IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

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JANE DOE, Petitioner-Appellant v.
JOHN DOE and JOHN DOE II, Respondents-Appellees

NO. 22172

APPEAL FROM THE FAMILY COURT OF THE THIRD CIRCUIT
(FC-P NO. 96-032K)

FEBRUARY 22, 2001

BURNS, C.J., AND WATANABE, J.,
AND LIM, J., DISSENTING

OPINION OF THE COURT BY BURNS, C.J.

In this paternity case, the petitioners are the mother and her minor son. The respondents are the minor son's statutorily presumed father and the minor son's alleged father. The appellant is the minor son's mother.

In April 1987, Petitioner-Appellant Jane Doe (Mother) married Respondent-Appellee John Doe (Presumed Father). During their marriage, Mother gave birth to a daughter (Daughter) on October 4, 1988, and to a son (Son) on July 7, 1992. Mother and Presumed Father were divorced by a March 22, 1994 Divorce Decree (1994 Divorce Decree) that awarded Mother physical custody of Daughter and Son and child support from Presumed Father.

Two years later, on April 22, 1996, Mother filed a Petition for Paternity, Custody and Other Relief alleging that Respondent-Appellee John Doe II (Alleged Father) is Son's natural father.

In its March 18, 1998 Order on Plaintiff's Request for Genetic Testing Filed May 2, 1996, the court denied Mother's motion and Son's request for genetic testing on the basis that the 1994 Divorce Decree estops Mother from pursuing her paternity case and Son was in privity with Mother.

In its November 25, 1998 Decision/Judgment from Trial Held October 22, 1998, the family court decided that: (1) "[Mother] and/or [Son] . . . have not overcome the presumption of paternity previously established for [Son] to be with [Presumed Father]; and (2) "[Alleged Father] is not the natural father of [Son]."

We conclude that the 1994 Divorce Decree dissolving the marriage between Mother and Presumed Father does not estop or bar Mother from pursuing her paternity cause of action and that the family court violated the express and unequivocal mandate stated in Hawai‘i Revised Statutes (HRS) § 584-11(a) (Supp. 1996) and, in essence, as repeated in HRS § 584-12(4) (Supp. 1996), that "[t]he court . . . upon request of a party shall, require the child, mother, or alleged father to submit to genetic tests, including blood tests." Consequently, we vacate the following:

1. The March 18, 1998 Order on Plaintiff's Request for Genetic Testing Filed May 2, 1996.

2. The July 29, 1998 Decision/Order on Plaintiff's Motion for Reconsideration of Court's Order on Plaintiff's Request for Genetic Testing Filed April 4, 1998.

3. The November 25, 1998 Decision/Judgment from Trial Held October 22, 1998.

4. The following of the March 25, 1999 Findings of Fact and Conclusions of Law: Findings of Fact (FsOF) nos. 4, 18, 23, 35, and 42; and Conclusions of Law (CsOL) D, G, H, K, L, M, N, Q, S, T, U, V, W, and X.

We remand for entry of an order granting Mother's May 2, 1996 Request for Genetic Testing pursuant to HRS § 584-11 and for further proceedings consistent with HRS Chapter 584 and this opinion.

BACKGROUND

In December 1993, in FC-D No. 93-0281K, Presumed Father filed a complaint for a divorce in which he alleged, in relevant part, that the parties have two children below age 18.

A December 10, 1993 (Stipulated) Order for Post/Pre Decree Relief awarded Mother temporary physical custody of the children subject to Presumed Father's specified rights of visitation and ordered Presumed Father to pay Mother $1,645 per month "for family support" commencing December 1, 1993.

On February 3, 1994, Mother and Presumed Father filed their Marital Settlement and Child Custody Agreement (MSCCA). The MSCCA stated that Daughter and Son are "two children the issue of this marriage who are minors and require support[.]" The MSCCA agreed that Mother should be awarded physical custody of the children subject to joint legal custody and Presumed Father's specified visitation and payment of specified child support. The 1994 Divorce Decree approved and incorporated the MSCCA.

The parties returned to the family court on various occasions thereafter to resolve disputes, especially disputes pertaining to child support and visitation.

On April 22, 1996, Mother filed a Petition for Paternity, Custody and Other Relief alleging and asking that Alleged Father be declared the natural father of Son and asking for child support, visitation, costs, attorney fees, and genetic testing of Mother, Son, and Alleged Father.

On May 2, 1996, pursuant to HRS § 584-11, Mother filed a Request for Genetic Testing in which she asked that

> she, [Son], and [Alleged Father] appear at a time and place prearranged by the parties for the purposes of identification in a qualified laboratory for the purpose of obtaining the blood specimen. Alternatively, in the event of the default of [Alleged Father], [Mother] will request that the same test and procedures be performed upon [Mother], [Son], and [Presumed Father].

