

# The Extraordinary Case of *Julia BB.*: Why the Third Department Reversed a Finding of Severe Abuse and Sent a Child Home Three Years After Her Removal

By Cynthia Feathers

The case of *Julia BB.*, a tragic tale with a joyful ending, provides valuable insights as to the rights of natural parents versus foster parents, the nature of Family Court termination of parental rights proceedings involving medical proof, and the power of the appellate process to right wrongs. The case ended late last year. By denying a motion for permission to appeal, the Court of Appeals ended a four-year battle that had pitted an upstate Social Services agency, which charged that parental abuse explained baby Julia's fractures, against the parents, who contended that their daughter had a medical condition.

The case had begun when the parents, who had two thriving young children, had the misfortune of having a baby with multiple medical symptoms that defied easy diagnosis. The character of the parents was as unlike that of abusers as one could possibly imagine, and under their nurturing care, their older children, John and Emily, enjoyed robust emotional and physical health. Over and over, the parents went to the family pediatrician seeking answers for Julia's strange skin discolorations, swelling of her extremities, and spells of excessive sweating. Renowned experts in osteogenesis imperfecta from New York City opined that such condition, also known as brittle bone disease, explained multiple subtle fractures eventually detected in Julia—without any pain or sign of trauma.

All such evidence was rejected by Social Services attorneys and the Family Court judge, who were persuaded by two local doctors with little expertise in osteogenesis imperfecta. After spending considerable time with the parents and examining Julia, one doctor initially authored a report stating that he did not believe there had been any abuse. The next day, however, he testified against the parents at a removal hearing. Further, in the ensuing months, he aggressively sought to have Julia removed from her parents' care and to have them prosecuted criminally for child abuse, writing letters to both the Social Services agency and the local district attorney. Such actions far exceeded those of a mandated reporter and raised questions about the doctor's objectivity and whether he was influenced by a fellow physician, the foster father, who had labeled the parents "sociopaths" and had declared his desire to adopt Julia.

Social Services' initial attempts to remove Julia failed, and she remained at home, without incident, in the care of her parents and grandmother until several months later, when she choked, apparently on mucus, cereal

and/or amoxicillin. At the time, her parents, grandparents, and siblings were all at home. Despite such proof of a benign event, a second doctor saw something sinister. He concluded that Julia had been smothered, explaining that he sought to find a unifying diagnosis for both the fractures and the choking. Thus, his notion that the choking resulted from abuse was merely a default diagnosis. Illuminating testimony by a more qualified expert, the chief of neonatology at a local hospital, exposed the deep flaws in such default diagnosis.

Well before all such evidence was received, Social Services and Family Court seemed to have irrevocably decided that Julia was abused. From the outset, they referred to the foster parents as the "adoptive parents" and treated them almost tenderly, while subjecting the natural parents to hostility from caseworkers supervising weekly visitation in a cramped room. Rather than protecting the primacy of the natural parents' rights, Social Services and Family Court had thus turned the statutory scheme upside down and elevated the foster parents' rights. Moreover, in contravention of a statutory command that Julia be placed with suitable relatives, she remained with the foster parents. An aunt and uncle who were exemplary parents were deemed unfit because they would not accept the unproven theory that one or both of the parents had hurt the child. Only after sustained, valiant efforts did the relatives eventually win the right to alternate weeks of custodial care of Julia.

The predetermination of the case also seemed to explain Family Court's response to a motion to reopen. When the parents moved immediately after fact-finding summations to present highly probative proof regarding their child's medical condition, Family Court rejected their application. Indeed, on the day arguments on the motion were to be heard, the court issued its fact-finding decision. Drawing heavily upon Social Services' slanted summary of testimony, the court concluded that severe abuse of Julia had been shown by clear and convincing evidence and that derivative neglect of John and Emily had been proven by a preponderance of the evidence. In a procedural anomaly that worked to the parents' advantage upon appeal, Family Court allowed the opinions of the parents' medical experts for dispositional purposes. Thus, upon reversal of the denial of the motion to reopen, the appellate court was able to consider such proof for fact-finding purposes.

After the finding of severe abuse, Family Court had only two dispositional options as to Julia: termination of parental rights or suspended judgment. The proof so overwhelmingly preponderated in favor of suspended judgment that the decision to sever parental rights was stunning. The most cogent and salient proof was a comprehensive report from the court-appointed psychologist urging that terminating parental rights would do grievous harm to all three children. Although Social Services required the parents to *take* a parenting class, they had the skills to *teach* such a class, according to the neutral expert. The children's law guardian also advocated urgently for a disposition of suspended judgment.

