FAMILY COURT OF THE STATE OF NEW YORK
CITY OF NEW YORK: COUNTY OF QUEENS

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In the Matter of

A , C , D
D ., E and
JI

Docket Nos.: NA

Children Under Eighteen Years of Age
Alleged to be Neglected by

CORRECTED
DECISION AND ORDER
UPON FACT-FINDING

J
C

Respondents.

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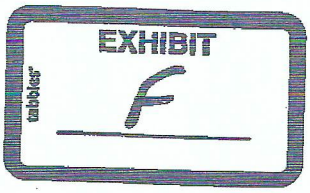

FRIEDMAN, R.;

By petitions filed on February 26, 2004, Commissioner of the New York City Administration for Children's Services [hereinafter ACS], alleges that the children D (born January 3, 1989), A (born March 25, 1991), E (born December 26, 1992), C and D (born August 31, 1996), and J (born January 22, 2004) are abused and/or neglected within the meaning of Family Court Act §1012.

The petitions allege that J then aged five weeks, was admitted to Schneider Children's Hospital on February 19, 2004, with three skull fractures: a left frontal vertex fracture; a left temporal fracture, both with soft tissue swelling; and an occipital fracture, extending toward the base of the skull, with no soft tissue swelling.

The petitions further allege that the parents' explanation of the child's injuries are "not medically consistent" with those injuries.

Regarding the remaining children, the petitions allege, that as a result of the injuries J sustained, they are derivately abused and/or neglected children.

On the date of filing, February 26, 2004, a hearing in accordance with Family Court Act §1027 was conducted before Family Court Judge Robert Clark. Counsel for the Commissioner and the law guardians appeared, as did assigned counsel for the mother. [The respondent father appeared with retained counsel on March 1, 2004, along with all other counsel before this Court]. On neither date did the Commissioner or the law guardian for the five older children ever make application for the remand of these children. That is, in accord with Family Court Act §1027, they did not contend that these children's interests require court orders of removal from home

into foster care to avoid imminent risk to the children's life or health. The remand order for J issued at the initial appearance on February 26, 2004, was continued by this Court and remains in effect. An order of protection was also issued against both parents concerning J. remand: they could visit under supervision and could not interfere with the care and custody of the foster parents, the child's aunt and uncle. There has never been a violation of the order of protection alleged against either parent. The older children have remained paroled to the respondent parents under ACS supervision during the lengthy pendency of these proceedings. Again, neither ACS nor their law guardian has ever raised any child protective issues or concerns about the parents' care of the five children at home with them.

In order to determine whether the six children have been abused or neglected as alleged in these petitions, a fact-finding hearing was conducted before this court. Five witnesses testified at the fact-finding hearing: Ms. Heather Mathison-Edwards, a child protective caseworker employed by ACS; Dr. Debra Esernio-Jenssen, a pediatrician called as an expert witness by the Commissioner; Dr. Steven Jack Schneider, a pediatric neurosurgeon called as an expert witness, also by the Commissioner; and the respondent parents, O and J . Seven exhibits were also admitted into evidence. These exhibits consisted of the two reports of suspected child abuse called in by Schneider Children's Hospital; medical records from Mary Immaculate and Schneider Hospitals; two c.v.'s of Drs. Esernio-Jenssen and Schneider; and a CAT scan film referred to by Dr. Schneider.

Ms. Mathison-Edwards has been a child protective caseworker for over fifteen years. She estimates that she has made thousands of home visits. Assigned to this case on February 23, 2004, she began by going to the house and speaking with the father; she found that she could

communicate with him in English, but that she needed to return with a Spanish-speaking interpreter to speak with the mother(who in any event was not at home during her first home visit, still remaining at the hospital with the baby) and some of the children. She also reviewed the reports of suspected child abuse which were called into the State Central Registry by Schneider Children's Hospital on February 21, and February 22, 2005. She also spoke by phone to Dr. Jenssen who had first seen the child J on Saturday, February 20, and again, on February 21, 2005. She asked Dr. Jenssen whether any of these injuries could have been caused during birth, and Dr. Jenssen said no, because the baby was delivered by C-section. It was unclear to this caseworker whether Dr. Jenssen had seen the baby's birth records or had known whether the C-section had been scheduled or was an emergency response to the baby's breech position. Dr. Jenssen told her that the two fractures on the side of the head could not have been caused by a fall to the carpeted floor.

Ms. Mathison-Edwards found that the father was forthcoming and cooperative. He repeated what his wife had told him when she called him at work; he confirmed that he had told her to take the baby to the hospital. He was saddened and perplexed by Ms. Mathison's reference to a third, older fracture. He offered no explanation for the fracture(s) they had been told about, other than the one he and the mother had consistently given--the baby's fall from her fifteen year-old sister's arms. The caseworker learned that Dr. Jenssen had interviewed the parents for four hours over that weekend. Ms. Mathison-Edwards went to the hospital that same evening. She saw the baby, who had no visible marks or bruises, and who was eating and sleeping well, in no apparent distress. Medical personnel told her that they could not date the purported third fracture (the occipital).

