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IN THE SUPREME COURT OF THE STATE OF HAWAII

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IN THE INTEREST OF THE P CHILDREN

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SCWC-22-0000636

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(CAAP-22-0000636; FC-S NO. 19-1-0083 and FC-S NO. 19-1-0084)

FEBRUARY 13, 2025

DISSENTING OPINION BY DEVENS, J.

I respectfully dissent and would affirm the Intermediate Court of Appeals' (ICA) decision vacating the family court's September 26, 2022 orders revoking foster custody, granting the Department of Human Services (DHS) permanent custody of the children, and ordering the adoption of the children. The family court failed to appoint counsel for Mother until November 12, 2019, a lapse of over five months after the State filed its initial petition for family supervision on June 6, 2019, and over four months after the family court granted the State

temporary foster custody on June 21, 2019 and Mother made her first appearance before the family court on July 2, 2019.

I respectfully disagree with the Majority based on this court's prior pronouncements that an indigent parent has a constitutional and "guaranteed" right to court-appointed counsel "as soon as" the State "files" a petition seeking child custody because it is "[a]t that point" that a parent's rights are "substantially affected" and counsel is required.<sup>1</sup> In re T.M., 131 Hawai'i 419, 435-36, 319 P.3d 338, 354-55 (2014); see also In re L.I., 149 Hawai'i 118, 119, 122, 482 P.3d 1079, 1080, 1083 (2021); In re JH, 152 Hawai'i 373, 378, 526 P.3d 350, 355 (2023). Because the ICA adhered to and applied this court's established precedent in rendering its decision, I would affirm the ICA's judgment on appeal vacating the family court's orders entered on September 26, 2022 and the court's orders affecting custody of the children issued from June 21, 2019.

Contrary to the Majority's expressed concerns, appointing counsel "as soon as" the State initiates a parental rights proceeding, as this court mandated in its past decisions, does

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<sup>1</sup> Hawai'i Revised Statutes (HRS) § 587A-33(i) creates a two-year timeline for DHS to file a motion to terminate parental rights if the child is in foster care for fifteen months during that time. HRS § 587A-33(i) (2018) ("Absent compelling reasons, if the child has been in foster care under the department's responsibility for an aggregate of fifteen out of the most recent twenty-two months from the date of entry into foster care, the department shall file a motion to terminate parental rights.").

not conflict, contradict, or undermine the best interests of a child. By the time DHS files a petition for family supervision or temporary foster custody, it should have conducted an investigation into the family's situation. Thus, DHS should possess sufficient information to assist the court in determining a parent's need for court-appointed counsel at the initial hearing.

Protecting a parent's constitutional right to court-appointed counsel and serving a child's best interests is not an "either/or" proposition. Appointing counsel as soon as DHS files a family supervision petition serves the child's best interests by ensuring the State does not inappropriately remove the child from the parent, protects a parent's constitutional right to court-appointed counsel, allows the court-appointed attorney to immediately contact and appropriately advise the parent, and avoids future claims of error and unfairness.<sup>2</sup> If a parent thereafter voluntarily decides not to participate in the proceedings, then this court's holding in JH would apply, and the case would be reviewed applying a case-by-case analysis

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<sup>2</sup> We must acknowledge that in the past there has been a disproportionate number of Native Hawaiian and Pacific Islander children represented in Hawai'i's foster care system. In some instances, the percentage of Native Hawaiians in the Child Welfare System has been almost twice the estimated percentage of Native Hawaiians in the population as a whole. Studies have shown that Native Hawaiian and Pacific Islander children spend more time in the foster care system and are less likely to be reunited with their families. A majority of Native Hawaiian and Pacific Islander children in the Child Welfare System were removed by court order.

based on harmless error and fundamental fairness. See JH, 152 Hawai'i at 376, 526 P.3d at 353.

A decade ago, this court expressly held that "trial courts must appoint counsel for indigent parents upon the granting of a petition to DHS for temporary foster custody of their children." T.M., 131 Hawai'i at 436, 319 P.3d at 355 (emphases added).

