SCWC-18-0000773

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

FC-S Nos. 14-1-0092 & 15-1-0072

IN THE INTEREST OF

L.I. AND H.D.K.

APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER TERMINATING PARENTAL RIGHTS FILED ON SEPTEMBER 21, 2018

Family Court of the Second Circuit

Hon. Douglas J. Sameshima

MOTION FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER'S APPLICATION FOR WRIT OF *CERTIORARI* BY *AMICI CURIAE* LAWYERS FOR EQUAL JUSTICE, LEGAL AID SOCIETY OF HAWAI'I, ACLU OF HAWAI'I FOUNDATION, THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, AND THE NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL

MEMORANDUM IN SUPPORT OF MOTION

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Lawyers for Equal Justice, The Legal Aid Society of Hawai‘i (“Legal Aid”), the ACLU of Hawai‘i Foundation (“ACLU of Hawai‘i”), the National Association of Counsel for Children (“NACC”), and the National Coalition for a Civil Right to Counsel (“NCCRC”), by and through their attorneys, hereby move this Court for leave to appear as *amici curiae* and to file a brief in support of Petitioner’s Application for Writ of *Certiorari*.

This Motion is made pursuant to Rules 27(a) and 28(g) of the Hawai‘i Rules of Appellate Procedure and is based upon the attached memorandum.

DATED: Honolulu, Hawai‘i, July 28, 2020.

Respectfully submitted,

/s/ Thomas A. Helper
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Lawyers for Equal Justice, the Legal Aid Society of Hawai‘i, the ACLU of Hawai‘i Foundation, the National Association of Counsel for Children, and the National Coalition for a Civil Right to Counsel respectfully request that the Court grant them leave to file an *amicus curiae* brief in support of Mother/Petitioner-Appellant's Application for Writ of *Certiorari.*

Lawyers for Equal Justice ("LEJ") is a non profit law firm that advocates for low income residents of Hawai‘i. The central mission of LEJ is to help low income households in Hawai‘i gain access to the resources, services and fair treatment that they need to realize their opportunities for self-achievement and economic security. LEJ seeks to change systems and policies to make justice, equality and opportunity available to everyone.

The Legal Aid Society of Hawai‘i ("Legal Aid") is Hawaii's largest private non profit law firm servicing Hawaii's low income population. It is a Statewide organization with offices on all major Hawaiian Islands. Legal Aid's mission is to address critical legal needs through

high quality legal advocacy, outreach and education in the pursuit of fairness and justice. Since 2001, it has represented thousands of litigants in child abuse and neglect cases, both as parents' counsel and guardian ad litem. The rights at issue in this case are at the core of Legal Aid's mission and, therefore, Legal Aid and its client population have a personal, vested and organizational interest in the outcome of this case.

The Americans Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 1.8 million members dedicated to the principles of liberty and equality embodied in the Bill of Rights and the nation's civil rights laws. The American Civil Liberties Union of Hawai‘i Foundation ("ACLU of Hawai‘i")—the state affiliate of the American Civil Liberties Union—has over 4,000 members in the State of Hawai‘i and is also dedicated to defending and protecting civil rights and civil liberties. Due process rights, including the procedural guarantees of notice and an opportunity to be heard, are among the core rights guaranteed by the U.S. and Hawai‘i constitutions and protected by the ACLU. The right to counsel goes to the core of the due process clause's protection of the opportunity to be heard.

Founded in 1977, the National Association of Counsel for Children ("NACC"), is a 501(c)(3) non-profit child advocacy and professional membership association dedicated to advancing the rights, well-being, and opportunities of youth impacted by the child welfare system through access to high-quality legal representation. A multidisciplinary organization, its members primarily include child welfare attorneys and judges, as well as professionals from the fields of medicine, social work, mental health, and education. NACC's work includes federal and state level policy advocacy, the national Child Welfare Law Specialist attorney certification program, a robust training and technical assistance arm, and an amicus curiae program. Through the amicus curiae program, NACC has filed numerous briefs promoting the legal interests of

children in state and federal appellate courts, as well as the Supreme Court of the United States. More information about NACC can be found at www.naccchildlaw.org.

NACC submits this brief on behalf of the interests of children in having the best and most appropriate outcomes in child protective proceedings. Depriving parents of legal representation creates a high risk that the constitutionally-protected relationship between children and their parents will be erroneously disrupted. NACC submits the brief to provide this Court with information about the important role that parents' counsel play in child protective proceedings to ensure that accurate decisions are reached.

The National Coalition for a Civil Right to Counsel ("NCCRC") is an unincorporated association that seeks to advance the recognition of a right to counsel in civil cases involving fundamental interests and basic human needs, such as child custody. NCCRC is comprised of over 300 participants from 40 states, including civil legal services attorneys, supporters from public interest law firms, and members of the private bar, academy, state/local bar associations, access to justice commissions, national organizations, and others. The NCCRC supports litigation, legislation, and other advocacy strategies seeking a civil right to counsel, including amicus briefing where appropriate. In this vein, NCCRC participants worked closely with the American Bar Association's Presidential Task Force on Access to Justice on its 2006 Resolution (which passed the ABA House of Delegates on a unanimous vote) that urges federal, state and territorial governments to recognize a right to counsel in civil cases such as child custody.

The NCCRC has an interest in this case because the right to parent is fundamental in law and is, to parents themselves, as precious as life itself. The indigent parents that many NCCRC participants represent frequently lack the educational background or knowledge to be able to present their cases themselves before the trial court in any meaningful or effective way.

Consequently, parents and their interests must be protected through the presence of counsel. In recognition of this, the great majority of states currently provide a statutory right to appointed counsel for indigent parents in dependency matters, while some states have also found a constitutional right to counsel.

Collectively, the organizations filing this motion have an interest in this specific case because the fundamental rights of all parents in Hawai‘i to the care, custody, and control of their children, as well as their right to counsel when involved in child welfare proceedings, are at stake. The organizations filing this motion agree with the Petitioner that there are two significant issues implicated in this case. First, there is a significant and harmful ambiguity, created by the *In re T.M.*, 131 Hawai‘i 419, 319 P.3d 338 (2014), opinion, as to the proper timing of the appointment of counsel for indigent parents involved in child welfare cases. The brief would explain why this Court must resolve that ambiguity in favor of early appointment of counsel, including the fact that this would put Hawai‘i in line with other states as well as national guidance on this issue. Second, the brief would explain why the harmless error analysis, currently used by the Intermediate Court of Appeals in assessing failure to appoint counsel in child welfare proceedings, is inadequate to protect parents' constitutional right to counsel. Therefore, it should be replaced with a structural error analysis that requires reversal upon violation.

As this case implicates the larger questions of *when* parents involved in child welfare proceedings should be appointed counsel and how an appellate court should analyze the failure to appoint counsel, the aforementioned organizations respectfully ask that this Court grant leave to file an *amici curiae* brief to discuss these issues. The proposed brief is attached.

DATED: Honolulu, Hawai‘i, July 28, 2020.

Respectfully submitted,

/s/ Thomas A. Helper
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IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

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IN THE INTEREST OF

L.I. AND H.D.K.

CERTIFICATE OF SERVICE RE: MOTION FOR LEAVE TO APPEAR AS *AMICI CURIAE*

APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER TERMINATING PARENTAL RIGHTS FILED ON SEPTEMBER 21, 2018

Family Court of the Second Circuit

Hon. Douglas J. Sameshima

CERTIFICATE OF SERVICE

I hereby certify that two copies each of the (1) MOTION FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI BY *AMICI CURIAE* LAWYERS FOR EQUAL JUSTICE, LEGAL AID SOCIETY OF HAWAI‘I, ACLU OF HAWAI‘I FOUNDATION, THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, AND THE NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL and the (2) [PROPOSED] BRIEF BY *AMICI CURIAE* LAWYERS FOR EQUAL JUSTICE, THE LEGAL AID SOCIETY OF HAWAI‘I, THE ACLU OF HAWAI‘I FOUNDATION, THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, AND THE NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL IN SUPPORT OF PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI will be served upon the following persons by depositing in the U.S. Mail, postage pre-paid:

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DATED: Honolulu, Hawai‘i, July 28, 2020.

Respectfully submitted,

/s/ Jongwook “Wookie” Kim
JONGWOOK “WOOKIE” KIM

ACLU OF HAWAI‘I FOUNDATION

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[PROPOSED] BRIEF BY *AMICI CURIAE* LAWYERS FOR EQUAL JUSTICE, THE LEGAL AID SOCIETY OF HAWAI‘I, THE ACLU OF HAWAI‘I FOUNDATION, THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, AND THE NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL IN SUPPORT OF PETITIONER'S APPLICATION FOR WRIT OF *CERTIORARI*

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Exhibit A

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Summers, Alicia, et al., *Examining Hearing Quality In Child Abuse And Neglect Cases: The Relationship Between Breadth Of Discussion And Case Outcomes*, 82(C) Children and Youth Services Review 490 (2017) 13

U.S. Department of Health and Human Services' Administration for Children and Families, Information Memorandum 17-02 (2017) 11, 13, 17

Wood, S. M., Summers, A., & Duarte, C.S., *Legal Representation in the Juvenile Dependency System: Travis County, Texas' Parent Representation Pilot Project,* 54 Family Court Review 277 (2016) 17

STATEMENT OF CASE/IDENTITY AND INTEREST OF AMICI

Amici hereby incorporate by reference the Statement of Case/Proceedings from Petitioner's Application for Writ of *Certiorari*. The identity and interest of *amici* are set forth in *amici's* Memorandum in Support of Motion for Leave to Appear.

STATEMENT OF POINTS OF ERROR

While the Intermediate Court of Appeals was correct when it found that the trial court's three month delay in appointing counsel for Petitioner was impermissible, it committed a grave error when it excused this error as harmless. Moreover, the Court of Appeals incorrectly considered the denial of counsel to have occurred at the time when Petitioner was deprived of custody, as opposed to when the petition was filed.

STANDARD OF REVIEW

This Court has repeatedly held, "[w]e answer questions of constitutional law 'by exercising our own independent judgment based on the facts of the case.' *State v. Trainor*, 83 Hawai'i 250, 255, 925 P.2d 818, 823 (1996) (citations and internal quotation marks omitted); *State v. Lee*, 83 Hawai'i 267, 273, 925 P.2d 1091, 1097 (1996) (citation, internal quotation marks, and brackets omitted). Thus, we review questions of constitutional law under the 'right/wrong' standard." *State v. Jenkins*, 93 Hawai'i 87, 100, 997 P.2d 13, 26 (2000).

SUMMARY OF ARGUMENT

Amici urge this Court to grant the Petitioner's application for Writ of *Certiorari* and mandate the appointment of counsel to indigent parents at the time that the State files a petition or other filing for custody or family supervision, as opposed to after the parent is divested of

custody. Further, this Court should hold that failure to appoint counsel is structural error, requiring reversal without proof of harm.

In *In re T.M.,* 131 Hawai‘i 419, 319 P.3d 338 (2014), this Court inadvertently created a substantial ambiguity as to the timing of the appointment of counsel for indigent parents. *T.M*. in at least three places mandated the appointment of counsel upon the State *filing* a petition for custody of a child[1] but later suggested a trial court appoint counsel upon the trial court *granting* such a petition.[2] Though *T.M.* as a whole supports mandated appointment of counsel at the earlier stage, the Intermediate Court of Appeals stated that counsel must be appointed when the court *grants* a petition for custody. This ambiguity as to timing continues to put parents at risk of an erroneous deprivation of custody at the inception of a case. This Court should hold that the filing of a petition for either custody or family supervision triggers the constitutional right to appointed counsel for indigent parents.

In addition, the Intermediate Court of Appeals relied on the harmless error test to hold that the trial court's failure to appoint counsel was harmless. As discussed in this brief, a harmless error analysis cannot be utilized when counsel is denied because counsel is essential to

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[1] 131 Hawai‘i 419 (2014) ("Therefore, we additionally hold that parents have a constitutional right to counsel under article I, section 5 in parental termination proceedings and that from and after the filing date of this opinion, courts must appoint counsel for indigent parents once DHS files a petition to assert foster custody over a child."); *Id*. at 435 ("Thus, as 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*. ("Mandating the appointment of counsel for indigent parents once DHS moves for custody would remove the vagaries of a case-by-case approach.").

[2] *Id*. at 436 fn. 23 ("Thus, in Hawai‘i, the appointment of counsel is mandated because attempting to determine in advance of the proceedings whether legal representation would ultimately be required is an exercise in futility. The safeguard for parental rights thus rests on the appointment of counsel at the beginning of proceedings, in the instant case in February 2010, when T.M. was taken into custody by DHS.").

a fair trial and because the harmless error test relies on impossible speculation as to how counsel could have benefitted the parent at a particular juncture. This Court should instead import the structural error analysis from the criminal context and hold that a failure to appoint counsel to an indigent parent in a child welfare proceeding requires automatic reversal.

ARGUMENT

I. The Court should resolve the ambiguity created by *In re T.M.* in favor of appointment of counsel at the time when the State files for custody or family supervision because of the strong parental interest recognized in Hawai‘i as well as the significant risk of error.

The Respondent does not contest Petitioner's position that due process requires counsel to be appointed when the petition is filed and not later. However, because of the critical importance of the issue, amici provide additional support as to why it is essential that this Court hold that counsel must be appointed when a petition for custody or family supervision is filed.

A. The right to parent is one of the most fundamental rights recognized by this Court and the U.S. Supreme Court, and thus is deserving of the strongest due process protections such as resolving the ambiguity in favor of early appointment.

The right of parents to the care, custody, and control of their children has been recognized as one of the most essential, if not the most essential, fundamental guarantees protected by the U.S. Constitution. *Troxel v. Granville*, 530 U.S. 57, 65 (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").

However, parental rights have taken on an even greater significance in Hawai‘i. This Court has recognized that not only has a parent's right to counsel "long been recognized as a fundamental one", but it is one of "manifest importance". *In the Interest of Doe*, 77 Hawai‘i 109, 114, 883 P.2d 30, 35 (1994). Indeed, it was this Court's greater concern for protecting this core fundamental right that caused it to break with the U.S. Supreme Court and recognize a right to appointed counsel for parents in child welfare cases. *In re T.M.,* 131 Hawai‘i 419, 319 P.3d

338 (2014) (recognizing right to counsel for parents in child welfare cases in contrast to *Lassiter v. Dep't of Soc. Servs.,* 452 U.S. 18 (1981), and agreeing with *Lassiter* dissent).[3]

B. Appointment when the petition is filed guarantees that counsel will be present at the time when a parent's rights are "substantially affected" and protects against the high likelihood of an erroneous deprivation.

i. All child welfare hearings implicate the substantial rights of parents.

The moment a petition for custody or family supervision is filed, the fundamental rights of parents are at risk. The instant case is an excellent example: two days before the review hearing scheduled on January 13, 2015, the State recommended placement of the child in foster custody, and at the review hearing, Petitioner was forced to appear without counsel and lost custody of her children. And in fact, if the court finds that "the child's remaining in the family home is contrary to the welfare of the child and the child's parents are not willing and able to provide a safe family home for the child, even with the assistance of a service plan", then the court *must* place the child in foster custody. Haw. Rev. Stat. § 587A-30(b)(1). The State's recommendation in this case combined with the statutory requirement highlight the fact that "as

[3] Hawai'i's recognition that a right to counsel is necessary to protect this long-recognized and cherished fundamental right is in line with the near-nationwide consensus that all indigent parents must be provided with counsel in abuse/neglect proceedings. Forty-three states plus the District of Columbia provide a right to counsel for all indigent parents in abuse/neglect proceedings. John Pollock, *The Case Against Case-By- Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases*, 61 Drake L.J. 763, 777-78 (Spring 2013). Additionally, while many states have mooted the question of a constitutional right to counsel in dependency cases by enacting a statutory right, six state high courts have declared that their state constitution's due process clause requires the appointment of counsel for all indigent parents in abuse/neglect proceedings. *S.B. v. Dep't of Child. & Fam.*, 851 So. 2d 689 (Fla. 2003); *Danforth v. State Dep't*, 303 A.2d 794 (Me. 1973); *New Jersey Div. of Youth & Family Servs. v. B.R.*, 929 A.2d 1034 (N.J. 2007); *In re Ella B.*, 285 N.E.2d 288 (N.Y. 1972); *In re Welfare of Myricks*, 533 P.2d 841 (Wash. 1975); *State ex rel. Lemaster v. Oakley*, 203 S.E.2d 140 (W. Va. 1974).

soon as DHS files a petition asserting custody over a child, parents' rights are 'substantially affected.'" 131 Hawai'i at 435, 319 P.3d at 354.

Additionally, even review hearings that do not directly address the question of whether the child will be placed in State custody nonetheless substantially affect parental rights:

> When a petition for [family] supervision is filed, the Family Court must conduct a return hearing and decide whether the child's physical or psychological health or welfare has been harmed or is subject to threatened harm by the acts or omissions of the child's family, whether the child should be placed in foster custody or under family supervision, and what services should be provided to the child's parents.

In the Interest of T.A., K.A., A.S., 139 Hawai'i 33, 383 P.3d 136, 2016 WL 4491823, at *1 (Ct. App. 2016) (citing Haw. Rev. Stat. § 587A-28(a) and (c) (Supp. 2015)) (unpublished). Thus, there remains a possibility that, even if a petition is styled as one for family supervision, foster custody could ultimately be ordered at the return hearing depending on the Court's assessment of harm to the child. Moreover, the appointment of counsel for such hearings will help ensure that parents can sufficiently defend against or otherwise meaningfully respond to the allegations against them, as well as contest services that they may feel are unnecessary and/or impermissibly invasive to the parents' rights over the child.

Once a family is placed under family supervision, the State has a number of rights over the parent, including the right to monitor and supervise the parent and the right to access the child's family home. *See* Haw. Rev. Stat. § 587A-15(a)(1). Before such potentially-intrusive rights are granted to the State, a parent should have the opportunity to consult with court-appointed counsel. Additionally, once family supervision is ordered, the State has the authority to unilaterally place the child in temporary foster care, after which a hearing must be conducted within three (3) days, upon *notice* by the State to the Court – i.e., the State is not required to file a separate petition for foster custody. *See id.* § 587-15(a)(2). Counsel should be appointed at the

filing of a petition for family supervision because there might be no other separate "trigger" for the appointment of counsel, and the parent faces the possibility of losing custody of his or her children at the review hearing described in Haw. Rev. Stat. § 587A-15(a)(2)(A).

Appointing counsel as soon as the State files a petition for custody or family supervision thus helps ensure that parents' rights are protected at the moment the risk arises. Moreover, as pointed out by the Petitioner, this Court in *T.M.* recognized that Hawai'i right to counsel law is more protective than federal law in that the right attaches at the threat of the deprivation, rather than actual deprivation.[4]

ii. All child welfare hearings are complex, charged proceedings, a difficult situation for parents that is worsened by the disparate resources of the parties.

All child welfare proceedings are an emotionally brutal experience, especially where parents are participating in an adjudication or other hearing seeking removal of their children:

> Typically, a parent becomes enmeshed in the court system after the Department either has removed or seeks to remove children from his/her custody. At this juncture, parents are angry, frustrated, and frightened about the prospects of losing their children to a system in which strangers will raise them…Often these parents appear hostile and confrontational as they have been stripped of the most important piece of their lives – their children. Few of us would behave differently.

Sankaran, Vivek & I. Lander, *Procedural Injustice: How the Practices and Procedures of the Child Welfare System Disempower Parents and Why It Matters,* 1 Mich. Child Welfare L. J. 11, 13 (2007). In *In re K.L.J.*, 813 P.2d 276 (Alaska 1991), a case cited approvingly by *T.M.*, the Supreme Court of Alaska recognized that "A parent who is without the aid of counsel in

[4] *In re T.M.,* 131 Hawai'i at 419 fn. 23 ("In contrast to the federal rule, see *Scott v. Illinois*, 440 U.S. 367, 373-74, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979), indigent criminal defendants in Hawai'i have a right to an attorney whenever they are threatened by imprisonment, even if imprisonment is not subsequently imposed. *State v. Dowler*, 80 Haw. 246, 249, 909 P.2d 574, 577 (App. 1995)").

marshalling and presenting the arguments in his favor will be at a decided and frequently decisive disadvantage which becomes even more apparent when one considers the emotional nature of child custody disputes, and the fact that all of the principals are likely to be distraught." In fact, in some instances, the children may have already been temporarily removed,[5] thus amplifying the emotional strain on the parents.

Additionally, parents in these proceedings are not only under intense emotional strain, but are also more likely to be living in poverty, lack knowledge and experience navigating the court system, and be dealing with mental health issues that further strain effective self-representation.[6] Common factors in Hawai'i identified as contributing to incidents of child abuse or neglect include chronic family violence, drug and alcohol abuse, domestic violence, mental health issues, insufficient or misused incomes, and inadequate housing. State of Hawai'i, Department of Human Services, Audit, Quality Control and Research Office, *A Statistical Report on Child Abuse and Neglect in Hawai'i* at 11 (2018). Child welfare experts have recognized that parents with such issues are "among the least likely of individuals to be able to defend themselves on their own and to articulate to a court why their children should be returned to their care" while at the same time "also the very parents that the system must work with to achieve its primary goal of reunification." Sankaran, Vivek, *Moving Beyond Lassiter: The Need for a Federal Statutory Right to Counsel for Parents in Child Welfare Cases,* 44 J. Legis. 1, 11 (2017).

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[5] See Haw. Rev. Stat. §§ 587A-8 and/or 587A-9.

[6] *See* Sankaran, Vivek, *Moving Beyond Lassiter: The Need for a Federal Statutory Right to Counsel for Parents in Child Welfare Cases*, 44 J. Legis. 1 (2017); *and*, Gerber, Lucas A., et al. *Effects of An Interdisciplinary Approach to Parental Representation in Child Welfare,* 102 Children and Youth Services Review 42 (July 2019).

These proceedings are also legally complex at every stage.[7] As Justice Blackmun noted in his dissent in *Lassiter* (a dissent heavily relied on in *T.M.*), the legal issues in this context are "neither simple nor easily defined." 452 U.S. at 45 (Blackmun, J., dissenting) (discussing termination proceedings specifically). In Hawai'i, the Child Protective Act[8] contains five separate parts, each with numerous sections further defined by regulations, policies, and caselaw. In addition, not just uniform state laws like the Interstate Compact on the Placement of Children,[9] but federal child welfare laws, which have proliferated over the past thirty-five years, guide these cases. The laws – which include, among others, the Child Abuse Prevention and Treatment Act,[10] the Indian Child Welfare Act,[11] the Adoption Assistance and Child Welfare Act,[12] the Adoption and Safe Families Act,[13] the Multiethnic Placement Act,[14] the Fostering Connections to Success and Increasing Adoptions Act,[15] and the Family First Prevention Services Act[16] – impose binding obligations on child welfare agencies and detail steps that

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[7] Attorneys representing parents are expected to be familiar with at least 18 specific laws and areas of laws. American Bar Association, *Standards of Practice For Attorneys Representing Parents in Abuse and Neglect* at 8-9 (2006).

[8] Haw. Rev. Stat. Chapter 587A.

[9] Haw. Rev. Stat. Chapter 350E.

[10] 42 U.S.C. § 5101 *et. seq.*

[11] 25 U.S.C. § 1901 *et. seq.*

[12] 42 U.S.C. § 621 *et. seq.*

[13] 42 U.S.C. § 670 *et. seq.*

[14] 42 U.S.C. § 671 *et. seq.*

[15] 42 U.S.C. § 621 *et. seq.*

[16] Pub. L. 115-123.

agencies may or must take prior to interfering with a parent's liberty interest on either a temporary or permanent basis.

In the instant case, the family court held a periodic review hearing on January 13, 2015, where for the first time the State requested custody of the child L.I. At such a hearing, Haw. Rev. Stat. § 587A-30(b) sets out several important findings that the court must make, including "whether the child is receiving appropriate services and care, whether the case plan is being properly implemented, and whether the department's or authorized agency's activities are directed toward a permanent placement for the child", as well as "whether the child is safe."

At this, or any hearing where the child's status is at issue, it is unrealistic to expect an unrepresented parent to request, review, and question the reports of the caseworkers, cross-examine witnesses, provide and question supporting witnesses, produce and introduce documentary evidence, argue caselaw as well as statutory and regulatory requirements, distinguish between burdens of proof, understand fact versus opinion evidence, make requests for discovery, and make arguments in support of their position for each of these findings. In fact, "few parents have experience in advocacy, knowledge of the rules of family court, or of their rights as parents." Gerber, Lucas A., et al. *Effects of An Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 Children and Youth Services Review at 42 (July 2019).

The unfairness of requiring parents to face such complex proceedings or else suffer a substantial deprivation of rights is heightened by the imbalance of power between the parties, which hinders a judicial officer's ability to develop a clear and accurate picture of the case facts. As outlined by Justice Blackmun in his dissent in *Lassiter*:

> The State has legal representation through the county attorney. This lawyer has access to public records concerning the family and to professional social workers who are empowered to investigate the family situation and to testify against the parent. The State's legal representative may also call upon experts in family relations, psychology, and

> medicine to bolster the State's case. And, of course, the State's counsel himself is an expert in the legal standards and techniques employed at the termination proceeding, including the methods of cross-examination.

Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 43 (1981).[17] As Justice Blackmun further outlined, this imbalance, when coupled with the complexity of the proceedings, requires counsel:

> Faced with a formal accusatory adjudication, with an adversary -- the State -- that commands great investigative and prosecutorial resources, with standards that involve ill-defined notions of fault and adequate parenting, and with the inevitable tendency of a court to apply subjective values or to defer to the State's "expertise," the defendant parent plainly is outstripped if he or she is without the assistance of "'the guiding hand of counsel.'" *In re Gault*, 387 U.S., at 36, quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932). When the parent is indigent, lacking in education, and easily intimidated by figures of authority, the imbalance may well become insuperable.

Id., at 46 (1981). This truth has also been recognized by the U.S. Department of Health and Human Services' Administration for Children and Families (hereafter "ACF"), which has said that "[t]here is consensus in the field that ... the complexity of legal proceedings in child welfare cases require all parents to have competent legal counsel." ACF Information Memorandum 17-02 at 3 (2017).

C. Because children in Hawai‘i do not have a right to counsel in child welfare cases, their wishes are less likely to be made known to the court when their parents also lack counsel at critical hearings.

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[17] In *Santosky v. Kramer*, the Court raised a similar concern:

> The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given termination proceeding. The State's attorney usually will be expert on the issues contested and the procedures employed at the factfinding hearing, and enjoys full access to all public records concerning the family. The State may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers whom the State has empowered both to investigate the family situation and to testify against the parents.

455 U.S. 745, 763 (1982).

Hawai‘i does not mandate the appointment of an attorney to represent the child in an abuse or neglect proceeding.[18] Rather, the only requirement is the appointment of a guardian *ad litem* ("GAL") to "protect the best interests of the child."[19] A best interests standard takes into account the child's wishes, but ultimately the GAL can support a position that conflicts with the child's wishes and even in that scenario the court is not obligated to appoint an independent attorney for the child.[20] This structure, when coupled with a failure to timely appoint counsel for

[18] Haw. Rev. Stat. § 587A-17(a) provides that the court may appoint counsel for any "indigent party" in an abuse/neglect proceeding if it is in the child's best interest, and since § 587A-4 defines "party" to include the child who is the subject of the proceeding, it appears courts have discretion to appoint counsel. Hawai‘i is in the minority of states that does not provide this due process protection. First Star Institute, *A Child's Right to Counsel: A National Report Card on Legal Representation for Abused & Neglected Children*, Fourth Edition (2019), available at http://caichildlaw.org/Misc/RTC4.pdf. The importance of this right was recognized in *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005). Furthermore, there is a growing body of research to show the impact of high quality legal rep for children. See Justice in Government Project, *Key Studies and Data About How Legal Aid Assists Children in Foster Care* (2019*)*, *available at* https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/policy/foster-care-8-8-19.pdf.

[19] See Haw. Rev. Stat. § 587A-16(c)(3); *see also,* Haw. Rev. Stat. § 587A-4 (GAL is appointed to "protect and promote the needs and interests of a child…"), and *In re T.M.*, which explained that "Due to the possibility of a conflict of interest between a guardian *ad litem*'s role as the advocate of the best interests of the child and a lawyer's role as the zealous advocate of the client's position, it has been explained that "it is important that [a] guardian ad litem . . . not undertake to represent [the child] as a parent." (citation omitted).

[20] Haw. Rev. Stat. § 587A-16(c)(6) ("If the child's opinions and requests differ from those being advocated by the guardian *ad litem*, the court shall evaluate and determine whether it is in the child's best interests to appoint an attorney to serve as the child's legal advocate concerning such issues and during such proceedings as the court deems to be in the best interests of the child.") A national child advocacy organization, which grades all 50 states on a child's right to counsel, gave Hawai‘i an "F" grade in 2019. First Star Institute, *A Child's Right to Counsel: A National Report Card on Legal Representation For Abused & Neglected Children* (4th Edition) (2019), *available at* http://caichildlaw.org/Misc/RTC4.pdf. See also Fuatagavi, Lydia M.S., *Analysis of the Rights of Children in Foster Care in Hawai‘i,* 20 Asian-Pacific L. & Pol'y J. 139, 155-156 (2019) ("A foster child's right to an attorney should not be limited to instances in which a child's opinion and requests differ from that advocated by the guardian ad litem.").

the parent, allows a scenario where the wishes of both parent and child to reunite, as well as their version of the facts and history of events, are not presented by any attorney. As recognized by experts, early appointment of counsel leads to many important outcomes: an increased rate of appearance of parties at subsequent hearings; a higher likelihood of placement with parents or kin at immediately subsequent hearings; an increase of services ordered for the parents; earlier permanency / case closure; and an increase in reunification as a case outcome. Summers, A. & Gatowski, S. I. & Gueller, M.. *Examining Hearing Quality In Child Abuse And Neglect Cases: The Relationship Between Breadth Of Discussion And Case Outcomes*, 82(C) Children and Youth Services Review 490 (2017). And ACF has added that "The absence of legal representation for any party at any stage of child welfare proceedings is a significant impediment to a well-functioning child welfare system." ACF Information Memorandum 17-02 at 2 (2017).

D. An erroneous decision at the beginning of a child welfare case has a cascading effect on the rest of the case and may increase the chances for termination of parental rights.

What occurs at each hearing of a child welfare case lays the foundation for each subsequent hearing. The facts proven at the adjudication hearing provide the justification for the case service plan ordered at the dispositional hearing. Evidence of the parent's and agency's willingness to comply with the terms of the plan, which is reviewed at every hearing, determines whether the child will come home or will enter another permanent living arrangement. The events that occur during the time when the plan is in effect constitute the primary evidence introduced at the termination of parental rights hearing.[21]

[21] See e.g. *R.V. v. Commonwealth of Kentucky*, 242 S.W.3d 669, 672 (Ky. Ct. App. 2008) ("Clearly, the proceedings in a dependency action greatly affect any subsequent termination proceeding. Indeed, in the case at bar, the cabinet changed its goal from returning A.J.V. to his parents to permanent placement with his foster family. The district court approved that goal

Errors in child protective proceedings have a compounding effect since all future decisions build upon each finding and order made at prior hearings. Errors such as unnecessary removal, failure to explore relative placement, inappropriate suspension of visits, or false allegations of substance abuse or mental illness affect both short- and long-term decisions in the case, the parties' involvement in the case plan, and the relationships between parents and children. When errors during earlier hearings go unchallenged, by the time of the final termination hearing it may be very difficult, if not impossible, to mitigate or assess the precise impact of the error because that error may have affected the entire direction of the case. Thus, unsurprisingly, state policymakers, courts and commentators have all emphasized the important role that parents' counsel play, especially early on in a child welfare case, to reduce the likelihood that this type of taint will occur.

It is also the case that matters move quickly in child welfare proceedings, and parents need the continuous, real-time assistance of counsel to keep up. The Respondent itself made this very point:

> The facts in CPA cases are on-going and continue to develop during the life of the case. *In re Doe*, 96 Hawai'i 272, 283, 30 P.3d 878, 889 (2001). Whether a parent is able to provide a safe family home with or without the assistance of a service plan is continually being assessed. HRS § 587A-30(b). By contrast, the facts comprising a charge as part of a criminal case are completed at the time the charges are filed and the matter goes to court.

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change. Although, in theory, the goal could change again, back to reunification, it is clear that a district court's approving adoption as a permanency goal significantly increases the risk that parental ties will be severed."); *In re D.M.K.*, 2010 Mich. App. LEXIS 1352 at *11 (Mich. Ct. App. 2010) ("These initial hearings allow the parties to become familiar with the parents' abilities and deficits, the child's needs, and the efforts necessary for reunification. In a sense, the initial dispositional hearings form the cornerstones of the succeeding review hearings, the permanency planning phase, and the ultimate decision to terminate parental rights."); *In re J.J.L.*, 223 P.3d 921, 924 (Mont. 2010) ("Adjudication hearings 'must determine the nature of the abuse and neglect and establish facts that resulted in state intervention and upon which disposition, case work, court review, and possible termination are based.'").

The Hawai'i Intermediate Court of Appeals has recognized the potential cascading effects failing to appoint counsel. In *In re "A" Children*, it found that certain failures at the start of the case (such as not getting notice of hearings) created a "chain of events" that ultimately led to the father's termination of parental rights and that "could have been broken if Father had had counsel."[22] 119 Hawai'i 28, 58, 193 P.3d 1228, 1258 (2011). The court also noted a significant issue caused by the lack of counsel at the early stages of child welfare proceedings:

> At oral argument, the deputy attorney general representing DHS mentioned that parents never file answers in child-protective proceedings. Our own observations of the records in termination-of-parental-rights appeals confirms this representation. The failure of parents to file answers in child-protective proceedings is troublesome and underscores the importance for parents in such proceedings to have appointed counsel who can guide them whenever DHS seeks to remove a child from the family home. A written answer is important because it helps to frame the issues that are in dispute in a case and the statutory elements that must be established by DHS in order to gain family supervision, foster custody, or permanent custody of the children involved in a child-protective proceeding.

119 Hawai'i at 58, 193 P.3d at 1258 n.39.

E. Providing a right to counsel at the time that the State files for custody or family supervision is in line with the law in a majority of states as well as with national policy standards.

At least 32 of the 43 states with a right to counsel (including the District of Columbia) provide this right for all stages of a child welfare proceeding, including the very first hearings.[23]

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[22] Similarly, the Kentucky Court of Appeals observed that the failure to provide counsel at the dependency stage "incurably tainted" the termination. *R.V. v. Commonwealth*, 242 S.W.3d 669, 673 (Ct. App. Ky. 2008).

[23] In dependency proceedings: AK R CINA Rules 12(a); A.C.A. § 9-27-316(h)(6)(A); C.R.S. § 19-3-202; Conn. Gen. Stat. § 46b-135(b); D.C. Code § 16-2304(b)(1); Fla. Stat. § 39.013(1); O.C.G.A. § 15-11-160(b); 705 ILCS 405/1-5(1); Ind. Code § 31-32-4-6(A)(2)(a); Iowa Code § 232.89(1); Kan. Stat. Ann. § 38-2205(b); La. Ch.C. Art. 608(A) 22 M.R.S. § 4005(2); MD Code, Courts and Judicial Proceedings, § 3-813(a); MCR 3.915(B)(1)(b)(i)&(ii) Mt. St. § 41-3-425(2)(a); Neb. Stat. § 43-279.01(1)(b); N.H. Stat. 169-C:10, II(a); NMSA § 32A-4-10(B); N.Y. Fam. Ct. Act § 262(a); N.C. Gen. Stat. § 7B-602(a); N.D. Cent. Code, § 27-20-26(1); 26 ORC

Hawai‘i would thus be conforming its policy to the majority of states by recognizing a right to counsel when the petition is filed.

National best practices also support providing parents with counsel immediately after the state files a petition alleging abuse or neglect, if not earlier. The American Bar Association's Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases recommends that courts "ensure [that] appointments are made when a case first comes before the court, or before the first hearing, and last until the case has been dismissed from the court's jurisdiction."[24] Additionally, the National Council of Juvenile and Family Court Judges ("NCJFCJ") has similarly recognized that "[b]ecause critically important decisions will be made at the very first hearing, parents should be represented by counsel as early in the process as possible." NCJFCJ, *Enhanced Resouce Guidelines* at 42 (2016).

Finally, ACF's 2017 Information Memorandum contained specific "best practices considerations," including a recommendation to "implement binding authority or constitutional protection requiring parents, children and youth to be appointed legal counsel at or before the

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Ann. 2151.352; 10A Okl. St. Ann. § 1-4-306(A)(1)(a); 42 Pa CSA § 6337; RI Gen. Laws § 40-11-7.1(b); S.C. Code Ann. § 63-7-1620(3); Tenn. Code Ann. § 37-1-126(a)(2)(A); Tex. Fam. Code § 107.013(a-1); Utah Code Ann. § 78A-6-1111(1); Va. Code Ann. § 16.1-266(D); Rev. Code Wash. (ARCW) § 13.34.090(2); Wyo. Stat. § 14-3-422. Other states, such as New Jersey, Arizona, and West Virginia also have a statutory right to counsel but the timing of appointment is not clear.

[24] American Bar Association, *Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases* at 7 (2006). Similarly, the American Bar Association's Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings specifies that "The appointment of a child's lawyer must be made as soon as practicable to ensure effective representation of the child and, in any event, before the first court hearing. American Bar Association, Resolution 101A (2011).

initial court appearance in all cases." ACF Information Memorandum at 13 (2017). The memorandum further explains:

> Early appointment of counsel allows attorneys for parents and children to be involved from the very beginning of a case. Attorneys can contest removals, identify fit and willing relatives to serve as respite care providers, advocate for safety plans and identify resources, all of which may help prevent unnecessary removal and placement. Where removal is necessary attorneys for parents and children can be actively involved in case planning, helping to craft solutions that address their client's needs and concerns and expediting reunification or other permanency goals.

Id., at 6. Notably, ACF's policy memorandum cites a Texas pilot study which found that "…cases where attorneys were appointed within ten days of petition filing had more permanent outcomes (e.g., reunification) than cases in which attorneys were appointed later." *Id.*[25]

II. The failure to appoint timely counsel in child welfare proceedings is structural error that requires reversal, and a harmless error analysis is inapplicable.

By determining that the failure to appoint counsel at a hearing where Petitioner was deprived of her children was impermissible but ultimately harmless, the Court of Appeals undermined both the fundamental constitutional rights of parents and the constitutional right to counsel. This Court should hold that the denial of counsel at the early stages of the child welfare proceeding is reversible per se, just as it is in criminal cases. In fact, one of the few constants in the evolution of the U.S. Supreme Court's structural error doctrine has been that a complete denial of counsel at a critical stage of criminal proceedings is the "most obvious" kind of structural error. *United States v. Cronic,* 466 U.S. 648, 658 (1984). Additionally, numerous

[25] The study that is cited is Wood, S. M., Summers, A., & Duarte, C.S., *Legal Representation in the Juvenile Dependency System: Travis County, Texas' Parent Representation Pilot Project.* 54 Family Court Review 277 (2016).

state courts have held that the denial of counsel in child welfare cases is harmful per se or structural error requiring reversal.[26]

As outlined by the Petitioner, this Court held in *State v. Loher*, 140 Hawai‘i 205, 398 P.3d 794 (2017), that there are two characteristics of structural errors. The first is where "certain rights protected by the Hawai‘i Constitution" are "so basic to a fair trial that [their] contravention can never be deemed harmless", and the second is where "the impact of the error on conviction is impossible to reliably assess and when harmless error review would require the appellate court to engage in pure speculation." *Id*.[27] The denial of counsel in a child welfare case, such as occurred in the instant case, meets both of these criteria.

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[26] See e.g. *In Interest of R.D.,* 277 P.3d 889, 896 (Colo. App. 2012) ("A majority of other jurisdictions addressing the issue have concluded that the violation of a respondent parent's statutory or constitutional right to counsel in a termination of parental rights hearing is either reversible error per se or structural error"); *G.P. v. Ind. Dep't of Child Servs.,* 4 N.E.3d 1158, 1167 (Ind. 2014) (in dependency case, court states, "[i]n a number of contexts, Indiana courts have applied a bright-line rule as to the right to counsel—reversing convictions or other judgments when that right is denied … We think this bright-line rule is the right approach to take here, as well"); *Matter of Adoption of K.A.S.*, 499 N.W.2d 558, 567 (N.D. 1993) ("[It is] an axiom in criminal cases that counsel enables an accused to procure a fair trial ... and the formality of these termination and adoption proceedings, along with their substantial threat to a fundamental interest of the parent, is not so different from those in a criminal case"; court skeptical that denial of counsel in TPR case "can ever be 'harmless,' under any standard"); *In re S.S.,* 90 P.3d 571, 575-76 (Okla. Civ. App. 2004) (in termination case, parent deprived of counsel for first half of proceedings; court holds that "the actual or constructive denial of assistance of counsel altogether is legally presumed to result in prejudice …When a defendant is deprived of counsel, it is inappropriate to apply either the prejudice requirement or the harmless error analysis …")

[27] While not part of the *Loher* test, in deciding whether to import the structural error test to the civil child welfare context, this Court should consider the underlying rights at stake that the trial rights (such as a right to counsel) are seeking to protect. In the instant case, those rights are the fundamental rights of parents. Such recognition has caused courts in other jurisdictions to eschew the "civil" label when recognizing the right to counsel itself. See e.g. *Rutherford v. Rutherford*, 464 A.2d 228, 235 (Md. 1983) (finding right to counsel in civil contempt proceedings, and noting that "[a]s repeatedly pointed out in criminal and civil cases, it is the fact of incarceration, and not the label placed upon the proceeding, which requires the appointment of

A. The U.S. Supreme Court and other courts have recognized that appointment of counsel is a right that is basic to a fair trial.

Respondent does not appear to challenge the position that appointment of counsel is a right that is basic to a fair trial, nor suggest that Petitioner or other indigent parents are capable of representing themselves in a child welfare hearing without counsel.

This Court has said that "it is well-settled that "[t]he right of one charged with [a] crime to counsel [is] . . . deemed fundamental and essential to [a] fair trial[.]" *State v. Mundon*, 121 Hawai'i 339, 366, 219 P.3d 1126, 1153 (2009). This parallels federal law, where the U.S. Supreme Court has held that denials of counsel "defy analysis by 'harmless-error' standards because they affec[t] the framework within which the trial proceeds, and are not simply an error in the trial process itself." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-149 (2006) (holding that that improper disqualification of particular counsel, a lesser deprivation than complete deprivation, is also structural error defying analysis); *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (trial is "presumptively unfair ... where the accused is denied the presence of counsel at a critical stage"). This Court, in analyzing *Gonzalez-Lopez*, has said that "although Justice Scalia indicated that his harmlessness analysis was based on the trial and structural error dichotomy, ... his reasoning with respect to whether a defendant must show prejudice supports the view that certain constitutional rights, including the right to counsel of choice, are 'so basic to a fair trial that their infraction can never be treated as harmless error.'" *State v. Cramer*, 129

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counsel for indigents."); *Mead v. Bachlor,* 460 N.W.2d 493, 501 (Mich. 1990) (reversing own precedent that had found no right to counsel in civil contempt, noting national trend towards focusing on the interest at stake, and commenting that "to the extent that Sword turned on the civil-criminal dichotomy, it might now be regarded as an anomaly"); *Artibee v. Cheboygan Circuit Judge*, 243 N.W.2d 248, 250 (Mich. 1976) ("many procedural safeguards attendant to criminal trials have been made applicable to [civil] paternity proceedings").

Hawai‘i 296, 310, 299 P.3d 756, 770 (2013) (quoting *Chapman v. Cal.*, 386 U.S. 18, 23 (1967)). Thus, federal and state law both recognize the denial of counsel as essential to a fair trial.

In *Loher*, this Court further explained why the right to counsel is so essential to having a fair trial:

> A defendant may ‘lack[] both the skill and knowledge to adequately prepare’ and present his or her defense, and for this reason, it is crucial that the defendant is provided with the ‘guiding hand of counsel at every step in the proceedings against him’ ... it is of paramount importance that defendants in our jurisdiction are “accorded 'a meaningful opportunity to present a complete defense'“ in order to satisfy the guarantees that due process affords. *State v. Matafeo*, 71 Haw. 183, 185, 787 P.2d 671, 672 (1990) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)). “A primary reason that a defendant is guaranteed effective assistance of counsel is to ensure that the defendant is not denied due process,” *State v. Tetu*, 139 Hawai'i 207, 219, 386 P.3d 844, 856 (2016), because counsel helps ensure that the defendant is able to present the defense of his or her choosing and receives a fundamentally fair trial.

