Case No.

IN THE SUPREME COURT OF THE UNITED STATES

J.H., PETITIONER,

v.

E.R.S.

PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

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March 3, 2020

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QUESTIONS PRESENTED

An Afghanistan war veteran left the service with an honorable discharge to care for her child. A few years later, she was diagnosed with post-traumatic stress disorder (PTSD) caused by her military service. Realizing that her life was beginning to lose stability, she put her child, with the court's approval, in his biological father's care so she could obtain PTSD treatment in an out-of-state shelter for female veterans. But when she returned after accomplishing precisely what the court had approved—putting her life back together to reunite with her child—the court applauded her but terminated her rights and those of her child.

Almost fifty years ago, this Court held: "[t]he State registers no gain towards its declared goals when it separates children from the custody of fit parents." *Stanley v. Illinois*, 405 U.S. 645, 652, 92 S. Ct. 1208, 1213, 31 L. Ed. 2d 551 (1972), *reaffirmed in Santosky*, 455 U.S. at 767. Yet the Colorado Step-Parent-Adoption Statute, C.R.S. § 19-5-201 et seq., allows the State to do just that: permanently separate children from their fit parents.

Questions presented:

1. Whether, in order to ensure that basic constitutional guarantees define the framework of proceedings to terminate the fundamental constitutional liberty rights of children and parents, the Due Process and Equal Protection Clauses of the

Constitution require that the plain or structural error doctrine be applied to reach the merits of constitutional questions raised for the first time on direct appeal.

2. Whether the Due Process and Equal Protection Clauses of the Constitution require that appellate courts address the merits of claims of violation of a child's constitutional rights raised for the first time on direct appeal, where the child was not represented by counsel during the proceedings that permanently terminated his constitutional liberty right to have a relationship with his parent.

3. Whether the Due Process and Equal Protection Clauses require appellate courts to conduct an independent *de novo* review of the constitutional facts in proceedings to terminate the fundamental constitutional liberty rights of children and parents.

PARTIES TO THE PROCEEDINGS

Petitioner is the mother, J.H. Respondent is E.R.S, the father's spouse. The child is I.E.H.

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Petitioner, the mother, J.H., respectfully petitions for a writ of certiorari in this case to review the published opinion of the Colorado Court of Appeals. *In re E.R.S.*, 2019 COA 40, 452 P.3d 174, *cert. denied sub nom. J.H. v. E.R.S. for adoption of I.E.H.*, No. 19SC322, 2019 WL 4264211 (Colo. Sept. 9, 2019). The opinions of the Colorado Supreme Court and Court of Appeals are attached. App. A and C.

JURISDICTION

On September 9, 2019, the Colorado Supreme Court denied the Petition for Writ of Certiorari.[1] On December 4, 2019, the Court granted the mother's petition for extension of time until February 6, 2020 to file her petition for writ of certiorari. The petition was submitted on February 6, 2020. On February 11, 2020, the Court ordered Petitioner to resubmit the petition within 60 days. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

[1] It is important to note that in the fiscal year 2019, 949 petitions for writ of certiorari were filed in the Colorado Supreme Court. During that same period, the court granted certiorari in 49 cases (5.16%). As a result, the Colorado Court of Appeals has become the court of last resort for most Colorado citizens.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process and Equal Protection Clauses of the Constitution. The Colorado Step-Parent-Adoption, Colo. Rev. Stat. § 19-5-201 et seq., and Dependency and Neglect, Colo. Rev. Stat. § 19-3-100.5 et seq., statutes, Colo. Rev. Stat. § 19-5-105.

INTRODUCTION

A State (which has failed to provide any assistance to a child and her veteran mother, the child's primary caregiver, whose untreated war wounds resulted in loss of her employment and housing) *does not have any interest* in terminating the constitutional liberty rights of a child and mother (who obtained a court decree allowing her to leave her child safely with his biological father so that she could get treatment) *after* the mother has been successfully treated for PTSD and secured housing and gainful employment so she could have her child back, pursuant to a court order – especially *without* appointing either counsel or Guardian ad Litem (GAL) for the child or counsel for the mother and *without* hearing from any child psychologist and other neutral witness who could testify as to the best interest of the child.

The Step-Parent-Adoption Statute, as interpreted by Colorado courts, not only allows permanent separation of children from their *fit* parents but allows

separation without the fundamentally fair proceeding required by the United States Constitution and without affording children and parents the constitutional safeguards that Colorado provides in Dependency and Neglect (D&N) cases, C.R.S. § 19-3-100.5 et seq.

Under Colorado law, had the mother not acted to ensure her child was safe while she was treating her PTSD, the State would have opened a D&N case that would have provided mother and child the required resources and constitutional safeguards. But because the mother, as a fit parent, decided in the best interest of her child to keep him safe (with his biological father), the State did not open a D&N case. Instead, it terminated the constitutional rights of mother and child without affording either of them the resources and constitutional safeguards provided to children and parents in D&N cases.

