131 Hawai'i 419
Supreme Court of Hawai'i.

In the Interest of T.M.

No. SCWC–12–0000521. | Jan. 6, 2014.

Synopsis

Background: Department of Human Services (DHS) filed petition seeking termination of parental rights of mother to her child. The Family Court, Aley K. Auna, Jr., J., granted petition. Mother appealed. The Intermediate Court of Appeals, 129 Hawai'i 453, 303 P.3d 1230, affirmed. Mother filed petition for writ of certiorari.

Holdings: The Supreme Court, Acoba, J., held that:

[1] family court abused its discretion in failing to appoint counsel for mother until nearly 19 months after DHS filed petition for temporary foster custody over her infant son, and

[2] indigent parents are guaranteed the right to court-appointed counsel in termination proceedings under the Due Process Clause of the State Constitution; abrogating, *In re "A" Children*, 119 Hawai'i 28, 193 P.3d 1228.

Vacated and remanded.

West Headnotes (7)

[1] **Infants**
Indigents and paupers; public defenders

Family court abused its discretion in failing to appoint counsel for mother until nearly 19 months after Department of Human Services (DHS) filed petition for temporary foster custody over her infant son and only five months prior to hearing that ultimately led to termination of mother's parental rights; the failure to immediately appoint counsel for mother even after it became apparent that DHS would seek to terminate her parental rights left her without the necessary assistance to prepare for the termination hearing, and mother was without legal guidance and did not have an advocate to represent her in negotiations with DHS. HRS § 587A–17.

Cases that cite this headnote

[2] **Appeal and Error**
Abuse of discretion

In reviewing a court's exercise of discretion, it must be determined whether the court abused its discretion.

Cases that cite this headnote

[3] **Appeal and Error**
Abuse of discretion

An "abuse of discretion" occurs when the trial court exceeds the bounds of reason or disregards rules of principles of law or practice to the substantial detriment of a party.

Cases that cite this headnote

[4] **Infants**
Protective custody and removal

Trial court's abuse of discretion in failing to appoint counsel for mother until nearly 19 months after Department of Human Services (DHS) filed petition for temporary foster custody over her infant son and only five months prior to hearing that ultimately led to termination of mother's parental rights was not remedied by the appointment of a guardian ad litem for mother; due to the possibility of a conflict of interest between guardian ad litem's role as the advocate of the best interests of the child and a lawyer's role as the zealous advocate of the client's position, it was important that guardian ad litem not undertake to represent the child as a parent.

Cases that cite this headnote

[5] **Infants**
Requisites and sufficiency

Family service plan issued in child protection proceeding did not violate notice provision of Child Protection Act, though it failed to inform mother that "the parents" failure to provide a safe family home within two years from the date when the child was first placed under foster custody by the court may result in the parents' parental rights being terminated, as notice provision did not take effect until after the family service plan had been issued. HRS § 587A–27(a)(7).

Cases that cite this headnote

[6] **Infants**
Requisites and sufficiency

Family service plan issued in child protection proceeding that did not inform mother of specific time frames during which she was required to complete certain actions or risk termination of her parental rights violated provision of Child Protection Act requiring such plans to contain such information. HRS § 587–26(c)(2).

Cases that cite this headnote

[7] **Constitutional Law**
Removal or termination of parental rights

Indigent parents are guaranteed the right to court-appointed counsel in termination proceedings under the Due Process Clause of the State Constitution; abrogating, *In re "A" Children*, 119 Hawai'i 28, 193 P.3d 1228. Const. Art. 1, § 5; HRS § 587A–17.

Cases that cite this headnote

Attorneys and Law Firms

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RECKTENWALD, C.J., NAKAYAMA, ACOBA, McKENNA, and POLLACK, JJ.

Opinion

Opinion of the Court by ACOBA, J.

