STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of FELICIA ALICIA CLEMONS, Minor.

CATHOLIC SOCIAL SERVICES OF OAKLAND COUNTY,

Petitioner-Appellee,

and

LATRECHA ADELL FOX, Guardian,

Appellee,

v

TAMARA ALICIA CLEMONS,

Respondent-Appellant.

UNPUBLISHED
August 19, 2008

No. 281004
Wayne Circuit Court
Family Division
LC No. 97-352477-NA

Before: Davis, P.J., and Wilder and Borrello, JJ.

PER CURIAM.

Respondent Tamara Alicia Clemons appeals as of right from the trial court order terminating her parental rights to the minor child (d/o/b 6/22/98) under MCL 712A.19b(3)(f). We reverse and remand.

The trial court made numerous errors that warrant reversal in this case. First, the trial court failed to advise respondent at her first court appearance that she had a right to an attorney and that if she could not afford an attorney, counsel would be appointed for her, as required by MCL 712A.17c(4) and MCR 3.915(B). This issue is not preserved for appeal because respondent did not raise the issue of her right to counsel before the trial court and the trial court did not address it. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). "As a general rule, issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances." *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). However "appellate courts will consider claims of constitutional error for the first time on appeal when the alleged error could have been decisive of the outcome." *Id.* at 547. An unpreserved claim of constitutional error is reviewed for plain error affecting substantial rights. *People v McCuller*, 479 Mich 672, 681; 739 NW2d 563 (2007). To avoid forfeiture

under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain (clear or obvious), and 3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is only warranted when the error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. *Id.*

We consider this error because compelling circumstances exist, and review is therefore warranted. Respondent was not advised, as required by MCL 712A.17c(4) and MCR 3.915(B), that she had a right to an attorney and that she had the right to have an attorney appointed for her if she could not afford to retain one. Respondent appeared at the termination hearing without counsel. As a non-lawyer, respondent may not have been aware that she had the right to legal representation at the proceedings, and she certainly could not be expected to know how to take the proper steps to preserve an issue for appellate review, or even that issues need to be preserved for appellate review at all. Thus, the fact that this issue is not preserved for review is, itself, a result of the error of which she now complains.

The constitutional guarantees of due process and equal protection extend the right to counsel to respondents in child protective proceedings. *In re Powers Minors*, 244 Mich App 111, 121; 624 NW2d 472 (2000). The right to counsel at termination proceedings "is . . . a fundamental constitutional right[.]" *In re Trowbridge*, 155 Mich App 785, 786; 401 NW2d 65 (1986). In addition, MCL 712A.17c provides:

> (4) In a proceeding under section 2(b) or (c) of this chapter, the court shall advise the respondent at the respondent's first court appearance of all of the following:
>
> (a) The right to an attorney at each stage of the proceeding.
>
> (b) The right to a court-appointed attorney if the respondent is financially unable to employ an attorney.
>
> (c) If the respondent is not represented by an attorney, the right to request and receive a court-appointed attorney at a later proceeding.
>
> (5) If it appears to the court in a proceeding under section 2(b) or (c) of this chapter that the respondent wants an attorney and is financially unable to retain an attorney, the court shall appoint an attorney to represent the respondent.
>
> (6) Except as otherwise provided in this subsection, in a proceeding under section 2(b) or (c) of this chapter, the respondent may waive his or her right to an attorney. . . .

MCR 3.915(B) similarly provides:

> **(B) Child Protective Proceedings.**
>
> (1) *Respondent.*

> (a) At respondent's first court appearance, the court shall advise the respondent of the right to retain an attorney to represent the respondent at any hearing conducted pursuant to these rules and that
>
> (i) the respondent has the right to a court appointed attorney if the respondent is financially unable to retain an attorney, and,
>
> (ii) if the respondent is not represented by an attorney, the respondent may request a court-appointed attorney at any later hearing.
>
> (b) The court shall appoint an attorney to represent the respondent at any hearing conducted pursuant to these rules if
>
> (i) the respondent requests appointment of an attorney, and
>
> (ii) it appears to the court, following an examination of the record, through written financial statements, or otherwise, that the respondent is financially unable to retain an attorney.
>
> (c) The respondent may waive the right to the assistance of an attorney . . .
> .

