South Carolina Law Review

Volume 9 | Issue 2 Article 5

Winter 1957

Legal Implications of Test-Tube Babies

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LEGAL IMPLICATIONS OF "TEST-TUBE" BABIES

INTRODUCTION

During the last few years, the lay press of the country has created widespread interest by publicizing artificial insemination, or as it is more commonly known, "test-tube" babies. These accounts in the newspapers and magazines indicate that the process is new and progressive. However, the ability to impregnate human beings by the artificial insemination process has been in existence as a laboratory technique since the middle of the 16th Century.[1] The first recorded successful case of artificial insemination in America was performed by Dr. J. Marion Sims of South Carolina in 1866, who later abandoned the practice because he considered it to be immoral.[2] This radical procedure started a barrage of questions and controversies that remain unsettled even today.

At least 10,000 children have been born in the United States by artificial insemination in the last 25 years[3] (some doctors estimate as many as 40,000).[4] It has been estimated that 1,000 to 1,200 babies are conceived by artificial insemination each year in the United States as compared with 4,000,000 children normally conceived.[5] The artificial insemination operation is simply and scientifically performed. However, it is usually necessary to try it several times before conception is achieved, with the results being successful in about 35 to 50 per cent of the cases.[6]

There are two types of artificial insemination in use at the present time. Artificial insemination which employs the husband's semen is termed homologous (AIH), and is usually considered as being legally and morally sound,[7] since the child conceived by this method is the biological product of the husband and wife. This method is employed when the husband is fertile but impotent, or where the wife is structually unable to have normal intercourse, but is capable of giving normal birth.[8] The second type of artificial insemination

1. Koerner, *Medicolegal Considerations in Artificial Insemination,* 8 LA. L. REV., 487 (1948).
2. Greenhill, J. P., "Artificial Insemination: Its Medicolegal Implications", *Symposium on Medicolegal Problems,* J. P. Lippincott Company, p. 45 (1948).
3. Seymour and Koerner, *Artificial Insemination, Present Status in the United States as Shown by a Recent Survey,* 116 J. Amer. Med. Ass'n. 2749 (1941).
4. Time, December 27, 1954, p. 52.
5. Lang, *Artificial Insemination — Legitimate or Illegitimate?,* McCalls, May 1955, p. 60.
6. Newsweek, December 27, 1954, p. 52.
7. Comment, 30 N. Y. U. L. REV. 1016 (1955).
8. 15 MISSOURI L. REV., pp. 154 and 155 (1950).

in which a donor other than the husband contributes the sperm is termed heterologous (AID). This technique is employed when the husband is sterile. In the case of AID the doctors administer semen from a carefully chosen anonymous donor, who is selected upon a basis of superior health, intelligence and good family background. In height, complexion and color of hair and eyes, they are as much like the sterile husband as possible.[9] Genetically, the attempt is to produce an offspring with hereditary characteristics similar to those of the husband.

If the semen of the husband is used, the child is obviously legitimate, but where that of a donor is used, general emotional and psychological problems are raised as well as many legal ramifications. There is a possibility that the husband will reject the child and danger that the wife might transfer her affection to the one who fathered her child. However, if the donor's identity is kept a secret, the latter possibility should be overcome. It is probable that if the child should discover through some careless remark that he is a "test-tube" baby, a definite psychological trauma might develop.[10]

Some of the legal problems raised by the use of AID are the possible illegitimacy of the child, subsequent speculation on the rights of inheritance, the husband's right to custody, the legal position of the administering physician, and possible adultery on the part of the mother.

