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Munchausen Syndrome by Proxy and its Evidentiary Problems

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NOTE

MUNCHAUSEN SYNDROME BY PROXY
AND ITS EVIDENTIARY PROBLEMS

I. INTRODUCTION

In our social climate of heightened public awareness, extensive social services, and child care systems, the abuse of children still persists. Each year, over one million children in the United States are abused—700,000 of these children are neglected or maltreated, 300,000 physically abused, and another 140,000 abused sexually. Between 2,000 and 5,000 of these abused children die of their injuries.

When people use the term "child abuse," it conjures images of broken bones, cigarette burns, bruises, bite marks, handprints, lacerations, welts, and abdominal and head injuries. However, child abuse does not consist only of physical injuries. The National Committee for the Prevention of Child Abuse defines child abuse as "a nonaccidental injury or pattern of injuries to a child." Physical abuse, physical neglect, sexual abuse, emotional abuse, and Munchausen's Syndrome by Proxy can all constitute child abuse.

Physical abuse of children is the most obvious to society because the damage to the child is easily detectable. Another form of child abuse, sexual abuse, "can range from exhibitionism and fondling to

3. Council on Scientific Affairs, supra note 1, at 796.
5. Council on Scientific Affairs, supra note 1, at 797.
6. The National Committee for the Prevention of Child Abuse (the "NCPCA") is a private organization founded in 1972 by Donna Stone. Ms. Stone was alarmed by the growing incidence of child abuse in the country, and felt that the public needed to be educated about this abuse. Hence, she established the NCPCA.
8. Id.
intercourse or [the] use of a child in . . . pornographic materials.”

Emotional abuse is the most difficult to diagnose because there are no tangible marks. It usually takes the form of verbal attacks—teasing, belittling, and badgering. The most common form of abuse seems to be physical neglect. It involves a failure to meet the child’s basic fundamental needs, including food, shelter, clothing, schooling, and medical care. Unfortunately, these forms of child abuse are all too familiar to us. A form of child abuse that is less familiar, but equally insidious, is Munchausen Syndrome by Proxy (“MSBP”). Part II of this Note will explain MSBP, its characteristics and its effects on children, ranging from death to extended hospitalization. Part III will discuss the variety of evidentiary problems encountered when attempting to label this child abuse as MSBP. Section A will set out the two patterns in which courts have taken action concerning MSBP—the “introduced pattern” and the “other factors pattern.” Weaved throughout this section will be the importance of allowing expert testimony on this subject. Section A(1) addresses MSBP in the criminal context, examining it as the motive for the crime. Section A(2) concerns New York’s res ipsa loquitur standard in the family court context. Section B focuses on other problems which also might be encountered when dealing with MSBP. These include MSBP’s absence from the Diagnostic and Statistical Manual

10. See id. at 798-99.
11. Id. at 798.
12. See id.
13. Id.
14. Baron Karl Fredrick Von Munchausen was an Eighteenth Century mercenary turned storyteller. His extravagant tales, which were derived from his adventures with the Russian army, entertained and amused his friends. Rudolph Eric Raspe, one of the Baron’s friends published the pamphlet entitled “Baron Munchausen’s Narrative of his Marvellous Travels and Campaigns in Russia.” It was loosely based upon the Baron’s original tales, but it “gave new literary measure to fabulous (and fabulously unlikely) adventure.” Donna A. Rosenberg, Web of Deceit: A Literature Review of Munchausen Syndrome By Proxy, 11 CHILD ABUSE & NEGLECT 547, 547-48 (1987); see also Albert L. Mehl et al., Munchausen Syndrome by Proxy: A Family Affair, 14 CHILD ABUSE & NEGLECT 577 (1990).

The term Munchausen Syndrome ("MS") was coined in 1951 by Dr. Richard Asher to describe an adult psychiatric disorder where medical histories and illnesses were completely fabricated. These medical tales were similar to the Baron’s exaggerated stories and therefore the disorder was named for him.

In 1977, Dr. Roy Meadow was the first to describe MSBP. The difference between this and MS is that the afflicted adult does not make himself sick; instead, the psychological disorder is manifested through fabricating the illness of another, typically the individual’s child, hence “by proxy.” The child is not afflicted with the disorder, but is the victim. See People v. Phillips, 175 Cal. Rptr. 703 (Ct. App. 1981); Rosenberg, supra.
of Mental Disorders, and distinguishing between MSBP mothers and overprotective mothers. Part IV includes recommendations to the legal community, the courts, and the legislatures. It also advocates that New York’s res ipsa loquitur standard be adopted by all family courts.

II. MUNCHAUSEN SYNDROME BY PROXY

Munchausen Syndrome by Proxy is considered the most baffling and bizarre form of child abuse by all those who encounter it. In simple terms, it can be described as medical abuse. The syndrome consists of a parent continually rushing her child to the hospital with complaints ranging from excessive vomiting and diarrhea to apnea and seizures. The child is generally very young, usually under two years of age. Doctors treating the child are quite confused by this persistent and recurring illness. In attempting to diagnose the illness, the child is subjected to extended hospitalizations, and countless unnecessary, invasive, and potentially harmful procedures which lead to no conclusive results. The reason for this inconclusiveness is that the child’s medical history, illness, and symptoms have all been fabricated by a parent or someone in loco parentis. These fabrications...

15. See Rosenberg, supra note 14, at 552. Excessive vomiting and diarrhea are caused by the non-accidental poisoning of the child. Roy Meadow, Non-Accidental Salt Poisoning, 68 J. BRIT. PAEDIATRIC ASSOC. 448 (1993). The mother can use therapeutic and prescription drugs such as laxatives, hypnotics, or anticonvulsants, or a household product such as table salt. Id. These products can be placed directly in the child’s mouth, added to the child’s bottle, or added to the tubes attached to the child while in the hospital. Id. at 449.

Apnea is the cessation of breathing during sleep. MERCY MEDICAL CENTER, INFANT APNEA CENTER PAMPHLET [hereinafter MERCY PAMPHLET]. A mother can induce this condition by pinching the child’s nose, placing her hand over the child’s face, or by choking the child. Michael J. Light & Mary S. Sheridan, Munchausen Syndrome by Proxy and Apnea (MBPA), 29 CLINICAL PEDIATRICS 162 (1990). The mother can also fabricate this illness by lying to the doctor about its occurrence.

