstances.¹⁴⁶ Relying on the literature, the court directed future trial court judges to evaluate the witness’s qualifications to determine if the witness possesses “the requisite degree of scientific reliability” before allowing an expert to testify in this manner.¹⁴⁷

Next, the court turned specifically to CSAAS testimony.¹⁴⁸ The court noted that CSAAS testimony “has been placed within the category of behavioral-science testimony that describes behaviors commonly observed in sexually-abused children.”¹⁴⁹ Despite the strength of the literature backing behavioral-science testimony such as CSAAS, “[c]ourts rarely permit the testimony for the purpose of establishing substantive evidence of abuse, but [generally] allow it to rehabilitate the victim’s testimony.”¹⁵⁰ For example, CSAAS evidence may be admitted after “the defense asserts that the child’s delay in reporting the abuse and recanting of the story indicate that the child is unworthy of belief.”¹⁵¹ After a detailed analysis of Summit’s work and the CSAAS elements, the court looked to whether CSAAS testimony is admissible under New Jersey law.¹⁵² It explained that expert testimony is only admissible under Rule 56 of the New Jersey Rules of Evidence¹⁵³ when “it relates to a subject-matter beyond the understanding of persons of ordinary experience, intelligence, and knowledge,”¹⁵⁴ and has “[a]cceptance within [the] scientific community.”¹⁵⁵

The court acknowledged that the scientific community has accepted the “theory that CSAAS identifies or describes

¹⁴⁵ *Id.* at 1202 (citing Myers et al., *supra* note 30, at 80-85).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1203.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* (internal citations omitted).

¹⁵¹ *Id.* at 1201 (internal citation omitted).

¹⁵² *Id.* at 1205.

¹⁵³ Rule 56 has been replaced and amended by Rule 702 of the New Jersey Rules of Evidence. *State v. Berry*, 658 A.2d 702, 707 (N.J. 1995).

¹⁵⁴ *J.Q.*, 617 A.2d at 1205 (citing *State v. Kelly*, 478 A.2d 364 (N.J. 1993); *Evers v. Dollinger*, 471 A.2d 405 (N.J. 1984)).

¹⁵⁵ *Id.* (citing *State v. Kelly*, 478 A.2d 364 (N.J. 1993)).

behavioral traits commonly found in child-abuse victims.”¹⁵⁶ It noted, however, that there is criticism of CSAAS evidence because there is overlap between the CSAAS behaviors and those observed in other syndromes.¹⁵⁷ Thus, the court came to the single, most-important realization that attorneys must remember when their clients are facing CSAAS evidence: “*the existence of the symptoms does not invariably prove abuse.*”¹⁵⁸ As a result, the court established that in New Jersey CSAAS evidence could only be “presented to the jury in accordance with its scientific theory,” namely why a child accommodated the abuse or did not disclose promptly.¹⁵⁹

Finally, the court analyzed whether in *J.Q.* Dr. Milchman’s expert CSAAS testimony was properly admitted before the jury.¹⁶⁰ While the court was unclear whether Dr. Milchman’s opinion that the children were sexually abused was reached “on the basis of her credibility assessments or on the basis of her understanding of CSAAS evidence,” the court held that her opinion was improperly admitted.¹⁶¹ If her opinion was based on her understanding of CSAAS evidence, the court held that the evidence would be improperly admitted “because CSAAS is not relied on in the scientific community to detect abuse.”¹⁶² The court further explained:

Summit did not intend the accommodation syndrome as a diagnostic device. The syndrome does not detect sexual abuse. Rather, it assumes the presence of abuse, and explains the child’s reactions to it . . . With child sexual abuse accommodation syndrome . . . one reasons from presence of sexual abuse to reactions to sexual abuse. Thus, the accommodation syndrome is not probative of abuse.¹⁶³

The court further endorsed the use of CSAAS testimony to rehabilitate children in the courtroom setting.¹⁶⁴ Adopting the comments of Professor John E. B. Myers and his colleagues, the court stated that CSAAS can justify why many children who have been abused recant their allegations or delay

¹⁵⁶ *Id.* at 1206 (internal citation omitted); Chandra Lorraine Holmes, *Child Sexual Abuse Accommodation Syndrome: Curing the Effects of a Misdiagnosis in the Law of Evidence*, 25 TULSA L.J. 143, 158-59 (1989).

¹⁵⁷ *J.Q.*, 617 A.2d at 1206.

¹⁵⁸ *Id.* (emphasis added).

¹⁵⁹ *Id.* at 1207.

¹⁶⁰ *J.Q.*, 617 A.2d at 1209.

¹⁶¹ *Id.*

¹⁶² *Id.* (internal citation omitted).

¹⁶³ *Id.* (internal citation omitted).

¹⁶⁴ *Id.*

disclosing their abuse.¹⁶⁵ Furthermore, the court found that, “[i]f use of the syndrome is confined to these rehabilitative functions, the confusion clears, and the accommodation syndrome serves a useful forensic function.”¹⁶⁶ Because Dr. Milchman’s CSAAS testimony was not used for this rehabilitative function, the court reasoned that her testimony was improperly admitted.¹⁶⁷

The New Jersey Supreme Court stuck as closely to Summit’s intent as possible.¹⁶⁸ As a result, the *J.Q.* decision became instrumental in helping other states’ highest courts, including the Supreme Court of Kentucky, to establish whether and how their state would admit CSAAS evidence.¹⁶⁹

B. *Kentucky: Sanderson v. Commonwealth of Kentucky*¹⁷⁰

One of the first states to consider CSAAS testimony in 1985, Kentucky has historically rejected the admittance of CSAAS testimony into evidence.¹⁷¹ The Supreme Court of Kentucky “has not accepted the view that . . . CSAAS or any of its components has attained general acceptance in the scientific community justifying its admission into evidence to prove sexual abuse or the identity of the perpetrator.”¹⁷² Historically, Kentucky courts have rejected CSAAS evidence on relevance grounds, finding CSAAS evidence does not “make the existence of any fact of consequence more probable or less probable than it would have been without the evidence.”¹⁷³ In *Sanderson v. Commonwealth of Kentucky*, the Supreme Court of Kentucky further expressed its distaste for CSAAS, describing it as

¹⁶⁵ *Id.* at 1210 (internal citation omitted) (“Since this ‘syndrome’ is only a piece of the child sexual abuse machinery, testimony concerning CSAAS may only be offered for the purpose for which it was defined—to explain the child’s irrational behavior.”).

