Buffalo Law Review

Volume 23 | Number 2 Article 12

1-1-1974

Family Law—A Man Who Consents to the Heterologous Artificial Insemination of His wife Is the Childs Father Whose Permission Is Required for the Adoption of the Child by Another.

Barbara J. Davies

Finally one must conclude that despite its legislative history, the courts will not look upon the New York statute as evidence of a strong state policy against all governmental intrusions into the workings of the free press. This conclusion is demonstrated by the explicit refusal of the majority in *Proskin* to construe the statute liberally and also by their refusal to require the district attorney to show anything more than that he desired the letter to investigate a serious crime. Thus if these lower court decisions are sustained by the New York Court of Appeals, there will be little protection for newsmen outside the increasingly narrow scope of the statute.

ROBERT L. NISELY

FAMILY LAW—A MAN WHO CONSENTS TO THE HETEROLOGOUS ARTIFICIAL INSEMINATION OF HIS WIFE IS THE CHILD'S FATHER WHOSE PERMISSION IS REQUIRED FOR THE ADOPTION OF THE CHILD BY ANOTHER.

During the marriage of *W* and *H* a child, conceived by artificial insemination, was born. *H*, who had full knowledge of the procedure and who had given his consent, was listed on the birth certificate as the child's father. The couple separated and were subsequently divorced; both the separation agreement and the divorce decree declared the child to be the daughter of *W* and *H*. The husband complied with all provisions of the divorce decree and retained visitation rights. The wife remarried and her new husband, *H'* (petitioner in this case), sought to adopt the child of the wife's first marriage.

Under the New York Domestic Relations Law, if a child is designated as born "in wedlock," both "parents" must consent to the adoption.[1] Upon *H*'s refusal to consent, petitioner instituted adoption proceedings in the Surrogate's Court of Kings County, claiming that *H*'s

1. N.Y. DOM. REL. LAW § 111 (McKinney 1964).

Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:

. . . .

2. Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;

3. Of the mother, whether adult or infant, of a child born out of wedlock . . . .

Id.

consent was not necessary. Petitioner contends that *H* is not the "parent" of the child within the meaning of the statute, in light of the circumstances surrounding the child's conception. The surrogate's court dismissed the petition. *Held:* a child born of consensual heterologous artificial insemination during a valid marriage is a legitimate child entitled to the rights and privileges of a naturally conceived child of the same marriage; the father of such child is therefore the "parent" whose consent is a prerequisite to the adoption of such child by another. *In re Adoption of Anonymous,* 74 Misc. 2d 99, 345 N.Y.S.2d 430 (Sur. Ct. 1973).

Consensual artificial insemination by a donor (AID) is a voluntary medical technique used to achieve human conception. Its use to overcome problems of male infertility and communicability of hereditary defects[2] is of relatively recent origin[3] and remains unregulated in most municipalities of New York State.[4] Technically known as heterologous insemination, the process involves placing the spermatozoa of a usually anonymous donor[5] into the reproductive organs of the female where it can then fertilize the ovum.[6] If the spermatozoa of the husband is used, the procedure is called artificial insemination by husband (AIH). AIH involves no legal questions, since the child is considered the natural child of the couple.[7] There is also a variation of the technique in which semen from the husband is added to semen of the donor so that if conception occurs it cannot be said conclusively that the resulting child is not biologically a product of the husband

---

2. *See* Kindregan, *State Power over Human Fertility and Individual Liberty,* 23 HASTINGS L.J. 1401, 1409 (1972).

3. *See, e.g.,* Note, *Artificial Insemination and the Law,* 1968 U. ILL. L.F. 203, 204.

4. *Contra,* NEW YORK CITY HEALTH CODE § 112, *cited in* E. BISKIND, BOARDMAN'S NEW YORK FAMILY LAW § 117, at 533 (1972).

> Artificial Human Insemination.—No person other than a physician duly licensed to practice medicine in the State of New York shall collect, offer for sale, sell or give away human seminal fluid for the purpose of causing artificial insemination in a human being or except in accordance with the regulations of the Board of Health of the Department of Health of the City of New York.

Id. See also NEW YORK CITY BOARD OF HEALTH REGULATIONS, *cited in* E. BISKIND, *supra,* at 533-34.

