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powers, and "this Court has consistently deplored the encroachment of other courts upon the legislative prerogative during the past decade." While giving credence to the doctrine of separation of powers, the Court does what the General Assembly declined to do.

The decision of Waddell may have taken from the North Carolina jury the discretionary power to render life imprisonment or death in capital cases of guilty verdicts, but this is no guarantee that the death penalty will not be selectively imposed. There is still room for discrimination. A jury, having the awareness that a defendant in a capital case faces mandatory death if convicted, may be more reluctant to bring in a guilty verdict. This reluctance may stem from the fact that a defendant is black, white, rich, poor, or has red hair. Any punishment, death or otherwise, will remain cruel and unusual until such punishment is applied equally.

Several bills that would affect the death penalty have been proposed for introduction into the 1973 General Assembly, which is presently in session. The extent of these bills is not known at the present, but according to news reports at least two proposals seek a mandatory death penalty and at least one proposal opposes capital punishment. By the time this paper is printed, the outcome of these bills will probably be known. Whatever the legislature decides, the North Carolina Supreme Court will inevitably be confronted with its new law. It will be interesting to see how the Court will dissect the new law to conform to judicial specifications.

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The Presumption of Legitimacy: A Rebuttable Presumption

A child born in wedlock is presumed to be legitimate. According to Professor Stansbury, "this presumption is one of the strongest known to the law and it has been said that 'irresistible evidence' of the rebutting circumstances is necessary to overcome it."[1] It is the purpose of this comment to examine the various methods by which this presumption may be rebutted, placing primary emphasis on blood grouping tests and North Carolina law.

The original common law seems to have made the presumption conclusive. That is, no proof no matter how convincing could refute the presumption that a child born in wedlock was the husband's legitimate child.

[1] D. Stansbury, *The North Carolina Law of Evidence*, Sec. 246 (2d ed. 1963).

The English common law later saw modification which permitted rebuttal by proof that the husband "was impotent or was beyond the four seas (that is, outside the jurisdiction of the King of England) during a period that was deemed to make his fatherhood a biological impossibility."[2] It is now clear that the presumption can be overcome, but the various jurisdictions are not in accord on the methods and degree of proof necessary to accomplish this. An early New York case declared the proof must establish the absolute impossibility of paternity.[3] A more recent Massachusetts case held proof beyond a reasonable doubt was sufficient[4] and Alabama approved a "clear and conclusive test."[5] Such tests continue to be modified somewhat as new means to exclude paternity are recognized by the courts and legislatures.

North Carolina Law

North Carolina has long recognized the presumption of legitimacy of a child born in wedlock, and as previously noted according to Stansbury, it is one of the strongest known to the law. However, as early as 1825 in *State v. Pettaway*,[6] North Carolina rejected the old common law rule which made the presumption conclusive unless the husband was beyond the four seas. That is, the presumption was deemed rebuttable by proof that the husband could not have been the father as by showing that he was impotent, or that he could not have had access to his wife during the period of conception.

However, the court has strictly construed these tests and as late as 1941 in *Ray v. Ray*,[7] held that evidence that the husband and wife did not engage in sexual intercourse was insufficient if access was possible. Such rulings are amply supported by prior holdings of North Carolina's Supreme Court. For example, in *State v. Green*,[8] the defendant was charged with abandonment and nonsupport of his minor child. His only defense was that he was not the child's father, and he sought to introduce evidence that despite the fact that he and his wife were living together, they did not engage in sexual intercourse during the period of conception. This and other evidence was excluded and on appeal to the Supreme Court of North Carolina the Court asked, "When a child is born in wedlock,

[2] 128 A.L.R. 713 (1940).
[3] *Id.* at 714.
[4] *Id.* at 717.
[5] *Id.* at 718.
[6] State v. Pettaway, 10 N.C. 623 (1825).
[7] Ray v. Ray, 219 N.C. 217, 13 S.E.2d 224 (1941).
[8] State v. Green, 210 N.C. 162, 185 S.E. 670 (1936).

the husband and wife living in the same house, is legitimacy conclusively presumed?"[9] The question was answered in the affirmative. The court went on to say,

> The ancient rule of the common law that if the husband was within the four seas no proof of non-access was admissible has been modified in this state only to the extent that the presumption may be rebutted by evidence tending to show that the husband could not have had access or was impotent.[10]

Despite such strong language it will be seen that the rule in this state has been expanded, and although the courts sometimes refer to the presumption as "conclusive" even in recent decisions, such is not actually the present state of the law.

