

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of AUSHA NIA TUCKER, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

GENEAL ROBERSON, JR.,

Respondent-Appellant,

and

CHANTELLA TUCKER,

Respondent.

In the Matter of AUSHA NIA TUCKER, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

CHANTELLA TUCKER,

Respondent-Appellant,

and

GENEAL ROBERSON, JR.

Respondent.

UNPUBLISHED
September 15, 2009

No. 289919
Washtenaw Circuit Court
Family Division
LC No. 08-000029-NA

No. 289920
Washtenaw Circuit Court
Family Division
LC No. 08-000029-NA

Before: Sawyer, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

In Docket No. 289919, respondent Geneal Roberson, Jr., appeals as of right from the trial court's order terminating his parental rights to the minor child under MCL 712A.19b(3)(g) and (j). In Docket No. 289920, respondent Chantella Tucker appeals as of right from the same order, which terminated her parental rights to the same child under MCL 712A.19b(3)(a)(ii), (g), and (j). We affirm the termination of respondent Tucker's parental rights in Docket No. 289920, reverse the termination of respondent Roberson's parental rights in Docket No. 289919, and remand for further proceedings.

I. Due Process

In Docket No. 289919, respondent Roberson argues that the trial court's decision terminating his parental rights must be reversed because his rights to procedural and substantive due process were violated. We agree in part and disagree in part.

Whether the child protective proceedings complied with respondent Roberson's rights to substantive and procedural due process is a question of law that we review *de novo*. *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009). But because respondent Roberson did not raise any due process issue in the trial court, this issue is unpreserved. We review unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A. Substantive Due Process

Substantive due process requires that a statute bear "a reasonable relation to a permissible legislative objective." *In re McEvoy*, 267 Mich App 55, 70; 704 NW2d 78 (2005). Thus, substantive due process " 'demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.' " *McAvoy v H B Sherman Co*, 401 Mich 419, 436; 258 NW2d 414 (1977), quoting *Nebbia v New York*, 291 US 502, 525; 545 S Ct 505; 78 L Ed 940 (1934).

As respondent Roberson argues, parents have a fundamental substantive due process liberty interest—more precious than any property right—in the care, custody, and management of their children. *In re Rood*, *supra* at 91, 111; see also *In re B & J*, 279 Mich App 12, 22-23; 756 NW2d 234 (2008). Thus, "[i]n order to comply with the guarantees of substantive due process, the state must prove parental unfitness by at least clear and convincing evidence before terminating a respondent's parental rights." *Id.* at 23 (internal quotations and citation omitted). The Juvenile Code satisfies this standard because it requires that a statutory ground for termination of parental rights be proven by clear and convincing evidence. *Id.* An error in the application of this process does not amount to a violation of substantive due process.

B. Procedural Due Process

A parent's liberty interest in the care, custody, and management of his child does not evaporate simply because he has not been a model parent or has lost temporary custody of his child to the state. *In re Rood*, *supra* at 91. Thus, where the state moves to terminate parental

rights, it must provide the parents with fundamentally fair procedures, i.e., with procedural due process. *Id.* At a minimum, procedural due process requires notice and an opportunity to be heard. *Id.* at 92. Due process also requires fundamental fairness in light of the interests at stake.¹ *Id.*

A parent who is not named as a respondent “must be notified of and permitted to participate in each hearing, including dispositional review hearings, permanency planning hearings, and termination proceedings.” *Id.* at 94. State and federal laws impose many procedural requirements on a state agency before it may terminate parental rights. See *id.* at 95-106. Accordingly, a “respondent may certainly claim procedural error in an action brought by the state to terminate this right if the state fails to comply with the required procedures and its failure may be said to *have affected the outcome* of the case.” *Id.* at 107 (emphasis added).

In *In re Rood*, our Supreme Court found that the respondent father, who was not initially named as a respondent, was deprived of procedural due process by the state’s failure to notify him of the proceedings or to engage him to participate, despite his having appeared and provided a current address to the court and the agency. *Id.* at 107-108, 118-119. The Court then examined whether the respondent father was sufficiently responsible for his own lack of participation as to excuse the due process violations. *Id.* at 111-114. The Court concluded that he was not, and that the trial court clearly erred in finding otherwise. *Id.* at 111. The Court also concluded that “[b]ecause respondent’s rights were terminated directly and indirectly because of his uninformed lack of participation, he was deprived of minimal due process.” *Id.* at 122.

