Privity, Preclusion, and the Parent-Child Relationship

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INTRODUCTION

Preclusion, a modern term encompassing the procedural principles of res judicata and collateral estoppel, is a judicial mechanism that serves to prevent relitigation of a claim or issue once a final determination has been made in a court of competent jurisdiction.1 Through the use of preclusion, courts may secure finality and consistency in judgments and eliminate harassing multiple litigation and spurious claims.2 Courts may invoke preclusion to prevent relitigation not only by parties to the first action, but by nonparties as well;3 courts have justified preclusion of nonparties in future litigation by reason of their privity relationship with parties to the first action.4

The doctrine of privity provides that a nonparty whose interests are substantially identical to those of a party who has had his day in court is not deprived of justice by the denial of an opportunity to relitigate the same matters. While privity is ostensibly based on any commonality of interests, common law courts have traditionally viewed the doctrine as applying to a fixed set


of relationships.\(^6\) Familial relationships are conspicuously absent from the traditional privity lists. Consequently, rather than determining whether the merits of each case and the underlying policy factors warrant imposition of preclusion, most courts have summarily refused to invoke preclusion, holding that parents and children are not in privity.\(^6\)

Cases involving the parent-child relationship do not mandate such a rhadamantine application of traditional privity rules. Rather, the unique nature of this relationship requires a rational judicial approach to the use of preclusion. This Comment will consider the policies underlying privity and preclusion and apply those policies to selected cases in which the courts have improperly invoked, or failed to invoke, preclusion. It will also evaluate possible solutions to the conflict between preclusion and substantive rights by examining those procedures and judicial controls by which the policies favoring preclusion may be fulfilled in parent-child cases without jeopardizing the rights of the persons involved.

I. BACKGROUND

A. Preclusion in General

The concept of continuity is fundamental to the Anglo-American legal system. The law is a continuum; interdependence of decisions forms the basis for a just application of its principles.\(^7\) One aspect of this continuum is the doctrine of stare decisis;\(^8\) another is law of the case.\(^9\) Preclusion is merely one additional facet of this overall interdependence. In applying preclusion, a court in essence invokes a more specific form of stare decisis—the principle by which former adjudication may influence subsequent cases. Preclusion requires stricter adherence to previously litigated claims or issues and may demand the same result reached in former cases. This demand may serve to preclude subsequent cases.

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\(^7\) The principles of preclusion and their rationale are discussed in terms of the general continuum concept in A. Vestal, Res Judicata/Preclusion 3-7 (1969).

\(^8\) See M. Green, Basic Civil Procedure 211 (1972); 2 H. Black, supra note 5, at § 603.

litigation altogether.

The preclusion principles are not self-justifying. They exist only because they serve to protect interests that our society and legal system have recognized as indispensable to fundamental fairness and to efficient adjudication of disputes. Four distinct policies provide the foundation for all forms of preclusion: (1) to provide security to litigants by assuring finality, (2) to ensure consistency in judgments, (3) to avoid harassing multiple litigation, and (4) to reduce the burden on the courts by elimination of spurious claims. Where the imposition of preclusion serves none of these policies, it is neither justified nor desirable. Conversely, if denying the right to relitigate a claim or issue would serve one or more of the above policies, the courts should carefully weigh the factors favoring preclusion, rather than mechanically refuse to apply it by reason of traditional privity rules. These policies apply equally to both categories into which preclusion may be subdivided—claim preclusion and issue preclusion.

1. Claim preclusion

Claim preclusion operates to prevent a party or privy to an initial action from relitigating in a second suit a claim on which a final judgment has been reached. Although many legal scholars have further subdivided this principle, one rule suffices to cover all cases: “One may not sue twice on the same cause of action where the first suit terminated in a final judgment on the merits.” This simple definition includes all the requirements that must be satisfied to invoke claim preclusion: (1) same cause of action, (2) decision on the merits, and (3) finality of judgment.

The first requirement, that the causes of action in the two suits be identical, has proved troublesome. Courts and commentators have failed to develop a sufficiently precise definition of “cause of action” that is workable in a majority of cases. Two

10. The rationale of the policies favoring preclusive effect of claims and issues is discussed in A. Vestal, supra note 7, at 8-12. Professor Vestal refers to a policy of “establishing the rights of individuals.” Providing security to litigants by assuring finality and consistent judgments is a policy implicit in this category. See id. at 8.


12. For an introduction to the concepts of claim and issue preclusion, see A. Vestal, supra note 7, at 43-59, 189-206 (1969).

13. Commentators have traditionally split the concept of claim preclusion into “bar” and “merger” and treated the two separately. See M. Green, supra note 8, at 201-02 (1972); J. Fleming, Civil Procedure § 11.9, at 550 (1965).

14. J. Mccord, supra note 1, at 622.

15. For a discussion of the basic problems surrounding the definition of “claim” or
Theories concerning what constitutes a single claim or cause of action have evolved. The primary right theory narrowly defines a cause of action or claim as the infringement of a single right by a single wrong. The more practical theory, from the standpoint of judicial economy, is the factual test that requires a plaintiff to litigate in one action all issues arising from a single transaction or series of transactions.

The second criterion for claim preclusion requires that the initial judgment be rendered on the merits; i.e., the judgment must be based on those factual conclusions which support the claim and not on unrelated matters. Thus, any judgment obtained by fraud or collusion is not an adjudication on the merits and therefore not a proper circumstance for the imposition of preclusion. Whether or not a judgment is considered to be on the merits for preclusion purposes may depend at times on procedural rules such as those pertaining to multiple dismissals.

The third criterion requires that the first judgment be "final" before preclusion can be invoked in a second suit. Finality generally connotes exhaustion of remedies with the particular judicial body pronouncing judgment. Finality does not necessarily indicate, however, that the original litigant's rights have been conclu-

"cause of action" and their potential resolution, see Schopflocher, What is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata?, 21 Ore. L. Rev. 319, 363 (1942). For more recent discussions, noting that problems of vagueness continue to plague the phrase "cause of action," see M. Green, supra note 8, at 202-03; J. Fleming, supra note 13, § 11.10, at 552-57.

16. The United States Supreme Court approved the primary right theory in Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 321 (1927):

A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong.

A more recent decision adhering to this concept of cause of action is Smith v. Kirckpatrick, 305 N.Y. 66, 70, 11 N.E.2d 209, 212 (1933). While still an accepted theory, the application of the primary right formulation often results in excess fragmentation that may serve to cloud rather than clarify a party's ultimate rights.

17. E.g., Williamson v. Columbia Gas & Elec. Corp., 186 F.2d 464, 469-70 (3d Cir. 1950); Falcone v. Middlesex Co. Medical Soc'y, 47 N.J. 92, 219 A.2d 505 (1966); cf. Ashe v. Swenson, 397 U.S. 436, 448, 453-55 (1969) (Harlan, J., concurred) (Harlan argues for a "same transaction" test in applying preclusion in criminal or quasi-criminal cases. This is basically the test now advocated in the Restatement, referred to as the "transactional view." Restatement (Second) of Judgments § 61 & Comment a (Tent. Draft No. 1, 1973).)


sively determined. State courts are split on the issue of finality where an appeal is pending.\footnote{See Makariw v. Rinard, 222 F. Supp. 336, 338 (E.D. Pa. 1963) (applying Pennsylvania law): "[T]he rule of res judicata is that when a Court of competent jurisdiction has determined a litigated cause on its merits, the judgment entered, until reversed, is, forever and under all circumstances, final and conclusive. . . ." This principle is further clarified in a footnote to the opinion: "The fact that an appeal is pending in the prior civil action does not militate against its effect as a final judgment." Id. at 338 n.1. But see Mutual Orange Distrib. v. Agricultural Prorate Comm'n, 30 F. Supp. 937, 942 (S.D. Cal. 1940) (applying California law). The court applied a California statute (CAL. CN. PROC. CODE § 1049 (West 1959)) that it construed to deny preclusive effect of a judgment to which an appeal was pending. See also MONT. REV. CODE ANN. § 53-8706 (1947).} A majority of jurisdictions, including the federal courts, consider judgments to be final pending appeal. The United States Supreme Court has twice ruled that cases are final pending appeal and allowed preclusion despite subsequent reversal.\footnote{Reed v. Allen, 286 U.S. 191 (1932); Deposit Bank v. Frankfort, 191 U.S. 499 (1903). The Restatement (Second) follows this view. RESTATEMENT (SECOND) OF JUDGMENTS § 41 & Comments b & f (Tent. Draft No. 1, 1973).}

