Singapore Journal of Legal Studies
[1991] pp. 466 -475

THE LEGAL IMPLICATIONS OF ARTIFICIAL INSEMINATION BY DONOR

Advances in medical science have opened up new vistas for mankind. However, some of these advances such as artificial insemination by donor, sit uncomfortably within the existing legal framework. The writer considers the legal implications of donor insemination and suggests that legislation be passed to resolve some of the difficulties.

I. INTRODUCTION

ARTIFICIAL insemination is the process by which semen is placed inside a woman's vagina or uterus by means other than sexual intercourse. Artificial insemination is possible either by a donor or a husband. Artificial insemination by donor (AID) is used if the husband is infertile or is a possible carrier of an inheritable disease. This article is concerned only with the legal implications of donor insemination. As the husband will not be the biological father of the child conceived by artificial insemination, the child will under common law be treated as illegitimate with all the disadvantages that are associated with such a status.

In England, such a position was considered unsatisfactory and calls were made for the law to be reformed. The Warnock Committee, for instance, recommended "that the AID child should in law be treated as the legitimate child of its mother and her husband where they have consented to the treatment...."[1] This led eventually to the enactment of section 27 of the Family Law Reform Act 1987. Under section 27, a child born in England and Wales as the result of donor insemination of a married woman "shall be treated in law as the child of the parties to the marriage and shall not be treated as the child of any person other than the parties to that marriage." Section 27 would not, however, be applicable if it is proved to the satisfaction of the court that the husband did not consent to the insemination of his wife. In Singapore, as many as ten to fifteen percent of married couples suffer from infertility problems.[2] Donor insemination is, therefore, likely to be increasingly

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1 *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, Cmnd. 9314 (1984), para. 4.17. Also see the recommendations of the English Law Commission in Law Com. No. 118, paras. 12.9 and 12.11.

2 Information provided by Dr. Christopher Chen at a forum "Artificial Insemination: Implications", held on 30 January 1991, Singapore.

used and in the absence of legislation similar to that applicable in England and Wales, the legal position in Singapore is unclear.

II. PRESUMPTION OF LEGITIMACY

Any discussion of the legal implications of donor insemination must take into account the presumption of legitimacy found in section 114 of the Evidence Act.[3] The section provides that where a person is born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after the dissolution of such a marriage, the mother then remaining unmarried, it shall be "conclusive proof" that the person is the legitimate son of that man unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten. The phrase "conclusive proof" is explained in section 4(3) of the Evidence Act which states that "[w]hen one fact is declared by this Act to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it."[4]

Section 114, which is similar to section 112 of the Indian Evidence Act, is modelled on the common law presumption of paternity.[5] It allows only one way of rebutting the presumed fact, *i.e.* by proof of "no access". In *Karapaya Servai and Ors.* v. *Mayandi*,[6] it was held that the phrase "means no more than opportunity of intercourse."[7] With this definition in mind, it is submitted that the paradigm case in which "no access" can be proved is one in which it is impossible for sexual intercourse to take place between the parties to a marriage.[8] Such impossibility can be shown by "physical separation of the parties with no possibility of contact"[9] or by the impotence of the husband. Other causes rendering sexual relations between the spouses impossible during the relevant period would, presumably, also be admissible.[10] However, it is suggested that evidence which merely shows that conception is improbable or even impossible would not be regarded as proof of non-access. Therefore, even if a husband were shown to be infertile, such a fact would not be sufficient evidence of "no access" as long as there were opportunities for sexual intercourse to take place at a time when the child could have

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3 Cap. 97 (1985 Rev. Ed.).

4 For an example of a case applying section 114, see *Re Khoo Thean Tek's Settlements* [1929] S.S.L.R. 50.

5 On the common law presumption, see P.M. Bromley, *Family Law* (7th ed., 1987), pp. 240-244.

6 A.I.R. 1934 P.C. 49.

7 *Ibid.*, p. 50.

8 Also see *Sarkar's Law of Evidence* (13th ed., 1981, Prabhas C. Sarkar and Sudipto Sarkar, eds.), pp. 1012-1016.

9 See W.K. Leong, *Family Law in Singapore* (1990), p. 285.

10 See *The King* v. *Luffe* 8 East 193, especially pp. 206-207.

been conceived." Likewise, evidence of a wife's adultery alone would be insufficient to rebut the presumption of legitimacy. Thus, if both spouses are of one race but the child has characteristics belonging to another race,[12] the child would be regarded as the legitimate child of the husband even if the alleged adulterer is of that other race.

The interpretation of "no access" equates the phrase with the impossibility of sexual intercourse taking place. This is an extremely strict view and it is submitted that there are at least two possible qualifications which need to be made. A hint of the first qualification arises from the case of *Ainan Bin Mahamud* v. *Syed Abu Bakar Bin Habib Yusoff and Ors.*, where Aitken J. had this to say of the phrase "no access":

> That is the only way in which the presumption created by this section can be rebutted, and those who seek to rebut the presumption must prove that sexual intercourse between the parties *did not take place* at any time when, by such intercourse, the husband could according to the ordinary course of nature be the father of the child.[13]

There is a great difference between saying that intercourse did not take place and that it could not have taken place. The language used by the learned judge would seem to suggest that proof of "no access" would not be limited to facts showing the impossibility of sexual intercourse between husband and wife. Instead, any evidence such as blood tests, racial or genetic characteristics, would be potentially admissible *if they were relevant in showing that intercourse between the spouses did not take place at the probable time of conception of the child.*[14] The consequence of such a broad interpretation of "no access" would be to reduce the 'conclusiveness' of section 114. That is not necessarily unsatisfactory as it would enable the court to make a more factually accurate determination of paternity. In the context of donor insemination, however, it might be felt that such a result is objectionable since

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11 Above, note 9, and also see T.Y. Chin, *Evidence* (1988), p. 285.

12 Analogous to the example given by Bromley of a situation where "both spouses are white but the child and the alleged adulterer are black": above, note 5, at p. 244.

13 [1939] 8 M.L.J. 209. at p. 215. (Emphasis added.)

14 Emphasis added. But even if this qualification is accepted, the evidence would not be admissible in showing that the child is not the issue of the husband although this would be the natural inference once it is accepted that intercourse did not take place. The distinction is important as it submitted that the phrase "no access" is meant to connote a fact situation measured entirely in physical terms and is not concerned with the accurate determination of biological ties. Therefore, once it has been found as a fact that intercourse has taken place between both spouses, it matters not that the result of blood tests indicates that the husband could not possibly have been the father of the child. If, on the other hand, the fact of intercourse is in doubt, then such a result may be admissible in showing that the parties had "no access" to each other. It must be conceded, however, that the relevancy of such evidence is likely in most cases to be very slight.

children born to married couples as a result of AID ought, as far as possible, to be regarded as legitimate if both parties have consented to the treatment. It might be tempting, therefore, to interprete "no access" restrictively so as not to prejudice such children. However, if a narrow interpretation of non-access is accepted on this basis, then it must apply equally to all other fact situations as well other than those involving donor insemination. This would be unfair to a husband who, through the application of a factually inaccurate presumption of legitimacy, would have to assume the responsibilities and liabilities of fatherhood even though the child is not his. And even where AID is involved this can also lead to unfairness if the husband never consented to the insemination of his wife.[15] It is submitted that the lesser of two evils would be to interprete "no access" in a manner which would allow the factual determination of paternity to be as accurate as possible. Ultimately, this issue also indirectly questions the whole basis for the distinction between legitimacy and illegitimacy. As long as the distinction exists, some children will inevitably be prejudiced and perhaps the time has come to reconsider its validity in today's society.[16] It follows, accordingly, that if the interpretation of "no access" put forward by the writer is accepted, the only situation in which the presumption might operate artificially would be one in which the wife had sexual relations with her husband and another at a time when the child could have been begotten. In such a situation there is as much a chance of the child being the husband's as there is of the child being the adulterer's. Section 114, however, would make the fact of intercourse conclusive proof of the husband's paternity.

This broader interpretation of non-access does find some support from the cases. In *Kasi Ammal* v. *Ramasami*,[17] the judge after referring to *Karapaya*[18] had this to say:

> There is no warrant for the contention... that if a man proves non-access in the sense that he never had intercourse with the woman he should prove further that he had no opportunity of having intercourse.... If he had an opportunity of intercourse, but notwithstanding such opportunity, if the husband proves to the satisfaction of the Court that he had no intercourse in my opinion he establishes thereby non-access....[19]

In this context it is useful to note that like section 114, the common law presumption of legitimacy could also be rebutted by proof of non-

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15 Such a consequence would be unlikely in Singapore as the wife would not be artificially inseminated without the consent of the husband, see above, note 2.

16 It has been argued by W.K. Leong that the distinction is an unjust one, see above, note 9, pp. 272-273.

17 A.I.R. 1949 Mad. 881.

18 Above, note 6.

19 Above, note 17, at p. 882.

access. While the term "non-access" appears initially to have been given a restrictive interpretation,[20] when the *Banbury Peerage case*[21] fell to be decided, it was the unanimous opinion of the Court of Common Pleas that it included proof of the non-existence of intercourse between husband and wife.

