STATE OF MICHIGAN

IN THE COURT OF APPEALS

IN RE WANGLER/PASCHKE MINORS

Supreme Court No.: 149537
Court of Appeals No.: 318186
Lower Court No.: 07-35009-NA-1-3

MELISSA PASCHKE

Respondent Mother-Appellant

v

DEPARTMENT OF HUMAN SERVICES and
SANILAC COUNTY PROSECUTOR,

Co-petitioners-Appellee

149537

PETITIONER/APPELLEE'S BRIEF IN RESPONSE TO RESPONDENT/APPELLANT MOTHER'S APPLICATION FOR LEAVE TO APPEAL

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COUNTER STATEMENT OF JURISDICTION

The Appellee disagrees with the Appellant's Statement of Jurisdiction as presented in his appeal as being a complete and correct statement of this Court's jurisdiction over this matter. While the Appellant has correctly noted MCR 7.302(B)(5) confers jurisdiction to this Court to review a decision of the Court of Appeals, the Appellant has failed to show that the lower court decision was clearly erroneous and that material injustice will result. In addition, the Court of Appeals ruling is consistent with both its own rulings as well as the rulings of this Honourable Court. Therefore this matter is not properly before this Court and leave should be denied at this time.

COUNTER STATEMENT OF QUESTIONS PRESENTED

I. Does the Trial Court's acceptance of the Appellant's written plea of admission that had been taken under advisement for eleven months pursuant to a mediated settlement constitute a violation of the Appellant's due process rights where the Appellant had been fully advised of her rights in writing; was represented by counsel at all stages of the proceeding; and, agreed to the terms of the mediated settlement after conferring with counsel and being fully advised of the consequences of her agreement; when the plea is accepted in the absence of the Appellant after the Appellant failed to adhere to the terms of the mediated settlement?

THE TRIAL COURT ANSWERED: "NO"

APPELLEE ANSWERED, "NO"

APPELLANT ANSWERED, "YES"

THE COURT OF APPEALS' Majority opinion found that the Trial Court entered an adjudication and disposition order on February 2, 2013 and denied the Appellant's appeal as an improper collateral attack on adjudication.

II. Did the Court of Appeals commit clear error when it found that the Trial Court's February 4, 2013 order was the first dispositional order in this matter following the acceptance of the Appellant's written plea of admission at the January 31, 2013 hearing in this matter?

THE TRIAL COURT DID NOT ADDRESS THIS ISSUE

APPELLEE ANSWERED, "NO"

APPELLANT ANSWERED, "YES"

THE COURT OF APPEALS' Majority opinion found that the February 4, 2013 order was a formal exercise of the Trial Court's jurisdiction in this matter that constituted an "order of disposition" that was appealable as of right under MCR 3.993(A)(1); and, therefore the Appellant was required to raise her jurisdictional challenge by appealing the February 4, 2013 order, rather than waiting until after the July 16, 2013 termination order to challenge jurisdiction.

COUNTER STATEMENT OF FACTS

The facts in this case are relatively straightforward. On January 11, 2012 the Michigan Dept. of Human Services (DHS) filed an Original Petition of Abuse and Neglect seeking removal of the three minor children due to the Appellant's opiate addiction and repeatedly exposing the minor children to domestic violence in the home. Based upon that filing, the trial court ordered the removal of the minor children, for placement in the care and custody of the DHS. DHS then elected to place the minor children in the care of an aunt.

A Preliminary Hearing was held on January 11, 2012. At that hearing the minor children were continued in foster care, and the Appellant was granted a continuance to allow for her to obtain counsel. The Preliminary Hearing was reconvened on January 19, 2012. When the Preliminary Hearing reconvened on January 19, 2012, the Appellant appeared with counsel. At that hearing the parties agreed to refer the matter to alternative dispute resolution; the Appellant agreed to participate in mediation after conferring with her attorney. The minor children were continued in the care and custody of the DHS placed in foster care. The trial court then authorized the petition and scheduled the parties to meet in Mediation on February 28, 2012.

