# IN THE MICHIGAN SUPREME COURT

**Appeal from the Michigan Court of Appeals**
**SHAPIRO, P.J., and M. J. KELLY and O'BRIEN, JJ.**

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In re J Ferranti, Minor.

Supreme Court No.
Court of Appeals Nos. 340117; 340118
Otsego County Circuit Court
Family Division
LC No. 13-000071-NA

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## APPLICATION FOR LEAVE TO APPEAL

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## STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Appellants, Michael and Susan Ferranti, appeal the trial court's order terminating their parental rights to their fourteen-year-old daughter, Jessica. In doing so, the trial court committed multiple errors, each of which requires reversal. First, the court violated the Ferrantis' due process rights by accepting their adjudicatory plea without advising them of any of the rights they were waiving, as required by MCR 3.971(B). Next, it directly violated the Court of Appeals' ruling in *In re HRC*, 286 Mich App 444; 781 NW2d 105 (2009), by privately interviewing Jessica in chambers without creating a transcript of the conversation. Finally, it exceeded its statutory authority by visiting the Ferrantis' home so that it could personally observe the conditions of the home, a disputed issue in the case. Again, it failed to keep any record of its observations.

Despite these plain errors, the Court of Appeals still affirmed the trial court's decision, refusing to even address the first two issues noted above. *In re Ferranti*, unpublished opinion per curiam of the Court of Appeals, issued May 10, 2018 (Docket Nos. 340117, 340118), Attach. A. Citing this Court's decision in *In re Hatcher*, 443 Mich 426; 505 NW2d 834 (1993), it refused to address the Ferrantis' claim of adjudicatory error, finding that the claim was barred by the collateral attack doctrine. *Id.* at 6. And because the Ferrantis did not object to the private, chambers interview of Jessica, it failed to address that claim as well, even under the plain error standard. *Id.* at 9. It found that the Ferrantis' "waiver extinguished any error." *Id.*

The Court did review the third error in the case, and while it acknowledged that the trial court plainly erred by visiting the home, it ruled that this error did not affect the Ferrantis' substantial rights. *Id.* at 8-9. It reached this conclusion despite the trial court's concession that this case was a "closer decision than the usual," and the fact that it explicitly relied on the improper home visit in its termination of parental rights ("TPR") opinion. Opinion and Order dated 8-7-17, at 6, 7, Attach. B. ("[E]ven when the Court viewed the situation, it is not where a person with Spina Bifida will thrive."). Its reliance on its personal observations were particularly harmful given the fact that there was conflicting testimony on the condition of the home, in which the Ferrantis still lived with their other children, and in which Jessica had unsupervised parenting time until the TPR petition was filed. Without a doubt, the trial court's multiple errors prejudiced the Ferrantis and affected their substantial rights.

The Court of Appeals' decision was clearly erroneous and will cause material injustice if it stands. MCR 7.305(B)(5)(A). But two jurisprudentially significant reasons – both relating to the need to ensure that appellate courts meaningfully review potential errors in TPR appeals – exist for this Court to grant this Application. MCR 7.305(B)(3). First, this case presents this Court with the opportunity to clarify whether *In re Hatcher*, 443 Mich at 426, is still good law, and if so, whether it should prevent appellate courts from reviewing due process errors that occurred at the adjudicatory stage in TPR appeals. MCR 7.305(B)(3). This Court has wrestled with this issue for many years – in which it has issued

conflicting rulings – and the issue still remains unresolved. See, e.g., *In re Mays*, 490 Mich 993, 994 n 1; 807 NW2d 304 (2012) (inviting parent to challenge adjudicatory errors at the post-dispositional stage); *In re Hudson*, 483 Mich 928; 763 NW2d 618 (2009) (reversing TPR because trial court failed to properly advise parent before accepting adjudication plea); *In re Mitchell*, 485 Mich 922; 773 NW2d 663 (2009) (same); *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014) (allowing parent to challenge adjudicatory errors in post-dispositional appeal); *In re Jones*, 499 Mich 862; 874 NW2d 129 (2016) (vacating adjudication and TPR orders because the trial court failed to properly adjudicate the parent). But see *In re Hill*, ___ Mich ___; ____ NW2d ____ (2018) (Docket No. 155152) (leaving undisturbed Court of Appeals' decision precluding parent from challenging adjudicatory error in TPR appeal).

Relying on this confusion, the Court of Appeals has also issued conflicting rulings, which has meant that a parent's ability to raise these types of errors on appeal hinges on the panel he or she draws. See, e.g., *In re Kanjia*, 308 Mich App 660; 866 NW2d 862 (2014); *In re Collier*, 314 Mich App 558; 887 NW2d 431 (2016); *In re Alston*, unpublished decision per curiam of the Court of Appeals, issued March 17, 2016 (Docket No. 328667), Attach. C.; *In re Guido-Seger*, unpublished opinion per curiam of the Court of Appeals, issued February 7, 2017 (Docket No. 333529), Attach. D. (app pending) (all permitting parents to challenge adjudicatory errors in TPR appeals). But see *In re Gazella*, 264 Mich App 668; 692 NW2d 708 (2005) (finding that a parent can only challenge an adjudicatory error in a direct appeal of

the initial dispositional order).[1] This Court should use this opportunity to overrule *In re Hatcher* and allow appellate courts to review adjudicatory errors in TPR appeals.

Second, the case presents an opportunity to articulate the standard to determine when a parent in a TPR appeal has waived an issue such that an appellate court cannot review the issue, even under the plain error standard. Neither this Court, nor the Court of Appeals has ever addressed this issue. Here, the Court of Appeals refused to review the Ferrantis' claim that the trial court had violated their rights by privately interviewing Jessica in chambers. *In re Ferranti*, unpub op at 9, Attach. A. The Court found that the Ferrantis had waived their right to raise the issue by agreeing to the interview, even though the trial court never disclosed how the interview would be conducted, who would be present and whether a record of the interview would actually be kept. Despite the trial court's failure to disclose these material facts, the Court of Appeals still deemed the issue waived and did not analyze the merits of the claim.