Seizure disorders, also known as epilepsy, are a disorder of the brain’s cerebral function “characterized by sudden, brief attacks of altered consciousness, motor activity, sensory phenomena, or inappropriate behavior.” THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 1311 (Robert Berkow et al. eds., 14th ed. 1982). A mother can induce a seizure through the partial suffocation of her child. Light & Sheridan, supra, at 163. Here again, the mother can merely present to the doctor a convincing history of seizures. This will cause the doctor to prescribe anticonvulsant medications and to do further testing. Roy Meadow, ABC of Child Abuse: Munchausen Syndrome By Proxy, 299 BRIT. MED. J. 248, 249 (1989).

Phillips, 175 Cal. Rptr. at 709.


18. See Rosenberg, supra note 14, at 548.
can occur in one of two ways. First, although the child actually vom-its or ceases to breath, these symptoms are induced by some type of parental action. For instance, sodium can be added to formula to cause excessive diarrhea and vomiting, or a piece of plastic or a hand can be placed over a child’s mouth and nose to cause the child to stop breathing. Hence, medical symptoms appear. Second, the parent could present to the doctor a history of illness in the child that simply does not exist. This can be done by describing a seizure which never happened. The doctor, relying on this information from the parent, will immediately place the child on medication and then perform a variety of tests.

Typically, the perpetrator of this form of child abuse is the mother, but fathers can also be the catalyst. Mothers who induce this form of child abuse will generally “transfer their own unmet parental needs ... onto pediatricians, nurses, spouses, maybe even the community and get from these people through their child’s illness the attention and sympathy they never got from their own parents.” Often, the mother has some type of medical background and “thrive[s] in ... [the] medical environment,” knowing her

19. Phillips, 175 Cal. Rptr. at 707-08.
20. Id. at 709.
21. Adel F. Makar & Paula J. Squier, Munchausen Syndrome by Proxy: Father as Perpetrator, 85 PEDIATRICS 370 (1990). There are no statistics available as to the percentage of male MSBP perpetrators because only a few studies have identified this occurrence. See, e.g., V. Faye Jones et al., The Role of the Male Caretaker in Munchausen Syndrome by Proxy, 32 CLINICAL PEDIATRICS 245 (1993); Makar & Squier, supra. These fathers are the dominant figures in the hospital—asking the questions and knowing the details of the child’s illness. Makar & Squier, supra at 372. The mother tends to be passive in her relationship with the father as well as with the hospital staff. Id. This Note will use the term “mother” and the pronouns “she” and “her,” since in the overwhelming majority of cases the mother is the perpetrator.
22. Phillips, 175 Cal Rptr. at 709 (quoting the testimony of Dr. Martin Blinder, a psychiatrist). The psychological literature seems to suggest that the mother/physician relationship is that of a power struggle. These women are thought to have been emotionally neglected and psychologically abandoned by their uninterested mothers and unavailable fathers. See Herbert A. Schreier, The Perversion of Mothering: Munchausen Syndrome by Proxy, 56 BULLETIN OF THE MENNINGER CLINIC 421, 433 (1992). They also feel “a sense of disappointment and betrayal by those whom they felt had the power to give to them when they were in need.” Id. at 428 (quoting Ben Bursten, Some Narcissistic Personality Types, 54 INT’L J. PSYCHO-ANALYSIS 287, 293 (1973)). These feelings cause the women to seek out a kindly physician whom they view as a powerful figure who shares their emotional space, values their opinion, and admires them. Id.

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child’s medical history with extreme accuracy, becoming friendly with staff and other parents, sometimes spending more time with hospital personnel than with her child, and being very calm when told about extensive procedures that will be done to the child. The mother and child will also develop a symbiotic relationship.

MSBP is difficult to detect because “most health professionals do not expect overprotectiveness to manifest itself as child abuse.” Moreover, the concern, competence, and intelligence of these mothers, combined with a doctor’s training to listen to parents when diagnosing children, makes it difficult for doctors to suspect a mother as the possible cause of her child’s illness. Once the diagnosis is made and the mother is confronted, she becomes outraged and vehemently denies any wrongdoing. Yet when the mother is separated from the child, the symptoms and signs of the child’s illness disappear.

MSBP is an under-recognized form of child abuse that “seems as preposterous to most people today as child sexual abuse seemed [twenty] years ago.” And yet it is being recorded with increasing frequency. This suggests that it is more common and occurs on a larger scale than was previously suspected.

25. See id. at 548.
27. Id. at 374-75; Rosenberg, supra note 14, at 548. A symbiotic relationship has been defined as being “without clear definition between mother and child and their respective needs.” In re Aaron S., Nos. N-671-92, N-676-92, N-678-92 and N-677-92, slip op. at 4 (N.Y. Fam. Ct. Suffolk County Feb. 22, 1993).
30. See People v. Phillips, 175 Cal. Rptr. 703, 708 (Ct. App. 1981); Meadow, supra note 29.
34. Id. at 289.
35. See Kaufman et al., supra note 17, at 144-45; Mehl et al., supra note 14, at 582; Herbert Schreier & Judith A. Libow, Munchausen Syndrome By Proxy: Diagnosis and Prevalence, 63 AM. J. ORTHOPSYCHIATRY 318, 319 (1993).
III. EVIDENTIARY PROBLEMS

When attempting to introduce MSBP as the form of abuse the child has suffered, a variety of obstacles await. These include objections to the relevancy and admissibility of expert testimony, the defendant/mother’s mental state not being an issue, and MSBP not being a recognized illness.

A. Patterns

Two distinct evidentiary patterns have evolved around MSBP in case law. Some courts consider a child to be abused if his or her parent is found to have introduced a foreign substance into the child to create the illusion of a medical illness. This Note will use the term “introduced pattern” to describe this type of fact pattern. The introduced pattern has been dealt with in both criminal and family courts. However, it is often very difficult to prove that the parents have forced a foreign substance into the child’s system. The term “other factors pattern” will be used to describe instances where the courts took some type of action despite the lack of proof of the parent inducing the symptoms. It involves suggesting that MSBP exists, and then proving a variety of other factors, such as poor family stability. This pattern is not used in the criminal courts because it does not produce enough evidence to fulfill the beyond a reasonable doubt burden of proof.

