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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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IN THE INTEREST OF JH

SCWC-21-0000316

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-21-0000316; FC-S NO. 18-00251)

MARCH 24, 2023

DISSENTING OPINION BY WILSON, J.

The relationship between children and parents in our society is of preeminent importance. To protect the family from separation by unjust government removal of children from their parents, a panoply of constitutional rights protects the sacrosanct family bond from being broken by the State without adequate justification. Parenting is a constitutionally guaranteed right. Troxel v. Granville, 530 U.S. 57, 65, 120 S. Ct. 2054, 2060 (2000) ("The liberty interest at issue in this case - the interest of parents in the care, custody, and control of their children - is perhaps the oldest of the fundamental

liberty interests recognized by this Court."); In re Doe, 99 Hawai'i 522, 533, 57 P.3d 447, 458 (2002) ("We affirm, independent of the federal constitution, that parents have a substantive liberty interest in the care, custody, and control of their children protected by the due process clause of article I, section 5 of the Hawai'i Constitution."). Where the State seeks to take a child from parents, the interests at stake for the children, the parents and the State are of the highest order. See In re TM, 131 Hawai'i 419, 434, 319 P.3d 338, 353 (2014) ("the State's decision to deprive a parent of his or her child is often 'more grievous' than the State's decision to incarcerate a criminal defendant.") (citations and quotations omitted). Our families in Hawai'i are protected from unjust loss of their children by the constitutional right to counsel for indigent parents facing action by the State seeking to take custody of their children or to terminate their parental rights. See, e.g., In re L.I., 149 Hawai'i 118, 119, 482 P.3d 1079, 1080 (2021) (holding that the failure to appoint counsel at the time the State filed its petition for family supervision was structural error). It is settled that any parent who cannot afford an attorney is constitutionally entitled to court appointed counsel in actions by the State to end their parental rights. TM, 131 Hawai'i at 421, 319 P.3d at 340 ("courts must appoint counsel for indigent parents once DHS files a petition

to assert foster custody over a child."). Prior to the Majority's decision in this case, violation of the right to counsel in parental termination cases was of such severity that it constituted structural error that could only be remedied by a new hearing with legal representation afforded the parents. The Majority now guts the right to counsel by rejecting the structural error standard and replacing it with a weak "fairness" standard that allows for the Majority's conclusion that deprivation of JH's parents' constitutional right to counsel was fair.¹

Mother and Father were appointed counsel at the October 12, 2018 initial hearing on the Department of Human Service's ("DHS") petition for temporary foster custody. The Family Court of the First Circuit ("family court") later *sua sponte* dismissed their attorneys when parents did not appear for

¹ The Majority declares that the five month period when parents were wrongfully deprived of right to counsel did "not materially impact[] their ability to present their case." Respectfully, this is exactly the speculative armchair analysis that this court sought to avoid by applying the protection of structural error such that the fundamental due process rights of parents are not subject to "the vagaries of a case-by-case approach." TM, 131 Hawai'i at 435, 319 P.3d at 354. No record can exist of the importance of five months of representation when the family court has deprived the parent of representation during that time. Surmising that the five months of representation would have been of no value to parents in their preparation for a hearing on the termination of their parental rights contravenes the importance of the right to counsel under Article I, section 5. Why not surmise, consistent with the importance of the right to counsel, that during that five-month period counsel could have encouraged and assisted parents to receive family counseling, obtain employment and otherwise establish a record that would demonstrate their competency to be JH's parents. It is this speculative surmise by courts justifying violation of parents' right to counsel that the protection afforded by structural error analysis is meant to prevent.

a continued hearing on DHS's petition for foster custody on August 14, 2019. The family court further ordered that notice of all future hearings to the parents be waived. Presumably without notice of the family court action discharging their attorneys, parents may have been under the belief counsel represented them. For over five months the parents of JH were without counsel as the family court and the State proceeded to prepare for a January 21, 2020 hearing to terminate their right to be the parents of JH. On January 14, 2020, DHS filed its Motion to Terminate Parental Rights without notifying parents. Inexplicably, DHS served notice on the parents' prior attorneys who had been discharged by the family court. It appears that parents did not learn that they were unrepresented, nor that they were facing a motion for termination of parental rights until January 21, 2020 when they appeared in court for a periodic review hearing. At that time, at least Mother learned for the first time that the family court had intended to decide their parental termination rights that day in their absence.