In contrast, in *In re HRC*, 286 Mich App at 444, the Court of Appeals – applying the plain error standard – allowed the parents to challenge the private, chambers interview of the child even though they never objected to the interview at

[1] Illustrative of this confusion, two members of the panel in this case – Judges O'Brien and Kelly – sat on the panel in *Guido-Seger*, in which they permitted the parent to challenge an adjudicatory error in a TPR appeal. *In re Guido-Seger*, unpub op at 3, Attach. D. ("The Michigan Supreme Court has since held that such a challenge may be permissible when 'the manner in which the trial court assumed jurisdiction violated the [respondent's] due process rights.'"). But here, they refused to do so and did not acknowledge the conflict in their rulings.

the trial court. *In re HRC*, 286 Mich App at 450. And after evaluating the claim, the Court of Appeals reversed the TPR decision, finding that "the use of an unrecorded and off the record in camera interview in the context of a juvenile proceeding, for whatever purpose, constitutes a violation of parents' fundamental due process rights." *In re HRC*, 286 Mich App at 456-457. This Court should take this case to clarify that due to the fundamental rights involved in TPR appeals, appellate courts should only deem an issue waived when a parent has been fully informed of the rights they are permanently waiving. This approach would comport with waiver doctrine in other areas of the law. See, e.g., *Johnson v Zerbst*, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938) (finding that a person only waives a right when she intentionally relinquishes a known right). In this case, given the fact that the parents were never informed of the specifics of the unlawful interview, the Court of Appeals should have analyzed the claim using the plain error doctrine, as it did in *HRC*.

Because of the multiple errors in this case, the Ferrantis ask this Court to grant this Application and reverse both the trial court's adjudication and TPR decisions. Additionally, because the trial court exceeded its authority and received inadmissible evidence when it visited the home and privately interviewed Jessica, the Ferrantis ask that this matter be assigned to a different judge on remand.

## STATEMENT OF QUESTIONS PRESENTED

I. A trial court violates the due process rights of parents when it fails to advise them of their procedural rights, set forth in MCR 3.971, before accepting an adjudicatory plea. See, e.g., *In re Wangler*, 498 Mich 911; 870 NW2d 923 (2015); *In re Mitchell*, 485 Mich at 922; *In re Hudson*, 483 Mich at 928. Here, the trial court failed to advise the Ferrantis of any of their rights before accepting their plea. Did the trial court violate the Feranntis' due process rights?

The Court of Appeals did not answer this question, citing this Court's ruling in *In re Hatcher*, 443 Mich at 426.
Appellants answer yes.

II. *In re Hatcher*, 443 Mich at 426, extended the collateral attack bar to prevent parents in child protective proceedings from challenging adjudicatory errors in TPR appeals. But unlike the cases relied upon by *Hatcher*, adjudication and TPR proceedings are not separate cases, but are part of a "single continuous proceeding." *In re LaFlure*, 48 Mich App 377, 391; 210 NW2d 482 (1973). Consistent with this, both this Court and the Court of Appeals, despite *Hatcher*, have permitted parents to challenge due process errors in the adjudicatory process in TPR appeals. See, e.g., *In re Jones*, 499 Mich at 862; *In re Mitchell*, 485 Mich at 922; *In re Hudson*, 483 Mich at 928; *In re Collier*, 315 Mich App at 558. Yet, in this case, the Court of Appeals, citing *Hatcher*, refused to address whether the trial court had violated the Ferrantis' due process rights at the adjudicatory stage. Should this Court overrule *In re Hatcher*?

The Court of Appeals could not answer this question.
Appellants answer yes.

III. The Court of Appeals found that the trial court plainly erred by visiting the Ferrantis' home, because the trial court lacked any statutory authority giving it the right to do so. Nevertheless, the Court found that the error did not affect the Ferrantis' substantial rights, even though the trial court noted that the case was a "closer decision than the usual," kept no record of its observations, and relied on the visit in its TPR decision. Did the Court of Appeals err in finding that the trial court's plain error did not affect the Ferrantis' substantial rights?

The Court of Appeals answered no.
Appellants answer yes.

IV. The Court of Appeals refused to address the Ferrantis' claim that the trial court had violated *In re HRC*, 286 Mich App at 444 by privately interviewing Jessica in chambers without creating a transcript. Instead, it found that the parents had waived the issue by agreeing to the interview. But the trial court never told the Ferrantis how the interview would be conducted, who would be present, and whether a record of the interview would actually be kept. In fact, the court did not even tell the father's attorney that the interview had happened. Did the Court of Appeals err in finding that the Ferrantis had waived their right to appellate review of this issue?

The Court of Appeals answered no.
Appellants answer yes.

## STATEMENT OF JURISDICTION

This is an application for leave to appeal after a decision by the Michigan Court of Appeals. This Court has jurisdiction pursuant to Const 1963, art 6, §4; MCL 600.212; MCL 600.215(3); and MCR 7.301(A)(2) to review by appeal a case after a decision by the Court of Appeals.

On May 10, 2018, the Court of Appeals affirmed the trial court's decision terminating the parental rights of Michael and Susan Ferranti. *In re Ferranti,* unpub op, Attach. A. This timely application is being filed within 28 days of the Court of Appeals' decision. MCR 7.302(C)(2).

## STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

### I. Background

Jessica Ferranti is the 14-year-old daughter of Michael and Susan Ferranti. For most of her life, she has been diagnosed with spina bifida, chronic kidney disease, Attention Deficit Hyperactivity Disorder, and a neurogenic bladder. 10-29-15 Tr. at 9. Jessica's spina bifida has left her unable to walk without the assistance of a walker, and she often uses a wheelchair. In addition, these conditions require Jessica to empty her bladder, with a catheter, every two hours. Even with perfect care, Jessica will likely need dialysis and a kidney transplant at some point in her life.

Jessica has required medical supervision for her entire life. When Jessica was born, doctors admitted her into the Neonatal Intensive Care Unit. 6-20-17 Tr. at 43. She has undergone multiple orthopedic surgeries related to spina bifida, and has required a bladder augmentation to increase her bladder size. Letter From Doctor re: Jessica Medical Visit dated 11-3-15. Jessica has regular nephrology appointments to ensure that her kidneys are still functioning properly. She also has a high risk of urinary tract infections, which her spina bifida makes difficult to detect. Letter From Doctor re: Jessica Medical Visit dated 11-3-15.

Jessica was raised in Gaylord, Michigan, living with her parents, older brothers Austin and Nick, now 21-years-old and 19-years-old respectively, and 16-year-old sister Kimberly. Every day, Jessica takes prescription and over-the-counter medication for her conditions. Every night, she wears a pull-up diaper to

prevent urine leaks. As a young child, she was unable to bathe herself or provide other self-care. As Jessica has matured, however, she has taken on a much more active role in her treatment and daily hygiene. 10-18-16 Tr. at 36.

In October 2013, the Department of Health and Human Services ("the Department" or "DHHS") investigated allegations that Mr. and Mrs. Ferranti had neglected Jessica and her three siblings due to the cleanliness of their home. 10-29-15 Tr. at 14. The Department removed all four children from the home and placed them in foster care, while it provided Mr. and Mrs. Ferranti with a treatment plan. 5-10-17 Tr. at 34-36. Eleven months later, the Department and the court, satisfied with the Ferrantis' progress, closed the case and returned all four children home. *Id.* at 36.

