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COMMENTS

Artificial Insemination — A Model Statute

The increasing incidence of artificial inseminations in the fifties and sixties resulted in a profusion of commentary devoted to the significance of the procedure. Characteristic of the motivations of many writers were the moral, psychological, and social implications of the technique. In contrast, the creative legal response was limited. Paralleling the stagnation of judicial and legislative action in most states, the number of commentators addressing the issue in recent years has been minimal. This comment hopes to focus the attention of legislators on the need to clarify the morass surrounding artificial insemination.

While statistical data is scant and the available estimates often conflict, one estimate places the annual number of births in the United States resulting from the process at twenty thousand, while others are far less conservative. The rapid scientific advancement in the field as evidenced by these statistics suggests that the number of artificial inseminations performed in the future will sharply increase,

1 Artificial insemination is usually performed in three situations:
   (1) When the husband is unable to procreate because of impotency or some other physical incapacity other than sterility, artificial insemination homologous [hereinafter referred to as A.I.H.] is employed, by which the husband’s semen is used. Note, Artificial Insemination, 30 BROOKLYN L. REV. 302, 303 (1964). No significant legal questions are presented by this procedure, since the husband’s semen is used and therefore the child is unquestionably his.
   (2) Artificial insemination heterologous [hereinafter referred to as A.I.D.; in certain contexts it will refer to artificial insemination in general] entails the added involvement of a third-party donor. Id. It is this procedure that presents most of the legal problems which will be discussed.
   (3) A hybrid procedure which involves the use of a mixture of the husband’s semen with that of a third-party donor and has been termed “confused” artificial insemination [hereinafter referred to as C.A.I.], Tallin, Artificial Insemination, 34 CAN. B. REV. 1, 7-8 (1956), or combined artificial insemination. Note, Social and Legal Aspects of Human Artificial Insemination, 1965 WIS. L. REV. 859 n. 4, citing Gutmacher, The Role of Artificial Insemination in the Treatment of Sterility, 15 OBSTET. AND GYNECOL. SURVEY 767, 773 (1960). The labyrinth created by this procedure is neither more certain nor less of a problem and thus should be considered equally along with the analysis of A.I.D. legal problems. See also O’Rahilly, Artificial Insemination: Medical Aspects, 34 U. DET. L.J. 383 (1957); Symposium on Artificial Insemination, 7 SYRACUSE L. REV. 96, 97 (1955) (common indications for use of donor semen).

2 For historical and bibliographic material see CIBA FOUNDATION SYMPOSIUM, LAW AND ETHICS OF A.I.D. AND EMBRYO TRANSFER 17 (New Series 1973); R. FRANCOEUR, UTOPIAN MOTHERHOOD (1973) [hereinafter cited as FRANCOEUR]; Note, Social and Legal Aspects of Human Artificial Insemination, supra note 1 at 860-62.

3 FRANCOEUR, supra note 2, at 19.

4 Samuel G. Kling (author of several books on medicolegal problems) says artificial insemination births number closer to ten thousand per year in New York City alone. With the success rate of impregnation as low as twenty per cent, the total number of inseminations performed in the United States each year could easily by in excess of one hundred thousand. Moreover, the number of people affected is almost certainly higher than the least conservative estimate, since those who take advantage of the procedure are not apt to publicize the fact for fear of societal disapproval and because of some of the legal consequences. Id.
making legislative action imperative.\(^5\) Artificial insemination poses a variety of legal issues concerning legitimacy,\(^6\) divorce, support, and adultery, which the courts and legislatures have failed to address adequately. Consequently, following a critical examination of the cases and some existing statutes, a model statute will be proposed.

The Judicial Morass

The reasons for the dearth of case law in this area are speculative at best and differences of opinion are certain to exist. Opponents of A.I.D. often point to this very fact when arguing against the need for legislation. However, it does not follow a fortiori that the number of people affected is minimal.\(^7\) The few cases that are reported and meet the problem squarely evidence the importance of the issue to those involved. Moreover, it is apparent from an examination of these cases that the decisions and their underlying rationale lack uniformity and require statutory clarification.

