/* This case is reported in 526 N.Y.S.2d 718. In this child custody case, a parent who has custody was requested by parties seeking to change custody to be required to take an HIV test as a precondition of maintaining custody. The court ruled (rather forcefully) that since HIV is not passed by casual contact that such testing would not be required. */

Jane and John Doe, Petitioners,

v.

Richard Roe, Respondent.

Supreme Court, New York County, IAS Part 20.

March 14, 1988

KRISTIN BOOTH GLEN, Justice:

This motion brought pursuant to CPLR 3121 raises an important question not previously addressed in any written or reported decision concerning the obligation of a parent seeking to retain custody of her/his child to submit to a compulsory test for AIDS. In addition to the general questions which apply in determining 3121 motions, this application presents issues of privacy, public policy and Fourth Amendment rights. Further, the special characteristics of AIDS and AIDS testing, the potential stigmatization of persons identified as suffering from AIDS or infected with the so-called AIDS virus, and other detriments of non-consensual mandatory testing for this dread disease suggest that a much stricter standard than materiality and relevancy should be employed where AIDS testing is at issue.

To place the issues in context, a brief summary of the facts may be useful.

FACTS

Respondent father is the present and long-term custodian of two minor children. Petitioners, the maternal grandparents, have obtained certain information, otherwise inadmissible, that respondent has told various persons that he is suffering from AIDS. When asked on the stand, in the course of the custody hearing, whether he had in fact made such statements or whether he suffered from AIDS, the respondent asserted his Fifth Amendment privilege. Based on this assertion of privilege, I drew a negative inference as permitted by law.

Thereafter, petitioners moved for an order compelling the respondent to submit to a physical examination, specifically "an examination to test for AIDS" (Acquired Immune Deficiency Syndrome). The motion did not indicate

whether the "test" required was a general physical examination which might indicate that respondent was actually suffering from AIDS, or a blood test to determine whether he was seropositive for the HIV antibody. Respondent opposes any blood test, although he consents to undergoing a physical examination. The question is, therefore, what standard must be met, or what showing made before an involuntary AIDS test can be compelled. Before this question can be addressed, the present level of knowledge concerning AIDS and AIDS testing, as well as special problems such testing raises, relevant case law and clearly expressed public policy must all be reviewed and considered.

THE PRESENT MEDICAL UNDERSTANDING OF AIDS AND HIV-SEROPOSITIVITY

AIDS is the clinical manifestation of a dysfunction of the human immune system caused or at least widely thought to be caused by a recently discovered virus. Logallo, et al., Frequent Detection and Isolation of Cytopathic Retroviruses (HTLV-III) from Patients with AIDS and at Risk for AIDS, 224 Science 500 (May, 1984). The AIDS virus has received several names: Human T-Lymphotrophic Virus Type III (HTLV-III); Lymphadenopathy-Associated Virus (LAV); AIDS-Associated Retrovirus (ARV); and, most recently, Human Immunodeficiency Virus (HIV). Coffin, et al., Human Immunodeficiency Viruses (Letter) 232 Science 697 (May, 1986) (Proposing HIV Terminology).

Persons who are infected with the HIV virus fall into three categories. The first, or what is commonly referred to as AIDS, is the most severe form of the infection, and most victims of the disease die within two years. It is characterized by a breakdown of the immunological system and the presence of one or more opportunistic infections such as Kaposi's sarcoma and Pneumocystis Carinii pneumonia. The second possible form of infection is AIDS-Related Complex (ARC) a milder degree of immunodeficiency characterized by a number of symptoms including swollen lymph nodes, persistent fever, fatigue, etc. The third and most common form of infection is asymptomatic, which results in no abnormal infections. There is no certainty that persons in the third category will ever develop either ARC or AIDS itself, although it is predicted that some twenty-five (25%) to fifty (50%) percent of persons infected with the virus will develop AIDS within five to ten years of the initial infection. Inst. of Med., Nat'l. Acad. of Science, Confronting AIDS: Directions for Public Health, Health Care and Research, 91 (1986).