The next day she returned to the L. home with an interpreter. Neither parent was yet home; the father, on the way home from work; the mother, on the way home from the hospital. A maternal aunt was with the children. She again found the home extremely neat and clean. She interviewed each child individually. She had informed the parents of her intent to interview the children; they had not asked her to wait until they arrived.

She found that each child gave her his or own account of what happened in his or her own words from his or her own vantage point; she found each of them forthcoming and cooperative and she did not feel as though any of them had been coached or rehearsed. Each child was, she found, happy and well-adjusted and loving of the other family members. Each was saddened by what had happened to their baby sister. Each child stated that the parents never used corporal punishment; they were disciplined by being sent to their room or by losing TV privileges. None of the children had ever seen either parent do anything mean to the baby. The baby slept in a crib in the parents' bedroom. Their mother prevented all but D , the oldest, from holding the baby, although each child expressed a desire to do so. For instance, C , who was in the living room when the baby fell, said that he likes to hold the baby, but his mother tells him not to touch the baby, Ms. Mathison-Edward specifically asked the children about this, since she knew that younger children liked to hold and play with baby siblings.

D was very sad when she recounted what had happened. She demonstrated how she had been holding baby J at her mother's request, while her mother was running a bath for the baby. She demonstrated where she had been standing in the living room, near the couch, that the baby was in her arms which were crossed, forming a cradle for the baby, that she was holding her about 21/2 -3 feet above the carpeted floor (observed by the caseworker to be relatively thick,

new carpeting), and rocking from side to side when the baby fell out of her arms onto the carpeted floor. In response to the caseworker's question, she denied that the baby had hit the couch on the way down. Her eight year-old brother C was also sitting in the living room, watching TV at the time. The baby screamed when she fell; D was afraid to touch the baby. She waited until her mother ran in from the bathroom and picked up the baby.

Ms. Mathison-Edwards spoke with all of the children. They were all home from school at the time of the incident which occurred during a week school was in recess. A who was eleven years old knew that her baby sister had fallen. She had first been in the kitchen; then, in her bedroom; she did not see the fall. She heard the baby cry and came out to see her mother pick the baby up from the floor. C told the caseworker that he was sitting in the living room watching TV when the baby fell. He confirmed how D had been holding the baby. He showed her the couch he was sitting on which is next to the TV and pointed out the couch on the other side where D was standing with the baby. It is unclear as to whether this couch was in his direct view. In response to a question, as to how the baby looked when she fell, he said that she fell onto her left side and cried and that his mother came in and picked the baby up from the floor. D , C 's twin, was also interviewed; he said that he had been in the bedroom, playing with his toys, heard the baby scream, came out to see what happened, and saw his mother picking up the baby from the floor. E , nine years old, had been playing outside at about 11:00 a.m. when this incident occurred. The bathroom is located down a hall which is next to the kitchen, which is next to the living room. Everyone estimated that the mother got to the living room in a matter of seconds.

Ms. Mathison-Edwards interviewed the mother at her home on February 24, 2005. She

was preparing a bath to give the baby and had asked her oldest, her fifteen year-old daughter to hold the baby while she was doing this. She heard a scream while she was in the bathroom and she ran out. It was the baby whom she had heard screaming; D did not scream. Nor did C . When she arrived in the living room, she saw the baby on the floor and she picked up the baby. She looked at the baby; Mrs. felt nervous. She said that the baby was "screaming hard[;] she figured something had, you know, had happened, so she ran out. It wasn't a normal cry, it was a scream, so she ran right out from the bathroom." She paused to call her husband, and then took the baby to Mary Immaculate Hospital. She could not understand how the baby had incurred an old injury; she asked the caseworker whether that could have happened during birth. Aside from this speculation as to the origin of the "old" fracture, the mother also consistently gave the account of the baby's fall from her teenaged daughter's arms as her only explanation of an unusual occurrence prior to the baby's hospitalization.

ACS never requested that any of the other children, ranging in age from eight to fifteen years old be brought for medical examinations or observations.

Dr. Debra Esernio-Jenssen was called as a witness by the petitioner. Dr. Esernio-Jenssen, a pediatrician, is associated with the Division of General Pediatrics at Schneider Children's Hospital, and she is the director of the hospital's Child Protection Team. Dr. Esernio-Jenssen was qualified as an expert in pediatrics and in child abuse.

