

**Legal Aspects of Artificial Human Reproduction:
Can the Law Afford to Play Ostrich?**

by

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I. INTRODUCTION

When Aldous Huxley wrote 'Brave New World'¹ in 1931 he projected the emergence of his vision six hundred years into the future. In 1946 he considered that 'today it seems quite possible that the horror may be upon us within a single century.'

While the advent of test-tube babies and hired wombs may seem a far call from the state of affairs Huxley depicts, these changes are already with us and, as this article will show, are capable of causing considerable problems for the lawyer.

Artificial insemination can be defined as the medical procedure by which male semen is introduced into the female reproductive organs by means other than copulation for the purpose of procreation. As practised among humans a differentiation is made according to the source of the semen which is used. A.I.H. (artificial insemination husband) uses the semen of the husband of the woman inseminated. If the semen is provided by a person other than the husband A.I.D. (artificial insemination donor) is the usual term employed. The use of mixed husband and donor sperm is referred to as A.I.C. (artificial insemination combined).

Artificial insemination as a voluntary medical technique to achieve human conception is generally used to overcome problems of male infertility, impotence and communicable heredity defects.

Artificial insemination gives rise to a wide variety of legal considerations which require to be clarified. These include the question of the legality of artificial insemination, the status of the child born as a result of artificial insemination, the mutual rights and obligations of the child and its parents, and the duties of the inseminating physician and the donor.

¹ Huxley Aldous, *Brave New World*, 1977, Triad/Panther Books, 14.

II. ARTIFICIAL INSEMINATION

1. *The Legal Status of Artificial Insemination*

The legal status of artificial insemination has yet to be clarified in the United States, Canada, the United Kingdom, Australia and New Zealand although fifteen American states have implicitly recognised its legality in their legislation.

It has been suggested for example, that artificial insemination may constitute a criminal conspiracy to produce an illegitimate child, or that it may give rise to a charge of assault and battery or some other offence against the person, where it is carried out without the consent of the person inseminated. However for practical purposes, both possibilities can be discounted. Firstly, because it is unlikely that the elements of conspiracy to effect an unlawful purpose would be applicable to artificial insemination, and if they were it is doubtful that the parties to such an operation would be charged with the offence. Secondly, artificial insemination without consent is highly improbable.

The question of whether artificial insemination constitutes adultery has been widely canvassed by American courts.

In *Orford v. Orford*² a decision of the Ontario Supreme Court, A.I.D. was denounced as adultery, with or without the husband's consent. A.I.D. was considered adulterous because:

the essence of the offence 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 . . .³

In 1954 an Illinois court also stated that A.I.D. amounted to adultery.⁴ More recently the Californian Supreme Court in *People v. Sorenson*⁵ defined adultery as necessarily involving sexual intercourse and articulated the modern position on the subject.

Since the doctor may be a woman, or the husband himself may administer the insemination by a syringe, this is patently absurd; to consider it an act of adultery with the donor who at the time of insemination may be a thousand miles away, or may even be dead; is equally absurd.⁶

Today in the light of legislation favourable to artificial insemination it seems doubtful that any American court would hold that A.I.D. constitutes adultery.

In Australia and New Zealand the question is largely an academic one. Under the common law the act of adultery required among other things, some penetration of the female organ by the male organ.⁷ In

² (1921) 58 D.L.R., 251.

³ *Ibid.*, 258.

⁴ 23 U.S.L.W. 2308 (1954).

⁵ 68 CAL 2d 280, 437, P2d 495 (1968).

⁶ *Ibid.*, 289, 501.

⁷ *Locke v. Locke*, (1956) 95 C.L.R. 165.

*Maclennan v. Maclennan*⁸ Lord Wheatey made it clear that A.I.D. without the husband's consent could not amount to adultery in Scottish law, indicating that the law must be similar in England.

The Family Proceedings Act 1981 in New Zealand and the Commonwealth Family Law Act 1975 in Australia render any legal as opposed to moral discussion of adultery in relation to A.I.D. superfluous. Section 48 of the Australian Act and section 39 subsection (1) of the New Zealand Act provide that the irretrievable breakdown of marriage is henceforth the sole ground for a decree of dissolution of marriage.

2. *The Status of the A.I. Child*

The status of the A.I.D. child is of legal concern. The issue of legitimacy does not arise in relation to A.I.H. and arguably is of more limited application to the A.I.C. child.

In America several decisions have held that a child conceived by A.I.D. is illegitimate even when the mother's husband has consented to the procedure.

In *Gursky v. Gursky*⁹ the issue to be decided by the court was whether the husband had an obligation to support the consensual A.I.D. child. The court held that in the absence of a statutory device equivalent to adoption, it had no authority to legitimate an A.I.D. child. The court also emphasised

the concept . . . historically imbedded in the law . . . that a child who is begotten through a father who is not the mother's husband is deemed to be illegitimate.¹⁰

However the court's assertion that the notion is 'deeply imbedded' in American law is belied by the traditional rule that a child born to a married woman is presumed to be the legitimate child of the woman's husband. It is anomalous that this traditional rule would be applied to legitimate a child conceived by extra-marital sex but not one conceived by A.I.D.

By contrast other courts have not hesitated to legitimate A.I.D. children and the modern trend is clearly in favour of legitimation.

In *Strnad v. Strnad*¹¹ the court held that an A.I.D. child was legitimate. Custody proceedings resulted in the awarding of the child to the mother, but notwithstanding that the child was conceived by consensual A.I.D., the court held that the best interest of the child called for visitation by the husband. The court considered that

logically and realistically the situation is no different than that pertaining in the case of a child born out of wedlock who by law is made legitimate upon the marriage of the interested parties.¹²

⁸ [1958], SC 105.

⁹ 39 MISC 2d 1083, 242 N.Y.S. 2d 406 (1963).

¹⁰ *Ibid.*, 1085, 408.

¹¹ 190 MISC 786, 78 N.Y.S. 2d 390 (1948).

¹² *Ibid.*, 789, 392.

More recent cases ruling that A.I.D. children are legitimate rest primarily on the ground that there is a strong public policy in favour of legitimacy. This was the approach taken in both *re Adoption Anonymous*¹³ and *People v. Sorenson*¹⁴ which recognised that the law favours legitimation to protect the integrity of the family unit and that no useful purpose is served by stigmatising an innocent A.I.D. child as illegitimate.

In *People v. Sorenson*¹⁵ the court considered that:

A reasonable man, who, because of his inability to procreate, actively participates and consents to his wife's artificial insemination, in the hope that a child will be produced whom they will treat as their own, knows that such behaviour carries with it the legal responsibilities of fatherhood and criminal responsibility for non-support.¹⁶

Many American States have enacted statutes which create a legal presumption of legitimacy for A.I.D. children when the mother and her husband have given their written consent to the procedure. The trend both legislatively and judicially favouring legitimation is important in that it promotes the psychological welfare of the A.I.D. child, facilitates the paternal role of the man who consented to the child's conception and fosters nuclear family solidarity. The family unit need not be disrupted by legal problems of the father being required to adopt his own child and the unit of mother, father and A.I.D. child is rendered virtually indistinguishable from natural family units. As the present goal of artificial insemination is to enable those who cannot conceive their own children to become parents, these steps represent a welcome clarification of the status of the A.I.D. child.

In Australia and New Zealand the common law rule that a child born to a woman who is unmarried or whose biological father is a person other than the husband of its mother is illegitimate has been eroded by legislative abolition of the status of illegitimacy.¹⁷ The general rule is further affected by the strong presumption that a child born to persons who were married to each other at the time of the child's birth is legitimate.

The presumption of legitimacy in New Zealand applies to children born to a woman during her marriage or within ten months after the marriage has been dissolved by death or otherwise.¹⁸

Thus an A.I.D. child born within a marriage is presumed to be the child of its mother and her husband or former husband. It is therefore not necessary that the social father of the A.I.D. child adopt the child or that a paternity order under section 47 subsection (1) of the Family

¹³ 74 MISC 2d 99, 345 N.Y.S. 2d 430 (1973).

¹⁴ 68 CAL 2d 280, 437 P2d 495 (1968).

¹⁵ *Supra*.

¹⁶ *Ibid.*, 285, 499.

¹⁷ S.2, Status of Children Act 1969 (NZ).

¹⁸ S.5, Status of Children Act 1969.

Proceedings Act 1980 be sought.

However where the A.I.D. child born within the marriage is non-consensual or disputes arise between the husband and the wife, there may be an attempt to rebut the presumption of paternity.

The presumption is rebutted by adducing evidence that the mother's husband is not the father of the child. Evidence may take the form of blood tests, proof that the husband was impotent or sterile at the time of the child's conception, or proof of non access by the husband.

Where it is sought to rebut the presumption of paternity, the fact that the husband's name is on the birth register, a deed of acknowledgement of paternity and implied admission of paternity by conduct will only serve as prima facie evidence of paternity. On the other hand a paternity order pursuant to the Family Proceedings Act 1980 or a declaration of paternity pursuant to section 10 of the Status of Children Act 1969 operate as conclusive proof of paternity.

The confidentiality of artificial insemination renders it unlikely that evidence that might rebut the presumption of legitimacy will come to light.

However where the husband actively seeks to rebut the presumption the status of the A.I.D. child is vulnerable.