Commonwealth Decisions

Several noteworthy Commonwealth cases have treated the artificial insemination issue, the earliest being Orford v. Orford.\(^8\) In Orford plaintiff and defendant had never consummated their marriage because of painful intercourse. Nevertheless, the wife gave birth to a child. In an action for alimony, the husband defended by alleging that his wife had committed adultery, and the wife responded that the birth resulted from A.I.D. The court indicated that the plaintiff's action could have been successful only if it were first proven that A.I.D. had in fact been performed, and if it were further found that as a matter of law this procedure is not adulterous, notwithstanding the fact that it was performed without the husband's consent. The court refused to accept the wife's account of the A.I.D. as credible, ruling that she had committed adultery in the ordinary way and

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\(^5\) The increase in the number of frozen sperm banks in the United States as a result of improved storage techniques will undoubtedly be followed by a rise in the artificial insemination rate. Id. at 283-84. Additionally, the change in societal attitudes with a trend toward liberalization is an important factor. For sociological, psychological, and religious attitudes see Bohm, Artificial Insemination, 34 U. DET. L.J. 397 (1977); Dienes, Artificial Donor Insemination: Perspectives on Legal and Social Change, 54 IOWA L. REV. 253 (1968); Kelly, Artificial Insemination: Theological and Natural Law Aspects, 33 U. DET. L.J. 135 (1955); Pommerenke, Artificial Insemination: Genetic and Legal Implications, 9 OBSTET. AND GYNECOL. SURVEY, 189 (1957); Symposium, Morals, Medicine and the Law, 31 N.Y.U. L. REV. 1157 (1956); Note, Social and Legal Aspects of Human Artificial Insemination, 1965 WIS. L. REV. 859.

\(^6\) Legitimacy is possibly the most important issue since the child is burdened with certain legal disabilities, such as limitations on property and inheritance rights, directly flowing from the status of illegitimacy. The removal of this characterization necessarily eliminates the consequent legal problems. For a survey of the legal consequences of illegitimacy see H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 177-180 (1968); H. KRANSE, ILLEGITIMACY: LAW AND SOCIAL POLICY (1971).

\(^7\) See notes 3, 4, 5 supra.

\(^8\) 226 N.E. 891 (1936).
hence was not entitled to alimony payments. While this finding would have been sufficient on the merits, the court chose to confront the plaintiff's legal argument that A.I.D. would not constitute adultery, and thus, by way of dictum, the court rejected the contention that actual sexual intercourse must be involved. The court also disagreed with the categorization of moral turpitude as the essential element of adultery. Rather it viewed adultery as

the voluntary surrender to another person of the reproductive powers or faculties of the guilty person; and any submission of those powers to the service or enjoyment of any person other than the husband or the wife comes within the definition of "adultery.""19

The court extended this logic to the point of suggesting that "such an act performed upon a women against her will might constitute rape."10

This blanket statement characterizing A.I.D. as adulterous is unwarranted considering the definition of adultery and the rationale behind making the offense grounds for divorce.11 An adulterous situation presupposes direct physical contact between two individuals, a requisite not easily met in the context of an A.I.D. procedure. One commentator considered the court's rationale absurd since the motivation for adulterous conduct is most often sexual gratification.12 Pregnancy, far from being a desired result, is carefully avoided through contraception. Hence, if surrendering one's reproductive powers is the essence of adultery,13 the "normal" adulterous situation is no longer objectionable. On the other hand, if pleasure and physical contact are the bases for adultery, how can the court find adultery in a factual setting where the dominant motive is conception and the means involves neither physical contact nor sexual gratification?14


11 "Voluntary sexual intercourse of a married person with a person other than the offender's husband or wife." BLACK'S LAW DICTIONARY 71 (4th ed. 1951). See generally 2A WORDS AND PHRASES, "Adultery" 96 (1935). The term sexual intercourse seems to be consistently present in the definitions. It is important to note also that the cases which define sexual intercourse uniformly include penetration as requisite. See generally 39 WORDS AND PHRASES, "Sexual Intercourse" 107 (1955) and the cases cited therein.


13 This also raises the question of whether others (eg., physician or donor) would likewise be guilty of adultery. Id. at 47.

