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Human Leukocyte Antigen Testing: Technology Versus Policy in Cases of Disputed Parentage

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NOTES

Human Leukocyte Antigen Testing: Technology Versus Policy in Cases of Disputed Parentage

I. INTRODUCTION

Many cases of disputed paternity in the past five years have developed an unusual focus. Instead of addressing the paternity issue in efforts to establish eligibility for welfare assistance,[1] an in-

1. The number of cases to establish an illegitimate child's paternity has increased since 1976 because of federal legislation requiring any mother of an illegitimate child who desires welfare assistance to cooperate with the state in establishing paternity. *See* 42 U.S.C. § 602 (1976 & Supp. V 1981). Congress' intent, therefore, is to alleviate some of the taxpay-

creasing number of recent cases have arisen in which a married father participating in a divorce proceeding claims that a child of the marriage is not his biological child[2] or an unwed father seeks to prove paternity in order to gain custody or visitation rights.[3] The technology of blood testing has advanced dramatically with the increased number of disputed paternity cases and, although not completely accurate, this technology is better than ever before at positively identifying the father of a particular child.[4] The Human Leukocyte Antigen (HLA) test presently can exclude a person from the list of potential fathers with ninety-five to ninety-nine percent certainty and can verify paternity with ninety to ninety-eight percent probability.[5] Thus, the use of modern HLA testing can affect dramatically cases of disputed parentage.

State law controls the admission of HLA test results as evidence in paternity cases.[6] Some states expressly allow admission of HLA test results through statutes,[7] while other states permit the courts, in their discretion, to deal with this issue.[8] In either situation, the courts enjoy a wide latitude in determining the weight that they will accord the scientific evidence.[9] Policy considerations such as protection of the best interests of the child and preservation of family integrity often affect a court's decisions on the ad-

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ers' burden by shifting the obligation of support to the illegitimate child's father.

2. *See, e.g.*, Balfour v. Balfour, 413 So. 2d 1167 (Ala. Civ. App. 1982); County of Fresno v. Superior Court, 92 Cal. App. 3d 133, 154 Cal. Rptr. 660 (1979); Rachal v. Rachal, 412 A.2d 1202 (D.C. 1980); B.S.H. v. J.J.H., 613 S.W.2d 453 (Mo. Ct. App. 1981).

3. *See, e.g.*, LaCroix v. Deyo, 113 Misc. 2d 89, 447 N.Y.S.2d 864 (1981) (custody dispute between step-father and biological father of child after mother's death); J.B. v. A.F., 92 Wis. 2d 696, 285 N.W.2d 880 (Ct. App. 1979) (custedy dispute between maternal grandparents and biological father of child after motber's death).

4. Sussman & Gilja, *Blood Grouping Tests for Paternity and Nonpaternity*, 1981-1 N.Y. ST. J. MED. 343 (1981). *See generally* N. BRYANT, AN INTRODUCTION TO IMMUNOHEMATOLOGY 169-79 (1982) (discussion of HLA system and applications of HLA antigen typing).

5. Sussman & Gilja, *supra* note 4, at 343, 345. *See also* Terasaki, *Resolution by HLA Testing of 1000 Paternity Cases not Excluded by ABO Testing*, 16 J. FAM. L. 543 (1978).

6. H. KRAUSE, CHILD SUPPORT IN AMERICA, THE LEGAL PERSPECTIVE 218 (1981).

7. *E.g.*, GA. CODE ANN. § 74-306 (1981); IND. CODE ANN. § 31-6-6.1-8 (Burns 1980).

8. *E.g.*, Cramer v. Morrison, 88 Cal. App. 3d 873, 153 Cal. Rptr. 865 (1979); Malvasi v. Malvasi, 167 N.J. Super. 513, 401 A.2d 279 (1979); *cf.* Pratt v. Victor B., 112 Misc. 487, 448 N.Y.S.2d 351 (Fam. Ct. 1982).

9. Imwinkelried, *A New Era in the Evolution of Scientific Evidence—A Primer on Evaluating the Weight of Scientific Evidence*, 23 WM. & MARY L. REV. 261, 270-72 (1981). *See also* Berry v. Chaplin, 74 Cal. App. 2d 652, 169 P.2d 442 (1946) (jury found actor Charlie Chaplin to be father even though blood tests excluded him); State v. Camp, 286 N.C. 148, 209 S.E.2d 754 (1974) (state supreme court upheld jury finding that man was natural father even though blood tests excluded him).

missibility of and the weight given to HLA test results.[10]

This Note, however, does not attempt to argue through evidentiary analysis that more courts should recognize statistical and mathematical probabilities of paternity that the HLA test furnishes. Instead, this Note assumes that the judicial trend of using HLA test results as affirmative evidence[11] will continue, and accepts the proposal that these results are scientifically reliable.[12] The Note will focus on the policy considerations and arguments that should affect the admissibility of the HLA blood test as affirmative evidence in various disputed parentage cases.

This Note first examines the use of HLA test results to determine the paternity of illegitimate children who do not have a legal father, and concludes that courts should admit the results unconditionally in these circumstances. Second, the Note analyzes the use of the HLA blood test to settle paternity disputes that arise in a divorce context. Because of the important policy considerations that exist, the Note recommends that courts admit the results subject to a legislatively developed statute of limitations of two or three years. Finally, the Note advocates that public policy factors indicate the need for a two-year statute of limitations to govern the admissibility of HLA test results in situations in which an unmarried father attempts to introduce them to assert paternity rights concerning a presumably legitimate child who has a legal father.

II. HLA Blood Tests

A. *History of Blood Tests in a Legal Setting*

Dr. Karl Landsteiner discovered the major blood groupings at the University of Vienna in 1901.[13] This discovery facilitated the first safe transfusions of human blood[14] and resulted in increased

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10. *See* J. Goldstein, A. Freud & A. Solnit, Before the Best Interests of the Child 3-15 (1979); J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child (1979). *See generally* Muench & Levy, *Psychological Parentage: A Natural Right*, 13 Fam. L. Q. 129 (1979).

11. Pratt v. Victor B., 112 Misc. 2d at 489-90, 448 N.Y.S.2d at 353. *See also infra* notes 43-46 and accompanying text.

12. *See infra* note 25 and accompanying text.

13. R. Race & R. Sanger, Blood Groups in Man 8-9 (1975). The major groupings are A, B, O, and AB. *Id.*

14. A. Erskine, The Principles and Practice of Blood Grouping 6-7 (1973). Dr. Landsteiner received the Nobel Prize in medicine in 1930 in recognition of his discovery of the major blood groups. *Id.*

knowledge of genetics[15] and the use of blood tests as paternity determinants.[16] The American Medical Association (AMA) fully endorsed and recommended the Landsteiner series of tests[17] to the legal community in 1952.[18] Because the tests were only fifty to sixty percent efficient in definitely proving non-paternity,[19] however, states enacted statutes that allowed courts to admit results of the tests as evidence in paternity cases only if they excluded the accused father.[20]

While such exclusionary statutes remained effective, scientific advancements in the discovery of identifying antigens in blood continued. Early blood tests had located antigens only on red

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15. *See generally* M. LEVITAN & A. MONTAGU, TEXTBOOK OF HUMAN GENETICS (1971) [hereinafter cited as HUMAN GENETICS].

16. The discovery in 1927 by Dr. Landsteiner and his colleague, Dr. Phillip Levine, of the M-N antigen on the red blood cell proved more useful in court as a paternity test than in diminishing the risks that accompany blood transfusions. A blood group antigen is an inherited antibody on the surface of a red blood cell that determines a blood grouping reaction with specific antiserum. The genes that control development of blood group antigens vary in frequency in different racial and ethnic groups. STEDMAN'S MEDICAL DICTIONARY 88 (5th ed. 1982).

The M-N antigen test is a reliable genetic marker because of this high percentage of distinction in the genes of a random sample of the population. This test alone can establish nonpaternity with approximately 32% efficiency. HUMAN GENETICS, *supra* note 15, at 148-210. *See also* Page-Bright, *Proving Paternity—Human Leukocyte Antigen Test*, 27 J. FORENSIC SCI. 135, 139-40 (1982). *See generally* K. BOORMAN & B. DODD, AN INTRODUCTION TO BLOOD GROUP SEROLOGY 154-63, 322-23 (1970).

17. The Landsteiner series of tests refers to the ABO blood test joined with the later discovered M-N and Rh blood systems tests. The ABO test consists of identifying the blood type of parents (O, A, B, or AB) and comparing it to that of the child. Ross, *The Values of Blood Tests as Evidence in Paternity Cases*, 71 HARV. L. REV. 466 (1958). The M-N data proved useful in later studies of the Rh system, which Dr. Landsteiner and Dr. Alexander S. Wiener discovered in 1940. The Rh system showed that humans carry either an Rh-positive or Rh-negative antigen. In addition to explaining why persons who received a transfusion of their own blood group sometimes reacted adversely to a blood transfusion, the Rh system discovery helped explain and prevent *erthroblastosis fetalis*, a disease of the newborn. In addition, the Rh system provided another genetic marker helpful in improving the exclusion rate in a paternity test. A.G. ERSKINE, *supra* note 14, at 6. *See also* HUMAN GENETICS, *supra* note 15; J. QUEENAN, MODERN MANAGEMENT OF THE RH PROBLEM 1-55 (1977).