5. "[T]here would appear to be no reason why the donor should not be known to or indeed selected by the recipient, if the latter preferred it that way and the donor was agreeable." MacLennan v. MacLennan, [1958] Scots L.T.R. 12, 14.

6. Kindregan, *supra* note 2, at 1408.

7. *In re* Adoption of Anonymous, 74 Misc. 2d 99, 100, 345 N.Y.S.2d 430, 431 (Sur. Ct. 1973) [hereinafter cited as instant case]. *See also* Sagall, *Artificial Insemination,* TRIAL, Jan.-Feb., 1973, at 59.

(AIHD).[8] It should be stressed that artificial insemination does not involve sexual intercourse with the donor.

Despite its relative simplicity as a medical procedure,[9] artificial insemination raises profound social problems. Some organized religious groups have opposed its use. Although there is neither an official Protestant nor Jewish position on the subject, the Catholic position is one of categorical opposition.[10]

There are many legal problems and questions of public policy surrounding the use of artificial insemination.[11] One legal issue the courts have been forced to confront is whether a woman who submits to the procedure can be charged with adultery; on this the courts have split. Dicta in the pioneer case of *Orford v. Orford*,[12] in which AID was performed without the consent of the husband, declared that the procedure constituted adultery. A superior court in Illinois followed the *Orford* rationale by holding that the act, even though consented to by the husband, is adulterous.[13] A Scottish decision, however, reflects a contrary view.[14] In *People v. Sorensen*,[15] a California case generally cited for its holding on the legitimacy of the consensual AID child as well as its statements on adultery, a man medically determined to be sterile agreed to permit his wife to be artificially inseminated. Upon separation and divorce in 1964, Mrs. Sorensen obtained custody of the child but did not request support for it. Because of an illness in 1966, she was forced to receive public assistance under the California Aid to Needy Children Program. An action was then brought by the District Attorney of Sonoma County, California, alleging that the defendant, Mr. Sorensen, was guilty of violating a state penal statute[16] which

8. Sagall, *supra* note 7, at 59.

9. *Id.* at 60.

10. "The Catholic position is that it is morally wrong under any circumstances to impregnate a woman either with the semen of a man not her husband or with the semen of her husband gathered outside the natural sex act." Comment, *The Legal Consequences of Artificial Insemination in New York*, 19 SYRACUSE L. REV. 1009, 1011 (1968).

11. Sagall, *supra* note 7, at 59.

12. [1921] 58 D.L.R. 251.

13. Doornbos v. Doornbos, No. 54-S-14891 (Ill. Super. Ct., Dec. 13, 1954), *appeal dismissed on procedural grounds*, 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956).

14. MacLennan v. MacLennan, [1958] Scots L.T.R. 12.

15. 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968).

16. CAL. PENAL LAW § 270 (West 1970).

> A father of either a legitimate or illegitimate minor child who willfully omits without lawful excuse to furnish necessary clothing, food, shelter or medical attendance or other remedial care for his child is guilty of a misdemeanor and punishable by a fine not exceeding one thousand dollars ($1,000)

imposed upon him an obligation to support. The defendant was convicted. In its affirmance, the California Supreme Court defined adultery as necessarily involving sexual intercourse and articulated the modern position on the subject:

> 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.[17]

The consequences of artificial insemination and subsequent live birth create another major legal problem: the legitimacy of a child conceived by means of AID and born to a married woman and her consenting husband.[18] Two of the three major cases that discuss the question have held that such a child is legitimate issue. *Strnad v. Strnad*[19] was a custody proceeding which resulted in the awarding of the child to the mother. However, since the husband was not shown to be an unfit guardian, and notwithstanding the fact that the child was conceived by consensual AID, the court held that the best interest of the minor child called for visitation by the husband. The court indirectly declared such a child to be legitimate, stating that

> logically and realistically, the situation is no different than [sic] 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.[20]

---

or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment . . . . This statute shall not be construed so as to relieve such father from the criminal liability defined herein for such omission merely because the mother of such child is legally entitled to the custody of such child nor because the mother of such child, or any other person, or organization, voluntarily or involuntarily furnishes such necessary food, clothing, shelter or medical attendance or other remedial care for such child, or undertakes to do so.

