DISSENTING OPINION BY ACOBA, J., WITH WHOM DUFFY, J., JOINS

By its decision today, the majority denies indigent persons access to justice in parental termination actions. Hawaiʻi is now one of only five states that leaves the appointment of counsel for indigent parents in termination-of-parental-rights proceedings to the random method of case by case determination. See In re "A" Children, 119 Hawaiʻi 28, 46 n.35, 193 P.3d 1228, 1246 n.35 (App. 2008). Despite the overwhelming national trend away from discretionary appointment, the majority embraces the majority's ultimate holding in Lassiter v. Department of Social Services, 452 U.S. 18 (1981), which practically every state has justly rejected.

Here, Petitioner/Mother-Appellant (Petitioner)[1] was denied the opportunity to present her side of the case on appeal. On March 11, 2005, the family court of the third circuit (the court) rendered its findings of fact (findings), conclusions of law (conclusions), and order [collectively, Termination Order], terminating Petitioner's parental rights. After entry of this Termination Order, Petitioner had twenty days to file a motion for reconsideration of the court's decision under Hawaiʻi Revised Statutes (HRS) § 571-54 (1993),[2] as a prerequisite for filing an

[1] For the purposes of preserving confidentiality, Petitioner/Mother-Appellant is referred to a "Petitioner" and the subject child is referred to as "RGB" or "the child."

[2] HRS § 571-54 provided in relevant part:

> An order or decree entered in a proceeding based upon section 571-11(1), (2), (6), or (9) shall be subject to

(continued...)

appeal. The court sua sponte discharged appointed counsel without the substituted appearance of any new attorney. Thus, Petitioner was left without counsel for the first eighteen days of this crucial period. When the court appointed appellate counsel, Carrie Yonemori, Esq. (Yonemori), Yonemori failed to file Petitioner's motion for reconsideration. As a consequence, Petitioner's direct appeal was dismissed for lack of jurisdiction. Therefore, Petitioner has never had the opportunity to object to the Termination Order on appeal.

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[2](...continued)

> appeal to the supreme court only as follows:
>
> Within twenty days from the date of the entry of any such order or decree, any party directly affected thereby may file a motion for a reconsideration of the facts involved. The motion and any supporting affidavit shall set forth the grounds on which a reconsideration is requested and shall be sworn to by the movant or the movant's representative. The judge shall hold a hearing on the motion, affording to all parties concerned the full right of representation by counsel and presentation of relevant evidence. The findings of the judge upon the hearing of the motion and the judge's determination and disposition of the case thereafter, and any decision, judgment, order, or decree affecting the child and entered as a result of the hearing on the motion shall be set forth in writing and signed by the judge. Any party deeming oneself aggrieved by any such findings, judgment, order, or decree shall have the right to appeal therefrom to the supreme court upon the same terms and conditions as in other cases in the circuit court and review shall be governed by chapter 602; provided that no such motion for reconsideration shall operate as a stay of any such findings, judgment, order, or decree unless the judge of the family court so orders; provided further that no informality or technical irregularity in the proceedings prior to the hearing on the motion for reconsideration shall constitute grounds for the reversal of any such findings, judgment, order, or decree by the appellate court.

(Emphases added.) Because the Termination Order in this case was issued pursuant to HRS Chapter 587, the jurisdictional provision in HRS § 571-11(9) (1993 & Supp. 2005) applied, and, thus, pursuant to the foregoing portion of HRS § 571-54, a motion for reconsideration was required prior to appeal. HRS § 571-54 has since been amended. The current version of the statute does not require a motion for reconsideration as a prerequisite to appeal.

In light of these circumstances, I would hold (1) that the Intermediate Court of Appeals (ICA) did not gravely err in concluding that Petitioner's "Motion for: 1) New Trial, and/or 2) to Reconsider and/or Amend Judgment and/or All Previous Orders, and/or 3) for Release of All Evidence or Files in Case, and/or 4) for Dismissal" filed on February 6, 2007 (Rule 60 Motion) was properly considered under Hawaiʻi Family Court Rules (HFCR) Rule 60(b)(6), (2) that article I, section 5 of the Hawaiʻi Constitution guarantees indigent parents the right to court-appointed counsel in parental termination proceedings,[3] (3) that Petitioner's right to court-appointed counsel was violated when Petitioner was not provided effective assistance of counsel on appeal, and (4) that Petitioner should be allowed a direct appeal in light of the fact that this court allows such appeals for indigent criminal defendants when an attorney fails to perfect the appeal or files a late appeal. Therefore, I would direct that Petitioner have twenty days from the issuance of this court's judgment to petition the court for reconsideration pursuant to HRS § 571-54, the denial of which is subject to appeal in accordance with that statute.

Unlike the majority, I believe it is wrong to reach the findings and conclusions in the Termination Order inasmuch as

[3] The due process clause of article I section 5 of the Hawaiʻi Constitution provides in part that "[n]o persons shall be deprived of life, liberty or property without due process of law[.]"

Petitioner has had no opportunity to present her side of the case on direct appeal. Accordingly, I respectfully dissent.

The "facts" and procedural history that follow are taken from the record and findings and conclusions in the Termination Order which Petitioner has been precluded from appealing, except as to those matters pertaining to her ineffective assistance of counsel claim under her Rule 60 motion.

I.

A.

Pre-Termination Proceedings

Petitioner's involvement with Respondent/Respondent-Appellee Department of Human Services (DHS or Respondent) began on March 30, 2001, when Petitioner's child (RGB) was taken into police protective custody after being found in the care of Petitioner's boyfriend, who had a history of substance abuse and had been diagnosed with chronic paranoid schizophrenia with acute exacerbation. On April 6, 2001, RGB was placed in temporary foster care with DHS.

The initial hearing on the Petition was held on April 6, 2001, where Petitioner appeared with counsel Cynthia Linet, Esq. (Linet). On June 15, 2001, Petitioner stipulated to the court's jurisdiction and the court returned the child to Petitioner under family supervision.

On November 29, 2001 and November 30, 2001, Petitioner, along with Linet, appeared at hearings where DHS requested the

court to award foster custody. On November 29, 2001, the court denied DHS's request. At that hearing, Petitioner requested permission to proceed pro se, and the court therefore granted Linet's oral motion to withdraw as counsel.

On April 4, 2002, DHS again requested foster custody of RGB, which was awarded. On April 8, 2002, Petitioner applied for court-appointed counsel and the court appointed Alika Thoene, Esq. (Thoene). Disposition hearings were held on April 12, 2002, April 15, 2002, May 14, 2002, and June 14, 2002. At all times, Petitioner was represented by Thoene, except at the June 14, 2002 hearing, at which Petitioner did not appear, and was defaulted for that hearing only.

Following those hearings, the court found that Petitioner suffered from a mental condition which distorted her perception of the people she came in contact with, causing her to think that everyone was conspiring against her to deprive her of the child. The court further found that Petitioner's misperceptions and her inability to control her emotions led her to have conflicts with people who were trying to assist her. The court also found that Petitioner's mental disorder prevented her from applying lessons learned to adequately parent the child and, thus, the child was not provided clean or appropriate clothing, was not bathed on a regular basis, and was not adequately supervised. The court concluded that, due to her mental disorder, Petitioner was incapable of adapting to situations not

compatible with her own lifestyle and beliefs, which endangered the child and rendered Petitioner incapable of providing a safe home for the child, and therefore, Petitioner's continued care for the child would result in serious injury to her, delaying physical, emotional, social, and/or psychological development with long term negative effects.

On July 8, 2002, Petitioner filed a motion to terminate Thoene as counsel and requested to proceed pro se. On August 8, 2002, the court granted Petitioner's request, but required that Thoene act as stand-by counsel to assist Petitioner in the presentation of her case.

Over the next two years, Petitioner had visits with the child, which were often problematic. As the visitations continued to deteriorate, RGB was evaluated by psychologist Dr. John Wingert. Following the hearing on April 4, 2004, the court suspended visitation indefinitely.

B.

Termination Proceedings

The permanent custody trial was held on six separate dates between August 23, 2004 and December 13, 2004. Petitioner was present throughout the trial, along with G. Kay Iopa, Esq., (Iopa), acting as stand-by counsel.

On December 23, 2004, Iopa filed a Motion to Reconsider Denial of Oral Motion to Continue Trial. On January 11, 2005,

Iopa filed a Motion to Reinstate Visitation. Both motions were denied at a hearing on January 13, 2005.

On March 11, 2005, the court entered its Termination Order. Based on numerous findings regarding Petitioner s behavior, mental condition, and ability to care for RGB, as well as the harmfulness of Petitioner s continued visits with the child, the court concluded:

> 1. The State of Hawai i has established by clear and convincing evidence the criteria set forth in [HRS §] 587-73(a).
> 2. Continued attempts at reunification of [RGB] with [Petitioner] will cause harm to [RGB] as defined in [HRS §] 587(2) [sic].
> 3. It is in the best interests of [RGB] that permanent custody of the child be awarded to DHS.

C.

Court-Discharge of Petitioner s Counsel and Subsequent Appointment of Counsel

The court s Termination Order stated that:

> [Iopa], stand-by counsel for [Petitioner], is discharged. Based on representations as to changes in her resource status, if [Petitioner] wishes the assistance of court-appointed counsel to pursue further relief or to perfect an appeal, she must tender a new application for court-appointed counsel to the [c]ourt immediately.

(Emphasis added.) At the point of discharge no counsel was substituted.

On March 29, 2005, Petitioner applied for court-appointed counsel, and counsel was appointed the same day. Yonemori, Petitioner s new counsel, failed to file a motion for reconsideration in order to preserve Petitioner s right to appeal the permanent custody ruling, as was required under HRS § 571-54 at that time.

D.

Post-Termination Proceedings

1.

2005 Proceedings

While the majority states that "[t]here are no filings in the record from either Yonemori or Petitioner from March 29, 2005 to March 10, 2006," majority opinion at 14, the record is replete with Petitioner's and Yonemori's actions leading up to Petitioner's March 10, 2006 "Motion for Relief From Judgment Order of March 11, 2005." The record indicates that DHS filed numerous reports indicating that Petitioner's appeal was pending. For example, on August 3, 2005, DHS filed a report to the court noting that Petitioner's appeal "may delay the adoption process[.]" On August 4, 2005, RGB's guardian ad litem filed a report stating that DHS would be unable to proceed with adoption unless Petitioner's appeal was resolved. The guardian ad litem report also stated that "[the guardian ad litem] ha[s] spoken to [Yonemori], the attorney appointed to represent [Petitioner] . . . and [Yonemori] has related that the necessary paperwork pertaining to such appeal should be submitted to the Supreme Court shortly."

Additionally, the record shows that between March and August of 2005, Yonemori recounted that several matters occurred that delayed her filing of Petitioner's Notice of Appeal:

> 2. That I was unaware that a Notice of Appeal had not been filed in the case herein. I have only done a few Family Court DHS appeals and in all previous cases, the prior attorney had filed the Notice of Appeal.
>
> . . . .
>
> 6. That between March and August of this year [2005], I have had four (4) close family members . . . pass away. Therefore, I may have been preoccupied and not as vigilant about case details.
>
> 7. That the delay in filing the Notice of Appeal was in no way caused by [Petitioner], who is understandably quite anxious about this case.

(Emphases added.) This was stated in Yonemori's declaration of counsel, dated September 27, 2005.[4]

The record also reflects that Yonemori attempted to file a Notice of Appeal as she had represented she would to the guardian ad litem. On September 30, 2005, Yonemori attempted to file a Notice of Appeal. However, Yonemori explained that the Notice of Appeal was rejected by the clerk of court, and cited several events occurring in October and November 2005:

> 2. That on or about September 30, 2005[,] I filed a Notice of Appeal in the case herein.
>
> 3. That sometime in October, I was notified by [a] Family Court Clerk [] that my cover page was in error and that the documents were being returned to me for corrections.
>
> 4. That I waited for the return of the documents and checked my court jacket at the Circuit Court on a weekly basis. I did not realize that the documents were returned to me via my Family Court jacket until late November.
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> 5. That my close friend . . . passed away in late November and I left shortly thereafter for the mainland to attend his funeral and for sometime [sic] off.
>
> 6. That due to the stresses of leaving for the mainland, holidays, and finishing up work for EPIC/Ohana Conferencing, I completely forgot about making the appropriate corrections for this case.

(Emphases added.) This was set forth in Yonemori's declaration

[4] This declaration was attached to Yonemori's Motion to Extend Time to File and Docket Record on Appeal from March 31, 2005 to September 30, 2005. The motion to extend was dated September 27, 2005. The back of the declaration indicates the documents were "Received (LDB) SEP 27, 2005," but the motion was filed on March 17, 2006.

of counsel dated March 10, 2006.[5] According to the declaration, the foregoing delays were not caused by Petitioner. Yonemori's March 10, 2006 declaration explained "[t]hat the delays in filing all papers in this case are due to my irresponsibility and are in no way caused by [Petitioner], who is understandably quite anxious about this case." (Emphasis added.)

2.

2006 Proceedings

A report from RGB's guardian ad litem dated January 26, 2006, stated that "[the guardian ad litem] was able to speak very briefly with [Yonemori]" and Yonemori had related to the guardian ad litem that "[Petitioner] ha[d] been coming to [Yonemori's] office every week and that the appeal '[was] on'."

On March 10, 2006, Petitioner filed a pro se Motion for Relief from the Order of March 11, 2005, pursuant to HFCR Rule 60. Petitioner's affidavit attached to her pro se Motion for Relief argued that "[c]ounsel assigned by this court remains ineffective to bring this matter to justice[.]" On March 13, 2006, Yonemori refiled the Notice of Appeal of the Termination Order. On March 15, 2006, Yonemori also filed a Motion for Relief from the Termination Order, pursuant to HRCR Rule 60.

On June 2, 2006, Yonemori filed a Motion for Withdrawal and Substitution of Counsel. In support of the motion, Yonemori

[5] This declaration is attached to Yonemori's Motion to Extend time to File and Docket Record on Appeal from September 30, 2005 to March 17, 2006, dated March 10, 2006, and filed on March 17, 2006.

stated in her Declaration of Counsel that she believed a legal conflict existed with her continued representation of Petitioner due to Petitioner's ineffective assistance of counsel claim:

> 2. I am bringing this Motion for Withdrawal and Substitution of Counsel because I believe that a legal conflict exists with my continued representation of [Petitioner].
> 3. [Petitioner's] Rule 60 motion alleges in part ineffective assistance of counsel. I am one of the three attorneys who may not have effectively assisted [Petitioner].
> 4. [Petitioner] verbally executed a waiver of conflict with me at the last court hearing.
> 5. I do not want to see [Petitioner] prejudiced in anyway [sic] by her waiver and I have spoken to her about the importance of preserving all possible grounds of appeal. [Petitioner] stated that it was not her intent that this waiver be "permanent."

(Emphases added.) In support of her motion for withdrawal, Yonemori indicated that she could not devote time to the case for periods in July, November, and December 2006 and that she was also anticipating a jury trial in early fall of that year:

> 8. I have just come through a difficult period and have not had sufficient time to devote to [Petitoner's] case and to educate myself areas [sic] of law (trust, discrimination, poverty, etc.), which may be important in the Rule 60 motion and possible appeal. [Petitioner] also requires an attorney who will meet with her on a frequent and prolonged basis. I will not be here for two weeks in early July and also for two week periods in October and December. I also anticipate that I will have a jury trial in early fall. Therefore, I am concerned that [Petitioner] would not have accessibility to my legal counsel during these numerous time periods.