On February 28, 2012 the parties met at the scheduled mediation conference. At that conference an agreement was reached. Essentially the agreement was that the Appellant would give a written plea of admission to

Paragraphs 8 through 14 of the January 11, 2012 petition. As part of that plea the parties agreed to have the Appellant's written plea of admission held in abeyance for a period of six months to allow the Appellant an opportunity to participate in treatment services without the trial court taking formal jurisdiction over the minor children. In executing her written plea, the Appellant was given written notice of her constitutional protections and the potential consequences of entering a plea. The plea form, filed as Appellant's Exhibit 2 outlines in 12 paragraphs all of the Appellant's rights. Paragraph 7 of the Entry of Plea form advises the Appellant that the trial court could later use her plea of admission to terminate her parental rights. The 12th paragraph of that plea form, signed by the Appellant, indicates that the Appellant has read the form, understands what the form says, and is signing the plea form voluntarily. The Appellant's signature appears on the back of the plea form as well. Additionally, the Entry of Plea for was signed by the Appellant's attorney, the Prosecutor, and the Lawyer Guardian Ad Litem (LGAL).

At the conclusion of the February 28, 2012 mediation conference, the parties did not appear before the court due to the unavailability of a judge or referee to preside over the hearing. However, both the Entry of Plea and the Mediation Resolution were presented to the Judge Gregory Ross on February 28, 2012. Judge Ross reviewed the agreement and plea, and affixed his signature to the bottom of the mediation agreement indicating the plea and mediation agreement had been adopted as the court's order, pursuant to the agreement of the parties.

Following the Mediation Conference, the trial court scheduled a series of review hearings to consider progress in this matter. The first of those review hearings was scheduled on May 3, 2012.

At the May 3, 2012 hearing, the Appellant failed to appear. She was represented by counsel. The testimony presented at the May 3, 2012 hearing was essentially that the Appellant had not been in contact with her DHS caseworker for six weeks; and, that the Appellant had not participated in any drug testing since the first week of February. (See Transcript May 3, 2012 at Pages 11 through 13). At the conclusion of the May 3, 2012 hearing, the trial court entered a Review Hearing Order that adopted the DHS recommendations, and continued all the prior orders. One the orders continued was the February 28, 2012 Mediated Settlement, including the order holding the Appellant's plea in abeyance.

Subsequent review hearings were held on August 2, 2012, November 1, 2012, and January 31, 2013. The Appellant failed to appear at the August 2, 2012 and the January 31, 2013 hearings. At each of these hearings the trial court adopted the DHS recommendations, and continued its prior orders. (See Transcripts August 2, 2012, November 1, 2012, and January 31, 2013). By the January 31, 2013 hearing, the Appellant had repeatedly failed to participate in services; had repeatedly found herself incarcerated; and had failed to maintain contact with her DHS caseworker as had been ordered by the trial court. In addition, by the

time of the January 31, 2013 hearing, the Appellant had not completed a single term of the February 28, 2012 Mediation Resolution.

At the conclusion of the January 31, 2013 review hearing, the DHS asked the Trial court to accept the Appellant's February 28, 2012 plea of admission based upon the Appellant's failure to comply with any of the terms of the Mediation Plan and subsequent review hearing orders. Of significance is the fact that the original mediation plan gave the Appellant a six month window in which her plea would be held in abeyance; that window expired on August 28, 2012. However, the Appellant was given an additional five months to participate in the mediation plan. At the conclusion of the January 31, 2013 hearing, the trial court found that the Appellant had absented herself, and that accepting her February 28, 2012 plea was appropriate. The trial court then took jurisdiction over the minor children based upon the February 28, 2012 plea, adopted the DHS recommendations as the court's order; and, scheduled the matter for a subsequent review hearing on April 25, 2013. (See Transcript January 31, 2013). Of note is the fact that the Appellant's trial counsel agreed that the trial court could assume jurisdiction over the children based upon the February 28, 2012 mediated agreement; trial counsel for the Appellant agreed that the intent of the mediated plea was to confer jurisdiction over the children to the Court. (See Transcript January 31, 2013 at pages 7 through 9).

In the interim period between the January 31, 2013 hearing, and the April 25, 2013 hearing, the DHS filed a Supplemental Petition Seeking Termination of

Parental Rights. That petition was filed on March 13, 2103, and was scheduled of hearing on April 25, 2013. Both the review hearing and the termination hearing scheduled for April 25, 2013 were adjourned at the request of the prosecutor due to a scheduling conflict. A second adjournment of those hearings occurred when Judge Clabuesch took ill. Ultimately the review hearing and the termination petition were considered on June 26, 2013.