. . . .

The provisions of this section are applicable whether the parents of such child are married or divorced, and regardless of any decree made in any divorce action relative to alimony or to the support of the child . . . .

Id.

17. People v. Sorensen, 68 Cal. 2d 280, 289, 437 P.2d 495, 501, 66 Cal. Rptr. 7, 13 (1968).

18. Biskind, *Legitimacy of a Child Born by Artificial Insemination,* 5 J. FAMILY L. 39 (1965). *See generally* Smith, *Artificial Insemination—No Longer a Quagmire,* 3 FAMILY L.Q. 1 (1969).

19. 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948).

20. *Id.* at 787, 78 N.Y.S.2d at 392.

However, another New York court has ruled to the contrary. In 1963 the question of a consensual AID child's legitimacy was raised during the course of an annulment proceeding in *Gursky v. Gursky*.[21] The issue was whether the husband had an obligation to support the consensual AID child. In holding the child illegitimate, the court emphasized that

> [t]he concept . . . historically is deeply imbedded in the law . . . that a child who is begotten through a father who is not the mother's husband is deemed to be illegitimate.[22]

Moreover, the court reasoned that the legislature's failure to pass statutes which would render legitimate those children conceived through artificial insemination, while at the same time modifying concepts of legitimacy in other areas,[23] must be deemed a manifestation of the legislature's disinclination to alter the logical results of illegitimacy in such cases.

Perhaps the most enlightened discussion of the legitimacy issue is in *Sorensen*.[24] There, the California Supreme Court stated that the public policy of California favors legitimation and no public purpose would be served by stigmatizing such a consensual AID child as illegitimate:

> [A] reasonable man who, because of his inability to procreate, actively participates and consents to his wife's artificial insemination in the hope that a child will be produced whom they will treat as their own, knows that such behavior carries with it the legal responsibilities of fatherhood and criminal responsibility for nonsupport.[25]

In holding that a consensual AID child is legitimate, the court stated that legitimacy is a legal status which may exist despite the fact that the husband is not the natural father of the child.

Cases dealing with the issue of the legitimacy of consensual AID children are implicity grounded on the doctrine of the presumption of legitimacy. In cases in which paternity is at issue there is a presumption

---

21. 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).

22. *Id.* at 1085, 242 N.Y.S.2d at 408.

23. *See generally* N.Y. DOM. REL. LAW §§ 24, 145 (McKinney 1964), *as amended*, N.Y. DOM. REL. LAW § 24 (McKinney Supp. 1973).

24. For a discussion of the facts of the case, see text accompanying notes 15-17 *supra*.

25. People v. Sorensen, 68 Cal. 2d 280, 285, 437 P.2d 495, 499, 66 Cal. Rptr. 7, 11 (1968).

that the husband is the father of the child.[26] In most states it is a rebuttable presumption; thus the burden of persuasion is placed on the party arguing illegitimacy.[27] Authorities are in dispute as to the type of evidence sufficient to rebut the presumption; two standards frequently employed are that the presumption may be rebutted, (1) by evidence which is clear and convincing, or (2) only by evidence which shows beyond a reasonable doubt that the husband could not have been the child's father. Evidence of the husband's impotency or sterility, evidence that husband and wife were not living together under circumstances in which sexual intercourse was possible (non-access), and blood grouping tests are examples of the types of evidence which have been held sufficient to rebut the presumption.[28]

Reasons offered for the presumption of legitimacy include the law's desire to make amends for its shabby treatment of illegitimate children generally[29] and its interest in stabilizing family relationships.[30] The trend towards narrowing rather than enlarging the area in which children are labeled illegitimate[31] evidences a recognition of the stigmatizing effect of bastardization.

The same barriers that are erected to prevent a naturally conceived child from being bastardized are not relevant to the question of the legitimacy of a consensual AID child. It is likely that the husband agreed to his wife's artificial insemination precisely because of the existence of factors—impotency, sterility, *Rh* blood factor—that would constitute sufficient evidence to rebut the legitimacy presumption. The husband's consent combined with the fact that the donor's identity is kept secret and that the doctor's knowledge and records are not open to discovery[32] operate as barriers to proving illegitimacy of

26. *See* H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 15-17 (1971).

