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Legal Problems of Artificial Insemination

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LEGAL PROBLEMS OF ARTIFICIAL INSEMINATION

An American court for the first time through Judge Gorman, sitting in Superior Court of Cook County, Illinois, has taken a definite stand on the legal issues involved in Artificial Insemination.

> Homologous Artificial Insemination (when the specimen of semen used is obtained from the husband of the woman) is not contrary to public policy and good morals, and does not present any difficulty from the legal point of view.
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> Heterologous Artificial Insemination (when the speciment of semen used is obtained from a third party or donor) with or without the consent of the husband is contrary to public policy and good morals, and constitutes adultery on the part of the mother. A child so conceived is not a child born in wedlock and therefore is illegitimate. As such it is the child of the mother, and the father has no right or interest in said child.[1]

This decision has aroused a considerable amount of apprehension in the homes containing such clinically produced children.[2] The time for appeal from the foregoing decision will soon lapse, therefore, there is little hope that this case will result in a decision by the Illinois appeal court. The country must await another case, or legislative action, before the course of the law will be developed.

At the present time there are no statutes declaring the act of artificial insemination to be lawful or unlawful, nor determining the status or rights of the children produced. Bills have been introduced in the legislatures of at least six states[3] to declare such children legitimate if conceived with the consent of the husband. Because of the conflicting public opinion toward the practice, in all likelihood the legislatures will hesitate to take action in the near future, but will allow the courts to set some precedents.

The court decisions to date are few. The social stigma, resulting from the practice, forces the parents to keep secret the infants origin. The problem is of instant importance in cases of divorces on the grounds of adultery, and situations involving custody of the child. The majority of litigation will not arise until the death of a parent requires the disposition of property. Participating relatives will not be too prone to protect the social and legal standing of the "test tube" issue.

Artificial Insemination is the introduction of semen into the female reproductive tract by mechanical means in order to effect pregnancy without sexual intercourse.[4]

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[1] Doornbos v. Doornbos, N. 54 S. 14981 (Superior Ct., Cook Co. Dec. 13, 1954).

[2] Estimations that there were at least 9000 children alive in the U.S. in 1940 produced by artificial insemination, Israel, *The Scope of Artificial Insemination in the Barren Marriage,* 202 Am. J. Med. Sci. 92 (1941), and 20,000 by 1951, Plowscowe, *Sex and the Law,* 113 (1951).

[3] Illinois, Indiana, Minnesota, New York, Virginia, and Wisconsin.

[4] Schlemer, M.D., *Artificial Insemination and the Law,* 32 Mich. S. B. J. 44 (Apr., 1953).

Artificial Insemination in which the husband's semen is used is referred to as A.I.H., and that in which a donor's semen is used is termed A.I.D.[5] The reported cases are in accord in holding that A.I.H. produces few legal problems because the husband is also the biological or natural father.[6] However, an unusual situation is created when artificial insemination is the medical answer to the impotency of the husband, and this same impotency is the ground for an annulment action by the wife.[7] An English court granted a decree of nullity to the wife on the grounds of impotency of the husband thereby illegitimizing a child produced through A.I.H. even though the husband was the natural father.[8] The logical solution to this problem came in 1953 when the English court stated that if a wife had sufficient realization of her position in law regarding the impotency of her husband when she had the insemination treatments, such treatments might have amounted to an approbation of the marriage, thereby barring her from an annulment.[9] The solution is strengthened by the fact that the insemination in this later case was A.I.D. rather than A.I.H.. A.I.H. treatments give rise to stronger arguments in favor of a bar to annulment actions on the grounds of impotency than A.I.D. treatments. When the sperm of the husband is united with the ova of the wife the marriage is consummated, although not in the normal method. In most of the states an answer to the question of the legitimacy of the child may be provided by statutes that legitimize the issue of all marriages declared null in law.[10] It is not to be doubted that the legislatures did not have this anomaly in mind at the time of the passage of the statutes, but it would appear that these statutes are broad enough to cover an A.I.H. child but not an A.I.D. child.

A.I.D. presents two basic problems: What is the legal status of the child? Does the act itself constitute adultery for the purposes of criminal prosecution or dissolution of the marriage?