At the June 27, 2013 termination hearing, all parties were present, including the Appellant, but only one witness was presented, DHS caseworker Jessica Holtrop. Prior to Ms. Holtrop's testimony, the trial court was asked to apply the evidentiary standard used in MCR 3.977(H), and to take judicial notice of the entire case file. The trial court received no objection from the Appellant's attorney or other counsel and granted the motion. A motion to bi-furcate the proceeding was also granted. (See Transcript June 27, 2013 at pages 5 through 7). Ms. Holtrop then took the stand.

In the grounds phase of the June 27, 2013 hearing Ms. Holtrop testified at length regarding the efforts made by her agency to assist the Appellant in overcoming her addiction and domestic violence issues. Much of Ms. Holtrop's unrebutted testimony centred around the inability of the agency to engage the Appellant in services due to the Appellant making herself unavailable for contact. In addition, Ms. Holtrop testified that the Appellant had not successfully completed any of the substance abuse counseling programs she had been referred to. (See Transcript June 27, 2013 at pages 11 through 13). In

addition, Ms Holtrop testified that the Appellant had only gone to four of the random drug screens that had been asked of her during the period of February 1, 2012 to October 1, 2012; during that period, the Appellant was ordered to do random drug screenings twice a week (See Transcript June 27, 2013 pages 8 & 9). With respect to the drug screenings, Ms. Holtrop further testified that after October 1, 2012 the order had been changed and the Appellant was required to test daily from October 1, 2012 through December 2012; the Appellant only did four tests during that timeframe. (See Transcript June 27, 2013 pages 10 & 11).

Additional testimony from Ms. Holtrop indicated that the Appellant had been referred for individual counseling twice during the proceedings, but that the Appellant had discontinued counseling after only a few sessions, or did not attend at all. (See Transcript June 27, 2013 at pages 13 through16). Ms. Holtop also testified that the Appellant had only visited the children five times between January 11, 2012 and August 2, 2012. (See Transcript June 27, 2013 at pages 16 & 17). Much of Ms. Holtrop testimony remained consistent on cross-examination. (See Transcript June 27, 2013 pages 22 through 38).

At the conclusion of Ms. Holtrop's testimony during the grounds phase of the proceeding, the trial court heard arguments from counsel as to whether a statutory ground supporting termination had been established. (See Transcript June 27, 2013 pages 38 through 44). At the conclusion of counsels' argument the trial court found that the petitioner had proven a statutory basis for termination

under MCL 712A.19b(3)(a),(c), and (g). The court then proceeded to the best interest phase of the proceeding. (See Transcript June 27, 2013 at page 44).

During the best interest phase of the proceeding, Ms. Holtrop was again questioned. On redirect Ms. Holtrop testified that she believed the best interests of the children were served by termination of the Appellant's parental rights. She specifically testified as to each of the three children. With respect to Jamie Wangler Ms. Holtrop testified that while he had a relationship with his mother, and was soon to be 18, Jamie's needs would be better served if he was allowed to pursue permanency through independent living programs available to him. (See Transcript June 27, 2013 pages 45 & 46). With respect to Joshua Ms. Holtrop testified that Joshua was no longer interested in a relationship with the Appellant due to her instability and drug use. (See Transcript June 27, 2013 at pages 46 through 49).

As it related to Marissa, the youngest child, Ms. Holtrop believed that permanency and stability were paramount. Specifically, Ms. Holtrop testified that Marissa was in need of counseling to overcome fears for the Appellant and her chosen lifestyle. Additionally, Ms. Holtrop testified that at this point in the proceeding, termination would change very little in Marissa's life because the Appellant was already not part of Marissa's life. (See Transcript June 27, 2013 at page 49). Most poignantly Ms. Holtrop testified during cross exam by the LGAL that Marissa frequently inquired as to whether the Appellant was dead

because the Appellant was frequently unable to be located. (See Transcript June 27, 2013 at page 59).