2. Issue preclusion

Issue preclusion is more pervasive in its effect than claim preclusion and may operate on entirely different causes of action. Issue preclusion may be invoked where the issues are (1) identical in both cases, (2) ultimate—\textit{i.e.}, necessary to the ultimate disposition of both cases—and (3) actually litigated in the first case.\footnote{See Vestal, Preclusion/Res Judicata Variables: Nature of the Controversy, 1965 WASH. U.L.Q. 158, 159-87.}

The requirement of identity of issues presents a problem similar to that of "same cause of action."\footnote{See notes 14-17 and accompanying text supra.} Theoretically, identity of issues should be determined by comparing underlying factual conclusions. In the interest of judicial economy, however, the modern trend is to allow considerable latitude in the comparison.\footnote{See RESTATEMENT (SECOND) OF JUDGMENTS § 68, Comment c (Tent. Draft No. 1, 1973) (suggesting that a finding of negligence due to excessive speed may be equated for preclusion purposes with a finding of negligence for failure to keep a proper lookout).} In fact, the breadth that courts attach to the concept of an issue may be a function of a crowded docket.\footnote{See Vestal, supra note 22, at 162.} In other words, a judge may be more willing to find identity of issues and impose preclusion if the relitigation of the same or closely related facts would unduly burden an overcrowded schedule.

Issue preclusion may be invoked only if the issue under consideration is an "ultimate" one. An ultimate issue is one that is necessary to the disposition of the cause of action. Logically, one
may not be bound by the determination of an issue if that issue was not relevant to the final judgment reached by the court. A notable opinion authored by Judge Learned Hand established the principle that ultimate issues decided in an initial suit cannot preclude redetermination of the same issues in a second suit if those issues are only mediate therein. 26 Other decisions have held that determination of facts or issues mediate in an initial action cannot preclude their redetermination as ultimate facts in a second suit. 27 The reasoning behind both principles is to prevent unintentional preclusion of an issue, the importance of which was not foreseeable in the original action. 28

According to the Restatement of Judgments, an "actually litigated" issue is one put in issue by the pleadings, submitted to the trier of fact for a determination, and actually ruled on by the trier of fact. 29 Thus, it would seem that to satisfy the third criterion for issue preclusion a litigant must have entered evidence on the issue and received a judicial determination based upon that evidence. 30 Some courts, however, have held that issues are fully litigated once a final determination is reached whether the decision is deemed to be on the merits or is merely the result of a procedural determination. 31 As a general rule, the requirement of actual litigation for purposes of issue preclusion necessitates a true decision on the merits.

B. Preclusion of Nonparties

Anyone not a party to the original action may be precluded from litigating the same matters if he is found to be in privity with the original litigant. Preclusion of nonparties, however, is not limited to the traditional privity rules. Under differing circumstances two other preclusive devices may be relevant to the parent-child relationship—derivative rights and adequate representation. 32 After an examination of each concept, the application

26. The Evergreens v. Nunan, 141 F.2d 927 (2d Cir. 1944). "'Ultimate' facts are those which the law makes the occasion for imposing its sanctions." Id. at 928. See Moore v. United States, 246 F. Supp. 19 (N.D. Miss. 1965): "Evidentiary facts or mediate data... are those from which ultimate facts may be inferred." Id. at 21.
27. See Restatement of Judgments § 68, Comment p (1942).
29. Restatement of Judgments § 68(2) & Comments c & d (1942).
32. Vestal, supra note 1, at 12-17. Professor Vestal concludes that the applicability of any of the principles by which a nonparty might be precluded is dependent more on
of these three preclusive tools to the parent-child relationship will be discussed.

1. Traditional privity

Privity, in its most general sense, has been defined as "[d]erivative interest founded on, or growing out of, contract, connection, or bond of union between parties." Commonality of interest, then, is the core of the privity concept. As a matter of policy, a nonparty should be bound by a judgment if his interests and those of an original litigant are sufficiently identical to ensure that no dilution of rights occurs.

Instead of attempting to define privity in terms of this underlying policy based on common interests, however, courts have almost universally resorted to a process of definition by classification. Certain relationships have been held to be privy relationships to the exclusion of all others. Most jurisdictions are currently unwilling to find privity in any relationships other than those traditionally recognized.

33. BLACK'S LAW DICTIONARY 1361 (rev. 4th ed. 1968).
34. Commonality of interest was traditionally considered to include a requirement of mutuality in the application of preclusion. Neither party nor privy could invoke preclusion against another unless that person was able to invoke it against them. Iselin v. C.W. Hunter Co., 173 F.2d 388, 391 (5th Cir. 1949); Ericson v. Slomer, 94 F.2d 437, 440 (7th Cir. 1938); 1 A. FREEMAN, supra note 5, at § 428; RESTATEMENT OF JUDGMENTS §§ 93, 96, & Comment a (1942).

A trend toward rational extension of the preclusion principles to nonparties is seen in the demise of the mutuality doctrine. The foundation for the abandonment of mutuality was laid in Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942). A limited application of the Bernhard doctrine has been recognized by the United States Supreme Court in Blonder-Tongue Lab., Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971). This is the position adopted by the Restatement (Second).

ships, such as bailor-bailee, lessor-lessee, and assignor-assignee, appear to be based on commonality of financial or property interests; parent-child or other familial relationships are conspicuously absent. The understood meaning of this exclusion has been that "[k]inship, whether by affinity or consanguinity, does not create privity, except where it results in the descent of an estate one to the other."

2. Derivative rights

A nonparty may also be precluded if he is attempting to relitigate a right arguably derived from a party in the first action. Although the concept is generally associated with tort law, many of the tort cases are relevant to this discussion since they deal with familial relationships. The most common derivative action is the suit for loss of services or consortium by the spouse of an injured party. Since the right to maintain this action is directly dependent on the rights of the injured spouse, it is called a derivative claim. Once the spouse holding the primary right has litigated the issue of liability for the injury, a court may preclude relitigation of the same issues in an action by the other spouse for loss of services and consortium. A similar situation may occur

N.W.2d 259, 263 (1965); trustee-bankrupt: Coleman v. Alcock, 272 F.2d 618, 622 (5th Cir. 1965); ward-guardian: New Mexico Veteran's Serv. Comm'r v. United States Van Lines, Inc., 325 F.2d 548, 550 (10th Cir. 1963).

37. In delineating the scope of privity, the Restatement of Judgments uses the following language:

The rule applies to any form of transfer whether by purchase, gift or operation of law. Thus, it applies to heirs, devisees and others taking by conveyance and to receivers, trustees in bankruptcy, purchasers at judicial sale and others taking by action of law in judicial process. The rule applied to a transfer of legal title or of equitable title or the creation of a lien whether by consent of the transferor or by judicial process.

RESTATEMENT OF JUDGMENTS § 89, Comment c (1942).

