IN THE SUPREME COURT OF THE STATE OF HAWAI'I

---o0o---

JANE DOE, Plaintiff-Appellant-Respondent,

vs.

JOHN DOE, Defendant-Appellee-Petitioner,

and

JOHN DOE II, Defendant-Appellee-Respondent.

NO. 22172

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(FC-P NO. 96-032K)

JULY 10, 2002

MOON, C.J., LEVINSON, AND NAKAYAMA, JJ.;
RAMIL AND ACOBA, JJ., NOT JOINING[1]

OPINION OF THE COURT BY MOON, C.J.

Defendant-appellee-petitioner John Doe [hereinafter, Alleged Father] timely petitioned this court for a writ of certiorari, which we granted, to review the opinion of the Intermediate Court of Appeals (ICA) in Doe v. Doe, No. 22172

[1] A separate opinion or opinions will be filed subsequently.

(Haw. Ct. App. Feb. 22, 2001) (ICA Op.). Alleged Father contends that the ICA erred in holding that Hawai‘i Revised Statutes (HRS) chapter 584, Hawaii's version of the Uniform Parentage Act (1973) [hereinafter, UPA], prevents him from asserting defenses based upon res judicata and equitable estoppel in a paternity action. We agree with Alleged Father. For the reasons discussed herein, we reverse in part and affirm in part the ICA's decision.

I. BACKGROUND

A. Family Court Proceedings

In April 1987, plaintiff-appellant Jane Doe [hereinafter, Mother] married defendant-appellee John Doe II [hereinafter, Presumed Father]. During their marriage, Mother gave birth to a daughter (Daughter) in 1988 and to plaintiff John Doe III [hereinafter, Son] on July 7, 1992. Mother and Presumed Father were divorced pursuant to a March 22, 1994 Divorce Decree (Divorce Decree or Decree). The Divorce Decree incorporated a "Marital Settlement and Child Custody Agreement[,]" which stated that "[t]here are two children[,] the issue of this marriage[,] who are minors and who require support to wit: [Daughter and Son]." The Decree awarded Mother physical custody of Daughter and Son and contained a detailed visitation schedule. The Decree also ordered Presumed Father to pay child support and contained detailed provisions for insurance, educational, and other support. Between August 1994 and April 1996, Mother and Presumed

Father each filed numerous motions in the family court related to custody, visitation, and support disputes.

On April 22, 1996, over two years after entry of the Divorce Decree, Mother filed a "Petition for Paternity, Custody and Other Relief[,]" pursuant to HRS chapter 584, asserting that Alleged Father is Son's natural father. Mother sought, inter alia: (1) an order for genetic testing of Alleged Father, Mother, and Son in accordance with HRS § 584-11 (Supp. 1995), discussed infra; (2) a judgment establishing Alleged Father as Son's natural father; (3) orders awarding visitation to Alleged Father "in accordance with the best interests of the minor child" and modifying "any conflicting orders of the [c]ourt"; and (4) orders requiring Alleged Father to pay child support. Alleged Father denied the allegations in Mother's petition and asserted defenses of res judicata and estoppel. Presumed Father also asserted the same defenses. Both defendants filed motions to dismiss the action on these grounds, which the family court initially denied without prejudice.

On July 29, 1996, Mother moved to have Son joined as a party plaintiff and for appointment of a guardian ad litem for Son, which the family court granted. In his first report to the court, the guardian ad litem opined that it would be in the best interests of Daughter and Son for genetic tests to be completed and sealed by the court, to be released "only in accordance with

further recommendations made by the children's therapists in consultation with" the guardian ad litem.

Following evidentiary proceedings that took place on November 20 and 21, 1997 and January 15, 1998, the family court issued an order on March 8, 1998, denying Mother's request for genetic testing.[2] The family court ruled that Mother was barred from pursuing the paternity issue because: (1) the issue of Son's legitimacy had already been determined by the Divorce Decree and was barred by res judicata;[3] and (2) Mother was

---

[2] We note here that Mother opposed the evidentiary proceedings on the ground that HRS § 584-11 mandated that genetic testing be performed and did not permit the family court to exercise its discretion in deciding whether to order testing. Mother raised this issue in her appeal to the ICA, which decided it in her favor. As will be discussed in Section III.B.1 infra, Mother is correct on this point.

[3] As it has been used in recent jurisprudence, the doctrine of res judicata generally encompasses two concepts: claim preclusion and issue preclusion (or collateral estoppel). Dorrance v. Lee, 90 Hawai'i 143, 148, 976 P.2d 904, 909 (1999). Claim preclusion prohibits a party from relitigating a previously adjudicated cause of action. Id. Claim preclusion may also prohibit a party from relitigating any claim "with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." Restatement (Second) Judgments § 24(1) (1980); see also Silver v. Queen's Hospital, 63 Haw. 430, 437-38, 629 P.2d 1116, 1122 (1981) (plaintiff precluded from bringing claims in state court where the plaintiff could have brought the same claims in an earlier federal suit arising from the same series of events). Issue preclusion, or collateral estoppel, on the other hand, applies to a subsequent suit between the parties or their privies on a different cause of action and prevents the parties or their privies from relitigating any issue that was actually litigated and finally decided in the earlier action. See Dorrance, 90 Hawai'i at 148, 976 P.2d at 909.