On May 28, 1996, Presumed Father denied the allegation of Mother's petition, asserted that the relief requested was

barred by the 1994 Divorce Decree, contended that "[t]he relief requested by [Mother] in the Petition is barred by estoppel, fraud, laches, res judicata, collateral estoppel, waiver, and other matter constituting an avoidance or affirmative defense[,]" and prayed

> [t]hat the Court determine that (1) [Presumed Father] is the natural and legal father of [Son], (2) award [Presumed Father] custody of [Son], (3) order that [Mother] pay to [Presumed Father] child support in accordance with the applicable child support guidelines[,] and (4) award [Presumed Father] costs including reasonable attorney's fees for the defense of this action[.]

On June 3, 1996, Alleged Father denied the allegation of Mother's petition, denied the court's jurisdiction, and asserted that the relief requested was barred by the 1994 Divorce Decree and that Mother should be estopped from contradicting it.

On September 4, 1996, pursuant to HRS § 584-9(a) (Supp. 1999), the court appointed a guardian ad litem (GAL) for Son. On September 11, 1996, the court added Son as a "party plaintiff."

On September 20, 1996, the court entered a restraining order enjoining all parties from discussing the issues in the case in the presence of Son and/or Daughter. The court made no provisions for the fact that Son was then a party plaintiff.

On March 14, 1997, the GAL filed his First Report of Guardian Ad Litem in which he opined, in relevant part, that "[i]t would be in the best interests of the children that blood testing be conducted . . . at the convenience of the parties and the Court." The GAL further opined that "[t]he results of blood

testing should be sealed by the Court, and released only in accordance with further recommendations made by the children's therapists in consultation with the GAL."

At the November 20, 1997 evidentiary hearing on Mother's May 2, 1996 Request for Genetic Testing, Mother testified that when Son was born, the two possible biological fathers were Presumed Father and Alleged Father. As Son got older, the similarities between Son and Alleged Father caused Mother to believe that Alleged Father was more likely the biological father. She further testified, in relevant part:

> Q Why didn't you file this paternity action after you had married your attorney and the dispute starting happening concerning custody and visitation at that point? Why didn't you file this paternity action then -- two years ago?
>
> A Just, uh, because it was still, you know, waiting and watching [Son] grow.

When asked why she did not do it sooner, she testified:

> A Because I came from a very abusive relationship and I was fearful and I was extremely fearful for my son. I watched him [indiscernible] a window, being flung by his arm against the corner of a building that [indiscernible] and marked up his face. I had a restraining order. To get him out of the house, I had to hold onto him and I left with nothing and I went and filed a restraining order. I was scared to death and I was scared for my son if I revealed anything like that.
>
> Q It's not then because between the -- in the intervening time that you came to believe that [Alleged Father] having a 1.9 million piece of property might be a better source of child support?[1]
>
> A No.

(Footnote added.)

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[1] Finding of Fact no. 21 of the March 25, 1999 Findings of Fact and Conclusions of Law states, "Evidence was indirectly offered as to land assets of [Respondent-Appellee John Doe II], but no current market value or equity was established."

The March 18, 1998 Order on Plaintiff's Request for Genetic Testing Filed May 2, 1996, states, in relevant part, as follows:

> The basic issue before the Court is whether or not it is in the best interest of [Son] to order genetic testing of the parties to establish/disestablish paternity. The underlying issue is whether the presumption established by HRS §584-4(a)(1) should be allowed to be rebutted. The Court has not found nor been directed to any Hawaii case law addressing these issues other than *Blackshire vs. Blackshire*, 52 H. 480.
>
> Necessarily involved issues are the burden and standard of proof. The Court concludes the involved presumption articulates a compelling public policy which imposes, . . . the burden of proof on [Mother] and [Son], to establish by clear and convincing evidence that it is in the best interest of [Son] to order genetic testing (see, Hawaii Rules of Evidence, Rule 304 and commentary).
>
> . . . .
>
> . . . [T]he Court concludes [Mother] is estopped to pursue the paternity issue as against [Alleged Father]. It offends the notion of fair play that a party to multiple actions involving multiple requests, hearings and court orders establishing and accepting paternity as to one father, and all the while knowing there was a question of paternity, could now, when dissatisfied with the established father, seek to undo her creation. Such a situation appears to be what the doctrine of estoppel was designed to prevent.
>
> The only other party seeking to change the status quo is [Son] . . . . There is authority that a non-party child to a prior action where the issue paternity was or could have been litigated is not bound by any determination in such action based on a lack of privity.[2] It is difficult to understand how a parent and child could not be in privity for a divorce action determination as to the child's parentage, custody, visitation and support. . . . What closer identification, interest, bond could there be than a mother and child. [Mother] professes to be bringing the instant action in the best interest of [Son]. Did she not have that same best interest in mind when she negotiated and stipulated to the original decree for both children being of the parties to the marriage, for the custody and visitation and a support order exceeding the then Child Support Guidelines? . . .
>
> . . . .