The questions from the Honorable Jerry Jones (of the Colorado Court of Appeals) during the oral arguments highlight the heart of this problem.

> JJ: Counsel. Let's assume all of the same facts as we have in this case except that instead of a step-parent adoption the Department of Human Services institutes a dependency and neglect action.
>
> Sure.
>
> JJ: OK. In that circumstance, what has to happen is that a treatment plan has to be devised, and that treatment plan in a case like this would typically involve things like mental health treatment, housing or help with housing in terms of finding available housing, perhaps some vocational training, things like that, all of which is designed to deal with the trauma, and the homelessness, and the lack of income,

> and those sorts of things. And this plan would be in place for a while and the parent would have an opportunity to fix those things under the supervision of the Department.
>
> That is correct.
>
> JJ: OK. But under this statute none of that happens.
>
> That is correct.
>
> JJ: OK. Even though the facts are the same and the result is termination of the relationship.
>
> Correct.
>
> JJ: All right, why isn't that an equal protection problem?

(Oral Arguments,

https://www.courts.state.co.us/Courts/Court_of_Appeals/Oral_Arguments/Index.

cfm, [January 15, 2019 at 1:00 pm, third Floor] at 1:21:48.)

> JJ: But aren't all those steps I was talking about with the treatment plan – those are in recognition of *Troxel*, that we have to do whatever we can to try to make this relationship work because the first goal, the very first goal, is to have these two continue with their relationship; it's to avoid termination of the relationship. This seems to me, under this other statutory scheme that's just not even taken into consideration.

(*Id*. 1:25:32.)

Nonetheless, the Colorado Court of Appeals (COA) affirmed termination of the relationship of this mother and child, in flagrant disregard of *Santosky* and *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).

STATEMENT OF THE CASE

The mother, an Afghanistan war veteran, was the primary caregiver for the first five years of her son's life and shared a strong and special emotional bond with him. (App. H. TR [03-14-17], p. 40; App. I. TR [04-12-17], pp. 34-5.) When the mother started having PTSD attacks, her first concern was the best interest of her child. (App. I. TR [04-12-17], p. 21.) Given her painful familiarity with instability growing up in the foster care system, her first reaction was to protect her child from that pain and instability. (*Id*.)

Therefore, she did the hardest thing she had ever had to do – far harder than gathering the remains of her friends' bodies after an improvised explosive device hit their unit in Afghanistan. (*Id*.) With the District Court's approval, she allowed her son to live temporarily with his biological father, so she could repair, restore, and reclaim her life without traumatizing him. (App. H. TR [03-14-17], p.40-46; App. I. TR [04-12-17], p. 35-37; App. J. pp. 213-14 [2009JV15, Supr, CF.] [the 2013 court-approved agreement].)

In spite of the fact that their agreement made it clear that the reason for allowing the father to have temporary full custody of the child was that the mother's PTSD has resulted in loss of housing and employment, the father's attorney recommended that the homeless unemployed mother pay $569.38 in

monthly child support. (App. J. pp. 213-14 [2009JV15, Supr, CF.].) The father added that number after the agreement was signed. (*See id*. [note the father's handwriting].) The District Court found the mother responsible for $569.38 in monthly child support at the same time it approved the plan to give father temporary full custody because PTSD had robbed the veteran mother, who had been a model citizen and mother until then, of employment and housing. *See id*. The mother, who was not represented by counsel, lacked the effective ability to appeal that decision, being overwhelmed by the PTSD attacks, unemployment, homelessness, and separation from her child – all of which were new for her. She knew, though, that she had to fight to save her life so she could get her child back. And that she did, with the same determination she fought for this country in Afghanistan.

Against the odds, after many months of effort, the mother was able to enter, and then successfully complete, an out-of-state veterans' PTSD treatment program (none were available to female veterans in Colorado) and then a residential veterans' program. (App. H. TR [03-14-17], p. 40-46; App. I. TR [04-12-17], p. 35-37.)

But just at the moment that she had stabilized her life and obtained a job and housing – having succeeded where so many others had not – the father sought to terminate her parental rights, despite the court order that memorialized their

agreement to allow her to resume exercise of her parental rights upon doing just that. (App. J. pp. 217-19 [2016JA1 CF.]; App. J. pp. 213-14 [2009JV15, Supr, CF.].)

As soon as she was able to get control over her PTSD, find a job, and rent an apartment, the mother – who never intended to abandon her child, (App. H. TR [03-14-17], p. 52, ll. 16-18; App. J. pp. 213-14 [2009JV15, Supr, CF.]) – tried to get her child back. The father, however, did not respond to her messages. (App. H. TR [03-14-17], p.65, ll. 19-20, pp. 69-70, 10-12.) And because she was not represented by counsel, she mistakenly believed the father's statement that she was not allowed to see her son until she was current with her (erroneously determined) child support. (App. H. TR [03-14-17], p.91, ll. 13-15.)