As of November 9,1987, the total reported number of persons with AIDS (that is, the most virulent form of the disease) in the United States reached 44,795, over the half of whom have died. Fed. Center for Disease Control (CDC), Weekly Surveillance Report-United States AIDS Program, (November 9, 1987). The group of persons who are infected with the HIV virus but who

are suffering neither from AIDS nor from ARC, commonly referred to "seropositives" in the U.S. is estimated to be between 1-1 1/2 million. Public Health Service Plan for the Prevention and Control of AIDS Virus: (Report of Coolfont Conference), June 4-6, 1986 at 4, reprinted in principal part in 101 Pub. Health Rep. 341 (July-Aug. 1986). According to an estimate of Dr. James Curran at the Center for Disease Control, of men between the ages of 20 and 50, approximately 1 in 30 carries the virus. AIDS: Statistics But No Answers, 236 Science 1423, 1425 (June 12, 1987).

MEDICAL ASPECTS OF AIDS TESTING

To speak of an examination for AIDS, therefore, is to propose a number of entirely distinct possibilities. First, an individual could be subject to a general physical examination which, if s/he were suffering from full-blown AIDS would likely reveal one of the characteristic opportunistic infections. Second, the symptoms of ARC might also be apparent in a general physical examination, although confirmation of the disease and the cause of the symptoms might be dependent on a blood test. The third, and the most commonly used notion of an "AIDS test" is a blood test which simply shows whether the individual tested is seropositive for the HIV antibody.

Demonstration of the extraordinarily high level of false-negatives and positives from the original AIDS blood test has led to the standard use of a two-part process. The Enzyme-Linked Immunosorbent Assay (ELISA) test is the initial screening test. [footnote 1] The second step of the testing process is the confirmatory test; the primary confirmatory test now in use is the Western Blot Test. [footnote 2] Even this two-part testing protocol may however, produce errors.

The test may register negative in the early stages of viral infection before the anti-bodies have been sufficiently mobilized to show up as positive on an antibody test. This incubation period-the time between infection and antibody reaction-usually lasts about six weeks but may be as long six months or more. [footnote 3] False-positives can also occur. [footnote 4] Finally, even these accuracy rates assume that the test is performed properly. The accuracy rates of commercial laboratories offering the test vary widely, including up to 20% false-positivity rates on pretested samples. [footnote 5]

A blood test is, therefore, no guarantee either that the person tested has or does not have AIDS or the HIV antibody. Be side these technical difficulties, however, non-voluntary AIDS testing presents a number of problems which have been recognized by authorities involved in the field.

SPECIAL PROBLEMS OF AIDS TESTING

The lack of absolute reliability, threat to civil liberties, potential ostracization, and psychic harm which may occur from mandatory testing have resulted in most experts and organizations including the Surgeon General of the United States, the United States Public Health Service, The American Medical Association, and most state and local health departments including New York's opposing mandatory non-voluntary testing.

A person who has been involuntarily tested for AIDS and receives a positive result may suffer a number of possible injuries. Perhaps first and foremost among these is the danger of stigmatization and ostracism which may result. The AMA Board of Trustees has written

... the stigma which accompanies a diagnosis of AIDS, based on fear and society's attitude towards IV drug abusers and homosexuals presents a factor beyond the control of the infected individual or medicine. An HIV-Seropositive individual who might live five years or much longer with no overt health problems, once identified in a community, may be subject to many and varied discrimination, by family and loved ones, neighbors and friends, employers and fellow employees, and other providers of services.

AMA Board of Trustees Report, Prevention and Control of Acquired Immunodeficiency Syndrome: An Interim Report, 258 J.Am.Med.Assn. 2097, 2098 (1987). In addition, the psychological impact of learning that one is seropositive has been compared to receiving a death sentence. Sequelae include severe stress and depression, including possible contemplation of suicide. [footnote 6] Besides these social and psychological dangers, mandatory AIDS testing also raises serious Fourth Amendment questions.