In the case of an unmarried woman with an A.I.D. child the issue of paternity is unlikely to arise so long as the sperm donor remains anonymous. In this respect confidentiality is crucial to protect the interests of the donor. However where it is in the best interests of the A.I.D. child to learn the identity of the donor father, the law may be called upon to compromise between two conflicting interests.

It is submitted that American legislation legitimating the A.I.D. child could provide guidelines for similar legislation in New Zealand. Typically the American statutes set forth some combination of the following conditions in order to legitimate the child. The child must be born to a married woman; the artificial insemination must be performed by a licensed physician; the woman and her husband must consent to the insemination; and the consent must be in writing.

Arguably these statutes do not adequately regulate the practice of artificial insemination but they do provide at the least a foundation for the legitimation issue which is basic to a determination of the rights of a child born as a result of the artificial insemination. The inadequacies stem from a lack of consideration of three important issues. Firstly the legal implications of artificial insemination outside the context of marriage have not been considered. While public policy appears to favour the requirement that a child be provided with a father as well as a mother, the use of artificial reproductive technology by unmarried persons is a proper matter for legislative concern.

Secondly, the donor child relationship has received little attention. The issue in most artificial insemination controversies is whether the husband of the mother is the A.I.D. child's legal father, and the A.I.D. donor has been insulated from support liability. If however, the donor's identity becomes known, the child could be deemed his 'illegitimate' child. As a result the donor would be subject to liability for the child's support. Where a single donor contributes to the conception of many children, he could thus be subjected to substantial liability.

Finally none of the statutes grants an A.I.D. child any rights in the event the husband fails to consent to his wife's insemination. Legitimation under these statutes is apparently conditioned on his affirmative agreement to the procedure. This conditional legitimation is in decided contrast to the common law and modern statutory presumptions of legitimacy for a child born within a marriage or shortly thereafter. In the absence of a statute requiring the husband's consent, the legitimacy of a non-consensual A.I.D. child would be presumably determined in the same way as that of a naturally-conceived child whose father is not the husband of its mother, since the artificial nature of the conception should not per se mandate different considerations.

The statutory consent requirement would be a reasonable precondition to legitimacy if absence of consent were defined to include only an affirmative objection. Consent might then include implied consent or failure to affirmatively object to the procedure. Without such a provision an A.I.D. statute could place an A.I.D. child in a legal status inferior to that occupied by his naturally conceived but equally 'illegitimate' counterpart, who has at least the benefit of the presumption of legitimacy. This result seems inequitable in the light of the general trend towards granting illegitimate children legal equality with legitimate children.

It is submitted that a consideration of the American legislation together with an examination of the inadequacies would lay the groundwork for a law protecting the interests of the A.I.D. child.

3. *Custody Support and Inheritance of the A.I.D. Child*

The uncertain status of the A.I.D. child raises the question of custody, support and the mutual rights of inheritance between such a child and its parents.

In America according to the statutes and recent case law under which A.I.D. children are deemed legitimate, the husband of the child's mother, if he consents to the A.I.D., possesses the same legal rights and obligations as a natural parent. The husband's consent to

the A.I.D. child operates as an implied promise to support the child which may not be repudiated at a later time, even after a divorce.

In *People v. Sorenson*¹⁹ the Supreme Court of California upheld a criminal prosecution against a man for the failure to provide support for a child born to a former wife as a result of A.I.D. The court observed that a husband who consents to the procreation of a child cannot create a temporary relationship to be assumed and disclaimed at will, rather, the relationship must be one where the husband bears the obligation to support the child for whose existence he is directly responsible.

The husband also possesses the same legal rights as a natural parent. In *Abajan v. Dennett*²⁰ and *Strnad v. Strnad*²¹ former husbands were held to be entitled to visitation rights in respect of A.I.D. children.

In Australia and New Zealand the duty of parents to maintain a child conceived as a result of A.I.H. differs in no respect from their legal obligation to maintain other children. The same duty applies in relation to an A.I.D. child provided that the husband of its mother has accepted the child into the family unit and is presumed to be the father, or is at least in loco parentis to the child.

There is a high correlation between the right of custody and the duty to support an A.I.D. child. In the relevant New Zealand and Australian Acts 'child of the marriage' is defined sufficiently broadly to include children born by artificial insemination. As a 'child of the marriage' the A.I.D. child is entitled to support and the parents assume obligations of maintenance and acquire rights of guardianship and custody in respect of that child.

Problems arise however, where the mother of an A.I.D. child and her husband live apart and proceedings are taken by one of the parties to the marriage for maintenance and custody of the child. In such proceedings the paternity of the child may be in issue. Should the presumption of legitimacy be rebutted, the respective rights of the parents and child are seriously affected.