18. Davidsohn, Levine & Wiener, *Medicolegal Application of Blood Grouping Tests*, 149 J. A.M.A. 699 (1952).

19. K. BOORMAN & B. DODD, *supra* note 16, at 321 (citing 62% efficiency of tests); L. SUSSMAN, BLOOD GROUPING TESTS, MEDICOLEGAL USES 89 (1968) (citing 53% efficiency of tests).

20. *E.g.*, ALA. CODE § 26-12-5 (1975); CAL. EVID. CODE § 895 (West 1966); GA. CODE ANN. § 74-101 (1981); MD. ANN. CODE art. 16, § 66G (1981); OHIO REV. CODE ANN. § 3111.16 (Page 1980); TENN. CODE ANN. § 36-228 (1977). Georgia has amended its blood test statute and now permits the admission of HLA tests specifically as evidence to prove or disprove parentage. *See* authorities cited *supra* note 7.

blood cells.[21] Tests for antigens on white blood cells, however, soon promised a higher probability of paternity exclusion because the antigen on the white cell—the human leukocyte antigen (HLA)—was more rare.[22] Combining the HLA test with other blood tests achieved a ninety-one to ninety-three percent probability of paternity exclusion.[23] The more recent use of the HLA tests with antigen tests has improved the certainty of paternity exclusion to ninety-five percent, while adding the RBC enzyme and plasma protein tests increase certainty to 99.95%.[24] Additionally, the pooling of the results of the HLA test with those of the Landsteiner series and other blood antigen tests can lead to a significant positive statistical probability of paternity that approaches one hundred percent.[25]

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21. *See* STEDMAN'S MEDICAL DICTIONARY 1659-63 (5th ed. 1982). At least fifteen different red blood cell antigenic systems exist, including ABO, M-N, P, Rh, Lutheran, Kell, Lewis, Duffy, Kidd, Diego, Yt, I, Xg, Dombrock, and Colton. As of 1976, scientists had identified over 250 antigens on red blood cells. B. LEAVELL & O. THORUP, FUNDAMENTALS OF CLINICAL HEMATOLOGY 720 (1976).

22. N. BRYANT, *supra* note 4, at 172.

23. AMA & Family Law Section, ABA, *Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage*, 10 FAM. L. Q. 247, 257 (1976) [hereinafter cited as *AMA-ABA Guidelines*]. *See also* Comment, *Paternity Testing with the Human Leukocyte Antigen System: A Medicolegal Breakthrough*, 20 SANTA CLARA L. REV. 511 (1980).

24. Sussman & Gilja, *supra* note 4, at 345.

25. *Id.* at 343. In calculating the probability of paternity, the HLA test is more precise than other blood tests because it identifies one specific genetic marker, the HLA *haplotype*. Identification of this genetic marker allows more accurate determination of paternity because only approximately one person in one thousand has the same HLA *haplotype* as any given person. Terasaki, *supra* note 5, at 544. Every individual inherits two immutable *haplotypes*, one from each parent. N. BRYANT, *supra* note 4, at 171, 175-76. Four genes compose each *haplotype*, and two inherited *haplotypes* that share a location on a white blood cell are a *genotype*. Page-Bright, *supra* note 14, at 141. The genetic make-up of *genotypes* can vary, and the observable characteristics of these variations comprise an individual's genetic category of *phenotype*. STEDMAN'S MEDICAL DICTIONARY 1071 (5th ed. 1982). Since science has identified at least 6600 *phenotypes*, Lee, Lebeck & Wong, *Estimating Paternity Index from HLA-typing Results*, 74 AM. J. CLIN. PATH. 218, 218 (1980), and recognizes the theoretical probability that approximately 20 million different *phenotypes* exist, the possibility that a child and a putative father share a common *haplotype* but are unrelated is very unlikely. A. SVEJGAARD, M. HAUGE, C. JERSILD, P. PLATZ, L. RYDER, L. NIELSEN, & M. THOMSEN, THE HLA SYSTEM 8-12 (1975). *See* Note, *Blood Test Evidence in Disputed Paternity Cases: Unjustified Adherence to the Exclusionary Rule*, 59 WASH. U.L.Q. 977, 983-95 (1981).

In 1978, a study using HLA testing on one thousand putative fathers that the Landsteiner series test had not excluded determined the rate of error in HLA testing procedures to be 0.35%. Terasaki, *supra* note 5, at 548. The HLA test showed that 640 of the fathers whom the Landsteiner test had not excluded had at least a 90% probability of paternity, while it definitely excluded 250 of the men. The HLA test could not resolve 10% of the cases. *Id.* at 552. Thus, because of the low rate of error and the high rate of exclusion, courts

Courts also have addressed some of the test's disadvantages. The cost of the HLA test, for example, is quite high in comparison with other blood test costs.[26] In *Little v. Streater*,[27] however, the Supreme Court reduced the unequal effect of this cost by holding that an indigent male has a right to obtain blood tests, including the HLA test, if a statute setting forth the requirements for a child's receipt of welfare has caused the mother to name the indigent as a defendant in the case.[28] Other disadvantages of the HLA test involve difficulties with the testing itself. For example, since white blood cells generally are viable for only twenty-four to seventy-two hours after drawing the blood sample,[29] the HLA test must occur within that timespan. Additionally, mailing samples of blood to testing centers requires that the package arrive within this period in an insulated box that protects the sample from extreme temperatures.[30] These disadvantages, however, appear minor in comparison with the scientific proof and information that the HLA test provides.[31]

B. Use of Blood Tests as Evidence

Blood tests did not gain significant judicial acceptance in the United States until the 1940s,[32] and even then the courts often

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have begun to use the HLA test more widely in cases of disputed paternity. Two reports in which the HLA test results identified two different fathers for alleged twins further illustrate the power of the HLA test. *See* Majsky & Kout, *Another Case of Occurence of Two Different Fathers of Twins by HLA Typing*, 20 TISSUE ANTIGENS 305 (1982); Terasaki, Gjertson, Bernoco, Perdue, Mickey, & Bond, *Twins with Two Different Fathers Identified by HLA*, 299 NEW ENG. J. MED. 590 (1978). HLA typing also has indicated that the husband of a married woman who had been raped was the father of the fetus with a 96% probability. This indication proved correct after the child's delivery. Pollack, Schafer, Barford, & Dupont, *Prenatal Identification of Paternity—HLA Typing Helpful After Rape*, 244 J. A.M.A. 1954 (1980).

26. Sussman & Gilja, *supra* note 4, at 344 (usual blood grouping tests cost approximately $150, in comparison to $600 for blood grouping tests that include the HLA test).

27. 452 U.S. 1 (1981). *See infra* section III.

28. *Streater*, 452 U.S. at 3. The Court found that requiring an indigent in such an instance to pay the high costs of the tests would violate due process since "[t]he effectiveness of the seven systems [including HLA] attests the probative value of blood test evidence in paternity cases." *Id.* at 8.

29. Keith, *Resolution of Paternity Disputes by Analysis of the Blood*, 8 FAM. L. REP. [BNA] No. 4, at 4005 n.25 (Nov. 24, 1981); N. BRYANT, *supra* note 4, at 235-36.

30. Keith, *supra* note 29, at 4005 n.41.

31. *See supra* text accompanying notes 22-25.

32. *See, e.g.*, Livermore v. Livermore, 233 Iowa 1155, 11 N.W.2d 389 (1943). *But cf.* Commonwealth v. Zammarelli, 17 Pa. D. & C. 229 (1931) (first reported paternity case which used blood test results).

gave little evidentiary weight to the results.[33] Instead, the courts would adhere strictly to statutes that required blood tests to be held inconclusive on the issue of paternity. Thus, in the infamous 1946 paternity case *Berry v. Chaplin*,[34] the court held that Charlie Chaplin was the father of a child even though blood tests clearly excluded him as the biological father.[35] The result of the Charlie Chaplin case is by no means archaic; failure to grant conclusive effect to blood test evidence that definitely excluded the putative father occurred as recently as 1974.[36]

Generally, however, standard blood tests have been important evidence in United States paternity suits since the 1940s.[37] Because of the Landsteiner series' low probability of successfully proving paternity,[38] legislatures fashioned statutes to permit the use of these tests only if they proved that a man was not the father.[39] The more precise HLA test, however, can serve as two types of evidence: as exclusionary evidence to show that the putative father could not be the biological father of the child,[40] and as inclusionary or affirmative evidence to indicate the high probability of paternity.[41] Since most states originally fashioned blood test admissibility statutes to deal with exclusionary evidence that the Landsteiner series provided,[42] the use of the HLA test to exclude the putative father has not created as much legal controversy as its affirmative use to prove paternity. A majority of the states which have such statutes mandate that blood tests are admissible only to

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33. *See supra* note 9.

34. 74 Cal. App. 2d 652, 169 P.2d 442 (1946).

35. *Id.* at 664-65, 169 P.2d at 451. Because of the heated adverse publicity that the case attracted, the California Legislature adopted the Uniform Act on Blood Tests to Determine Paternity, CAL. EVID. CODE §§ 890-897 (West 1966). The Act provides in pertinent part: "If the Court finds that the conclusion of all the experts, as disclosed by the evidence based upon the tests, are [sic] that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly." CAL. EVID. CODE § 895 (West 1966). *See infra* note 45.

