DOES THE PRESUMPTION OF LEGITIMACY ACTUALLY PROTECT THE BEST INTERESTS OF THE CHILD?

Department of Health & Rehabilitative Services v. Privette, 617 So. 2d 305 (Fla. 1993).

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I. INTRODUCTION

Angela Sease went to the Department of Health and Rehabilitative Services (HRS) to apply for Aid to Families with Dependent Children (AFDC)[1] benefits.[2] She completed a standard form supplying the information necessary to receive assistance.[3] She alleged on the forms that William Privette was the father of her child,[4] although she was married to Jim Sease at the time of her child's conception and birth, and had listed her husband as the father on the birth certificate.[5] HRS subsequently sued William Privette on Angela Sease's behalf to establish paternity of the child and to secure an order of child support[6] despite the fact that the Seases were still married.[7]

The trial court, based on the complaint form generated by HRS, issued a court order compelling William Privette to submit to a "Human Leukocyte Antigen" (HLA)[8] test.[9] Opposing the lawsuit,

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1. AFDC benefits are provided for in 42 U.S.C. § 601 (1988). To receive AFDC benefits, the recipient must sign over their right to receive child support for any family members for whom assistance is sought. 45 C.F.R. § 232.11 (1993). In addition, the recipient must cooperate with the state agency to obtain support. *Id*. § 232.12.

2. Privette v. HRS, 585 So. 2d 364, 365 (Fla. 2d Dist. Ct. App. 1991) (*Privette I*), *aff'd*, 617 So. 2d 305 (Fla. 1993) (*Privette*). Angela Sease applied to receive the public financial assistance for herself and her daughter. *Id.*

3. *Id*.

4. HRS v. Privette, 617 So. 2d 305, 306 (Fla. 1993) (*Privette*). This form later served as the basis for a complaint in the circuit court against William Privette, the putative father in this case. *Id*. at 307. "Putative father" is the term used to refer to a person who is alleged to be the "father of a child born out of wedlock." BLACK'S LAW DICTIONARY 1237 (6th ed. 1990).

5. *Privette*, 617 So. 2d at 307.

6. *Id.* at 306. HRS' interest in the litigation was to identify the child's father and to obtain reimbursement from him for the public funds Ms. Sease received on the child's behalf. *Id*. at 306 n.1. See *supra* note 1 for an explanation of AFDC benefits.

7. Respondent's Answer Brief at vii-viii, *Privette* (No. 78,837).

8. For a general discussion of HLA testing and its use, validity, and acceptability in the scientific and legal community, see Patricia B. Blumberg, Note, *Human Leukocyte Antigen Testing: Technology Versus Policy in Cases of Disputed Parentage*, 36 VAND. L. REV. 1587 (1983). HLA testing can exclude an individual from paternity with 95–99% certainty and can establish paternity with 90–98% certainty. *Id*. at 1588.

9. *Privette*, 617 So. 2d at 307. Section 742.12 of the *Florida Statutes* sets out the procedures for conducting blood tests and conditions for admitting HLA testing into evidence in contested paternity cases. FLA. STAT. § 742.12 (1993). Florida courts have held

Privette argued that the order violated his constitutional right to privacy.[10] Specifically, he contended that the state's interest was not compelling and that a HLA test would not be the least intrusive method of furthering the public policy that parents should support their children.[11] Additionally, Privette raised the defense that a presumption of legitimacy[12] exists for a child born to a married woman.[13] He argued that, in order to protect the child's best interests, the court should not allow the presumption to be rebutted.[14]

William Privette filed a petition for a writ of certiorari for review of the order with the Second District Court of Appeal.[15] The

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HLA testing admissible in paternity litigation. McQueen v. Stratton, 389 So. 2d 1190, 1190 (Fla. 2d Dist. Ct. App. 1980) (holding that putative father must undergo HLA testing if good cause requirement is met); Carlyon v. Weeks, 387 So. 2d 465, 465 (Fla. 1st Dist. Ct. App. 1980) (affirming judgment of paternity which admitted results of HLA testing and doctor's deposition regarding HLA testing into evidence); Simons v. Jorg, 384 So. 2d 1362, 1363 (Fla. 2d Dist. Ct. App. 1980) (allowing HLA test results into evidence based on their reliability and accuracy when good cause requirement is met). Prior to ordering a party to submit to a blood test, the ordering party must show good cause and show that the request relates to a matter in controversy. FLA. R. CIV. P. 1.360(a)(1)–(2) (1994); *see* Rymer v. Rymer, 508 So. 2d 789, 790 (Fla. 5th Dist. Ct. App. 1987).

10. Respondent's Answer Brief at 23, *Privette* (No. 78,837). The right to privacy advanced by the Florida Constitution has been characterized as "the most comprehensive of rights and the right most valued by civilized man." Rasmussen v. South Fla. Blood Serv., 500 So. 2d 533, 535 (Fla. 1987) (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)); *see* FLA. CONST. art. I, § 23.

11. Respondent's Answer Brief at 34–36, *Privette* (No. 78,837); *see In re* Browning, 568 So. 2d 4 (Fla. 1990) (holding that right to privacy is subject to compelling state interests).

12. The presumption of legitimacy is a rule of evidence which presumes that a child born to a woman and her lawful husband is the biological child of the husband and wife. BLACK'S LAW DICTIONARY 1186 (6th ed. 1990). The presumption is implicated in a paternity action when a party asserts that the husband is not the father of the wife's child. *Id*. The party making the assertion must convince the trier of fact by clear and convincing evidence that the husband is not the child's father. Cartee v. Carswell, 425 So. 2d 204, 206 (Fla. 5th Dist. Ct. App. 1983). See *infra* note 25 for a listing of cases requiring clear and convincing evidence to rebut the presumption.

13. *Privette I*, 585 So. 2d at 365. Florida cases recognize that a child conceived before marriage but born during wedlock is legitimate. Dennis v. HRS, 566 So. 2d 1374, 1377 (Fla. 5th Dist. Ct. App. 1990). See *infra* note 26 regarding legitimating a child under § 742.091 of the *Florida Statutes*. Florida also considers a child legitimate who is conceived during wedlock and born after the termination of a marriage. *See* Smith v. Wise, 234 So. 2d 145 (Fla. 3d Dist. Ct. App. 1970) (holding that child born 283 days after mother's divorce was former husband's legitimate child). Section 61.052(4) of the *Florida Statutes* maintains that a child born during the parties' marriage will not be rendered a child out of wedlock. FLA. STAT. § 61.052(4) (1993).

14. *Privette I*, 585 So. 2d at 365.

15. *Privette*, 617 So. 2d at 305.

Second District Court of Appeal granted certiorari, quashed the order, and remanded the case to the circuit court.[16] The Florida Supreme Court then granted review of the appellate court's decision because of direct conflict with *Pitcairn v. Vowell*.[17] *Pitcairn* held that a putative father lacked standing to assert the presumption and could be compelled to submit to HLA testing.[18] The *Privette* case presented the Florida Supreme Court with the opportunity to clarify under what circumstances the presumption of legitimacy could be rebutted. HELD: A trial court, in order to grant a request for a blood test which challenges a legitimate child's paternity, must find that the best interests of the child would be better served if the blood test result reveals that the putative father is the biological father.[19] To safeguard the child's best interests, the supreme court directed that certain procedures must be followed before a judge can order HLA testing in a case where the presumption of legitimacy exists.[20] The court must hear arguments from the parties, appoint a guardian ad litem to represent the child, and make a factual determination that the child would benefit if the putative father is declared to be the child's legal father.[21] The trial court is also responsible for determining whether the complaint is brought in good faith, appears factually accurate, "and is likely to be supported by reliable evidence."[22]

Florida courts have long recognized the presumption of legitimacy as one of the strongest rebuttable presumptions in the law[23]

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16. *Privette I*, 585 So. 2d at 366. The circuit court did not hear the case again since HRS sought further review. *Privette*, 617 So. 2d at 305.

17. 580 So. 2d 219 (Fla. 1st Dist. Ct. App. 1991); *see Privette*, 617 So. 2d at 306.

18. *Pitcairn*, 580 So. 2d at 222.

19. *Privette*, 617 So. 2d at 308. The court later restated this holding, adding that the trial court must determine that "the child's best interests will be served by being declared illegitimate *and* having parental rights transferred to the biological father." *Id*. at 309 (emphasis added). This implies that the child cannot be declared illegitimate unless there is a biological father available to be a parent. *Id*.

20. *Id*. at 308.

21. *Id*. The *Privette* court did not require the legal father be a party to the action, but it did require that he have actual or constructive notice and an opportunity to argue if he wishes. *Id*. at 308 n.4.

22. *Id*. at 308.

23. *Id*. at 307; *see* Gammon v. Cobb, 335 So. 2d 261, 264 (Fla. 1976) (asserting that "one of the strongest rebuttable presumptions known to the law is required to be overcome before the child can be bastardized."); *see also* Sacks v. Sacks, 267 So. 2d 73, 76 (Fla. 1972) (recognizing that Florida courts "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."); Eldridge v. Eldridge, 16 So. 2d 163, 163 (Fla. 1944) (holding that

originating from the public policy interest in protecting the welfare of children.[24] The *Privette* court maintained that clear and convincing evidence must be presented to overcome the presumption[25] when a party challenges the legitimacy of a child born to a married couple.[26] While the decision of the Florida Supreme Court in *HRS v. Privette* serves to illustrate that the presumption is still recognized, the opinion's applicability is unclear.[27] Although *Privette* and the

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only husband could repudiate child's legitimacy when presumption is implicated); Albert v. Albert, 415 So. 2d 818, 820 (Fla. 2d Dist. Ct. App. 1982) (recognizing presumption as "one of the strongest rebuttable presumptions known in the law."); Sanders v. Yancey, 122 So. 2d 202, 203 (Fla. 2d Dist. Ct. App. 1960) (recognizing that strong moral arguments prohibited mother from declaring anyone but former husband as father of child).

24. *See Sacks*, 267 So. 2d at 76 (commenting that "[t]he 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."); Valdes v. Lambert, 568 So. 2d 117, 119 n.3 (Fla. 5th Dist. Ct. App. 1990) (noting Florida's strong public policy favoring legitimacy); Blitch v. Blitch, 341 So. 2d 251, 252 (Fla. 1st Dist. Ct. App. 1976) (recognizing that "[t]he purpose of the strong presumption in favor of legitimacy . . . is to protect the interest and the welfare of the child"). *Privette* reinforces this policy, reasoning that "[o]nce children are born legitimate, they have a right to maintain that status both factually and legally." *Privette*, 617 So. 2d at 307.

25. *Privette*, 617 So. 2d at 308. Florida cases require clear and convincing evidence to rebut the presumption. *See, e.g.,* Cartee v. Carswell, 425 So. 2d 204, 206 (Fla. 5th Dist. Ct. App. 1983) (affirming final judgment of paternity because appeal was barred by res judicata and because appellant failed to provide clear and convincing evidence to rebut the presumption of legitimacy); Albert v. Albert, 415 So. 2d 818 (Fla. 2d Dist. Ct. App. 1982) (allowing stipulation as to husband's non-paternity of child born during marriage to constitute clear and convincing evidence to rebut presumption in dissolution action). *But see* Baker v. Williams, 503 So. 2d 249, 253 (Miss. 1987) (requiring proof beyond reasonable doubt for challenging paternity of child presumed legitimate).

The *Privette* court determined that clear and convincing evidence is the appropriate standard to rebut the presumption because clear and convincing evidence is required for the termination of parental rights. *Privette*, 617 So. 2d at 308; *see* Santosky v. Kramer, 455 U.S. 745, 768–69 (1982) (requiring clear and convincing standard rather than preponderance standard since private interest being affected is substantial); Padgett v. HRS, 577 So. 2d 565, 571 (Fla. 1991) (mandating that clear and convincing evidence is applicable burden of proof for termination of parental rights); Carlson v. HRS, 378 So. 2d 868, 869 (Fla. 2d Dist. Ct. App. 1979) (holding that clear and convincing evidence is required to sever parental custody).

26. *Privette*, 617 So. 2d at 308. Section 742.091 of the *Florida Statutes* considers a child whose parents marry at any time after the child's birth to be legitimate. FLA. STAT. § 742.091 (1993).

27. The following phrases illustrate the vague language used by the court regarding the applicability of the *Privette* opinion. "This conclusion is especially compelling in light of the fact that we must establish a neutral rule applicable to *all cases of this type*." *Privette*, 617 So. 2d at 309 (emphasis added). The court also stated that "[t]his policy is a guiding principle that must inform every action of the courts in this *sensitive legal area*." *Id.* at 307 (emphasis added).

earlier conflicting case of *Pitcairn v. Vowell*[28] concern putative fathers seeking to avoid compulsory submission to blood tests for determination of paternity, the *Privette* holding also applies to putative fathers seeking to establish paternity of a child born to a married couple.[29] The *Privette* court did not clearly state whether the holding is applicable only in instances where the presumption of legitimacy exists and a party presents a motion for blood testing, or whether it extends to any action in which a party seeks to rebut the presumption and declare a child illegitimate.[30]

Privette is significant because it places a greater burden on the party attempting to rebut the presumption of legitimacy by establishing procedures which must be followed before a trial court can grant a party's request for HLA testing.[31] The *Privette* decision promotes the assumption that illegitimacy stigmatizes children and should be avoided if possible.[32] The *Privette* decision further creates potential roadblocks which may serve to prevent children from discovering the identity of their biological fathers.[33]

The *Privette* holding gives a putative father the ability to avoid HLA testing during the discovery phase of a trial and forces the

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28. Pitcairn v. Vowell, 580 So. 2d 219 (Fla. 1st Dist. Ct. App. 1991). The Florida Supreme Court granted review of *Privette* based on direct conflict with *Pitcairn v. Vowell*. *Privette*, 617 So. 2d at 305.

29. A putative father must first establish standing to rebut the presumption before the *Privette* analysis would apply. See *infra* note 34 on the criteria a putative father must meet to have standing to bring a paternity action when the presumption of legitimacy is implicated.

30. For example, Florida courts have allowed parties to rebut the presumption in a dissolution proceeding where both spouses stipulate that the legal father is not the child's biological father. Albert v. Albert, 415 So. 2d 818 (Fla. 2d Dist. Ct. App. 1982) (holding that husband was not estopped from denying paternity even after signing child's birth certificate and both parties agreed that he was not biological father). In some instances, both parties will also stipulate to the identity of the biological father. *Id.* at 820 (citing Sanders v. Yancey, 122 So. 2d 202 (Fla. 2d Dist. Ct. App. 1960)).

31. *Privette*, 617 So. 2d at 308. Prior to *Privette*, parties could obtain a blood test under § 742.12 of the *Florida Statutes* as a matter of discovery when the presumption of legitimacy was implicated. *See* Wolfe v. Wolfe, 582 So. 2d 133 (Fla. 2d Dist. Ct. App. 1991) (holding § 742.12 applicable to dissolution proceedings). *But see* Marshek v. Marshek, 599 So. 2d 175 (Fla. 1st Dist. Ct. App. 1992) (holding that HLA test could not be ordered until determining whether wife was equitably estopped from denying husband's paternity).

32. *Privette*, 617 So. 2d at 309. The majority admonished that a child should not be "stigmatized without reason" and referred to the "stigma of illegitimacy" later in the opinion. *Id*.

33. *Id*. at 310 (Grimes, J., dissenting).

party challenging the presumption to present a prima facie case of paternity against him.[34] In addition, the decision requires a trial court to appoint a guardian ad litem in all paternity actions in which the presumption is implicated and to hold an evidentiary hearing prior to granting a motion for HLA testing.[35] However, the supreme court did not provide specific guidelines for Florida courts to determine when the establishment of illegitimacy would be contrary to the best interests of the child.[36]

The opinion's failure to specify the type of actions[37] the holding applies to presents a dilemma for judges and for attorneys whose practices deal with questions of paternity.[38] Furthermore, requiring the appointment of a guardian ad litem may serve to delay proceedings because guardians ad litem are a limited resource and there is a great need for them in neglect and abuse cases where their ap-

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34. *See Privette*, 617 So. 2d at 308. The United States Supreme Court has held that a putative father attempting to establish paternity must meet an "established relationship test" to have standing to bring an action when the presumption is implicated. Lehr v. Robertson, 463 U.S. 248, 267–68 (1983). When the presumption of legitimacy is implicated, a putative father "is required to show that he has manifested a substantial concern for the welfare of his illegitimate child before he may be accorded standing to assert an interest with respect to that child." Kendrick v. Everheart, 390 So. 2d 53, 60 (Fla. 1980); *see* Van Nostrand v. Olivieri, 427 So. 2d 374, 377 (Fla. 2d Dist. Ct. App. 1983) (requiring unwed father to show "substantial concern" to have standing to obtain discovery to establish paternity of illegitimate child) (quoting *Kendrick*, 390 So. 2d at 60)).

35. *Privette*, 617 So. 2d at 308. The purpose of the hearing is to hear argument from the legal father if he wants to be heard on the motion and to receive input from the court appointed guardian ad litem, as well as the other parties to the action. *Id*. at 308 nn.4–5.

36. *Id*. at 305. The *Privette* court alluded to the possibility that "the child's need for support" may outweigh the "stigma of illegitimacy," but it did not specify how to determine if this is the case. *Id*. at 309; *see, e.g.,* Mize v. Mize, 621 So. 2d 417, 424–25 nn.16–21 (Fla. 1993) (providing Florida courts with specific factors to consider when determining whether primary custodial parent's relocation would be in best interests of child).

37. The facts of the *Privette* case involve a request for an HLA test which could render a presumably legitimate child illegitimate. *Privette*, 617 So. 2d at 305. Other instances arise where a presumably legitimate child can be declared illegitimate without a request for a HLA as in a stipulated dissolution. *See* Albert v. Albert, 415 So. 2d 818 (Fla. 2d Dist. Ct. App. 1982) (allowing presumption of legitimacy to be rebutted by stipulation of both parties to dissolution action, without requiring blood test to disprove presumption).

38. See *supra* note 27 and accompanying text for examples of vague language in the *Privette* opinion. See Ownby v. Ownby, 639 So. 2d 135 (Fla. 5th Dist. Ct. App. 1994), for a recent example of the disagreement between judges on whether *Privette* should apply to dissolution cases or strictly to paternity cases.

pointment is mandated by statute.[39] The resulting delay would leave children uncertain as to their paternity while their cases continue to be litigated.

This Note provides an overview of the historical basis for the presumption of legitimacy. The Note briefly reviews statutes and enforcement acts that make financial support available to children and reviews the mandates to which state agencies must adhere in order to obtain federal money for children. Additionally, the Note discusses case law in Florida and in other jurisdictions regarding rebutting the presumption of legitimacy.[40] *Privette* should not be extended beyond its facts to require the appointment of a guardian ad litem in every case where the presumption is implicated, but should be limited to those cases in which a motion for a blood test is made.[41] The Note concludes that the *Privette* holding should not be considered binding authority mandating the appointment of a guardian ad litem in dissolution actions where the parties stipulate that the husband is not the biological father of a child born or conceived during the marriage.[42] Finally, this Note suggests various factors that

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39. FLA. STAT. § 61.401 (1993). The statute requires the appointment of a guardian ad litem to represent the minor child in cases of verified allegations of neglect or child abuse. *Id*. Section 61.401 enables the court to appoint a guardian ad litem in actions for marriage dissolutions when the court determines that it would be in the child's best interests. *Id*. Section 415.508(1) of the *Florida Statutes* also mandates the appointment of a guardian ad litem in child abuse and neglect proceedings and § 39.465(2)(a) provides that a guardian ad litem shall be appointed in proceedings for termination of parental rights. FLA. STAT. §§ 415.508(1), 39.465(2)(a) (1993). But see *In re* E.F., 639 So. 2d 639 (Fla. 2d Dist. Ct. App. 1994), where the court unanimously affirmed the trial judge's termination of a natural mother's parental rights without appointing a guardian ad litem for her children as required by § 39.465(2) of the *Florida Statutes* and holding that the ruling did not amount to fundamental error. *Id*. at 640. In the same opinion, the court certified the following question to the Florida Supreme Court: "WHETHER A TRIAL COURT COMMITS FUNDAMENTAL ERROR IF IT FAILS TO APPOINT A GUARDIAN AD LITEM IN A PARENTAL TERMINATION PROCEEDING AS REQUIRED BY SECTION 39.465(2), FLORIDA STATUTES[?]" *Id*. at 645.

40. Few published cases on the subject of rebutting the presumption of legitimacy in Florida exist. For example, the *Privette* court cited to only seven Florida cases in its opinion and 16 cases from other jurisdictions. *See generally Privette*, 617 So. 2d at 305. Therefore, this Note will also analyze case law in other jurisdictions to determine whether the Florida Supreme Court made the proper recommendation in *Privette*.

41. *See* M.F. v. N.H., 599 A.2d 1297, 1307 (N.J. Super. Ct. App. Div. 1991) (holding that trial court must determine whether blood test would be in child's best interests before ordering testing and only *recommended* that a guardian ad litem be appointed in every case).

42. See *supra* note 39 for a discussion of § 61.401 of the *Florida Statutes* regarding the appointment of guardians ad litem.

the guardian ad litem should consider in determining if the child's interests would best be served by allowing the presumption to be rebutted.[43]

II. HISTORICAL OVERVIEW

A. History of Paternity Determination

Common law paternity determinations and early paternity statutes were criminal in nature.[44] Terms such as "bastard" and "illegitimate" illustrate the stigma attached to children in early paternity actions.[45] The use of these references is declining from common usage, and they have been replaced with terms such as "children born out of wedlock."[46] The current trend not to characterize children as legitimate or illegitimate[47] is evidenced by United States Supreme

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43. Other jurisdictions have cited the following factors for determining whether a putative father can bring an action against a woman married to someone else:

> [E]motional bonds, economic support, custody of the child, the extent of personal association, the commitment of the putative father to attending to the child's needs, the consistency of the putative father's expressed interest, the child's name, the names listed on the birth certificate, and any other factors which bear on the nature of the alleged parent-child relationship.

C.C. v. A.B., 550 N.E.2d 365, 372 (Mass. 1990). These factors were also utilized in Ban v. Quigley, 812 P.2d 1014, 1017 (Ariz. Ct. App. 1990), and *M.F.*, 599 A.2d at 1301. See *infra* note 126 for a listing of cases requiring a determination of the child's best interests before allowing evidence to be admitted to rebut the presumption.

44. MARGARET C. HAYNES ET AL., CHILD SUPPORT REFERENCE MANUAL at III-5 (1990).

45. Digests such as *West's Florida Digest* contain tables to assist the researcher in corresponding the old key number with the new key number under the topic "Bastards," later retitled "Illegitimate Children," and currently found under the heading of "Children-out-of-Wedlock."

46. FLA. H.R. REP. NO. 1373, 1989 Fla. Laws. ch. 89-61 (enacted). The Act, approved June, 1989, amended *Florida Statutes* §§ 61.052, 440.02, and 768.18, to remove the term "illegitimate children" and replaced it with "children born out of wedlock."

47. Former Surgeon General Dr. Joycelyn Elders, when interviewed by Sam Donaldson, stated, "I do not feel in my own heart that there is any such thing as an illegitimate child. There may be a child who is born where both parents were not married, but I don't feel that children are illegitimate." *This Week with David Brinkley* (ABC television broadcast, Nov. 28, 1993), *available in* LEXIS, Nexis Library, Script File. She additionally commented that the word "bastard" should not be used to refer to a child when the two parents are not wed. *Id.*; *see* HRS v. Wright, 522 So. 2d 838 (Fla. 1988). Justice Kogan, who authored the majority opinion in *Privette*, dissented in *Wright*, arguing that "[t]he majority's adherence to outdated and limited concepts ignores the general, overriding policy of insuring that support is provided to children. Under modern thought, it is no longer the child that is `illegitimate,' but rather the father who has acted illegitimately." *Wright*, 522 So. 2d at 842 (Kogan, J., dissenting).

Court decisions which struck down statutes that discriminated between children born to a marriage and those born out of wedlock.[48]

The presumption of paternity was virtually conclusive at common law.[49] Only the husband could question the legitimacy of a child born during his marriage by providing evidence of impotency or proof that he did not have access to his wife at the time of conception.[50] This rule protected the mother's reputation and avoided stigmatizing the child unnecessarily.[51] Formerly, the *Florida Statutes*[52] provided that only an unmarried woman could bring a paternity action against a putative father.[53] However, in 1976, the Florida Supreme Court held the limitation unconstitutional as a violation of equal protection in *Gammon v. Cobb*.[54] The *Gammon* court reached this conclusion because the statute did not allow a married woman to bring a paternity suit on behalf of her children for support.[55]

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48. *See*, *e.g.*, Gomez v. Perez, 409 U.S. 535, 538 (1973) (holding that state cannot deny child support to children born out of wedlock once right is established); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 165 (1972) (holding that denial of workmen's compensation recovery rights to unacknowledged illegitimate children denied equal protection); Levy v. Louisiana, 391 U.S. 68, 72 (1968) (holding that illegitimate children could not be denied right to wrongful death benefits of mother).

49. See Sanders v. Yancey, 122 So. 2d 202, 204 (Fla. 2d Dist. Ct. App. 1960) (citing Goodright v. Moss, 98 Eng. Rep. 1257 (K.B. 1777)), which noted a famous quote from Lord Mansfield regarding the presumption of legitimacy that "the rule, founded in decency, morality, and policy, is that the declarations of the father or the mother cannot be admitted to bastardize the issue born after marriage."

50. State v. R.A.I., 294 S.E.2d 142, 145 (W. Va. 1982).

51. *Id*.; *see* Kennelly v. Davis, 221 So. 2d 415, 416 (Fla. 1969) (holding that prohibiting woman from declaring child illegitimate in order to receive child support from putative father did not deny equal protection); *Sanders*, 122 So. 2d at 205 (holding that mother could not declare child illegitimate when child was "conceived in wedlock" even though she was separated from husband and had not had sexual relations with him prior to conception). The earlier ban prohibiting married women from bringing paternity actions against putative fathers sometimes led to absurd results. *See, e.g.,* Taylor v. Taylor, 279 So. 2d 364, 366 (Fla. 4th Dist. Ct. App. 1973) (prohibiting wife from bringing paternity action against putative father because she married someone else after child was conceived, but allowing husband to deny paternity of child in dissolution of marriage proceeding).

52. FLA. STAT. § 742.011 (1993).

53. Law of June 24, 1983, ch. 214, § 13, 1983 Fla. Laws 845, at 849 (amended 1983).

54. Gammon v. Cobb, 335 So. 2d 261, 268 (Fla. 1976). In *Gammon*, the woman and her boyfriend lived together and he fathered her seven children. *Id*. at 262. She had not lived with her husband for 20 years. *Id*.

55. *Id*. at 268. Several other jurisdictions recognized a married woman's right to bring a paternity action against a man other than her husband much earlier than the *Gammon* case. *See* Pursley v. Hisch, 85 N.E.2d 270, 271 (Ind. App. 1949) (allowing mar-

United States Supreme Court and Florida decisions have used the presumption of legitimacy to hold that a child born to a married couple is of the marriage.[56] Such decisions prevent a putative father from rebutting the presumption where it would adversely affect the child's best interests.[57] Courts have even refused to rebut the presumption where the legal father is conclusively shown not to be the biological father.[58] Recently, courts have held statutes unconstitutional which denied standing to putative fathers to challenge the presumption.[59] Decisions in other jurisdictions have em

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ried woman to bring action against man other than husband for purposes of paternity); B. v. O., 232 A.2d 401, 404 (N.J. 1967) (holding that married woman had standing to rebut presumption of paternity on behalf of minor child); Martin v. Lane, 291 N.Y.S.2d 135, 138 (Fam. Ct. 1968) (holding that married woman could bring paternity action against defendant other than husband even though married during "conception, gestation, and birth of child"); Wright v. Gann, 217 S.E.2d 761, 763 (N.C. Ct. App. 1975) (holding illegitimate child of married woman not precluded from instituting paternity action for support against someone other than woman's husband); State v. Coliton, 17 N.W.2d 546, 551 (N.D. 1945) (interpreting Uniform Illegitimacy Act to allow married woman to establish paternity in man other than her husband for purposes of support).

56. Michael H. v. Gerald D., 491 U.S. 110, 114 (1989) (holding presumption not rebutted where blood test showed 97.8% probability that putative father was biological father); Eldridge v. Eldridge, 16 So. 2d 163, 164 (Fla. 1944) (holding presumption not rebutted because husband did not meet wife until 226 days before child's birth, with normal gestation being 280 days); Wade v. Wade, 536 So. 2d 1158, 1159 (Fla. 1st Dist. Ct. App. 1988) (estopping husband in dissolution proceeding from denying paternity and support for child born during marriage where husband held child out to others as his for nine years, signed birth certificate, named him as son in will, and carried as dependent for military and tax purposes).

57. See *supra* note 56 for cases upholding the presumption of legitimacy. *See also* Smith v. Wise, 234 So. 2d 145, 148 (Fla. 3d Dist. Ct. App. 1970) (holding mother's claim that man other than former husband was father of child born 283 days after divorce insufficient to rebut presumption that former husband was child's father). See *infra* note 126 for cases which require a best interests of the child analysis to be conducted before allowing evidence to rebut the presumption.

58. *Michael H.*, 491 U.S. at 115 (denying putative father's request for visitation of child and establishment of paternity even after blood tests showed 98.07% probability that putative father was the biological father because it would have disrupted family unit); Grant v. Jones, 635 So. 2d 47, 48 (Fla. 1st Dist. Ct. App. 1994) (remanding trial court's judgment of paternity in light of *Privette* because trial court did not perform best interests analysis, despite test results showing high probability of paternity in putative father); A.T. v. M.K., 547 N.Y.S.2d 510, 513 (N.Y. Fam. Ct. 1989) (establishing that DNA test revealing 99.993% probability of paternity is not conclusive evidence of paternity since establishment by clear and convincing standard also requires evidence of litigant's credibility, access, and relationship of parties).

59. *See, e.g.*, *In re* J.W.T., 872 S.W.2d 189 (Tex. 1994). The Supreme Court of Texas struck down §§ 11.03(a)(7) and 12.06(a) holding that a putative father had standing to bring an action for paternity. TEX. FAM. CODE ANN. §§ 11.03(a)(7), 12.06(a) (West Supp. 1994). The sections prohibited a putative father from attempting to establish pa-

phasized placing the best interests of the child above a putative father's right to obtain or to avoid a HLA test.[60]

Principles of res judicata[61] and equitable estoppel[62] may prevent a husband from declaring that a child born during his marriage is not his biological child.[63] These principles can also prevent a wife from denying or challenging her husband's paternity.[64] Res judicata

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ternity of a child who has a presumed father. *In re J.W.T.*, 872 S.W.2d at 198. Section 12.06(a) prohibited the presumption from being challenged by someone outside the marriage and § 11.03(a)(7) allowed an action only if there was no presumed father. *Id*. at 189.

60. *See In re* Marriage of Ross, 783 P.2d 331, 338 (Kan. 1989) (refusing to permit trial court to hold hearing on mother's paternity petition of child born during her marriage without first analyzing whether the hearing was in child's best interests by evaluating emotional, mental, and physical needs); M.F. v. N.H., 599 A.2d 1297, 1302 (N.J. Super. Ct. App. Div. 1991) (terminating action by putative father when paternity claim conflicted with statute providing that presumption cannot be rebutted unless it is in child's best interests); *In re J.W.T.*, 872 S.W.2d at 197 (Tex. 1994) (focusing on whether a relationship with "true" father was in the best interests of the child).

61. Res judicata may be applied when the following conditions are met: "(a) Identity of the matter sued upon; (b) Identity of the cause of action; (c) Identity of the parties; and (d) Identity of the quality or capacity of the persons for or against whom any claim is made." Cartee v. Carswell, 425 So. 2d 204, 205 (Fla. 5th Dist. Ct. App. 1983); *see* Pelella v. Pelella, 604 So. 2d 14, 15 (Fla. 3d Dist. Ct. App. 1992) (barring redetermination of paternity of child because res judicata of final divorce decree); Johnson v. Johnson, 395 So. 2d 640, 641 (Fla. 2d Dist. Ct. App. 1981) (holding that final dissolution decree awarding child support resolved question of child's paternity and prohibited husband from attempting to relitigate the paternity of a child born during the marriage).

62. Equitable estoppel arises when one party detrimentally relies on the misrepresentation of another. BLACK'S LAW DICTIONARY 538 (6th ed. 1990); *see* S.W.T. v. C.A.P, 575 So. 2d 806, 806–07 (Fla. 4th Dist. Ct. App. 1991) (holding that trial court erred in ordering HLA testing without determining if wife was estopped from denying husband's paternity where couple lived as man and wife for five years after child's birth); T.D.D. v. M.J.D.D, 453 So. 2d 856, 857–58 (Fla. 4th Dist. Ct. App 1984) (holding that trial court must first determine whether wife is equitably estopped from denying child's paternity before compelling husband to submit to HLA testing); Marshall v. Marshall, 386 So. 2d 11, 12 (Fla. 5th Dist. Ct. App. 1980) (precluding husband from denying paternity of child in dissolution action after filing affidavit acknowledging paternity for amended birth certificate).

