IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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In the Interest of RGB, A Minor

NO. 28582

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(FC-S NO. 01-0063)

APRIL 1, 2010

K. HAMAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

2010 APR -1 AM 8:02

FILED

MOON, C.J., NAKAYAMA, AND RECKTENWALD, JJ.,
AND ACOBA, J., DISSENTING, WITH WHOM DUFFY, J., JOINS

OPINION OF THE COURT BY RECKTENWALD, J.

In this appeal, we consider whether the family court abused its discretion in denying Mother's motion for relief from an order terminating Mother's parental rights. The motion alleged that Mother received ineffective assistance of counsel in the proceeding that resulted in the termination order, as well as in her direct appeal from that order.

Mother's child, RGB, was born in July of 1999. RGB was taken into protective custody on March 30, 2001, after she was found dirty and without a diaper or underclothing in the custody of Mother's ex-boyfriend, who had a history of substance abuse and had been diagnosed with chronic paranoid schizophrenia. RGB was later returned to Mother, but was placed in foster custody in April, 2002, and has remained with the same foster family since then. Mother and RGB were subsequently involved in a series of interactions with the Department of Human Services (DHS) and proceedings before the Family Court for the Third Circuit (family

court). Mother was allowed to visit with RGB, but these visits had increasingly negative effects on RGB and were discontinued by the family court in 2004 after it concluded that "the visits were causing injury to [RGB's] psychological capacity as evidenced by a substantial impairment in [RGB's] ability to function."

After conducting a six-day permanency hearing, the family court issued its Findings of Fact, Conclusions of Law and Order terminating Mother's parental rights (Termination Order) on March 11, 2005.[1] On February 6, 2007, Mother filed a 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," alleging that her prior counsel was ineffective. The family court denied Mother's motion on May 8, 2007.

Mother seeks review of the May 21, 2009 judgment of the Intermediate Court of Appeals (ICA), entered pursuant to its April 9, 2009 Summary Disposition Order (SDO), affirming the family court's order denying Mother's motion. In her application for a writ of certiorari (application), Mother raises the following questions:

> A. Whether The Intermediate Court Of Appeals ("ICA") "Borrowing" Of Criminal Matters Analogy To Apply To Family Court Claims Of Ineffective Counsel Is Authorized By Law And Meets Constitutional Standards?
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> B. Whether The ICA Upholding Of The Trial Court's Refusal To Release "Confidential" Records That Appellate's [sic] Counsel Could Not Examine But At The

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[1] The Honorable Ben H. Gaddis presided.

Same Time Requiring Counsel To "Identify Any Prejudice Stemming From This Limitation" Meets Fair Disclosure Standards?

We resolve Mother's appeal as follows. First, we consider the basis of Mother's ineffective assistance of counsel claim. Since we conclude that the family court properly determined that Mother had a right to counsel under the United States Constitution in the circumstances of this case, we do not reach the question of whether the Hawaiʻi Constitution provides indigent parents a right to counsel in all termination proceedings. Second, we conclude that a Hawaiʻi Family Court Rules (HFCR) Rule 60(b)(6) motion was an appropriate method for raising an ineffective assistance of counsel claim in the circumstances of this case.

Third, we hold that the family court did not abuse its discretion in denying Mother's motion, particularly in view of the negative impacts on RGB of the delay in resolving her custodial status. Thus, we respectfully disagree with the dissenting opinion's view that such impacts should not be considered in assessing that motion. Dissenting Opinion at 81-82. The motion was filed nearly two years after the family court's March 11, 2005 order terminating Mother's parental rights, and contained no allegations whatsoever about what errors had occurred in the family court proceedings leading up to the entry of the Termination Order. By the time the motion was filed, RGB had been living with the same foster family for nearly

five years, and wanted to be adopted by that family. However, the adoption had been delayed pending the resolution of these proceedings. As set forth in a January 2006 report by DHS to the family court:

> [RGB's foster parents] want to adopt [RGB] and have been ready to proceed with the adoption process ever since biological mother's parental rights were terminated in March 2005. However, biological Mother's pending appeal to the court . . . has prevented the DHS and [RGB's foster parents] from proceeding with the adoption. Hence, [foster parents] and [RGB] and the entire family are disappointed. Per [foster mother], [RGB] continually wonders and asks "when will she be adopted".

Given those circumstances, and given Mother's failure in the Rule 60(b)(6) motion to identify any potentially meritorious issues that would have been raised but for the ineffectiveness of her counsel, the family court did not abuse its discretion when it denied the motion.

