

2011

# Micah John Reller v. Karine Anesia Schlagel Toledo Reller v. Francis J. Argenziano : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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Micah John Reller,  
Petitioner/Appellee,

vs.

Karine Anesia Schlagel Toledo  
Reller,  
Respondent/Appellee,

vs.

FRANCIS J. ARGENZIANO,  
Intervenor/Appellant.

**Appellant's Opening Brief**

Case No. 20110457

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APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT, WEST JORDAN  
DEPARTMENT, SALT LAKE COUNTY, UTAH JUDGE TERRY CHRISTIANSEN

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IN THE UTAH COURT OF APPEALS

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MICAH JOHN RELLER,

Petitioner/Appellee,

vs.

KARINE ANESIA  
SCHLAGEL TOLEDO  
RELLER,

Respondent/Appellee,

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FRANCIS J. ARGENZIANO,

Intervenor/Appellant.

**APPELLANT'S OPENING BRIEF**

Case No. 20110457

## TABLE OF CONTENTS

Table of Contents .....	i
Table of Authorities .....	ii
Jurisdiction .....	1
Preservation Below .....	2
Determinative Law .....	3
Statement of the case .....	4
a. <i>Nature of the case.</i> .....	4
b. <i>Course of the proceedings.</i> .....	4
c. <i>Post decree proceedings.</i> .....	5
Relevant Facts .....	7
Summary of the Argument .....	11
Argument on Appeal .....	14
I.     The Rellers Were Estopped From Challenging the Adjudication. ....	14
II.    The Initial Divorce Decree's Paternity Adjudication Became Res Judicata. ....	16
III.   The Trial Court Did not Have Jurisdiction to Revisit its Parentage Adjudication Years Later. ....	20
IV.    Public Policy And The UPA Properly Restrict Challenges to Existing Parentage Adjudications. ....	26
Conclusion .....	29
Certificate of Service .....	31
Addendum A .....	32

## TABLE OF AUTHORITIES

### Constitutional Provisions

Utah Const. Art. VIII, §5 .....	3
---------------------------------	---

### State Statutes

Utah Code Ann. §30-3-11.3 (2011) .....	17
Utah Code Ann. §30-3-7 (2011) .....	17
Utah Code Ann. §30-3-1 (2011) .....	21
Utah Code Ann. §30-3-5 (2011) .....	18
Utah Code Ann. §63G-4-401 (2011) .....	22
Utah Code Ann. §78-45g-623(3) .....	9
Utah Code Ann. §78A-4-103 (2011) .....	1
Utah Code Ann. §78B-15-102 (2011) .....	20
Utah Code Ann. §78B-15-104 (2011) .....	12, 20-22
Utah Code Ann. §78B-15-204 (2011) .....	11, 14, 16
Utah Code Ann. §78B-15-623 (2011) .....	3, 9, 12, 13, 15, 16, 21, 22, 28
Utah Code Ann. §78B-15-607 (2011) .....	3, 12, 14-16, 20, 23, 27, 28
Utah Code Ann. §78B-15-610 (2011) .....	14

### State Rules

Utah R. Civ. P. 54(c)(2) .....	15
Utah R. Civ. P. 55(c) .....	4, 23
Utah R. Civ. P. 59 .....	17, 23, 28, 30

Utah R. Civ. P. 60(b) .....	4, 12, 13, 17, 22-26, 28, 30
Utah R. Civ. P. 7(b)(1) .....	24
<u>Cases</u>	
<i>Baby E.Z. v. T.I.Z.</i> , 2011 UT 38, 678 Utah Adv. Rep. 17 .....	2
<i>Calder Bros. v. Anderson</i> , 652 P.2d 922 (Utah 1982) .....	23
<i>Case v. Case</i> , 2004 UT App 423, 103 P.3d 171 .....	1
<i>Dep't of Human Servs. ex rel. Parker v. Irizarry</i> , 945 P.2d 676 (Utah 1997) .....	2
<i>Doe v. V.H.</i> , 894 P.2d 1285 (Utah Ct. App. 1995) .....	25
<i>General Constr. &amp; Dev., Inc. v. Peterson Plumbing Supply</i> , 2011 UT 1, 248 P.3d 972 .....	2
<i>Goodright v. Moss</i> , 2 Cowp. 591, 98 Eng. Reprint 1257 (1777) .....	27
<i>Hagan v. Hagan</i> , 810 P.2d 478 (Utah Ct. App. 1991) .....	18, 20
<i>Holder v. Holder</i> , 340 P.2d 761, 9 Utah 2d 163 (1959) .....	26
<i>Jacobsen v. Jacobsen</i> , 703 P.2d 303 (Utah 1985) .....	17
<i>Jensen v. Young</i> , 2010 UT 67, 245 P.3d 731 .....	25
<i>Kessimakis v. Kessimakis</i> , 580 P.2d 1090 (Utah 1978) .....	17
<i>Krambule v. Krambule</i> , 1999 UT App 357, 994 P.2d 210 <i>cert. denied</i> 4 P.3d 1289 (Utah 2000) .....	16, 18
<i>Lilly v. Lilly</i> , 2011 UT App 53, 250 P.3d 994 .....	1
<i>Lopes v. Lopes</i> , 518 P.2d 687 (Utah 1974) .....	26, 27
<i>Macris &amp; Assocs., Inc. v. Neways, Inc.</i> , 2000 UT 93, 16 P.3d 1214 .....	1, 19

<i>Miller v. USAA Cas. Ins. Co.</i> , 2002 UT 6, 44 P.3d 663 .....	1
<i>Pearson v. Pearson</i> , 2008 UT 24, 182 P.3d 353 .....	27
<i>Richins v. Delbert Chipman &amp; Sons Co.</i> , 817 P.2d 382 (Utah App. 1991) ...	25, 26
<i>Roth v. Joseph</i> , 2010 UT App 332, 244 P.3d 391 .....	23
<i>State v. Munguia</i> , 2011 UT 5, 253 P.3d 1082 .....	3
<u>Other Authorities</u>	
46 Am. Jur. 2d Judgments § 545 .....	19
L. Utah 2008, ch. 3, § 1368 .....	9

## JURISDICTION

The Utah Court of Appeals has jurisdiction pursuant to Utah Code Ann. §78A-4-103(2)(h) (2011).

