



Abuse Not Demonstrated; Conflicting Expert Testimony

In upholding Family Court's determination that petitioner had not demonstrated the child (Sincerity) was abused when the child was in the custody of the mother, in the face of expert testimony the child suffered forceful blunt trauma within 24 hours of death, the Second Department explained:

The Family Court Act defines an "[a]bused child," *inter alia*, as "a child less than eighteen years of age whose parent or other person legally responsible for his [or her] 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] (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" (Family Ct Act § 1012[e][i], [ii]). The petitioner may establish a *prima facie* case of abuse through a method of proof "closely analogous to the negligence rule of *res ipsa loquitur*" (...see Family Ct Act § 1046[a][ii]...). If the petitioner establishes a *prima facie* case of abuse, "the burden of going forward shifts to respondents to rebut the evidence of parental culpability," although the burden of proof always remains with the petitioner

The Family Court's assessment of witnesses' credibility is accorded deference and will not be disturbed unless clearly unsupported by the record Where there is conflicting testimony and the matter primarily turns on an assessment of witnesses' credibility, we accord great weight to the Family Court's factual findings * * *

The mother's expert witness, the forensic pathologist who conducted the autopsy on Sincerity's body, testified that based upon a microscopic examination of the brain injury, Sincerity sustained the brain injury a few days to one week prior to her death. Notably, the petitioner did not present evidence establishing that Sincerity was exclusively in the mother's care for a period of time greater than 24 hours before her death. Moreover, the forensic pathologist testified that she could not determine whether Sincerity died from blunt force trauma to the head or by accidental asphyxiation caused by being placed to sleep on her side and wrapped in a blanket on the mother's futon. [Matter of David T..., 2013 NY Slip Op 07049, 2nd Dept 10-30-13](#)