

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
(Hoekstra, P.J., and Sawyer and Gleicher, JJ.)

In the Matter of Wangler/Paschke,
Minor Children.

Supreme Court No. 149537

Court of Appeals No. 318186

Sanilac Circuit No. 07035009-NA
Hon. John R. Monaghan

**BRIEF AMICUS CURIAE OF
FAMILY DEFENSE ATTORNEYS OF MICHIGAN**

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STATEMENT OF QUESTION PRESENTED

- I. Is A “Dispositional Order” Within the Context of a Termination of Parental Rights Proceeding an Order that Terminates Parental Rights Instead of Ordering a Different Course of Action?**

Amicus Curiae Family Defense Attorneys of Michigan answer, “YES.”

- II. Was the Court of Appeals dissent correct in finding that the Termination Order was the First Dispositional Order?**

Amicus Curiae Family Defense Attorneys of Michigan answer, “YES.”

- III. Did the Court of Appeals err by applying *In re Hatcher’s* collateral attack doctrine to bar Respondent-Mother’s constitutional due process challenge to the process employed by the Trial Court in entering its order of jurisdiction over the minor children in this case?**

Amicus Curiae Family Defense Attorneys of Michigan answer, “YES.”

INTEREST OF AMICUS CURIAE

The Family Defense Attorneys of Michigan (“FDAM”) is a group of attorneys who advocate for families in the child welfare system, typically representing parents in child welfare proceedings. FDAM members “strive to promote family preservation through zealous legal advocacy, quality attorney representation, and community education about Michigan child protective services, foster care and adoption matters.” Mission Statement, www.fdam.org (last accessed July 15, 2015). Moreover, FDAM’s purpose as an organization is, inter alia, to “promote quality legal representation for parents and caregivers in child welfare cases,” “promote the selection of qualified, zealous attorneys in child protection representation,” and “promote child welfare system reform to balance child protection and family preservation.” Purpose, www.fdam.org (last accessed July 15, 2015). The instant case presents significant legal issues that impact the child welfare arena, and particularly the clients of FDAM’s members. In particular, FDAM members regularly confront jurisdictional issues in their cases, and the instant case squarely arises from the adjudicative process utilized by the trial court in that case.

This Court’s decision in the instant case will have significant impact on child welfare proceedings as it asks the parties to address the meaning of “dispositional order.” Even to the extent that the instant case is fact-specific, and perhaps even unique with the trial court using a mediation agreement to assume jurisdiction, this Court’s decision and analysis of whether the termination order was the “first dispositional order,” will impact many other cases. Assisting this Court answer the questions posed in the order granting leave ties directly into FDAM’s mission and purposes, as stated on its

website, www.fdam.org (last accessed July 15, 2015). Moreover, the Court of Appeals' application of *In re Hatcher* to prevent an appeal of an adjudication proceeding after termination of parental rights is an ongoing problem in child welfare cases, and its resolution will have wide-reaching effects in child welfare appeals.

STATEMENT OF FACTS

This appeal arises from a child welfare case where Appellant-Mother's parental rights were terminated. The appeal involves the method by which the trial court assumed jurisdiction over the children. The facts essential to this amicus brief are as follows:

The Prosecution filed a child protective proceeding due to various allegations of abuse against Respondent-Mother. (JA 70a-72a). At the preliminary hearing, the parties decided to go to mediation. The mediation session resulted in a mediation agreement, which was signed by the parties on February 28, 2012. (JA 66a-67a). The mediation agreement accomplished several tasks.

First, Respondent-Mother admitted to several allegations in the petition. (JA 66a, ¶ 2a). In particular, Respondent-Mother admitted to the fact that there had been a prior child protective service file due to domestic violence and drug abuse, that services were provided to her in that prior case, that Respondent-Mother failed to communicate with the case worker and to attend appointments, that she had failed random drug screens, and that she was involved in a domestic dispute in December 2011. (JA 69a, 70a-71a).

Second, the mediation agreement held the adjudication in abeyance for a 6-

month period. (JA 66a). Third, Respondent-Mother agreed to a service plan and visitation schedule. (JA 66a). Fourth, Respondent-Mother was limited from communicating with Matthew Brown. (JA 67a). And finally, the agreement asked that the Circuit Court set a review hearing in 90 days. (JA 67a).