Under the traditional rule the mother of an illegitimate child normally has the right to custody of the child. Therefore in the case of the A.I.D. child, who has been declared 'illegitimate' the mother of the child has a greater right to the custody than his natural father or her estranged husband where the child is not a 'child of the marriage'. However, both the husband of the mother and the natural father are entitled to apply for custody of the child.

Maintenance orders under Part VI of the Family Proceedings Act may be made in respect of an A.I.D. child who is a 'child of the

¹⁹ *Supra*.

²⁰ 15 MISC 2d 260, 184 N.Y.S. 2d 178 (1958).

²¹ *Supra*.

marriage' upon separation.

The succession rights of an A.I.D. child, are in the absence of express testamentary provision, predicated on the question of legitimacy.

In the United States at common law an illegitimate child was considered the child of no one and thus was unable to inherit. Today, however, at common law, an illegitimate child is able to inherit from its mother but not from its putative father. Recent statutory legitimation of the A.I.D. child has allowed an A.I.D. child to take property by intestate succession from the husband of his mother. In the light of the judicial and legislative trend towards legitimation it would appear that the A.I.D. child often has the same right as any other child to inherit his father's property.

In New Zealand the inheritance rights of an A.I.D. child depend upon the dispositive words of the will or upon common law rules where the deceased 'father' dies intestate.

Although it has always been open to a testator to leave property specifically to illegitimate children by identifying them, a rebuttable presumption used to operate at common law so that references to 'children' or 'issue' or 'heirs of my body' were interpreted to refer only to legitimate children. However this rule of construction was abolished by subsection (2) of section 3 of the Status of Children Act 1969.

Therefore, there is no legal bar to an A.I.D. child taking under his father's will as if he were the natural child of the testator. It would also appear that he can contest the will by bringing a claim under the Family Protection Act 1955 providing the paternity of the testator has not been disproved.

By virtue of section 3 of the Status of Children Act 1969 it would seem than an A.I.D. child can also take under the intestacy of the husband of his mother. This general proposition however, would not apply where the presumption of paternity has been rebutted in court proceedings.

Section 7 of the Status of Children Act 1969 which provides that:

- (1) the relationship of father and child . . . shall, for any purpose related to succession to property or to the construction of any will of other testamentary disposition or any instrument creating a trust, or for the purpose of any claim under the Family Protection Act 1955 be recognised only if—
 - (a) the father and the mother of the child were married to each other at the time of its conception or at some subsequent time.

read together with section 5 would appear to cover the case of an A.I.D. child.

Section 7 subsection (1)(b) and (c) would also appear to permit an A.I.D. child to make a claim against the estate of the donor where his paternity has been established. This possibility is important in the con-

text of the confidentiality of A.I.D. records to be discussed later.

Although the A.I.D. child can be clumsily assimilated within the framework of the law, it is submitted that his legal status is far from certain. Therefore a judicial or preferably legislative determination of the A.I.D. child's status is crucial. Such a determination is not only a prerequisite to the A.I.D. child's assured security and stability but is arguably a fundamental human right. The present situation makes a mockery of the 'welfare of the child' principle professed to be the governing maxim of family law.

III. IN VITRO FERTILISATION

While A.I.D. offers a possible solution for couples who cannot have children because of the husband's infertility, in vitro fertilisation and embryo transfer allows some previously infertile women to bear their own children. The technique also allows a couple's biological child to be conceived in vitro and then carried to term in the uterus of a surrogate mother. Human conception by in vitro fertilisation plus embryo transfer was first successfully performed in 1978.

The test-tube baby, like the A.I.D. child presents a variety of legal problems deriving from the uncertain legal status of the participants in the procedure.

The consequences of the failure to define the rights and duties of parties to in vitro fertilisation are parallel to those noted in relation to artificial insemination. However the dangers inherent in regulatory legislation are possibly more far reaching. It has been suggested that heightened state interest in regulating artificial reproductive technology could be a prelude to significant governmental control of the reproductive process itself. This regulation would inevitably diminish individual choice and pose constitutional issues, particularly relative to the right to privacy. Thus these broader considerations must be borne in mind in a consideration of the legislative measures required to clarify the status of the 'test-tube' child.

The major difference between artificial insemination and in vitro fertilisation is that artificial insemination assures the child a biological tie with its mother regardless of whether the sperm used is that of the husband or of a third party donor. In vitro fertilisation however, can break the connection between a child and both its biological parents. In such a case the child bears no legal relationship to either of its social parents unless he is formally adopted by them.