(Emphases added.) Yonemori further declared that she "firmly believed" in Petitioner's arguments and asked the court to "appoint[] a competent and knowledgeable attorney" to the case:

> 9. I have gone through voluminous files and spoken with [Petitioner] on a number of occasions, as well as done research, and firmly believe in the various issues that she has brought up. I do not want to see her rights jeopardized or further compromised in any way and feel that she should be appointed a competent and knowledgeable attorney who will work closely with her and strenuously pursue this case.

> 10. [Petitioner] is in contact with an attorney (in California, but also still actively licensed in Hawaiʻi) who has excellent foresight and understanding about this case. I have also spoken with him about the pending Rule 60 motion and possible appeal. It is my recommendation that the court consider appointing this individual as [Petitioner's] counsel.

(Emphases added.)

On June 2, 2006, Yonemori also filed a "Specifications on Rule 60 Motions," which asserted that Petitioner had verbally agreed to consolidate the two previously-filed Rule 60 motions and provided arguments in support of the claim for relief. Yonemori also admitted that her "failure to file a timely appeal and meet with [Petitioner] in 2005, ha[d] unfortunately delayed the resolution of this matter."

After a hearing held on June 2, 2006, the court issued an order on June 26, 2006, finding that "due to [Petitioner's direct] appeal, this court lacks jurisdiction to act on her Rule 60(b) motion and motion for withdrawal and substitution of counsel[.]" Therefore, the court "[held] in abeyance any ruling on [Petitioner's] Rule 60(b) motion or motion for withdrawal and substitution unless moved on; and direct[ed Petitioner] and [Petitioner's] counsel to address th[ose issues] to the appellate court."

On June 28, 2006, this court dismissed Petitioner's direct appeal for lack of jurisdiction pursuant to HRS § 571-54, stating:

> [Petitioner] did not file a motion for reconsideration within twenty days after entry of the [Termination Order], as [HRS] § 571-54 [] required. Therefore, [Petitioner] failed to perfect her right to assert an appeal under HRS

> § 571-54 [], and there is no appealable order. Absent an appealable order, we lack jurisdiction over this case.

(Emphasis added.)

Subsequently, on September 28, 2006, the court orally denied Petitioner's Rule 60 motions and Yonemori's motion to withdraw. On October 17, 2006, Petitioner, acting pro se, attempted to appeal the court's denial of these motions. On November 9, 2006, the court issued its written order denying Petitioner's Rule 60 motions and Yonemori's motion to withdraw as counsel, concluding, with respect to Petitioner's March 15, 2006 motion, "that it was not timely filed filed [sic] under Hawaii law," and with respect to Petitioner's pro se Rule 60 motion filed on March 10, 2006, that

> (1) the motion only requests general relief and Rule 60(b) requires particularity . . . ; (2) the motion fails to provide any new evidence to support a basis for relief under [HFCR Rule 60(b)]; (3) as to the relief sought, the court afforded [Petitioner] extensive time at trial to present evidence to address all of the issues . . . ; (3) [sic] the court appointed legal counsels to assist [Petitioner] to the extent she was willing to work with the legal counsels appointed; (4) [HFCR Rule 6] does not permit the court to extend or enlarge the time within which to bring this motion and the court will not enlarge or extend the time within which this motion can be brought; and (5) the time within which to bring this motion had been long outstanding causing delay in the final resolution on the case and this matter needs to be put to rest[.]

(Emphases added.) On January 17, 2007, the ICA dismissed Petitioner's appeal for lack of jurisdiction under HRS § 571-54, "because [the court] ha[d] not reduced the September 28, 2006 oral announcement to an appealable written order."

On February 6, 2007, Petitioner filed the Rule 60 Motion, from which this appeal was taken. On April 24, 2007, the

court orally denied this motion, and filed its order on May 8, 2007. Petitioner filed a Notice of Appeal from the May 8, 2007 order on June 7, 2007.

E.

The ICA issued its SDO on April 9, 2009. The ICA stated that the Termination Order was not before it because Petitioner had failed to file the motion for reconsideration necessary to perfect an appeal from that order:

> From [Petitioner's] point-of-view, this appeal concerns the termination of her parental rights with respect to [RGB], who was born in July of 1999. [Petitioner's] parental rights were terminated in the [c]ourt's March 11, 2005 [Termination Order]. However, the Termination Order is not before the court on this appeal. On June 28, 2006, in S.Ct. No. 27814, the Hawaiʻi Supreme Court entered an order dismissing [Petitioner's] appeal from the Termination Order, which stated:
>
> > The [Termination Order] was not, by itself, an appealable final order under HRS § 571-54 (1993). . . . [Petitioner] did not file a motion for reconsideration within twenty days after entry of the [Termination Order], as HRS § 571-54 (1993) required. Therefore, [Petitioner] failed to perfect her right to assert an appeal under HRS § 571-54 (1993), and there is no appealable order. Absent an appealable order, we lack jurisdiction over this case[.]

In the Interest of RGB, a Minor, No. 28582, 2009 WL 953392 at *1 (Haw. App. Apr. 9, 2009) (SDO) (emphasis added).

The ICA recognized that Petitioner had sought relief from the court's May 8, 2007 Order Denying Relief, and that Petitioner raised as one of the points of error on appeal that the lack of competent counsel had violated her due process rights:

> 1. [Petitioner] was denied her due process rights to competent counsel; and
> 2. [The court] erred when it refused to allow [Petitioner] to review certain "confidential" records and files in this case.

Id. (emphasis added). The ICA decided Petitioner's arguments on their merits "[n]otwithstanding DHS's argument that [Petitioner's Rule 60 Motion] was untimely and subject to dismissal[.]" Id. at *2.

II.

As to the first point of error, the ICA concluded that "[Petitioner fail[ed] to identify with specificity [] at which points in the case that she was unconstitutionally deprived of access to competent counsel[,]" id., and "[i]t appears from the record that [Petitioner] was represented by appointed counsel or standby consulting counsel at all hearings leading up to the Termination Order[,]" id. Specifically with regard to the post-termination time frame, the ICA noted that it was "troubled by the impact of the [Termination Order's] immediate discharge of [Petitioner's] standby attorney . . . , particularly in light of [the court's] assessment of [Petitioner's] mental health status," id., and that, "[a]lthough new counsel apparently was appointed on the same day that [Petitioner] finally got her application in to the court, [counsel] failed to preserve [Petitioner's] rights to challenge the Termination Order by failing to immediately file a motion for reconsideration[,]" id. (emphasis in original).

Despite recognizing that "[counsel] herself later described her performance as falling below the level of competence required to protect [Petitioner's] rights[,]" id., the ICA rejected Petitioner's claim because "[Petitioner] ha[d] not

identified . . . a single 'appealable issue' that could have been raised had counsel preserved her rights to an appeal from the Termination Order[,]" id. Therefore, applying by analogy the standard for ineffective assistance used in criminal matters, the ICA concluded that "[Petitioner] has failed to even suggest a meritorious basis upon which counsel could have filed a motion to reconsider and could have raised on appeal from the Termination Order[,]" and thus, "[the court] did not err in declining to grant [Petitioner] relief based on ineffective assistance of counsel." Id. The ICA concluded that "[the court] did not err in limiting [Petitioner's] access to the post-November 6, 2006 confidential record in this case." Id. at *3. Based on the foregoing, the ICA affirmed the court's May 8, 2007 Order Denying Relief. On August 13, 2009, Petitioner filed a petition for writ of certiorari (Application).

III.

Petitioner presented two questions in her Application:

> [1] Whether the [ICA's] "borrowing" of criminal matters analogy to apply to family court claims of ineffective counsel is authorized by law and meets constitutional standards?
> [2] Whether the ICA [sic] upholding of the trial court's refusal to release "confidential" records that appellate's counsel could not examine but at the same time requiring counsel to "identify any prejudice stemming from this limitation" meets fair disclosure standards?

In my view as to Question 1, the ICA gravely erred (1) in failing to hold that Yonemori was ineffective because she did not file the motion for reconsideration and (2) in failing to

hold that Petitioner should be allowed to perfect her appeal because of such ineffectiveness.

IV.

Petitioner's Rule 60 Motion from which this appeal was taken has been subsequently treated by the parties, and apparently by the court and the ICA, as a motion for relief from judgment under HFCR Rule 60(b). HFCR Rule 60(b) provides, in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from any or all of the provisions of a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceedings was entered or taken.

(Emphasis added.)

The central argument presented in Petitioner's Motion, as well as on appeal, appears to be that she was denied due process due to ineffective assistance of counsel. Petitioner's claim could only fall under HFCR Rule 60(b)(6), inasmuch as none of the other provisions would encompass a claim of ineffective assistance. The ICA has characterized HFCR Rule 60(b)(6) as follows:

> Rule 60(b)(6) permits the trial court in its sound discretion to relieve a party from a final judgment. Such

> relief is extraordinary and the movant must show that (1) the motion is based on some reason other than those specifically stated in clauses 60(b)(1) through (5); (2) the reason urged is such as to justify the relief; and (3) the motion is made within a reasonable time.
>
> The first requirement is self-explanatory and merely indicates that subsection (6) is a residual clause to provide relief for considerations not covered by the preceding five clauses. The second requirement means that the movant must prove that there are exceptional circumstances justifying relief.[6]
>
> The third requirement calls for diligence by the moving party. Although Rule 60(b)(6) motions are not subject to the one-year limitation, they must be brought within a reasonable time. What constitutes a "reasonable time" is determined in the light of all attendant circumstances, intervening rights, loss of evidence, prejudice to the adverse party, the commanding equities of the case, and the general policy that judgments be final.
>
> Since Rule 60(b)(6) relief is contrary to the general rule favoring finality of actions, the court must carefully weigh all of the conflicting considerations inherent in such applications. Once the court has made a determination to grant or deny relief, the exercise of its discretion will not be set aside unless the appellate court is persuaded that, under the circumstances of the case, the court abused its discretion.

Hayashi, 4 Haw. App. at 290-91, 666 P.2d at 174-75 (citations omitted) (emphases added).

A.

In support of Petitioner's Rule 60(b) motion, the declaration of counsel dated January 24, 2007, stated that

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[6] The "exceptional circumstances" requirement stated in Hayashi v. Hayashi, 4 Haw. App. 286, 666 P.2d 171 (1983), was taken from the standard applied under Hawaiʻi Rules of Civil Procedure (HRCP) Rule 60(b)(6) in Isemoto Contracting Co. v. Andrade, 1 Haw. App. 202, 616 P.2d 1022 (1980). Although termination proceedings under Chapter 587 are technically civil, as discussed herein, the liberty interests at stake here are rare to civil proceedings, and thus, the "exceptional circumstance" requirement is satisfied in part by the nature of the termination proceedings themselves.

Moreover, in Hayashi, the ICA indicated that "exceptional circumstances" were necessary to justify the lengthy delay in that case, stating that, "[i]n the instant case, Wife waited six years before filing her Rule 60(b)(6) motion. Such a delay may or may not be unreasonable depending upon whether any exceptional circumstances are present which would mitigate the lengthy delay in bringing the motion." 4 Haw. App. at 291, 666 P.2d at 175 (emphases added). Thus, it appears that, in Hayashi, the second and third factors were related, inasmuch as "justify[ing] relief" by showing "exceptional circumstances" was necessary in part to justify the lengthy delay. For the reasons discussed below, there were numerous circumstances in this case justifying Petitioner's two-year delay in filing the motion at issue.

"[Petitioner] was not afforded competent legal counsel and was therefore denied her constitutionally protected [right to] due process and equal protection of the laws under the Hawaiʻi ([a]rticle I, [s]ection 5), and [the] United States of America Constitution (14th Amendment)[.]" With regard to Petitioner's appellate counsel, the declaration stated that "[t]he Order Appointing Court-Appointed Counsel [] was filed on March 29, 2005, or 12 days before the 'Notice of Appeal' 30 day appeal period was due in this case, thereby denying [Petitioner's] right to appeal her adverse decision by competent counsel."[7]

As stated above, following the April 24, 2007 hearing, the court issued an order denying the Rule 60(b) Motion. Although the court did not indicate that it was treating the Rule 60(b) Motion as one for relief under HFCR Rule 60(b)(6), the court addressed Petitioner's ineffective assistance argument on the merits, concluding that the record reflected that both judges involved in the case made "great effort[s]" to ensure that Petitioner was represented throughout the proceedings.

> As to [Petitioner's] claim that [Petitioner] lacked representation, the record clearly reflects that both [j]udges involved in this case made great effort to have [Petitioner] represented throughout the proceedings. The court accommodated [Petitioner] when she requested to have her counsel discharged and had standby counsel appointed to assist [Petitioner] throughout the case, all of which is reflected in the court's prior ruling contained in it's [sic] Findings of Fact, Conclusions of Law and Order filed March 11, 2005[.]

[7] As noted supra, however, a motion for reconsideration was a prerequisite to filing the Notice of Appeal in this case.

On appeal from that order, Petitioner argued that she "was denied her right to competent counsel in violation of her constitutional rights to due process of law expressed . . . in [a]rticle I, [s]ection 5 Hawaii [c]onstitutional rights [sic][,]" and stated that the "standard of review for a denial of a motion for post-decree relief is the abuse of discretion standard." (Emphases added.) The only provision in the HFCR which would allow a "motion for post-decree relief" based upon denial of the right to counsel is HFCR Rule 60(b)(6).

The ICA opted to "consider the substance of [Petitioner's] arguments on this appeal[,]" "[n]otwithstanding DHS's argument that [Petitioner's] February 6, 2007 Motion for Relief was untimely and subject to dismissal." RGB, 2009 WL 953392, at *2. Thus, the ICA presumably believed the motion was brought "within a reasonable time" under HFCR Rule 60(b)(4), (5), or (6). Id.

Consistent with the ICA's ruling on the merits, DHS, in its Response to the Application, characterized Petitioner's motion "from which this appeal was taken" as one under HFCR Rule 60(b). The DHS in its Response proceeded to argue that the ICA's decision on the merits was correct, without contending that Petitioner's Motion from which the appeal was taken was untimely under HFCR Rule 60(b), and thus, apparently abandoned that argument.

B.

1.

In order for Petitioner's Rule 60(b) Motion to be properly considered under HFCR Rule 60(b)(6), it must meet the requirements of Hayashi. First, as set forth supra, the motion must be "based on some reason other than those specifically stated in clauses 60(b)(1) through (5)[.]" Hayashi, 4 Haw. App. at 290, 666 P.2d at 174. A due process violation based on a claim of ineffective assistance of counsel satisfies this requirement, as it does not fall within any of the first five clauses of HFCR Rule 60(b).[8]

[8] In a divorce case, Lowther v. Lowther, 99 Hawaiʻi 569, 57 P.3d 494 (App. 2002), the ICA suggested that "gross neglect" on the part of counsel might be considered an "egregious" form of the conduct covered by HFCR Rule 60(b)(1), and might be allowed outside of the one-year limitation on motions under Rule 60(b)(1) if the court were to instead in its discretion consider it under Rule 60(b)(6), thereby eliminating the one-year limitation:

> HFCR Rule 60(b)(1) permits relief from a divorce decree for the reasons of "mistake, inadvertence, surprise, or excusable neglect" but requires the motion to be made not more than one year after the decree. HFCR Rule 60(b)(6) permits relief from a divorce decree for "any other reason justifying relief from the operation of the judgment." In other words, HFCR Rule 60(b)(6) does not permit relief for the reasons of "mistake, inadvertence, surprise, or excusable neglect[.]" More specifically,
>
> > [t]here are two situations that courts sometimes characterize as "other reasons," but that are more likely egregious forms of conduct covered under another clause of Rule 60(b), and clause (6) is invoked to circumvent the one-year limitation. The first occurs when a party comes in more than a year after judgment to assert that he is the victim of some blunder by counsel. Claims of this kind seem to fit readily within the grounds of mistake, inadvertence, and excusable neglect set out in clause (1), and numerous courts have so held and have denied relief. However, when there is gross neglect by counsel and an absence of neglect by the party, some courts have refused to impute the attorney's negligence to the
>
> (continued...)

