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Family Law -- Blood -- Grouping Tests and the Presumption of Legitimacy

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Family Law—Blood-Grouping Tests and the Presumption of Legitimacy

One of the oldest and strongest evidentiary presumptions is that a child who is born during a valid marriage is legitimate.[1] Recently, in *Wright v. Wright*,[2] the North Carolina Court of Appeals considered whether that presumption may be rebutted by a blood-grouping test and concluded that it may not.

In *Wright*, the wife brought suit against her husband of twenty years for alimony without divorce and custody of and support for her three-year-old child.[3] The husband admitted the validity of the marriage and his duty to support the child. He also counterclaimed for custody of the child.[4] Subsequently, Mr. Wright moved without objection for a blood-grouping test pursuant to North Carolina General Statutes section 8-50.1[5] to determine whether he could be the biological father of the child. The test results apparently demonstrated that Mr. Wright could not be the child's biological father, for Mr. Wright amended his answer to deny paternity of the child and allege adultery by his wife.[6] The physician who performed the tests died before he could either testify as to his findings or reduce them to a writing admissable as evidence of them. Consequently, the trial court judge ordered the parties to appear for another blood-grouping test. It was from this order that the plaintiff appealed to the North Carolina Court of Appeals.[7]

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[1]The presumption that a child is legitimate if he was born in lawful wedlock and his father was "within the four seas" was the basis for King John's ruling that Philip the Bastard was legitimate in the play *The Life and Death of King John* written by William Shakespeare in 1596. In that play the King's brother had sent Philip's legal father to Germany on a royal mission during the period of conception. While it was suggested that the brother was the father of Philip, it was conclusively presumed that Philip was legitimate because Germany was "within the four seas." Since that time a greater possibility of access has been required to presume legitimacy, but the term "within the four seas" has remained as a euphemism for having access to the mother.

[2]11 N.C. App. 190, 180 S.E.2d 369 (1971), *appeal docketed*, No. 46, N.C. Sup. Ct. May 19, 1971.

[3]The parties also had two college-age children whom the father continued to support. Brief for Plaintiff-Appellant to the North Carolina Court of Appeals at 2.

[4]Supplemental Brief for Plaintiff-Appellee to the North Carolina Supreme Court at 1.

[5]N.C. GEN. STAT. § 8-50.1 (1969). Brief for Defendant-Appellee to the North Carolina Court of Appeals at 9.

[6]Brief for Plaintiff-Appellant to the North Carolina Court of Appeals at 3. Mr. Wright maintained that the results of the blood-grouping tests indicated that the father's blood group was A, that the mother's blood group was O, and that the child's blood group was B. Brief for Defendant-Appellee to the North Carolina Court of Appeals at 9. For an explanation of the significance of these results, *see* text accompanying notes 15-16 *infra*.

[7]Brief for Plaintiff-Appellant to the North Carolina Court of Appeals at 4.

The court of appeals acknowledged that the language of the blood-test statute, which provides that "[i]n the trial of any civil action . . . . [t]he results of such blood-grouping tests shall be admitted in evidence . . . . ,"[8] appeared broad in its application. It felt, however, that the North Carolina Supreme Court's decision in *Eubanks v. Eubanks*,[9] which was decided after the blood-test statute was enacted, precluded admission of the results of the blood tests into evidence to establish nonpaternity. In *Eubanks*, the supreme court had stated that "[i]f there was access, *there is a conclusive presumption* that the child was lawfully begotten in wedlock."[10] From this language the court in *Wright* concluded that

> [u]nder the clear holding of *Eubanks* the results of a blood-grouping test cannot be used to establish nonpaternity if there was access; and if nonaccess is established the results of the blood-grouping test would be superfluous. Therefore, since the results of the blood-grouping test are incompetent or immaterial evidence, the order requiring the test was error.[11]

The conclusion that the results of a blood-grouping test cannot be admitted into evidence in a civil suit to rebut the presumption of legitimacy is not unique to North Carolina.[12] However, since the results of the tests may be very probative in a paternity suit,[13] it is necessary to examine the nature of the blood-grouping test, the evolution of the com-

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[8]N.C. GEN. STAT. § 8-50.1 (1969), provides:

> **Competency of Evidence of Blood Tests.**—In the trial of any criminal action or proceedings in any court in which the qustion of paternity arises, regardless of any presumptions with respect to paternity, the court before whom the matter may be brought, upon motion of the defendant, shall direct and order that the defendant, the mother and the child shall submit to a blood grouping test . . . . The results of such blood grouping tests shall be admitted in evidence when offered by a duly licensed practicing physician or other qualified person. Such evidence shall be competent to rebut any presumptions of paternity.
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> In the trial of any civil action, the court before whom the matter may be brought, upon motion of either party, shall direct and order that the defendant, the plaintiff, the mother and the child shall submit to a blood grouping test . . . . The results of such blood grouping tests shall be admitted in evidence when offered by a duly licensed practicing physician or other duly qualified person.

[9]273 N.C. 189, 159 S.E.2d 562 (1968).

[10]*Id.* at 197, 159 S.E.2d at 568, *cited in* Wright v. Wright, 11 N.C. App. 190, 191, 180 S.E.2d 369, 370 (1971) (emphasis by the court of appeals).

[11]11 N.C. App. at 192, 180 S.E.2d at 370.

[12]*See* Kusior v. Silver, 54 Cal. 2d 603, 354 P.2d 657, 7 Cal. Rptr. 129 (1960); Annot., 46 A.L.R.2d 1000 (1956).

[13]*See* text accompanying notes 14-19 *infra*.

mon law presumption of legitimacy, and the blood-test statute itself in order to determine whether the refusal to admit the test results can be justified.

A blood-grouping test[14] involves examining an individual's red blood cells to determine if either or both of two substances known as agglutinogen A and agglutinogen B are present. The individual's blood group is described accordingly: if both substances are present, the blood is classified as group AB; if neither is present, the blood is classified as group O; and if only agglutinogen A or agglutinogen B is present, the blood group is A or B respectively.

Blood groups have three important qualities which enable certain conclusions to be drawn about the identity of a child's parents. The first is that the blood group of a person can be determined at birth or very shortly thereafter. In addition, an individual's blood group remains constant throughout life, unaffected by age, disease, or medication. Perhaps more importantly, a child inherits his blood group from his parents in accordance with certain known laws of genetics. By these laws, if a particular agglutinogen does not appear in the red blood cells of either the mother or father, it cannot appear in the red blood cells of the child. Also, a parent with group AB blood cannot have a child with group O blood (regardless of the blood group of the other parent), nor can a parent with group O blood have a child with group AB blood.[15]

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[14]The discussion here covers only the most basic test. There are other, newer tests available which involve a more detailed examination of the blood of the parties and thus enable more accurate predictions of the possibility of parentage. For more complete discussions of blood-grouping tests, see S. SCHATKIN, DISPUTED PATERNITY PROCEEDINGS (3d ed. 1953) [hereinafter cited as SCHATKIN]; Ross, *The Value of Blood Tests as Evidence in Paternity Cases*, 71 HARV. L. REV. 466 (1958); Whitlatch & Marsters, *Contributions of Blood Tests in 734 Disputed Paternity Cases: Acceptance by the Law of Blood Tests as Scientific Evidence*, 14 WEST. RES. L. REV. 115 (1962); Comment, *The Use of Blood Grouping Tests in Disputed Paternity Proceedings*, 50 MICH. L. REV. 582 (1952); Comment, *California's Conclusive Presumption of Legitimacy*, 35 SO. CAL. L. REV. 437 (1962); Recent Developments, *California's Tangled Web: Blood Tests and the Conclusive Presumption of Legitimacy*, 20 STAN. L. REV. 754 (1968); Annot., 163 A.L.R. 939 (1946); Annot., 46 A.L.R.2d 1000 (1956).

[15]TABLE SCHATKIN 169.

