IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
(Mr Justice Wilson)

Royal Courts of Justice
Tuesday, 21st September 1999

Before:
LADY JUSTICE BUTLER SLOSS DBE
LORD JUSTICE EVANS
LORD JUSTICE THORPE

C (A CHILD)

MR. M. HOROWITZ Q.C. (instructed by Messrs Bindman & Partners, London, WC1) appeared on behalf of the Applicant Mother.
MR. G. MURDOCH Q.C. (instructed by the Legal Department, London Borough of Camden) appeared on behalf of the London Borough of Camden.
MR. A. KIRK appeared by the Official Solicitor on behalf of the Child.

JUDGMENT

LADY JUSTICE BUTLER-SLOSS: This is an application by the parents for permission to appeal against the decision of Wilson J given on 7th September 1999, when he directed that a little girl, born on 8th April 1999, should be taken to Great Ormond Street or to some other suitable hospital, and there she should be tested as to whether or not she was infected with HIV. The mother and the father both seek to appeal from that decision. The father is not present, having conducted his objection to the local authority's application for this test in person, and it appears from what was said in the judgment of Wilson J, he did it with great ability. Most unfortunately, he has chosen not to attend today, although he is one of the applicants for permission to appeal. The mother is not present. It looks as though they may have decided to pre-empt the date for this test which is to be at Great Ormond Street on Friday. No one is certain where they are. They may or may not be out of the country. It is an element of irresponsibility which is very sad, since they are otherwise able, intelligent and responsible people, and there is no doubt that they have in all aspects except one been responsible and caring parents. They indicated to the judge that they were going to stay at home pending any further action that might be taken, such as an application for permission to appeal, and as I said to Mr. Horowitz, who represents the mother, they ought to examine their consciences as to whether they ought to be going off like this with their child. They are behaving, as I have already said, in a somewhat irresponsible way.

At the end of the day it is the child who matters. Whether or not the child should or should not be tested is a matter for the welfare of the child, and the behaviour of the parents in a matter as important as this ought not to deflect this court from dealing with it. The way in which they have behaved is irrelevant to the decision to which this court has to come; that is to say, whether or not

Wilson J's decision, in the exercise of his discretion, was or was not capable of being appealed. On an application for permission to appeal, it is for this court initially to decide whether or not there is an arguable case which passes that threshold which makes it necessary for an appeal to be heard.

The background to this sad case is that the mother, who had one or more previous relationship, found in 1990, from one previous relationship, that she was HIV positive. I ought to say that Wilson J gave a careful judgment of some 22 pages, and that judgment was given in open court, and therefore the facts are already known. It is not necessary for me to deal with them other than shortly. I adopt with gratitude the careful analysis of the facts from Wilson J.

The mother, having found that she was HIV positive, came to terms with that sad state of affairs and imposed upon herself a regime of alternative medicine and of careful diet and healthy living, which has had the result, from her point of view, that she remains, some eight or nine years later, very fit and well, although she remains HIV positive. She met the father, whom she has not married, in 1997. He was tested and is negative. They planned a child and their daughter was born on 8th April 1999. They chose not to go through the normal system of registering at a hospital for anti-natal care because they were concerned that the conventional medical treatment would impose what to both of them would be an unacceptable approach to the birth, and the mother had the child at home with the assistance of a midwife. She had a natural birth and the child was born entirely fit and obviously, the judge said in his judgment, an adorable baby.

They registered with a new general practitioner some weeks after the birth of the child. The mother told the general practitioner or produced some former notes of the previous general practitioner which showed that she was HIV positive. That was not picked up immediately by the general practitioner, but when she read the notes some days or weeks later she got immediately in touch with the parents and saw them and sought their consent to seeing a consultant at Great Ormond Street. Great Ormond Street is one of a comparatively small number of hospitals which have a unit dedicated to dealing with children who are HIV positive. With some reluctance the parents went to see a doctor at Great Ormond Street but refused to have the child tested and refused any sort of treatment for the child.

