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Bastards - Presumption of Legitimacy - Competency of Husband and Wife to Testify to Nonaccess during Time of Conception - The Admissibility and Weight of Blood Grouping Tests

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RECENT CASES

BASTARDS — PRESUMPTION OF LEGITIMACY — COMPETENCY OF HUSBAND AND WIFE TO TESTIFY TO NONACCESS DURING TIME OF CONCEPTION — THE ADMISSIBILITY AND WEIGHT OF BLOOD GROUPING TESTS. — Plaintiff sued defendant to establish paternity and to provide for support of a child born to plaintiff nine days after her divorce from her husband. Although plaintiff was separated from her husband, there was evidence that the husband had visited plaintiff during the period of conception. Plaintiff testified that defendant was the only man she had intercourse with during the period of conception, and her husband testified that he had no intercourse with plaintiff during the period of conception. Blood grouping tests showed the husband could not have been the father. The trial court judge instructed the jury that if there was a reasonable possibility of access between the plaintiff and her husband, the presumption of legitimacy is conclusive. Plaintiff appealed from an adverse judgment. The Supreme Court of California *held* that the presumption of legitimacy can be rebutted by evidence that showed plaintiff's husband was not the father and that if in the opinion of experts the blood grouping tests showed that the husband was not the father, then the rebuttable presumption of legitimacy is conclusively rebutted. *Kusior v. Silver*, 7 Cal. Rptr. 129 (1960).

The presumption of legitimacy of a child born in wedlock is one of the strongest known to law.[1] In the early days of the law no dispute was allowed, except in case of husband's impotency, if the husband was within the four seas of England.[2] The common law presumption has been relaxed or modified and it is now generally held to be rebuttable.[3] There have, however, been varying statements as to the degrees of proof required to rebut it; *e. g.*, beyond a reasonable doubt,[4] clear and conclusive proof of nonaccess at the time the child was begotten,[5] nonaccess and impotency of the husband,[6] clear and convincing proof,[7] and cohabitation physically impossible.[8] If the child is born within a reasonable time after the termination of the marriage, the presumption of legitimacy will still apply.[9]

A majority of jurisdictions, still following the Lord Mansfield rule,[10] will not permit either the husband or the wife to testify that they did not have

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1. Morrison v. Nicks, 211 Ark. 261, 200 S.W.2d 100 (1947); Bariuan v. Bariuan, 186 Kan. 605, 352 P.2d 29 (1960); Cameron v. Rowland, 208 La. 663, 23 So.2d 283 (1945); Smith v. Smith, 71 S.D. 305, 24 N.W.2d 8 (1946).

2. See *In re* Findley, 253 N.Y. 1, 170 N.E. 471 (1930).

3. In Kolwalski v. Wojtkowski, 19 N.J. 247, 116 A.2d 6, 17 (1955) the dissenting judge cites 38 jurisdictions so holding.

4. Ratliff v. Ratliff, 298 Ky. 715, 183 S.W.2d 949 (1944); Sayles v. Sayles, 323 Mass. 66, 80 N.E.2d 21 (1948); Holder v. Holder, 9 Utah2d 163, 340 P.2d 761 (1959).

5. Secondine v. Secondine, 311 P.2d 215 (Okl. 1957); Commonwealth v. Iacovella, 121 Penn. 139, 182 Atl. 727 (1936); State v. Kellner, 247 Wis. 425, 20 N.W.2d 106 (1945).

6. Jackson v. Jackson, 259 Ala. 267, 66 So.2d 745 (1953); Craven v. Selway, 216 Iowa 505, 246 N.W. 821 (1933); *In re* Rowe's Estate, 172 Ore. 293, 141 P.2d 832 (1943).

7. Eldridge v. Eldridge, 153 Fla. 873, 16 So.2d 163 (1944); Groulx v. Groulx, 98 N.H. 481, 103 A.2d 188 (1954); Smith v. Smith, 71 S.D. 305, 24 N.W.2d 8 (1946).

8. Williams v. Williams, 230 La. 1, 87 So.2d 707 (1956).

9. *In re* Estate of Julian, 184 Kan. 94, 334 P.2d 432 (1959); Moore v. Smith, 178 Miss. 383, 172 So. 317 (1937); Powell v. State, 84 Ohio 165, 95 N.E. 660 (1911).

