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STATE OF MICHIGAN

COURT OF APPEALS

In re DEMONTIGNY and LAUBE, Minors.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Petitioner-Appellee,

v

JEANEEN LYNN HATLAK,

Respondent-Appellant.

UNPUBLISHED
December 17, 2019

No. 345760
Bay Circuit Court
Family Division
LC No. 16-012245-NA

ON REMAND

Before: BOONSTRA, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

This case returns to this Court on remand from our Supreme Court[1] for reconsideration in light of *In re Ferranti*, 504 Mich 1; 934 NW2d 610 (2019). We now vacate the trial court's order of adjudication with regard to respondent-mother and remand to the trial court for further proceedings.

Respondent-mother pleaded to the trial court's jurisdiction. See *In re Demontigny/Laube Minors*, unpublished per curiam opinion of the Court of Appeals, issued May 9, 2019 (Docket No. 345760), p 5-6. On appeal, respondent-mother challenged the trial court's assumption of jurisdiction and we agreed that the trial court failed to comply with MCR 3.971(B)(4) by advising respondent-mother that her plea could be used against her in a later termination proceeding. *Id*. We concluded, however, that the unpreserved error did not warrant relief

[1] *In re Demontigny/Laube*, ___ Mich ___ (2019).

because respondent-mother failed to demonstrate prejudice or that the error seriously affected the fairness or integrity of the proceedings. *Id*., unpub op at 6-7. We explained:

> Critically, respondent has not presented this Court with any evidence showing that she would not have entered the plea had she been informed that it could be used as evidence at the termination hearing. Indeed, on the current record, respondent's assertion that she would do so is doubtful. Respondent was informed that her plea could eventually lead to a petition to terminate her parental rights, particularly if she did not benefit from her service plan, which would inevitably be fashioned to address the allegations in the petition. Thus, while respondent was not specifically informed that the plea could be used as evidence, she understood that her failure to address the allegations in the petition could lead to the termination of her parental rights. Being so informed, respondent choose [sic] to enter her no-contest plea and begin working on her service plan instead of challenging the petition. Having been informed that not contesting the plea could put her on a path to the termination of her parental rights, we find it unlikely that respondent would have abstained from entering the plea had she been informed that the plea could be used as evidence in the termination hearing.
>
> Moreover, it is clear that the referee, in assuming jurisdiction over the children, was focusing on the issues of substance abuse and domestic violence. Evidence of police involvement for domestic violence, concerning an incident when FL was in the home, was elicited at a preliminary hearing before adjudication. Also elicited was that respondent had a history of being "volatile" after drinking. Her own attorney stated that respondent had "a big issue" with drinking in the past, and a Department of Health and Human Services employee affirmed that respondent was an alcoholic. The children's guardian ad litem at this hearing referred to "a continuing pattern of drinking and domestic violence." It is true that these statements were not provided under oath, but, given (1) the above information, which was elicited even before the adjudication hearing; (2) the large amount of evidence regarding alcohol abuse and domestic violence that petitioner presented throughout the proceedings; and (3) the fact that some of the information regarding these issues was supported by police records and criminal records, it is not reasonable to conclude that if respondent had not pleaded to the petition, the court would not have assumed jurisdiction over the children by way of trial. Accordingly, it is not reasonable to conclude that any error regarding MCR 3.971(B)(4) affected respondent's substantial rights; resulted in adjudication of an "innocent" parent; or affected the fairness, integrity, or public reputation of judicial proceedings. Thus, despite the error, respondent is not entitled to relief. [*Id.*, unpub op at 7.]

After the release of our opinion, the Supreme Court issued its decision in *Ferranti*. In that case, our Supreme Court reversed the *Hatcher*[2] collateral-bar rule which generally

[2] *In re Hatcher*, 443 Mich 426; 505 NW2d 834 (1993).

prohibited a respondent in a child-protective proceeding from challenging the adjudication except in a direct appeal from the initial dispositional order. *Ferranti*, 504 Mich at 25-29. Our prior opinion did not apply the collateral-bar rule to respondent-mother's challenge. Rather, we concluded that respondent-mother was not entitled to relief under plain-error review. Nonetheless, because *Ferranti* clarified plain-error review in cases where the trial court fails to advise the respondent in accordance with MCR 3.971(B)(4), our prior opinion is directly implicated by our Supreme Court's decision, necessitating this remand.

Following *Ferranti*, "adjudication errors raised after the trial court has terminated parental rights" are still reviewed for plain error affecting the respondent's substantial rights. *Ferranti*, 504 Mich at 29. Accordingly, to be entitled to relief, respondent-mother must establish that (1) an error occurred; (2) the error was clear or obvious; and (3) the plain error affected her substantial rights. *Id*.

"Due process and our court rules require a trial court to advise respondents-parents of the rights that they will waive by their plea and the consequences that may flow from it." *Id*. at 30. Specifically, MCR 3.971(B)(4) requires the trial court to advise the respondent that any plea entered at the adjudicative phase may be used as evidence in subsequent hearings to terminate parental rights. As our prior opinion recognized, there is no question that the trial court failed to properly advise respondent-mother in accordance with MCR 3.971(B)(4).[3] Thus, plain error has been established.

Thus far, our prior analysis comports with *Ferranti*. Where our prior analysis departs with *Ferranti* is on the last plain-error requirement: the respondent's substantial rights. As already noted, in our prior opinion, we concluded that the failure to advise respondent-mother in accordance with MCR 3.971(B)(4) did not warrant relief because respondent-mother failed to demonstrate prejudice or that the error seriously affected the fairness or integrity of the proceedings. *Ferranti*, however, forecloses this type of analysis.

Rather, our Supreme Court reasoned that a trial court's failure to comport with MCR 3.971 when taking a plea results in a constitutionally deficient proceeding which cannot be remedied "by what might have transpired at trial." *Id*. Accordingly, the error results in an invalid plea which relieves petitioner of its burden to prove that the respondent is "unfit at a jury trial, with all of its due-process protections." *Id*. The constitutional deprivation affects the "very framework" within which the case proceeds and therefore affects the respondent's substantial rights. *Id*. at 30-31.

[3] We note that, coinciding with the release of its opinion, the *Ferranti* court also released several amendments to the court rules, some of which appear to reinstate portions of the *Hatcher* framework. See *In re Ferranti*, 504 Mich at 9 n 1. MCR 3.971(B)(4), however, is retained in the new rules and therefore we need not decide which version of the court rules to apply to this case.

Therefore, because the trial court failed to advise respondent-mother of the consequences of her plea in accordance with MCR 3.971(B)(4), we must depart from our prior analysis, vacate the trial court's order of adjudication, and remand this case to the trial court for further proceedings. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood