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In the Supreme Court of the State of Hawaii

In the Interest of T. M.	FC-S No. 10-002K Application for Writ of Certiorari Chief Judge Craig H. Nakamura Judge Daniel R. Foley Judge Alexa D. M. Fujise

Application for Writ of Certiorari

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Application for Writ of Certiorari

[REDACTED] seeks immediate review of two grave errors committed against her.

1. Did the Intermediate Court of Appeals commit grave error by holding that the Family Court of the Third Circuit[1] need not appoint counsel for an indigent minor parent to defend her parental rights and advise her while her child remained in foster care for more than nineteen months?

2. Did the ICA commit grave error when it allowed the family court to deny a parent's repeated requests to continue the termination hearing after it failed to appoint a lawyer for the parent for most of the two-year period in which her child was in foster care?

Statement of Proceedings

The Department of Human Services took custody of two children: [REDACTED] a teenager, and her child, T. M. [Record on Appeal, JEFS Docket No. 22 at pages 11-51; 52[2].]. The family court did not appoint a lawyer for [REDACTED] until after the Department moved to terminate her parental rights and T. M. had been in foster care for more than nineteen months. [*Id.* at 181-85, 694.].

[REDACTED]—now with counsel—made several requests to continue the termination hearing. [Tr. 12/13/2011 (Dkt. No. 51) at 4-5; Tr. 02/07/2012 (Dkt. No. 52) at 6-8; Tr. 03/09/2012 (Dkt. No. 55) at 57, 61.]. All were denied. [Tr. 12/13/2011 (Dkt. No. 51) at 9-10; Dkt. No. 52 at 13-14; Tr. 03/16/2013 (Dkt. No. 56) at 5.]. The family court terminated [REDACTED]

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[1] The Honorable Aley K. Auna, Jr. presided.

[2] The page numbers cited in the Record on Appeal refer to the numbers that appear in the .pdf format.

parental rights. [Dkt. No. 22 at 904-07.]. [redacted] appealed. [Dkt. No. 22 at 932.]. The ICA[3] affirmed. The Chief Judge dissented. [Dkt. No. 98; Exhibit A.].

Statement of the Case

[redacted] was fifteen years old when she gave birth to T. M. [Dkt. No. 22 at 12.]. They lived in a remote part of the Big Island. [*Id.* at 20.]. She dropped out of high school in the 9th Grade and was diagnosed with bipolar disorder[4], anxiety, and insomnia. [*Id.* at 21.]. She also suffered from [redacted]. [*Id.* at 44, 32.]. She stopped taking medication prescribed for her mental health problems. [*Id.* at 21.]. [redacted] started to address her mental health problems to "[redacted]" [*Id.* at 44.].

When [redacted] and her child went to a domestic violence shelter in Kona, the Department petitioned the family court for temporary custody. [*Id.* at 11-51.]. At the initial hearing, the family court stressed to the adults about the importance of getting a lawyer:

> You all, the parents, have an opportunity to either agree or disagree with the [Department's] allegations. . . . It's always wise . . . when children are temporary out-of-home placement, that you have the benefit of having an attorney help you.
>
> And if you cannot afford an attorney, then the Court may appoint an attorney to represent you at no cost to you. All I would need is an application to be completed. I'll review it, and if you qualify financially, I will appoint an attorney to represent you. That's always a good idea only because there's a lot of legal things that happen in the courtroom that you may not be aware of or familiar with, and having an attorney by your side is always a great benefit.

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[3] Judge Daniel R. Foley and Judge Alexa D. M. Fujise constituted the bare majority.

[4] [redacted] was later diagnosed with post-traumatic stress disorder. [Dkt. No. 22 at 63-82.].

[Tr. 01/07/2010 (Dkt. No. 44) at 8-9.]. The family court inexplicably excluded [redacted]

> Now, [redacted] her situation is a little different, and that is because she's a minor under the law, she's entitled to a guardian ad litem. At the same time she is a mother, a parent, and so she's entitled to an attorney. I'm going to try my best to find a person that can act in both responsibilities. There may be, though, the situation where she will have both an attorney and a guardian ad litem, two people, because what the guardian ad litem may feel would be in her best interest may not be what she would like. So that's why she would need an attorney.

