

Public Policy Considerations in Rulings on the Uniform Act on Blood Tests to Determine Paternity

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PUBLIC POLICY CONSIDERATIONS IN
RULINGS ON THE UNIFORM ACT ON
BLOOD TESTS TO DETERMINE PATERNITY

ROBERT JOHNSTON

*Commonwealth v. Goldman*¹ provides an example of the reluctance of a court, in a jurisdiction that has adopted in its entirety the *Uniform Act on Blood Tests to Determine Paternity*,² to modify the existing statutory and common law presumptions operating in favor of the legitimacy of any child born in wedlock.

The act as adopted in Pennsylvania applies to "a civil action in which paternity, parentage or identity of a child is a relevant fact" and authorizes the court to order the mother, child, and alleged father to submit to blood tests. On refusal of any party, "the court may resolve the question of paternity, parentage, or identity of a child against such party." The single most important section of the Act as far as the Goldman case is concerned is section 5, which provides that "the presumption of legitimacy of a child born during wedlock is overcome if the court finds that the conclusion of all the experts as disclosed by the evidence based upon the tests shows that the husband is not the father of the child."³

In their comments on the Uniform Act, its authors gave these reasons for writing section 5:

A new provision referred to in section 5 has been drawn relating to children born in wedlock claimed to be illegitimate. Most states have a strong presumption of legitimacy—in fact, a conclusive presumption of legitimacy of children born in wedlock except in such situations as impotency, non-access, and a child of a different race. As to all other situations, the child is conclusively presumed to be legitimate when born in wedlock. This is based on social policy today. It has also been influenced by the

¹ 199 Pa. Super. 274, 184 A.2d 351 (1962).

² 9 ULA 102-114.

³ PA. STAT. ANN. *tit.* 28, secs. 307.1-307.10 (1961).

difficulty of proof with certainty. Where blood tests could determine with absolute accuracy the non-paternity of a child born in wedlock, the presumption should yield. Therefore, this act is drawn to include those cases.⁴

The Goldman case was an action by the wife against her husband, with a divorce pending, for support of minor children born during wedlock. The defendant husband filed a petition denying paternity and praying for an order requiring submission of the necessary parties to blood grouping tests. The court ordered the tests under the Pennsylvania Uniform Act, and, on an appeal by the wife affirmed the order, holding that the act applies to such a proceeding despite the birth of the children during wedlock and the absence of other evidence to rebut the presumption favoring the legitimacy of children so born.

While the opinion accepts the interpretation of the Act that its authors clearly intended, it does so unwillingly:

But the legal rules devised to support legitimacy were . . . based upon an evident desire of the courts to preserve the sanctity of the family. The rules were deemed "essential in any society in which the family is the fundamental unit" and were "founded in good morals and public decency."

We recognize that there is something disgusting about a husband who, moved by bitterness toward his wife, suddenly questions the legitimacy of her child whom he has been accepting and recognizing as his own. Except in rare situations the rules of evidence have heretofore prevented his doing this.

. . . By providing a new method to overcome the presumptions of legitimacy, the legislature has opened avenues to a husband to question the paternity of his wife's children which never before were available to him.⁵

⁴ 9 ULA 108-109.

⁵ *Supra*, note 1, 354-55.

As a ground for excluding the case at bar from the application of the Act, the dissenting opinion uses Art. 3, Sect. 3 of the Pennsylvania Constitution, which provides that "no bill, except general appropriations bills, shall be passed containing more than one subject, which shall be clearly expressed in its title." But it appeals essentially to public policy:

It appears to me that the majority are reading into the title of the Act a main objective or purpose not expressed therein . . . ; whereas the *real* object as set forth in the title is to bestow power upon the courts to authorize blood tests under certain circumstances. I cannot give to the phrase "the effect thereof"⁶ the broad meaning given by the majority . . . In my opinion these words fail to indicate reasonably the vast changes in the law which will result from the view adopted by the majority. If its view is adopted, then, in every proceeding, civil or criminal, wherein paternity, parentage or the identity of a child is involved (the child may be an infant or a septuagenarian), the charge of illegitimacy may be raised by any party to the litigation. Families may live together for many years before this charge is asserted. This is clearly against all reason, common sense, and morals, in the light of the sanctity which we have given to the family unit in our way of life.⁷

For ten years prior to the passage of the Uniform Act on Blood Tests to Determine Paternity, Pennsylvania had had a law providing for the submission of parties to blood grouping tests under certain circumstances. In the cases arising under this law, the courts were reluctant to permit an interpretation of the statute that would add to the existing grounds for the bastardization of a child. This law was known as the Act of May 24, 1951, P. L. 402, 28 P. S. 306, and provided that

In any proceeding to establish paternity, the court, on motion of the defendant, shall order the mother, her

⁶ The title of the act, as it appears in Pennsylvania law, is "Uniform Act on Blood Tests to Determine Paternity: An Act Authorizing the Court to Order the Parties Under Certain Circumstances to Submit to Blood Grouping Tests Under Certain Conditions, and the Effects thereof."

