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STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals

IN RE DVL, MINOR

Supreme Court No. 166509

Court of Appeals No. 362365

_____/

Wayne Circuit Court No. 21-000658-NA

**The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.**

# BRIEF ON APPEAL OF APPELLEE DEPARTMENT OF HEALTH AND HUMAN SERVICES

**ORAL ARGUMENT REQUESTED**

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Dated: August 6, 2024

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## STATEMENT OF JURISDICTION

This Court has jurisdiction under MCR 7.303(B)(1) to review by appeal a case after a decision by the Court of Appeals.

On November 2, 2023, the Court of Appeals—in a split decision—affirmed the trial court's order asserting jurisdiction over DVL. *In re D V Lange,* unpublished per curiam opinion of the Court of Appeals, issued November 2, 2023 (Docket No. 362365), (attached as Appendix A). Lange filed a motion to reconsider, which was denied on December 7, 2023. (12/7/23 COA Order, attached as Appendix B.)

Lange filed an application for leave to appeal. MCR 7.305(C)(2)(c). On March 13, 2024, this Court scheduled oral argument on the application.

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

IA. Did the Court of Appeals correctly find that the trial court should have assumed jurisdiction over the minor child pursuant to MCL 712A.2(b)(1) and (2) under the circumstances of this case?

Appellant's answer: No.

Appellee's answer: Yes.

Trial court's answer: No.

Court of Appeals' answer: Yes.

IB. Was *In re Hockett*, 339 Mich App 250 (2021) correctly decided?

Appellant's answer: No.

Appellee's answer: Yes.

Trial court's answer: No.

Court of Appeals' answer: Yes.

IC. Does DVL qualify as a dependent homeless minor pursuant to MCL 712A.2(b)(3)(A)?

Appellant's answer: Yes.

Appellee's answer: No.

Trial Court's answer: Did not answer.

Court of Appeals' answer: No.

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## STATUTE INVOLVED

**MCL 712A.2 provides as follows.**

The court has the following authority and jurisdiction:

(a) Exclusive original jurisdiction superior to and regardless of the jurisdiction of another court in proceedings concerning a juvenile under 18 years of age who is found within the county if 1 or more of the following apply:

***

(b) Jurisdiction in proceedings concerning a juvenile under 18 years of age found within the county:

(1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship. As used in this sub-subdivision:

***

(B) "Neglect" means that term as defined in section 2 of the child abuse and neglect prevention act, 1982 PA 250, MCL 722.602.

(2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in. As used in this sub-subdivision, "neglect" means that term as defined in section 2 of the child abuse and neglect prevention act, 1982 PA 250, MCL 722.602.

(3) If the juvenile is dependent and is in danger of substantial physical or psychological harm. The juvenile may be found to be dependent when any of the following occurs:

(A) The juvenile is homeless or not domiciled with a parent or other legally responsible person.

(B) The juvenile has repeatedly run away from home and is beyond the control of a parent or other legally responsible person.

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(C) The juvenile is alleged to have committed a commercial sexual activity as that term is defined in section 462a of the Michigan penal code, 1931 PA 328, MCL 750.462a or a delinquent act that is the result of force, fraud, coercion, or manipulation exercised by a parent or other adult.

(D) The juvenile's custodial parent or legally responsible person has died or has become permanently incapacitated and no appropriate parent or legally responsible person is willing and able to provide care for the juvenile. 712A.2 Authority and jurisdiction of court.

(c) Exclusive original jurisdiction superior to and regardless of the jurisdiction of another court in proceedings concerning a juvenile under 18 years of age who is found within the county if 1 or more of the following apply:

***

(d) Jurisdiction in proceedings concerning a juvenile under 18 years of age found within the county:

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(2) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship. As used in this sub-subdivision:

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(C) The juvenile is alleged to have committed a commercial sexual activity as that term is defined in section 462a of the Michigan penal code, 1931 PA 328, MCL 750.462a or a delinquent act that is the result of force, fraud, coercion, or manipulation exercised by a parent or other adult.

