

STATE OF MICHIGAN  
IN THE SUPREME COURT

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IN RE CONTEMPT OF KELLY MICHELLE DORSEY,

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PEOPLE OF THE STATE OF MICHIGAN  
Petitioner-Appellee,

v

TYLER MICHAEL DORSEY,  
Respondent,

and

KELLY MICHELLE DORSEY,  
Appellant

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Supreme Court: 150298  
Court of Appeals: 309269  
44th Cir. Ct. Livingston County  
Family Division: 08-12596-DL

**SUPPLEMENTAL BRIEF**  
**ON BEHALF OF APPELLANT,**  
**KELLY MICHELLE DORSEY**

**PROOF OF SERVICE**

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Dated: November 12, 2015

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**QUESTION PRESENTED**

- I. WHETHER THE APPELLANT'S CHALLENGE TO THE TRIAL COURT'S ORDER HOLDING HER IN CRIMINAL CONTEMPT AMOUNTS TO AN IMPERMISSIBLE COLLATERAL ATTACK ON THE TRIAL COURT'S JANUARY 14, 2011, ORDER REQUIRING HER TO SUBMIT TO DRUG TESTING UNDER *IN RE HATCHER*, 443 MICH 426, 438, 505 NW2d 834 (1993)?

Appellant's answer: "No."

Appellee's answer: "Yes."

The Trial Court ruled: "Yes."

The Court of Appeals ruled: "Yes."

## **INTRODUCTION**

In its September 30, 2015 order scheduling oral argument on the Application for Leave to Appeal, under MCR 7.305(H)(1), the Court requested that the parties submit supplemental briefs within 42 days<sup>1</sup> on whether the general rule, set forth in the case of *In re Hatcher*, 443 Mich 426, 438, 505 NW2d 834 (1993), which bars collateral attacks in appeals from parental rights termination orders on the initial exercise of the court's jurisdiction, operates to bar Ms. Dorsey's challenge to the January 14, 2011 drug testing order in the context of an appeal from her criminal contempt conviction. This issue was addressed, albeit briefly, on pages 15-16 of the Application for Leave to Appeal filed on October 21, 2014. In summary, *Hatcher* does not bar a collateral challenge to the underlying drug testing order that was issued by the family court on January 14, 2011.

## **STATEMENT OF FACTS**

The application for leave to appeal filed on October 21, 2014, contains a thorough summary of the relevant facts. It would be duplicative to restate them here. Ms. Dorsey emphasizes that even though she was indigent, she was not represented by counsel in her son's juvenile delinquency matter until January 27, 2012, which was after the show cause motions were filed seeking to hold her in contempt for refusing to drug test and was only a few days before her show cause hearing. (Order for Adjournment, Jan. 27, 2012).<sup>2</sup> Ms. Dorsey was provided court-appointed counsel in the abuse and neglect case, but that matter concluded in November 2011. (Show Cause Hr'g Tr. 5:21,

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<sup>1</sup> This filing deadline fell on November 11, 2015, a legal holiday, and hence it was extended by court rule to November 12, 2015. MCR 1.108(1).

<sup>2</sup> Undersigned appellate counsel was not contacted about this case until late February 2012, after Ms. Dorsey was held in contempt. Another attorney represented her at the show cause hearing and the sentencing hearing. (Show Cause Hr'g Tr. 1, Feb. 2, 2012).

18:14-21, Feb. 2, 2012). She did not have counsel when the drug tests were requested by Susan Grohman, her son's probation officer, on January 9, 2012, and January 10, 2012. (Show Cause Hr'g Tr. 19:11-13, 20:19-25, 21:1-17, Feb. 2, 2012).

### ARGUMENT

#### I. **HATCHER DOES NOT BAR APPELLANT'S CHALLENGE TO THE JANUARY 14, 2011 DRUG TESTING ORDER.**

*Hatcher* is not controlling on this case for several reasons. First, however, in order to elaborate on the reasons why *Hatcher* is not controlling, an analysis of the holding in *Hatcher* is essential. *Hatcher* was an abuse and neglect case that resulted in the termination of the appellant's parental rights. *Hatcher*, 443 Mich at 428. The case began when the Department of Social Services filed a petition for temporary wardship of the child. *Id.* at 428-29. The parent in *Hatcher* challenged the probate court's subject matter jurisdiction, but did not do so in an appeal from the probate court's initial assertion of subject matter jurisdiction or from the first dispositional order. *Id.* at 430-33. Instead, he appealed from the order, rendered over a year later, terminating his parental rights. *Id.* The parent contended on appeal that his stipulation to a temporary wardship for the child was insufficient to provide a factual basis for the probate court's assertion of subject matter jurisdiction. *Id.* at 436-37. This stipulation was given by the parent nearly two months after the referee, acting for the probate court, found there was probable cause to believe that the allegations in the petition were true. *Id.* at 429-30.

