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Use of DNA tests in cases of determining legal paternity

Summary

The objective of the study involves testing the influence of accessibility of DNA tests, on paternity determination. Without doubt, DNA tests determining the family relationship have become one of the most frequently performed genetic tests commercially. They are carried out both at individual request, as well as for use in judicial proceedings. Undoubtedly, the common use of DNA tests to exclude consanguinity has become very popular in judicial practice. Moreover, it seems that due to the fact that DNA tests are quite accurate in determining blood relations, the regulations of the Family and Guardianship Code have been changed in order to base paternity on the certainty of genetic relation. The study also involved the regulations of the Family and Guardianship Code as well as judicial decisions in order to indicate the nature of evidence from genetic testing and its impact on paternity recognition.

Keywords descent, paternity, DNA, genetic tests, judicial procedure

Introduction

In recent years, genetic testing for the purpose of establishing consanguinity has revolutionized the approach to family relation. The growing industry of selling online genetic tests has enabled the performance of such tests without the consent or even the knowledge of relatives. Making use of genetic testing in determining a child's parentage has become very common in judicial practice.

Sometimes these tests are already carried out at the pre-trial stage, when, before bring legal action, a parent tries to verify the genetic relation of a child. These tests are then carried out with or without the permission of the parties concerned or their legal guardian. In such a situation, there may be the impetus to bring a civil action.

Furthermore, it should be noted that just because of the possibility of such reliable determination of consanguinity, the Family and Guardianship Code has been changed by the Act of 6 November 2008 on amendments to the Family and Guardianship Code, as well as other laws.

The subject of this article is the analysis of the influence of DNA testing on civil procedure in terms of paternity denial, establishing ineffectuality of recognition of paternity, as well as judicial paternity recognition.

The paper describes not only development of forensic genetics in determination of paternity but primarily the influence of the method alone on the legal institution of paternity. In this area, not only the regulations of the Family and Guardianship Code and Code of Civil Procedure have been analysed but also the extensive case law on the subject. Indeed, it seems that the genetic determination of consanguinity not only became a means of evidence which makes the legal procedure more efficient, but also forced a new approach to the institution of consanguinity, especially to paternity.

DNA testing

The development of DNA analysis and the possibility of comparing and analysing DNA samples from two people allow fairly reliable and easy determination of a person's ancestry [1] and the relationship between individuals. The question of a person's lineage and knowledge of this origin is treated as a personal property of an objective character, to be determined with a high degree of certainty [2]. The research of G. Niemiałtowska [3] showed that in parentage cases establishing or denying paternity, blood test evidence was virtually replaced by evidence from DNA testing. DNA examination involving the comparison of at least

two samples of genetic material, is not a new research method. In Germany as early as in 1924, i.e. the year the inheritance pattern of the AB0 gene system was established, the designation of this system was introduced to jurisprudence, and in the years 1924-1929 such examination was performed in over 5000 cases [4]. According to B. Turowska [5], prof. Jan Stanislaw Olbrycht of the Department of Forensic Medicine in Cracow, as early as in 1926 performed the first casework on the AB0 group system for the Cracow court. In this Department, in the years 1927-1946, examinations were carried out in 158 cases mainly related to disputes over child maintenance [6]. In the United States, the first report of the American Medical Association (AMA), published in 1937, was concerned with nothing else but testing blood groups in paternity cases [7].

The common use of DNA testing also allows, for instance, the refutation of judicial fiction of the descent from a legal parent, and not a biological parent [8]. Modern genetics does not allow determination of a parent without taking DNA samples from a potential parent. The tracing of ancestry is performed by comparing two samples of DNA material taken from parent and a child. Thus, by excluding parentage on the basis of available tests, we cannot determine the real ancestor data. Such a possibility would exist only in the case of creating DNA population databases and comparison of DNA tests results.

