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Blood Grouping Tests And The Presumption of Legitimacy

COMMENTS

BLOOD GROUPING TESTS AND THE PRESUMPTION OF LEGITIMACY

This comment deals briefly with the presumption that a child born to a married couple is the legitimate issue of that marriage. The status of this presumption in Virginia is considered in light of the Virginia statute[1] authorizing the use of blood grouping tests in certain cases where the paternity of a child born during wedlock is at issue. The constitutionality of such tests is not within the scope of this comment.

I. The Presumption

In the second half of the eighteenth century, there existed at common law a very strong, but rebuttable, presumption that a child born in wedlock was the natural and lawful issue of that marriage. Lord Mansfield ruled that the spouses to whom a child was born could not testify to any facts indicating illegitimacy until it was shown that one spouse had no access to the other during the period in which conception must have taken place. After this non-access was proven, the spouses could testify, but their testimony could not relate to the facts of non-access.[2]

The presumption enjoyed equal strength in the nineteenth century. It could be overcome by proof that the husband was entirely absent from the community at the time of conception, or that the husband was impotent, or that there had been no sexual intercourse between the husband and wife during the time conception could have taken place.[3] The evidence required to overcome this presumption was in many cases understandably absent, and the presumption, for all practical purposes, was conclusive.

In this country today, the presumption that a child born in wedlock is legitimate is recognized in every state.[4] The strength of the presumption, however, varies considerably with the circumstance and jurisdiction.

In certain jurisdictions the presumption has been considered con-

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[1] Va. Code Ann. § 8-329.1 (Cum. Supp. 1968).

[2] Goodright v. Moss, 2 Cowp. 591, 98 Eng. Rep. 1257 (1777). This is known as the Lord Mansfield Rule.

[3] Hargrave v. Hargrave, 9 Beav. 552, 50 Eng. Rep. 457 (Rolls 1846).

[4] Annot., 57 A.L.R.2d 729 (1958).

clusive,[5] but these jurisdictions are in a rapidly shrinking minority.[6] In most jurisdictions the presumption is rebuttable.[7] The problem to be resolved is the amount of evidence required to overcome the presumption in the particular situations where it is involved.

The legitimacy of a child born during wedlock can be an issue in divorce cases where the ground is adultery or perhaps pregnancy unknown to the husband at the time of marriage, and the father is one other than the husband. Legitimacy can also be an issue in annulment or support proceedings, or in criminal prosecutions for rape or seduction where a child resulted from the unlawful intercourse. In any of these proceedings, there are two general situations possible in addition to post-marital conception. The first is conception prior to the marriage with the wife seeking to establish that the husband is in fact the father. A second situation is premarital conception with the wife (mother) seeking to establish that a man other than her husband is the father.

The law that has evolved from the first situation is not entirely consistent. Some courts have held that the presumption of legitimacy is as strong as it would have been had conception occurred after marriage,[8] whereas others have held that the presumption is weakened by proof of premarital conception.[9] Generally, the presumption, though rebuttable, is strengthened if the husband had knowledge of the pregnancy at the time of marriage.[10] The burden of proof is on the party seeking to establish illegitimacy.[11]

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[5] *Id.* at 758.

[6] Kusior v. Silver, 54 Cal. 2d 603, 354 P.2d 657 (1960); *In re* Estate of Marshall, 120 Cal. App. 2d 747, 262 P.2d 42 (1953) [These cases have been modified by CAL. CODE CIV. PROC. §§ 1980.1-1980.7 (West 1960).]; State v. Shoemaker, 62 Iowa 343, 17 N.W. 589 (1883); State v. E.A.H., 246 Minn. 299, 75 N.W.2d 195 (1956); Rhyne v. Hoffman, 59 N.C. (6 Jones Eq.) 335 (1862); State v. Herman, 35 N.C. (13 Ired.) 502 (1852). *Contra,* West v. Redmond, 171 N.C. 742, 88 S.E. 341 (1916); Hudson v. Hudson, 151 Neb. 210, 36 N.W.2d 851 (1949); Schmidt v. State, 110 Neb. 504, 194 N.W. 679 (1923); Kawecki v. Kawecki, 67 Ohio App. 34, 35 N.E.2d 865 (1941) (In these cases it seems that the presumption was actually rebuttable but there was insufficient proof.); 9 J. WIGMORE, EVIDENCE § 2527 (3d ed. 1940); Kidd, *Some Recent Cases in Evidence,* 13 CALIF. L. REV. 468, 474 (1925); 29 IOWA L. REV. 121, 122 (1943).

