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Artificial Insemination: A New Scientific Achievement Gives Rise to a Need for New Legislative in Texas

Dan M. Cain

NOTES

Artificial Insemination: A New Scientific Achievement Gives Rise to a Need for New Legislation in Texas

The growing use of artificial insemination as a means of providing aid to childless couples[1] has engendered new and as yet unresolved legal problems. The answers to these problems can best be provided by the legislatures of the various states.[2] In the absence of such legislative guidelines, however, the courts have been compelled to resolve the legal issues within the context of the common law. The purpose of this Note is to demonstrate the inadequacy of the common law as applied to the legal issues which arise through the use of artificial insemination and to point out the need for effective legislation. This purpose is best achieved by an examination of the existing case precedent and the applicable Texas law of legitimacy and adultery.

I. The Concept of Artificial Insemination

The medical definitions of artificial insemination[3] are varied and of little use to the layman. In simple terms "artificial insemination attempts to impregnate a female without the presence of a male body."[4] It is important to note, however, the differences between the two methods of artificial insemination. Artificial Insemination Homologous (A.I.H.) is the insemination of the female with the semen of her husband when intercourse is impossible because of physiological or psychological reasons. Artificial Insemination Heterologous (A.I.D.) is the insemination of the wife with the semen of a donor other than the husband.

While it is estimated that between one-third and two-thirds of the artificial insemination cases are of the A.I.H. variety,[5] the only serious legal problems raised by this method are those involving the standard of medical competency required[6] and whether this form of artificial insemination con-

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[1] In 1960 it was estimated that between 5,000 and 7,000 births per year were taking place as a result of artificial insemination. Guttmacher, *The Role of Artificial Insemination in the Treatment of Sterility*, 15 Obstetrical & Gynecological Survey 767, 769 (1960). *See also* Verkauf, *Artificial Insemination: Progress, Polemics, and Confusion—An Appraisal of Current Medico-Legal Status*, 3 Houst. L. Rev. 277 (1966). The importance of artificial insemination to childless couples is somewhat revealed by the fact that the number of couples wanting to adopt children traditionally outnumbers the available children by 10 to 1. There is some evidence, however, that this trend has reversed in recent years. *See* Katz, *Community Decision-Makers and the Promotion of Values in the Adoption of Children*, 4 J. Family L. 7, 8-9 (1964).

[2] *See* note 43 *infra*, and accompanying text.

[3] Artificial insemination is the "introduction of semen into the female genital tract by mechanical means rather than by coitus." Verkauf, *Artificial Insemination: Progress, Polemics, and Confusion—An Appraisal of Current Medico-Legal Status*, 3 Houst. L. Rev. 277, 277 (1966). "Artificial insemination then is an attempt to further the chances of and facilitate the encounter between the female germ cells—the ova—and the male seed—the semen—by artificial means." A. Schellen, Artificial Insemination in the Human 6 (1957).

[4] Note, *People v. Sorensen: Artificial Insemination Gives Birth to Real Legal Problems in California*, 4 Calif. W.L. Rev. 177, 177 (1968).

[5] Weinberger, *A Partial Solution to Legitimacy Problems Arising From the Use of Artificial Insemination*, 35 Ind. L.J. 143 (1960).

[6] *See* Note, *Artificial Insemination Versus Adoption*, 34 Va. L. Rev. 822 (1948).

stitutes a consummation of the marriage.[7] A.I.D.,[8] on the other hand, creates a myriad of legal, medical,[9] and theological[10] problems. The most significant legal questions examined by the courts to date concern the legitimacy of the resulting child and whether the insemination process itself is adulterous.

II. Artificial Insemination: A Look at the Cases

The discussion of questions of adultery and illegitimacy in the early Canadian case of *Orford v. Orford*[11] indicated that a woman participating in artificial insemination was guilty of adultery and that the child resulting from the insemination was illegitimate.[12] Although the court conceded that there had been no intercourse in the natural sense of the word,[13] it reasoned that the artificial insemination could be considered to be intercourse because the "essence of the offense of adultery"[14] was present. This decision evidenced the traditional concept of adultery in that the moral turpitude (or the lack of the same) was less important than the fact that a "false strain of blood" had been introduced into the husband's family.[15] It is important to note that the court did not feel that the lack of consent by the husband to the artificial insemination was an important factor.