The trial court failed to advise respondent of her right to counsel in any of the transcripts of proceedings at which respondent appeared that have been provided to this Court. The court also failed to advise respondent that she had the right to a court-appointed attorney if she was financially unable to afford an attorney. In light of the fact that respondent has appointed appellate counsel, it is likely that she would have exercised her right to an attorney during the proceedings below and would have been financially unable to retain an attorney. At the hearing in which respondent's parental rights to the minor child were terminated, she appeared in propria persona. Although a respondent in a child protection proceeding may waive the right to counsel, MCL 712A.17c(6); MCR 3.915(B)(1)(c), there is no indication from the record that respondent's appearance without counsel was the result of respondent knowingly, intelligently, and voluntarily waiving her right to counsel after being properly advised of her right to counsel. Respondent never indicated a desire to represent herself and forego the assistance of counsel. Rather, respondent's appearance without counsel was the result of the trial court's failure to properly advise her of her right to counsel.

Respondent had a constitutional right to the assistance of counsel at the hearing in which her parental rights were terminated and was not advised of this right. Thus, error occurred, and the error was plain, *i.e.* clear or obvious. *Carines*, *supra* at 763. Furthermore, to the extent that respondent's parental rights were terminated while she was not represented by counsel, the error affected respondent's substantial rights because she was deprived of her liberty interest in the care and custody of her child. *Id.* Reversal is warranted because the deprivation of respondent's constitutional right to counsel seriously affected the fairness, integrity or public reputation of the judicial proceedings that resulted in the termination of respondent's parental rights. *Id.*

The erroneous deprivation of counsel at child protective proceedings can be subject to a harmless error analysis. *In re Hall*, 188 Mich App 217, 222-223; 469 NW2d 56 (1991). In this

case, however, we reject any notion that the erroneous deprivation of respondent's right to counsel and right to appointed counsel was harmless. This error, alone, or in conjunction with other errors made by the trial court, requires reversal because the error affected the fundamental fairness of the proceedings. *In re AMB*, 248 Mich App 144, 211, 235; 640 NW2d 262 (2001). It is axiomatic that it is fundamentally unfair to deprive a parent of their liberty interest in the care and custody of their child when the parent is not represented by counsel at the termination proceedings and has not been advised of their right to counsel or appointed counsel.

Respondent was also denied her constitutional right to be judged by an impartial decision maker. "A hearing before an unbiased and impartial decisionmaker is a basic requirement of due process." *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975). A trial judge is presumed to be fair and impartial, and a litigant who challenges this presumption bears a heavy burden to prove otherwise. *In re Susser Estate*, 254 Mich App 232, 237; 657 NW2d 147 (2002).

Again, we observe that this issue is not preserved for appeal because it was not raised before or decided by the trial court. *Fast Air, Inc*, *supra* at 549. However, we will review this issue because the lack of an impartial decision maker clearly would be decisive to the outcome of the case. *Grant*, *supra* at 547. Again, our review of an unpreserved claim of constitutional error is for plain error affecting substantial rights. *Carines*, *supra* at 763; *McCuller*, *supra* at 681.