[7] *See, e.g.,* Patterson v. Gaines, 47 U.S. (6 How.) 581, 589 (1847); Bullock v. Knox, 96 Ala. 195, 198, 11 So. 339, 340 (1892); State *ex rel.* Walker v. Clark, 144 Ohio St. 305, 312, 58 N.E.2d 773, 776 (1944); Annot., 57 A.L.R.2d 729 (1958).

[8] Stegall v. Stegall, 22 F. Cas. 1226 (No. 13,351) (C.C. Va. 1825); Grant v. Stimpson, 79 Conn. 617, 66 A. 166 (1907); Clark v. State, 208 Md. 316, 118 A.2d 366 (1955); Kingsbury v. Kingsbury, 75 N.Y.S.2d 699 (Sup. Ct. 1947); Cornwall v. Cornwall, 160 Va. 183, 168 S.E. 439 (1933); Bowles v. Bingham, 16 Va. (2 Munf.) 442 (1811).

[9] Wright v. Hicks, 15 Ga. 160, 60 Am. Dec. 687 (1854); Jackson v. Thornton, 133 Tenn. 36, 179 S.W. 384 (1915).

[10] Phillips v. State, 82 Ind. App. 356, 145 N.E. 895 (1925); Ervin v. Bass, 172 Miss. 332, 160 So. 568 (1935).

The second general situation has also been treated with some degree of inconsistency. Most courts recognize a rebuttable[12] presumption that the husband, rather than a third person, fathered the child.[13] A very unusual situation can develop when conception occurs during one marriage but the child is born during a subsequent marriage to a different man. Courts have taken divergent opinions here. In some jurisdictions the child is presumed to be fathered by the first husband,[14] whereas in others the child is presumed to be fathered by the second.[15]

The presumption of legitimacy of a child born in wedlock has been improperly relied upon in a few cases where the child was born shortly before the marriage. In this situation some courts have refused to apply any presumption,[16] while others have recognized only a weak one.[17]

There is no definite quantum of evidence required to rebut the foregoing presumptions of legitimacy. Each case must be resolved independently upon the strength of the competent testimony offered.[18] Courts have, however, used as a criterion for the required evidence such phrases as clear and satisfactory testimony,[19] or competent and relevant evidence[20] or evidence that removes reasonable doubt.[21] On the other hand, courts have refused to consider the bad reputation of the mother,[22] or the stated opinion of the putative father that he was

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[11] *See, e.g.*, Carnegie v. Carnegie, 261 Ala. 146, 73 So. 2d 556 (1954); *In re* Lentz, 247 App. Div. 31, 283 N.Y.S. 749 (Sup. Ct. 1935).

[12] Phillips v. State, 82 Ind. App. 356, 145 N.E. 895 (1925); State v. Romaine, 58 Iowa 46, 11 N.W. 721 (1882); Clark v. State, 208 Md. 316, 118 A.2d 366 (1955).

[13] People *ex rel.* Hood v. Gleason, 211 Ill. App. 380 (1918); Pursley v. Hisch, 119 Ind. App. 232, 85 N.E.2d 270 (1949); Phillips v. State, 82 Ind. App. 356, 145 N.E. 895 (1925); Clark v. State, 208 Md. 316, 118 A.2d 366 (1955).

[14] Darrow v. Geisen, 102 Ind. App. 14, 200 N.E. 711 (1936); King v. Peninsular Portland Cement Co., 216 Mich. 335, 185 N.W. 858 (1921).

[15] Zachmann v. Zachmann, 201 Ill. 380, 66 N.E. 256 (1903); Bower v. Graham, 285 Mo. 151, 225 S.W. 978 (1920).

