

IN THE MICHIGAN SUPREME COURT
Appeal from the Michigan Court of Appeals
Markey, PJ, and Stephens and Riordan, JJ

IN RE JONES, Minors

Circuit Court No. 13-13-NA
Court of Appeals No. 326252
Supreme Court No.

RESPONDENT-MOTHER'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Appellant, Laura Jones, appeals the trial court's order terminating her parental rights to her two children, Renee and Gracie. The trial court erred by exercising its dispositional authority to terminate Ms. Jones' parental rights without first properly adjudicating her. Although the Court of Appeals agreed that the trial court erred in its adjudication of Ms. Jones, it refused to address the merits of the claim. Instead, the Court of Appeals interpreted this Court's decision in *In re Hatcher*, 443 Mich 426; 505 NW2d 834 (1993), to forbid it from reviewing any errors in the adjudication process in a termination of parental rights ("TPR") appeal. *In re Jones*, unpublished decision per curiam of the Court of Appeals, issued on October 27, 2015, at 3 (Docket No. 326252), Attachment A. Thus, the Court of Appeals affirmed the trial court's TPR decision.¹ *In re Jones*, unpub op at 9. Ms. Jones is requesting that this Court reverse the trial court's decision and remand the matter for an adjudication trial.

This Court should grant this Application because it involves a legal issue of major significance to child welfare jurisprudence—the ability of parents to challenge errors that occur at the adjudication stage in TPR appeals.² Since *Hatcher*, 443 Mich at

¹ Although the Court of Appeals affirmed the trial court's decision finding statutory grounds for termination, it still remanded the case for the trial court to consider whether the children's placement with relatives weighed against terminating parental rights. *In re Jones*, unpub op at 6-7.

² On April 1, 2015, this Court granted an Application for Leave to Appeal in *In re Wangler/Paschke*, 497 Mich 986; 861 NW2d 44 (2015), to resolve whether and to what extent the collateral attack analysis in *In re Hatcher*, 443 Mich 426; 505 NW2d 834 (1993), extends to a parent's due process challenge to the adjudicatory process. This Court, however, resolved *Wangler* without having to address this issue. *In re Wangler/Paschke*, ___ Mich __; ___ NW2d ___ (2015), Attachment B.

426, the Court of Appeals has consistently barred parents from raising adjudicatory errors in TPR appeals. See, e.g., *In re Gazella*, 264 Mich App 668, 680; 692 NW2d 708 (2005); *In re Powers*, 208 Mich App 582, 587; 528 NW2d 799 (1995).³ Citing *Hatcher*, the Court of Appeals has repeatedly found that a parent who does not appeal the initial dispositional order permanently forfeits her ability to raise any errors that occurred prior to the initial dispositional hearing.⁴ *Gazella*, 264 Mich App at 679-680; *Powers*, 208 Mich App at 587.

This Court's jurisprudence post-*Hatcher*, however, strongly suggests that the Court of Appeals is misapplying *Hatcher*. This Court, recognizing that a child protective proceeding is one, continuous proceeding, has consistently allowed parents to raise errors that occur at any point in the proceeding in either a TPR appeal or a challenge to a post-dispositional order. See *In re Hudson*, 483 Mich 928, 935; 763 NW2d 618 (2009) (CORRIGAN, J., concurring). For example, in *In re Hudson*, 483 Mich at 928, and *In re Mitchell*, 485 Mich 922; 773 NW2d 663 (2009), this Court reversed TPR

³ In addition to these published decisions, there are numerous unpublished Court of Appeals' decision where the Court of Appeals, citing *Hatcher*, has refused to address adjudicatory errors. See, e.g., *In re Shaw*, unpublished decision per curiam of the Court of Appeals, issued on March 19, 2015 (Docket No. 323753), Attachment C; *In re Walker*, unpublished decision per curiam of the Court of Appeals, issued on June 25, 2013 (Docket No. 313782), Attachment D; *In re Vanalstine*, unpublished decision per curiam of the Court of Appeals, issued on April 11, 2013 (Docket No. 312858), Attachment E.