On the same day she signed the mediation agreement, Respondent-Mother signed a document entitled "Entry of Plea Pursuant to MCR 5.971 as Part of Mediation," which purports to advise her of several rights she would be waiving by agreeing to the mediation. (JA 68a-69a). It appears from the record that the Trial Court waited until January 31, 2013 to address the jurisdiction of the court. At that hearing, the Trial Court stated that it would take "formal jurisdiction as an Act 87 ward." (01/31/13 Hearing, JA 195a). The Trial Court entered its adjudication order on February 4, 2013 as part of the "order following dispositional review/permanency planning hearing." (02/04/13 Order, JA 202a-207a).

The Prosecutor then filed a supplemental petition requesting termination of parental rights. (JA 208a-212a). The trial court entered its initial dispositional order on July 16, 2013, by which it also terminated Respondent-Mother's parental rights. (JA 296a-299a).

The Court of Appeals issued a published opinion affirming the termination of parental rights (by Judges Hoekstra and Sawyer), with a dissenting opinion (by Judge Gleicher). (JA 321a-325a; 326a-332a). This Court granted leave to appeal on April 1, 2015. (JA 334a). This Court directed the parties to address the following: (1) the meaning of the phrase "dispositional order" within the context of a termination of

parental rights proceeding; (2) whether the termination order constituted the first dispositional order; and (3) whether and to what extent the collateral attack analysis in *In re Hatcher*, 443 Mich 426 (1993), extends to the respondent's due process challenge. (04/01/15 Sct Order, JA 334a).

STANDARD OF REVIEW

This Court reviews the interpretation and application of law by the trial court de novo. *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010), citing *Estes v Titus*, 481 Mich 573, 578–79; 751 NW2d 493 (2008). This Court reviews for clear error in the trial court's factual findings. *In re Trejo Minors*, 462 Mich 341, 356–57; 612 NW2d 407 (2000). “A finding is ‘clearly erroneous’ [if] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.” *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

ARGUMENT

I. A “Dispositional Order” Within the Context of a Termination of Parental Rights Proceeding is an Order that Terminates Parental Rights Instead of Ordering a Different Course of Action.

“In Michigan, child protective proceedings comprise two phases: the adjudicative phase and the dispositional phase.” *In re Sanders*, 495 Mich 394 at 404 (2014), citing *In re Brock*, 442 Mich 101, 108; 499 NW2d 752 (1993). “Generally, a court determines whether it can take jurisdiction over the child...during the adjudicative phase.” *Brock* at

108. “Once the court has jurisdiction, it determines during the dispositional phase what course of action will ensure the child's safety and well-being. *Id.*”

Regarding potential courses of action a court may take (via entry of a dispositional order) the court rules and statutes indicate that:

- “The court shall enter an order of disposition as provided in the Juvenile Code and these rules.” See MCR 3.973(F)(1) and
- “If the court finds that a juvenile concerning whom a petition is filed is... within this chapter, the court may enter any of the following orders of disposition...” See MCL 712A.18(1) which lists a variety of actions the court may take.

Statutes and court rules also impose certain requirements before an order of disposition is entered:

- “Before the court enters an order of disposition...the agency shall prepare a case service plan that shall be available to the court and all the parties to the proceeding.” See MCL 712A.18f(2).
- “Before the court enters an order of disposition the court shall consider the case service plan...” See MCL 712A.18f(4). (This statute also directs the court to consider information from a variety of sources (listed in the statute) and “any other evidence offered.”).
- “The court shall not enter an order of disposition until it has examined the case service plan as provided in MCL 712A.18f. The court may order compliance with all or part of the case service plan and may enter such

orders as it considers necessary in the interest of the child.” See MCR 3.973(F)(2).

Additionally:

- MCR 3.977(E) allows for termination of parental rights at initial disposition in certain circumstances.

Finally:

- “If the court finds that a juvenile...is not within this chapter, the court shall enter an order dismissing the petition.” See MCL 712A.18(1).

To summarize, the relevant statutes list a variety of dispositional actions a court may order after it has reviewed a proposed case service plan; the court rule includes termination of parental rights to the statutory options. Thus, a dispositional order is an order that:

- Orders one or more of the options available under the statute, including parental compliance with a case service plan, **or**
- Terminates parental rights (per the court rule) instead of taking one or more options available per the relevant statutes, **or**
- Dismisses the petition.

It is the experience of Amicus Curiae that termination at initial disposition is rare; dismissal of the petition is rarer still. What normally happens is that the parent(s) are ordered to engage in a case service plan.