## ISSUES AND STANDARDS OF REVIEW

**Issue 1.** Whether, after more than year had passed since an adjudication of parentage had been made in a divorce decree, the trial court had subject matter jurisdiction to set aside that adjudication of parentage.

**Standard of Review:** Whether the lower court had subject matter jurisdiction to set aside its own previous judgment presents a question of law, which is reviewed for correctness. *Case v. Case*, 2004 UT App 423, ¶ 5, 103 P.3d 171; *Lilly v. Lilly*, 2011 UT App 53, 250 P.3d 994.

**Issue 2.** Whether the Divorce Decree was res judicata on the issue of parentage.

**Standard of Review:** Whether res judicata bars an action is a question of law that is reviewed for correctness. *Miller v. USAA Cas. Ins. Co.*, 2002 UT 6, ¶19, 44 P.3d 663 (citing *Macris & Assocs., Inc. v. Neways, Inc.*, 2000 UT 93, ¶ 17, 16 P.3d 1214).



**Issue 3.** Whether the parties to an adjudication of parentage that was made in their decree of divorce are estopped from raising the issue of parentage more than a year after the decree of divorce was entered.

**Standard of Review:** Estoppel is generally a mixed question of fact and law with differing degrees of deference given to the trial court, depending on several considerations. *See Dep't of Human Servs. ex rel. Parker v. Irizarry*, 945 P.2d 676, 678 (Utah 1997). However, where the estoppel arises as a matter of statute and the facts are undisputed, as here, the matter should be treated as one of statutory construction. "The interpretation of a statute is a question of law," which is reviewed for correctness. *General Constr. & Dev., Inc. v. Peterson Plumbing Supply*, 2011 UT 1, ¶5, 248 P.3d 972.

#### **PRESERVATION BELOW**

The first issue, subject matter jurisdiction, may be raised at any time, including, for the first time on appeal. *Baby E.Z. v. T.I.Z.*, 2011 UT 38, ¶31, 678 Utah Adv. Rep. 17. Issues numbered two and three (res judicata and statutory estoppel respectively) were brought to the Trial Court's attention at least twice. *See* Record on Appeal ("R.") 154-155; 157-168 and R. 321 - 324. The Trial Court ruled favorably on the first raising of res judicata and estoppel. R. 246. However, Appellant was not joined into this case until the very day of the deadline for filing

a notice of appeal and, accordingly, the Trial Court never had an opportunity to rule on the latter attempt to raise the issues. Because of the manner in which the Trial Court's various rulings were obtained (by surreptitious stipulations) and the timing of those rulings, the second and third issues are reviewable under the Exceptional Circumstances Doctrine, which addresses "rare procedural anomalies" (*State v. Munguia*, 2011 UT 5, ¶11, 253 P.3d 1082) and the Plain Error Doctrine, because the error regarding statutory estoppel should have been obvious. *Munguia* ¶12.

#### **DETERMINATIVE LAW**

**Determinative Law:** Utah Const. Art. VIII, §5

The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute.

**Determinative Law:** Utah Code Ann. §78B-15-607 (2011)

See Addendum A.

**Determinative Law:** Utah Code Ann. §78B-15-623 (2011)

See Addendum A.

**Determinative Law:** Utah R. Civ. P. 55(c)

Setting aside default. -- For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

**Determinative Law:** Utah R. Civ. P. 60(b)

See Addendum A.

#### STATEMENT OF THE CASE

a. *Nature of the case.* This is an appeal from a stipulated order – a final judgment – that entered years after an earlier final divorce decree. The new stipulated order purported to resolve once again all “outstanding” issues in the parties’ divorce, determining that “there are no minor children born between the parties.” This was contrary to the final decree of divorce entered years earlier that had adjudicated Micah Reller as the father of a child that was born of the parties’ marriage (“the Child”). The stipulated order also contradicted the Trial Court’s earlier finding that the prior paternity determination in the decree of divorce was an actual adjudication of parentage under Utah’s Uniform Parentage Act.

b. *Course of the proceedings.* On August 30, 2006, Petitioner, Micah Reller, filed for divorce from Respondent, Karine Reller. Micah’s Verified Petition alleged among other things that there “has been 1 child/ren born of this

marriage” (“the Child”). Karine Reller waived answering and consented that judgment could enter consistent with Micah’s petition. Accordingly, on September 12, 2006, the Trial Court entered the Decree of Divorce and Judgment (the “Decree”), which reflected that one child was born of the marriage, to wit: the Child.

c. *Post decree proceedings.* On June 20, 2007, Micah Reller filed a Petition to Modify, seeking a change of custody based on Respondent Karine Reller’s conduct. As part of that dispute, on October 23, 2007, Karine Reller filed her own Petition to Modify, in which she sought to readjudicate parentage. There, for the first time, Karine asserted that Micah Reller was not the father, but rather that the father was Intervenor Frank Argenziano. Karine joined Argenziano as a party and Argenziano filed a motion to dismiss, which was heard by Commissioner Tack on March 13, 2008. On May 21, 2008, Commissioner Tack issued her recommended order, which was served on all parties. It was later entered by the Trial Court as an order as written. *Inter alia*, that order determined that Micah Reller had been adjudicated the Child’s father by the Decree on September 12, 2006, that Argenziano should be dismissed, and that Karine, who knew of the issue at the time of the divorce, should be estopped from challenging paternity.

Karine objected to that recommendation, but then on June 25, 2008, she withdrew her objection. The following day, June 26, 2008, almost two years post decree, Karine and Micah Reller executed their Stipulation to Set Aside Decree of Divorce, in which, unbeknownst to Argenziano, they stipulated to set aside the original Decree of Divorce (in its entirety) apparently so the Trial Court could later enter findings that Micah Reller was not the biological father of the Child.

