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STATE OF MICHIGAN
IN THE SUPREME COURT
FROM THE COURT OF APPEALS

IN RE D V LANGE MINOR

Supreme Court Case No. 166509

Court of Appeals Case No. 362365

Wayne County Circuit Court, Juvenile Division Case No. 2021-000658-NA

_____/

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APPELLANT-MOTHER'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Everyone involved in this case agrees on the appropriate resolution: state-provided residential treatment for the child, DVL. The only question is how, administratively, to arrange for that treatment.

First, DHHS insists that it cannot assist Ms. Lange without a court taking jurisdiction. To support this claim, DHHS cites the Michigan statute and court rule that explain how a court takes jurisdiction – not language stating that DHHS must follow this procedure before helping any family. DHHS Br. at 5 (citing MCL 712A.2 and MCR 3.961). 712A.2 explains that the "court has the following authority and jurisdiction . . . ." It does not say anything about DHHS's authority, or limits on it. MCR 3.961 simply lays out what must be in a petition where there is a "request for court action to protect a child."

But DHHS is not so limited. As explained in Ms. Lange's opening brief, DHHS's own Adoption Policy Manual specifically mentions its program designed to help families like Ms. Lange and DVL without the involvement of the courts. That document indicates that funds are available to assist with "treatment of physical, mental or emotional conditions" including the very treatment DVL needs – "[t]emporary out-of-home placement.[1] " DHHS provides absolutely no response to this point at all – it just dogmatically asserts: "Simply put, DHHS does not have the

[1] Michigan Department of Health and Human Services, *Adoption Services Manual*, *Post Adoption Services ADM 0990*, ADB 2013-003 (October 10, 2013) <https://dhhs.michigan.gov/olmweb/ex/AD/Public/ADM/0990.pdf >

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authority to place children outside of a parent's home for treatment without a court's jurisdiction, let alone secure services for them." DHHS Br. at 5.

But even if DHHS were correct that jurisdiction is necessary, it is unclear why it so steadfastly continues to insist that the correct path to jurisdiction is through 712A.2(b)(1) or (b)(2), instead of 712A.2(b)(3). Those first two sections require blame be assigned to the parent – that she "refuses" to provide care "when able to do so" or has engaged in some sort of "neglect." 712A.2(b)(1)-(2). Yet the trial court specifically found in this case that Ms. Lange had made "Herculean efforts" to deal with DVL's mental health issues, 9a, and also found DHHS had failed to make any factual showing of "what the mother . . . was supposed to do except . . . to go pick him up at the hospital . . . even if it means that her other children are going to be abused." 25a. The lawyer-guardian ad litem, advocating for DVL, agrees that Ms. Lange "was not neglectful," and goes so far as to say she would have been neglectful if she had "taken DVL home without treatment." Minor Child's Br. at 6.

DHHS appears to be asking this Court to simply disregard those factual findings. But challenges to the trial court's jurisdiction decision are reviewed for clear error "in light of the court's finding of fact." *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). And a clearly erroneous determination can only be made after giving "due regard to the trial court's special opportunity to observe the witnesses." *Id.* at 296-97. The trial court's finding that Ms. Lange had not

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neglected DVL or refused to provide him care was correct; it certainly was not clearly erroneous.

Meanwhile, 712A.2(b)(3) does provide a path for jurisdiction[2], without requiring any finding of neglect. It applies to any juvenile who is "dependent and is in danger of substantial physical or psychological harm" and defines "dependent" to include one who is "homeless." 712A.2(b)(3)(A). That is DVL's precise situation; indeed, the trial court specifically suggested to DHHS that "perhaps a dependency petition can be filed." 26a.

DHHS claims that the language of (b)(3) must be construed so narrowly that it does not confer jurisdiction here, yet (b)(1) and (b)(2) must be construed so broadly that they do. The consequences of that approach are significant: by conferring blame on Ms. Lange where none is due, it interferes with her constitutional right to parent her son. She would be unable to visit with JVL, or direct his care, without court permission. This Court should reverse the Court of Appeals and make three rulings:

(1) jurisdiction in this case is improper under (b)(1) and (b)(2);

(2) DHHS nevertheless has the authority to assist JVL in cases like this one, where the parent and DHHS agree on the proper treatment plan; and

[2] Both the L-GAL and the Children's Law Section have submitted briefs in this case agreeing that jurisdiction is not appropriate under sections (b)(1) and (b)(2), but is appropriate under (b)(3). *See* Minor Child's Br. on Appeal; Amicus Curiae Br. of the Children's Law Section.

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(3) the appropriate path to jurisdiction in this case, if DHHS wishes to pursue one, would be under section (b)(3).

I. Jurisdiction under sections (b)(1) and (b)(2) is improper, as Ms. Lange did not refuse to provide proper care and did not neglect DVL.

Recognizing that sections (b)(1) and (b)(2) both require some sort of action or inaction by a parent before jurisdiction can be conferred, DHHS offers several suggestions for why it would be fair to blame Ms. Lange for DVL's situation. DHHS repeatedly claims that Ms. Lange "refused" to pick up DVL from the hospital because she did not "believe" she could keep DVL and his siblings safe. DHHS Br. at 1, 2, 6-7. DHHS accuses Ms. Lange, twice, of using DVL's behavior as a "safe harbor" for her own actions. *Id.* at 1, 7. It even makes the (somewhat insulting) suggestion that she did not "want" him in her home. *Id.* at 2, 8.

