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FAMILY LAW—VISITATION RIGHTS—KNOWN DONOR OF SPERM USED IN ARTIFICIAL INSEMINATION AWARDED VISITATION RIGHTS—C.M. v. C.C., 152 N.J. Super. 160, 377 A.2d 821 (Cumberland County Ct. 1977)

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FAMILY LAW—VISITATION RIGHTS—KNOWN DONOR OF SPERM USED IN ARTIFICIAL INSEMINATION AWARDED VISITATION RIGHTS—*C.M. v. C.C.*, 152 N.J. Super. 160, 377 A.2d 821 (Cumberland County Ct. 1977).

Ms. C.C. and Mr. C.M. met in 1975.[1] Although the exact nature of their ensuing relationship is unclear, it can best be described as casual, with only occasional dating. They neither lived together, nor engaged in any sexual relations. C.C., however, told C.M. that she wanted to give birth to a child conceived by artificial insemination. C.M. volunteered the use of his semen. The two then went to a doctor who referred them to a sperm bank. Although the sperm bank refused the use of its facilities, probably because C.C. was single, she learned from the attending physician of an artificial insemination procedure using a glass syringe and a bell jar.[2] After several months and numerous attempts, C.C. conceived a child using this method.

Shortly after conception, C.C. and C.M.'s relationship terminated. Moreover, after the child's birth, C.C. prevented C.M. from establishing any relationship with the child. C.C. paid all hospital, doctor, and delivery costs, and provided for the child's subsequent needs.

Against the foregoing background, C.M. brought suit for visitation rights. At the trial, C.M. testified that he and C.C. had dated each other and had contemplated marriage. When he agreed to provide his sperm in accordance with C.C.'s wishes, he believed their marriage was imminent. He contended that it was not until C.C. learned that she was pregnant that she terminated the relationship. C.M. also maintained that up to that point he had assumed he would share parental responsibility for the child.[3]

C.C., on the other hand, denied ever contemplating marriage or any other serious relationship with C.M. In support of this contention she argued that the relationship had always been a strictly

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1. The exact date of the commencement of their relationship is unclear from the opinion, but the court alludes to the fact that C.C. and C.M. had known each other for two years at the time of the trial. C.M. v. C.C., 152 N.J. Super. 160, 166, 377 A.2d 821, 824 (Cumberland County Ct. 1977).

2. C.M. remained in one room while C.C. attempted to inseminate herself in another with semen provided by C.M. C.M. v. C.C., 152 N.J. Super. 160, 161, 377 A.2d 821, 821-22 (Cumberland County Ct. 1977).

3. Brief for Plaintiff at 1, C.M. v. C.C., 152 N.J. Super. 160, 377 A.2d 821 (Cumberland County Ct. 1977).

platonic one, that conception was accomplished through the use of artificial insemination, and that she had paid for all delivery and subsequent living expenses for the child.[4] She also claimed that her original purpose in discussing the idea of artificial insemination with C.M. was to inquire whether she should ask one of his friends to supply the sperm.[5] Based on this conflicting testimony, the court found for C.M., holding that a known donor of semen used by an unmarried woman to artificially inseminate herself was the natural father of the child and, as such, was entitled to visitation rights. The court's decision has not been appealed.

For the purposes of this discussion, there are two types of artificial insemination.[6] The classifications relate to the supplier of the sperm. Artificial Insemination Husband, or AIH, is the introduction of the husband's sperm into the wife. It is used where normal fertilization by sexual intercourse is impossible. Artificial Insemination Donor, AID, is the insemination of a married woman by the sperm of a third party donor. In AID cases, the predominate legal issue is whether the husband or the donor is the father. No such issue exists in AIH cases because the husband is the donor. In fact, AIH rarely poses any legal problems because the child is viewed as the biological offspring of both parents.[7]

Most legal problems in AID cases[8] arise when one parent

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4. Brief for Defendant at 3-4, C.M. v. C.C., 152 N.J. Super. 160, 377 A.2d 821 (Cumberland County Ct. 1977). At the time of trial, the child was over a year old and had been cared for solely by C.C. *Id.* at 4. Plaintiff suggested that C.C. was living with a girl friend and that they intended to raise the child together. Brief for Plaintiff, *supra* note 2, at 6. The court's opinion, however, is silent on this point.