Dr. Esernio-Jenssen first examined Jennifer on February 22, 2004, three days after she was admitted to Schneider Children's Hospital of Long Island Jewish Hospital as a transfer from Mary Immaculate Hospital where she had been taken on February 18, 2004. Her team was called in to consult by the attending pediatric resident. The Mary Immaculate Hospital CAT scan

had revealed two skull fractures [the occipital at the back of the head and one on the left side; the Schneider's scan and MRI, three]. The earlier CAT scan had shown a contusion; the Schneider scan had not. J. · was in a regular medical unit, and not in intensive care. She found that the child "appeared to be extremely well cared for, very robust.[and] that there were absolutely no manifestations of abuse." The only physical finding was that the baby had some swelling on her scalp on her left side slightly above her ear, the area of the linear (non-depressed) parietal fracture. When the doctor palpated it, it did not seem to bother the child at all. Dr. Jenssen conceded that the amount of soft tissue swelling was small, and may not have been noticeable to a layman. The child did not have any retinal hemorrhages. Sometimes, with a severe impact, small numbers could be found on one area of the eye. This was never considered a case of shaken baby syndrome.

Since there were disparities between the Mary Immaculate CAT -scan and the Schneider CAT scan and MRI, Drs. Jenssen,. Schneider, and Johnson, a neuroradiologist, decided to order a three dimensional CAT scan which made it much easier to see the fracture lines. Dr. Jenssen did not in her testimony raise any follow-up discussion between her and Dr. Schneider about his conclusions as a pediatric neurologist about the results of this refined test. This revealed, according to Dr. Jenssen's testimony, three fractures, "but two of the fractures looked like they clearly were emanating from the same impact site." [near the area where the soft tissue swelling was on the child]. They appeared to line up as one fracture. The third fracture, according to Dr. Jenssen, went from the back of the head down towards the neck. That was the occipital fracture. There was no soft tissue swelling near the occipital site; there was a "very small" subdural hematoma near the soft tissue swelling site. Such an injury in a child this young, because of the

elastic nature of an infant's skull, would have to be caused by a contact injury—either a child falling from a sufficient height and/or onto an unforgiving surface or from something making contact with the child's head. The occipital fracture could not have occurred at the same time as did the other fracture(s). She believed it to be the older of the fractures, as there was no soft tissue swelling. Dr. Jenssen never received an explanation from the parents or from anyone else of the fracture in the back of the head.

Dr. Jenssen ruled out any possibility that the C-section could have resulted in trauma to the baby's head during delivery. She also ruled out the parents' and 15 year-old's description of the fall as the cause of the linear parietal fracture(s) on the left side of the baby's head. While this fall might have occurred, it was not, according to Dr. Jenssen , the cause of the baby's injuries. To buttress this conclusion, Dr. Jenssen cited three studies with a total sample of approximately 367 children who suffered observed falls in hospitals onto harder surfaces than the soft carpeting in the L . home. In addition to a collarbone fracture and a "questionable" occipital fracture, these studies revealed slighlly less than 1 percent incidence of skull fractures (three, in these studies).The child had a bacterial infection (for which she had undergone a spinal tap). Dr. Jenssen testified that whatever had caused it as well as an abnormal coagulation factor revealed in blood tests did not indicate a brittle bone condition which might have made the child prone to fractures.

Dr. Jenssen conducted her interviews of both parents in person, and of D , by telephone, with the aid of an social worker on her team who was fluent in Spanish. The social worker interpreted; there was no speaker phone. These interviews occurred days after the ACS interviews and after any interviews with other medical and hospital personnel. From the

translated answers, Dr. Jenssen concluded that the parents and D sounded "almost rehearsed" because they all used the same words, such as "sleeping like a baby" to describe when Jennifer fell onto the floor [the child did not cry immediately upon impact]. She later conceded that it would not have been unusual for all family members to discuss among themselves the events leading up to the baby's hospitalization and her condition. She noted some other phrases they used in common; there were also differences. The mother thought that the baby had fallen on her right side. Under repeated questioning by Dr. Jenssen, D changed her story somewhat and said maybe the surface onto which the baby had fallen was "a little hard." Dr. Jenssen learned only after the interviews (from the ACS caseworker) that fifteen year-old D might be suffering from cerebral palsy or from some other condition that gave her an "awkward" gait. The hospital record notes also indicate that D suffered from a seizure disorder.

Dr. Jenssen conceded that by the time she interviewed the parents, the child was doing well medically and that they were aware of the child's injuries. Nevertheless, she remarked in her interview notes that neither parent asked about the baby's welfare. She considered the apparent omission "interesting," and significant despite the fact that the parents had been constantly present in the hospital and had kept themselves informed by speaking to other medical and hospital personnel. She insisted that her focus was on the lack of a plausible explanation(s) for these injuries. However, she regarded a social history as "very important" when doing a forensic interview and early medical examination of a child: birth history, past medical history; social history.

