Journal of Law and Health

Volume 1 | Issue 2 Article 5

1986

Widow and the Sperm: The Law of Post-Mortem Insemination

E. Donald Shapiro
New York Law School

Benedene Sonnenblick

THE WIDOW AND THE SPERM: THE LAW OF POST-MORTEM INSEMINATION

By Prof. E. Donald Shapiro[1] and Benedene Sonnenblick[2]

The ownership of sperm should be a very simple legal concept. Indeed, during most of recorded legal history, there has never been any question that the owner of the sperm was the man carrying it in his body. With a few ancient Talmudic commentaries[3] aside, the very possibility of wandering sperm never occurred to lawyers throughout the ages. However, in a recent case decided in the French Tribunal de grand instance, *Parpalaix c. CECOS*,[4] a court for the first time in legal history was forced to address this issue.

Who controls the sperm when it has left the body? The man who donated or sold it? The sperm bank that bought it? The sperm bank that stores or possesses it? The man's spouse or family? What rights and liabilities attach to the controller of the sperm? Who has the right to determine its use? May a sperm donor visit the product of the sperm? Is the donor obligated to support the product of the sperm? What are the inheritance rights of the product of the sperm? Does the sperm have status or is it mere property to be owned and disposed of by the wishes of its owner, whomever that may be?

The issues of post-mortem insemination came into focus in 1984, following the death of Alain Parpalaix, a citizen of France. In 1981, Alain, who was then twenty-four, was suffering from testicular cancer and undergoing chemotherapy. His doctor warned him that the treatment would render him sterile. In December therefore, he made one "deposit" of sperm at the Centre d'Etude et de Conservation du Sperme (CECOS),[5] a government backed research center and sperm bank. If Mr. Parpalaix was thinking about his own mortality that day he gave no indication of it to the sperm bank since he left no instructions as to the future use

---

[1] A.B., Dickinson College: J.D., Harvard Law School; LL.D., New York Law School; LL.D. Dickinson College; H.L.D., York College; The Joseph Solomon Distinguished Professor of Law at New York Law School, and Supernumerary Fellow of St. Cross College at Oxford University.

[2] B.A., Colgate University; J.D., New York Law School; associated with the firm of Pegalis & Wachsman, P.C., Great Neck, New York.

[3] It was argued from the 5th century Babylonian Talmud that Sages recognized that it was possible for a woman to become pregnant *sine concubito* while bathing in water into which a man had discharged semen. Rosner, *Artificial Insemination in Jewish Law* in JEWISH BIOETHICS 105, 107 (F. Rosner & J.D. Bleich eds. 1979) (citing Babylonian Talmud Hagigah 14b). In his work, *Haggohot Semak*, Rabbi Perez ben Elijah of Corbeil warned women against lying on the sheets upon which a man, not her husband, had slept lest she conceive by his sperm. *Id.* In the oft-quoted Midrashic legend, Ben Sira was conceived by the prophet Jeremiah's daughter while she bathed in water into which her father, coerced by wicked men, had discharged semen. *Id.* at 108.

[4] Trib. gr. inst. Creteil, Aug. 1, 1984, Gazette du Palais [G.P.], Sept. 15, 1984, at 11.

[5] Center for the Study and Conservation of Sperm, a government run sperm bank in the Paris suburb of Cremlin-Bicetre.

of the sperm.[6] The sperm was stored at CECOS in a frozen state in liquid nitrogen where it was kept at −321° Farenheit for more than two years.

At the time Alain donated the sperm in 1981, he was living with Corinne Richard in Marseilles without the benefit of state or church marriage. Alain's condition deteriorated quite rapidly. In a hospital ceremony on December 23, 1983, Alain and Corinne were married. Alain died two days later on Christmas day at the age of 26.

Corinne Parpalaix then requested Alain's sperm deposit from CECOS.[7] CECOS procedures, however, did not provide for such a return.[8] The center denied Corinne's request as other centers had denied the requests of other widows.[9] CECOS told Corinne that no law mandated the return of the sperm as it now belonged to the center. CECOS advised Corinne to seek a legal determination from the Ministry of Health, which generally had held in the past that both the husband and the wife must consent to artificial insemination: thus, presumably, both must be alive. The Ministry, on May 10, 1984, chose not to solve this unique problem and told Corinne it would decide at a later date.[10] Corinne reacted with outrage and, joined by her in-laws, chose to pursue the matter in the courts.

The Parpalaixs' claim sounded in contract. They contended that as Alain's natural heirs (spouse and parents), they had become the owners of the sperm and CECOS had broken its contract by not returning the sperm. Plaintiffs relied on Article 1939 of the French Civil Code, which governs contracts of deposit of material goods in general and provides: "In the case of death of the person who made the bailment, the thing bailed may be returned only to his heir."[11] Moreover, "[i]f the thing bailed is indivisible, the heirs must agree among themselves in order to receive it."[12] Under this view, the sperm would be considered a movable object or property and therefore would be inheritable.[13] Corinne and her in-laws also testified that although Alain had not left written instructions,

---

[6] G.P., *supra* note 4, at 12. It is not clear from the text of the opinion or news sources what the terms of the sperm bank's contract were.

[7] *A French Woman Sues Over Sperm*, N.Y. Times, July 2, 1984, at 7, col. 1. *See also Woman Must Wait To Know If She Can Have Dead Husband's Baby*, Reuters N. Eur. Serv., June 28, 1984 (available on NEXIS, Wires file) [hereinafter cited as *Woman Must Wait*].

[8] Sperm banks in the United States also have no procedures for return of depositor's sperm on his death. *See supra* notes 114-18 and accompanying text.

[9] *Life After Death; French Woman Wins Sperm Bank Decision*, Washington Post, Aug. 2, 1984, at B1, col. 1 (hereinafter *Life After Death*).

[10] *France; Love in Legal No Man's Land*, Newsweek, July 16, 1984, at 44; *Widow Wants Child From Deceased Husband's Frozen Sperm*, The Associated Press, June 29, 1984.

[11] Code Civil [C. Civ.] art. 1939 (French Civil Code, J. Crabb trans., Rothman 1977).

