Public Policy Position
Amicus Brief in the Case of
***In re J. Ferranti* (Case No. 157907-8)**

The Children's Law Section is a voluntary membership section of the State Bar of Michigan, comprised of 459 members. The Children's Law Section is not the State Bar of Michigan and the position expressed herein is that of the Children's Law Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Children's Law Section has a public policy decision-making body with 19 members. On August 16, 2018, the Section adopted its position after a discussion and vote at a scheduled meeting. 10 members voted in favor of the Section submitting an amicus brief in the case of *In re J. Ferranti*, 0 members voted against this position, 0 members abstained, 9 members did not vote.

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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 No. 157907-8
Court of Appeals Nos. 340117, 340118
Otsego Circuit Court Case No.: 13-000071-NA
Hon. Michael K. Cooper

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BRIEF OF *AMICUS CURIAE* CHILDREN'S LAW SECTION OF THE STATE BAR OF MICHIGAN

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STATEMENT OF JURISDICTIONAL BASIS

The Children's Law Section adopts the jurisdictional summary set forth in Appellee, Department of Health and Human Services' Brief on Appeal, at p v. MCR 7.204(A)(1)(c); MCR 7.212(D)(2); MCR 7.303(B).

STATEMENT OF QUESTIONS INVOLVED

I. Whether This Court Should Reaffirm *In re Hatcher* Because the Collateral Bar Rule Is Particularly Important in Cases Involving Parental Termination Cases, Given Children's Need For Permanency, and Juvenile Proceedings, by Their Nature, Provide Extensive Opportunities For Trial Courts to Review the Proceedings?

Amicus Answers: YES.

Appellee Answers: YES.

The Lower Court Answers: YES.

Appellants Answer: NO.

II. Whether The Trial Court's Entry into the Home Required a Warrant Supported by Probable Cause Issued by a Neutral and Detached Magistrate, or the Existence of One or More Exceptions to the Warrant and Probable Cause Requirements, but on the Instant Facts, Failed to Qualify as Error Affecting Appellants' Rights such that the Lower Courts' Rulings Should be Affirmed?

Amicus Answers: YES.

Appellee Answers: YES.

The Lower Court Answers: YES.

Appellants Answer: NO.

III. Whether the Trial Court's Decision to Interview the Child *In Camera*, At The Urging of Appellants, Should be Affirmed?

Amicus Answer: YES.

Appellee Answers: YES.

The Lower Court Answers: YES.

Appellants Answer: NO.

STATEMENT OF INTEREST

A. Children's Law Section of the State Bar of Michigan

The Children's Law Section (Section or CLS) is a recognized section of the State Bar of Michigan. The Section has over 400 members who are attorneys and judges working in Michigan's child welfare system. Working together, the Section's members make crucial decisions each day that directly and substantially affect the lives of children and families. The Section provides services to its membership in the form of educational seminars, advocating and commenting on proposed legislation relating to child welfare law topics, and filing *amicus curiae* briefs in selected child welfare law cases filed in Michigan Courts.

The Section, because of its active and exclusive involvement in the field of child welfare/juvenile law, and as part of the State Bar of Michigan, has an interest in the development of sound legal principles in these legal areas. The instant case is of particular interest to members of the Children's Law Section because it concerns many issues that bear upon the interests of children and their families.

STATEMENT OF FACTS AND PROCEEDINGS

The Children's Law Section (CLS) as amicus, adopts, generally, the statement of facts and proceedings set out by the appellee Department of Health and Human Services (DHHS) in its supplemental brief filed in this court. The Children's Law Section provides these additional facts and background as part of its brief.

A. Earlier Proceedings

Jessica Ferranti was born on 8/11/03. She is the biological and legal daughter of Michael and Susan Ferranti, who were married before Jessica's birth. The family had a long history of involvement with the agency and the court, with the mother having her rights terminated to other children more than 20 years before these proceedings, and before she was married to Michael Ferranti. Jessica then came to the attention of the juvenile court (the Otsego Circuit Court's Family Division) in October 2013. At that time the family came to the attention of the court because of the parents' inability to address Jessica's ongoing serious medical issues[1] and the dangerous lack of cleanliness in the home. At that time the foster care worker Christina Pudvan stated that:

> …. I did go on a home visit with the ongoing worker who provided intensive services through CPS. I visited the home at that point and the home conditions were extremely poor. I would say that I've been in- in the last 12 years of working in- during in-home services between the court and working at MDHHS, between that home visit with Ms. Mathias and viewing the pictures at the time of the removal, that was probably the worst home conditions I've seen in my career. T. 5/10/17, pp. 36-37.

Based upon these conditions Jessica was adjudicated as a temporary ward of the court and services were provided to the family, particularly in-home services. The worker went on to describe how, even after Jessica was returned home there were continuing concerns regarding

[1] As the trial court noted, Jessica has Spina Bifida and Chronic Kidney Disease. She is unable to walk without the assistance of a walker and frequently uses a wheelchair. Because of her kidney disease she will need dialysis and possibly a kidney transplant in the future. Opinion and Order of Trial Court, 8/7/17.

hygiene, cleanliness and medical concerns, as well as the family's ability to actively address Jessica's schoolwork. T. 5/10/17, pp. 38-39.

B. <u>The Instant Case</u>

1. Preliminary Hearing

Within a year the agency was again requesting that Jessica be removed from the parents' home, again because of serious inadequacies in the conditions of their home and their failure to consistently address Jessica's chronic medical condition. Based upon these reports the agency again petitioned the court to take jurisdiction over Jessica. At the very beginning of the first preliminary hearing the trial court informed the parents of the rights that they had in a child protective proceeding, including the right to counsel, the right to a trial by jury or by the court, the burden on the petitioner of proving the case by a preponderance of the evidence, the right to cross-examine witnesses and the right to subpoena witnesses in their behalf. T. 10/29/15, pp. 5-6. The trial court then heard reports from the PS worker regarding the basis of the agency's referral to the court, which included reports that Jessica had unmet medical needs involving her kidney condition; the fact that the family's home was in very poor condition and was unsanitary, but Jessica would crawl through the home. The court was also informed that there had been a prior termination of the mother's rights to other children in 1991 and that Jessica, along with her three siblings had been removed in 2013. That case led to the provision of various services to the family, including counseling, medical transportation, food assistance and housing assistance. T. 10/29/15, pp. 9-15.

At the continued preliminary hearing held on 11/3/15 the court appointed separate counsel for the parents, and the court continued placement of Jessica outside of the parents' home. T. 11/3/15, pp. 4-17. Then at a hearing held on 11/17/15, which the court described as a continued preliminary hearing, the court took testimony from a number of witnesses. These included

Michelle Mills, a nurse practitioner from the University of Michigan, who worked in pediatric nephrology. Ms. Mills described Jessica's medical condition, which was a chronic kidney disease, and included at that time a urinary tract infection. While Jessica had been scheduled to be seen at various appointments, the parents failed to bring her for at least three of the appointments in July, August and September 2015. The major risk to Jessica at that time was from infection. The attorney for the father questioned the witness. T. 11/17/15, pp. 6-14. Amy Croft, the Protective Services worker then testified regarding the results of her investigation. She reported that Jessica had problems at school because she had a strong body odor and that she often ran out of catheters at school. Ms. Croft had also been to the parents' home, which was very cluttered, was littered with animal feces throughout the home and the bathroom and bedroom was very dirty and also smelled strongly of urine. The family informed the worker that Jessica would get around the house by crawling, and that she had an open sore on her leg. When questioned by the father's attorney Ms. Croft noted that Jessica did inform her that she liked to crawl in the home and that the parents had been making efforts to clean the home. T. 11/17/15, pp. 19-25, 28-29.

