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Human Artificial Insemination: An Analysis and Proposal for Florida

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HUMAN ARTIFICIAL INSEMINATION: AN ANALYSIS AND PROPOSAL FOR FLORIDA

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I. INTRODUCTION

The law strives to keep abreast of the problems created by scientific advances in fields which affect human interaction. The practice of human artificial insemination is such an area. To clarify the context in which these problems arise, this article begins with a summary of the history of artificial insemination, hereinafter referred to as AI, and a consideration of its present status and probable future. The psychological and sociological aspects of the practice are next discussed. The effect on the marital relationship and other possible legal issues which exist under Florida law are then presented. Finally, alternative legislative proposals are evaluated, and a proposed artificial insemination statute for Florida is presented.

Artificial insemination has been defined as "the deposition of semen in the vagina, cervical canal, or uterus by means of instruments."[1] As practiced among humans, a differentiation is made according to the source of the semen which is used. If it is provided by the husband of the woman inseminated, the procedure is designated AIH (Artificial

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1. REPORT OF COMMISSION APPOINTED BY HIS GRACE THE ARCHBISHOP OF CANTERBURY, ARTIFICIAL HUMAN INSEMINATION 7 (1948).

Insemination, Husband).[2] Where the semen of a third party donor is used, AID (Artificial Insemination, Donor)[3] is the term usually employed. The use of mixed husband and donor semen is sometimes referred to as CAI (Combined Artificial Insemination).

II. General Background

A. *History*

Ancient Jewish literature indicates that man has known of artificial insemination since the second century.[4] However, the earliest efforts to accomplish artificial insemination apparently were not made until early in the 14th century, when Arabs fertilized horses in this manner.[5] Dr. John Hunter of England reported the artificial insemination of a wife with the semen of her husband in the late 18th century.[6] In 1866, Dr. J. Marion Sims, an American physician, effected a series of fifty-five inseminations with the husband's semen.[7] Use of a donor's semen achieved recognizable status with the work of Dr. Robert Dickinson commencing in 1890.[8] In 1907, the Russian physiologist, Iwanoff, published a work, based upon extensive experimentation, which provided the basis for and stressed the advantages of the large-scale use of artificial insemination in animal husbandry.[9]

B. *Present Status*

Artificial insemination is now a technique capable of being performed by any physician.[10] Because an almost complete lack of data results from the secrecy insisted upon by the parties to AI, reliance must be placed on informed estimates. The number of individuals conceived through AI and now living in the United States has been estimated to be up to 200,000.[11] The growing importance of this procedure is demonstrated by the fact that several sperm storage banks have been established in the United States and Europe.[12]

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2. Also referred to frequently as "homologous artificial insemination."

3. Also referred to frequently as "heterologous artificial insemination."

4. Kardimon, *Artificial Insemination in the Talmud*, 2 Hebrew Med. J. 164 (1950).

5. J. Schellen, Artificial Insemination in the Human 9 (1957).

6. Home, *An Account of the Dissection of an Hermaphrodite Dog*, 1 Philosophical Transcript Royal Soc'y 158 (1799). Home refers to the plight of a linen merchant who consulted Doctor Hunter because he was unable to father a child due to hypospadias (a deformity of the penis in which the uretha opens on its under surface).

7. J. Sims, Clinical Notes on Uterine Surgery (1866).

8. Guttmacher, *Artificial Insemination*, 97 Annals N.Y. Acad. of Sci. 623 (1962).

9. Iwanoff, *De la fecondation artificielle chez les mammiferes*, 12 Archives of Sci. & Biology St. Petersburg 7 (1907).

10. Guttmacher, *The Role of Artificial Insemination in the Treatment of Sterility*, 15 Obstetrical & Gynecological Survey 767 (1960).

11. Commissioner of Pub. Welfare v. Koehler, 284 N.Y. 260, 30 N.E.2d 587, 20 N.Y.S.2d 172 (1940).

12. *See* Levisohn, *Dilemma In Parenthood: Socio-Legal Aspects of Human Artificial Insemination*, 36 Chi-Kent L. Rev. 3 (1959).

One out of ten married couples in the United States cannot conceive offspring in the usual manner.[13] Moreover, even though reliable data is not available on the proportion of childless marriages due to male sterility, in forty percent of the reported cases of infertility the fault is the husband's sterility.[14] AIH is medically indicated when the husband has live spermatozoa of adequate motility, but for one of a number of possible reasons cannot deposit them so that conception may occur. Principally these are paraplegia (a paralysis resulting from an injury to the spinal column) and hypospadias (the urethral opening occurring on the underside of the penis).[15] AID is medically indicated when there is a complete absence of live spermatozoa and also when there is clinical sterility, as with a poor sperm count, coupled with a long history of a failure to conceive. AID is also indicated in some marriages for genetic reasons such as a history of serious hereditary disease in the husband's family and in some instances of Rh factor incompatibility between the wife and the husband.[16]

C. *Future of Artificial Insemination*

An important indication of whether the practice of AI is likely to increase is in the area of adoption. The two main reasons for turning to AI are an inability or unwillingness to have a child normally and the inability or unwillingness to utilize adoption procedures.[17] All of the reasons for an unwillingness to adopt cannot, of course, be known. Many individuals dislike the often inquisitorial approach of the case worker. The formalities and protracted proceedings are often disliked, as is the probationary period during which the child may be taken away. Some would rather not have the local publicity which usually attends an adoption. AID is seen as a means of avoiding these undesirable aspects of adoption and as offering positive attractions. Those most frequently mentioned are that the wife's maternal urge is satisfied by actually bearing the child, that the child's hereditary characteristics are the product of the wife and a selected donor rather than of an unknown couple, and that secrecy can be maintained. It is impossible to evaluate the impact of adoption on the future of AID other than to state that the number of couples who might use AID is reduced by the number who choose and are permitted to use adoption instead.