63. *See* Wade v. Wade, 536 So. 2d 1158, 1160 (Fla. 1st Dist. Ct. App. 1988) (estopping husband in dissolution proceeding from denying paternity and support for child born during marriage where husband had held child out to others as his child). *But see* Knauer v. Barnett, 360 So. 2d 399, 404 (Fla. 1978) (recognizing right of husband to contest parentage of child born to wife during marriage); Mistretta v. Mistretta, 566 So. 2d 836, 838 (Fla. 5th Dist. Ct. App. 1990) (holding child conceived during married parties' separation and born during reconciliation failed to give rise to estoppel even though dissolution action occurred after child's first birthday and husband's claim of child as dependent).

64. *Privette*, 617 So. 2d at 308 n.3; *see* Brenda J. Runner, *Protecting a Husband's Parental Rights when His Wife Disputes the Presumption of Legitimacy*, 28 J. FAM. L.

can bar parties from relitigating a child's paternity if a divorce decree addresses the custody and support of a child.[65] However, courts have held that a child may bring a subsequent paternity action if the child was not a party to the original action.[66]

B. Legislation Affecting Establishment of Paternity

Section 742.12(1)[67] of the *Florida Statutes* provides a basis for a

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115, 117 (1989–90); *see also T.D.D.*, 453 So. 2d at 858 (quashing trial court's order for HLA testing because court did not first determine whether wife was equitably estopped from denying husband's paternity); Van Nostrand v. Olivieri, 427 So. 2d 374, 376–77 (Fla. 2d Dist. Ct. App. 1983) (precluding mother from denying that former husband was father of child born during marriage where order of child support had been obtained and entered in final divorce decree).

65. *See* HAYNES ET AL., *supra* note 44, at III-11; *see also* HRS v. Robison, 629 So. 2d 1000, 1001 (Fla. 3d Dist. Ct. App. 1993) (estopping former husband from redetermining paternity of one of couple's children, whom former husband denied was his after father became delinquent in making child support payments); Atkinson v. Atkinson, 408 N.W.2d 516, 519 (Mich. Ct. App. 1987) (recognizing equitable parent doctrine in continuing father's parental rights after divorce even though he was adjudged not to be biological father of child). *But see* Freda v. Freda, 476 A.2d 153, 155 (Conn. Super. Ct. 1984) (holding father could offer evidence to show someone else fathered child even though final dissolution decree stated child was from marriage); Lopez v. Lopez, 627 So. 2d 108, 111 (Fla. 1st Dist. Ct. App. 1993) (holding that court retains jurisdiction to determine paternity after final dissolution entered where parties do not disclose wife's pregnancy prior to entry of final judgment); Lathrop v. Lathrop, 627 So. 2d 1317, 1317 (Fla. 2d Dist. Ct. App. 1993) (refusing to allow husband to have final judgment set aside which declared him to be father of wife's child after he had participated in inconclusive blood tests and then signed agreement stating he was child's father).

66. *See* HRS v. Wyatt, 475 So. 2d 1332 (Fla. 5th Dist. Ct. App. 1985) (allowing HRS to bring paternity suit against putative father on behalf of child even though prior paternity action brought by mother had been dismissed with prejudice); Johnson v. Hunter, 447 N.W.2d 871, 874–77 (Minn. 1989) (dismissing mother's 1969 paternity action with prejudice did not bar child's subsequent action in 1985); Baker v. Williams, 503 So. 2d 249, 254 (Miss. 1987) (holding legitimate child not barred from challenging paternity adjudicated earlier in divorce decree since child was not party to dissolution); N.M. v. J.G., 605 A.2d 709, 712 (N.J. Super. Ct. App. Div. 1992) (allowing 16-year-old child to bring action against putative father where mother had previously asserted paternity in husband because child was not in privity in dissolution action adjudicating paternity in mother's former husband); *see also Van Nostrand*, 427 So. 2d at 376 (holding putative father not barred from bringing paternity action on child's behalf because he was not party to dissolution proceeding which acknowledged wife's former husband as father).

67. Chapter 742 of the *Florida Statutes* provides, in pertinent part:

> In any proceeding to establish paternity in law or in equity, the court on its own motion *may* or upon request of a party *shall* require the child, mother and alleged fathers to submit to Human Leukocyte Antigen tests or other scientific tests that are generally acceptable within the scientific community to show a probability of paternity.

FLA. STAT. § 742.12(1) (1993) (emphasis added).

party to request the trial court to compel an individual to submit to HLA testing for a paternity determination.[68] HLA testing does not violate the parties' right of privacy due to Florida's compelling state interest in establishing paternity and support for children.[69] Unmarried women can bring claims pursuant to section 742.12(1) to establish paternity in putative fathers.[70] HRS can use the statute to establish paternity on behalf of mothers who have subrogated their claims for support to HRS in order to receive AFDC benefits.[71] In addition, a married woman can bring suit under the statute for support against a putative father, thereby excluding her spouse as the child's biological father.[72] Similarly, a presumed legal father can request a HLA test to dispute his paternity of a child born to the marriage.[73] A putative father can also petition for an HLA test to rebut the marital presumption.[74] Finally, the statute also applies in dissolution cases where either spouse questions the paternity of a child born or conceived during a marriage.[75]

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68. When the procedure originally became available, HLA testing could only exclude a man from being the biological father of a child. *See* Blumberg, *supra* note 8, at 1587–89. The current blood grouping tests can positively identify paternity in a putative father with 90–98% certainty. *Id*. at 1588.

69. State v. Meacham, 612 P.2d 795, 797–98 (Wash. 1980) (drawing blood to determine paternity is not unconstitutional when based on compelling state interest).

70. *See* Vidal v. Rivas, 556 So. 2d 1150 (Fla. 3d Dist. Ct. App. 1990).

71. *See* HRS v. Tindall, 622 So. 2d 115, 116 (Fla. 4th Dist. Ct. App. 1993) (holding that HRS is entitled to request order for blood tests to establish paternity in putative father for child support).

72. *See* Jones v. Crawford, 552 So. 2d 926, 927 (Fla. 1st Dist. Ct. App. 1989) (allowing woman who married man she claimed was not child's father to sue another man to establish paternity of child).

73. Wolfe v. Wolfe, 582 So. 2d 133, 134 (Fla. 2d Dist. Ct. App. 1991) (holding § 742.12 applicable to proceedings for dissolution of marriage).

74. *See* Kendrick v. Everheart, 390 So. 2d 53, 61 (Fla. 1980) (recognizing putative father's right to obtain declaratory judgment for paternity of illegitimate children after providing evidence establishing familial relationship with children). A putative father in a paternity action can also implead third parties under § 742.12 of the *Florida Statutes* to obtain blood tests and procure evidence to assist in his defense that he is not the biological father. Schatz v. Wenaas, 510 So. 2d 1125, 1126 (Fla. 2d Dist. Ct. App. 1987).

75. *See* Marshek v. Marshek, 599 So. 2d 175, 176 (Fla. 1st Dist. Ct. App. 1992) (holding that wife could file motion for blood tests under § 742.12, but not before determining whether equitable estoppel precluded wife from denying husband's paternity); *Wolfe*, 582 So. 2d at 134 (holding § 742.12 applicable to proceedings for dissolution of marriage). A presumed father may also establish his non-paternity in a dissolution proceeding without requesting a blood test. Albert v. Albert, 415 So. 2d 818, 820 (Fla. 2d Dist. Ct. App. 1982) (allowing presumption of legitimacy to be rebutted by stipulation of both parties in dissolution action).

Title IV-D of the Social Security Act provides federal aid to states in order to assist in establishing paternity and enforcing support obligations.[76] The Child Support Enforcement Amendments of 1984 (CSEA) requires all states to develop guidelines and procedures to assist courts in establishing the amount of an order for child support.[77] The 1988 Family Support Act requires states to establish procedures complying with federal mandates for establishing paternity.[78] In order to receive federal funding, states now have to operate their AFDC plans according to federal law.[79] Title 42 of the *United States Code*, § 666(a)(5)(B), requires states to mandate paternity testing upon the request of any party to a paternity proceeding.[80] Therefore, in 1989, the Florida Legislature reworded section 742.12(1) from "may" to "shall" regarding the ordering of blood tests at the request of a party.[81] This legislation reflects the current trend toward encouraging the establishment of paternity and the enforcement of support obligations.[82]

C. Case Law Implicating the Presumption of Legitimacy

The presumption of legitimacy has been challenged in several recent Florida cases. In *Wolfe v. Wolfe*, the First District Court of Appeal, relying on section 742.12 of the *Florida Statutes*,[83] granted a husband's request for HLA testing during dissolution proceedings.[84] The *Wolfe* decision did not discuss whether the husband was estopped from denying paternity or mention the best interests of the

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76. 42 U.S.C. § 601 (1988). The Department of Health and Human Services implements this program and insures that the plan is met with substantial compliance. *Id*. § 652.

77. *Id*. § 667; 45 C.F.R. § 302.56 (1993).

78. Marygold S. Melli, *Child Support Enforcement in Cases of Disputed Paternity*, *in* DISPUTED PATERNITY PROCEEDINGS 28-1 (Sidney B. Schatkin ed., 1991).

79. 42 U.S.C. § 602(a)(26)(B) (1988).

80. *Id*. § 666(a)(5)(B); *see* M.F. v. N.H., 599 A.2d 1297, 1302 (N.J. Super. Ct. App. Div. 1991) (denying putative father's request under state statute compelling blood testing in contested paternity case because mother and presumptive father were married at time of conception and birth, did not disavow husband's paternity, continued to live together, and filed legal father's name on birth certificate).

81. 1989 Fla. Laws ch. 89-183, at 756; STAFF ANALYSIS OF FLA. SENATE COMM. ON JUDICIARY CIVIL CS/SB 532, at 2 (1989).

82. Ronald Brownstein, *Identifying Fathers Called Crucial to Welfare Reform*, L.A. TIMES, Dec. 16, 1993, at A1.

83. See *supra* note 67 for the pertinent language of § 742.12.

84. Wolfe v. Wolfe, 582 So. 2d 133, 134 (Fla. 2d Dist. Ct. App. 1991).

child. The earlier cases of *S.W.T. v. C.A.P.*,[85] and *T.D.D. v. M.J.D.D.*,[86] decided in the Fourth District Court of Appeal, both held that it is error for a trial court to compel blood testing when challenging the paternity of a legitimate child without first determining if the challenging party is estopped from doing so.[87] Following these cases, *Marshek v. Marshek* recognized that an estoppel claim should be decided before the parties are required to submit to a HLA test if the estoppel claim is properly brought before the court.[88]

Middleton v. Middleton involved a pregnant woman who disputed her husband's paternity of her unborn child in a dissolution proceeding.[89] The husband filed a motion requesting a HLA test because he thought he might be the father of his wife's child.[90] Although the trial court denied his motion, the appellate court ruled that his motion should be granted under section 742.12 of the *Florida Statutes* and directed the trial court to conduct further proceedings to determine if the husband was the child's biological father.[91] However, the First District Court of Appeal in *Middleton* did not require the appointment of a guardian ad litem for the child before deciding whether the marital presumption could be rebutted.[92]

In *Grant v. Jones*, the mother sought to establish paternity of her child in a man other than her husband.[93] The First District Court of Appeal remanded the case to the trial court in light of

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85. S.W.T. v. C.A.P., 575 So. 2d 806 (Fla. 4th Dist. Ct. App. 1991).

