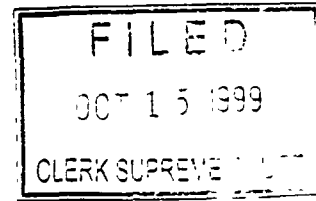


IN THE COURT OF APPEALS OF IOWA

No. 1999-225 (9-449) / 98-2175

Filed October 15, 1999



IN THE INTEREST OF B.M.,
Minor Child,

I.S. and A.S., Great-Grandparents,
Appellants.

Appeal from the Iowa District Court for Tama County, Michael J. Newmeister,
District Associate Judge.

Great-grandparents appeal the denial of the State's petition to terminate the parental rights of their granddaughter to her son. They contend the court erred in failing to find compelling circumstances to terminate the parental rights.

AFFIRMED.

David E. Mullin of Mullin & Lavery, P.C., Cedar Rapids, for appellants.

Nancy L. Burk, Toledo, for appellee-mother.

Mark Lindholm, Marshalltown, guardian ad litem for minor child.

Heard by Sackett, C.J., and Huitink and Mahan, JJ.

SACKETT, C.J.

Appellants, Agnes and Isaac, the great-grandparents and current custodians of Bradley, born in 1991, appeal from a juvenile court ruling denying the state's petition to terminate the parental rights of Bradley's mother, LaDonna, a member of the Sac and Fox Tribes of Oklahoma. Appellants contend the evidence introduced in the juvenile court supports termination. We affirm.

Our review of an action arising from a child in need of assistance proceedings is de novo. Iowa R.App.P. 4. We give weight to the fact findings of the juvenile court, especially when considering the credibility of the witnesses, but we are not bound by these findings. Iowa R.App.P.14(f)(7).

This is the second appeal this court has entertained concerning the parental rights of Bradley. In the first *In Re B.M.*, 532 N.W.2d 504 (Iowa App. 1995) we refused to terminate LaDonna's parental rights saying:

[T]he unique circumstances of this case lead us to conclude all of the objectives of the ICWA [Indian Child Welfare Act] can be accomplished without terminating LaDonna's parental rights.

Testimony revealed that under the extended kinship system of the Sac and Fox Tribe leaving a child in the care of extended family is common. Bradley's family is an example of this practice ***

It is not in Bradley's best interests to be returned to LaDonna's custody at this time *or in the near future*. However there are no compelling circumstances which lead us to conclude it is in Bradley's best interests to terminate LaDonna's parental rights. At the present time Agnes and Isaac are the proper custodians for Bradley, and he sees them as his parents. However, they are both close to seventy years of age, and it is questionable

whether they will be able to parent Bradley until he reaches the age of majority.

A long-term permanency order placing Bradley in the custody of his great-grandparents is the more appropriate option in this case. We are bound to protect and promote “the stability and security of [both] Indian tribes and families” whenever possible. A permanency order guarantees Bradley will be raised in the culture of the Sac and Fox Tribe of Iowa, yet preserves his ties to LaDonna and the Sac and Fox Tribe of Oklahoma. *B.M.*, 532 N.W.2d at 507. (Emphasis supplied.)

The Indian Child Welfare Act is applicable to this appeal. The Act, which came in 1978, as a result of Congress recognizing an alarmingly high percentage of Indian families being broken up by removal of their children who are then placed in non-Indian foster and adoptive homes and institutions, determined it be the policy of the Nations to establish minimum federal standards for removal of Indian children from their families. See 25 U.S.C.A. Section 1901, 1902 (West 1999). The Act specifies a number of requirements that need to be complied with before removing Indian children from their Indian family and/or terminating parental rights. See 25 U.S.C.A. Section 1911, 1912, 1913 (1999). The Iowa statutory and case law are modified in a termination proceeding governed by the provisions of the Act. See *In re J.W.* 498 N.W.2d 417, 419 (Iowa App. 1993), *In re R.L.F.*, 437 N.W.2d 599, 601 (Iowa App. 1989). The provisions of Indian Child Welfare Act are to be strictly construed and applied. *In re J.W.*, 498 N.W.2d 417, 421 (Iowa App. 1993). The dual objectives of the Act are: (1) to protect the best interests of Indian children and (2) to

promote the stability and security of Indian tribes and families. *See In Interest of B.M.*, 532 N.W.2d 504 (Iowa App. 1995).

