DISSENTING OPINION OF LIM, J.

In Blackshear v. Blackshear, 52 Haw. 480, 478 P.2d 852 (1971), the appellant filed in the lower court certain motions by which he sought to modify the amount of child support owing on account of the four minor children decreed to be his in a divorce granted some three years before. In the motions, appellant also sought to deny his paternity of two of the four. Id. at 480, 478 P.2d at 853.

The divorce decree had incorporated an agreement between the appellant and the appellee, the former Mrs. Blackshear, that had been approved by the decreeing court and filed in the divorce action. The agreement specified the amount of child support to be paid by the appellant for the support of "the four minor children of the marriage[,]" designating each child by name. Id. at 481, 478 P.2d at 853.

In denying the motions, the lower court found the issue of paternity to be *res judicata*. On appeal, the Hawai'i Supreme Court affirmed that conclusion, holding that "[a]ppellant's position as to their parentage is without merit, this issue having been finally adjudicated below." Id.

I believe Blackshear is directly on point and dispositive in this case. When the divorce court approved and its decree incorporated the MSCCA entered into by Mother and Presumed Father, the question of the paternity of Son was

rendered *res judicata* as to the parties to the divorce, including Mother, who nevertheless brings this petition, more than two years later, questioning the paternity of Son.

The overarching and superseding justification for the majority's holding, that "[a] presumptively legitimate child of questionable parentage should know the truth of her parentage – both, if there is a difference, her natural and her legal parentage[,]" taken from Doe v. Roe, 9 Haw. App. 623, 626-27, 859 P.2d 922, 924 (1993)(internal quotation marks omitted), is taken from questionable context as Doe was a case in which the infant's parentage was being litigated, for the first time, in parallel divorce and paternity actions but was not yet adjudicated in either. Id. at 623-24, 859 P.2d at 923.

Surely, such a child should know and have her parentage judicially and finally determined. Vital issues may then be addressed and permanently adjudicated concerning responsibility for the care, shelter, support, guidance, nurture and -- lest I neglect to mention it -- love of the child.

In this case, on the other hand, Son's parentage was, per Blackshear, finally adjudicated in the prior divorce action. From his birth, and for at least six years since entry of the divorce decree, the accretions of the heart have bound Presumed Father and this boy, still just eight years old, pursuant to that final adjudication. We now propose to expose these most

cherished ties to the imperious and unsentimental vagaries of the altar of knowledge. This appears to be the majority's only mission because the Alleged Father "has avowed to have no interest in [Son] in the past, present or future[.]" I must confess I lack the pioneering courage to fully embrace this particularly brave new world.

Implicit in the majority's conclusion is the notion that the legislature, in promulgating HRS chapter 584, implicitly overruled the supreme court's holding in Blackshear.

Though concise and unadorned by lengthy justification, the holding in Blackshear nonetheless embodies, at least in my view, a fundamental preference for stability over knowledge, for the ties the heart of a child develops over the brute fact of blood, that obtains when the welfare of the child is at stake. It is perhaps because of this foundation that the laconic holding in Blackshear goes without having to say much.

If the legislature indeed intended to undermine this foundation with its passage of HRS chapter 584, one would expect at least some such discussion, at the very least some such mention, in the chapter's legislative history:

> The Uniform Parentage Act, promulgated and adopted by the National Conference of Commissioners on Uniform State Laws in 1973 and approved by the House of Delegates of the American Bar Association in 1974, is intended to provide substantive legal equality for all children regardless of the marital status of their parents. The Uniform Act is 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."

Hse. Stand. Comm. Rep. No. 136, in 1975 House Journal, at 980-81.

Levy v. Louisiana, 391 U.S. 68, 72 (1968), reversed on equal protection grounds an interpretation of a Louisiana law which barred illegitimate children from recovering for the wrongful death of their natural and nurturant mother. Stanley v. Illinois, 405 U.S. 645, 658 (1972), invalidated on the same grounds an Illinois law by which the state took custody of illegitimate children from their natural father, upon the death of their natural mother, without a hearing to determine his fitness to have custody of them.

