

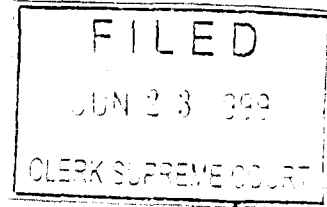
IN THE COURT OF APPEALS OF IOWA

No. 9-034 / 98-0804

Filed June 23, 1999

**IN RE THE MARRIAGE OF DAVID ROSEBERRY
and CONNIE L. ROSEBERRY**

Upon the Petition of
DAVID ROSEBERRY,
Appellee,



And Concerning
CONNIE L. ROSEBERRY, n/k/a
CONNIE L. MOORE,
Appellant.

Appeal from the Iowa District Court for Linn County, David M. Remley,
Judge.

Connie Moore appeals from the dismissal of her paternity action and a sealing
of genetic test results. **AFFIRMED IN PART; REVERSED IN PART AND
REMANDED WITH INSTRUCTIONS.**

David C. Thompson of Milroy, Eckhart & Thompson, Vinton, for appellant.

Stephen B. Jackson and Stephen B. Jackson, Jr., Cedar Rapids, for appellee.

Considered by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ.

Zimmer, J., takes no part.

SACKETT, C.J.

Respondent-appellant Connie L. Roseberry and petitioner-appellee David Roseberry were divorced on October 3, 1986. At that time, Connie and David represented to the dissolution court David was not the father of Connie's unborn child. The interests of the child, Alishia, who was born November 19, 1986, were not represented. There was no genetic testing. The dissolution court, on the testimony of Connie and David, bastardized Alishia. Connie has now, for herself and Alishia,¹ filed a petition to modify the dissolution decree alleging Alishia is David's child and both she and David misrepresented to the dissolution court David was not the father. Connie requested the finding of non-paternity be modified and David be required to pay past and current support, medical insurance, and educational expenses beyond high school for Alishia. After Connie filed her petition, blood tests of David, Connie, and Alishia were ordered. The blood tests were taken and their results were returned.

David then filed a motion for summary judgment and adjudication of law points. The district court sustained the motion, dismissing Connie's petition. The district court also sustained David's motion to seal the test results. Both rulings are challenged on appeal. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

¹ Connie contends she represents Alishia's interest, though Alishia is not a named party. The dissolution court has an obligation to the minor children of these parties. We, therefore, consider Alishia's interest.

The district court, in sustaining David's motions, found the issue of his paternity was litigated in the dissolution action and the doctrine of claim preclusion prevented the issue being relitigated. Connie contends issue preclusion should not be applied because, viewing the facts in the light most favorable to her position, there is evidence the finding of non-paternity was made only after she and David lied to the dissolution court.

An action for modification of a dissolution decree is tried in equity and our review is de novo. *In re Marriage of Bolick*, 539 N.W.2d 357, 359 (Iowa 1995); Iowa R. App. P. 4. To succeed in a modification action, there must be a showing of changed circumstances that are permanent and continuous in nature and not contemplated by the court when the dissolution decree was entered. *In re Marriage of Phipps*, 379 N.W.2d 26, 28 (Iowa App. 1985). We look to what was within the knowledge or contemplation of the dissolution court when the decree was entered. *In re Marriage of Bethards*, 526 N.W.2d 871, 874 (Iowa App. 1994).

This action did not go to trial but was dismissed after the district court sustained a motion for summary judgment and for adjudication of law points. Consequently, we review the district court's ruling at law. We review on the summary judgment to determine whether, viewing the record as a whole in the light most favorable to Connie, there were no genuine issues of material fact; that is, had Connie presented her evidence to the modification court and it was believed, it would not have supported her claim for modification. *See Sampson v. American Standard*

Ins. Co., 582 N.W.2d 146, 149 (Iowa 1998); *Dickerson v. Mertz*, 547 N.W.2d 208, 212 (Iowa 1996).

The prerequisites for issue preclusion are well established: (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. *Weishaar v. Snap-On Tools Corp.*, 582 N.W.2d 177, 180-81 (Iowa 1998). There need not be an actual trial for issue preclusion to apply; the issue can be stipulated to by the parties if subsequently included in a judgment or decree. *See State ex rel. Casas v. Fellmer*, 521 N.W.2d 738, 740-41 (Iowa 1994).

