1978

A Close Encounter of the First Kind: Artificial Insemination and an Enlightened Judiciary

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LEGAL ESSAY

A CLOSE ENCOUNTER OF THE FIRST KIND: ARTIFICIAL INSEMINATION AND AN ENLIGHTENED JUDICIARY

by George P. Smith, II*

On July 19, 1977, Judge J. C. Testa of the Juvenile and Domestic Relations Court of Cumberland County, New Jersey, had an original—and heretofore unreported—judicial encounter of the first kind: a case of first impression, with no standard of *stare decisis* for guidance or, for that matter, security.[1]

C. C., an unmarried woman, conceived a child through sperm artificially donated by C.M., a friend of some two years. C. C. had considered artificial conception with other friends, but C. M. suggested that he be the one to assist since he and C. C. had often spoken of marriage. For some unreported reason, C. C. did not want to have normal intercourse with C. M. *before* they married. The parties consequently consulted a doctor who in turn referred them to a sperm bank. While refusing the couple's wish to use the facilities of the sperm bank, the doctor-in-charge revealed to C. C. the procedures used for achieving artificial insemination which involve the use of a glass syringe and a glass jar.

C. C. made regular visits to C. M.'s apartment for the express purpose of artificially inseminating herself. There was no carnal connection involved. Rather, C. M. stayed in one room and when he had completed producing semen, he called C. C. and she, in turn, came from another room, ob-

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[1] C. M., Plaintiff, v. C. C., Defendant, 152 N.J. Super. 160, 377 A.2d 821 (1977).

tained the semen, returned to a private room in the apartment and proceeded to inseminate herself—artificially. After a number of attempts, success was achieved and conception occurred. No cohabitation followed.

Until about the third month of pregnancy, C. M. assumed he would be allowed to act toward the child, when born, in the same manner as any other father might act toward his natural child. C. C. testified that during the period of the pregnancy, C. M. was but a visitor in her private home from time to time, as other friends were. The "relationship" between C. C. and C. M. subsequently ended.

When the child was born, C. M. applied for visitation rights. The issue before the court then became whether C. M. was the *natural* father of the child since the sperm used to conceive the child was transferred to C. C. by unnatural, artificial means.[2] The resolution of this issue was central to the determination of whether C. M. was entitled to visitation rights as well as subject to the imposition of the co-ordinate responsibility of child support and payment of expenses incurred in the child's birth.

The court, while refusing to take a specific position on the propriety of the use of artificial insemination between unmarried persons, ruled that public policy demanded that, whenever possible, it was in the best interests of a child to have two parents. Accordingly, the court held that as to custodial and visitation rights, no distinction should be made between a child conceived naturally and artificially. C. M.'s petition was granted.[3] The court, in recognizing C. M. as the natural father, also recognized and imposed upon him the responsibility to support and maintain the child. Contrary to C. C.'s argument that C. M. was "unfit," the court found him to be educationally and financially able to meet his responsibilities and obligations of parenthood[4] and that he had a genuine interest in the child.

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[2] *Id.* at 822.

[3] *Id.* at 825.

[4] C. M. was, by profession, a teacher.

Although the court did not find an exact case on point for precedential guidance, it did look to and draw from certain related cases in order to guide it in resolving the dilemma of the instant case.

Even as to an illegitimate child, it has been established that a natural father is entitled to exercise rights of visitation.[5] In the instant case, the court rightly determined, with relative ease, that despite the artificiality and "strained uniqueness" of conception, C. M. was in fact the natural father of the child conceived through C. C.'s use of his sperm.

The best interests of a child and the best interests of society are served by preventing, or at least easing, the pressures and taint of illegitimacy by determinations such as those made by this enabled New Jersey judiciary. Although the initial social, ethical, and religious repugnancy of the procedure engaged in by C. C. and C. M. cannot be ignored, the immediate welfare of a guiltless child and the economic costs imposed upon society in raising that child must be considered paramount and controlling. Finding legitimacy in cases of this nature is the only equitable solution. By no means should such a finding be taken as a legal, social, ethical, or religious condonation of the act of artificial insemination by unmarried couples. Rather, such a recognition of the centralness of legitimacy as the over-riding issue here is but a humane and enlightened legal response to an admittedly distasteful problem.

