

# ACCIDENTS HAPPEN: EXPOSING FALLACIES IN CHILD PROTECTION ABUSE CASES AND REUNITING FAMILIES THROUGH AGGRESSIVE LITIGATION

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## INTRODUCTION

In New York City, much-needed critical attention has been paid to the racial disproportionality and overreach of the city’s child welfare system, the Administration for Children’s Services (“ACS”), and its conflation of poverty with neglect.<sup>1</sup> The vast majority of child protection cases

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<sup>1</sup> See, e.g., Rachel Aviv, *Where Is Your Mother? A Woman’s Fight to Keep Her Child*, NEW YORKER (Dec. 2, 2013), <https://perma.cc/7FXR-93WS> (revealing that a single mother who left her son home alone for lack of childcare lost custody of her child); Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of ‘Jane Crow,’* N.Y. TIMES (July 21, 2017), <https://perma.cc/6A3T-WPLH> (discussing the negative long-term impacts of the foster care system); Jessica Horan-Block, Opinion, *A Child Bumps Her Head. What Happens Next Depends on Race.*, N.Y. TIMES (Aug. 24, 2019), <https://perma.cc/HB5N-JFLE>; Emma S. Ketteringham, Opinion, *Live in a Poor Neighborhood? Better Be a Perfect Parent*, N.Y. TIMES (Aug. 22, 2017), <https://perma.cc/9N9W-JK3R> (“The problem is not that child services fails to remove enough children. It’s that the agency has not been equipped to address the daily manifestations of economic and racial inequality. Instead, it is designed to treat structural failings as the personal flaws of low-income parents.”); Yasmeen Khan, *Family Separations in Our Midst*, WNYC (Apr. 17, 2019), <https://perma.cc/22LL-TNX8> (discussing emergency removals in New York City child neglect cases).

brought in New York City allege child neglect rather than abuse.<sup>2</sup> This article explores the proportionally smaller category of cases brought with the most severe physical abuse allegations, cases in which ACS is often seen to be most justified in removing and separating children from their families. As The Bronx Defenders Family Defense Practice has developed and evolved over its ten years in existence, we have found that early litigation exposes the fact that, much like elsewhere in child protective law, these serious physical abuse cases are often based on misperceptions and are susceptible to both mistake and overreach.

The mere existence of a fracture, head trauma, or other serious injury in a young child or infant that cannot be explained, even without additional evidence of an intentional act, can trigger civil child abuse allegations, tear apart a family, and stigmatize a parent as an “abuser.” In the context of public defense, where the vast majority of parents represented are low-income people of color, whose parent-child bonds are largely devalued, the severity of an accusation alone can mean long-protracted family separation and, in some cases, the permanent dissolution of a family.

Head trauma and “unexplained fracture” allegations seem medically complicated and unassailable when they include a diagnosis of abuse by a medical professional. A parent defender’s understandable first reaction may be that the case is unwinnable, indefensible, or that a parent faced with these charges may never get their children home. A common response is to resolve the case as expeditiously as possible without challenging the allegations.

In many cases, however, injuries labeled as “unexplained” may be the result of accidents simply unwitnessed by the parents, events not fully understood or believed by medical professionals due to bias, the result of a natural disease process or, in some cases, the injuries may not exist as pled. In our experience in The Bronx Defenders Family Defense Practice, employing aggressive and early litigation in abuse cases, in conjunction with holistic client advocacy by parent advocates and social workers, has more than halved the amount of time families are separated.<sup>3</sup> By immediately demanding proof of abuse or medical evidence that substantiates the

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<sup>2</sup> In 2018 in the Bronx, there were 12,407 reports of suspected neglect to the State Central Register, contrasted to the 233 abuse reports received. NYC ADMIN. CHILD SERVS., CHILD WELFARE INDICATORS ANNUAL REPORT 2018, at 9 (2019), <https://perma.cc/JC5C-GKPM>.

<sup>3</sup> See Section III.A, *infra*, for a discussion of our data on physical abuse cases. A recent study sponsored by The Annie E. Casey Foundation found that children of parents represented by interdisciplinary offices like The Bronx Defenders spent 118 fewer days on average in foster care during the four years following an abuse or neglect filing, as compared to panel attorneys. Lucas A. Gerber et al., *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 CHILD. & YOUTH SERVS. REV. 42 (July 2019); see also John Kelly & Michael Fitzgerald, *New York’s Parent Defender Model Lowers Reliance on Foster*

abuse allegations, we have in many cases been able to expose that alleged abusive injuries are more likely accidentally caused or related to a natural disease process, even if the accidents are not witnessed. In challenging these cases through immediate and aggressive litigation, we have been able to both achieve quicker reunification between our clients and their children and expose the fallacy that certain injuries in a baby, such as a skull fracture, are necessarily from abuse. We have also found that these cases are winnable, even where a parent can never explain how their child sustained an injury. Early, creative, and aggressive litigation is the key, and this article shares strategies that can be used to win cases, reunify families more quickly, and expose the fallacy that a young child's "unexplained" injury in some communities is necessarily abusive.

The purpose of the article is to use our experience litigating physical abuse cases in the Bronx to provide practitioners and family defenders both in New York and in other states with ideas and strategies of how to move cases forward for parents and caretakers charged with serious physical abuse of a child. It is our hope that, by challenging these allegations, defense attorneys can expose the misperceptions and overreach of agencies that charge parents with physical abuse based on injuries alone.<sup>4</sup>

Part I includes real Bronx Defenders case examples that demonstrate the shift in how our practice now aggressively litigates abuse cases early and often and how it has changed outcomes for our clients. Part II provides a legal background on some of the most applicable New York City and State child protection processes, statutes, and standards, as well as the racially disproportionate ways in which those statutes, standards, and practices target people of color. Part III provides some of the tools and strategies we have found most useful in pushing reunification, using our cases to demonstrate how emergency hearings, expert witnesses, motion practice, and depositions can expose the fallacy of many abuse cases.

#### I. SHIFT TO EARLY AND AGGRESSIVE LITIGATION IN THE BRONX DEFENDERS' ABUSE CASES

Over the last ten years, as The Bronx Defenders Family Defense Practice has developed and grown, we have changed the way in which we approach physical abuse cases. When we first represented parents charged

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*Care, Study Finds*, CHRON. SOC. CHANGE (May 6, 2019), <https://perma.cc/44AM-FE8G> (summarizing and discussing the findings of the Gerber et al. report).

<sup>4</sup> The authors understand and appreciate the vast difference in resources available to a lawyer at an institutional provider in New York City such as The Bronx Defenders as compared to a practitioner in upstate New York or in another state. The goal of this article is to demonstrate that abuse cases are not only winnable but that there are avenues to reunite families more quickly even if a parent is charged with abuse based on unexplained injuries.

with abuse based on the existence of unexplained injuries alone, we often, though not always, delayed litigation in order to collect all of the information and records, obtain multiple experts who could testify in person, and understand all of the evidence before challenging ACS's claims of abuse. Unfortunately, this resulted in long and protracted trials conducted over a period of years, thereby frustrating clients, attorneys, and judges alike. Clients had to wait until the trial itself, many months or years down the line, before exposing that fractures in the petition in fact didn't exist or were not definitive, or that ACS's original claims in the petition were not all they appeared to be. The following is such an example.

A. *"Multiple Fractures in Three-Month-Old Baby": Protracted Litigation Exposes Medical Overreach*

Josephine lives in the Bronx with her grandmother, husband, teenage cousin, and three young children, including her three-month-old son Evan.<sup>5</sup> One morning, when returning from her full-time overnight job, her husband tells her that Evan was holding his arm in a funny way while drinking his nighttime bottle. Worried, Josephine checks in on Evan to find him sleeping soundly in his crib, so she decides to check on him when he next wakes. A few hours later, Josephine notes that, despite gulping his bottle, Evan holds his arm differently and seems to be in pain when she moves him. Josephine talks with her husband, and neither can recall anything happening that could have caused an injury. Josephine immediately takes Evan to an emergency room.

At the hospital, the doctors clinically examine Evan and x-ray his arm. The clinical examination reveals that Evan has no swelling and does not appear to be in pain during tummy time. A radiologist reads the X-ray and suggests that Evan may have a small arm fracture, though it is difficult to read on X-ray. The doctors question Josephine, but she can't recall any event that could have fractured her baby's arm. She notes that sometimes her older children play with Evan while he sits in a bouncy seat, but that she always cautions them to be gentle with their little brother. The emergency room refers Evan to a child abuse pediatrician and conducts a full skeletal survey<sup>6</sup> on Evan. The skeletal survey reveals a possible abnormality in the ribs that could be a fracture and possible leg fractures but is not conclusive.

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<sup>5</sup> Names and identifying details in all cases have been changed to protect client confidentiality.

<sup>6</sup> A skeletal survey (or a bone survey) is a full body X-ray of the bones of the body. Christine W. Paine & Joanne N. Wood, *Skeletal Surveys in Young, Injured Children: A Systematic Review*, 76 CHILD ABUSE & NEGLECT 237, 237 (2018). It is often done when there is

Even though Evan is healthy and his mother has sought appropriate and immediate medical care, ACS and the child abuse pediatrician<sup>7</sup> (“CAP”) allege that both parents abused Evan based on the existence of “multiple” fractures. ACS forcibly removes not just Evan but all three of the children from their home, placing them in foster care. ACS files a petition against the parents alleging abuse based on the existence of three sets of unexplained fractures. The petition does not include information that we learn later but was as yet unknown at the time: (1) the fact that the child is clinically well, (2) that the leg “fractures” may actually be abnormalities or normal bone variants, and (3) that a radiologist has determined that the bones themselves may look abnormal.

Evan is discharged from the hospital without receiving a cast, medication, or any other treatment for his allegedly fractured arm and legs. At the first appearance in family court, Josephine’s lawyers ask for an emergency hearing for the children’s return but quickly withdraw after the child abuse pediatrician states that the injuries were caused by abuse, without explaining how the abnormalities were determined to be fractures or why they were necessarily from abuse. Josephine’s attorneys decide they need more time to evaluate the medical evidence and speak to experts.

Over the next several years, Josephine’s attorneys prepare for trial, hire experts including two bone specialists, and pore over the medical evidence. After almost a year of litigation it becomes clear, and even the child abuse pediatrician concedes, that Evan’s leg “fractures” were, in fact, not fractures but a normal variation of a child’s bones as seen in an X-ray. It also becomes clear that the alleged rib fractures may also have

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a fracture suspected due to child abuse to see whether there are other occult or unknown fractures that may not be showing clinical symptoms. *Id.*

<sup>7</sup> The concept of “Child Abuse Pediatricians” is a relatively new phenomenon, having gained formalization and wider-spread utilization within the past ten years. *See* AM. BD. OF MED. SPECIALTIES, ABMS BOARD CERTIFICATION REPORT 2017-2018, at 8 (2018). The term refers to a sub-specialization for which pediatricians receive certification. The field of “Child Abuse Pediatrics” was created in 2006 in response to increased interest in the biologic basis of disease processes that have their origins in childhood trauma experiences. A fuller discussion of this specialization is beyond the scope of this article but is an important piece of the issues at play in these cases. For just a few examples of the literature on this issue, see Keith A. Findley et al., *Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting It Right*, 12 HOUS. J. HEALTH L. & POL’Y 209 (2012) (explaining that in the past decade the legitimacy of “Shaken Baby Syndrome” diagnoses has been called into question, as demonstrated by the evolution of the diagnosis nomenclature from “Shaken Baby Syndrome” to “Abusive Head Trauma,” among other examples); Kip Nelson, *The Misuse of Abuse: Restricting Evidence of Battered Child Syndrome*, 75 L. & CONTEMP. PROBS. 187 (2012) (explaining that “Battered Child Syndrome” was intended to be a helpful tool for physicians, but has degraded into a cunning instrument for prosecutors who use the designation inappropriately, such as to mask otherwise impermissible or prejudicial character evidence).

been normal variants and that the arm “fracture” may have been nursemaid’s elbow.<sup>8</sup> During the trial, it is exposed that the radiologist who originally read the X-rays was not even certified in pediatric radiology and that a more sensitive radiology study did not show an arm fracture. In addition, it isn’t until at least a year into the case that the court hears testimony from our client, the children’s mother, who up to that point has had no opportunity to tell her story or speak to the judge about the allegations. Over the course of the multi-year trial, the mother, our client, completed services and slowly gained more contact with her children, eventually reunifying with them fully.

After three years in court, Josephine consents to a neglect finding after her children have been back in her care for many months. In total, the family is separated for over a year and mired in a family court case for over three years. In that time period, it not only becomes clear that there were not three sets of fractures, that at best there was an arm fracture or a rib fracture, and that it is possible that some if not all of the fractures never existed at all. Unfortunately, it takes years to clarify these issues and work toward reunification, during which time the children are in foster care with limited parental contact.

*B. Challenging Abuse Allegations at Case Outset: Proving an Infant Skull Fracture Is Accidental*

While it is impossible to know exactly what would have occurred if Josephine’s lawyers had pursued a full emergency hearing at the case outset, our recent and numerous experiences litigating aggressively against abuse allegations soon after the case is filed have routinely and quickly exposed ACS’s inadequate investigations and lack of firm medical evidence to support their abuse allegations, even where injuries remain unwitnessed or without a clear cause. The following example is demonstrative.

One afternoon in January 2019, Rosa is folding laundry in her Bronx apartment bedroom while her six-year-old son Johnny and nine-month-old daughter Wendy play on the bed. As the siblings are cuddling and playing, they accidentally bang heads when Johnny, who is laying on his back, sits up as his baby sister Wendy crawls over him. Johnny cries, and Rosa comforts him. Rosa checks Wendy for injuries but she seems fine. Later that evening, Rosa breastfeeds Wendy and puts her to bed without issue.

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<sup>8</sup> For a description and discussion of nursemaid’s elbows, see Mohd Miswan MF et al., *Pulled/Nursemaid’s Elbow*, 12 MALAY. FAM. PHYSICIAN 26, 26-28 (2017).

