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Article 9

Child Conceived by Artificial Insemination Declared Illegitimate

should be long past the time when we believe that passing a law or adding a family living class to the curriculum will solve most major marriage problems. . . ."[40]

The majority of school administrators today favor a policy allowing married youths to continue their schooling. In a nationwide survey among school superintendents,[41] seventy-eight per cent of those polled, although not endorsing the idea of high school marriages, believed that married students should be permitted to stay in school. One superintendent said: "Our present policy allows married students to continue their education. To date we have not been even slightly embarrassed."[42] A great majority also denounced any segregation of married students – seventy-eight per cent believed that they should not be separated from the unmarried students in extra-curricular activities and ninety-three per cent said there should be no segregation at lunchtime.[43]

Litigation in the area of married high school students is usually initiated by victims of allegedly unreasonable and arbitrary regulations. The trend today is not only to liberalize existing regulations,[44] but to finally eliminate all special regulation of married students. This development should lead to the disappearance of all litigation in this area.

[40] Kerchoff & Rimel, *supra* note 36, at 562.
[41] *Opinion Poll,* The Nation's Schools, Nov. 1956, p. 86.
[42] *Ibid.*
[43] *Ibid.*
[44] An example of the current policy in Rock Island, Illinois is presented by Dr. Hanson, Superintendent of Schools, in NEA J., Sept. 1961, p. 26. "Marital Status: High school marriages are not socially or economically defensible. Hence, the deans and other personnel will counsel students against contracting them even though marriage does not bar attendance. In the event of pregnancy, the student will be dropped unless she is a senior in the last 6 weeks of the school year, in which case she will be denied the privilege of attendance but granted permission to study at home, present her work to the school, and if satisfactory, be granted a passing grade."

Recent Decision:

Child Conceived By Artificial Insemination Declared Illegitimate

The practice of artificial insemination wherein the woman is impregnated with the semen of someone other than her husband[1] [hereinafter referred to as AID] is not a new concept.[2] Its increasing use among childless married couples,[3] which has resulted in a

[1] In addition to heterologous insemination (AID), homologous insemination (AIH) is also widely practiced. AIH constitutes the impregnation of a female with her husband's semen as opposed to the seed of a third party donor. See Vecchi, *Artificial Insemination and Legitimacy in Pennsylvania,* 66 DICK. L. REV. 1, 2 (1961).
[2] The Arabs employed artificial insemination as early as the fourteenth century in the breeding of mares. The first successful human insemination was accomplished by Eustachius in the sixteenth century. Koerner, *Medico-legal Considerations in Artificial Insemination,* 8 LA. L. REV. 484, 487 (1948).
[3] LoGatto, *Artificial Insemination: I Legal Aspects,* 1 CATHOLIC LAWYER 172, 173 (1955).

large number of such children conceived by this method,[4] poses a number of legal questions. One of the most significant problems presented by the growth of AID concerns the legitimacy of resulting offspring, since the rights of paternal support and inheritance are involved.

In a recent annulment action, the evidence disclosed that the wife had submitted to AID with her husband's written consent and as a result had given birth to a child. In granting a decree of annulment the New York Supreme Court *held* that a child conceived through AID with the consent of its mother's husband is not the legitimate offspring of the husband, but as he consented to the insemination, he should be estopped from denying the child financial support. *Gursky v. Gursky,* 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).

The first reported English case on this subject was *L. v. L.*[5] where the wife sought to have her marriage annulled on the grounds of non-consumation due to her husband's psychological impotency. After granting the decree of nullity, the court concluded that the wife's child conceived through homologous insemination was illegitimate. As a matter of policy, the court concluded, "that the child should be made illegitimate is most regrettable . . . sons are not judged by the error of their parents."[6]

This approach was followed in the case of *Doornbos v. Doornbos,*[7] wherein the court vigorously denounced the practice of AID as against "public policy and good morals. . . ."[8] It held that a child so conceived should be considered born out of wedlock and therefore illegitimate; thus the husband should have no right or interest in the child.

Confronted with a similar problem the New York Supreme Court reached the opposite conclusion. In *Strnad v. Strnad,*[9] the child had been begotten through AID with the husband's consent while the parties were still married. After being separated by judicial decree, the wife petitioned the court to determine the husband's visitation rights to the child. The court found the husband a fit guardian and indicated that the interests of the child might best be served by his reasonable periodic visits.

But the court did not stop there; it attempted to vindicate its position concerning the visitation rights by finding that the child should be considered the husband's legitimate offspring. Establishing legitimacy in terms of adoption, the court held that the child was "semi-adopted" or "potentially adopted" by the husband.

Relying on Section 24 of the New York Domestic Relations Law, which provides that an illegitimate child will be legitimatized upon the subsequent marriage of its natural parents, the court stated that, "logically and

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[4] Between 1941 and 1955 there was a population increase of 40,000 children born through artificial insemination of which 10,000 live in New York City. LoGatto, *Artificial Insemination: I Legal Aspects, supra* note 3, at 173.