When the father blocked her efforts to contact her son, she desperately tried to find someone to represent her so that she could see her son. But Colorado Legal Services was not able to help. (App. H. TR [03-14-17], p.61, ll. 17-24.)

When the father realized that the mother, who had actually achieved the terms of their court-approved agreement, was not going to give up on her child, he filed a petition on behalf of his wife for step-parent adoption, which required termination of the fundamental constitutional liberty rights of the child and mother. (App. J. pp. 217-19 [2016JA1 CF.] [the August 2016 petition].) The juvenile court (the same judge presided over the family law and juvenile cases), however, did not

appoint counsel for the child or the mother. Neither did it appoint a GAL for the child.

Almost six months later, mother was able to find a *pro bono* attorney – although an attorney who had never represented a client in a termination proceeding and had no knowledge of the complex constitutional and statutory issues involved. (App. J. p. 221 [2016JA1 CF.] [entry of appearance of *pro bono* counsel].)

During the termination hearing, the trial court commended Appellant as a single mother, the primary caregiver for her son for the first five years of his life, a war veteran, and a wounded warrior who overcame PTSD and homelessness. (App. I. TR [04/12/17], pp. 34, 35, 36.) The court, however, found that despite the court-approved agreement, which had conditioned regaining her parental rights on addressing her PTSD and securing employment and housing,

> kids can't wait that long … while Ms. [H] was getting herself together, and I think she's done a good job of doing that, [IEH] was waiting, and [it] wasn't fair to him to wait. I understand why it happened, but it wasn't fair for him to wait.

(*Id*. TR [04/12/17], p. 37.)

The court also found that the mother's inability to pay $569 per month, while she was homelessness and unemployed, was an independent basis for terminating her parental rights. (*Id*. TR [04-12-17], p. 38-39; App. H. TR [03-14-

17], p. 13, ll. 14-23.) The mother's undisputed testimony, however, established that:

- The mother's monthly income/VA disability benefits from May of 2013 until April 2016 was $597. (App. H. TR [03-14-17], pp. 13-14.)
- Even that small amount itself was not received in several months. (*Id*.)
- Child Support Services advised her that she would be in compliance with her child support obligations if she could make $50 monthly payments. (*Id.*, p. 54.)

The Colorado Step-Parent-Adoption statute specifically requires that the court determine if the parent, *without cause*, failed to pay *reasonable* child support within her/his means. The court made no such determination. Furthermore, the court did not hold the father to his burden to prove with clear and convincing evidence either what constituted reasonable child support for each of the twelve months at issue or whether the mother's homelessness, unemployment, and PTSD treatment constituted "cause" under the statute. In addition, the mother – who was the primary caregiver for the first five years of her child's life – testified that now, having finally put her life back together, she was determined to pay her share of child support. (E.g., *id*., p. 59.)

The father never filed any motions to enforce the (erroneous) child support order. Mother, who could not afford a lawyer, was never notified that failure to pay

could result in termination of her parental rights. Neither was she given the opportunity to develop a plan to avoid it. And despite applauding her for having accomplished the seemingly impossible, the court did not consider those achievements or the complete reversal in the mother's circumstances. Its finding, in direct contradiction of the undisputed evidence, was

> she failed without cause to pay reasonable child support. There is a total of $125. Even if I take Ms. H's word of, hey, there is no way I can pay the $576, which I get, $125 is minimal, and *it is not a reasonable amount for* [*I.E.H*].

(App. I. TR [04-12-17], p. 51, ll. 20-5 [emphasis added].)

This statement directly contradicts the plain language of the statute, Colo. Rev. Stat. § 19-5-105 ("Whether the parent has failed to pay regular and reasonable support for the care of the child, ***according to that parent's means***." § 19-5-105 3(c)(II) (emphasis added)). The statute requires the juvenile court to make specific determination as to what was the reasonable monthly payment *under the mother's circumstances* – in this case, unemployed, living in a veteran homeless shelter, with her VA benefits cut for months, and then trying to rebuild her credit so she could find housing and employment to regain stability so she could make child support payments.

Mother's undisputed testimony during the termination hearings demonstrated that, by the time the father filed the petition, she was perfectly capable of taking care of her child. (R. *passim*.) Conversely, the father presented

no evidence to refute her testimony or establish that it was in the best interest of the child not to have any contact with his fit mother. (R. *passim*.) There was no testimony from any experts.[2] (*Id*.) The court did not appoint counsel or GAL for the child. (*Id*.) And there was no independent testimony regarding the child's best interest. (*Id*.) The court did not make any direct or indirect inquiry regarding the almost 10-year old child's wishes. (*Id*.) Instead, the court decided to, in its own word, "practice pop psychology."

