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Domestic Relations: Heterologous Artificial Insemination

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and inoffensive man could be unduly restrained without any remedy. The granting of a request for a hearing concerning restraint leads to an adversary procedure where essential facts can be determined and preserved in the record for appeal. The law is well established that a defendant charged with crime should not be denied those procedural remedies that are of the essence of an opportunity to defend.[16] Plagiarizing the tongue-in-cheek phraseology of Judge Nix in the *French* case, we may conclude that defendants tied to logs, enclosed in steel cages, or otherwise restrained unjustly, will cease to be a problem if such a hearing procedure is adopted.

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DOMESTIC RELATIONS: HETEROLOGOUS ARTIFICIAL INSEMINATION

In *Gursky v. Gursky, —Misc.2d—, 242 N.Y.S.2d 406 (1963)* the husband sued for annulment of marriage and separation from his wife who had, with the plaintiff's consent submitted herself to the technique of heterologous artificial insemination, and as a result of said technique, had given birth to a daughter. The wife counterclaimed for separation.

It was stipulated by the parties that there had been a failure of consummation of the marriage and as a result of this failure both agreed in writing that the wife would be artificially inseminated with the semen of a third party donor.[1] Included in this written agreement was a promise by the husband to pay all expenses resulting from the insemination. The court in deciding the wife's counterclaim held that the husband, as the result of an implied promise, was liable for support of the child but ruled, nevertheless, that the child was illegitimate in the eyes of the law.

> "Unless there can be read into the statutory enactments of this state, dealing with persons born out of wedlock, an intention to modify the settled concept as to the status of a child whose father was not married to its mother, it *must* be presumed that the historical concept of illegitimacy with respect to such a child remains in force and effect."[2]

This decision was based on the settled common law concept

[16] Snyder v. Commonwealth, 291 U.S. 97, 122, 54 Sup.Ct. 330, 338, 78 L.Ed. 674, 686 (1933).

[1] Artificial insemination which utilizes a third party donor is known as heterologous artificial insemination (A.I.D.) as distinguished from homologous artificial insemination where the husband is the donor of the semen (A.I.H.), Johnston, *Family Law*, 31 N.Y.U.L. REV. 368 (1956).

[2] 242 N.Y.S.2d at 409 [Emphasis added.].

of illegitimacy,[3] as adopted by the statutes of New York.[4] More specifically, the court said that these laws are applicable in instances involving children begotten by heterologous artificial insemination.[5] But the common law concept of illegitimacy as adopted by statute did not, indeed could not have, envisioned the biological technique of artificial insemination and it was therefore with futility that the court looked to those statutes for guidance in the *Gursky* case. The failure of a legislature to act in a new area does not necessarily mean that the legislative intent is to apply existing statutes to an entirely different concept of the law. Is it any wonder that state legislatures hestitate to act in an area as tenuous as this? Heterologous artificial insemination is tightly enterwoven with problems of legitimacy, negligence, malpractice and inheritance, to name but a few. That legislation dealing with this problem is slow in coming is understandable but the lack of it should not give license to the courts to apply statutes in an area where they have no reasonable or logical application.

When the *Gursky* case is considered in light of the statute applied and the lack of case law to use as precedent, it appears to be a well reasoned case. But however well reasoned it may be, the result is still obnoxious to ones sense of justice.

In *Strnad v. Strnad*,[6] the court, while aiming at the correct end result attempted to formulate a new theory of law by which a child, born to a wife as the result of heterologous artificial insemination and performed with the consent of the husband, could be made legitimate in the eyes of the law. The court used the words "partial" and "semi-adoption" in an attempt to establish a constructive parentage on the part of the husband. The court in the *Gursky* case rejected this theory and pointed out that legal adoption is statutory and cannot be conferred by the court.[7]

In both the *Gursky* case and the *Strnad* case the court was confronted with heterologous artificial insemination performed on the wife with the husband's consent. In the latter case, the court recognized the importance of the husband's consent and stated: " . . . [A]ssuming again that plaintiff was artificially inseminated with the *consent* of the defendant, this child is not an illegitimate child."[8]

The court in the *Gursky* case recognized that the document of "consent" signed by the husband and entered into evidence, constituted more than a mere acquiescence or approval by him to the

[3] One begotten and born out of lawful wedlock is termed a bastard. *Ibid. Ex parte* Newsome, 212 Ala. 168, 102 So. 216 (1924); Curry v. Maynard, 227 Ind. 46, 83 N.E.2d 782 (1949); State v. Coliton, 73 N.D. 582, 17 N.W.2d 546 (1945); Annot., 156 A.L.R. 1403 (1945).

[4] N.Y. FAMILY COURT ACT ANN. § 512 (Thompsonn 1962).

[5] 242 N.Y.S.2d at 410.

[6] 190 Misc. 786, 78 N.Y.S.2d 390 (1948).

[7] 242 N.Y.S.2d at 411.