38. Several courts have held specifically that husband and wife are not in privity. E.g., Acuff v. Schmit, 248 Iowa 272, 78 N.W.2d 480 (1956); Palmer v. Clarksdale Hosp., 213 Miss. 611, 57 So. 2d 476 (1952). But see Fleming v. Cooper, 275 Ark. 634, 284 S.W.2d 857 (1955). Community property states have held that husband and wife are in privity for specific purposes. See, e.g., Zaragosa v. Craven, 33 Cal. 2d 325, 202 P.2d 73 (1949). See also 1B MOORE'S FEDERAL PRACTICE ¶ 0.411 (11) (2d ed. 1965). Other courts have refused to find privity between parent and child. E.g., Sayre v. Crews, 184 F.2d 723 (5th Cir. 1950); Salay v. Ross, 155 N.Y.S.2d 841 (Sup. Ct. 1956).

39. 1 A. FREEMAN, supra note 5, at § 438.

40. See RESTATEMENT (SECOND) OF TORTS § 494 (1965).


42. For cases basing preclusion on derivative rights, see, e.g., Kobmann v. Ross, 374 Mich. 678, 682, 133 N.W.2d 195, 197 (1965) ("[The husband's] action was derivative and dependent on the right of the plaintiff wife to prevail in her suit. Her action having fallen,
between parent and child; a parental suit for loss of services or medical costs could conceivably be precluded by determination of a previous action on behalf of the injured child. The derivative rights concept of preclusion is presently a minority view, but is recognized as a concept distinct from traditional privity in those jurisdictions where it is applied.43

3. Adequate representation

Although abstract principles warranting preclusion center on the idea of adequate representation, few courts formally recognize a distinct doctrine of preclusion based on this concept.44 There are, however, cases which warrant invocation of preclusion principles that do not fall within the traditional privity or derivative rights classifications. The preclusion of all members of a class in a class action suit is such a case.45 Some commentators have deemed such actions to be governed by the privity concept,46 but the class action suit is essentially based on principles of adequate representation. Seldom would all members be found to fall within a recognized privity classification. Rule 23 of the Federal Rules of Civil Procedure and the impracticality of massive joinder of parties justify the imposition of preclusion on members of a class who are neither parties nor privies to the initial class suit.47

The example of class actions demonstrates the fundamental principle of adequate representation. Where claims or issues are sufficiently litigated to render subsequent inquiry fruitless, preclusion should be imposed regardless of the precise relationship between the persons bringing the actions. Occasionally courts have invoked what is essentially a doctrine of adequate representation when unable to impose preclusion within the limits of tra-


45. But see In re Air Crash Disaster, 350 F. Supp. 757 (S.D. Ohio 1972), denied, 416 U.S. 956 (1974). Neither the court of appeals nor the Supreme Court were willing to sanction the district court's finding of preclusion based on adequate representation.

46. Professor McCoid includes class actions along with other examples of privity by representation. J. McCoid, supra note 1, at 647.

ditional privity. For example, in *Burns v. Unemployment Compensation Board of Review*, the court precluded litigation of a claim after a similarly situated individual had brought an action based on identical principles. The court ruled that the second plaintiff and all like individuals were precluded although they were neither parties nor privies to the initial action, since all possible issues had been adequately litigated in the first suit." *Burns* is a relatively isolated example, however; no jurisdiction has regularly applied the principle of adequate representation to justify preclusion.

4. Application to the parent-child relationship

The prevailing view has been that the parent-child relationship does not establish privity and therefore a child cannot be bound by a judgment against his parent under that theory. This rule has prevailed without regard to the identity of claims or issues or to the conclusiveness of the facts involved. In some instances, however, the policies favoring preclusion are clearly served by holding that a child is bound by a judgment binding on his parent. In many cases, particularly in personal injury litigation, these policies can be served without jeopardizing the rights of the child. In other circumstances, the imposition of preclusion on a child after the parent has had his day in court would work an injustice despite apparent identity of claims or issues. In domestic relations suits, for example, where the relationship between parent and child often becomes critical, policies exist that may render imposition of preclusion unwarranted and unjust. In such intrafamilial disputes the parent cannot always be relied on to adequately represent the best interests of the child.

Since some parent-child cases warrant the invocation of preclusion and others do not, it may appear that courts are justified in adhering to the rigid principles of traditional privity. Arguably, it is preferable to allow some unnecessary litigation rather than


50. Id. at 65 A.2d at 446. The court did not attempt in its per curiam opinion to harmonize its decision with basic preclusion and privity principles.


52. See, e.g., Everett v. Everett, 57 Cal. App. 3d 65, 129 Cal. Rptr. 8 (1976) and text accompanying notes 121-27 infra.
possibly deprive a child of his substantive rights by improperly invoking preclusion. It is unnecessary, however, to err at all since it is possible to distinguish the situations in which preclusion is proper from those in which it is not. Alternatively, the need for preclusion may be circumvented entirely. The ensuing discussion will analyze cases typical of each situation and seek to facilitate the formulation of a rational approach to both.

II. Preclusion in Parent-Child Cases

A. Cases Justifying Preclusion

Provided that the facts meet the criteria for either claim or issue preclusion and that the parent has adequately represented the child's interest in the first action, a court can justifiably preclude an action brought on behalf of the child after a judgment is reached in the action brought by the parent. These requirements are generally satisfied in personal injury litigation. Since any recovery on a minor child's claim will usually go to his parents, they have adequate opportunity and incentive to litigate fully the issues or claims on behalf of the child, as well as any related claims that they hold independently.

Two situations arise in personal injury litigation in which preclusion could apply to parent-child cases. The most common of these situations is that of a multiple injury accident. Where parent and child are injured in a single automobile collision, for example, each has an independent claim for relief. The issues necessary to establish the two claims, however, are generally identical. In such a case issue preclusion might be invoked to bar unnecessary relitigation. A second situation in which preclusion might be applied is that of a single injury to the child. Again two claims arise. The child has one cause of action for any injuries sustained, while the parent may bring suit for loss of services and companionship or for medical expenses.

1. Personal injury—Independent claims

Preclusion often becomes an issue in cases involving multi-passenger automobile accidents since each person injured may seek to bring a separate action for damages. In a large percent-

53. See notes 159-74 and accompanying text infra.
54. Text accompanying notes 14 (criteria for claim preclusion) and 22 (criteria for issue preclusion) supra.
55. See King, Collateral Estoppel and Motor Vehicle Accident Litigation in New York, 36 Fordham L. Rev. 1, 11-12 (1967). The author suggests that automobile accident
tage of these cases, the passengers are family members—often parents and children. In such cases the ultimate issues necessary for a finding of liability or negligence are generally identical for all passengers, yet because no privity exists in the traditional sense courts have commonly allowed repetitive litigation until each claimant has had his day in court.

The case of *Greenlee v. John G. Shedd Aquarium* aptly illustrates a court’s refusal to apply preclusion where clearly justified. In 1957 an automobile carrying the Greenlee family and driven by Edgar Greenlee collided with a truck belonging to Shedd Aquarium. Two of the children were killed and the remaining passengers and driver suffered severe injuries. Mrs. Greenlee brought suit against Shedd Aquarium and the employee truck driver, alleging willful and wanton negligence. A jury found Greenlee to be the sole cause of the accident and absolved the Aquarium from all negligence. The judgment was affirmed on appeal.

In 1970, the surviving child, Regina Lynn Greenlee, brought an action against Shedd Aquarium, the driver of the truck, and her father for personal injuries sustained in the accident thirteen years earlier. Shedd Aquarium and its employee driver moved for summary judgment on the ground that the Greenlee child was precluded from relitigation of the same issues. The motion was granted. The child then appealed, asserting that preclusion was improper because she was neither party nor privy to the initial litigation.

In 1976—almost twenty years after the accident—the litigation is an appropriate area for expansion of the preclusion principles beyond the traditional limits imposed by privity and mutuality. *Id.* at 42-47.