In addition to severing parental rights as to Julia, Family Court ordered ongoing Social Services intervention and intrusion into the lives of John and Emily, who had remained at home in their parents' care, without any services, throughout the litigation. The Court embraced the attitude of the Social Services agency, whose conviction that the parents were abusers fueled an intransigent insistence that the other children were derivatively neglected—in the face of uncontroverted proof that they were exceptionally happy and well-adjusted.

Rather than realizing that the parents' superb care of John and Emily supported a benign interpretation of their sister's ambiguous condition, Social Services struggled to find sinister theories to explain the alleged dichotomy in the care of the children. While Social Services and the foster parents had floated as a theory Munchausen's Syndrome by Proxy, they could not garner one scintilla of expert support for so branding either parent. On the contrary, the only credible evidence on that topic, provided by the court-appointed expert and a therapist who extensively counseled the family during the litigation, was that such experts had considered and completely rejected the diagnosis.

Throughout the parents' legal struggles in Family Court, they fortunately had superb trial counsel: Eleanor DeCoursey of Gordon, Tepper and DeCoursey (a member of the Executive Committee of the NYSBA Family Law Section) and Laurie Shanks, a clinical professor of law at Albany Law School. As middle-class professionals, the parents would not have qualified for assigned counsel, yet the exorbitant cost of protracted proceedings would have been devastating, and trial counsel thus generously agreed to represent the parents at a discounted rate. The parents' trial counsel sought appellate counsel with a fresh perspective and contacted me to handle the appeal. In agreeing to do the appeal pro bono, I reflected on NYSBA's expansion of its definition of pro bono to encompass representation to litigants in the "gap group"—persons who are not indigent and do not qualify for pro bono under the core definition, but who need free or low-cost services to achieve justice.

In *Julia BB.*, achieving justice took a startlingly long time. The timetable of the case is chilling when measured against Julia's life and highlights the problems of the Family Court practice of scheduling only a day or two of testimony a month in a case that requires dozens of days of testimony. Julia was born in October 2003 and removed from her parents in March 2004, when she was six months old. Not until April 2006, when Julia was 2½ years old, did Family Court render its decision to terminate parental rights. Fortunately, the Third Department immediately granted a stay of that decision, allowing ongoing family contact throughout the pendency of the appellate proceedings.

The case was orally argued in September 2006. Given the size of the record—7,000 pages—the Third Department did not render its extraordinary decision until May 2007, when Julia was 3½ years old. In a powerful, unanimous, 23-page decision, the reviewing court deplored the decision to terminate parental rights, ordered Julia to be returned forthwith to her parents, and directed that the Family Court Judge have no further role in this case.<sup>1</sup> Perhaps most striking was the reviewing court's probing discussion of medical proof and the scathing criticism of doctors whose objectivity appeared severely compromised.

The doctors' testimony invited such attack. However, given the conservative nature of appeals and the reviewing court's traditional deference to the trial court's credibility determinations, the in-depth dissection of the prosecution's proof was remarkable. As with any appeal, while the trial court had the advantage of observing the witnesses' demeanor to make credibility determinations, the appellate court had the advantage of the objectivity of multiple judges. Such dispassion was critical in a case like *Julia BB.*, in which, in a seeming domino effect, a premature belief that Julia was abused, colored the views and drove the actions of person after person aligned against the natural parents.

The day the Third Department's decision was handed down, Julia's mother waited anxiously for the promised delivery of the child who had been removed from her care three years, three months earlier. Rather than receiving the child that day, the stunned mother received Social Services' affidavit of intention to appeal and an invocation of the agency's right, as a governmental body, to an automatic statutory stay. The delay of the long-awaited joyful homecoming was short-lived. One week later, the Court of Appeals lifted the stay, and Julia went home. Social Services delayed by several more months the parents' ultimate vindication by filing futile motions for reargument in the Third Department and for leave to appeal in the Court of Appeals, with the support of *amici curiae* who had not read the record and briefs.

