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MICHIGAN STATE PLANNING BODY

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September 30, 2019

Larry S. Royster
Clerk, Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: File Number 2015-21
Proposed Amendments to Juvenile Court Rules

Dear Mr. Royster,

We are writing to comment on the rules referenced above. We are writing on behalf of the Michigan State Planning Body. We are writing to express our opposition to the rule as proposed.

A. Introduction. In June of this year, the Michigan Supreme Court decided **In re: Ferranti** (Docket #157907). The **Ferranti** case overruled **In re: Hatcher**, a 1993 case that held that a parent whose parental rights were terminated could not challenge a legal error in the adjudication phase of the proceeding in the appeal of a later order terminating that parent's parental rights. In effect, **Hatcher** split parental rights cases into two separate proceedings. The impact of **Hatcher** has been to effectively preclude almost all appeals of jurisdictional errors in parental rights cases—since in most courts parents were not notified of their right to appeal and therefore unknowingly waived their right to appeal.

The Planning Body filed an amicus brief in **Ferranti** (and in several other pre-**Ferranti** cases challenging **Hatcher**) urging that **Hatcher** be overruled. We were delighted with the **Ferranti** decision when it was announced.

At the same time that the Court decided **Ferranti** it published for comment a series of court rules amending procedures in child protective proceedings. See ADM File #2015-21, Order dated June 12, 2019. We are writing to oppose these court rule changes. Instead, we urge the Court to create a work group to make recommendations for amendments to the rules to implement the **Ferranti** decision.

B. The proposed rule is not consistent with the holding in Ferranti. The core holdings of **Ferranti** are that child protection cases are "a single continual proceeding" (slip opinion at p. 15) and that the **Hatcher** court made a "foundational mistake" when it analyzed the proceedings as if the dispositional phase were a second proceeding independent from the adjudication phase of the proceeding.

We note at the outset that there were two reversible errors in **Ferranti**—the "foundational mistake" of applying collateral estoppel jurisprudence to what is a "single continual proceeding"; and a violation of the Ferranti's due process rights—by not informing the parents of their rights in the plea process, Slip Opinion, p. 14.

The proposed rules address the due process issues—by clearly requiring that the trial court advise parents of their rights in the plea and adjudication process [MCR 3.971(B)] and by explicitly stating that a failure to advise parents of their rights permits the parent to challenge the jurisdictional decision on a later appeal from an order terminating that parent's rights [MCR 3.972(G)].

However the rules do not correct the "foundational mistake" of **Hatcher**; instead the rules replicates that error—by stating that a respondent's failure to appeal the initial adjudication order may act as a bar from challenging the assumption of jurisdiction in an appeal from an order terminating parental rights [MCR 3.971(B)(8)].

In other words, the proposed rules recreate the **Hatcher** appellate structure (only with better procedural notice)—they do not end it. The proposed rules are inconsistent with the clear intent of the Court's pronouncement in **Ferranti**.

While this conflict is sufficient grounds to reject the proposed rules, we offer these additional comments.

1. The rules create an appellate structure in parental rights cases that is inconsistent with the appellate structure in other sections of the Michigan Court Rules. The general rule is that a single case is appealable as of right only once—at the conclusion of that case, see MCR 7.204. Interlocutory appeals are available only by leave.

The proposed rule creates a procedure applicable to child protection cases that is anomalous in Michigan's procedural system in two different ways: (a) it creates an appeal as of right of an interim (adjudicatory) order; (b) it eliminates the right to appeal a critical aspect of the case at the time that a final order (terminating a parent's rights) is entered.

There are many cases across our justice system where a party might believe that an interim appeal would result in a more efficient resolution of the case – e.g., many civil cases where summary disposition orders are denied; many criminal cases where a pretrial procedural order (e.g., admitting a confession; or denying a motion to suppress evidence obtained in a seizure) is denied. An error at this stage of the proceeding may have a significant impact on the outcome of the case. In these cases, the parties have the choice of waiting until the end of the case and appealing or seeking leave to file an interlocutory appeal, see, e.g., MCR 2.116(J)(2).

We are aware of no statutory basis for creating this unique set of procedural rules for child protective proceedings. Indeed, we believe **Ferranti** mandates an opposite outcome.

