IN THE MICHIGAN SUPREME COURT

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

In re J Ferranti, Minor.

Supreme Court Nos. 157907; 157908
Court of Appeals Nos. 340117; 340118
Otsego County Circuit Court
Family Division
LC No. 13-000071-NA

APPELLANTS' SUPPLEMENTAL BRIEF

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INTRODUCTION

The trial court committed three obvious errors in this case, each of which requires reversal. First, the court violated the Ferrantis' due process rights by accepting their adjudication plea without advising them of any of the procedural rights they were waiving as required by MCR 3.971(B). Next, it exceeded its statutory authority by visiting the Ferrantis' home so that it could personally witness the conditions of the home, and by relying on its observations in its TPR decision. Finally, the court erred by privately interviewing the child in chambers, even though neither the Juvenile Code nor the court rules permit this. See *In re HRC*, 286 Mich App 444, 446; 781 NW2d 105 (2009) ("[W]e hold that a trial court presiding over a juvenile proceeding has no authority to conduct in camera reviews of the children involved.").

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 *In re Ferranti*, unpublished opinion per curiam of the Court of Appeals, issued May 10, 2018 (Docket Nos. 340117, 340118), 99a. Citing this Court's decision in *In re Hatcher*, 443 Mich 426; 505 NW2d 834 (1993), it refused to address the Ferrantis' claim that their adjudication plea was improper, finding that the claim was barred by the collateral attack doctrine. 104a. It also failed to review the claim that the trial court erred by privately interviewing the child in chambers – even under the plain error standard – because the Ferrantis did not object to it. 107a.

While the Court of Appeals did review the third error in the case, acknowledging that the trial court plainly erred by visiting the home, it ruled that this error did not affect the Ferrantis' substantial rights. 106a-107a. It reached this conclusion even though the trial court conceded that this case was a "closer decision than the usual," and relied on its observations during the improper home visit to terminate the Ferrantis' parental rights. 97a, 98a. ("[E]ven when the Court viewed the situation, it is not where a person with Spina Bifida will thrive."). Given that the trial court's multiple errors prejudiced the Ferrantis and affected their substantial rights, this Court should reverse the decision to terminate their parental rights.

The Court of Appeals' unwillingness to review the multiple plain errors in this case demonstrates why this Court should overrule *In re Hatcher* and hold that the collateral attack rule does not bar parents from challenging adjudicatory errors in TPR appeals. *Hatcher* incorrectly held that a child protective proceeding consists of distinct actions with multiple final orders, each of which must be appealed immediately and separately. In reaching this holding, *Hatcher* ignored longstanding precedent that child protective proceedings are actually one continuous proceeding with a final order at the conclusion of the entire case when parental rights are terminated. See *In re Hudson*, 483 Mich 928, 935; 763 NW2d 618 (2009) (CORRIGAN, J., concurring); *In re LaFlure*, 48 Mich App 377, 391; 210 NW2d 483 (1973). Consistent with this view, the court rules do not even require

trial courts to advise parents of their right to appeal a nonfinal adjudication order, nor do they provide a right to the appointment of counsel to pursue such an appeal.

Tellingly, over the past five years, both this Court[1] and the Court of Appeals[2] have refused to follow *Hatcher* and have repeatedly allowed parents to challenge adjudicatory errors in post-dispositional and TPR appeals. But so long as *Hatcher* remains good law, the ability of parents to litigate errors in the adjudicatory process will be inconsistent and will hinge on the views of particular jurists hearing the case. Justice demands more. Given that TPR decisions involve the permanent deprivation of fundamental constitutional rights, both children and parents deserve an appellate process in which reviewing courts reach the merits of all claims of error that occurred in the case.

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[1] 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).

[2] 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 opinion per curiam of the Court of Appeals, issued March 17, 2016 (Docket No. 328667); *In re Guido-Seger*, unpublished opinion per curiam of the Court of Appeals, issued February 7, 2017 (Docket No. 333529) (app pending) (all permitting parents to challenge adjudicatory errors in TPR appeals).

STATEMENT OF QUESTIONS PRESENTED

I. A trial court violates due process when it fails to advise parents 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). Here, the trial court failed to advise the Ferrantis of any of their rights before accepting their plea. Did the trial court violate the Ferrantis' due process rights?

The trial court did not answer this question.
The Court of Appeals did not answer this question.
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 at 391. Consistent with this, both this Court and the Court of Appeals have permitted parents to challenge errors in the adjudicatory process in TPR appeals. See, e.g., *In re Mitchell*, 485 Mich at 922; *In re Collier*, 315 Mich App at 558. Should this Court overrule *In re Hatcher*?

The trial court did not answer this question.
The Court of Appeals did not answer this question.
Appellants answer yes.

III. The plain error rule allows litigants to challenge an unpreserved error if the error was plain and affected substantial rights. *People v Carines*, 460 Mich 750, 762; 597 NW2d 130 (1999). This Court has consistently applied this rule to unpreserved errors in TPR appeals. See, e.g., *In re Mitchell*, 485 Mich at 922; *In re Hudson*, 483 Mich at 928. Should this Court apply the plain error rule when a parent claims an adjudicatory error in a TPR appeal?

The trial court did not answer this question.
The Court of Appeals did not answer this question.
Appellants answer yes.

IV. The Court of Appeals correctly found that a trial court has no legal authority to visit a parent's home in a child protective proceeding to observe its condition. *In re Ferranti*, unpub op, 106a. Here, the trial court not only viewed the home but also relied on its personal observation to

terminate the Ferrantis' parental rights, in a case it deemed was "one of the tougher decisions the Court has faced." Did the trial court plainly err?

The trial court did not answer this question.
The Court of Appeals answered yes, but ruled that the error did not affect the Ferrantis' substantial rights.
Appellants answer yes.

V. A trial court has no legal authority to privately interview a child in chambers in a TPR proceeding. *In re HRC*, 286 Mich App at 444. Here, the court privately interviewed the child after the close of evidence in a case it described as a "closer decision than the usual." It also kept no record of the interview, not did it tell the father's attorney that it had even happened. Did the trial court plainly err?

The trial court did not answer this question.
The Court of Appeals did not answer this question.
Appellants answer yes.

STATEMENT OF JURISDICTION

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. 99a. A timely application was filed within 28 days of the Court of Appeals' decision. MCR 7.302(C)(2). On July 5, 2018, this Court granted oral argument upon application and ordered supplemental briefing.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

I. Background

Jessica Ferranti is the 14-year-old daughter of Michael and Susan Ferranti. She has been diagnosed with spina bifida, chronic kidney disease, Attention Deficit Hyperactivity Disorder, and a neurogenic bladder. 6a. 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 always required medical supervision. When Jessica was born, doctors admitted her into the Neonatal Intensive Care Unit. 89a. She has undergone multiple orthopedic surgeries related to spina bifida, and has required a bladder augmentation to increase her bladder size. 15a. 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. 15a.

Jessica was raised in Gaylord, Michigan, living with her parents, older brothers Austin and Nick, and older 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. 52a.

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 siblings due to the cleanliness of their home. 8a. 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. 75a. Eleven months later, the Department and the court – satisfied with the Ferrantis' progress – closed the case and returned all four children home. 75a.

II. Procedural History

A. Removal

On October 29, 2015, the Department filed a second petition to remove just Jessica from the home. 6a. It alleged that Mr. and Mrs. Ferranti had neglected Jessica by showing a "lack of follow-through on [her] medical needs." 6a. It also alleged that Jessica had frequently missed doctor's appointments and that the Ferranti home was unsuitable for a child with Jessica's medical needs. 6a. 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.

That day, the court held a preliminary hearing. 4a. At the hearing, Amy Croff, the Department's case worker assigned to investigate the matter, described the Ferranti home as cluttered, "smell[ing] strongly of urine," with "cat feces on the hallway floor." 7a. Following her testimony, the court removed Jessica from her home, and placed her in foster care. 10a. But the court still allowed Jessica to visit the Ferrantis and her siblings – without any supervision – in their home. 10a. In

fact, Jessica's unsupervised visits with her family continued until the Department filed its petition to terminate parental rights. 84a.

At the preliminary hearing, the court also instructed Jessica's lawyer-guardian ad litem, David Delaney, to inspect the Ferranti home. 9a-10a. Within a week, Mr. Delaney visited the home. 11a. In contrast to Ms. Croff's testimony, Mr. Delaney concluded that the house was both habitable and suitable for Jessica. 11a. He testified that he found no feces on the floor, and that the home had, at most, a "light odor." 11a.

