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The AID Child and *In re Marriage of Adams:* Ambiguities in the Illinois Parentage Act (or Who's Your Daddy?)

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Notes

The AID Child and *In re Marriage of Adams*: Ambiguities in the Illinois Parentage Act (or Who's Your Daddy?)

I. INTRODUCTION

Artificial insemination is now a widely accepted reproductive practice.[1] According to a recent report, 172,000 women in the United States underwent artificial insemination in 1987 and 65,000 births resulted.[2] As the use of this procedure has become more common, courts have been forced to deal with the many legal complications that accompany it.[3]

The Illinois Appellate Court for the Second District decided *In re Marriage of Adams*,[4] a divorce proceeding in which the husband of an artificially inseminated woman refused to provide child support for the resulting child because he claimed that he was not the child's legal father. Under the Illinois Parentage Act ("IPA"),[5] a husband who consents in writing to his wife's insemination is con-

1. *See* Goldstein, *Artificial Insemination by Donor—Status and Problems*, in GENETICS AND THE LAW 197 (A. Milunsky and G. Annas eds. 1976). Because approximately 15% of all married couples are infertile, with the male responsible 40% of the time, artificial insemination by donor ("AID") has become a major technique employed in therapy of couples with infertility problems. *Id. See also* L. ANDREWS, NEW CONCEPTIONS: A CONSUMER'S GUIDE TO THE NEWEST INFERTILITY TREATMENTS, INCLUDING IN VITRO FERTILIZATION, ARTIFICIAL INSEMINATION, AND SURROGATE MOTHERHOOD 159-96 (1984).

2. Marwick, *Artificial Insemination Faces Regulation, Testing of Donor Semen, Other Measures*, JAMA, at 1339, Sept. 9, 1988 (statistics based on recent study from the Office of Technology Assessment).

3. *See* Healey, *Legal Regulation of Artificial Insemination and the New Reproductive Technologies*, in GENETICS AND THE LAW III 139 (A. Milunsky and G. Annas eds. 1984). *See also* E. NOBLE, HAVING YOUR BABY BY DONOR INSEMINATION 239-81 (1987) (discussing legal implications of artificial insemination with respect to legitimacy, divorce and support obligations, adultery, inheritance rights, and donor rights); L. ANDREWS, *supra* note 1, at 188-95. For a summary of reports by AID commissions worldwide, *see* G. ANNAS & S. ELIAS, REPRODUCTIVE GENETICS AND THE LAW 235-38 (1987).

4. 174 Ill. App. 3d 595, 528 N.E.2d 1075 (2d Dist. 1988), *rev'd on other grounds*, 133 Ill. 2d 437, 551 N.E.2d 635 (1990).

5. ILL. REV. STAT. ch. 40, paras. 1451-1453 (1989).

sidered the legal father of the resulting child.[6] The statute is silent, however, as to the legal status of a child thus conceived without the husband's consent. In *Adams*, the court considered whether the husband, who did not give written consent to the insemination as required by the IPA, nevertheless was obligated to provide child support.[7]

The court also considered whether the statute prohibited the wife from relying on common law remedies, such as the doctrine of equitable estoppel,[8] to prove that her husband actually consented to the insemination and thus force her husband to provide child support.[9] In addition, the court addressed which party should bear the burden of proving the husband's actual consent to the wife's insemination, or the lack of such consent, if equitable relief is available.[10] The *Adams* court held that the wife could rely on common law remedies to prove that her husband actually consented to the procedure, that the husband's conduct amounted to actual consent, and that the husband bore the burden to prove non-consent.[11] The court, therefore, ordered the husband to provide support for the child.[12]

Subsequently, *Adams* was reversed by the Illinois Supreme Court because the trial court incorrectly applied Illinois law to the dispute. Nonetheless, the appellate court decision remains important[13] because it is the only Illinois court decision in the last thirty

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6. *Id.* paras. 1452-1453. For the full text of these provisions, *see infra* note 54.

7. *Adams*, 174 Ill. App. 3d at 599, 528 N.E.2d at 1076.

8. Equitable estoppel is defined as the "preclusion of a person by his act or conduct or silence from asserting rights which might otherwise have existed." BLACK'S LAW DICTIONARY 637 (4th ed. 1968).

9. *Adams*, 174 Ill. App. 3d at 611, 528 N.E.2d at 1084.

10. *Id.* at 615, 528 N.E.2d at 1087.

11. *Id.* at 615, 618, 619, 528 N.E.2d at 1087-89.

12. *Id.* at 615, 618, 528 N.E.2d at 1087, 1089.

13. In re Marriage of Adams, 133 Ill. 2d 437, 447-48, 551 N.E.2d 635, 638-40 (1990). For a discussion of the Illinois Supreme Court opinion, *see infra* notes 151-61 and accompanying text.

[Editor's Note: In the absence of clarification from the legislature, the Illinois Supreme Court may be forced to return to this issue in the future. More and more couples are turning to innovative reproductive techniques, including the use of sperm donors, surrogate mothers, and *in vitro* fertilization. This development is due to an increase in fertility problems resulting from delaying pregnancy, and a corresponding decrease in the number of children available for adoption because of the ready availability of family planning and legalized abortion. *See* Matter of Adoption of Baby Girl L. J., 132 Misc.2d 972, 505 N.Y.S.2d 813 Sur. 1986) (noting that the wait for a child to adopt may be as long as seven years, thus forcing couples to resort to scientific methods in order to conceive a child). As the use of these techniques grows, courts and legislatures will be required to address the ethical and legal implications of this new biotechnology. In a pivotal case involving conception through artificial insemination and surrogate motherhood, the court stated:

years to address the legal impact that artificial insemination has upon a husband's support obligations to the resulting child. In addition, *Adams* exposes deficiencies in the Illinois statute governing the legal relationship between a husband and the child his wife conceives through artificial insemination.

This Note first discusses the technique of artificial insemination and reviews Illinois' judicial and legislative response to artificial insemination.[14] It then examines *In re Marriage of Adams*[15] and analyzes *Adams* in light of the Illinois Parentage Act.[16] Finally, this Note suggests changes to the Act that would provide more adequate protection for the interests of children conceived through artificial insemination.[17]

II. BACKGROUND

A. *Types of Artificial Insemination*

There are two types of artificial insemination.[18] The first variation of the procedure is homologous artificial insemination ("AIH").[19] In this procedure, a woman is impregnated with the semen of her husband.[20] The other, more common variation is the artificial insemination donor method ("AID").[21] Unlike AIH, this reproductive technique involves an anonymous sperm donor.[22] Be-

"The problem is how to enjoy the benefits of the technology—especially for infertile couples—while minimizing the risk of abuse. The problem can be addressed only when society decides what its values and objectives are in this troubling, yet promising area." Matter of Baby M., 537 A.2d 1227, 1264 (N.J. 1988).]

14. *See infra* notes 18-66 and accompanying text.

15. *See infra* notes 67-161 and accompanying text.

16. *See infra* notes 162-182 and accompanying text.

17. *See infra* notes 183-186 and accompanying text.

18. INTERNATIONAL DICTIONARY OF MEDICINE AND BIOLOGY 1447-48 (Vol. II 1986).

19. *Id.*

20. *Id.* Doctors employ AIH when natural reproduction is not possible due to impotence or drug-induced erectile dysfunction. *Id.*

21. *Id.* For additional discussion about this procedure, *see* Goldstein, *supra* note 1, at 197. AID is used to treat infertile couples when the male is sterile or has a sperm abnormality, or when there is a risk of transmitting a genetic or infectious disease. *Id.* at 197-98; G. ANNAS & S. ELIAS, supra note 3, at 227-28. For commentary on the right to use AID, *see* Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 VA. L. REV. 405, 428 (1983).

22. INTERNATIONAL DICTIONARY OF MEDICINE AND BIOLOGY 1447-48 (Vol. II 1986). For commentary on a third variation of this procedure, *see* Comment, *Artificial Insemination and Surrogate Motherhood—A Nursery Full of Unresolved Questions*, 17 WILLAMETTE L. REV. 913, 917 (1981). This third variation is known as "confused" artificial insemination ("AIC"). *Id.* Under this procedure, a woman is inseminated with a mixture of her husband's and a donor's sperm. *Id. See also* Wadlington, *Artificial Insemination: The Challenge for Family Law*, 69 VA. L. REV. 465, 469 (1983). This

cause most legal complications involving artificial insemination stem from the AID method,[23] this Note will focus exclusively upon the use of AID.