The next morning while she is feeding Wendy, Rosa notices that Wendy's head is slightly swollen and that Wendy has a bruise on her forehead. Not taking any chances, Rosa brings Wendy to her primary care doctor, who refers Wendy and Rosa to the emergency room at a Bronx public hospital. The hospital conducts a CT scan and finds that Wendy has two minor skull fractures and a very small bleed in the brain underlying the fractures. When questioned at the hospital about the injury, Rosa gives the only explanation she has for how Wendy sustained the fractures: that her children bumped heads on the bed. Wendy appears happy and playful in the hospital, nursing multiple times throughout the day.

The hospital finds Rosa's explanation concerning and calls ACS to report Rosa, setting in motion investigations for potential criminal prosecution and family separation. ACS and the NYPD repeatedly question Rosa. Because Rosa cannot provide a reason deemed adequate for the swelling on Wendy's head, she is not allowed to take her daughter home. Once discharged from the hospital, ACS places Wendy, Johnny, and an older sibling with Rosa's sister, telling Rosa that, despite there being no court order, she cannot see her children for any prolonged period of time and that all contact between Rosa and her children must be supervised. Rosa is incredibly distraught, since she is still nursing Wendy every few hours.

Two days later, ACS files a petition in Bronx Family Court alleging that Rosa and her husband abused their daughter, based on an emergency room doctor's statement that Rosa's explanation for the injury was "inconsistent with the child's injuries." Despite the fact that Rosa acted entirely appropriately, sought medical attention, and that no doctor could provide an explanation for the injuries or conclude that they were caused by an abusive act, she still faces abuse charges from the state. The petition fails to mention why Rosa's account of the head banging between Wendy and her brother is considered inconsistent with a skull fracture, nor does the petition state whether ACS spoke to any specialist doctors other than a physician in the emergency room.

When assigned to represent Rosa, the Bronx Defenders attorney learns that she hasn't seen her children in two days, believing she was not allowed any contact.<sup>9</sup> Rosa tells her attorneys that she has never been arrested or had prior contact with ACS. Before going in to arraign the case,

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<sup>9</sup> After a child is removed from their parents' care into foster care, the government becomes responsible for the child's care and custody. ACS is also responsible for scheduling and facilitating visitation between parents and their children. *See* N.Y. SOC. SERV. LAW § 384-b(7) (McKinney 2019). According to ACS's own policies, visitation should be the "least restrictive" as is safely possible—meaning not only the most time and days, but also the lowest level of "supervision." N.Y.C. ADMIN. FOR CHILDREN'S SERVS., POL'Y AND PROC. NO. 2013/02, DETERMINING THE LEAST RESTRICTIVE LEVEL OF SUPERVISION NEEDED FOR FAMILIES WITH



Rosa shows her attorneys Wendy's discharge summary, which indicates that Wendy did not even need follow up care and that the type of skull fracture Wendy sustained can be from falling or bumping one's head. Rosa tells her attorneys this summary was provided to ACS.

At intake, ACS asks that the court place the children with their relatives. At the arraignment, after consulting a pediatric neurosurgeon to confirm the fracture could be caused by two children banging heads against one another, The Bronx Defenders ask for an emergency hearing to keep the children in Rosa's care. During the appearance, the judge holds a short informal hearing, asking the ACS caseworker for evidence to support the charges that Wendy's skull fractures were the result of abuse. By questioning the ACS worker, the judge learns that this worker did not speak to the doctors who actually examined Wendy, but instead only spoke to two social workers. In fact, though Rosa is accused of abuse, the ACS worker does not have an opinion from any medical professional that the injuries are the result of abuse, only a statement from a physician in the emergency room where Wendy received treatment who believed that two children bumping heads could not cause a skull fracture. The judge questions the ACS worker and finds out that the ACS worker interviewed and observed the other children, who had no bruising or other issues. The Bronx Defenders attorney asks the ACS worker whether an actual medical professional had deemed the injury abusive, but the ACS worker cannot answer. In addition, the attorney for the children notes that the fourteen-year-old daughter desperately wants to return home, corroborates the head banging incident, and describes her parents as loving.

Given the lack of information brought by ACS and the agency's inability to articulate why the injury was actually abusive or non-accidental, the court sends all the children home to Rosa that same day over ACS's objection. The court orders ACS to visit the home to check in but does not require the family to participate in any services. Indeed, in making its decision, the court points out that there was no phrasing in the abuse petition alleging that Wendy's skull fracture was actually the result of abuse rather than an accident. ACS objects and requests that the children be sent to foster care with Rosa's sister. The judge denies the request, inviting ACS to amend the petition if and when the agency has more information.

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CHILDREN IN FOSTER CARE (2013); OFFICE OF CHILDREN AND FAM. SERVS., CHILD WELFARE AND COMM. SERVS., 17-OCFS-ADM-14: FAMILY VISITING POLICY FOR CHILDREN IN FOSTER CARE 5 (2017). Often, visitation will be restricted for weeks if not months to an ACS "agency" office, where families are forced to spend time in often tiny rooms under the constant surveillance of a caseworker, also known as a Child Protective Specialist. These visits often constrict families from being themselves or sharing the comfortable intimacy of "family time." *See, e.g.,* Jeanette Vega, 'Your Actions Are Setting You Back' - Losing My Temper in Visits Hurt My Case, RISE (Sept. 1, 2015), <https://perma.cc/77MG-VV2N>.

Just over three months later, ACS withdraws its abuse petition against the parents, never producing evidence that baby Wendy was abused or that her skull fracture was anything other than an unfortunate accident. Weeks later, Rosa receives a letter that the original ACS investigation was “unsubstantiated.” Nevertheless, Rosa tells her attorney that she is now scared to bring her children to the hospital.

## II. A FRAMEWORK OF BRONX CHILD PROTECTION ABUSE CASES

When a parent brings a baby or young toddler under two years old to a Bronx hospital emergency room to seek medical assistance with an injury to the head, or brings a young child or baby who has something wrong with their leg or arm, the hospital likely runs tests and imaging. If the imaging, such as a CT scan or an X-ray, reveals skull fractures, brain injuries, rib fractures, or arm or leg fractures, hospital staff question the parent about how the injury happened and, if unsatisfied with the response, subsequently call ACS to report possible abuse.<sup>10</sup> ACS conducts a short investigation and, if a medical professional raises even the slightest suspicion of abuse, even if there may be an accidental cause for the injury, ACS usually intervenes and separates a child from the parent or restricts a parent’s access to their child. This is almost always done before coming to court to file abuse charges or seek a judicial order to remove children.

When ACS separates a parent from a child, the agency must come to court the next business day to seek judicial oversight over the child’s removal, which generally is in the form of an abuse petition. In many cases, the government charges the parent for inflicting the very injury the parent was seeking assistance for when the parent originally came to the hospital. For example, in the case of Rosa above, she was seeking medical assistance for the swelling she found on Wendy’s head and then was ultimately accused of causing the head injury for which she sought treatment.

When the government ultimately charges a parent with abuse, the abuse petition often only includes the child’s age, the alleged injuries, and a vague statement that the injuries are suspicious for abuse, or more often

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<sup>10</sup> The majority of hospital staff who interact with an injured child—physicians, surgeons, dentists, osteopaths, residents, interns, registered nurses, and staff involved in admissions, examinations, care or treatment—are categorized as “mandated reporters” and are required by law to report when there is reasonable cause to suspect abuse. Injuries such as “fractures . . . to skull, nose, facial structure . . . skeletal trauma accompanied by other injuries . . . multiple or spiral fractures . . . in various stages of healing” are listed in guidance to these professionals for determining if there is reasonable suspicion of abuse or maltreatment. SHELDON SILVER & ROGER GREEN, *A GUIDE TO NEW YORK’S CHILD PROTECTIVE SERVICES SYSTEM* (2001), <https://perma.cc/P3DU-954W>. For a 2019 OCFS publication containing similar guidance, see OFFICE OF CHILDREN AND FAM. SERVS., *CHILD PROTECTIVE SERVICES MANUAL* (2019).

simply that a parent's explanation is inconsistent with the injuries according to medical staff. The petitions are often based on poorly investigated allegations with no definitive medical evidence that any particular injury was caused by abuse. The petition rarely includes potential variances in diagnoses or causes that are still being ruled out at the time of filing. And almost never is the source with the medical opinion of abuse actually named. Instead, the petition may say "staff from Named Hospital state that an injury is not consistent with the parent's explanation or is suspicious for abuse." The petition seldom articulates in any detail why an injury itself, such as a rib fracture, bespeaks abuse or why a certain parental explanation for an injury would be implausible.<sup>11</sup>

Nevertheless, in our experience, cases charging parents with abuse, even if often poorly investigated, are treated as more "serious" from the moment of filing than those charging parents with neglect.<sup>12</sup> For example, once the specter of abuse is raised, a parent's contact with a child is almost always restricted to a few supervised hours a week at ACS or a foster care agency.<sup>13</sup>

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<sup>11</sup> For example, a typical petition may have the following language, "on or about [date], the emergency room doctor who received the CT at [hospital] stated that the child sustained a skull fracture. The mother stated that she believed this was the result of the baby hitting its forehead while playing with another child. According to [doctor], this explanation is inconsistent with the injuries." The petition often will not include further allegations as to why the parent's explanation of the injuries was insufficient or inconsistent, therefore suggesting abuse.

<sup>12</sup> The distinction is roughly analogous to the distinction between felony and misdemeanor charges in criminal court. In our experience, the vast majority of cases in Bronx Family Court are brought under neglect dockets, which often involve facts or circumstances related to raising children in poverty. *See* discussion *supra* notes 2, 7.

<sup>13</sup> Under N.Y. FAM. CT. ACT § 1030(c) (McKinney 2019), a parent has a right to reasonable and regularly scheduled visitation with a child who is not in their care unless the court finds that the child's health or life would be in danger. § 1030(c) allows the court to order supervised visitation if it is in the best interest of the child. In cases where physical abuse is alleged, in the authors' experience, courts routinely commence with visitation supervised by ACS. At this time, ACS's policy is to provide at least one visit per week for two hours at a time, or two to three visits a week for infants and toddlers of shorter duration. N.Y.C. ADMIN. FOR CHILDREN'S SERVS., POL'Y AND PROC. NO. 2013/02, DETERMINING THE LEAST RESTRICTIVE LEVEL OF SUPERVISION NEEDED FOR FAMILIES WITH CHILDREN IN FOSTER CARE (2013). In our practical experience, ACS will often not provide more than two visits a week unless ordered to do so. In some cases, in our experience, the courts will order visits supervised by a family member, which allows a parent to have more contact with a child in foster care. *See, e.g., In re T.A.*, No. 21833-4/11, 2012 WL 745087, at \*2 (N.Y. Fam. Ct. Feb. 28, 2012) (ordering supervised visitation by either the grandparents or a 24-hour nanny). However, this often does not commence until some visits have occurred under agency-based ACS supervision. In addition, ACS, and sometimes the attorneys for the children, take the position that a court may not be able to order unsupervised visitation on certain serious abuse cases before fact-finding. *See, e.g., In re Daniel O.*, 141 A.D.3d 434, 435 (N.Y. App. Div. 2016); *see also infra* Section II.B (discussing the Daniel O. case further).

Due to serious time lags, cases often don't reach trial for years. In the intervening time, parents and children remain separated from one another with supervised contact only, and the government moves along the federally-mandated timeline that may require the agency to file a petition to terminate the parents' rights altogether.<sup>14</sup> The section that follows provides an abbreviated look into the path of a typical child protection abuse case in the Bronx after the case has been filed in family court. Abuse cases are litigated in two basic types of hearings: at a classic "fact-finding" trial or at a reunification hearing called a "1028 hearing," known in other jurisdictions as the "shelter hearing" or "removal hearing." Given that the majority of these cases are argued under a *res ipsa loquitur* theory, explained below, the background provides special focus on those cases.<sup>15</sup>

A. *Abuse Investigations and Prosecutions Disproportionately Impact Low-Income People of Color*

Before discussing the doctrinal elements and legal path of an abuse case, it is crucial to address the reality that hospital reporting practices, laws, statutes, and standards disproportionately impact parents of color who live in low-income, heavily policed and surveilled communities. In discussing abuse cases, what is ultimately at stake for parents is the fundamental freedom to seek medical care for their children<sup>16</sup> and to be met with help, compassion, and care rather than with suspicion, distrust, and a prosecutorial eye. We contend that this freedom and right is simply not afforded equally.

Research consistently shows that children of color receive differential treatment in the pediatric emergency room.<sup>17</sup> Once there is a suspicion

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<sup>14</sup> The Adoption and Safe Families Act (ASFA), passed in 1997, created a federally-mandated timeline within which states must, save for the exemptions provided within the statute, file to terminate parents' rights when children remain in foster care. Under ASFA, the government is required to file to terminate a parent's rights—thereby "freeing" a child to be adopted—after a child has been in foster care for fifteen out of the last twenty-two months. 42 U.S.C. § 675(5)(E) (2019). This timeline, when layered upon staggering family court delays, creates disastrous results, given that serious abuse cases will often not even commence trial for over a year.

<sup>15</sup> The doctrine of *res ipsa loquitur* infers negligence from the nature of an accident or injury rather than from concrete proof of the injury's causation. 79 CHRISTINE M.G. DAVIS ET AL., N.Y. JUR. NEGLIGENCE § 194 (2d ed. 2019). New York extends that doctrine to inferences of abuse, and "permits a finding of abuse or neglect based upon evidence of an injury to a child which would ordinarily not occur absent acts or omissions of the responsible caretaker . . . authoriz[ing] a method of proof which is closely analogous to the negligence rule of *res ipsa loquitur*." *In re Philip M.*, 82 N.Y.2d 238, 246 (1993) (citations omitted).

<sup>16</sup> See *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (recognizing "the fundamental right of parents to make decisions concerning the care, custody, and control of their children").