## II. Procedural History

### A. Removal

On October 29, 2015, the Department filed a second petition to remove just Jessica from the home. 10-29-15 Tr. at 9. It alleged that Mr. and Mrs. Ferranti had neglected Jessica by showing a "lack of follow-through on [her] medical needs." *Id.* at 9. It did not, however, petition to remove any of Jessica's siblings from the home. At all times during this case, Jessica's siblings remained at home with their parents.

In its petition, the Department alleged that Jessica had frequently missed doctor's appointments and that the Ferranti home was unsuitable for a child with

Jessica's medical needs. *Id.* That day the court held an emergency hearing. *Id.* at 1.

At that hearing, Amy Croff, the Department's case worker assigned to investigate the matter, testified and described the Ferranti home as cluttered, "smell[ing] strongly of urine," with "cat feces on the hallway floor." *Id.* at 11-12. Following this testimony, the court removed Jessica from her home, and placed her in foster care. *Id.* at 25. But the court still allowed Jessica to visit the Ferrantis and her siblings – without any supervision – in their home. 10-29-15 Tr. at 24-25. In fact, Jessica's unsupervised visits with her family continued until March 2017, when the Department filed its petition to terminate parental rights. Updated Case Service Plan dated 5-10-17, at 5.

At the preliminary hearing, the court also instructed Jessica's lawyer-guardian ad litem, David Delaney, to inspect the Ferranti home. 10-29-15 Tr. at 21-24. Within a week, Mr. Delaney visited the home. 11-3-15 Tr. at 4. In contrast to Ms. Croff's testimony, Mr. Delaney concluded that the house was both habitable and suitable for Jessica. *Id.* at 5. He testified that he found no feces on the floor, and that the home had, at most, a "light odor." *Id.* at 4. In addition, the court heard from Catherine Bragg, a physical therapist who had worked with Jessica at a physical rehabilitation center. Ms. Bragg also disputed the Department's opinions from the initial hearing. She explained that Jessica's hygiene skills were normal when compared with the other developmentally disabled children she treated. *Id.* at 10. Ms. Bragg further noted that Mr. and Mrs. Ferranti took "extremely" good

care of Jessica. *Id.* at 10-11. She recalled that Jessica's brother Austin came with the family to Jessica's appointments, where he would "carry her and move the wheelchair . . . to make it easier because of her needs." *Id.* at 10. Finally, she testified that the Ferrantis brought Jessica to the vast majority of her 37 rehabilitation appointments, and always called to reschedule the few appointments they cancelled. *Id.* at 11.

Following this new testimony, the court still declined to return Jessica to her parents. 11-3-15 Tr. at 17. The court explained that it had ongoing "concern[s] on [Jessica's] medical items," which needed to be resolved. *Id.* at 17. It noted, however, that "if [the home's cleanliness] was the only issue, we wouldn't be [here]." *Id.*

Two weeks later, the court held yet another preliminary hearing to evaluate Mr. and Mrs. Ferranti's ability to meet Jessica's medical needs. 11-17-15 Tr. at 5. Michelle Mills, a nurse at the C.S. Mott Children's Hospital, testified for the Department. *Id.* at 3. She explained that she had two concerns regarding Jessica's medical care. *Id.* at 6-11. First, she noted that the Ferrantis had missed three of Jessica's recent doctor's appointments. *Id.* at 7. Second, she believed that Mr. and Mrs. Ferranti had fallen behind in refilling Jessica's prescriptions. *Id.* Ms. Mills acknowledged, however, that "it's hard to say with certainty" whether the Ferrantis had actually fallen behind. *Id.* at 8. She further admitted that Jessica suffered no negative effects from her three missed appointments. *Id.* at 12. Again, the court

declined to return Jessica to her parents, and instead found probable cause to continue the proceedings. *Id.* at 44-45.

### B. Michael and Susan Ferranti's Plea

The court held a pre-trial hearing on December 21, 2015. At this hearing, the court accepted admissions by the Ferrantis without advising them of any of the rights they were waiving. Both Michael and Susan Ferranti agreed to the following admission, as read by the court:

> Jessica has spina bifida, a medical condition that renders her unable to walk without assistance of a walker. Jessica can also get around . . . with the use of a properly fitted wheelchair, and also has been known to scoot or crawl on the ground. She is also diagnosed with chronic kidney disease and neurogenic bladder. These diagnoses make it inevitable that Jessica will need dialysis and a kidney transplant in the future, but proper medical treatment will prolong this need. As a result of her medical conditions, Jessica has to be catheterized regularly on a schedule and in a sterile and hygienic environment. As a result of these medical diagnoses, Jessica has various medications and doctors' appointments that must be followed up on.

12-21-15 Tr. at 7. In addition, both Mr. and Mrs. Ferranti agreed that:

> Walgreens' records indicated that Jessica's 30-day supply of ADHD medication was filled on January 16th and May 6th of 2015. Rite Aid indicated that Jessica's Detrol medication was filled on January 6th, 2015, and her vitamin D was filled on January 6th, 2015. Her sodium bicarbonate, iron, and vitamin D prescriptions could all be filled free of charge to Medicaid, as opposed to paying for them out of pocket.

*Id.* at 8. The Ferrantis admitted to no other facts or allegations. They made no admissions to their home's cleanliness, or to any failure to meet Jessica's medical needs. But from these admissions, the court determined that it had "a factual basis . . . to take jurisdiction" of Jessica. *Id.* at 9.

But prior to accepting these admissions, the court never advised the Ferrantis of any of the rights they were waiving, including their rights to a trial, to have the Department prove the allegations in the petition, to have witnesses testify on their behalf, and to cross examine the Department's witnesses, all required by MCR 3.971(B). Nor did the court advise the Ferrantis of any of the consequences of entering a plea, including the fact that the plea could later be used against them in TPR proceedings.

Nevertheless, the court still accepted the admission and assumed jurisdiction of Jessica. After the hearing, the court did not advise the Ferrantis of their right to appeal its decision to assume jurisdiction of Jessica.

### C. The Family Treatment Plan

The court held a dispositional hearing on January 12, 2016. There, the Department proposed a parent–agency treatment plan for the Ferrantis, which the court adopted. Order of Disposition dated 1-12-16, at 5. This plan required the Ferrantis to complete psychological evaluations, provide a clean home for Jessica, and meet Jessica's medical needs. Parent Agency Treatment Plan dated 1-11-16, at 3. As part of this plan, Wellspring Lutheran Services, the agency overseeing Jessica's foster care, assigned case-manager Michele Klein to work with Mr. and Mrs. Ferranti. *Id.* at 3. Specifically, Ms. Klein was responsible for arranging for an in-home service provider to meet with the Ferrantis, help the Ferrantis maintain a clean home, and assist in scheduling Jessica's medical appointments. *Id.* Ms. Klein also had to provide the court with updates on both Jessica's life in foster care, and

Mr. and Mrs. Ferranti's progress with their treatment plan. *Id.* In addition to ordering the Ferrantis to comply with their treatment plan, the court scheduled a review hearing to monitor their progress. Order of Disposition dated 1-12-16.