[5] [1949] 1 All E.R. 141.

[6] L. v. L., *supra* note 5, at 146.

[7] 23 U.S.L. WEEK 2308 (Ill. Super. Ct. Dec. 13, 1954).

[8] *Ibid.* AID has been condemned as against public policy in a number of jurisdictions. The court considered it adultery in Orford v. Orford, 58 D.L.R. 251 (1921), and in Russell v. Russell, [1924] A.C. 687. *Contra,* Hoch v. Hoch, unreported case, Cir. Ct. Cook Co. Ill. (1945), referred to in Chicago Sun (Feb. 10, 1945); Maclennon v. Maclennon, [1958] Scots L.T.R. 12. The latter two cases did not consider that the traditional definition of adultery applied to AID, since there was no corporal connection.

[9] 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948).

realistically, 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."[10]

Realizing the possible far-reaching results of its decision, the court refused to pass on property rights stating that it "was not concerned with them in this particular case."[11]

In the principal case the court attempted to employ "reason and logic," in order to effect "a proper and just adjudication." It began by defining the concept of illegitimacy. By statute[12] and case law[13] an illegitimate child has been defined as a child begotten and born out of wedlock or out of lawful matrimony. The court reasoned that "illegitimate," "bastard" and "natural" child refer to the status of a child whose natural father is not his mother's husband.[14] Employing this concept of illegitimacy it held that a child conceived through AID must be considered illegitimate since the husband could not have been the child's natural father even though he was the spouse of its mother.

The court expended a major portion of its opinion in criticizing the rationale of the *Strnad* case.[15] It cited to Section 110 of the Domestic Relations Law which expressly provides that adoption is a legal and judicial proceeding, and that "no person shall hereafter be adopted except in pursuance of this article." Thus in New York the process of adoption is judicial in character, and the husband's consent of itself would not render the child his legitimate offspring. The court, therefore, held that in no sense could a child be labeled as "semi-adopted" or "potentially adopted." Moreover, it reasoned that *Strnad*'s solution of the problem of legitimacy through a theory of implied adoption constituted a tacit recognition that the child would otherwise have been illegitimate. The court rejected *Strnad*'s application of Section 24 of the Domestic Relations Law because that statute operates to legitimatize a child only when its biological parents later intermarry.[16] This was not the case in *Strnad,* for the child's natural father, the donor, did not marry its mother as to bring it within the scope of this statute.

As in *Strnad,* the court in *Gursky* did not expressly pass on property rights. Yet under the circumstances it was hesitant to leave the child without future provision for support. It reasoned that the husband by his consent had induced the wife to undergo the artificial insemination and for that reason she detrimentally altered her position. Consequently the court concluded that it would be unconscionable for the husband to escape the burden of supporting the child. It therefore invoked the doctrine of equitable estoppel, placing upon him the responsibility of the child's support.[17]

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[10] *Id.* at 787, 78 N.Y.S.2d at 391.

[11] *Ibid.*

[12] N.Y. FAMILY CT. ACT §512.

[13] Comm'r of Pub. Welfare v. Koehler, 284 N.Y. 260, 264, 30 N.E.2d 587, 589 (1940).

[14] For a profitable discussion of this point see SCHATKIN, DISPUTED PATERNITY PROCEEDINGS §2 (3d ed. 1953).

[15] A good critique of the *Strnad* case may be found in LoGatto, *Artificial Insemination: I Legal Aspects,* 1 CATHOLIC LAWYER 172, 177-79 (1955) and in Schlemer, *Artificial Insemination and the Law,* 32 MICH. STATE BAR J. 44 (1953).

[16] See also Rice, *A.I.D.-An Heir of Controversy,* 34 NOTRE DAME LAW. 510, 517 (1959).

[17] The court also found an implied contract and stated that "the husband's written consent to the procedure implied a promise on his part to furnish support for any offspring resulting from the insemination."

It is clear then that two divergent and apparently contradictory views with regard to the legitimacy of AID children have been introduced in New York. The *Strnad* holding is in accord with the general tendency of courts to find legitimacy. Such a finding does not socially stigmatize the child and enables him to take full advantage of inheritance rights. On the other hand, the *Gursky* holding, while it appears to be the more correct application of the law, results in harsh consequences with respect to inheritancy. An illegitimate child cannot inherit from his father,[18] but can inherit from his mother provided she leave no legitimate issue.[19] Moreover, the illegitimate cannot inherit from any of her relatives.[20]

