GENETIC TESTING TO DETERMINE PATERNITY

[Updated excerpts from Trial Judges' Bench Book District Court Edition, Volume 1, Family Law. Paternity Chapter (2009), Pages 12-20 through 12-29]

1. Generally

a) Genetic paternity testing may (a) prove that the man is not the child's biological father or (b) establish the man's paternity based on a statistical probability that he is the child's biological father. [*See* G.S. § 8-50.1(b1)] (Prior to 1979, genetic test results were admissible only to exclude paternity, not to establish a putative father's paternity.)

(1) North Carolina's court of appeals and supreme court have upheld the admissibility of genetic paternity test results obtained using a mathematical formula known as Bayes theorem and a 0.5 or 50% prior, nongenetic probability of paternity. [*See Brown v. Smith*, 137 N.C.App. 160, 526 S.E.2d 686 (2000) (rejecting defendant's argument that a prior probability of 0, instead of .5, should have been used); *see also State v. Jackson*, 320 N.C. 452, 358 S.E.2d 679 (1987) (setting out the formula for determination of the paternity index and explaining application of Bayes theorem in the context of a HLA tissue typing test); *Cole v. Cole*, 74 N.C.App. 247, 328 S.E.2d 446, *aff'd*, 314 N.C. 660, 335 S.E.2d 897 (1985) (per curiam) (discussing how probability of paternity is calculated).]

(2) "Prior probability," in a paternity testing context, is a numerical representation of the nature and value of the nongenetic evidence. [*Brown v. Smith,* 137 N.C.App. 160, 526 S.E.2d 686 (2000).]

(3) The prior probability value, typically expressed as a number between 0 and 1, is used in the conversion of the combined paternity index into the probability of paternity. The number 0 indicates that paternity is factually impossible, while 1 indicates that paternity is factually certain. A neutral assessment of the nongenetic evidence would result in a prior probability of 0.5. [*Brown v. Smith,* 137 N.C.App. 160, 526 S.E.2d 686 (2000) (where expert testified that paternity by defendant was a factual possibility, it would have been error to assign 0 as the prior probability of paternity).]

2. When the court can order testing pursuant to G.S. § 8-50.1

a) In the trial of any civil action in which the question of parentage arises. [G.S. § 8-50.1(b1)]

(1) A question of parentage does not arise when paternity has already been decided in a prior proceeding. [*Heavner v. Heavner,* 73 N.C.App. 331, 326 S.E.2d 78, *review denied,* 313 N.C. 601, 330 S.E.2d 610 (1985) (parentage already decided when father pled guilty in criminal nonsupport action and admitted paternity in divorce complaint); *Williams v. Holland*, 39 N.C.App. 141, 249 S.E.2d 821 (1978) (defendant

barred by res judicata from putting paternity in issue in child support enforcement action based on prior adjudication of paternity in divorce and support proceeding).]

(2) A question of parentage does not arise in a rape prosecution as parentage is not an element of the offense. [*State v. Jackson*, 320 N.C. 452, 358 S.E.2d 679 (1987) (since G.S. § 8-50.1 was not applicable, G.S. § 8C-1, Rules 701 through 706, relating to the testimony of experts, applied to testimony of geneticist concerning results of blood typing tests).]

b) When the issue of paternity has not been litigated or judicially determined.

(1) Defendant former husband was not barred from contesting paternity of a child born during the parties' marriage and was entitled to testing because paternity had not been litigated and because defendant had never formally acknowledged paternity in the manner prescribed by G.S. § 110-132. [*Ambrose v. Ambrose*, 140 N.C.App. 545, 536 S.E.2d 855 (2000) (trial court had earlier entered "a formal order" that denied defendant's request for a paternity test and incorporated an agreement between the parties in which defendant agreed to pay child support).] [*Cf. Jones v. Patience*, 121 N.C.App. 434, 466 S.E.2d 720, *review denied*, 343 N.C. 307, 471 S.E.2d 72 (1996) (holding that in a child custody action involving a child's mother, her husband (or former husband), and a child born during their marriage, in which the mother challenges the paternity of her former husband, the mother cannot attempt to rebut the presumption that her former husband is the child's father *unless* another man has formally acknowledged paternity or has been adjudicated to be the child's father).]

c) When the putative father has never formally acknowledged paternity in the manner prescribed by G.S. § 110-132 or in another sworn written statement.