At the April review hearing, Ms. Klein admitted that Wellspring had not provided the family with full support services. 4-12-16 Tr. at 4. Instead, Wellspring placed the Ferrantis on a waiting list, which delayed their treatment. *Id.* Because of this delay, she could not provide a complete update on the Ferrantis' progress, and the court scheduled a new review hearing for July. *Id.* at 8.

In July, Ms. Klein explained that, for the most part, Jessica was doing well in foster care. 7-12-16 Tr. at 4. Ms. Klein acknowledged, however, that Jessica was having serious trouble in school. *Id.* at 4-5. While in foster care, Jessica was failing three classes, had a D in English, and had not submitted 20 different assignments. Updated Parent Agency Treatment Plan dated 3-28-16, at 6.

At this hearing, the court also learned that the Ferrantis had complied with their requirement to undergo psychological evaluations. 7-12-16 Tr. at 4-5. Both Mr. and Mrs. Ferranti met with Timothy Strauss, a limited licensed psychologist, who completed the evaluations. Evaluation of S. Ferranti dated 4-13-16; Evaluation of M. Ferranti dated 4-14-16. Mr. Strauss noted that Mrs. Ferranti had pulmonary fibrosis, which caused her to have significantly reduced lung capacity. 5-10-17 Tr. at 10. He believed that Mrs. Ferranti's condition could impact her ability to care for Jessica, but noted that she was at a "low risk for physical abuse." *Id.* at 14.

Mr. Strauss also evaluated Mr. Ferranti. He testified that Mr. Ferranti had a chronic back condition, but was "not overwhelmed with parenting [Jessica]." *Id.* at 26. Mr. Strauss concluded his report with two recommendations. First, he recommended that both Mr. and Mrs. Ferranti undergo counseling to address their parenting skills. Evaluation of S. Ferranti dated 4-13-16, at 8; Evaluation of M. Ferranti dated 4-14-16, at 8-9. Second, he believed that the Ferrantis' unsupervised visits with Jessica should continue, as "it didn't appear that there was any significant risk of physical or emotional abuse." 5-10-17 Tr. at 17.

Three months later, at an October 18, 2016 review hearing, Ms. Klein reported that Wellspring had terminated the Ferrantis' Family Support Services because "they didn't make any progress," and "the condition of [their] home did not change over the course of [their] program." 10-18-16 Tr. at 6. She acknowledged, however, that over the past year, Mr. and Mrs. Ferranti had attended all of Jessica's medical appointments. *Id.* at 20-21. In addition, Ms. Klein admitted that the Ferrantis had cleaned Jessica's bedroom before a scheduled inspection in September, and that it was still clean during an unannounced inspection three weeks later. *Id.* at 7. She further noted that the Ferrantis kept their house cleaner throughout the previous month, and that the home "as it stood [now]," was appropriate for Jessica. *Id.* at 13-14.

Still, Ms. Klein maintained that Wellspring could provide no further services to the Ferrantis, and recommended the termination of their parental rights. *Id.* at 10. She explained that, although the Ferrantis had cleaned Jessica's bedroom, they

had not cleaned Jessica's bathroom. *Id.* at 7. When pushed, however, Ms. Klein admitted that, based on her most recent visit to the Ferranti home, "the bathroom was cleaner than it was before," and was now acceptable for Jessica. *Id.* at 24-25.

Mr. Delaney, the lawyer-guardian ad litem, also inspected the home again. He agreed that the home was acceptable for Jessica. *Id.* at 46-47. Moreover, he concluded that the Ferranti home "just [has] an older bathroom," not a dirty one. *Id.* at 46. The court, however, still authorized the Department to file a petition to terminate the Ferrantis' parental rights. *Id.* at 48.

Following the conflicting descriptions of the Ferranti home, the court informed the parties that it wanted to view the home. *Id.* at 49. It explained that viewing the home "would really help [] in this case." *Id.* at 49-50. In two later hearings, the court repeated that it would visit the home. 12-6-16 Tr. at 2; 1-10-17 Tr. at 8. The court also clarified that it "wanted to see the premises" because "that's a crucial issue in this [case]." 1-10-17 Tr. at 8. In February 2017, the court visited the Ferranti home. Updated Case Service Plan dated 5-10-17, at 2. The court, however, created no record of the visit, and did not otherwise document its findings in any way.

On November 9, 2016, the Department petitioned for the termination of Mr. and Mrs. Ferranti's parental rights to Jessica under MCL 712A.19b(3)(c)(i) and MCL 712A.19b(3)(g). Supplemental Petition to Terminate Parental Rights date 11-9-16. The Department claimed that the "conditions which led to the adjudication" – the Ferrantis' alleged inability to meet Jessica's medical needs – "continue[d] to

exist" without a "reasonable likelihood that they'll be rectified within a reasonable time." *Id.* It further claimed that the Ferrantis "failed to provide proper care" for Jessica and were unlikely to do so "within a reasonable time." *Id.*

Soon after the Department filed its petition to terminate the Ferrantis' parental rights, the court modified its original visitation order. Order After Dispositional Review dated 1-10-17. Although Jessica had enjoyed these unsupervised visits without incident for over a year, the court now gave the Department the "discretion to allow unsupervised or supervised parenting time." *Id.* Two months later, the Department indefinitely suspended all visitation between Jessica and her parents. A month later, the court partially reinstated the Ferrantis' parenting time with Jessica, now requiring Department supervision. Order After Continued Motion Hearing Regarding Unsupervised Parenting Time dated 4-18-17, at 1.

**D. Termination of Parental Rights Hearing**

The TPR hearing began on May 10, 2017. The Department called several witnesses who worked with the Ferranti family years earlier. Christina Pudvan, the Ferrantis' foster care worker in 2014, testified about Jessica's wellbeing. 5-10-17 Tr. at 35-40. She admitted, however, that she lacked any "personal knowledge of the [current] condition [of the home]." *Id.* at 46. She further admitted that she "had not personally observed anything [in the case]" since 2014. *Id.* at 48.

In addition, Lisa Matthias, a Child Protective Services employee, also testified about the condition of the Ferranti home. *Id.* at 53. But she too admitted

that she had had no contact with the Ferrantis, and had not seen their home in over four years. *Id.* at 58.

The Department also called Ms. Klein to testify. During her testimony, she recalled a conversation with Jessica's doctors. In this conversation, doctors explained that Jessica would have "some sort of [urine] leakage [for the rest of her life]," even with proper treatment and catheterization. *Id.* at 79. Ms. Klein further acknowledged that Jessica has shown a "growing attention to" her hygiene and self-care. *Id.* at 82.