27. H. CLARK, LAW OF DOMESTIC RELATIONS 172 n.96 (1968). *But see* H. KRAUSE, *supra* note 26, at 16. Several states continue to employ a conclusive presumption which upholds the child's legitimacy even when non-paternity can be established absolutely.

28. H. CLARK, *supra* note 27, at 172-73.

29. *Id.* at 172 n.96.

30. H. KRAUSE, *supra* note 26, at 15.

31. There have been several recent cases dealing with the rights of illegitimate children in relation to support, inheritance, rights in wrongful death actions, etc. which have been argued on constitutional grounds. *See, e.g.*, Labine v. Vincent, 401 U.S. 532 (1971); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968); Storm v. None, 57 Misc. 2d 342, 291 N.Y.S.2d 515 (Fam. Ct. 1968). *See* Biskind, *supra* note 18, at 43.

32. Doctors' records are not open to discovery to protect the donor. Even so, it is doubtful that a court would find the donor, rather than the husband who consented to the AID, liable for the child's support. *See generally* Note, *supra* note 3, at 209-10.

a consensual AID child. Perhaps the only evidence that might be sufficient to establish an AID child's illegitimacy is that of the husband's failure effectively to consent.

The same policy considerations which are against stigmatizing a naturally conceived child by branding him illegitimate underlie the desire to avoid bastardizing a child conceived by consensual AID. The policy is strengthened by the existence of the estoppel doctrine.

> When a husband consents to the artificial insemination of his wife because of his own physical or psychological sexual inadequacies but permits his name to be listed on the birth certificate as the father, it would seem that a presumption of legitimacy born of the recognition that it is necessary to remove from children the stigma of illegitimacy, should operate as an estoppel against both a wife and husband contravening or contradicting his parenthood.[33]

Should a couple wish to ensure the legitimacy of a child conceived by artificial insemination without relying on the estoppel doctrine, it can institute statutory adoption proceedings. This is seldom done, however, "because the parents wish to avoid even the limited notoriety entailed by adoption."[34]

Only a handful of state legislatures have had the foresight to enact statutes which would eliminate the necessity of judicial determinations on the subject of the legitimacy of consensual AID children. Oklahoma,[35] Kansas,[36] and Georgia[37] have enacted the most comprehen-

---

33. Biskind, *supra* note 18, at 43. *See also* E. BISKIND, BOARDMAN'S NEW YORK FAMILY LAW § 117, at 536 (1972).

34. H. CLARK, *supra* note 27, at 157 n.28 (1968).

35. OKLA. STAT. ANN. tit. 10, §§ 551-52 (Supp. 1972).

§ 551. The technique of heterologous artificial insemination may be performed in this State by persons duly authorized to practice medicine at the request and with the consent in writing of the husband and wife desiring the utilization of such technique for the purpose of conceiving a child or children.

§ 552. Any child or children born as the result thereof shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife so requesting and consenting to the use of such technique.

Id.

36. KAN. STAT. ANN. § 23-129 (Supp. 1968).

Any child or children heretofore or hereafter born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived child of the husband and wife so requesting and consenting to the use of such technique.

Id.

37. GA. CODE ANN. § 74-101.1(1) (Supp. 1969).

All children born within wedlock, or within the usual period of gestation thereafter, who have been conceived by the means of artificial insemination, are

sive provisions. Under these statutes an AID child born to consenting parents during the course of the marriage is declared legitimate for all purposes. In these states the doctor is not criminally liable and the mother is not an adulteress. Arizona's law[38] that children born out of wedlock are deemed to be legitimate would cover AID children should Arizona courts choose to declare that their birth is out of wedlock.

In analyzing the rationale of the instant case, it is helpful to approach the matter as did the court, both examining the public policy issues and considering whether the very few cases dealing with the subject of the legal status of a consensual AID child are persuasive authority.