Courts sometimes use the term res judicata when referring to claim preclusion, see, e.g., In re Herbert M. Dowsett Trust, 7 Haw. App. 640, 644 & n.2, 791 P.2d 398, 401 & n.2 (1990), and, at other times, have used the term res judicata when applying the doctrine of issue preclusion, or collateral estoppel. See, e.g., State by Price v. Magoon, 75 Haw. 164, 190-91, 858 P.2d 712, 725 (1993). In this opinion, we use the term res judicata or "preclusion" when referring generally to both doctrines of issue preclusion (or collateral estoppel) and claim preclusion, and we use the specific term when appropriate.

equitably estopped from asserting a position inconsistent from the positions she had taken in numerous other motions in the custody and support proceedings wherein she asserted that Presumed Father was the father of Son. The family court also ruled that Son was in privity with Mother as to his interest in the divorce proceeding and was, therefore, precluded from pursuing the paternity action as well. Final judgment was entered on November 25, 1998, and Mother timely appealed. Son did not cross appeal. Presumed Father filed a notice with this court stating that he did not intend to participate in defending the judgment on appeal.

B. ICA Proceedings

On appeal, assigned to the ICA, Mother asserted several points of error, many of which need not be addressed because of our disposition of this case. In relevant part, Mother contended that: (1) in Hawai‘i, a chapter 584 proceeding is the exclusive means by which paternity can be determined; (2) her paternity claim was not barred by the doctrine of claim preclusion because claim preclusion applies only when the same parties were involved in the prior proceeding, and Alleged Father was not a party to the earlier divorce proceeding; (3) issue preclusion, or collateral estoppel, did not apply because the issue of paternity was never actually litigated in the divorce proceeding; and

(4) the application of equitable estoppel to her case was unfair to Son.

The ICA essentially agreed with Mother. Basically, the ICA reasoned that Hawaii's adoption of chapter 584 preempted any defenses based upon res judicata or equitable estoppel and that, therefore, Alleged Father could not assert these defenses. In a dissenting opinion, Judge Lim concluded that Blackshear v. Blackshear, 52 Haw. 480, 478 P.2d 852 (1971), discussed infra, was dispositive and that, according to Blackshear, Mother was precluded from relitigating the issue of paternity because the issue had already been decided by the Divorce Decree. Alleged Father timely applied for a writ of certiorari, which this court granted on March 29, 2001.

II. STANDARDS OF REVIEW

A. Writ of Certiorari

In deciding whether to grant a petition for certiorari, this court reviews ICA decisions for (1) grave errors of law or of fact, or (2) obvious inconsistences in the decision of the ICA with that of the supreme court, federal decisions, or its own decision, and the magnitude of such errors or inconsistencies dictates the need for further appeal. See HRS § 602-59(b) (1993). The acceptance or denial of a petition by this court is discretionary. See HRS § 602-59(a).

B. Questions of Law

Interpretation of the relevant statutes and the issue whether the defenses of res judicata and equitable estoppel can be applied in a chapter 584 paternity proceeding are questions of law. This court reviews questions of law de novo. See Gump v. Wal-Mart Stores, Inc., 93 Hawai‘i 417, 420, 5 P.3d 407, 410 (2000).

III. DISCUSSION

A. Whether HRS Chapter 584 Preempts Defenses Based upon Res Judicata and Equitable Estoppel

In Blackshear, the parties' August 1964 divorce decree incorporated an agreement providing for the payment by the former husband of child support for the four minor children of the marriage. Blackshear, 52 Haw. at 480-81, 478 P.2d at 853. Approximately three years later, in the context of litigation concerning modification of support payments, the former husband sought to introduce evidence that two of the four children were not fathered by him. See id. at 481, 478 P.2d at 853. The circuit court determined that the legitimacy of the children was "res judicata." Id. The former husband appealed, and this court held that "[a]ppellant's position as to [the children's] parentage is without merit, this issue having been finally adjudicated below." Id. Thus, at the time that Blackshear was decided in 1971, a party could be precluded from relitigating the

issue of paternity based upon a prior determination of paternity in a divorce decree.

In 1975, the legislature adopted Hawaii's version of the UPA. See 1975 Haw. Sess. L. Act 66, at 115-26 (now codified at HRS chapter 584). The ICA concluded that, because HRS § 584-6 (1993) "permits 'the child's natural mother, whether married or unmarried at the time the child was conceived,' to bring a paternity action 'within three years after the child reaches the age of majority[,]'" the law established by Blackshear had been displaced. See ICA Op. at 25 (quoting HRS § 584-6). The ICA reasoned that the legislative policy underlying chapter 584 establishes that "a presumptively legitimate child of questionable parentage should know the truth of her or his parentage -- both, if there is a difference, her or his natural and her or his legal parentage." ICA Op. at 21 (quoting Doe v. Roe, 9 Haw. App. 623, 626-27, 859 P.2d 922, 924 (1993)) (brackets omitted). The ICA further concluded that the foregoing policy "supersedes all of the equitable estoppel considerations asserted by Presumed Father and the family court." ICA Op. at 21. We disagree.