According to *State v. Herman*[11] the presumption applies even when the child is born within a month or day after the mother's marriage. However, the case pointed out that such antenuptial conception would make the presumption more easily rebutted. Other cases make it clear that the presumption also applies where conception took place during wedlock, though the child was born after the marriage had been terminated by divorce. However, if the child is born more than ten months after the death of the alleged father there arises a rebuttable presumption that conception had not taken place at the time of death.[12] The law also presumes that children may be born to a married couple as long as such marriage continues regardless of the age of the parties. *Stanley v. Foster*[13] cites the old common law rule that the possibility of issue is commensurate with life.

Although the courts recognize non-access as a valid rebuttal of the presumption of legitimacy, they refuse to permit the husband or wife to testify as to such non-access. "A husband or wife may not 'bastardize the issue' by testifying to the husband's non-access during the period when conception may have occurred."[14] According to Stansbury the court has kept this rule within narrow bounds. Therefore, it only applies when paternity is directly in issue. It does not apply in divorce proceedings when the issue of paternity is absent. At any rate, the spouses may still testify to other facts bearing on the question of legitimacy. As *State v. Pettaway*[15]

[9] *Id.* at 163, 185 S.E. at 671.
[10] *Id.*
[11] State v. Herman, 35 N.C. 502 (1852).
[12] D. Stansbury, *The North Carolina Law of Evidence*, Sec. 246 (2d ed. 1963).
[13] Stanley v. Foster, 244 N.C. 201, 92 S.E.2d 925 (1956).
[14] D. Stansbury, *The North Carolina Law of Evidence*, Sec. 61 (2d ed. 1963).
[15] State v. Pettaway, 10 N.C. 623 (1825).

pointed out the wife may be examined as to her criminal intercourse with another because "a fact so secret in its nature can scarcely ever be proved by other evidence." Non-access may be proved by witnesses other than the husband and wife and the fact that the wife is living in open adultery is "a potent circumstance tending to show non-access."[16] The wife herself may testify that a person other than her husband was the father of the child according to *State v. Bowman.*[17] Thus, despite the prohibition on testimony concerning non-access by the husband or wife the issue of legitimacy can be delved into by other means.

Blood Tests Affecting the Presumption

The almost exclusive tests of impotency and non-access were expanded as early as 1877 when *Warlick v. White*[18] held that evidence that the husband and wife were white while the child was of mixed blood would rebut the presumption of legitimacy of a child born in wedlock. Much more importantly North Carolina by statute in 1949 expanded the tests to include blood-grouping tests which as will be seen can be utilized to overcome the presumption.

Although the use of such blood tests to rebut the presumption of legitimacy when there was access was until recently in doubt the following case seems to put the matter at rest. The 1972 case of *Wright v. Wright*[19] held that in both criminal and civil actions in which the issue of paternity arises, the results of blood-grouping tests must be admitted in evidence regardless of any presumptions of legitimacy, and such evidence is competent to rebut the presumption. The case involved a wife seeking alimony and child support. The husband-defendant denied he was the father of the child in question and requested that blood-grouping tests be made pursuant to G.S. 8-50.1,[20] which reads,

> In the trial of any criminal action . . . in which the question of paternity arises, regardless of any presumptions with respect to paternity, the court . . . upon motion of the defendant, shall direct and order that the defendant, the mother and the child shall submit to a blood grouping test. . . . Such evidence shall be competent to rebut any presumptions of paternity.
>
> In the trial of any civil action, the court . . . upon motion of either party shall direct and order . . . (blood-grouping tests).

[16] Ray v. Ray, 219 N.C. 217, 13 S.E.2d 224 (1941).
[17] State v. Bowman, 231 N.C. 51, 55 S.E.2d 789 (1949).
[18] Warlick v. White, 76 N.C. 175 (1877).
[19] Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).
[20] N.C. Gen. Stat. Sec. 8-50.1 (1949).

Although the trial court issued an order for the test to be made, the Court of Appeals reversed the order.[21] The Court of Appeals cited a recent case, *Eubanks v. Eubanks*,[22] as a clear holding that such blood-grouping tests could not be used to establish non-paternity if there was access. The Supreme Court refused to interpret the Eubanks decision in this manner. It quoted the misleading language in *Eubanks*, i.e., "If there was access, there is a conclusive presumption that the child was lawfully begotten in wedlock."[23] Then the Supreme Court stated,

> Taken literally and out of context, the quoted statement would disallow evidence even of impotency or physical or racial differences to rebut the presumption. However, the topic sentence of the paragraph (in Eubanks) . . . demonstrates the real rationale of the rule: 'When a child is born in wedlock, the law presumes it to be legitimate, and this presumption can be rebutted only by facts and circumstances which show that the husband could not have been the father, *as that* he was impotent or could not have had access. . . .'[24]

The court went on to explain that non-access and impotency were cited in the above statement only as examples of the kind of evidence that would show that the husband was not the father. There was nothing to prevent blood-grouping tests from being such evidence. The court continued:

> Although we continue to recognize (the presumption) . . . this presumption must give way before dependable evidence to the contrary. Blood-grouping tests which show that a man cannot be the father of a child are perhaps the most dependable evidence we have known.[25]

The Court of Appeals decision as to the order for blood-grouping tests was reversed, and G.S. 8-50.1 was held to authorize such tests even when there was access.

