MICHIGAN STATE PLANNING BODY

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June 25, 2020

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.

A. Background.

In June of 2019, the Court decided **In re: Ferranti** (Docket #157907). The **Ferranti** case overruled **In re: Hatcher**, 443 Mich 426 (1993). The **Hatcher** decision 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.

At the same time that the Court decided **Ferranti** it both adopted and published for comment a series of court rules amending procedures in appeals from child protective proceedings. See ADM File #2015-21, Order dated June 12, 2019. While the Planning Body supported the rules to the extent that they provided clearer notice, the Planning Body opposed the changes because they failed to correct the "foundational mistake" in **In re: Hatcher –** the rules continue to treat the jurisdictional and dispositional phases of termination cases as bifurcated processes, preventing parents from challenging an error in the jurisdictional phase of a child protective proceeding at the time of the final order terminating their parental rights.

Since June of last year, SCAO staff have continued their review of the interim rule and their dialog with stakeholders, including the Planning Body.

On March 19, 2020, the Court issued two orders on this file – the first adopting some technical revisions to the June 2019 rule; the second publishing for comment a series of more substantive revisions to the current rule. This comment focuses on the latter.

B. The Planning Body is generally supportive of the proposed rule changes.

The purpose of the proposed changes is to make the rules regarding appeals in parental rights cases consistent – both internally (within child protection proceedings) and with other procedural rules governing appeals. To that end, the proposed rules would make the process for perfecting an appeal consistent across all child protective proceedings;

would change the time period for filing an appeal of a termination order from 14 to 21 days (consistent with the appeal period in all other civil matters); and would provide "docket priority" (under MCR 7.213(C)) to all appeals from child protective proceedings. The Planning Body supports each of these changes.

While supporting the goals of the new rules, the Planning Body believes that the new language in proposed MCR 7.202(5) should be clarified. While that language is sufficient for the limited purpose of establishing docket priority under MCR 7.213, adding "child protective proceeding, or delinquency case in which a dispositional order removing the minor from the minor's home is an issue" to the definition of "custody cases" is problematic because both child protective and delinquency proceedings involving removal of a child are driven by different constitutional requirements and policy considerations than cases that fall under the current definition of custody cases.

Also, in MCR 7.202(5) the proposed phrase "…in which a dispositional order removing the minor from the minor's home…" is ambiguous. This concern is heightened by the fact that there is not to our knowledge a clear definition of "an order removing a child" in the court rules.

As a one possible fix, we suggest moving the proposed change to MCR 7.202(5) directly into MCR 7.213(C) – this change would make it clear that this definition is limited to the determination of docket priority.

C. The proposed rule changes do not address the "foundational mistake" in In re: Hatcher. The Planning Body urges the Court to continue to work with stakeholders to address this issue.

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 rule amendments address the due process issues but continue a bifurcated appellate structure in parental rights cases.

There are three recurrent fact patterns that Planning Body member programs see where parents may accept a jurisdictional finding through a plea or by deciding not to pursue an immediate appeal: (a) because of a short term family crisis, the family needs to access services; the family is informed that the only way to access services is through a juvenile court proceeding; (b) while the family disagrees with the jurisdictional finding, it wants to have a cooperative relationship with the Department of Health and Human Services and believes that the quickest way to reunite

the family is to work with the Department; (c) the case begins with the Department committed to a prompt reunification of the family, but then something changes – e.g., the case is assigned to another worker – and the Department's plan for the case changes to termination.

Many of the terminations that we see are cases that begin with marginal jurisdictional allegations – often conditions that are directly related to the family's poverty – but where the eventual grounds for termination months or years later are solely a failure to comply with a (often burdensome and unrealistic) services plan. We believe that parents in these cases should have the right to judicial review of the entire case record.

We understand the complex considerations that must be balanced in these cases – children's need for protection from abuse or neglect; children's need for stable homes; families' rights to freedom from governmental interference and their rights to raise their children as they see fit; the need for prompt decisions in cases regarding the care of children; the need for efficiency and finality in legal proceedings affecting the rights of families; etc.

We don't believe that the Court has to date accurately reflected the **Ferranti** holding in the court rules. We understand that SCAO staff are willing to continue a dialog with stakeholders, including the Planning Body, to address several remaining **Ferranti** issues. The issues to be discussed include the right-to-appeal issues addressed in the comment and a more detailed definition of "an order removing a child". We support this process and look forward to participating in it.

D. Conclusion.

The **Ferranti** decision was a tremendous step forward in terms of preventing unnecessary and constitutionally deficient terminations of parental rights. The **Ferranti** rules are an opportunity for the Court to consider the relationship between the initial jurisdictional decision in a child protection proceeding and the later dispositional decision – in light of long term policy goals of the state, including a preference for reunification of families and a reduction in the state's reliance on foster care.

We believe that a prompt review at the time that a child is removed from her familial home and a full review if parental rights are terminated are both critical procedural protections for fundamental constitutional rights. We don't believe that to date the Court has adopted rules that fully implement **Ferranti**. We urge the Court to continue to work with stakeholders to develop rules that balance these important considerations. The Planning Body looks forward to being part of this future process.

Respectfully submitted,

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