The Legal Status of the Semi-Adopted

J.C. Schock
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During the spring and summer of 1941 questionnaires were sent to 30,000 of America's 150,000 doctors. Replies were received from only 7,642 of those questioned. But through this fraction of America's medical profession a startling fact was disclosed. Half of the doctors replying revealed that, to their personal knowledge, more than 9,500 American children owe their existence to the procedure known as artificial insemination—a practice new to medical science, and unknown in the law.

It seems certain that this figure represents the very minimum number of children thus conceived. How many more like children may already be in existence can be a subject only of mere conjecture, since the true answer is a secret closely guarded by the remaining unasked and unanswering 142,000 doctors. But the figure as it stands is sufficiently impressive to merit attention and help for these who are born but not conceived. Science, the procreator of innumerable mysteries, has this time conceived a problem the solution of which lies not only in the minds of science but also equally in the hands of the law, and into the law's lap science has unceremoniously dropped its burden. So far as medical science is concerned artificial insemination is a practical answer to sterility. It is a fact, successful and established. So far as the law is concerned, artificial insemination may be a difficult problem, uncertain and yet to arise.

The production of synthetic babies, while an old idea, is a relatively new "industry". The knowledge that artificial insemination would produce offspring dates almost from the very dawn of medical history, but the application of this knowledge, as a final resort, to the problem of sterility in human beings is a modern innovation. Hardly a child so conceived is, today, more than ten years of age. Yet this very fact all too clearly indicates the growing importance of this problem. In the first ten years of its application this procedure has produced a minimum of upwards of 10,000 children. It would indicate that a major portion of our future population might owe its existence to a test tube.

These "test-tube" babies fall into two distinct classifications. In the first are those who are the offspring of a married couple prevented by some physical abnormality or emotional incapacity from normal conception. In this class of case the natural mother and father are the wife and the husband. Only the conception is artificially induced through the agency of science. With this type of case, no legal problems are involved, since the child is truly the offspring of both the husband and the wife. Children of this class must be admittedly legitimate, since the law, fond as it is of infinite distinctions, has not yet gone so far as to dictate the method of conception.

The second class, however, does give rise to many problems, including the question of legitimacy, since to it belong those children born of a pregnancy in-
duced without the benefit of the mother's husband. In this type, an outside and independent "donor" is selected with care by the physician in attendance. Only he knows this donor's identity. Conception in the wife is thereafter achieved by means of artificial insemination, aided by the contribution of the unknown donor. The children thus produced form the subject of this discussion. These are the children who owe their existence to modern medical science. These are the children who are not the sons and daughters of their mothers' husbands. These are the normal, healthy children whose "fathers" were test tubes and whose mothers were experimental laboratories, but who are nevertheless human beings undistinguishable and unmarked. These are the semi-adopted.

Legally, these thousands of children would seem to be without fathers. Will they, and possibly many thousands more, be permitted to share in the estates of their mothers' husbands? Are they descendants of their mothers only? Are they half-bastards to be condemned by the law to the stigmata of illegitimacy and barred forever from their normal place in the scheme of things?*

The term "semi-adopted" is the one generally accepted as applied to those children born of artificial insemination. Doctors and psychologists have found it a convenient expression to distinguish such children from those born of the natural union of husband and wife, and also from such children as may be legally adopted as that term is employed usually. The designation, "semi-adoption", seemed a happy choice for this in-between conception which has produced the test-tube baby. To the lay mind it seemed adequate to say that the husband "adopted" his wife's offspring by his consenting to the process. Hence the origin and significance of this terminology.

But in law the word "semi-adopted" and its derivatives are unfortunate and misleading. While all reputable physicians have always secured the consent of the husband prior to the insemination, this consent on the part of the husband constitutes his entire process of "adoption" of the child yet to be born. Specifically then, the question is this: Will a child conceived by means of artificial insemination and born of a pregnancy induced through the aid of some unknown donor acquire his full legal status as a child of his pseudo-father with whom no ties of blood of any kind exist, and whose only act of acceptance of this child was his consent to the insemination?

There are no decided cases on this subject. In fact, any considered legal opinion is, as yet, extremely rare. Magistrate Jeannette Brill of New York has said, "The presumption of the law is that a child born in wedlock is legitimate. But in a test-tube case, where the father knows that he is not the father, I can't see how the child can be anything but illegitimate."1

There is much to be said for this argument. The Pennsylvania courts have

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1Coronet, Vol. 10, No. 6, page 12.
held uniformly that, since adoption was unknown at common law, the statutory formalities must be strictly adhered to. Adoption is defined as the "taking of the child of another in the manner provided by, and with the consequences specified in the statute." There seems little room for doubt. Unless the child is taken "in the manner provided by" the statute, the taking cannot be a legal taking or adoption, and the seemingly necessary consequence is that a child not so taken cannot be benefitted by the provisions of Section 16, B, of the Intestate Act of June 7, 1917, P. L. 429, relative to the inheritance rights of adopted children. In short, it would seem that unless all the requirements of the statute are faithfully met, the child remains at law as a stranger to the person who would be his foster parent.

Accepting, for the sake of argument only, that this is the present law applicable to the case, it is now necessary to consider whether the adoption statute is, in its terms, at all applicable to the situation under discussion, namely the taking by the husband of a child born of his wife of a pregnancy induced by artificial insemination through the aid of some outside donor. In other words, will the courts of Pennsylvania hold, as a condition precedent to the full legitimacy of the child as regards the pseudo-father, the necessity for observing statutory procedure in the case of a husband who would "adopt" his wife's test-tube offspring.

The act of April 4, 1925, P. L. 127 as amended, June 5, 1941, P. L. 93 and July 2, 1941, P. L. 229 lists, in part, the following requisites for a legal adoption:

a. Petition by the adopting parent or parents to the orphans' court, setting out the name, age, date and place of birth of the person to be adopted as well as the name or names of the natural parent or parents, or anyone else whose consent to the adoption must be secured.

b. The consent of the adopting parent's husband or wife.

c. The consent of the parents or surviving parent of the person proposed to be adopted, where such person has not reached the age of eighteen years, except that in the case of an illegitimate child the consent of the mother only is necessary.

d. Hearing before the court.

e. The decree of adoption.

The one major objection which must be made generally to this entire procedure, as applied to test-tube babies, is its publicity. But to explain, even in part, the practical difficulty which will be encountered immediately if publicity is forced upon the process of artificial insemination, some consideration of its procedure must be made. In all test-tube cases closest secrecy is the predominating feature. Artificial insemination is resorted to usually only after the married couple has exhausted every hope of curing the husband's sterility. In the usual course of events only the husband, the wife and the acting physician have any knowledge whatever that this process has been employed. The child, to his own belief and to that of

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his family's friends, is the offspring of his mother's husband. The couple is never
told the identity of the donor, and he in turn does not know and cannot discover
the name of the woman he has benefitted.

Today, according to reliable medical estimates, fifteen per cent of all married
couples are involuntarily childless. This means that there are some three million
marriages in which sterility prevents childbearing. In about half of these cases
artificial insemination will produce the desired children. And for many of this
number it will be the only possible solution to the sterility. That it has already
produced, at least, upwards of ten thousand children bears mute testimony, not
only to its practical effectiveness, but also to the fact that its resources have been by
many couples considered the final resort in the solution of their own physical in-
capacity. It is an accepted medical fact which can bring an otherwise impossible
happiness to millions of people. But its entire value will be lost if the courts are
to force upon it arbitrarily an unwanted publicity.

The very life-blood of artificial insemination is secrecy. Will a husband choose
to come into court and publicly admit that he is incurably sterile? Usually he will
not so long as there burns within him one remaining spark of family pride. Will
the husband choose to admit publicly that the child his wife has borne is not his,
but actually that of some professional donor? Again the answer must be an almost
inevitable negative. Will the child itself be happier knowing that the one he has
become accustomed to call "father" is not actually his father at all, but that instead
he has been sired by some unknown who has been paid for his services? What
will be the effect upon the mother when she learns the name of the father or
fathers of her children? The possible psychological repercussions are overwhelm-
ing to contemplate, if the secrecy be destroyed and the pseudo-father be forced into
open court.

What then will be the inevitable result if the courts do require formal adop-
tion proceedings by the husband to "adopt" his own wife's offspring born during
this marriage? It can be only this, that the same artificial insemination which has
already proven a God-send to thousands of happy couples and which may, in the
near future, equally benefit millions more, will die of publicity and shame and
will be relegated to the laboratory whence it came. Medical science, instead of
having successfully filled a long-felt need, will have served as midwife to ten thou-
sand bastards.

But laying aside the almost inevitable conclusion that mankind would avoid
such a procedure if attended by open publicity, and supposing that some few
couples might find its advantages desirable in spite of the attendant notoriety, yet
the purely legal difficulties in attempting to comply with the statutory requirements
remain. A brief consideration of the requisites above enumerated will bear this out.

First of all the adopting parent or parents must petition the orphans' court.
The petition must state the name of the child to be adopted. What name could be
given for this test-tube baby? The name of the actual father could not be given since this is a fact which cannot be revealed. If the name of the mother, as in the case of some illegitimates, then this is the same name as that of the petitioning husband and there would appear the incongruous situation of a father seemingly "adopting" his own child, appearing as it would, John Doe, adopting John Doe, Jr.

But even though this difficulty be overcome successfully, the second requirement, that is, the names of the natural parents, presents a real difficulty. The name of the mother is readily available, but should the petition show the father to have been "test-tube number 216"? And if it be so given, would this fulfill the rigid statutory requirement? Obviously it would not since the name to be given is that of the person whose consent is required. A test tube can hardly be said to come into this classification. Furthermore, it must not be forgotten that the name of the natural father is often impossible to obtain, or, if possible, extremely undesirable since its revelation would prove highly disastrous to the psychological well-being of all the parties concerned. It is true that situations do exist where the donor's name is actually known to the physician or the foundation performing the insemination. In fact many times accurate records are purposely kept by members of both the medical and psychological professions in order to form the basis of studies of heredity and psychological development and progress. In such cases it would appear that the actual ascertaining of the donor's name would be simply a matter of record. This is true, but when considered in the light of the effect this revelation to the public would produce, numerous difficulties are at once encountered.

A single example will suffice to illustrate these difficulties. All donors are selected with great care. They must be entirely free from any hereditary incapacity or taint. They must possess good character and better than average intelligence. The number of persons answering to these requirements and available as donors is necessarily small. Frequently therefore, one man may be the donor in a great number of cases. Two years ago Dr. Seymour, reporting in the *Journal of the American Medical Association*, discussed the progress of thirteen "semi-adopted" children all sired by the same man, but born of thirteen different mothers. The donor in this case was an eminent figure in his profession, a college graduate and possessor of an intelligence quotient in the genius rating. He had a wife and two children of his own. The value of his contribution scarcely can be overestimated.

If it be assumed that, instead of the present secrecy, this donor's name would have to be revealed, as required by the present Pennsylvania adoption statute, in subsequent adoption proceedings by the husbands of the women he has thus benefitted, there would appear the unpleasant spectacle of a married man, with children of his own, who was the admitted father of thirteen additional children, each of a different mother. Even though it were made not to appear actually adulterous through some modification of the terminology of parenthood used in the petition, still, so far as the public is concerned, it would seem to accuse the donor of a program of extramural propagation, which would be almost certain to work a sub-
stantial injury to him both professionally and socially. If the donor knows that his name is subsequently to appear as such in public, the risk that he would be asked to run in most cases would be too great. The result is obvious. The valuable services of desirable donors would be lost irretrievably and the whole system of artificial insemination fail.

There can be but one conclusion. The statute makes demands which are, as applied to children produced through artificial insemination, actually impossible to fulfill, or of such a nature that the strict compliance would make necessary a revelation disastrous in its consequences.

Those sections of the statute requiring the consent of various other persons raise only the same problems. The consent of the wife of the "adopting" husband could certainly be readily obtained. This would seem to be necessary for the particular adoption proceeding apart from any consent or agreement prior to the child's birth. In the case of a test-tube baby, however, this wife is the actual mother of the child, and would have to give her consent as its natural parent. Certainly the consent of the wife-mother, even though only one consent, should be sufficient to meet both requirements.

