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Paternity—The Right of an Indigent Putative Father to Counsel in a Paternity Action—Hepfel v. Bashaw, 279 N.W.2d 342 (Minn. 1979)

court clarified the *Grilli* procedure by explaining that the defendant may present, in effect, a bifurcated defense. By defining the terms commonly used in entrapment cases, the *Ford* decision has made it clear that a defendant who raises both a "true entrapment" claim and an entrapment-related due process defense may have the two issues considered separately by the court and the jury. The court's ruling in *Ford* is likely to give defense attorneys greater latitude in employing entrapment-related defenses on behalf of their clients.

Paternity—THE RIGHT OF AN INDIGENT PUTATIVE FATHER TO COUNSEL IN A PATERNITY ACTION—*Hepfel v. Bashaw*, 279 N.W.2d 342 (Minn. 1979).

Illegitimate children have long been substantially equal to their legitimate siblings in the primary rights of maternal inheritance and support because of the certainty of the maternal blood tie.[1] Unlike the maternal blood tie, however, paternity is difficult to prove.[2] Thus, preference for the child of legitimate birth, whose paternity is presumed to be certain, has long been sanctioned by law in societies in which property and status are transferred from generation to generation through the father.[3] Due to the importance of accurately determining paternity in cases in which the identity of the father is contested, it would appear desirable for all

1. *See In re* Estate of Pakarinen, 287 Minn. 330, 337, 178 N.W.2d 714, 718 (1970) (identity of mother usually easily established), *appeal dismissed*, 402 U.S. 903 (1971); MINN. STAT. § 525.172 (1978) ("An illegitimate child shall inherit from his mother the same as if born in lawful wedlock . . . ."); H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 5 (1971) ("[W]ith respect to its mother, the illegitimate has long been equal . . . to his legitimate sibling.").

2. "Paternity practice has suffered from the old saw to the effect that 'maternity is a matter of fact whereas paternity is a matter of opinion.' " H. KRAUSE, *supra* note 1, at 106. *See In re* Estate of Pakarinen, 287 Minn. 330, 337, 178 N.W.2d 714, 718 (1970) ("[N]o method of proof we are now aware of exists by which fatherhood can be conclusively established."), *appeal dismissed*, 402 U.S. 903 (1971). *See generally* Note, *Paternal Inheritance Rights of Illegitimate Children and the Problem of Proving Paternity*, 24 WAYNE L. REV. 1389 (1978).

3. As Justice Cardozo remarked in *In re* Findlay, 253 N.Y. 1, 170 N.E. 471 (1930):

> Potent, indeed, the presumption [of legitimate birth] is one of the strongest and most persuasive known to the law . . . , and yet subject to the sway of reason. Time was, the books tell us, when its rank was even higher. If a husband, not physically incapable, was within the four seas of England during the period of gestation, the court would not listen to evidence casting doubt on his paternity. The presumption in such circumstances was said to be conclusive.

Id. at 7, 170 N.E. at 472.

Today, the presumption of legitimacy is still normally given great weight. *See* 9 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2527 (3d ed. 1940) (child born of a married woman during wedlock presumed the child of mother's current husband).

parties involved in such a proceeding to be represented by competent counsel. In *Hepfel v. Bashaw*,[4] the Minnesota Supreme Court addressed this issue, deciding that an indigent defendant in a paternity suit is, in certain circumstances, entitled to court appointed counsel, despite the lack of current statutory authority for such an appointment under Minnesota law.[5] Furthermore, in view of the policy considerations favoring accurate adjudications of paternity, the *Hepfel* court urged the Legislature to provide "for the availability and use of the blood-grouping tests currently available."[6]

The *Hepfel* case consolidated the rehearing of *Hepfel v. Bashaw*[7] and *Erickson v. Stassi*.[8] In *Hepfel*, an eighteen-year-old high school student was named the defendant in a paternity proceeding initiated on December 5, 1975.[9] The complainant was represented as an indigent by the Houston County Attorney.[10] Upon denial by the district court of defendant's motion for an order appointing counsel to represent him, defendant petitioned the Minnesota Supreme Court for a writ of mandamus.[11] The writ was issued on the ground that when "both parties to a paternity proceeding satisfy the standards of indigency . . . , the defendant should likewise be afforded counsel."[12] The Houston County Attorney's petition for rehearing was granted on October 18, 1976.[13]

In *Erickson*, complainant was represented as an indigent by the St.

