EXHIBITION OF A CHILD IN COURT TO DETERMINE PATERNITY

Glascock v. Anderson, 83 N.M. 725, 497 P.2d 727 (1972)

Plaintiff successfully brought a paternity suit against defendant. The defendant appealed, citing as error the exhibition of the plaintiff's year old child to the jury. The Supreme Court of New Mexico affirmed and *held*: a child may be exhibited to the trier of fact to have the child's features observed and compared with those of the putative father.[1]

Though reliable and relevant evidence is generally admissible, the trial judge may exclude it if its prejudice outweighs its probative value.[2] Evidence which is submitted to the trier of fact, who then "inspects" the evidence through the use of his senses so as to perceive facts about it, is demonstrative evidence.[3] An example of demonstrative evidence is the exhibition of a child before the trier of fact in a paternity suit to show his resemblance to the father. Courts have split over the propriety of exhibiting a child to the jury as an aid in determining paternity:[4] a few courts absolutely prohibit exhibition;[5] others allow the

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1. Glascock v. Anderson, 83 N.M. 725, 497 P.2d 727 (1972).

2. *See* C. MCCORMICK, LAW OF EVIDENCE §§ 151-52 (1954); *cf.* UNIFORM RULE 513 1963); C. MCCORMICK, *supra* note 2, at § 179.

3. *See, e.g.*, Gallagher v. Viking Supply Corp., 411 P.2d 814 (Ariz. App. 1966); Grenz v. Werre, 129 N.W.2d 681 (N.D. 1964); Rich v. Cooper, 234 Ore. 300, 380 P.2d 513 (1963); C. MCCORMICK, *supra* note 2, at § 179.

4. Evidence of resemblance, both through the exhibition of the child and testimony, was admissible and competent until the eighteenth century in England. The tendency now in that country is to discount its value. *See* S. SCHATKIN, DISPUTED PATERNITY PROCEEDINGS 126 (2d ed. 1947). For a collection of English cases, *see* 1 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 166 n.2 [hereinafter cited as WIGMORE]. The leading English case is the Douglas Cause, 2 Hargrave Collectania Jurdicia 386, 402 (1769), in which Lord Mansfield noted:

> I have always considered likeness as an argument of a child's being the son of a parent; and the rather, as the distinction between individuals in the human species is more discernible than in other animals; a man may survey ten thousand people before he sees two faces perfectly alike; and in an army of an hundred thousand men, every one may be known from another. If there should be a likeness of features there may be a discriminancy of voice, a difference in the gesture, the smile, and various other things; whereas a family-likeness runs generally through all these, for in everything there is a resemblance, as of features, features [*sic*], size, attitude and action . . . .

child to be exhibited if he is sufficiently mature to possess "settled features"[6] or if only certain aspects of the alleged resemblance are to be compared;[7] and some courts allow exhibition without qualification.[8]

Most courts that refuse to allow the exhibition of children to determine paternity consider evidence of resemblance between a child and the putative father unreliable[9] because jurors cannot evaluate its sig-

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For the view of early medical authorities, *see* 1 T. BECK, MEDICAL JURISPRUDENCE 499-500 (6th ed. 1838); A. DEAN, MEDICAL JURISPRUDENCE 90 (1854); A. HERZOG, MEDICAL JURISPRUDENCE 734-59 (1931).

When the question of race is involved, authorities generally agree that evidence of resemblance is admissible. According to Wigmore:

> [The] progeny of persons of one race receive from the progenitors certain corporal traits very different from the traits transmitted from a progenitor of another race. The presence of the peculiar traits of the race is therefore evidential to show a progenitor of the race bearing those traits. The admissibility of this evidence has never been doubted by courts . . . .

1 WIGMORE, *supra* at § 167. *See* S. SCHATKIN, *supra* at 126; Annot., 40 A.L.R. 97, 131 (1924). *But see* Almeida v. Correa, 51 Hawaii 594, —, 465 P.2d 564, 570 n.9 (1970), suggesting that the question of race should be the subject of expert testimony.