With all that in mind Amicus Curiae agrees with the Court of Appeals dissenting opinion (JA 326a-332a) and the dissent’s conclusion that the trial court never properly

acquired jurisdiction in this matter. In addition to the rationale of the dissenting opinion, Amicus Curiae also believes the admissions made via the plea were not sufficient to support jurisdiction. Thus the trial court did not have authority to take any action other than dismissing the petition (per MCL 712A.18(1)).

II. The Court of Appeals Dissent was correct in concluding that the Termination Order was the First Dispositional Order.

A. The Court of Appeals Dissent and Orders in Child Welfare Cases

According to the Court of Appeals dissenting opinion, it appears that the majority viewed only two orders as candidates for the first dispositional order in this matter. Those would be the orders dated February 4, 2013 and July 16, 2013. (COA Majority Opinion, pp. 2-3; COA Dissenting Opinion, p. 4).

The July 16, 2013 order terminated Respondent-Mother's parental rights. That is one of the dispositional options available to the trial court, as discussed above in Section I. So unless this Court believes there was a proper adjudication and order of disposition entered before the July 16, 2013 termination order, then that order must be the first order of disposition. So far as Amicus Curiae can tell from the record in this case, the trial court never entered an order of disposition until it terminated Respondent-Mother's parental rights. Thus, Amicus Curiae agrees with the rationale of the Court of Appeals dissenting opinion on this issue.

The February 4, 2013 order was an Order Following Dispositional Review/Permanency Planning Hearing (SCAO Form JC 19) (JA 202a-207a). This Order presumes an initial order of disposition has been entered. It is not at all clear from the

record why the majority opinion concluded that the February 4, 2013 order was the initial dispositional order. In fact, that order was preceded by three other orders; these prior orders were also labeled as an order following dispositional review hearings and entered utilizing SCAO form JC 19. (05/04/12 Order Following Dispositional Review, JA 109a-114a; 08/06/12 Order Following Dispositional Review, JA 146a-151a; 11/20/12 Order Following Dispositional Review, JA 178a-183a).

As this Court knows, there are a variety of forms created by the State Court Administrative Office that can be used to enter orders of adjudication and orders of disposition in child welfare cases (and for use in child welfare cases generally). In this case, the trial court used the SCAO form titled Order After Preliminary Hearing (Child Protective Proceedings) (form JC 11a) (JA 32a-36a) after the very first court hearing. The order terminating Respondent-Mother's parental rights was entered using SCAO form JC 63 (Order Following Hearing to Terminate Parental Rights) (JA 296a-299a).

Given that "[c]ourts speak through their written orders, not their oral statements." *Hosner v Brown*, 40 Mich App 515 (1972), there should be a written order of adjudication and a written order of disposition. One will not find an Order of Adjudication or an Order of Disposition entered using the SCAO forms in the Joint Appendix. The specific forms are JC 49, which is titled Order of Adjudication (Child Protective Proceedings) and JC 17, which is titled Order of Disposition (Child Protective Proceedings). In the experience of Amicus Curiae, the SCAO form orders are regularly used when such orders are entered. Given that there are specific forms for these

actions and that the trial court used the (correct) SCAO forms at other times during the proceeding is puzzling.

Unless this Court finds that some other order entered before the July 16 order is an order of adjudication or an order of disposition, the only order that can be viewed as the first dispositional order is the July 16, 2013 order terminating Respondent-Mother's parental rights. And while termination at initial disposition is a valid course of action (in some cases), if that order is the also first order of disposition then Respondent-Mother is free to attack that order in her appeal. That means Respondent-Mother can attack not only the termination order but the trial court's exercise of jurisdiction. This is significant in this case because the allegations pled to do not support jurisdiction.

B. Why The Allegations Pled to do not Support Jurisdiction

Respondent-Mother's admissions were not sufficient to establish jurisdiction as required by this Court's decision in *People v Tennyson*, 487 Mich 730; 790 NW2d 354 (2010). Nor do the admissions comport with *In re Youmans*, 156 Mich App 679, 684-685; 401 NW2d 905 (1986).

This Court in *Tennyson* examined the interplay between the juvenile jurisdiction statute and Michigan's criminal code. In *Tennyson*, an adult was convicted of violating MCL 750.145 and this Court reversed the conviction. The criminal statute makes it crime for a person to tend to cause a minor child to become neglected or delinquent so as to tend to come under juvenile court jurisdiction. Reduced to its essence, *Tennyson* says that it is not enough to allege a parent has done something "bad" (or even criminal)

in order for a child to come under juvenile court jurisdiction. There must be a connection between the allegedly “bad” or criminal behavior and the child. *Tennyson*, 487 Mich at 754.