ADULTERY

Adultery is familiarly known in law as the illicit intercourse of two persons, at least one of whom, is married.[11] Whenever the term adultery is defined, the words sexual intercourse are invariably used to describe one of the principal characteristics of the offense. According to the ecclesiastical law, intercourse between a man and a woman of whom one, at least, was lawfully married to a third person constituted adultery; the ecclesiastical law regarded adultery as a sin arising out of the marriage relation.[12] Adultery has also been defined as unfaithfulness of a married person to the marriage bed.[13]

At common law, adultery was not a crime but it has now been made a crime by statute in most jurisdictions.[14] Although adultery was not

9. See note 6 *supra.*
10. See note 1 *supra,* pp. 495 and 496.
11. Hull v. Hull, 2 Strob. 174 (S.C. 1848).
12. Wright, James F., "Legal Aspects of Artificial Insemination", *Symposium on Medicolegal Problems,* J. P. Lippincott Company, p. 62 (1948).
13. State v. Hart, 30 N.D. 368, 152 N.W. 673 (1915).
14. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 16-406; MISSISSIPPI CODE, 1942 § 1998; CODE OF VIRGINIA, 1950 § 18-82; REV. STAT. MAINE, 1954 § 1 of Ch. 134; CODE OF GEORGIA, 1953 § 26-5801.

an indictable offense at common law, it was condemned because of the possibility of introducing into the family of the husband a false strain of blood.[15]

It has been said that the essence of the offense of adultery consists in the voluntary surrender of the reproductive system of a married woman to one other than her husband.[16] However, the fact that it has been held by some courts that anything short of actual sexual intercourse does not constitute adultery strengthens the view that it is not the moral turpitude that is involved, but the invasion of the reproductive function.[17]

The first case in which the problem of heterologous artificial insemination was presented in 1921 in the Canadian case of *Orford v. Orford*.[18] In this case the plaintiff was suing for alimony; and after finding as a fact that the child born to the plaintiff was the product of adulterous intercourse rather than artificial insemination as the plaintiff had claimed, the court declared that "the essence of the offense of adultery consists not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive powers or faculties of the guilty person," and that therefore AID with or without the consent of the husband was adultery. In this case the insemination was done without the consent of the husband.

The problem was first dealt with by a court in this country in 1945 in *Hoch v. Hoch*,[19] where the husband was asking for divorce on the ground of adultery and alleging that the child born to his wife was not his. The court found that the wife had insisted upon having a child and had obtained it through artificial insemination. The court said, by way of dicta, that AID does not fit any definitions of adultery, and could not therefore support an action for divorce.

A New York court was confronted with the question of the custody of a child where the wife had been artificially impregnated with the consent of her husband.[20] The court concluded that the child was not illegitimate, but had been at least semi-adopted by the consent of the husband, and that the father was entitled to visitation rights the same as those to which an adopting father would be entitled. This case would seem contrary to the *Orford* case which declared AID

15. Wright, *supra* note 12, at 63.
16. Note, 8 FLORIDA L. REV. p. 308 (1955).
17. See Wright, note 12 *supra*, p. 65.
18. 49 ONT. L. R. 15, 58 S.L.R. 251 (1921).
19. Cir. Ct. of Cook County, Illinois (1945); See Time, February 26, 1945, p. 58.
20. Strnad v. Strnad, 190 Misc. 786, 78 N.Y.S. 2d 390 (Sup. Ct. 1948).

adulterous. However, it is important to note that in the *Orford* case, the insemination was done without the consent of the husband.

Later in *R. E. L. v. E. L.*,[21] which arose on a wife's petition for a decree of nullity of marriage, the homologous type of artificial insemination was presented. The parties had been married in 1942, but because of the husband's impotency, the marriage was never consummated. The husband received medical treatment but there was no improvement and the wife then decided to try artificial insemination with the semen of her husband. The wife had a number of artificial inseminations during the following year, the last being successful. On January 27, 1948, she left her husband permanently but did not know at the time that she was pregnant; the child was born in September of 1948. The court granted the wife an annulment even though the result would be to bastardize the child and held that artificial insemination of a wife with the husband's semen would not be sufficient to consummate the marriage. This case was not concerned with whether or not artificial insemination was legitimate.