We agree the dissolution decree addressed and resolved the paternity issue, and the determination David was not the father was essential to the resulting judgment. While the facts Connie supplied would support a finding the district court was deceived when the issue was resolved because Connie was a part of the alleged deception, we distinguish her claim from the father's claim in *Bethards*, 526 N.W.2d at 873, where he was not a part of the deception. We agree with the district court Connie's claims against David flowing from his alleged paternity of Alishia were correctly found to be precluded by claim preclusion; she was a party to the proceedings and had knowledge of the facts she now alleges, and we affirm this finding.

The next question is whether Alishia's claims for modification of the paternity finding and for support are precluded where the finding of non-paternity in the dissolution decree was made based solely on statements of David and Connie that are now alleged to be false, and where Alishia did not have independent representation. To answer the question, we need to determine whether Alishia's interests were so connected to Connie's that she had a fair opportunity to litigate and was bound by the resolution.

A mother's action to establish paternity has been found to bar a child's subsequent action. *See State ex rel. Casas v. Fellmer*, 521 N.W.2d 738, 742 (Iowa 1994). In *Casas*, the supreme court rejected the State's claim it was not barred by *res judicata* from collecting child support from a putative father where the mother had at an earlier time petitioned to establish paternity and a decree approving settlement of the action was approved by the district court. The supreme court in *Casas* rejected the State's claim the child's interest in establishing paternity varied significantly from her mother's and she had a fundamental right to bring her own action to establish paternity. *Id.* at 742. Rather, the court found the child's interest so connected to her mother's that the child was found to have had a fair and full opportunity to litigate and was bound by resolution. *See id.*

Unlike the mother in *Casas*, there is no evidence to support a finding Connie represented Alishia's interests in the dissolution action. In fact, the available evidence

shows Connie advanced on summary judgment she agreed to lie about Alishia's paternity so David would not seek custody of the other children.

Additionally, *Casas* is distinguishable in that the decree, given preclusive affect there, came after the mother, who was never married to the alleged father, sued to establish paternity. Connie's actions were to cause the dissolution court to find non-paternity. The finding was made despite (1) the strong presumption Alishia, conceived during the marriage, was legitimate, *see In re Marriage of Schneckloth*, 320 N.W.2d 535, 536 (Iowa 1982); and (2) the fact that presumption can only be rebutted by clear, strong, and satisfactory evidence. *Metallo v. Musengo*, 353 N.W.2d 872, 875 (Iowa App. 1984).

Before approving a stipulation or agreement that concerns a minor child's interests, the court should review the matter to assure the interests of the child are not adversely affected. *See In re Marriage of Handeland*, 564 N.W.2d 445, 446 (Iowa App. 1997); *In re Marriage Udelhofen*, 538 N.W.2d 308, 310 (Iowa App. 1995). Parents cannot contract away or otherwise modify child support obligations. *In re Marriage of Zeliadt*, 390 N.W.2d 117, 119 (Iowa 1986). A court should enforce or approve such a contract only after assuring itself the parents are not asking for approval of that which adversely impacts a child's interests. *See id.*; *see also In re Marriage of Wimmer*, 349 N.W.2d 505, 507 (Iowa App. 1984). There is evidence the dissolution court was deceived as to the facts of Alishia's paternity; consequently, the

facts now alleged were not known to the dissolution court when it entered the decree which adversely impacted Alishia's interests. *See Bethards*, 526 N.W.2d at 873. Alishia's right to seek a modification of the decree is not barred by res judicata.

We next address the finding the blood test results be sealed and their admission is barred by issue preclusion. There is no basis to preclude Alishia from utilizing the tests to support her claim to modify paternity. The interests of a child in this state born out-of-wedlock (1) to be legitimate, (2) to have his or her birth father identified, and (3) to be supported by both parents, are strong. There once may have been justification for allowing a child to be bastardized through a dissolution proceeding with no more than the statements of the two parties to the proceeding. However, in this era of advanced medical science where there are testing procedures to confirm or deny paternity, including blood tests that allow for determination of paternity to be made with considerable accuracy, *see State ex rel. Wegman v. Schulz*, 417 N.W.2d 228, 230-31 (Iowa App. 1987), there is no justification to bastardize a child without utilizing testing. The presumption that children born during a marriage are legitimate has historically been extremely strong. *See Kuhns v. Olson*, 258 Iowa 1274, 1276, 141 N.W.2d 925, 926 (1966). There now is strong support for medical evidence to play a cardinal role in paternity disputes.