[2] The authority to which the court is referring is Hall v. Lalli, 194 Ariz. 54, 977 P.2d 776 (Az. 1999). It follows the general rule that a paternity adjudication in a divorce or annulment proceeding is not binding on a child who was not a party. Annotation, *Effect, in Subsequent Proceedings, of Paternity Findings or Implications in Divorce or Annulment Decree or in Support or Custody Order Made Incidental Thereto*, 78 A.L.R.3d 846 (1977).

> For the reasons stated herein, the Court finds that [Mother] has failed to carry her burden of showing by clear and convincing evidence that genetic testing should be ordered and she has not overcome the presumption of paternity previously established for [Son] to be with [Father].
>
> [Mother's] Motion for Request for Genetic Testing filed May 2, 1996, is denied with prejudice.

(Footnote added; citations omitted.) In plain language, the court decided that Mother is estopped from pursuing her paternity cause of action, and Son is barred because he is in privity with Mother.

The July 29, 1998 Decision/Order on Plaintiff's Motion for Reconsideration of Court's Order on Plaintiff's Request for Genetic Testing Filed April 4, 1998, states, in relevant part, as follows:

> As to [Mother's] argument on HRS §584-13(c), [Mother] omits a material provision of the cited section, namely that the mandate to order genetic testing is conditional on finding it is practicable; and the entire issue of whether a judicial declaration of the relationship (parent/child) is in the best interest of the child. Construing the provisions of the entire statute section, the Court concludes "practicable" is not confined to logistical issues but includes declining to order genetic testing where a finding has been made that such testing is not in the best interests of the child.

On November 25, 1998, the family court entered its Decision/Judgment from Trial Held October 22, 1998, in relevant part, as follows:

> [T]here is . . . no clear and convincing evidence that it is in [Son's] best interest to find in [Mother's] or [Son's] favor on genetic testing.
>
> While the Court greatly appreciates the GAL's [Guardian Ad Litem's] interest and efforts on [Son's] behalf, the Court continues to respectfully disagree with the GAL's opinion that [Son's] interests will be served by pursuing this matter. The net result would be to disestablish paternity in the only father [Son] has known, and to establish paternity in a person who has avowed to have no interest in [Son] in the past, present or future . . . .

> The Court concludes no party seeking affirmative relief has sustained their burden of establishing paternity in [Alleged Father]. . . .
>
> The Court therefore orders, adjudges and decrees as follows:
>
> 1) [Alleged Father] is not the natural father of [Son]. . . .
>
> . . . .
>
> 3) Each party shall bear their own attorneys fees and costs.
>
> 4) [Mother] shall reimburse/pay the fees and costs of the GAL incurred in this matter[.]

On December 24, 1998, Mother filed a notice of appeal.

On January 20, 1999, the GAL filed a motion for instruction as to what further involvement, if any, he should take.[3] In the motion, the GAL stated that "the interests of [Son] may be adequately represented in the appeals process by counsel for [Mother]. However, should the Court believe that this is not the case, instructions to that extent are sought to assure that the purposes of the appointment have been adequately carried out by [GAL]."

In an order filed on February 26, 1999, the family court decided that

> the [GAL], as representative of the best interests of the subject minor, has party status and instructions to the [GAL] could, in fact, affect the substantive actions taken by the Court and/or frustrate or interfere with the appeal; and, therefore, unless there is a remand to address the [GAL's] concerns, the Court determines it has no jurisdiction to entertain the [GAL's] motion.

[3] The record does not explain why the guardian ad litem did not file a timely appeal on behalf of the son born on July 7, 1992, to Petitioner-Appellant Jane Doe (Mother).

On March 25, 1999, the family court entered its Findings of Fact and Conclusions of Law. The CsOL state, in relevant part, as follows:

> D. The burden of proof is on [Mother] and [Son] to establish by clear and convincing evidence that it is in the best interest of [Son] to order genetic testing.
>
> . . . .
>
> G. [Mother] is estopped to contest the issue of paternity and/or is prevented from raising the issue by reason of res judicata, subject to whether the best interests of [Son] warrant the application of estoppel against [Mother].
>
> H. [Mother] is barred by the doctrine of res judicata as against [Alleged Father].
>
> . . . .
>
> K. A close family relationship with more may be enough to bind a non-party to a judgment.
>
> L. Under the circumstances of this case, [Son] is bound by the prior judgment in the divorce decree establishing paternity in [Presumed Father].
>
> M. The Court declines to give such weight or credit to Ms. James[4] opinion(s) that would justify a finding by clear and convincing evidence that genetic testing should be ordered in [Son's] best interests.
>
> N. [Mother] and/or [Son] have failed to carry their burden of showing by clear and convincing evidence that genetic testing should be ordered and have not overcome the presumption of paternity previously established for [Son] to be with [Presumed Father].
>
> . . . .
>
> Q. The overall burden to show by clear and convincing evidence that testing is in [Son's] best interest is on [Mother] and/or [Son].
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> . . . .
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> S. Construing the provisions of the entire statute section, HRS §584-13(c), "practicable" is not confined to

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[4] Finding of Fact no. 17 of the March 25, 1999 Findings of Fact and Conclusions of Law states, "Three witnesses, Alan Tuhy, Terry Fujioka and Beverly James, testified their opinion was that genetic testing and/or paternity should be allowed/established for a variety of reasons, and to be disclosed to [Son] at a variety of times."

> logistical issues but includes declining to order genetic testing where a finding has been made that such testing is not in the best interests of the child.
>
> T. There is no clear and convincing evidence that it is in [Son's] best interest to find in [Mother's] or [Son's] favor on genetic testing.
>
> U. No party seeking affirmative relief has sustained their burden of establishing paternity in [Alleged Father] or disestablishing paternity in [Presumed Father].
>
> V. [Alleged Father] is not the natural father of [Son]. . . .
>
> W. There are no conflicting orders with respect to [Presumed Father] regarding the parentage of [Son] that need to be modified.
>
> X. [Mother] is liable for reimbursement/payment of the GAL fees.

(Footnote added.)

In plain language, the court decided that Mother and Son are estopped from pursuing the paternity cause of action because the paternity cause of action is *res judicata*, and Son is in privity with Mother. The court also decided that Alleged Father is not the natural father of Son.

MOTHER'S POINTS ON APPEAL

1. The family court reversibly erred when it refused to order genetic testing.

2. CsOL G and H are wrong and the family court reversibly erred in concluding that Mother is precluded from bringing the paternity action. Mother did not raise the paternity issue in the divorce case "because [Son] and [Alleged Father] were not parties to the prior action, nor was the issue of paternity raised and determined in the prior action."

3. COL L is wrong and the family court reversibly erred in ruling that Son was precluded from litigating the paternity issue. "[T]he issue was not determined, he was not a party to that action and he was not represented by a Guardian Ad Litem."

4. COL D is wrong and the family court reversibly "erred in concluding that the burden of proof is on Mother and [Son] to establish by clear and convincing evidence that it is in the best interests of [Son] to order genetic testing."

5. The family court reversibly erred in failing to find that it is in Son's best interests that genetic testing be done to establish paternity.

Presumed Father declines to participate in this appeal. Alleged Father asks for an affirmance of the family court's orders and decrees.

The GAL's position in the family court and in an answering brief filed in this appeal is "to allow the genetic testing and **then** determine what was the best course to take on the test results." (Emphasis in original.)

RELEVANT STATUTES

Prior to 1975, paternity actions were governed by HRS Chapter 579 (1968). HRS § 579-1 (1968) states, in relevant part, as follows:

> **Petition against alleged father; time limit; preliminary examination.** Any unmarried woman or any married woman who was

> separated from and was not living with her husband prior to and at the time her child was conceived, . . . within two years after the delivery of her child, may petition the judge of the family court . . . for an adjudication of paternity and for other relief under this chapter against the person whom she alleges is the father of the child.
>
> The petition may also be filed by either of the parents or a guardian of the mother, or by any person as the next friend of the child, or by any public officer or employee concerned with the welfare of the child, within two years after the date of the child's birth.

HRS Chapter 584 (1993 and Supp. 1999) is Hawai‘i's Uniform Parentage Act. It was first enacted in 1975. In the following quotations of the relevant statutes, if the statute has not been amended post-1993, we will cite the HRS (1993). If the statute quoted includes a post-1993 amendment, we will cite the HRS (Supp. 1997). This is because the March 18, 1998 Order on Plaintiff's Request for Genetic Testing Filed May 2, 1996 was preceded by hearings on November 20, 1997, November 21, 1997, and January 15, 1998. If the statute quoted has been amended post-1997, we will note the amendment in a footnote.

HRS § 584-4 (Supp. 1997) states, in relevant part, as follows:

> **Presumption of paternity.** (a) A man is presumed to be the natural father of a child if:
>
> (1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within three hundred days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court;
>
> . . . .
>
> (5) Pursuant to section 584-11, he submits to court ordered genetic testing and the results, as stated in a report prepared by the testing laboratory, do not exclude the possibility of his paternity of the child;

> provided the testing used has a power of exclusion greater than 99.0 per cent and a minimum combined paternity index of five hundred to one; or
>
> . . . .
>
> (b) 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.