Under MCR 3.977(A)(3), where termination of parental rights is sought, the burden of proof is on the petitioner. In this case, the petitioner, Tilnisha Margerum,[1] did not appear at the hearing in which respondent's parental rights were terminated. Instead, the trial court assumed the role of the petitioner and accuser. At the hearing, respondent and the minor child's guardians, Latrecha Fox and her husband,[2] were sworn in, and the trial court questioned them regarding the elements of the statutory grounds for termination. By questioning respondent and the Foxes, the trial court assumed the role of the accuser or petitioner in the proceedings. By assuming the role of the petitioner in the petitioner's absence, the trial court essentially functioned as an advocate of petitioner to establish grounds for terminating respondent's parental rights. In *Crampton*, the Supreme Court observed that judges and decision makers can be disqualified without a showing of actual bias in situations where the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable. *Crampton*, *supra* at 351. The situations which present such a risk include when the judge or decision maker:

(1) has a pecuniary interest in the outcome;

(2) "has been the target of personal abuse or criticism from the party before him";

[1] We question whether Margerum, a Catholic Social Services adoption worker, was authorized to file a petition seeking termination of respondent's parental rights to the minor child under MCR 3.977(A)(2) and MCL 712A.19b(1). However, we need not resolve this issue on appeal in light of our decision to reverse the termination of respondent's parental rights on other grounds.

[2] The husband's first name was not stated on the record.

(3) is "enmeshed in [other] matters involving petitioner * * *"; or

(4) might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decisionmaker. [*Id.* (footnotes omitted).]

The fourth situation is applicable here. In this case, by assuming the role of the petitioner, who should have been present at the hearing, but was not, and who bore the burden of proving that termination of respondent's parental rights was warranted, and then making the decision to terminate respondent's parental rights, the trial court first participated in the case as an accuser and subsequently acted as the decision maker. Moreover, the trial court only asked questions of Latrecha and Mr. Fox and respondent that would have tended to elicit evidence warranting termination of respondent's parental rights. For example, the trial court asked Latrecha whether she had received any child support from respondent in the past two years and whether respondent had spoken or communicated with, seen, or sent gifts to the minor child in the past two years. The trial court also asked Latrecha if respondent had had anything to do with the minor child's life. However, the trial court did not ask respondent any questions about her ability to pay support or visit, contact or communicate with the minor child. The trial court also failed to ask respondent any questions regarding whether she had good cause for failing to support or visit, contact or communicate with the minor child. The trial court's questions clearly had an accusatory or prosecutorial bent. If the trial court had also attempted to ask questions or elicit evidence regarding whether respondent had the ability to pay support or visit, contact or communicate with the child, or whether there was good cause for respondent's failures in this regard, the partiality of the trial court might not be so questionable. However, the trial court very clearly assumed the role of the accuser in this case, and the "evidence" that the trial court sought to elicite was limited to evidence that would warrant termination of respondent's parental rights. To compound the magnitude of this error, the trial court did not afford respondent the opportunity to present evidence. And, as noted above, respondent was not represented by counsel during the hearing. We find that, under these circumstances, the probability of actual bias on the part of the trial judge, acting both as accuser and decision maker, is too high to be constitutionally tolerable. *Id.* Respondent was deprived of her right to be tried by an impartial decision maker. This error was plain and clearly affected respondent's substantial rights because her liberty interest in the care and custody of her child was terminated. Reversal is therefore warranted based on this error.

Next, the trial court erred in terminating respondent's parental rights because there was no clear and convincing evidence to support termination of respondent's parental rights under MCL 712A.19b(3)(f). In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination has been met by clear and convincing evidence. *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004). Once the lower court determines that a statutory ground for termination has been established, it "shall order termination of parental rights . . . unless the court finds that termination of parental rights to the child is clearly not in the child's best interests." MCL 712A.19b(5). See also *In re Trejo*, 462 Mich 341, 352-354; 612 NW2d 407 (2000). We review a decision terminating parental rights for clear error. MCR 3.977(J); *Trejo*, *supra* at 356. A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). "[R]egard shall be given to the special

opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

We are left with the definite and firm conviction that the trial court clearly erred in terminating respondent's parental rights because, based on the testimony elicited by the trial court, acting as the petitioner or accuser, there was not clear and convincing evidence to support the trial court's decision to terminate respondent's parental rights under MCL 712A.19b(3)(f).[3] MCL 712A.19b(3)(f) provides:

> (3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
>
> * * *
>
> (f) The child has a guardian under the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8102, and both of the following have occurred:
>
> (*i*) The parent, having the ability to support or assist in supporting the minor, has failed or neglected, without good cause, to provide regular and substantial support for the minor for a period of 2 years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for a period of 2 years or more before the filing of the petition.
>
> (*ii*) The parent, having the ability to visit, contact, or communicate with the minor, has regularly and substantially failed or neglected, without good cause, to do so for a period of 2 years or more before the filing of the petition.