The Majority does not dispute that parents' right to counsel was violated during the five-month period between the continued hearing on DHS's petition for foster custody and the review hearing when counsel was reappointed.² Nor does the

² The right to counsel attached "once DHS file[d] a petition to assert foster custody over a child." See L.I., 149 Hawai'i at 122, 482 P.3d at 1083.

Majority dispute that parents were presumably unaware that they were without representation for five months. And there is no dispute that the family court ordered that it was not necessary to notify parents that a motion was filed to terminate their parental rights.

As correctly determined by the Intermediate Court of Appeals ("ICA"), the parents constitutional right to counsel was abrogated when the family court dismissed their counsel, ordered that they no longer were entitled to be notified of future proceedings and thereafter scheduled a hearing to determine their parental rights with the assumption that parents would be absent from the hearing. Prior to the Majority's ruling, it has been settled that a proceeding to determine parental rights conducted in violation of parents' right to counsel is fundamentally unfair. The structure of the proceeding becomes unfair. Because Mother and Father's respective counsel were discharged after DHS petitioned for temporary foster custody but before their parental rights were terminated, the family court's failure to provide parents with adequate representation "cannot be deemed harmless." L.I., 149 Hawai'i at 123, 482 P.3d at 1084 ("The family court's failure to appoint Mother counsel when DHS filed its petition for family supervision was structural error and cannot be deemed harmless."). Of what advantage to the family or the courts is the discharge of an indigent parent's

counsel? The opportunity for participation of the parent with a lawyer - whose advice is deemed under the Hawai'i State Constitution to be so essential as to require court-appointment - is lost. On the other hand, even where an indigent parent who fails to appear for a hearing is defaulted, if parent's counsel is not discharged by the court, the parent continues to have representation by court-appointed counsel who, as an attorney continuing in the case, will have the professional and economic incentive to contact the parent. Court-appointed counsel will also have the duty to respond if the parent requests further advice, including the set-aside of a default judgment. Had counsel for JH's parents not been terminated by the family court, the issue of deprivation of counsel would not have arisen in this case. Nor would the Father in In re JB, SCWC-21-0000283, 2023 WL 2553925 (Haw. Mar. 17, 2023) have been prejudiced if the family court had allowed counsel to continue. As with the parents of JH, the family court terminated counsel for JB's indigent father because he failed to appear at a continued hearing on DHS's petition for temporary foster custody.

The ICA rightly found that once there is a violation of the right to counsel for a parent facing termination of parental rights, the threat to the fundamental fairness of the judicial process is of such magnitude that a structural error

has been committed requiring a new parental rights determination.

The Majority concedes that until JH's case, the structural error standard protected indigent parents by requiring a new termination hearing when their right to counsel was violated.³ But now the Majority provides a new analysis finding the proceedings to be fair notwithstanding that (1) the family court discharged parents' counsel and waived notice to parents of future hearings; (2) the family court scheduled a hearing to consider termination of their parental rights in the parents' absence; and (3) parents were unjustly deprived of five months of representation before the decision terminating their parental rights was entered.

Starkly contradicting the settled principle recognized by the ICA that violation of an indigent parents right to

³ The Majority limits the holding of T.M. and L.I. to instances where the family court fails to appoint counsel for indigent parents at the outset when a petition for family supervision or foster custody is filed. While it is true that under the facts of T.M. and L.I., this court found structural error was committed due to the family court's delay in appointing counsel, the rationale for applying a structural error analysis applies equally where the family court discharges an indigent parent's counsel. The violation of right to counsel is not necessarily of greater consequence at the beginning of the case than later in the case. The Majority's finding that the failure to appoint counsel is of greater consequence than the discharge of counsel leads to false assumptions such as that made by the Majority that the five-month period parents were without counsel was of no consequence. Under this false analysis, a parent whose attorney was timely appointed at the inception of a case, but was thereafter improperly discharged by the court before a termination of rights hearing would be less deserving of the due process right to counsel than the parent who receives the protection of structural error because counsel is not appointed until shortly after the beginning of child custody proceedings.

counsel constitutes structural error⁴ infecting the fairness of the termination of parental rights proceeding, the Majority condones the family court's termination of parents' counsel and removal of their parental rights by applying for the first time a harmless error/fairness analysis. The Majority looks back at the proceedings that occurred after the violation of parents' right to counsel and finds fairness.⁵ Thus, the profound protection of parental rights provided by a structural error remedy is discarded in favor of an analysis that allows the appellate court to parse the record and decide whether - notwithstanding the violation of parents right to counsel - a harmless injustice occurred.