The importance and usefulness of confirming kinship using DNA testing was duly reflected by the Polish jurisdiction by introducing the amendment to Family and Guardianship Code in June 2009 [9], although this type of evidence had been already used before, and (as Stojanowska has demonstrated in her studies) the courts believe that this type of evidence gives a very high probability of determination of paternity [10]. Undoubtedly, DNA testing has revolutionized forensic hemogenetics. DNA analysis is carried out using either traditional methods or DNA polymorphism testing. The traditional method, based on genetic markers, is definitely less expensive and, as demonstrated by Turowska [11], quite effectively excludes the paternity of a man. On the other hand, when these methods do not give unambiguous answers to the question of whether a man is the father of a child, more expensive DNA polymorphism tests are carried out.

Both these methods require collecting DNA material in advance. In questioned paternity cases, typically DNA samples from mother, child and father are examined, and in uncommon situations of missing one or both parents, when the pregnancy is the result of incestuous relationship or prostitution where there is more than one alleged father, the tests are carried out within a larger group of people [12]. It should be noted that a part of biological material will be destroyed during the analysis, while the remaining part of the specimen should be destroyed after the test has been completed, although it is not explicitly stated by legal regulations. [13].

Collection of DNA samples may be more or less invasive in character. In fact DNA samples can be collected from each element of the human body, such as saliva or hair [14]. Taking such a sample is non-invasive. However, in most cases such tests are carried out on blood samples and it should be noted that taking blood should belong to a medical treatment.

Determination of paternity on the basis of DNA testing is far more applicable in legal actions taken to establish father of a child. The actions taken to determine the family relationship between a child and a woman are quite scarce, and in addition, it should be noted that according to Art. 61 [9] the mother is a woman who gave birth to the child, thus proving kinship between a woman and child is limited to evidence from the child's birth record. The problem of determining a kinship between a child and a concrete father is far more complex. First, it should be emphasized that for paternity recognition, the legal presumption plays an important role. In this regard, the legislative body has introduced a marital and parental presumption in relation to a child born during the marriage as well as for an illegitimate child. As for the child who was born during the marriage, the baby's descent from the mother's husband is presumed [15]. In contrast, when the child was born to an unmarried woman, it is presumed that the child's father is the one who had sexual intercourse with the mother on the day that was not earlier than three hundred days before the child's birth and not later than one hundred eighty-one days before it [16]. However, it should be noted that both of these presumptions are of a refutable character.

If the paternity is not due to the presumptions of Art. 62, the cessation of paternity may occur, either by judicial determination of paternity or by acknowledgement of paternity. The paternity acknowledgement is otherwise possible only to a living child, until reaching adulthood by the child. An exception to this rule is provided in Art. 75 of the Family and Guardianship Code which states that the recognition can also be made before the birth of a child; although, as Pietrzykowski points out, the legal effects of such recognition will arise only after the birth of a living child [17].

It should be noted that current legal paternity determination follows on the basis of the genuine relationship between the man and the child. Since, according to Art. 67 of the Family and Guardianship Code, paternity denial is done by demonstrating that the mother's husband is not the father of the child, not by showing the impossibility that he could be the father, as it was in the earlier regulation. Undoubtedly, such a clear exclusion of paternity is possible only on the basis of DNA testing [18]. The exception to the DNA evidence is the situation in which the mother's

husband consented to the conception of the child as a result of medical treatment [19].

Even more important is DNA determination of kinship with respect to the child's descent from a man who is not married to the mother. According to the prior regulations of the Family and Guardianship Code, the acknowledgement of a child by father was based on the statement of intent; however, the new Art. 73 of the Code states that the recognition of a child happens on the basis of the man's statement of knowledge declaring that he is the father of the child. This is also confirmed by Art. 73 § 3 of the Family and Guardianship Code, and on that basis the civil registrar refuses to accept the statements necessary for paternity recognition if the recognition is not acceptable, or if there is doubt about the child's descent. Therefore, in accordance with Polish family law, the basis for determining paternity is a real and genuine parentage of the child from the man. Moreover, in line with Art. 78 § 1 of the Code, the man who acknowledged paternity, may take an action to establish the ineffectuality of recognition within six months from the date on which he learned that the child is not his biological offspring.

