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SOME OBSERVATIONS ON THE UN-UNIFORM ACT ON BLOOD TESTS TO DETERMINE PATERNITY*

A. Frederick Harris†

OF THE VARIOUS state and territorial jurisdictions which by judicial decision or statute have admitted into evidence the results of blood grouping tests,1 a reasonable facsimile of the Uniform Act on Blood Tests to Determine Paternity is now in effect in only six, including one territory.2 As severally enacted, the Uniform Act betrays its name. The purpose of this article is to discuss with reference to the Uniform Act and its purported state counterparts: (1) some cases in which the Act provides that a blood test shall be taken and (2) some situations in which the test results will be admitted into evidence and the effect of such admissibility, if any, upon fact questions.

I. THOSE CASES IN WHICH THE ACT PROVIDES THAT A BLOOD TEST SHALL BE TAKEN

This title would, at first glance, appear to be distinguishable from discussion topic (2) noted above. But the ease with which courts confound the difference between them (given a little legislative help in the enacting process) is illustrated by a recent pair of California decisions.

When the California legislature enacted its version of the Uniform Act, it omitted the provision that “The presumption of legitimacy of a child born during wedlock is overcome if . . . the conclusions of all the experts . . . show that the husband is not the father of the child.”

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* THE UNIFORM ACT ON BLOOD TESTS TO DETERMINE PATERNITY as approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in 1952, is reprinted in the Appendix to this article.

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Discussion of this portion of the statute is topically germane to the effect upon fact questions, if any, which admissibility of test results would have, and in that context more anon. However, when a husband attempted to escape child-support liability by introducing not only test results of his wife and alleged offspring, but also convincing testimony concerning the unusually long period of gestation (304 days) and the fact that the wife admitted extra-marital relations, the above-noted legislative omission inspired an appellate court to observe that this omission reflected a legislative purpose to restrict the relevance of the statute to bastardy proceedings. Two years later this decision was again in the fore in an interesting three-party paternity proceeding. The plaintiff and her (non-party) husband had separated in February, 1953, obtaining an interlocutory decree of divorce in July, 1953. The child involved was probably conceived in October or November, 1953. Both plaintiff and her husband testified that sexual relations between them ceased at the time of separation. However, the husband did continue to visit the couple's old home allegedly to see their eight-year old child. Witnesses testified, and plaintiff admitted, that sometimes the husband stayed until three or four in the morning. There was other testimony which indicated that other men had also visited the home throughout this period, but none of the said testimony directly involved the defendant. Plaintiff maintained that the defendant was the only man with whom she had had intercourse during this period. Blood tests showed that the plaintiff's husband could not have been the father of the child, but that defendant was within the class that could have been. Under the California statutes concerning legitimacy it was arguable that plaintiff's (non-party) spouse fathered the child, and


6. Compare Cal. Code Civ. Pro. § 1962(5): “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. . . .” (emphasis added) with Cal. Code Civ. Pro. § 1963: “. . . a child born in lawful wedlock, there being no divorce from bed and board, is legitimate. . . .” and Cal. Civ. Code § 193: “All children born in wedlock are presumed to be legitimate.” Both latter presumptions are disputable; the last applies to all children born within ten months of the “dissolution of the marriage.” Cal. Civ. Code § 194. The cohabitation necessary to invoke the former, and indisputable, presumption is cohabitation at the time of conception which involves much more than the mere possibility of access at conception. Kusior v. Silver, 54 Cal.2d 603, 354 P.2d 657, 7 Cal. Rptr. 129 (1960). Recently there has been asserted a rebuttable common law presumption of legitimacy—arising from the mother's cohabitation with her husband at the time of conception—by a court which confused this asserted presumption with the common law rebuttable presumption codified by Cal. Civ. Pro. § 1962 noted supra. The court then compounded its error by reversing a trial court's determination that the presumption had been rebutted when birth occurred after a divorce, though within the ten month period prescribed by Cal. Civ. Code § 194. See People ex. rel. Gonzalez v. Monroe, 192 N.E.2d 691 (Ill. App. 1963). The California legislation served as the model for similar Canal Zone provisions, see C. Z. Code tit. 8, §§ 331-333 (1963).
The defendant used the first case as a basis for contending that while the Act applied only in non-filiation proceedings, the omission of the presumption portion of the Act—coupled with the already extant legitimacy statutes—expressed legislative purpose that the male spouse be saddled with paternity under the facts in question. The California Supreme Court rejected this argument, and also expressly disavowed the "dictum" of the first case that was allegedly to the contrary. The point here is not to comment upon whether counsel accurately cited these cases for what they held, nor whether each individual case is decided correctly under the relevant California law. It is merely to demonstrate that the cases are not necessarily irreconcilable.