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 opinion of the Department's case worker from the preliminary hearing. She explained that Jessica's hygiene skills were normal when compared with the other developmentally disabled children she treated. 13a. Ms. Bragg further noted that Mr. and Mrs. Ferranti took "extremely" good care of Jessica. 13a. 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." 13a. Finally, she testified that the Ferrantis brought Jessica to the vast majority of her rehabilitation appointments and always called to reschedule the few appointments they cancelled. 13a.

Following this new testimony, the court still declined to return Jessica to her parents. 14a. The court explained that it had ongoing "concern[s] on [Jessica's]

medical items," which needed to be resolved. 14a. It noted, however, that "if [the home's cleanliness] was the only issue, we wouldn't be [here]." 14a.

Two weeks later, the court held another preliminary hearing to evaluate Mr. and Mrs. Ferranti's ability to meet Jessica's medical needs. 16a. Michelle Mills, a nurse at the C.S. Mott Children's Hospital, testified for the Department. 16a. She explained that she had two concerns regarding Jessica's medical care. 17a-18a. First, she noted that the Ferrantis had missed three of Jessica's recent doctor's appointments. 17a. Second, she believed that Mr. and Mrs. Ferranti had fallen behind in refilling Jessica's prescriptions. 17a. Ms. Mills acknowledged, however, that "it's hard to say with certainty" whether the Ferrantis had actually fallen behind. 17a. She further admitted that Jessica suffered no negative effects from her three missed appointments. 18a. Again, the court declined to return Jessica to her parents, and instead authorized the petition. 20a.

B. Michael and Susan Ferranti's Plea

The court held a pre-trial hearing on December 21, 2015. At this hearing, without first advising them of any of the rights they were waiving, the court accepted an adjudication plea by the Ferrantis. 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.

21a. 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.

21a. The Ferrantis did not admit to any other facts. They made no admissions to their home's cleanliness, or to any failure to meet Jessica's medical needs. From these admissions alone, the court determined that it had "a factual basis . . . to take jurisdiction" of Jessica. 21a.

But prior to accepting these admissions, the court never advised the Ferrantis of any of the rights they were waiving, including their rights to an adjudication 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, or that they would forever lose their right to challenge the adjudication if they did not immediately appeal it.

C. Parent-Agency Treatment Plan

Three weeks later, the court held a dispositional hearing. There, the Department proposed a parent–agency treatment plan for the Ferrantis, which the court adopted. 23a. This plan required the Ferrantis to complete psychological evaluations, provide a clean home for Jessica, and meet Jessica's medical needs. 22a. 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. 22a. Specifically, Ms. Klein was responsible for arranging for an in-home service provider to meet with the Ferrantis to help them maintain a clean home and assist them in scheduling Jessica's medical appointments. 22a. 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. 22a. The court scheduled a review hearing to monitor their progress. 23a

At the April review hearing, Ms. Klein admitted that Wellspring had not provided the family with full support services. 25a. Instead, Wellspring placed the Ferrantis on a waiting list, which delayed their treatment. 25a. Because of this delay, she could not provide a complete update on the Ferrantis' progress, and the court scheduled another review hearing for July. 26a.

In July, Ms. Klein explained that, for the most part, Jessica was doing well in foster care. 46a. Ms. Klein acknowledged, however, that Jessica was having serious trouble in school. 46a. While in foster care, Jessica was failing three classes, had a D in English, and had not submitted twenty different assignments. 24a.

At this hearing, the court also learned that the Ferrantis had complied with their requirement to undergo psychological evaluations. 46a. Both Mr. and Mrs. Ferranti met with Timothy Strauss, a limited licensed psychologist, who completed the evaluations. 27a, 37a. Mr. Strauss noted that Mrs. Ferranti had pulmonary fibrosis, which caused her to have significantly reduced lung capacity. 72a. 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." 73a.

Mr. Strauss also evaluated Mr. Ferranti. He testified that Mr. Ferranti had a chronic back condition, but was "not overwhelmed with parenting [Jessica]." 74a. Mr. Strauss concluded his report with two recommendations. First, he recommended that both Mr. and Mrs. Ferranti undergo counseling to address their parenting skills. 34a, 48a-49a. 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." 73a.

Three months later, 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." 47a. She acknowledged, however, that over the past year, Mr. and Mrs. Ferranti had attended all of Jessica's medical appointments. 50a. In addition, Ms. Klein admitted that the Ferrantis had cleaned Jessica's bedroom before a scheduled inspection, and that it was still clean during an unannounced inspection three weeks later. 47a. 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. 48a.

Still, Ms. Klein maintained that Wellspring could provide no further services to the Ferrantis, and recommended the termination of their parental rights. 48a. She explained that, although the Ferrantis had cleaned Jessica's bedroom, they had not cleaned Jessica's bathroom. 47a. 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. 51a-52a.

Mr. Delaney, the lawyer-guardian ad litem, also inspected the home again. He agreed that the home was acceptable for Jessica. 53a. Moreover, he concluded that the Ferranti home "just [has] an older bathroom," not a dirty one. 53a. The court, however, still authorized the Department to file a petition to terminate the Ferrantis' parental rights. 53a.

Following the conflicting descriptions of the Ferranti home, the court informed the parties that it wanted to view the home. 53a. It explained that viewing the home "would really help [] in this case." 53a-54a. In two later hearings, the court repeated that it would visit the home. 63a, 70a. The court also clarified that it "wanted to see the premises" because "that's a crucial issue in this [case]." 70a. So in February 2017, the court visited the Ferranti home. 84a. 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). 55a. 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." 55a. It further claimed that the Ferrantis "failed to provide proper care" for Jessica and were unlikely to do so "within a reasonable time." 55a.

Soon after the Department filed its petition to terminate the Ferrantis' parental rights, the court modified its original visitation order. 67a. Although Jessica had enjoyed unsupervised visits without incident for over a year, the court gave the Department the "discretion to allow unsupervised or supervised parenting time." 67a. Two months later, the Department indefinitely suspended all visits between Jessica and her parents. A month after that, the court partially reinstated the Ferrantis' parenting time with Jessica, but required the Department to supervise visits. 71a.

D. Termination of Parental Rights Hearing

The TPR hearing began on May 10, 2017. The Department called several witnesses who had worked with the Ferranti family years earlier. Christina Pudvan, the Ferrantis' foster care worker in 2014, testified about Jessica's wellbeing. 75a-77a. She admitted, however, that she lacked any "personal

knowledge of the [current] condition [of the home]." 77a. She further admitted that she "had not personally observed anything [in the case]" since 2014. 77a.

In addition, Lisa Matthias, a Child Protective Services employee, also testified about the condition of the Ferranti home. 78a. But she too admitted that she had had no contact with the Ferrantis, and had not seen their home in over four years. 78a.

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. 80a. Ms. Klein further acknowledged that Jessica had shown a "growing attention to" her hygiene and self-care. 81a.

Finally, the Department called Katherine Vroman, a Wellspring Family Support worker assigned to the Ferrantis. 82a. 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." 82a. She also provided the Ferrantis with "some cleaning supplies and totes and things to help organize the home." 82a. She testified that, during one visit, she had helped the Ferrantis clean their home, and admitted that they maintained the cleanliness "fairly well." 82a. 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. 83a. Ms. Vroman would

not rule out that the Ferrantis could still benefit from further in-home services. 83a. Still, Wellspring terminated the Ferrantis from the program. 83a.

Following this testimony, the court stated that it was "inclined to speak to Jessica," but did not specify how the interview would be conducted. 89a. 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. 90a. The court informed the attorney that it had already privately spoken with Jessica, and would consider that conversation in its ruling. 90a-91a. 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 TPR 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." 86a. He described how Jessica's brothers "just hug up on her," and how Mrs. Ferranti spends the visits with Jessica "glued right next to her." 86a. He also noted that Jessica's brothers bought an expensive vacuum cleaner for the family, to help keep the house clean. 87a. 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. 88a. 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." 88a.

She then shared stories of painting Jessica's fingernails, playing with make-up, and changing each other's hairstyles during visits. 89a.

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." 89a. 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." 89a. 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. 89a.

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." 91a. 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." 91a.

E. Order Terminating Parental Rights

On August 7, 2017, the court terminated the Ferrantis' 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." 97a-98a.

In its ruling, the court relied on its personal 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." 97a. 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." 98a.

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." 97a-98a. 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. 98a.

The Ferrantis appealed the decision to the Court of Appeals, which affirmed the trial court's ruling. 99a. The Court of Appeals, citing *In re Hatcher*, 443 Mich at 426, refused to address whether the trial court had violated the Ferrantis' due process rights by accepting an adjudication plea without first advising them of the procedural rights they were waiving. 104a. It also failed to address whether the trial court had erred by privately interviewing Jessica in chambers in violation of *In re HRC*, 286 Mich App at 453, finding that the issue had not been properly preserved. 107a.

The Court of Appeals did find that the trial court had plainly erred in visiting the Ferranti home. 106a. But it ruled that the plain error did not affect their substantial rights. 107a.

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). Under this standard, 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 crucial to this process 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 at 394 (citing *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993)). Thus, when parents decide to 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 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938) (finding that a person can only waive 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 the rights which are being waived, before accepting an adjudicatory plea. MCR 3.971(B). The Michigan Court Rules specify that, at a minimum, the court must advise respondents of their rights 1) to a trial by a judge or jury, 2) to have the Department prove its allegations by a preponderance of the evidence, 3) to have witnesses appearing against them testify under oath, 4) to cross-examine witnesses, 5) to subpoena their own witnesses, and 6) 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 considering waiving.

A trial court's failure to properly advise a parent of the rights they are waiving constitutes plain error. See *In re Jones,* 499 Mich at 862; *In re Wangler*, 498 Mich at 911; *In re Hudson*, 483 Mich at 928; *In re Mitchell*, 485 Mich at 922; *In re Collier*, 314 Mich App at 558 (all reversing TPR decisions based on improper adjudications). In her concurrence in *Hudson*, Justice Corrigan explained that an improper adjudication 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 an invalid plea creates a "fundamental error," which leads to the "admission of unchallenged and untested evidence in later proceedings." *Id.* at 940. In particular, Justice Corrigan 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, both Mr. and Mrs. Ferranti entered a plea, which the trial court accepted and used to assume jurisdiction over Jessica. 21a-22a. But at no point during the hearing did the court – in direct violation of MRC 3.971(B) – advise the Ferrantis of any 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 constitutional obligations set forth in MCR 3.971.

The trial court's plain error in failing to advise the Ferrantis of the consequences of their adjudicatory plea affected their substantial rights. The adjudication procedures required by the court rules are used to protect parents "from the risk of erroneous deprivation" of their parental rights. *In re Brock*, 442 Mich at 111. 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. In other words, dispositional hearings "assume a previous finding of parental unfitness." *Id.* Thus, once the court accepted the Ferrantis' invalid plea, it stripped them of their constitutional presumption of fitness and instead conditioned the restoration of their full parental rights on complying with and benefiting from court-ordered services.

In addition to the substantive shift of rights that occurred after the invalid plea, the Ferrantis also lost key procedural rights. They lost their right to a jury trial, which they only had at the adjudication stage. *Id.* at 406; MCR 3.911(A); see *People v Cook*, 285 Mich App 420, 427; 776 NW2d 164 (2009) ("a constitutionally

invalid jury waiver is a structural error that requires reversal."). They also lost their right to have the allegations of unfitness proven against them with legally admissible evidence. MCR 3.972(C)(1); *In re Sanders*, 495 Mich at 406. Thus, the faulty adjudication affected the Ferrantis' substantial rights in multiple ways. On this basis alone, this Court – as it did in *Jones*, 499 Mich at 862, *Wangler*, 498 Mich at 911, *Hudson*, 483 Mich at 928, and *Mitchell*, 485 Mich at 922 – 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. 104a. The Ferrantis ask this Court to overrule *Hatcher* and 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."). Applying this rule, 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.* Similarly, in *Edwards v Meinberg*, 334 Mich 355; 54 NW2d 684 (1952), this Court prevented a defendant, who had lost a jury trial, from attacking the validity of that ruling in a separate and subsequent proceeding. In these and other cases, Michigan courts have properly prevented 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) (emphasis added).

