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THE LEGAL INCUBATION OF ARTIFICIAL INSEMINATION: A PROPOSAL TO AMEND THE ILLINOIS PARENTAGE ACT

The number of adoptable infants has steadily declined in recent years. Consequently, many married couples have accepted artificial insemination as an alternative means of conceiving a child. Heterologous insemination is a procedure in which a married woman is inseminated with the semen of a third party donor. This procedure is commonly referred to as the Artificial Insemination Donor (AID) method. The recently enacted Illinois Parentage Act (IPA),¹ however, fails to adequately define the relationship of a child born to a married couple through heterologous artificial insemination and, therefore, several provisions of the IPA need to be amended.

In enacting the IPA, the legislature essentially adopted the language of the Uniform Parentage Act (UPA)² which expressed three vital functions. First, it legitimized a child conceived through the AID procedure as long as the husband of the impregnated woman consented to the procedure. Second, it relieved the third party donor of any parental responsibilities. Finally, it permitted the disclosure of confidential records pertaining to the insemination when "good cause" is shown.

Although the IPA effectively addresses certain valid concerns deriving from the AID procedure, the scope of the IPA is unquestionably limited. The Commissioner's comments to section 5 of the UPA noted the Act's inadequacy in dealing with many of the pressing legal issues raised by artificial insemination.³ The Commissioner urged state legislators to further consider certain legal aspects of this process before drafting legislation. Unfortunately, these comments were not heeded when the Illinois legislature passed the IPA because the IPA is virtually a mirror image of the fallible UPA.

The IPA is presently in need of reform. It should be amended to resolve three significant issues pertaining to the administration of the AID procedure. First, the IPA fails to clarify whether the insemination of a married woman constitutes adultery. In 1954, in

1. ILL. REV. STAT. ch. 40, §§ 1451-53 (1984).

2. UNIFORM PARENTAGE ACT § 5 (1973).

3. UNIFORM PARENTAGE ACT § 5 (1973) (Commissioner's comment). The Commissioner noted that "this Act does not deal with many complex and legal problems raised by the practice of artificial insemination." *Id.*

Doornbos v. Doornbos,⁴ an Illinois appellate court held that the AID method constituted adultery, on the part of the mother, regardless of whether the insemination was performed with the consent of the husband. The current trend in other states, however, is to recognize the AID procedure as outside the realm of adultery because there is no sexual intercourse between the donor and the mother.⁵

In light of *Doornbos*, Illinois arguably remains in opposition to the persuasive stand adopted by other jurisdictions. To overcome this undesirable position, the IPA should be amended to expressly state that the impregnation of a married woman by artificial insemination does not constitute adultery. This amendment would permit the married couple to utilize the AID method without any apprehension of potential criminal repercussions.

A second legal ramification of the AID procedure which the IPA does not address adequately relates to the question of legitimacy. The IPA legitimizes the AID child of a married couple so long as the husband consents, in writing, to the procedure. This language is important because if the AID child is deemed the legitimate offspring of the married couple, it must follow that the child should be regarded as the biological child of the consenting husband. This proposition poses several questions concerning the rights and obligations of a husband who consents to the AID procedure.

In *Anonymous v. Anonymous*,⁶ for example, a New York court held that a husband who had signed a written agreement consenting to the AID procedure had a legal duty to support a child conceived through artificial insemination. In *In re Adoption of Anonymous*,⁷ the consenting husband of an artificially impregnated woman was considered the "parent" of the AID child, and thus his approval was required in subsequent adoption proceedings. These cases illustrate the potential problems that the AID process generates when the husband consents to the AID procedure.

The glaring weakness of the IPA legitimacy provision, however, is that the statutory language fails to define the rights and obligations of the parties when the husband does not consent to the AID procedure. The legal status of the AID child, absent such consent, is highly speculative. Likewise, the rights and duties of the non-consenting husband remain unclear. One view is to declare the

4. *Doornbos v. Doornbos*, Super. Ct. Cook County, No. 545 14981, 23 U.S.L.W. 2308 (1954), *aff'd*, 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956) (abstract).

5. See, e.g., *People v. Sorenson*, 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968).

6. 41 Misc. 2d 886, 246 N.Y.S.2d 835 (1964).

7. 74 Misc. 2d 99, 345 N.Y.S.2d 430 (1973).

AID child illegitimate without such consent.⁸ The underlying rationale of this position is that the child was born against the will of the husband, and therefore the law should not force the husband to support the child.

Some commentators, however, have espoused an alternative theory which avoids the stigma of labeling an AID child as illegitimate.⁹ If an AID child is conceived without the husband's consent, but nevertheless is subsequently supported by the husband, then the child should be regarded as the legitimate and natural child of the married couple. Thus, if the couple is later divorced, the husband would be estopped from avoiding child support payments. An amendment to the IPA to preclude the non-consenting husband from denying his parental duties, once he manifests an initial willingness to provide for the child, would operate to guard the vulnerable rights of the AID child.

