THE PRESUMPTION OF PATERNITY—REBUTTABLE OR CONCLUSIVE

Alber v. Alber, 93 Idaho 755, 472 P.2d 321 (1970)

Plaintiff received a divorce decree from her defendant husband on May 2, 1967, having testified at the divorce hearing that no child was born of the marriage.[1] A child was born to the plaintiff on October 26, 1967, and thereafter she filed a motion to amend and modify the divorce decree to include a provision for child support payments of $50 a month and payment of her attorney's fee.[2] The trial court ordered the original divorce decree to be amended to include the child support and attorney fee payments. The lower court reasoned that the child was conceived during the marriage and regardless of access of other parties to the plaintiff, "the law appears to be that the husband cannot disclaim paternity."[3] The trial court determined the law to be that any child conceived during marriage is conclusively presumed to be the child of the husband. The defendant appealed to the Supreme Court of Idaho arguing that the presumption of legitimacy is not conclusive but can be controverted. He alleged that he and his wife had been separated since November 1966, that the child was conceived between the dates of February 1 and February 10, 1967, and that the mother had carried on an adulterous relationship from the time of the separation until March, 1967. He further alleged that this evidence of non-access coupled with the adulterous relationship was sufficient to rebut the presumption of legitimacy. *Held*: The presumption of legitimacy is rebuttable. The case was remanded for a new trial to determine whether the evidence of non-access was sufficient to rebut the presumption successfully.[4]

This case was one of first impression in Idaho, for the court had to determine the effect of the presumption of legitimacy on a child conceived during wedlock.[5] Previous Idaho cases had only discussed the

1. Alber v. Alber, 93 Idaho 755, 756, 472 P.2d 321, 322 (1970).
2. *Id.*
3. *Id.* at 757, 472 P.2d at 323.
4. *Id.* at 761, 472 P.2d at 327.
5. *Id.* at 759, 472 P.2d at 325. "Legitimacy" and "paternity" may be synonymous as far as their effect is concerned. When the child of married parents is involved, the proof of one of these facts automatically establishes the other. The question of paternity is distinct from that of legitimacy where an attempt is made to establish that the father of a child is one other than the husband, or where no marriage exists. Walker, *Legitimacy and Paternity*, 14 ARK. L. REV. 55 (1959-60). It might also be stated here, that when authorities use the word "presumption" they are speaking of an inferential relation between one fact or group of facts and another fact or group of facts. The one may for convenience be called the basic fact and the other the presumed fact. Morgan, *Further Observations on Presumptions*, 16 S. CAL. L. REV. 245 (1943). For further information on presumptions and what is needed to overcome them *see* Bohlen, *The Effect of Rebuttable Presumptions of Law upon the Burden of Proof*, 68 U. PA. L. REV. 307 (1920); McCormick, *Charges on Presumptions and Burden of Proof*, 5 N.C. L. REV. 291 (1927).

presumption of paternity with respect to the legitimacy of the marriage.[6] The court in *Alber* commenced its discussion of the presumption by reviewing the common law doctrine and its alterations through time.

At common law, legitimacy was a rule of substantive law rather than presumption that "he is the father whom the marriage indicates" and "every child conceived in wedlock is legitimate."[7] As time elapsed, two exceptions to the conclusive presumption of legitimacy arose: impotency and physical absence for a period before birth so as to make it a natural impossibility that the husband could have been the father.[8] The trend in the United States today is away from the conclusive presumption of legitimacy,[9] and courts agree that the presumption will fall when "common sense and reason are outraged by holding that it abides."[10]

The problem which the court in *Alber* on remand must confront is determine the amount of evidence sufficient to rebut this presumption. The courts are not in agreement as to the type of evidence and the degree of proof required to rebut the presumption successfully.[11] Some courts have followed the English rule requiring conclusive evidence in order to rebut the presumption.[12] *Lee v. Stix*[13] held that in the case of a married

6. Alber v. Alber, 93 Idaho 756, 759, 472 P.2d 321, 325 (1970).

7. Annot., 7 A.L.R. 329 (1920). For an absurdity reached as a result of this conclusive presumption *see* 2 F. POLLOCK AND F. MAITLAND, THE HISTORY OF ENGLISH LAW 398-99 (2d ed. 1898). Herein is the story of St. Hugh of Lincoln who was away for 3 years and when he returned he discovered his wife had given birth to a child the day before his arrival. The court held the child was the legitimate child of St. Hugh.

