NATURAL RESOURCES JOURNAL

Volume 10
Issue 2 *Spring 1970*

Spring 1970

Artificial Insemination in New Mexico

J. Douglas Deaner

COMMENTS

ARTIFICIAL INSEMINATION IN NEW MEXICO

Human artificial insemination has been practiced in the United States for more than fifty years,[1] yet the problems generated have been given little attention by legislators or courts in this country. This Comment outlines the legal difficulties facing the child product of artificial insemination and his "parents" under present New Mexico law. A legislative approach to obviate these difficulties is proposed. The difficult social and religious problems[2] of human artificial insemination are not considered. The immediate problems generated by artificial insemination are three: the legitimacy of the child, the support obligations of the husband to the child upon the divorce of the husband and wife, and the inheritance rights of the child.

Although a surprising number of children have been born by artificial insemination,[3] there has been little litigation in the United States overall and none in New Mexico to determine the legal status of an AID child.[4] Since the AID child is not the natural child of the husband and is the natural offspring of the mother, the AID child might well be considered illegitimate.

The pertinent New Mexico statutes give scant indication of the AID child's status. New Mexico Stat. Ann. § 22-4-1 (1953) refers to a "child born out of wedlock and not legitimated. . . ."[5] This statute seems to have little applicability to an AID child, since the statute concerns itself with children born to an unmarried woman,

1. Artificial insemination is the placing of semen in the vagina, cervical canal, or uterus by means of instruments. Note, *Social and Legal Aspects of Human Artificial Insemination,* 1965 Wis. L. Rev. 859. For a history of artifical insemination, see Verkauf, *Artificial Insemination: Progress Polemics, and Confusion—An Appraisal of Current Medico-Legal Status,* 3 Houston L. Rev. 277 (1966).

2. For an overview of the social and religious problems, see G. Williams, The Sanctity of Life and the Criminal Law 118 (1957); *Church-State: A Legal Survey—1966-1968,* 43 Notre Dame Law. 684, 715 (1968); Note, *Social and Legal Aspects of Human Artificial Insemination,* 1965 Wis. L. Rev. 859; Note, *The Socio-Legal Problems of Artificial Insemination,* 28 Ind. L.J. 620 (1953).

3. Estimates of the total number of AID children born run from 5,000 to 20,000; Guttmacher, *Artificial Insemination,* 97 Annals N.Y. Acad. Sci. 623 (1962), to a high of 50,000; Levisohn, *Dilemmas in Parenthood—Socio-Legal Aspects of Human Artificial Insemination,* 4 J. Forensic Med. 147 (1957).

4. Artificial insemination, Donor (AID), also referred to as heterologous artificial insemination. Artificial insemination, Husband (AIH), also referred to as homologous artificial insemination, is the other type of artificial insemination used. AIH employs the semen of the husband and produces none of the legal problems caused by AID.

5. N.M. Stat. Ann. § 22-4-1 (1953):

> Mother's duty to support.—The mother owes her child born out of wedlock and not legitimated (in this act [22-4-1 to 22-4-27] referred to as "the child") maintenance and support as if the same were born in wedlock.

resulting in the child's illegitimacy. New Mexico Stat. Ann. § 29-1-20 (1953) sets forth the method to be followed to legitimate children born out of wedlock.[6] This statute would require the AID child's natural parents, the mother and the donor of the semen, to marry in order to legitimate the child. Section 29-1-20 resolves nothing concerning the AID child.

Other state courts have attempted to meet the legitimacy problem of the AID child with less than satisfactory results. In an Illinois case, *Doornbos v. Doornbos,* 12 Ill. App. 2d 473, 143 N.E.2d 844 (1958) (Abstract only), the court upheld the wife's contention that her two children, conceived by AID, were illegitimate and the husband had no interest in the children. In a New York case, *Gursky v. Gursky,* 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963), the court reasoned that AID children were illegitimate and could only be legitimated by adoption procedures. Many legal scholars agree the AID child is presumed illegitimate under existing statutes in most states.[7]

A problem squarely faced by several state courts is the husband's duty, after divorce from his wife, to support an AID child. In *Gursky* the court concluded that the husband had an obligation to support the child, since the husband's consent to AID contained an implied promise to support the child, inducing wife to act upon her husband's wishes.[8]

In a recent California case, *People v. Sorensen,* 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968), the husband's ex-wife brought criminal proceedings against him for nonsupport of the AID child born during the couple's marriage. The court equated the donor of semen with a donor of a human organ or blood, and for support purposes the court could only look to the lawful father for support of the AID child. The court went on to say the husband was the lawful father of the AID child within the meaning of § 270 of the California Penal Code which reads in part: "A father of either a legitimate or illegitimate minor child who . . . willfully omits . . . clothing, food, shelter . . . for his child is guilty of a misdemeanor. . . ."[9] The court pointedly refused to consider the

6. N.M. Stat. Ann. § 29-1-20 (1953):
Legitimation by marriage of parents.—Illegitimate children become legitimate by the marriage of their parents.