<sup>17</sup> See, e.g., Kent P. Hymel et al., *Racial and Ethnic Disparities and Bias in the Evaluation and Reporting of Abusive Head Trauma*, 198 PEDIATRICS 137 (2018) (finding significant racial

of abuse raised at the hospital, Black children are more likely than white children to receive full body X-rays to check for fractures, despite the fact that Black children are no more likely than white children to have X-ray findings suggestive of abuse.<sup>18</sup> For example, in a six-year-long study of the Children's Hospital of Philadelphia, researchers concluded that African-American and Latinx toddlers hospitalized for fractures were five times more likely to be evaluated for child abuse with a skeletal survey, and three times more likely to be reported for suspected abuse and/or maltreatment.<sup>19</sup> The study's authors concluded that "racial differences do exist in the evaluation and reporting of pediatric fractures for child abuse, particularly in toddlers with accidental injuries."<sup>20</sup> Further, a recent study that examined medical professionals' implicit biases showed the existence of stereotyping that linked race and class to abuse.<sup>21</sup>

Due to hospitals' disparate reporting practices, ACS's disparate investigation rates within communities of color, and the well-documented disproportionate policing and surveillance of families of color, there is consequently a massively disproportionate effect on families of color and those living in poverty.<sup>22</sup> This means that, for families of color, certain

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and ethnic disparities in children evaluated and reported for abusive head trauma); *see also* Robert L. Hampton & Eli H. Newberger, *Child Abuse Incidence and Reporting by Hospitals: Significance of Severity, Class, and Race*, 75 AM. J. PUB. HEALTH 56 (1985) (finding Black and Latinx families more likely to be reported to child services by hospitals than white families); J.N. Wood et al., *Disparities in the Evaluation and Diagnosis of Abuse Among Infants with Traumatic Brain Injury*, 126 PEDIATRICS 408 (2010) (finding higher rates of traumatic brain injury diagnoses in publicly insured/uninsured infants, leading to concern of over-evaluation in Black and publicly insured communities).

<sup>18</sup> Paine & Wood, *supra* note 6, at 237.

<sup>19</sup> Wendy G. Lane et al., *Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse*, 288 JAMA 1603, 1606-07 (2002).

<sup>20</sup> *Id.* at 1603.

<sup>21</sup> Cynthia J. Najdowski & Kimberly M. Bernstein, *Race, Social Class, and Child Abuse: Content and Strength of Professionals' Stereotypes*, 86 CHILD ABUSE & NEGLECT 217, 221 (2018) ("Our findings demonstrate a degree of consensus among medical professionals regarding the existence and content of stereotypes that link race and social class to child abuse.").

<sup>22</sup> *See id.*; *see also* Sheila D. Ards et al., *Racialized Perceptions and Child Neglect*, 34 CHILDREN & YOUTH SERVS. REV. 1480, 1488 (2012) ("The one aspect of the chain of events over which caseworkers have the largest control—investigation and substantiation—is the one area that we find is most consistently related to racialized beliefs and perception"); Frank Edwards, *Family Surveillance: Police and the Reporting of Child Abuse and Neglect*, 5 RSF 50, 63 (2019) (citations omitted) ("Race plays a powerful role in explaining the geography of family surveillance. For children and families of color, population composition and policing powerfully explain the intensity of family surveillance").

injuries are considered “abusive” that would not be seen as even suspicious among affluent and predominantly white communities mere blocks away.<sup>23</sup>

In contrast to other anecdotes within this article, the reality for a wealthy, white family might proceed as follows. In a wealthy Manhattan zip code,<sup>24</sup> a white mother brings her baby to the emergency room after her son’s babysitter reported discovering what she described as a “weird soft spot” on her son’s head. The emergency room staff immediately calls in a pediatric neurologist. The pediatric neurologist diagnoses the child with a skull fracture. The mother states that she has no idea how this injury occurred. Doctors tell her that it is common to have no explanation, given that skull fractures can be caused by trivial contact, such as if a baby hits his head hard with a toy or on a wall. The child’s treatment team consoles the mother. They reassure her that the injury is minor, requires no treatment, and will not cause any long-term damage. The child spends the night in the hospital for monitoring and goes home the next morning. The mother never hears from ACS or the police. The child returns home to his mother’s care and is never separated from his loving family.

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<sup>23</sup> For an in-depth analysis of these dynamics and the well-documented and severe racial disproportionality within the child welfare system, see Erin Cloud, Rebecca Oyama & Lauren Teichner, *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. REV. F. 68 (2017), <https://perma.cc/BE2M-79EX>; see also Clifford & Silver-Greenberg, *supra* note 1; Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (Oct. 2015), <https://perma.cc/5FHV-6JQD>; Thomas D. Morton, *The Increasing Colonization of America’s Child Welfare System: The Overrepresentation of African-American Children*, 57 POL’Y & PRAC. PUB. HUM. SERV. 23 (1999); VAJEERA DORABAWILA & NICOLE D’ANNA, N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., DISPROPORTIONATE MINORITY REPRESENTATION (DMR) IN CHILD WELFARE AND JUVENILE JUSTICE SYSTEMS (2015), <https://perma.cc/G48R-P7DT>; GREGORY OWENS, DIRECTOR OF SPECIAL PROJECTS, N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., OCFS INITIATIVE TO ADDRESS RACIAL DISPROPORTIONALITY IN CHILD WELFARE AND JUVENILE JUSTICE, (Jan. 19, 2011), <https://perma.cc/P5RX-3KVY>; JOSHUA PADILLA & ALICIA SUMMERS, NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, DISPROPORTIONALITY RATES FOR CHILDREN OF COLOR IN FOSTER CARE (2011), <https://perma.cc/HF9S-UDV9>.

<sup>24</sup> This story is fictitious, but is based, in part, on conversations with medical professionals and other individuals who work with families in other boroughs. For just one real-life example of the differential treatment of a white, upper class parent who may have inadvertently injured their child, see Anna Arons, *Jenny Mollen, Jason Biggs, and How Race and Class Shape the Aftermath of Childhood Accidents*, PASTE (May 3, 2019, 1:32 PM), <https://perma.cc/R76X-ZKGF> (“[F]ar too many parents do end up alone, with their children snatched from their arms, after accidents as common as Ms. Mollen’s. The difference for these parents: they are poor, they are people of color, and they do not have the benefit of the doubt from child services.”); Lisa Respers France, *Jenny Mollen Reveals She Dropped Her Son on His Head, Fracturing His Skull*, CNN ENT. (Apr. 18, 2019, 3:25 PM), <https://perma.cc/NVF3-RT8W>.

It is well-documented that Black families are grossly overrepresented in New York's child welfare system in general, and that the system's laws problematically conflate poverty with neglect in myriad ways.<sup>25</sup> In our experience, poor parents of color who bring their young babies and children to Bronx hospitals with certain injuries are often met with interrogation rather than consolation and compassion. The case anecdotes throughout this article describe parents repeatedly being charged with abuse based exclusively on injuries that litigation reveals are plausibly accidental. Even if ACS ultimately drops its charges or the children return home after a hearing, the government has inflicted needless, irreversible, and serious harm on families.<sup>26</sup>

### B. *A Parent's First Day in Family Court*

On a parent's first date in Bronx Family Court, a parent meets a lawyer either from The Bronx Defenders or from a panel of 18-B private attorneys.<sup>27</sup> Sometimes a parent's child or children are still in the hospital, while in other circumstances the child with the injury and his or her siblings have already been placed in foster care. Attorneys often have mere minutes to review the abuse petition and speak to a client on a crowded court bench before being rushed into courtrooms to arraign the case. Many times, neither the parents nor the attorney enter the courtroom even knowing where the children are physically located or ACS's plan for the children's care should they not go home. As discussed earlier, the petitions often lack specificity as to how ACS will prove that a certain injury is the result of physical abuse. At the initial arraignment appearance, the

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<sup>25</sup> See sources cited *supra* note 23 and *infra* note 26; see also Emma S. Ketteringham et al., *Healthy Mothers, Healthy Babies: A Reproductive Response to the "Womb-to-Foster-Care-Pipeline,"* 20 CUNY L. REV. 77, 86-87 (2016) (discussing low-income families' disparate involvement with the child protective apparatus); Amy Mulzer & Tara Urs, *However Kindly Intended: Structural Racism and Volunteer CASA Programs,* 20 CUNY L. REV. 23, 27 (2016) (discussing race and class disproportionality in the child welfare context, specifically within CASA programs).

<sup>26</sup> See, e.g., Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care,* 19 U. PA. J.L. & SOC. CHANGE 207, 211 (2016) (demonstrating the long-term harm of removal, even when children are removed from their family's care less than a month); Wendy Jennings, *Separating Families Without Due Process: Hidden Child Removals Closer to Home,* 22 CUNY L. REV. 1, 8 (2019) (discussing the ways in which family separation traumatizes children).

<sup>27</sup> In New York's First Appellate Division, Article 18B of the County Law provides for the assignment and compensation of private attorneys to represent indigent defendants. N.Y. COUNTY LAW Art. 18-B § 722 (McKinney 2019); *id.* § 722-b.

court formally assigns the lawyer to the parent<sup>28</sup> and addresses the question of where the child or children will be placed pending litigation, whether staying with relatives or being placed in foster care.<sup>29</sup> Unless a parent requests an emergency hearing for the return of their children, the next court date will be set months out for a preliminary conference with a court attorney—not the judge. The trial on whether or not a child’s injury exists and is the result of a parent’s physical abuse against the child, rather than a normal childhood accident, may be delayed anywhere from several months to, more typically, at least a year. Thus, on the date of arraignment, parents are left with the choice of either reserving the right to an emergency hearing and waiting as the trial litigation slowly progresses or instead affirmatively attempting to prove that they did not abuse their child, without a full understanding of the actual “abuse” they are being accused of perpetrating.

On the initial court date, judges may also issue temporary orders of protection on behalf of the subject children.<sup>30</sup> In our experience, ACS often requests such orders as a matter of course whenever charging abuse. Where the court finds that the subject children’s lives or well-being are in danger, it may restrict parents’ access to their children to supervised visitation at ACS agencies throughout the borough,<sup>31</sup> where families must interact in a single small room while caseworkers observe their every move. Unfortunately, expanding beyond these restrictive settings in an abuse case can be a protracted process that may not occur until after trial on the ultimate issue of abuse.<sup>32</sup>

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<sup>28</sup> N.Y. FAM. CT. ACT § 261 (McKinney 2019) (guaranteeing a constitutional right to counsel in certain family court cases); *id.* § 262 (establishing that the judge must inform the party of the right to have counsel at the initial court appearance).

<sup>29</sup> *Id.* § 1027.

<sup>30</sup> *Id.* § 1029.

<sup>31</sup> *Id.* § 1030(c).

<sup>32</sup> Unfortunately, given one recent First Department decision, Bronx Family Court judges often feel constrained from liberalizing visitation arrangements pre-trial in abuse cases, in large part because ACS cites that case as a barrier to unsupervised visits pre-trial. In the 2016 case *In re Daniel O.*, the First Department reversed an order granting unsupervised time in a pre-trial abuse case. 141 A.D.3d 434 (N.Y. App. Div. 1st Dep’t 2016). In fact, the court found that it was an abuse of discretion to order unsupervised visitation at all before a trial. However, in that case, the Bronx Family Court judge had not taken testimony and, though it was pre-trial, the case was also pre-hearing, making it very different than many abuse cases now which are litigated extensively through witnesses pre-trial, which affords the judge an opportunity to evaluate credibility and expand visitation. Nevertheless, given *Daniel O.*, the massive lag times before a trial hearing may actually mean that parents cannot visit their children outside of government agencies or supervision by friends or family for years before any allegation has even been proven against them. *See, e.g., In re Aliah M.J.-N.*, 145 A.D.3d 891 (N.Y. App. Div. 2d Dep’t 2016) (reversing a family court order finding that “it was an improvident exercise of discretion for the Family Court to direct that the mother shall have unsupervised visitation with the subject child prior to the disposition of the Family Court Act article 10 proceeding



After arraignment, ACS provides parents with a “service plan” in which they are expected to enroll in various courses before allegations are even substantiated against them.<sup>33</sup> In abuse cases, these courses may include anger management, batterers accountability, parenting, mental health assessments, and/or substance abuse assessments. Parents are expected to voluntarily participate in these services, even if they maintain that they have never engaged in abusive behavior toward their children and were simply seeking medical assistance at an ER for a discovered injury. Often, ACS constructs these service plans with little information about the family, and without meaningful consultation with the children or social workers. Parents have a right to visitation that is not supposed to be denied on the basis of failure to adequately comply with their service plan.<sup>34</sup> However, the on-the-ground reality in our experience is that ACS often declines to expand visits on the basis of non-compliance with services, frequently restricting parenting time with children to twice-weekly, two-hour visits in the stifling supervised agency setting until and unless parents engage in these services.

While awaiting a trial date, parents and their counsel will generally meet at least twice with a court attorney assigned to specific judges: first for a preliminary conference and second for a settlement conference. These appearances, however, do not take place before a judge, so issues of substantive fact continue to go unaddressed.<sup>35</sup> In other words, unless attorneys file motions, orders to show cause, or other pleadings, the court may not see a parent between arraignment and trial, other than at twice-yearly permanency hearings when a child is in foster care.<sup>36</sup> In the interim,

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which was still pending”); *In re Bree W.*, 98 A.D.3d 522 (N.Y. App. Div. 2d Dep’t 2012) (reversing a family court order that granted a mother in a neglect and abuse case at least one hour of unsupervised visitation); *In re T.A.*, No. 21833–4/11, 2012 WL 745087, at \*2 (N.Y. Fam. Ct. 2012) (“permit[ing] the children to reside with their parents with an order of protection requiring that neither parent be with either child in the absence of the grandparents or a newly-hired nanny who stayed in the parents’ home 24 hours per day.”). *But see In re Matthew W.*, 125 A.D.3d 677 (N.Y. App. Div. 2d Dep’t 2015) (permitting supervised parenting time pre-trial).