B. Judicial Response to the AID Child's Legitimacy

Artificial insemination has raised the legal question of the legitimacy[24] of a child conceived through this procedure.[25] Historically, Illinois courts uniformly have applied a strong presumption that a child naturally born or conceived during marriage is legitimate.[26] In 1985, the Illinois legislature codified this presumption.[27] This

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variation has no medical superiority over the usual AID procedure and is much less popular today than it was a decade or two ago. *Id.*; L. ANDREWS, *supra* note 1, at 180. Recent research warns against mixing sperm because the addition of the husband's sperm may reduce the possibility of fertilization. *Id.*

23. Oakley, *Test Tube Babies: Proposals for Legal Regulation of New Methods of Human Conception and Prenatal Development*, 8 FAM. L.Q. 385, 386 (1974).

24. Legitimacy is defined as "[l]awful birth; the condition of being born in wedlock." BLACK'S LAW DICTIONARY 1046 (4th ed. 1968). Illegitimacy is defined as "[t]he state or condition of one whose parents were not married at the time of his birth." *Id.* at 882.

25. Some courts have held that children conceived through AID are legitimate. *See, e.g.*, People v. Sorenson, 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968); Strnad v. Strnad, 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948). Other courts have determined that AID children are illegitimate. *See, e.g.*, Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963); Doornbos v. Doornbos, 23 U.S.L.W. 2308 (Super. Ct. Cook County, Ill. Dec. 13, 1954), *appeal dismissed on procedural grounds*, 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956). For additional commentary on legitimacy and the AID child, *see* L. ANDREWS, FEMINIST PERSPECTIVES ON REPRODUCTIVE TECHNOLOGIES 33-35 (American Bar Foundation Working Paper No. 8701, 1987); Noble, *supra* note 3, at 242-48.

26. Simcox v. Simcox, 175 Ill. App. 3d 473, 475, 529 N.E.2d 1032, 1034 (1st Dist. 1988); *In re* Estate of Hutchins, 120 Ill. App. 3d 1084, 1089, 458 N.E.2d 1356, 1359 (4th Dist. 1984); People *ex rel.* Valle v. Valle, 113 Ill. App. 3d 682, 686, 447 N.E.2d 945, 949 (1st Dist. 1983); Happel v. Mecklenburger, 101 Ill. App. 3d 107, 112, 427 N.E.2d 974, 978 (1st Dist. 1981); People *ex rel.* Adams v. Mitchell, 89 Ill. App. 3d 1023, 1028, 412 N.E.2d 678, 682 (1st Dist. 1980); *In re* Ozment, 61 Ill. App. 3d 1044, 1047, 378 N.E.2d 409, 411 (3d Dist. 1978); People *ex rel.* Smith v. Cobb, 33 Ill. App. 3d 68, 70, 337 N.E.2d 313, 315 (1st Dist. 1975); People *ex rel.* Jones v. Schmitt, 101 Ill. App. 2d 183, 186, 242 N.E.2d 275, 276 (3rd Dist. 1968); People *ex rel.* Gonzalez v. Monroe, 43 Ill. App. 2d 1, 7, 192 N.E.2d 691, 693 (2d Dist. 1963). The court in People v. Powers, 340 Ill. App. 201, 204, 91 N.E.2d 637, 639 (1st Dist. 1950), explained that this presumption originates in the need for family stability and in the need to protect helpless infants who would be "tarred forever with the stigma of illegitimacy" without this presumption.

27. ILL. REV. STAT. ch. 40, para. 2505(a) (1989). Section 5(a), entitled "Presumption of Paternity," provides:

> (a) A man is presumed to be the natural father of a child if: (1) he and the child's natural mother are or have been married to each other, even though the marriage is or could be declared invalid, and the child is born or conceived during such marriage; or (2) after the child's birth, he and the child's natural mother have married each other, even though the marriage is or could be declared invalid, and he is named, with his consent, as the child's father on the

presumption, however, may be rebutted by clear and convincing evidence.[28] Such evidence conclusively must establish that the husband was unable to procreate or that circumstances rendered it impossible for the husband to father the child.[29]

Regardless of the presumption of legitimacy afforded naturally born or conceived children, however, Illinois courts have been reluctant to legitimize AID children, irrespective of the husband's consent to the procedure.[30] The issue of AID children's legitimacy has been addressed by only two Illinois courts, both in the context of divorce proceedings.[31] In these two cases, Illinois courts began to analyze the rights of both the AID child and the husband of the woman who is inseminated. In the first case,[32] the court indicated that artificial insemination did not constitute grounds for divorce as adultery.[33] In the second case[34] the court strongly opposed le-

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child's birth certificate pursuant to Section 12 of the "Vital Records Act," approved August 8, 1961, as amended.

Id. For commentary on this statute, *see* Klages, *The Illinois Parentage Act of 1984: The Continuing Shift Toward Civil Enforcement*, 73 ILL. B.J. 564 (1985).

28. Ill. Rev. Stat. ch. 40, para. 2505(b) (1989). *See* Simcox, 175 Ill. App. 3d at 475, 529 N.E.2d at 1034; People *ex rel.* Brown v. Bloodworth, 155 Ill. App. 3d 901, 905, 508 N.E.2d 1152, 1154 (5th Dist. 1987); *Hutchins*, 120 Ill. App. 3d at 1089, 458 N.E.2d at 1359; *Happel*, 101 Ill. App. 3d at 112, 427 N.E.2d at 979; People *ex rel.* Smith v. Cobb, 33 Ill. App. 3d at 70, 337 N.E. 2d at 313. The Illinois Supreme Court first enunciated this standard in Orthwein v. Thomas, 127 Ill. 554, 21 N.E. 430 (1889). In that case, the court noted that this presumption should be very difficult to rebut because the law is unwilling to bastardize children. *Orthwein*, 127 Ill. at 562, 21 N.E. at 431-32. *See generally* Note, *The Burden of Proof in a Paternity Action*, 25 J. FAM. L. 357 (1986); Note, *R.McG. & C.W. v. J.W. & W.W.: The Putative Father's Right to Standing to Rebut the Marital Presumption of Paternity*, 76 N.W. U.L. REV. 669 (1981).

29. *Happel*, 101 Ill. App. 3d at 112, 427 N.E.2d at 979.

30. For a general discussion of legitimacy and the AID child, *see* Smith, *The Razor's Edge of Human Bonding: Artificial Fathers and Surrogate Mothers*, 5 W. NEW ENG. L. REV. 639, 641-43 (1983); Wadlington, *Artificial Insemination: The Dangers of a Poorly Kept Secret*, 64 NW. U.L. REV. 777, 785-92 (1970); Comment, *New Reproductive Technologies: The Legal Problem and a Solution*, 49 TENN. L. REV. 303, 312-16 (1982).

31. *See* Doornbos v. Doornbos, 23 U.S.L.W. 2308 (Super. Ct. Cook County, Ill. Dec. 13, 1954), *appeal dismissed on procedural grounds*, 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956); Hoch v. Hoch, No. 44-C-8307 (Cir. Ct. Cook County Ill. 1945) (unreported case as cited by Oakley, *supra* note 23, at 387 n.17. For additional discussion of *Hoch*, *see* Comment, *Artificial Human Reproduction: Legal Problems Presented by the Test Tube Baby*, 28 EMORY L.J. 1045, 1072 n.160 (1979). Although these are the only two Illinois cases that have addressed this issue, the argument that the legal father of an AID child is the husband of the inseminated woman was raised by a party to a more recent contested adoption case. *See In re* Adoption of McFadyen, 108 Ill. App. 3d 329, 438 N.E.2d 1362 (2d Dist. 1982), *cert. denied*, 460 U.S. 1015 (1983). In that case, however, the court dismissed the argument as inapplicable to the facts presented and never reached the merits of the artificial insemination argument. *McFadyen*, 108 Ill. App. 3d at 335-37, 438 N.E.2d at 1366-67.

32. *Hoch*, No. 44-C-8307 (Cir. Ct. Cook County Ill. 1945).