The court relies principally upon *Sorensen* to reach its holding of legitimacy, not only because it is the most recent decision but also because it is the only reported decision of an appellate court.[39] The California Supreme Court held that the defendant in *Sorensen* was the lawful father of a dependent child born of consensual AID and that the term "father" as used in the penal statute was not limited to a biological or natural father. The court in the instant case quotes approvingly that portion of the *Sorensen* opinion which sets forth the doctrine of equitable estoppel. The operating principle is that a man who actively participates in his wife's decision to undergo the artificial insemination procedure in the hope that a child will be born—a child whom he expects to nurture as his own—is estopped from disclaiming responsibility toward that child. The surrogate's court quotes a sentence from *Sorensen* that has a direct bearing on the issue in the instant case:

> Nor are we persuaded that the concept of legitimacy demands that the child be the actual offspring of the husband of the mother and if semen of some other male is utilized the resulting child is illegitimate.[40]

The court focuses on *Sorensen's* resolution of the illegitimacy question because petitioner here argues that the child of his wife's first marriage is illegitimate. If the court had agreed with petitioner and accepted the

---

irrebuttably presumed legitimate if both the husband and wife consent in writing to the use and administration of artificial insemination.

Id.

38. ARIZ. REV. STAT. ANN. § 14-206 (1956).

39. For a discussion of the facts of the case, see text accompanying notes 15-17 *supra.*

40. Instant case at 103, 345 N.Y.S.2d at 433-34.

doctrine that the father of an illegitimate child has no standing to object to adoption by the husband of the natural mother,[41] petitioner would have been successful in his efforts to adopt the child.

The surrogate's court proceeds to examine *Gursky v. Gursky*,[42] the leading New York case on the subject. In light of the fact that the much-criticized *Gursky* decision is the only published opinion which flatly holds that consensual AID children are illegitimate, the court declares it not to be persuasive. The surrogate's court deigns not to follow *Gursky* because the definition of an illegitimate child upon which that case relied was developed long before the advent of artificial insemination.[43] The fact that the New York legislature has not yet enacted a statute concerning artificial insemination is not necessarily indicative of a belief on the part of the legislature that courts should decline to rule on the issue. The court suggested that the failure of the legislature to enact any new measure may be rationalized on the ground that the judiciary can reach an acceptable solution.[44]

Because of the scarcity of decisional law,[45] the court turns to public policy considerations in attempting to reach a decision. It considers New York's statutory presumption in favor of legitimacy as stated in section 24 of the Domestic Relations Law.[46] Under that statute a child born of a void or voidable marriage, even when the marriage is deliberately and knowingly bigamous, incestuous or adulterous, is legitimate and is entitled to all the rights of a child born of a perfectly valid marriage. The legislature's strengthening of the existing statute in 1969 is evidence of its strong disfavor of bastardizing the issue of any marriage.[47]

---

41. *See, e.g., In re* Adoption of Brousal, 66 Misc. 2d 711, 322 N.Y.S.2d 28 (Sur. Ct. 1971).

42. For a discussion of the case, see text accompanying notes 21-22 *supra.*

43. Instant case at 104, 345 N.Y.S.2d at 434.

44. *Id.*, 345 N.Y.S.2d at 435.

45. For a discussion of *People v. Sorensen* and *Gursky v. Gursky*, see text accompanying notes 15-17, 21-22 *supra.*

46. N.Y. DOM. REL. LAW § 24(1) (McKinney Supp. 1973).

> A child heretofore or hereafter born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage, or shall have consummated a common-law marriage where such marriage is recognized as valid . . . is the legitimate child of both natural parents notwithstanding that such marriage is void or voidable or has been or shall hereafter be annulled or judicially declared void.

Id.

47. N.Y. DOM. REL. LAW § 24(1) (McKinney Supp. 1973). *See also* REPORT OF LAW REVISION COMMISSION, N.Y. LEG. DOC. No. 65C (1969).