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[7] In the English case of L. v. L., [1949] 1 All E.R. 141, an annulment was granted on the grounds that although the wife had been artificially inseminated with the semen of the husband the marriage had never been technically consummated. The resulting child was consequently declared to be illegitimate.

[8] Because the scope of this discussion is an examination of the legal questions raised by artificial insemination heterologous (A.I.D.) any further reference to "artificial insemination" pertains to A.I.D.

[9] The British Medical Association stated its disapproval of A.I.D. in *Legal Status of Euthanasia, Abortion, and Artificial Insemination*, British Medical Journal, July 30, 1960, at 365. For a discussion of the medical ethics involved in artificial insemination *see* Guttmacher, *Test-Tube Paternity*, The Nation, March 29, 1958, at 270. Precautionary steps to be followed by a physician practicing artificial insemination are noted in E. Novak & G. Jones, Novak's Textbook of Gynecology 656 (1961), and include at least three to six months of prior counseling with the husband and wife, at least one psychiatric interview, knowledge of the husband's sterility for at least one year, prior attempts to treat the husband's sterility, establishment of the wife's fertility, and evidence that the husband, rather than the wife, initiated the action. *See generally* Christakos, *Human Genetic Manipulation; Fact and Fancy*, Duke Alumni Register, Sept. 1968, at 1.

[10] While the theological considerations of artificial insemination are subject to rapid change and even variation within a given religious sect, some general observations may be made. The Roman Catholic Church apparently condemns both A.I.D. and A.I.H. as illicit and unnatural. *See* Hassett, *Freedom and Order Before God: A Catholic View*, 31 N.Y.U.L. Rev. 1170 (1956); Kelly, *Artificial Insemination: Theological and Natural Law Aspects*, 33 U. Det. L.J. 135 (1956). The Anglican Church, on the other hand, apparently accepts A.I.H. while voicing disapproval of A.I.D. *See Committee Report, The Family in Contemporary Society*, in The Lambeth Conference 1958, at 2.142 (1958). No official Jewish or Protestant view has been manifested and decisions concerning artificial insemination are apparently left to the individual. *See* Rackman, *Morality in Medico-Legal Problems: A Jewish View*, 31 N.Y.U.L. Rev. 1205 (1956); Ramsey, *Freedom and Responsibility in Medical and Sex Ethics: A Protestant View*, 31 N.Y.U.L. Rev. 1189 (1956). *See generally* Smith, *Genetic Manipulation: The End of an Illusion*, Duke Alumni Register, September, 1968, at 8.

[11] 58 D.L.R. 251 (1921).

[12] The court's discussion of artificial insemination in *Orford* must be considered dicta, however, since the court did not believe the wife's story and assumed its truth only for the sake of discussion.

[13] Virtually every definition of the term "adultery" contains a requirement of "intercourse." "Adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife." Black's Law Dictionary 71 (4th ed. 1951).

[14] 58 D.L.R. 251, 258 (1921).

[15] *See* Note, *Artificial Insemination: A Parvenu Intrudes on Ancient Law*, 58 Yale L.J. 457 (1949).

Conversely, an Illinois court in *Hoch v. Hoch*[16] treated the lack of the husband's consent as a critical factor. The court held that the wife's participation in artificial insemination *without her husband's consent* constituted adultery and that the husband was entitled to a divorce on that ground. From the court's discussion it appears that if consent had been given by the husband the A.I.D. would not have been adulterous. In the later Illinois case of *Doornbos v. Doornbos*,[17] however, the *Hoch* rationale was not adopted. The wife was awarded a divorce on the ground of the husband's drunkenness, but the court went on to note that A.I.D. either with or without the husband's consent constitutes adultery and is against good morals and public policy. The wife's testimony that the couple's child was produced by artificial insemination was held to be sufficient grounds for declaring the child to be illegitimate. Furthermore, because of the illegitimacy of the child the husband was denied visitation rights.[18]

In *Strnad v. Strnad*[19] a New York court resolved the issue of the child's legitimacy following artificial insemination upon the unique theory that such a child is "potentially adopted or semi-adopted" by the husband of the mother.[20] In granting visitation rights to the husband subsequent to the separation of the couple the court held that the situation was similar to the one in which the child is born out of wedlock and legitimized upon the marriage of the parents.

