Masthead Logo

DePaul Law Review

Volume 17
Issue 3 *Summer 1968*

Article 11

Artificial Insemination - Upon Whom Shall the Duty to Suport Rest?

Walter Birk

CASE NOTES

ARTIFICIAL INSEMINATION—UPON WHOM SHALL THE DUTY TO SUPPORT REST?

The State of California brought criminal proceedings against the defendant, Follmer Sorensen, charging him with violating section 270 of the California Penal Code,[1] for failure to support a child born to the defendant's wife and conceived by artificial insemination. Because of the defendant's sterility,[2] his marriage had remained childless and after receiving the defendant's written consent, a physician inseminated the defendant's wife, as a result of which a child was born. The defendant represented to friends that he was the father of the child, and treated the child as his own. Four years after the child's birth, the Sorensens separated with Mrs. Sorensen retaining custody of the child and agreeing that the defendant would not have to provide support. The Sorensens were later divorced. Two years after the divorce decree, Mrs. Sorensen became ill and in order to support her child applied for and received financial assistance under the Aid to Needy Children Program of Sonoma County. The District Attorney's Office demanded that the defendant provide support, and when he failed to comply, they brought this action. The Municipal Court found the defendant guilty. The defendant's appeal was transferred to the Court of Appeals on certification.[3] The Court of Appeals reversed the trial court's decision, holding that the State could not sustain its burden of proving the defendant's paternity on a theory of estoppel. On rehearing the Supreme Court of California vacated the appellate court's judgment and affirmed the trial court's decision, holding that the consenting husband to artificial insemination was the lawful father of a child so conceived within the meaning of section 270 of the California Penal Code. *People v. Sorensen*, 68 Cal. 2d 285, 437 P.2d 495 (1968).

Sorensen is important as it represents the first decision of a court of last resort in the area of artificial insemination, and because it is the first criminal

[1] CAL. PEN. CODE § 270 (West Supp. 1967), "[a] father of either a legitimate or illegitimate minor child who wilfully omits . . . remedial care for his child is guilty of a misdemeanor . . . ."

[2] BLACK'S LAW DICTIONARY 1584 (4th ed. 1951) defines sterility as an "incapacity to germinate or reproduce."

[3] People v. Sorensen, 254 Cal. App. 2d 869, 62 Cal. Rptr. 462, 463 (1967): "The appeal comes before the court on certificate, pursuant to rule 62(a) of California Rules of Court, . . . that the transfer is necessary to settle an important question of law. . . . Whether the husband of a woman who, with his consent, was artificially inseminated . . . may be found guilty . . . in violation of section 270 of the Penal Code."

case to date to discuss both the legal relationship between a child conceived by artificial insemination and the consenting husband, and the corresponding liability for non-support. The purpose of this note is to analyze the reasoning of the court in determining what relationship existed, and the resulting liability. As *Sorensen* is a case of first impression, it will be necessary to examine the decisions reached by prior civil cases when faced with similar problems. Classically, there are three methods by which one could legally be considered a father: a biological father, statutory adoption, and adoption by acknowledgment. These methods have no application for determination of paternity in artificial insemination cases.[4] Since liability for non-support, both civil and criminal, is an incident of paternity, the first step in analyzing *Sorensen* will be an examination of prior artificial insemination cases in which the paternity issue was discussed. Where paternity is absent some other theory for establishing liability for non-support must be presented. Therefore, a complete analysis of *Sorensen* will require a review of the cases which have discussed liability for non-support, although finding the consenting husband not to be the father. Since legislative action will probably be required in this area, consideration will also be given to the possible effects *Sorensen* will have in instituting future legislation. Although the number of cases dealing with artificial insemination have been few, the probability of a large number of such cases arising is great.[5]

Artificial insemination is defined as "the introduction of semen of the husband (homologous) or of another (heterologous) into the vagina otherwise than through the act of coitus."[6] The legal problems concerning artificial insemination arise from heterologous insemination and hereinafter, the term artificial insemination will relate only to this type of insemination. It is the general practice of physicians in artificial insemination cases to obtain the written consent of the husband prior to treating the woman. The selection of a donor is made in such a way that his physical characteristics and appearance resemble, as closely as possible, that of the husband. The donor remains anonymous and the identity of the woman inseminated is withheld from the donor.

