Adopting Attitudes

Looking to adopt? Call a lawyer first.

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Parents living with HIV can encounter a barrage of legal hurdles in maintaining relationships with their children. Some of these issues are driven by the parents' identities not only as people with HIV but as members of other minorities: Gay men and lesbians, people of color, single women, the poor. Despite this, however, parents with HIV have fared better in custody cases than one might expect.

The emotional, frequently contentious nature of custody disputes, often produced in the wake of fracturing relationships, can cloud the parties' focus on solutions that truly serve a child's best interests. Making sure a child stays in contact with both parents requires continued communication between parties who may feel intense hostility toward each other. It is not surprising, then, that HIV has been used as a weapon in custody proceedings, a product of either ignorance and fear, or a willingness to exploit phobic perceptions of HIV and the behavior that causes its transmission.

Courts afford the rights of biological parents considerable weight in custody disputes. However, these rights are not inviolate, and the standard which family courts employ in resolving custody matters is a determination of what is in "the best interests of the child." Needless to say, "best" is a standard that is subject to all manner of subjective views and values.

Fortunately, most reported custody cases that focus on HIV status have rejected arguments that a parent's or household member's HIV infection should control a decision as to who can best parent a child. Most recently, a 1995 state appeals court decision in Kentucky, *Newton v. Riley*, upheld the rejection of a father's request for sole custody based on his ex-wife's marriage to a man with AIDS. The court noted the widely accepted conclusion that there is no risk of HIV infection through close personal contact or normal household activities. One state, Florida, has enacted a statute forbidding the denial of custody to a biological parent or grandparent solely because that person has HIV.

In adoption cases, in which deference to the rights of the biological parents plays a different role, the results are less predictable. In the 1993 case of *The Adoption of Nicholle Johnson*, the Indiana Court of Appeals affirmed a trial judge's decision to allow a biological mother to withdraw her consent to the adoption of her child after learning that both the prospective mother and father who had cared for the child since birth were HIV positive. The following year, a Florida judge

awarded custody of a three-year-old to the adoptive father's parents, reasoning this would be less traumatic than living with parents who were going to die. However, in the more recent case of *The Interest of John T.*, a Nebraska appellate court concluded that a state agency's plan to remove a toddler from his foster parents solely because the foster mother had HIV was not in the child's best interests. The court wisely noted that it was not its role to "save" the child from one tragedy by replacing it with another -- the loss of both parents with whom he shared a strong bond. [For more on the Nebraska and Florida adoption cases, see "The Parent Trap".]

The health of a prospective parent is a relevant factor in determining the appropriateness of an adoption. What remains largely unregulated and unresolved is the extent to which a potential parent's life-shortening disability should act as a bar to adoption. It's clear that the Americans With Disabilities Act applies to adoption authorities, but it has remained a largely untapped resource. It is likely to be invoked in the future to block unreasonable interference with the rights and abilities of people with disabilities, including HIV, to parent.

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