THE USE OF DNA TESTING IN CONTESTED ESTATE MATTERS

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1. Introduction

As a result of media coverage given to criminal law cases, the concept of DNA testing is widely known. Such cases account for much of the change to Canadian legislation in the obtaining and banking of forensic evidence. Many of the *Canadian Charter of Rights and Freedoms* issues involved in determining the right to order and obtain DNA samples have arisen and been developed as a result of juris-prudence in criminal law, as have the issues surrounding the reliability or integrity of DNA testing. In criminal law matters, DNA testing orders are normally made in accordance with the provisions of the *Criminal Code*.[1] However, in determining whether to make such an order, the court will evaluate whether such an order would serve the administration of justice, having due regard for the protections afforded under the Charter.[2] In family law, issues of paternity have resulted in judicial orders for DNA testing to determine paternity or parentage.

In contrast to the numerous decisions in criminal law and family law matters across Canada, where DNA testing has been

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1. R.S.C. 1985, c. C-46.
2. For a concise review of the state of the law involving DNA orders in criminal matters, see the Ontario Court of Appeal case of *R. v. Briggs* (2001), 55 O.R. (3d) 417, 157 C.C.C. (3d) 38, 45 C.R. (5th) 99 (C.A.), leave to appeal to S.C.C. refused [2002] 2 S.C.R. v, 165 O.A.C. 45*n*, 162 C.C.C. (3d) vi. See also the appellant's factum in *R. v. Briggs* as posted by Federico and Rondinelli in Federico and Rondinelli's DNA NetLetter™ XDNA 1999 to date, accessible through Quicklaw.

ordered by the courts, there is little such jurisprudence in estate matters. In Ontario, there is, moreover, little legislation to which the courts can resort for guidance in making an order for DNA testing. Such an order in estate cases will often be complicated by the fact that an order sought may involve DNA analysis and testing to be conducted on the remains of a deceased person. As a result, other issues become relevant. Who has the authority to consent to such testing on behalf of the deceased person? What sorts of orders, discretionary or otherwise, is the court entitled to make? Under what circumstances can such orders be made? What governs the making of such orders? This article will address all of these issues and review the relevant and most recent case law.

2. What is DNA?

DNA testing analyzes deoxyribonucleic acid, which is the genetic material present in most cells in any living organism. In humans, 99% of DNA is identical between one person and the next. However, 1% of a person's DNA is "unique" to that person. It is the analysis of this "unique" DNA that facilitates what is called by testing facilities an "identity profile" which is specific to an individual. Identical twins, having exactly the same DNA, constitute the only exception to this rule, making any differentiation impossible when using the DNA process.[3] The very technical and scientific analysis of the procedure and history of DNA testing is beyond the scope of this article. Readers interested in exploring this subject should look to the literature available from various DNA laboratories and testing facilities.

3. How Does DNA Testing Work?

DNA testing begins with a biological sample. While, according to the writer's understanding, a fresh blood sample is the most effective in laboratory testing, almost every cell in the human body, such as tissue, dried blood, bone marrow, tooth pulp saliva, and/or hair samples can be used.[4] Each person has a total of 46 chromosomes, 23 from each of the mother and father. The DNA profile of a particular child, while being genetically distinct from every other

3. J. Clay, "DNA and the Case of the Alleged Heir" (1994), 13 E. & T.J. 145.
4. *Ibid.*, at p. 146.

person, will share some DNA from each parent, making shared DNA testing useful where there is a disputed biological relationship in an estate matter.[5] DNA testing can establish paternity or maternity, and can be used to determine other biological relationships, such as that between siblings, or between aunts/uncles and nieces/nephews.[6] Where paternity is at issue, the laboratory compares the chemically extracted DNA of a child to that of the mother and that of the alleged father, in determining whether a match exists. The results of DNA testing for paternity or maternity may guarantee either 0% or a greater than 99.8% probability.[7] Kinship analysis can also be determined.