[1] It is well-established that an involuntary blood test constitutes a search and seizure within the Fourth Amendment's scope requiring probable cause. Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826,16 L.Ed.2d 908 (1966). Where a bodily intrusion may additionally endanger the health of the person sought to be tested (including, of course, mental health), a compelling need must be shown. See Winston v. Lee. 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985). The law on mandatory testing to detect the presence of drugs is in a process of evolution, but those tests have also been declared unconstitutional under the Fourth Amendment absent a reasonable suspicion of impairment on the job or a truly compelling state interest in regulating a particular industry. See, e.g., Caruso v. Ward, 131 A.D.2d 214, 520 N.Y.S.2d 551 (1st Dept.1987).

This amalgam of problems has resulted in opposition to involuntary AIDS testing by such groups as the ACLU, see National ACLU Policy 268, "Communicable Diseases and AIDS" adopted July 16, 1986.

The Association of State and Territorial Health Officials (ASTHO) has also

taken a position with regard to the availability of information concerning HIV testing in response to court subpoena. In the absence of legislation proposed by ASTHO the organization proposes

Public Health agencies should advocate that court orders for disclosure of name-linked information should not be issued except when compelling reasons for disclosure are demonstrated. (emphasis added).

Astho, Guide to Public Health Practice: AIDS Confidentiality and Anti-Discrimination Principles: Interim Report at p. 7 (November, 1987).

While there is no consensus under what circumstances the extraordinary remedy or involuntary testing should take place, it is clear that the medical, psychosocial, and legal ramifications of such testing place it on an entirely different plane than other, non-invasive or minimally invasive procedures. This information must be taken into account whenever an involuntary AIDS test is sought, and must be part of the balancing process in which a court engages.

CASE LAW ON TESTING

Surprisingly few cases have been found in which an AIDS test, or, more accurately, HIV antibody test was sought in a court setting. In the first reported New York case, Glass v. McGreevy, 134 Misc.2d 1085, 514 N.Y.S.2d 622 (S.Ct. Rensselaer Co. 1987) the court held that it was improper and an abuse of discretion to impose the condition of a negative AIDS test prior to release on bail.

/* This case is reported in this service. */

In Matter of Department of Social Services o/b/o Troy C. (Anonymous) v. Janice T. (Anonymous), 137 A.D.2d 527, 524 N.Y.S.2d 267 (1988) the Second Department reversed an order directing an AIDS test for a woman who bit a deputy sheriff while he was attempting to execute a warrant in a neglect proceeding. The Court did not have to consider whether a stricter standard was required in the AIDS setting since it found, pursuant to F.C.A. Sections 251 and 1038-a, that the results of a blood test were not even "reasonably related to establishing the allegations" (supra, at 528, 524 N.Y.S.2d 267) in the neglect proceeding.

In one unreported Family Court abuse proceeding where the respondent mother was charged with biting her son and the son had threatened suicide because of his fear of contracting AIDS, the judge withdrew his order after being apprised of the City's position against involuntary testing by representatives of the Human Resources Administration and the City Commission on Human Rights. In the Matter of Michael P. (CSS), Docket No.

N1456/86, (Fam.Ct., Richmond Co. 1986), order with-drawn, Matter of Joann B., Docket No. N1459-61/86 (Fam.Ct. Richmond Co. 1986), reported in Staten Island Advance, February 3, 1986 at A1, and February 13, 1986 at A1 and A6.