If lack of knowledge is a major impediment to the spread of AID, it will probably be surmounted only gradually. As public awareness

13. Warner, *Problems and Treatment of the Infertile Couple*, 57 MED. WOMEN'S J. 13 (1950).

14. Warner, *Artificial Insemination*, 51 MED. WOMEN'S J. 17 (1944).

15. Warner, *supra* note 13, at 16 and 19.

16. Warner, *Artificial Donor Inseminations (An Analysis of 100 Cases)*, 13 HUMAN FERTILITY 37 (1948).

17. The choice of artificial insemination also implies the rejection of three other alternatives not discussed here, *i.e.*, divorce, continued childlessness, or extramarital intercourse.

increases, however, the attitude of individual couples toward AID, as shaped by prevailing public opinion, will become the most influential factor in the future of AID. However, the fact that ten to fifteen percent of all married couples are childless seems sufficient for the belief that AID will eventually be practiced extensively.[18]

III. Psychological Aspects

There is little direct evidence on the psychological aspects of AID.[19] Doctors who practice AID emphasize the benefits provided by the unique emotional experience of motherhood, together with the joy invariably expressed by the couple when the child is born. Many couples are said to demonstrate their continued satisfaction when they return for additional AID children.[20] The lack of litigation is seen by some as proof that AID does not result in emotional disaster. Indeed, many practitioners feel that the AID children often provide an indispensable ingredient for a stable marital relationship.[21] It is believed that through intimate association the familial relationships develop just as they would if the child were conceived normally. The lack of a biological relation between the husband and child is regarded as insignificant.[22]

The psychological aspects of AI can be affected by religious influences. Of the major religions, AI has received disapproval only from the Catholic Church,[23] while the general Jewish[24] and Protestant[25] position is to consider AI as an individual matter resting solely with each person's conscience.

There are reasons for proceeding with caution when considering AID. A man's emotional response to knowledge of his sterility may result in a sense of guilt over his inadequacy.[26] For the husband, the child may serve as a continual reminder of an unpleasant fact. The child may also remind the wife that she has given birth to a stranger's child. She may develop a sense of guilt or a longing for the donor, while the

18. Warner, *supra* note 13.

19. Gerstel, *A Psychological View of Artificial Donor Insemination*, 17 Am. J. Psychotherapy 64 (1963).

20. Weisman, *Symposium on Artificial Insemination: The Medical Viewpoint*, 7 Syracuse L. Rev. 96, 99 (1955).

21. Farris & Garrison, *Emotional Impact of Successful Donor Insemination, A Report on 38 Couples*, 3 Obstetrics & Gynecology 1 (1954).

22. Comment, *Artificial Insemination: Confusion Compounded*, 3 Wayne L. Rev. 35, 42 (1956).

23. Hassett, *Freedom and Order Before God: A Catholic View*, 31 N.Y.U.L. Rev. 1170 (1956).

24. Rackman, *Morality in Medico-Legal Problems: A Jewish View*, 31 N.Y.U.L. Rev. 1205, 1208 (1956).

25. Noble, *The Protestant Viewpoint, Symposium on Artificial Insemination*, 7 Syracuse L. Rev. 101, 103 (1955).

26. Bohn, *Artificial Insemination: Psychologic and Psychiatric Evaluation*, 34 U. Det. L.J. 397, 400 (1957).

husband may harbor a corresponding jealousy of the donor.[27] Further problems may be occasioned as the child's personality develops. The husband may place the blame on the wife or the wife may claim exclusive credit for particular aspects of the child's personality or behavior. If the child's behavior leads to a family crisis, his status may be revealed through an emotional outburst. One practitioner reported two instances of acute pregnancy psychoses necessitating hospitalization and four instances of disturbed patients requiring ambulatory psychotherapy as a result of AI, but this was among 340 women he successfully artificially inseminated.[28]

The potential psychological problems for the AID child are due to the possibility that he may discover his status. The resultant harm to the child could be severe. If the child had doubts about his parentage, the couple would be unable honestly to allay those fears, and the child would probably develop a feeling of insecurity. Finally, if AID had any adverse effect upon the relationship between the couple, the child's welfare correspondingly would be jeopardized. However, the child does have the advantage, in contrast to many other children, of being a wanted child.[29] Moreover, there is nothing to indicate that the child does not, in fact, become a loved member of the family.[30]

Neither of the conflicting views has been factually verified, but since AID is being practiced, the lack of evidence of psychologically bad results tends to confirm the belief that AID is not psychologically harmful. It is advisable that every couple contemplating AID be fully informed by competent counselors. AID is unlikely to cure emotional ills and is probably appropriate only when the marital relationship is stable enough to withstand the stresses which the AID child may cause. However, the affirmative arguments that marriages with children seem to be more stable than childless marriages, that there is a basic need of women to bear children and that AID is successful in satisfying these needs,[31] are all worthy of more than a summary dismissal.

IV. SOCIOLOGICAL ASPECTS

A vital concern of society is the integrity of the family unit. Lack of empirical evidence makes it difficult to determine whether the practice of AID results in a harmonious family group. However, the lack of evidence of discord, in view of the practice to date, tends to confirm the belief that AID does not disrupt the family.

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27. *Id.*

28. Guttmacher, *The Role of Artificial Insemination in the Treatment of Sterility*, 15 OBSTETRICAL & GYNECOLOGICAL SURVEY 767, 781 (1960).