Status of the Child

"(Illegitimate children) . . . are such children as are not born either in lawful wedlock or within a competent time after its determination."[11] "The term 'born out of wedlock' arises because of the presumption which attaches to the children born to a man and woman married to each other, and includes children, whose parents are not, and have not been, married to each other regardless of the marital status of either

[5] A.I.H., Artificial Insemination with Husband's semen; A.I.D., Artificial Insemination with a Donor's semen.
[6] "Homologous Artificial Insemination . . . does not present any difficulty from the legal point of view." *Supra,* note 1.
[7] 35 Am. Jur. 256.
[8] R.E.L. v. E. L., (1949) P. 211, 1 All. E. R. 141.
[9] Slater v. Slater, (1953) P. 235, 1 All. E. R. 246.
[10] Wis. Stats. (1953) §245.36.
[11] In Re Paterson's Estate, 34 Cal. App.2d 305, 93 P.2d 825 (1939).

parent with respect to another."[12] Thus the legitimacy of a child conceived through the natural method of effectuating pregnancy rests upon the existence of a marital bond between the natural parents. The extension of the application of this test to encompass children produced through clinical impregnation depends upon the reasoning behind the test, and the application of the reasoning to this method.

The concepts of "legitimacy of the child" and "adultery" are inexorably intertwined, in that every child conceived through adultery, fornication, or comparable crime against morality, is illegitimate. The term "adultery" as used under this heading is not restricted to any statutory or judicial definition for the purpose of prosecution or divorce, but rather embraces all acts which effectuate conception and are offenses contrary to the unity of marriage. For purposes of clarification this concept will be labeled "adultery in effectu."

An evaluation of the essence and purpose of marriage is essential to a clearer understanding of the scope of this concept. Marriage is the permanent,[13] voluntary union of one man and one woman,[14] suitably ratified,[15] for the purpose of procreation and education of children;[16] and secondarily, the preservation of mutual moral and social purity.[17] The two elements under instant scrutiny for purposes of this article are; marriage is restricted to but one man and one woman, to the exclusion of all others, for the prime purpose of procreation. Therefore, a voluntary union of any alien male sperm, i.e., sperm of any man other than the husband, with the ova of the wife violates one of the essential characteristics of marriage, to-wit, the union of one man and one woman. As far as the effect, or result, of the insemination, it results in the union between a wife and a man not her husband. Her act is adultery "in effectu"—the child is not born in, but out of wedlock.[18]

The primary objection to this statement of reasoning is based on the theory that no wrong is committed unless carnal pleasures are taken, and that adultery demands moral turpitude.[19] If such reasoning were

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[12] State v. Coliton, 73 N.D. 582, 17 N.W.2d 546 (1945).

[13] "(The marriage) . . . being established, the power of the parties as to its extent or duration is at an end." Adams v. Palmer, 51 Me. 481 (1863).

[14] Nachimson v. Nachimson, Court of Appeal (1931) P. 217, 99 L.J.P. 104, 143 L.T. 254.

[15] Amsterdam v. Amsterdam, 56 N.Y.S.2d 19 (1945).

[16] ". . . therefore the primary and most legitimate object of wedlock, the procreation of issue . . ." Brown v. Brown, 1 Hagg. Ecc. 523 (1828).
"The essential purpose is the establishment of the conventional home and family with children." Rubman v. Rubman, 251 N.Y. Supp. 474 (1931).
"The mere fact that the law provides that physical incapacity for sexual relationship shall be ground for annulling a marriage is of itself a sufficient indication of the public policy that such relationship shall exist with the result and for the purpose of begetting offspring." Mirizio v. Mirizio, 242 N.Y. 74, 150 N.E. 605 (1926).

[17] *Supra,* note 15.

[18] *Supra,* note 1.

[19] *The Socio-Legal problems of Artificial Insemination,* 28 Ind. L. J. 626 (1953).

to be extended, it would follow that the child of an unmarried woman would be legitimate if produced through A.I.D. because no immoral physical license was involved, and that a child could be conceived by an unmarried woman by means other than adultery or fornication. Such a child could be no more legitimate than one conceived through illicit intercourse. The fact that the woman is married or not is immaterial because marriage grants such marital rights only as between the contracting parties,[20] thus the wife has no more right to consent to, nor the husband any right to condone the clinical impregnation of the wife, than they would have to an act of sexual intercourse between the wife and the third party donor. Unless the natural parents of the child are husband and wife, the marital status of the parties merely determines whether the act is adultery or fornication.