4. 279 N.W.2d 342 (Minn. 1979).
5. *See id.* at 343-44, 348.
6. *Id.* at 347.
7. 279 N.W.2d 341 (Minn. 1976), *aff'd on rehearing*, 279 N.W.2d 342 (Minn. 1979).
8. No. A-4342 (Minn. 6th Dist. Ct. Aug. 30, 1977).
9. *See* 279 N.W.2d at 343; 279 N.W.2d at 341.
10. *See* 279 N.W.2d at 341.
11. *See id.*
12. *Id.* A county attorney may represent a claimant in a paternity proceeding if requested to do so by a district or county court judge, public welfare, or other social service agency. *See* MINN. STAT. § 257.254 (1978). There is no comparable statutory provision for appointment of counsel for the putative father. Prior to amendment in 1977, the provision, "and in all other cases when the petitioner is unable to employ an attorney through inability to pay for such services" followed the words "social service agency." Act of Apr. 22, 1971, ch. 143, § 4, 1971 Minn. Laws 272, 273-74, *as amended by* Act of May 26, 1977, ch. 282, § 5, 1977 Minn. Laws 484, 486 (codified at MINN. STAT. § 257.254 (1978)). It is doubtful that the 1977 amendment would alter the result in *Hepfel*. The *Hepfel* court indicated that eligibility for counsel under the statute is not based solely on a petitioner's inability to pay. The court stated that in the absence of statutory standards for eligibility, the "substantial hardship" standard contained in rule 5 of the Minnesota Rules of Criminal Procedure would be relied upon. *See* 279 N.W.2d at 348; MINN. R. CRIM. P. 5.02(3).

The Uniform Parentage Act is proposed legislation that would provide for the appointment of counsel for indigent defendants in paternity proceedings. *See* UNIFORM PARENTAGE ACT § 19(a). In Minnesota, the Act was introduced in the Senate and passed with minor amendment on April 19, 1979. *See* MINN. S. JOUR. 969-71 (1979).
13. *See* 279 N.W.2d at 343.

Louis County Attorney.[14] Defendant, an airman first class in the Air Force, failed to qualify for legal aid under federal guidelines.[15] Consequently, defendant moved in district court that counsel be appointed. Upon the authority of the first *Hepfel* case, the district court granted defendant's motion and the county, charged with the cost of providing counsel, appealed.[16]

In addressing a putative father's right to counsel, the court affirmed and reiterated its earlier *Hepfel* ruling that an indigent defendant must be provided counsel when the complainant is represented as an indigent.[17] The court, however, reversed the district court's order in *Erickson* because the defendant was not an eligible indigent within the "substantial hardship" standard contained in the Minnesota Rules of Criminal Procedure.[18]

The judicial determination of paternity traditionally has been an action of limited scope, providing the means to fix parental responsibility and thus prevent the child from becoming a public charge.[19] The action was designed to aid welfare authorities on whom would fall the burden of support if the father could not be identified and held responsible.[20]

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14. *See id.*

15. *Id.* at 344. The poverty level dollar amount for a family unit of one in Minnesota was $3,713.00 at the time the *Erickson* action was initiated. *See* 42 FED. REG. 24,271 (1977) (amending 45 C.F.R. § 1611 app. A). Defendant's income was 50% above the poverty level. 279 N.W.2d at 344. In order to be eligible for legal service, the maximum annual income level may not exceed 125% of the official poverty threshold. *See* Appellants' Brief at 8.

16. *See* 279 N.W.2d at 343-44. Defendant had a net income of $364.00 per month and monthly obligations totalling approximately $160.00. *See* Appellants' Brief at 4. In addition, his total debts to various creditors equalled approximately $2,911.00. *See id.* Defendant had contacted an attorney who informed him that his fees would be approximately $2,500.00. *Id.* at 5.

17. *See* 279 N.W.2d at 348.

18. *See id. See generally* MINN. R. CRIM. P. 5.02.

19. At common law, the child born out of wedlock was deemed to be *filius nullius*, the son of no one. *See* H. KRAUSE, *supra* note 1, at 3. No statutes provided for legitimation by establishment or acknowledgement of paternity, or by the subsequent marriage of the parents. *See* G. DOUTHWAITE, UNMARRIED COUPLES AND THE LAW 112 (1979). In Minnesota, illegitimate children become legitimate by the subsequent marriage of their parents to each other. *See* MINN. STAT. § 517.19 (1978). Children born of marriages declared null in law and of prohibited marriages are also considered legitimate. *See id.*

At common law, parents had no obligation to support their illegitimate children. *See* Helmholz, *Support Orders, Church Courts, and the Rule of* Filius Nullius: *A Reassessment of the Common Law*, 63 VA. L. REV. 431, 432 (1977). This problem was recognized by the Church of England and partially alleviated through sanctions enforced by its courts. *See id.* In the sixteenth century, the sanctions of the Church of England began to lose their force and secular penalties for non-support were instituted. *See id.* at 447. The first child support statute, the Elizabethan Poor Law, was enacted in 1576. *See* An Act for Setting the Poor on Work, 1576, 18 Eliz. 1, c. 3, § 2.

