[MS Chancery Court of Jackson County; R. v. R.]

DEFENDANT'S MEMORANDUM OF LAW
REGARDING ISSUES TO BE ADDRESSED AT TRIAL

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT

On April 6, 2005, this Court issued a temporary order in the above-captioned divorce and custody matter, appropriately granting temporary physical custody to Defendant of her three minor children. During the period of temporary custody, the Court enjoined Defendant from "allowing the children to be in the presence of the Defendant's sister or any boyfriend of [sister]." The Court issued this visitation restriction because Defendant had informed the Court that Sister is infected with the human immunodeficiency virus ("HIV"). At the upcoming hearing in this matter on July 25, 2005, Defendant will urge the Court to grant full physical custody to her and to lift any visitation restriction prohibiting the children from having contact with their aunt. Defendant submits this brief to assist the Court's consideration of HIV-related issues at the upcoming hearing. This brief seeks to provide the Court with medical and legal information regarding Sister's ability to visit the children. Although the Court may examine and resolve other legal and factual issues at the July 25 hearing, Defendant does not address those issues herein.

For the reasons discussed below, the Court need not – and should not – consider the HIV status of Defendant's sister as a factor in determining the custody, care or control of Defendant's three children. As discussed in section I of this brief, an adult's infection with HIV is not a legitimate basis for restricting that individual's contact with a minor child. For many HIV-positive individuals, including Sister, HIV is a chronic condition that can be treated with effective medication. Moreover, decades of scientific knowledge conclusively demonstrate that HIV cannot be transmitted by casual contact in the household. As Defendant explains in section II of this brief, a custodial parent retains constitutionally-protected rights to determine the care and control of her children. For that reason, the Court may not interfere with Defendant's

decision to allow her children to visit their aunt unless Sister poses an "appreciable danger of hazard" to the children. In light of established medical facts about HIV, it is clear that Sister poses no danger to the children in this case. Indeed, numerous courts in analogous cases throughout the country have held that an adult's HIV status should not interfere with determinations of custody and visitation. Finally, as discussed in section III of this brief, Mr. X, the biological father of Defendant's youngest child, lacks standing to object to Sister's visitation with the children. Mr. X has forfeited his parental rights by making no effort over the nine years since the child's birth to develop a relationship with his biological son. For this reason, the Court need not consider Mr. X's objections to Sister's contacts with the children.

FACTUAL BACKGROUND

[Defendant's husband filed divorce action] After an initial hearing, this Court appropriately awarded temporary custody to Defendant []. Mr. X moved to intervene as the biological father of Defendant's youngest child. [], this Court held a further hearing on the divorce and custodial matters regarding [Defendant's] three minor children.

As Defendant will testify on July 25, she has resided for several months with her children in Hawaii. Both Defendant's mother and her sister reside in Hawaii as well, and Defendant moved to the state in the hope of maintaining a close familial relationship with them as she raises her children. Defendant intends to remain in Hawaii following the disposition of this action.

Defendant's sister has been diagnosed with HIV. Sister is in the regular care of a licensed physician, and she is in good physical health. In the past, Sister has maintained a close relationship with Defendant and Defendant's children. In the four months since the Court's temporary custody order, however, Sister has had no physical contact with Defendant's children.

ARGUMENT

I. MEDICAL KNOWLEDGE ABOUT HIV AND AIDS DEMONSTRATES THAT HIV/AIDS IS NOT A BASIS FOR RESTRICTIONS ON VISITATION AND CUSTODY

As explained below, the fact that an adult is infected with HIV is not a legitimate reason to restrict that individual's contact with family members. Medical knowledge about HIV strongly supports this conclusion. In this section, Defendant details established facts about HIV to assist the Court's consideration of this matter. Medical knowledge about HIV transmission clearly indicates that HIV cannot be contracted through casual contact. Being around or living with people with HIV does not pose any threat of infection or illness, and presents no cognizable danger to children.