(D) The juvenile's custodial parent or legally responsible person has died or has become permanently incapacitated and no appropriate parent or legally responsible person is willing and able to provide care for the juvenile.

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## INTRODUCTION

DVL's mother, Kathleen Lange, refused to pick DVL up from the hospital when he was medically ready for discharge in July 2021 when he was 13 years old because she did not believe that she could keep him and the other children in the home safe from him. Prior to filing its petition, the Department of Health and Human Services gave Lange options to keep DVL in the home and get him services to address his mental health issues. Lange refused. She continued to refuse having him in her home while the petition was pending and at the trial in mid-2022.

Despite Lange's refusal and the clear language of the jurisdictional statute in the Juvenile Code, the trial court did not assert jurisdiction. DHHS appealed, and a majority in the Court below found that the trial court clearly erred, reversed the trial court's decision, and remanded. Lange filed an application with this Court.

The majority of the Court of Appeals reached the correct outcome. In short, regardless of whether Lange's conduct was blameworthy or otherwise reflected poor parenting, there was no place to house DVL after Lange refused to take him home. Lange cannot use DVL's behavior as a safe harbor for her own behavior. For that reason, after the trial court refused to grant jurisdiction in 2022, the Department sought a *second* petition for jurisdiction and during the pendency of that petition, DVL was placed in a residential home. The trial court docketed the second petition but took no action to adjudicate it until the Court of Appeals issued its opinion in November 2023; in other words, the trial court essentially told DHHS to do all the things the court initially told it not to do. DHHS must have jurisdiction over DVL to take the appropriate steps to protect DVL's welfare in this circumstance.

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## COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

DHHS filed a petition seeking the trial court's jurisdiction over all three of Kathleen Lange's children when she refused to pick up her middle son, DVL, from the hospital. (7/22/21 DHHS Pet; 5/4/22 Tr. p 22.)

Lange has three children. They are JJL (age 17), DVL (age 16), and CRL (age 10).[1] Lange adopted DVL when he was five years old. (5/4/22 Tr. p 15.) Lange and her now former wife were married when DVL's adoption was final, but they could not both adopt him because same sex adoption was not yet legal; Lange is DVL's only legal parent. (*Id.* at 13.) Lange and her former wife adopted JJL and CRL together, and they share custody of those children. (*Id.* at 14.)

### DVL's mental health

DVL has been diagnosed with reactive attachment disorder (RAD), oppositional defiant disorder (ODD), post-traumatic stress disorder (PTSD), and attention deficit hyperactivity disorder (ADHD). (*Id.* at 15–16.) Lange was aware of DVL's mental health diagnoses and needs when she adopted him. (*Id.* at 15.) In late 2020, Lange decided to send DVL to a year-long program in Montana to address his mental health needs. (*Id.*) DVL was terminated from the program after six months because of his behavior. (*Id.* at 16.) He returned to Lange's home in April 2021, and she took him to St. John Hospital on June 4, 2021, for a psychiatric admission. (*Id.* at 19, 21.)

[1] The children were 15, 13, and 8 years old when DHHS filed its petition in 2021.

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**Lange refused to take DVL home.**

When medical personnel at St. John Hospital determined DVL was medically ready for discharge in July 2021, Lange refused to pick up DVL. (*Id.* at 22.) DHHS gave Lange options to have DVL in an outpatient program, but Lange refused. (*Id.*) Between July 2021 and the trial in May 2022, Lange did not make any effort to have DVL return to her home. (*Id.* at 23.) Lange made clear she did not want him in her home, explaining that his threatening behavior made her home unsafe for him and her other children; while DVL completed more than one psychiatric admission, he continued to be physically combative and verbally threatening. (*Id.* at 22-24.). (*Id.*)

**The trial court's findings**

The trial court denied jurisdiction and said Lange's efforts to get DVL help were sufficient. (6/16/22 Tr. pp 18–20; 7/19/22 Order of Adjudication.)