This Court held in the first paragraph of *Hatcher* that "the probate court properly assumed jurisdiction and that the parents' collateral attack on the court's subject matter jurisdiction was invalid." *Id.* It concluded its analysis by stating that the holding "severs

a party's ability to challenge a probate court decision years later in a collateral attack where a direct appeal was available. . . ." *Id.* at 444. It also noted that the holding preserved "the finality of probate court decisions. . . ." *Id.* This simply means that this Court found that the probate court had subject matter jurisdiction in *Hatcher*. *Id.* at 438-40. It does not mean that subject matter jurisdiction cannot be collaterally attacked as that interpretation would conflict with the well-established rule that a court's subject matter jurisdiction may be challenged at any time, including by a collateral attack. See, e.g., *Hatcher*, 443 Mich at 438 ("It is beyond question that a party may attack subject matter jurisdiction at any time." (citing *Shane v Hackney*, 341 Mich 91, 67 NW2d 256 (1954))); *In re Hague*, 412 Mich 532, 544-45, 315 NW2d 524 (1982) (noting that a party may attack subject matter jurisdiction at any time because the lack of subject matter jurisdiction renders any orders or judgments void (citing *United States v United Mine Workers of America*, 330 US 258, 293, 67 S Ct 677, 91 L Ed 2d 884 (1947) and *Walker v City of Birmingham*, 388 US 307, 320-21, 87 S Ct 1824, 18 L Ed 2d 1210 (1967))); *State Bar v Cramer*, 399 Mich 116, 125, 249 NW2d 1 (1976) (citing Richard B. Kuhns, *Limiting the Criminal Contempt Power: New Roles For the Prosecutor and the Grand Jury*, 73 Mich L. Rev. 484, 504 (1975)); Dan B. Dobbs, Law of Remedies 154-55 (2d ed Abr 1993).

Later in the opinion, this Court held that a "probate court's subject matter jurisdiction is established when the action is of a class that the court is authorized to adjudicate, and the claim stated in the complaint is not clearly frivolous." *Hatcher*, 443 Mich at 437. A court determines whether it has subject matter jurisdiction by looking to

"the contents of the petition after the probate judge or referee has found probable cause to believe that the allegations contained within the petitions are true." *Id.*

The Court also noted that there is a difference between a challenge asserting that the trial court lacked subject matter jurisdiction and a challenge that the trial court erred in exercising its subject matter jurisdiction. *Hatcher*, 443 Mich at 438-39. The Court determined that the parent's argument that his stipulation did not establish facts sufficient to invoke the probate court's subject matter jurisdiction was a challenge to the probate court's exercise of its subject matter jurisdiction rather than the existence of subject matter jurisdiction. *Id.* at 438-40. The Court wrote, "[t]he father's arguments address the procedure by which the probate court proceeded after it had established subject matter jurisdiction on the basis of a validly filed petition." *Id.* at 438. *Hatcher* noted that challenges to the court's erroneous exercise of subject matter jurisdiction, as opposed to the court's subject matter jurisdiction itself, must generally be made on direct appeal and not as a collateral attack on the underlying order or judgment in an appeal from a subsequent order. *Id.* at 439 (citing *Life Ins. Co. of Detroit v Burton*, 306 Mich 81, 10 NW2d 315 (1943) and *Edwards v Meinberg*, 334 Mich 355, 54 NW2d 684 (1952)).<sup>3</sup>

The Court of Appeals has recognized that *Hatcher* does not always apply in family law cases. In the case of *Department of Human Services v Holm (In re S.L.H.)*, the Court of Appeals explained:

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<sup>3</sup> *Hatcher* also overruled *Fritts v Krugh*, 354 Mich 97, 115, 92 NW2d 604 (1958) to the extent that it contained an exception to the general rule by permitting collateral attack on a judgment of permanent wardship based on a lack of subject matter jurisdiction if there was no evidentiary support for the judgment even when the petition was legally sufficient. *Hatcher*, 443 Mich at 440-44. The Court held that *Fritts* involved a challenge to the exercise rather the absence of the probate court's jurisdiction. *Id.*

Ordinarily, an adjudication cannot be collaterally attacked following an order terminating parental rights. That is true, however, only when a termination occurs following the filing of a supplemental petition for termination after the issuance of the initial dispositional order. If termination occurs at the initial disposition as a result of a request for termination contained in the original, or amended, petition for jurisdiction, then an attack on the adjudication is direct and not collateral, as long as the appeal is from an initial order of disposition containing both a finding that an adjudication was held and a finding that the children came within the jurisdiction of the court. [*Dep't of Human Servs v Holm (In re S.L.H.)*, 277 Mich App 662, 669-70, 747 NW2d 547 (2008) (footnotes omitted) (noting that the collateral attack rule in *Hatcher* only applies when the termination of parental rights occurs sometime after the initial dispositional order)].

Furthermore, *Hatcher* only applies when there is an order that could have been appealed. See *In re Bechard*, 211 Mich App 155, 159, 535 NW2d 220, 221-22 (1995) ("The collateral estoppel bar of *Hatcher* can only be raised if, at the adjudicatory stage, there was a written order from which respondent could appeal."). In *Bechard*, there was no order expressly taking jurisdiction, and consequently, no direct appeal of the previous order was available meaning that the appeal was not a collateral attack. *Id.* at 159-60. Thus, *Hatcher* does not apply to appeals from the first dispositional order and when there was no previous written order to appeal. See *Hatcher*, 443 Mich at 438-40; *Holm*, 277 Mich App at 669-70; *Bechard*, 211 Mich App at 159-60; see also *In re Wangler/Paschke*, \_\_\_ Mich \_\_\_, \_\_\_ NW2d \_\_\_ (2015) (Docket No. 149537) (noting that an appeal from the order terminating parental rights, which was filed after the trial court issued dispositional orders without adjudicated the parent first, was not a collateral attack barred by *Hatcher*).

