

## COMMENT

### **Failing to Speak for Itself: The Res Ipsa Loquitur Presumption of Parental Culpability and its Greater Consequences**

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*Without a word, Korczak took off the child's shirt, placed him behind the fluoroscope, and turned off the overhead light. Everyone could see the boy's heart beating rapidly on the screen. "Don't ever forget this sight," Korczak told them. "Before you raise a hand to a child, before you administer any kind of punishment, remember what his frightened heart looks like."<sup>1</sup>*

#### INTRODUCTION

After her son, Jullian, sustained second-degree burns on his feet and buttocks, Hyacinth brought him to the

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1. BETTY JEAN LIFTON, *THE KING OF CHILDREN: A BIOGRAPHY OF JANUSZ KORCZAK* 144 (Farrar, Straus and Giroux 1988). I am grateful to Shaina Kovalsky for bringing this anecdote to my attention.

Nassau County Burn Unit. There, the attending physician discovered that about six percent of Jullian's total body surface was covered in burns.<sup>2</sup> He questioned Hyacinth about the source of the burns. She claimed that while bathing, Jullian managed to turn on the hot water and scald himself.<sup>3</sup> The doctor quickly realized that her explanation could not possibly be accurate. If it were true, Jullian would have had burns on his thighs where the water would have reached him, as well as splash marks elsewhere on his body.<sup>4</sup> Instead, Jullian exhibited the tell-tale signs of an immersion burn. Applying the *res ipsa loquitur* presumption found in Family Court Act section 1046(a)(ii),<sup>5</sup> the court found that Jullian was abused and held Hyacinth responsible for his injuries. The provision

provides that a *prima facie* case of child abuse or neglect may be established by evidence of (1) an injury to a child that would not ordinarily occur absent an act or omission of the parent or other person responsible for the care of the child and (2) that the parent or such other person was the caretaker of the child when the injury occurred.<sup>6</sup>

Once the Department of Social Services proved that the injuries were consistent with child abuse, it established a *prima facie* case against Hyacinth. Then, "the burden of going forward shift[ed] to the parent or other person responsible for [the] care of the child to offer a reasonable and adequate explanation of how the child sustained the injury."<sup>7</sup> Hyacinth failed to rebut the presumption of parental culpability against her, because she could not provide an adequately plausible explanation for the burns. The court therefore held that Jullian was an abused child.<sup>8</sup> On appeal, the court had to weigh Jullian's future safety and health interests against Hyacinth's rights as a parent.

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2. Comm'r of Soc. Servs. of New York *ex rel.* Jullian L. v. Hyacinth L., 619 N.Y.S.2d 762, 763 (App. Div. 2d Dep't 1994).

3. *Id.*

4. *Id.*

5. N.Y. FAM. CT. ACT § 1046(a)(ii) (McKinney Supp. 2008).

6. *Comm'r of Soc. Servs.*, 619 N.Y.S.2d at 763.

7. *Id.*

8. *Id.*

To ensure his safety, the court decided to place Jullian in the custody of the Commissioner of Social Services, because “an erroneous failure to provide protection for a child in an [A]rticle 10 proceeding may have disastrous consequences.”<sup>9</sup> The decision seems to have been drawn from common sense, yet not all cases are as clearly indicative of child abuse.

While historically used as a theory of negligence, the *res ipsa* presumption has also been used in New York State family courts for over four decades to explain what logic already dictates—i.e., parents who have no plausible explanation for their children’s suspicious injuries are likely guilty of abusing them.<sup>10</sup> Still, not all unexplained and severe injuries speak for themselves, and this becomes a more serious problem when the victim is too young to speak for himself. There are consequences that result from a rule that presumes parental culpability, especially one that is not applied uniformly.

This Comment will first explain the historical background of the *res ipsa loquitur* presumption, and its subsequent codification in the Family Court Act. Then, it will explore the six factors that New York courts use to evaluate whether a parent has rebutted the presumption, and the inconsistencies that occur in its application. Lastly, the Comment will address the greater consequences of the *res ipsa* presumption’s application and the findings of abuse that result from it, and advocate for change to increase consistency and transparency in such proceedings.

## I. HISTORICAL BACKGROUND—CODIFYING COMMON SENSE

Presiding over a child protective proceeding in 1965, Judge Harold A. Felix was faced with a problem: there was an unquestionably battered, one-month-old child whose parents could not provide a reasonable explanation for his

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9. *Id.* at 764.

10. Although I tend to refer to the respondents in Article Ten proceedings as “parents,” this is not entirely accurate. Section 1012(g) of the Family Court Act has been interpreted broadly to include any caregiver or person responsible for the child. This may include neighbors, paramours, babysitters, and other family members. See N.Y. FAM. CT. ACT § 1012(a), (g) (McKinney Supp. 2008); *In re Nathaniel “TT,”* 696 N.Y.S.2d 274, 275-76 (App. Div. 3d Dep’t 1999); *In re Maureen G.*, 426 N.Y.S.2d 384, 387-90 (Fam. Ct. 1980).

injuries. However, there was no direct proof that the parents abused the child. Judge Felix wrote in his decision, "Proof of abuse by a parent or parents is difficult because such actions ordinarily occur in the privacy of the home without outside witnesses."<sup>11</sup> Then, without pretense, precedent, or statutory influence, he continued:

Therefore in this type of proceeding affecting a battered child syndrome, I am borrowing from the evidentiary law of negligence the principle of "res ipsa loquitur" and accepting the proposition that the condition of the child speaks for itself, thus permitting an inference of neglect to be drawn from proof of the child's age and condition, and that the latter is such as in the ordinary course of things does not happen if the parent who has the responsibility and control of an infant is protective and non-abusive. And without satisfactory explanation I would be constrained to make a finding of fact of neglect on the part of a parent or parents and thus afford the court the opportunity to inquiry [sic] into any mental, physical or emotional inadequacies of the parents and/or to enlist any guidance or counseling the parents might need. This is the Court's responsibility to the child.<sup>12</sup>

There was a similar case the following year in Westchester County Family Court. Citing the application of *res ipsa loquitur* found in Judge Felix's opinion, the court, seemingly *sua sponte*, adopted its own rules of evidence regarding the case. The decision stated that the "burden of proof relating to the allegations of the petition remains upon the [p]etitioner to be established by a preponderance of the relevant, competent and material evidence."<sup>13</sup> The court also held that once the petitioner has shown that the child suffered injuries while in the care of his parents, then the petitioner has established a *prima facie* case and it becomes the parent's burden to come forward with an explanation for those injuries.<sup>14</sup> In lieu of legislation, the courts continued to utilize the rule.<sup>15</sup> In 1970, the doctrine was codified in the revised Article Ten of the Family Court

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11. *In re S*, 259 N.Y.S.2d 164, 164-65 (Fam. Ct. 1965).

12. *Id.* at 165. See also Monrad G. Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679, 698-99 (1966) (quoting *In re S*).

13. *In re Young*, 270 N.Y.S.2d 250, 253 (Fam. Ct. 1966).

14. *Id.*

15. See George J. Alexander, *1966 Survey of New York Law: Family Law*, 18 SYRACUSE L. REV. 383, 389 (1966).

Act,<sup>16</sup> as a rule of evidence for use in child protective proceedings. The statute states 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 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.<sup>17</sup>

County family courts quickly interpreted the new law as creating a “statutory presumption” of child abuse or neglect, rebuttable only when parents presented a reasonable and satisfactory explanation for their child’s injuries.<sup>18</sup> According to this interpretation, once the petitioner (i.e., a child protection agency, usually the county’s department of social services or its administration for children’s services or child welfare) has established that a child’s injuries are consistent with abuse, the burden of coming forward with an explanation shifts to the child’s parents to prove that they did not inflict the injuries. In the earlier stages of the rule’s application, a few courts articulated the rule as shifting the burden of proof to the parents after the child protection agency met its burden of establishing a prima facie case.<sup>19</sup>

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16. *In re Roman*, 405 N.Y.S.2d 899, 903 (Fam. Ct. 1978). See also Douglas J. Besharov, *State Intervention to Protect Children: New York’s Definitions of “Child Abuse” and “Child Neglect,”* 26 N.Y.L. SCH. L. REV. 723, 725-27 (1981).

17. N.Y. FAM. CT. ACT § 1046(a)(ii) (McKinney Supp. 2008).

18. See, e.g., *In re Edwards*, 335 N.Y.S.2d 575, 579-80 (Fam. Ct. 1972).

19. See, e.g., *In re Philip M.*, 589 N.Y.S.2d 31, 32 (App. Div. 1st Dep’t 1992) (“The statute thereby shifts the burden of proof to the parents to rebut evidence of abuse by providing a ‘reasonable and adequate explanation of how the injuries were sustained.’” (quoting *In re Erin “QQ,”* 270 N.Y.S.2d 502, 502 (App. Div. 3d Dep’t 1992))), *aff’d*, 624 N.E.2d 168 (N.Y. 1993); *In re Jesse S.*, 543 N.Y.S.2d 502, 503 (App. Div. 2d Dep’t 1989) (“Once a prima facie case has been established by the petitioner, the burden shifts to the alleged abuser to offer a satisfactory explanation to rebut the evidence.”); *In re Cerda*, 495 N.Y.S.2d 47, 48 (App. Div. 1st Dep’t 1985) (“Once the statutory conditions are met and a prima facie case of neglect is established the ‘burden of coming forward with proof’ shifts from the petitioner to the parent, who is then required to offer a satisfactory explanation for the child’s injuries.” (quoting *In re Young*, 270 N.Y.S.2d 250, 253 (Fam. Ct. 1966))); *In re Roman*, 405 N.Y.S.2d 899, 903 (Fam. Ct. 1978) (“To insure that the secrecy of the acts themselves would not leave battered children unprotected, the Courts redistributed the burden of proof by borrowing the principle of *res ipsa loquitur* from negligence law.”); *In re Fred S.*,

However, in 1993, in the case of *In re Philip M.*, the Court of Appeals clarified the rule by holding that “the burden of proving child abuse always rests with [the] petitioner.”<sup>20</sup> Once the petitioner establishes a prima facie case of abuse, there is a presumption of parental culpability. Yet, parents may testify or present evidence to rebut the presumption. Despite the establishment of a prima facie case of abuse or neglect, the court does not have to find that the parents are abusive; rather the “respondents may simply rest without attempting to rebut the presumption and permit the court to decide the case on the strength of petitioner’s evidence or, alternatively, they may present evidence which challenges the establishment of the prima facie case.”<sup>21</sup> The Court of Appeals also clearly articulated the different types of evidence that parents may present to rebut the presumption. It suggested that parents may present evidence that the child was not in their care when the injury occurred, or that the injury was the result of an accident. They may also question the evidence presented that the child had an injury consistent with child abuse.<sup>22</sup>

Today, the statute is frequently cited in Article Ten proceedings to establish a finding of abuse or neglect, especially when there are unexplained and severe injuries. However, different interpretations continue to emerge, as judges grant weight to the different factors before them. More importantly, courts still struggle with the notion of the statutory presumption and its consistent application.<sup>23</sup>

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322 N.Y.S.2d 170, 177 (Fam. Ct. 1971) (“[T]hen petitioner is deemed to have established a prima facie case and the burden of going forward with the proof, shifts from the petitioner to the respondents who are then required to offer satisfactory explanation concerning injuries.”).

20. 624 N.E.2d 168, 172 (N.Y. 1993).

21. *Id.*

22. *Id.*

23. See *In re Ashley RR.*, 816 N.Y.S.2d 580, 582 (App. Div. 3d Dep’t 2006) (“Although generally referred to as a presumption, this method of proof does not create a true presumption . . . .”); *Albany County Dep’t for Children, Youth & Families v. Ana P.*, 827 N.Y.S.2d 525, 527 (Fam. Ct. 2006) (“To say that this is a confusing area of the law is an understatement of presumptively large dimensions.”).