Dr. Esernio-Jenssen seems to have focused most on Mr. in her forensic

interview. She pointed out in her notes that "mom and dad portrayed their life as ideal, with no worries or stresses." She then wrote, "with six children, one income household"(she did not ask how much Mr. [redacted] earned as a full-time construction foreman, working steadily), and also with issues regarding their immigration status, "I can't imagine no stresses." She knew that Mr. [redacted] had come here from Ecuador about twelve years ago and admitted that she did not know anything about his standard of living there. In response to a question by respondent father's counsel, she stated that she "still thinks it's suspicious." The Court then asked, "what was the significance of that?" She answered, 'well, I think that when you live in [a] two-bedroom or one-bedroom apartment--." The Court asked a follow-up question: [I]n terms of your assessment as to whether this was abuse, what, if any, significance is there in your saying that you think they are not being candid about how much stress is in their lives? Dr. Jenssen replied, "[b]ecause it's based on the fact that I had found out from the parents that they have a prior ACS encounter and what is well reported in the medical literature and what is well known...nationally, is that child abuse occurs at times of stress in the household. It could be financial stress, it could be emotional stress. It could be postpartum stress and those are the kind of social questions or social history questions I ask." "We ask for issues about domestic violence, drug or alcohol use. Again, those are all stresses in a household...I find it very hard to believe that there is absolutely no stress within the circumstances of how they're living. And I find that suspicious."

Dr. Jenssen testified about, and her notes emphasized, the father's responses to her questions. He acknowledged that he had in the past drunk too much beer and spent too much of his non-work time away from his family. He had ceased this behavior last year when he had

become an evangelical Christian. She questioned him further about whether he remembered the specific date he had stopped this behavior; he replied that he did in fact recall the day, since it was on Father's Day. She took this response as evidence of alcoholism, since she felt that only an alcoholic would remember exactly when he had stopped drinking. Both parents acknowledged that there had been one previous ACS involvement, when one of the boys arrived at school with a bruise. The report was unfounded by ACS, as it had been the result of an encounter between their child and another youngster outside. The caseworker, Ms. Mathison-Edwards did not even mention this unfounded report in her testimony. In his interview, the father also candidly acknowledged family immigration issues. Dr. Jenssen found that these answers heightened her suspicions and demonstrated to her that the parents were not forthcoming. Throughout her testimony, Dr. Jenssen was quite defensive and argumentative with all counsel except Petitioner's attorney who had called her as its witness.

Dr. Steven Jack Schneider, qualified as an expert in pediatric neurosurgery, testified professionally and without any apparent bias. Dr. Schneider testified that, of the three purported fractures, the one described as the oldest, the occipital fracture, was almost certainly a developmental anomaly (due to "wormian bones"). He certainly had never told Dr. Jenssen that this was an old fracture. As for the other fractures, he did not believe the line observed on the CAT scan were an artifact. They were real. However, he considered it extremely unlikely that the two linear left side fractures represented separate injuries. Rather, they were a single continuous fracture. Jennifer had suffered a single injury rather than, as it might first might have appeared, three separate ones. Rejecting the possibility that the injury had resulted from a simple fall, Dr. Schneider postulated some alternative possibilities. He pointed out that a fall from 4 feet

even onto carpeting could produce the fracture without any external bruising, if the person holding the baby fell onto her, as could a four foot fall onto a tile floor. If the baby were thrown while the person holding her was walking, the fracture could result. These scenarios were possible, he explained, because the physics and mechanics of momentum differs from a fall from rest. Dr. Schneider was at pains to differentiate between the situation in which the baby was dropped from a standing position, and the one in which she was dropped or thrown by someone moving. The fracture could also have occurred if Jennifer struck some hard projection while falling., but Dr. Schneider thought that less likely, as such injury is generally accompanied by a visible depression in the head (a "ping-pong injury").

Insofar as relevant to this proceeding, Family Court Act §1046(a)(ii) provides, that:

> proof of injuries sustained by a child or of the condition of a child of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or other person legally responsible for the care of such child shall be prima facie evidence of child abuse or neglect, as the case may be, of the parent or other person legally responsible.

This provision of the child protective statute has been construed to permit "a finding of a abuse or neglect based upon evidence of an injury to a child which would ordinarily not occur absent acts or omissions of the responsible caretaker" (Matter of Philip M., 82 NY2d 238, 244) (1993) in that "[s]ection 1046(a)(ii) provides that a prima facie case of child abuse or neglect may be established by evidence of (1) an injury to a child which would ordinarily not occur absent an act or omissions of respondents, and (2) that respondents were caretakers of the child at the time that the injury occurred" (Matter of Philip M., supra, at 243).

Once the petitioner has established a prima facie case of abuse or neglect the

"respondents may simply rest without attempting to rebut the presumptions and permit the court to decide the case on the strength of the petitioner's evidence or, alternatively, they may present evidence which challenges the establishment of the prima facie case. Their evidence may, for example,

(1) establish that during the time period when the child was injured, the child was not in respondent's care; (2) demonstrate that the injury or condition could reasonably have occurred accidentally, without the acts or omissions of the respondent; or (3) counter the evidence that the child had the condition which was the basis for the finding of injury" (Matter of Philip M., supra at 244-245).