In *In re Rood*, the respondent was aware that proceedings were pending against respondent Tucker, but he did not receive notice of any hearings or proceedings after the initial disposition, until the termination petition was filed. See *id.* at 80-83, 113. Further, the respondent in *In re Rood* had no notice that services and evaluations were available to him, and he was never notified “that his parental rights could be at stake in a neglect case *against [the mother]*.” *Id.* at 113 (emphasis in the original). “In other words, although he had actual notice of [the child’s] removal and the allegations against [the mother], by no means did he receive actual notice of the full nature and import of the proceedings with regard to his own rights.” *Id.* Moreover, the Court stated that “[s]ubsequent notice of the termination petition and the appointment of counsel are insufficient to afford due process when *respondent’s rights were terminated in part because he had not participated in the earlier proceedings.*” *Id.* (emphasis in original). The Court added that “[e]ven if respondent willfully failed to follow up with the DHS or the court *in the neglect proceeding against [the mother]*, he did not effectively forfeit his constitutional parental rights at a later termination proceeding *against him* by doing so.” *Id.* at 114 (emphasis in original). The Court recognized that the respondent father’s failure to visit and support his child was “certainly additional evidence of his own neglect,” but stated that “a

¹ The fairness of a statutory or regulatory process is to be evaluated in light of the interest at stake, the risk of erroneous deprivation, and the state’s interest, including the function involved and the burdens imposed by having to provide other procedures. *In re Rood, supra* at 92-93, 122. Here, however, respondent Roberson is challenging only the fairness of the process as *applied* to him, not the fairness of the procedures mandated by the statutes.

showing of neglect, alone, merely triggers a parent's right to participate in services. It does not automatically justify termination." *Id.*

In the present case, respondent Roberson was aware of his child's removal, and of the pendency of proceedings against the mother. It is unclear whether he was served with notices of hearings and copies of court orders before the termination petition was filed. However, he conceded that the caseworkers informed him of the hearings after his attorney was released, and urged him to appear. Therefore, this case is not as egregious as *In re Rood*, and respondent Roberson certainly bears more responsibility for his failure to participate than did the respondent in *In re Rood*.

As in *In re Rood*, however, there is no indication that respondent Roberson was ever informed that *his* parental rights could be at stake in the neglect case pending against the mother, until the termination petition was filed. As stated by the Court in *In re Rood, supra* at 113, "although he had actual notice of [the child's] removal and the allegations against [the mother], by no means did he receive actual notice of the full nature and import of the proceedings with regard to *his own rights*." (Emphasis added.)

We also note that, in *In re Rood*, the trial court asserted jurisdiction over the child in June 2006, and the termination petition was filed in January 2007. *Id.* at 80, 83. In the interval, the respondent could have been ordered to participate in services, if he had been given proper notice. In the present case, by contrast, the adjudicative trial was held on June 10, 2008, the trial court asserted jurisdiction over the child on June 30, 2008, and the initial dispositional hearing was held on July 30, 2008. The termination petition was filed less than a week later, on August 5, 2008.

MCL 712A.13a(8)(c) provides that "participation in the initial services plan is voluntary without a court order." See also MCR 3.965(E)(2). Under MCL 712A.6, a court acquires jurisdiction over adults only incidentally to its jurisdiction over a minor child or juvenile. See also MCL 712A.6b (jurisdiction over non-parent adults). Similarly, MCL 712A.1(1) provides that once a court finds that a child is within the court's jurisdiction, "the court may enter any of the following orders of disposition that are appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained." See also MCR 3.973(A) and (D).

In the present case, respondent Roberson's parental rights were terminated because of his failure to visit the child, his failure to provide a day care plan, his failure to attend court hearings, his continued contacts with the mother in violation of a personal protection order (PPO), past incidents of domestic violence, and his lack of insight concerning the effects of domestic violence on a child. As in *In re Rood*, respondent Roberson's failure to address these issues before the trial court's assertion of jurisdiction is evidence of neglect. However, "a showing of neglect, alone, merely triggers a parent's right to participate in services. It does not automatically justify termination." *In re Rood, supra* at 114.