> *I wish that I had heard from some mental health professionals from either side*. Because what that leaves this Court to do is to practice pop psychology, and, while I won't tell you that I am a novice in this area having sat as a judge for 14 years, and having been a divorce attorney for ten years before that, as well as different kinds of an attorney as well, certainly I'm aware of some things psychologically that go on with kids and with adults.

(App. I. (TR [04-12-17], p. 42, ll. 4-12 [emphasis added]).)

The juvenile court's opinion, *see* App. G (the court did not issue a written order), is devoid of any analysis of how it is in the best interest of the child not to

[2] Were the mother given and advised of her right to hire an expert, the expert would explain that Mother desperately wants her child to know that she was never abandoned by her mother. As a foster child, Mother is painfully familiar with the life-long impact of having been abandoned – and of growing up in an unsafe environment, which was why she ensured her child was safe and was not affected while she received treatment for PTSD and battled homelessness and unemployment. *Cf.* Deborah Moskovitch, *Estranged or Abandoned by a Parent: Are Children Scarred for Life?* https://www.huffpost.com/entry/oprahs-most-memorable-gue_b_869497 (last visited May 2019).

have any relationship with her fit mother who was able and willing to take care of him and who had done everything in her power to protect him.

On appeal, the mother's appellate counsel asserted the fundamental constitutional and statutory rights of the child, who had no representation, and of herself, whose *pro bono* trial counsel, who was not familiar with this area of law, had not raised. The mother requested that the COA follow its sister states and address these structural errors because of the paramount importance of the liberty rights at stake; because the juvenile court had not appointed a counsel or GAL for the child; and because the failure to raise the structural errors was ineffective assistance of counsel *per se*. The mother also requested that the COA follow its sister states and apply the *de novo* standard of review and thus perform an independent review of the juvenile court's findings regarding the constitutional facts, which affected the fundamental rights of the child and mother.

The COA, disregarding the overwhelming majority of States who have held otherwise:

- Held that the doctrine of structural error does not apply in proceedings for termination of the fundamental constitutional liberty rights of children and parents; that it only applies to constitutional issues raised in criminal cases. *In re E.R.S.*, 2019 COA ¶ 37.

- Did not address the mother's arguments regarding the *de novo* standard of review for constitutional facts and ineffective counsel *per se* when counsel fails to raise structural errors.
- Did not apply the plain error doctrine to address the constitutional issues, including the juvenile court's failure to appoint counsel and GAL for the child.
- Did not reach any of the constitutional or statutory interpretation issues.

Further, the COA:

- Did not provide an analysis of how the father had met his burden to prove with clear and convincing evidence that the mother intended and continued to intend to abandon her child (in spite of both the undisputed evidence of a court-approved agreement that conditioned regaining parental rights and the conflicting testimony regarding the father blocking the mother's attempt to contact her child) or had without cause failed to pay child support and did not intend to pay child support in the future (even though the undisputed testimony established that the mother did not have the ability to pay while she was unemployed and homeless and, now that she had secured housing and employment, was willing and able to contribute).

- Did not address the juvenile court's erroneous statutory interpretation regarding reasonable child support payment pursuant to § 19-5-105 3(c)(II) ("Whether the parent has failed to pay regular and reasonable support for the care of the child, according to that parent's means.").
- Did not address the issue that the juvenile court not only had not made any specific findings (not conclusory statements) regarding the best interest of the child but could not have made any such findings given that the child had no counsel or GAL; that no independent expert or lay witness was called to testify regarding the child's best interest; and that the court did not make any inquiry regarding the almost-ten-year-old child's wishes.
- Instead, in the absence of *any analysis* of the best interest of *this child*, it merely stated:

> The conflict between the best interests of the child and the natural parent's right to parenthood, which can arise in a stepparent adoption [case] ..., is resolved in Colorado law by placing primary importance on the best interests of the child.

In re E.R.S., 2019 COA ¶ 48 (quoting *E.R.S. v. O.D.A.*, 779 P.2d 844, 850 (Colo. 1989).

This statement, however, directly contradicts Santosky.

Santosky, 455 U.S. at 760 ("We have little doubt that the Due Process

Clause would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." quoting *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549, 554, 54 L.Ed.2d 511 (1978) (internal citations, alteration, and quotation marks omitted)).

REASONS FOR GRANTING THE PETITION

I. The Due Process and Equal Protection Clauses of the Constitution require application of the structural and plain error doctrines and independent de novo *review of constitutional facts by appellate courts in proceedings to permanently terminate the fundamental constitutional liberty rights of children and their parents.*

There is a split among the States regarding:

1. Whether the doctrine of structural error applies in proceedings for termination of the fundamental constitutional liberty rights of children and their parents.
2. Whether the doctrine of plain error applies in proceedings for termination of the fundamental constitutional liberty rights of children and their parents.