7. G. Williams, The Sanctity of Life and the Criminal Law 118, 121 (1957).

8. Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406, 410-11 (Sup. Ct. 1963). A later New York case cited the Gursky case with approval: Anonymous v. Anonymous, 41 Misc. 2d 886, 246 N.Y.S. 2d 835 (Sup. Ct. 1964).

9. Cal. Penal Code § 270 (West 1957).

legitimacy or property rights of an AID child, saying this area was properly for legislative action.[10]

New Mexico support statutes differ between support by a father of a legitimate child and support by a father of an illegitimate child.[11] Unlike California, New Mexico courts would be required determine the legitimacy of an AID child before a remedy for non-support is attempted.

How a New Mexico court would decide the legitimacy of an AID child to determine the support obligations of the husband is difficult to forecast. The biological fact that the husband is not the natural father could be the deciding factor. New Mexico Stat. Ann. § 40A-6-2 (Supp. 1969) seems to encompass support obligations by the father of his natural and legitimate child. A stronger statutory argument can be made that the AID child is illegitimate because the child was born out of wedlock, under N.M. Stat. Ann. § 22-4-1 (1953). Although the words "out of wedlock" have never been construed in New Mexico, an Indiana Court has stated that a child born to a married woman but conceived by someone other than her husband is a child born out of wedlock.[12]

If an AID child is determined to be illegitimate, a further problem arises, because N.M. Stat. Ann. § 22-4-2 (Supp. 1969), requires support by the natural father, and in AID cases, the husband, not being the natural father, may not be required to support the child.

An AID child's rights of inheritance under the present New Mexico laws of intestacy are unsettled. The present statutes encompass three types of situations: inheritance by the natural children of the

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

11. N.M. Stat. Ann. § 40A-6-2 (Repl. 1964, Supp. 1969):

> Abandonment of dependent.—Abandonment of dependent consists of:
>
> A. a man having the ability and means to provide for his wife and minor child's support, and abandoning or failing to provide for the support of such dependent and thereby leaving such wife or minor child dependent upon public support. . . .
>
> Whoever commits abandonment of dependent is guilty of a fourth degree felony.

N.M. Stat. Ann. § 22-4-2 (Supp. 1969):

> Liability of father to support until age eighteen—The father owes the child maintenance and support, having regard to the condition in life of the mother, until the child attains the age of eighteen [18] years, or if the child is physically or mentally incapable of working, until the child arrives at full age. The father is also liable to pay the expenses of the mother's pregnancy and confinement. The father is also liable for the child's funeral expenses.

This statute is set out in Article 4 of N.M. Stat. Ann. under the title of bastardy. Article 4 also sets out the penalty for failure of the father to support his illegitimate child. N.M. Stat. Ann. § 22-4-21 (Supp. 1969).

12. Pursley v. Hisch, 119 Ind. App. 232, 85 N.E.2d 270 (1949); *see also* State v. Coliton, 73 N.D. 582, 17 N.W.2d 546 (1945).

parent,[13] inheritance by adopted children,[14] and inheritance by illegitimate children from the mother and natural father.[15]

Again, the status of the AID child is crucial. If the AID child is considered illegitimate, he may inherit from his mother and the donor, but not the husband of the mother.[16] The donor must recognize the AID child as his own under N.M. Stat. Ann. § 29-1-18 (1953) in order for the AID child to take by intestacy. This is an absurd result considering the donor could be dead, impoverished or hopefully unknown. The only way an AID child in New Mexico will inherit as an adopted child is for the husband and wife formally and legally to adopt him.[17]

AID presents problems which state courts have been hard pressed to solve satisfactorily under existing law. The status of the AID child remains undefined in most states. Only Oklahoma has enacted definitive legislation specifically to cure problems caused by AID.[18]

13. N.M. Stat. Ann. § 29-1-10 (1953):

Inheritance by surviving spouse and children.—Subject to the provisions of sections 1840 and 1841 [29-1-8, 29-1-9] of this article when any person having title to any estate, not otherwise limited by marriage contract, dies without disposing of the estate by will, it is succeeded to and must be distributed subject to the payment of his debts in the following manner: One-fourth thereof to the surviving husband or wife and the remainder in equal shares to the children of decedent and further, as provided by law.