A later English decision further illustrates the absence of sound reasoning on the part of the judiciary. As in Orford, the marriage in L. v. L.\textsuperscript{15} was never consummated, with failure attributed to the husband's psychological problems. A.I.H.\textsuperscript{16} had been performed, resulting in the birth of a child. The wife subsequently sought to annul the marriage on the grounds that it had not been consummated. The petition was granted which in effect made the child, born of a void marriage, illegitimate. The argument against permitting the decree was estoppel and approbation, in that the plaintiff herself had authorized the procedure and thus public policy should not have permitted her to claim at such a late date that she wished the marriage annulled. The wife testified that she had acquiesced to the procedure in an attempt to cure her husband's psychological problems. In this light the court rejected the husband's argument, reasoning that his wife's actions could not be construed as approbation of what remained an abnormal marriage.\textsuperscript{17} Almost as an afterthought the court turned its attention to the unfortunate child.

That the child should be made illegitimate is most regrettable, but the stigmas of birth are of less effect than they were, and sons are now judged by the errors of their parents.\textsuperscript{18}

Such an observation is indicative of the insensitivity of the courts in dealing with the plight of such children. Though paying lip service to the injustice of judging children by the acts of their parents, that is precisely what the court has done.

American Decisions

The American judicial attitude toward A.I.D. has been diverse and often confusing. Initiating this confusion was the case of Strnad v. Strnad,\textsuperscript{19} in which the visitation rights of a husband who had consented to A.I.D. were at issue. The court granted visiting privileges even though the child was not of the husband's blood. To justify their decision, the court found that in effect the child had been potentially adopted or semi-adopted, and therefore, the husband was entitled to the same rights and privileges that he would have if the child had been formally adopted.\textsuperscript{20} This decision is of questionable value in clarifying the A.I.D. problem. There is no legal support in the case itself and the term "semi-adopted" has not been found in any other

\textsuperscript{15} [1949] 1 All E. R. 141 (P. 1948).
\textsuperscript{16} See note 1 supra.
\textsuperscript{17} Accord, Slater v. Slater, [1953] 1 All E. R. 246 (C.A. 1952).
\textsuperscript{19} 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948).
\textsuperscript{20}
reported case. Instead of clearly defining the rights of the husband as equivalent to those of a natural parent, the court adopted a spurious fiction in an attempt to bring its rationale within existing legal doctrine surrounding adoption. As a result, an opportunity to formulate distinct guidelines was bypassed.\(^{21}\)

In \textit{Doornbos v. Doornbos},\(^{22}\) a declaratory judgment in an action for divorce, the court held that the minor child conceived by A.I.D. was illegitimate, that A.I.D. constituted adultery, and that the mother's husband has no interest in the child.\(^{23}\) A month prior to the \textit{Doornbos} decision, another unreported case had been decided somewhat differently.\(^{24}\) There the court had avoided confronting the issue of legitimacy by employing a strong presumption in its favor.\(^{25}\) In \textit{Doornbos}, however, use of this presumption was precluded by the admission that A.I.D. had been performed.

Finally, fifteen years after the \textit{Strnad} case, a New York court met the question of A.I.D. legitimacy head on in \textit{Gursky v. Gursky}.\(^{26}\) The case involved a husband's action for annulment and separation which was dismissed for insufficient proof. However, the wife's counterclaim, initially for separation and upon amendment for annulment, was granted. She contended that the marriage had never been consummated. The evidence established that a child had been born to

\(^{21}\) Ten years after \textit{Strnad} the A.I.D. question was again before the New York courts in \textit{People ex rel. Abajian v. Dennett}, 15 Misc. 2d 260, 263-64, 184 N.Y.S.2d 178, 182-83 (Sup. Ct. 1958). A husband petitioned to enforce a Nevada divorce decree that incorporated a New York separation agreement, in which he had been granted certain visitation rights. For the first time the mother claimed the children were not his but were conceived by A.I.D. and thus he had no rights concerning the children. The facts made it easy for the court to disregard this questionable claim by stating that the Nevada decree was entitled to full faith and credit and comity under the Constitution. The court implied that if it were decided that the A.I.D. claim was true, the children might well be deemed illegitimate. In avoiding that result the court said:

[\textit{W}]hatever now motivates respondent to assert the claim of artificial insemination, so as to extinguish petitioner's privileges of custody and visitation, most assuredly does not inure to the benefit of the children. For to stigmatize them as children of an unknown father . . . is no more, in my view, than an attempt to make these innocents out as children of bastardy. And where a parent attempts such means, the law will still the lips of such a parent. This I believe will be done even where artificial insemination is lawful, for, on the last turn, it is the children who, when so revealed, must go through life in obfuscation.


