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Uniform Parentage Act: Ohio Recognizes Genetic Testing's Validity to Rebut the Presumption That the Natural Mother's Husband Is Not the Father

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UNIFORM PARENTAGE ACT: OHIO RECOGNIZES GENETIC TESTING'S VALIDITY TO REBUT THE PRESUMPTION THAT THE NATURAL MOTHER'S HUSBAND IS NOT THE FATHER—*Hulett v. Hulett*, 45 Ohio St. 3d 288, 544 N.E.2d 257 (1989).

I. INTRODUCTION

The common law defines a bastard as one who is begotten and born out of wedlock.[1] The illegitimate child was historically considered "nullius filius" - the child of no one - and was not entitled to support from the natural father.[2] Therefore, under the common law, courts attempted to avoid bastardizing a child previously thought to be legitimate due to the social and legal stigma attached to the bastardy status.[3] Ohio court decisions followed the common law and created a strong presumption that a child born within lawful wedlock or a competent time after a marriage terminates is legitimate.[4] This presumption is maintained in Chapter 3111 of the Ohio Revised Code, enacted in 1982 when the Ohio General Assembly adopted a form of the Uniform Parentage Act.[5] The Ohio General Assembly enacted a section which creates a presumption that a woman's husband is the father of any children born during marriage.[6] This presumption is rebuttable by

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1. 1 W. BLACKSTONE, COMMENTARIES *454; 2 J. KENT, COMMENTARIES ON AMERICAN LAW 173 (1827).

2. Annotation, *Right of Illegitimate Child to Maintain Action to Determine Paternity*, 19 A.L.R.4th 1082, § 2 (1983).

3. *See* Miller v. Anderson, 43 Ohio St. 473, 477, 3 N.E. 605, 606-07 (1885) (prohibiting testimony of mother to bastardize a child born during the marriage because of the effect it may have upon the innocent child), *overruled by* Johnson v. Adams, 18 Ohio St. 3d 48, 479 N.E.2d 866 (1985) (making presumption of legitimacy generally rebuttable); Moore v. Dague, 46 Ohio App. 2d 75, 85, 345 N.E.2d 449, 455 (1975) (deploring stigma so often attached to the status of illegitimacy); 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 2064, at 482 (1978) (discussing Lord Mansfield's rule excluding testimony of spouses regarding paternity).

4. Powell v. State *ex rel.* Fowler, 84 Ohio St. 165, 168, 95 N.E. 660, 661 (1911), *overruled on other grounds*, State *ex rel.* Walker v. Clark, 144 Ohio St. 305, 58 N.E.2d 773 (1944).

5. House Bill 245, which adopted a modified version of the Uniform Parentage Act, was sponsored by Representative Fix and approved by the governor on March 30, 1982. Ohio was the eleventh state to adopt a version of the Uniform Parentage Act. 9B U.L.A. 2 (1987). Six other states have adopted the act since 1982. *Id.* The seventeen states which have adopted a version of Uniform Parentage Act are Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, North Dakota, Ohio, Rhode Island, Washington and Wyoming. *Id.* The Ohio chapter was updated in 1986 in a bill sponsored by Representative Tansey which appended sections 3111.30 through 3111.38 regarding artificial insemination. The amendment was approved by the governor June 24, 1986. OHIO REV. CODE ANN. § 3111.30-.38 (Anderson 1989).

6. OHIO REV. CODE ANN. § 3111.03(A)(1) (Anderson 1989). The statute states that a man is presumed to be the natural father of any child born during the marriage or within three hun-

evidence which is clear and convincing.[7] The Ohio Parentage Act includes a statutory authorization of the types of evidence that may be used to rebut the presumption.[8]

This casenote addresses the Ohio Supreme Court's decision in *Hulett v. Hulett*,[9] which determined the proper statutory interpretation of Ohio Revised Code Sections 3111.03(A)(1), 3111.03(B), 3111.09 and 3111.10. The casenote begins by reviewing Ohio's historical approach to paternity proceedings. It then discusses Ohio's modified version of the Uniform Parentage Act as enacted under Chapter 3111 of the Ohio Revised Code. The casenote compares Ohio's statute of limitations for a paternity action[10] with other states' requirements and considers the implicit policy implications of the limitations period and the application of the equitable doctrine of laches as a possible alternative means to bar paternity suits. Finally, the casenote considers possible policy implications of Ohio's statutory format as suggested by the concurring opinion in *Hulett v. Hulett*.

II. FACTS AND HOLDING

Lori L. and Roger Hulett were married in Franklin County on June 30, 1984.[11] On November 11, 1985, Roger Zachary Hulett was born.[12] Lori Hulett (appellant) instituted a divorce action in Franklin County Court of Common Pleas, Division of Domestic Relations, on July 22, 1986, seeking temporary and permanent custody of Roger Zachary, alimony, and child support.[13]

On July 24, 1986, appellant, the child, Roger Zachary, and Allen R. Davis submitted to blood and tissue tests at the Ohio State University Hospital Paternity Testing Laboratory.[14] The results of the test indicated a 98.66% probability that Davis was the child's biological father.[15] Appellant amended her complaint on August 13, 1986, setting forth additional grounds for the action.[16] Roger Hulett (appellee) filed

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dred days after the marriage terminates by death, annulment, divorce, dissolution, or separation pursuant to a separation agreement. *Id.*

7. *Id.* § 3111.03(B); *see also* State *ex rel.* Walker v. Clark, 144 Ohio St. 305, 58 N.E.2d 773 (1944).

8. OHIO REV. CODE ANN. § 3111.10 (Anderson 1989).

9. 45 Ohio St. 3d 288, 544 N.E.2d 257 (1989).

10. OHIO REV. CODE ANN. § 3111.04 (Anderson 1989).

11. *Hulett v. Hulett*, 45 Ohio St. 3d 288, 288, 544 N.E.2d 257, 258 (1989).

12. *Id.*

13. *Id.* at 288-89, 544 N.E.2d at 258.

14. *Id.* at 289, 544 N.E.2d at 258.

15. *Id.*

16. *Id.* For discussion of the blood and tissue testing and their validity in paternity actions, see footnotes 173 and accompanying text.

his answer on August 19, 1986, with a counterclaim for divorce[17] and custody of the child.[18]

On August 25, 1986, appellant filed a motion to add the child as party plaintiff and Davis as party defendant.[19] She also filed a second amended complaint requesting paternity determination.[20] The court granted her motion to join the new parties.[21]

On advice of counsel, appellee submitted to blood and tissue testing on September 11, 1986.[22] He filed an answer October 6, 1986, alleging that he was the child's father and asserted as a defense the statutory presumption of paternity.[23]

The results of the blood and tissue testing excluded appellee as biological father of Roger Zachary Hulett.[24] Appellant filed a motion for partial summary judgment regarding the non-paternity of appellee.[25] The court denied her motion and ordered additional blood and tissue tests.[26] The results of the second set of tests also excluded appellee as the child's biological father and indicated that there was a 98.47% probability that Davis was the biological father.[27]

Appellee filed a motion for summary judgment on the paternity issue on February 9, 1987,[28] after appellant renewed her motion for partial summary judgment on the issue of his non-paternity.[29] On February 26, 1987, the parties filed a stipulation of facts and Davis filed an affidavit acknowledging paternity of Roger Zachary Hulett.[30]

The domestic relations court granted appellant's partial summary

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17. 45 Ohio St. 3d at 289, 544 N.E.2d at 258.

18. Brief of Appellant at 1, Hulett v. Hulett, 45 Ohio St. 3d 288, 544 N.E.2d 257 (1989) (No. 88-98).

19. 45 Ohio St. 3d at 289, 544 N.E.2d at 258.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* Appellant's motion was based on the two sets of genetic tests that unanimously excluded appellee as the natural father. Brief of Appellant at 1, Hulett v. Hulett, 45 Ohio St. 3d 288, 544 N.E.2d 257 (1989) (No. 88-98). The appellant argued that a declaration of appellee's non-paternity was mandated by section 3111.09(D). *Id.* Section 3111.09(D) of the Ohio Revised Code states that "[i]f the court finds that the conclusions of all the examiners are that the alleged father is not the father of the child, the court shall enter judgment that the alleged father is not the father of the child." OHIO REV. CODE ANN. § 3111.09(D) (Anderson 1989).

26. 45 Ohio St. 3d at 289, 544 N.E.2d at 258.

27. *Id.*

28. *Id.* The appellee based his summary judgment motion on a narrow interpretation of the syllabus of Joseph v. Alexander, 12 Ohio St. 3d 83, 465 N.E.2d 448 (1984). *See* Brief of Appellant at 1, Hulett v. Hulett, 45 Ohio St. 3d 288, 544 N.E.2d 257 (1989) (No. 88-98).