(1) Defendant former husband was not barred from contesting paternity of a child born during the parties' marriage because the issue had not been litigated and because defendant had never formally acknowledged paternity in the manner prescribed by G.S. § 110-132; defendant had a right to a genetic test under these facts. [*Ambrose v. Ambrose*, 140 N.C.App. 545, 536 S.E.2d 855 (2000).]

3. When court cannot order testing pursuant to G.S. § 8-50.1

a) When paternity has already been litigated or otherwise judicially determined.

(1) Trial court erred in ordering the parties to submit to DNA or gene testing when defendant judicially determined in a previous action to be the father of the minor child based on test results showing a 99.99% probability of paternity; prior determination res judicata. [*State ex rel. Hill v. Manning*, 110 N.C.App. 770, 431 S.E.2d 207 (1993).]

(2) Putative father's legitimation of a child by a consent order entered pursuant to G.S. § 49-12.1(c) (legitimation of child when mother married to another at time of birth) judicially determined his paternity and barred him from contesting paternity and obtaining paternity testing in a support proceeding for the child; res judicata applicable. [*State ex rel. Meza v. Meza*, 179 N.C.App. 227, 633 S.E.2d 892 (2006) (**unpublished**).]

(3) Divorce order incorporating a separation agreement in which plaintiff and defendant admitted that three children were born of their marriage, and which included provisions relating to custody and support, judicially determined all issues of paternity; denial of former husband's request for paternity testing affirmed. [*Rice v. Rice*, 147 N.C.App. 505, 555 S.E.2d 924 (2001).]

(4) New York paternity determination entitled to full faith and credit in North Carolina; North Carolina district court had no authority to invite relitigation of the paternity issue by ordering blood testing. [*New York ex rel. Andrews v. Paugh*, 135 N.C.App. 434, 521 S.E.2d 475 (1999); *see also* G.S. § 110-132.1 providing for full faith and credit to paternity determination by another state).]

(5) A default judgment entered against the putative father conclusively established his paternity so that res judicata barred the granting of a later motion for blood testing. [*Garrison ex rel. Chavis v. Barnes*, 117 N.C.App. 206, 450 S.E.2d 554 (1994).]

(6) Order of paternity entered after mother and defendant filed affirmations of paternity pursuant to G.S. §§ 110 -132 and 110-133 judicially established that defendant fathered the child involved in later contempt proceeding; defendant could not, twelve years later, move for a blood test.[*Sampson County ex rel. McNeill v. Stevens*, 101 N.C.App. 719, 400 S.E.2d 776 (1991); *see also Person County* Replacement 2009 Chapter 12-24 *ex rel. Lester v. Holloway*, 74 N.C.App. 734, 329 S.E.2d 713 (1985) (where paternity judgment entered pursuant to mother's affirmation of paternity and father's acknowledgment of paternity, and father executed a sworn voluntary child support agreement, he could not later attack the paternity judgment by a motion for a blood grouping test in a proceeding related solely to support).]

(7) Trial court was correct to deny defendant mother's motion for paternity testing filed in a custody action two years after court entered a custody order in which the court made a finding of fact that plaintiff was the father of the child. [*Helms v. Landry,* 363 N.C. 738, 686 S.E.2d 674, *reversing* 194 N.C. App. 787, 671 S.E.2d 347 (2009).]

b) When the father has admitted paternity in a sworn statement.

(1) Where father admitted in verified complaint for absolute divorce and in an incorporated separation agreement that three children were born of the marriage, denial of father's motion for paternity testing affirmed. [*Rice v. Rice*, 147 N.C.App. 505, 555 S.E.2d 924 (2001).]

(2) Father was barred from raising the issue of paternity by his own allegation in his divorce complaint that child was born of his marriage to defendant; trial court erred in ordering blood grouping test. [*Heavner v. Heavner,* 73 N.C.App. 331, 326 S.E.2d 78, *review denied,* 313 N.C. 601, 330 S.E.2d 610 (1985); *but see Guilford County ex rel. Gardner v. Davis*, 123 N.C.App. 527, 473 S.E.2d 640 (1996) (parentage of child not an issue actually litigated and necessary to the prior action for divorce between child's mother and her husband, the presumed father, so putative father could not assert collateral estoppel to bar a subsequent action to establish his paternity of the child).]

c) When there is a pending Rule 60(b) motion to set aside an order of paternity.