The Rellers then surreptitiously filed their Stipulation to Set Aside Decree of Divorce on July 7, 2008.<sup>1</sup> On July 10, 2008, Judge Christiansen signed the Order Setting Aside Decree of Divorce. Neither the Order Setting Aside Decree of Divorce nor the stipulation on which it was based were ever served on Argenziano. The order dismissing Argenziano from the case was served by the Trial Court on Argenziano by mail on August 14, 2008.

On March 16, 2009, the Trial Court entered a stipulated partial Decree of Divorce, which divorced the Rellers again and now excluded Micah Reller as the Child's *biological* father. However, it reserved all other issues. The Rellers did not file a final order in this case until well after Argenziano sought to Intervene anew. Argenziano's Application and Motion to Intervene was filed on February

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<sup>1</sup>"Surreptitious" because the Rellers did not include Argenziano as a party to that stipulation and did not serve him with a copy of it when they filed it.

22, 2011. There Argenziano sought intervention to set aside the previous order setting aside the original decree of divorce - at least to the extent that order purported to set aside the Decree's adjudication of parentage. To accommodate counsel for Micah and Karine, Argenziano agreed to extensions of the hearing date on the intervention motion, during which the Rellers filed their Stipulated Order Resolving All Outstanding Issues in the Parties' Divorce - again without notice to Argenziano. That stipulated order was signed by Judge Terry Christiansen on April 11, 2011, and was a final judgment. Intervention was granted on May 12, 2011, which was the deadline for a notice of appeal. Consequently Argenziano filed his Notice of Appeal that same day.

Also of note, but not apparent from the record in this case, Appellee Karine Reller had initiated a separate administrative action, which was dismissed. She then initiated an independent action in the District Court to have Argenziano adjudicated the parent of A.E.R. The temporary orders in that action have required Appellant Argenziano to submit to genetic testing.

### **RELEVANT FACTS**

1. Petitioner Micah Reller and Respondent Karine Reller were married in August 2, 2002, and a Decree of Divorce and Judgment dissolving the marriage was entered September 12, 2006 (the "Decree"). R. 1-19.

2. On April 12, 2005, during the marriage, a child (the “Child”) was born. R. 3.

3. The uncontested Verified Petition alleged, and the subsequent Decree and the Findings of Fact and Conclusions of Law found, that there was “one child born of this marriage,” which was the Child. R. 3, 62 and 79.

4. On or about June 20, 2007, Micah filed a Petition to Modify the Decree, alleging that a substantial and material change of circumstances had occurred; Micah sought an award of sole custody and to restrict Karine to supervised parent time. R. 94 - 124.

5. Karine moved to dismiss Micah’s Petition to Modify ( R. 130-131); Later, however, Karine brought her own petition to modify the decree of divorce, which she filed on October 23, 2007; There she alleged for the first time that Micah was not the parent of the Child. R. 139-141.

6. Karine’s petition to modify the decree of divorce, alleged *inter alia* that Intervenor Agenziano was actually the father of the child. R. 140.

7. Karine then had Argenziano joined as a party, amended her petition to modify seeking to have the court change the adjudication of parentage and make Argenziano pay child support. R. 143 - 146.

8. On December 4, 2007, Argenziano was served with a Summons, the

court's "Order of Joinder" and an Amended Petition to Modify Decree of Divorce. R. 151-153.

9. On January 3, 2008, Argenziano moved to vacate his joinder and dismiss the petition to modify as it related to him, asserting the Child already had an adjudicated father. R. 154 - 237.

10. A hearing was held before the Honorable Michelle Tack, District Court Commissioner on March 13, 2008 ( R. 242), following which the Commissioner recommended, on May 23, 2008, as follows:

"2. [Micah Reller] was adjudicated as the child's father at the entry of the parties' decree of Divorce on or about September 12, 2006, pursuant to Utah Code Ann. §78-45g-623(3) of the Utah Code." R. 266-267, ¶ 2.<sup>2</sup>

\* \* \*

"6. Based upon the adjudication of paternity within the parties' Decree of Divorce, the issue of paternity is not properly before this court and therefore this court currently lacks jurisdiction over the Third Party

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<sup>2</sup>Chapter 45g, Utah's Uniform Parentage Act (the "UPA"), was enacted in 2005. As part of a 2008 recodification of the Judicial Code, it was renumbered to Chapter 15 of Title 78B, with section numbers remaining unchanged. (*See* L. Utah 2008, ch. 3, § 1368.) Thus, §78-45g-623(3) has been renumbered and is now located at Utah Code Ann. §78B-15-623(3) (2011). Because there are no significant changes, citations to the UPA are to the current 2011 version.



Respondent, Francis Joseph Argenziano.” R. 267, ¶ 6.

11. After that recommendation, but before its entry as an order signed by the judge, and without notice to Argenziano, Micah and Karine entered into a stipulation to set aside the decree of divorce, which they filed with the Trial Court, along with an order setting aside the Decree. R. 260 - 265.

12. On July 10, 2008, based on the Rellers’ stipulation, Judge Christiansen signed the Order Setting Aside Decree of Divorce. R. 264 - 265.

13. On March 17, 2009, the Trial Court entered new Findings of Fact and Conclusions of Law and a Decree of Divorce, which divorced the Rellers (again) and now excluded Micah Reller as the biological father of the Child, based on a genetic testing report dated August 22, 2007; All other issues were reserved. R. 304 - 310.<sup>3</sup>

14. On February 22, 2011, Argenziano filed his Application and Motion for Intervention, seeking intervention on the issue of whether the Trial Court had jurisdiction to readjudicate its September 12, 2006 Adjudication of Micah Reller as the Child’s father. R. 313 - 332.

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<sup>3</sup>No formal stipulation, notice to submit or other pleading in the Record appears to support this decree. It does appear, however, that the Trial Court took Petitioner’s affidavit of jurisdiction and grounds orally on the record on December 4, 2008. R. 298. Additionally, the Findings of Fact and Decree of Divorce were approved as to form by Karine. R. 306, 309.