29. 45 Ohio St. 3d at 289, 544 N.E.2d at 258.

judgment motion on March 9, 1987[31] and issued a declaration that the appellee was not the child's biological father.[32] In the divorce judgment, the trial court granted the appellant custody and gave the appellee specified visitation.[33] The appellee appealed the decision on paternity; no appeal was filed from the divorce judgment.[34] The Court of Appeals for Franklin County reversed and remanded on November 17, 1987.[35] The appellate court concluded that

> [w]here there is clear and convincing evidence of sexual relations between husband and wife during the time in which the child must have been conceived, the presumption of R.C. 3111.03 becomes essentially conclusive and cannot be rebutted by genetic tests which are, by statute, to be used only with respect to an alleged father, not a presumed father.[36]

The Ohio Supreme Court granted a motion to certify the record, reversed the court of appeals, and remanded the case.[37]

The *Hulett* court framed the issue as whether genetic test results, authorized by Ohio Revised Code Sections 3111.09 and 3111.10,[38] can be used to overcome the presumption of paternity conferred upon the husband of the child's natural mother pursuant to section 3111.03(A)(1).[39] Specifically, the court held that the statutory presumption may be rebutted by clear and convincing evidence to the contrary; such evidence includes the items listed in section 3111.10 with section 3111.10(C) explicitly identifying genetic tests as admissible evi-

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31. *Id.*

32. Brief of Appellant at 1, Hulett v. Hulett, 45 Ohio St. 3d 288, 544 N.E.2d 257 (1989) (No. 88-98).

33. *Id.* at 2.

34. *Id.*

35. Hulett v. Hulett, No. 87AP-330 (Ohio Ct. App. Nov. 17, 1987) (LEXIS, States library, Ohio file).

36. *Id.* The appellate court drew a distinction between an individual who is presumed to be the father under section 3111.03(A)(1) of the Ohio Revised Code and a man whom a mother alleges to be the father in a paternity action. *Id.* Sections 3111.09 and 3111.10, which define admissible evidence in a paternity action, both use the term alleged father. *Id.* Section 3111.09 refers to "the child's mother, the child, the alleged father." OHIO REV. CODE ANN. § 3111.09 (Anderson 1989). Section 3111.10(A) refers to "[e]vidence of sexual intercourse between the mother and alleged father." *Id.* § 3111.10(A). Section 3111.10(B) admits an expert's opinion on "the statistical probability of the alleged father's paternity" *Id.* § 3111.10(B). Section 3111.10(D) admits "[m]edical evidence relating to the alleged father's paternity." *Id.* § 3111.10(D).

37. 45 Ohio St. 3d at 289, 544 N.E.2d at 258.

38. OHIO REV. CODE ANN. §§ 3111.09 -.10 (Anderson 1989). Section 3111.09 addresses when a court has authority to order the child's mother, the child, the alleged father, and any other person who is a defendant in an action to submit to genetic testing. Section 3111.10 lists admissible evidence in "an action brought under sections 3111.01 to 3111.19." The listing includes "[g]enetic test results, weighted in accordance with evidence, if available, of the statistical probability of the alleged father's paternity." *Id.* § 3111.10.

39. 45 Ohio St. 3d at 293, 544 N.E.2d at 262.

dence.[40] The court relied on an *in pari materia* interpretation to reach this result.[41] The Ohio Supreme Court rejected appellee's contention that genetic tests could only be used in proceedings *other* than those involving the section 3111.03(A)(1) presumption.[42]

The *Hulett* court commented that the doctrine of laches may be used to bar a paternity action when the action would be prejudicial to the defendant.[43] The concurrence was written by Justice Brown,[44] who was joined by Justices Wright and Resnick.[45] Although the doctrine of laches does address the concerns they express, the concurring justices indicated that the disruption in the family relationship which may result from the paternity action needed to be controlled in a closer manner.[46] The concurrence expressed dissatisfaction that the elements of fatherhood are not adequately defined in Chapter 3111 and that the limitations period is too long.[47]

III. BACKGROUND

A. *The Common Law of Ohio*

The common law presumes that a child born in wedlock is legitimate.[48] Ohio common law recognizes the presumption and, in an ear-

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40. *Id.*

41. *Id.* at 292, 544 N.E.2d at 261.

42. *Id.* at 293, 544 N.E.2d at 261-62. The appellate court made a distinction in its reasoning between a presumed father and an alleged father. Hulett v. Hulett, No. 87AP-330 (Ohio Ct. App. Nov. 17, 1987) (LEXIS, States library, Ohio file) ("There are two classes of father anticipated by R.C. Chapter 3111: alleged and presumed."). It concluded that genetic testing could only be used with an alleged father; appellee was a presumed father and genetic testing was therefore inapplicable. *Id.* The appellate court drew this distinction on the wording of sections 3111.09 and 3111.10; each refers to evidence available to prove an alleged father is a natural father. *Id.* The court concluded that such evidence was "not meant to assist the court in determining whether the evidence has overcome the presumption that the presumed father (the husband of the mother) is the father." *Id.* "The manifest purpose of R.C. 3111.09 and 3111.10 is to permit genetic tests as affirmative evidence that a man alleged to be the father of a child is in fact the father and not to permit tests to prove a negative with respect to a presumed father." *Id.* The Ohio Supreme Court did not specifically address this aspect of the court of appeals' reasoning. 45 Ohio St. 3d 288, 544 N.E.2d 257. Since the court determined that genetic testing was applicable to an action to rebut the statutory presumption under section 3111.03(A)(1), it can be inferred that the court rejected the lower court's distinction between alleged and presumed fathers. *See id.* at 293, 544 N.E.2d at 262.

43. 45 Ohio St. 3d at 296, 544 N.E.2d at 263.

44. *Id.* at 295, 544 N.E.2d at 263.

45. *Id.* at 297, 544 N.E.2d at 265.

46. *Id.* at 296, 544 N.E.2d at 264 (Brown, J., concurring). A paternity suit can disrupt an established family relationship until the child reaches age twenty-three since it can be brought up to five years after the child attains age eighteen. OHIO REV. CODE ANN. § 3111.05 (Anderson 1989).

47. 45 Ohio St. 3d at 295-96, 544 N.E.2d at 263-64 (Brown, J., concurring).

48. Comment, *Rebutting the Marital Presumption: A Developed Relationship Test*, 88 COLUM. L. REV. 369, 371 (1988). The marital presumption, known as Lord Mansfield's Rule,

lier period, only allowed it to be rebutted by "clear, certain and conclusive . . . [evidence] that the husband had no powers of procreation, or the circumstances were such as to render it impossible that he could be the father of the child."[49] In 1944, the Ohio Supreme Court, in *State ex rel. Walker v. Clark*,[50] overruled the second paragraph of *Powell v. State ex rel. Fowler*'s[51] syllabus, thus rejecting the limited means *Fowler* recognized to overcome the presumption that the husband was the child's father.[52] Walker had testified that she had no relations with her husband after their separation and that there was hostility between them.[53] Walker's former husband also testified that he had not associated with her since the separation and was under a restraining order not to molest her.[54] Walker offered additional proof of her former husband's non-paternity, including an exhibition of the child and testimony by a medical doctor regarding a blood test comparison between the child, her former husband and herself.[55]

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provided that a women's husband was the father of any children born of the marriage. *Id.* This presumption was based on "notions of 'morality and decency' and became widely accepted after its pronouncement in 1777." *Id.* (footnote omitted). *See generally* J. WIGMORE, *supra* note 3, § 2063, at 469-73 (1978) (history of Lord Mansfield's Rule rejecting spousal testimony to defeat the marital presumption). The Ohio courts rejected Lord Mansfield's Rule and allowed the testimony of a wife and husband as competent in paternity cases. *E.g.*, Yerian v. Brinker, 33 Ohio L. Abs. 591, 35 N.E.2d 878 (Ohio Ct. App. 1941).

49. Powell v. State *ex rel.* Fowler, 84 Ohio St. 165, 165, 95 N.E. 660, 660 (1911), *overruled on other grounds*, State *ex rel.* Walker v. Clark, 144 Ohio St. 305, 58 N.E.2d 773 (1944). A presumption is an inference which is required to be drawn from the existence of one fact by a rule of law. 1 B. JONES, JONES ON EVIDENCE, § 3:1 (6th ed. 1972). Thus, the marital presumption is an inference from the initial fact that a certain man was the mother's husband at the time of conception to the inferred fact that the man is the child's father. Presumptions are divided into two classes, conclusive and rebuttable. *Id.* § 3:4. Conclusive presumptions can not be overcome by any proof that the inferred fact does not exist as long as the initial fact is established. *Id.* Rebuttable presumptions can be disproved if, despite the existence of the initial fact, a party can prove the inferred fact does not exist. *Id.*

50. 144 Ohio St. 305, 58 N.E.2d 773 (1944).