Finally, we hold that the family court did not abuse its discretion in precluding Mother from having access to those records in this case that were generated after September 28, 2006, i.e., more than a year after her parental rights were terminated, while allowing her to have access to records created prior to that date for purposes of appeal.

Accordingly, we affirm the judgment of the ICA.

## I. Background

### A. Termination of Parental Rights

DHS first became involved with Mother and RGB on March 30, 2001, when RGB was taken into protective custody. On

April 6, 2001, the family court awarded DHS temporary foster custody of RGB. On June 15, 2001, RGB was returned to Mother's care under family supervision. On April 4, 2002, the family court awarded foster custody to DHS. Mother was allowed supervised visitation. On April 1, 2004, the family court suspended visitation between Mother and RGB indefinitely.

A permanent plan hearing was held on August 23, August 30, September 3, September 20, September 27 and December 13, 2004.[2] On March 11, 2005, the family court issued its Termination Order, which included the following relevant Findings of Fact (FsOF):[3]

> 3. Mother grew up on the mainland in difficult circumstances. She was hospitalized on at least four different occasions for psychiatric conditions. Mother abused drugs and substances. She was in a series of unstable, sometimes violent relationships with men.
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> 4. Mother had another child who was removed from her care by the State of California. Over her objection, the parental rights of Mother to her older daughter were terminated, and the child was permanently placed with Mother's sister.
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> . . .
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> 6. While living in the bay area of California, Mother again became pregnant. Fearful that California

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[2] No transcripts of this or any other proceeding in this case were included in the record on appeal.

[3] Mother did not dispute the family court's FsOF in her February 6, 2007 motion, in her appeal to the ICA, or in her application to this court, and we therefore rely on the family court's FsOF for the purposes this appeal. Cf. Robert's Haw. Sch. Bus, Inc. v. Laupahoehoe Transp. Co., 91 Hawaiʻi 224, 239, 982 P.2d 853, 868 (1999) (holding that "[f]indings of fact that are unchallenged on appeal are the operative facts of a case"), superseded by statute on other grounds as recognized in Haw. Med. Ass'n v. Haw. Med. Serv. Ass'n, 113 Hawaiʻi 77, 107, 148 P.3d 1179, 1209 (2006).

Moreover, we note that the dissent relies in part on the family court's FsOF regarding Mother's mental health condition to dispute the propriety of the family court's decision to discharge Mother's counsel, Dissenting Opinion at 78, and also relies on DHS's Answering Brief to the ICA, which draws significantly from the FsOF, for its own recitation of the facts, Dissenting Opinion at 4-7.

authorities would remove her second child, she moved to Hawaiʻi when eight months pregnant with [RGB].

. . .

8. Mother encountered many difficulties living in Hawaiʻi after the birth of [RGB]. She did not apply for public assistance because she was fearful that State authorities might remove [RGB]. She had very little money. At times she and [RGB] were homeless.

9. On March 30, 2001, [RGB] was taken into police protective custody after she was found in the care of [Mother's ex-boyfriend]. At the time that she was placed in police custody, she was dirty and did not have on a diaper or underclothing.

10. [Mother's ex-boyfriend] and Mother had been in a relationship for many years. [Mother's ex-boyfriend] had a history of substance abuse and a mental health diagnosis of chronic paranoid schizophrenia with acute exacerbation. He had been acquitted of two sexual assault offenses due to incapacity.

11. A temporary foster custody hearing was conducted. Mother applied for and received the services of court-appointed attorney, Cynthia Linet.

12. On April 6, 2001, the Family Court awarded the Department of Human Services ("DHS"), temporary foster custody of [RGB] on the basis that she was subject to imminent harm due to Mother's past history of mental health problems and her current relationship with [Mother's ex-boyfriend].

. . .

14. On June 15, 2001, . . . the Court returned [RGB] to [Mother's] care under family supervision.

15. On November 29, 2001, DHS again petitioned the Court for foster custody of [RGB]. Mother and [RGB] had been evicted from the homeless shelter and had moved to the Rossmond Hotel. Mother was having difficulty controlling [RGB] and following through with skills taught by the parenting program that she attended.

16. The Court . . . continued family supervision of Mother and [RGB].

17. Mother's attorney, Ms. Linet, moved to withdraw as counsel. Mother asked to be allowed to represent herself. The Court allowed Ms. Linet to withdraw as Mother's counsel and allowed Mother to appear *pro se*.

18. On April 4, 2002, DHS again petitioned for foster custody of [RGB]. Mother and [RGB] had moved back to the homeless shelter because the Rossmond Hotel was closed for renovation. . . . Based on representations made, the Court awarded foster custody of [RGB] to DHS and scheduled a contested disposition hearing to determine whether [RGB] should remain in foster care.