Additionally, we find strong public and legislative support to allow the results of genetic tests to trump over prior evidence and determinations of paternity. The

legislature's enactment in 1997 of amended Iowa Code chapters 598 and 600B gives us such direction.²

Iowa Code section 598.21(4A) states, in pertinent part:

If, during an action initiated under this chapter or any other chapter in which a child or medical support obligation may be established upon a prior determination of paternity, a party wishes to contest the paternity of the child or children involved, all of the following apply:

a. (1) *If the prior determination of paternity is based on . . . a court or administrative order entered in this state, . . . the provisions of section 600B.41A apply.*

Iowa Code § 598.21(4A)(a)(1) (1997) (emphasis added).

Section 600B.41A states, in pertinent part:

600B.41A Actions to overcome paternity--applicability--conditions.

1. Paternity which is legally established may be overcome as provided in this section if subsequent blood or genetic testing indicates that the previously established father of the child is not the biological child. Unless otherwise provided in this section, this section applies to the overcoming of paternity which has been established according to any of the means provided in section 252A.3, subsection 8, by operation of law when the established father and the mother of the child are or were married to each other, or as determined by a court of this state under any other applicable chapter.

Iowa Code § 600B.41A(1) (1997).

² The amendments are in response to the Iowa Supreme Court's decision in the case of *Dye v. Geiger*, 554 N.W.2d 538 (Iowa 1996). In *Geiger*, the court found a former husband, not the biological father of the child in question, could be held responsible for child support because the stipulation and decree found him to be the father. *Id.* at 541.

While we agree with the district court these amendments are not specific to the facts of this case,³ they do indicate the legislature's strong support for the modification of paternity determinations when results of genetic testing are contrary to prior determinations of paternity.

We remand to the district court to appoint an attorney to represent Alishia and entertain a modification action to reconsider Alishia's paternity. The blood test results should be unsealed and received in evidence if proper foundation is established.

Connie should have no support claim until she shows she is not able to support Alishia, and then only from the time she makes the showing. *See Herb v. Herb*, 251 Iowa 957, 962, 103 N.W.2d 362, 363-64 (1960).

AFFIRMED IN PART; REVERSED IN PART AND REMANDED WITH INSTRUCTIONS.

Huitink and Mahan, JJ., specially concur; Streit and Vogel, JJ., dissent.

³ Connie had advanced before the district court these amendments supported her position.

HUITINK, J. (specially concurring)

I cannot distinguish Connie's situation from the relationship of the parties in *Casas*. Because Alisha's interests are derivative of Connie's, the conclusion that the common issue raised was fully and fairly litigated is inescapable. The issue then is not whether all the elements of issue preclusion have been established, but whether the preclusive effect of the 1986 decree may be avoided.

A judgment may be collaterally attacked and its preclusive effect avoided if it was obtained by extrinsic fraud. *Metello v. Musango*, 353 N.W.2d 872, 875 (Iowa App. 1994) (citing *Sandler v. Sandler*, 258 Iowa 84, 86, 137 N.W.2d 591, 592 (1965)). *Mauer v. Rohde*, 257 N.W.2d 489, 496 (Iowa 1977). See also A. Vestal, *Res Judicata/Preclusion*, V-414 (1969). The remedy for relief from a judgment obtained by fraud is separate and distinct from a modification proceeding based on changed circumstances. *In re Marriage of Bauder*, 316 N.W.2d 697, 699 (Iowa App. 1981). The court has both rule-based and equitable authority to vacate or modify a fraudulent decree. Iowa R. Civ. P. 252, 253. *Shaw v. Addison*, 236 Iowa 720, 728-29, 18 N.W.2d 796, 801 (1945). Unlike its rule-based authority, the court may invoke its equitable authority without regard to the one-year time limit provided in Iowa Rule of Civil Procedure 253. *Id.*