*Hatcher* is essentially an extension of the well-established collateral bar rule, which bars collateral attacks on underlying orders in appeals from contempt convictions,

to the context of parental rights termination orders. *Compare Hatcher*, 443 Mich at 438-40 with *Maness v Meyers*, 419 US 449, 458-60, 95 S Ct 584, 42 L Ed 2d 574 (1975) (citing *Howat v Kansas*, 258 US 181, 189-90, 42 S Ct 277, 66 L Ed 550 (1922)) and *Cramer*, 399 Mich at 125. Several exceptions exist to the collateral bar rule, namely: (1) when the court lacked personal or subject matter jurisdiction to issue the underlying order; (2) when the underlying order conflicts with a prior order from a federal court; (3) when the order requires an irretrievable surrender of constitutional guarantees; and (4) where the underlying order was transparently invalid or patently frivolous. See *Maness*, 419 US at 460-68; *In re Novak*, 932 F2d 1397, 1401-02 (CA 9, 1991); *United States v Michigan*, 712 F2d 242, 244 (CA 6, 1983); *Cramer*, 399 Mich at 125. There also appears to be an exception to the collateral bar rule when performance of the act required by the underlying order is impractical. See *Kirby v Mich High Sch Athletic Ass'n*, 459 Mich 23, 39-41, 585 NW2d 290 (1998). *Hatcher* operates in the same way that the collateral bar rule does in that it bars collateral challenges to the exercise of subject matter jurisdiction, but it does not bar challenges to subject matter jurisdiction itself. See *Hatcher*, 443 Mich at 438-40; *Cramer*, 399 Mich at 125.

**A. HATCHER IS NOT APPLICABLE IN THIS CASE BECAUSE IT IS FACTUALLY DISTINGUISHABLE.**

While there are some similarities between the collateral bar rule and *Hatcher*, the application of *Hatcher* to this case would not be precise. The problem with applying *Hatcher* to this case is that simply does not fit factually.

First, this case involves an appeal from a contempt order in a juvenile delinquency case. (Order of Contempt [Kelly Dorsey] ¶ 6, Feb. 6, 2012; Order of

Contempt [Kelly Dorsey] ¶ 6, Feb. 10, 2012). The family court issued the contempt order for the violation of an order to submit to random drug testing that was contained within the January 14, 2011 supplemental dispositional order relating to the November 2009 delinquency petition. (Supp. Order of Disp. ¶ 27, Jan. 14, 2011). By contrast, *Hatcher* was an abuse and neglect case where the appeal was taken from the termination of parental rights in the supplemental dispositional order. *Hatcher*, 443 Mich at 428.

This is a critical difference. Because *Hatcher* was an abuse and neglect case, an indigent parent would have had access to court-appointed counsel. See MCR 3.915(B)(1) (requiring the appointment of counsel for indigent respondent parents in child protective abuse and neglect proceedings); see also *Lassiter v Dep't of Social Servs.*, 452 US 18, 31-32, 101 S Ct 2153, 68 L Ed 2d 640 (1981) (acknowledging that in some cases the constitution requires the appointment of counsel for indigent parents in proceedings that could result in the termination of parental rights). Counsel is not appointed for parents in juvenile delinquency cases until after a show cause motion is filed seeking to hold them in contempt. See *Mead v Batchlor*, 435 Mich 480, 505, 460 NW2d 493 (1990); *People v McCartney*, 132 Mich App 547, 552, 348 NW2d 692 (1984) (citing *Jaikins v Jaikins*, 12 Mich App 115, 120, 162 NW2d 325 (1968)), *People v Johnson*, 407 Mich 134, 148, 283 NW2d 632 (1979). Thus in the context in which *Hatcher* arose, it was taken for granted that an indigent parent would have counsel appointed to represent them and would have ready access to a direct appeal of the family court's orders at the proper time. See MCR 3.915(B)(1). In this case, Ms. Dorsey was not represented by counsel in her son's delinquency matter until January

27, 2012, which was over a year after the family court issued the drug testing order. (Show Cause Hr'g Tr. 19:11-13, 20:19-25, 21:1-17, Feb. 2, 2012; Order for Adjournment, Jan. 27, 2012). The *Hatcher* Court simply did not contemplate a situation where the parent was not represented by counsel at time when the direct appeal should have been filed. See *Hatcher*, 443 Mich at 430.

Second, criminal contempt is very different from the termination of parental rights. The termination of parental rights is not strictly civil in nature, but it does not carry with it the possibility of incarceration. See *In re Moss*, 301 Mich App 76, 84, 836 NW2d 182 (2013) (citing *Santosky v Kramer*, 455 US 745, 762, 102 S Ct 1388, 71 L Ed 2d 599 (1982)). Criminal contempt is quasi-criminal in nature and can result in incarceration for a fixed period of time. MCL 600.1715; *In re Contempt of Dougherty*, 429 Mich 81, 90-91, 413 NW2d 392 (1987). *Hatcher* should not be applied to this case because it is more precise to apply case law that actually arose out of criminal contempt cases. See, e.g., *Maness*, 419 US at 459-61; *Cramer*, 399 Mich at 125.