¹⁶⁶ *Id.* at 1209.

¹⁶⁷ *Id.* at 1211.

¹⁶⁸ *See generally id.* at 1209 (internal citation omitted).

¹⁶⁹ *E.g.*, *Steward v. State*, 652 N.E.2d 490 (Ind. 1995); *Sanderson v. Commonwealth*, 291 S.W.3d 610 (Ky. 2009); *Commonwealth v. Hudson*, 631 N.E.2d 50 (Mass. 1994); *People v. Peterson*, 537 N.W.2d 857 (Mich. 1995).

¹⁷⁰ 291 S.W.3d at 610.

¹⁷¹ *Id.* at 617 (Scott, J. dissenting) (citing *Kurtz v. Commonwealth*, 172 S.W.3d 409, 413, 414 (Ky. 2005); *Miller v. Commonwealth*, 77 S.W.3d 566, 571, 572 (Ky. 2002); *Newkirk v. Commonwealth*, 937 S.W.2d 690, 691-96 (Ky. 1996); *Hall v. Commonwealth*, 862 S.W.2d 321, 322, 323 (Ky. 1993); *Hellstrom v. Commonwealth*, 825 S.W.2d 612, 613, 614 (Ky.1992); *Dyer v. Commonwealth*, 816 S.W.2d 647, 652-54 (Ky. 1991); *Brown v. Commonwealth*, 812 S.W.2d 502, 503, 504 (Ky. 1991); *Mitchell v. Commonwealth*, 777 S.W.2d 930, 932, 933 (Ky. 1989); *Hester v. Commonwealth*, 734 S.W.2d 457, 458 (Ky. 1987); *Lantrip v. Commonwealth*, 713 S.W.2d 816, 817 (Ky. 1986); *Bussey v. Commonwealth*, 697 S.W.2d 139, 140, 141 (Ky.1985)).

¹⁷² *Newkirk*, 937 S.W.2d at 693.

¹⁷³ *Id.* (citing KY. R. EVID. 401).

“generic and unreliable.”¹⁷⁴ The facts of *Sanderson* are simple—the complainant, B.T., alleged she had been sexually abused by her step-father.¹⁷⁵

In December 2000, the appellant married Mendy, the mother of B.T.¹⁷⁶ After the wedding, Mendy and B.T. “moved into [the] Appellant’s house” which included a garage.¹⁷⁷ In 2006, B.T. accused her step-father of abusing her multiple times each week since the family moved in together.¹⁷⁸ B.T. testified that her step-father threatened to hurt her if she ever tried to disclose the abuse.¹⁷⁹ B.T. testified that the abuse always “took place in the garage,” and after the family moved to a new home, the abuse occurred “in the garage, in B.T.’s room, and in Mendy’s room.”¹⁸⁰

After Mendy and the appellant had a baby, they began “experiencing marital problems.”¹⁸¹ The couple sought divorce, and the appellant left the marital home on February 25, 2006.¹⁸² Two months later, a parent of one of B.T.’s friends told Mendy that during a visit to the marital home years earlier, her daughter “watched a pornographic movie with B.T. and Appellant.”¹⁸³ Although initially denying the story, B.T. eventually admitted to Mendy that she had “watched the movie and told Mendy about the abuse that had taken place.”¹⁸⁴

The appellant was eventually indicted, and was convicted by a jury “of two counts of Second-Degree Sodomy and three counts of First-Degree Sexual abuse.”¹⁸⁵ He “was sentenced to thirty-five years in prison.”¹⁸⁶ On appeal, the Appellant argued that the trial court erred in admitting CSAAS evidence against him.¹⁸⁷

The appellant objected to the CSAAS symptom testimony “from Mendy, Brian Terrell (B.T.’s father), and Lori Brown, a clinical psychologist.”¹⁸⁸ All three witnesses testified

¹⁷⁴ *Sanderson*, 291 S.W.3d at 614.

¹⁷⁵ *Id.* at 611.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 612.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

to “B.T.’s physical and psychological ‘symptoms,’” but “the most damaging testimony came from Brown, a clinical psychologist who counseled B.T. and gave testimony that B.T.’s addition of new allegations of sexual abuse [wa]s normal.”¹⁸⁹

The Supreme Court of Kentucky evaluated the State’s precedent that generally rejected the introduction of CSAAS evidence.¹⁹⁰ The general rule against CSAAS testimony was established in *Miller v. Commonwealth*:

[A] party cannot introduce evidence of the habit of a class of individuals either to prove that another member of the class acted the same way under similar circumstances or to prove that the person was a member of that class *because* he/she acted the same way under similar circumstances.¹⁹¹

Essentially, this means that “[w]here a victim had delayed reporting of abuse, [it is] improper [to admit] testimony of a seasoned child sex abuse investigator [to] state[] that it was common, in her experience, for sexually abused victims to delay reporting of the abuse.”¹⁹² Building off that rule, the Kentucky Supreme Court further showed its distrust of CSAAS testimony in *Newkirk v. Commonwealth of Kentucky*.¹⁹³ There, the court stated that there are many reasons to exclude CSAAS testimony including: “the lack of diagnostic reliability, the lack of general acceptance within the discipline from which such testimony emanates, and the overwhelmingly persuasive nature of such testimony effectively dominating the decision-making process, uniquely the function of the jury.”¹⁹⁴

With this precedent in mind, the court examined Brown’s testimony.¹⁹⁵ Although never mentioning CSAAS specifically, “Brown testified that it is normal for child victims of sexual abuse, like B.T., to add details about their abuse after they have been in counseling for an extended period of time and to appear happy in their outward life”¹⁹⁶ The court found error with this testimony, however, describing it as “the exact type of generic and unreliable evidence this court has repeatedly held to be reversible error.”¹⁹⁷ The court reversed the

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 613.

¹⁹¹ *Miller v. Commonwealth*, 77 S.W.3d 566, 572 (Ky. 2002) (emphasis in original).

¹⁹² *Sanderson*, 291 S.W.3d at 613 (internal quotation marks omitted).

¹⁹³ *Newkirk v. Commonwealth*, 937 S.W.2d 690 (Ky. 1996).

¹⁹⁴ *Sanderson*, 291 S.W.3d at 613 (internal quotation marks omitted).