36. State v. Camp, 286 N.C. 148, 209 S.E.2d 754 (1974). In 1975 the North Carolina Legislature amended the state statute to provide that blood test results which exclude the possibility of paternity be conclusive in effect. N.C. GEN. STAT. § 8-50.1 (1981). *See also supra* note 9.

37. *See, e.g.*, Jordan v. Mace, 144 Me. 351, 69 A.2d 670 (1949) (Maine Supreme Court held that jury cannot disregard blood group tests which exclude one in paternity action); Commonwealth v. D'Avella, 339 Mass. 642, 162 N.E.2d 19 (1959) (if blood test excludes one as father in paternity suit, court must find in defendant's favor as matter of law).

38. *See supra* notes 16 & 21 and accompanying text.

39. *See supra* note 20 and authorities cited therein.

40. H. KRAUSE, *supra* note 6, at 218-19.

41. *Id.* at 219-42.

42. *See supra* text accompanying notes 19-21.

exclude paternity.[43] Eight states, however, have enacted statutes that adopt section 12 of the Uniform Parentage Act, thereby allowing admission of statistics which address the likelihood of paternity.[44] Ten other states have retained statutes from previously drafted uniform acts that permit introduction of blood tests as affirmative evidence if the court, within its discretion, deems the evidence relevant.[45] A few state courts have used judicial notice to admit evidence of statistical probability in paternity suits.[46]

In those jurisdictions that have no controlling statute, courts can use the standard set forth in *Frye v. United States*[47] to admit blood test results as reliable scientific evidence. *Frye* allows a court to admit scientific evidence only if the evidence has "gained general acceptance in the particular field in which it belongs."[48] Courts additionally require stringent proof that scientific evidence is reliable because judges fear scientific test results unduly will impress and sway jurors,[49] and that the results or methods of scien-

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43. *See supra* note 20 and authorities cited therein.

44. COLO. REV. STAT. § 19-6-113 (1978); HAWAII REV. STAT. § 584-12 (1976); MINN. STAT. ANN. § 257.63 (West 1982); MONT. CODE ANN. § 40-6-113 (1981); N.C. GEN. STAT. § 8-50.1 (1981); N.D. CENT. CODE § 14-17-11 (1981); WASH. REV. CODE ANN. § 26.26.110 (Cum. Supp. 1982); WYO. STAT. § 14-2-110(a)(iii) (1977). *See also* CAL. CIV. CODE §§ 7000 to 7021 (West 1983) (adopting Uniform Parentage Act, but not provision concerning statistical evidence of likelihood of paternity).

Section 12 of the Uniform Parentage Act provides that "[e]vidence relating to paternity may include . . . (3)blood test results, weighted in accordance with evidence, if available, of the statistical probability of the alleged father's paternity." UNIF. PARENTAGE ACT § 12, 9A U.L.A. 602 (1979). The National Conference of Commissioners on Uniform State Laws and the American Bar Association approved the Act in 1973.

45. CAL. EVID. CODE § 895 (Cum. Supp. 1981-82); ILL. ANN. STAT. ch.40 § 1401 (Smith-Hurd Cum. Supp. 1982); KY. REV. STAT. ANN. § 406.111 (Bobbs-Merrill 1970); LA. REV. STAT. ANN. § 9:397.2 (West Supp. 1982); ME. REV. STAT. tit. 19 § 280 (Cum. Supp. 1982); N.H. REV. STAT. ANN. § 522:4 (1974); OR. REV. STAT. § 109.258 (1981); 42 PA. CONS. STAT. ANN. § 6136 (Purdon 1982); R.I. GEN. LAWS § 15-8-14 (1981); UTAH CODE ANN. § 78-45a-10 (1977).

These ten states have adopted either § 4 of the Uniform Act on Blood Test to Determine Paternity (UBTA) or § 10 of the Uniform Act on Paternity (UPA). The two sections are nearly identical and § 10 of the UPA provides in pertinent part: "If the experts conclude that the blood tests show the possibility of the alleged father's paternity, admission of the evidence is within discretion of the court, depending upon the infrequency of the blood type." The National Conference of Commissioners on Uniform State Laws and the American Bar Association enacted the UBTA in 1952, and approved the UPA in 1960.

46. *See, e.g.*, Broadwater v. Broadwater, 247 Md. 607, 233 A.2d 782 (1967); Malvasi v. Malvasi, 167 N.J. Super. 513, 401 A.2d 279 (1979).

47. 293 F. 1013 (D.C. Cir. 1923). *See also* Imwinkelried, *supra* note 9, at 262-73.

48. 293 F. at 1014.

49. E. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 92 (1980). *See also* Huntingdon v. Crowley, 64 Cal. 2d 647, 414 P.2d 382, 51 Cal. Rptr. 254 (1966).

tific tests are faulty.[50] The HLA test, however, apparently meets the *Frye* standard because it has gained general acceptance and recognition in both legal and medical circles.[51] Nevertheless controversy still surrounds the use of the HLA test as affirmative evidence in paternity suits because courts are hesitant to recognize a statistical probability of paternity. For example, in 1980 a Massachusetts court[52] reiterated the concern of the Judicial Council of Massachusetts that litigants would raise "constitutional questions under the Fourth and Fifth Amendments . . . if . . . test results [were] used to establish the probability of paternity rather than being limited to proof of exclusion of paternity."[53] Other courts,[54] however, have viewed HLA test results as highly reliable admissible evidence even when state statutes did not expressly permit their use as affirmative proof of paternity. In *Pratt v. Victor B.*,[55] for instance, a New York Family Court judge wrote in dicta:

> It is recommended that the current Legislature consider an amendment which would permit the use of . . . [the ABO red cell antigen series], even if it does not exclude the putative father, when offered in combination with the HLA test. Of course, there would still be no basis for using this test for proof of paternity except in combination with a nonexclusory HLA test.[56]

This Note now focuses on the policy considerations that affect the admissibility of HLA test results in various disputed paternity cases.

III. Use of HLA Blood Tests in Cases of Disputed Parentage

A. Paternity Determination of an Illegitimate Child

1. The Necessity for Accurate and Objective Evidence

Because a high percentage of the approximately three million illegitimate children born in the United States between 1972 and

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50. E. Imwinkelried, *supra* note 49, at 92.

51. *See AMA-ABA Guidelines*, *supra* note 23 and accompanying text.

52. Commonwealth v. Blazo, 10 Mass. App. Ct. 324, 406 N.E.2d 1323 (1980).

53. *Id.* at 327 n.1, 406 N.E.2d at 1326 n.1 (paraphrasing Fifty-fifth Report of the Judicial Council of Massachusetts, Pub. Doc. No. 144, 31, 38-40 (1979)).

54. *See, e.g.*, Pratt v. Victor B., 112 Misc. 2d 487, 448 N.Y.S. 2d 351 (1982); J.H. v. M.H., 177 N.J. Super. 436, 426 A.2d 1073 (1980). *See also*, Tice v. Richardson, 7 Kan. App. 2d 509, 644 P.2d 490 (1982) (statute fails to specify type of blood test and court held that the certainty associated with HLA tests allows that evidence to be admitted to determine paternity).

55. 112 Misc. 2d 487, 448 N.Y.S.2d 351.

56. *Id.* at 490, 448 N.Y.S.2d at 353.

1979[57] received welfare assistance,[58] the United States Congress in 1975 enacted legislation that places the burden of supporting these children upon their parents, especially their fathers.[59] The Aid to Families with Dependent Children (AFDC) program requires mothers of illegitimate children to cooperate with the states in establishing their children's paternity in order to obtain support payments from fathers.[60] Unless a mother agrees to cooperate, the government can refuse to disperse funds to the family.[61] Families can receive AFDC aid only if the government does not locate the child's putative father, or if a court finds that the man is not the father or is indigent.[62] This forced cooperation requirement coupled with the large number of illegitimate children who attempt to qualify for AFDC funds[63] has precipitated the largest number of disputed parentage cases.[64]

Recognition of the inadequacy of the other types of evidence that courts admit in disputed paternity cases demonstrates an imperative need for reliable affirmative scientific evidence in such litigation. Courts generally will admit the testimony of the mother and putative father concerning their alleged sexual relations.[65]

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57. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 66 (1979).

58. For example, in Alabama, Arkansas, Florida, Georgia, Illinois, Kentucky, Louisiana, Maryland, Mississippi, Missouri, New Jersey, New York, North Carolina, Pennsylvania, Tennessee, Texas, and Virginia between 30-50% of the children receiving welfare funds were illegitimate. STAFF OF SENATE COMM. ON FINANCE, 94TH CONG., 1ST SESS., WAGE GARNISHMENT, ATTACHMENT AND ASSIGNMENT, AND ESTABLISHMENT OF PATERNITY 288 (Comm. Print 1975).

59. 42 U.S.C. § 602 (1976 & Supp. V 1981).

60. 42 U.S.C. § 602(26) (1976) provides in pertinent part that

> as a condition of eligibility for aid, each applicant or recipient will be required-
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> . . . .
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> (B) to cooperate with the state (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed, or in obtaining any other payments or property due such applicant or such child, unless (in either case) such applicant or recipient is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child on whose behalf aid is claimed . . . .