Youmans holds that juvenile court jurisdiction cannot be conferred by the consent of the parties. *Youmans*, 156 Mich App at 684. Applying these two principles to this case means that the trial court never properly acquired jurisdiction over Respondent-Mother’s minor children.

Tennyson involved a ten-year old child who was in a home while the Detroit police were executing a search warrant. *Id.* at 733. During their search the police found a baggie of heroin and two loaded firearms. *Id.* at 733. This Court concluded that those facts alone would not be sufficient to warrant juvenile court jurisdiction.

The Court reached this conclusion for a number of reasons. One was that the child “did not violate, nor was he in danger of violating, any "municipal ordinance or law of the state or of the United States.”” *Id.* at 751. Additionally the *Tennyson* record did not contain any evidence whatsoever that the child was disposed or inclined to abuse drugs, engage in criminality, or become a delinquent for any other reason. *Id.*

Moreover, (in this Court’s view) the prosecutor presented no evidence regarding the child's education, behavioral history, relationships with his peers, or any other relevant fact that could support the conclusion that defendant's actions "tended to cause" *this* child, to become delinquent. *Id.* at 751 (emphasis in original).

Most telling about this Court’s analysis in *Tennyson* is that it focuses on the child, specifically how the parent’s behaviors have affected the child. It does not focus solely

and exclusively on the parent's behavior. This rationale should control resolution of this matter as well.

In this case Respondent-Mother entered a "plea" consisting of admitting the following allegations:

8. On November 22, 2011 a Childrens Protective Services case was opened due to Domestic Violence and drug abuse. At this time Melissa Paschke acknowledged an addiction to heroin, and a history of domestic violence in her relationship with Matthew Brown.

13. At the time of this filing, Melissa Paschke has failed to provide any verification of attendance and/or completion of in-patient treatment for her substance addiction.

14. On December 28, 2011 Melissa Paschke was involved in a domestic dispute with her boyfriend, Matthew Brown. During that dispute, Mr. Brown struck Ms. Paschke in the face causing bruising and a swollen eye. Ms. Paschke contacted her sister Katie Wilson to request assistance; upon retrieving Melissa, Ms. Wilson noted that Ms. Paschke had bruising to her face and a swollen eye and Melissa acknowledged this was from Matt Brown.

All these allegations concern Respondent-Mother, detailing things she did or things that happened to her. None of these allegations mention her three minor children. This "plea" does not acknowledge that any of the minor children violated any municipal ordinance of law of the state or of the United States nor does it suggest that any of the minor children were inclined to engage in criminal behavior.

The plea does not acknowledge that the children's education has suffered, that the children's relationship with peers suffered, or that these children had, in any other way, become delinquent or that they had been abused or neglected.

When Mother's parental rights were terminated her youngest child was 11 years old; the other children were older. So the children were old enough to have a peer group. They were certainly old enough to engage in criminal behavior. Yet, just as in *Tennyson*, there was no mention of how Respondent-Mother's shortcomings affected her children.

That said, *Tennyson* is a criminal decision and, in the experience of Amicus Curiae, that does not seem to carry much weight in child protection cases. This case allows the Court to reiterate *Tennyson* and to do so specifically in the child welfare context.

In deciding *Tennyson* this Court compared the factual situation presented by *Tennyson* to those of *People v Antjuan Owens*, an unpublished opinion per curiam of the Court of Appeals, issued September 11, 2007 (Docket No. 271064), 480 Mich 1012, 743 NW2d 53 (2008) (**Tab A**). This Court noted that in *Owens* a police raid found a 13-year-old child residing in a home with no food or furniture, and was full of trash and animal feces (though it did have electricity and heat). *Tennyson*, 487 Mich at 749. This Court said those facts were sufficient for neglect under either MCL 712A.2(b)(1) or (b)(2).

The contrast between *Tennyson* and *Owens* illustrates that the Court clearly had circumstances in mind that it believed would be sufficient to support juvenile court jurisdiction. But such facts need to be alleged and proven (or pled to). That did not happen in this case. This case is far more similar (factually) to *Tennyson* than *Owens*.