Blood Group of child.	Blood Group of Mother.	Blood Groups the Father Cannot Have.
O	O, A, or B	AB
A	O or B	O or B
B	O or A	O or A
AB	A	O or A
AB	B	O or B
AB	AB	O

In most paternity proceedings there is no legal doubt as to the identity of the mother of the child. Therefore, a comparison of the mother's blood group with that of the child will reveal which blood groups it is possible for the biological father to have. A showing that the putative father has a blood group which makes it *possible* that he sired the child is not really significant because the number of possible biological fathers is still vast. On the other hand, proof that the putative father has a blood group which makes it impossible that he sired the child is most significant. Accordingly, most jurisdictions which admit into evidence the results of blood-grouping tests recognize this distinction and allow their introduction only to show nonpaternity.[16]

The accuracy of properly conducted tests is rated at about one error for every 50,000 to 100,000 cases.[17] However, even with this extremely high degree of accuracy, the jurisdictions are split as to whether evidence of the test results may conclusively establish nonpaternity.[18] With respect to this issue, the North Carolina position seems to be that

> [s]ince the statutes do not make the test which establishes nonpaternity conclusive of that issue . . . it seems clear that the legislative intent was that the jury should consider the test results, whatever they might show, along with all the other evidence in determining the issue of paternity.[19]

In contrast to the relatively recent judicial acceptance of the blood-grouping test,[20] the conclusive presumption that a child born during coveture is legitimate is of ancient origin. Originally used to protect "the fruit of the profligacy of kings and nobles from the perils of disinheritance,"[21] the presumption was extended to protect even the most common

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[16]H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 129 (1971) [hereinafter cited as KRAUSE]; Whitlatch & Marsters, *Contributions of Blood Tests in 734 Disputed Paternity Cases: Acceptance by the Law of Blood Tests As Scientific Evidence*, 14 WEST. RES. L. REV. 115 (1962); Annot., 46 A.L.R.2d 1000, 1019 (1956). *But see* Carpenter v. Goodall, ___ Ind. ___, 244 N.E.2d 673 (1969). The UNIFORM ACT TO DETERMINE PATERNITY § 4 would admit blood tests as evidence of paternity "depending upon the infrequency of the blood type." *See also* Annot., 46 A.L.R. 2d 1000, 1022 (1952).

[17]KRAUSE 133; SCHATKIN 289; *see generally* Ross, *The Value of Blood Tests as Evidence in Paternity Cases*, 71 HARV. L. REV. 466 (1958).

[18]For examples of the view that the test results are not conclusive, *see* Ross v. Marx, 24 N.J. Super. 25, 93 A.2d 597 (1952); Annot., 46 A.L.R.2d 1000, 1032 (1956). For examples of the view that the tests are conclusive, *see* Houston v. Houstin, 199 Misc. 469, 99 N.Y.S.2d 199 (Dom. Rel. Ct. 1950); Annot., 46 A.L.R.2d 1000, 1028 (1956).

[19]State v. Fowler, 277 N.C. 305, 310, 177 S.E.2d 385, 387 (1970). It is important to note that *Fowler*, unlike *Wright*, was a criminal action. Therefore, the blood test evidence was admissible regardless of any presumptions. *See* note 8 *supra*.

[20]Blood groups were first discovered in 1901. SCHATKIN 164.

[21]J. LAWSON, THE LAW OF PRESUMPTIVE EVIDENCE 141 (2d ed. 1899) [hereinafter cited as LAWSON].

born from the perils of illigitimacy.[22] While at one time the conclusiveness of the presumption was absolute if the father was "within the four seas,"[23] courts have tempered it by making exceptions when the legitimacy of the child can be shown by clear and convincing evidence[24] to be contrary to the laws of nature.[25] Those exceptions that have been granted have generally reflected the existing state of medical knowledge.

The most common exception to the conclusiveness of the presumption permits the introduction of evidence which shows that the husband did not have access to his wife during the period when conception must have occurred.[26] At first, nonaccess could be established only by proof that the husband literally was not "within the four seas."[27] As medical knowledge about conception developed, the period when conception had occured could be determined more accurately. This development eased the problem of proof of nonaccess. Today, all that the alleged father need show is that he did not have an opportunity for sexual intercourse with the mother during that brief period of time when the child was conceived.[28]

An exception which developed later and which reflected a greater medical sophistication recognized the physical inability of the alleged father to procreate. One of the earliest expressions of this exception was to deny paternity when the putative father was below the age of puberty. However, because medical science was unable to determine precisely when an individual reached puberty, a rough estimate was relied on and children were bastardized if the husband was below the age of fourteen.[29] As medical knowledge became more exact, other, more accurate estimations of the possibilities of parentage were admitted into evidence to rebut the presumption of legitimacy. For example, it is now possible medically to detect sterility[30] and impotence.[31] Some courts allow medi-

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[22]*See generally* KRAUSE ch. 1.