19. The Court appointed Alexander W. Thoene,

> Jr.[[4]] to serve as counsel for Mother. The disposition hearing was conducted on April 12, 15, and May 14, 2002. Mother failed to appear for the fourth day of the disposition hearing on June 17, 2002.
>
> 20. The Court defaulted Mother for purposes of the disposition hearing and found that she suffered from a mental condition which distorted her perception of the people that she had been in contact with to the point that she considered all of them to be conspiring against her to deprive her of [RGB]. The Court concluded that this perception of Mother and her inability to control her emotions led her to have conflicts with people who had been trying to assist her. The Court found that Mother was a person of above-average intelligence and was able to pass parent education classes. Not withstanding her cognitive abilities, the Court found that Mother's mental disorder prevented her from applying the lessons learned to adequately parent [RGB], and that consequently, [RGB] was often deprived of clean and appropriate clothing, did not bathe on a regular basis, and did not have adequate supervision. The Court determined that this was not a simple matter of Mother having a different lifestyle, but more a matter of Mother being incapable of adapting to situations which were incompatible with her lifestyle and beliefs, and that this inability to adapt, was a by-product of her mental disorder, and endangered [RGB] and rendered Mother incapable of providing a safe home for [RGB]. The Court concluded that continuation of [RGB] in Mother's care would result in serious injury to [RGB], delaying physical, emotional, social, and or psychological development with long term negative consequences for [RGB].
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> . . .
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> 22. On July 8, 2002, Mother filed a motion to terminate Alexander W. Thoene, Jr. as her counsel. She indicated that she would proceed *pro se*. On August 8, 2002, the Court granted Mother's request to proceed *pro se*, but required Mr. Thoene to serve as stand-by counsel for Mother to assist her in the presentation of her case.
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> . . .
>
> 24. At first, visits . . . between Mother and [RGB] went well. [RGB] appeared more loving towards Mother and did not seem to be resistant to visits. Mother interacted with [RGB] very appropriately, . . .
>
> 25. On September 19, 2002, a . . . visit did not go well. Mother seemed easily frustrated. When [RGB] wanted to call her foster mother or preschool teacher on a play phone, Mother stopped participating in the play. Mother became emotional and made inappropriate statements to [RGB] such as, "I'm your mommy, they want to take you away and make you think

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[4] Thoene is referred to variously in the record as "Alexander" and "Alika." For the purposes of this opinion, we adopt the phrasing reflected in the family court's FsOF and appointment of counsel, and utilize the name "Alexander."

someone else is your mommy, but I am your mommy." [RGB] had to go to the bathroom five times in the last hour of the visit.

. . .

27. In the summer and fall of 2002, [RGB] began to make statements about a "man in a brown car." [RGB] made statements that suggested that the man had been violent towards Mother. [RGB] also said that the man in the brown car put a thing in her mouth and she threw up. Service providers became concerned that [RGB] may have been sexually abused by a male before she was placed into foster care.

28. Mother's response to the concern about the possible sex abuse of [RGB] was to vehemently reject any possibility that the child had been sexually abused while in her care. Much later in the case, Mother disclosed that she had owned a brown car during the time that she and [RGB] were homeless. . . .

. . .

33. During the early part of 2003, Mother's visits with [RGB] continued. While most visits went well, more difficulties arose in February. Mother began to make inappropriate comments to [RGB] during supervised visits. Comments by Mother included statements such as, "They are brain washing you" and "Mommy is looking for a house and soon you can come home." . . .

34. The foster mother reported that [RGB] returned from visits with Mother very upset with concerns about where she was going to live and whether she would be moved. . . .

. . .

35. Between January and March 2003, [RGB] had displayed numerous anxious behaviors both in the home of the foster parents and in therapy. After visits with Mother were suspended, [RGB's] anxious behaviors abated.

. . .

37. On May 1, 2003, at Mother's request, stand-by counsel, Alexander W. Thoene, Jr. withdrew and G. Kay Iopa was appointed as replacement stand-by counsel for Mother.

38. Throughout this proceeding, Mother has had difficulties with her attorneys. At times, she has insisted on proceeding *pro se*. At other times, she has requested new counsel or postponements until she could gather enough funds to hire counsel of her choice. Mother has proven herself unable to organize and effectively present her own case. At the same time, she has often refused to allow her court-appointed counsel to proceed on her behalf. For this reason, the Court appointed Mother stand-by counsel. Mother was allowed to present her own case and question witnesses to the extent that she was able to do so, but she was also allowed to rely on stand-by counsel to present her case when she was not able to proceed. Stand-by counsel was also available to assist Mother in the preparation of appropriate motions and pleadings.