33. Comment, *supra* note 31, at 1072 n.160 (discussing *Hoch*).

gitimizing the AID child because it concluded that artificial insemination is equivalent to adultery and therefore, any child resulting from the procedure is illegitimate.[35]

The first Illinois court to discuss the legitimacy of an AID child was *Hoch v. Hoch*,[36] in which the husband sought a divorce from his wife on the grounds of adultery.[37] In *Hoch*, the husband returned home after a two-year absence to find his wife pregnant.[38] The wife contended that her pregnancy was the result of AID, and not adultery.[39] The court indicated that artificial insemination did not constitute grounds for divorce as adultery.[40] The wife, however, had committed adultery in the conventional way.[41] Hence, the court concluded that the child was illegitimate in the traditional sense and granted the divorce.[42]

The legitimacy of an AID child again was addressed in *Doornbos v. Doornbos*.[43] In *Doornbos*, the wife, seeking a divorce, asked an Illinois trial court to rule that AID was not adultery and that her AID child was legitimate.[44] Instead, the *Doornbos* court ruled that AID, with or without the consent of the husband, is contrary to public policy and morality.[45] Thus, the court held that an AID child is born out of wedlock and therefore, is illegitimate.[46] *Doornbos* concluded that the husband was not the child's father and had no legal right to the child.[47]

C. *Illinois Parentage Act*

Hoch and *Doornbos* illustrate some of the legal questions raised

34. *Doornbos*, 23 U.S.L.W. 2308.
35. *Id.*
36. No. 44-C-8307 (Cir. Ct. Cook County Ill. 1945).
37. Oakley, *supra* note 23, at 387 n.17 (discussing *Hoch*).
38. Comment, *supra* note 31, at 1072 n.160 (discussing *Hoch*).
39. *Id.*
40. *Id.*
41. *Id.* For further commentary on the holding in *Hoch*, *see* Comment, *supra* note 22, at 920.
42. Comment, *supra* note 31, at 1072 n.160 (discussing *Hoch*).
43. 23 U.S.L.W. 2308 (Super. Ct. Cook County, Ill. Dec. 13, 1954), *appeal dismissed on procedural grounds*, 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956).
44. Comment, *supra* note 31, at 1072 n.160 (discussing *Doornbos*). *Doornbos* is only briefly summarized at 23 U.S.L.W. 2308. Therefore, additional source material is referenced to provide a lengthier discussion of the facts in this case.
45. *Doornbos*, 23 U.S.L.W. at 2308.
46. *Id.* at 2308. The court concluded that the wife's use of AID was equivalent to adultery. *Id.* For further commentary on *Doornbos*, *see* Wadlington, *supra* note 30, at 788; Levisohn, *Dilemma in Parenthood: Socio-legal Aspects of Human Artificial Insemination*, 36 CHI. KENT L. REV. 1, 23 (1959); E. NOBLE, *supra* note 3, at 262.
47. *Doornbos*, 23 U.S.L.W. at 2308.

by artificial insemination.[48] In response to these and other similar questions, the National Council of Commissioners of State Laws promulgated the Uniform Parentage Act ("UPA")[49] in 1973.[50] Under the UPA, if a husband consents to the AID procedure, the child born to his wife as a result of this procedure is considered the his legal child.[51] Soon after the creation of the UPA, state legislatures began to enact AID statutes modeled after the UPA.[52] The Illinois legislature enacted the Illinois Parentage Act ("IPA")[53] in 1984, essentially adopting the language of the UPA.[54]

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48. *See supra* notes 32-47 and accompanying text.

49. UNIF. PARENTAGE ACT, 9B U.L.A. 301-45 (1987).

50. *See* UNIF. PARENTAGE ACT § 5, 9B U.L.A. 301 (1987) (Commissioners' comment). The UPA specifically focuses upon the paternity of the AID child in Section 5. That section provides:

> (a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is artificially inseminated with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record or elsewhere, are subject to inspection only upon an order of the court for good cause shown.
>
> (b) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other that the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.

UNIF. PARENTAGE ACT § 5, 9B U.L.A. 301 (1987). For a discussion of the development and implications of the UPA, *see* Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1 (1974). *See also* Krause, *Artificial Conception: Legislative Approaches*, 19 FAM. L.Q. 185, 195 nn. 52, 53 (1985). For commentary on proposed modifications of the UPA, *see* Comment, *supra* note 30, at 332-41.

51. UNIF. PARENTAGE ACT § 5, 9B U.L.A. 301 (1987).

52. *See* UNIF. PARENTAGE ACT, 9B U.L.A. 2 (Prefatory table, Supp. 1990). The Uniform Parentage Act has been adopted by the following 17 states: Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, North Dakota, Ohio, Rhode Island, Washington, Wyoming. *Id.*

53. ILL. REV. STAT. ch. 40, paras. 1451-1453 (1989).

54. *Compare id. with* UNIF. PARENTAGE ACT § 5, 9B U.L.A. 301 (1987). Section 2 of the IPA provides:

> Any child born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived child of the husband and wife so requesting and consenting to the use of such technique.

ILL. REV. STAT. ch. 40, para. 1452 (1989).

Section 3 of the IPA provides:

> (a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband shall be treated in law as if he were the natural father of the child thereby conceived. The husband's consent must be in writing executed and acknowledged by both the husband and wife. The physician who is

The IPA first was introduced to the Illinois legislature as Senate Bill 61.[55] At the third reading of this bill, Senator John D'Arco explained that the bill was designed to clarify who the legal father of an AID child would be.[56] During the subsequent House debates on this bill, Representative Steven Nash explained that the bill would establish that, if the husband of a woman who is artificially inseminated consents to the insemination, then he would be considered the resulting child's natural father.[57] After further discussion, the House passed the bill.[58] Governor James Thompson cast an amendatory veto of this bill.[59] The Governor proposed that Section 3[60] be eliminated, thus rendering the bill silent as to the relationship between the AID child and the husband of the woman who was inseminated.[61]

After the Governor's amendatory veto, the House reconvened

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to perform the technique shall certify their signatures and the date of the insemination, and file the husband's consent in the medical record where it shall be kept confidential and held by the patient's physician. However, the physician's failure to do so shall not effect the legal relationship between the father and the child. All papers and records pertaining to the insemination, whether part of the permanent medical record held by the physician or not, are subject to inspection only upon an order of the court for good cause shown.

(b) The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife shall be treated in law as if he were not the natural father of a child thereby conceived.

ILL. REV. STAT. ch. 40, para. 1453 (1989). For text of section 5 of the UPA, *see supra* note 50.

55. 83RD ILL. GEN. ASSEM., SENATE PROCEEDINGS, May 19, 1983, 44 (debates on Senate Bill 61).

56. *Id.* Senator D'Arco noted that in In re Adoption of McFadyen, 108 Ill. App. 3d 329, 438 N.E.2d 1362 (2d Dist. 1982), the court seemed to indicate that the donor would be the legal father of the AID child. *Id.* D'Arco referred to this case as "McFadden" in error. Because no Illinois "McFadden" case mentions artificial insemination, it is clear that he was referring to *McFadyen*. Senator D'Arco disagreed with the court's conclusion and stated that the legal father should be the husband of the woman who is artificially inseminated. *Id.* Although D'Arco misconstrued the *McFadyen* holding, which did not actually address the legal parentage of the AID child, his comments are relevant to his interpretation of the bill's purpose. For additional discussion of *McFadyen*, *see supra* note 31.

57. 83RD ILL. GEN. ASSEM., HOUSE PROCEEDINGS, June 24, 1983, 171 (debates on Senate Bill 61).

58. 83RD ILL. GEN. ASSEM., HOUSE PROCEEDINGS, June 24, 1983, 174.

59. *See* 83RD ILL. GEN. ASSEM., HOUSE PROCEEDINGS, Nov. 2, 1983, 81 (debates on Senate Bill 61).

60. Section 3 is codified at ILL. REV. STAT. ch. 40, para. 1453 (1989). Among other things, this section clarifies the legal relationship between the AID child and the consenting husband. ILL. REV. STAT. ch. 40, para. 1453 (1989). For the complete text of this section, *see supra* note 54.

61. *See* 83RD ILL. GEN. ASSEM., HOUSE PROCEEDINGS, Nov. 2, 1983, 81-82 (debates on Senate Bill 61).

and discussed the bill further.[62] At that time, Representative Richard Brummer proposed postponing passage of the bill until certain ambiguities in the bill could be resolved.[63] Specifically, Representative Brummer noted that the bill as amended by the Governor's veto did not address what happens when a married woman is artificially inseminated without the consent of her husband, who has support obligations.[64] Apparently, Representative Brummer believed that the bill as originally passed did address the legal status of a child conceived by artificial insemination. According to Brummer, the bill as originally passed provided that a child so conceived without the consent of the husband was not the husband's legal child.[65]

The House subsequently overrode the Governor's amendatory veto and passed the legislation as originally approved by the legislature.[66] Notwithstanding Representative Brummer's interpretation of the bill as passed, the plain language of the IPA as enacted is unclear because it fails expressly to address the legal status of an AID child born without the husband's written consent. The IPA's express language is strictly confined to those instances when the woman obtains her husband's written consent to the procedure. Moreover, the IPA does not create a presumption of consent that would insure the legitimacy of a child conceived artificially.

III. *IN RE MARRIAGE OF ADAMS*

A. Facts

In 1984, Ritaray Adams ("Ritaray") underwent the AID procedure without the written consent of her sterile husband, John Adams ("John").[67] As a result of the procedure, Ritaray conceived

62. 83RD ILL. GEN. ASSEM., HOUSE PROCEEDINGS, Nov. 2, 1983, 81.

63. *Id.* at 81-82.

64. *Id.* Representative Brummer stated: "I would respectfully suggest that we would be better off not accepting the Governor's amendatory veto and not putting . . . a law on the books that everyone now seems to agree is somewhat ambiguous and does create some problems." *Id.* at 82.

