IN THE COURT OF APPEALS OF IOWA

No. 8-387 / 97-1603

FILED
NOV 30 1998
CLERK SUPREME COURT

IN THE INTEREST OF A.C., A.C., and D.C., Jr., Children.

B.C., Mother,

Appellant.

Appeal from the Iowa District Court for Buchanan County, Alan D. Allbee, and Stephen C. Clarke, Associate Juvenile Judges.

A mother appeals from the termination of her parental rights. **AFFIRMED IN PART; REVERSED IN PART AND REMANDED.**

Larry F. Woods, Oelwein, for appellant.

Thomas J. Miller, Attorney General, Charles K. Phillips, Assistant Attorney General, and Andrea Dryer, Assistant County Attorney, for appellee State.

Gary McClintock, Independence, for minor children.

Considered by Sackett, C.J., and Huitink and Vogel, JJ.

000065

SACKETT, C.J.

Bessie, the mother of Amanda, born in 1984; Amber, born in 1987; Amy, born in 1989; and Dennis, born in 1991, appeals a juvenile court order terminating her parental rights. She contends (1) res judicata precluded the juvenile court from terminating because there was an earlier finding the State failed to prove grounds for termination; (2) her constitutional rights were violated; and (3) she has become a better parent and is able to care for the children. We reverse the termination and remand to the juvenile court for further orders consistent with this opinion.

The State originally sought to terminate Bessie's parental rights under Iowa Code section 232.116(1)(d)[1] (1996). No other grounds were pled. The juvenile court

---

[1] Iowa Code section 232.116(1)(d) provides:

> 1. Except as provided in subsection 3, the court may order the termination of both the parental rights with respect to a child and the relationship between the parent and the child on any of the following grounds:
>
> . . . .
>
> d. The court finds that all of the following have occurred:
>
> (1) The child has been adjudicated a child in need of assistance pursuant to section 232.96.
>
> (2) The child has been removed from the physical custody of the child's parents for a period of at least six consecutive months.
>
> (3) There is clear and convincing evidence that the parents have not maintained significant and meaningful contact with the child during the previous six consecutive months and have made no reasonable efforts to resume care of the child despite being given the opportunity to do so. For the purposes of this subparagraph, "significant and meaningful contact" includes but is not limited to the affirmative assumption by the parents of the duties encompassed by the role of being a parent. This affirmative duty, in addition to financial obligations, requires continued interest in the child, a genuine effort to complete the responsibilities prescribed in the case permanency plan, a genuine effort to maintain communication with the child, and requires that the parents establish and maintain a place of importance in the child's life.

Iowa Code § 232.116(1)(d).

found (1) the State had failed to prove the necessary elements to terminate parental rights, specifically finding there was not clear and convincing evidence Bessie had not maintained significant and meaningful contact with the children; (2) grounds for termination under section 232.116(1)(e) were proven, but not pled; and (3) termination under a ground not pled violates due process. The juvenile court ordered the State to file under at least sections 232.116(1)(e) & (h).

The juvenile court made the following specific findings:

> That the children's mother has had frequent visits with [the] children over the past six months. A few visits were missed for lack of transportation, weather-related cause and on one occasion, the mother's illness. The visits have progressed from supervised, to monitored, to unsupervised. No significant protective concerns have been noted during visits over the past six months. The children's mother has been given sufficient training and has demonstrated satisfactory parenting skills. Unfortunately, the mental and emotional condition of the children's mother is such that she is barely able to manage her own affairs, let alone supervise active youngsters on a full-time basis. The issues of dependency and depression continue to be very present and prevent reunification of the children with their mother at this time. The court cannot conclude upon this record, however, that the children's mother has not maintained significant and meaningful contact with the children during the last six months. She has kept a job, continued to demonstrate her interest in and communication with her children by frequent visitation, has shown genuine effort, though unsuccessful, to complete at least a majority of her responsibilities set forth in the case plan, and has attempted to maintain a place of importance in the children's lives.
>
> That the children require permanency placement without any further delay. Without permanency, the children will continue to suffer from emotional harm from a sense of loss, separation and anxiety. The children's mother has been given more than adequate time to demonstrate her ability and willingness to meet the case plan requirements but has been unable to do so. No relative placements have been proposed. Termination for purposes of adoptive placement is most appropriate given the children's ages and ability to bond and attach. The children are adoptable and resources appear available.

The State amended its petition as directed and notified Bessie of the amendment. Bessie's parental rights were subsequently terminated following a 1997 hearing under the grounds alleged in the amended petition.

