IN THE MICHIGAN SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
SHAPIRO, P.J. AND M.J. KELLY AND O'BRIEN J.J.

IN RE FERRANTI, MINOR.

SUPREME COURT NOS. 157907; 157908
COURT OF APPEALS NOS. 340117; 340118
OTSEGO COUNTY CIRCUIT COURT
FAMILY DIVISION; J-15-089-NA

APPELLEE'S SUPPLEMENTAL BRIEF IN RESPONSE TO APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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JURISDICTIONAL STATEMENT

The Michigan Supreme Court has jurisdiction pursuant to MCR 7.301(a)(2) to review by appeal a after decision by the Court of Appeals. The Court of Appeals decision was issued on May 10, 2018, and Appellant filed a motion for leave to appeal. On July 5, 2018, this Court ordered the Clerk to schedule oral argument on whether to grant the application for leave to appeal and directed that the parties file supplemental briefs.

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STATEMENT OF QUESTIONS PRESENTED

I. Did this Court correctly hold in *In re Hatcher*, 443 Mich 426 (1993), that the collateral attack rule applied to bar the respondents-parents from challenging the trial court's initial exercise of jurisdiction over the respondents on appeal from an order terminating parental rights in that same proceeding?

Appellants/Respondents: No

Appellees/Petitioners: Yes

The Court of Appeals: Yes

II. If *Hatcher* was correctly decided, would due process concerns in this case override the collateral bar rule when the court did not reiterate their rights immediate prior to the taking of their plea, even though the parties were advised of their rights at the initial inquiry hearing, were represented by counsel at all stages of the proceeding, chose to enter a plea of admission to certain allegations and participated in services over the duration of the 20 month long case and enough legally admissible evidence was presented at the preliminary hearing for the trial court to have taken jurisdiction?

Appellants/Respondents: Yes

Appellees/Petitioners: No

The Court of Appeals: No

III. Were Appellant's substantial due process rights violated when the trial court viewed a Respondent-parent's home when the Respondents and their counsel repeatedly requested on the record for the trial court and all parties to do so, and when there was overwhelming additional evidence presented at the terminating hearing to meet the clear and convincing evidence standard to override any due process concerns?

Appellants/Respondents: Yes

Appellees/Petitioners: No

The Court of Appeals: No

IV. Did the trial court violate Appellant's substantial rights when it privately spoke to the minor child, although the Respondent-parents repeatedly requested on the record that such interview occur, when the Guardian ad litem had met his statutory duties in meeting with the child and did not have any objection to this procedure, and the trial court did not appear to rely on any of that information gleaned in that meeting in his termination opinion?

Appellants/Respondents: Yes

Appellees/Petitioners: No

The Court of Appeals: No

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COUNTER STATEMENT OF FACTS

I. FAMILY HISTORY

Jessica Ferranti is a fifteen year old girl who has spina bifida, stage three chronic kidney disease, attention deficit disorder, constipation, hydrocephalus, and metabolic acidosis. (5a, 1b). In addition, she has been in and out of foster care twice during the last several years due to her parents being wholly unable to care for her medical needs and keep the home in a basic sanitary condition. Since 2013, the family has had numerous in-home services to assist them with scheduling and attending Jessica's medical appointments and to assist with keeping the home clean and safe for Jessica. [14b]. The family worked with a variety of in home service providers, including Northern Family Intervention Services. They were provided with financial help to replace the flooring, which had become deplorable due to animal feces and neglect, individual counseling for both Appellants, the Family Support Program, intensive services with Child Protective Services ("CPS") and with housing assistance because they neglected to inform the workers that they being evicted. [12b]. Even with these services, Appellants still needed direction from the trial court to rehome the various pets they had that they were unable to care for and that contributed to the poor home conditions. [15b].

Starting in 2013, CPS received referrals that Appellants were unable to ensure that Jessica catheterized herself regularly, and had difficulty attending Jessica's various medical appointments and keeping up to date on her prescription medications. [15b]. During that period of time, Appellants worked with numerous experienced caseworkers to monitor their progress on cleaning up the family home. After viewing the home during this time period, Christina Pudvan, a caseworker with over twelve years of experience described Appellant's home as "the worst home conditions I've seen in my career." [12b]. Jessica was removed from the home and placed in foster care from October 2013 until approximately August 2014. Appellees did not request case closure until November 2014 so that Appellants were able to continue participating in the in-home services to maintain placement of the

child at home. Even after Jessica was returned home, Child Protective Services received referrals regarding the child's cleanliness but continued to make herculean efforts to maintain Jessica at home and continued with offering intensive services. [13b]. When the court case closed the family still had the assistance of Northern Family Intervention Services, and Family Support Services. [13b]

II. THE CURRENT CASE

In October 2015, CPS worker Amy Croff investigated a new referral involving Jessica. She visited Jessica at school where she could readily observe dirt and grime on her neck and in addition, Jessica had a strong smell of body odor and urine about her person. [7a, 4b]. Ms. Croff visited the home and found it to be in extremely unsafe and unsanitary conditions yet again. There were animal feces on the carpet, the home was extremely cluttered, there was no wheelchair available for Jessica to move about and the bathroom had fecal matter all over it. [7a, 21b, 22b]. Jessica's bedroom smelled very strongly of urine as well. Jessica regularly moves around the house by crawling and at the time had an open wound on her foot, so the unsanitary conditions of the home were especially concerning. [7a, 23b].