Clearly, the legislature passed HRS chapter 584 in order to ensure that illegitimate children enjoy the rights and protections that adjudicated parentage affords. Hence the chapter has no application to a case like this one, in which the divorce decree adjudicating Son's parentage has already afforded him the rights and protections the chapter is meant to confer.

There is no indication that the legislature promulgated the chapter to rectify, on behalf of the confessing party, admittedly false divorce pleadings, no matter how sympathetic the circumstances which gave rise to the omission. Nor is there any

indication that the legislature intended the law as a vehicle for "father shopping." And there is not a scintilla of evidence in the legislative history that the law was meant to foster a search for one's paternity in the service of knowledge for knowledge's sake.

At least one annotator concludes that it is well nigh universally accepted among the jurisdictions that an adjudication of paternity in a prior divorce proceeding is conclusive upon its parties in a later paternity proceeding:

> Specifically, in almost every case considering the effect, in subsequent proceedings between a husband and wife, of a finding or implication of paternity in a divorce or annulment decree, or in an incidental support or custody order, the courts have held or recognized that a husband and wife are concluded by the prior paternity determination.

Donald M. Zupanec, 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, 851 (1977)(footnote omitted).

A merely cursory review of such cases uncovers several directly on point, and reveals the principles and cogent considerations underlying the majority rule.

In In re Marriage of Klebs, 554 N.E.2d 298 (Ill. Ct. App. 1990), wife filed for divorce and a contest for custody of her daughter born during the marriage ensued. Some two years

later, a judgment for dissolution of marriage was issued incorporating an agreed order granting the parties joint custody of the daughter while maintaining her physical residence with the husband. The judgment stated that the daughter had been born to the marriage. Soon after, the wife remarried. Id. at 301.

About six months after the divorce, the wife filed a petition for determination of the paternity of her daughter. The wife also sought to vacate the portions of the divorce judgment establishing her former husband's paternity and granting him joint legal and full physical custody. The wife's petition revealed that blood tests taken about a month before the filing of her petition rather conclusively established that her current husband, and not her former husband, was the natural father of her daughter. Id.

The trial court ordered the former husband to undergo similar blood tests, which yielded much the same result. At an evidentiary hearing, the wife admitted that at the time she filed the divorce petition, she had already begun to suspect that her daughter was not the issue of her former husband because she bore a physical resemblance to her current husband instead. Id. at 302.

The trial court vacated the divorce judgment insofar as it found paternity in the former husband. The trial court held that "it was in [the daughter's] best interest to recognize that she had two fathers." The trial court further held that the

current husband was "the biological father" but that the former husband was "the 'equitable' or 'psychological' father[.]" The trial court did not, however, disturb the custody arrangements established in the divorce judgment. Id.

On appeal, the Appellate Court of Illinois held that the trial court erred in ordering the former husband to submit to blood tests and in not dismissing the wife's petition. As to the latter error, the appellate court stated, *inter alia*, that:

> Certainly, the petitioner in this case was a party to the dissolution proceedings. Therefore, she may be estopped from raising the issue of [her daughter's] parentage and the finding of paternity, as set forth in the dissolution decree, may be held *res judicata* for the purposes of her post-decree petition.

Id. at 303.

Similarly, in Markert v. Behm, 394 N.W.2d 239 (Minn. Ct. App. 1986), wife alleged in her petition for divorce that her husband was the father of her daughter born during the marriage. Over the course of the divorce proceedings, she reiterated that assertion in an affidavit, in a stipulation and in testimony. She asked for custody of her daughter subject to the husband's rights of visitation and for child support from the husband for her daughter's care and maintenance. The final decree of divorce declared daughter to be the child of husband and wife. Id. at 240-41.

About eight months later, the wife commenced a paternity action, seeking a declaration that an alleged father, and not her former husband, was the natural father of her daughter. She also requested a court order compelling the parties to submit to blood tests. Later the wife added a request that her daughter be joined as co-plaintiff and that a guardian ad litem be appointed by the court to represent her. Id. at 241.