29. Weisman, *supra* note 20, at 98.

30. Bohn, *supra* note 26.

31. BISHOP, ARTIFICIAL HUMAN INSEMINATION: REPORT OF A CONFERENCE (1948). *See also* Weisman, *supra* note 20.

The practice of AID introduces a new family relationship to our society. The traditional father, mother and child relationship is replaced by mother, husband, donor and child. However, when this new relationship is created, generally it is concealed. Many of the functions of the family have been undergoing change, but it has not necessarily been a disorganizing change.[32] Without attempting to predict whether AID will be successfully integrated into the American family, it should be noted that in other societies the reproductive function is partially outside the family with no resultant family instability or social disorganization.[33]

The possibility of a marriage between the child and another of his biological father's children presents one of the major sociological objections to AID, but the statistical probability of such an eventuality is probably infinitesimal. There are conditions which could raise the probability significantly in a given area, but they have not yet been shown to exist.[34] The same possibility of consanguineous marriage exists for some adopted children, but it is not a product of the adoptive process.

Other sociological objections range from predictions that in the 1980's all children will be begotten by AI and brought up in public institutions, as in Orwell's *Brave New World*,[35] to that of another Third Reich. Of course these are possibilities, but the fact remains that AI is already a means that could easily be used to that end. While this may not be prevented from occurring in other countries, the professional responsibility currently employed by American doctors tends toward responsible use of AI.

The concealment of the AID child's biological father poses diverse problems. Immediately apparent is the deception of the child. It is possible that children seldom rely upon the genetic characteristics of their parents in any specific sense, but the problem could become acute if, for example, a child believed himself to carry the genetic defect of the husband which prompted the couple to turn to AID.

Before considering what might be done about the problem of secrecy, it is first necessary to analyze the reasons for its maintenance. Secrecy is seen as a vital aspect of the attempt to create, through AID, a family like other families. Although its preservation may be a psychological burden, full disclosure could easily defeat attainment of the desired goal. The donor and mother might become attracted to each other and the donor

32. Mangin, *Symposium on Artificial Insemination: The Sociological and Anthropological Viewpoint*, 7 SYRACUSE L. REV. 106 (1955).

33. *Id.* at 108.

34. In Note, 30 BROOKLYN L. REV. 302, 321 (1964) it is stated that the problem could well become acute with a limited group of donors supplying numerous specimens. However, that assessment is also based upon the supposition that each specimen would be used for 200 inseminations. In practice, only one insemination is performed with each specimen.

35. G. ORWELL, 1984 52 (Signet ed. 1952).

might become the object of the husband's jealousy.[36] The child's loyalties might be divided. The development of normal family relations under such circumstances would probably be difficult. The uncertain status of AID in contemporary culture makes the couple avoid even the limited disclosure that a child was conceived through AID.

The most important aspect of secrecy concerns the legal status of the AID child. In the absence of legislation to the contrary, the child would probably be considered illegitimate.[37] Notwithstanding the value of AID to them, most couples are unwilling to expose their child to the social stigma associated with illegitimacy. The couple would also desire to avoid the social stigma associated with male sterility and to enjoy the recognition which usually accompanies childbirth. With our present social mores, the arguments for concealment have the greater weight, and the dangers associated with secrecy seem too remote to justify a threat to the welfare of the child and family.

V. EFFECT ON THE MARITAL RELATIONSHIP

A. *Adultery*

The two legal actions for terminating a marriage in Florida are annulment and divorce. Artificial insemination might be alleged to support a ground in either proceeding. Artificial insemination might be claimed to constitute either of two statutory grounds for divorce: adultry[38] or extreme cruelty.[39] AI might also affect a third ground, the natural impotency of a spouse.[40]

There is no Florida case law on the issue of whether AID constitutes adultery. Adultery has been held by all Florida courts to mean sexual relations by intercourse on the part of either spouse with another man or woman.[41] Some penetration of the female organ by the male organ has always been required for a finding of adultery.[42] If such penetration were held to be the sole criterion, it is clear that AID could not be found to constitute adultery. But other jurisdictions have not proceeded on such simple reasoning. In only two cases in the United States has the question of adultery through AID been squarely raised. Both were in the same state, and in both cases the courts reached opposite conclusions.

In *Doornbus v. Doornbus*[43] the court in granting a divorce held that a child conceived by AID with the husband's consent was illegitimate,

36. Bohn, *supra* note 26.
37. *See* p. 962 *infra*.
38. FLA. STAT. § 65.04(3) (1967).
39. FLA. STAT. § 65.04(4) (1967).
40. FLA. STAT. § 65.04(2) (1967).
41. FLORIDA BAR ASS'N, FLORIDA FAMILY LAW § 21.8 (1967).
42. 24 AM. JUR. *Divorce and Separation* § 24 (1966).
43. 23 U.S.L.W. 2308 (Super. Ct. Cook County, December 13, 1954).

that the husband was not entitled to any visitation rights, and that the wife was guilty of adultery despite the husband's condonation of the wife's action. However, in *Hoch v. Hoch*[44] the court held that AID without the husband's consent was not adultery constituting grounds for divorce because, while there was no consent, there was also no sexual intercourse.

In a recent case, the California Supreme Court, in deciding the question of the husband's duty of support of a child conceived by AID, stated:

> In the absence of legislation prohibiting artificial insemination, the offspring of defendant's valid marriage to the child's mother was lawfully begotten and was not the product of an illicit or adulterous relationship.[45]

A Canadian court in the case of *Orford v. Orford*,[46] finding AI without the husband's consent to constitute adultery, stated that impregnation per se is the test of adultery and that sexual union of the bodies or moral turpitude is of no consequence. The court said in dictum:

> [T]he essence of the offense of adultery consists, not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive powers or faculties of the guilty person; and any submission of those powers to the service or enjoyment of any person other than the husband or the wife comes within the definition of 'adultery.'[47]

This definition of adultery is completely at variance with the well recognized common law and statutory definitions which require physical connection. If the *Orford* test were used to determine adultery, a married woman could swallow a contraceptive pill, have complete sexual intercourse with a man other than her husband, and no adultery would be committed. Such a conclusion is absurd.