20. *See* H. KRAUSE, *supra* note 1, at 105. Historically, the action was also designed to alleviate the burden placed on the parishioners of the Church of England from whom

Judgments against the father normally include support or lump-sum settlements, cost of the mother's confinement, and expenses for prosecuting the action.[21]

In jurisdictions in which the paternity action is a criminal proceeding, the action may be a prosecution for the crime of fornication or bastardy.[22] In these jurisdictions, the safeguards of criminal prosecution apply; proof of paternity must be beyond a reasonable doubt, blood tests may be provided at public expense, and indigent defendants have the right to court-appointed counsel.[23] The right to counsel arises from the criminal nature of the proceedings.[24] The father's support obligation is imposed only incidentally, as a condition to probationary suspension of the potential criminal penalty.[25] Therefore, since the fourteenth amendment requires that indigent criminal defendants threatened with incarceration be furnished with counsel,[26] the indigent putative father may exercise this right.

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funds for the support of illegitimate children were collected before passage of the Elizabethan Poor Law in 1576. *See also* Helmholz, *supra* note 10, at 432.

> The purpose of the paternity action in modern times has not substantially changed. Present law requires that the State welfare agency establish a single, identified unit whose purpose is to secure support for children who have been deserted or abandoned by their parents, utilizing any reciprocal arrangements adopted with other States to obtain or enforce court orders for support. If it is necessary to establish paternity to find an obligation to support, this unit is supposed to carry out this activity. The State welfare agency is further required to enter into cooperative arrangements with the courts and with law enforcement officials to carry out this program.

S. REP. NO. 93-1356, 93d Cong., 2d Sess. 2, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 8133, 8134.

21. *See* H. KRAUSE, *supra* note 1, at 148-49. In Minnesota, the court may order the father to pay lump sum or periodic payments at specified intervals. *See* MINN. STAT. § 257.261(1) (1978). The mother may also "recover the costs of the action paid or incurred by her, including a reasonable amount for attorney's fees." *Id.* § 257.261(3). In addition, the father is liable for the reasonable expense of the mother's pregnancy and confinement and for suitable maintenance for a specified time period. *See id.* § 257.251 (1978).

22. *See* H. KRAUSE, *supra* note 1, at 109.

23. The guarantee of the right to counsel for defendants threatened with incarceration is embodied in the sixth amendment. *See* U.S. CONST. amend. VI. This amendment has been construed to apply to all stages of criminal proceedings in which "counsel's assistance [is] necessary to assure a meaningful 'defence.'" United States v. Wade, 388 U.S. 218, 225 (1967).

24. H. KRAUSE, *supra* note 1, at 109.

25. *Id.*; *see, e.g.*, State v. Robinson, 245 N.C. 10, 12, 95 S.E.2d 126, 128 (1956) (criminal judgment continued for two years on condition that weekly support payments be made).

26. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."). The sixth amendment guarantee of the right to counsel was later held applicable to the states through the fourteenth amendment. *See* Gideon v. Wainwright, 372 U.S. 335 (1963); U.S. CONST. amend. XIV, § 1.

In a majority of jurisdictions, however, the paternity action is a civil proceeding.[27] Accordingly, proof of paternity need rest upon no more than a preponderance of the evidence.[28] In addition, there is no right to court-appointed counsel.[29] Unfortunately, without the safeguards of criminal prosecution, the interests of the putative father are not adequately protected. Current paternity practice is replete with corruption and in some jurisdictions it is not unusual to find that ninety-five percent of those persons named as defendants in paternity suits are subsequently found guilty.[30] Clearly, reform of the law of illegitimacy is necessary both to insure that the man falsely named as a father is accorded the fullest possible protection and to protect the primacy of the illegitimate child's rights against his biological father.[31]

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27. In those jurisdictions in which the paternity suit is considered to be a civil action, the main purpose of the suit is to compel the putative father to support his child. *See, e.g.*, State v. Sax, 231 Minn. 1, 7, 42 N.W.2d 680, 684 (1950) ("The terms of the statutes evince a purpose to place the illegitimate father in as reasonable a position toward the child as if the child were legitimate."). In jurisdictions in which bastardy proceedings are considered to be criminal in nature, the proceeding usually provides some type of punishment for the father in addition to requiring him to support his child. *See, e.g.*, State v. Robinson, 245 N.C. 10, 16, 95 S.E.2d 126, 131 (1956) ("defendant may be prosecuted and convicted if he has wilfully neglected and refused to support his child").

28. Several courts have recognized that this evidentiary standard is less than adequate for use in paternity suits because the charge is so easily made yet very difficult to contradict. *See, e.g.*, Commissioner v. Rose, 283 A.D. 781, 781, 128 N.Y.S.2d 355, 356 (1954) ("the burden of proof . . . goes beyond a mere preponderance of the evidence to the point of entire satisfaction").

29. *See, e.g.*, Miller v. Gordon, 58 A.D.2d 1027, 397 N.Y.S.2d 500 (1977).