HIV is a very fragile virus, and transmission is extremely difficult. See generally del Rio & James W. Curran, *Epidemiology and Prevention of Acquired Immunodeficiency Syndrome and Human Immunodeficiency Virus Infection*, in Mandell, Douglas, and Bennett's Principles and Practice of Infectious Diseases 1477, 1488-92 (Gerald L. Mandell et al. eds., Elsevier, Inc., 6th ed. 2005) (1979); Faya v. Almaraz, 329 Md. 435, 445, 620 A.2d 327, 331-32 (1993). Indeed, surveillance and epidemiologic data support only four modes of transmission of HIV: unprotected sexual contact, sharing of infected needles, receiving transfusions of infected blood, and transmission from infected mothers to their infants *in utero*, during delivery or through breast feeding. See Faya, 329 Md. at 445, 620 A.2d at 332. Unlike influenza, tuberculosis and the common cold, HIV is not spread through the air by droplet infection. Ctrs. for Disease Control and Prevention, *HIV and Its Transmission*, (updated September 22, 2003)[1]

HIV cannot be transmitted through casual contact or day-to-day interactions at home, work or school. One cannot contract HIV through touching, hugging, kissing, or sharing food

[1] *Available at* http://www.cdc.gov/hiv/pubs/facts/transmission.htm.

utensils, towels, bedding, swimming pools, telephones or toilet seats. Id.[2] Neither saliva nor tears are capable of transmitting the virus. Id.[3] HIV cannot be transmitted between family members in the normal household setting unless there is contact between the open wound or mucous membranes of one person and the infected blood of another. Id.

In light of these extremely limited modes of possible HIV transmission, children are not at heightened risk of transmission due to the presence of a person living with HIV in the household. Indeed, it has been well established for two decades that HIV cannot be spread by day-to-day contact in the home. For example, in an early study of the households of over 17,000 people with HIV, researchers found no instance where a family member who was not the patient's sexual partner contracted HIV. Ctrs. For Disease Control and Prevention, *Apparent Transmission of Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus from a Child to Mother Providing Health Care*, 35 (5) Morbidity & Mortality Wkly. Rep. (1986)[4]. In another study, more than 1000 household contacts of HIV-infected persons were carefully detailed, with absolutely no evidence of transmission. The study indicated that transmission had not occurred between household members after thousands to tens of thousands of days of sharing eating utensils, towels, combs, toilets, bathtubs, and beds. Friedland, *Transmission of HIV-1 From One Child to Another*, 330 New Eng. J. Med. 1313, 1314 (1994) (letter to the editor). Supported by these and other comprehensive studies of HIV transmission, the Association of Family and Conciliation Courts has stated:

---

[2] Cf. Faya v. Almaraz, 329 Md. 435, 445, 620 A.2d 327, 331-32 (1993) (taking judicial notice of characteristics of HIV and its modes of transmission); Doe v. Borough of Barrington, 729 F. Supp. 376, 381 (D.N.J. 1990) (relying on Centers for Disease Control and Prevention and Surgeon General reports to observe that AIDS cannot be spread through casual contact).
[3] See also Note, *Public Hysteria, Private Conflict: Child Custody and Visitation Disputes Involving an HIV Infected Parent*, 63 N.Y.U. L. Rev. 1092, 1102 (1988).
[4] *Available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/00000680.htm.

> There is no evidence of HIV transmission to children through normal parent/child contact. Extensive studies continue to clearly document that transmission of the AIDS virus does not occur from the HIV+ parent to the child or to other adults living closely together in the same household.

Ass'n of Fam. and Conciliation Cts., *Policy Re: AIDS and Family Law* 3 (1992).

For decades, courts throughout the country have recognized that there is no actual risk that a minor can contract HIV from a family member in the home. See, e.g., Conkel v. Conkel, 31 Ohio App. 3d 169, 173, 509 N.E.2d 983, 987 (1987) (rejecting mother's argument that children might contract HIV during overnight visits with father, and noting that "AIDS or other HIV-associated diseases are not contracted by casual household contact"); Jane W. v. John W., 137 Misc. 2d 24, 27, 519 N.Y.S.2d 603, 605 (N.Y. Sup. Ct., Kings County 1987) (noting that father's diagnosis of "AIDS and the possible transmittal of the AIDS virus should play little if any role in determining this . . . application for visitation"); Stewart v. Stewart, 521 N.E.2d 956 (Ind. Ct. App. 1988) (holding that father's visitation rights should not be terminated because he had AIDS, and noting evidence that household contact was not a recognized mode of HIV transmission).