In Europe, the Civil Court of Rome held that AID constituted adultery.[48] In *MacLennan v. MacLennan*[49] the Court of Session in Scotland held squarely to the contrary, that AID is not adultery and that no divorce can be granted solely upon that basis. In the Scottish case Lord Wheatley cautioned that while unconsciously being influenced by our moral and ethical standard,

> this problem . . . must be decided by the objective standard of

44. Unreported, Cir. Ct., Cook County, Ill. (1948); *see* Chicago Sun, Feb. 10, 1945, at 13, col. 3; TIME, Feb. 26, 1945, at 58.

45. People v. Sorensen, — Cal. 2d —, 437 P.2d 495, 66 Cal. Rptr. 7 (1968).

46. 49 Ont. L.R. 15, 58 D.L. R. 251 (1921).

47. *Id.* at 22.

48. Hahlo, *Some Legal Aspects of Artificial Insemination*, 74 S. AFRICA L.J. 167 (1957).

49. [1958] Sess. Cas. 105, (Scot.), 1958 Scots L.T.R. 12.

> legal principles as these have been developed and must be confined to the narrow issue of whether this form of insemination constitutes adultery in the eyes of the law. . . .[50]
>
> The idea that a woman is committing adultery when alone in the privacy of her bedroom she injects into her ovum by means of a syringe the seed of a man she does not know and has never seen is one which I am afraid I cannot accept.[51]

These cases illustrate the dilemma that will face a trial judge in Florida if AID is alleged as adultery or as a defense thereto. Not one of the confusing welter of decisions is a judgment by a court of final jurisdiction. It seems clear that no one could contend that AIH is adultery. Realistically, existing definitions of adultery, formulated long before artificial insemination became a problem, should be legislatively redefined in the light of changed circumstances.

There are possible defenses to alleged adultery through AID. Consent to the AID could constitute the affirmative defense of connivance.[52] Adultery on the part of the wife does not constitute a ground for divorce by the husband where the adultery is forced upon her or the husband's conduct conduced to or aided in it.[53] Also, there is a possible defense of condonation or an intentional forgiveness of the matrimonial offense.[54]

With or without the husband's consent, AID should not constitute adultery. Lord Wheatley's reasoning in *MacLennan v. MacLennan* is logical and follows the modern definition of adultery.[55] With AID there can be no destruction of faith in the chastity or loyalty of one's spouse since there has been no act of sexual intercourse to destroy her chastity. There is no other man or woman with whom a spouse has consorted. There is no sexual pleasure with someone other than the other spouse, for there is no coitus. In fact, the donor's identity generally is not even known.

B. *Extreme Cruelty*

If a wife were artificially inseminated without her husband's actual consent, the result might be sufficient for divorce on the ground of extreme cruelty.[56] Extreme cruelty consists of mental as well as physical elements. The conduct required for this ground must depend on the facts of a case and whether the conduct results in the infliction of pain and

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50. *Id.* at 108.
51. *Id.* at 114.
52. *Cf.* Oyama v. Oyama, 138 Fla. 422, 189 So. 418 (1939).
53. McMillan v. McMillan, 120 Fla. 209, 162 So. 524 (1935).
54. Kollar v. Kollar, 155 Fla. 705, 21 So.2d 356 (1945).
55. Ermis v. Ermis, 255 Wis. 339, 38 N.W.2d 485 (1949). Adultery is the voluntary sexual intercourse of a married man or woman with a person other than the offender's wife or husband. Penetration by the man of the woman is necessary to prove adultery. Dennis v. Dennis, 2 All E.R. 51 (1955); 24 AM. JUR. *Divorce and Separation* § 24 (1966).
56. *See, e.g.*, FLA. STAT. § 65.04(4) (1967).

suffering on the spouse.[57] The husband would have to show that the wife's conduct over a period of time caused him great mental pain and anguish, affected his health seriously, and made further cohabitation an intolerable and unbearable burden.[58] The birth of a child through AID may create in the husband strong feelings of inferiority, and these feelings may be accentuated as his wife fulfills her reproductive function. If the husband has not consented to AID[59] feelings of impotence and inferiority may be aggravated. Because he has had no knowledge or control over the conception of the child, he may feel that the child is not his own and that his wife has violated her marriage vows. Doctors, perhaps to avoid this, generally require the parties to sign a form to consent to AID.[60]

C. *Impotency*

The term "naturally impotent," as either a statutory ground for divorce in Florida[61] or for annulment,[62] means a lack of capacity to copulate existing at the time of the marriage.[63] Regardless of how the condition arose, it must be incurable.[64] A spouse's impotency must not be known to the other spouse at the time of the marriage.[65] Because annulment is possible where the marriage was never consummated by normal sexual intercourse, a major question raised by AIH is presented: Is AIH a consummation of marriage which will bar an action for divorce or annulment by the wife on grounds of the husband's impotency? An English court has answered in the negative, holding that "the conception of the child . . . when done with the dominant intention of producing normality in their sex relations [was not] approbation of an abnormal marriage."[66] In that case the annulment was granted to the wife even though the child was made illegitimate. A statute enacted a few months later avoided this harsh result by providing that any child who would have been legitimate if his parents' marriage were dissolved by divorce "shall be legitimate even though the marriage is voidable and annulled."[67]

In 1953 an English court held that an unsuccessful AID attempt does not waive a wife's right to annulment on the ground of non-consum-

57. Lyon v. Lyon, 54 So.2d 679 (Fla. 1951).

58. Kellogg v. Kellogg, 93 Fla. 261, 111 So. 637 (1927).

59. The physician generally requires the parties to sign a form to consent to AID. An example of this form is shown in FLORIDA BAR ASS'N, FLORIDA FAMILY LAW § 3.62 (1967).

60. The question of consent is also of extreme importance in determining the legal rights of the child and the duties owed to him. *See* p. 962 *infra*.