8. Comment, *California's Conclusive Presumption of Legitimacy—Its Legal Effect and its Questionable Constitutionality*, 35 S. CAL. L. REV. 437, 438 (1962); *see* Pendrell v. Pendrell, 2 Strange 925, 93 Eng. Rep. 945 (1732); Fridman, *The Presumption of Legitimacy*,26 SOL. 293 (1959); Note, *Presumption of Legitimacy of a Child Born in Wedlock*, 33 HARV. L. REV. 306 (1919); Note, *Conclusive Presumption of Legitimacy not Overcome by Negative Results of Blood Tests*, 34 S. CAL. L. REV. 104, 107 (1960); Note, *Liability of Possible Fathers: A Support Remedy for Illegitimate Children*, 18 STAN. L. REV. 859, 864 (1966); Comment, *The Presumption of Legitimacy as Affected by Standing, Antenuptial Conception, and the Lord Mansfield Rule*, 24 U. MIAMI L. REV. 414, 416 (1970); 37 N.D. L. REV. 110 (1961); 24 U. PITT. L. REV. 653, 657 (1963).

9. Comment, *California's Conclusive Presumption of Legitimacy—Its Legal Effect and its Questionable Constitutionality*, 35 S. CAL. L. REV. 437, 439 (1962). For the jurisdictions which hold the presumption is rebuttable *see* Kolwalski v. Wojtkowski, 19 N.J. 247, 266, 116 A.2d 6, 17 (1955).

10. In re Findlay, 253 N.Y. 1, 5, 170 N.E. 471, 473 (1930).

11. 37 N.D. L. REV. 110 (1961).

12. Preston-Jones v. Preston-Jones, (1951) A.C. 391. This case made it clear that only proof of illegitimacy beyond a reasonable doubt would suffice to show that the child was not legitimate. For further discussion of the presumption in England *see* Cretney, *Somebody Else's Child*, 113 SOL. J. 4 (1969); Fridman, *The Presumption of Legitimacy*, 26 SOL. 293 (1959); Lasack, *Towards Reform of the Law of Illegitimacy*, 113 L.J. 478 (1963); Note, *Law Commission and Proof of Paternity in Civil Proceedings*, 111 SOL. J. 650 (1967); Comment, *The Putative Father and the Illegitimate Child*, 25 MODERN L. REV. 736 (1962).

woman, "proof of an adulterous relationship is insufficient to establish paternity unless by equally clear, convincing and entirely satisfactory proof she negates access by her husband."[14] The court in *JD v. MD*[15] also required clear and convincing proof but labeled this requirement as "substantial evidence."[16] On the other hand, the requirement proposed in *State v. Brown*[17] was that "substantial evidence" will rebut the presumption, but the court set forth no guidelines as to the definition of "substantial."[18] It has been stated that mere preponderance of the evidence is not sufficient to rebut the presumption of legitimacy in the majority of jurisdictions.[19] It can be seen that the degree of proof differs from jurisdiction to jurisdiction, and that terminology adds even greater confusion in this area.

The *Alber* court makes it quite clear what degree of proof is required on remand when it states: "As a court of appellate review, we are unable to say whether the appellant herein established by clear and convincing evidence his non-access during the time of the conception of the child."[20] Consequently, the defendant will have to prove by clear and convincing evidence that he had no access to the plaintiff. Implicit in the statement is that the court must recognize non-access as a means of rebutting the presumption of legitimacy.

The common law exceptions of impotency and absence during the period of conception are recognized by every state, but evidence of facts outside of these two exceptions is where the conflict over relevance or admissibility, or both, begins. In addition to the common law exceptions, evidence of non-access, sterility, physical appearance, abnormal periods of gestation, and blood tests have frequently been allowed to controvert the presumption.[21] These five types of evidence

13. 55 Misc. 2d 940, 286 N.Y.S.2d 987 (1968).