## II. AN IRREBUTTABLE PRESUMPTION?: FACTORS CONSIDERED BY COURTS WHEN DETERMINING WHETHER A PARENT HAS REBUTTED THE PRESUMPTION OF PARENTAL CULPABILITY

New York State family courts and the appellate divisions of supreme courts consider six different factors in their analysis of whether a parent has rebutted the presumption of parental culpability. Although courts do not explicitly refer to these six factors in their decisions, they are implicit in the case law. Recognizing this pattern, and then compiling the six factors, required a comprehensive study of the reported cases that invoked Family Court Act section 1046(a)(ii), the *res ipsa loquitur* presumption, or other cases that related to those terms or cited them.<sup>24</sup> Judges or child welfare attorneys seeking guidance or an overall pattern on this issue must rely on published case law. It is difficult to determine the extent to which these cases are representative of the broader use of the presumption, but the cases cite one another, creating a coherent body of case law. Nonetheless, the exclusive use of published cases remains a necessary limitation of this study. In an attempt to create consistency and transparency, it is helpful to make explicit what courts have left implicit.

The six major factors that courts evaluate in *res ipsa* cases are the respondent's presentation of: (A) a consistent and plausible account of events; (B) corroborating expert testimony; (C) a diligent effort to seek medical treatment; (D) a single injury with no other marks that are suggestive of abuse; (E) the expression of emotion at the fact-finding hearing; and, when possible, (F) a plausible alternative explanation for the injury. Understandably, these factors mirror society's conception of parental obligations, and are therefore based on socially acceptable parenting methods. For example, a reasonable and caring parent diligently seeks medical treatment for his injured child, regardless of

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24. This study began with a list of cases compiled by Margaret A. Burt, Esq., a child advocate who specializes in child welfare, foster care, adoptions, and child abuse and neglect cases. After reading all of the cases that Burt compiled, and then reading all of the cases cited within those cases, as well as conducting several Westlaw searches, a nexus of cases emerged. As demonstrated by the body of case law cited in this Comment, approximately 150 *res ipsa* cases provided the foundation on which the six factors and subsequent analysis rests.

the fact that it could expose him to charges of child abuse. If any of the aforementioned factors are not present, it is more than likely that the family court will take note and ultimately enter an order finding that the child was abused or neglected.

An analysis of the relevant case law demonstrates that it is extremely difficult for parents to rebut a claim of *res ipsa loquitur* abuse or neglect. Obviously, this difficulty is partly due to the nature of the injuries and illnesses that lend themselves to the application of the *res ipsa* doctrine. The cases that invoke the statutory presumption usually involve extremely egregious physical injuries or sexual abuse resulting in the transmission of a sexually transmitted infection.<sup>25</sup> Furthermore, the children are often very young, and therefore unable to articulate the source of their injuries. Thus, the presumption is difficult to rebut, because the severity of the injury and the age of the child make it seemingly obvious that the parent is responsible for

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25. See, e.g., *In re Fantaysia L.*, 828 N.Y.S.2d 497 (App. Div. 2d Dep't 2007) (three-year-old child contracted gonorrhea); *In re Sanah J.*, 806 N.Y.S.2d 78, 79 (App. Div. 2005) (“[A] child, who was three months old, sustained 11 rib fractures, a fractured arm and leg, cerebral edema, retinal hemorrhaging, a subdural bilateral hematoma, and bruises.”). See generally Paulsen, *supra* note 12, at 698-703.

While the majority of the cases that invoke the presumption involve egregious physical injuries or in the case of sexual abuse, a sexually transmitted disease, it is also important to note that the presumption can be applied in cases involving obvious and severe emotional impairment. In the case of *In re Keith R.*, 474 N.Y.S.2d 254 (Fam. Ct. 1984), a five-year-old child's extreme emotional disturbance and knowledge about sexual intercourse activated the presumption. The child told the psychiatrists examining him that he wanted “to be a killer when he grows up.” *Id.* at 256. He also “manipulated two anatomically correct dolls to engage them in a parody of sexual intercourse, ending in shaking spasms” and had a wealth of knowledge about “sexual concepts.” *Id.* The court noted that a child would not have this level of emotional impairment were it not for the “acts or omissions” of an abusive or neglectful parent. *Id.* at 257-58 (quoting N.Y. FAM. CT. ACT § 1046(a)(ii) (Supp. 2008)). The court found that the child had to have obtained his knowledge and emotional impairment from “someplace” and his mother was his primary caretaker and therefore, she was culpable for the emotional abuse. *Id.* at 258. The mother failed to offer any explanation to rebut the presumption against her, and subsequently the court entered a finding of neglect. *Id.* Although the presumption was successfully applied in this case, it is far more common for it to be applied in cases involving physical and sexual abuse, because the evidence of abuse tends to be overwhelmingly obvious and compelling. *Id.* at 257 (“Every reported decision that the Court has found construing this section [1046(a)(ii)] involved physical injuries sustained by the child.”).



maltreatment or poor supervision at the very least. Where the evidence of abuse or neglect is not particularly compelling, however, the court will simply dismiss for failure to establish a prima facie case based on a preponderance of the evidence, rather than force parents to present a satisfactory explanation for the injuries present.<sup>26</sup> Nevertheless, where the petitioner has established that a prima facie case exists, the case law demonstrates that it is almost impossible for parents to rebut the presumption of parental responsibility.

*A. A Consistent and Plausible Account of Events*

First, once a prima facie case of child abuse has been established, the burden of explanation shifts to the parents to show that they are not responsible.<sup>27</sup> It is not enough for parents to deny that they knew of the injuries or how they were inflicted because such a denial does not truly explain the origin of the injuries, especially when the parents were the sole caretakers of the child when the injuries were inflicted.<sup>28</sup> It is also insufficient to claim that the injuries were the result of an accident if more elaborate details are not provided.<sup>29</sup> Rather, parents must provide a credible account of events in which their child could have sustained the injuries, and they must be consistent in their narrative of what occurred. Parents often fail to properly explain the nature of their child's injuries, resulting in a finding of abuse. For example, in the case of *In re Daquwan G.*, the court found that the mother failed to rebut the presumption, noting that the mother's explanation was "contradictory, implausible, or otherwise unreasonable or lacking in credibility."<sup>30</sup> Furthermore, in cases where both parents are respondents, the two must testify to the same

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26. See, e.g., *In re Tony B., Jr.*, 841 N.Y.S.2d 419, 420 (App. Div. 4th Dep't 2007); *In re Shawna "K."*, 716 N.Y.S.2d 139, 141 (App. Div. 3d Dep't 2000); *In re Nassau County Dep't of Soc. Servs.*, 575 N.Y.S.2d 518, 519 (App. Div. 2d Dep't 1991).

27. *In re Philip M.*, 624 N.E.2d at 172.

28. 1 GARY SOLOMON, PRACTICE MANUAL FOR LAW GUARDIANS: REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS 221 (2005).

29. See, e.g., *In re Malta L.*, 747 N.Y.S.2d 765, 765 (App. Div. 1st Dep't 2002).

30. 814 N.Y.S.2d 723, 725 (App. Div. 2d Dep't 2006).

account of events, because their failure to recall the incident in the same way will easily raise the suspicion of abuse.<sup>31</sup>

*B. Presentation of Expert Testimony Corroborating Their Explanation*

Even when caregivers have a compelling explanation for the injuries that led to the petition, it is essential that they also present expert testimony, usually from a medical professional, which corroborates their explanation. While this is not statutorily required, courts are hesitant to accept a parent's explanation without additional proof.<sup>32</sup> This is in part because the petitioner has already established a prima facie case that the child has been abused, and has usually done so using testimony from medical experts.<sup>33</sup> It then becomes the respondent's burden to refute this expert testimony by providing an explanation. Thus, respondents must often present their own experts to contradict the petitioner's evidence.<sup>34</sup> Expert medical testimony is extremely important: in the majority of cases where the res

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31. See, e.g., *In re Cerda*, 495 N.Y.S.2d 47, 48 (App. Div. 1st Dep't 1985).

32. See, e.g., *In re C. Children*, 616 N.Y.S.2d 644, 645 (App. Div. 2d Dep't 1994) (noting that the mother did not offer any evidence to rebut medical testimony); *In re James P.*, 525 N.Y.S.2d 38, 40 (App. Div. 1st Dep't 1988) (noting that the mother did not offer any medical testimony and failed to rebut the presumption).

33. See, e.g., *In re Marc A.*, 754 N.Y.S.2d 45, 47 (App. Div. 2d Dep't 2003) ("[A] prima facie case of child abuse and/or neglect was clearly established by the expert medical testimony of . . . a pediatrician trained in child abuse."); *In re Shetonya W.*, 610 N.Y.S.2d 235, 236 (App. Div. 1st Dep't 1994) (finding that respondent's explanation was "discredited by uncontradicted expert medical testimony"); *In re William W., Jr.*, 510 N.Y.S.2d 370, 371 (App. Div. 4th Dep't 1986) (finding that a prima facie case was established after child explained injury to four witnesses and doctor testified that the child's wrist injury was most likely inflicted with a rope).

34. See, e.g., *In re Eric "CC,"* 653 N.Y.S.2d 983, 984 (App. Div. 3d Dep't 1997) (noting that at the fact-finding hearing the parents attempted to rebut the presumption by "present[ing] the testimony of a pediatric geneticist/physician who evaluates and attends to children with birth defects and genetic diseases"); *New York City Dep't of Soc. Servs. ex rel. H. and J. Children v. Carmen J.*, 619 N.Y.S.2d 65, 66 (App. Div. 2d Dep't 1994) (noting that parents presented an expert in an attempt to rebut the presumption by proving that the child's injuries were "the result of an accidental fall out of a bathtub").

ipsa presumption was rebutted by parents, medical experts strongly corroborated the parents' account of events.<sup>35</sup> Conversely, courts often cite medical testimony that contradicts the respondents' explanations in decisions in which respondents fail to rebut the presumption.<sup>36</sup>

In addition, it may be necessary for respondents to present the testimony of an expert in a field other than medicine. For instance, in the case of *In re Damen M.*, the parents maintained that their eight-week-old daughter had sustained first- and second-degree burns when their hot water shut-off valve malfunctioned and allowed a sudden stream of hot water to scald their baby.<sup>37</sup> The Administration for Children's Services presented medical testimony indicating that the mother had immersed her child in the scalding water. To refute this testimony, the mother offered the testimony of an engineer, who stated that the valve did often malfunction, but would not present a problem if the person using the water turned on both the hot and cold water valves at the same time.<sup>38</sup> The court weighed the engineer's testimony, but still found that the mother was abusive.<sup>39</sup> As this case demonstrates, the court is free to weigh the testimony of any experts presented, including its own.

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35. See, e.g., *In re Zachary* "MM," 714 N.Y.S.2d 557, 560-61 (App. Div. 3d Dep't 2000); *In re Anthony R.C., Jr.*, 570 N.Y.S.2d 205, 205-06 (App. Div. 2d Dep't 1991); *In re BW*, N.Y. L.J., Sept. 14, 1995, at 32 (Fam. Ct. 1995).

36. See, e.g., *In re Kayla C.*, 797 N.Y.S.2d 559, 560 (App. Div. 2d Dep't 2005) (noting that the medical expert stated that baby's constant "spitting up was not interfering with her ability to gain weight"); *In re Kortney C.*, 770 N.Y.S.2d 758, 759-60 (App. Div. 2d Dep't 2004) (crediting the testimony of a medical expert who opined that child's injuries could be the result of an accident, but could not have occurred the way caretaker explained that they did); *In re Julissa "II,"* 629 N.Y.S.2d 334, 335 (App. Div. 3d Dep't 1995) (noting that child's doctor testified that injuries were not caused by accident).