30. *See* H. KRAUSE, *supra* note 1, at 107. *See also* Sussman, *Blood Grouping Tests—A Review of 1000 Cases of Disputed Paternity*, 40 AM. J. CLINICAL PATHOLOGY 38, 41 (1963) (study found that after results of blood tests in 1000 disputed paternity cases in New York City, total number of men probably falsely accused was approximately 396). After reviewing current paternity practice, Professor Krause noted that "[b]lackmail and perjury flourish, accusation is tantamount to conviction, decades of support obligation are decided upon in minutes of court time and indigent defendants usually go without counsel or a clear understanding of what is involved." H. KRAUSE, *supra*, at 108.

31. Beginning in 1968, the United States Supreme Court rendered a series of decisions holding that the equal protection clause of the Constitution prohibits unequal treatment of legitimate and illegitimate children in any substantive area other than inheritance. *See* Trimble v. Gordon, 430 U.S. 762 (1977) (state law that prevents an acknowledged illegitimate child from inheriting from her father violates the equal protection clause); Jimenez v. Weinberger, 417 U.S. 628 (1974) (illegitimate children are entitled to disability insurance benefits under Social Security Act without showing dependency upon disabled parent if state permits inheritance from wage-earning parent); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973) (statute limiting welfare benefits to households with married parents denies equal protection to illegitimate children); Gomez v. Perez, 409 U.S. 535 (1973) (denying illegitimate children the right to parental support granted to legitimate children violates the equal protection clause); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (workers' compensation law violates the equal protection clause by denying benefits to unacknowledged illegitimate children); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) (statute denying mother recovery for

In Minnesota, the paternity action is civil in nature.[32] Prior to the ruling in *Hepfel*, a Minnesota attorney general's opinion had determined that civil prosecution precluded the court from appointing counsel for indigent defendants in paternity proceedings.[33] Rejecting the traditional import of the civil and criminal categories, the court in *Hepfel* stated that a civil label was not dispositive of the issue and cited the increasing recognition of the right to counsel in non-criminal proceedings.[34] Noting that an accurate determination of paternity is essential to preserve the substantial interests of the mother, putative father, and illegitimate child,[35] the *Hepfel* court held that counsel should be provided to an indigent defendant who meets the eligibility standards of "substantial hard-

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wrongful death of her illegitimate children violates equal protection clause); Levy v. Louisiana, 391 U.S. 68 (1968) (statute denying illegitimate children the right to recover for wrongful death of their mother violates equal protection clause). For the Minnesota Supreme Court's response to the constitutional rulings, see Weber v. Anderson, 269 N.W.2d 892 (Minn. 1978) (thrust of modern law is to accord children born out of wedlock same legal status as other children); Unborn Child v. Evans, 310 Minn. 197, 245 N.W.2d 600 (1976) (denial of insurance proceeds to the illegitimate offends equal protection clause of fourteenth amendment), *noted in* 4 WM. MITCHELL L. REV. 233 (1978); Northwestern Nat'l Bank v. Simons, 308 Minn. 243, 243 N.W.2d 78 (1976) (illegitimate children are within definition of "issue" and are therefore entitled beneficiaries under trust); *In re* Estate of Pakarinen, 287 Minn. 330, 178 N.W.2d 714 (1970) (discrimination based solely on illegitimate status no longer constitutionally permissible; however, standards of proof necessary for illegitimate child to inherit from putative father who dies intestate are not unconstitutional), *appeal dismissed*, 402 U.S. 903 (1971). *See generally* Gray & Rudovsky, *The Court Acknowledges the Illegitimate:* Levy v. Louisiana and Glona v. American Guarantee & Liability Co., 118 U. PA. L. REV. 1 (1969); Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1 (1974); Comment, *Constitutional Law: Equal Protection for Illegitimates*, 17 WASHBURN L.J. 392 (1978); 24 LOY. L. REV. 116 (1978).

32. *See, e.g.*, Smith v. Bailen, 258 N.W.2d 118, 119 (Minn. 1977); State *ex rel.* Nelson v. Nelson, 298 Minn. 438, 441, 216 N.W.2d 140, 143 (1974); State v. Tolberg, 273 Minn. 221, 222, 140 N.W.2d 845, 846 (1966).

33. *See* Op. Minn. Att'y Gen. 779-K (April 13, 1962).

34. 279 N.W.2d at 344-45. One authority has noted that:

> [t]he substantive and procedural rules in civil cases are as complex as those in criminal cases, and trained counsel often represents the opposing party. Thus, it is clear that there is no substantial difference between the plight of the uncounseled criminal and the indigent civil litigant who must appear pro se.

Comment, *Indigent's Right to Appointed Counsel in Civil Litigation*, 66 GEO. L.J. 113, 115 (1977).

35. These interests include the fundamental right of the child to self-dignity and freedom from the inequality that it may experience as a result of the unearned taint of illegitimacy. *See* note 52 *infra*. Financial and emotional problems burden the mother who, without a legal father for her child, may be forced to turn to welfare agencies for help in supporting the child.

The putative father's interests are both direct and indirect. Directly, he is financially affected if he is adjudicated the father for then he must contribute to the support of the child. Indirectly, he is threatened with the loss of his liberty, since incarceration may be imposed for criminal nonsupport under MINN. STAT. § 609.375 (1978). The putative father must also bear the social stigma resulting from an adjudication of paternity.