The most recent case involving the question of artificial insemination was a divorce proceeding in which the wife petitioned for the sole custody of her 5 year old son on the ground that he was conceived by heterologous artificial insemination and that therefore her husband was not the father. The mother asked the court to rule that artificial insemination is not contrary to public policy, does not constitute adultery, that the child is legitimate, and that the husband had no legal interest in the child. Judge Gorman, in an unreported opinion, stated that the husband had no legal right or interest in the child, but he also ruled that heterologous artificial insemination, with or without the consent of the husband, is contrary to good morals and constitutes adultery on the part of the wife. However, in Judge Gorman's opinion, homologous artificial insemination is not contrary to public policy and presents no legal problems.[22]

Evidence of Legitimacy

There is a presumption of law that a child born during wedlock is the child of the husband and is legitimate.[23] However, this fact is generally only prima facie evidence of the child's legitimacy and it may be rebutted by proof of such non-access or other fact, which

21. Note, 35 Cornell L. Q. 183, p. 211 (1949); Report on an Unofficial Commission Appointed by the Archbishop of Canterbury in 1945, S.P.C.K. 1948.

22. Doornbos v. Doornbos, (Super. Ct., Cook County, Illinois, December 13, 1954), Newsweek, December 27, 1954, p. 48; Note 30 N. Y. U. L. Rev. 1016, (1955).

23. Kinnington v. Cato, 68 S.C. 470, 47 S.E. 719 (1904); Tarleton v. Thompson, 125 S.C. 182, 118 S.E. 421 (1923).

shows that the husband was not its father.[24] Even at early common law the presumption of legitimacy could be overcome by proof of the husband's sterility and today the presumption is more easily controverted than in earlier times. Today it is generally recognized by the courts that a child is illegitimate though born or begotten during marriage, when access of the husband at the time of the conception was impossible.[25]

As pointed out previously, it is probable that if a child should learn that he is a "test-tube" baby, an undesirable psychological trauma would develop, and for this reason it seems highly desirable as a matter of policy, that the wife be precluded from showing in evidence that her child was conceived through artificial insemination.[26]

The role of the courts in this controversy is critical; the future of 40,000 families rests upon the sagacity and perspicacity of the courts. It must be remembered that if the courts rule that artificial insemination by the donor method is illegal, 40,000 children will be declared illegitimate, 40,000 mothers will be deemed adulterous, and will subsequently afford grounds for 40,000 potential divorce cases.

INHERITANCE

Whether a child conceived by heterologous artificial insemination is legitimate or illegitimate is an important question in respect to rights of inheritance. At common law, an illegitimate child has no inheritable blood and cannot inherit.[27] But the legislature has power to confer on illegitimate children the right to inherit, and there are statutes in most jurisdictions conferring this right in varying degrees.[28]

In accordance with the general common law rule, an illegitimate child cannot take as an heir or distributee of the natural father,[29] but the statutes of most jurisdictions in the United States now recognize the right of an illegitimate child to inherit from his mother.[30] Therefore, if it is decided that an AID child is illegitimate and the husband fails to adopt it legally, the child cannot inherit from the husband.[31]

24. State v. Schumpert, 1 S.C. 85 (1869); Barr's Next of Kin et al. v. Cherokee, Inc., et al., 220 S.C. 447, 68 S.E. 2d 440 (1951).
25. *Ibid.;* 10 C. J. S. 20.
26. See note 8 *supra,* p. 159.
27. Barwick v. Miller. 4 Desaus. Eq. 434 (S.C. 1814).
28. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 19-53.
29. Gibson v. Rikard, 143 S.C. 402, 141 S.E. 726 (1928).
30. See note 28 *supra;* Trout v. Burnett, 99 S.C. 276, 83 S.E. 684 (1914); Rhodes v. Williams, 143 Ga. 342, 85 S.E. 105 (1915); Hardesty v. Mitchell, 302 Ill. 369, 134 N.E. 745 (1922); Hastings v. Rathbone, 194 Iowa 177, 188 N.W. 960 (1922).
31. See note 25 *supra,* p. 1832.