In due course the local authority became involved and applied for a specific issue order. They were given leave by Connell J to do so. The Official Solicitor is representing the child. At the hearing Wilson J heard four days of evidence, including a number of medical experts. The mother was represented by Mr. Horowitz QC who represents her today. The father represented himself. The local authority is represented by Mr. Gordon Murdoch QC and the Official Solicitor by Mr Kirk who attends today. The hearing lasted, including judgment, some five days. The consensus of evidence was firmly in favour of a medical test. There was both written evidence from the first consultant, Dr. Gibbs, at Great Ormond Street, oral evidence from Dr. Novelli from Great Ormond Street, a letter from a professor or doctor at Edinburgh on behalf of the mother which she was obliged to present to the court, and a consultant, Dr. Walters, from Imperial College, who is a co-author with Dr Novelli but gave independent evidence, both from Imperial College. He is also at St Mary's, Paddington. All of them were of the opinion that there was a 25 to 30 per cent chance that this child would be HIV positive and that it was necessary to test the child. If the child was positive further treatment would be highly desirable. The mother has from the onset of the birth breastfed the baby. If the baby is HIV positive, such breastfeeding obviously can continue. If the

child is negative, then the medical experts were unanimous that the mother ought not to breastfeed.

There was one consultant, a Professor of Pathology from Ontario, who had done a study on HIV and similar matters, and his view was in accord with the parents in doubting the existence of HIV as such, doubting its relation to Aids, and definitely doubting any need either to test or, in particular, to treat.

The judge in his judgment chose, as was his right, to accept the preponderance of medical evidence, from Great Ormond Street and St Mary's, Paddington, supported, as it was, from Edinburgh, and took the view that this was the orthodox but also responsible approach of the medical profession to HIV and Aids. The judge was only dealing, and it is crucial that this should be clear, with the question of the first test. If the child is positive, it would not be necessary to test again but it may be necessary to treat. The consensus was, from all but Professor de Harven from Ontario, that treatment for a baby under six months was important. If the child is negative but the mother continues to breastfeed, it may well be necessary to have further tests. Indeed, because the baby has been breastfed throughout, the test only applies to up to some eight weeks before the date of the test. It would be likely that it would be necessary to test again and if the mother continues to breastfeed to continue to test until the end of breastfeeding.

Dr Novelli and Dr Walters' view, as set out by Wilson J at page 17 of his judgment, in a passage which it is necessary to read, said this:

> "... if the baby is not tested for HIV, the professionals who should be advising on her care... are under a grave handicap which can only be to the prejudice of the baby. If, in the absence of a test, the baby develops illness, a doctor treating her who knows of the possibility that she is infected will have to cater for that possibility in the proposed treatment; if, in fact, the baby is uninfected, it is likely that the proposed treatment will be unduly aggressive."

The parents do not accept the evidence of the doctors. They do not accept the decision of the judge, and the mother through counsel comes to us to say that they are good parents with very strongly held views. There is no emergency here. The judge recognized that he could not prevent the breastfeeding because to make such a direction would be ineffective with the mother, and that as responsible parents it is wrong for the court to intervene in decisions which are pre-eminently decisions for parents. The judge is criticised for setting out the parents' strongly held views but not evaluating those views, particularly not evaluating the impact upon the parents of any form of medical regime which would have an enormous impact on them and has already had sufficient impact for them to leave their home. They would find it difficult to abide by any step in the process, and the effect of their enormous upset and distress at having imposed upon them a decision to have their baby tested would inevitably affect the care which they are giving to this child and, indeed, although Mr Horowitz was cautious enough not to say so directly, has shown itself by the fact that they have acted irresponsibly, disappearing with this child, instead of giving the child the normal routine that one would expect for a five month old baby. This is the effect of the stress upon them of what they consider to be an unwarranted interference with their rights and responsibilities for their child. Mr. Horowitz says that there has to be a space within which parents can reject the current orthodoxy, even though that may be based upon good medical evidence. There is an alternative view. They should be entitled to parental autonomy to make that choice, and that is

something with which the courts should not intervene. He says that this is a continuing and developing area of medicine and that the parents ought to be free to make these decisions without the interference of the court. The judge therefore was in error in not evaluating the parents' response. He erred in his exercise of discretion in under-emphasising this parental response and the impact upon the child, and that area in life when parents ought to be left to get on with the care of their own children without authoritarian intervention. I am paraphrasing the rather better way in which Mr Horowitz actually argued this to us.

Mr Horowitz relied upon a decision of this court in Re T (Wardship: Medical Treatment) [1997] 1 FLR 502. I have to say, having been one of the judges in that case, which was a liver transplant case, that it was at the other end of any spectrum that one might be considering. In that decision in my judgment I cited a passage from the Master of the Rolls, Sir Thomas Bingham, in Re Z (A Minor) (Identification: Restrictions on Publication) [1997] Fam 1, and I read the passage from the Master of the Rolls:

> "I would for my part accept without reservation that the decision of a devoted and responsible parent should be treated with respect. It should certainly not be disregarded or lightly set aside. But the role of the court is to exercise an independent and objective judgment. If that judgment is in accord with that of the devoted and responsible parent, well and good. If it is not, then it is the duty of the court, after giving due weight to the view of the devoted and responsible parent, to give effect to its own judgment. That is what it is there for. Its judgment may of course be wrong. So may that of the parent. But once the jurisdiction of the court is invoked its clear duty is to reach and express the best judgment it can."