We begin by reviewing the relevant statutory provisions. HRS § 584-1 (1993) provides in relevant part:

> **Parent and child relationship defined.** As used in this chapter, "parent and child relationship" includes the legal relationship existing between . . . a child and father whose relationship as parent and child is established under this chapter . . . incident to which the law confers or imposes rights, privileges, duties, and obligations.

(Underscored emphasis added.) HRS § 584-3 (1993) provides in relevant part:

> **How parent and child relationship established.** The parent and child relationship between a child and:
>
> . . . .
>
> (2) The natural father may be established under this chapter[.]

(Underscored emphasis added.) Thus, chapter 584 provides a vehicle by which paternity may be established. By their plain language, HRS §§ 584-1 and 584-3 do not state that chapter 584 is the exclusive means by which paternity must be established. Accordingly, chapter 584 is not the exclusive means by which a determination of paternity can be made. Other states that have adopted the UPA have expressly reached similar conclusions. See, e.g., Division of Child Support Enforcement ex. rel. Blake v. Myrks, 606 A.2d 748, 751 (Del. 1992) (concluding that "the [Delaware Parentage Act] is not the exclusive means of establishing paternity"); In re Paternity of JRW and KB, 814 P.2d 1256, 1261 (Wyo. 1991) (rejecting the appellant's contention that the Wyoming Parentage Act "invalidate[s] any other paternity determination not made in strict compliance with the Act"); State ex rel. Daniels v. Daniels, 817 P.2d 632, 635 (Colo. Ct. App. 1991) (holding that "the UPA does not mandate the exclusion of the doctrine of res judicata." (Emphasis omitted.)).

The ICA determined that, because HRS § 584-6 permits a mother to bring a paternity action any time before the child reaches age twenty-one, a defendant cannot assert a defense based upon preclusion. HRS § 584-6 provides in relevant part:

> (a) A child, or guardian ad litem of the child, the child's natural mother, whether married or unmarried at the time the child was conceived, or her personal representative or parent if the mother has died; or a man alleged or alleging himself to be the natural father, or his personal representative or parent if the father has died; or a presumed father as defined in section 584-4, or his personal representative or parent if the presumed father has died; or the child support enforcement agency, may bring an action for the purpose of declaring the existence or nonexistence of the father and child relationship within the following time periods:
> . . . .
> (2) If the child has not become the subject of an adoption proceeding, within three years after the child reaches the age of majority . . . .

(Emphases added). This provision merely creates a statutory claim for relief in accordance with the rights, obligations, and procedures outlined in chapter 584. Nothing in the statute displaces common law doctrines of preclusion and estoppel any more than any other claim for relief established by other statutes. Accordingly, we disagree that HRS § 584-6 permits relitigation of the issue of paternity where it has already been determined in a prior proceeding.

Our conclusion that an individual can be precluded or estopped from relitigating the issue of paternity on the basis of a previous judgment is consistent with the case law in nearly every other jurisdiction that has adopted the UPA. See State ex. rel. Henderson v. Tolver, 639 So. 2d 1371, 1373 (Ala. Ct. Civ.

App. 1994) (mother precluded from asserting that an individual other than her former husband was the father of two children where the prior divorce decree referred to the children as "born of the marriage"); In re Marriage of Hotz, 214 Cal. Rptr. 658, 659 (Ct. App. 1985) (former husband precluded from denying paternity in a post-divorce support proceeding where the divorce decree declared that the child was the issue of the marriage); Daniels, 817 P.2d at 633-35 (former husband precluded from denying paternity in a post-divorce support proceeding where the earlier divorce decree declared that the children were the result of the marriage); Myrks, 606 A.2d at 749-50 (individual who stipulated to paternity in an earlier support proceeding barred from subsequently attempting to disestablish paternity under Delaware Parentage Act procedures); In re Marriage of Klebs, 554 N.E.2d 298, 300-303 (Ill. App. Ct. 1990) (mother collaterally estopped from reopening divorce decree which identified child as "born to the marriage" where mother's motive was solely to bring about paternity petition to disestablish paternity in former husband); In re Marriage of Ross, 772 P.2d 278, 283 (Kan. Ct. App. 1989) (mother who claimed former husband was the father of a child in an earlier divorce proceeding was equitably estopped from subsequently pursuing a paternity petition against a different individual), affirmed in part and reversed in part on other grounds, 783 P.2d 331 (Kan. 1990); Markert v. Behm, 394