4. The Application of DNA Testing in Estate Cases

In estate matters, the alleged relation, mother or father, is deceased. Inevitably, by the time a claim is brought against an estate, the deceased has been buried or cremated. Samples may still be obtained as a result of the deceased's hospitalization, dental work or autopsies and, more easily if the deceased banked a DNA sample. Failing the availability of clinical samples, it may be possible to exhume a body for testing. While DNA cannot be extracted from cremated ashes, it can be found in any bone extracts which have survived the cremation process. Other options would be the testing of other living persons — for example, parents and siblings — where the laboratory undertakes a kinship analysis in determining a DNA pattern of a deceased person.[8]

5. What is a DNA Bank?

In some instances, it may be discovered that prior to death a person banked a sample of blood at a particular laboratory or facility for long-term preservation. In such cases, the deceased person may have signed a form authorizing posthumous DNA testing and setting out a "chain of custody" procedure and may have referenced the same in a will.[9] A typical chain of custody procedure normally includes fingerprinting, a photograph, signatures and

5. *Ibid.*, at p. 145.
6. Orchid Helix, "DNA Paternity Testing Service".
7. *Ibid.*; Clay, *op. cit.*, footnote 3, at p. 147.
8. *Ibid.*, at p. 147.
9. Helix Biotech Corp., "Estate Testing Consent and Chain of Custody Form".

written consent, together with the taking of a DNA sample. DNA samples may be stored long term without affecting the integrity of the sample taken.[10] DNA testing can be conducted from within three to ten days or up to six weeks, depending on the nature of the testing and samples used.[11] The cost of DNA testing is relatively small considering the level of accuracy and conclusiveness of the results obtained in resolving an estate dispute.[12]

6. What Are the Potential Sources of DNA?

For a full list of the sources of DNA and preservation of samples, one can consult a testing or laboratory facility. A non-exhaustive list of sample sources includes bone, blood, semen, saliva, teeth, urine, hair, muscles and skin. More unusual sources for DNA include drinking containers, eating utensils, mouth pieces from musical instruments, chewing gum, cigarette butts, envelope flaps, stamps, mouth guards, dentures, lip balms/sticks, watches, rings, razors, hair roots, hats, sports headbands, bicycle helmets, facial tissue, used bandages, pulled teeth and clothing.

7. Who Can Authorize the DNA Testing of the Remains of a Deceased Person?

The right to authorize DNA testing on the remains of a deceased person appears, to date, not to have been dealt with in a court decision or ruling. In the context of estate planning, a person who is concerned over potential claims being brought against his or her estate could provide a written direction regarding the authorizing of DNA testing, either in his or her will or in a separate document that is incorporated by reference into the will.[13]

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10. Clay, *op. cit.*, footnote 3, at p. 148.
11. Orchard Helix literature.
12. By way of example, the cost to produce a DNA profile and provide a sample for self-storage with Orchid Helix is currently about $330 plus GST per sample; the cost of a complete DNA maternity/paternity test is $510 plus GST per triad.
13. The doctrine of incorporation by reference would require that the direction be in existence at the time of making the will, that it be referred to in the will, and that the reference to it in the will be sufficient to identify the particular document. In Ontario, a memorandum not incorporated by reference is merely "precatory", in other words, an expression of a wish made by a testator that is not intended to be legally binding: *Blow (Re)* (1977), 82 D.L.R. (3d) 721, 18 O.R. (2d) 516, 2 E.T.R. 209 (H.C.J.); *Rudaczyk Estate v. Ukranian Evangelical Baptist Assn. of Eastern Canada* (1989), 69 O.R. (2d) 613, 34 E.T.R. 231 (H.C.J.).

Where a person has taken no steps to bank a blood sample or to authorize DNA testing after death, it is arguable that the executor or estate trustee has the authority to permit the taking of a tissue sample for DNA testing to be carried out.[14] In the recent Ontario Superior Court of Justice case of *Sopinka (Litigation Guardian of) v. Sopinka*,[15] Quinn J. articulated the long-standing legal principle that the executor of an estate has the authority to dispose of the body of a deceased and the remains of a deceased, including cremated ashes. This duty includes a right of possession of the body for the purposes of disposition, a right which exists even against the wishes of the surviving spouse of a deceased.[16]

The rights of the personal representative in respect of burial of the deceased continue after burial. Were it not so, "those who oppose the executor would disinter the body as soon as it was buried".[17] The duty to dispose of the remains of a deceased person is circumscribed by the obligation to do so in a dignified manner.[18] This duty also includes disposal in a manner befitting the deceased's station in life,[19] and in a manner suitable to the estate of the deceased.[20]