65. *See* 83RD GEN. ASSEM., HOUSE PROCEEDINGS, June 24, 1983, 172 (debates on Senate Bill 61). During debate, Representative Brummer noted that the bill required the husband's written consent to the wife's insemination and stated: "I think that's a very important distinction [the written consent requirement]; because, if the husband does not consent, he would certainly not want to be put in the position of being deemed to be the father of that child." *Id.*

66. 83RD ILL. GEN. ASSEM., HOUSE PROCEEDINGS, Nov. 2, 1983, at 83.

67. In re Marriage of Adams, 174 Ill. App. 3d at 602, 528 N.E.2d at 1078, *rev'd on other grounds*, 133 Ill. 2d 437, 551 N.E.2d 635 (1990).

and gave birth to a son, John David ("J.D.").[68] Shortly thereafter, Ritaray filed a petition for dissolution of marriage, in which she also sought child support for her son, J.D..[69] Before trial, John moved for summary judgment on the child support issue.[70] He claimed that he was not J.D.'s legal father because he never had given written consent to his wife's insemination as required under the IPA.[71] Therefore, John argued that he should not be required to pay child support.[72] In response to John's motion, Ritaray alleged that he had orally consented to her insemination and that he had never objected to the insemination prior to the time the procedure was performed.[73]

The trial court denied John's motion because an issue of fact existed as to whether John gave actual consent to the procedure.[74] At trial, the court determined that John actually had consented to the AID procedure.[75] The court reasoned that actual consent would waive the statutory prerequisite of written consent.[76] Accordingly, the trial court awarded Ritaray sole custody of J.D. and directed John to pay child support.[77]

John appealed to the Illinois Appellate Court for the Second District.[78] He claimed that the trial court should have granted his motion for summary judgment because the IPA mandates a husband's written consent before a parental obligation may be imposed.[79] He argued that the trial court abused its discretion when it denied his motion because the absence of his written consent was

68. *Id.* at 603, 528 N.E.2d at 1079.

69. *Id.* at 604, 528 N.E.2d at 1080.

70. *Id.*

71. *Id.*

72. *Id.* at 604, 606, 528 N.E.2d at 1080-81. Under the IPA, "[t]he husband's consent must be in writing executed and acknowledged by both the husband and wife." ILL. REV. STAT. ch. 40, para. 1453 (1989).

73. *Adams*, 174 Ill. App. 3d at 608, 528 N.E.2d at 1082.

74. *Id.* at 607, 528 N.E.2d at 1082.

75. *Id.* at 604, 528 N.E.2d at 1080. The trial court made thirty-five separate findings of fact with respect to John's actual consent. *Id.* at 611, 528 N.E.2d at 1085. For a list of these findings, *see infra* note 84. In making these findings, the trial court acknowledged that John and Ritaray advanced diametrically opposed theories on the issue of consent and that both parties were impeached on certain points to which each testified. *Adams*, 174 Ill. App. 3d at 614, 528 N.E.2d at 1086.

76. *Id.* at 607, 528 N.E.2d at 1082. The trial court concluded that John was estopped from denying his legal parental responsibilities and mandated that he pay child support for J.D. *Id.* at 604-05, 528 N.E.2d at 1080.

77. *Id.* at 605, 528 N.E.2d at 1080.

78. *Id.* at 605, 528 N.E.2d at 1081.

79. *Id.* at 606, 528 N.E.2d at 1081.

undisputed.[80] John further argued that the evidence did not establish that he actually consented to his wife's insemination.[81] In response, Ritaray again contended that John orally had consented to her insemination, and that he had failed to object to her insemination at any time prior to the procedure.[82] Ritaray argued that John's actions regarding her insemination constituted his waiver of the statute's written consent requirement, and that therefore John was estopped from denying legal parentage.[83]

B. The Majority Opinion

The appellate court affirmed the trial court's decision and held that John's actions were legally sufficient to estop him from denying his support obligation.[84] First, the court rejected John's argument that the IPA provision requiring written consent barred

80. *Id.* at 605, 528 N.E.2d at 1081.

81. *Id.* at 611, 528 N.E.2d at 1084.

82. *Id.* at 608, 528 N.E.2d at 1082.

83. *See id.* at 607-08, 528 N.E.2d at 1082.

84. *Id.* at 618, 528 N.E.2d at 1089. Of the trial court's findings of fact, the appellate court found the following findings to be "significant":

> 1. In order to have children with Ritaray, John tried on two occasions to have his vasectomy reversed.
> 2. The parties discussed the AID procedure which was primarily introduced to Ritaray through the medical writings John brought home and John's conversations. John also obtained the address of [the doctor who performed the procedure].
> 3. Both parties visited with [the doctor] together to discuss the AID procedure. No written consent or affirmative oral consent was given to [the doctor] by either party. Most of the conversation was between John and [the doctor].
> 4. In 1984, Ritaray made visits to [the doctor] which were known to John.
> 5. John was aware that Ritaray was using a basal thermometer and charting her body temperature.
> 6. John knew about the sonograms Ritaray had and paid for them.
> 7. John knew about Ritaray's appointment for the AID procedure.
> 8. John took Lamaze classes with Ritaray.
> 9. John and Ritaray discussed child care and breast feeding.
> 10. John and Ritaray discussed names for the baby.
> 11. John went with Ritaray to the hospital for J.D.'s birth.
> 12. John never objected to his name on the birth certificate showing him as the father.
> 13. J.D. was listed as a dependent on John and Ritaray's 1985 Federal tax return which John had caused to be prepared.
> 14. During the six weeks after J.D.'s birth and leaving for Illinois, John helped care for J.D.
> 15. John bought a present for J.D. for Christmas 1985.
> 16. The settlement agreement proposed by John in early 1986 had the following provisions:
>
> A. The parental responsibility for the minor child, namely, John David Adams, born August 4, 1985, shall be shared by both parties.
>
> B. The primary custody and physical residence of said minor child shall be

further inquiry into the circumstances surrounding the decision to utilize the AID procedure.[85] In determining whether actual consent is a sufficient substitute for written consent, the court engaged in a lengthy analysis of *R.S. v. R.S.*.[86]

In *R.S.*, a Kansas appellate court faced an analogous fact pattern and construed a similar statute.[87] In *R.S.*, the husband orally consented to the wife's participation in AID.[88] Like John, the husband in *R.S.* argued that he was not required to pay child support because the Kansas statute required a husband's written consent.[89] The *R.S.* court reviewed the statute and concluded that the Kansas legislature did not intend that a husband who orally consented to AID should escape parental obligation.[90] Invoking the doctrines

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with the wife. The husband shall have the right to visit with and be visited by the minor child at reasonable times and places.

C. The husband shall pay to the wife, as and for child support, the sum of $50. Payable on the 15th and 30th of every month commencing March 15, 1986, for a total of $100 per month, and continuing each and every month, until such time as said minor child reaches his majority, marries or becomes self-supporting, whichever comes first.

17. Other than John's alleged conversations with Ritaray which she denied, John had no conversations with anyone else in which he denied consent to Ritaray's AID procedure, or in which he disclaimed parental responsibility for J.D. until after dissolution proceedings were filed.

18. John made no written statement or communication to anyone at all in which he denied consent to Ritaray's AID procedure, or disclaimed parental responsibility for J.D., until after the dissolution proceedings were filed.

Id. at 611-13, 528 N.E.2d at 1085.

85. *Id.* at 610-11, 528 N.E.2d at 1084.

86. *Id.* at 608-10, 528 N.E.2d at 1082-84 (reviewing R.S. v. R.S., 9 Kan. App. 2d 39, 670 P.2d 923 (1983)).

87. *R.S.*, 9 Kan. App. 2d at 39, 670 P.2d at 924. *See* KANSAS STAT. ANN. §§ 23-128, 23-130 (1981). Section 23-128 of the Kansas statute provides: "The technique of heterologous artificial insemination may be performed in this state at the request and with the consent in writing of the husband and wife desiring the utilization of such technique for the purpose of conceiving a child or children." *Id.* § 23-128. Section 23-130 of the Kansas statute provides: "The consent provided for in this act shall be executed and acknowledged by both the husband and the wife and the person who is to perform the technique." *Id.* § 23-130.

88. *R.S.*, 9 Kan. App. 2d at 40, 670 P.2d at 925.

89. *Id.* at 41, 670 P.2d at 926. For the relevant text of the Kansas statute, *see supra* note 87.

