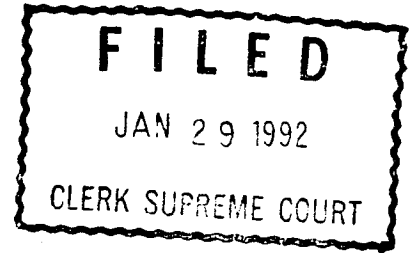


IN THE COURT OF APPEALS OF IOWA

No. 1-494 / 90-1830



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Upon the Petition of

DOUGLAS G. BRUCE,

Petitioner-Appellant/Cross-Appellee,

And Concerning

ELIZABETH SARVER,

Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Story County,
M. D. Seiser, Judge.

Alleged father appeals district court's dismissal of
his paternity action. **AFFIRMED, BUT FOR THE REASONS STATED
HEREIN.**

Luis Herrera of Herrera and Schemmel, P.C., Des Moines,
for appellant.

Kathy P. Ryman of Legal Aid Society of Story County,
for appellee.

Heard by Oxberger, C.J., and Schlegel and Habhab, JJ.

HABHAB, J.

Ayla Rachel Elizabeth Repp was born in October 1982. Her mother is Elizabeth Sarver. Douglas Bruce claims he is Ayla's father. However, Elizabeth denies that he is. Bruce and Elizabeth Sarver have never been married to each other. In addition, Bruce has never been adjudicated to be Ayla's father.

In 1990 Bruce filed a petition in Dallas County asking that he be awarded visitation with Ayla. In a subsequent amended petition, he asked that Ayla be placed in his physical custody and that Elizabeth be directed to pay him child support; in the alternative, he repeated his request for visitation rights.

In the Dallas County case, Elizabeth filed a motion to dismiss Bruce's petition. The motion was sustained. The district court held it lacked jurisdiction over Bruce's custody, child support, and visitation requests, since Bruce had never been adjudicated the child's father nor has he ever been married to Elizabeth.

Bruce appealed from the dismissal of his petition in the Dallas County case. We reversed and remanded that case with directions to take jurisdiction and determine the issue of paternity. Bruce v. Sarver, 472 N.W.2d 631 (Iowa App. 1991).

While the Dallas County case was pending on appeal, Bruce filed a paternity action in Story County under Iowa Code chapter 675. In her answer, Elizabeth raised the

affirmative defense of res judicata. After a hearing on the res judicata issue, the Story County trial court ruled it did not have jurisdiction to hear the case while an appeal was pending. The trial court reasoned the Dallas County case on appeal raised essentially the same issues as the later filed Story County case. It therefore dismissed the Story County case. In its dismissal order, the trial court also ruled Bruce was entitled to a jury trial under chapter 675 on the paternity issue.

Bruce appealed, and Elizabeth cross-appealed.

As this case is at law, our review is for errors of law. Iowa R. App. P. 4.

We believe the trial court, based on those facts and circumstances confronting it at the time, was correct in dismissing the Story County case. The same issues and claims asserted in the Story County case were or should have been adjudicated (claim preclusion) in the Dallas County case. Thus the principles of res judicata applied even though the Dallas County case was on appeal. Johnson v. Ward, 265 N.W.2d 746 (Iowa 1978).

However, that ruling does not resolve our problem. As we pointed out earlier, the Dallas County case was dismissed for lack of jurisdiction because paternity had not been established. Bruce, 472 N.W.2d at 631-32. We reversed, holding the district court had equitable jurisdiction to hear the case and remanded the case to the

Dallas County District Court to rule on paternity and the other issues involved. Id. at 632.

Thus, as presently constituted, we have two cases pending involving the same issues and subject matter, one in Dallas County and the other in Story County. We believe the Story County case should be dismissed at this time without prejudice for it was the last to be filed. In doing so, we point out that once the Dallas County case is resolved and since the same issues are involved, the rules and points of law applicable to res judicata would apply to the Story County case. We see no need in imposing the additional burden of litigation on the courts or the litigants insofar as the Story County case is concerned.

Accordingly, we affirm the Story County district court's dismissal order, except we order the dismissal to be without prejudice. We do so on the ground that a similar action is pending in Dallas County. In affirming the dismissal, we do not rely on that part of the Story County order that predicates its ruling on res judicata. Although the trial court was correct in its reasoning when it entered its ruling in the Story County case, our reversal of the Dallas County case with the remand order to establish paternity removes the defense of res judicata.

Our holding here in no way alters the proceedings in Dallas County. The district court there was already ordered to consider the paternity issue under the rationale of our opinion in Bruce v. Sarver, 472 N.W.2d 631 (Iowa

App. 1991). With the dismissal of the present case, it follows that we need not rule on whether the petitioner is entitled to a jury trial in Story County. That issue is rendered moot by our ruling.

AFFIRMED, BUT FOR THE REASONS STATED HEREIN.