The state's interest is strong. Without a legal father for the child, the state is usually

ship" currently required for proceedings *in forma pauperis*.[36] The court rested its decision on the exercise of its supervisory authority to ensure the fair administration of the adversary system of justice and explicitly declined to rule upon constitutional grounds.[37]

The court's reasoning, however, implicitly parallels the substance of due process guarantees.[38] The fundamental requisite of due process is the opportunity to be heard at a meaningful time and in a meaningful manner before deprivation of life, liberty, or property.[39] Indigent paternity defendants are conceivably subject to loss of their property or liberty if adjudicated the father of an illegitimate child. They may be held liable for payments of child support and, upon failure to make such payments, could be subject to incarceration.[40] In a recent case, the

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sought for financial support. The state thus becomes the child's adopted father in a financial sense.

Currently very little attention is given to the accuracy of the determination of paternity in the trial of a contested paternity action. Professor Harry D. Krause, in a study of illegitimacy law and social policy, found that testimony from the sitting judiciary hearing paternity cases revealed to the Illinois Family Study Commission of 1966 that more than one in seven paternity defendants was erroneously held liable as the father of someone else's child. *See* H. KRAUSE, *supra* note 1, at 108.

36. *See* 279 N.W.2d at 348. "A defendant is financially unable to obtain counsel if he is financially unable to obtain adequate representation without substantial hardship for himself or his family." MINN. R. CRIM. P. 5.02(3).

The Minnesota Supreme Court Advisory Committee on Rules of Criminal Procedure strongly recommends certain standards to be employed as guidelines for an efficient and uniform determination of eligibility. Eligibility is based on the defendant's cash assets and net income. The determination of eligibility is made by the court as a practical matter. Various circumstances affecting the defendant's cash assets and income may warrant a determination of eligibility even though the dollar amounts specified by the Committee have been exceeded. *See* MINN. R. CRIM. P. 5.02(3), Comment.

37. 279 N.W.2d at 348. *But see* Salas v. Cortez, 24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 529, *cert. denied*, 100 S. Ct. 209 (1979). In *Salas*, the California Supreme Court held that in proceedings to determine paternity in which the state appears as a party or appears on behalf of a mother or child, indigent defendants are constitutionally entitled to appointed counsel. *Id.* at 34, 593 P.2d at 234, 154 Cal. Rptr. at 537.

38. *See* note 26 *supra*. In describing the balancing test that determines what process is due, the United States Supreme Court has stated that "[t]he extent to which procedural due process must be afforded . . . is influenced by the extent to which [an individual] may be 'condemned to suffer grievous loss' . . . ." Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970).

39. *See, e.g.*, Armstrong v. Manzo, 380 U.S. 545, 550 (1965) (failure to give father notice of pending adoption proceedings deprived father of rights without due process of law).

40. *See* note 12 *supra*. Sanctions for the crime of non-support are found in MINN. STAT. § 609.375 (1978), which provides:

> Whoever is legally obligated to provide care and support to his . . . child, whether or not its custody has been granted to another, and knowingly omits and fails without lawful excuse to do so is guilty of non-support of said . . . child, . . . and upon conviction thereof may be sentenced to imprisonment for not more than 90 days or to payment of a fine of not more than $300.

California Supreme Court granted court-appointed counsel to an indigent defendant in a paternity action on the ground that counsel was constitutionally required in light of due process guarantees.[41] The Minnesota court's reliance in *Hepfel* on the fair administration of justice as a basis for court-appointed counsel is substantially similar to the constitutional reasoning set forth by the California court.[42]

In addition to its holding on the right to counsel, the *Hepfel* court expressed concern that a man falsely named as the putative father can be held responsible for child support based upon the uncorroborated testimony of the mother without the routine use of blood tests in paternity investigations.[43] Furthermore, federal law currently requires, as a condition to obtaining federal funds, that states develop appropriate procedures to establish the paternity of children whose mother applies for assistance under the Aid to Families with Dependent Children program.[44] Accordingly, a major area of reform in paternity actions is the development and use of uniform verification procedures requiring the utilization of blood tests.[45] "Without such scientific evidence of high

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Id. § 609.375(1). If the non-support continues for a period longer than 90 days, the defendant may be guilty of a felony and subject to imprisonment for not more than five years. *Id.* § 609.375(2).

41. *See* Salas v. Cortez, 24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 529, *cert. denied*, 100 S. Ct. 209 (1979).

42. *Compare* 279 N.W.2d at 348 ("We hold that counsel is required, not because we are constitutionally compelled to do so, but because, given the present adversary nature of paternity adjudications, there is no better method available to us to protect the important interests involved.") *with* Salas v. Cortez, 24 Cal. 3d 22, 31, 593 P.2d 226, 232, 154 Cal. Rptr. 529, 535 ("If paternity is to be determined in an adversary proceeding at the behest of the state, surely the interests of all concerned demand that the defendant be able to defend fully and fairly. He cannot do so when his indigency prevents him from obtaining counsel."), *cert. denied*, 100 S. Ct. 209 (1979).