¹⁹⁵ *Id.* at 614.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

conviction and remanded the case to the trial court for a new trial due to the improper CSAAS testimony admitted.¹⁹⁸

The *Sanderson* case is an important tool for attorneys in Kentucky defending against sexual abuse allegations. Moreover, this case provides a basis for attorneys in other jurisdictions to mount objections to the introduction of CSAAS evidence to substantiate children's claims of sexual abuse. In fact, *Sanderson* outlines the key arguments against CSAAS evidence, specifically noting its unreliable nature.

C. *Alabama: W.R.C. v. State*¹⁹⁹

Attorneys representing clients accused of sexual abuse of a child in Alabama do not have the same precedential backing to object to the use of CSAAS evidence at trial. Recently, when faced with an analogous issue to that of the Kentucky Supreme Court in *Sanderson*, the Alabama Court of Criminal Appeals,²⁰⁰ in *W.R.C. v. State*, declined to follow the *Sanderson* holding and instead found that CSAAS testimony may be admitted against the defendant when the testimony relates to child victims generally and not to specific victims.²⁰¹

At the trial of W.R.C., the prosecutor admitted CSAAS evidence against him.²⁰² A jury convicted W.R.C. of first degree sodomy and sexual abuse, and he was sentenced to a total of 30 years imprisonment.²⁰³ W.R.C. appealed his conviction, specifically objecting to the admittance of CSAAS evidence against him at his trial.²⁰⁴

The alleged victim, L.O., who "lived with his grandmother, E.O.," accused his grandmother's husband, W.R.C., of sexually abusing him "over the span of a month" when he was seven years old (10 years before the start of trial).²⁰⁵ L.O. testified that following the abuse "W.R.C. told him to 'keep this between us' and threatened that if L.O. told anyone, he would kill both L.O. and E.O."²⁰⁶

¹⁹⁸ *Id.*

¹⁹⁹ *W.R.C. v. State*, 69 So. 3d 933 (Ala. Crim. App. 2010).

²⁰⁰ The Alabama Court of Criminal Appeals is the intermediate appellate court in Alabama. Ala. Appellate Courts, *Judicial System Chart*, JUDICIAL.ALABAMA.GOV, http://judicial.alabama.gov/chart_judicial.cfm (last visited Jan. 11, 2015).

²⁰¹ *W.R.C.*, 69 So. 3d at 939-40 (citing *Sanderson*, 291 S.W.3d at 610).

²⁰² *Id.* at 936.

²⁰³ *Id.* at 934.

²⁰⁴ *Id.* at 934-36.

²⁰⁵ *Id.* at 934.

²⁰⁶ *Id.* at 935.

At trial L.O. listed a number of reasons to explain why he did not disclose the abuse sooner: “because he did not want to talk about it; because he knew no one else who was suffering from something similar; because even though E.O. and W.R.C. separated shortly after the incidents, they still communicated; and because he did not want to hurt his grandmother.”²⁰⁷ L.O. testified that when he was 15 or 16 years old, he finally disclosed the assaults to an aunt with whom he was living.²⁰⁸

On appeal, W.R.C. argued “that the trial court erred in allowing what he claims was expert testimony regarding [CSAAS]²⁰⁹ and delayed disclosure by child sexual-abuse victims from Maribeth Thomas, the clinical director of the Prescott House Child Advocacy Center.”²¹⁰ W.R.C. objected to Thomas’s testimony at trial as well.²¹¹ In response to W.R.C.’s objection, “the prosecutor pointed out that Thomas had never interviewed or even met L.O. and that she was not going to testify about L.O. at all,” but rather about behaviors common to abused children across the country.²¹² Despite W.R.C.’s objection, Thomas was deemed “an expert in child development and child and adolescent sexual abuse.”²¹³ During her testimony, Thomas explained:

... that in her experience and based on research done in the subject area, child victims of sexual or physical abuse do not always disclose the abuse and that nondisclosure may be because the perpetrator is an adult or a family member, because the child does not have the vocabulary to describe the abuse, because the child fears the consequences of disclosure, or because the perpetrator has threatened the child . . . [;] “that both experientially and the research

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ As in *Sanderson*, the expert did not specifically testify to CSAAS evidence. Nevertheless, the court, for purposes of the appeal, presumed that the expert’s testimony related to CSAAS evidence. The court stated, “Thomas, however, did not testify regarding any syndrome or about any ‘typical’ characteristics of abused children; her testimony was limited to delayed disclosure by some child victims and the possible reasons for such delayed disclosure. All of her testimony was based on her own experience in working with abused children and on research that had been done in the field of abused children. In addition, as noted above, Thomas specifically testified on cross-examination that all children are different and that every child victim reacts differently to abuse. Thus, we seriously question whether Thomas’s testimony can be considered testimony regarding CSAAS. That being said, delayed disclosure is considered one element of CSAAS, and, as such, Thomas’s testimony in this regard is not necessarily outside the realm of CSAAS testimony. For the purposes of this opinion, then, we presume that Thomas’s testimony falls within the category of CSAAS testimony, and we address it as such.” *Id.* at 938.

²¹⁰ *Id.* at 936.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at 937.

indicates that male victims are less likely to disclose than female victims” . . . and that there is a “significant difference” between males and females with respect to delayed disclosure . . . [;] that when the perpetrator is a family member, both her experience and research in the area indicate that child victims are more likely not to disclose or to delay disclosure . . . [;] that statistics indicate child sexual-abuse victims “more often than not” delay disclosing the abuse . . . [;] that such delayed disclosure may be the result of a lack of understanding of how to make the disclosure, which is why sometimes children will disclose in the fifth or sixth grade, when the state begins sex education for students . . . [;] that delayed disclosure could be the result of fear by the child victim of the consequences of disclosing the abuse . . . [; that] when disclosure is made, it is typically made to someone the child victim trusts . . . [; and] that it is not unusual for a child victim not to be able to provide a specific date that the abuse occurred unless the abuse occurred on a typically memorable day, such as Christmas or a birthday.²¹⁴

On cross-examination, defense counsel was able to challenge Thomas, leading her to admit “that every child is different and that not all children react the same way to abuse—some child victims show no signs of dysfunction at all, while others show dramatic signs of dysfunction.”²¹⁵ The other witnesses on cross-examination also admitted that “L.O. exhibited no signs of dysfunction, had good grades in school, and was active in extracurricular activities at school.”²¹⁶

On appeal, W.R.C. argued that at his trial Thomas’s CSAAS testimony was improperly admitted in violation of Alabama Rule 702,²¹⁷ because, since “there is no consensus in the scientific community as to the ‘typical’ characteristics or behaviors of sexually abused children, testimony about CSAAS cannot satisfy the reliability requirement for admission” of scientific evidence pursuant to Rule 702 and the *Daubert* standard.²¹⁸ The court clarified, however, that under Alabama common law, nonscientific expert evidence is not subject to the *Daubert* standard.²¹⁹ Instead, nonscientific expert evidence may be admitted under Rule 702 if the witness is “qualified as an expert in the field” and the testimony “assist[s] the trier of fact.”²²⁰ Here the court found that Rule 702 (as well as Rule

²¹⁴ *Id.*

²¹⁵ *Id.* at 937.