Although such evidence is admissible it is not conclusive. In *State v. Fowler*,[26] the court held that even when a blood-grouping test demonstrates non-paternity "our law does not make the test conclusive of that issue." Such tests are to be considered by the jury along with all the other evidence on the question of paternity. The court points out that none of

[21] Wright v. Wright, 11 N.C. App. 190, 180 S.E.2d, 369 (1971).
[22] Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d, 562 (1968).
[23] *Id.* at 197, 159 S.E.2d at 568.
[24] Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).
[25] *Id.* at 172, 188 S.E.2d at 325.
[26] State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

the relevant statutes requires the results of such tests to be conclusive. Instead they merely direct that such evidence shall be admitted in evidence.

Thus, the defendant may find himself being convicted in a bastardy prosecution or support proceeding even though the tests excluded him as the father. Charlie Chaplin experienced such a result in *Berry v. Chaplin*,[27] in 1946. There the California jury disregarded the excluding blood-grouping test and found Chaplin the father of the child in question on the basis of other evidence tending to show paternity. Such a result seems difficult to justify especially in a time when scientific tests are thought by many to be infallible. On the other hand, it must be conceded that such tests depend on the skill and training of those who perform them. Mistakes can be made, and the medical profession does not contend they are infallible even when correctly administered. On the contrary, they admit that there are theoretical exceptions of one in approximately 50,000 to 100,000 cases.[28] Recognizing that such possibility of error appears negligible when compared to the reliability of other forms of evidence, it can nevertheless be maintained that no evidence should be conclusive unless made so by statute. It is a question many legislatures should consider.

The Fowler case referred to previously was based on facts differing greatly from *Berry v. Chaplin*. Here the defendant in a bastardy prosecution requested the tests pursuant to the statutes, but such was impossible in that the child had died. Defendant then asked for dismissal of the action contending that since no tests could be made it would constitute a denial of due process to continue the prosecution. The court was not convinced and ruled against the defendant. Justice Sharp writing for the court referred to the relevant statutes which clearly do not make the results of such tests conclusive. Dismissal of the prosecution was not warranted even though defendant did have a "substantial right" to such tests and such must be ordered *when possible*. Due to the death of the child, the tests were impossible and defendant could not complain.

Blood-grouping tests are often an invaluable aid to the innocent defendant, but their benefit is limited. They can never prove paternity. The test might show the defendant or someone else to have a blood type which the father of the child must have had, "but this only indicates that of all the people of that blood type or group, he, as well as anyone else with that blood type or group, *could* have been the father . . . ."[29] Nevertheless, it

[27] Berry v. Chaplin, 74 Cal. App. 2d 652, 169 P.2d 442 (1946).
[28] State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).
[29] *Id.* at 308, 177 S.E.2d at 387.

has been estimated that by such tests a defendant falsely accused of fathering a child "has a 50-55% chance of proving his non-paternity."[30]

CONCLUSION

The presumption of legitimacy of a child born in wedlock is clearly not conclusive. The presumption may be rebutted by evidence of non-access, impotency, racial differences, and excluding blood-grouping tests. North Carolina simply states that such evidence must show that defendant could not be the father, and it is entirely possible that new methods of proving this will be recognized in the future. One hopes that the legislature will take a new look at the weight to be given blood-grouping tests results. While a conclusive presumption is unwarranted due to the possibility of human error in administering such tests, it, nevertheless, appears that the results should be entitled to more weight than merely being considered along with all the other evidence. It is conceivable that a jury upon hearing evidence of illicit sexual intercourse might find against the defendant even though the blood tests convince them that he is not the father. That is, they may decide to punish him for the illicit sexual activity regardless of his paternity or nonpaternity of the child. Although some may consider this justice, such a result is clearly contrary to the statutes and beyond the province of the jury. It would seem that excluding blood tests should at least create a rebuttable presumption that the defendant is not the father. Such a rule would leave the tests open to attack as to the quality and skill of those administering the tests. At any rate this is an issue that the legislature should face, hopefully in the near future.

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Prepaid Legal Services: An Overview

People in middle income brackets usually spend a substantial portion of their incomes on various types of insurance. This is done for the purpose of avoiding the full financial impact occasioned by major losses or personal injury. To accomplish this goal of adequate coverage, insurance must broaden its reach to all areas in which major costs could foreseeably occur. While various plans are widely available in the areas of accident, fire, and health insurance, there are very few such systems designed to insure against the costs of legal services. Any void in the insurance field is

[30] *Id.*