There are also several unreported decisions from other states which have arisen in custody disputes. In one such case involving a request for an HIVS-antibody test, an Ohio court refused to order a gay father to submit to such testing as a condition for visitation despite a request by his ex-wife, the custodial parent. In the Matter of Smalley, No. 83-112, Dom.Rel.Ct., Muskingum Co., filed 12/86; reported in Lambda, AIDS Update, vol. 2, no. 1, June/July 1987, at 4. Accord Doe v. Doe, No. 78D 5040 (Cir.Ct. Cook Co., 111.1978); JR. v. L.R. (Cir.Ct. St. Louis Co., Mo.1986); In re Marriage of Grein, No. 80-C-72 (Cir.Ct. Champaign Co., Ill.1988) (mother, a nurse treating AIDS patients required to inform court and father concerning her patients, but no test ordered). [footnote 7] However, none of these cases considered the public policy aspects involved in involuntary AIDS testing, particularly where the relevant public policy was clear and unambiguous.

NEW YORK PUBLIC POLICY ON AIDS TESTING

[2] The clear position of state and city health officials has been a virtually complete ban on involuntary testing for the HIV virus. Laboratories which may conduct the tests are limited in number and subject to strict regulation. They are specifically prohibited from conducting any test in the absence of a signed consent form. 10 N.Y.C.R.R. 58-1.1 (last amended October 1, 1987) (State regulation); New York City Department of Health Commissioner's Regulations, HIV/HTLV-II, LAV Antibody Testing, September 3, 1986 (City regulation). Thus, even if a court were to order a test, no laboratory authorized and equipped to perform it would be able to do so without violating the law. [footnote 8]

The State and City have demonstrated a similar concern for the confidentiality of records of persons already tested and found to be infected with AIDS. Such records are specifically subject to the confidentiality requirements of Pub.Health L. 206(1)(j) (McKinney 1971 & Supp.1988); 10 N.Y.C.R.R. 24-1.2 (effective December 23, 1985); see also New York City Health Code 11.07(a)-(b) (as amended September 27, 1983). [footnote 9] The Department of Health has proposed a Bill to create a new Article 27-H of the Public Health Law. N.Y.C. Draft of Proposed "AIDS Confidentiality Bill" (circulated by NYC Department of Health January 11, 1988 as "8s Health

This proposed legislation would further strengthen and clarify legal

protections for confidentiality of AIDS records. One of its provisions, reflecting the current policy of health officials, would prohibit turning over such confidential information, even pursuant to court order, absent a showing of "compelling need for disclosure which cannot otherwise be accommodated in a civil or criminal proceeding." (Emphasis added). Pub. Health L. Proposed 2797(2)(h)(i). This, it should be noted, deals with compulsory protection of records only after a person has voluntarily been tested. The testing itself is, of course, a far greater intrusion.

[3] Existing regulations and laws, as well as the stated policy of responsible Health Departments and health officials demonstrate a public policy militating strongly against court interference in the confidentiality of existing records, and unalterably opposed to judicially coerced nonvoluntary testing.

PHYSICAL EXAMINATIONS AND TESTS PURSUANT TO CPLR 3121

CPLR 3121(a) provides as follows: After commencement of an action in which the mental or physical condition or the blood relationship of a party ... is in controversy, any party may serve notice on another party to submit to a physical, mental or blood examination by a designated physician...

CPLR 3121(a) (McKinney Supp.1988). The party seeking such examination must meet two burdens. First, s/he must demonstrate that the other party's mental or physical condition is actually "in controversy". &e, e.g., Koump v. Smith, 25 N.Y.2d 287, 303 N.Y.S.2d 858, 250 N.E.2d 857 (1969).

Second, the party seeking the test or examination must ordinarily demonstrate that the evidence sought is "material and necessary" pursuant to CPLR 3101(a) (McKinney Supp.1988), referable to disclosure under CPLR 3121(a), see Koump v. Smith, 8upra. If these burdens are met, the party opposing the test may assert that the material or examination is privileged under CPLR 3101(b) and CPLR 4504. As to this issue, the opposing party has the burden.