[23]LAWSON 141.

[24]The expressions of the kind of proof required are varied. *See, e.g.*, State v. Clark, 144 Ohio St. 305, 312, 58 N.E.2d 773, 776 (1945) (clear and convincing); *In re* Davis' Estate, 169 Okla. 133, 135, 36 P.2d 471, 473 (1934) (strong, satisfactory, and conclusive); *In re* Thorn's Estate, 353 Pa. 603, 606, 46 A.2d 258, 260 (1946) (clear, direct, satisfactory, and irrefragable). *See also* Annot., 128 A.L.R. 713 (1940).

[25]*In re* Findley, 253 N.Y. 1, 170 N.E. 471 (1930); Ray v. Ray, 219 N.C. 217, 13 S.E.2d 224 (1941); Regina v. Murrey, 91 Eng. Rep. 115 (K.B. 1705).

[26]*E.g.*, The King v. Luffe, 103 Eng. Rep. 316 (K.B. 1807).

[27]Dominus Rex v. Albertson, 91 Eng. Rep. 416 (K.B. 1699).

[28]*See* SCHATKIN 519-541.

[29]LAWSON 142. *See also* SCHATKIN 98.

[30]KRAUSE 143; SCHATKIN 541-47; Schatkin, *Defense of Sterility in Paternity Cases*, 59 W. VA. L. REV. 258 (1957); Note, *Evidence-Paternity-Sterility Test*, 36 TUL. L. REV. 347 (1962).

[31]State v. Broadway, 69 N.C. 411 (1872); KRAUSE 143; SCHATKIN 541-47.

cal opinion as to the existence of these facts to be admitted as competent evidence to rebut the legitimacy presumption.[32]

Less scientific, but more within the human experience, is the evidentiary concept that the physical appearance of the child itself may be admissable to rebut the presumption.[33] It is felt that the child's genetically inherited physical appearance, including both the features and the racial characteristics, may aid in the identification of the parents. The admission of this kind of evidence has come under increasing criticism, not on the issue of whether such characteristics are inherited, but rather as to whether they can be accurately distinguished in the parents and the child.[34]

The apparent basis for these exceptions under which evidence may be introduced to rebut the presumption of legitimacy is that the evidence thus admitted is "clear and convincing" proof of nonpaternity. It is anomolous, then, that many courts have been reluctant to admit the results of the highly accurate blood-grouping tests to rebut the same presumption.

The usual justification for the strength of the presumption of legitimacy is the protection of the stability of the traditional family structure that is basic to our society.[35] To allow legitimacy to be disproved by evidence of questionable reliability and which is less than "clear and convincing" would be most unsettling to that structure. But certainly the results of blood-grouping tests are no less clear and convincing or reliable than the evidence of sterility, impotence, or nonaccess which is presently admitted to rebut the presumption. Furthermore, the family structure has probably already been destroyed by the suspicions and perhaps actual knowledge which led to a request for a blood test. While it is true that the presumption does provide some protection for the child, this protection is generally only as to his legal rights as a legitimate child and does not protect against the psychological damage from the actual loss of the father. As the legal burdens of illegitimacy continue to be reduced,[36] it would seem that this presumption which the North Carolina

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[32]*See, e.g.*, Haugen v. Swanson, 219 Minn. 123, 16 N.W.2d 900 (1944).

[33]Woodward v. Blue, 107 N.C. 407, 12 S.E. 453 (1890) (physical and racial characteristics); State v. Horton, 100 N.C. 443, 6 S.E. 238 (1888) (physical appearance); Warlick v. White, 76 N.C. 175 (1877) (racial characteristics); State v. Anderson, 63 Utah 171, 224 P. 442 (1924) (physical appearance); KRAUSE 139; Annot., 40 A.L.R. 97 (1926); Annot., 95 A.L.R. 314 (1935). *But see*, Hess v. Whitsett, 257 Cal. App. 2d 552, 65 Cal. Rptr. 45 (1968).