Ms. Croff investigated further and learned that Jessica had not been seen by her urologist for a six month follow up, and had not seen her primary care physician for anything except an ear infection in the last year. For a child with Jessica's medical conditions, this was highly unusual. Appellants had not sought treatment for the wound on Jessica's foot and normally a child with Jessica's medical conditions would be referred to a wound clinic. [7a]. Jessica did not complete her physical therapy as recommended through Mott Children's Hospital and had not had a refill completed on her medications that she takes for her kidney functioning. In fact, Ms. Croff reviewed the records and found that Jessica's 30 day prescription for Detrol was last filled in March 2015. [7a]. Ms. Croff filed a petition for removal and the trial court granted that request. At the preliminary hearing, the court read Appellants their rights and appointed counsel to represent them during the proceedings. [5a]. Once brought into care, Jessica's doctor found that she had a urinary tract infection, which was previously undetected and may

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have been caused by her not receiving her necessary prescriptions. One of the risks of missing these medical appointments is that untreated urinary tract infections can accelerate renal damage and decline in overall function. [1b, 2b]. Intermittent catheterizing is necessary for Jessica's bladder health and to decrease her risk of UTI's and the Detrol medication helps to decrease the risk of infection. [1b, 2b]. Jessica has decreased sensitivity due to her medical conditions and may not know that she has a urinary tract infection, which is also why these appointments are so necessary. [7a].

Upon Appellant's request, the trial court conducted a contested preliminary hearing. Michelle Mills, a pediatric nurse practitioner at the nephrology clinic at the University of Michigan testified that with a child with Jessica's medical conditions should be seen every three to four months, but that Jessica had missed appointments in July, August and September 2015. [1b, 2b] She stated that Jessica was supposed to be taking Detrol every day and it did not appear the prescription had been filled as it should have been. [17a]. Ms. Mills further stated that without regular monitoring, Jessica was at risk of developing secondary infections and that it was very concerning she had missed those appointments because as a child reaches puberty, there is a greater risk of their kidney function declining. [3b]. Ms. Croff testified that when she first met with Jessica at the school, she had visible dirt on her neck and a body odor such that it was disruptive to the teaching staff and other students in the class. [4b]. The school also reported that Jessica regularly ran out of catheters. [4b]. In addition, Ms. Croff provided additional testimony regarding the conditions of the home and indicated that the home was very cluttered and animal feces were on the floor of Jessica's bedroom. [5b]. She also reported that the bathroom was very dirty with possible urine and feces around the toilet. Jessica's room smelled strongly of urine and her mattress appeared to be very dirty and soiled. [5b]. Appellant Michael Ferranti testified and stated that he "didn't normally go to that end of the house," referring to the area of the home where Jessica's room was and the children's bathroom was, and agreed that the conditions of that area

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was "atrocious." [7b]. The trial court authorized the petition during this hearing, there was also a colloquy between the trial court and counsel about dates for a jurisdictional trial.

On December 21, 2015, rather than continuing with the jurisdictional trial date, both Appellants entered a plea to two allegations, three and twelve. [21a, 30b-34b]. Appellants essentially admitted to the same evidence that was already presented at the preliminary hearing by various witnesses. Both Appellants were represented by counsel and acknowledged that they wanted to enter a plea to those allegations. [21a]. Immediately after the Appellants entered their plea, the trial court made the statement "Obviously any adjourned date that had been set for a trial would not be discontinued as there's no longer a need for it." [21a], at which time Appellant Michael Ferranti's attorney indicated to the court that his client would be attending some appointments with the minor child. He did not object to the plea process or make any objection over what had just occurred. The trial court held an additional twelve (12) hearings after the parties entered a plea, between review hearings, permanency planning hearings, motion hearings and status conferences[1] and Appellants were represented by counsel at each of these hearings and never objected to the trial court's exercise of jurisdiction, defect in any plea proceedings or any other aspect of the trial court's procedure, including the interview of the minor child and the home visit

A permanency planning hearing occurred on October 18, 2016. The guardian ad litem acknowledged having met with the child and indicated that the condition of the home when he viewed it was "minimal." [10b] Wellspring caseworker Michelle Klein, who worked with the family on the 2013-14 case as well as the current case, testified that the family had made very little progress on the home conditions until after the prior review hearing when the Department asked for the court to schedule a permanency planning hearing. [8b]. Despite Jessica being in care for nearly a year, the family took no

[1] The trial court also held a dispositional hearing on 1-12-16, but this hearing does not appear to have been transcribed.

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steps to clean the home prior to the Department telling the court they were seeking a goal change. Appellants even told Caseworker Klein that they do not feel that there is anything wrong about the way they keep their home and that the conditions will not change and they will not live up to the Department's expectations. [9b].