To date in vitro fertilisation has not required total third party donor involvement but neither technological problems nor cost preclude the simultaneous utilisation of both sperm and egg donors. The result could be that a child has a total of five parents, a biological, a gesta-

tional and a social mother as well as a biological and a social father.

Reconciling the rights of the different parties involved is crucial. To date legislatures and courts have attempted to accommodate in vitro fertilisation within the framework of traditional law. However the law makes no provision for genetic separation of parent from offspring.

For purposes of clarity the legal issues engendered by in vitro fertilisation shall be discussed with reference to three main situations.

Firstly, the situation where the ovum of the mother and sperm of the husband are fertilised artificially and the mother carries and bears the child.

Secondly, the situation where an egg of a donor female is fertilised by sperm from the husband, and the child is carried to term by the wife.

Thirdly, the situation where the ovum of a donor female is fertilised by sperm from the husband and the child is carried by the donor female or by a surrogate mother. This situation may involve either artificial insemination (where the donor female carries the child) or in vitro fertilisation and necessitates a contractual relationship between the parents seeking the child and the woman who carries the child to term.

The first situation bears a direct relationship to that of the A.I.D. (H)? child. The child is biologically the produce of both parents—the only difference is that fertilisation has occurred outside the body.

The second situation raises issues akin to those discussed in relation to the A.I.D. child. Instead of a donor father, the child is the biological child of both parents but has an independent genetic mother. The law makes no provision for such a situation but such a child may be assimilated into the traditional framework of the law. Legitimacy of the child is relatively unproblematic because paternity is not in dispute and the law does not recognise rebuttal of maternity. As the social mother has carried the child to term it is unlikely that she would later disclaim responsibility for the child and the law does not allow her to do so. The child is a 'child of the marriage' and the usual rules of custody, maintenance and inheritance apply.

It is in the third situation where the child is carried to term by a woman other than the mother that different considerations apply.

Contracts to transfer children for valuable consideration have existed since time immemorial; the difference today is that the techniques of A.I.D. and in vitro fertilisation have greatly facilitated the performance of such contracts.

Legal sanctions against 'selling' and 'buying' children are widespread in the United States and to date have served as a prime obstacle in surrogate parenting through A.I.D. or in vitro fertilisation. The

black market in baby selling has long been outlawed on the grounds of public policy. Public policy and private morality both argue that the treatment of human infants as chattels is abhorrent and an affront to the sanctity of human life.

Since the baby-selling arrangement is typically characterised by a middleman who for a specified sum of money provides a couple desiring a child, with the child of a donor—usually an unwed mother, there is a justified concern that the profit motive of this middleman dominates any considerations for the welfare of the baby, the mother or the adoptive parents. Factors such as duress and intimidation may also mean that the mother is denied her right to a conscious adoption decision. Furthermore, in the absence of selection procedures, there is no way of ensuring that the child's adoption by the adoptive parents, will be in his best interests.

In an attempt to prohibit such transactions, many states have explicit legislative bans against charging fees or taking payments for the adoption of children, as well as mandatory statutory requirements in private adoptions.

Thus in America a couple entering into a baby contract risk criminal sanctions. In California section 273(a) of the Penal Code makes it a misdemeanour to pay money or anything of value to a parent for the consent or co-operation of the parent to a subsequent adoption of the child. The statute also forbids payment of living and maternity related expenses of the mother contingent upon the placement of the child for adoption. Similarly, the presence of consideration might bring the contract within the scope of section 181 of the Penal Code which makes it a felony punishable by two to four years imprisonment to pay 'money or deliver anything of value to another, in consideration of having a person placed in his custody'. Violations of these laws are seldom prosecuted, but the threat of prosecution nonetheless remains a serious deterrent to baby contracts.

Even if a court was to hold that the baby contract fell outside the ambit of express criminal prohibitions, it might rely on the underlying policies of the statutes to strike down the contract. Some American jurisdictions have held that contracts for the adoption of children in return for valuable consideration, or for release of support obligations, are void as contrary to public policy.

In *Willey v. Lawton*²² a natural mother with custody, and her spouse agreed to adopt the children and thereby relieve the dependant father of his support obligations, provided that he pay \$5000. The court held that the contract was void and against public policy. The decision was reached on the grounds that allowing parents to be free

²² 9 Ill App 2d 344, 132 N.E. 2d 34 (1956).

to transfer a child for money would 'lend to the destruction of one of the finest relations of human life'.

