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TESTED IN COURT: THE RIGHT TO BREASTFEED

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The human right to food and nutrition recently faced a hard test in Eugene, Oregon, in the United States. On September 17, 1998, Kathleen Tyson of Eugene, then six months pregnant, was told that her blood tests indicated that she was HIV-positive. Her son, Felix, was born on December 7, 1998. He appeared to be healthy in every way. Less than 24 hours after his birth, Kathleen was pressed by a pediatrician to treat Felix with AZT, an antiretroviral drug, and to not breastfeed him.

Having studied the issue along with her husband, David, she declined to accept that advice. Within hours, a petitioner from Juvenile Court came to her room, and issued a summons for her to appear in court two days later. She and her husband were initially charged with “intent to harm” the baby, but the petition, dated December 10, 1998, said that the child “has been subjected to threat of harm.” When the Tysons appeared in court, they were ordered to begin administering AZT to Felix every six hours for six weeks, and to stop breastfeeding completely. The court took legal custody of the infant, but allowed the Tysons to retain physical custody so long as they obeyed the court's orders.

A trial was held in Eugene, Oregon from April 16 to April 20, 1999. There were three main lines of argument for the Tysons. First, the Tysons' advocates questioned the validity of the blood tests used as the basis for diagnosing Kathleen Tyson as HIV-positive. This was supported by expert witness Roberto Giraldo, who has published extensively on the uncertainties surrounding the tests. Second, they raised questions as to whether it has really been clearly demonstrated that HIV causes AIDS. This was the view advanced by expert witness David Rasnick, a leading challenger of conventional thinking about the causes of AIDS. Third, I was to be the expert witness regarding the human rights dimensions of the case.

I wanted to argue that the basic principle underlying health care decision-making normally is that patients themselves are to make the final decisions regarding their care, on the basis of informed consent. The function of health care workers is to provide the information needed, and to give advice, but not to make the final decisions. While there

are exceptional cases in which the state may override this principle, and the patient may be treated coercively, the conditions required to justify such an exception were not met in this case. The published scientific evidence was not adequate to justify the state's presumption that breastfeeding by a woman diagnosed as HIV-positive (but otherwise asymptomatic) would be subjecting that child to excessive risk by breastfeeding. Moreover, I wanted to show that United Nations agencies and the United States government had repeatedly reaffirmed the principle that HIV-positive women should not be coerced. Their official policy is that the treatment of HIV-positive women should be based on their informed consent.

After I was sworn in, and the Tysons' lawyer explained that he was going to ask me about the human rights dimensions of the case, the judge intervened and said these matters were irrelevant. I then had to step down. Just hours later, the judge gave his decision: the Tysons lost. Thus, the state retained legal custody of Felix. The Tysons retained physical custody on the condition that, as ordered, Felix would not be breastfed.

The physicians who took the state's side in the case against the Tysons sincerely believed that the Tysons were endangering Felix. However, the scientific community has failed to meet its obligations to produce the strong and clear scientific knowledge that is needed to guide individuals in situations like the one faced by the Tysons. I believe that if the Tysons had been presented with clear, hard evidence that breastfeeding Felix would be likely to harm him, they would have decided accordingly. We have clear indications of the physicians' strong beliefs, but we do not have scientifically sound studies of the sort they themselves claim to require. If there is a failure of informed consent, there is an obligation on the part of government and health care workers to provide better information. Resort to coercion is not the appropriate remedy.

Both the Tysons and the cause for realization of the human right to food and nutrition lost in this case. Nevertheless, this setback might be turned to advantage if it helps us to appreciate the importance of clarifying and strengthening those rights. It is as important for health care workers and policy makers to understand the importance of human rights as it is for them to understand the technical and scientific dimensions of health care.

REFERENCES

- Kent, George, "Women's Right to Breastfeed vs. Infants' Rights to Be Breastfed," *SCN News*, No. 17 (December 1998), pp. 18-19. (The entire issue, focussed on Nutrition and HIV/AIDS, can be accessed through the SCN's website, at <http://www.unsystem.org/acscn> This piece can be found in the PDF file at pages 20-21.)
- Kent, George, "HIV and Breastfeeding," *Mothering*, No. 94 (May/June 1999), pp. 65-67, 70-71.