I recite one sentence from my judgment:

> "As Sir Thomas Bingham MR said in Re Z, the court decides and in doing so may overrule the decision of a reasonable parent."

The decision of these parents is not to allow this child to have the first test. The issue is not: Should this baby have treatment? That may or may not arise in the future. The issue is to determine the medical status of the child by a test which is likely to be definitive, in the sense that, if it says the child is positive, everyone knows what the position is, but less definitive if the test is negative at that stage. I have no doubt at all, for my part, that it is right that this child should have the test done. I can see no reason whatever for this court to interfere with the clear and careful decision of Wilson J. In my view, he analysed and weighed in the balance the competing arguments of the parents and the overwhelming medical evidence presented by the Council and the Official Solicitor.

The issue before this court is an issue of knowledge. What is the position of this child? In my view, the child is clearly at risk if there is ignorance of the child's medical condition. The degree of intrusion into the child of a medical test is slight. The degree of intrusion into the family of taking the child to the hospital for a medical test would for most people be comparatively slight. The parents have magnified this into a major issue because they do not accept any of the premises upon which the tests will be carried out. But the welfare of the child is paramount. The court has been

asked to deal with the case. It cannot shirk its duty. The space sought by Mr Horowitz, which is a space in which parental decisions are final, undoubtedly exists, but it exists subject to section 1(1) of the Children Act. It does not matter whether the parents are responsible or irresponsible. It matters whether the welfare of the child demands that such a course should be taken and, as Evans L.J. was asking during this hearing in argument: Can it be in the child's best interests for the parents to remain ignorant of their own child's state of health? You only have to ask that question for most people to say no. We are not talking about the rights of parents. We are talking about the rights of the child. Wilson J set out various articles of the UN Convention on the Rights of the Child. We do not in a sense need that. It is all encapsulated in section 1 of the Children Act, but it does give added strength to this most important of all points, that the parents' views, which are not the views of the majority, cannot stand against the right of the child to be properly cared for in every sense. This child has the right to have sensible and responsible people find out whether or not she is or is not HIV positive, either as a result of the birth to her mother, or as a result of the breastfeeding. There is a 25 per cent chance, according to the doctors, that she is HIV positive because of the birth. There is an increased danger because of breastfeeding. There is a 1 in 3 or 1 in 4 chance that she may be HIV positive. What seems to me to be crucial is that someone should find out so that one knows how she should be looked after. The idea that she should have aggressive treatment, because doctors who know about it feel, because they do not know if she is or is not HIV positive, that they must give her additional treatment, when it would not be necessary if she was not HIV positive, seems to me as sad as if they will not give her adequate treatment because the parents did not tell the doctor and the child was in fact seriously ill and was not given adequate treatment. Either way this child has her own rights. Those rights seem to me to be met at this stage by her being tested to see what her state of health is for the question of knowledge. That is as far as it goes. I therefore would refuse the application for permission to appeal.

LORD JUSTICE EVANS: I agree.

LORD JUSTICE THORPE: I also agree. Mr Kirk, instructed by the Official Solicitor acting for the child, has submitted an admirably succinct skeleton argument. I recite three sentences which I accept without qualification. I share the Official Solicitor's difficulty in discerning any issue of great public interest or question of general policy that arises for determination. I agree with the Official Solicitor that the single issue before the court below was whether or not the child should be tested for the presence of the HIV virus. I also agree that the effect of the learned judge's order was to ascertain the medical status of the child so that all concerned with her future welfare, her parents and the medical profession might be better informed as to appropriate avenues of treatment in the event of illness. In adopting those submissions, I would only emphasize the relative ease of the judge's task. First, the relevant legal principle was not in any doubt. The relationship between the power of the parents and the power of the court is so clearly stated by Sir Thomas Bingham MR in the passage from the case of Re Z cited by my Lady. Thus the essential judicial task was to evaluate the scientific evidence from a number of leading experts. That Wilson J did with conspicuous care. This morning Mr. Horowitz conceded that the judge's findings on the medical issues were unassailable. In my opinion were permission given the appeal would have no prospect of success.

Order: Application refused; legal aid taxation of the mother's costs; order of 17th September to continue until further order of the High Court.

(Order not part of the judgment of the court)