5. C.M. v. C.C., 152 N.J. Super. 160, 161, 377 A.2d 821, 821 (Cumberland County Ct. 1977). Defendant argued that she seriously considered using B. as the donor of the sperm and that it was only after discussing it with C.M. that she changed her mind and decided to use him. Brief for Defendant, *supra* note 4, at 8.

6. *In re* Adoption of Anonymous, 74 Misc. 2d 99, 100, 345 N.Y.S.2d 430, 431 (Sur. Ct. 1973). For a discussion of this case, see text accompanying notes 33-36 *infra*.

7. *In re* Adoption of Anonymous, 74 Misc. 2d 99, 100, 345 N.Y.S.2d 430, 431 (Sur. Ct. 1973). The court in *Anonymous* used the phrase "natural child" when describing the AIH procedure. *Id.* at 100, 345 N.Y.S.2d at 431. The term is ill-advised in the artificial insemination context because it connotes legal implications that tend to be conclusory. Indeed, defendant argued that artificial insemination by definition is directly opposed to the concept of "natural." Brief for Defendant, *supra* note 4, at 2-3.

8. *In re* Adoption of Anonymous, 74 Misc. 2d 99, 100, 345 N.Y.S.2d 430, 431 (Sur. Ct. 1973). The AID procedure may be performed with the consent of the husband (consensual) or without it (nonconsensual). The few reported cases involving consensual AID include: People v. Sorensen, 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968); *In re* Adoption of Anonymous, 74 Misc. 2d 99, 345 N.Y.S.2d 430 (Sur.

questions the legitimacy of an AID child in a divorce or support action.[9] In the typical AID setting couples go to a sperm bank where a doctor selects the donor. Donors are often medical students whose physical characteristics resemble those of the husband. The doctor usually selects, as a donor, a married man who is free from congenital defects and has at least one normal child. Total anonymity prevails.[10]

The court in the instant case was presented with a unique factual situation that matched neither the AID nor the AIH pattern. Because the donee was a single woman, and the donor was not an anonymous third party, the C.C. facts differ from an AID pattern. If the instant case was decided on an AID theory, a serious question would arise about the legitimacy of the child. Under an AID theory C.M. would be viewed as a volunteer with no connection to either C.C. or the child, hence the child would be without a father and by definition, illegitimate. If, on the other hand, the case was decided on an AIH theory, the child would be legitimate, but the court would be faced with the absence of a "marriage" contemplated by the AIH theory.

The court attempted to circumvent this impasse by drawing a parallel between the manner of conception in the instant case and conception by intercourse. It observed that, in this case, a woman chose to have a baby and a man chose to provide the needed sperm. They were not married to each other and selected a method for transmitting sperm other than by sexual intercourse. The court, in *C.M. v. C.C.*,[11] noted that if conception took place

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Ct. 1973); Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963); People *ex rel.* Abajian v. Dennett, 15 Misc. 2d 260, 184 N.Y.S.2d 178 (Sup. Ct. 1958); Strnad v. Strnad, 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948). Of these, only two, *Dennett* and *Strnad*, deal with the visitation rights of the father. While the court in C.M. v. C.C., 152 N.J. Super. 160, 377 A.2d 821 (Cumberland County Ct. 1977), did examine *Strnad*, it omitted *Dennett* altogether. For an analysis of both cases, see text accompanying notes 21-27 *infra*. There are no reported cases on nonconsensual AID.

9. The court in Strnad v. Strnad, 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948), has accepted the argument that an AID child is not technically of the husband's blood, but it allowed visitation rights.

10. A. ROSENFELD, THE SECOND GENESIS 153-54 (1969). The physician has a great deal of responsibility in artificial insemination cases. Elaborate release or consent forms must be filled out and signed by the parties.

C.C. was turned away from the sperm bank. Not only were they not married, but the policy of anonymity of the donor would have been violated as well. *Accord*, Tucker, *Legal Problems of Artificial Insemination*, 33 WOMEN LAW. J. 57 (1947).

11. 152 N.J. Super. 160, 165, 377 A.2d 821, 824 (Cumberland County Ct. 1977).

by intercourse there would be no question that the 'donor' would be the father. The court then framed the issue as whether C.M. was any less a father because he provided the semen by a method different from that normally used.[12] In addressing the issue of fatherhood, the court returned to the question whether, under the *C.C.* facts, the insemination was of the AID or AIH type. It reasoned that C.C. was "more analogous" to the AIH situation.