(1) A party must obtain relief from an acknowledgment of paternity and voluntary support agreement pursuant to a trial court's ruling on a Rule 60(b) motion before the trial

court can grant a motion for paternity testing. [*State ex rel. Bright v. Flaskrud*, 148 N.C.App. 710, 559 S.E.2d 286 (2002); *State ex rel. McKinney v. Lotharp*, 161 N.C.App. 541, 589 S.E.2d 751 (2003) (**unpublished**).]

(2) Judgment of paternity must be set aside before complainant is entitled to an order for blood testing under G.S. § 8-50.1(b1). [3 Lee's North Carolina Family Law § 16.18a (5th Ed. 2002).]

(3) For more on setting aside a paternity judgment pursuant to Rule 60(b), *see* II.P at page 38.

d) When a putative father seeks to compel testing of mother's husband and husband does not deny paternity of the child born during his marriage to the mother of the child.

(1) The North Carolina Supreme Court has construed a former version of G.S. § 8-50.1 as not conferring standing upon an alleged parent (the putative father) to compel a presumed father (husband) to submit to a blood test to determine the parentage of a child born during the marriage of the husband and mother. [*Johnson v. Johnson*, 343 N.C. 114, 468 S.E.2d 59 (1996) (per curiam) (adopting dissent in 120 N.C.App. 1, 461 S.E.2d 396 (1995)); *see Jeffries v. Moore*, 148 N.C.App. 364, 559 S.E.2d 217 (2002) (calling the holding in *Johnson* "very narrow" and noting that "*Johnson* merely placed a restriction upon an alleged parent's ability to compel blood testing of a presumed father as a means to challenge the presumption of legitimacy pursuant to N.C.G.S. § 8-50.1 - as the statute read when the action originated").]

(2) Note: G.S. § 8-50.1(b1), requiring testing of mother, child and alleged father defendant [and not mother's husband if he is not a defendant in a civil action], may be inconsistent with 42 U.S.C. § 666(a)(5)(B)(i)), which requires states to adopt laws or procedures requiring the genetic testing, upon the request of a party, of the child and *all* parties in a paternity or child support proceeding (including a mother's husband when the husband is the child's presumed father) and the requesting party makes a sworn statement setting forth facts establishing a reasonable possibility that a party is or is not the child's father.

4. Costs of testing

a) The party who requests the genetic testing generally is required to pay the cost of the blood or genetic testing. [G.S. § 8-50.1(b1)]

b) Due process, however, requires that the state pay the cost of genetic paternity testing when an indigent putative father requests genetic testing in a civil action to establish paternity. [*See Little v. Streater*, 452 U.S. 1 (1981) (application of a Connecticut general statute to deny appellant blood grouping tests because of his lack of financial resources violated the due process guarantee of the Fourteenth Amendment).]

c) Federal funding is available to pay the cost of genetic testing in civil paternity actions brought by a state or county child support enforcement (IV-D) agency on behalf of a child, the child's mother, or the putative father. [45 C.F.R. 304.20(b)(2)(i)(B) (provision for federal funding).] Invoices for genetic testing are admissible as evidence without foundation testimony

of a third party and are prima facie evidence of the cost of testing. [G.S. § 49-14(f)] d) The court may, in its discretion, tax the expense of genetic testing as costs in the action. [G.S. § 8-50.1(b1)]

5. Admitting results of tests ordered by a court pursuant to G.S. § 8-50.1

a) When the court orders testing pursuant to G.S. § 8-50.1(b1), the results of the tests may be admitted into evidence under a less formal procedure. [*Columbus County ex rel. Brooks v. Davis*, 163 N.C.App. 64, 592 S.E.2d 225 (2004).]

b) The less formal procedure is set out in G.S. § 8-50.1(b1), which provides that verified documentary evidence is sufficient to establish the chain of custody of the blood specimens that were tested.

c) If no party files with the court and serves on the other party or parties at least 10 days before hearing or trial a written objection to admission of the blood or genetic test results contesting the procedures or results of the test and stating the basis for the objection, the test results are admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy. [G.S. § 8-50.1(b1)]

d) Test results are admissible upon documentary proof of chain of custody only if the testing was ordered by the court upon motion of a party and the other requirements of G.S. § 8-50.1(b1) are met.