. . .

42. On August 8, 2003, [RGB] had a visit with Mother at Parent's Inc. This visit seemed to go well, but the foster mother reported that on the drive home from the visit, [RGB] asked about what happens to mommies that hurt their babies. The foster mother asked how the mommy hurt the baby and [RGB] responded that the mother took the baby to the man in the brown car and held her down and the man "hurt me." [RGB] told the foster mother that the man said that he was going to cut her with a knife and was going to put it in her "tuni" and cut her up. "Tuni" is a word that [RGB] uses for vagina. [RGB] related that she kicked the man in his leg and he got really mad and slapped her and she screamed loud. [RGB] also said that . . . Mother[] let the man put medicine in her mouth and that she threw up all over Mother's bed. Concerns about the statements of the child caused DHS again to suspend[] visits with Mother.

43. On August 28, 2003, visits between [RGB] and Mother again resumed . . . .

44. During this period, there were numerous conflicts between Mother and the supervising agency . . . .

. . .

54. At a review hearing on January 29, 2004, the DHS worker reported that Mother continued to make inappropriate statements to [RGB] about how she was going to return to Mother. The social worker indicated that [RGB's] old fears had returned. . . .

55. [RGB] and Mother continued to visit twice a week for one and a half hours per visit under the supervision of a DHS aide. While the visits seemed to go well, [RGB] showed troubling signs of distress in her play sessions with her therapist. Prior to visits with Mother, [RGB] would cry frantically and vomited on one occasion.

56. In February 2004, in the evenings, [RGB] began complaining of a fast heart beat and gasping for breath. Her pediatrician . . . diagnosed her with adjustment disorder noting that the stress reaction was likely caused by the visits that [RGB] had with Mother.

. . .

59. On March 12, 2004, [RGB] asked to leave a supervised visit early. Mother became very upset and began to accuse the supervisor of training [RGB] to make such statements. The visitation supervisor attempted to terminate the visit, but Mother continued to escalate emotionally, threatening to sue the social worker and saying that she would talk to the Governor. [RGB] reacted by trying to reassure and placate both Mother and the visitation supervisor. [RGB] cried as the supervisor carried her back to the State Building where [RGB] was placed in an office. Mother followed [RGB] and supervisor back to the office where she created a scene, shouting and demanding to see [RGB]. After Mother finally left, [RGB] asked the visitation supervisor whether it was safe to leave.

. . .

57.[[5]] On March 18, 2004, the Court again suspended visits between Mother and [RGB] pending another court hearing.

. . .

59. On April 1, 2004, after a hearing, the Court concluded that further visits with Mother would be psychologically injurious to [RGB]. Visitations between [RGB] and Mother were suspended indefinitely.

60. Shortly after the visits with Mother were suspended, [RGB's] symptoms of distress and anxiety disappeared.

61. Mother has had no contact with [RGB] since March 12, 2004.

62. Over the years, Mother has substantially improved her circumstances. She has stopped abusing drugs and alcohol; her mental health condition has improved; she has required no hospitalization for mental health problems. Mother has consistently sought treatment and has taken medication when prescribed. Mother has found safe and stable housing, and has managed to maintain such housing for an extended period of time. She has terminated her relationship with an inappropriate, abusive partner. She has obtained and completed services, and has for the most part successfully completed the services required in her service plan.

63. Unfortunately[,] serious problems remain. Throughout the course of these proceedings, Mother has suffered from mental health disorders which seriously compromise her ability to provide appropriate care for [RGB].

64. Mother 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.

. . .

69. Mother does not understand or appreciate the impact that her own behavior has on [RGB]. She accepts little responsibility for [RGB's] problems and instead focuses on complaints and criticisms of others.

. . .

73. When visits with Mother were finally terminated, [RGB] was almost five. At that time, [RGB] was a very vulnerable child who suffered from anxiety, regressive behavior, negative psychological symptomatololgy [sic] and general emotional disruption. [RGB's] psychological distress threatened to interfere with her developmental growth and bonding abilities. [RGB's] psychological problems were primarily caused by stress generated by visits with Mother.

74. At the time that visits between Mother and [RGB] were terminated, the visits were causing injury to [RGB's] psychological capacity as evidenced by a

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[5] Several of the family court's FsOF are misnumbered, and several numbers appear more than once. The original numbering is preserved here.