14. N.M. Stat. Ann. § 29-1-17 (1953):

Inheritance by and from adopted child.—Whenever a child has been legally adopted, such child shall inherit from the adopting parents. . . . For all inheritance purposes without exception the adopted child shall be considered a natural child of the adopting parents. . . .

15. N.M. Stat. Ann. § 29-1-18 (1953):

Illegitimate child—Inheritance by and from—Evidence of recognition by the father.—Illegitimate children shall inherit . . . from the father whenever they have been recognized by him as his children, in writing, by an instrument signed by the reputed father and must be such as to show upon its face that it was so signed with the intent of recognizing such children as heirs. . . .

16. *Id.*

17. N.M. Stat. Ann. § 29-1-17 (1953) (*See* text, *supra* note 14).

18. Okla. Stat. Ann. tit. 10, §§ 551-53 (Supp. 1967) provides:

§ 551. Authorization

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. Status of child

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

§ 553. Persons authorized—Consent

No person shall perform the technique of heterologous artificial insemination unless currently licensed to practice medicine in this State, and then only at

Several other states have attempted similar legislation, but none has been successful.[19] New York City regulates the medical aspects of artificial insemination without resolving the legal problems.[20] Mem-

the request and with the written consent of the husband and wife desiring the utilization of such technique. The said consent shall be executed and acknowledged by both the husband and wife and the person who is to perform the technique, and the judge having jurisdiction over adoption of children, and original thereof shall be filed under the same rules as adoption papers. The written consent so filed shall not be open to the general public, and the information contained therein may be released only to the persons executing such consent, or to persons having a legitimate interest therein as evidenced by a specific court order.

Georgia has enacted a statute legitimizing children born by artificial insemination, but the statute refers only to children born by artificial insemination and makes no distinction between AID and AIH. Ga. Code Ann. tit. 74, § 101. 1 (Supp. 1968).

Arkansas also recently enacted a statute concerning children born by artificial insemination. Unfortunately this statute is of limited scope, legitimizing children born by artificial insemination for purposes of intestate succession of the wife and husband. The consent of the husband to the artificial insemination of the wife is required. Ark. Stat. Ann. § 61-141 (Supp. 1969). For a review of this statute, see G. Smith, *For unto Us a Child is Born-Legally,* 56 A.B.A.J. 143 (1970).

For other proposed statutes, see 9 Villanova L. Rev. 77 (1963); Note, *Human Artificial Insemination: An Analysis and Proposal for Florida,* 22 U. Miami L. Rev. 952 (1968).

19. The states proposing bills concerning AID, but failing to pass legislation are: Illinois, Indiana, Minnesota, New York, Ohio, Virginia and Wisconsin. Hager, *Artificial Insemination: Some Practical Considerations for Effective Counseling,* 39 N.C.L. Rev. 217 (1961).

20. New York City Health Code, art. 21 (1959):

No person other than a licensed physician shall perform an artificial insemination or collect, offer for sale, sell or give away human seminal fluid for the purpose of causing artificial insemination.

A proposed donor of seminal fluid shall have a standard serological test for syphilis and a smear and cultural for gonorrhea within one week before his seminal fluid is taken and, immediately prior to taking his seminal fluid, he shall be given a complete medical examination with particular attention to his genitalia.

A proposed donor and a proposed recipient of seminal fluid shall each have a blood test to establish their respective Rh factors before artificial insemination is attempted. Such a test shall be made by a laboratory operated pursuant to Article 13 and classified for hematology, including blood grouping and Rh typing. If the proposed recipient is negative for the Rh factor, only seminal fluid from a donor who is also negative for the Rh factor shall be used.

A person who is affected with a venereal disease, tuberculosis, brucellosis or who has any congenital disease or defect shall not be used as a donor of seminal fluid for artificial insemination.

A physician who performs an artificial insemination shall keep a record of (1) the names and addresses of the physician, donor, and recipient, (2) the results of the medical examination and serological and all other tests, and (3) the date of artificial insemination.