²¹⁶ *Id.*

²¹⁷ “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” ALA. R. EVID. 702.

²¹⁸ *W.R.C.*, 69 So. 3d at 938.

²¹⁹ *Id.* at 938-39 (internal citation omitted).

²²⁰ *Id.* at 939 (internal citation omitted).

403)²²¹ was satisfied since Thomas was declared as an expert by the trial court in “child development and child and adolescent sexual abuse,” and because her testimony about “delayed disclosure” aided the jury in understanding why L.O. waited almost a decade to disclose his abuse.²²²

Most importantly, the court pointed out that the evidence was proper because Thomas did not testify specifically about L.O., but instead about abused children generally.²²³ Thomas did not “testify that L.O.’s behavior was consistent with children who had been sexually abused or that she believed L.O.’s accusations.”²²⁴ Furthermore, Thomas never said whether L.O. had suffered abuse.²²⁵

In Alabama, as a result of *W.R.C.*, attorneys will most likely have CSAAS evidence admitted against their clients. They will, however, be able to limit the testimony to general testimony about children who have been sexually abused, not about the victim.

IV. OBJECTIONS TO CSAAS EVIDENCE

Custody proceedings generally take place in a state’s Family Court, in front of a single judge who will determine the fate of the family.²²⁶ In these proceedings, the rules of evidence are often relaxed in order to allow the judge to obtain as much information about the child and the parties as possible.²²⁷ The relaxed evidentiary rules, combined with the admission of CSAAS evidence, will present challenges to attorneys defending a parent accused of sexual abuse. Although in the majority of states CSAAS testimony is admissible to rehabilitate the child,

²²¹ “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” ALA. R. EVID. 403.

²²² *W.R.C.*, 69 So. 3d at 939.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ GOLDZBAND, *supra* note 7, at 168 (“The tragedy rests on the fact that judges are still called on to determine the disposition of fought-over children, even in these supposedly enlightened days in which child advocacy is emerging as the dominant trend in resolving custody battles.”).

²²⁷ See Mark Hardin, *Child Protection Cases in A Unified Family Court*, 32 FAM. L.Q. 147, 179 (1998); see generally Hon. Bruce A. Newman, *Evidentiary Rules and Standards of Proof in Child Neglect and Abuse Cases*, 75 MICH. B.J. 1165, 1165-66 (1996) (explaining some of the unique rules in juvenile court including the admittance of testimony of “prior bad acts” to show propensity and hearsay evidence); e.g., WASH. REV. CODE ANN. § 9A.44.120 (West 2013).

attorneys representing the accused parent should object to the admittance of CSAAS testimony and outline the many shortcomings of CSAAS to the judge.²²⁸

Under Rule 26 of the Federal Rules of Evidence, and its state counterparts, parties seeking to admit expert testimony of a witness during trial must put the court and the opposing parties on notice.²²⁹ Consequently, attorneys representing the accused parent will know in advance if opposing counsel intends to admit expert testimony on CSAAS during the trial. Once put on notice, the accused parent's attorney should, prior to trial, move to exclude any expert testimony on CSAAS under a *Daubert* motion.²³⁰

Based on the shortcomings of CSAAS evidence discussed *supra*, below I have delineated various arguments attorneys representing clients accused of sexually abusing their child should make in support of their motion to exclude expert testimony on CSAAS. Each argument outlined below should, of course, be briefed in their motion papers, as well. Attorneys should not consider this to be a comprehensive list and should make as many objections as possible.

A. *CSAAS is Not a Diagnostic Tool*

The most troublesome defect of CSAAS is that it is not a tool to discover whether a child has been sexually abused.²³¹ In fact, “[n]owhere in Summit’s 1983 article does he ever claim that it should be used for this purpose.”²³² Instead, Summit has continuously stated that “such utilization is inappropriate and

²²⁸ See generally GARDNER, *supra* note 1, at 297.

²²⁹ Robert C. Morgan & Ashe P. Puri, *Expert Witnesses and Daubert Motions*, 5 SEDONA CONF. J. 15, 20 (2004) (citing FED. R. CIV. P. 26). The relevant part of Rule 26 of the Federal Rules of Evidence reads, “In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.” FED. R. CIV. P. 26(a)(2)(A).

²³⁰ Morgan & Puri, *supra* note 229, at 20. The majority of states have adopted *Daubert*, and consequently a *Daubert* motion should be made. As of 2013, only a handful of states have not adopted *Daubert*. In those states, a *Frye* motion should be made. See generally Kat S. Hatzivramidis, *Florida State Courts Adopt Daubert Standard, Changing the Way Expert Testimony Operates*, FORENSISGROUP (July 7, 2014), <http://www.forensisgroup.com/our-blog/florida-state-courts-adopt-daubert-standard-changing-the-way-expert-testimony-operates>.

²³¹ Myers, *supra* note 18, at 309 (quoting Mary B. Meinig, *Profile of Roland Summit*, 1 VIOLENCE UPDATE 6, 6 (1991)); see *Hall v. State*, 611 So. 2d 915, 919 (Miss. 1992) (“[CSAAS] was not meant to be used as a diagnostic device to show that abuse had, in fact, occurred.”).