At the conclusion of Ms. Holtrop's testimony during the best interest phase of the proceeding the trial court entertained further argument from counsel then indicated a written opinion would be issued. (See Transcript June 27, 2013 at pages 60 through 68). The trial court issued its written opinion on July 16, 2013. In that opinion Judge Monaghan carefully considered the evidence and found that the petitioner had met their burden as to all three statutory grounds upon which termination had been sought, and that termination was in the best interests of the minor children. Judge Monaghan noted that the children received no future benefit to continuing the Appellant's parentage over these children. Judge Monaghan then issued an order terminating the Appellant's parental rights to all three children. The Appellant Mother appealed that July 16, 2013 order.

Oral arguments were held before the Court of Appeals on April 8, 2014. During the course of oral arguments, counsel for the Appellant raised two primary issues. First, counsel argued that the trial court's acceptance of the Appellant's plea of admission without the Appellant was a violation of the Appellant's due process rights. Second, counsel argued that the termination proceeding was an initial disposition hearing requiring legally admissible evidence. During the course of oral arguments, opposing counsel conceded that that February 4, 2013 order constituted an order of adjudication. The Court of

Appeals upheld the termination order with split ruling. The majority found that the February 4, 2013 order of disposition was the initial disposition order, and that the Appellant had failed to take her appeal of right as to that order; she was therefore barred from exercising a collateral attack upon jurisdiction. Judge Gleicher in her written dissent, would have found that the trial court failed to obtain jurisdiction, and therefore the termination hearing occurred at the initial disposition. Judge Gleicher would vacate the termination order. Neither the majority, nor the dissent addressed whether the trial court could take a plea under advisement as was done in this case. The Appellant now seeks leave to appeal the Court of Appeals' May 27, 2014 affirmation of the termination order.

ARGUMENT

I. The Trial Court's acceptance of the Appellant's written plea of admission that had been taken under advisement for eleven months pursuant to a mediated settlement does not constitute a violation of the Appellant's due process rights where the Appellant had been fully advised of her rights in writing; was represented by counsel at all stages of the proceeding; and, agreed to the terms of the mediated settlement after conferring with counsel and being fully advised of the consequences of her agreement; when the plea is accepted in the absence of the Appellant after the Appellant failed to adhere to the terms of the mediated settlement.

A. STANDARD OF REVIEW.

In this matter, the trial court found clear and convincing evidence supporting three of the statutory basis upon which termination was sought. That finding was made during the course of a supplemental review hearing in which a termination petition had been brought to the trial court for consideration. The trial court

issued a written opinion and order finding that the petitioner had established a basis to support termination of the Appellant's rights pursuant to MCL 712A.19b(3)(a), (c)(i), and (g). In addition, the trial court found clear and convincing evidence that termination was in the best interests of all three children; then entered an order terminating the Appellants' parental rights. On appeal an order terminating parental rights is reviewed in its entirety for clear error. In this instant case the Appellant has alleged an unpreserved constitutional challenge. As cited by opposing counsel, unpreserved constitutional challenges are reviewed to determine whether a plain error exists that affects substantial rights; reversal is required where the trial court's errors seriously affect the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 597 NW 2d 482 (1999). In this case, the trial court's actions did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings; nor did the trial court's actions violate the Appellant's statutory or constitutional rights. There was no due process violation warranting this Honourable Court's review therefore for the reasons to be set forth, leave should be denied

B. THE APPELLANT/RESPONDENT MOTHER'S WRITTEN PLEA OF ADMISSION TO ASSUME JURISDICTION IN THIS MATTER IS VALID BECAUSE IT EXCEEDS ALL THE NECESSARY CONSTITUTIONAL REQUIREMENTS OF FUNDAMENTAL FAIRNESS AND DUE PROCESS; AND, THE COURT'S USE OF THE MATERIAL AND RELEVANT EVIDENCE STANDARD WAS NOT UNFAIR AND DID NOT VIOLATE THE APPELLANT/RESPONDENT'S DUE PROCESS RIGHTS

In this matter, the Appellant has not challenged the trial court's findings that a statutory basis existed to terminate parental rights. Nor has the Appellant challenged the trial court's finding that termination was in the best interests of the minor children. Because the Appellant has not raised these issues in her appeal, the Appellant has waived appellate review of the grounds and best interest findings. This Court should therefore only consider the two issues raised by the Appellant in her brief for this application for leave, but otherwise leave the trial court 's findings as to the evidence supporting termination of parental rights intact.