8. The State of the Law in Ontario — Will the Court Make an Order for DNA Testing?

In Ontario, the legal limitation on DNA testing is directly linked to the lack of legislation, either requiring individuals to provide samples or empowering the court to use its discretion to make the order. In some estate matters, DNA testing is possible only if siblings or parents of the deceased agree and give their consent to be

14. As an underlying matter for consideration when advising estate trustees where DNA issues arise, the estate trustee should be aware of liability in negligence for not making appropriate investigations to ensure the proper entitlement of a particular heir. Statutory requirements exist as well as an extensive body of case law: *Trustee Act*, R.S.O. 1990, c. T.23, s. 53; *Estates Administration Act*, R.S.O. 1990, c. E.22, s. 24. See, for example, *Re Short Estate*, [1941] 1 W.W.R. 593 (B.C.S.C.); *Re Ashman* (1907), 15 O.L.R. 42 (H.C.J.); *Re Barton Estate*, [1950] 1 W.W.R. 46 (Sask. K.B.).
15. (2001), 55 O.R. (3d) 529, 42 E.T.R. (2d) 105, [2001] O.J. No. 3657 (QL) (S.C.J.).
16. *Hunter v. Hunter*, [1930] 4 D.L.R. 255, 65 O.L.R. 586 at p. 596 (H.C.J.).
17. *Waldman v. Melville (City)* (1990), 65 D.L.R. (4th) 154, 36 E.T.R. 172, [1990] 2 W.W.R. 54 (Sask. Q.B.).
18. *Abeziz v. Harris Estate*, [1992] O.J. No. 1271 (QL) (Gen. Div.); *Saleh v. Reichert* (1993), 104 D.L.R. (4th) 384, 50 E.T.R. 143 (Ont. Ct. (Gen. Div.)).
19. *Tzedeck v. McIntyre Estate*, [1952] 4 D.L.R. 529, [1953] 1 S.C.R. 31.
20. *Williams v. Williams* (1882), 20 Ch. D. 659 at p. 664.

tested themselves to complete and validate the kinship analysis procedure. In Ontario, there have been a number of family law cases in respect of child support proceedings where paternity was an issue and DNA testing was ordered by the court.

9. Applicable Statutes and Authorities

(1) The Courts of Justice Act

Pursuant to s. 105 of the *Courts of Justice Act*[21] (the "*CJA*"), the court is authorized to order a medical examination, physical or mental, of a party to a proceeding. Section 105(2) provides:

> 105(2) Where the *physical or mental condition of a party* to a proceeding is in question, the court, on motion, *may order the party to undergo* a physical or mental examination by one or more health practitioners.

(Emphasis added.) Case law has provided clarification that the composition of a person's blood is a medical condition.[22]

In *Bauman v. Kovacs*,[23] Lambert J.A. held that "the composition of a person's blood is a physical condition of a person, and the requirements of the rule that the order that a person submit to examination must be in relation to a physical or mental condition is met in this case . . . the blood composition of a person is, in that sense, within the definition of 'condition'".

Evidently, s. 105 of the *CJA* can assist counsel in arguing that the court has discretion to order blood tests, or any other physical or mental examinations, provided that the subject-matter of the examination is a material issue in the proceedings and further good reason exists to believe that there is substance to the allegations made. In estate matters, where a determination of a relationship through DNA analysis is requested, one may argue that the court has the discretion to make such an order.[24] Where the question of a party's physical or mental condition is not raised by a party to the proceedings, but by another party, the court must be satisfied that

21. R.S.O. 1990, c. C.43.
22. *Bauman v. Kovacs* (1986), 10 B.C.L.R. (2d) 218, 20 C.P.C. (2d) 111, 6 R.F.L. (3d) 121 (C.A.); *M. v. H.* (1999), 2 R.F.L. (5th) 424, [1999] O.J. No. 4360 (QL) (S.C.J.).
23. *Supra*, at p. 221.
24. Section 105 of the *CJA* is not expressly restricted to a person who is living, although a deceased person cannot be a party *per se*. Arguably, an action could be maintained in the name of an estate where there is an issue regarding the condition of the deceased and the allegation against the estate is relevant and a material issue in the proceedings.

the allegation is relevant to a material issue and there is good reason to believe there is substance to the allegation.[25]

(2) The Ontario Rules of Civil Procedure — Rule 33

Rule 33 of the Ontario *Rules of Civil Procedure*,[26] regarding medical examinations of parties, serves as a supplement to s. 105 of the CJA, empowering the court to order physical or mental examinations of any party whose physical or mental condition is in question in any proceeding. Rules 33 through 33.08 of the Ontario *Rules of Civil Procedure* are commended to the reader for further consideration.