2.

Second, the "reason urged" must be "such as to justify the relief[.]" Id. As explained further infra, the circumstances set forth herein present "exceptional circumstances justifying relief[,]" id. at 290, 666 P.2d at 175, inasmuch as Petitioner urges (1) that she was denied her due process right to effective assistance of counsel under the Hawaiʻi Constitution, (2) in the context of a proceeding in which her constitutionally protected right to the care and custody of her child was permanently terminated, under circumstances where (3) the court dismissed Petitioner's counsel immediately upon the termination of parental rights without substituted counsel and required Petitioner to request court-appointed counsel for purposes of appeal, (4) despite the court's finding that "[Petitioner] suffers from a mental health condition that distorts her

[8](...continued)
party and have granted relief under Rule 60(b)(6).

> Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 2d § 2864 (1995) (citation omitted).
>
> In this case, there was gross neglect by counsel for [movant] and by [movant]. Therefore, . . . the family court did not abuse its discretion when it declined [movant's] request to set aside or modify other parts of the Divorce Decree . . . .

Lowther, 99 Hawaiʻi at 576-77, 57 P.3d at 501-02. However, no constitutional right to effective counsel has been established in the context of a divorce proceeding, and Lowther did not address the question of whether a claim for relief based on ineffective assistance on constitutional due process grounds could properly be considered under HFCR Rule 60(b)(1). Inasmuch as a constitutional right to effective counsel cannot be equated with "mistake, inadvertence, surprise, or excusable neglect" under Rule 60(b)(1), but is instead an error of constitutional magnitude, it does not properly fall under Rule 60(b)(1), and, thus, would be encompassed under HFCR Rule 60(b)(6). Therefore, the discussion in Lowther is inapposite here.

perceptions of people and this causes her to come into conflict with and to refuse to cooperate with people that are trying to help her[,]" RGB, 2009 WL 953392, at *2. Under the particular circumstances of this case, then, consideration of the merits of Petitioner's arguments is warranted under HFCR Rule 60(b).

3.

Finally, the motion must be "made within a reasonable time[.]" Hayashi, 4 Haw. App. at 290, 666 P.2d at 174. Under Hayashi, reasonableness requires "diligence by the moving party." Id. at 290, 666 P.2d at 175. Petitioner acted with diligence in this case, inasmuch as, despite her mental condition, she consistently attempted to assert her right to effective assistance of counsel, both before and after the Termination Order was entered, as noted in sections (a) and (b) below.

a.

Before the Termination Order

2004 Proceedings

On September 17, 2004, Petitioner filed pro se, a Motion for Dismissal of Counsel and Continuance of September 20, 2004 Hearing and to Grant Continuance to Submit Witness Letters. In that motion, Petitioner alleged, inter alia, that (1) "[Petitioner has] been seeking new counsel, that [sic] has slowed my ability to bring in all needed witnesses and letters"; (2) "[a]ssigned counsel, [Iopa], has told me repeatedly . . . that 'it is beyond [the] scope of [her] duties as standby

counsel' to help locate, contact, or interview witnesses"; (3) "[a]ffiant has enough money today to secure independent counsel"; (4) "[a]ffiant compels the court to note that [Iopa], and counsel preceding assigned by the court, have neglected proper counsel or representation"; (5) "[l]ack of [e]ffective counsel has slowed the progress of this case"; (6) "I pray the court will allow modification, and dismissal of this lawyer, so new counsel can work with me more effectively, to continue this matter to September 27, 2004 for a successful hearing"; and (7) "[a] fair conclusion of these hearing[s] is in the best interest of my child." Without explanation, the court denied Petitioner's subsequent motion for court-appointed counsel, stating only: "Application denied[.] [Iopa] will continue as stand by [sic] counsel until further order[.]"

Despite having denied Petitioner's previous request to dismiss Iopa as counsel for the termination hearing based on Petitioner's allegations that (1) Iopa was ineffective and (2) Petitioner had the resources to secure her own attorney, the court sua sponte concluded in its March 11, 2005 Termination Order that "Iopa . . . is discharged. Based on representations as to changes in her resource status, if [Petitioner] wishes the assistance of court-appointed counsel to pursue further relief or to perfect an appeal, she must tender a new application for court-appointed counsel to the [c]ourt immediately." Thus, the court unilaterally and sua sponte discharged Iopa without any

indication that new counsel had been substituted to take on the case at the point that Iopa was discharged. As previously noted, on March 29, 2005, Petitioner filed her application for court-appointed counsel, which was granted, appointing Yonemori.

b.

After the Termination Order

2005 Proceedings

As noted previously, the record reflects that Yonemori attempted to file Petitioner's Notice of Appeal in 2005. Yonemori stated that she "was unaware that a Notice of Appeal had not been filed in the case herein" and she "had four (4) close family members . . . pass away [and t]herefore may have been preoccupied and not as vigilant about case details." Indeed, Yonemori declared that "the delay in filing the Notice of Appeal was in no way caused by the [Petitioner.]" (Emphasis added.) To recount further, Yonemori stated on the record that "on or about September 30, 2005[, Yonemori] filed a Notice of Appeal in the case[,]" but that "sometime in October [2005], [Yonemori] was notified . . . that [her] cover page was in error," that she "did not realize that the documents were returned to [her] via [her] Family Court jacket until late November[,]" "[her] close friend . . . passed away in late November and [Yonemori] left . . . for the mainland[,] and for these reasons, she "completely forgot about making the appropriate corrections for this case." Again, Yonemori admitted that "the delays in filing all papers in this

case [were] due to [her] irresponsibility and [were] in no way caused by the [Petitioner], who [was] understandably quite anxious about this case." (Emphasis added.)

2006 Proceedings

As noted above, on March 10, 2006, Petitioner, acting pro se, filed a HFCR Rule 60 motion seeking relief from the March 11, 2005 judgment, alleging that "[c]ounsel assigned by this court remains ineffective to bring this matter to justice[.]" A few days later, on March 13, 2006, Petitioner, represented by Yonemori, filed a Notice of Appeal, appealing from the March 11, 2005 Order. Two days later, on March 15, 2006, Petitioner, represented by Yonemori, filed another Motion for Relief from the March 11, 2005 Order pursuant to HFCR Rule 60(1), (2), and (3).

As stated above, on June 2, 2006, Yonemori filed the "Specifications on Rule 60 Motions," noting that Petitioner had agreed to consolidate the two Rule 60 motions, and alleging, inter alia, that "[Petitioner's] case may have been [] prejudiced by ineffective assistance of counsel[,]" that Yonemori "fail[ed] to file a timely appeal and meet with [Petitioner] in 2005"; on that same day, Yonemori filed a Motion for Withdrawal and Substitution of Counsel, alleging, inter alia, that she had "not had sufficient time to devote to [Petitioner's] case and to educate [her]self [on the] areas of law[,]" and due to various commitments, "[Petitioner] would not have accessibility to [her

as] legal counsel[.]" Yonemori concluded that Petitioner "should be appointed a competent and knowledgeable attorney[.]"

Also as noted before, on June 26, 2006, "due to [Petitioner's] current appeal," the court held rulings in abeyance on "[Petitioner's] Rule 60(b) motion and motion for withdrawal and substitution of counsel[.]"

On June 28, 2006, this court dismissed Petitioner's appeal for failing to timely file a Motion for Reconsideration; on October 17, 2006, Petitioner, acting pro se, filed a Notice of Appeal from the Order denying her Rule 60 motion; and on November 9, 2006, the court issued its "Order Denying Motion for Withdrawal and Substitution of Counsel filed [June 2, 2006]; Motion for Relief from March 11, 2005 Order filed March 15, 2006; and Motion for Relief from Judgement of March 11, 2005 filed March 10, 2006." Petitioner's pro se appeal from the denial of her Rule 60 motion was dismissed by the ICA for lack of jurisdiction on January 12, 2007, because "the [] court ha[d] not reduced the September 28, 2006 oral announcement to an appealable written order." It appears that subsequently, Petitioner was able to secure private counsel who, on February 6, 2007, filed the motion, from which the instant appeal was taken.

c.

The record in this case, recounted above, reveals that Petitioner consistently made efforts to assert her rights, inter alia, to effective assistance of counsel, and that any lack of

diligence was, by court-appointed appellate counsel's own admission, on the part of Yonemori. See Lowther, 99 Hawaiʻi at 576-77, 57 P.3d at 501-02 (recognizing that "when there is gross neglect by counsel and an absence of neglect by the party, some courts have refused to impute the attorney's negligence to the party and have granted relief under Rule 60(b)(6)"). In light of the foregoing circumstances, Petitioner acted with diligence in pursuing post-judgment relief.

C.

Furthermore, according to the Hayashi court, "[w]hat constitutes a 'reasonable time' is determined in the light of all attendant circumstances, intervening rights, loss of evidence, prejudice to the adverse party, the commanding equities of the case, and the general policy that judgments be final." 4 Haw. App. at 290, 666 P.2d at 175. As noted supra, in its Answering Brief, Respondent asserted that "[i]n considering what is a 'reasonable time' to bring a Rule 60(b)(6) motion the court must consider all of the attendant circumstances including prejudice to the adverse party, and in this case the prejudice would be considerable since the child has spent the vast majority of her life in foster care." This was the only argument regarding "attendant circumstances" presented by Respondent. As stated above, Respondent apparently abandoned any argument as to the timeliness of the Rule 60(b) Motion in its Response on certiorari. While the rights of the child are undoubtedly of

vital import, those rights are not inconsistent with Petitioner's constitutional right to effective assistance of counsel, and allowing Petitioner relief to which she is entitled at this point does not mean that the child's rights will be negatively impacted.

D.

Based on the foregoing, the ICA did not gravely err in concluding that Petitioner's Rule 60 Motion may be considered a motion made within the meaning of HFCR Rule 60(b)(6). Petitioner satisfied the three requirements set forth in Hayashi, and therefore it is appropriate to address the merits of Petitioner's arguments.

V.

Petitioner's first argument is essentially that she was denied effective assistance of counsel both during and after the termination proceedings. The threshold issues in determining whether Petitioner's due process rights were violated are (1) whether there is a due process right to counsel in termination proceedings and, if so, (2) the standard of effectiveness to be applied.

A.

With respect to the first threshold issue, the Supreme Court in Lassiter has not mandated counsel in termination proceedings as a due process right under the United States Constitution. In Lassiter, the Supreme Court, by a 5-4 majority,

determined that an absolute right to counsel exists only where the indigent "may be deprived of his [or her] physical liberty." 452 U.S. at 27. The Court ruled that, in all other cases, including a termination of parental rights proceeding, the balancing test set forth in Matthews v. Eldridge, 424 U.S. 319, 335 (1976), should be applied on a case-by-case basis. 452 U.S. at 27. That test "propounds three elements to be evaluated in deciding what due process requires, viz., the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." Id. The Supreme Court held that, in determining whether court-appointed counsel is required by due process, "[w]e must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom." Id.

Starting from that proposition, the majority discussed at length the importance of the interests at stake in a termination proceeding:

> This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to the companionship, care, custody and management of his or her children is an important interest that undeniably warrants deference and, absent a powerful countervailing interest, protection. Here the State has sought not simply to infringe upon that interest but to end it. If the State prevails, it will have worked a unique kind of deprivation. A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore[,] a commanding one.
>
> Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision. For this reason, the State may share the indigent parent's interest in the availability of appointed

> counsel. If, as our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed interests, the State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal. North Carolina itself acknowledges as much by providing that where a parent files a written answer to a termination petition, the State must supply a lawyer to represent the child.
>
> The State's interests, however, clearly diverge from the parent's insofar as the State wishes the termination decision to be made as economically as possible and thus wants to avoid both the expense of appointed counsel and the cost of the lengthened proceedings his presence may cause. But though the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here, particularly in light of the concession in the respondent's brief that the potential costs of appointed counsel in termination proceedings is [sic] admittedly de minimis compared to the costs in all criminal actions.
>
> Finally, consideration must be given to the risk that a parent will be erroneously deprived of his or her child because the parent is not represented by counsel.

Id. at 27-29 (quotation marks, citations, and footnote omitted) (emphases added).

The Supreme Court summarized its analysis of the Eldridge factors as applied to termination proceedings as follows:

> The dispositive question, which must now be addressed, is whether the three Eldridge factors, when weighed against the presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty, suffice to rebut that presumption and thus to lead to the conclusion that the Due Process Clause requires the appointment of counsel when a State seeks to terminate an indigent's parental status. To summarize the above discussion of the Eldridge factors: the parent's interest is an extremely important one (and may be supplemented by the dangers of criminal liability inherent in some termination proceedings); the State shares with the parent an interest in a correct decision, has a relatively weak pecuniary interest, and, in some but not all cases, has a possibly stronger interest in informal procedures; and the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high.

Id. at 31 (emphases added). However, the majority concluded that

it could not "say that the Constitution requires the appointment of counsel in every parental termination proceeding[,]" and, instead, it is for the trial court to weigh the factors in the first instance to determine whether counsel must be appointed, subject to appellate review. Id. at 32. Although determining that based on the specific circumstances of that case, it could not determine that lack of representation had rendered the proceedings "fundamentally unfair," the Lassiter court emphasized that

> our Constitution imposes on the States the standards 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. Informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but also in dependency and neglect proceedings as well. Most significantly, 33 States and the District of Columbia provide statutorily for the appointment of counsel in termination cases. The Court's opinion today in no way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise.

Id. at 33-34 (emphases added) (citations omitted).

B.

This court has not previously decided whether there is a due process right to counsel in termination proceedings. However, the ICA has, with some reservation, employed the approach adopted in Lassiter for determining whether court-appointed counsel must be provided to indigent parents in a termination case. See "A" Children, 119 Hawaiʻi at 48-57, 193 P.3d at 1248-57; In re D.W., 113 Hawaiʻi 499, 501-05, 155 P.3d 682, 684-88 (App. 2007).

1.

Applying the standard set forth in Lassiter in D.W., the ICA rejected the Mother's argument that she "was denied her due process right to full representation of counsel[,]" because "consulting counsel had limited powers and duties." 113 Hawaiʻi at 505, 155 P.3d at 688. To the contrary, the ICA determined that, "[a]lthough the family court's . . . memorandum supports Mother's assertion 'that consulting counsel had limited powers and duties,' it does not support Mother's assertion that she was thereby denied her constitutional right to due process[,]" but instead "supports the contrary assertion that Mother had the benefit of 'full representation of counsel' and was not denied her right to due process." Id. The ICA further based its conclusion on the fact that "[t]he record does not support Mother's assertions that 'consulting counsel lacked the resources to exercise ordinary subpoena powers, let alone seek expert witnesses.'" Id.

2.