More recently in a declaratory action brought by a married couple biologically incapable of bearing children, who sought a finding which would in effect validate their proposal for a surrogate parenthood agreement, a Michigan trial judge held that the State's law:

is clear in expressing the public policy of this state that all persons involved in offering, giving or receiving anything of value in connection with an adoption are controlled by the state's proscriptions.²³

The reasons expressed by the court were that:

the evils attendant to the mix of lucre and the adoption process are self-evident and the temptations of dealing in 'money market babies' exist whether the parties be strangers or friends.²⁴

The court found that even conceding the good faith and personal desires and intentions of the plaintiffs as represented, a change in the rules regarding payments would have to come from the legislature. The decision currently is on appeal; one key argument being asserted is that application of the statute in such instances unconstitutionally infringes upon the right to privacy, in that it unduly interferes with the parties' decision making rights regarding procreation.

Given that contracts to bear a child by contrast with contracts to buy a child already in existence are becoming increasingly popular in America, it is submitted that the legislation must redirect its attention to the question.

While such contracts are arguably immoral and unenforceable, changing standards of personal morality, rapid increases in the demand for adoptable infants and the fact that such contracts are being performed in America, necessitate a reappraisal of public policy.

It is submitted that the responses of the past are no longer appropriate today, because considerations of social merit arguably outweigh former objections, and may tip the balance in favour of such contracts.

While the court in *Doe v. Kelly, Attorney-General*²⁵ appeared to consider a contract to conceive, bear and give up a child in exchange for valuable consideration, to pose the same dangers to the welfare of the mother and child, as the sale of children per se, it may be argued that a contract to bear a child is less subject to these objections. Where the purchaser is the natural father of the child, and there is no middleman, the risk that hard commercial considerations will prevail over the interests of the child or the mother is slight. In addition, the con-

²³ *Doe v. Kelly, Attorney-General*, Civil Action No. 78 815 531 C.J. Circuit Court of Wayne County, Michigan, January 28, 1980.

²⁴ *Ibid.*

²⁵ *Ibid.*

tract to carry a child involves a social benefit not available by any other means—the contract parents can obtain a child that is biologically the husband's.

The argument that the arrangement exploits the carrier may also be disputed. In so far as it is possible that carriers will be drawn from lower income groups, and their decision dictated by financial incentive, this claim is superficially appealing. It is equally arguable, however, that an adult woman, in good health, should not be denied the right to weigh for herself, the risks and benefits of such an arrangement provided that she has full knowledge of these risks, and that her choice is uncoerced.

In New Zealand, there is to the writer's knowledge, no criminal prohibition barring contracts to bear a child, although it is highly probable that contracts to buy and sell children per se would be held to be void on the grounds of public policy.

While contracts prejudicial to the status of marriage are void at common law, and contracts that are sexually immoral are illegal at common law, it is certainly arguable that contracts to bear a child fall outside these categories.

Within the existing legal framework there are laws that would hamper the implementation and enforcement of baby contracts, some of the most problematic being those governing paternity. However, without legislative recognition of baby contracts, paternity and adoption proceedings are only likely to arise in the event of a contractual dispute since such contracts are typically shrouded in secrecy.

Under the present law if the carrier, seeking to repudiate the contract, is married and cohabiting with her husband at the time of conception, there is a presumption that the issue is a 'child of the marriage' (section 5 Status of Children Act 1969). Unless the other party to the contract, the couple, can rebut the presumption their claim to the child may be negated.

Where the carrier is not married or cohabiting and seeks to retain the child, the contractual father may be able to establish his paternity more readily. Notwithstanding proof of paternity, if the contract is held to be inadmissible or unenforceable, he will not however have any priority for the custody of the child.

A contract to carry a child can be considered as an alternative form of childbearing or adoption. As such it can be assessed in terms of its unique potential and problems. Analysis of the problems can then determine the scope of regulation needed to protect the interests of the child, the carrier, the parents and the State.

The attitude of the state to the private child-bearing decision is differential. Although not all persons are equally equipped to be parents,

only in extreme cases will the state intervene. The state's reluctance to interfere with the couple's decision to have a child is founded in part on recognition that the child-bearing decision is intensely personal and protected in many of its aspects from state intrusion by the right of privacy. In many child-bearing decisions the government's intervention is unnecessary, both because the parents genuinely desire to have a child and because the bond between the natural parents and the child tends to ensure or is presumed to ensure that the interests of the child will be protected.

In contrast the state plays a more substantial role in the adoption process. Since there is no bond between the adoptive parents and the child, and the adoptive mother has not experienced the physical and psychological effects of pregnancy and childbirth, it cannot be assumed that the adoptive parents will feel the same degree of attachment to and responsibility for the child as would natural parents. By intervening the state protects the interests of all parties.

In so far as the contract to carry a child involves the transfer of an infant from the natural mother to an adoptive family, it is similar to adoption. In two respects however, the contract appears to be a better risk than adoption. Firstly since one of the adoptive parents is the natural father, the chance for success of the adoption is possibly higher. Secondly, the agreement to carry a child is entered into prior to conception, free from the financial and emotional pressure of an unwanted pregnancy. Thus a decision to contract for a child is likely to be better considered than a corresponding adoption decision.