The respondent-father also testified in his own behalf, and he stated that he was meeting Jessica's needs. He noted that Jessica was now old enough to be able the catheterize herself, and that he would bring catheters to school when she needed them. The father denied that the home was unusually dirty and that he wanted Jessica back in his care. Following arguments by counsel the court authorized the petition and continued her placement. T. 11/17/15, pp. 35-37, 40,43-46.

2. Trial/Plea Proceedings

At a hearing held on 12/21/15 the court conducted a status conference on the case. At that proceeding counsel for the parents, as well as both respondents expressly agreed that they would offer pleas of admission to certain paragraphs in the petition and that they agreed that the court

would then take jurisdiction over Jessica. After going over the specific language of the parts of the petition that the parents were admitting to, the court accepted the admissions, and took jurisdiction over Jessica as to both parents. The court did not inform the parents of their rights or the potential consequences of the admission at this proceeding. Counsel for the respondents did not object to the court taking the admissions, nor did counsel object to the basis for the admissions. T. 12/21/15, pp. 4-10.

3. Dispositional Hearing

The trial court conducted a dispositional hearing on 1/12/16, where the court adopted a case service plan for the respondents. The plan required, in part, that the respondents complete psychological evaluations, that they maintain a clean home for Jessica and that they meet Jessica's medical needs. The respondents were also to be provided with in-home services which could assist them in establishing and maintaining a clean home and to assist in scheduling medical appointments. Order of Disposition, 1/12/16. Neither the respondent mother or the respondent father filed an appeal from the decision or order of the court, which formally made Jessica a ward of the court and gave the court jurisdiction over the parents.

4. Periodic Review Hearings

Over the next year the court conducted at least six separate review hearings where it addressed the status of the family, the services being provided to the respondent-parents and to Jessica.[2] The court also addressed the question of whether Jessica could be placed into a guardianship with a relative in Indiana, a proposal that eventually fell through because the relative lost interest in the plan. See T. 1/10/17, pp. 4-5. Moreover, while initially the parents were cooperative and they made progress on the treatment plan, they began to be resistant to both

[2] Review hearings were held on: 4/12/16, 7/12/16, 9/20/16, 10/18/16, 12/6/16, 1/10/17.

services and the recommendations of the workers on the case. At the hearing held on 7/12/16 the worker reported that the parents were not in agreement with some of the recommendations in a psychological evaluation, in particular that the mother be involved in individual therapy. The parents also resisted assistance offered to help with the condition of their home, saying that they were not going to change. T. 7/12/16, pp. 5-6.

On 10/18/16 the court held a permanency planning hearing. At that hearing the private agency foster care worker described the efforts that had been made to improve the condition of the home, including services in the home by the Family Support Program. These services were unsuccessful because the condition of the home did not change. In fact when the worker visited the home in July 2016, the conditions in both Jessica's former bedroom and the bathroom were still deplorable and unsanitary. The foster care worker also noted that the family had a 25 year history of neglect of their children, including a termination of the parent's rights based in part on medical neglect. Despite the history, and the persistent problems the parents told the worker that they were not going to change. T. 10/18/16, pp. 6-11. At the end of this hearing the court authorized the filing of a petition to terminate parental rights by the agency. The court also mentioned in passing that he would want to see the home. There were no objections from either of the parents. T. 10/18/16, pp. 6-11, 49.

The trial court again mentioned his plan to visit the parents' home at the hearing on 12/6/16. The court continued the proceedings to give the agency the opportunity to investigate the placement of Jessica with a paternal aunt in Indiana through a guardianship. T. 12/6/16, pp. 4,6, 10-11, 13. However, by the status conference held on 1/10/17 the parties informed the court that the guardianship plan had fallen through. The case was therefore set for a hearing on the termination petition. T. 1/10/17, pp. 4-5,8. At no time during these extensive review hearings did

either respondent move to withdraw their initial plea, nor did either respondent file a motion for rehearing or for new trial challenging the propriety of the original plea/adjudication.

5. Termination Hearing

The trial court conducted termination proceedings over six separate dates. The CLS amicus here adopts the summary of the testimony at those proceedings as set out by the appellee DHHS, with these additional facts. At the hearing held on 5/10/17 the trial judge noted that he, along with the attorneys, visited the home about three months before that hearing. T. 5/10/17, p. 84. Respondents' counsel did not object to this visit nor did they make any further comment regarding the visit. Then, at the hearing held on 6/20/17 the respondent-father testified in his own behalf. He was asked by his attorney:

Q- Are you asking the Court to interview Jessica prior to making a decision on termination?

A- I would ask that, yes. T. 6/20/17, p. 22.

Later, in that hearing, the judge stated that he "…was inclined to speak with Jessica." Both counsels for the respondents did not object to the suggestion, in fact they stated that they would request that the court do so. T. 6/20/17, pp. 45-46.

The termination hearing concluded on 7/5/17 when counsel made closing arguments. In his argument, counsel for the respondent father conceded that there was sufficient evidence to support the grounds for termination of the father's rights. Counsel's theory was that termination was not in Jessica's best interests. T. 7/5/17, pp.20-23 At the conclusion of the hearing, the judge stated that he met with Jessica, and that "She's a delightful child." T. 7/5/17, p. 30. The court then stated that the particular issue in the case was whether or not termination of the parents' rights was in Jessica's best interests by "… clear and convincing evidence…" This was also the standard that

counsel for the parent(s) had cited in their arguments regarding best interests. T. 7/5/17, pp. 17, 30-31.

6. Findings of Trial Court

The trial court entered an Opinion and Order in the case on 8/7/17. In the opinion the court summarized the testimony of the witnesses in the termination hearings. The court found that there was sufficient evidence to support termination of both the respondent-father's and the respondent-mother's rights pursuant to MCL 712A.19b(3)(c)(i) and 712A.19b(3)(g). The court then found, by clear and convincing evidence, that termination of the parents' rights was in Jessica's best interests. In the opinion the court stated, about the respondents' home, that "It is not as atrociously bad as it was, but even when the Court viewed the situation, it is not where a person with Spinal (sic) Bifida will thrive." Opinion and Order of Trial Court, pp. 5-7.

Neither the respondent-father or the respondent mother filed a motion for rehearing or for new trial challenging the court's finding of jurisdiction over themselves and over Jessica. The respondents also did not move to withdraw their pleas in the trial court. The respondents did file an appeal of right to the Court of Appeals on 9/11/17 after the termination decision.

ARGUMENTS

I. This Court Should Reaffirm *In re Hatcher* Because the Collateral Bar Rule Is Particularly Important in Cases Involving Parental Termination Cases, Given Children's Need For Permanency, and Juvenile Proceedings, by Their Nature, Provide Extensive Opportunities For Trial Courts to Review the Proceedings.