3. Whether appellate courts should conduct an independent *de novo* review of the constitutional facts in proceedings for termination of the fundamental constitutional liberty rights of children and their parents.

Considering the paramount importance of the liberty rights at stake, most States apply the structural and plain error doctrines and perform an independent *de novo* review of constitutional facts in proceedings for termination of the fundamental constitutional liberty rights of children and their parents.

As the Supreme Court of Michigan has emphasized: "*A structural error rule for the deprivation of counsel in termination of parental rights proceedings would simply recognize that termination of parental rights is a deprivation of a liberty interest at least as significant as incarceration*." *In re Hudson*, 483 Mich. 928, 939, 763 N.W.2d 618, 628 (2009) (emphasis added); *see also, e.g*, *In re T.S.*, 192 A.3d 1080, 1087 (Pa. 2018), *cert. denied sub nom. T.H.-H. v. Allegheny Cty. Office of Children, Youth & Families*, 139 S. Ct. 1187, 203 L. Ed. 2d 220 (2019) (applying the structural error doctrine to reach the merits of the child's right to counsel [representing the child's legal interest] and GAL [representing the child's best interest] arguments); *State ex rel. Children, Youth & Families Dep't v. Rosalia M.*, 2017-NMCA-085, ¶¶ 16-19, 406 P.3d 972, 977 (applying the structural error doctrine to reach the merits of the constitutional arguments); *In re S.M.H.*, 2019 WI 14, ¶¶ 15-16, 385 Wis. 2d 418, 428–30, 922 N.W.2d 807, 812–13 (same); *In re*

R.L.J., 310 P.3d 1078 (Kan. Ct. App. 2013) (unpublished); *In re Deana E.*, 61 Conn. App. 197, 210, 763 A.2d 45, 52 (2000); *Sarah A. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 427 P.3d 771, 784 (Alaska 2018) (same); *In re Adoption of L.B.M.*, 639 Pa. 428, 446, 161 A.3d 172, 183 (2017); *In re Det. of D.F.F.*, 172 Wash. 2d 37, 41, 256 P.3d 357, 360 n 2 (2011); *In re D.I.B.*, 988 S.W.2d 753, 758 (Tex. 1999); *In re Adoption of B.J.M.*, 209 P.3d 200, 207 (2009); *In re Torrance P.*, 724 N.W.2d 623, 635 (2006).

Nothing in the language of this Court's opinions suggests that the structural error analysis does not equally apply to *all* fundamental constitutional errors. *See, e.g., United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-50, 126 S. Ct. 2557, 2563-64, 165 L. Ed. 2d 409 (2006).

Further, it is hard to fathom how the COA did not find the unconstitutional separation of a child from his fit mother—a wounded veteran—a "manifest injustice," justifying application of plain error review to reach the merits of the arguments. *In re E.R.S.*, 2019 COA 40, ¶¶ 38-39. *But see Blueflame Gas, Inc. v. Van Hoose*, 679 P.2d 579, 587 (Colo. 1984). This is particularly problematic considering the number of States that have applied the plain error doctrine to issues raised for the first time in appeal of termination of parental rights cases. *See, e.g.*, *In re Interest of Justine J.*, 288 Neb. 607, 608, 849 N.W.2d 509, 511 (2014) (applying the plain error doctrine in proceedings for termination of constitutional

liberty rights of children and their parents to reach the merits of the arguments); *Marcia V. v. State*, 201 P.3d 496, 502 (Alaska 2009) (same); *In re Custody of D.A.*, 2008 MT 247, ¶ 33, 344 Mont. 513, 521, 189 P.3d 631, 637 (same); *MSH v. ALH*, 2012 WY 29, ¶ 6, 271 P.3d 983, 985 (Wyo. 2012); *In re Duren*, 355 Mo. 1222, 1226, 200 S.W.2d 343, 345 (1947).

Colorado, however, has deprived its children and their parents of these constitutional safeguards. *In re E.R.S.,* 2019 COA 40 (holding that the structural error doctrine only applies in criminal case). As a result, similarly situated children and parents subject to termination proceedings are treated differently depending on the State in which the Step-Parent-Adoption case is filed.

In addition, in light of the heightened burden of proof and the necessity of a fundamentally fair process in termination proceedings, **the trial court's ruling that the evidence sufficiently supports termination of parental rights involves conclusions of law and findings of constitutional facts, which are reviewed *de novo*, independently, with no presumption of correctness**. *See, e.g., In re Interest of Noah B. et al*., 295 Neb. 764, 891 N.W. 2d 109 (Neb. 2017); *In re Carrington H.*, 483 S.W.3d 507, 523-24 (Tenn. 2016); *Matter of C.M*., 432 P.3d 763, 768 (Okla. 2018); *In re A.S*., 906 N.W.2d 467, 472 (Iowa 2018).

The Colorado Court of Appeals, however, did not conduct an independent *de novo* review (and did not even state what standard of review it did apply).

The mother, aware (through personal experience) of the long-term trauma suffered by children who believe they have been abandoned by their parents, moved to Colorado from New York to allow her son to have his father in his life. She thereby lost the protections of New York law and was subject to the Colorado Court of Appeals' determination that it was acceptable for Colorado courts not only to permanently terminate her rights but to refuse to allow the child and her fit mother to have any contact during the pendency of a case – thus in this case depriving her son of even the knowledge that his mother did not abandon him and had been actively fighting for him for more than a year.

Colorado children and their parents deserve the equal protection of the laws; the same constitutional protections afforded to the children and parents in Alaska, Connecticut, Kansas, Michigan, Missouri, New Mexico, Pennsylvania, Washington, Wisconsin, etc.—States that understand the importance of the fundamental liberty interests involved and protect their citizens from the trauma of separating children from their fit parents.

No less importantly, Colorado children and parents subject to the Step-Parent-Adoption Statute deserve the same protections afforded to children and parents in Dependency and Neglect (D&N) cases (where there are extensive *Santosky* safeguards). It is hard to fathom why a parent whose fitness is not

questioned and her child are not protected by, at the very least, the same constitutional safeguards afforded to children and parents in D&N proceedings.

II. The Colorado Step-Parent-Adoption Statute Violated the Due Process and Equal Protection Clauses of the Constitution.

"When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it." *Santosky*, 455 U.S. at 759. "Few consequences of judicial action are so grave as the severance of natural family ties." *Id*. at 787; *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 119 (1996).

Parents and children therefore are constitutionally entitled to "fundamentally fair procedures" in termination proceedings. *Santosky*, 455 U.S. at 754.

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985).

In D&N cases in Colorado, terminating the parent-child legal relationship requires clear and convincing evidence that establishes that: the child has been adjudicated dependent or neglected; an appropriate treatment plan, approved by the trial court, has not been complied with by the parent or has not been successful in rehabilitating the parent; the parent is unfit; and the parent's conduct or condition is unlikely to change within a reasonable time. Furthermore, before the State can move for termination, it ***must*** make reasonable efforts to reunify the family,

Section 19-3-100.5(1); *see* § 19-3-604(2)(h), (k)(III), including assessing the family, developing a plan for providing services, and offering visitation services. *See* § 19-3-208. It "*must* also consider and eliminate less drastic alternatives, and the parents must be given the opportunity to rehabilitate through participation in the treatment plan." *People In Interest of L.M.*, 2018 CO 34, ¶ 28, 416 P.3d 875, 881 (emphasis added).

The Step-Parent Adoption Statute, however, does not provide for these rights. Instead, it allows termination, without any advance notice, for failure to pay child support. This violates the rights of the mother and child to fundamentally fair procedures and equal protection—and thus cannot pass the strict scrutiny test. *See, e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 102–03, 117 S. Ct. 555, 556, 136 L. Ed. 2d 473 (1996) ("once a State affords [a] right . . . the State may not bolt the door to equal justice" (internal citation omitted)); *City of Cleburne*, 473 U.S. at 440.[3]

III. The Juvenile Court's failure to appoint counsel and GAL for the child in Step-Parent-Adoption proceedings is a structural error.

[3] The only interpretation of the step-parent-adoption statute consistent with its purpose and the overall purpose of the child welfare laws – "[t]o preserve and strengthen family ties whenever possible." § 19-1-102—would allow step-parent adoption only when the other fit parent does not contest the adoption. Any contested hearing that could result in permanent termination of the rights of children and parents requires a finding of unfitness, i.e., dependency or neglect of the child, and must therefore be addressed by opening a D&N case. *See, e.g.*, *Quilloin*, 434 U.S. at 255.

The Step-Parent-Adoption Statute affects the fundamental liberty rights of the child and the mother by permanently terminating their rights. The Step-Parent-Adoption statute *requires* terminating the parental rights of the other parent—instead of allocating parental responsibilities to the step-parent, in the child's best interest, in recognition of the structure of a growing number of modern families. There is, however, no value in terminating the parental rights of a fit parent. And, as explained above, the statute fails to provide the constitutionally-required substantive and procedural safeguards provided in the D&N statute. Therefore, pursuant to *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) the mother and child both have rights to counsel in the termination of parental right proceedings under the Due Process Clauses of the Constitutions.

In addition, the Colorado Children's Code provides for appointment of counsel. C.R.S. § 19-1-105(2). The trial court's denial of the motions to appoint a GAL and counsel violated the child's right to equal protection of the laws and must be reversed.

Finally, contrary to the COA's opinion, in other jurisdictions "[f]ailure to appoint counsel for a child involved in a contested, involuntary termination of parental rights proceeding is a structural error and is not subject to harmless error analysis." *In re Adoption of L.B.M.*, 183 (Pa. 2017); *In re Dependency of MSR*, 271

P.3d 234, 244-45 (Wash. 2012); *Matter of Adoption of K.D.K.*, 1997 OK 69, ¶ 4 , 217-18.

"Inadequate representation of the children, either as a guardian ad litem or as their counsel, could harm the respondents because those roles help shape the court's view of the best interests of the children, which serves as the basis upon which termination of parental rights is determined." *In re Christina M.,* 908 A.2d 1073, 1082 (Conn. 2006).

Denial of the right to counsel is, therefore, violation of equal protection. *In re Adoption of J.E.V.,* 141 A.3d 254, 265–66 (N.J. 2016).

If the child were represented by counsel and GAL, they would request that instead of terminating the rights of the child and his fit mother, the court allocate parental responsibilities to the step-parent so the child could benefit from the love and support of three parent figures – instead of punishing the child for his mother's PTSD and the war veteran mother for doing the best any parent could do for her child, protecting her child from the trauma of the nightmare she had to endure before she triumphed. [4]

[4] These experts would have testified that it is in the best interest of the child to have the mother in his life.

Dr. Phyllis Magrab, a child psychologist with substantial experience in childhood trauma. She has a PhD in Child Psychology and is a licensed psychologist in the District of Columbia. She is an endowed Professor of Pediatrics at Georgetown University, where she's been a professor since 1969 and

IV. The Due Process and Equal Protection Clauses require review of the fundamental constitutional issues raised for the first time on appeal.

Colorado appellate courts review constitutional issues raised for the first time on appeal. *Robinson v. People in Interest of Zollinger*, 476 P.2d 262, 263 (Colo. 1970) (*the mother specifically cited this case in response to the Honorable Steve Bernard's question during the oral arguments*. 1:30:07-1:30:43); *People In Interest of A.M.D.*, 648 P.2d 625 (Colo. 1982); *Robinson v. People*, 173 Colo. 113, 476 P.2d 262 (1970); *Kinsey v. Preeson*, 746 P.2d 542, 545 (Colo. 1987); *People in Interest of C.E.*, 923 P.2d 383, 385 (Colo. App. 1996); *People in Interest of A.E.*, 914 P.2d 534, 539 (Colo. App. 1996); *People ex rel. R.D.*, 277 P.3d 889, 895 (Colo. App. 2012); *In re Dependency of MSR*, 271 P.3d at 240; *Levingston v. Washoe Cty. By & Through Sheriff of Washoe Cty.*, 112 Nev. 479, 482–83, 916 P.2d 163, 166 (1998).

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full professor since 1981. She is the Director of the Georgetown University Center for Child and Human Development (since 1975). She was Chief Pediatric Psychologist for Georgetown's Department of Pediatrics from 1969-2005. She holds a UNESCO Chair and has been a Commissioner on the U.S. National Commission since 2007. She has extensive clinical and academic experience in childhood trauma and the effects of divorce and family separation on children and parents.
https://gufaculty360.georgetown.edu/s/contact/00336000014RXrKAAW/phyllis-magrab (last visited Feb 6, 2020).

Dr. Lavita Nadkarni, the Associate Dean and Director of Forensic Studies at the Graduate School of Professional Psychology at University of Denver. https://www.du.edu/gspp/about/faculty.html (last visited Feb 6, 2020).

Nevertheless, without any analysis of why it its appropriate to deprive the child and his mother from the protections afforded to the above litigants, the COA refused to address the fully briefed constitutional issues.

Considering that, in spite of the mandate of the Children's Code, the juvenile court did not appoint counsel for the indigent mother or her child, resulting in the mother being represented by a *pro bono* counsel with no experience in termination proceedings, and considering that, as indicated above, Colorado appellate courts have elsewhere addressed the constitutional issues raised for the first time on appeal of civil cases, the panel's decision not to address the fundamental constitutional issues raised in this case violated the rights of the child and mother pursuant to the Due Process and Equal Protection Clauses of the Constitution.

V. Juvenile courts must make specific findings regarding the constitutional facts required to meet the clear and convincing burden for each legal element in termination cases.

The juvenile court's opinion provides no findings regarding:

- Whether the father proved with clear and convincing evidence (1) the "reasonable amount" within the means of the mother for each of the twelve months preceding the filing of the petition, and (2) whether the mother failed to pay that reasonable amount, without cause.

- What factors it considered in determining the best interest of the child and what evidence constituted the basis for determining that the father proved with clear and convincing evidence that it was in the best interest of the child not to have any contact with her fit mother. (The facts were undisputed that at the time of the hearing mother was fit and had secured employment and housing; she was able and willing to care for her child; the father had introduced no independent testimony on best interest of the child; other less drastic alternatives such as allocation of parental responsibilities were readily available; child psychologists were available to testify that termination is not in the best interest of the child).
- How the father could overcome the *Troxel* presumption that the mother acted in the best interest of her child when she gave him temporary full custody and was now acting in her child's best interest by regaining shared custody.