[*Id.* at 13-14.]. [redacted]'s guardian objected to the dual role "if there's going to be a difference of opinion in working as a guardian ad litem than working as her attorney[.]" [Tr. 01/14/2010 (Dkt. No. 45) at 9.]. The family court still refused to appoint a lawyer. [*Id.* at 8.]. No lawyer was appointed for [redacted] after the Department drafted and the family court ordered a family service plan. [Dkt. No. 22 at 164-180; 199-204.].

Both mother and child remained in foster care for almost two years. [*Id.* at 181-85.]. Before [redacted]s eighteenth birthday, the Department announced that because T. M. had been in foster care for so long, it had to "set a termination of parental rights hearing." [Tr. 05/24/2012 (Dkt. No. 47) at 5.].

The family court agreed, but suggested that they delay the termination hearing so that [redacted] would be an adult. [*Id.* at 5-6.] [redacted]'s guardian reminded the family court that it had neglected to appoint a lawyer:

> I've mentioned this several times in this case. She has never been assigned anybody as her attorney in her case involving her child, [T. M.]. If we are going to permanency at this point, [redacted] is going to be turning 18, the suggestion is that she apply for and look at getting her own attorney for that case.

[*Id.* at 7.]. The family court still took no action. [*Id.*].

The Department filed its motion to terminate [redacted]'s parental rights. [Dkt. No. 22 at 548-52.]. Four months later the Department informed the family court that even though Ms. [redacted] tried to settle the case on her own, the termination hearing must proceed. [Tr. 09/13/2011 (Dkt. No. 48) at 7.]. The Department requested the family court to appoint a lawyer for Ms. [redacted] [*Id.* at 7-8.].

The family court was still reluctant to appoint someone and asked [redacted]s guardian ad litem to stay on the case. She refused:

> Your Honor, at this point I believe that it is a conflict. . . .
> . . . .
> The other thing too is that when we discussed this . . ., I was very concerned that she wasn't really listening to what the attorneys and the social workers were telling her in the hearing that she needed to hear. I think she really does need to sit down with somebody as an attorney . . . and get the advice that she needs as a mother dealing with her child, given her and her struggles through her teenage stuff that she's been doing these past couple of years.

[*Id.* at 8-9.]. The family court eventually appointed a lawyer for [redacted]. [*Id.* at 11; Dkt. No. 22 at 694, 181-85.]. T. M. had been in foster care for more than nineteen months.

Given this long delay, [redacted] tried to continue the termination hearing:

> MS. JACKSON: [redacted] just turned 18 in September. She herself was a child in foster care who had a child.
> THE COURT: Right.
> MS. JACKSON: Now the case is about her [child]. So [redacted] really now does not want to lose her child and does not want to have her parental rights terminated. And because she's been an adult herself for just a couple of months, we're asking the Court for a little more time so that [redacted] can do what she

> needs to do to provide a home for herself and her [child]. . . .
>
> At this point we'd ask the Court not to set a hearing to terminate parental rights but to give mother a little more time to show everyone in this room and the Court that she is able and willing and ready to be a full-time parent for [T. M.] because obviously [T. M.] can't wait for anybody else to get their life together. However, the child is very, very happy with the foster mother. He's actually, according to everyone who spoke at the ohana conference, a very well-adjusted, happy child, who knows who all of his relatives are and feels loved by all these people. But I think it would be very difficult and sad for [T. M.] to suddenly be moved to a different home and lose contact with his mother. So I'm asking the Court for a little more time so that [redacted] can do what she needs to do to provide a home for herself and her [child].

[Tr. 12/13/2011 (Dkt. No. 51) at 4-5.]. The family court denied the request. [*Id.* at 9-10.].

