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Bastardy - Presumption of Legitimacy - Sufficiency - Exclusionary Blood Tests

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cording to federal standards,[27] now must be the product of a lawful search. This was articulated recently in *State v Manning*.[28] Thus, North Dakota has at present reasonably defined the procedure for the lawful execution of a warrant and the admissibility of evidence obtained therefrom by means of statutes and court decisions. Strict guidelines have not been formally pronounced, since our courts are in accord with other jurisdictions, which hold that each case will be decided on its particular facts[29] subsequent to conformity with the essential statutory requirements.

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BASTARDY—PRESUMPTION OF LEGITIMACY—SUFFICIENCY—EXCLUSIONARY BLOOD TESTS—Petitioner was seeking support for her three children. Defendant denied responsibility for support of the youngest child on the grounds that he was not the father, and requested a blood grouping test pursuant to section 418 of The Family Court Act. Petitioner, respondent and the child were tested. The results indicated that the respondent should be excluded as the father of the child. Petitioner's attorney conceded that the doctor who conducted the test was one of the foremost serologists and hematologists in the country and an expert in blood grouping tests. The court pointed out that in questions of paternity an exclusion is convincing proof that the respondant is not the father of the child born out of wedlock. But, when a child is born in wedlock the presumption of legitimacy is one of the strongest presumptions in law and requires more than a fair preponderance of evidence to overcome the presumption. The court must be entirely satisfied that the alleged father is not a parent of the child. *Held,* the presumption of legitimacy of a child born in wedlock had been overcome by the exclusionary results of the blood grouping test. *Crouse v Crouse,* 273 N.Y.S. 2d 595 (1966)

The presumption that a child born in wedlock is legitimate is a strong presumption founded in early common law [1] Early English law said that if the husband, not physically incapable, was within

27. Elkins v. United States, 364 U.S. 206 (1960) Weeks v. United States, 232 U.S. 383 (1914). The Supreme Court excluded from consideration by federal courts of any and all evidence illegally seized by federal officers.

28. 134 N.W.2d 91 (N.D. 1965).

29. Gouled v. United States, *supra* note 21 McKnight v. United States, 183 F.2d 977 (D.C. Cir. 1950).

1. Bayne v. Willard, 261 N.Y.S.2d 793, 796 (1965) Feazel v. Feazel, 222 La. 113, 62 So.2d 119, 121 (1952) Holder v. Holder, 9 Utah 2d 163, 340 P.2d 761-62 (1959) *In re* Findlay, 170 N.E. 471-72 (Ct. App. 1930) Hargrave v. Hargrave, 9 Bev. 555, 50 Eng. Rep. 457, 458 (1864).

the four seas of England during the period of gestation, the court would not listen to evidence casting doubt on his paternity [2] This common law rule has yielded to reason[3] and most courts today hold that the presumption of a child's legitimacy if born during wedlock is rebuttable.[4]

However, California,[5] Oregon,[6] and North Dakota[7] are examples of states which hold that when a wife, cohabitating with her husband during the possible period of conception, has a child, that child is conclusively presumed to be the child of the husband. The possible period of conception is measured backwards from the date of birth to the period when conception must have taken place. It is a period required by the laws of nature to produce a fully developed child. A period of more than 314 days has been held to be too long from intercourse to birth.[8] The French Civil Code recognizes a period of 300 days.[9] Both California and Oregon have limited their conclusive presumption to cases in which the parties were living together at the possible time of conception.[10] California disallowed the use of the presumption where conception admittedly took place after the retroactive date of the final judgment of divorce.[11]

The only methods of overcoming the presumption in early common law were that the defendant was: (1) incompetent (2) entirely absent so as to have no intercourse or communication of any kind with the mother at the period during which the child must in the course of nature, have been begotten.[12] To this has been added the exclusion by a blood grouping test made in a scientific manner

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2. *In re* Findlay *supra* note 1, at 473 (discussion of the background of the presumption of legitimacy).

3. *Supra* note 2, at 472.