This court's decision in *In re Hatcher*, 443 Mich 426 (1993), has provided unique support for assuring the finality of decisions in parental termination cases. Not only does the collateral bar rule assure finality, its application in these cases is consistent with the structure of child protective proceedings, which affords parties, in particular parents, multiple opportunities to challenge and review decisions of the court. Given this structure, a parent's failure to challenge an adjudication in a timely fashion should act as a bar to raising those issues after a parent's rights are terminated, given the ample procedural opportunities to challenge them throughout the pendency of the case.

A. Procedures Available to Challenge the Original Adjudication in the Trial Court

The instant case provides a telling example of the missed opportunities for challenging the trial/adjudication proceedings. The trial court here conducted a trial proceeding on 12/21/15 when it took pleas of admission from both parents. T. 12/21/15, pp. 4-9; see MCR 3.971. The court then conducted a dispositional hearing on 1/12/16, where the court formally made Jessica a temporary ward of the court, placed her in foster care and adopted a case service plan. Order of Disposition, 1/12/16. At this point the respondents each had the right to appeal to the Court of Appeals, pursuant to MCR 3.993(A)(1), which provides that:

> (A) The following orders are appealable to the court of Appeals by right:
> (a) an order of disposition placing a minor under the supervision of the court or removing the minor from the home.

Here, neither respondent appealed the decision of the trial court after the adjudication. This failure alone should act as an abandonment of any challenge(s) to the proceedings at trial/disposition. The

language of the rule is clear, that it allows an appeal from the juvenile's first disposition. This court should emphasize that this appeal of right is available to respondent's after the initial disposition in the case, and that here neither respondent availed themselves of this right.

The plain language of MCR 3.993(A)(2) makes it clear that an appeal after "…an order terminating parental rights" is a separate and distinct basis for filing an appeal of right. Logically, there is no reason to require an appellant to wait to the termination case to challenge the jurisdictional decision of the trial court. In fact, given this court's decision in *In re Sanders*, 495 Mich 394 (2014) it is clear that the trial is a critical stage of the proceedings and that this court has properly provided for an appeal after the trial and initial disposition. Reasonably there must be some consequence for the failure of respondent to avail themselves of that right. Challenges to the basis of a plea or adjudication should be appealed immediately after they occur.

Moreover, respondents here, could have filed a petition for rehearing, pursuant to MCL 712A.21(1), which provides that:

> (1) At any time while the juvenile is under the jurisdiction of the court, an interested person may file a petition in writing and under oath for a rehearing upon all matters coming within the provisions of this chapter. Upon the rehearing, the court may affirm, modify, or set aside any order reviewed under this section.

Clearly, respondents had the continuing opportunity to challenge the original dispositional order of the trial court, after it took the plea of admission and then adopted the treatment plan. Respondents did not do so, despite the fact that the temporary custody case was pending for a year and the court conducted six separate review hearings over that period of time. Even after the court terminated parental rights, respondents had up to 14 days to challenge the decision of the trial court through a motion for rehearing, and that motion could have raised the propriety of the earlier plea.[3]

[3] Along with the statute on rehearings, the court rules separately provide for motions for rehearing/new trial. MCR 3.992. That rule allows 21 days "…after the date of the order resulting

Despite respondents' claims on appeal that their due process rights were violated at the original adjudication, they never filed a motion for rehearing/new trial. This failure to challenge the adjudication in the trial court should also be considered to be a forfeiture of their claims on appeal after the termination of their parental rights. See *People v Vaughn*, 491 Mich 642 (2012).

Respondents' primary challenge here is to the validity and fairness of the pleas that they offered in the trial court on 12/21/15. However, at no time during this case, either in the trial court or on appeal did they move to withdraw the plea. The proper procedure in any challenge to a plea should be that the respondent(s) moves to withdraw the plea in the trial court. In fact, in criminal proceedings there is a specific rule dealing with withdrawal of a plea. That rule, MCR 6.510(D) provides that:

> (D) Preservation of Issues. A defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the rules in this subchapter or any other claim that the plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal.

Admittedly, the rule in criminal proceedings does not specifically apply in juvenile court proceedings. See MCR 3.901(A)(2). However, the basic rules regarding plea withdrawal have been applied to juvenile proceedings. See *In re Zelzack*, 180 Mich App 117 (1989) (applying general rules of plea withdrawal in a child protection/parental termination). In fact, the rule governing pleas of admission in delinquency cases specifically provides for plea withdrawal, at MCR 3.941(D) which states that:

> Before the court accepts the plea, the juvenile may withdraw the plea by right. After the court accepts the plea, the court has the discretion to allow the juvenile to withdraw a plea.

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from the hearing or trial" for a rehearing motion and "…14 days after the date of the order terminating parental rights." The rule also allows the court to "… entertain an untimely motion for good cause shown." MCR 3.992(A).

In juvenile delinquency proceedings the respondent is required to move to withdraw a plea in the trial court, and failure to do so means that the issue has not been preserved. *In re Zelzack, supra; In re Octavio Baez*, Ct. of Appeals No. 336973 (Released 6/17/18). The same rules of plea withdrawal should apply in a child protective proceeding, *i.e.*, that a respondent must first move to withdraw the plea in the trial court and that failure to do so would mean that the issue has not been preserved. This court could resolve this issue by requiring that a respondent-parent first move to withdraw any plea in the trial court and that failure to do so would mean that any challenge to a plea is not preserved.

Moreover, this court should recognize that respondents in child protective cases are not entitled to the same level of due process protection as criminal defendants or juvenile delinquents. Compare, *In re Winship*, 397 U.S. 358; 90 SCt. 1068; 25 L.Ed. 2d 368 (1970) (finding that juvenile delinquents, like adults are entitled to proof beyond a reasonable doubt standard when charge with a criminal/delinquent act) with *Santosky v Kramer*, 455 U.S. 745; 102 S.Ct. 1388; 71 L.Ed.2d 599 (1982) (finding that the constitutional standard of proof to support termination of parental rights was clear and convincing evidence and that the criminal standard was not required because the liberty interest involved was not as great).

Here, the respondent-appellants have simply ignored the requirements of plea withdrawal, by never requesting to withdraw the plea in either the trial court or on appeal. In fact, even in respondents' prayer to this court they failed to even address the need to withdraw their plea. See Application for Leave to Appeal, *In re Ferranti*, Sup.Ct. No. 157907;157908 at p. 31. This court should emphasize that a failure to move to withdraw a plea would mean that the claim is not properly preserved.

This case and similar appeals are also evidence that appellants need to move to bring claims of ineffective assistance of counsel to preserve claims that certain issues were not preserved in the trial court. Principles applicable to claims of ineffective assistance of counsel in *Walters v Nadell*, 481 Mich 377 (2016). Generally, a respondent-parent, like a criminal defendant, should be required to move first for a hearing in the trial court, to present a claim of ineffective assistance. *People v Ginther*, 390 Mich 436 (1973). Respondents failed to make any claim of ineffective assistance here, thus waiving any claim that the respondents' trial counsel in any way performed inadequately, including their failure or choice not to challenge the propriety of the plea proceedings. Implicit in this is a conclusion that both counsel's decision not to challenge the original adjudication proceedings at any time during the case was evidence that this was a proper matter of counsel's strategy in the case. Given that, respondent-appellants should not be allowed to challenge that position for the first time on appeal. *Walters v Nadell*, 481 Mich 377 (2008). This failure is particularly important because it must be assumed that respondents' counsel were aware of the caselaw governing these proceedings, in particular *In re Hatcher, supra* and that their failure to challenge the original plea would limit any claims on appeal. *People v Stanaway*, 446 Mich 643 (1984); *Strickland v Washington*, 466 U.S. 668; 104 S.Ct. 2052; 80 L.Ed. 2d 674 (1984) (requiring that in any challenge to the effective assistance of counsel, the defendant must overcome the strong presumption that counsel's acts were sound trial strategy).