N.W.2d 239, 241-42 (Minn. Ct. App. 1986) (mother equitably and collaterally estopped from pursuing paternity action against a different man where she had previously testified that her former husband was the father of their child and the earlier divorce decree identified her former husband as the father); Gipson v. Enright, 753 S.W.2d 122, 123 (Mo. Ct. App. 1988) (mother collaterally estopped from relitigating the issue of paternity where prior a divorce decree adjudicated the child to be born of mother and her former husband); In re Marriage of Holland, 730 P.2d 410, 411 (Mont. 1986) (former husband collaterally estopped from disestablishing paternity where divorce decree declared the child to be "of the marriage"); Love v. Love, 959 P.2d 523, 526 (Nev. 1998) (stating "it is generally accepted that decisions as to the paternity of a child, litigated pursuant to a divorce decree, are res judicata as to subsequent proceedings between the parties");[4] N.M. v. J.G., 605 A.2d 709, 712 (N.J. Super. Ct. App. Div. 1992) (mother equitably estopped from pursuing paternity action against a different man where she had previously submitted sworn testimony that her former husband was the father of the child); Callison v. Naylor, 777 P.2d 913, 916 (N.M. Ct. App. 1989) (former husband collaterally estopped from disestablishing paternity after the divorce decree determined the offspring to be

[4] The court in Love held that the appellant could proceed with an action in the trial court to vacate the divorce decree with the goal of disestablishing paternity because the appellant had alleged "extrinsic fraud" in the earlier divorce proceeding. See Love, 959 P.2d at 526.

a child of the marriage); In re M.Z., 472 N.W.2d 222, 223 (N.D. 1991) (appellant precluded from disestablishing paternity where previous stipulation to paternity was incorporated into support judgment); Gilbraith v. Gilbraith, 512 N.E.2d 956, 959 (Ohio 1987) (former husband precluded from disestablishing paternity in post-divorce support proceeding); Pettinato v. Pettinato, 582 A.2d 909, 912-13 (R.I. 1990) (mother equitably estopped from disestablishing paternity during a divorce proceeding where mother's earlier conduct evinced an acceptance of husband as the child's father); In re Paternity of JRW and KB, 814 P.2d 1256, 1264-65 (Wyo. 1991) (former husband precluded from disestablishing paternity where the earlier divorce decree identified the children as issue of the marriage).[5]

Moreover, contrary to the ICA's conclusion, HRS § 584-6(c) does not permit Mother to relitigate the issue of paternity. HRS § 584-6(c) states:

[5] Eighteen jurisdictions, including Hawai'i, have substantially adopted the UPA. See UPA Table of Authorities, 9B U.L.A. 377 (2001). Of these, the only jurisdiction that has permitted relitigation of the issue is Washington, and that was in a case with unusual factual circumstances. In McDaniels v. Carlson, 738 P.2d 254, 256-60 (Wash. 1987), the court held that a petitioner could pursue an action to establish paternity because the child's mother had alternately cohabited with the petitioner and the former husband of the mother, despite the fact that the divorce decree identified the child as "issue" of the marriage. The court held that the elements of equitable and collateral estoppel had not been established. The child viewed both the petitioner and the former husband as father figures and had established a workable relationship with each.

> Regardless of its terms, an agreement, other than an agreement approved by the court in accordance with section 584-13(b) [relating to pretrial settlements in paternity actions under this chapter], between the alleged or presumed father and the mother or child, shall not bar an action under this section.

(Emphasis added.) The ICA determined that the Divorce Decree between Mother and Presumed Father was an "agreement" that cannot bar Mother from pursuing an action under HRS § 584-6(a). ICA Op. at 22-23. However, the Divorce Decree is not a mere "agreement"; the Decree constitutes a final judgment of the family court. Cf. Brooks v. Minn, 73 Haw. 566, 571-72, 836 P.2d 1081, 1084-85 (1992) (agreement in a divorce proceeding concerning payment of a promissory note was merged into the judgment and became enforceable as a judgment rather than as a contract). HRS § 580-5 (1993) states:

> Upon the hearing of every complaint for annulment, divorce, or separation, the court shall require exact legal proof upon every point, notwithstanding the consent of the parties. Where the matter is uncontested and the court, in its discretion, waives the need for a hearing, then the court shall require exact legal proof upon every point by affidavit.

Thus, the Divorce Decree has the same binding effect as any other court judgment. See Gilbraith, 512 N.E.2d at 959-60 (specifically rejecting the contention that the analogous provision in the Ohio Parentage Act barred consideration of paternity determined in a divorce judgment arising from a stipulation). We adopt the reasoning of the court in Gilbraith regarding Ohio's statutory provision analogous to HRS § 584-6(c) and state:

> [W]e are convinced that [HRS § 584-6(c)] is, in general, limited by its terms to those agreements ordinarily made outside the judicial process, and that it is not intended to apply when there is a final judicial resolution of rights and obligations on the basis of an underlying agreement between the parties to an action. This is just as true for a legitimation order as it is for a dissolution decree, both of which manifestly involve, by virtue of their roles in the judicial process, something more than an "agreement" as that term is used in [HRS § 584-6(c)].

