D.A. 11-4-92 017 w/app

FILED
SID J. WHITE
JUN 15 1992
CLERK, SUPREME COURT
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IN TEE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, o/b/o A[redacted] S[redacted]

Petitioner/Plaintiff

Case *78,837*
DCA No. 91-00536

vs.

WILLIAM PRIVETTE

Respondent/Defendant

PETITIONER'S INITIAL BRIEF

On Review from the District Court.
of Appeal, Second District
State Of Florida

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PRELIMINARY STATEMENT

Petitioner, State, Department of Health and Rehabilitative Services, will be referred to herein as HRS.

A.S. will be referred to herein as the mother.

Respondent, William Privette, will be referred to herein a5 the putative father.

Reference to the appendix will be as follows: A- followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The putative father was served with a Complaint to Determine Patemity that set forth allegations that the mother had engaged in sexual intercourse with the putative father which resulted in the birth of the minor child in question. (A-1)

HRS filed a motion for an order requiring the parties submit to a human leukocyte antigen (HLA) test for the purpose of determining the patemity of the minor child. (A-3)

For the purposes of the hearing on the motion for HLA the parties stipulated to the following facts:

1. The child for whom support is being sought in this case is B[redacted]S[redacted]

2. The mother of B[redacted]S[redacted] is A[redacted]S[redacted]

3. B[redacted]S[redacted] was bom [redacted]1989.

4. A[redacted]S[redacted] was married to J[redacted]S[redacted] prior to [redacted]1989, and at the time the minor child was conceived.

5. A[redacted]S[redacted] was married to J[redacted]S[redacted] as of the date of the filing of the patemity action.

6. the birth certificate of B[redacted]S[redacted] lists her father as J[redacted]S[redacted]

After hearing, the trial court entered an order requiring the parties to submit to the HLA blood test. (A-5)

The putative father filed a petition for writ of certiorari with the Second District Court of Appeal requesting that the

order entered by the trial court be quashed. The district court granted the petition and quashed the motion. Privette v. State, Department of Health and Rehabilitative Services, o/b/o S., 585 So.2d 365 (Fla. 2d DCA 1991). In its opinion, the district court acknowledged that its decision conflicted with the decision of the First District Court of Appeal in the case Pitcairn v. Vowell, 580 So.2d 219 (Fla. 1st DCA 1991).

HRS filed its notice to invoke the discretionary jurisdiction of this Court on the basis of the conflict between the Privette and the Pitcairn decisions.

SUMMARY OF THE ARGUMENT

A putative father does not have standing in a paternity action to raise the presumption of legitimacy as a defense where the petitioning mother was married at the time of the conception and birth of the minor child.

The presumption of legitimacy exists for the protection of the child. Sacks v. Sacks, 267 So.2d 73 (Fla. 1972). However, the Privette decision now allows a putative father to avoid his parental responsibilities by raising the presumption. This runs counter to the best interest of the child. As the court stated in Pitcairn v. Vowell, 580 So.2d 219, 222 (Fla. 1st DCA 1991), "We see no worthwhile purpose to be served by allowing the presumption to be used in furthering the avoidance of parental responsibility."

The conflict between the Privette and Pitcairn decisions should be resolved in favor of the rule of law enunciated by Pitcairn; a putative father does not have standing to raise the presumption of legitimacy in avoidance of his parental responsibilities.

A petitioning mother should not be required to overcome the presumption of legitimacy before she is allowed to obtain an order directing the putative father submit to a scientific test to determine paternity. The Privette decision requires the married petitioning mother to dispel the legitimacy presumption

to being allowed to engage in paternity related discovery. This limitation runs counter to the law. the Second District Court based its ruling on the right of privacy provision of the Florida Constitution. Article I, Section 23, Fla. Const.

HRS contends that as long as the requirements of Rule 1.360, Fla.R.Civ.P are met, there is no constitutional prohibition to the ordering of the paternity blood test.

The United States Supreme Court has upheld as valid the non-consensual drawing of blood from a person in numerous **cases.** Breithaupt **v.** Abram, 352 U.S. 432 (1957); Schmerber **v.** California, 384 U.S. 757 (1966).