The requirement that the movant show the requested test or physical examination to be only material and relevant is not, however, universally applied. Section 3121 is generally employed in personal injury actions where a plaintiff who seeks monetary recovery can be deemed to have waived privacy and confidentiality claims about relevant physical information by virtue of commencing her/his lawsuit. Virtually all of the case law under the section has arisen in this context.

More recently, however, physical tests have been sought from defendants, posing an entirely different conceptual situation because of their involuntary participation in the action. [footnote 10] Professor Siegel suggests that this may require a "stronger showing" than is necessary in the usual case. This

suggestion has already been implicitly adopted in the family law setting.

[4] Thus, where the physical condition of the defendant is in controversy and the evidence sought is arguably material and relevant but where there are other, less intrusive ways of proving the facts in controversy, a blood test will not be ordered. See In Re Ivette D., 118 Misc.2d 434, 460 N.Y.S.2d 718 (Fam.Ct. Kings Co.1983). [footnote 11] Courts have also refused to order tests, even though material and relevant where the result of such tests would unnecessarily stigmatize the parties. See Hill v. Hill, 20 A.D.2d 923, 249 N.Y.S.2d 751 (2d Dept. 1964); 1n Re Ivette D., supra.

[5] There is, therefore, authority for flexible application of Section 3121 depending on the context in which the test is sought and the nature of the test itself. Based on the special characteristics and dangers of AIDS testing and on the strong public policy of confidentiality and insistence in voluntary testing, I hold that the most stringent test-that is, a showing of compelling need-must be met before an involuntary test for the HIV antibody may be ordered.

EFFECT OF RESPONDENT

HAVING AIDS

It is important to note what is not at issue here. There is no claim, nor could there be on the available medical evidence, that the children would be in danger from living with respondent if he were seropositive.

The overwhelming weight and consensus of medical opinion is clear; the HIV virus is not spread casually. Rather, it has specific and well-known modes of transmission, through sexual contact, exposure to infected blood or blood components, and prenatally from mother to infant. Recommendations for Prevention of HIV Transmissions in Health Care Settings, 36 Morbidity and Mortality Weekly Report 35 (August 1987). A recent summary of HIV infection routes concludes that the three routes discussed above "still remain the only ones demonstrated to be important", Freedland and Klein, Transmission of the Human Immunodeficiency Virus, 317 N.Eng.J.Med. 1125 (1987).

Numerous studies have found no risk of HIV infection through close personal contact or sharing of household functions.

See, J. Curran et al., Epidemiology of HIV Infection and AIDS in the United States, 239 Science 610, 615 n. 45 (February 5, 1988); e.g., Lawrence, HTLV-III/LAV Antibody Status of Spouses and Household Contact Assisting in Home Infusion of Hemophilia Patients, 66 Blood 703, 704-05 (1985). These studies have figured prominently in decisions by federal and state courts upholding

the rights of HIV-infected children to attend public schools (see, e.g., Ray v. School District of Desoto County, 666 F.Supp. 1524,1530-32 (M.D.Fla.1987); Thomas v. Atascadero Unified School District, 662 F.Supp. 376, 380 (C.D.Cal.1987); District 27 Community School Board v. Board of Education of the City of New York, 130 Misc.2d 398, 502 N.Y.S.2d 325 (Sup.Ct. Queens Co.1986). Cf Jane W v. John W, 137 Misc.2d 24, 519 N.Y.S.2d 603 (Sup.Ct. Kings Co.1987) (father suffering from AIDS not precluded from visitation with one-and-a-half-year old daughter).

[6] Instead, petitioners make two other claims. They are: (1) "that a person with AIDS, among other reasons, has a minimal life expectancy, which is certainly a consideration in the courts awarding temporary or permanent custody"; and (2) "the court will want to consider if a person facing a death-threatening illness is prone to take his own life and that of others."

It is well-settled that the fact of a handicapping condition alone cannot deny custody to an otherwise qualified parent, e.g., Hatz v. Hatz, 116 Misc.2d 490 (Fam.Ct. Rensselaer Co.1982), citing the leading case of Carney v. Carney, 24 Cal.3d 725, 598 P.2d 36 (1979). The question which must be answered is the effect, if any, of the handicapping condition on the child or children.