[12] *Id.*

[13] G.P., *supra* note 4, at 12.

it was his intention that Corinne use the sperm to conceive after his death. Indeed, the only reason he had deposited the sperm was to avoid sterility. In a more dramatic plea, Corinne's attorney Paul Lombard argued that she had not only a legal but also a moral right to obtain the sperm. Persuading the court that the question was not just inheritance but love, he urged: "Let her give life to this child, the fruit of a love that she goes on expressing with quiet determination. It is her most sacred right."[14]

The sperm bank's contentions were several. First, CECOS maintained that its only legal obligation was to the donor, not to Corinne.[15] Under the normal deposit arrangement, the deposit is not returnable to the next of kin of a deceased depositor. Second, CECOS argued that sperm is an indivisible part of the body, much like a limb, an organ, or a cadaver and is therefore not inheritable absent express instructions.[16] Since Alain failed to state his wishes in regard to the sperm's future use, and since he and Corinne were not married at the time he made the deposit, his intentions at that point were unclear. Because it is impossible to ascertain what his intentions were at the time of death, the sperm deposit should not be turned over. Finally, CECOS contended that the act itself of depositing the sperm was strictly for therapeutic purposes, apparently to aid Alain psychologically. CECOS argued that "[a]rtificial insemination is practiced only to overcome male sterility. Giving birth is not a therapeutic matter."[17] CECOS contended that going beyond the realm of therapeutics would open the door to all sorts of abuses.[18]

Before discussing the parties' contentions, the Tribunal de grand instance acknowledged and briefly described the difficulties that French laws governing inheritance rights and illegitimacy would impose on a child born "post-mortem."[19] By strict interpretation of the Civil Code (based on the Napoleonic Code from the early 19th Century), any child born more than 300 days after the putative father's death is deemed illegitimate.[20] Even if the reach of the article were to be miraculously interpreted or legislatively altered to establish paternity, the child would be barred from inheriting through his father pursuant to another article

---

[14] *Woman Must Wait*, *supra* note 7.

[15] G.P., *supra* note 4, at 12.

[16] *Id.* at 12.

[17] *Id.* at 12; *Woman Must Wait*, *supra* note 7.

[18] CECOS attorney Catherine Vincent-Paley mentioned as an example the possibility of lesbian couples using donor sperm. *Life After Death*, *supra* note 9.

[19] The term "post-mortem" insemination had been coined earlier by the French attorney Xavier Labbee. *See* Labbee, *L'Insemination Artificielle Pratiquee Apres La Mort Du Donneur*, Gazette du Palais, Sept. 18, 1984, at 2, col. 1. American commentators have referred to children so born as "posthumous sperm bank children" or more amusingly because of the technique of freezing the sperm, as children "en ventre sa frigidaire" which is a variation of the legal term commonly used for an unborn child, "en ventre sa mere." Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent*, 48 A.B.A. J. 942, 943 (1962) [hereinafter Leach, *Perpetuities in the Atomic Age*].

[20] C. Civ. art. 315.

of the code which states that to inherit, the child must exist at the time of death and then expressly disqualifies "[o]ne who is not yet conceived."[21]

The court offered no solutions to the obstacles created by these laws. It seemed to imply, however, that, given the various new methods of procreation, the laws were outdated.[22] Conclusions of law were limited to the issue squarely before the court—whether Alain's wife and parents had the right to obtain his sperm.

Although the simple solution would be to apply the contract principles upon which both parties substantiated their contentions, the court expressly declined to do so. The court found that the articles cited by the plaintiffs pertained only to those movable, inheritable things which may be considered "objects of deposit" pursuant to other sections of the code. The court also found that it is impossible to characterize human sperm as movable, inheritable property within the contemplation of the French legislative scheme. The code, therefore, was found wholly inapplicable.[23]

The court similarly disagreed with the defendant's position that the sperm be considered an indivisible part of the body. Instead, it described sperm as "the seed of life . . . tied to the fundamental liberty of a human being to conceive or not to conceive."[24] This fundamental right must be jealously protected, and is not to be subjected to the rules of contracts. Rather, the fate of the sperm must be decided by the person from whom it is drawn. Therefore, the sole issue becomes that of intent.[25]

The court had to decide not only whether Alain Parpalaix had intended his widow to be artificially inseminated with his sperm, but also whether that intent was "unequivocable."[26] The absence of a written declaration of Alain's intent did not by itself preclude the fulfillment. The court considered all relevant factors.[27]

The court found that Alain's wife and parents were in the best position to ascertain "the deep desires of their son."[28] Through their testimony they had established "the formal will of Corinne's husband to make his wife the mother of a common child."[29] This desire was consummated by his entering into the solemn contract of marriage two days before his death.[30] The court further found that because CECOS had at no time

---

[21] C. Civ. Art. 725.

[22] "Must we," queried the court, "under these circumstances, revise our traditional ideas of conception?" Gazette, *supra* note 4, at 12.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 13.

[28] *Id.*

[29] *Id.*

[30] *Id.* Indeed, it appears that the very purpose of the marriage was to provide Corinne with easy access to the sperm in her quest to have Alain's child.

told Alain that it would oppose any restitution of the deposit to a third party, it had impliedly agreed to conform to his wishes.[31] That CECOS had previously refused similar requests as "against normal procedures" was not a sufficient basis for denying Corinne's request. Moreover, as the court further noted, CECOS had not established its policy on this question until after Alain's death.[32]

Thus, the Tribunal de grand instance, found in the fundamental right to procreate, the basis for the first judicial or legislative pronouncement on post-mortem artificial insemination. Property rights and status became irrelevant to the decision. The court ordered that CECOS, following the expiration of the one month appeal period, return the totality of the sperm drawn from Alain to a doctor chosen by his wife Corinne.[33] CECOS made no appeal, and Corinne was artificially inseminated on November 28, 1984.[34] Two of the nine test tubes containing Alain's sperm were used in tests and the remaining seven were injected in one insemination. Unfortunately, due to the small quantity and poor quality of the sperm, Corinne did not become pregnant.[35] Thus, the entire judicial exercise which aroused proponents and opponents throughout the world resulted in naught. Nevertheless, the legal proposition has been established; the myriad of legal, moral, ethical, and medical problems have been discussed in a legal forum.

The law has been unable to keep up with recent advances in the area of artificial insemination (AI). The *Parpalaix* case represents only one of the many legal problems created by inadequate legislation concerning artificial insemination and other new procreative techniques.[36] The lack of statutory guidelines in the United States and throughout the world has left many unanswered questions about the ownership of the donated sperm, the legal responsibilities of the sperm bank, the possibility of "posthumous parenting,"[37] and the rights of the child conceived by the different types of artificial insemination.[38]

---

[31] *Id.*

[32] *Id.*

[33] *Id.* at 14.

[34] *Woman Fails to Conceive from Dead Husband's Sperm*, Reuters N. Eur. Serv., Jan. 11, 1985 (available on NEXIS, Wires file).

[35] *Id.*

[36] The new reproductive techniques include artificial insemination, *in vitro* fertilization, surrogate motherhood, egg donation, artificial embryonation, and embryo adoption. *See* Shapiro, *New Innovations in Conception and Their Effects Upon Our Law and Morality*, 31 N.Y.L. SCH. L. REV. 37 (1986); L. ANDREWS, NEW CONCEPTIONS: A CONSUMER'S GUIDE TO THE NEWEST INFERTILITY TREATMENTS INCLUDING IN VITRO FERTILIZATION, ARTIFICIAL INSEMINATION, AND SURROGATE MOTHERHOOD (1984) [hereinafter cited as NEW CONCEPTIONS].

[37] "Posthumous parenting" was a term used by Winthrop Thies in his article *A Look to the Future: Property Rights and the Posthumously Conceived Child*, 110 TR. & EST. 992 (1971), and refers to a widow's use of her dead husband's sperm to conceive his child.

