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***In re T.M.* and Expanding Due Process Rights**

Most people in America know that our criminal justice system affords a right to counsel for defendants who cannot afford it. This guarantee stems from the famous case of *Gideon v. Wainwright*, which recognized that “in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.” In most *civil* cases, however, indigent litigants have no right to an appointed attorney. There are exceptions: most states require appointed counsel for limits to “physical liberty” (like civil commitment for mental illness) or for cases where the state seeks to remove children (like termination of parental rights or abuse and neglect cases). And many states appoint counsel in critical matters like paternity, guardianship, and adoption, while a few guarantee counsel for private custody or domestic violence cases. But states’ approaches are inconsistent, leaving many indigent people with the daunting task of having to represent themselves in important proceedings that could affect the rest of their lives.



The Hawai‘i Supreme Court earlier this year took a big step forward in fulfilling the principles set forth by *Gideon* by ruling—unanimously—in *In re T.M.* that the Hawai‘i Constitution affords parents with the right to counsel in proceedings that could result (either immediately or eventually) in the termination of their right to raise and rear their children. This case is a major victory for due process guarantees and reaffirms a commitment to fairness and meaningful representation in legal proceedings that have the potential to sever ties between parents and children permanently.

The facts in this case are familiar to just about any public interest lawyer practicing in family courts across the country: A mother appealed the family court’s decision to terminate her rights to her child and argued that the lower court erred in failing to appoint her counsel earlier in the child welfare proceedings. In partnership with the [National Coalition for a Civil Right to Counsel](#), a coalition of Hawai‘i nonprofit organizations—the [American Civil Liberties Union of Hawai‘i](#), the [Hawai‘i Appleseed Center for Law and Economic Justice](#), and the [Legal Aid Society of Hawai‘i](#)—filed an *amicus* brief in support of a universal and guaranteed right to counsel for indigent parents facing this type of action. The Hawai‘i Supreme Court ultimately adopted the position of the mother and the *amici* so that indigent parents in Hawai‘i are now entitled to counsel in such matters. Here we explain the history of the *T.M.* case and why the Hawai‘i Supreme Court reached its decision.

The Law in Hawai‘i Before *T.M.*

More than three decades ago, the U.S. Supreme Court held in *Lassiter v. Department of Social Services* that the [Federal Constitution’s due process clause](#) does not guarantee counsel in all termination of parental rights cases. However, prior to *In re T.M.*, [43 states and the District of Columbia](#) guaranteed the right to counsel for indigent parents in all or most state-initiated child welfare proceedings, while [44 states](#) extended this guarantee to termination proceedings. In a number of these states, courts used their respective state constitutions to guarantee the right to counsel in termination proceedings under the due process clause contained therein. Of the remaining states not guaranteeing counsel in these proceedings (including Hawai‘i), all but Mississippi confer upon the court the power to decide whether it is necessary to appoint counsel.

[Hawai‘i Revised Statutes § 587A-17\(a\)](#) reads, “The court may appoint an attorney to represent a legal parent who is indigent based on court-established guidelines.” Thus, trial judges in family court had enormous discretion over whether an indigent parent received legal representation. At the same time, the Supreme Court of Hawai‘i has generally interpreted the [Hawai‘i Constitution’s due process clause](#) to be stronger than federally guaranteed rights (even though the two provisions are similarly worded). And the Court [will look to state constitutional law when](#)

necessary to protect an individual's rights: "When the [federal] interpretation of a provision present in both the United States and Hawai'i Constitutions does not adequately preserve the rights and interests sought to be protected, we will not hesitate to recognize the appropriate protections as a matter of state constitutional law." The high court **has a tradition** of conferring more constitutional protections for individuals when interpreting its state constitution: "We have not hesitated in the past to extend the protections of the Hawaii Bill of Rights beyond those of textually parallel provisions in the Federal Bill of Rights when logic and a sound regard for the purposes of those protections have so warranted."

In re T.M. offered an ideal opportunity to expand the right to counsel for indigent parents in Hawai'i and bring the state in line with the majority of states that already guaranteed this fundamental right.

In re T.M.

This case came from the family court in Kona, on Hawai'i Island (also known as "the Big Island"). T.M.'s mother ("Mother") gave birth to T.M. in June 2009, when she was fifteen years old. Around six months later, Mother and child moved into a domestic violence shelter. There the Hawai'i Department of Human Services filed two Petitions for Temporary Foster Custody: one over Mother (because she herself was a minor at the time) and one over T.M. In the meantime, Mother was diagnosed with several psychological disorders. At the initial hearing on the petitions from the Department of Human Services, the court appointed an attorney for T.M.'s adult father and for Mother's mother. However, because Mother was a minor, the court did not appoint legal representation for her. Instead, the court appointed a guardian *ad litem* to advise the court as to Mother's best interests.