HRS § 584-6 (1993) states, in relevant part, as follows:

> **Determination of father and child relationship; who may bring action; when action may be brought; process, warrant, bond, etc.** (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; provided that any period of time during which the man alleged or alleging himself to be the natural father of the child is absent from the State or is openly cohabitating with the mother of the child or is contributing to the support of the child, shall not be computed.
>
> . . . .
>
> (c) Regardless of its terms, an agreement, other than an agreement approved by the court in accordance with section 584-13(b), between the alleged or presumed father and the mother or child, shall not bar an action under this section.

HRS § 584-8(a) (Supp. 1997) states, in relevant part, as follows: "Without limiting the jurisdiction of any other court, the family court has jurisdiction of an action

brought under this chapter. The action may be joined with an action for divorce, annulment, separate maintenance, or support."

HRS § 584-11 (Supp. 1997) states, in relevant part, as follows:

> **Genetic tests**. (a) The court may, and upon request of a party, shall, require the child, mother, or alleged father to submit to genetic tests, including blood tests. If the requesting party is the mother or the alleged father, the court shall require that the request be made pursuant to a sworn statement. The sworn statement made by the party must either:
>
> (1) Allege paternity setting forth facts establishing a reasonable possibility of the requisite sexual contact between the parties; or
>
> (2) Deny paternity setting forth facts establishing a reasonable possibility of the non-existence of sexual contact between the parties. The testing utilized must have a power of exclusion greater than ninety-nine point zero per cent (99.0%) and a minimum combined paternity index of five hundred to one, and shall be performed by an expert qualified as an examiner of genetic markers, appointed by the court. . . .
>
> (b) The court, upon reasonable request by a party, shall order that independent tests be performed by other experts qualified as examiners of genetic markers.
>
> (c) In all cases, the court shall determine the number and qualifications of the experts.
>
> (d) "Genetic test" means the testing of inherited or genetic characteristics (genetic markers) and includes blood testing for paternity purposes.
>
> (e) In any trial brought under this chapter, a report of the facts and results of genetic tests ordered by the court under this chapter shall be admissible in evidence by affidavit of the person whose name is signed to the report, attesting to the procedures followed in obtaining the report. A report of the facts and results of genetic tests shall be admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy, unless objection is made. The genetic testing performed shall be of a type generally acknowledged as reliable by accreditation bodies designated by the United States Secretary of Health and Human Services. An alleged parent or party to the paternity action who objects to the admission of the report concerning the genetic test results must file a motion no later than twenty days after receiving a copy of the report and shall show good cause as to why a witness is necessary to lay the foundation for the admission of the report as evidence. The court may, sua sponte, or at a hearing on the

motion determine whether a witness shall be required to lay the foundation for the admission of the report as evidence. The right to call witnesses to rebut the report is reserved to all parties.

HRS § 584-12 (Supp. 1997) (prior to Act 153 effective July 7, 1998[5]) states, in relevant part, as follows:

> **Evidence relating to paternity.** Evidence relating to paternity may include:
>
> . . . .
>
> (3) Genetic test results, including blood test results, weighted in accordance with evidence, if available, of the statistical probability of the alleged father's paternity;
>
> (4) Medical or anthropological evidence relating to the alleged father's paternity of the child based on tests performed by experts. If a man has been identified as a possible father of the child, the court may, and upon request of a party shall, require the child, the mother, and the man to submit to appropriate tests;
>
> (5) A voluntary, written acknowledgment of paternity that shall create a rebuttable presumption of paternity; and
>
> (6) All other evidence relevant to the issue of paternity of the child.

HRS § 584-13 (1993) states, in relevant part, as follows:

> **Pretrial recommendations.** (a) On the basis of the information produced at the 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

[5] Act 153, effective July 7, 1998, deleted from the end of paragraph (5) the words "that shall create a rebuttable presumption of paternity; and," added a paragraph (6), and redesignated the former paragraph (6) as paragraph (7).

> 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 [pertaining to "[g]uidelines in establishing amount of child support"], 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.
>
> (d) The guardian ad litem may accept or refuse to accept a recommendation under this section.
>
> (e) The informal hearing may be terminated and the action set for trial if the judge conducting the hearing finds it unlikely that all parties would accept a recommendation he might make under subsection (a) or (c).

HRS § 584-14(a) (1993) states, in relevant part, as follows: "An action under this chapter shall be a civil action governed by the Hawaii Rules of Civil Procedure or the Hawaii Family Court Rules."