[8] 190 Misc. at 786, 78 N.Y.S.2d at 392. [Emphasis added.]

procedure. It was rather a request by the husband made to the physician to perform the artificial insemination upon his wife. This "consent" is the tool by which a child so conceived may be deemed legitimate.

The law presumes the legitimacy of a child born during a state of lawful matrimony.[9] But this is a presumption which may be rebutted should the husband present evidence to prove that the child, even though born during the course of his marriage to the child's mother, was conceived by her in an adulterous relationship.[10]

In the *Gursky* case, the child was born during the lawful marriage of the parties; the presumption of legitimacy therefore attaches. But the child's father was not the mother's husband. The question now becomes; is the act of conceiving through heterologous artificial insemination an act of adultery? Arguably not, because conception was not coupled with an act of voluntary sexual intercourse which is a necessary element in establishing adultery.[11] Conception was accomplished by a scientific technique consented to by each spouse in order to gain a child for the mutual benefit and pleasure of both. Where consent, approval and request are evidenced by conduct and contract, the parties should both be estopped from denying the legitimacy of the child.

The doctrine of equitable estoppel may be applied where one party assumes a position which, if not maintained, will result in an injustice to another.[12] Certainly, the husband in the *Gursky* case assumed the position of prospective father and subsequently the position of father. If he is allowed to change this position, an injustice accrues to both the wife and the child.

An estoppel arises when one by acts, representations, admissions or silence intentionally induces another to change his position for the worse.[13] The husband requested in writing that the procedure be performed. He promised to pay all expenses arising out of the act; and no evidence was entered to show that his wife would have submitted to the procedure without her husband's consent. Not only did he induce his wife to act to her detriment but by living with her after the procedure was accomplished he ratified it! Now he wishes to deny the legitimacy of the child. If, as in the *Gursky* case, the plea of illegitimacy is allowed the court sanctions the infliction of an outrage upon the wife and her child. Estoppel,

[9] Duke v. Duke, 185 N.E.2d 478 (Ind. 1962); State *ex rel* Satterfield v. Sullivan, 115 Ohio App. 347, 185 N.E.2d 47 (1962).

[10] State *ex rel* Satterfield v. Sullivan, *supra* note 9.

[11] Commonwealth v. Moon, 151 Pa. Super. 555, 30 A.2d 704 (1943); Ermis v. Ermis, 255 Wis. 339, 38 N.W.2d 485 (1949).

[12] Dodd v. Rotterman, 330 Ill. 362, 161 N.E. 756 (1928); Young v. Venters, 229 Ky. 806, 18 S.W.2d 277 (1929); Seire v. Police & Fire Pension Comm'n, 4 N.J. Super. 230, 66 A.2d 746 (1949).

[13] Posner v. United States Fid. & Guar. Co., 33 Misc.2d 653, 226 N.Y.S.2d 1011 (Sup.Ct. 1962); Neverett v. Towne, 121 Vt. 447, 159 A.2d 345 (1960).

in its broadest sense, is penalty paid by one for affirmative acts which inflict injury upon another, and its application here would seem appropriate.

Under the circumstances of this case and others which will follow involving heterologous artificial insemination with consent of the husband, it would seem logical and just to place the responsibility of parenthood upon the husband's shoulders as though he were the natural father, for this is the intent of the parties when agreement and consent is given. Such is the responsibility imposed upon the foster parents of adopted children.

A plea of estoppel neither admits nor denies the facts alleged by the plaintiff, who in the *Gursky* case was the husband, but denies his right to allege them,[14] thus allowing the presumption of legitimacy to stand.

In a volatile environment such as ours, man finds himself confronted daily with frustrations ignited by the constant flux of his surroundings. Because most of us tend to seek stability and security, we build within ourselves a wall of resistance to these changes. The net result of this repulsion to change has been described as cautious, conservative and backward. In the area of science, this trait results in what is referred to as the 'sociological lag.' This 'lag' appears in all phases of human endeavor and manifests itself in an unwillingness to keep pace with technological progress. John Adams acknowledged this trait when he said: "All changes are irksome to the human mind, especially those which are attended with great dangers and uncertain effects."

Such resistance to change has a beneficial effect on our society by adding an element of stability to what would otherwise be a tortuous day by day fight to adapt. In the field of law, resistance to change appears in the principle of stare decisis. This system of jurisprudence derives part of its strength from a resistance to change coupled with the ability to do so as the need arises. But the court in the *Gursky* case adhered to the common law with such tenacity that a sound decision based on the best interest of the child was impossible. Occasionally, as in the *Gursky* and *Strnad* cases, the courts find themselves confronted with a set of facts for which there is no established body of law. In such instances the duty of the court is to render a just and beneficial remedy which may be used as precedent in future litigation involving the same subject matter.

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[14] Emerson-Brantingham Implement Co. v. Arrington, 216 Ala. 21, 112 So. 428 (1927).