\(^{23}\) \textit{Contra}, Hoch v. Hoch, No. 44-C-9307 (Cir. Ct. Cook County, Ill. 1945).


her as a result of A.I.D., performed with her husband’s written consent. In addressing the legitimacy issue, the court chose to rely upon the common law concept that “a child who is begotten through a father who is not the mother’s husband is deemed to be illegitimate.”

The court rejected *Strnad*, suggesting that adoption in New York is accomplished according to statute, and if not undertaken in that manner cannot be recognized. As such, the semi-adopted rationale of the *Strnad* court fails and the child must be deemed illegitimate. Despite its decision to brand the child as illegitimate, the court applied alternatively the doctrines of implied contract and equitable estoppel to compel support of the child by the husband.

The Gursky court’s basic failure lies in its inability to modify common law concepts so as to render them compatible with a situation engendered by modern technology. Moreover, it seems inequitable to place the entire burden upon the husband. If a husband who consents to the A.I.D. can be estopped to deny his obligations of support, why then should the wife and mother be permitted to have the marriage annulled? Sound public policy would dictate that in order to preserve the family unit and give the child the benefit of two parents, a mother who has consented to A.I.D. should be precluded from later asserting the husband’s impotency as grounds for annulment.

The trend toward liberalization of A.I.D. case law began with *People v. Sorensen*. In contrast to the aforementioned cases, this decision came in response to the application of a criminal statute

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27 *id.* at 1085, 242 N.Y.S.2d at 408.  
28 *Strnad v. Strnad*, 190 Misc. 786, 787, 78 N.Y.S.2d 390, 391 (Sup. Ct. 1948); *see* text accompanying note 20 supra.  
30 *See In re Adoption of Anonymous*, 74 Misc. 2d 99, 345 N.Y.S.2d 430 (Sup. Ct. 1973) (criticizing this case). The rationale for barring actions for annulment in such instances is based upon the cases which allow defenses of laches or ratification. Some courts have held that continued cohabitation for an unreasonable time, coupled with knowledge of the alleged infirmity, will bar an action to annul. *Donati v. Church*, 13 N.J. Super. 454, 80 A.2d 633 (App. Div. 1951), *citing* G. v. M., 10 App. Cas. 171 (H.L. 1885); *Godfrey v. Sharwell*, 38 N.J. Super. 501, 119 A.2d 479 (Ch. 1955); *Kirschbaum v. Kirschbaum*, 92 N.J. Eq. 7, 111 A. 697 (Ch. 1920); *Jwaideh v. Jwaideh*, 140 A.2d 303 (D.C. Mun. Ct. 1958). It would seem that the additional fact of the artificial insemination procedure should give rise to an even stronger inference of ratification. It is granted that an exception to this general rule of ratification is recognized in circumstances where an attempt is made to alleviate the infirmity with reasonable expectations of success. In that event, a court may find that a delay in initiating an annulment proceeding is justified. *Singer v. Singer*, 9 N.J. Super. 397, 74 A.2d 622 (Ch. 1950). However, the performance of an A.I.D. cannot in any way be construed as an attempt to correct impotency or like disorders. On the contrary, the mutual consent to an A.I.D. implies that the parties have decided to continue the marriage and have children in spite of the problem. In these circumstances, a subsequent petition for annulment should be barred on the basis of approbation of the marriage.

making it a misdemeanor to wilfully neglect to provide support for one's minor child.\textsuperscript{32} The Supreme Court of California affirmed the conviction of the defendant for refusing to support the child born to his wife by means of A.I.D.

Seven years after the marriage the defendant husband had discovered that he was sterile and initially had refused to consent to either adoption or A.I.D. Eight years later, however, the couple executed a written agreement permitting a physician to perform the insemination. A child was born and the birth certificate listed the defendant as the father, although the information had been provided by the mother. For four years all went smoothly, during which time the defendant represented to others that he was the father of the child. A separation and subsequent divorce followed, the decree stating that jurisdiction would be retained by the court in regard to any support obligation.