61. *Id.*

62. 42 U.S.C. § 602 (1976 & Supp. V 1981).

63. *See supra* notes 57-58 and accompanying text.

64. *See supra* note 1 and accompanying text.

65. *See, e.g.*, Gelinas v. Nelson, 165 Conn. 33, 327 A.2d 565 (1973) (court admitted mother's testimony about intercourse with defendant and denial of sexual relations with other men near time of conception); Pryor v. James, 377 So. 2d 252 (Fla. Dist. Ct. App. 1979) (mother testified to several occasions of sexual intercourse with defendant who alleged

Such testimony leads to obviously inherent problems. The testimony not only will be self-serving, but a strong likelihood exists that parties and witnesses will commit perjury.[66] Other types of proof also invite perjury. For instance, putative fathers often will use the defense of multiple access—that the mother was sexually active with other men at or near the time of conception—to counter an allegation of paternity.[67] Other evidence that courts admit because of its "quasi-scientific" nature includes physical resemblance,[68] gestation period of the child,[69] and polygraph tests.[70] The reliability and accuracy of such evidence, however, is doubtful.

An obvious need, therefore, exists for accurate and objective evidence that does not depend on the veracity of witnesses or on "quasi-scientific" evidence. The recent Supreme Court decision in

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mother had been promiscuous); People *ex rel.* Raines v. Price, 37 Ill. App. 3d 921, 347 N.E.2d 29 (1976) (parties and witnesses directly contradicted one another concerning sexual relationships of plaintiff-mother); Collins v. Wise, 156 Ind. App. 424, 296 N.E.2d 887 (1973) (mother testified to repeated acts of intercourse with defendant prior to and shortly after child's conception date); Tice v. Richardson, 7 Kan. App. 2d 509, 644 P.2d 490 (1982) (mother testified to numerous sexual relations with defendant but only one with present husband during three month period); Pratt v. Victor B., 112 Misc. 2d 487, 448 N.Y.S.2d 351 (N.Y. Fam. Ct. 1982) (mother testified to having sexual relations with defendant who disputed number of times and chronological period of the alleged acts).

66. *See* Arther & Reid, *Utilizing the Lie Detector Technique to Determine the Truth in Disputed Paternity Cases*, 45 J. CRIM. L.C. & P.S. 213, 215 (1954).

67. State *ex rel.* Leonard v. Hogan, 32 Or. App. 89, 573 P.2d 328 (1978). *See generally* Sass, *The Defense of Multiple Access in Paternity Suits: A Comparative Analysis*, 51 TUL. L. REV. 468 (1977) (comparing the use of the multiple access defense in the United States, West Germany, France, Hungary, and the Soviet Union).

68. J. WIGMORE, EVIDENCE § 166, at 627 (3rd ed. 1940). Presenting "evidence" of physical resemblance usually entails examination of the child by the jury, which compares his features to those of the father. *See, e.g.*, McLemore v. Richardson, 32 Conn. Supp. 533, 343 A.2d 229 (Conn. Super. Ct. 1975); G.L. v. S.D., 382 A.2d 252 (Del. Super. Ct. 1977), *rev'd on other grounds*, 403 A.2d 1121 (Del. 1979); Joseph v. State, 149 Ga. App. 296, 254 S.E.2d 383 (1979); Schigur v. Keck, 93 Mich. App. 763, 286 N.W.2d 917 (1979); Glascock v. Anderson, 83 N.M. 725, 497 P.2d 727 (1972); State v. Clay, 236 S.E.2d 230 (W.Va. 1977). A minority of the states, however, do not allow the jury to examine the child. *See* Esch v. Graue, 72 Neb. 719, 101 N.W. 978 (1904); Cook v. State, 172 Tenn. 42, 109 S.W.2d 98 (1937); Schlehlein v. Duris, 54 Wis. 2d 34, 194 N.W.2d 613 (1972). *See generally* Comment, *Evidence: Admissibility of Evidence of Resemblance, Where Paternity in Issue*, 11 CORNELL L. Q. 380 (1926) (discussion of older cases advocating use of all evidence of resemblance).

69. The alleged father usually presents evidence of gestation period to show that conception was not possible on admitted dates of sexual intercourse because the length of time between "conception" and the date of birth was beyond the normal 40 week duration of pregnancy. American courts have used evidence concerning the length of pregnancy for years. *See In re* Estate of McNamara, 181 Cal. 82, 183 P. 552 (1919) (claim of 304 days as duration of pregnancy held not normal period of gestation); Karen K. v. Christopher D., 86 A.D.2d 633, 446 N.Y.S.2d 345 (N.Y. App. Div. 1982) (256 day gestation period required remanding for expert medical testimony).

70. *See* Arther & Reid, *supra* note 66, at 214.

Mills v. Habluetzel[71] heightened this need. The Court held in *Mills* that a one year statute of limitations for filing a paternity action on behalf of an illegitimate child violated equal protection.[72] Although the majority opinion did not suggest an appropriate statute of limitations for these actions, Justice O'Connor indicated in her concurring opinion that even Texas' four year statute of limitations was inappropriate.[73] Justice O'Connor supported her belief that statutes of limitation should not bar paternity actions involving illegitimate children who do not have a legal father during the child's minority by stating that the government has an interest not only in seeing that " 'justice is done' "[74] but also in enhancing the state's fiscal integrity by reducing the welfare rolls.[75] Justice O'Connor also observed that the "State's concern about stale and fraudulent claims is substantially alleviated by recent scientific developments in blood testing dramatically reducing the possibility that a defendant will be falsely accused of being the illegitimate child's father."[76] Thus, if future litigants bring paternity actions five, ten, or even fifteen years after the birth of a child, the courts will need objective and reliable evidence such as the HLA test results, especially when the alternative types of evidence include possible perjury or hazy recollections.

2. The Appropriate Evidentiary Weight for HLA Test Results

(a) Reliability

Although a present and future need for trustworthy evidence such as HLA test results clearly exists in paternity suits, courts still are uncertain about the evidentiary weight they should accord affirmative, as opposed to exclusive, use of this evidence. Courts either can hold positive test results conclusive on the issue of paternity or can consider them in conjunction with other evidence.[77] A decision by the courts to deem affirmative evidence of the probability of paternity conclusive would foreclose the possibility of considering or testing another man as the possible father.[78]

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71. 102 S. Ct. 1549 (1982).
72. *Id.* at 1555-56.
73. *Id.* at 1556.
74. *Id.*
75. *Id.* at 1557.
76. *Id.* at 1557 n.2.
77. *See supra* note 9 and accompanying text.
78. Since the same HLA haplotype exists in only one person in one thousand, the probability that the test would reveal a 90-99% likelihood of paternity in the wrong man is

Courts, therefore, should not consider the HLA blood test conclusive until it can indicate with one hundred percent accuracy the fact, rather than the probability, of paternity. Currently, the more practical alternative is to allow the trier of fact to consider HLA blood test results in light of other evidence. Although the jurors could not base their decision strictly on the HLA evidence, the judge could instruct them to give it greater weight than the other evidence.[79] Recent cases[80] and medical reports[81] that cite the accuracy of the HLA test in paternity disputes impliedly justify this type of jury instruction.

(b) The Child's Best Interests

In addition to the reliability of the tests, strong policy reasons also support a judicial determination to give HLA test results significant affirmative evidentiary weight in paternity actions. The two primary considerations are first, the best interests of the child[82] and second, the fiscal integrity of the state.[83] A child's best interests in this context include the receipt of financial and emotional support from his father[84] and establishment of a legal relationship with his father that engenders a sense of identity and may facilitate inheritance[85] or "adoption" by the father or paternal grandparents if the mother dies during the child's minority.[86] Of course, a legal determination pursuant to HLA test results that a

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highly doubtful. The possibility, however, is strong enough to create doubt in a juror's mind. *See supra* note 25.

79. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 211, at 521-23 (2d ed. 1972).

80. *See, e.g.*, Reid v. White, 112 Misc. 2d 294, 446 N.Y.S.2d 991 (N.Y. Fam. Ct. 1982); State v. Meachem, 93 Wash. 2d 735, 612 P.2d 795 (1980).

81. *See supra* note 25.

82. *See supra* note 10 and accompanying text.

83. *See infra* notes 91-96 and accompanying text.

84. *See supra* note 10. Goldstein, Freud, and Solnit emphasize the emotional needs of the child more than his financial needs.

85. *See* Stone, *Report of the Committee on the Law of Succession in Relating to Illegitimate Persons*, 30 MOD. L. REV. 552 (1967). *See generally* Note, *Uniform Probate Code—Illegitimacy—Inheritance and the Illegitimate: A Model for Probate Reform*, 69 MICH. L. REV. 112 (1970) (discussion advocating parity between legitmate and illegitmate children's inheritance rights).

86. *See, e.g.*, LaCroix v. Deyo, 113 Misc. 2d 89, 447 N.Y.S.2d 864 (N.Y. Fam. Ct. 1981) (natural father and stepfather seek custody after death of minor child's mother); Marticorena v. Miller, 597 P.2d 1349 (Utah 1979) (two men, each of whom had previously been married to deceased woman, sought status as biological father of child to facilitate custody); J.B. v. A.F., 92 Wis. 2d 696, 285 N.W.2d 880 (Wis. Ct. App. 1979) (maternal grandparents and unwed male claiming to be natural father seek custody of deceased mother's minor child).

man must support a child financially because he is the biological father does not guarantee fulfillment of the social goal to provide the child with emotional support. The establishment of an emotional relationship between a father and child, however, is more likely to occur if the court forces a nonindigent father to build a financial tie to the child, than it is if the father never institutes any type of contact.