Bessie contends the issue of termination of her parental rights had been determined in the first order. She advances the State, having failed to prove the grounds originally pled, is barred by issue and claim preclusion from re-filing and obtaining termination under a different code section.

This is an issue of res judicata. In dealing with res judicata, there are two specific types, namely issue preclusion and claim preclusion. *See Israel v. Farmers Mut. Ins. Ass'n*, 339 N.W.2d 143, 146 (Iowa 1983).

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); *Krafi v. El View Constr., Inc.*, 394 N.W.2d 365, 367-68 (Iowa 1986); *Israel*, 339 N.W.2d at 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).

We find no guidance on this issue from prior reported cases of the Iowa courts. 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.

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. (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 in 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.

There may be cases where the State is precluded from succeeding in a second termination action based on the same evidence as the first, after the first action had been tried and dismissed. This case does not present such a set of circumstances. The juvenile court's ruling was not a final judgment. The court found insufficient proof to support the grounds pled, but rather than dismissing the case ordered the State to amend to conform to the proof offered. The petition was amended on notice to Bessie. Consequently, her constitutional rights to notice and due process were protected. *See In re D.E.D.*, 476 N.W.2d 737, 739-40 (Iowa App. 1991) (Oxberger, C.J., concurs; Habhab, J., concurs in part and dissents in part). We affirm the trial court on this issue.

Bessie next contends her constitutional rights were violated when (1) the juvenile judge interjected himself into the proceedings seeking further evidence on adoptability of the children, and (2) the juvenile court extensively examined Carol Digmann, a case worker with Lutheran Social Services.

We review de novo for errors at law. *See State v. Glanton*, 231 N.W.2d 31, 32-36 (Iowa 1975); *State v. Matlock*, 387 N.W.2d 781, 782-85 (Iowa App. 1986) (Schlegel, J., dissenting). Bessie does not claim bias or prejudice, nor can either be presumed. *See In re A.B.*, 445 N.W.2d 783, 783-84 (Iowa 1989). There was no error here.

Bessie's last contention is there is not clear and convincing evidence supporting the termination of her parental rights. The hearing was commenced on July 30, 1997. The children at that time had been living with Bessie for more than one month.

Bessie contends the evidence introduced at trial proves she was adequately caring for her children and there was not clear and convincing evidence they could not be returned to her care.

The juvenile court, in terminating, found:

> Throughout the last two years it has been acknowledged both in Court findings and in reports that [Bessie] loves her children. The children have a bond with their mother. The children wish to be reunited with their mother.
>
> Throughout the last two years, however, it has been [Bessie's] own choices and behaviors that have prevented reunification. Those behaviors are well-documented, both through reports and the Court's own findings.
>
> [Bessie] has been unable to maintain a suitable home environment on a consistent basis, notwithstanding the fact that the children are not with her on a full-time basis. Since January of 1997, she has been in a supervised living situation where she is graded weekly. Her compliance with the expectations of HACAP has been inconsistent at best. It is distressing to note that when her housing was inspected on the morning of July 30th, 1997, the first day of trial, she received the second highest negative score that she had received since living in the housing unit.
>
> [Bessie's] counselors would have the Court ignore [Bessie's] inability to maintain a consistently acceptable home environment in evaluating whether the children can be returned to her care. It is suggested that her love and affection for the children and her ability to get them to day care on a short-term basis is evidence enough that the children should be returned.
>
> . . . .
>
> The July extended visit that the children had with their mother is the most telling predictor of her future behavior. Not only was her housekeeping substandard . . . , her basic supervision of her children was wholly inadequate. It is disturbing that she viewed it as appropriate that it was the children's job to wake her up in the morning so that she could accompany them to the day care program where they lived the majority of the waking day. It is even more disturbing that [Bessie] testified that her six-year-old child may very well have not brushed his teeth for the entire three weeks that he was in her care, as he had reported to his foster mother subsequent to the visit. When examined on this point, [Bessie] testified that she had told him to brush

> his teeth. She admitted that she did not supervise him completing that task. She opined that the consequences for *his failure* would be cavities and other dental problems. Upon further examination, Bessie reluctantly agreed that it should have been her job to make sure that her child brushed his teeth. Fortunately for the child, he could return to his foster home where his dental hygiene could be restored and he would not have to face the cavity-filled fate of living in his mother's home.
>
> [Bessie's] lack of care extends not only to her children's short-term needs, but also to their long-term needs. She has been and continues to be on probation for criminal offenses. She acknowledges that she has made no attempt to make restitution as ordered by the Court, nor to complete community service hours. She was ordered to participate in community service two years ago. She has completed no community service, although she has clearly had the time and opportunity to do so if she had chosen. She appears to give no thought to the jailtime that she may serve as a result of her failure to complete the terms of her probation. More importantly, she fails to consider the impact on her children if her probation is revoked as a result of her failures.
>
> . . . .
>
> The Court concludes, therefore, that the only course left open is to free these children for adoption. While successful adoption is never guaranteed, the positive relationship which these children have for each other and their ability to relate to and bond with responsible adults and with their peers makes it more hopeful that the ultimate result will be favorable.