Third, the order placing the minor under the supervision of the family court and the order terminating parental rights in *Hatcher* were appealable by right. MCR 3.993(A)(1), (2). In this case, the January 14, 2011 order was a supplemental dispositional order. (Order of Supp. Disp., Jan. 14, 2011). It could not be appealed as of right under any of the categories in MCR 3.993(A). Consequently, it could only be appealed by leave. MCR 3.993(B). Thus, Ms. Dorsey was not guaranteed the right to appeal the drug testing order rendered on January 14, 2011, and accordingly, *Hatcher* does not apply to this case. Cf. *Bechard*, 211 Mich App at 159.

Fourth, the parent in *Hatcher* also had a full hearing before his parental rights were terminated, he would have had a full hearing before the petition was authorized if he had shown up for it, and he would have had a trial on the temporary wardship if he had not stipulated to it. *Hatcher*, 443 Mich at 429-32. In this case, Ms. Dorsey received none of these things because the focus of the proceedings was her son's conduct. Thus all the due process protections were given to him. See MCR 3.915(A); *In re Gault*, 387 US 1, 27-58, 87 S Ct 1428, 18 L Ed 2d 527 (1967); *Holm*, 277 Mich App 669-71. This situation conflicts with this Court's holding in *Department of Human Services v Laird (In re Sanders)*, 495 Mich 394, 410-11, 413-23, 852 NW2d 524 (2014).<sup>4</sup> This Court recognized in *Sanders* that minimal due process protections must be afforded before the state can burden a fundamental right. See *id.* at 410-11 (citing *Mathews v Eldridge*, 424 US 319, 333-35, 96 S Ct 893, 47 L Ed 2d 18 (1976)). Intrusions into the body, such as blood tests and drug tests, implicate fundamental rights. See *Schmerber v California*, 384 US 757, 769-70, 86 S Ct 1826, 16 L Ed 2d 908 (1966) ("Whatever the validity of these considerations in general, they have little applicability with respect to searches involving intrusions beyond the body's surface. The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.").

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<sup>4</sup> The Court of Appeals has held that *Sanders* applies retroactively to cases that were pending when it was decided on June 2, 2014. See *In re Kanjia*, 308 Mich App 660, 671-74, 866 NW2d 862 (2014).

The *Sanders* Court held that the adjudication of one parent could not be used to terminate the rights of the other parent if the other parent was not adjudicated. *Sanders*, 495 Mich at 413-23. In this case, the family court adjudicated the juvenile as delinquent, but never made any adjudication as Ms. Dorsey, nor did it afford her sufficient due process. Instead, it relied on MCL 712A.6 and MCL 712A.18 to issue orders affecting adults based on its jurisdiction over the child. The Court of Appeals has held that challenges based on *Sanders* are not collateral attacks on jurisdiction, but instead are direct attacks on the family court's exercise of its dispositional authority. *In re Kanjia*, 308 Mich App 660, 669-70, 866 NW2d 862 (2014) (citing *Sanders*, 495 Mich at 419, 422). This conflict between *Hatcher*, the Court of Appeals opinion in this case<sup>5</sup>, and *Sanders* is grounds to grant leave to appeal. MCR 7.305(B)(5)(b).

Fifth, the supplemental dispositional order, containing the drug testing order that was issued on January 14, 2011, was part of the proceedings relating to the delinquency petition filed in November 2009 (Petition 2009-0801259602). (Supp. Order of Disp. ¶ 1, Jan. 14, 2011). The juvenile was not adjudicated guilty in relation to the August 2010 petition (Petition 2010-081259604) until two weeks later on January 31, 2011. (Register or Actions). The two show cause motions in this case were filed under the proceedings relating to the August 2010 petition. (Mot. and Order to Show Cause [Kelly Dorsey], Jan. 10, 2012). The fact that the drug testing order was entered in relation to the November 2009 petition, and yet the two show cause motions filed by the juvenile's probation officer on January 10, 2012, were tied to the August 2010 petition is a significant difference between this case and *Hatcher*. The juvenile in this case had

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<sup>5</sup> *In re Contempt of Dorsey*, 306 Mich App 571, 858 NW2d 84 (2014).

not yet been adjudicated guilty on the August 2010 petition at the time the drug testing order was entered. In *Hatcher*, the termination of parental rights happened after the adjudication. *Hatcher*, 443 Mich at 429-33. As such, *Hatcher* simply does not apply in this situation. See *Wangler*, \_\_\_ Mich at \_\_\_; slip op at 1.

Lastly, this Court based its decision in *Hatcher* on the principle of finality. *Hatcher*, 443 Mich at 444. Finality is certainly a valid concern when parental rights are terminated, a permanent act, and the child is adopted. *Id.* at 444. However, finality is not nearly as important in the context of drug testing. In fact, a warrant requiring drug testing for an indefinite duration undermines the requirement that a warrant be issued by a neutral and detached magistrate, because at some point it is the executing officers who begin to supersede the neutral magistrate in determining whether probable cause still justifies the continued existence of the warrant. See *United States v Burgess*, 576 F3d 1078, 1097 (CA 10, 2009) (citing *United States v Syphers*, 426 F3d 461, 469 (CA 1, 2005) and Fed R Crim P 41(e)(2)(A)(i)).

