STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of AP, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellant,

v

FELICIA PATTERSON,

Respondent-Appellee.

UNPUBLISHED
August 4, 2000

No. 219790
Wayne Circuit Court
Family Division
LC No. 88-271332

Before: Kelly, P.J., and White and Wilder, JJ.

PER CURIAM.

This case involves the family court's refusal to authorize the May 10, 1999, petition (hereafter "second petition") filed by the Family Independence Agency, which requested that the court exercise jurisdiction over the minor child pursuant to MCL 712A.2(b); MSA 27.3178(598.2)(b). At the time the family court referee considered the second petition, the FIA already had custody of the minor child pursuant to an earlier authorized petition, filed on November 23, 1998 (hereafter "first petition"), although a family court judge had affirmed a referee's recommendation that the minor child be returned to respondent. The FIA now appeals as of right from the order of a family court judge affirming a referee's decision not to authorize the second petition and directing that the minor child be returned to respondent, subject to a condition for a stay which the FIA did not satisfy. We affirm.

The FIA first claims that the family court erred in ruling that the second petition was barred by res judicata or collateral estoppel. The first petition was premised on respondent's failure to secure suitable housing and her history of alcoholism.[1] The second petition raised these two issues,[2] plus

[1] Respondent did not have her own home and had lived with relatives for the first years of the child's life, and she was currently living in a homeless shelter. The referee found, and we agree, that living in a shelter does not in itself constitute neglect. Also, the FIA worker admitted that the alcohol abuse had occurred years before and that respondent denied any current drug or alcohol abuse.

[2] FIA's counsel stated in argument concerning respondent's housing, "That was part of the original, the

allegations that the respondent had stolen her grandmother's car and wrecked it, which resulted in a skirmish between the two women and the grandmother obtaining a PPO.

In order for a prior judgment to operate as a bar to subsequent proceedings under the doctrine of res judicata, three requirements must be met: (1) the subject matter of the second action must be the same; (2) the parties or their privies must be the same; and (3) the prior judgment must have been on the merits. *In re Hamlet (After Remand)*, 225 Mich App 505, 519; 571 NW2d 750 (1997); *In re Pardee*, 190 Mich App 243, 248; 475 NW2d 870 (1991). However, if new facts develop, res judicata does not apply. *Hamlet*, *supra*, citing *In re Koernke Estate*, 169 Mich App 397, 399-400; 425 NW2d 795 (1988). Here, the second petition alleged the development of new facts, i.e., respondent's fight with the grandmother over the wrecked car, and, consequently, the dismissal of the prior petition did not act as a bar to the subsequent proceeding. *Pardee*, *supra* at 248. Moreover, as this Court has noted, "res judicata should not be a bar to 'fresh litigation' of issues that are appropriately the subject of periodic redetermination as is the case with termination proceedings where new facts and changed circumstances alter the status quo." *Id.* at 249 (citation omitted).

Neither the referee nor the family court specifically stated that the second petition was barred by the doctrine of res judicata, but, rather, stated only that the issues had already been adjudicated. Thus, though the doctrine of res judicata was not applicable, the doctrine of collateral estoppel was. The doctrine of collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding. *Hawkins v Murphy*, 222 Mich App 664, 671; 565 NW2d 674 (1997).

In considering this issue, we first note that, under MCR 5.991(D)(2), the family court judge was required to deny the FIA's request for review absent a clear error of law on the part of the referee that likely would have affected the outcome or could not otherwise be considered harmless. MCR 5.991(D)(2). We review de novo a trial court's decision concerning the application of the doctrine of collateral estoppel. *Barrow v Pritchard*, 235 Mich App 478, 480; 597 NW2d 853 (1999).

Here, the referee properly limited the application of collateral estoppel to the allegations in the second petition concerning respondent's housing and alcoholism issues. The second petition was filed within days of the family court's ruling affirming the referee's decision not to authorize the first petition because of a lack of evidence. Moreover, because the second petition did not allege a nexus between respondent's alleged assaultive conduct towards her mother and her alleged housing instability or substance abuse, we reject petitioner's claim that the allegation regarding assaultive conduct sufficiently alleged a change of facts or a new factual development to avoid application of the res judicata doctrine. *Pardee*, *supra* at 243. The allegations concerning respondent's conflict with her mother were properly treated as a separate claim for purposes of determining whether petitioner alleged conduct falling within MCL 712A.2(b); MSA 27.3178(598.2)(b).[3]

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first petition, and also it's a continuing allegation on our second petition . . ."

[3] We note that counsel for the child recommended unification with the mother.

Nonetheless, our holding does not foreclose the FIA from pursuing a new petition based on respondent's housing situation or substance abuse problems that bear on the issue of neglect and go beyond merely alleging long-term housing instability and past substance abuse problems. Indeed, the referee's findings at the adjudicative trial on the first petition left open the possibility of a new or different circumstance evidencing neglect arising if the minor child, when of school age, continued to be subjected to frequent moves. However, any factual changes or developments since the first petition should be alleged with sufficient clarity and specificity so as to reasonably appraise respondent of the charge. *In re Hatcher*, 443 Mich 426, 433; 505 NW2d 834 (1993).

The FIA next claims that the family court erred in denying a probable cause hearing to establish if one or more of the allegations in the second petition were true and fell within MCL 712A.2(b); MSA 27.3178(598.2)(b). We disagree. The allegations concerning respondent's long-term housing instability and substance abuse were properly dismissed without a probable cause hearing because, on their face, those allegations were barred by collateral estoppel. Further, the allegations concerning respondent's conflict with her grandmother were properly dismissed without a probable cause hearing because the second petition, on its face, failed to allege any nexus between respondent's ability to care for the minor child and her alleged assaultive conduct towards her grandmother. The alleged fight did not take place in the child's presence. Cf. *In re S R*, 229 Mich App 310, 316; 581 NW2d 291 (1998) (criminal status alone not sufficient for jurisdiction); *In re Miller*, 182 Mich App 70, 80; 451 NW2d 576 (1990) (domestic violence in front of a child is relevant to show an unfit home). Thus, even if there was probable cause to sustain the allegation concerning respondent's conflict with her grandmother, that allegation, standing alone, would not fall within MCL 712A.2(b); MSA 27.3178(598.2)(b). Considering solely the contents of the second petition, we find no error in the family court judge's ruling affirming the referee's decision not to authorize the second petition.

Even assuming that an adequate nexus could have been alleged, the FIA failed to pursue the matter by submitting another petition in the family court. As noted, a subsequent petition alleging new developments would not be barred by res judicata. At this juncture, we believe it would serve little purpose to hold a probable cause hearing on a petition for family court jurisdiction without considering the minor child's current situation. Hence, if the FIA intends to pursue this matter, it should file a new petition specifying a relevant nexus and relating it to the minor child's current situation.

Affirmed.

/s/ Michael J. Kelly
/s/ Helene N. White
/s/ Kurtis T. Wilder