

IN THE COURT OF APPEALS OF IOWA

No. 3-700 / 13-0880
Filed August 21, 2013

**IN THE INTEREST OF K.S.P., K.L.M.,
and K.R.M.,
Minor Children,**

**T.M., Father,
Appellant.**

Appeal from the Iowa District Court for Woodbury County, Brian L. Michaelson, Associate Juvenile Judge.

The father appeals the termination of parental rights. **AFFIRMED.**

Matthew R. Metzgar of Rhinehart Law, P.C., Sioux City, for appellant.

Thomas J. Miller, Attorney General, Janet Hoffman, Assistant Attorney General, Patrick Jennings, County Attorney, and Diane Murphy, Assistant County Attorney, for appellee.

Joseph Kertels of Juvenile Law Center, Sioux City, attorney and guardian ad litem for minor children.

Chad Thompson, Kingsley, for mother.

Considered by Potterfield, P.J., and Mullins and Bower, JJ.

BOWER, J.

T.M. appeals the district court ruling terminating his parental rights to three children. T.M. argues the petition for termination was barred by the doctrine of res judicata and lacked a factual basis. We find res judicata is not applicable and a sufficient factual basis exists for terminating T.M.'s parental rights. Accordingly, we affirm.

I. Background Facts and Proceedings

This appeal concerns the second of two petitions for termination of parental rights filed regarding T.M., the putative father of K.R.M., K.L.M., and K.S.P.¹ The initial petition, filed October 30, 2009, sought to terminate the rights of both parents. The court dismissed the petition and found the best interests of the children did not support terminating the mother's rights and there were no statutory grounds for terminating the rights of T.M. Since the dismissal of the 2009 petition, the mother's problems with drug addiction have improved and she is not a party to the present action.

T.M. has had a troubled history since dismissal of the first petition. T.M. was incarcerated at the time of the dismissal and was released from jail on March 26, 2010. He was taken into custody following a parole violation on April 30, 2010, causing him to miss permanency modification hearings in August 2010, and January 2011. T.M. was arrested again on December 23, 2011, in South Dakota on drug charges. Following his arrest, he was given suggestions to deal

¹ The children were adjudicated to be children in need of assistance (CINA) on August 24, 2006, and again on September 1, 2009. T.M. is described as the putative father in the petition.

with his substance abuse. He refused these suggestions and stated his intention to continue using drugs. T.M. missed review hearings on March 7 and August 2, 2012, with no reason given for his absence. Prior to the August 2012 hearing, T.M. had failed to stay in contact with department of human services personnel, had failed to submit to mandatory drug testing, and had been arrested once again on drug and drunk driving charges.

T.M. failed to appear at the next review hearing on November 7, 2012. It was at this time the district court found the best interests of the children might be served by terminating T.M.'s parental rights.² The petition was filed on December 11, 2012. A termination hearing was held on February 6, 2013. T.M., once again, failed to appear for the hearing. In his place, his mother notified the court T.M. was sick. T.M. had been arrested again by the time the court reconvened the termination hearing on February 26, 2013.

The district court terminated T.M.'s parental rights on May 22, 2013. The court relied upon T.M.'s frequent incarceration, instability, and chemical dependency.

II. Standard of Review

We review termination of parental rights *de novo* and consider whether the state has presented clear and convincing evidence in support of termination. *In re D.A.W.*, 552 N.W.2d 901, 902 (Iowa Ct. App. 1996).

² The district court also noted a request to withdraw filed by T.M.'s counsel on the grounds T.M. was failing to appear at hearings and communicate with his attorney. The attorney was allowed to withdraw after informing the district court T.M. had failed to communicate with his attorney for an extended period of time, and an arrest warrant had been issued for T.M.

III. Discussion

T.M. argues termination is precluded by the doctrine of res judicata. He also argues there is an insufficient factual basis for terminating his parental rights.

A. Res Judicata

T.M. argues the district court was precluded from terminating his parental rights because the issue had been previously litigated and was barred as res judicata.

The doctrine of res judicata prevents relitigation of an issue of fact or law which was previously litigated in a prior action. *Bascom v. Jos Schlitz Brewing Co.*, 395 N.W.2d 879, 881 (Iowa 1986). In order to use the doctrine, T.M. must show: (1) the issues are identical, (2) the issues were raised in the prior matter, (3) the issues were material and relevant to the prior action, and (4) the determination of the issues was necessary and essential to the earlier case. *Id.* at 881–82. The related doctrine of claim preclusion requires parties to present their whole claim at once, rather than bringing it to court piecemeal. *B&B Asphalt Co. v. T.S. McShane Co.*, 242 N.W.2d 279, 286 (Iowa 1976). A second claim is precluded when the acts and recovery are the same, or when identical evidence supports both claims. *Huffey v. Lea*, 491 N.W.2d 518, 521 (Iowa 1992).