In summary, this case is factually distinguishable from *Hatcher* because (1) Ms. Dorsey did not have a court-appointed attorney until after the show cause motion to hold her in contempt was filed; (2) this case is a juvenile delinquency matter while *Hatcher* was a child protective abuse and neglect matter; (3) in *Hatcher* the parent had an appeal of right from the underlying order, but here Ms. Dorsey would have an appeal only by leave; (4) the parent in *Hatcher* was afforded due process or at least the opportunity for due process that he declined, but in this case the due process protections were given to Ms. Dorsey's son; (5) the termination order in *Hatcher* was rendered after the adjudication, but in this case the adjudication of the juvenile, for the

petition the show cause motions were filed under, did not occur until two weeks after the drug testing order was rendered; and (6) finality is an important factor in the context of the termination of parental rights, but is not an important factor in the context of drug testing.

**B. THE APPLICATION OF *HATCHER* TO THIS CASE WOULD CONFLICT WITH A HOLDING OF THE UNITED STATES SUPREME COURT THAT COLLATERAL ATTACKS ON CONTEMPT ORDERS ARE PERMISSIBLE WHEN THE UNDERLYING ORDER REQUIRES THE IRRETRIEVABLE SURRENDER OF CONSTITUTIONAL RIGHTS.**

The application of the holding in *Hatcher* to this case would conflict with the United States Supreme Court's holdings in *Maness v Meyer*, 419 US 449, 460-61, 95 S Ct 584, 42 L Ed 2d 574 (1975) and *United States v Ryan*, 402 US 530, 532-33, 91 S Ct 1580, 29 L Ed 2d 85 (1971). This would be grounds for this Court to grant leave to appeal. MCR 7.305(B)(5)(b).

In *Maness*, an attorney represented a seller of obscene magazines in Texas. *Id.* at 450. The attorney's client was convicted of selling seven obscene magazines in violation of a local criminal ordinance. *Id.* In addition to permitting the adoption of local anti-obscenity ordinances, Texas permitted city attorneys to seek injunctions in district court, the court of general jurisdiction in Texas, to prevent the distribution of obscene materials. *Id.* at 450-51. Six days after he was convicted for violating the obscenity ordinance, the client received a civil subpoena to produce fifty-two magazines to the district court and personally appear there to give testimony. *Id.* at 450. The attorney filed a motion to quash the subpoena on the grounds that it was an attempt to get the

client to incriminate himself in violation of the Fifth Amendment of the United States Constitution. *Id.* at 451. The city attorney countered the motion by noting that the proceeding was purely civil in nature. *Id.* at 452. The district court denied the motion to quash. *Id.* at 453. When the client took the stand to testify, he asserted his Fifth Amendment right to remain silent based on the advice of the attorney. *Id.* The city attorney sought to have the client held in contempt for asserting the Fifth Amendment privilege against self-incrimination and refusing to answer the questions. *Id.* The district court instructed the client to bring the magazines to the court over the lunch recess. *Id.* The client did not bring the magazines to court and reasserted his Fifth Amendment privilege at which point the district court held the client in contempt and drew an adverse inference that the magazines were obscene. *Id.* at 454. The district court inquired of the client as to whether his disobedience was predicated on the advice of his attorney and whether he would produce the magazines if his attorney told him they were not incriminating. *Id.* The client responded that he was following his attorney's advice. *Id.* The district court then held the attorney and his co-counsel in contempt along with the client and sentenced them to ten days in jail and a \$200 fine. *Id.* at 455. Another judge changed the penalty to a \$500 fine and no jail time. *Id.* at 457.

The Supreme Court in *Maness* began its analysis by noting the general rule that even erroneous orders must be obeyed, unless they are stayed, until they are set aside on direct appeal and that they cannot be collaterally challenged in an appeal from the contempt conviction. *Id.* at 458-59 (citing *Howat*, 258 US at 189-90). After stating the general rule, the Supreme Court began to distinguish it in civil cases involving the Fifth Amendment by stating:

When a court during trial orders a witness to reveal information, however, a different situation may be presented. Compliance could cause irreparable injury because appellate courts cannot always "unring the bell" once the information has been released. Subsequent appellate vindication does not necessarily have its ordinary consequence of totally repairing the error. In those situations we have indicated the person to whom such an order is directed has an alternative:

[We] have consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal. *Cobbledick v United States*, [309 U.S. 323 (1940)]; *Alexander v. United States*, 201 U.S. 117 (1906); *cf. United States v. Blue*, 384 U.S. 251 (1966); *DiBella v. United States*, 369 U.S. 121 (1962); *Carroll v. United States*, 354 U.S. 394 (1957).

*United States v Ryan*, 402 U.S. 530, 532-33 (1971). [*Maness*, 419 US at 460 (alterations in original) (emphasis added).]

*Maness* noted that this "precompliance review" was appropriate because a motion to suppress the evidence would not be a sufficient remedy and that the Fifth Amendment privilege against self-incrimination was available in civil cases. See *id.* at 461-66. *Maness* also took into consideration that there was no possibility of immunity from future criminal prosecution based on the evidence sought by the subpoena and that the issue was not merely one of privacy. *Id.* at 468.

In *Ryan*, the Supreme Court observed that although a respondent served with a federal grand jury subpoena, requiring him to produce books, documents, and records,

could not appeal the trial court's denial of his motion to quash as it was not a final order, the respondent still had two options:

But compliance is not the only course open to respondent. If, as he claims, the subpoena is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the event that contempt or similar proceedings are brought against him. Should his contentions be rejected at that time by the trial court, they will then be ripe for appellate review. [*Ryan*, 402 US at 532.]