The first issue raised by the Appellant is that the Appellant's plea is invalid because the written plea does not adequately preserve the Appellants procedural and substantive due process rights. This simply is not the case, and in fact, the written plea that was used, goes beyond the requirements dictated by the Courts as being necessary to afford a parent due process.

Unlike many counties in Michigan, Sanilac County has elected to utilize alternative dispute resolution to settle child protection cases. In so doing, Sanilac County has adopted a Mediation Plan approved by the Michigan Supreme Court. That plan essentially brings all the parties to the neglect proceeding together at a table in a confidential setting, with a neutral third party facilitator assisting in crafting a resolution. If an agreement is reached, that agreement is memorialized in writing, signed by the parties, and presented to the court for approval. Once approved, that mediation agreement becomes the order of the court.

In the instant case, each of the parties met on February 28, 2012 in a mediation conference. With the exception of Mr. Paschke, all the parties were represented by counsel. The Appellant was present, with her attorney, and did actively participate in that mediation conference. As noted in the Appellant's brief an agreement was reached. The terms of that agreement required the Appellant to enter a written plea to certain paragraphs of the January 11, 2012 neglect petition. In return for giving a written plea, the parties all agreed to have the trial court hold off on accepting that plea for a period of six months to allow the Appellant an opportunity to resolve her substance abuse and domestic violence issues. Of significance is the fact that the Appellant agreed to these terms, and acknowledged her agreement by signing both the plea and the mediation resolution with the approval of her attorney. That agreement was then made into an order with the signature of Judge Gregory Ross affixed at the bottom. Given that the Appellant actively participated, and was represented by competent counsel, its difficult see how her due process rights were violated. Nothing that was accomplished in the mediation process was done without the Appellant full knowledge and consent.

The current version of the Michigan Court Rules as they relate to juvenile matters offers no guidance with respect to mediation. However, MCR 2.507(G) addresses settlement agreements in civil proceedings. A binding settlement agreement is one that is either made in open court on the record; or, one that is made in writing subscribed by the party against whom the agreement is offered,

or by that party's attorney. MCR 2.507(G). This rule applies to settlement agreements made outside of an open court. *Metro Life Ins Co v Goolsby*, 165 Mich App 126 (1987). In this case, both the Appellant, and her attorney subscribed to the written agreement.

As noted by the Appellant, due process in the course of a child protection matter requires the State to make reasonable efforts to notify a parent of the proceedings and allow him a meaningful opportunity to participate. Child protection proceedings are civil proceedings. *In re Adair*, 191 Mich. App. 710 (1991). Due Process in a civil proceeding requires notice, an opportunity to be heard in a meaningful time and manner, and an impartial decision maker. *Hinky Dinky Supermarket, Inc. v Dept. of Community Health*, 261 Mich App. 604 (2004). Due process does not always require a hearing or an adversarial proceeding. *Westland Convalescent Ctr v Blue Cross Blue Shield of Michigan*, 414 Mich 247(1982). The opportunity to be heard does not require a full trial like proceedings, but requires a forum in which the party has a chance to know and address the evidence. *Id* at 270-271. What due process is will depend upon the nature of the proceeding, the risks involved, and the governmental interest affected. *In re Brock*, 442 Mich 101 (1993).

The mediation process utilized by Sanilac County goes well beyond allowing a parent a meaningful opportunity to participate. In this matter, the Appellant was able to actively craft the resolution to which she agreed. She sat at a table, as an equal and was able to directly confront the evidence, and voice her position to all

the parties with her own words, as well as through counsel, without the repercussion of having those words come back to haunt her at trial. In addition, the Appellant was given full knowledge of her fundamental rights in this matter, and the repercussions of giving a plea of admission.

As part of the process, the actual plea form is signed, twice, by the Appellant. Enumerated in 12 paragraphs are the Appellant's constitutional rights along with an explanation of the repercussions of giving a plea in this matter. The Appellant through the advice of counsel acknowledged that she had read those rights, understood those rights, and was freely giving her plea of admission to paragraphs 8 through 14 of the January 11, 2012 petition. Paragraph 7 of the Entry of Plea form puts the Appellant on notice that if the court accepts her plea, that plea could later be used to terminate her parental rights. It was with full disclosure that the Appellant consented to the terms of the mediation resolution.