In *Hatcher*, this Court extended the collateral attack rule in a novel way – it barred parents appealing a final TPR decision from challenging errors during the adjudication stage within the same case. Justice McCormack, joined by Justice Viviano and Justice Bernstein, noted this in *In re Hill*, ___ Mich ___; ___ NW2d ___ (2018) (Docket No. 155152), in which they pointed out that unlike the cases *Hatcher* relied upon, adjudication and TPR decisions are not made in two distinct proceedings. *Id.* at 3. Rather, they are a part of the same, continuous case, beginning with the filing of a petition and ending with a final determination of whether a parent's rights should be terminated. *Id.* Thus, the adjudication is actually a nonfinal order issued in the middle of a longer 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 the final TPR decision. 483 Mich at 935.

The court rules are consistent with the understanding that an adjudication is a nonfinal order. The 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 Jones*, 499 Mich at 862 (vacating adjudication and TPR orders because the trial court failed to properly adjudicate the parent); *In re Sanders*, 495 Mich at 394 (allowing parent to challenge adjudicatory errors in post-dispositional appeal); *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010) (reversing TPR for failures to involve an incarcerated parent in the adjudication and dispositional stages); *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); see also *In re Kanjia*, 308 308 Mich App 660; 866 NW2d 862 (2014); *In re Collier*, 314 Mich App at 558; *In re*

Alston, unpublished opinion per curiam of the Court of Appeals, issued March 17, 2016 (Docket No. 328667); *In re Guido-Seger*, unpub op; (all reversing TPRs based on errors in the adjudicatory stage.).

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 ___, ___ NW2d ___, at 4.

As such, the Ferrantis request that this Court overrule *Hatcher* and allow litigants to challenge adjudicatory errors in TPR appeals. When litigants raise unpreserved adjudicatory errors, this Court should apply the plain error standard set forth in *People v Carines*, 460 Mich at 750, which both it and the Court of Appeals have always applied when reviewing unpreserved errors in TPR cases. See, e.g., *In re Hudson*, 483 Mich at 928; *In re Mitchell*, 485 Mich at 922; *In re HRC*, 286 Mich App at 450 (all applying plain error standard). This standard would require litigants to demonstrate that the adjudicatory error was plain or obvious and affected "substantial rights." *Carines*, 460 Mich at 763.

Applying this rule to this case, the Ferrantis ask this Court to reverse the trial court's adjudication and TPR decisions because the trial court plainly erred when it failed to properly advise them of any of their rights before accepting their adjudicatory plea, and that error affected their substantial rights.

III. The Trial Court Plainly Erred When It Visited The Ferranti Home To Witness The Condition Of The Home.

Standard of Review

This Court reviews unpreserved statutory and constitutional challenges for plain error affecting substantial rights. *People v Carines*, 460 Mich at 776. Under this standard, 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

This Court should also reverse the termination of the Ferrantis' parental rights because the trial court's second error – viewing the Ferranti home – was plain error that affected their substantial rights. Indeed, the Court of Appeals admitted that the trial court erred in viewing the Ferranti home. *In re Ferranti*, unpub op, 105a, ("[W]e agree that the trial court erred by personally visiting and viewing respondents' home.").

The Court of Appeals' finding of error was correct. 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. Rather, juvenile courts are courts of limited authority, and their power to act stems from specific statutes and court rules. MCR 3.901(A)(2)*; s*ee also *In re Macomber*, 436 Mich 386, 389-390; 461 NW2d 671 (1990) (noting that juvenile courts are of limited jurisdiction and can only exercise powers defined by the Legislature).

No court rule or statute authorizes a juvenile court to view a family's home. 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, even if MCR 2.507(D) somehow applied in this case, the trial court's decision to directly witness the condition of the home even exceeded the authority provided in that rule. 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 could not view a relevant location as part of an independent investigation into disputed facts. *Id*. Instead, a trial court could only view a relevant location to clarify its understanding of undisputed facts. *Toussaint v Conta*, 292 Mich 366, 370; 290 NW 830 (1940). This accords with the longstanding evidentiary rule that a judge can never serve as a witness in a case. MRE 605.

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 352-353. 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, simply viewed an intersection where a car accident had occurred to gain a better understanding of the evidence introduced at trial. *Toussaint*, 292 Mich at 369-370. In *Toussaint*, neither party disputed the location of the accident, only whether the defendant had driven negligently. *Id.* at 367-368.