²³² GARDNER, *supra* note 1, at 298; see generally Summit, *supra* note 2, at 177.

goes beyond the intentions of his description”²³³ and sought to clarify CSAAS’s purpose in his 1992 clarification article.²³⁴ Thus, if an opponent seeks to introduce CSAAS evidence as substantive evidence of abuse, the accused’s attorney must object to this inappropriate use of Summit’s work.²³⁵ The attorney’s objection to this misappropriation should be as follows: “*Your honor, CSAAS evidence should not be admitted in this trial. Mrs. Smith’s attorney is seeking to admit CSAAS evidence as proof that Jane was sexually abused. This, however, is an incorrect use of CSAAS evidence. The scientific community does not consider CSAAS as a tool to determine whether a child has been sexually abused or not. All CSAAS does is explain how children who have been abused respond to their abuse. CSAAS, does not, however, tell us whether a child, like Jane, has been abused. In fact, following Dr. Summit’s 1983 article identifying CSAAS, prosecutors and defense attorneys used CSAAS evidence in exactly this way, and Dr. Summit wrote a follow-up article criticizing this improper use of his article. Furthermore, as the New Jersey Supreme Court in State v. J.Q. explained, the majority of courts across the nation do not admit CSAAS evidence ‘as substantive evidence of abuse.’*”²³⁶

B. CSAAS is Obsolete

The second weakness of CSAAS testimony is that it is inapplicable to our modern world.²³⁷ CSAAS is relatively outdated, having been established in 1983.²³⁸ Relying on the stories of sexual abuse victims of the early 1980s, CSAAS explains that children may delay disclosure of their abuse or recant their stories because of fear of not being believed by adults, specifically their mothers and the police.²³⁹ Today, however, sexual abuse allegations are progressively more common.²⁴⁰ In fact, unlike in 1983, modern “mothers are much more likely to believe the child[,] and the police and child protective services . . . are likely to [err on the side of caution and] accept as valid even the most frivolous and absurd

²³³ GARDNER, *supra* note 1, at 298.

²³⁴ Summit *supra* note 90; Weiss & Alexander, *supra* note 21, at 414.

²³⁵ Hall, 611 So. 2d at 919; *see* Myers, *supra* note 18, at 318.

²³⁶ State v. J.Q., 617 A.2d 1196, 1201 (N.J. 1993) (quoting Myers et al., *supra* note 142, at 68 (internal citations omitted)).

²³⁷ *See generally* GARDNER, *supra* note 1 at 297-98.

²³⁸ *Id.* at 298.

²³⁹ Summit, *supra* note 2, at 187-89.

²⁴⁰ Paquette, *supra* note 7 (internal citation omitted).

accusations.”²⁴¹ With this change in society, it is no longer appropriate to use CSAAS evidence to explain delays in exposure or recantations. Consequently, when the accusing parent’s attorney seeks to introduce CSAAS evidence to rehabilitate the child, the accused parent’s attorney must object to the obsolete nature of CSAAS evidence. The attorney may object by arguing: “*Your honor, CSAAS is incredibly obsolete and inapplicable to our case. CSAAS was developed in 1983, a time when sexual abuse allegations were less common and children who accused their parents of sexually abusing them were not believed, especially by their mothers. It was under these circumstances that Dr. Summit created CSAAS. Dr. Summit explained that children often delay disclosure of their abuse or recant for fear that they would not be believed. This is no longer the case. Children are taught now from an early age that if an adult touches them inappropriately they should tell an adult immediately. Children are no longer under the pressure Dr. Summit described. In fact, Dr. Summit specifically said many girls recant their stories because mothers do not believe them, but here, not only does Mrs. Smith believe the accusation, she was the one who brought the accusation to the court’s attention. As a result, evidence that Jane recanted is not evidence that she was abused and felt pressure from her mother to recant, but rather it is evidence that she is less credible because she has changed her story.*”

C. CSAAS Creates a “No-win Situation” for the Accused

The third problem with CSAAS evidence is that it creates a “no-win situation” for the accused.²⁴² According to CSAAS, a common characteristic of children who have been sexually abused is that they often recant their allegations and deny abuse ever occurred.²⁴³ This characteristic of CSAAS creates a “lose-lose battle” for the accused.²⁴⁴ “If the child *admits* sexual abuse, then the allegation is considered confirmed. If the child *denies* sexual abuse, then the allegation is *still* considered confirmed by concluding that the denial is

²⁴¹ GARDNER, *supra* note 1, at 297; see Mark Steller & Tascha Boychuk, *Children as Witnesses in Sexual Abuse Cases: Investigative Interview and Assessment Techniques*, in CHILDREN AS WITNESSES 47, 47 (Helen Dent & Rhona Flin eds. 1992) (“[C]hild sexual abuse allegations . . . historically were dismissed as untrue.”).

²⁴² GARDNER, *supra* note 1, at 298.

²⁴³ Summit, *supra* note 2, at 188.

²⁴⁴ GARDNER, *supra* note 1, at 298.

merely a manifestation of the child being in the secrecy phase of the CSAAS.”²⁴⁵ For an attorney defending the accused, this is really the main reason to fight the admission of CSAAS evidence against their client. The attorney should make vehement objections such as: “*Your honor, if this evidence comes in against Mr. Smith, we will not need to have the rest of the trial because your mind will already be made up. If evidence is presented that Jane said on multiple occasions that her father abused her, then Jane will be presented as an abuse victim. But if evidence is presented that Jane told her mother that her father abused her, but then told the social worker her father did not abuse her, then under CSAAS Jane is again presented as an abuse victim. Either way, Jane is automatically presented as an abuse victim. Mr. Smith should be able to expose the inconsistencies in Jane’s disclosure to her mother and the interviews with the social worker, but CSAAS will take away any benefit from that cross-examination.*”

D. CSAAS Rejects Other Causes of Helplessness and Accommodation Emotions

The fourth weakness with CSAAS lies with the “helplessness” and “accommodation” elements. According to CSAAS, child victims often have feelings of helplessness and rage. Summit explains that many of these children express these emotions through “self-hate, self-mutilation, suicidal behavior, promiscuous sexual activity and repeated runaways . . .”²⁴⁶ CSAAS does not, however, consider other explanations for the child’s rage or sense of helplessness.²⁴⁷ In fact, there are many reasons a child may be angry; reasons “that have absolutely nothing to do with sex abuse,”²⁴⁸ but everything to do with something else, such as their parents’ custody dispute.²⁴⁹ A defense attorney must point out the inadequacy of these elements to the court. An attorney may argue, “*Your honor, CSAAS explains that if a child feels helpless or full of rage and acts out, she is more than likely expressing her rage after years of abuse. CSAAS, however, does*

²⁴⁵ *Id.* (emphasis in original).

²⁴⁶ Summit, *supra* note 2, at 185.

²⁴⁷ GARDNER, *supra* note 1, at 298-99.

²⁴⁸ *Id.* at 299.

²⁴⁹ Paquette, *supra* note 7, at 1424 (internal citation omitted) (“Emotions displayed by a child involved in a bitter custody dispute are similar to those emotions displayed by a sexually abused child.”).

not consider any other reason the child may be helpless or angry. Perhaps she is feeling these emotions over this current custody dispute? For example, Jane may feel helpless because she is being treated “like a rope in a tug-of-war” between her two parents. Maybe she has been throwing temper tantrums to get her parents’ attention, not because she has been abused by Mr. Smith. Maybe she threw her book at her teacher last week because she is angry her parents are getting a divorce, not because she has been abused. Who knows? But what we do know is that there are many reasons Jane may be acting out, not just because she may have been abused.”

E. CSAAS is Extremely Prejudicial

Finally, the fifth weakness of CSAAS testimony is that it has little probative value and is highly prejudicial to the accused.²⁵⁰ Under Rule 403 of the Federal Rules of Evidence, and its state counterparts, evidence may be inadmissible “if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”²⁵¹ CSAAS “is not probative of abuse;”²⁵² it does not make the fact that the child was abused “more probable or less probable than it would have been without the evidence.”²⁵³ Consequently, CSAAS testimony does not assist the fact-finder, and thus, is barely probative.²⁵⁴ CSAAS testimony is, furthermore, highly prejudicial to the accused because of its misleading qualities.²⁵⁵ For example, the symptoms of CSAAS are present in other syndromes²⁵⁶ and may appear in children who have not been abused.²⁵⁷ Additionally, children who have been abused sometimes do not show any of these characteristics.²⁵⁸ Furthermore the “overwhelmingly

²⁵⁰ Gitlin, *supra* note 91, at 506.

²⁵¹ FED. R. EVID. 403.

²⁵² State v. J.Q., 617 A.2d 1196, 1209 (N.J. 1993) (citing Myers et al., *supra* note 30, at 67).

²⁵³ Newkirk v. Commonwealth, 937 S.W.2d 690, 693 (Ky. 1996) (citing KY R. EVID. 401).

²⁵⁴ *Id.*

²⁵⁵ Gitlin, *supra* note 91, at 506.

²⁵⁶ J.Q., 617 A.2d at 1203.

²⁵⁷ Gitlin, *supra* note 91, at 506 (citing People v. Patino, 32 Cal. Rptr. 2d 345, 349 (Cal. Ct. App. 1994)) (“The concern of unfair prejudice to the defendant is particularly acute in child sexual abuse cases, because CSAAS evidence ‘can be highly prejudicial if not properly handled by the trial court . . . [since] the particular aspects of CSAAS are as consistent with false testimony as with true testimony.’”).

²⁵⁸ O’Donohue, *supra* note 8, at 298.

persuasive nature of such testimony effectively dominat[es] the decision-making process” taking the power away from the fact-finder.²⁵⁹ Therefore, “admitting CSAAS evidence during trial has resulted in nothing short of ‘widespread misunderstanding.’”²⁶⁰ As a result, attorneys for the accused must object to CSAAS testimony on relevance grounds. They may consider saying: “*Your honor, CSAAS is not relevant under a 403 balancing test. First, CSAAS has little probative value as it does not detect abuse. In fact, the Supreme Court of Kentucky has described it as ‘generic and unreliable.’²⁶¹ It only describes common characteristics of abuse victims. For example, if Mrs. Smith proves that Jane has the characteristics of CSAAS, she has not proven anything, most especially not that Jane has been abused. Furthermore, these characteristics appear in children who have not been abused and are characteristics of many other syndromes. Thus, CSAAS evidence is just meant to mislead you and further prejudice Mr. Smith.*”

V. CROSS EXAMINING EXPERT WITNESSES

Regardless of the above objections, in the majority states CSAAS evidence will most likely be admissible at the trial to explain why the child may have delayed in disclosing her abuse or why she may have recanted her story.²⁶² This is particularly the case in family court where the rules of evidence are relaxed.²⁶³ In criminal cases involving accusations of child sexual abuse, such as those surveyed *supra*, the judges will take their gate-keeper role seriously before admitting CSAAS testimony since the stakes are so high—mandatory sentences and sexual offender registration;²⁶⁴ in family court, however, judges are more likely to admit expert evidence on

²⁵⁹ Sanderson v. Commonwealth, 291 S.W.3d 610, 613 (Ky. 2009) (internal citation and quotations omitted).

²⁶⁰ Gitlin, *supra* note 91, at 506 (citing Myers et al., *supra* note 30, at 68).

²⁶¹ Sanderson, 291 S.W.3d at 614.

²⁶² People v. Spicola, 947 N.E.2d 620, 635 (N.Y. 2011); State v. J.Q., 617 A.2d 1196, 1209 (N.J. 1993).

²⁶³ See Hardin, *supra* note 227, at 179; see generally Newman, *supra* note 227 (generally explaining some of the unique rules in juvenile court including the admittance of testimony of “prior bad acts” to show propensity and hearsay evidence); e.g., Wash. Rev. Code Ann. § 9A.44.120 (West 2013).

²⁶⁴ See STATE STATUTES RELATED TO JESSICA’S LAW, NATIONAL CONFERENCE FOR STATE LEGISLATURES, available at http://www.leg.state.vt.us/WorkGroups/sexoffenders/NCSLs_Jessicas_Law_Summary.pdf (last visited Jan. 30, 2015); e.g., CONSEQUENCES FOR SEX OFFENSES AGAINST A CHILD IN VERMONT, available at http://www.leg.state.vt.us/WorkGroups/sexoffenders/Sex_offense_penalty_chart.pdf (last visited Jan. 30, 2015).

CSAAS in order to gain as much evidence as possible to make their custody and visitation determinations.²⁶⁵ That is not to say that the stakes are not high in family court; a parent accused of sexually abusing his or her child could lose custody of the child, could be required to have only supervised visitation with the child, or could lose visitation all together.²⁶⁶ Because this evidence is likely to come in, with a limitation as to its purpose, attorneys for the accused need to expect to lose their motion to exclude the expert testimony. As a result, they should be prepared to highlight the weaknesses of CSAAS testimony in their examination of the expert witness and be prepared to expand on these weaknesses in their opening and closing arguments.

A. “Battle of the Experts”

Once the motion to exclude the expert testimony on CSAAS is denied, the attorney of the accused parent must then seek to present an expert as well, creating a “battle of the experts.” Although the testimony, if admissible, will most likely only be used to rehabilitate the child, its inclusion is inherently accusatory. When the witness testifies to the common characteristics of an abused child, he or she is, in a way, saying that the child was probably abused if she has that characteristic.²⁶⁷ For example, an expert witness may say, “*It is very common for a child who has been sexually abused to recant her allegations.*”²⁶⁸ Because Jane has recanted, the judge may infer that she has been abused, despite the fact that the expert did not specifically say so.

In order to combat this type of testimony, the accused will also need an expert.²⁶⁹ A good expert is one who believes in the accused parent’s case, has had substantial training, is a member of “professional societies,” has experience lecturing,

²⁶⁵ See generally *United States v. Frabizio*, 445 F. Supp. 2d 152, n.7 (D. Mass. 2006) (“Although the rules of evidence apply equally in civil and criminal cases, the Court must be especially vigilant in applying evidentiary rules in the criminal context, given the stakes for the defendant and the fact that, ultimately, the government bears the burden of proof beyond a reasonable doubt.”); see also *Barefoot v. Estelle*, 463 U.S. 880, 916 (1983) (Blackmun, J., dissenting) (“[W]hen a person’s life is at stake . . . a requirement of greater reliability should prevail.”).

²⁶⁶ See generally *Paquette*, *supra* note 7, at 1420.

²⁶⁷ *Newkirk v. Commonwealth*, 937 S.W.2d 690, 693 (Ky. 1996).

²⁶⁸ *Summit*, *supra* note 3, at 190.

²⁶⁹ *GOLDZBAND*, *supra* note 7, at 42 (“[T]he lawyer would probably want to use psychiatric evidence to support his position, and also to combat possible psychiatric evidence introduced by the opposition.”).

perhaps as a professor at a university, and is board certified.²⁷⁰ The lawyer can search for these qualities by interviewing potential experts and reading each candidate's *curriculum vitae*.²⁷¹ Additionally the expert must have certain experience in the field of child sexual abuse in order to be qualified to testify:

The expert must possess specialized knowledge of child development, individual and family dynamics, patterns of child sexual abuse, the disclosure process, signs and symptoms of abuse, and the use and limits of psychological tests. The expert is familiar with the literature on child abuse, and understands the significance of developmentally inappropriate sexual knowledge. The expert is able to interpret medical reports and laboratory tests. The expert also is trained in the art of interviewing children, and is aware of the literature on coached and fabricated allegations of abuse. Of tremendous importance is the expert's clinical experience with sexually abused children.²⁷²

In order to combat CSAAS testimony, the accused's expert will need to point out the weaknesses in the study. For example, if the accusing parent's witness testifies to the common characteristics of CSAAS, the accused parent's expert witness must counter with other scientific evidence. For example, it is important to point out that other studies show that "there are no markers of abuse[; c]hildren who are sexually abused experience a wide range of symptoms . . . [and] there is no unique pattern of symptoms exhibited by the sexually abused child."²⁷³ As a result, it will be important for the accused's expert witness's responses on direct examination to explain this by saying, "*There is no clear indicator of child sexual abuse, and there is no set of characteristics exhibited by all abused children. Some abused children show none of the symptoms, and some children who have not been abused show them all.*"²⁷⁴ Additionally, it will be important to really drive home that CSAAS does not necessarily mean the child was abused. Consequently, the attorney for the accused should be sure to question the expert in such a way that he or she explains to the judge by testifying, "*The theory that a child has been abused because she has or does not have a characteristic of CSAAS is an improper use of CSAAS because CSAAS was never*

²⁷⁰ GOLDZBAND, *supra* note 7, at 55-59.

²⁷¹ *Id.*

²⁷² State v. J.Q., 617 A.2d 1196, 1202 (N.J. 1993) (quoting E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES 284-85 (2d ed. 1992)).

²⁷³ O'Donohue, *supra* note 8, at 298 (internal citations omitted); see State v. Rimmasch, 775 P.2d 388, 401 (Utah 1989) (internal citations omitted).

²⁷⁴ O'Donohue, *supra* note 8, at 298 (internal citations omitted).

meant to detect child abuse. Also, there are many other reasons that a child may be experiencing these characteristics, most of which probably stem from this custody dispute.”

B. Cross-Examination of the Accusing Parent’s Expert Witness

Although the two experts should, in a way, cancel out each other, the attorney for the accused parent must still cross-examine the accusing parent’s expert witness by focusing on the weaknesses of CSAAS. The attorney must also remember to focus on the fact that CSAAS is a non-diagnostic tool that is not probative of abuse.²⁷⁵

The first step the defense attorney should take is to point out that this expert has no knowledge of whether the child was sexually abused by the accused parent since CSAAS is a nondiagnostic tool. Experts on CSAAS will be permitted to testify on common characteristics of sexually abused children, but not on individual victims.²⁷⁶ On this cross-examination, the accused’s attorney must remind the trier of fact that this witness is not testifying about the child, but only general information. A defense attorney could ask the following questions: *“You testified on direct examination that you never interviewed Jane, correct? Rather, all you testified to is common characteristics of abused children, correct? And since CSAAS is not a diagnostic tool, you cannot definitively say whether or not Jane was sexually abused by Mr. Smith, correct? In fact, it would be an improper use of Dr. Summit’s research to state definitively whether a child was abused, isn’t that correct?”*

The next step the attorney for the accused parent should take is to point out how CSAAS is obsolete. Since sexual abuse allegations are no longer immediately dismissed, the pressures Summit describes that cause children to recant are no longer relevant.²⁷⁷ As a result, it is important to point out that Jane recanted not because she felt pressure from society or from her mother. The attorney for the accused should consider asking the following questions of the expert: *“You testified on direct examination that after a child discloses his or her abuse, the child may recant because their biggest fears have come to life, correct? They feel that they have ruined their*

²⁷⁵ State v. Davis, 581 N.E.2d 604, 609 (Ohio 1989).

²⁷⁶ See W.R.C. v. State, 69 So. 3d 933, 939 (Ala. Crim. App. 2010).

²⁷⁷ GARDNER, *supra* note 1, at 297.

families, correct? You testified that their mothers guilt them into recanting in order to save the family, correct? When Dr. Summit wrote his article, mothers and fathers were blaming their victim children for the hardships facing their families, correct? But this is no longer the case anymore, is it? Today, children are taught to immediately tell a teacher, parent, or coach if an adult touches them in any way. Isn't that correct? Aren't children programmed now to understand that if they report abuse that their parents will stand by to support them, to protect them? Aren't children told to report abuse to the police, no matter who the abuser is? Isn't it true the environment that Dr. Summit wrote his article in has disappeared?"