⁴ Interestingly, in *In re Kanjia*, 308 Mich App 660; 866 NW2d 862 (2014), the Court of Appeals reversed a TPR decision because of an error in the adjudication stage. *Id.* at 670-671. There, the trial court had failed to adjudicate the parent but nevertheless terminated his parental rights. The Court of Appeals addressed the claim, reasoning that the parent was not attacking the court's exercise of jurisdiction, which it noted would be precluded by *Hatcher*, but was instead attacking the court's exercise of its dispositional authority as a violation of due process. *Id.* at 669.

decisions, finding that the parents' adjudication pleas were invalid because the trial court had failed to properly advise them of the rights they were waiving. In *In re Mays*, 490 Mich 993; 807 NW2d 304 (2012), this Court, in reversing a TPR decision, noted that the father still had the right to challenge the trial court's failure to adjudicate him. *Id.* at 994, n 1. And in *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014), this Court reversed a trial court's post-dispositional order because the trial court had failed to properly adjudicate the father. *Id.* at 422-423. In each of these cases, this Court allowed the parent to raise adjudicatory errors in post-dispositional appeals, even though the parent had failed to appeal the initial dispositional order.

Here, Ms. Jones, similar to the parents in *Hudson* and *Mitchell*, argued that the trial court had improperly adjudicated her - violating her due process rights - because it never advised her of any of the procedural rights she was waiving. But the Court of Appeals, in direct conflict with this Court's case law post-*Hatcher*, refused to address the merits of the claim. This Court should grant this Application to clarify that *In re Hatcher* does not preclude parents from challenging adjudicatory errors in TPR appeals.

STATEMENT OF QUESTIONS PRESENTED

- I. A juvenile court only obtains the dispositional authority to terminate a parent's rights after it properly adjudicates the parent. Here, the trial court never properly adjudicated the Appellant, because it failed to inform her of any of her procedural rights, including her right to an adjudication trial, prior to finding that she had waived her right to be adjudicated. Did the trial court err by exercising its dispositional authority to terminate the Appellant's parental rights where it failed to properly adjudicate her?

Trial court did not answer this question.

Court of Appeals did not answer this question.

Appellant says yes.

- II. Despite noting that the trial court had improperly adjudicated the Appellant, the Court of Appeals, relying on *In re Hatcher*, refused to address the merits of the argument. But in *Hatcher*, this Court only held that a juvenile court's subject matter jurisdiction is established when a petition is authorized at the preliminary hearing. In fact, since *Hatcher*, this Court, recognizing that child protective proceedings are one, continuous proceeding, has consistently allowed parents to challenge errors in the adjudicatory process in appeals of termination of parental rights orders. Did the Court of Appeals misapply *Hatcher*?

Trial court did not answer this question.

Court of Appeals says no.

Appellant says yes.

STATEMENT OF THE BASIS OF JURISDICTION

This is an application for leave to appeal after a decision by the Michigan Court of Appeals.

This Court has jurisdiction pursuant to Const 1963, art 6, §4; MCL 600.212; MCL 600.215(3); and MCR 7.301(A)(2) to review by appeal a case after a decision by the Court of Appeals.

On October 27, 2015, the Court of Appeals affirmed the trial court's decision to terminate Ms. Jones' parental rights. This timely application is being filed within 28 days of the Court of Appeals' decision. MCR 7.302(C)(2).

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The trial court terminated the parental rights of Laura Jones, even though it never properly obtained dispositional authority over her through a valid adjudication.

Laura Jones is the mother of three children: her son, Justin, and her two daughters, Renee and Gracie. 8/9/13 Pet. at 1. On August 9, 2013, the Department of Human Services (“DHS”) filed a petition to remove Justin, Gracie, and Renee from her home, alleging that Ms. Jones excessively disciplined the children, failed to properly supervise them, and exposed them to marijuana. *Id.* Although the court held an emergency hearing that day, Ms. Jones requested the appointment of counsel, so the hearing was adjourned. But the court authorized the petition and continued the children’s placement in foster care. 8/9/13 Tr. at 5, 8.