86. T.D.D. v. M.J.D.D., 453 So. 2d 856 (Fla. 4th Dist. Ct. App. 1984).

87. See *supra* note 62 for cases discussing equitable estoppel.

88. Marshek v. Marshek, 599 So. 2d 175, 176 (Fla. 1st Dist. Ct. App. 1992). The *Marshek* court quashed the HLA order despite the seemingly mandatory language of § 742.12 of the *Florida Statutes*, reasoning that if the requesting party is estopped from challenging paternity, then the results of the test would not be admissible as evidence. *Id*. See *infra* notes 149–50 and accompanying text regarding § 742.12 of the *Florida Statutes*.

89. Middleton v. Middleton, 623 So. 2d 851 (Fla. 1st Dist. Ct. App. 1993). This was the second time the *Middleton* case was appealed. *Id*. The case was previously remanded because the trial court entered an order of non-paternity against the husband in an ex parte hearing, which was conducted without notice to the husband as to the issue of paternity. Middleton v. Middleton, 603 So. 2d 618 (Fla. 1st Dist. Ct. App. 1992). The order of non-paternity was based on the wife's testimony that she and her husband had not engaged in intercourse during the period of conception. *See id*.

90. *Middleton*, 623 So. 2d at 618.

91. *Id*.

92. *Id*.

93. Grant v. Jones, 635 So. 2d 47, 47 (Fla. 1st Dist. Ct. App. 1994).

Privette.[94] The appellate court determined that the issue of whether the child's need for support outweighed the stigma of illegitimacy must be addressed even though a final judgment of paternity had already been entered.[95] The more recent case of *Ownby v. Ownby*, involved a paternity dispute between a couple seeking a dissolution where they agreed on the paternity of all but the youngest of six children born during their marriage.[96] The husband sought to vacate the lower court's order directing the parties to comply with their previous stipulation to have HLA testing performed.[97] He argued that a best interests of the child analysis had not been performed and that the child would benefit if his paternity remained "uncontroverted."[98] The district court quashed the lower court's order and directed that on remand a guardian ad litem be appointed for the child[99] and that the putative father be joined as a party to the dissolution.[100] Judge Griffin dissented, stating that joining the unidentified putative father as a party to the action was unnecessary in a dissolution action.[101] He suggested that the best interests of the child analysis should focus on whether the legal father's rights should be limited before involving the putative father in the proceeding.[102]

III. THE PRIVETTE *COURT'S ANALYSIS*

The Florida Supreme Court granted review of the *Privette* case because the Second District's decision in *Privette v. Department of Health & Rehabilitative Services* directly conflicted with *Pitcairn v.*

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94. *Id*. at 48. *Grant* was a public assistance case instituted by HRS on the mother's behalf. *Id*. at 47.

95. *Id*. at 47–48. The trial court previously entered a final adjudication of paternity after the parties submitted to blood tests which revealed a high probability that the putative father was the child's biological father. *Id*. at 47; *see* Gingola v. HRS, 634 So. 2d 1110, 1111 (Fla. 2d Dist. Ct. App. 1994) (granting appeal of putative father's paternity adjudication in which trial court utilized HLA test results without performing best interests of child analysis under *Privette* and child's mother was married to someone else when child was conceived).

96. Ownby v. Ownby, 639 So. 2d 135, 136 (Fla. 5th Dist. Ct. App. 1994).

97. *Id*. at 137.

98. *Id*.

99. *Id*. at 138.

100. *Id*. at 138 n.3.

101. *Id*. at 139–40 (Griffin, J., concurring in part, dissenting in part).

102. *Id*.

Vowell.[103] *Pitcairn* involved a mother's attempt to establish paternity in a putative father while still legally married to another man.[104] The putative father in *Pitcairn* sought review of the circuit court's order requiring him to comply with HLA testing for purposes of pretrial discovery.[105] The First District denied review and held that a putative father cannot avoid a potential order of child support by raising the presumption of legitimacy because he lacks standing.[106] In contrast, the Second District in *Privette* maintained that William Privette, the putative father, had standing to invoke the presumption of legitimacy, noting the presumption as "one of the strongest rebuttable presumptions known to the law."[107]

A. The Majority: Best-Interests-of-the-Child Analysis and Evidentiary Hearing Required

Writing for the supreme court, Justice Kogan focused his analysis on the two main concerns of the case: attacking a child's legitimacy and threatening to terminate the parental rights of a legal father without notice simply to reimburse HRS for public assistance benefits.[108] The court suggested that grounds may exist to justify impugning a child's legitimacy and the legal father's parental rights, but the court did not specify in what instances this could occur.[109] The court emphasized that the presumption of legitimacy is premised on a policy of furthering the child's best interests.[110] The court appeared disturbed that the trial court agreed to order the test based on HRS's financial interest and dismayed that the legal father did not have notice of the action or have an opportunity to intervene.[111] Although the court did not dispute HRS's authori

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103. Privette v. HRS, 585 So. 2d 364, 365 (Fla. 2d Dist. Ct. App. 1991) (*Privette I*); Pitcairn v. Vowell, 580 So. 2d 219 (Fla. 1st Dist. Ct. App. 1991); *see* HRS v. Privette, 617 So. 2d 305, 306 (Fla. 1993) (*Privette*).

104. *Pitcairn*, 580 So. 2d at 220. *Pitcairn* did not involve reimbursement for public monies to the state. *See id*.

105. *Id*. at 220.

106. *Id*. at 222.

107. *Privette I*, 585 So. 2d at 365 (citing Eldridge v. Eldridge, 16 So. 2d 163 (Fla. 1944)). See *supra* note 34 regarding the putative father's standing to invoke the presumption and note 23 regarding the strength of the presumption.

108. *Privette*, 617 So. 2d at 307.

109. *Id*.

110. *Id*. at 308 n.3.

111. *Id*. at 307. For example, the court noted:

ty to attempt to establish paternity for purposes of support, the court recognized the child's interest in maintaining legitimate status and the legal father's interest in maintaining a relationship with the child.[112]

The supreme court essentially agreed with the district court's holding that before ordering a blood test, the trial court must determine how the best interests of the child will be affected.[113] The supreme court refined the language of the district court, directing that the trial court must "find that the child's interests will be better served even if the blood test later proves the child's factual illegitimacy."[114] Additionally, the supreme court directed that a guardian ad litem must be appointed for the child.[115] However, because the trial court failed to appoint a guardian ad litem, adhere to proper procedures, or establish an adequate record of facts, the supreme court concluded that the trial court improperly ordered the putative father to undergo HLA testing.[116] The supreme court approved the Second District Court of Appeal's decision and remanded for further proceedings consistent with its opinion.[117]

B. The Dissent: Putative Father Does Not Have Standing to Raise the Presumption of Legitimacy During Discovery

In his dissent, Justice Grimes recognized that the presumption of legitimacy is based on the public policy of protecting the welfare of

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> Essentially this case has been litigated as though it is about nothing more than repayment of money HRS expended on behalf of the child. . . . There was absolutely no consideration of the child's best interests and no mention of the child's legal father. For all we know, no attempt was made to notify the legal father. . . . [N]or was he given the chance to intervene, if he in fact is available and so desires.

Id.

112. *Id*. (citing Santosky v. Kramer, 455 U.S. 745 (1982); *In re* D.B., 385 So. 2d 83 (Fla. 1980)).

113. *Id*. at 308. The district court previously held that the trial court must determine if the child's interests would be adversely affected in order to allow a party to rebut the presumption. *Privette I*, 585 So. 2d at 366.

114. *Privette*, 617 So. 2d at 308.

115. *Id.*

116. *Id.* at 310.

117. *Id*. Justice Kogan suggested that the stigma of illegitimacy may be outweighed by the child's need for support in light of abandonment by the legal father, but he failed to provide a basis for determining when the need for support outweighed the stigma to the child. *Id*. at 309–10.

children.[118] However, he asserted that the legislature enacted section 742.12(1) of the *Florida Statutes* in furtherance of the public policy that parents should be identified and made to provide support for their children.[119] Justice Grimes concluded that a putative father should not have standing to raise the presumption during discovery in order to avoid potential child support.[120] Although Justice Grimes did not dispute that a final hearing should focus on protecting the best interests of the child, he did not agree that the presumption can enable a putative father to avoid a potential order of child support.[121] Justice Grimes disagreed that maintaining the presumption would protect the child's welfare because it could operate to help the putative father to avoid paying support.[122] He expressed that the majority's decision would make a HLA test more difficult to obtain, thereby making it harder to discover a child's biological father's identity and determine who would have to provide support for the child.[123]

IV. CRITICAL ANALYSIS

In *Pitcairn v. Vowell*, Judge Nimmons' dissent proposed a certified question to the Florida Supreme Court. The question addressed whether a trial court could compel HLA testing of a putative father to establish paternity of a child born during a mother's marriage to another man before determining whether rebuttal of the presumption would be in the child's best interests.[124] The *Privette* decision

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118. *Id*. at 310 (Grimes, J., dissenting). See *supra* note 24 and accompanying text discussing the public policy of protecting the welfare of children.

119. *Id*.; *see* FLA. STAT. § 742.12(1) (1993).

120. *Id*. Justice Grimes interpreted the statute to require HLA testing based on the following language: "[I]n any proceeding to establish paternity in law or in equity, the court on its own motion may or upon the request of a party shall require the child, mother and alleged fathers to submit to [HLA] tests . . . ." *Id*. (quoting FLA. STAT. § 742.12(1) (1989)).

121. *Privette*, 617 So. 2d at 310.

122. *Id*.

123. *Id*.

124. Pitcairn v. Vowell, 580 So. 2d 219, 227 (Fla. 1st Dist. Ct. App. 1991) (Nimmons, J., dissenting). The supreme court declined to grant certiorari to review the certified question. The complete question as it appears in Judge Nimmons' dissent is as follows:

> IS A TRIAL COURT AUTHORIZED TO COMPEL AN ALLEGED STRANGER TO THE MARRIAGE TO UNDERGO HLA TESTING FOR PURPOSES OF ESTABLISHING PATERNITY OF A CHILD BORN DURING THE PETITIONING MOTHER'S MARRIAGE TO HER HUSBAND BEFORE DETERMINING

indirectly answered this question in the negative by requiring the trial court to determine the impact on the child's interests in the event the putative father is proven to be the biological father *before* compelling the parties to undergo blood tests in order to establish paternity.[125]

The *Privette* court's requirement that a best-interests-of-the-child analysis be performed before allowing evidence to be offered to rebut the presumption has been implemented in other jurisdictions.[126] The difficulty lies in the questions that are left unanswered by the *Privette* decision. Most importantly, the opinion does not specify the circumstances under which the holding of the case must be applied.[127]

A. Interests of the Parties

The welfare of the child should be the primary focus in a case where the presumption of legitimacy is implicated.[128] The outcome of the litigation affects the child's rights regarding inheritance, benefits, and support.[129] It further affects the child's name, the

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> (1) THAT THE HUSBAND HAS BEEN MADE A PARTY TO THE MOTHER'S PATERNITY ACTION, (2) THAT THE PARTIES TO THE MARRIAGE ARE NOT ESTOPPED TO DENY THE HUSBAND IS THE FATHER, (3) THAT IT IS IN THE CHILD'S BEST INTEREST THAT THE PRESUMPTION OF LEGITIMACY BE SET ASIDE, AND (4) THAT THE PRESUMPTION OF LEGITIMACY HAS BEEN REBUTTED BY SUBSTANTIAL EVIDENCE?