Once it had drawn this conclusion, the court was forced to cast C.M. in the AIH definitional requirement of husband. Drawing on principles developed from its examination of AID cases, the *C.C.* court found an obligation for support based upon an analogy to a situation where a husband had consented to the artificial insemination of his wife by a third party donor.[13] This consent created a relationship between the husband and the child that could not be "assumed and disclaimed at will."[14] Rather, the "husband" must be the "father" of the children for whom he is directly responsible.

After establishing C.M.'s moral and legal responsibility for the child, the court went on to announce the policy that a child should be "provided with a father as well as a mother."[15] It supported its policy decision by finding that it was in the best interests of the child to have two parents if possible.[16] Finally, the court noted that

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12. *Id.* The statement of the issue is critical in *C.C.* because once couched in these terms, the resolution is almost preordained.

13. 152 N.J. Super. at 166, 377 A.2d at 824 (citing Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963) and People v. Sorensen, 68 Cal. 2d 280, 284, 437 P.2d 495, 499, 66 Cal. Rptr. 7, 11 (1968)). For a detailed examination of these cases, see text accompanying notes 28 through 42 *infra*.

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

15. 152 N.J. Super. at 166, 377 A.2d at 824. The court set no guidelines for the implementation of such a policy in the area of artificial insemination, nor did it recognize any exceptions to its rather broad statement. It would be interesting to see how such a policy would be viewed if, for example, a widow who had undergone the AID procedure with the consent of her husband who died before conception, were to discover that X, a medical student, was the donor of the semen used for her child's conception. Using the *C.C.* court's analysis and policy considerations, if X sued for visitation rights he would stand a good chance of success. There would be a known donor who was able and willing to undertake responsibility for a child he helped conceive. He would also provide the "second parent" that the court sees as the right of every child. The argument should undoubtedly be made that since, at the time of the donation, neither the medical student nor the mother had intended him to be the father of the child, he should not later be allowed to assert the rights of a parent. This note contends that the focus on the intent and conduct of both parties is the proper one. *See* text accompanying note 60 *infra*.

16. 152 N.J. Super. at 167, 377 A.2d at 825. For a discussion of the best interests of the child standard, see text accompanying notes 43-50 *infra*.

the donor was not anonymous, but rather was someone C.C. had been acquainted with for at least two years.[17] It also emphasized that C.M. was not only in a good position to assume the responsibilities of fatherhood, he was also willing to do so.[18]

The *C.C.* court's analysis is subject to criticism because the court attempted to force this case into a traditional mold by drawing parallels to analyses in other artificial insemination cases without adequately examining the factual context in which the cases took place. It missed the import of the relationship between the parties. Instead, the court opted for whatever prior case law factually approached *C.C.* without considering that those precedents may be of little value where traditional relationships and motivations are absent.

C.C. was unique because it could not be properly cast as either an AID or AIH case. It differed from the AIH situation because there was neither a husband nor was there a serious, ongoing relationship which could be constructively viewed as a marriage. AID cases could not be profitably compared because there was no third party donor; C.M. was known to C.C. and willingly donated the sperm with knowledge of its intended use.

C.C.'s knowledge of the donor was a central element in the court's decision to allow C.M. visitation rights to the child. The court reasoned that in the usual AID[19] situation, the donor, by giving his semen anonymously, impliedly disclaims any responsibility for its use. It then observed that C.C. had received the semen from a friend whom she had known for two years. In reaching its conclusion that the *C.C.* facts were more analogous to the AIH cases, the court further observed that had the couple been married, C.M. would be the father, or if the child had been conceived by intercourse, C.M. would be the father, whether married or not. It then held that "if an unmarried woman conceives a child through artificial insemination from semen from a known man, that man cannot be considered any less a father because he is not married to the woman."[20]

In addition to the presence of a known donor, the *C.C.* court

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17. *See* note 1 *supra*.

18. 152 N.J. Super. at 167-68, 377 A.2d at 825. Since C.M. was a teacher, the court felt that he was able to contribute to both the educational and financial support of the child. *Id.*

19. *See* text accompanying notes 8-10 *supra* for a discussion of the usual AID procedures.

20. 152 N.J. Super. at 163, 377 A.2d at 824.

relied on several artificial insemination cases and the abstract principle that it is in the best interests of a child to have two parents. A brief examination of those cases will reveal the significant factual distinctions between *C.C.* and the earlier artificial insemination cases that render the earlier cases inapplicable to *C.C.*

Two of the cases cited in *C.C.* deal with visitation rights of the father after a valid divorce decree. In *Strnad v. Strnad,*[21] plaintiff wife brought an action against her husband seeking to terminate his visitation rights with their minor child. The wife had been artificially inseminated by a third party donor with the husband's consent during their marriage. The court was not persuaded by the wife's claim that defendant husband was an unfit guardian, finding instead that the best interests of the child called for the visits.[22] The court did not directly address the issue of whether the husband was the father of the AID child, holding instead that he had potentially or semi-adopted the child. From this it reasoned that the husband was entitled to the same rights as those normally granted a foster parent who had formally adopted a child.[23]

A slightly different issue was examined in *People ex rel. Abajian v. Dennett,*[24] where a man brought an action against his wife to enforce custody arrangements provided for in their separation agreement. She claimed that since both of their children were born as a result of artificial insemination, plaintiff was not the father of the children, and therefore should not be allowed any custody or visitation rights.[25] The court, in holding for the plaintiff, disallowed the defendant's artificial insemination claim on the ground that the defendant, in agreeing to the language of the divorce decree, furnished "sufficient legal basis to estop the assertion of any contrary claim."[26] Moreover, to allow the defendant's claim would be, according to the court, contrary to the best interests of the children. A decision for the defendant would create illegitimacy, a result which the court would not allow as "parens patriae" for the children.

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21. 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948).

22. *Id.* at 787, 78 N.Y.S.2d at 391.

23. *Id.* at 787, 78 N.Y.S.2d at 391-92.

24. 15 Misc. 2d 260, 184 N.Y.S.2d 178 (Sup. Ct. 1958).

25. Plaintiff also challenged the general fitness of his ex-wife to retain custody of the children. *Id.* at 262-63, 184 N.Y.S.2d at 182. On this issue the court held that the plaintiff's evidence had not shown a sufficient change of circumstances in the relationship between his ex-wife and the children to warrant a modification of the separation agreement. *Id.* at 265, 184 N.Y.S.2d at 184.

26. *Id.* at 263, 184 N.Y.S.2d at 182.

Direct comparison of *Strnad* and *Dennett* with *C.C.* is not instructive. *Strnad* and *Dennett* dealt with married couples who used AID procedures with the knowledge and consent of both parties. In both cases the children knew their parents and had lived with them as a family for some period of time. These cases may be instructive, however, because they point out the factors courts examine when attempting to fashion a remedy where judicial or legislative guidance is lacking. In *Strnad*, the court looked to the interaction of the child with the defendant and determined that the relationship was akin to adoption.[27] *Dennett* is particularly enlightening in this vein because it examined the actions of both parties, estopping one from claiming a construction of the facts that would have been clearly inconsistent with earlier behavior. In both cases, then, the courts emphasized the actions of the parties and the nature of their relationship.

At least one court has held that an AID child is illegitimate, but found the father's duty to support on another theory. In *Gursky v. Gursky*,[28] a husband brought an action for annulment and separation.[29] The evidence presented at trial indicated that shortly after their marriage, the Gurskys discovered that they would not be able to bear children. After seeking medical advice, the couple decided that the wife would be artificially inseminated by a third party donor. Further evidence indicated that both parties signed consent forms for the procedure. In addition, the husband promised to pay for all medical expenses. After the child was born, the birth certificate listed the plaintiff as the father and defendant as the mother of the child.

The *Gursky* court found that a child conceived by the AID procedure was not the legitimate issue of the husband.[30] However, he could be held responsible for the support of an AID child under a theory of implied contract and equitable estoppel.[31] Under this theory, the court determines if a legal agreement can be inferred

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27. The opinion omits the specific facts of defendant's interaction with his child. In arriving at its opinion the court also assumed that the AID procedure was done with the consent of the husband. 190 Misc. at 788, 78 N.Y.S.2d at 392.

28. 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).

29. Plaintiff specifically pleaded for an annulment based upon a failure of consummation of the marriage, and for separation on the ground of abandonment and cruel and inhuman treatment. *Id.* at 1084, 242 N.Y.S.2d at 407-08.

30. *Id.* at 1088, 242 N.Y.S.2d at 411.

31. *Id.* The court cited two New York cases as support for its theory, Renner v. John T. Stanley Co., 136 Misc. 492, 493, 240 N.Y.S. 148, 149 (1930), and Wells v. Mann, 45 N.Y. 327 (1871).

from the facts and circumstances of the case even though no formal agreement was made by the parties. If the court finds such an agreement, then the breaching party will be held liable. After examining the evidence, the court held that there was an implied contract between plaintiff and defendant to conceive the child, and the husband was estopped from denying his obligation to support the child.[32]

The conduct of the parties was also closely scrutinized in *In re Adoption of Anonymous*[33] where the petitioner was attempting to adopt his wife's child from her first marriage. The child had been conceived by consensual AID during her first marriage. The ex-husband was listed as the father of the child on the birth certificate. After the divorce he was allowed visitation rights and complied with all the support conditions of the decree. He refused, however, to consent[34] to the stepfather's adoption of the child. The petitioner argued that such consent was not required because the first husband was not the natural father of the child.

The court held that "a child born of consensual AID during a valid marriage is a legitimate child entitled to the rights and privileges of a naturally conceived child of the same marriage."[35] It grounded its opinion on a strong statutory policy in favor of legitimacy, finding that "it would seem absurd to hold illegitimate a child born during a valid marriage, of parents desiring but unable to conceive a child, and both consenting and agreeing to the impregnation of the mother by a carefully and medically selected anonymous donor."[36]

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32. 39 Misc. 2d at 1088-89, 242 N.Y.S.2d at 411-12.

33. 74 Misc. 2d 99, 345 N.Y.S.2d 430 (Sur. Ct. 1973).

34. N.Y. DOM. REL. LAW § 111 (McKinney 1977). Consent is required under subsection 1 of the statute:

> 1. Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:
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> (a) Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;
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> (b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;
>
> (c) Of the mother, whether adult or infant, of a child born out of wedlock;
>
> (d) Of any person or authorized agency having lawful custody of the adoptive child.

35. 74 Misc. 2d at 105, 345 N.Y.S. 2d at 435-36. In so holding the court expressly overruled the *Gursky* decision that had held such a child to be illegitimate. *Id.* at 104, 345 N.Y.S.2d at 434.

36. *Id.* at 104-05, 345 N.Y.S.2d at 435.

Perhaps the most frequently cited artificial insemination case is *People v. Sorensen*.[37] *Sorensen* involved a criminal prosecution against a husband for failure to support a minor child conceived through consensual AID and born during his marriage.[38] Defendant and his wife had agreed to use the AID procedure after fifteen years of marriage. They consulted a physician and signed an agreement regarding the procedures to be used. The defendant also signed a consent form permitting his wife to undergo the procedure. She subsequently became pregnant and bore a child. The defendant lived with his wife and child for about four years during which time he treated the child as his own and represented to friends that he was the child's father. The couple separated when the child was four years old. After the separation, Mrs. Sorensen requested no support payments for the child.

Two years later, Mrs. Sorensen became unable to work due to illness and applied for and received public assistance from the County of Sonoma, California. The defendant made no support payments to the child although a demand for support was made by the district attorney.[39] The court framed the issue as whether the husband of a woman who had submitted to an AID procedure with his consent was guilty of failing to support the child. It held that Sorensen was the father of the child and that his "conduct carries with it an obligation for support."[40] In arriving at its conclusion, the court found that an AID child did not have a "natural father" since the anonymous donor was "no more responsible for the use made of his sperm than is the donor of blood or a kidney."[41] It sought, instead, to determine who was the lawful father.

The court ruled that the defendant was the lawful father of the child. It held that a husband who consented to an AID procedure must bear "the legal responsibilities for fatherhood."[42]

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37. 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968).

38. Suit was brought by the welfare authorities pursuant to CAL. PENAL CODE § 270 (West Supp. 1978).

39. The demand was made pursuant to the California Penal Code. *See id.*

40. *Id.* at 284, 437 P.2d at 498, 66 Cal. Rptr. at 10.

41. *Id.*

42. *Id.* at 285, 437 P.2d at 499, 66 Cal. Rptr. at 11. The court construed the word "father" in the statute to include a husband who chooses to use the semen of a third party donor to inseminate his wife for the purposes of conceiving a child. *Id.* at 286, 437 P.2d at 499-500, 66 Cal. Rptr. at 10-11. This finding was grounded on the court's premise that "[o]ne who consents to the production of a child cannot create a temporary relation to be assumed and disclaimed at will, but the arrangement must be of such character as to impose an obligation of supporting those for whose existence he is directly responsible." *Id.* at 285, 437 P.2d at 499, 66 Cal. Rptr. at 11.

In each of the cases discussed thus far, *Strnad, Dennett, Gursky, Anonymous,* and *Sorensen,* the court relied on one or more of the following elements in finding a "father" for the child: evidence of a marriage, written evidence of the parties' intent at the time of insemination, evidence that the child had lived or interacted with both parents, or evidence of conduct forming the basis for an implied contract or equitable estoppel. C.C. and C.M. were not married nor were they seriously involved beyond a casual dating relationship over a two year period. Since the insemination procedure was not accomplished at a sperm bank or under the auspices of a doctor, there was no documentary evidence to be examined. The child, who at the time of the trial was one year old, had never met C.M. and could not, therefore, have cultivated the psychological and emotional relationship with C.M. that the children in all the preceding artificial insemination cases had developed with their fathers. Perhaps realizing the lack of appropriate factual elements to justify treating C.M. as a lawful father, the *C.C.* court invoked the best interests of the child test to reach what it felt was a desirable result.

The New Jersey courts traditionally use the best interests of the child test, as formulated in *Baker v. Baker*,[43] to evaluate a parent's visitation right. In *Baker*, the question before the court involved access by a father to his illegitimate child who was in the mother's custody. The court held that the best interests of the child called for visits by the father unless the mother could show that the visits would be harmful.[44] In 1971, *R. v. F.*[45] reaffirmed this test by holding that the father of an illegitimate child possessed visitation rights without the express or implied consent of the mother.

In allowing the visitation rights, the court was strongly persuaded by the following facts: the couple had lived together as husband and wife for approximately one year before the child was born, and had engaged in a private, unlicensed ritual of marriage; the couple wore wedding rings and lived together as a family; the father demonstrated strong interest in and actively cared for the child while the "family" remained together; and finally, the wife

43. 81 N.J. Eq. 135, 85 A. 816 (Super. Ct. Ch. Div. 1913). The court equated the visitation rights issue to that of custody which uses the same standard. *Id.*

44. *Id.* at 139, 85 A. at 816.

45. 113 N.J. Super. 396, 273 A.2d 808 (1971).

left her husband because she wanted to make a clean start with her child.[46]

A close reading of *R. v. F.* reveals the *C.C.* court's concern with characterizing C.M. as the "natural father" of the child. New Jersey law mandates that the mother of an illegitimate child shall have custody and control of the child and the putative father shall have no access to the child without the mother's consent.[47] The *R. v. F.* court found that the "admitted father who showed an active interest in the child's welfare should not be classified as a 'putative' father."[48]

Similarly, the *C.C.* court found a factual basis for C.M.'s asserted paternity from a casual dating relationship and C.M.'s statement that he "fully intended to assume the responsibilities of parenthood."[49] There was, however, no examination of C.C.'s intent, the significance of the unusual fact situation, or the possible adverse impact which C.M.'s visits could have on the child. Rather than carefully examining the possible adverse impact of allowing visitation, the court simply decided that "[i]t is in a child's best interests to have two parents whenever possible."[50]

The *C.C.* court's "best interest" approach was coupled with its underlying conviction that the biological parents—that is, the providers of the sperm and egg—have a strong, instinctive, and positive tie to the child regardless of the circumstances.[51] Others ar-

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46. *Id.* at 399-400, 273 A.2d at 810.