15. On April 12, 2011 a “Stipulated Order Resolving All Outstanding Issues in the Parties Divorce” was entered, which among other things, adjudicated “there are no minor children born between the parties...” R. 365 - 368.

16. On May 12, 2011 Argenziano’s motion to intervene was granted and he filed a notice of appeal from the April 12, 2011 order. R 420 - 423.

### SUMMARY OF THE ARGUMENT

The entry of the original Decree on September 12, 2006 between Micah and Karine awarded custody of the Child to Karine, ordered Micah to pay child support, and declared that the Child had been born as issue of their marriage. Therefore, that Decree adjudicated the Child’s parentage and it was a final and appealable order. As between Micah and Karine, the issue of parentage was *res judicata* and both Micah and Karine were estopped by statute from raising the issue of paternity again. Moreover, the District Court, once having made the adjudication of parentage, lost subject matter jurisdiction to revisit that adjudication and allowing revisitation of it violates public policy.

Under Utah’s Uniform Parentage Act (the “UPA”), if a married woman has a child during her marriage, “[her husband] is presumed to be the child’s father.” Utah Code Ann. §78B-15-204(1)(a) (2011). If those parties divorce, that presumption of paternity must be rebutted *before* a decree of divorce is entered.

Otherwise, if the issue of paternity is raised in the divorce pleadings “and the tribunal addresses the issue and enters an order, the parties are estopped from raising the issue again.” Utah Code Ann. §78B-15-607(1)(a) (2011). Moreover, “the order of the tribunal may not be challenged on the basis of material mistake of fact.” *Id.* The September 12, 2006 Decree of Divorce adjudicated Micah as the father, and both Micah and Karine were estopped from raising the issue further. In addition to this statutory estoppel, the Trial Court also found that Karine was specifically estopped from challenging that Adjudication because of her actions.

Even absent estoppel, the Trial Court did not have jurisdiction to entertain Micah and Karine’s belated challenge to its Adjudication, which was almost two years old when they stipulated to set aside the Decree. The UPA grants subject matter jurisdiction to adjudicate parentage as a part of a divorce action. *See* Utah Code Ann. §78B-15-104(1) (2011). However, subject matter jurisdiction to set aside an existing adjudication of parentage once made, flows from entirely different sources of the law. Jurisdiction to establish parentage comes from section 104 of the UPA in conjunction with section 607 (with respect to married parents), whereas jurisdiction to set aside a parentage adjudication relies on Section 623, as well as the pertinent rules of civil and appellate procedure. Just as a court does not retain perpetual jurisdiction to set aside judgments under Utah R.

Civ. P. 60(b), a court does not retain perpetual jurisdiction to modify or entertain challenges to parentage adjudications.

Section 623 of the UPA provides that parentage adjudications are binding on the parties to the divorce. Once such an adjudication is made, the scope of permissible challenges is limited. “A party to an adjudication of paternity may challenge the adjudication only under law of this state relating to appeal, vacation of judgments, or other judicial review.” Utah Code Ann. §78B-15-623(6) (2011). Thus, once the Trial Court entered its Adjudication, its jurisdiction to review that adjudication was limited. It had no appellate jurisdiction, which is limited to this Court. Jurisdiction for “judicial review” did not lie because that relates to judicial review of administrative parentage adjudications by the Office of Recovery Services.

Therefore, the Trial Court’s jurisdiction was limited to the law relating to “vacation of judgments.” Because the Decree was based on default, the Rellers’ only avenue was to move to set aside the judgment under Utah R. Civ. P. 60(b). The time for that in this case extended for three months following entry of the Decree. After that, the Trial Court lost jurisdiction to consider a motion under Rule 60(b). Not only were the avenues to challenge paternity after entry of the Decree limited, they were not traveled.

Utah's public policy strongly favors the legitimacy of children born to married couples. When the court allows setting aside adjudications of parentage through the simple expedient of setting aside a decree of divorce, it sets a dangerous precedent. Once the court starts down that slippery slope where does it stop? Here it was two years. Can children of married couples be illegitimated four, six, twenty years later? On the parent's death bed forty years later?

### **ARGUMENT ON APPEAL**

#### **I. The Rellers Were Estopped From Challenging the Adjudication.**

In district courts, parentage adjudications may take place in divorce actions, as well as other contexts not germane here. *See* Utah Code Ann. §78B-15-610(1) (2011) (allowing parentage adjudications to be joined with divorces, as well as adoptions, terminations of parental rights, *etc.*). However, where children are born into a marriage, the UPA limits the time to raise parentage issues. And once parentage is adjudicated in a divorce, the plain language of the UPA limits the scope of subsequent challenges.

When a child is born into a marriage, the husband is the presumed father. Utah Code Ann. §78B-15-204(1)(a) (2011). In that case, paternity “may be raised by the presumed father or the mother at any time prior to filing an action for divorce or in the pleadings at the time of the divorce of the parents.” Utah Code

Ann. §78B-15-607(1). Thus, the outside time limit to raise paternity issues appears to be when the parents divorce. Irrespective of that limit though, if either party raises paternity in the divorce and the divorce court adjudicates paternity, the parties are almost completely foreclosed by the UPA from further challenging that adjudication:

If the question of paternity has been raised in the pleadings in a divorce and the tribunal addresses the issue and enters an order, the parties are estopped from raising the issue again, and the order of the tribunal may not be challenged on the basis of material mistake of fact.

Utah Code Ann. §78B-15-607(1)(a) (2011).

The divorce court is deemed to have adjudicated paternity if “the final order: (a) expressly identifies a child as a ‘child of the marriage,’ ‘issue of the marriage,’ or similar words indicating that the husband is the father of the child; or (b) provides for support . . . by the husband.” Utah Code Ann. §78B-15-623(3) (2011). In short, if the issue is raised and the divorce court adjudicates parentage, those parties are “estopped from raising the issue again.”