1. Introduced Pattern

The introduced pattern includes not only the situation where a mother directly introduces substances into the child’s system, but also illnesses such as apnea, in which the child’s normal functioning has been disrupted by some action on the part of the mother.

a. Criminal Context

The criminal courts use the introduced pattern in cases where MSBP is the catalyst for the crime. Thus, if there is some evidence

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36. In re Bowers, No. 92-1490, 1992 Ohio App. LEXIS 49, at *10 (Jan. 2, 1992) (holding evidence of MSBP to be insufficient to find the child to be a dependent and/or neglected child).
37. Id.
38. Id.
that a foreign substance was introduced into the child's system, a conviction is extremely likely. However, even where there is evidence to link a mother to the abuse of her child, the prosecution may still have a problem with the admissibility of expert testimony relating to MSBP.\textsuperscript{40}

The problem of the admissibility of expert testimony first arose in California. In 1981, Priscilla Phillips was found guilty of murdering one of her daughters by introducing a sodium compound into her system and of willfully endangering the life and health of another daughter by the same means.\textsuperscript{41} This case involved a classic example of MSBP. The first adopted daughter, Tia, was continually hospitalized for vomiting and diarrhea. All the medical tests performed showed no abnormalities except a blood test which revealed "abnormally high levels of blood serum sodium, and of bicarbonate."\textsuperscript{42} A little over a year after Tia's illness was diagnosed, she was dead. The San Francisco Coroner's office labeled the cause of death as sodium poisoning.\textsuperscript{43} The doctors, though baffled by the circumstances of Tia's death, never suspected her mother as the cause of the illness. Thus, the authorities were not notified and no charges were filed.

Shortly after Tia's death, the Phillips' adopted another daughter, Mindy, who on various occasions was also hospitalized for vomiting and diarrhea. Her blood tests also showed elevated sodium levels. This time the pediatrician took a second look—two children, from the same family but who were not blood related, suffered from the same mysterious illness. Mindy's formula was then analyzed, and "[t]he sodium content was 448 milliequivalents per liter. According to the manufacturer's specification, the sodium content should have been only 15 milliequivalents per liter."\textsuperscript{44} Mindy was placed in the Intensive Care Unit. Her mother was not permitted to feed her, and was only allowed supervised visits.\textsuperscript{45} The symptoms eventually subsided and Mindy's health was restored.

After this incident, Child Protective Services was notified and charges relating to the abuse of both daughters were filed. As part of

\textsuperscript{40} See State v. Lumbrera, 845 P.2d 609 (Kan. 1992).
\textsuperscript{41} Phillips, 175 Cal. Rptr. at 705.
\textsuperscript{42} Id. at 705-07. For a description of how sodium is introduced into the child's system, see supra note 15.
\textsuperscript{43} Phillips, 175 Cal. Rptr. at 708.
\textsuperscript{44} Id.
\textsuperscript{45} The parents of hospitalized children are usually allowed to take part in their care by administering feedings and/or staying overnight in the child's room. See id.
the prosecution's case, it was suggested that MSBP was the motive for Phillips' conduct. Dr. Martin Blinder, a psychiatrist, was called to testify as to the symptoms and signs of MSBP. Dr. Blinder never examined Phillips and had never treated anyone with this disorder; his testimony was based solely on reports he had read in various medical journals. On appeal, defense counsel asserted that the trial court erred in allowing the expert testimony to be admitted based solely on reports of others, rather than personal observations of the defendant or other persons diagnosed with MSBP.

The California Court of Appeals found the expert testimony to be relevant and admissible for two reasons. First, even though the defendant did not make her mental state an issue in the case, the psychiatric testimony showed a motivational element. Second, the court found that the testimony fell within the confines of Section 801 of the California Evidence Code. The court reasoned that even though Dr. Blinder's testimony was largely based on reports by others rather than on his own observations, this affected the weight of his testimony, not the admissibility of it, since the reports met the reasonable reliability standard. Dr. Blinder relied on six sources from the United States and England, including a work by Dr. Roy Meadow (a leading expert on MSBP), an article in the Journal of the American Medical Association, and a report in Pediatrics. These sources

46. Id.
47. Id.
48. Id. at 712.
49. Although motive is not a required element which needs to be proven in a criminal case, it strengthens the prosecution's argument and also assists the jury when forming its decision. See Pointer v. United States, 151 U.S. 396, 414-15 (1894) ("It is not an element of the burden of proof . . . that a motive or inducement to commit the offence [sic] should be proved."); see also United States v. Brown, 518 F.2d 821, 828 (7th Cir. 1975).
50. This section describes the boundaries of expert testimony:
   If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
   (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
   (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.
CAL. EVID. CODE § 801 (West 1967) (emphasis added); see also FED. R. EVID. 702, 703.
52. Id. at 713 n.1. These articles were among the first written on the subject of MSBP. Dr. Meadow's article described two MSBP cases and continued by describing the MSBP
met the reasonable reliability standard because they were published in reputable medical journals, which the medical community itself looked to for the most up-to-date information.

Even though an expert witness may not be personally familiar with MSBP—as was the case in Phillips—the witness should still be permitted to testify. The medical and legal professions themselves are just becoming familiar with MSBP. If it is not within the common knowledge of these two communities, it is highly unlikely that the jurors would have heard of, much less be able to understand, MSBP. This testimony shows that the actions taken by the mother are not only peculiar, but also a recognized form of child abuse. The jury should be allowed to see this “parent” in her true light—as an abuser.

In another case involving MSBP, Commonwealth v. Robinson, an eleven month old boy died due to massive salt intoxication. The evidence showed that the mother had access both to large amounts of salt and to the child’s formula; her fingerprints were discovered on a few salt packets, a bottle laced with salt was discovered among her belongings, and she knew the child was suffering from salt ingestion before the staff informed her of this diagnosis. Even though the introduced pattern was evident in this case, the judge granted a motion in limine which deprived the jury of hearing relevant expert testimony concerning MSBP. Despite the omission of this testimony, the defendant was found guilty of involuntary manslaughter in the death of her son.

Although the mother was convicted in Robinson, in another case a jury may not believe that a mother would intentionally make her child ill or blatantly lie to a doctor concerning her child’s health.