The expert psychiatrist appointed by the court, interviewed all parties and the children. His testimony was clear that even if the respondent were suffering from AIDS and bad a shortened life span, this fact would not justify removing the children from their long-term custodial parent with whom they have such strong bonds of love and affection. In addition, again assuming that the respondent actually suffered from AIDS, the expert witness felt that respondent's knowledge of the disease would create no danger to him or to the children. Finally, the expert testified that he saw no evidence of any suicidal ideation.

The psychiatrist was asked to assume the worst case scenario precisely to determine whether a test or examination would produce evidence necessary or relevant to this proceeding. Since it is the expert's opinion that infection with AIDS would not justify removal of these children from their loving long-term custodial parent, the need for such information, if it must be involuntarily compelled, cannot be justified.

CONCLUSIONS

AIDS is a terrible and tragic reality in our city, state, nation, and world. Although many approach AIDS victims with sympathy and compassion, AIDS has all too frequently been the occasion for discrimination, stigmatization, and hysteria. As an institution which is and should be a bulwark against

discrimination of all kinds, the court system must be especially wary about attacks on individual and social rights made in the guise of health-related AIDS claims.

I have no reason to believe, and do not mean to suggest that the petitioners in this case acted in other than good faith in bringing on this application. Nevertheless, the potential for misuse in other cases cannot be overlooked, particularly when coupled with possible racism or homophobia, given the composition of the major groups "at risk" for AIDS. Accordingly, the requirement of showing a compelling need for involuntary testing in civil litigation must be recognized and enforced by the courts in this painful and troubled time.

[7] For the reasons discussed above and on the facts of this case, I find that no compelling interest has been shown. Even if the more lenient test of relevancy and materiality were applied, however, petitioners have not met their burden here. [footnote 12] Accordingly, the motion, insofar as it seeks an involuntary blood test for the HIV antibody is denied. [footnote 13]

1. The ELISA test is highly sensitive to HIV anti-bodies. so much so that its potential for error is to "overreact" resulting in a false-positive. The New York Blood Center has found that 1-3 percent of donors are repeatedly positive on the ELISA test and that 90% of those are negative on the confirmatory test. A study conducted by the Atlanta Red Cross and the CDC in 1935 tested 61.190 units of blood, finding 569 to be initially reactive on an ELISA test but 171 repeatedly ELISA reactive. Of the 150 which were tested further. only 40 were confirmed as positive. Ward et al., Laboratory and Epidemiologic Evaluation ol Enzyme Immuno Assay for Antibodies to HTLV-lll, 256 J.Am.Med.Assn. 357 (1986).

2. The Western Blot became the first confirmatory test to be licensed by the Food and Drag Administration shortly after the CDC conference on testing. Biotec Research, DuPont AIDS Cleared by the FDA, Wall Street Journal. May 1, 1937 at 5.

3. See. e.g., Marlink et al., Low Sensitivity of ELISA Testing in Early HIV Infection. 315 New Eng.J.Med. 1549 (1986).

4. The predictive value for seropositivity of an ELISA positive confirmed by a Western Blot has been estimated at 90.9% in a population in which the level of infection is .05%. For every one hundred people who test positive in that group, 10 will be false-positives. Davis, Serologic Tests lor the Presence of Antibody to Human T-Lymphothropic Virus Type 111(1986), Table 111 at 17.

5. See Burke, et al., 256 J.A.M.A. 347 (1986).

6. See e.g., Pindyck, Psycho-Social Impact of Anti-HTLV-III Notification: The New York Experience, in N.I.H., Impact of Routine HTLV-III Antibody Testing of Blood and Plasma Donors on Public Health (1986).