The Uniform Act provides that the court on its own initiative or upon "suggestion" by anyone whose blood is involved may order blood tests "In a civil action, in which paternity is a relevant fact. . . ." While some enactments of this language have made minor changes in phraseology, all enactments correct the unduly restrictive effect of decisions under less happily-drafted antecedent blood test legislation. For example, the Pennsylvania Supreme Court, in an action by a divorced woman against her ex-husband to have a support order modified to include a child born after the divorce, held that the ex-husband was not entitled to demand a blood test because a support action was not, in the language of the antecedent statute, a "proceeding to establish paternity. . . ." However, as has been noted, the Uniform Act's language does not go as far as it could, for if paternity is not a relevant fact but someone's blood type is, a blood test will not be forthcoming under

7. UNIFORM ACT § 1.
8. E.g., PA. STAT. ANN. tit. 28, § 307.1 (Supp. 1962): "In a civil action in which paternity parentage or identity of a child is a relevant fact . . . " But cf. ORS 109.110 to 109.230 (1961) which provides for blood tests "In a civil action under ORS 109.110 to 109.230 in which paternity is a relevant fact . . . ." (Emphasis added.) The italicized statutes apply to proceedings concerning a child born out of wedlock "or . . . if born alive (which) may be born out of wedlock . . . ."
9. Commonwealth ex. rel. O'Brien v. O'Brien, 390 Pa. 551, 136 A.2d 451 (1957) (4-3), interpreting PA. STAT. ANN. tit. 28, § 306 (1951). (This act was repealed July 13, 1961.) The holding—that the defense to a child support action raised when defendant alleges he is not the child's father fails to convert the litigation into "a proceeding to establish paternity"—has been called "illogical," Comment, 31 TEMP. L.Q. 397 (1958). It is not illogical, however, if one categorizes the action solely upon the basis for relief presented by plaintiff. This is exactly the procedure followed, for example, by a federal court when it is called upon to determine whether or not litigation presents a "federal question" for purposes of conferring jurisdiction upon a United States District Court. However, the opinion's reasoning lacked power. It relied heavily upon Commonwealth ex. rel. Stappen, 336 Mass. 174. 143 N.E.2d 221 (1957), in which that court noted that while prior to enactment the proposed Massachusetts blood test legislation read: "Whenever it shall be relevant . . . to determine the parentage or identity of any person . . . it was amended during the enactment process to read "In any question to determine the question of paternity. . . ." The Massachusetts court then approved tests on common law grounds. The Pennsylvania court argued not from legislative history but by legislative analogy, noting that " . . . the Pennsylvania legislature employed terms of wider application when it made birth certificates prima facie evidence of their contents in proceedings in which 'paternity is controverted.'" (Emphasis by the court.)
the current phraseology. Perhaps in a case where the Act does not specifically apply but a plaintiff capriciously refuses to accede to defendant's request for a test, the judge could delay plaintiff's action until acquiescence.

Contemporary case law has seemingly recognized the availability of blood tests to a husband who separated from his wife shortly after the birth of their first child (and before their second child was born) and who must defend a divorce action which also seeks support for both children. However, in Commonwealth v. Goldman the Pennsylvania Superior Court has recently recognized that the broad language of the Uniform Act does not entirely sweep away traditional judicially-formulated doctrines, which therefore remain to interact with and temper the legislative policy. Consider the Weston case in which, two and a half years after the birth of their last child, the couple separated and the wife filed an action for support (but not for divorce) for herself and for the two children of the marriage. The husband countered with a demand for blood tests of the two children. In reversing an order granting the husband's request, the court said: "Defendants in the heat of these actions should not be provided a legal vehicle whose chief use will be to embarrass their wives and injure innocent children. . . ." The court held that the husband was "estopped" from demanding the tests which, upon a first reading of the Goldman opinion and without further judicial influence, one might think the husband was entitled to as a matter of right. What the court actually did here was to protect two analytically separable relational interests. Aside from the policy of sparing wives' embarrassment, the court may have forestalled an action which might well have ended any hope of reconciliation between the spouses. It may be arguable that to prevent an irreparable family breach is a worthwhile policy particularly when the future of young children is at stake. If, however, the action merely is one to increase a support order which accompanied a prior divorce decree, or if the support action originates after the conclusion of the divorce proceedings, the above rationale fails. Further, it has been argued that an unqualified utilization of the Uniform Act would

14. Id. at 783. But see Weinreb, Book Review, 76 Harv. L. Rev. 1695, 1701 (1963): "The policy of holding liable all fathers and exonerating all men who are not fathers is unquestioned. . . ."
permit familial relationships which have acquired solidified acceptance to be challenged or disrupted long after the factual beginnings of such acceptance. 10 This is the second relational interest which the result reached in the Weston case operates to protect. While it is true that the majority opinion in Goldman contained a vaguely worded threat of estoppel in answer to the argument in favor of protecting this second relational interest, which was advanced by the Goldman dissent, perhaps it was too-vaguely worded to command respect until the result in Weston was reached. 11 In any event, the situation now seems to be that before successfully seeking a blood test as of right, one must not only rely upon the statutory language, but also carefully analyze the family relationship as it existed for some time prior to the demand for the blood tests. Absent some judicially-formulated doctrine which would forbid a litigant in certain circumstances from challenging family relationships, there seems to be no reason why defendants should not be allowed to utilize the mechanism of the Uniform Act, inasmuch as defendants could introduce evidence of blood types fortuitously available from other sources to prove the same issues. 12


17. Commonwealth v. Goldman, 199 Pa. Super. 274, 283, 184 A.2d 351, 355 (1962). However, the facts in the Weston case presented unacknowledged though difficult problems for the court in attempting to apply traditional estoppel concepts. In other words, in order to use the estoppel concept as a defense, it must be shown that there was an acknowledgment of paternity on the part of one party to the other, which extracted a corresponding reliance thereon. Thus, if a defendant husband is to be estopped from denying paternity, the representation and reliance must interact between the husband and child. Clevenger v. Clevenger, 189 Cal. App. 2d 22, 11 Cal. Rptr. 707 (1961). See Annot., 90 A.L.R.2d 58, 3 (1963). On the contrary, the older of the two children in the Weston case was about four years old at the time of the support action, making doubtful the presence of any reliance interest. Compare the child’s age in Haugen v. Swanson, supra note 16. Further, the court in the Weston case observed that defendant’s children “... were accepted and held out to the world by him as his children until his wife’s personal differences led to a support action...” (Emphasis added.) But see Lyons v. Scott, 181 Cal. App. 2d 787, 1 Cal. Rptr. 529 (1960). The case involved non-defendant husband in child-support proceedings who, prior to suit, had admitted paternity, paid support funds on an informal basis through the Probation Office, and who had claimed the offspring as exemptions for federal income tax purposes. The court held (alternatively) that he was not forbidden to apply for blood tests in a formal support action. Cf. State v. Carter, 191 N.E.2d 541, 543 (1963) (Presumption of legitimacy of offspring of plaintiff wife negates estoppel against non-spouse defendant) (by implication); Arais v. Kalensnikoff, 10 Cal.2d 428, 74 P.2d 1043 (1937). See Annot., 115 A.L.R. 167 (1938): “In the birth certificate, the mother caused John Morales to be named as the father of the child; but this does not raise an estoppel against her... There is no evidence that she led the defendant to believe that this statement was true...” 74 P.2d at 1047.

18. Vecchi, Artificial Insemination and Legitimacy in Pennsylvania, 66 Dick. L. Rev. 1, 5 (1961). The assumption here is that the Uniform Act does not provide
With the exception of certain minor procedural changes tailored to fit the nature of criminal cases, the Uniform Act provides that "This act shall apply to criminal cases..." One immediate issue which suggests itself is whether the availability of blood tests in criminal cases is limited by the earlier-noted provision that a blood test shall be ordered only when paternity is a relevant fact. It has been assumed that the criminal proviso is not so limited. This interpretation could lead to many difficulties because, in some instances, it would be advisable to have the case labelled a criminal proceeding in order to avoid the problem of whether paternity must be a relevant fact before a blood test can be ordered. One purpose for which a blood test can be ordered, where paternity is not "a relevant fact," is for purposes of impeachment. In a recent New York case, defendant was indicted for second-degree rape, which allegedly resulted in prosecutrix's pregnancy. There were multiple acts of intercourse alleged between the prosecutrix and defendant. In a preliminary statement, prosecutrix swore that she had had relations with no one other than the defendant. In a jurisdiction providing for blood tests by statute, though not having the Uniform Act, the trial judge, noting the absence of compelling appellate authority, held that the defendant was entitled to have prosecutrix and her child submit to tests, on the theory that if the results indicated that the defendant was not the child's father, this would impeach prosecutrix's preliminary statement, though these same results would not exculpate defendant of the charge of second-degree rape. The trial judge followed an earlier and very similar California case decided under the Uniform Act, a case which did not, however, consider the problem of whether paternity had to be "a relevant fact" in a criminal proceeding before a blood test would be ordered. However, it is submitted that even if the Act is read so that paternity must be a relevant fact before the test will ensue, nevertheless, on facts close to the two above-noted cases, a request for tests by defendant should be honored. It may be that where, upon preliminary examination, prosecutrix swears that defendant is the only man with whom she ever had relations, she may not be lying, but merely mistaken as to defendant's identity. If this is the case, then the test results excluding paternity would ipso facto be exculpatory of the crime. In both the New York and California cases noted above, this seems unlikely because of the allegations of repeated illicit acts on the part of both defendants. However, in situations where only one criminal act

the only device for introducing evidence of blood types, but merely supplements those situations in which other proof may or may not be obtainable.


is alleged, the blood test may provide a needed safeguard against mis-

taken identity.

Among the noteworthy cases in which a court might order blood
tests is the situation where the female plaintiff wants the putative father
of her child to submit to tests. Formerly, in view of the fact that a
blood test could not conclusively prove paternity, but only disprove it,
plaintiff's application would be denied. 23 Thus, when a mother sought
damages from the alleged father of her child for breach of a contract
for support, her demand that the defendant submit to a blood test to
further establish his liability was refused. This position is implicit,
though not inexorable, in the light of holdings to the effect that when
a defendant submits to a blood test in the hope that it will disprove
paternity, but his hopes are frustrated by the test results which indicate
the possibility of paternity, the adversary may not then utilize the test
results. These conclusions were reached both under blood test
statutes 24 and apart from them. 25 This rule of exclusion of evidence,
however, does not prevail under the Uniform Act, as will shortly be
demonstrated, and hence the female plaintiff under the language of
section 1 of the Uniform Act may ask a court to order defendant's
submission to blood tests. Further, Section 1 of the Uniform Act
declares that "If any party refuses to submit to such tests, the courts
may resolve the question of paternity against such party. . . ." In the
ordinary statutory rape case, this could lead to the possibility of a
prima facie finding of guilt. In a situation where the prosecution
may use the test results as evidence of the possibility of paternity, it
may put the defendant in the unpleasant position of either refusing to
take a blood test, risking a finding of paternity against him, or
taking the blood test and, if it does not exclude the possibility of
paternity, having the results introduced against him as evidence of the
possibility that he fathered the prosecutrix's child.