53. The court in In re Bowers recognized “the difficulty which the trier of fact may experience in distinguishing between a parent with [MSBP] and one who is merely overprotective of a minor medical problem,” and concluded that credibility of the expert testimony would be a key factor for the jury. No. 92-1490, 1992 Ohio App. LEXIS 49, at *14 (Jan. 2, 1992).
55. Id. at 1236.
56. The case does not explain the courts rationale for granting the motion in limine.
Thus, a guilty mother might go free. To eliminate this possibility, the expert testimony about MSBP should be allowed.\textsuperscript{58}

The Supreme Court of Kansas has recently reversed and remanded a first degree murder conviction in a case in which MSBP played a large role.\textsuperscript{59} The state's opening statement put forth MSBP as a possible motive for the killing.\textsuperscript{60} An expert witness, a pathologist, testified and gave a broad definition of MSBP.\textsuperscript{61} On a motion by the defense, all MSBP testimony was stricken from the record because the state did not present any evidence that the defendant suffered

\begin{itemize}
\item 58. In cases like \textit{Phillips} where the mother's conduct exceeds the bounds of child abuse and becomes homicide, an insanity type defense might be used. Although this Note does not address the use of MSBP as a defense, it is very likely that it could be so used. The Model Penal Code will be used for a brief analysis of an MSBP insanity defense, since the insanity statutes vary among the states. \textit{See} R.D. Mackay, \textit{Post-Hinckley Insanity in the U.S.A.}, CRIM. L. REV. 88 (1988). The Code states that “[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.” \textbf{MODEL PENAL CODE} § 4.01(1) (Official Draft 1962).
\item 60. \textit{Id.} at 618-19.
\item 61. \textit{Id.} at 619. The witness described MSBP as occurring when . . . a parent would inflict on a child an illness or fake symptoms of an illness in order for the parent to be the center of attention or gain sympathy, and they gain that through the child; and the child is the one with the fake illness or the fake symptoms.
\end{itemize}

\textit{Id.} (quoting Dr. Eva Vachal).
from the condition. But should the testimony have been stricken?

In Phillips, there was no direct testimony that the defendant suffered from MSBP. A hypothetical question was posed and the answer indicated that the defendant "evince[d] symptoms consistent with . . . Munchausen's Syndrome by Proxy," but the expert stated he "could not render an opinion concerning [the] appellant herself, because he had never examined her." The expert testimony in Lumbrera should not have been stricken. Lumbrera was on trial for manslaughter, not manslaughter by MSBP. MSBP was only one of many factors in the case; thus, the state did not have to prove that she suffered from MSBP. It was enough to show that this form of child abuse exists. The state's expert was being used "to teach the jurors scientific . . . principles they [might] need to evaluate the facts in the case." Kansas also allows expert testimony to be used for this purpose. In Sterba v. Jay, the court ruled that "[e]xpert opinion testimony is admissible if it will be of special help to the jury on technical subjects as to which the jury is not familiar or if such testimony would assist the jury in arriving at a reasonable factual conclusion from the evidence." The expert explained the syndrome without applying it to the facts of the case. The jury, through this testimony and the other evidence presented, should have been permitted to draw its own conclusions.

Expert testimony in the criminal context is crucial to cases involving MSBP. Juries need this information to have a better understanding of the events that transpired, and to reach a verdict beyond a reasonable doubt. This is important because a juror may not believe that a parent would harm her child in this manner, and thus have difficulty in reaching a decision. The MSBP testimony will aid a juror in realizing that the alleged crime is a result of child abuse. This circumstantial evidence will facilitate the juror's deliberations.

62. Id.
63. The defense objected to the hypothetical question but the trial judge allowed it. The appeals court upheld the hypothetical question on the grounds that the expert made it clear that he could not make a diagnosis of defendant. People v. Phillips, 175 Cal. Rptr. 703, 711 (Ct. App. 1981).
64. Id. (quoting the testimony of Dr. Martin Blinder).
65. Id.
Judges also need to be equipped with this information when sentencing a defendant, and when making recommendations for counseling or parenting classes. Furthermore, MSBP testimony should also be preserved in the record for its precedential value. The MSBP form of child abuse is something with which courts are not extremely familiar, and thus they may be hesitant to allow relevant testimony in. However, if a court admits this MSBP testimony, other jurisdictions may be more inclined to also allow the same type of testimony. This precedential effect will help the legal system educate itself concerning MSBP.

Another reason for preservation in the record is, if the case is appealed, the higher court will be aware that the incident was not just a freak accident but a continuing form of child abuse. Additionally, if the mother moves to a different jurisdiction and is arrested there for harming another child, the preserved record could inform the prosecutor of the existence of MSBP—since it is a very new and unusual disorder. The prosecutor may not have otherwise focused on it. By viewing the record, the prosecutor will learn about the details of MSBP and discern the evidence in the present case is very similar to what is in the court record. The prosecutor may then decide to further investigate this form of child abuse, and may even present expert testimony on the abuse.69

b. Family Court Context

Each state has its own grounds for removal of children from their home, either on a temporary or permanent basis. These commonly focus on the best interests of the child. Abuse is clearly contrary to the best interests of any child, and is therefore strong grounds for removal. In Maryland and New York, when MSBP is found, courts have placed children in temporary protective custody. Such cases contain strong circumstantial evidence that a foreign substance was introduced into the child, and thus follow the introduced pattern.70

69. See, e.g., State v. Lumbrera, 845 P.2d 609, 614-15 (Kan. 1992); Woods v. Department of Social Services, 272 A.2d 92, 94 (Md. Ct. Spec. App. 1971). Although the Woods case does not mention MSBP, the court considered the fact that five other children had died due to breathing difficulty when left in this mother’s care. Id. This case occurred in 1971, prior to Meadow’s first description of MSBP. See supra note 14. Thus, there is a possibility that MSBP played a role in these deaths—this “breathing difficulty” was perhaps a form of induced apnea.

70. See, e.g., Aaron S., Nos. N-671-92, N-676-92, N-678-92 and N-677-92; In re Colin
In a Maryland case, *In re Colin R.*, three year old Colin was continually hospitalized for vomiting, dehydration, high urinary output, and low potassium levels.\(^{71}\) Colin did not respond to any of the conventional medical treatments.\(^{72}\) The doctors were mystified, but decided to perform one more procedure, a urine test, which revealed the presence of diuretics in Colin’s system.\(^{73}\) All medications and unsupervised visits were immediately discontinued.\(^{74}\) Colin’s symptoms ceased and his urine tests were normal.\(^{75}\) His mother fit the classic MSBP mother—a licensed nurse who vehemently denied any knowledge of how the diuretics entered Colin’s system.\(^{76}\) Colin was ultimately found to be a victim of MSBP, and social services were contacted.\(^{77}\) In connection with the pending case, the Sheriff’s Department was granted a search warrant for the parents’ home.\(^{78}\) The search revealed a hypodermic syringe and two vials of the diuretic Lasix in the mother’s bedroom dresser drawer.\(^{79}\)

The trial court declared Colin to be a “child in need of assistance”\(^{80}\) and placed him under the protective supervision of social services.\(^{81}\) The trial court was convinced that Colin’s mother had engaged in conduct—the improper administration of drugs—which threatened his permanent health and life.\(^{82}\) This conclusion can be attributed to the testimony of Colin’s treating physicians, the hospital record, and the other evidence presented.\(^{83}\) It was also in line with Maryland’s desire “to separate a child from his parents . . . when necessary for his welfare.”\(^{84}\)