Id.

125. *Privette,* 617 So. 2d at 308.

126. *See* Ban v. Quigley, 812 P.2d 1014, 1017 (Ariz. Ct. App. 1990) (holding that inquiry must be made into best interests of child before ordering blood test to establish paternity and allow putative father to attempt to rebut marital presumption); C.C. v. A.B., 550 N.E.2d 365, 372 (Mass. 1990) (requiring court to consider whether "substantial parent-child relationship" exists between child and putative father before allowing presentation of evidence to rebut presumption); M.F. v. N.H., 599 A.2d 1297, 1300 (N.J. Super. Ct. App. Div. 1991) (reversing order for blood test where trial court had not determined whether child's best interests would be served by paternity action brought by putative father over objection of child's mother and legal father); McDaniels v. Carlson, 738 P.2d 254 (Wash. 1987) (holding that under Uniform Parentage Act, child's best interests must be considered before allowing putative father to seek blood tests where family unit has already been established).

127. See *infra* text accompanying notes 173–76 regarding the *Privette* court's failure to specify in what type of actions the holding is applicable.

128. *Privette,* 617 So. 2d at 307.

129. Locklear v. Sampson, 478 So. 2d 1113, 1115 (Fla. 1st Dist. Ct. App. 1985) (noting that citizenship, medical history, inheritancy, and other collateral consequences flow from paternity judgment).

determination of the child's paternal grandparents, and the child's religious affiliation, and it determines with whom the child will form a father/child relationship.[130] Overall, the outcome affects interests that are social, psychological, emotional, and medical,[131] as well as financial. Yet, with all of these interests at stake, no one represented the child in the *Privette* case.[132] The Florida Supreme Court in *Privette* attempted to remedy this dilemma by requiring the appointment of a guardian ad litem to represent and safeguard the interests of the child.[133] Other jurisdictions have held that even if the facts of the case appear to point to terminating the legal father's rights and vesting parental rights in the biological father, courts should err on the side of caution and receive input from a guardian ad litem before making a determination.[134]

The mother's interests may be financial, or they may be personal, depending on with whom she wants her child to be associated. As to parental interests, however, they are separate and distinct from those of the child.[135] The interest of the mother in *Privette* was not clear because she had maintained inconsistent positions since the child's birth.[136] Prior to HRS' request to identify the child's father, Angela Sease had not brought an action on behalf of the child for nearly one year.[137] The putative father, William Privette, wanted to

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130. *See In re* K.S., 515 P.2d 130, 133 (Colo. Ct. App. 1973) (noting consequences of termination of parental rights can permanently affect child's right to support, right of inheritancy, and the development of a parent/child legal relationship).

131. See *infra* note 169 and accompanying text regarding medical concerns.

132. *Privette,* 617 So. 2d at 308 n.5.

133. *Id.* at 308.

134. *See* M.R.D. v. F.M., 805 P.2d 1200, 1203 (Colo. Ct. App. 1991) (ruling that trial court erred in denying motion for guardian ad litem because child must be joined as indispensable party in paternity proceeding); *In re* Marriage of de la Cruz, 791 P.2d 1254, 1256 (Colo. Ct. App. 1990) (finding that Uniform Parentage Act requires that child be made party to action challenging child's legitimacy); Majidi v. Palmer, 530 N.E.2d 66, 70 (Ill. App. Ct. 1988) (holding that guardian must be appointed for child in proceeding initiated by putative father where child's mother sought to dismiss action); Lechner v. Whitesell, 811 S.W.2d 859, 861 (Mo. Ct. App. 1991) (requiring appointment of guardian ad litem to represent child in paternity action because child's interests may conflict with mother's).

135. *See Lechner*, 811 S.W.2d 859 (Mo. Ct. App. 1991).

136. *Privette*, 617 So. 2d at 307. The record indicates that Angela Sease listed James Sease as the father of her daughter on the child's birth certificate and alleged that William Privette was the father of the child when she sought AFDC benefits. *Id*. at 306–07. See *supra* note 1 for a discussion of AFDC benefits.

137. Respondent's Answer Brief at 21, *Privette* (No. 78,837).

maintain his privacy and possibly avoid financial and legal obligation to a child whose mother was married to another man.[138]

The legal father's interest in *Privette* was not known since he was not provided with notice of the action and he was not joined as a party.[139] If the plaintiffs' motion for a HLA test in the original action in *Privette* had been granted, the result could have terminated Jim Sease's parental rights by adjudicating paternity in William Privette without providing any notice to Jim Sease.[140] Husbands similarly situated may have an interest in preventing the termination of parental rights.[141] The court correctly required either actual or constructive notice to allow the legal father to present arguments for or against the petition and to obtain representation avoiding a premature termination of the legal father's parental rights.[142]

B. Statutory Mandates

The *Privette* holding required the trial court to determine whether the outcome of a HLA test would adversely affect the child before the court could order the parties to submit to HLA testing.[143] The wording of section 742.12 of the *Florida Statutes* appears to mandate a HLA test when requested by any party.[144] However, the statute makes no reference to a best interests of the child analysis.[145] The *Privette* court's decision not to compel testing does not directly contradict the intention of federal mandates establishing paternity for children whose mothers subrogate their support claims to HRS.[146] The 1988 Family Support Act[147] requires states to imple-

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138. *Privette*, 617 So. 2d at 307. The *Privette* court cautioned against viewing these types of cases as concerning nothing more than "men allegedly trying to evade parental obligations." *Id*.

139. *Id*.

140. *Id*.

141. *Id*. at 308 n.3.

142. *Id*. at 308 n.4.

143. *Id*. at 308.

144. FLA. STAT. § 742.12(1) (1993). See *supra* note 67 for the language of the statute. See also *infra* notes 147–52 and accompanying text for a discussion of the interpretation of the mandatory language used in the statute.

145. § 742.12(1).

146. 1989 Fla. Laws ch. 183, at 756; STAFF ANALYSIS OF FLA. SENATE COMM. ON JUDICIARY CIVIL CS/SB 532, at 2 (1989).

147. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988) (codified at 42 U.S.C. § 666 (1988)).

ment procedures compelling children and all parties in a contested paternity case to have blood tests performed at the request of any party to the proceeding.[148] In 1989, in order to comply with that Act, the Florida Legislature changed the language of section 742.12(1) from "[i]n any proceeding to establish paternity . . . the court on its own motion or upon request of a party *may* require the child, mother, and alleged fathers to submit to [HLA] tests"[149] to "[i]n any proceeding to establish paternity . . . the court on its own motion may or upon request of a party *shall* require the child, mother, and alleged fathers to submit to [HLA] tests."[150] Although the amended language appears to make testing mandatory, the legislative history behind the change states that a court does not need to require testing when there is a "showing of good cause."[151] A court's refusal to compel a putative father to submit to HLA testing when the presumption is implicated satisfies the requirement of good cause because the child could be adversely affected by the outcome. The interest in maintaining a child's legitimacy whenever possible and the risk of premature termination of the legal father's parental rights support this conclusion.[152]

C. Joinder and Notice to the Legal Father

The *Privette* opinion does not require the husband to be joined

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148. 1989 Fla. Laws ch. 183, at 756. STAFF ANALYSIS OF FLA. SENATE COMM. ON JUDICIARY CIVIL CS/SB 532, at 1 (1989).

149. Law of July 1, 1986, ch. 220, § 154, 1986 Fla. Laws ch. 1603, at 1724 (revised 1989). *But see* Vidal v. Rivas, 556 So. 2d 1150, 1151 (Fla. 3d Dist. Ct. App. 1990) (interpreting § 742.12(2) as directory, not mandatory). *Florida Statutes* § 742.12(2) states that "the court, upon reasonable request of a party, shall order that an additional test be made." FLA. STAT. § 742.12(2) (1993). *Vidal* dealt with "reasonable request" language that does not exist in § 742.12(1). *See Vidal*, 556 So. 2d at 1151.

150. FLA. STAT. § 742.12(1) (1993). See *supra* notes 67–75 and accompanying text regarding parties ability to bring a motion to compel HLA testing under the statute.

151. 1989 Fla. Laws ch. 183, 756; STAFF ANALYSIS OF FLA. SENATE COMM. ON JUDICIARY CIVIL CS/SB 532, at 2 (1989). For example, a mother is under a duty to cooperate with HRS in public assistance cases to help establish the paternity of the child, unless good cause is shown for not cooperating. 45 C.F.R. § 232.42 (1993). Good cause is established by a showing of possible harm to the child or the mother, as in the case of incest or rape. *Id*.

152. *Privette*, 617 So. 2d at 307. The majority opinion in *Privette* states: "Once children are born legitimate, they have a right to maintain that status both factually and legally if doing so is in their best interest." *Id*. (citing FLA. CONST. art. I, § 9).

as a party to the action,[153] which could create potential joinder problems.[154] The legal father could bring an action later to dispute the paternity of a child if he is not joined in the original action against the putative father.[155] This could leave a child without a legal father for purposes of support if the wife's husband is not joined to the action and the putative father successfully avoids an HLA test.[156] The legal father could then prevail in a non-paternity suit if he is not equitably estopped from denying paternity.[157]

D. Standing to Assert the Presumption

The majority in *Privette* determined that putative fathers cannot avoid support liability by merely declaring that their constitutional right of privacy is invaded.[158] Case law establishes that the right to privacy is not absolute and is overcome when the state's interest is compelling.[159] Actions to establish paternity and secure

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153. *Id*. at 308. The court only requires that actual or constructive notice be provided to the legal father so that he can decide whether to appear. *Id*. at 308 n.4. The court does not require that the legal father be joined as an indispensable party. *Id*. at 308.

154. *See* Van Nostrand v. Olivieri, 427 So. 2d 374 (Fla. 2d Dist. Ct. App. 1983) (holding that estoppel and res judicata do not preclude putative father from bringing paternity action despite final divorce decree adjudicating child's paternity in mother's husband because putative father was not joined as party to dissolution action); Herout v. Lawrence, 423 So. 2d 558 (Fla. 1st Dist. Ct. App. 1982) (foreclosing mother's cause of action against putative father because she had already sued and obtained child support from her husband in dissolution action).

155. *See* Erwin v. Everard, 561 So. 2d 445 (Fla. 5th Dist. Ct. App. 1990) (reversing trial court's ruling that biological father did not have to support child because mother was married at child's birth and husband was not joined to wife's paternity action against putative father); Lynn v. Lynn, 358 So. 2d 908 (Fla. 1st Dist. Ct. App. 1978) (holding that person who is not biological father of child does not have to pay child support for child).

156. *See* Albert v. Albert, 415 So. 2d 818, 820 (Fla. 2d Dist. Ct. App. 1982) (allowing couple to stipulate in dissolution that presumed legal father was not biological father of minor child born during marriage).