90. *R.S.*, 9 Kan. App. 2d at 44, 670 P.2d at 927-28. The *Adams* court noted that after reviewing pertinent case law, the *R.S.* court considered the statute and found no indication that the Kansas legislature intended that a husband who orally consents to the AID procedure cannot be held liable on an equitable estoppel or implied consent theory. *Adams*, 174 Ill. App. 3d at 609, 528 N.E.2d at 1084 (citing *R.S.*, 9 Kan. App. 2d at 44, 670 P.2d at 928). The *R.S.* court held that a husband's consent to his wife's insemination is presumed to continue through conception unless the husband establishes by clear and convincing evidence that he withdrew such consent. *R.S.*, 9 Kan. App. 2d at 44, 670 P.2d at 928. The *R.S.* court also held that a husband who, in the presence of his wife and

of equitable estoppel and implied consent, the *R.S.* court then concluded that the husband had a duty to support the AID child.[91]

John argued that a showing of actual consent cannot be used to create a support obligation because the term "must" in connection with the IPA requirement of written consent barred a claim for a support obligation when that written consent is not obtained.[92] According to John, the legislative intent expressed in the IPA's language precluded the court from waiving the written consent requirement.[93] Based on *R.S.*, however, the court rejected John's arguments.[94] The court interpreted the IPA's "must" language as

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the treating physician, orally consents to his wife's insemination is estopped from denying that he is the child's father. He impliedly has agreed to support the child and act as its father. *Id.*

91. *Id.* The *Adams* court explained that the *R.S.* court reviewed several decisions from other states in which a duty to provide child support was based upon the husband's actions. *Adams*, 174 Ill. App. 3d at 609, 528 N.E.2d at 1083. In its discussion of *R.S.*, *Adams* reviewed the cases that *R.S.* considered. *Id.* at 609-10, 528 N.E.2d at 1083-84. The *R.S.* court reviewed *Gursky v. Gursky*, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963), in which that court imposed a support obligation upon a husband who consented in writing to the AID procedure. *R.S.*, 9 Kan. App. 2d at 41-43, 670 P.2d at 926-27. The *Gursky* court reasoned that a husband's conduct, including written consent to the procedure, implied his promise to furnish support for any resulting offspring. *Gursky*, 39 Misc. 2d at 1088, 242 N.S.Y.2d at 411. *Gursky* recognized an implied contract upon which the wife relied to her detriment and focused upon the doctrine of equitable estoppel in order to create a duty of support in the husband. *Id.* *R.S.* also reviewed K.S. v. G.S., 182 N.J. Super. 102, 440 A.2d 64 (1981), in which the husband claimed that he withdrew his consent to his wife's insemination. *R.S.*, 9 Kan. App. 2d at 43, 670 P.2d at 927. The *K.S.* court determined that the husband's consent was effective until the wife conceived and that the husband had the burden of establishing that he had revoked his consent. *K.S.*, 182 N.J. Super. at 109-10, 440 A.2d at 68. The *R.S.* court also found analogous the case of *In re* Marriage of L.M.S. v. S.L.S., 105 Wis. 2d 118, 312 N.W.2d 853 (1981). *R.S.*, 9 Kan. App. 2d at 43, 670 P.2d at 927. In *L.M.S.*, although the husband consented to his wife's impregnation by another man, the husband claimed in divorce proceedings that he was not obligated to support the child. *L.M.S.*, 105 Wis. 2d at 119, 312 N.W.2d at 854. *L.M.S.* concluded that a husband who participates in an arrangement to create a child has a legal obligation to support that child. *Id.* at 122, 312 N.W.2d at 855.

92. *Adams*, 174 Ill. App. 3d at 610, 528 N.E.2d at 1084. *See* ILL. REV. STAT. ch. 40, para. 1453 (1989).

93. *Adams*, 174 Ill. App. 3d at 610-11, 528 N.E.2d at 1084. John noted that the Illinois legislature used "must" in connection with the requirement that the husband's consent be in writing, while the legislature used "shall" with regard to the doctor's duty to certify the husband's signature. *Id.* at 610, 528 N.E.2d at 1084. John argued that the use of the term "must," as compared to "shall," expresses a different, mandatory requirement. *See Adams*, 174 Ill. App. 3d at 610, 528 N.E.2d at 1084. John reasoned that a doctor's failure to comply with the duty to certify the husband's signature (prefaced in the statute by the term "shall") does not affect the parent/child relationship. *Id.* John contended that, in contrast, failure to comply with the statutory "must" language effects the parent/child relationship, thereby releasing him from any support obligation. *Id.*

94. *Id.* at 610-11, 528 N.E.2d at 1084. *Adams* relied upon *R.S* in order to interpret the IPA. *Id.* at 608-11, 528 N.E.2d at 1082-84. However, the Kansas statute upon which the *R.S.* court focused does not contain the "must" language found in the IPA.

directory rather than mandatory and concluded that the IPA allows a court to impose support obligations on a husband based upon an estoppel or waiver theory, notwithstanding his failure to consent in writing.[95]

The appellate court next considered whether the trial court abused its discretion when it found that John actually consented to Ritaray's insemination.[96] To determine whether John had consented, the trial court focused on his actions both before and after conception to determine whether he consented.[97] John argued that, in the cases cited by the trial court, the courts had relied on oral and/or written evidence of express consent.[98] In those cases, consent was manifested either by an affirmative act prior to the procedure or by long-term, unequivocal acts following the procedure.[99] According to John, those cases were distinguishable because no similar evidence existed in his case.[100] Therefore, John contended that his actions did not rise to the level of actual consent.[101]

John also argued that the trial court gave improper weight to misleading evidence in order to establish that he had induced Ritaray to proceed with the AID procedure.[102] He contended that the trial court gave too much probative value to evidence that he signed an authorization for medical tests; paid Ritaray's and J.D.'s doctor and hospital bills; stayed with Ritaray during her labor; accepted joint responsibility for J.D. in the settlement agreement he prepared; and, listed J.D. as a dependent on the couple's joint fed-

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See KANSAS STAT. ANN. § 23-128, 23-130 (1981). Instead, the Kansas statute states that insemination "may" be performed with the husband's written consent and uses the term "shall" with reference to the husband's and the wife's duty to execute consent to the insemination. *See* KANSAS STAT. ANN. §§ 23-128, 23-130 (1981). For the complete text of the Kansas statute, *see supra* note 87.

95. *Adams*, 174 Ill. App. 3d at 610-11, 528 N.E.2d at 1084.

96. *Id.* at 611, 528 N.E.2d at 1084.

97. *Id.* at 611-13, 528 N.E.2d at 1085.

98. *Id.* at 613, 528 N.E.2d at 1085-86.

99. *Id. Adams* referred specifically to *In re* Marriage of L.M.S. v. S.L.S., 105 Wis. 2d 118, 312 N.W.2d 853, in which a sterile husband consented to his wife's impregnation by another man. *Adams*, 174 Ill. App. 3d at 609-10, 528 N.E.2d at 1083. In *L.M.S.*, the husband held himself out to the public as the child's natural father and supported the child for years. *L.M.S.*, 105 Wis. 2d at 120, 312 N.W.2d at 854. The *L.M.S.* court held that the husband had an obligation to provide child support. *Id.* at 122, 312 N.W.2d at 854. For additional discussion of *L.M.S.*, *see supra* note 91.

100. *Adams*, 174 Ill. App. 3d at 613, 528 N.E.2d at 1086.

101. *Id.* John claimed that although Ritaray testified that he knew of and consented to the AID procedure, her testimony on this issue was either discredited or was inconsistent with her previous testimony. *Id.* at 613, 528 N.E.2d at 1086.

102. *See id.*

eral income tax return.[103] John argued that this evidence could have been construed in many ways other than as his inducement to Ritaray to be inseminated and therefore should not have provided a valid foundation for Ritaray's estoppel argument.[104]

The appellate court rejected all of these arguments and concluded that the two strongest reasons for affirming the trial court's finding were that the couple listed J.D. on their joint income tax return and that the proposed settlement agreement provided for child support.[105] The court explained that John's excuse that the tax return was both his and Ritaray's was not sufficient to establish that John had not recognized and taken advantage of J.D. as his dependent.[106] The appellate court also acknowledged that John disagreed with the trial court's evaluation of witnesses' testimony.[107] The appellate court noted that the trial court recognized that both John's and Ritaray's testimony had been impeached and discredited to a certain extent.[108] Nonetheless, the court concluded that the trial testimony raised credibility issues within the discretion of the trial court to decide.[109] The court then held that the trial court acted within its discretion when it determined that John actually consented to the AID procedure.[110]

The *Adams* majority also addressed the dissent's assertion that the majority erroneously shifted the burden of proof on the consent issue to John.[111] According to the majority, the dissent ignored the fact that John raised non-consent as an affirmative defense to Ritaray's child support claim.[112] As a result of this pleading strat-

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103. *Id.*

104. *Id.* at 613-14, 528 N.E.2d at 1086. John explained that as a physician's assistant, he routinely signed authorizations for medical tests, which included Ritaray's tests. *Id.* In addition, John explained that most of Ritaray's and J.D.'s medical expenses were paid for by his Navy benefits. *Id.* John also argued that the joint income tax return that the couple filed did not reflect his recognition of J.D. as his dependent because the return reflected J.D. as Ritaray's dependent. *Id.* Finally, John argued that contents of the proposed settlement agreement did not reflect his consent to Ritaray's insemination because the couple had been motivated to make the settlement appear "fair and conscionable" in order to take advantage of Florida's inexpensive divorce proceedings. *Id.*

105. *Id.* at 614, 528 N.E.2d at 1086.