It was fundamentally unfair to terminate respondent Roberson's parental rights on the basis of his failure to address these issues at a time when he did not know that his parental rights were at stake *and* the trial court did not yet have authority to order participation in services. The trial court did not assert jurisdiction over the child until June 30, 2008. At that time, the trial court did *not* order respondent Roberson to address these issues and did not notify him that his

parental rights were in jeopardy. Rather, the order of adjudication simply states that the prior visitation order is continued.

The initial dispositional order entered on July 30, 2008, states that the parents shall comply with and benefit from the case service plan and suspends respondent Roberson's visitation. However, the case service plan does not list any services available to respondent Roberson, and did not require him to do anything except obtain child care for his work-related absences and a supervisor for weekend visitation, even though the worker knew that respondent Roberson had lost his employment. In any event, even if the plan could be interpreted as ordering respondent Roberson to participate in services, he was not given a fair opportunity to comply because the termination petition was filed less than a week later. At the October 8, 2008, pretrial hearing, respondent Roberson's request for supervised visitation was denied, and the court again failed to order him to participate in services.²

We conclude that the termination proceeding against respondent Roberson was conducted in violation of his right to procedural due process, and that this error was "plain." The effect of this error on respondent Roberson's substantial rights is addressed in section II(B), *infra*.

II. Termination of Parental Rights

Both respondents argue that the trial court erred in finding that the statutory grounds for termination were established by clear and convincing evidence and that petitioner failed to make reasonable efforts toward reunification.

The existence of a statutory ground for termination must be proven by clear and convincing evidence. MCR 3.977(F)(1)(b) and (G)(3); *In re Miller*, 433 Mich 331, 344-345; 445 NW2d 161 (1989); see also MCL 712A.19b(1). The trial court's findings of fact are reviewed for clear error and may be set aside only if, although there may be evidence to support them, the reviewing court is left with a definite and firm conviction that a mistake has been made. MCR 3.977(J); *Miller, supra* at 337. Due regard is given to the trial court's special opportunity to judge the credibility of witnesses. *Id.*

The trial court terminated respondent Tucker's parental rights under MCL 712A.19b(3)(a)(ii), (g), and (j), but found that only §§ 19b(3)(g) and (j) were proven with respect to respondent Roberson. Those subsections allow a court to terminate parental rights under the following circumstances:

² On appeal, the prosecutor refers to an updated case service plan, unsigned parent-agency agreements, and two reunification assessments in support of its position that reasonable efforts at reunification were made with respect to respondent Roberson. These documents indicate that multiple services were provided to "the family," without distinguishing between the child's parents, her sibling's father, and the foster parents. Further, all of these documents are dated October 31, 2008, a week before the termination hearing, and approximately three weeks after the pretrial hearing. Thus, they cannot be deemed to meet the requirements of procedural due process or to constitute reasonable efforts toward reunification.

(a) The child has been deserted under any of the following circumstances

* * *

(ii) The child's parent has deserted the child for 91 or more days and has not sought custody of the child during that period.

* * *

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the age of the child.

* * *

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

MCL 712A.19a(2) requires that reasonable efforts toward reunification be provided in all cases except those specifically listed. In this case, petitioner does not argue that it was not obligated to make reasonable efforts toward reunification with respect to both respondents. Rather, it asserts that it complied with this statutory obligation.

A. Respondent Tucker

Respondent Tucker argues that because petitioner filed the termination petition less than a week after the initial dispositional order was entered, she was not afforded a reasonable opportunity to participate in or benefit from services. We disagree.

Although her initial participation in services was voluntary, respondent Tucker had been offered drug screens and supervised visitation since the first preliminary hearing. Despite her expressed willingness to participate in services, she failed to do so or keep in contact with the caseworker. Services were not provided before the jurisdictional trial, not because of petitioner's failure to offer them, but because respondent Tucker failed to make herself available.