The right to privacy provision of the Florida Constitution was not intended to provide an absolute guarantee against all governmental intrusion into the private life of individuals. Stall v. State, 570 So.2d 257 (Fla. 1990). **A** state interest which is compelling overrides the privacy interest of the individual, if the public interest cannot be fulfilled by less drastic or intrusive means. Winfield **v.** Division of Par-Mutual Wagering, 477 So.2d **544 (Fla.** 1985).

HRS contends that there is a compelling state interest behind requiring paternity tests; fixing the parentage of children and ensuring that children be maintained from the resources of their natural parents. Gammon **v.** Cobb, 335 So.2d 261 (Fla. 1976). The intrusion of the HLA test is minimal and is a highly reliable test. No evidence that is comparable to that

obtained by the HLA test is available by less intrusive means. Therefore, ordering an HLA blood test for the purpose of determining paternity is not a violation of a putative father's right of privacy under the Florida or federal constitutions. the fact that the petitioning mother is married should have no effect that this point.

ARGUMENT I

A PUTATIVE FATHER DOES NOT HAVE STANDING IN A PATERNITY ACTION TO RAISE THE PRESUMPTION OF LEGITIMACY

The Second District Court of Appeal has ruled that a putative father has standing in a paternity action to raise the presumption of legitimacy. Privette v. State, Department of Health and Rehabilitative Services, o/b/o S., 585 So.2d 364 (Fla. 2d DCA 1991). This is apparently the first reported case in Florida that makes the presumption available as a defense to the putative. HRS contends that the proper rule is that expressed by the First District Court of Appeal when it addressed this same issue.

In Pitcairn v. Vowell, 580 So.2d 219 (Fla. 1st DCA 1991), the district court held "that a putative father does not have standing to raise the presumption of legitimacy in avoidance of the potential ordering of support for the child." Id, at page 222. The court went on to state that the line of case law discussing the issue of the legitimacy presumption has always addressed the right of one of the legal parents to raise the presumption when the other parent sought to establish that a third person was the actual biological father. In effect, the Second District Court has expanded the availability of the presumption beyond its historic role. This expansion runs contrary to the purpose of the presumption.

> The courts of this State have created a strong presumption in favor of legitimacy to protect the interests of the child when the child was either born or conceived in wedlock. (Citations omitted.) ***This presumption*** as ***noted above was created to protect the welfare of the child.***

Sacks **v. Sacks,** 267 So.2d **73** (Fla. 1972).

Until the Privette decision, the law did not grant standing for a putative father in a paternity action to employ a presumption created to protect a child, a child he claims not have fathered. This is particularly so when the presumption is employed to frustrate and prevent the natural mother's efforts to protect the child.

This Court further stated in **Sacks, supra,**

> ***"This presumption . . . was created to protect the welfare of the child. To now utilize this same presumption to deny this child support is to destroy the very reason*** for ***its existence.*** The welfare of the child demands that we recognize and honor not the fiction, but the underlying purpose upon which the fiction was created.

Id at page 76.

The presumption's purposes of maintaining the integrity of the family and saving the child from the "embarrassment" of being bastardized are certainly laudatory. However, as this Court noted in Gammon **v.** Cobb, 335 So.2d 261, 265 (Fla. 1976), the real party in interest in a paternity action is the minor child. **It** is the child's best interest which are paramount. The interests of the child in having a "legitimate" father run deeper than concerns of integrity of the family unit of social or community

embarrassment. In a paternity action before it for review, the First District Court of Appeal addressed these important concerns in Locklear v. Sampson, 478 So.2d 1113 (Fla. 1st DCA 1985).

> Critical rights and consequences result from a valid judgment establishing paternity that affect not only the parties to the action, but also the minor child, that child's children, and other persons. . . We do not view this action as if it were simply a claim between private parties to enforce a monetary obligation because there are often substantial but then unknown collateral consequences that will obviously flow from any judgment establishing the fact of paternity. For example, the fact of paternity should be reliably established because the minor child's parental medical history might become important or even critical in the medical treatment of the child and his or her offspring. Rights of inheritance are affected. In some instances even citizenship status may be affected by a determination of paternity. Undoubtedly there are other collateral consequences that might result from a judgment establishing paternity.