That is precisely what happened here. Micah raised the issue in his Verified Petition, alleging that the Child “was born of this marriage” (R. 3), and that he, Micah, should pay child support. R. 13; *see* Utah R. Civ. P. 54(c)(2) (“judgment by default shall not be different in kind from . . . that specifically prayed for in the

demand for judgment”). The Child was born during the marriage and so Micah was the presumed father. That presumption was not “rebutted in accordance with Section 78B-15-607.” Utah Code Ann. §78B-15-204(2) (2011); *see id.* §607(4) (no presumption to rebut once adjudication is made). On the basis of Micah’s Verified Petition, the Trial Court granted default and entered the Decree on September 12, 2006. The Decree adjudicated Micah as the Child’s father by finding the Child was born of the marriage and ordering that Micah pay child support. R. 62, 79; *see* Utah Code Ann. §78B-15-623(3) (2011).

Lest there be any doubt, on March 13, 2008, a year and a half after the Rellers’ Decree was final, the Trial Court revisited the issue in a hearing and later specifically ruled that Micah “was adjudicated as the [C]hild’s father on or about September 12, 2006.” R. 245 - 46, and 266-67. The Trial Court also ruled that, because of her conduct, Karine was specifically “estopped from challenging the adjudication of paternity.” R. 246, 267. As of September 12, 2006, both Micah and Karine were estopped from even raising the issue of parentage.

## **II. The Initial Divorce Decree’s Paternity Adjudication Became Res Judicata.**

“The principles of res judicata apply fully in the context of divorce proceedings.” *Krambule v. Krambule*, 1999 UT App 357, ¶13, 994 P.2d 210 *cert.*

*denied* 4 P.3d 1289 (Utah 2000) *citing Jacobsen v. Jacobsen*, 703 P.2d 303, 305 (Utah 1985). The Utah Supreme Court has stated it thus:

This Court is clearly committed to the proposition that in order to modify a prior decree the moving party must show a substantial change of circumstances. In the absence of such a showing, the decree shall not be modified and the matters previously litigated and incorporated therein cannot be collaterally attacked in face of the doctrine of *res judicata*.

*Jacobsen*, 703 P.2d at 305 (Utah 1985) *quoting Kessimakis v. Kessimakis*, 580 P.2d 1090, 1091 (Utah 1978). Essentially then, absent a substantial and material change in circumstance parties are barred from re-litigating issues which were or could have been litigated. *Jacobsen v. Jacobsen*, 703 P.2d at 305 (Utah 1985); *but see* Utah R. Civ. P. 59 and 60 (addressed *infra.*, which provided limited time periods to set aside or amend judgments).

In divorces involving children, if both divorcing parties have completed the divorce education class required by Utah Code Ann. §30-3-11.3 (2011), the divorce decree “becomes absolute: (a) on the date it is signed by the court and entered by the clerk in the register of actions.” Utah Code Ann. §30-3-7(1) (2011). The Rellers completed that divorce education class and so their divorce was final and absolute as of September 16, 2006. *Id.*; *see* R. 56, 57 (the divorce education class certificates). Absent some exception *and* a substantial and



material change in circumstances, the Decree's Adjudication became *res judicata* as of that date.

There are some exceptions to the doctrine of *res judicata* that have been created either judicially or statutorily. This may have caused some confusion among practitioners, because these exceptions afford courts continuing modification jurisdiction in certain areas. For example, statute specifically grants "continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health, and dental care, and for distribution of the property." Utah Code Ann. §30-3-5(3) (2011).

Even where continuing modification jurisdiction exists, however, "the extent of the change necessary to modify a divorce decree varies with the type of modification sought." *Hagan v. Hagan*, 810 P.2d 478, 482 (Utah Ct. App. 1991) (*citation omitted*). Thus, changes in child support will require a lesser quantum of change in circumstances, while modifying a property distribution will involve "compelling reasons arising from a substantial and material change in circumstances." *Id.* Nonetheless, as a predicate to modifying a divorce decree, there must be *some* substantial and material change in circumstances from those that existed at the time of the original decree of divorce. *Krambule v. Krambule*, 1999 UT App 357, ¶¶ 13, 16.

Here, however, even if jurisdiction to modify the Adjudication existed, there were no changes in circumstances that would support it. At the date of Adjudication, the Child was already 17 months old. Genetic testing was available had anyone chosen to challenge the Child's parentage. No one did. The parties had the opportunity to litigate the issue of parentage, it was adjudicated, and the decree became absolute, with the Adjudication becoming *res judicata*. See e.g. *Macris & Assocs. v. Neways*, 2000 UT 93, ¶37 (*res judicata* applies "to all matters essentially connected with the subject matter of the litigation" irrespective of specific findings or specify references in the pleadings) (*quoting* 46 Am. Jur. 2d Judgments § 545).

More than two years later, Micah and Karine decided to try an "end run" around the Adjudication by stipulating to set aside the decree. It is understandable that Micah Reller had a change of heart after he learned the Child was not his biologically. It is also understandable that he decided he would rather not support the Child. Likewise, Karine Reller understandably may have preferred to pursue a more wealthy man and have him responsible for child support so she could live off it.

But being understandable does not overcome the bar: To modify the Decree's Adjudication, the Rellers had to assert (and the Trial Court had to find)

that a substantial and material change of circumstances had occurred after the Decree entered that related to the Adjudication. *Hagan v. Hagan*, 810 P.2d at 478, 482 (Utah Ct. App. 1991). That was simply impossible. First, the biology never changed; so if Micah was not the biological father, that was always the case. Second, even if Micah was mistaken about the biology at the time of divorce, the UPA prohibits challenges to existing adjudications on the basis of material mistake of fact. Utah Code Ann. §78B-15-607(1)(a) (2011). As parties to the original divorce action both Micah and Karine Reller are precluded from re-litigating the issue of parentage by the doctrine of *res judicata*.

### **III. The Trial Court Did not Have Jurisdiction to Revisit its Parentage Adjudication Years Later.**

The UPA grants jurisdiction to three “tribunals” to adjudicate parentage – the district court, the juvenile court, and the Office of Recovery Services (“ORS”)<sup>4</sup>. Utah Code Ann. §§78B-15-102 (26) and 104(1) (2011). Here the original parentage adjudication was made by the district court in a divorce proceeding as described in Utah Code Ann. §78B-15-607(2011).