While *Ryan* noted the existence of precompliance appellate review of the underlying order, after being held in contempt, in a federal case, *Maness* extended precompliance appellate review of the underlying order, after a contempt conviction, to state civil cases. See *Maness*, 419 US at 450-61.

In this case, *Maness* requires that the Court consider Ms. Dorsey's challenge to the underlying drug testing order in her appeal from the contempt orders. See *id.* at 460-61. Ms. Dorsey was not offered or given immunity in exchange for submitting to the twice weekly for three months drug testing regime. See *id.* at 468. The Court of Appeals acknowledged that Ms. Dorsey did not have immunity for the results of the drug test and would have been subject to prosecution if she submitted a positive drug test or if she refused to drug test. (Ct App Op Slip Op 10). Just as the magazine subpoena did in *Maness*, the drug testing order in this case compelled Ms. Dorsey to abandon her Fourth Amendment right against unreasonable searches and her Fifth Amendment right against self-incrimination. See *Maness*, 419 US at 460-66. As noted above, Ms. Dorsey did not have an appeal of right, but only an appeal by leave from the January 14, 2011 drug testing order, and she did not have an attorney to represent her at that time. MCR 3.993(B); (Show Cause Hr'g Tr. 19:11-13, 20:19-25, 21:1-17, Feb. 2, 2012;

Order for Adjournment, Jan. 27, 2012). Consequently, there is a conflict in that *Maness* would permit Ms. Dorsey to challenge the underlying drug testing order in her appeal from the contempt conviction while *Hatcher* and the Court of Appeals opinion in this case would not. See *Maness*, 419 US at 460-61; *Hatcher*, 443 Mich at 438.

**C. HATCHER IS NOT APPLICABLE BECAUSE THE FAMILY COURT LACKED SUBJECT MATTER JURISDICTION OVER THE PARENT OF THE JUVENILE IN THE DELINQUENCY PROCEEDING.**

The argument that the family court lacked subject matter jurisdiction is thoroughly discussed on pages 14-23 of the Application for Leave to Appeal and 1-5 of the Reply in support of the Application for Leave to Appeal. As noted above, *Hatcher* does not prevent collateral attacks on the family court's subject matter jurisdiction. *Hatcher*, 443 Mich at 438-39. Instead, it precludes collateral attacks on the family court's *exercise* of its subject matter jurisdiction. *Id.* at 438-40.

The arguments in the Application for Leave to Appeal and the Reply in Support of the Application for Leave to Appeal refer to the classes of orders that a court may issue as subject matter jurisdiction. Although the word "order" is usually an indication of the exercise of subject matter jurisdiction, it is not in this case. The Utah Supreme Court recognized this while interpreting its statutes, which are similar to those in effect in Michigan. See *State v Moreno*, 203 P3d 1000, 1006-08, 1012 (Utah 2009) (holding that a collateral challenge to the underlying drug testing order was permissible on appeal from the contempt conviction because the juvenile court only had subject matter jurisdiction to order the parent to comply with reasonable conditions and the conditions it imposed were unreasonable). The Court of Appeals followed *Moreno* in finding that

the drug testing of the parents of juvenile delinquents violated the Fourth Amendment, but did not follow *Moreno* in terms of subject matter jurisdiction. (Ct App Slip Op 9-10). The Court of Appeals held that the family court obtains subject matter jurisdiction over the parent when it obtains subject matter jurisdiction over the child. (Ct App Slip Op 6, 10). *Moreno* agreed with this analysis to a point, but it noted that the subject matter jurisdiction possessed by the juvenile court over adults was limited to reasonable orders. *Moreno*, 203 P.3d at 1012. In other words, the juvenile court exceeded the subject matter jurisdiction granted it by the statutes when it imposed unreasonable orders on the parents of juveniles in delinquency proceedings. See *id.*

Just as occurred in *Moreno*, the juvenile court also exceeded its jurisdiction in this case. In Michigan, MCL 712A.2 grants the family court jurisdiction over juveniles who have violated any municipal ordinance or law of Michigan or the United States. Naturally, subject matter jurisdiction for violations of the laws of Michigan also lies with the criminal division of the circuit court. See *People v Kiyoshk*, 493 Mich 923, 923, 825 NW2d 56 (2013) (citing *People v Lown*, 488 Mich 242, 268, 794 NW2d 9 (2011)). The age of the defendant is not a matter of subject matter jurisdiction as it does not relate to the class, kind, or character of the case. *Id.* The effect of MCL 712A.2 is to grant exclusive personal jurisdiction to the family court over juveniles charged with violations of the laws of the state. *Id.* (citing *People v Veling*, 443 Mich 23, 31-32, 504 NW2d 456 (1993)). It is possible for a juvenile to be tried as an adult in circuit court through the statutory waiver of the family court's jurisdiction over the juvenile or for a juvenile to be erroneously charged in circuit court and waive his or her personal jurisdiction objection. See *id.* at 923-24. This situation, where both the circuit court and the family court have

the same subject matter jurisdiction when a violation of the a state law is alleged, illustrates the problem with the Court of Appeal's conclusion that blanket subject matter jurisdiction over the adult is obtained when the family court obtains subject matter jurisdiction over the juvenile. (Ct App Slip Op 6). Though both the circuit court and the family court have the same subject matter jurisdiction regarding juvenile delinquents charged with violations of state law, a circuit court, if the juvenile ended up in circuit court by statutory waiver or any other form of waiver, would not have the power to order the parent of a criminal defendant to submit to drug testing or impose other conditions on the adult in the child's criminal case beyond reimbursements. MCL 600.606, and MCL 769.1. Yet, the family court can do so up to a point. See MCL 712A.6 and MCL 712A.18. As such, there is something more to MCL 712A.6 and MCL 712A.18 than personal jurisdiction (orders affecting adults) or the exercise of subject matter jurisdiction (the order itself). These statues, though they refer to orders, are actually granting a form of subject matter jurisdiction to the family court with limitations on its scope. See *In re Macomber*, 436 Mich 386, 390-91, 398-99, 461 NW2d 671 (1990).