Four days later, DHS filed an amended petition. The next day, the court held a continued preliminary hearing. The court placed the children with their fathers, 8/15/13 Tr. at 15, 17-18, 27, but still maintained a goal of reunifying the children with Ms. Jones. *Id.* at 29.

The court also assumed jurisdiction over the children at this hearing, based on three admissions made by Ms. Jones. 9/16/13 Tr. at 16, Attachment F. Prior to making the admissions, the court failed to advise Ms. Jones of any of the rights she was waiving, as required in MCR 3.971. The court did not tell her that she had a right to an adjudication trial or that her admissions could be used against her in a subsequent TPR hearing. In fact, the court never even mentioned the possibility that Ms. Jones’ parental rights could be terminated as a result of these proceedings.

Nevertheless, the court accepted Ms. Jones' admissions. Ms. Jones admitted that on one occasion, Renee had left her home without her knowledge. *Id.* at 13. When Ms. Jones discovered this, she ran outside and found Renee. *Id.* On another occasion, she admitted that the children had left her home when she was sleeping and were playing with the neighbors. She was "furious" and apologized to the neighbors. *Id.* at 14. Finally, Ms. Jones admitted that she grabbed Renee's hair once when Renee began walking into the road without holding her mother's hand. *Id.* at 16. Ms. Jones did not intend to hurt Renee and Renee did not cry. *Id.* Renee was just "a little mad." *Id.* Ms. Jones denied the remaining allegations in the petition. *Id.*

Based on these statements, the court adjudicated Ms. Jones as an unfit parent and assumed jurisdiction over the children, which stripped Ms. Jones of her constitutional right to care for the children and transferred that decision-making authority to the court. The court, however, failed to specify under which provisions of MCL 712A.2(b) jurisdiction was actually established. See Order after Preliminary Hearing dated 9/17/13, Attachment G.

After the court assumed jurisdiction over the children, it held a series of review hearings. At the December 2013 review hearing, the trial court learned that Ms. Jones had successfully completed anger management counseling. 12/16/13 Tr. at 6-8. She was visiting the children, who were always happy to see her, even though some of the visits did not go as well as others. *Id.* at 9. The DHS worker noted that one barrier to reunification was that Mr. Krueger, with whom Ms. Jones was residing, refused to let DHS into his home without DHS first contacting him. *Id.* at 15. The worker also

recommended that Ms. Jones meet with a counselor to work on parenting skills, among other issues. *Id.* at 23.

At the March 2014 review hearing, it was noted that Mr. Krueger was participating more willingly with DHS. 3/3/14 Tr. at 9. A parenting education counselor stated both Mr. Krueger and Ms. Jones were doing “great.” *Id.* at 6, 10–11. In addition, Ms. Jones’ visits were going much better, though there were some days where the visits did not go well. *Id.* at 12.

On May 1, 2014, DHS filed a supplemental petition, alleging misconduct against Mr. Hearn, Gracie and Renee’s father, with whom the children were living. 5/1/14 Supp. Pet. DHS requested that the girls be returned to Ms. Jones’ care with in-home services. *Id.* at 4.

Four days later, trial court held an emergency hearing on the supplemental petition. 5/5/14 Tr. at 5. At the hearing, it was noted that the girls seem to be doing well on extended overnight visits with their mother, but DHS still wanted additional services in the home. *Id.* at 10. Ms. Jones was “somewhere around ninety percent of doing everything that needs to be done for a return.” *Id.* at 11. She had completed a psychological evaluation and the SMILE co-parenting course, continued to attend counseling and to work with a parent-aide, self-initiated an in-home support program, and was almost done with parenting education classes. *Id.* at 12–14. Additionally, during a twelve-hour road trip with the girls to visit their brother, the caseworker noted that Ms. Jones did well, although there were some lows to be expected with long road trips. *Id.* at 14–15. Even so, Ms. Jones demonstrated “an increase in patience” with her

children, despite needing additional support during very stressful times. *Id.* at 15-16. DHS requested the girls be placed back into care with their mother. *Id.* at 17. The court then placed the girls with Ms. Jones for an extended visit. *Id.* at 25-26.