On December 6, 2016, the trial court held a status conference. It was the first date that the court inquired of all parties whether anyone had objections to him viewing the home:

> THE COURT: ...What I wanted to do was see the premises. I think I remember Mr. Delaney's report, but so I want to set up a time to view it. That would be a time just—since it's part of the trial, things can't be explained to be at that time that this is so-and-so's room. When you get back into court, that can happen then. You can say, you know, 'When you saw this room, which was off to the left, that's where things are."
>
> MR. FERRANTI: That'd be perfect, your Honor.

[63a]

At the January 10, 2017 status conference, the parties worked out the logistics of the home visit and the court again reiterated that no one could speak to him at that time and that the termination hearing would be the appropriate time to make any arguments to inform him of what he viewed. [70a]. At no time did any parties or counsel object to this procedure.

The termination trial occurred subsequent to the scheduled home visit. Tim Strauss, a limited licensed psychologist, conducted psychological evaluations on Appellants on April 13, 2016. [11b]. Aside from the recommendations, Mr. Strauss noted that both Appellants appeared at his office for their evaluations with a significant body odor. He stated that for him to consider it significant, he has to open

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a window to air the room out and for both of them, he did. [11b]. He summarized the reasons he found that to be noteworthy:

> Usually when people come in for parental fitness evaluations, they attempt to try to put their best food forward, so its not unusual for parents to kind of dress up or clean up. They tend to try to present themselves in the most favorable light they can, which is understandable and actually a good sign. When they—when both of these parents came in with the body odor, especially when they knew the concerns were about health and physical neglect, it raises the questions about—if they can't take care of their own health or cleanliness, it raises the question of if they can do that for their children.

[11b].

Kathy Vroman, who was with the Family Support program, also testified. She worked with Appellants from March 2016-June 2016. [20b]. Ms. Vroman indicated that Appellants made progress in the "main area" of the home as far as cleanliness, but did not make much progress in other areas of the home. [20b]. Ms. Vroman said that Jessica's room would be filled with clean and dirty clothes on the floor, debris like empty bottles, wrappers, books would be on the floor and that the room smelled very strongly of cat urine. [20b]. She said that the bathroom Jessica would use was very dirty, with soap scum, urine and feces on the floor, garbage overflowing and bathtub was very dirty. [21b]. She said on the last day of the services in the home, the bathroom "did not look like anything had been done," and that Ms. Vroman informed Appellants it would be a barrier to Jessica being returned. [21b]. Ms. Vroman also said that there was an option for her to extend services but that the family did not feel that they would benefit further. [21b]. She would give the family small goals as far as the cleaning of the home

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and the goals were rarely met by the family and that in her experience she would have concerns about a child with Jessica's medical needs residing in that home. [21b].

Michelle Klein testified that at the time that the prior case closed in November 2014, there were still a few concerns with the smell in Jessica's bedroom of urine but the Family Support Worker purchased a new mattress for her bedroom. [16b]. Ms. Klein also set up Children's Special Healthcare Services and had an in home nurse from Munson Home Healthcare Services to work with the family. [16b]. In the current case, Ms. Klein indicated that Appellants were initially reluctant to participate in services and as of June 7, 2016, still had not made an appointment to begin counseling. [17b]. Once they began counseling, they missed various appointments. Ms. Klein stated when she initially visited the home at the start of the current case that it was cluttered but there was a strong smell of urine in Jessica's room and the mattress needed to be replaced again, but that the floor had been picked up. [18b]. She was in the home on a monthly basis and the conditions of the home varied. She said there was always an odor and that cat urine was a problem, although it improved. [18b].

However in October 2016, the day before the permanency planning hearing, Ms. Klein did an unannounced visit and the conditions of the bathroom were horrible, with dried feces and urine on the floor and was not acceptable. [18b]. She also indicated that when Jessica came into care, that the medications that Appellants provided were ones that the previous foster parents filled one year prior and that the prior CPS worker was unable to determine if they had filled the prescription more recently. [18b]. When Jessica first came into care, she had a bladder infection from a bacteria that was typically found in the fecal matter of animals. [19b]. She further went on to say that if Jessica's medical needs were not met, it could cause a decline in her kidney function and result in her needing dialysis or a transplant. Jessica had attended one appointment in one year while she was at home with her parents between the two cases, not the three that were required. [19b]. Ms. Klein recommended termination

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based on the plethora of services that the family had received and their lack of benefit from these services.

Appellant Michael Ferranti also testified and indicated that Jessica would likely always have a urine odor about her based on him researching the topic on WebMD. [22b]. He also implied that Jessica's mattress had to be repeatedly replaced due to her urine leaking, not cat urine. [22b]. He went onto explain "we're not the perfect family. It's hard to keep a lot of things clean and uncluttered due to five people being in the home[2]," regarding the home conditions. [23b]. He admitted that the bathroom was in an unsanitary condition when Ms. Klein viewed it several months prior, but that "lately" they had been keeping the home clean. [23b]. Appellant Michael Ferranti also admitted that Jessica had missed important doctor's appointments, and was not consistently provided her Detrol for her bladder. [24b].