Evidence introduced included the testimony of Kathleen Brubaker, a social work case manager who worked out an extended visit for the children when school was out in 1997. Under her plan, the children went to Bessie's on June 11 and stayed until June 30. Brubaker visited for one hour on June 19 and found the home satisfactory, and no problems with the children were noted. Brubaker made an unannounced visit on June 30. A child care provider was with the children. Brubaker found the children "appeared clean, well-kept, calm, and comfortable."

There was a second three-week visit for the children with Bessie that started July 7 and ended just before the hearing commenced that resulted in the termination decision. Brubaker set up contacts for the family with three or four providers each week and there were no significant concerns. Brubaker, when asked about the visitations, testified:

> Q. Were you aware of anything that occurred during these visits, either in your role as a case coordinator or from your personal observations of the situation, that would cause you concern to the point that you do not believe the children can be returned home at this point, at least for a trial visit? A. During what I saw or am aware of during that time, no, there's nothing that would have been -- had the children never been removed from Bessie's home, there would have been nothing going on during those visits that would have been cause for removal.
>
> . . . .
>
> Q. After the children had returned to their foster home, had any reports come back from the foster home as to anything the children may have said or been upset about? A. The only thing, nothing certainly serious or significant. The comment was made from Dennis that it was very crowded in the trailer. There were a lot of people in that small space. You know, maybe comments about the chores that the kids did and the number of chores that they needed to do. Nothing of real significance or concern.
>
> Q. The chores that they had to do, they were not something that was beyond their years or capable of performing; is that right? A. I don't believe so, no.
>
> Q. This June 30th, this unannounced visit, you indicated they were -- seemed to be well-adjusted, happy, and conversing? A. Yes. They were very talkative about the things they had been doing with their mother, very animated about going to the circus that evening. They appeared cheerful. They were clean, properly dressed.
>
> . . . .
>
> Q. It's probably not a fair question to you, but with the services that are being provided, if they were pulled out or called off or discontinued, do you have any concerns about the children being able to be returned to Bessie's care? A. Yes, I would. I don't have a long history with Bessie, it's very brief, but from what I've read in the file and been aware of, I don't believe she could have the children home

now without services. Perhaps that's something that could happen in the future, but I don't believe it could happen now.

Q. And what concerns would you have right now? A. Again, this is coming from my understanding of the past. I understand there's some dependency issues with Bessie and her relationships with men, particularly [D.C.] who is, as I understand it, in prison right now.

Melinda O'Leary, a family therapist with Four Oaks, holding a bachelor's and master's degree in social work from the University of Iowa, testified she had seen Bessie in her home twenty-seven times in five months between February and the time of trial. She testified she had seen the children five or six times for approximately one hour and home visits were generally one hour. She testified, in part:

Q. . . . [D]id you formulate an opinion as to the parenting abilities of [Bessie] after having watched her and viewed her with her children. A. Yes.

Q. . . . [W]hat was that opinion? A. She was very comfortable with her children. Her children appeared to be very comfortable and loving with her, affectionate.

My experience with children coming from . . . troubled homes is that they generally put on quite a show for newcomers and these children didn't do that for me. They remained very natural and followed their mother's directives while I was in the home, respected my boundaries. . . . [T]hey weren't overly friendly when we met, nor were they remote.

I had the opportunity to watch Bessie ask them to do chores and see their follow-through. I think she had good above-average parenting skills.

. . . .

. . . I think the best thing that ever happened to Bessie, based on the history that I've read about her life . . . was when she lost everything she had and her children were taken away from her and her stipend that went along with being a welfare mother . . . .

Her parents have never been a support to her . . . .

. . . [N]early two years of being on her own for the first time in her life have been more valuable to her . . . than any counseling she's had and any therapy that she's received and maybe even more powerful than her medicines because she has learned to do on her own and that's a hard diagnosis to overcome and . . . it took a very drastic measure to

give her the opportunity to learn to behave differently in the world and . . . she's been a very independent functioning person the past, well, since February, since I've known her.

. . . .