The UPA also specifically limits the *challenges* to a parentage adjudication

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<sup>4</sup>The ORS is somewhat restricted, with its authorization being “in accordance with Section 62A-11-304.2 and Title 63G, Chapter 4, Administrative Procedures Act.” *Id.* §78B-15-104(1).

that a tribunal can consider. Utah Code Ann. §78B-15-623(6) (2011); *see* discussion *infra*. (noting the scope of permissible challenges). Assuming the Rellers were not estopped and could raise those challenges, however, the UPA limited their time to raise them, as well as the Trial Court's jurisdiction to consider them. The fact is, the Rellers simply did not raise challenges that the Trial Court had jurisdiction to entertain.

Unlike the custody and support issues addressed above, however, the Legislature did not confer continuing modification jurisdiction upon the District Court for parentage adjudications. Certainly Utah's divorce statutes do not envision continuing jurisdiction to modify parentage. *See generally* Utah Code Ann. §30-3-1 (2011) *et seq.* The UPA alone grants and limits the jurisdiction of the district courts in parentage adjudications. Utah Code Ann. §78B-15-104 (2011).

Under the UPA, parentage determinations are binding on the parties and, if made in a divorce, the UPA, unlike the divorce code, does not grant continuing modification jurisdiction. Rather, once an adjudication enters, the parties have just three avenues available to challenge an adjudication. "A party to an adjudication of paternity may challenge the adjudication only under law of this state relating to appeal, vacation of judgments, or other judicial review." Utah

Code Ann. §78B-15-623(6) (2011). Subject to those statutory avenues, the UPA affords one bite at the proverbial parentage apple and the Rellers' end run attempt at a second bite should not be allowed.

Of the three avenues the Rellers could have pursued to modify or set aside the Adjudication, only the second, "vacation of judgments," could have applied, and it was a path not taken. And although Micah implied that he, or the Trial Court, did use Rule 60(b) when Micah and Karine stipulated to set aside the Decree, by then the Trial Court had lost jurisdiction.

Clearly the Trial Court had no jurisdiction for the appeal listed in Section 623(6). That lies with this Court and no appeal from the Adjudication was ever filed. The third avenue listed was "other judicial review," which is not applicable either. The ORS is a tribunal that may adjudicate parentage, but its adjudications are specifically subject to "Title 63G, Chapter 4, Administrative Procedures Act." Utah Code Ann. §78B-15-104(1) (2011). The Administrative Procedures Act specifically provides for "judicial review" of administrative adjudications, including those of the ORS. Generally, parties can obtain judicial review of an administrative action by filing "a petition for judicial review of final agency action within 30 days [of the action] . . ." Utah Code Ann. §63G-4-401 (2011). Here there was no agency action and, hence, nothing to judicially review.

That leaves the law relating to “vacation of judgments.” While this was actually available to the Rellers, they never pursued it - and certainly not while jurisdiction existed. The time during which the Trial Court could vacate the Adjudication was not unlimited and it lost jurisdiction long before the Rellers took what steps they did take.

“A trial court may set aside a default judgment only ‘in accordance with [r]ule 60(b) . . . .’” *Roth v. Joseph*, 2010 UT App 332, ¶15, 244 P.3d 391, (*cert denied* 251 P.3d 245) (*quoting* Utah R. Civ. P. 55(c) and *citing* *Calder Bros. v. Anderson*, 652 P.2d 922, 926 n.4 (Utah 1982)). Because the Decree (and its Adjudication) was a default judgment, Rule 60(b) was really the only path available to set aside the Decree or the Adjudication.<sup>5</sup> That rule states that “the procedure for obtaining any relief from a judgment *shall* be by motion as prescribed in [the Utah Rules of Civil Procedure] or by an independent action.” Utah R. Civ. P. 60(b) (emphasis added). Under Rule 60(b) a court may relieve a party from a final judgment for several reasons, including mistake,<sup>6</sup> surprise,

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<sup>5</sup>Theoretically, the Rellers could have moved for a new trial or to amend judgment under Utah R. Civ. P. 59. However, that had to be done within 10 days of the Adjudication and there is no hint in the record of such a motion.

<sup>6</sup>Ignoring for the moment that once an adjudication is made, the UPA estops parties from raising the issue and that “the order . . . may not be challenged on the basis of material mistake of fact.” Utah Code Ann. §78B-15-607(1)(a).

newly discovered evidence, as well as fraud, misrepresentation, or other misconduct by the adverse party.

The Rellers have argued below, albeit after the fact, that the Trial Court could or actually did rely on Rule 60(b). After Commissioner Tack announced from the bench on May 12, 2011, that Argenziano's intervention was granted, Micah objected. His memorandum in support of that objection asserted that Rule 60(b) was somehow used in setting aside the Decree. R. 430 - 438. There Micah states:

8. The parties then in July 2008, realizing that Petitioner [Micah] was likely not the minor child's father, stipulated to set aside the Decree of Divorce. On July 1, 2008, the Court set aside the Decree of Divorce based upon the Court having adequate grounds to do so pursuant to Rule 60 b) [*sic*] of the Utah Rules of Civil Procedure and the Utah Uniform Parentage Act. . .

R. 431a.<sup>7</sup> Micah had also earlier argued that the Trial Court "[had] jurisdiction to set aside the divorce under both the Utah Parentage Act and Rule 60(b) of the Utah Rules of Civil Procedure . . ." R. 373.

The problem with that claim twofold. First, it did not happen. Nobody moved to set aside the Adjudication under Rule 60(b) and no Rule 60(b) motion appears in the record. R.1 - 622; *see* Utah R. Civ. P. 7(b)(1) ("motion shall be in

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<sup>7</sup>The Record on Appeal did not initially number this page, which is located between R. 431 and R. 432.

writing and state succinctly and with particularity the relief sought and the grounds for the relief sought”).