37. 765 N.Y.S.2d 347, 348 (App. Div. 1st Dep't 2003).

38. *Id.*

39. *Id.* at 348-49. See also *In re Chaquill R.*, 865 N.Y.S.2d 716 (App. Div. 3d Dep't 2008). In that case, a ten-month-old child "suffered second and third degree burns on his buttocks and thighs from scalding hot water in a bathtub." *Id.* at 717. The respondent claimed that the burns were the result of a defective water heater. The court relied in part on a plumber's report, which stated that "while the control on the water heater was set at a hot cycle, the tank was functional." *Id.* at 717-18. Subsequently, it affirmed the family court's finding of abuse. *Id.* at 718-19.

In some cases, the court may hold an expert to a particularly high standard. In the case of *In re Peter R.*, the family court called a pediatric neurologist as an independent expert, after both parties had their experts testify.<sup>40</sup> The independent expert testified that the mother's explanation that her son had fallen from a couch or kitchenette was plausible and that her son's skull fracture could have been the result of such an accident.<sup>41</sup> On appeal, the Supreme Court, Appellate Division found that the family court should not have relied on the testimony of the independent expert, because he never met the family, "did not review the parents' hearing testimony, and reached his conclusion that the skull fracture could have been caused either by the fall from the couch or the kitchenette incident without specifically considering relevant factors such as the height and velocity of these reported falls and the force used."<sup>42</sup> Though the appellate court felt that it was important for the independent expert to consider the velocity and height of the child's fall from a piece of furniture, such considerations may not have occurred to the independent expert who practiced in the field of neurology, not physics.

### *C. Diligent Efforts to Seek Medical Care*

The parent's diligence in obtaining medical treatment is another crucial factor in the court's determination of whether the parent has rebutted the presumption. The court must decide on a case-by-case basis "whether the parents have provided an acceptable course of medical treatment for their child in light of all the surrounding circumstances."<sup>43</sup> This factor is often cited in decisions, particularly in cases in which the parents waited several days to obtain medical treatment or even failed to seek it at all.<sup>44</sup> Perhaps the weight given to this factor is due to the

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40. 779 N.Y.S.2d 137, 139 (App. Div. 2d Dep't 2004).

41. *Id.*

42. *Id.* at 140.

43. *In re Hofbauer*, 393 N.E.2d 1009, 1014 (N.Y. 1979).

44. See, e.g., *In re Peter R.*, 779 N.Y.S.2d at 138 (parents waited three days); *In re Christopher C.*, 631 N.Y.S.2d 666, 666-67 (App. Div. 1st Dep't 1995) (mother failed to seek treatment); *In re Jorge S.*, 621 N.Y.S.2d 66, 66 (App. Div.

assumption that parents who were truly concerned about their children's health, rather than the possibility of being charged with child abuse, would have immediately sought medical treatment for them.<sup>45</sup> In some cases, the court will weigh the severity of the injuries against the amount of time it took for the parent to seek medical treatment. For example, in the case of *In re Seamus K.*, the court held that the child was neglected, because the father had failed to take his severely injured infant son to the hospital after ninety minutes.<sup>46</sup> The court found that a reasonable parent, "confronted with a two-month-old child who was screaming, pale, acting strangely, vomiting, refusing to eat and displaying seizure-like symptoms would have summoned emergency medical aid and would not have waited approximately 90 minutes for the child's other parent to arrive home from work to assess the situation."<sup>47</sup> However, in cases in which the injuries are less severe, parents are not expected to seek medical treatment as quickly. Along these lines, in the case of *In re Brandyn "P"*, a one-year-old sustained a fractured tibia while in his father's care.<sup>48</sup> Nevertheless, due to the relatively less serious nature of the injury, the parents were able to rebut the presumption of parental culpability, despite the fact that they had not sought medical care until the day after the incident.<sup>49</sup> Thus, to overcome the burden of explanation, parents must seek adequate medical care for their children in a timely fashion relative to the injuries sustained.

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1st Dep't 1995) (mother failed to seek prompt treatment); *In re C. Children*, 616 N.Y.S.2d 644, 645 (App. Div. 2d Dep't 1994) (parent waited two days); *In re Dep't of Soc. Servs.*, 612 N.Y.S.2d 217, 218 (App. Div. 2d Dep't 1994) (mother did not seek treatment promptly).

45. See *In re Keith R.*, 474 N.Y.S.2d 254, 258 (Fam. Ct. 1984) ("Parents are responsible, in the first instance, for the welfare of their children. They are, and must be held to be, the first line of defense against injury and impairment.").

46. 822 N.Y.S.2d 168, 173 (App. Div. 3d Dep't 2006) (Crew III, J., concurring in part, dissenting in part).

47. *Id.*

48. 716 N.Y.S.2d 830, 831 (App. Div. 3d Dep't 2000).

49. *Id.* at 831-32.

D. *Presence of a Single Injury Which Is Inconsistent with Abuse*

Respondents who demonstrate that the child sustained a single injury and no other marks or bruises consistent with mistreatment are able to rebut the presumption more easily than those whose children exhibit multiple injuries and telltale bruises or belt marks.<sup>50</sup> In the former set of cases, the single injury in question obviously cannot be one that is symptomatic of child abuse. While this may seem like common sense, parents have tried to deny abuse despite the presence of physical injuries that are unmistakably indicative of maltreatment. For example, in the case of *In re Randy V.*, an eighteen-month-old child sustained first- and second-degree burns after being burnt with a clothes iron.<sup>51</sup> The court noted that the photographs of the burn clearly showed the “distinct shape and image of the face plate of an iron, with even the imprint of the steam holes visible on the child’s skin.”<sup>52</sup> Burns of this nature are rarely accidental, and in fact reveal that the scorching object was pressed into the child’s skin.<sup>53</sup>

Many cases, however, involve injuries with slightly more elusive origins. In these cases, the court will often look to the number, type, and frequency of the injuries sustained. Children who sustain various repeated and unexplained injuries of a severe nature will be deemed abused. Moreover, when a child sustains multiple injuries on several occasions, the respondent cannot rebut the presumption by claiming that each injury represents an accidental and isolated incident, because “the credibility of the ‘accident’ explanation diminishes as the instances of

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50. See generally James Tuthill Weston, *The Pathology of Child Abuse*, in *THE BATTERED CHILD* 77, 91-96 (Ray E. Helfer & C. Henry Kempe eds., 1968).

51. 786 N.Y.S.2d 823, 824-25 (App. Div. 3d Dep’t 2004).

52. *Id.* at 825.

53. *Id.* See also Comm’r of Soc. Servs. of New York *ex rel.* Jullian L. v. Hyacinth L., 619 N.Y.S.2d 762, 763 (App. Div. 2d Dep’t 1994) (noting that mother claimed that child burnt himself by turning on water in the bathtub, yet child possessed “no burns on the front of his thighs where the water would have been expected to land, and that there were no splash marks on the child”); *In re William W., Jr.*, 510 N.Y.S.2d 370, 371 (App. Div. 4th Dep’t 1986) (noting that child had an injury, which was described by doctor as “classic for a rope burn”).

similar alleged ‘accidental’ injury increase.”<sup>54</sup> However, when the child has a single injury and no other signs of abuse, courts will entertain the possibility of an accident or an alternative explanation.<sup>55</sup>

#### E. *An Appropriate Amount of Emotion*

Parental emotion is a factor that at times has affected the court’s determination of the parents’ credibility or ability to rebut prima facie evidence of abuse. Recalling the testimony of a respondent father, whose young son had approximately 100 to 150 diffuse retinal hemorrhages, as well as other injuries, which suggested shaken baby syndrome, Family Court Judge Friedman wrote that the father “left virtually everyone in the courtroom with the proverbial ‘lump in the throat.’”<sup>56</sup> She felt that there was no possible way that a father with such an outpouring of emotion and concern could possibly harm his child in the manner alleged. Judge Friedman went on to argue that this case could not possibly be “a true *res ipsa* case” of abuse, because based on the parent’s demonstration of concern, the injuries could never speak for themselves.<sup>57</sup> In contrast, in a case where the parents failed to rebut the presumption, the court specifically cited the parents’ testimony, which was delivered without emotion or concern, as evidence of parental responsibility.<sup>58</sup> Although the weight given to

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54. *In re Vincent M.*, 597 N.Y.S.2d 309, 313 (App. Div. 1st Dep’t 1993) (quoting *People v. Henson*, 304 N.E.2d 358, 363 (N.Y. 1973)); *see also In re Briana R.*, 653 N.Y.S.2d 765, 766-67 (App. Div. 4th Dep’t 1997) (quoting *In re Cerda*, 495 N.Y.S.2d 47, 48 (App. Div. 1st Dep’t 1985)).

55. *Compare In re Jorela L.*, 635 N.Y.S.2d 584, 585 (App. Div. 1st Dep’t 1995) (holding that a lower court properly discounted a medical examiner’s testimony that child died of natural causes, because the child had numerous injuries at her death), *and In re John Z.*, No. 15654-05, 2006 WL 3069293, at \*3 (N.Y. Fam. Ct. Oct. 27, 2006) (noting the “timing and sheer quantity of injuries to such a little child”), *with In re A.G. & K.G., Jr.*, N.Y. L.J., Jan. 13, 1992, at 25-26 (Fam. Ct. 1992) (holding that presumption was rebutted where father argued that child contracted chlamydia perinatally, “because the physical examination of [the child] revealed no evidence of bruising, scarring or trauma to that site,” and because of “the absence of psychological damage” commonly associated with victims of sexual abuse).

56. *In re Sem J.B.*, N.Y. L.J., Nov. 13, 1997, at 30 (Fam. Ct. 1997).

57. *Id.*

58. *In re Seamus K.*, 822 N.Y.S.2d 168, 172 (App. Div. 3d Dep’t 2006); *see*

demonstrable emotion in a parent's testimony is understandable, this factor may place an unnecessary burden on parents who are particularly nervous or unfamiliar with the family court system and believe that their child may be taken away if they make the wrong statements or appear unstable in any way. Alternatively, it also allows a particularly calculating parent to elicit undeserved sympathy from the court.

#### F. *A Plausible Alternate Explanation*

Respondents capable of coming forth with an alternate explanation for their child's injuries, such as the presence of another caretaker, may be able to rebut the presumption. If the parents are the sole caretakers during the time when the injury occurred, and yet fail to sufficiently explain their child's injuries, the presumption applies and is not likely to be rebutted.<sup>59</sup> Even if the parent was not the perpetrator, it is enough that the child was solely in the parent's custody when the abuse likely took place.<sup>60</sup>

If, however, the parents establish the presence of an additional caretaker or that the child was not in their custody during the critical period, then the court may weigh that evidence and determine that the parents rebutted the presumption.<sup>61</sup> In the case of *In re Zachary "MM"*, the parents' three-month-old son had a depressed skull fracture as well as fifteen other fractures of his legs, ribs, and wrist.<sup>62</sup> Yet, the appellate court affirmed the family court's

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also *In re F. Children*, 577 N.Y.S.2d 57, 58 (App. Div. 1st Dep't 1991) (holding that respondent failed to rebut the presumption where she was in attendance, but failed to show interest at the proceedings).