HRS § 580-47(a) (Supp. 1997) states, in relevant part, as follows:

> Upon granting a divorce, or thereafter if, in addition to the powers granted in subsections (c) and (d) [to revise child support orders], jurisdiction of those matters is reserved under the decree by agreement of both parties or by order of court after finding that good cause exists, the court may make any further orders as shall appear just and equitable (1) compelling the parties or either of them to provide for the support, maintenance, and education of the children of the parties; (2) compelling either party to provide for the support and maintenance of the other party; (3) finally dividing and distributing the estate of the parties, real, personal, or mixed, whether community, joint, or separate; and (4) allocating, as between the parties, the responsibility for the payment of the debts of the parties whether community, joint, or separate, and the attorney's fees, costs, and expenses incurred by each party by reason of the divorce.

DISCUSSION

The family court concluded that the basic issue was whether it was in Son's best interests to allow the HRS § 584-4(a)(1) statutory presumption of paternity to be rebutted by a genetic test. It answered that question in the negative. The basis of the family court's decision is stated in FOF no. 42 as follows: "To disestablish paternity in the only father [Son] has known, and to establish paternity in a person who has avowed to have no interest in [Son] in the past, present or future would not be in [Son's] interest."

All of the other of the family court's decisions facilitated its decision in FOF no. 42. These other decisions are as follows: (1) Mother's and Son's request for a genetic test is denied; (2) Mother is equitably estopped from contradicting Presumed Father's paternity because of what she did and did not do in and with respect to the divorce case; (3) as a

result of the 1994 Divorce Decree, the paternity issue is *res judicata* as to both Mother and Son; and (4) Mother has failed to carry her burden of overcoming the HRS § 584-4(a)(1) statutory presumption of paternity.

For the following reasons, we conclude that the family court reversibly erred.

First, we conclude that the family court violated the express and unequivocal mandate stated in HRS § 584-11(a) that "[t]he court . . . upon request of a party shall, require the child, mother, or alleged father to submit to genetic tests" and the similar mandate in HRS § 584-12(4). As stated by this court in Child Support Enforcement Agency v. Doe, 88 Hawai'i 159, 174, 963 P.2d 1135, 1150 (App. 1998):

> We also disagree with Appellant's contention that genetic tests are not mandatory. HRS § 584-11 provides, in pertinent part, for genetic tests: "(a) The court may, and upon the request of a party shall, require the child, mother, or alleged father to submit to genetic tests, including blood tests." (Emphasis added.) Because genetic testing is mandatory when requested by a party, the statute does not confer discretion on the family court to consider the best interest of the child before ordering such tests.

We further conclude that the family court was wrong when it concluded that HRS § 584-13(c) modifies the unequivocal mandates of HRS §§ 584-11(a) and -12(4). HRS § 584-13 authorizes the court to recommend a pretrial compromise settlement which considers "the best interests of the child." This consideration of the "best interest of the child" and recommendation for settlement should occur after the "genetic tests, including blood

tests" permitted/mandated by HRS § 584-11(a) and the "appropriate tests" permitted/mandated by HRS § 584-12(4). If this recommendation for settlement occurs before the "genetic tests, including blood tests," and a party refuses to accept the recommendation for settlement, HRS § 584-13(c) specifies that "the court shall require the parties to submit to genetic tests, if practicable." We disagree with the family court's definition in its March 25, 1999 Conclusion of Law S of the word "practicable." We define it as "[c]apable of being . . . done." The American Heritage Dictionary of the English Language (1969) at 1028.

In our view, the family court: (1) erred when it imposed rather than recommended its HRS § 584-13 pretrial recommendation; and (2) violated HRS §§ 584-11 and -12 when it denied Mother's motion for genetic tests. The family court's statutory duty to order genetic tests does not involve any consideration of "the best interests of the child." The only time the consideration of "the best interests of the child," HRS § 584-13(a), is relevant is when the family court is deciding "an appropriate recommendation for settlement," HRS § 584-13(a), to be made to the parties. If the recommended settlement is rejected, the case goes to trial. HRS § 584-13(c). "In any trial brought under [HRS Chapter 584], a report of the facts and

results of genetic tests ordered by the court under this chapter shall be admissible in evidence[.]" HRS § 584-11(e).

Second, we disagree with the family court's view that Son's interests will not be served by pursuing this matter. It is not unusual for Alleged Father to want not to be involved. We repeat and reaffirm the policy, based on HRS Chapter 584 and other relevant considerations, 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." Doe v. Roe, 9 Haw. App. 623, 626-27, 859 P.2d 922, 924 (1993). This is the policy of HRS Chapter 584, Hawai‘i's Uniform Parentage Act. This policy supersedes all of the equitable estoppel considerations asserted by Presumed Father and the family court.

Third, we 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).