Id at page 1115.

In addition to entitling a child to financial support, paternity establishment is an essential element of a child's eligibility for many public and private benefits stemming from the father-child relationship. For instance, in cases in which the father has been employed and has contributed to Social Security, the child is entitled to receive benefits through the Social Security system until the age of eighteen in the event of the father's death, disability, or retirement during the child's minority.

If the father is a member of the Armed Forces, he can draw an extra allowance to provide a household for his dependents. The child is also eligible for commissary and post exchange privileges. Children are also entitled to military health care and insurance (CHAMPUS) benefits.

Non-marital children may be eligible for dependent benefits under workers' compensation if the father is injured on the job. Once paternity is established, the child may have the legal right to bring court action for damages if the father is injured or killed.

The medical concerns raised by the Locklear court justify further reflection. It is in the child's best medical interests to know the identity of his father. A significant number of diseases, birth defects, and other disorders are genetically transmitted to children by their parents. Many inherited disorders are not detectable at birth but have important implications later in life. A lack of knowledge may prevent appropriate medical care. In addition, many genetic disorders may be passed directly to the child's own offspring. Not knowing that the child is a potential carrier of a particular disorder prevents effective genetic counseling when the child becomes an adult and is ready to begin a family.

Advance warning of health risks could be lifesaving information in the event the child is ever faced with a medical crisis. Often the only indication for diagnosis and treatment of

a disorder is a medical history. However, early detection and prevention of diseases may be impossible without knowledge of family history. Where paternity is not established, children are deprived of valuable medical information; information that can lead to a healthier life for a child.

The Privette Court's concern with the presumption of legitimacy and allowing a putative father to raise the presumption as a defense, actually runs counter to the best interests of the minor child.

As illustrated in the Pitcairn decision, the presumption's purpose has historically been to enforce parental rights and responsibilities. See, for instance, T.D.D. v. M.D.D., 453 So.2d 856 (Fla. 4th DCA 1984), which involved a situation where a presumed father used the presumption toward retaining his parental relationship where the mother sought to establish that someone else was the father. The following cases involved situations in which the mother attempted to use the presumption to prevent the husband from avoiding the responsibilities of fatherhood. Eldridge v. Eldridge, 16 So.2d 163 (Fla. 1944); M.A.F. v. G.L.K. 573 So.2d 862 (Fla. 1st DCA 1976); M.P.S.H. v. D.H., 516 So.2d 1151 (Fla. 4th DCA 1987). In Dennis v. Department of Health and Rehabilitative Services, 566 So.2d 1374 (Fla. 5th DCA 1990), the presumption was used to assist the child to obtain support, rather than avoid the requirement of support.

Whereas the presumption has always been raised to ensure parental obligations are met, the Privette decision changes the nature of the presumption. According to the Privette decision, the presumption can now be raised as a means of avoiding or preventing the establishment of parental responsibilities. As stated in the Pitcairn decision, "We see no worthwhile purpose to be served by allowing the presumption to be used in furthering the avoidance of parental responsibility.' Id at page 222. The putative father's use of the presumption does not further the interests of the child, but is instead employed to frustrate and prevent the mother's efforts to protect her child.

> The contrasting common law presumptions, i.e., that the father is the man to whom the mother was married on the date of conception or that the father is the man to whom the mother is married on the date of birth, were promulgated to protect the child from the shame of illegitimacy and are not determinative of paternity, which is the issue here... the mother identifies Hamilton as the father, and if she is willing to expose her child to embarrassment resulting from confusion as to the identify of her father, then we prefer to accept the mother's word..."

Hamilton v. Liberty National Life Insurance Company, 207 So.2d 472, 475 (Fla. 2d DCA 1968).

The Privette decision wauld require every married female petitioner in a paternity action to involve in litigation, as a party or witness, her husband, regardless of whether she in good faith believed he was not the natural father. It could result in a miscarriage of justice in instances where the husband has

abandoned the marriage and is unavailable to the wife for blood testing.