[16] *See, e.g.*, State *ex rel.* Burkhart v. Ferguson, 187 Iowa 1073, 174 N.W. 934 (1919).

[17] Stevenson v. Washington's Adm'r, 231 Ky. 233, 21 S.W.2d 274 (1929); Stein's Adm'r v. Stein, 32 Ky. L. Rptr. 664, 106 S.W. 860 (1908); Kotzke v. Kotzke's Estate, 205 Mich. 184, 171 N.W. 442 (1919).

[18] *See, e.g.*, State v. Lender, 266 Minn. 561, 124 N.W.2d 355 (1963).

[19] Eldridge v. Eldridge, 153 Fla. 873, 16 So. 2d 163 (1944); Needham v. Needham, 299 S.W. 832 (Mo. App. 1927).

[20] Clark v. State, 208 Md. 316, 118 A.2d 366 (1955).

[21] Gross v. Gross, 260 S.W. 2d 655 (Ky. 1953); Phillips v. Allen, 84 Mass. (2 Allen) 453 (1861).

[22] Moore v. Moore, 117 Tex. 174, 299 S.W. 653 (1927).

in fact the father,[23] or evidence that no intercourse occurred between spouses who had access to one another.[24]

Virginia follows the trend of avoiding, if possible, the stigma of illegitimacy. Avoidance is accomplished through long standing statutory provisions[25] and the recognition of the presumption that a child born in wedlock is legitimate.[26] The court has made it unequivocally clear, however, that legitimacy will not be presumed from illicit intercourse.[27]

In Virginia the presumption of legitimacy is strong, but rebuttable.[28] In at least one case the presumption of legitimacy was complemented and strengthened by a presumption of marriage from the fact of continuous cohabitation.[29] The court has stated, however, that the presumption of legitimacy may be overcome by evidence that is clear and positive,[30] or is cogent and satisfactory,[31] or shows non-access beyond a reasonable doubt.[32] Evidence that has met these standards included proof that a mulatto child was born to caucasian spouses[33] and proof that no marriage, either void or voidable, existed when the child was born.[34] On the other hand, the court has held that the presumption should survive testimony of the husband that a child born three months after marriage was not his,[35] and disputed testimony that the husband was absent from the community at the time of conception.[36]

II. The Blood Grouping Test

The presumption of legitimacy has no doubt resulted in inequities because of the difficulty in sustaining the burden of proof. Certain

[23] Vanover v. Steele, 173 Ky. 114, 190 S.W. 667 (1917); Rhyne v. Hoffman, 59 N.C. (6 Jones Eq.) 335 (1862).

[24] *In re* McDermott's Estate, 125 Neb. 179, 249 N.W. 555 (1933).

[25] Va. Code Ann. § 64.1-7 (1968); Va. Code § 5270 (Michie 1942); Va. Code § 2554 (1887). These statutes provide that the issue of a void or voidable marriage are deemed to be legitimate. *See also* Henderson v. Henderson, 187 Va. 121, 46 S.E.2d 10 (1948); Cornwall v. Cornwall, 160 Va. 183, 168 S.E. 439 (1933); Goodman v. Goodman, 150 Va. 42, 142 S.E. 412 (1928); Heckert v. Hile's Adm'r, 90 Va. 390, 18 S.E. 841 (1894).

[26] *See, e.g.*, Stegall v. Stegall, 22 F. Cas. 1226 (No. 13,351) (C.C. Va. 1825).

[27] Vanderpool v. Ryan, 137 Va. 445, 119 S.E. 65 (1923).

[28] Cases cited notes 44, 45, and 47 *infra*.

[29] Reynolds v. Adams, 125 Va. 295, 99 S.E. 695 (1919).

[30] Scott v. Hillenberg, 85 Va. 245, 7 S.E. 377 (1888).

[31] Reynolds v. Adams, 125 Va. 295, 99 S.E. 695 (1919).

[32] Gibson v. Gibson, 207 Va. 821, 153 S.E.2d 189 (1967).