[34]*In re* Wendell's Estate, 146 Misc. 260, 262 N.Y.S. 41 (Sur. Ct. 1933); Hanawalt v. State, 64 Wis. 84, 24 N.W. 489 (1885). For a discussion of the unreliability of the results achieved by determining parentage from racial characteristics, *see* Annot., 32 A.L.R.3d 1303. *See also* Recent Developments, 20 STAN. L. REV., *supra* note 14, at 754.

[35]KRAUSE 15; LAWSON 141.

[36]KRAUSE 21.

Supreme Court has already called a "rather harsh rule" should be further tempered "by the application of a degree of common sense . . . ."[37]

Indeed, this would appear to have been the intent of the North Carolina legislature when it enacted the statute concerning the competency of blood-grouping tests.[38] The first paragraph of the statute now provides that the results of the blood tests shall be admissible in all *criminal* proceedings and that "[s]uch evidence shall be competent to rebut any presumptions of paternity." The second paragraph states that the evidence shall be admitted in all *civil* actions but fails to state whether or not it is competent to rebut the presumptions of legitimacy. The legislative history of the statute suggests that it is not competent. When the statute was first enacted in 1949, the phrases "regardless of any presumptions with respect to paternity" and "shall be competent to rebut any presumptions of paternity" were omitted.[39] In 1965 they were added to amend only the first paragraph.[40] Since the second paragraph, which deals with the competence of blood tests in civil actions, was not so amended, it is arguable that the legislative intent was not to affect the presumptions of legitimacy in civil actions. However, a conclusion that it is not competent would limit the use of blood tests to those few civil actions where there is no presumption of legitimacy. Such a limitation implies that the legislature had no intent other than to codify the existing state of the law. A conclusion that the blood test is competent to rebut the presumption would bring the law of North Carolina into agreement with the laws of nature and the history of the presumption itself. Finally, such a conclusion would not be contrary to the supreme court's ruling in *Eubanks*.[41] In *Eubanks* the court was concerned with a situation in which the husband claimed that he had not had access during the period of conception. At no time did the question arise as to whether the husband could have introduced blood-grouping test results into evidence.

While the language of the statute and common sense suggest that it should be possible to rebut the presumption of legitimacy by use of blood-grouping tests, it is important to consider a significant difference

[37]Ray v. Ray, 219 N.C. 217, 219, 13 S.E.2d 224, 226 (1941).

[38]Ch. 51, § 1, [1949] N.C. Sess. L. 45.

[39]*Id.*

[40]Ch. 618, § 1, [1967] N.C. Sess. L. 673.

[41]*See* notes 9-11 & accompanying text *supra.*

between blood test results and the more traditional types of rebuttal evidence used in paternity suits. Because an individual's blood group never changes, a blood test can be used to show nonpaternity (and adultery) as long as there are samples of the parties' blood available.[42] The value of the other types of rebuttal evidence dissipates with the passage of time. Thus, when the husband attempts to plead nonaccess in a case arising many years after a child is born, either he will experience difficulty in gathering this now stale evidence or the evidence will indicate that he knew or should have known that the child was conceived during a period when he did not have access. This prior knowledge may justify exclusion of the evidence under the doctrines of laches or estoppel.[43] However, because blood-grouping tests are usually administered only after a dispute has arisen, the husband is not put on notice that the child is not his when the child is born. Consequently, the doctrines of laches or estoppel would not seem to require the exclusion of blood-test results which establish nonpaternity. In addition, since the tests are always available to the husband, they remain a constant threat to a family structure which still may be viable.

Perhaps of greater concern as a policy consideration is the effect that proof of nonpaternity has on the child. After the passage of time, the actual social relationship between father and child will have become more important to the child than their biological relationship.[44] Some courts have recognized this phenomenon and have ruled that the father's

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[42]Recent Developments, 20 STAN. L. REV., *supra* note 14, at 760.