The decisive issue in *Sorensen* was a determination of whether the defendant, a consenting husband to artificial insemination, was the father of the child

[4] The husband is obviously not the natural father. Adoption, being statutory, requires strict compliance with the particular statute. Adoption by acknowledgment applies only to the putative father acknowledging the child as his own, after a subsequent marriage to the mother.

[5] It had been estimated that there were from 20,000 to 100,000 people born by artificial insemination in 1941 and the number could be expected to grow. Seymour and Kearner, *Artificial Insemination*, 116 A.M.A.J. 2742 (1941).

[6] STEDMAN'S MEDICAL DICTIONARY 776 (20th ed. 1961).

so conceived. Since the classical methods for establishing paternity have no application to artificial insemination, a review of how prior civil cases have handled the problem will be necessary. The earlier artificial insemination cases, when faced with the problem of determining paternity, found the consenting husband to be the father of a child conceived by artificial insemination. In these cases, the issue of paternity arose in conjunction with a determination of the husband's visitation privileges, and since the welfare of the child is given a great deal of consideration in visitation cases, it undoubtedly had a significant effect on the court's reasoning. The first of these cases, *Strnad v. Strnad*,[7] involved an action brought in order to have part of a divorce decree providing for the consenting husband's visitation rights removed. The plaintiff contended that the child was conceived by artificial insemination and by virtue of that fact the defendant was not the father. The court rejected this contention holding the husband to be the father. The theory of the court in reaching this conclusion was "[t]hat the child has been potentially adopted or semi-adopted by the defendant"[8] and the relationship between the defendant and child might be described as similar to a foster parent who had adopted the child.[9] The court further held the child to be legitimate, drawing an analogy to "the case of a child born out of wedlock who by law is made legitimate upon the marriage of the interested parties."[10] In its reasoning the court expresses its desire to protect the best interests of the child.[11] The court in *Sorensen* mentions *Strnad* as holding that a child conceived by artificial insemination with the husband's consent is legitimate but does so without any reference to the semi-adoption theory. The other case holding the husband to be the father, *People v. Dennett*[12] did so by way of dicta on grounds of public policy. In *Dennett*, the mother defended her refusal to allow her ex-husband the visitation privileges provided for in the divorce decree on the grounds that the children were conceived by artificial insemination, and therefore the plaintiff was not their father. The court held that since the defendant had never raised the issue of artificial insemination in the separation or divorce proceedings, she was now estopped from doing so. The court concluded, by way of dicta, that the child was legitimate and by implication that the husband was the father.

It may be further reasoned . . . that whatever now motivates respondent to assert the claim of artificial insemination . . . most assuredly does not inure to the

[7] Strnad v. Strnad, 190 Misc. 786, 78 N.Y.S.2d 390 (1948).

[8] *Id.* at 787, 78 N.Y.S.2d at 391.

[9] *Id.*

[10] *Supra* note 7 at 787, 78 N.Y.S.2d 392.

[11] *Supra* note 7 at 787, 78 N.Y.S.2d 391.

[12] People *ex rel.* Abajian v. Dennett, 15 Misc. 2d 260, 184 N.Y.S.2d 178 (1958).

benefit of the children. For to stigmatize them as children of an unknown father by means of artificial insemination . . . is no more, in my view, than an attempt to make these innocents out as children of bastardy. . . .[13]

Two more recent cases, have held the husband not to be the father. Both of these cases involved the problem of civil liability for child support and therefore have a closer relationship to *Sorensen*. In *Gursky v. Gursky*,[14] an action for annulment, the husband contended that the marriage was never consummated and that there was no issue as a result of the marriage. The court agreed with this contention, holding by implication that the husband was not the father of the child conceived by artificial insemination. The court reached this conclusion by relying on the Illinois case of *Doornbos v. Doornbos*.[15] The *Doornbos* court held:

Heterologous artificial insemination (when the donor is a third party) with or without the consent of the husband, is contrary to public policy and good morals and constitutes adultery on the part of the mother and the father has no right or interest in the child.[16]

It is difficult to determine what weight *Doornbos* will have in future cases since the holding therein is neither based on precedent nor accompanied by a discussion of the court's reasoning in reaching its conclusion. The *Gursky* court went on to reject the *Strnad* decision, criticizing the semi-adoption theory on the grounds that it was an attempt to contravene the adoption statutes. However, the court in *Gursky* did find that the husband was liable for the support of the child. The holdings in *Gursky* were essentially accepted in a similar factual situation in the next year by the court in *Anonymous v. Anonymous*.[17]