In a more practical vein, judicial determination of paternity can affect substantially the emotional and economic interests that accompany inheritance. Most recent Supreme Court cases have attempted to equalize the status of legitimate and illegitimate children[87] but the Court has allowed some forms of discrimination toward illegitimate children to continue in the area of inheritance law. In the 1978 case of *Lalli v. Lalli*,[88] the Supreme Court established a principle that would allow the denial of an illegitimate child's claim to any inheritance in his father's estate. In the five-to-four decision the Court specifically upheld a New York statute that required the adjudication of an illegitimate child's paternity during the father's lifetime for the child to have any claim to the father's estate via intestate succession.[89] The dissenting justices in *Lalli* argued forcefully that if a father dies intestate before judicial determination of a child's paternity then the state's intestacy laws may prohibit the illegitimate child from inheriting even though the community has common knowledge of the child's paternity or the father openly acknowledges it.[90]

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87. *See, e.g.*, New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973) (Court invalidated on equal protection grounds a welfare statute that discriminated against illegitimate children); Weber v. Aetna Cas. & Surety Co., 406 U.S. 164 (1972) (Court invalidated on equal protection grounds a workmen's compensation provision governing disbursement of benefits because it discriminated against illegitimate children); Levy v. Louisiana, 391 U.S. 68 (1968) (Court struck down state wrongful death statute that discriminated against illegitimate children as violative of equal protection). *But see* Califano v. Boles, 443 U.S. 282 (1979) (Court upheld Social Security provision that denied insurance benefits to illegitimate children because it lacked sufficient impact to constitute discrimination); Mathews v. Lucas, 427 U.S. 495 (1976) (Court upheld Social Security provision denying benefits to illegitimate children not judicially recognized, as necessary for administrative convenience).

88. 439 U.S. 259 (1978).

89. *Id.* at 259 (Powell, J., Burger, C.J., and Stewart, J., announcing judgment); *id.* at 276 (Stewart, J., concurring); *id.* at 276 (Blackmun, J., concurring).

90. *Id.* at 277 (Brennan, J., White, J., Marshall, J., and Stevens, J., dissenting). The dissenting Justices pointed out that the father not only had acknowledged his illegitimate child openly, but also had provided financial support. The dissent also expressed doubt that a person who failed to write a will would have the cognizance to adjudicate his paternal relationship with an illegitimate child for purposes of insuring that the child would inherit

(c) *The State's Fiscal Integrity*

In addition to promoting children's best interests, the courts also can use HLA blood test results as affirmative evidence that can enhance a state's fiscal integrity.[91] Under the AFDC program a mother cannot receive welfare assistance for an illegitimate child until she helps the state institute a paternity suit against the natural father.[92] Since the incidence of illegitimacy is steadily increasing,[93] states will save money if the fathers, rather than the states, support these children.[94] One state supreme court expressed this policy as follows: "The State has a compelling interest in assuring that the primary obligation for support of illegitimate children falls on *both* natural parents rather than on the taxpayers of this state."[95] Other state courts have echoed this sentiment.[96] Another fiscal reason for judicial use of affirmative HLA blood test results is the possibility of avoiding unnecessary costly litigation if such use will expedite admissions of paternity by natural fathers and acceptance by them of financial responsibility.[97]

Thus, strong public policy considerations favor use of the HLA blood test as affirmative evidence in paternity determinations of illegitimate children who do not have a legal father. No statute of limitations, however, except the child's reaching majority age

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via intestate succession. *Id.* at 278.

91. *See, e.g.*, J.E.G. v. C.J.E., 172 Ind. App. 515, 360 N.E.2d 1030 (1977) (court acknowledged that legitimate interest in paternity suit is to protect the public interest by preventing the illegitimate child from becoming a ward of the state).

92. *See supra* notes 58-62 and accompanying text.

93. *See supra* note 57 and accompanying text.

94. *See supra* text accompanying note 73.

95. State v. Wood, 89 Wash. 2d 97, 102, 569 P.2d 1148, 1151 (1977).

96. *See, e.g.*, State *ex rel.* S.M.B. v. D.A.P., 284 S.E.2d 912 (W. Va. 1981). The West Virginia Supreme Court colorfully wrote in dicta:

> In this regard we would note that the incidence of illegitimacy rises in this country every year; furthermore, a few women, perhaps following the example of T.S. Garp's mother, J. Irving, *The World According to Garp* (1978), deliberately choose to have children out of wedlock because they consciously decide that they want a child but not a husband. *See, e.g.*, Rivlin, 'Choosing to Have a Baby on Your Own,' *Ms*, April 1979, p. 68. While we hardly find this either an intelligent or an appropriate approach to the sound upbringing of children, nonetheless, we must recognize the existence of new patterns of life. The difficulty, of course, with eccentric lifestyles is that when they fail to yield the results which were intended the ultimate burden of compensating for individuals' lack of foresight ultimately falls upon the inadequate resources of the West Virginia Department of Welfare.

Id. at 915-16 (footnote omitted).

97. *In re* Karen K. v. Christopher D., 36 A.D.2d 633, 446 N.Y.S.2d 345 (N.Y. Fam. Ct. 1982).

should limit its use.[98] Although the Supreme Court had the opportunity in *Mills*[99] to specify an appropriate statute of limitations for paternity actions that mothers bring, it failed to do so.[100] Some state courts have commended the Court's reasoning in *Mills* that the statute in question was invalid since no similar statute of limitations governed a father's attempt to disprove paternity of children born to his marriage.[101] State courts also have emphasized that the HLA blood test is highly reliable, objective, and always available.[102] The Minnesota Supreme Court made the highest recommendation for the HLA blood test when it urged its state legislature to require the HLA test in all paternity cases.[103] The court attached as much importance to the test as to the right to counsel in paternity disputes.[104]

B. Paternity Disputes at Time of Divorce

Many husbands who participate in divorces try to establish grounds of adultery[105] or avoid payment of child support[106] by alleging that they are not the father of a child born to the marriage. Generally, however, husbands must overcome a presumption that children of the marriage are legitimate.[107] Although some cases have traced the presumption of legitimacy to Roman law,[108] the English common law embraced it with the adoption of Lord Mansfield's Rule in the eighteenth century.[109] The Rule effectively made

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98. *See supra* notes 72-74 and accompanying text.

99. *See* authority cited *supra* note 71.

100. *See supra* note 73 and accompanying text. The *Mills* court found a four year statute of limitations inappropriate. A later case cited *Mills* as precedent and found a six year statute of limitations inappropriate. Hummel v. Smith, 301 Pa. Super. 276, 447 A.2d 965 (1982) (Beck, J., concurring).

101. *In re* Paternity of M.D.H., 437 N.E.2d 119, 125-26 (Ind. Ct. App. 1982); *see* Lenoir *ex rel.* Cogdell v. Johnson, 46 N.C. App. 182, 264 S.E.2d 816 (1980); State *ex rel.* S.M.B. v. D.A.P., 284 S.E.2d 912 (W. Va. 1981).

102. Hummel v. Smith, 301 Pa. Super. 276, 285-86, 447 A.2d 965, 970 (1982) (Beck, J. concurring); *see* Malvasi v. Malvasi, 167 N.J. Super. 513, 401 A.2d 279 (Super. Ct. Ch. Div. 1979).

103. Hepfel v. Bashaw, 279 N.W.2d 342 (Minn. 1979).

104. *Id.* at 344.

105. *See, e.g.*, Rachel v. Rachel, 412 A.2d 1202 (D.C. 1980) (husband seeking legal separation on ground of adultery claimed younger child was not his biological offspring). *See also* Note, *Divorce—Authority of Court to Order Mother to Submit Her Child to Blood-Grouping Tests to Determine Issue of Adultery*, 15 J. FAM. LAW 592 (1977).

106. *See* L.A.J. v. C.T.J., 577 S.W.2d 151 (Mo. Ct. App. 1979) (father challenged child support decree on basis of his nonpaternity).

107. *See infra* notes 113-19 and accompanying text.

108. *See, e.g.*, Keunedy v. State, 117 Ark. 113, 116, 173 S.W. 842, 843 (1915).

109. Goodwright v. Moss, 2 Cowp. 591, 98 Eng. Rep. 1257 (1777).

the presumption of legitimacy irrebuttable by preventing either spouse from testifying to nonaccess to each other at the time of conception.[110] Several commentators have criticized the Rule,[111] however, and many American courts have abandoned it.[112]

Although a few states such as California[113] and Nebraska[114] still have a conclusive presumption of legitimacy, most states have adopted a rebuttable presumption through statutes[115] or common law.[116] Eight states have statutorily adopted[117] a provision of the Uniform Parentage Act[118] that establishes a rebuttable presumption of legitimacy.[119] Thus, the majority of states allow evidence rebutting the presumption of legitimacy, including proof of the husband's nonaccess,[120] the wife's adultery,[121] and the husband's

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110. *Id.*

111. *E.g.* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 67 (2d ed. 1972); J. WIGMORE, EVIDENCE §§ 2063-64 (3d ed. 1940).

112. *See, e.g.*, Serafin v. Serafin, 401 Mich. 629, 258 N.W.2d 461 (1977); Ventresco v. Bushey, 159 Me. 241, 191 A.2d 104 (1963); Moore v. Smith, 178 Miss. 383, 172 So. 317 (1937).

113. CAL. EVID. CODE § 621 (West Cum. Supp. 1983). *See also* Comment, *The Irrebuttable Presumption of California Evidence Code Section 621*, 12 U.C.D. L. REV. 452 (1979).

114. Hudson v. Hudson, 151 Neb. 210, 36 N.W.2d 851 (1949).

115. *See, e.g.*, IOWA CODE §§ 675.7-.15 (1975); KAN. STAT. ANN. § 38-1101 (Supp. 1981); N.M. STAT. ANN. §§ 40-51 to -7 (1983); VT. STAT. ANN. tit. 15, § 331 (1974); WEST VA. CODE §§ 48-7-1 to 4 (1966 & Cum. Supp. 1975).

116. Missouri, Pennsylvania, South Carolina, and Virginia have adopted a common law rebuttable presumption of legitimacy. *See* Note, *Children Born of the Marriage—Res Judicata Effect on Later Support Proceedings*, 45 MO. L. REV. 307 n.5 (1980).

117. CAL. CIV. CODE § 7004 (West 1983); COLO. REV. STAT. § 19-6-105 (1973); HAWAII REV. STAT. § 584-4 (1976); MINN. STAT. ANN. § 257.55 (West 1982); MONT. CODE ANN. § 40-6-105 (1981); N.D. CENT. CODE § 14-17-04 (1981); WASH. REV. CODE ANN. § 26.040 (Supp. 1983); WYO. STAT. § 14-2-102 (1978). Montana's statute differs from the Uniform Parentage Act in that it allows rehuttal of the presumption of legitimacy by a preponderance of the evidence rather than by clear and convincing evidence. *See infra* note 137.

118. *See supra* note 44.

119. The Uniform Parentage Act provides:

> (a) A man is presumed to be the natural father of a child if:
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> (1) he and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court;
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> . . . .
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> (b) A presumption under this section may be rehutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

UNIF. PARENTAGE ACT § 4(a)(1) & (b), 9A U.L.A. 590-91 (1979).

120. *See, e.g.*, Mock v. Mock, 411 So. 2d 1063 (La. 1982). *See supra* notes 128-30 and accompanying text.

impotence or sterility.[122] State courts recently have admitted evidence from blood tests like the HLA.[123] Obviously, the older forms of "proof" are neither as reliable nor as objective as the HLA blood test[124] since they rely partly on past recollections and self-serving commentary.[125]

The courts in those states with a rebuttable presumption of legitimacy generally will allow the results of an HLA blood test into evidence if the proponent husband shows good cause for their admission.[126] Because the husband is attempting to prove he is not the father of the child, he would use the test results as exclusionary evidence. If the test, however, indicated a high likelihood of paternity the mother or child would want to use the results as affirmative evidence. The controversy surrounding the use of HLA blood tests in divorce situations, however, does not concern whether the results are exclusionary or affirmative as it does in paternity determinations in illegitimacy cases,[127] but instead focuses more on the applicable statute of limitations. Recent judicial decisions and modern policy considerations support a statute of limitations in paternity determinations of illegitimate children, the only limit of which should be a child's reaching the age of majority.[128] However, similar policy considerations—the best interests of the

121. *See supra* note 105 and accompanying text.

122. *See* CAL. EVID. CODE § 621 (West Supp. 1983) (statute provides that a conclusive presumption of paternity exists if conception occurs while husband and wife cohabitate, but that no such presumption exists if one can show that the alleged father was impotent or sterile). Vincent B. v. Joan R., 126 Cal. App. 3d 619, 179 Cal. Rptr. 9 (1981) (The burden of showing impotence or sterility is upon the person claiming paternity. The court will allow blood test results to rebut conclusive presumption of a cohabitant's paternity only after the claiming party carries the burden of proof and shows sterility or impotence.). *See also* Recent Development, *California's Tangled Web: Blood Tests and the Conclusive Presumption of Legitimacy*, 20 STAN. L. REV. 754, 757 (1968).

123. *See, e.g.*, County of Fresno v. Superior Court, 92 Cal. App. 3d 133, 137-38, 154 Cal. Rptr. 660, 662-63 (1979) (court allows use of the HLA blood test to prove nonpaternity if parties lay adequate foundation and demonstrate good cause); J.H. v. M.H., 177 N.J. Super. 436, 441, 426 A.2d 1073, 1076 (1980) (holding that HLA testing was not precluded in divorce case); Wake County v. Green, 53 N.C. App. 26, 279 S.E.2d 901 (1981) (holding that the HLA test may be used in a divorce case to show that a man other than the husband was the father of a child). *See also infra* note 124 and accompanying text.

124. *See supra* note 25 and accompanying text.

125. See cases cited *supra* notes 65-66 for purposes of analogy. The cases illustrate instances in which courts have allowed older means of proof in paternity disputes. These means of proof rely heavily upon self-serving statements and past recollections.

126. *See, e.g.*, Balfour v. Balfour, 413 So. 2d 1167, 1169 (Ala. Civ. App. 1982); County of Fresno v. Superior Court, 92 Cal. App. 3d 133, 137-38, 154 Cal. Rptr. 660, 662-63 (1979) (existence of better blood test than ABO test found sufficient for good cause).

127. *See supra* notes 53-56 and accompanying text.

128. *See supra* notes 97-104 and accompanying text.

child[129] and the preservation of family integrity[130]—bolster the argument for a very brief statute of limitations in paternity disputes at the time of divorce.

1. The Child's Best Interests

Two of a child's possible interests at the time of a divorce are maintenance of his status as legitimate[131] and insulation from routine disavowals of his legitimacy in divorce proceedings.[132] Because recent Supreme Court cases have sought to equalize the status of illegitimate and legitimate children,[133] arguments based on the legal consequences of being labelled "illegitimate" command less support.[134] The child's interest in preserving his legitimacy, therefore, is more defensible if parties present it to reflect a concern with the maintenance of a legal relationship with the father as well as the avoidance of any social stigmas of illegitimacy. Maintenance of a child's legal relationship with his father achieves an important and practical economic goal: as long as the child is the legal dependent of the husband seeking a divorce, the husband must support the child financially during minority.[135] A child's interest in protection from courtroom denials of his legitimacy in divorce proceed-

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129. *See supra* note 10 and accompanying text.

130. *See, e.g.*, Ferguson v. Ferguson, 126 Cal. App. 3d 744, 179 Cal. Rptr. 108, 110 & n.2 (1981).

131. *See infra* notes 133-35 and accompanying text.

132. *See* Recent Development, *supra* note 122, at 758, 759 n.23.

133. *See supra* note 85 and accompanying text. *See also* Comment, *The Expanding Rights of the Illegitimate*, 3 CREIGHTON L. REV. 135 (1970).

134. *See, e.g.*, Mathews v. Lucas, 427 U.S. 495, 512-13 (1976) (stigma of illegitimacy is not determinative of illegitimate's rights to social security benefits); Gomez v. Perez, 409 U.S. 535, 538 (1973) (discrimination results if state denies substantial benefits for an illegitimate because of that child's status compared to legitimate children); Comment, *supra* note 133. *Contra* Serafin v. Serafin, 401 Mich. 629, 258 N.W.2d 461 (1977) (Coleman, J., concurring). In his concurring opinion of the case, Justice Coleman wrote in dicta:

> Despite these enlightened advances, there still are, unfortunately, social distinctions made hetween the legitimate and illegitimate child which continue to stigmatize the illegitimate child and scar his or her psychological development. We need no learned treatise to know that many children branded as illegitimate suffer painful and sometimes crippling emotional damage at the hands of cruel or thoughtless peers and adults. The work "bastard" has not yet lost its sting to the children against whom it is too often applied. Moreover, feelings of parental rejection and abandonment are realities that often continue to plague the illegitimate child. Related neglect and even abuse are not uncommon. It is no accident that many of these children strike back by committing antisocial or criminal acts.

Id. at 637-38, 258 N.W.2d at 464.

135. *See, e.g., In re* Paternity of M.D.H., 437 N.E.2d 119, 128 (Ind. Ct. App. 1982); County of Lenoir *ex rel.* Cogdell v. Johnson, 46 N.C. App. 182, 186, 264 S.E.2d 816, 819 (1980).

ings, in comparison, reflects a concern for his emotional well-being. If courts admit HLA blood test results in all divorce proceedings for the purpose of denying paternity, then husbands could engage routinely in "fishing expeditions" by requesting that the blood tests be taken and the results admitted in efforts to avoid child support.[136] The traumatic effect of divorce on children is obviously evident, and courts should recognize the repugnance of additionally subjecting a minor to a blood test and thereby forcing the child to acknowledge that his father is attempting to deny paternity. The failure of some states to have a statute of limitations that bars a husband's action to disprove his paternity[137] makes such scenarios inevitable. Because the economic and emotional interests of children are so significant, all states should adopt some statute of limitations to limit such action.