At no time throughout the pendency of this proceeding was the Appellant denied either procedural or substantive due process. In fact, by referring the matter to mediation, and by allowing the Appellant's plea to be held in abeyance for a period of six months, the trial court, as well as the other parties, took extra steps to afford the Appellant more protection than would be the norm. At every stage of the proceeding, this Appellant was represented by counsel; even at the hearings the Appellant chose not to attend. What's more the original agreement held the Appellant's plea in abeyance for six months. In actuality the Appellant was afforded an additional five months to participate in services without the trial

court accepting her plea. It was after the Appellant had missed two of the three review hearings, and failed to do any of the services the Appellant agreed to do that the trial court accepted the Appellant's plea.

The question then is whether the Appellant's plea is valid. It is. MCR 3.971(B) states that before accepting a plea, the court must advise the respondent of their rights and the potential consequences of giving a plea on the record, or "in a writing that is made part of the file." In this case, the Appellant was notified of her rights in a writing that was made part of the file; Appellant's Exhibit 2. Appellant counsel only challenges the validity of the plea, not the sufficiency of the facts to which the Appellant admitted to establish a preponderance of evidence in support of jurisdiction.

While opposing counsel cites many strong cases outlining due process requirements, opposing counsel does not cite to a single opinion forbidding the trial courts to rely on written pleas. In this case, the trial court elected to utilize a written plea. The question is does that written plea form conform to the requirements of MCR 3.971 as it relates to the plea taking process. If it does, then the plea is valid.

Nowhere in the Appellant's argument does the Appellant cite a single deficiency in the actual written plea form. The Appellant seems to completely overlook the fact that she signed a form, with the advice of counsel; that advised her of her rights, agreed to give up those rights, and entered a plea. The written plea form used, complies with every aspect of MCR 3.971. There is nothing

deficient about the plea that would invalidate the trial court accepting the Appellant's written plea on January 31, 2013.

When Judge Ross signed the order adopting the Mediation Resolution, on February 28, 2012, Judge Ross's signature is a certification that the trial court has made the requisite findings that the plea was voluntarily and accurate. In so doing the trial court was relying upon the representation of the parties to the Mediation Resolution, that the plea was being voluntarily conferred. In addition the trial court was relying upon the representation of the Appellant, who twice signed the Entry of Plea form, that she had read the terms of the plea, knew her rights, and was willing to voluntarily enter a written plea. This is all that MCR 3.971 requires.

Because the plea conforms to the requirements of MCR 3.971, the trial court could in fact take jurisdiction over the children. The mediation resolution, which was adopted as an order of the court, was not a means of circumventing the trial process, but was instead an opportunity for the Appellant to craft a resolution that might afford her more control in the proceeding; and, optimistically hoped for success on the Appellant's part within six months, which would have negated the need to accept the Appellant's February 28, 2012 plea. Built into that resolution though, and accepted as a term by the Appellant, was the expectation that failure to participate in the mediation plan would result in the trial court accepting the Appellant's plea. This was a gamble that both the state, and the Appellant participated in by crafting the mediation resolution. The Appellant did not follow

through on the terms of the agreement she voluntarily made, so after giving her an extra five months, the trial court accepted her plea.

The effect of accepting the Appellant's plea was that the trial court formally assumed jurisdiction over the children. While the plea was accepted on January 31, 2013, the plea was actually given on February 28, 2012. Pursuant to *In re LaFlure,* 48 Mich App 377 (1973), these are continuous proceedings. MCR 3.216(H) while not directly applicable is the only court rule that addresses mediated agreements. That rules states that a mediation agreement is enforceable when signed by the parties, and the parties are bound to take steps to enter it in a judgement. Here the parties, signed the agreement on February 28, 2012; and entered that judgement on February 28, 2012 when Judge Ross adopted the agreement as a court order. Throughout the proceeding, the Appellant was at risk of having her plea accepted at any time during the course of the case. The effect of accepting the Appellant's plea was that the trial court had jurisdiction of these children dating back to February 28, 2012 the date the Appellant entered her plea. For purposes of conducting the termination of parental rights hearing, the trial court could then rely upon the continuous record of the proceedings from day one, January 11, 2012.