II.

THE ADMISSIBILITY OF BLOOD TEST RESULTS INTO EVIDENCE AND
THE EFFECT THEREOF

Section 2 of the Uniform Act provides for the test-taking pro-
cedure, including provisions for the appointment of experts by the
court itself. 26 It is further provided that the party which moved the

Morris, 156 Ohio St. 333, 102 N.E.2d 450 (1951).
26. This is important. If the only testimony is that of an expert chosen by one
of the parties, his evidence of exclusion will not overturn on appeal a contrary finding
court to appoint test-conducting experts may "demand" that other qualified experts perform additional tests, the results of which shall also be admissible. However, some procedural questions are left unanswered: (1) why the non-moving adversary should not likewise be permitted to demand additional tests when he is unsatisfied with the originals, and (2) in view of the fact that the court may order the tests sua sponte, why none of the non-moving parties in this instance has a similar right. There is, however, a provision that the experts "shall be subject to cross-examination by the parties." Assuming compliance with the procedural requirements, and the queries are laid aside, one is then confronted with the question of whether or not the test results should be admitted into evidence.

Aside from a situation in which the experts "disagree in their findings or conclusions," in which case "the question shall be submitted upon all the evidence . . .," section 4 of the Uniform Act provides for two major contingencies, the first of which declares:

If the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly.\(^{28}\)

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of paternity, Lyons v. Scott, 181 Cal. App. 2d 787, 5 Cal. Rptr. 529 (1960) (alternative holding). Before adoption of the Uniform Act in New Hampshire, it was held in an annulment proceeding that plaintiff-husband’s expert could testify as to test results which were entitled to evidentiary weight. On all the evidence, non-jury finding of non-paternity was not erroneous; however, expert’s testimony was weakened by informal remarks of another expert as to tentative scientific acceptance of non-paternity shown by results of particular test administered. Groulx v. Groulx, 98 N.H. 481, 103 A.2d 188 (1954).

27. The Uniform Act’s language seems to contemplate a plurality of experts, though one expert’s testimony was admitted in State ex. rel. Dolloff v. Sargent, 100 N.H. 29, 118 A.2d 596 (1955); see Kusior v. Silver, 54 Cal.2d 620, 354 P.2d 668-69 n.5, 7 Cal. Rptr. 140-41 n.5 (1960); accord, (under other legislation) Commonwealth v. D’Avella, 339 Mass. 642, 162 N.E.2d 19 (1959) (sole expert’s exclusionary testimony went unchallenged). The wisdom of the provision providing for cross examination of experts cannot be over-emphasized, since blood test results are not quite cut and dried. Cross-examination might point out the less than conclusive nature of the particular test administered, or develop evidence of scientific disagreement as to the significance of its results. The possibility exists that the tests were inefficiently administered. See Mitulinski v. Mitulinski, 17 App. Div.2d 238, 234 N.Y.S.2d 313 (1962), in which a husband’s divorce decree, granted on the basis of blood test evidence, was upset because: (1) there was no evidence that an unmarked test tube of blood taken from the umbilicus of the subsequently deceased infant was in fact the blood tested; (2) two important serum checks which should have been made were in fact omitted. But see, as to point (1), State ex. rel. Dolloff v. Sargent, 118 A.2d at 598-99; cf. Wooley v. Hafner’s Wagon Wheel, Inc., 22 Ill. 2d 413, 176 N.E.2d 757 (1961). There, the litigant seeking to challenge admissibility of blood test for alcohol content had the burden of showing some irregularity in the chain of possession of the blood sample. The holding is limited to civil cases; see Comment, 110 U. PA. L. REV. 895, 897-98 (1962), which takes the position that differing criminal and civil standards of proof affect only the weight, not the admissibility, of such evidence. As to Mitulinski’s point (2), see Comment, 50 MICH. L. REV. 582, 595-96 (1952) which describes three ways in which serum used in blood tests can be checked for viability. See also Littell & Sturgeon, Defects in Discovery and Testing Procedures: Two Problems in the Medicolegal Application of Blood Grouping Tests, 5 U.C.L.A. L. REV. 629, 635-43 (1958).

Every jurisdiction that has enacted the Uniform Act has included the above provision except Utah, which merely provides that: "The results of the test shall be received in evidence where definite exclusion of parentage is established, otherwise the results of the tests shall be inadmissible. . ." However, it has been held under other blood test legislation that even where the statute provides for admissibility of test results, but is silent upon their evidentiary weight, exclusionary test results would determine the issue. It is possible that even the Utah courts would reach a similar result, even though an argument could be made that the legislature by omitting the above provision had some other result in mind.

The Uniform Act provision noted above was adopted to "remedy" the outrage exemplified by a 1937 California holding which permitted a finding of paternity in the face of blood tests showing a contrary, that is, exclusionary, result. Nine years later this case became a cause celebre when three physicians testified that Charles Chaplin could not have fathered Joan Berry's child. The appellate court, nevertheless, refused to overturn the jury finding that Chaplin could have, and did.