59. See, e.g., *In re TYanna M.*, 811 N.Y.S.2d 118, 119 (App. Div. 2d Dep't 2006); *In re Aniyah F.*, 788 N.Y.S.2d 119, 120-21 (App. Div. 2d Dep't 2004); *In re Infinite G.*, 783 N.Y.S.2d 656, 657 (App. Div. 2d Dep't 2004).

60. See, e.g., *In re Lauren B.*, 607 N.Y.S.2d 77, 78 (App. Div. 2d Dep't 1994); *In re Ruth McL.*, 528 N.Y.S.2d 385, 385 (App. Div. 1st Dep't 1988).

61. See, e.g., *In re Nyomi A.D.*, 783 N.Y.S.2d 596, 598 (App. Div. 2d Dep't 2004) (holding that parents were not responsible for child's injuries when they were not at home and child was in the care of babysitter when injured); *In re Kristen B.*, 724 N.Y.S.2d 303, 303 (App. Div. 1st Dep't 2001) (holding that parent rebutted presumption by showing that child was not in respondent's care when injured, and noting that neighbor who babysat for the child did not testify).

62. 714 N.Y.S.2d 557, 558 (App. Div. 3d Dep't 2000).



finding that the parents rebutted the presumption. The parents established that the babysitter had cared for the child during the period when his injuries occurred.<sup>63</sup> The Supreme Court, Appellate Division found that:

Although the child was also in his parents' care during the relevant time period, viewing the evidence as a whole and in consideration of the timing of the injuries and the finding that the child care provider abused the child, we conclude Family Court did not err in holding that petitioner failed to establish by a preponderance of the evidence that respondents abused Zachary, particularly in light of the fact that respondents repeatedly sought medical attention for their son.<sup>64</sup>

The parents rebutted the presumption of parental culpability by presenting evidence that clearly showed that their child care provider had abused their infant.

Respondents' cases are also strengthened by their ability to provide a reasonable, medically-sound, alternate explanation for the injuries present. Here, *In re A.G. & K.G., Jr.* is instructive.<sup>65</sup> In this case, the parents provided the court with persuasive medical evidence that demonstrated that their young child had acquired chlamydia perinatally, rather than through sexual abuse.<sup>66</sup> The court found that the explanation offered was substantiated by medical literature and "conceivable within a reasonable degree of medical certainty."<sup>67</sup> This explanation led the court to find that the parents had not sexually abused their child, and due to this finding, the court dismissed the petition against them.<sup>68</sup> In contrast, in the case of *In re Mathew D.*, the court found both parents abusive where they argued that their child suffered from *osteogenesis imperfecta*, a rare disease more commonly known as "brittle bone disease."<sup>69</sup> In this case, the medical testimony revealed that the child's fractures were

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63. *Id.* at 559-62.

64. *Id.* at 561.

65. N.Y. L.J., Jan. 13, 1992, at 25 (Fam. Ct. 1992).

66. *Id.* at 25-26.

67. *Id.* at 26.

68. *Id.*

69. 641 N.Y.S.2d 526, 527-31 (Fam. Ct. 1996).

suggestive of abuse, and no new fractures had appeared while the child was in the hospital or subsequently in his foster care placement.<sup>70</sup> Lastly, and most damaging to the parents' explanation, the child tested negative for the disease, leading both medical experts to discredit any possibility of the parents' explanation being true.<sup>71</sup> As these cases demonstrate, alternative explanations that are well-grounded medically and substantiated by the evidence presented greatly help rebut the presumption of parental responsibility. However, when the evidence does not support the alternative explanation in any way, the respondents' credibility diminishes quickly.

In sum, parents facing the statutory presumption found in section 1046(a)(ii) should: (A) be consistent and thorough in their explanations; (B) present expert testimony corroborating their explanation; (C) show that they were diligent in their efforts to seek medical treatment as soon as possible; (D) demonstrate that the child exhibits only a single injury with no other marks or bruises consistent with abuse or mistreatment; (E) exhibit an appropriate amount of emotion or concern at the fact-finding hearing; and, when possible, (F) provide an adequate and plausible alternative explanation for the injury, including the presence of an additional caretaker or a rare medical condition that would cause such injuries. If one or more of the six factors are missing, it is likely that the court will take notice and enter a finding of abuse or neglect.<sup>72</sup> The first three factors are perhaps the most crucial in determining whether the court will find that the respondent parents have met their burden of explanation.<sup>73</sup> Though the last three are also given

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70. *Id.* at 529.

71. *Id.* at 530. As noted in the case, the test "is 'only' 85% accurate." *Id.* The court weighed the accuracy of the test with the other evidence of abuse and found that the parents failed to rebut the presumption of parental responsibility. *Id.*

72. *See, e.g., In re Peter R.*, 779 N.Y.S.2d 137, 138-40 (App. Div. 2d Dep't 2004) (noting that parents did not timely seek medical treatment and that the mother's testimony contained "significant inconsistencies"); *In re Michael A.*, 560 N.Y.S.2d 559, 560 (App. Div. 4th Dep't 1990) (noting the presence of multiple injuries and bruises). *But see In re A.G. & K.G., Jr.*, N.Y. L.J., Jan. 13, 1992, at 25-26 (Fam. Ct. 1992) (dismissing petitions against both parents where court takes note of all six relevant factors).

73. *See, e.g., In re Daqwuan G.*, 814 N.Y.S.2d 723, 725 (App. Div. 2d Dep't 2006) (inconsistent account of events); Comm'r of Soc. Servs. of New York *ex rel.*

weight, they are less frequently cited in *res ipsa* abuse and neglect cases.<sup>74</sup> Because there are no uniform or standard criteria for applying the presumption, inconsistencies arise in its application. Therefore, in order to achieve more consistency, precision, and transparency in their decisions, family and supreme courts should rely on the factors more explicitly than they currently do.

### III. INCONSISTENCIES IN THE APPLICATION OF THE PRESUMPTION

One of the greatest problems with the application of the *res ipsa loquitur* doctrine in Article Ten proceedings is its inconsistent implementation. In a practice manual for law guardians, Gary Solomon explains:

Even assuming that the Legislature has achieved a fair balance of interests [between protecting children and preserving the family unit] in Article Ten, any lawyer who practices in Family Court will soon learn that, in a forum in which bureaucratic and judicial decision-making can be largely subjective, in practice Article Ten's provisions are only as fair and effective as the social services officials, lawyers and judges who interpret and implement them.<sup>75</sup>

This is particularly true in *res ipsa* cases of abuse or neglect, where the statutory presumption is applied inconsistently with respect to socio-economic status and families with multiple caretakers.

#### A. *Inconsistency with Regard to Socio-Economic Status*

In many cases, parents consult qualified child welfare

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Jullian L. v. Hyacinth L., 619 N.Y.S.2d 762, 763-64 (App. Div. 2d Dep't 1994) (expert medical testimony); *In re* C. Children, 616 N.Y.S.2d 644, 645 (App. Div. 2d Dep't 1994) (medical treatment not promptly sought); *In re* Shetonya W., 610 N.Y.S.2d 235, 236 (App. Div. 1st Dep't 1994) (expert medical testimony); *In re* Jacinta J., 529 N.Y.S.2d 661, 661-62 (App. Div. 4th Dep't 1988) (lack of consistent explanation).

74. See, e.g., *In re* F. Children, 577 N.Y.S.2d 57, 58 (App. Div. 1st Dep't 1991) (no emotion at fact-finding hearing); *In re* William W., Jr., 510 N.Y.S.2d 370, 371 (App. Div. 4th Dep't 1986) (injury that is indicative of abuse); *In re* Mathew D., 641 N.Y.S.2d 526, 527 (Fam. Ct. 1996) (plausible alternative explanation).

75. 1 SOLOMON, *supra* note 28, at 1.

attorneys and experienced medical experts in order to explain their child's injuries. Additionally, the standard of medical care and the time it takes to administer such care become important in *res ipsa* cases, because seeking adequate medical treatment is a factor that courts consider when deciding if parents' behavior is consistent with abuse or neglect. Ultimately, parents with more financial resources at their disposal have an advantage when trying to defend themselves against a claim of *res ipsa* abuse or neglect, because they have access to more qualified lawyers and medical experts, and better medical care. While it may be true that those with more resources have an advantage in most legal proceedings, it is especially true in *res ipsa* cases where parents must rebut a presumption of responsibility against them and where the standard of proof is a preponderance of the evidence.<sup>76</sup>

All respondents are guaranteed the effective representation of counsel at Article Ten proceedings,<sup>77</sup> but respondents who can afford well-trained and experienced attorneys may enjoy the additional benefits of a better defense and a lawyer with a smaller caseload.<sup>78</sup> Furthermore, parents with access to excellent medical care may be able to rebut the presumption with more ease than those without, because the court takes note of parental concern with respect to their child's injuries and, therefore, the standard and adequacy of the medical care administered. Parents lacking health insurance or other resources may not be able to obtain the same services as parents with health insurance. Most importantly, because parents rebutting the presumption often present expert medical testimony to the court, parents able to afford a "battle of the experts" are much more likely to rebut the presumption than those who lack this ability.<sup>79</sup>

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76. See N.Y. FAM. CT. ACT § 1046(b)(i) (McKinney Supp. 2008); see also *In re Philip M.*, 624 N.E.2d 168, 172 (N.Y. 1993).

77. N.Y. FAM. CT. ACT § 262(a)(i) (McKinney Supp. 2008); see, e.g., *In re Erin G.*, 527 N.Y.S.2d 488, 490 (App. Div. 2d Dep't 1988).

78. See Cynthia Feathers, *Julia BB: An Appellate Attorney's Perspective*, ALBANY COUNTY BAR ASS'N NEWSL. (Albany County Bar Ass'n, Albany, N.Y.), Jan. 2008, at 19 ("Another atypical aspect of the case was that the parents had retained superb private counsel at trial . . . . As middle-class professionals, the parents would not have qualified for assigned counsel.") (parentheses omitted).

79. See, e.g., *In re Madeline A.*, 866 N.Y.S.2d 150, 151 (App. Div. 1st Dep't

In the case of *In re BW*, the respondent parents retained their own counsel, obtained exceptional medical treatment immediately, and presented testimony from three highly qualified physicians.<sup>80</sup> In doing so, they were able to rebut the presumption against them. In his decision, Westchester Family Court Judge Spitz elaborated on the measures the family made to ensure the safety of their child, but in the process, he also revealed clues about their socio-economic status and access to resources. The child's father was a teacher in Westchester County, and the mother was a paralegal who, at the time, worked in Manhattan. While the child was represented by a court-appointed law guardian, the parents were able to hire private counsel.<sup>81</sup> Shortly after realizing that their baby was not well, the father called the child's doctor and then took the child to the emergency room. The mother went to work in Manhattan. However, when she discovered that her baby required a "lumbar puncture or spinal tap," she immediately "hired a private car to transport her from Manhattan" to the hospital.<sup>82</sup> The physician at the hospital later concluded that the child's injuries had resulted from shaken baby syndrome and alerted the local child protection agency.<sup>83</sup>

At the proceedings, a battle of the experts ensued. The Department of Social Services presented the testimony of

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2008) (finding that parents "presented no medical evidence of their own," despite their argument that the family court's "compensation directive for a neurologist's expert services was inadequate"); *In re C. Children*, 616 N.Y.S.2d 644, 645 (App. Div. 2d Dep't 1994) ("[M]other offered no medical evidence to rebut the testimony of the doctors."); *In re James P.*, 525 N.Y.S.2d 38, 40 (App. Div. 1st Dep't 1988) (noting that mother "offered no medical evidence to rebut the testimony of the doctors"); *In re Mathew D.*, 641 N.Y.S.2d 526, 528 (Fam. Ct. 1996) (noting that test to determine if child had brittle bone disease was "ultimately authorized at public expense"). *But see In re Julia BB.*, 837 N.Y.S.2d 398, 404-11 (App. Div. 3d Dep't 2007) (holding that child was not abused after six treating physicians testified and offered different theories for child's injuries); *In re Robert "YY."*, 605 N.Y.S.2d 418, 419-20 (App. Div. 3d Dep't 1993) (finding that parents rebutted the presumption where three different physicians testified and "[a]ll of the physicians who testified agreed that Robert's injury could have been caused accidentally").