It is also important to note that in any effective assistance of counsel challenge the appellant must show that there is a reasonable probability, that but for counsel's error, the result of the proceeding would have been different. *People v Stanaway, supra*; *Strickland v Washington, supra*. Here appellants have not challenged the effectiveness of counsel and they have not challenged the sufficiency of the evidence here. In fact, at trial, counsel for the respondents conceded that there

was sufficient evidence to support the grounds for termination, but argued that termination was not in Jessica's best interests. T. 7/5/17, pp. 14-20, 20-22. Then on appeal respondents have not challenged the sufficiency of the evidence at all. It must be presumed that there was no prejudice here and that any claimed error did not affect the result of the proceedings. Where an appellant-parent does not challenge the sufficiency of the evidence he or she is admitting that the trial court properly found that they are unfit parents as a matter of law. Once that determination has been made the emphasis must be on the interests of the children and the respondents' due process interests are significantly diminished. *In re Moss*, 301 Mich App 76 (2013), interpreting *Santosky v Kramer*, 455 U.S. 745; 102 S.Ct. 1388; 71 L.Ed. 2d 599 (1982).

Where an appellant has failed to object to a claimed error in the trial court, the appellate court can only review the issue pursuant to this court's "plain error" rule, *People v Carines,* 460 Mich 750 (1999); *In re Utrera*, 281 Mich App 1 (2008). Here the respondent-appellants have not made any plain error analysis in their challenge to the plea/adjudication proceeding. The claim should be considered to be abandoned. Whenever an appellant does properly raise a plain error claim, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e.clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, that the error affected the outcome of the proceedings. Also, the defendant(respondent) who bears the burden of persuasion with respect to prejudice. Finally, the appellate court can only reverse when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence." *People v Carines, supra* at 763-764, quoting *United States v Olano*, 507 U.S. 725, 736-737; 113 S.Ct. 1770; 123 L.Ed. 2d 508 (1993). Here, while the error may have been plain, the error did not

affect the outcome of the proceedings, both because there was sufficient evidence to support the court taking jurisdiction earlier in the case (*i.e.*, there was extensive evidence to support the basis for jurisdiction presented at the preliminary hearing, T. 11/17/15, pp. 6-44), and the evidence supported termination of both respondent's rights to the point where they never challenged the sufficiency of the evidence. Finally, as in *People v. Carines, supra*, the claimed error did not seriously affect the fairness, integrity or public reputation of the judicial proceeding, particularly given the unchallenged evidence supporting termination and the fact that respondents never challenged the sufficiency here.

B. Application of the Rule in *Hatcher*

The foregoing analysis amply demonstrates that respondents in child protective proceedings have extensive opportunities to challenge any purported errors (in particular errors at the trial/adjudication) at various times throughout the proceedings and that the failure to timely raise those claims should have consequences, in particular, that the failure to raise those claims should foreclose them from raising them on appeal after the termination of their parental rights. This should be true because child protective proceedings are different from most other civil proceedings. First, because, as demonstrated, the fact that the court has conducted a trial and then entered a disposition does not end the case in the trial court. Instead, unlike a criminal or other civil case, the case remains in the trial court, with the court conducting periodic review hearings, pursuant to MCR 3.975.

Given the nature of the proceedings, it is important to apply a rule, like the collateral bar rule, that limits when a party can raise issues on appeal and when they should be considered to be abandoned. Second, juvenile proceedings are unique because they involve three separate sets of parties: the petitioner (usually the state); the parent(s), guardian or legal custodian; and the child.

MCR 3.903(A)(19)(b). In fact, only the child is guaranteed an attorney from the very beginning of the case. See MCL 712A.17c and MCL 712A.17d. As the case proceeds, in both time and in the stage of the proceeding, the importance of the child's interests, both legally and practically, increases. Once the court finds sufficient evidence to support termination of the parents' rights the interests of the child must be considered to be paramount. While the rights of parents must be given proper consideration, the rights of the children, particularly their right to permanency and stability. One commentator has noted that:

> A problem arises when a parent is afforded all procedural due process measures to protect her substantive due process right to parent her child, but the parent is then adjudicated to have abused or neglected the child such that the safety of the child precludes returning her to her parents' home. At this point, the substantive due process rights which continue to flow to the parent should shift to the child to protect her right to achieve permanency, either by returning to the care of her parent, or by achieving a new and sustainable family structure that is able to meet her needs. Matthew Skeens: *The Right to be Parented: Recognizing a Child's Substantive Due Process Right to Permanency*, 13 Dartmouth L.J. 1, 23 (2015).

The United States Supreme Court recognized the same policy considerations in *Lehman v Lycoming Cty Children's Services Agency,* 458 U.S. 502; 102 S.Ct. 3231; 73 L.Ed.2d 928 (1982) where it rejected a parent's claim that she was entitled to habeas corpus relief after termination of her parental rights. In rejecting the claim, the court emphasized that:

> It is undisputed that children require secure, stable, long-term continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current "home," under the care of his parents or foster parents, especially when such uncertainty is prolonged. *Id* at pp. 513-514.

Clearly, the child has a strong interest in finality which is separate from the interests of the parents. This court recognized the impact of such a policy in *In re Hatcher, supra* at p. 444, where it stated that: "It should provide repose to adoptive parents and others who rely on the finality of probate court decisions."

The application of the collateral bar rule in a termination case is directly analogous to the rules regarding appeals in criminal violation of probation cases. In *People v Pickett*, 391 Mich 305 (1974), this court was presented with the question of whether a probationer had the right to appeal after the revocation of his probation and his sentence to a term of imprisonment. This court first held that a probationer was entitled to two appeals of right, first after the conviction and imposition of probation and second, after the determination of probation violation and prison sentence. This court then directly addressed the scope of the two appeals of right:

> Obviously the scope of appeal as of right following original conviction and probation can only cover matters arising up to that time. Since we have held that there is the just described appeal as of right, we hold that the appeal as of right following determination of probation violation and sentence must necessarily be limited to those matters relating to the probation violation and the hearing thereon. We have given the defendant the opportunity to raise any questions concerning his trial on his first appeal of right. To allow him to raise trial related matters on his second appeal, would, in effect, be granting two appeals to the same final determination and make the 63 day requirement of GCR 1963,803.1 in taking an appeal as of right meaningless. *People v. Pickett, supra* at 316-317. (emphasis added)

Then, in *People v Kaczmarek*, 464 Mich 478 (2001) this court reaffirmed its holding in *Pickett*, emphasizing that the defendant, in his appeal from a violation of probation, "…encompasses only those issues that he could not have raised in an appeal from his 1995 marijuana conviction." *Id* at p. 485. The rule in criminal proceedings should also apply in child protective proceedings, particularly where the liberty interests of parents are less than those of criminal defendants. *Santosky v Kramer, supra*.