4. State v. Coliton, 73 N.D. 582, 17 N.W.2d 546, 548 (1945), *In re* Wray's Estate, 93 Mont. 525, 19 P.2d 1051, 1054 (1933) State v. Soyka, 181 Minn. 533, 233 N.W 300-01 (1930) Smith v. Smith, 71 S.D. 305, 24 N.W.2d 8, 9 (1946) Murr v. Murr, 87 Cal. App.2d 511, 197 P.2d 369, 372 (D.Ct. App. 1948) See also dissenting opinion in Kolwalski v. Wojtkowski, 19 N.J. 247, 116 A.2d 6, 17 (1955) where judge cites 38 jurisdictions holding the presumption to be rebuttable where there was no cohabitation.

5. CAL. CODE CIV. PROC. (Supp. 1966) § 1962 (5) (1966), Not withstanding any other provision of the law the issue of a wife cohabiting with her husband who is not impotent is indisputably presumed to be legitimate.

6. ORE. REV. STAT. 109.070 (1) (Supp. 1965) The child of a wife cohabitating with her husband who is not impotent shall be conclusively presumed to be the child of her husband whether or not the marriage of the husband and wife may be void.

7. N.D.C.C. § 31-11-02 (4) (1960) The issue of a wife cohabiting with her husband who is indisputably presumed to be legitimate.

8. Commonwealth v. Gromo, 190 Pa. Super. 519, 154 A.2d 417-18 (1959).

9. WRIGHT, FRENCH CIVIL CODE ANNO. Title VII § 312 (1908).

10. Kusior v. Silver, 7 Cal. Rptr. 129, 354 P.2d 657, (1959), Burke v. Burke, 261 Or. 691, 340 P.2d 948 (1959).

11. Price v. Price, 51 Cal. Rptr. 699, 702 (Dist. Ct. App. 1961).

12. Hargrave v. Hargrave, *supra* note 1, at 457, Query if judge meant impotent when he spoke of incompetent in point 1 Compare Lewis v. Powell, 178 So.2d 769, 771 (La. Ct. App. 1965), "It is therefore necessary for him to show, in order to meet the conditions of Civil Code Article 189 that his remoteness from his wife was such that cohabitation was physically impossible."

by a duly qualified person where there is no dispute among the experts as to the accuracy of the test.[13]

The courts are split as to the amount of evidence which is required to override a presumption of legitimacy and have stated in various manners that it must be clear, strong and satisfactory,[14] clear and convincing,[15] clear and conclusive,[16] or beyond a reasonable doubt.[17] The courts thus seem to hover between the standards of civil and criminal proof. In those states which have statutes authorizing the use of the blood grouping tests, there is nothing in the statutes to indicate the evidentary weight which is to be attached to the test results.[18] A prominent exception is the article 5 proviso of the Uniform Act on Blood Tests To Determine Paternity which would make an exclusion conclusive proof of non-paternity

Many jurisdictions have passed statutes authorizing the use of the blood grouping test in disputed paternity cases.[19] Seven of these have adopted the Uniform Act, though with variations that show a reluctance to accept Article 5.[20] Of the jurisdictions adopting the Uniform Act, only Utah, Pennsylvania, and New Hampshire have enacted the Article 5 proviso.

In other jurisdictions the courts are split on the weight given to the exclusionary blood test. New Jersey held that the test is only entitled to the same weight as other evidence,[21] others state that they should be given great weight.[22] Only in actions against third parties or where there has been no cohabitation have the court accepted the results as conclusive evidence of non-paternity [23] The District of Columbia has, however, given the test conclusive weight in an action of a husband against his wife, even though

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13. Commonwealth v. Leary, 345 Mass. 59, 185 N.E.2d 641-42 (1962), Commonwealth v. D'Avella, 399 Mass. 642, 162 N.E.2d 19, 22 (1959).