56. *Id.* at 42, 344 N.E.2d 788 (1976).
58. *Id.* at 408, 176 N.E.2d at 687. The purpose of the willful and wanton negligence allegation was to facilitate recovery even in the event that Greenlee was found contributarily negligent.
59. *Id.* at 409, 176 N.E.2d at 688: “The [jury] instructions were fair and correct. They leave no room for doubt that... there was no negligence attributable to defendants and that Edgar Greenlee’s negligence, and his alone, caused the accident.”
60. *Id.* at 412, 176 N.E.2d at 689.
61. *Greenlee v. John G. Shedd Aquarium*, 36 Ill. App. 3d 924, 344 N.E.2d 788 (1976). Shedd and the driver of the truck filed motions for summary judgment which were granted. Consequently, plaintiff’s appeal from the order did not involve the propriety of naming her father as a defendant. *Id.* at 925, 344 N.E.2d at 788-89.
62. *Id.* at 925, 344 N.E.2d at 789 (emphasis added): “Plaintiffs only contention on appeal is that the granting of defendants’ motion for summary judgment on the grounds or [sic] collateral estoppel was improper.” No allegations of fraud, collusion, or misconduct in the first action were made.
Illinois Court of Appeals overruled the order granting summary judgment and remanded the child's action for retrial on the merits.\(^\text{63}\) Despite the probable futility of additional litigation, the appellate court felt bound to follow the traditional privity rules that had the effect of exempting the child from preclusion.\(^\text{64}\)

In the child's suit, the court could have invoked issue preclusion since all the necessary elements were present.\(^\text{65}\) The issues were identical to those in the original action and the liability sought in both cases was based on the same facts. The issues involved in the second suit were ultimate ones on which final liability would be established, just as in the first case. Finally, the issues were fully and conclusively litigated in the first action.
Moreover, the court’s decision failed to serve the policy of avoiding harassing litigation. Years after final resolution of the first action, Shedd Aquarium and its employee must unnecessarily expend additional time and money defending a second action based on exactly the same issues as before. Finally, the failure to invoke preclusion in this case resulted in unnecessary delay and additional burden on an already overcrowded court system. This is well attested by the six years already expended in the second action.68

On the other hand, imposition of preclusion would not have diluted the child’s rights in this case. No evidence or rationale was presented that tended to show that the parent abridged or compromised the child’s interests in any way. On the contrary, the evidence shows that her rights were vigorously represented.70

2. Personal injury—dependent claim

When a child is injured, the parents have the option of bringing an action on behalf of the child and in his name or bringing the action on behalf of themselves for loss of services and expenses incurred. While the rights of the parents in such a case create a distinct claim, that claim is, of course, dependent on the existence of the child’s primary claim. It is equally clear that the issues will be identical to both claims in such cases and that the imposition of preclusion is warranted.

In Whitehead v. General Telephone Co.,71 parents and child brought independent actions for recovery based on the same accident. The Whitehead child suffered a burn while using a telephone during a storm in which the telephone line was struck by lightning. Her parents brought an action against the telephone company for loss of the child’s services, alleging negligence by the company’s employee in repair work done on the telephone at the Whitehead residence prior to the accident. A trial on the merits resulted in a judgment for the telephone company.72

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69. Regina Lynn Greenlee brought her action in 1970. The summary judgment for defendants was not overturned until 1976. 36 Ill. App. 3d at 924-25, 344 N.E.2d at 788-89.
70. While the original Greenlee action did not include a claim for damages on behalf of Regina Greenlee, the mother’s suit did include wrongful death actions on behalf of her two sons and personal injury claims on behalf of herself, her husband, and her surviving son. Id. at 925, 344 N.E.2d at 788. Mrs. Greenlee was certainly provided with sufficient motivation to exhaustively litigate the issues common to these claims and that of Regina Greenlee.
72. Id. at 109-10, 254 N.E.2d at 11-12.
Thereafter, the father brought a second action, this time on behalf of the minor child, for the same injuries, alleging the same theory of negligence. In this action the Whitehead child prevailed. The telephone company appealed, claiming that the child should have been precluded by the original judgment from bringing a second action. The arguments on appeal dealt with the policies underlying preclusion. The intermediate appellate court affirmed the lower court’s ruling, as did the Ohio Supreme Court on further appeal. The latter court held that the single injury gave rise to two separate causes of action, that the parents’ right to recover was in fact derivative of the child’s primary right, but that preclusion could be invoked only to bar relitigation by parties or their privies. Since, according to traditional concepts, the child was not in privity with the parents, her cause of action could not be precluded by their suit.

As with the Greenlee case, Whitehead contained all the necessary elements of issue preclusion. Apparently, the court did not impose preclusion because the parents and child did not fall within one of the classic privity definitions. The Ohio court rejected a more liberal concept of preclusion and demanded the traditional privity status before precluding a nonparty.

Notably, the Whitehead opinion contains dicta indicating that in certain circumstances a child may be precluded by a

73. Id. at 111, 254 N.E.2d at 12. Major Materials Co., a co-defendant in the action, settled and was dismissed as a party defendant. The jury then returned a verdict of $12,500 against General Telephone Co. and judgment was entered thereon.

74. Id.

75. Id. at 113, 254 N.E.2d at 13-14: “[A]ppellant argues that the present case is one where the defense of collateral estoppel should be appropriate, and urges that the definition and use of the word privity adopted by the courts of Ohio thwarts the policies of the doctrine of res judicata.” To this the court responded: “In our opinion, the existing Ohio requirement that there be an identity of parties or their privies is founded upon the sound principle that all persons are entitled to their day in court. The doctrine of res judicata . . . should not be permitted to encroach upon fundamental and imperative rights.” Id. at 116, 254 N.E.2d at 15.

76. Unreported opinion of the Lucas County Court of Appeals.

77. 20 Ohio St. 2d at 116, 254 N.E.2d at 15.

78. Id. at 112-13, 254 N.E.2d at 13. See also Weiand v. City of Akron, 13 Ohio App. 2d 73, 233 N.E.2d 880, 882 (1968) (holding that injury to daughter gave rise to two claims: the daughter’s claim for damages resulting from personal injury, and her parents’ claim for damages resulting from loss of services and for medical expenses).

79. 20 Ohio St. 2d at 115, 254 N.E.2d at 15: “In the present case, the parent’s cause of action for loss of services and medical expenses of the minor child, although derivative, does not arise by way of succession from an estate or interest of the minor child.” See Conold v. Stern, 138 Ohio St. 352, 366, 35 N.E.2d 133, 140-41 (1941). But see notes 144-46 and accompanying text infra.

80. 20 Ohio St. 2d at 114, 254 N.E.2d at 13.

81. See note 22 supra.
judgment binding on his parent. Such circumstances include cases where the child is a nominal party, whether or not he actively participates in or controls the litigation; where the child is a real party in interest; or where the parent and child are in actual privity under one of the traditional classifications. Lamentably, the court in Whitehead did not perceive that the desirability of precluding the second suit would not have been enhanced even had one or more of the above circumstances been applicable.

The Whitehead court's failure to apply preclusion served, as in Greenlee, to undermine the basic policies supporting preclusion. The defendant telephone company was denied the protection of a reasonable assumption of finality after it had prevailed once in a trial on the merits. Furthermore, the court's decision underscores the absurdity of inconsistent judgments; the telephone company was found negligent and therefore liable for the injury to the Whitehead child, but not negligent and therefore not liable for the loss of services to her parents resulting from the same injury. The relitigation of the same issues by nominally different parties and the consequent increase in expense and time to the defendant can certainly be characterized as harassing. Finally, the addition of another full trial on the merits and two appeals placed an unwarranted burden on the court system. Moreover, there was no contention that the Whitehead child was inadequately represented by her parents in the initial litigation.