"[A]s soon as DHS files a petition asserting custody over a child, parents' rights are 'substantially affected.' At that point, an attorney is essential to protect an indigent parent's liberty interest in the care, custody and control of his or her children." Id. at 435, 319 P.3d at 354 (emphases added).

That did not happen in this case. Here, the State through DHS filed a petition for family supervision on June 6, 2019. At the first hearing held on June 21, 2019, Mother was not present, nor did she have court-appointed counsel. The record on appeal does not include transcripts of the initial hearing; thus, it is unknown why Mother was not in attendance. At the hearing, without Mother or counsel present, the court granted DHS temporary foster custody of Mother's children pursuant to DHS's oral motion for custody.

Parents who find themselves in adverse and dire child custody situations are often dealing with personal hardships, including mental health issues, addiction, physical disability, job loss, housing insecurity, transportation challenges, and

financial distress which hinders their ability to attend scheduled court hearings.<sup>3</sup> They may be flat-out scared and intimidated by the court proceedings and may not understand the consequences of a petition for family supervision or foster custody. See T.M., 131 Hawai'i at 435, 319 P.3d at 354 ("[A] parent in termination proceedings may struggle with legal issues that are 'neither simple nor easily defined,' and with a standard that is 'imprecise and open to the subjective values of the judge.'" (citing Lassiter v. Dep't of Soc. Servs. of Durham Cty., N.C., 452 U.S. 18, 45 (1981) (Blackmun, J., dissenting))). A parent's life-struggles are often the very reason they are at risk of losing custody in the first place, and that is why it is critical that the court appoints counsel "as soon as" DHS files a petition for family supervision or foster custody as required by this court's prior decisions.

Counsel is crucial in child custody proceedings. With counsel, a parent will be better informed, notified of any changes in proceedings, and counsel can advise and prepare parents for what is at stake once an initial petition is filed. Without counsel, parents are likely unaware that their parental rights are implicated from the moment DHS moves for family

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<sup>3</sup> The Majority notes that parents' "disengagement" in these types of proceedings "is not an uncommon feature." This highlights why it is imperative that counsel be appointed "as soon as" a petition is filed.

supervision or foster custody. Appointing counsel at the outset eliminates the risk of structural error.

In the instant case, Mother was present at the next court hearing held on July 2, 2019, eleven days after the first hearing. DHS was represented by counsel while Mother was not. The court ordered that her children were to remain in DHS's temporary foster custody, thus continuing the impairment of Mother's parental rights. The court did not appoint Mother counsel. The transcript of the second hearing, like the first, was not included in the record. Therefore, it is unknown what, if anything, the court explained to Mother about the proceedings, including the potential consequences of not attending a hearing, the risk of permanently losing her children, and significantly, the option of applying for and having counsel appointed for her. See In re Doe, 99 Hawai'i 522, 533, 57 P.3d 447, 458 (2002) ("Procedural due process requires that an individual whose rights are at stake understand the nature of the proceedings he or she faces."). Whether the family court adequately explained to Mother how to apply for counsel or simply directed her to retain counsel for the proceedings, without informing her that she had a constitutional right to court-appointed counsel, cannot be determined from the

record and therefore requires second-guessing.<sup>4</sup>

At the third hearing held on July 16, 2019, Mother was not in attendance and the record is silent as to why she was not present. The court still did not appoint Mother counsel. At this hearing, the court revoked temporary foster custody and awarded DHS foster custody. Mother's constitutional rights continued to be substantially affected.

A fourth hearing was held on November 5, 2019. Mother attended, but again without representation, while the State had counsel. Again, the record does not reflect what, if anything, the court explained to Mother about obtaining counsel. The court's minutes reflect that Mother, pro se, made an oral motion to set aside the default entered against her in the prior proceedings. The court granted Mother's motion without objection and continued foster custody, thus Mother's parental rights remained substantially impaired.

Mother was finally appointed counsel on November 12, 2019, over five months after DHS initially filed its petition for family supervision, and over four months after the court awarded

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<sup>4</sup> "Moreover, the harm suffered by parents proceeding without counsel may not be readily apparent from the record, especially because without the aid of counsel, it is unlikely that a case is 'adequately presented.'" T.M., 131 Hawai'i at 436, 319 P.3d at 355 (citing Lassiter, 452 U.S. at 51 (Blackmun, J., dissenting)).