Our supreme court has uniformly held the requisite fraud must be extrinsic rather than intrinsic. *Mauer*, 257 N.W.2d at 496. In *Mauer* the court distinguished extrinsic and intrinsic fraud in these terms:

Intrinsic fraud “occurs within the framework of the actual conduct of the trial and pertains to and affects the determination of the issue presented therein. It may be accomplished by perjury, or by the use of false or forged instruments, or by concealment or misrepresentation of evidence.” *Auerbach v. Samuels*, 10 Utah 2d 152, 155, 349 P.2d 1112, 1114 (1960); A. Vestal, *Res Judicata/Preclusion*, p. V-410 (1969).

Extrinsic fraud, on the other hand, has been described as that fraud which keeps a litigant from presenting the facts of his or her case and prevents an adjudication on the merits. Examples of extrinsic fraud are a bribed judge, dishonest attorney representing the defrauded client, or a false promise of compromise. See A. Vestal, *Res Judicata/Preclusion*, *supra*, at V-418, and citations, cf. *United States v. Throckmorton*, 98 U.S. 61, 65-66, 25 L. Ed. 2d 93, 95 (1878).

Connie’s amended application to modify the 1986 decree implicates the court’s equitable authority to grant relief from a judgment tainted by extrinsic fraud. Connie’s contention that she acquiesced in concealing Alisha’s paternity because David threatened to contest custody of their other children at least raises a fact question on the existence of extrinsic fraud. Summary judgment should not have been granted.

I would reverse and remand for further proceedings to determine whether Connie can establish the extrinsic fraud necessary to avoid the preclusive effect of the 1986 judgment. I concur with the majority on all other issues.

Mahan, J., joins this special concurrence.

STREIT, J. (dissenting)

I respectfully dissent. The majority declares that the dissolution court “bastardized Alisha” and sets out to right this wrong. Such action is not supported by our law.

A mother appeals a trial court’s dismissal of her petition to establish her child’s paternity she had previously denied in her divorce. Connie Moore appeals the trial court’s grant of summary judgment on her paternity action seeking to establish the paternal relationship between David Roseberry and her daughter, Alisha Moore. In their 1986 divorce decree, Roseberry and Connie Moore stipulated Roseberry was *not* Alisha’s father. Moore is unable to set aside the divorce decree after a delay of ten years; she should not be allowed to collaterally attack the decree, and should be barred by the doctrine of issue preclusion. The trial court’s grant of summary judgment should be affirmed. Moore also appeals the district court’s order the genetic test results be sealed. We properly reverse this order.

I. Background & Facts.

In 1985 David and Connie Roseberry were divorced. The court incorporated a stipulation offered by the parties into the decree. The stipulation stated Moore was pregnant, Roseberry was not the father, and Roseberry was to have no future obligations or rights with regard to the unborn child. On November 19, 1986, Moore gave birth to Alisha Moore.

Moore has not sought to have the divorce decree set aside based on fraud, coercion, or duress. In the last ten years, the divorce decree was modified numerous times regarding physical custody of the children and child support obligations of the parties. Each time a modification was filed with the court, it identified Moore and Roseberry as the parents of the three boys. Moore never challenged the accuracy of these representations. It was not until January 1997, over ten years after the trial court's original decree, Moore sought a new determination of paternity between Roseberry and Alisha.

In February 1998 the court ordered Roseberry to participate in genetic testing for the purpose of determining whether or not Roseberry was Alisha's father. The parties submitted to genetic testing. Roseberry moved for summary judgment on the paternity action, arguing it was barred by issue preclusion. After the trial court granted Roseberry summary judgment, Roseberry filed a motion to stop the genetic analysis and have the records sealed. The trial court ordered the records sealed. Moore motioned to unseal the genetic test results. The trial court denied the motion and ordered the results remain sealed unless Moore was successful in her appeal of the court's grant of summary judgment.