**The Department files a second petition**

Because the court dismissed DHHS' 2021 petition in June 2022 and Lange still refused to get DVL from placement, DHHS filed a second petition in July 2022. (8/2022 DHHS Am Pet.) The petition alleged that DVL still suffered from the same diagnoses, that Lange still refused to bring him home, and DVL had nowhere to go. (*Id.*) After authorizing the petition and DVL's placement into a residential setting, the court held pretrial hearings while waiting for the Court of Appeals to issue an opinion. It was not until after the Court of Appeals issued its opinion on November

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2, 2023, that the trial court agreed to act on DHHS' second petition and set the matter for a trial. Ultimately, DHHS withdrew the second petition (which did not include JJL or CRL) based upon the Court of Appeals' opinion. (11/30/2023 Order.)

**Proceedings in the Court of Appeals and the Michigan Supreme Court.**

On July 29, 2022, DHHS appealed the trial court's determination. In a split decision, the Court of Appeals reversed the trial court and remanded for additional proceedings. (Appendix A.) Lange then filed a motion for reconsideration; that motion was denied. (Appendix B.) Thereafter, Lange filed an application for leave to appeal in this Court and this Court ordered additional briefing on March 13, 2024.

## STANDARD OF REVIEW

This Court reviews "the trial court's decision to exercise jurisdiction for clear error in light of the court's findings of fact." *In re BZ,* 263 Mich App 286, 295 (2004). A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. MCR 2.613(C). Questions of statutory construction are reviewed de novo. *In re Est. of Von Greiff*, 509 Mich 292, 303 (2022).

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## ARGUMENT

### I. The Court of Appeals correctly found that the trial court should have assumed jurisdiction over the minor child pursuant to MCL 712A.2(b)(1) and (2) because there was nowhere for DVL to go without the court's intervention.

Simply put, DHHS does not have the authority to place children outside of a parent's home for treatment without a court's jurisdiction, let alone secure services for them. See MCL 712A.2; MCR 3.961 (initiating child protective proceedings). See also *In re Ferranti,* 504 Mich 1, 14–15 (2019) (describing the initiation process). Without the trial court taking jurisdiction over children, even those with mental health issues, there is no place for them to receive treatment unless their parents can secure treatment privately. For that reason, the Court of Appeals' prior decision in *In re Hockett*, 339 Mich App 250 (2021) was correctly decided. While the Department understands the reason for respondent's proposed resolution, the statutory language is unambiguous and does not provide this resolution. Any change will have to come from the Legislature.

#### A. There was a preponderance of the evidence to take jurisdiction over DVL under MCL 712A.2(b)(1) and (2).

The purpose of child protective proceedings is the protection of the child. *In re Brock*, 442 Mich 101, 107 (1993). "Child protective proceedings are generally divided into two phases: the adjudicative and the dispositional." *Id*. at 108. The adjudicative phase determines whether the trial court may exercise jurisdiction over the child. *Id*. To establish jurisdiction, the petitioner must prove by a preponderance of the evidence that a statutory ground exists under MCL 712A.2(b).

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*In re SLH*, 277 Mich App 662, 669 (2008). A "preponderance of the evidence" means evidence of a proposition that when weighed against the evidence opposed to the proposition "has more convincing force and the greater probability of truth." *People v Cross*, 281 Mich App 737, 740 (2008).

MCL 712A.2(b)(1) says a court has jurisdiction over a child "[w]hose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or *other care necessary* for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being." (Emphasis added.) Subsection (b)(2) allows a court jurisdiction over a child when a parent's "home or environment, by reason of neglect, is an unfit place" for the child to live.