Records kept by a physician pursuant to this section shall not be subject to inspection by persons other than authorized personnel of the Department. A person who has access to these records shall not divulge any part thereof so as to disclose the identity of the persons to whom they relate.

bers of the medical profession generally follow informal rules when performing AID.[21]

The solution to the AID problem seems to lie with definitive legislation covering the medical and legal areas of AID. This Comment's proposed statute attempts to solve the legal problems, leaving the medical aspects in the hands of the medical profession.

The following statute is recommended for adoption in New Mexico. It is similar to the Oklahoma statute, but incorporates further medical protection for all parties involved, using the New York City Health Code guidelines.

The basic assumption of the proposed statute is that AID children should be considered legitimate for all purposes. It is assumed that couples who desire to have children by AID also desire the resulting offspring to be considered their own.

A. Authorization, Consent

(1) Heterologous artificial insemination may be performed in this state by persons duly authorized to practice medicine at the request and with the written, signed and dated consent of the husband and wife.

(2) Written, signed and dated consent of the husband and wife evidencing voluntary consent to heterologous artificial inseminaton must be filed in the district court for the county in which the petitioners reside before heterologous insemination may be performed.

(3) The written consent so filed shall not be open to the general public. The information shall be released only by court order to persons having a legitimate interest in the records.

B. Status of the Child

Any child born as a result of heterologous artificial insemination [in conformity with this act] shall be considered the legitimate child of the mother and husband in all respects.

C. Medical Standards

(1) A proposed donor of seminal fluid to be used for heterologous artificial insemination shall be given a standard serological test for

21. Holloway, *Artificial Insemination: An Examination of the Legal Aspects*, 43 A.B.A.J. 1089, 1090 (1957). The rules are:

1. The Donor must remain unknown to the husband and wife.
2. All parties must voluntarily consent to the procedures.
3. The Physician must know the couple well.
4. Fees charged must be kept low to eliminate mercenary motives.
5. Signed papers should be kept to a minimum or dispensed with.

syphilis and a smear culture for gonorrhea within one week before his seminal fluid is taken. A medical examination shall be given the donor immediately prior to taking his seminal fluid.

(2) A person affected with venereal disease, tuberculosis, brucellosis or who has any congenital disease or defect shall not be used as a donor of seminal fluid for artificial insemination.

(3) Records kept by a physician pursuant to this act shall not be subject to inspection. Records may only be inspected by persons having a legitimate interest in the records on order of a court.

(4) Physicians engaged in performing heterologous artificial insemination shall be held to the ordinary standard of care required of medical practitioners and shall not be held to guarantee or warrant quality of sperm, success of insemination or health of the child.

Section A(1) of the proposed statute recognizes the practice of AID, giving it legislative recognition. This section merely recognizes that AID practices exist, and for the safety of all, should be regulated.

Section A(2) serves to document the AID event for future protection of the parties involved. A consent on file, signed by the parties will prevent a husband or wife from disavowing his or her consent to AID at a later date.

Requiring the consent of both parties to AID prevents the wife from having AID performed without the consent of her husband. If the wife succeeds in having AID performed without the consent of her husband, the child will not be considered the legitimate offspring of the husband and wife under this act.

Section A(3) protects the privacy of the parties involved in AID, allowing access to the records only upon court order.

Section B establishes the legal status of the AID child. Coupled with A(2), Section B establishes the AID child as the natural child of the husband and wife. Section A(2) establishes the proof needed for Section B. Section B is proposed to answer all questions concerning the AID child's legitimacy, the husband's duty to support and the AID child's property rights in the husband and wife's estate. The bracketed material in Section B is optional, leaving a legislative choice to include all AID children in the proposed statute, whether born in New Mexico, or to limit the applicability of the statute only to those AID children born in conformity with this statute.

Sections C(1) and (2) deal with safeguards to be followed by the medical profession. The section is not definitive since the medical profession should be left broad discretionary powers when performing AID.

Section C(3) is designed to keep the donor's identity secret. The donor's identity should only be revealed when a court determines it absolutely necessary.

Section C(4) recognizes the risks a couple might be taking in having AID performed. It is thought the ordinary medical standard of care required of doctors is a sufficient test when determining liability of a doctor who performs AID. A too stringent standard of care might result in discontinuance of the practice by the medical profession.

J. DOUGLAS DEANER