Although *Sorensen* found liability for non-support, as did *Gursky*, it predicated the liability on entirely different grounds. To fully understand this holding, it will be useful to analyze the grounds upon which *Gursky* predicated liability, notwithstanding its finding of non-paternity. The civil liability for support in *Gursky* was based on estoppel, the court holding that the husband by his consent created an implied contract to support and was estopped from denying his liability. *Anonymous*, following this reasoning, came to a similar conclusion.

Although the civil cases were able to base liability on grounds of estoppel, notwithstanding a lack of paternity, *Sorensen*, being criminal in nature, did not have this alternative. Being a criminal action, a determination of non-

[13] *Id.* at 263-64, 184 N.Y.S.2d at 182-83.

[14] 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (1963).

[15] Doornbos v. Doornbos, No. 54 S. 14981 (Superior Court, Cook Co., Dec. 13, 1954).

[16] *Id.*

[17] 41 Misc. 2d 886, 246 N.Y.S.2d 835 (1964).

paternity was fatal to the state, for while it may be possible that some element of a criminal action may be based on estoppel, criminal liability in toto cannot, as it would be a deprivation of due process. The state at the appellate court level did attempt to use the estoppel theory in a unique manner, contending that the defendant by his consent was estopped from denying his paternity, one element of the crime. The court rejected this contention, reasoning that the only cases presented by the state in which estoppel was permitted in criminal actions, were cases of embezzlement,[18] and therefore in the court's opinion, estoppel was not permissible for proving paternity. The appellate court, noting that the three classical methods for establishing paternity were not applicable,[19] and rejecting the state's estoppel argument, concluded that the state had not sustained its burden of proving the defendant's paternity and therefore criminal liability could not exist.

In vacating the appellate court's judgment and affirming the trial court's decision, the Supreme Court held that a consenting husband to artificial insemination was the lawful father of a child so conceived within the meaning of section 270 of the California Penal Code and therefore liable for non-support. The court did not consider the theory of estoppel in reaching this conclusion although estoppel was the basis of both lower courts' decisions. The crucial issue in *Sorensen* was a determination of whether the legal relationship of father-child existed. The court held that the word father within the meaning of section 270 is not limited to a natural father, and that since the donor is not the natural father within the meaning of that word, none would exist, and therefore the court must look for a lawful father. This required an interpretation of the statute, first as to the meaning of the word father, by using principles of statutory construction, and then an interpretation of the statute in toto, in light of legislative intent as to the objective to be reached. The court by applying two principles of statutory construction[20] held the defendant to be the lawful father, stating that ". . . a reasonable man who, because of his inability to procreate, actively participates and consents to his wife's artificial insemination . . . knows that such behavior carries with it the legal responsibilities of fatherhood and criminal responsibility for nonsupport."[21] The court then found that although the legislature probably did not consider cases of artificial insemination, "the

[18] People v. Sorensen, 254 Cal. App. 2d at —, 62 Cal. Rptr. 465 (1967).

[19] *Id.* at —, 62 Cal. Rptr. at 464.

[20] 68 Cal. 2d at —, 437 P.2d at 499:

Penal statutes are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice. . . . [t]he Court must endeavor, if possible, to view the statute from the standpoint of a reasonable man who might be subject to its terms . . . .

[21] *Id.* at —, 437 P.2d at 499.

intent . . . obviously was to include every child, legitimate or illegitimate, born or unborn, and enforce the obligation of support against the person who could be determined to be the lawful parent."[22] The court found that viewing the statutes with the expanded interpretation of "father" "does not distort the statutory language, and it achieves the statutory objective of providing support for the child and prevents an obvious injustice. . . ."[23] In reaching this conclusion, the court cites *Gursky* for its implied contract theory. The court further supports its holding on the grounds of public policy in that if the consenting husband were not liable, the child would become a ward of the state in the event of the mother's inability to support. The court further notes that to hold any other way would be to place the social stigma of having no father on the child and would therefore not be in his best interests. *Sorensen* also holds, by way of dicta, that in the absence of a statute prohibiting artificial insemination, the child is legitimate and was not the product of an adulterous relationship.[24] In supporting these holdings, the court notes the absurdities reached if insemination were considered an adulterous act. The court supports its legitimacy holding, on the grounds that the public policy of the state favors legitimation and that no valid purpose could be served by holding otherwise. Although the court does reach these conclusions, it did so by way of dicta, recognizing that these areas are properly subjects for legislative action.