DHS foster custody.<sup>5</sup>

At the hearing held on November 26, 2019, Mother's counsel attended, Mother's presence was waived, and the court continued foster custody and all prior orders.

Mother's counsel attended the court hearing held on December 3, 2019. The court noted in the minutes that "mother has no transportation and is looking for a ride to court," and she arrived at 8:31 a.m. The court continued foster custody.

Mother appeared at all subsequent court hearings with her attorney.

For over two decades this court has recognized "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." Doe, 99 Hawai'i at 533, 57 P.3d at 458. In T.M., this court held that parents have a constitutional right to counsel in parental termination proceedings, and we honored that right by directing that family courts "must appoint counsel for indigent parents once DHS files a petition to assert foster custody over a child." 131 Hawai'i at 421, 319 P.3d at 340 (emphases added). We also held that the trigger and timing in

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<sup>5</sup> The record indicates that the court approved court-appointed counsel for Mother one week after she applied.



which courts must appoint counsel for indigent parents is "as soon as DHS files a petition asserting custody over a child[.]" Id. at 435, 319 P.3d at 354. That is to say, the appointment of counsel is required at the inception of the case because, at that point, a parent's constitutionally protected parental rights are "substantially affected" and "an attorney is essential to protect an indigent parent's liberty interest in the care, custody and control of his or her children." Id. This court has never made a parent's right to court-appointed counsel dependent on a parent's engagement or appearance at the initial hearing. On the contrary, this court explicitly stated that "indigent parents are guaranteed the right to court-appointed counsel" because parental rights are implicated at the time the petition is filed. Id. at 435-36, 319 P.3d at 354-55 (emphasis added).

This court has analogized the right to counsel in child custody cases to the right to counsel in criminal cases. Id. at 434, 319 P.3d at 353. In T.M., we cited to Justice Stevens's dissenting opinion in Lassiter, and stated that "'the reasons supporting the conclusion that the Due Process Clause . . . entitles the defendant in a criminal case to representation by counsel apply with equal force' in cases where the state seeks to terminate parental rights." Id. (quoting Lassiter, 452 U.S.

at 59-60 (Stevens, J., dissenting)).

In 2021, we reiterated T.M.'s explicit mandate in L.I. and affirmed our bright-line rule that the "family courts must appoint counsel for indigent parents when DHS files a petition for family supervision because, at that point, parental rights are substantially affected as foster custody can be ordered by the court at a subsequent hearing." L.I., 149 Hawai'i at 122, 482 P.3d at 1083 (emphases added).

L.I. held that a family court's failure to appoint counsel for a parent "when DHS filed its petition" constituted "structural error" and, therefore, "cannot be deemed harmless." Id. at 123, 482 P.3d at 1084. As stated, the timing to appoint counsel is dictated by the filing of a petition for family supervision or foster custody because it is at that point that a parent's constitutional rights are "substantially affected." Although L.I.'s decision was issued after the instant case was initiated, its insight into T.M.'s holding is instructive.

In L.I., the mother was appointed counsel ninety-seven days after her child was placed in foster custody. Id. at 120, 482 P.3d at 1081. This court ruled that "the family court's three-month delay in appointing counsel for Mother, after DHS was awarded foster care, is a clear violation of In re T.M." Id. at 123, 482 P.3d at 1084. In L.I., this court vacated the ICA's judgment and rejected the ICA's conclusion that the family

court's failure to timely appoint counsel was harmless. Id. at 122-23, 482 P.3d at 1083-84; see In Int. of L.I. and H.D.K., No. CAAP-18-0000773, 2020 WL 1679419 (Haw. App. Apr. 6, 2020) (SDO) (vacated). To demonstrate that the mother did not suffer prejudice or harm, the ICA in L.I. cited to the mother's early absence from the courtroom, her failure to provide DHS with her current contact information, and her inconsistent responses that delayed the completion of paperwork necessary to appoint counsel. L.I., 149 Hawai'i at 120-21, 482 P.3d at 1081-82. This court expressly rejected the ICA's reasoning that the three-month delay in appointing counsel was harmless error. Id. at 122-23, 482 P.3d at 1083-84. L.I. held that "[t]he failure to timely appoint counsel is structural error which, under State v. Loher, requires vacatur without the necessity of proving harmful error." Id. at 123; 482 P.3d at 1084 (citing State v. Loher, 140 Hawai'i 205, 222, 398 P.3d 794, 811 (2017)).

