DNA testing and succession disputes

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Last year, a tarot card reader convinced the Spanish Courts to order the exhumation of Salvador Dali's body for DNA paternity testing. Unfortunately for her, her cards were wrong and the test showed she was not his daughter.

Back on English soil, when one sister secretly administered her late father's estate, the other reignited rumours that she was not her farther's biological daughter in order to deny her the inheritance. In *Nield-Moir v Freeman*, the judge grappled with the extent of the Court's powers and with human rights considerations in deciding whether or not to order DNA paternity testing in the context of an inheritance dispute.

The story

Veronica and Colin Birtles had a daughter, Janice, in 1961 and a year later, Veronica gave birth to Lorraine. Veronica and Colin divorced and she later died. Janice moved to Australia. Colin died in June 2013 without leaving a will. The intestacy rules mean that his children inherit his estate. With Janice still in Australia, Lorraine administered her father's estate and 'sold' his house to herself. She made no effort to contact Janice.

When Janice realised what was happening she issued proceedings. Her primary case is that Lorraine was not Colin's daughter and so should not inherit anything. To resolve the issue, Janice asked Lorraine to take a DNA test . Lorraine refused, saying the test was unnecessary because Veronica and Colin were married when she was born and Colin was on her birth certificate. This created a legal presumption that Colin was her father.

Is DNA testing 'sufficiently accurate'?

Janice proposed to pay for Dr Syndercombe-Court, a forensic geneticist at King's College London, to do the test. Lorraine questioned whether Dr Syndercombe-Court could provide *'sufficient proof'* of her parentage, having said she could not *'definitively'* determine whether Lorraine and Veronica are full sisters.

Dr Syndercombe-Court subsequently explained that *'I am a scientist. In my work I use the word 'definitively' to mean 'beyond any doubt' or 'absolute (100%) certainty'…if I were asked to quantify the possibility that my testing will produce an entirely accurate result I would say 97% to 98%.'* The Judge decided that this was *'evidence worth having.'*

Does the Court even have the power to order that someone do a DNA test?

The Family Law Reform Act 1969 allows the Court to direct *'the use of scientific testing to ascertain whether such tests show that a party to the proceedings is or is not the father or mother of that person.'* However, as Colin is dead and not a party, this did not apply.

There was no case where the Court ordered someone to *'submit unconditionally'* to scientific testing, except in special cases (e.g. where someone is lacking mental capacity or there is an emergency – such as taking the blood samples of Sergei and Yulia Skripal).

The Judge decided that *'he could not see why'*, in principle, a person cannot be ordered to consent to a mouth swab saliva test for DNA testing purposes, in the same way as a search order requires a person to consent to a search of premises and the seizure of items falling within the scope of the Court order'. As to the physical effects of a mouth swab, he said *'self-evidently, it is quick, painless and carries no appreciable risk to the health of the donor of the sample.'*

He then considered the mental effects. He balanced the *'risk of upset to a person who has long believed herself to be the child of a certain person and then is shown not to be'* with the fact that there *'is already litigation on foot in which the issue of parentage has arisen.'* The judge ordered that

Lorraine consent to giving a saliva sample by way of mouth-swab, failing which the Court would draw an adverse inference.

Is this a breach of human rights?

The European Convention of Human Rights enshrines the right to respect for private and family life. That was relevant because Lorraine has a right to respect for privacy over her parentage. However, interference with Lorraine's human rights was justified because the DNA test was a *'means of protecting the public interest in the accurate resolution of inheritance disputes'.*

'If science can help, then it should'

As the accuracy of DNA testing improves and the traditional 'nuclear family' structure is changing, it is not surprising that the Courts are seeing more cases involving DNA testing. This case is just one in a line of recent decisions on the subject. Back in 2016, the Privy Council in *the Re Baronetcy of Pringle of Stichill* decided that DNA evidence, collected for a family history project, could be used to resolve a Scottish baronetcy succession dispute.

In *Anderson v Spencer*, a sample had already been taken from the alleged father before he died. The applicant wanted to find out if he was his son, because the deceased passed on a 50% risk of inherited predisposition to cancer to his children. The Court of Appeal ordered that the sample be tested.

Nield-Moir v Freeman clarifies the Court's jurisdiction to order individuals to consent to DNA testing. The judge did not order that Lorraine be forcibly DNA tested, but provided a clear path for the Court to follow should she refuse.

It seems likely that in similar cases the Court will move towards ordering DNA testing as a far quicker and cheaper means of resolving disputes than a full trial with witness evidence. In this case, there was both a sister and a niece against whom Lorraine's DNA could be compared and so Colin's resting place, unlike Salvador Dali's, was left undisturbed.

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