On May 22, 2014, the trial court held a review hearing with respect to Ms. Jones. Ms. Jones reported that Renee and Gracie were doing very well. 5/22/14 Tr. at 17. Less than a month later, at a dispositional hearing related to one of the fathers, the court learned that the girls continued to do well with Ms. Jones. 6/9/14 Tr. at 11. DHS noted that Ms. Jones was “making good changes in their home.” *Id.* at 12. Similarly, at a permanency planning hearing in July 2014, the court reiterated to Ms. Jones to take comfort in the high praise and compliments that she had received, and to keep working hard. 7/24/14 Tr. at 26.

Although things had been going well, on September 12, 2014, DHS filed a supplemental petition requesting that the girls be removed from Ms. Jones’ care. 9/12/14 Supp. Rem. Pet. The petition alleged that Ms. Jones excessively disciplined the children. *Id.* Based on these allegations, DHS removed the children pending a full hearing.

Three days later, the trial court held an emergency hearing on the petition. Ms. Jones denied the allegations in the petition, but the court continued the children’s placement in foster care. 9/15/14 Tr. at 24. A week later, at a continued hearing, Ms. Jones requested a trial on the allegations against her. 9/22/14 Tr. at 9-10, 12.

Less than a month later, DHS filed a petition to terminate Ms. Jones’ parental rights to Justin, Renee, and Gracie. 10/16/14 TPR Pet. The court heard testimony over

three days. Ultimately, the court exercised its dispositional authority to terminate Ms. Jones' parental rights to Renee and Gracie under MCL 712A.19b(3)(c)(i) and (j). 2/16/15 TPR Op. at 12, 14. But the court did not terminate her rights to Justin.

Ms. Jones appealed the trial court's decision. On October 27, 2015, the Court of Appeals affirmed the trial court's decision. However, the Court of Appeals noted that "[i]t is undisputed that the trial court failed to comply with MCR 3.971(C) when it accepted respondent's plea." *In re Jones*, unpub op at 2.

ARGUMENT

I. **The Trial Court Erred In Exercising Its Dispositional Authority To Terminate Ms. Jones' Parental Rights When It Never Properly Adjudicated Her Unfitness**

Standard of Review

The interpretation and application of statutes and court rules, along with questions of constitutional law, are reviewed de novo. *In re Sanders*, 495 Mich at 403-404 (2014). Although Ms. Jones did not preserve this error at the trial court, this Court can still review it so long as there was a plain error that affected her substantial rights.

People v Carines, 460 Mich 750, 763-64; 597 NW2d 130 (1999).

Argument

The trial court erred in exercising its dispositional authority to terminate Ms. Jones' parental rights without first properly adjudicating her parental unfitness. In *Sanders*, 495 Mich at 394, this Court recognized the constitutional import of the adjudication hearing and plainly held that "due process requires that every parent receive an adjudication hearing before the State can interfere with his or her parental rights." *Id.* at 415. The adjudication hearing, according to this Court, "protects the parents' fundamental right to direct the care, custody and control of their children." *Id.* at 422. The hearing plays this role because once the State proves a parent's unfitness at such a hearing, it then obtains the constitutional authority to strip the parent of her fundamental right to care for her child. Recognizing the significance of the adjudication hearing, the Court of Appeals, in *In re Kanjia*, 308 Mich App at 660, applied the *Sanders* rule and reversed a TPR decision because the trial court had failed to adjudicate a

father. *Id.* at 674. The Court of Appeals found that the failure to properly adjudicate the father deprived the trial court of the dispositional authority to terminate his parental rights. *Id.* at 669-671.

Here, Ms. Jones never received an adjudication hearing. Instead, the trial court found that she had waived her constitutional right to such a hearing. But, a valid waiver never occurred. Courts must “indulge every reasonable presumption against waiver of fundamental constitutional rights.” *People v Williams*, 475 Mich 245, 260; 716 NW2d 208 (2006). As such, to waive a constitutional right, an individual must have specific knowledge of the constitutional right and express an intentional decision to abandon the protection of the right. *Id.* at 261.