61. FLA. STAT. § 65.04(2) (1967).

62. FLA. STAT. § 65.04(2) (1967); Cott v. Cott, 98 So.2d 379 (Fla. 2d Dist. 1957).

63. Gibbs v. Gibbs, 156 Fla. 404, 23 So.2d 382 (1945); Cott v. Cott, 98 So.2d 379 (Fla. 2d Dist. 1957).

64. *Id.*

65. *Id.*

66. L. v. L., 1 All E.R. 141, 145 (1949).

67. 14 Geo. VI c. 25, § 9 (1950). *See also In re* Ruff's Estate, 159 Fla. 777, 32 So.2d 840 (1947).

mation of the marriage.[68] A New York court in 1963 reached a similar conclusion in a case which involved AID done with the husband's consent, based on the fact that the marriage had not been consummated, even though the AID was successful.[69]

VI. LEGAL STATUS AND RIGHTS OF THE CHILD

A. *Legal Status of the Child*

A child produced by AID has been held to be illegitimate in every reported case in the United States in which the issue has been squarely presented. However, in other cases the AID child has been treated as if he were legitimate, in order to determine his rights or the obligations owed to him. Florida has no case law on the status of the AID child.

In *Strnad v. Strnad*[70] the court, in deciding a motion to fix the extent of a separated husband's right to visit the child who was in the mother's custody, held that the husband was not deprived of the parental visitation right by the fact that the child was the offspring of an AID consented to by the husband. The court held that the child was legitimate for the reason "that the child has been potentially adopted or semi-adopted by the defendant."[71]

Ten years after the *Strnad* case, the same court used an indirect approach to prevent a child conceived by AID from being declared illegitimate:

> [T]o stigmatize them as children of an unknown father by means of artificial insemination of the mother is no more, in my view, than an attempt to make these innocents out as children of bastardy. And where a parent attempts such means, the law will still the lips of such a parent. This I believe will be done even where artificial insemination is lawful, for, on the last turn, it is the children who, when so revealed, must go through life in such obfuscation.[72]

The effect of this case was to estop the parent from testifying as to the fact of AID if it would not inure to the benefit of the child.

In 1963, the same court as that in the two foregoing cases handed down the decision of *Gursky v. Gursky*.[73] Following common law principles and their current statutory enactments, the court came to a decision which was well reasoned, though perhaps shocking and displeasing

68. Slater v. Slater, 1 All E.R. 246 (1953).
69. Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).
70. 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948).
71. *Id.* at 787, 78 N.Y.S.2d at 391.
72. People *ex rel.* Abajian v. Dennett, 15 Misc. 2d 260, 264, 184 N.Y.S.2d 178, 183 (Sup. Ct. 1958).
73. 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).

to some.[74] The question before the court was whether a child conceived by AID with the husband's consent is legitimate as to the husband and, if not, whether there is a duty on any other ground to support the child. On the first issue, the court held that a child conceived by AID, even with the husband's consent, is not the legitimate issue of the husband. On the second issue the court found a duty of support.

One author[75] states that the court in *Gursky v. Gursky*[76] failed to follow the example set by *Anonymous v. Anonymous*[77] of subordinating technical considerations to a concern for the welfare of the child. Another author states that the court in *Gursky* should have followed the decision in the *Strnad* case:[78]

> It did not place enough emphasis on the fact that artificial insemination was not contemplated when the common law rule was established nor when the New York Legislature passed the statute relied upon by the Court. The Court could have taken into consideration the fact that AI is a new scientific advancement in the field of medicine and could have given the policy of legitimacy a more liberal interpretation.[79]

The language of the Family Court Act of New York, which defined an illegitimate child as one born "out of wedlock," was interpreted to mean a child whose "father" is not its mother's husband.[80] Neither the statute nor New York case law defines "father." To reason that the husband of a woman who, with his consent, conceives artificially is the child's "father" and that the child is therefore born "in wedlock" would not require a distortion of the statutory language. In fact, such an interpretation would best achieve the court's avowed purpose of reaching a result least harmful to the child. This interpretation was used in *People v. Sorensen*,[81] where the court held that the term "father" cannot be limited to the natural father but depends on the actual legal relationship of father and child.

Sorensen was also a typical example of a court avoiding the legitimacy issue except to find the AID child legitimate for a specific purpose consistent with California public policy.

In California, legitimacy is a legal status that may exist despite

74. There has been a tremendous number of articles written on the *Gursky* case, and almost all are critical of the decision. *See, e.g.*, Note, 64 COLUM. L.R. 376 (1964); Note, 1964 DUKE L.J. 163 (1964).

75. 1964 DUKE L.J. 163 (1964).

76. 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).

77. 208 Misc. 633, 143 N.Y.S.2d 221 (Sup. Ct. 1955).

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

79. 3 J. FAMILY L. 365 (1963).

80. Commissioner of Pub. Welfare v. Koehler, 284 N.Y. 260, 264, 30 N.E.2d 587, 589, 20 N.Y.S.2d 172 (1940).

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

> the fact that the husband is not the natural father of the child. . . . [S]ince the subject of legitimation as well as that of succession of property is properly one for legislative action . . . , we are not required in this case to do more than decide that, within [the California criminal non-support of a child statute the husband] is the lawful father of the child conceived through heterologous artificial insemination and born during his marriage to the child's mother.[82]

A child's interest could be protected at the evidentiary level. The presumption that children born in wedlock are legitimate is universally recognized and is one of the strongest rebuttable presumptions known in law.[83] Some states create this presumption by statute, but it is clear that the presumption exists independently of statute in practically all jurisdictions including Florida.[84] A husband can contest the legitimacy of a child born in wedlock, but the wife does not have this right.[85] The natural parent argument has been advanced to attack the application of this presumption to the AID child. This argument is that the wedlock or the marriage to legitimize the child would have to be between the mother and the biological father. A Florida statute provides that "if the mother of any bastard child and the *reputed* father shall at any time after its birth intermarry, the child shall in all respects be deemed and held legitimate . . . ."[86] It does not seem necessary to construe the word "reputed" any way other than as it is normally defined to avoid the establishment of the biological father.[87] It might, however, be necessary to estop a parent from testifying as to AID, as was done in a New York case,[88] or to hold as an Illinois case did that some evidence of artificial conception of a child was not sufficient to overcome the strong presumption of legitimacy.[89]