Although the approach in *Kasi Ammal* might appear initially to be at variance with the Privy Council's definition of "no access" in *Karapaya*, it is submitted that both decisions are reconcilable. In *Karapaya,* which was a case concerned with succession, both spouses came together in December 1911 after living separately for a considerable time. They were for a short period after that residing in reasonable proximity, the wife being in the house of a relative of the husband, with nothing to suggest that they were hostile to each other. The birth of the child was said to have taken place in August of the following year and their Lordships observed that this fact might well be almost fatal to the contention that the child was illegitimate. In the course of argument, counsel suggested that "access" implied actual cohabitation and their Privy Council's definition must be seen in that context as rejecting a very narrow interpretation of the term. If their Lordships had accepted counsel's suggestion, they would have had to hold the presumption of legitimacy rebutted as both parties were not living together although they were residing in reasonable proximity. No argument was ever put forward to their Lordships that if the husband or some other interested party could prove affirmatively that no sexual intercourse had taken place between the spouses at a time when the child could have been conceived, such a fact would amount to "no access". Such an argument might well have been successful. Support for this view comes from the fact that their Lordships also observed that the one person who might have been able to give useful evidence in the question of non-access, *i.e.,* the person in whose house the wife was staying in, was not called to give evidence. If "no access" strictly meant opportunity of intercourse without any qualification whatsoever, it is difficult to see what usefulness could be served by receiving evidence from such a person. Such evidence would only be useful if it showed that notwithstanding the opportunity, no intercourse ever took place, or alternatively, that even though sexual intercourse was not impossible, it was highly unlikely or improbable that any opportunity was availed of.

An example of the latter can be seen in the case of *Mt. Saroo Mali and Anor. v. Yeshwant Narayan Mali.*[22] In that case both spouses had lived apart for many years and this was taken by the trial judge as an indication that relations between them could not have been cordial enough for the wife to admit the husband to her embraces at odd intervals in her father's house. The trial judge also rejected such an

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20 See the case of *The King* v. *Luffe* 8 East 193.
21 1 Sim. & St. 153.
22 A.I.R. 1934 Nag. 124.

allegation as improbable because the father's house consisted of only one small room in which the entire family resided. On appeal it was contended, on behalf of the wife, that the parties lived in the same small village and in houses only two or three doors from each other. Counsel for the wife further contended that impossibility of access must be proved and that nothing short of that will suffice. The appeal judge in dismissing the appeal said that the Indian equivalent of section 114 "merely requires proof to the satisfaction of the court that the parties had no access to each other: not that there was no possibility of access".[23] It is submitted that such an approach is perfectly logical. There may be many situations in which sexual intercourse is possible but highly improbable. An obvious example is where relations between both spouses have broken down and both have formed associations of relative permanence with members of the opposite sex. The burden of proving that the facts are such as to render it highly improbable that any opportunity of intercourse would be availed of would rest on the person alleging it and such evidence ought to be weighty before non-access is presumed. Notwithstanding the improbability of sexual intercourse taking place, such a presumption of non-access can, of course, be rebutted if actual intercourse between the spouses can be established at the time in which the child could have been begotten.[24]

The second possible qualification to the general definition of "no access" put forward in *Karapaya* can be more simply stated "no access" ought to be presumed if both spouses are separated by an order of court and, possibly, where a decree *nisi* has been granted. While there does not appear to be any case establishing this point under section 114, such an exception is well established under common law. In *Ettenfield v. Ettenfield*,[25] it was held that if the parties have been separated by the decree of a competent court and if the child must have been conceived after the date of the decree, there is a presumption that the child is

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[23] *Ibid.*, p. 125.

[24] Admittedly, difficult situations can arise. For instance, child *A* claims that he is legitimate because at the time of his conception, his parents were still living under the same roof and therefore had the opportunity of intercourse and child *B*, disputing the claim, produces evidence from the housekeeper, to the effect that the couple did not avail themselves of the opportunity. Such evidence might be based on the fact that the marriage relationship between both spouses was strained with them sleeping in separate rooms. In such a situation, if the court accepts on a balance of probabilities the evidence of the housekeeper, it must consider the presumption rebutted and dismiss *A's* claim unless actual evidence of intercourse can be produced. This is ultimately a question of fact and should be no more difficult to prove than the fact that even though both spouses live in the same house, there are in fact two separate households under one roof. If such facts are established, they can count towards showing that the parties have during the requisite period lived apart as a fact going to show irretrievable breakdown of marriage under section 88(3) of the Women's Charter, Cap. 353 (1985 Rev. Ed.), see *Mouncer* v. *Mouncer* [1972] 1 All E.R. 289. It is also worth emphasising again that the evidence produced by persons such as *B* must be sufficiently weighty as the result of holding the presumption rebutted would lead to the bastardisation of an individual.