[38] *See infra* notes 51-59 and accompanying text.

To appreciate the extent and severity of the problems caused by artificial insemination, one must first explore the scientific and legal history of the procedure. Artificial insemination in itself is not new. It has been performed on animals for centuries. For years, breeders have used frozen bull semen to inseminate their cattle. It is said that the first successful artificial insemination occurred in the fourteenth century when an Arab mare was impregnated with the semen of a stallion.[39] The first recorded successful human artificial insemination was performed in England in 1770 by a surgeon named John Hunter.[40] This new practice was slow to be accepted in the United States. It was not until nearly a century later, in 1866, that a physician named Marion Simms successfully artificially inseminated a woman.[41] Instead of receiving praise worthy of his accomplishment, however, his actions were looked upon with utter disdain. The community's deep-seated religious and moral scruples about the very idea of a woman becoming pregnant by such an unnatural manner forced Simms to abandon his experimentation.[42] In that same year, an Italian scientist, Montegazza, found that human sperm could survive freezing and proposed that frozen sperm banks be used by widows whose husbands were killed at war.[43] The process had little success until 1949, however, when it was discovered that the addition of a small amount of glycerol before freezing would increase the chances of the sperm's survival. Currently sperm is frozen and stored in a tank filled with liquid nitrogen at $-328°$ Farenheit.[44] Sperm which has been stored for over ten years has produced healthy children.[45]

Today artificial insemination has gained widespread acceptance and medical technology has made it increasingly available and inexpensive[46] to the estimated fifteen percent[47] of all married couples who are infertile.[48] For these couples, artificial insemination has become one of the alternatives to adoption.

---

[39] S. KLING, SEXUAL BEHAVIOR AND THE LAW 59-60 (1965).

[40] W. FINEGOLD, ARTIFICIAL INSEMINATION 6 (2d ed. 1976).

[41] S. KLING, *supra* note 39.

[42] *Id.*

[43] IDANT LABORATORY, IDANT SPERM BANKING HANDBOOK (available from Idant Laboratory, 645 Madison Ave., N.Y., N.Y.) [hereinafter Idant].

[44] *Id.*

[45] *Id.*

[46] The cost of testing and freezing one ejaculate is $55.00. Yearly storage fees are $45.00 for up to 6 units, $5.00 for each additional unit. One unit is approximately equal to 0.5 cubic centimeters and is used for one insemination treatment. IDANT, *supra* note 43.

[47] L. SPEROFF, R. GLASS, & N. KASE, CLINICAL GYNECOLOGICAL ENDOCRINOLOGY AND INFERTILITY 468 (1984). *See also* L. ANDREWS, *supra* note 36, at 2 (referring to surveys done by the National Center for Health Statistics in the United States).

[48] Infertility is defined as one year of unprotected coitus without conception. This estimate, however, may be well below the actual percentage, for two reasons: first, it designates "infertile" women who have unsuccessfully tried to become pregnant in the

The development of artificial insemination has also permitted the creation of a surrogate motherhood procedure. A woman who suffers from blocked or nonexistent fallopian tubes (the largest cause of female infertility) or who suffers from medical problems which make pregnancy extremely dangerous or undesirable can become a mother simply by contracting with another woman or surrogate mother to carry and give birth to a child. The surrogate usually is impregnated by the husband through artificial insemination.[49] Thus, the husband is the natural father and the wife is the "social" or adoptive parent.[50]

Men who fear sterility resulting from disease, chemotherapy or similar treatment, or exposure to hazardous substances and men who have undergone vasectomies but wish to retain the option of having children may be well advised to donate sperm for future procreation. The availability of the frozen sperm can be considered "fertility insurance."[51]

There are three types of artificial insemination. Homologous artificial insemination, or artificial insemination by husband (AIH), is self-explanatory. In a simple medical procedure a woman, at the time of ovulation, is inseminated by means of a syringe containing her husband's semen, which may have been deposited before he became infertile. AIH was made available to the astronauts in 1961. Therefore, even if space travel were to harm their reproductive systems, they could still father healthy children using the stored sperm.[52]

---

past year and cannot possibly include those who haven't tried to conceive and therefore do not know they are infertile. Second, the estimate includes only married women. L. ANDREWS, *supra* note 36, at 2 (quoting Martin O'Connell, Chief of the Fertility Statistics Branch of the Census Bureau of the United States).

Medical studies indicate that 40% of infertility is attributable to male causes, 15% to cervical causes, 10% to uterine causes, 30% to tubal and peritoneal causes, 20% to ovarian causes, and 5% to miscellaneous causes. Shane & Schiff, *The Infertile Couple: Evaluation and Treatment*, 28 CLIN. SYMP. 5, 8 (1976).

[49] Although the impregnation can occur by other new procreative techniques such as *in vitro* fertilization or embryo adoption or artificial embryonation. Shapiro, *supra* note 36.

[50] Shapiro, *supra* note 36, at 46. *See generally* Smith, *The Razor's Edge of Human Bonding: Artificial Fathers and Surrogate Mothers*, 5 W. NEW ENG. L. REV. 639 (1983) (concluding that adequate regulation of surrogate motherhood should cause no major societal problems); Furrow, *Surrogate Motherhood: A New Option for Parenting*, 12 LAW, MED. & HEALTH CARE 106 (1984); Keane, *Legal Problems of Surrogate Motherhood*, 1980 S. ILL. U.L.J. 147 (discussing legal issues raised by breach of contract and statutes relating to surrogate motherhood); Holder, *Surrogate Motherhood, Babies for Fun and Profit;* 12 LAW, MED. & HEALTH CARE 115 (1984).

[51] For example, when Roberto Casali learned that he had cancer, he deposited sperm. After his death, his wife was inseminated and gave birth. Another man donated sperm which was used to inseminate his wife during his chemotherapy treatments. She became pregnant, but he died before the child was born. Later, she again used the stored sperm to have a second child, this one "post-mortem." L. ANDREWS, *supra* note 36, at 196.

[52] *See* Leach, *supra* note 19.

Confused or combined artificial insemination (AIC) is another artificial insemination procedure by which the semen of the husband is mixed with that of an anonymous donor. The psychological effect of the mixture is threefold.[53] First, it gives the husband some basis for believing that he is the natural father of the resulting child. Second, it eases the physician's fear of committing perjury by listing the husband as the natural father on the birth certificate. Third, it strengthens the already almost irrebutable judicial presumption that the husband is the natural father of a child born during the marriage.[54] The practice of AIC is not nearly as popular as it was a decade ago.[55]

Artificial insemination by donor (AID) is artificial insemination using the sperm of a man other than the woman's husband. The "donor" is very often a medical student, hospital resident, or other graduate or undergraduate student who is given a standard compensation for his "donation."[56] Most physicians try to match certain traits of the donor such as hair, skin and eye color, height, ethnic or religious background, and educational level.[57] It is even possible for a woman to choose to be inseminated with the sperm of a Nobel Prize Laureate.[58] AID can overcome the barriers of conception created by problems of sterility or low sperm count. It may also be used when incompatible Rh factors exist in the blood of the parties, or when there is a possibility of a genetic disease or mutation being passed to the natural children. Moreover, AID enables an unmarried woman to conceive without heterosexual relations. Almost always the donor is anonymous and signs a written waiver of any rights as father. Often a doctor performing the procedure will use the semen of a different donor in each treatment to further confuse the identity of the "successful" donor. A 1979 survey of physicians indicated that as many as six pregnancies per donor was typical.[59]

---

[53] Shaman, *Legal Aspects of Artificial Insemination*, 18 J. FAM. L. 331, 332 (1980). *See also* Wadlington, *Artificial Conception: The Challenge For Family Law*, 69 VA. L. REV. 465 (1983) (examining artificial conception practices and the resulting legal problems).