Being the first case in which a court of last resort has faced the issue of artificial insemination, *Sorensen* is extremely important. The court's determination of paternity and criminal liability for non-support was restricted to section 270 of the California Penal Code. However, the overall import of the decision, considering the dicta regarding legitimacy and adultery, represents a complete reversal and liberalization of judicial attitude towards artificial insemination, as contrasted with the holdings in *Doornbos* which were representative of the prior judicial attitude on artificial insemination. *Sorensen*, by holding that the consenting husband is the lawful father, the child is legitimate, and the wife is not an adulteress, reaches conclusions exactly opposite to *Doornbos*. Since *Doornbos* was a trial court decision, neither citing precedents nor providing reasoning to support its holding, the well-reasoned opinion of the *Sorensen* court and sensible results reached therein will be influential in creating a favorable judicial attitude towards artificial insemination in the United States.

Sorensen is of further importance, being a case of first impression as to the criminal liability for non-support of a consenting husband to artificial insem-

[22] *Id.* at —, 437 P.2d at 498.

[23] *Id.* at —, 437 P.2d at 501.

[24] Id. at —, 437 P.2d at 501.

ination. In jurisdictions where the objectives of the particular criminal support statute are similar to the California Code and it appears that the legislature has not considered the problem of artificial insemination, *Sorensen* will be authority for broadening the interpretation of "father" within the particular criminal statute so as to encompass the husband who consents to artificial insemination. In jurisdictions where the legislature has refused to consider proposed artificial insemination legislation,[25] this refusal may be interpreted as an intention by the legislature to preserve a strict interpretation of "father" and therefore *Sorensen* may not be applicable. A reasonable alternative for basing liability in this situation would be to hold the consenting husband estopped from denying his paternity. Although this argument was rejected by the appellate court in *Sorensen*,[26] the strength of this rejection is questionable in light of Justice Finlayson's concurring opinion in *People v. Main*,[27] a case not cited by the court, in which a general rule for when estoppel should be available in criminal cases was set forth.

> The sole basis for the application of the doctrine of estoppel in criminal cases is the existence in some individual of a private right, depending for existence upon the acts of estoppel, which right was invaded by the accused when he committed the crime.[28]

Applying this rule to *Sorensen*, the child's right to support is dependent for existence on an estoppel arising out of the defendant's consent, and it is the violation of this right which constituted the crime. This application is supported by the Tennessee case of *Hale v. State*,[29] a criminal action for failure to support a wife. Here the defendant alleged that since he had entered into a common law marriage, and Tennessee does not recognize the validity of such a marriage, he was not legally the husband and therefore could not be liable for support. The court found the defendant guilty of non-support, holding that although his common law marriage was invalid, he was estopped from denying its validity. Thus in a criminal support action, the defendant was estopped from denying his relation as husband to the person he failed to support. This is analogous to *Sorensen* where, instead of estoppel being used to establish the husband-wife relationship, it was attempted as a means of establishing the father-son relationship. Little, if any difference, can be seen between the two situations.

[25] Indiana (1949); Minnesota (1949); New York (1948, 1950); Ohio (1955); Virginia (1948); Wisconsin (1949); *Medicolegal Aspects of Artificial Insemination: A Current Appraisal*, A.M.A.J. 1640 (April 30, 1955).

[26] 254 Cal. App. 2d —, 62 Cal. Rptr. 465.

[27] People v. Main, 75 Cal. App. 471, 242 P. 1078 (1926).

[28] *Id.* at 1084.

[29] 179 Tenn. 201, 164 S.W.2d 822 (1942).

The reasoning of *Sorensen* will probably be extended so as to place liability on the consenting husband under civil support statutes. Once again, this application would be valid only in jurisdictions where there was apparently no legislative consideration of artificial insemination, and the objectives of the statute were similar to those of section 270 of the California Penal Code. Where these limitations are not met, a reasonable alternative in this situation would be to predicate liability for civil support on a theory of estoppel or implied contract as in *Gursky*.