10. Expressed in Goodright v. Moss, 2 Cowpers 591, 98 Eng. Rep. 1258 (1777) as "But it is a rule, founded in decency, morality, and policy, that they [husband and wife] shall not be permitted to say after marriage, that they have had no connection, and therefore that the offspring is spurious; more especially the mother, who is the offending party."

access at the time the child was conceived.[11] Some courts, because of abrogation of the common law rule by statute[12] or by judicial decision,[13] have allowed the husband and wife to testify as to nonaccess. At least two jurisdictions hold that a wife may testify but the husband may not,[14] and one has held that the husband can but the wife cannot.[15]

Many states have enacted statutes admitting blood grouping tests to prove non-paternity.[16] Some jurisdictions now hold that if there is no question as to their accuracy, these tests are conclusive proof of non-paternity;[17] while others hold that the results will be weighed as any other evidence tending to show non-paternity.[18]

North Dakota holds that the presumption of legitimacy is rebuttable, and that a husband and wife can testify as to non-access during period of conception.[19] There is no statute in North Dakota authorizing the taking of blood grouping tests in disputed paternity proceedings or admitting them as evidence.[20]

The instant case presents the modern view on the presumption of legitimacy in that it allows the husband and the wife to give testimony that would

11. Franks v. State, 26 Ala. App. 430, 161 So. 549 (1935) (but the wife may testify to circumstances that infer nonaccess); Shatford v. Shatford, 214 Ark. 612, 217 S.W.2d 917 (1949); Morris v. Morris, 40 Del. 480, 13 A.2d 603 (1940); Craven v. Selway, 216 Iowa 505, 246 N.W. 821 (1933); Dudley's Adm'r v. Fidelity & Deposit Co., 240 S.W.2d 76 (Ky. 1951); Hubert v. Cloutier, 135 Me. 230, 194 Atl. 303 (1937); Sayles v. Sayles, 323 Mass. 66, 80 N.E.2d 21 (1948); Zutavern v. Zutavern, 155 Neb. 395, 52 N.W.2d 254 (1952); State v. Sargent, 100 N.H. 29, 118 A.2d 596 (1955); Salas v. Olmos, 47 N.M. 408, 143 P.2d 871 (1943); *In re* Anonymous, 12 Misc.2d 781, 177 N.Y.S.2d 784 (1958); State v. Campo, 233 N.C. 79, 62 S.E.2d 500 (1950); *In re* Rowe's Estate, 172 Ore. 293, 141 P.2d 832 (1943); Commonwealth v. Carrasquilla, 191 Pa. Super. 14, 155 A.2d 473 (1959); Peoples National Bank of Greenville v. Manos Brothers, 226 S.C. 257, 84 S.E.2d 857 (1954); Longoria v. Longoria, 324 S.W.2d 244 (Tex. Civ. App. 1959); State v. Kellner, 247 Wis. 425, 20 N.W.2d 106 (1945). *But cf.*, 7 WIGMORE, EVIDENCE § 2063, 2064 (3d ed. 1940).

12. Vasquez v. Esquibel, 346 P.2d 293 (Colo. 1959); Peters v. District of Columbia, 84 A.2d 115 (D.C. 1951); State v. Soyka, 181 Minn. 353, 233 N.W. 300 (1930); *In re* Wray's Estate, 93 Mont. 525, 19 P.2d 1051 (1933); Loudon v. Loudon, 114 N.J. Eq. 242, 168 Atl. 840 (1933); *In re* Kressler's Estate, 76 S.D. 158, 74 N.W.2d 599 (1956); *In re* Adoption of a Minor, 29 Wash.2d 759, 189 P.2d 458 (1948).

13. Moore v. Smith, 178 Miss. 383, 172 So. 317 (1937); Yerian v. Brinker, 35 N.E.2d 878 (Ohio App. 1941).

14. People v. Dile, 347 Ill. 23, 179 N.E. 93 (1931); Bariuan v. Bariuan, 186 Kan. 605, 352 P.2d 29 (1960).

15. Eldridge v. Eldridge, 153 Fla. 873, 16 So.2d 163 (1944).

16. Retzger v. Retzger, 161 A.2d 469 (D.C. 1960); Jordan v. Davis, 143 Me. 185, 57 A.2d 209 (1948); Commonwealth v. d'Avella, 162 N.E.2d 19 (Mass. 1959); Groulx v. Groulx, 98 N.H. 481, 103 A.2d 188 (1954); Cortese v. Cortese, 10 N.J. Super. 152, 76 A.2d 717 (1950); Schulze v. Schulze, 35 N.Y.S.2d 213 (1942); State v. Clark, 144 Ohio St. 305, 58 N.E.2d 773 (1944); Commonwealth v. Coyle, 190 Pa. Super. 509, 154 A.2d 412 (1959); Prochnow v. Prochnow, 274 Wis. 491, 80 N.W.2d 278 (1957). For a comprehensive coverage of the medical and scientific aspects of the blood grouping tests, see MCCORMICK, EVIDENCE § 178 (1st ed. 1954); 1 WIGMORE, EVIDENCE § 165b (3d ed. 1940); 50 Mich. L. Rev. 582 (1952); 29 N.D.L. Rev. 156 (1953).

17. Retzger v. Retzger, 161 A.2d 469 (D.C. 1960); Jordan v. Mace, 144 Me. 351, 69 A.2d 670 (1949); Commonwealth v. d'Avella, 162 N.E.2d 19 (Mass. 1959); Ross v. Marx, 21 N.J. Super. 95, 90 A.2d 545 (1952); Foglio v. Foglio, 13 Misc.2d 767, 176 N.Y.S.2d 43 (1958).