<sup>33</sup> See N.Y. SOC. SERV. LAW § 384-b(7)(f)(1) (McKinney 2019).

<sup>34</sup> N.Y. FAM. CT. ACT § 1030(c) (McKinney 2019); N.Y. SOC. SERV. LAW § 384-a(2)(b) (McKinney 2019); OFFICE OF CHILDREN AND FAM. SERVS., CHILD WELFARE AND COMM. SERVS., *supra* note 9, at 5.

<sup>35</sup> Sometimes parties may appear in front of the judge on discovery motions for records that must be obtained through motion, such as a child or parent’s mental health records. These appearances tend to be perfunctory and non-substantive as they relate to the facts of the underlying case. See FAM. CT. ACT. § 1038 (governing the scope of discovery in abuse and neglect cases).

<sup>36</sup> Under FAM. CT. ACT. § 1089, courts are required to conduct hearings regarding placement and permanency every six months while children are placed in foster care. At these hearings, courts must determine a permanency “goal” for the child, such as “return to parent” or

months and sometimes years may pass without a case moving forward, while a parent is stalled having only supervised contact with their young child growing up out of their care.

C. *Family Court Prosecution Theories of Physical Abuse*

At the trial, which often comes years after a child is removed and a parent is charged with abuse,<sup>37</sup> parties litigate under a preponderance of the evidence standard<sup>38</sup> to determine the ultimate question of whether the parent committed “child abuse” as defined by the Family Court Act.<sup>39</sup> ACS can seek to prove abuse against a parent in one of three ways: 1) by proving a parent inflicted or allowed to be inflicted injury resulting in a serious or life-threatening consequences; 2) by proving by direct evidence that a parent’s action or inaction caused a child to have a serious or life threatening injury; or 3) through circumstantial evidence, by proving under a theory of *res ipsa loquitur* that a child’s injuries or death would not have occurred absent abuse.<sup>40</sup>

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“adoption,” *id.* § 1089(d)(2)(i)(A)-(E), as well as whether the government has made “reasonable efforts” toward achieving that goal. *Id.* § 1089(d)(2)(i)(E)(iii). Permanency hearings encourage the government and courts to more quickly determine a “permanent” plan for children. Thus, in a situation where a child languishes in foster care pending adjudication at trial, courts are required to evaluate and re-evaluate the appropriateness of a goal of “return to parent,” often before they have even had a chance to determine whether or not the allegations are substantiated.

<sup>37</sup> The average time from the filing of the petition to a trial hearing was 8.1 months in the Bronx, according to 2013 data. NICOLE MADER, THE NEW SCHOOL CTR. FOR N.Y.C. AFFAIRS, CHILD WELFARE WATCH, BY THE NUMBERS: A STATISTICAL PORTRAIT OF THE COURT’S CHILD PROTECTIVE CASES 19, <https://perma.cc/63YR-J9A3> (last visited Apr. 25, 2019). However, in the authors’ experience, there is massive variability in the amount of time it takes to resolve abuse/neglect cases; some cases resolve on the day of intake, while abuse cases often take years.

<sup>38</sup> FAM. CT. ACT § 1046(b) (“In a fact finding hearing . . . any determination that the child is an abused or neglected child must be based on a preponderance of the evidence”).

<sup>39</sup> *Id.* § 1012(e) (defining child abuse). At a trial, only “competent, material, and relevant” evidence is admissible; inadmissible hearsay will not be permitted. *Id.* § 1046.

<sup>40</sup> An “abused child” is defined in FAM. CT. ACT § 1012(e) as:

A child less than eighteen years of age whose parent or other person legally responsible for his care

(i) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protected disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or

(ii) creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ . . . .”

In our experience, by and large, most physical abuse cases in the Bronx are filed under the third theory of prosecution, pursuant to *res ipsa loquitur*, when a child—usually a young child or infant—has injuries, accidental causes of the injuries were ostensibly ruled out, and the parents or caretakers were in control of the child when the injuries allegedly occurred.<sup>41</sup> In those cases, ACS has no direct evidence of abuse but maintains that a child’s specific injuries either bespeak abuse or could not have been caused in the way the parents suggest. These cases generally come about when a concerned parent brings an infant or pre-verbal toddler to the doctor or hospital after noticing abnormal symptoms, either more minor ones such as a bump on the head or a swollen leg or arm, or major ones, like decompensation, seizures, or failure to breathe. The parents themselves are often seeking emergency medical help for a worrisome symptom, only to find themselves accused of the very symptoms or injuries they are seeking help for.

In order to establish a *prima facie* case of abuse under a *res ipsa loquitur* theory, ACS must demonstrate both (1) evidence of the child’s injury that is the result of abuse and not an accident or other natural causes, and (2) that the respondents were the caretakers of the child when the injury occurred.<sup>42</sup> In other words, the statute itself should not allow ACS to file cases simply because a doctor or ACS finds a parent’s explanation for an injury inconsistent or “suspicious.” Rather, the statute is fault-based and requires that there be evidence that an injury is the result of abuse.<sup>43</sup> However, it is our experience in Bronx Family Court that ACS

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<sup>41</sup> The theory of proving abuse under *res ipsa loquitur* is codified in FAM. CT. ACT § 1046 and is available to ACS when it is able to show “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 . . . .” FAM. CT. ACT § 1046(a)(ii). When the government is unable to meet the standard for abuse under FAM. CT. ACT § 1012(e), they may seek leave to amend the petition from abuse allegations to neglect allegations. Possible neglect causes of action include failure to seek immediate medical care, failure to properly supervise, or a failure to protect from someone else’s abuse. N.Y. FAM. CT. ACT § 1012(f). Even if an injury happened accidentally, if it came about due to negligent conduct or if the parent failed to seek appropriate medical attention, the government may make out a case of neglect. *See, e.g., In re Alanie H., Jr.*, 69 A.D.3d 722 (N.Y. App. Div. 2d Dep’t 2010) (finding neglect for failure to bring child to emergency room, but declining to find abuse based on parent’s credible non-abusive explanation); *In re Vincent M.*, 193 A.D.2d 398 (N.Y. App. Div. 1st Dep’t 1993) (finding neglect when a mother left child with the child’s father, who the mother should have known was unsuitable and unsafe, but declining to enter abuse finding).

<sup>42</sup> *In re Lisa A.*, 57 Misc. 3d 948, 954 (N.Y. Fam. Ct. 2017) (citation omitted).

<sup>43</sup> *See In re Philip M.*, 82 N.Y.2d 243, 246 (1993).

will often plead a case as an abuse docket without having definitive medical evidence that a certain injury is necessarily from abuse as opposed to being accidental.<sup>44</sup>

When ACS relies upon a *res ipsa loquitur* theory to prove abuse, in most cases it must present expert testimony to establish that, to a reasonable degree of medical certainty, the child's injury was caused by an act of abuse rather than an accidental or natural cause, "unless that conclusion is within the common understanding of the finder-of-fact."<sup>45</sup> Kings County Family Court has specifically clarified that the expert's opinion "may not be based upon supposition or speculation. The doctrine of *res ipsa loquitur* is not applicable where it is merely possible that negligence or abuse was the cause of the injury."<sup>46</sup> In the Bronx, ACS's usual practice for meeting this standard at trial is to call the child abuse pediatrician on staff who consulted on the case or examined the child in the hospital.<sup>47</sup> That doctor will then often provide an opinion in court, to a reasonable

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<sup>44</sup> See, e.g., *In re Lisa A.*, 57 Misc. 3d at 948 (finding that, despite the physician's testimony that the child's injury was accidental, a prima facie case was nonetheless established by evidence of the child's injuries and evidence that respondents were the caretakers of the child at the time the injuries occurred). This is not unique to the Bronx. See, e.g., *In re Alanie H.*, 69 A.D.3d at 722 (pleading the initial case as abuse on the basis of head trauma, which parents were able to rebut by demonstrating that injuries were a result of meningitis and its subsequent treatment).

<sup>45</sup> *In re G.C. Children*, No. xx/o6, 2009 WL 1543684, at \*9 (N.Y. Fam. Ct. June 2, 2009).

<sup>46</sup> *Id.* at \*10 (citation omitted).

<sup>47</sup> See generally *In re Xavier F.*, NA10810-11/12, 2015 WL 3938469 (N.Y. Fam. Ct. Jun. 26, 2015) (finding that ACS proved abuse in an abusive head trauma case in part because ACS's testifying doctor treated the child while respondents' expert was retained for the purposes of litigation and testified based on her review of the available records and never examined the child). Though an exploration of the sometimes problematic nature of child abuse pediatricians is both well-documented and beyond the scope of the article, it is worth noting that, in our experience as attorneys defending parents against child abuse charges in family court, the child abuse pediatrician is often not willing to conclude that an injury was caused by an act of abuse to a reasonable degree of medical certainty. Even in such cases, the government still files petitions against parents and conducts emergency removals, thereby setting a punitive process in motion, even if the family is ultimately reunited and the parent is exonerated. See *In re Eric G.*, 99 A.D.2d 835 (N.Y. App. Div. 2d Dep't 1984) (overturning a finding of abuse because petitioner's expert witness acknowledged that the infant's femur fracture could have been caused accidentally when one of the respondents lifted the child out of the crib); see also DEBORAH TUERKHEIMER, *FLAWED CONVICTIONS: SHAKEN BABY SYNDROME AND THE INERTIA OF INJUSTICE* 71 (2014) ("[T]he reality of clinical diagnosis is . . . convoluted. Doctors generally struggle to translate the best available scientific knowledge into practice, often reaching conclusions akin to 'educated guesses.'"). For a discussion of some of the problems with the field of child abuse pediatrics, see GEORGE J. BARRY & DIANE L. REDLEAF, *FAM. DEF. CTR., MEDICAL ETHICS CONCERNS IN PHYSICAL CHILD ABUSE INVESTIGATIONS: A CRITICAL PERSPECTIVE* 75 (2014) ("Because many different areas of medicine come into play in the determination of whether a particular injury is the result of abuse, a child abuse pediatrician cannot credibly claim to be [an] expert in all of them.").

degree of medical certainty, that certain injuries are indicative of abuse after other accidental and natural causes were medically ruled out. Especially with a very young baby, the doctor often will testify that the baby could not cause this injury or injuries to themselves, or that the number of injuries, even if some could be accidental, bespeak abuse in a young baby.<sup>48</sup>

Once ACS meets its *prima facie* burden, the burden then shifts to respondent parents to rebut the presumption of abuse by, for example, advancing a theory that creates a credible accidental or natural cause explanation for the child's injuries, proving the child's abuse diagnosis is wrong, or by showing that the child wasn't in the parent's control when the injuries were sustained; in other words, someone else did it.<sup>49</sup> As the 1993 Court of Appeals case *Matter of Philip M.* details, the establishment "of a *prima facie* case does not require the court to find that parents were culpable; it merely establishes a rebuttable presumption of parental culpability which the court may or may not accept based upon all the evidence in the record."<sup>50</sup>

To rebut the presumption, defense attorneys can call their own medical experts to demonstrate a known or possible accidental cause for the child's injury or injuries<sup>51</sup> or can also rebut the presumption by putting on

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<sup>48</sup> See *In re Vincent M.*, 193 A.D.2d 398, 402 (N.Y. App. Div. 1st Dep't 1993) (finding that "the credibility of the 'accident' explanation diminishes as the instances of similar alleged 'accidental' injury increase") (citations omitted). Even with this testimony, because fractures can be caused through accidental means, courts have found that a fracture alone, absent additional factors such as marks, bruises, or other injuries may not necessarily meet the *prima facie* standard. See, e.g., *In re Tony B.*, 41 A.D.3d 1242 (N.Y. App. Div. 4th Dep't 2007) (affirming family court determination that evidence that a three-month-old child suffered a skull fracture was insufficient to meet *prima facie* standard for abuse); see also *In re Brandyn P.*, 278 A.D.2d 533, 535 (N.Y. App. Div. 3d Dep't 2000) (citations omitted) ("Although a spiral fracture may be compatible with a finding of abuse, standing alone it does not compel a finding of abuse. In cases involving such a fracture where abuse is established, there have been other physical manifestations of abuse such as marks, bruises or other fractures . . .").

<sup>49</sup> See *In re Philip M.*, 82 N.Y.2d 238, 246 (1993) ("Before relying upon its provisions, the court should consider such factors as the strength of the *prima facie* case and the credibility of the witnesses testifying in support of it, the nature of the injury, the age of the child, relevant medical or scientific evidence and the reasonableness of the caretaker's explanation in light of all the circumstances. In weighing the caretaker's explanation, the court may consider the inferences reasonably drawn from his or her actions upon learning of the injury. Certainly, the caretaker's failure to offer any explanation for the child's injuries, to treat the child, or to show how future injury could be prevented are factors to be considered by the court, for they reflect not only upon the caretaker's fault and competence but also the strength of the caretaker's rebuttal evidence.").

<sup>50</sup> *Id.* at 243.

<sup>51</sup> See, e.g., *In re Brea E.*, NA-XXXXX-18, 2019 WL 1984174, at \*4-5, \*10 (N.Y. Fam. Ct. Feb. 22, 2019) (finding that the respondent father's medical expert's testimony rebutted ACS's allegations of abuse); *In re Tyler S.*, 103 A.D.3d 731 (N.Y. App. Div. 2nd Dep't 2013)

a medical defense, challenging the methodology and medical determinations of ACS's expert. This is most effectively done by calling expert witnesses to counter and challenge ACS's expert witnesses.<sup>52</sup> This method of defense is often used, for example, in cases where a client is accused of losing control and shaking their baby, allegedly resulting in serious and life-threatening brain and eye injuries or other symptoms to the baby. In these circumstances, ACS's witness, generally a child abuse pediatrician, has diagnosed a baby with Shaken Baby Syndrome.<sup>53</sup> Shaken Baby Syndrome, which is often now referred to as Abusive Head Trauma ("AHT"), is a hypothesis that the violent shaking of an infant can be diagnosed by the existence of certain symptoms in a baby, including subdural hematoma in the brain, retinal hemorrhages, and various other brain findings.<sup>54</sup>

Given the myriad studies calling into question the diagnostic method of Shaken Baby Syndrome, as well as post-conviction criminal court decisions discrediting the diagnosis of Shaken Baby Syndrome as forensically unreliable, the use of defense expert witnesses in these types of cases is particularly effective and important.<sup>55</sup> In addition to the use of expert witnesses, defense attorneys may also attempt to rebut the presumption by advancing alternative caretakers who might have plausibly caused the child's injuries.<sup>56</sup>

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(reversing the family court and finding that, although ACS established a prima facie case of abuse, the mother's own testimony and expert proposing an accidental cause rebutted the prima facie abuse case).

