STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE J FERRANTI
Minor

Supreme Court Nos. 157907;
157908
Court of Appeals No. 340117
340118
Otsego County Family
Court No.: 13-000071-NA
Honorable Michael K. Cooper

/

VIVEK S. SANKARAN (P68538)
CHILD WELFARE APPELLATE CLINIC
Attorney for Appellants-Respondents

MANDA M. BREUKER (P67826)
Otsego County Prosecutor's Office
Attorney for Petitioner-Appellee

DAVID M. DELANEY (P43485)
David M. Delaney, PLC
Appellee Guardian ad Litem

/

SUPPLEMENTAL BRIEF OF APPELLEE GUARDIAN AD LITEM

TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATEMENT OF BASIS OF JURISDICTION

Appellee Guardian ad Litem adopts the Statement of Basis of Jurisdiction of Appellee Department of Health and Human Services

COUNTER STATEMENT OF QUESTIONS INVOLVED

I. WHETHER THIS COURT'S OPINION IN *IN RE HATCHER,* 443 Mich 426 (1993), CORRECTLY HELD THAT THE COLLATERAL ATTACK RULE APPLIED TO BAR THE RESPONDENT-PARENTS FROM CHALLENGING THE COURTS INITIAL EXERCISE OF JURISDICTION OVER THE RESPONDENTS ON APPEAL FROM AN ORDER TERMINATING PARENTAL RIGHTS IN THAT THE SAME PROCEEDING?

Trial Court answers:	"Yes"
Appellants answer:	"No"
Appellees answer:	"Yes"

II. (a) WHETHER ISSUES THAT ARE NOT PROPERLY RAISED BEFORE A TRIAL COURT CAN BE RAISED ON APPEAL ABSENT COMPELLING OR EXTRAORDINARY CIRCUMSTANCES?

Trial Court answers:	"No"
Appellants answer:	"Yes"
Appellees answer:	"No"

(b) RESPONDENTS RECEIVED AN ADJUDICATION AND WERE REPRESENTED BY COUNSEL, AND THEY COULD HAVE FILED A DIRECT APPEAL. WHETHER REPONDENTS CAN COLLATERALLY ATTACK THE TRIAL COURT'S EXERCISE OF JURISDICTION IN THE INSTANT APPEAL?

Trial Court answers:	"No"
Appellants answer:	"Yes"
Appellees answer:	"No"

WHETHER APPELLATE REVIEW OF THIS CLAIM OF ERROR IS FORECLOSED?

Trial Court answers:	"Yes"
Appellants answer:	"No"

Appellees answer: "Yes"

III. WHETHER THE BURDEN BORN BY CHILDREN OVERRIDE A PARENT'S DUE PROCESS CONCERNS?

Trial Court answers: "Yes"

Appellants answer: "No"

Appellees answer: "Yes"

IV. WHETHER WITH THE CONSENT OF THE PARENTS, A TRIAL COURT IS PERMITTED TO VISIT A RESPONDENT'S HOME TO OBSERVE ITS CONDITION?

Trial Court answers: "Yes"

Appellants answer: "No"

Appellees answer: "Yes"

WHETHER A PARTY IS ALLOWED TO ASSIGN AS ERROR ON APPEAL SOMETHING WHICH HIS OR HER OWN COUNSEL DEEMED PROPER AT TRIAL TO PERMIT THE PARTY TO HARBOR ERROR AS AN APPELLATE PARACHUTE?

Trial Court answers: "No"

Appellants answer: "Yes"

Appellees answer: "No"

V. WHETHER WITH THE CONSENT OF THE PARENTS A TRIAL COURT MAY INTERVIEW A CHILD WHO IS THE SUBJECT OF CHILD PROTECTIVE PROCEEDINGS IN CHAMBERS?

Trial Court answers: "Yes"

Appellants answer: "No"

Appellees answer: "Yes"

WHETHER A PARTY IS ALLOWED TO ASSIGN AS ERROR ON APPEAL SOMETHING WHICH HIS OR HER OWN COUNSEL DEEMED PROPER AT TRIAL TO PERMIT THE PARTY TO HARBOR ERROR AS AN APPELLATE PARACHUTE?

Trial Court answers:	"No"
Appellants answer:	"Yes"
Appellees answer:	"No"

COUNTER STATEMENT OF FACTS

Appellee Guardian ad Litem adopts the Counter Statement of Facts of Appellee Department of Health and Human Services.

COUNTER ARGUMENT

I. THIS COURT'S OPINION IN *IN RE HATCHER,* 443 Mich 426 (1993), CORRECTLY HELD THAT THE COLLATERAL ATTACK RULE APPLIED TO BAR THE RESPONDENT-PARENTS FROM CHALLENGING THE COURTS INITIAL EXERCISE OF JURISDICTION OVER THE RESPONDENTS ON APPEAL FROM AN ORDER TERMINATING PARENTAL RIGHTS IN THAT THE SAME PROCEEDING.

