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ARKANSAS COURT OF APPEALS

DIVISIONS II & III
No. CV-21-516

	Opinion Delivered December 14, 2022
TERRY HOLMES APPELLANT	APPEAL FROM THE SALINE COUNTY CIRCUIT COURT [NO. 63DR-16-410]
V.	HONORABLE KEN CASADY, JUDGE
STACI JONES APPELLEE	AFFIRMED

MIKE MURPHY, Judge

In this one-brief appeal, appellant Terry Holmes argues that the Saline County Circuit Court erred in reforming the 2016 divorce decree between him and appellee Staci Jones to contemplate the care and custody of their biological child born during the marriage. On appeal, he argues that res judicata barred the relitigation of paternity. We affirm.

Staci and Terry were married on April 29, 2015. In April 2016, Staci gave birth to a daughter. Terry was told the child was not his, and he was not named on the birth certificate. Terry and Staci were divorced by decree of the Saline County Circuit Court on May 24, 2016. The parties, acting pro se, used an online legal form to create their petition for divorce and the form decree. That form, corresponding pleadings, and decree provided there were no children born of the marriage.

In October 2020, Staci petitioned the court to reform the decree to reflect a child born of the marriage and award the corresponding custody and support. Terry moved to dismiss, arguing that res judicata barred any reformation of the decree and future awards of support or custody because the issues could have been litigated in the 2016 divorce but were not. The circuit court denied the motion to dismiss. A paternity test established Terry as the father of the child. Without waiving his objections and arguments concerning res judicata, Terry agreed to an order modifying the original decree reflecting him as the biological father, awarding custody to Staci, and ordering child support. Terry now appeals, arguing the circuit court erred in not dismissing the petition under principles of res judicata.

In reviewing a circuit court's decision on a motion to dismiss regarding the application of the legal doctrine of res judicata, our review is de novo. *Skinner v. Shaw*, 2020 Ark. App. 407, at 5, 609 S.W.3d 454, 457–58. We presume that the circuit court acted properly and made such findings of fact as were necessary to support its judgment. *Wyatt v. Wyatt*, 2018 Ark. App. 177, at 7, 545 S.W.3d 796, 802. The primary consideration in cases involving the welfare of a child is the best interest of that child. *Ark. Dep't of Hum. Servs. v. Couch*, 38 Ark. App. 165, 169, 832 S.W.2d 265, 267 (1992).

The purpose of res judicata is to put an end to litigation by preventing a party who has already had a fair trial on the matter from litigating it again. *Hardy v. Hardy*, 2011 Ark. 82, at 10, 380 S.W.3d 354, 359. Res judicata bars not only the relitigation of claims that were actually litigated in the first suit but also those that could have been litigated. *Id.* Res judicata is an affirmative defense provided in Arkansas Rule of Civil Procedure 8(c). There

are limits on its applicability. For example, if fraud or collusion is used in the procurement of the first judgment, res judicata may not apply. *McGee v. McGee*, 100 Ark. App. 1, 4, 262 S.W.3d 622, 625 (2007). Additionally, the doctrine of res judicata is not strictly applicable in child-custody matters. *Bamburg v. Bamburg*, 2014 Ark. App. 269. The supreme court has held that in proceedings concerning custody and support, the rules of civil procedure do apply, but they must be balanced with public policy. *See id.*; *see also Davis v. Off. of Child Support Enf't*, 322 Ark. 352, 356, 908 S.W.2d 649, 652 (1995). The welfare of the child is paramount. *Davis*, *supra*.

