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North Dakota Law Review

Volume 40 | Number 1 Article 5

1964

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Recommended Citation

Demars, David T. (1964) "Artificial Insemination - Problem Child of the Law," *North Dakota Law Review*: Vol. 40 : No. 1 , Article 5.
Available at: https://commons.und.edu/ndlr/vol40/iss1/5

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ARTIFICIAL INSEMINATION—PROBLEM CHILD OF THE LAW

I. INTRODUCTION

Recently the much discussed but seldom litigated issue concerning the legal effect of human conception by artificial insemination was presented before a court of this country for consideration.[1] Artificial insemination, commonly referred to as AI, is the introduction of semen into the female reproductive tract by mechanical means in order to effect pregnancy.[2] AI is of two types: (1) Homologous artificial insemination, usually called AIH, uses the seminal fluid of the husband injected by mechanical means into his wife to induce conception and (2) Heterologous artificial insemination, generally known as AID, using the seed of a third party donor in a similar manner.[3] AIH is normally free from legal complications since only husband and wife are involved and the child is the biological product of his lawfully-wedded parents.[4] AID, however, is surrounded by an entanglement of possible legal difficulties due to the entrance of the third-party donor into the picture. Thus the remainder of this note will concentrate on a discussion of AID.

AI is not an extremely recent development. It was first practiced on a human being in England in 1799 and the first recorded successful AIH in the United States was accomplished in 1866.[5] AID appears to have its beginnings in the early 20th century.[6] During the 1930's hundreds of pregnancies were reported to have been effected by AI.[7] Although it is difficult to gauge accurately the extent to which AI has been used, the conclusion has been drawn that it has increased enormously in the last twenty years both in the United States and in Europe.[8]

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1. Gursky v. Gursky, 242 N.Y.S.2d 406 (N.Y. 1963). Child was held not to be legitimate issue, see *infra* note 38.
2. 32 WASH. L. REV. 280 (1957).
3. Rice, *AID—An Heir of Controversy,* 34 NOTRE DAME LAW. 510, 511 (1959).
4. 30 N.Y. L. REV. 1016 (1955).
5. Rice, *supra* note 3, at 511.
6. Rice, *supra* note 3, at 511.
7. Holloway, *Artificial Insemination An Examination of The Legal Aspects,* 43 A.B.A.J. 1089, 1090 (1957).
8. Rice, *supra* note 3, at 512.

Due to the secrecy normally surrounding the use of AI, generalities and statistics are of less than usual reliability.[9] It has been estimated that 1000 to 1200 babies are conceived by AI in the United States each year and that there are 50,000 to 100,000 AI individuals living in this country today.[10] Since ten percent of the couples of child bearing age are childless and twenty-five to forty percent of them are childless because of the husband's incapacity, an ideal situation for the use of AID is presented because adoption is often an inadequate or impossible means of obtaining children.[11]

If the use of AID should increase, or even, as one writer put it, if the practice should stop immediately, serious legal problems arise because of what has already been done.[12] A few of the problems which might be encountered are: (1) Does AID constitute adultery on the part of the mother or third party donor? (2) Is the child conceived by AID legitimate? (3) What are the inheritance rights of such a child? (4) What obligations for support and rights to custody are incurred by the donor and the husband of the child's mother?

There is no statutory law either permitting or denying the right to resort to AID and the legality of AID has not been decided in the cases dealing with this subject.[13] Statutes dealing with AID have been proposed in at least six states but none has been enacted.[14] This lack of legislation forces the courts to apply indirectly-related law to solve problems presented by AID and often produces unsatisfactory results.