The guardian *ad litem* may have been an attorney, but she did not represent Mother. In fact, while the court hoped that the guardian *ad litem* would be able fill both of these roles, the guardian *ad litem* recommended several times throughout the proceedings that Mother have a separate court-appointed attorney to defend her against allegations of abuse and neglect and advocate for the reunification of her child. It was not feasible for the guardian to act in a dual role. Even **the court had acknowledged that Mother might require a separate attorney** to represent her as T.M.'s mother. Mother's best interests as a child herself could differ considerably from her interests as a parent seeking to reunite with her child. Mother, however, did not submit an application for a court-appointed attorney, and the family court apparently did not advise her to submit such an application to protect her parental rights until much later in the proceedings.

Two months later, the family court held a family-service-plan hearing in which the parties established that the goal was to return T.M. to a safe and stable home with Mother. The parties agreed to several provisions, all related to life improvements for Mother that, if achieved in "a reasonable amount of time," would result in T.M.'s return to her; however, the court never specified the length of time that these steps would take. Parents generally have **two years** to demonstrate that they can provide a safe and stable home. However, it appears that Mother was never informed of these relevant dates and time limits.

Approximately two years after the initial hearing, the Hawai'i Department of Human Services filed a petition to terminate Mother's parental rights. Still no lawyer was appointed to represent Mother. Prior to the initial hearing on the department's petition to terminate, and still prior to her eighteenth birthday, Mother applied for court-appointed counsel (with the help of her guardian *ad litem*). The family court did not grant the application at that time, instead encouraging the parties to settle the case without a trial or hearing. Finally, four months after the Department of Human Services announced its intent to set a termination of parental rights hearing, the court appointed counsel for Mother.

In the months leading up to the termination hearing, Mother was showing great progress in counseling and treatment. She was devoted to maintaining a relationship with her child. She had been waking up before 5:00 a.m. on Saturdays and traveling several miles throughout Kona to spend the entire weekend with her child (who remained in foster care). She found a job at a bakery and was saving money to rent a small but clean home for her and her child. Despite these facts, the family court denied her request to allow more time for her to create the stable home T.M. needed. The family court terminated her parental rights and granted the department's petition.

Arguments on Appeal and Hawai'i Supreme Court's Resolution

Mother wanted to appeal the decision. The family court appointed appellate counsel from a different county, and Mother appealed to Hawaii's Intermediate Court of Appeals. She argued that the family court had abused its discretion in failing to appoint counsel soon enough. Mother contended that when a child enters foster care and falls within the purview of the State, the risk of losing parental rights immediately comes into play, and the family court is obligated to appoint counsel to ensure due process protections.

In a 2-1 decision, **the Intermediate Court of Appeals upheld the family court's ruling**, basing its decision on the fact that Mother did not apply for a court-appointed attorney prior to the petition to terminate her parental rights, its belief that the proceedings were not initially adversarial, and the fact that the court itself had counseled Mother on what she needed to do to regain custody of T.M. The chief judge of the Intermediate Court of Appeals, Craig

Nakamura, **dissented**:

Under the circumstances of this case, I would hold that the Family Court abused its discretion in failing to appoint counsel until nineteen months after T[.]M[.] had been placed in foster custody. In my view, the Family Court did not appoint counsel early enough before the parental termination hearing to give Mother a fair opportunity to defend against the [department]'s request to terminate her parental rights.

Mother **appealed the court's decision** to the Hawai'i Supreme Court and argued that the family court erred in her case by not appointing her counsel earlier in the proceedings. She urged the Court to adopt a bright-line rule requiring an automatic appointment of counsel at the start of the child welfare proceedings. She argued that her case highlighted that leaving the appointment of counsel to the discretion of the family court in pretermination proceedings was simply unworkable.

The Court allowed the ACLU of Hawai'i, Legal Aid Society of Hawai'i, and the Hawai'i Appleseed Center for Law and Economic Justice, in partnership with the National Coalition for a Civil Right to Counsel, to file an *amicus brief*. *Amici* contended that the strong protections granted in the Hawai'i Constitution's due process clause ultimately required appointment of counsel for all indigent parents. *Amici* pointed out that the vast majority of states had adopted a bright-line rule requiring counsel in all abuse, neglect, and termination proceedings, leaving Hawai'i in the minority. *Amici* explained how this bright-line rule avoided the three problems of a case-by-case approach: insufficient information on the judge's part to determine whether to appoint counsel; inconsistent standards for appointment of counsel; and ineffective appellate review of a trial court's decision not to appoint counsel. (In his *Lassiter* dissent, Justice Blackmun explained the **inadequacies of appellate review**: "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.") Additionally, *amici* argued, the right to counsel ought to apply equally to minor parents; the appointment of a guardian *ad litem* alone is insufficient representation.

