To: The Honorable Joy A. San Buenaventura, Chair,
The Honorable Les Ihara, Jr., Vice Chair, and
Members of the Senate Committee on Human Services

Re: **SB 2072 – RELATING TO COURT-APPOINTED ATTORNEYS**
Hearing: Tuesday, February 8, 2022, 3:30 p.m., Conference Rm 225 & via videoconference
Position: **Strong Support**

Aloha Chair San Buenaventura, Vice Chair Ihara, Jr., and Members of the Committee on Human Services:

The Health Committee of the Democratic Party of Hawai‘i stands in strong support of SB 2072. This measure would require the court to appoint counsel to indigent parents upon the filing of a petition for custody or family supervision and make every effort to do so at the first hearing attended by the parents.

The Health Committee of the Democratic Party of Hawai‘i supports this bill as it will provide indigent biological parents with the right to court-appointed counsel under the due process clause of the Hawaii State Constitution in termination of parental rights proceedings. Clearly, the failure of the family court to appoint counsel for indigent parents in the timely manner is an abuse of discretion and or a structural error necessitating a reversal of any adverse ruling to the parents.

This is important because indigent parents are required by laws to be fully, fairly, and adequately represented by counsel during such proceedings where the court can order that, in the best interests of the child, parental rights need to be permanently terminated. This is an extremely traumatic and complex proceeding where, when weighing the evidence, historically the weight tips in favor of the evidence presented by the Child Protective Services. As such, this perceived bias of the judicial system can only be countered by fair, proper and adequate representation. Absent such mandate, the indigent parents' right to due process will be unfairly abrogated. Mahalo for this opportunity to testify; please pass this bill.

Respectfully yours,
/s/ *Melodie R. Aduja*
Chair, Health Committee, Democratic Party of Hawai‘i
Contact: legislativepriorities@gmail.com (808) 258-8889

Senator Rhoads,

As an advocate for families in the child welfare system, I hear at least one of the following from every parent: the court appointed lawyer didn't notify of the right to contest an allegation, the right to respond to a caseworker court report "on the record", the existence of a Central Registry with narrow opportunity for expungement, and rare, if at all, communication throughout a case. One parent in a 5-year case never had a copy of the caseworker report prior to 15 minutes before hearings. The stipend for court appointed lawyers is $120. per month for each case, yet "the recommended is a caseload of no more than 50-100 cases depending on what the attorney can handle competently." How can any lawyer handle defense of this many cases with such a low compensation?

I strongly support this bill, but would add:

(b) The court appointed attorney for the legal parent or 17 party in child welfare cases shall practice in compliance with the American Bar Association Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases and shall provide a copy of the standards to the legal parent or party no later than at the time that an attorney client relationship is 5 created.

(c) The attorney shall notify the client that his name is on the Central Child Abuse Registry prior to making a decision on stipulating to or contesting the the allegations.

February 7, 2022

Re: Testimony in Support of SB 2072, Relating to Court-Appointed Attorneys

To Chair Buenaventura, Vice Chair Ihara, and members of the Committee on Human Services:

On behalf of the National Coalition for a Civil Right to Counsel (NCCRC), I am pleased to submit this testimony in support of SB 2072. This bill is necessary to ensure that the constitutional rights of parents are fully protected.

The statute governing appointment of counsel for parents in child welfare proceedings, Haw. Rev. Stat. § 587A-17(a), currently states, "The court may appoint an attorney to represent a legal parent who is indigent based on court-established guidelines." However, in *In re T.M.*, 319 P.3d 338 (Haw. 2014), the Supreme Court of Hawai'i held that the Hawaii Constitution's due process clause requires the appointment of counsel for all parents in abuse/neglect and termination of parental rights proceedings. The *T.M.* decision put Hawai'i in line with the vast majority of other states as to the right to counsel, and ensures that the fundamental, constitutional rights of parents receive the due process protection that they deserve. Then, in *In re L.I.*, 149 Haw. 118, 482 P.3d 1079 (2021), the Court clarified an unanswered question from *T.M.* and held that counsel must be appointed for the parents upon filing of a petition and not later, and that petitions for both custody and family supervision trigger the right to appointed counsel.

The statute now needs to be amended for a number of reasons:

First, § 587A-17(a) has not been rewritten since *T.M.*, so it still states a court has discretion as to whether or not to appoint counsel for an indigent parent, rather than it being mandatory. This could lead trial judges unaware of *T.M.* to mistakenly believe they have the discretion to deny the appointment of counsel, or that appointment of counsel does not apply to cases involving family supervision.

Second, § 587A-17(a) says nothing about the timing of appointment. It is therefore necessary to clarify exactly that counsel must be appointed upon filing of a petition, as outlined by *L.I.*

Third, trial courts may not be asking whether parents want counsel or may be improperly including that parents have waived such their right to counsel. In *In re T.S.*, 353 P.3d 409 (Haw. App. 2015), after a father's retained counsel withdrew, the trial court "questioned whether Father wanted to proceed without an attorney" and said to him, "[I]f you're not comfortable and would like to have an attorney present, then you can let me know." The father then said that he would proceed. From this, the Court of Appeals concluded that "Father was aware of his right to counsel but chose to proceed without counsel." Thus, the Court of Appeals either required the

father to request appointed counsel or determined he had waived his right to appointed counsel. Yet *T.M.* does not require a parent to affirmatively request counsel in order for the right to counsel to attach; rather, it states that trial courts "must appoint counsel." And in order to fully protect the vital parental rights at stake, any waiver of appointed counsel must be knowing, voluntary, and on the record. The current version of § 587A-17(a) does not address these things.

SB 2072 eliminates the discretionary language in § 587A-17(a), requires the court to inquire whether the parent desires counsel, specifies that counsel must be appointed quickly absent certain extenuating circumstances, and requires a waiver of appointed counsel to be knowing, voluntary, and on the record. Moreover, it addresses the situation where a parent no longer has retained counsel but may qualify for appointed counsel (a fairly common occurrence where a low-income parent is able to secure counsel for a short period but then runs out of resources). These statutory changes are necessary to ensure that the constitutional requirements laid out in *T.M.* and *L.I.* are met and that parents are not deprived of their children without due process.

We thank you for your consideration and hope the bill gains your support.

Sincerely,

John Pollock
Coordinator, NCCRC