Florida is one of the more liberal states in protecting its children. In a recent Florida case the "best interests of the child" doctrine was used to override the statutory necessity of consent from the State Department of Public Welfare, which was guardian of a child, so that the foster parents could adopt the child.[90] The court stated that "the paramount issue before this court is the best interests of the child . . . ."[91]

Because of the strong presumption favoring legitimacy, the use of a mixture of the husband and donor's semen or combined artificial

82. *Id.* at —, 437 P.2d at 501, 66 Cal. Rptr. at 13.
83. 10 AM. JR. 2D *Bastards* § 10 (1963).
84. Eldridge v. Eldridge, 153 Fla. 873, 16 So.2d 163 (1944).
85. *Id.*
86. FLA. STAT. § 742.091 (1967) (emphasis added).
87. "Reputed" is defined as "according to reputation or popular belief." WEBSTER'S NEW COLLEGIATE DICTIONARY 729 (7th ed. 1963).
88. People *ex rel.* Abajian v. Dennett, 15 Misc. 2d 260, 184 N.Y.S.2d 178 (Sup. Ct. 1958).
89. Ohlson v. Ohlson (Unreported, Super. Ct. Cook County, Ill., Nov., 1954).
90. *In re* Alexander, 206 So.2d 452 (Fla. 1968).
91. *Id.* at 453.

insemination (CAI) would probably prevent illegitimacy of the child. It seems doubtful that the presumption could be overcome by merely proving that the husband has a low fertility potential, since this only shows it was *unlikely* that the hubsand was the natural father, not that it was *impossible* for him to father the child. There is no medical advantage gained by CAI, other than to help the husband psychologically. The problem with using CAI, however, is that the antibodies in the husband's semen may make the attempted fertilization ineffectual.[92]

It is clear that a child conceived through AIH is the legitimate issue of the husband and the mother. If it were to be decided in Florida that the AID child is illegitimate then the many problems that are connected with that status arise.

B. *Inheritance Rights*

In Florida, an illegitimate child is entitled to inherit from his mother, but not from his mother's husband.[93] Where the husband leaves a will and names the beneficiary, no problem arises. However, if a testator leaves property to the husband's "child" or "issue," and these words are used in their judicially interpreted sense, an illegitimate child may be incapable of taking under the will. A bequest to "children" or "issue" excludes illegitimates unless a contrary intention can be ascertained.[94] Thus, it appears that the question of consent to AID would be of extreme importance in determining the validity of the child's claim under the will, should AID children be held illegitimate. Where the husband consented to the AID or subsequently condoned it, it seems that the court should find that the husband intended to provide for the child by his will. Additionally, the consent of the husband to AID might constitute an acknowledgement of himself as the father of the child which would allow inheritance under a Florida statute.[95] The language of the statute does not appear to preclude this desirable result.[96]

The advantage of secrecy as to the identity of the donor has already been discussed.[97] In practice it would also prevent the AID child from asserting any inheritance rights against the donor. In Florida, the natural parents of an adopted child cannot inherit from the adopted child.[98]

92. Guttmacher, *The Role of Artificial Insemination in the Treatment of Sterility*, 15 OBSTETRICAL & GYNECOLOGICAL SURVEY 767, 773 (1960).

93. FLA. STAT. § 731.29 (1967).

94. With the exception of statutory provisions to the contrary, an adopted child is an heir at law. FLA. STAT. § 731.30 (1967). A putative father can acknowledge his child. FLA. STAT. § 731.29(1) (1967), and the child becomes legitimate if his parents intermarry. FLA. STAT. § 742.091 (1967).

95. FLA. STAT. § 731.29 (1967)

96. *Id.*: "Every illegitimate child is an heir of his mother, and also of the *person* who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father." (Emphasis added.)

97. *See* p. 957 *supra*.

98. FLA. STAT. § 731.30 (1967).

By analogy, if the AID child was treated by the courts in the same manner, the donor would not be allowed to inherit from the child.

An effective method for allowing the AID child to inherit from the husband would be for the husband to legally adopt the child.[99] However, the undesirable notoriety and other reasons for the reluctance of people to use this device has already been discussed.[100] The hubsand might refuse adoption after consenting to AID, or he might die before the child's birth or before the adoption is completed. Finally, adoption is a legal formality which, as a practical matter, would rarely be used by a husband who has not even drawn a will.

C. *Child Support*

A second problem, if the child is found to be illegitimate, is whether the husband or donor can be forced to support a child conceived by AID. As a general rule, a husband is not liable to support a child born to his wife but not procreated by him.[101] The Florida statute dealing with failure to support refers to any person who deprives *his* child of necessary sustenance or raiment.[102]

In Florida, the putative father has a legal liability to support a child procreated by him.[103] Failure to do so can result in severe penalties.[104] The donor of an AID child might be saved from prosecution by the secrecy involved because there would have to be a judicial determination in Florida that the alleged father (donor) was, in fact, the father of the child.[105] Since there is no case law on the rights or obligations, if any, of the donor they should be defined by legislation. It has been recommended that a standard form of release could relieve the donor of all obligations as a putative father.[106]

Notwithstanding the statutes and the general rule, courts which hold that an AID child is illegitimate might find another basis for the husband's duty of support where he has given consent. In *Gursky v. Gursky* the court was able to find a contract implied in fact.[107] The same cases hold that the wife's reliance and action on the husband's implied promise that the child would be part of the husband's family and be supported by him would estop him from refusing such support.