As a matter of law, the burden of proving abuse or neglect by a preponderance of the evidence always remains with the petitioner. Thus, where the petitioner's evidence establishes a prima facie case, "the burden of going forward shifts to respondents to rebut the evidence of *** culpability *** the burden of proving child abuse always rests with petitioner; shifting the burden of explanation or of going on with the case does not shift the burden of proof" (Matter of Philip M., supra, at 244 [internal citation omitted]. Therefore, while the establishment of a prima facie case permits the trial court to make a finding of abuse or neglect, the court "is never required to do so" (Matter of Philip M., supra at 244).

This case of alleged child abuse illustrates the problems inherent in deriving findings of fact from expert testimony. The difference between the testimony of the two experts was also the difference between an apparent pattern of abuse and a one-time incident which may actually not have been abuse at all. Dr. Jenssen saw three fractures, one of which, which she thought was

older, in and of itself convinced her of the abuse. She argued that this occipital fracture could not have been accidental. She did not mention that the pediatric neurosurgeon on her own team, Dr. Schneider, had thought that it most likely was not be a fracture at all. He pointed out that in some cases bones are "Wormian," giving the false impression of a fracture. This condition pertaining to bones imperfectly "knitting," at the base of the skull, was first noted in the skulls of ancient Inca Indians, who came from exactly the part of the world from which the Lliviganay family originates (in their case, Ecuador). It is a developmental anomaly found in the South American population the L s belong to. Because Dr. Jenssen who testified before Dr. Schneider did, never mentioned the issue, she could not be cross-examined as to exactly why she rejected Dr. Schneider's interpretation. Remarkably, Petitioner never recalled Dr. Jenssen to address Dr. Schneider's testimony.

The Court is painfully aware of the frequency of serious child abuse, and it has no interest in leaving a child at the mercy of abusers. The Res Ipsa presumption is needed because in many cases, such as this one, the child in question cannot possibly say what happened. Conversely, the Court is also aware that parents run a real risk of being accused of abuse when they bring injured children to doctors and do not know who injured the child. Any experience with such accusations sensitizes them to further contact with child protective agencies. There is a real possibility that bending too far in the direction of seeing abuse, and of blaming both parents under the Res Ipsa doctrine, may cause parents to avoid bringing children to doctors, and thus may endanger those children.

Cases that have reached appellate courts show that parental behavior is very important in judging probabilities in situations like this one, in which it will never be possible to be certain of

what happened. Parental behavior is certainly a factor courts use to assess the strengths of parents' rebuttal evidence. Contrast with, e.g., Matter of Kayla C., 797 NYS2nd, 2005 AppDiv (2 nd Dept.) LEXIS 7288 (2005) (mother's resistance and hostility towards home health professionals' assistance); Matter of Alyssa C.M.., 17 AD3rd 1023 (4 th Dept. 2005) (parent's delay in seeking medical care); Matter of Nyomi A.D. 10 AD3rd (2 nd Dept. 2004) (cancellation of the child's medical appointment after injury sustained); and Matter of Peter R., 8 AD3rd 576 (2 nd Dept. 2004) (mother's initial description of incident enhanced and elaborated during trial testimony.) This Court found it very significant that the parents in question were not evasive. They did not change their stories to evade responsibility for their child. They did not try to shift blame or to exaggerate what had happened. They consistently said that whatever had happened had occurred when their 15 year old daughter D: had dropped the child.

Whether or not that statement is correct, it has some implications. The Court believes with Dr. Schneider that there was only a single fracture. There was, then, a single event which caused the fracture. Medical evidence showed that it had occurred no more than three days prior to the discovery of the fracture, during a period when all five school-age children were home all the time due to a school recess. The fracture was classified as acute, meaning occurring within 0-3 days prior to the child's admission to Mary Immaculate Hospital. Suppose the parents had caused the fracture in a single fit of abuse. Then we must imagine that they had the guile to wait for another incident, when the child was dropped (and, incidentally, reacted by screaming in a way different from any previous scream) to take the child to a hospital, hoping that the doctors would blame the earlier injury on the daughter D . Yet the parents always seemed quite guileless. It seems more likely that, if the fracture occurred before the known fall which led to the

hospital visit, the parents were unaware of it. They rushed the baby to the hospital, probably because of their earlier exposure to ACS (in a case deemed unfounded). That the fracture was unlikely to have resulted from the fall shocked them.

It is inherent in a Res Ipsa proceeding that we do not know exactly what happened. The 15 year old was badly shocked by what she thought she had done. Even the apparent witness, the 6-year old child, said he was watching television and thus probably saw nothing until he heard the baby scream. The mother clearly forbade her children, apart from the 15-year old, from holding the child, for fear of injury. Did one of them defy her and fall on top of the child while holding or moving with the baby? Did the 15-year old drop the child on something hard like a projecting piece of furniture? According to Dr. Schneider, either could have produced this fracture.

The parents seemed to the Court, which is the finder of fact, to be extremely credible. They also seemed, quite properly, to feel that they had been caught up in a Kafkaesque nightmare.