80. N.Y. L.J., Sept. 14, 1995, at 32 (Fam. Ct. 1995).

81. *Id.*

82. *Id.*

83. *Id.*

two medical experts, a caseworker, a police officer, and the family's daycare providers, while the respondents presented the testimony of three different medical experts, in addition to the family's pediatrician.<sup>84</sup> Among the physicians testifying for the Department of Social Services were the ophthalmologist who evaluated the child and the neurosurgeon who performed surgery on the child. The court noted that the neurosurgeon in charge of the child's care was the Chief of Pediatric Neurosurgery at New York Medical College.<sup>85</sup> To refute their testimony, the respondent parents presented three expert witnesses: the Chief of Pediatric Neurology at St. Luke's Roosevelt Hospital Center, the Director of the Division of Pediatric Neurosurgery at Montefiore Medical Center, and an "Assistant Professor at Columbia University College of Physicians and Surgeons in the Department of Diagnostic Neuroradiology."<sup>86</sup> The court ultimately granted more weight and credibility to the respondent's experts, lauding their professional credentials.

The parents also used the child's access to exceptional medical care and the presence of a number of "protective devices" in their home to demonstrate their constant concern and dedication.<sup>87</sup> Judge Spitz observed that the child "received good neonatal and post natal care and had received all required vaccinations. The parents also used protective devices at home including gates, electrical outlet covers, and a sound monitoring system."<sup>88</sup> It is important to note, however, that these are tools utilized by parents who can afford them. Reading between the lines of this case, it seems apparent that the parents were able to rebut the presumption in part because they could afford to do so. They were able to afford to baby-proof their home, obtain immediate medical treatment for their child, retain private counsel, and engage in a battle of experts, which ultimately led to their legal victory. Parents unable to afford these services face scrutiny from the court, and therefore may be unable to rebut the presumption.

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84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

B. *The Problem of Multiple Caretakers*

The inconsistent application of the presumption becomes evident when analyzing cases in which multiple caregivers were present during the time period when the child sustained injuries. If a child is not always in the custody of a parent during the time period in question, that parent may still face a prima facie case of abuse. One family court held that the rule with respect to multiple caregivers is that “[i]f the child is primarily in the custody of the parent, during the critical period when the injury was sustained, the rule should apply, unless the parent proves that the injury occurred at a time when the child was not in his custody.”<sup>89</sup> This allows courts the discretion to find both parents abusive if they shared responsibility for the child during the critical time period, even if only one of them actually inflicted the injuries.<sup>90</sup> Consequently, the identity of the abuser does not need to be ascertained in order to hold both parents culpable.<sup>91</sup> Traditionally, this meant that all the caretakers responsible for the child within the critical time period were usually found abusive. Courts that were unable to discern conclusively which parent or caregiver was responsible for the child simply found that all of them were abusive or neglectful, unless they were able to prove otherwise.<sup>92</sup>

More recently, however, courts have not held parents or caregivers responsible in cases involving many different caregivers. This is because the involvement of a large number of caretakers alone acts to rebut the statutory presumption with regard to any particular caretaker. For

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89. *In re Tara H.*, 494 N.Y.S.2d 953, 958 (Fam. Ct. 1985); *see also In re Jessica Z.*, 515 N.Y.S.2d 370, 377 (Fam. Ct. 1987).

90. *In re Tara H.*, 494 N.Y.S.2d at 958.

91. *In re Ruth McL.*, 528 N.Y.S.2d 385, 385 (App. Div. 1st Dep’t 1988).

92. *See, e.g., In re Najam M.*, 648 N.Y.S.2d 559, 560-61 (App. Div. 1st Dep’t 1996) (finding that both parents abused daughter); *In re Tyeasia C.*, 641 N.Y.S.2d 673, 674 (App. Div. 1st Dep’t 1996) (finding that both mother and father abused daughter where child did not reside with father all the time); *In re Cynthia V.*, 462 N.Y.S.2d 721, 723 (App. Div. 2d Dep’t 1983) (finding that both mother and father neglected their children); *In re Ulster County Dep’t of Soc. Servs.*, 1995 WL 519189, at \*3, 6 (N.Y. Fam. Ct. Mar. 24, 1995) (noting that each parent denied blame, but finding child to have been abused and neglected by both parents).

example, in the case of *In re Ashley RR.*, the parents of two young sexually abused girls were not held responsible, because approximately forty different adults had access to the girls during the period in which they were abused.<sup>93</sup> The daughters were in the care of their maternal grandmother the majority of the time, but they were also exposed to her friends and family as well as daycare providers.<sup>94</sup> Similarly, in the case of *In re Tony B., Jr.*, the court held that the Erie County Department of Social Services had failed to establish a prima facie case of abuse against the caretakers.<sup>95</sup> Although the three-month-old child had a fractured skull, he had been in the care of many different people, including the respondents, in the forty-eight hours prior to his injury. The court dismissed the petition against the caretakers, because the agency failed to establish a case “against any particular person or persons.”<sup>96</sup>

While it is logical to not hold parents responsible for abuse when their children have been exposed to numerous caretakers, this rule is not applied consistently in the context of fewer caretakers. Sometimes when there are only a few caretakers, courts hold all possible caretakers responsible; however, sometimes they do not. This discrepancy is evident in recent cases. In the case of *In re Fantaysia L.*, the parents shared custody of their three-and-a-half-year-old daughter.<sup>97</sup> Although she frequently saw her father, who lived with his mother (the child’s paternal grandmother), the child primarily resided with her mother and stepfather. When the young girl contracted gonorrhea, the burden was on all four adults to provide an explanation that would rebut the presumption against them.<sup>98</sup> The court explained “[t]hat the evidence showed that the child could

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93. 816 N.Y.S.2d 580, 583-84 (App. Div. 3d Dep’t 2006).

94. *Id.* at 583.

95. 841 N.Y.S.2d 419, 419-20 (App. Div. 4th Dep’t 2007).

96. *Id.*; see also *Veronica C. v. Carrión*, 866 N.Y.S.2d 49, 50-51 (App. Div. 1st Dep’t 2008) (holding that child care provider and child’s parents acted as caretakers within the twenty-four hours prior to the diagnosis of child’s injury and thus, child protection agency failed to make prima facie case “against anyone in particular”).

97. 828 N.Y.S.2d 497, 499 (App. Div. 2d Dep’t 2007).

98. *Id.*



have contracted the disease in either household,” and that this “neither defeated the petitioner’s prima facie case nor precluded application of the doctrine of res ipsa loquitur.”<sup>99</sup> It would have been almost impossible for all four adults to explain the girl’s gonorrhea.

Yet, in a similar case, a family court used different reasoning altogether. In *Albany County Department for Children, Youth & Families v. Ana P.*, the victim was a three-year-old girl with gonorrhea.<sup>100</sup> After both her father and mother tested positive for the sexually transmitted disease, the Department for Children, Youth & Families filed a petition claiming that both parents were abusive.<sup>101</sup> However, after its medical expert “testified as to the unlikelihood of an adult female transmitting the disease to a three year old child in a sexual manner,” the Department conceded that the mother had not transmitted the disease to her daughter.<sup>102</sup> Nonetheless, it argued that based on the doctrine of res ipsa loquitur, the mother was responsible for her daughter’s abuse. The court refused to apply the doctrine to the mother, holding that the petitioner failed to meet its burden of proof with regard to her because she was not able to transmit the disease to her child.<sup>103</sup> The court also went a step further and held that the mother was not responsible, because the doctrine does not “extend to situations that would implicate a person based on a theory of facilitation, accessorial conduct or a failure to protect.”<sup>104</sup> This case is particularly remarkable due to the court’s refusal to extend the doctrine to charge the mother with child abuse. It is far more common that all caretakers are held responsible.<sup>105</sup>

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99. *Id.*

100. 827 N.Y.S.2d 525, 526 (Fam. Ct. 2006).

101. *Id.*

102. *Id.*

103. *Id.* at 528-29.

104. *Id.* at 528.

105. See, e.g., *In re Seamus K.*, 822 N.Y.S.2d 168, 171-72 (App. Div. 3d Dep’t 2006) (holding both parents responsible for abuse where numerous family members had access to child); *In re Keone J.*, 766 N.Y.S.2d 192, 193-94 (App. Div. 1st Dep’t 2003) (finding that mother, boyfriend, and father abused child where child visited with father, but was under mother’s care); *In re Najam M.*, 648 N.Y.S.2d 559, 560-61 (App. Div. 1st Dep’t 1996) (finding that both parents

As Professor Merrill Sobie explained, “In practice, when the case involves multiple respondents or others who may be guilty, the presumption may lead to apparently incongruous results. . . . The upshot is that several innocent parties along with the guilty party may become trapped by the presumption.”<sup>106</sup> In a rare but strong dissent in the case of *In re Seamus K.*, Justice Crew III argued that the presumption cannot fairly be extended to this degree without the finding being based “upon pure conjecture.”<sup>107</sup> He maintained that when a “number of individuals have access to the child during the relevant time period and it is equally likely that the underlying injuries could have been inflicted by any one of those individuals as the other, the presumption simply cannot be invoked.”<sup>108</sup> Nevertheless, courts have chosen to invoke the presumption when there are multiple caretakers and, in the process, they have failed to demonstrate consistency in their decisions.

#### IV. GREATER CONSEQUENCES OF THE APPLICATION OF THE RES IPSA PRESUMPTION AND THE RESULTING FINDINGS OF ABUSE AND NEGLECT

Parents face a number of challenges in cases where a child protection agency utilizes the *res ipsa loquitur* doctrine to prove abuse or neglect. Because the child welfare system “recognizes that the health and safety of children is of paramount importance,”<sup>109</sup> matters are necessarily resolved with the child’s best interests in mind. This ultimately means that respondents lack the protections granted to defendants in criminal proceedings. Ulster County Family Court Judge Mary M. Work articulated this best when she wrote:

[T]he respondents receive fewer procedural protections than in

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abused daughter); *In re Tyeasia C.*, 641 N.Y.S.2d 673, 674 (App. Div. 1st Dep’t 1996) (holding that both mother and father abused daughter where child did not reside with father all the time).

106. N.Y. FAM. CT. ACT § 1046 cmt. (McKinney Supp. 2008) (Prof. Merrill Sobie, Supplementary Practice Commentaries).

107. *In re Seamus K.*, 822 N.Y.S.2d at 175 (Crew III, J., concurring in part, dissenting in part).

108. *Id.*

109. N.Y. SOC. SERV. LAW § 384-b(1)(a) (McKinney Supp. 2008).

criminal proceedings where incarceration is a possibility. There is no right to jury trial. The standard of proof is preponderance of the evidence, not beyond a reasonable doubt. The right to confrontation is diluted by allowing the child's out-of-court statement to be received in evidence. The exclusionary rule does not apply in child protective proceedings. The most severe disposition available is placement of the child for one year with extensions of placement granted only if shown that the parents are likely to continue to abuse and neglect the child. The goal in Family Court is to protect the child and to rehabilitate, not punish, the parent.<sup>110</sup>

A fact-finding hearing in which the rules of evidence are relaxed and the standard of proof is weak places parents in a difficult situation. Furthermore, a subsequent finding of abuse or neglect stigmatizes parents with respect to future proceedings and often results in grave consequences.