Fourth, Mother's participation in the MSCCA and other agreements with Presumed Father is not a basis for equitably estopping her from pursuing her petition in this case. HRS

§ 584-6(c) expressly states that "[r]egardless of its terms, an agreement, other than an agreement approved by the court in accordance with section 584-13(b), between the alleged or presumed father and the mother or child, shall not bar an action under this section."

Fifth, we conclude that the family court erroneously applied the "claim preclusion" and "issue preclusion" rules.

The Hawai‘i Supreme Court has stated that

> [a]lthough this court has stated that the doctrine of *res judicata* involves two aspects - claim preclusion and issue preclusion - each aspect, in practice, involves distinct questions of law.
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> Specifically, claim preclusion prohibits a party from relitigating a previously adjudicated cause of action. 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.

Dorrance v. Lee, 90 Hawai‘i 143, 148-9, 976 P.2d 904, 909 (1999) (emphases in original).

In the instant case, there is no collateral estoppel/issue preclusion. The issue of paternity was not and could not have been contested, litigated, and/or determined in the divorce cause of action. The family court's authority in a divorce cause of action does not include the authority to

adjudicate questions of paternity.[6] The issue of paternity could have been, but was not, contested, litigated, and/or determined in a paternity action, and that paternity action could have been, but was not, joined with the divorce action.

The question is whether there is claim preclusion. The first "cause of action" was a divorce action. Does the 1994 Divorce Decree and the claim preclusion rule bar the paternity cause of action? More plainly stated, is Mother barred from pursuing her paternity action now because she did not join a paternity action with her divorce action? Our answer is no.

The permission to join a paternity cause of action with a divorce cause of action is statutory. If, at the time of the divorce action, a party questions paternity, HRS § 584-8(a) states that "[t]he [paternity] action may be joined with an action for divorce[.]" In other words, a paternity action under HRS Chapter 584, Hawai'i's Uniform Parentage Act, and a divorce action under HRS Chapter 580 "may" be joined together. This

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[6] In contrast, in Hawai'i's Uniform Reciprocal Enforcement of Support Act, Hawai'i Revised Statutes (HRS) § 576-39.5 (1993) states as follows:

> **Paternity.** If the obligor asserts as a defense that the obligor is not the father of the child for whom support is sought and it appears to the court that the defense is not frivolous, and if both the child's alleged father and the child's mother are present at the hearing or the proof required in the case indicates that the presence of either or both of then is not necessary, the court may adjudicate the paternity issue. Otherwise, the court may adjourn the hearing until the paternity issue has been adjudicated.

statute confirms that paternity actions and divorce actions are separate and distinct causes of action.

The first sentence of HRS § 571-47 (1993) states that

> [w]henever, 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.

Like HRS § 584-8(a), HRS § 571-47 permits, but does not require, the joinder of a paternity action under HRS Chapter 584, Hawai‘i's Uniform Parentage Act, with an action involving child custody/support.[7]

No statute authorizes the family court to refuse compliance with the mandates of HRS Chapter 584 on the ground that Mother, when she was a party in a divorce action, did not dispute Presumed Father's presumed paternity and have a paternity action joined with the divorce action.

The dissent states that Blackshear v. Blackshear, 52 Haw. 480, 478 P.2d 852 (1971), is "directly on point and dispositive in this case." We disagree. When Blackshear was decided, paternity actions could not be brought (a) by a mother living with her husband prior to and at the time her child was conceived, (b) by a mother's husband, or (c) after two years after the child was born. HRS § 332-1 (1955). In Blackshear,

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[7] When the court adjudicates the paternity issue, the case must be labeled as a paternity case in addition to the label already assigned to the case and all parties must have notice of the paternity case being adjudicated. The adjudication of the paternity case must be in accordance with HRS Chapter 584, Hawai‘i's Uniform Parentage Act.

the divorce decree was entered in 1964. In the latter part of 1967, the divorced former husband sought a modification of the child support payments and "sought to deny his parentage of two of the four minor children involved in this case." Id. at 480, 478 P.2d at 853. "The matter of legitimacy was found to be res judicata" by the family court. Id. at 481, 478 P.2d at 853. In its opinion, the Hawai‘i Supreme Court stated that "[a]ppellant's position as to their [two of the four minor children's] parentage is without merit, this issue having been finally adjudicated below." Id. The court did not explain its statement. In light of HRS § 332-1 (1955), claim preclusion is not the only reasonable interpretation.

More significantly, the relevant law relating to paternity actions has changed since Blackshear was filed. HRS Chapter 584, Hawai‘i's Uniform Parentage Act, became law in 1975. 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[.]"