[redacted] requested another continuance after showing great progress as a mother:

> . . . She apparently has gotten the message that this child, you know, is her child and that if she wants to be [T. M.'s] mother and raise [the child], she has to do a number of things to be able to provide a home for [T. M.], including employment, earning a living, having a home, an actual residence where she can live with [T. M.] and raise [T. M.], an ability to pay the rent and to provide for [the child] in every other way.
>
> And at this point, although we have the hearing scheduled in just a few weeks, I'm asking the Court to consider delaying that hearing and continuing it for another six months to allow Alexandra to continue to do as well as she is doing and to continue on her path to be independent and to be able to provide a home for her [child] because that is really what she wants to do.

[Tr. 02/07/2011 (Dkt. No. 52) at 6-8.]. The family court was unmoved:

> [W]hen we do adult things, ie. have children, we must accept adult consequences. And so even though you may have been a minor when the child was born, you automatically jumped into the realm of accepting adult responsibility to take care of children. So I'm not convinced that now she turns 18, automatically she became adult for purposes of taking care of children.

. . . .

So the Court will deny the motion to continue.

[*Id.* at 13-14.].

At the termination hearing, [redacted] showed that with more time she could keep her parental rights:

> She turned 18 in September of 2011, at which time I was appointed to represent her. Prior to that time, she herself was a minor, a minor with a child—and she had her own guardian ad litem. In having reviewed the file and the documents up until the point that I was appointed, I never expected to meet the young woman that I did meet and the woman who's testified today.
>
> . . . .
>
> She's a very well-spoken young lady. She's obviously bright enough to have gone ahead and figured out how to get a job, how to continue her education, how to find a place to live, and how to address her sobriety. And I'm asking the Court at this time, because of her extraordinary progress in the last few months because it appears that she will be able to care for [T. M.] in six months, and that's why we're asking the Court not to terminate her parental rights.

[Tr. 03/09/2012 (Dkt. No. 55) at 57, 61.]. The family court still refused and terminated her parental rights. [Tr. 03/16/2012 (Dkt. No. 56) at 5.]. [redacted] appealed and the ICA affirmed.

1. The ICA Committed Grave Error by Holding that the Family Court need not Appoint Counsel for an Indigent Minor Parent while her child Remained in Foster Care for more than Nineteen Months.

The State and federal constitutions protect a parent's "interest in the care, custody, and control of their children[.]" *In re RGB*, 123 Hawaii 1, 17, 229 P.3d 1066, 1082 (2010) (quoting *In re Doe*, 99 Hawaii 522, 533, 57 P.3d 447, 458 (2002)). The Hawaii Constitution requires courts to ensure parents receive a "fair procedure" before the legal bond to their children is permanently

severed by the government[5]. *Id.*

The family court can ensure a fair procedure by appointing counsel. Hawaii Revised Statutes (HRS) § 587A-17[6]. Whether the due process clauses require the family court to appoint counsel depends on the circumstances of each case. *In re A Children*, 119 Hawaii 28, 60, 193 P.3d 1228, 1260 (App. 2008). A due process violation arises when the family court disregards the "risk that a parent will be erroneously deprived of his or her child because the parent is not represented by counsel." *In re RGB*, 123 Hawaii at 17, 229 P.3d at 1082.

In assessing this risk, the Supreme Court of the United States noted that the complexity of termination proceedings can easily overwhelm an uncounseled adult parent:

> Expert medical and psychiatric testimony, which few parents are equipped to understand and fewer still to confute, is sometimes presented. The parents are likely to be people of little education, who have had uncommon difficulty in dealing with life, and who

[5] The federal constitution also requires at the very least that State procedures in separating parents from children comport with Due Process. *Lassiter v. Dept. of Soc. Serv.*, 452 U.S. 18, 33 (1981) ("In its Fourteenth Amendment, our Constitution imposes on the States the standard necessary to ensure that judicial proceedings are fundamentally fair. A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution.").