In White v. Francis, 522 So.2d 946, 948 (Fla. 1st DCA 1988), the district court stated, "Neither a presumption of legitimacy based on marital status, nor the circumstances that a party has identified more than one putative father by either a serial or single complaint, precludes trial of a paternity action under the statutes invoked by appellants." The rule of law set forth by the Privette decision would preclude the paternity trial if the husband died or has abandoned the family. This runs contrary to the purpose of the presumption being the protection of the child. The Privette decision instead benefits and protects the putative father.

The conflict between the Privette and Pitcairn decisions on the issue of standing should be resolved in favor of adopting the holding and reasoning of Pitcairn. HRS contends that the Pitcairn holding that the putative father does not have standing to raise the presumption of legitimacy to avoid the establishment of parental responsibilities furthers the best interests of the child and the social policies underlying paternity actions and the presumption of legitimacy, The Privette decision should be reversed.

ARGUMENT II

A PETITIONING MOTHER IS NOT REQUIRED TO OVERCOME THE PRESUMPTION OF LEGITIMACY IN A PATERNITY ACTION BEFORE A DISCOVERY ORDER *CAN* BE ENTERED DIRECTING THE PUTATIVE FATHER TO SUBMIT TO A SCIENTIFIC TEST TO DETERMINE PATERNITY.

In addition to its holding that a putative father has standing to raise the presumption of legitimacy in a paternity action, the Privette decision holds that the mother must dispel the presumption before an order can be entered requiring the putative father to submit to a a paternity **test**. Obviously, if the putative father does not have standing to raise the presumption of legitimacy, the mother should not be required to rebut the presumption prior to obtaining an order to compel submission to a paternity test, HRS further contends that even if this Court should determine the putative father does have standing to raise the presumption, the Privette requirement placed on the mother to dispel the presumption prior to engaging in paternity related discovery should be rejected.

Other than the Privette decision, there is no established principle of law which requires a mother to disprove her husband is the father of the child in question in order to discover a putative father's blood sample. The Privette opinion does not cite any statutory authority or case law in support of this new principle of law. Instead, Privette states that Section 742.12, Florida Statutes (1989), is not dispositive when the putative

father bases his objection to the paternity test on the right to privacy guarantee at Article I, Section 23 of the Florida Constitution. HRS contends the privacy guarantee does not bar physical examinations for the purposes of determining paternity.

A married mother is not prohibited as a matter of law from prosecuting a paternity action against a man other than her husband. Gammon v. Cobb, 335 So.2d 261 (Fla. 1976); Herout v. Lawrence, 423 So.2d 558 (Fla. 1st DCA 1982).

The presumption of legitimacy is a rebuttable presumption. Eldridge v. Eldridge, 153 Fla. 873, 16 So.2d 173 (1944). It must be overcome by clear and satisfactory evidence. In Re Braxton's Estate, 425 So.2d 23 (Fla. 4th DCA 1982). Since a married female is not prohibited from bringing the paternity action, the issue is really whether the burden of proof sufficient to rebut the presumption can be carried.

There is no statutory requirement or case law which mandates that the husband be joined in paternity actions. The fact that the husband has not been joined as a party goes to the issue of proof, not the right to maintain the paternity action and compel the putative father to submit to a paternity test.

The taking of an HLA test is ordinarily a proper aspect of discovery in a paternity action. Nostrand v. Olivieri, 427 so.2d 374 (Fla. 2d DCA 1983).

> The purpose of modern discovery is to assist the administration of justice, to aid a party in preparing and presenting his case. . . to advance the function of a trial in ascertaining the truth, and to accelerate the disposition of suits...
>
> In essence, then, a party is permitted to attempt to discover those matters relevant to the subject matter of the pending action...

Southern Mill Creek Products Co., Inc. v. Delta Chemical Company, 203 So.2d 53, 55 (Fla. 2d DCA 1967).

The relevance of the HLA blood test in paternity cases is well recognized. Nostrand, supra; Holliman v. Green, 439 so.2d 955 (Fla. 1st DCA 1983; Carlyon v. Weeks, 387 So.2d 465 (Fla. 1st DCA 1980); Simons v. Jorq, 384 So.2d 1362 (Fla. 2d DCA 1980). If the paternity of a child is placed directly in issue, the blood type of the putative father become3 a proper subject of discovery, and the HLA blood test a proper means of discovery. As previously discussed in Argument I of this brief, serious consequences may flow from a determination of paternity, and the HLA blood test is a useful, if not necessary, discovery tool in paternity actions. Locklear v. Sampson, 478 So.2d 1113 (Fla. 1st DCA 1985).