43. 279 N.W.2d at 346; *see* H. KRAUSE, *supra* note 1, at 107 (the evidence in most paternity actions consists of an accusation by the woman and a denial by the putative father; under such circumstances, judges feel constrained to enter a finding of paternity without requiring corroborating evidence).

44. *See* Social Security Act § 208(b), 42 U.S.C. § 654(4) (1976).

The mother may have personal reasons for not wanting her child's paternity determined. The Senate Finance Committee, however, expressed concern at the extent to which the dependency on AFDC is the result of the increasing number of illegitimate children on the rolls for whom parental support is not being provided because the identity of the father has not been determined. The Committee stated that an AFDC child has a right to have its paternity determined in a fair and efficient manner, and that this right takes priority over any interest of the mother. *See* S. REP. NO. 93-1356, 93d Cong., 2d Sess. 51, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 8133, 8154-55.

45. *See* Hepfel v. Bashaw, 279 N.W.2d at 347. In State *ex rel.* Ortloff v. Hanson, 277 N.W.2d 205 (Minn. 1979), the court stated that:

> [It] is our belief that blood-test procedures provide the most reliable means for making the determination of paternity more accurate and efficient.
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> . . . .
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> While these accurate tests are available at relatively low cost, Minnesota

probative value," one court noted, "the rules of evidence relating to proof of paternity have not changed much since our judicial ancestors threw witches into a New England pond and judged them according to whether they sank or swam."[46]

Currently, however, blood tests are not required practice.[47] Thus, the *Hepfel* court noted that the federal system encourages the traditionally aggressive role of the welfare department in a paternity proceeding, in which it singly pursues the task of finding the man it can legally hold responsible for child support.[48] With the technological ability to determine that a particular man is probably the father of a particular child, it is imperative that this resource be available to all parties in a paternity proceeding.[49] Therefore, the *Hepfel* court urged the Minnesota Legislature to statutorily provide for the availability and use of a series of seven

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does not have any statutory procedure specifically designed to meet the problem. Rule 35.01, Rules of Civil Procedure, does provide the court with authority to order a party to submit to a blood examination in an action in which the blood relationship of a party is in controversy, but we believe it would be helpful if the legislature would consider the entire matter of blood testing in the context of paternity actions.

Id. at 206-07. In a more recent case, Golden v. Golden, 282 N.W.2d 887 (Minn. 1979), the court also urged the Legislature to study the use of blood testing in the context of paternity actions, noting the apparent accuracy of the testing procedures. The court has further recommended that the county attorneys of the state encourage the use of blood test procedures in paternity proceedings. *See* Benson v. LaBatte, No. 48149, slip op. at 4 (Minn. Dec. 7, 1979).

46. Libertowski v. Hojara, 141 Ind. App. 439, 445, 228 N.E.2d 422, 425 (1967).

47. *See* Social Security Act § 101(a), 42 U.S.C. § 652(a)(1) (1976) (provides for the establishment of "such standards for State programs for locating absent parents, establishing paternity, and obtaining child support as he [the Secretary of Health, Education and Welfare] determines necessary to assure that such programs will be effective"). *But see* Wessels v. Swanson, No. 49558 (Minn. Nov. 23, 1979). In *Wessels*, the defendant was adjudicated the father of twin boys and was ordered to pay support to the plaintiff mother and children. The Minnesota Supreme Court directed affirmance of the support order, effective 90 days after the filing of the opinion, unless within that period defendant could present evidence that would negate operation of the judgment. Noting its recognition of the importance of development and utilization of sophisticated blood-grouping tests in *Hepfel* and *Ortloff*, the Minnesota Supreme Court held that "if such [blood] tests furnish reliable evidence substantiating defendant's denial of paternity, such evidence would furnish a reason justifying relief from the operation of the judgment." *Id.*, slip op. at 2. Thus, although the court had previously urged the Legislature to consider the implementation of blood testing procedures, *see* 279 N.W.2d at 347; State *ex rel.* Ortloff v. Hanson, 277 N.W.2d 205, 206-07 (Minn. 1979), it would appear that in the absence of legislative directives, the Minnesota Supreme Court will consider the results of such blood tests admissible to negate the claim of paternity. Whether such results will be admissible to show statistical probabilities that tend to establish paternity in addition to their traditional value as exclusionary tests is an issue that the court has not directly faced to date.

48. 279 N.W.2d at 346. The court refers to the paternity action as a "welfare subrogation claim, with the predominant interest properly represented before the court being that of the welfare board seeking its own reimbursement." *Id.* at 347.