51. 84 Ohio St. at 165, 95 N.E. at 660. In *Fowler*, a woman alleged that Powell was the father of her child even though she had been married prior to the child's conception. *Id.* at 166, 95 N.E. at 661. Fowler claimed that she had illicit relations with Powell during each of several separations from her husband. *Id.* At the time of conception, she claimed that she had been permanently separated from her husband for a little over one month and was proceeding with a divorce action. *Id.* The court found that Fowler had failed to prove that it was impossible for her husband to have fathered the child since "access was a physical possibility at all the time from the date that she claims there was a final separation up until the time the divorce was granted" four months after conception. *Id.* at 171, 95 N.E. at 662.

52. *Walker*, 144 Ohio St. at 312, 58 N.E.2d at 776.

53. *Id.* at 306, 58 N.E.2d at 774.

54. *Id.* at 306-07, 58 N.E.2d at 774.

55. *Id.* at 307, 58 N.E.2d at 774. The blood tests indicated that Walker's former husband could not be the father since the child's blood type was A while both Walker and her former husband had blood type O.

The *Clark* court held that the presumption is rebuttable under a standard of clear and convincing evidence which shows that sexual relations did not occur, irrespective of the opportunity for such relations to have occurred.[56] The *Clark* holding meant that, to rebut the marital presumption, the husband's proof would no longer be limited to lack of ability or opportunity to engage in sexual relations.[57] The court also concluded that the presumption may be challenged by the natural mother as part of her paternity case against another man.[58]

In the 1950's, states began to authorize the use of blood tests as a means to exclude an alleged father in a paternity suit.[59] In 1952, the Uniform Act on Blood Tests to Determine Paternity was approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association.[60] The act authorizes a court to order blood or tissue tests to resolve the question of paternity in any civil action where paternity is relevant.[61] The act makes a conclusive presumption of non-paternity where the results of the blood tests indicate an individual could not be the child's father.[62] Seven states have adopted this uniform act.[63] In states not adopting the Uniform Act on Blood Tests to Determine Paternity, the use of a blood test is authorized by statute or judicial decision.[64]

In its decision in *Hall v. Rosen*,[65] the Ohio Supreme Court affirmed Ohio's position that a biological father could not be held for support where the mother, during her pregnancy, married another man

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56. *Id.*

57. *Id.*

58. *Id.* at 314, 58 N.E.2d at 777.

59. Note, *Human Leukocyte Antigen Testing: Technology Versus Policy in Cases of Disputed Parentage*, 36 VAND. L. REV. 1587, 1590 (1983).

60. Harris, *Some Observations on the Un-Uniform Act on Blood Tests to Determine Paternity*, 9 VILL. L. REV. 59, 59 (1963).

61. UNIF. ACT ON PATERNITY § 7, 9B U.L.A. 359 (1960). The Comment to section seven explains that sections seven through ten of the Uniform Act on Paternity are part of the Uniform Act on Blood Tests to Determine Paternity. *Id.* Section one of the Uniform Act on Blood Tests to Determine Paternity gives a court authority to order blood tests on its own initiative or a motion by any party in a civil action in which paternity is a relevant fact. UNIF. ACT ON BLOOD TESTS TO DETERMINE PATERNITY, *reprinted in*, Harris, *supra* note 60, at 76.

62. 1 B. JONES, *supra* note 49, § 3:80.

63. CAL. EVID. CODE §§ 890-897 (West 1966); ILL. ANN. STAT. ch. 40, para. 1401-1407 (Smith-Hurd 1980); LA. REV. STAT. ANN. §§ 9:936-:938 (West Supp. 1990); OKLA. STAT. ANN. tit. 10, §§ 501-508 (1987); OR. REV. STAT. §§ 109.250-.262 (1983); 42 PA. CONS. STAT. ANN. §§ 6131-6137 (Purdon 1982); UTAH CODE ANN. §§ 78-25-18 to -23 (1987).

64. *See, e.g.*, State *ex rel.* Walker v. Clark, 144 Ohio St. 305, 314, 58 N.E.2d 773, 777 (1944) (blood tests admissible to exclude an individual from paternity in absence of statutory approval); OHIO REV. CODE ANN. § 3111.16 (Anderson 1989); OHIO GEN. CODE §§ 12122-1 to -2 (1939) (Ohio's paternity statutes prior to the adoption of the Uniform Parentage Act).

65. 50 Ohio St. 2d 135, 363 N.E.2d 725 (1977), *overruled by*, Johnson v. Adams, 18 Ohio St. 3d 48, 479 N.E.2d 868 (1985).

who had full knowledge of her condition.[66] The man's knowledge of her condition indicated that he consented to stand *in loco parentis* to the child.[67] The *Rosen* decision reflected the court's concern for the possible harm that may be caused by bastardizing a previously legitimate child and disrupting the normal psychological and sociological father-child relationship which is nurtured by support and association.[68] The court also was concerned with the potential of "father-shopping" which it described as "seeking support from the most successful of possible candidates."[69] The court stated that delayed paternity actions are problematic due to stale evidence and potential disruption of other established families by the moral disparagement and increased financial responsibilities.[70]

In *Owens v. Bell*,[71] a 1983 decision, the Ohio Supreme Court recognized the admissability of Human Leukocyte Antigen (HLA) testing as relevant evidence in paternity proceedings without statutory authorization.[72] HLA testing focuses on the white blood cells whereas traditional blood testing centers on red blood cell antigens.[73] Due to the large number of HLA antigens and the relative rarity of certain combinations, HLA testing presents a degree of accuracy not previously available for paternity tests.[74] The statistical figures may be misleading, however, and there has been wide debate on whether to admit the testing at all, whether to limit the results to exclude paternity, or whether to allow the results for excluding and establishing paternity.[75]

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66. *Id.*
67. *Id.*
68. *Id.* at 140, 363 N.E.2d at 728.
69. *Id.*
70. *Id.*
71. 6 Ohio St. 3d 46, 451 N.E.2d 241 (1983).
72. *Id.* The case arose prior to the enactment in Ohio of the Uniform Paternity Act which expressly recognized that genetic testing is admissible evidence in paternity proceedings in Ohio. *Id.* The Ohio Supreme Court's decision in *Owens* allowed the admission of HLA tests in cases arising prior to the enactment of the Ohio Parentage Act. *Id.* at 53, 415 N.E.2d at 246-47.
73. Reisner & Bolk, *A Layman's Guide to the Use of Blood Group Analysis in Paternity Testing*, 20 J. FAM. L. 657, 666 (1981-82).
74. *Id.* There are more than fifty different known factors in the HLA system which are divided into three groups, A, B, and C. *Id.* Every person can have two factors from each group which are linked and inherited together. *Id.* A child will inherit one from his mother and one from his father. *Id.* If an alleged father has none of the antigens that the child has, he may be excluded as the father. *Id.* at 667-68. Most HLA groups are rare so the chance that a randomly chosen man will possess the groups of the true father is small. Ellman & Kaye, *Probabilities and Proof: Can HLA and Blood Group Testing Prove Paternity?* 54 N.Y.U. L. REV. 1131, 1140 (1979).
75. *See generally* Ellman & Kaye, *supra* note 74, at 1133 (doubtful that any expert can correctly testify to a quantified probability that an individual is in fact the father); Perna, *The Uniform Reciprocal Enforcement of Support Act and the Defense of Non-Paternity: A Functional Analysis*, 73 KY. L.J. 75, 121-26 (1984-85) (admissibility of blood tests in URESA proceeding governed by state law reflecting conflict on whether or not such tests should be used

The Ohio Court of Appeals for Clark County outlined the necessary evidentiary foundation for admitting HLA tests in *Camden v. Miller*.[76] The court drew an analogy with the foundation necessary to admit blood-alcohol tests to determine the relevant criteria.[77] The process includes a showing that "(1) the blood was timely taken, (2) from a particular identified person, (3) by an authorized person and in accordance with approved methods, (4) was properly labeled and (5) there was an unbroken chain of custody."[78]

B. *Ohio's Parentage Act*

Ohio enacted an amended version of the Uniform Parentage Act in 1982.[79] The enactment signaled a major change in the purpose of paternity actions in Ohio. The statute's primary focus is to safeguard the child's interest;[80] the emphasis is no longer on providing a remedy for the mother.[81] Ohio Revised Code Section 3111.02 indicates that the parent/child relationship can be established pursuant to sections 3111.01 through 3111.10.[82] Section 3111.04 outlines who has standing to bring a action to establish the parent/child relationship.[83] The parties with standing include the biological mother, the child or his/her representative, and a man alleged or alleging himself to be the child's father.[84]

The decision in *Joseph v. Alexander*[85] recognized that the Ohio version of the Uniform Paternity Act codified the *Walker* principles[86] as well as the established public policy for Ohio paternity suits.[87] In its decision in *Joseph*, the Ohio Supreme Court acknowledged that an ac-

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in a paternity proceeding); Teraski, *Resolution by HLA Testing of 1000 Paternity Cases Not Excluded by ABO Testing*, 16 J. FAM. L. 543 (1978) (supporting HLA tests as evidence of paternity).