2. Preservation of Family Integrity

The public policy of maintaining family integrity provides further support for a short statute of limitations in the divorce context. Some courts have characterized family integrity as "actual" and "legal."[138] Involvement in a divorce can destroy "actual" family integrity,[139] but courts feel that "legal" family integrity can survive.[140] A reasonable statute of limitations that excludes some blood test evidence in divorce proceedings would help maintain the legal father-child relationship and, although the child would not benefit from his father's presence, the existence of a legal relationship hopefully would preserve at least some of the psychological and emotional bonds between the two.[141] An important consideration that courts should include in their analysis of this policy-dominated area is that, although the impact and accuracy of other forms of evidence[142] may diminish, the utility and accuracy of the HLA blood test never waivers.[143] Thus, the HLA blood test could affect dramatically the number of paternity disavowals and destroy some legal relationships that courts should maintain to protect the

136. *See* Recent Development, *supra* note 122, at 759 n.23; R.D.S. v. S.L.S., 402 N.E.2d 30, 37 n.13 (Ind. Ct. App. 1980).

137. *See, e.g., In re* Paternity of M.D.H., 437 N.E.2d 119 (Ind. Ct. App. 1982).

138. *See, e.g.*, Stephen B. v. Sharyne B., 124 Cal. App. 3d 524, 530, 177 Cal. Rptr. 429, 432 (1981).

139. *Id.*, at 530, 177 Cal. Rptr. at 432.

140. *Id.*

141. *Id.* at 531, 177 Cal. Rptr. at 433.

142. *See supra* notes 120-22 and accompanying text.

143. *See supra* note 25.

economic and emotional interests of children and the legal integrity of the family. The best method for states to minimize the effect of HLA test results on children of divorce is to adopt short statutes of limitation that begin to run at the birth of the child. Present state statutes of limitation range from two years[144] to nonexistent.[145] Interestingly, the Uniform Act on Parentage contains a statute of limitations of five years starting to run at the birth of the child[146] that apparently contradicts the express admonition in the Act's Comments that "paternity actions should be brought promptly"[147] to determine the paternity of illegitimate children. Although a child must be at least six months old before he can undergo an HLA blood test,[148] a two to three year statute of limitations beginning at the date of the child's birth would be reasonably adequate. A time limit of two or three years would afford a husband enough time to disprove the paternity of a child whom he discovered was not his biological offspring, yet would be short enough to protect the economic and emotional interests of a child who had achieved the longevity within the family unit that courts equitably should recognize as worthy of the protection that they give legal family integrity. In those divorce actions in which a man seeks to disprove paternity within a two or three year statute of limitations courts should admit HLA blood test results because they most objectively can exclude the man as the biological father.[149] In those instances, however, when a husband seeks to disprove paternity of a child who is over two or three years old, states should have statutes of limitation that toll not only the admission

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144. *See, e.g.*, Stephen B. v. Sharyne B., 124 Cal. App. 3d at 527, 177 Cal. Rptr. at 431 (1981).

145. *See supra* note 137.

146. Section (6)(a) of the Uniform Parentage Act provides:

> (a) A child, his natural mother, or a man presumed to be his father under Paragraph (1), (2), or (3) of Section 4(a), may bring an action
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> . . . .
>
> (2) for the purpose of declaring the nonexistence of the father and child relationship presumed under Paragraph (1), (2), or (3) of Section 4(a) only if the action is brought within a reasonable time after obtaining knowledge of relevant facts, but in no event later than five years after the child's birth. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party.

UNIF. PARENTAGE ACT § 6(a), 9A U.L.A. 593 (1979).

147. UNIF. PARENTAGE ACT § 7 Commissioners' Comment (1979).

148. *See, e.g.*, Elzey v. Smith, 412 So. 2d 918, 919 (Fla. Dist. Ct. App. 1982) (baby had to be six months old to undergo HLA blood test because the baby needed to weigh enough to give blood).

149. *See supra* note 25 and accompanying text.

of HLA blood test results, but also the cause of action itself.

C. *Unwed Fathers Attempting to Establish Paternity Rights*

Unwed fathers recently have attempted to establish various rights respecting their children in the same actions in which mothers seek paternity determinations of illegitimate children. The rights that fathers usually seek are custody of the child,[150] visitation with the child,[151] or prevention of the child's adoption.[152] Many unwed fathers have achieved these goals since the Supreme Court held in *Stanley v. Illinois*[153] that an unmarried father was entitled to notice and a hearing in child custody proceedings for his illegitimate children.[154] Because the unwed father claiming paternity and seeking adoption of his illegitimate child bears the bur-

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150. *See, e.g.*, W.E.J. v. Superior Court, 100 Cal. App. 3d 303, 160 Cal. Rptr. 862 (1979); *In re* Kelvin M., 77 Cal. App. 3d 396, 143 Cal. Rptr. 561 (1978); *In re* Tricia M., 74 Cal. App. 3d 125, 141 Cal. Rptr. 554 (1977), *cert. denied*, 435 U.S. 996 (1978); Pi v. Delta, 175 Conn. 527, 400 A.2d 709 (1978); Stevens v. Leone, 35 Conn. Supp. 237, 406 A.2d 402 (1979); *In re* Ozment, 61 Ill. App. 3d 1044, 378 N.E.2d 409 (1978); Vanderlaan v. Vanderlaan, 9 Ill. App. 3d 260, 292 N.E.2d 145 (1972); Hrouda v. Winne, 77 A.D.2d 62, 432 N.Y.S.2d 643 (1980). *See generally* Note, *Putative Fathers: Unwed, But No Longer Unprotected*, 8 HOFSTRA L. REV. 425 (1980) (general discussion of the increased rights presently afforded putative fathers).

151. *See, e.g.*, Roque v. Frederick, 272 Ark. 392, 614 S.W.2d 667 (1981); Donald J. v. Evna M., 81 Cal. App. 3d 929, 147 Cal. Rptr. 15 (1978); Griffith v. Gibson, 73 Cal. App. 3d 465, 142 Cal. Rptr. 176 (1977); Sullivan v. Bonafonte, 172 Conn. 612, 376 A.2d 69 (1977); Forestiere v. Doyle, 30 Conn. Supp. 284, 310 A.2d 607 (1973); People *ex rel.* Ritchie v. Ritchie, 58 Ill. App. 3d 1045, 374 N.E.2d 1292 (1978); People *ex rel.* Vallera v. Rivera, 39 Ill. App. 3d 775, 351 N.E.2d 391 (1976); Dustin v. Belanger, 429 A.2d 212 (Me. 1981); Pennsylvania v. Rozanski, 206 Pa. Super. 397, 213 A.2d 155 (1965). *See generally* Note, *The Rights of Fathers of Non-Marital Children to Custody, Visitation and to Consent to Adoption*, 12 U.C.D. L. REV. 412 (1979) (discussion of visitation rights under the Uniform Parentage Act).

152. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978); Rothstein v. Lutheran Social Servs., 405 U.S. 1051 (1972); Adoption of Rebecca B., 68 Cal. App. 3d 193, 137 Cal. Rptr. 100 (1977); Cheryl H. v. Superior Court, 41 Cal. App. 3d 273, 115 Cal. Rptr. 849 (1974); People *ex rel.* Slawek v. Covenant Children's Home, 52 Ill. 2d 20, 284 N.E.2d 291 (1972). *See generally* Note, *Unwed Fathers: Conflict of Rights in Adoption Proceedings*, 7 FLA. ST. U.L. REV. 559 (1979); Recent Development, *Constitutional Law—Fourteenth Amendment—Equal Protection Clause—Adoption—Rights of Putative Fathers*, 18 DUQ. L. REV. 375 (1980) (discussion of statute requiring the mother's, but not the putative father's consent before adoption as violative of equal protection).

153. 405 U.S. 645 (1972).

154. *Id. Stanley* found that a father's interest in his illegitimate child was "cognizable and substantial." Prior to this 1972 decision, unwed fathers were predominately unsuccessful in attempting to claim custody of their biological children. *See, e.g.*, Jolly v. Queen, 142 S.E.2d 592 (N.C. 1965). *See generally* Marcus, *Equal Protection: The Custody of the Illegitimate Child*, 11 J. FAM. L. 1 (1971); Recent Development, *Family Law—Voluntary Legitimation—Father Has No Absolute Right to Legitimate Child Solely on Proof of Biological Fatherhood*, 8 ST. MARY'S L.J. 392 (1976); Stanley v. Illinois, 405 U.S. 645, 652 (1972).

den of proof,[155] he needs a precise method of proving paternity like the HLA blood test.[156]

Unwed fathers also have attempted to utilize the results of the HLA test to prove their paternity when litigating other rights.[157] On the basis of the *Stanley* decision and state statutes that adopt provisions of the Uniform Parentage Act,[158] for example, unwed fathers successfully have sought custody of their children by using the clear and convincing proof of the HLA blood test.[159] Thus, the HLA blood test has extended the rights of unwed fathers and, because admittance of the test has not proved controversial when unwed fathers seek to establish paternity of a clearly illegitimate child, courts generally have denied admittance only intermittently on the basis of outdated exclusionary statutes.[160]

The attempted extension of the use of the HLA test by an alleged biological father to challenge the paternity of a presumably legitimate child, however, has caused courts to consider important policy considerations that might limit this controversial use. In *Happel v. Mecklenburger*,[161] for instance, the alleged biological father of an eight year old child brought suit to establish paternity and visitation rights. The lower court denied his request to require the parties to submit to the HLA blood test.[162] The court of appeals upheld the trial court's decision because the HLA blood test was only one factor in the determination of paternity, and the denial of the motion to require the test, therefore, was not reversible error.[163] Extensive dicta which detailed strong policy considerations indicated that the appellate court preferred to deny use of tests like the HLA which could identify the biological father of a

155. *See* H. KRAUSE, *supra* note 6, at 140-47.