In contrast, HRS §§ 580-41 through 580-56 (Supp. 1999) authorize divorce actions. They authorize the family court to enter divorce decrees, order spousal support, award custody/visitation of children, order child support, divide/distribute the estate of the parties, and allocate the

responsibility for the payment of the debts of the parties and the attorney fees, costs, and expenses incurred by each party by reason of the divorce. They do not authorize paternity decisions within the divorce action. With respect to a child or children, divorce cases proceed on the basis of the presumed father's presumed paternity of the child or children under HRS § 584-4 (Supp. 1999).

As noted above, "claim preclusion prohibits a party from relitigating a previously adjudicated cause of action." Dorrance, supra. But the divorce cause of action does not involve paternity issues and is a separate and distinct cause of action from the paternity cause of action. Although the two causes of action could have been joined,[8] they were not required to be joined. Therefore, a previously adjudicated divorce cause of action awarding child custody/support does not bar a subsequent paternity cause of action regarding the child/children involved in the child custody/support order(s).

In our view, the precedent in other states that a finding or implication of paternity in a divorce or annulment decree, or in an incidental support or custody order, bars the

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[8] In this opinion, we do not discuss the way or ways in which a paternity cause of action can be "joined with" a filed but not finally decided divorce case. We conclude, however, that when paternity is contested in a divorce case, a paternity case must be "joined with" the divorce case, all parties must have notice of the paternity case being adjudicated, and the paternity case must be adjudicated in accordance with HRS Chapter 584, Hawai‘i's Uniform Parentage Act. However this may be done, it was not done with respect to the divorce case between Mother and Respondent-Appellee John Doe that was finally decided by the March 22, 1994 Divorce Decree.

parties from thereafter challenging paternity. Annotation, *Effect, in Subsequent Proceedings, of Paternity Findings or Implications in Divorce or Annulment Decree or in Support or Custody Order Made Incidental Thereto*, 78 A.L.R.3d 846 (1977), is contrary to Hawai‘i's law. In Hawai‘i, paternity issues cannot be adjudicated in divorce actions, paternity issues can be adjudicated only in paternity actions, and paternity actions may be, but are not required to be, joined with divorce actions. A divorce decree is no exception to the provision in HRS § 584-6(a)(2) that "the child's natural mother, . . . may bring an action for the purpose of declaring the existence or nonexistence of the father and the child relationship . . . within three years after the child reaches the age of majority[.]" We agree with the minority precedent of Shell v. Law, 935 S.W.2d 402 (Tenn. App. 1996) (no *res judicata* because the parties are not the same, and no judicial estoppel because, at the time of the divorce hearing, the parties were unaware of the true facts relating to paternity of the child in that DNA tests had not been performed), and Guilford County v. Davis, 123 N.C. App. 527, 473 S.E.2d 640 (1996) (alleged father may not rely on the divorce decree as an adjudication of presumed father as the biological father of the child because the divorce decree merely relies upon the presumption of legitimacy).

Sixth, it being the law, as stated in HRS § 584-6(c), that "an agreement, other than an agreement approved by the court in accordance with section 584-13(b), between the alleged or presumed father and the mother or child, shall not bar" a paternity action, it is not logical or reasonable that a divorce decree that is based on an agreement not approved by the court in accordance with HRS § 584-13(b) and a divorce case in which the issue of paternity was not contested or litigated, shall bar a subsequent paternity action.

Seventh, assuming the mother knew or should have known at the time of the divorce that the presumed father was not the biological father and harmed or damaged the presumed father and/or the biological father by her concealment, the law should deal with those matters in ways that punish the mother and benefit the injured party or parties. It should not deal with them by refusing to comply with HRS §§ 584-11(a) and -12(4) by barring simple and reliable blood tests that would accurately determine the issue of paternity.

CONCLUSION

Accordingly, we conclude that CsOL D, G, H, L, M, N, Q, and S are wrong, COL K is too general, COL T is irrelevant, and CsOL U, V, W, and X are premature.

We vacate the following:

1. The March 18, 1998 Order on Plaintiff's Request for Genetic Testing Filed May 2, 1996.

2. The July 29, 1998 Decision/Order on Plaintiff's Motion for Reconsideration of Court's Order on Plaintiff's Request for Genetic Testing Filed April 4, 1998.

3. The November 25, 1998 Decision/Judgment from Trial Held October 22, 1998.

4. The following of the March 25, 1999 Findings of Fact and Conclusions of Law: FsOF nos. 4, 18, 23, 35, and 42, and CsOL D, G, H, K, L, M, N, Q, S, T, U, V, W, and X.

We remand for entry of an order granting Mother's May 2, 1996 Request for Genetic Testing pursuant to HRS § 584-11, and for further proceedings consistent with HRS Chapter 584 and this opinion.

On the briefs:

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Chief Judge

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