This "semi-adoption" principle was later rejected by the New York Supreme Court in *Gursky v. Gursky*.[21] There, despite the presence of a child born to the mother as a result of artificial insemination, the court annulled the marriage on the ground that it had never been consummated. In declaring the child to be illegitimate the court stated that the information in the birth certificate is "neither controlling nor determinative of the parental status of the parties nor of the status of the infant."[22] The court noted that the legitimation of children is the task of the legislature and the fact that it has not acted to legitimate A.I.D. children implies a desire to consider them illegitimate.[23] The court went on to hold the husband liable for support payments, however, under the principles of implied contract and equitable estoppel because he had consented to the insemination.

The recent California case of *People v. Sorensen*[24] represents the most enlightened approach to the problems posed by artificial insemination. The court relied heavily on the public policy favoring legitimacy to up-

[16] No. 44-c-9307 (Ill. Cir. Ct., 1948) (unreported).

[17] No. 54-s-14981 (Super. Ct., Cook County, Ill., 1954) (unreported).

[18] An opportunity to resolve the inconsistencies of the Illinois courts was lost when the appeal from *Doornbos* was dismissed on procedural grounds. The appeal, taken by the state as *parens patriae*, emphasized the presumption of legitimacy and argued that the illegitimate status unjustly deprived the child of its right to support and inheritance from the husband. Doornbos v. Doornbos, 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956).

[19] 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948).

[20] 78 N.Y.S.2d at 391.

[21] 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).

[22] 242 N.Y.S.2d at 408.

[23] The 1964 New York case of Anonymous v. Anonymous, 41 Misc. 2d 866, 246 N.Y.S.2d 835 (Sup. Ct. 1964), cited *Gursky* with approval but did not clearly indicate whether the two children of the couple were being held to be illegitimate.

[24] 437 P.2d 495, 66 Cal. Rptr. 7 (1968).

hold the conviction of the husband for failure to support a child born to his wife as a result of artificial insemination. The *Sorensen* court held that "no valid public purpose is served by stigmatizing an artificially conceived child as illegitimate."[25] In addition, the court labeled the contentions that the doctor and the wife, and/or the donor and the wife, had committed adultery by the process of artificial insemination as "patently absurd."[26] Although the decision hinged on the court's interpretation of the particular California penal statute involved,[27] it is significant to note the court's broad statement that "[i]n the absence of legislation prohibiting artificial insemination, the offspring of [the husband's] valid marriage to the child's mother was lawfully begotten and was not the product of an illicit or adulterous relationship."[28] The reasoning of *Sorensen* is probably applicable in whatever context the question of artificial insemination is raised and should serve as persuasive precedent "not only for the California court in other cases, but for other state courts as well."[29]

III. Texas Law Relevant to Artificial Insemination

The Texas Law of Legitimacy and Adultery. The legitimacy of the child produced by artificial insemination raises several problems. If the child were declared illegitimate his right to support,[30] inheritance,[31] and workmen's compensation[32] from the husband of the mother would be unavailable. Furthermore, any decision concerning the legitimacy of an A.I.D. child must necessarily be considered against the overriding doctrine that a child born during the lawful marriage of the husband and wife is presumed to be the legitimate child of the couple.[33] This presumption is one of the strongest known to law and is rebuttable only by proof that the husband was impotent or did not have access to the wife during the period of gestation.[34] The presumption is given even greater weight by the evidentiary rule that the testimony of the husband or wife may not be received "for

[25] 437 P.2d at 501, 66 Cal. Rptr. at 13.