[54] Wadlington, *supra* note 53, at 469.

[55] *See id.* (citing Curie-Cohen, Luttrell & Shapiro, *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENG. J. MED. 585, 587 (1979)).

[56] The term "donation" is a misnomer. "Donors" are actually paid for depositing semen in most sperm banks. *See* Wadlington, *supra* note 53 at 471 (citing W. FINEGOLD, *supra* note 40). The more meticulous commentator may refer to the deposits as "venditions," to the men who produced the deposits as "vendors" and to the procedure which utilizes them as "artificial insemination by vendor" (AIV). *See Law Conference 1984-Discussion on Bioethics*, 1984 N.Z.L.J. 237, 239.

[57] Wadlington, *supra* note 53.

[58] *See Note, Eugenic Artificial Insemination: A Cure for Mediocrity?*, 94 HARV. L. REV. 1850 (1981); W. CURRAN & E. D. SHAPIRO, LAW, MEDICINE AND FORENSIC SCIENCE 934 (3d ed. 1982).

[59] Wadlington, *supra* note 53.

Because AID involves the use of a third party's sperm, it has typically been a well-spring of legal and moral problems.[60] What is the status of the child? The donor? The husband, if there is one? What are the legal ramifications of the procedure? One interpretation is that the treating doctor and the woman commit adultery by participation in the process of AID.[61] This idea is absurd not only because it ignores the possibility that the doctor may be a woman but also because the husband himself may be administering the treatment. Another opinion is that the woman is committing adultery with the donor of the sperm.[62] This too is ridiculous. The woman has in all likelihood never met or seen the donor who may be dead or a thousand miles away. Yet in Canada in 1921, in *Orford v. Orford*,[63] the Ontario Supreme Court equated AID with adultery because "[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. . . ."[64] This Victorian view of AID endured in some states at least until the 1950's. In 1954, in *Doornbos v. Doornbos*,[65] an Illinois court adopted the *Orford* view. In 1955, the Ohio Senate contemplated, but did not enact, a resolution to classify AID as adultery punishable by a fine of $500 or imprisonment up to five years.[66] In *MacLennan v. MacLennan*,[67] the Scottish Court of Sessions held that AID, even without the husband's consent, did not constitute adultery, since adultery is concerned with the means of impregnation rather than with the impregnation itself. In the MacLennan divorce action, the wife's answer to an allegation of adultery was that she had conceived by AID. The *MacLennan* court recognized that it is possible for a woman to artificially inseminate herself.[68] However, the court found that although "[u]nilateral adultery is possible, as in the case of a married man who ravishes a woman not

---

[59] Wadlington, *supra* note 53.

[60] *Id.*; Shaman, *supra* note 53; L. ANDREWS, *supra* note 36; Kritchevsky, *The Unmarried Woman's Right to Artificial Insemination: A Call for An Expanded Definition of Family*, 4 HARV. WOMEN'S L.J. 1 (1981).

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

[62] Orford v. Orford, 58 D.L.R. 251; Doornbos v. Doornbos, 12 Ill. App. 2d 473, *aff'd* 139 N.E.2d 844 (1956).

[63] 58 D.L.R. 251.

[64] *Id.*

[65] 12 Ill. App. 2d 473, *aff'd* 139 N.E.2d 844 (1956).

[66] Ohio Senate Bill 93 (1955).

[67] 1958 Sess. Cas. 105 (Scot. Outer House).

[68] The procedure is so simple that it can easily be done without the aid of a physician. *See* L. ANDREWS, *supra* note 36, at 180.

his wife, . . . self-adultery is a conception as yet unknown to the law."[69]

Through increasing criticism by medical and legal scholars alike, the notion that AID constituted adultery was eventually rejected (although, apparently, there are still some who view it as such),[70] but the legal status of the child may still be in dispute. In *Strnad v. Strnad*,[71] a New York court deemed a child conceived by AID legitimate by an inaccurate analogy to the child born out of wedlock who is legitimized upon the marriage of his parents.[72] In essence, the court reasoned, the child is "potentially adopted or semi-adopted."[73] Although the court failed to recognize that a declaration of legitimacy is actually completely different from adoption,[74] the result of the case seemed at last to signal the acceptance of AID. However in 1963, a New York court reverted to an unsympathetic view. In *Gursky v. Gursky*,[75] the court reasoned that even though § 112 of the New York Sanitary Code recognized the practice of artificial insemination, it could not be construed to render the resulting child a legitimate issue.[76] It rejected the *Strnad* decision on the basis that it was not supported by legislation or legal precedent.[77] Notwithstanding the husband's consent or even insistence that his wife undergo AID and his being listed as the father on the birth certificate, the court plainly stated that in accordance with settled law, a child begotten through a father who was not the mother's husband is deemed to be illegitimate.[78] However, the court held that husband financially responsible for the child on a contract theory. By consenting to the AID he had made an implied promise to support the offspring in consideration of the wife's compliance. Moreover, he was equitably estopped from denying support because his wife had acted to her detriment in reliance on his consent.[79]

The most logical evaluation of the legal significance of AID was made by the Supreme Court of California in 1968. In *People v. Sorensen*,[80] the court acknowledged for the first time that a child conceived by artificial insemination during a valid marriage was not the product of an illicit or adulterous relationship and was entitled to the presumption of legitimacy. The court assumed that without the husband's active participation and consent, his wife would not have undergone the treat-

---

[69] MacLennan, 1958 Sess. Cas. at 114.

[70] *See* Comment, *Artificial Insemination and the Law*, 1982 B.Y.U. L.R. 935.

[71] 190 Misc. 2d 786, 78 N.Y.S.2d 390 (N.Y. Sup. Ct. 1948).

[72] *Id.* at 788, 78 N.Y.S.2d at 392.

[73] *Id.* at 787-88, 78 N.Y.S.2d at 391-92.

[74] *Id.*

[75] 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (N.Y. Sup. Ct. 1963).

[76] *Id.* at 1086, 242 N.Y.S. 2d at 410.

[77] 39 Misc. 2d at 1087, 242 N.Y.S.2d at 410.