B. Cases Not Justifying Preclusion

In contrast to the personal injury cases discussed above,
domestic relations cases often involve countervailing policies that render imposition of preclusion improper. In divorce and filiation proceedings, the interests of parent and child may not be identical. Consequently, the parent cannot always be relied on to represent fully the child's rights. Should the child's right be compromised by a parent in either type of action, imposition of preclusion in a subsequent action brought by the child would be unjust. Naturally, there are cases in which the parent adequately represents the child's interests. It is difficult, however, to distinguish between the cases in which the child's interests are sufficiently represented and those in which the child's interests are compromised. To avoid this difficulty, most courts have adhered to the traditional privity rules in domestic relations suits, denying preclusive effect without an in-depth examination of whether or not it is warranted.

To inflexibly deny preclusion in domestic relations cases serves to insure preservation of rights, but offends the fundamental preclusion policies. Besides fostering the possibility of inconsistent judgments, postponed finality, and overburdened courts, denial of preclusion in divorce or filiation cases allows relitigation of potentially embarrassing and harassing questions. An examination of some pertinent divorce and filiation cases reveals the nature of this conflict of policies in this area and points the way to an effective solution to the preclusion/rights problem.

1. Divorce proceedings

Most questions concerning parent-child preclusion in divorce proceedings center on the issue of child support. Since a parent bringing a contested divorce action may be more concerned with expeditious dissolution of the marriage than with the provision of adequate child support, a conflict of interests between parent and child may arise.

The most extreme cases of this nature are those in which support is denied based on a finding of nonpaternity in the divorce action. Traditionally, the issue of paternity has been litigated without the participation of the child whose paternity was in question. If the child brings a subsequent suit for support

dependent on filial status, courts are reluctant to deny him the opportunity to litigate the issue since, according to traditional classifications, the child is neither party to the initial action nor in privity with his parent. Thus, the child would not be bound by any decision on the issues. In such cases, the traditional privity rules serve to protect the child.

The rights of the child, however, are not always jeopardized by imposition of preclusion in subsequent litigation. There is some assurance that the custodial parent of a child will adequately protect the child’s financial interests, since that parent will generally be responsible for the child’s care and also be the direct recipient of any support awarded by the court. Moreover, in many cases the issues, including paternity, are established by unequivocal evidence; hence, there is no justification for allowing a second day in court.

The difficulty in distinguishing those cases in which preclusion is proper from those in which it is not is illustrated by Gonzales v. Pacific Greyhound Lines, Inc. There, when a child brought an action for wrongful death of his putative father, the court admitted into evidence a judgment in a prior divorce decree in which the child had been declared not to be the offspring of the deceased man. The child’s action was accordingly dismissed. On appeal, the case was remanded for trial because the paternity determination was held not to be binding on the child who had not been made a party to the original divorce proceeding.

In such a case, the propriety of preclusion is dependent upon the conclusiveness of the facts upon which nonpaternity is established. It is perfectly clear from the Gonzales opinion that the court was convinced that the child’s rights may have been abridged in the divorce proceeding. That possibility made application of preclusion improper. The dilemma lies in the fact that the court could not protect the rights of the child without creating

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91. 34 Cal. 2d 749, 214 P.2d 809 (1950).

92. Id. at 751, 214 P.2d at 810. The decision was also based on a California statute allowing only a spouse or a descendant of the natural or putative parent to challenge legitimacy. See Cal. Civ. Code § 195 (West 1954).

93. 34 Cal. 2d at 753, 756, 214 P.2d at 811, 813.

94. The divorce was uncontested. The mother of the child alleged in that proceeding that her husband was not the child’s natural father; she asked for no support. In the wrongful death action brought by the child, the mother repudiated her former testimony, claiming that she had lied in the divorce proceeding to prevent the court from possibly awarding custody of the child to her husband. 34 Cal. 2d at 753, 214 P.2d at 811.
the possibility of inconsistent judgments.

Few courts have addressed this dilemma. In Daniels v. Daniels, the court attempted to rationalize the problem of inconsistent judgments on identical facts, but did so by attacking the symptoms instead of the problem. In this case a prior divorce decree had included a finding of nonpaternity on the part of the natural mother's husband. In a subsequent action for support brought by the child, the ex-husband entered into evidence the former judgment to deny responsibility for child support. The court held that the child was not bound by the adjudication of nonpaternity since she was neither party nor privy to the initial litigation. The court realized that remanding the case for trial raised the possibility of inconsistent judgments. In order to avoid this potential result, the court reexamined the first decision and determined that the divorce decree did not adjudicate the issue of paternity as to the child, but only as to the mother. In other words, the finding of nonpaternity in the first action merely estopped the mother from asserting that her ex-husband was the child's father; the finding did not actually determine paternity.

The Daniels rationale provides an inadequate remedy to the problem of inconsistent judgments. It fails to take into account the nature of the evidence on which nonpaternity is established or the adequacy of representation of the child on the support issue. No evidence of fraud or collusion was adverted to in Daniels, yet the court felt bound to follow the traditional privity doctrine rather than to attempt to measure the relative conclusiveness of the original finding.

A minority of courts have chosen to avoid the possibility of inconsistent judgments on divorce issues by precluding subsequent litigation. Yarborough v. Yarborough relied on a Georgia statute that specifically made a "consent (or other) decree in a divorce suit, fixing permanent alimony for a minor child. . . binding upon [the child]. . ." On appeal, the United States Su-
premised Court relied on the full faith and credit provision of the Constitution\textsuperscript{102} to hold the Georgia divorce decree binding on the child in the courts of another state where the second action was brought.\textsuperscript{103} Significantly, the dissent made an attempt to relate the preclusive effect of the judgment to the persuasiveness of the merits by adverting to the question of adequate representation of the child's interests.\textsuperscript{104}

If preclusion were made contingent on the relative conclusiveness of the factual determinations in each case, the problem of inconsistent judgments would be partially circumvented. In cases where no doubt exists regarding the merits of an initial decision, preclusion in a subsequent action cannot result in injustice. If, however, a court is unable to ascertain the validity of the factual conclusions in a previous suit, imposition of preclusion in a subsequent suit may infringe the rights of the second litigant. Domestic relations suits present this dichotomy since compromise or collusion may affect some judgments while other judgments may be established with near absolute certainty. For example, in cases where nonpaternity is established through the use of blood group exclusion tests, no doubt exists upon which to base a protective policy of nonpreclusion.\textsuperscript{105}

Unfortunately, such a sifting process is not procedurally feasible under present privity practices. To determine that preclusion is justified by privity and that parent and child are in privity only when the facts are conclusive enough to warrant preclusion creates a circular argument, not a useful rule. In addition, it is unreasonable to expect the trial judge in a subsequent suit brought by a child to know when collusion between spouses in the previous divorce action may have colored the evidence. An adequate solution must provide protection of rights and insurance against unnecessary relitigation.\textsuperscript{106}

\textsuperscript{102} U.S. Const. art. IV, § 1.

\textsuperscript{103} 290 U.S. at 210, 213.

\textsuperscript{104} 290 U.S. at 214 n.1 (Stone, J., dissenting).

\textsuperscript{105} The validity of a number of blood grouping tests is now undisputed. The total number of phenotypes existing under seventeen readily available tests exceeds 55 million. Norway, Sweden, and Denmark have established national blood typing centers that enable their courts to prove nonpaternity in approximately 90 percent of those cases in which a false accusation has been made. \textit{See generally} H. Krause, \textit{Illegitimacy: Law and Social Policy} 123-37 (1971). Many spurious relitigations of paternity could be eliminated by adopting a similar plan in the United States. Legislation has been proposed to establish and fund a number of national blood typing stations. \textit{See S. Rep. No. 93-533, 93d Cong. 1st Sess. (1973). These provisions, originally proposed in H.R. 3153, 93d Cong., 1st Sess. (1973), were omitted when the bill was enacted into law. \textit{See Act of Dec. 31, 1973, Pub. L. No. 93-233, 87 Stat. 947 (1974).}}

\textsuperscript{106} \textit{See notes 159-74 and accompanying text infra.}
2. Filiation proceedings

Filiation proceedings, also known as paternity or bastardy suits, present an even stronger conflict of policies than do divorce proceedings. The illegitimate child is often an unwanted child, and courts are naturally skeptical of the adequacy of representation by the natural mother. There is a resulting reluctance to apply preclusion based on such representation. Moreover, lower courts are becoming more aware of the need to protect the interests of illegitimates as a result of changing social attitudes toward illegitimacy and recent Supreme Court cases securing for illegitimates many substantive rights.