Section 742.12, Florida Statutes (1991), mandates the taking of a paternity determination test. The procedure for compelling a party to submit to a physical examination such as an HLA blood test is set forth in Rule 1.360, Fla.R.Civ.P. the essential requirements of law which must be met before a party can be

subjected to a compulsory HLA blood test are set forth in the rule, which provides in part:

> (1) A party may request any other party to submit to, or to produce a person in his custody or legal control for, examination by a qualified expert when the condition that is the subject of the requested examination is in controversy.
>
> . . .
>
> (B) In cases when the condition in controversy is not physical, including domestic relations and bastardy cases when the blood group is in issue, a party may move for an examination by a qualified expert as in subdivision (1). . .
>
> (2) An examination under this rule is authorized only when the party submitting the request has good cause for the examination, At any hearing the party submitting the request shall have the burden of showing good cause.

Pursuant to Rule 1.360 and case law interpreting the rule, the two essential prerequisites which must be manifested are: (1) that the physical condition or blood group of the party against whom the order is sought must be "in controversy", and (2) that "good cause" for compelling the HLA blood test be shown. Gasparino v. Murphy, 352 So.2d 933 (Fla. 2d DCA 1977).

"In controversy" means that the party's condition is directly involved in some material element of the action or defense, and "good cause" means that the physical condition of the party, even though in controversy, cannot be adequately evidenced without the assistance of expert medical testimony.

Anderson v. Anderson, 470 So.2d 52 (Fla. 4th DCA 1985); Fruh v. State, Department of Health & Rehabilitative Services, 430 So.2d 581 (Fla. 5th DCA 1983); Paul v. Paul 366 So.2d 853 (Fla. 3d DCA 1979); Gasparino, supra.

Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed. 2d 152 (1964), is the landmark case interpreting the in controversy and good cause requirements of Rule 35(a), Fe.R.Civ.P. The federal rule is substantially similar to the Florida rule.

Good cause is met by showing that the physical condition of the putative father, even though in controversy, cannot adequately be evidenced without the assistance of the blood test results. Gasparino, supra, The genetic information to be obtained from the putative father cannot be obtained from any other source.

The Privette decision not only creates a new rule of law regarding a putative father's ability to raise the legitimacy presumption, it also establishes a procedure contrary to the requirements of Section 742.12, Florida Statutes, and Rule 1.360, Fla.R.Civ.P. No longer is compliance with the procedural and substantive requirements of Rule 1.360 sufficient to justify compelling a putative father to submit to a paternity test when the presumption of legitimacy exists. The mother must now do more than comply with the good cause requirement of the rule. Privette requires her to rebut the legitimacy presumption.

The Privette decision has changed the presumption of legitimacy from an affirmative defense to be addressed at trial to the basis for a motion to dismiss. the logical extension of Privette would be to prohibit any discovery until the mother rebuts the presumption of legitimacy. According to Privette, the married female petitioner would be required to put on an evidentiary hearing to rebut the presumption as a predicate to discovery. This would be much like the evidentiary hearing required in civil cases as a predicate to pleading for punitive damages. This type of evidentiary hearing relating to the presumption of legitimacy would apparently require that the husband of the petitioning mother will have to disavow the father-child relationship in order for the court to the HLA test.

This type of inquiry, including the additional Privette requirement of an investigation into the emotional position of the child, is not in the best interest of the child; and the presumption exists for the protection of the child, not to impede relief that would benefit the child.

The Privette court's reliance on the privacy guarantee of the Florida Constitution as a basis for barring the HLA blood test, in the absence of the newly created evidentiary hearing requirement, is misplaced.

In the present action, the putative father claimed that he had a constitutionally protected right to privacy that precluded

any requirement that he submit to having his blood drawn for the purpose of conducting a paternity test. The issue of the constitutionality of a non-consensual draw of blood from a person has been addressed by the United States Supreme Court. In Breithaupt **v.** Abram, **352** U.S. 432, **1** L.Ed.2d **448, 77** S.Ct. **408 (1957),** the Court found that the results of a non-consensual blood test taken while the accused was unconscious was not a violation of due process.