None of DHHS's accusations are remotely supported by the record, in light of section (b)(1)'s provision that refusing to provide care is only grounds for jurisdiction when the parent is "able to do so" and section (b)(2)'s requirement that the home must be unfit "by reason of neglect." The trial court could not "find that [Ms. Lange has] been neglectful or abusive." 26a. Judge Redford, writing in dissent, opined that there was "no indication that DVL's mother did anything other than undertake exhaustive, comprehensive, and costly measures to try to care for DVL" and not taking him home "was not an act of neglect" because there was no evidence "that she was able . . . to provide DVL with the proper or necessary support in her home." *In re Lange*, unpublished per curiam opinion of the Court of Appeals, issued

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November 2, 2023 (Docket No. 362365) (REDFORD, J., dissenting) at 3. Even the Court of Appeals majority opinion, ruling that jurisdiction was appropriate, first admitted that Ms. Lange's "refusal" to provide care was "based upon DVL's . . . ongoing mental health issues that made him a significant threat to himself and others." *In re Lange*, unpublished per curiam opinion of the Court of Appeals, issued November 2, 2023 (Docket No. 362365) at 2. Simply put, there was no factual showing that Ms. Lange refused to provide care that she was <u>able</u> to provide, or neglected DVL in any way.

DHHS does briefly suggest that, perhaps, (b)(1) or (b)(2) can confer jurisdiction even when the parent is blameless. It argues that the outcome at the Court of Appeals was correct "regardless of whether Lange's conduct was blameworthy." DHHS Br. at 1. And it claims that *In re Hockett* was correctly decided "because, regardless whether the respondent parent is blameworthy, DHHS must act" to ensure the safety of the child. *Id.* at 8-9. The Court of Appeals majority agreed, relying on language in *In re Hockett* conceding it was "unfortunate" that the Michigan statute "uses the word 'unfit' to describe situations like this" because "[u]nfitness connotes active wrongdoing" and asserting that "culpability is not a prerequisite for court intervention." Slip op. at 4 (quoting *In re Hockett*, 339 Mich App 250, 256; 981 NW2d 534 (2021)).

But the Court of Appeals cannot ignore language in a statute simply because it finds it "unfortunate" that it was used. Section (b)(1) requires a showing that the

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parent refused to do something she was "able" to do; section (b)(2) requires some actual "neglect." Neither was satisfied here, and thus jurisdiction was improper.

DHHS makes one last suggestion – that this Court adopt its reading of (b)(1) and (b)(2) "[u]ntil the Legislature amends the law." DHHS Br. at 11; see also DHHS Br. at 5 ("Any change will have to come from the Legislature."). But if this Court allows DHHS to continue to take jurisdiction in cases like this, there would be no need for a legislative fix. It is only if this Court holds that there are limits on jurisdiction, and the Legislature is concerned about those limits, that it is likely to step in.

II. If DHHS wishes to seek court jurisdiction, section (b)(3) is the appropriate path to pursue.

Meanwhile, if DHHS wishes to seek court jurisdiction in this case, section (b)(3) would provide it. As explained in Ms. Lange's opening brief, jurisdiction would be appropriate under (b)(3) because DVL qualifies as "homeless" and thus as a dependent under the statute. Both Michigan and federal statutes define a "homeless" individual to be one who does not have an "adequate" nighttime residence. Here, Ms. Lange's home – which the trial court found to be unsafe for DVL and for his siblings if he were to return there – was inadequate.

DHHS ignores the point that a home must be adequate; it simply asserts (twice) that DVL "has a home." DHHS Br. at 9. But it does not argue, and cannot argue given the evidence presented and the factual findings of the trial court, that this home would actually be a proper one for DVL given his immense needs.

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Instead, DHHS argues that DVL cannot qualify as homeless because Ms. Lange would not allow him in the home, and that somehow means he has a home. DHHS Br. 9-10. But there is nothing in (b)(3) that speaks to the reasons a child has no home – it simply indicates jurisdiction would be proper if a juvenile is "homeless" (and is in danger of harm). The case on which DHHS relies, *In re B and J*, 279 Mich App 12; 756 NW2d 234 (2008)[3], is inapposite. In that case, the Court of Appeals held that the state cannot terminate a parent's rights when it was the state that "intentionally set out to create" the grounds for that termination. *Id.* at 19. That holding has no bearing on when the state might act due to circumstances that exist outside of state action. DHHS seems to suggest a parent might unfairly benefit from reading this jurisdictional provision broadly – that it would allow a parent to artificially "create" circumstances so the court would have jurisdiction over their child. This, of course, is not something any parent would ever do, and is certainly not something Ms. Lange did here. The Court should find that jurisdiction would be proper in this case under 712A.2(b)(3).

[3] DHHS refers to this case as *In re Diaz/Orozco* in its brief. Appellant believes the proper case name is *In re B and J*.

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CONCLUSION

For the reasons mentioned above, Ms. Lange respectfully asks this Court to reverse the Court of Appeals decision mandating that the trial court take jurisdiction over DVL under MCL 712A.2(b)(1) and (b)(2) and hold instead that jurisdiction is appropriate under MCL 712A.2(b)(3)(A).

Respectfully submitted,

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Statement of Countable Words

The foregoing reply brief of appellant-mother contains 1,890 countable words, so it conforms with the requirements of MCR 7.212(B) & (G).