106. *Id.* The *Adams* court theorized that John could have filed a separate return. Instead, John chose to recognize J.D. as a dependent and as a result, John should be prohibited from failing to recognize J.D. as his dependent at a later date. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 614, 528 N.E.2d at 1086-87.

110. *Id.* at 615, 528 N.E.2d at 1087.

111. *Id.* For discussion of the dissent, *see infra* notes 122-150 and accompanying text.

112. *Id.* As part of his answer to Ritaray's petition for dissolution of marriage, John

egy, the court concluded that John bore the burden of proving that he did not consent to the AID procedure.[113]

The appellate court noted that the trial court had cited case law[114] that established that the party who asserts estoppel bears the burden of proof.[115] According to the appellate court, although Ritaray had the burden of proving estoppel, she also had operating in her favor a rebuttable presumption that her husband initially consented to the AID procedure.[116] The trial court had balanced John's burden to demonstrate lack of consent—which he bore because he raised non-consent as an affirmative defense—with Ritaray's presumption of his initial consent, which shifted to John the burden of rebuttal.[117] The appellate court thus concluded that the trial court properly had assigned the evidentiary burdens.[118]

The majority also disagreed with the dissent's argument that the trial court inappropriately subjected John's testimony to a higher degree of scrutiny,[119] holding that both parties had been subjected to equivalent levels of examination.[120] The majority explained that, although the trial court had noted that in some cases the evidence presented by the party who denies paternity is subject to careful scrutiny, in this case, the trial court specifically stated that the testimony of *both* John and Ritaray had been carefully measured against the unrebutted facts.[121]

C. The Concurring and Dissenting Opinion

Justice Dunn concurred in part and dissented in part with the majority opinion.[122] He agreed that the lack of written consent would not preclude the court from requiring John to pay child sup-

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filed an affirmative defense in which he alleged that Ritaray agreed to the AID procedure without John's consent or knowledge. *Id.* In his second amended affirmative defense, John repeated the allegations of his original affirmative defense and also contended that he continuously had objected to Ritaray's insemination. *Id.* Ritaray denied those allegations. *Id.*

113. *Id.*

114. *Id.* The trial court cited Adams v. Mitchell, 89 Ill. App. 3d 1023, 412 N.E.2d 678 (1st Dist. 1980), a case not involving either Ritaray or John Adams. *Id.*

115. *Adams*, 174 Ill. App. 3d at 615, 528 N.E.2d at 1087.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *See id.*

121. *Id.*

122. *Id.* at 618, 618-21, 528 N.E.2d at 1089, 1089-91 (Dunn, J., concurring in part, dissenting in part).

port.[123] A husband who expressly consents to the AID procedure, or who by his conduct induces his wife to utilize the procedure, must be prevented from denying legal parental responsibility.[124] Justice Dunn stated that to hold otherwise might lead to unconscionable results never contemplated by the legislature.[125]

Justice Dunn, however, disagreed with the majority opinion on two points. He argued that the majority's statutory interpretation was flawed because the majority failed to recognize that the IPA is ambiguous.[126] The dissenting Justice also argued that the majority allocated the burdens improperly when it delegated to John the burden of proving that he did not consent to the procedure and when it subjected John's testimony to careful scrutiny.[127]

Justice Dunn examined the legislative history of the IPA and stated that, during the House proceedings, a representative recognized that the IPA leaves ambiguous the legal relationship between a husband and an AID child when the wife is artificially inseminated without the husband's consent.[128] The Justice observed that the IPA seemingly left to the courts the difficult task of determining the legal status of a husband who fails to consent in writing, and a child born to his wife as a result of the AID procedure.[129] In response to this ambiguity, Justice Dunn advocated placing the burden upon the wife to establish her child's legitimacy.[130]

According to the opposing Justice, the IPA requirement of written consent was inconsistent with the court's requirement that the

123. *Id.* at 619, 528 N.E.2d at 1089.

124. *Id.*

125. *Id.*

126. *Id.* at 618-19, 528 N.E.2d at 1089-90.

127. *Id.* at 619-20, 528 N.E.2d at 1089-90.

128. *Id.* at 618-19, 528 N.E.2d at 1089. In support of this observation, Justice Dunn referred to Representative Brummer's concerns about the bill as amended by the Governor. *Id.* For the relevant portions of the legislative debates, *see supra* notes 55-66 and accompanying text. Justice Dunn, however, misconstrued the legislative debate. Although the IPA is indeed ambiguous with respect to the legal relationship between a husband who fails to consent in writing and an AID child, the legislature did not address the ambiguity to which Justice Dunn refers. *See* 83RD ILL. GEN. ASSEM., HOUSE PROCEEDINGS, Nov. 2, 1983, 81-82 (debates on Senate Bill 61). Representative Brummer referred only to the ambiguity of the bill as amended by the Governor's veto. *See id.*

129. *Adams*, 174 Ill. App. 3d at 619, 528 N.E.2d at 1089 . Representative Brummer apparently believed otherwise. Brummer asserted that the IPA addresses the legal status of the AID child and provides that in the absence of written consent, the child has no legal father. *See* 83RD ILL. GEN. ASSEM., HOUSE PROCEEDINGS, Nov. 2, 1983, 81-82 (debates on Senate Bill 61). For additional discussion of Rep. Brummer's comments during House debate, *see supra* note 65.

130. *Id.* at 620, 528 N.E.2d at 1090.

husband prove non-consent.[131] Justice Dunn reasoned that if the legislature intended for a husband to bear the burden of proof, the statute would contain a presumption of consent, as provided in other state statutes,[132] rather than a written consent requirement.[133] Justice Dunn argued that the IPA requirement of written consent should be interpreted as a legislative response to the possible problems of proof when only oral consent is alleged.[134]

Justice Dunn explained that Ritaray sought the benefits of the IPA even though she failed to obtain John's written consent in accordance with the statute;[135] as a result, she should bear the burden of demonstrating that John consented to the procedure.[136] The dissent concluded that the court should have required Ritaray to prove clear, unequivocal evidence of estoppel.[137]

Justice Dunn also contended that the trial court improperly subjected John's testimony to "careful scrutiny."[138] Although he noted that careful scrutiny is appropriate when the husband denies paternity in a natural birth,[139] Justice Dunn argued that the trial court inappropriately applied the same scrutiny to John's testimony.[140] According to Justice Dunn, the normal presumption of legitimacy does not apply in AID cases and, therefore, careful scrutiny should not be applied to the testimony of a husband who fails to consent in writing to the AID procedure.[141] Rather, the more careful level of scrutiny should have been applied to Ritaray's testimony.[142] Justice Dunn argued that the conduct of the party claiming estoppel may be scrutinized when there is evidence suggesting that there was no explicit inducement to perform by the other party.[143] Hence, careful scrutiny of Ritaray's testimony was appropriate because she was determined to have a child despite John's reluctance and the family's impending

131. *Id.* at 619, 528 N.E.2d at 1090.

132. *Id.* Justice Dunn referred here to K.S. v. G.S., 182 N.J. Super. 102, 440 A.2d 64 (1981), in which the court cited both the Arkansas and Maryland parentage statutes which mandate a presumption of consent. *Id. See* ARK. STAT. ANN. § 61-141(c) (1987); MD. CODE ANN. § 1-206(b) (1986).

133. *Adams*, 174 Ill. App. 3d at 619, 528 N.E.2d at 1090.

134. *Id.* at 619-620, 528 N.E.2d at 1090.

135. *Id.* at 620, 528 N.E.2d at 1090

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* (citing *In re* Ozment, 61 Ill. App. 3d 1044, 378 N.E.2d 409 (3d Dist. 1978)).