Appellants contend the court should have terminated parental rights because these were compelling circumstances supporting termination. Appellants advance that LaDonna has been absent from Bradley's life for four additional years, they are four years older and LaDonna has not tackled her substance abuse problems.

In addressing termination in the first case this court specifically found LaDonna failed to comply with the case permanency plan, continued to deny she had a substance abuse problem, and had, for all practical purposes, abandoned Bradley.

At the time of the second termination hearing LaDonna was serving a prison sentence following her conviction on assault charges. She continued to have problems with substance abuse and for all practical purposes had abandoned Bradley.

LaDonna contends the matters now raised in the second termination hearing were decided in the first and res judicata applies. She also contends that to modify the termination order requires a showing of a substantial change of circumstances and this has not been done. LaDonna agrees that Isaac and Agnes have four generations represented in their family structure. She admits she continues to struggle with substance abuse and this problem contributed to her criminal conviction. She points out the state has offered her no services since 1995.

In general, the doctrine of issue preclusion prevents parties to a prior action in which judgment has been entered from relitigating in a subsequent action issues raised

and resolved in the previous action. *Hunter v. City of Des Moines*, 300 N.W.2d 121, 123 (Iowa 1981). When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in subsequent actions between the parties, whether on the same or a different claim. *Id.*

Four prerequisites are required before the doctrine of issue preclusion can properly be applied in any given case: (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination of the issue in the prior action must have been necessary and essential to the resulting judgment. *See Bascom v. Jos. Schlitz Brewing Co.*, 395 N.W.2d 879, 881-82 (Iowa 1986); *Kraft v. El View Constr., Inc.*, 394 N.W.2d 365, 367-68 (Iowa 1986); *Israel v. Farmers Mutual Ins. Assn.*, 339 N.W.2d 143, 146; and *Hunter*, 300 N.W.2d at 123.

Claim preclusion under the doctrine of res judicata is based on the principle that a party may not split or try his claim piecemeal; but must put in issue and try his entire claim or put forth his entire defense in the case on trial. *B & B Asphalt Co. v. T.S. McShane Co.*, 242 N.W.2d 279, 286 (Iowa 1976). An adjudication in a former suit between the same parties on the same claim is final as to all matters which could have been presented to the court for determination. *Id.* A party must litigate all matters growing out of his claim at one time and not in separate actions. *Id.*

Iowa courts apply an evidentiary test to determine whether a claim preclusion applies to a “second” claim:

A second claim is likely to be considered the same as a first claim, and therefore precluded, “if the acts complained of, and the recovery demanded, are the same, or when the same evidence will support both actions.”

Huffey v. Lea, 491 N.W.2d 518, 521 (Iowa 1992) (quoting *Leuchtenmacher v. Farm Bureau Mut. Ins. Co.*, 460 N.W.2d 858, 860 (Iowa 1990)) (Emphasis added).

Other jurisdictions have addressed claim preclusion and issue preclusion in a termination-of-parental-rights setting.

In *In re Juvenile Appeal*, 460 A.2d 1277 (Conn. 1983), the Connecticut Supreme Court faced a situation in which the first termination was dismissed on an ancillary issue of waiver. The court held evidence relating to events prior to the first hearing were admissible in the second action because the issues were not decided on their merits in the first action. *Id.* at 1280. The court discussed successive termination actions and preclusion at some length, determining:

The doctrines of preclusion, however, should be flexible and must give way when their mechanical application would frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal controversies.

Id. at 1282. The court also noted the effect time has in changing circumstances in child-in-need-of-assistance cases:

Because the issue of whether termination of parental rights is appropriate must be decided upon the basis of conditions as they appear at the time of trial, the

doctrines of res judicata and collateral estoppel ordinarily afford very little protection to a parent who has once successfully resisted an attempt to terminate his rights to a child.

Id.

In *Scott v. Prince Georges County Dept. of Social Servs.*, 545 A.2d 81 (Md. 1987), the Court of Special Appeals faced a claim the trial court improperly considered evidence introduced in a previous termination proceeding when deciding a later termination proceeding. The court held the “clear and convincing” standard provided a sufficient guarantee of due process. *Id.* at 88. The trial court considered both old and new evidence in the latter proceeding, stating:

We hold that the trial court was not prevented by the doctrine of res judicata from using this evidence to meet the constitutionally required clear and convincing level of proof. We do not hold today that res judicata could never apply to successive termination actions, but rather that here the new evidence showed changed circumstances which justified a changed result.