Taken in its entirety, the rule from *In re Hatcher, supra* serves the important interests of the children and the state in assuring finality in juvenile court proceedings. It also assures that litigants, particularly parents, raise issues in a timely and effective manner to assure that the trial court can properly consider all relevant issues and that respondents appeal any errors in a timely

fashion to assure that they do not linger throughout the pendency of the case and interfere with the children's interests in finality. This court should reaffirm its decision in *In re Hatcher, supra*.

II. Court Rule Does Not Allow a Court to Enter a Private Home For Inspection, and Even If It Did, The Trial Court's Entry into the Home, Coupled with Its Fact-Finding Purpose, Constituted a Search that Required a Warrant Supported by Probable Cause Issued by a Neutral and Detached Magistrate, or the Existence of One or More Exceptions to the Warrant and Probable Cause Requirements.

A. Court Rules Do Not Permit Government Entry into a Litigant's Home

The general rules of civil procedure provide that "[o]n application of either party or on its own initiative, the court sitting as trier of fact without a jury may view property or a place where a material event occurred." MCR 2.507(D). However, chapter two of the Michigan Court Rules do not apply "where the limited jurisdiction of a court makes a rule inherently inapplicable or where a rule applicable to a specific court or a specific type of proceeding provides a different procedure." MCR 2.001.

Child protective proceedings provide for a different procedure. Specifically, chapter three of the Michigan Court Rules provides that "[t]he rules in this subchapter, in subchapter 1.100, and in subchapter 8.100 govern practice and procedure in the family division of the circuit court in all cases filed under the Juvenile Code." MCR 3.901(A)(1). Just as importantly, "[o]ther Michigan Court Rules apply to juvenile cases in the family division of the circuit court only when this subchapter specifically provides." MCR 3.901(A)(1).

The analogous rule applicable to child protective proceedings does not allow wholesale judicial viewing of the scene. MCR 3.923(A). Rather, this rule expressly provides for four methods that a trial court may use in child protective proceedings "[i]f at any time the court believes that the evidence has not been fully developed ...." MCR 3.923(A). Specifically, a trial court in a child protective proceeding may (1) examine a witness, (2) call a witness, (3) adjourn

the matter before the court and cause service of process on additional witnesses, or (4) adjourn the matter before the court and order production of other evidence. MCR 3.923(A).

Significantly, the four very specific provisions in MCR 3.923(A) are not followed by more general language so as to allow for a more expansive construction through the application of textual construction rules such as *ejusdem generis*.[4] Rather, the canon *expressio unius est exclusio alterius* provides that the methods a trial court may use to more fully develop the record in child protective proceedings are restricted to the four methods enumerated in MCR 3.923(A).[5] By enumerating these four record-developing methods, other methods such as viewing the scene were impliedly excluded. Likewise, the canon of *noscitur a sociis*[6] provides that the methods a trial court may use to more fully develop the record in child protective proceedings should be given related meaning. All four of these methods constitute traditional, in court, on the record methods of developing an evidentiary record with evidence and witnesses physically present in the courtroom. Thus, to the extent MCR 3.923(A) is subject to a textual interpretation canon that expands its meaning, that meaning should be restricted to methods of developing an evidentiary record by traditional, in court, on the record methods with evidence and witnesses physically present in the courtroom. As the Court of Appeals recognized in this matter: "In sum, there is no

[4] Under the doctrine of *ejusdem generis*, when a rule uses a general term and specific examples included within the general term, "the general term is restricted to include only things of the same kind, class, character, or nature as those specifically enumerated." *Hudson v Hudson*, 314 Mich App 28, 34-35; 885 NW2d 652 (2016).

[5] "[T]he canon *expressio unius est exclusio alterius* ... states that the express mention of one thing implies the exclusion of other similar things." *People v Garrison*, 495 Mich 362, 372; 852 NW2d 45 (2014).

[6] "[U]nder the doctrine of *noscitur a sociis*, a word or phrase should be given meaning by its context or setting." *People v Couzens*, 480 Mich 240, 250; 747 NW2d 849 (2008). According to this canon, "words and clauses will not be divorced from those which precede and those which follow." *People v Hill*, 486 Mich 658, 668; 786 NW2d 601 (2010). Consequently, "words grouped in a list should be given related meaning." *Id*.

statutory provision, court rule, or caselaw that permits a trial court in a juvenile proceeding to view a child's home." *In re Ferranti*, unpublished opinion *per curiam* of the Court of Appeals, issued May 10, 2018 (Docket No. 340117). "An unauthorized view by the finder of fact is misconduct." *Vanden Bosch v Consumers Power Co*, 56 Mich App 543, 557; 224 NW2d 900, 907 (1974), *rev'd on other grds* 394 Mich 428 (1975).

B. The Manner in Which the Lower Court Viewed the Scene was Error

Even if *arguendo* the trial court was authorized to view the Ferranti household – which it was not – the method it employed was further erroneous. The Court of Appeals has repeatedly held that it is error for a trial court to view a scene without giving the parties and their counsel an opportunity to be present. See, e.g., *Travis v Preston*, 249 Mich App 338, 349; 643 NW2d 235 (2002); *People v Eglar*, 19 Mich App 563, 565; 173 NW2d 5 (1969) ("We agree with the defendant's appellate counsel that it was error for the judge to view the premises without having given the defendant and counsel for both parties an opportunity to be present with him.") In the instant case, the trial court allowed the parties and their respective counsel to accompany the court when viewing the home, but it did not allow either party to speak to the court during the viewing. Allowing the parties to be present but ordering them to remain silent during their presence is the functional equivalent of not allowing the parties or their counsel an opportunity to be present as it precludes any form of advocacy or even explanation during the viewing and thus renders their right to be present a mere formality that exalts form over substance.

C. The Fourth Amendment Protects the Home from Government Intrusion

Even if this Court finds that the trial court was authorized to view the scene as a matter of state law, the Ferranti's reasonable expectation of privacy in their own home precluded the trial

court from doing so in this instant absent a warrant supported by probable cause or the existence of probable cause coupled with some exigency excusing the warrant requirement.

Both the federal and state constitutions guarantee the right of individuals to be secure against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, §11. "At the Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Collins v Virginia*, __ US __, __; 138 S Ct 1663, 1670; 201 L Ed 2d 9 (2018) (internal quotations and citation omitted). Thus, "[t]he maxim that 'every man's house is his castle' is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen." *Weeks v United States*, 232 US 383, 390; 34 S Ct 341; 58 L Ed 652 (1914), *overruled in pt on other grds by Mapp v Ohio*, 6 L Ed 2d 1081; 367 US 643; 81 S Ct 1684 (1961), *and Elkins v United States*, 364 US 206; 80 S Ct 1437; 4 L Ed 2d 1669 (1960). See also, *Collins v Virginia*, __ US __; 138 S Ct 1663; 201 L Ed 2d 9 (2018) ("[W]hen it comes to the Fourth Amendment, the home is first among equals.") This principle "was enacted into the fundamental law in the 4th Amendment ...." *Weeks*, 232 US at 390.