In reaching its determination that public policy favors legitimacy of consensual AID children, the court notes that the policy objections against bigamous, incestuous, and adulterous relationships have not prevented the legitimation of the issue of such relationships. There is far less reason, in light of the non-adulterous circumstances surrounding the child's conception and birth, to stigmatize the consensual AID child, even though there exist moral and religious objections to artificial insemination.[48]

In re Adoption of Anonymous is the first case squarely to confront the issue of the legitimacy of the consensual AID child; previously cited decisions dealt with the issue only as it necessarily had to be faced to decide questions such as support or visitation rights. A finding of legitimacy or illegitimacy in the instant case was dispositive of the issue of whether petitioner could adopt the child without the consent of the first husband. A finding of illegitimacy in *Gursky,* by contrast, would not have been so conclusive, since all children, illegitimate as well as legitimate, are entitled to support from those responsible for their birth.[49]

Contributing to the opinion's persuasiveness is the fact that, although the court is cognizant of the moral arguments attending artificial insemination, it does not digress from the legal issue which it must decide—that of legitimacy.

One might well question how the contrary finding of illegitimacy could have been supported when the clear intent of the parties in undergoing the procedure was to give birth to their own "legitimate" child. No valid purpose would be served by a state policy that would compel a man who is assuming the paternal role in administering love, support, guidance, and care to expend the time and money to adopt a child he considers his own.

It would have been instructive had the opinion indicated whether the existence of section 112 of the New York City Health Code[50] had any bearing on the surrogate's court's decision. It is unclear whether the court neglected to mention the issue of the doctor's liability because the doctor who treated the wife came within the purview of the Health

48. Instant case at 105, 345 N.Y.S.2d at 435.

49. In *Gursky v. Gursky* the responsibility was based on consent to the artificial insemination which the husband was estopped from denying. *See generally* H. KRAUSE, *supra* note 26, at 22-25.

50. *See* NEW YORK CITY HEALTH CODE § 112, in E. BISKIND, BOARDMAN'S NEW YORK FAMILY LAW § 117, at 533 (1972).

Code or because criminal liability of the doctor would have no effect on the legal status of a consensual AID child. One also wonders whether the failure even to mention the possible adultery of the wife results from the apparent absurdity of such a charge or because the Health Code obviates the issue.

It may be speculated that the collateral effects of the decision will occur in the areas of "reliance," parent-child relationship, intestacy succession, and future legislation.

Despite its noteworthiness in forthrightly addressing the legitimacy issue, the instant case will not have the impact of a court of appeals ruling.[51] Yet *Gursky* is itself only a trial court decision, as is *Strnad*. We now live in a period in which enlightened attitudes toward human reproduction are more prevalent.[52] In light of this, the instant case could support a move in New York to ensure the legitimacy of consensual AID children. If the court of appeals is ever called upon to decide the issue, it will most likely confer approval on such a trend.

One factor which will weigh heavily in such a decision is the reliance New Yorkers have placed upon lower court decisions when choosing to utilize artificial insemination.[53] Support for the proposition that such a consideration is important can be found in the action of the court of appeals in recognizing bilateral Mexican divorces. In *Rosenstiel v. Rosenstiel*[54] the court of appeals stated that

> [i]n the background of this problem is a long series of decisions over a period of a quarter of a century in the New York Supreme Court at Appellate Division and at Special Term recognizing the validity of bilateral Mexican divorces *which we consider has some relevancy to the question before us.*[55]

---

51. In a telephone conversation of October 2, 1973 with Anthony E. Maglio, attorney for petitioner, counsel indicated that petitioner would not appeal from the dismissal of the adoption petition.

52. There has been judicial as well as statutory sanction of abortion on demand with certain limitations. *See, e.g.*, Roe v. Wade, 93 S. Ct. 705 (1973); N.Y. PENAL LAW § 125.05(3) (McKinney Supp. 1973).

> 3. "Justifiable Abortional Act." An abortional act is justifiable when committed upon a female with her consent by a duly licensed physician acting (a) under a reasonable belief that such is necessary to preserve her life, or (b) within twenty-four weeks from the commencement of her pregnancy . . . .

Id.

53. Some authorities estimate that as of 1968 there were 5000-7000 births in the United States as a result of artificial insemination. *See generally* Note, *supra* note 3, at 205 nn.16-17.

54. 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965).

55. *Id.* at 71, 209 N.E.2d at 710-11, 262 N.Y.S.2d at 88 (emphasis added).

The second major area in which the decision may have an effect is in the parent-child relationship. Specifically, a legitimacy holding may be interpreted as promoting the psychological welfare of the consensual AID child in question, facilitating the paternal role of the man who consented to the child's conception, and fostering nuclear family solidarity.