[6] The ICA has urged policy makers to "reexamine the discretionary nature" of the statute. *In re A Children*, 119 Hawaii 28, 60, 193 P.3d 1228, 1260 (App. 2008). This Court as the "ultimate interpreter" of Article I, Sec. 5 of the Hawaii Constitution, *AlohaCare v. Dept. of Human Serv.*, 127 Hawaii 76, 87, 276 P.3d 645, 656 (2012), should adopt a bright-line rule and require the family court to provide minor parents with immediate access to counsel when their children are placed in foster care. It is a far better way to ensure that termination proceedings comply with due process and would reduce uncertainties. *See Lassiter v. Dept. of Soc. Serv.*, 452 U.S. 18, 50 (1981) (Blackmun, J., dissenting) (case-by-case approach "entails serious dangers for the interests at stake and the general administration of justice."); *In re K.L.J.*, 813 P.2d 276, 282 n. 6 (Alaska 1991) ("we reject the case-by-case approach"); *MEK v. RLK*, 921 So.2d 787, 790 (Fla. App. 2006) (under state constitution, "a constitutional right to appointed counsel arises when the proceeding can result in a permanent loss of parental rights.").

> are, at the hearing, thrust into a distressing and disorienting situation. That these factors may combine to overwhelm an uncounseled parent is evident[.]

Lassiter, 452 U.S. at 30. Other courts recognize that the indigent parent is at an extremely unfair disadvantage. *In re Jay*, 150 Cal. App. 3d 251, 197 Cal. Rptr. 672, 680 (1983) ("An uneducated indigent can easily become overwhelmed by such a proceeding without the assistance of counsel."); *Flores v. Flores*, 598 P.2d 893, 896 (1979) (Alaska 1979) ("A parent who is without the aid of counsel in marshaling and presenting 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.").

At the very start of this case the family court separated and excluded [redacted] from the other parents because she was a child. The family court refused to appoint a lawyer and instead hoped that her desire to keep her child would not conflict with the recommendations of her guardian. Even after the guardian raised multiple objections to the conflict, the family court took no action.

The family court's failure to appoint counsel for a teenaged mother created the risk of an erroneous deprivation of parental rights. A child's entry into foster care through government intervention is often the start of a downward spiral that may lead to the termination of parental rights. *In re A Children*, 119 Hawaii at 58, 193 P.3d at 1258 (failure to appointment counsel sooner created "a chain of events that could have been broken if Father had had counsel."); *In re Emilye A*, 9 Cal. App. 4th 1695, 12 Cal. Rptr.2d 294, 301 (Cal. App. 1992) ("Practically speaking, once

the state has become involved in the parent/child relationship . . ., there is a substantial possibility that the parent may lose custody of the child"); *Crist v. Div. of Youth and Fam. Serv.*, 128 N.J. Super. 402, 320 A. 2d 203, 211 (N.J. Super 1973) ("Since the proceeding for temporary custody is frequently a prelude to a petition to terminate parental rights, or failure in a temporary custody proceeding may permanently discourage further interest in a final termination proceeding, there is equal justification for legal representation at the earlier, temporary state of the proceeding.").

T. M.'s entry into foster care triggered two crucial deadlines for [redacted]. Once a child has been in foster care for fifteen continuous months, the Department *must* move to terminate parental rights. HRS § 587A-33(i). At a hearing on the Department's motion, the family court must determine *inter alia* if it is reasonably foreseeable that [redacted] "will become willing and able to provide the child with a safe family home . . . within a reasonable period of time, which shall not exceed two years from the child's date of entry into foster care[.]" HRS § 587A-33(a)(2).

Without a lawyer [redacted] could not contribute to the Department's service plan. [Dkt. No. 22 at 164-180; 199-204.]. The service plan is a crucial document establishing the conditions a parent must meet in order to be reunited with his or her child. HRS § 587A-27(a). The plan must notify parents that the Department will move to terminate their rights if their child remains in foster care for an aggregate of fifteen out of twenty-two months. HRS § 587A-27(a)(7). The plan must "be understood by and [cannot] overwhelm" the parent. HRS § 587A-27(b).