Appellant Michael Ferranti also requested that the trial court interview Jessica. His counsel asked him," Are you asking the Court to interview Jessica prior to making a decision on termination?' He responded "I would ask that, yes." [25b]. Appellant also indicated that at the close of the prior foster care case, he was satisfied with the services that Appellee provided. [25b]. He also claimed that Jessica bathed each night and every morning and could not explain why Jessica had such a strong body odor at the time she was removed. [25b]. He admitted at parenting time visits that he did not notice a smell or urine or body odor. [25b]. He also said that just a few weeks prior to his testimony, one of the foster care workers,[3] Bridget, came to his home, and "yes, it wasn't the cleanest." [26b].

At the conclusion of testimony, the court inquired of counsel and the parties and said that he would like to speak to Jessica. [89a]. He stated "anyone has a right to object, so I'm just contemplating is that all right or is there an opposition to it?" [89a]. Appellant Michael Ferranti's counsel responded "...I would actually request it," and affirmed that he did not object. [27b]. Appellant Susan Ferranti's counsel

[2] In addition to Michael and Susan Ferranti living in the home, they had three other children who are siblings of Jessica, ages 18, 20 and 15 who all resided in the home, none of whom were subjects of this petition. [25b].
[3] Wellspring foster care supervisor Bridget Goss who did not testify at the termination hearing.

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stated "We don't object. We encourage the court to talk with Jessica." [27b]. The guardian ad litem added, "I have no objection...and would just add for the record having interviewed her a number of times, she is competent to do so, even though she is 13 or 14 years old." [27b]. While on the record, the court made arrangements to meet with Jessica privately with a court employee present. [27b]. During closing arguments, Appellant Michael Ferranti's counsel stated again, "Certainly we're requesting that Jessica be interviewed," and the court confirmed that he had already spoken to her. [90a].

On August 7, 2017, the trial court issued its opinion terminating parental rights. The court relied on MCL 712a.19b3(c), and MCL 712a.19b3(g). [92a]. The court made findings based upon the various child welfare professionals who had testified, that the parents would be unable to provide the care and hygienic home that Jessica needed. Regarding best interests, the court indicated that was a close call, given the testimony by Jessica's older sibling and the parents regarding the bond they had with her. Michael and Susan Ferranti appealed this decision and the Court of Appeals, after hearing oral argument, affirmed the trial court's decision. The Court of Appeals applied the collateral bar rule of *In re Hatcher*, and held that Appellants were foreclosed from attacking the trial court's jurisdiction based on defects in the plea process. [99a]. The Court of Appeals also held that it was an error for the trial court to view the home, but concluded that their substantial rights were not affected because in the trial court's order and opinion, he made no reference to observations regarding the statutory bases of termination. [99a]. The Court based this conclusion on the fact that Respondents and their counsel were present and aware of what the court was viewing and because the trial court allowed the parties to supplemental through testimony on the record after the viewing. Last the Court of Appeals held that the interview of Jessica did not violate Appellant's substantial rights because the trial court solicited input from the parties prior to the interview and both parties affirmatively urged the trial court to conduct the interview. These facts acted as a waiver and extinguished any error. Appellants subsequently filed a motion for leave to appeal and this Court ordered that the parties brief the issues.

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ARGUMENT

I. This Court's decision in *In re Hatcher*, 443 Mich 426 (1993) was correct and properly held that the collateral attack rule bars challenges to a trial court's initial exercise of jurisdiction in a subsequent appeal from an order terminating parental rights.

a. Standard of Review

Whether child protective proceedings complied with a parent's right to procedural due process presents a question of constitutional law, which this Court reviews de novo. *In re Sanders,* 495 Mich 394, (2014)

b. Argument

In *Hatcher*, this Court overruled *Fritts v Krugh*, 354 Mich 97 (1958). This Court in *Hatcher* specifically held that the ruling would sever a party's ability to challenge a probate court decision *years later* in a collateral attack where a direct appeal was available. *Hatcher*, 443 Mich at 444. The reasoning behind this decision is to preserve the finality of the trial court's decisions in child protective proceedings. In addition, finality is also important to the ultimate goal of finding permanency for the minor children.[4]

A collateral attack occurs whenever a challenge is made to any judgment in any manner rather than through a direct appeal. *People v Howards,* 212 Mich App 366, 369 (1995). A party may attack subject matter jurisdiction at any time, even if it is not in direct appeal. *Bank v Michigan Ed. Assn.,* 315 Mich App 496 (2016). However, *Hatcher* holds that a trial court's exercise of that jurisdiction may only be challenged on direct appeal. *Hatcher*, 443 Mich at 444. Thus, if a direct appeal was available, but a

[4] Appellant provides a laundry list of case law to support the implication that this Court and the Court of Appeals regularly allow parties to challenge jurisdiction via collateral attack. The majority of these cases deal with the 'one parent doctrine,' or cases where the trial court failed to appoint counsel *and* there was some other procedural deficiency.

party refused to appeal at that time, the party will be precluded from challenging the court's jurisdiction years later in the form of a collateral attack. *Hatcher*, 443 Mich at 444.