Similarly, "the Fourth Amendment's protection of curtilage has long been black letter law." *Collins v Virginia*, __ US __, __; 138 S Ct 1663, 1670; 201 L Ed 2d 9 (2018). "To give full practical effect to th[e] [right to retreat into one's own home], the Court considers curtilage – the area immediately surrounding and associated with the home – to be part of the home itself for Fourth Amendment purposes." *Collins*, __ US at __; 138 S Ct at 1670 (internal quotations and citation omitted). "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *Id*. (internal quotations and citation omitted). "When

a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred." *Id*. "Such conduct thus is presumptively unreasonable absent a warrant." *Id*.

D. Viewing a Respondent's Home Constitutes a Search

The U.S. Supreme Court has taken a bifurcated approach to its Fourth Amendment jurisprudence. The first approach seeks to protect an individual's property interests. Under this line of precedent, "approaching a home with the purpose of gathering information is not, standing alone, a Fourth Amendment search." *People v Frederick*, 500 Mich 228 at __; 895 NW2d at 548. However, when "the Government obtains information by physically intruding on a constitutionally protected area ... a search has undoubtedly occurred." *Grady v North Carolina*, __ US __, __; 135 S Ct 1368, 1370; 191 L Ed 2d 459 (2015). Under this approach, a trespass by a government official committed for the purpose of information-gathering constitutes a search for purposes of the Fourth Amendment. *United States v Jones*, 565 US 400, 408; 132 S Ct 945; 181 L Ed 2d 911 (2012); *People v Frederick*, 500 Mich 228; 895 NW2d 541 (2017). The fact that the government intrusion is committed to advance the best interests of a child is of no moment because "the government's purpose in collecting information does not control whether the method of collection constitutes a search." *Grady*, __ US __, __; 135 S Ct at 1370.

The second approach considers an individual's privacy interests. Under this approach, "[w]hen an individual seeks to preserve something as private, and his expectation of privacy is one that society is prepared to recognize as reasonable, ... official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause." *Carpenter v United States*, __ US __, __; 138 S Ct 2206, 2213; __ S Ct __ (2018). See similarly, *Kyllo v United States*, 533 US 27, 33; 121 S Ct 2038; 150 L Ed 2d 94 (2001) ("[A] Fourth Amendment search

occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.")

Analyzed under either approach, a Court viewing a litigant's home to gather information would constitute a search for Fourth Amendment purposes. Such a viewing would constitute a physical intrusion upon a constitutionally protected area coupled with an intent to gather information. Similarly, such a viewing would also result in a government intrusion upon an area that the litigant seeks to preserve as private, and this expectation of privacy is one that society is prepared to recognize as reasonable. Thus, under either approach, a Court viewing a litigant's home to gather information would constitute a search for Fourth Amendment purposes.

"[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment subject only to a few specifically established and well delineated exceptions." *Coolidge v New Hampshire*, 403 US 443, 454-55; 91 S Ct 2022; 29 L Ed 2d 564 (1971) (footnote omitted; citation omitted). "The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.'" *Coolidge*, 403 US at 455 (footnote omitted; citation omitted).

E. Exceptions to the Warrant and Probable Cause Requirement

Although searches conducted outside the judicial process without prior approval by a neutral and detached judge or magistrate are *per se* unreasonable under the Fourth Amendment, such searches may occur if one of the specifically-established and well-delineated exceptions to the warrant and probable cause requirements apply. One such exception occurs where a person who has a reasonable expectation of privacy waives their privacy interests and thereby consents to the search.

"Fourth Amendment rights are waivable and a [party] may always consent to a search of himself or his premises." *People v Woodard*, 321 Mich App 377, 383–84; 909 NW2d 299 (2017), *lv den* 501 Mich 1027 (2018). See also, *Birchfield v North Dakota*, __ US __, __; 136 S Ct 2160, 2185; 195 L Ed 2d 560 (2016) ("It is well established that a search is reasonable when the subject consents ....") "[T]he consent must be unequivocal, specific, and freely and intelligently given," *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005), and must not be "coerced, by explicit or implicit means, by implied threat or covert force." *Schneckloth v Bustamonte*, 412 US 218, 228; 93 S Ct 2041; 36 L Ed 2d 854 (1973). Consequently, a party's "acquiescence to a claim of lawful authority" is insufficient to constitute consent. *Bumper v North Carolina*, 391 US 543, 548–50; 88 S Ct 1788; 20 L Ed 2d 797 (1968).

"[W]here the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority." *Florida v Royer*, 460 US 491, 497; 103 S Ct 1319; 75 L Ed 2d 229 (1983). The State also bears the burden of establishing that the person who gave authority to conduct warrantless search of premises had common authority over premises. *Illinois v Rodriguez*, 497 US 177, 181–82; 110 S Ct 2793; 111 L Ed 2d 148 (1990).

F. The Lower Courts Did Not Err

As the Court of Appeals noted, the court's viewing of respondents' home did not violate respondents' due process rights "[b]ecause 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 ..." *In re Ferranti*, p 7. Moreover, it does not appear that the trial court's visit to the home affected the

outcome of the proceedings where any observations were merely cumulative considering the testimony of witnesses who described both the historical condition of the home, the services provided, the current condition of the home, and the effect of the condition of the home on the child's medical condition. *Id*. The trial court merely yielded to other evidence that "the many professionals unanimously agreed that the house Fawas unhygienic and was probably not going to improve ..." *Id*. The sole fact referenced by the trial court regarding the condition of the home that it observed during the viewing was amply supported by other witness testimony, including the effect that the condition of the home had on the child's medical condition. *Id*. In short, the trial court's viewing of the home merely confirmed the witnesses' testimony, and under these circumstances, respondents failed to demonstrate that any error in the trial court's visit to the home affected their substantial rights. *Id*. Accordingly, the trial court's ruling should be affirmed.

III. A Court May Not, Consistent With The Due Process Clause, Interview a Child *In Camera,* Without Giving the Litigants an Opportunity to Confront and Cross-Examine the Child.

A. Michigan Law Does Not Allow *in Camera* Examinations in Child Protective Proceedings

In *In re HRC*, 286 Mich App 444; 781 NW2d 105 (2009), the Michigan Court of Appeals addressed trial courts' use of *in camera* interviews in the context of child protective proceedings.[7] "Generally, such ex parte communications are not permitted except as provided by law." *Id*. at 451 (citing Michigan Code of Judicial Conduct, Canon 3). Acknowledging that the Child Custody Act, MCL 722.21, *et seq*., permits the use of *in camera* interviews with children for the sole and limited

[7] "An in camera interview is an ex parte communication that occurs off the record in a judge's chambers and in the absence of the other interested parties and their attorneys." *In re HRC*, 286 Mich App 444, 451; 781 NW2d 105 (2009) (citing Black's Law Dictionary (8th ed)).

purpose of determining the child's parental preferences, the *In re HRC* Court acknowledged that the "use of an in camera interview for fact-finding presents multiple due process problems." *Id*. at 452.

> While questioning in an in camera interview does not constitute a due process violation as long as the interview is limited to the child's parental preferences, [citations omitted], it is not difficult to see how the use of an in camera interview for fact-finding presents multiple due process problems: Should questions or answers arise concerning disputed facts unrelated to the child's preference, there is no opportunity for the opposing party to cross-examine or impeach the witness, or to present contradictory evidence; nor is there created an appellate record that would permit a party to challenge the evidence underlying a court's decision. [Citations omitted.] And, as this Court has noted, even an interview limited appropriately in its scope, "will result in information that affects other child custody factors..." [Citation omitted.] Nonetheless, this Court has concluded that due process, in the context of custody disputes, permits in camera interviews of children for the limited purpose of determining their parental preference. [Citation omitted.] [*In re HRC*, 286 Mich App at 452.]