Terry argues that Staci is attempting to relitigate the decree, and Arkansas precedent consistently holds that res judicata bars parents from challenging paternity once it has been established through a prior action. This is not a misstatement of the law; Terry is correct that there is no shortage of cases applying the doctrine of res judicata to bar relitigation of paternity when it was established under a divorce decree. *McCormac v. McCormac*, 304 Ark. 89, 799 S.W.2d 806 (1990); *State Off. of Child Support Enf't v. Williams*, 338 Ark. 347, 995 S.W.2d 338 (1999); *Hardy v. Hardy*, 2011 Ark. 82, 380 S.W.3d 354; *Putt v. Suttles*, 2011 Ark. App. 688, 386 S.W.3d 623. The case before us today, however, is distinguishable. First, paternity was never actually litigated. The court never even knew a child existed. And second, while it is also true that res judicata bars litigation of issues that could have been litigated but were not, no precedent has ever applied res judicata to delegitimize a child born during wedlock. As the supreme court explained in *Williams*, *supra*, doctrines of res judicata and collateral estoppel were observed "[b]ecause of the potentially damaging effect that

relitigation of a paternity determination might have on innocent children." 338 Ark. at 352, 995 S.W.2d at 340 (quoting *In re Paternity of JRW & KB*, 814 P.2d 1256, 1265 (Wyo. 1991)); *see also Martin v. Pierce*, 370 Ark. 53, 60, 257 S.W.3d 82, 88 (2007) (applying res judicata despite fraud allegations due to the policy implications of delegitimizing a child).

A circuit court may modify a divorce decree after ninety days has passed from its entry pursuant to Arkansas Rule of Civil Procedure 60 when that decree contains a general reservation of jurisdiction with respect to issues considered in the original action. *Toney v. Burgess*, 2018 Ark. App. 54, at 3, 541 S.W.3d 469, 471. Arkansas Code Annotated section 9-12-312(a)(1) (Repl. 2020) provides that when a decree is entered, the court shall make an order concerning the care of the children. Divorces have no effect on the legitimacy of children born before the entry of the decree. Ark. Code Ann. § 9-12-311 (Repl. 2020).

Here, a strict application of res judicata would effectively delegitimize a child born of a marriage. We do not think that this tracks with the spirit of the law. Courts are encouraged to take a more flexible approach to res judicata in settings involving children so that they may be able to best assess what is in the best interest of the child. *Bamburg*, *supra*. Nor is child support something that may be obstructed by clever implementation of civil procedure. *Davis*, 352 Ark. at 356, 908 S.W.2d at 652 ("This case therefore requires us to balance the application of ARCP Rule 41 against the public policy that a minor's right to support cannot be permanently settled by his parent."). Put another way, res judicata is a viable defense to a challenge to an established paternity finding, but only insofar as it is not wielded to the affected child's detriment. A child was born of the marriage, and the circuit court was

required to make an order concerning her care and custody. It was not erroneous for the court to deny the motion to dismiss.

Affirmed.

KLAPPENBACH, GRUBER, and BROWN, JJ., agree.

ABRAMSON and GLADWIN, JJ., dissent.

ROBERT J. GLADWIN, Judge, dissenting. In an effort to reach a desired result, the majority makes an argument for the appellee that was not made to the trial court nor to this court. That error is compounded by the fact that it also disregards clear established precedent that res judicata should apply in this case. I would reverse the trial court's failure to apply res judicata; therefore, I dissent.

I. *Facts*

A more thorough examination of the procedural history of this case is necessary for an understanding of the issues presented.

Holmes and appellee Staci Jones were married on April 29, 2015. The parties separated on or about July 15, 2015, and Jones filed a pro se complaint for divorce in the Saline County Circuit Court on April 20, 2016. She alleged in her verified divorce complaint that there were no minor children born of the marriage and that none were expected. Holmes entered his appearance and waived service and notice. The divorce decree was filed on May 24, 2016, stating that "[t]here are no children born during this marriage and none are expected."

On October 26, 2020, Jones filed a petition alleging that the parties had entered into an "agreed Divorce" and had utilized a "do it yourself" kit. She claimed, "Everything was correct in that Divorce proceeding . . . but the parties did have a child that was theirs biologically and which was born during the marriage." The child's birth certificate was attached to the petition, and it reflects that the child was born on April 5, 2016, two weeks before Jones's divorce complaint was filed. Jones asked that the divorce decree be "reformed" to reflect that the parties had a child born to them during the marriage. She asked that she be awarded custody and child support and that medical and insurance expenses for the child be divided equally.