(3) The Succession Law Reform Act

There is no provision in the *Succession Law Reform Act*[27] (the "*SLRA*") to determine paternity and/or parentage. Section 58 of the *SLRA* states that the court may order provisions to be made out of the estate of the deceased for the support of a dependant. A "dependant" is defined under s. 57 of the *SLRA* as, *inter alia*, "a child of the deceased . . . to whom the deceased was providing support or was under a legal obligation to provide support immediately before his or her death".[28] The *SLRA* can be of great assistance in estate matters where DNA becomes an issue because of an alleged relationship of maternity or paternity.

In the Ontario Surrogate Court case of *Ruby (Re)*[29] in 1983, Haley J. gave an extensive review of the court's powers in an estate matter concerning a dependant's support claim and the application of interacting statutes. In *Ruby*, it was argued that ss. 3 to 8 of the *Children's Law Reform Act*[30] (the "*CLRA*") ousted the jurisdiction of the court to determine parentage in any other proceeding. Under s. 8 of that Act, where there is no presumption of parenthood, a declaration of parentage under s. 5 could be made only by the Supreme Court of Ontario (as it was then known), and then (by s. 5(2)) only where both persons whose relationship is sought to be established are living. Haley J. asserted that s. 5(2) of the *CLRA* was a declaration of

25. *CJA*, s. 105(3).
26. R.R.O. 1990, Reg. 194.
27. R.S.O. 1990, c. S.26.
28. The definition of "child" in s. 57 includes "grandchild".
29. (1983), 43 O.R. (2d) 277 (Surr. Ct.).
30. R.S.O. 1980, c. 68 (now R.S.O. 1990, c. C.12).

public policy that no parentage inquiry should be undertaken when one party is dead. She further asserted that it could not have been the legislative intention that such a principle apply to matters under the *SLRA*. While acknowledging that the *Family Law Reform Act*,[31] the *CLRA* and the *SLRA* were enacted in the same period as part of the general reform of legislation for support matters, Haley J. saw no basis for finding that there were any overriding policy principles that should apply to all three statutes, regardless of the specific wording of the individual Act:

> In my opinion s. 1(1)(a) of the *Succession Law Reform Act*, defining child, and saying clearly "includes a child conceived before and born alive after the death of the parent" contemplates the determination of parenthood *for the purposes of the Succession Law Reform Act* after the death of one party to the parenting relationship.
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> I do not think that this specific approach of the *Succession Law Reform Act* is overridden by the principle in the *Children's Law Reform Act*, s. 5(2). The *Children's Law Reform Act* is a procedure for making a declaration *in rem, i.e.*, "an order recognized for all purposes" (s. 5(3)). It is reasonable that there should be a higher standard required for a determination "*in rem*" which will affect all persons whether or not they are parties to the proceedings.
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> Secondly, I do not agree that the *Children's Law Reform Act* provides the only basis for determining parenthood. I follow the judgment of the Ontario Court of Appeal in *Sayer v. Rollin* (1980), 16 R.F.L. (2nd) 289, which draws a distinction between a jurisdiction for a declaration and the nature of a judgment *in rem* and a determination which is a *material part of a dispute which is otherwise within the jurisdiction of the court.*[32]

Ruby is evidently of assistance in estate matters where an application is made for the support of a dependant where parentage is an issue, but one of the parents is not living.

10. Case Law

(1) Ontario Case Law

In the family law context, where there is a child support application in cases of disputed paternity, the court does not appear to be hesitant in making an order for DNA testing pursuant to s. 10 of the

31. R.S.O. 1980, c. 152 (now the *Family Law Act*, R.S.O. 1990, c. F.3).
32. *Ruby*, *supra*, footnote 29, at p. 280.

CLRA.[33] In the 1995 case of *Silber v. Fenske*,[34] Greer J. ordered blood tests to be undertaken to establish paternity of a child in the context of a support application, in accordance with s. 10 of the *CLRA*. In the course of her reasons, Madam Justice Greer considered whether ss. 7 and 8 of the *Canadian Charter of Rights and Freedoms* would be violated if a blood test was ordered. She interpreted the wording of s. 10 of the *CLRA* to mean that no one can take blood for purposes of a paternity test without that person's consent. Furthermore, in the event that consent is not given, the court is permitted to draw an adverse inference. However, no one is forced to give the sample.