47. The statute provides:

> The mother of an illegitimate child, whether married or single, shall have the exclusive right to its custody and control and the putative father of such child shall have no right of custody, control or access to such child without the mother's consent. If, however, it is proved that the mother is unfit to have the custody and control of such child, the Superior Court or any other court which may have jurisdiction in the premises may make any order touching the custody or control of such child which might heretofore have been made.
>
> This section is intended to be declaratory of the existing law upon this subject and it shall, under no circumstances, be construed as an implication that the rights of such a mother have hitherto been less than as herein above defined.
>
> Amended by L.1953, c. 9, p. 80 § 26.

N.J. STAT. ANN. § 9:16-1 (West 1976).

48. 113 N.J. Super. at 407, 273 A.2d at 814. The court also found that the issue of fatherhood would not have to be determined through a formal bastardy proceeding, but could be accomplished by voluntary admission. *Id.* at 408, 273 A.2d at 814-15.

49. 152 N.J. Super. at 167, 377 A.2d at 824.

50. *Id.* at 167, 377 A.2d at 825.

51. This would appear to be the view taken by some in the field of family law.

gue, however, that the physical realities of conception and birth are not the direct cause of the child's emotional attachment. Rather, they are the result of "day-to-day attention to his needs for physical care, nourishment, comfort, affection and stimulation."[52] The latter view stresses the psychological relationship between parent and child rather than the biological relationship. "An absent biological parent will remain or tend to become a stranger."[53]

The New York Court of Appeals recently addressed this issue in *Bennet v. Jeffreys*,[54] where the natural mother petitioned to obtain custody of her child from its guardian after a prolonged separation. In remanding the case, the court outlined the pertinent considerations of the best interests test as: the length of custody of the non-parent custodian, testimony of a psychologist that returning to the mother would be "very traumatic for the child," the mother's current fitness, "the circumstances and environment of the custodian, the stability of her household, her inability to adopt, her age, and any other circumstances bearing upon the fitness or adequacy of a child's custodian over the whole period of childhood. . . ."[55] This test as applied in *Jeffreys* would allow a parent the "right" to rear his or her child[56] unless "extraordinary circumstances" dictate that the best interests of the child warrant different treatment.[57]

The unique fact situation in *C.C.* militates toward the kind of test applied in *Jeffreys*. The child in *Jeffreys* had never known its "father" and at the time of the appeal, it was well over a year old. Similarly, in *C.C.*, the child had never known its "father" while the mother had adequately provided for the child, and had ap-

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Some commentators, however, have found this position somewhat anomalous in light of the many cases of infanticide, infant-battery, child neglect, abuse, and abandonment. J. GOLDSTEIN, A. FREUD, & A.J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 17 (1973).

52. *Id.*

53. *Id.* The authors emphasize that the role of the psychological parent could be filled by any adult who has day-to-day interaction, companionship, and shared experiences with the child. But it could never be done by an "absent, inactive adult, whatever his biological or legal relationship to the child may be." *Id.* at 19.

54. 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976). The mother had given up her child, now an eight-year-old girl, shortly after birth, to a former schoolmate of the child's grandmother. *Id.* at 544, 356 N.E.2d at 280, 387 N.Y.S.2d at 823.

55. *Id.* at 552, 356 N.E.2d at 285, 387 N.Y.S.2d at 828.

56. The child would have the concomitant right to be reared by the parent. *Id.* at 546, 356 N.E.2d at 281, 387 N.Y.S.2d at 824.

57. This rule implicitly recognizes the great care courts must take in utilizing their parens patriae power. Under current constitutional principles, courts could not displace parents "except for grievous cause or necessity." *Id. See generally* Stanley v. Illinois, 405 U.S. 645 (1972).

parently bestowed upon it all the love and care any parent would. The court should have considered the possible detrimental impact that the intrusion of C.M. would have upon the child. The result of not making the child illegitimate is a laudable one, but it should not be achieved at the expense of the child's psychological well-being. Rather than basing its decision on the premise that a child should have two parents whenever possible, the court should have weighed the potential social and emotional harm in the case against the intangible benefit of exposing the child to its "biological" father.[58]

The *C.C.* decision, then, rests on three grounds: the lack of an anonymous donor which allowed the court to treat the case as an AIH situation; several earlier cases which held that a man who consents to artificial insemination while in a family setting has the rights and duties of a father; and finally, the court's notion that it is in the best interests of a child to have two parents. These grounds, taken either separately or together, do not provide an entirely satisfactory basis for the decision.