2. The rule will unnecessarily burden the Court of Appeals and will cause delays in adjudicating parental rights cases. We assume these rules were proposed because of a

belief that they will contribute to faster and surer dispositions in parental rights cases. We believe that the rules will have the opposite effect.

It is our strong belief that the lack of appeals of jurisdictional findings post-**Hatcher** has been due to the fact that parents have been ignorant of their appellate rights—not that they agree with the jurisdictional findings in their cases. Most parents (and many parents' attorneys) have long assumed that parental rights cases are "a single continual proceeding" and that their appellate rights, if it becomes necessary to exercise them, will include that entire proceeding.

The proposed rules will discourage parents from voluntarily agreeing that their cases are within the jurisdiction of the court. A fully informed parent (knowing that they face the possible termination of their parental rights and that they are forever waiving their right to contest the factual allegations or the legal assertions in the petition) will be more likely to fully adjudicate the petition and then, if unsuccessful, to appeal the jurisdictional finding.

It is very possible that the new rules will cause a significant increase in the number of trials in parental rights cases and the number of adjudicatory hearing appeals. These appeals would add to the caseload of the appellate courts. For the cases where parents exercise their right to appeal, these appeals will delay the final disposition of the cases—and permanency planning for children.[1]

Also, the notice of the right to appeal the adjudication decision will not stop parents from seeking to appeal clear adjudicatory errors in the earlier phase of the case. See the comment from the 6th Circuit Court Administrator, Scott T. Hamilton, pointing out the ambiguities in the proposed rules that will continue to permit these appeals.

3. The proposed rules will make parental rights cases more adversarial and will discourage parents from working cooperatively with the Michigan Department of Health and Human Services. As counsel in many parental rights termination cases, we recognize that a frequent fact pattern involves a parent facing a crisis—e.g., housing instability or a child with medical or behavioral issues. In these cases, while the parent may have a defense to the petition, they voluntarily plea to jurisdiction in order to access services from the Department. In the majority of cases, these agreements work out—the services received by the parent permit the family to address and resolve the crisis. However, in some cases, the relationship with the Department changes—e.g., a new crisis impacts the family; either the family or the Department is unable to fulfill its part of the agreement—and the case turns into a contested case.

Under the proposed rules, parents and their counsel will understand that an agreement to work with the Department carries a significant risk to the parents—the risk that, if the

[1] One of the rare instances where courts have permitted interim appeals as of right is **Harlow v. Fitzgerald**, 457 U.S. 800 (1982) and its progeny (permitting interim appeals in civil rights cases filed against government actors). Empirical research has shown that these interim appeals "increase the costs and delays associated with constitutional litigation". See Amanda Frost, SCOTUS blog, September 29, 2017; https://www.scotusblog.com/2017/09/academic-highlight-schwartz-qualified-immunity/

relationship with the Department deteriorates at some point in the future, they will have waived their most viable defense to the overall termination action. We note that the ultimate termination decision is often not based on the pre-petition behavior of the parent or any danger to the child—in the disposition phase, parental rights are frequently terminated due to the parent's failure to comply with an MDHHS services plan, see MCL 712A.19b(3)(C).

C. Conclusion; we recommend that the Court create a work group to make recommendations about revisions to the court rules to reflect the Ferranti decision. We believe that there is consensus around several broad goals for our child protective system. These goals include that children be protected; that children be provided care in their natural families whenever possible; that parents and children facing challenges receive services to help them address those challenges; that child protective proceedings be handled expeditiously; that to the greatest extent possible parents and the state are working together for the good of the children throughout the proceeding; and that, when family reunification is not possible, that the child be provided with permanency planning services.

The **Ferranti** decision provides important guidance in implementing these goals. The proposed rules neither fully implement **Ferranti** nor further these broader goals. We urge the Court to fully implement **Ferranti**.

Rather than propose edits to the current rules, we recommend that the Court direct the State Court Administrative Office (SCAO) to convene a work group to review the rules in light of the **Ferranti** decision and these shared broader goals. The Planning Body is very interested in working with SCAO on such a committee.

Respectfully submitted,

Angela R. Tripp
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