*421 We hold that the failure of the Family Court of the Third Circuit [1] (the court) to appoint counsel for Petitioner/Mother–Appellant Jane Doe (Petitioner) until nearly nineteen months after Respondent–Appellee Department of Human Services (DHS) filed a Petition for Temporary Foster Custody over Petitioner's son, T.M. constituted an abuse of discretion under Hawai'i Revised Statutes (HRS) § 587–34 [2] (2006) and § 587A–17 [3] (Supp.2012) which necessitates vacating the court's April 17, 2012 Order "Terminating [Petitioner's] Parental Rights and Awarding Permanent Custody" to DHS. [4] We recognize that parents have a substantive liberty interest in the care, custody, and control of their children that is protected by the due process clause of article I, section 5 of the Hawai'i Constitution. [5] *In re Doe*, 99 Hawai'i 522, 533, 57 P.3d 447, 458 (2002). Therefore, we additionally hold that parents have a constitutional right to counsel under article I, section 5 in parental termination proceedings and that from and after the filing date of this opinion, courts must appoint counsel for indigent parents once DHS files a petition to assert foster custody over a child.

For the reasons set forth herein, the aforesaid April 17, 2013 Order of the Court, the "Findings of Fact [(findings)] and Conclusions of Law [(conclusions)] re [Termination of Parental Rights (TPR)] Hearing" entered on May 3, 2012, and the July 26, 2013 judgment of the Intermediate Court of Appeals (ICA) filed pursuant to its June 28, 2013 Summary Disposition Order affirming the court's order are vacated, and the case is remanded for a new hearing.

I.

A.

T.M. was born to Petitioner on June 8, 2009, when Petitioner was fifteen years old. In August, 2009, Petitioner was "diagnosed with Psychotic Disorder, Bipolar [Disorder], Panic Disorder, and Adjustment Disorder with Mixed Disturbance Emotions/Conduct." DHS filed two Petitions for Temporary Foster Custody, one over Petitioner and one over T.M., on January 6, 2010.

On January 7, 2010, the court held a hearing on the DHS petition. At the hearing, the court advised both Petitioner's parents and Petitioner herself of the salutary purpose of having a court-appointed attorney:

> ****341 *422** [The Court]: You all, the parents, have an opportunity to either agree or disagree with the allegations. If you disagree, that's fine. I mean, you know, I'm not holding anything against anyone until the evidence is presented and I have to make a decision. It's always wise, however, when children are in 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.
>
> You may choose to represent yourself if you wish. That's fine, and I will try my best to help—or let you know what's happening. I cannot give you legal advice, but at least I can kind of give you your options, and you make your decisions on what you want to do. You may, if you wish, hire your own attorney. That's up to you, but that will be at your cost. So there's a couple of options.

(Emphases added.) The court stated it would attempt to find one person to act both as guardian ad litem and as an attorney for Petitioner but suggested that having separate persons act as a guardian ad litem and as an attorney might be necessary:

> Now, [Petitioner], 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.

(Emphasis added.) The record does not indicate that Petitioner submitted an application for court-appointed counsel at that point.

Following the hearing, the court approved court-appointed counsel for Petitioner's mother and T.M.'s father. [6] However, the court did not appoint counsel for Petitioner. Instead, the court apparently had Stephanie St. John (St. John) act as Petitioner's guardian ad litem. At the next hearing, on January 14, 2010, the court suggested that St. John was serving both as Petitioner's guardian ad litem and Petitioner's attorney: [7]

> THE COURT: Okay. Very well. Ms. St. John, you're pretty much playing a dual role here.
>
> MS. ST. JOHN: Well, that's my first thing, your Honor, is that at this point understanding that I haven't spoken with [Petitioner] yet, and I need to speak with her about this stuff because if there's going to be a difference of opinion in working as a guardian ad litem than working as her attorney, then I would be suggesting that she have a separate attorney to deal with her as a mother over [T.M]. But at this point I haven't spoken with her to find out whether or not there is any conflict between those two positions.

(Emphases added.) But, as indicated above, St. John did not confirm that she was serving as Petitioner's attorney. Instead, St. John told the court that there might be a conflict in serving in both capacities and she would "speak with [Petitioner]" to determine if Petitioner desired to have "a separate attorney".