In sum, based on medical knowledge of HIV transmission, it is clear that being in the presence of a person living with HIV or sharing a household with a person living with HIV is neither hazardous nor unsafe.[5]

II. RESTRICTIONS ON DEFENDANT'S CUSTODY ARE NOT WARRANTED BECAUSE HER SISTER'S HIV STATUS DOES NOT POSE ANY DANGER TO THE CHILDREN

[5] A large number of families in the United States have been affected by the HIV epidemic. According to the Centers for Disease Control and Prevention, approximately 1.1 million Americans are infected with HIV. See Ctrs. For Disease Control and Prevention, *A Glance at the HIV/AIDS Epidemic*, (updated June 21, 2005) *at* http://www.cdc.gov/hiv/PUBS/Facts/At-A-Glance.htm. Many people living with HIV in Mississippi and elsewhere are raising minor children successfully. Indeed, hundreds of thousands of children in the U.S. have at least one HIV-positive parent, and these families "are found in all regions of the country and in communities of all sizes (not just in urban centers)." Mark A. Schuster, et al., *HIV-Infected Parents and Their Children in the United States*, 90 (7) Am. J. Pub. Health 1074 at 1077, 1079 (2000); see also Rotheram-Borus et al., *Six-Year Intervention Outcomes for Adolescent Children of Parents with Human Immunodeficiency Virus*, 158 Archives Pediatric & Adolescent Med. 742 (2004).

In its temporary order of physical custody to Defendant, the Court indicated that Defendant is "enjoined from allowing the children to be in the presence of the Defendant's sister [], or any boyfriend of Sister." As explained above, medical knowledge about HIV establishes that this restriction should be lifted at the Court's earliest opportunity and certainly should not be included in the Court's final order. Sister's HIV status does not pose any danger to the children. Indeed, the overwhelming weight of judicial authority acknowledges that Sister's HIV status should not be treated as a basis for restricting custody or visitation. For these reasons, the final order should not restrict the children from being in the presence of their aunt, Sister, with whom they have a warm and loving relationship, or her boyfriend.

A. Parents Have a Fundamental Right to Determine the Care, Custody, and Control of Their Children

As long recognized by the United States Supreme Court, Defendant's right as a parent has to raise her children is a fundamental one protected by the due process clause of the Fourteenth Amendment. Troxel v. Granville, 530 U.S. 57, 66, 120 S. Ct. 2054, 2060 (2000). "The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and '[r]ights far more precious than property rights.'" Stanley v. Illinois, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212 (1972) (internal citations omitted). Indeed, the Supreme Court has noted that these rights are "perhaps the oldest of the fundamental liberty interests" recognized under the federal Constitution. Troxel, 530 U.S. at 65, 120 S. Ct. at 2060.

Accordingly, the Due Process Clause "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." Id. at 66, 120 S. Ct. at 2060. There is a "strong presumption . . . that fit parents act in the best interests of their children…." Stacy v. Ross, 798 So. 2d 1275, 1279 (Miss. 2001) (citing Troxel, 530 U.S. at 68,

120 S. Ct. at 2061). Therefore,

> '[A]s long as a parent adequately cares for his or her child, (i.e., is fit) there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.'

Stacy, 798 So. 2d at 1279-80 (quoting Troxel, 530 U.S. at 68-69, 120 S. Ct. at 2061). As further clarified by the U.S. Supreme Court, the Due Process Clause "does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." Troxel, 530 U.S. at 72-73, 120 S. Ct. at 2064.

B. Restrictions on Visitation Are Imposed in Mississippi Only Where There Is an "Appreciable Danger of Hazard Cognizable in Our Law"

In light of the strength and constitutional dimension of parental rights, courts will not infringe on parental rights absent a compelling need. Indeed, a chancery court does not have the power to restrict a parent's right to determine with whom a child may spend time unless the circumstances present "an appreciable danger of hazard cognizable in our law." Newsom v. Newsom, 557 So. 2d 511, 517 (Miss. 1990).[6] Put another way, "something approaching actual danger or other substantial detriment to the children . . . is required before a chancellor may restrict visitation. . . ." Cox v. Moulds, 490 So. 2d 866, 867 (Miss. 1986).