At the same time, the policies favoring preclusion become even more critical. A determination of nonpaternity should provide an accused man with some assurance of finality, especially if accomplished through the use of blood grouping tests. Inconsistency of judgments in paternity actions is less tolerable than in personal injury litigation; a man is either the father of a child or he is not. Irreconcilable decisions would seem to indicate that one court had failed in its duty to provide a forum for just adjudication of disputes. Finally, unnecessary relitigation of the paternity issue is among the most harassing actions imaginable.

The diversity of state paternity statutes presents a major...
obstacle to formulation of a uniform policy of preclusion in filiation proceedings. Since a majority of states regard the proceeding as essentially civil and limited to an in personam action for support rights,\textsuperscript{112} it is appropriate to restrict the analysis for preclusion purposes to those cases.

The paramount problem in applying preclusion to filiation proceedings concerns the party bringing the action. Authority exists among the states for allowing the suit to be maintained by the mother,\textsuperscript{113} the child (by next friend or guardian ad litem),\textsuperscript{114} the prosecuting attorney upon the mother's complaint,\textsuperscript{115} or a designated state agency.\textsuperscript{116} Most courts readily admit, however, that the primary purpose of the action is to establish the child's support rights.\textsuperscript{117} Some courts specify that regardless of who brings the action, the child is the real party in interest.\textsuperscript{118} This ambiguity as to who is in fact bringing the action can cause conflicting decisions about the preclusive effects of a former judgment on the issue of paternity.

In Stevens v. Kelley,\textsuperscript{119} a California appellate court held that a judgment with respect to a mother in a paternity suit also binds the child. A guardian ad litem brought the case on behalf of an illegitimate minor to establish a duty of support in the natural father. Since a determination of nonpaternity had already been made in an action by the mother, the court precluded the guardian's suit.\textsuperscript{120} The court held that since the purpose of the first action was to establish support for the child, he was the real party in interest. That the child was not a nominal party in the first action made no difference.\textsuperscript{121}


\textsuperscript{118} E.g., Kyne v. Kyne, 38 Cal. App. 2d 122, 100 P.2d 806, 811 (1940).

\textsuperscript{119} 57 Cal. App. 2d 318, 134 P.2d 56 (1943).

\textsuperscript{120} Id., 134 P.2d at 59. The holding of Stevens was not an isolated phenomenon, devoid of practical implications. The case is cited in a California family law practice handbook for the proposition that a minor is bound by a judgment with respect to his parent in a paternity proceeding. 1 CALIFORNIA FAMILY LAWYER § 18.8 (1961).

Stevens exemplifies a court's willingness to find preclusion whenever relitigation of claims or issues appears unnecessary. The case is not consistent, however, with the mainstream of preclusion law or the policies concerning the protection of minor's rights. The child was not in privity with the parent in the traditional sense in this case, nor is it clear that his parent represented him adequately. The Stevens court also appears to have disregarded the relative conclusiveness of the nonpaternity finding in reaching its decision, since it refers to the compromise of the child's rights by the mother in the first action as an acceptable practice. On this point a majority of states disagree with Stevens, holding that a mother's release or compromise of the child's support rights is not binding in the child's subsequent action.

In the 1976 case of Everett v. Everett, another California appellate court disparaged the Stevens holding. In the original Everett case, the mother brought an action to adjudicate the paternity of her illegitimate child. Oral and documentary evidence was presented to a jury. Thereafter, the mother and putative father had filed a written stipulation providing that the judge should take the case from the jury and that the stipulation should be considered as the mother's testimony. On the basis of that stipulation, the putative father had prevailed and a finding of nonpaternity had been made.

A year later the child brought suit through a guardian ad litem, alleging that the defendant in the prior suit was in fact the child's natural father and that the former judgment was collusive, being the product of an agreement to pay the mother a lump sum of money and an annuity of substantial value. The putative father demurred, claiming that the judgment in the mother's earlier suit precluded any subsequent litigation of the issue. The trial court agreed and accordingly dismissed the child's suit.

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1976); CAL. CIV. PROC. CODE § 369 (West 1973).
122. 57 Cal. App. 2d 318, 134 P.2d at 61: "There is no Code section which specifically denies the mother of an illegitimate child authority to compromise claims of the child in an action for support brought by the mother on behalf of the child against the alleged father."
123. E.g., Kamp v. Morang, 277 Ala. 575, 579, 173 So. 2d 566, 569-70 (1964); Gammon v. Cobb, 335 So. 2d 261, 266-67 (Fla. 1976).
125. Id. at 67, 129 Cal. Rptr. at 9-10.
126. Id.
127. Id. at 67-68, 129 Cal. Rptr. at 10.
128. Id. at 68, 129 Cal. Rptr. at 10.
On appeal, the court in *Everett* resolved the problem of insuring that the minor child's rights were not diluted by holding that he was not bound by the judgment with respect to his mother.\(^{129}\) The decision failed to resolve another dilemma, however. Since, under existing law, the mother retains the right to bring the action\(^{130}\) but the child is not bound by any decision rendered in her case, judicial economy suffers, as do the other interests protected by the preclusion doctrines.

It appears that the *Everett* case presented an apt situation for application of issue preclusion with one qualification—the possibility of collusion and compromise in the mother's original action tended to undermine the probability that the judgment in *Everett* was on the merits. If the defendant were indeed the father of the illegitimate child and the child's interests were not adequately provided for in the collusive settlement purportedly entered into by the mother, then preclusion in the *Everett* case would have resulted in abridgment of the child's right to support. Yet it is not always easy to determine if collusion occurred in a previous suit. Preclusion in such cases would be subverted entirely if the party desiring to relitigate had merely to allege impropriety to secure a second day in court. As with the divorce cases, the courts in filiation proceedings are faced with the question whether they can adequately distinguish between cases warranting imposition of preclusion and those in which the policies favoring preclusion must be subordinated to other interests.

**III. Proposed Solutions**

The cases discussed above clearly demonstrate that the judicial practice of rigidly refusing to apply preclusion to the parent-child relationship because of traditional privity rules works a disservice to our system of resolving disputes. Often the courts have allowed harassing litigation and inconsistent judgments by adhering to the traditional rules. Conversely, some attempts to invoke preclusion in parent-child cases have failed to take into account

\(^{129}\) *Id.* at 70-71, 129 Cal. Rptr. at 12; See Cal. Civ. Code § 231 (West 1954). In so holding, the court borrowed a principle from the probate code providing that a minor's right cannot be compromised without judicial sanction. See Cal. Prob. Code § 1431 (West 1956).

\(^{130}\) *Everett* was brought under Cal. Civ. Code § 231 (West 1954), which allows the mother to bring the action. This statute has since been replaced by the Uniform Parentage Act, Cal. Civ. Code §§ 7001-7018 (West Supp. 1976). Under the new law, the mother retains authority to bring the action, but the problem of preclusion is obviated by the inclusion of a mandatory joinder provision under which the child must be made a nominal party.
account possible parental compromise of a child’s rights. In some cases the application of preclusion is just and desirable. Even when countervailing factors such as minors’ rights are absent, under present practices judges have no reasonable alternative but to deny preclusion. Courts presently lack the procedural tools to sift cases and apply preclusion only to those that factually warrant it. Forward-looking jurisdictions are, however, currently testing major procedural changes in order to promote judicial economy through application of preclusion. The three major devices which courts have invoked to prevent unnecessary litigation are the real party in interest rule, expanded concept of privity, and mandatory joinder.