76. 34 Ohio App. 3d 86, 517 N.E.2d 253 (1986).

77. *Id.* at 87, 517 N.E.2d at 255.

78. *Id.*

79. *See supra* note 5.

80. *See* OHIO REV. CODE ANN. § 3111.13(C) (Anderson 1989) (any provision in a judgment or order in this action must be in the best interest of the child).

81. *E.g.*, Johnson v. Norman, 66 Ohio St. 2d 186, 421 N.E.2d 124 (1981)

82. § 3111.02.

83. *Id.* § 3111.04.

84. *Id.*

85. 12 Ohio St. 3d 88, 465 N.E.2d 448 (1984). Joseph alleged in his complaint that he was the natural father of a child born during the marriage of Barbara and William Alexander. *Id.* Joseph sought to have himself declared the natural father so that he could resume a parent-child relationship that he had established with the child prior to its disruption by the Alexanders. *Id.* at 89, 465 N.E.2d at 448. The complaint alleged that the Alexanders had recognized Joseph as the father, allowed him regular visitation with the child, and accepted his support payments for the child's maintenance. *Id.*

86. *See infra* notes 90-99 and accompanying text.

87. 12 Ohio St. 3d at 89, 465 N.E.2d at 449.

tion may be brought by the alleged biological father despite the presumption that a husband is the father of children born during the marriage.[88] Therefore, Ohio Revised Code Section 3111.04 does not limit standing of alleged biological fathers to situations where the child is born out of wedlock.[89]

The *State ex rel. Walker v. Clark*[90] decision recognized that the statutory presumption of paternity in the husband of the natural mother at the time of conception is rebuttable.[91] Section 3111.03(A)(1) codified that presumption by stating that the husband is the natural father for children born during the marriage or within 300 days after its termination.[92] The *Walker* Court overruled the second paragraph of the *Powell v. State ex rel. Fowler*[93] syllabus with a narrow interpretation of how that presumption may be rebutted. The *Walker* Court adopted the position that " 'where an opportunity for sexual intercourse is shown, the presumption favoring legitimacy, while very strong, is not conclusive, and may be rebutted by showing that intercourse did not in fact take place; but the proofs should be clear and convincing.' "[94] The new test devised in *Walker* requires that the evidence be "clear and convincing" in establishing that husband and mother did not have sexual relations during the pertinent time despite the opportunity to do so.[95] Therefore, even before the enactment of the Uniform Parentage Act in Chapter 3111 in 1982, the Ohio Supreme Court recognized that the marital presumption was not conclusive.

The Ohio Supreme Court expanded the types of evidence admissible to rebut the presumption beyond impotency and lack of access.[96] Prior to any statutory authorization for such tests, the court in *Walker* considered the admissability of blood-grouping tests because the plain-

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88. *Id.*

89. *Id.* at 90, 465 N.E.2d at 449. On remand, the case was tried to a jury which found the alleged father, not the husband, was the child's natural father. Joseph v. Alexander, No. CA-6781 (Ohio Ct. App. May 19, 1986) (LEXIS, States library, Ohio file). The Stark County Court of Appeals reversed, basing its decision on a narrow interpretation of the Ohio Supreme Court's decision in the initial decision. *Id.* The appellate court interpreted the syllabus to require proof of no sexual intercourse between husband and wife in order to overcome the statutory presumption of the husband's paternity. *Id.*

90. 144 Ohio St. 305, 58 N.E.2d 773 (1944).

91. *Id.* at 305, 58 N.E.2d at 773.

92. OHIO REV. CODE ANN. § 3111.03 (Anderson 1989).

93. 84 Ohio St. 165, 95 N.E. 660 (1911). The second paragraph of the *Powell* syllabus stated that "[b]efore such child can be adjudged a bastard the proof must be clear, certain and conclusive, either that the husband had no powers of procreation, or the circumstances were such as to render it impossible that he could be the father of the child." *Id.*

94. 144 Ohio St. at 310-11, 58 N.E.2d at 776 (quoting Annotation, *Proof Necessary to Establish Bastardy of Child Born to Married Woman*, 36 L.R.A. (N.S.) 255, 256 (1912)).

95. *Id.* at 312, 58 N.E.2d at 777.

96. *Id.*

tiff had introduced a blood-grouping test in her case to prove paternity.[97] But, because such evidence was comparatively new, the court determined it had no evidentiary value in proving paternity.[98] The court ruled, however, that the plaintiff should have the right to introduce such evidence to exclude her former husband from the list of potential fathers.[99]

Ohio Revised Code Section 3111.09 governs the admission of HLA/genetic tests.[100] In *Hulett v. Hulett*,[101] the Ohio Supreme Court recognized that Chapter 3111 must be read so that its sections are interpreted *in pari materia*.[102] Therefore, the genetic tests described in sections 3111.09 and 3111.10 can be used to rebut the presumption of section 3111.03(A)(1).[103] There is no evidence regarding the intent of the legislature to limit the applicability of these sections.[104]

In *Johnson v. Adams*,[105] the Ohio Supreme Court overruled *Hall v. Rosen* based on the statutory authority of Ohio Revised Code Chapter 3111.[106] The court rejected the conclusive presumption created in *Rosen* which effectively prevented a man from rebutting the marital presumption because he married the mother during her pregnancy.[107] The court noted that

> [t]he conclusive presumption of paternity set forth in *Hall* and *Miller* deprives a child of support from its biological father, while imposing a duty of support upon another man who may have had no intention of accepting such a burden at the time that he married the child's mother. . . . [T]his conclusive presumption cannot be said to be founded upon a "universal truth."[108]

The court determined that the accuracy of HLA testing limits the potential for "father shopping" and pointed out that the admission of genetic tests as proof of paternity is no more disruptive than other types of proof previously accepted in the courts.[109]

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97. *Id.* at 312-13, 58 N.E.2d at 776-77.
98. *Id.* at 313, 58 N.E.2d at 777.
99. *Id.* at 314, 58 N.E.2d at 777.
100. OHIO REV. CODE ANN. § 3111.09 (Anderson 1989).
101. 45 Ohio St. 3d 288, 544 N.E.2d 257 (1989).
102. *Id.* at 292, 544 N.E.2d at 261.
103. *Id.* at 293, 544 N.E.2d at 261.
104. *Id.*
105. 18 Ohio St. 3d 48, 479 N.E.2d 866 (1985). In *Johnson*, the alleged father sought to avoid liability by support payments because the child's natural mother had married her sister's brother-in-law while she was pregnant. *Id.* at 48, 479 N.E.2d at 866. Johnson separated from her husband one week after the marriage. *Id.*
106. *Id.*
107. *Id.* at 50, 479 N.E.2d at 868.
108. *Id.*
109. *Id.* at 50, 479 N.E.2d at 869.

In the span of forty years, Ohio's approach to paternity actions has changed dramatically. The period of change opened with a recognition that the marital presumption could be rebutted by evidence other than proof of inability or lack of access.[110] It culminated in the recognition of a man's ability to rebut the presumption of paternity created when he married a pregnant woman.[111] The period also encompassed the evidentiary evolution of blood tests and HLA tests as recognized scientific proof of paternity or non-paternity.[112] The impact of using scientific evidence such as HLA to create or destroy family relations, however, has not always been carefully considered by the legislatures or courts. The remainder of this casenote will address these concerns within the framework of *Hulett v. Hulett.*

IV. ANALYSIS

A. The Parties' Arguments

Appellee argued that genetic testing is inadmissible evidence for determination of the child's natural father.[113] He based his argument on the fact that Ohio Revised Code Section 3111.03(A)(1) creates a presumption of paternity in the husband of the natural mother for children born of the marriage.[114] He contended that this statutory presumption can only be rebutted by clear and convincing evidence that there had been no sexual relations between the husband and wife during the period of conception.[115] His theory was based on a narrow reading of *Joseph v. Alexander*.[116] The appellee interpreted the *Joseph* syllabus as holding that genetic testing is not applicable to rebutting the statutory presumption *unless* there is evidence that there had been no sexual relations between the husband and wife during the period of conception.[117] He therefore concluded that genetic tests can not be used to rebut the 3111.03(A)(1) presumption when there is evidence that such sexual relations did occur.[118] This narrow reading of *Joseph* would

110. *Walker*, 144 Ohio St. at 305, 58 N.E.2d at 773.