New York has applied the doctrine of res ipsa loquitur\(^{85}\) “to

\(^{71}\) *Colin R.*, 493 A.2d at 1085.
\(^{72}\) *Id.*
\(^{73}\) *Id.*
\(^{74}\) *Id.* at 1086.
\(^{75}\) *Id.*
\(^{76}\) *Id.*
\(^{77}\) See *id.*
\(^{78}\) *Id.*
\(^{79}\) *Id.*
\(^{80}\) A child in need of assistance is defined as “a child who requires the assistance of the court because (1) He . . . is not receiving ordinary and proper care and attention, and (2) [h]is parents . . . are unable or unwilling to give proper care and attention to the child . . . .” Md. Code Ann., Cts. & Jud. Proc. § 3-801(e) (Supp. 1989).
\(^{81}\) *Colin R.*, 493 A.2d at 1085.
\(^{82}\) *Id.* at 1091.
\(^{83}\) *Id.* at 1086, 1089-90.
\(^{85}\) The res ipsa loquitur doctrine is found in section 1046(a)(ii) of New York’s Family
explain specific injuries of children by strong inferences of abuse . . . where the parent has primary custody during the critical period when injury was sustained."86 This doctrine has been used in two cases involving MSBP.

In *In re Jessica Z.*, a little girl was repeatedly hospitalized over a four month period for diarrhea, dehydration, and a blood infection. Jessica’s symptoms subsided when she was in the Intensive Care Unit, but as soon as she was transferred to a private room to which her parents had access, her symptoms returned.87 At this point, her doctors became suspicious and ordered a chemical test that revealed the presence of laxatives in her system.88 The doctors immediately contacted Child Protective Services and the mother was charged with “intentionally inflicted physical injury upon her infant daughter, . . . creating a substantial risk of death, disfigurement or impairment of her physical and emotional health.”89

Conflicting expert testimony was presented concerning the cause of Jessica’s illness. Dr. Leonard Newman, the Chief of Pediatric Gastroenterology at Westchester County Medical Center, and Jessica’s treating physician, concluded that Jessica was an MSBP child.90 He based this conclusion on his personal observations of Jessica, his prior contact with MSBP cases, and on the fact that a vast number of MSBP characteristics were present in Jessica’s relationship with her mother.91 The other witness, Dr. Frederick Daum, Chief of Pediatric Gastroenterology at Northshore University Hospital, felt that Jessica’s persisting illness could have been caused by complications from a prior operation.92 Dr. Daum had never encountered MSBP before and

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Court Act:

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

N.Y. Fam. Ct. Act § 1046(a)(ii) (McKinney 1987) (emphasis added). This doctrine is not used in the criminal context because of the high burden of proof.

87. Id. at 373.
88. Id.
89. Id. at 370-71.
90. Id. at 372, 375-76.
91. Id. at 375. These characteristics included the mother having some medical training, a symbiotic relationship between the mother and child, and the abatement of the illness when Jessica was not in her mother’s care. Id. at 373-75.
92. Id. at 376.
based his opinion on a review of Jessica's hospital records and a short examination of her prior to trial. Despite this conflicting testimony from two highly qualified pediatric gastroenterologists, the court found that "Dr. Newman's testimony [was] by far the more persuasive." It elaborated by stating that

[i]n his role as treating physician, he had the experience of personally observing the child and frequent contact with her other physicians and hospital staff during the period in question. No motive can be ascribed to his initial diagnosis and immediate report to Child Protective Services other than his concern for the child's safety.

Despite an absence of concrete evidence to establish that Jessica's mother gave her the laxatives, the court felt that the circumstantial evidence was established by more than the required preponderance, that her mother introduced laxatives into her system, and thus the res ipsa loquitur standard was applied.

The standard was also used to establish MSBP abuse in the case of In re Aaron S., where an eight year old allegedly suffered from central apnea. Medical records documented this "long and unexplained" history of apnea, and revealed that Aaron's mother was the only witness to these attacks, which had been occurring since infancy. Based on his mother's credibility, Aaron was placed on an apnea monitor at six weeks of age. He remained on the monitor for five months when the Infant Apnea Center (the "IAC") decided to discharge him from the program due to his mother's non-compliance. The IAC's medical records indicate that

93. Id.
94. Id.
95. Id.
96. Id. at 377.
97. Id.
99. Id. at 6.
100. Ms. S. claimed to be a nurse, and thus her observations were given a great amount of weight even though testing done on Aaron found no cause for the alleged apnea. Id. at 14-15.
101. An apnea monitor is used at home, tracking the child's heart rate and respiration during sleep. An alarm sounds if either of these functions falls below a certain level. MERCY PAMPHLET, supra note 15.
103. IAC is a division of Mercy Medical Center located in Rockville Centre, New York. See MERCY PAMPHLET, supra note 15.
they felt Aaron's mother might be fabricating his history of apnea.\textsuperscript{105} The case indicates that Aaron's apnea episodes ceased at one point, but then started again in 1988 and allegedly continued until 1992.\textsuperscript{106} During this time, Aaron had been subjected to cardiopulmonary resuscitation and had slept in his mother's bed every night so she could revive him.\textsuperscript{107}

At a hearing to determine whether Aaron was a neglected child, five\textsuperscript{108} of the eight experts called to testify agreed that he was the victim of MSBP.\textsuperscript{109} Their conclusions were based on the fact that his mother fit many of the MSBP characteristics,\textsuperscript{110} Aaron's extensive medical history,\textsuperscript{111} Aaron's siblings' medical records, and his mother's medical history.\textsuperscript{112} But the strongest evidence came from Aaron's foster mother, who testified that "Aaron has been with her since August 24, 1992 and that he ha[d] never had an episode of apnea, [was] not connected nightly to a monitor and sle[pt] in his own bed."\textsuperscript{113}

The court used a res ipsa loquitur analysis because of the cumulative circumstantial evidence of abuse and "the dramatic abatement of [the] illness upon removal from the parent."\textsuperscript{114} The credibility of the expert witnesses was one of the key factors in the judge's determination.\textsuperscript{115} The court also noted that "the issue . . . [was] a pediatric diagnosis as to [Aaron] and his protection, not a diagnosis as to of the apnea monitor program, the parent is required to keep records of all alarms and to stay in contact with the Center. \textit{Id.} at 16. 