140. *Id.*

141. *Id.*

142. *Id.*

143. *See id.*

bankruptcy.[144]

Because the trial court used an improper standard of proof,[145] Justice Dunn recommended that the case be reversed and remanded. In addition, he attached little significance to the aspects of John's conduct upon which the trial court and the majority placed great weight.[146] For example, Justice Dunn viewed John's listing of J.D. as a dependent on the couple's joint tax return as insignificant.[147] A taxpayer need not be a legal parent to claim a child as a dependent.[148] In addition, Justice Dunn observed that by filing a joint return with Ritaray, John was entitled to list Ritaray's child as a dependent, just as the couple listed John's three children by his former wife as dependents.[149] It was improper to force legal paternity upon John simply because he took advantage of federal income tax laws.[150]

D. The Supreme Court Decision

The Illinois Supreme Court reversed *Adams* because the trial court applied Illinois law when it should have applied Florida law.[151] The supreme court noted that prior to trial for the dissolution of their marriage, the couple stipulated that J.D.'s parentage should be determined under Illinois law rather than Florida law.[152] The court explained that the stipulation was contrary to customary choice of law principles because Florida had a more significant relationship to the dispute.[153] The court observed that the wife had been inseminated in Florida, that the couple had been residents of Florida through the course of the wife's pregnancy, and the child was born in Florida.[154] For that reason, the court reversed and

144. *Id.* at 620, 528 N.E.2d at 1090

145. *Id.*

146. *Id.* at 621, 528 N.E.2d at 1090. Justice Dunn argued that the majority improperly placed too much significance on the fact that John paid for Ritaray's medical bills because those bills were paid as part of John's Navy benefits. *Id.* at 621, 528 N.E.2d at 1091. He also found aspects of John's conduct following J.D.'s conception, including John's discussion of child care and breast feeding, to be ambiguous. *Id.* Justice Dunn further noted that John's failure to voice his lack of consent to third parties was insignificant. *Id.* Reliance on John's silence conflicts with the IPA's requirement that consent, and not lack of consent, be memorialized. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. In re Marriage of Adams, 133 Ill. 2d 437, 447-48, 551 N.E.2d 635, 639-40 (1990).

152. *Id.* at 443-44, 551 N.E.2d at 637-38.

153. *Id.* at 447, 551 N.E.2d at 639.

154. *Id.*

remanded the case for a determination as to whether the husband has a support obligation under Florida law.[155]

In dicta, the supreme court examined the IPA and commented that the written consent requirement could be considered a mandatory prerequisite to establishing the husband as the legal father of the AID child.[156] The court compared the IPA to the Florida parentage statute and noted that under the Florida statute, the absence of written consent might not preclude a party from proving the child's legitimacy by other means, as under an estoppel theory.[157] The court thus implied that, in the absence of a husband's written consent, equitable relief might not be available under the IPA.[158] Nonetheless, the court also recognized John's argument that if written consent is not an indispensable prerequisite to establishing him as legal father, it would likely be Ritaray's burden to establish the necessary estoppel.[159] The court noted that placing the burden of proof upon Ritaray might better accomplish the purpose of the legislation.[160] The court quoted from Justice Dunn's dissent that "[h]ad the legislature intended that the burden of proving non-consent would be on the husband, the requirement of written consent would not have been necessary."[161]

IV. ANALYSIS

The IPA was enacted to clarify the legal relationships among the parties involved in the AID procedure.[162] *Adams* demonstrates,

155. *Id.* at 447-48, 551 N.E.2d at 639. The Florida parentage statute provides: "Any child born within wedlock who has been conceived by the means of artificial insemination is irrebuttably presumed to be legitimate, provided that both the husband and wife have consented in writing to the artificial insemination." FLA. STAT. ANN. § 742.11 (1986).

156. *Adams*, 133 Ill. 2d at 444, 551 N.E.2d at 638 (citing Andrews v. Foxworthy, 71 Ill. 2d 13, 21, 373 N.E.2d 1332, 1335 (1978) ("must" generally construed as mandatory)).

157. *Id.* at 445, 551 N.E.2d at 638. With reference to the Florida statute, the court stated that "the absence of written consent might simply fail to establish an irrebuttable presumption of legitimacy, and legitimacy might still be provable by other means, such as under an estoppel theory." *Id.* In support of applying Florida law, the court stated: "We do not believe that we should allow the minor to forgo what benefits may exist for him under the Florida statute and to stipulate instead to the application of perhaps the more stringent provision." *Id.* at 447, 551 N.E.2d at 639. For the full text of the Florida statute, *see supra* note 155.

158. *See id.* The supreme court, however, did not foreclose the possibility that a support obligation might be imposed irrespective of whether legitimacy was provable under the IPA. *Id.*

159. *Id.* at 448, 551 N.E.2d at 639.

160. *Id.*

161. *Id.* at 448, 551 N.E.2d at 639-40.

162. *See supra* notes 48-66 and accompanying text. Indeed, the IPA is entitled "An Act to define the legal relationships of a child born to a wife and husband requesting and

however, that the IPA has in fact blurred the relationships it sought to clarify.[163] The primary problem with the IPA is that it fails explicitly to address situations in which the husband does not consent in writing to his wife's insemination.[164] As a result, the statute is ambiguous.

This ambiguity yields three possible, and conflicting, interpretations of the IPA. Under one interpretation, the written consent requirement is mandatory and in the absence of such consent, the AID child has no legal father and the husband has no support obligation. A second interpretation views the requirement of written consent as simply directory, thus allowing the wife to pursue an equitable remedy under which the husband may be forced to provide support in the absence of written consent. Under this interpretation, the written consent requirement places the burden on the wife to establish that her husband consented to the insemination if his written consent was not obtained. A third interpretation also views the IPA's written consent requirement as directory, but recognizes a presumption of initial consent that shifts the burden to the husband to rebut the presumption with evidence demonstrating that he did not consent to his wife's insemination.

As suggested by the Illinois Supreme Court opinion in *Adams*, the first interpretation finds support in the plain language of the IPA.[165] The IPA provides that if a woman is artificially inseminated, her husband will be considered the natural father if he gives written consent to the procedure.[166] Additionally, under the IPA,

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consenting to heterologous artificial insemination." ILL. REV. STAT. ch. 40, paras. 1451-1453 (1989).

163. For a critical discussion of the IPA, *see* Comment, *The Legal Incubation of Artificial Insemination: A Proposal to Amend the Illinois Parentage Act*, 78 J. MARSHALL L. REV. 797 (1985). According to that Comment, the IPA "fails to adequately define the relationship of an [AID child] born to a married couple." *Id.* at 797.

164. *Id.* at 798. In its comment to section 5 of the UPA, on which the IPA is largely based, the National Conference on Commissioners on Uniform State Laws suggested that state legislatures should consider further the legal issues raised by artificial insemination prior to adopting the UPA without modification. UNIFORM PARENTAGE ACT § 5, 9B U.L.A. 302 (1987) (Commissioners' comment). The Commissioners noted that the UPA does address many of the complex and legal problems raised by artificial insemination. *Id.* Apparently, the Illinois legislature dismissed this suggestion when they drafted the IPA.

165. *Adams*, 133 Ill. 2d at 444-45, 551 N.E.2d at 638. The Illinois Supreme Court noted, in dicta, that the IPA's requirement that consent "must be in writing" may be considered a mandatory requirement for establishing a parent/child relationship. *Id.* at 444, 551 N.E.2d at 638 (citing Andrews v. Foxworthy, 71 Ill. 2d 13, 21, 373 N.E.2d 1332, 1335 (1978) ("must" generally construed as mandatory)).

166. ILL. REV. STAT. ch 40, para. 1452 (1989). For the full text of this section, *see supra* note 54.

the donor never will be considered the legal father of the AID child.[167] Under this interpretation, the language of IPA means that a child conceived through artificial insemination will be considered legitimate under the IPA only if his mother obtained written consent from her husband; thus, in the absence of written consent, the child will have no legal father. The mandatory language of the IPA would prevent a wife who does not obtain her husband's written consent from availing herself of an equitable remedy. Accordingly, once a child is conceived by artificial insemination without the husband's written consent, a court may not inquire into the circumstances surrounding the insemination, and the court thus is forced to deny the child legitimacy.

The problem with this interpretation, however, is that it entirely fails to consider the best interests of the AID child. Although naturally conceived children are entitled to a presumption of legitimacy, the mandatory language in the IPA prevents the AID child from being considered legitimate unless the wife obtains her husband's consent. This harsh result contradicts the presumption of legitimacy that pervades both common law and Illinois statutes.[168] Earlier case law provides that, based on public policy and morality, AID children are not entitled to a presumption of legitimacy.[169] Today, this view seems outdated.

Under current law, even a child resulting from an adulterous relationship is entitled to a presumption of legitimacy.[170] The only distinction between a child born as a result of an adulterous liaison and an AID child is that an AID child is conceived with the help of a syringe and donor sperm. That distinction does not justify denying the AID child the same protection under the law as a naturally conceived child.[171]

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167. ILL. REV. STAT. ch. 40, para. 1453 (1989). For commentary on the rights of the AID donor as parent, *see* Shaman, *Legal Aspects of Artificial Insemination*, 18 J. FAM. L. 331, 343-44 (1980). *See also* In the Interest of R.C., 775 P.2d 27 (Colo. 1989) (semen donor brought paternity action to establish parental rights of AID child).

168. For additional discussion of this presumption, *see supra* notes 26-29 and accompanying text.

169. *See* Doornbos v. Doornbos, 23 U.S.L.W. 2308 (Super. Ct. Cook County, Ill. Dec. 13, 1954), *appeal dismissed on procedural grounds*, 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956). For additional discussion of *Doornbos*, *see supra* notes 43-47 and accompanying text.

170. *See* ILL. REV. STAT. ch. 40, para. 2505 (1989). For the text of this provision, *see supra* note 27.