[78] *Id.*

[79] *Id.*

[80] 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968).

ment.[81] In ascertaining legitimacy, "the determinative factor is whether the legal relationship of father and child exists."[82] Any claims that the sperm donor be regarded as the father were correctly dismissed: "the anonymous donor of sperm cannot be considered the natural father as he is no more responsible for the use made of his sperm than is the donor of blood or a kidney."[83] Because there is no natural father, we can look only for a lawful father.[84] The *Sorensen* decision was grounded also on important public policy. Recognizing that labeling the child "illegitimate" would serve "no valid public purpose,"[85] the court noted that "[t]he child is the principal party affected, and if he has no father, he is forced to bear not only the handicap of social stigma but financial deprivation as well."[86]

Until the mid-1960's, no states had legislation on artificial insemination.[87] Currently, twenty-eight states have statutes which support the *Sorensen* findings.[88] Ten states[89] have been modeled after § 5 of the

---

[81] *Id.* at 285, 437 P.2d at 499, 66 Cal. Rptr. at 10.

[82] *Id.* at 284, 437 P.2d at 498, 66 Cal. Rptr. at 10.

[83] *Id.* at 289, 437 P.2d at 501, 66 Cal. Rptr. at 13.

[84] *See id.* at 284, 437 P.2d at 498, 66 Cal. Rptr. at 10.

[85] *Id.* at 288, 437 P.2d at 501, 66 Cal. Rptr. at 13. *See also* People *ex. rel.* Abajian v. Dennett, 15 Misc. 2d 260, 184 N.Y.S.2d 178 (Sup. Ct. 1958) (estopping wife from claiming that children born to her as a result of AI were not father's children and, therefore, he should not be accorded visitation and custody privileges); State *ex rel.* H. v. P., 457 N.Y.S.2d 488 (1982) (husband submitting to a blood grouping test for purposes of showing he is not the father of the AID child was not permitted. The court stated that such a test could potentially bastardize the child without determining paternity, and would thus offend the public policy).

[86] People v. Sorenson, 68 Cal.2d at 288, 437 P.2d at 501, 66 Cal. Rptr. at 13.

[87] Fashing, *Artifical Conception: A Legislative Proposal*, 5 CARDOZO L. REV. 713, 718 (1984).

[88] ALA. CODE § 26-17-21 (1985); ALASKA STAT. § 25.20.045 (1985); ARK. STAT. ANN. § 61-141(C) (1971); CAL. CIVIL CODE § 7005 (West 1983); COLO. REV. STAT. § 19-6-106 (1978); CONN. GEN. STAT. ANN. §§ 45-69f to -69n (West 1981); FLA. STAT. ANN. § 742.11 (West Supp. 1986); GA. CODE ANN. § 19-7-2 (1982), 43-34-42 (1984); ILL. ANN. STAT. ch. 40, § 1451-53 (Smith-Hurd Supp. 1985); KAN. STAT. ANN. §§ 23-128 to -130 (1981); LA. CIV. CODE ANN. art. 188 (West Supp. 1986); MD. EST. & TRUSTS CODE ANN. § 1-206(b) (1974); MASS. GEN. LAWS. ANN. ch. 46, § 4B (West Supp. 1985); MICH. COMP. LAWS ANN. § 700.111(2), 333.2824(6) (1980); MINN. STAT. § 257.56 (1982); MONT. CODE ANN. § 40-6-106 (1985); NEV. REV. STAT. § 126.061 (1985); N.J. STAT. ANN. §§ 9:17-38 to :17-59 (West Supp. 1985); N.Y. DOM. REL. LAW § 73 (McKinney 1977); N.C. GEN. STAT. § 49A-1 (1984); OKLA. STAT. ANN. tit. 10, § 551-553 (West Supp. 1985); OR. REV. STAT. § 109.239, .243, .247 and 677.355, .360, .365, .370 (1983); TENN. CODE ANN. § 68-3-306 (1983); TEX. FAM. CODE ANN. § 12.03 (Vernon 1975); VA. CODE § 64.1-7.1 (1980); WASH. REV. CODE ANN. § 26.26.050 (Supp. 1986); WIS. STAT. ANN. § 891.40 (West Supp. 1985); WYO. STAT. § 14-2-103 (1985).

[89] ALA. CODE § 26-17-21 (1985); CAL. CIV. CODE § 7005 (West 1983); COLO. REV. STAT. § 19-6-106 (1978); MONT. REV. CODE ANN. § 40-6-106 (1985); MINN. STAT. ANN. § 257.56 (West 1982); NEV. REV. STAT. § 126.061 (1985); N.J. STAT. ANN. §§ 9:17-38 to :17-59 (West Supp. 1985); WASH. REV. CODE ANN. § 26.26.050 (Supp. 1986); WIS. STAT. ANN. § 891.40 (West Supp. 1983-1984); WYO. STAT. § 14-2-103 (1986).

Uniform Parentage Act[90] which was proposed in 1973. All statutes generally require the written consent of both the "husband" and the "wife" and provide that the husband will be considered the legal father. Two states expressly deny any paternity rights to a third party donor.[91] Records must generally be kept confidential and must be filed with the state department of health. In many instances, the physician must certify that he performed the procedure.[92]

Of the various states which have enacted legislation on artificial insemination, all but one[93] have left open the issue of what rights an unmarried woman has to the procedure. Some state laws appear to prohibit artificial insemination of unmarried women.[94] This is particularly alarming considering that it has been reliably estimated that of the more than 20,000[95] babies born by artificial insemination in the United States

---

[90] UNIF. PARENTAGE ACT, § 5, 9A U.L.A. 592 (1979). Section 5 of the UNIFORM PARENTAGE ACT provides:

> (a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with the semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.
>
> (b) The donor of the semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.

[91] *Id.* at 592-93. The statutes of Texas and Oregon explicitly state the rights and duties of third party donors. All other states, however, imply that the donor has no rights since the husband will be considered the legal father. *See* OR. REV. STAT § 109.239 (1985), TEX. FAM. CODE ANN. § 12.03 (Vernon 1975).

[92] For a detailed overview of the various statutes on artificial insemination, *see* Fashing, *supra* note 87. *See also* Andrews, *The Stork Market: The Law of the New Reproductive Technologies*, A.B.A. J., Aug. 1984, at 50 [hereinafter cited as Andrews, *Stork Market*].

[93] Oregon expressly allows both married and unmarried women to use AID. The statute merely requires a woman's written request and consent and "if she is married," her husband's consent. OR. REV. STAT § 677.365 (1985). Other states have eliminated the adjective "married" from subsection (b) in their adoption of the UNIFORM PARENTAGE ACT. *See* CAL. CIV. CODE § 7005 (West 1983); COLO. REV. STAT. § 19-6-106 (1978); WASH. REV. CODE ANN. § 26.26.050 (Supp. 1986); WIS. STAT. ANN. § 891.40 (West Supp. 1985); WYO. STAT. § 14-2-103 (1985).