(1) When mother's husband asked for paternity testing and paid for it upon being contacted by a child support enforcement agency, the resulting test report did not qualify for admission under the relaxed evidentiary requirements of G.S. § 8-50.1(b1); trial court properly refused to allow it into evidence. [*Catawba County ex rel. Kenworthy v. Khatod*, 125 N.C.App. 131, 479 S.E.2d 270 (1997).]

(2) When chain of custody reports were not verified as required by the statute, the reports were not admissible under G.S. § 8-50.1(b1). [*Rockingham County Dep't of Social Services ex rel. Shaffer v. Shaffer*, 126 N.C.App. 197, 484 S.E.2d 415 (1997).]

6. Effect of the results of tests conducted pursuant to G.S. § 8-50.1

a) When genetic paternity testing has been ordered pursuant to G.S. § 8-50.1(b1) and the test results are admitted as evidence, the test results create a presumption (rebuttable by clear, cogent, and convincing evidence) that the putative father is:

(1) The child's father if all of the genetic test results indicate that the putative father is not excluded as the child's father and that the probability of his paternity of the child is at least 97%. [G.S. § 8-50.1(b1)(4); *see Nash County Dep't of Social Services ex rel. Williams v. Beamon*, 126 N.C.App. 536, 485 S.E.2d 851, *review denied*, 493 S.E.2d 655 (1997) (where court held, without addressing the applicability of G.S. § 8-50.1(b1), that a putative father's testimony that he did not know the mother, that he did not have sexual relations with her, nor recall meeting her, was sufficient to rebut the presumption of paternity created by the 99.96% probability of paternity test result).]

(2) Not the child's father if all of the genetic test results indicate that the probability of his paternity of the child is less than 85%. [G.S. § 8-50.1(b1)(1)] Replacement 2009 Chapter 12-27

b) The results of genetic tests ordered pursuant to G.S. § 8-50.1(b1) may be admitted as evidence on the issue of paternity but do not create any presumption with respect to paternity if:

(1) The results of two or more genetic tests are inconsistent or experts disagree in their findings or conclusions based on genetic testing; or

(2) The test results do not exclude the putative father and the probability of his paternity is between 85% and 97%. [G.S. § 8-50.1(b1) (2), (3)]

c) The presumptions set out above do not apply when the genetic testing was not ordered pursuant to G.S. § 8-50.1(b1). [*See Catawba County ex rel. Kenworthy v. Khatod*, 125 N.C.App. 131, 479 S.E.2d 270 (1997).]

7. Admitting results of tests not ordered by the court

a) If the test results do not meet the requirements for admission under G.S. § 8-50.1(b1), the rule of *Lombroia v. Peek*, 107 N.C.App. 745, 421 S.E.2d 784 (1992), applies and the party seeking to admit the results must present independent evidence of the chain of custody. [*Columbus County ex rel. Brooks v. Davis*, 163 N.C.App. 64, 592 S.E.2d 225 (2004); *Catawba County ex rel. Kenworthy v. Khatod*, 125 N.C.App. 131, 479 S.E.2d 270 (1997); *Lombroia v. Peek*, 107 N.C.App. 745, 421 S.E.2d 784 (1992).]

b) The independent evidence must accurately identify the substance analyzed by proving a chain of custody that establishes "that the substance came from the source claimed and that its condition was unchanged." [*Lombroia v. Peek*, 107 N.C.App. 745, 421 S.E.2d 784 (1992) (citations omitted).]

c) The chain of custody requirement in *Lombria* can be met:

(1) Through competent evidence regarding the "chain of possession, transportation and safekeeping of the blood sample sufficient to establish a likelihood that the blood tested was in fact blood drawn" from the alleged parent. [*Lombroia v. Peek*, 107 N.C.App. 745, 421 S.E.2d 784 (1992) (trial court erred in admitting blood test in paternity action where only evidence as to proper chain of custody was expert witness who "had no personal knowledge" concerning the test).]