It is submitted that, as with adoption, regulation is required to protect the interests of all parties. Appropriate legislation would not only ensure that contracts to bear a child pose no threat to social interests, but would in fact promote them.

The terms of the contract, in particular, must be given discerning consideration in any legislative proposal.

Firstly, because the pregnancy has not yet occurred, there is necessarily some uncertainty about the effect of the pregnancy and childbirth on the health of the prospective carrier. The obvious goals are to ensure a healthy mother and child and to guard against exploitation of the carrier. Although the contract parents have a strong incentive to seek out a healthy carrier and to see that she receives adequate medical treatment, some determination of their duties in respect of the hostess mother is necessary.

Secondly, while the possibility that the adoptive parents will reject the child or that the natural mother will recant is a risk accentuated by the length of time between the agreement and the date of placement, it should not render such contracts non-viable as an alternative form of

childbearing. The degree of risk involved, even in the absence of state regulation, may not actually be great. The circumstances of the baby contract make a breach by the parents unlikely. If breach does occur the father will remain liable for the support obligation where paternity is proved.

Breach by the hostess mother may take one of two forms. In the event of breach during pregnancy, by way of abortion, a remedy in damages should adequately protect the contract parents. If the mother breaches after the birth by refusing to surrender the child the state at least has an assurance that both sets of parents want the child. However an appropriate contract remedy is more difficult to fashion. Damages will not be satisfactory, since as a general rule contract damages are not awarded for emotional harm and economic injury will be difficult to show. Specific performance also meets with some serious objections. Most importantly specific performance may conflict with the policy that custody disputes between natural parents should be resolved in the best interests of the child. The child is not represented in the contracting process and its interests may differ significantly from those of the parties.

However the 'welfare of the child' standard should guide the court in the resolution of contractual disputes. The court will determine custody in terms of its dual functions, child protection and dispute resolution. In performing the first of these functions it will necessarily and appropriately place the physical welfare of the child first. Thus when an award to either natural parent would pose a serious threat to the child's health, that fact should be determinative. In the absence of such a threat however, determination of which parent will best serve the interests of the child is speculative. On the level of dispute resolution, the contract case appears equally balanced since both disputants are natural parents, ready and able to take the child. Fairness suggests that the existence of the contract freely entered into by both parties, should shift the custody decision in favour of the natural father.

Thirdly, the contract should outline the rights and liabilities in respect of amniocentesis and in the event of a defective child.

It is submitted that contracts to bear a child, if properly regulated pose no serious threat to the public interest; to the contrary they promote public interest by providing a viable alternative to childless couples anxious to experience parenthood. It is essential however that appropriate regulation aims to ensure that essential terms are included in the contract and to assure that the contract is entered into advisedly and without duress. Legislative attention to the contract could be coupled with provision for the involvement of a state agency (with functions not dissimilar to those of a state adoption agency) in the per-

formance of such contracts. A state agency could be utilised to oversee and regulate the making of contracts to bear a child ensuring that the contracts meet the legal requirements and that the rights of all parties be protected. In addition to oversight the agency could be enjoined to counsel the contracting parties, particularly the carrier whose position is recognised to be the most vulnerable.

While public policy may at present militate against such contracts, it is submitted that minor modifications to existing law making such contracts possible, would provide an important alternative to the traditional means of obtaining a child for those couples who truly desire one.

V. FURTHER CONSIDERATIONS

The purpose of this paper has been to draw attention to the legal dilemma at present pertaining to recent medical advancements.

It has been submitted that enlightened judiciaries and legislatures are required to resolve the uncertainties stemming from the alternative forms of human conception.

The lack of legal certainty is patently unfair to the innocent A.I.D. child and test-tube baby whose financial, physical and emotional well-being is at risk. The uncertainty is also unfair to the child's mother and her husband, both of whom have an interest in knowing what legal relationship exists between them and the child, and to the donor and hostess mother who have a legitimate interest in having their rights and liabilities definitively determined.

It is only when these issues are confronted that the traditional framework will be recognised as providing inappropriate mechanisms for their satisfactory determination. Reappraisal of the law is crucial if the parties involved are to be accorded legal security.

Commonsense and moral decency have been postulated as the touchstones for resolution of this legal dilemma.

In stressing the need for legislation, several important features have perhaps been understated or overlooked.