157. *See* Marshall v. Marshall, 386 So. 2d 11, 12 (Fla. 5th Dist. Ct. App. 1980) (precluding husband from denying paternity of child in dissolution action after filing affidavit acknowledging paternity for amended birth certificate). *But see Albert*, 415 So. 2d at 819 (granting husband's request that his non-paternity be recognized in final dissolution decree).

158. *Privette,* 617 So. 2d at 309. The *Privette* court recognized that the state's interest is compelling only when an allegation is factually adequate and a record exists establishing that the child would be "better served" if the results of a HLA test proved the putative father to be the biological father. *Id*.

159. *See* Schmerber v. California, 384 U.S. 757, 759 (1966) (affirming that no violation of right of privacy occurred when blood was involuntarily withdrawn to determine

support satisfy the compelling interest of the state in adjudicating disputed paternity proceedings and providing support for children.[160] However, the court correctly held that the putative father had standing to raise the presumption of legitimacy that a child born in wedlock is a child of the marriage[161] because the child's and the legal father's rights could have been prematurely affected, without conducting a best interests of the child analysis, if the *Privette* court had held otherwise.[162]

E. Burden of Proof

The *Privette* court required a showing of clear and convincing evidence[163] by the party seeking to rebut the presumption of legitimacy before it would order a putative father to submit to an HLA test.[164] This requirement affects the requesting party's ability to obtain a blood test as a routine discovery matter in cases implicating the marital presumption.[165] The party bringing the action must present a prima facie case of paternity based on clear and convincing evidence without the assistance of the HLA results.[166] Thus, the

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blood alcohol content of driver); State v. Meacham, 612 P.2d 795, 797 (Wash. 1980) (finding that blood drawn to determine paternity is not unconstitutional and is based on compelling state interest in establishing paternity of minor children).

160. *Privette,* 617 So. 2d at 309. See *supra* notes 68–69 and accompanying text regarding blood tests and compelling state interests.

161. *Privette,* 617 So. 2d at 309 n.8. In affirming the district court, the majority in *Privette* noted: "It may be true that the putative father lacks standing to assert the child's presumption of legitimacy, but this means little." *Id*. It appears that the court used a legal fiction by stating that when the putative father asserts a *privacy* interest, the child's best interests are placed in issue, implicating the presumption. *Id*. If the child's best interests call for maintaining the presumption, then there would be no compelling state interest to justify requiring the blood test. *Id*. The court seems to suggest that the putative father gains standing through a privacy interest arising from article I, § 23 of the Florida Constitution. *Id*. It would have been safer to have left the emphasis on what was in the best interests of the child without giving too much recognition to Privette's privacy argument. Otherwise, the court may be inadvertently recognizing a greater right to privacy for the putative fathers of children born to married women than the putative fathers of children born to unwed mothers.

162. *See supra* text accompanying note 141.

163. The clear and convincing standard is an intermediate standard less than the standard of beyond a reasonable doubt used in criminal cases, and greater than the preponderance of the evidence standard usually required in civil cases. Smith v. HRS, 522 So. 2d 956, 958 (Fla. 1st Dist. Ct. App. 1988).

164. *Privette,* 617 So. 2d at 308.

165. *Id*.

166. *Id*.; *cf*. Van Nostrand v. Olivieri, 427 So. 2d 374, 375 (Fla. 2d Dist. Ct. App.

Privette court correctly held that the clear and convincing standard is the proper standard required to rebut the presumption because the HLA test could result in terminating the legal father's parental rights.[167] However, the prohibition against allowing a HLA test to be conducted and used as a discovery tool to gather evidence may be premature since the admission of the results into evidence are not conclusive as to paternity.[168]

F. The Child's Rights

Debate exists over whether the presumption of legitimacy should preclude discovery of the identity of the child's biological father or whether parties should be allowed to rebut the presumption, not only to obtain support for the child, but for medical and genetic reasons.[169] Some courts have allowed parties to rebut the presumption of legitimacy in cases where the mother and legal father have not lived together since before the birth of the child and the mother was living with the child's biological father at the time of the child's birth.[170] Courts have prevented parties from rebutting the presumption even where blood tests conclusively established that

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1983) (holding that order of HLA test is proper discovery request in paternity action of presumed legitimate child).

167. *Privette*, 617 So. 2d at 309. The *Privette* court recognizes that a blood test result establishing paternity in the putative father does not automatically terminate the rights of the legal father. *Id*. at 307 n.2. See *supra* note 25 for cases which adhere to the clear and convincing standard to rebut the presumption of paternity. *See also* Albert v. Albert, 415 So. 2d 818 (Fla. 2d Dist. Ct. App. 1982) (allowing parties' stipulation in dissolution action that husband was not father of child to rebut presumption of legitimacy as clear and convincing evidence).

168. *See infra* note 171; *see also* Grant v. Jones, 635 So. 2d 47 (Fla. 1st Dist. Ct. App. 1994) (relying on *Privette* in refusing to allow HLA results to rebut presumption without best-interests-of-the-child analysis); Karl H. Muench & Dale R. Sanders, *The "Probability of Paternity" May Not Be*, 60 FLA. B.J. 31 (1986) (regarding the conclusiveness of HLA test results in paternity cases).

169. Benac v. Bree, 590 So. 2d 536, 538 n.3 (Fla. 2d Dist. Ct. App. 1991) (acknowledging that even though knowing who child's natural father is could prove crucial to compiling a medical history, such knowledge is not sufficient to require HLA testing); Locklear v. Sampson, 478 So. 2d 1113, 1115 (Fla. 1st Dist. Ct. App. 1985) (noting that paternity judgment affects knowledge of important factors such as parent's medical history that could become critical in the treatment of child).

170. *See, e.g.*, Gammon v. Cobb, 335 So. 2d 261 (Fla. 1976) (allowing presumption to be rebutted where woman did not live with husband for 20 years and had seven children with her boyfriend).

the child's legal father was not the child's biological father.[171] Conversely, a child's right to know his or her biological origins and the need for a complete medical history are important interests of the child.[172] *Privette* does not provide any guidance regarding how much weight, if any, these considerations merit.

G. The Application of *Privette*: Broad Holding or Narrow Rule?

The Florida Supreme Court in *Privette* did not clarify whether it intended to create a narrow rule requiring the trial court to appoint a guardian ad litem only in paternity actions in which an HLA test is requested. The court may have intended to include any action which could result in illegitimating a child, including dissolution actions where the parties agree that the children born during the marriage are not the husband's children.[173] The opinion uses the language "cases of this type,"[174] but does not explain whether this phrase means any action involving a presumption of legitimacy due to the marital status of the mother at the child's conception or birth, or only paternity actions involving a married woman and a request for a blood test.[175]

The difficulty in interpreting the holding of *Privette* occurs when a circuit court judge or general master encounters parties seeking to rebut the presumption, but none of the parties request a blood test, as in a dissolution proceeding.[176] In such an action, both parties to

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171. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989) (holding that presumption was not rebutted even where blood test showed a 97.8% probability that putative father was biological father).

172. *Locklear*, 478 So. 2d 1113.

173. See *supra* notes 30, 37, 75 regarding dissolution actions.

174. *Privette*, 617 So. 2d at 309. See *supra* note 31 for discussion of other instances of the *Privette* court's vague language.

175. *See* Mize v. Mize, 621 So. 2d 417 (Fla. 1993) (citing *Privette* to emphasize the necessity of considering the child's best interests as paramount). In *Mize*, the primary custodial parent sought to permanently remove the child from the state even though the dissolution decree expressly forbade it; yet, the court cited to *Privette* interpreting "cases of this type" to mean ones that impact a child's best interests. *Id*. at 420. Justice Shaw's concurrence provided an exhaustive list of factors for a trial court to consider when making a determination of whether the move would be in the child's best interests and for the appointment of a guardian ad litem when necessary. *Id.* at 425 n.17 (Shaw, J., concurring).

176. *See* Albert v. Albert, 415 So. 2d 818 (Fla. 2d Dist. Ct. App. 1982) (allowing stipulation as to husband's non-paternity of child born during marriage to rebut presumption in dissolution action); *supra* notes 156, 167.

the dissolution may stipulate that the child is not the presumed legal father's biological child and that the husband neither wishes to provide support nor seek to have visitation with the child. The parties may or may not identify or agree on a biological father. The question then becomes whether the court can, under *Privette*, allow the presumption of legitimacy to be rebutted based on the parties' agreement, leaving the child illegitimate and without a legal father if paternity is not then established in a putative father.

The *Privette* court advocates maintaining a child's legitimacy whenever possible for children born to married women, justifying its position with vague references to the stigma such children may otherwise experience.[177] Technological advances have enabled single women to conceive and raise children without the assistance of a legal father through artificial insemination. Similarly, an unwed mother is not under any obligation to identify her child's father except in public assistance cases where state financial support is sought for the child.[178] Both of these are examples of children not born with a presumption of legitimacy. The *Privette* decision goes too far in its protection of presumably legitimate children by creating an onus against allowing the presumption to be rebutted even when the legal father is not opposed to the action.[179] The "better served" language of *Privette* is problematic and makes it difficult to create a standard for determining whether to grant a motion for a blood test.[180]

The additional requirement of a guardian ad litem to supplement the judgment of the trial court appears well intended by providing the child with actual representation in the proceedings and safeguarding the child's interests.[181] The requirement that the court must find that the child's interests would be better served if declared the child of the putative father is ambiguous.[182] Addition

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177. *See supra* note 32 and accompanying text.

178. See *supra* note 151 regarding the mother's duty to cooperate with HRS in public assistance cases.

179. *Privette*, 617 So. 2d at 308 (requiring finding "that the child's best interests will be *better served*" if results show that putative father is biological father) (emphasis added).

180. *Id*.

181. *Id*. at 308 n.5. The court notes that the child is an indispensable party when represented by a guardian ad litem. *Id*.

182. *Cf.* Mize v. Mize, 621 So. 2d 417, 424–25 nn.19–21 (Fla. 1993) (providing specific criteria for courts' use in determining when relocation would be in child's best inter-

ally, the lack of any suggested criteria to determine the child's best interests makes the holding even more difficult to implement.[183]

Because the *Privette* opinion does not specifically contain any limiting language, the decision could result in an unnecessary use of guardians ad litem if applied to situations where both parties seeking dissolution stipulate that the child is not the legal father's biological child. The opinion focuses on two main concerns: impugning the legitimacy of a child and terminating a legal father's parental rights without notice.[184] The risk of terminating a father's legal rights without notice is eliminated in a stipulated dissolution action where the parties agree that the child is not of the marriage because the husband is a party to the dissolution action and therefore has notice. One of *Privette*'s main concerns, the failure to provide a legal father with notice, is therefore not implicated in a dissolution proceeding.[185]

A guardian ad litem should not be required where the parties have already agreed to the circumstances of the child's birth. The child is not at risk from the legal recognition of the fact that the child was conceived with the mother's boyfriend rather than with her legal husband. Because the child's factual illegitimacy is already recognized by the child's family in a stipulated dissolution, the addi-

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ests).