(2) By sworn affidavits or witness testimony from the people involved in the various stages of specimen custody and collection. [*Columbus County ex rel. Brooks v. Davis*, 163 N.C.App. 64, 592 S.E.2d 225 (2004) (evidence not sufficient to establish chain of custody for samples from putative father and child when unverified client authorization forms were only evidence that samples were from those parties; evidence not sufficient to establish chain of custody for sample from mother when no testimony or affidavit from person who performed the DNA tests at the lab).]

8. Expert testimony with respect to test results

a) A qualified expert witness may testify in a criminal action with respect to the meaning or significance of the results of a genetic paternity test even though the witness did not personally perform the test. [*See State v. Green*, 55 N.C.App. 255, 284 S.E.2d 688 (1981) (relying on language in G.S. § 8-50.1(a)).]

b) An expert, however, may not offer opinion testimony that the putative father is, in fact, the child's biological father. [*State v. Jackson*, 320 N.C. 452, 358 S.E.2d 679 (1987) (a genetics expert may not express an opinion on who is a child's father because the opinion does not aid the jury); *Brooks v. Hayes*, 113 N.C.App. 168, 438 S.E.2d 420 (1993), *review denied*, 335 N.C. 766, 442 S.E.2d 508, 509 (1994) (jury is capable of deciding if a defendant is a child's father once the expert explains the scientific data and provides the resulting probability figures); *Lombroia v. Peek*, 107 N.C.App. 745, 421 S.E.2d 784 (1992) (error for doctor to testify that, in his opinion, "it's extremely likely" that defendant fathered the child; a jury is equally capable of weighing the genetic factors along with the nongenetic circumstances to determine the ultimate probability of paternity); *State ex rel. Williams v. Coppedge*, 105 N.C.App. 470, 414 S.E.2d 81, *rev'd on other grounds*, 332 N.C. 654, 422 S.E.2d 691 (1992) (proffer of geneticist's opinion as to the probability of paternity would have gone beyond testimony as to scientific information and would have trampled upon the jury's domain).]

9. Use of G.S. § 1A-1, Rule 35 to order testing of mother's husband

c) A district court may have authority to order genetic paternity testing of the mother's husband pursuant to G.S. § 1A-1, Rule 35. [*Jeffries v. Moore,* 148 N.C.App. 364, 371 n.3, 559 S.E.2d 217 (2002) (Greene, J., concurring) (discussing in dicta that "there appears to be authority under Rule 35" for such testing as long as the mother's husband is a party to the action).]

(a) Testing in a IV-D case

a) A IV-D agency may order testing by administrative subpoena.

(1) In a civil action to establish paternity brought by a state or county child support enforcement (IV-D) agency on behalf of a child, the child's mother, or the putative father, the IV-D agency may, without obtaining a court order, issue a subpoena requiring the child, the child's mother, the child's putative father, and the mother's husband (if he is the child's presumed father) to appear and submit to blood or genetic testing to establish paternity. [G.S. § 110-132.2(a)]

(2) The subpoena must be served pursuant to G.S. § 1A-1, Rule 4. [G.S. § 110-132.2(a)]

(3) A person who is subpoenaed may contest the subpoena within 15 days of receipt of the subpoena by requesting a hearing before the district court in the county in which the IV-D agency is located. Notice of the hearing must be served on all parties pursuant to G.S. § 1A-1, Rule 4. [G.S. § 110-132.2(b)]

(4) The court must hold a hearing and make a determination within 30 days as to whether the petitioner must comply with the subpoena to undergo testing. [G.S. § 110-132.2(b)] A person who willfully refuses to comply with the subpoena or a court order requiring compliance with the subpoena may be held in civil or criminal contempt. [G.S. § 110-132.2(a)]

(5) A party may contest the results of a genetic test conducted pursuant to G.S. § 110-132.2. If a party contests the test results and pays the cost of additional testing, the IV-D agency must obtain additional testing. [G.S. § 110-132.2(a)]

