IN THE COURT OF APPEALS OF IOWA

No. 1999-416 (9-669) / 99-332
Filed December 27, 1999

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Upon the Petition of
LARRY DERONDE,
Petitioner-Appellant,

And Concerning
LU ANNE ABBOTT,
Respondent-Appellee.

Appeal from the Iowa District Court for Mills County, Keith Burgett, Judge.

DeRonde appeals from the order to strike petition to establish custody and visitation and related matters. **REVERSED.**

Kolleen K. Samek, Des Moines, for appellant.

Matthew G. Woods of Peters Law Firm, Glenwood, for appellee.

Heard by Streit, P.J., Vaitheswaran, J., and Hayden, S.J.*

***Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).**

STREIT, P.J.

Placing the cart before the horse ensures you will get nowhere fast. Such was the case of Larry DeRonde when he improvidently filed a petition to modify custody rather than an original petition to establish custody. When he attempted to rectify his mistake by instituting the appropriate action, the district court, relying on issue preclusion, precluded him from arguing the best interests of his son. Finding the issues involved in a petition for modification dissimilar to those involved in an original petition for custody, we reverse the trial court's order to strike.

I. Background Facts & Proceedings.

In December of 1994 unmarried Lu Anne Abbott gave birth to her son, Christopher. Approximately eight months later, the state filed a petition to establish paternity of Christopher. The court entered an order establishing Larry DeRonde as Christopher's father and ordered child support. During the pendency of the state-instituted paternity action, DeRonde filed his own petition to establish paternity, custody, and visitation. DeRonde did not pursue this action, and the court dismissed it involuntarily two years later under Iowa Rule of Civil Procedure 215.1. The court never addressed DeRonde's visitation rights or his custodial rights upon determination of his paternity.

In April of 1997 a juvenile court found Christopher to be a child in need of assistance (CINA) and temporarily placed him in DeRonde's care subject to supervision by the department of human services (DHS). During the pendency of the

CINA action, DeRonde filed a petition to modify custody and support. He requested the court modify the previous custody arrangement by granting him primary physical care and custody of Christopher. The court, however, stayed determination of the petition for modification until termination of the CINA action. In November of 1997 the juvenile court returned Christopher to Abbott's custody and dismissed the juvenile action. Abbott then filed a motion to adjudicate law points asserting DeRonde was barred from introducing any evidence in support of his petition for modification that predated the termination of the CINA proceeding. The court precluded DeRonde from arguing Christopher's best interests finding the juvenile court had made such a determination when it returned the child to Abbott's care. The court ordered DeRonde must demonstrate a substantial change in circumstances since the termination of the CINA proceeding. DeRonde took no further action on his modification petition and dismissed it in September of 1998.

DeRonde then filed an original petition to establish custody and visitation, seeking primary physical care and joint legal custody because no prior order had definitively addressed his custodial concerns. In response, Abbott filed a motion to either dismiss or strike his original petition, claiming DeRonde's petition for custody was an attempt to circumvent the district court's adjudication of law points in his earlier petition to modify. Abbott argued DeRonde was prohibited from relitigating the best interests of Christopher and DeRonde should refile his petition as a modification action. Relying on the doctrine of issue preclusion, the court ordered

DeRonde amend his petition as one for modification and that he must rely on events postdating the termination of the CINA proceedings in showing a substantial change in circumstances.

DeRonde appealed the court's order contending the court erred in relying on the doctrine of issue preclusion as the issues in his original petition were not identical to those issues addressed in his petition to modify. The court's order only addressed Abbott's motion to strike. It was not a final judgment. DeRonde, without seeking application for interlocutory appeal under Iowa Rule of Appellate Procedure 2(a), immediately appealed.

II. Jurisdiction.

The right to appeal is only available from a final order, and we normally lack jurisdiction to hear appeals from interlocutory orders "unless permission to appeal is granted." *Rowen v. Lemars Mut. Ins. Co.*, 357 N.W.2d 579, 581 (Iowa 1984). Under Iowa Rule of Appellate Procedure 1(d), however, an appeal improperly regarded as arising from a final judgment may be construed as an application for interlocutory appeal. We may grant an application for interlocutory appeal if: (1) the ruling involves substantial rights, (2) the ruling will materially affect the final decision, and (3) determination of the issue will better serve the interests of justice. Iowa R. App. P. 2(a); *see Banco Mortgage Co. v. Steil*, 351 N.W.2d 784, 787 (Iowa 1984) (ruling the test for granting jurisdiction to an improvident interlocutory appeal was the same as a proper application for interlocutory appeal under Iowa Rule of Appellate

Procedure 2(a) Although the applicable legal standards of rule 1(d) and rule 2(a) mimic one another in form, the stringency of their application are strides apart as granting jurisdiction to an improvident interlocutory appeal is approached with reluctancy and should only be permitted in the most necessary of circumstances. *See In re Marriage of Denly*, 590 N.W.2d 48, 52 (Iowa 1999) (citing *In re W.D. III*, 562 N.W.2d 183, 186 (Iowa 1997)); *see also In re Marriage of Graziano*, 573 N.W.2d 598, 600 (Iowa 1998) ("We . . . cannot and do not grant permission under rule 1(d) merely because child placement is implicated.").

