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The Uniform Act on Blood Tests: Disavowal and Divorce

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Conclusion

It is submitted that in Louisiana, pursuant to the Perkins rule, a defendant may not be cross-examined as to his prior acts of misconduct for the purposes of impeachment. Cross-examination in this regard is limited *solely to prior convictions*, and is governed by R.S. 15:495 and the rules discussed heretofore in this Comment. Cross-examination as to prior acts of misconduct not for impeachment purposes, but to prove the crime charged, are regulated by the rules discussed in the companion article to this Comment.[68]

W. Michael Adams

THE UNIFORM ACT ON BLOOD TESTS: DISAVOWAL AND DIVORCE

The Uniform Act on Blood Tests to Determine Paternity[1]

in *Dotson* is based upon the admissibility of the rebuttal testimony, not upon the propriety of the questioning of the defendant on cross-examination.

Later, in *State v. St. Amand*, 274 So.2d 179 (La. 1973), defendant, charged with armed robbery, was asked on cross-examination whether or not he used narcotics. After his denial, the prosecution was permitted to show that he had stated to the contrary on a prior occasion. A majority of the court found that the initial questioning was proper because the state during its case in chief had produced evidence of narcotic paraphernalia found in St. Amand's apartment at the time of his arrest. The court rejected the defendant's contention that the state was attempting to impeach the defendant on an irrelevant matter because "the evidence of narcotic paraphernalia found in St. Amand's apartment made the questioning within the scope of that subject." *Id.* at 192. The court held that the initial inquiry into defendant's prior narcotics addiction was permissible because "[i]t is almost axiomatic today that most armed robberies are associated with drug addicts trying to obtain funds to sustain their grim appetites. In armed robbery prosecutions, therefore, the subject of drug use by the accused is relevant." *Id.* Since the prior drug use of the defendant was deemed to be relevant and non-collateral, the court reasoned that he could be "impeached" on the matter.

Again, properly understood, this case appears to involve the application of the knowledge-intent-system exception to the prior crimes exclusionary rule in the court's determination of whether the narcotic paraphernalia found in defendant's room and brought out by the state in its case in chief, justified questioning the defendant on cross-examination about prior drug use. Thus, the decision should not be interpreted as standing for the proposition that it is proper *impeachment* to ask a defendant about prior use of narcotics.

68. 33 LA. L. REV. 614 (1973).

1. The Uniform Act on Blood Tests to Determine Paternity [hereinafter cited as UNIFORM ACT] states in part:

"Section 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 person 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

was adopted by the National Conference of Commissioners on Uniform State Laws in 1952.[2] The uniform act allows admission into evidence the results of blood grouping tests,[3] and is now in effect in eight states, including Louisiana, and one territory.[4]

The enactment of the statute in Louisiana in 1972 came sixteen years after the Louisiana supreme court's decision in *Williams v. Williams*.[5] In that case, a husband sought to disvow

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to submit to blood tests. If any party refuses 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.

"Section 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.

"Section 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.

"Section 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.

"Section 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."

2. HANDBOOK OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 185 (1952).

3. UNIFORM ACT § 4.

4. CAL. EVID. CODE §§ 890-97 (West 1966) (adopted 1953); ILL. REV. STAT. ch. 106 3/4, §§ 1-7 (1963) (adopted 1957); LA. R.S. 9:396-98 (Supp. 1972) (adopted 1972); N.H. REV. STAT. ANN. §§ 522.1-10 (1955) (adopted 1953); OKLA. STAT. tit. 10, §§ 501-08 (Supp. 1967) (adopted 1967); ORE. REV. STAT. §§ 109.250-62 (1971) (adopted 1953); PA. STAT. ANN. tit. 28, §§ 307.1-11 (1961) (adopted 1961); UTAH CODE ANN. §§ 78-25-18 to 78-25-23 (1955) (adopted 1955); C.Z. CODE tit. 8, §§ 491-97 (1963) (adopted 1963). Michigan once enacted what it termed the Uniform Act, but it differed substantially from the model act and was repealed by MICH. STAT. ANN. tit. 27A.9901 (1962). However, blood tests may be obtained in support cases where the child is born out of wedlock under their paternity act. *See* MICH. STAT. ANN. tit. 25.491-510 (1957).