Though our supreme court has not addressed application of the doctrine in the context of a termination-of-parental-rights proceeding, we have previously examined the decisions of other states and found subsequent termination petitions based on the same evidence but offering new grounds are barred, while

subsequent petitions arguing new grounds or evidence are allowed. See *In re B.M.*, No. 98-2175, 1999 WL 823851, *3-5 (Iowa Ct. App. Oct. 15, 1999). Though we are not bound by that decision today, we read the cases similarly and reach the same conclusion.

We are called upon to determine whether the grounds and evidence in the two petitions are identical and find they are not. The statutory grounds asserted in each petition are the same, though the evidence relied upon is not. T.M.'s history of substance abuse and general tendency towards lawlessness has continued unabated, and arguably worsened, since the initial petition was dismissed. He was jailed and facing numerous charges at the time the termination order was entered. His statement refusing substance abuse treatment occurred after the initial petition was dismissed. The district court considered T.M.'s full history in this matter; however we cannot say identical evidence was used in both petitions. T.M.'s history, subsequent to dismissal of the initial termination, was the controlling factor in the termination order. The second petition is not barred by *res judicata*.

B. Termination

T.M. contends there is no factual basis for termination and termination is not in the best interests of the children. We reject his arguments. The petition contains significant detail and explains in painstaking fashion the grounds upon which termination was sought.

Iowa Code chapter 232.116 (2011) sets forth the grounds for termination of parental rights. The court is directed to place primary consideration on the

safety of the children, long-term nurturing and growth of the children, and the physical, mental, and emotional needs of the children. Iowa Code § 232.116(2). Termination in this matter was sought pursuant to sections 232.116(1)(d), (i) and (l). We need find adequate evidence for only one of the offered grounds to affirm the district court. *In re S.R.*, 600 N.W.2d 63, 64 (Iowa Ct. App. 1999).

Paragraph “d” provides for termination after the child has been adjudicated to be a child in need of assistance because of abuse or neglect and the circumstances have continued despite the parent being offered or having received services. Iowa Code § 232.16(1)(d)(1)–(2). Paragraph “i” provides for termination after the child is found to be in need of assistance, there is clear and convincing evidence the abuse or neglect posed a significant risk to the life of the child or is an imminent danger, and services would not correct the conditions in a reasonable time. Iowa Code § 232.16(1)(i)(1)–(3). Paragraph “l” provides for termination where the child is in need of assistance and custody has been transferred, the parent has a severe substance abuse problem that poses a danger to the parent or child, and there is an indication the condition will prevent the child from being returned in a reasonable time. Iowa Code § 232.116(1)(l)(1)–(3).

The district court did not explicitly state which of the grounds it was relying upon in terminating T.M.’s rights. We find sufficient grounds exist for each. On September 1, 2009, the children were found to be children in need of assistance and to have been neglected by their parents. T.M. has been offered services and has not only refused them but has stated his intention to continue abusing

illegal drugs leading us to conclude that additional services will serve no purpose. Finally, custody of the children has been removed from T.M., he has a severe drug problem, and due to his refusal to seek treatment for his problems, it is unlikely the children could be returned to his care at any time in the future. Considering his refusal to comply with court-ordered treatment and testing, and his inability to appear for court hearings designed to assess and address the care and well-being of his children, we agree with the district court the best interests of these children are served by terminating his parental rights.

T.M. also argues section 232.116(3) provides ample reason to decline the harsh remedy of termination. Section 232.116(3) is permissive, not mandatory. See *In re V.M.K.*, 460 N.W.2d 191, 193 (Iowa Ct. App. 1990). Whether subsection 3 should be used to dismiss the petition is within the discretion of the district court and must be based upon the best interests of the child as presented by the unique circumstances of the case. See *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App. 1997) overruled on other grounds by *In re P.L.*, 778 N.W.2d 33, 39 (Iowa 2010). T.M. argues the children are with their mother, he is close with his children, and asks us to assume the oldest child, over ten years old, would object to termination. Considering T.M.'s ongoing substance abuse problems, his general lawlessness and consistent history of serious legal problems, and his inability to appear in court for important hearings regarding his children, we find the children's best interest requires termination of T.M.'s parental rights.

AFFIRMED.