The trial court held that the wife was estopped from bringing a paternity action by the previous divorce decree. The trial court did not rule on the wife's motion to add her daughter as co-plaintiff or her request for appointment of a guardian ad litem. On appeal, the Court of Appeals of Minnesota affirmed, holding that "the doctrines of collateral estoppel, equitable estoppel, and res judicata all bar[red]" the wife's paternity action. Id.

With respect to estoppel, the court of appeals reasoned, "Now that [wife] has succeeded in having [husband] named as [daughter's] father for the purpose of collecting child support, she challenges his paternity, in direct contradiction to her own prior testimony. Clearly, [wife] would be both collaterally and equitably estopped from challenging this adjudication because it was based on her own testimony." Id. at 242.

The court of appeals also noted that "paternity was clearly placed in issue by the pleadings in the dissolution

action and . . . the finding of fact that the children are the minor children of [husband] is res judicata and bars further litigation of the issue in the paternity action." Id. (internal quotation marks and citations omitted).

Again, in Ghrist v. Fricks, 465 S.E.2d 501 (Ga. Ct. App. 1995), wife and her husband had a son born during the marriage. The husband was listed as the father on the son's birth certificate. The husband related to the son as a father does, and a father-and-son bond developed between them. Unbeknownst to the husband, however, his wife had been carrying on an affair with an alleged father beginning a few months into the marriage and continuing through and after the period of her son's conception. The wife first suspected that the alleged father was the natural father of her son shortly after discovering she was pregnant. Id. at 503, 505.

Almost two years after her son's birth, the wife filed for divorce. In her divorce complaint, the wife alleged that her husband was the natural father of her son. About a month later, the wife and the husband entered into a settlement agreement which referred to her son as their minor child and laid out the husband's visitations rights and child support responsibilities. About another month later, the divorce court entered a final judgment and decree of divorce which expressly incorporated the settlement agreement. Id.

About three months after the divorce became final, the wife and the alleged father married. Eight months after their marriage, they had blood tests performed which confirmed the alleged father's paternity. They then filed a paternity action to determine the alleged father's paternity, and to relieve the former husband of his child support obligations and divest him of his parental rights. Over the former husband's objection, the trial court ordered him to submit to a blood test, which excluded any possibility that he was the natural father of the son. Id.

Following a jury trial, the trial court entered a judgment declaring the alleged father to be the son's legal and biological father, relieving the former husband of his child support obligations and divesting him of his parental rights. Id. at 504.

The Court of Appeals of Georgia reversed, holding that the wife and the alleged father were collaterally estopped from bringing the paternity action by the previous divorce judgment and their actions and positions therein. In so holding, the court of appeals remarked that "[t]his court cannot in good conscience permit [wife and alleged father] to now deny that [the former husband] is the child's father and to sever all ties the child has with his legal father." Id. at 505.

Even if a paternity action is brought by the state on behalf of a mother under similar circumstances, the result remains the same. In State ex rel. Henderson v. Tolver, 639

So. 2d 1371 (Ala. Civ. App. 1994), the State of Alabama sought a paternity determination and child support from the alleged father on behalf of a mother of twin daughters. The Court of Civil Appeals of Alabama affirmed dismissals by the district court and by the circuit court on a request for trial de novo because a previous judgment of divorce barred the paternity action on the grounds of *res judicata*. Id. at 1372.

Rejecting the state's argument that the judgment of divorce lacked sufficient "phrases as to paternity" to have preclusive effect, the court of civil appeals noted statements of the parties in the divorce proceedings -- that the children "were born of the marriage," and that the children "were born of our marriage" -- as well as provisions in the judgment dealing with child custody and visitation. Id. at 1372-73.

Titus v. Rayne, 1992 WL 437586 (Del. Fam. Ct. 1992), is to the same effect, but notable for the court's frank exposition of its opinion about the equitable aspects of the wife's actions:

> She intended to get what she could out of Husband at a time when it was to her benefit and she further intended to later discard him at will. She knew that Husband did not know. She now wants him out of Amanda's life forever and is apparently already making plans for Amanda to be adopted by Mr. Rufo. Where does this leave Husband, who has contributed love, support, care and affection for Amanda over a long period of time? The plain facts are that Wife was told [by her attorney] she could lie and get away with it, so she did.