[25] [1940] P. 96.

illegitimate.[26] Such a presumption of non-access can be rebutted if it can be established that the parties cohabited together not-withstanding the order or that sexual intercourse took place between them. Admittedly, this second qualification is without judicial support but it is submitted that it can be supported on policy grounds. The Women's Charter provides that "[w]here a court grants a decree of judicial separation it shall no longer be obligatory for the petitioner to cohabit with the respondent."[27] With the right to consortium being brought to an end by an order of court and not by implication,[28] this should raise a presumption that both parties to the marriage have not cohabited. Where a judicial separation or decree *nisi* has been granted, it is an indication that the marriage relationship has broken down. Often one or both parties would be starting life afresh with new relationships. It would therefore be extremely inconvenient if "no access" is not presumed in such circumstances as any child then born to the wife would be regarded as the legitimate child of the husband. It is also submitted that section 2(2) of the Evidence Act does not exclude this second qualification which merely expands on the understanding of "no access" in section 114. Alternatively, even if this second qualification is not accepted, it is possible to argue that a decree of judicial separation or decree *nisi* makes it highly improbable that the parties availed themselves of any opportunity of intercourse.

This lengthy discussion of section 114 is important because a child conceived by donor insemination and born to a married couple would be regarded as the legitimate child of the husband unless "no access" can be established. If such a fact is established, a number of possible legal problems can then arise as a result of the child's illegitimate status.

III. LEGAL IMPLICATIONS IF SECTION 114 IS INAPPLICABLE

Section 61(2) of the Women's Charter provides that a person can be ordered to maintain his legitimate or illegitimate child. If "no access" is established, a child conceived as a result of donor insemination would not be the child of the husband. It is provided, however, that where a person has accepted a child who is not his own as a member of his family, it shall be his duty to maintain that child while he remains a child.[29] The practice in Singapore is for a woman to be inseminated

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26 *Ibid.*, at p. 110. Also see *Andrews* v. *Andrews and Chalmers* [1924] P. 255.

27 Cap. 353 (1985 Rev. Ed.), section 95(2).

28 This distinction is important. As W.K. Leong points out, section 88(5), (6) and (7) of the Women's Charter are "premised upon the 'innocent' spouse being able lawfully to refuse to cohabit with the 'offender'" (above, note 9, at p. 173). However, since section 114 raises a strong presumption, it may not be justifiable to presume non-access in those circumstances since no order of court is involved. What of the position where an order under section 68(3) has been made prohibiting one spouse from entering the matimonial home? The position is extremely unclear but it is submitted that the better view is that "no access" should be presumed in such a case.

29 Above, note 27, section 62(1).

only if she is married and her husband has consented to the insemination. In most cases, therefore, the child born as a result of AID would be accepted by the husband as a member of his family except in the unlikely situation of both spouses separating before the birth of the child. In such a case, upon separation there would no longer be any family unit on which the child might be said to be a member of.[30] It must be pointed out, however, that the duty to maintain a child accepted as a member of one's family appears to be a secondary obligation. Accordingly, it is expressly provided by the Charter that a person maintaining such a child can recover the sums expended from the father or mother of the child." This raises the possibility that should the relationship between husband and wife deteriorate, the husband can sue the wife to recover all sums expended on the child. It is submitted, however, that any such contention ought to fail if the husband has consented to the insemination. By so consenting a husband makes an implicit representation that he will support the child. The wife by being inseminated and bearing the child to term obviously relies on such a representation. It would accordingly be inequitable if a husband were allowed subsequently to recover from his wife the sums expended by him in maintaining the child. He should be estopped from enforcing his strict legal rights.

Some problems relating to succession can arise *vis-a-vis* a child conceived by donor insemination.[32] Under the Intestate Succession Act,[33] "child" means "a legitimate child and includes any child adopted by virtue of an order of court under any written law for the time being in force in Singapore, Malaysia or Brunei Darussalam".[34] This is a very narrow definition, and if non-access is established, would not include a child conceived and born as a result of donor insemination unless such a child has been formally adopted by a court order. A similar problem arises under the Inheritance (Family Provision) Act.[35] The phrase "dependent of the deceased" includes such deceased's son and daughter. The terms "son" and "daughter" are defined as including adopted children.[36] Accordingly, under both Acts, even though the deceased might have consented to the insemination of his wife, and even if he had in his lifetime treated the child as if such child were his own, the child would not be entitled to any part of his estate should he die intestate, nor to a reasonable provision of maintenance out of his estate. Such a conclusion is clearly unsatisfactory.