Normally, in heterologous artificial insemination cases (AID), the donor is unknown. The basic issues involve whether the putative father, i.e., the husband of the artificially inseminated mother, becomes the real father of the artificially conceived child.

As early as 1948, the New York Supreme Court held that a woman artificially inseminated by a third party donor, with her husband's consent, gave birth to a legitimate child. The woman's husband was "entitled to the same rights as that acquired by a foster parent who has formally adopted a

[5] R. v. F., 113 N.J. Super. 396, 273 A.2d 808 (City Ct. 1971).

child, if not the same rights as those to which a natural parent under the circumstances would be entitled."[6]

However, in *Gursky v. Gursky*,[7] the New York trial court held that even though a husband consents to his wife's use of AID, the child is nonetheless, illegitimate. A more enlightened and contemporary California Supreme Court in *People v. Sorenson*[8] in 1968 rejected the *Gursky* thesis and went on to hold that a husband who consents to his wife's use of AID cannot disclaim his lawful fatherhood of the child for the purpose of child support. The court construed a state penal nonsupport statute to incorporate liability of a consenting father of the AID child—finding a genetic relationship, as such, unnecessary in order to establish the required father-child relationship.[9]

In 1973, the New York Supreme Court appeared to have obtained a far greater degree of sophistication in deciding the case of *Adoption of Anonymous*.[10] The *Gursky* decision was not to be accorded blind precedential value. Rather, the court found a strong state policy favoring legitimacy and, further, that a child born of consensual artificial insemination by a donor, accomplished as such during a valid marriage, is legitimate and thus entitled to enjoy all rights and privileges of a child who is conceived in a natural way of the same marriage.

Since the *Sorenson* and *Anonymous* decisions, several states have passed legislation legitimizing the offspring of AID when the husband consents to the procedure.[11] These

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[6] Strnad v. Strnad, 190 Misc. 786, 78 N.Y.S.2d 390, 391-92 (Sup. Ct. 1948).

[7] 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963). The *Gursky* court disapproved the *Strnad* court's conclusion.

[8] 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968). *See also*, Smith, *Artificial Insemination—No Longer a Quagmire*, 3 FAM. L. Q. 1 (1969); Smith, *For Unto Us A Child Is Born—Legally*, 56 A.B.A.J. 143 (1970).

[9] *Id.* at 13-14.

[10] 74 Misc. 2d 99, 345 N.Y.S.2d 430 (Sup. Ct. 1973).

[11] *See, e.g.*, CAL. CIV. CODE § 7004 (West. Supp. 1977); GA. CODE ANN., § 74-101.1 (1973); KAN. STAT. ANN., § 23-129 (1974); N.C. GEN. STAT. § 49A-1 (Supp. 1977); N.Y. DOM. REL. LAW § 73 (McKinney 1977); OKLA. STAT. ANN. tit. 10, § 552 (Supp. 1977).

See also, ARK. STAT. ANN., § 61-141(c) (1971) (AID child is intestate taker of husband).

judicial and legislative developments indicate clearly that both branches of government no longer equate AID with adultery and may even signal the public's willingness to sanction more startling genetic developments.[12]

The basic reason for allowing a married couple to give birth to a child by artificial insemination—the expression and fulfillment of their love through procreation—does not apply when an unmarried woman, who cannot assure her child a normal, traditional family relationship, seeks the use of artificial insemination. It was obviously because of this social and even ethical prohibition, that the physician in charge of the sperm bank refused to allow C. C. to use the services of the sperm bank. Yet, the liberalization of certain state adoption laws that now permit single individuals to adopt children[13] and the growing recognition of the liberation of women, present perhaps growing doubts relative to the validity of the rationale of such a societal constraint.

A society that accepts the spirit of female liberation that motivates women to conceive with no wish for formalized family relationships or ties should allow a single woman who does not conceive because of physical inabilities or professional interest to conceive with bioengineering techniques, for example. The "So Long As It Works For *You*" philosophy of the 1970's would embrace such a preference of a single woman.[14]

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[12] Smith, *The Medicolegal Challenge of Preparing for a Brave Yet Somewhat Frightening New World*, 5 J. OF LEGAL MED. 9 (April, 1977).

