IN THE COURT OF APPEALS OF IOWA

No. 2-969 / 12-0394
Filed December 12, 2012

IN THE INTEREST OF A.R.N. AND E.M.N.,
Minor Children,

J.M.B., Mother,
Petitioner-Appellee,

B.M.N., Father,
Respondent-Appellant.

Appeal from the Iowa District Court for Bremer County, Peter B. Newell, District Associate Judge.

A father appeals the district court's order terminating his parental rights. **REVERSED.**

David A. Kuehner of Eggert, Erb, Mulcahy & Kuehner, P.L.L.C., Charles City, for respondent-appellant father.

Lana L. Luhring and Shannon R. Michael of Laird & Luhring, Waverly, for petitioner-appellee mother.

Considered by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ.

VOGEL, J.

Brian appeals the termination of his parental rights to his two children, A.N., born 2006, and E.N., born 2008. The children's mother, Jeanie, filed a petition to terminate Brian's parental rights pursuant to Iowa Code section 600A.8(3)(2011). The district court granted the petition, finding Brian abandoned the children and termination was in their best interests.

Brian and Jeanie were married in 2006 and lived together until June 2010, when Brian moved out. Brian has not communicated with the children since July 31, 2010, when he lit Jeanie's car—which was outside the home where Jeanie and the children lived—on fire. He was subsequently convicted of arson and sentenced to a term of imprisonment not to exceed ten years. A no-contact order was issued at the time of Brian's arrest, though there was no mention of it in the January 31, 2011 sentencing order.[1]

Jeanie filed a petition for dissolution of marriage on August 5, 2010. On December 23, 2010, Brian filed an application for hearing for temporary visitation, which was resisted by Jeanie, citing Brian's criminal history, her and the children's fear of Brian, and that the younger child does not recognize Brian. A stipulation regarding the terms of the dissolution of marriage was reached on May 7, 2011, including the following provision on visitation:

> **VISITATION:** That upon the Respondent's discharge from prison and expiration or modification of any existing no contact order. (sic) The Respondent may petition the Court to establish appropriate visitation. The Respondent need not pay any additional filing fee for said hearing. The Court shall retain jurisdiction of this issue.

[1] At the termination hearing, both parties testified it was their mistaken belief that a no contact order was still in effect.

This stipulation was incorporated by the district court the same day, in a decree dissolving the marriage of Brian and Jeanie.[2]

On August 30, 2011, Jeanie filed a petition for termination of Brian's parental rights asserting Brian had abandoned the children under Iowa Code section 600A.8(3). On February 14, 2012, after a hearing on the matter, the district court found that Brian had abandoned the children and termination of his parental rights was in the children's best interests. Brian appeals.

We review termination proceedings under chapter 600A de novo. *In re R.K.B.*, 572 N.W.2d 600, 601 (Iowa 1998). The grounds for termination must be established by clear and convincing evidence. Iowa Code § 600A.8; *In re M.M.S.*, 502 N.W.2d 4, 5 (Iowa 1993). We accord weight to the factual findings of the juvenile court, especially those regarding witness credibility, but we are not bound by them. *Id.* The paramount concern in termination proceedings is the best interest of the child. Iowa Code § 600A.1; *see In re P.L.*, 778 N.W.2d 33, 39 (Iowa 2010) (holding best interests are to be determined within statutory framework and not upon the judge's own perceptions).

We begin by reviewing the principles of a stipulation incorporated into the dissolution of marriage decree. A stipulation and settlement in a dissolution proceeding is a contract between the parties. *In re Marriage of Lawson*, 409 N.W.2d 181, 182 (Iowa 1987). Therefore, it is enforceable as any other contract,

[2]While the stipulation was in the record on appeal, the decree was not. Our rules of appellate procedure require the entire record be timely transmitted or advance arrangements made with the clerk's office. This includes any evidence of which judicial notice has been taken. *See* Iowa R. App. P. 6.801, 6.802. Under Rule 6.802(5), this court requested and received from the clerk of the district court, the dissolution of marriage decree.

and a party may not withdraw or repudiate the stipulation prior to entry of judgment by the court. *In re Marriage of Ask*, 551 N.W.2d 643, 646 (Iowa 1996). A stipulation will not be incorporated in the decree unless the court "determines the settlement will not adversely affect the best interests of the parties' children." *In re Marriage of Jones*, 653 N.W.2d 589, 594 (Iowa 2002) *quoting In re Marriage of Udelhoffen*, 538 N.W.2d 308, 310 (Iowa Ct. App. 1995). Here, the parties stipulated that once Brian is discharged from prison he will have the opportunity to petition the court to establish appropriate visitation. By incorporating this agreement into the dissolution decree, the court determined the provision did not adversely affect the best interests of the children.

Jeanie filed the petition to terminate Brian's parental rights less than four months after she agreed that allowing Brian the chance of petitioning for visitation with the children in the future was in the children's' best interests. While her action in filing the petition was not an inappropriate collateral attack on the dissolution decree, we find the doctrine of judicial estoppel prevents her from pursuing the petition to terminate at this time. *See State ex rel. Perkins v. Perkins*, 325 N.W.2d 764, 765 (Iowa Ct. App. 1982) (finding an action to terminate under chapter 600A was not an improper collateral attack on a separate action for child support because the juvenile court clearly had jurisdiction to terminate the parental rights and a judgment can be attacked collaterally only if it was entered without jurisdiction).

The doctrine of judicial estoppel "prohibits a party who successfully and unequivocally asserts a position in one proceeding from asserting an inconsistent position in a subsequent proceeding." *Graber v. Iowa Dist. Ct.*, 410 N.W.2d 224,

227 (Iowa 1987). A fundamental feature of the doctrine, however, is the successful assertion of the inconsistent position in the earlier action. *Id.* at 228. Without that caveat, the rule's application would be unwarranted because no risk of inconsistent or misleading results would exist. *Id.* In addition, application of the doctrine requires proof of an intentional attempt to mislead the court with the inconsistency. *Roach v. Crouch*, 524 N.W.2d 400, 403 (Iowa 1994). Because the doctrine is intended to protect the courts rather than the litigants, an appellate court may raise estoppel on its own motion. *State v. Duncan*, 710 N.W.2d 34, 43-44 (Iowa 2006). If there is a significant change in the facts after the initial position, then a change in position does not violate the doctrine of judicial estoppel. *Winnebago Indus., Inc. v. Haverly*, 727 N.W.2d 567, 575 (Iowa 2006).

In what appears to be an attempt to side-step the visitation stipulation incorporated into the decree, Jeanie now asserts termination of Brian's parental rights is in the children's best interests. However, to comply with the dissolution decree, Jeanie would need to show that Brian has been "discharge[d] from prison" and "any existing no contact order" has expired or been modified, and Brian has taken no further action. Jeanie could then petition for termination. Or, if Jeanie could prove a substantial change of circumstances, which would warrant a modification of the dissolution decree, the grounds for termination may be supported. *See id.*; *see also In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000) (holding a petitioner must prove, by a preponderance of the evidence, a substantial change in circumstances, not contemplated by the original court, to justify modification of custody). However, the record only indicates that Jeanie changed her stance and used the termination court to

change the stipulated findings of the dissolution court. We appreciate Jeanie's argument that Brian, by his own actions, has separated himself from the children, which would normally support the statutory basis for proving abandonment under 600A.8(3). Nonetheless, Jeanie cannot utilize this termination action to repudiate her own agreement incorporated into the dissolution decree, unless she complies with the terms of the decree or shows a substantial change of circumstances. *See id.* Accordingly, we reverse the district court's order.

REVERSED.