Under the statute\textsuperscript{33} the court determined that the meaning of the word "father" was not limited to the natural or biological father, but extended to the legal father, a relationship to be determined by the court. The court further observed that a reasonable man in the position of the defendant would be cognizant of the legal responsibilities attendant to consenting to the A.I.D. procedure.\textsuperscript{34} The main policy ground for the court's decision to impose criminal liability was the state's interest in protecting the public fisc from the burden of supporting the neglected child.\textsuperscript{35} Though the question of the legitimacy of the A.I.D. child was not at issue under the statute, since it provided for such support whether the child is legitimate or illegitimate, the court did address itself to the problem.

In the absence of legislation prohibiting artificial insemination, the offspring of defendant's void marriage to the child's mother was lawfully begotten and was not the product of an illicit or adulterous relationship.\textsuperscript{36}

To consider A.I.D. to be adultery, the court continued, is absurd

\[\text[s]ince the doctor may be a woman, or the husband himself may administer the insemination \ldots to consider it an act of adultery with the donor, who at the time \ldots may be a thousand miles away or may even be dead, is equally absurd.\textsuperscript{37}\]

\textsuperscript{32} Id. at 281, 437 P.2d at 496, 66 Cal. Rptr. at 8.

\textsuperscript{33} Cal. Penal Code § 270 (West 1970).

\textsuperscript{34} This statement by the court related to whether the statute met the notice requirement of due process under the fourteenth amendment. 63 Cal. 2d 280, 285, 437 P.2d 495, 499, 66 Cal. Rptr. 7, 11 (1968).

\textsuperscript{35} Id. at 287, 437 P.2d at 500, 66 Cal. Rptr. at 12.

\textsuperscript{36} Id. at 289, 437 P.2d at 501, 66 Cal. Rptr. at 13.

\textsuperscript{37} Id.
However, the court never explicitly held that such a child is legitimate, though it did not see any valid public purpose served by stigmatizing the child as illegitimate. While Sorensen was definitely a step in the right direction, its statements on legitimacy and adultery were merely dicta. Hopefully, legislatures will take the next affirmative step.

The most recent and far reaching case in A.I.D. litigation, In re Adoption of Anonymous, involved a proceeding initiated by the petitioner to adopt his wife's child of a former marriage. The former husband refused his consent. The petitioner contended that his consent was not necessary because the child was conceived by A.I.D. and thus the former husband was not the father of the child. In dismissing the petition for adoption, the court relied heavily upon Sorensen, placing emphasis specifically upon that court's finding that the defendant was the lawful father of the child born of consensual A.I.D. Moreover, it totally rejected Gurskey, stating that "a child born of consensual A.I.D. during valid marriage is a legitimate child entitled to the rights and privileges of a naturally conceived child of the same marriage."

The Statutory Wasteland

Eliminating the problem of A.I.D. by making the practice a criminal offense was at one time under serious consideration. Though this approach has not gained meaningful support, the seemingly indifferent attitude of most state legislatures toward the need for specific remedial statutory provisions aimed at the mechanics of the procedure itself and the social and legal disabilities of A.I.D. children is not

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39 In response to Sorensen the California legislature amended the Penal Code by adding: The husband of a woman who bears a child as a result of artificial insemination shall be considered the father of the child for the purposes of this section, if he consented in writing to the artificial insemination.

CAL. PENAL CODE § 270 (West 1970). The Civil Code also contains a noteworthy section: A child born to a woman as a result of conception through artificial insemination to which her husband has consented in writing is legitimate if the birth occurs during the marriage or within 300 days after the marriage has been dissolved.


41 The controlling statute requiring consent of both parents was N. Y. DOM. REL. § 111 (McKinney Supp. 1974).

42 See text accompanying note 34 supra.


encouraging. Furthermore, those states that have legislatively addressed the problem have done so with varying degrees of foresight and understanding.

In most jurisdictions, the technical aspects of the A.I.D. procedure have been left to the discretionary judgment of the medical profession. An exception, however, is the City of New York which treats this subject in its health code.\textsuperscript{45} While the code provides reasonable guidelines for the selection and testing of donors, along with the stipulation that only licensed physicians may perform the procedure, there is a semantic flaw. To provide that only a licensed physician may "perform an artificial insemination, or collect, offer for sale, sell or give away human seminal fluid. . . ."\textsuperscript{46} implies that even healthy donors cannot be remunerated. More importantly, the statement that only physicians may give away seminal fluid for such purposes seemingly makes it necessary that all donors be doctors. While it appears that the intent of this clause is solely to insure the good health of donors and in addition prevent the commercialization of "sperm banks," another construction is possible and assiduous attention to wording while drafting such a provision would prevent unnecessary ambiguity. The only treatment of A.I.D. in the New York State statutes is a recent


§ 21.01 Physician to perform artificial insemination and collect seminal fluid.