Id. at 960 (footnote omitted). Consequently, a final Divorce Decree is not an "agreement" within the meaning of HRS § 584-6(c), and the statute does not permit Mother to escape the preclusive effect of the Divorce Decree.

Our conclusion that an individual can be precluded or estopped from asserting paternity on the basis of a previous judgment is also consistent with the purposes of chapter 584. We respectfully disagree with the ICA that the policy enunciated by chapter 584 is to permit a "presumptively legitimate child of questionable parentage" to "know the truth of her [or his] parentage[.]" ICA Op. at 21. The fundamental purposes of chapter 584 are "to provide substantive legal equality for all children regardless of the marital status of their parents" and to protect the rights and ensure the obligations of parents of children born out of wedlock. See Stand. Comm. Rep. No. 190, in 1975 House Journal, at 1019. The legislature enacted the UPA because the UPA was

> designed to meet the constitutional equality standards enunciated by the United States Supreme Court in two lines of decisions, one beginning with Levy v. Louisiana, 391 U.S. 68 (1968), dealing with the substantive rights of the child born out of wedlock; and the other beginning with Stanley v. Illinois, 405 U.S. 645 (1972), dealing with the rights of the father of a child born out of wedlock.

Stand Comm. Rep. No. 190, in 1975 House Journal, at 1019. The substantive legal rights that illegitimate children were denied in many states included such rights as the right to intestate succession, the right to benefit from a statutory cause of action typically accorded to legitimate children, and the right to be the beneficiary of child support from the father. See generally Gomez v. Perez, 409 U.S. 535 (1973); UPA Prefatory Note, 9B U.L.A. at 378-79. For purposes of this discussion, the UPA and, by extension, chapter 584 are largely concerned with establishing a means by which to identify the person (usually the father) against whom these rights may be asserted. See UPA Prefatory Note, 9B U.L.A. at 379. In short, it is to ensure that every child, to the extent possible, has an identifiable legal father. Although this goal will usually overlap with the desire of a child to know the identity of his or her biological father, the two are not always the same. Precluding Mother from attempting to relitigate the issue of paternity and disestablish paternity in Presumed Father is consistent with the goal of chapter 584 to ensure that every child has a legal father.

We emphasize the foregoing policy discussion in part to correct a misstatement made by the ICA regarding the manner in which the legal presumptions established by chapter 584 are to be applied in paternity proceedings. HRS § 584-4 (Supp. 1995) established several legal presumptions that are to be employed in a paternity action. One of these is that a man is presumed to be the father of a child if the child is born to the man's wife during the time the couple is married. See HRS § 584-4(a)(1). Another is that a man is presumed to be the father of a child if appropriate genetic testing suggests that he is the child's biological father. See HRS § 584-4(a)(5). In determining legal paternity, HRS § 584-4(b) instructs that:

> A presumption under this section may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

(Emphasis added.) Thus, the statute mandates that, when conflicting presumptions are present, the family court consider the individual facts of each case in light of "policy and logic" to determine paternity. In contrast, relying upon its belief that the purpose of chapter 584 was to ensure that every child be able to determine the identify of his or her biological father, the ICA appears to conclude that the presumption based on genetic testing controls as a matter of law:

> [W]e conclude that as compared to the presumption based on HRS §§ 584-4(a)(1) (presumption of paternity based on marital status), the presumption based on HRS § 584-4(a)(5) (presumption of paternity based on genetic testing) is "the presumption which on the facts is founded on the weightier considerations of policy and logic" and, therefore, it "controls." HRS § 584-4(b).

ICA Op. at 21. We disagree. If the genetic testing presumption "controlled" as a matter of law, then HRS § 584-4 would plainly say so, and there would be no point in directing the court to consider which competing presumption "on the facts is founded on the weightier considerations of policy and logic[.]" Thus, the genetic testing presumption is not more important than the other presumptions; it is one of several that must be considered in light of the fundamental purpose of chapter 584.

Moreover, we note that construing HRS § 584-6 as the ICA did would be contrary to the purposes of chapter 584 in many instances. According to the ICA's interpretation, a presumed father of a child, whose paternity had been established in a prior judicial proceeding, could initiate an action to disestablish paternity any time, so long as the child had not yet turned twenty-one. See HRS § 584-6(a), supra at 10 (stating that "a presumed father" "may bring an action for the purpose of declaring the existence or nonexistence of the father and child relationship"). Because such an action could be brought even in the absence of another identifiable father, the result would be to leave a child with no identifiable legal father --

particularly if the genetic testing presumption of HRS § 584-4(a)(5) "controlled." The legislature most certainly did not intend such a result in adopting the UPA as codified in chapter 584.

Furthermore, we note that the National Conference of Commissioners on Uniform State Laws recently promulgated the Uniform Parentage Act (2000) [hereinafter, UPA (2000)]. Although the provisions of UPA (2000) are not determinative of how this court should interpret chapter 584, the provisions of UPA (2000) relating to the binding effect of a prior adjudication of parentage and the rationale for making these revisions are nonetheless helpful.[6] Section 637 of UPA (2000) states in relevant part:

> (c) In a proceeding to dissolve a marriage, the court is deemed to have made an adjudication of the parentage of a child if the court acts under circumstances that satisfy the jurisdictional requirements of [Section 201 of the Uniform Interstate Family Support Act, dealing with long-arm jurisdiction over nonresidents], and the final order:
>
> (1) expressly identifies a child as a "child of the marriage," "issue of the marriage," or similar words indicating that the husband is the father of the child; or
>
> (2) provides for support of the child by the husband unless paternity is specifically disclaimed in the order.
>
> (d) Except as otherwise provided in subsection (b) [relating to the binding effect of a prior adjudication on the child, see discussion infra], a determination of parentage may be a defense in a subsequent proceeding seeking to adjudicate parentage by an individual who was not a party to the earlier proceeding.

[6] The UPA does not expressly address these issues.

(Emphases added.) The comment to UPA (2000) section 637 states in relevant part:

> A considerable amount of litigation involves exactly who is bound and who is not bound by a final order determining parentage. . . . .
>
> . . . .
>
> Subsection (c) resolves whether a divorce decree constitutes a finding of paternity. This subsection provides that a decree is a determination of paternity if the decree states that the child was born of the marriage or grants the husband visitation or custody, or orders support. This is the majority rule in American jurisprudence.
>
> Subsection (d) gives protection to third parties who may claim benefit of an earlier determination of parentage.

(Emphasis added.) These provisions of UPA (2000) are helpful because, assuming arguendo that there was any ambiguity regarding the question whether an individual can be bound by a previous determination of parentage made outside the parameters of chapter 584, UPA (2000) represents the present consensus of how the issue should be resolved on policy grounds, a view that we share. See, e.g., Gilbraith, 512 N.E.2d at 961 (declaring that "[t]he establishment and maintenance of the various aspects of the relationship between parent and child is a particularly intricate, sensitive and emotional process with which courts should be reluctant to interfere" and that, as a general rule, "relitigation of parentage [should] be barred"); Myrks, 606 A.2d at 751 (noting that, if the court were to allow relitigation of paternity issues under the Delaware Parentage Act, "all findings

of paternity made in conjunction with child support proceedings would be nonbinding and subject to attack at a later time"); In re JRW and KB, 814 P.2d at 1265 ("Because of the potentially damaging effect that relitigation of a paternity determination might have on innocent children, the doctrines of res judicata and collateral estoppel are rigorously observed in the paternity context.").

Additionally, the existence of HRS § 571-47 (1993) does not change the above analysis, as Mother contends. HRS § 571-47 states:

> Whenever, in any action involving the custody or support of a child apparently born in lawful wedlock, the legitimacy of the child is placed in issue, the court may make the child a party to the action, if not already a party, and shall thereupon determine the legitimacy of the child as one of the issues in the action. The court shall appoint a guardian ad litem to represent the interests of the child and may assess the reasonable fees and expenses of the guardian ad litem as costs of the action, payable in whole or in part by any or all parties as the circumstances may justify. In the event the child is not made a party to the action, a determination that the child was not born to parents married to each other at the time of the child's birth shall not be binding upon the child.

Presumably focusing on language stating that the family court "shall thereupon determine the legitimacy of the child as one of the issues in the action," Mother submits that HRS § 571-47 requires the family court to determine paternity whenever so requested by a party, as long as the request is made in the context of a custody or support proceeding. We disagree.

HRS § 571-47 is a general jurisdictional statute that was enacted in 1967, before this court's decision in Blackshear and before the legislature's enactment of HRS chapter 584. See 1967 Haw. Sess. L. Act 56, § 5, at 63. It was inserted into a provision of the statutes dealing generally with procedures in juvenile courts, see generally Rev. Laws Haw. (RLH) chapter 333 (1955), and remains in an analogous section of the HRS today. See generally HRS chapter 571, part V (describing procedures in family courts). The provision was one of several designed to enhance the powers of the juvenile courts and was enacted to "set[] forth certain statutory criteria for handling the issue of legitimacy raised in a custody or support action" because there was no statute on the "subject" at the time. Stand. Comm. Rep. No. 611, in 1967 Senate Journal, at 1127. Considering its history and reading the statute as a whole, we believe the statute is designed to ensure, by appointment of a guardian ad litem, that a child is represented in a support proceeding when the issue of the child's legitimacy or parentage is raised. However, the issue of parentage itself must be properly before the court in the first instance, and the issue cannot properly be before the court if the party asserting the issue is precluded or estopped from raising it. The statute focuses on proper representation for the child and says nothing about displacing common law doctrines of res judicata or equitable estoppel.