According to finding 7 of the court's May 3, 2013 findings and conclusions, "[f]amily court jurisdiction over [T.M.] and

TPR hearing. In relevant part, the court found that Petitioner "has made positive progress and matured over the last couple months," but that "the evidence also indicates that [Petitioner] lacks adequate resources and ability to care for both herself and her son." The court was "not confident that [Petitioner] will be able to make lasting positive changes at any point in the near future."

The court therefore concluded that Petitioner was "not presently willing and able to provide [T.M.] with a safe family home, even ***430** ****349** with the assistance of a service plan" and that it was "not reasonably foreseeable that [Petitioner] ... will become willing and able to provide [T.M.] with a safe family home, even with the assistance of a service plan, within a reasonable period of time to not exceed two years from [T.M.'s] date of entry into foster **care**, which was on February 10, 2010." Hence, the court ruled that "[t]he Permanent Plan filed with the court on December 6, 201[1] is in the best interest of the child." Under the permanent plan, Petitioner's **parental** rights would be **terminated** and T.M. would be adopted by his aunt and uncle.

III.

Petitioner appealed to the ICA. The ICA affirmed the court's decision to **terminate** Petitioner's **parental** rights. The ICA majority opinion held that the court did not abuse its discretion "when it failed to appoint counsel to represent [Petitioner] earlier in the proceedings." *In re T.M.*, No. CAAP–12–000521, 129 Hawai'i 453, 2013 WL 3364109, at *1 (Haw.App.2013) (SDO). The majority noted that Petitioner "challenges none of the [court's] findings of fact but instead[ ] argues in a vague and conclusory manner that she could have avoided **termination** proceedings if counsel had been appointed sooner." *Id.* However, "an independent view of the record reveal[ed] no indication that the lack of earlier-appointed counsel prejudiced [Petitioner's] substantial rights." *Id.* (citing *In re Doe*, 99 Hawai'i at 534 n. 18, 57 P.3d at 459 n. 18).

In this regard, the ICA majority explained that Petitioner did not file an application for court-appointed counsel until September 2011, that the proceedings were not initially adversarial in nature, and that Petitioner "was counseled by the [court] itself on what was expected of her if she wanted to retain her child." *Id.* at *1–2. The majority concluded that it "[could not] hold that the court's omission '[led] to [an] erroneous decision [.]' " *Id.* at *1 (quoting *Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18, 27, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981)). [14] The ICA majority therefore affirmed the court's order.

Chief Judge Nakamura dissented. He noted that "both the Family Court and the guardian ad litem recognized that Mother's rights and interests as a **parent** were distinct from and may conflict with Mother's rights and interests as a child. Nevertheless, the Family Court waited until nineteen months after T.M. was placed in foster custody before appointing counsel for Mother." *Id.* at *4 (Nakamura, C.J., dissenting). He would have held that "the Family Court did not appoint counsel early enough before the **parental termination** hearing to give Mother a fair opportunity to defend against the DHS's request to **terminate** her **parental** rights." *Id.* (citing *In re "A" Children*, 119 Hawai'i 28, 57–59, 193 P.3d 1228, 1257–59 (App.2008)). Hence, Chief Judge Nakamura would have "vacate[d] the order **terminating** Mother's **parental** rights and remanded the case for further proceedings." *Id.*

IV.

In her Application Petitioner asks in pertinent part whether "counsel for an indigent minor **parent**[,]" such as Petitioner, should have been appointed "to defend her **parental** rights and advise her while her child remained in foster care for more than nineteen months[.]"

V.

[1] [2] [3] We hold that the court's failure to appoint counsel for Petitioner prior to September 13, 2012 constituted an abuse of discretion under HRS § 587–34 and § 587A–17. Because those statutes [15] stated that the court may appoint an attorney to represent a legal **parent** who is indigent, HRS § 587A–17; *see also* HRS § 587–34, "discretion resided in the court as to whether to do so[.]" *In* ***431** ****350** *re Doe*, 108 Hawai'i at 153, 118 P.3d at 63 (holding that a statute that provided that the court "may" appoint a guardian ad litem left the court with discretion to make an appointment).