⁷ *Supra*, note 1, 357-58.

child, and the defendant to submit to one or more blood grouping tests, by a duly qualified physician, to determine whether or not the defendant can be excluded as being the father of the child, and the results of such tests may be received in evidence, but only in cases where definite exclusion of the defendant is established.

In *Commonwealth v. Hunsick*,⁸ upon a charge and conviction of fornication and bastardy, the defendant used in his defense blood tests that excluded him as father of the bastard child born to the prosecutrix. The court ruled:

Appellant's principal contention is that since he was excluded as the child's father by the blood grouping tests, the trial judge "must direct a verdict of not guilty." This contention is based upon the provision of the Act of May 24, 1951 [quoting act]. The Act of 1951 does not accord to blood grouping tests the conclusive effect for which appellant contends. The statute merely provides that such tests "may be received in evidence."⁹

But it was to the case of *Commonwealth ex. rel. O'Brien v. O'Brien*¹⁰ that the court in the Goldman case devoted most careful attention, for the critical difference between the wording of the 1951 Act and that of the Uniform Act revealed the intention of the Legislature in incorporating the Uniform Act into the body of Pennsylvania statutory law.

The O'Brien case was a proceeding by a former wife to increase the amount of a support order entered in favor of her and a daughter, and to include a son born before her divorce but after separation from her husband. Disavowing paternity of the son, the former husband moved for the compulsory blood grouping test under the 1951 Act. The trial court dismissed the motion. On appeal of the case to the intermediate court, the husband contended that only the word "proceeding" in the 1951 Act required interpretation to determine the scope of the Act relative to appellant's request for a blood test to de-

⁸ 182 Pa. Super. 639, 128 A.2d 169 (1956).

⁹ *Id.* at 170-71.

¹⁰ 182 Pa. Super. 584, 128 A.2d 164 (1956); 390 Pa. 551, 136 A.2d 451 (1957).

termine the paternity of the child. But the court took the view that "to establish paternity" were the really significant words of the Act, and that the action at bar was not a proceeding to establish paternity. The ruling opinion referred to the existing presumptions of legitimacy:

The presumption of legitimacy is one of the strongest known to the law. It stands until met with evidence which makes it clearly appear that the husband cannot be the father of the child [citation omitted].

... We do not find in the Act of 1951 a clear and express mandate to depart from a rule which has been so firmly established and so long followed.

... To uphold appellant's contention would mean that paternity could be brought into issue in every support case. In view of the bitterness which frequently exists between husband and wife at such a time, there is little doubt that paternity would often be questioned for the sole purpose of embarrassment and delay. To order a blood grouping test in the case at bar would do more than establish a new rule of evidence. It would create a whole new philosophy concerning the presumption of legitimacy. This we think the Legislature did not intend to do by the Act of 1951.¹¹

The dissenting opinion attacked the justification in public policy for imposing a conclusive presumption of legitimacy upon the parties:

... Not all rules of evidence are designed to determine the truth, but some are designed to establish a desired relationship between parties, or to strengthen family ties. Assuming, without admitting, that there are sociological reasons for establishing a conclusive presumption of legitimacy when a child is born or conceived while its mother and her husband are living together as husband and wife, I can see no sociological or other reason to apply a conclusive presumption of legitimacy when the mother

¹¹ 128 A.2d 164, 66.

and her husband were, as here, "living apart" when the child was conceived and born.¹²

A divided court of last resort affirmed this decision, and on the same grounds.¹³ Considerations of public policy again played a part in the contrasting opinions. The court ruled:

It is true that the present proceeding is one in which paternity is relevant or one in which paternity is an issue, but it is not a proceeding brought to establish paternity. In support actions brought by a wife against a husband for support of a minor child born during wedlock, paternity has already been established in the eyes of the law by operation of the presumption of legitimacy of children born during wedlock . . . The presumption of legitimacy is invoked at the very moment of birth and no further proceedings are required to establish the paternity of the child. This presumption is essential in any society in which the family is the fundamental unit.¹⁴

The dissenting opinion held that the majority had missed the point at issue in invoking the presumption of legitimacy at all:

. . . To hold that a "presumption" established a fact "in the eyes of the law" is not only to look upon justice as blindfolded, but to blind her by the law's own hand. The very nature of a "presumption" is to permit it to be rebutted by clear evidence to the contrary, and no evidence known to the judicial process is more lucid and scientifically certain than the blood grouping test when used to negative paternity . . . The ultimate vice of the majority opinion is not merely the improper use of a "presumption" as a substitute for fact, but the use of the presumption at all . . . The only question is whether the Legislature intended to narrowly limit the grant to defendants of a judicial means of acquiring clearly admissible and relevant evidence,

¹² *Id.* at 168.