> substantial impairment in [RGB's] ability to function. Had the visits with Mother continued, [RGB] would have suffered continued psychological harm which would have resulted in serious injury to her, delaying physical, emotional, social, and/or psychological development with long term negative consequences for the child.
>
> 75. Despite numerous and extensive efforts by many service providers and therapists, it appears unlikely that the mother/daughter relationship between Mother and [RGB] will improve. Returning [RGB] to Mother's home and care would be harmful to [RGB].
>
> 76. [RGB] is now almost six. After visits with her mother terminated, [RGB's] symptoms of psychological distress have abated and she is doing very well.
>
> 77. Under the circumstances presented in this case, reasonable efforts were made by the DHS to make it possible for [RGB] to return to her mother's home.
>
> 78. Mother and Father[[6]] are not currently able to provide [RGB] with a safe family home, even with the assistance of a service plan. It is not reasonably foreseeable that either parent will become able to provide [RGB] with a safe family home within a reasonable period of time.
>
> 79. The proposed permanent plan is in the best interests of [RGB].

The family court concluded that "[i]t is in the best interests of [RGB] that permanent custody of the child be awarded to DHS." The family court ordered, in pertinent part:

> 2. Permanent custody of [RGB] is awarded to the Department of Human Services pursuant to H.R.S. 587-73(b)(1) and existing parental rights of Mother and Father of [RGB] are terminated.
>
> . . .
>
> 4. It is in [RGB's] best interests that the participation of Mother 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.
>
> . . .
>
> 7. <u>G. Kay Iopa, stand-by counsel for Mother, is discharged</u>. Based on representations as to changes in her resource status, if Mother 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 Court immediately.

(Emphasis added).

### B. Mother's difficulties with counsel

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[6] Father was defaulted from the proceedings in October 2001.

As stated in the family court's March 11, 2005 FsOF, "[t]hroughout this proceeding, Mother has had difficulties with her attorneys." Mother's first attorney, Cynthia Linet, withdrew as counsel for Mother on November 30, 2001. Mother then proceeded pro se. However, during an April 4, 2002 hearing, the family court awarded DHS foster custody of RGB. Mother subsequently applied for court-appointed counsel on April 8, 2002, and the family court appointed Alexander Thoene, Jr. (Thoene) as counsel for Mother. Mother, however, continued to submit documents to the court on her own behalf, including an Objection to Proposed Order dated April 19, 2002.

On July 8, 2002, Mother filed a motion to dismiss Thoene as counsel and to proceed pro se. In its order following a hearing on August 8, 2002, the family court denied Mother's motion to dismiss Thoene, but allowed Mother to proceed pro se with Thoene as standby counsel.

On May 15, 2003, G. Kay Iopa (Iopa) was substituted "as counsel" for Mother, effective May 1, 2003. Mother continued to file motions on her own behalf, including a May 21, 2003 Emergency Motion to Advance June 13, 2003 Hearing on Mother's Motion to Restore Visitation.

It appears that Mother subsequently had difficulties with Iopa. On July 21, 2003, the family court held a hearing and issued an order that noted, "Mother can obtain a new lawyer or apply for court appointed counsel. If she obtains a new counsel,

Ms. Iopa will be [discharged]." In a hearing on July 12, 2004, Mother made an oral motion for a new attorney. In its written order, which was not issued until March 7, 2005, the family court denied Mother's oral motion and noted her objection for the record. The family court noted:

> [Iopa] was appointed as stand by counsel as [Mother] wanted to represent herself. At times [Mother] represented herself and at times relied on Ms. Iopa. The court accepted this as the court felt it was useful. The court has seen nothing to indicate Ms. Iopa [has] not been effective in her representation and notes Ms. Iopa has worked hard to assist [Mother]. Little purpose would be served to appoint a new attorney. The new attorney would have a difficult time getting up to speed due to the volume of documents in this case & does not see how new counsel could provide better representation.

On September 17, 2004, Mother filed a pro se Motion for Dismissal of Counsel and Continuance of September 20 [H]earing and to Grant Continuance to Submit Witness Letters. Mother stated:

> 3. Assigned counsel, Kay Iopa, has told me repeatedly since July 29, 2004 that "it is beyond my scope of duties as stand-by counsel" to help locate, contact, or interview witnesses.
>
> 4. By contrast, a) the lawyer has made decisions without my knowledge or consent b) Kay Iopa's assignment to this case has caused lawyers who were interested in this case to decline, because they choose not to compete with the lawyer assigned as counsel.
>
> 5. Affiant has enough money today to secure independent counsel.
>
> 6. Absence of counsel would encourage new counsel to help me conclude this case effectively, and therefore would in fact be more time and cost effective.
>
> 7. Affiant compels the court to note that this lawyer, and counsel preceding assigned by the court, have neglected proper counsel or representation and proof of my ability to work with another lawyer needs to be considered.
>
> 8. Volunteer lawyer prior to that was effective in returning my child home, then was unable to continue pro bono.
>
> . . .

On October 21, 2004, Mother submitted an Application for Court-Appointed Counsel. A handwritten note on her application states, "Application denied[.] Ms. Iopa will continue as stand by counsel until further order."

**C. Subsequent proceedings**

Following the six-day permanency plan hearing, the family court issued its March 11, 2005 Termination Order, in which the court discharged Iopa.[7] On March 29, 2005, Mother filed an Application for Court-Appointed Counsel. The family court approved the application the same day, and appointed Carrie M. Yonemori (Yonemori) as Mother's counsel effective March 29, 2005. Yonemori appears to have been appointed as regular, as opposed to standby, counsel.

There are no filings in the record from either Yonemori or Mother from March 29, 2005 to March 10, 2006.[8] The record is silent during the intervening period, with the exception of several orders of the family court continuing permanent custody

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[7] In its Termination Order, the family court noted that it made its decision to discharge Iopa "[b]ased on representations as to changes in [Mother's] resource status." Although we do not have a transcript of the proceedings to indicate what was represented to the family court, Mother's prior statements to the family court concerning her resources include her September 17, 2004 Motion for Dismissal of Counsel in which she stated, "[a]ffiant has enough money today to secure independent counsel[,]" and a February 1, 2005 Pro Se Closing Argument and Request in which Mother stated, "[m]y financial future is more secure based on an inheritance from my parents, currently under probate in Montgomery County, Pennsylvania."

[8] As explained further, infra, on March 17, 2006, Yonemori filed a declaration stating that she had attempted to file a Notice of Appeal "on or about September 30, 2005," but that the documents were returned to her for corrections. Yonemori asserted that she "completely forgot about making the appropriate corrections for this case."

and various filings on the part of RGB's guardian ad litem and DHS.

For example, on August 3, 2005, DHS filed a report to the family court in which it noted that RGB was "doing well in her current placement[,]" but that Mother'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 until Mother's appeal was resolved, and noted that delaying the adoption "is certainly not in the child's best interest[.]" On January 17, 2006, DHS filed a report to the family court in which it noted that RGB "continues to do very well in the care of foster parents, . . . whom she has resided with for nearly four years." DHS further noted that RGB's foster parents were "ready to proceed with the adoption process[.]"

On March 10, 2006, Mother filed a pro se Motion for Relief from Judgment with regard to the family court's March 11, 2005 Termination Order, pursuant to HFCR Rule 60.[9] Mother submitted an affidavit along with the motion, in which she declared:

> 1. I am the mother of [RGB];
> 2. The court made a finding to terminate my parental rights on March 11, 2005.
> 3. Counsel assigned by this court remains ineffective to bring this matter to justice;
> 4. The court made it's finding based on false and inaccurate information;
> 5. Based on the mistake, inadvertence, surprise,

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[9] As discussed more fully in Part III(B), infra, HFCR Rule 60(b) permits a party, within certain limitations, to seek relief from a judgment or order for reasons of mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, and "any other reason justifying relief[.]"

> excusable neglect, fraud, misrepresentation, professional error, misconduct and/or newly discovered evidence, I now bring this motion.

On March 13, 2006, Yonemori filed a Notice of Appeal of the Termination Order on Mother's behalf.[10] On March 15, 2006, Yonemori also filed a Motion for Relief from the March 11, 2005 Order, pursuant to HFCR Rule 60, on Mother's behalf. In Yonemori's Declaration of Counsel in support of the motion, she asserted:

> 2. I am bringing this Motion . . . because [Mother] believes that there has been (a) mistake, inadvertence, and/or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); and (c) fraud, misrepresentations and/or other misconduct by the state.
>
> 3. [Mother] states that the court's final judgment is based on false testimony and deficient documents, some of which she was not able to properly cross-examine, and therefore through mistake, inadvertence, and/or excusable neglect the court has rendered an erroneous decision which must be corrected.
>
> 4. Under-signed was appointed as counsel to [Mother] after the ten day time allowed for in Rule 59(b) and therefore she and [Mother] did not have an opportunity to discuss [Mother's] concerns and/or go through the voluminous record in this case.
>
> 5. [Mother] believes that the State's witnesses, documents, and testimony were fraudulent, grossly misrepresented facts, and constituted purposeful misconduct.
>
> 6. [Mother] has attempted to bring up these points and arguments, as well has [sic] have her side of the case heard, to the court in the past by [sic]

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[10] On June 28, 2006, this court dismissed the appeal for lack of jurisdiction, stating:

> Mother-Appellant did not file a motion for reconsideration within twenty days after entry of the March 11, 2005 findings of fact, conclusions of law, and order, as [Hawaiʻi Revised Statutes (HRS)] § 571-54 (1993) required. Therefore, Mother-Appellant 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.

was prevented from doing so by her attorneys.

On March 17, 2006, Yonemori, on behalf of Mother, filed two separate motions to extend time to file and docket the record on appeal. Although both motions were file-stamped March 17, 2006, the first was dated September 27, 2005, and the second was dated March 10, 2006.

In her Declaration of Counsel accompanying the motion dated September 27, 2005, Yonemori declared:

> 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 late March and August of this year, 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 the appellant, who is understandably quite anxious about this case.

In her Declaration of Counsel accompanying the motion dated March 10, 2006, Yonemori declared:

> 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 Family Court Clerk Jodi Leialoha 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.
>
> 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 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.
>
> 7. That the delays in filing all papers in this case are due to my irresponsibility and are in no way caused by the appellant, who is understandably quite anxious about this case.

. . .

The family court appears to have been concerned that Yonemori could have a conflict of interest in representing Mother in an appeal alleging ineffective assistance of counsel. The family court held a hearing on April 6, 2006 and found that, "[b]ased upon [Mother's] representations in court, the court finds she understands the potential conflict of interest between her & her current counsel & waives any conflict of interest." The family court further noted, "[Mother] waives any conflict of interest as to her current counsel."

On May 23, 2006, DHS filed a report to the family court, in which it noted that "[RGB] continue[d] in her placement" where she "has been [] since April 4, 2002[,]" that she "wants to remain there forever because she loves her foster parents whom she refers to as 'mom' and 'dad[,]'" and that "she wants to be adopted as soon as possible[.]"

On June 2, 2006, Mother, through Yonemori, filed a document styled "Specifications on Rule 60 Motions."[11] Yonemori asserted that Mother had verbally agreed to consolidate the two previously-filed Rule 60 motions. Yonemori also provided some argument on Mother's previous assertions that she was entitled to relief due to "(1) mistake, inadvertence, and/or excusable neglect; (2) newly discovered evidence which by due diligence

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[11] Although this document is file-stamped "May 33, 2006," a hand-written date of "June 2" appears above the stamped date.

could not have been discovered in time to move for a new trial under Rule 59(b); and (3) fraud, misrepresentations and/or other misconduct by the state."

With regard to Mother's assertion that she was entitled to relief due to mistake, inadvertence and/or excusable neglect, Mother, through Yonemori, asserted that the court's judgment was based on false or erroneous testimony and documents. Mother further asserted that she was prejudiced by the ineffective assistance of Thoene because she was only allowed to communicate with him in writing, and of Iopa because they disagreed as to case direction. Mother further asserted that Yonemori's "failure to file a timely appeal and meet with [Mother] in 2005" had delayed resolution of the case.

With regard to Mother's assertion that she was entitled to relief due to newly discovered evidence, Mother asserted that she and RGB were beneficiaries of her parents' trust, which had been the subject of litigation at the time of the permanency plan proceedings. Mother further asserted that termination of her parental rights would impact RGB's inheritance rights, and that any "perceived deficiencies" in Mother's care of RGB would be corrected when she received the trust proceeds.

With regard to Mother's assertion that she was entitled to relief on the basis of fraud, misrepresentations and/or misconduct by the State, Mother asserted that "State's witnesses, documents and testimony were fraudulent, grossly misrepresented

facts, and constituted purposeful misconduct."

Also on June 2, 2006, Yonemori filed a Motion for Withdrawal and Substitution of Counsel. In Yonemori's Declaration of Counsel in support of the motion, Yonemori asserted:

> 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 [Mother].
>
> 3. [Mother's] Rule 60 motion alleges in part ineffective assistance of counsel. I am one of the three attorneys who may not have effectively assisted [Mother].
>
> 4. [Mother] verbally executed a waiver of conflict with me at the last court hearing.
>
> 5. I do not want to see [Mother] prejudiced in anyway [sic] by her waiver and I have spoken to her about the importance of preserving all possible grounds of appeal. [Mother] stated that it was not her intent that this waiver be "permanent."
>
> . . .
>
> 10. [Mother] is in contact with an attorney (in California, but also still actively licensed in Hawaii) 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 [Mother's] counsel.