156. Stanley v. Illinois, 405 U.S. at 657 n.9.

157. *See, e.g.*, Marticorena v. Miller, 597 P.2d 1349 (Utah 1979).

158. *See* UNIF. PARENTAGE ACT, §§ 2 & 6(a)(1), 9A U.L.A. 588, 593 (1979). An unwed father can bring an action under §§ 2 and 6(a)(1), which provide that the "parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents" and that "a child, his natural mother, or a man presumed to be his father under Paragraph (1), (2), or (3) of Section 4(a), may bring an action . . . at any time for the purpose of declaring the existence of the father and child relationship presumed under Paragraph (1), (2), or (3) of Section 4(a)."

159. *See, e.g.*, LaCroix v. Deyo, 113 Misc. 2d 89, 447 N.Y.S.2d 864 (N.Y. Fam. Ct. 1981), *aff'd*, 88 A.D.2d 1077, 452 N.Y.S.2d 726 (1982).

160. *See, e.g.*, J.B. v. A.F., 92 Wis. 2d 696, 698-705, 285 N.W.2d 880, 881-84 (Wis. Ct. App. 1979).

161. 101 Ill. App. 3d 107, 427 N.E.2d 974 (1981).

162. *Id.* at 109, 427 N.E.2d at 977.

163. *Id.* at 112, 427 N.E.2d at 981.

child whose paternity was in doubt even by his mother.[164] The strongest public policy argument against a paternity claim by the alleged biological father that the court recognized was the preservation of the family unit.[165] Although the parents of the child in *Happel* had divorced, the legal father and child regularly visited each other and the legal father supplied child support.[166] Thus, in denying the unwed father's cause of action the court gave more weight to the established emotional family ties between the legal father and the child than to the possibly destructive recognition of the unwed father's paternity rights.[167]

Not all courts recognize the *Happel* rationale. In *R. McG. v. J.W.*[168] the dissent voiced the same policy considerations that the *Happel* court found determinative,[169] but the majority allowed an unwed father to use the HLA blood test successfully to claim paternity of a child born to a married couple.[170] The dissent strongly criticized the majority's holding and noted the state's strong interest in promoting durable family ties.[171] The majority, however, based its decision on the equal protection grounds that an unwed father has the right to seek his paternity rights concerning a child born to a marriage, just as an unwed mother can institute a paternity suit against a married man.[172] Although the court did not discuss specifically the natural father's good faith, it did note that the guardian *ad litem* consistently advocated allowance of the action,[173] and that the plaintiff instituted his claim one and one-half years after the birth of the child.[174] If factors such as these indicate an earnest and persistent interest by the biological father to establish a parent-child relationship, then the effects of such a relationship would be positive because the child would benefit from the

164. *Id.* at 115, 427 N.E.2d at 983. The mother had undergone artificial insemination with sperm of both her husband and an anonymous donor near the time of conception. She also had sexual intercourse with her husband and the plaintiff near the same dates. 427 N.E.2d 979.

165. *Id.* at 115, 427 N.E.2d at 983.

166. *Id.*

167. The unwed father sought both a determination of paternity and visitation rights. 427 N.E.2d at 977.

168. 615 P.2d 666 (Colo. 1980).

169. *Id.* at 676 (Lohr, J., dissenting).

170. *Id.* at 669.

171. *Id.* at 676-77.

172. *Id.* at 671.

173. *Id.* at 672.

174. *Id.* at 667-68.

love and support of two "fathers" instead of one.[175]

Like the cases in which a husband wants to disprove his paternity in a divorce, unwed father cases in which the plaintiff attempts to prove he is a child's biological parent require the plaintiff to overcome a rebuttable presumption of legitimacy.[176] The plaintiffs in both *Happel*[177] and *R. McG.*[178] tried to use the HLA blood test because it provides the most reliable evidence in establishing paternity. The differing conclusions on admissibility in these cases, however, indicate the importance that courts place on the values of family preservation. This Note proposes that an appropriate statute of limitations would govern most effectively the use of the HLA blood test in unwed father cases. No reason exists to bar an unwed father, for instance, from claiming visitation rights with his biological child if he institutes the action within a reasonable time.[179] A suggested reasonable time of two years from the date of the child's birth would give the unwed father enough time to seek judicial recourse that used the precise, objective evidence which the HLA test provides, and would also protect the established family unit as deeper emotional ties between the child and his legal father developed.

IV. CONCLUSION

The use of the HLA blood test as evidence in cases of disputed parentage involves very emotional issues. Different types of disputed paternity cases present similar policy considerations with one common denominator: the best interests of the child. Determination of those interests, however, is difficult and scientifically inexact. Medical and bio-medical engineering developments in the determination of paternity often outrace legal reasoning. Because of this unavoidable dichotomy, American courts have shown mixed reactions to the use of the HLA blood test as evidence in disputed paternity cases. While many courts have recognized its accuracy and extolled its use as objective evidence, other courts have expressed a more tentative attitude. In general, however, courts have

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175. *See* Case Comment, *Bastardizing the Legitimate Child: The Colorado Supreme Court Invalidates the Uniform Parentage Act Presumption of Legitimacy in* R. McG. v. J.W., 59 DEN. L.J. 157, 171-72 (1981).

176. *See supra* notes 115-19 and accompanying text.

177. *See supra* note 161 and accompanying text.

178. *See supra* note 169 and accompanying text.

179. See *supra* notes 129-48 and accompanying text for an analogous argument in the area of paternity disputes in divorce actions.

admitted the HLA blood test as both exclusionary and affirmative evidence in various paternity claims.

Yet, the common denominator—the best interests of the child—has resulted in courts questioning the appropriateness of the evidence in certain cases. Concerns for family values and the child's emotional and financial health constitute the major public policy considerations in this debate. Because the accurate, reliable evidence that the HLA blood tests provides may clash with a child's best welfare, admittance of the HLA blood test as evidence in disputed paternity cases may not always be appropriate.

First, this Note proposes that the HLA blood test should be unconditionally admissible in all paternity claims involving illegitimate children who do not have a legal father. Requiring admission of the HLA blood test in AFDC and non-AFDC paternity suits would serve both public and private interests because it is the most reliable and accurate evidence available. Positive identification of the biological father would benefit the illegitimate child emotionally and financially; and if the father continued to support the child willingly, the public sector would realize financial benefits. Litigation also would decrease if HLA blood test results convinced a father to accept his parental duties without a judicial mandate.

Second, this Note suggests that courts admit the HLA blood test as evidence in paternity disputes which arise out of divorce proceedings only if those actions fall within a two or three year statute of limitations. Such actions involve different policy considerations than do paternity actions involving illegitimate children who do not have a legal father. A supposedly legitimate child, for example, is subject to illegitimacy and loss of financial support if the father who has supported him can prove he is not the biological father. The law, therefore, should afford some protection to the child from evidence—albeit accurate and reliable—which could seriously harm his best interests. The law, however, should not bar such claims by the father completely, and arguably should protect him from unjustified responsibility. Policy considerations, therefore, favor requiring the father to forego his paternity action within two to three years from the child's birth.

Finally, this Note advocates a two year statute of limitations for actions by unmarried fathers who attempt to introduce HLA blood test results to assert paternity rights concerning a presumably legitimate child who has a legal father. Two very strong policy considerations—the rights of unwed fathers and the best interests

of the child—clash in this situation. Although an unwed father undouhtedly has a right to seek paternity of his illegitimate child, such an action poses no difficulty to the use of the HLA blood test as evidence. Indeed, courts should encourage the use of the HLA test in this instance because of the accuracy and objectivity of the evidence. In situations in which an unmarried father attempts to introduce HLA blood test results in order to assert paternity rights concerning a presumably legitimate child who has a legal father, however, the public policies clash. The growing support for equal protection of the rights of unwed fathers militates in favor of admission, but a child's emotional and economic interests and society's interest in the preservation of the family constitute powerful elements of the argument for inadmissibility. The best solution, again, seems to be reliance on the statute of limitations as a line of demarcation for the use of the HLA blood test as evidence. Thus, if an unwed father wants to seek paternity rights of a child already born to a marriage, courts should require him to bring his claim within a two year period commencing at the birth of the child. Thereafter, the courts should not permit the unmarried father to disrupt the established family unit.

Thus, although the technology is available to provide accurate and reliable information about paternity, courts should not allow the unchecked use of this evidence. Legislatures and courts should weigh carefully the availability and capability of the HLA blood test against the desirability and necessity of the information it provides. Although the test can clarify biological relationships, courts should not neglect the psychological, emotional, and economic aspects of the human condition in the blind rush to use all the evidence that science can provide.

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