(6) The results of genetic testing conducted pursuant to G.S. § 110-132.2 are admissible as evidence at trial of a civil action to establish paternity by stipulation of the parties or by evidence establishing a chain of custody of the genetic samples and authentication of the test results and lab records. [*See Lombroia v. Peek*, 107 N.C.App. 745, 421 S.E.2d 784 (1992) (setting out procedure for admission of test results other than those obtained pursuant to G.S. § 8-50.1(b1).] The rules regarding the admissibility of genetic test results under G.S. 8-50.1(b1) (see section II.I at page 20) do not apply with respect to genetic paternity tests conducted pursuant to an administrative subpoena issued under G.S. § 110-132.2. [*See Catawba County ex rel. Kenworthy v. Khatod*, 125 N.C.App. 131, 479 S.E.2d 270 (1997).]

b) When a determination of paternity is pending in a IV-D case, the court must enter a temporary child support order against the putative father upon motion and clear, cogent, and convincing evidence that the putative father is the child's father. The results of a genetic paternity test are clear, cogent, and convincing evidence of paternity if they indicate at least a 97% probability of paternity. [G.S. § 49-14(f)]

West's North Carolina General Statutes Annotated Currentness
Chapter 8. Evidence (Refs & Annos)
Article 7. Competency of Witnesses
§ 8-50.1. Competency of blood tests; jury charge; taxing of expenses as costs

(a) In the trial of any criminal action or proceeding in any court in which the question of parentage arises, regardless of any presumptions with respect to parentage, the court before whom the matter may be brought, upon motion of the State or the defendant, shall order that the alleged-parent defendant, the known natural parent, and the child submit to any blood tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage and which are reasonably accessible to the alleged-parent defendant, the known natural parent, and the child. The results of those blood tests and comparisons, including the statistical likelihood of the alleged parent's parentage, if available, shall be admitted in evidence when offered by a duly qualified, licensed practicing physician, duly qualified immunologist, duly qualified geneticist, or other duly qualified person. Upon receipt of a motion and the entry of an order under the provisions of this subsection, the court shall proceed as follows:

(1) Where the issue of parentage is to be decided by a jury, where the results of those blood tests and comparisons are not shown to be inconsistent with the results of any other blood tests and comparisons, and where the results of those blood tests and comparisons indicate that the alleged-parent defendant cannot be the natural parent of the child, the jury shall be instructed that if they believe that the witness presenting the results testified truthfully as to those results, and if they believe that the tests and comparisons were conducted properly, then it will be their duty to decide that the alleged-parent is not the natural parent; whereupon, the court shall enter the special verdict of not guilty; and

(2) By requiring the State or defendant, as the case may be, requesting the blood tests and comparisons pursuant to this subsection to initially be responsible for any of the expenses thereof and upon the entry of a special verdict incorporating a finding of parentage or nonparentage, by taxing the expenses for blood tests and comparisons, in addition to any fees for expert witnesses allowed per G.S. 7A-314 whose testimonies supported the admissibility thereof, as costs in accordance with G.S. 7A-304; G.S. Chapter 6, Article 7; or G.S. 7A-315, as applicable.

(b) Repealed by Laws 1993, c. 333, § 2 eff. Aug. 1, 1994.

(b1) In the trial of any civil action in which the question of parentage arises, the court shall, on motion of a party, order the mother, the child, and the alleged father-defendant to submit to one or more blood or genetic marker tests, to be performed by a duly certified physician or other expert. The court shall require the person requesting the blood or genetic marker tests to pay the costs of the tests. The court may, in its discretion, tax as part of costs the expenses for blood or genetic marker tests and comparisons. Verified documentary evidence of the chain of custody of the blood specimens obtained pursuant to this subsection shall be competent evidence to establish the chain of custody. Any party objecting to or contesting the procedures or results of the blood or genetic marker tests shall file with the court written objections setting forth the basis

for the objections and shall serve copies thereof upon all other parties not less than 10 days prior to any hearing at which the results may be introduced into evidence. The person contesting the results of the blood or genetic marker tests has the right to subpoena the testing expert pursuant to the Rules of Civil Procedure. If no objections are filed within the time and manner prescribed, the test results are admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy. The results of the blood or genetic marker tests shall have the following effect:

(1) If the court finds that the conclusion of all the experts, as disclosed by the evidence based upon the test, is that the probability of the alleged parent's parentage is less than eighty-five percent (85%), the alleged parent is presumed not to be the parent and the evidence shall be admitted. This presumption may be rebutted only by clear, cogent, and convincing evidence;

(2) If the experts disagree in their findings or conclusions, the question of paternity shall be submitted upon all the evidence;

(3) If the tests show that the alleged parent is not excluded and that the probability of the alleged parent's parentage is between eighty-five percent (85%) and ninety-seven percent (97%), this evidence shall be admitted by the court and shall be weighed with other competent evidence;

(4) If the experts conclude that the genetic tests show that the alleged parent is not excluded and that the probability of the alleged parent's parentage is ninety-seven percent (97%) or higher, the alleged parent is presumed to be the parent and this evidence shall be admitted. This presumption may be rebutted only by clear, cogent, and convincing evidence.