Finally, the Department called Katherine Vroman, a Wellspring Family Support worker assigned to the Ferrantis. *Id.* at 90. Beginning in March 2016, she visited the Ferranti home every week in order to "create a . . . safe, clean, and healthy environment for the family," and "make schedules [to] meet [Jessica's] medical needs." *Id.* at 92. She also provided the Ferrantis with "some cleaning supplies and totes and things to help organize the home." *Id.* at 93. She testified that, during one visit, she had helped the Ferrantis clean their home, and admitted that they maintained the cleanliness "fairly well." *Id.* Ms. Vroman also testified that the Ferrantis had kept all of their scheduled appointments from March 2016 until June 2016, when Mrs. Ferranti became ill and was hospitalized. *Id.* at 95. Ms. Vroman would not rule out that the Ferrantis could still benefit from further in-home services. *Id.* at 96. Still, Wellspring terminated the Ferrantis' treatment plan. *Id.* at 95.

Following this testimony, the court stated that it was "inclined to speak to Jessica," but did not specify how the interview would be conducted. 6-20-17 Tr. at 45. While neither parent objected to the interview, on the final day of the termination hearing, Mr. Ferranti's attorney asked whether the court still planned to interview Jessica. 7-5-17 Tr. at 15. The court informed the attorney that it had already privately spoken with Jessica, and would consider that conversation in its ruling. *Id.* at 15; 30. But the court created no transcripts or recordings of this conversation, and neither of the Ferrantis' lawyers were present during the conversation.

Jessica's parents and sister also testified during the termination hearing. Mr. Ferranti described the family's visits with Jessica. He said that at these visits, Jessica immediately "comes up to me and gives me a hug." 6-20-17 Tr. at 12. He described how Jessica's brothers "just hug up on her," and how Mrs. Ferranti spends the entire visits with Jessica "glued right next to her." *Id.* He also noted that Jessica's brothers bought an expensive vacuum cleaner for the family, to help keep the house cleaner. *Id.* at 26. In addition, her sister, Kimberly, described Jessica's bond with the family. She explained how she started attending Jessica's medical appointments to learn about helping with Jessica's care. *Id.* at 39-40. When asked about her relationship with Jessica, Kimberly replied "of course it's very strong. I mean, if I were to lose my baby sister, it'd be really hard on me and it's not something I'm prepared for." *Id.* at 40. She then shared stories of painting Jessica's fingernails, playing with make-up, and changing each other's hairstyles

during Jessica's visits. *Id.* at 42-43. Finally, Mrs. Ferranti testified about Jessica's relationship with her two brothers. She noted that Jessica's siblings "all love Jessica more than anything," and that everyone "falls over backwards to make sure Jessica has what she needs." *Id.* at 44. She recalled that, when Jessica was born and placed into the Neonatal Intensive Care Unit, Jessica's then five-year-old brother Nick "scrubbed for 15 minutes and put on everything that he needed to see his sister." *Id.* at 43. She also explained that both brothers were saving money to take Jessica on a trip to a jellybean factory that she was hoping to visit. *Id.*

At the conclusion of the testimony, the court noted the difficulty of the decision it had to make. It stated, "Often I know where I am going on a case. This is not one of those cases." 7-5-17 Tr. at 30. The court further noted "it's not clear – on the clear and convincing evidence for whether or not it is in her best interest," observing that it was "very unusual for an intact family to be here and for the State to be seeking the termination of parental rights on a child in an intact family that in many ways is going well." *Id.*

**E. Order Terminating Parental Rights**

On August 7, 2017, the court terminated Michael and Susan's parental rights to Jessica, again noting that it was a "closer decision than the usual" and "one of the tougher decisions the Court has faced." 8-7-17 Tr. at 6, 7. Still, the court relied on testimony from caseworkers who had not been involved with the Ferrantis' treatment in three years. *Id.* at 3-4.

The court also relied on its own inspection of the Ferranti home. It determined that, based on "the Court['s] view [of] the [house]," the Ferranti home was "not where a person with Spinal [*sic*] Bifida will thrive." *Id.* at 7. The court found by clear and convincing evidence that "there was no reasonable likelihood that [the conditions in the home] would be rectified anytime soon." *Id.* at 6.

In addition, the court found by clear and convincing evidence that it was in "Jessica's best interest for her parents' rights to be terminated." *Id.* at 6-7. Although the court noted that Jessica was bonded with her family, it determined that the Ferrantis would not be able to provide her the constant attention that she needed. *Id.* at 7.

## ARGUMENT

### I. The Trial Court Violated The Ferrantis' Due Process Rights By Failing To Advise Them Of The Consequences Of Their Adjudication Plea.

***Standard of Review***

This Court reviews unpreserved statutory and constitutional challenges for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). Moreover, this Court will reverse a trial court's decision when it finds that a lower court's error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 772.

***Argument***

The trial court violated Mr. and Mrs. Ferranti's due process rights by failing to advise them of the consequences of their adjudicatory plea. In a child protective proceeding, the State must "provide the parents with fundamentally fair procedures," before it "moves to destroy . . . familial bonds." *Santosky v Kramer*, 455 US 745, 753–754; 102 S Ct 1388; 71 L Ed 2d 599 (1982). An adjudication trial is particularly important in this respect, because "[t]he procedures used in adjudicative hearings protect the parents from the risk of erroneous deprivation of their parental rights." *In re Sanders,* 495 Mich 394, 406; 852 NW2d 524 (2014)(citing *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993)). Thus, when parents enter into an adjudicatory plea, they are waiving their constitutional right to an adjudication trial to determine their parental unfitness. See *In re Sanders*, 495 Mich at 423 ("[D]ue process requires a specific adjudication of a parent's

unfitness before the state can infringe the constitutionally protected parent-child relationship."). After a proper adjudication, a parent's unfitness is presumed and the focus of the case shifts to what services and requirements will serve the best interests of children. *Id.* at 418.

Because a parent has a constitutional right to an adjudication trial, a trial court can only accept an adjudicatory plea after it ensures that the plea is "knowingly, understandingly, and voluntarily made." MCR 3.971(C)(1); see also *Johnson v Zerbst*, 304 US at 464 (finding that a person only waives a constitutional right when she intentionally relinquishes a known right). Thus, when a trial court adjudicates a parent without satisfying the "knowingly, understandingly, and voluntarily" requirement, it "violate[s] the respondent-[parents'] due process rights." *In re Wangler*, 498 Mich at 911.

To ensure that a plea is knowingly, understandingly and voluntarily made, a trial court must "advise the respondent on the record" of the "allegations in the petition," as well as which rights they are waiving, before accepting an adjudicatory plea. MCR 3.971(B). The court cannot accept a plea unless it first advises the respondents that they will surrender their rights to a trial by a judge or jury, to have the Department prove its allegations by a preponderance of the evidence, to have witnesses appearing against them testify under oath, to cross-examine witnesses, to subpoena their own witnesses, and that the plea can later be used as evidence to terminate parental rights. MCR 3.971(B)(3-4). These rights are crucial

in ensuring that parents understand the constitutional right they are going to waive.