Authorities agree that an awareness of his own illegitimacy can have a deleterious effect on a child's self-image.[56] The importance of early parent-child interaction as a factor in the emotional development of the individual has long been recognized.[57] This fact becomes especially significant when combined with the argument that the law provides few safeguards to protect the child's psychological well-being.[58]

> Freud-Goldstein-Solnit call the adult who provides day-to-day affection and stimulation "the psychological parent," and they insist that a child's relationship with his psychological parent, whether or not he or she is the child's natural parent, should never be interrupted.[59]

The child's psychological parent is the person to whom the child is related by memories, from whom he learns through identification, and with whom he is connected by daily experiences.

In the instant case it is likely that the father, who wanted this child, who spent time with her during her crucial formative years, and from whom she acquired some of her sense of identity, would have been deprived of seeing his "own" child had she been adopted by petitioner. By declaring the child legitimate, the child's psychological father, *H* (in the case of artificial insemination there is really no "natural" father[60]), may continue to see her and to exercise some degree of paternal control over her. Yet, petitioner would still have the opportunity to be with his wife's daughter and aid in her socialization.

---

56. H. KRAUSE, *supra* note 26, at 263 n.14.

57. L. BROOM & P. SELZNICK, SOCIOLOGY 99 (4th ed. 1968).

58. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973) (discussed in Kramer, *The "Psychological Parent" is the Real Parent*, N.Y. Times, Oct. 7, 1973, § 6 (Magazine), at 70).

59. Kramer, *The "Psychological Parent" is the Real Parent*, N.Y. Times, Oct. 7, 1973, § 6 (Magazine), at 70.

60. People v. Sorensen, 68 Cal. 2d 280, 284, 437 P.2d 495, 498, 66 Cal. Rptr. 7, 10 (1968).

The psychological parent concept is better suited to the nuclear family situation where mother, father, and consensual AID child all live together without the problem of divorce. Nuclear family solidarity is fostered by a judicial declaration that the man who is the psychological father is also the legal father. Thus, the family unit need not be disrupted by legal problems of the "father's" being required to adopt his own child. The unit of mother, father, and AID child becomes indistinguishable from natural family units. This is essentially the goal of artificial insemination—to enable those who cannot conceive their own families to become parents.

Holding consensual AID children to be legitimate may have an impact on intestate succession, as it would seem to permit a consensual AID child to inherit[61] from his father without the father having to file an order of filiation.[62]

The decision in the instant case may generate a legislative response to the problem of AID children. In light of the increased use of the medical technique, more courts will be faced with the legitimacy issue in cases involving adoption, visitation rights, support, inheritance, and especially in cases where husbands, having given their consent, try to deny their support obligations. Statewide legislation, perhaps similar to the Oklahoma or Kansas enactments, would eliminate all inconsistency that might result from numerous and conflicting trial court decisions, in the absence of a court of appeals pronouncement. Such legislation should also clarify the potential liability of doctors who employ AID in their practices.

---

61. Illegitimacy status originally only affected one's property rights. *See, e.g.*, Biskind, *supra* note 18, at 43.

62. N.Y. EST., POW. & TRUSTS LAW § 4-1.2(a)(1)-(3) (McKinney 1967).

> (a) For the purpose of this article:
>
> (1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.
>
> (2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.
>
> (3) The existence of an agreement obligating the father to support the illegitimate child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made as prescribed by subparagraph (2).

Id.

Despite the fact that the instant case involves a consenting husband, the holding raises the question of whether a court would legitimate a child conceived by artificial insemination conducted without the husband's consent.[63] Possible alternatives range from holding the child legitimate for all purposes to a finding of absolute illegitimacy. There is also the possibility that a court might deem such a child "quasi-legitimate"—*i.e.,* the husband would be obliged to support the child but the child would be prohibited from being an intestate successor to the "father's" estate. A judicial declaration of the non-consensual AID child's legitimacy would serve the same positive purpose of avoiding the negative effects of bastardization as does the holding that consensual AID children are legitimate. However, the "legitimate-for-all-purposes" solution raises additional problems. Perhaps a woman who had committed adultery and had become pregnant by another man might attempt, improperly, to explain the child as being the result of non-consensual artificial insemination. The possibilities for marital disruption here are numerous. On the other hand, holding the child conceived by non-consensual AID illegitimate is extreme in that it operates as a punishment to both the child and its mother.

