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' REPLY TO APPELLEES' SUPPLEMENTAL BRIEFS

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ARGUMENT

In its brief, DHHS concedes three important points: 1) the trial court plainly erred by failing to advise the Ferrantis of the procedural rights they would be waiving before accepting their adjudication pleas, DHHS Br. at 17 ("It was plain error for the trial court to not fully advise Appellants of their rights at the time of the plea."); 2) the case law prohibiting courts from interviewing children in chambers – as the court did in this case – should not be disturbed, DHHS Br. at 23 (DHHS "is not requesting that this Court alter its current jurisprudence regarding in camera interviews."); and 3) the court plainly erred by visiting the Ferranti home, as it had no authority to do so. DHHS Br. at 19-20 ("The trial court clearly erred in viewing the family's home" and "overstepped its authority.").

Despite making these concessions, DHHS nevertheless asks this Court to affirm the termination of parental rights ("TPR") decision, requesting this Court to ignore the plain errors for a variety of reasons, each of which will be examined below.

I. The Trial Court's Plain Error In Accepting The Ferrantis' Adjudicatory Pleas Affected Their Substantial Rights.

First, DHHS, relying on this Court's ruling in *In re Hatcher*, 443 Mich 426; 505 NW2d 934 (1993), argues that this Court should not review the plain errors in the adjudicatory process and also argues that any error in the process did not affect the Ferrantis' substantial rights. In the Appellants' Supplemental Brief, undersigned counsel briefed why this Court should overrule *Hatcher*. App. Br. at 18-21. In short, *Hatcher* was wrongly decided because adjudication and TPR

proceedings are not collateral proceedings but are different stages in one continuous case. Consistent with this understanding, the court rules do not require that courts advise parents of their right to appeal an adjudication order or their right to appointed counsel to litigate such an appeal. DHHS acknowledges this omission, even suggesting that "the trial court should be required to provide each parent with a written advice of rights . . . indicating to them that they have the right to appeal." DHHS Br. at 14. Additionally, the rules do not require courts to tell parents that they will forever lose their right to challenge adjudicatory errors if they fail to appeal the interlocutory decision immediately. In other words, *Hatcher* has created a framework in which parents lose the opportunity to challenge the State's deprivation of their constitutional right to parent – the right at stake in every adjudication decision – without ever being told how to perfect such a challenge.[1]

Additionally, DHHS argues that should this Court overrule *Hatcher*, it should still affirm the TPR decision because the adjudicatory errors, though obvious, were harmless given testimony that was introduced at the preliminary hearing. DHHS Br. at 16. This argument misses key differences between the

[1] DHHS also argues that this Court and the Court of Appeals have only overlooked *Hatcher's* collateral attack rule where courts have also deprived a parent of the right to counsel. DHHS Br. at 17. This is incorrect. In many of the cases in which this Court and the Court of Appeals reversed TPR or other post-dispositional orders based on faulty adjudications, counsel represented the parents at the adjudication stage. See, e.g. *In re Guido-Seger*, unpublished opinion per curiam of the Court of Appeals, issued February 17, 2017 (Docket No. 333529) (app pending); *In re Jones*, 499 Mich 862; 874 NW2d 129 (2016); *In re Alston*, unpublished decision per curiam of the Court of Appeals, issued March 17, 2016 (Docket No. 328667); *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014); *In re Mays*, 490 Mich 993, 994 n 1; 807 NW2d 304 (2012).

purposes of a preliminary hearing and the adjudication trial. Preliminary hearings occur prior to a full adjudication trial because emergency decisions must be made about whether the petition should be authorized and where a child will be placed pending the adjudication trial. MCR 3.965(B)(12)(13). Because of the immediate need to make these decisions, the rules of evidence do not apply, and hearsay is admissible. MCR 3.965(B)(12). At the preliminary hearing, the trial court is only tasked with making a finding as to whether probable cause exists to find that one or more allegations in the petition is true and falls within the scope of MCL 712A.2(b), an incredibly low standard. *Id.*

In contrast, the adjudication trial is a full evidentiary hearing, after which – if the State prevails – a parent's constitutional right to direct their child's upbringing is transferred to the State. As this Court noted in *In re Sanders*, "The [adjudication] trial is the only fact-finding phase regarding parental fitness, and the procedures afforded respondent parents are tied to the allegations of unfitness contained in the petition. . . . The procedures . . . protect the parents from the risk of erroneous deprivation of their parental rights." As such, parents have a right to discovery before the trial, MCR 3.922(A), and a right to a trial by jury. MCR 3.911(A). And at the adjudication trial, the rules of evidence strictly apply. MCR 3.972(C).