The most specific and relevant of the statutes pertaining to adults in juvenile delinquency proceedings is MCL 712A.18(1)(b), which states that the family court can impose reasonable rules of conduct on the parents of juvenile delinquents. The word "reasonable" is a limitation on "rules of conduct." As MCL 712A.18 is more specific than MCL 712A.6, and the two statues were adopted at the same time they must be construed in the same way. See *Macomber*, 436 Mich at 391-92. Thus, both statues must be construed to contain a reasonableness limitation on the orders the family court can issue. *Id.* Thus, when the family court issues orders that are not reasonable, such

as an unreasonable drug testing order that violates the Fourth Amendment, the family court has exceeded the subject matter jurisdiction afforded it by statute to issue orders concerning adults in juvenile delinquency cases. See *Moreno*, 203 P3d at 1012; *Macomber*, 436 Mich at 391-92.

It is true, as cited by the Court of Appeals in its opinion, that statutes are construed to presume the retention of jurisdiction rather than its divestment unless that divestment is clearly stated. See *In re Waite*, 188 Mich App 189, 202; 468 NW2d 912 (1991) (citing *Campbell v St John Hosp*, 434 Mich 608, 614, 455 NW2d 695 (1989)). However, this rule of interpretation is limited to the jurisdiction of the circuit court and other courts of general jurisdiction. See *Campbell*, 434 Mich at 614 (citing *Detroit Auto Inter-Ins Exch v Maurizio*, 129 Mich App 166, 341 NW2d 262 (1983)). Family courts are courts of limited jurisdiction. MCL 600.1021; *In re Kasuba Estate*, 401 Mich 560, 566, 258 NW2d 731 (1977). As noted in the argument in the Application for Leave to Appeal, MCL 712A.2, MCL 712A.6 and MCL 712A.18 cannot be construed in a manner that renders them unconstitutional. See *Sanders*, 495 Mich at 404, 412-13 ("At the onset, we note that the Court of Appeals' interpretation in *CR* of MCL 712A.6 and MCR 3.973(A) would seemingly grant trial courts unfettered authority to enter dispositional orders, as long as the court finds them to be in the child's best interests. This Court, however, has a duty to interpret statutes as being constitutional whenever possible." (citing *Taylor v Gate Pharm*, 468 Mich 1, 6, 658 NW2d 127 (2003))). Construing MCL 712A.6 and MCL 712A.18 to grant the family court subject matter jurisdiction to issue unreasonable orders compelling the parent of a juvenile delinquent to submit unreasonable searches that violate the constitutional protections in the Fourth

Amendment would render these statutes unconstitutional. See *Sanders*, 495 Mich at 412-13 (citing *Taylor*, 468 Mich at 6); *Moreno*, 203 P.3d at 1008.

Consequently, the drug testing order in this case does not fall within the range of the family court's subject matter jurisdiction. See MCL 712A.6, 712A.18; *Moreno*, 203 P3d at 1012; *Macomber*, 436 Mich at 391-92. As such, *Hatcher* does not bar a collateral attack on the family court's lack of subject matter jurisdiction in issuing the January 14, 2011 drug testing order. *Hatcher*, 443 Mich at 438-40.

**D. THE APPLICATION OF *HATCHER* TO THIS CASE WOULD NOT BAR THE CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE.**

In addition to challenging the subject matter jurisdiction of the family court, the Application for Leave to Appeal also challenged the sufficiency of the evidence in regards to the criminal contempt conviction. This issue was not a collateral challenge to the underlying drug testing order. Instead, it was a direct appeal of and challenge to the contempt conviction. As this issue is not a collateral attack, *Hatcher* does not apply to it. See *Hatcher*, 443 Mich at 438-40; *People v Matish*, 384 Mich 568, 572, 184 NW2d 915 (1971); *People v Boynton*, 154 Mich App 245, 247, 397 NW2d 191 (1986) (citing *Matish*, 384 Mich at 572).

