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# Artificial Insemination— No Longer a Quagmire

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GEORGE P. SMITH, II\*

With the recent decision in *People v. Sorenson*,<sup>1</sup> a significant departure in ritualistic thinking in the area of domestic relations was signaled when it was determined that if a consenting husband allows an act of artificial insemination to be performed on his wife, and the positive result of the act is a child, the husband is—accordingly—liable for the child's support. No social stigma of illegitimacy will be imprinted on the child and no question of adultery can be raised as to the wife and donor or doctor.

In this particular case, the defendant husband, a domiciliary of California, after being married to his wife for fifteen years, granted his permission for her to be artificially inseminated. He, himself, had been found sterile after seven years of marriage. A local physician administered *heterologous insemination*, commonly referred to as A.I.D.,<sup>2</sup> by securing semen from a third party and injecting it through a syringe into the defendant's reproductive tract. The wife became pregnant as a consequence of the act and gave birth to a male child.

The child's birth certificate listed the defendant as the father

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1. 66 Cal. Rptr. 7, 437 P.2d 495 (1968).

2. The other way for effecting artificial insemination is referred to as *homologous insemination*, or A.I.H. Here, a husband's semen is secured and injected into the wife. This is generally necessitated because of a physiological (genital) obstruction by either of the marriage partners. Legal problems are only created under acts of A.I.D. which is the more prevalent of the two methods.

According to one prominent authority, the number of children born through heterologous insemination or A.I.D. was in 1950 approximately 100,000 in the United States. Today, the estimate is that over a quarter of a million such children live in the States and perhaps another 100,000 in the other regions of the world. FINEGOLD, *ARTIFICIAL INSEMINATION* 58 (1964).

See generally, Holloway, *Artificial Insemination: An Examination of the Legal Aspects*, 43 A.B.A.J. 1089 (1957).

and for nearly four years, a normal family relationship existed with the defendant going so far as to represent to his friends that he was in fact the father of the child.

In 1964, the Sorensens separated and Mrs. Sorensen requested no support maintenance for the child. Due to an illness in 1966, she was, however, forced to receive public assistance under the California Aid to Needy Children Program. This present action was subsequently maintained by the District Attorney alleging the defendant's guilt under Section 270 of the California Penal Code which imposes an obligation of support by the father under the Needy Children Program.

The term, "father," must—the Court said—be construed broadly under the statute presented here and, under no circumstances, be tied to a rigid definition of a biologic or natural father. Rather, the central consideration to be evaluated is whether the legal relationship of father and child exists.<sup>3</sup> The legal presumption, subject to rebuttal, is therefore maintained that if a child is born to a woman who is or has been married either during the marriage itself or within three days after its dissolution, the child in every case will be presumed to be legitimately born of that marriage.<sup>4</sup>

It is without purpose to categorize a child as either legitimate or illegitimate because such a categorization does not resolve the issue of the legal consequences flowing from a defendant's participation in the child's existence.<sup>5</sup> The stigmatization of an artificially conceived child as illegitimate serves no valid public purpose.<sup>6</sup>

Sexual intercourse is, rather obviously, a primary element for effecting or completing an act of adultery.<sup>7</sup> On first reading, one would conclude that no serious problems would be raised in the

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3. 437 P.2d 495, 498 (1968).

4. *Id.*, at 497.

5. 437 P.2d 495, 500, 501 (1968).

6. *Id.*, at 501.

Interestingly, since the beginning of time, woodland harbingers have—albeit inadvertently—furthered the basic principles of artificial insemination through innocent acts of cross-pollination. Sound principles of animal husbandry also dictate cross fertilization or selective breeding.

7. See generally, Note, *Social and Legal Aspects of Human Artificial Insemination*, 1965 WISC. L. REV. 859.

The New York Penal Law §255.17 (McKinney 1964) states: "A person is guilty of adultery when he engages in sexual intercourse with another person at a time when he has a living spouse, or the other has a living spouse."

artificial insemination quagmire over this issue. Regrettably, this is not the case. Since A.I.D. is not in fact the original fruit of a lawful marriage, a child who is born of this process is quite simply not the child of the impregnated female's lawful spouse. Since the husband had no physical part in the birth of the child, his wife—so the majority of past cases hold—has committed adultery.<sup>8</sup>

Even though a husband may have consented to A.I.D. for his wife, he may subsequently claim the insemination as a basis for divorce and his consent may not even be held to negate the criminal act of adultery.<sup>9</sup>

An Ontario court decided in 1921,<sup>10</sup> that a woman had committed adultery when she participated in A.I.D. because such act "involves the possibility of introducing into the family of the husband a false strain of blood."<sup>11</sup> The whole emphasis for determining adultery was shifted from physical penetration or intercourse to *any* act which might introduce a false strain of blood into the husband's family.

In deciding *Doornbos v. Doornbos*,<sup>12</sup> a Superior Court in Cook County, Illinois, followed the *Orford* rationale and found that the issue born as a consequence of A.I.D.—even where the lawful husband consented to the procedure—is illegitimate and the very act itself is adulterous.<sup>13</sup>

An English tribunal in *L v. L*<sup>14</sup> concluded that although no issue of adultery was present in a situation where A.I.H. was present (homologous insemination using the husband's semen), since the issue was not the product of a normal sexual act, it was nevertheless illegitimate.<sup>15</sup>

*Hoch v. Hoch*<sup>16</sup> was the first case in the United States—although never officially recorded and therefore of dubious precedential value—which held A.I.D., even without the husband's consent, was

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8. See Smith, *Through a Test-Tube Darkly: Artificial Insemination and the Law*, 67 MICH. L. REV. 127 (1968); Hager, *Artificial Insemination: Some Practical Considerations for Effective Counseling*, 39 N. CAR. L. REV. 217 (1961).