No person other than a licensed physician shall perform an artificial insemination or collect, offer for sale, sell or give away human seminal fluid for the purposes of causing artificial insemination.

§ 21.03 Examination of donor and recipient.

(a) A proposed donor of seminal fluid shall have a standard serological test for syphilis and a smear and culture for gonorrhea within one week before his seminal fluid is taken and, immediately prior to taking his seminal fluid, he shall be given a complete medical examination with particular attention to his genitalia.

(b) A proposed donor and a proposed recipient of seminal fluid shall each have a blood test to establish their respective Rh factors before artificial insemination is attempted. Such test shall be made by a laboratory operated pursuant to Article 13 and classified for hematology, including blood grouping and Rh typing. If the proposed recipient is negative for the Rh factor, only seminal fluid from a donor who is also negative for the Rh factor shall be used.

§ 21.05 Disqualification of donors.

A person who is affected with venereal disease, tuberculosis, brucellosis or who has any congenital disease or defect shall not be used as a donor of seminal fluid for artificial insemination.

§ 21.07 Records; contents and confidentiality.

(a) A physician who performs an artificial insemination shall keep a record of (1) the names and addresses of the physician, donor and recipient, (2) the results of the medical examination and serological and all other tests, and (3) the date of the artificial insemination.

(b) Records kept by a physician pursuant to this section shall not be subject to inspection by persons other than authorized personnel of the Department. A person who has access to these records shall not divulge any part thereof so as to disclose the identity of the persons to whom they relate.

\textsuperscript{46} \textit{Id.} § 21.01 (emphasis added).
amendment to its domestic relations law making A.I.D. children legitimate and natural children for all purposes provided that both husband and wife have consented to the procedure.\textsuperscript{47}

The Georgia statute\textsuperscript{48} provides for an irrebuttable presumption of legitimacy for all children born of A.I.D. during wedlock or within the usual period of gestation.\textsuperscript{49} Only licensed physicians may perform artificial inseminations, and a penalty of one to five years in prison is provided upon conviction of violating this section.\textsuperscript{50} Under the statute, a physician may be relieved of civil liability stemming from the results of the insemination, provided it does not arise from his negligent performance and written consent is received from both the husband and the wife.\textsuperscript{51} The statute permits the performance of the procedure without the written consent of both parties, at the physician’s choosing, although the child would be illegitimate under the statute without such consent.

Oklahoma has improved upon the Georgia statute by providing for performance of A.I.D. by licensed physicians, \textit{only} with the consent of both the husband and the wife.\textsuperscript{52} As in the Georgia statute, though more specifically, the Oklahoma statute provides that the child will be “at law in all respects the same as a naturally conceived legitimate child. . . .”\textsuperscript{53} More importantly, the statute includes specific rules for executing and filing the consent of the parties.\textsuperscript{54} Of questionable expediency, however, is the section concerning the necessity for involving a judge in the execution and acknowledgment of the consent. This provision places at issue the discretionary power of the judge in approving the use of the technique. If he may deny permission, under what guidelines is the decision to be made? If such a decision is discretionary, the possibility exists that judges who are against the procedure morally or otherwise might prohibit its use in their jurisdictions. The role of the judge should be limited to insuring that the documents are in compliance with all other provisions of the section and that they are properly filed.


\textsuperscript{49} Id. § 74-101.1(a).

\textsuperscript{50} Id. § 74-101.1(b).

\textsuperscript{51} Id. § 74-101.1(c).


\textsuperscript{53} Id. § 552.

\textsuperscript{54} Id. § 553.

