

Trevor Todd and Judith Milliken

The Use of DNA in Estate Litigation



Deoxyribonucleic acid (DNA, for short) is the genetic code found in the nucleus of each of our body cells.

Because each person's genetic code is unique, it is like a genetic "fingerprint."

Initially DNA evidence was largely used only in criminal proceedings. There it has proven an extremely valuable investigative tool, used both to prove the identity of the perpetrator and to eliminate potential suspects who are innocent of the crime.

Thus, at crime scenes, police members routinely collect any items that may contain traces of DNA and forward them for analysis by a forensic laboratory to determine if any identifiable DNA may be located. If present, a DNA profile is prepared and may be used in future to compare the profile with the DNA of any potential suspects.

These days, it is not at all unusual for the media to report that an accused has been convicted of a serious crime largely based on DNA evidence. Many so-called "cold" cases have been revisited and historic samples analyzed for DNA, resulting in convictions many years after the original crime was committed.

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The corollary is that we have also been shocked to learn of wrongly convicted individuals, like David Milgaard, who have spent years in prison before being finally exonerated by DNA evidence.

DNA evidence is useful, however, far beyond criminal investigations. Because our DNA is a combination of the genes we inherit from each parent, it can be very helpful in civil disputes involving questions of paternity or other biological relationships. With increasing frequency, DNA is being used successfully to determine an individual's parentage.

Real Life Examples of DNA's usefulness in Estate Litigation

My first exposure to the utility of DNA evidence in a civil case occurred in about 1991. I was presented with a situation where a man had vanished on a ferry trip from Vancouver to Victoria. An order under the *Presumption of Death Act* was obtained.

This deceased had left an estate valued at approximately \$500,000. Because he died intestate, the proceeds of his estate were to pass to his surviving next-of-kin.

I represented the deceased's five siblings who appeared, at first glance, to be his closest next-of-kin. The picture suddenly changed when a 28-year-old woman came forward alleging she was the deceased's natural daughter. This woman was from the Northwest Territories where the deceased had indeed once lived. His siblings, however, had never heard of her and she had little proof of paternity.

By way of proof, this claimant had a few short, written communications between the deceased and herself. The only so-called "acknowledgment" of paternity was comprised of a couple of payments the deceased had made on her behalf many years before. Although the claimant alleged that her mother had told her that the deceased was her father, the birth registration indicated "father not known."

We succeeded in circumventing an expensive Court action by obtaining a Supreme Court order directing that the claimant and each sibling provide a sample for DNA analysis. Within a few weeks, this scientific analysis determined

that the probability was 99.99 percent that the deceased was indeed the claimant's biological father. Given these conclusive scientific results, the case was resolved almost immediately.

Subsequently, I have used DNA in several cases to assist in determining the question of paternity. The results are sometimes surprising.

For example, a few years ago I was involved in another Court case where a man in his 50s was devastated to learn that his "father" was not really his father. Indeed his biological father was not the man who had raised him; he was a long-standing "family friend." As a result, this unfortunate man lacked any standing to bring an action under the *Wills Variation Act* to contest his "father's" Will. Thus he was effectively disinherited by the man who had raised him and acted as his father for his entire life.

Another interesting case involved the death of a businessman in his early 50s. This deceased died unexpectedly in a motor vehicle accident, leaving a widow and a young son.

Given that this deceased was well known in his local community, his death received some publicity. A few weeks later, a 35-year-old woman came in to see me, alleging the deceased was her father.

By way of background, the deceased had been in a rock band as a teenager. He had had casual sex with a young female fan and she became pregnant. He denied paternity of the infant and the young woman was left to raise the child alone. Thirty-five years later this child, now a grown woman, claimed that he was her father.

As it happened, I had known the deceased many years before and this young woman bore a strong resemblance to him. I agreed to act on her behalf and immediately launched a Court action claiming an interest in the estate, filing a *caveat* in the Probate Registry to suspend the application for appointment of the widow as the administrator of the estate. This apparently savvy businessman had

not executed a new Will to replace his previous Will that had been revoked by his marriage. Therefore he died intestate and his widow was seeking to administer the estate, which included an active business.

In this case, the *caveat* was instrumental in obtaining a DNA sample. The widow consented to provide the deceased's blood-stained clothing worn at the time of his accidental death. She did so to facilitate her immediate appointment as administrator. DNA analysis of the blood confirmed that the deceased had indeed been the claimant's biological father. This biological relation entitled the claimant, on the intestacy, to inherit a one-third share of the residue of her father's rather sizeable estate.