Some observers advise that all questions as to the legitimacy of a child conceived by heterologous artificial insemination should be ignored and reliance should be placed upon the secrecy attendant on artificial insemination and on the presumption that a child born during wedlock is legitimate.

In most cases of artificial insemination, the circumstances may never be known to anyone other than the husband, wife, and attending physician. However, contests challenging the right and capacity of a child conceived by artificial insemination to inherit property from the husband of the mother may arise. Legislation should be enacted to permit the introduction of evidence to show the intestate's action during his life in order to prove that he desired the estate to go to the child and not to interested relatives.[32] If the mother and her husband executed wills, the child could be protected without relying upon the courts or legislature to decide the question.

HUSBAND'S RIGHT TO CUSTODY

Generally, the natural parent of a minor illegitimate child is entitled to the custody of the child and it is the duty of the court to award the custody to the natural parent unless it is clearly evident that such parent is unfit or incompetent to take charge of the child. However, the paramount consideration in determining to whom the custody of a child shall be awarded after divorce or during separation is the welfare and best interest of the child.[33]

In the case of *Strnad v. Strnad,*[34] which involved the custody of a child conceived by heterologous artificial insemination, the court held that the husband was entitled to visitation rights, which were not precluded by the fact that he was not the child's biological father. The court concluded that the child had been semi-adopted by the defendant husband. At any rate, the husband, with particular reference to visitation, is entitled to the same rights and obligations as those acquired by a foster parent who has formally adopted a child, if not the same rights as those to which a natural parent would be entitled.[35]

"Upon the authority of the *Strnad* case it would appear that in a closely analogous case of a custody proceeding, the court would hold that the husband would have the same rights as those acquired by a foster parent who has formally adopted a child."[36]

32. Koerner, *supra* note 1, at 503.
33. 27 C. J. S. 309; 17 Am. J. 683.
34. See note 20 *supra.*
35. 15 Mo. L. REV. 157.
36. *Ibid.*

LEGISLATION

As previously stated, there has been no satisfactory settlement of AID and its ramifications. The different problems that may eventually arise should be ominous to all parties concerned with this radical method of procreation.

Some of the precautions advised for doctors in this field are that fingerprints and written consents of the recipient and her husband be preserved, together with photographs of the husband. In the event that the sterile husband brought a suit for divorce or instituted a proceeding to annul the marriage, he would be estopped by this written consent showing that he had agreed to have his wife artificially impregnated.[37]

The donor must be protected against blackmail and other involvements. The identity of the donor should be absolutely concealed from the recipient donee, and that of the recipient donee from the donor. Some of the precautions suggested to insure this are that the sperm be delivered to the doctor at a time other than when the patient is present and that the donor be admitted through a back entrance which is not used by the patients. Another precaution advised is that the donor be a married man and that both his and his wife's consent be obtained in writing, properly acknowledged before a notary.[38]

Even though every possible precaution is considered and taken, every party concerned with artificial insemination remains in a dubious position until some concrete and satisfactory solution to the problem has been reached.

It should be remembered that should heterologous artificial insemination be declared adulterous, the above mentioned consents would be of no value.[39] There are still too many people who would regard artificial insemination as contrary to good morals and against the best interests of the community, and a court might find a contract to perform an artificial insemination void as against public policy. In any event, public opinion will exert considerable gravitational influence upon the final resolution of the question. The courts have an increasingly important problem before them and comprehensive decisions are necessary.