*A. Consequences that Result from Testifying (or Failing to Testify) at the Fact-Finding Hearing*

If parents choose to testify at the fact-finding hearing, the court may find that their testimony is not credible and that their explanation is insufficient to rebut the presumption.<sup>111</sup> Additionally, parents may feel pressured to omit details of the incident or refrain from telling the truth, because they fear that they will implicate another family member or caretaker.<sup>112</sup> Even if parents testify that another

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110. *In re* Ulster County Dep't of Soc. Servs., 1995 WL 519189, at \*5 (N.Y. Fam. Ct. Mar. 24, 1995) (citations omitted); *see also* N.Y. FAM. CT. ACT § 1046(b)(i) (McKinney Supp. 2008); *In re* Tammie Z., 484 N.E.2d 1038, 1038-39 (N.Y. 1985).

111. *See, e.g., In re* Kortney C., 770 N.Y.S.2d 758, 759-60 (App. Div. 2d Dep't 2004) (noting that the medical expert's testimony contradicted the caregiver's explanation); *In re* Marc A., 754 N.Y.S.2d 45, 47 (App. Div. 2d Dep't 2003) (noting that the parents' explanations lacked credibility).

112. In the case of *In re Seamus K.*, the parents tried to rebut the presumption by showing that several family members had access to the child. The court noted, "at the hearing, respondents never specifically accused any particular adult family member of inflicting the injury." 822 N.Y.S.2d 168, 172 (App. Div. 3d Dep't 2006). Yet, there are many obvious reasons why parents would not accuse members of their extended family of abusing their child, i.e., parents may not feel comfortable throwing their extended family members under the proverbial bus to save their own family unit.

caretaker was responsible, they still may risk a finding of neglect or abuse, because they knew or should have known that the caretaker would place the child in danger, or because they failed to protect the child from harm.<sup>113</sup> Interestingly, if both parents decide to testify and each parent attempts to implicate the other, they both risk a finding of abuse or neglect. For instance, in the case of *In re Ulster County Department of Social Services*, both parents testified that they did not have “exclusive control” of the child and that neither had seen the other injure the child in any way.<sup>114</sup> Despite their testimony, the court held that:

Applying § 1046(a)(ii) against both parents and finding both guilty works a terrible hardship on an innocent parent as well as on the infant who may be denied the care and companionship of a fit parent. But the legislature believed the risk of returning a child to an abusive parent outweighed the burden on the innocent parent. In criminal law, a different value judgment has been applied: better the guilty go free than the innocent be convicted. In a criminal case analogous to this case, the Court of Appeals reversed the conviction of two caretakers accused of shaking a baby to death because the People had been unable to prove which had done the shaking.<sup>115</sup>

Yet, here the court found that the child had been abused and neglected by both parents, based on the theory

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113. See, e.g., N.Y. FAM. CT. ACT § 1012(e)(ii), (f)(i)(B) (McKinney Supp. 2008); *In re Dawn D.*, 612 N.Y.S.2d 215, 216 (App. Div. 2d Dep’t 1994) (holding that “even if [the mother] had not physically abused [the child], the court could have properly determined that she had failed to protect [her] from physical danger”); *In re Robert “YY,”* 605 N.Y.S.2d 418, 420 (App. Div. 3d Dep’t 1993) (holding that a parent may be responsible “for the abusive acts of another party, including those of the other parent, if he or she ‘knew or should reasonably have known’ that the child was in danger”).

114. 1995 WL 519189, at \*3; cf. *In re Dep’t of Soc. Servs.*, 612 N.Y.S.2d 217, 218 (App. Div. 2d Dep’t 1994) (discussing a situation where both parents blamed one another for placing child’s hands on burner).

115. *In re Ulster County Dep’t of Soc. Servs.*, 1995 WL 519189, at \*5. It is interesting to note that approximately three decades earlier, while reviewing the first case to apply the doctrine, *In re S*, George J. Alexander argued that parents essentially bear the burden of proving that they are innocent. He argued, “[w]hile one can sympathize with the court’s motive it seems doubtful that the situation is far different from criminal proceedings in which it would be equally expeditious to make a defendant exculpate himself.” George J. Alexander, 1965 *Survey of New York Law: Family Law*, 17 SYRACUSE L. REV. 318, 323 (1965).

that it is better to remove a child from the care of both parents, even if only one is potentially abusive, than to risk the possibility of further abuse.<sup>116</sup> Thus, parents are forced to defend themselves in a system that is largely skewed against them. It is justifiably skewed, however, in favor of safeguarding their children. Because the ultimate goal of protecting children is of extreme importance, parents must overcome harsh scrutiny from the court when testifying at Article Ten proceedings.

However, respondents who decide not to testify when trying to rebut the presumption of parental culpability are at great risk of a determination of abuse or neglect, because it is their burden to come forth with an explanation for their child's injuries. When respondents do not testify, the court is allowed to "draw the strongest inference against [them] that the opposing evidence in the record permits."<sup>117</sup> When a court possesses some evidence that a child was abused, and then takes note of the respondent's failure to testify, a negative inference against the respondent usually follows.<sup>118</sup> Of course, respondents are free to invoke their Fifth Amendment right against self-incrimination.<sup>119</sup> New York State courts have repeatedly held that the *res ipsa* presumption does not violate a respondent's Fifth Amendment right against self-incrimination because the decision to testify "is a tactical, not a compelled one," where the presumption may be rebutted in alternate ways and by presenting additional evidence.<sup>120</sup> Nonetheless, courts will

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116. *In re Ulster County Dep't of Soc. Servs.*, 1995 WL 519189, at \*5-6.

117. *Comm'r of Soc. Servs. v. Philip De G.*, 450 N.E.2d 681, 683 (N.Y. 1983). There are many cases that utilize this inference. *See, e.g., In re Jasmine A.*, 795 N.Y.S.2d 87, 89 (App. Div. 2d Dep't 2005); *In re Randy V.*, 786 N.Y.S.2d 823, 825 (App. Div. 3d Dep't 2004) (quoting *In re Megan G.*, 737 N.Y.S.2d 684, 687 (App. Div. 3d Dep't 2002)); *In re Themika V.*, 613 N.Y.S.2d 708, 709 (App. Div. 2d Dep't 1994).

118. *See, e.g., Nassau County Dep't of Soc. Servs. ex rel. Dante M. v. Denise J.*, 661 N.E.2d 138, 141 (N.Y. 1995); *In re Jasmine A.*, 795 N.Y.S.2d at 89; *In re Randy V.*, 786 N.Y.S.2d at 825; *In re Ashley M.*, 653 N.Y.S.2d 163, 164 (App. Div. 3d Dep't 1997).

119. *In re Fred S.*, 322 N.Y.S.2d 170, 177 (Fam. Ct. 1971).

120. *In re Roman*, 405 N.Y.S.2d 899, 904 (Fam. Ct. 1978). *See also* William Wesley Patton, *Rethinking the Privilege Against Self-Incrimination in Child Abuse Dependency Proceedings: Might Parents Be Their Own Worst Witnesses?*, 11 U.C. DAVIS J. JUV. L. & POL'Y 101, 145 (2007). The *res ipsa* presumption has also been challenged on other constitutional grounds. New York State courts

still penalize parents who choose to invoke their right against self-incrimination. As the court in the case of *In re Fred S.* held, "Silence is not always golden. . . . The respondents have a right to stand mute. If they do so, however, . . . they run the great risk of having the prima facie case established . . . against them with finality, particularly as in most cases of this nature, there are no outside witnesses."<sup>121</sup> It seems, therefore, that any ambiguity about parental culpability means that parents are damned if they do testify, and damned if they do not testify: in the former case they face an almost irrebuttable presumption of culpability, and in the latter they face the strongest inference against them.<sup>122</sup>

B. *Consequences that Result from a Subsequent Finding of Abuse or Neglect*

Once a court has entered a finding of abuse or neglect against a parent, many other negative consequences may flow from that decision. A finding of abuse or neglect "constitutes a permanent, and significant, stigma . . . [that] might indirectly affect [a parent's] status in potential future proceedings."<sup>123</sup> This is particularly true with regard to

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have repeatedly upheld the constitutionality of the res ipsa presumption. *See, e.g., In re Christopher Anthony M.*, 848 N.Y.S.2d 711, 714 (App. Div. 2d Dep't 2007) (holding that respondent father's assertion that section 1046(a)(ii) was unconstitutional was academic because father was able to rebut the presumption); *In re Vance A.*, 432 N.Y.S.2d 137, 141-42 (Fam. Ct. 1980) (finding that although deciding whether to testify at an Article Ten proceeding presents a parent with a difficult choice, imposing this choice is not a violation of the Fifth Amendment privilege against self-incrimination); *In re J.R.*, 386 N.Y.S.2d 774, 780 (Fam. Ct. 1976) (finding that rebuttable presumptions like the one found in section 1046(a)(ii) do not violate the Fourteenth Amendment).

121. *In re Fred S.*, 322 N.Y.S.2d at 178.

122. The issue of self-incrimination becomes increasingly important for parents facing criminal charges as well as an Article Ten proceeding. To avoid issues of self-incrimination, Article Ten allows for concurrent trials. Additionally, family courts have the discretion to grant testimonial immunity in any subsequent criminal proceedings. Parents are not always granted concurrent trials or testimonial immunity, however, and are often forced to choose between presenting a complete defense or having their testimony used against them in criminal proceedings. If they do choose to testify, their statements in family court are admissible and discoverable in criminal court. If they choose not to testify, they face the strongest inference against them in family court. *See id.* at 175-76; 1 SOLOMON, *supra* note 28, at 212-13.

123. *In re H. Children*, 548 N.Y.S.2d 586, 587 (App. Div. 2d Dep't 1989); *see*

derivative findings of neglect or abuse. In an Article Ten hearing, evidence that proves abuse or neglect of one child is admissible in determining whether other children under the parent's care were abused or neglected.<sup>124</sup> Once a court determines that one child was abused or neglected, that evidence often leads to derivative findings of neglect or abuse for other children under that parent's care.<sup>125</sup> It is extremely likely that a derivative finding will be made even when there is no evidence that a second child has been harmed, because "a derivative finding of neglect [or abuse] should be made where the evidence as to the directly abused or neglected child demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in their care."<sup>126</sup>

In some cases, parents who had previously attempted to rebut the presumption by vehemently denying the abuse are later required to admit to the abuse in order to successfully undergo and complete treatment for their behavior, and eventually obtain custody of their children or visitation rights. In other words, in some cases, once the court enters a finding of abuse, parents who had previously denied responsibility for the child's injuries must accept responsibility for those injuries so that they may prove that they have learned from, and made efforts to overcome, such acts; only then will they regain custody of their children. *In re Ashley M.* is illustrative.<sup>127</sup> By presenting the daughter's out-of-court statements in addition to validating expert

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also *In re Jason S.*, 826 N.Y.S.2d 744, 745 (App. Div. 2d Dep't 2007); *In re Daqwuan G.*, 814 N.Y.S.2d 723, 725 (App. Div. 2d Dep't 2006).

124. N.Y. FAM. CT. ACT § 1046(a)(i) (McKinney Supp. 2008).

125. See, e.g., *In re Sidney FF.*, 844 N.Y.S.2d 453, 454-55 (App. Div. 3d Dep't 2007); *In re Quincy Y.*, 714 N.Y.S.2d 293, 294-95 (App. Div. 1st Dep't 2000); New York City Dep't of Soc. Servs. *ex rel.* H. and J. Children v. Carmen J., 619 N.Y.S.2d 65, 67 (App. Div. 2d Dep't 1994); *In re Edwards*, 335 N.Y.S.2d 575, 577-78, 582 (Fam. Ct. 1972). Cf. *In re Kadiatou B.*, 861 N.Y.S.2d 20, 20-21 (App. Div. 1st Dep't 2008) (affirming the dismissal of a derivative neglect petition against parents where underlying findings of abuse were "remote in time" and "reached solely on the basis of the legal construct *res ipsa loquitur*").