A trial court's failure to properly advise a parent of the rights they are waiving constitutes plain error. *In re Hudson*, 483 Mich at 928; *In re Mitchell*, 485 Mich at 922; *In re Wangler*, 498 Mich at 911; *In re Collier*, 314 Mich App at 558 (all finding plain error and reversing TPR decisions based on improper adjudications). In her concurrence in *Hudson*, Justice Corrigan explained that an ineffective plea "pervade[s] the . . . child protective proceeding that follow[s] and deprive[s] respondent[s] of due process." *In re Hudson*, 483 Mich at 935 (Corrigan, J., concurring). She further explained that accepting a bad plea creates a "fundamental error[]," which leads to the "admission of unchallenged and untested evidence in later proceedings." *Id.* at 940. In particular, she emphasized that the trial court failed to satisfy due process because "[i]t never even mentioned the possibility that respondent's parental rights could be terminated on the basis of her admissions [in her plea]." *Id.* at 935.

Here, the trial court failed to advise the Ferrantis of <u>any</u> of the rights they would be waiving if they entered into a plea. On December 21, 2015, both Mr. and Mrs. Ferranti entered a plea, which only addressed Jessica's medical conditions and prescription refills. 12-21-15 Tr. at 6-8. The trial court then accepted their pleas, and took jurisdiction over Jessica. *Id.* at 8-9. But at no point in this hearing, or in any other hearing, did the court, in violation of MRC 3.971(B), advise the Ferrantis of the rights they were surrendering. The court failed to advise them of their rights

to a jury trial, to have the Department prove the allegations in the petition, to have witnesses testify on their behalf, or to cross examine the Department's witnesses. MCR 3.971(B)(3)(a-e). In addition, the trial court failed to advise the Ferrantis that their plea could later be used as evidence in a TPR hearing. MCR 3.971(B)(4). Instead, the court accepted the plea, assumed jurisdiction over Jessica, presumed their parental unfitness and eventually used its dispositional authority to terminate the Ferrantis' parental rights to Jessica. Thus, the court failed to fulfill its obligations under MCR 3.971.

The trial court's failure to advise the Ferrantis of the consequences of their adjudicatory plea affected their substantial rights. The adjudication procedures required by the Michigan Court Rules are used to "protect the parents from the risk of erroneous deprivation" of their parental rights. *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993). Once a court has determined a parent's unfitness at the adjudication stage, the parent loses her presumption of fitness. During the dispositional hearings that follow an adjudication, "the court is concerned only with what services and requirements will be in the best interests of the children." *In re Sanders*, 495 Mich at 418. Dispositional hearings "assume[] a previous finding of parental unfitness." *Id.*

In addition, once a parent loses their right to an adjudication trial, they forever lose their right to a jury trial, which they only have at the adjudication stage. *Id.* at 406. In criminal cases, "a constitutionally invalid jury waiver is a structural error that requires reversal." *People v Cook*, 285 Mich App 420, 427; 776

NW2d 164 (2009). This rationale equally applies to child protective proceedings. If invalid jury waivers were subjected to a harmless error analysis, then courts would be forced to "speculate about whether a hypothetical jury would also have" reached the same conclusion as a judge. *Id.* at 427. Additionally, the parent also loses their right to have the allegations of unfitness proven against them with legally admissible evidence. MCR 3.972(C)(1).

Thus, in many ways, the faulty adjudication affected the Ferrantis' substantial rights. On this basis alone, this Court, as it did in *Wangler*, 498 Mich at 911, should reverse the trial court's adjudication and termination orders.

## II. This Court Should Overrule *In Re Hatcher* And Should Allow Parents to Challenge Adjudicatory Errors In TPR Appeals.

### *Standard of Review*

Whether this Court should overrule *In re Hatcher*, 442 Mich at 426, presents a question of law that this Court should review de novo. *In re Sanders*, 495 Mich at 403-404.

### *Argument*

The Court of Appeals, relying on *In re Hatcher*, refused to address the Ferrantis' claim that the trial court violated their due process rights at the adjudication stage. *In re Ferranti*, unpub op at 6, Attach. A. The Ferrantis ask this Court to overrule *Hatcher*, to clarify that parents may challenge adjudicatory errors in TPR appeals.

Traditionally, the collateral bar rule requires a litigant to challenge a trial court's erroneous ruling in a direct appeal of that decision, and precludes an attack

in a different proceeding. See e.g. *People v Ingram*, 439 Mich 288, 291, n 1; 484 NW2d 241 (1992) ("Collateral attacks encompass those challenges raised other than by initial appeal of the conviction in question); *People v Howard*, 212 Mich App 366, 369; 538 NW2d 44 (1995) ("[A] challenge brought in any subsequent proceeding or action is a collateral attack."). For example, in *Jackson City Bank & Trust Co v Frederick*, 271 Mich 538; 260 NW2d 908 (1935), this Court prevented a litigant from challenging the validity of a prior divorce in a subsequent lawsuit about inheritance rights. *Id.* The Court properly prevented the litigants from using "a second proceeding to attack a tribunal's decision in a previous proceeding." *Workers' Compensation Agency Dir v MacDonald's Indus Prod, Inc (On Reconsideration)*, 305 Mich App 460, 474; 853 NW2d 467 (2014).

But as Justice McCormack, joined by two other members of this Court, noted in *In re Hill*, ___ Mich ___; ___ NW2d ___ (2018) (Docket No. 155152), unlike the cases *Hatcher* relied upon, adjudication and TPR decisions are not made in two distinct proceedings. *Id.* at 3. Rather, they are a "single continuous proceeding," beginning with the filing of a petition and ending with a determination of whether a parent's rights will be terminated. *Id.* Thus, the adjudication is actually a nonfinal order issued in the middle of a lengthy proceeding. But, as described by Justice Corrigan in her concurrence in *In re Hudson*, errors in the adjudicatory process can infect the entire child protective process, deprive a parent of due process, and cast into doubt the validity of a TPR decision. 483 Mich at 935. Thus, in *Hudson*, this

Court refused to apply *Hatcher's* collateral bar rule, and reversed a TPR decision based on errors in the adjudicatory process. 483 Mich at 928.

Consistent with the understanding that an adjudication is a nonfinal order, the court rules do not require courts to advise parents of their right to appeal an adjudication decision. Nor is there a requirement that courts appoint counsel for parents to handle the appeal. And perhaps most importantly, the rules do not require courts to advise parents that if they fail to immediately appeal adjudicatory errors, they will permanently waive their right to challenge any mistakes in the adjudicatory process.