Turning to *Youmans*, the court's authority under the juvenile jurisdiction statute is "purely statutory" and "cannot be conferred by the consent of the parties." *Youmans*, 156 Mich App at 684, citing *Lehman v Lehman*, 312 Mich 102, 106; 19 NW2d 502 (1945). Moreover, "although the respondents are free to admit the truth of the allegations...the admissions do not establish the court's jurisdiction. The court must make an independent determination of whether the allegations are sufficient...to assume jurisdiction over the matter." *Youmans*, 156 Mich App at 684-685. That does not appear to have happened here.

What appears to have happened is that the trial court took jurisdiction over the children simply because Respondent-Mother entered a plea to some of the allegations in the petition. There is no indication that the trial court explained why the admissions were sufficient. There was no comparison of the admissions to the facts of *Tennyson* or *Youmans* (or any other case). And this is the experience of Amicus Curiae generally – that trial courts treat any plea tendered as sufficient to assume jurisdiction. But that is not what case law says; if anything case law suggests otherwise.

Youmans also notes certain factual situations that do not support jurisdiction, much less termination: "we do not believe that dirty homes and diaper rash are the type of "neglect" contemplated by the statute authorizing...termination of parental rights." Even "leaving medication within the reach of children" is not sufficient for jurisdiction or termination. *Id.* at 685. Again, this suggests that simply entering a plea is not enough for a court to take jurisdiction over minor children.

Youmans was recently cited by the Court of Appeals, in the unpublished decision of *In re SJT*, unpublished per curiam opinion of Court of Appeals, issued March 26, 2015 (Docket No. 323246) (**Tab B**). Amicus Curiae refers to *SJT* because the end result of that case was that the Court of Appeals reversed a termination of parental rights in similar circumstances to the instant matter.

In *SJT* the trial court took jurisdiction based on admissions made by the mother and the purported consent of the father. The Father was never adjudicated unfit but his parental rights were eventually terminated. In addition to the obvious *Sanders* problem, the Court of Appeals also noted that Father's consent was not sufficient for jurisdiction, citing *Youmans*.

This leads Amicus Curiae to ask why the instant case should be any different. So far as Amicus Curiae is aware, an agreement made via mediation is essentially a consent agreement. That fact, combined with the lack of allegations concerning the effect of Respondent-Mother's behaviors on her children lead to the conclusion that the trial court never properly attained jurisdiction over these children.

III. *In re Hatcher* cannot apply as a collateral bar to a parent's due process challenge of the adjudication procedure.

In child welfare cases following termination of parental rights, DHS regularly argues that the parent cannot challenge anything that occurred during the adjudicative phase, relying on *In re Hatcher*, 443 Mich 426, 428; 505 NW2d 834 (1993). The trial courts and appellate courts across this State have inconsistently applied *Hatcher* as a bar to a "collateral attack" on the adjudication phase, such that some decisions have

allowed a challenge to the jurisdiction, particularly when the respondent-parent has argued that the trial court denied them due process. Nonetheless, DHS and prosecutors around this state still cite *Hatcher* to bar a challenge to the adjudication, and many appellate decisions have agreed that a parent cannot challenge the adjudication phase unless the parent appeals the initial dispositional order.

In *Hatcher*, the father of a newborn child was arrested at the hospital for “drunk and disorderly conduct.” *Hatcher*, 443 Mich at 428. DHS filed a petition to make the child a temporary ward of the court. *Id.* at 430. The father abused drugs and alcohol, which made his home unfit. *Id.* at 429. The mother had mental illness and could not be left alone with the child. *Id.* at 429. Even though the father knew mother could not adequately care for the child, he still left the child alone with the mother. *Id.* at 429.

At the trial on the temporary wardship, the parents stipulated that the infant should become a court ward, thus permitting the trial court to exercise jurisdiction. *Id.* at 430. After a series of review hearings, the trial court terminated the rights of both parents and the father appealed. *Id.* at 431.

The Court of Appeals reversed because – in spite of the stipulation to the trial court’s jurisdiction – the Court reasoned that “neither parent stipulated to facts that supported a statutory basis for jurisdiction.” *Id.* at 432. The Court of Appeals thus held that the termination order was void ab initio because the trial court lacked subject matter jurisdiction. *Id.* at 432.