Similar to the trial court's view of the scene, the *In re HRC* Court noted that "[w]hile a court in a juvenile proceeding is required to make a finding regarding the child's best interests, there is, significantly, no statutory provision that would permit a trial court presiding over a juvenile proceeding to conduct an in camera interview." *Id*. at 452–53. "Nor is there any caselaw, let alone any longstanding caselaw, that permits a trial court in a juvenile proceeding to conduct an in camera interview regarding the child's best interests."[8] *Id*. at 453. "Accordingly, there is no

[8] There is, however, longstanding caselaw that permit trial courts presiding over disputed custody cases to "see and talk informally with the child, preferably in chambers, when it is of discretionary age." *Bowler v Bowler*, 351 Mich 398, 406; 88 NW2d 505 (1958). See also, *Ex parte Leu*, 240 Mich 240, 249–50; 215 NW 384 (1927) ("A private, informal interview with the child by the court would seem to be the natural and most effectual way to obtain an unembarrassed and uninfluenced expression of the child's actual choice. Numerous cases are reported which show that course was adopted by the court before reaching a final decision.") However, even this line of precedent provided that "[a]ny technical objections to such informal interviews are usually waived by the parties, or may be met by the presence of counsel for both parties in chambers and a judicial summary of the judge's findings later upon the record." *Bowler*, 351 Mich at 406-07.

authority that permits a trial court presiding over a juvenile matter to conduct in camera interviews, on any subject whatsoever, with the children." *Id*.

The *In re HRC* Court noted that the trial court there conducted *in camera* interviews of all the children, did not indicate that the interviews would be limited to a particular purpose, intended that the interviews would be generally used to determine the children's best interests. *In re HRC*, 286 Mich App at 453. That panel further noted that the trial court there "made no statements on the record reflecting the types of questions the children were asked or the evidence that was elicited" and created "no reviewable record whatsoever regarding what occurred during these interviews." *Id*. at 453-54. Thus, the Court concluded:

> The court erred by conducting the in camera interviews. A trial court presiding over a juvenile matter must abide by the relevant substantive and procedural requirements of the juvenile code. See *In re A.P.*, 283 Mich. App. 574, 595, 770 N.W.2d 403 (2009). It is not free to pick and choose procedures from the CCA and implant them into juvenile proceedings. *Stated simply, the CCA's substantive and procedural requirements are not applicable to proceedings conducted under the juvenile code. Id. As noted, nothing in the juvenile code, the caselaw, the court rules, or otherwise permits a trial court presiding over a termination of parental rights case to conduct in camera interviews of the children for purposes of determining their best interests. Accordingly, we hold that a trial court presiding over a juvenile proceeding has no authority to conduct in camera interviews of the children involved*. [*In re HRC,* 286 Mich App at 453–54 (emphasis added).]

Despite the fact that the trial court in *In re HRC* "conducted these interviews, without objection from either party," *In re HRC*, 286 Mich App at 453-54, that Court concluded "that the trial court plainly erred" and the error "affected respondents' substantial rights."[9] *Id*. at 454.

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[9] *But cf*., *In re Morgan*, unpublished opinion *per curiam* of the Court of Appeals, issued July 14, 2011 (Docket No. 302352) (distinguishing *In re HRC* and holding *in camera* interview was harmless where "the trial court used the interview more as a therapeutic opportunity to allow [the child] to voice her opinion," the child's desires "were made known through other documentary evidence and the testimony of other witnesses," the trial court made respondent aware "of what actually took place at the in camera interview," and the Court of Appeals panel was "provided with an adequate record to review the trial court's ultimate decision."); and *In re Arzola-Ferris*, unpublished opinion *per curiam* of the Court of Appeals, issued March 15, 2011 (Docket No.

B. Constitutional Law Does Not Allow *in Camera* Examinations in Child Protective Proceedings

The right to confrontation and cross-examination are of ancient origin. *Greene v McElroy*, 360 US 474, 496; 79 S Ct 1400; 3 L Ed 2d 1377 (1959). Although these rights "find expression" in the Sixth Amendment, but they apply in "all types of cases where administrative and regulatory actions were under scrutiny." *Id*. at 496-97.

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. *While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination*. They have ancient roots. *They find expression in the Sixth Amendment* which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. *It has spoken out not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny*. [*Greene*, 360 US at 496–97 (all emphasis added).]

See also, *Jenkins v McKeithen*, 395 US 411, 428; 89 S Ct 1843; 23 L Ed 2d 404 (1969) ("We have frequently emphasized that the right to confront and cross-examine witnesses is a fundamental aspect of procedural due process.")

Similarly, in *Goldberg v Kelly*, 397 US 254; 90 S Ct 1011; 25 L Ed 2d 287 (1970), the Supreme Court again reiterated that "*[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses*." *Id*. at 269-70 ("Welfare recipients must therefore be given an opportunity to confront

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299796) (distinguishing *In re HRC* where "the trial court's in camera interview of the two oldest children took place in the presence of a court reporter and before the filing of a permanent custody petition" and "[t]he trial court noted that the parties could order a transcript of the in camera interviews.")

and cross-examine the witnesses relied on by the department.") (emphasis added). Thus, "[c]ross-examination of a witness is a matter of right." *Alford v United States*, 282 US 687, 691; 51 S Ct 218; 75 L Ed 624 (1931). See also, *Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 426; 576 NW2d 667 (1998) ("A party's right to cross-examine adverse witnesses is a basic due process right.") As one U.S. Supreme Court Justice has explained, "[t]he right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision for jury trials in civil cases."[10] *Adickes v S H Kress & Co*, 398 US 144, 176; 90 S Ct 1598; 26 L Ed 2d 142 (1970) (Black, J., concurring).

In *Jenkins v McKeithen*, 395 US 411, 428–29; 89 S Ct 1843; 23 L Ed 2d 404 (1969), the Court found error in placing limitations upon this right.

> When viewed from this perspective, it is clear the procedures of the Commission do not meet the minimal requirements made obligatory on the States by the Due Process Clause of the Fourteenth Amendment. Specifically, the Act severely limits the right of a person being investigated to confront and cross-examine the witnesses against him. Only a person appearing as a witness may cross-examine other witnesses. Cross-examination is further limited to those questions which the Commission 'deems to be appropriate to its inquiry,' and those questions must be submitted, presumably beforehand, in writing to the Commission. We have frequently emphasized that the right to confront and cross-examine witnesses is a fundamental aspect of procedural due process. [*Jenkins*, 395 US at 428-29 (citations omitted).]

In *In re HRC*, *ante*, the Court of Appeals balanced the relevant tripartite interests announced in *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976), namely the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and the government's interest, including the function involved

[10] So paramount is this right that it is even accorded to incarcerated prisoners so long as it does not affect the safety of the institution. *Williams v Warden, Mich Reformatory*, 88 Mich App 782, 786 n3; 279 NW2d 313 (1979).

and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id*. at 335. The *In re HRC* Court noted that "the stakes for the private parties involved are very high: parents stand to lose their constitutional right to the care and custody of the child forever, while the child risks the loss of the care of his or her natural parents." *In re HRC*, 286 Mich App at 455. "Further, given the characteristics of the in camera interview, the risk of an erroneous deprivation of these fundamental rights is substantial, while the value of an in camera procedure is low." *Id*. The *In re HRC* Court further found that "[u]nrecorded, off the record, in chambers interviews of children could potentially unduly influence a court's decision and could affect the court's findings, not just with regard to the child's best interests, but also with regard to whether the statutory grounds for termination exist." *Id*. Additionally, the Court noted that "such procedures provide no opportunity for cross-examination, impeachment, or meaningful appellate review." *Id*. The Court further found that "[t]he risk of error associated with the use of the in camera interview is plainly unwarranted, especially considering the fact that the testimony elicited through such a procedure can be obtained another way at little cost to the state or the parties involved; for example, through another witness's testimony or by documentary evidence." *In re HRC*, 286 Mich App at 455-56. Thus, the Court concluded that "the use of unrecorded, in camera interviews in termination proceedings violates parents' due process rights." *In re HRC*, 286 Mich App at 455.

> Accordingly, given the fundamental parental rights involved in termination proceedings, the risk of an erroneous deprivation of those rights given the in camera procedure, and the fact that the information is otherwise easily obtained, it is clear that the child's interest in avoiding the discomfort caused by testifying in open court does not outweigh the parents' interest in having the child testify on the record. Thus, it is our view that the use of an unrecorded and off the record in camera interview in the context of a juvenile proceeding, *for whatever purpose*, constitutes a violation of parents' fundamental due process rights. [*In re HRC*, 286 Mich App at 456 (emphasis added).]

The *In re HRC* Court's analysis is valid, and the same result obtains here. Parents' constitutional right to the care and custody of their children forever, and the children's right to the care of his or her natural parents are perhaps one of the most fundamental, constitutional rights that exist. "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as "of basic importance in our society," ... rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *MLB v SLJ*, 519 US 102, 116; 117 S Ct 555; 136 L Ed 2d 473 (1996). Because termination of this fundamental constitutional right is at stake, as opposed to determining whether a court may merely exercise jurisdiction over the child, cross-examination and confrontation are even more paramount. *Cf., In re Brock*, 442 Mich 101, 110, 111-12; 499 NW2d 752 (1993) (holding that litigants have no right to confront and to cross-examine during adjudicative phase of a child protection proceeding because "[n]ot every adjudicative hearing results in removal of custody" and "in order to permanently terminate respondents' parental rights, further hearings would be required, and the statutory elements for termination must be proven by clear and convincing evidence.");[11] *In re England*, 314 Mich App 245, 263–64; 887 NW2d 10, 20 (2016) ("Furthermore, respondent had no right to cross-examine O'Neill at the preliminary inquiry or present his own expert witnesses.") The risk of an erroneous deprivation of this interest through in camera interviews is great where children often say things devoid of context and unaware of how the listener may interpret them and where judges who are not as familiar with the case or the children as are the parties may not apprehend the need for additional context or explication. The

[11] *In re Brock*, 442 Mich 101; 499 NW2d 752, 758 (1993) is further distinguishable because there "[d]uring the video depositions, respondents' counsel were able to observe the child through a one-way window," and "counsel were allowed to submit questions to the examiner before and during the deposition.")

probable value of allowing confrontation and cross-examination obviate all of these concerns. For these same reasons, the government's interest would also be better protected with minimal increase in the fiscal and administrative burdens that confrontation and cross-examination would entail.

The Court of Appeals here ruled that the Ferrantis could not be heard to complain of this error because they invited it through their consent expressed through counsel. However, "there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client ...." *Taylor v Illinois*, 484 US 400, 417–18; 108 S Ct 646; 98 L Ed 2d 798 (1988). See also, *New York v Hill*, 528 US 110, 114; 120 S Ct 659; 145 L Ed 2d 560 (2000) ("For certain fundamental rights, the [paty] must personally make an informed waiver.") One such fundamental right is the right to confront and cross-examine witnesses. *Brookhart v Janis*, 384 US 1, 7, 8; 86 S Ct 1245; 16 L Ed 2d 314 (1966). To the extent that the Ferranti's counsel could waive this fundamental constitutional right, it is unclear from the record whether the trial court adequately apprised the parties that its interview would occur in camera and outside of their presence.

C. Balancing the Right to Confrontation with Other Important Interests

"[T]he Confrontation Clause reflects a preference for face-to-face confrontation at trial," ... a preference that 'must occasionally give way to considerations of public policy and the necessities of the case.'" *Maryland v Craig*, 497 US 836, 849; 110 S Ct 3157; 111 L Ed 2d 666 (1990). See also, *Chambers v Mississippi*, 410 US 284, 295; 93 S Ct 1038; 35 L Ed 2d 297 (1973) ("[T]he right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.") "But its denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined." *Chambers*, 410 US at 295. However, "where face-

to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact disserve the Confrontation Clause's truth-seeking goal." *Maryland*, 497 US at 857. Under such circumstances, alternative measures that mitigate emotional distress in a child while still allowing for questioning the witness while observing his or he demeanor satisfy Due Process. See, e.g., *Maryland v Craig*, 111 L Ed 2d 666; 497 US 836; 110 S Ct 3157 (1990) (holding that party was not deprived of right to confront child witness in child abuse case where child testified against defendant at trial outside defendant's physical presence by one-way closed circuit television). *Accord*, *In re Brock*, 442 Mich 101, 112–13; 499 NW2d 752, 758 (1993) (finding no denial of the right to confront child witness during adjudicatory phase of child protective proceeding where "[d]uring the video depositions, respondents' counsel were able to observe the child through a one-way window" and "were allowed to submit questions to the examiner before and during the deposition.")

D. The Lower Courts Did Not Err

At the conclusion of testimony, the trial court indicated that it desired to speak with the child. Transcript (6-20-17), p 45. The trial court asked, "[A]nyone has a right to object, so I'm just contemplating is that all right or is there an opposition to it?" *Id*. at 45. In response, Appellant Michael Ferranti's counsel stated, "I would actually request it," and Appellant Susan Ferranti's counsel stated, "We don't object. We encourage the court to talk with Jessica." *Id*. at 46. The Guardian *Ad Litem* also stated, "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." *Id*. Only after this colloquy did the trial court schedule a time to meet with the child privately with a court employee present. *Id*. at 48. During closing arguments, Appellant Michael Ferranti's

counsel reiterated, "Certainly we're requesting that Jessica be interviewed," and the trial court confirmed that it had already spoken to her. Transcript (7-5-17), p 15.

Based upon this record, the Court of Appeals correctly noted that "[r]espondent 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 Ferranti*, p 7 (quoting *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011)). The Court of Appeals further concluded that "[b]ecause 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 [the child]," and this "waiver extinguished any error." *Id*. The Court of Appeals was correct in its analysis; thus, the trial court's ruling should be affirmed.

Conclusion and Relief Requested

Based upon the foregoing, the amicus Children's Law Section asks that this court either dismiss the application of the respondent-parents or affirm the decision of the Court of Appeals.

Respectfully submitted,

Dated: September 25, 2018

/s/
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Dated: September 25, 2018

/s/
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