9. *Id.*

10. 49 ONT. L. R. 15, 58 D.L.R. 251 (1921).

11. *Id.*, at 22, 58 D.L.R. at 258.

12. 23 U.S.L. Week 2308 (Sup. Ct., Cook County, Illinois, December 13, 1954).

13. *Id.*

14. 1 All E.R. 141 (1949).

15. *Id.*

16. *Time Magazine*, February 26, 1945, p. 58.

not adultery. In 1948, a New York Court followed suit and held a child born of A.I.D. was legitimate.<sup>17</sup>

1963 saw the New York Supreme Court deciding that a child born of A.I.D. is illegitimate and the wife's act is adultery, even though the husband gave his consent.<sup>18</sup> The consent did, however, make the husband liable for the child's support on an implied contract theory.<sup>19</sup>

Adultery is committed solely for sexual gratification and is completed by an act of physical intercourse. In A.I.D., there is no physical gratification evidenced and there certainly is no physical act of intercourse involved. The donor and the recipient never consciously lay eyes upon one another.<sup>20</sup>

*Sorensen* provides a glimmer of hope in judicial decision-making regarding the pressing social need for legitimation of children born of an A.I.D. union.<sup>21</sup> Justice McComb, speaking for a unanimous Court, has added with equal clarity the modern position regarding A.I.D. as an act of adultery. "Since the doctor may be a woman, or the husband himself may administer the insemination by a syringe this is patently absurd; to consider it an act of adultery with the donor who at the time of insemination may be a thousand miles away or may even be dead is equally absurd."<sup>22</sup>

The state legislatures are to be chided with the same severity as the courts for flaunting the misunderstanding and, indeed, ignorance of past generations at a modern, progressive age. Although some legislative bodies have exhibited an awareness and a certain degree of sensitivity to the artificial insemination dilemma, only one—and then by implication—has sought to legalize its use.<sup>23</sup>

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17. *Strnad v. Strnad*, 190 Misc. 786, 78 N.Y.S. 2d 390 (Sup. Ct. 1948).

18. *Gursky v. Gursky*, 39 Misc. 2d 1083, 242 N.Y.S. 2d 406 (Sup. Ct. 1948).

19. *See Anonymous v. Anonymous*, 41 Misc. 2d 886, 246 N.Y.S. 2d 835 (Sup. Ct. 1964) where an inference of illegitimacy with a corresponding implied promise of support was found in a similar A.I.D. problem.

20. BOARDMAN, *NEW YORK FAMILY LAW WITH FORMS* 483, 484 (Biskind prep. 1966).

21. See notes 5 & 6, *supra*.

22. 437 P.2d 495, 501 (1968).

For a related problem precipitated by advancing artificial insemination techniques, see Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent*, 48 A.B.A.J. 942 (1962).

23. Indiana House Bill 350 (1949); N.Y. Senate Bill 493 (1951); N.Y. Senate Bill 579

Article 21 of the New York Health Code (1959),<sup>24</sup> while inferentially approving A.I.D., has not been interpreted as legalizing the process. It prescribes certain medical standards to be followed for donors of semen and provides for the keeping of records.

Oklahoma is the first state legislature to assume a definitive posture within the area and to take the first bold step forward.<sup>25</sup> The statute quite simply provides children born through heterologous artificial insemination (A.I.D.) will be recognized by the law as natural born children of the husband and wife. Thus, it appears that the inseminated wife is protected against subsequent allegations of adultery which her consenting husband might raise under this law. No protection is afforded such a wife who—on her own initiative—experiments in A.I.D. without the consent of her husband.

Assuming that a basic underlying purpose of marriage is directed toward the achievement of the act of procreation, it would logically hold that if this purpose has been frustrated, it would be proper to resolve it by means of artificial insemination—assuming, naturally, that the marriage partners wish to have the situation remedied. Heterologous artificial insemination is morally and ethically justifiable. It is not adulterous and the issue born by such a union should be recognized as being legitimate.

It is encouraging to find—at last—one judicial body and one legislature who have begun to forge a pathway in what, heretofore, was a dense legal frontier land. The distressing fact is that if others do not join in the work, progress will never be achieved within this century which beckons to a brave new world. The issue is simple. Common sense and moral decency<sup>26</sup> are the touchstones for resolution of this current legal dilemma.

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(1959); N.Y. Senate Bill 778 (1949); N.Y. Senate Bill 745 (1948); Virginia Senate Bill 199 (1948); Wisconsin Assembly Bill 407 (1949). All of these bills, if passed, would have legitimized A.I.D. children born with the consent of the impregnated women's husbands; yet all were defeated.

24. Formerly, N.Y. SANITARY CODE §112.

25. OKLA. STAT. ANN. tit. 10, §§551-53 (Supp. 1967).

26. See generally, FLETCHER, MORALS & MEDICINE (1947); Symposium, *Morals, Medicine and the Law*, 31 N.Y.U.L. REV. 1157 (1956).