126. *In re Dutchess County Dep't of Soc. Servs.*, 661 N.Y.S.2d 670, 671 (App. Div. 2d Dep't 1997); see also *In re F. Children*, 707 N.Y.S.2d 32, 33 (App. Div. 1st Dep't 2000); *In re Vincent M.*, 597 N.Y.S.2d 309, 314 (App. Div. 1st Dep't 1993).

127. 683 N.Y.S.2d 304 (App. Div. 3d Dep't 1998); 653 N.Y.S.2d 163 (App. Div. 3d Dep't 1997).

testimony, the Chemung County Department of Social Services established that a father had sexually abused his daughter.<sup>128</sup> The father then attempted to rebut the *res ipsa* presumption by showing that there was “no medical or physical evidence of abuse” and that the claims against him “may have emanated from his wife’s antipathy towards him.”<sup>129</sup> The family court, however, found that he had sexually abused his three-year-old daughter.<sup>130</sup> Noting that he failed to testify, the Supreme Court, Appellate Division affirmed the family court’s decision, and thereby found that it was permitted to make the strongest negative inference against the father allowed by the opposing evidence.<sup>131</sup> A dispositional order was then entered requiring the father to complete a sexual offender treatment program.<sup>132</sup> According to the Appellate Division:

[The father] attended all of the program’s sessions and completed the homework assignments, [but] he refused to take responsibility for his behavior by admitting that he sexually abused his daughter. As a consequence, he was terminated from the program since, without such an acknowledgment, treatment efforts could not be successful. . . . Following an evidentiary hearing, Family Court found that respondent had willfully violated the order of disposition by not successfully completing the program and sentenced him to a six-month jail term.<sup>133</sup>

On appeal, the father argued that he did not want to acknowledge that he abused his daughter because he was protected by his right against self-incrimination.<sup>134</sup> The court rejected this argument, however, citing the therapeutic nature of the program and finding that the right against self-incrimination only protects one from the actual possibility of criminal prosecution.<sup>135</sup> In other cases,

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128. *In re Ashley M.*, 653 N.Y.S.2d at 164.

129. *Id.* at 165.

130. *Id.* at 164.

131. *Id.* at 164-65.

132. *In re Ashley M.*, 683 N.Y.S.2d at 304.

133. *Id.* at 304-05.

134. *Id.* at 305.

135. *Id.*; see also *In re Kristi “AA,”* 742 N.Y.S.2d 920, 921 (App. Div. 3d Dep’t 2002) (affirming family court’s finding “that respondent had willfully violated its order of disposition and sentenced him to a six-month jail sentence” because



courts have cited a parent's denial of, or inability to take responsibility for, their child's injuries as a reason to keep the child in foster care.<sup>136</sup>

While accepting responsibility for abuse may be the best way to begin treatment for abusive parents, this seems somewhat problematic. Parents attempting to rebut the *res ipsa* presumption maintain their innocence during the fact-finding hearing. However, once the court enters a finding of abuse or neglect, those same parents must then shift tactics and follow a dispositional order, which may involve engaging in treatment programs that require them to openly admit to wrongdoing. If parents fail to admit to wrongdoing, they risk extending their children's foster care placement, and subsequently risk the termination of their parental rights. If a child has been in foster care for fifteen of the past twenty-two months, the child protection agency is required to file a petition to terminate parental rights, unless: (1) the child is in the care of a relative; (2) there are compelling reasons otherwise; or (3) the agency has not provided the parents with the necessary services to ensure the safe return of the child to their care.<sup>137</sup> Thus, a failure to quickly admit to wrongdoing as part of a dispositional order could lead to the filing of a petition to terminate parental rights.

The negative consequences that flow from the application of the *res ipsa* presumption place parents who attempt to defend themselves against claims of abuse or neglect under harsh scrutiny. Parents who fail to testify face the strongest negative inference against them and an almost irrebuttable presumption of parental culpability as they struggle to navigate a child welfare system that is largely skewed in favor of protecting their children. Yet it is

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he refused to sign a contract admitting that he was a sexual offender, and thus failed to complete the sex offender program required by the order of disposition); Gary Solomon, "*Res Ipsa*" Presumption of Abuse or Neglect: Legal Background, in TENTH ANNUAL CHILDREN'S LAW INSTITUTE 63, 73-75 (2007).

136. See, e.g., *In re F. Children*, 707 N.Y.S.2d 32, 33-34 (App. Div. 1st Dep't 2000); *In re Theone McR.*, 657 N.Y.S.2d 707, 707 (App. Div. 1st Dep't 1997); *In re Tanya M.*, 616 N.Y.S.2d 45, 45 (App. Div. 1st Dep't 1994).

137. N.Y. SOC. SERV. LAW § 384-b(3)(d)(i) (McKinney Supp. 2008). Presumably in this situation, the agency has already provided services to the parents, but the parents have failed to properly participate in those services, perhaps by failing to admit responsibility for their actions.

not enough to focus solely on the burden that the presumption places upon parents. The burden felt by parents to overcome the *res ipsa* presumption against them ultimately places a harsher burden on their children. It is the children that bear the weight of any disposition, so it is imperative that courts make accurate findings before arriving at their dispositions. When placing a child in foster care for up to a year—a common Article Ten disposition<sup>138</sup>—there is no room for error: unnecessarily removing a child from a loving and stable home is damaging, while leaving a child in an abusive home may be fatal.<sup>139</sup> Most importantly, it is the child that suffers while languishing in foster care.<sup>140</sup>

#### V. PROPOSALS FOR CHANGE

During a House of Commons speech, Winston Churchill stated that “democracy is the worst form of government, except all those other forms that have been tried from time to time.”<sup>141</sup> This quote seems particularly pertinent when applied to the *res ipsa* presumption. Indeed, in a world where infants sustain fractured skulls and toddlers contract gonorrhea, a presumption of parental culpability is a necessary evil.<sup>142</sup> However, the *res ipsa* presumption is problematic at best and inefficient, inconsistent, and unjust at worst. Yet, the court’s appropriation of the doctrine from negligence law was motivated by the need to protect

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138. See, e.g., *In re* Damen M., 765 N.Y.S.2d 347, 348 (App. Div. 1st Dep’t 2003); *In re* Sharonda S., 752 N.Y.S.2d 898, 898-99 (App. Div. 2d Dep’t 2003); *In re* Tevon C., 720 N.Y.S.2d 178, 178 (App. Div. 2d Dep’t 2001); *In re* Tyeasia C., 641 N.Y.S.2d 673, 673 (App. Div. 1st Dep’t 1996); *In re* Shetonya W., 610 N.Y.S.2d 235, 236 (App. Div. 1st Dep’t 1994).

139. See 1 SOLOMON, *supra* note 28, at 3-4.

140. In 2003, the median length of stay in foster care in New York was twenty-eight months. U.S. DEP’T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, Child Welfare Outcomes 2003: Annual Report, Ch. VI. State Data Pages, New York, [http://www.acf.hhs.gov/programs/cb/pubs/cwo03/state\\_data/newyork.htm](http://www.acf.hhs.gov/programs/cb/pubs/cwo03/state_data/newyork.htm).

141. Richard Rose & William Mishler, *Testing the Churchill Hypothesis: Popular Support for Democracy and Its Alternatives*, 16 J. PUB. POL’Y 29, 31 (1996) (quoting 444 PARL. DEB., H.C. (5th ser.) (1947) 206-07).

142. See *In re* Tony B., Jr., 841 N.Y.S.2d 419 (App. Div. 4th Dep’t 2007) (fractured skull); *In re* Fantaysia L., 828 N.Y.S.2d 497 (App. Div. 2d Dep’t 2007) (gonorrhea).

children abused behind closed doors in the absence of conclusive proof.<sup>143</sup> Although the *res ipsa* presumption is difficult to rebut, and it is applied inconsistently and unfairly, it is the best possible option for dealing with a horrific social problem. Nonetheless, some reforms should be implemented to ensure that the doctrine is applied more consistently and fairly.

A. *Allow Parents to Refrain from Testifying Without Drawing a Negative Inference*

In an Article Ten proceeding, the respondent lacks protections afforded in criminal proceedings. Whereas incarceration is a possibility in criminal proceedings, in Article Ten proceedings the worst possible disposition is placement of the child in foster care for one year with extensions granted only if parents are still a risk to the child. The goal of family court is the rehabilitation, rather than the punishment, of the parent, with the hopes of preserving the family unit.<sup>144</sup> For this reason, the standard of proof is weaker and the rules of evidence are more flexible in Article Ten proceedings than in criminal proceedings.<sup>145</sup> The lack of protections granted to parents biases the proceedings in favor of the court's conception of what is in the best interests of the child, and consequently, against parental rights.

Currently, respondents who decide not to testify may invoke their Fifth Amendment right against self-incrimination; however, the court may then draw the strongest negative inference against them that the opposing evidence allows.<sup>146</sup> Courts penalize parents twice for failing to testify—first, because the court will consider their failure to testify when determining whether the parent has provided a consistent and plausible explanation for the child's injuries, and second, because then the court may draw the strongest negative inference from that silence. Granting parents the right to testify without drawing this

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143. See *In re S*, 259 N.Y.S.2d 164, 164-65 (Fam. Ct. 1965).

144. *In re Ulster County Dep't of Soc. Servs.*, 1995 WL 519189, at \*5 (N.Y. Fam. Ct. Mar. 24, 1995).

145. See N.Y. FAM. CT. ACT § 1046 (McKinney Supp. 2008).

146. See *supra* notes 117-22 and accompanying text.

inference would be a small concession that would still allow the system to favor children's best interests. Ultimately, the court would still consider whether or not the parent explained the injuries—a burden that obviously cannot be met as readily in the absence of testimony from the parent. However, changing the automatic negative inference would allow parents to remain silent as to their culpability without risking a finding of abuse or neglect based largely on their failure to testify. It would also prevent parents from implicating themselves if they refuse to testify for fear of implicating another family member.<sup>147</sup>

B. *Establish County Funds for Indigent Parents to Utilize When Attempting to Rebut the Presumption*

Parents who are better equipped to hire experts, retain private counsel, and obtain medical treatment for their children are better equipped to rebut the presumption. It is difficult to overcome this inconsistency, because it is inherent and mirrored in society. Parents who are better able to provide for their children are traditionally viewed as better parents. Therefore, it is not surprising that parents of a higher socio-economic status may be able to rebut the presumption more easily than their indigent counterparts. This bias is reflected in Article Ten proceedings, where:

anomalous results, and a certain measure of unfairness, seem unavoidable. Whenever a caseworker decides to remove a child or allow the child to remain at home, or a judge endorses that decision, personal views concerning child rearing, as well as subjective or biased impressions of the parent, can contaminate the decision-making process. Concededly, the same flaws exist in any bureaucracy or court system. However, given the compelling liberty interests involved in an Article Ten proceeding, the penalties for human error are rarely as severe.<sup>148</sup>

Because there are compelling liberty interests involved, namely, the possibility of placing a child in foster care or the termination of parental rights, there should be some additional support for indigent parents attempting to rebut the *res ipsa* presumption. Moreover, in an Article Ten

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147. See *supra* notes 112-16 and accompanying text.