\begin{itemize}
  \item \textsuperscript{105} \textit{Id.} at 15.
  \item \textsuperscript{106} \textit{See id.}
  \item \textsuperscript{107} \textit{Id.} at 2.
  \item \textsuperscript{108} These experts consisted of the Chief of Staff at Schneider Children's Hospital ("Schneider") in New Hyde Park, New York, a neurologist affiliated with Schneider, the Chief of Critical Care Medicine at Schneider, a psychiatrist and Director of the Family Guidance Center at Children's Hospital Medical Center in Oakland, California, and a pediatrician. \textit{See id.} at 7, 9, 13, 17, 18.
  \item \textsuperscript{109} \textit{Id.} at 19.
  \item \textsuperscript{110} \textit{Id.} at 17-19.
  \item \textsuperscript{111} \textit{See supra} text accompanying notes 96-105.
  \item \textsuperscript{112} His brother Joshua had suffered from failure to thrive, chronic diarrhea, and seizures. His sister Courtney had been tested for a variety of illnesses, including leukemia, Epstein Barr Syndrome, and connective tissue disorder. \textit{Aaron S.}, slip op. at 35-36. Ms. S. has been involuntarily admitted to two psychiatric hospitals for a suicide attempt and threats to harm herself and the children. \textit{Id.} at 20-22.
  \item \textsuperscript{113} \textit{Id.} at 13.
  \item \textsuperscript{114} \textit{Id.} at 6.
  \item \textsuperscript{115} \textit{See id.} at 38.
\end{itemize}
Ms. S.'s mental condition, and therefore acknowledged that the mother's mental condition was not the issue and thus need not be proved. However, it still allowed the MSBP testimony because it was a pediatric diagnosis relevant to the health and welfare of the child. Thus, if an objection to MSBP testimony is made based on the premise that the defendant's mental state is not at issue, the court can still allow the testimony under the relevancy of the child's medical diagnosis.

2. Other Factors Pattern

With the introduced pattern, there is either direct evidence of a foreign substance being introduced into the body or strong circumstantial evidence that this is what occurred. On the other hand, with the other factors pattern, the evidence of the fabrication is not as strong, but there are other problems within the family which lead the court to conclude that the child should be removed from the home. So far, the other factors trend has only been applied in the family court context of custody battles and termination of parental rights. In determining the best interest of the child, courts not only take into consideration an MSBP diagnosis, but also the psychological fitness of each parent as well as other factors, including economic and family stability.

In *Place v. Place*, a father was awarded custody of his two daughters. The trial court found that the older daughter was the victim of MSBP and, if placed with her mother, would be subject to repeated and unnecessary and possibly invasive medical investigations. The mother was found to be a psychologically unstable parent, and thus, unfit. The court further found the father to be better able to provide a more psychologically and economically stable homelife for the girls.

Increasingly, many courts are facing the extremely difficult choice of whether to terminate a parent's rights to their child. Three
states—Alabama, Indiana, and Vermont—have encountered this choice in instances involving MSBP as a form of child abuse. An Alabama court terminated parental rights based on child abuse in the form of MSBP, and the fact that both parents were unemployed and did not avail themselves of any of the rehabilitative measures offered to them. An Indiana court held that a mother’s instability and minimal potential for change, combined with her child’s exhibition of self-abuse, the lack of a mother-child bond, and the unnecessary medications administered to the child as the result of MSBP, warranted termination of the mother’s parental rights. In Vermont, a child’s health and safety were found to be in danger due to MSBP and her parents’ failure to acknowledge the syndrome. Based on this and the child’s special needs, inadequate supervision, an alcoholic father, and a mother suffering from seizures, the court terminated the parental rights.

B. Other Problems

There are two other problems that might be encountered when dealing with MSBP cases. First, MSBP is not listed in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (the “DSM”). Second, there is the difficulty in deciphering between an overprotective mother, a “help-seeker mother,” and an MSBP mother.

1. The DSM

The DSM argument was asserted by the defense in Phillips. Counsel argued that the MSBP testimony should not be admitted because MSBP was an unrecognized illness which was not listed in the DSM, and therefore was “not generally accepted by the medical

124. Fessler v. State Dep’t of Human Resources, 567 So. 2d 301, 302 (Ala. Civ. App. 1989). These rehabilitative measures included job training, vocational services, and various counseling sessions offered by the Department of Human Resources. Id. at 302.


127. The case does not elaborate on what these special needs might be.


129. A “help-seeker mother” may also present a child with a factitious or induced illness, but her motivations differ from those of an MSBP mother. Judith A. Libow & Herbert A. Schreier, Three Forms Of Factitious Illness In Children: When Is It Munchausen Syndrome by Proxy?, 56 AM. J. ORTHOPSYCHIATRY 602, 605 (1986).

profession.'"\(^{131}\) The judge found that this was not a requirement of the California Rules of Evidence, nor was it a scientific technology falling within the realm of the Kelly standard.\(^{132}\) Accordingly, these objections were overruled,\(^{133}\) and the expert testimony was admitted. Since the DSM is widely recognized as the authority on mental disorders, however, such an argument could persuade other courts not to admit evidence of MSBP.

Although the present version of the DSM, the DSM-III-R, still does not list MSBP as a disorder,\(^{134}\) it does contain a section on factitious disorders.\(^{135}\) These disorders are "characterized by physical or psychological symptoms that are intentionally produced or feigned."\(^{136}\) The description continues by stating that Munchausen Syndrome is the most well known form of these factitious disorders.\(^{137}\) Since MSBP is a variant of Munchausen Syndrome, in one sense the DSM-III-R does recognize MSBP.

Also, a listing in the DSM is not dispositive to the existence of an illness. The DSM-III-R begins with a cautionary statement which states, in part, that the "diagnostic criteria and the DSM-III-R classification of mental disorders reflect a consensus of current formulations of evolving knowledge in our field but do not encompass all the conditions that may be legitimate objects of treatment or research efforts."\(^{138}\) Consequently, the immense amount of medical and psychiatric literature on MSBP confirms its existence,\(^{139}\) and is enough to allow testimony on the disorder to be admitted, as evidenced in Phillips.

Furthermore, one of the proposals for DSM-IV is the addition of factitious disorders by proxy, which would include MSBP.\(^{140}\) The


\(^{132}\) Id. at 714. The Kelly standard requires a new scientific technique, such as voice identification, to be generally accepted by the relevant scientific community before it can be used as evidence in a legal proceeding. People v. Kelly, 130 Cal. Rptr. 144, 148-50 (1976).