Holmes responded that the parties had lived together for approximately two months and that when the child was born on April 5, 2016, Jones told him that the child was not his. He is not listed on the child's birth certificate, and Jones "has the child call someone else 'Daddy.'" He affirmatively pled the defenses of Rules 12(b) and 8(c) of the Arkansas Rules of Civil Procedure in addition to judicata, laches, estoppel, and failure to state facts upon which relief can be granted.

On December 14, 2020, Holmes moved to dismiss Jones's petition, alleging that Jones's boyfriend had been present for the child's birth and that Holmes was not named on the birth certificate. He also alleged that two weeks after the child's birth, Jones filed a notarized deposition in the divorce action and stated under oath that there were no children of the marriage and that none were expected. The May 24, 2016, decree reflects the same. He argued that res judicata has been applied to the issue of paternity when paternity is

addressed under a divorce decree. *State Office of Child Support Enf't v. Williams*, 338 Ark. 347, 995 S.W.2d 338 (1999); *McCormac v. McCormac*, 304 Ark. 89, 799 S.W.2d 806 (1990). Holmes also relied on *Department of Human Services v. Seamster*, 36 Ark. App. 202, 820 S.W.2d 298 (1991)[1] and *Mathis v. Estate of McSpadden*, 2012 Ark. App. 599.[2] He argued that the May 24, 2016, decree was a final judgment on the merits; that the decree was based on proper jurisdiction and fully contested in good faith; that the decree and petition involve the same cause of action; and that both involve the same parties. Accordingly, he argued that res judicata barred Jones's claim.

On February 22, 2021, Holmes's attorney sent a letter to the presiding judge stating that over two months had passed since the dismissal motion was filed and Jones had not responded. Holmes asked the court to grant his motion to dismiss the pending petition with prejudice. Jones's attorney responded in a file-marked letter stating, "I felt that I had said what I needed to say in my Petition. [Holmes's attorney] is factually correct about everything, so I cannot ethically file something that denies any of it." Furthermore, Jones's attorney

[1]The *Seamster* court held that res judicata barred a paternity action brought by the Arkansas Department of Human Services on behalf of a child born out of wedlock. *Seamster*, 36 Ark. App. at 300, 820 S.W.2d at 300. A previous paternity action had been brought by the mother without joining the child as a party, and it resulted in a nonpaternity finding. *Id.* at 203, 820 S.W.2d at 298–99. However, *Seamster* applied only to paternity determinations made under the statute in effect in 1979 and noted that the statute currently in effect provides that paternity actions may be filed by the child as a named party and that the child's rights may be different from those of the mother *Id.* at 205, 820 S.W.2d at 300.

[2]The *Mathis* court followed *Seamster* in affirming the dismissal of a child's paternity complaint under res judicata when the child's mother's paternity complaint has been dismissed due to her failure to appear at the hearing. 2012 Ark. App. 599, at 6.

stated that the child "had nothing to do with this misrepresentation to the court by these parties that was done to save from paying a legal fee." Jones's attorney concluded the letter by stating:

> I cannot believe that the law should be this harsh to a child that did nothing wrong, but [Holmes's attorney's] motion was factually correct, and I could not refute what she reported concerning the law. I think the court knows that when I have something to fight with, I do not hesitate to do so. However, I have nothing either way this time.

On February 26, the circuit filed an order denying the dismissal motion.

In a file-marked March 30 letter, Jones's attorney asked the trial court to sign a proposed order for DNA testing that would require Holmes to pay for the test if it resulted in a positive match for him. In response, Holmes's attorney maintained that res judicata prevented reopening the paternity issue but asked that laches and wrongdoing be considered in determining whether he should pay for the DNA test. On April 16, the trial court ordered each party to submit to DNA testing with Jones bearing the costs "at this time."

The paternity test established that Holmes is the biological father of the child. An "Agreed Order" was filed July 9 stating, "Without [Holmes] waiving his objection regarding res judicata, the court finds [Holmes] is the father of the child, [Jones] is awarded custody, and [Holmes] is ordered to pay child support." No visitation was awarded, Holmes was ordered to reimburse Jones $340 for the cost of the DNA test, and Holmes was ordered to pay $279 a month in child support beginning November 1, 2020.