[33] Watkins v. Carlton, 37 Va. (10 Leigh) 560 (1840).

[34] Patterson v. Anderson, 194 Va. 557, 74 S.E.2d 195 (1953), *cert. denied*, 345 U.S. 965 (1953).

[35] Bowles v. Bingham, 16 Va. (2 Munf.) 442 (1811).

[36] Scott v. Hillenberg, 85 Va. 245, 7 S.E. 377 (1888).

husbands have been held responsible for fathering children who, in fact, were products of adulterous or otherwise illicit relationships. To combat the presumption of legitimacy in such cases, discerning attorneys began introducing the results of blood grouping tests for the purpose of proving non-paternity. The issue of whether it was proper to sustain a motion requesting the court to order such tests first reached a court of last resort in 1933.[37] The court held that it was proper to overrule the motion because the tests had not yet been proven reliable.[38] This skepticism was shared in other early cases where test results were actually admitted. In those cases the court upheld findings against men who, according to the blood test results, could not have been the father of the child in question.[39]

The blood grouping test is not a new technique. It is the same test that is used to determine blood type and RH factor. The legal value of the test rests on the fact that blood type is an inheritable characteristic, and thus the blood type of a child depends necessarily upon the blood type of its natural, as compared to its legal, parents. In conducting the tests, skilled technicians determine the blood type of the mother, of the child, and of the putative father. The results of these tests are considered by experts in the fields of genetics and hematology. Their findings can indicate that the child's blood type could have resulted from genes supplied by the mother and by some third male, but could not have resulted from genes supplied by the mother and the putative father. This determination would tend to obviate the possibility that the putative father was the natural father.[40]

The medical profession has for a long time recognized that the test techniques have been sufficiently refined to produce almost one hundred per cent accuracy in determining blood types.[41] The medical authorities agree that the tests are effective to exonerate over fifty per

[37] State v. Damm, 62 S.D. 123, 252 N.W. 7 (1933).

[38] *Id.*

[39] *See, e.g.*, Berry v. Chaplin, 74 Cal. App. 2d 652, 169 P.2d 442 (1946); Arais v. Kalensnikoff, 10 Cal. 2d 428, 74 P.2d 1043 (1937); Jordan v. Davis, 143 Me. 185, 57 A.2d 209 (1948).

[40] *See, e.g.*, HARLEY, MEDICO-LEGAL BLOOD GROUP DETERMINATION 8-9, 16-19 (1943); SCHATKIN, DISPUTED PATERNITY PROCEEDINGS 234 (3d ed. 1953); WEINER, BLOOD GROUPS AND TRANSFUSION 35-49, 190-93 (3d ed. 1943); 1 J. WIGMORE, EVIDENCE § 165(a) (3d ed. 1940); Denton, *Blood Groups and Disputed Parentage*, 27 CAN. B. REV. 537, 539 (1949); McDermott, *The Proof of Paternity and the Progress of Science*, 1 How. L. J. 40, 46-47, 58 (1955); Schatkin, *Law and Science in Collision: Use of Blood Tests in Paternity Suits*, 32 VA. L. REV. 886 (1946); 39 CALIF. L. REV. 277, 278 (1951).

[41] ANDRESEN, THE HUMAN BLOOD GROUPS 101-04 (1952); SCHATKIN, DISPUTED PATERNITY PROCEEDINGS 234 (3d ed. 1953).

cent of the men who are wrongfully accused of fathering a child.[42] These authorities recognize, however, that there is a very remote possibility that due to gene mutations, the test results might tend to show that the true father is not the father.[43]

The legal profession today also recognizes the value of blood grouping tests as evidence. The reliability and techniques of such tests are now the subjects of judicial notice,[44] and the test results, when they exclude paternity,[45] are usually given great evidential weight.[46]

The legal situations where blood grouping tests are quite valuable, such as criminal prosecutions for rape or seduction and civil suits for divorce,[47] for support,[48] or for the sole purpose of establishing paternity,[49] are indeed the same situations where the law frequently interjects its presumption of legitimacy.