Both this Court and the Court of Appeals have recognized the inherent unfairness of the *Hatcher* rule, and have carved out many exceptions to its rule. See, e.g., *In re Mays*, 490 Mich at 994 n 1 (inviting parent to challenge adjudicatory errors at the post-dispositional stage); *In re Hudson*, 483 Mich at 928 (reversing TPR because trial court failed to properly advise parent before accepting adjudicatory plea); *In re Mitchell*, 485 Mich at 922 (same); *In re Sanders*, 495 Mich at 394 (allowing parent to challenge adjudicatory errors in post-dispositional appeal); *In re Jones*, 499 Mich at 862 (vacating adjudication and TPR orders because the trial court failed to properly adjudicate the parent); see also *In re Kanjia*, 308 Mich App at 660; *In re Collier*, 314 Mich App at 558; *In re Alston*, unpublished decision per curiam of the Court of Appeals, issued March 17, 2016 (Docket No. 328667), Attach. C.; *In re Guido-Seger*, unpub op, Attach. D., (all permitting parents to challenge adjudicatory errors in TPR appeals).

After examining these cases, Justice McCormack aptly noted, "[W]ith all of these carve-outs, it is hard to say what is left of the *Hatcher* rule." *In re Hill*, ___ Mich ___, at 4

As such, Appellants request that this Court overrule *Hatcher* and allow litigants to challenge adjudicatory errors in TPR appeals. Applying this rule to this case, the Appellants ask that this Court find that the trial court violated their due process rights when it failed to properly advise them of any of their rights before accepting their adjudicatory plea, and reverse both the adjudication and TPR decisions.

## III. The Court Of Appeals Erred When It Found That The Trial Court's Plain Error In Visiting The Ferranti Home Did Not Affect Their Substantial Rights.

### *Standard of Review*

This Court reviews unpreserved statutory and constitutional challenges for plain error affecting substantial rights. *People v Carines*, 460 Mich at 776. Moreover, the Court will reverse a trial court's decision when it finds that a trial court's error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 772.

### *Argument*

The Court of Appeals correctly ruled that the trial court erred in viewing the Ferranti home. *In re Ferranti*, unpub op at 7, Attach. A., ("[W]e agree that the trial court erred by personally visiting and viewing respondents' home."). A trial court commits a "[c]lear legal error" when "[it] incorrectly chooses, interprets, or applies

the law." *In re AP*, 283 Mich App 574, 590; 770 NW2d 403 (2009). In addition, a trial court presiding over a TPR case "has no authority" to perform an action when "nothing in the juvenile code . . . permits a trial court" to do that action. *In re HRC*, 286 Mich at 454.

In a TPR proceeding, a trial court has no authority – either via statute or court rules – to view a family's home. Juvenile courts are courts of limited authority, MCR 3.901(A)(2), and their power to act stems from specific statutes and court rules. *Id.* The Juvenile Code establishes that "[o]ther Michigan Court Rules apply to juvenile cases . . . *only when this subchapter specifically provides*." MCR 3.901(A)(2)(emphasis added). Thus, although in certain types of civil cases, the rules do allow courts, sitting as the trier of fact, to "view property or a place where a material event occurred," MCR 2.507(D), that rule has not been incorporated into the child protective court rules, as required by MCR 3.901(A)(2). And there is no statute that empowers a juvenile court to do this.

Moreover, the trial court's view here exceeded MCR 2.507(D)'s limitations. A trial court, sitting as trier of fact, can never view a relevant location when the condition of that location is disputed. *Travis v Preston*, 249 Mich App 338, 350; 643 NW2d 235 (2002). In *Travis*, the Court of Appeals held that a trial court cannot view a relevant location as part of an independent investigation into disputed facts. *Id.* Instead, a trial court can view a relevant location only to clarify[] its understanding of undisputed facts. *Toussaint v Conta*, 292 Mich 366, 370; 290 NW 830 (1940).

For example, in *Travis*, the Court of Appeals reversed a trial court's decision to impose fines on a farmer accused of violating an ordinance, which prohibited "obnoxious odors," after the court visited the farm to inspect its smell. 249 Mich App at 352-53. The trial court was, thus, "not merely clarifying its understanding of undisputed facts" but was instead "making an independent investigation and observation." *Id.* at 350. In contrast, a trial court did not exceed its authority when it, as fact-finder, viewed an intersection where a car accident had occurred. *Toussaint*, 292 Mich at 369-370. In *Toussaint*, neither party disputed the location of the accident, only whether the defendant drove negligently. *Id.* at 367-368.

This limitation accords with due process. The Court of Appeals has long recognized that when a trial judge considers evidence outside of the record, it denies the parties a fair proceeding. See *People v Eglar*, 19 Mich App 563, 566; 173 NW2d 5 (1969)("The judge was the trier of fact. No evidence could properly be considered by him that was not presented as part of the trial."). But when a trial court, sitting as fact-finder, considers information outside of the record, it eliminates the "opportunity for the opposing party to cross-examine or impeach the witness, or to present contradictory evidence." *In re HRC*, 286 Mich at 452.

For example, in *Eglar*, the Court of Appeals held that a trial court could not consider evidence outside of the record – even if the court disclosed "that [it] has done so to the parties." *Eglar*, 19 Mich App at 566. The court observed that when a trial court does this, the judge puts an attorney "in the embarrassing dilemma of compelling respect by the judge for his client's right to have no evidence considered

that is not part of the record, but simultaneously running the risk of antagonizing and arousing the suspicion of the judge." *Id.* The exact dilemma occurs when a judge visits a home to resolve a disputed issue in a TPR hearing.

Here, the Court of Appeals agreed that the trial court erred, noting that "there is no statutory provision, court rule, or caselaw that permits a trial court in a juvenile proceeding to view a home." *In re Ferranti*, unpub op at 8, Attach. A. But the court incorrectly found that the error did not affect the Ferrantis' substantial rights. *Id.* at 8-9. By the end of the case, the cleanliness of the Ferrantis' house was the key disputed fact in the case. The dispute over the Ferranti home's cleanliness began early in the proceedings. On October 29, 2015, Amy Croff, a Department case worker, described the home as "cluttered, "smell[ing] strongly of urine," with "cat feces on the hallway floor." 10-29-15 Tr. at 11-12. Five days later, Jessica's lawyer-guardian ad litem, David Delaney, disagreed, describing the home as "suitable," and disputed Ms. Croff's cat feces observations. 11-3-15 Tr. at 4. Mr. Ferranti also disputed Ms. Croff's testimony about the house. He explained that the house was not nearly as dirty as Ms. Croff described, and that he had never seen the cat feces problem that she identified. 11-17-15 Tr. at 39-40.