5. *See, e.g.*, Bilkovie v. Loeb, 156 App. Div. 719, 141 N.Y.S. 279 (1912); Beuschel v. Manowitz, 151 Misc. 899, 271 N.Y.S. 279 (Sur. Ct. 1934); Cook v. State, 172 Tenn. 42, 109 S.W.2d 98 (1937); State v. Neel, 23 Utah 541, 65 P. 494 (1901); Hanawalt v. State, 64 Wis. 84, 24 N.W. 489 (1885). *Cf.* note 9 *infra.*

6. *See, e.g.*, Thomas v. United States, 121 F.2d 905 (D.C. Cir. 1941) (dictum); Fillipone v. United States, 2 F.2d 928 (D.C. Cir. 1924); Hassler v. District of Columbia, 122 A.2d 827 (D.C. Mun. Ct. App. 1956); Hall v. Centolanza, 28 N.J. Super. 391, 101 A.2d 44 (1953); Yerian v. Brinker, 33 Ohio L. Abs. 591, 35 N.E.2d 878 (Ohio App. 1941). *See also* notes 14-16 *infra* and accompanying text.

7. *See, e.g.*, People v. Kingcannon, 276 Ill. 251, 114 N.E. 508 (1916); Lawhead v. State, 99 Okla. 197, 226 P. 376 (1924); State v. Anderson, 63 Utah 171, 224 P. 442 (1924). *Cf.* note 13 *infra.*

8. *See* Kelly v. State, 133 Ala. 195, 32 So. 56 (1902); Yielding v. State, 23 Ala. App. 335, 125 So. 203 (1929); Narrell v. State, 22 Ala. App. 548, 117 So. 609 (1928); Green v. State, 22 Ala. App. 297, 115 So. 71 (1928); Brantley v. State, 11 Ala. App. 144, 65 So. 678 (1914); Green v. Commonwealth *ex rel.* Helms, 297 Ky. 675, 180 S.W.2d 865 (1944); Scott v. Donovan, 153 Mass. 378, 26 N.E. 871 (1891); Finnegan v. Dugan, 96 Mass. 197 (1867); People v. Haab, 260 Mich. 673, 245 N.W. 545 (1932); Gilmanton v. Ham, 38 N.H. 108 (1859); Gaunt v. State, 50 N.J.L. 490, 14 A. 600 (Ct. Err. & App. 1867); Glascock v. Anderson, 83 N.M. 725, 487 P.2d 72 (1972); State v. Woodruff, 67 N.C. 89 (1872); Pope v. Kincaid, 99 W. Va. 677, 129 S.E. 752 (1925). *Cf.* Smith v. Hawkins, 93 Miss. 588, 47 So. 429 (1905); Anderson v. Aupperle, 51 Ore. 556, 95 P. 330 (1908).

9. *See* Kaneshiro v. Belisario, 51 Hawaii 649, 466 P.2d 452 (1970); Almeida v. Correa, 51 Hawaii 594, 465 P.2d 564 (1970); Robnett v. People, 16 Ill. App. 299 (1885); Risk v. State, 19 Ind. 152 (1862) (dictum); Clark v. Bradstreet, 80 Me. 454, 15 A. 56 (1888); Bilkovie v. Loeb, 156 App. Div. 719, 141 N.Y.S. 279 (1912); Beuschel v. Manowitz, 151 Misc. 899, 271 N.Y.S. 279 (Sur. Ct. 1934); *In re* Wendel's Estate, 146 Misc. 269, 262 N.Y.S. 41 (Sur. Ct. 1933) (dictum); Cook v. State,

nificance[10] and prejudicial because jurors might imagine resemblances.[11] The difficulty with preserving a satisfactory record of the exhibition of a child for review also militates against the use of such evidence.[12]

Some jurisdictions that allow children to be exhibited have developed rules to help preserve a record of the evidence presented, to insure the reliability of the evidence and to minimize its prejudicial effect. The court may require that counsel lay a foundation, through testimony or comment, indicating which features of the child and the putative father are similar; or the court may simply encourage counsel to comment on similarities.[13] To minimize unreliability and prejudice,