Contrary to Lange's argument that "everyone" agreed that DVL could not return to Lange's home, see Lange's Br, pp 12, 14–15, 22, DHHS filed a petition seeking the trial court's jurisdiction because Lange did not provide proper or necessary support, other care necessary for DVL's health, when he is subject to a substantial risk of harm to his mental well-being and because Lange's home was unfit for DVL. Specifically, Lange refused to pick up DVL when he was medically ready for discharge in July 2021 because DVL would not be safe in her home. (5/4/22 Tr. p 22.) Lange then did not enroll him in an outpatient program even though DHHS was ready to facilitate those services; she insisted he go to an inpatient program even though medical professionals said he did not qualify for that level of treatment at that time. (*Id.*) Between July 2021, when DHHS filed its

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petition, and the trial in May 2022, Lange did not make any effort to have DVL return to her home. (*Id.* at 23.) Based upon Lange's position about DVL returning home and the language in MCL 712A.2(b)(1), (2), and (3), DHHS had to file a petition seeking the court's jurisdiction to protect DVL when Lange could not. Indeed, DVL's behavior does not create a safe harbor for Lange to avoid her obligation to her child.

Lange's behavior met the requirements in MCL 712A.2(b)(1) and (2) for the court to take jurisdiction, and it provided the only avenue by which the Department could secure DVL's welfare.

### B. *In re Hockett* was correctly decided, and DVL's mental health needs mirror those of the child in that case.

The Court of Appeals considered facts similar to DVL's when it decided *In re Hockett* in 2021. In late 2019, DHHS sought a trial court's jurisdiction because NRH's mother refused to get the child from the hospital. *In re Hockett*, 339 Mich App 250, 252 (2021). Like DVL, NRH's mother claimed his mental health needs were so great that he needed additional hospitalization. *Id.* The trial court heard testimony about NRH's mental health history and treatments and that his mother admittedly refused to bring him home. *Id.* at 253. The trial court concluded NRH's mother was neglectful when she refused to get him from the hospital even though, like with DVL, the court recognized the mother's difficult position. *Id.* at 255. In determining the trial court properly took jurisdiction, the Court of Appeals noted

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that NRH was receiving the kind of treatment his mother wanted for him *only after* the court took jurisdiction. *Id.*

Here, the trial court heard similar testimony. DVL has been diagnosed with reactive attachment disorder (RAD), oppositional defiant disorder (ODD), post-traumatic stress disorder (PTSD), and attention deficit hyperactivity disorder (ADHD). (5/4/22 Tr. pp 15–16.) Lange was aware of DVL's mental health diagnoses and needs when she adopted him at five years old. (*Id.* at 15.)

In late 2020, Lange sent DVL to an out-of-state year-long program to address his mental health needs; however, DVL was terminated from the program after six months because of his behavior. (*Id.* at 15–16.) He returned to Lange's home in April 2021, and she took him to St. John Hospital on June 4, 2021, for a psychiatric admission. (*Id.* at 19, 21.)

She also did not pick up DVL when medical personnel at St. John Hospital determined DVL was medically ready for discharge in July 2021. (*Id.* at 22.) Even so, DHHS gave Lange options to have DVL in an intensive outpatient program, but Lange refused. (*Id.*) Between July 2021 and the trial in May 2022, Lange did not make any effort to have DVL return to her home. (*Id.* at 23.) Lange made clear she did not want him in her home. (*Id.*)

Unlike the trial court in *Hockett*, the trial court here did not take jurisdiction over DVL, even though Lange said multiple times she did not want him in her home, and she had made little to no effort to visit with him between July 2021 and the trial in May 2022. (*Id.*) Consist with the Department's analysis above, *In re*

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*Hockett* was correctly decided because, regardless whether the respondent parent is blameworthy, DHHS must act to ensure both the safety of the children at issue, NRH in *In re Hockett* and DVL here, and other children like them, because their parents did not keep them safe. DHHS had no other statutory mechanism but to seek the court's authority for placement under MCL 712A.2, and Lange should not be able to use DVL's behavior as a safe harbor.

### C. DVL's mental health needs do not fit under MCL 712A.2(b)(3) because he is not dependent, so jurisdiction is essential to enable the Department to take the appropriate steps to protect DVL's welfare.