Finally, the family court has a duty to ensure that parents understand the requirements in the plan and the consequences for noncompliance. HRS § 587A-27(c). If a party objects to the plan or cannot understand the plan, the family court must hold a hearing "to determine the terms, conditions, and consequences of a service plan that will ensure a safe home for the child." *Id.*

The plan in this case did not contain the legally-required notice pursuant to HRS § 587A-27(a)(7). needed a lawyer to scrutinize this plan, lodge objections to its form and content, and demand a hearing. It cannot be expected that would have known that the plan was facially defective or known that she had the right to demand a hearing and oppose the plan.

Neither the service plan nor the family court informed that she had up to two years to be able to provide a safe family home for T. M. She had no lawyer to advise her about these deadlines. No lawyer was appointed to assist her in developing a strategy to comply with the family service plan or even get T. M. out of foster care in time.

A lawyer could have attempted to avoid termination proceedings by encouraging others, such as 's own parents or even T. M.'s father and his family, to take custody of T. M. It could have filed motions to amend the service plan and set up a viable alternative to foster care. At the very least, a lawyer could have advised her about the crucial two-year deadline and what evidence was necessary to show a suitable home for T. M. never had the chance to explore these options without a lawyer.

The Judiciary's own Access to Justice Commission encourages judges to "appoint[]

lawyers to act as counsel for indigent parties in individual cases." *Access to Justice Commission, Hawaii Judicial Pro Bono Policy* attached as Exhibit B. The family court's failure to appoint a lawyer for Ms. Rigaud undermines the Judiciary's commitment to economic equality and justice.

A teenaged mother still has the constitutional right to a fair procedure with the Department. The family court's dogged refusal to appoint a lawyer for during the nineteen continuous months her child was in foster care arose to a violation of her Due Process rights. The ICA has gravely erred in allowing the family court's decision to stand.

2. **The ICA Committed Grave Error when it Allowed the Family Court to deny 's Repeated Requests to Continue the Termination Hearing After it Failed to Appoint a Lawyer for the Parent for most of the two-year Period in Which her child was in Foster care.**

By the time the family court appointed counsel, termination proceedings were underway. Parental rights are terminated upon proof that the parent cannot provide a safe family home "within a reasonable period of time, which shall not exceed two years from the child's date of entry into foster care." HRS § 587A-33(a)(2). During this two-year period, was in foster care herself, burdened with a family service plan, and without a lawyer to help her comply with the plan and meet its objectives. Thus, would have had to be able to provide a safe family home *at the time of the hearing.*

The ICA's entire analysis is a single, declaratory sentence. According to the ICA, Ms. was "given a reasonable amount of time, more than two years, after TM was placed in foster custody, to demonstrate that she was willing and able to provide TM with a safe family home." [Ex. A at page 5.]. This is grave error.

was a child herself during this period of time. She was indigent and had no lawyer. It is unclear whether she even knew that she had only two years to show that she could provide a safe family home for T. M. The continuances were necessary to provide a safe family home right then and there.

The family court, however, did not consider the late appointment of counsel for ,[7] and s circumstances. Forcing to defend herself before she was able to present the evidence necessary to keep her child created a foregone conclusion. The refusal to continue every request for a continuance was an abuse of discretion.

Conclusion

The ICA found no objection in allowing a minor parent to fend for herself while her child remained in foster care for more than nineteen months. The ICA also approved of the family court's refusal to continue the hearing on termination of parental rights. 's application for a writ of certiorari must be granted to address and correct these grave errors.

Dated: Wailuku, Maui, Hawaii: September 12, 2013.

/s/ Benjamin Lowenthal .
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[7] The family court showed a great deal of flexibility in allowing the Department to file its motion, but set the hearing at a much later time to try and avoid any problems associated with depriving a teenaged of her child. The family court did not want to set the hearing on the motion until after became an adult. [Dkt. No. 47 at 5-6.].