One factor that Appellee asks this Court to consider when determining whether to permit a collateral attack on jurisdiction is the length of time between the initial finding of jurisdiction and an appeal after a termination decision on a supplemental petition to terminate. Often a goal change from reunification to termination does not occur until at least one year has passed since removal of the child from the parent's home. Adding on the time it takes a trial court to schedule and complete a hearing on the termination petition and then issue its decision, plus the additional eight to nine months it takes a child protective case to work its way through the Court of Appeals further compounds the issue. If the decision is reversed on procedural grounds caused by a defect at the jurisdictional phase, Petitioner may be in the position of having to rely on witnesses who are now unavailable or unable to be located, witnesses who have fading memories, witnesses who are now reluctant to testify given the passage of time, and the possibility of other legally admissible evidence becoming unavailable.

Even more importantly, the child or children at issue in the case are continued to be placed out of the home while the parties litigate these issues. Meanwhile, the children may be bonding with their relative or foster caregiver and developing additional relationships. They may struggle emotionally with not having permanency and the uncertainty of not knowing where they will be living in the future. Child welfare professionals have long recognized that to ensure a child's well-being, they need a stable primary attachment figure and a sense of long term stability. In order for the courts to keep the goal of permanency in mind, Appellees ask that this Court adhere to the rule of *Hatcher* and continue to bar any collateral attacks on jurisdiction except in very limited circumstances where the trial court has not followed *Sanders* or has committed a violation of due process that cannot be ignored such as failure to appoint counsel.

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In addition, this matter may be analogous to a criminal case decided by this Court. In *People v Ward*, 459 Mich 602 (1999), this Court declined to allow a defendant to withdraw his plea, based on deficiencies in the plea taking process, fourteen months after his conviction on the basis that the Defendant was represented by competent counsel, and despite the errors in the plea taking process, his counsel did not object. In that case, this Court cited the importance of the need for finality and efficiency and effective administration of justice. *Ward*, 459 Mich at 611. It is even more important in a child protective case such as this one due to the need of achieving permanency for the child. If a Respondent-parent is able to proceed on a plea of admission while represented by counsel, and knowing that the trial court may have not complied fully with the court rule at the time of the taking of their plea, they could effectively use the procedure as an appellate parachute if the trial court proceeds to terminate their parental rights in the future, regardless of how overwhelming the substantive evidence is that backs up the statutory bases for termination. As well as protecting the important due process rights of the Respondent-parents in child protective cases, there should also be an obligation to ensure timely permanency for the child for the finality of the case. The court system should use every attempt to balance the rights of the parents with the 'rights' of the child to have a permanent home.[5]

Child protective cases are different from criminal cases in many ways, but particularly in that the only parties in a criminal case are the state and a defendant. Although protecting the parent's fundamental right to make decisions concerning the care, custody and control of their children is of the utmost importance, child protective cases should also take into consideration the needs of the child. Allowing a parent to participate in a child protective case for twelve, eighteen, or twenty four months

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[5] "It seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so too, do children have these interests, and so, too, must their interests be balanced in the equation. At a minimum, our prior cases recognizing that children are, generally speaking constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel." *Troxel v Granville*, 530 US 57, 87-87 (2000) (STEVENS, J. dissenting). Skeens, *The Right to be Parented: Recognizing a Child's Substantive Due Process Right to Permanency*, 13 Dartmouth L.J., 1, 6 (2015).

prior to a termination of parental rights order being entered, only for them to then appeal the process by which the trial court gained jurisdiction in the first place, seems like an inequitable result for the child, as well as the parent. All parties benefit from the efficient administration of justice and the ability to quickly resolve disputes and appeals.

To make the collateral bar rule more navigable for parties and counsel, one solution is that the trial court should be required to provide each parent with a written advice of rights, either attached to the order of adjudication or entry of plea, or orally on the record, indicating to them that they have the right to appeal or ask for leave to appeal the court's exercise of jurisdiction and giving the parties a finite amount of time in which to appeal that order. MCR 3.971 could also be amended to add a provision where the court asks counsel, if the parties are represented, if they believe that the court has complied with the court rule, similar to MCR 6.302(E) in the criminal courts. If the court had not complied with the court rule, than it must rectify any discrepancies prior to accepting the plea.

II. Due Process concerns do not override the collateral bar rule when Appellants were read their rights at the initial preliminary hearing, were represented by counsel at every phase of the proceedings, entered a plea of admission and participated in services for nearly twenty (20) months and never challenged the trial court's exercise of jurisdiction.

A. Standard of Review

Unpreserved constitutional challenges are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764 (1999). Generally an error affects substantial rights if it caused prejudice, for example, if it affected the outcome of the proceedings. *Id.* at 763. When plain error has occurred, reversal is warranted only when an error seriously affected the fairness, integrity or public reputation of judicial proceedings. *In re Osborne (on remand, after remand)*, 237 Mich App 597, 606 (1999).

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B. Argument

The Fourteenth Amendment provides for heightened protection against interference with fundamental rights and liberty interests by government. *Sanders*, 495 Mich at 409. Parents have a significant interest in the companionship, care, custody and management of their children, and that interest is an element of liberty protected by due process. *In re JK*, 468 Mich 202, 210 (2003), *citing In re Brock*, 442 Mich 101, 109 (1993). Due process requires fundamental fairness, which is determined in particular situation first by considering any relevant precedents and then assessing the several interests that are at stake. *In re Brock,* 442 Mich, 101, 111 (1993).