[94] Note, *Reproductive Technology and the Procreative Rights of the Unmarried*, 98 HARV. L. REV. 669, 671 (1985) [hereinafter cited as Note, *Reproductive Technology*].

[95] Andrews, *Stork Market*, *supra* note 92, at 50.

each year, 1,500 are born to single women.[96] Commentators such as Barbara Kritchevsky[97] assert that in view of the Supreme Court decisions on procreation,[98] "it is a legal and constitutionally protected right for an unmarried woman to become pregnant by AI."[99] Extensive legislation on the subject, Kritchevsky claims, is not necessary unless a problem arises. A statute need only make three basic provisions.[100] First, the statute should specify that it is legal for a physician to artificially inseminate an unmarried woman who has consented. Many physicians have refused to perform the procedure for fear of being prosecuted. Others have refused simply because they believe that it is either immoral[101] or financially unreasonable for unmarried women to become mothers.[102] A legislative determination of legality would both ease the doctors' fears and replace their moral judgment with that of the individual desiring insemination. The second provision should be that the sperm donor's health requirements be as strictly regulated as are the health requirements for those donors whose sperm will be used to inseminate married women. The third provision would designate the child a legitimate child of the mother, a fact which would establish such rights as the ability to inherit

---

[96] Donovan, *The Uniform Parentage Act and Nonmarital Motherhood by-Choice*, N.Y.U. REV. L. AND SOC. CHANGE 193, 195 (1983).

[97] Kritchevsky, *supra* note 60. *See also* Shaman, *supra* note 53, at 344-46; Note, *Reproductive Technology*, *supra* note 94.

[98] *I.e.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (Wisconsin statute prohibiting noncustodial parents with legal support obligations from re-marrying without court approval violated Equal Protection Clause of the fourteenth amendment since it restricts one's fundamental right to marry); Roe v. Wade, 410 U.S. 113 (1973) (Texas Criminal statutes prohibiting abortion except as a measure to save a mother's life violated the Due Process Clause of the fourteenth amendment, which was deemed to include in one's right to privacy, a "qualified right" to terminate one's pregnancy); Eisenstadt v. Baird, 405 U.S. 438 (1972) (Massachusetts statute prohibiting the furnishing and distribution of contraceptives except to married persons violated the Equal Protection Clause of the fourteenth amendment since it discriminated between two similarly situated groups—the married and the unmarried); Carey v. Population Services Int'l, 431 U.S. 678 (1977) (New York statute prohibiting 1) any advertising or display of contraceptives; 2) any sale or distribution of contraceptives to minors under 16; 3) all persons except pharmacists from distributing contraceptives to those 16 and over, held to be unconstitutional in its entirety under the first and fourteenth amendments as regards non-prescription contraceptives); Skinner v. Oklahoma, 316 U.S. 535 (1942) (Oklahoma statute providing sterilization of certain types of habitual criminals violated Equal Protection Clause of the fourteenth amendment as to one convicted once of stealing chickens and twice of robbery).

[99] *See* Kritchevsky, *supra* note 60, at 40.

[101] *I.e.*, lesbianism. Some doctors will perform AI on women involved in heterosexual relationships only, while others believe any unmarried woman should not have children. *Id.* at 3, 6.

[102] *Id.* Many make the unfounded assumption that because a woman is unmarried she will be unable to support the child alone. *Id.* at 3 & n.13, 17 n.79.

through the mother or to sue for her wrongful death. Under this provision, the father would be listed as unknown.[103]

A different problem arises when an unmarried woman wishes to be inseminated with the sperm of a known donor. In that case, Kritchevsky suggests that each participant's rights should be dictated by their intentions. If the man donates the sperm with the expectation that he will be known as the father, then his paternal rights are to be protected. The woman, however, may accept the sperm on the condition that the donor waive all paternal rights. If the donor makes any later claim as father, a judge should not be able to invalidate the donor's waiver even though it is generally believed to be in the child's best interests to have two parents.[104]

Only one case thus far in the United States has addressed the issue of the rights of a known donor whose sperm was used in the artificial insemination of an unmarried woman. In *C.M. v. C.C.*,[105] an unmarried couple who had been dating wanted a child but allegedly did not want to conceive by sexual intercourse.[106] A physician refused their request for artificial insemination, but by speaking with the physician the couple learned the basics of the procedure and tried it themselves in C.M.'s apartment. C.M. would produce the sperm in one room and C.C. would inseminate herself in another. After a few attempts they were successful. During C.C.'s pregnancy the two broke off their relationship, but C.M. still wanted to be known as the child's father and sued for visitation rights on the grounds that it was their intention at the time of the artificial insemination that he would act as father.

The court equated C.M.'s position with that of the natural father of an illegitimate child who is afforded visitation rights. Thus the determination was based on "whether a man is any less a father because he provides the semen by a method different from that normally used."[107] If the couple had been married, there would be no question that the husband/donor would be legally considered the father. The court found that when a known donor intends to act as father and that intention is known to the woman, he is legally the child's father notwithstanding their marital status.[108] The decision was based secondly on the premise that it is in the child's best interest to have two parents whenever possible.[109] The

---

[102] *Id.* Many make the unfounded assumption that because a woman is unmarried she will be unable to support the child alone. *Id.* at 3 & n.13, 17 n.79.

[103] *Id.* at 41.

[104] *Id.* at 40-41.

[105] 152 N.J. Super. 160, 377 A.2d 821 (Juv. & Dom. Rel. Ct. 1977).

[106] One cannot help but be skeptical of the allegations of a successful "at home" artificial insemination, considering the fact that even under ideal laboratory conditions, the success rate varies from 20 to 100 percent. ANDREWS, *supra* note 36, at 181.

[107] 152 N.J. Super. at 163, 377 A.2d 824.

[108] *Id.*

[109] *Id.*

court made no indication of who would be considered the father had C.C. married another man during her pregnancy.

Another interesting case involving the artificial insemination of an "unmarried"[110] woman is the recent California case of *Loftin v. Flournoy*.[111] One partner of a lesbian couple was artificially inseminated with the semen of her lover's brother.[112] One partner was thus the biological mother and the other was the biological aunt and putative father. Two years after the birth of the child, the couple separated and the mother refused to allow the lesbian "father" to visit the child. The case before the court was not the paternity rights of the sperm donor, but rather the visitation rights of the other lesbian "parent." In its decision to grant standard visitation rights, the court analogized the status of the lesbian "father" to that of a *de facto* psychological parent.[113]

None of the statutes on artificial insemination indicate who owns the sperm donation, but sperm banks generally require those donors who are to be anonymous to sign a written waiver of any rights to the deposit and any paternity claims to children born from it. In return, the sperm bank guarantees the donor's anonymity. Thus, according to the contract between the parties, the donor no longer "owns" the sperm.

