STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of R.N., Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

LISA HAMPTON,

Respondent-Appellant,

and

JAMES NOBLE,

Respondent.

UNPUBLISHED
March 6, 2003

No. 243151
Oscoda Circuit Court
Family Division
LC No. 99-000068-NA

In the Matter of ROBERT NOBLE, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

JAMES NOBLE,

Respondent-Appellant,

and

LISA HAMPTON,

Respondent.

No. 243375
Oscoda Circuit Court
Family Division
LC No. 99-000068-NA

Before: Donofrio, P.J., and Saad and Owens, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal as of right from a trial court order terminating their parental rights to the minor child under MCL 712A.19b(3)(b)(*i*), (g), and (j). We affirm.

We first address respondent Hampton's argument that the trial court lacked subject-matter jurisdiction, thus rendering its subsequent orders void. Respondent did not object to the trial court's assumption of jurisdiction at any time during the twenty-two-month course of these proceedings. The trial court's subject-matter jurisdiction may not be collaterally attacked in an appeal from an order terminating parental rights. *In re Hatcher*, 443 Mich 426, 444; 505 NW2d 834 (1993). Moreover, we note that the trial court properly assumed jurisdiction over R.N. when he was removed from his mother's care, based on respondent Hampton's admission to leaving him with inadequate supervision on three occasions. In addition, the trial court also heard evidence that respondent Hampton had recently been homeless, that her two older children (who had been R.N.'s babysitters) were juvenile delinquents, and that an emergency removal of R.N. from the home had been made because of respondent Hampton's most recent failure to supervise. The fact that R.N. was left "without the care necessary for his or her health or morals" was established by a preponderance of the evidence, and the trial court correctly assumed jurisdiction. MCL 712A.2(b)(1); MCR 5.972(C)(1).

We next address respondent Noble's argument that the trial court abused its discretion in admitting at the evidentiary hearing evidence of his 1988 Florida "best interests"[1] plea to two counts of promoting a sexual performance by a child, Fla. Stat. 827.071.[2] However, respondent Noble expressly approved the admission of this evidence below.[3] It is well established that a party may not take a position in the trial court and subsequently seek redress in an appellate court on the basis of a position contrary to that taken in the trial court." *Phinney v Perlmutter*, 222

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[1] Which is, apparently, the Florida equivalent of a nolo contendere plea.

[2] The statute states as follows: "A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a child less than 18 years of age." Fla. Stat. 827.071(3). A "sexual performance" is "any performance or part thereof which includes sexual conduct by a child of less than 18 years of age." Fla. Stat. 827.071(1)(h). A "performance" is defined as "any play, motion picture, photograph, or dance or any other visual representation exhibited before an audience." Fla. Stat. 827.071(1)(b). The statute defines "sexual conduct" to include (i) "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse"; (ii) "actual lewd exhibition of the genitals"; (iii) "actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party"; or (iv) "any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed." Fla. Stat. 827.071(1)(g).

[3] Respondent Noble's challenge to the probable cause affidavit underlying the criminal charges was sustained.

Mich App 513, 544; 564 NW2d 532 (1997). Thus, respondent Noble waived appellate review of this issue.

Finally, both respondents argue that the grounds for termination were not supported by clear and convincing evidence. We review a court's decision to terminate parental rights for clear error. *In re CR*, 250 Mich App 185, 194; 646 NW2d 506 (2002).

As noted above, the trial court terminated respondent Noble's parental rights pursuant to both MCL 712A.19b(3)(b)(*i*) and (g). Respondent Noble was convicted under a statute prohibiting conduct that we believe falls within the scope of "sexual abuse," as used in MCL 712A.19b(3)(b). Moreover, not only did respondent Noble decline to pursue rehabilitation for this conduct, he refused to completely cooperate with the psychological analyses performed for this case. As such, there is no reason to believe that respondent Noble has been properly rehabilitated, as necessary to increase the likelihood of such abuse not happening to R.N. As a result, we are not persuaded that the trial court clearly erred in terminating respondent Noble's rights pursuant to MCL 712A.19b(3)(b)(*i*).

The trial court also terminated respondent Noble's parental rights pursuant to MCL 712A.19b(3)(g). Here, the evidence indicated that respondent Noble had been incarcerated for all but one year and four months of R.N.'s lifetime, and that he had unresolved substance abuse and sexual abuse issues. Although scheduled to be released from prison three months after the termination hearing, he had been imprisoned or on parole for much of the past thirteen years. Further, he had not provided for R.N.'s support while incarcerated. Accordingly, we are not persuaded that the trial court clearly erred in terminating respondent Noble's rights pursuant to MCL 712A.19b(3)(g).

The trial court terminated respondent Hampton's parental rights pursuant to MCL 712A.19b(3)(j). The evidence was clear that for several years respondent Hampton had not provided proper supervision and discipline for her children, allowing R.N. to be improperly supervised, and resulting in her two oldest children becoming juvenile delinquents and residing in juvenile detention facilities. Despite what appeared to be the capacity to properly parent, respondent Hampton failed to benefit from the warnings and assistance provided her by petitioner, and, at the time of termination, she still had not demonstrated the self-motivation to effectively parent. Thus, there was no reasonable expectation that she would be able to provide proper care or custody within a reasonable time, and it was likely that R.N. would suffer harm from respondent Hampton's continuing failure to provide discipline and supervision. Therefore, we do not believe that the trial court clearly erred in terminating her parental rights pursuant to MCL 712A.19b(3)(j).

Affirmed.

/s/ Pat M. Donofrio
/s/ Henry William Saad
/s/ Donald S. Owens