In addition, Michelle Klein, a Wellspring case worker, provided inconsistent reports on the home's cleanliness. Within the same hearing, Ms. Klein testified both that the Ferrantis did not improve "unsanitary conditions of the [their] home," and, that the home "as it stood [now]," was appropriate for Jessica. 10-18-16 Tr. at 6, 13-14. In contrast, Mr. Delaney disagreed with Ms. Klein, and instead

acknowledged that "the house was okay" for Jessica. *Id.* at 46. Following this conflicting testimony, the court stated "I suspect I'm going to want to see the house. . . I would like to see it. That would help me in the case." *Id.* at 49-50. The court viewed the home only to investigate and resolve the dispute over the home's cleanliness.

Then after viewing the home, the court directly relied upon its personal observations to terminate Mr. and Mrs. Ferranti's parental rights. In its opinion, it concluded that "when the Court viewed the [Ferranti home], it is not where a person with Spinal Bifida [*sic*] will thrive." Opinion and Order dated 8-7-17, at 7, Attach. B. But the Ferrantis had no meaningful way to challenge that conclusion at the termination hearing. The court did not create a record of its findings, and the Ferrantis could not know which observations were most important to rebut. Nor could they cross-examine the judge. Moreover, the trial court, by failing to create a record of its visit, prevented any appellate court from meaningfully measuring the precise harm of its error. Thus, the trial court's violation certainly affected the Ferrantis' substantial rights, and warrants a reversal of the trial court's decision.

## IV. The Court Of Appeals Erred By Refusing To Review Whether The Trial Court Exceeded Its Authority And Violated Due Process By Privately Speaking With Jessica In Chambers.

### *Standard of Review*

Whether the Court of Appeals erred by refusing to review the Ferrantis' claim presents a question of law that this Court should review de novo. *In re Sanders*, 495 Mich at 403-404.

***Argument***

The Court of Appeals erred when it refused to review the Ferrantis' claim that the trial court exceeded its statutory authority and violated the Ferrantis' due process rights by privately speaking with Jessica in chambers without creating a record. The Court ruled – with very little analysis – that the Ferrantis had permanently waived their right to raise this issue on appeal, finding that their "waiver extinguished any error." *In re Ferranti*, unpub op at 9, Attach. A. In doing so, it refused to apply the forfeiture rule set forth in *People v Carines*, 460 Mich at 776, which allows litigants to raise unpreserved issues under a plain error standard.

In *Carines*, this Court distinguished between a waiver, which completely bars a litigant from raising an issue on appeal, from forfeiture, which permits a litigant to raise an unpreserved error under the plain error standard. This Court noted, "Where forfeiture is the failure to make a timely assertion of a right, waiver is the intentional or abandonment of a known right." *Carines*, 460 Mich at 762-763 n 7. Applying this distinction, in *In re HRC*, the Court of Appeals reviewed the exact error present in this case – the trial court's private interview of a child in chambers – even though the parents had agreed to the interview. 286 Mich App at 450.

Here, the Court of Appeals erred in finding that both parents had agreed to waive a known right. At the TPR hearing, while the attorneys for both parents did indicate their willingness for the court to interview Jessica, 6-20-17 Tr. at 45-46, the court specifically stated that another person would be in the room during the

interview, suggesting that a record would be kept of the conversation. *Id.* at 48. ("I will make sure there's somebody who would be in there with me."). Other than that short exchange, the court did not discuss any of the details of how the interview would actually be conducted

But the court did not create a record, and in fact, had even failed to inform Mr. Ferranti's attorney that it had even spoken to Jessica. 7-5-17 Tr. at 15. Given the fact that the Ferrantis did not know how the interview would be conducted, or that it had even occurred, the Court of Appeals erred in finding that they had expressly agreed to it, thereby precluding any appellate review of the issue.

Had the Court of Appeals reviewed this error, it would have determined that the error was plain and affected substantial rights. In *HRC*, the Court of Appeals squarely confronted this issue and reversed a termination decision where the trial court "opted to conduct in-camera interviews" of the children involved. 286 Mich App at 450. Neither party objected to these interviews, and the trial court later concluded that termination was in the children's best interests. *Id.* In reversing the decision, this Court held that "a trial court presiding over a juvenile proceeding has no authority to conduct in camera interviews of the children involved." *Id* at 453. This Court further rejected the argument that a trial court could interview a child even if each party agreed to allow the interview. *Id.* Instead, it concluded that "it is not difficult to see how the use of an in camera interview for fact-finding presents multiple due process problems." *Id.* at 452.

Here, the trial court directly violated this Court's ruling in *HRC* and privately spoke with Jessica – in chambers – at the conclusion of proofs in the TPR hearing. 6-20-17 Tr. at 45; 7-5-17 Tr. at 15. The court did not allow the Ferrantis' attorneys to attend this interview and it created no transcript or recordings of this conversation. In addition, the court did not even notify the attorneys of the interview until after completing it. 7-5-17 Tr. at 15. In taking these steps, the trial court violated the Ferrantis' due process rights.

The trial court's interview with Jessica affected the Ferrantis' substantial rights. The court only asked to speak with Jessica after the conclusion of the proofs and after noting the difficulty of the decision it had to make. It stated, "Often I know where I am going on a case. This is not one of those cases." 7-5-17 Tr. at 30. The court further stated, "it's not clear – on the clear and convincing evidence for whether or not it is in her best interest," observing that it was "very unusual for an intact family to be here and for the State to be seeking the termination of parental rights on a child in an intact family that in many ways is going well." *Id.* Later, it wrote that the decision was a "closer decision than the usual" and "one of the tougher decisions the Court has faced." Order and Opinion dated 8-17-17, Attach. B. These statements suggest that the trial court's interview with Jessica, along with its visit to the Ferranti home, played a critical role in its decision.

Additionally, in *HRC*, the Court of Appeals held that because the trial court failed to keep a record of the unlawful interview – thereby "creating an inadequate record for meaningful judicial review at the appellate level" – the error "seriously

affected the basic fairness and integrity of the proceedings below." *In re HRC*, 286 Mich App at 457. In other words, similar to the trial court's error in visiting the Ferrantis' home, the precise harm of this error is impossible to ascertain because the trial court failed to keep any record of its interview. In a case that was "closer than usual," this Court, as the Court of Appeals did in *HRC*, should presume the harmful impact of the court's multiple errors, and find that the mistakes substantially affected the Ferrantis' rights.

## CONCLUSION

This case provides this Court with the opportunity to ensure that meaningful appellate review exists for parents in termination of parental rights appeals. For the reasons stated in the Application, the Ferrantis respectfully request that this Court grant this Application, reverse the trial court's decision to terminate their parental rights, and remand the case to be heard before a different judge.

Respectfully submitted,

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PROOF OF SERVICE

Vivek Sankaran states that on June 7, 2018 he sent via first class, USPS mail a copy of the Appellant-Parents' Application for Leave to Appeal to the Michigan Supreme Court to the following:

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Respectfully submitted,

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