Subsequently, in "A" Children, the ICA addressed at length the question of whether a right to counsel attaches in termination proceedings. Initially, the ICA noted that "[t]he Hawaiʻi Supreme Court has affirmed that 'independent of the federal constitution, 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 Hawaiʻi

Constitution.'" 119 Hawaiʻi at 44-45, 193 P.3d at 1244-45 (quoting In re Doe, 99 Hawaiʻi 522, 533, 57 P.3d 447, 458 (2002)). With regard to the magnitude of the deprivation of rights at issue in a termination proceeding, the ICA stated that "[t]he right of a parent to his or her child is more precious to many people than the right of life itself. Indeed, it has been recognized that the permanent termination of parental rights is one of the most drastic actions the state can take against its inhabitants." Id. at 46, 193 P.3d at 1246 (quotation marks, citations, and brackets omitted) (emphasis added). However, as the ICA noted, under our statutory law, "appointment of counsel for an indigent parent who is a party to a child-protective proceeding remains discretionary in Hawaiʻi[.]" Id.

a.

In that connection, HRS § 587-34(a) (1993) provides that

> [t]he court shall appoint a guardian ad litem for the child to serve throughout the pendency of the child protective proceedings under this chapter. The court may appoint additional counsel for the child pursuant to subsection (c) or independent counsel for any other party if the party is an indigent, counsel is necessary to protect the party's interests adequately, and the interests are not represented adequately by another party who is represented by counsel.

(Emphases added.) As recognized by the ICA, "Hawaiʻi thus remains one of only a handful of states that does not, by statute or case law, guarantee indigent parents a right to appointed counsel, at least at the stage of a child-protective proceeding at which parents are threatened with the prolonged and/or indefinite deprivation of custody of their children." 119

Hawaiʻi at 46, 193 P.3d at 1246 (emphasis added). The ICA noted that "in only five states (Delaware, Hawaiʻi, South Carolina, Tennessee, and Wyoming) is the appointment of counsel for indigent parents in termination-of-parental-rights proceedings left to the discretion of the trial court." Id. at 46 n.35, 193 P.3d at 1246 n.35.

Tracing the history of the case law on this subject, the ICA noted that "[p]rior to 1981, the overwhelming majority of state and federal courts that had addressed the issue held that constitutional due process required that indigent parents be provided with court-appointed counsel in termination-of-parental-rights and prolonged-deprivation-of-custody cases." Id. at 46, 193 P.3d at 1246. The ICA recognized, however, that, in 1981, in Lassiter, the Supreme Court "rejected the prevailing case law and held that under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, indigent parents in a state-initiated termination-of-parental-rights proceeding do not have a per se right to be represented by court-appointed counsel." Id. at 48, 193 P.3d at 1248 (footnote omitted). The ICA summarized the holding in Lassiter as requiring that courts "balance the presumption that the right to court-appointed counsel is triggered only when an indigent parent is threatened with the loss of his or her personal liberty against . . . (1) the private interests at stake, (2) the government's interest, and (3) the risk that the failure to appoint counsel

will lead to an erroneous decision." Id. at 57, 193 P.3d at 1257. The ICA interpreted Lassiter as providing that, "[b]ecause the private interests of the parents and the competing interests of the government are evenly balanced, the court's determination invariably hinges on the third factor." Id.

b.

Applying Lassiter to the facts of "A" Children, the ICA "conclude[d], in light of the record, that [Father] was denied his constitutional right to due process when he was not provided with counsel until sixteen days prior to trial." Id. Because the ICA in that case based its decision on the specific facts of the Father's case, it declined to explicitly "decide in this case whether to join the vast majority of states that require, as a bright-line rule, that counsel be appointed for indigent parents in all termination-of-parental-rights cases." Id. at 60, 193 P.3d at 1260. The ICA "express[ed] grave concerns, however, about the case-by-case approach adopted in Lassiter for determining the right to counsel[,]" id., because, as set forth in Justice Blackmun's dissenting opinion in Lassiter, that approach

> places an even heavier burden on the trial court, which will be required to determine in advance what difference legal representation might make. A trial judge will be obligated to examine the State's documentary and testimonial evidence well before the hearing so as to reach an informed decision about the need for counsel in time to allow preparation of the parent's case.

Id. (quoting Lassiter, 452 U.S. at 51 n.19 (Blackmun, J., dissenting)).

VI.

A.

However, this court has "affirm[ed], 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 Hawaiʻi Constitution." Doe, 99 Hawaiʻi at 533, 57 P.3d at 458 (emphasis added). In that regard, in Doe, this court held that

> [p]arental rights guaranteed under the Hawaiʻi Constitution would mean little if parents were deprived of the custody of their children without a fair hearing. Indeed, parents 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. Furthermore, the Supreme Court has said that parental rights cannot be denied without an opportunity for them to be heard at a meaningful time and in a meaningful manner.

Id. (first emphasis added) (second emphasis in original) (quotation marks, citations, and brackets omitted). This court determined in Doe that an opportunity to be heard in "a meaningful manner" included the right to an interpreter "where [] parental rights are substantially affected[,]" id. at 534, 57 P.3d at 459, including "where one purpose of the hearings was to determine whether or not parental rights should eventually be terminated[,]" id. at 535, 57 P.3d at 460.

In light of the constitutionally protected liberty interest at stake in a termination of parental rights proceeding, this court should hold, consistent with the great majority of states, 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 Hawaiʻi Constitution.

B.

Even assuming the balancing test in Lassiter were appropriate, weighing the Eldridge factors on a case-by-case basis will always come out in favor of appointing counsel under the Hawaiʻi Constitution. As Lassiter recognized, "a parent's desire for and right to the . . . custody . . . of his or her children is an important interest that undeniably warrants deference and, absent a powerful countervailing interest, protection[,]" and, therefore, "[a] parent's interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one." 452 U.S. at 27 (emphasis added). Thus, the private interests at stake in a termination proceeding weigh strongly in favor of appointing counsel, especially in light of the substantive liberty interest in custody embodied in the Hawaiʻi Constitution.

As for the State's interest, the Lassiter court indicated that the State's interests actually weighed largely in favor of appointing counsel, stating that "the State has an urgent interest in the welfare of the child," and thus, "it shares the parent's interest in an accurate and just decision." Id. The Lassiter court recognized that "[i]f, as our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed interests, the

State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal." Id. at 28 (emphasis added). Additionally, although recognizing that the State has an interest in the economy of the proceedings, Lassiter noted that "it is hardly significant enough to overcome private interests as important as those here[.]" Id. (emphasis added). Thus, under the Supreme Court's formulation the competing interests weigh heavily in favor of appointing counsel.

The final consideration in the balancing test is "the risk that a parent will be erroneously deprived of his or her child because the parent is not represented by counsel." Id. Contrary to the Lassiter court's conclusion that the risk may be determined on a case-by-case basis, the risk of erroneous deprivation is undeniably present in every case. Due to the nature of the interests at stake, even in cases where the issues may not seem extremely complex and thus the risk may seem lesser in degree, the balance weighs in favor of appointing counsel.

C.

Other courts have similarly rejected Lassiter's "case by case" approach on state constitutional grounds. In M.E.K. v. R.L.K., 921 So.2d 787, 790 (Fla. App. 5 Dist. 2006), the Florida District Court of Appeals for the Fifth District rejected this aspect of Lassiter, because Lassiter "addressed only the minimum

due process requirements under the federal due process clause[,]" and "[t]he citizens of Florida are also protected by the due process clause in Article [I], section 9 of the Florida Constitution." That court held that

> [i]n the area of termination of parental rights, the Florida due process clause provides higher due process standards than the federal due process clause. Under the federal provision, Lassiter does not require appointment of counsel in every case. It only requires a case-by-case determination. But under the state due process clause, [Florida case law] requires appointment of counsel in "proceedings involving the permanent termination of parental rights to a child."

Id. (emphasis added).

Similarly, in Matter of K.L.J., 813 P.2d 276, 282 (Alaska 1991), the Supreme Court of Alaska "reject[ed] the case-by-case approach set out by the Supreme Court in Lassiter[,]" based on the due process clause of the Alaska Constitution, and because it agreed with the dissenters in Lassiter that due process balancing clearly comes out in favor of appointing counsel in every case. In evaluating the interests at stake, the K.L.J. court stated that "[t]he private interest of a parent whose parental rights may be terminated via an adoption petition is of the highest magnitude[,]" because "[t]he right to direct the upbringing of one's child is one of the most basic of all civil liberties." Id. at 279 (quotation marks and citation omitted). That court noted that "[t]he United States Supreme Court has called the right to have children a basic civil right of man, and noted that custody is a right far more precious than

property rights." Id. (internal quotation marks, citations and ellipsis omitted).

As for the State's interest, the Alaska Supreme Court determined that "[a]ppointment of counsel will make the fact-finding process more accurate, thereby furthering the state's interest in terminating the rights of parents who do in fact neglect or abandon their children[,]" and "[t]he state's interest in its citizens receiving a just determination on such a fundamental issue cannot be open to question." Id. at 280 (emphasis in original). The K.L.J. court conceded "the state undoubtedly has a legitimate interest in avoiding the cost of appointed counsel and its consequent lengthening of judicial procedures[,]" but agreed with Lassiter that "'though the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here[.]'" Id. (quoting Lassiter, 452 U.S. at 28).

Regarding the third factor, "the risk that a parent will be erroneously deprived of his or her right[,]" that court reasoned:

> [a]lthough the legal issues in a given case may not be complex, the crucial determination of what will be best for the child can be an exceedingly difficult one as it requires a delicate process of balancing many complex and competing considerations that are unique to every case. A parent who is without the aid of counsel in marshalling and presenting the 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.

Id. (emphasis added).

In rejecting the Lassiter approach, that court agreed with Justice Blackmun's dissent in Lassiter that "the due process balancing in the abstract favors a bright line rule where 'the private interest is weighty, the procedure devised by the state fraught with risks of error, and the countervailing governmental interest insubstantial.'" Id. at 282 n.6 (quoting 452 U.S. at 48-49 (Blackmun, J., dissenting)). The Alaska Supreme Court further recounted the following disadvantages associated with the case-by-case approach:

> First, as Justice Blackmun illustrated, the case-by-case approach adopted by the majority does not lend itself practically to judicial review. The transcript of a termination proceeding alone will not be dispositive of whether an unrepresented indigent was disadvantaged. The transcript will not show whether the indigent litigant had adequate discovery or access to legal resources necessary for constructing a defense. Consequently, the reviewing court must expand its analysis into a "cumbersome and costly," time-consuming investigation of the entire proceeding. Since the case-by-case approach involves a constitutional inquiry, "it necessarily will result in increased federal interference in state proceedings." A case-by-case approach is also time consuming and burdensome on the trial court. Not only must it determine in advance the need for counsel, it must develop pretrial procedures and standards in order to determine properly the need for counsel. There is no guarantee that these standards will produce equitable decisions in every case. Additionally, 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. These factors increase the possibility that appointment of counsel will be denied erroneously by the trial court. Because of the procedural delays encountered in litigation of appeals, the parent's rights could be terminated erroneously for an extended period of time. The parent also would be denied the custody of his or her children during this period. An absolute right to counsel would avoid any erroneous denial of appointment of counsel and would eliminate the need for cumbersome and time-consuming standards, while preserving the right to family integrity.

Id. (quoting 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)) (ellipsis omitted) (emphases added).

D.

Both M.E.K. and K.L.J. echo the sound determination that has been made by almost every state, either in the legislature or by the courts, that a right to counsel should inhere in the context of parental termination proceedings. See, e.g., In re J.A.H., 172 P.3d 1, 7 (Kan. 2007) (recognizing that "[b]ecause the statute requires the appointment of counsel to indigent parents, . . . the analysis is instead limited to whether the statutory right to counsel has been denied" (emphasis added)); In re Kafia M., 742 A.2d 919, 927 n.5 (Me. 1999) (recognizing that "[i]n Danforth v. State Dept. of Health and Welfare, 303 A.2d 794 (Me. 1973), we held that the due process clause requires the appointment of counsel to indigent parents faced with the termination of their parental rights[,]" and that, subsequently, "[t]he requirement of appointed counsel has been embodied in the child protection statutes" (emphasis added)); Div. of Youth & Family Servs. v. V.J., 898 A.2d 1059, 1062 (N.J. Super. Ct. Ch. Div. 2004) (recognizing "that New Jersey has recognized the parent's fundamental interest in the care and custody of children[,]" and that counsel must be appointed in both temporary and permanent deprivation proceedings, because "[f]or the State to intrude permanently or only temporarily in a manner designed to

disassemble the nuclear family, society's most basic human and psychological unit, without affording counsel . . . to a class of society's least equipped adversaries strikes the court as a fundamental deprivation of procedural due process" (quotation marks and citations omitted) (emphasis added)); In re Adoption of R.I., 312 A.2d 601, 602 (Pa. 1973) (noting that "[i]t has long been established that an individual is entitled to counsel at any proceeding which may lead to the deprivation of substantial rights[,]" and holding that "[w]hile [such] cases are criminal in nature, the logic behind them is equally applicable to a case involving an indigent parent faced with the loss of her child" (internal quotation marks and citations omitted) (emphases added)); In re Welfare of J.M., 125 P.3d 245, 249 (Wash. App. Div. 3 2005) (recognizing that "[i]t is well settled in Washington that the right to counsel attaches to indigent parents in termination proceedings by way of [statute]" and that "[t]his right derives from the due process guaranties of article I, section 3 of the Washington Constitution as well as the Fourteenth Amendment" (citations omitted)); In re Stephen Tyler R., 584 S.E.2d 581, 589 n.9 (W. Va. 2003) (noting that "[i]n child neglect proceedings which may result in the termination of parental rights to the custody of natural children, indigent parents are entitled to the assistance of counsel" by virtue of both constitutional due process and statutory requirements);. The rationale of those cases applies equally under the due

process clause of the Hawaiʻi Constitution, especially given the special protection afforded to parents' liberty interests in the care and custody of children. See Doe, 99 Hawaiʻi at 533, 57 P.3d at 458. Thus, article I, section 5 encompasses a right to court-appointed counsel for indigent parents in a termination proceeding.

E.

The majority asserts that (1) "[b]ecause the family court properly determined that [Petitioner] had a right to counsel under the United States Constitution, we decline to reach the question of whether the Hawaiʻi Constitution provides indigent parents a right to counsel in all termination proceedings," majority opinion at 34, and (2) "the determination of what protections the Hawaiʻi Constitution provides to indigent parents is not properly before us[,]" id. at 34 & n.18. Respectfully, these assertions are incorrect for at least two reasons.

First, these assertions ignore the fact that parents, such as Petitioner, have a constitutional right to the "care, custody, and control of their children[,]" under the due process clause of article I, section 5 of the Hawaiʻi Constitution. Doe, 99 Hawaiʻi at 533, 57 P.3d at 458. This court has already determined that parents in termination proceedings "have a substantive liberty interest . . . protected" by that clause. Id. Furthermore, this "substantial liberty interest" is

"independent of the federal constitution[.]" Id. Given the nature of this interest, the majority's discretionary appointment approach is inimical to the protection guaranteed parents under the Hawaiʻi Constitution, for the reasons recounted above.