14. Nelson v. Nelson, 249 Iowa 638, 87 N.W.2d 767, 770 (1958).

15. Duke v. Duke, 134 Ind. App. 172, 185 N.E.2d 478-79 (1962).

16. Sagrue v. Crilley, 329 Ill. 458, 160 N.E. 847, 849 (Ill. Sup. 1928), *cert. denied*, 278 U.S. 616, Koenig v. State, 215 Wis. 658, 255 N.W. 727 (1934).

17. Holder v. Holder, 9 Utah 163, 340 P.2d 761, 763 (1959), Sayles v. Sayles, 323 Mass. 66, 80 N.E.2d 21, 23 (1948), Ratliff v. Ratliff, 298 Ky. 715, 183 S.W.2d 949, 952 (Ct. App. 1944).

18. CAL. EVIDENCE CODE § 890-897 (1967), C NN. GEN. STAT. ANN. § 52-184 (1958) MAINE REV. STAT. ANN. tit. 19 § 262 (1964), MD. ANN. CODE art. 16 § 66G (Supp. 1966) N.J. STAT. ANN. 2A:83-2, 3 (1962), N.Y. FAMILY CT. ACT § 418 (1962), N.C. GEN. STAT. ANN. § 49-7 (Supp. 1966), OHIO REV. CODE ANN. 2317.47 (1964) PA. STAT. ANN. tit. 28 § 306 (1961), R.I. GEN. LAWS 15-8-13 (1956), WIS. STAT. ANN. 885.23 (1965).

19. *Supra* note 18.

20. Uniform Act on Blood Tests to Determine Paternity; CAL. EVIDENCE CODE § 890-97 (1967) ILL. ANN. STAT. ch. 106 ¾ § 1-7 (Smith-Hurd 1966), N.H. REV. STAT. ANN. 522:1-522:10 (1955); ORE. REV. STAT. 109.250-109.262 (1965) PA. STAT. ANN. tit. 28 P.S. § 307.1-307.10 (Supp. 1966), UTAH CODE ANN. 78-45a-17 (Supp. 1965). *E.g.*, Uniform Act § 5, p. 112, The presumption of legitimacy of a child born during wedlock is overcome if the court finds that the conclusion of all the experts, as disclosed by the evidence based upon the tests, show that the husband is not the father.

21. Ross v. Marx, 24 N.J. Super. 25, 93 A.2d 597-98 (1952).

22. Commonwealth v. Gromo, 190 Pa. Super. 519, 154 A.2d 417-18 (1959), State *ex rel.* steiger v. Gray, 76 Ohio Abs. 393, 145 N.E.2d 162, 167-68 (Juv. Ct. 1957), both cases dealing with children born out of wedlock.

23. Commonwealth v. D'Avella, *supra* note 13, at 22, Anonymous v. Anonymous, 1 App. Div.2d 312, 150 N.Y.S. 344, 348 (Sup. Ct. 1959).

there was a possibility of cohabitation at the time of conception.[24] This holding appears to be against the great weight of authority as there was evidence that the husband might have lived with his wife at the time of conception, there being a separation of only nine months prior to the birth.

The question of reliability and accuracy of the blood grouping test, which was previously doubted by the courts,[25] is at the present time well accepted and the courts do not hesitate to take judicial notice of its accuracy and reliability.[26] Courts have accepted reports showing that the application of these tests will exonerate about fifty-five per cent of those falsely accused in such action.[27] This figure is based on the possibility of blood groupings being the same by coincidence.

Judicial disregard of the blood test exclusion is no doubt due to a misunderstanding of the true nature of the test results which are a demonstrable scientific fact. Dr. Alexander S. Wiener had the following to say about the reliability of the blood grouping tests:

> When a qualified blood specialist, in conducting a blood grouping test, obtains a particular result, that same result will be reached by other experts. It cannot be reversed, overruled, or set aside, because it represents a scientific finding. Hence, blood grouping test evidence is immeasurably more accurate than any other means available to the courts for the obtaining of true facts in cases of disputed parentage.[28]

The results are recognized today by both medical and legal authors alike, at least as a matter of fact, as opposed to a point of law.[29] It should be pointed out that recognition is only given to tests which show a negative result. None of the tests devised at

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24. Retzer v. Retzer, 161 A.2d 469, 471 (Munic. Ct. App. D.C. 1960) " to refuse such aid in favor of the ability of the trier of fact to weigh all the evidence and emerge with a contrary and supposedly correct solution is, in the words of one of the cases 'egregiously unrealistic'." (Commonwealth v. D'Avella).