The Court's suggestion in the question and Lange's argument here that DHHS file a petition under MCL 712A.2(b)(3), see Lange's Br, pp 30–34, is misplaced because DHHS cannot legally file a "dependency" petition under these circumstances. The allegations that brought DVL to DHHS' attention do not fit under any provision of that statute. DVL is not homeless; he has a home, but Lange has refused to allow him to remain there. See MCL 712A.2(b)(3)(A). DVL has not repeatedly run away from home and is not beyond the control of his parent. See MCL 712A.2(b)(3)(B). DVL has not committed a commercial sexual activity, i.e., human trafficking. See MCL 712A.2(b)(3)(C). And, lastly, Lange has not died and is not permanently incapacitated. See MCL 712A.2(b)(3)(D).

DVL is not homeless because, again, he has a home with Lange, but she has not allowed him to return. Lange cannot now use MCL 712A.2(b)(3)(A) as a way for the court to take jurisdiction and hold her harmless because she created the

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scenario for DVL to be without a home. The Court of Appeals dealt with a similar issue in *In re Diaz/Orozco*, 279 Mich App 12 (2008) when DHHS assisted in facilitating the parents' deportation from the United States and then petitioned the trial court for jurisdiction and termination of the deported parents' parental rights. The Court of Appeals reversed the trial court and found that when the state deliberately acts with the purpose of "virtually assur[ing] the creation of a ground for termination of parental rights," and then proceeds to seek termination on that very ground, the state violates the due process rights of the parent. *Id*. at 19–20. While DHHS did not create the circumstances here, Lange created them, doing essentially the same thing DHHS did in *In re Diaz/Orozco*; in other words, Lange created the circumstances of DVL's homelessness when she did not take him home and claims his behavior is the reason he is homeless.

Simply put, Lange will not have DVL in her home. She did not pick him up from a hospital when he was medically ready for discharge. Her actions fit the definition of grounds under which a court must take jurisdiction under the Juvenile Code. See MCL 712A.2(b)(1) and (2).

Since there was no place to house DVL, the Department was duty bound to seek jurisdiction. The bottom line is that Lange still does not want DVL in her home regardless of her reasons, and DHHS cannot just leave DVL without assistance and ignore his needs. If this Court determines DHHS should not have filed a petition and the trial court correctly dismissed the matter, the best DHHS can do for DVL and young people like him is to leave them at the nearest homeless

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center and hope for the best. Simply put, DHHS does not have any authority to place children without a trial court's jurisdiction, let alone secure services for them. See MCL 712A.2; MCR 3.961 (initiating child protective proceedings). See also *In re Ferranti,* 504 Mich 1, 14–15 (2019) (describing the initiation process). Without the trial court taking jurisdiction over children, even those with mental health issues, there is no place for them to receive treatment unless their parents can secure treatment privately. Indeed, even MCL 712A.2(b)(3), including (A) ("[t]he juvenile is homeless") – the "dependency" portion of the jurisdictional statute – requires that a trial court have jurisdiction before intervening on behalf of children.

The Legislature can amend MCL 712A.2(b)(3) to include a category giving DHHS the same placement authority it already possesses to place children and service them for severe mental health issues under subsections (1), (2), and (3) without categorizing the parent's actions as neglect. Lange suggests that the Department should have provided services to Lange "without court involvement," see Lange's Br, pp 34–38, but the circumstance here is governed by the framework of MCL 712A.2(b)(3)(A), even though as a legal matter, DVL would only qualify as a homeless child because Lange has refused to place him in her home for the security of others in her home and, again, a parent should not be permitted to create the circumstance of homelessness and use that circumstance as a safe harbor. Until the Legislature amends the law, the Department is bound to follow the procedures outlined in MCL 712A.2(b).

The Court of Appeals correctly reversed the trial court.

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## CONCLUSION AND RELIEF REQUESTED

DHHS requests this Court affirm the Court of Appeals and allow DVL and Lange the opportunity to continue to receive the services they both have received since 2021 through the trial court's jurisdiction.

Respectfully submitted,

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## WORD COUNT STATEMENT

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