It is with the consent of the father that the real difficulty arises, since it appears that the consent of both of the natural parents is necessary even though the father, in this case, might be considered as having abandoned his child. What has been said regarding the mere naming of the donor is equally applicable to the requirement of his consent. At first glance, the statute, in this instance, would seem to be adequate, since it provides that in the case of an illegitimate the consent of the mother only is necessary. But this automatically gives rise to a vicious circle of faulty reasoning. It is first necessary to call the child illegitimate in order to meet the statutory requirement for an adoption to make the child legitimate. Of course, under the statute as amended in 1941, when the child has reached the age of eighteen years after having lived continuously with the adopting couple for a period of ten years, no consent by the natural parents is necessary. This in some measure at least eases the situation of the test-tube baby. But it puts upon the adopting parents the burden of waiting eighteen years, with the risk of death of the pseudo-father during this long period. Today, as has been pointed out, practically no test-tube baby is more than ten years of age, and in time of war the future is short.

Manifestly all of this discussion leads to but one conclusion. The Adoption Act of 1925, P. L. 127, together with its amendments, was not enacted with the situation of the test-tube baby in the legislative mind. Consequently it is inadequate to meet his needs. It was to be hoped sincerely that the amendments of 1941 might ease this situation but, as observed by Professor A. J. White Hutton in 46

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"It is doubtful whether the legislative mind has improved the general situation of adoption." It is obvious that it has not considered the present problem.

But granting that the system of adoption as it exists in Pennsylvania today is inadequate and impractical as applied to test-tube babies, and that almost without exception the pseudo-father will not resort to its provisions for the reasons outlined, does it necessarily follow that a child as conceived must invariably be considered by the courts as illegitimate as to the pseudo-father? Statutory adoption certainly would fully legitimatize the child. But the present statute has been shown to be inadequate to meet this situation. On the other hand, the courts have recognized only the status of legitimacy or that of illegitimacy. For them there has been no middle ground. Yet it is now a fact beyond all dispute that medical science has created just such a middle ground. Faced with this new situation, in which direction should the courts face? Can the courts, independent of any statute, still find a test-tube baby fully legitimate?

It is true that the case holdings have been almost unanimous to the effect that the court can only follow the legislative lead.

"Instead of passing a general act, giving to adopted children all the rights of those who are natural-born, the legislature has chosen, as has been shown above, to advance step by step, and we cannot properly do otherwise than follow where it leads; hence, since the supposed rights of an adopted child have not been extended to cover the situation here presented, we can only repeat what we said in Boyd's Estate, 270 Pa. 504, 507; 'If it is deemed wise to provide that adopted children shall have the rights here claimed for them, the legislature can extend the law to cover them; we cannot.'” Russell’s Estate, 284 Pa. 164; 130 Atl. 319.

True it is that this concerns a different issue than the one now under consideration, but it is useful to show that the past determination of the court has been to keep the entire subject exclusively within the control of the legislature. Can the court now do otherwise than adhere to this announced policy when confronted with the case of the child produced through artificial insemination? That it can, without torturing the statute or abandoning precedent, is the thesis of the present discussion.

Let it be assumed that a case arises under the legislation now in existence. Because of the hardships imposed by the statute, the pseudo-father has never legally adopted his wife’s son. This pseudo-father is now dead, intestate, and his "semi-adopted" ten-year-old son is claiming his statutory share of his "father’s" estate, against his mother who contends that her husband has died without issue. What will the court answer? Will it apply the strict rule adhered to almost universally and say that since this "father" did not legally adopt his wife’s child, the child

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shall not be entitled to share in the distribution of the estate? If it does so hold, then this result will be flatly contradictory to every intent of this married couple in seeking artificial insemination as a last possible means of leaving an heir. Or, will the court adopt a new and broader view, holding, which seems certainly true, that the legislature never intended the adoption statutes to apply to a test-tube case, and that in this situation, the consent of the husband prior to the insemination is the only act of adoption necessary to constitute the test-tube child his full and legal heir?

This latter possible holding is certainly the more equitable and the more likely to achieve the desired result. It is exactly what the parties intended and went to such great lengths to achieve. Can this be done without statutory authority? Of course, if the decided cases are to be considered as the only controlling consideration, then such a result at first would seem impossible. "We know of no authority for the proposition that, in the state of Pennsylvania, a child may be adopted by parole". But it must be remembered that every decided case has been concerned with the adoption of children conceived naturally and not through artificial insemination, and every case can be distinguished on this factual ground alone. In the interest of justice the cases must be distinguished, and the established rulings held inapplicable to the present situation.