II. ADULTERY

Whether or not the mother is guilty of adultery is the issue raised most often by the few cases which have involved the use of AID. In considering the matter of adultery, two separate actions must be recognized, one being a crimi-

9. Rice, *supra* note 3, at 511.
10. Seymour and Koerner, *Artificial Insemination, Present Status in the United States as Shown by a Recent Survey,* 116 J. AMER. MED. ASSN. 2747 (1941).
11. Hager, *Artificial Insemination Some Practical Considerations For Effective Counseling,* 39 N.C.L. REV. 217 (1961).
12. 28 IND. L.J. 620 (1953).
13. Levisohn, *Dilemma In Parenthood Socio-Legal Aspects Of Human Artificial Insemination,* 36 CHI.-KENT L. REV. 1, 18 (1959).
14. Rice, *supra* note 3, at 520.

nal prosecution for the crime of adultery and the other a civil action for divorce.

Adultery at common law was not an indictable offense but was left to the ecclesiastical courts for punishment as a sin due to sexual connection between a man and woman of whom one at least was married to a third person.[15] Adultery in modern law has generally been made a criminal act by statute, punishable by fine or imprisonment.[16] Thus the nature and elements of the offense of adultery depend primarily on the definition of the crime provided by statute or adopted by the courts in the absence of statutory definition. Courts have held that adultery has no technical meaning in the law aside from that used in the ordinary and popular sense,[17] but that the gist of adultery is voluntary sexual intercourse by a married person with any other person not his or her wife or husband.[18] If either the mother or married donor involved in AID were to be prosecuted for adultery under this definition it is difficult to comprehend how either party could be convicted of the crime. AID is mechanical and involves no actual connection of the sexual organs of the donor and the mother, nor actual penetration into the body of the latter which is generally considered sexual intercourse as required by the courts.[19] Even by criminal statute voluntary sexual intercourse is required for adultery, thus AID would not seem to qualify[20] Strict interpretation required of criminal statutes has precluded varying the definition of adultery to include anything but sexual intercourse as defined by the courts. An unmarried donor would also be relieved from prosecution for the offense of adultery, as provided by some statutes, due to the lack of sexual intercourse in AID[21]

All of the cases which have involved AID and adultery have been decided in the divorce courts of various jurisdictions. The first case ever litigated dealing directly with AID was *Orford v Orford*, a Canadian case, which held

15. State v. Hasty, 121 Ia. 507, 96 N.W 1115 (1903).
16. *Ex Parte* Rocha, 30 F.2d 823, 824 (S.D. Tex. 1929).
17. State v. Hart, 30 N.D. 368, 152 N.W 672, 673 (1915).
18. Commonwealth v. Moon, 151 Pa. Super. 555, 30 A.2d 704, 708 (1943).
19. Williams v. State, 92 Fla. 125, 109 So. 305, 306 (1926).
20. N.D. CENT. CODE § 12-22-09 (1960).
21. *Ibid.*

that AID performed on the wife *without knowledge of the husband* was adultery on her part and denied her petition for alimony on that basis.[22] In that case the court rejected the necessity of sexual intercourse and held that adultery is committed by any act which involves the possibility of introducing into the family of the husband a false strain of blood.[23] The court further concluded that the essence of adultery was the invasion of the marital rights of the husband or wife.[24] An American case with facts similar to the *Orford* case came to a contrary conclusion in dicta saying that if the wife had proven her contention that she had submitted to AID, and had not committed adultery in the normal way, she could not be divorced.[25] The nearest American case decided squarely on the question of AID and adultery was decided in 1954 wherein the court followed the *Orford* case saying that AID, *with the consent of the husband,* was contrary to public policy, good morals, and was adultery on the part of the wife.[26] It would appear that as between the two cases holding AID as adultery the *Orford* case is more acceptable because of the lack of consent by the husband.

The election of some courts to hold that AID is adultery seems to be based on the proposition that there is no requirement that divorce statutes be strictly construed, thus the mere possibility of a bastard child is sufficient grounds for divorce.[27] Some statutes providing for adultery as grounds for divorce include in the definition of adultery the element of voluntary sexual intercourse.[28] The mechanical nature of AID has no resemblance to sexual intercourse so it would seem very difficult even under liberal interpretation to obtain a divorce for AID as adultery under such a definition.