[26] *Id.* The court noted that, in fact, the doctor may be the wife's husband or even a woman and that the donor may be "a thousand miles away" or even dead at the time of the insemination.

[27] Cal. Penal Code § 270 (West 1955). The relevant portion of the section provides that "[a] father of either a legitimate or illegitimate minor child who willfully omits without lawful excuse to furnish necessary food, clothing, shelter or medical attendance or other remedial care for his child is guilty of a misdemeanor . . . ." Subsequent to the decision in *Sorensen* the California legislature amended Penal Code 270 to include children conceived through artificial insemination.

[28] 437 P.2d 495, 501, 66 Cal. Rptr. 7, 13 (1968).

[29] Smith, *Through a Test Tube Darkly: Artificial Insemination and the Law*, 67 Mich. L. Rev. 127, 139 (1968).

[30] Beaver v. State, 96 Tex. Crim. 179, 256 S.W. 929 (1923).

[31] *See* Hayworth v. Williams, 102 Tex. 308, 116 S.W. 43 (1909). *See also* Tex. Prob. Code Ann. § 42 (1956).

[32] Texas Indem. Ins. Co. v. Hubbard, 138 S.W.2d 626 (Tex. Civ. App. 1940), *error dismissed, judgment correct.*

[33] Byrd v. Traveler's Ins. Co., 275 S.W.2d 861 (Tex. Civ. App. 1955), *error ref. n.r.e. See generally* Comment, *Illegitimacy in Texas*, 37 Texas L. Rev. 599 (1959). The Illinois court in Ohlson v. Ohlson, No. 53-s-1410 (Super. Ct., Cook County, Ill., 1954) (unreported), made significant use of the presumption of legitimacy in relation to artificial insemination. The husband's visitation rights were upheld when the administering doctor testified that it was not likely, *but possible*, that the husband was the natural father of the child. The court held that this testimony was insufficient to overcome the presumption that a child born during the continuance of a lawful marriage is legitimate.

[34] Marckley v. Marckley, 189 S.W.2d 8 (Tex. Civ. App. 1945).

the purpose of showing non-access or otherwise assailing the legitimacy of the child."[35] The strength of this presumption reflects the strong public policy in Texas favoring legitimacy.[36]

Adultery in Texas is defined as "the *living together and carnal intercourse* with each other, or *habitual carnal intercourse* with each other *without living together*, of a man and woman when either is lawfully married to some other person."[37] In light of this definition it would seem clear that artificial insemination could not be considered an adulterous act in Texas. The wife cannot be said to be "living together" with either the donor or the doctor since "living together" requires that the parties reside together in the same place.[38] Even if the mechanics of artificial insemination could be held to satisfy the "carnal intercourse" requirement of the statute, a single instance of insemination would not constitute "living together"[39] and even occasional instances would not amount to "habitual" intercourse.[40] But, despite the apparent compatibility of artificial insemination with the Texas law of adultery and illegitimacy legislative guidelines may be necessary to shape the policy decisions which the courts must make in this area.

Proposed Texas Legislation. The Texas legislature may soon have the opportunity to enact legislation concerning artificial insemination. The proposed legislation as presently drafted provides:

> (a) Where a husband consents to the artificial insemination of his wife, any resulting child shall be [is] the legitimate child of both of them.
>
> (b) Where a wife is artificially inseminated, no child born as a result of the insemination shall be regarded as the legitimate child of the donor, unless he is the consenting husband.[41]

The lack of legislation at the present time in Texas reflects the serious problems faced by the states in drafting such statutes. The only guidelines present are the information and opinions provided by counselors, doctors, sociologists, religious leaders and anthropologists.[42] Furthermore, important policy decisions must be made as to whether artificial insemination is to be encouraged, discouraged, or even prohibited altogether.[43]

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[35] C. McCORMICK & R. RAY, 1 TEXAS LAW OF EVIDENCE § 90, at 112 (1956), and cases cited therein.