14. *Id.* at 989. *Accord*, Miller v. Robertson, 258 N.E.2d 420 (Ind. Ct. App. 1970); In re Findlay, 253 N.Y. 1, 170 N.E. 471 (1930); Matter of Black v. Brown, 27 A.D. 2d 683, 276 N.Y.S.2d 361 (1967); People v. Lewis, 25 A.D. 2d 567, 267 N.Y.S.2d 728 (1966); Hynes v. McDermott, 91 N.Y. 451 (1883); Cairgle v. American Radiator and Standard Sanitary Corp., 366 Pa. 249, 77 A.2d 439 (1951); Hargrave v. Hargrave, 9 Beau 552, 50 Eng. Rep. 457 (1846).

15. 453 S.W.2d 661 (Mo. 1970).

16. *Id.* at 663. Here the court stated that to amount to "substantial" the evidence must amount to clear, convincing and satisfactory proof that no copulation occurred or was possible between husband and wife.

17. 446 S.W.2d 498 (Mo. Ct. App. 1969).

18. *Id.* at 500.

19. Stone v. Stone, 76 Wash. 2d 586, 458 P.2d 183 (1969).

20. Alber v. Alber, 93 Idaho 755, 761, 472 P.2d 321, 327 (1970).

21. Comment, *California's Conclusive Presumption of Legitimacy—Its Legal Effect and Its Questionable Constitutionality*, 35 S. CAL. L. REV. 437, 439 (1962).

provide a rational basis for finding non-paternity. The absurdity arises in the courts' utilization of this evidence, which will become apparent in a discussion below.

The origin of the non-access rule stems from an opinion by Lord Mansfield[22] in *Goodright v. Moss*:[23]

> As to time of birth, the father and mother are the most proper witnesses to prove it. But it is a rule, founded in decency, morality and policy that they shall not be permitted to say after marriage that they had no connection and therefore that the offspring is spurious.[24]

In *Barnett v. Barnett*[25] the court strictly applied the rule, holding that because neither the husband nor the wife could testify as to the non-access reflected in the hospital records, neither could the doctor testify that the child was a bastard.[26] The present trend seems to be reflected in *Cairgle v. American & Standard Sanitary Corp.*[27] which allows the presumption of legitimacy to be rebutted by evidence of non-access, ". . . which is clear, convincing, direct and unanswerable," even though the possibility of access is not entirely excluded.[28] The standard set forth in *Cairgle* is that not only is evidence of non-access admissable, but that there is no need for absolute certainty. In accordance with this ruling, the court in *Fitzsimmons v. DeCicco*[29] held that a married woman's testimony of non-access to her husband for fourteen years was competent evidence in a paternity suit against a man with whom she had been sleeping for two years prior to the birth of her baby.

The *Mansfield* rule has been accepted in many jurisdictions throughout the years, because it is one means of preventing a finding of illegitimacy.[30] Yet, the status of the bastard has improved in the past two centuries so that the rationale utilized to justify the rule is questionable.[31]

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22. 9 DUQUESNE L. REV. 129, 130 (1970).

23. 2 Comp. 591, 98 Eng. Rep. 1257 (1777).

24. *Id.* at 593, 98 Eng. Rep. at 1258.

25. 451 S.W.2d 939 (Tex. Ct. App. 1970).

26. *Id.* at 941. There is no doubt that the court in *Alber* does allow both spouses to testify as to non-access.

27. 366 Pa. 249, 77 A.2d 439 (1951).

28. 24 U. PITT. L. REV. 653, 657 (1963). *Accord*, State v. Mejia, 97 Ariz. 215, 399 P.2d 116 (1965); Hartford Nat'l Bank and Trust Co. v. Prince, 28 Conn. Sup. 348, 261 A.2d 287 (1968); Miller v. Robertson, 258 N.E.2d 420 (Ind. Ct. App. 1970); Lee v. Stix, 55 Misc.2d 940, 286 N.Y.S.2d 987 (1968); Barnett v. Barnett, 451 S.W.2d 939 (Tex. 1970).

29. 44 Misc.2d 307, 253 N.Y.S.2d 603 (1964).

30. Comment, *Illegitimacy—Two State Supreme Courts Divide Upon Admissability of Spouses' Testimony as to Non-Access*, 112 U. PA. L. REV. 613, 615 (1964).