Perhaps the most rational position is the middle course of holding the non-consensual AID child legitimate for purposes that immediately affect its life (support and the positive psychological effect of a father's surname) but not for the purposes of inheritance. The statutory and judicial trend away from bastardization suggests that even the non-consensual AID child should be permitted a name. Whether the husband must support the child should be based on a balancing test: one must weigh the desire of having the husband support a child to whose conception he did not consent against the possibility of its becoming a public charge. Surely the state would prefer the former alternative. Because of the thorny issues examined above, it is desirable that any statutory enactment on artificial insemination speak specifically to the point of the legitimacy of non-consensual AID children.

For the court in *In re Adoption of Anonymous* to have given credence to the poorly articulated opinion in *Gursky* that an AID child is illegitimate would have been to turn its back on the interests of the child, the family, and the medical profession. In view of the enlightened attitude shown by the surrogate's court, the legal future for AID chil-

63. *See generally* Note, *supra* note 3, at 219-23.

dren appears bright. "The testing agents for resolving this area of critical legal dubitation are common sense and moral decency."[64]

BARBARA J. DAVIES

64. Smith, *For Unto Us a Child is Born—Legally,* 56 A.B.A.J. 143, 145 (1970).

BIBLIOGRAPHIC NOTE

I. ILLEGITIMACY IN GENERAL
- A. H. KRAUSE, ILLLEGITIMACY: LAW AND SOCIAL POLICY (1971) (very general background on artificial insemination; especially good discussion of the presumption of legitimacy, ascertainment of paternity, and attitudes toward illegitimacy);
- B. REPORT OF THE LAW REVISION COMMISSION, N.Y. LEG. DOC. No. 65C (1969) (discussion of the purpose for the repeal of sections 24 and 145 of DRL and reasons for the enactment of new section 24 [effect of marriage on legitimacy of children]);
- C. Biskind, *Legitimacy of Children Born by Artificial Insemination,* 5 J. FAMILY L. 39 (1965) (how the presumption of legitimacy may be rebutted);
- D. Note, *Artificial Insemination and the Law,* 1968 U. ILL. L.F. 203 (extremely good article on virtually all aspects of artificial insemination with an interesting section on rebutting legitimacy presumption).

II. LEGAL STATUS OF CHILD CONCEIVED BY ARTIFICIAL INSEMINATION
- A. Sagall, *Artificial Insemination,* TRIAL, Jan.-Feb., 1973, at 59 (article written by a doctor not only touches upon all important issues related to artificial insemination but gives an account of medical aspects of donor selection, actual procedure, etc.; liability from point of view of physician);
- B. Smith, *For Unto Us a Child is Born—Legally,* 56 A.B.A.J. 143 (1970) (discuscussion of proposed Arkansas statute to solve problem of legal status of AID child);
- C. Note, *Artificial Insemination,* 30 BROOKLYN L. REV. 302 (1963) (legal status of AID child in relation to presumption of legitimacy and difficulty of overcoming presumption in AID cases);
- D. Note, *Social and Legal Aspects of Human Artificial Insemination,* 1965 WIS. L. REV. 859 (discussion of traditional artificial insemination issues, *e.g.,* adultery, illegitimacy, morality; especially good overview of historical, psychological and sociological aspects).

III. ADOPTION
- A. M. PAULSEN, W. WADLINGTON, J. GOEBEL, DOMESTIC RELATIONS CASES AND MATERIALS, Part IV (1970) (textual discussion of legal issues related to human reproduction, *e.g.,* population control, legitimacy and adoption);
- B. H. CLARK, LAW OF DOMESTIC RELATIONS §§ 18.1-.10 (1968) (hornbook examination of legal and social issues related to adoption);
- C. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973) (examination of drastic new approach to adoption and custody as well as discussion of the importance of the psychological parent to child's emotional well-being).

INTENTIONAL
BLANK