After the jurisdictional trial, respondent Tucker submitted to some drug screens, and was allowed one supervised visit. Respondent Tucker then missed a screen, tested positive for alcohol, and tested positive for adulterants. At the initial disposition, respondent Tucker was again ordered to submit to random drug screens as a condition to supervised visitation and was also ordered to submit to a psychological evaluation, a substance abuse assessment, and to comply with the evaluators' recommendations. She was also ordered to attend counseling and parenting classes, and to obtain appropriate housing and employment. Respondent Tucker missed her next drug screen and tested positive for cocaine on August 1, 2008.

The termination petition was filed on August 5, 2008, but respondent Tucker was informed that she could continue to participate in services. Respondent Tucker thereafter failed to report for her drug screens, so they were cancelled. She appeared for the first part of her

substance abuse evaluation, but did not complete it, and did not participate in any other services. It was not until three months later, after the termination hearing started, that respondent Tucker signed up for parenting classes and GED classes. When the hearing concluded, she had not yet attended any sessions.

It is apparent from this record that respondent Tucker was offered the opportunity to participate in services since the beginning of this case, but chose not to participate. The record demonstrates that petitioner made reasonable efforts to reunify respondent Tucker with her child.

With regard to the statutory grounds for termination, the record shows that respondent Tucker failed to visit, attend any hearings, or have any meaningful contact with the agency for a 109-day period between February 22, 2008, and June 10, 2008. An attorney appeared on her behalf, and twice represented that respondent Tucker had transportation problems, but there was no explanation for her absence at two subsequent hearings, and no request for custody or visitation was made on her behalf. Her attorney last asked for visitation on March 3, 2008, but even that was 99 days before respondent Tucker's appearance at the jurisdictional trial.³ We conclude that there was clear and convincing evidence that respondent Tucker deserted the child for 91 or more days without seeking custody of the child during that period. The trial court did not clearly err in finding that termination of respondent Tucker's parental rights was appropriate under § 19b(3)(a)(ii).

With regard to § 19b(3)(g), the evidence showed that respondent Tucker never had employment, appropriate housing, or transportation. She missed many of her drug screens, and she tested positive for alcohol, cocaine, and adulterants during the 30-day period before the termination petition was filed. She also failed to complete her substance abuse evaluation, misrepresented her history of alcohol and drug use, and refused to admit that she had a substance abuse problem. She failed to attend her psychological evaluation. She visited the child only once, due to her failure to provide clean screens. Moreover, she was involved in various domestic violence episodes and non-domestic altercations, resulting in at least two arrests. She continued to violate the PPO that she obtained against respondent Roberson. She provided excuses for all of the failings identified by petitioner, and never made any progress on any of the problems identified. In addition, she did not sign up for parenting classes or GED classes until the termination hearing was underway. There was clear and convincing evidence that respondent Tucker failed to provide proper care for the child, and given her lack of progress, there was no reasonable expectation that she would be able to do so within a reasonable time considering the age of the child. Therefore, the trial court did not clearly err in finding that termination of respondent Tucker's parental rights was also appropriate under § 19b(3)(g).

Similarly, with respect to § 19b(3)(j), the evidence showed that when the child was removed from respondent Tucker's care, her apartment was filthy and unsanitary, and there was evidence of drug and alcohol use. Respondent Tucker never obtained appropriate housing. She continued to test positive for drugs, alcohol, and adulterants. At the time of the termination

³ Respondent Tucker spoke to a caseworker on the telephone sometime in March 2008, but there is no indication that she sought custody of the child at that time.

hearing, she was living with a man whose last name she did not recall. She continued to engage in altercations with others, resulting in two arrests. She continued to maintain contact with respondent Roberson, despite the PPO. She never meaningfully participated in services or otherwise addressed any of the issues identified by petitioner. The trial court did not clearly err in finding that the child was reasonably likely to be harmed if placed in respondent Tucker's home, thereby justifying termination of respondent Tucker's parental rights under § 19b(3)(j).

For these reasons, we affirm the trial court's order terminating respondent Tucker's parental rights to the minor child.