Section 19b(3)(f) requires proof of two separate facts: first, respondent must have had the ability to support or assist in supporting the minor and have failed to do so, without good cause, for a period of 2 years before the filing of the petition, § 19b(3)(f)(*i*) and; second, respondent must have had the ability to visit, contact or communicate with the minor and have regularly and substantially failed to do so, without good cause, for a period of 2 years of more before the filing of the petition, § 19b(3)(f)(*ii*). In this case, the trial court failed to make any inquiry or elicit any testimony regarding whether respondent had the ability to support or assist in supporting the minor child and whether there was good cause for respondent's failure to provide regular and substantial support. The trial court also failed to inquire or elicit testimony regarding whether respondent had the ability to visit, contact, or communicate with the minor child and whether there was good cause for her failure to visit, contact or communicate with the minor child. Because there was no inquiry and therefore no evidence regarding these elements

[3] We observe that although the trial court did not specifically cite MCL 712A.19b(3)(f) in terminating respondent's parental rights, based on the statute cited in the petition and the language used by the trial court, it appears that the trial court's decision to terminate respondent's parental rights was based on this section of the statute.

of § 19b(3)(f)(*i*) and (*ii*), there was not clear and convincing evidence to support the trial court's decision to terminate respondent's parental rights.

Finally, the trial court erred in failing to appoint a lawyer-guardian ad litem to represent the minor child. MCL 712A.17c(7) provides that, in child protective proceedings, "the court shall appoint a lawyer-guardian ad litem to represent the child. The child shall not waive the assistance of the lawyer-guardian ad litem." MCR 3.915(B)(2)(a) similarly provides that, in child protective proceedings, "[t]he court must appoint a lawyer-guardian ad litem to represent the child at every hearing, including the preliminary hearing. The child may not waive the assistance of a lawyer-guardian ad litem." "[A] child's right to counsel is the right to 'zealous advocacy' under MCL 712A.17c(7), as well as the analogous court rule, MCR 5.915(B)(2)." *In re AMB*, *supra* at 222. At the hearing in which respondent's parental rights were terminated, the minor child was not represented by a lawyer-GAL. There was no appearance by a lawyer-GAL, and the record contains no order appointing a lawyer-GAL for the minor child. MCL 712A.17c(7) uses the mandatory word "shall," *Roberts Mecosta Co Gen Hosp*, 466 Mich 57, 65; 642 NW2d 663 (2002), and the child may not waive the right to a lawyer-GAL. The lack of a lawyer-GAL to ensure that the rights and best interests of the minor child were protected also warrants reversal in this case. Because of our conclusion that this case must be remanded, we do not address an issue not raised by the parties on appeal: whether respondent has standing to assert the minor child's constitutional right to counsel. See *In re EP*, 234 Mich App 582, 597-598; 595 NW2d 167 (1999), rev'd on other grounds sub nom *In re Trejo*, 462 Mich 341 (2000). On remand, the trial court shall appoint a lawyer-GAL for the minor child as required by MCL 712A.17c(7) and MCR 3.915(B)(2)(a).

For the reasons stated above, we reverse and remand for further proceedings consistent with this opinion, beginning with the filing of a petition by an authorized person under MCR 3.977(A)(2) and MCL 712A.19b(1). Given the egregious violations of respondent's constitutional rights that occurred in this case, this case shall be assigned to a different judge on remand to preserve the appearance of justice. *Bayati v Bayati*, 264 Mich App 595, 602-603; 691 NW2d 812 (2004).

Reversed and remanded for proceedings consistent with this opinion before a different judge. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello