

Los Angeles Superior Court Case No. BD 450081 Court of Appeal
Case No. B234877

SECOND APPELLATE DISTRICT DIVISION THREE

*Dr. Katz's Testimony Regarding Parental Alienation Was Not
Subject to the Kelly/Frye Test*

Amici Curiae and mother argue that the trial court improperly admitted evidence regarding “parental alienation syndrome” (PAS) and “parental alienation” and that such evidence is inadmissible under the evidentiary standards set forth in *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, 1014 and *People v. Kelly* (1976) 17 Cal.3d 24, also known as the “Kelly/Frye test.” Specifically, amici curiae and mother contend that the trial

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court’s decision was “decidedly influenced” by Dr. Katz’s testimony regarding PAS and “parental alienation” and that such evidence was inadmissible.¹²

The *Kelly/Frye* test applies to the admissibility of expert testimony based on “a

new scientific technique.”¹³ (*People v. Kelly, supra*, 17 Cal.3d at p. 30.) In determining whether expert testimony is based on such a technique, the court must consider the test’s “narrow ‘common sense’ purpose, i.e., to protect the jury from techniques which, though ‘new,’ novel, or ‘experimental,’ convey a ‘misleading aura of certainty.’” (*People v. Stoll* (1989) 49 Cal.3d 1136, 1155-1156 (Stoll).)

Absent some “some special feature which effectively blindsides the jury,” a psychologist’s expert opinion testimony is not subject to the *Kelly/Frye* test. (Stoll, *supra*, 49 Cal.3d at p. 1157.) This is because “ ‘[w]hen a witness gives his personal opinion on the stand—even if he qualifies as an expert—the jurors may temper their acceptance of his testimony with a healthy skepticism born of their knowledge that all human beings are fallible. . . .’ ” (Ibid.)

In *Stoll*, for example, a defendant accused of child molestation proffered expert opinion testimony by a psychologist who conducted tests on the defendant and concluded that she did not possess any pathology in the nature of sexual deviation. (Stoll, *supra*,^[1]_[SEP] 49 Cal.3d at p. 1146.) The trial court excluded the expert opinion on the grounds that it did not pass the *Kelly/Frye* test. (Id. at p. 1147.) The California Supreme Court, however, held that “[t]he psychological testimony proffered here raises none of the concerns addressed by *Kelly/Frye*. The methods employed are *not* new to psychology or the law, and they carry no misleading aura of scientific infallibility.” (Id. at p. 1157.)

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Because mother did not make this objection to the evidence in the trial court, she forfeited it on appeal. (Evid. Code, § 353, subd. (a).) We nonetheless address the merits of the argument.

The test involves a two-step process: “(1) the reliability of the method must be established, usually by expert testimony, and (2) the witness furnishing such testimony must be properly qualified as an expert to give an opinion on the subject.”

(*People v. Kelly*, *supra*, 17 Cal.3d at p. 30, italics omitted.)

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By contrast, courts have found that expert testimony regarding certain psychological “syndromes” must pass the *Kelly/Frye* test. For example, in *People v. Bledsoe* (1984) 36 Cal.3d 236, 251, the court held that under the *Kelly/Frye* test expert testimony regarding the “rape trauma syndrome” was not admissible to prove that the complaining witness was raped. Similarly, in *In re Sara M.* (1987) 194 Cal.App.3d 585, 592, the court held that under the *Kelly/Frye* test expert testimony regarding the “child molest syndrome” was not admissible to prove that a child was molested.

Here, when asked about the “parental alienation syndrome,” Dr. Katz stated that no such syndrome was in the American Psychological Society’s Diagnostic and Statistical Manual of Mental Disorders and that alienation is not a “psychiatric diagnosis.” He added, however, that in high-conflict divorce cases, children are sometimes alienated from one parent. Dr. Katz stated: “You can’t be diagnosed as having alienation, but it is clear, everyone involved in these kind of cases know[s] the children are estranged and sometimes alienated from their parents.” Accordingly, Dr. Katz did *not* offer an opinion based on PAS or any other syndrome or diagnosis. He instead simply discussed a dynamic that he frequently observed during his three decades of practice and offered his expert opinion regarding the matter.

Dr. Katz did not present expert testimony regarding a “new scientific technique” or employ a method or analysis that is new to psychology or law. Nothing in his testimony carried a misleading aura of scientific infallibility. Indeed, he readily

admitted that parental alienation was not a syndrome or diagnosis. We thus hold that Dr. Katz's expert opinion regarding parental alienation was not subject to the *Kelly/Frye* test, and that the trial court did not error in admitting such evidence.

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DISPOSITION

The petition is denied and the stay of the July 28, 2011, order is lifted. This court's August 31, 2011, order is vacated. This opinion shall become final as to this court immediately. Costs are awarded to real party in interest Steven Lesserson.