Greer J. referred to the analysis of s. 10 of the *CLRA* by Lesage J. in *Evans v. Hammond*,[35] where he ruled that neither compulsion nor coercion is involved in a s. 10 order and that s. 10 is:

> . . . procedural because what it does is permit a party, in a civil proceeding, to ask the court for permission to ask certain persons for samples of their blood, and to submit those samples in evidence. The effect of the submission of this evidence would be to assist the court in establishing whether or not any of such persons was, in fact the father of the child. The section goes on to say, in s-s. (3), that refusal to submit to such requests permits the court to draw such inference as it considers appropriate. In my view, the section does little more than to give legislative sanction to what I understand to have been a fairly common practice in the courts. I say that because there are many cases where a party to an affiliation proceeding has been asked by the other side to provide blood samples, and the unexplained refusal to comply with the request has resulted in the court drawing an inference adverse to the refuser. That, it seems to me, is only reasonable, since in a civil case as this is, the refusal of one of the parties to produce materially relevant evidence in their possession would, absent a reasonable explanation, almost inevitably result in the trier of fact concluding that such evidence would be either (a) helpful for the opposite party, and/or (b) harmful to the one who refused to produce it.

Section 8 of the *Canadian Charter of Rights and Freedoms* states that everyone has the right to be secure against unreasonable search and seizure. Justice Greer concluded:[36]

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33. *B. v. J.* (2001), 19 R.F.L. (5th) 11, [2001] O.J. No. 2659 (QL) (S.C.J.); *Baugh v. Samuels* (2001), 24 R.F.L. (5th) 270, [2001] O.J. No. 5614 (QL) (S.C.J.); *M. v. H.* (1999), 2 R.F.L. (5th) 424, [1999] O.J. No. 4360 (QL) (S.C.J.).
34. (1995), 11 R.F.L. (4th) 145, [1995] O.J. No. 4360 (QL) (Gen. Div.).
35. (Unreported, April 5, 1979, Ont. Co. Ct.), at p. 4, quoted in *Silber, supra*, at pp. 150-51.
36. *Silber, supra*, at p. 151, quoting from *N. (R.) v. D. (M.)* (1985), 49 O.R. (2d) 490, 13 C.R.R. 26 (Prov. Ct.).

> ". . . an order under s. 10 would not constitute or cause an unreasonable search or seizure. For s. 8 to be violated, the search or seizure must be unreasonable. In a s. 10 situation, the taking of blood would not constitute an unreasonable search or seizure."

In *Silber*, Greer J. also addressed whether s. 10 of the *CLRA* violates s. 7 of the Charter. Section 7 states that everyone has a right to life, liberty and security of the person and the right not to be deprived thereof, except in accordance with the principles of fundamental justice. Justice Greer referred to the case of *P. (K.) v. N. (P.)*,[37] wherein Rutherford J. declared that s. 10 of the Act did not violate s. 7 of the Charter:

> It is well established law that there is no prima facia infringement of s. 7 until the defendant establishes both a deprivation of life, liberty or security of the person, and that the deprivation is in a manner contrary to the principles of fundamental justice. No s. 7 Charter breach is made out, however, unless there is an interference with the physical or mental integrity of the individual or with the individual's control over such integrity.
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> I do not find that the impugned provision interferes with the physical or mental integrity of the individual. It does not authorize the forcible taking of blood.
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> . . . . .
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> If there is no compulsion or coercion involved in an order made under s. 10 of the Act, the provision constitutes neither a denial nor an infringement of the rights guaranteed by s. 7 of the Charter.