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22. Orford v. Orford, 49 ONT. L.R. 15, 58 D.L.R. 251 (1921), hereinafter referred to as the *Orford* case.
23. *Id.* at 258.
24. *Id.* at 258.
25. Hoch v. Hoch, Civil No. 44-C-9307, Cir. Ct. Cook County Ill. (1948) for discussion see Rice, *AID—An Heir of Controversy,* 34 NOTRE DAME LAW. 510, 514 Levisohn, *Dilemma In Parenthood Socio-Legal Aspects Of Human Artificial Insemination,* 36 CHI.-KENT L. REV. 1, 23 (1959).
26. Doornbos v. Doornbos, Civil No. 54-S-14981, Super. Ct. Cook County Ill., Dec. 13, 1954 for discussion see Rice, *AID—An Heir Of Controversy,* 34 NOTRE DAME LAW 510, 514 (1959) Levisohn *Dilemma In Parenthood Socio-Legal Aspects Of Human Artificial Insemination* 36 CHI.-KENT L. REV. 1, 23 (1959).
27. Tallin, *Artificial Insemination,* 34 CAN. B. REV. 1, 18-19 (1956).
28. *E.g.,* N.D. CENT. CODE § 14-05-04 (1960).

As a practical matter it is difficult for the husband to obtain a divorce on the grounds that AID is adultery on the part of the wife because rules of evidence prohibit testimony by a husband or wife as to non-access which would bastardize a child.[29] Some cases, however, have tended to admit such evidence when adultery alone is at issue and resulting illegitimacy of a child only incidental.[30] The wife may also have a good defense to the husband's action by introducing evidence of condonation by the husband[31] or possible connivance[32] if the husband had consented to AID.

If the reasoning of the courts holding AID as adultery is followed some unsatisfactory results might occur A donor's semen can now be preserved for about two years,[33] thus it is possible for the mother to be impregnated after the donor is dead in which case she would have to be convicted of adultery with a dead man. If the seed of the husband and donor is mixed the result would have the wife committing adultery with her husband. Despite all the reasons for holding the contrary, some authorities have expressed no doubt but that AID is adultery on the part of both married donor and married recipient.[34] It would seem that the better approach would bypass adultery and treat AID as the new genus that it is.

III. LEGITIMACY

The problem of legitimacy of the child is one of the most perplexing presented by mechanical conception. This problem has been met directly in two reported American cases. *Strnad v Strnad*, the first such case, involved the visitation rights of a husband with regard to a child conceived by AID prior to divorce of the wife from the husband.[35] The court therein decided that even though the child was not of the blood of the husband he was po-

29. Goodright *ex dem.* Stevens v. Moss, 2 Cowp. 591, 98 Eng. Rep. 1257 (1777) Annot. 4 A.L.R.2d 567 (1949).
30. Koffman v. Koffman, 193 Mass. 593, 79 N.E. 780 (1907).
31. Beck v. Beck, 120 N.W.2d 585 (Neb. 1963), Ross v. Ross, 119 N.W.2d 495 (Neb. 1963).
32. Dennis v. Dennis, 68 Conn. 136, 36 Atl. 34 (1896).
33. Tallin, *supra* note 27, at 6.
34. *ARCHBISHOP OF CANTERBURY'S COMMISSION ON ARTIFICIAL INSEMINATION, REPORT ON ARTIFICIAL HUMAN INSEMINATION,* 37 (London, 1948) as referred to in 40 N.C. L. REV. 111 (1961).
35. Strnad v. Strnad, 190 Misc. 786, 78 N.Y.S.2d 390 (1948), hereinafter referred to as the *Strnad* case.

tentially adopted or semi-adopted by the husband who would be entitled to the same rights as a foster parent who had adopted the child.[36] In its opinion the court expressly stated that a child conceived by AID is as legitimate as a child born out of wedlock who is made legitimate upon marriage of the *interested parties*.[37] *Gursky v Gursky*, the most recent case dealing with AID, also involved the legitimacy of a child so begotten.[38] Although the case was decided in the same state as *Strnad* the court came to the opposite conclusion. Reasoning that since the legislature has declined to modify the concept of illegitimacy, a child conceived by AID is logically illegitimate since he is begotten by a father other than the husband of his mother [39] In this case the court distinguishes the *Strnad* case by stating that the holding in the earlier case was not supported by authority, and the conclusion of the court therein that the child was potentially adopted recognized illegitimacy by implication.[40]