The doctrine of structural error recognizes that the inherent nature of certain constitutional rights is so significant in affording a person a fair trial that "certain errors are not subject to harmlessness review." Loher, 140 Hawai'i at 222, 398 P.3d at 811 ("[C]ertain rights protected by the Hawai'i Constitution are so basic to a fair trial that their contravention can never be deemed harmless.") (internal

quotations and citations omitted). Such errors are considered structural when the impact of the error is difficult to assess and invites speculation. Id. The relationship between a parent and child is sacrosanct. The termination of parental rights is one of the most devastating tribulations a parent and child can suffer. It is an indescribable anguish, grief, and sense of loss that changes a parent and child forever. "[T]he 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." T.M., 131 Hawai'i at 434, 319 P.3d at 353 (citing Lassiter, 452 U.S. at 59 (Stevens, J., dissenting)).

In the case at hand, the appointment of counsel did not occur until approximately five months after the State filed its petition, over four months after the family court awarded the State temporary foster custody, and more than four months after Mother first appeared before the family court. The record is inadequate to determine what exactly happened at those initial hearings except that counsel was not appointed for Mother when the petition for family supervision was filed or when the court awarded temporary foster custody to the State. Mother required an attorney from the inception of the case. T.M. and L.I. required the court to appoint counsel "as soon as" DHS filed its petition for family supervision and the court awarded foster custody.

The facts in the present case are analogous to T.M. and L.I. and distinguishable from JH. In JH, the parents were appointed counsel at the start of the proceedings and their constitutional rights were thus safeguarded from the initiation of the case. 152 Hawai'i at 376-77, 526 P.3d at 353-54. The parents' subsequent absence from the proceedings resulted in the discharge of counsel, who was later reappointed when the parents participated again. Id. at 378-79, 526 P.3d at 355-56.

JH reaffirmed the principle that "[a]n indigent parent's right to counsel kicks in when parental rights are substantially affected," which pursuant to T.M. occurs "as soon as" DHS files a petition. Id. at 378, 526 P.3d at 355; T.M., 131 Hawai'i at 435, 319 P.3d at 354. However, JH distinguished the "appointment, discharge, and reappointment of counsel" as different from the failure to appoint counsel at the outset of a case being filed. 152 Hawai'i at 376, 526 P.3d at 353.

We reasoned,

[d]ischarge of counsel cases do not present the same problems that surface when courts do not appoint counsel in the first place. If the court does not appoint counsel at the start of CPA proceedings, then "the harm suffered by parents proceeding without counsel may not be readily apparent from the record, especially because without the aid of counsel, it is unlikely that a case is adequately presented."

Id. at 379, 526 P.3d at 356 (quoting T.M., 131 Hawai'i at 436, 319 P.3d at 355).

A parent who has the benefit of court-appointed counsel at

the start of a case will receive the appropriate legal counsel and be able to make informed decisions before proceeding. In T.M. and L.I. counsel was not appointed at the outset until after custody was awarded. Structural error applied. In JH, counsel was appointed at the outset of the case and before the awarding of custody. Structural error did not apply. Thus, we applied a harmless error analysis and held that viewing the case "in its entire context," the parents "received a fundamentally fair trial." JH, 152 Hawai'i at 381, 526 P.3d at 358. JH established a harmless error/fairness analysis when counsel is appointed at the start of the case, but is subsequently discharged if the parent fails to participate in the proceedings. JH left our holdings in T.M. and L.I. intact.