> Furthermore, due process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by the whole community sense of "decency and fairness" that has been woven by common experience into the fabric of acceptable conduct. . . the blood test procedure has become routine in our everyday life. It is a ritual for those going into the service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, thought a longer, routine in becoming blood donors. Likewise, we note that a majority of our States have either enacted statutes in some form authorizing tests of this nature or permit findings so obtained to be admitted into evidence. We therefore, conclude that a blood test taken by a skilled technician is not such conduct that shocks the conscience, ". . . nor such a method of obtaining evidence that it offends a `sense of justice'. . ."

Id, at U.S. **436-437.**

In Schmerber **v.** California, **384** U.S. 757, **16** L.Ed.2d **908, 86 S.Ct. 1826 (1966),** the court affirmed the driving under the influence conviction of a defendant in which an analysis of his blood was admitted into evidence. The blood sample had been drawn without the defendant's consent. In so ruling, the Court

found that there had been no violation of the defendant's rights under the Fourth, Fourteenth, or Fifth Amendments to the United States Constitution. The Court reached its conclusion while recognizing that "the overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." Id, U.S. page 917.

It is recognized that right the right of privacy contained in the Florida Constitution is broader than that of the Federal Constitution. Winfield v. Division of Pari-Mutual Wagering, 477 So.2d 544 (Fla. 1985). However, the right of privacy derived from the Florida Constitution was not intended to provide an absolute guarantee against all governmental intrusion into the private life of individuals, Stall v. State, 570 So.2d 257 (Fla. 1990). The right of privacy will yield to compelling governmental interests. Winfield, supra.

This Court has enunciated the appropriate standard of review in assessing a claim of unconstitutional governmental intrusion into an individual's privacy rights under the Florida Constitution,

> The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.

Winfield, supra at page 547.

Accordingly, a state interest which is compelling must be held to override even privacy interests of constitutional dimensions if the public interest cannot be fulfilled by less drastic or intrusive means. In a paternity action, there is no less drastic or intrusive means of determining the blood typing of a putative father for the purpose of conducting a paternity test, than by drawing a sample of the putative father's blood.

The compelling state interest behind compelling paternity tests is evident: that children be maintained by the resources of their parents in order to relieve the burden borne by the general public and the custodial parent. State, Department of Health and Rehabilitative Services, o/b/o Gillespie v. West, 378 So.2d 1220, 1227 (Fla. 1979). Gammon v. Cobb, 335 So.2d 261, 265 (Fla. 1976); Section 409.2551, Florida Statutes (1991). Public policy is strongly in favor of establishing the paternity of children.

The HLA testing directed under Section 742.12(1), Florida Statutes, provides the least intrusive means for accomplishing the public policy behind the paternity statute. It is clear from an examination of the United States Supreme Court decisions previously discussed, that the taking of blood samples is a commonplace and well accepted aspect of modern life. Briethaupt, supra, at U.S. 436.

The procedural regularity of blood testing in Florida paternity cases is well established. HLA testing has been

commonly accepted by Florida courts and admitted into evidence in paternity cases with regularity. Simons v. Jorg, 384 So.2d 1362 (Fla. 2d DCA 1980); McQueen v. Stratton, 389 So.2d 1190 (Fla. 2d DCA 1980) Carlyon v. Weeks, 387 So.2d 465 (Fla. 1st DCA 1980). the test involves very little pain, anxiety, or risk to health.

The First District Court of Appeal upheld a trial court order requiring a putative father submit to HLA testing even though he claimed that the test would be injurious to his health due to the fact that he had a type of hepatitis. The district court found that the test did not pose a health threat to the putative father, and that the trial court did not exceed its authority or depart from the essential requirements of the law. Bailey v. Richardson, 412 So.2d 69 (Fla. 1st DCA 1982).

Courts in other jurisdictions have consistently ruled that there is no invasion of a federal constitutional right by ordering a defendant in a paternity action to furnish a blood sample for a paternity test.