Even though the experts agree that the test results show exclusion, it is still possible that a given defendant may be the father. One recent evidence casebook categorizes this area as one in which the courts should take judicial notice of exclusionary results. This, however, is not precisely accurate, inasmuch as mutations do occur making it some-
what less than absolutely certain that test results agreed to as exclusionary always reflect the truth, and courts have been careful to scrutinize such situations carefully when alerted to them. But the Uniform Act's inflexible result when all the experts do agree removes in this area, what may be said to be the greatest conceptual flaw in the law of evidence, namely, the sacrifice of probability upon the altar of less-than-absolute certainty. Undeniably, the Uniform Act has labelled exclusionary blood tests as falling into the judicial notice category even though these are not traditional judicial notice situations. But there is no doubt that more cases will be decided correctly under this mandate of the Uniform Act than formerly, when blood test results indicating exclusion of paternity suffered the undeserved evidentiary ignominy of inadmissibility or disregard by the finder of fact.

Much more difficult, and hence more controversial, is the treatment of those cases in which the test results indicate with a greater or lesser degree of probability, but never with the high degree of certainty that accompanies an exclusionary result, that the defendant in fact did father the child in question. There are several possible methods of treating such test results.

One resolution, formulated in understandable pique at a court's refusal to admit any blood test results, would make the results of blood tests in paternity proceedings equally admissible with like evidence of blood types commonly admitted in criminal cases, that is, that the test results be admitted regardless of their showing. This solution is questionable because of the fact that quite frequently paternity proceedings differ strategically from the ordinary criminal case to which the commentator now analogizes. Consider one such leading case: defendant was accused of rape, and one exhibit was his overcoat which was smeared with type O blood. The prosecutrix likewise had blood

34. Weinreb, op. cit. supra note 14, at 1700. The rate of mutation has been calculated at 1 in every 10,000 cases. See Ross, The Value of Blood Tests as Evidence in Paternity Cases, 71 HARV. L. REV. 466, 471 (1958). However, since the uneven occurrence of these mutations in a given number of cases is an unknown, and assuming that blood test results disagree with the mothers' allegations more than once in every 10,000 cases, Ross concludes that "... the evidential weight of the test is a function of the (unknown) average truthfulness of the mothers ..." Id. at 476. The concept of truthfulness here must be leavened to mean good faith, since mothers might be misinformed as well as deliberate liars.

35. See Miller v. Domanski, 26 N.J. Super. 316, 97 A.2d 641 (App. Div. 1953), in which an expert testified that exclusion would have been shown by tests were it not for the mother's unusual "seriologic makeup." The Court held no error in excluding this testimony, and the finding of paternity was upheld.

36. Note, 43 YALE L.J. 651-52 (1934), criticizing State v. Damm, 62 S.D. 123, 252 N.W. 7 (1933); Annot., 104 A.L.R. 430 (1933). A later opinion in the same case, State v. Damm, 64 S.D. 209, 266 N.W. 667 (1936), ameliorates the doctrinal harshness of the original opinion but then somewhat undercuts this result by implying that in each case the proponent of blood test evidence will have to go through the dreary process in the trial court of laying a foundation of the scientific acceptability of blood test results.
type O. Defendant explained the bloodstains by stating that they were the result of a fight with another girl, who it turned out, had blood type A. Despite a logical hiatus in the conclusiveness of this proof (defendant's blood type was unknown; it could have been type O also, and the fight with the other girl could have accounted for its presence on his coat) the court held no error in admitting this evidence for whatever weight it might contribute. On these facts, however, in addition to whatever weight the blood-type evidence might have, there exists the independent corroboration, by defendant's own admission, that he was in an altercation with someone, and the jury could speculate whether the blood was in fact defendant's or the prosecutrix's. In paternity cases, however, particularly where defendant denies intercourse (as did Chaplin) the only other corroborative evidence is quite likely to be plaintiff's testimony. This coupled with admissible test results not having a sufficiently high degree of probative weight seems unduly prejudicial to defendant's case. Under the familiar A-B-AB-O sequence of blood types, the range of probability can be narrowed, at best, to thirteen per cent—and then only in some few cases—using the combined frequency of the two less-prevalent blood types, AB and B, which occur in three and ten per cent of the population respectively. For example, if the child's blood type is B, and the mother's is O or A, the father's must be B or AB, and we may conclude that only thirteen out of an average of any one hundred men could have been the father. Much less satisfactory results occur when the child and the alleged father have blood type factors O or A or both present, since these two types represent forty-five and forty-two per cent of the population respectively.

In these situations where the blood test results do not unequivocally exclude paternity, the Uniform Act likewise equivocates in the guise of the second major contingency of section 4:

If the experts conclude that the blood tests show the possibility of the alleged father's paternity, admission of this evidence is within the discretion of the court, depending upon the infrequency of the blood type.