No person shall perform the technique of heterologous artificial insemination unless currently licensed to practice medicine in this state, and then only at the request and with the written consent of the husband and wife desiring the utilization of such technique. The said consent shall be executed and acknowledged by both the husband and wife and the person who is to perform the technique, (Continued on next page)
The foremost contribution of the Kansas A.I.D. statute\(^55\) lies in that legislature's realization that the need for clarification of the A.I.D. child's status is as important to those affected before passage of legislation as to those born subsequent to it's enactment. The pertinent section provides for the retroactive legitimacy of A.I.D. children.\(^55\) However, poor drafting again leaves certain questions unanswered. Since the rights and benefits of a naturally conceived child are conferred only if the procedure has been consented to by husband and wife, what happens to those who, prior to the enactment of the statute, did not execute such a consent? May they now file proper consent forms in order to gain the benefits of this section? In light of the intent behind this section, it would appear that nothing would prevent subsequent consent, but this procedure is open to challenge since the statute does not so provide.

A Proposal

None of the previous attempts at a statutory treatment of artificial insemination has comprehensively addressed the profusion of legal problems that this procedure raises. Hence, the model statute which follows is an attempt to cure the inadequacies of existing legislation.

§ 1. Definitions

(a) Artificial Insemination: For the purposes of this statute shall mean the technique of introducing seminal fluid into a woman's vagina, cervical canal, or uterus with the aid of instruments, and not involving sexual intercourse.

(b) Artificial insemination shall be classified according to one of the following techniques:

(1) Artificial Insemination Homologous (A.I.H.) employing the seminal fluid of the recipient's husband.

(2) Artificial Insemination Heterologous (A.I.D.) employing the seminal fluid of a third-party donor.

(3) Combined or Confused Artificial Insemination (C.A.I.) employing the seminal fluid of the recipient's husband mixed with the seminal fluid of a third-party donor.

(Continued from preceding page)

and the judge having jurisdiction over adoption of children, and an original thereof shall be filed under the same rules as adoption papers. The written consent so filed shall not be open to the general public, and the information contained therein may be released only to the persons executing such consent, or to person having legitimate interest therein as evidenced by a specific court order.


\(^{56}\)Id. § 23-129.

Any child or children heretofore or hereafter born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived child of the husband and wife so requesting and consenting to the use of such technique.
§ 2. Consent

(a) The written consent shall be required of the husband and wife requesting the artificial insemination.57

(b) A proposed donor shall sign a written form offering seminal fluid for use in an artificial insemination58 and consenting to its use, provided however, he is considered a healthy donor based upon the provision of § 3. Said form shall include a statement that it is understood that the identity of the recipient of the seminal fluid is not to be disclosed to the donor: further, that the donor shall not reveal his identity to any actual or potential recipient of his seminal fluid. It is provided further that this form shall be filed along with all other required forms according to the procedures provided by § 4.

(c) The wife of any donor of seminal fluid shall sign a form consenting to the use of her husband's seminal fluid for the purposes of artificial insemination. Said form shall include a statement that she has read and fully understands the meaning of the form signed by her husband; and that she understands and accepts that all statements made therein shall apply equally to her.59

§ 3. Procedures

(a) Only a person licensed to practice medicine may perform an artificial insemination.

(b) The selection of donor semen for use in an artificial insemination shall be conducted by a licensed physician.

(c) The following procedures shall be performed as a minimum safeguard in the selection of a healthy and suitable donor:60

(1) A proposed donor of seminal fluid shall have a standard serological test for syphilis and a smear and culture for gonorrhea within one week before his seminal fluid is

57 For this and all other requirements to be effective penalties must be provided for their violation. This author will not attempt to set out any suggested penalties. This is for each individual legislature to decide upon. Practice Aids: See 15 AM. JUR. LEGAL FORMS 2d Physicians and Surgeons §§202:84, 202:85, 202:86 (1973).
58 Id. § 202:87.
59 Id. § 202:88.
60 The intent behind this section is to provide a "minimum" standard below which artificial insemination would no longer be a desirable procedure. Implicit in this section is that so long as a physician complies with this and all other relevant sections of the statute, a civil action could not be brought against him as a result of the procedure. This would not bar, however, an action based upon his negligent performance of the procedure.
donated, and immediately prior to taking his seminal fluid he shall be given a complete medical examination with particular attention to the genitalia.\textsuperscript{61}