This Court in *Hatcher* addressed the distinction between subject matter jurisdiction and the exercise of jurisdiction. *Id.* at 438-439. The Supreme Court held

that the father's appeal was an improper collateral attack on jurisdiction because the father did not appeal the exercise of jurisdiction by challenging the sufficiency of the petition and the temporary wardship. *Id.* at 438. Instead, at the hearing on the temporary wardship, the father did not dispute the petition's contents and agreed to the placement of the child outside the home. *Id.* at 441. This Court went outside child welfare law, and relied on a probate/real estate case, *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538; 260 NW 908 (1935), to explain the differences between subject matter jurisdiction and the exercise of jurisdiction. *Id.* at 441, 444.

In *Jackson*, the bank who was administrating the estate of a decedent in a probate proceeding tried to set aside conveyance of real property by challenging prior divorce judgment. *Jackson City Bank*, 271 Mich at 541. The property had been transferred to husband and wife as tenants by the entireties, such that the Bank argued that the parties were not legally married as the wife "never legally divorced her former husband" and that the disputed property should pass under the decedent's will rather than by deed. *Id.* In the prior divorce case, wife filed a divorce complaint on the ground that her then-husband failed to provide suitable maintenance and support, and the divorce decree was later entered without the husband ever making an appearance. *Id.* at 542. The divorce judgment entered less than two months after the divorce complaint was served, which was contrary to Michigan statute. *Id.* at 543. It was upon this statutory defect that the Bank in the subsequent estate matter challenged the validity of the prior divorce decree. *Id.* at 544. Based on the facts presented to this Court in *Jackson City Bank*, this Court noted: "There is a wide difference between a want of

jurisdiction, in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction, in which case the action of the trial court is not void although it may be subject to direct attack on appeal.” *Id.* at 544. This Court held, thus, that when the trial court clearly has jurisdiction over the subject matter, but the judgment “might be set aside for irregular or erroneous exercise of jurisdiction if appealed from,” then such a judgment “may not be called in question collaterally.” *Id.* at 545.

In these other cases relied on by this Court in *Hatcher*, such as *Jackson City Bank*, the collateral attack of a prior order actually occurred in a different case that was a completely separate proceeding. See, e.g., *Jackson City Bank*, 271 Mich at 545; *Banner v Banner*, 45 Mich App 148, 152-15; 206 NW2d 234 (1973) (motion to set aside divorce after death of spouse); *Harmsen v Fizzell*, 354 Mich 60, 63; 92 NW2d 631 (1958) (habeas corpus challenge to child welfare decision). These cases truly did embody a “collateral attack” to the court’s exercise of jurisdiction because that exercise of jurisdiction occurred in a *completely separate proceeding*.

But in the context of an appeal following the termination of parental rights, the parent challenges the taking of jurisdiction further down the line in the *same proceeding*. The parent (or anyone else for that matter) did not file a complaint—creating a new action and a new case number—to challenge the Trial Court’s jurisdiction in a prior case. Instead, the parent challenges the decision on appeal after his or her parental rights were terminated. Such a challenge in the context of the child welfare proceedings --- particularly when an adjudication occurs that violates a parent’s constitutional rights --

does not upset or delay the finality of the proceeding, as this Court in *Hatcher* suggested. *Hatcher*, 443 Mich at 444 (“Our ruling today severs a party’s ability to challenge a probate court’s decision years later in a collateral attack where a direct appeal was available. It should provide repose to adoptive parents and others who rely upon the finality of probate court decisions.”).

Indeed, “finality” is delayed whenever a parent in a child welfare proceeding appeals the order terminating parental rights. That a parent might also raise challenges to other orders that were issued during those proceedings does not change the finality of the termination order, until the appellate court rules on validity of the termination order. As the Court of Appeals stated in *In re Kanjia*, ___ Mich App __; ___ NW2d ___ (December 30, 2014), a challenge to jurisdiction following an order terminating parental rights is not a collateral attack, “but rather a direct attack on the trial court’s exercise of its dispositional authority.” *Kanjia*, slip op at 5, citing *Sanders*, 495 Mich at 422.

Moreover, it does not appear from this Court’s opinion that the parent in *Hatcher* posed a due process challenge to the adjudicative proceedings. The Court of Appeals opinion was not publicly available, either through a search of the Court of Appeals website, or other case law search engines.