⁴ As the ICA explained, citing L.I., 149 Hawai'i at 122, 482 P.3d at 1083, a structural error analysis ensures that parents' fundamental due process rights "are not subject to 'the vagaries of a case-by-case approach.'" Harmless error, on the other hand, invites the "vagaries of a case-by-case approach[.]" Id.

⁵ In rejecting the structural error protection for the parents of JH, the Majority notes that counsel represented parents for 22 of 27 months. Yet the Majority concedes that, if, at the beginning of the case, counsel was not appointed in a timely manner, structural error would apply and "the vagaries of a case-by-case approach" under the Majority's new fairness standard would be inapplicable. Compare the prejudice resulting from the deprivation of five months of representation to the lesser prejudice, for example, from the delay of one month of appointment of counsel after DHS files a petition for family supervision or foster custody. Why should the weaker "fairness" standard apply to the five-month deprivation of counsel and the much stronger structural error standard apply to the shorter, presumably less prejudicial, violation of right to counsel from a one-month delay in appointment of counsel?

Thus, it is unclear how the Majority squares its fairness analysis with its test for structural error. Wouldn't the importance of structural error protection be greater where the wrongful discharge of parents' counsel occurred after the initial appointment of counsel and deprived parents of representation for five months?

Respectfully, heretofore it was a core legal consensus and an unquestioned precept of constitutional justice that a termination of parental rights proceeding conducted after deprivation of the right to counsel constitutes structural error because deprivation of counsel is a threat to the fundamental fairness of the very structure of the proceedings meant to ensure the safety of families and protect the sacrosanct relationship between parent and child. The Majority offers inadequate⁶ justification for its departure from settled precedent applying the structural error standard. There is no evidence suggesting that family courts will be overwhelmed if violations of parents' right to counsel constitute structural error requiring a new hearing on the termination of parental rights; nor is there evidence that indigent parents are creating administrative problems by manipulating the courts to delay proceedings by not appearing at scheduled termination hearings. In this case, there was no apparent effort by the family court or DHS to inform the parents of the proceedings designed to terminate their right to be with their children.

⁶ Some discussion in the Majority opinion notes that it would "cause friction" with the two-year time period to prepare a family service plan in HRS § 587A-33(a) if parents prevailed on appeal and thereafter on remand received a new parental rights termination hearing. But indigent parents constitutional right to counsel cannot be dependent on the two-year time period for preparation of a family service plan. The court's violation of parents right to counsel is not rendered harmless because the parents' lawful appeal to an appellate court of the state of Hawai'i takes more than two years.

The new rule adopted by the Majority—that proceedings terminating parental rights can be just when done after parents are deprived of right to counsel—unnecessarily defies the bedrock constitutional principle that families must be protected by the application of structural error when the State seeks to take children from their parents. The Majority's analysis assumes (1) that legal representation of the parents for the five months at issue would not have made a difference and (2) that it can be said beyond a reasonable doubt that deprivation of the right to counsel for parents whose parental rights are at stake is of no consequence. These assumptions are unfounded and dangerous, and they undermine the integrity of the judicial process by discarding the protections afforded by the recognition that removal of a parents' right to counsel threatens the very structure that ensures the fairness of the judicial system.

Respectfully, on this record of willing parents whose fear of losing their child causes them to persevere and bring their plea for justice all the way to the Supreme Court of the State of Hawai'i, it cannot be said beyond a reasonable doubt that deprivation of their right to be represented after the State sought temporary custody of their child was harmless. To even apply the harmless error analysis deprecates the seriousness of the rights of parents to be with their children.

Families, children, parents and our society deserve the constitutional protection of the application of structural error whenever parents are deprived of the right counsel at the fateful proceedings to determine their parental rights. The ICA was correct. Application of the harmless error/fairness standard cheapens the right to counsel for families facing termination of parental rights.

I respectfully dissent. Article I, section 5 of the Hawai'i Constitution protects our families from the State taking children from indigent parents whose right to counsel is violated when the court wrongly discharges their attorney after DHS files a petition to assert foster custody over a child. The profound societal implications resulting from the deprivation of the right to counsel to indigent parents facing the loss of a child necessitates the protection of the structural error standard when the court abrogates that fundamental right. The parents of JH should receive a new hearing on the motion to terminate their rights to be the parents of their child.

/s/ Michael D. Wilson