Silber, like many criminal cases involving the taking of DNA samples, is precedent for the proposition that provincial legislation authorizing blood tests in disputed paternity cases does not contravene the *Canadian Charter of Rights and Freedoms*.[38]

In *M. v. H.*,[39] Robertson J. ordered DNA tests in accordance with s. 10 of the *CLRA* and s. 105 of the *CJA* in order to determine paternity. Justice Robertson stated that: "An objective and impartial

37. (1988), 15 R.F.L. (3d) 110 at pp. 111-12, 37 C.R.R. 189 *sub nom. Pakka v. Nygard* (Ont. H.C.J.).
38. In *C. (N.E.) v. M. (C.J.)*, [2001] O.J. No. 1671 (QL) (S.C.J.), where there was no DNA order sought, Lalande J. went so far as to say "with the advent of DNA testing, a blood test should be all that is required in order to determine the issue of paternity, and that it should not be necessary for the court to rely on inferences and presumptions".
39. *Supra*, footnote 33, at para. 1.

scientific test can provide the court with a reliable source of evidence and gauge of credibility. The interests of justice require the court to consider the best evidence".[40] In his view, s. 10 of the *CLRA* and s. 105 of the *CJA* empower a court to order blood tests in any civil proceeding.[41]

Justice Robertson went further to state that: "At law, blood tests should be ordered unless the request is made in bad faith, or would adversely affect the health of a child."[42] He referred to the case of *F. (M.) v. S. (R.)*,[43] where the court held that:

> . . . the principle to be applied in exercising the discretion under s. 10 should be that a request for leave to obtain blood tests should be granted unless:
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> (a) it can be shown that the actual process of conducting a blood test might prejudicially affect the health of the child, or
> (b) the actual request for leave to obtain the blood test is made in bad faith.

The court held that "it would be the rare case indeed when an order for leave to obtain blood tests would not be granted, particularly if the argument is being made that the application for leave to obtain a blood test was being made in bad faith".[44]

In *R. (S.) v. Hill Estate*,[45] Desmarais J. held that the court did not have jurisdiction to require testing to determine parentage in a paternity dispute. The court held that, without statutory authority, the court cannot order the test. In that case, the defendant sought an order to set aside a previous order of the court that a blood sample be taken from the body of a deceased person. The issue before the court was whether the blood test should be admitted as evidence in proceedings before the courts, which included an action by the mother for damages for sexual assault and a second proceeding seeking support from the deceased's estate for the daughter.

Desmarais J. held inapplicable s. 8 of the *CLRA* (which provides for a declaration of paternity in certain circumstances). Moreover,

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40. *Supra*, at para. 5.
41. *Supra*, at para. 6.
42. *Supra*, at para. 8, citing *H. v. H.* (1979), 100 D.L.R. (3d) 364, 25 O.R. (2d) 219 at p. 222, 9 R.F.L. (2d) 216 (H.C.J.).
43. (1991), 83 D.L.R. (4th) 717 (Ont. Ct. (Prov. Div.)), at p. 721.
44. *Supra*, at p. 722.
45. (1996), 14 E.T.R. (2d) 111 *sub nom. Roussel v. Hill Estate*, [1996] O.J. No. 2247 (QL) (Gen. Div.).

although s. 5 of the *CLRA* provides that "any person may apply to the court for a declaration that a male person is his or her father", in this case it was not the alleged child who brought the application. Moreover, as noted earlier, s. 5(2) of the *CLRA* bars any application under s. 5(1) unless "both the persons whose relationship is sought to be established are living". Accordingly, the court was of the view that there was no jurisdiction under the *CLRA* to order DNA testing.[46]

As for the daughter's dependant's relief claim under Part V of the *SLRA*, the court observed that no steps were taken by the daughter of the applicant to seek support or deal with the issue of the child's paternity prior to the deceased's death. It therefore followed that even if the deceased were found to be the child's biological father, the child was not a "dependant" within the meaning of ss. 57 and 58 of the *SLRA*, because the deceased had no legal obligation to provide support to the child at the time of his death. The court also noted that any parental support obligation which could be found under the *Family Law Act* would not extend to a child who is 16 years of age or older and who has withdrawn from parental control. In this particular case, the child was almost 18 years of age and had given birth to a child of her own.