¹³ 390 Pa. 551, 136 A.2d 451 (1957).

¹⁴ *Id.* at 453.

to only one class of defendants [those who have purportedly fathered a child out of wedlock], or whether in view of the broad language employed, a wider application was intended.¹⁵

The situation of the O'Brien and Goldman cases is the same: a disaffected husband, faced with the imminence of a court order compelling him to support children who he is sure are not his own, petitions under the applicable statute for a compulsory blood test in the hope that the test results will scientifically exclude him from being the father.

In the O'Brien case the court twice rejected the petition and refused to admit within the meaning of the language "a proceeding to establish paternity" in the 1951 Act, a proceeding to which paternity had acknowledged relevance.

But the language of section 1 of the Uniform Act, adopted in 1961, left the court in the Goldman case no such opportunity for a strict construction of the statute. The Goldman case was a civil action in which paternity, parentage, or identity of a child was a relevant fact; and the language of section 1 of the Act expressly provides for such situations.

The opinion in the O'Brien case ruled that only the nature of the proceeding stood between the petitioner and the blood test that he sought to have administered. In the Goldman case the nature of the proceeding was the same, and the more general language of the Uniform Act now compelled sanction of the tests.

Another reason for the court's reluctance in the Goldman case to find authorization in the statute for granting the blood test is that presumably, having followed the way indicated by the language of section 1 of the Uniform Act, the

¹⁵ *Id.* at 455-56. A 1959 Pennsylvania case referred approvingly to the *O'Brien* case on the issue of the strength of the presumption of legitimacy. This was *Commonwealth v. Carrasquilla*, 191 Pa. Super. 14, 155 A.2d 473. In this case the prosecutrix proceeded for neglect to support a child born out of wedlock. Although the prosecutrix was separated from her husband, no decree of divorce had issued prior to the conception of the child. Held: in view of the strength of the presumption of legitimacy, the evidence, for failing to show non-access of the husband beyond a reasonable doubt, was insufficient to sustain a conviction.

court must also follow the language of section 5 of the Act if the test results excluded the husband from being the father of the child in question. For then the court must allow the findings of those tests to overcome any presumptions of the legitimacy of children born during wedlock, however conclusive at common law.

This the court in the O'Brien case would certainly not have wanted to do. In fact, in reasoning that the case was not a proceeding to establish paternity, the court presumed that the operation of law had already established it. *A fortiori*, then, paternity being established, the case at bar could not possibly be such a proceeding.

Nor has Pennsylvania alone traveiled over the quantum of inviolability that the law may feel free to construct about the noumenon of a family in order to protect it. These are the jurisdictions that have enacted the *Uniform Act on Blood Tests to Determine Paternity*:

New Hampshire	April 1953
Oregon	May 1953
California	September 1953
Illinois	July 1957
Pennsylvania	July 1961
Panama Canal Zone	February 1963

In their versions of the Uniform Act, California and Oregon omit section 5.¹⁶

Those adopting the Act have approached in two ways the question whether, as between the revealed truth of science and the considered experience of law, science will prevail. The designers of the Uniform Act recognized that a given man is either the father of a given child, or is not; the two conditions cannot simultaneously obtain. Pennsylvania, Illinois, and the Canal Zone now face a literal application of this logic to those uncertain areas in which the ancient and arbitrary presumptions of legitimacy would formerly have been decisive.¹⁷ The other jurisdictions that have adopted the Act have

¹⁶ 9 ULA 104.

¹⁷ *California's Conclusive Presumption of Legitimacy—Its Legal Effect and its Questionable Constitutionality*, 35 SO. CAL. L. REV. 437, 454 (1962).

nonetheless enabled their courts, for reasons of public policy, to indulge in the irrationality of imposing paternity of a child upon a husband who the science of genetics incontrovertibly determines is not its father.¹⁸

California and Oregon are two jurisdictions that have enacted the Uniform Act without section 5. This omission permits them to retain the presumptions of legitimacy already extant in their law. Two California cases demonstrate how a court can facilitate the imposition of paternity upon a husband in spite of the contradictory results of blood grouping tests.