Id. at 87.

The court went on to say:

Additionally, res judicata extends “only to the facts and conditions as they existed at the time of the first judgment and does not bar the fresh litigation of an issue which is appropriately subject to periodic redetermination, as subsequent facts and changed conditions may alter the status of the thing being evaluated.” Child welfare seems to be a particularly appealing subject for periodic redetermination because children can be quickly and irretrievably scarred by negative circumstances.

Id. at 90 (citations omitted).

The Maryland court also examined cases from other jurisdictions which held, “Res judicata poses no barrier to a second action to terminate parental rights, and does not limit the evidence which can be considered at the second action.” *Id.* at 91. Following the rationales used by courts from other jurisdictions, the Maryland court said:

If the State had brought the second petition to terminate appellant’s rights and had alleged nothing new, there is no doubt that it would be barred by res judicata. But there were new facts and circumstances introduced at the second action which could not have been introduced at the first. Although the court did not terminate appellant’s parental rights in the first action, her children remained in the custody of the State and she was ordered to work with the Department toward reunification. ... The Department filed the second petition when it became clear that appellant’s continued refusal to work toward reunification had resulted in stagnation, with no likelihood of remedy. Regardless of any difficulties appellant may have had with the Department, the record shows that she made no effort to cooperate with them and thus retain her parental rights. All of the foregoing amounted to substantial new reasons for termination. The new facts created a qualitatively different situation: the second cause of action was not identical, and therefore not barred by res judicata. Because the new facts had to be put into context, the trial court was correct in admitting evidence of events prior to the first action at the second proceeding.

Id. at 92.

In *Slatton v. Brazoria County Protective Servs. Unit*, 804 S.W.2d 550 (Tex. App. 1991), the Texas Court of Appeals addressed parents’ claims all evidence of matters before a first trial seeking termination of their parental rights was barred by

res judicata in a second trial for termination of these rights, and there was insufficient evidence to sustain the termination of the second trial. The Texas court said, “The scope of res judicata is not limited to the matters actually litigated, but also includes causes of action or defenses arising from the same subject matter that might have been litigated in the first suit.” *Id.* at 553. The Court held, “The prior denial of termination was not a complete bar to the subsequent action, but it was a bar to the admission of the Slattons’ conduct which occurred prior to that order being used against them.” *Id.* The court then affirmed the trial court finding there was sufficient evidence of a clear and convincing nature to support the jury’s findings providing the basis for terminating the parental rights of the parents. *Id.*

What we gain from these cases is that states have generally held where a termination of parental rights is sought based on the same evidence but on different grounds used in a prior fully-litigated action, then the action is barred by res judicata. However, a petition that alleges new grounds and is supported by evidence of activities that occurred after the first hearing is not barred by res judicata.

LaDonna’s behavior following the first termination is substantially more of the same. We need not decide, however, whether we should apply res judicata because appellants have failed to prove the necessary elements to modify the permanency order.

The permanency order is a dispositional order. The modification of a dispositional order is provided for in Iowa Code section 232.103 (1995). A party

seeking a modification of a prior dispositional order must show the circumstances have so materially and substantially changed that a modification is in the best interest of the child. *In re D.S.*, 563 N.W.2d 12, 14 (Iowa App. 1997). *See also, In the Interest of C.D.*, 509 N.W.2d 509, 511 (Iowa App. 1993).

The circumstances that existed at the time of the first termination hearing are substantially the same circumstances that existed at the time of the second hearing. LaDonna suffers from substance abuse and is not able to care for Bradley child and is totally uninvolved in his life. In *B.M.*, 532 N.W.2d at 507, we recognized Bradley should not then or in the near future be returned to his mother's care.

There is nothing to suggest that LaDonna presents a danger to Bradley or that she has in any way interfered with Agnes' and Isaac's custodial responsibilities. Bradley is not experiencing problems in his placement.

The focal point is the best interests of Bradley. *In re C.D.*, 509 N.W.2d 509 (Iowa App. 1993). *See also In Re C.G.*, 444 N.W.2d 518, 520 (Iowa App. 1989). His interests are well served in the current arrangement.

The focus of the permanency order was to provide for the placement with the grandparents. LaDanna was not offered additional services. The changes appellant contend support termination were well within the contemplation of the court when the permanency order was issued. We affirm the juvenile court disposition.

AFFIRMED.