Prior to the *Doornbos* case, on only two other occasions has the status of the child been discussed, and then only as dicta. In 1921 a Canadian court granted a divorce to the husband on the grounds of adultery.[21] The action was brought by the wife for alimony, and the husband counterclaimed alleging adultery and delivery of a child even though the marriage had never been consummated because of the physical inability of the wife. The wife claimed the child was conceived through artificial insemination without the knowledge of the husband. Actual intercourse on the part of the wife with a third party was found, but the court stated that if the child had been produced through A.I.D., this form of impregnation would also be adulterous.

> Adultery is the invasion of the marital rights of the husband or wife. Adultery consists, not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive powers or faculties of the guilty person . . .

Grasping for a legal basis to support this public policy and sense of moral justice, the court quoted the purpose supporting the common law action of criminal conversation; "Because in the case of the woman it involves the possibility of introducing into the family of the husband a false strain of blood."

In a custody proceeding between a wife and husband involving the rights of the defendant-husband to visit the artificially produced child, the New York Supreme Court declared that the husband had the same rights of visitation of a child produced through A.I.D. with the consent of the husband as that acquired by a foster parent who had formally adopted the child, and that such a child was not illegitimate.[22] The court came to this conclusion by a strained analogy to the procedure of the legitimizing statutes. It stated:

[20] 55 C.J. 809.
[21] Orford v. Orford, 49 Ont. L. R. 15, 58 D.L.R. 251 (1921).
[22] Strnad v. Strnad, 190 Misc. 786, 78 N.Y.S.2d 390 (1948).

> The child has been potentially adopted or semi-adopted (by the consent of the husband to the impregnation).... The situation is no different than that pertaining in the case of a child born out of wedlock who by law is made legitimate upon the marriage of the interested parties.

The court overlooked a distinguishing feature of the legitimizing statutes in that an illegitimate child is made legitimate by the statute if its *natural parents* are subsequently married.[23] These statutes could not apply to legitimize an A.I.D. child since the parties are married prior to the insemination and the husband is not a natural parent. The provision was designed to apply in an entirely different situation.

The terms "potentially adopted or semi-adopted" are without legal meaning since adoption procedures are strictly statutory,[24] and no attempt had been made to comply with the provisions in the Strnad case. Seemingly the terms were picked at random to justify a solution which is not grounded in law, but which has a certain specious validity.

An inference of illegitimacy and legal wrong prior to the so-called "potential adoption" is presented through the analogy to the legitimizing statutes—indeed otherwise the statutes would not be mentioned. Thus the court inferentially expressed an opinion against the propriety of procreation by this medium.

The Strnad case should not be mistakenly interpreted as condoning the clinical impregnation with a donor's semen when the husband's consent is given. The court expressly stated that the decision in no way encompassed the legality or morality of the method itself. The husband's consent has no more effect in legitimizing the child than the approval of a husband in justifying a wife's illicit intercourse with a third party.

> When the contracting parties have entered into a married state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the State, statutory or common, which defines and prescribes those rights, duties and obligations. They are of law, not of contract. It was of contract that the relation should be established, but being established, the power of the parties as to their extent or duration is at an end. Their rights under it are determind by the will of the sovereign as evidenced by law. They can neither be modified nor changed by any agreement of parties.[25]

From the foregoing statements it is clear that there is but a single test for the legitimacy of a child—the existence of a marital bond be-

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[23] Wis. Stats. (1953) §245.36. "In any and every case where the father and mother of an illegitimate child or children shall lawfully intermarry . . . such child or children shall thereby become legitimated . . ."

[24] "It seems clear that there must be a substantial compliance with statutory provisions." 1 Am. Jur. 626.

[25] *Supra,* note 13.

tween the natural parents. The basis of the test for legitimacy is grounded in the fulfillment of prime purpose of marriage, viz. the procreation of offspring through the marital union, rather than in the existence or absence of moral turpitude involved in the method of conception. An application of this test to a child produced through A.I.D., with or without the consent of the husband, results in illegitimacy.

Statutory Adultery

There is little danger that any of the parties connected in any manner with the clinical impregnation of a woman, with her consent, with the semen of a donor, not her husband, can be subject to criminal prosecution, or that the wife may be divorced on the grounds of adultery under the present interpretation of the law.[26]

There was no criminal action for adultery under common law,[27] and divorce on the grounds of adultery was encompassed in ecclesiastical law,[28] which body of law was not taken over in this country. Thus a criminal prosecution for adultery and divorce on this ground must be based on statute.

The criminal statutes in this field provide punishment for two distinct classes of acts: (1) adulterous cohabitation, and (2) the commission of adultery.[29] It is evident that there could be no conviction in a state having the former type of statute since intercourse and continuing cohabitation are required.[30] Under the latter class a single act of adultery is sufficient.[31] However in all states the legislatures have left to the courts the interpretation and determination of what constitutes adultery. The universal rule has been evolved that "to constitute an offense there, of course, must be an actual contact of the sexual organs and a penetration into the body of the female, the insertion of the male organ to some extent into the female organ."[32] Since this essential element is absent in artificial impregnation, A.I.D. could not be included in any present construction of the criminal statute against adultery.[33]

The same element of penetration and connection is necessary for adultery as a ground for divorce so the same conclusion can be drawn.[34] In addition a continued cohabitation between the married couple sub-

[26] *Supra*, note 4.
[27] 1 Am. Jur. 685.
[28] 9 R.C.L. 244.
[29] 74 A.L.R. 1361.
[30] Quartemas v. State, 48 Ala. 269 (1872).
[31] State v. Byrum, 60 Neb. 384, 83 N.W. 207 (1900).
[32] State v. Warner, 79 Vt. 500, 291 Pac. 307 (1930); and others to the same effect; Maxey v. State, 66 Ark. 523, 52 S.W.2d (1899); People v. Courier, 79 Mich. 366, 44 N.W. 571 (1890).
[33] Hoch v. Hoch, Chicago Sun (Feb. 10, 1945); Time Magazine 58 (Feb. 26, 1945) to the effect that A.I.D. could not be included in a definition of adultery.
[34] "In the law of divorce 'adultery' is the voluntary sexual intercourse of a married person with one not the husband or wife of that person." Johnson v. Johnson, 78 N.J.Eq. 507, 80 Atl. 119 (1911).

sequent to the clinical impregnation could constitute condonation to bar the action providing that the husband knew of or consented to the insemination at the time of the later cohabitation.[35]

CONCLUSION

A child produced through artificial insemination with the semen of the husband is legitimate. Any child produced through clinical impregnation with the sement of a donor, with or without the consent of the husband, is illegitimate. None of the parties (wife, husband, donor, or doctor) are subject to criminal prosecution for adultery. The wife cannot be divorced on the ground of adultery.

No court, other than the Illinois court in the *Doornbos* case,[36] has squarely met the problem or come to a semblance of a conclusion, nor is there a likely possibility of another such decision in the near future because of judicial aversion to meeting new questions of law. This problem should be resolved in the law by legislative action, and would, in all probability result in the following: (1) a declaration that an A.I.D. child is legitimate and a legalization of insemination methods by setting up health and safety standards to control its operation, or (2) a declaration that an A.I.D. child is illegitimate and an inclusion of the practice of clinical insemination with a donor's semen without the knowledge or consent of the husband within the grounds for divorce. It is not likely that any criminal penalties would be imposed because of the existent wide-spread practice and since the prosecution for adultery is primarily designed as a means toward punishment for moral turpitude.

In all probability both courses of action will be adopted in one state or the other depending upon the popular ideas of morality existing in such states since the basis for any legislative action in this field is public policy[37]—that principle of law which demands that no individual act in any manner against the public good.

The unity of the marriage state is of prime consideration to the public interest since the family is the basic unit in society. Any interference with the unity of marital life is a threat to the public good and is contrary to public policy. A.I.D. breaches this unity through the introduction of a foreign male sperm into the ova of the wife.

Illegitimate children are a burden and care to the state, and result from an act which is a blot on any civilized moral code. An A.I.D. child is illegitimate since the impregnation produces a union between the generative powers of a wife and a man not her husband.

The public good demands that true records of all births be kept for purposes of inheritance, and to prevent intermarriage within the same

[35] 19 C.J. 85.
[36] *Supra*, note 1.
[37] *Supra*, note 1.

family. Since the majority of the plans for legalization of the method provide for the secrecy of the donor's name, and that the birth certificate be made out in the husband's and wife's name, there will be many misapplications of the laws of inheritance through ignorance of the real father, and a possibility of marriage between brother and sister since a donor could father many children of diverse women.

The method of securing the sperm—masturbation—is subject to strict censure and certainly tends to lower the standard of moral life in the community. It is true that there are other approved methods of securing sperm, but they are not ordinarily used.

The above reasons form the basic objections to A.I.D. On the other side of the scale is found the joy of a barren couple in raising a family. Let us hope for the public good that when the decision is made, reason will outweigh this twinge of humanism and the sterile couple will be left to the normal procedures of adoption.

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