The Supreme Court of Mississippi has reversed several restrictions for lack of evidence of harm or danger to the child. For example, in Dunn v. Dunn, the court reversed a restriction enjoining a father from allowing his children to be in the presence of his partner. 609 So. 2d 1277, 1286 (Miss. 1992). In Dunn, no evidence indicated that "the mere presence of a lover of

[6] This standard appears to have developed in the context of restrictions on parental visitation. Its applicability to the context of a parent with primary custody is unclear. See, e.g., Stanley v. Illinois, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212 (1972), Stacy v. Ross, 798 So. 2d 1275, 1279-80.

Michael's would be detrimental to the children or dangerous in any way." Id.[7] Similarly, in Chamblee v. Chamblee, the Supreme Court reversed a chancellor's visitation restriction that had barred a child from being in the presence of "'any male companion not related to [the mother] by blood or marriage.'" 637 So. 2d 850, 862 (Miss. 1994). According to the court, the visitation restriction was both "overbroad" and unsupported by evidence establishing any potential threat from the mother's boyfriend or anyone else. Id.

In Cox v. Moulds, the Supreme Court reversed a denial of overnight visitation and a restriction that the father could visit his daughter only at his ex-mother-in-law's home. The chancery court's express reason for imposing these restrictions was that the father's home was very small and the court was concerned about the 13-year-old daughter's need for privacy. Cox, 490 So. 2d at 869-71. The Supreme Court held this restriction to be "manifestly erroneous" because no substantial evidence in the record supported an appreciable danger of hazard cognizable in state law. Id. at 871. Significantly for the case at bar, the court also reviewed the record for other evidence of harm and found that, although the father resided with his sister, who had been institutionalized at least twice for "nervous disorders," the fact of this disability alone did not suggest that the presence of the sister in the home created any potential hazard to the children. Id. at 870.

In sum, Mississippi law clearly prohibits custodial restrictions that are not based on substantial evidence of harm or danger to the children. Such substantial evidence cannot be shown in the instant case based on the HIV status of Defendant's sister, because Sister's HIV status poses no threat of harm at all to Defendant's children.

[7] The Dunn Court also noted that "[a]n extramarital relationship is not, *per se*, an adverse circumstance." 609 So. 2d 1277, 1286 (Miss. 1992) (quoting Morrow v. Morrow, 591 So. 2d 829, 833 (Miss. 1991)).

C. The HIV Status of Defendant's Sister Is Not a Basis for Restricting Defendant's Custodial Rights

Courts around the country have rejected concerns about HIV transmission as grounds for restricting custody or visitation. See, e.g., Sherman v. Sherman, 1994 WL 649148 (Tenn. Ct. App. Nov. 18, 1994) (HIV status of child's uncle, who lived with child's father, was not a basis for limiting father's visitation rights); North v. North, 102 Md. App. 1, 648 A.2d 1025 (1994) (reversing trial court's denial of overnight and extended visitation rights on the basis of father's HIV status); Stewart v. Stewart, 521 N.E.2d 956 (Ind. Ct. App. 1988) (ruling that father's HIV infection did not support trial court's termination of visitation rights); Jane W. v. John W., 137 Misc. 2d 24, 519 N.Y.S.2d 603 (N.Y. Sup. Ct., Kings County 1987) (granting application of father with AIDS for unsupervised visitation with his 18-month-old daughter, *pendente lite*).

In Newton v. Riley, 899 S.W.2d 509 (Ky. Ct. App. 1995), a father, upon learning that his ex-wife's new husband had AIDS, sought modification of a joint custody arrangement to give him sole custody of the minor child. The appellate court affirmed the trial court's refusal to change the custodial arrangements because "the dispositive factor in . . . custody/visitation case law [involving HIV] has been the courts' reliance on the medical community's increased understanding of HIV and its modes of transmission." Id. at 510. The Newton court specifically cited "the widely accepted conclusion among medical researchers . . . that there exists no risk of HIV infection through close personal contact or sharing of household functions." Id. (internal quotations and citations omitted).