"In reviewing a court's exercise of discretion it must be determined whether the court abused its discretion." *In re Doe,* 108 Hawai'i at 153, 118 P.3d at 63. "An abuse of discretion occurs when the trial court exceeds the bounds of reason or disregards rules of principles of law or practice to the substantial detriment of a party[.]" *Id.* (internal quotation marks omitted). [16]

A.

The record demonstrates that the court was aware from the inception of the proceedings that Petitioner required an attorney in her role as mother, yet failed to appoint one until September 13, 2011. The nineteen month delay in the appointment of counsel for Petitioner constituted an abuse of discretion.

As noted, on January 6, 2010, DHS filed a petition to assert temporary custody over both Petitioner and T.M. A hearing on the Petition was held on January 7, 2010, and the court informed all of the parties that they could file an application for a court-appointed attorney. As to Petitioner, the court explained that she was entitled to a guardian ad litem as a child, and to an attorney as a mother. The court stated that it would try to appoint an individual to "act in both responsibilities," but acknowledged that there might be a conflict if the same person was appointed to serve both roles.

[4] After the initial hearing, the court immediately granted the applications for a court-appointed attorney for T.M.'s father and Petitioner's mother. However, the court did not appoint an attorney for Petitioner, even though it recognized the potential conflict of having one person serving both as guardian ad litem and as attorney. Instead, St. John was appointed as Petitioner's guardian ad litem. At the January 14, 2010 hearing the court told St. John that she was "playing a dual role here." However, St. John, rejected the assertion that she was also serving as Petitioner's attorney. The record does not indicate that the court followed through with St. John to determine whether a conflict existed between her "dual role[s]." [17]

Despite the court's recognition at the January 7, 2010 hearing that it was "a good idea" for the parties to be represented by counsel, and that unrepresented parties would have difficulty understanding the legal significance of the proceedings, the court failed to appoint Petitioner an attorney. Thus, Petitioner was the only primary party [18] without counsel. [19]

**351 *432 At the May 24, 2011 hearing, St. John brought Petitioner's absence of counsel to the court's attention. St. John stated that she was only serving as Petitioner's guardian ad litem, and reminded the court that Petitioner had never been assigned an attorney. At the same hearing, DHS informed the court that it was going to file a motion to terminate Petitioner's parental rights. St. John then suggested to the court that because the DHS sought to terminate Petitioner's parental rights, counsel should be appointed for Petitioner. However, the court took no action even though it had the discretion to appoint counsel for Petitioner. Instead, the court left it to the guardian ad litem who had taken opposing positions to that of Petitioner to do so.

On September 13, 2011, the court noted that it had received Petitioner's application for counsel but that it had "not appointed anyone yet" because of the "possibility that this matter is going to be resolved by way of [an agreement between the parties regarding] a guardianship." Thus, despite the existence of ongoing negotiations among the parties, Petitioner was left unrepresented. The court's decision to delay the appointment of counsel until after the outcome of the settlement proceedings left Petitioner without a legal advocate for her position in the crucial negotiations among Petitioner, T.M.'s guardian, and DHS.

On September 20, 2011, only five months before the termination hearing, Jackson appeared for the first time. The court at several points asked Jackson if Petitioner was willing to agree to terminate her parental rights, even though Petitioner's counsel had "just met with Petitioner [that] morning." Jackson disclosed that she "didn't think that [the termination of parental rights was] the way the case was going." Thus, it is apparent that at the September 20, 2011 hearing DHS abandoned its original approach of guardianship without parental rights termination, and the court shifted to asking Petitioner to accede to the termination of her parental rights. Consequently, it was crucial that Petitioner was provided counsel at the inception of the proceedings to inform her of the limitations of the guardianship approach

and of the possibility that if other options were pursued, her parental rights would be in jeopardy.