<sup>52</sup> See, e.g., *In re Tyler S.*, 103 A.D.3d at 731.

<sup>53</sup> *In re Xavier F.*, NA10810-11/12, 2015 WL 3938469, at \*13 (N.Y. Fam. Ct. June 26, 2015) (finding that an infant was abused based on serious physical injuries, including subdural hematomas and retinal hemorrhages, that were deemed consistent with inflicted abusive head trauma and the respondents were responsible for the injuries sustained).

<sup>54</sup> Findley et al., *supra* note 7, at 220 ("[T]he trend in recent years has been to move away from terms involving shaking towards generalized terms such as AHT, which avoids the criticisms of shaking by relying upon an undetermined mechanism."); Randy Papetti et al., *Outside the Echo Chamber: A Response to the "Consensus Statement on Abusive Head Trauma in Infants and Young Children,"* 59 SANTA CLARA L. REV. 299, 305 (2019).

<sup>55</sup> See e.g., *People v. Bailey*, 144 A.D.3d 1562 (N.Y. App. Div. 4th Dep't 2016) (vacating a conviction that was based upon a dated understanding of Shaken Baby Syndrome, and finding that advances in scientific understanding of head trauma constitute new and material facts such that the outcome would likely be changed if a new trial were granted). For a sample of the studies and literature discussing the syndrome and its unreliability in determining abuse, see SWEDISH AGENCY FOR HEALTH TECH. ASSESSMENT AND ASSESSMENT OF SOC. SERVS., REPORT 225E, TRAUMATIC SHAKING – THE ROLE OF THE TRIAD IN MEDICAL INVESTIGATIONS OF SUSPECTED TRAUMATIC SHAKING: A SYSTEMATIC REVIEW (2016), <https://perma.cc/FNW7-GP4L>; RANDY PAPETTI, THE FORENSIC UNRELIABILITY OF THE SHAKEN BABY SYNDROME (2018); TUERKHEIMER, *supra* note 47, at 71.

<sup>56</sup> See, e.g., *In re Miguel G.*, 134 A.D.3d 711, 712 (N.Y. App. Div. 2d Dep't 2015) (finding that the mother's expert provided sufficient evidence to show that the child was not in the exclusive care of the mother); *In re David T.C.*, 110 A.D.3d 1084, 1086 (N.Y. App. Div. 2d

If the court enters a finding of abuse against the parents, the court is empowered to move to a second phase of the proceedings called the “dispositional” phase, which allows the court to make further orders against the parents pending the end of court supervision.<sup>57</sup> Dispositional orders include the child’s placement at home, in foster care, or elsewhere, and can include orders the parent must follow in order to keep a child home or to achieve reunification.<sup>58</sup>

#### D. *Emergency Reunification Hearings in Abuse Cases*

As opposed to a fact-finding trial, which litigates the ultimate question of whether a parent’s acts constituted abuse or neglect, parents may also seek to litigate abuse cases at hearings where they seek the children’s return to their care, in some states called a “shelter hearing” and in New York referred to as an emergency hearing or a “1028 hearing.”<sup>59</sup>

New York Family Court Act Sections 1027 and 1028 allow respondent parents<sup>60</sup> to seek an emergency hearing at any time before the fact-finding trial has been completed, at which the relief sought is the return of the child to the parent’s care.<sup>61</sup> Generally speaking, parents can only ask for a 1027 or 1028 emergency hearing once throughout the life of the

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Dep’t 2013) (finding that the petitioner failed to prove that the deceased child was in the exclusive care of her mother at the time she sustained her brain injury); *In re Zachary MM.*, 276 A.D.2d 876 (N.Y. App Div. 3d Dep’t 2000) (finding that the child care provider was responsible for child’s subdural hematomas); *In re Vincent M.*, 193 A.D.2d 398, 399, 401 (N.Y. App Div. 1st Dep’t 1993) (stating that the mother testified to being sick and not caring for the child after his birth but pointed to the father’s usual rough treatment of the child while playing with him and noted that the child had been in the care of other relatives and a babysitter); *In re Lisa A.*, 57 Misc. 3d 948 (N.Y. Fam. Ct. 2017); *In re Jason D.*, [Index Number Redacted by Court] N.Y.L.J. 1202759445045, at \*1 (N.Y. Fam. Ct. Jan. 11, 2016).

<sup>57</sup> These orders can be effective for up to twelve months if the child is home or, if the child is in foster care, from permanency hearing to permanency hearing until “permanency” is achieved by termination of parental rights, an order of custody, kinship guardianship, or a return to the parent, among other options. N.Y. FAM. CT. ACT § 1054(c) (McKinney 2019) (“In conjunction with an order releasing the child to a non-respondent parent . . . the court may also issue . . . an order of supervision of a respondent parent . . . . An order of supervision of the respondent entered under this subdivision may be extended upon a hearing for a period of up to one year for good cause.”); *Id.* § 1052 (enumerating rules for dispositional hearings and orders); *Id.* § 1089 (enumerating rules for permanency hearings).

<sup>58</sup> *Id.* §§ 1054, 1055, 1057.

<sup>59</sup> *Id.* § 1028.

<sup>60</sup> Sections 1027 and 1028 allow either a parent or a person legally responsible to seek the return of the children to their care, though in the vast majority of cases, particularly abuse cases, it is the parent exercising their right under Sections 2017 and 1028. *Id.* §§ 1027, 1028.

<sup>61</sup> *Id.* §§ 1027, 1028. There are two types of expedited hearings under the New York Family Court Act, each with slightly different requirements for scheduling: § 1027 governs those cases in which a remand order has not yet been entered by Family Court, whereas § 1028 governs those in which a remand order has already been entered.

case and often utilize this option when the case is filed and the child is removed. However, in some circumstances, parents can seek another hearing if “good cause” is shown, usually by demonstrating a material change in circumstances.<sup>62</sup>

Though the greater context of what actually constitutes abuse or neglect is certainly relevant, as well as whether ACS can ultimately meet its *prima facie* burden at trial, ACS’s inability to prove an abuse charge at a 1027 or 1028 hearing does not in and of itself mean that a child comes home to their parent or caretaker. At the emergency hearing stage, the legal inquiry is three-fold. Firstly, ACS must show that there would be an “imminent risk of harm” to the child if they were to be returned to their parent or caretaker.<sup>63</sup> Secondly, ACS must also show that such imminent risk cannot be mitigated by services, resources, or orders.<sup>64</sup> Thirdly, ACS must prove that, in balancing the harms between such an imminent risk and the harm of removing a child from its caretaker or parent, the risk of harm outweighs that of a removal’s harm.<sup>65</sup> Hearsay evidence is permissible at these hearings.

In New York, emergency 1028 removal hearings occur much earlier in the path of a family court case than a trial does. While trials may not commence until years into the legal life of a case, emergency 1028 hearings can be requested on the date of arraignment and are usually scheduled within a day.<sup>66</sup> The authors acknowledge that these types of delays and statutory schema may not be the norm elsewhere, and that some of these litigation efforts would need to be done through post-finding motion practice in other jurisdictions. Part III will discuss the benefits and strategic considerations attendant to asking for emergency hearings for the return of children upfront when the case is filed or soon after, as opposed to waiting to litigate all the issues at trial. Of course, this assumes that trial is far after an emergency hearing.

Under the prior model of slowly litigating a case at trial over a protracted period of time after a case is filed, parents and children remain in limbo while the cases against them remain mere unproven allegations. Orders of protection, visitation restrictions, service plan requirements, and other major obstacles often remain in place. When attorneys do not disrupt this structure through affirmative litigation and/or motion practice, removal and separation become normalized as the case’s status quo.

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<sup>62</sup> *Id.* § 1028.

<sup>63</sup> *Nicholson v. Scopetta*, 3 N.Y.3d 357, 372-82 (2004) (delineating the legal standard for removal hearings in New York).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> N.Y. FAM. CT. ACT § 1028 (McKinney 2019) (“[S]uch hearing shall be held within three court days of the application and shall not be adjourned.”).



Children may grow up away from their parents, often in foster care. Parents may feel stigmatized and become discouraged by the feeling that they have been adjudicated guilty before ever having their day in court, and may understandably disengage completely from the arduous and often humiliating process of services, supervised visitation, and state surveillance. In this way, families from impoverished, surveilled, and oppressed communities of color may be permanently severed as a result of the child's injury that ultimately may be determined accidental years later, while for parents in privileged communities, the medical intervention fades into memory with minimal disruption to the family itself.<sup>67</sup>

### III. AGGRESSIVE AND EARLY LITIGATION IN ABUSE CASES GETS KIDS HOME, ACHIEVES BETTER SETTLEMENTS, AND OVERTURNS THE PRESUMPTION THAT CERTAIN INJURIES BESPEAK ABUSE

It can be daunting to represent a parent or caretaker in family court charged with seriously abusing or even causing the death of their own child, especially those charges based on allegations of serious head trauma or multiple broken bones. There are the practical challenges attendant to cases with complex medical findings or injuries, ranging from an entirely unfamiliar medical field to thousands of pages of discovery.<sup>68</sup>

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<sup>67</sup> For a discussion of how the child welfare system disproportionately impacts families of color and perpetuates inequality, see *supra* note 23. See also DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE, at ix-x (2002) (“One hundred years from now, today’s child welfare system will surely be condemned as a racist institution—one that compounded the effects of discrimination on Black families by taking children from their parents, allowing them to languish in a damaging foster care system or to be adopted by more privileged people”); Erin Cloud, Rebecca Oyama & Lauren Teichner, *supra* note 23, at 70 (“Maybe the answer is that privilege keeps those who are not oppressed by the child welfare system from recognizing the implicit fear of Blackness that pervades the system”); Dorothy Roberts, *Race and Class in the Child Welfare System*, PBS, <https://perma.cc/4YZ2-NDHB> (last visited Mar. 29, 2019) (discussing how systemic flaws within child protective services disproportionately affect Black and Latino families); Kathryn Joyce, *The Crime of Parenting While Poor*, NEW REPUBLIC (Feb. 25, 2019), <https://perma.cc/B2UF-NL36> (discussing how often allegations of child maltreatment are a result of the everyday struggles of low-income families faced predominantly by families of color); CHILD WELFARE INFO. GATEWAY, CHILDREN’S BUREAU, RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE (2016), <https://perma.cc/6KDS-VKWC> (exploring the prevalence of racial disproportionality and disparity in the child welfare system).

<sup>68</sup> This is especially true when a parent or caretaker did not witness what may have caused the injury, as the defensive case theory often requires multiple and varied experts to dig into the symptomology and imaging *ex post facto*.

There is also the challenge of representing a parent who has been stigmatized in the proceedings as a “child abuser”—or worse, a murderer.<sup>69</sup> Regardless of the actual degree of injury severity, the case always appears serious based on an abuse docket filing and a listing of injuries, the children are almost always removed to foster care, and, in some scenarios and in other jurisdictions, the government can even file a companion case seeking to terminate the client’s parental rights.<sup>70</sup> Allowing the court process to move at its own pace may mean waiting months or years to get to trial and narrow the issues, standing by as the government subpoenas records, investigates, and looks for doctors to testify. Meanwhile, children remain in foster care and visitation expands slowly and incrementally, sometimes never going beyond agency-supervised visits pre-trial.<sup>71</sup>

The question then becomes, what next? What next, after you interview your client accused of abuse, and she tells you she has no idea how her newborn or young child sustained an injury or tells you that her child fell off the bed or out of her arms? What if she says she is seeking the same answers and can’t believe she is being charged with the very injury she was seeking medical care for in the first place? What if the newborn also has rib fractures? What if the baby has died after falling off a bed having sustained a head injury, or if the baby has symptoms often considered synonymous with Shaken Baby Syndrome? What if the government claims to—or does—have a child abuse pediatrician who will testify that the injuries are likely from abuse and couldn’t have been caused by the child themselves, even if the child is mobile?

First and most importantly, the intent of this section is to encourage other family defenders that these cases are manageable, winnable, and not always as impossible as they seem at first blush. What’s more, aggressive litigation on abuse allegations exposes the fallacies that certain injuries or

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<sup>69</sup> By this, we specifically mean the stigma our clients face by the judge and parties within the courtroom, the hurdles in convincing fact-finders and other counsel to view clients not as “killers” or “abusers” but as humans, parents, and caretakers worthy of dignity, respect, and an honest chance to tell their story.

<sup>70</sup> New York legal procedure generally does not allow for the filing of abuse and termination proceedings at the same time. N.Y. SOC. SERV. LAW §§ 358-a, 384-b (McKinney 2019). However, the authors are aware that many states allow for concurrent abuse and termination proceedings with separate standards of proof. CHILD WELFARE INFO. GATEWAY, CHILDREN’S BUREAU, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 3 (2016), <https://perma.cc/ZVP9-LR7C> (“While State laws require that proceedings to terminate parental rights be initiated when statutory grounds are met, approximately 34 States, the District of Columbia, and the U.S. Virgin Islands provide for exceptions . . .”).