31. Comment, *Domestic Relations—Evidence Presumption of Legitimacy*, 9 DUQUESNE L. REV. 129, 133 (1970). For further discussion *see* Leider v. Leider, 434 Pa. 293, 299, 254 A.2d 306, 309

Evidence of sterility is another means of rebutting the presumption which has been accepted by some courts. In *Hughes v. Hughes*[32] it was clear that the husband was sterile at the time of conception, and even though he had intercourse with his wife during this time, he was adjudicated not to be the father. In *Department of Public Welfare of City of New York v. Hamilton*,[33] the court stated:

> In our opinion the trial court should have granted an adjournment upon the statement of defense counsel that he had additional medical testimony to prove that defendant was sterile in March, 1951, the alleged time of conception. The undisputed expert testimony established that the defendant was sterile in February, 1953.[34]

For the court to ignore medical evidence of sterility at the time of conception seems unjustifiable.[35]

Some courts have allowed the child to be displayed before the jury to aid in rebutting the presumption of legitimacy. The jury can therefore determine whether the child possesses certain characteristics of the alleged father or even whether the child is of a different race from the alleged father. Wigmore has stated:

> The sound rule is to admit the fact of similarity of specific traits, however presented, provided the child is in the opinion of the trial court, old enough to possess settled features or other corporeal indications.[36]

(1969) in which the court stated, "that the rule proscribing a husband and wife from testifying as to non-access is an anachronism and that the time for completely abandoning this rule has arrived." Bell, *Competency of a Husband and Wife to Testify as to Non-Access*, 21 TEMP. L.Q. 217 (1947); 24 U. PITT. L. REV. 653 (1963).

32. 125 Cal. App. 2d 781, 271 P.2d 172 (1954). For further discussion of the case *see* Note, *"Exception" to the Conclusive Presumption of Legitimacy*, 28 S. CAL. L. REV. 185 (1955).

33. 282 App. Div. 1025, 126 N.Y.S.2d 240 (1953).

34. *Id.* at 241. *Accord*, Krog v. Krog, 32 Cal.2d 812, 198 P.2d 510 (1948); Potasz v. Potasz, 69 Cal. App.2d 20, 155 P.2d 895 (1945); Crepald v. Wagner, 132 So.2d 222 (Fla. Ct. App. 1961); Hogeboom v. Hurlburt, 207 Misc. 997, 141 N.Y.S.2d 691 (1955).

35. Schatkin, *The Defense of Sterility in Paternity Cases*, 59 W. VA. L. REV. 258, 265 (1957); for further discussion *see* R. HOTCHKISS, INFERTILITY IN MEN 29-42 (1952); A. WEISMAN, SPERMATOZOA AND STERILITY 59-98 (1941); Walker, *Legitimacy and Paternity*, 14 ARK. L. REV. 55 (1959-60); Note, *Evidence—Paternity—Sterility Test/*, *36* TUL. L. REV. 347 (1962).

36. 1 J. WIGMORE, EVIDENCE § 166, at 627 (3rd ed. 1940) [hereinafter cited as WIGMORE]. *Accord*, In Re Stone's Estate v. Heller, 77 Idaho 63, 286 P.2d 329 (1955); Salyers v. Commonwealth, 255 S.W.2d 605 (Ky. Ct. App. 1953); Finley v. Rowell, 243 Miss. 455, 138 So.2d 489 (1962); State v. Johnson, 351 Mo. 214, 234 S.W.2d 219 (1950); State v. Bryant, 361 Mo. 318, 234 S.W.2d 584 (1950); State *ex rel.* Sievert v. Merrigan, 73 S.D. 582, 46 N.W.2d 909 (1951); State *ex rel.* Larson v. Benson, 46 S.D. 565, 195 N.W. 437 (1923); State *ex rel.* Berge v. Patterson, 18 S.D. 251, 100 N.W. 162 (1904).

It has been held in *Peters v. Campbell*[37] that a child of seventeen months had sufficiently matured so that the physical similarities between the child and the alleged father could be appraised. *Clark v. Bradstreet*[38] held that the age of the child is irrelevant, but it would seem that this view would be sounder if applied to only those cases of miscegenation.[39] Wigmore is in agreement with this position.