111. *Johnson*, 18 Ohio St. 3d at 52, 479 N.E.2d at 870.

112. *See generally* Owens v. Bell, 6 Ohio St. 3d 46, 451 N.E.2d 241 (1983); Camden v. Miller, 34 Ohio App. 3d 86, 517 N.E.2d 253 (1986).

113. Hulett v. Hulett, 45 Ohio St. 3d 288, 544 N.E.2d 257 (1989).

114. OHIO REV. CODE ANN. § 3111.03 (Anderson 1989).

115. Brief of Appellant at 1, Hulett v. Hulett, 45 Ohio St. 3d 288, 544 N.E.2d 257 (1989) (No. 88-98).

116. 12 Ohio St. 3d 88, 465 N.E.2d 448 (1984).

117. Brief of Appellant at 1, Hulett v. Hulett, 45 Ohio St. 3d 288, 544 N.E.2d 257 (1989) (No. 88-98).

118. 45 Ohio St. 3d at 291, 544 N.E.2d at 260.

indicate that genetic tests may only be used to rebut the presumptions created by Ohio Revised Code Section 3111.03(A)(2) or (A)(3).[119]

The appellant argued that the statutory language, on its face, defeats the appellee's interpretation of *Joseph v. Alexander*.[120] According to the appellant, the *Joseph* syllabus acknowledges that an action may be brought by an alleged biological father despite the presumption that a husband is the father of children born during the marriage.[121] It is not contrary to public policy to allow such an individual to maintain a paternity action.[122]

The *Joseph* opinion is silent as to which evidence may be used to rebut the statutory presumption beyond evidence of an absence of sexual relations.[123] The text of Ohio Revised Code Section 3111.10 enumerates evidence which may be admitted in an action brought under this chapter.[124] The statute authorizes the use of both medical evidence (genetic testing) and evidence establishing the husband's lack of access to his wife.[125]

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119. *Id.*

120. Brief of Appellant at 20-21, Hulett v. Hulett, 45 Ohio St. 3d 288, 544 N.E.2d 257 (1989) (No. 88-98).

121. *Id.* The *Joseph* syllabus states "[w]hile every child conceived in lawful wedlock is presumed legitimate, such presumption is not conclusive and may be rebutted by clear and convincing evidence that there were no sexual relations between husband and wife during the time in which the child must have been conceived." 12 Ohio St. 3d at 88, 465 N.E.2d at 448.

122. *Id.* at 89, 465 N.E.2d at 449 ("This legislation, not being in conflict with any constitutional provision, establishes the applicable rule of public policy."). In fact, the United States Supreme Court has recognized that, in certain circumstances, a biological father has a right, under the due process clause of the fourteenth amendment, for a hearing to determine his rights with regard to a his child born outside of a marital relationship. Lehr v. Robertson, 463 U.S. 248 (1983) (where natural father demonstrates a full commitment to responsibilities of parenthood, his interest in personal contact with his child acquires substantial due process protection); *cf.* Caban v. Mohammed, 441 U.S. 380 (1979) (father who has not participated in rearing of the child has no constitutional claim of veto over child's adoption); Quilloin v. Walcott, 434 U.S. 246 (1978) (not violative of equal protection to allow divorced father to veto adoption but not allow natural father a similar veto when natural father has not sought custody of child or taken any responsibility for rearing the child); Stanley v. Illinois, 405 U.S. 645 (1972) (state can not separate father from children with whom he had lived for eighteen years without a hearing). *But cf.*, Michael H. v. Gerald D., 109 S. Ct. 2333 (interim ed. 1989) (California statute creating presumption of paternity in woman's husband does not violate putative natural father's substantive due process rights).

123. The *Joseph* Court ruled that the lower court's dismissal of the case was an abuse of discretion and remanded the cause to the trial court. 12 Ohio St. 3d at 90, 448 N.E.2d at 449. The court's ruling was limited to whether the alleged father had stated a valid cause of action under section 3111.04(A) of the Ohio Revised Code and did not consider how the alleged father would prove that he was the parent. *Id.*

124. OHIO REV. CODE ANN. § 3111.10 (Anderson 1989).

125. *Id.* § 3111.09 (permitting court, on its own motion or motion of any party to order genetic tests); *Id.* § 3111.10(A) (evidence of sexual intercourse between the mother and alleged father admissible); *Id.* § 3111.10(C) (genetic test results admissible, weighted in accordance with the evidence of the statistical probability of the alleged father's paternity); *Id.* § 3111.10(E) (all other relevant evidence to the issue of paternity admissible).

B. The Ohio Supreme Court's Decision

The court rejected the appellee's interpretation of the *Joseph v. Alexander* syllabus.[126] The court noted that "the plain language of the syllabus does not convey that evidence showing a lack of sexual relations between the husband and wife is the exclusive method by which the presumption may be overcome."[127] The court emphasized that its decision in *Joseph* simply reversed the court of appeals' judgment affirming the trial court's dismissal of the suit.[128] Because the *Joseph* decision is silent as to admissible evidence in a challenge to the marital presumption, the court in *Hulett* found the *Joseph* opinion not controlling.[129]

The *Hulett* court pointed out that the *Joseph* court had access to the entire text of Chapter 3111 and noted "[i]t is highly unlikely that the *Joseph* court would countenance the use of one form of competent evidence enumerated in R.C. 3111.10 to the exclusion of other competent evidence identified therein."[130] Additionally, the court noted that section 3111.09(E) defines genetic tests in reference to its use "in sections 3111.01 to 3111.19 of the Revised Code."[131] Because section 3111.10(C) authorizes the use of genetic test results "[i]n an action brought under this chapter,"[132] the court concluded that genetic tests must be admissible in overcoming the presumption of paternity contained in section 3111.03(A)(1).[133] This conclusion is mandated because sections 3111.02, 3111.03, 3111.04, 3111.09 and 3111.10 "are *in pari materia* and must be construed together."[134] Furthermore, the court explained that there is nothing in the relevant code sections indicating a legislative intent to limit genetic test results to only those paternity proceedings not seeking to rebut the marital presumption.[135] The General Assembly could have excluded the use of genetic evidence under certain circumstances; it also could have made the presumption conclusive if it had intended such a result.[136]

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126. 45 Ohio St. 3d 288, 291, 544 N.E.2d 257, 260 (1989).
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 292, 544 N.E.2d at 260.
131. *Id.* at 292, 544 N.E.2d at 261.
132. OHIO REV. CODE ANN. § 3111.10 (Anderson 1989).
133. 45 Ohio St. 3d at 292, 544 N.E.2d at 261.
134. *Id.*
135. *Id.* at 293, 544 N.E.2d at 261.
136. *Id.* The General Assembly did make the presumption under sections 3111.03(A)(1) and (2) conclusive with respect to conception through artificial insemination. OHIO REV. CODE ANN. § 3111.37(A) (Anderson 1989).

The court, in a footnote, noted that California had addressed the issue of excluding admission of genetic evidence under certain circumstances.[137] In contrast to the framework established in Chapter 3111, California Evidence Code Section 621 limits the individuals who may bring a paternity action to rebut the presumption that the husband is the father.[138] The rule states that "[e]xcept as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."[139] The California rule continues, in paragraphs (b) and (c), to allow the husband and mother respectively to challenge the conclusive presumption through a motion for blood tests.[140] On the other hand, a man who alleges that he, not the husband, is the child's father has no standing to challenge the marital presumption.[141] For claims brought by both the mother and husband, the action is limited to a period of two years from the child's date of birth.[142] However, since the California rule does allow the mother to challenge the marital presumption, the reference to the California rule seems misplaced. If Ohio had adopted a provision similar to California Evidence Code Section 621, the appellant still would have been able to challenge the appellee's paternity under subsection (d)[143] since the appellant's suit for divorce and paternity determination occurred within two years of the child's birth.[144]

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137. 45 Ohio St. 3d at 293 n.3, 544 N.E.2d at 261 n.3.

138. CAL. EVID. CODE § 621 (West Supp. 1991).

139. *Id.* § 621(a).

140. *Id.* § 621(b)-(c).