The *Gursky* case followed the general rule making a child illegitimate which has been begotten by one other than the husband of the mother [41] Declaring a child illegitimate under this rule is difficult under the law as it now stands, since one of the strongest presumptions in the law is that a child born in wedlock is legitimate.[42] This presumption, it has been reasoned, is rebutted only by evidence of non-access or complete absence of the husband when the child must have been conceived.[43] Courts which still strictly follow the rule, as stated by Lord Mansfield, prohibit the parents of a child from giving evidence to these matters if such evidence would tend to bastardize the child.[44] These courts would very probably disallow a husband's testimony as to the performance of AID on his wife since such evidence would often tend to show non-access, an element necessary to rebut the presumption of legitimacy

36. *Id. at* 391.
37. *Id. at* 392.
38. Gursky v. Gursky, 242 N.Y.S.2d 406 (N.Y. 1963).
39. *Id.* at 409, *Accord,* State v. Coliton, 73 N.D. 582, 17 N.W.2d 546, 549 (1945).
40. *Supra* note 38, at 411.
41. State v. Coliton, 73 N.D. 582, 17 N.W.2d 546, 549 (1945).
42. Demilio v. New York State Thruway Authority 235 N.Y.S.2d 642, 651 (N.Y. 1962).
43. Lanford v. Lanford, 377 P.2d 115, 116 (Colo. 1962).
44. Goodright *ex dem* Stevens v. Moss, 2 COWP. 591, 98 ENG. REP. 1257 (1777).

One court, when confronted with conflicting evidence as to conception by AID, followed this rule in stating that the presumption of legitimacy was not overcome, and consequently denied the mother's right to testify as to conception by AID.[45]

Some courts when confronted with the problem of legitimacy and AID may well have less difficulty in admitting evidence of non-access. The rule prohibiting such testimony has been severely criticized by competent authority[46] and some courts have relaxed the effect of the presumption by admitting evidence. These courts feel that the presumption is merely rebuttable if disputed by the husband or wife or descendant of either, thus allowing illegitimacy to be proven like any other fact.[47] Courts have held recently that where all parties agree that a child is not of the husband the presumption of legitimacy has been overcome.[48] Considering these later cases, which seem to be the modern trend, the difficulty of overcoming the presumption is being removed at least in some jurisdictions. The relaxation of Lord Mansfield's rule allows greater facility in the admittance of evidence of AID, thus permitting a child so conceived to be declared illegitimate with greater ease.

The law will declare a child legitimate if after its illegitimate birth his parents marry.[49] It would seem then that even the direct authority of the *Strnad* case cannot be relied on since marriage of merely *interested parties* would be ineffective for legitimation. In order to accomplish the desired result it would seem necessary for the mother and donor to marry.

Until the enactment of legislation it would seem that the only means available to parents with children conceived by AID, to insure their legitimacy, would be formal adoption according to statute. Lack of action may deprive the child of any legal father since, due to the secrecy of AID, the donor and the mother are usually unknown to each other.

45. Ohlson v. Ohlson, No. 53-S-1410, Super. Ct. Cook County Ill. (1954) for discussion see 8 U. FLA. L. REV. 304, 309 (1959).

46. 7 WIGMORE, EVIDENCE § 2063-2064 (3d ed. 1940).

47. *Supra* note 41, at 548.