<sup>71</sup> See, e.g. *In re Daniel O.*, 141 A.D.3d 434 (N.Y. App. Div. 2d Dep’t 2016); *In re Aliyah M.J.-N.*, 145 A.D.3d 891 (N.Y. App. Div. 2d Dep’t 2016) (citations omitted); *In re Bree W.*, 98 A.D.3d 522 (N.Y. App. Div. 2d Dep’t 2012) (holding it an improvident exercise of discretion for the court to grant unsupervised visitation without a full trial hearing).

medical findings without explanation or a plausible story are necessarily abusive rather than accidentally caused or from a natural disease process. When they are not winnable at trial or hearing, or doing so is not advantageous for various reasons, the cases can still be pushed forward using various devices to either achieve clarification of the allegations, family reunification, or better and more expeditious resolutions for clients.

Over the last several years at The Bronx Defenders,<sup>72</sup> we have approached these cases aggressively and head-on using litigation and legal techniques to move abuse cases forward more quickly and with more intention and strategy than we have in the past. By doing so, we have been able to narrow the legal and factual issues at stake, disprove abuse, reunify families, and, of crucial importance, repeatedly bring the client in front of the judge to demonstrate that the client is a conscientious and concerned parent, not the “abuser” the government paints them to be. We have found that in most abuse cases, an aggressive litigation approach, paired with early and concerted collaboration with family defense advocates from our office, has yielded quicker reunification and exoneration.<sup>73</sup>

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<sup>72</sup> While this article provides specific anecdotes of Bronx Defenders cases, the work at The Bronx Defenders is no different than the work done by other institutional providers in the city, particularly Brooklyn Defender Services (BDS), an office whose family defense attorneys have pioneered and heavily litigated abuse cases to reunify clients with their children. In fact, it is through partnership, sharing of information and resources, and case law created by BDS and cited throughout this article that, at The Bronx Defenders, we have been able to achieve what we have for our clients.

<sup>73</sup> In one case, we asked for an emergency hearing where a three-month-old twin baby girl sustained a femur fracture and had no other injuries. We represented the mother and another attorney represented the father and grandmother. Our client, the mother, was at work when the child sustained the injury and started showing symptoms. No one could provide an explanation for the injuries. All parties suspected that the child was either accidentally dropped by the father or fell off the bed. Over the course of a long hearing that lasted many months, it became clear that no one would provide an explanation but that the government also could not prove the injury was the result of abuse. Both the mother and the father testified and appeared in court on many occasions. The judge became fond of them, as did the foster care agency, and the judge gradually expanded their contact with their children over a period of months, understanding through observations regarding their visits, services, and in court that the parents were devoted parents who were possibly scared to explain that something happened. At the end of the hearing, the judge did not send the children home but granted liberal unsupervised contact and a clear path toward reunification. The children came home several months later and ultimately the mother was given a resolution whereby she did not receive a finding of neglect after several more months of supervision. At this juncture, she has her children and no child protective record. Again, despite the fact that we “lost” the hearing on the merits, we were able to tell the judge a story of two devoted parents who were not abusers and achieved a more expedient reunification than we would have had we waited for trial. *See also, e.g., In re Matthew W.*, 125 A.D.3d 677 (N.Y. App. Div. 2nd Dep’t 2015) (“[T]he Family Court properly directed ACS to commence overnight parental visits and thereafter, except for good cause, to temporarily release the subject children to the parents’ custody”); *In re Nyla W.*, 105 A.D.3d 861, 861-62 (N.Y. App. Div. 2nd Dep’t 2013) (awarding the mother “unsupervised

It is the intention that the strategies discussed below can be replicated in other forms throughout New York and different jurisdictions where similar remedies and hearings may be available to parents charged with abuse. The authors acknowledge that each jurisdiction and case in family court is different. The authors are also aware that different attorneys have various resources at their disposal, including access to potential expert witnesses or even access to adequate time for litigating these cases. The authors are also mindful that a litigation strategy must always, first and foremost, support a client's goal for the case, whether that be to get a client's children home or to relatives, or another resolution that provides a clear path toward reunification.

A. *Tackling the Government's Abuse Prosecution Through Immediate Pre-Trial Emergency Hearings*

By far the most impactful and effective strategy that we have implemented in abuse cases over the last several years where children are removed has been to request, in many cases where we may not have in the past, an immediate emergency hearing to return the child either at the case's filing or shortly thereafter.

1. Data Support Effectiveness of Early and Aggressive Pre-Trial Litigation

As stated above, at an emergency hearing in the State of New York, the government retains the burden to prove the child is at imminent risk.<sup>74</sup> The evidentiary rules are relaxed and hearsay is permissible.<sup>75</sup> Because the parent can request a hearing at any time prior to the entry of a finding of neglect or abuse, attorneys representing clients charged with physical abuse often reserve the right to this hearing for a later date when more information is garnered from the client, an expert is obtained, or services are arranged and ongoing. Often, this hearing right is never exercised. However, as a matter of statutory right, this hearing can be requested at a client's first arraignment once a child has been removed or a parent excluded from the home.<sup>76</sup>

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visitation with the subject child three times per week for up to four hours each visit" after a partial hearing pursuant to Family Court Act § 1028).

<sup>74</sup> See *supra* Part II.

<sup>75</sup> FAM. CT. ACT § 1046(a)(iv).

<sup>76</sup> This right to seek an immediate hearing may also be exercised upon an order removing a parent or caretaker from the home, including an order of protection and exclusion order. See, e.g., *In re Elizabeth C.*, 156 A.D.3d 193, 203-204 (N.Y. App. Div. 2d Dep't 2017) (citing N.Y. FAM. CT. ACT § 1028(f)).

For a long time within our practice, attorneys would infrequently request such hearings at the inception of an abuse case, except in rare circumstances. It was thought to be strategically advantageous to spend as much time as possible gathering information about the strength of the abuse case against the parent and encouraging the parent to engage in services while we obtained records and discovery. However, in recent years, attorneys at The Bronx Defenders have begun petitioning the court much earlier in the case for an emergency hearing seeking the immediate return of the children, often at the parent's first appearance in court or shortly thereafter.

The data we have obtained from our own practice bears out the effectiveness of this shift. As of January 2019, we analyzed our most recent cases in which The Bronx Defenders represents, or previously represented, parents accused of serious physical abuse.<sup>77</sup> The Bronx Defenders requested emergency hearings on the issue of removal in nearly half of those cases.<sup>78</sup> In cases where we requested an emergency hearing, children were returned home within 226 days, on average. In cases where we did not request a removal hearing but in which children eventually returned home, children were not returned home for 595 days on average, more than *twice* as long. Furthermore, even in cases where we originally asked for a hearing, commenced the hearing, but withdrew it for one reason or the other, we found that hearings led to better overall outcomes. In each case that has proceeded to a hearing but in which the hearing request was withdrawn before its conclusion, the agency ultimately dropped the charge from abuse to neglect.

Furthermore, the data show that, as we have evolved to request removal hearings earlier and earlier in the case—often now on the date the petition is initially filed—the length of time children are separated from their parents has drastically decreased. For example, of hearings requested in 2016, it took on average 400 days for families to be reunited. Of hearings requested in 2017, that average dropped to 111 days, and in 2018 the average was 253 days. Though at the time of this writing, it is early 2019 and thus data cannot be appropriately analyzed, at least five of our practice's cases have resolved with children, usually babies, returned to their parents charged with abuse either on the date of arraignment itself or within three days.

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<sup>77</sup> We collected and analyzed data from 57 of the most recent abuse cases to which The Bronx Defenders was assigned, from 2016 to present. Due to constraints in the scope of this article, we cannot confirm with certainty that this includes every single relevant case, but it does represent the vast majority of recent abuse cases, if not all of them.

<sup>78</sup> Based on our data, Bronx Defenders attorneys requested emergency hearings in 26 of 57 cases.

## 2. Building the Defense: First Steps in Litigating an Emergency Hearing

Upon asking for a hearing, Bronx Defenders attorneys, parent advocates, and social workers meet with the client to determine their goals. The legal team consults within the practice and often with experts regarding the relative strength of the client's case. In order to adequately defend a client in a serious physical abuse case, an attorney must seek to understand the factual allegations and alleged medical findings against the client and the government's theory of prosecution.

The first question many attorneys ask is how certain injuries occurred: the "what happened?" question during the first interview with the client after reviewing a petition. "How did your baby get this injury?" "Did you see any symptoms?" "Walk me through the last 3 days." While this is a proper question to ask, it is important to also ask and explore "do the injuries exist at all in the way the government is pleading the injuries?" The government's petition or complaint may say "rib fracture," but the radiology report may say "slight rib abnormality, possibly a rib fracture." The government's petition may say "arm fracture," but the report may say "bone formation on the humerus." It is important to immediately seek the medical records to understand and investigate the source of any medical findings, and in most cases these records can be obtained quickly. Social workers and parent advocates play an incredibly important role at this early stage, meeting with clients and child protective workers, as well as with child abuse pediatricians, to obtain facts and information that can be used at the hearing on cross-examination.

When we first started requesting these hearings, ACS would often only call its child protective caseworker to testify about their conversations with the medical professionals who clinically evaluated the child's injuries at the hospital.<sup>79</sup> As time went on, judges quickly realized that it was relatively useless to hear a doctor's hearsay statements through a caseworker, even if it was technically admissible under a decreased evidentiary standard, as it was difficult to evaluate the credibility of the medical professional's statements through sometimes double or even triple layers of hearsay. Often at our lawyers' insistence, some Bronx judges started demanding that ACS call as witnesses the child abuse pediatricians or another medical professional to support or clarify the government's abuse allegations.<sup>80</sup> Only in this way could we cross-examine the doctor

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<sup>79</sup> Because the hearsay rules are relaxed due to the urgent nature of the proceedings, statements of a doctor to a caseworker are admissible at an emergency 1028 hearing in New York family courts. *See* FAM. CT. ACT § 1046(a)(iv).

<sup>80</sup> On occasion, given the relaxed evidentiary standards at emergency hearings, the judges will at least require ACS to submit a detailed multi-page report from a doctor explaining why

and allow the court to assess the doctor's credibility or, in some cases, determine if the doctor in fact believed the injuries were the result of abuse.<sup>81</sup>

### 3. Two-Day Hearing Exposes "Abusive" Leg Fractures as Accidental: *Lisa A.* Case Study

The Bronx Defenders represented a woman charged with abuse based on her eight-month-old daughter's leg fractures. In *Matter of Lisa A.*, our client noticed one evening that her daughter, Lisa, had a swollen leg and appeared to be in pain.<sup>82</sup> As a result, our client immediately brought her daughter to the hospital, where doctors discovered that both of the child's legs were fractured in the same place. Lisa's mom could not explain to the doctors how Lisa sustained the leg fractures but proposed the possibility that her legs were fractured based on the way our client carried Lisa on her back and sometimes sat down while the child was in the carrier. Finding our client's explanation not plausible based on conversations with hospital staff, ACS forcibly separated Lisa from her mother and charged her mother with abuse.

Once our attorneys met Lisa's mother, her Bronx Defenders attorney requested an emergency hearing on the day the petition was filed. At our insistence, the judge required that ACS meet its burden by calling the child abuse pediatrician, who suggested that the injuries were caused by abuse. The hearing took one day,<sup>83</sup> wherein both the mother and child abuse pediatrician testified. The child abuse pediatrician acknowledged on her direct testimony and then again on cross-examination that, while the mother did not have an explanation the pediatrician believed could plausibly cause the injuries, the injuries were nevertheless much more likely the result of an accident than of abuse. Finding that the government had not met its burden, that the child had multiple caretakers, and that the mother took appropriate action when she noticed the child's leg swelling, the judge ordered the child returned to her mother that same day.<sup>84</sup> The

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certain injuries are suggestive of abuse in lieu of relying on the caseworker to testify to a doctor's statements. This is admissible given the requirement that only material and relevant evidence may be admitted. FAM. CT. ACT § 1046(c).

<sup>81</sup> And, of course, judges and attorneys for the children also have the opportunity to question the diagnosing CAPs.

<sup>82</sup> *In re Lisa A.*, 57 Misc. 3d 948, 951 (N.Y. Fam. Ct. 2017). See generally *In re Lisa A.* for a lengthier discussion of the facts observed by the court.

<sup>83</sup> Generally speaking, hearings take more than a day and can be protracted over days to weeks and even months, though, under New York's statutory scheme, certain hearings for reunification must go day to day while the issues are litigated. FAM. CT. ACT §§ 1027(a)(i), 1028(a)(ii).

<sup>84</sup> *In re Lisa A.*, 57 Misc. 3d at 954-55. Similarly, in April 2019, we were assigned to represent a mother who, alongside her husband, was charged with abuse based on their three-

case ultimately resolved several months later with a dismissal of the petition after a relatively short supervision period.

#### 4. Early and Aggressive Litigation Against “Multiple” Fractures Reunites Family More Quickly than Protracted Years-Long Litigation

In some cases, though the factual issues are not resolved on the first day or even the first week and the cases are more medically complicated than a single leg or skull fracture, early and aggressive litigation can still reunite a family more quickly and brings on a more reasonable, if still difficult, settlement.