172 Tenn. 42, 109 S.W.2d 98 (1937); State v. Neel, 23 Utah 541, 65 P. 494 (1901); State *ex rel.* Schehlein v. Duris, 54 Wis. 2d 34, 194 N.W.2d 613 (1972) (dictum); Hanawalt v. State, 64 Wis. 84, 24 N.W. 489 (1885). *Cf.* Keniston v. Rowe, 16 Me. 38 (1839); Jones v. Jones, 45 Md. 144 (1876). Whether these prohibitions are absolute is not always clear; a court could allow a child who is older or who has some peculiarity to be exhibited. The New York rule and the Wisconsin rule completely prohibit any exhibitions. *But see* Parrent, *Exhibiting the Child to the Jury in Paternity Cases: Hawaii's New Rule,* 10 J. FAM. L. 30 n.2 (1970), suggesting that the New York rule may not completely prohibit exhibition because the New York Court of Appeals has not ruled on this question and the New York cases are distinguishable because they are rape cases. This, however, may be an artificial distinction, since *Bilkovie* and *Beuschel, supra,* were civil actions for damages due to assault and rape, and many jurisdictions that allow the child to be exhibited have refused to distinguish rape cases from bastardy proceedings. *See* Kovacsics v. State, 193 Ind. 228, 139 N.E. 359 (1923); State v. Kipers, 109 Kan. 577, 201 P. 68 (1921); State v. Danforth, 73 N.H. 215, 60 A. 839 (1905); Zell v. State, 14 Ohio App. 446 (1922). *Cf.* Green v. State, 176 Tenn. 449, 143 S.W.2d 713 (1940); Bishop v. Webster, 154 Va. 771, 153 S.E. 832 (1930).

10. *See* Kaneshiro v. Belisario, 51 Hawaii 649, 466 P.2d 452 (1970); Almeida v. Correa, 51 Hawaii 594, 465 P.2d 564 (1970).

11. *See* Bilkovie v. Loeb, 156 App. Div. 719, 141 N.Y.S. 279 (1913); Hanawalt v. State, 64 Wis. 84, 24 N.W. 489 (1885). *Cf.* State v. Thomas, 38 Wyo. 72, 264 P. 1017 (1928). *Bilkovie* suggests that if all other factors are equal, the jury might accept the plaintiff's testimony if they imagine a resemblance. *See also* Gallina v. Antonelli, 220 Cal. App. 2d 63, 33 Cal. Rptr. 570 (1963), in which the judge refused to view the child because he could not perceive resemblances between parents and children.

12. *See* State v. Harvey, 112 Iowa 416, 84 N.W. 535 (1900); Glascock v. Anderson, 83 N.M. 725, 497 P.2d 727 (1972) (dissenting opinion); Hanawalt v. State, 64 Wis. 84, 24 N.W. 489 (1885).

13. *See* Flores v. State, 72 Fla. 302, 73 So. 234 (1916); Yerian v. Brinker, 330 Ohio L. Abs. 591, 35 N.E.2d 878 (Ohio App. 1941); Hall v. Centolanza, 28 N.J. Super. 381, 101 A.2d 44 (1953); State v. Anderson, 63 Utah 171, 224 P. 442 (1924). *Cf.* Hassler v. District of Columbia, 122 A.2d 827 (D.C. Mun. Ct. App. 1956). *Hall* and *Yerian* state that oral comment is desirable because it is open to cross examination and objection, and may provide some guidelines for the jury and reviewing court.

some courts either refuse to allow the exhibition of any child who is below a certain age or, since children do not develop uniformly, the judge decides whether the child is sufficiently mature to have settled features.[14] Although courts have been reluctant to establish specific age requirements, decisions of a few jurisdictions indicate that infants less than one year of age may not be exhibited.[15] In some jurisdictions failure of the judge to determine that a child meets the settled features requirement is error.[16] Other jurisdictions, purporting to follow the settled features rule, fail to enforce it, and the judge has unbridled discretion to determine whether a child will be exhibited.[17] If exhibition is allowed, the jury has the responsibility of assessing the weight