In this particular case, a mother of six was running a bath. She told her 15-year old daughter to hold the 5 month old. She testified that she heard a scream, and saw the child lying on the floor in evident distress. The daughter, who is a victim of cerebral palsy or other disorder which causes her to move awkwardly, said that she had dropped the child. The mother immediately called her husband, who told her to call an ambulance. The hospital ran a non-three dimensional CAT scan, which initially showed two fractures. These events are not in dispute.

The child abuse team at the hospital was headed by Dr. Jenssen. She interpreted the scan to show multiple fractures inflicted at different times, amounting to evidence of a pattern of child

abuse. Interviewing the husband, she became convinced that the problem was his alcoholism. She rejected his claim that, although he had been a drinker in the past, his conversion to become an evangelical Christian had solved the problem. The husband found Dr. Jenssen's emphasis on ethnic and religious issues odd and even distasteful. The court takes note of the fact that Dr. Jenssen is a pediatrician, not a psychiatrist or psychologist or qualified social worker. It is not clear to what extent her views on the relationship between the parents and their presentation should be counted as expert. It is notable that Dr. Jenssen stated that she considered the social situation of the family a key indicator of abuse or non-abuse. She seemed to veer back and forth between saying that the parents acted suspiciously and basing her entire finding of abuse on the physical evidence. Even then the supposed existence of the earlier fracture was crucial to her conclusions.

A pediatric neurosurgeon from Schneider Children's Hospital, Dr. Schneider, interpreted the three dimensional CAT scan data. He saw a single fracture, which had spread in two distinct directions. Dr. Schneider also thought that the scan might show a condition called wormian bones, a particular way in which an infant's skull knits after birth which is common in South and Central American populations– which is what the parents are.

Both doctors doubted that the 15 year old's account could be accurate. Dr. Jenssen cited studies of 367 cases in which babies had been dropped in hospitals; slightly fewer than 1 percent of which (3) had suffered skull fractures.

Given the contradictions between the various witnesses, it was up to the court to weigh their credibility. The parents seemed quite credible. Dr. Jenssen's belief that religion could not affect alcoholism runs counter to the well-established success of Alcoholics Anonymous, which

is based on a religious theme. That connection was brought out some years ago when an atheist sued to keep a court from demanding that he attend Alcoholics Anonymous on exactly the ground that it contradicted his anti-religious beliefs. See, Matter of Griffin v. Coughlin, 88 NY2d (1996) There was, moreover, no prior record of abuse or neglect in a family which had been raising children for fifteen years. There is every evidence that this child had always been well cared for.

The child encountered no further problems in foster care. That could be interpreted as proof that she had been saved from an abusive household, or else as an indication that the fracture had been a one-time accidental event.

The original remand order was premised on imminent danger. That would make sense if there had been three fractures, but it is much more difficult to support if there was only one incident, especially where the single incident is not so obviously a case of abuse. The much-cited hospital study used phrases like "highly unlikely" to describe the possibility that a child dropped on her head would sustain a skull fracture. Highly unlikely is not never. Many would count a 5 or even 10 percent chance as highly unlikely, but in a study of 500 cases that would equate to 25 or 50 skull fractures. If no skull fractures at all had been seen, the study would have said never -- zero percent. The court is, moreover, mindful that this is a fairly old study, and that more recent ones have not been cited to back it up. Can anyone believe that, of the millions of babies in hospitals in the United States, only 300 or 400 have been dropped on their heads during the past decade or so? That the study was done by hospitals, moreover, raises a question. If it were ever accepted that dropping a baby on her skull invited a fracture, would not the hospitals face much stiffer liability? If that is understood, then the absence of more recent

studies suggests that skepticism is in order. As noted above, the cited study is not nearly so decisive as it might appear.

The court must note the contradiction in Dr. Jenssen's methodology--on the one hand she relies on lack of explanation, which might seem objective; on the other, she says again and again that her perception of the social situation of the family is key--it is what aroused her suspicions. It follows that if she were somehow misinterpreting that social situation, by her own stated methodology she could not be nearly so sure of abuse. Moreover, the rate of reported injuries in the study, just under 1 percent, is significant. This percentage means that for every thousand cases in which infants fell, ten would result in skull fractures not resulting from any kind of abuse. Dr. Jenssen described such fractures as occurred here as 'highly improbable.' As the law guardian for the five older children pointed out, highly improbable is not at all the same as 'never.' Highly improbable might mean as much as 5 percent of the time, or even 10 percent. In the same ten thousand cases, that would mean 50 or 100 skull fractures wrongly attributed to abuse.

Almost never is by no means the same thing as never. Recent charges concerning drug companies' involvement in clinical trials and in medical publications highlight the fact that such studies may be much more self-interested than they appear. It is up to those using them to consider that possibility. Worse, the study is fairly old, in a rapidly-changing area of medical research. This research apparently does much more than cross ts and dot is; it seems often to be changing our understanding of just what causes a variety of exactly the injuries with which Courts like this one are concerned. In one case, in England, there was a major national scandal, because an expert doctor condemned several women to prison for injuries it later turned out they

almost certainly had not caused.