Finally, the court stated as follows:

> In the end, the death of [the deceased] does not confer jurisdiction on any court to order something be done to his remains that could not be done while he was alive in the absence of any specific statutory authority. There is no statutory authority to order blood samples be taken from a dead body for the purpose of testing to establish paternity. In the circumstances therefore I find there is no authority under the *Children's Law Reform Act*, nor the *Succession Law Reform Act* to order the taking of samples from the remains of [the deceased], subsequent to his death.[47]

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46. See also *Turner v. Irwin Estate* (2003), 233 D.L.R. (4th) 610 (Man. C.A.), wherein the court refused to compel the administrator of a deceased person's estate to consent to DNA testing of an existing blood sample from the deceased. The appellant had hoped the DNA test would provide compelling evidence that he was a son of the deceased — leading to a declaration to that effect under the *Family Maintenance Act*, R.S.M. 1987, c. F20 (and a consequential entitlement to a share of the deceased's intestate estate). Freedman J.A., speaking for a unanimous appellate bench, declined to make the order for DNA testing on the grounds that a court order must have some "efficacy". He pointed out that a declaration of parentage could not be made because of the statutory condition to its making that "both the person and the child whose relationship is sought to be established are living".
47. *Hill Estate*, *supra*, footnote 45, at para. 30.

Although the court suggests a rather limited statutory authority for ordering paternity testing — in this case, that both parties to the relationship sought to be established by the testing must be alive — the case says nothing about the provisions of s. 10 of the CLRA. It appears that counsel did not argue the merits of this section. Perhaps the reason for this is that the primary action was commenced not by the alleged child of the deceased, but by a woman who had commenced an action for damages for sexual assault, negligent infliction of emotional stress and breach of fiduciary duty. Any order for DNA testing in accordance with the CLRA would require an application being made by the child, or by the guardian of a child. Furthermore, the secondary action brought before the court, although on behalf of the child, was seeking support as a dependant under the SLRA, which support obligation did not exist prior to the date of death of the deceased.

Although there are Ontario cases where DNA orders have been made, the case law is limited to determining parentage, namely, paternity, and in the majority of cases, both alleged parents have been alive.

(2) British Columbia Case Law

In Canada, it appears that British Columbia offers the most fertile ground in providing precedent for the making of DNA orders in the context of estate proceedings. British Columbia has legislation in place requiring an alleged father to submit to DNA testing in matters concerning paternity. Rule 15 of the British Columbia *Provincial Court (Family) Rules*[48] empowers the court to order DNA testing of a party to a proceeding.[49] Similarly, Rule 30 of the British Columbia *Supreme Court Rules*[50] enables the court to make a discretionary order to obtain blood tests, where it would be appropriate and just to do so. Rule 30 is part of the discovery process created by the rules of the court. Note that Rule 30 refers to the physical and mental condition of a "person" as opposed to a "party".

There are several cases where Rule 30 of the British Columbia *Supreme Court Rules* has been relied upon to order DNA testing.[51] In most of those

48. B.C. Reg. 417/98.
49. *L.M.S. v. R.H.*, [1996] B.C.J. No. 2539 (QL) (Prov. Ct.).
50. B.C. Reg. 221/90.
51. *T.N.T. v. J.S.*, [1998] B.C.J. No. 256 (QL) (S.C.); *S. (J.C.) v. S. (J.M.)* (1998), 60 B.C.L.R. (3d) 295, 28 C.P.C. (4th) 373 (S.C.); *C.C. (Guardian ad litem of) v. Y.K.B.*, [1996] B.C.J. No. 996 (QL) (S.C.); *Noonan v. Edward* (1996), 16 E.T.R. (2d) 318 (B.C.S.C.); *D. (J.S.) v. V. (W.L.)* (1995), 12 B.C.L.R. (3d) 46 (S.C.); *D. (J.S.) v. V. (W.L.)*, [1995] 5 W.W.R. 495, 94 W.A.C. 144, 3 B.C.L.R. (3d) 380 (C.A.); *S. (D.M.) v. C. (J.) Estate* (1994), 120 D.L.R. (4th) 581, 6 E.T.R. (2d) 197, 34 C.P.C. (3d) 117 (B.C.S.C.); *Cruikshank v. Cruikshank*, [1993] B.C.J. No. 650 (QL) (S.C.).

cases, the orders related to parties who were alive. Some involved the testing of an alleged father; others involved testing of other parties, including a child, to establish a biological or kinship relationship. Of the cases decided in accordance with Rule 30 of the British Columbia *Supreme Court Rules*, only two are estate matters involving a deceased person, but in neither was a sample ordered to be taken from a deceased person.

In *D. (J.S.) v. V. (W.L.)*,[52] the British Columbia Court of Appeal summarized the state of the law:

> . . . 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 *Bauman v. Kovacs*, *supra*, that an order may be made under R. 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 best be served by obtaining such evidence so that the truth may be ascertained.

The most recent case concerning the ordering of DNA testing in an estate matter is the British Columbia Supreme Court decision in *Lansing (Guardian ad litem of) v. Richardson*.[53] This case involved an application to vary the will of a deceased person, brought by a person purporting to be his child. Hutchison J. declared that, in accordance with the British Columbia *Wills Variation Act*,[54] paternity must be established prior to recognition of a legal claim to share in the estate. Under the statute, the burden of proving paternity (on a balance of probabilities) was on the plaintiff, the alleged child, through her mother. DNA analysis was ordered to determine whether the child was the biological daughter of the deceased. The cost of such analysis was ordered to be borne by the estate. In this particular case, there were already DNA samples taken from the deceased's body as a result of a criminal proceeding, which led to the conviction of the deceased's killer. On the basis that the deceased had a legal obligation to the child, the court ordered that the DNA analysis be conducted on the alleged child and on the samples obtained from the deceased. When the respective DNA samples of the deceased person and of the daughter showed a greater

52. *Supra*, at para. 26.
53. (2002), 45 E.T.R. (2d) 105, 2002 BCSC 262 (S.C.).
54. R.S.B.C. 1996, c. 490.

than 99.9% probability that the deceased was the father of the alleged child, the court awarded the child a share of the deceased's estate.

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In *Hrycoy Estate v. Hrycoy Estate*,[55] all of the parties to the application, but for one plaintiff, agreed that the remains of the deceased should be disinterred so that DNA testing could be done to assist in the determination of parentage. The court dismissed the application on the basis that it was premature. In his judgment, Burrows J. was of the view that the validity of the will should first be determined since, if the will were valid, there would then be no question of an intestacy — and therefore no question as to whether an alleged child would share in the deceased's estate under applicable intestacy rules.

11. Conclusion

DNA testing appears to be a fairly new and successful technique which, from the nature of the scientific processes involved, provides results of compelling accuracy. In the face of this technology, it is frustrating to observe the frequency with which judges — particularly in family law cases and, to some extent, in estates cases — find themselves unable to compel the taking of blood samples or other matter for the purpose of DNA testing in civil proceedings. It is submitted that it is in the public interest, and in the interest of parties to a civil proceeding, to be able to verify the truth of a particular set of facts both efficiently and economically. DNA testing provides the solution.[56]

A number of cases have cited comments made by Lord Denning in *S. v. S.*,[57] and which the writer considers to be significant for the development of principles upon which DNA analysis should be ordered:

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55. 1999 ABQB 279, [1999] A.J. No. 410 (QL) (Q.B.). See also *F. (C.J.) v. H. (B.B.)*, [1996] 3 W.W.R. 436, 139 Sask. R. 66, 20 R.F.L. (4th) 262 (Q.B.).
56. While the accuracy of DNA testing has been challenged in court proceedings, those challenges have arisen in criminal cases — where the standard of proof "beyond a reasonable doubt" is far higher than the standard of "balance of probabilities" in civil proceedings. Depending on the nature of the test and the integrity of the sampling, the accuracy of DNA tests can be as high as 99.99%.
57. [1970] 1 All E.R. 1162 at p. 1165 (C.A.), affd [1970] 3 All E.R. 107 (H.L.).

> Finally, I must say that, over and above all the interests of the child, there is one overriding interest that must be considered. It is the interest of justice. Should it come to the crunch, then the interest of justice must take first place . . .
>
> In my opinion when, a court is asked to decide whether a child is legitimate or not, it should have before it the best evidence which is available. It should decide on all of the evidence, and not half of it. There is at hand in these days expert scientific evidence — by means of a blood test — which can in most cases resolve the issue conclusively. In the absence of strong reason to the contrary, a blood test should be made available. The interests of justice so require.

A review of the DNA process itself, the legislation and the case law demonstrates the types of disputes which have arisen and for which DNA would be of assistance in resolving. The family law examples are useful in providing the court with guidance that can be applied to estate matters. Perhaps, however, Ontario should consider adopting specific provisions, akin to those of British Columbia, within its *Rules of Civil Procedure* to make it easier for the court to make DNA testing orders in estate matters.