> A physiological principle . . . tells us that 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 these 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; though its use, since the abolition of slavery in this country, is now very rare, because the issues in which it is relevant can only be uncommon.[40]

Courts have held that the husband is not the father even though he had intercourse with his wife during the normal period of conception in those cases where the husband and wife are of the same race and the child is of mixed blood.[41]

The length of the period of gestation is also a method of rebutting the presumption allowed by some courts. The normal period of gestation set by the medical profession is 280 days, but the period can vary from 220-330 days for a full-term baby.[42] Thus an abnormal period of gestation, for example 190 days, would seem sufficient to rebut the presumption of legitimacy.[43]

In *Smith v. Wise*[44] the father argued for the adoption of the period of gestation set by the medical profession as being 280 days, but the court held that the fact that birth occurred 283 days after the divorce was

37. 80 Wyo. 492, 345 P.2d 234 (1959).

38. 80 Me. 454, 15 A. 56 (1888).

39. *See* note 37 *supra* at 240.

40. WIGMORE § 167.

41. U.S. v. Hung Chang, 134 F. 19, 23 (6th Cir. 1904); Bullock v. Knox, 96 Ala. 195, 11 So. 339 (1892); Wright v. Hicks, 12 Ga. 155, 56 Am. Dec. 451 (1852); Cross v. Cross, 3 Paige (N.Y.) 139, 23 Am. Dec. 778 (1832); Watkins v. Carlton, 10 Leigh (Va.) 560 (1840).

42. Note, *Evidence: Disputable Presumption of Parentage in California*, 11 HASTINGS L.J. 200, 201 (1959). *Accord*, Smith v. Wise, 234 So.2d 145, 147 (Fla. Ct. App. 1970); Rasco v. Rasco, 447 S.W.2d 10, 17 (City Ct. App. Ky. 1969); Comment, *Presumption of Legitimacy and Related Problems*, 23 S. CAL. L. REV. 538, 539 (1950).

43. In Re McNamara's Estate, 181 Cal. 82, 183 P. 552 (1919); Murr v. Murr, 87 Cal. App. 2d 511, 197 P.2d 369, 371 (1948).

44. 234 So.2d 145 (1970). *Accord*, Rasco v. Rasco, 447 S.W.2d 10 (Ct. App. Ky. 1969).

insufficient alone to determine that conception did not occur until after the divorce. The child was concluded to be the legitimate child of the marriage.[45]

The most controversial and yet seemingly the most reliable evidence of non-paternity is the blood test.[46] The European courts recognized the evidentiary value of blood tests as early as 1924,[47] but no court in the United States had accepted the evidentiary value and accuracy of the tests until *State v. Damm*[48] in which the court stated in dicta:

> . . . it is our considered opinion that the reliability of the blood test is definitely and indeed unanimously established as a matter of expert scientific opinion entertained by authorities in the field, and we think the time has undoubtedly arrived when the results of such tests, made by competent persons and properly offered in evidence, should be deemed admissable in the court of justice whenever paternity is in issue.[49]

Today, most courts do accept blood tests as evidence of non-paternity, but the weight given to such evidence varies from jurisdiction to jurisdiction. It must be stated that blood tests are used as negative evidence and nothing is proven if the blood groupings indicate that the alleged father might be the true father of the child.[50] Initial opposition to the use of blood tests as evidence of non-paternity raised such arguments as (1) the test was scientifically inaccurate and therefore not accepted by

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45. *Id.* at 147.

46. For the history and general discussion of the blood-groups *see* L. SNYDER, THE PRINCIPLES OF HEREDITY (1951); C. MCCORMICK, EVIDENCE § 178 (1st ed. 1954); WIGMORE § 165(b); Britt, *Blood Grouping Tests and the Law: The Problem of "Cultural Lag"*, 21 MINN. L. REV. 671 (1937); Galton, *Blood Grouping Tests and Their Relationship To The Law*, 17 ORE. L. REV. 177 (1938); Ratimorszky, *Blood Tests in Paternity Cases*, 19 CLEV. ST. L. REV. 491 (1970); Whitlack & Marsters, *Contribution of Blood Tests in 734 Disputed Paternity Cases: Acceptance by the Law of Blood Tests as Scientific Evidence*, 14 WEST RES. L. REV. 115, 120 (1962); Note, *Children Born in Wedlock: Blood Tests and the Presumption of Legitimacy in Missouri*, 39 U.M. K.C. L. REV. 121, 126 (1970); Comment, *The "Gap" Between the Law of Paternity and the Science of Serology: Blood Tests in Non-Paternity Proceedings*, 16 MERCER L. REV. 306 (1964).