In Schultz v. Superior Court of Butte County, 113 Cal.App. 696, 170 Cal.Rptr. 297 (Ct. App. 1980), a mother charged with welfare fraud was ordered to submit to a HLA blood test in connection with a paternity determination. (The HLA blood test is the same of type of test ordered in the appeal before this court.) The mother claimed the blood draw and test violated her Fourth and Fifth Amendment constitutional rights, The California

appellate ruled otherwise. See also: **M. v. E 114 Misc. 2d 800, 452 NYS** 2d **266 (1981); L.v.K. 109 Misc.** 2d **259,** 439 NYS **801 (1981).**

The Supreme Court of the State of Washington has held that constitutional objections based upon a right of privacy does not preclude a trial court from ordering the withdrawal of a small amount of blood from an alleged father for testing. State v. Meachum, 93 Wash.2d 735, 612 P.2d 795 (Wash. 1980). In discussing the constitutionality of an order requiring an HLA blood test, the Washington Supreme Court stated:

> The intrusion by the State is minimal in each instance and the State's interest in accurately determining the parentage of the children concerned is compelling. . . the interest of the State in the welfare of its minor children has long been a compelling and paramount concern. . .
>
> . . .
>
> Here, the State has a compelling interest in fixing the parentage of a minor child. The test specified to be used is highly reliable. No other evidence that is at all comparable in effectiveness is available to the State. The pain inflicted when blood is withdrawn by an experienced technician is inconsequential. And, any hazard to health is virtually nonexistent.

Id, page 797.

New Jersey law holds that there is no unconstitutional infringement of a person's religious tenets by requiring that person to submit to a HLA blood test for the purpose of determining paternity. Essex County Division of Welfare v.

Harris, 460 A.2d 713 (N.J. Super. A.D. 1983). In discussing the interest of society and the use of the HLA test, the Essex court stated:

> We have no doubt of society's paramount and compelling interest in determining parentage and of its consequent overriding interest in accurately resolving contested paternity questions by requiring putative fathers to submit to routine and minimally intrusive blood testing. (Citation omitted.) The interests of children of disputed parentage are thereby advanced; the interests of the taxpayers who might be called upon to provide for the child's support in the absence of a paternity determination are thereby protected. . . Nor is there any doubt that HLA testing constitutes a significant advance in providing a reliable scientific tool for the fair and correct resolution of disputed paternity issues.

Id, at pages 714-715.

Since this Court's decisions in Simons v. Jorg, supra, and McQueen v. Stratton, supra, the advances in medical knowledge and the receptiveness of the courts and legislatures to require HLA genetic testing in paternity actions, and the admission into evidence of the results of such testing, has been reflected throughout the country. See Paternity - HLA Tissue Typing, 37 ALR 4th 167.

Clearly, the Second District Court's limitations on the use of scientific paternity tests on the basis of the Florida Constitution's right of privacy provision is not justified. the foregoing discussion illustrates the compelling reasons for ordering such tests, and the fact that such tests are extremely

reliable and provide the least intrusive means of obtaining necessary and crucial information. The fact that the petitioning party in a paternity action is a married woman should have no affect on giving the right of privacy additional weight.

This Court should reject the Privette court's requirement that a married female petitioner in a paternity action must initially rebut the presumption of legitimacy before the trial court has authority to order scientific testing for the purpose of determining paternity. This Court should further reject the Privette court's finding that the Florida Constitution's right of privacy requires a petitioner: to go through a more stringent procedure for obtaining a order compelling a paternity blood test than that required by Section **742.12**, Florida Statutes, and Rule 1.360, Fla.R.Civ.P.

CONCLUSION

Petitioner respectfully requests this Honorable Court reverse the Second District Court of Appeal's order quashing the order requiring the HLA testing.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has furnished by U.S. Mail to DANIEL A. DAVID, ESQUIRE, First Florida Bank Building, 1800 Second Street, Suite 918 Sarasota, Florida, 34236, and CHARLES L. CARLTON, ESQUIRE, Carlton & Carlton, P.A., 2120 Lakeland Hills Boulevard, Lakeland, Florida, 33805, this 12th day of June, 1992.

WILLIAM H. BRANCH, ESQUIRE
Fla. Bar No. 401552