148. 1 SOLOMON, *supra* note 28, at 3.

proceeding, the consequences of an unsound decision are severe. Courts must weigh the possibility of an unwarranted placement in foster care, and the subsequent termination of parental rights, against the possibility of returning the child to a violent, neglectful, and dysfunctional home. Family courts, therefore, have an obligation to make the most accurate determination possible with regard to the child's future placement in foster care or his own home.<sup>149</sup>

Ideally, counties should establish or increase funds for parents seeking to hire medical experts to testify at fact-finding hearings as well as increase funds to county legal aid societies willing to defend parents.<sup>150</sup> These funds may also be used to test for illnesses which would rule out child abuse. For example, in cases of alleged shaken baby syndrome, parents may use county funding for a test for *osteogenesis imperfecta* or "brittle bone disease."<sup>151</sup> Additionally, in rare cases, when it is difficult to determine which parties and witnesses are the most credible, the court may utilize funds to hire its own independent medical experts.<sup>152</sup> These funds would not correct the problems that indigent parents face at Article Ten proceedings or the inconsistencies in the application of the law, but they would be a step towards leveling the playing field.<sup>153</sup>

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149. See *In re Ruth McL.*, 528 N.Y.S.2d 385, 385-86 (App. Div. 1st Dep't 1988); *In re Valerie Leonice T.*, 487 N.Y.S.2d 10, 12 (App. Div. 1st Dep't 1985); *In re Ulster County Dep't of Soc. Servs.*, 1995 WL 519189, at \*5.

150. Telephone Interview with Margaret A. Burt, Esq., Child Welfare Attorney (Feb. 19, 2008).

151. See, e.g., *In re Mathew D.*, 641 N.Y.S.2d 526, 528 (Fam. Ct. 1996) (noting that the test to determine if the child had brittle bone disease was "ultimately authorized at public expense").

152. See, e.g., *In re Peter R.*, 779 N.Y.S.2d 137, 139 (App. Div. 2d Dep't 2004) (indicating that the family court called a medical specialist to testify as its own independent witness).

153. See *Recommendations and Solutions Proposed by Child Welfare Watch*, CHILD WELFARE WATCH, Winter 2005-06, at 3, reprinted in TENTH ANNUAL CHILDREN'S LAW INSTITUTE 81-82 (2007).

C. *Develop and Consistently Apply New Rules with Respect to Utilizing the Presumption When There Are Multiple Caretakers*

Due to the rising divorce rates, the frequent presence of both parents in the workforce, and the evolution of the family in the United States, it is inevitable that more and more children will have numerous caretakers throughout their childhoods. Courts have applied the presumption in an inconsistent manner with respect to cases that involve multiple caretakers.<sup>154</sup> New York State family courts and appellate courts should apply Justice Crew III's rule from *In re Seamus K.*<sup>155</sup> In his opinion, Justice Crew III argued that when several people have access to the injured child during the critical period and "it is equally likely that the underlying injuries could have been inflicted by any one of those individuals as the other, the presumption simply cannot be invoked."<sup>156</sup>

In cases in which many people had access to the child, Justice Crew III's rule is particularly easy to apply because the sheer number of caretakers involved acts to discredit the use of the presumption, or alternatively, to consider the presumption immediately rebutted.<sup>157</sup> Conversely, when there are four or fewer caretakers, application of Justice Crew III's rule becomes slightly more difficult. In cases in which there are only a few caretakers, the presumption should be applied. However, in such cases, the court should make every attempt to "extinguish" the presumption with respect to caretakers who could not possibly have abused the child.<sup>158</sup> All ambiguities should be resolved in favor of

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154. See *supra* Part III.B.

155. 822 N.Y.S.2d 168, 175 (App. Div. 3d Dep't 2006) (Crew III, J., concurring in part, dissenting in part).

156. *Id.*

157. See, e.g., *In re Tony B., Jr.*, 841 N.Y.S.2d 419, 420 (App. Div. 4th Dep't 2007) (holding that the petitioners failed to make a prima facie case "against any particular person or persons," because several people cared for the child in the forty-eight hours preceding the diagnosis of his injuries); *In re Ashley RR.*, 816 N.Y.S.2d 580, 583 (App. Div. 3d Dep't 2006) (finding the presumption rebutted where forty adults had access to children who had been sexually abused).

158. See, e.g., *Albany County Dep't for Children, Youth & Families v. Ana P.*, 827 N.Y.S.2d 525, 526-27 (Fam. Ct. 2006) (holding that the "res ipsa

applying the presumption. That is, in the face of ambiguity, parents should be held to providing an explanation for their children's injuries. As the family court in the case of *In re Tara H.* held, "[i]t is always possible that someone other than the parent inflicted the injury."<sup>159</sup> Yet it is better to cloak several caretakers in the presumption than to risk exposing the child to danger.

D. *Integrate the Six Factors That Courts Consider In Res Ipsa Cases Into Case Law*

As discussed in Part II above, family and appellate courts consider six factors when deciding whether a parent has rebutted the presumption of parental culpability.<sup>160</sup> If a court recognized these factors explicitly in a decision, then they will be integrated into the relevant case law. By integrating these factors into the law, courts will be able to apply the statutory presumption with more consistency. When a res ipsa case of abuse or neglect comes before a family court, the court may simply consider each of the factors, as well as any other evidence before it, to help determine whether the parent has rebutted the presumption.

Once the factors are integrated into the case law, courts will decide each res ipsa case before them by evaluating the factors, and ideally, will achieve greater uniformity in their decisions. The six factors need not be exclusive, but should serve as the main criteria for a finding of abuse or neglect in res ipsa cases. Furthermore, when parents are trying to rebut the presumption against them, they may look to the factors for concrete criteria on the statutory presumption. If the factors are explicitly integrated into case law, parents will know what judges consider when faced with a res ipsa claim of abuse or neglect. They will have a better understanding of what is required of them when they attempt to rebut the presumption of culpability. This will force courts to be more transparent and precise in their application of the doctrine.

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presumption ha[d] been extinguished as to the mother" after the court found that it was unlikely that she transmitted gonorrhea to her young daughter in a sexual manner).

159. 494 N.Y.S.2d 953, 958 (Fam. Ct. 1985).

160. See *supra* Part II.

On the balance, the *res ipsa loquitur* presumption codified in section 1046(a)(ii) of the Family Court Act is a necessary evil that provides judges with the ability to make common sense inferences in order to ensure the safety of the children before them. It is biased against parents, but only to the extent that the child's best interests are protected and considered paramount.<sup>161</sup> In 1971, a year after the law was codified, the court in the case of *In re Fred S.*<sup>162</sup> held that Article Ten:

does not require a legal straight jacket where all the evidence must fit into predetermined slots of minute exactitude. No branch of the law is a perfect science. The statute should not prescribe the rights of society, angrily offended by increases in child abuse and neglect. This (Article 10 of the Family Court Act) is an enlightened law for the great and more effective protection of children, their health, safety and welfare. It is not a vehicle for recrimination against parents or their constitutional rights.<sup>163</sup>

Indeed, Article Ten of the Family Court Act balances the right of the child to a stable home, free from the threat of violence and harm, with the right of the parents to raise their children as they see fit.<sup>164</sup> It should not be altered, but rather applied more consistently. The proposals outlined above provide a starting point for reform of the statutory presumption's application. Allowing parents to testify without drawing a strong negative inference is a small concession. It would allow a parent to avoid a finding of abuse based largely on his or her failure to testify, but it would also allow family courts to continue to weigh all of the evidence before them, including a parent's failure to present a consistent account of the events that led to the child's injury. Additionally, creating county funds for indigent parents to utilize when trying to rebut the presumption, developing concrete rules with regard to children in the custody of multiple caretakers, and integrating the six factors that courts invoke in their decisions into case law, are steps towards achieving a higher level of uniformity, transparency, and consistency

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161. See N.Y. SOC. SERV. LAW § 384-b(1)(a) (McKinney Supp. 2008).

162. 322 N.Y.S.2d 170 (Fam. Ct. 1971).

163. *Id.* at 182-83.

164. 1 SOLOMON, *supra* note 28, at 3.



than is currently achieved.

#### CONCLUSION

Valerie Leonice T.'s body was covered in bruises, cuts, belt marks, and cigarette burns.<sup>165</sup> Although she was only five years old, she revealed that her uncle had raped her in the past.<sup>166</sup> Her mother, Joyce T., was arrested for endangering Valerie's welfare and sentenced to probation.<sup>167</sup> She subsequently faced an Article Ten proceeding regarding her daughter's injuries.<sup>168</sup> The court in this case noted, "It appears that the mother has had a long history of psychiatric problems, having been in foster care almost since birth. At the age of 15, while [Joyce] was living with her mother, she was sexually abused by her mother's boyfriend, resulting in the birth of Valerie . . . ."<sup>169</sup> In the case of *In re Valerie Leonice T.*, it is apparent that Valerie and Joyce's lives are guided by the indelible imprint of sexual abuse, physical beatings, and a series of negative interactions with the foster care system. In applying the *res ipsa* doctrine, the court had to decide whether it was better for Valerie to remain in foster care or to return to Joyce's dysfunctional and abusive home.<sup>170</sup> Either way, she risked following in her mother's unfortunate footsteps. The court stated, "Clearly, the paramount concerns are the best interests and welfare of the child, which required the court to take into account the potential threat to the child's health and safety."<sup>171</sup> Although this case involved particularly egregious injuries and circumstances, it exemplifies the core problem in applying the *res ipsa* doctrine. The problem is one of balancing the safety interests of the child with parental rights.

While it is extremely difficult for parents to rebut the *res ipsa* presumption, and although numerous negative

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165. *In re Valerie Leonice T.*, 487 N.Y.S.2d 10, 11 (App. Div. 1st Dep't 1985).

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *See id.* at 12.

171. *Id.*

consequences arise in the application of the presumption, it is a sound and justifiable policy in a horrific and difficult area of law. There is a delicate balance between the state, the protection of the child, and parental rights in child welfare law.<sup>172</sup> The *res ipsa* presumption attempts to maintain that balance statutorily by assuming that parents are responsible for their children's unexplained and severe injuries, because ultimately, "the State's interest in protecting abused children and the unthinkable consequences to the children if they are left in the hands of abusive parents far outweigh the potential consequences to the parents."<sup>173</sup> Thus, although there is a balance, the protection of children remains the supreme goal in Article Ten proceedings.

Reforms should be made to the rule to ensure the consistency of its application; however, the presumption itself should remain intact. Because victims of severe child abuse are often non-verbal, young, impressionable, and unable to seek medical treatment on their own, invoking the presumption is the only possible way that a court may hold parents responsible for the abuse their children have suffered. Therefore, the presumption is crucial to the adjudication of child abuse and neglect cases, in light of the presence of egregious physical or sexual abuse and a lack of information about the perpetrator. Still, the inconsistent application of the doctrine has produced "incongruous results" with respect to the factors considered in the court's decision to establish a finding of abuse, socio-economic status, and among families with multiple caretakers, even within the same judicial department.<sup>174</sup> The goal now is to create a more cohesive approach to applying the doctrine throughout New York State, because although the doctrine greatly affects parents and governs parental rights, the real victims of a poorly applied rule are New York's children.

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172. Susan Vivian Mangold, *Challenging the Parent-Child-State Triangle in Public Family Law: The Importance of Private Providers in the Dependency System*, 47 BUFF. L. REV. 1397, 1397-98 (1999).

173. *In re Diane P.*, 494 N.Y.S.2d 881, 885 (App. Div. 2d Dep't 1985).

174. See N.Y. FAM. CT. ACT § 1046 cmt. (McKinney Supp. 2008) (Prof. Merrill Sobie, Supplementary Practice Commentaries).