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How Does DNA Testing Work?

Briefly, our DNA defines us. The genetic blueprint from which we are made, it determines our physical characteristics and our basic personality types. It also strongly influences our abilities, our habits, our dislikes, and so forth. It is found in almost every cell in our body and influences everything that we do, feel, and think. DNA is passed down through the generations and connects each of us to our biological family.

Each individual's DNA is made up of 23 pairs of chromosomes, a combination of the chromosomes inherited from each parent at the time of conception. In essence, each of us is the result of the fusion of a single egg cell and a single sperm cell. Each parent contributes through her egg or his sperm, 23 chromosomes, i.e., one-half of that parent's own chromosomal pair.

When each egg or sperm cell is originally created in the mother's or father's body, each cell goes through a division process that takes it from the

parent's 23 chromosomal pairs to just 23 chromosomes (one of each). The egg cell and the sperm cell each contribute their individual chromosomes so the new human embryo possesses 23 newly combined pairs of chromosomes.

Thus each individual has two versions of each of the inherited 23 chromosomes—one version from his or her mother and the other version from the father. This knowledge is the foundation of DNA testing for paternity.

To determine paternity, most laboratories will conduct the testing of 16 specific areas of each individual's DNA sample. These areas are called *loci*. Each individual will have two readings for each DNA loci tested. Once testing is completed, the DNA loci are compared. For each loci, one number will match one of the mother's numbers for that loci. The remaining loci must match the one of the biological father's numbers for that loci.

In determining paternity, for every matched loci a paternity index is calculated that reflects how frequently such a match occurs in a particular race population, at large. Should all the loci match, then these paternity indices are combined and a probability of paternity is calculated. That probability is the final percentage calculated. If there is a complete match, it is typically stated as a probability of paternity of 99.999 percent and higher.

If any single loci does not match, then naturally paternity is completely excluded.

Obviously, this testing is far more commonly used to determine paternity than maternity; the same process would apply, however, for both determinations.

Advantages of DNA Analysis

Prior to DNA analysis, forensic scientists were limited to comparing the blood groupings of the parties in question. Such analyses were of limited assistance in confirming parentage because the identification was tentative at best. The chances of paternity could at most be expressed as a probability of 1 per several thousand.

The second generation of blood testing, HLA blood typing, improved the sophistication of the testing but not to the degree of DNA analysis.

DNA analysis has facilitated a much more sophisticated level of discrimination that enables scientists to provide probabilities in the order of 1 chance per billion.

As well, DNA analysis allows testing far beyond the scope of blood testing because DNA typically does not significantly degrade over time. Thus analysis may be made of samples many years old. Furthermore DNA is quite resistant to degradation by common environmental attacks such as weather. As a result, DNA testing can often be performed on samples that have been exposed to detergents, acids and bases, gasoline, salt, and bacterial contamination.

Another distinct advantage of DNA testing is its sensitivity to testing. Indeed DNA is so sensitive, it permits small samples to be divided and submitted for testing by more than one laboratory. It thus reduces the possibility of error because testing may be conducted independently by more than laboratory. This helps to counter objections on the basis of inadequate laboratory processes.

DNA testing can be conducted with any sample containing nucleated cells. This would include cells such as hair, semen, urine, and saliva. Naturally, however, one must prove that the appropriate person was the source of the sample and that the chain of continuity of the sample was maintained. Both those elements must be established if the Court is to find that the test results relate to the person in question.

The Legal Basis for Comparing DNA Samples in Civil Proceedings in British Columbia

In British Columbia, Rule 30 of the Rules of Court states, in part, as follows.

30(1) Where the physical or mental condition of a person is in issue in a proceeding, the Court

may order that the person submit to examination by a medical practitioner or other qualified person. A Court may make such order respecting the examination and any expenses connected therewith as it thinks just, including an order that the result of the examination be put in writing and the copies be made available to interested parties.

.....

30(4) Where the Court considers it necessary or expedient for the purposes of obtaining full information or evidence, it may order the production, inspection, and preservation of any property, and authorize any samples to be taken or observations to be made or experiments to be conducted on or with the property.

DNA testing can be conducted with any sample containing nucleated cells. This would include cells such as hair, semen, urine, and saliva.