**II. *HATCHER* CONFLICTS WITH *ROSE v AARON* TO THE EXTENT THAT IT PREVENTS COLLATERAL CHALLENGES TO THE SENTENCE IMPOSED FOR A CRIMINAL CONTEMPT CONVICTION BASED ON AN UNCONSTITUTIONAL ORDER.**

Even in the event that *Hatcher* applies to bar reversal of the criminal contempt conviction, a conflict would exist in that *Rose v Aaron*, 345 Mich 613, 615, 76 NW2d 829

(1956), prohibits the imposition of the remainder of the sentence. MCR 7.305(B)(5)((b). The trial court in *Rose v Aaron*, issued a temporary restraining order preventing the defendant from receiving gifts from, associating with, or visiting the plaintiff's wife. *Rose*, 345 Mich at 614. The defendant was held in contempt for violating this order and sentenced to 30 days in jail and \$50 in costs. *Id.* The trial court stayed its contempt order pending appeal, and the defendant appealed from the order finding him guilty of criminal contempt. *Id.* at 614-15 This Court held that the trial court erred in granting the underlying temporary restraining order. *Id.* at 614 (citing *Hadley v Hadley*, 323 Mich 555, 36 NW2d 144 (1949)). This Court also applied the collateral bar rule and declined to reverse the criminal contempt conviction. *Id.* at 615. (citing *Holland v Weed*, 87 Mich 584, 588, 49 NW 877 (1891)). However, this Court also held that because the underlying order was erroneous, the trial court was prohibited from imposing the remainder of the sentence that had been suspended pending appeal. *See id*; *see also Lester v. Sheriff of Oakland Cnty.*, 84 Mich App. 689, 698, 270 NW2d 493 (1978) (citing *Rose*, 345 Mich at 615).

The circumstances in this case are identical to those in *Rose*. As in *Rose*, the trial court granted a stay pending appeal and an appeal bond. (Mot. Hr'g Tr. 21:2-5, 21:15-20, Mar. 22, 2012; Register of Actions 7). Even though the criminal contempt conviction was affirmed, the Court of Appeals found that the underlying order was unconstitutional. (Ct App Slip Op 9-10). Ms. Dorsey served 42 days in jail out of her 93 day sentence before the sentence was stayed and the appeal bond was granted. (Sentencing Hr'g Tr. 5:10; Order of Contempt [Kelly Dorsey] ¶ 6, Feb. 10, 2012;

Register of Actions 7). Consequently, the remainder of the sentence cannot be imposed on Ms. Dorsey. See *Rose*, 345 Mich at 615 (citing *Holland*, 87 Mich at 588).

### **CONCLUSION**

In conclusion, *Hatcher* does not bar Ms. Dorsey from attacking the underlying January 14, 2011 drug testing order. This case is factually distinguishable from *Hatcher* in that Ms. Dorsey did not have court-appointed counsel until well after any opportunity to appeal the underlying order had passed. It is also distinguishable because (1) this case is a juvenile delinquency matter while *Hatcher* was a child protective abuse and neglect matter, (2) Ms. Dorsey would have an appeal only by leave in this case as opposed to the appeal by right enjoyed by the appellant in *Hatcher*, (3) in this case the due process protections were given to Ms. Dorsey's son, but not to her, (4) the termination order in *Hatcher* was rendered after the adjudication, and (5) finality is simply not nearly as important a factor in the context of drug testing as it is in the context of parental rights terminations.

Additionally, there are case law conflicts that would merit granting leave to appeal. MCR 7.305(B)(5)(b). *Hatcher* and the Court of Appeals opinion in this case conflict with *Maness* because according to *Maness* a person who is ordered in a state civil case to produce potentially incriminating information, without any grant of immunity from prosecution, may resist production and challenge the underlying order on appeal from the contempt conviction. *Maness*, 419 US at 460-61. The rule in *Maness* does not promote contempt towards court orders as the respondent still faces the very real risk of a contempt conviction if the appeal fails. *Hatcher* is also not applicable to challenges to the subject matter jurisdiction of the family court provided that the challenge is to the

subject matter jurisdiction of the family court and not the family court's exercise of its subject matter jurisdiction. See *Sanders*, 495 Mich at 412-13 (citing *Taylor*, 468 Mich at 6); *Moreno*, 203 P.3d at 1008; *Hatcher*, 443 Mich at 438-40. Lastly, the application of *Hatcher* in preventing a challenge to the sentence imposed on Ms. Dorsey after her conviction for criminal contempt would conflict with *Rose* as the balance of a criminal contempt sentence that has been stayed pending appeal cannot be imposed after the conviction is affirmed when the underlying order was erroneous or unconstitutional. See *Rose*, 345 Mich at 615 (citing *Holland*, 87 Mich at 588).

### **RELIEF REQUESTED**

Ms. Dorsey requests that this Court grant leave to appeal to address the issues in the application and that this Court ultimately reverse the opinion of the Court of Appeals in this case. Ms. Dorsey also requests the entry of a judgment of acquittal on the two show cause orders issued in this case. Alternatively, Ms. Dorsey requests a new trial and any other just relief.

Respectfully submitted,

November 12, 2015

/s/ Kurt T. Koehler

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STATE OF MICHIGAN  
IN THE SUPREME COURT

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IN RE CONTEMPT OF KELLY MICHELLE DORSEY,

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PEOPLE OF THE STATE OF MICHIGAN  
Petitioner-Appellee,

v

TYLER MICHAEL DORSEY,  
Respondent,

and

KELLY MICHELLE DORSEY,  
Appellant

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Supreme Court: 150298  
Court of Appeals: 309269  
44th Cir. Ct. Livingston County  
Family Division 08-12596-DL

**PROOF OF SERVICE**

In compliance with MCR 7.305(A)(3), I hereby certify that I served the Supplemental Brief and this proof of service, through the e-service functionality provided by truefiling.com, on William Worden, the attorney for the appellee, and Dennis Brewer, the attorney for Tyler Dorsey.

Respectfully Submitted,

November 12, 2015

/s/ Kurt T. Koehler

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