A third area in which the IPA is deficient concerns the underlying mechanics of the AID procedure. The IPA does not effectively regulate the practice of physicians who perform artificial insemination. A survey conducted by the *New England Journal of Medicine* concluded that physicians conducted negligible genetic screenings of donors.¹⁰ Less than 29% of the 700 physicians surveyed stated that they actually performed biochemical tests on the donor, and only one percent tested for the carrier state of Tay Sachs disease. Furthermore, the study found that the majority of physicians performing artificial insemination procedures were inadequately trained.

New York is one state which regulates sperm donation adequately. For instance, in New York City, the New York Municipal Code requires that AID donors undergo serological blood tests, and the state disqualifies the donor if a disease or genetic defect is detected.¹¹ The Code also penalizes physicians who ignore these pro-

8. See Smith, *Through a Test-Tube Darkly: Artificial Insemination and the Law*, 67 MICH. L. REV. 127, 145 (1968).

9. See, e.g., Comment, *Artificial Human Reproduction: Legal Problems Presented by the Test Tube Baby*, 28 EMORY L.J. 1045, 1076 (1979); Comment, *Artificial Insemination and Surrogate Motherhood—A Nursery Full of Unanswered Questions*, 17 WILLAMETTE L. REV. 913, 939 (1981). The author proposes a solution that would create "a rebuttable presumption of paternity in favor of the mother's husband . . ." *Id.* at 939. The husband could bring forth evidence "establishing that the procedure was unrequested and that the child is unwanted." *Id.* However, the child would still be afforded some protection. If the husband fails to rebut the presumption, then the child, "conceived without initial consent, but later accepted and wanted by the unconsenting husband, would not face the risk of legal bastardization." *Id.*

10. See Currie-Cohen, Lutrell & Shapiro, *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENG. J. MED. 585, 588 (1979).

11. N.Y.C. DEPT. OF HEALTH, HEALTH CODE §§ 21.01 - 21.05 (1973).

cedures. The Illinois legislature has failed to regulate this area effectively, an oversight that ultimately perils the health of the unprotected AID child. The IPA should incorporate a provision, similar to the New York Code, demanding that physicians conduct a thorough examination of the AID donor prior to his donation. Only then will the integrity of the AID procedure be preserved.

Closely related to the matter of insufficient examination of donors by physicians is the problem of incomplete medical records, and the failure of most physicians to retain permanent files of AID donors and the children conceived through the AID procedure. The New England Survey determined that there was inadequate record keeping by physicians because of physicians' concerns in protecting the confidentiality of the donor's identity.

Once again, New York stringently demands the maintenance of permanent records of the AID donor.¹² The data must reveal the test results for gonorrhea, tuberculosis, blood tests, and any other congenital disease or defect. These confidential records must also include the names and addresses of the physician, donor, and recipient. The only occasion in which these medical records may be reviewed is upon a showing of "good cause."¹³ These regulations are beneficial because they legitimately balance the competing interests of the donor's confidentiality and the disclosure of vital medical records.

The IPA refers to "records" in section 3 of the Act,¹⁴ but it does not mandate that complete files be maintained. Without this necessary stringent regulation, most physicians will not retain comprehensive medical records. Because the IPA does not require physicians to keep permanent records of the AID donor or child, it fails to effectively provide for the potential needs of the AID child who may subsequently establish valid medical reasons for obtaining the identity of the AID donor. An amended provision to the IPA directing physicians to preserve complete records of AID donors and their recipients would be a valuable and essential addition to the IPA.

A recent report indicates that over 20,000 infants are born annually as a result of the artificial insemination method of conception. Yet, the IPA does not address several complex legal issues that are incubating because of this procedure. The Illinois legislature should clarify the legal ramifications of the AID procedure for married couples by incorporating the following amendments into the IPA. First, the IPA should declare that the conception of a married woman through the AID method does not constitute adul-

12. N.Y.C. DEPT. OF HEALTH, HEALTH CODE, § 21.07(a) (1973).

13. ILL. REV. STAT. ch. 40, § 1453(a) (1984).

14. *Id.*

tery. Second, the Act should include a provision which estops a non-consenting husband from denying future parental responsibility once he has manifested a willingness to support the AID child. Finally, the IPA must be amended so that it strictly regulates the physical examination of artificial insemination donors and requires physicians to retain comprehensive medical records of the donor and the AID child. These proposed amendments to the IPA are critical because they would protect not only the participating married couple and the third party donor, but more importantly, they would preserve the legal rights of the AID child.

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