[5] [6] Additionally, nothing in the record demonstrates that Petitioner was aware that she had a two-year deadline to provide T.M. with a safe family home under the Child Protective Act.[20] The report from the first Ohana Conference incompletely stated that Petitioner had one year to provide a safe family home for T.M. Thus, Petitioner was without counsel to advise her of significant deadlines.

Finally, the events following the appointment of counsel indicate the necessity of appointing counsel for Petitioner at the time T.M. was taken into DHS custody. At the September 13, 2011 hearing, St. John noted that Petitioner "wasn't really listening to what the attorneys and the social workers were telling her in the hearing that she needed to hear." Therefore, St. John believed that Petitioner "really [did] need to sit down with somebody as an attorney for her ... [to] get the advice that she needs as a mother dealing with her child." (Emphases added.) St. John's statement makes it clear that, prior to September 13, 2011, Petitioner *433 **352 was not afforded legal advice on how to maintain her parental rights to T.M.

However, following the court's appointment of an attorney, Petitioner's behavior improved significantly. Petitioner began to pass her drug tests and become more involved in her substance abuse counseling. This was reflected in the court's findings after the termination hearing. The court stated that Petitioner had "made positive progress and matured over the last couple of months." Petitioner made rapid strides following the appointment of counsel.

Additionally, Petitioner had made progress in being able to provide a safe family home for T.M. Petitioner had lived with T.M. for eight months in foster mother's home, and visited once a week after August 15, 2010. Before trial, Petitioner would wake up before 5 a.m. to travel to foster mother's home to spend both Saturday and Sunday with T.M. Therefore, Petitioner had probably developed a connection with T.M. It may be that had counsel been appointed sooner, Petitioner may have been able to comply with the terms of the family plan and provided T.M. with a safe family home at an earlier date.

B.

In sum, the court did not appoint counsel for Petitioner until more than nineteen months after T.M. entered foster custody, and only five months prior to the hearing that ultimately terminated Petitioner's parental rights. The failure to immediately appoint counsel for Petitioner even after it became apparent that DHS would seek to terminate Petitioner's parental rights left Petitioner without the necessary assistance to prepare for the March 2, 2012 termination hearing. Petitioner was without legal guidance and did not have an advocate to represent her in negotiations with DHS.

Because for most of the proceedings, Petitioner was the only primary party without counsel, it was unreasonable not to have afforded Petitioner the assistance of counsel while the other primary parties, including DHS, were represented by counsel. Consequently, the court abused its discretion in failing to appoint counsel earlier in the proceedings. Thus, the court's April 17, 2012 Order Terminating Parental Rights and Awarding Permanent Custody to DHS must be vacated, and the case remanded for a new hearing.

VI.

The foregoing review of the instant case reveals the inadequacy of an approach that allows the appointment of counsel to be determined on a case-by-case basis once DHS moves to assert foster custody over a child.[21] In *Doe*, this court "affirmed, independent of the federal constitution, that parents have a substantive liberty interest in the care, custody, and control of their children protected by the due process clause of article I, section 5 of the Hawai'i Constitution." 99 Hawai'i at 533, 57 P.3d at 459. *Doe* explained that "parental rights guaranteed under the Hawai'i constitution would mean little if parents were deprived the custody of their children *434 **353 without a fair hearing." *Id.* " Indeed, '[p]arents have a fundamental liberty interest in the care, custody, and management of their children and the state may not deprive a person of his or her liberty interest without providing a fair procedure for the deprivation.' " *Id.* (quoting *Hollingsworth v. Hill*, 110 F.3d 733, 738–39 (10th Cir.1997)). *Doe* therefore held that

the right to a "fair procedure" required the appointment of interpreters "at family court proceedings where [ ] parental rights are substantially affected." 99 Hawai'i at 534, 57 P.3d at 460.