Moreover, the court in Blackshear was presumably aware of this provision when it decided that the issue of the parentage of a child born in wedlock could not be relitigated in a subsequent support proceeding. We do not believe that HRS § 571-47, enacted nine years before chapter 584 as part of a general measure to improve the functioning of the juvenile courts, was intended to allow the use of the paternity proceedings in chapter 584 to displace common law doctrines of preclusion or estoppel.

Based on all of the foregoing, we hold that: (1) the enactment of chapter 584 does not displace this court's previous decision in Blackshear; (2) does not prevent a proper litigant in a paternity action from asserting defenses based upon res judicata and equitable estoppel; and (3) a final judgment -- including a divorce decree -- can serve as the basis for such defenses.

B. Application to this Case

Here, the family court determined that the issue of Son's parentage was "res judicata" and that Mother was equitably estopped from proceeding with a paternity action. We now turn to one aspect of res judicata -- issue preclusion.

Issue preclusion, or collateral estoppel, bars relitigation of an issue where: (1) the issue decided in the prior adjudication is identical to the one presented in the action in question; (2) there is a final judgment on the merits;

(3) the issue decided in the prior adjudication was essential to the final judgment; and (4) the party against whom issue preclusion is asserted was a party or in privity with a party to the prior adjudication. Dorrance, 90 Hawai‘i at 149, 976 P.2d at 910. Issue preclusion can be raised defensively by one who was not a party in the prior adjudication. See Ellis v. Crockett, 51 Haw. 45, 55-57, 451 P.2d 814, 822, reh'g denied, 51 Haw. 86, 451 P.2d 814 (1969).

In this case, all of the foregoing requirements have been met with respect to Mother. The prior adjudication was the divorce proceeding between Mother and Presumed Father. The identical issue of who is Son's father was determined by the Divorce Decree when it declared that "[t]here are two children the issue of this marriage who are minors and who require support[,]" expressly naming Daughter and Son. The Divorce Decree constituted a final judgment. The issue of paternity was essential to the portion of the final judgment that ordered Presumed Father to make support payments and that provided for custody and visitation. Finally, the defense is being asserted against Mother, who was a party to the divorce proceeding. Similar circumstances were present in Blackshear, the difference being that the defense was asserted against the former husband rather than the former wife. Accordingly, we hold that Mother is barred by the doctrine of issue preclusion, or collateral

estoppel, from bringing an action against Alleged Father to establish paternity pursuant to HRS § 584-6. In light of this determination, we need not address whether the doctrines of claim preclusion or equitable estoppel bar Mother's petition.

C. Other Issues

1. The "Best Interest of the Child" and Genetic Testing

Although not strictly necessary to the disposition of this case, we address the following issue in order to make clear that the ICA correctly applied Child Support Enforcement Agency v. Doe, 88 Hawai'i 159, 963 P.2d 1135 (App. 1998) [hereinafter, CSEA], and that CSEA continues to be "good law" notwithstanding this opinion. The family court, before deciding whether to order genetic testing in this case, conducted evidentiary proceedings in order to determine if such testing would be in Son's "best interests." See supra note 2. HRS § 584-11(a) (Supp. 1995) stated in relevant part that "[t]he court may, and upon request of a party, shall, require the child, mother, or alleged father to submit to genetic tests, including blood tests." (Emphasis added.) In CSEA, the ICA held that the language of HRS § 584-11(a) was mandatory and did not permit the family court to consider whether such testing was in the best interests of the child before ordering testing. See CSEA, 88 Hawai'i at 174, 963 P.2d at 1150. Nonetheless, the family court in this case ruled that language in HRS § 584-13(c), conditioning an order for

testing on whether such testing was "practicable," permitted the family court to refuse to order the testing if it was not in the best interest of Son. This latter ruling by the family court was error.

HRS § 584-13 addresses pre-trial settlement issues and provides in relevant part:

> (a) On the basis of the information produced at [a mandated] pre-trial hearing, the judge conducting the hearing shall evaluate the probability of determining the existence or nonexistence of the father and child relationship in a trial and whether a judicial declaration of the relationship would be in the best interest of the child. On the basis of the evaluation, an appropriate recommendation for settlement shall be made to the parties, which may include any of the following:
>
> (1) That the action be dismissed with or without prejudice;
>
> (2) That the matter be compromised by an agreement among the alleged father, the mother, and the child, in which the father and child relationship is not determined but in which a defined economic obligation is undertaken by the alleged father in favor of the child and, if appropriate, in favor of the mother, subject to approval by the judge conducting the hearing. In reviewing the obligation undertaken by the alleged father in a compromise agreement, the judge conducting the hearing shall consider the best interest of the child, in the light of the factors enumerated in section 576D-7, discounted by the improbability, as it appears to him, of establishing the alleged father's paternity or nonpaternity of the child in a trial of the action. In the best interest of the child, the court may order that the alleged father's identity be kept confidential. In that case, the court may designate a person or agency to receive from the alleged father and disburse on behalf of the child all amounts paid by the alleged father in fulfillment of obligations imposed on him; or
>
> (3) That the alleged father voluntarily acknowledge his paternity of the child.
>
> (b) If the parties accept a recommendation made in accordance with subsection (a), judgment shall be entered accordingly.