Counsel for the Appellant argues that the plea was invalid because the Appellant was not present at the time the trial court accepted her plea. As noted, there are no cases in which a parent's plea was taken without the presence of the respondent parent. But, this also is not a case where the Appellant's plea was

taken without the presence of the Appellant. In fact, the Appellant gave her plea, in writing on February 28, 2012. As part of that plea, an agreement was made that the court would hold that plea in abeyance for a period of time. But, the Appellant was present, and signed the plea form when her plea was executed. The only thing that transpired between the February 28, 2012 entry of the Appellant's plea, and the January 31, 2013 acceptance of that plea, was the Appellant's failure to follow through on a single term of the Mediation Agreement she had signed. That agreement allowed the trial court to summarily accept the Appellant's plea, at any time that she was out of compliance with the terms of the agreement. The Appellant did not have to be present for the trial court to accept her plea because of the way the plea agreement was structured.

Your Appellee concedes that ordinarily, a respondent parent's presence would be required. However, the facts presented here are unique to this case. Unlike those cases cited by opposing counsel, this case is distinguished by the fact that the parties all agreed to give the court the ability to accept the Appellant's plea at any time she was out of compliance with the terms of the agreement. This was a condition that Appellant voluntarily consented to when she affixed her signature to the plea for as well as the Mediation Resolution.

The Adjudication in this matter took place on February 28, 2012 when the Appellant signed the plea form, and the trial court accepted the resolution agreed to by the parties. Allowing the Appellant an opportunity to comply with the agreement before accepting her plea, gave the Appellant more protection than she

was entitled to. On February 28, 2012 the trial court had the option to reject the mediated settlement and schedule a trial. The parties had that same opportunity to reject the offer and go to trial. Nobody did that. Instead the parties crafted a plan that gave the Appellant time to get her house in order, without the stigma of formal jurisdiction. But that agreement came with a price, the Appellant would give up her right to a trial, and the trial court could accept her plea at any time she was out of compliance.

All that transpired on January 31, 2013 was a review of the earlier mediation plan, and a court finding that the Appellant had failed to uphold her end of the plan. The trial court then imposed the anticipated consequence for failing to complied; it took jurisdiction over the minor children. The Appellant's signature to the Mediation Agreement indicates that the Appellant was aware of the terms of the agreement, accepted those terms, and accepted the consequences of failure to abide by those terms. This is very much akin to a contract between the parties wherein the terms of the contract dictate the course of action taken should one of the parties fail to perform on the contract. Here, the Appellant failed to uphold her end of the contract so the trial court imposed the agreed upon sanction. While the Appellant may disagree with having her written plea used as the basis of adjudication, a year after she gave it, that is exactly what she knowingly, voluntarily, and understandingly agreed would happen if she failed to comply with the terms of the agreement. There is nothing unfair about enforcing the agreement made by the parties therefore the adjudication should stand as a valid

exercise of the court's jurisdiction. This becomes especially true when the Appellant is represented by counsel at all stages of the proceeding, and had a hand in crafting that agreement after consulting with her attorney.

As noted by opposing counsel, there are no cases directly on point with this case. Counsel has however, cited to *In re Hudson*, 483 Mich 928, 763 NW 2d 618 (2009). While offering some guidance as to the plain error standard of review, *Hudson* is clearly distinguishable from this case for the reason that the Appellant in *Hudson* was denied counsel throughout the majority of the proceedings. In fact, the court in *Hudson* did not appoint counsel for two full years and only appointed counsel for the respondent parent two weeks before the termination proceeding. In such a case, there would be a clear due process violation.

However, unlike *Hudson*, the Appellant in this case was appointed counsel by the second hearing, well before any talk of settlement occurred. It's the very fact that the Appellant in this matter had the opportunity to consult with counsel at all stages of the proceeding, including the mediation and plea process that negates any finding of a due process violation. This proceeding was not fundamentally unfair. The trial court in this matter made extra efforts to ensure that the Appellant's substantive due process rights were protected. The trial court appointed counsel, for the Appellant at the inception of the case. The trial court held off on accepting the Appellant's mediated plea for 11 months, instead of accepting her plea in May 2012 when it was apparent that the mediation plan was not being followed by the Appellant. The trial court made painstaking efforts to

protect and preserve the Appellant's due process rights. Even though the process was unusual, at no time was the Appellant's subject to a constitutional violation of her rights. Therefore her application for leave should be denied.

II. The Court of Appeals did not commit clear error when it found that the Trial Court's February 4, 2013 order was the first dispositional order in this matter following the acceptance of the Appellant's written plea of admission at the January 31, 2013 hearing in this matter.

Whether the court has jurisdiction is determined by a parent's plea of admission or no contest. MCR 3.971. Jurisdiction in this matter was taken based upon the Appellant's written plea of admission. In her written plea, the Appellant gave up her right to a trial. Because the Appellant gave up her right to a trial by virtue of the written plea, the January 31, 2013 hearing cannot be considered a trial. The fundamental question is what type of hearing was the January 2013 hearing.

As the Court of Appeals majority noted, the January 31, 2013 hearing, was in fact an adjudication hearing, as well as the initial disposition hearing. While there were many other hearings that occurred prior to the January 31, 2013, those hearings are predicated on the Appellant's agreement to adhere to the mediated settlement and treatment plan. When she failed to comply with the terms of the settlement agreement, the trial court was at liberty to summarily accept the Appellant's plea. This was one of the terms to which the Appellant agreed when she entered into the mediation agreement. She was put on notice of that condition by her attorney, and by the actual written plea and agreement. All that occurred

at the January 31, 2013 hearing, was the trial court exercising its discretion to impose the agreed upon consequences. That agreed upon consequence was that the trial court would exercise formal jurisdiction over the children, and impose a dispositional order.

Once the trial court elected to exercise formal jurisdiction over the children, the trial court was required to enter a disposition order. MCR 3.973(C) anticipates the possibility that the trial court can move to immediate disposition following a trial or plea in a neglect proceeding. This is exactly what occurred; the trial court assumed jurisdiction, and imposed an immediate disposition order which was memorialized in the February 4, 2013 order of disposition. Nothing more was required.

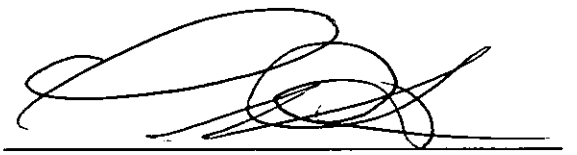
Because the February 4, 2013 order was a valid exercise of the trial court's jurisdiction based upon the mediated settlement of the parties, the February 4, 2013 order could only be considered an initial disposition order. As correctly ruled by the Court of Appeals majority, the Appellant's opportunity to challenge jurisdiction was immediately following the entry of the February 4, 2013 order. For whatever reason, the Appellant did not raise that challenge, but instead waited until after the termination order had entered to collaterally challenge the trial court's jurisdiction. As noted by *In re Hatcher*, 443 Mich 426, 505 NW 2d 834 (1993) a valid exercise of the court's jurisdiction is established by the contents of the petition after a judge or referee has found probably cause to believe the allegations are true.

Like *Hatcher*, this trial court found probable cause to believe the allegations were true; in fact, the Appellant waived the probable cause determination. Also like *Hatcher,* this Appellant stipulated by virtue of a written plea, that the enumerated paragraphs were true; and, like *Hatcher* the Appellant in this case did not dispute the facts that lead to adjudication. Contrary to opposing counsel, both the trial court and the Court of Appeals applied *Hatcher* as it was intended to be applied. This was in fact, a termination at a supplemental review hearing. The Appellant's application for leave should be denied because the Court of Appeals did not misapply the law and correctly ruled that the Appellant could not collaterally attack jurisdiction. .

CONCLUSION AND REQUEST FOR RELIEF

WHEREFORE, for all the reasons set forth herein, your Appellee, the Sanilac County Department of Human Services, by and through the Sanilac County Prosecuting Attorney's Office, would request this Honorable Court dismiss this application for leave for the reason the Appellant has failed to show that the lower court decision was clearly erroneous and that material injustice will result.

Respectfully submitted,



Dated: July 11, 2014

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