Theoretically, a donor whose semen has been used is under a duty to maintain a child born as a result of the insemination. Such a duty

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30 See *M* v. *M (Child of the Family)* (1981) 2 F.L.R. 39.
31 Section 62(2).
32 Also see W.K. Leong, above, note 9, pp. 270-271.
33 Cap. 146 (1985 Rev. Ed.).
34 *Ibid.*, section 3.
35 Cap. 138 (1985 Rev. Ed.).
36 *Ibid.*, section 2.

can be enforced only if the donor can be identified. Medical practice in Singapore (as in many other jurisdictions), however, is to keep the donor's identity strictly confidential. Although it is possible that in a proper case a court of law might, on the ground of public policy, order the disclosure of the donor's identity so as to allow proceedings for maintenance to be brought, such a prospect appears remote.

The Registration of Births and Deaths Act[37] provides that particulars of the birth of a child must be furnished in the prescribed form. The writer understands that some husbands of women who have given birth to a child conceived as a result of donor insemination have allowed themselves to be registered as the child's legitimate father.[38] In most cases this will be unobjectionable because of section 114 of the Evidence Act. On the other hand, if section 114 is inapplicable, such an act might amount to the wilful making of a false statement which is a statutory offence under the Registration of Births and Deaths Act.[39] Such particulars would also be liable to correction as being errors of fact or substance.[40]

IV. RIGHTS TO KNOW?

Another important issue is the extent to which a child born as a result of donor insemination should be given the right to know the truth of his origins. A qualified right already exists in the case of an adopted child.[41] In the U.K., the Warnock Committee recommended that on reaching the age of eighteen the child should have basic information about the donor's ethnic origin and genetic health and that legislation be enacted to provide the right of access to this.[42] Other suggestions have also been made, for instance, that an AID child who wished to marry ought to be given the opportunity to ensure that there is no prohibited relationship with the intended spouse.[43] This issue should be given sufficient consideration if legislation is contemplated.

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37 Cap. 267 (1985 Rev. Ed.).

38 Above, note 2.

39 Section 27(1).

40 Above, note 32, section 24(3).

41 Cap. 4 (1985 Rev. Ed.), section 12(6).

42 Above, note 1, para. 4.21. At present the Singapore Ministry of Health guidelines provide that only healthy male donors will be accepted into the National Sperm Bank Programme so as to minimise the spread of genetically transmitted and other diseases among the offsprings produced. Accordingly, all donors accepted into the Programme are carefully screened to rule out familial and other related diseases, letter dated 16 August 1991 from Dr S.C. Emmanuel, Acting Head, Research and Evaluation Department, Ministry of Health, to the author.

43 Consultation Paper on *Legislation on Human Infertility Services and Embryo Research* (1986) (published by the Department of Health and Social Services), reproduced in Hoggett and Pearl, *The family, law and society: cases and materials* (2nd ed., 1987), p. 445. Also see Law Com. No. 118, at paras. 12.22-23. Singapore Ministry of Health Guidelines also provide that to minimise the risk of consanguinity in the future Singapore

IV. CONCLUSION

As has been pointed out earlier, medical practice in Singapore is to ensure that only married women are inseminated. The husband's consent is also a prerequisite and donors are screened for transmissible or inheritable diseases. These practices and section 114 go a long way in preventing problems from arising. From the foregoing, however, it is quite clear that although the legal problems that can arise as a result of donor insemination do not appear immediate, the legal position of a child conceived as a result of AID is still not entirely satisfactory. Therefore, if AID is to be continued, it is strongly recommended that legislation similar to section 27 of the U.K. Family Law Reform Act 1987 be passed. This simple step would resolve many of the problems outlined.

TAN CHENG HAN*

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population, detailed and careful tracking of donors is done to ensure that they do not father more than 3 offsprings through the National Sperm Bank Programme. The fully computerised Central Sperm Bank Registry enables this tracking to be done with considerable precision: letter dated 16 August 1991 from Dr. S.C. Emmanuel.

* LL.B.(N.U.S.), LL.M.(Cantab.), Lecturer, Faculty of Law, National University of Singapore, Advocate & Solicitor (Singapore).