171. *See generally* Comment, *supra* note 22, at 921. The "single most important issue" surrounding AID is the legal status of the AID child. *Id.* "Not only will a finding of legitimacy directly affect the child's acceptance and alleviate psychological trauma that may result from stigmatization as an illegitimate, it indirectly forms the basis for other

The second interpretation of the IPA—that written consent is directory rather than mandatory—was advocated by the dissent in *Adams*.[172] The difference between the first interpretation and the second is significant because the latter allows a wife who does not obtain her husband's written consent to pursue equitable relief to establish her child's paternity. Under this interpretation, the child is not entitled to a presumption of legitimacy and the wife bears the burden of proving that her husband actually consented by his actions to her insemination.[173]

This approach also is flawed. It disregards the mandatory language of the IPA to provide the wife with an equitable remedy. By interpreting the IPA's language as directory, the dissent's interpretation is inconsistent with the statute's plain meaning. Moreover, under the second interpretation, and in the absence of written consent, the AID child would have no legal father unless the mother could prove that her husband had otherwise consented to her insemination.[174] Like the result achieved under the first interpretation, this result does not address the best interests of the AID child because it fails explicitly to extend to the AID child the presumption of legitimacy to which naturally conceived children are entitled.

The majority in *Adams* advocated the third interpretation, which also maintains that the written consent requirement is merely directory. As demonstrated in the majority opinion in *Adams*, it is possible to view the statute's silence on the subject of legal paternity when the mother does not obtain written consent as an invitation to the courts to provide an equitable remedy.[175] In addition, the third interpretation recognizes a presumption of ini-

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rights and obligations of the parties involved, such as inheritance, visitation, and support." *Id.*

172. *See Adams*, 174 Ill. App. 3d at 619, 528 N.E.2d at 1089 (Dunn, J., concurring in part, dissenting in part). Justice Dunn reasoned that the language was not mandatory because to view the IPA as mandatory would lead to "unconscionable results never intended by the legislature." *Id.*

173. Justice Dunn reasoned that if the legislature had intended the burden of proving non-consent to fall upon the husband, then the requirement of written consent would not have been necessary. *Id.* at 619, 529 N.E.2d at 1090. He noted that if a wife failed to comply with the IPA, then her child is no longer protected by the statute and she must bear the burden of proving that her husband consented to the insemination. *Id.* at 620, 528 N.E.2d at 1090 Justice Dunn argued that if a wife is inseminated because she reasonably relies on conduct by her husband that indicates his consent to the procedure, then the husband may be estopped from denying that he is the legal father of the AID child. *See id.*

174. For discussion regarding the donor's legal status, *see supra* note 167 and accompanying text.

175. *Adams*, 174 Ill. App. 3d at 610-11, 528 N.E.2d at 1084.

tial consent by the husband that shifts the burden of proving non-consent to the husband.[176] This presumption of initial consent operates to establish the husband as the AID child's father unless the husband can rebut the presumption and prove that he did not consent to his wife's insemination. Considered in this light, the presumption of initial consent is indistinguishable from a presumption that the AID child is legitimate.

Like the second interpretation, the third interpretation is flawed because it fails to follow the mandatory language of the IPA. The primary problem with the approach is that the court recognized the functional equivalent of a presumption of legitimacy that has no foundation in the IPA. The IPA contains no language to suggest that the husband is required to prove that he did not consent to the insemination in order to escape legal paternity, nor does it explicitly set forth any presumption of initial consent or legitimacy.[177]

Indeed, during the legislative debates surrounding the IPA, Representative Brummer noted that Illinois law establishes an almost irrebuttable presumption of legitimacy for naturally conceived children; he specifically added that this presumption would not apply to children conceived through artificial insemination.[178] *Doornbos*, which held that AID children are illegitimate, is in complete accord with Brummer's remark. The decision remains good law in Illinois.[179]

The most vulnerable party involved in the AID procedure is the resulting child.[180] By enacting the IPA, the Illinois legislature did little to protect the interests of the AID child. Using any of the three possible interpretations of the IPA, it is impossible to protect the best interest of the AID child and to remain consistent with the statute's mandatory requirement of written consent. Under the first interpretation, if the consent requirement is mandatory, as its plain language suggests, the logical result is unconscionable because this interpretation places in jeopardy the AID child's legiti-

176. *Id.* at 615, 528 N.E.2d at 1087.

177. *See* ILL. REV. STAT., ch. 40, paras. 1452-1453 (1989). For the full text of these provisions, *see supra* note 54.

178. 83RD ILL. GEN. ASSEM., HOUSE PROCEEDINGS, Nov. 2, 1983, 82 (debates on Senate bill 61).

179. For a discussion of the *Doornbos* case, *see supra* notes 43-47 and accompanying text.

180. For commentary on the interests of the AID child, *see* J. GLOVER, ETHICS OF NEW REPRODUCTIVE TECHNOLOGIES 48-51 (1989); G. ANNAS & S. ELIAS, *supra* note 3, at 241. Primary consideration should always be given to the "best interests" of the potential child, rather than to any other party involved. *Id.* at 241.

macy. The second interpretation avoids the logical result of the statute's mandatory language by allowing the wife the option of an equitable remedy, yet it also fails adequately to protect the AID child's interest by failing to extend to the child the presumption of legitimacy afforded to naturally conceived children. Finally, the third interpretation urged by the majority in *Adams* departs even further from the mandatory written consent requirement because it disregards the statutory language and places the burden upon the husband to establish his non-consent to the AID procedure. The majority's interpretation comes closest, however, to equalizing the rights of AID children with those of naturally conceived children.

Any of the three approaches leaves the legal status of the AID child in jeopardy.[181] For this reason, the IPA should be modified to clearly establish who the presumed legal parents of the AID child are if the husband has not given written consent to his wife's artificial insemination, and to incorporate a presumption of the husband's consent to the procedure.[182]

V. RECOMMENDATIONS

In 1988, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Status of Children of Assisted Conception Act,[183] which incorporates a presumption that children conceived by AID are legitimate.[184] When a married woman bears a child using AID, this Act declares her husband the legal father of

181. *See* Comment, *supra* note 163, at 798. Under the IPA, the legal status of the AID child, absent the husband's consent, is highly speculative. *Id.*

182. For discussion of analogous proposed modifications to Ohio's Parentage Act, *see* Eisenman, *Fathers, Biological and Anonymous and Other Legal Strangers: Determination of Parentage and Artificial Insemination by Donor Under Ohio Law*, 45 OHIO ST. L.J. 383 (1984).

183. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT, 9B U.L.A. 87-102 (Supp. 1990).

184. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 3, 9B U.L.A. 91 (Supp. 1990). Section 3 provides:

> [Except as provided in Sections 5 through 9 of this [Act]], the husband of a woman who bears a child through assisted conception is the father of the child, notwithstanding any declaration of invalidity or annulment of the marriage obtained after the assisted conception, unless within two years after learning of the child's birth he commences an action in which the mother and the child are parties and in which it is determined that he did not consent to the assisted conception.

Id. Currently, only one state, North Dakota, has adopted the Uniform Status of Children of Assisted Conception Act. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT, 9B U.L.A. 8 (Prefatory table, Supp. 1990).

the child.[185] The only exception recognized by this Act occurs when the husband commences an action against the mother and the child within two years of learning of the birth and establishes that he did not consent to the assisted conception.[186]

Unlike the IPA, this Act is responsive to situations in which the husband claims that he did not consent to the procedure by creating a rebuttable presumption that the husband consented to the procedure. As a result, a nonconsenting husband has both the opportunity and the burden to establish his non-consent. Under the Uniform Act, the AID child is afforded at least some protection lacking under the IPA. Additionally, an AID child, conceived without the husband's initial consent, but later accepted and wanted by that husband, would not face the risk of illegitimacy.

The IPA should be revised to incorporate a similar presumption of legitimacy. This revision would alleviate unnecessary litigation over support obligations. This change also would guarantee AID children the same legal status as their naturally conceived counterparts. The newly adopted Uniform Status of Children of Assisted Conception Act includes this presumption and should serve as a model for the Illinois legislature when it amends the IPA.

VI. CONCLUSION

Adams exposes a significant deficiency in the Illinois Parentage Act. In its current form, the IPA fails to address the full spectrum of legal problems that face the AID child. For that reason, the IPA should be amended to incorporate a presumption that children born as a result of the AID procedure are legitimate. Artificial insemination is destined to remain a viable and often utilized solution to the problem of infertility. Combined with climbing divorce rates and changing family relationships, the use of artificial insemination will continue to produce legal problems similar to those presented in *Adams*. In response to those problems, and in order to safeguard the interests of the resulting children, the Illinois legislature must enact laws that are responsive to the unique situation of the AID child.

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185. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 3, 9B U.L.A. 91 (Supp. 1990).
186. *Id.*