In order to take jurisdiction, a trial court must find that one or more of the statutory allegations alleged in the petition have been proven by a preponderance of the evidence, and this may be done via plea of admission or through a trial. MCR 3.971, MCR 3.972. The trial court must ensure that the plea is made knowingly, understandingly and voluntarily. MCR 3.971(c). In the instant case, the Court of Appeals opined that in prior cases where the collateral bar rule was overcome by due process concerns, these cases were premised on reviewing the "one parent doctrine," or cases where the trial court both failed to appoint counsel *and* advise the Respondent-parents of his or her rights. *In re Ferranti,* unpublished per curiam opinion Court of Appeals [May 10, 2018] Docket Nos. 340117; 340118. Appellee has not been able to locate any cases where only a failure to reiterate a parent's rights prior to a plea has been the sole cause of the Court allowing for a collateral attack. Further, the Court of Appeals held that because Respondent-parents were represented by counsel, and received an adjudication, they could have filed a direct appeal and continued to follow *Hatcher*.

On the day that the trial court authorized the removal of the minor child, Appellants were informed of various rights, including that they had a right to a trial by a jury or judge, that Appellee would have to prove the allegations by a preponderance of the evidence, and that they had a right to an attorney. [5a]. The trial court also addressed Appellant's other rights including the ability to subpoena

witnesses and cross examine witnesses. Both Appellants acknowledged that they understood those rights. [6a]. The court appointed counsel at that hearing, and it should also be noted that this was not the first time Appellants had been involved in child protective proceeding in front of the trial court. [6a]. Thus, they were familiar with the child protective system.

Between the time of the initial preliminary hearing and the time Appellants entered a plea, the court held several continued preliminary hearings where it took testimony from various witnesses, including CPS worker Amy Croff and Michelle Mills, pediatric nurse practitioner from the University of Michigan pediatric nephrology clinic. [16a]. Ms. Mills testified that the last Detrol prescription was filled in March 2015 and without this medication being taken regularly, it could cause urinary tract infections which could decrease her kidney function. [17a]. Based upon this testimony and the testimony of Amy Croff, the trial court authorized the petition and scheduled the matter for trial. It should also be noted that certainly the trial court had enough legally admissible evidence entered at the preliminary hearing to take jurisdiction of the minor child, had the same evidence been admitted at a jurisdictional trial. Appellant Michael Ferranti testified at the preliminary hearing and even described the conditions of his home in his preliminary hearing testimony as being "atrocious." [7b]

At the pretrial hearing on December 8, 2015, both Appellants and their counsel indicated their desire to proceed with a jury trial. [63a]. At the status conference on December 21, 2015, Appellants entered a plea indicating that they failed to timely fill Jessica's medications. [21a]. This information was already admitted into evidence through Ms. Croff and Ms. Mills at the preliminary hearing. Both Appellants were represented by counsel at the time of their pleas and prior to accepting the pleas, the trial court asked them, "is that what you want to do?" in response to both of their counsel advising the court of their intentions to enter a plea. [21a]. They both responded affirmatively. The court did not advise them of their rights again, nor did the trial court indicate to them that one consequence of the plea is that it could be used as evidence in a later termination proceeding.

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In re Hudson and *In re Mitchell* permit a parent to challenge termination a circuit court's failure to timely appoint counsel and failure to advise "of the consequences of a plea." *In re Hudson*, 483 Mich 928 (2009), *In re Mitchell*, 485 Mich 922 (2009). However, this case can be distinguished from *Hudson* or *Mitchell*. In *Hudson*, the respondent-mother was deprived of her right to counsel for nearly two years while the case was pending and as a result no evidence on her behalf was ever presented at any of the dispositional review hearings or permanency planning hearings. *Hudson*, 483 Mich at 929. In addition, the mother in that case was not advised of her rights when she entered her plea at the preliminary hearing while unrepresented by counsel and in fact, the trial court asked her "for purposes of today," regarding her waiver of counsel, regardless of the fact that she entered a plea. *Id*. at 930. The Court in *Hudson* determined that failing to advise respondent of the consequences of her plea was compounded by the absence of counsel to represent her. *Id*. at 936. *Mitchell* had similar facts to *Hudson*, where the respondent entered a plea without being advised of the consequences of the plea and of having a right to counsel.

In this case, Appellants were immediately appointed counsel at the first hearing and advised of their rights at the preliminary hearing. From there, Appellant's counsel vigorously defended their rights and cross examined various DHHS witnesses at the preliminary hearing and asserted Appellant's right to a jury trial on the record. It was plain error for the trial court to not fully advise Appellants of their rights at the time of the plea, but this failure to do so did not affect their substantial rights. The information in the allegations that Appellants admitted to was already a part of the court record through the testimony of Michelle Mills and Amy Croff at the preliminary examination. In fact, Appellant Michael Ferranti's own testimony at the preliminary hearing would be enough evidence for the court to take jurisdiction. Further, it is clear from the trial court's termination opinion that the issue of Jessica's prescriptions being refilled was not at the center of the decision on whether to terminate parental rights. The court did not rely on the issue of prescriptions being refilled in making the decision

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whether to terminate parental rights, as the central issues were the cleanliness of the home relative to keeping the child in a safe and healthy environment and attending medical appointments.