Second, the majority's assertion that "the determination of what protections the Hawaiʻi Constitution provides to indigent parents is not properly before us" is incorrect inasmuch as the majority opinion establishes the standard of ineffective assistance of counsel in parental terminations proceedings. This court has recognized that the right to effective assistance of counsel is protected under the Hawaiʻi Constitution. See State v. Montalbo, 73 Haw. 130, 828 P.2d 1274 (1992) ("Appellant had a right to effective counsel under the Hawaii Constitution, art. I, § 14 and the U.S. Constitution, Sixth and Fourteenth Amendments."); State v. Smith, 68 Haw. 304, 309, 712 P.2d 496, 499-500 (1986) (stating that the "assistance of counsel guaranteed by the . . . Hawaii Constitution is satisfied only when such assistance is effective"). As discussed fully infra, while the majority rejects "importing criminal law concepts directly," majority opinion at 52, it in fact utilizes the "potentially meritorious defense" factor, one of the two factors constituting Hawaii's criminal standard for ineffective assistance of counsel under the Hawaiʻi Constitution. See Briones v. State, 74 Haw. 442, 465-66, 848 P.2d 966, 977 (1993) (establishing that the standard for

ineffective assistance at the appellate level "centers on whether counsel informed him or herself enough to present appropriate appealable issues in the first instance" and "[a]n appealable issue is an error or omission . . . resulting in the withdrawal or substantial impairment of a potentially meritorious defense)" (emphasis added); State v. Antone, 62 Haw. 346, 348-49, 615 P.2d 101, 104 (1980) (stating that in order to prove ineffective assistance of counsel at the trial level, the appellant must "[f]irst[,] . . . establish specific errors omissions of defense counsel . . . [and s]econd, . . . establish that these errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense") (emphasis added). Thus, the majority's opinion implicates Petitioner's due process right to effective counsel under the Hawaiʻi Constitution. In rejecting that right, the majority's decision today will have a deleterious effect on indigent parents, but especially on those parents who most need legal representation.[9]

[9] It may be observed that "[n]ational child welfare experts generally consider Hawaiʻi to be at the forefront of most states in services to families in child abuse and neglect . . . cases." Iokona Baker and Faye Kimura, Access to Justice: Parents' Rights to Counsel in Termination of Parental Rights, 12-DEC Haw. B.J. 11 (2008). However, trial courts in Hawaiʻi "have refused to decide whether counsel must be appointed for all indigent parents in [parental termination] cases." Id. at 12. Thus, "[s]ince children of Native Hawaiian descent represent the largest ethnic group in Hawaii's foster care system, barriers to obtaining timely quality legal counsel in child welfare cases has had and will continue to have a profound effect on the character of the statewide community as more and more Native Hawaiian parents lose the right to have their children return home." Id.

VII.

A.

Having determined that article I, section 5, of the Hawaiʻi Constitution encompasses a right to counsel at termination proceedings, the question arises as to the standard of effectiveness to be applied. This court has stated that the right to counsel "cannot be satisfied by mere formal appointment, for the assistance of counsel guaranteed by the United States and Hawaiʻi Constitutions is satisfied only when such assistance is effective." Smith, 68 Haw. at 309, 712 P.2d at 499-500 (internal quotation marks, citations, and ellipsis omitted); see also McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (holding that "the right to counsel is the right to the effective assistance of counsel"); Matter of D.D.F., 801 P.2d 703, 707 (Okl. 1990) ("Taking into consideration both the constitutional and statutory requirements that counsel be provided [in a termination of parental rights proceeding], we must also agree with [the father] that the right to counsel is the right to effective assistance of counsel. The right to counsel would be of no consequence if such counsel were not required to represent the parent in a manner consistent with an objective standard of reasonableness.") (Emphasis added.). Thus, plainly, in order for it to be meaningful, the right to counsel in a termination proceeding must necessarily mean the right to effective counsel.

B.

The liberty interest of a parent in the care, custody and control of his children is as fundamental as the interest of a criminal defendant in personal liberty, and the deprivation of that parental interest, in fact, may be more "grievous." As Justice Stevens stated:

> A woman's misconduct may cause the State to take formal steps to deprive her of her liberty. The State may incarcerate her for a fixed term and may permanently deprive her of her freedom to associate with her child. The former is a pure deprivation of liberty; the latter is a deprivation of both liberty and property, because statutory rights of inheritance as well as the natural relationship may be destroyed. Although both deprivations are serious, often the deprivation of parental rights will be the more grievous of the two.

Lassiter, 452 U.S. at 59 (Stevens, J., dissenting) (emphases added). Thus, as Justice Stevens recognized, "the Due Process Clause of the Fourteenth Amendment entitles a defendant in a criminal case to representation by counsel [and] appl[ies] with equal force to a case of [parental termination]." Id. at 60 (emphasis added).

The judicial procedures utilized for termination proceedings resembles a criminal prosecution. The State has considerable expertise and resources in prosecuting the case in comparison to an indigent parent defendant. Id. at 44-45 (Blackmun, J. dissenting, joined by Brennan, J. and Marshall, J.). "The legal issues . . . are neither simple nor easily defined" and the legal standard against which the defendant parent is judged is "imprecise and open to the subjective values of the judge." Id. at 45.

Because the liberty interest at stake in a termination proceeding parallels that in a criminal proceeding, "the range of competence demanded of attorneys in criminal cases" should be similar to that demanded of attorneys in termination proceedings. A survey of other jurisdictions demonstrates that the great majority of courts apply the criminal standard for determining the ineffective assistance of counsel in termination proceedings. See, e.g., V.F. v. State, 666 P.2d 42, 46 (Alaska 1983) (applying Alaska's criminal standard for ineffective assistance of counsel as announced in Risher v. State, 523 P.2d 421, 425 (Alaska 1974)); Jones v. Ark. Dep't of Human Servs., 205 S.W.3d 778, 794 (Ark. 2005) (adopting the federal criminal "standard for ineffectiveness set out in Strickland[v. Washington, 466 U.S. 668 (1984)]"); In re V.M.R., 768 P.2d 1268, 1270 (Colo. Ct. App. 1989) (holding that the Strickland standard applied to non-criminal cases such as parental termination cases); State v. Anonymous, 425 A.2d 939, 943 (Conn. 1979) (adopting the Connecticut criminal standard for ineffective assistance of counsel enunciated in Buckley v. Warden, 418 A.2d 913, 916 (Conn. 1979)); In re A.H.P., 500 S.E.2d 418, 421-22 (Ga. App. 1998) ("'In order to prevail on a claim of ineffective assistance of counsel [the mother] must show that [her] counsel's performance was deficient and that the deficient performance was prejudicial to [her] defense.'" (Quoting Smith v. Francis, [] 325 S.E.2d 362[, 363] ([Ga.] 1985). (Citing Strickland[].))); In re R.G.,

518 N.E.2d 691, 700-01 (Ill. App. 1988) ("[W]hether respondent shall prevail on her claim that she was deprived of her right to the effective assistance of counsel is guided by the standards set out in Strickland[], and adopted by our supreme court in People v. Albanese[,] 473 N.E.2d 1246[, 1255 (Ill. 1984)]."); In re D.W., 385 N.W.2d 570, 579 (Iowa 1986) ("Although the sixth amendment is not implicated here, we nonetheless will apply the same standards adopted for counsel appointed in a criminal proceeding.") (Citations omitted.); In re Rushing, 684 P.2d 445, 449 (Kan. App. 1984) ("While the case before us is not a criminal prosecution, we are not asked to and we see no justification to decline application of Sixth Amendment right to effective assistance of counsel law and yardsticks to this parental severance case."); In re Stephen, 514 N.E.2d 1087, 1091 (Mass. 1987) (concluding that "the [criminal] standard set forth in [Commonwealth v. Saferian, 315 N.E.2d 878, 882-83 (Mass. 1974),] for judging the effectiveness of counsel's assistance is appropriate for evaluating claims of ineffective assistance of counsel in care and protection proceedings"); Powell v. Simon, 431 N.W.2d 71, 74 (Mich. App. 1988) (applying "by analogy the principles of ineffective assistance of counsel as they have developed in the criminal law context" (citing In re Trowbridge, 401 N.W.2d 65 (Mich. App. 1986))); New Jersey Div. of Youth & Family Servs. v. V.K., 565 A.2d 706, 712-13 (N.J. Super. Ct. App. Div. 1989) (applying Strickland); In re Matthew C., 227 A.D.2d

679, 682 (N.Y. App. Div. 1996) (affording parents the "protections equivalent to the constitutional standard of effective assistance of counsel afforded defendants in criminal proceedings" (citing In re Erin G., 527 N.Y.S.2d 488, 490 (N.Y. App. Div. 1988)); Jones v. Lucas County Children Servs. Bd., 546 N.E.2d 471, 473 (Ohio App. 1988) ("[T]he two-part test for ineffective assistance of counsel used in criminal cases, announced in Strickland[,] is equally applicable in actions by the state to force the permanent, involuntary termination of parental rights."); In re K.L.C., 12 P.3d 478, 480-81 (Okla. App. 2000) (using Strickland as a "guiding principle[]" in determining whether counsel was ineffective in termination of parental rights case); In re Bishop, 375 S.E.2d 676, 678 (N.C. Ct. App. 1989) (applying the criminal standard for ineffective assistance of counsel as set out in State v. Braswell, 324 S.E.2d 241, 248 (N.C. 1985)); In re M.S., 115 S.W.3d 534, 544-45 (Tex. 2003) (applying Strickland to civil parental-rights termination proceedings); In re E.H., 880 P.2d 11, 13 (Utah App. 1994) (adopting "the Strickland test to determine a claim for ineffective assistance of counsel in proceedings involving termination of parental rights"); In re M.B., 647 A.2d 1001, 1004 (Vt. 1994) (applying Strickland); In re M.D.(S)., 485 N.W.2d 52, 55 (Wis. 1992) (stating that "the Strickland test also has application to proceedings for the involuntary termination of

parental rights"). Thus, the ICA appropriately determined that the criminal standard should apply.

C.

In the criminal context, this court has set forth the standard for ineffective assistance of counsel at the trial level as follows:

> The burden of establishing ineffective assistance of counsel rests upon the appellant. His burden is twofold: First, the appellant must establish specific errors or omissions of defense counsel reflecting counsel's lack of skill, judgment or diligence. Second, the appellant must establish that these errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense. Where an appellant successfully meets these burdens, he will have proven the denial of assistance "within the range of competence demanded of attorneys in criminal cases."

Antone, 62 Haw. at 348-49, 615 P.2d at 104 (citations and footnote omitted) (emphasis added). This court has also established a standard for ineffective assistance of appellate counsel, as follows:

> [I]t is counsel's responsibility, in the limited time and space allowed, to present issues that may have influenced the trial court's decision adversely to his or her client. Our focus, therefore, is not upon the possible, or even probable, influence appellant's counsel's actions had on the appellate court, but, instead, we center on whether counsel informed him or herself enough to present appropriate appealable issues in the first instance.
>
> An "appealable issue" is an error or omission by counsel, judge, or jury resulting in the withdrawal or substantial impairment of a potentially meritorious defense. Every appealable issue is not required to be asserted. The page limitation on the appellate briefs and the dictates of effective appellate advocacy compel appellate counsel to advance a limited number of key issues.
>
> . . . Counsel's scope of review and knowledge of the law are assessed, in light of all the circumstances, as that information a reasonably competent, informed and diligent attorney in criminal cases in our community should possess. Counsel's informed decision as to which issues to present on appeal will not ordinarily be second-guessed. Counsel's performance need not be errorless. If, however, an appealable issue is omitted as a result of the performance of counsel whose competence fell below

> that required of attorneys in criminal cases[,] then appellant's counsel is constitutionally ineffective.

Briones, 74 Haw. at 465-67, 848 P.2d at 977-78 (emphases added) (emphases and footnotes omitted).

VIII.

A.

Applying Hawaii's criminal standard to the pre-termination period in this case, the ICA was correct that Petitioner "fails to identify with specificity [] at which points in the case that she was unconstitutionally deprived of access to competent counsel[,]" RGB, 2009 WL 953392, at *2, and, moreover, fails to meet her burden of identifying "specific errors or omissions of defense counsel reflecting counsel's lack of skill, judgment or diligence[,]" Antone, 62 Haw. at 348-49, 615 P.2d at 104, in the pre-termination proceedings. As noted by the ICA, Petitioner "was represented by appointed counsel or standby consulting counsel at all hearings leading up to the Termination Order." RGB, 2009 WL 953392, at *2.

B.

With regard to the post-termination proceedings, the ICA, despite (1) being "troubled by the impact of the immediate discharge of [Petitioner's] standby attorney in the Termination Order," id., (2) "particularly in light of [the court's] assessment of [Petitioner's] mental health status[,]" id., (3) recognizing that "[Petitioner's counsel] failed to preserve [Petitioner's] rights to challenge the Termination Order by

failing to immediately file a motion for reconsideration[,] id., (4) and herself later describ[ing] her performance as falling below the level of competence required to protect [Petitioner s] rights in this case[,] id., conclude[d] that [the court] did not err in declining to grant [Petitioner] relief based on ineffective assistance of counsel[,] id. That decision was based on the ICA s determination that [Petitioner] has not identified to this court a single appealable issue that could have been raised had counsel preserved her rights to an appeal from the Termination Order. Id.

The ICA recited the definition of an appealable as an error or omission by counsel, judge, or jury resulting in the withdrawal or substantial impairment of a potentially meritorious defense. Id.(quoting Dan v. State, 76 Hawai i 423, 432-33, 879 P.2d 528, 537-38 (1994)); see also Briones, 74 Haw. at 465-67, 848 P.2d at 977-78 (quoted supra). However, in Dan and in Briones, upon which Dan relied, the defendants claiming ineffective assistance of appellate counsel in fact filed a timely appeal. Thus, neither Dan nor Briones presents the same circumstance as in this case, in which Petitioner s counsel forfeited Petitioner s right to appeal altogether,by failing to file a motion for reconsideration.

Briones requires that counsel inform[] him or herself enough to present appropriate appealable issues in the first instance[.] 74 Haw. at 465, 848 P.2d at 977. By counsel s own

admission, that standard was not met in this case, as counsel allowed the filing date to lapse, and simply failed to file a motion for reconsideration as the necessary prerequisite for a timely appeal, or, by her own admission, even to meet with Petitioner in 2005. Counsel did not make an informed decision that no appealable issues existed such that an appeal was unnecessary, but failed to make any decision at all.[10] Such representation manifestly falls below the level of competence required of attorneys in a termination proceeding. For these reasons, I would hold that the court abused its discretion in denying Petitioner's Rule 60 Motion. Therefore, the ICA gravely erred in concluding that "[the court] did not err, in declining to grant [Petitioner] relief based on ineffective assistance of counsel." RGB, 2000 wl 953392, at *2.

C.

In opposition to the foregoing, the majority states three reasons for not "importing criminal law concepts directly." Majority opinion at 52-55. These reasons do not justify the majority's rejection of the ineffective assistance standard used in criminal cases.

1.

The majority's first reason is that the right to counsel in the criminal context is based on the Sixth Amendment

[10] While Yonemori rendered ineffective assistance to Petitioner with respect to her failure to file the motion for reconsideration, the record reflects that Yonemori's actions were not due to ill-will or bad faith.

of the United States Constitution and article I, section 14 of the Hawaiʻi Constitution and the right to counsel in termination of parental rights proceedings is based on the Due Process Clause in the Fourteenth Amendment and the due process clause in article I, section 5 of the Hawaiʻi Constitution.