The facts of *C.C.* clearly indicate that C.C. specifically intended nothing more than a casual relationship with C.M. There was never any sexual relationship between the two, nor did they ever live together as friends or roommates. No conduct by either party indicated an awareness or expectation of anything but a casual relationship. Yet disregarding overwhelming evidence to the contrary, the court impliedly created a stronger relationship for the benefit of the child. Further, even after C.C. decided to use C.M. as the donor, there was never a hint of anything personal or intimate between them. The procedure itself was conducted in a very mechanical and impersonal manner. The method used to impregnate C.C. should have put C.M. on notice that C.C. viewed him solely as a volunteer.[59]

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58. The court seems to assume, without specifically stating, that a child needs a male parent to be raised properly. There was some evidence that C.C. was living with a girl friend and that they intended to raise the child together. Brief for Plaintiff, *supra* note 4, at 6. Plaintiff argued that it would be harmful for a male child to be raised "without the knowledge and benefit of a father figure." *Id.* He further argued that the defendant had not demonstrated that a father's entrance into the child's life at this point would have any harmful impact on the child. *Id.* If the court accepted this argument, it made an error in not substantiating it with at least some empirical evidence. This would seem especially true because many single parents are currently adopting children. *See generally* J. GOLDSTEIN, *supra* note 51, at 62.

59. This argument was made by the defendant but discounted by the court which found that plaintiff had not waived his parental rights. Brief for Defendant, *supra* note 4, at 3-4.

The question of intent is curiously absent from the *C.C.* opinion, with the exception of the court's finding that C.M. "fully intended to assume the responsibilities of parenthood."[60] The court did not examine or discuss what C.C.'s intent may have been, nor does the court seem concerned that the facts do not logically substantiate C.M.'s assertion of marital intent.

The major flaws in the *C.C.* court's analysis are its rigid adherence to the traditional conviction that every child should have a father, and its unwillingness to search beyond the field of family law for a possible solution to the question before it. The court failed to realize that novel fact situations sometimes call for novel approaches. Rather than confine itself to family law principles, the court should have explored two areas of contract law, implied contract-equitable estoppel and express contract.

The implied contract-equitable estoppel approach had already been used by the *Gursky* court and can be readily adapted to the *C.C.* fact situation. The inquiry should focus on the conduct and declarations of both parties. If the plaintiff had been led to believe that he was to be the father of the child and the husband of C.C., and that was his motivation for agreeing to the procedure, then C.C. would be estopped from asserting a contrary argument. If, on the other hand, there was no such evidence, C.M. would be precluded from asserting any rights to the child. The burden of proof should be on plaintiff since he is the one seeking to change the status quo.

A second approach would require an express contract. Absent an express contract, the court would refuse to enforce an asserted right of access to the child. While this solution may seem somewhat draconian in the family law setting, in a case such as *C.C.*, the nature of the conception itself should put the parties on notice that some kind of formal agreement is advisable. In addition to realistically giving effect to the parties' intent, this approach may also prompt needed legislative action.

The *C.C.* court's failure to confront the full range of implications generated by the instant fact situation illustrates the danger of some courts' tendencies to view a case solely as a contract, tort, or family law problem. Once a case has been labelled, many courts limit their analysis to one category, excluding any theories or approaches not within the traditional field. The *C.C.* result illustrates the problem well. The court recognized the uniqueness of the case,

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60. 162 N.J. Super. at 163, 377 A.2d at 824.

but refused to look beyond family law rubric. Instead, it settled for an analogy within the artificial insemination context that in many respects is unsatisfactory. The law need not and should not be read so restrictively. Employing an express or implied contract-equitable estoppel approach may be extremely helpful in such novel areas as artificial insemination. These approaches focus on the facts of the individual case, and militate against the kind of loose comparisons engaged in by the *C.C.* court. This kind of judicial pioneering would be especially useful in light of the increasing number of cases for which there is no legal precedent or legislative guidelines for courts to follow. As in *C.C.*, these cases are often prompted by scientific advancement not anticipated by the law. "There is always a painful lag before the mechanisms and attitudes of society, including the law, catch up with the new reality that science has wrought."[61] Courts, by responding to novel problems with flexible approaches, can minimize this lag between the law and technological reality.

Daniel Lennon Saxe

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61. A. ROSENFELD, *supra* note 10, at 6.