The premise for the amendments to the Family and Guardianship Code was to enable a reliable determination of paternity. A reliable paternity determination without doubt is due to DNA tests, which was impossible to carry out in the 1960's when the code now in force was introduced.

According to the justification to the legal regulation, presently the rule should rely on legal paternity on an actual biological relationship between the child and the mother and father. However, it should be noted that in typical situations it is not always advisable to verify the existence of biological consanguinity, especially when the probability is high and as such is not disputable. The writers of the amendment made the assumption that "voluntary adoption of the overall responsibilities and powers resulting from the legal parenthood to an illegitimate child causes the presumption that – in typical situations – the motive for taking these responsibilities by a man to the child that was not born of his wife is his genetic relationship with the child" and "the change of the voluntary paternity concept is possible due to the development of the natural sciences and desirable in order to adopt the legal status of international standards and meet the expectations of society" [20].

At present, the ineffective recognition of paternity is regulated by Art. 78 which states that the man who accepted paternity may take action in court to establish the ineffectuality of recognition within six months from the date he learned that the child is not his biological offspring. Before introducing the amendments, according to Art. 80, a man could annul the paternity recognition of the child only if his statement of intent is defective. Therefore, the crucial difference between the old Art. 80 and the current Art. 78, besides the terminology difference that now states recognition of a child in contrast to the previous acknowledgement of paternity, is the fact that under Art. 80 the recognition of the child consists in the declaration of intent, but under Art. 78 the acknowledgement of paternity consists in the statement of the man's knowledge that the child is his biological offspring, so that the regulations concerning defects of the declaration of intent are not applicable here. According to the past Art. 80, if the child was recognized by a man, despite the fact he was not the biological father, he could refer solely to a defect in the statement of intent, error, deceit or threat in particular. So that the mere fact that he was not the biological father of the child was not a prerequisite for annulling the recognition. Consequently, the period of time he could acknowledge his recognition as ineffective was shorter.

It is therefore necessary to consider the *ratio legis* of the new regulation. According to the legal grounds for the legal memorandum "at present it is possible to reliably determine the child's parentage on the basis of DNA testing. For this reason, the principle should now be to base the legal parent-child relationship on the actual biological relationship between the child and the mother and father (...). Changing the concept of voluntary paternity determination is possible due to the development of natural sciences (DNA testing) and desirable in order to adapt a legal status of international standards and meet the expectations of society" [21].

Another reason for the possibility of ineffective paternity recognition is the fact that belonging to a particular family (coming from a particular father) is the part of the civil status registry so that the data contained in it should be true, in accordance to Art. 4 on the civil status registry. The certificate is then inaccurate if the man who recognised the child was not his biological father. The truth of this principle however is not absolute, which is evidenced by the appointment of deadlines for changing inaccurate marital status or preparing a new birth certificate of a full and final adoption.

The third reason for the introduction of such a regulation was the need to ensure the protection of the rights of men who, due to new achievements of science, could determine their genetic consanguinity. It must be then remembered that paternity determination is associated with certain obligations imposed on the parent. These are the duties related to the care of the child and their property as well as to child support. These obligations can be a particular nuisance, especially when the man is not in relationship with the child's mother, they do not live together and he does not take regular care of the child. Then the case is mainly about his child support obligation.

According to these reasons, the law has begun to change, as is visible from the Family and Guardian Code amendment of 2008, in which a statement of intent on child recognition was replaced by a

statement of knowledge. This raises a very important question whether the amendments destabilised the legal situation of the child. Until this time, a man could take judicial action for denial of paternity within only six months from the time he found out about the birth of the child, which in most cases took place when a child was still small and did not establish strong emotional relations with the father. Currently, the man can actually annul his recognition at any time (within 6 months from finding out that he is not the biological father of the child). Undoubtedly, such a radical change in the law may affect not only the family institution as such, but also the durability of the bonds in it.