Because the allegations admitted to as part of the plea were supported by testimony and not relied upon in the decision to terminate parental rights, the omission of advising the Appellants of these rights did not seriously affect the fairness or integrity of these proceedings. There was overwhelming legally admissible evidence submitted at the preliminary hearing that supported a finding of jurisdiction, so it is not clear that there would have been a different outcome had Appellants proceeded with trial in lieu of entering a plea. The first time Appellants have argued against the validity of their own admissions has been on appeal. All counsel agreed at the plea hearing on 12/21/15 that there was enough evidence for the court to take jurisdiction and no party or counsel voiced objections. Appellants were given full notice of the proceedings, attorneys to represent their interests and a full and fair hearing where they opted to enter a plea of admission rather than continue with the already scheduled jurisdictional trial date. Their admissions, coupled with the evidence already admitted at the preliminary hearing clearly demonstrated that there is not a reasonable probability that the outcome of the proceeding as far as the court's exercise of jurisdiction would have been different had they been advised of these rights or if they had exercised their right to a trial. MCL 712a.2(b)(1) and (2). Appellants should not now be allowed to assign error on appeal to something that their counsel agreed was appropriate at the trial court level. There is no evidence that the failure to provide Appellants with these rights affected the outcome of the proceedings given the legally admissible evidence that was already entered into the record. Therefore Appellee asks this Court to find that any error in failing to advise Appellants of their rights during the plea taking process did not affect their substantial rights or the outcome of this case and to deny Appellant's application for leave to appeal and affirm the decision of the Court of Appeals.

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If this Court does determine that the error affected their substantial rights, but declines to revisit *Hatcher*, Appellee requests that the Court simply remand the case to the trial court for an adjudication that complies with the court rule.

III. The trial court clearly erred in viewing the family's home, however, this error did not affect their due process rights because the Appellants specifically requested that the court visit their home and that the trial court allowed Appellants to present evidence regarding the visit to the home at subsequent court hearings.

A. Standard of Review

Unpreserved constitutional challenges are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764 (1999). Generally an error affects substantial rights if it caused prejudice, for example, if it affected the outcome of the proceedings. *Id.* at 763. When plain error has occurred, reversal is warranted only when an error seriously affected the fairness, integrity or public reputation of judicial proceedings. *In re Osborne (on remand, after remand),* 237 Mich App 597, 606 (1999).

B. Argument

After the permanency planning hearing, but prior to the commencement of the termination hearings, the trial court requested to see Appellant's home. The court arranged for a specific day for the attorneys, guardian ad litem and himself to view the home. Appellants were instructed that "you can't really tell me [the judge] anything at that time," and "if there's things that need to be explained...or testimony about it, that can happen afterwards when we're back in court and we will schedule a trial date." [70a]. In response to the trial court scheduling a time to complete the home visit, Appellant Michael Ferranti's counsel responded "Okay. That's fine."[70a] At the subsequent two hearings, neither Appellant nor Appellee discussed the issue of the home visit. In fact, no party addressed the issue of the home visit until Appellant Michael Ferranti's closing argument where his counsel indicated that "....the

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Court has been through the home, as I have." [90a]. The Guardian ad litem also referenced the home visit in his closing argument and stated "We've all been to the home in this case, which was minimally adequate." [28b].

Although the trial court overstepped its authority in viewing the home, this error did not affect Appellant's substantial rights. Various witnesses testified over the course of the termination proceedings as to the condition of the home. Appellants testified and provided the trial court with additional information regarding the home conditions as well. Any effect that the home visit had on the trial court's opinion appears to be minimal given the reliance on DHHS witnesses. Appellants had the opportunity at trial to explain or present any additional evidence as to the condition of their home and in fact, the trial court specifically instructed them of that. In addition, Appellant's did not object to the home visit and welcomed it. Therefore, Appellee asks this Court to affirm the Court of Appeal's decision and to find that any error in viewing the home did not affect their substantial rights. A party should not be allowed to assign as error on appeal something which his or her counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute. *Dresselhouse v Chrysler Corp.*, 177 Mich App 470, 476 (1989).

The Court of Appeals agreed that it would be meritless for Appellee to argue that the home visit was appropriate due to their being no provision in the statutes, case law or court rules that allows such a home visit. Appellee does not dispute the standing of the law, and does not suggest that this Court make any changes to the law as it stands. The Court of Appeals correctly determined that because Appellants were present, together with their counsel at the home visit, and the trial court allowed Appellants to provide any testimony about what the court viewed at the visit, that it did not affect their substantial rights. The Court found that any observations that the trial court made about the home were backed up by testimony of witnesses with respect to the home conditions. Appellee requests that this

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Court adopt the reasoning of the Court of Appeals and not make any changes to the existing precedent and to find that the act of viewing the home did not violate their substantial rights.

IV. Appellant's due process rights were not violated when the trial court interviewed the child because Appellant repeatedly requested that the court interview her and were part of the one the record discussion of how and when the interview would occur.

A. Standard of Review

Unpreserved constitutional challenges are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764 (1999). Generally an error affects substantial rights if it caused prejudice, for example, if it affected the outcome of the proceedings. *Id.* at 763. When plain error has occurred, reversal is warranted only when an error seriously affected the fairness, integrity or public reputation of judicial proceedings. *In re Osborne (on remand, after remand)*, 237 Mich App 597, 606 (1999).