II. Standard of Review.

Actions to establish or overcome paternity are triable as ordinary proceedings. Iowa Code §§ 600B.10, 600B.41A(5); *Dye v. Geiger*, 554 N.W.2d 538, 539 (Iowa 1996). This appeal comes to us after the district court's grant of Roseberry's

summary judgment motion. Our review of a grant or denial of summary judgment is at law. Iowa R. App. P. 4; *Sampson v. American Standard Ins. Co.*, 582 N.W.2d 146, 149 (Iowa 1998). Summary judgment is only appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c); *Phipps v. IASD Health Servs. Corp.*, 558 N.W.2d 198, 201 (Iowa 1997).

III. Moore's Petition to Establish Paternity and Support.

Moore contends her petition to establish paternity and support is allowable because the stipulation was a misrepresentation to the court and, alternatively, she has an action under Iowa Code section 600B.41A(1)(1997). Roseberry contends her claim is barred by issue preclusion and section 600B.41A(1) is inapplicable to the facts of this case.

Moore had a vehicle to challenge her divorce decree based on fraud, coercion, or duress under Iowa Rules of Civil Procedure 252 and 253. To do so, however, Moore must have filed her petition to set aside the judgment of the court within one year after it was filed. Iowa R. Civ. P. 253. Moore waited ten years to challenge the divorce decree. Having failed to seek to set aside the decree, Moore cannot make a collateral attack as she has attempted to do here. "It is a well-established rule of law in this state that, where the court has jurisdiction both of the person and the subject matter, a judgment is conclusive against collateral attack, though it be erroneous." *In re Estate of Lilienthal*, 574 N.W.2d 349, 352 (Iowa App. 1997).

Even if Moore were allowed to challenge the 1986 judgment through this action, she is barred by the doctrine of issue preclusion. The prerequisites for issue preclusion are well established: (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. *Weishaar v. Snap-On Tools Corp.*, 582 N.W.2d 177, 181 (Iowa 1998). An actual trial is unnecessary for issue preclusion to apply; the issue can be stipulated to by the parties. *See State ex rel. Casas v. Fellmer*, 521 N.W.2d 738, 741 (Iowa 1994). It was not just Roseberry, but Moore also, who represented to the court through the parties' stipulation Roseberry was not Alisha's father.

Our supreme court has held issue preclusion barred the determination of paternity. *In re Evans*, 267 N.W.2d 48, 51 (Iowa 1978). The majority herein relies on *In re Marriage of Bethards*, 526 N.W.2d 871 (Iowa App. 1994), to support its conclusion that res judicata does not apply. *Bethards* relies on *Evans* for this proposition. However, *Evans* holds that paternity may be litigated following a default decree since the issue was never expressly determined in the original divorce action. *Evans*, 267 N.W.2d at 51; *see In re Marriage of Bethards*, 526 N.W.2d 871, 876 (Iowa App. 1994) (Cady, J., dissenting).

In *Evans*, the question also presented was whether paternity could be litigated when the issue was earlier determined in a child support modification proceeding.

The modification order was based on a specific stipulation of the parties that the child was not the husband's and ordered he "shall not be obligated to pay child support." *Evans*, 267 N.W.2d at 50. In a later proceeding, the district court vacated the prior modification order to allow the determination of paternity. *Id.* The supreme court reversed the district court's vacation and paternity determination on the doctrine of issue preclusion. *Id.* The *Evans* court simply declared: "Once the paternity issue was resolved, absent an appeal, familiar principles of res judicata bar further litigation." *Id.* at 51.

The issue of Roseberry's paternity was specifically determined in the divorce action. The issue is identical to the one before the court. Whether Roseberry was Alisha's father was material and relevant to the disposition of the divorce because such determination would define Roseberry's rights and obligations in regard to Alisha. Issue preclusion applies to this case, and the trial court should be affirmed.

Moore argues her action is allowed, despite the common law doctrines discussed above, under Iowa Code section 600B.41A (1997).¹ This statute has been recently held unconstitutional by our supreme court in *Callender v. Skiles*, 1999 WL 80774 (Iowa 1999). For that reason, the statute cannot be used as a vehicle for

¹ Iowa Code section 600B.41A(1) (1997) provides:

1. Paternity which is legally established may be overcome as provided in this section if subsequent blood or genetic testing indicates that the previously established father of a child is not the biological father of the child. Unless otherwise provided in this section, this section applies to the overcoming of paternity which has been established according to any of the means provided in section 252A.3, subsection 8, by operation of law when the established father and the mother of the child are or were married to each other, or as determined by a court of this state under any other applicable chapter.