*Kusior v. Silver*¹⁹ was an action to establish paternity and to provide for support of a child born to plaintiff nine days after the entry of a final decree of divorce. The court held that blood tests showing the husband could not have been the father still did not preclude the court from giving instructions regarding the conclusive presumption of legitimacy:

In *Hill v. Johnson* [citation omitted], a wife who was living in the same house with her husband at all times . . . brought suit against a third party for support. Blood tests disclosed that the husband could not have been the father . . . "Evidence of the result of a blood test is to be considered with all other evidence in the case and is not conclusive. It was error to admit the evidence since it is contrary to the conclusive presumption of legitimacy." The Hill case was decided in 1951, and the Legislature in 1953 enacted our version of the *Uniform Act on Blood Tests to Determine Paternity*, providing . . . "If the court finds that the conclusions of all the experts . . . are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly" [citation omitted]. However, the Legislature significantly refrained from adopting section 5 of the Uniform Act . . .

. . . It is apparent that the failure of the Legislature to enact that part of the Act which would specifically have

¹⁸ *Exclusionary Blood Tests in Disputed Paternity Proceedings*, 18 NYU INTRA. L. REV. 437, 454 (1962).

¹⁹ 7 Cal. Rptr. 129, 354 P.2d 657 (1960).

enabled the result of a blood test to overcome the conclusive presumption declared in the Code Civ. Proc. #1962, subd. 5, must be deemed an intention not to change the rule stated in *Hill v. Johnson, supra*.

Moreover, section 1962, subd. 5, was amended in 1955 by the addition of the emphasized words "*notwithstanding any other provision of law*, the issue of a wife cohabiting with her husband who is not impotent is indisputably presumed to be legitimate."²⁰

In Oregon, in the absence of any cases, ORS 109.070 would apply: "The child of a wife cohabiting with her husband who is not impotent shall be conclusively presumed to be the child of her husband, whether or not the marriage of the husband and wife may be void."

No cases in point have yet appeared in Illinois or the Panama Canal Zone.

In general, jurisdictions which in disputed paternity cases accept as conclusive evidence blood tests excluding a party from paternity also extend the principle unaltered to cases affecting the legitimacy of children born in wedlock.²¹ Other jurisdictions in general hold evidence that the results of blood grouping tests indicate nonpaternity is not conclusive on the question of disputed paternity, but is merely entitled to the same weight as other evidence.²²

Virginia law is silent on the relevance of blood tests to conclusive presumptions of legitimacy. The inference there-

²⁰ *Id.* at 667. The court affirmed this same position a year later in *Wareham v. Wareham*, 15 Cal. Rptr. 465, 195 Cal. App. 2d 64 (1961), which was a proceeding to modify an interlocutory decree of divorce. Blood tests excluded the husband from being the father of the child whose paternity was in issue. At the same time, there was evidence to the effect that at the time of the child's possible conception the wife was cohabiting with her husband. The court ruled that the statutory conclusive presumption of legitimacy applied. The *Southern California Law Review* article (*supra*, note 17) reviews a quarter century of similar California decisions.

²¹ *C. v. C.*, 200 Misc. 631, 109 NYS 276 (1951); *Houston v. Houston*, 199 Misc. 469, 99 NYS 2d 199 (1950); but *Cf. Complaint of Dunn*, 203 Misc. 181, 115 NYS 2d 348 (1952).

²² *State by Doloff v. Sargent*, 100 N.H. 29, 118 A.2d 596 (1955).

fore may be drawn that in Virginia, in cases in which the paternity of a child born in wedlock is in issue, the results of blood grouping tests cannot, *per se*, rebut the presumption that the child is legitimate.²³

A strong tradition of law, then, stands in the way of the ready acceptance of the *Uniform Act on Blood Tests to Determine Paternity* in the form in which the Commission on Uniform Laws approved it. Two of the six jurisdictions that have adopted it have deliberately modified it to permit them to sustain that same tradition. The available case from the jurisdictions that have adopted the Act in its entirety shows a court applying it as written with evident reluctance to do so.

²³ The Virginia courts' position on the evidence sufficient to overcome the common law presumption of legitimacy appears in *Watkins v. Carlton*, 10 Leigh (37 Va.) 586, 601-02 (1840); *Reynolds v. Adams*, 125 Va. 295, 99 S.E. 695 (1919); *Hoover v. Hoover*, 131 Va. 522, 109 S.E. 424 (1920); and *Parker v. Harcum*, 201 Va. 441, 111 S.E. 2d 444 (1959).