(2) A proposed donor and a proposed recipient of seminal fluid shall each have a blood test to establish their respective RH factors before artificial insemination is attempted. Such test shall be made by a duly authorized laboratory, which is classified for hematology, including blood grouping and RH typing. If the proposed recipient is negative for the RH factor, only seminal fluid from a donor who is also negative for the RH factor shall be used.\textsuperscript{62}

(3) A person who is affected with venereal disease, tuberculosis, brucellosis, or who has any congenital disease or defect shall not be used as a donor of seminal fluid for artificial insemination.\textsuperscript{63}

(4) Each donor shall be allowed to make \underline{________} donation(s) for purposes of artificial insemination and his seminal fluid shall be used for only \underline{________} impregnation(s).\textsuperscript{64}

§ 4. Records

(a) All forms and records as required under the provisions of this statute shall be filed and recorded in the office of the city health department in the city in which the artificial insemination is to be performed.\textsuperscript{65}

(b) Said forms and records shall be kept strictly confidential and no person shall have access to such forms and records unless authorized by a specific court order in the appropriate jurisdiction.\textsuperscript{66}

§ 5. Status of Parties

(a) It is provided that all children heretofore and hereafter born as a result of artificial insemination shall be deemed legitimate and natural children for all purposes, of the husband


\textsuperscript{62} \textit{Id.} § 21.03 (b). The italicized portion is the author's substitute for a part of the section that specifically applies to New York. A state enacting a similar section would insert appropriate wording based on its own laws.

\textsuperscript{63} \textit{Id.} § 21.05.

\textsuperscript{64} The purpose of this section is to prevent the possibility of unknown incestuous situations. Any number might be inserted from as low as one to as high as twenty or more according to what the numerical odds are believed to be. \textit{See} note, \textit{Artificial Insemination}, 30 \textit{Brooklyn L. Rev.} 302, 321 (1964); \textit{Note, A Legislative Approach to Artificial Insemination}, 53 \textit{Cornell L. Rev.} 497, 512 n.88 (1968).

\textsuperscript{65} \textit{See} note 56 \textit{supra} and accompanying text.
and wife requesting the artificial insemination, and it is further provided that such children shall be entitled to all rights, benefits, and privileges consistent with such status.67

(b) No party (husband or wife) having consented to an artificial insemination according to the rules set forth in this statute may bring an action of annulment of a marriage for lack of consummation.68

(c) Artificial insemination shall not constitute adultery by the recipient or the donor, and their respective spouses may not bring an action for divorce based on such grounds, provided however, that the consent of such spouse as required by this statute has been executed, filed, and recorded.69

§ 5. Effect of Statute

(a) It is provided that all terms and provisions of this statute are to supercede any existing statutory provision that conflicts with said terms and provisions. Any such statute that is in conflict shall have no further force or effect. The failure to repeal or amend any such conflicting statute is not to be construed as evidence that the statutes do or do not conflict.70

Conclusion

The initial concern which any A.I.D. statute should address is the status and welfare of the child born thereby. Absence of a provision legitimizing such children results in unnecessary and unjust legal disabilities and social stigmatization. The next item of concern should be the creation of medical guidelines for the performance of artificial inseminations to insure safe and healthy implementation of the procedure. Consent forms should be required of the recipient, the husband, the donor and the donor’s wife to insure that all parties concerned fully understand their decision. The recording of such documents will prevent the assertion of claims of adultery and will preclude the granting of annulments on grounds of impotency subsequent to the birth of an A.I.D. child. The identities of all the parties involved should be kept confidential to insure that the child’s rights are not impaired and that no causes of action can be asserted against the other parties.

67 See notes 57 and 58 supra and accompanying text.
69 See Orford v. Orford, 58 D.L.R. 251 (1921).
70 It would of course be preferable to strike from the books any conflicting statutes. However, it is not always realistically possible to foresee all such situations where conflicts may arise. Conflicts between certain statutes often do not become apparent until litigation occurs and the statutes are applied. This section would resolve those situations in favor of
Finally, the number of donations allowed per donor and the number of impregnations from each donation should be limited to prevent the possibility of accidental “in-breeding.”

The foregoing proposal does not purport to be the only possible approach to the problem. However, it can function as a starting point for legislative debate from which a viable A.I.D. statute may be constructed. Whatever the ultimate form of such an enactment, it is apparent that statutory guidance must be provided.

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