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99. *Id.*

100. *See* p. 954 *supra.*

101. Annot., 90 A.L.R.2d 583, 584 (1950).

102. FLA. STAT. § 828.04 (1967) (emphasis added).

103. Clements v. Banks, 159 So.2d 892 (Fla. 1964).

104. FLA. STAT. § 856.04 (1967).

105. Clark v. Blackburn, 151 So.2d 325 (Fla. 1963).

106. FLORIDA BAR ASS'N, FLORIDA FAMILY LAW § 3.64 (1967). However, if a court found that the donor had an obligation to the child, the release might be against public policy even where the mother brings the action.

107. 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).

The husband might also be compelled to support the child by virtue of his standing *in loco parentis* to it.[108] A person who receives a child into his family under circumstances which create a presumption that he intends to assume liability for support must fulfill those duties.[109]

In *People v. Sorensen*,[110] the Supreme Court of California established the husband's duty of support in the first criminal prosecution involving AID. The court stated that:

> [T]he term "father" . . . cannot be limited to the biologic father or natural father as those terms are generally understood. The determinative factor is whether the legal relationship of father and child exists. . . .
>
> [I]t is safe to assume that without defendant's active participation and consent the child would not have been procreated.[111]

The indication from the majority of decisions to date is that without the husband's consent to AID, he has no duty of support to the resulting child.[112]

D. *Visitation Privilege*

If the husband of a mother who conceives a child by AID has the support obligations of a natural father, he should also have the corresponding privileges. Where the husband is the non-custodial parent, his right to visit the child should be determined under the same guidelines as a natural father.

In the much-quoted decision of *Strnad v. Strnad*,[113] the court decided a motion to fix the extent of the separated husband's right to visit the child who was in the mother's custody. The court held that the defendant-husband was a fit visitor for the child, and stated that he was not deprived of parental visitation rights by the fact that the child was the offspring of an AID consented to by the husband.

E. *Conclusion*

The common law concept of illegitimacy was grounded in moral considerations of adultery and pre-marital sexual relations when the practice of AID was not contemplated. If the courts broaden this original concept of illegitimacy to fit artificial insemination cases, they will be pursuing a totally unrealistic approach to the practicalities of law and

108. *See* Annot., 90 A.L.R.2d 583, 586 (1950).

109. Comment, *Custody of Children in Artificial Insemination Cases*, 15 Mo. L. Rev. 153, 159 (1950).

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

111. *Id.* at —, 437 P.2d 498, 66 Cal. Rptr. at 11.

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

113. 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948).

the exigencies of sound social policy. This author feels that *Gursky v. Gursky*[114] is a mandate to the legislature to act to determine the legitimacy of these children.

VII. OTHER POSSIBLE LEGAL PROBLEMS

While it is unlikely that prosecution for the following offenses would result, it is nevertheless a possibility under Florida law. The possibility is more remote for some offenses than others.

A. *Forgery*

Where the husband's name is listed on the birth certificate as the father, by a person who knows the child was conceived by AID, the crime of uttering a forged instrument has been committed. By statute, whoever utters and publishes as true a false record, knowing it to be false, with the intent to defraud any person, is subject to fine or imprisonment or both.[115] Doctors can probably avoid forgery charges by having one doctor perform the insemination and having another, without knowledge of how the child was conceived, deliver the child.

B. *Criminal Adultery*

Adultery may constitute a crime, but in Florida the crime requires living in *open* adultery.[116] This requirement alone should rule out AID as a method of perpetrating the crime. The state has the burden of showing that the parties (mother and donor) lived together openly as if the relations of husband and wife existed and a mere occasional illicit intercourse is not sufficient.[117]

C. *Doctor and Donor's Liability*

A doctor is of course liable for ordinary negligence.[118] If an abnormal child resulted from AID it would probably be impossible to ascribe negligence because proof of causation would be virtually impossible due to genetic uncertainties. Nevertheless, most doctors insist that the husband and wife release him from any responsibility in the event of abnormal issue. This is one provision in the typical consent form.[119] If a doctor administered AID without the consent of the woman, the unprivileged touching could constitute a battery.[120] Adultery has previously been discussed, but those who contend that the doctor or donor could be

114. 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).
115. FLA. STAT. § 831.02 (1967).
116. FLA. STAT. § 798.01 (1967).
117. Watson v. State, 142 Fla. 218, 194 So. 640 (1940).
118. Atkins v. Humes, 107 So.2d 253 (Fla. 2d Dist. 1958).
119. FLORIDA BAR ASS'N, FLORIDA FAMILY LAW § 3.62 (1967).
120. 6 AM. JUR. *Assault & Battery* § 5 (1963).

guilty of adultery should note the absurdities involved when the doctor is a woman or the donor has died before the wife is impregnated with his seed. The donor, if he was not protected by the concealment of his identity, might be made to pay hospital and medical expenses incidental to the birth of the child.[121]

VIII. A Legislative Remedy

A. *What is Necessary?*

Notwithstanding the fact that society has a positive interest in finding children legitimate, and that the practice of AID does not have the evils normally associated with the conception of offspring who are not the natural children of their mother's husband, it seems unlikely that the courts, bound by a rigid definitional approach, will consistently classify the AID child as legitimate.

There are three approaches that may be taken. One is to remain passive and let the courts handle the situation. Another is to enact legislation prohibiting the practice of AID. The third is to enact legislation regulating AID as a legal practice and declaring the resulting children legitimate or illegitimate.

To remain passive is to let a confused situation continue and possibly worsen. Litigation will increase as more AID children are born, grow older, and as their parents die. With the increased litigation, judicial conflict will grow and policy will become more obscure. It is more constructive to solve this problem by enacting legislation applying to AID than by forcing the courts to solve the problems by interpreting statutes which were never meant to deal with it. A failure to legislate would amount to an abnegation of the policy-making function for which the legislature is uniquely qualified. Public policy on important and controverted issues should be legislatively declared so that individuals can conduct their lives accordingly, avoiding needless hardships.