Although *Hatcher* is oft-cited by the prosecutor any time a parent challenges the trial court’s exercise of jurisdiction in the appeal of the termination order, appellate courts – including this Court – have declined to apply *Hatcher* in the face of a parent’s constitutional challenge to the adjudication proceeding. For instance, this Court has vacated trial court termination orders, when confronted with a challenge to the due

process violations embodied in the “one-parent-doctrine.” See, e.g., *In re Farris*, 497 Mich 959; 858 NW2d 468 (2015); *In re Regnier*, 497 Mich 975; 860 NW2d 131 (2015); see also *In re Kanjia, supra*. These cases relied on this Court’s decision in *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014), although *Sanders* was an interlocutory appeal from the order of adjudication, and not a challenge to the adjudication order after entry of an order terminating parental rights.

In addition to the *Sanders* line of cases, this Court in *In re Hudson*, 483 Mich 928; 763 NW2d 618 (2009), permitted the attack on jurisdiction following termination of parental rights. In this Court’s order affirming the Court of Appeals’ decision (which had reversed the trial court’s termination order), this Court stated that the trial court committed plain error by “in failing to advise the respondent that her plea could later be used in a proceeding to terminate her parental rights in violation of MCR 3.971(B)(4).” *Hudson*, 483 Mich at 928. The challenge to the adjudicative proceedings were challenged on appeal as a due process violation. In *In re Hudson/Morgan*, unpublished per curiam opinion of Court of Appeals, Issued, August 26, 2008 (Docket 282765), slip op at 12 (**Tab C**).

The Court of Appeals has also permitted a challenge to jurisdiction at the time of the termination appeal, when the parent raises a due process challenge to the adjudication phase. See, eg, *In re CMH/CAH*, unpublished per curiam opinion of Court of Appeals, issued November 27, 2012 (Docket Nos. 309440 & 309441) (attached at **Tab D**). In that case, a child welfare case commenced and quickly turned to termination, even though there was never an adjudication of the mother’s fitness as a parent.

CMH/CAH, slip op at * 1. The trial court used this expedited procedure because the children’s grandparents sought to adopt the grandchildren. *CMH/CAH*, slip op at * 1-2. The mother mounted a due process challenge to those trial court procedures. The Court of Appeals held in *CMH/CAH* that “there was nothing on the record to indicate that the trial court was aware that it had to obtain jurisdiction over CAH and CMH under MCL 712A.2(b) before it could terminate respondent’s parental rights.” *CMH/CAH*, slip op at * 2. The Court of Appeals held that the violation amounted to plain error affecting the mother’s substantial rights. See *CMH/CAH*, slip op. at *2.

As articulated by the dissenting opinion in *Wangler/Paschke*, the court rules and statutes in child welfare embody the constitutional protections that must be undertaken before a parent can be deprived of the constitutional right to the care, custody, and control of their children. (05/27/14 Dissenting Opinion, p. 1). A trial court’s failure to ensure that a parent knowingly and voluntarily waived their rights is a due process violation. Moreover, failure of the trial court to ensure that the plea is accurate is a due process violation. As stated in the dissent, “[t]he mediation procedure employed as a substitute for an adjudicative trial improperly bypassed the due process protections enshrined in the court rules.” (05/27/14 Dissenting Opinion, p. 1).

If *Hatcher* has any place in Michigan child welfare jurisprudence, then it could only potentially apply to bar a parent’s challenge of jurisdiction when jurisdiction is assumed following a jurisdiction trial (bench or jury), which trial results in fact findings that establish allegations in the petition by admissible evidence consistent with MCL 712A.2(b). MCR 3.972(C) (rules of evidence apply in jurisdiction trial); MCR 3.972(E)

(the verdict in a jurisdiction trial “must be whether one or more of the statutory grounds alleged in the petition has been proven). In that instance, the parent would file an appeal by right from the initial dispositional order following the jurisdiction trial and verdict, and the parent should not wait to challenge the verdict from the jurisdiction trial after an order terminating parental rights. Moreover, the underlying premise of *Hatcher* is that the exercise of jurisdiction must be challenged on direct appeal (whereas subject matter jurisdiction can be raised at any time). *Hatcher*, 443 Mich at 437. This Court in *Hatcher* failed to appreciate the difference between the exercise of jurisdiction, as the term is used in other cases (like *Jackson City Bank*) and the unique body of law that governs child welfare proceedings. The assumption of jurisdiction over a child in a child welfare proceeding is inherently based on the proven facts at the adjudication proceeding. *Hatcher* wrongly stated that the exercise of jurisdiction “is initially established by the pleadings, such as the petition, rather than by later trial proceedings that may establish by a preponderance of the evidence that a child is within the continued exercise of jurisdiction of the probate court’s subject matter jurisdiction.” *Hatcher*, 443 Mich App at 438.