Next, the attorney for the accused parent must clarify that the child's initial accusation was not "delayed" (Jane accused her father of abusing her for four weeks, but did not disclose until after the fourth week) to accommodate the abuse but rather was a false allegation. Summit believed that children delay their disclosure and do not seek help because they love their abusive parent and do not want to get their parent in trouble.²⁷⁸ It is the job of the accused parent's attorney to point out that this is not necessarily true; that if abuse had truly happened, the child would have disclosed sooner. The attorney should lead the expert into saying there are other reasons the child may have accused her parent of sexual abuse after the fact because the allegation is fabricated. This is incredibly important because it is very possible that Jane is lying because Mrs. Smith has suggested or told her to lie, with hopes of keeping Mr. Smith from his daughter.²⁷⁹ It is also possible that Jane wants to live with her mother, either on her own accord or because of her mother's suggestions, and as a result, is making up a story about her father.²⁸⁰ Without intending to, parents can easily make suggestions to their children causing the children to make up false stories and accusations.²⁸¹

To do this, the attorney should ask: "*You testified on direct examination that children may wait long periods of time*

²⁷⁸ Summit, *supra* note 2, at 186.

²⁷⁹ O'Donohue, *supra* note 8; see Alexander, *supra* note 10.

²⁸⁰ Paquette, *supra* note 7, at 1421 (citing Blush & Ross, *Sexual Abuse Allegations in Divorce: The SAID Syndrome*, in *SEXUAL ABUSE ALLEGATIONS IN DIVORCE CASES* 67, 82 (1988)) (footnote citation and quotation omitted).

²⁸¹ O'Donohue, *supra* note 8, at 302 (citing Poole, D.A., & Lindsay, D.S., *Interviewing Preschoolers: Effects of Nonsuggestive Techniques, Parental Coaching, and Leading Questions on Reports of Nonexperienced Events*, 60 *EXPERIMENTAL PSYCHOL.* 1, 129-54 (1995)).

to disclose their abuse because they fear their allegations will be dismissed outright as lies, correct? And that these children would rather accommodate the abuse than face adults or the police who may not believe their allegations, correct? But as we just discussed, children today are taught to come to an adult immediately if another adult touches them, correct? Under that reasoning, we would expect Jane to tell someone that her father had abused her, wouldn't we? But Jane did not tell anyone her father had abused her, did she? She didn't tell her mother? She didn't tell her teacher? Her dance instructor? Her soccer coach? She didn't tell anyone she was being abused, did she? So isn't it possible that she did not delay disclosing her abuse because it just never happened? Couldn't it instead be possible that she made the allegations when she did because of other reasons? Isn't it possible that Mrs. Smith told Jane to make up this story? Isn't it possible that Mrs. Smith suggested to Jane that her father had harmed her? Isn't it possible that Jane just wants to be sure that she does not live with her father? And since CSAAS is not a diagnostic tool, you cannot be certain that there was a delayed disclosure rather than a fabricated allegation, can you?"

Finally the last step the accused parent's attorney should take is to point out the issues with the "helplessness" and the "accommodation" elements. According to CSAAS, child victims often have feelings of helplessness and rage.²⁸² Because CSAAS does not consider other explanations for the child's rage or sense of helplessness,²⁸³ the attorney for the accused parent must point out the other potential causes of the emotions, namely the custody dispute.²⁸⁴ The attorney may consider asking the expert the following questions: *"You testified on direct examination that a child may experience feelings of helplessness and rage, correct? You said a child may harm herself, correct? She may cry, correct? She may lash out at school, correct? But there could be other reasons that a child lashes out at school correct? In fact, isn't it possible that a child whose parents are getting divorced may begin to act out in school? The child may be upset that one parent has left the marital house, correct? The child may be upset that she does not*

²⁸² Summit, *supra* note 3, at 186.

²⁸³ GARDNER, *supra* note 1, at 298-99.

²⁸⁴ Paquette, *supra* note 8, at 1424 (citing Daniel C. Schman, *False Allegations of Physical and Sexual Abuse*, 14 BULL. AM. ACAD. PSYCHIATRY & L. 5, 16 (1986)) ("Emotions displayed by a child involved in a bitter custody dispute are similar to those emotions displayed by a sexually abused child.").

see the nonresidential parent that often, correct? The child may feel she is to blame for the breakup, correct? She may feel that she is a pawn in the parties' custody case, correct? She may feel that the visitation schedule is overwhelming, correct? In fact there are many reasons the child may act out in school, correct? And since CSAAS is not a diagnostic tool, you can't be sure that a child acting out in school has been sexually abused, can you?" Thus, with each set of questions, the elements of CSAAS are combatted. When the accused parent's attorney uses these questions to point out the inconsistencies between what CSAAS stands for and the facts of reality, the judge will not automatically assume the child has been abused and will instead rely on the facts of the trial.

CONCLUSION

CSAAS evidence may present huge obstacles for an attorney representing a client accused of sexually abusing his child during a custody dispute. The most challenging element is that CSAAS creates a "lose-lose" situation for the accused father.²⁸⁵ It may seem that if CSAAS testimony is admitted into evidence, the accused father will automatically be found to have abused his daughter and he will lose all visitation rights.

The attorney, however, can rely on the weaknesses of CSAAS in order to still advocate for his client. First, the attorney should move to exclude any expert testimony on CSAAS. When arguing on the motion to exclude, attorneys for the accused parent should use CSAAS shortcomings to object to the admittance of expert testimony. If the judge admits expert testimony nonetheless, the attorney should cross-examine the expert witness pointing out all the vulnerabilities of CSAAS testimony. With these two steps, the attorney for the accused parent can not only vindicate his client, but also ensure that his client still has the opportunity to raise his daughter and watch her grow.

Rebecca Naeder[†]

²⁸⁵ GARDNER, *supra* note 1, at 298.

[†] J.D. Candidate, Brooklyn Law School, 2015. Thank you to the wonderful faculty of Brooklyn Law School for their advice and support, especially Anita Bernstein, Bennett Capers, Marsha Garrison and Cynthia Godsoe. I would also like to thank Robert Z. Dobrish and the team at Dobrish, Michaels, Gross, LLP, who inspired me to examine Child Sexual Abuse Accommodation Syndrome. Most importantly, I want to thank my parents, grandparents, and brother for always believing in me.