14. Thomas v. United States, 121 F.2d 905 (D.C. Cir. 1941); Fillipone v. United States, 2 F.2d 928 (D.C. Cir. 1924); Hassler v. District of Columbia, 122 A.2d 827 (D.C. Mun. Ct. App. 1956); Flores v. State, 72 Fla. 302, 73 So. 234 (1916); Hall v. Centolanza, 28 N.J. Super. 381, 101 A.2d 44 (1953); Yerian v. Brinker, 330 Ohio L. Abs. 591, 35 N.E.2d 878 (Ohio App. 1941); Roberts v. State, 205 Okla. 632, 240 P.2d 104 (1951); Ratzlaff v. State, 102 Okla. 263, 229 P. 278 (1924); Lawhead v. State, 99 Okla. 197, 226 P. 376 (1924); State *ex rel.* Fitch v. Powers, 75 S.D. 209, 62 N.W.2d 764 (1954); State v. Forbes, 108 Vt. 361, 187 A. 422 (1936); Lohsen v. Lawson, 106 Vt. 481, 174 A. 861 (1934).

The reason for the settled features rule was explained in 1 WIGMORE § 166:

> (1) The fanciful acceptance of a resemblance—which is the danger feared—is only likely where the child is so young as to have decidedly unmarked features; and it is both proper and feasible to obviate this objection by excluding the evidence where the child is too young, either by leaving the matter to the trial court's discretion, or by fixing a minimum age. (2) The physiological principle being perfectly well settled, it is poor policy to exclude invariably a piece of evidence that will usually be useful merely because it may occasionally be abused.

15. *Compare* State v. Smith, 54 Iowa 104, 6 N.W. 153 (1881), *with* State v. Harvey, 112 Iowa 416, 84 N.W. 535 (1900), *and* State v. Danforth, 48 Iowa 43 (1878). *See also* Overlock v. Hall, 81 Me. 348, 17 A. 169 (1889); Clark v. Bradstreet, 80 Me. 454, 15 A. 56 (1888). *Compare* Barnes v. State, 37 Tex. Crim. 320, 39 S.W. 684 (1897), *with* Gray v. State, 43 Tex. Crim. 300, 65 S.W. 375 (1901).

16. Thomas v. United States, 121 F.2d 905 (D.C. Cir. 1941) (dictum); Fillipone v. United States, 2 F.2d 928 (D.C. Cir. 1924); Hassler v. District of Columbia, 122 A.2d 827 (D.C. Mun. Ct. App. 1956); Flores v. State, 72 Fla. 302, 73 So. 234 (1916); Hall v. Centolanza, 28 N.J. Super. 381, 101 A.2d 44 (1953); Yerian v. Brinker, 330 Ohio L. Abs. 591, 35 N.E.2d 878 (Ohio App. 1941). In *Fillipone,* the jury was instructed that the exhibition had no evidentiary value unless it showed the reproduction of physical characteristics peculiar to the alleged father and so striking as to leave no doubt.

17. *See* State *ex rel.* Fitch v. Powers, 75 S.D. 209, 62 N.W.2d 764 (1954). *Compare* State v. Forbes, 108 Vt. 361, 187 A. 422 (1936), *with* Lohsen v. Lawson, 106 Vt. 481, 174 A. 861 (1934). *Compare* Roberts v. State, 205 Okla. 632, 240 P.2d 104 (1951), *with* Lawhead v. State, 99 Okla. 197, 226 P. 376 (1924).

and credibility of the evidence in light of the child's maturity.[18]

In jurisdictions where exhibition is always allowed, it is thought that the age, maturity and strength of resemblance of the child affect the weight rather than the admissibility of the evidence.[19] Proponents of this position assert that judges are no more competent than jurors to assess the maturity of the child and the significance of resemblance. The court in *Glascock v. Anderson*[20] adopted this position, which is contrary to the typical rule requiring the judge to make all decisions on the admissibility of evidence.