141. *See id.* The United States Supreme Court upheld the constitutionality of the California rule which denies an alleged biological father the right to challenge the conclusive presumption. Michael H. v. Gerald D., 109 S. Ct. 2333, 2346 (interim ed. 1989). The Court reached this result after analyzing historical protections of the traditional family unit, concluding that it is not common for states to allow a putative father to assert parental rights when the marital union itself is embracing the child as its own. *Id.* at 2342-44. *But cf.* Comment, *supra* note 48, at 373-75 (putative father's right to bring an action to rebut the marital presumption).

142. CAL. EVID. CODE § 621(c)-(d) (West Supp. 1991).

143. Subsection (d) provides that "[t]he notice of motion for blood tests under subdivision (b) may be raised by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child." *Id.* § 621(d).

144. Roger Zachary Hulett was born November 11, 1985. Hulett v. Hulett, 45 Ohio St. 3d 288, 288, 544 N.E.2d 257, 258 (1989). Lori Hulett filed her divorce action July 22, 1986 and a second amended complaint requesting a paternity determination August 25, 1986. *Id.* at 289, 544 N.E.2d at 258. Allen Davis filed an affidavit with the court acknowledging paternity on February 26, 1987. *Id.* As required by the California rule, Lori Hulett's motion and Davis' affidavit were within the two year period following the child's birth. Therefore, California's conclusive presumption would not have afforded Roger Hulett the relief he desired because it would not, under the facts of the case, deny the use of genetic tests to rebut the marital presumption.

The court's decision recognized that there were policy concerns which might justify limiting the admissibility of genetic testing.[145] In particular, the court reviewed the concerns expressed in the *Hall v. Rosen*[146] decision regarding the potential for father shopping to find the "father" who could provide the most support for the mother and child.[147] The court rejected this concern and concluded that this potential is avoided because of the accuracy of genetic testing and the fact that genetic testing is not "stale evidence."[148] Although the court acknowledged that a paternity suit may have a negative impact on the exiting family structure, it concluded that the impact is no more negative than when the presumption is rebutted with the parties' testimony instead of genetic test results.[149]

The statute of limitations for bringing a paternity action is five years after the child reaches age eighteen.[150] As the concurring opinion points out, some states which have adopted the Uniform Parentage Act have placed a markedly shorter period of limitations on the action.[151]

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145. *Id.* at 293-94, 544 N.E.2d at 262.

146. 50 Ohio St. 2d 135, 363 N.E.2d 725 (1977).

147. 45 Ohio St. 3d at 293-94, 544 N.E.2d at 262.

148. *Id.* at 294, 544 N.E.2d at 262. It is interesting to note that, though the Ohio Supreme Court focused its decision on the admissibility of genetic testing (HLA testing) to rebut the marital presumption, the HLA testing was not determinative in this case. Hulett v. Hulett, No. 87AP-330 (Ohio Ct. App. Nov. 17, 1987) (LEXIS, States library, Ohio file). The HLA data did not contribute any exclusionary evidence regarding the appellee. *Id.* However, the red cell data, which had long been accepted in the courts as a means of excluding a man as a potential father, indicated that, because of the absence of the antigen N, the appellee could not be the child's father. *Id.* The HLA evidence and red cell data indicated that defendant Allen Davis could not be excluded as a potential father. *Id.*

149. 45 Ohio St. 3d at 294, 544 N.E.2d at 262.

150. OHIO REV. CODE ANN. § 3111.04 (Anderson 1989).

151. 45 Ohio St. 3d at 296 n.7, 544 N.E.2d at 264 n.7 (Brown, J., concurring). The footnote lists eleven states which have shortened the period of limitations to five years or less for such paternity determinations. *Id.* Alabama, Colorado, Missouri, Montana, North Dakota and Wyoming limit an action to no later than five years after the child's birth. *Id.* Rhode Island limits an action where the child has no presumed father to no later than four years after the child's birth. *Id.* Hawaii and Minnesota limit the action to no later than three years. *Id.* California and Illinois limit the action to no later than two years after the child's birth. *Id.* Thus, the majority of the seventeen states which have enacted some form of the Uniform Parentage Act have chosen to restrict the time period for the action. The Uniform Parentage Act, in its original form, places a three year limitation on an action brought to determine the paternity of a child who has no presumed father. UNIF. PARENTAGE ACT § 7, 9B U.L.A. 306 (1973). However, since the section also allows that an action brought by or on behalf of the child shall not be barred until three years after the child reaches the age of majority, the act has the effect of a twenty-one year period of limitations. FAMILY LAW HANDBOOK 192 (S. Kolko ed. 1985). Even though a state may desire to limit the period in which a paternity action may be brought, the limitation is subject to the constraints of the United States Constitution. The statute of limitations cannot be so restrictive that the opportunity to bring a paternity action on behalf of an illegitimate child is illusory. Mills v. Habluetzel, 456 U.S. 91 (1982) (one year period of limitation for a support action brought by an illegitimate child violates equal protection).

The concurrence asserted that the shorter limitation periods "force parentage determinations to be made before a long-term relationship is established between the presumed father and the child."[152]

The majority opinion claimed that the courts' equitable authority to bar an action by laches is a sufficient means to protect the interests of the defendant.[153] The doctrine of laches was defined by the Ohio Supreme Court in *Russell v. Fourth National Bank*[154] as an equitable requirement that "rights should be asserted before lapse of time has made a judicial inquiry difficult and uncertain by reason of the death of parties, the loss of papers and books, the death of witness and the intervention of equities."[155] In *Smith v. Smith*,[156] the Ohio Supreme Court held that, "in order to successfully prosecute a claim of laches, the person asserting the claim must show that he has been materially prejudiced by the delay of the adverse party in asserting his rights."[157]

The standard of material prejudice to the defendant is applicable to bar an action even though the action is brought within the period of limitations for a paternity action.[158] The concurrence supported the application of the doctrine of laches as a judicial limitation on paternity actions but expressed a preference for legislative action over judicial law-making.[159] This preference for legislative action may be well founded since the perceived reliability of genetic testing to determine true paternity may nullify traditional aspects of material prejudice such as the unavailability of witnesses and loss of records.[160] It is noteworthy, however, that the court was unable to cite a case where laches was successfully asserted to bar the action.[161]

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152. 45 Ohio St. 3d at 296-97, 544 N.E.2d at 265 (Brown, J., concurring).

153. *Id.* at 294-95, 544 N.E.2d at 263.

154. 102 Ohio St. 248, 131 N.E. 726 (1921).

155. *Id.*

156. 168 Ohio St. 447, 156 N.E.2d 113 (1959).

157. *Id.* at 455, 156 N.E.2d at 119.

158. 45 Ohio St. 3d at 295, 544 N.E.2d at 263.

159. *Id.* at 297, 544 N.E.2d at 265 (Brown, J., concurring).

160. Wright v. Oliver, 35 Ohio St. 3d 10, 12, 517 N.E.2d 883, 885 (1988) (unavailability of witnesses is not material prejudice when defendant has "highly reliable, accurate and accepted scientific tests that can exclude practically all men wrongfully accused of being the father").

161. In *Wright*, the Ohio Supreme Court ruled that the doctrine of laches was inapplicable in a paternity suit brought prior to the expiration of the statute of limitations because the defendant failed to show material prejudice. *Id.* at 10, 517 N.E.2d at 886. The court asserted that its decision was consistent with those reached in other states and, in footnote four, cited a North Dakota case in which the deciding court had noted " '[o]ur research has not revealed a case, nor has any been called to our attention, in which an alleged father has successfully raised laches as a defense in a paternity action.' " *Id.* at 18 n.4, 517 N.E.2d at 886 n.4 (quoting Williams County Social Serv. Bd. v. Falcon, 367 N.W.2d 170, 175 (N.D. 1985)).

C. *The Concurrence*

The potential impact of the decision in *Hulett v. Hulett* is apparent when the concurring opinion is carefully analyzed. The justices who joined in the concurring opinion acknowledged that the majority's result was mandated by the statute.[162] However, according to the majority's reasoning and result, the rights and obligations of fatherhood can be determined solely on the basis of genetic testing.[163] This result, the concurring justices claimed, supplants the long-established common law which gives a strong presumption of legitimacy to children born in wedlock.[164] The presumption finds its roots in the interest of stabilizing family relationships.[165] The statute gives preference to genetic test results, over the common law presumption, without adequately defining the elements of fatherhood.[166] Fatherhood is more than just the genes the child carries; there are sociological and psychological components to the relationship as recognized in the laws of adoption.[167] The concurrence pointed out that adoption laws "acknowledge[] that parentage is comprised of a totality of factors, the least significant of which is genetics."[168]

The concurring justices urged that the issues of paternity be separated from the issues of fatherhood; the statute melds these issues together.[169] The opinion gave the example of a father seeking to avoid child support at time of a divorce despite the effect the suit will have on the pre-existing parent-child relationship.[170] "Such an action presumably can occur until the child becomes an adult and parental support is no longer legally required. Severing a long-term relationship between a father and a child in this manner would be devastating to any child and may leave a child destitute."[171] In Ohio, this result is possible up to time the child is twenty-three years old.[172]

In a second example, the court pointed out that a mother or an alleged father seeking to destroy the relationship with the marital father is aided by the statute because "[t]he bond between the father and child or length of time that the mother or alleged father have suspected

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162. 45 Ohio St. 3d at 295, 544 N.E.2d at 263 (1989) (Brown, J., concurring) (joined by Wright, J. and Resnick, J.)