25. State *ex rel.* Slovak v. Holod, 63 Ohio App. 16, 24 N.E.2d 962-63 (1939) Commonwealth v. English, 123 Pa. Super. 161, 187 Atl. 298, (1936).

26. Cortese v. Cortese, 10 N.J. Super. 162, 76 A.2d 717, 720 (1950), expressing the view of most courts; "It is plain we should hold as we do, that this unanimity of respected authorities justifies our taking judicial notice of the general recognition of the accuracy and value of the tests when properly performed by persons skilled in giving them." Houghton v. Houghton, 179 Neb. 275, 137 N.W.2d 861 (1965).

27. Saks v. Saks 189 Misc. 667, 71 N.Y.S.2d 279 (Dom. Rel. Ct. 1947), See also SCHATKIN, DISPUTED PATERNITY PROCEEDINGS 205 (3rd. ed. 1953).

28. Wiener, *The Judicial Weight of Blood Grouping Test Results*, 31 J. CRIM. L. C. 532 (1940-41) Dr. Wiener is the co-discoverer of the mechanics of heredity of Rh Hr blood types (1941-1945), discoverer of blocking and conglutination tests for Rh sensitization (1944-1945), discoverer of two new blood factors Ca and U (1953), factor I (1956), factor Rh(a), Rh(b), Rh(c), M(e), Dr. Wiener was also the one who made the blood exclusion tests for the court in the present case.

29. 1 WIGMORE, EVIDENCE, § 1656 (I)(4), (3rd. ed. 1940) "But at this point comes into play the great discovery of science (emerging after many years of patient research by numerous scientists, but now accpted by all) *viz.* that *no particular gene* A, B, *or* O *will appear in the progeny unless it was present in one of the parents.*"; Ross, *The Value of Blood Grouping Tests As Evidence In Paternity Cases*, 71 HAR. L. REV. 466 (1958).

this time are able to use results which are positive because this only puts the defendant in a class which might be the father

The acceptance of the exclusionary blood test as conclusive in cases where there is cohabitation, or the possibility of cohabitation, is the more modern approach.[30] The early reasons for the presumption, namely that the illegitimate had no rights as an heir, to protect him against the social stigma, and to protect the family unit, are slowly falling by the wayside and the courts are beginning to catch up with the times. This is due, for the most part, to legislation designed to protect the rights of the illegitimate child.[31] While the presumption should not be "lightly thrown aside, such a presumption should not be permitted to relieve wrongdoers from their full legal obligation. "[32]

While North Dakota has recognized the presumption as being rebutable where there is a lack of cohabitation, it still maintains that where there was cohabitation at the time of conception the conclusive presumption remains in effect.[33] We have no statute dealing with the use of the blood grouping test, but in *Coliton* the court accepted the use of the blood test to exclude paternity

Apparently, statutory provisions in this area have not improved on the English rule of "the four seas." In light of North Dakota's recognition of the blood test value, it remains for the legislature to consider the merit of the blood test in paternity determination. Under the present statutes, if there is cohabitation the husband must bear the burden of the child even if evidence is available through the exclusionary blood grouping test, which would conclusively prove that it is genetically impossible for him to be the father.

EARLE R. MYERS, JR.

30. Retzer v. Retzer, *supra* note 24.
31. *The Rights of Illigitimates under Federal Statutes*, 76 HAR. L. REV. 337 (1962), note dealing extensively with the rights of illigitimates.
32. Estey v. Mawdsley, 3 Conn. Cir. 491, 217 A.2d 493, 495 (1966).
33. State v. Colilton *supra* note 4.