Of course, the Sixth Amendment does not apply directly to the states, but through the Due Process Clause of the Fourteenth Amendment.[11] Furthermore, it is not the source of the right that triggers the right to appointment of counsel, but the importance of the defendant's personal liberty interest. See Lassiter, 452 U.S. at 26 (recognizing that "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel"). The majority in Lassiter stated that "it is not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel" and that the Due Process Clause of the Fourteenth Amendment requires "a right to appointed counsel even though proceedings may be styled 'civil' and not 'criminal.'" Id. (quoting In re Gault, 387 U.S. 1, 41 (1932)) (emphasis omitted and emphases added). Therefore, that the source of a right to

[11] See Kansas v. Ventris, -- U.S. --, 129 S.Ct. 1841, 1844-45 (2009) (right to counsel under the Sixth Amendment applies to the states through the Fourteenth Amendment); Lassiter, 452 U.S. at 35 ("The decision . . . that the Sixth Amendment right to counsel did not apply to the States and that the due process guarantee of the Fourteenth Amendment permitted a flexible, case-by-case determination of the defendant's need for counsel in state criminal trials-was overruled in Gideon v. Wainwright, 372 U.S. [335,] 345 [(1963).]"); Gideon, 372 U.S. at 342 ("A provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the [s]tates by the Fourteenth Amendment.").

counsel may differ is not only an unremarkable proposition; it is immaterial. As Lassiter itself recognized, that the right to counsel in the criminal cases and in parental rights cases originate in different constitutional clauses does not alter the fact that each implicates a right to counsel whether the proceeding is denominated as civil, as in termination proceedings, rather than criminal.

2.

The majority's second reason that "there are substantial differences in the purposes of criminal as opposed to termination of parental rights[,]" majority opinion at 52, is unpersuasive.[12] These differences could not have escaped the Lassiter court and made no difference in the assessment of the need for counsel. The considerations for affording indigent defendants the right to counsel in criminal and termination proceedings are the same.

The right to counsel in criminal cases is "designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law." Gideon, 372 U.S. at 344. Gideon held that "any person hailed to court, who is too poor to

[12] The majority argues that "a civil [termination] proceeding focuses on the best interest of the child and not on guilt or innocence," that "procedural rules governing criminal cases are not necessarily applicable or even desirable in [family] courts," that the "burden of proof in termination cases is clear and convincing evidence rather than proof beyond a reasonable doubt" and that "judicial involvement is much more intensive than it is in the usual criminal case." Majority opinion at 52-53 (citations omitted). These differences apparently were not considered relevant by the Lassiter majority or dissent.

hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Id. Gideon reasoned that there was a disparity in the resources and knowledge of the law between the State and the unrepresented defendant as "[g]overnments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime[,]" id., while on the other hand "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law[,]" id. at 345. "[An intelligent and educated layperson] is incapable, generally, of determining for himself whether the indictment is good or bad [and is] unfamiliar with the rules of evidence." Id. "Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible." Id. Thus, "[h]e lacks both the skill and knowledge adequately to prepare his defense, even though he have [sic] a perfect one." Id.

Similarly, the majority in Lassiter recognized that "the ultimate issues" in a termination case "are not always simple[.]" 452 U.S. at 30. "Expert medical and psychiatric testimony, which few parents are equipt to understand and fewer still to confute, is sometimes presented." Id. The "legal standard against which the [] parent is judged . . . adds another dimension to the complexity of the termination proceeding[,]" id. at 44 (Blackmun, J., dissenting, joined by Brennan, J. and

Marshall J.), as the "legal issues posed by the State . . . are neither simple or easily defined[,]" id. at 45, and the "standard is imprecise and open to the subjective values of the judge[,]" id.

There is a "gross disparity in power and resources between the State and the uncounseled indigent parent." Id. at 44 (Blackmun, J., dissenting, joined by Brennan, J. and Marshall J.). "[T]he State's counsel [] is an expert in the legal standards and techniques employed at the termination proceeding" and "has access to public records concerning the family[,]" to "professional social workers who are empowered to investigate . . . and testify against the parent[,]" and to "experts in family relations, psychology, and medicine to bolster the State's case." Id. at 43 (Blackmun, J., dissenting, joined by Brennan, J. and Marshall J.).

Moreover, as the Lassiter majority stated, "parents [in termination proceedings] are likely to be people with little education," "have had uncommon difficulty in life," and are "thrust into a distressing and disorienting situation." Id. at 30. A "parent cannot possibly succeed without being able to identify material issues, develop defenses, gather and present sufficient supporting nonhearsay evidence, and conduct cross-examination of adverse witnesses." Id. at 45-46 (Blackmun, J., dissenting, joined by Brennan, J. and Marshall J.). The Lassiter majority recognized that the State "shares the parent's interest

in an accurate and just decision[,]" which is "most likely to be obtained through the equal contest of opposed interests." Id. at 28 (emphasis added). Further, the State's "urgent interest in the welfare of the child," id. at 27, "may perhaps best be served by a hearing in which both the parent and the State . . . are represented by counsel, without whom the contest of interests may become unwholesomely unequal[,]" id. at 28 (emphasis added).

Given the sometimes complex issues presented at termination proceedings, the State's "gross disparity in power and resources[,]" and the laypersons' inability to adequately represent themselves, affording counsel in parental termination cases accomplishes the same purpose as affording counsel for indigent persons in criminal cases -- the assurance of "fair trials before impartial tribunals in which every defendant stands equal before the law." Gideon, 372 U.S. at 344. Thus, the purposes of appointing counsel for indigent persons share a commonality in criminal and termination proceedings that compel adoption of a criminal standard for effective assistance of counsel.

3.

The majority's third reason is that the "interests implicated by criminal and termination of parental rights are substantially different." Majority opinion at 53. Respectfully, this reason is incongruous in light of the foregoing judicial statements likening criminal and termination proceedings to each

other and the adoption of guaranteed counsel in termination proceedings in forty-five states.

"[T]he interest of parents in the care, custody, and control of their children-is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme Court]." Troxel v. Graniville, 530 U.S. 57, 65 (2000). As the Lassiter majority acknowledged, "a parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent powerful countervailing interest, protection.'" 452 U.S. at 27 (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)). Thus, to reiterate, "[a] parent's interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one." Id. (emphasis added). "The fundamental significance of the liberty interest at stake [in termination proceedings] is undeniable." Id. at 43 (Blackmun J., dissenting, joined by Brennan, J. and Marshall, J.) (emphases added).

"A termination of parental rights is both total and irrevocable" and "leaves the parent with no right to visit or communicate with the child, to participate in, or even know about, any important decision affecting the child's religious, educational, emotional or physical development." Id. at 39. "This deprivation is of critical significance" and "[s]urely there can be few losses more grievous than the abrogation of

parental rights." Id. As discussed supra, this court has also held that "parents have a fundamental liberty interest in the care, custody, and management of their children[.]" Doe, 99 Hawaiʻi at 533, 57 P.3d at 458 (emphasis added). Respectfully, given the longstanding recognition of the liberty interest in the care, custody, and control of one's children by the Supreme Court, the grievous nature of terminations, and this court's acknowledgment that parents have a "fundamental liberty interest" with respect to their children, the majority's assertion that a parent's liberty interest is somehow less important or "substantially different[,]" majority opinion at 53, rings hollow.

Moreover, in asserting that the "termination of parental rights proceedings implicate the interests of the child in having a prompt and permanent resolution" of his or her custody status, majority opinion at 53-54, the majority assumes that a natural parent's position is contrary to the child's best interest. But the best interests of the child is best served when both sides are equally represented. See Lassiter, 452 U.S. at 28. In In re Emilye A., 9 Cal. App. 4th 1695, 1699, 12 Cal. Rptr. 2d 294, 298 (Cal. App. 1992), a father appealed the lower court's order contending, in part, that he was deprived of the effective assistance of his first attorney at the jurisdiction hearing. The California Court of Appeals concluded that the father in this case had "a constitutional right to counsel in

dependency proceedings," and was "entitled to effective assistance of counsel." Id. at 1707, 12 Cal. Rptr. 2d at 301. That court recognized that some courts "have held or stated in dicta that a parent may not seek reversal of an order in a dependency proceeding on the grounds of incompetency of counsel, using the rationale that the paramount concern is the child's welfare," but rejected that view. Id. at 1707 n.9, 12 Cal. Rptr. 2d at 301 n.9.

> [T]he implicit and erroneous assumption on which this reasoning is based is that the child's welfare has been served by the interruption of the parents' custody and control despite the fact that the child's parents were not effectively represented during the proceedings. Can it be said that it is in the best interest of a child to be taken from the accustomed custody and control of his or her parents when there has not been a fair hearing related to the need for such intervention?

Id. (emphasis added). Furthermore, reversal does "not necessarily mean that the status quo is reinstated and that the child can no longer be protected. . . . [I]t simply requires that the proceedings be reconducted because the parents were not properly represented." Id.

The majority's view in the instant case that "parental proceedings implicate the interests of the child in prompt and permanent resolution" erroneously assumes that the child's best interest can only be served by the termination of Petitioner's parental rights even though Petitioner was not effectively represented during her appeal. Even the Lassiter majority would not go so far. According to Lassiter, while "the State has an urgent interest in the welfare of the child," "it shares the

parent's interest in an accurate and just decision." Lassiter, 452 U.S. at 27 (emphasis added). To reiterate, because "accurate and just results are most likely to be obtained through equal contest of opposed interests," "the State's interest in the child's best interest may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal." Id. at 28 (emphasis added).

D.

After reciting three reasons for not "importing criminal law concepts directly," the majority purportedly adopts "a fundamental fairness test" from State ex rel. Juvenile Department of Multnomah County v. Geist, 796 P.2d 1193 (Or. 1990) [hereinafter Geist II], affirming on other grounds, State ex rel. Juv. Dep't v. Geist, 775 P.2d 843 (Or. Ct. App. 1989) [hereinafter Geist I]. In Geist II, mother, on direct appeal to the Oregon court of appeals, sought review of the Oregon circuit court's order terminating her parental rights. Id. at 1196. The court of appeals refused to review mother's claim that her trial counsel was inadequate because the legislature had not created an appropriate forum in which to bring a direct appeal.

> "[E]ven though we can accept mother's assertion of a right to competent and effective counsel under the statute, direct appeal on the trial court record is not the appropriate forum. The legislature has not created a special forum, as it has in criminal matters (ORS 138.510-ORS 138.680), and there is no source from which we may derive the authority to create one. We hold that the question of the effectiveness of counsel may not be reviewed on direct appeal."

Id. at 1200 (quoting Geist I, 775 P.2d at 848). However, the

Oregon Supreme Court decided that "[a]bsent an express legislative procedure . . . , this court may fashion an appropriate procedure[,]" id., that "any challenges to the adequacy of appointed trial counsel must be reviewed on direct appeal," id. at 1201, and that "a standard which seeks to determine whether a termination proceeding was 'fundamentally fair[,]'" id., must be adopted. Under this "fundamental fairness test," a parent "must show, not only that [the parent's] trial counsel was inadequate, but also that any inadequacy prejudiced [the parent's] cause to the extent that [the parent] was denied a fair trial, and therefore, that the justice of the circuit court's decision is called into serious question." Id. at 1204 (emphasis added). That court concluded that "mother's trial counsel represented her with professional skill and judgment" and on de novo review, concluded that the evidence justified terminating mother's parental rights. Id. at 1205.

Other jurisdictions, however, have criticized the Geist II test by pointing out that there is little practical difference between the Geist II test and the test of ineffective assistance of counsel in criminal cases as set forth in Strickland. See L.W. v. Dep't of Children & Families, 812 So. 2d 551, 554 (Fla. App. 2002) (declining to follow the fundamental fairness test because "[i]t is not clear to us how these civil standards of ineffective assistance of counsel [such as the fundamental fairness test employed in Geist II] differ in practice from the criminal

standard announced in Strickland"); New Jersey Div. of Youth & Family Servs. v. B.R., 929 A.2d 1034, 1038 (N.J. 2007) (declining to adopt the fundamental fairness test because the court "see[s] little practical difference between the [Geist II and Strickland] standards"); In re Termination of Parental Rights of James W.H., 849 P.2d 1079 (N.M.App. 1993) (describing Strickland as the majority position and noting that while "contrary authority [such as Geist II] appears to provide lesser standards, . . . we are not certain that the result reached would have been different under the criminal law standard [of Strickland]"); State in Interest of E.H. v. A.H., 880 P.2d 11, 13 n.2 (Utah App. 1994) ("We believe that Geist [II] essentially adopts the Strickland test in holding that the parent must show inadequate performance by counsel and that the inadequacy prejudiced the parent's case." (Citing Geist II, 796 P.2d at 1204.)).

In Strickland, the Supreme Court adopted the federal standard for ineffectiveness of counsel in a criminal proceeding, to the effect that (1) "counsel's performance was deficient[,]" 466 U.S. at 687, and (2) counsel's "deficient performance prejudiced the defense[,]" id., -- i.e, there must be "a reasonable probability, that but for counsel's unprofessional errors, the result of the proceeding would have been different[,]" id. at 694 (emphases added). This court has expressly rejected the Strickland standard. Briones, 74 Haw. at 462, 848 P.2d at 976 ("We have declined, however, to adopt the federal standard for

reviewing trial counsel's performance." (Citation omitted.)); Smith, 68 Haw. at 310 n.7, 712 P.2d at 500 n.7 (criticizing the Strickland test as being "unduly difficult for a defendant to meet."). In rejecting the Strickland standard, this court criticized the federal prejudice requirement:

> One need not be a lawyer to appreciate the difficulty of meeting the prejudice requirement established by the Court. Given the inherent subjectivity of determining whether past results would probably have been different, defendants will successfully prove clear cases of prejudice only where there is evidence that they should not have been convicted.

Id. at 310, 712 P.2d at 500 (quoting Genego, The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation, 22 Am. Crim. L. Rev. 181, 199).

In Briones, this court explained that the Strickland standard was "too burdensome for defendants to meet" because the "prejudice requirement [is] almost impossible to surmount."

> Federal cases concerning effective assistance of trial and appellate counsel rely on the standard enunciated in [Strickland], a test criticized as being too burdensome for defendants to meet because it imposes a double burden upon defendants trying to show their counsel's ineffective assistance, resulting in a prejudice requirement almost impossible to surmount. [Smith], 68 Haw. [at] 310 n. 7, 712 P.2d [at] 500 n. 7 []. Strickland required not only that trial counsel's action or omission be an "unprofessional error," but that that error resulted in a "reasonable probability that . . . the result of the proceeding would have been different." 466 U.S. at 694[.]

Briones, 74 Haw. at 462, 848 P.2d at 976 (emphases added). Thus this court concluded that "[t]he holding in Smith specifically rejected the standard enunciated in Strickland." Id.

Unlike the standard adopted in Hawaiʻi, both Strickland and Geist II require that persons challenging the adequacy of counsel demonstrate that, if not for their counsel's

ineffectiveness, the outcome of the case would be different. As noted above, Strickland describes its prejudice prong as requiring "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Similarly, Geist II will not require reversal or remand where "on de novo review of the record, the reviewing court is satisfied . . . that even with adequate counsel, the result inevitably, would have been the same." 796 P.2d at 1204 (emphasis added). In affirming the circuit court's decision, Geist II concluded that there was no "reasonable likelihood that a remand to the circuit court would produce evidence to establish trial counsel's inadequacy, or that any deficiency of counsel affected the outcome of the termination proceedings." Id. at 1205 (emphasis added).