Moore's claim. Even if the statute had not been held unconstitutional, it does not provide Moore a vehicle to challenge the 1986 divorce decree. Iowa Code section 600B.41A creates a statutory exception to issue preclusion in paternity actions under specified circumstances. The limited exception applies only to the circumstance whereby a man who has been legally established as the father of a child challenges the paternity finding based on genetic tests, revealing, to a high certainty, he is not the child's father. The statute is limited to this circumstance and does not apply to Moore's circumstance. One condition of overcoming the previous establishment of paternity is "genetic testing demonstrat[ing] the established father is not the biological father of the child." See Iowa Code § 600B.41A(3)(f) (1997). Here, Moore seeks to establish paternity which has been previously established not to exist. The statute does not apply.

The majority finds issue preclusion prevents Moore from pursuing a claim of paternity against Roseberry but then goes on to order further proceedings on the issue with the pronouncement of "strong public and legislative support to allow the results of genetic tests to trump over prior evidence and determination of paternity." The majority finds the child's interests were not represented earlier, that remands for further proceedings concerning paternity and support if "Connie ... is not able to support Alishia." *Herb v. Herb*, 251 Iowa 957, 103 N.W.2d 361, 363 (1960) is cited for support for this. *Herb* stands for no such action. In *Herb* the supreme court reversed a trial court's approving an agreement concerning child support owed and

modified future support. In rejecting a father's claim of contract, the court concluded that an agreement between divorced parents reducing the amount of child support payments to be made by husband must be founded upon a good and sufficient consideration. *Id.*

The concurring judge appeals to our sense to do right. Although extrinsic fraud may be the grounds to attack a judgment of the court, this is done in the context of our rules of procedure. The cases cited by the concurror do not stand for the proposition that the equitable powers of the court are such that a court may vacate a fraudulent decree at any time. *Shaw* stated:

The general practice in Iowa where equitable relief is sought to set aside a judgment where the grounds therefor could not reasonably be discovered, and were not discovered, within the year after the rendition of judgment, is for the petitioner to institute an independent action in equity against the successful party in the judgment action.

Shaw v. Addison, 236 Iowa 720, 18 N.W.2d 796, 801 (1945).

Shaw concludes:

It has been the uniform holding of this court that where the petitioner has not in the exercise of proper diligence discovered the fraud or other grounds upon which he relies within the year after the entry of final judgment or decree, he may institute suit in equity invoking the equitable powers of the court to vacate the judgment or grant him a new trial, after the time fixed in the statute for so doing has passed. But while the proceeding is in equity we have also uniformly held that the grounds alleged for the relief must be found among those specified in the statutory provisions noted herein authorizing the relief.

Shaw, 236 Iowa 720, 18 N.W.2d 796, 801(1945).

Moore had time to file the action to vacate after the threats of litigation expired. Moore signed the original divorce papers knowing they were false. She claims she did this because of her fear of a custody dispute. Even if she was coerced into this signing, the rules allowed her to attack this decree within one year. She failed to do this. She does not allege her fear of a custody dispute prevented her from righting this wrong in a timely manner. She does not explain why she remained silent, despite repeated visits to the courts for modifications. Due diligence is required, at a minimum, to be shown in getting around the time limits on filing to vacate a fraudulent decree. Her waiting over ten years from the original decree is sufficiently long to escape any of the valiant rescue efforts by the majority.

IV. Trial Court's Seal of Genetic Test Results.

Moore contends the trial court erred in sealing the genetic test results and in its denial of her motion to unseal the test results. Moore argues Alisha is entitled to know the results of the test even if she is precluded from relitigating paternity.

Roseberry was ordered by the district court, pursuant to Iowa Code section 600B.41 and 600B.41A, to participate in genetic testing. The tests would be submitted to the district court for the purpose of determining Roseberry's paternity of Alisha. After summary judgment was granted on Moore's paternity action, Roseberry sought to stop the genetic testing and have the genetic samples destroyed. The district court denied his request. Rather, the trial court ordered the results of the genetic test sealed, only to be released by subsequent order of the court after notice and hearing.