Id. at *9. Less vehement, perhaps, but of the same opinion in a divorce case, was the Supreme Court of Rhode Island in Pettinato v. Pettinato, 582 A.2d 909, 912 (R.I. 1990):

> We are concerned about the situation . . . wherein a mother can tell a man that he is the father of her child, marry him, and live together as a family, and then illegitimize the child during a divorce proceeding by attacking the legal presumption of paternity that she helped bring about.

I am more attuned to the concern expressed by the Supreme Court of Wyoming in In re Paternity of J.R.W., 814 P.2d 1256, 1265 (Wyo. 1991):

> 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.

Titus, supra, is also notable for the relative efficiency with which it marshals the case law supporting the majority rule:

> I have already cited Slagle v. Slagle, 11 Va.Ct.App., 341 S.E.2d 346 (1990) which also found that the divorce decree itself constituted res judicata. Many other jurisdictions have considered this issue and found in a similar fashion. See, e.g., Conlon v. Heckler, 719 F.2d 788 (5th Cir.1983); De Weese v. Unick, 102 Cal.App.3d 100, 162 Cal.Rptr. 259 (1980); McNeece v. McNeece, 39 Colo.App. 160, 562 P.2d 767 (1977); In re Marriage of Yakubec, 154 Ill.App. 3d 540, (Iowa Ct.App.1986); In re Marriage of Zodrow, 727 P.2d 435 (Kan.1986); Anderson v. Anderson, 407 Mass. 251, 552 N.E.2d 546 (1990); Rucinski v. Rucinski, 172 Mich.App. 20, 431 N.W.2d 241 (1988); Clay v. Clay, 397

> N.W.2d 571 (Minn.Ct.App.1986), appeal dismissed, 484 U.S. 804 (1987); Butler v. Brownlee, 152 Mont. 453, 451 P.2d 836 (1969); Arnold v. Arnold, 207 Okla. 352, 249 P.2d 734 (1952); In re Adoption of Young, 469 Pa. 141, 364 A.2d 1307 (1986); Chrzanowski v. Chrzanowski, 325 Pa.Super. 298, 472 A.2d 1128 (1984); Luedtke v. Koopsma, 303 N.W.2d 112(S.D.1981); Lerman v. Lerman, 148 Vt. 629, 528 A.2d 1121 (1987); N.C. v. W.R.C., 173 W.Va. 434, 317 S.E.2d 793 (1984).

Titus, 1992 WL 437586 at *12. See also In re Presse, 554 So.2d 406 (Ala. 1989)(extensive discussion of the historical development of the majority rule).

In ignoring the ample example *contra* Mother's position, the majority seems most impressed by the "express and unequivocal mandate" of HRS chapter 584 requiring the parties to submit to genetic testing. However, as my discussion of the purpose of the chapter indicates, the mandate has no legitimate purpose and therefore no mandatory application where, as here, paternity and related rights and protections have already been adjudicated. The Wyoming Supreme Court has reached the same conclusion:

> Appellant's argument fails, however, since it ignores the clear policy implications underlying the [Wyoming Parentage] Act. While genetic testing, appointment of a guardian ad litem and an informal hearing are mandatory in the case of an initial, contested paternity determination, the Act does not mandate that the same procedures be used when paternity has already been established with the consent of the parties in a prior adjudication. We read nothing in the Parentage Act which requires full procedural compliance with the Act before the question of paternity is

> resolved. Where, as here, appellant and the mother agreed that the children were born of the marriage and this agreement was reflected in the divorce decree, there has been no violation of the mandatory language in the Act. The Act, as applied to the circumstances in this case, made appellant the "presumed father" and, as such, a blood test was not mandatory to establish parentage at the time of divorce. Under W.S. 14-2-106(a) in effect at the time of the divorce, appellant failed to exercise the statutory option of challenging his "presumed father" status in a parentage action joined with the divorce proceeding.

JRW, 814 P.2d at 1261 (footnote omitted).