B. Argument

Several times during the proceedings, the trial court referenced a desire to meet with Jessica. At the conclusion of the proofs, the court asked the parties if anyone had an objection to him meeting with Jessica. [27b]. In response to this query, Appellant Michael Ferranti's counsel stated, "Your Honor, I would actually request it." [27b]. When directly asked if either Appellant objected to it, both Appellants through their counsel indicated that they did not object, in fact, they encouraged the court to do so. [T27b]. Again, during closing argument, Appellant Michael Ferranti's counsel against voiced his client's desire to have the court speak to Jessica. [90a]. The court did schedule a time to meet with Jessica prior to issuing its opinion.

In *In re HRC*, 286 Mich App 444 (2009), the Court of Appeals held that it was plain error that affected the respondents' substantial rights to conduct an in camera interview of the child prior to making a determination on whether termination would be in the child's best interests. In that case, the court already made the determination that there were statutory grounds to terminate and requested

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the interview in order to make the best interests determination. In *HRC*, the parties appeared to passively agree to the request to interview the child, but the court never directly asked the parties if they objected or gave them a chance to place an objection on the record. *HRC*, 286 Mich App at 450-451. It is not clear whether or not the court in *HRC* was provided with information through the proofs as to the children's preferences.

There are no other published cases that explore the issue of in camera interviews of children in child protective proceedings, but there are at least two unpublished Court of Appeals opinions that address the issue. In *In re Morgan*, the Court of Appeals determined that used of an in camera interview was harmless given that the trial court used that interview as a therapeutic opportunity to allow the child to voice her opinion and that the respondent was later made aware of what occurred during the interview, and that the child's desires were made known through other testimony and evidence. *In re Morgan*, (unpublished per curiam of the Court of Appeals, issued July 14, 2011, Docket No. 302352).

In the case at bar, there is not a transcribed record about what the trial court gleaned from the meeting with the child. There are statements throughout the record from the guardian ad litem where he indicated what the child's wishes were based on his interviews with her. [26b]. In addition, Appellant's counsel both *repeatedly requested* that the trial court meet with the child prior to him issuing an opinion on the case. Appellant Michael Ferranti's counsel requested that this meeting occur on more than one occasion in the course of the termination proceeding. The trial court stated "...anyone has a right to object, so I'm just contemplating is this all right or there an opposition to it?" [27b]. In response to that question, Appellant Michael Ferranti's counsel responded "Your Honor, I would actually request it." Appellant Susan Ferranti's counsel responded "We would encourage it." [27b] The trial court then went on to discuss the logistics with the parties while on the record. In fact, Appellant Susan Ferranti's counsel even inquired about the timing of the visit and at the same time, the trial court also

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arranged for the date and time of closing arguments. Any insinuation that Appellant Michael Ferranti's counsel was unaware that the visit occurred is not supported by the record. [27b].

There is another unpublished case that also addressed this issue. In re LDS the Court of Appeals determined that although the trial court erred in conducting an in camera review with the child, because respondent did not object to the trial court conducting these interviews, she could not demonstrate plain error that affected her substantial rights. *In re LDS*, (unpublished per curiam opinion of the Court of Appeals, issued May 25, 2010, Docket No. 295286). If this Court extends this reasoning, the Appellants not only acquiesced to the actions of the trial court, but actually requested that the trial court take these actions. Appellant is now claiming that these actions violated their due process rights when the trial court even stated that it would not conduct the interview if any party objected. Appellant is now attempting to use this as an appellate parachute now that their rights were terminated by the trial court. Appellant did not file a motion for a new trial on either of these issues at the trial court level, nor did Appellant object to the trial court's procedure.

Because Appellant repeatedly requested that the trial court conduct an in camera interview with the child, Appellee requests that this Court find that any error in the trial court conducting this meeting be determined to not affect their substantial rights and to deny Appellant's application for leave to appeal. Appellee is not requesting that this Court alter its current jurisprudence regarding in camera interviews in abuse or neglect cases, but would only note that as a practical matter, it can be difficult for a child involved in these cases to testify in open court. Despite being the subject of an abuse or neglect petition, often their loyalties to their parents put them in a difficult or awkward position if either party attempts to question them about their previous home life, or their preferences regarding permanency. In the alternative, if this Court finds that this error affected Appellant's substantial rights, Appellee requests that in lieu of ordering a new trial, that this Court remand this matter for a hearing in front of the trial court and ask the trial court to reopen the proofs and to place on the record the substance of

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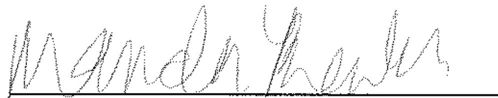
the conversations he had with the juvenile and give any party an opportunity to call the juvenile as a witness and to be questioned regarding the substance of the conversation with the trial court.

CONCLUSION

WHEREFORE Appellee requests that this Honorable Court DENY Appellant's application for leave to appeal for the reasons set forth above.

Respectfully Submitted,

Dated: 8/20/2018



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