140 Hawai‘i at 224, 398 P.3d at 813 (emphasis in original). This reasoning is no less true in child welfare cases, where parents face the loss of their fundamental right to parent at every step and are no more able to navigate the complex web of laws and standards than are criminal defendants.

Recognizing the importance of the right to counsel and the underlying fundamental right of parents, the Supreme Court of Georgia reversed its own precedent and abandoned the harmless error test for child welfare cases, concluding that “[W]hen the state is terminating a parent’s ‘fundamental and fiercely guarded right’ to his or her child, although technically done in a civil proceeding, the total and erroneous denial of appointed counsel during the termination hearing is presumptively harmful because it calls into question the very structural integrity of the fact-finding process.” *In re J.M.B.,* 676 S.E.2d 9, 12 (Ga. App. 2009).

B. Courts have recognized that the impact of a denial of the right to appointed counsel in civil cases is impossible to reliably assess.

In *Gonzalez-Lopez*, the Supreme Court explained why the improper disqualification of

particular counsel (a lesser deprivation than complete deprivation) was distinct from ineffective assistance of counsel, because for the latter:

> [w]e can assess how those mistakes affected the outcome. To determine the effect of wrongful denial of choice of counsel, however, we would not be looking for mistakes committed by the actual counsel, but for differences in the defense that would have been made by the rejected counsel - in matters ranging from questions asked on voir dire and cross-examination to such intangibles as argument style and relationship with the prosecutors. We would have to speculate upon what matters the rejected counsel would have handled differently - or indeed, would have handled the same but with the benefit of a more jury-pleasing courtroom style or a longstanding relationship of trust with the prosecutors. And then we would have to speculate upon what effect those different choices or different intangibles might have had. The difficulties of conducting the two assessments of prejudice are not remotely comparable.

To attempt harmless error analysis in this scenario, Justice Scalia concluded, was to engage in "a speculative inquiry into what might have occurred in an alternate universe." *Id*. at 150.

This same speculation clearly comes into play when there is no counsel whatsoever, and for a child welfare case just as much as a criminal case. See e.g., *In re Adoption of L.B.M.*, 639 Pa. 428, 446, 161 A.3d 172, 183 (2017) (adopting structural error test for denial of counsel in termination of parental rights cases because "harmless error analysis would require speculation after the fact to evaluate the effect of the lack of appointed counsel, effectively requiring proof of a negative.")

The impossibility of evaluating the effect of the denial of counsel is revealed by an examination of what will happen on appeal. Since the trial record that will be relied upon by the appellate court for "harmless error" review is biased and incomplete (due to it being developed without the benefit of counsel representing the parent's interest), there is virtually no chance that the record will reveal *any* merits of the parent's case that might have led to a different outcome. Even if a parent is fortunate enough to secure counsel for the appeal, such counsel will be limited

to arguing whatever skeletal evidence was in the trial court record, and will not be able to adduce new evidence. Justice Blackmun's dissent in *Lassiter* elaborated upon this:

> The [majority opinion] assumes that a review of the record will establish whether a defendant, proceeding without counsel, has suffered unfair disadvantage. But in the ordinary case, this simply is not so. The pleadings and transcript of an uncounseled termination proceeding at most will show the obvious blunders and omissions of the defendant parent. Determining the difference legal representation would have made becomes possible only through imagination, investigation, and legal research focused on the particular case. Even if the reviewing court can embark on such an enterprise in each case, it might be hard pressed to discern the significance of failures to challenge the State's evidence or to develop a satisfactory defense .... Because a parent acting pro se is even more likely to be unaware of controlling legal standards and practices, and unskilled in garnering relevant facts, it is difficult, if not impossible, to conclude that the typical case has been adequately presented.

Lassiter, 452 U.S. at 50-51 (Blackmun, J., dissenting).

This situation for appeals thus creates an unavoidable Catch-22: only in situations where a parent has been appointed counsel and thus "afforded an opportunity of developing a record upon which his rights may be intelligently and certainly determined", *Atkins v. Moore*, 218 F.2d 637, 638 (5th Cir. 1955) (per curiam) (capital case), can the record have been adequately developed and the risk of error be accurately assessed. Even some courts that have applied a harmless error analysis have acknowledged this dilemma.[28]

[28] *See e.g. State ex rel. Adult and Family Services Division v. Stoutt*, 644 P.2d 1132, 1137 (Or. App. 1982) (conceding that "[I]t is circular to look to the record to determine whether counsel could have affected the result, when one of the principal missions of counsel in any litigation is to develop the record", but still applying harmless error test in part because *Lassiter* did so); *J.C.N.F. v. Stone County Dept. of Human Services,* 996 So.2d 762, 771 (Miss. 2008) (agreeing that presence of counsel "may have greatly changed the hearing transcript now before this Court", but nonetheless finding result would have been the same).

In the instant case, the Respondent relies on the fact that Petitioner, once given counsel more than three months later, stipulated to the grant of foster custody and did not appeal.[29] However, it is impossible to know whether Petitioner's actions in this regard would have been different had she been given counsel prior to the hearing and not been deprived of her children for over three months. In essence, this is the precise kind of speculation that is anathema to a situation where counsel is denied at a critical stage.

CONCLUSION

For the reasons set forth above, *amici* urge this Court to hold that lower courts must appoint counsel to an indigent parent when the State *files* a petition for custody or family supervision and adopt a structural error analysis requiring reversal for failure to appoint counsel for the parent. Such a ruling is in line with this Court's opinion in *In re T.M.,* aligns Hawai'i with the national consensus regarding the early appointment of counsel for parents in child welfare proceedings, and helps ensure that parents involved in such proceedings are not erroneously deprived of their fundamental, constitutional rights to counsel and to the care, custody, and control of their children.

[29] In its brief, Respondent describes the 97-day delay in appointing counsel to be "comparatively brief" to the duration of the entire case. This argument belies the truth that in dependency court cases, time is of the essence. Federal law mandate timelines intended to prevent youth from languishing in state custody, including most notably the Adoption and Safe Families Act, which requires state agencies to move forward termination of parental rights cases if the child has been in care for 15 of the last 22 months (unless certain circumstances apply). Once a child is removed, the metaphorical clock begins to tick. Ninety-seven days is 21% of the parent's timeline under federal law to regain custody of their child. It is a significant amount of time to measure progress (or lack thereof) with court-ordered services, progress (or lack thereof) with child/parent visitation, and overall reasonable efforts (or lack thereof) to achieve the permanency plan. Deprived of counsel during this period, it is impossible to know how the parent's uncounseled and unadvised actions may have been different or influenced the trajectory of the case in a divergent way to inform eventual judicial permanency decisions.

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Respectfully submitted,

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