Bronx Defenders attorneys and social workers, alongside a law firm working *pro bono*, represented a mother charged with abuse based on allegations of her eight-month-old’s multiple fractures, including a fracture to her vertebrae, an old clavicle fracture, and a possible rib fracture. The child was hospitalized after her mother brought her to the emergency

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week-old daughter’s linear and mild skull fracture and the parents’ “inability” to provide an explanation for the skull fracture. The infant had no other injuries. The family also had a nine-year old daughter and no history with ACS. The newborn was only in the hospital for a few hours, during which time the hospital called ACS, who removed the children and placed them with the mother’s relatives. When ACS appeared on the first date and filed an abuse petition, they asked that the judge place the children in foster care with our client’s relatives. The Bronx Defenders attorney asked for an emergency hearing. It soon became clear, after conversations between our client’s husband, another respondent, and ACS, that he had accidentally dropped the baby on the side of the changing table, hitting her head. Out of fear, he had not told his wife, our client, who was very protective of her daughter, and had also not told the hospital, fearing severe consequences. At the hearing, ACS called its worker. The Bronx Defenders presented evidence in the form of an affirmation from a pediatric neurosurgeon and also offered to call our client to testify. The court was also provided pictures of the home and a video of the father reenacting how the baby fell. The pediatric neurosurgeon’s affirmation provided general information to the court and showed that the type of skull fracture sustained is exactly the type a baby would sustain from being dropped onto a hard surface, rather than from abuse. Evidence also showed that the mother, our client, was never told that her husband had dropped their baby, and was in the shower at the time, which is why she had “no explanation.” After ACS had presented its evidence, the judge found that there was no imminent risk and that the baby and her older sister could come home with ACS services in place to our client, the mother, with the father in the home supervised by our client around the baby. The court found that in a *res ipsa* case, accidental causes had to be ruled out, which hadn’t happened here. The baby went home to the family and there have been no further issues. In fact, as of a month after the hearing date, ACS had not offered the family any services to address what ACS had initially claimed was abuse. For additional cases in this vein, see *In re Alanie H.*, 69 A.D.3d 722 (N.Y. App. Div. 2d Dep’t 2010) (granting the parents’ application pursuant to Family Court Act § 1028 to return the child to their custody after finding that the child’s injuries were not caused by head trauma but by a form of meningitis and the treatment the child received); *In re Christopher Anthony M.*, 46 A.D.3d 896, 898 (N.Y. App. Div. 2d Dep’t 2007) (finding that “the admissible evidence at the 1028 hearing” clearly showed that the father had not abused the child).



room seeking help, explaining that the child was not moving her leg. Our client had two other children, worked as a home health aide, and had no child protective or criminal history. Our client spent a month with her daughter in the Bronx hospital as the physicians attempted to determine the cause of her daughter's spine condition. Having found no natural or genetic medical explanation, the physicians ultimately determined the spinal and other fractures were caused from abuse. A month into the child's hospital stay, our client was charged with abuse, and ACS removed all three children and placed them into kinship foster care. After meeting our client the day after she was separated from her children when she was ultimately charged with abuse, Bronx Defenders attorneys sought an emergency hearing for the return of her children. The hearing went on for over a year on an almost weekly basis. By asking for a hearing, we received immediate discovery and learned that the rib fracture was indeed not a "fracture" at all, but rather a medically explained and non-abusive abnormality. We were able to quickly narrow the alleged fractures from three to two.

At our insistence, the judge directed ACS to bring in the child abuse pediatrician with the opinion that the injuries were abusive. She testified that the back injury was caused by abuse and, in fact, demonstrated in court with her hands how she believed the injury had occurred. The medical records were vague as to how the child abuse pediatrician planned to call the injury abusive. But by asking for a hearing, within a week or two of the case filing, we had in-court testimony and cross examination about the doctor's proposed mechanism of injury, providing us with the prosecution theory we needed to refute. Over the course of a year, with consistent and regular time before the court, we called two of our own experts and created a serious dispute as to the nature and cause of the injuries, such that the judge determined she would never know if the injuries were the result of abuse or not.<sup>85</sup> Had we waited for trial to litigate these issues, it could have taken years and we may never have learned how the child abuse pediatrician opined on how the injury occurred. At the end of the hearing and prior to the court's decision, when offered a clear and expedient path to getting her children home, our client agreed to consent to a

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<sup>85</sup> Over the course of that year, alongside a Bronx Defenders social worker, our client continuously met with the foster care agency to show that she would do anything she could to support her children and get them home. In addition, the Bronx Defenders social worker was able to repeatedly point out at meetings and conferences that our client was already caring for the children as if they were home, and that the agency's service plan did not comport with the serious allegations, begging the question as to whether the foster care agency or ACS fully believed our client had abused her children in the first place. This type of out-of-court, holistic advocacy proved crucial to the case's ultimate success.

finding of neglect, *not abuse*, without making any admission of wrongdoing. Her children were soon returned home.

In this case, the benefit came not only from moving the case forward more quickly than it otherwise would have and learning the child abuse pediatrician's theory, but also from litigating an ongoing hearing, returning to court at least thirty times in the first several months of the case. All parties and the judge got to know our client and hear her testify. They saw our client coming to court day in and day out, sacrificing time at work, passing time in the waiting area for hours, devoted to getting her kids home. Within a few months of starting the hearing, the judge heard the mother testify and could see that she was not a violent "child abuser," as portrayed in the petition, but a concerned parent looking for an explanation and cure for her daughter's rare injuries. For complex reasons, our client decided to consent to a finding of neglect without admission. As a result, her children soon came home. Had we waited to challenge the abuse allegations at trial and not asked for a hearing, she would have rarely come to court or seen movement in the case, as we would have waited months or years for a trial to commence. Importantly, the court may have been influenced by the nature of the allegations and never would have had the opportunity to get to know her and understand her to be a concerned, loving parent.<sup>86</sup>

As in this case example, sometimes a resolution may not be the dismissal of the petition but consent to a lesser charge that would not have been offered but for a hearing and, though not ideal, facilitates reunification. It has been our experience that negotiating *nolo* pleas to neglect findings often provides more space for creative paths to reunification, or even an exchanged-for "global resolution" of a *nolo* plea and reunification itself.<sup>87</sup> Part of this may simply have to do with the fact that judges are considering cases in which a child has suffered potentially serious injuries, and—even if they cannot conclude that the parent caused such an injury—they may seek some level of perceived insight or responsibility from the parent in order to feel comfortable sending the children home.

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<sup>86</sup> *Cf. In re Eric G.*, 99 A.D.2d 835, 835 (N.Y. App. Div. 2d Dep't 1984) (finding, based on a fact-finding hearing, that the infant had no other injuries or bruises except for a fractured femur and that the parents had no prior history of child abuse and were described as "caring parents").

<sup>87</sup> In New York, submissions to neglect are more or less analogous to *nolo contendere* pleas in the criminal context, wherein a client neither admits nor denies the allegations but allows the court to enter a finding. It is important in every case to consider whether a finding of neglect, or any type of plea, could have collateral consequences or could uniquely impact a client. For example, even though the findings of neglect are not public findings in the same way criminal findings are, they may still have collateral consequences for non-citizens or clients whose work deals directly with children. For some parents, a submission to neglect would not be the right choice of resolution.

Consider the above mother's story in comparison to Josephine's story discussed earlier.<sup>88</sup> This is a clear demonstration that issues can be narrowed and lack of medical evidence exposed if ACS is required to put forward their proof of injury right away. While an extended emergency hearing is not ideal and can be incredibly grueling for a family and a client, the case is heard multiple times a week and the lawyer has the opportunity to move the case forward, all the while demonstrating the parent's commitment to reuniting with their children and exposing their truth.

##### 5. Redefining Victory: Important Benefits from Upfront Aggressive Litigation

These reunification stories are powerful, but reunification is not the sole success from hearings. In other cases, we have asked for hearings and later withdrawn our request, or have asked for hearings and lost after many months. In those cases, there are still important benefits gained from upfront litigation. At the very least, defense counsel receives discovery from the government and an opportunity to be seen by the judge in court on visitation or various other issues. In some cases, the children aren't returned home and the hearing is "lost" on the merits but, in the process of the court appearances, the judge gets to know the family, and the narrative around that family changes. Through this, the parent may be granted expanded visitation and may feel more engaged with the legal process itself. A more expedient path toward reunification may also be established. In other cases, it might make more sense to withdraw the hearing request because the investigation and discovery have helped clarify the limits of the available defenses and that a certain plea or outcome, even if the plea is to abuse, is likely the best outcome and should be taken sooner rather than later.<sup>89</sup>

The important takeaway from conducting upfront litigation through emergency return hearings is not only that it narrows the issues, can prove there is no abuse, helps clarify the government's case, and sometimes achieves reunification; it also keeps your client and the case in front of the judge. A hearing does not allow the government, the judge, or any party to ignore or delay dealing with the critical and complicated medical issues involved with abuse cases because the case is calendared before the court multiple times a week, or at least more frequently than it would be

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<sup>88</sup> See *supra* Part I.

<sup>89</sup> As stated above, even in cases where we originally asked for an emergency hearing, started the hearing, but later withdrew, hearings led to better overall outcomes. In each case in which we requested a hearing but ultimately withdrew the hearing request before its conclusion, the agency then dropped the charge from abuse to neglect. See discussion *supra* Section III.A.1.

otherwise. It requires all parties, including the parents' attorneys, to consider the strength of the case at its inception, before the crushing delays of court set in and before the separation of families drags on, often needlessly.

*B. Additional Strategies for Moving Abuse Cases Forward Pre-Trial*

While litigating an emergency hearing and requiring the government to bring in a doctor to substantiate abuse allegations, the government may realize that they cannot prove their abuse case or that, for other reasons, it makes sense to consent to a lesser charge for a parent in order to end the hearing. In the Bronx, if this happens, ACS will in some cases offer a neglect finding and agree to withdraw the abuse allegations against the client. While this is not as favorable as a withdrawal or outright dismissal of the petition, consenting to a neglect finding can come with return of the children or expanded unsupervised contact between a parent and a child with a clear plan toward reuniting the family.

For example, in the case discussed above,<sup>90</sup> wherein a child sustained spine and clavicle fractures, the hearing was litigated over many court dates over the course of a year. After the mother had finished all services, the government agreed to withdraw the abuse petition against her and consent to a neglect finding. With that agreement, our client was allowed unsupervised time and a clear path towards reunification. It was incredibly difficult for our client to agree to a finding that she neglected her daughter given that two experts testified the injuries were not abusive in nature, but she agreed to the resolution because it allowed her to get her children home more quickly.<sup>91</sup> Had we not litigated the hearing, narrowed the factual issues, and demonstrated to the judge and ACS that the fractures were very possibly accidental, and in any event not caused by our client, we would never have been offered a neglect finding or a clear timeline for reunification. In addition, because of the delays attendant to litigating abuse trials in family court, had the case gone to trial without a

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<sup>90</sup> See case description *supra* Section III.A.3.

<sup>91</sup> There are complicated dynamics at play that might impact why someone might take a settlement that leaves them with a potential finding when they know they have done nothing wrong. In the middle of a protracted removal hearing or other such proceeding, when parents are offered a lower charge if it means getting their children back home, some parents may be willing to take such a plea despite the fact that they have not injured their children. The reasons for this are myriad and case-dependent, but some include: 1) the facts surrounding how an injury occurred would meet the standard for neglect, and this resolution is a best-case scenario; 2) taking a plea ends litigation and means that children come home, visits are expanded, or a caretaker otherwise has more access to their child; and 3) depending upon the jurisdiction, parents may be able to request later hearings to vacate these findings of neglect. In New York, this process is conducted through a contested dispositional hearing, wherein a parent or caregiver might seek a suspended judgment. N.Y. FAM. CT. ACT § 1052 (McKinney 2019).

prior hearing, it would not have concluded for months to years, leaving our client with only agency-supervised contact until the conclusion of the trial.

1. Pre-Trial Motion Practice: Motions to Dismiss Before or After Emergency Hearing

In some cases, if defense counsel prevails at a pre-trial hearing in showing there is no proof of abuse, they can subsequently file a motion to dismiss to end the case or force the government to withdraw. In some instances, a pre-trial return hearing may not be appropriate for a client, for reasons ranging from the client not wanting the hearing to other factors in the client's life.<sup>92</sup> In other jurisdictions, a hearing might not be statutorily available, or a judge may be resistant to litigation. In those circumstances, family defenders can consider civil motion practice as a way to move cases forward, narrow the issues, and tell the client's story. This is especially true when the allegations on their face are insufficient to prove abuse.

In our experience, cases filed under an "abuse" cause of action often follow one of a few similar fact patterns: a young child has "unexplained" injuries, a doctor states that a parent's explanation for a child's injury is "inconsistent" with the injuries, or, in tragic circumstances, a child has died without an obvious cause. In some cases, the petition is pled as abuse under the *res ipsa* theory but there is no requisite statement in the petition from a medical professional indicating the injuries are abusive; therefore, the petition is facially insufficient.<sup>93</sup>

Here, it is as important as ever to return to the statute to determine whether or not the stated petition makes out a claim for abuse. Though it may seem obvious, we repeatedly turn to the statute to ensure that the government has asserted facts that satisfy every element of the abuse cause of action. In New York State, as explained above, a cause of action for abuse requires that the government show that a parent's intentional action or omission either caused a serious long-term injury or resulted in

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<sup>92</sup> Though FAM CT. ACT § 1028 requires that hearings for the return of children "be held within three court days of the application and shall not be adjourned," in our experience, hearings can be incredibly time-consuming as they require all lawyers and the client to be present. Additionally, the family courts in New York City are only open weekdays from 9 AM to 4:30 PM, leaving hearings to be protracted and occurring in minutes-long increments over weeks or even months.

<sup>93</sup> For example, the petition may state, "according to staff at Named Medical Center, the child was brought in and found to have a skull fracture, subdural hematoma, and a cephalohematoma. The parents could not provide an explanation for the injuries." Or it may state that the parents' explanation is "inconsistent" with the injuries. The petition might contain no statements from a medical professional indicating the injuries are consistent with abuse.

the child's death, or that the parent created the situation that resulted in substantial injury or death.<sup>94</sup> Under a *res ipsa* theory of prosecution, they must show that the injury could not have occurred but for such an abusive act or omission. If the injury could be caused by accidental means, all other possibilities must have been ruled out. In practice, this *should* require the government to allege that injuries were the result of abuse by including a statement from a medical professional who determined the injuries are from abuse or at least suggestive of abuse.

