

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of SHAWN LOWE, JR. and SETH
MASON LOWE, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

JENNIFER LOWE,

Respondent-Appellant,

and

SHAWN LOWE, SR.,

Respondent.

In the Matter of SHAWN LOWE, JR. and SETH
MASON LOWE, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

SHAWN LOWE,

Respondent-Appellant,

and

JENNIFER LOWE,

Respondent.

UNPUBLISHED

April 29, 2004

No. 251697

Branch Circuit Court

Family Division

LC No. 02-002283-NA

No. 251768

Branch Circuit Court

Family Division

LC No. 02-002283-NA

Before: White, P.J., and Markey and Owens, JJ.

PER CURIAM.

In these consolidated appeals, respondents-appellants Jennifer Lowe and Shawn Lowe, Sr., appeal by right from an order terminating their parental rights to the minor children pursuant to MCL 712A.19b(3)(b)(i), (g), (j), and (k)(iii). We affirm.

I

Respondent Jennifer Lowe argues that the termination order is invalid because the trial court held the termination hearing more than sixty-three days after the termination petition was filed on January 8, 2003, contrary to MCR 5.974(F)(1)(b).¹ We agree that the trial court failed to comply with the time requirements of MCR 5.974(F)(1)(b), but this rule provides no sanctions for noncompliance. Accordingly, respondents are entitled to relief for this error only if the violation of the court rule is inconsistent with substantial justice. MCR 2.613(A); *In re TC*, 251 Mich App 369, 370-371; 650 NW2d 698 (2002). Here, respondents have failed to demonstrate that holding the termination hearing more than sixty-three days after the filing of the petition was inconsistent with substantial justice. Consequently, they are not entitled to appellate relief.

II

Both respondents argue that the trial court erred in finding sufficient evidence of statutory grounds to terminate their parental rights to the children.

In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met by clear and convincing evidence. *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1993). We review the trial court's findings of fact under the clearly erroneous standard. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Under this standard, the trial court's decision must strike the reviewing court as more than just maybe or probably wrong. *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). This Court gives due regard to the trial court's unique ability to assess the witnesses' credibility. MCR 2.613(C); *In re Miller*, *supra* at 344.

Here, the trial court found grounds to terminate respondents' parental rights under MCL 712A.19b(3)(b)(i), (g), (j) and (k)(iii). The court previously found that respondents physically abused the children's older sister, and this Court affirmed an order terminating respondents' parental rights to that child. *In re JML*, unpublished opinion per curiam of the Court of Appeals, issued May 29, 2003 (Docket Nos. 245551 and 245687). Respondents' prior abuse of the older child satisfied the prior abuse requirement of § 19b(3)(b)(i). Respondents contend, however, that

¹ The rules governing child protection proceedings were amended and recodified as part of new subchapter 3.900, effective May 1, 2003. Former MCR 5.974(F)(1)(b) is now codified as MCR 3.977(G)(1)(b).

the evidence did not satisfy the anticipatory abuse prong of § 19b(3)(b)(i). We disagree. As this Court observed in *In re Powers*, 208 Mich App 582, 588; 528 NW2d 799 (1995), how a parent treats one child is probative of how that parent might treat another child. Furthermore, Drs. Haugen and Henry both determined from their assessments of respondents that respondents were unwilling to accept responsibility for their past abuse of the older child, and that this refusal would prevent them from resolving the abuse issues. This evidence supported the trial court's finding that respondents were likely to abuse their younger children. Although Dr. Lazar disputed Drs. Haugen's and Henry's findings, the trial court determined that Dr. Henry and Dr. Haugen were more credible, and this Court defers to the trial court's ability to assess witness credibility. Accordingly, we cannot conclude that the trial court's findings were clearly erroneous. *In re Miller*, *supra* at 337.

Respondents also contend that their prior abuse of the older child was not probative of how they would treat their younger children because the older child's serious behavioral problems made her more susceptible to abuse. The trial court inferred from Dr. Henry's testimony regarding Shawn Michael's "disregulation" that the events relating to Jasmine's abuse were beginning to repeat themselves with Shawn Michael, and that respondents were not doing anything to change the outcome. The trial court's rejection of respondents' "target child" argument was thus supported by the evidence.

The same evidence that supports termination under § 19b(3)(b)(i) also supports termination under §§ 19b(3)(g) and (j). Section 19b(3)(g) requires evidence that the parent failed to provide proper care and custody, and that there is no reasonable likelihood the parent will become able to do so within a reasonable time. The trial court inferred that Shawn Michael's disregard related to the abuse in respondents' home. This constituted a past failure to provide proper care and custody. The same evidence that supports the anticipatory abuse prong of § 19b(3)(b)(i) applies also to the anticipatory neglect prong of § 19b(3)(g), and to § 19b(3)(j) (likelihood of future harm to the children if returned to the parents' care).

Respondents contend that the trial court erred in finding sufficient evidence under § 19b(3)(k), because it relied on the findings from the previous termination order, without making specific findings that the abuse of the older child involved battering, torture, or severe physical abuse. But, 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. *McMichael v McMichael*, 217 Mich App 723, 727; 552 NW2d 688 (1996). We see no reason why this rule would not apply here, where the trial court made a prior, valid final judgment that respondents' abuse of their older child rose to the level of battering, torture, or severe physical abuse.

Respondent Shawn Lowe argues that termination of his parental rights was improper because there had been no noteworthy change of circumstances since the trial court's previous decision to return Shawn Michael and Seth to respondents care. We understand respondents' confusion and complaint that the successor judge seemingly abandoned her predecessor's movement toward reunification when there was no change of circumstances other than respondents' ninety-three-day incarceration. But, the trial court's prior efforts at reunification did not constitute a judicial determination that respondents were fit parents, nor did they bind the future court's actions.

Respondent Shawn Lowe asserts in his statement of questions presented that termination of his parental rights was contrary to the children's best interests, but his brief does not include any argument in support of this issue. It is therefore waived because a party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim. *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). In any event, the evidence did not show that termination of Shawn Lowe's parental rights was clearly not in the children's best interests. MCL 712A.19b(5); *In re Trejo*, *supra* at 353.

We affirm.

/s/ Helene N. White
/s/ Jane E. Markey
/s/ Donald S. Owens