> (c) If a party refuses to accept a recommendation made under subsection (a) and genetic tests, including blood tests have not been taken, the court shall require the parties to submit to genetic tests, **if practicable.** Thereafter the judge shall make an appropriate final recommendation. If a party refuses to accept the final recommendation, the action shall be set for trial.

(Emphases added.) The purpose of HRS § 584-13 is to encourage settlement and to give the family court a broad range of options in pursuing this goal. However, the language of subsection (c), consistent with HRS § 584-11, mandates that genetic testing be performed (where it has been requested by a party) if the parties cannot reach a settlement. The commentary to the analogous UPA section demonstrates that the mandatory testing requirement in subsection (c) was designed to further the goal of settlement:

> The settlement procedures contemplated by this Section are voluntary. If any party refuses to accept a settlement recommendation, the action will be set for trial. It is expected, however, that, as soon as reliable blood test evidence becomes available on a large scale, the great majority of cases will be settled consensually in the light of such evidence.

(Emphasis added.) Consequently, we agree with the ICA that the language conditioning genetic testing on such testing being "practicable" refers only to the practical aspects of completing the testing and does not permit the family court to consider the "best interest of the child" in deciding whether to order testing in the first place. See ICA Op. at 19-20.[7] Accordingly, the

[7] This interpretation is consistent with the underlying purposes of the UPA and chapter 584. HRS § 584-13 encourages settlement of disputed paternity issues that take into account the best interest of the child, even absent genetic test results. If the case cannot be settled and genetic testing has not been performed, the statute mandates genetic testing (upon request of a party) as a further means of encouraging settlement. If the case still does

(continued...)

family court erred in concluding that it was permitted to consider whether genetic testing was in Son's best interest before ordering the testing. The family court's error was harmless, however, because the family court correctly ruled that Mother was precluded from bringing the action in the first place. The proper course of action should have been to dismiss Mother's complaint before even considering testimony concerning Son's best interest.

2. Son's Interest

Finally, we wish to emphasize that our decision deals exclusively with Mother's ability to pursue a chapter 584 paternity action. It does not address the propriety of the family court's decision that Son was precluded from bringing this action on the ground that he was in privity with Mother during the divorce proceeding. Son did not cross-appeal the family

---

[7](...continued)
not settle and the evidence at trial presents conflicting presumptions of paternity, the trial judge is to choose the logi presumption "which on the facts is founded on the weightier considerations of policy and c[.]" HRS § 584-4(c). These latter considerations involve not only the best interests of the child but also the rights and obligations of parents. See supra at 16 (identifying the two fundamental purposes of chapter 584 and the UPA as equalizing the legal treatment of children born out of wedlock and protecting the rights of natural fathers).

We note that, notwithstanding its final paternity decision, HRS § 584-15(c) (Supp. 2001) permits the court to issue orders to any appropriate party addressing "any other matter in the best interest of the child" and that the family court retains continuing jurisdiction to enforce or modify these orders. See HRS §§ 584-17 (1993) and 584-18 (Supp. 2001).

court's judgment. It is well-settled that "an appellee is ordinarily not entitled to attack a judgment without a cross appeal." Arthur v. Sorensen, 80 Hawai'i 159, 167, 907 P.2d 745, 753 (1995) (citing Shoemaker v. Takai, 57 Haw. 599, 607, 561 P.2d 1286, 1291 (1977)). The ICA properly did not address Son's status, and we have no occasion to do so here.

IV. CONCLUSION

Based on the foregoing, we hold that the enactment of chapter 584 does not displace this court's previous decision in Blackshear, does not prevent a proper litigant in a paternity action from asserting defenses based upon res judicata and equitable estoppel, and a final judgment -- including a divorce decree -- can serve as the basis for such defenses. We further hold that Mother is barred by the doctrine of issue preclusion, or collateral estoppel, from bringing an action against Alleged Father to establish paternity pursuant to HRS § 584-6. Finally, we reiterate that Child Support Enforcement Agency v. Doe, 88 Hawai'i 159, 963 P.2d 1135 (App. 1998) (holding that HRS § 584-11 mandates genetic testing if the proper statutory requirements have been satisfied), is valid law and hold that the term "practicable" in HRS § 584-13(c) does not permit the family court to consider the "best interest of the child" in deciding whether to order genetic testing. Accordingly, we reverse the ICA's decision, except that we affirm its analysis as to CSEA and the

interpretation of the term "practicable" in HRS § 584-13(c). Consequently, we affirm the family court's November 25, 1998 final judgment.

Barry D. Edwards,
for defendant-appellee-
petitioner, on the writ

Mark Van Pernis (of Van
Pernis, Smith & Vancil),
for plaintiff-appellant-
respondent

Alan H. Tuhy,
guardian ad litem