[36] *See* Home of Holy Infancy v. Kaska, 397 S.W.2d 208 (Tex. 1965). *See also* Krause, *Bringing the Bastard into the Great Society — A Proposed Uniform Act on Legitimacy*, 44 TEXAS L. REV. 829 (1966); Smith, *Family Law, Annual Survey of Texas Law*, 21 SW. L.J. 50, 55 (1967).

[37] TEX. PEN. CODE ANN. art. 499 (1952) (emphasis added).

[38] Polous v. State, 117 Tex. Crim. 1, 36 S.W.2d 754 (1931); Hay v. State, 92 Tex. Crim. 472, 244 S.W. 531 (1922).

[39] Storey v. State, 94 Tex. Crim. 246, 250 S.W. 427 (1923).

[40] Lara v. State, 153 Tex. Crim. 84, 217 S.W. 853 (1949). *See* Cordill v. State, 83 Tex. Crim. 74, 201 S.W. 181 (1918).

[41] Proposed legislation Subtitle A, ch. 8, § 8.03.

[42] *See* Note, *Artificial Insemination: A Parvenu Intrudes on Ancient Law*, 58 YALE L.J. 457 (1949). For suggested provisions to be contained in future legislation *see* Note, *People v. Sorensen: Artificial Insemination Gives Birth to Real Legal Problems in California*, 4 CALIF. W.L. REV. 177, 195 (1968).

[43] It has been suggested that an attempt to prohibit artificial insemination entirely would meet possible constitutional obstacles. Note, *People v. Sorensen: Artificial Insemination Gives Birth to Real Legal Problems in California*, 4 CALIF. W.L. REV. 177, 195 (1968). *See* Griswold v. Connecticut, 381 U.S. 479 (1965). Several state legislatures have failed in their attempt to legalize artificial insemination by legitimizing the offspring. Oklahoma, on the other hand, has successfully enacted

IV. CONCLUSION

It has become increasingly apparent that it is "anomalous for a court to consider artificial insemination within the existing common-law framework of adultery and illegitimacy."[44] Only through legislative action can effective steps be taken to resolve the legal issues raised by the practice of artificial insemination.[45] The proposed Texas legislation as presently drafted, however, is seriously deficient in at least one important aspect. While the statute would clearly define the law concerning artificial insemination *with the husband's consent*, the questions arising when consent is lacking (and the problem of proving such consent) remain unanswered. A statutory requirement of the *prior written consent* of the husband before the wife may be artificially inseminated would deter this situation from arising. The lack of consent should be provided as grounds for divorce by the husband and a declaration of the illegitimacy of the resulting child. The enactment of such legislation would provide a means by which the Texas courts could be removed from the absurd position of having to decide questions of artificial insemination with legal concepts and statutes created long before the process of artificial insemination was even imagined.

Lyman G. Hughes

Federal Civil Procedure — "Manufactured" Diversity Not Permitted

A minor sustained injuries in an automobile accident in Pennsylvania, where he lived with his mother. With her consent and joinder he petitioned the Orphans' Court for the appointment of a nonresident guardian of his estate, conceding that this was an attempt to "manufacture" diversity of citizenship so that suit could be brought in federal court. The Orphans' Court appointed the guardian, who instituted an action in a federal district court to recover for injuries sustained by the minor in the accident. The minor's mother was joined as plaintiff in her own right under the doctrine of pendent jurisdiction.[1] The district court dismissed the suit for lack of

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legislation which provides that the child resulting from artificial insemination is to be considered as a "naturally conceived legitimate child of the husband and wife." OKLA. STAT. ANN. tit. 10, § 552 (Supp. 1967). *See generally* Note, *Legislative Approach to Artificial Insemination*, 53 CORNELL L. REV. 497 (1968).

[44] Smith, *Through a Test Tube Darkly: Artificial Insemination and the Law*, 67 MICH. L. REV. 127, 139 (1968).