48. Kucera v. Kucera, 117 N.W.2d 810, 814 (N.D. 1962).

49. N.D. CENT. CODE § 14-09-02 (1960).

IV RIGHTS OF INHERITANCE

Courts, when confronted with the problem of legitimacy of an AID child, have expressly refused to pass on any personal rights, including inheritance rights, of that child.[50] Though the problems of AID have not frequently been litigated there is some case law on the problems of adultery and legitimacy If the courts must ever decide directly on inheritance rights they will have to apply existing law in the absence of specific legislation on the rights of an AID child. The question of the AID child's right to inherit by will is practically non-existant since statutes provide that a testamentary disposition may be made to any person having legal capacity [51] A real problem arises regarding the child's inheritance rights and who can inherit from the child.

If the theory of the *Strnad* case is followed it would seem that there would be very little problem so far as intestate inheritance by the AID child is concerned. In that case the court considered the child potentially adopted or semi-adopted and legitimated by marriage of the interested parties.[52] Carrying this reasoning to its logical conclusion it would seem that the child would be entitled to all the rights of an ordinary legitimate, and property could pass to and from him by intestate succession as provided by statute.[53]

If the AID child is declared illegitimate, or made so by a ruling that AID is adultery, it is apparently necessary in the absence of legislation to apply the ordinary laws of intestacy The rule at common law was that a bastard was "the son of nobody" and could not inherit property or transmit his estate, should he die intestate, to anyone but his lineal issue.[54] This rule applied to both the father and mother of the illegitimate child.[55] Most states have modified this strict common law rule by expressly allowing the

50. Gursky v. Gursky, 242 N.Y.S.2d 406, 412 (N.Y. 1963).
51. N.D. CENT. CODE § 56-01-05 (1960).
52. Strnad v. Strnad, 190 Misc. 786, 78 N.Y.S.2d 390, 391 (1948).
53. N.D. CENT. CODE § 56-01-04 (1960).
54. *In Re* Klingaman, 128 A.2d 311, 312 (1956) *In Re* Paterson's Estate, 34 Cal. App. 2d 305, 93 P.2d 825, 828 (1939).
55. *In Re* Kuenzle's Estate, 219 Minn. 176, 17 N.W.2d 309, 312 (1944).

mother to inherit from the child,[56] as well as allowing the child to inherit from and through his mother.[57] Applying the law just stated the AID child would be allowed to inherit only from his mother since the husband is not the legal father.

Some statutes would allow an AID child that has been held illegitimate to inherit from the donor, who is technically his legal father, just as if the child had been born in wedlock.[58] As a practical matter, however, such inheritance is impossible in AID since the donor usually remains anonymous.

The donor father, assuming he could be determined, by common law could not inherit from his illegitimate child upon the latter's dying intestate.[59] Statutes abrogating the common law prohibition usually condition the father's inheritance on acknowledgement or recognition of the illegitimate child as his own.[60] The anonymity of AID, however, prevents this acknowledgement.

The safe course for the parents of a child conceived by AID would again seem to be formal adoption, thus establishing his right to inherit as a lineal descendant from his only known father as well as from his mother.[61] Adoption can be had without consent of the father of an illegitimate by most statutes, making a determination of the donor's identity unnecessary.[62]

V. CUSTODY AND SUPPORT

Whether the third-party donor or the husband must support a child conceived by AID is a matter not directly decided by any court where both the donor and the husband were involved. However, in the *Gursky* case, though the child was declared illegitimate, the husband was ordered to furnish support on the theory of equitable estoppel and implied contract. The duty thus imposed rested on the fact the

56. N.D. CENT. CODE § 56-01-06 (1960).
57. N.D. CENT. CODE § 56-01-05 (1960).
58. *Ibid.*
59. State v. Chavez, 42 N.M. 569, 82 P.2d 900 (1938).
60. *Ex rel.* Thompson, 224 La. 995, 71 So. 2d 544 (1954).
61. Hoellinger v. Molzhon, 77 N.D. 108, 41 N.W.2d 217, 220 (1950); *In Re* Berg's Estate, 72 N.D. 52, 4 N.W.2d 575, 577 (1942).
62. N.D. CENT. CODE § 14-11-04 (1960).

husband gave his consent to the performance of AID and that he treated the child as his own.[63]