The Michigan Court Rules codify these constitutional principles. Before a court can allow a parent to waive her constitutional right to an adjudication hearing, it must ensure that the waiver is “knowingly, understandingly, and voluntarily made.” MCR 3.971(C)(1). Additionally, the court must advise the parent of the procedural rights she is waiving, including the right to an adjudication trial before a judge or referee, and must advise the parents of the consequences of the plea, including that the plea can later be used as evidence in a TPR hearing. MCR 3.971(B)(4).

The failure to properly advise a parent of the constitutional rights she is waiving constitutes reversible error. Most recently, in *In re Wangler/Pashke*, ___ Mich ___, ___ NW2d ___ (2015), this Court reversed a TPR decision because the trial court had erred in accepting the mother’s adjudication plea. The court had failed to advise the mother of the procedural rights she was waiving and also failed to establish support for finding

that a statutory ground for jurisdiction had been met. *Id.* As a result, this Court held that “manner in which the trial court assumed jurisdiction violated the respondent-mother’s due process rights” and set aside both the adjudication and TPR orders. *Id.* Similarly, in *In re Hudson*, 483 Mich at 928, and *In re Mitchell*, 485 Mich at 922, this Court reversed TPR decisions because the trial courts had improperly accepted adjudication pleas. *Id.* In both cases, the trial court had failed to advise parents of the consequences of their waiver, most notably the fact that the waiver could be used against them in a subsequent TPR hearing. In fact, in *Hudson*, the trial court “never even mentioned the possibility that respondent’s parental rights could be terminated on the basis of her admissions.” *Hudson*, 483 Mich at 935 (CORRIGAN, J., concurring). As noted by Justice Corrigan in a concurring opinion, “The consequences of these errors pervaded the 26-month child protective proceeding that followed and deprived respondent of due process.” *Hudson*, 483 Mich at 935 (CORRIGAN, J., concurring).

What happened in this case is nearly identical to what happened in *Wangler/Paschke*, *Hudson* and *Mitchell*. There is no dispute that the trial court completely failed to advise Ms. Jones of any of her procedural rights prior to finding that she waived her right to an adjudication trial. Instead, the court simply asked Ms. Jones whether she wanted to make admissions. Ms. Jones then made three admissions, each followed by explanations as to what happened. After hearing the admissions, the court summarily concluded, “With those three admissions, the [c]ourt is satisfied that it has jurisdiction over the children.” At no point did the court advise Ms. Jones of the DHS’ burden of proving the allegations against her, of her right to a trial before a judge or a

jury, or of any of the consequences of her admissions, including that they could be used against her in a subsequent TPR hearing.⁵ In fact, similar to *Hudson*, 483 Mich at 935, the trial court failed to mention any possibility that Ms. Jones' parental rights could be terminated based, in part, on the admissions she was making.

The record reveals a complete failure on the part of the trial court to ensure that Ms. Jones was intentionally abandoning her constitutional right to an adjudication hearing. Because the trial court never properly adjudicated her unfitness, it lacked the dispositional authority to terminate her parental rights. As such, this Court should reverse the trial court's decision and remand the matter for a new adjudication hearing.

II. The Court Of Appeals Misapplied *Hatcher*

Standard of Review

This Court reviews questions of law de novo. *In re Sanders*, 495 Mich at 403-404 (2014).

Argument

The Court of Appeals correctly noted that "it is undisputed that the trial

⁵ In addition to failing to advise Ms. Jones of the procedural rights she was waiving, the trial court also failed to ensure that Ms. Jones' admissions constituted valid grounds to assume jurisdiction under MCL 712A.2(b), which is required by MCR 3.971(C)(2). Ms. Jones' three admissions did not establish grounds for jurisdiction under MCL 712A.2(b) but instead demonstrated a reasonable exercise of parental judgment. Tellingly, either in its order or on the record, the trial court never even identified under what section of MCL 712A.2(b) jurisdiction was established. See Order after Preliminary Hearing dated 9/17/13.

court failed to comply with MCR 3.971(C) when it accepted respondent's plea." *In re Jones*, unpub op at 2. But it wrongly concluded that *Hatcher* precluded it from reviewing the plain error.