See also, Smith, *Manipulating the Genetic Code: Jurisprudential Conundrums*, 64 GEO. L.J. 697 (1976); Smith, *Through A Test Tube Darkly: Artificial Insemination and the Law*, 67 MICH. L. REV. 127 (1968).

[13] *See* N.Y. DOM. REL. LAW § 110 (McKinney 1977); 2 AM. JUR. 2d *Adoption* § 10 (1963).

[14] *See* Smith, *Uncertainties on the Spiral Staircase: Metaethics and the New Biology*, 41 THE PHAROS 10 (1978).

Surrogate mothering, for example, will become a more troublesome problem in the years ahead and demand legislative guidance. Already, there is a significant demand for surrogates. The "normal" situation here is that a barren wife (whose condition is normally caused by hysterectomy) still wishes—with her husband—to raise a family. A surrogate is thus obtained and agrees to be artifically inseminated with the husband's semen and carry the baby from conception to birth. Upon birth, the married couple claims the issue as their own through adoption procedures.

Interestingly, although a new intellectual climate of openness and reevaluation is evident in the Roman Catholic hierarchy, this climate has not fostered new and significant moral directions for the Church and its theologians in this specific area of concern.[15]

The official Church posture today remains the same as it was first announced by Pope Pius XII in his address to the Fourth International Convention of Catholic Physicians, October 1949. The Pope stated that an act of artificial insemination outside the state of marriage was immoral; so, too, was use of a donor or third party's semen (AID) to facilitate conception by a married couple. Such an act was to be "rejected summarily." The Pope also rejected use of homologous artificial insemination (AIH), where semen derived artificially from a woman's husband is introduced into her reproductive tract, for Catholic couples.[16]

In 1951, the same Pope sought to amplify, and thereby explain, his views relative to AIH. Accordingly, he expanded upon his idea that the conjugal act was a personal act of "simultaneous and immediate cooperation on the part of the husband and wife." He continued by observing that "this is something much more than the union of two seeds, which may be brought about even artificially, without the natural action of husband and wife."[17]

The concern of Pope Pius XII over the *manner* of obtaining semen in AIH is, today, no longer viewed by most moralists as a valid obstacle to this procedure.[18] Indeed, when this method of conception is the only method by which the "procreative mission" may be met, pastoral counselors are encouraged to suggest use of AIH.

Because of the possibility of malpractice suits, some doctors refuse to perform artificial insemination. Yet "do-it-yourself" instructions are readily available and easily effected. Witt, *A Detroit Lawyer Finds Proxy Mothers for Childless Couples Who Desperately Want to be Parents*, PEOPLE WEEKLY, June 12, 1978, at 71.

[15] *See* HUMAN SEXUALITY—NEW DIRECTIONS IN AMERICAN CATHOLIC THOUGHT (1977).

[16] *Id.* at 137.

[17] *Id.* at 137, 138. (Address to the Congress of Italian Catholic Union of Midwives).

[18] *Id.* at 138.

Donor insemination or AID, however, is still regarded by many as "an intrusion into the exclusivity and intimacy of the conjugal bond that is hard to reconcile with the Christian understanding of the nature of conjugal love."[19] Yet, there is clear evidence that couples who have successfully used AID have enriched their personal and marital lives and that the issue has not been "a painful reminder" of the husband's impotency or infertility.[20]

Society is, perhaps, not ready to allow the re-shaping and re-definition of the social, religious, ethical, and political perspective in such a way as to allow condonation or validation of those acts that C. C. undertook in the previously discussed saga of *C. M. v. C. C.* An enlightened judiciary can go only so far.

So long as a re-thinking of religious perspective appears not to be forthcoming, as it does here, a truly enlightened society cannot be developed or promoted. Thus, if a vanguard action of any nature is to be charted, it must not only come from enlightened judicaries, but from legislatures as well.

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[19] *Id.* at 139.
[20] *Id.*