Although it did not use this information in making its decision, the Court is aware that the scientific study of child injuries is a very active area of medical research. As in other areas, the views of the scientific community can change quite rapidly and drastically. In particular, some recent studies have brought into question long-established views of the origins of child injuries, in one country (England) causing the reversal of convictions. This increased research effort makes the Court question why, in this case, the research cited is somewhat elderly. As an example of a semi-popular account of the sheer volume and significance of recent work, the Court notes an article in the 30 July 2005 issue of The New Scientist (pp 6-8), a long-established British journal, which in turn cites technical medical articles: Archives of Pediatric and Adolescent Medicine, Volume 158, p. 454 ("Studies of Trio of Symptoms Found in Shaken-Baby Cases") and American Journal of Forensic Medicine and Pathology, Vol. 22, p.1. Again, the Court relied on none of these articles. It did observe with concern that the medical evidence relied only on older research in a rapidly-developing area.

The charge, in effect, is one of depraved indifference to the welfare of the child. The Court, however, sees no evidence that either parent intentionally injured the child or showed anything resembling depraved indifference. There is every appearance that the Lliviganays are a loving, concerned, intact family -- exactly what the entire Family Court system attempts to foster and preserve. Dr. Jenssen saw stresses and hidden flaws based on one in-person interview with the parents and on one telephone interview with one child. In contrast, the experienced case worker who has been continuously supervising and observing all of the children and the parents for more than a year observed no such stresses. She describes the family as well-adjusted and

loving.

The Court feels that overly broad use of Res Ipsa charges will likely deter parents from bringing children to doctors as needed. It is notable that in this case the parents behaved exactly as they were supposed to, and also that they avoided placing undue blame on the 15 year old daughter -- who actually admitted dropping the infant. The Court can say this because it has had very extensive experience of parents who clearly did not want to expose themselves to abuse charges, and who adopted dodges such as going to different doctors and hospitals which might be unaware of their children's previous conditions. This case does not seem to bear comparison with those cases. Unless a conscious distinction is made between credible and incredible parents, the court system will be condemning entirely innocent children to no medical care at all. What might seem to be reasonable insurance against error, always assuming neglect, will turn out to be the opposite.

The Court considered Dr. Schneider substantially more expert than Dr. Jenssen, and it accepts his view that there was only one fracture event. Thus there is no evident pattern of child abuse. The Court found it odd that Dr. Jenssen so rigidly rejected any alternative to her favored scenario, despite advice from her own child abuse team.

Dr. Jenssen seemed unable to make up her mind as to how she could be sure that the parent(s) had been abusive. On the one hand, she seemed to emphasize the fact of the fracture(s) and the absence of a credible explanation. On the other, she decided that the parents were likely to be abusive because of her perception of their family stressors, and, perhaps, because of their stated beliefs. The family had freely shared with her intimate details, such as the father's acknowledgment that in the past he had drunk too much beer, and had spent too much non-work

time away from his family. Also, that he ceased this behavior upon his conversion to evangelical Christianity. They also told her that ACS had investigated a prior report of suspected child neglect, which turned out to be unfounded; and shared with her family immigration issues. Despite these disclosures, she found that they were not forthcoming, that they were hiding something, despite any factual or analytical basis for her conclusion. She could not imagine that someone could conquer a dependency without a formal program or that personal religious beliefs could sustain a person in this situation. She could not believe that anyone other than an alcoholic, for instance, could remember the day he ceased his habit, even if that day happened to be Father's Day, and even if that day occurred within the last year. She seemed not to identify with the many persons who could, for example recall the date when he or she stopped smoking, or that such person accomplished that on his or her own. She specifically emphasized the parents' previous encounter with ACS as a factor in her assessment, then backtracked when it became clear that the earlier allegation had been unfounded. Given these movings back and forth, the Court gained the impression that Dr. Jenssen had formed an intuitive judgment, and that she would make almost any argument to back it up.

Additionally, Dr. Jenssen's demeanor during her testimony seemed to belie her professional status. She was inappropriately argumentative and surprisingly defensive. At one point, during cross-examination by the respondent father's attorney, she contemptuously refused to answer a question, characterizing it as ridiculous, until ordered to do so by the court. This might have been expected in an inexperienced witness, but not in a professional witness who has testified in dozens, if not in hundreds, of cases. Similarly, this Court was taken aback by Dr. Jenssen's overly dramatic hand gestures.

The Court was also very impressed by a significant omission in Dr. Jenssen's testimony. A member of her team, more highly qualified than she in pediatric neurology, had called into question the very existence of the fracture (occipital) upon which she had relied so heavily in making an allegation of child abuse. This omission made it unnecessary for her to explain why she disagreed with her team member. This Court found Dr. Schneider, this team member, to be far more credible and far more professional. Remarkably, Petitioner never sought to recall Dr. Jenssen as a rebuttal witness to Dr. Schneider in this critical aspect of testimony.