Aside from the question of inheritance rights, the problem of support of the child also arises in this area. Section 513 of the New York Family Court Act provides that the natural parents of a child born out of wedlock are liable for the support of the child. Following the rationale of *Gursky,* however, the natural father of an AID child is the donor. But to hold liable the donor for the support of the child would be incongruous since the purpose of AID is to furnish barren couples with offspring. On the other hand, it is undisputed that the husband of a woman who bears an illegitimate child during marriage has neither a moral[21] nor legal obligation for the child's support.[22]

The perplexities overshadowing this area have not gone unnoticed. Bills seeking to legitimatize these children have been introduced in six states[23] but none have passed. Typical of this proposed legislation was the bill introduced in the New York State Senate in 1948. It provided that "a child born to a married woman by means of artificial insemination with the consent of her husband shall be deemed the legitimate natural child of both the husband and his wife for all purposes. . . ."[24]

English jurists have also considered the problems presented by AID. In a memorandum prepared by the Council of the Law Society delivered to the Department Committee on Artificial Insemination the following was recommended:

> As regards parental rights and duties a child conceived with the consent of the husband, during the lifetime of the husband, should be in the same position as one who is legitimate. . . .
>
> Any doubts there may be under present law as to the legitimacy of a child conceived with the husband's consent . . . through AID . . . should be removed by legislation.[25]

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[18] *In re* Vincent's Estate, 189 Misc. 489, 71 N.Y.S. 2d 165 (Surr. Ct. 1947).

[19] N. Y. DECED. EST. LAW §83 (13); *In re* Cady, 257 App. Div. 129, 12 N.Y.S.2d 750, *aff'd mem.*, 281 N.Y. 688, 23 N.E.2d 18 (1939).

[20] *In re* Simpson's Estate, 175 Misc. 718, 24 N.Y.S.2d 954 (Surr. Ct. 1941).

[21] "The husband of the wife inseminated in AID has no natural moral obligation towards the donated child. . . . He may, of course, if he wishes, take on the obligation of caring for the child, but that is not an obligation of natural justice. . . ." DAVIS, ARTIFICIAL HUMAN FECUNDATION 15 (1951).

[22] Collins v. Collins, 195 Misc. 119, 89 N.Y.S.2d 252 (Dom. Rel. Ct. 1949).

[23] Illinois, Indiana, Minnesota, New York, Virginia and Wisconsin. See Levinsohn, *Dilemma in Parenthood: Socio – Legal Aspects of Artificial Human Insemination,* 36 CHI-KENT L. REV. 1, 29 (1959).

[24] Sen. No. 758, 2,048, Int. 745 (1948). A Virginia proposal was very similar. "Children born as a result of artificial insemination shall be considered the same as legitimate children for all purposes, if the husband of the mother consented to the operation." S 745 GA Sess. (1948).

[25] Memorandum, *The Legal Implications of Artificial Insemination,* 56 LAW SOC. GAZ. 529, 531 (1959).

None of the proposals has been enacted into law. Each requires the husband's consent as the *sine qua non* for the child's legitimazation. This view has created considerable discussion and invoked much criticism.

> The fact that the husband has freely consented to the artificial insemination does not have a bearing on the question of the child's legitimacy. If it did, by similar reasoning it might be urged that the fact that a husband had consented to the commission of adultery by his wife would legitimatize the issue resulting from the adulterous connection.[26]

The court in *Gursky* noted that the legislature has declined to modify the historical concept of illegitimacy when confronted with the problem of AID.[27] It concluded that, "this is another indication of the disinclination on the part of the legislature to disturb the application of the historical concept of illegitimacy to children begotten through heterologous artificial insemination."[28] This unwillingness is grounded upon the theory that the practice is against public policy and good morals. The court also referred to the *Doornbos* opinion where AID was found to constitute adultery and for that reason held to be against public policy.[29]

This would also seem to be the implication of the *Gursky* holding. Since this is the predominant view in New York and in the other jurisdictions where this question has been passed upon, it would not be unlikely that any bill seeking to legitimatize AID children would be met by strong opposition.

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[26] SCHATKIN, DISPUTED PATERNITY PROCEEDINGS §2 (3d ed. 1953); see also Holloway, *Artificial Insemination: An Examination of the Legal Aspects*, 43 A.B.A.J. 1089, 1155 (1957).

[27] While no bill has passed legitimatizing AID conceived children, New York City has enacted an ordinance regulating the donation and distribution of semen. This regulation, while not expressly approving of the practice, tacitly condones it. By requiring standards with which donors are to be selected and records kept, it has attempted to curtail irregularities that might possibly result from the misuse of artificial insemination. N.Y.C. HEALTH CODE §§21.01-21.07.

[28] Gursky v. Gursky, 39 Misc. 2d 1083, 1087, 242 N.Y.S.2d 406, 410 (Sup. Ct. 1963).

[29] Doornbos v. Doornbos, 23 U.S.L. WEEK 2308 (Ill. Super. Ct. Dec. 13, 1954).