Men who use sperm banks to store their sperm for their own future use, however, do own their donation(s) of sperm and are required to pay for its maintenance and its later withdrawal.[114] Upon notice of the death of the donor, however, many storage agreements authorize the sperm bank to dispose of the deposit.[115] Requests from the widow of

---

[110] "Unmarried" in the legal sense. The woman in this case was legally unmarried although she and her lesbian lover were "married" by the Metropolitan Community Church, a national church organized by and for the gay and lesbian community. *See* Shapiro & Schultz, *The Impact of New Birth Innovations and The Single-Sex Family*, 24 J. FAM. L. 271 (1986).

[111] No. 569630-7 (Cal. Super. Ct. Sept. 4, 1984).

[112] This type of arrangement is not at all unusual in today's gay and lesbian community. *See* Stern, *Lesbian Insemination*, CO-EVOLUTION QTLY. (Summ. 1980); Moria, *Lesbian Self-Insemination: Life Without Father*, OFF OUR BACKS, Vol. XII (Jan. 1982); LESBIAN HEALTH INFORMATION PROJECT, ARTIFICAL INSEMINATION: AN ALTERNATIVE CONCEPTION, (1979) (c/o San Francisco Women's Centers, 3545 18 St., San Francisco, CA 94110).

[113] *See* Shapiro & Schultz, *supra* note 110.

[114] *See supra*, note 46 and accompanying text.

[115] The IDANT agreement provides:

> Upon the termination of Idant's obligations under this Agreement for any reason whatsoever, Idant may dispose of the specimen by thawing and/or discarding or by use in scientific research or in any other practicable manner, except that no Specimen will be used, without the Client's written consent, for the purpose of causing pregnancy by means of artificial insemination.

IDANT, *supra* note 43, at 14-15.

the donor to be inseminated with the sperm, as a matter of practice, are denied absent express instructions in the donor's will or a court order.[116]

There are no reported cases thus far which indicate what factors a U.S. court would consider in granting an order allowing the widow access to the decedent's sperm deposit. No statute or case law in the United States indicates whether the sperm should be treated, as *Parpalaix* contends, as an object of inheritable personal property or as an indivisible part of the body. For lack of better authority, the *Parpalaix* decision should be considered. Moreover, in *Griswold v. Connecticut*[117] the Supreme Court recognized the right to bear or beget a child based on the fundamental right of privacy. "Read in light of its progeny,[118] the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State."[119]

If an American widow were to be inseminated with her husband's sperm, whether the child may inherit through the father is unclear. This obstacle to the practice of "posthumous parenting" was foreseen by Professor W. Barton Leach[120] as early as 1962 and by Professor Winthrop Thies in 1971.[121] Both commentators formulated three approaches to determining the inheritance rights. First, the states should enact legislation. Leach suggests statutes similar to those already existing in Vermont and Kentucky.[122] Thies proposes a more tailored statute which he would entitle "The Uniform Rights of the Posthumously Conceived Child Act."[123]

---

[116] The agreement provides that "[i]n no event shall Idant be required to release any portion of the Specimen to any person other than the Client's physician or, after the Client's death, to any person, except in either case as directed by an order of a court of competent jurisdiction." *Id.* at 14.

[117] 381 U.S. 479 (1965) (a state may not prohibit a married couple's use of contraceptives).

[118] *See* Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973); Carey v. Population Services International, 431 U.S. 678 (1977).

[119] G. GUNTHER, CONSTITUTIONAL LAW 515 (1985).

[120] Leach, *supra* note 19, at 942. Leach urged the legal world to heed his offered solution, which is described below, and "[l]et it not be recorded in history that the American Institute of Biological Sciences has defeated the American Bar Association and by our own rules!"

[121] Thies, *supra* note 37, at 922.

[122] *See* KY. REV. STAT. ANN. § 381.216 (Baldwin 1981). VT. STAT. ANN. tit. 27, § 501 (1975); These statutes provide that:

> Any interest in real or personal property which would violate the Rule Against Perpetuities shall be reformed, within the limits of that rule, to approximate most closely the intention of the creator in interest. In determining whether an interest would violate said rule and in reforming an interest the period of perpetuities shall be measured by actual rather than possible events, provided that the measuring lives must have a causal relationship to the vesting or failure of the interest.

See also Leach, *supra* note 19, at 944.

[123] The Act would address five basic issues: (1) the rights of the child pursuant to the decedent's instructions; (2) the child's rights where the will is silent; (3) the child's rights where he or she is conceived by AID pursuant to the decedent's instructions; (4)

The second method of determining inheritance rights is by provision in the sperm donor's will. This would also solve the problem of whether a widow may obtain her husband's sperm. Thies suggests the will set forth a specific procedure with detailed guidelines.[124] The third method of determining the child's rights lies with the judiciary. Leach maintains that the Rule Against Perpetuities,[125] which, as it exists, serves as a barrier to the inheritance rights of the posthumously conceived child, is not so rigid in its application that the judiciary cannot adapt it to the advances of medical science.

Leach has offered the first solution to any court faced with this problem. His well thought out "holding" would be that a posthumously conceived sperm bank child of the donor's widow is the legitimate child of the late husband and the widow, at least if she has not remarried at the time of conception.[126] Thies suggests that the child's right to inherit be authorized by judicial decree[127] if, by the testimony of all interested parties, the court is convinced that the decedent would have "wished his widow, during her widowhood to conceive a child of his to take under

---

the child's rights as decedent's "issue," "distributee" and the like under a will executed before and after the effective date of the Act; and (5) the cut-off point designating how late after the father's death the child could be born and still fall under the protection of the Act (if not specifically stated in the will). Thies, *supra* note 37, at 922.

[124] For example, the will should instruct that after each artificial insemination treatment, both the widow and the physician should make an affidavit swearing that the treatment was performed using the testator's sperm. If the procedure is successful, the widow, doctor and hospital should be required to file a second affidavit within 120 days of the birth of the child stating the birth date, the name and sex, and whether the child survived 90 days. If the child so survives, it will be deemed the testator's child and may inherit according to the will. The will may, of course, designate other survival periods and it should set limitations upon the number of occasions of birth (but not of children, since the pregnancy could result in a multiple birth). The privilege of utilizing the testator's sperm may be terminated upon the widow's remarrying. *Id.* at 922-23.

[125] The common-law Rule Against Perpetuities provides that no interest is good unless it must vest, if at all, not later than 21 years after some life-in-being at the time of creation of interest. The period within which interests must vest or fail is 21 years after any reasonable number of lives in being at the creation of the interest, plus actual periods of gestation. However, periods of gestation are included in the period of perpetuities only so far as they actually occur. Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 640, 642 (1938).

[126] The court should define the duration of a man's life-in-being under the Rule Against Perpetuities as "the period of his reproductive capacity, including any post-mortem period during which his sperm remains fertile." Leach, *Perpetuities in the Atomic Age*, *supra* note 19, at 944.

Thies similarly believes that the posthumously conceived child should serve as a measuring life for grants running from his or her father's death, but that a specific number of years after death should be designated as the period during which the child must be conceived to be deemed a "natural child" and therefore a measuring life. He suggests a very reasonable and logical cut-off point—the period should extend to the year that the decedent would have reached the age of 71, the age at which the average man assumably becomes incapable of reproduction. Thies, *supra* note 37, at 960.