In Steven L. v. Dawn J., 148 Misc. 2d 779, 561 N.Y.S.2d 322 (N.Y. Fam. Ct., Kings County 1990), a father petitioned for a change in custody on the grounds that the child's mother had tested positive for HIV. The court found that the sole fact that the mother tested positive was insufficient to warrant a change in custody because HIV in and of itself does not pose a

danger to a child. While noting that "[i]t would not be in the child's best interest to be exposed to any person, including a parent who had a[n] . . . easily, contagious disease," the court made reference to the numerous studies that have shown no risk of HIV infection through close personal contact or sharing household functions and ordered that custody remain with the mother. Id. at 783, 561 N.Y.S.2d at 324

Here, as in the cases cited above, Sister poses no risk to her nephew and nieces. Moreover, Sister's health is good,[8] and she is receiving regular care from a healthcare professional. Compare Blevins v. Bardwell, 784 So. 2d 166, 175-76 (Miss. 2001) (it was not "manifestly wrong" for the court to consider, in addition to numerous other factors favoring the mother, that a person "critically ill" with HIV and who smoked three to four packs of cigarettes

[8] While HIV once was considered to be almost invariably a fatal illness, with the advent of powerful and effective medication, this is no longer the case. Today, many people live for many years with HIV infection without experiencing any illness. In 1996, the introduction of a new class of anti-viral medication marked an incredible revolution in the treatment of HIV. These medications are able powerfully and effectively to suppress HIV and prevent resultant immune compromise. See Jonathan E. Kaplan, *Guidelines for Preventing Opportunistic Infections Among HIV-Infected Persons - 2002: Recommendations of the U.S. Public Health Service and the Infectious Diseases Society of America*, 51 (RR-8) Morbidity & Mortality Wkly. Rep. (2002), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5108a1.htm. As a result, many people experience HIV as a chronic, manageable condition that causes minimal adverse health effects.

per day was living with the father). Id. at 175-76.[9] Sister, like many other people living with HIV, experiences HIV disease as a chronic condition for which she receives treatment; she is not critically ill and has no habits that could endanger the children.

III. INTERVENOR MR. X HAS NO PARENTAL RIGHTS AND NO STANDING TO RAISE ANY ISSUE CONCERNING SISTER'S HIV STATUS

Regardless of the merits of his argument, Mr. X lacks standing to object to Defendant's decision to allow her children to visit with Sister. A biological father such as Mr. X who has been absent from his child's life for the nine years since his birth lacks any parental rights under Mississippi law. Mr. X proceeds from the mistaken assumption that his biological tie to Child alone vests him with parental rights, despite his utter failure to establish any relationship whatsoever with Child before this divorce proceeding. The extent to which a biological father of a child born out of wedlock has any parental rights is dependent on "the degree to which the putative father had attempted to establish a relationship with his child." Humphrey v. Pannell, 710 So. 2d 392, 397 (Miss. 1998) (citing Lehr v. Robertson, 463 U.S. 248, 103 S. Ct. 2985 (1983)); accord Griffith v. Pell, 881 So. 2d 184, 186 (Miss. 2004) ("[E]ven when a third party to a marriage is the biological father of a child of the marriage, the biological father does not have

[9] While Sister's stable health and treatment renders Blevins inapplicable, Defendant submits that courts should not necessarily weigh critical illness in a family against a parent. See, e.g., Cox, 490 So. 2d at 870 (reversing denial of overnight visitation, despite the fact that father lived with sister who had been hospitalized twice for nervous disorders); In re Marriage of Carney, 24 Cal. 3d. 725, 739-40, 598 P.2d 36, 44 (1979) (awarding custody to quadriplegic father); Matta v. Matta, 44 Mass. App. Ct. 946, 693 N.E.2d 1063 (1998) (awarding custody to mother with multiple sclerosis who had been using wheelchair since 1991 and was terminally ill); Harper v. Harper, 559 So. 2d 9 (La. Ct. App. 1990) (awarding custody to mother with spina bifida). Indeed, even if Sister had encountered medical difficulties as a result of HIV, her medical condition would not be a reason to restrict the children from seeing their aunt. See In re Interest of John T., 538 N.W.2d 761, 772-73 (Neb. Ct. App. 1995) (in a case decided before modern advances in treatment, the court assumed that the foster parent with AIDS might suffer illness or death but held that children should not be shielded from life's realities); Cooper, *HIV-Infected Parents and the Law: Issues of Custody, Visitation and Guardianship in AIDS Agenda: Emerging Issues in Civil Rights* 78 (1992) ("basing custody or visitation decisions on a desire to 'shield' a child is not likely to be in the child's best interest, and, in fact, may be harmful").