Amici argued that this case was the result of a faulty policy, namely giving the family court discretion to determine whether an attorney was necessary at all rather than supplying an attorney as a matter of course. Indeed, courts and legislatures in nearly every state had reached the same conclusion. In order to ensure that such an abuse of discretion could not occur in the future, *amici* argued, having appointed counsel for all indigent parents was essential.

The Hawai'i State Supreme Court agreed with Mother that the family court erred in not appointing a lawyer for Mother earlier, and remanded Mother's case for further proceedings. The Court ordered that indigent parents must always be provided with counsel "once [the Department of Human Services] files a petition to assert foster custody over a child," which means the duration of abuse and neglect and termination proceedings. Writing for a **unanimous court**, Justice Simeon Acoba used this case as a perfect example of the "inadequacy" of the case-by-case approach:

Inherent in the substantive liberty interest that parents have in the care, custody, and control of their children under the Hawai'i Constitution is the right to counsel to prevent erroneous deprivation of their parental interests.... In light of the constitutionally protected liberty interest at stake in a termination of parental rights proceeding, we hold that indigent parents are guaranteed the right to court-appointed counsel in termination proceedings under the due process clause in article I, section 5 of the Hawai'i Constitution.

This ruling, **the Court held**, was justified by the fact that "the State's decision to deprive a parent of his or her child is often 'more grievous' than the State's decision to incarcerate a criminal defendant," as well as the reality that parents "may struggle with legal issues that are 'neither simple nor easily defined,' and with a standard that is 'imprecise and open to the subjective values of the judge.'" (During oral argument before the Court, Justice Richard W. Pollack pointed out that in a criminal prosecution for littering, the maximum penalty is thirty days in jail, and the defendant has the right to counsel. On the other hand, in proceedings where a parent can lose his or her child permanently, there is no such right.) The Court cited issues flagged by *amici* and Mother such as the difficulty of appellate review and of the trial judge determining in advance whether counsel will make a difference in a particular case.

Looking Ahead

The *T.M.* decision and the resulting policy change are positive steps forward for Hawai'i and for due process rights across the country. When fundamental freedoms (like the right to parent) are at stake, actors in court must come to the table with equal footing and ability to make a sound legal argument. Legal representation is one of the most effective ways to move toward this goal—one that Hawai'i is slowly embracing.

Indigent parties are unquestionably at a disadvantage in court proceedings without counsel. The outcome of a parental rights termination proceeding ought to depend upon a parent's ability to care for the child, not on that parent's ability to pay for a lawyer or navigate the court system. Having access to legal representation, regardless of ability to pay for it, brings the judicial system a step closer to the fundamental fairness enshrined in our state and federal constitutions. Our legal system is complex, and expertise in both procedural and substantive provisions is critically important to navigate that system, especially when fundamental freedoms are at stake. Parties without counsel are less likely to

understand and assert their rights effectively and are therefore at a clear and significant disadvantage when representing themselves. Despite the generally accepted notion that counsel is a critical part of ensuring fair outcomes, not all courts guarantee appointed legal representation for all matters.

In recent years, legal organizations such as the American Bar Association **have articulated their support** for applying the right to counsel to all situations that “concern basic human needs.” This principle is applied inconsistently across the country, however, as parties often do not have a guaranteed right to court-appointed counsel even when such basic human needs such as shelter, safety, sustenance, health, and child custody are at stake.

This lack of counsel is particularly problematic in family court and not only because of the importance of what is at stake. Family courts traditionally exercise more discretion than other courts due to the especially complex and delicate dynamics it adjudicates, like child custody agreements, child support payments, and divorces. Disputes brought to family court sometimes adhere to the criminal court adversarial model, in which one side seeks to prove the other guilty and impose criminal penalties; other times, judges seek to resolve disputes between parties through a compromise, with an emphasis on reconciliation and preserving relationships. As a result, the right to counsel in family court differs by state and type of action. The inconsistencies enshrined in family court procedures sometimes leave vulnerable parties without legal representation and, therefore, at risk of constitutional harm.

We firmly believe that increased access to counsel ensures that justice is truly served. Looking beyond *In re T.M.*, we are working toward increased access to justice for all. While the shortcomings of the justice system are many, with persistence, we continue to chip away at the injustices that hinder a fair legal process.



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