[45] Furthermore, as new scientific advancements are achieved the law must continue to develop. Of particular importance to artificial insemination are the developments in the field of eugenic control. At present there is no general consensus on what physical or mental characteristics of the donor should be considered important. *See* Hager, *Artificial Insemination: Some Practical Considerations for Effective Counseling*, 39 N.C.L. REV. 217, 223 (1961). The subject of eugenics is, however, properly one for future legislation. Note, *Artificial Insemination: A Parvenu Intrudes on Ancient Law*, 58 YALE L.J. 457 (1949).

[1] *See* United Mine Workers v. Gibbs, 383 U.S. 715 (1966), for a discussion of the scope of pendent jurisdiction.

jurisdiction.[2] *Held, affirmed*: Diversity of citizenship artificially created by appointment of a nonresident guardian violates section 1359 of the Judicial Code.[3] *McSparran v. Weist*, 402 F.2d 867 (3d Cir. 1968).

I. Development of "Manufactured" Diversity

Despite the *Erie v. Tompkins*[4] requirement that federal courts apply the same substantive law in diversity cases[5] as would be applied in state courts, there remain differences which may cause a litigant to prefer one court over the other. The differences between state and federal procedure, the reputation of a particular judge, or the general reputation of juries for liberal damage awards are only a few of the reasons for a possible preference of one court over the other. Where such differences create a preference for the federal court in a case which initially presents no choice of forum, parties often attempt to create or "manufacture" diversity by seeking appointment of a nonresident representative.

Statutes have been enacted to regulate the "manufacture" of diversity jurisdiction and to relieve federal courts of "business that intrinsically belongs to the state courts."[6] Prior to the enactment of section 1359[7] in 1948, the federal statutes which regulated "manufacture" of diversity were contained in section 80[8] and section 41[9] of the Judicial Code of 1940. Section 80 required dismissal of an action when the suit did not involve a real and substantial dispute properly within the jurisdiction of the court or when the parties to the suit had been improperly or collusively aligned to create diversity. Section 41 provided that a federal court was to have no jurisdiction of a suit on a promissory note in favor of an assignee unless the suit could have been prosecuted in federal court if no assignment had been made. By combining these sections, section 1359 provides that "a district court shall not have jurisdiction of a civil action in which a party, by assignment, or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." Although section 1359 was intended to be inclusive of the statutes from which it was derived,[10] the revision omits the prior "real and substantial" interest requirement of section 80. Specific provision in the new statute for the requirement of a "real and substantial" interest was not considered necessary due to the assumption that "any court will dismiss a case not within its jurisdiction when its attention is drawn to the fact, or even on its own motion."[11]

However, in past interpretations of section 1359 the courts have not in-

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[2] McSparran v. Weist, 270 F. Supp. 421 (D. Pa. 1967).

[3] 28 U.S.C. § 1359 (1964).

[4] 304 U.S. 64 (1938).

[5] 28 U.S.C. § 1332 (1964) provides that cases involving a controversy between citizens of different states or between a citizen of a state and an alien and having an amount in controversy of $10,000 or more may be brought in a federal court.

[6] Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 76-77 (1941).

[7] 28 U.S.C. § 1359 (1964).

[8] 36 Stat. 1098 (1911).

[9] 36 Stat. 1091 (1911).

[10] *See* Reviser's Note, 28 U.S.C. § 1359 (1964).

[11] *Id.*

sisted upon this "real and substantial" interest requirement.[12] The words "improper" or "collusive" have been construed to mean an illegal agreement or understanding between opposing sides in an action rather than an arrangement by one party to create diversity.[13] Thus, a party's actions were not thought to be within the statute if such actions were in themselves lawful, although the motive in creating diversity was to gain access to federal court.[14] Since the citizenship of a personal representative rather than the beneficiary was generally considered controlling for purposes of determining diversity,[15] it was possible to appoint a representative, such as an executor, administrator, or trustee, solely because his citizenship provided diversity, and this would not constitute "improper" or "collusive" conduct within the meaning of section 1359.[16]