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 295-96, 544 N.E.2d at 264.

171. *Id.* at 296, 544 N.E.2d at 264.

or known the truth about the child's parentage is rendered irrelevant where genetics is the sole test."[173] The concurring opinion urged the legislature to amend the law to give more specific guidelines defining fatherhood and to limit the period of time during which a paternity action can be brought.[174]

D. Genetic Testing and The Risk of Error—Social Policy Considerations

Genetic testing appears to the uninitiated to be the perfect answer to the uncertainties of determining paternity. On its face, HLA testing seems to eliminate the need for self-serving testimony and denials as to who engaged in intercourse with whom, when, and under what circumstances. The probability figure attached to the results of an HLA test sounds commanding; testing can indicate whether a man is (or is not) the father of a child with a ninety to ninety-nine percent certainty.[175] It is worthwhile, however, to examine the meaning of these percentages.

The percentages are deceiving.[176] The results are based on the assumption that only two candidates could be the child's biological father. Such an assumption therefore supposes that each person has a fifty-fifty chance of being the father.[177] If, however, the pool of candidates is larger than two, the analysis becomes inherently misleading.[178]

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173. *Id.*

174. *Id.* at 297, 544 N.E.2d at 265.

175. Reisner & Bolk, *supra* note 73, at 671. Using HLA alone, the probability of excluding a caucasian male as not the father is ninety percent; it is eighty-eighty percent for a black male. *Id.* When HLA testing is combined with other blood group systems, the exclusion probability rises to ninety-six percent. *Id.* These percentages are defined as a prior probability of exclusion which is a measure of the power of a blood group system's ability to exclude an innocent man as the father. *Id.* at 670-71. The number defines the chances of exclusion of that innocent man before any tests are performed. *Id.* at 670. The likelihood of paternity probability indicates the possibility that an alleged father produced a single sperm containing all the genetic information a given child will receive from his father. *Id.* at 672. This figure can be calculated in a given case to exclude at least ninety-five percent of the population. *Id.*

176. For example, Ellman and Kaye point out that the probability of exclusion is the probability that a man selected at random from the relevant population would be excluded by the test. Ellman and Kaye, *supra* note 74, at 1141. Their article gives an example of a paternity proceeding where both the mother and father live in Los Angeles at the time of the child's conception. *Id.* If the relevant population was limited to caucasian males past the age of puberty, a ninety-five percent exclusion probability would still leave 100,000 possible fathers. *Id.; see also* Tribe, *Trial by Mathematics*, 84 HARV. L. REV. 1329 (1971)(questioning the wisdom of using any type of statistical evidence in a trial).

177. Reisner & Bolk, *supra* note 73, at 674. When the fifty percent assumption is used, the likelihood of paternity probability is mathematically equal to the probability of exclusion of paternity. *Id.*

178. *Id. See, e.g.*, Ellman & Kaye, *supra* note 74, at 1150. The assumption that there is a fifty percent probability that the alleged father is the real father seems to have no basis. *Id.* This percentage is the equivalent of assuming that the pool of possible candidates is reduced to two individuals prior to consideration of the HLA results. *Id.* As Ellman and Kaye point out, "such an

The scientific and legal community is fairly divided on whether, and to what extent, HLA testing should be admitted in paternity cases because of the potentially misleading factor of probabilities.[179] Some authorities advocate admitting HLA testing solely for the purpose of excluding an individual as the biological father.[180] The majority of the states either judicially or statutorily admit HLA testing in order to exclude an individual as a potential biological father.[181] Other authorities argue that HLA testing also should be admitted as positive evidence of paternity.[182] A majority of the states have accepted this position and admit HLA tests for both exclusionary and inclusionary purposes.[183]

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assumption ensures that in every case in which any recognized blood test does not exclude the defendant, one will find that he is probably the father." *Id.*

When the pool of candidates is greater than two, the use of fifty percent probability that any one candidate is the father is inaccurate. If there are more than two candidates, the probability of any one man being the father is less than fifty percent. Therefore, basing the paternity calculation on an initial presumption of fifty percent probability of fatherhood is misleading at best.

179. *See* sources cited *supra* note 75.

180. Ellman & Kaye, *supra* note 74, at 1133 (supporting admission of statistical evidence of HLA test in paternity actions but doubting that an expert can testify correctly "to any quantified probability that the defendant in a given case is in fact the father"). Leonard R. Jaffee recognizes the value of admitting HLA results as conclusive proof of non-paternity but questions whether it should be used as legally relevant independent evidence that a certain man is the biological father. Jaffee, *Comment on the Judicial Use of HLA Paternity Test Results and Other Statistical Evidence: A Response to Teraski*, 17 J. FAM. L. 437, 457 (1979). Jaffee advances the theory that where the issue is essential and the proponent of the evidence has the burden of persuasion, any probabilistic evidence such as HLA testing should be inadmissible to prove the ultimate fact. *Id.* at 475. In drawing a comparison with the admissibility of fingerprint evidence, Jaffee points out that 1) where there is a match, the probability that the fingerprint would match another individual is so small as to be only theoretical and 2) the use of fingerprint evidence alone is not conclusive of guilt or innocence. *Id.* at 481-84. Jaffee concludes that, since HLA tests only narrow the field to a certain point and can never narrow the field to less than two possible fathers, they should never be admitted as conclusive evidence absent other evidence of paternity. *Id.*

181. *See* Note, *supra* note 59, at 1593-94; Annotation, *Admissibility and Weight of Blood-Grouping Tests in Disputed Paternity Cases*, 43 A.L.R.4th 579 (1986); Annotation, *Admissibility, Weight and Sufficiency of Human Leukocyte Antigen (HLA) Tissue Typing Tests in Paternity Cases*, 37 A.L.R.4th 167 (1985). Tennessee has taken an unusual approach regarding the admission of blood tests to prove paternity by leaving it to the trial court judge's discretion. TENN. CODE ANN. § 24-7-112(b) (Supp. 1989). Tennessee admits blood tests to exclude an individual from the class of possible biological fathers. *Id.* If the tests do not exclude the alleged father, the statute provides that "the court, upon motion for the introduction of the results . . . shall determine whether such results may be admitted into evidence." *Id.* The statute lists factors for the court's consideration, including the probative value and authentication. *Id.* If the court admits the evidence, it is to be considered with all other evidence of paternity. *Id.*

182. *See* Note, *supra* note 59, at 1594.

183. Those states which have adopted the Uniform Parentage Act or the Uniform Act on Blood Tests to Determine Paternity authorize genetic testing to prove paternity. *See* ARIZ. REV. STAT. ANN. § 12-847 (Supp. 1989) (blood tests admissible as evidence in paternity cases); IND. CODE § 31-6-6.1-8 (Supp. 1989) (blood tests conclusive evidence if excluding alleged father; admissible in all cases of paternity as evidence); KY. REV. STAT. ANN. § 406.111 (Baldwin 1988) (blood tests showing possibility of alleged father's paternity admissible within the discretion of the court depending upon the infrequency of the blood type); LA. REV. STAT. ANN. § 9:396 (Supp.

Therefore, it is worthwhile to consider whether the sociological impact of accepting HLA tests as conclusive evidence of paternity outweighs limiting its application to evidence excluding a man as the biological father.

1. The State's Interest

The state's interest in determining paternity is fiscal to a large extent.[184] The state does not want the child to become a ward of the state and dependent on state funds for its support.[185] The state also has an interest in ensuring that the child be "supported, cared for, educated and reared in an atmosphere conducive to the production of self-reliant, law-abiding citizens."[186] Therefore, when the mother is unmarried, the state has a high interest in determining the biological father so that he may be required to provide the mother and child with support.