II. (a) ISSUES THAT ARE NOT PROPERLY RAISED BEFORE A TRIAL COURT CANNOT BE RAISED ON APPEAL ABSENT COMPELLING OR EXTRAORDINARY CIRCUMSTANCES, AND (b) RESPONDENTS RECEIVED AN ADJUDICATION AND WERE REPRESENTED BY COUNSEL, AND THEY COULD HAVE FILED A DIRECT APPEAL. BECAUSE REPONDENTS CANNOT COLLATERALLY ATTACK THE TRIAL COURT'S EXERCISE OF JURISDICTION IN THE INSTANT APPEAL, APPELLATE REVIEW OF THIS CLAIM OF ERROR IS FORECLOSED.

III. THE BURDEN BORN BY CHILDREN OVERRIDE A PARENT'S DUE PROCESS CONCERNS

Standard of Review

Appellee Guardian ad Litem adopts the Standard of Review of Appellee Department of Health and Human Services.

ANALYSIS

Appellant-parents argue that the trial court violated MCR 3.971(B)(4) by failing to advise at the time of the plea that the plea could be used as evidence in a later proceeding to terminate parental rights. Appellants failed to preserve this issue by challenging the validity of the pleas in the trial court. This Court generally reviews unpreserved issues for plain error affecting substantial rights. *In re TK*, 306 Mich App 698 (2014). Appellate review of this issue is

foreclosed because appellants are not permitted to collaterally attack the trial court's exercise of jurisdiction following the termination of parental rights.

Absent certain exceptions, a trial court's exercise of jurisdiction over a child must be challenged in a direct appeal from the initial dispositional order. MCR 3.993(A)(1). *In re SLH*, 277 Mich App 662 (2008). Exceptions have been recognized when the trial court fails to *both* timely appoint counsel and "to advise the respondent that his plea could later be used in a proceeding to terminate his parental rights," *In re Mitchell*, 485 Mich 922 (2009). None of the exceptions apply in the instant case. Because appellants cannot collaterally attack the trial court's exercise of jurisdiction in the instant appeal, the court must reject this claim of error.

Where the trial court failed to advise that a plea could be later used as evidence in a proceeding to terminate parental rights, as required by MCR 3.971(B)(4), a respondent must establish prejudice from that. Appellants make no claim that the various allegations in the petition were untrue and the record does not indicate there were any viable challenges to the petition allegations, which clearly justified the court's jurisdiction over the child. Given these circumstances, appellants have not established a reasonable probability of a different outcome had they gone to trial.

To be entitled to relief based on this unpreserved issue, respondent must demonstrate that the error affected her substantial rights. An error affects substantial rights if it is prejudicial, i.e., if it affects the outcome of the proceedings. *People v Jones*, 468 Mich 345 (2003).

In support of the plea to the trial court's exercise of jurisdiction, Appellants admitted to certain facts relating to the removal of the child. These same facts were established at the termination hearing through the testimony of the family services caseworkers who worked with

appellants in prior proceedings. Because petitioner presented independent evidence at the termination hearing to establish the facts elicited in appellant's statements at the plea hearing, the trial court was not required to rely on respondent's statements at the plea hearing.

Thus, a trial court's failure to advise that a plea could later be used as evidence in a proceeding to terminate parental rights does not affect the outcome of the proceeding, and therefore, does not affect substantial rights. *Jones*.

The Guardian ad Litem adopts the well reasoned position of the appellees in *In re* HILL, Minors SC: 155152 Order issued April 6, 2018.

This court's opinion as to the collateral attack rule in *In re Hatcher* 443 Mich 426 (1993) was correct. This court's ruling was consistent with the court rule that a final order be appealed MCR 7.203(A). This court in *In re Hatcher,* 443 Mich 426 (1993) followed the rule from the US Supreme Court in *Mathews v. Eldridge,* 424 US 319 (1976), establishing a three part balancing test to determine whether additional "due process" determination is afforded.

The three part test is:

1. The interests of the individual in retaining their property and the injury threatened by the official action;
2. The risk of error through the procedures used and probable value, if any, of additional or substitute procedural safeguards;
3. The costs and administrative burden of the additional process, and the interests of the government in efficient adjudication.

The "costs" of prong 3 are generally born by the children. Additional time in foster care

while appellant review takes place; lack of finality; trauma of possibly being reunited with parents subject to a termination again; risking their personal safety and mental wellbeing. All of which far outweighs granting a parent additional "due process". *Petitioner/Appellee's Brief in Response to Respondent/Appellant Mother's Application for Leave to Appeal*.