\(^{133}\) See supra notes 50-52 and accompanying text.

\(^{134}\) AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. rev. 1987) [hereinafter DSM-III-R].

\(^{135}\) Id. at 315-20.

\(^{136}\) Id. at 315.

\(^{137}\) Id. at 316.

\(^{138}\) Id. at xxix (emphasis added).

\(^{139}\) See, e.g., Schreier & Libow, supra note 35, at 318; Rosenberg, supra note 14, at 551.

\(^{140}\) Stuart Taylor & Steven Hyler, Update on Factitious Disorders, 23 INT'L J. PSYCHIATRY MED. 81, 85-87 (1993).
proposed diagnostic criteria for this disorder would be:

A. Production or feigning of physical signs or symptoms in another person who is under the individual’s care.

B. The motivation for the perpetrator’s behavior is a psychological need to assume the sick role (indirectly) as evidenced by the absence of external incentives for the behavior, such as economic gain.141

This proposed change further weakens the unrecognized illness argument. If DSM-IV includes factitious disorders by proxy, the entire argument will be eliminated.

2. The Difference Between MSBP, Over Protective, and Help-Seeker Mothers

It may be hard to convince a fact-finder that an MSBP mother is not just being overly protective, or a “help-seeker” mother. However, overprotective mothers and help-seeker mothers can both be distinguished from MSBP mothers, and prosecutors should emphasize these differences when presenting their cases. Overprotective mothers do not induce their child’s illness or falsify symptoms that do not exist. Rather, they tend to overreact to symptoms that the child exhibits. Their motivation is genuine concern for the child’s health and well-being.

In the case of help-seeker mothers, the frequency of the symptoms and the mother’s motivation differ from those of MSBP cases.142 Help-seekers usually present their child with a factitious illness on one occasion, whereas MSBP mothers continue their actions over an extended period of time.143 The motivation of help seeker mothers to deceive the doctor “often involves a realistic need for outside intervention,”144 due to their feelings of being depressed, exhausted, or overwhelmed.145 Their attempts to deceive a doctor about the child’s illness is often easily uncovered by the medical staff.146 Once

141. Id. at 85 tbl. 2.
142. See supra note 130.
143. Libow & Schreier, supra note 129, at 603, 605.
144. Id. at 605.
145. Id.
146. Id. By contrast, as shown in In re Jessica Z, the problems an MSBP child evidences are sometimes very difficult to distinguish from legitimate health problems. 515 N.Y.S.2d 370, 376 (Fam. Ct. 1987). In that case, the defense presented expert testimony that the child’s problems could have been due to complications of a prior operation. See supra notes 92-93 and accompanying text; see also In re Bowers, No. 92-1490, 1992 Ohio App. LEXIS
the mother is confronted with the falsified evidence, her reaction is one of relief and she is eager to receive outside intervention. An MSBP mother’s motivation, on the other hand, is to fulfill her unmet needs, and she will deny any involvement in or knowledge of her child’s factitious illness.

IV. RECOMMENDATIONS

The legal community may inadvertently allow MSBP to persist. In failing to recognize and acknowledge its existence, it fails to protect the already abused child. Since the key problem in many of the MSBP cases is the lack of incontrovertible evidence to show that the mother actually administered the foreign substance, the legal and medical communities should unify their efforts, and attempt to obtain video taped evidence. Yale-New Haven Hospital in Connecticut used this approach to confirm its suspicions of MSBP in one instance. A closed circuit camera with a pinhole lens was situated in the ceiling of the child’s hospital room and focused on the bed, while a monitor was placed in a locked room with access given only to treating staff. As a result of this, the mother was observed three times in a thirty minute period emptying the contents of a syringe into her child’s mouth. The video not only confirmed the medical staff’s suspicions, it also became part of the child’s permanent medical record, which could be introduced as evidence in

49, at *14 (Jan. 2, 1992) (identifying the problem a jury may have in “distinguishing between a parent with [MSBP] and one who is merely overprotective”).

147. Id.

148. See supra notes 22, 31 and accompanying text.

149. See Mark A. Epstein et al., Munchausen Syndrome by Proxy: Considerations in Diagnosis and Confirmation by Video Surveillance, 80 PEDIATRICS 220 (1987); James D. Frost, Munchausen’s Syndrome by Proxy and Video Surveillance, 142 AM. J. DISEASES CHILDREN 917 (1988).

150. Epstein et al., supra note 149, at 220-21.

151. Id. at 221, 223.

152. Id. at 221.

153. This videotape would come in under the hearsay exceptions and thus be admissible evidence. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trust-
any proceedings against the mother.154

Courts should be advised that while children of all ages are at risk for MSBP,155 those under age five are considered to be at an increased risk.156 This is due to their lack of language and communication skills, and their inability to differentiate between good parenting and improper parenting.157 To determine whether a child suffers from MSBP, courts should consider relevant factors, such as whether there were other witnesses to the child’s episodes of illness (especially in cases of apnea);158 whether the family has an unusual medical or psychiatric history, for example, determining if the mother is a hypochondriac; whether older siblings had similar medical problems when they were infants and if so, whether they are still alive or what the cause of their death was; whether there is a pattern of doctor shopping (by checking past medical records); and whether the child has been treated in more than one hospital or in multiple states.159 In addition, courts should consider the work and social history of the parents.160

Once MSBP has been established, a child should immediately be removed from the home for two reasons. First, and foremost, the mortality rate for MSBP victims is nine percent.161 Second, even

worthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

FED. R. EVID. 803(6).

The United States Court of Appeals for the Second Circuit held that hospital records were admissible under Rule 803(6). United States v. Sackett, 598 F.2d 739, 742 (2d Cir. 1979); see also 2 MCCORMICK ON EVIDENCE § 293 (John W. Strong ed., 4th ed. 1992). However, videotapes may be considered not in the ordinary course of business. Yet it has been urged that “Rule 803(6) should be interpreted so that the absence of routineness without more is not sufficiently significant to require exclusion of the record. Nonroutine records made in the course of a regularly conducted ‘business’ should be admissible if they meet the other requirements of Rule 803(6) . . . .” 2 JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT § 7.38, at 230 (2d ed. 1992) (quoting 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE 803(6)[03], at 803-182 (1987)).