Holmes filed a timely notice of appeal on August 4, 2021.

II. *Applicable Law*

In *Williams*, 338 Ark. at 350–51, 995 S.W.2d at 339–40, the Arkansas Supreme Court held:

> Res judicata bars relitigation of a subsequent suit when: (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based upon proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involve the same claim or cause of action; and (5) both suits involve the same parties or their privies. *See Miller County v. Opportunities, Inc.*, 334 Ark. 88, 971 S.W.2d 781 (1998); *Hamilton v. Arkansas Pollution Control & Ecology Comm'n*, 333 Ark. 370, 969 S.W.2d 653 (1998). Res judicata bars not only the relitigation of the claims that were actually litigated in the first suit but also those that could have been litigated. *See Wells v. Arkansas Pub. Serv. Comm'n*, 272 Ark. 481, 616 S.W.2d 718 (1981). Where a case is based on the same events as the subject matter of a previous lawsuit, res judicata will apply even if the subsequent lawsuit raises new legal issues and seeks additional remedies. *See Swofford v. Stafford*, 295 Ark. 433, 748 S.W.2d 660 (1988).
>
> In the past, we have applied the doctrine of res judicata to the issue of paternity when paternity was established under a divorce decree. *See McCormac v. McCormac*, 304 Ark. 89, 799 S.W.2d 806 (1990). In *McCormac*, a mother sought to relitigate the paternity issue following a divorce decree and the request was included in her response to her ex-husband's motion to hold her in contempt for failing to comply with visitation. In the original divorce decree, the chancery court had found that it had subject-matter jurisdiction and had awarded custody, set child support, and fixed visitation. On appeal, we held that the mother's paternity claim was barred by res judicata because the mother pled in the divorce action that the child was born of the marriage, and the father admitted this fact. Our court of appeals has held similarly in several cases. *See, e.g.*, *Golden v. Golden*, 57 Ark. App. 143, 942 S.W.2d 282 (1997); *Scallion v. Whiteaker*, 44 Ark. App. 124, 868 S.W.2d 89 (1993); *Department of Human Servs. v. Seamster*, 36 Ark. App. 202, 820 S.W.2d 298 (1991); *Benac v. State*, 34 Ark. App. 238, 808 S.W.2d 797 (1991).

In determining whether res judicata applied to a divorce decree wherein paternity was not contested, this court held as follows:

> The critical question regarding res judicata of the divorce decree on the issue of paternity is not whether child support was ordered but whether the issue of

> paternity was decided and if so whether appellant had full and fair opportunity to litigate the issue. If it was decided and appellant did have such an opportunity the divorce decree is res judicate on that issue.

McGee v. McGee, 100 Ark. App. 1, at 5, 262 S.W.3d 622, 625–26 (2007) (citations omitted).

The majority cites *Wyatt v. Wyatt*, 2018 Ark. App. 177, 545 S.W.3d 796, stating that our standard is that we presume that a trial court acted properly and made findings of facts as were necessary to support its judgment. In this case, however, there were no disputed facts and only one question of law. The majority further erroneously sets out the well-established best-interest standard that is used in custody cases. These standards are incorrect because there are no factual issues on appeal, and this is not a custody case.

III. *Argument*

Holmes cites *Williams*, *supra*, for the elements of res judicata and contends that res judicata bars Jones's attempt to relitigate the decree. I agree. The divorce decree addressed whether children were born of the marriage and was a final judgment on the merits; the decree was based on proper jurisdiction; the divorce action was fully contested in good faith, and there is no allegation of fraud or collusion in obtaining the decree; both the decree and Jones's petition to reform it involve the same claim or cause of action; and the same parties are involved.