The genetic test result was provided to the district court and became a part of this case file.

Roseberry argues the court had authority to order the records sealed under Iowa Rule of Civil Procedure 123. That rule allows the court “for good cause shown” to make any order in the discovery context “which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Moore seeks the information in the records, not in relation to a discovery matter, but for knowledge of the information itself. Roseberry has not proven “good cause” for the records to remain sealed and Alisha to be deprived of the knowledge of who her natural father is. Roseberry did not show annoyance, embarrassment, oppression, undue burden, or expense would result from Alisha obtaining this information. It may prove embarrassing to Roseberry if it is shown he deceived the trial court years ago and has failed to support his daughter. This shame is tolerable. The only embarrassment that will result will be the disclosure of Alisha’s father — not an unjust result.

The majority orders the trial court to unseal the blood tests. This is logical since the action is going forward. However, even if the trial court were affirmed on its dismissal of the action, disclosure is not protected by Iowa Rule of Civil Procedure 123.

The district court's grant of summary judgment on Moore's paternity action should be affirmed. The court's order the genetic test results be sealed should be reversed.

Vogel, J., joins this dissent.

No. 98-0804. [9-034] IN RE MARRIAGE OF ROSEBERRY

Appeal from the Iowa District Court for Linn County, David M. Remley, Judge.
AFFIRMED IN PART; REVERSED IN PART AND REMANDED WITH INSTRUCTIONS. Considered by Sackett, C.J., and Huitink, Streit, Vogel and Mahan, JJ. Zimmer, J., takes no part. Opinion by Sackett, C.J. Huitink and Mahan, JJ., specially concur; Streit and Vogel, JJ., dissent. (21 pages \$8.40)

Connie and David were divorced on October 3, 1986. At that time, Connie and David represented to the dissolution court David was not the father of Connie's unborn child. The interests of the child, Alishia, who was born November 19, 1986, were not represented. There was no genetic testing. The dissolution court, on the testimony of Connie and David, bastardized Alishia. Connie has now, for herself and Alishia, filed a petition to modify the dissolution decree alleging Alishia is David's child and both she and David misrepresented to the dissolution court David was not the father. Blood tests were taken and their results were returned. David filed a motion for summary judgment and adjudication of law points. The district court sustained the motion, dismissing Connie's petition. The district court also sustained David's motion to seal the test results. Both rulings are challenged. We affirm in part, reverse in part, and remand. The district court found the issue of his paternity was litigated in the dissolution action and the doctrine of claim preclusion prevented the issue being relitigated. Connie contends issue preclusion should not be applied. We agree the dissolution decree addressed and resolved the paternity issue, and the determination David was not the father was essential to the resulting judgment. We agree with the district court Connie's claims against David flowing from his alleged paternity of Alishia were precluded; she was a party to the proceedings and had knowledge of the facts she now alleges. We affirm this finding. The next question is whether Alishia's claims are precluded. A mother's action to establish paternity has been found to bar a child's subsequent action. See *State ex rel. Casas v. Fellmer*, 521 N.W.2d 738, 742 (Iowa 1994). Unlike the mother in *Casas*, there is no evidence Connie represented Alishia's interests in the dissolution action. The available evidence shows Connie agreed to lie about Alishia's paternity. Before approving a stipulation or agreement that concerns a minor child's interests, the court should review the matter to assure the interests of the child are not adversely affected. There is evidence the dissolution court was deceived as to the facts of Alishia's paternity; consequently, the facts now alleged were not known to the dissolution court when it entered the decree. Alishia's right to seek a modification of the decree is not barred. Also, there is no basis to preclude Alishia from utilizing the blood tests to support her claim to modify paternity. We remand to the district court to appoint an attorney to represent Alishia and entertain a modification action to reconsider Alishia's paternity. The blood test results should be unsealed. **SPECIAL CONCURRENCE ASSERTS:** I cannot distinguish Connie's situation from the relationship of the parties in *State ex rel. Casas v. Fellmer*, 521 N.W.2d 738, 740-41 (Iowa 1994). Because Alishia's interests are derivative of Connie's, the conclusion that the common issue raised was fully and fairly litigated is inescapable. The issue then is not whether all the elements of issue preclusion have been established, but whether the preclusive effect of the 1986 decree