One of the leading scholars in this area seems to approve of the above compromise provision: "In view of the probability that the development of new, additional tests may further narrow the group in

37. Shanks v. State, 185 Md. 437, 45 A.2d 85 (1945); Annot., 163 A.L.R. 931 (1945). But see Lane v. State, 172 A.2d 400, 404 (1961), cautioning that the evidence in Shanks was admitted on the state's rebuttal.


which the potential father must fall, the practice suggested in the Uniform Act seems an expedient solution."  

Applying the Uniform Act’s proposal to the A-B-AB-O blood types, imagine the following situation in which the mother’s blood type is O, the child’s is A, and the defendant’s is likewise type A. The father must, on these facts, be either type A or AB or, in other words, only forty-five out of every hundred average men could have fathered this child. Since the probability of paternity is inversely proportionate to the relative frequency of the blood type, the chances are slightly better than even on the basis of these results that a defendant whose blood type is either A or AB is in fact the father. Judicial discretion should be exercised to exclude this evidence because its probative weight is exceeded by its inflammatory nature. A case in which we know the father must be either blood type B or AB or, in other words, only thirteen out of an average of every one hundred men could have fathered the child, presents a borderline situation if we know the defendant’s blood type is one of those two. Perhaps admissibility here should turn on the corroborative effect of other evidence in the case, but the Uniform Act’s provision does specify that infrequency of the blood types in question shall be determinative of admissibility, and it could be implied that the criterion is intended to be an exclusive one. It must be noted, however, that the A-B-AB-O tests are only one of at least three tests which are physiologically separate but which by correlation of their independent results can perhaps reduce the possibilities of paternity more than any one individual test. Therefore, it might be possible to reduce the odds of a given defendant’s paternity below the thirteen per cent minimum provided by the A-B-AB-O sequence alone. Any such reduction of possibility could well influence a judge applying the Uniform Act to exercise his discretion of favor of admissibility.

The Uniform Act’s proposal has encountered divided legislative acceptance. California and Pennsylvania did not enact the quoted portion of section 4; Utah, as noted, specifically forbids such evidence; Oregon, New Hampshire and the Canal Zone, on the contrary, enacted the provision in haec verba. The view here is that the Utah provision

40. MCCORMICK, EVIDENCE § 178 (1954).

41. See People v. Nichols, 341 Mich. 311, 67 N.W.2d 230 (1954), a case in which the court’s language far outshadows its result; see text accompanying note 47 infra.

42. Here, however, McCormick would admit the evidence on the ground that it “would be substantially corroborative of other evidence that he was the father. . . .” MCCORMICK, EVIDENCE § 178 (1954).


44. UTAH CODE ANN. tit. 9, § 78-25-21 (Supp. 1963).

is the wisest, and that all blood test evidence not excluding the possibility of paternity should be inadmissible, certainly when the facts are tried before a jury. The contrary argument, that blood test results showing a possibility of paternity should be admitted for their corroborative effect on other evidence in the case seems particularly weak because so frequently there is a paucity of other evidence in the case, and what other evidence there is—usually the female plaintiff's testimony—needs no corroboration insofar as impressing the jury is concerned. We know that juries are anxious to find defendants liable for paternity (in those jurisdictions in which blood test results excluding paternity do not conclude the finder of fact) even though the jury is confronted with an exclusionary test result. The absurdity of a case like Charles Chaplin's is not that the jury found that he fathered Joan Berry's child even when the blood tests unanimously concluded that this was impossible; it is that an appellate court was compelled to allow this finding to stand. This being so, it is submitted that since juries are willing to find paternity even where the tests dictate the contrary, they will be even more likely to find paternity where they have for consideration tests results that indicate merely the possibility of paternity. This result is too prejudicial to defendants. In the language of the most complete judicial discussion of the problem:

The jury was given to understand that the tests were made on defendant's motion, to establish his non-paternity and that when the results failed to do so he then objected to their admission into evidence and sought to conceal them from the jury. The possible psychological effect on the minds of the jurors cannot be ignored. The use of scientific apparatus and tests and expert testimony as to scientific results, placed before the jury with an instruction that they should accord such weight thereto, bearing on the controverted issue, as they might deem proper, could not have failed to mislead the jurors into believing that this totally irrelevant evidence might be considered as having probative value. The average juryman is bound to be impressed by an array of scientific witnesses under circumstances in which its utter irrelevancy is not made clear, but, on the contrary, it is permitted to pose as relevant testimony to be weighed by them. This was prejudicial to defendant.

To be sure, the court's language overstates the case. The evidence involved a fact situation in which the percentages of defendant's paternity based upon non-exclusionary test results were slightly less than

46. See Comment, 14 W. Res. L. Rev. 115, 117 (1962). The tactic for a defendant, therefore, is to eschew a jury trial. See State ex rel. Steiger v. Gray, 145 N.E.2d 162 (Cuyahoga Co., Ohio Juv. Ct. 1957) in which five out of six different blood test results were inconclusive; the sixth excluded the possibility of defendant's paternity, whereupon the court acquitted him.
one out of two. Hence the evidence carried a certain amount of logical relevance. But there is substantial danger of confusion in trying to explain to the jury the exact percentage of logical relevance that it did have. Of course, in factual situations in which the likelihood of parentage becomes greater because of the rarity of the blood types yielding the exclusionary result, the court's remarks about the logical relevancy of such evidence arguably lose proportionate force, though a contrary view holds that the irrelevance never diminishes, and would therefore deny all corroborative force to such evidence:

What is of interest is the correctness with which the judge decides in those cases in which he excludes an alleged paternity as incompatible with the blood-type system. Only in these cases can the blood type test conceivably be used as evidence. When the mother's declaration agrees with what is to be expected from the test—for example, if a wife of blood type M and a husband of the same blood type produce a child of type M—there is nothing prima facie abnormal in the test results that could give rise to a dispute or be used as evidence.48

Notwithstanding, two other omnipresent dangers still remain. First, the danger of confusing the fact-finder about the percentages of probability involved, a danger which is aggravated to the apotheosis by a situation in which blood test results are admissible for a duality of purpose: first, to exclude plaintiff's non-party husband as the father of the child and second, to show the possibility that the defendant could have fathered the child, a more than theoretical possibility;49 Secondly, the prejudicial effect which such evidence will have.50 The incidence of logical relevancy never overcomes these two factors to such a degree that the percentages involved can safely be said to have legal relevance. Nor has the female plaintiff's case been harmed irreparably by excluding this evidence since, as noted, juries are all too willing to believe her story despite exclusionary test results to the contrary. A jury likely to reject conclusive evidence favorable to the alleged father would probably be overly-prejudiced by non-conclusive evidence detrimental to him.

Any discussion in this area would be incomplete without some discussion of the age old presumption of legitimacy. The presumption sets forth a fact-finding rule of thumb to the effect that when it is proven that a married woman has given birth to a child, it will be determined as a fact (in the absence of evidence to the contrary) that the woman's husband fathered that child. The infinite varieties of human conduct can

48. Ross, supra note 34, at 473.
50. See Note, 39 Calif. L. Rev. 277, 279 (1951): "The prejudicial effects of admitting in evidence the latter inconclusive result outweighs any possible probative value."
pose challenging fact situations against which to juxtapose the above rule, but the policy reasons behind the rule are said to be two-fold: (1) to avoid stigmatizing the child socially and (2) to avoid that jeopardization of the child's legal rights which would accompany a declaration of his bastardy, though this last reason, it has been argued, seems to have declining significance.

California and the Canal Zone have embellished the above presumption by the indisputable addition that a woman who conceives a child while cohabiting with her husband forecloses all argument that the husband is not the father. The Uniform Act's section 5, by contrast, provides:

The presumption of legitimacy of a child born during wedlock is overcome if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, show that the husband is not the father.

This section codifies those cases which, though recognizing blood test evidence as admissible and extraordinarily probative, and likewise recognizing the common-law presumption, have held that the former was sufficient to conclusively rebut the latter. Of the jurisdictions adopting the Uniform Act, only Utah, Pennsylvania, and New Hampshire have enacted the above proviso. California, the Canal Zone, and Oregon have not. Of course, had California and the Canal Zone included this provision, it would not affect the rule that if the woman cohabited with her husband at the time of conception the husband is indisputably presumed to be the father, because that rule applies "Notwithstanding any other provision of law..."

The real statutory question presented is what effect the omission of the Uniform Act's proviso would have upon the non-mandatory presumptions of legitimacy, that is, those situations in which a child is born during wedlock

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51. E.g., where the woman conceives the child while married to one man but gives birth to it while married to someone else. See sources cited in McCormick, Evidence § 309 n.31 (1954).
52. On the ground that statutes have alleviated the harsh common law rules concerning the rights of bastards, see note 51 supra. Compare Ross, supra note 34, at 482 n.22: "The courts in Denmark seem inclined to accept the blood-test exclusion as unconditional and absolute proof in cases concerning children born out of wedlock, despite contradictory testimony of the mother. On the other hand, the courts have shown greater reluctance in cases concerning legitimate children, such as divorce cases and cases concerning the status of the child." One might ask: Does the diverse weight accorded blood-test results constitute a responsible action by the fact-finder? Is it compatible with treating such situations as though they are worthy of judicial notice, as has been suggested supra, note 33?
54. See note 3, supra.
55. See Haugen v. Swanson, 16 N.W.2d 900, 902 (1944).
57. See note 5, supra.
or within ten months after the dissolution of a marriage. Suggested resolutions ranged from statements to the effect that the omission restricted the statute's applicability to filiation proceedings to proposals which would admit the exclusionary blood test results to offset the non-mandatory presumptions without according the tests conclusive effect. The actual California solution was more dramatic: in cases where exclusionary blood test results confront the non-mandatory presumptions, the latter yield. Presumably, then, Oregon, which has no mandatory presumptions in its statute, and assuming its blood test statute has wider applicability than filiation proceedings, would follow suit.

