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SCWC-21-0000283

IN THE SUPREME COURT OF THE STATE OF HAWAII

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IN THE INTEREST OF JB

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CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(CAAP-21-0000283; FC-S NO. 17-00089)

DISSENTING OPINION BY WILSON, J.

Again the Majority rejects the protection due parents under Article I, section 5 of the Hawai'i Constitution who face action by the State to take their children. JB's indigent father failed to appear at hearings held in child custody proceedings and as a result, the Family Court of the First Circuit ("family court") *sua sponte* discharged his court appointed counsel on April 17, 2018. Father later appeared with his attorney at the hearing to terminate his right to parent his son JB. He requested leave of court to defend his parental rights. He had been previously defaulted by the family court and requested the default be set aside in order for him to enter

an appearance with his attorney. Father explained that he failed to appear previously because he believed JB's maternal grandfather would be awarded custody of JB. Because he learned that was not true, he came to court to protect his right to be the legal parent of his son. The court denied his request to be a party in the proceeding that was underway and terminated his rights as a parent.

The purported reason he and his counsel were precluded by the family court from defending his right to be a father to JB was that Father waited too long to appear. There was no finding that the trial could not be continued, or that Father's attorney was unable to proceed within a reasonable time period.

The Intermediate Court of Appeals ("ICA") correctly concluded that the family court violated Father's right to counsel by *sua sponte* discharging his court appointed counsel on April 17, 2018 when Father failed to appear for the continued hearing on the Department of Human Service's ("DHS") petition for temporary foster custody.

Applying the new fairness standard, it adopted in In re JH, SCWC-21-0000316, 2023 WL 2518743 (Haw. Mar. 15, 2023), the Majority reverses the ICA to conclude the proceedings were fair. As noted in my dissent to JH, in so doing the Majority guts the protection afforded families in Hawai'i by the structural error standard. Until the Majority decision in JH,

violation of an indigent parent's right to counsel in a parental rights proceeding posed a fundamental threat to the fairness of the proceeding that required application of the structural error standard and a new hearing. The injustice to JB's father resulting from the Majority's adoption of the "fairness" standard is a florid example of the danger to families posed by this new, weak "fairness" standard. Though JB's father and his lawyer appeared at the termination hearing, they were barred from the proceeding notwithstanding that the family court had violated father's right to counsel by previously discharging his attorney. As noted, When Father appeared at the termination hearing, he stated that the reason he was previously absent from the proceedings was because he was under the false impression (from information relayed to him by DHS) that JB was going to be placed with maternal grandfather. Had Father's counsel not been discharged by the family court, it is likely that Father would have found out far sooner that JB was not being placed with maternal grandfather.

I respectfully dissent to the severe diminution of the protection of indigent parents' right to counsel caused by replacement of the formidable structural error standard with the weak "fairness" standard in all cases wherein an indigent parent's right to counsel is violated by courts' wrongful

termination of counsel. JB's father is due another parental rights termination hearing.

DATED: Honolulu, Hawai'i, March 24, 2023.

/s/ Michael Wilson