47. State v. Damm, 64 S.D. 309, 266 N.W. 667, 669 (1936).

48. *Id.*

49. *Id.* at 312, 266 N.W. at 668. For further discussion of State v. Damm *see* Maguire, *A Survey of Blood Group Decisions and Legislation in the American Law of Evidence*, 16 S. CAL. L. REV. 161 (1943).

50. Walker, *Legitimacy and Paternity*, 14 ARK. L. REV. 55, 58 (1959-60); *Accord*, Britt, *Blood-Grouping Tests and the Law: The Problems of "Cultural Lag"*, 21 MINN. L. REV. 671 (1937); Cretney, *Blood Test*, 118 NEW L.J. 1020 (1958); Waters, *Blood Test and the Presumption of Legitimacy*, 118 NEW L.J. 77 (1968); Whitlach & Marsters, *Contribution of Blood Tests in 734 Disputed Paternity Cases: Acceptance By the Law of Blood Tests as Scientific Evidence*, 14 WEST. RES. L. REV. 115, 120 (1962); Comment, *The "Gap" Between the Law of Paternity and the Science of Serology: Blood Tests in Non-Paternity Proceedings*, 16 MERCER L. REV. 306, 311 (1954).

the scientific world, (2) the test was negative in force and application, and (3) there was an insufficient number of cases of proof of non-paternity by blood tests.[51] Technological advances have controverted these arguments successfully. The accuracy of the ABO group has proven to be 99.99 per cent.[52] Because of the recognition of this validity, the Uniform Act on Blood Tests to Determine Paternity was drafted by the Commissioners on Uniform State Laws which makes the blood tests conclusive evidence of non-paternity.[53] A few states have adopted it in modified versions.

Even in those states which make the blood test conclusive,[54] complexities still arise as evidenced in California. In *Kusior v. Silver*[55] the court held that the presumption of paternity is not rebuttable if husband and wife cohabited, but is rebuttable if the husband only had access. The blood test would conclusively rebut the presumption if the husband only had access. The decision in *Kusior v. Silver* revolved around the definition of *cohabiting* as used in the state statute which reads:

> Not withstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent, is undisputably presumed to be legitimate.[56]

Seven years after the *Kusior* case was decided, the Supreme Court of California ruled on *Jackson v. Jackson*.[57] The court here held that:

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51. Britt, *Blood-Grouping Test and the Law: The Problems of "Cultural Lag"*, 21 MINN. L. REV. 671 (1937).

52. Ratimorszky, *Blood Tests in Paternity Cases*, 19 CLEV. ST. L. REV. 491, 500 (1970). For further discussion on the accuracy of blood tests *see* Brooks, *Evidence*, 14 RUTGERS L. REV. 390 (1960); Whitlach & Marsters Contribution of Blood Tests in 734 Disputed Paternity Cases: Acceptance by the Law of Blood Tests as Scientific Evidence, 14 WEST. RES. L. REV. 115, 125; Note, *Conclusive Presumption of Legitimacy Not Overcome by Negative Results of Blood Tests*, 34 S. CAL. L. REV. 104 (1960). In order for the court to recognize the validity of the blood test, the court must be shown that the blood test was made by an expert and that the procedure was carried out as carefully as possible.

53. Comment, *The "Gap" Between the Law of Paternity and the Science of Serology: Blood Tests in Non Paternity Proceedings*, 16 MERCER L. REV. 306, 310 (1954). For more discussion of the act *see* Ratimorszky, *Blood Tests in Paternity Cases*, 19 CLEV. ST. L. REV. 491, 501 (1970).