183. Other jurisdictions have specified factors to enable the trier of fact to make a determination of when it would be in the child's best interests to allow the presumption to be rebutted. M.F. v. N.H., 599 A.2d 1297 (N.J. Super Ct. App. Div. 1991). The enumerated factors to weigh in considering the issue include:

> (1) Harm to the child such as emotional injury, distrust, and possible confusion of knowing the parenting father is not biological father;
> (2) Protection of the child's physical, mental, and emotional needs;
> (3) The stability of the family relationship and extent of the intrusion that would result from a paternity determination;
> (4) The consistency of the putative father's interest in the child;
> (5) Societal stigma that may result or be perceived by establishing the relationship, including placing the child's birth outside of the traditional wedlock setting;
> (6) Continuity of established relationships;
> (7) Any extent to which uncertainty of parentage already exists in the child's mind;
> (8) The child's interest in knowing family and genetic background, including medical and emotional history.

Id. at 1302. *M.F.* also points out that an independent opinion and investigation may be required to determine the child's best interests. *Id*.

184. *Privette*, 617 So. 2d at 308.

185. *Id*. at 308 n.3.

tional procedures required by *Privette* are unnecessary. Other children in the court system have far greater needs for guardians ad litem, such as cases of abuse and neglect proceedings, where the children's lives may be in danger. Another reason to avoid the appointment of a guardian ad litem in a stipulated dissolution proceeding is that by appointing a guardian ad litem, the child becomes an actual party to the proceeding.[186] The child may later wish to sue to establish paternity in either the putative father or the presumed father depending on the outcome of the litigation.[187] When the child is joined as a party to the litigation, the outcome is res judicata and the child is precluded from later bringing a suit to establish paternity.[188] Additionally, the requirement is unnecessary because the presiding judge may appoint a guardian ad litem in any dissolution proceeding if the judge suspects that a fraud is being perpetrated by the parties, or coercion or duress is involved in order to protect a minor child's best interests.[189]

The *Privette* court's use of case law from other jurisdictions with various factual circumstances lends credibility to the idea that the holding was not intended to be limited purely to the facts before the court in *Privette*.[190] The cases cited in *Privette* include circumstances which challenge the presumption of legitimacy, including putative fathers seeking to rebut the presumption[191] and dissolution proceedings where one or more of the parties challenge a child's paternity.[192]

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186. *Id*. at 307 n.5.

187. See *supra* note 66 discussing instances of children bringing actions to establish paternity.

188. *In re* J.R.W., 814 P.2d 1256 (Wyo. 1991). The Supreme Court of Wyoming identified four criteria to determine whether res judicata applies to a paternity proceeding. *Id*. at 1265. The criteria include identity of the parties, subject matter, issues, and interests in the litigation. *Id*.

189. See *supra* note 39 for a discussion of FLA. STAT. § 61.401 (1993), and the appointment of guardians ad litem.

190. *Privette*, 617 So. 2d at 308. The opinion stringcites 12 cases from other jurisdictions involving the presumption of legitimacy, but does not explain or comment on any of the cases individually. *Id*.

191. *Id*. (citing John M. v. Paula T., 571 A.2d 1380 (Pa. 1990)); Foster v. Whitley, 564 So. 2d 990 (Ala. Civ. App. 1990)).

192. *Privette*, 617 So. 2d at 308; Atkinson v. Atkinson, 408 N.W.2d 516, 517 (Mich. Ct. App. 1987) (recognizing that husband who is not biological father may establish paternity under "equitable parent" doctrine despite wife's objections to his paternity); Nelson v. Nelson, 460 N.E.2d 653 (Ohio Ct. App. 1983) (holding that husband and wife's stipulation that husband was not father of child born during marriage insufficient to overcome presumption of legitimacy); *see* Banta v. Banta, 782 P.2d 946 (Okla. Ct. App.

However, the *Privette* court clearly identified the two main concerns of the case as preserving the legitimacy of children and protecting the parental rights of legal fathers.[193] Therefore, the *Privette* holding should only apply to cases where rebutting the marital presumption could adversely affect the child's interest in continuing a relationship with his or her legal father[194] and where the legal father may not have notice of the paternity action.[195] The *Privette* holding should not be mandatorily applied to dissolutions where the parties have stipulated to the children's paternity. When the parties agree on the child's parentage in a stipulated dissolution, appointing a guardian ad litem and conducting a best-interests-of-the-child analysis would result in unnecessary delay and waste of judicial resources. A judge can still appoint a guardian ad litem and require a hearing to determine the best interests of the child if the judge believes that a dissolution stipulation regarding a child's parentage would negatively impact the child financially or otherwise.[196] However, in a dissolution where the parties do not agree on the parentage of one or more of the children, the action becomes a disputed paternity proceeding as well and it may be necessary to apply the procedures outlined in *Privette* to avoid adversely affecting the child or children involved.[197]

1989) (precluding wife from contesting former husband's paternity where both had stipulated in divorce decree that he was not biological father and former husband consented to be presumed father, had agreed to pay support, and was awarded visitation). But see Middleton v. Middleton, 623 So. 2d 851 (Fla. 1st Dist. Ct. App. 1993), a dissolution action implicating the presumption, where the Florida First District Court of Appeal did not even mention *Privette*. *Id*. The husband/appellant in *Middleton* requested the HLA test after his wife disputed his paternity. *Id*. The court did not adhere to *Privette*'s requirements of an evidentiary hearing and appointment of guardian ad litem when remanding the case to the trial court to grant the husband's motion for HLA testing. *Id*.

193. *Privette*, 617 So. 2d at 307.

194. In instances where there is not an established parent/child relationship, such as in the case of abandonment, this concern is not implicated. *Id*. at 308 n.3.

195. This concern may arise where a putative father brings an action to establish paternity of a child born to a married couple, and in cases where a wife attempts to bring an action for paternity against a putative father for support. *See* Ervin v. Everard, 561 So. 2d 445 (Fla. 5th Dist. Ct. App. 1990) (involving married woman who brought paternity action against man other than husband and did not join husband as party).

196. See *supra* note 39 and accompanying text for a discussion of FLA. STAT. § 61.401 (1993), regarding the appointment of guardians ad litem.

197. *See, e.g.*, Ownby v. Ownby, 629 So. 2d 135 (Fla. 5th Dist. Ct. App. 1994).

H. Implementing the Requirements of the *Privette* Holding

The *Privette* opinion does not address how to determine when the child's best interests are furthered by being declared illegitimate and transferring parental rights to the biological father.[198] The *Privette* court's concern that attacking a child's legitimacy because of financial need is adverse to a child's best interests is difficult to reconcile with dicta in the opinion which says that a child may be better off if illegitimate, but with a source of support.[199] The *Privette* court did not provide factors for courts to consider or offer guidelines to assist guardians ad litem in evaluating how a child's best interests will be affected by allowing the presumption to be rebutted. This Note suggests the following questions to assist the guardian ad litem in making an independent investigation of the facts. Answers to these questions would provide a trial court with information to help determine whether evidence should be allowed to rebut the presumption.

1) With whom has the child resided?

2) Has either the legal father or the putative father established a father/child relationship or any other type of relationship with the child?

3) Does the legal father wish to exercise or continue to exercise his parental rights?

4) Has the mother been living with either the legal father or the putative father?

5) For what length of time has the present custody arrangement been in effect?

6) Does the child have siblings who were conceived with either the legal father or the putative father?

7) Who does the child consider to be his or her father?

8) What name is listed on the child's birth certificate?

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198. *Privette*, 617 So. 2d at 308. *Privette* indicates that a legal father's abandonment of a child is contrary to the best interests of the child. *Id*. at 308 n.3. Furthermore, *Privette* suggests that this abandonment may constitute grounds to allow the presumption to be rebutted. *Id*.

199. *Id*. at 309–10; *see* Grant v. Jones, 635 So. 2d 47, 48 (Fla. 1st Dist. Ct. App. 1994) ("While it may be that in the present case the child's need for support will outweigh the stigma of illegitimacy, this issue was not addressed by the trial court, and clearly under *Privette*, it must be addressed.").

9) What last name does the child use?

10) Has the mother maintained inconsistent positions regarding the child's paternity?[200]

11) Does the legal father, putative father, or the mother object to submitting to a HLA test and if so, on what grounds?

12) What is the legal father's and the putative father's level of willingness and ability to provide for the child's emotional and intellectual development?

13) What is the legal father's and the putative father's level of emotional, mental, and physical fitness?

14) Has the legal father or putative father abandoned or abused the child or the child's mother?

15) Has the legal father or putative father ever acted contrary to the child's best interests?

16) Has the child's mother or legal father filed a dissolution proceeding?

17) Has the legal father or putative father provided any type of support for the child?

18) Does the legal father or putative father have the financial ability to pay child support?

19) Are there specific medical concerns implicated in seeking the adjudication of paternity?[201]

20) Are there circumstances concerning the child's citizenship or inheritancy which could be affected by paternity?[202]

Decisions of this nature must be made on a case-by-case basis.[203] No one factor should be determinative, but the court should assign various weight to the many factors taken into consideration. The focus should remain on the child's needs and best interests at all times during the litigation. The decision of whether to allow an action for paternity to proceed when the presumption of legitimacy is implicated should not be made without thoughtful consideration

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200. *See Privette*, 617 So. 2d at 308 n.6.

201. Locklear v. Sampson, 478 So. 2d 1113, 1115 (Fla. 1st Dist. Ct. App. 1985).

202. *Id.*; *see In re* Estate of Robertson, 520 So. 2d 99, 102 (Fla. 4th Dist. Ct. App. 1988) (allowing child to bring claim against natural father's estate even though she was determined to be child of marriage of mother and mother's husband in prior dissolution action).

203. McDaniels v. Carlson, 738 P.2d 254, 261–62 (Wash. 1987) (emphasizing that determination should focus on needs of particular child and unique circumstances of each case).

and caution, since it will result in a permanent adjudication of the child's rights.

V. CONCLUSION

As a result of *Privette*, a party may attempt to rebut the presumption of legitimacy by clear and convincing evidence if the court determines that it is in the child's best interests.[204] According to *Privette*, the court must appoint a guardian ad litem to represent the interests of the child.[205] The court must also hear arguments from the parties and hold a hearing to determine whether it would be in the child's best interests to adjudicate paternity in the putative father.[206] *Privette* applies to cases where a putative father seeks an adjudication as the natural and legal father as well as cases where the putative father seeks to avoid a paternity adjudication.[207] Although the language of *Privette* does not expressly limit its holding to instances where a party requests a blood test, *Privette* should not apply in dissolution proceedings where the husband and wife both seek to establish that the husband is not the biological father because the legal father is a party to the dissolution and has notice of the action, thereby eliminating the risk that his parental rights could be prematurely terminated.[208] For this reason, the *Privette* decision should be construed to apply only to contested paternity cases which implicate the presumption. Specific criteria, such as this Note suggests, should be used by the guardian ad litem in making an independent investigation to assist the court in determining what the child's best interests are in the outcome of the litigation.

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204. *See Privette*, 617 So. 2d at 305. The complaint must also be "brought in good faith" and "likely to be supported by reliable evidence." *Id*. at 308.

205. *Id*.

206. *Id*.

207. See *supra* note 34 for a discussion of the requirements necessary for putative fathers to establish standing.

208. See *supra* note 30 and accompanying text regarding a dissolution action in which the presumption of legitimacy was rebutted. In a dissolution, the husband is a party to the action either by actual or constructive notice under FLA. STAT. § 49.10 (1993).