Requiring a showing that the result would not inevitably have been the same in order to qualify for remand or reversal imposes an identical burden on parents in termination proceedings as on defendants in federal criminal cases under Strickland. As noted before, this court has rejected the Strickland standard "[g]iven the inherent subjectivity of determining whether past results would probably have been different." Smith, 68 Haw. at 310, 712 P.2d at 500. In my view, then, this court must also reject the Geist II test because, like Strickland, there is an "inherent subjectivity" in determining whether the outcome of the case would or would not be

"inevitably" the same and, like Strickland, imposes "a requirement almost impossible to surmount." See Briones, 74 Haw. at 462, 848 P.2d at 976. Hawaii's ineffective assistance standard in the criminal context, on the other hand, is significantly less demanding, allowing parties to prove ineffective assistance of counsel without a showing of "'actual' prejudice" and instead requiring "an evaluation of the possible, rather than probable, effect of the defense on the decision maker." Dan, 76 Hawaiʻi at 427, 879 P.2d at 532 (quoting Briones, 74 Haw. at 464, 848 P.2d at 977). Respectfully, it is illogical and unfair for this court to impose a stricter standard on parents in family court proceedings than on defendants in criminal court proceedings where this court has recognized that parents in termination proceedings "have a substantial liberty interest . . . protected by the due process clause of article I, section 5 of the Hawaiʻi Constitution." Doe, 99 Hawaiʻi at 533, 57 P.3d at 458. As stated before, the "Due Process Clause of the Fourteenth Amendment entitles a defendant in a criminal case to representation by counsel [and] appl[ies] with equal force to a case of [parental termination]." Lassiter, 452 U.S. at 60 (Stevens, J., dissenting). Thus, inasmuch as (1) other jurisdictions have criticized Geist II for having "little practical difference" from the Strickland standard, (2) this court has rejected Strickland because of its prejudice requirement, (3) Geist II imposes a prejudice requirement like

that in Strickland, and (4) Geist II would impose a heavier burden on parents than on criminal defendants to demonstrate ineffective assistance of counsel, the Geist II test should be rejected and the ICA's analogue of Hawaii's criminal standard should be applied to questions of ineffective assistance in termination cases.

IX.

A.

"[I]t is well settled that this court may relax the deadline for filing a notice of appeal 'where justice so warrants' and 'the untimely appeal had not been due to the defendant's error or wilful inadvertence.'" State v. Shinyama, 101 Hawaiʻi 389, 393 n.6, 69 P.3d 517, 521 n.6 (2003) (quoting State v. Caraballo, 62 Haw. 309, 312, 315, 615 P.2d 91, 94, 96 (1980)). In numerous cases, and under varying circumstances, this court and the ICA have heard appeals in criminal cases despite the fact that the attorney failed to perfect the appeal, or that the appeal was not timely filed. See, e.g., State v. Ontiveros, 82 Hawaiʻi 446, 448, 923 P.2d 388, 390 (1996) (declining to dismiss, although "[t]echnically, the conviction was not properly appealed[,]" because "we have established, as a general proposition, that counsel's failure to perfect an appeal in a criminal case does not preclude an appellant's right to appeal"); State v. Knight, 80 Hawaiʻi 318, 323-24, 909 P.2d 1133, 1138-39 (1996) (declining to dismiss the appeal "[i]n the

interest of justice" because, "[n]otwithstanding counsel's failure to comply with the time requirements of HRAP Rule 4(b), Knight, as a criminal defendant, is entitled, on his first appeal, to effective counsel who may not deprive him of his appeal by failure to comply with procedural rules"); State v. Erwin, 57 Haw. 268, 269, 554 P.2d 236, 237-38 (1976) (refusing to dismiss the appeal although it was "inescapable that timely filing of the notice of appeal did not take place[,]" because "it is clear that an indigent criminal defendant is entitled, on his first appeal, to court-appointed counsel who may not deprive him of his appeal by electing to forego compliance with procedural rules"); State v. Graybeard, 93 Hawaiʻi 513, 518, 6 P.3d 385, 390 (App. 2000) (declining to dismiss because "our appellate courts have ignored formal jurisdictional defects that are due to the derelictions of a criminal defendant's attorney"); State v. Maumalanga, 90 Hawaiʻi 96, 99-100, 976 P.2d 410, 413-14 (App. 1998) (although "[the d]efendant filed his notice of appeal fifty-nine days late[,]" holding that "the interests of justice require us to hold that [the d]efendant's failure to comply with HRAP Rule 4(b) does not preclude his right to appeal"); State v. Ahlo, 79 Hawaiʻi 385, 391-92, 903 P.2d 690, 696-97 (App. 1995) (where defendant was financially unable to obtain counsel and appellate counsel was late-appointed, holding that, "[u]nder these circumstances, faulting [the d]efendant for his failure to comply with the 30-day rule would lead to harsh and unjust

results"). As discussed above, the liberty interests at stake in a termination proceeding make it far more akin to a criminal proceeding than a typical civil matter.

The rationale underlying some of the foregoing cases was that the defendant was denied due process due to counsel's failure to perfect the appeal. In Erwin, this court agreed with the State "that a notice of appeal complying with [Hawaiʻi Rules of Criminal Procedure] Rule 37(b), was not filed within the ten-day period prescribed by Rule 37(c)." 57 Haw. at 269, 554 P.2d at 237. This court further conceded that "[n]o provision is made in Rule 37 for an extension of time to appeal in a criminal case[,]" and "[t]imely filing of a notice of appeal has been held to be a jurisdictional requirement." Id. at 269, 554 P.2d at 238. Nevertheless, this court "den[ied] the motion to dismiss the appeal and proceed[ed] to consideration of the merits," because "it is clear that an indigent criminal defendant is entitled, on his first appeal, to court-appointed counsel who may not deprive him of his appeal by electing to forego compliance with procedural rules[,]" and "failure by appointed counsel to commence the simple steps for appeal is a blatant denial of due process." Id. (emphasis added) (internal quotation marks and citation omitted).

In Knight, defendant's counsel failed to timely file the notice of appeal based upon negligence on the part of his secretary. 80 Hawaiʻi at 323, 909 P.2d at 1138. This court

noted that, "[a]s a general rule, compliance with the requirement of timely filing of a notice of appeal is jurisdictional, and we must dismiss an appeal on our motion if we lack jurisdiction." Id. (internal quotation marks and citation omitted). However, "[i]n the interest of justice, [this court] decline[d] to dismiss this appeal and [] address[ed] the merits of Knight's alleged points of error[,]" id. at 324, 909 P.2d at 1139, because "we have permitted belated appeals under certain circumstances, namely, when defense counsel has inexcusably or ineffectively failed to pursue a defendant's appeal from a criminal conviction in the first instance[,]" id. at 323, 909 P.2d at 1138 (brackets, ellipsis, internal quotation marks, and citation omitted). Petitioner, then, should be allowed to perfect her direct appeal, just as persons charged with crimes have been permitted to do because of counsel's ineffective late or imperfect filing of an appeal.

B.

Perhaps acknowledging that our precedent would mandate that Petitioner be permitted to file a direct appeal, the majority places additional burdens on parents not imposed on criminal defendants in this state, stating in a footnote that, "even if the holding in [Roe v.]Flores-Ortega, [528 U.S. 470 (2000),] were to apply . . . [,] counsel's failure to file a notice of appeal will only be considered per se ineffective where the party has specifically instructed his or her counsel to file

a notice of appeal." Majority opinion at 55 n.24 (citing 528 U.S. at 477) (emphasis added).

In Flores-Ortega, a criminal defendant sought habeas corpus relief alleging that his defense counsel had been ineffective in failing to file a notice of appeal. 528 U.S. at 474. The Court noted that counsel's actions in failing to file an appeal ranged between "two poles." Id. at 477. On one pole, the Court recognized that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." Id. (citing Rodriquez v. United States, 395 U.S. 327 (1969). At the other pole, "a defendant who explicitly tells his attorney not to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently." Id. (citing Jones v. Barnes, 463 U.S. 745, 751 (1983) (emphasis in original). The question presented in Flores-Ortega "[lay] between two poles" because the defendant had not "clearly conveyed his wishes [to appeal] one way or the other[.]" Id.

In deciding the question that lay between the two poles, the Supreme Court rejected the rule in the First and Ninth Circuits that "[c]ounsel must file a notice of appeal unless the defendant specifically instructs otherwise," and that failure to do so "is per se deficient." Id. at 478. The Supreme Court held such a rule was "inconsistent with," id., the two-part test in Strickland, id. at 477. With regard to the first part, the Court

determined that "where the defendant neither instructs counsel to file an appeal nor asks that an appeal be taken," the appropriate test is to first ask "whether counsel in fact consulted with the defendant about an appeal." Id. at 478. If counsel has consulted with the defendant, then "[c]ounsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." Id. If counsel had not consulted with defendant, the question becomes "whether counsel's failure to consult with the defendant itself constitutes deficient performance." Id.

With regard to the second part, which requires a defendant to show prejudice from counsel's deficient performance, the court "followed the pattern established in Strickland . . . requiring a showing of actual prejudice (i.e., that, but for counsel's errors, the defendant might have prevailed)[.]" Id. at 484 (emphasis added). The Court rejected the per se prejudice rule because it "ignore[d] the critical requirement that counsel's deficient performance must actually cause the forfeiture of the defendant's appeal" and held, instead, that "a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." Id. (emphases added).

Obviously, Flores-Ortega is not applicable to this case or in this jurisdiction. First, Flores-Ortega observed that "the

question presented [in the case lay] between [] two poles" because the defendant had not "clearly conveyed his wishes [to appeal] one way or the other." 528 U.S. at 477. The Court noted, however, that if a lawyer "disregard[ed] specific instructions from the defendant to file a notice of appeal," then he "act[ed] in a manner that is professionally unreasonable." Id. (citing Rodriquez v. United States, 395 U.S. 327 (1969). Here, Petitioner clearly conveyed her desire to appeal the Termination Order but was unsuccessful only because Yonemori was ineffective in failing to file the motion for reconsideration. Thus, the case here does not "lie between those two poles," id., but, if anything, lies at the first pole where "a lawyer . . . disregards specific instructions from the defendant to file a notice of appeal," id.

Second, Flores-Ortega applied the Strickland test, which requires a defendant to prove that "but for counsel's deficient failure to consult[,] he would have timely appealed." 466 U.S. at 484. This court has rejected Strickland's requirement as being "too burdensome" and "almost impossible to surmount." Briones 74 Haw. at 462, 848 P.2d at 976. For the reasons stated supra, it would be inconsistent and unwarranted for this court to impose an ineffective assistance standard on parents more burdensome than that placed on criminal defendants.

X.

As recounted before, despite the court's determination that "[Petitioner] suffers from a mental health condition that distorts her perceptions of people and this causes her to come into conflict with and to refuse to cooperate with people that are trying to help her[,]" as noted by the ICA, the court unilaterally and sua sponte dismissed Petitioner's trial counsel. At the point of discharge, no counsel was substituted in place of discharged counsel. Hence, Petitioner was without counsel during a crucial period following the termination hearing, from March 11, 2005, through March 29, 2005. Petitioner was not schooled in the law and presumably was unaware of the requirement that a motion for reconsideration was required to be filed. As recognized in K.L.J., discussed supra, "[a] parent who is without the aid of counsel in marshalling and presenting the arguments in his favor will be at a decided and frequently decisive disadvantage." 813 P.2d at 280. Newly-appointed counsel, Yonemori, had two days in which to file a timely motion for reconsideration of the court's Termination Order in order to preserve Petitioner's right to subsequently challenge that Order by appeal. Yonemori did not.

Petitioner's counsel therefore ineffectively failed to pursue Petitioner's appeal in the first instance. Yonemori herself admitted that her failure to immediately file the motion for reconsideration fell below the level of competence required

to protect Petitioner s rights.[13] As a result of Yonemori s ineffective assistance, Petitioner s direct appeal was later rejected by this court for lack of jurisdiction because Petitioner had failed to timely file a motion for reconsideration as required by HRS § 571-54. Thus, Petitioner was permanently deprived of one of the most basic liberties under our constitution, never having had the opportunity to challenge the findings of fact and conclusions of law supporting the Termination Order by way of direct appeal.[14]

As discussed in Knight, this court in the interest of justice[,] 80 Hawai i at 324, 909 P.3d at 1139, has declined to

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[13] Relevant to Yonemori s level of competence, it is not entirely clear from the record that Yonemori was aware, even after the fact, that a motion for reconsideration had to be filed as a prerequisite to filing an appeal, but only that she failed to timely appeal.

[14] As noted before, HRS § 571-54 no longer requires that a motion for reconsideration be filed as a prerequisite to appeal in cases arising under HRS chapter 587. With regard to the 2006 amendments, which removed the requirement, the Committee on Judiciary and Hawaiian Affairs stated that

> [t]he purpose of this measure is to eliminate the requirement for a motion for reconsideration in the appellate process for child protective cases[,] and further explained:
>
> > Under the current law, a party must first file a motion for reconsideration with the family court judge who issues a child protective order before the party may appeal the order. This requirement means that the party must file the motion for reconsideration, give notice of the motion to the other parties, have a hearing, and obtain a decision from the same judge who issues the order. Often, parties may miss the deadline for filing the motion for reconsideration and are thereafter estopped from challenging the order on appeal.
> >
> > Your Committee finds that this requirement builds unnecessary delay into the appellate review system. To speed the resolution of child protective services cases, this measure will remove the motion for reconsideration as a prerequisite to the appellate process.

Sen. Stand. Comm. Rep. No. 2245, in 2006 Senate Journal, at 1132 (emphases added). Thus, the legislature specifically addressed the unfairness and delay that results, in a case such as the one at bar, deleting the requirement that a motion for reconsideration be filed prior to appeal.

dismiss an appeal "when defense counsel has inexcusably or ineffectively failed to pursue a defendant's appeal from a criminal conviction in the first instance[,]" id. at 323, 909 P.2d at 1138. Likewise, this court should permit Petitioner's appeal to be taken because Yonemori "ineffectively failed to pursue [Petitioner's appeal in the first instance." Id. Based on the facts and circumstances in this case and the principle set forth herein that due process requires effective representation in termination proceedings, in the interests of justice, Petitioner should be allowed twenty days from the issuance of this court's judgment to petition the court for reconsideration pursuant to HRS § 571-54, the denial of which is subject to appeal in accordance with the statute.

XI.

In arriving at the conclusion that there was no abuse of discretion in denying Petitioner's Rule 60(b) Motion, the majority asserts that (1) "the delay . . . in determining permanent custodial status has a substantial negative impact on the interests of the child[,]" majority opinion at 58, (2) Petitioner has failed "to identify any potentially meritorious issues that could have been raised but for Yonemori's failure to timely appeal," id. at 61, (3) "[Petitioner's] Rule 60(b) Motion did not adequately establish that she did not play a role in contributing to the delay in bringing the motion[,]" id. at 62, and (4) Petitioner "failed to include in the appellate

record any transcripts of proceedings relevant to determining whether the family court abused its discretion[,]" id. at 63. I respectfully disagree with the majority's conclusion for the reasons following.

A.

As to its first assertion, the majority argues that the additional delay that would be caused by granting the Rule 60(b)(6) motion was a factor that weighed substantially in favor of denying the motion and "[Petitioner] failed to establish an entitlement to relief sufficient to overcome that factor." Majority opinion at 61. Additionally, the majority's assertion that this opinion stands for the proposition that the "negative impacts on RGB of the delay in resolving her custodial status" "should not be considered in assessing [Petitioner's Rule 60(b)(6)] motion[,]" id. at 3, is wrong.