In the absence of the equitable estoppel doctrine used in the *Gursky* case it would be difficult to hold the husband liable for support under existing statutes. When the AID child is held illegitimate the husband is under no duty to support him. This duty could be placed on the donor, as actual father of the child, by statutes[64] generally in force changing the common law rule which did not impose such a duty.[65] If the donor should fail to carry out this duty, assuming of course he can be identified, the mother would have a legal cause of action against him. This action first would establish paternity of the donor,[66] which is not necessary if he acknowledged fatherhood,[67] then would force support[68] under penalty of contempt of court.[69] Because the same donor is frequently employed for a number of inseminations, the duty of support which might be placed upon him could be oppressive.[70]

The holding of the *Strnad* case, if followed, declaring the child legitimate or adopted, would place the duty of support definitely on the husband in the same manner as he would be required to support any legitimate issue.[71]

The problem of custody of the AID child would not generally arise under the *Strnad* case since if the child were declared legitimate the husband would be entitld to custody.[72] Under the *Gursky* case a problem of custody might arise only if the mother would die, since statutes generally entitle the mother of an illegitimate to primary custody.[73] On death of the mother, courts have held that the putative father has superior rights to custody of the child.[74]

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63. Gursky v. Gursky, 242 N.Y.S.2d 406, 412 (N.Y. 1963).
64. N.D. CENT. CODE § 32-36-03 (1960).
65. State v. Tieman, 32 Wash. 294, 73 Pac. 375, 376 (1903).
66. N.D. CENT. CODE § 32-36-09 (1960) State v. Coliton, 73 N.D. 582, 17 N.W.2d 546 (1945).
67. N.D. CENT. CODE § 32-36-04 (1960).
68. *Ibid.*
69. N.D. CENT. CODE § 32-36-25 (1960).
70. O'Rahilly, *Artificial Insemination, Medical Aspects*, 34 U. DET. L.J. 383, 386 (1957).
71. Bismarck Hospital and Deaconesses Home v. Harris, 68 N.D. 374, 280 N.W 423 (1938)
72. N.D. CENT. CODE § 14-09-04 (1960).
73. N.D. CENT. CODE § 14-09-05 (1960).
74. *Ex rel.* Smith, 42 Cal. 2d 91, 265 P.2d 888 (1954)

This holding, however, is generally qualified by the courts when they require that the father be a suitable person,[75] and by the fact that cases as well as statutes require the best interests of the child to be the primary consideration in any custody proceeding.[76] Considering especially the latter qualification it becomes apparent that the husband would be entitled to custody as against the donor in an AID situation since the husband has provided the home and care for the child whereas the donor, although the legal father, is a stranger to the child.

VI. CONCLUSION

Solutions for the problems discussed herein have been introduced for enactment by statute in several states but none of these have been adopted. The bill introduced in Minnesota would have made AI unlawful but would have legitimitized children which resulted therefrom.[77] The statute proposed in New York would have made the child legitimate having all the rights and subject to all duties of that relationship, but conditioned this legitimization on the express or implied consent of the husband to AID.[78]

It would appear that some legislation is necessary since, as has already been seen, existing law does not always provide satisfactory results to the special situation surrounding AID. Any statute which might be proposed should be concerned with the problems already discussed and, in addition thereto, the duties and responsibilities of the doctor administering AID The moral and social conflicts of AID, once more firmly resolved, could furnish a guide for the courts and legislatures to follow in settling disputes of this nature.

DAVID T DEMARS

75. *Ex rel.* Human v. Hyman, 164 Pa. Super. 64, 63 A.2d 447 (1949).
76. N.D. CENT. CODE § 30-10-06 (1960) , *In re* Wagner, 84 N.W.2d 587 (N.D. 1957).
77. Levisohn, *Dilemma In Parenthood Socio-Legal Aspects of Human Artificial Insemination*, 36 CHI.-KENT L. REV. 1, 29 (1959).
78. *Artificial Insemination—The Legal Viewpoint*, 32 SYRACUSE L. REV. 108, 109 (1957).