[43]*Cf.* State v. Shoemaker, 62 Iowa 343, 17 N.W. 589 (1883). The doctrines of laches and estoppel bar claims when the court feels that it would be inequitable for relief to be granted. Laches is applied when the claimant allows an unreasonable length of time to pass before making his claim and is generally concerned with the staleness of the evidence. An estoppel, on the other hand, is raised when a representation by the claimant has been relied on by someone else to their detrement. In such a case the court will not allow the claimant to deny his representations in order to support his claim. Both of the doctrines, however, require that the one whose claim is being barred have knowledge or notice of the true facts. *See generally, e.g.*, Moore v. Deal, 239 N.C. 224, 79 S.E.2d 507 (1954) (laches); Matthieu v. Piedmont Natural Gas, Co., 269 N.C. 212, 152 S.E.2d 336 (1967) (estoppel).

[44]There is an argument that a rule compelling the putative father to request a blood-grouping test shortly after the child is born or be barred from doing so at a later time would force the putative father to request the test sooner than he otherwise would have and thus deprive the child of the benefits of having a father in his early, formative years. Such a conclusion, however, would permit otherwise unjustified fishing expeditions into the issue of paternity at the expense of the innocent child and ignores the impact on that child of the later breach of the social relationship. That kind of inquiry simply is not justified where the controversy between the parents occurs some years after the birth of the child and the issue of paternity is merely another handy weapon in a marital dispute.

right to have a blood-grouping test admitted into evidence is not unlimited. A New York City family court has held that where the father has held himself out as the father of the child and is so regarded by the child and the world,

> [t]o grant the request for a blood-grouping test . . . would open the door to unwarranted challenges of paternity and thus undermine the security of children whose parents become antagonists bent on harassing one another. [This would] work irreparable harm on the child.[45]

In addition, a Pennsylvania superior court has said that

> [t]here is something inherently repulsive about a man questioning the paternity of children who were conceived by his wife and born to her while he was living with her and who were accepted and held out to the world by him as his children until his and his wife's personal differences led to [this dispute].[46]

The defendant in *Wright* argued that requiring a father to challenge the legitimacy of children born to his wife immediately or not at all is unfair to the husband who merely suspects that his wife has been unfaithful and delays asking for a blood-grouping test with the hope of saving his family.[47] However, this result has parallels in other family law doctrines. For example, under the doctrine of "condonation"[48] if one spouse continues to live with the other after a breach of the marital relationship, he (or she) is precluded from seeking redress of that breach.[49]

The North Carolina Court of Appeals has also recognized the need to protect children from the uncertainty of future blood-grouping tests. In *Johnson v. Johnson*[50] the father admitted paternity in his answer and requested the blood-grouping test. Since paternity was not in issue the court ruled that the father did not have a right to have the test adminis-

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[45]Time v. Time, 59 Misc. 2d 912, ___, 300 N.Y.S.2d 924, 927 (Family Ct. 1969).

[46]Commonwealth *ex rel.* Weston v. Weston, 201 Pa. Super. 554, 556, 193 A.2d 782, 783 (1963).

[47]Supplemental Brief for Defendant-Appellant to the North Carolina Supreme Court at 5.

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> Condonation in law is the conditional forgiveness by a husband or wife of a breach of marital duty by the other, whereby the forgiving party is precluded, so long as the condition is observed, from claiming redress for the breach so condoned.

State v. Manon, 204 N.C. 52, 53, 167 S.E. 493 (1933).

[49]Condonation may be implied from conduct. 1 R. LEE, NORTH CAROLINA FAMILY LAW § 87 (1963).

[50]7 N.C. App. 310, 172 S.E.2d 264 (1970).

tered. The court suggested, however, that even had paternity been in issue,

> [i]n light of the facts of this case, in which the defendant was married to plaintiff in 1959 and lived with her until November 1968, seven years after the birth of their daughter and four years following the birth of their son, common sense, public policy and overriding consideration for the welfare of innocent children would seem to dictate [that the motion for a blood-grouping test be denied] despite the broad language of [section] 8-50.1.[51]

In light of the accuracy of the blood-grouping test, it seems evident that its results should be admitted to rebut the presumption of legitimacy in all types of proceedings. However, in light of the potential for abuse, the courts should restrict its use to those cases where the issue of paternity is timely raised and is not just a handy weapon in a family dispute.

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[51] *Id.* at 314, 172 S.E.2d at 266-67.