Artificial insemination insofar as its practice with human beings is concerned, apparently has no established legal status. Research, at any rate, has not disclosed a statute specifically dealing with the matter. To date, there have been only six state legislatures which

37. Koerner, *Medicolegal Considerations in Artificial Insemination*, 8 LA. L. REV. 494 (1948).
38. *Id.*, at 497.
39. *Id.*, at 498.

have considered bills on artificial insemination, but none has enacted them.[40]

Some considerations which should weigh in any possible legislation would include the following:

The interest of the child should require prime consideration. Even if the legality of AID is established, the rights of the child regarding inheritance from the husband and the donor still require legislation. Legislation will be required concerning the inheritance of the child from the husband of the mother. This will insure to the child the legal capacity to take.[41]

Then there is the problem of the child's inheritance rights from the donor, who is the biological father. Adoption procedure in such an instance is out of the question. A large number of courts will probably not declare the offspring capable of inheritance from the biological father, since from a practical standpoint it would seem best that no rights of inheritance flow from the donor to the child. Yet, there are a few jurisdictions which recognize the right of illegitimates generally.[42]

The husband may deny responsibility for the child. Argument is made that the maintenance of records proves that the child is the product of AID and not adultery, and that the husband consented and, therefore, has the rights and duties of a parent.[43] But if the courts establish that AID is illegal, it may be reasoned that AID is adulterous and all consents are void, giving the husband a legal denial.[44]

AID involves introduction into the wife's body of the seed of a man other than her husband. Should the courts declare this legal, then by analogy it may be argued that the courts would condone introduction of the seed of a man other than her husband whether it involved artificial insemination or any other method of deposition of the seed. With the practice of AID on a large scale, a single donor may father a large number of children and the chance of their mating incestuously would be increased.

These legal problems and the many others which have been suggested from time to time show the need for legislation to govern a practice which, whatever the objections to it, seems bound to become socially important. The greatest complexities of the issue are yet to come and they obviously will create, increasingly, the need for legislation.

40. Indiana, Minnesota, Virginia, Ohio, New York and Wisconsin.
41. See note 39 *supra*. Koerner, *supra*, note 1, at 498.
42. Koerner, *supra*, note 1, at 501.
43. 28 Ind. L. J. 639 (1953).
44. Koerner, *supra*, note 1, at 498.

There are some dangerous and doubtful factors referred to in the British Medical Journal:

(1) The law governing the registration of births — if the husband is registered as the father, there is an infringement of the Perjury Act, 1911, which may subject the husband and the advising and abetting physician to fine or penal servitude, — if the father's name is not stated, the child's illegitimacy is patent to everyone who sees the certificate;

(2) If there is a will or a settlement creating an interest in property in favor of the 'heirs of the body' of the couple, they may be faced with the alternative of disclosing the child's illegitimacy or of committing a fraud upon the person who would benefit in the absence of legitimate offspring. In the latter event, the physician who brought about the conception might find himself involved in the subsequent proceeding . . . .; and despite the use of a consent form, either the husband or the wife may deny having given a real consent. If the degree of consent is brought into issue the physician might find himself charged with a serious assault.[45]

CONCLUSION

The conclusion to this discussion is best voiced by these views appearing in the Journal of the American Medical Association:

> The paucity of law relating to the procedure suggests that the public has given little serious consideration to its many implications. There are legal, social, and moral questions associated with the use of the procedure that have not been resolved. The rights of husbands, wives, children, donors and physicians are not clear. The obligations and liabilities of all who participate in or who are affected by artificial insemination procedures are subject to conjecture and doubt. Medicine has made a scientific procedure available to society, but until the people individually and collectively determine and express public policy, in the form of legislation or otherwise, the uncertainties associated with the procedure will remain.[46]

Artificial insemination strikes so strongly against the mores, folkways and institutions of our culture that legislation regarding this

45. British Medical Journal, May 3, 1947, p. 606.
46. 157 J. Amer. Med. Ass'n. 1616 (1955).

matter would be extremely difficult to enact. But the fact remains that the practice is rather widespread and the legal problems raised cannot be swept aside by ignoring them. It's none too early for the legal profession, bench and bar alike, to be giving serious thought to the implications of a practice which involves directly several thousand additional people each year. The fact that the insemination took place in one jurisdiction is no assurance that the legal problems raised will not require resolution in a different jurisdiction. It seems that the practices and procedures of artificial insemination will be determined by a combination of society's concepts and those extant laws dealing with the implied and the inherent legal relationships.

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