Contrary to this statement, the assumption of jurisdiction over a child in a child welfare proceedings is most certainly *not* based on the pleadings. Instead, it is based on the proven allegations. Indeed, the jurisdictional phase of a child welfare proceeding is the only part of the case in which a parent can demand a jury trial! MCL 712A.17(2); MCR 3.971(A). The assumption of jurisdiction of a child in a child welfare proceeding is not equivalent to the exercise of jurisdiction. Indeed, once the probate court establishes

its subject matter jurisdiction, but before an adjudication trial which would give the probate court facts (or not) to assume jurisdiction under MCL 712A.2(b), the probate court *exercises jurisdiction* – the court exercises jurisdiction when it holds a removal hearing, during the probable cause hearing, during a preliminary hearing, and so on. This exercise of jurisdiction is not the same as the function of the trial court in assuming jurisdiction under MCL 712A.2(b). It is also noteworthy that in its analysis of the exercise of jurisdiction, this Court in *Hatcher* does not mention or cite MCL 712A.2(b) – the statute governing the trial court’s assumption of jurisdiction over the child in a child welfare proceeding. *Hatcher*, 443 Mich at 436-444.

Here respondent-mother challenged the validity of the adjudication on due process grounds. (Appellant’s Brief, p. 21). In this case, the trial court decided to exercise jurisdiction based on respondent-mother’s “plea” as contained in the mediation agreement. This Amicus Brief has already articulated supra in Section II.B why the allegations to which Mother plead could not form the basis of jurisdiction under MCL 712A.2(b). But assuming for the sake of argument that the allegations to which Mother plead could form the basis for the Trial Court to exercise jurisdiction, Respondent-Mother’s due process rights were violated when the Trial Court failed to ensure that her plea was knowing, voluntary, and accurate.

The requirements of a plea of admission or no contest are contained in MCR 3.971(C). First, MCR 3.971(C)(1) requires a trial court to take a plea that is voluntary. In order to take a voluntary plea, the trial court must take steps to affirm that the plea is

“knowingly, understandingly, and voluntarily made.” See *In re Hudson*, 483 Mich 928; 763 NW2d 618 (2009) (citing MCR 3.971(C)(1)).

Second, MCR 3.971(C)(2) requires the trial court to ensure that the plea is accurate. This requires the trial court to establish that the plea of admission supports “a finding that one or more statutory grounds alleged in the petition are true, preferably by questioning the respondent unless the offer is to plead no contest.” MCR 3.971(C)(2). The court rule clearly places the onus on the trial court to ensure the accuracy of the plea, by stating “The court shall not **accept** a plea of admission or of no contest **without establishing support for a finding** [that the allegations in the petition are true] ... **preferably by questioning the respondent...**” MCR 3.971(C)(2) (emphasis added).

While the respondent-mother in this case admitted to certain allegations in the petition, it does not appear from the record that the trial court did anything to ensure that the plea was voluntarily, knowingly entered, or that the plea was accurate. Instead, the trial court relied on the mediation agreement and related entry of plea document that were signed and filed on February 28, 2012. This shortfall was even more problematic in this case because nearly one whole year had passed between the time of the mediation agreement and when the trial court finally decided to assume jurisdiction (February 28, 2012 until January 31, 2013).

Because this was not a valid plea—and there was no adjudication hearing—the Trial Court’s order of adjudication was erroneous. The Trial Court hastily accepted those stale admissions from the mediation agreement and took jurisdiction over the children. The Trial Court did *nothing* to assess the respondent-mother’s knowledge or

understanding of the allegations which she had admitted nearly one year before. In fact, respondent-mother was not even present at the proceeding at which the trial court decided to exercise jurisdiction. (JA 191a). The Trial Court did not engage in any type of questioning to ensure that the respondent-mother understood her plea and that it was voluntary.

Moreover, counsel for respondent-mother challenged the constitutionality of the procedures employed to exercise jurisdiction. (Appellant's SCT Brief, p.25).

RELIEF REQUESTED

Amicus curiae Family Defense Attorneys of Michigan respectfully ask that this Court vacate the decision of the Court of Appeals, set aside the trial court's order terminating the respondent-mother's parental rights, and remand to the trial court for further proceedings consistent with the Constitution, and the statutes and court rules governing child protection proceedings.

Respectfully submitted,

Date: July 22, 2015

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