In *Hatcher*, this Court confronted a narrow issue – when subject matter jurisdiction is established in a child protective proceeding. 443 Mich at 437. This Court correctly held that subject matter jurisdiction is created once a court authorizes a petition at the preliminary hearing. *Id.* at 437, 438. Finding that the petition was validly authorized, this Court rejected the Appellant's argument. *Id.* at 443.

But this Court, in dicta, reached beyond the narrow issue presented in the case to incorrectly opine that parents should never be able to challenge errors in the adjudicatory process in TPR appeals, characterizing such a challenge as a "collateral attack." *Id.* at 444. To support its conclusion, this Court cited to several cases in which litigants attempted to challenge the validity of final orders in completely separate legal proceedings. For example, in *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538; 260 NW 908 (1935), this Court disallowed a litigant from challenging the validity of a final divorce decree in a completely separate probate action. *Id.* at 545-546. In *Harmsen v Fizzell*, 354 Mich 60; 92 NW2d 631 (1958), this Court refused to allow parents to initiate a new habeas corpus action to challenge errors in a child protective proceeding. *Id.* at 63. And in *Banner v Banner*, 45 Mich App 148; 206 NW2d 234 (1973), the Court of Appeals found that a wife could not initiate an action to vacate a valid divorce judgment years later simply because her husband had died. *Id.* at 152-153. Each of these cases

undoubtedly involved a “collateral attack” – that is, a litigant’s attempt to challenge the validity of a final order in a completely separate proceeding.

But a parent in a child protective proceeding who challenges an adjudicatory error in a TPR appeal is not attacking a final order in a separate proceeding. To the contrary, she is attacking an order in the same proceeding.

Michigan courts have consistently held that child protective proceedings are one, continuous proceeding. *In re Hudson*, 483 Mich at 935 (CORRIGAN, J., concurring); *In re LaFlure*, 48 Mich App, 377, 391; 210 NW2d 482 (1973). The proceedings start with a preliminary hearing. MCR 3.965. They continue to the adjudication trial. MCR 3.972. And they conclude with a final TPR hearing. MCR 3.977. As such, errors that occur at any stage of the process can affect the final TPR decision. See, e.g, *In re Hudson*, 483 Mich at 935 (CORRIGAN, J., concurring) (observing that “the combination of the trial court's errors at the preliminary hearing in failing to appoint counsel and in accepting respondent's invalid plea affected the entire proceeding that followed.).

Recognizing this basic principle, this Court, even after *Hatcher*, has always allowed litigants to raise errors that occurred at any point in the child protective proceeding in a TPR or post-dispositional appeal. In *Hudson*, 483 Mich at 928, and *Mitchell*, 485 Mich at 922, this Court reversed TPR decisions, finding that the parents’ adjudication pleas were invalid. In *Mays*, 490 Mich at 993, this Court, in reversing a TPR decision, noted that the father still maintained the right to challenge the trial court’s failure to adjudicate him. *Id.* at 994, n 1. And in *Sanders*, 495 Mich at 394, this Court reversed a trial court’s post-dispositional order because the trial court had failed

to properly adjudicate the father. *Id.* at 422-423. In each of these cases, this Court allowed the parent to raise adjudicatory errors in TPR and post-dispositional appeals, even though the parent had failed to appeal the initial dispositional order, because those errors directly impacted the validity of the TPR order. Again, a child protective proceeding is one, continuous proceeding. Thus, the challenge to an error in the adjudicatory process in a TPR appeal is not a collateral attack.

Despite this case law, the Court of Appeals, in this case and many others, continues to misinterpret *Hatcher*. It has relied on *Hatcher's* poorly reasoned dicta to prevent parents from raising serious errors in the adjudicatory process in TPR appeals. This Court's intervention is necessary to correct this misapplication.

CONCLUSION

Ms. Jones respectfully requests that this Court grant this Application, reverse the trial court's order terminating her parental rights, and remand the matter to the trial court for a new adjudication trial.

Respectfully submitted,

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