7. But see local 1812 American Federation of Government Employees v. United States Depanrtment of State, 662 F.Supp. 50 (D.C.D.C.l987), holding that no preliminary injunction would issue against inclusion in medical fitness program for foreign service employees of a blood test for the HIV antibody. The court found that the test there involved no additional intrusion (since a full blood work-up was already required) and was rationally and closely related to fitness for duty in a post with inadequate ability to deal with AIDS. Significantly, the Department of State had determined that

... HIV-infected individuals showing no symptoms of related disease and without significant immune system dysfunction ... are eligible for placement in the United States and ... posts in ... foreign countries which do not present unusual health hazards and where adequate medical care is believed to be available. Individuals in more serious condition are limited to United States service. No employee will be separated ... by a finding of HIV infection.

Id. at 52.

8. Several requests for HIV-antibody tests have been made by the District Attorneys offices in New York City, e.g. People v. Santana, Indictment No. 4419/83 (Sup.Ct.Oueens Co.). In such cases Dr. Stephen C. Joseph, the Commissioner of the Department of Health of the City of New York has submitted an affidavit setting forth this policy and set of regulations, and the requests have been withdrawn.

9. In his affidavit in People v. Santana, supra, (indictment No. 4419/83, Sup.Ct.. Queens County), Dr. Joseph explicitly made the connection between involuntary testing and confidentiality. He wrote

Testing in the absence of consent may also have harmful consequences for the AIDS antibody testing program. A precedent established by coercive, non-anonymous testing could undermine the City's efforts to assure individuals of its commitment to confidentiality.

Affidavit of Dr. Stephen C. Joseph dated September 3, 1987.

10. As Professor Siegel writes in the 1987 Supplementary Practice Commentaries to Section 3121 of the CPLR:

... [Tlhere is always more conceptual trouble in exacting a physical examination of a defendant than of a plaintiff, mainly because of physician-patient privilege. Waiver of the privilege is not hard to spell out with a plaintiff whose examination is sought. The invocation of the court's jurisdiction is

a strong basis for a waiver. But the defendant, who just wants to be left alone, is no jurisdiction invoker. The waiver route is not available, therefore, or harder to negotiate in any event, when the one whose condition is involved is the defendant.

Siegel, Practice Commentaries, CPLR C3121:6 (1987) (McKinney Supp.1988).

11. That case involved a child protective proceeding where the respondent/stepfather was charged with having sexually abused his thirteen-year old step-daughter by engaging in repeated acts of sexual intercourse over a period in excess of one year. It was further alleged that as a result of this sexual abuse the child gave birth to an infant son. The Commissioner of Social Services moved for a Human Leukocyte Antigen (HLA) blood grouping test of the step-father, the child and her infant in an effort to prove the alleged sexual abuse. The court denied the request and wrote as follows:

The HLA test, in the instant proceeding, is neither material nor necessary to the prosecution of the action. It is unnecessary, certainly, in that the subject child is a willing, cormpetent, and available witness to testify at the trial. It is immaterial, in the sense that the establishment of probable paternity, is not required to prove what is at issue in the proceeding -- that is, sexual abuse of the child and, further that an exclusion of paternity could not free the respondent from meeting the issue of alleged repeated sexual intercourse with the child.

Ivette D., supra, 118 Misc.2d 434, at 438, 460 N.Y.S.2d 718.

12. The issue of potentially shortened life span is also insufficient grounds for removing custody (cf. Collins v. Collins, 115 A.D.2d 979, 497 N.Y.S. 2d 544 [4th Dept.l985]).

13. As respondent has offered and agreed to undergo a physical examination, arrangements for this will be made by the court in consultation with attorneys for both sides. In the unlikely event that respondent actually does suffer from AIDS, this information will be necessary for him in terms of planning his own long-term care as well as considering long-term arrangements for the children. The physical examination is both voluntary and non-intrusive, and, to the extent that it would turn up evidence of AIDS itself, rather than simply seropositivity, is far more useful given the issues and facts in this case.