In the absence of legislative action to the contrary, the dicta in *Sorensen* will be authority for the proposition that a child conceived by artificial insemination is legitimate, and the act itself, when done with the husband's consent, does not constitute adultery. What position the courts will take regarding these matters, when the husband does not consent, is questionable. It seems fairly certain however that *Sorensen* will not be applicable.

Sorensen will probably be influential in instigating legislation. As well reasoned a decision as *Sorensen* is, it is still a stop-gap solution at best. The *Sorensen* court recognized this need for legislative action in its opinion.[30] In prospective, *Sorensen* represents a step forward by the courts, in recognizing the unique problems raised by artificial insemination and the need for responsible solutions, and in so doing will surely act as a gentle prod to state legislatures in general and the California legislature in particular.

It is apparent that the present laws are inadequate in resolving all the legal problems created by artificial insemination. Satisfactory solutions can only be attained through legislative action. Although legislation has been proposed in a few states,[31] Oklahoma and Georgia[32] have been the only states to take positive action. In May 1967, Oklahoma passed a statute[33] allowing artificial insemination to be performed by licensed physicians where the written consent of both the wife and husband had been obtained. The statute provides that a child so conceived shall be deemed in law the same as a naturally conceived child. As pointed out in a recent medical journal, it is not as important what the legislature says, as that it says something. "At least any stand would constitute a bit of *terra firma* in a sea of uncertainty."[34] In considering the need for legislative action, the words of Justice Cardozo are well taken: "[I]t is for the legislature to declare when conscience is disturbed."[35] There is an

[30] *Supra* note 20 at —, 437 P.2d at 501.

[31] *Supra* note 25.

[32] 74 GA. CODE ANN. § 74-101.1 (Supp. 1964).

[33] OKLA. STAT. tit. 10, §§ 551-553 (Supp. 1967).

[34] Abel, *The Present Status of Artificial Insemination*, 85 SURGERY GYNECOLOGY AND OBSTETRICS 528 (1947).

[35] People v. Westchester Co. National Bank, 231 N.Y. 465, 487, 132 N.E. 241 (1921).

analogy to be drawn between the present situation and that of a child conceived in a bigamous marriage. In this instance the Illinois legislature enacted a statute making the child legitimate.[36] So long as the Illinois legislature refuses to take any action regarding the legal status of artificial insemination, no reason can be seen for not enacting a statute, as in Georgia,[37] legitimizing the children so conceived in an effort to protect these innocents.

Walter Birk

[36] ILL. REV. STAT. ch. 89, § 17(a) (1967).

[37] *Supra* note 32.

CONSTITUTIONAL LAW—DUE PROCESS—DEFENDANT'S RIGHTS DURING EXTRA-JUDICIAL IDENTIFICATION DEFINED

Ernest Crume was arrested by the Houston, Texas police for drunkenness on December 14, 1956. Later the police questioned him concerning a robbery which had occurred four days earlier, and in pursuit of their suspicions, had him appear in several lineups. As a result of one of these lineups and an individual confrontation, he was identified by the victim of the robbery and subsequently convicted. During the lineup in which the identification was made, the officers singled the defendant out from the other participants, forced him to wear a hat and to repeat the words, "This is a stickup." In the later confrontation, which occurred in a private office, he was asked to wear a jacket which matched the description of that worn by the robber and to walk alone past the witness, again repeating the words he had spoken in the lineup. In both instances, the individual attention focused on the defendant was not police-instigated, but was arranged at the request of the witness in order that she might be as certain as possible before making a positive identification. In a federal habeas corpus proceeding, the United States District Court for the Southern District of Texas denied the defendant relief. In affirming that decision, the United States Courts of Appeals addressed itself primarily to Crume's contention that the police, by exerting a suggestive influence on the witness, had rendered the means of identification so unfair as to be in violation of his right to due process. *Crume v. Beto*, 383 F.2d 36 (5th Cir. 1967).[1]

[1] Circuit Judge Rives specially concurred in the result only, on the grounds that the prisoner had not exhausted his state remedies as to the question of due process and that the question was not properly before the court since it had not been considered or decided by the Federal District Court. Crume v. Beto, 383 F.2d 36, 41 (5th Cir. 1967).