B. Respondent Roberson

As explained in section I, *supra*, petitioner had an obligation to make reasonable efforts to reunify the child with respondent Roberson, even if he was the noncustodial parent, particularly when it became clear that respondent Tucker was not making progress. See *In re Rood*, *supra* at 119-122. However, the only services offered were the single initial drug screen, a home assessment, supervised visitation at the agency, and contact with the caseworker. No other services were offered to respondent Roberson because he was not initially made a respondent. In particular, he was not offered services to address any of the issues identified by the agency, i.e., domestic violence, parenting skills, lack of family support, and lack of an appropriate child care plan, despite his many telephone calls expressing interest in visiting and caring for the child. Thus, we conclude that petitioner violated its statutory duty to make reasonable efforts to reunify the child with respondent Roberson. Further, as more fully discussed below, we conclude that the effect of this violation precluded a finding that the statutory grounds for termination were proven by clear and convincing evidence. See *id.* at 89.

With regard to § 19b(3)(g), the evidence showed that respondent Roberson left the child alone on the night that the child was taken into care, visited her only once, and failed to provide a child care plan for when he worked out of town. Respondent Roberson also declined to appear in court after his attorney was dismissed, had a history of domestic violence, maintained a relationship with respondent Tucker, routinely violated the PPO, and showed no insight into the long-term effects of domestic violence on children. Thus, we agree that there was clear and convincing evidence that respondent Roberson failed to provide proper care for the child.

However, respondent Roberson was not offered services to address any of these issues. Lack of contact and support is not automatic grounds for termination; it is evidence of neglect. *Id.* at 113, 114-117. “[A] showing of neglect, alone, merely triggers a parent’s right to participate in services. It does not automatically justify termination.” *Id.* at 114. “Moreover, . . . the statutory scheme does not relieve the state of its responsibility to make reasonable efforts toward reunification with a parent merely because, as here, that parent has a history of . . . violence toward adults.” *Id.* at 118.

In the present case, there was no evidence that respondent Roberson ever harmed the child, his home was found to be appropriate, and the caseworker had no concerns during his single visit with the child. Further, respondent Roberson was successfully caring for other children, including a two-year-old child who was present during the termination hearing, who the trial court noted was remarkably well behaved. Respondent Roberson lost his job as an over-the-road truck driver and was looking for local employment, obviating the need to provide overnight

day care for the child. Considering petitioner's violation of its statutory duty to make reasonable efforts toward reunification against this backdrop, the evidence did not enable the trial court to find by clear and convincing evidence that respondent Roberson, if provided with appropriate services, would not have been able to provide proper care and custody within a reasonable time. See *In re Rood, supra* at 114-117. Therefore, the trial court clearly erred in finding that termination of respondent Roberson's parental rights was warranted under § 19b(3)(g).⁴

With regard to § 19b(3)(j), the evidence again showed that respondent Roberson left the child alone on the night she was taken into care, had a history of domestic violence, maintained a relationship with respondent Tucker, routinely violated the PPO, and had no insight into the long-term effects of domestic violence on children. Conversely, there was no evidence that respondent Roberson ever harmed the child, his home was found to be appropriate, and he was successfully caring for other minor children. As the Court recognized in *In re Rood, supra* at 118, a trial court "thwart[s] the statutory scheme by presuming that [a] respondent was a danger to [the child] on the basis of his criminal history when that history did not include any of the enumerated offenses." *Id.* at 118. Here, petitioner had a duty to provide services to respondent Roberson even if he had a history of domestic violence, showed little insight, and espoused the view that children should be placed with their mothers. Petitioner's violation of its statutory duty to make reasonable efforts toward reunification again precludes a finding that there is a reasonable likelihood that the child would be harmed if placed in respondent Roberson's home. *Id.* at 114-117. Therefore, termination of respondent Roberson's parental rights was also improper under § 19b(3)(j).

For these reasons, we reverse the order terminating respondent Roberson's parental rights and remand for further proceedings not inconsistent with this opinion.

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra

⁴ We note that the supplemental termination petition did not request termination of respondent Roberson's parental rights under § 19b(3)(g). However, respondent Roberson does not argue that it was improper for the trial court to consider § 19b(3)(g) for that reason.