In *Johnson v. Adams*,[187] the Ohio Supreme Court recognized that Ohio's paternity act "reflects the public-policy concern that a child should not be made a 'ward of the state' when some individual, other than the state, justifiably is responsible for that child's welfare."[188] The state's interest, however, is diminished when the mother is married and there is a marital presumption that her husband is the child's natural father. The husband is obligated to provide the mother and child with support. Unless this father contests paternity in a divorce action to avoid support payments, he must continue to provide support after the marital relationship is extinguished.[189] In cases where there is not a third party who is alleging himself as the biological father, it is actually in the state's interest to maintain the marital presumption of paternity rather than to allow it to be rebutted with genetic testing. Since a di-

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1990) (Uniform Act on Blood Tests to Determine Paternity); ME. REV. STAT. ANN. tit. 19, § 280 (Supp. 1989) (blood tests conclusive as to non-paternity; if tests indicate alleged father is not excluded as a potential candidate and percentage is less than 97, tests are admissible and are to be weighed with other evidence; if tests show 97% or higher probability of paternity, alleged father is presumed to be the father); MD. FAM. LAW CODE ANN. § 5-1029(e)(Supp. 1989) (blood tests admissible to exclude alleged father as possible father; admissible as evidence of paternity if probability of paternity is at least 97.3%); OR. REV. STAT. § 109.258 (1983) (Uniform Act on Blood Tests to Determine Paternity); UTAH CODE ANN. § 78-45a-10 (1987) (provision similar to Kentucky statute); VA. CODE ANN. §§ 20.49.3-.4 (Supp. 1989) (court has authority to order blood tests and admit as evidence of paternity).

184. *See* Note, *supra* note 59, at 1601. Since the number of illegitimate births are increasing, the states will be able to save money if the natural father supports the child. *Id.*

185. *Id.*

186. Southern Ohio Sav. Bank & Trust Co. v. Boyer, 66 Ohio App. 136, 138, 31 N.E.2d 161, 162 (1940).

187. 18 Ohio St. 3d 48, 479 N.E.2d 866 (1985).

188. *Id.* at 52, 479 N.E.2d at 869.

189. *See* Note, *supra* note 59, at 1602-05 (discussing cases involving paternity disputes at the time of divorce).

vorce may occur at any time after a child is born, even after the support obligation has expired, the state's interest in paternity contests raised in conjunction with a divorce proceeding should center more around the statute of limitations issues than whether the HLA tests are being used to exclude the husband as the natural father.[190] The state can limit the negative impact on the established parent-child relationship and ensure continued support for the child by narrowing the period of time in which the marital presumption may be challenged in a paternity action.

2. The Child's Interest

The purpose of the Ohio Parentage Act is to promote the best interest of the child.[191] The child has an interest in being adequately cared for during its infancy and tender years.[192] When the courts allow a husband to rebut the presumption of paternity through genetic testing, the child bears the risk that this source of support will be denied. The court proceedings and genetic testing also will likely have a negative psychological impact on the child and any established parent-child relationship between the child and his mother's husband.[193] Finally, the use of genetic testing to rebut the marital presumption may bastardize a previously legitimate child. There continues to be a social[194] and legal[195] stigma attached to the status of illegitimacy which the state

190. *Id.* at 1604.

191. *See supra* text accompanying notes 79-84. This focus stems from the fact that the Uniform Parentage Act contemplates that the primary interest of a paternity action will be the child's. FAMILY LAW HANDBOOK 192 (S. Kolko ed. 1985).

192. *Cf.* Southern Ohio Sav. Bank & Trust Co. v. Boyer, 66 Ohio App. 136, 138, 31 N.E.2d 161, 162 (1940) (adoption laws intended to ensure child is "supported, cared for, educated and reared in an atmosphere conducive to production of self-reliant, law-abiding citizens").

193. *In re* Gilbraith, 32 Ohio St. 3d 127, 131, 512 N.E.2d 956, 961 (1987) ("The establishment and maintenance of the various aspects of the relationship between parent and child is a particularly intricate, sensitive and emotional process with which courts should be reluctant to interfere.").

194. *See supra* note 3 and accompanying text.

195. *Cf.* Green v. Woodward, 40 Ohio App. 2d 101, 104, 318 N.E.2d 397, 400-01 (1974) (noting that courts have historically interpreted the word child or children in statutes to mean only legitimate children). The legal impact of illegitimacy can be exemplified by a review of intestate laws which differentiate between legitimate and illegitimate children of a deceased natural father. Ohio law permits a child born out of wedlock to inherit from his or her mother as if the child had been born in lawful wedlock. OHIO REV. CODE ANN. § 2105.17 (Anderson 1989). However, an illegitimate child may only inherit from his father if the natural father has filed an application in probate court acknowledging that the child is his. *Id.* § 2105.18. If the probate court is satisfied that the applicant is the natural father and that the establishment of the relationship is for the best interest of the child, the court will enter that finding and thereafter the child will be treated as if born in lawful wedlock. *Id.* Once the child is recognized in the probate court as if born in lawful wedlock, the child may inherit through intestate descent and distribution laws, sharing per stirpes with all the children of the decedent. *Id.* § 2105.06(B).

should, as a matter of social policy, minimize by protecting the legitimacy of children born within a marriage.

A state, however, cannot categorically deny paternity contests regarding children born within a marriage. The courts have recognized that a child has a due process right to know the identity of his biological parent.[196] Any determination that genetic testing cannot be used to rebut the statutory presumption of paternity will have a res judicata effect on the child who is a party to the action; this judicial determination has the effect of denying the child the right to a determination of paternity at a later age.[197]

3. Preservation of Family Integrity

The common law recognizes a state's interest in preserving the integrity of the family unit.[198] Though state laws may govern the familial relationship to a lesser extent than in the past, the state continues to promote the family through the marital relationship in some areas.[199] In a series of cases, the United States Supreme Court has acknowledged due process rights to certain aspects of the family relationship.[200]

The admission of genetic tests to rebut the statutory presumption of paternity has an adverse effect on the family unit. Established parent-child relationships are subject to disruption. The paternity proceeding can be used by a vengeful spouse to hurt the other spouse with a resulting impact on the child who is caught in the middle. In many instances, however, the paternity issue will arise in the process of a divorce proceeding where there is no longer a family unit to protect. In

196. Annotation, *supra* note 2, § 2. The Uniform Parentage Act specifically authorizes an illegitimate child to bring an action to establish paternity. 9B U.L.A. 302 (1973).

197. *Gilbreath*, 32 Ohio St. 3d at 131, 512 N.E.2d at 961 (relitigation of parentage is barred in any subsequent paternity action, including one initiated under Chapter 3111); *cf.* Collett v. Cogar, 35 Ohio St. 3d 114, 518 N.E.2d 1201 (1988) (declaration of paternity signed by one putative father does not have force of final judgment and does not bar, on res judicata grounds, subsequent paternity action against another man).

198. *E.g.*, Bonkowsky v. Bonkowsky, No. 42208 (Ohio Ct. App. Dec. 12, 1980) (LEXIS, States Library, Ohio file).

199. *Cf.* Moore v. Dague, 46 Ohio App. 2d 75, 84, 345 N.E.2d 449, 455 (1975)("Intestate succession is one of the few remaining examples of a long recognized state interest in the promotion of the family through the marriage relationship."); Green v. Woodward, 40 Ohio App. 2d 101, 318 N.E.2d 397 (1974) (state's interest in promoting family life justifies treating illegitimate offspring different from legitimate in disposition of property).

200. Carey v. Population Services Int'l, 431 U.S. 678 (1977) (individual right to decide whether to bear children); Loving v. Virginia, 388 U.S. 1 (1967) (right to choose to marry); Griswold v. Connecticut, 381 U.S. 479 (1965) (married couples' right to use contraceptives in the privacy of their home); Prince v. Massachusetts, 321 U.S. 158 (1944) (due process encompasses the family relationships); Meyer v. Nebraska, 262 U.S. 390 (1923) (right to choose child's education).

this sense, the impact of admitting genetic testing to exclude the husband from the class of potential fathers may be minimal to the family as a whole.

V. CONCLUSION

The Ohio Supreme Court's decision in *Hulett v. Hulett* interprets Ohio's Parentage Act as authorizing the use of genetic testing to rebut the presumption of legitimacy created by Ohio Revised Code section 3111.03(A)(1). The statutory language on its face commands the court's result. There are a number of factors, however, both evidentiary and social, which the statutory language fails to consider. As pointed out in the concurring opinion, the statute fails to define fatherhood in terms other than a biological relationship thus ignoring emotional and psychological bonds that are a part of any parent-child relationship. Additionally, the statute, by granting a twenty-three year statute of limitations period, disregards the impact a delayed paternity action can have on the parent-child relationship and existing family units. These statutory omissions warrant reconsideration by the legislature of Ohio's Paternity Act. The General Assembly should consider refining statutory definitions, the use of genetic testing in paternity actions, and the period of limitations in which paternity can be challenged.

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