The Majority's decision in the present case has the practical effect of eliminating structural error in parental rights cases. The holdings of T.M., L.I., and JH required the appointment of counsel at the point DHS filed a petition for family supervision. "Otherwise, structural error will nullify an outcome adverse to a parent." JH, 152 Hawai'i at 376, 526 P.3d at 353.

The Majority, in essence, replaces structural error with an across-the-board case-by-case analysis similar to the United States Supreme Court's majority opinion in Lassiter, which we expressly rejected in T.M. As this court articulated in T.M.,

"[m]andating the appointment of counsel for indigent parents once DHS moves for custody would remove the vagaries of a case-by-case approach." 131 Hawai'i at 435, 319 P.3d at 354. Eliminating structural error leaves the protection of a fundamental right to chance, subject to appellate review, potentially held years after the violation of that right, on a possibly under-developed family court record.

The Majority's decision affirming the family court's termination of Mother's parental rights rests in part on her attendance record and degree of engagement. Active engagement, disengagement, re-engagement, and attendance now appear to be the critical considerations rather than treating the right to counsel as a fundamental constitutional right subject to structural error if counsel is not appointed immediately upon the filing of a petition affecting a parent's rights. The present decision does not reconcile with T.M., L.I., and JH, and there are no cogent reasons to depart from or overrule our prior decisions. See Dairy Rd. Partners v. Island Ins. Co., Ltd., 92 Hawai'i 398, 421, 992 P.2d 93, 116 (2000) ("[A] court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it.") (quotations and citations omitted); see also State v. Garcia, 96 Hawai'i 200, 206, 29 P.3d 919, 925 (2001).

T.M. pronounced that parents have a constitutional right to

counsel in parental rights proceedings, which L.I. clarified requires that counsel be appointed when DHS files a petition for family supervision, or structural error will apply. T.M., 131 Hawai'i at 421, 319 P.3d at 341; L.I., 149 Hawai'i at 122, 482 P.3d at 1083. JH distinguished discharging counsel during a proceeding from failing to appoint counsel at the beginning of a proceeding, but did not overrule T.M. or L.I. Our case law is clear and no compelling reasons have been offered to deviate. If counsel is not appointed when either a petition for family supervision or foster custody is filed, it is per se structural error.

There is an imbalance of power when the State files a petition for family supervision or foster custody, which is exacerbated if an indigent parent is unrepresented. Appointing counsel at the outset will ensure a fair resolution and fair process for all involved. Requiring the appointment of counsel as soon as a family supervision petition is filed, whether an indigent parent is present or not, will protect a parent's constitutional rights, can be expeditiously accomplished by the family court, will serve to expedite the proceedings, and gives a parent and child the best opportunity to preserve the family unit. The appointment of counsel ensures procedural fairness and enhances the protections that both parent and child are



entitled to under our constitution.

If counsel is appointed at the start, there is no risk of structural error. Claims that structural error is "unbending," "unfairly benefits a voluntarily absent parent at the expense of their child," and negatively impacts a child's best interests overlook the flexibility that JH provides if a parent does not participate in the proceedings after first being appointed counsel. Applying structural error ensures that parents are appointed counsel once their parental rights are "substantially affected," which this court has held occurs at the moment a petition for family supervision is filed. Structural error does not "upen[d] the child's interest in permanency" because if counsel is appointed at the start of a parental rights proceeding, the parent's constitutional right will be protected and structural error will not apply.

We should follow the same course of precedent charted by this court in T.M., L.I., and JH. In this case, the court appointed Mother counsel over five months after DHS filed the initial petition for family supervision and over four months after the State was granted temporary foster custody and Mother first appeared in court. In L.I., this court held that the failure to appoint counsel for three months after DHS was awarded foster care was a "clear violation of In re T.M." 149 Hawai'i at 123, 482 P.3d at 1084. This case is no different and

is in fact more egregious.

An indigent parent has an undeniable right to court-appointed counsel, and a parent must and should be provided counsel as soon as a parental rights petition is filed. If a parent subsequently chooses not to participate in the proceedings, despite the availability and advice of counsel, then this court will apply JH's fairness analysis in deciding whether the parent received a fundamentally fair proceeding.

Accordingly, I respectfully dissent.

/s/ Vladimir P. Devens