The Third Circuit followed this interpretation in *Jaffe v. Philadelphia & Western R.R.*[17] by sustaining a diversity action under the Pennsylvania wrongful death and survival statutes although the administratrix was a nonresident stenographer employed by the widow's attorney. The *Jaffe* court held that since there was no attack on the appointment of the administratrix as such, the motive that actuated it "is immaterial upon the question of identity or diversity of citizenship."[18] The court felt the administratrix was a real party in interest since she had assumed the duty to sue for and collect the cause of action, although the lawsuit was apparently the only asset under her management. *Jaffe* relied on *Mecom v. Fitzsimmons Drilling Co.*,[19] a United States Supreme Court case involving the appointment of a resident administrator to prevent federal removal jurisdiction from attaching. *Mecom* held that it was improper to inquire into the purposes and motives for appointing representatives when the appointment is lawful in itself. The court reasoned that to do so would amount to an unwarranted attack on another court's decree. The *Jaffe* decision and reasoning was reaffirmed by the Third Circuit in *Corabi v. Auto Racing, Inc.*[20] in which the mother of a deceased child had petitioned the state court for leave to resign as administratrix so that a nonresident administrator could be appointed to obtain diversity of citizenship. The state court granted the request and, on a certified question[21] from the federal district court, the Third Circuit found that "to make use of state law to obtain diversity jurisdiction . . . is not collusive within the ordinary meaning of that term."[22] *Corabi* has become a leading case and is followed in most cir-

[12] Corabi v. Auto Racing, Inc., 264 F.2d 784 (3d Cir. 1959).

[13] *Id.* at 788.

[14] County of Todd v. Loegering, 297 F.2d 470 (8th Cir. 1961); Corabi v. Auto Racing, Inc., 264 F.2d 784 (3d Cir. 1959); McCoy v. Blakely, 217 F.2d 227 (8th Cir. 1954).

[15] *See generally* C. WRIGHT, FEDERAL COURTS § 29 (1963).

[16] Jamison v. Kammerer, 264 F.2d 789 (3d Cir. 1959).

[17] 180 F.2d 1010 (3d Cir. 1950).

[18] *Id.* at 1012.

[19] 284 U.S. 183 (1931).

[20] 264 F.2d 784 (3d Cir. 1959).

[21] 28 U.S.C. § 1292(b) (1964) provides for appeal of otherwise nonappealable orders that involve a controlling question of law as to which there is substantial ground for difference of opinion and immediate appeal may materially advance the ultimate termination of the litigation.

[22] 264 F.2d 784, 788 (3d Cir. 1959).

cuits which have considered the question of "manufactured" diversity of citizenship.[23]

II. McSparran v. Weist

The *McSparran* court felt that it was impossible to give content to the "otherwise indefinite and ambiguous words 'improperly' or 'collusively' "[24] without going into the legislative history of section 1359. After examining the reviser's comments,[25] the court held that the requirement of a "real and substantial" interest must be used to interpret the words "improper" or "collusive." Thus, parties designated simply to create diversity of citizenship are improperly or collusively named because they have no "real and substantial" interest in the controversy.

Overruling the *Jaffe*[26] and *Corabi*[27] cases, the court held in an en banc decision that under the "real and substantial" interest test the motive for appointing "straw representatives" must be subjected to careful scrutiny by the court in each case to determine if there has been improper or collusive action. In *McSparran* the parties admitted seeking appointment of a nonresident guardian in a state court proceeding solely to create diversity of citizenship. This constituted collusion on the face of the record although the guardian was technically a real party in interest under state law.[28]

The court distinguished *Mecom*[29] on the ground that section 1359 was not involved there. In *Mecom* appointment of an administrator was effected not to create federal jurisdiction but to avoid it. The court felt that the language "to invoke the jurisdiction" in section 1359 clearly evidenced "a policy against the creation of federal jurisdiction and not against its avoidance."[30] By distinguishing *Mecom*, the court was able to avoid its holding that to inquire into the motive for appointing a representative when the appointment is in itself lawful amounts to an unwarranted collateral attack on another court's decree. The court in *McSparran*, although not specifically mentioning the *Mecom* statement, held that this inquiry did not amount to an attack on another court's decree. The representative remains in his position but his citizenship is not determinative for purposes of diversity. The court felt that, in this situation, he occupies the role of a guardian *ad litem* or a next friend "whose function merely is to supply a party on the record responsible for costs."[31]