The trial court clearly understood the differences between the preliminary hearing and the adjudication trial in this case. At the outset of the preliminary hearing, it stated, "it's an emergency hearing" and "just a very initial hearing." 6a.

Later that hearing, the court remarked, "I obviously can't have a full-blown trial in this short notice or this short amount of time," and instructed the Ferrantis that they didn't have to respond to the allegations. 8a. Consistent with this, at the conclusion of the preliminary hearing, the court scheduled the matter for an adjudication trial before a jury. Everyone clearly understood that the preliminary hearing was not the adjudication trial.

Given the key differences between the two hearings – and the constitutional significance of the adjudication trial in a child protective proceeding – this Court should not rule that the State can deprive parents of their right to an adjudication trial based on hearsay evidence secured at an emergency-driven preliminary hearing.

II. The Trial Court's Plain Error To Visit The Ferranti Home Affected Their Substantial Rights.

Second, DHHS argues that though the trial court plainly erred in visiting the Ferranti's home, the error did not affect their substantial rights because it was harmless. DHHS Br. at 19. This error was anything but harmless.

During the case, the court had two primary concerns: 1) the Ferrantis' attention to their daughter's medical needs and 2) the condition of their home. 20a. But by the end of the case, only the condition of the home remained an issue as the Ferrantis had attended all of the child's medical appointments. 50a.

Yet the condition of the home remained in dispute throughout the case, as the court had received conflicting information about whether it was habitable for the child. See App. Br. at 25-26. So the trial court wanted to view the house itself,

noting, "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.

Then, after viewing the home, the court explicitly relied on those observations in its TPR decision. The court wrote, "[W]hen the Court viewed the [Ferranti home], it is not where a person with Spinal Bifida [*sic*] will thrive." 105a. Because the court relied on its personal observations to rule on the dispositive issue in the case, this Court should not construe the trial court's plain error as being harmless.

III. The Ferrantis Did Not Waive Their Right To Challenge The Trial Court's Unlawful Interview Of Their Child.

Finally, DHHS argues that though the trial court had no authority to interview the child, this Court should not address the argument because the Ferrantis' waived their right to challenge it. This argument misunderstands the Court's waiver doctrine.

In *People v Carines*, 460 Mich 750, 762, n 7; 597 NW2d 130 (1999) this Court, citing *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993), noted that "waiver is the intentional abandonment of a known right." *Carines*, 460 Mich at 762, n 7. "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *Olano*, 507 US at 733. When a court deems an issue waived, an appellate court may not review it. In contrast, where a litigant does not intentionally abandon a known right, but instead

fails to object to the trial court's decision, appellate courts can still review the error under the plain error standard. *Carines*, 460 Mich at 763.

Here, the Ferrantis never waived their right to challenge the unlawful interview of their child. Although their trial counsel did ask the court to speak with the child, there was little discussion about how that interview would actually be conducted, or who would be present during the interview. Most importantly, the trial court never revealed that it would not keep a record of the interview, thus precluding trial counsel or any appellate court from ever learning what questions were asked of the child, what responses were given and how that information was relied upon by the court. None of these issues were ever discussed. Nevertheless, the court simply proceeded to interview the child in chambers. Given that the Ferrantis were never fully informed about what would occur – that is, what rights they would be waiving – the record does not support a finding that they intentionally abandoned a known right.

Thus, this Court should review the error under the plain error standard. And for the reasons stated in the Appellant's Supplemental Brief, this error certainly affected the Ferrantis' substantial rights. App. Br. at 28-29.

CONCLUSION

For the aforementioned reasons, 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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