49. It is hoped that with the use of reliable test evidence on a large scale, the majority

blood-grouping tests recommended by a joint report of the American Medical Association and the American Bar Association.[50] These testing procedures promise, in addition to conclusively establishing non-paternity, to determine paternity affirmatively in terms of statistical probabilities.[51] Blood-grouping tests, conducted in accordance with the highest standards of care, can provide proof equal to that of other types of circumstantial evidence.[52]

The model for reform of the paternity action is the Uniform Parentage Act[53] (U.P.A.), which provides for the equality of all children regardless of the marital status of their parents, with the exception of the right to inherit from the father.[54] The U.P.A. contains a network of presumptions identifying circumstances in which it is probable that a particular man is the child's father,[55] as well as procedures to prove paternity when the external circumstances do not indicate the probable father.[56] These

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of paternity cases will be settled consensually in the light of such evidence. *See* Krause, *supra* note 31, at 9.

The *Hepfel* court noted that with the use of the blood grouping tests, " 'the cumulative probability that at least one of these tests will exclude paternity of a falsely accused man' exceeds 90 percent." 279 N.W.2d at 347 & n.7.

For a discussion of the benefits and problems of utilizing blood tests in establishing paternity, see Wiener, *Problems and Pitfalls in Blood Grouping Tests for Non-Parentage*, 15 J. FOR. MED. 106 (1968).

50. *See* 279 N.W.2d at 347 & n.7.

51. *See* H. KRAUSE, *supra* note 1, at 127-28.

52. *See id.* at 128. As Professor Krause noted, "if blood typing cannot establish paternity positively in *medical* terms, the proof of paternity may reach a level of probability which is entirely acceptable in *legal* terms." *Id.* (emphasis in original).

53. UNIFORM PARENTAGE ACT §§ 1-29. The Uniform Parentage Act was drafted and adopted in 1973 by the National Conference of Commissioners on Uniform State Laws. The Act was approved in 1974 by the House of Delegates of the American Bar Association. *See* Krause, *supra* note 31, at 1. To date, the Uniform Parentage Act is law in seven states. *See* CAL. CIV. CODE §§ 7000-7017.1 (West Supp. 1979); COLO. REV. STAT. §§ 19-6-101 to -129 (1978); HAWAII REV. STAT. §§ 584-1 to -26 (1976); MONT. CODE ANN. §§ 40-6-101 to -131 (1978); N.D. CENT. CODE §§ 14-17-01 to -26 (Supp. 1977); WASH. REV. CODE ANN. §§ 26.26.010-.905 (Supp. 1979); WYO. STAT. §§ 14-2-101 to -120 (1977).

54. The United States Supreme Court has given "traditional deference to a State's prerogative to regulate the disposition at death of property within its borders." Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 170 (1972).

55. A man is presumed to be the natural father of a child if he and the mother are or have been married and the child was born during the marriage or within 300 days after termination of the marriage; if he and the child's mother have attempted to marry each other, although the marriage is or could be declared invalid; if he and the mother attempt to marry or marry after the child's birth, and he either is obligated to support the child, is named on the child's birth certificate, or acknowledges paternity; if he takes the child into his home and openly holds it out as his own before the child reaches the age of majority; or if he acknowledges paternity in a writing filed with the appropriate state agency. *See* UNIFORM PARENTAGE ACT § 4.

56. *See id.* § 12. Evidence relating to paternity that may be considered includes: evidence of sexual intercourse between the mother and the alleged father at any possible time

procedures reduce the unpleasantness, cost, and time involved in the traditional paternity case.[57] Settlement without litigation also is facilitated.[58]

A significant contribution made by the U.P.A. is a provision requiring the court to appoint counsel for any party who is financially unable to obtain counsel.[59] Only the interpretation of the standard for determining indigency remains in issue.[60] The *Hepfel* court made note of the uniform law in its opinion because the U.P.A. is under consideration by the Minnesota Legislature.[61] In anticipation of this pending legislation, the Minnesota court declined to consider whether appointment of counsel to represent indigent defendants in paternity proceedings is required by the equal protection or due process guarantees of the federal and state constitutions.[62]

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of conception; an expert's opinion regarding statistical probability of the alleged father's paternity based on the duration of the mother's pregnancy; blood test results; medical or anthropological evidence based on tests performed by experts; and all other evidence relevant to the issue of paternity. *See id.*

57. The author states in M. VIRTUE, FAMILY CASES IN COURT 36-37 (1956), that these traditional conflicts are:

> [s]o bitter . . . , and so punishing for all the parties, that some scholars in the social work field have wondered whether society is wise in attempting to identify the father of an illegitimate child and exacting financial payments from him. The courtroom presentation of a bastardy case is at best a sordid spectacle.

58. *See* UNIFORM PARENTAGE ACT § 13. On the basis of information produced at the pre-trial hearing, the judge or referee may make an appropriate recommendation for settlement. *See id.* Recommendations may include: dismissal of the action without prejudice; compromise, whereby the father assumes a defined economic obligation in favor of the child although the father and child relationship is not established; and voluntary acknowledgment of paternity by the father. *See id.* Any of the parties to the action, including the guardian ad litem, may refuse to accept a recommendation. *See id.*

59. *See id.* § 19(a). Current Minnesota law provides that only the complainant in a paternity action is entitled to court-appointed counsel if such counsel is requested by a district or county court judge, public welfare, or other social service agency. *See* MINN. STAT. § 257.254 (1978).