A. Real Party in Interest Rule

Many jurisdictions have attempted to avoid the problems that result in multiple litigation of single claims and issues by adopting a real party in interest rule. Such a rule typically provides that “every action shall be prosecuted in the name of the real party in interest.” Because the person whose rights are being adjudicated will be a nominal party under this rule, theoretically no compromise of the interested party’s rights is possible. In a suit by a parent regarding the child’s rights, the child would then be made a nominal party, in which case a guardian ad litem would be appointed to protect his interests.

The Kansas Supreme Court has held its state’s real party in


132. The Supreme Court of Nebraska has recognized the necessity for an expanded privity concept, balanced by considerations of fairness: “In all cases in which a person finds himself subject to preclusion generally, either (1) he has had the opportunity to litigate the matter or (2) his interests have been adequately represented in the litigation of the matter.” Vincent v. Peter Pan Bakers, Inc., 182 Neb. 206, 207-08, 153 N.W.2d 849, 850 (1967). See id. at 211, 153 N.W. at 851-52 (Carter, J., concurring). Likewise, the California Supreme Court justified an expanded application of preclusion to meet the needs of limiting litigation: “As has been said in considering the application of the doctrine [of privity], courts examine the practicalities of the situation and attempt to determine whether plaintiffs are sufficiently close to the original case to afford application of the principle of preclusion.” Armstrong v. Armstrong, 15 Cal. 3d 942, 951, 544 P.2d 941, 946, 126 Cal. Rptr. 805, 810 (1976).

133. E.g., FED. R. CIV. P. 17(a); KAN. STAT. ANN. § 60-217(a) (1964). No adequate definition of a real party in interest has been promulgated. See Kennedy, Federal Rule 17(a): Will the Real Party in Interest Please Stand?, 51 MINN. L. REV. 675 (1967).

134. FED. R. CIV. P. 17(a).

135. In the case of a minor, representation is mandatory. See, e.g., CAL. CIV. PROC. CODE § 372 (West 1973). This does not necessarily prevent any compromise of a child’s interest, however, since an unsympathetic parent may represent the child generally or as guardian ad litem. But see note 170 and accompanying text infra.
interest statute136 applicable to filiation proceedings.137 In doing so, the court noted that the purpose of the statute is to prevent harassing multiple suits on the same claim by persons other than nominal parties.138 By holding the rule applicable to filiation suits, the court has insured that the child, indisputably the real party in interest, is also the nominal party. Theoretically, a parent would then have no opportunity to enter into a covert agreement compromising the child’s support rights. The court’s opinion includes dicta indicating that a judgment for or against the putative father in a filiation suit brought by the child as real party in interest would be conclusive as to the child and a bar to any others.139

While the real party in interest rule appears to be an effective solution in the context of filiation proceedings, the rule has not been without criticism.140 Since it is difficult in any given factual situation to identify the real party in interest, commentators have criticized the rule as being confusing and without function, particularly in cases where an individual is represented in litigation by an institution such as an insurer.141 Even in filiation cases the rule conflicts with most state paternity statutes that specifically allow persons other than the child to bring the action.142 Criticisms of the rule reached fruition when New York abolished its real party in interest rule in 1957 after scholars convinced the legislature that the purposes of the rule were better served by other devices.143 Despite the fact that the rule has been used to some effect in Kansas filiation proceedings, the same criticism applies to parent-child cases; other devices better serve the needs of both preclusion and protection of rights.

B. Extension of the Privity Concept

An obvious way to bring the parent-child relationship within

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138. Id. at 779, 486 P.2d at 1397.
139. Id.
141. See Kennedy, supra note 133, at 693-97, 701-03, 714-16.
142. Given the current status of most state laws it would be difficult to formulate a coherent real party in interest rule that would comport with the existing paternity statutes. Indeed, the Colorado Supreme Court has ruled that the child whose paternity is in question has no party status and may not be present in the court room, since his appearance might unduly sway a jury. See People ex rel. R.D.S., 183 Colo. 89, 514 P.2d 772 (1973).
the purview of the preclusion doctrine is to expand the traditional privity concept. Limitations must be placed on such expansion, however. A blanket application of preclusion to parent-child relationships would increase the potential for inequities resulting from compromise or collusion. Consequently, merely extending the privity list to include parent and child is not an appropriate solution. It should be recognized, however, that the principles of derivative rights and adequate representation are in essence a qualified extension of the preclusion doctrine beyond the traditional limits imposed by privity.

The derivative rights principle applies to those cases in which a single claim is sought to be litigated by both parent and child. Many courts consider actions by a spouse for loss of consortium or services to be derivative claims, wherein the party claiming damages for loss of intangible rights holds such a claim only through the injured party. If the primary right arising from the injury fails, the derivative right must fail also, and thus is subject to preclusion. The derivative rights principle serves equally well in parent-child cases based on loss of services or companionship and may apply to parental actions for medical costs. Basing preclusion on derivative rights principles prevents the problems of multiple litigation and inconsistent judgments found in the Whitehead case and in similar circumstances.

A few jurisdictions have found exigent circumstances sufficient to preclude strangers who had neither privy status nor a derivative claim. Professor Allan D. Vestal notes this growing trend to apply preclusion to nonparty-nonprivies under carefully scrutinized situations. Two elements which he finds to be com-

144. See notes 33-39 and accompanying text supra.
145. Notes 40-43 and accompanying text supra.
146. Notes 44-50 and accompanying text supra.
147. See notes 15-17, supra.
148. See Whitehead v. General Tel. Co., 20 Ohio St. 2d 108, 254 N.E.2d 10 (1969). In concluding that the single injury gave rise to two distinct claims, the court apparently resorted to a primary-right or similar definition of "claim." Under the modern transactional view, the accident in Whitehead would be held to produce a single claim, splitting of which would invoke preclusion. See note 79 supra.
150. Mass accident cases provide the clearest example of such an exigency. See In re Air Crash Disaster, 390 F. Supp. 757 (S.D. Ohio 1972), rev'd sub nom. Humphreys v. Tann, 487 F.2d 866 (6th Cir. 1973), cert. denied, 416 U.S. 956 (1974). In the Air Crash case, the district court invoked adequate representation as grounds for precluding additional litigation after the initial litigant lost. The Sixth Circuit, however, was unwilling to make this radical departure from traditional notions of privity. But see Esco Corp. v. Tru-Rol Co., 352 F. Supp. 416 (D. Md. 1972).
mon to all such situations are (1) a close relationship between the two actions—not necessarily between the parties—and (2) adequate representation of the party to be precluded. While many of the cases in which this expanded preclusion concept is applied seem limited to narrow factual holdings, the opinions often speak in terms of its general application.

Few courts have been willing to apply an expanded preclusion concept to the parent-child relationship. In *Armstrong v. Armstrong*, however, the California Supreme Court extended the doctrine of adequate representation to include that relationship. In this case the children of a divorced couple sought to relitigate financial rights determined in a prior divorce action to which the mother was a party. While California has been a leading jurisdiction in expanding the preclusion doctrines, *Armstrong* is among the first cases clearly applying adequate representation as a basis for preclusion within the parent-child relation.

152. *Id.* at 373. This was one argument presented by the appellants in *Whitehead*. See 20 Ohio St. 2d at 113, 254 N.E.2d at 13-14.

153. Vestal, *supra* note 151, at 373. Commentators have justified expansion of preclusion by imposing various limitations on its application. A deceptively simple argument is that if the interests of the litigants are sufficiently identical, preclusion will not be unjust. This limitation is insufficient since it ignores the fact that litigants may not attach the same significance to identical interests, and compromise may infect an initial judgment. See Note, 52 CORNELL L.Q. 724 (1967).