The majority also relies upon its conclusion that, in the battle of the presumptions of paternity defined in the chapter, the genetic-testing presumption championed by Mother wins. As the great weight of authority provides, however, we are in this case no longer speaking of presumptions, but of a final adjudication of paternity which is *res judicata*.

The same reasoning applies to the majority's contention that, pursuant to HRS § 584-6(c), the chapter does not recognize the MSCCA between Mother and Presumed Father. We are no longer talking about a mere agreement between the parties to the divorce. Given the divorce court's approval of the MSCCA and its incorporation into the final divorce decree, we are now speaking of a decree of a court jurisdictionally and in all other respects competent to enter a final adjudication of paternity with preclusive effect. HRS § 571-47.

Finally, the majority generates some heat in arguing that Mother did not suffer claim or issue preclusion by virtue of her participation in the divorce action because the issue of Son's paternity was not affirmatively disputed or litigated in the proceedings. The facts and holding in Blackshear and the great weight of other cases catalogued above render this argument simply untenable. Pursuant to such authority, Mother's admissions and actions in the divorce collaterally estop her from relitigating Son's paternity here. Moreover, the determination of Son's paternity in the divorce decree is *res judicata* and bars Mother's petition.

Once it is decided that Mother is collaterally estopped and her petition barred, it remains necessary to deal with Mother's contention that because Son was made a party to the action, his support (through his guardian ad litem) for testing and a paternity determination should be respected, the fate of Mother's requests notwithstanding.

It is true that a weight of example similar to that which bars Mother's petition holds that there is no such bar to an action by Son:

> However, it has been held or recognized, in virtually every case considering the question, that a finding or implication of a child's paternity resulting from an earlier divorce or annulment proceeding is not binding on the child in any subsequent action unless the child was a party to the prior proceeding.

Zupanec, supra, 78 A.L.R.3d at 851 (footnote omitted).

In this case, however, Son did not bring the paternity action. He was made a party to the action upon motion by Mother and his support for testing and a paternity determination come solely through the guardian ad litem appointed to represent his interests. His participation and position in this litigation being wholly derivative of Mother's petition, and Mother's petition being estopped and barred, it follows that Son's putative interest in the litigation is no impediment to dismissing Mother's petition.

If mere logic be insufficient in dealing with Son's involvement in the action, the same reference resorted to in favor of Son's putative interest may be levied against it:

> Generally, a finding or implication of paternity has been ruled conclusive in these cases on the ground that parties to a proceeding, and their privies, are bound by an adjudication of an issue rendered in a prior action, but also, in the absence of an adjudication, on the ground that a presumption of a child's legitimacy is conclusive.

Zupanec, supra, 78 A.L.R.3d at 851 (emphasis supplied). The privity exception to the general rule has been applied as follows:

> Appellants also seek to have Natalie added as a co-plaintiff in this action. This motion appears to be nothing more than a thinly disguised attempt to bolster appellants' case by using the child as a party. If Natalie were placed in such a position by appellants, she would share their

> interests and therefore would be in privity with them. Natalie's action would then be collaterally estopped by the previous divorce decree. As stated above, collateral estoppel bars relitigation of the same issues by those in privity with the original parties as well as by the original parties themselves.

Markert, 394 N.W.2d at 242 (citation omitted).

It may appear impractical to urge that the petition be dismissed, because in that event Mother may simply turn around and bring another petition in Son's name. But I do not believe such a change in petitioner would be merely a distinction without a difference. As in Markert, supra, Son's position in this litigation is infected by his Mother's motives and interests. It is quite a different litigation where Son is the original petitioner, and the guardian ad litem appointed to represent his interests in that event should recognize the critical differences.

For all of the foregoing reasons, I would affirm the July 29, 1998 order of the trial court denying Mother's request for genetic testing. Because Mother's petition was barred *ab initio*, I would vacate the November 25, 1998 judgment insofar as it purported to determine Alleged Father's paternity of Son. Because Alleged Father opposes Mother's petition, his right to proceed under HRS chapter 584 is not an issue in this case and I express no opinion on that subject. I would remand the case to the trial court for dismissal of Mother's petition on the grounds

that she is collaterally estopped and barred from bringing her petition.

I therefore respectfully dissent.