18. State v. Clark, 144 Ohio St. 305, 58 N.E.2d 773 (1944); Commonwealth v. Coyle, 190 Pa. Super. 509, 154 A.2d 412 (1959); State v. Brigham, 72 S.D. 278, 33 N.W.2d 285 (1948); Prochnow v. Prochnow, 274 Wis. 491, 80 N.W.2d 278 (1957).

19. State v. Coliton, 73 N.D. 582, 17 N.W.2d 546 (1945).

20. In State v. Eli, 62 N.W.2d 469 (N.D. 1954) the court stated in regards to blood tests, ". . . but if we assume that the court has power in the absence of statute in a proper case to direct the taking of blood grouping tests, we cannot here determine that the trial court erred in refusing the defendant's request and denying his motion upon the record presented."

bastardize the child, and it advocates making blood grouping tests conclusive.

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CHAMPERTY AND MAINTENANCE — CONTRACTS AND TRANSACTIONS WITH ATTORNEYS — CAN AN ATTORNEY RECOVER ON QUANTUM MERUIT WHEN HIS CONTRACT OF RETAINER IS CHAMPERTOUS? — Plaintiff, an attorney, was retained by a corporation to prosecute an action for a tax refund. It was agreed plaintiff's fee was to be contingent and that he would bear the expense of paying an expert witness whose testimony was necessary for recovery. After plaintiff successfully prosecuted the action the client refused to pay his fee, asserting that the agreement for payment of the fee of the witness was champertous. The Second Circuit Courts of Appeals *held* that despite the champertous character of the express contract of retainer, plaintiff could recover the reasonable value of his services on the theory of quantum meruit. *Kamerman v. United States*, 278 F.2d 411 (2d Cir. 1960).

The decision is contrary to the position taken by the American Law Institute, which asserts that an attorney who performs services in pursuance of a champertous agreement can recover neither the compensation stipulated in his contract of retainer nor their reasonable value.[1] A substantial body of authority honors this point of view.[2] Nevertheless the more widely supported ruling is in accord with the instant decision and allows the attorney to recover on the basis of a quantum meruit count.[3] One writer suggests that the variation in result among the various jurisdictions may be due to "differences in the specific conduct of the attorneys seeking compensation."[4] Illustrative of the force of this suggestion is a Virginia court's refusal of recovery on the ground that what the attorney undertook to do was in itself illegal.[5]

Other courts have taken a middle ground and hold that the right of recovery on the basis of quantum meruit is present but that the void express contract of retainer cannot be considered for the purpose of determining the value of the services actually rendered,[6] except that it may be used to limit recovery to the amount set forth in the contract.[7] In some instances it has been stated that the contract is admissible in evidence for the purpose of in-

1. Restatement, Contracts § 545 (1932) "A person who has agreed to render services under a bargain, illegal under the rules stated in §§ 541, 542 [Champerty and Maintenance], cannot recover either the agreed compensation for his services or their reasonable value. Nor can he retain from the proceeds acquired by enforcing the claim even reasonable consideration."

2. Weil v. Neary, 278 U.S. 160 (1929); Merland v. National Metropolitan Bank, 84 F.2d 238 (D.D.C. 1936); Sapp v. Davids, 176 Ga. 265, 168 S.E. 62 (1933); Moreland v. Devenney, 72 Kan. 471, 83 Pac. 1097 (1905); Hinckley v. Giberson, 129 Me. 308, 151 Atl. 542 (1930).

3. Watkins v. Sedberry, 261 U.S. 571 (1923); Rogers v. Samples, 207 Ky. 150, 268 S.W. 799 (1925); *In re* Snyder, 190 N.Y. 66, 82 N.E. 742 (1907); Stearns v. Felker, 28 Wis. 594 (1871). See *In re* Joslyn, 223 F.2d 184 (7th Cir. 1955); Darnell v. Broken Bow, 139 Neb. 844, 299 N.W. 274 (1941).

4. See CORBIN, CONTRACTS § 1426 at 712 (1951).

5. Roller v. Murray, 112 Va. 780, 72 S.E. 665 (1911). See also Brush v. City of Carbondale, 229 Ill. 144, 82 N.E. 252, 255 (1907); Gammons v. Johnson, 69 Minn. 488, 72 N.W. 563, 564 (1897).

6. Elliot v. McClelland, 17 Ala. 206 (1850); Dorr v. Camden, 55 W.Va. 226, 46 S.E. 1014 (1904).

7. Hamilton v. Burgess, 233 Ala. 4, 170 So. 348 (1936); *cf.* Oxborough v. St. Martin, 169 Minn. 72, 210 N.W. 854 (1926). See Freerks v. Nurnberg, 33 N.D. 587, 157 N.W. 119, 121 (1916).