Firstly it has been noted that most legal commentary on A.I.D. has concentrated on theoretical legal problems without paying attention to real psychological problems. As one writer notes:

most of the legal literature reads like an answer to the following exercise 'Review all of the case law and statutes relating to A.I.D. and discuss all possible lawsuits that any participant or product of A.I.D. might have against anyone. If time permits suggest a statutory scheme that might minimise these problems'.²⁶

The writer proceeds to examine the rationale for permitting A.I.D. to continue, contending that many practitioners are using it for

²⁶ Annas George J., 'Fathers Anonymous. Beyond the Best Interests of the Sperm Donor', (1980-81), 14 F.L.Q. 2.

eugenic purposes. This draws attention to the principle of 'the best interests of the child' and features of donor selection.

To avoid his criticism which could quite justifiably be levelled at this paper, I shall briefly discuss these points.

In many areas of family law 'the best interests of the child' or the 'welfare of the child' standard is stated to be the overriding principle. However it would often appear that lip service only is paid to this principle, and there is a similar danger in relation to methods of artificial human reproduction.

It is worth observing that the current rationale for servicing the infertile couple, the lesbian couple and the single woman, all rest primarily on a definition of the best interests of the couple or prospective parent and not on the best interests of the child. It may well be that the fundamental question is whether it is in fact in the best interests of the potential child to be the result of an artificial conception procedure?

While many physicians screen recipients to determine if their motives are proper and their marriage stable, there is no evidence that they are competent to make these judgements. Combined with the fact that there is no data concerning how children born into these situations fare, this may suggest that it is irresponsible to continue the practices without attempting to gather such data.

Discussion of the donor is not limited to a consideration of the legal rights and liabilities as may have been implied. In the same way as the contract between a couple and a surrogate mother should contain all the essential terms, a sperm vendor's contract should spell out the vendor's obligations in terms of his own physical and genetic health, an accurate family history, and quality of the specimens he is required to produce, the necessity for complete and permanent anonymity of the recipient and a waiver of any rights in any child resulting from insemination.

The issue of selection of the sperm vendor has arguably received too little attention. An American study,²⁷ found that almost all physicians make their own selection, most using medical students. Sixty-two percent used medical students or hospital residents, ten percent used other university or graduate students, eighteen percent used both and the remaining ten percent used donors from military academies, husbands of obstetric patients, hospital personnel and friends.

'Physicians in all these situations are making eugenic decisions—selecting what they consider 'superior' genes for A.I.D. In general they have chosen to reproduce themselves (or those in their profession) and while this should not surprise us, it should be a cause of con-

²⁷ Currie—Cohen.

cern since what may be controlling is more than just convenience. Physicians may believe that society needs more individuals with the attributes of physicians, but it is unlikely that society as a whole does. Lawyers would be likely to select law students, geneticists, graduate students in genetics . . . the point is not trivial. Courts have found in other contexts that physicians have neither the training, nor the social warrant to make 'quality of life' decisions.²⁸

Selecting donors in this manner, rather than matching for characteristics of the husband for example, seems to be primarily in the best interests of the physician rather than the child.

It is not denied that these issues are of prime importance, however it has not been considered apposite to discuss them in detail in this paper.

V. CONCLUSION

Developing biomedical technology for the engineering of human reproduction has generated an increasing amount of uneasiness and criticism, but the task of evaluation has been complicated by the fact that the benefits are immediate and tangible to specific individuals, while the costs are thought to be less tangible, long term and paid for by society en masse.

Technology which enables a loving couple, either thwarted in their efforts to conceive or frustrated by delays involved in adoption, to have a child and form a family unit is unobjectionable. Indeed employment of artificial reproductive assistance is arguably morally and ethically justifiable for such a purpose.

Likewise the development of a technique by which an aborted foetus can be transferred to the uterus of a woman keen to bear and nurture the child has much to commend it.

However, the fear that genetic engineering has a potential for political abuse is a real one. The possibility that those in power will be able to maintain and strengthen their control over society by regulating access to the technology and by using it to achieve eugenic goals is morally abhorrent.

It is important therefore, that regulatory legislation seeks to balance individual rights against state efforts to engineer genetic improvement. It is submitted that some degree of state regulation is both inevitable and desirable because artificial reproductive technology cannot be adequately controlled by private hands and to permit such techniques to be the subject of private enterprise is possibly more dangerous than state control.

²⁸ *Supra*, F.N. (33) 7.

It is hoped however, that the state can accomplish regulation without significant infringement of individual privacy.

In any event the time has arrived for the legislature to recognise artificial reproduction techniques and to clarify the rights and duties of the parties involved. It is undoubtedly incumbent on the legislature to adopt a discerning enlightened approach and accord the issue of such techniques a clear legal status. The ever-increasing gap between scientific capability and legal rules has set the stage for law reform. The law can no longer play ostrich, but must accept the legal challenge which artificial reproduction presents.