Judge Kalodner's dissent[32] expressed the view that the only issue presented in the district court and therefore the only question appropriate for

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[23] Kentucky Natural Gas Corp. v. Duggins, 165 F.2d 1011 (6th Cir. 1948); Curb & Gutter Dist. No. 37 of City of Fayetteville v. Parrish, 110 F.2d 902 (8th Cir. 1940); Harrison v. Love, 81 F.2d 115 (6th Cir. 1936); City of Detroit v. Blanchfield, 13 F.2d 13 (6th Cir. 1926); O'Neil v. Wolcott Mining Co., 174 F. 527 (8th Cir. 1909).

[24] 402 F.2d 867, 873 (3d Cir. 1968).

[25] *See* Reviser's Note, 28 U.S.C. § 1359 (1964).

[26] 180 F.2d 1010 (3d Cir. 1950).

[27] 264 F.2d 784 (3d Cir. 1959).

[28] Pa. Stat. Ann. tit. 20, § 320.1041 (1950).

[29] 284 U.S. 183 (1931).

[30] 402 F.2d 867, 875 (3d Cir. 1968).

[31] *Id.* at 874.

[32] *Id.* at 878.

review was whether the mother's claim could be sustained under the doctrine of pendent jurisdiction. By determining the case on the "threshold ground" of manufactured diversity, the majority avoided the issue of pendent jurisdiction. This criticism does not appear to be valid since an independent claim with requisite jurisdiction is needed to support a pendent claim.[33] Since the entire action was dismissed in the lower court for lack of jurisdiction, a valid claim with a jurisdictional base had to be established prior to consideration of the pendent claim.

Judge Kalodner also felt that "manufactured" diversity was not prohibited by section 1359. He based this conclusion on Judge Biggs' dissent in *Esposito v. Emery*,[34] a Third Circuit case decided the same day as *McSparran*. Judge Biggs had concluded that the motive of parties seeking appointment of a nonresident representative should not be considered and that the courts should restrict their inquiry to the question of who is the real party in interest as determined by state law. He contended that inquiring into the parties' motive "will open a fertile field for perjurious testimony and lead to great uncertainty."[35]

III. Conclusion

The result in *McSparran* supports the policy of reducing diversity jurisdiction expressed by section 1359 and recent amendments to the federal diversity statute.[36] Although diversity jurisdiction is intended to protect nonresident litigants from local prejudices,[37] there seems to be no valid reason for permitting a person to pursue a local action in federal court merely because he is able to "manufacture" diversity by having a nonresident appointed to act for him in a representative capacity. However, the *McSparran* court has fashioned a rule of law which may prove difficult to apply. Since the parties admitted that the purpose of the appointment was to create diversity, it was not necessary for the court to indicate specific elements for consideration in determining the validity of the selection of a representative. It should also be noted that a "real and substantial" interest will be difficult to determine on a case by case basis. Some nonresident representatives may be appointed for reasons other than the "manufacturing" of diversity, yet they may be unable to produce evidence of a "real and substantial" interest.

Since jurisdiction is a "threshold" question that must be established prior to litigating the substantive issues of a case, the *McSparran* rule may prove time consuming and expensive to the litigants in a federal court. The court must examine the available evidence to determine the motive for

[33] *See* United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

[34] 402 F.2d 878, 880 (3d Cir. 1968).

[35] *Id.* at 883.

[36] 28 U.S.C. § 1332 (1964) was amended in 1958 and 1964. In the 1958 amendment, a corporation's citizenship was extended to include the state where it has its principal place of business. The 1964 amendment extended the citizenship of a nonresident insurer to include the state of residence of its insured when a direct action is initiated against the insurer and the insured is not joined as a defendant. In each of these amendments, the legislature restricted litigation of what is substantially a local action to the state courts.

[37] *See* Bank of United States v. Deveaux, 2 U.S. (5 Cranch) 194 (1809).