5. 230 La. 1, 87 So.2d 707 (1956).

a child conceived by his wife during the marriage and, in the same proceedings, sought a divorce on the ground of adultery. To provide proof for each claim, he requested that blood grouping tests be ordered so that he might be able to disprove his paternity and thereby sustain the burdens of proof for both the action *en desaveu* and divorce action. The court, however, refused his request, holding the restrictive provisions of the Civil Code dealing with divorce and the action *en desaveu* do not authorize the use of blood tests.[6] The decision in *Williams* has been followed[7] although its principle has been criticized in light of the scientific reliability of such tests.[8]

The purpose of this Comment is to determine the possible effect the adoption of the uniform act will have on the Williams decision, both in relation to the power of the court to order blood grouping tests and also to the weight given the results of such tests. The discussion will also concern the applicable prescriptive period for each action.

Procedure

The first three sections of the act deal with its general procedural requirements in relation to the power of courts to order blood tests and to choose blood test experts. The court is given the *discretion* to order blood tests upon its own initiative or upon request of any person whose blood is involved.[9] However, upon motion of any party to the action, the court *must* order the tests.[10] Provision is further made that if any party refuses to submit to the tests, the court will have the discretion to either enforce its order or resolve the question

6. *Id.* at 7-8, 87 So.2d 709-10; *accord*, Babineaux v. Pernie-Bailey Drilling Co., 261 La. 1080, 262 So.2d 328 (1972) (reaffirmed the holding as to action *en desaveu* but did note that the evidence would be admissible, although not conclusive). *See also* Tannehill v. Tannehill, 261 La. 933, 261 So.2d 619 (1972) (dissenting opinion). Both *Tannehill* and *Babineaux* were decided before the model act was adopted.

7. Babineaux v. Pernie-Bailey Drilling Co., 261 La. 1080, 262 So.2d 328 (1972).

8. *The Work of the Louisiana Appellate Courts for the 1956-1957 Term—Persons*, 17 LA. L. REV. 303, 306, 310 (1957). *See generally*, C. MCCORMICK, EVIDENCE § 211 (2d ed. 1972).

9. UNIFORM ACT § 1; LA. R.S. 9:396 (Supp. 1972).

10. UNIFORM ACT § 1; State *ex rel.* Keithline v. Jennings, 436 P.2d 690 (Okla. 1970); McDonald, *Blood Grouping Tests—A New Act in Pennsylvania*, 33 PA. B. ASS'N Q. 76, 86 (1961).

of paternity against the party who has refused to submit to the testing.[11]

The court also has the authority to determine the number, qualifications, and compensation of the examiners of blood types.[12] Although the court can determine the number of experts, it has been held that the act envisions more than one examiner in order that the results of the tests be considered conclusive.[13]

Action En Desaveu

The Louisiana Civil Code provides that the "law considers the husband of the mother as the father of all children conceived during the marriage."[14] Although this presumption has been called the strongest known in the law,[15] the Code does provide for five instances in which the presumption of legitimacy may be challenged.[16] Absent these exceptions, this presumption is conclusive irrespective of any proof to the contrary. This was made clear by the court in *Williams*.[17]

An analysis of the appropriate provisions of the act is necessary in order to determine its effect on *Williams*, in relation to the admissibility of blood tests and the weight given such tests. Section four of the act provides that if the experts are in agreement that the results of the tests reveal that the

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11. UNIFORM ACT § 1. This should not result in any violation of constitutional rights. Schmerber v. California, 384 U.S. 757 (1966). However, under the Illinois enactment, if the defendant refuses to submit, his refusal cannot be revealed at trial. ILL. REV. STAT. ch. 106 3/4, § 1 (1963). Illinois altered the uniform act in this respect.

12. UNIFORM ACT §§ 2-3; LA. R.S. 9:397-397.1 (Supp. 1972). In relation to the procedure in testing and elimination of error, see S. SCHATKIN, DISPUTED PATERNITY PROCEEDINGS 131-37, 155-56 (2d ed. 1947); Littell & Sturgeon, *Defects in Discovery & Testing Procedures: Two Problems in the Medicolegal Application of Blood Grouping Tests*, 5 U.C.L.A. L. REV. 629 (1958). It has been suggested that the qualifications of the blood examiner be determined by some scientific society such as the American Association of Immunologists, since blood grouping is one branch of this specialty. Perhaps it would not be quite so suitable to have the experts certified by a medical society because it might certify only medical men and ignore the qualifications of others. Boyd, *Protecting the Evidentiary Value of Blood Group Determinations*, 16 S. CAL. L. REV. 193 (1943).

13. State v. Sargent, 100 N.H. 29, 118 A.2d 596 (1955).

14. LA. CIV. CODE art. 184.

15. Feazel v. Feazel, 222 La. 113, 62 So.2d 119 (1952).

16. LA. CIV. CODE arts. 185-90; Comment, 23 LA. L. REV. 759 (1963); Comment, 14 LA. L. REV. 401 (1954); Comment, 13 LA. L. REV. 587 (1953).

17. *See* notes 5-8 & accompanying text *supra*.

alleged father is the child's father, then the court has the discretion to admit the results depending on the infrequency of blood type.[18] On the other hand, if there is disagreement among the experts, the issue of paternity shall be submitted upon the evidence.[19] Furthermore, it is provided that if the experts are in agreement that the alleged father is not the child's father, then the question of paternity shall be resolved accordingly.[20] It has been held that this provision deals only with the question of biological paternity.[21] Where the legal presumption of legitimacy is conclusive, as in Louisiana, it appears this section alone could not be utilized to overcome it.[22] However, if the presumption is merely rebuttable, then the results of the tests could be given conclusive weight regardless of the legal presumption.[23]

Section five of the act provides that "[t]he presumption of legitimacy of a child born during wedlock is overcome if the court finds that the conclusions of all the experts . . . show that the husband is not the father of the child."[24] This provision is present in only five of the states which have adopted the model act, including Louisiana.[25] In considering this section, the Pennsylvania supreme court in *Commonwealth ex rel. Goldman v. Goldman*[26] reasoned that with the enactment of the model act the legislature has added another method by which to rebut the presumption of legitimacy and allowed the admission of blood tests results as conclusive evidence. Therefore, if all the experts are in agreement, the husband may successfully disavow his wife's child with no other evidence being required.[27]

18. California, Pennsylvania, and Illinois omit this provision. CAL. EVID. CODE § 895 (West 1966); ILL. REV. STAT. ch. 106 3/4, § 4 (1963); PA. STAT. ANN. tit. 28, § 307.4 (1961). Oklahoma expressly excludes it. OKLA. STAT. tit. 10, § 504 (Supp. 1967). It should be noted that each expert is to make a separate, independent blood analysis.

19. UNIFORM ACT § 4. However, the Illinois Act differs from the model act in that if the experts disagree, then the results are inadmissible. ILL. REV. STAT. ch. 106 3/4, § 4 (1963). Oklahoma omits this provision. OKLA. STAT. tit. 10, § 504 (Supp. 1967).

20. UNIFORM ACT § 4; LA. R.S. 9:397.2 (Supp. 1972).

21. Kusior v. Silver, 54 Cal. 2d 603, 354 P.2d 657, 7 Cal. Rptr. 129 (1960).

22. *Id.*; CAL. EVID. CODE § 621 (West 1966).

23. Kusior v. Silver, 54 Cal. 2d 603, 354 P.2d 657, 7 Cal. Rptr. 129 (1960).

24. UNIFORM ACT § 5; LA. R.S. 9:397.3 (Supp. 1972).

25. Pennsylvania, Illinois, Oklahoma, and New Hampshire.

26. 199 Pa. Super. 274, 184 A.2d 351 (1962); Illinois and Oklahoma have had no cases.

27. *Accord,* State v. Sargent, 100 N.H. 29, 118 A.2d 596 (1955). In these states the presumption of legitimacy is not conclusive.

In the jurisdictions which have not adopted section five,[28] only California has considered the question of the presumption of legitimacy. In California law, there is a presumption that a child conceived in wedlock is the legitimate child of the husband, but this presumption may be rebutted by clear and convincing proof.[29] However, if the child is conceived while the husband is cohabiting with the child's mother, the presumption is conclusive.[30]

The California supreme court considered the applicability of the model act in *Kusior v. Silver*.[31] In that case, a child was born while the husband was cohabiting with his wife, the child's mother, but the results of blood grouping tests revealed that the husband could not have been the father. The court, however, rejected the use of blood tests, holding that a husband is considered the *legal* father of his wife's child, when cohabitation and conception exist during marriage, and that the issue of biological paternity is therefore irrelevant.[32] The court's refusal to apply the model act was based upon two grounds. First, the court reasoned that the deletion of section five in the California enactment indicated an intention by the legislature to continue the conclusive presumption. Also, after adoption of the model act, the Evidence Code provision dealing with this conclusive presumption was amended to begin "notwithstanding any other provision of the law."[33] This amendment, the court felt, further showed legislative intent not to alter the conclusive presumption of legitimacy by adoption of the model act. The court, however, noted that absent cohabitation the presumption is merely rebuttable and the results of blood tests would be given conclusive weight under section four of the uniform act.

The presumption of legitimacy in Louisiana Civil Code

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28. California, Utah, Oregon, and Canal Zone.

29. CAL. EVID. CODE § 661 (West 1966).

30. *Id.* § 621; Wareham v. Wareham, 195 Cal. App. 2d 64, 15 Cal. Rptr. 465 (1961). Oregon and Canal Zone have the same dual presumptions. ORE. REV. STAT. § 41.350(6) (1971); ORE. REV. STAT. § 109.070(2) (1971); C.Z. CODE tit. 5, §§ 3221(5), 3222(31) (1963).

31. 54 Cal. 2d 603, 354 P.2d 657, 7 Cal. Rptr. 129 (1960).

32. *Accord*, Jackson v. Jackson, 67 Cal. 2d 241, 430 P.2d 289, 60 Cal. Rptr. 649 (1967) (allowed results of blood tests when there was cohabitation, but only if husband could prove that it was impossible for conception to take place during cohabitation); Louis v. Louis, 7 Cal. App. 3d 851, 86 Cal. Rptr. 834 (1970); Note, 20 STAN L. REV. 754 (1968).

33. CAL. EVID. CODE § 621 (West 1966).

article 184 is conclusive[34] even in the absence of cohabitation. It is doubtful, however, that Louisiana would follow the California approach in relation to the effect given blood grouping tests. The California court reasoned that the failure to adopt section five evidenced a lack of intention to alter the conclusive presumption. The Louisiana legislature has indicated a contrary intent by enactment of section five.[35] This intent is further shown by beginning the blood test statute "[n]otwithstanding any other provision of law to the contrary."[36] Therefore, a husband should be able to disavow his wife's child even when the proof required is based solely on the results of blood grouping tests.

Prescription for the Action En Desaveu

The uniform act lacks reference to a particular prescriptive period in which the husband must commence his suit.[37] It seems probable that the courts would consider the uniform act as an exception to article 184 and apply the applicable prescriptive period of article 191 for the action *en desaveu*. Thus, it would be necessary for the husband to institute proceedings within six months after the child's birth if he is in the same parish where the child is born or within six months after his return.[38]

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34. *See* note 16 *supra*.

35. LA. R.S. 9:397.3 (Supp. 1972).

36. LA. R.S. 9:396 (Supp. 1972). In relation to the California approach see note 33 and accompanying text *supra*.

37. A situation in which the court barred suit by the husband was *Commonwealth ex rel. Weston v. Weston*, 201 Pa. Super. 554, 193 A.2d 782 (1963), where the Pennsylvania court held that when a husband has held out his wife's child as his own, and conception occurred during cohabitation, he is estopped to deny paternity. On the other hand, the husband may bring the action at any time if conception did not occur during cohabitation even though the husband held the child out as his own. Commonwealth *ex rel.* Carter v. Carter, 43 Pa. D. & C.2d 157 (1967). Subsequent Pennsylvania decisions have incorporated this doctrine of estoppel into the state's blood test statute, Commonwealth *ex rel.* Hall v. Hall, 215 Pa. Super. 24, 257 A.2d 269 (1969); Commonwealth v. Phillips, 52 Pa. D. & C.2d 764 (1971), and although this principle has received criticism, it is firmly established in that state's jurisprudence. Harris, *Some Observations on the Un-Uniform Act on Blood Tests to Determine Paternity*, 9 VILL. L. REV. 59 (1963). Absent such a doctrine, there is no reason why a husband should not be able to utilize section five of the act at any time. Johnston, *Public Policy Considerations in Rulings on the Uniform Act on Blood Tests to Determine Paternity*, 4 WM. & MARY L. REV. 149 (1963). It is doubtful that Louisiana would incorporate such a doctrine into the state's statute.

38. Knowledge of the pregnancy is irrelevant in this consideration. *See* Feltus v. Feltus, 210 So.2d 388 (La. App. 4th Cir. 1968); *The Work of the Louisiana Appellate Courts for the 1967-1968 Term—Persons*, 29 LA. L. REV. 171 (1969).

Divorce

There are no decisions under the blood test statute where a party to a divorce action has attempted to prove adultery by the use of blood grouping tests.[39] Prior to the adoption of the act, in *Williams*, Louisiana rejected the use of such tests as proof of adultery.[40] The court concluded that the Civil Code requires proof of time, place, and correspondent in such an action. The basis of this holding is questionable because the Code only states adultery is ground for divorce;[41] evidence of adultery is merely a question of proof that could easily be sustained by the use of blood tests.[42] The model act does not seem to be so restrictive as to have application in only an action *en desaveu*. The Louisiana act states that it has application "in any civil action in which paternity is a relevant fact, *or* in an action *en desaveu*."[43] (Emphasis added.) This disjunctive language clearly contemplates civil actions beyond that of disavowal, and divorce undoubtedly is a civil action in which paternity is a relevant fact when the ground would be adultery resulting in the birth of a child.

Furthermore, the drafters of the model act stated that the statute would have application "[i]n paternity proceedings, *divorce actions* and other types of cases in which the legitimacy of a child is in issue."[44] (Emphasis added.) It is evident, therefore, that the drafters did intend the use of blood grouping tests in a divorce action where the ground is adultery and the legitimacy of a child is put in issue to support the allegation. Thus, the results of blood grouping tests should be conclusive evidence to disprove paternity of a child and satisfy the burden of proof in a divorce action by proving the wife's adultery.

The applicable procedure for the divorce action is similar to the action *en desaveu* since in both suits the paternity of

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39. It would seem in Oregon that the statute is applicable only to filiation proceedings because of the restrictive language of section one of their act. 26 ORE. OP. ATT'Y GEN. 233 (1954).

40. Williams v. Williams, 230 La. 1, 87 So.2d 707 (1956). *See* note 5 & accompanying text *supra*.

41. LA. CIV. CODE art. 139(1).

42. *The Work of the Louisiana Appellate Courts for the 1956-1957 Term—Persons*, 17 LA. L. REV. 303, 306, 310 (1957).

43. LA. R.S. 9:396 (Supp. 1972).

44. HANDBOOK OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 434 (1952).

the child is in issue. If all the experts agree that the husband could not be the child's father, then the question of paternity shall be resolved,[45] thereby satisfying the burden of proof. Thus adultery would be proved and the divorce should be granted.

Prescription in a Divorce Action

Since the act has application in a divorce action, the question again arises concerning the issue of prescription. Although a divorce action may be extinguished by reconciliation, the action is not subject to a prescriptive period.[46] Thus it might be possible that a situation would arise where the presumption of legitimacy would be overcome as to the divorce action but not in relation to the action *en desaveu*.[47] The court could incorporate the prescriptive period applicable to the action *en desaveu* into the act in every civil action where paternity is at issue. In such a situation, a husband, absent reconciliation, would have six months from the date of the child's birth to bring his divorce action, when he intends to prove adultery by the use of blood grouping tests.

However, there is no compelling reason to restrict the husband by a prescriptive period. The purpose of prescription in the action *en desaveu* is to protect the innocent child from the legal consequences of illegitimacy. In the divorce action, the question of legitimacy is at issue only in relation to the evidence required in order to prove adultery. The child would still be considered the legitimate child of the husband under the conclusive presumption of article 184 after the prescription for the action *en desaveu* has run. Therefore the husband should not be made to suffer by restricting the evidence available to him in the divorce action. Absent reconciliation the husband should be allowed to institute his divorce action at any time, with the prescriptive period being restricted to six months only when he wishes to disavow the child in the same proceeding. After this six month period has run, there should be no bar to his instituting a divorce action based on the results of blood grouping tests.[48]

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45. LA. R.S. 9:397.2 (Supp. 1972).
46. LA. CIV. CODE art. 154.
47. *Id.* art. 191.
48. It is left to judicial interpretation to determine what other actions are to be included in the provision "in any civil action in which paternity