The rules of preservation of appellate issues should apply in full in circumstances like this case. The general rule is that "…issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances." **People v Grant, 445 Mich 535 (1994)**. The justification for the rule is fairness, to the litigants, who are best able to address alleged errors at the time that they occur, and the public which has to bear the cost of new trials. **People v Carines, 460 Mich 750, 764-765 (1999).**[1] This analysis, set out in criminal cases, must be more expansive and compelling here because the children are the central parties in child protective proceedings, and they have an independent interest, along with the state, in the finality of the proceedings.

Lehman v Lycoming Cty. Children's Services Agency, 458 U.S. at 513-514. This is also true, because the respondent here, like in any child protection case where the court originally took temporary custody over the children, had a number of opportunities to rase the alleged error(s) or ask for a rehearing at each of the periodic review hearings and by filing a petition for rehearing. **See MCR 3.975(G), Post Dispositional Proceedings; MCR 3.976, Permanency Planning Hearings; and MCR 3.992(A), Rehearings or New Trials.**

To determine whether an unpreserved error at the original adjudication requires reversal, the court, on appeal, must apply the plain error rule, as set out in **People v Carines, supra at**

[1] The plain error rule has been applied, generally, in termination of parental rights appeals, **In re H.R.C., Mich App. 444 (2009); In re Jones, 316 Mich App. 110 (2016)**

460. The first three prongs of the rule from Carines require establishing the (1) an error occurred, (2) the error was "plain" clear or obvious, and (3) the error affected the outcome of the proceedings. The fourth Carines consideration states that reversal is only required where the error contributed to the conviction of an actually innocent person or otherwise undermined the fairness and integrity of the process to such a degree that an appellate court cannot countenance the error. **See People v. Cain, 498 Mich 108, 119 (2015).** *Amicus Curiae Brief of Children's Law Section of the State Bar of Michigan.*

COUNTER ARGUMENT

IV. WITH THE CONSENT OF THE PARENTS, A TRIAL COURT IS PERMITTED TO VISIT A RESPONDENT'S HOME TO OBSERVE ITS CONDITION. A PARTY IS NOT ALLOWED TO ASSIGN AS ERROR ON APPEAL SOMETHING WHICH HIS OR HER OWN COUNSEL DEEMED PROPER AT TRIAL SINCE TO DO SO WOULD PERMIT THE PARTY TO HARBOR ERROR AS AN APPELLATE PARACHUTE.

Standard of Review

Appellee Guardian ad Litem adopts the Standard of Review of Appellee Department of Health and Human Services

ANALYSIS

The guardian ad litem concurs with the ruling of the Court of Appeals.

Because respondents and their counsel were present during the viewing and aware of what the court was observing, and because the trial court allowed the parties to provide explanations to the court through testimony on the record after the viewing, the court's viewing of respondents' home did not violate respondents' due process rights. Further, given the trial court's reliance on the testimony of witnesses who described both the historical condition of the home, the services provided, and the current condition of the home, as well as the effect of the condition of the home on JF's medical condition, it does not appear that the trial court's visit to the home affected the outcome of the proceedings. *In re Ferranti,* unpublished per curiam opinion Court of Appeals (May 10, 2018) Docket Nos. 340117; 340118.

COUNTER ARGUMENT

V. WITH THE CONSENT OF THE PARENTS A TRIAL COURT MAY INTERVIEW A CHILD WHO IS THE SUBJECT OF CHILD PROTECTIVE PROCEEDINGS IN CHAMBERS. A PARTY IS NOT ALLOWED TO ASSIGN AS ERROR ON APPEAL SOMETHING WHICH HIS OR HER OWN COUNSEL DEEMED PROPER AT TRIAL SINCE TO DO SO WOULD PERMIT THE PARTY TO HARBOR ERROR AS AN APPELLATE PARACHUTE.

Standard of Review

Appellee Guardian ad Litem adopts the Standard of Review of Appellee Department of Health and Human Services.

ANALYSIS

The guardian ad litem concurs with the ruling of the Court of Appeals finding that both respondents consented to the interview; respondent-father's counsel stated, "I would actually request it," and respondent-mother's counsel stated, "We encourage the court to talk with JF." A "respondent may not assign as error on appeal something that she deemed proper in the lower court because allowing her to do so would permit respondent to harbor error as an appellate parachute." *In re Hudson,* 294 Mich App 261, (2011). Because the trial court solicited input from the parties before conducting the *in camera* interview and both parties affirmatively urged the trial court to conduct the interview, respondents waived their challenge to the court's *in camera* interview of JF. Respondents' waiver extinguished any error. *People v Carter,* 462 Mich 206, (2000). *In re Ferranti*.

RELIEF SOUGHT

Appellee Guardian ad Litem respectfully request that this Honorable Court affirm the Order Terminating Parental Rights.

Respectfully Submitted,

Dated: August 27, 2018

/s/David M. Delaney
DAVID M. DELANEY
Appellee Guardian ad Litem