In *In re "A" Children*, the ICA held that the court's failure to timely appoint counsel resulted in the father not receiving notice of hearings. 119 Hawai'i at 58, 193 P.3d at 1258. Judge Watanabe, writing for the ICA, pointed out that this created "a chain of events" that led to the termination of his parental rights and "that could have been broken if Father had had counsel." *Id.* The ICA applied the case-by-case approach adopted by a majority of the Supreme Court in *Lassiter*, where that court balanced the parent's interests, the state's interests, and the risk that a parent will be erroneously deprived of his or her child. *Id.* at 57, 193 P.3d at 1257. The ICA concluded that the dispositive factor was the third factor, and ruled that the "belated appointment of an attorney created an appreciable risk [the father] would be erroneously deprived of his parental rights[.]" *Id.* at 58, 193 P.3d at 1258.

However, the ICA "express[ed] grave concerns ... about the case-by-case approach adopted in *Lassiter* for determining the right to counsel." *Id.* at 60, 193 P.3d at 1260. According to the ICA, "as Justice Blackmun observed," under the case-by-case approach, "[a] trial judge will be required to determine in advance what difference legal representation might make." *Id.* (quoting *Lassiter*, 452 U.S. at 51 n. 19, 101 S.Ct. 2153) (Blackmun, J., dissenting). The ICA then concluded that "the *Lassiter* dissents present compelling arguments for a bright-line rule regarding the provision of counsel in termination-of-parental rights cases[.]" *Id.*

In *RGB*, an indigent parent asserted that her court-appointed counsel was ineffective. 123 Hawai'i at 17, 229 P.3d at 1082. Because the family court-appointed counsel, the *RGB* majority "decline[d] to reach the question of whether the Hawai'i Constitution provides indigent parents a right to counsel in all termination proceedings." *Id.* at 18, 229 P.3d at 1083. [22]

B.

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. As Justice Stevens asserted in *Lassiter*, 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. *Lassiter*, 452 U.S. at 59, 101 S.Ct. 2153 (Stevens, J., dissenting). Hence, "the reasons supporting the conclusion that the Due Process Clause ... entitles the defendant in a criminal case to representation by counsel apply with equal force" in cases where the state seeks to terminate parental rights. *Id.* (emphasis added).

This court has held that "[t]he right to counsel is an essential component of a fair trial" in the criminal context. *State v. Tarumoto*, 62 Haw. 298, 299, 614 P.2d 397, 398 (1980). The same considerations suggest that an attorney is necessary for a "fair procedure" in parental termination proceedings. *See Doe*, 99 Hawai'i at 534, 57 P.3d at 460; *see also RGB*, 123 Hawai'i at 47, 229 P.3d at 1112 (Acoba, J., dissenting) (stating that an attorney should be provided in termination **354 *435 hearings in light of the " constitutionally protected liberty interest at stake").

Furthermore, as Justice Blackmun explained in *Lassiter*, a parent in termination proceedings 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." 452 U.S. at 45, 101 S.Ct. 2153 (Blackmun, J., dissenting). A parent must "be prepared to adduce evidence about his or her personal abilities and lack of fault, as well as proof of progress and foresight as a parent[.]" *Id.* at 46, 101 S.Ct. 2153. They are faced "with an adversary—the State—that commands great investigative and prosecutorial resources, with standards that involve ill-defined notions of fault and adequate parenting, and with the inevitable tendency of a court to apply subjective values or to defer to the State's 'expertise.' " *Id.*

In *Matter of K.L.J.*, 813 P.2d 276 (Alaska 1991), the Alaska Supreme Court held that counsel is necessary in termination proceedings because " 'the crucial determination about what will be best for the child can be an exceedingly difficult one[,] ... it requires a delicate process of balancing many complex and competing considerations that are unique to every case.' " *Id.* at 282 (quoting *Flores v. Flores*, 598 P.2d 893, 896 (Alaska 1979)). Thus, "a parent cannot possibly succeed" without "the guiding hand of counsel." *Lassiter*,

452 U.S. at 46, 101 S.Ct. 2153 (Blackmun, J., dissenting). Hence, the appointment of an attorney is crucial to ensure that parents are provided a "fair procedure." *See Doe,* 99 Hawai'i at 533, 57 P.3d at 458.