Assuming that the earlier discussed policies of encouraging reconciliation between the discordant spouses and prohibiting challenges to long accepted family relationships have validity, it may be that restrictions should be placed upon blood test results which are submitted to contradict the presumption of legitimacy. As noted before, in cases where the support action follows a final divorce decree, a proportionately smaller chance of jeopardizing the chance of marital reconciliation is involved. Likewise, in cases where the alleged extra-marital mischief which the husband suspects sired the spurious offspring occurred shortly before the marriage's legal or social dissolution, the factor of a long standing familial relationship insofar as the allegedly spurious child is concerned would be absent. But where this interest may be discerned to be protectible, particularly in situations where it appears coincidentally with the not yet concluded marital relationship, courts may wish to exclude evidence offering a challenge to the presumption of legitimacy by means of an estoppel doctrine emanating from the parties' manifestations to one another of their supposed relationship. Of course, the court in deciding the Weston case took a much more circumscribed view in denying the availability of the tests, not waiting until the results were available before ruling that an estoppel came into play. Curiously, the court observed that "It is the taking of the blood test, and not the result of it, which does the harm. . . . Pricking the skin to get the blood is an act which plants indelibly upon the mind of a child the doubt as to its paternity which it will carry thereafter forever."

61. See note 8 supra. The Oregon Attorney General has said that the legislation constitutes an adoption of the Uniform Act, but the opinion implies a limited applicability to filiation proceedings. See 26 OPS. ATT'Y GEN. 233 (1954).
63. Id. at 783.
This view is an overstatement. It appears unlikely that the mere taking of blood from two children, four years old and under, will in and of itself disrupt the childrens' relationship with the husband of its mother "forever." By contrast, it might be argued that in the situation where the still extant marital relationship is involved, it is the mere demand for and taking of the blood test which does in fact produce the disruptive result.

Judicial development of an estoppel doctrine in this context involves the drawing of lines on a case to case basis with the inevitable vagueness which would accompany the evolution of such a doctrine. A possibility, perhaps more suitable for legislative evaluation, would be to preclude a challenge to the presumption originating in a relationship of the parties defined by pre-established statutory criteria, rather than an ad hoc after the fact determination of the parties' manifestations toward one another.\(^64\) This suggestion has the attraction of being harder contoured, so that parties will have a clearer idea in advance about whether their relationship toward one another is or has been such as to preclude a challenge to what they consider to be unpleasant facts. These considerations, likewise apropos to the question of whether a litigant should be entitled in the first place to demand a blood test under the Uniform Act, are reiterated here in conjunction with a discussion of the evidentiary effect of test results in the event some court—contrary to the Superior Court in the Weston case—should think itself obligated by the Uniform Act's provisions only to grant the litigant's demand for a blood test, but not bound to accept the results into evidence after consideration of the purposes for which the test results may be put to use by such litigant.

\(^{64}\) See Cal. Civ. Code § 195 (Supp. 1962): "The presumption of legitimacy can be disputed only by the people of the State of California in a criminal action . . . or the husband or wife, or the descendant of one or both of them. Illegitimacy, in such case, may be proved like any other fact."
APPENDIX

UNIFORM ACT ON BLOOD TESTS TO DETERMINE PATERNITY

§ 1. AUTHORITY FOR TEST.—In a civil action, in which paternity is a relevant fact, the court, upon its own initiative or upon suggestion made by or on behalf of any persons whose blood is involved may, or upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order the mother, child and alleged father to submit to blood tests. If any parties refuse to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice so require.

§ 2. SELECTION OF EXPERTS.—The tests shall be made by experts qualified as examiners of blood types who shall be appointed by the court. The experts shall be called by the court as witnesses to testify to their findings and shall be subject to cross-examination by the parties. Any party or person at whose suggestion the tests have been ordered may demand that other experts, qualified as examiners of blood types, perform independent tests under order of court, the results of which may be offered in evidence. The number and qualifications of such experts shall be determined by the court.

§ 3. COMPENSATION OF EXPERT WITNESSES.—The compensation of each expert witness appointed by the court shall be fixed at a reasonable amount. It shall be paid as the court shall order. The court may order that it be paid by the parties in such proportions and at such times as it shall prescribe, or that the proportion of any party be paid by (insert name of the proper public authority), and that after payment by the parties or (insert name of the public authority), or both, all or part or none of it be taxed as costs in the action. The fee of an expert witness called by a party but not appointed by the court shall be paid by the party calling him but shall not be taxed as costs in the action.

§ 4. EFFECT OF TEST RESULTS.—If the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly. If the experts disagree in their findings or conclusions, the question shall be submitted upon all the evidence. If the experts conclude that the blood tests show the possibility of the alleged father’s paternity, admission of this evidence is within the discretion of the court, depending upon the infrequency of the blood type.

§ 5. EFFECT ON PRESUMPTION OF LEGITIMACY.—The presumption of legitimacy of a child born during wedlock is overcome if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, show that the husband is not the father of the child.

§ 6. APPLICABILITY TO CRIMINAL ACTIONS.—This act shall apply to criminal cases subject to the following limitations and provisions: (a) An order for the tests shall be made only upon application of a party or on the court’s initiative; (b) the compensation of the experts shall be paid by (insert name of proper public authority) under order of court; (c) the court may direct a verdict of acquittal upon the conclusions of all the experts under the provisions of Section 4, otherwise the case shall be submitted for determination upon all the evidence.

§ 7. UNIFORMITY OF INTERPRETATION.—This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

§ 8. SEVERABILITY CLAUSE.—If any part of this act is declared invalid the remaining portion shall continue in full force and effect and shall be construed as being the entire act.

§ 9. SHORT TITLE.—This act may be cited as the Uniform Act on Blood Tests to Determine Paternity.

§ 10. TIME OF TAKING EFFECT.—This act shall take effect ....................