The court would not be without authority for such an apparently revolutionary holding. In Peterson's Estate, Mr. Chief Justice Mitchell begins his opinion, dated June 22, 1905, as follows:

"This case seems to have been argued and adjudged in the court below on the view that the only essential and governing fact on the question of adoption is the literal decree of the court. This is an error. The cardinal fact is the intent of the adopting parent. . . . No action by any court appears to be absolutely essential to a valid and lawful adoption."

The latter sentence quoted would seem to be no longer the law, as applied to the usual adoption proceeding. The Chief Justice based his statement in this particular on the adoption by deed possible under the Act of April 2, 1872, P. L. 31. Whether this method is still law is extremely questionable, as pointed out by Professor A. J. White Hutton in 42 Dickinson Law Review 12; at page 17.

However, nothing subsequent to 1905 has changed in any measure the import of the remainder of this quotation. It must be borne in mind that this statement was written with a prescribed statutory procedure for adoption already long since in existence. The implication is clear. The only way that this holding can be justified is that the court, through the Chief Justice, interpreted the law to mean that the statute was only a form for carrying into effect the adopting parent's in-

\[7\] Carroll's Estate, 219 Pa. 440, 68 A. 1038.
\[8\] 212 Pa. 453, 61 A. 1005.
tent. Thus, only the procedure for carrying out such an intent is that which the statute seeks to regulate. Whether or not the adopting parent had the requisite intent to adopt is the primary consideration for the court. Whether or not, with that intent, he thereafter proceeded according to the provisions of the statute is only of secondary consideration. Subsequent adoption statutes have varied and modified this procedure, but they have done no more than that. Nor has any subsequent case tended to undermine this statement, that the controlling fact is the intent of the adopting parent.

If this be the law, then the statutes in effect today, and the decided cases thereunder, as have been suggested, are those prescribing the procedure to be followed in carrying into effect an intent to adopt a child already in existence at the time such intent was formulated. This is true if it be conceded that the legislature did not have the situation of the test-tube baby in mind. In other words, the statutory procedure has been intended to apply only to living children, and is not the mandatory procedure for carrying into effect an intent relative to any other than such living children.

If this be true then the adoption statute has no application to the problem of artificial insemination, and the children thereby produced. At no time does the pseudo-father entertain any intent to adopt a living child, in spite of the misnomer, "semi-adoption," familiarly applied. The only intent of this sterile husband—yet would-be father—is to have a child of his own. It is never to adopt what he considers the child of another. His only intent is to have his wife bear him a child. If the husband "adopts" anything, it is but the fertile sperm of some outside donor, and fortified with this, he calls upon the agency of medical science to create in his wife a pregnancy he himself is unable to achieve. Nothing has been intended to be adopted except the medical substitute for the natural conception denied him. His consent, his wife's consent, and medical science unite at the moment of conception to bear for the husband a child and heir. This is his only intent, and a statute prescribing a procedure to carry out an utterly different intent to adopt a child already in existence, can have no application whatsoever to this situation. If the "cardinal fact is the intent", then let this be so, and the case of the test-tube baby is taken out of the adoption statute, notwithstanding other pronouncements of the court apparently to the contrary.

Thus the court, on its own reasoning and authority may hold such children fully legitimate, apart from any form of statutory procedure or regulation. The child is the legitimate son of the pseudo-father from the moment of its conception. The statute does not deal with the adoption of a sperm, and the cases, by their own admission, only interpret the statute. The child can and must be held fully legitimate, and this can be done with violence neither to the statute nor to any decided case.

This then should be the result should the case arise under the legislation now in existence. Nevertheless a simple statutory change would simplify the entire
question of artificial insemination. It is accordingly recommended that the Act of April 4, 1925, P.L. 127 as amended, June 5, 1941, P.L. 93 and July 2, 1941, P. L. 229, be further amended so as to read, in addition:

"Provided, however, that in any case where a husband gives his consent, either oral or in writing, to the medical insemination of his wife by artificial means, that no act of adoption shall in any event be necessary, and that any child or children subsequently born of any pregnancy thus induced by such artificial insemination shall for all purposes be the true and legal child or children of such consenting husband."

J. C. Schock