First, the equities in this case, such as the child's present status or the best interests of the child, are factors that must be determined after Petitioner is given the opportunity to present her side of the case. Cf. Lassiter, 452 U.S. at 28 (recognizing that "accurate and just results" are most likely to be obtained when both sides are equally represented"); In re Emilye A, 9 Cal. App. 4th at 1699, 12 Cal. Rptr. at 298 (noting that it is an "implicit and erroneous assumption" to assume that "the child's welfare has been served by the interruption of the parents' custody and control despite the fact that the child's

parents were not effectively represented during the proceedings"). Otherwise, only one side of the issues is presented for our consideration. This court cannot reasonably address the merits of Petitioner's position because Petitioner's direct appeal was dismissed before Petitioner could submit briefs on the merits. Thus, Petitioner is entitled to present her side of the case.

By deciding the merits of Petitioner's case without affording Petitioner her right to respond, the majority has undermined the legal calculus that includes the best interests of the child. It should be the judicial process that determines the result or outcome of the case, i.e, whether Petitioner had fair and equal treatment. As discussed supra, Lassiter recognizes that, as "our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed interests" and therefore "the State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal." 452 U.S. at 28.

In this vein, the majority's assertion that inasmuch as Petitioner failed to point to any alleged errors in the record,[15]

[15] The majority states that (1) Petitioner's Rule 60(b) motion "contained no allegations whatsoever about what errors had occurred in the family court proceedings leading up to the entry of the Termination Order[,]" majority opinion at 3, and also that (2) "[Petitioner] ha[d] failed to point to any alleged errors apparent in the record[,]" id. at 56.

majority opinion at 3, 56, and reliance upon the court's findings because Petitioner "did not dispute the family court's [findings] in her [Rule 60 motion], in her appeal to the ICA, or in her application to this court," id. at 7 n.3, are fundamentally unfair. Petitioner's Rule 60(b) motion, her appeal to the ICA, and application to this court did not concern the merits of Petitioner's termination but, instead, concerned whether Petitioner's counsel, including Yonemori, was ineffective. The Declaration of Counsel attached to Petitioner's Rule 60 motion asserted that "[Petitioner] was not afforded competent legal counsel and was therefore denied her constitutionally protected due process and equal protection of the laws under the Hawaiʻi (Article I, Section 5), and United States of America Constitution (14th amendment)[.]" Petitioner's appeal to the ICA asserted that "when [Petitioner] was appointed [Yonemori], she lost her opportunity to have evidence reconsidered and effectively lost her right to file a timely appeal" and "[w]hen the notice of appeal was finally filed on [October 17, 2006], the court herein rejected the appeal as untimely." Petitioner's Application asserted that "[Yonemori] failed to preserve [Petitioner's] right to an appeal from the Termination Order" and "in allowing the appeal to run and in also not filing for post-judgment relief . . . were clearly prejudicial to [Petitioner]." As discussed supra, Petitioner was foreclosed from challenging the merits of her parental termination because Yonemori failed to properly

preserve Petitioner's appeal. It was because of the ineffective assistance provided by Yonemori that Petitioner's direct appeal was dismissed. Therefore, Petitioner has not had an opportunity to challenge the findings or conclusions on the merits on direct appeal. Consequently, in fairness, Petitioner cannot be treated as if she had had that opportunity.

Furthermore, the majority's argument that this opinion "relies in part on the family court's [findings] regarding [Petitioner]'s mental health condition to dispute the propriety of the family court's decision to discharge [Petitioner]'s counsel, . . . and also relies on DHS's Answering Brief to the ICA, which draws significantly from the [findings]," majority opinion at 7 n.3, underscores a misconception of the issues presented. As discussed infra, because Petitioner has not been afforded effective assistance of counsel on appeal, she has never had a meaningful opportunity to address the findings. Had Petitioner been provided effective assistance of counsel, this court could properly assess the court's findings on the merits. Because Petitioner has not had an opportunity to address such findings, both the majority and the dissent must refer to findings as yet unaddressed by Petitioner. But, those findings relating to Petitioner's mental illness and underlying her ineffective counsel claim have been addressed by both sides and the ICA. It is undisputed that (1) the court sua sponte discharged Petitioner's trial counsel without any indication that

new counsel had been substituted to take on Petitioner's case, (2) Petitioner was left without counsel for the first eighteen of the twenty day period in which Petitioner needed to file her motion to reconsider, a prerequisite to filing an appeal, (3) Yonemori failed to file the required motion to reconsider, and (4) Petitioner's direct appeal was dismissed for lack of jurisdiction. As discussed above, Petitioner asserted in her Rule 60 motion, in her appeal to the ICA, and in her application to this court, that Yonemori was ineffective. Therefore, it is legally wrong to use the findings on the merits against Petitioner because Petitioner required competent counsel to effectively respond to the findings in the first place. Because this court dismissed Petitioner's direct appeal, the present appeal concerns not the merits of the termination, but the constitutional prerequisite that she have competent counsel in order to respond to such findings. Thus, with all due respect, the majority castigates Petitioner for the very reasons that she should have had effective counsel.

Second, Petitioner had a right to bring a motion to relieve her from the Termination Order under Rule 60(b)(6). In fact, the majority concedes that Petitioner's Rule 60(b)(6) motion "was an appropriate vehicle for raising ineffective assistance of counsel in the circumstances of this case."[16]

[16] The majority's note that "[o]ur conclusion [] does not authorize a challenge to the termination of parental rights based on ineffective assistance of counsel in a case where adoption of the child has already taken (continued...)

Majority opinion at 42-43. It is inherently wrong for the majority to assert that the delay caused by the Rule 60(b)(6) motion should "weigh substantially in favor of denying the motion" when Petitioner was entitled to bring a Rule 60(b)(6) motion and the Rule 60 motion was necessitated not by her, but by ineffective assistance of counsel. In penalizing Petitioner for the delay caused by appellate counsel in filing an invalid appeal and weighing the delay "substantially in favor of denying the motion[,]" the majority ignores the cause of the delay and renders Petitioner's right to bring a HFCR 60(b)(6) motion meaningless.

B.

As to its second assertion, the majority contradictorily faults Petitioner for not having a meritorious defense, despite its denouncement of the criminal standard in termination cases. The majority states, "In view of [Petitioner's] failure to identify any potentially meritorious issues that could have been raised but for Yonemori's failure to timely appeal, the record does not establish that the proceedings were fundamentally unfair." Majority opinion at 61 (emphasis

[16](...continued)
place[,]" majority opinion at 43 n.20, is not an issue raised, argued, or briefed by any party in this case. Nor is there a factual basis in the record to support this issue. Thus, the majority's note improperly decides an issue not before this court. See, e.g., Kapuwai v. City & County of Honolulu, 121 Hawaiʻi 33, 41, 211 P.3d 750, 758 (2009); Trustees of Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 171, 737 P.2d 446, 456 (1987); State v. Fields, 67 Haw. 268, 274, 686 P.2d 1379, 1385 (1984); Wong v. Bd. of Regents, Univ. of Haw., 62 Haw. 391, 394-95, 616 P.2d 201, 204 (1980).

added). But, demonstrating that a potentially meritorious defense exists is part of Hawaii's criminal standard for ineffective assistance of counsel. As discussed supra, this court has held that the ineffective assistance of appellate counsel in the criminal context "center[s] on whether counsel informed him or herself enough to present appropriate appealable issues in the first instance." Briones, 74 Haw. at 465, 848 P.2d at 977. "An 'appealable issue' is an error or omission by counsel, judge, or jury resulting in the withdrawal or substantial impairment of a potentially meritorious defense." Id. at 465-66, 848 P.2d at 977 (emphasis added). Thus, while the majority states that it adopts the "fundamental fairness test" purportedly from Geist II, in applying a meritorious defense requirement, the majority actually fashions a different test from Geist II. The majority's test, as argued by it, embodies a "potentially meritorious defense" which is inconsistent with Geist II and, thus, abandons any resemblance to Geist II.

Furthermore, the majority's reliance on the lack of a so-called meritorious issue as a basis for denying a Rule 60(b)(6) motion is wrong. Nowhere does HRFC 60(b)(6) require the movant to show a meritorious defense. Hayashi required that a movant "show that (1) the motion is based on some reason other than those specifically stated in clauses 60(b)(1) through (5); (2) the reason urged is such as to justify the relief; and

(3) the motion is made within a reasonable time. 4 Haw. App. at 290-91, 666 P.2d at 174-75.

Additionally, a potentially meritorious defense construct is inapplicable in this case. Whether a defendant has a potentially meritorious defense is either raised during or after a direct appeal. In cases determining the question of ineffective assistance of appellate counsel, petitioners have first been afforded a direct appeal. See, e.g., Loher v. State, 118 Hawaiʻi 522, 532-34, 193 P.3d 438, 448-50 (2009) (requiring that appellate counsel have the opportunity to be heard on the issue of whether appellate counsel rendered ineffective assistance on direct appeal by failing to raise an issue of whether defendant's "forced" testimony violated his right against self-incrimination); Dan, 76 Hawaiʻi at 432-33, 879 P.2d at 537-38 (affirming the court's conclusion that petitioner was not denied the effective assistance of counsel when his appellate counsel failed to file a motion for reconsideration of this court's memorandum opinion affirming his conviction); Briones, 74 Haw. at 468, 848 P.2d at 978 (holding that appellate counsel was ineffective on defendant's direct appeal because counsel's failure to raise an appealable issue was the "result of constitutionally inadequate preparation") (internal quotation marks and citation omitted). Thus, as Loher, Dan, and Briones reflect, only after a direct appeal is taken is review for a meritorious defense undertaken. Unlike in Loher, Dan, and

Briones, Petitioner was not allowed a direct appeal due to Yonemori's ineffectiveness. Yonemori herself admitted that her representation fell below the level of competence required to protect Petitioner's rights and as a result of Yonemori's ineffective assistance, Petitioner's direct appeal was rejected by this court.

C.

As to its third assertion, the majority again faults Petitioner for "not adequately establish[ing] that she did not play a role in contributing to the delay in bringing the motion" and for "not explain[ing] why [Petitioner] waited until March 10, 2006 before bringing Yonemori's inaction to the attention of the family court." Majority opinion at 62. To the contrary, the record does establish that Petitioner was not at fault so as to disqualify her from bringing the motion.

With respect to the first eighteen days after the issuance of the Termination Order, the record reflects that despite having denied Petitioner's previous request to dismiss Iopa as counsel for the termination hearing, the court apparently unilaterally and sua sponte dismissed Petitioner's counsel without explaining why trial counsel was dismissed. As noted before, no counsel was substituted at the point the court took it upon itself to discharge counsel. As a result of the court's order, Petitioner was improperly left without counsel for eighteen out of the crucial twenty-day time period for filing her

motion for reconsideration. As noted in detail in section IV.B.3.b. supra, with respect to the period from March 29, 2005, when Yonemori was appointed as counsel, until March 2006, the record reflects that the delay was due to Yonemori's ineffective assistance of counsel. Furthermore, the record also reflects that Petitioner was diligent in filing a notice of appeal on October 17, 2006, regarding the court's ruling on her Rule 60 motion and Yonemori's motion to withdraw. Petitioner did not learn that her October 17, 2006 appeal was premature until January 12, 2007, when the ICA issued its opinion dismissing the appeal for lack of jurisdiction. Shortly after the ICA issued its opinion on January 12, 2007, Petitioner, through new counsel, timely filed her Rule 60 Motion in this case.

Contrary to the majority's assertion that "the record does not reflect" the reasons "why [Petitioner] did not act sooner with regard to Yonemori's failure to timely appeal," majority opinion at 62-63, Petitioner has provided the "exceptional circumstances" to mitigate the delay. Admonishing Petitioner for the delay is unjust because the record in this case, as stated supra, is replete with evidence of delay admitted by appointed appellate counsel during this period. Because the record in this case established that any delay was due to the ineffective assistance of appellate counsel, Petitioner carried her burden under Hayashi and therefore, with all due respect, the majority's assertion "that [Petitioner] failed to provide any

information regarding her own understanding of what was transpiring between the issuance of the [Termination Order] and her filing of her pro se Motion for Relief from Judgment on March 10, 2006," id. at 63 n.29, is incongruous.

As discussed supra, the record reflects that "Petitioner ha[d] been coming to [Yonemori's] office every week" and was "understandably quite anxious" about bringing her appeal. Both of Yonemori's declarations of counsel filed on March 17, 2006 stated that the delays in filing Yonemori's appeal were due to Yonemori's actions and were in no way caused by Petitioner. Further, Petitioner's affidavit attached to her March 10, 2006 pro se Motion for Relief stated that "[c]ounsel assigned by this court remains ineffective to bring this matter to justice." (Emphasis added.) It is fundamentally wrong to lay the fault for the failure to file a timely motion for reconsideration and the resulting delay at the feet of Petitioner, rather than appellate counsel, as the majority does. The majority's decision cannot be justified by relying on the findings and conclusions terminating Petitioner's parental rights where Petitioner has been denied the opportunity to respond to those findings and conclusions on direct appeal because of ineffective assistance of counsel.

D.

As to its fourth assertion, the majority faults Petitioner for "fail[ing] to include in the appellate record any

transcripts of proceedings[17] relevant to determining whether the family court abused its discretion." Id. at 63. As discussed above, with respect to Petitioner's post-termination proceedings, Yonemori's ineffectiveness as appellate counsel was clearly demonstrated and admitted in the record. Because the error is manifest from the record and the transcripts are not needed to establish ineffective assistance of counsel error on appeal, Petitioner has met her burden of showing Yonemori's error "by reference to matters in the record[.]" Bettencourt v. Bettencourt, 80 Hawaiʻi 225, 230, 909 P.2d 553, 558 (1995).

XII.

Finally, Petitioner's second argument is that she should be allowed to "see the 'confidential records' in [Petitioner's] file." However, Petitioner does not indicate, nor does it seem possible, that any information contained in records pertinent to proceedings occurring after November 9, 2006, would have any relevance to the proceedings that resulted in the Termination Order, from which Petitioner seeks relief.[18] Thus,

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[17] The majority faults Petitioner for not including the transcripts for the permanent plan hearing, the April 6, 2006 hearing, and the hearing of Petitioner's February 6, 2007 Rule 60(b)(6) motion on April 24, 2007. Majority opinion at 64.

[18] At the time the court entered its order, HRS § 587-73(b)(4) (2006 Repl.) provided that

> [i]f the court determines that the criteria set forth in subsection (a) are established by clear and convincing evidence,[] the court shall order . . . [t]hat such further orders as the court deems to be in the best interest of the child, including, but not limited to, restricting or excluding unnecessary parties from participating in adoption or other subsequent proceedings, be entered[.]

(continued...)

the ICA did not gravely err in determining that the court "did not err in limiting [Petitioner's] access to the post-November 6, 2006 confidential record in this case." RGB, 2009 WL 953392, at *3.[19]

[18](...continued)
(Emphasis added.) In addition to the November 9, 2006 order, the court had determined in the Termination Order that "[i]t is in [RGB's] best interests that the participation of [Petitioner] and Father in subsequent hearings be limited or restricted to appearances on any motions for relief from this decision and order or any motions necessary to pursue an appeal."

[19] The court's decision to restrict Petitioner's participation in subsequent proceedings involving RGB, including access to court records, does not appear to be an abuse of discretion. See In Interest of Doe, 77 Hawaiʻi 109, 115, 883 P.2d 30, 36 (1994) ("The family court possesses wide discretion in making its decisions and those decisions will not be set aside unless there is a manifest abuse of discretion. Under the abuse of discretion standard of review, the family court's decision will not be disturbed unless the family court disregarded rules or principles of law or practice to the substantial detriment of a party litigant and its decision clearly exceeded the bounds of reason." (Citations, quotation marks, ellipsis, and brackets omitted.))