Second, the Trial Court had lost jurisdiction to entertain a 60(b) motion a full year and half before the Rellers surreptitiously filed their stipulation to set aside the Decree in July 2008. That is because the only plausible bases for a 60(b) motion were that Karine had perpetrated a fraud, that there was newly discovered evidence, or that there was a mistake as to paternity. However, motions based on all those reasons must be made “within 3 months after the judgment . . . was entered or taken.” Utah R. Civ. P. 60(b). That deadline was December 13, 2006, a full year and a half before July 2008. Once that deadline passed, “the trial court lack[ed] jurisdiction to consider the merits of the motion [under Rule 60(b)].” *Richins v. Delbert Chipman & Sons Co.*, 817 P.2d 382, 387 (Utah App. 1991); *see Doe v. V.H.*, 894 P.2d 1285, 1289 (Utah Ct. App. 1995) (trial court erred in considering merits of untimely 60(b) motion).

Nor did the discovery rule extend the time enough. That doctrine can extend the time so it starts to run when the party learns of or should have learned of the facts giving rise to the claim. *Jensen v. Young*, 2010 UT 67, ¶17, 245 P.3d 731. Karine Reller of course always knew about those facts. But Micah Reller was on notice of those facts by October 27, 2007 - three days (for mail service)



after Karine filed her Petition to Modify, which stated that Argenziano was the Child's father. R. 140. Even applying the discovery rule, the time for filing a 60(b) motion expired on January 27, 2008, five months earlier. The Trial Court simply did not have jurisdiction to set aside the Decree or its Adjudication.

*Richins v. Delbert Chipman & Sons Co.*, 817 P.2d 382, 387 (Utah App. 1991).

#### **IV. Public Policy And The UPA Properly Restrict Challenges to Existing Parentage Adjudications.**

Micah Reller may not be the Child's biological father. Nonetheless, he was and is, her adjudicated father as a matter of law. This comports with public policy, which, even predating the common law, has always favored legitimacy, discouraged "illegitimatizing" children later, and has always limited the extent to which parties may challenge the parentage of children born into a marriage. "At least as far back as the ancient Roman law, the rule has been quite general that a child born to a married woman is presumed to be the offspring of her husband and legitimate." *Holder v. Holder*, 340 P.2d 761, 762, 9 Utah 2d 163, 164 (1959). This presumption of legitimacy is so strong that to rebut it requires proof to the contrary beyond a reasonable doubt. *Lopes v. Lopes*, 518 P.2d 687, 688 (Utah 1974). Indeed, under "Lord Mansfield's Rule" "spouses themselves may not give

testimony which would tend to illegitimatize the child.” *Lopes*, 518 P.2d at 689;<sup>8</sup> *see Pearson v. Pearson*, 2008 UT 24, ¶19, 182 P.3d 353 (once a marital father assumes parental responsibilities and establishes a father-child relationship, any challenge to his presumption of paternity is deemed disruptive and unnecessary).

These policies, although somewhat updated for the times and technology, are embodied in the UPA, which has been adopted in Utah and other states and implements similar sound policy considerations. For example, the UPA appears to disallow genetic testing after a married man has been adjudicated as the father of a child of the marriage. It provides that “[i]f the [paternity] issue is raised *prior* to the adjudication, genetic testing *may* be ordered by the tribunal in accordance with Section 78B-15-608.” Utah Code Ann. §78B-15-607(1)(a) (2011) (emphases added). While use of the word “may” is generally discretionary, use of the predicate “if” implies that once an adjudication is made, genetic testing may not be ordered. Indeed, where parentage has been adjudicated, there is no presumption to rebut. *Id.* §607(4) (2011). At that stage, genetic testing becomes legally irrelevant because the very purpose of testing is to rebut the presumption of paternity that

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<sup>8</sup>In *Lopes*, the court noted Lord Mansfield said “it is a rule founded in decency, morality, and policy that they [husband and wife] should not be permitted to say after marriage that the offspring is spurious; or especially the mother, who is the offending party.” 518 P.2d 687 (1974) citing *Goodright v. Moss*, 2 Cowp. 591, 98 Eng. Reprint 1257 (1777).

attaches to the married father. *Id.* §607(3) (2011).

Furthermore, under the version of the Uniform Parentage Act adopted in most states, the presumption that the husband is the father of a child born into a marriage can become almost written in concrete after a finite time - just two years:

Section 607. Limitation: Child Having Presumed Father.

(a) Except as otherwise provided in subsection (b), a proceeding brought by a presumed father, the mother, or another individual to adjudicate the parentage of a child having a presumed father *must be commenced not later than two years after the birth of the child.*

(b) A proceeding seeking to disprove the father-child relationship between a child and the child's presumed father may be maintained at any time if the court determines that: (1) the presumed father and mother of the child neither cohabited nor engaged in sexual intercourse with each other during the probable time of conception; and (2) the presumed father never openly treated the child as his own.

Uniform Parentage Act §607 (2000) (emphasis added)..

In Utah, the presumed married father is given until a divorce is filed to challenge paternity. Utah Code Ann. §78B-15-607(1) (2011). That could be a very long time, but it is no less concrete once adjudicated. Once a divorce action commences, the UPA restricts the timing and methods available to challenge paternity. After the divorce enters and an adjudication is made, review becomes even more limited. Redress can only come through appeal, motion for a new trial under Utah R. Civ. P. 59, or motion for relief under Utah R. Civ. P. 60(b). Utah

Code Ann. §78B-15-623(6) (2011); *see* argument *supra*.

This structure is designed to maintain the legitimacy of children and the stability of the parent-child relationship – all for the benefit of the child. Were divorced parties able to set aside adjudications of parentage at any time through the simple expedient of agreeing to set aside the decree of divorce, the result would be court-sanctioned illegitimatization of children. This would be contrary to the intent of Utah Legislature, the intent of the committee drafting the uniform law, as well as the UPA's common law roots.