One author has recommended that AID should be made a criminal offense on the part of the doctor, other implementing intermediary, and the donor. It would appear that he approached the problem with less than a completely objective view.[122] The practice of AID should be voluntary and governed by individual choice. Therefore, no prohibitive legislation should be enacted to facilitate enforcement of any particular group's opposition to the free choice of any individual, where the activity does not harm the general health and morals of society.

Another complication of a statute prohibiting AID is the possibility

121. De Moya v. de Pena, 148 So.2d 735 (Fla. 3d Dist. 1963).

122. Rice, *AID—An Heir of Controversy*, 34 Notre Dame Law. 510 (1959). *See* note 23 *supra* and accompanying text.

that child-bearing is a right protected by the fourteenth amendment.[123] This argument could certainly be advanced to attack the statute as an unreasonable exercise of police power. Public morals legislation must show a reasonable connection between the regulation and the activity affecting public morality.[124] A prohibitive statute might not be reasonably connected to an activity that affects public morals. Additionally, legal authority declaring AID as adultery would appear to be in derogation of the common law requirement of penetration.

The most constructive remedy to the problem is to enact a legitimation statute framed in general terms. Oklahoma State Representative George Camp[125] proposed the first successful artificial insemination statute which the enlightened legislature of Oklahoma adopted in 1967.[126]

Today Oklahoma is the only state to have enacted a legitimation statute for the AID child.[127] Other states have attempted to enact legitimation statutes, but the last attempt[128] was sixteen years prior to the successful Oklahoma statute, and the scope of the problem has since greatly increased.

If legislation is enacted, a choice has to be made between comprehensive or general legislation. One author favors comprehensive legislation, covering each phase of the process from the donation of the sperm to the birth of the child.[129] He has also drafted an excellent example of comprehensive legislation.[130] The comprehensive legislation would have a state agency handle the policy decisions now being made by individual doctors, and a centralized recording facility would be maintained. This approach, however, would be disproportionate to the size of the problem. It would create more problems than it would solve. Deviations from the statutory norm would require sanctions and a problem of enforcement would then arise.

A general statute appears to be the most desirable alternative. While reflecting a policy of freedom of choice along with the protection of the child's welfare it should declare AID to be a lawful therapeutic practice,

123. *Cf.* Griswold v. Connecticut, 381 U.S. 479 (1965) which held that the right of privacy in marital relations is a fundamental right which is protected by the fourteenth amendment from infringement by the states. *Cf.* Cotner v. Henry, No. 16601 (7th Cir., April 17, 1968).

124. Eccles v. Stone, 134 Fla. 113, 183 So. 628 (1938).

125. The author is grateful to Representative Camp for the information he furnished for preparation of this paper.

126. 10 OKLA. STAT. § 551 (1967).

127. New York City Health Code art. 21 (1959) regulates AID, in that donors are required to undergo medical examination. The act was the result of New York doctors receiving advertisements offering semen from professional donors. As a result of recent decisions, New York City is in the unique position of legislating illegitimate children.

128. New York S.B. No. 493 (1951).

129. Comment, *Artificial Insemination: The Law's Illegitimate Child?*, 9 VILLANOVA L. REV. 77 (1963).

130. *Id.* at 90. A "Model Artificial Insemination Statute" appears in the appendix.

define the general procedures, establish the participation of the wife, husband, and donor as lawful and declare that the child shall be legitimate. The specific procedures of AID, with minimum essential exceptions, should be left entirely to the responsibility of the medical profession. Suggestions for the protection of the medical profession include comprehensive legislation which would reveal the identity of the donor.[131] However, the psychological and sociological implication discussed earlier would not seem to justify this.

B. *Proposed Florida Statute*

The author has drafted the following general artificial insemination statute and submits that it should be adopted in Florida. Although similar to the Oklahoma statute, it has been modified for additional protection.

A Bill to be Entitled

AN ACT relating to children; providing for legitimacy of children born through heterologous artificial insemination; providing that such children shall be considered as natural born children of husband and wife agreeing in writing to such process; providing for physicians' certification of the donor; providing for privacy; providing a penalty; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. 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.

Section 2. Any child born as the result thereof shall be considered legitimate for all purposes and 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 a technique.

Section 3. No person shall perform the technique of heterologous artificial insemination unless currently licensed to practice medicine in this State, and then only at 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 the husband and wife, the person who is to perform the technique and the judge having jurisdiction over adoption of children in the county in which the technique is to be performed. An original thereof shall be filed under the same rules as adoption papers. The written consent so filed shall not be open to inspection nor a certified copy given to any person

131. *See* Holloway, *Artificial Insemination: An Examination of the Legal Aspects*, 43 A.B.A.J. 1089, 1090 (1957).

other than the person executing such consent, or to persons having a legitimate interest therein as evidenced by a specific court order.

Section 4. The physician performing the heterologous artificial insemination shall select the donor and certify that the donor has the same general physical characteristics as the husband, a compatible Rh factor and is free from communicable and inheritable diseases. The certification shall be executed by the physician and acknowledged by the judge having jurisdiction over adoption of children. An original of the certification shall be filed in the same manner as the consent of the husband and wife and shall not be open to inspection to any person other than the husband or wife or to persons having a legitimate interest therein as evidenced by a specific court order. The physician shall not reveal the identity of the donor.

Section 5. Any employee of the State or the physician or the physician's employees who shall make public any information in violation of the privacy provisions of section 3 or section 4 of this chapter shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand dollars ($1,000.00) or imprisoned not more than ninety (90) days in the county jail or both.

Section 6. This act shall take effect upon becoming law.