> *Few parents are likely to enter into a consensual guardianship designed to care for their child while they are experiencing and addressing significant problems that threaten the parent-child relationship if, by doing so, they must surrender their liberty interest in the care, custody and control of their child.*

In the matter of D.I.S, 249 P.3d 775, 787 (2011) (emphasis added).

- How the father could meet his burden to prove the factors enumerated in Colorado Revised Statute section 14-10-124, in the absence of any competent evidence.
- What factors it considered in concluding that the mother was not likely to provide child support in the future. Mother was the primary caregiver for the child for the first five years of his life, before she was diagnosed with PTSD. As soon as she started having panic attacks and her life started to fall apart, she made sure that her child was safe. The only time during her life that she was not able to financially support her child was when she was homeless or in a female veteran shelter seeking treatment for her war-related PTSD. There is nothing in the record that could even suggest that she would not continue to financially support her child now that she was employed again and receiving her VA benefits.

Further:

- The juvenile court's statutory interpretation and application of § 19-5-105 3(c)(II) ("Whether the parent has failed to pay regular and reasonable support for the care of the child, according to that parent's means.") was clearly erroneous, as it did not make any findings

regarding the reasonable amount of child support in the mother's means for each of those twelve months.

- The juvenile court made no specific findings that the mother is "unfit" or "no longer available." There is no analysis of the requirements to consider whether the mother, ***at the time of the hearing, and looking into the future,*** **is available, able, and willing to care for the child**, *Petition of R.H.N.*, 710 P.2d 482, 487 (Colo. 1985).
- Neither did the court's best interest analysis include

> family stability, the present and future effects of adoption, including the detrimental effects of termination of parental rights, the child's emotional ties to and interaction with the contestants, the adjustment of the child to the living situation, the child's age, and the mental and physical health of the parties.
>
> *Id.* 710 P.2d 482, 486 or the ***mandatory*** factors in C.R.S. § 14-10-124. *See L.A.G. v. People in Interest of A.A.G.*, 912 P.2d 1385, 1394 (Colo. 1996).

As such, pursuant to the Due Process and Equal Protection Clauses, the juvenile court's failure to provide specific findings regarding these constitutional facts was reversible error. *See, generally L.A.G. v. People in Interest of A.A.G.*, 912 P.2d 1385, 1392 (Colo. 1996) (reversing the juvenile court's custody order in a D&N case for lack of specificity) ("The juvenile court relied solely on a limited number of the purposes set forth in section 14–10–124(1) of the Act in reaching its

decision with respect to custody. The juvenile court also set forth very limited findings of fact in its order. The juvenile court's failure to consider any purposes of the Code, when coupled with its failure to articulate sufficient facts to permit appellate application of the appropriate legal standard, requires reversal of the custody order it entered.").

Nevertheless, the COA affirmed without addressing these issues, let alone conducting an independent *de novo* review of the constitutional facts. And the Colorado Supreme Court denied certiorari review.

All citizens (and others subject to the jurisdiction of our courts), and especially our wounded veterans, deserve a fundamentally fair process and equal protection of the laws.

VI. Counsel's failure to raise the structural errors constituted ineffective assistance of counsel **per se** *and required the appellate court to reach the merits of the constitutional arguments.*

The mother also argued, both in her brief, App. D, Op. Br. pp. 10, 47-49, and during the oral arguments, 1:30:02-1:30-45, that the COA should have addressed the constitutional issues in this case, not only because Colorado law and the Due Process and Equal Protection Clauses required it to address the constitutional issues raised for the first time on appeal but also because not raising those structural errors in the juvenile court constituted ineffective assistance of

counsel *per se*.

In spite of the full briefing of this issue (because the father conceded this point by not responding to this argument, the reply did not include additional arguments) and addressing it during the oral arguments (the panel, which had denied the mother's request for additional time to address all the issues raised, did not ask any questions regarding this issue), the COA, instead of addressing the merits of the mother's ineffective assistance *per se* argument, merely held "We conclude that mother's allegation that trial counsel was ineffective lacks sufficient specificity. We therefore deny it without further inquiry." *E.R.S.*, ¶ 46. This also violated the mother's right to a fundamentally fair due process.

CONCLUSION

Colorado courts have denied the mother's request to see her son while this appeal is pending. The mother begs this Court to resolve the split among the States regarding these fundamental constitutional issues. Colorado should fully guarantee the constitutional rights of parents and children, elaborated in *Santosky* and *Troxel*, in step-parent adoption cases and ensure that no other children and parents will experience the pain that this mother and her son have been forced to endure.

DATED this 3rd day of March 2020.

Respectfully submitted,

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