any paternity rights if he fails to establish that he had a substantial relationship with the child.") (citing A.J. v. I.J., 270 Wis. 2d 384, 407, 677 N.W.2d 630, 642 (Wis. 2004)).

Both statutory and case law establish that Mr. X has forfeited his claim to parental rights by his years of neglect. Among the bases for termination of parental rights is making no contact with the child for over a year; *or* where there is "an extreme and deep-seated antipathy by the child toward the parent or when there is some other substantial erosion of the relationship between the parent and child which was caused at least in part by the parent's serious neglect, . . . prolonged and unreasonable absence, [or] unreasonable failure to visit or communicate . . ." Miss. Code Ann.§ 93-15-103(3)(b), (f) (2005). Under this statutory provision, the Court may base its decision on one or more factors. Miss. Code Ann. § 93-15-103(3) (2005). In this case, both factors apply: Mr. X forfeited his claim to parental rights both (1) by making no contact for several years and (2) by allowing a substantial erosion of his relationship with his biological child – if such a relationship can be said to exist at all – as a result of his serious neglect, unreasonable and prolonged absence, and unreasonable failure to visit or communicate. Mr. X has forfeited his parental rights under the statute.

Nor does Mr. X have parental rights under applicable common law. The Supreme Court of Mississippi defined the standard for finding abandonment over twenty years ago:

> where a parent, without just cause or excuse, forsakes or deserts his infant child for such a length of time, and under such circumstances, as to show an intent to shirk or evade the duty, trouble or expense of rearing it, or a callous indifference to its wants … he or she is guilty of such abandonment of it as to bar his or her right thereafter to reclaim its custody from any person who may have ministered to and protected it during such period of desertion. … Having once deserted the child, there is not guaranty that such a parent might not in the future be guilty of some equally atrocious conduct toward it.

Smith v. Watson, 425 So. 2d 1030, 1035 (Miss., 1983). In Smith, the court held that, due to the father's seeing the child only twice and paying no support until she was seven years old, the

father's "abandonment of the child was so firmly established as to bar his right thereafter to reclaim custody from the grandparents" who had custody. Id. Moreover, abandonment can arise from not only affirmative relinquishment but also "from the voluntary and extended failure even to seek custody." Hill v. Mitchell, 818 So. 2d 1221, 1225-26 (Miss. Ct. App. 2002) ("[A]t some stage, even occasional visits by parent cannot prevent a finding that the parent has so removed herself from active participation in a child's life such that abandonment has occurred."). See also Governale v. Haley, 87 So. 2d 686, 690 (1956) (citation omitted) (abandonment found where biological parent was "contributing nothing to [the child's] support, taking no interest in it, and permitting it to remain continuously in the custody of others, substituting such others in his own place so that they stand *in loco parentis* to the child . . .").

Because Mr. X failed to make any claim of paternity during the first nine year's of Child's life and has never made any attempt to foster a parental relationship with Child, he has legally abandoned the child. For that reason, he lacks standing to object to Defendant's decision to allow Child and her other children to visit with their aunt, Sister.

CONCLUSION

For the reasons discussed herein, Defendant will urge the Court at the July 25 hearing to lift any restriction on Defendant's ability to decide whether her sister may have contact with her minor children.

Dated: Gulfport, MS
July 20, 2005

[Respectfully submitted, MISSISSIPPI CENTER FOR LEGAL SERVICES CORP.; LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.; CLIFF JOHNSON, PIGOTT, REEVES, JOHNSON & MINOR, P.A.]