We reluctantly find it appropriate to grant DeRonde's appeal jurisdiction as it meets even the most stringent application of rule 2(a). The trial court in granting Abbott's motion to strike ruled:

> [T]his court has no discretion but to grant [Abbott's] Order to Strike Petition as it relates to [DeRonde's] assertion that he is able to litigate the best interests of the child as an original custody action. Rather, [DeRonde] will clearly only be allowed to relitigate custody in as far as he relies on events postdating November 25, 1997, [the date of the CINA termination], and that the action must be in the form of a Petition for Modification, rather than an original Petition to Establish Custody.

The court's ruling substantially affected DeRonde's rights. The ruling not only prevented the mere mention of the child's best interests—the very essence of an original petition for custody—but also changed the very nature of the action by demanding the cause of action be amended to a petition to modify. The legal standard applicable to an original petition for custody is a pure best-interests-of-the-child analysis. *See* Iowa Code § 598.41(1)(a) (1999). Conversely, the appropriate legal

standard for a petition to modify custody is a substantial change in circumstances. *Moore v. Kriegel*, 551 N.W.2d 887, 888 (Iowa App. 1996). Under a petition to modify, "[t]he parent seeking custody must . . . show not just an equal parenting ability, but a superior claim." *In re Marriage of Gonzales*, 373 N.W.2d 152, 154 (Iowa App. 1985); *see Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa App. 1996) (ruling previous custody arrangements should be disturbed only for the most cogent reasons). DeRonde brought an action seeking custody. The trial court ordered him to posture his case as a modification action. The district court's morphing of the cause of action forced DeRonde to adhere to a more strict legal standard. This forced adherence substantially effected his rights. Similarly, the application of a new legal standard to DeRonde's petition will materially affect the final decision as he will not be permitted to litigate the child's best interests but will be forced to show a substantial change in circumstances from a particular point in time. Finally, the determination of the issue at this juncture serves the interests of justice. Remanding the case for dismissal and then reappealing the issue would not only further elongate this already lengthy series of events but would also be a waste of judicial resources. Therefore, despite the improvident nature of this appeal, we grant jurisdiction.

III. Standard of Review.

We review a district court's ruling on a motion to strike for correction of errors at law. *See* Iowa R. App. P. 4; *cf. Ritz v. Wapello County Bd. of Supervisors*, 595

N.W.2d 786, 789 (Iowa 1999) (ruling correction of errors at law the appropriate standard of review for motions to dismiss).

IV. The Merits.

The district court, relying on the doctrine of issue preclusion, ruled DeRonde could not argue granting him primary physical care was in his son's best interests because the court's previous adjudication of law points regarding his earlier petition to modify resolved the issue. DeRonde appeals the court's application of issue preclusion claiming the issues involved in a petition to modify are not identical to the issues presented in an original petition to establish custody.

The doctrine of issue preclusion prevents a party from attempting "to relitigate an issue which has been raised and decided in a prior action." *Treimer v. Lett*, 587 N.W.2d 622, 625 (Iowa App. 1998) (citations omitted).

> The four elements of issue preclusion are: (1) the issue must be identical in the two actions; (2) the issue must be raised and litigated in the prior action; (3) the issue must be material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must be necessary and essential to the judgment.

Matsui v. King, 547 N.W.2d 228, 231 (Iowa App. 1996) (citing *Ackley State Bank v. Haupt*, 451 N.W.2d 495, 496 (Iowa 1990)).

Because the issues in a petition to modify are not identical to those in an original petition for custody, we need only address the first element. The first element of issue preclusion requires the issue decided in the prior case be precisely the same issue presented in the pending action. *State v. Sunclades*, 305 N.W.2d 491, 495 (Iowa

1981). As previously discussed, the appropriate legal standards for a petition to modify and an original petition for custody differ. One demands a substantial change in circumstances, whereas the other employs a pure best-interests-of-the-child analysis. The issues cannot be construed as being identical when the laws governing the actions differ. Furthermore, there was nothing for DeRonde's earlier petition to modify. There was no underlying order establishing a custodial arrangement. Absent such an underlying order, a petition to modify is an anomaly. Therefore, the appropriate vehicle for DeRonde to litigate his custodial interest was through an original petition to establish custody. It was error to apply the doctrine of issue preclusion. DeRonde's original petition for custody is the appropriate procedural tool to litigate his custodial interests.

REVERSED.