Therefore, it should be considered whether genetic tests have become the crown and the only evidence in paternity cases of recognition, denial and ineffective recognition.

It seems that one must agree with the Supreme Court opinion that "evidence of DNA polymorphism examination can be regarded only as a means of verifying the presumption of paternity" [22]. The acknowledgement that DNA tests are merely a juridical attempt to verify paternity, not its legal basis, also results from the Supreme Court judgement of 19 December 2003, which pointed out that "in cases of paternity recognition, the DNA tests evidence should not aim to demonstrate the basis of the presumption provided for in Art. 85 § 1 of Family and Guardianship Code, but to refute the presumption" [24]. It also indicates that "The DNA testing evidence not only allows the exclusion of paternity, but may also be a positive proof of the circumstances posing presumption of paternity according to Art. 85 § 1 of the Code" [24]).

The particular value of the evidence of DNA testing in paternity recognition and denial court cases was pointed out many a time by the Supreme Court, even before the amendments to the Family and Guardianship Code. According to the Supreme Court ruling of 14 January 1998 "although the Code of Civil Procedure does not establish a hierarchy of the evidence (Article 244-309 CCP), as no proof involves the court and it is subject to the unbiased decision of judges (art. 233 § 1 of CCP); however, biological evidence of DNA genetic code testing (Art. 309 CCP), which results in excluding an alleged father's paternity, has special value as the evidence in child parentage cases and usually this type of evidence must be regarded as more certain than personal type of evidence (testimony of witnesses, testimony of the case parties)" [25]. Similarly, in the ruling of 4 October 2000, the Supreme Court pointed out that "undermining the probative value of biological investigation cannot be based on a subjective factor associated with the conviction of the party concerned in obtaining different results than the results of the tests performed" [26].

On many occasions, the Supreme Court also pointed out that the proof of genetic testing cannot be the only evidence pointing to the fact that a man is not the father of the child [27]. In the ruling of 4 October 2000, the Supreme Court pointed out that "in cases involving the determination of paternity, the court's decision should not be taken only on the basis of the evaluation of biological evidence without the evidence relating to basis of the factual claim related to the hypothesis f Art. 85 § 1 of the Family and Guardianship Code". Similarly, in the judgement of 16 February 2004, the Supreme Court ruled that "Implementation of biological evidence (DNA analysis) into the judicial practice of paternity cases, suitably to the development of biological sciences, cannot lead to the infringements of procedural rules by limiting the scope of the trial evidence and juridical assessment of the evidence. The decisive meaning of the new evidence does not relieve the court of its obligation to assess the overall evidence, under Art. 233 § 1 of the Code of Civil Procedure" [28].

The supporting evidence proving that DNA tests cannot be the sole and sufficient evidence in court cases for denial, determination and acknowledgement of ineffective recognition of paternity, is the fact that in these cases it is still one of the presumptions, associated with the cohabitation during the conception, should be refuted according to Art. 62 and 85 of FGC.

Summary

In conclusion, it should be noted that although DNA tests do not constitute the only evidence in procedures of establishing paternity, they undoubtedly became the evidence which allows a fair, objective determination of consanguinity. However, it should be taken into consideration that only a properly conducted test can provide explicit results on consanguinity. Sometimes, for example, due to contamination or lab technician mistake, a DNA test may be misleading. The best example is the case of 2001 from Oklahoma City where an expert with 15 years of experience falsified hundreds of genetic examinations, on which evidence 23 people were sentenced to death, and 11 of them were executed [29].

At the same time, it should be pointed out that the development of DNA diagnostics, in particular DNA tests determining consanguinity, may have a negative effect on the institution of fatherhood and the stability of the civil status of child. So that the potential confirmation of paternity requests directed by the registry office of births, marriages and deaths as well as the possibility of ineffective paternity acknowledgement to a teenage child result in infringing personal and family privacy as well as the child's well-being.

Translation *Ronald Scott Henderson*