When the charging document does not state sufficient facts to meet the necessary elements of the abuse statute, practitioners can file a motion to dismiss for failure to state a claim even before there has been a trial on the issue of whether a parent was abusive or neglectful.<sup>95</sup> In New York family law cases, the statutory scheme provides two distinct grounds for dismissal at the motion to dismiss stage:

If facts sufficient to sustain the petition under this article are not established, or if, in a case of alleged neglect, the court concludes that its aid is not required on the record before it, the court shall dismiss the petition and shall state on the record the ground for dismissal.<sup>96</sup>

It may seem at odds with traditional lawyering instincts for an attorney to file a motion to dismiss if they expect such a motion to perfect or sharpen the government's pleadings to better make out an abuse cause of action. However, in the specific context of serious abuse cases, forcing the government to sharpen the exact pleadings and allegations can be helpful in narrowing the issues for the judge and developing a theory of defense. Furthermore, while you may not prevail on the motion, there are several reasons to consider filing: (1) it forces the government to articulate its claim more thoroughly; (2) it gives you an opportunity to push your client's theory and highlight certain facts alleged or lack thereof; and (3) it keeps the case in the judge's mind.<sup>97</sup> By filing a motion in writing and giving the judge the time to consider the issues away from the tension of the courtroom, you may possibly avoid the gut reaction of stress and stigma that can so overwhelm the tenor of an abuse case when all parties are present and arguing for different outcomes.

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<sup>94</sup> FAM. CT. ACT § 1012(e); *see supra* Section II.C.

<sup>95</sup> N.Y. C.P.L.R. 3211 (McKinney 2019); FAM. CT. ACT § 1051(c).

<sup>96</sup> FAM. CT. ACT § 1051(c).

<sup>97</sup> In some cases, depending on the judge, it might be worthwhile at the first arraignment to alert the judge to the fact that a petition does not state the necessary elements and ask for a motion schedule. In the right case, this is a strategic way to set the tone for the case and signal to the judge at the outset that the government may have proof issues.

## 2. Discovery Devices: Expert Disclosure Motions and Depositions

Expert discovery provides another area of practice that moves a case forward and can narrow the legal and medical issues. As previously discussed, in almost all cases based on medical findings, the government must call an expert witness to prove that a child's medical diagnoses and injuries resulted from abuse and not another non-abusive cause. When there is no direct evidence of abuse such as a firsthand witness, as is often the case, an expert usually must testify that certain accidents or natural illnesses were medically ruled out in favor of abuse. In New York, as in most jurisdictions, the civil practice law requires that, upon request, parties put one another on notice regarding the proposed testimony and credentials of an expert they seek to call.<sup>98</sup> The disclosure rules in New York are very specific and require the government to identify the proposed expert, disclose in reasonable detail the subject matter on which each expert will testify, the substance of the facts and opinions of the expected testimony, the summary of the grounds for the opinion, and the expert's qualifications.<sup>99</sup>

Similar to the petitions, ACS often provides an expert disclosure that is vague and unhelpful, containing conclusory statements of abuse without detail. For example, the disclosure may include one sentence that says, "based on the medical records and the injuries, Dr. XYZ will testify that the injuries are consistent with abuse." Under the civil practice rules of New York, these sentences or conclusions are not sufficient to put the parent or caretaker on notice of the expert's proposed testimony.<sup>100</sup> These disclosures fail to mention *why* the doctor believes the injuries or diagnoses constitute abuse, what other non-abusive diagnoses have been ruled out or, in some cases, why a parent's explanation for an injury or retelling of an event is not consistent with that injury. In some cases, we have come to learn from experience that disclosures are not necessarily strategically

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<sup>98</sup> N.Y. C.P.L.R. 3101(d)(1)(i). This is so an opposing party can prepare in advance and retain an expert themselves if necessary. This requirement is reciprocal; when defense counsel calls an expert they must provide such a disclosure to opposing counsel as well.

<sup>99</sup> *Id.* This puts the parent and their lawyers on notice of an expert's proposed testimony. The language of the CPLR does not allow a party offering an expert to give the expert's conclusory opinion, but rather requires the party proffering the expert to outline, in some level of detail, an expert's opinion and the substantive basis for that opinion. In an abuse case, this would require the government to not only state that a doctor would testify injuries are suggestive of abuse, but also why the doctor has reached this opinion and what methodology or tests were used to reach this conclusion. *See id.*

<sup>100</sup> *See id.*

vague, but rather indicate that the doctor may not actually hold the opinion that the injuries were caused by abuse—or may have doubts about their origins.

In these cases, it is important to push for more detailed pre-trial discovery and information about a child abuse pediatrician's opinion, even when you have the doctor's own medical records or notes if they have clinically evaluated the child. The doctor's notes or medical records often do not contain the necessary information to understand their opinion and to understand the extent of the injuries or the facts supporting a doctor's opinion. By pushing for pre-trial discovery, an attorney can at worst come to better understand the government's case, and at best may expose the government's lack of pre-trial proof to the judge. This may quickly force a settlement, withdrawal, or family reunification. Practically speaking, if the government will not provide an adequate disclosure or if a doctor's report is not helpful, an attorney can file a motion to compel an adequate disclosure.<sup>101</sup> This can accomplish three things: 1) in many cases, the court will compel the government to provide an adequate disclosure; 2) this signals to the judge and allows oral argument on the fact that the government may have an expert witness who cannot provide the requisite proof; and 3) importantly, it is an opportunity, like all opportunities in front of the judge, to push whatever theory of the case you are pursuing. If the government refuses to provide more information about a doctor's testimony or cannot obtain that information, and the medical records aren't helpful, an attorney may move for a deposition of the government's expert witness.<sup>102</sup>

For example, in a somewhat recent matter, we represented a father accused of abuse based on his newborn daughter's minor skull fracture and underlying small subdural hemorrhage. The parents had told ACS that they physically fought while the mother was holding the baby. The mother alleged that our client had "struck" the baby. This fact was disputed. There was also an allegation that, during the same argument, the child fell on the bed with the mother. Notably lacking from the abuse petition were any statements from a medical professional stating that the injuries were the result of abuse as opposed to accidentally caused.

Nevertheless, in pre-trial discovery, the government provided a signed disclosure indicating that the child abuse pediatrician who evaluated the child would testify that the baby's skull fracture was the result of abuse. No other details were provided. At a court appearance, we asked the judge to order the government to provide a supplemented disclosure, arguing that neither the disclosure nor the medical records contained the

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<sup>101</sup> N.Y. C.P.L.R. 3124.

<sup>102</sup> *See id.* 3101(d)(1)(iii).



doctor's detailed opinion nor any information about her opinion. To the judge, we intimated that the lack of detail in both the record, petition, and the disclosure might indicate that ACS could not prove its abuse case and did not have an expert that could establish the necessary elements of the abuse statute. The government indicated it could not supplement its disclosure because the doctor, as communicated through the hospital legal department, would not respond to inquiries regarding her opinion. As a result, and with no other way to obtain the discovery, we moved for a pre-trial deposition<sup>103</sup> of the child abuse pediatrician.<sup>104</sup> The attorney for the children joined our application. The government did not object, admitting that they did not know the opinion of the expert they planned to call. Unfortunately, the court determined that we did not need a deposition and could use the medical records to help us understand the child abuse pediatrician's opinion. Those records provided little help. On our appeal, the First Department reversed the family court's order and granted our motion for a deposition, finding that the parent was entitled to a deposition of the government's expert witness, since they could not obtain the doctor's opinion in any other way.<sup>105</sup> In fact, the court's decision stated that the

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<sup>103</sup> N.Y. C.P.L.R. 3101(d)(1)(iii) ("Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances."). The courts have not articulated a specific governing standard for the "special circumstances" inquiry but have generally emphasized the concern that the information at issue is not available from any other source. As the Second Department has explained, "[a]lthough the 'special circumstances' requirement of CPLR 3101(d)(1)(iii) is more than a nominal barrier to discovery, such circumstances exist where physical evidence is 'lost or destroyed' or 'where some other unique factual situation exists,' such as proof 'that the information sought to be discovered cannot be obtained from other sources.'" *Brooklyn Floor Maint. Co. v. Providence Wash. Ins.*, 296 A.D.2d 520, 521-22 (N.Y. App. Div. 2d Dep't 2002) (citations omitted). For cases regarding the special circumstances doctrine, see *Melendez v. Food Emporium*, 243 A.D.2d 264 (N.Y. App. Div. 1st Dep't 1997) (holding that disclosure from an expert and of the materials related to their inspection is warranted after a long delay in responding to a third party demand for expert information); *Mead v. Benjamin*, 201 A.D.2d 796, 796-97 (N.Y. App. Div. 3d Dep't 1994) (holding that trial courts should be given "considerable latitude" in granting discovery, though the special circumstances requirement is "more than a nominal barrier to discovery"); *Rosario v. Gen. Motors Corp.*, 148 A.D.2d 108, 109 (N.Y. App. Div. 1st Dep't 1989) (holding that a special circumstance exists where material physical evidence is inspected by an expert and then lost or destroyed before the other side has an opportunity to conduct its own expert inspection).

<sup>104</sup> In that matter, our attorneys made intense efforts to get the information, such as going through all the medical records, contacting the child abuse pediatrician, and speaking to the hospital's legal department. Though depositions are costly and not frequently taken in family court child protection cases in New York, the deposition, or the threat thereof, is a good option, especially where it is particularly unclear how an expert will testify that an injury is indicative of abuse. Like any discovery device, at worst it narrows the issues and allows for more fruitful settlement discussions, and at best could help achieve reunification and dismissal.

<sup>105</sup> *In re Aliyah N.*, No. 9025, 2019 WL 1715135, at \*1 (N.Y. App. Div. 1st Dep't Apr. 18, 2019).

parent would be entitled to the “substance of the expert’s expected fact finding testimony, including her expert opinion as to the extent of the child’s injuries, her future prognosis, or the facts supporting her conclusion that the child’s injuries were non-accidental.”<sup>106</sup> After a deposition of the child abuse pediatrician, ACS withdrew the abuse charges and agreed to settle the matter with a no-contest neglect finding for our client, the father, and returned the baby to his care.

### C. *Changing the Courthouse Culture and ACS Filing Procedures*

As challenges to abuse charges pervade the family courtrooms, judges become more accustomed to presiding over such litigation. While a judge may resist upfront litigation such as an emergency reunification hearing after reading a petition alleging abuse, by staying the course and litigating the case, a parent defender may win the hearing and ultimately start a cultural shift in the way the courthouse views abuse cases.

When parent defenders achieve reunification and prove that certain injuries do not bespeak abuse, or parents win trials or hearings even without an “explanation” for injuries, in subsequent abuse cases judges may begin to ask questions and require the government to put forth evidence of abuse from the start. In some cases, the judge may ask the government to provide more notice in a charging document. Where judges reunify families and subsequently receive reports that children are safe and well cared-for, they may feel further empowered to want to hear all the evidence before condoning separation. Through this litigation, judges, alongside parent defenders and other attorneys, learn the complex medical science underlying injuries and start to understand that the government may be overstating their abuse allegations. Therefore, when another abuse case comes before the judge, they may be better prepared to ask the important questions about proof and expert testimony and require the government to back up their allegations. By demanding this information from the government, judges can move an abuse case more quickly through court.

One welcome change we have recently seen in ACS’s practices is the somewhat increased filing of applications under Family Court Act Section 1026.<sup>107</sup> Under the law, when ACS removes a child, they must file a petition alleging either abuse or neglect no later than the next court day after the child is removed.<sup>108</sup> Normal practice has been to separate children from a parent and then file an abuse case without much investigation beyond a doctor’s statements that injuries are suspicious for abuse.

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<sup>106</sup> *Id.*

<sup>107</sup> N.Y. FAM. CT. ACT § 1026(c) (McKinney 2019) (allowing for pre-petition ACS investigation).

<sup>108</sup> *Id.*

In those circumstances, even if we prevail at a 1028 hearing, the case continues with supervision for months, until a trial date.

However, as in the case of several Bronx Defenders' clients who have children with so-called suspicious injuries, rather than filing an abuse petition, ACS has instead removed a child, and asked the court under Family Court Act Section 1026 for two to three days to investigate the suspicions raised by a doctor. In all of those cases where The Bronx Defenders have been involved, both in court and through out-of-court social work advocacy at the hospital and at ACS meetings, we have been able to avoid abuse filings and return children home. While even a three-day removal is incredibly traumatic and unnecessary for the family, ACS's use of Section 1026 allows the agency to investigate whether abuse actually exists, rather than filing a case and starting a months- or years-long process unnecessarily.

#### CONCLUSION

Physical abuse cases in child protection proceedings are plagued by gross overreach that disproportionately affects communities of color and causes needless, harmful, and long-term separation between parents and children while cases slowly move through court. By litigating cases upfront and putting the child protection agency's feet to the fire, parent defenders can achieve quicker family reunification, attain better resolutions for clients, and expose meritless abuse allegations. By experimenting with the legal devices that we have discussed, including removal hearings, motion practice, and expert witness litigation, attorneys will inevitably engage with the client and the legal case in a way they—and the court—may otherwise not have.

By litigating particular serious physical abuse cases upfront through emergency hearings and motion practice, defense counsel forces the government to immediately try to make its case, legitimize a removal, and substantiate its abuse charges. By hearing the medical evidence and witnesses, the court, the ACS attorneys, and the attorneys for the children can often better determine whether parents and children can be reunited with as little delay as possible, what type of visitation should occur, what services should be recommended, and whether there is a more appropriate non-reunification resolution to the matter. In other words, upfront litigation helps separate abuse cases that have merit from those that do not, which we have seen to be the majority of cases.

Litigating serious abuse cases through early litigation also requires the involvement of—and a true partnership with—the client. We have seen time and again in our work that, over the course of long, protracted abuse cases, parents may feel understandably disempowered by and disenfranchised from the system. They feel unheard in a case that is supposed

to be about them. They have been labeled an “abuser” and have been stigmatized and stereotyped. This is particularly destructive when a parent is accused of causing the very injury for which they themselves sought help. By engaging in affirmative, early, and aggressive litigation, attorneys are not only pushing more expeditious and better outcomes but are actively engaging with the case and their client. This can provide parents with reassurance that, despite the terrible accusations being hurled at them, reunification and exoneration are within reach. In our experience, they truly are.