154. Epstein et al., supra note 149, at 223.
155. See, e.g., Place v. Place, 525 A.2d 704, 705 (N.H. 1987) (affected children were seven and thirteen years old).
156. Mehl et al., supra note 14, at 583.
157. Id.
158. In cases of apnea, if the only witness to all of the stop-breathing episodes is the mother, the likelihood of MSBP increases. Whereas if the child stops breathing in the presence of others, it is more probable that there is a medical explanation.
159. See Rosenberg, supra note 14, at 559.
160. Id.
161. Jay P. Willging et al., Physical Abuse of Children: A Retrospective Review and an
when a child is removed from the home and thus protected from further physical injury, the likelihood of severe psychological trauma remains high. The extent of this trauma will increase the longer the child remains in the home; therefore, immediate removal will help to mitigate it. MSBP children are more likely to manifest feeding disorders, withdrawal, hyperactivity, Munchausen Syndrome, and are more likely to abuse their own children in the same manner. A classic example of this is J.H., an MSBP child, who was removed from foster care and returned to his parents against medical recommendation. His parents had been in psychotherapy, but still did not acknowledge the MSBP. By age six, he was deemed "out of control" and had been expelled from a special kindergarten for behaviorally disturbed children. Another example of this trauma is found in Aaron S., who has been diagnosed with a conduct disorder that is manifested through stealing, cruelty to animals, and setting fires.

As of 1989, there was only one case in the medical literature in which treatment of the mother was successful. This success rate is not encouraging, nor does it support the option of leaving the child in the home.

If the court deems it is in the best interests of an MSBP-victim-ized child to be left in the home, it must lay out an elaborate plan for supervision. For example, in In re Jessica Z., the court granted custody of the child to the father with strict supervision. Other aspects of the court's holding included the mother being placed under court-ordered psychiatric treatment; the father being placed in therapy; the examination of Jessica once a month by her treating physician; a nurse being assigned to assist in Jessica's care; extensive communication ordered between the physician, therapist, psychiatrist, and the Department of Social Services (the "DSS"); bi-monthly announced

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162. McGuire & Feldman, supra note 33, at 289.
163. Id. at 291-92.
164. Id. at 291.
165. J.H. was one of six children who took part in a study on the psychologic morbidity of children subjected to MSBP. Id. at 290.
166. Id.
and unannounced visits by the DSS; and the granting of authority to the DSS to immediately remove Jessica from her home if any of these safeguards were violated.\textsuperscript{170}

Children cannot protect themselves from the abuse they receive; thus, it becomes the legislature's job to protect them. Each state should adopt New York's res ipsa loquitur standard which provides that "[p]roof 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 . . . shall be prima facie evidence of child abuse or neglect."\textsuperscript{171}

This standard constitutes a rebuttable presumption\textsuperscript{172} in which only the burden of production shifts.\textsuperscript{173} First however, the state must satisfy two elements: (1) proof of injuries (2) that would ordinarily not be sustained or exist except for the acts of the parents.\textsuperscript{174} Once these prongs have been met, the burden of production then shifts to the parent to offer a satisfactory explanation as to the child's injuries.\textsuperscript{175} The ultimate burden of persuasion will always remain with the petitioner.

Proof of a child's injuries could consist of hospital records, police and social service reports, photographs, and x-rays. Although this standard may appear harsh, the second element limits the first to injuries that would "ordinarily not be sustained"\textsuperscript{176} by a child. For example, a child may have a broken arm and the x-rays show the break as being the type associated with a fall,\textsuperscript{177} or it could show a spiral fracture which is "not a common childhood injury."\textsuperscript{178} Another...

\textsuperscript{170} Id.
\textsuperscript{172} In re Sais, 404 N.Y.S. 2d 507, 508 (Fam. Ct. 1978); In re J.R., 386 N.Y.S. 2d 774, 779 (Fam. Ct. 1976).
\textsuperscript{173} In re Tashyne L., 384 N.Y.S. 2d 472, 474 (Sup. Ct. 1976).
\textsuperscript{174} FAM. CT. ACT § 1046(a)(ii).
\textsuperscript{175} Tashyne L., 472 N.Y.S.2d at 474.
\textsuperscript{176} FAM. CT. ACT § 1046(a)(ii).
\textsuperscript{178} United States v. Lingle, 27 M.J. 704, 705 (A.F.C.M.R. 1988); People v. Martin, 4 Cal. Rptr. 660, 664 (1992) ("A spiral fracture never occurs in a simple fall, and in a [three year old] child . . . it is usually caused by someone else."); see United States v. Curry, 31 M.J. 359, 363 (C.M.A. 1990) (a doctor explaining the difference between the tendons and
er example of an injury not ordinarily suffered by a child would be dehydration caused by massive amounts of sodium in the child’s system or excessive diarrhea caused by laxatives.

The adoption of this standard will enable children to be, at least temporarily, removed from abusive environments in an expeditious manner. This will go a long way in preserving the life, health, and safety of children.¹⁷⁹

V. CONCLUSION

MSBP is a form of child abuse that goes tragically unnoticed, and is thus not properly addressed by the legal system. Every state should recognize MSBP as a form of child abuse and prosecute abusers accordingly.

When MSBP abuse is discovered before irreparable harm is done, family court will most likely be the proper forum for the case. In family court settings, New York’s evidentiary standard of res ipsa loquitur should be adopted by all states. This will go a long way to ensure that abused children are protected.

Unfortunately, as with most forms of child abuse, MSBP can lead to death. In criminal cases that result from such deaths, the prosecutor should not have to prove that the defendant has MSBP. It should be enough to show that this was the form the abuse took. For example, if a child is physically abused, evidence presented will show that the parent, either with her own hand or an instrument, struck the child. Here, the parent directly causes the abuse. On the other hand, with MSBP abuse, the parent abuses the child by indirectly causing physical abuse through unnecessary medical procedures. The evidence will show that the child was admitted to various hospitals over an extended period of time, that there is no medical diagnosis for the illnesses presented at admission, and that the child’s symptoms disappear when the parent is denied contact. Since MSBP is the nature of

¹⁷⁹ Children are often sent home from the hospital because the doctor is hesitant to label the child as abused. See M. Elaine Billmire & Patricia A. Myers, Serious Head Injury in Infants: Accident or Abuse?, 75 PEDIATRICS 340 (1985). Unfortunately, many of these children die at the hands of their abuser. See, e.g., Lingle, 27 M.J. at 705; Curry, 31 M.J. at 367.
the abuse, psychological testimony concerning a definition and the general characteristics of the syndrome should be permitted. This will enhance a jury's understanding of the abuse, and will assist it in rendering a decision beyond a reasonable doubt.

As a legal community, we have an obligation to protect those who cannot protect themselves. Children are a prime example of this group, and their protection and well-being should be of the utmost importance to us.

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