Doe held that an interpreter was necessary where "parental rights are substantially affected." 99 Hawai'i at 534, 57 P.3d at 459. In the context of the Child Protective Act, the filing of a petition to assert custody initiates the termination process. As stated before, once a child is "is in foster care under the department's responsibility" for an aggregate of fifteen of twenty two months, DHS must file "a motion to terminate parental rights." HRS § 587A–33(I). At a termination hearing, parents must establish that they can provide a safe family home within two years of the child's entry into foster care. HRS § 587A–33(a)(2). However, before the termination hearing itself, issues that may be decisive in that proceeding may have been determined subsequent to DHS attaining custody of the child. Thus, as soon as DHS files a petition asserting custody over a child, parents' rights are "substantially affected." At that point, an attorney is essential to protect an indigent parent's liberty interest in the care, custody and control of his or her children. [23]

VII.

Mandating the appointment of counsel for indigent parents once DHS moves for custody would remove the vagaries of a case-by-case approach. As mentioned before, under the case-by-case approach, " 'it will not always be possible for the trial court to predict accurately, in advance of the proceedings, what facts will be disputed, the character of cross-examination, or the testimony of various witnesses.' " *Matter of K.L.J.,* 813 P.2d at 282 n. 6 (quoting Kevin W. Shaughnessy, Note, *Lassiter v. Department of Social Services: A New Interest Balancing Test for Indigent Civil Litigants,* 32 Cath. U.L. Rev. 261, 282–83 (1982)) (hereinafter Note, *A New Interest Balancing Test); accord RGB,* 123 Hawai'i at 49, 229 P.3d at 1114 (quoting *K.L.J.*). Hence, in a case-by-case approach, ***436 **355** there is a " 'possibility that appointment of counsel will be denied erroneously by the trial court.' " *Matter of K.L.J.,* 813 P.2d at 282 n. 6 (quoting Shaughnessy, Note, *A new interest balancinG test,* at 282–83). [24]

Similarly, " 'the case-by-case approach ... does not lend itself practically to judicial review.' " *Id.* (quoting Shaughnessy, Note, *A New Interest Balancing Test,* at 282–83). " '[T]he reviewing court must expand its analysis into a cumbersome and costly, time-consuming investigation of the entire proceeding.' " *Id.* (quoting Note, *A New Interest Balancing Test,* at 282–83). Moreover, the harm suffered by parents proceeding without counsel may not be readily apparent from the record, especially because without the aid of counsel, it is unlikely that a case is "adequately presented." *Lassiter,* 452 U.S. at 51, 101 S.Ct. 2153 (Blackmun, J., dissenting).

Additionally, real human costs are sustained by all of the parties when, as in the instant case, the court's failure to appoint counsel results in a remand for further proceedings. Under such circumstances, the court's ultimate determination regarding a child's placement may be significantly delayed. Both parents and children face continued uncertainty regarding parental status and a child's future. These costs would be mitigated by a rule cognizant of the reality that counsel is essential to ensuring that parents are provided a "fair procedure." *See Doe,* 99 Hawai'i at 533, 57 P.3d at 459.

[7] In sum, difficulties stemming from the case-by-case approach can result in the erroneous termination of parental rights. [25] Thus, 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 [26] under the due process clause in article I, section 5 of the Hawai'i Constitution. We direct that upon the filing date of this opinion, trial courts must appoint counsel for indigent parents upon the granting of a petition to DHS for temporary foster custody of their children. [27]

VIII.

Based on the foregoing, the court's April 17, 2012 order terminating parental rights, the May 3, 2012 findings and conclusions "re TPR Hearing", and the July 26, 2013 judgment of the ICA filed pursuant to its June 28, 2013 Summary Disposition Order affirming the court's order are vacated, and the case is remanded to the court for a new hearing consistent with this opinion.