The *Glascock* court formulated a rule that admits all relevant evidence of resemblance, whether by way of expert testimony, comparisons by persons familiar with the father and child, or comparisons made by the jury.[21] No foundation showing that the child has characteristics or features indicative of paternity need be laid, since it is the function of the jury to decide whether a resemblance exists.[22]

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18. State v. Mesquita, 17 Ariz. App. 151, 496 P.2d 141 (1972); State v. Cabrera, 13 Ariz. App. 527, 478 P.2d 142 (1970).

19. *See* Judway v. Kovacs, 4 Conn. Cir. 713, 239 A.2d 556 (1967) (dictum); Green v. Commonwealth *ex rel.* Helms, 297 Ky. 675, 180 S.W.2d 865 (1944); People v. Haab, 260 Mich. 673, 245 N.W. 545 (1932); Zell v. State, 15 Ohio App. 446 (1922); Bishop v. Webster, 154 Va. 771, 153 S.E. 832 (1930).

20. 83 N.M. 725, 497 P.2d 727 (1972).

21. *Id.* at 727, 497 P.2d at 729:

> Any relevant evidence, whether by way of expert opinion, by way of comparisons of features and traits made by the jury from observations of the features and traits of the child and the features and traits of the purported father, or by way of testimony of persons in a position of advantage to observe and draw comparisons between the features and traits of the child and those of the alleged father, should be admitted . . . .

The court in *Glascock* did not confront the question of admitting testimony of a layman without an exhibition. The opinion suggests that it might be permissible. This seems inconsistent with part of the justification for the rule that was adopted. If Wigmore's formulation was rejected because the judge's discretion was interposed between the jury and the child, interposing a witness between the child and the jury, and not allowing the jury to observe the child, would be even less desirable. The opinion in *Glascock*, however, emphasizes that the jurors are to weigh the evidence.

22. Despite the absence of a foundation indicating what comparisons the jury is to make, the court expects the jurors to confine their comparisons to "specific traits" and "individual features"; no "fancied general resemblance" is to be considered. Justice Stephenson, in his dissenting opinion to the *Glascock* decision, states, *id.* at 729, 497 P.2d at 731:

> Aside from the question of how the jury's mind is to be riveted to individual features and specific traits to the exclusion of fancied general resemblance when the infant is displayed, and assuming a definite resemblance of an individual feature or a specific trait, what, I inquire, has been proven.
>
> Even if we then further assume that the trier of the facts is fully informed as to the workings of Mendel's law of genetics and the functioning and

In adopting this rule, the *Glascock* court failed to adequately consider the objections of other courts to the use of evidence of resemblance. First, because many genetic variables interact to determine appearance, comparing a child with the putative father to determine if a resemblance exists does not provide a reliable indicium of paternity.[23] Secondly, because the exhibition of a child is likely to evoke sympathy, the prejudicial effect of an exhibition is likely to outweigh whatever probative value such evidence has.[24]

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interplay of the genes of the parents in relation to such feature or trait (knowledge which would apparently place the jury head and shoulders above authorities in the field) we are still left, under the hypothetical assumptions stated, with a mere possibility that the putative father is the father. I do not regard such a possibility as being evidence.

23. *See* Almeida v. Correa, 51 Hawaii 594,—, 465 P.2d 564, 569 (1970):

> Just as a child's face is not inherited as a unit, neither is an individual feature inherited as a unit from any one parent. . . . Rather, inheritance has been traced to physical traits even more specific than a single feature. Consider, for example, the effect of heredity on the nose. Some studies might indicate that there is one key gene producing the general shape of the nose, but most authorities agree that quite a number of genes are at work, each on a different part. That is, there may be separate genes for the bridge (its shape, height, and length); the nostrils (breadth, shape and size of apertures); the root of the nose and its juncture with the upper lip; and the bulb, or point of the nose.
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> . . . .
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> At any rate, it is clear that distinctive genes are at work, and that they work out independently; otherwise, the nose of every child would be a blend of its parents' noses. Even in the most inbred peoples, however, noses of every shape and size appear, providing the Mendelian segregation and sorting out of the "nose" genes. . . . In short, the individual does not "inherit" characteristics but only the potentialities to develop in a certain way through the transmitted genes. Moreover, since genes themselves interact, all genes probably affect all characteristics to a certain degree.