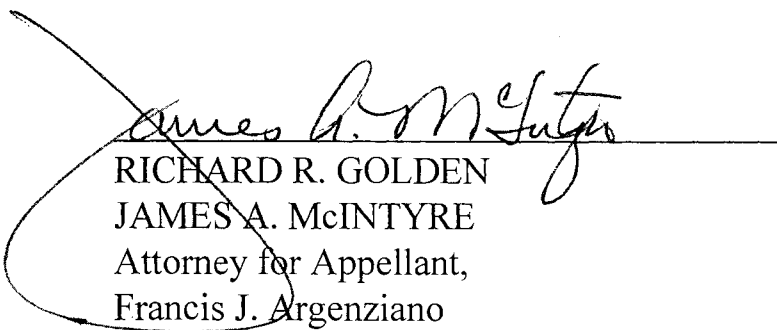
### CONCLUSION

The provision in the April 12, 2011 “Stipulated Order Resolving All Outstanding Issues in the Parties Divorce,” which adjudicated “there are no minor children born between the parties . . .” should be reversed and the matter remanded to the district court to enter an order that Micah Reller is confirmed as the Child's adjudicated father. The Rellers' Divorce Decree, which was final on September 16, 2006, had already adjudicated Micah Reller as the Child's father. After it entered, both Rellers were estopped by statute from even “raising the issue.” And Karine, who knew of the problem, was specifically estopped from any challenges. Even if that Adjudication was subject to further modification, there were no substantial and material changes in circumstances and it was simply *res judicata*.

Moreover, Utah's divorce statutes did not provide the Trial Court with continuing jurisdiction to modify that Adjudication. While the UPA did provide limited jurisdiction to entertain challenges to the Adjudication under Rule 59 or 60(b), the Rellers did not actually pursue any of those avenues. And even if they had, no action was taken until well after the Trial Court lost any jurisdiction it might have had.

DATED this 15<sup>th</sup> day of September, 2011.

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CERTIFICATE OF HAND-DELIVERY

I hereby certify that on the 2<sup>nd</sup> day of September, 2011, I hand-delivered a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF** to the following:

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A handwritten signature in cursive script, reading "Molly McIntyre", is written over a horizontal line.

## **Addendum A**

Limitation -- Child having presumed father

(1) Paternity of a child conceived or born during a marriage with a presumed father as described in Subsection 78B-15-204(1)(a), (b), or (c), may be raised by the presumed father or the mother at any time prior to filing an action for divorce or in the pleadings at the time of the divorce of the parents.

(a) If the issue is raised prior to the adjudication, genetic testing may be ordered by the tribunal in accordance with Section 78B-15-608. Failure of the mother of the child to appear for testing may result in an order allowing a motherless calculation of paternity. Failure of the mother to make the child available may not result in a determination that the presumed father is not the father, but shall allow for appropriate proceedings to compel the cooperation of the mother. If the question of paternity has been raised in the pleadings in a divorce and the tribunal addresses the issue and enters an order, the parties are estopped from raising the issue again, and the order of the tribunal may not be challenged on the basis of material mistake of fact.

(b) If the presumed father seeks to rebut the presumption of paternity, then denial of a motion seeking an order for genetic testing or a decision to disregard



genetic test results shall be based on a preponderance of the evidence.

(c) If the mother seeks to rebut the presumption of paternity, the mother has the burden to show by a preponderance of the evidence that it would be in the best interests of the child to disestablish the parent-child relationship.

(2) For the presumption outside of marriage described in Subsection 78B-15-204(1)(d), the presumption may be rebutted at any time if the tribunal determines that the presumed father and the mother of the child neither cohabited nor engaged in sexual intercourse with each other during the probable time of conception.

(3) The presumption may be rebutted by:

(a) genetic test results that exclude the presumed father;

(b) genetic test results that rebuttably identify another man as the father in accordance with Section 78B-15-505;

(c) evidence that the presumed father and the mother of the child neither cohabited nor engaged in sexual intercourse with each other during the probable time of conception; or

(d) an adjudication under this part.

(4) There is no presumption to rebut if the presumed father was properly served and there has been a final adjudication of the issue.

Utah Code Ann. § 78B-15-623 (2011)

### Binding effect of determination of parentage

(1) Except as otherwise provided in Subsection (2), a determination of parentage is binding on:

(a) all signatories to a declaration or denial of paternity as provided in Part 3, Voluntary Declaration of Paternity; and

(b) all parties to an adjudication by a tribunal acting under circumstances that satisfy the jurisdictional requirements of Section 78B-14-201.

(2) A child is not bound by a determination of parentage under this chapter unless:

(a) the determination was based on an unrescinded declaration of paternity and the declaration is consistent with the results of genetic testing;

(b) the adjudication of parentage was based on a finding consistent with the results of genetic testing and the consistency is declared in the determination or is otherwise shown; or

(c) the child was a party or was represented in the proceeding determining parentage by a guardian ad litem.

(3) In a proceeding to dissolve a marriage, the tribunal is considered to have made an adjudication of the parentage of a child if the question of paternity is raised and the tribunal adjudicates according to Part 6, Adjudication of Parentage, and the final order:

(a) expressly identifies a child as a "child of the marriage," "issue of the marriage," or similar words indicating that the husband is the father of the child; or

(b) provides for support of the child by the husband unless paternity is specifically disclaimed in the order.

(4) The tribunal is not considered to have made an adjudication of the parentage of a child if the child was born at the time of entry of the order and other children are named as children of the marriage, but that child is specifically not named.

(5) Once the paternity of a child has been adjudicated, an individual who was not a party to the paternity proceeding may not challenge the paternity, unless:

(a) the party seeking to challenge can demonstrate a fraud upon the tribunal;

(b) the challenger can demonstrate by clear and convincing evidence that

the challenger did not know about the adjudicatory proceeding or did not have a reasonable opportunity to know of the proceeding; and

(c) there would be harm to the child to leave the order in place.

(6) A party to an adjudication of paternity may challenge the adjudication only under law of this state relating to appeal, vacation of judgments, or other judicial review.

#### URCP Rule 60(b)

Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.

-- On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could

not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.