Other proposed limitations that might justify application of an expanded preclusion principle are (1) the requirement of a significant relationship, (2) imposition of preclusion only where an inconsistency in verdicts exists, and (3) application of preclusion only where the first litigant had incentive and did in fact fully litigate all issues sought to be relitigated. McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707, 714-17, 731 (1976). Unfortunately, these limitations suffer from vagueness and provide an insufficient standard with which to measure the probability of collusion or compromise.


155. 15 Cal. 3d 942, 948, 544 P.2d 941, 946, 126 Cal. Rptr. 805, 810 (1976).


157. 15 Cal. 3d at 948, 544 P.2d at 946, 126 Cal. Rptr. at 810. Although the court considered the nature of the relationship to be within the "privity" rubric, California has applied the term to cases not within the traditional classification scheme. Here it was based on adequacy of representation. See People v. Drinkhouse, 4 Cal. App. 3d 931, 937-38, 84 Cal. Rptr. 777, 778-77 (1970); People v. One 1964 Chevrolet, 274 Cal. App. 2d 720, 804, 79 Cal. Rptr. 447, 451-54 (1969); notes 44-50 and accompanying text *supra*.
We have previously held that privity exists where the person involved is "...so identified in interest with another that he represents the same legal right."... In the present case, [the children's] mother was entrusted with their care and custody and was a proper representative of their interests. ... For this reason, we conclude that [the children] are bound by the judgment in the divorce action to which their mother was a party.

The opinion leaves unresolved the question of what standard is to be applied in measuring adequacy of representation. Such a determination was unnecessary since in this case the complaint contained "no specific allegations of fraud, concealment, or other intentionally wrongful conduct."\[158\]

One of the major problems in determining whether a child has been adequately represented by his parent lies in the difficulty of ascertaining if collusion or improper compromise has infected an initial judgment or settlement, allegations notwithstanding. Consequently, preclusion based on adequate representation is an acceptable judicial tool when applied in personal injury suits where danger of compromise is slight, but is not acceptable in domestic relations cases where this danger is very great.

C. Mandatory Joinder

Perhaps the most viable solution to the preclusion problem is to obviate its necessity in parent-child cases by requiring join-der of all persons having a significant interest in the litigation.\[159\]

If all interested parties are required to join in the initial action, the court may determine the rights of all without the necessity of resorting to possibly inappropriate preclusion. Parties failing to intervene may be precluded from further litigation by such a mandatory intervention rule.\[160\]

Mandatory joinder of parties has been required at common law,\[161\] in the Federal Rules of Civil Procedure,\[162\] and in the procedural rules of many states.\[163\] Joinder of parties with related

158. 15 Cal. 3d at 948, 544 P.2d at 946, 126 Cal. Rptr. at 810.
163. E.g., Ill. ANN. STAT. ch. 110, § 23 (Smith-Hurd 1968); Tex. R. Civ. P. 39. Several states have specialized compulsory joinder statutes pertaining to certain subject matter.
claims is mandated by three policies: (1) to prevent a multiplicity of suits on a single cause of action, (2) to eliminate the possibility of multiple recoveries on a single claim, and (3) to rank claims in order to facilitate pro rata distribution of any assets obtained in the judgment. The first two reasons indicate that preclusion and compulsory joinder share common policy bases. Thus, preclusion by its nature serves as an encouragement to joinder of parties.

Two principal problems inherent in typical mandatory joinder provisions are not generally found in cases where parent and child have related interests that mandate joinder. First, the provision for nonjoinder if personal or subject matter jurisdiction would be destroyed is unlikely to apply to a case involving the joinder of a minor child with his parent. Second, the provision requiring a plaintiff to list all joinable parties, which often presents problems in identification of potential parties, is certainly not a deterrent to joinder of a child in either personal injury or domestic relations cases.

Joinder is a particularly suitable remedy in divorce and filiation cases because parent and child often have diverse interests that require separate representation to insure protection of rights and to prevent spurious litigation. The Uniform Parentage Act presents a major step toward fulfilling the purposes of preclusion without creating the possibility of abridging the rights of the minor child in a paternity suit. The Act requires a child whose parentage is in question to be joined in the filiation proceeding. Prior to promulgation and adoption of the Act, few states made it a practice either to join the child as a party to divorce or filiation proceedings in which paternity was contested or to appoint a guardian ad litem. The Act provides in part:


167. See, e.g., Tex. R. Civ. P. 39(c): "(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons [needed for just adjudication] . . . who are not joined, and the reasons why they are not joined."


The child shall be made a party to the action. If he is a minor he shall be represented by his general guardian or a guardian ad litem appointed by the court. The child's mother or father may not represent the child as guardian or otherwise. The court may appoint the [appropriate state agency] as guardian ad litem for the child. . . .

While the Act provides that the original suit may be instigated by virtually any interested party, problems regarding who is to bring the action and who is the real party in interest no longer affect the child since he is joined as a party and is separately represented. Additional expense of joinder resulting from court appointed guardians and their counsel may be minimized by working through an existing state agency as the Act suggests. Moreover, additional expenses incurred in a proceeding conducted under the Act would most likely be offset by recovering child support from the fathers of children who might otherwise be receiving state aid.

Adoption of the Uniform Parentage Act in California\(^\text{172}\) moots the precedential value of the Everett decision discussed above.\(^\text{173}\) The problems of collusive judgment, real party in interest, and preclusion that pervaded that case cannot exist under the new law. Joinder provisions similar to those in the Uniform Parentage Act may be extended to other areas by legislative action, but unfortunately, such legislation is slow in coming.\(^\text{174}\)

IV. CONCLUSION

The policies underlying the preclusion doctrine are judicially and socially sound. As the complexities and interdependence of modern life create more multiple party litigation, it is incumbent upon the courts to develop the preclusion principles to the greatest extent compatible with just results. The parent-child relationship is an appropriate area for expanded application of preclusion. It is one of the few relationships susceptible to absolute delineation that is not within the traditional privity rubric. It is consequently within easy judicial control and scrutiny.

In dealing with personal injury cases involving parent and

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171. See id. § 6.
173. Had the child been joined and represented by a court-appointed guardian, no compromise could have occurred. As a party, the child would also be bound by the judgment reached. See text accompanying notes 124-30 supra.
174. **Uniform Parentage Act** § 9; see note 163 supra.
child, courts have available several alternatives to aid in implementing the preclusion policies. First, enforcement of existing joinder provisions can often eliminate the need for preclusion altogether. Second, utilization of derivative rights rules may curtail multiple litigation of single claims. Finally, application of preclusion based on adequate representation can be applied to parent-child cases without significant danger of diluting the child’s rights.

The chief barrier to application of preclusion to domestic relations cases is the desire to insulate the rights of minor children from parents who may compromise or inadequately represent their interests. This problem may also be remedied within the ambit of current procedural law. The ideal solution is mandatory joinder of children with interest in parental litigation. The Uniform Parentage Act offers the most nearly complete remedy to preclusion and privity problems in filiation suits. Its adoption is desirable not only to remedy these procedural problems, but to replace the inadequate and antiquated filiation statutes currently in force in most states. Lacking this specialized statute, courts may invoke existing joinder provisions to compel joinder of children in divorce or filiation proceedings where their rights might be litigated.

The liberal application of privity-preclusion rules to the parent-child relationship suggested by the California Supreme Court is still an acceptable solution in many cases. While this solution is not adequate to prevent infringement of rights in all cases, until joinder becomes a universal practice many cases will continue to arise in which preclusion is the only device with which a court may limit spurious, repetitive litigation.

175. Besides offering a procedural device to rectify possible preclusion problems in filiation suits, the Uniform Parentage Act provides an integrated system whereby illegitimate children may secure other important procedural and substantive rights. Krause, supra note 110.

176. See Armstrong v. Armstrong, 15 Cal. 3d 942, 544 P.2d 941, 126 Cal. Rptr. 805; notes 159-63 and accompanying text supra.