This limitation is consistent with due process. Michigan courts have long recognized that when a trial judge considers evidence outside of the record, it denies the parties a fair proceeding. See, e.g., *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 had 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." 106a. But the court incorrectly found that the error did not affect the Ferrantis' substantial rights. 106a-107a.

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." 7a. Five days later, Jessica's lawyer-guardian ad litem, David Delaney, disagreed, describing the home as "suitable," and disputed Ms. Croff's observations. 11a. 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. 19a.

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. 47a, 48a. In contrast, Mr. Delaney disagreed with Ms. Klein, and instead acknowledged that "the house was okay" for Jessica. 53a. 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." 53a-54a. The court specifically viewed the home to investigate and resolve the dispute over the home's cleanliness.

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." 105a. By relying on its own observations, the court gave the Ferrantis no meaningful way to challenge its observations and conclusions. The court did not create a record of its findings so the Ferrantis had no way of knowing 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 ever meaningfully measuring the precise harm of its plain 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 Trial Court Exceeded Its Authority And Violated Due Process By Privately Speaking With Jessica In Chambers.

Standard of Review

This Court reviews unpreserved statutory and constitutional challenges for plain error affecting substantial rights. *People v Carines*, 460 Mich at 776. Under this standard, 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

Finally, this Court should reverse the trial court's TPR order because the trial court plainly erred by privately interviewing Jessica in chambers prior to

rendering its decision. Neither the Juvenile Code nor the court rules governing child protective proceedings permit a court to speak with a child in chambers. Instead, the Juvenile Code contains other measures to protect children while they testify in open court, including the use of a support person when testifying, MCL 712A.17b(4), the use of a videorecorded statement, MCL 712A.17b(13), or shielding the witness from the respondent upon a showing of psychological harm. MCL 712A.17b(12). Thus, when a court privately interviews a child, it exceeds its statutory authority, violates a parent's due process rights and contravenes the judicial canons of ethics, which expressly prohibit ex parte communications unless authorized by law. *In re HRC*, 286 Mich App 444; 781 NW2d 105 (2009); Michigan Code of Judicial Conduct, Canon 3(A)(4)(e).[3]

In fact, the Court of Appeals has already specifically ruled that a trial court's in-camera interview of a child is reversible error. In *HRC*, the Court of Appeals squarely confronted this issue and reversed a TPR decision where the trial court "opted to conduct in-camera interviews" of the children involved. *Id.* 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, the Court of Appeals held that "a trial court presiding over a juvenile proceeding has no authority to conduct in camera interviews of the children involved." *Id.* It further

[3] In contrast, it is well-settled that in child custody cases, the court rules expressly allow a judge to interview a child in chambers for the limited purpose of obtaining the child's preferences of where he or she wants to live. MCR 3.210(C)(5); *Molloy v Molloy*, 247 Mich App 348, 362; 637 NW2d 803 (2001) (finding that while child custody courts can interview a child to ascertain their preferences, they must also create a record of that interview to allow appellate review).

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. The due process problems are exacerbated when the trial court makes "no statements on the record reflecting the types of questions the children were asked or the evidence that was elicited" because "there is no reviewable record whatsoever regarding what occurred during these interviews." *Id.*

Here, the trial court privately spoke with Jessica – in chambers – during her parents' TPR hearing. 89a, 90a. The court did not reveal how it would be conducting the interview, nor what questions it would ask. Neither of the Ferrantis' attorneys were permitted to attend this interview, and the court created no transcript or recordings of its interview, thus precluding any appellate review involving the substance of the conversation. In addition, the court did not even notify the attorneys of the interview until after completing it. 90a. In taking these steps, the trial court exceeded its statutory authority and 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." 91a. 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." 91a. Later, it wrote that the decision was a "closer decision than the usual" and "one of the tougher decisions the Court has faced." 92a. These statements suggest that the trial court's interview with Jessica after the closing of proofs played a critical role in this close case.

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 measure because no one actually knows what the trial court learned when it obtained information outside the record. In a case that was "closer than the 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 and the supplemental brief, the Ferrantis respectfully request that this Court grant the 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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Dated: August 6, 2018