54. CAL. Evidence § 895 (Deering 1967); ILL. ANN. STAT. ch. 1063/4 § 4 (Smith-Hurd Supp. 1971); KY. REV. STAT. ANN. § 406.111 (Supp. 1965); N.H. REV. STAT. ANN. § 522.4 (1955); OKLA. STAT. ANN. ch. § 504 (1967); ORE. REV. STAT. § 109.258 (1969); PA. STAT. ANN. tit. 28, § 307.5 (Supp. 1971); UTAH STAT. ANN., § 78-25.21 (Supp. 1969); WIS. STAT. ANN. § 325.23 (1957).

55. 64 Cal.2d 603, 354 P.2d 657, 7 Cal. Rptr. 129 (1960).

56. CAL. CODE OF CIVIL PROCEDURE, § 1962, subd. 5.

57. 67 Cal.2d 245, 430 P.2d 289, 60 Cal. Rptr. 649 (1967).

> In the present case the blood tests were relevant, since they prove that conception did not occur at various times during the four-day cohabitation, that is, the moments when the newlyweds were engaged in sexual intercourse[58]

The result in *Kusior* has been followed in other California cases and in *Keaton v. Keaton*[59] in the court stated:

> Although the blood tests with other evidence were admissible on the issue whether conception did in fact occur during cohabitation of the spouses, when the trial court found that conception *did so occur*, the conclusive presumption of legitimacy attached by virtue of section 621.[60]

In effect the California courts do not give conclusive weight to the blood tests in cases involving section 621.[61] It has been argued that conclusive weight should be given to the results of blood tests because experts in analyzing blood are purely objective, whereas testimony concerning cohabitation is largely impressionistic.[62]

Conclusion

The conclusive presumption of legitimacy evolved to mitigate the strong social policy of the stigma attached to being a "bastard."[63] Today, that stigma is not as detrimental legally, psychologically, and economically to the child as it was years ago. For example, in some states a bastard is permitted to inherit from his mother, and because of our somewhat "freer" society, psychological effects would not be as great as they were before. A child should not have to be concerned about support, for in most cases the state will provide for his welfare.[64] It would

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58. 430 P.2d at 291.

59. 430 P.2d at 291.

59. 7 C.A. 3rd 214, 86 Cal. Rptr. 562 (1970).

60. *Id.* at 564. *Accord*, S.D.W. v. Holden, 275 C.A.2d 313, 80 Cal. Rptr. 269 (1969); Jackson v. Jackson, 27 Cal.2d 245, 430 P.2d 289 (1967), 60 Cal. Rptr. 649; Rasco v. Rasco, 447 S.W.2d 10 (Ky. Ct. App. 1969).

61. CAL. EVID. § 621 (Deering 1967).

62. Note, *Conclusive Presumption of Legitimacy not Overcome by Negative Results of Blood Tests*, 34 S. CAL. L. REV. 104 (1960). *Accord*, SCHATKIN, DISPUTED PATERNITY PROCEEDING 197 (4th ed. 1967) in which the attorney stated "The qualified expert who reports an exclusion of paternity, is not testifying to his opinion, but to a scientific fact of nature."

63. Johnston, *Public Policy Considerations in Rulings on the Uniform Act on Blood Tests to Determine Paternity*, 4 WM. & MARY L. REV. 149 (1963).

64. Comment, *California's Tangled Web: Blood Tests and the Conclusive Presumption of Legitimacy*, 20 STAN. L. REV. 754, 759 (1968). For further discussion on the child and society *see* Adams & Gallagher, *Some Facts and Observations about Illegitimacy*, 10 CHILDREN 43 (1963); Lundberg & Lenroot, *Illegitimacy as a Child-Welfare Problem* pts. 1-3 (U.S. Dep't of Labor, Children's Bureau. Pub. Nos. 66, 75, 128, 1920-24); Note, *Liability of Possible Fathers: A Support Remedy for Illegitimate Children*, 18 STAN. L. REV. 859 (1966).

seem in many instances that the courts are grasping at anything in order to preserve the familial tie, and in doing so, often punishing the husband. It must be remembered that the conclusive presumption was intended to protect the child, but today, the emphasis seems to have shifted to placing sanctions on the husband.

As discussed earlier, there are well-founded exceptions to the conclusive presumption, but these exceptions lose their effectiveness when confronted with the evidentiary burden imposed by the courts. It is time for the courts and legislatures to bring the presumption of legitimacy out of the dark ages. The courts are ignoring scientific facts and realities which is no longer justifiable.