CREDIT(S)

Added by Laws 1949, c. 51. Amended by Laws 1965, c. 618; Laws 1975, c. 449, §§ 1, 2; Laws 1979, c. 576, § 1; Laws 1993, c. 333, § 2, eff. Oct. 1, 1993; Laws 1993 (Reg. Sess., 1994), c. 733, § 1, eff. Aug. 1, 1994.

Rules Civ.Proc., G.S. § 1A-1, Rule 35

West's North Carolina General Statutes Annotated Currentness

Chapter 1A. Rules of Civil Procedure (Refs & Annos)
Article 5. Depositions and Discovery
Rule 35. Physical and mental examination of persons

(a) Order for examination.--When the mental or physical condition (including the blood group) of a party, or of an agent or a person in the custody or under the legal control of a party, is in controversy, a judge of the court in which the action is pending as defined by Rule 30(h) may order the party to submit to a physical or mental examination by a physician or to produce for examination his agent or the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of examining physician.--

(1) If requested by the party against whom an order is made under **Rule 35**(a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After such request and delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has

examined or may thereafter examine him in respect of the same mental or physical condition.

(3) This subsection applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subsection does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

CREDIT(S)

Added by Laws 1967, c. 954, § 1. Amended by Laws 1975, c. 762, § 2.

COMMENT

Comment to this Rule as Originally Enacted. -- *Section (a).* -- This section differs from federal **Rule 35**(a) only in the inclusion of certain changes proposed by the Advisory Committee in its 1955 report. Such inclusions make clear the right to require a blood test in an action in which blood relationships are in controversy. The provision for the examination of a person in the custody or under the legal control of a party will permit the examination of a minor or incompetent.

This procedure is new to North Carolina practice. However, the right to require the plaintiff in a civil action to recover personal injuries to submit to a physical examination was recognized in Flythe v. Eastern Carolina Coach Co., 195 N.C. 777, 143 S.E. 865 (1928). Section 8-50.1 authorizes the court in actions in which the question of paternity arises to order a blood test.

Section (b). -- This section permits the party examined to obtain the report of the physician making the examination. Since the party causing the examination could not obtain a copy of such a report made at the instance of the examined party because he might claim the report was privileged, this rule expressly provides that after the examined party requests a copy of the report of the examination made at the instance of the party causing the examination, the latter is entitled upon request to receive a report from the party examined of any examination previously or thereafter made concerning the same mental or physical examination.

The court is given the discretionary power to order that a copy of the report be furnished to any other party to the action.

Comment to the 1975 Amendment. -- North Carolina adopted this provision in this form in advance of its adoption as a part of the federal rules. The provisions bringing an agent of a party within the scope of the rule is the only present change aside from the addition of subsection (b)(3).

Subsection (b)(3). -- This new subsection removes any possible doubt that reports of examination may be obtained although no order for examination

has been made under **Rule 35**(a). Examinations are very frequently made by agreement and sometimes before the party examined has an attorney. The federal courts have uniformly ordered that reports be supplied and it appears best to fill the technical gap in the present rule.
The subsection also makes clear that reports of examining physicians are discoverable not only under **Rule 35**(b) but under other rules as well. To be sure, if the report is privileged, then discovery is not permissible under any rule other than **Rule 35**(b) and it is permissible under **Rule 35**(b) only if the party requests a copy of the report of examination made by the other party's doctor. But if the report is unprivileged and is subject to discovery under the provisions of rules other than **Rule 35**(b)--such as Rules 34 or 26(b)(3) or (4)--discovery should not depend upon whether the person examined demands a copy of the report.

Rules Civ. Proc., G.S. § 1A-1, **Rule 35,** NC ST RCP § 1A-1, **Rule 35**
Current through Chapter 18.

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