No. 98-0804. [9-034] IN RE MARRIAGE OF ROSEBERRY (continued)

may be avoided. Connie's amended application to modify the 1986 decree implicates the court's equitable authority to grant relief from a judgment tainted by extrinsic fraud. Connie's contention that she acquiesced in concealing Alisha's paternity because David threatened to contest custody of their other children at least raises a fact question on the existence of extrinsic fraud. Summary judgment should not have been granted. I would reverse and remand for further proceedings to determine whether Connie can establish the extrinsic fraud necessary to avoid the preclusive effect of the 1986 judgment. I concur with the majority on all other issues. Mahan, J., joins this special concurrence.

DISSENT ASSERTS: I respectfully dissent. The majority declares that the dissolution court "bastardized Alisha" and sets out to right this wrong. Such action is not supported by our law. Moore had a vehicle to challenge her divorce decree based on fraud, coercion, or duress under Iowa Rules of Civil Procedure 252 and 253. To do so, however, Moore must have filed her petition to set aside the judgment of the court within one year after it was filed. Iowa R. Civ. P. 253. Moore waited ten years to challenge the divorce decree. Having failed to seek to set aside the decree, Moore cannot make a collateral attack as she has attempted to do here. Even if Moore were allowed to challenge the 1986 judgment through this action, she is barred by the doctrine of issue preclusion. Moore argues her action is allowed, despite the common law doctrines discussed above, under Iowa Code section 600B.41A (1997). This statute has been recently held unconstitutional by our supreme court in *Callender v. Skiles*, 1999 WL 80774 (Iowa 1999). The majority finds issue preclusion prevents Moore from pursuing a claim of paternity against Roseberry but then goes on to order further proceedings on the issue with the pronouncement of "strong public and legislative support to allow the results of genetic tests to trump over prior evidence and determination of paternity." *Herb v. Herb*, 251 Iowa 957, 103 N.W.2d 361, 363 (1960) is cited for support for this. *Herb* stands for no such action. The concurring judge appeals to our sense to do right. Although extrinsic fraud may be the grounds to attack a judgment of the court, this is done in the context of our rules of procedure. The cases cited by the concurring do not stand for the proposition that the equitable powers of the court are such that a court may vacate a fraudulent decree at any time. In this case, Moore signed the original divorce papers knowing they were false. She claims she did this because of her fear of a custody dispute. Even if she was coerced into this signing, the rules allowed her to attack this decree within one year. She failed to do this. She does not allege her fear of a custody dispute prevented her from righting this wrong in a timely manner. She does not explain why she remained silent, despite repeated visits to the courts for modifications. Due diligence is required, at a minimum, to be shown in getting around the time limits on filing to vacate a fraudulent decree. Her waiting over ten years from the original decree is sufficiently long to escape any of the valiant rescue efforts by the majority. Moore contends the trial court erred in sealing the genetic test results and in its denial of her motion to unseal the test results. Moore argues Alisha is entitled to know the results of the test even if she is precluded from relitigating paternity. Roseberry argues the court had authority to order the records sealed under Iowa Rule of Civil Procedure 123. The court did not have the authority to seal the records under this rule. Moore seeks the

information in the records, not in relation to a discovery matter, but for knowledge of the information itself. Roseberry has not proven “good cause” for the records to remain sealed and Alisha to be deprived of the knowledge of who her natural father is. Roseberry did not show annoyance, embarrassment, oppression, undue burden, or expense would result from Alisha obtaining this information. It may prove embarrassing to Roseberry if it is shown he deceived the trial court years ago and has failed to support his daughter. This shame is tolerable. The only embarrassment that will result will be the disclosure of Alisha’s father — not an unjust result. The district court’s grant of summary judgment on Moore’s paternity action should be affirmed. The court’s order the genetic test results be sealed should be reversed. Vogel, J., joins this dissent.