The parents of a child are bound by the doctrine of res judicata when the issue of paternity has been litigated in prior action between them. *McCormac*, *supra*; *Seamster*, *supra*; *Williams*, *supra*. Jones pled that there was no child born of the marriage, and Holmes entered his appearance and did not contest such fact. Accordingly, the trial court found that there

was no child born during the marriage, and the divorce decree reflects that finding. Therefore, the majority's statement that the issue of paternity was never presented to the trial court is patently incorrect. Four years later, Jones's petition seeks to relitigate the paternity of the child by asking for the divorce decree's reformation. However, res judicata bars not only the relitigation of claims that were actually litigated in the first suit but also those that could have been litigated. *McGee*, *supra*; *Williams*, *supra*. Here, Jones had a full and fair opportunity to litigate the issue of paternity when she filed her complaint for divorce stating that no children were born of the marriage. Moreover, the divorce decree states that there were no children born of the marriage. Accordingly, the issue of paternity was decided. *See McGee*, *supra* (rejecting appellant's argument that he did not have a full and fair opportunity to litigate the issue when he knew at the time of the parties' divorce that paternity was in question and he did not believe he was the father of the twins).

Therefore, res judicata bars Jones's claim, and the trial court erred in failing to dismiss Jones's petition. *Williams*, *supra*. Insofar as the trial court's order applies an exception to res judicata for pro se litigants or because of harsh results in its application, the trial court erred. *Crutchfield v. Tyson Foods, Inc.*, 2017 Ark. App. 121, at 8, 514 S.W.3d 499, 504 (pro se litigants in Arkansas receive no special consideration of their arguments and are held to the same standards as licensed attorney); *Elder v. Mark Ford & Assocs.*, 103. Ark. App. 302, 288 S.W.3d 702 (2008) (applying Rule 11 sanctions to pro se litigant for filing frivolous lawsuit barred by res judicata); *Mathis*, *supra* (res judicata barred child's paternity action when mother's previous paternity suit was dismissed without prejudice for failure to appear at the hearing);

Williams, *supra* (res judicata barred relitigation of paternity as established in a divorce decree even when subsequent paternity tests showed that appellee was not the father).

The majority cites *Bamburg v. Bamburg*, 2014 Ark. App. 269, 435 S.W.3d 6 to support the proposition that Arkansas law has established a flexible application of res judicata. However, a careful reading of *Bamburg* reveals that this analysis is wholly misplaced. In *Bamburg*, the parties engaged in protracted litigation involving the custody and visitation of the parties' children. This litigation included two appeals to this court, one involving the appellant's argument that res judicata precluded the court from entertaining the appellee's motion for a change of custody and visitation since those issues had been previously litigated. Citing *Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002), this court quoted the unfortunate language "flexible approach to res judicata" to state that the circuit court always retains jurisdiction over child-custody and visitation matters. *Bamburg*, however, does not hold that a flexible application of res judicata is some type of equitable principle that allows a court to disregard established precedent. Further, the majority fails to advise the bench and bar when the flexible application of res judicata should be applied. Are we only to ignore established procedural precedent when it yields a harsh result in the context of paternity? Does it stop there? Or is a "flexible approach to res judicata" to be utilized anytime a court would like to reach a result that is contrary to established precedent? I suggest the answers to these questions are better left unanswered.

Finally, the majority makes an Arkansas Rule of Civil Procedure 60 argument and a public-policy argument saying that a more flexible application of res judicata is in the spirit of the law. The appellee never argued either point—she filed neither a response to the motion to dismiss in the trial court nor an appellee's brief in this court. We do not research or develop arguments for a party. *See Bassett v. Emery*, 2022 Ark. App. 470 (Murphy, J., dissenting).

IV. *Conclusion*

The majority sacrifices the foundational doctrine of res judicata to achieve the result it seeks, thereby opening a Pandora's box for future litigants who may use this precedent to overturn prior court orders for many unknown reasons. Simply stated, we have long held that the issue of paternity may not be relitigated once it has been established through a prior action. We should not ignore that precedent. I dissent.

ABRAMSON, J., joins.

Dobson Law Firm, P.A., by: *R. Margaret Dobson*, for appellant.

One brief only.