24. In Almeida v. Correa, 51 Hawaii 594, 465 P.2d 564 (1970), the court felt that exhibitions might be useful to illustrate expert testimony, but because of the prejudicial effect, the court prohibited exhibitions.

The resemblance test only seems to excite the sympathies of the jury. Many judges and jurors admit after the trial that they were impressed by the resemblance of the child to the defendant and gave that evidence much weight. Krause, *Scientific Evidence and the Ascertainment of Paternity*, 5 FAM. L.Q. 252, 272 (1971). *See* Hatcher v. State *ex rel.* McGill, 24 Tenn. App. 213, 142 S.W.2d 326 (1940) (trial judge's lengthy comment upon the resemblance of the child to defendant cited as error). The court in *Glascock*, however, indicated that it believes jurors will not be unduly influenced. 83 N.M. at 727, 497 P.2d at 729.

Some courts have held the presence of the child in the courtroom, even though the child was not introduced into evidence, to be prejudicial and error. Harrison v. District of Columbia, 95 A.2d 332 (D.C. Mun. Ct. App. 1953); Williams v. State *ex rel.* Taylor, 80 Fla. 286, 85 So. 917 (1920). Other courts have allowed the child to be present in the courtroom, or introduced as evidence to corroborate the plaintiff's testimony or to show damages. Morris v. Stanford, 58 Ga. App. 726, 199 S.E. 773

Since expert evaluation of anthropological data can aid in determining paternity, evidence of resemblance no longer need be an important factor in determining paternity.[25] If expert opinion were utilized to determine the parentage of a child, no sympathy-engendering exhibition of the child would need be made, and the possibility of inaccurate determinations would be minimized. Since the facts underlying the expert's opinion would be recorded,[26] it would be more feasible to review on appeal than the determination of resemblance.[27]

(1938); Nott v. Bender, 246 Ind. 186, 202 N.E.2d 745 (1964); Merritt v. Leuck, 231 Iowa 777, 2 N.W.2d 49 (1942); State v. Stark, 149 Iowa 749, 129 N.W. 331 (1911); State v. Hunt, 144 Iowa 228, 122 N.W. 903 (1909); State v. Neel, 23 Utah 541, 65 P. 494 (1901).

25. Keiter, *Advances in Anthropological Paternity Testing,* 21 AM. J. PHYS. ANTHRO. 81 (1963):

> The data at the disposal of the physical anthropologist contain sufficient information to determine 19 out of 20 cases at a level of three sigma significance (99.73 + probability) whether a given individual is the parent of a child in question. Only about 5% of all diagnoses remain uncertain.

The anthropological approach compares inheritable traits such as blood group systems, dermatoglyphic traits, and measurements. Krause, *supra* note 24, at 271.

The importance of blood tests in establishing that a man is not the father of a child should not be overlooked. Since children carry only the blood of their parents, factors cannot be present in a child's blood that are not present in the blood of either parent. The A-B-O, M-N-Ss and Rh-Hr systems are used in bloodtyping. The more factors used, the greater the number of men that can be excluded as the possible father. Exclusions can be established with certainty, inclusions can be established by degrees of probability. *Id.* at 261. For more information on bloodtyping, *see* 5 R. GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE ¶ 304.12 (3d ed. 1971); K. SIMPSON, MODERN TRENDS IN FORENSIC MEDICINE 110 (1953).

26. Raub v. Carpenter, 187 U.S. 159 (1902); Western Union Teleg. Co. v. Morris, 67 Kan. 410, 73 P. 108 (1903).

27. The *Glascock* dissent addresses the problem of preserving the evidence for review when an exhibition is used. An appellate court cannot adequately deal with a case that allows the child to be presented if 1) there is no substantial evidence of paternity except the exhibition; 2) neither party's evidence preponderates; or 3) a party objects to an exhibition on the grounds that no resemblance exists and his objection is overruled. 83 N.M. at 729, 497 P.2d at 731.

See LD v. JD, 481 S.W.2d 17 (Mo. App. 1972), in which the reviewing court, not afforded the opportunity to see the child, deferred to the findings of the trial court, which had seen the child.