

DISSENTING OPINION BY NAKAMURA, C.J.

I respectfully dissent. In my view, the Family Court of the Third Circuit (Family Court) abused its discretion in waiting too long to appoint counsel for Mother-Appellant (Mother). Accordingly, I would vacate the order terminating Mother's parental rights and remand the case for further proceedings.

Mother was only fifteen years old when she gave birth to TM. Approximately six months later, Mother and TM went to a domestic violence shelter due to a reported incident of domestic violence between TM's father and Mother. The Department of Human Services (DHS) sought, and the Family Court granted, temporary foster custody for both Mother, who had by then turned sixteen, and TM. Mother's foster custody was based on the threat of neglect and harm posed by her own mother's inability to care for her.

In addition to the challenges faced by Mother due to her being a minor, lacking stable family support, with a newborn child, Mother had mental health issues. Mother was diagnosed with bi-polar disorder (later reassessed as post-traumatic stress disorder) and assessed as suffering from depression and anxiety. Mother also had substance abuse issues -- she was being supervised by a juvenile probation officer and was required to complete a substance abuse program. Despite these challenges, the record indicates that at the time of her parental termination hearing, Mother had matured, had made significant progress in turning her life around, and had recognized TM as her first priority. The Family Court, however, determined that these changes had come too late and Mother had not made sufficient progress to enable her to provide TM with a safe family home.

The United States Supreme Court has adopted a case-by-case balancing test to determine whether parents faced with the deprivation of their parental rights are entitled to appointed counsel under the Due Process Clause of the United States Constitution. See Lassiter v. Dep't of Social Servs. of Durham Cnty., 452 U.S. 18, 31-32 (1981); In re "A" Children, 119 Hawai'i

28, 50, 193 P.3d 1228, 1250 (App. 2008). The Family Court appointed a guardian ad litem for Mother (due to Mother's status as a minor) to protect Mother's rights and interests as a child when TM and Mother were first placed in foster custody. However, both the Family Court and the guardian ad litem recognized that Mother's rights and interests as a parent were distinct from and may conflict with Mother's rights and interests as a child. Nevertheless, the Family Court waited until nineteen months after TM was placed in foster custody before appointing counsel for Mother. Until that time, despite the many challenges facing Mother, she did not have an attorney to represent her regarding her rights and interests as a parent and to advise her on how to safeguard, and avoid the termination of, her parental rights over her child. Indeed, Mother did not have an attorney to advise and represent her as a parent while she was a minor -- Mother was not appointed counsel until after she became an adult.

Under the circumstances of this case, I would hold that the Family Court abused its discretion in failing to appoint counsel until nineteen months after TM had been placed in foster custody. In my view, the Family Court did not appoint counsel early enough before the parental termination hearing to give Mother a fair opportunity to defend against the DHS's request to terminate her parental rights. See In re "A" Children, 119 Hawai'i at 57-59, 193 P.3d at 1257-59.

*Craig H. Nakamura*