The agency relied on the case of *In re Philip M.* (Commissioner of Social Services of City of NY)<sup>2</sup> to support its motion. But that case did not deal with the central standard at issue in *Julia BB.*—the clear and convincing standard governing termination of parental rights proceedings. Further, *Philip M.* was about young children who had contracted a sexually transmitted disease while in their parents' care, and there was no possible innocent explanation for their injuries. In *Julia BB.*, the symptoms were explained by a medical condition. The agency also cited *In re Sidney FF.* (Ulster County Dept. of Social Services—Ralph FF.),<sup>3</sup> a case involving a father who offered incredible explanations about how his child's fractures accidentally occurred. In *Julia BB.*, the parents did not offer false excuses. Instead, they repeatedly sought medical diagnosis and treatment for their child's skin discolorations, swelling, sweating, and fractures.

In the motion for permission to appeal, the agency also implicitly contended that the opinions which allegedly supported the abuse claim, which were narrowly based on X-rays and other tests, were inherently more reliable than the opinions that there was no abuse, which were broadly based on a global view of the evidence. The latter group of views included those of the children's pediatrician, the parents' experts, the court-appointed psychological expert, and the Third Department. This case dramatizes that medical science sometimes offers no clear-cut answers about the cause of physical conditions and that, for the truth to emerge, an open mind and an understanding of all relevant circumstances can be critical for doctors and Social Services agencies, as well as for lawyers and judges.

An *amicus curiae* brief, submitted in support of the Social Services' leave application by a Harvard professor on behalf of a children's legal advocacy group, complained that the Third Department had erroneously failed to find that the fractures detected in Julia constituted a serious physical injury. The court had placed other children at grave risk, since the bar for removal was now too high, according to the *amicus*. However, under Social Services Law § 384-b(8), the Penal Law § 10.00(10) definition applies, so that serious physical injury means a physical injury which creates a substantial risk of death or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ. Cases finding no physical injury demonstrate the propriety of the Third Department's holding in *Julia BB.*<sup>4</sup>

In cautioning that the finding of no serious physical injury would impact removals of at-risk children, the *amicus* brief conflated two disparate standards—the one for a finding that a child should be temporarily removed

pending proceedings against the parent (see generally *Nicholson v. Scopetta*<sup>5</sup>) and the one for justifying permanent and irrevocable severance of parental rights (see generally *Santosky v. Kramer*<sup>6</sup>). The *amicus* also claimed that a "virtual certainty" standard had been improperly imposed, when in actuality the Third Department correctly applied the clear and convincing evidence standard. Such elevated standard is constitutionally mandated because of the fundamental liberty interest of natural parents in the care and custody of their children.

Aptly and tellingly, the *amicus* brief was supported by the National Council for Adoption, underscoring the fact that the case had been improperly treated by Family Court and the Social Services agency as dealing with the rights of the foster parents, rather than the rights of the natural parents. A number of local services agencies, perhaps alarmed by the notion that an appellate court could question and undo the efforts of a sister agency, also joined in support of the motion for leave to appeal. Fortunately, the motion for permission and support of *amici curiae* were all to no avail. When the final agency application was denied, bringing closure to the family's long, anguished legal journey, Julia was four years, two months old. Haunted by the ongoing suspicions of the local agency even after dismissal of the petitions, the parents moved out of state to start a new life with their three children. The family is thriving there.

## Endnotes

1. See *In re Julia BB.* (Saratoga County Dept. of Social Services—Diana BB.), 42 A.D.3d 208, *lv. denied*, 9 N.Y.3d 815 (2007).
2. 82 N.Y.2d 238 (1993).
3. 44 A.D.3d 1121 (3d Dep't 2007).
4. See, e.g., *People v. Gray*, 30 A.D.3d 771 (3d Dep't 2006), *lv. denied*, 7 N.Y.3d 848 (2006) (defendant shot victim with shotgun from 20 feet away, causing 32 pellets to become lodged in arm, shoulder, chest; victim spent 12 days in hospital, missed 10 days of work, suffered numbness, restrictions of use for four months; no serious physical injury found); *People v. Parrotte*, 267 A.D.2d 884 (3d Dep't 1999), *lv. denied*, 95 N.Y.2d 801 (2000) (infant suffered trauma to chest and abdomen, resulting in 20 fractured ribs, elevated enzyme levels in liver and pancreas, and blood in kidney; though severe, injuries were not life threatening; no serious physical injury found).
5. 3 N.Y.3d 357 (2004).
6. 455 U.S. 745 (1982).

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