[127] Thies, *supra* note 37, at 923.

his will."[128] What would it take to convince the court? The closest relative to the decedent would exercise substituted judgment.[129]

By this analysis of inheritance rights, the finding of the Creteil Court that Alain would have consented to Corinne's use of the sperm seems logical. The fact that the decedent has done the act of depositing the sperm must be some indication of his intent. Thus, the failure to provide written consent, either in the will or with the sperm bank, should not pose a barrier to the procedure.

In *R.S. v. R.S.*,[130] the husband in a case involving AID contended that the child should not be considered legally his because he had never signed the statutorily required consent forms. The court found the husband's intent to be presumed due to his oral consent on several occasions, his awareness of the fact that his wife was undergoing the treatment, and his subsequent failure to object.[131] Although a dead man's consent cannot be applied by acquiescence to the procedure as it is being performed, it may be determined, as in *Parpalaix*, by his prior statements to his wife and relatives. The argument may be made, however, that because the husband has no opportunity to object to the procedure *while it is being performed*, prior statements alone cannot be a sufficient basis from which to infer consent. The statements, made by a dying man, may have been made more to comfort the saddened family than to authorize the treatment. Moreover, if the very act of depositing the sperm can be seen as an indication of intention, then the very failure of a man who knows he is dying to leave precise instructions should also be interpreted as an indication of posthumous intent.

Although the *Parpalaix* decision has been generally acclaimed as eminently humane,[132] it has been criticized by doctors and lawyers alike.[133] The court's order is a victory for the widow and even for the

---

[128] *Id.*

[129] This substituted judgment would be similar to that of hospital ethics committees and guardians of comatose or incompetent individuals as to whether the individual would have wanted to undergo treatment, to be sustained by a respirator, or to be left alone to die. *See In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976); Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977); *In re* Storar, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (1981).

[130] 9 Kan. App. 2d 39, 670 P.2d 923 (1983). *See also* K.S. v. G.S., 182 N.J. Super. 102, 440 A.2d 64 (1981); L.M.S. v. S.L.S., 105 Wisc.2d 118, 312 N.W.2d 853 (1981).

[131] 9 Kan. App. 2d at 39, 670 P.2d at 923.

[132] Nau, *Legal Perils of Posthumous Procreation*, Manchester Guardian, Aug. 3, 1984 at 12. *See Widow Wins Paris Case For Husband's Sperm*, N.Y. Times, Aug. 2, 1984, at A9, col. 1; *French Woman Wins Sperm Bank Decision*, Wash. Post, Aug. 2, 1984; *Dead Man's Sperm Case Forces Experts to Step Into the Unknown*, Rueters N. Eur. Serv., Aug. 2, 1984 (available on NEXIS, Wires file) [hereinafter cited as *Dead Man's Sperm*].

[133] French Government spokesman Roland Dumas reported that the number of couples requesting artificial insemination treatment each year was between 2000 and 3000 and rising. "There is a danger, he opined, that sperm banks will spread uncon-

father who can sire a child from the grave, but it may be detrimental to the child. Though the court permitted Corinne Parpalaix to continue expressing her love for Alain by bearing his child, nowhere in the *Parpalaix* decision did it address and consider the best interests of the child. Commentators have suggested that the child could suffer psychologically from being conceived by a dead man.[134] How such psychological effects would differ from those experienced by a child born to an unmarried woman by AID or a child who, at a very young age, loses his father, remains to be explained.

The August, 1984, decision disrupted the preparation of legislation in France. Two draft bills, which coincided with most of the customary CECOS rules, would have prohibited post-mortem insemination.[135] The author of one of the bills felt that it was unethical to permit the insemination of single, albeit widowed, women because it would add to the current superabundance of single parent families.[136] The *Parpalaix* decision left French legislators wary of the double risk of intervening in a rapidly changing medical field and thereby transfixing its progress on the one hand and seeing their laws become quickly outdated on the other. In January of 1985, a seminar was held by the Committee on Genetics, Procreation and Law (Procreation Genetique et Droit) which addressed the legal and ethical issues created by the new procreative technologies. France is still awaiting their report. Not until then will the legislators act.[137]

Britain's Law Commission has already reacted to *Parpalaix*. The Commission postulates that because a widow cannot be considered married to her husband once he dies, artificial insemination with his sperm should be considered AID and not AIH, thus rendering the resulting offspring

---

trollably." *French Minister Calls for Test-Tube Ethics World Conference*, Reuters N. Eur. Serv., July 12, 1984 (available on NEXIS, Wires file).
French physician Monique Vigny wrote that sperm banking could upset the human generations providing the possibility of a child having half-siblings 50-100 years its elder. *Dead Man's Sperm, supra* note 131.
One leading specialist interviewed was delighted by the decision, which he believed "respected the person," while another believed the decision to be "extremely dangerous." *Id.*

[134] Concerned for the child's psychological well-being, CECOS Professor Georges David told reporters, "The child is the one who has been forgotten when it ought to be the main person considered." *Dead Man's Sperm, supra* note 131. *See also* Nau, *supra* note 132.

[135] The French National Union of Family Associations holds strongly the notion that children need both a mother and a father. President of the French Episcopal Family Commission, Jacques Jullien was concerned that both the child and the widow could become obsessed with the memories of the deceased. *Les CECOS ont Recu Dix-Neuf Demandes de a Restitution de Sperme Congele*, Le Monde, Aug. 4, 1984.

[136] *Id.*

[137] *Questions et Responses*, 25 Fevrier, 1985.

illegitimate. The Commission has, however, seemed to accept the practice if the widow declares her former husband as the father—in that case he will be registered as the father without further inquiry.[138]

Just as there are moral and ethical implications in permitting the widow to use a sperm deposit for AIH, so are there moral and ethical implications in denying her this privilege. What is the rationale behind denying a widow access to that which would only be discarded? Suppose the sperm, rather than be discarded, were to be designated that of an unknown donor to be used in AID? If unmarried women have the right to procreate, even using known donor sperm, what is the reason for prohibiting a woman to choose to be inseminated with the sperm of a man who was once her legal husband? Should not the widow, who knew her husband's wishes and has presumably considered the disadvantages of posthumous parenting have a role in making the decision to create a child? Are there really any legal or public policy reasons that a vial of semen from a man who pays for its storage should not be considered part of his personal property to be made available to his heirs? These and other considerations must be fully explored by legislators before a case such as *Parpalaix* arises in the United States. As one commentator believes, it is doubtful that the judicial processes can "cope effectively with the problems of artificial conception during the remainder of this century."[139] The legislature must act quickly, for it is inevitable that *Parpalaix* will not be a unique case for the duration of this century or even this decade.

---

[138] COUNCIL FOR SCIENCE AND SOCIETY, in HUMAN PROCREATION ETHICAL ASPECTS OF THE NEW TECHNOLOGIES 75 (1984).

[139] Wadlington, *supra* note 53, at 477.