As the *Hepfel* court noted, however, the right to counsel "is of value only to the extent that counsel can assist in the adversary nature of the proceeding to protect the interests of those involved." 279 N.W.2d at 345. Thus, the indigent defendant's right to counsel in a paternity proceeding is merely one example of the means by which the accuracy of such proceedings can be improved.

60. For the standard of indigency applicable in Minnesota, see note 36 *supra*.

61. The Act was passed by the Minnesota Senate with minor amendment on April 19, 1979. *See* MINN. S. JOUR. 969-71 (1979). No further action was taken on the bill by the 1979 Minnesota Legislature.

62. *See* U.S. CONST. amend. XIV, § 1; MINN. CONST. art. I, § 7. The court had previously urged legislative reform:

> [C]ommentators and courts, including this one, have decried the legislative failure to enact statutes mitigating the harshness of the common-law rule which regarded a child born out of wedlock as "the child of nobody" or "the child of the people" in his social and economic relationships and "barbarically handicapped and burdened children of illegitimate parents for sins in the commission of which they had no part."

The Minnesota Supreme Court in *Hepfel* underscored the significance of the interests of all parties to the paternity action in the accurate determination of paternity and noted that the best method to protect those interests was adjudication in an adversary proceeding.[63] The complexity and importance of the paternity action magnifies the necessity for court-appointed counsel. The court, in effect, declined only to label its holding a constitutional right, in expectation that the pending Uniform Parentage Act would make a constitutional ruling unnecessary.

Torts—PARENTAL IMMUNITY FOR NEGLIGENT INSTRUCTION DENIED—*Romanik v. Toro Co.*, 277 N.W.2d 515 (Minn. 1979).

Around the turn of this century, American courts carved out a rule immunizing parents from tort actions brought by their children.[1] Based upon the need for harmony in the home[2] and preservation of the family

In re Estate of Pakarinen, 287 Minn. 330, 334, 178 N.W.2d 714, 716 (1970), *appeal dismissed*, 402 U.S. 903 (1971).

63. *See* 279 N.W.2d at 348.

1. The genesis of the rule lies in a series of state court decisions sometimes referred to as "the great trilogy." *See* Comment, *Tort Actions Between Members of the Family—Husband & Wife—Parent & Child*, 26 MO. L. REV. 152, 181-82 (1961). Mississippi became the first state to recognize parent-child tort immunity. *See* Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891). In *Hewlett*, the Mississippi Supreme Court adamantly refused to allow an action between a parent and child for an intentional personal tort. *Id.* at 711, 9 So. at 887. Although limited authority against the immunity existed in England, *see* Ash v. Ash, 90 Eng. Rep. 526 (1696) (daughter successfully sued her mother for assault, battery, and false imprisonment), the *Hewlett* court neither cited any authority nor discussed any rationale other than the "repose of families." *See* 68 Miss. at 711, 9 So. at 887. This rationale is of tenuous application in *Hewlett* because the child directed the action against the estate of a deceased parent. *Id.* at 707, 9 So. at 886. *Hewlett* was followed by McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903), in which the Tennessee Supreme Court denied a minor plaintiff recovery against a parent for alleged cruel and inhuman treatment. *Id.* at 393, 77 S.W. at 665. Although the cruel treatment was inflicted by a stepmother, the court held that the father was responsible and, therefore, the child was barred from bringing suit against the father. *Id.* at 391, 77 S.W. at 664. Then, in Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905), the Washington Supreme Court felt that society's interest in protecting family harmony mandated immunity when the tort involved incestuous rape. *Id.* at 243, 79 P. at 788. Many courts, finding the parent-child immunity analogous to interspousal immunity, denied the child a cause of action. *See, e.g.*, Downs v. Poulin, 216 A.2d 29, 32 (Me. 1966) (listing cases); Luster v. Luster, 299 Mass. 480, 482, 13 N.E.2d 438, 440 (1938), *overruled in part*, Sorensen v. Sorensen, 369 Mass. 350, 353, 339 N.E.2d 907, 909 (1975); McKelvey v. McKelvey, 111 Tenn. 388, 391, 77 S.W. 664, 665 (1903); Roller v. Roller, 37 Wash. 242, 245, 79 P. 788, 789 (1905).

2. *See, e.g.*, Balts v. Balts, 273 Minn. 419, 437-38, 142 N.W.2d 66, 78 (1966) (Rogosheske, J., concurring specially); Reingold v. Reingold, 115 N.J.L. 532, 535, 181 A. 153, 154-55 (1935), *overruled*, France v. A.P.A. Transp. Corp., 56 N.J. 500, 506-07, 267 A.2d