This section has been interpreted as giving the Supreme Court discretion to order the furnishing of blood samples. Such orders are most often granted in support proceedings and in affiliation proceedings (proceedings to determine the paternity or maternity). Such orders may, however, be made in estate litigation.

An early British Columbia decision relying on this section to direct that DNA samples be provided is *Bowman v. Kovacs* (1986) 10 B.C.L.R. (2d) 218 (C.A.). In that case the plaintiff, a married woman, believed another man “B” to be the father of her child. After her marriage ended in divorce, she brought an action against “B” claiming child maintenance and applied for an order under Rule 30(1) requiring that “B” submit to blood testing.

The Chambers Judge had granted an order directing the defendant “B” to provide a sample of blood for analysis. In this decision, the Court of Appeal upheld that order.

Subsequently, the BC Supreme Court in *C.(S.) v. M.(R.)* (1989) 49 C.R.R. 290, upheld the validity of an order for blood under section Rule 30(1). It ruled such an order did not infringe upon the Charter rights of the person compelled by the order to furnish the blood sample.

A few years later, the BC Court of Appeal confirmed an order that DNA blood samples be provided. In this case, *D.(J.S.) v. V. (W.L.)* (1995) 3 B.C.L.R. (3d) 380 (B.C.C.A.) at p. 381, the Court stated as follows.

In summary, while there is no specific legislation in this Province governing the obtaining of samples for DNA testing to determine biological paternity, it has been clear since *Bowman v. Kovacs* (supra), that an Order may be made under Rule 30(1) requiring a person to provide the necessary samples for such testing, where biological paternity must be determined in order to resolve a disputed claim. Such an Order is discretionary and, in the absence of guiding legislation, the principles which are to be applied in the exercise of that discretion must be derived from the developing case law. Those principles include recognition that DNA profiling provides evidence of a highly reliable kind when determining biological parentage and that the interests of justice will generally be best served by obtaining such evidence that the truth may be ascertained.

Statutory Presumption of Paternity

Section 95(1) of the *Family Relations Act* states, in part, as follows.

If a male person denies responsibility under section 88(1) on the basis that he is not the father of the child, the Courts must, unless the contrary is proved on a balance of probabilities,

presume that the male person is the father of the child in any case of the following circumstances.

- (d) The person was cohabiting with the mother of the child in a relationship of some permanence at the time of the birth of the child, or the child is born within 300 days after the person and the mother ceased to cohabit.

Thus, in applications for maintenance under the *Family Relations Act*, R.S.B.C. 1996, the *Family Relations Act* creates a statutory presumption of paternity if certain preconditions are fulfilled.

Lack of Presumption of Paternity under the *Wills Variation Act*

In contrast to the *Family Relations Act*, the *Wills Variation Act* contains no presumption of paternity. Therefore in *Wills Variation Act* claims, if there is any dispute as to the biological relationship, to justify any legal entitlement the Plaintiff

must first establish the relationship on the balance of probabilities.

Clearly this makes DNA particularly useful in claims made under the *Wills Variation Act*. Indeed it is perhaps somewhat surprising how frequently a DNA analysis shows a lack of biological relationship!

Conclusion

DNA analysis is playing an increasingly important role in determining the question of biological relations in estate matters. Such testing is relatively inexpensive and expeditious. What is more, DNA comparison usually provides overwhelmingly conclusive results.

In some other Canadian provinces, such as Manitoba, the Courts seem less disposed to order the production of blood for DNA analysis. In British Columbia, however, our Courts have proved far more willing to expedite the settlement of disputes by facilitating such conclusive scientific testing. ▲

Judith Milliken QC has practised law for 30 years in the areas of commercial law, criminal law, and most recently estate litigation. She teaches legal English and assists her husband Trevor Todd in his estate litigation practice.

Trevor Todd restricts his practice to Wills, estates, and estate litigation. He has practised law for 31 years and is a past chair of the Wills and Trusts (Vancouver) Subsection, BC Branch of the Canadian Bar Association, and a past president of the Trial Lawyers Association of BC. Trevor frequently lectures to the Trial Lawyers, CLE, and the BC Notaries and also teaches estate law to new Notaries. His Website includes 30 articles on various topics of estate law.

Voice: 604 264-8470

Fax: 604 264-8490

rttodd@disinherited.com

www.disinherited.com