In contrast, this Court finds Mr. and Mrs. very credible , but without guile, and very interested in the welfare of their children. They seemed to be excellent parents.

Their testimony was brief, but compelling. They were not rattled by cross-examination which is an accepted legal test of veracity. They were not impeached. They seemed entirely straightforward on the stand. Each made direct eye contact with the questioners. Neither seemed unduly nervous. They testified consistently with the account of events the day J fell which each had given before. They described what appeared to be a stable, supportive relationship. They had been married for approximately seventeen years. Mrs. stayed at home as a full-time homemaker and mother. Mr. worked as a construction foreman, supervising a crew of approximately fifteen. He has held this same responsible position for approximately twelve years, and supports his family on his annual income of approximately seventy to seventy-five thousand dollars per year. Their testimony did not reveal any of the stressors about which Dr. Jenssen had speculated.

Child abuse is a very real and terrible problem. This Court has taken numerous children from parents it considers abusive. It feels no need to prove its determination to protect children.

This is a rare case in which the totality of the evidence, including the parents' credible and sincere testimony and their accurate recollections of events, coupled with the apparently inaccurate assertion of multiple fractures, adequately rebuts the Res Ipsa presumption that the parents were individually or jointly responsible for the injury to the child.

The Court would again emphasize that cases such as this one do not admit of a simple solution insuring against future trouble. Taking a child from a loving family injures that child, quite aside from the future chilling effect cited. See, e.g., Nicholson v. Scoppetta, 3NY 3rd 357 (2004). Leaving a child with an abusive family invites further disaster. Neither solution is without risk. In this particular case, the family seems loving and intact, and poses no risk to J The evidence of abuse seems flimsy, particularly since the key study is open to alternative interpretation. From the Court's point of view, it was very compelling that the best-qualified witness, Dr. Schneider, saw only the single fracture event.

The Court certainly accepts that Jennifer suffered a serious injury, albeit, fortunately, with no long-term effects. The Court also accepts that the proffered explanation, although clearly not impossible, is unlikely to be correct. What the Court does not accept is that either parent accidentally or maliciously caused this injury or accident; or that they individually or jointly allowed it occur; or that they made any effort to cover it up. Present with the baby were five children ranging in age from eight to fifteen, all of whom loved the baby and badly wanted to hold her. The mother explicitly forbade all but the fifteen year-old from doing so. Children are not machines. They do not always do what they are told. The Court considers it far more likely that any of the children dropped the baby onto a hard surface such as the bathroom tile floor, or fell while moving with the baby, either of which both Drs. Jenssen and Schneider testified could

have caused the observed injury.

This Court therefore concludes, based upon its observations of the witnesses and assessments of their credibility and based upon the totality of the record, the respondent parents have demonstrated that the injury to J. could have occurred accidentally, without the acts or omissions of the parents. See, Matter of Phillip M., supra, 82 NY2d 238, 244. They have rebutted the res ipsa presumption and Petitioner has failed to meet its burden of proof. The remand order for J is vacated.

It is therefore

ORDERED, that Petitioner having failed to establish the allegations in the petitions with respect to the respondents C and J. the petitions are dismissed as to them in accord with Family Court Act §1051(c) [1]

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[1] The instant decision and order follows an informal oral decision read into the record on July 28, 2005. [This Court stayed any effect of that informal decision by staying vacatur of its remand order of J until it issued the written decision and order of 10 August]. A review of those proceedings reveals the following omission in the formal decision and order dated August 10, 2005: As was communicated to all counsel and parties on July 28, 2005, the court, following a lengthy fact-finding hearing, having found no credible evidence to support child abuse allegations against the respondents, dismisses any remaining neglect allegations pursuant to Family Court Act §1051(c).

The family, including the five children aged eight to fifteen who remained at home with the parents, as well as the baby, J who has been on remand status, has been under ACS and Forestdale Agency supervision during the lengthy pendency of this case. It is clear that the family did not and does not, according to ACS reports, require any further ACS services or protection. Workers have observed the parents to be appropriate and loving towards all of the children at all times. There are no outstanding referrals for services and there are no identified child protection issues.

Therefore, this Court determines that its aid is not required on the record before it (FCA §1051(e)); See, e.g., Matter of Lewis T., 249 AD2d 646, 648 (3rd Dept. 1998); Matter of Baby Girl W., 245 AD2d 830, 831-832 (3rd Dept. 1997); Matter of Angela D., 175 AD2d 244, 245 (2nd Dept. 1991) because there is no evidence that the respondents and the children require

ENTER

RHEA G. FRIEDMAN

Judge of the Family Court

Dated: Jamaica, New York

August 31, 2005

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continued supervision or protection by the child protective agency. See also, Matter of Michael B., 80 NY2d 299, 318 (1992)(new developments and changed circumstances while children have been removed determining parents' fitness and right to custody).