III. The Effect of Blood Grouping Tests on the Presumption

The effect of blood test results depends upon the strength of the presumption. A conclusive presumption, in the few instances where such exists, will be unaffected. On the other hand, a rebuttable presumption could be greatly affected, depending on the evidential value allowed the test results.

Some jurisdictions by statute have declared the test results to be conclusive when they show that the putative father was not the father.[50] In others the same result has been reached by judicial decision.[51] In

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[42] C. McCormick, Evidence § 178 (1954); Committee on Medico-legal Problems, American Medical Association, Medico-legal Application of Blood Tests 16 (1952).

[43] See note 53 *infra.*

[44] *See, e.g.*, Commonwealth v. D'Avella, 339 Mass. 642, 162 N.E.2d 19 (1959); Jordan v. Mace, 144 Me. 351, 69 A.2d 670 (1949); Cortese v. Cortese, 10 N.J. Super. 152, 76 A.2d 717 (1950); Fowler v. Rizzuto, 121 N.Y.S.2d 666 (Ct. Spec. Sess. 1953).

[45] *See, e.g.*, United States *ex rel.* Lee Kum Hoy v. Shaughnessy, 115 F. Supp. 302 (S.D.N.Y. 1953); People v. Nichols, 341 Mich. 311, 67 N.W.2d 230 (1954); Miller v. Domanski, 26 N.J. Super. 316, 97 A.2d 641 (1953); C. v. C., 200 Misc. 631, 109 N.Y.S.2d 276 (Sup. Ct. 1951); Cuneo v. Cuneo, 198 Misc. 240, 96 N.Y.S.2d 899 (Sup. Ct. 1950); 1 J. Wigmore, Evidence § 165(a) (3d ed. 1940).

[46] *See, e.g.*, note 56 *infra.*

[47] State v. Shanks, 437 Md. 185, 45 A.2d 85 (1945); C. v. C., 200 Misc. 631, 109 N.Y.S.2d 276 (Sup. Ct. 1951); Dellaria v. Dellaria, 183 Misc. 832, 52 N.Y.S.2d 607 (Sup. Ct. 1944).

[48] Groulx v. Groulx, 98 N.H. 481, 103 A.2d 188 (1954); Commonwealth v. Visocki, 23 Pa. D. & C. 103 (1935).

[49] *Complaint of* Dunn, 115 N.Y.S.2d 348 (Child. Ct. 1952).

[50] *See, e.g.*, N.C. Gen. Stat. § 8-50.1 (Cum. Supp. 1967); Uniform Act on Blood Tests to Determine Paternity §§ 1-11 [hereinafter cited as Uniform Act].

[51] Ross v. Marx, 21 N.J. Super. 95, 90 A.2d 545 (1952), *aff'd*, 24 N.J. Super. 25, 93

either case the presumption of legitimacy clearly is destroyed by the test results. The remaining jurisdictions that have ruled on the issue consider the tests inconclusive[52] and allow the trier of fact to determine the evidential value of the tests. In these latter jurisdictions the test results have still enjoyed much consideration.[53] There are some instances, however, where the test results failed to overcome the presumption, even though they tended to exclude the accused as being the father.[54]

At present a great number of states have enacted statutes dealing specifically with the use of blood grouping tests. The most comprehensive statute on the subject is the Uniform Act on Blood Tests to Determine Paternity.[55] To date seven states have adopted this act largely in its original form.[56] It provides that in cases where paternity is relevant, on motion of any person whose blood is involved or on motion of the court, the tests can be ordered to be performed on the mother, the child, and the putative father. The failure of a party to comply with this order can be brought to the attention of the court.

A.2d 579 (1952). The court stated: "It is universally accepted in medical and scientific fields that the result of a blood grouping test disproving paternity or, . . . indicating definite exclusion of parentage, is not an expression of opinion upon which experts can differ but, rather, is the statement of a scientifically established fact. It is a scientifically established fact just as it is a scientifically established fact that the world is round. As such it should be accepted by the courts of law. For a court to declare that these tests are not conclusive would be as unrealistic as it would be for a court to declare that the world is flat." *Id.* at 546. *See, e.g.*, Commonwealth v. D'Avella, 339 Mass. 642, 162 N.E.2d 19 (1959); State v. Sargent, 100 N.H. 29, 118 A.2d 596 (1955); C. v. C., 200 Misc. 631, 109 N.Y.S.2d 276 (Sup. Ct. 1951); Houston v. Houston, 199 Misc. 469, 99 N.Y.S.2d 199 (Dom. Rel. Ct. 1950).

[52] *See, e.g.*, Hill v. Johnson, 102 Cal. App. 2d 94, 226 P.2d 655 (1951); People v. Nichols, 341 Mich. 311, 67 N.W.2d 230 (1954); Groulx v. Groulx, 98 N.H. 481, 103 A.2d 188 (1954); Prochnow v. Prochnow, 274 Wis. 491, 80 N.W.2d 278 (1957).

[53] Beck v. Beck, 153 Colo. 90, 384 P.2d 731 (1963); Groulx v. Groulx, 98 N.H. 481, 103 A.2d 188 (1954); Crouse v. Crouse, 51 Misc. 2d 649, 273 N.Y.S.2d 595 (Dom. Rel. Ct. 1966) (test performed in court room); Saks v. Saks, 189 Misc. 667, 71 N.Y.S.2d 797 (Dom. Rel. Ct. 1947); Commonwealth v. Coyle, 190 Pa. Super. 509, 154 A.2d 412 (1959); Commonwealth v. Viscoki, 23 Pa. D. & C. 103 (1935).

[54] Berry v. Chaplin, 74 Cal. App. 2d 652, 169 P.2d 442 (1946); Harding v. Harding, 22 N.Y.S.2d 810 (Dom. Rel. Ct. 1940), *aff'd mem.*, 261 App. Div. 924, 25 N.Y.S.2d 525 (Sup. Ct. 1941); Prochnow v. Prochnow, 274 Wis. 491, 80 N.W.2d 278 (1957).

[55] UNIFORM ACT §§ 1-11.

[56] California, CAL. CODE CIV. PROC. §§ 1980.1-1980.7 (West 1960); Illinois, S.H.A. ch. 106 3/4, §§ 1-7 (Cum. Supp. 1969); New Hampshire, R.S.A. §§ 522:1-522:6 (1955); Oklahoma, 10 OKLA. STAT. ANN. §§ 501-507 (Cum. Supp. 1969); Oregon, O.R.S. §§ 109.250-109.262 (1967); Pennsylvania, 28 P.S. §§ 307.1-307.10 (Cum. Supp. 1969); Utah, U.C.A. §§ 78-45a-7 to 78-45a-17 (Cum. Supp. 1969). Under FED. R. CIV. P. 35 blood grouping tests are authorized. *See* Beach v. Beach, 114 F.2d 479 (D.C. Cir. 1940).

The tests are to be performed by experts selected by the court and by any party who is to be tested, if that party so desires to designate his own expert. When the experts agree as to the accuracy of the test, the results are conclusive on the issue of non-paternity. If the experts cannot agree, then the jury is to consider the test results with the other evidence.

Exclusive of those states that have adopted the Uniform Act, others have enacted statutes authorizing blood grouping tests. The exact form of these statutes varies considerably, yet there are some noticeable similarities in their provisions. Almost all statutes provide that the test results are admissible only for the purpose of proving non-paternity.[57] Some provide that the court,[58] as well as the prospective subjects of the tests, may move to have the tests performed, whereas in at least one jurisdiction any party to the proceeding may so move.[59] In any case where paternity is relevant,[60] some statutes provide that the court in its discretion may[61] order the tests to be performed, while others declare that the tests are mandatory.[62] The presumption of legitimacy is addressed squarely by several statutes and with few exceptions,[63] it is conclusively overcome by test results that exclude paternity.[64] In some states the use of the test is limited to certain types of cases, such as support,[65] bastardy,[66] or paternity.[67] A few states follow the Uniform

[57] CODE OF ALA. tit. 27, § 12(5) (Cum. Supp. 1967); ARK. STAT. § 34-705.3 (1962); COLO. REV. STAT. § 52-1-27 (1963); IND. STAT. ANN. § 3-658 (Cum. Supp. 1969); 19 M.S.A. § 257.23 (1959); M.C.L.A. § 722.716 (1968); MISS. CODE § 383-11 (Cum. Supp. 1968); NEV. REV. STAT. §§ 56.010, 56.011 (1967); N.Y. FAMILY COURT ACT §§ 418, 532 (1962); OHIO REV. CODE § 3111.16 (1964); W.S.A. § 325.23 (1958).

[58] 2 MD. CODE ART. 16, § 66G (1966); N.Y. FAMILY COURT ACT §§ 418, 532 (1962).

[59] N.C. GEN. STAT. § 8-50.1 (Cum. Supp. 1967).

[60] ARK. STAT. §§ 34-705.1 to 34-705.3 (1962); CONN. GEN. STAT. ANN. tit. 52, § 52-184 (1958).

[61] *See, e.g.*, N.Y. FAMILY COURT ACT §§ 418, 532 (1962). The discretion to be used in such cases has been declared to be sound judicial discretion and not mere personal discretion. Cortese v. Cortese, 10 N.J. Super. 152, 76 A.2d 717 (1950).

[62] *See, e.g.*, 2 MD. CODE ART. 16, § 66G (1966); N.C. GEN. STAT. § 8-50.1 (Cum. Supp. 1967); W.S.A. § 325.23 (1958).

[63] OHIO REV. CODE § 3111.16 (1964); State *ex rel.* Walker v. Clark, 144 Ohio 305, 58 N.E.2d 773 (1944).

[64] N.C. GEN. STAT. § 8-50.1 (Cum. Supp. 1967); UNIFORM ACT § 1-11.

[65] N.Y. FAMILY COURT ACT § 418 (1962).

[66] OHIO REV. CODE § 3111.16 (1964).

[67] N.Y. FAMILY COURT ACT § 532 (1962); CODE OF ALA. tit. 27, § 12(5) (Cum. Supp. 1967).

Act and allow the fact of a party's refusal to submit to the test to be brought out in court.[68]

Virginia's statute[69] provides that in divorce and support cases when a question of paternity arises, the court may, on motion of either party, regardless of any presumption in regard to paternity, order the blood grouping tests to be performed on the mother, child and putative father. The tests must be performed by a licensed physician at the cost of the moving party.

The language of this statute limits its application to only two situations: divorce and support. This limitation is extended by the fact that Virginia has not accepted a proposal[70] that would allow an unmarried mother to recover child support from the father of her illegitimate child.[71] The effect of the statute will, therefore, be felt in cases where there is a marriage and a child born in wedlock, thereby raising a presumption of legitimacy.[72]

IV. Conclusion

A careful reading of Virginia's statute indicates that the legislature contemplated a conflict between the presumption of legitimacy and blood test results. The statute, however, is silent as to the intended outcome of this conflict. In light of the preceding considerations, it is likely that the Virginia courts will consider the test results conclusive when they show non-paternity. It is doubtful, however, that the court will consider test results which indicate that the reputed father may in fact be the father. The statute is silent as to whether the court on its own motion may order the tests and as to whether the tests are mandatory in any situation. On these points the attorney can expect the court not to order the tests on its own motion, but to exercise sound judicial discretion in considering motions from the bar for the test.

C.L.W., Jr.

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[68] Code of Ala. tit. 27, § 12(5) (Cum. Supp. 1967); 2 Md. Code Art. 16, § 66G (1966); Nev. Rev. Stat. §§ 56.010, 56.011 (1967).

[69] Va. Code Ann. § 8-329.1 (Cum. Supp. 1968).

[70] Va. S. Doc. No. 5, Regular Sess. 1960, House and Senate Documents.

[71] No person shall be held for support of a child born to an unmarried mother unless he admits paternity under oath, either in open court or in writing. Va. Code Ann. § 20-61.1 (1960). *See* Brown v. Brown, 183 Va. 353, 32 S.E.2d 79 (1944).

[72] *See* note 37, and 39 through 48 *supra.*