Q. . . . [S]he became independent and is still able to function? A. She holds down a job. To my knowledge she doesn't have any special help financially. I think she might get a food box every now and then.

She walks to work. She walks home from work. She walks her children to their daycare.

She gets herself to . . . where her children are in foster care weekly, biweekly, . . . and this is done by a woman who has no driver's license and no car. I never hear her complain about it. I've offered to give her rides. I've even offered to make small loans and she refuses them.

The people that I've met, friends of Bessie's, primarily people that she works with, are people with whom she has a reciprocal relationship. They aren't people that sort of mutually take advantage of each other.

. . . .

Q. At this point is there still work to do on her dependency issue? A. Well, time will tell. . . . [S]he certainly has not found, in the two years that she's been on her own, people with whom she can get herself in trouble. . . . She doesn't show that pattern of continual crisis that we find with dependent personality disorder or with co-dependent personality disorder. So if her recent behavior is a predictor of her future behavior, I'd like to think that she'd do okay, but who knows.

Q. Are you currently providing any therapy to her with regard to this dependency issue? A. Yes.

Q. What type of therapy? A. Well, individual psychotherapy.

Q. . . . [W]hat types of things do you discuss that you believe are helpful to Bessie to deal with this dependency issue? A. . . . [E]very once in a while she can fall back . . . . She can provoke or manipulate other people into doing for her and feeling sorry for her and I think it particularly when she was told that she needed a payee for her finances because she was having some difficulty budgeting her income, that was a hard pill to swallow. And then the system has a snag in it and these checks, her checks come late and they come unpredictable and her response to that was to blame the system and to . . . become angry and frustrated, not depressed, and we processed that and, you know, she did something about it. She made phone calls to K-Mart corporate headquarters. She called her boss and her business manager people. She called her attorney. She tried to track down these checks

> by charting when they would be postmarked and when they would arrive at her home to see if there was any pattern.

The State's brief on this issue first advances the children cannot be returned because "the evidence showed the same problems at the end of the case that existed at its beginning. *The case began and ended with substandard housing conditions.*" The State next advances Bessie will always require services and her ability to keep her children will be dependent on maintenance of her mental health. The State argues she and the children were abused by her husband and the children's father, and though Bessie obtained a restraining order against him, she calls him when she needs assistance. The State focuses also on Bessie's failure to get her children to brush their teeth. The State does not address or contest the testimony of O'Leary, but argues, "There is considerable doubt about [Bessie's] ability to maintain that improvement."

Bessie dropped out of school in eleventh grade, but did obtain a GED. She claims events in her life, including problems with her husband and his alcohol and drug abuse, contributed to depression that led to the removal of the children from her care. She contends their loss, her loss of income, and her grandmother's death increased her depression. She attempted suicide. She subsequently was diagnosed with Attention Deficit Hyperactivity Disorder. She received medication.

Bessie has been gainfully employed at K-Mart for over one year. She has found job satisfaction; and her entry into the work place, together with medication, has helped eliminate problems she experienced living with small children in substandard housing with an abusive husband.

Bessie's employment at K-Mart does not provide sufficient income for her to totally support herself and her children. If Bessie and her children are reunited, Bessie will need financial assistance. The children's birth father is currently incarcerated but he is expected to be released soon. The State saw fit to terminate his parental rights, also terminating his responsibility to contribute to their support. The fact a parent needs to use financial programs does not preclude them from reclaiming their children.

Bessie's criminal convictions are for bad check charges. We recognize restitution has not been made, nor community service performed. We consider her limited budget and the amount of time Bessie spent with service providers and visitation, in addition to full-time employment, in assessing her failure to perform community service. She needs help in structuring a community service assignment that allows her time to participate with her children rather than take her away from them.

Bessie will continue to need services to care for her children, but there is not clear and convincing evidence her children cannot be returned to her care. In fact, by the time of the hearing they had been returned to her care for over a month without substantial problems. Bessie may have a relapse, but that fact does not support the State's case. The future is not predictable. No parent can assure his or her child they will be able to care for them in the future.

Bessie has deficiencies as a parent. Yet, she loves her children and they love her. In July of 1997, the State seemed to have succeeded in putting this family back

together. While we recognize deficiencies in her housekeeping skills and her failure to assure her son brushed his teeth, Bessie does not need to show she is a model parent (if there is such a thing as a model parent) before her children are returned to her care. Bessie has limitations. There may be better caregivers for her children, but the State is not directed to place children only with the most worthy.

The case is remanded to the juvenile court to make such orders as are needed. The children shall remain children in need of assistance.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.