The family court held a hearing on June 2, 2006 and, in its corresponding June 26, 2006 order, found that "due to [Mother's] current appeal, this court lacks jurisdiction to act on her Rule 60(b) motion and motion for withdrawal and substitution of counsel[.]" The court "[held] in abeyance any ruling on [Mother's] Rule 60(b) motion or motion for withdrawal and substitution unless moved on; and directs her and her counsel to address these to the appellate court." On June 28, 2006, this court dismissed the appeal for lack of jurisdiction. See n.10, supra.

Subsequently, on September 28, 2006, the family court orally denied the motions for relief and Yonemori's motion to withdraw. On October 17, 2006, prior to the issuance of the family court's written order, Mother appealed pro se from the family court's oral announcement denying her motions for relief. The ICA dismissed Mother's appeal for lack of jurisdiction, "because the family court ha[d] not reduced the September 28, 2006 oral announcement to an appealable written order."

On November 9, 2006, the family court issued its written order, denying Mother's pro se motion and Yonemori's motion for relief, as well as Yonemori's motion for withdrawal and substitution of counsel. The court found that Yonemori's motion for relief was untimely. With regard to Mother's pro se motion, the family court found:

> (1) the motion only requests general relief and Rule 60(b) requires particularity with respect to [] some of the relief being sought in this motion; (2) the motion fails to provide any new evidence to support a basis for relief under Rule 60(b), Hawaii Family Court Rules; (3) as to the relief sought, the court afforded Mother . . . extensive time at trial to present evidence to support the relief currently being requested and to address all of the issues for which relief is being sought in this motion; (3) [sic] the court appointed legal counsels to assist Mother . . . to the extent she was willing to work with the legal counsels appointed; (4) Rule 6, Hawaii Family Court Rules 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 has been long outstanding causing delay in the final resolution of the case and this matter needs to be put to rest[.]

The family court also found:

> Mother['s] . . . parental rights have been terminated and due to this status and the possibility of

> dissemination of these confidential records, the court finds that future court records are not currently available to Mother . . . ; provided however that court records will be made available for any appellate review of this decision.

Mother did not appeal the family court's written order.

On February 6, 2007, Mother's new counsel, James Ireijo,[12] filed a motion in the family court 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." The motion cited HFCR Rule 7(b), and was supported by a Declaration of Counsel, which asserted that Mother was not afforded competent legal counsel during several "pivotal" moments in the case, and was therefore denied her due process rights and equal protection of the law under the United States and Hawaiʻi Constitutions. Specifically, the declaration alleged that Mother was not represented by competent counsel and was denied her due process rights by:

> the Order Denying Mother's Motion to Reconsider Denial of Oral Motion To Continue Trial; and Exclusion of Exhibits Filed December 23, 2004, filed on March 7, 2005,[[13]] **and/or**, the Order Denying Mother's Motion to

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[12] It is unclear from the record when or how Yonemori withdrew from the case.

[13] On December 23, 2004, Mother filed a Motion to Reconsider Denial of Oral Motion to Continue Trial, and Exclusion of Exhibits. Mother requested that the court "[c]ontinue the evidentiary portion of the proceedings to allow MOTHER to call additional witnesses, whose identities have been previously disclosed[,]" and "[t]o allow the admission into evidence, audio tapes prepared by MOTHER of parent/child visits and MOTHER's interactions with service providers." Mother's motion was supported by a Declaration of Counsel, in which Iopa attested:

> . . .
> 2. MOTHER has strongly expressed her dissatisfaction with the extent of information before the Court;
> 3. MOTHER wishes to bring additional witnesses,

> Reinstate Visitation Filed January 11, 2005, filed on March 7, 2005,[[14]] **and/or** at the time of entry of the Court's Findings of Fact, Conclusions of Law and Order filed on March 11, 2005.

(Emphasis in original).

The Declaration further asserted:

> [Mother] did not have competent or any counsel when her child was permanently removed or taken away by Order on March 11, 2005, thus, the lack thereafter of a fair and legal opportunity to have further evidence considered or not considered, as well as losing her right to appeal due to severe time constraints.

The Declaration did not specify what error, if any, occurred during the permanency plan hearing. The Declaration further asserted that denying Mother access to records available to the appellate court was "a direct violation of the right to due process[.]"

DHS filed a memorandum in opposition to Mother's motion on April 23, 2007. DHS objected to Mother's motion for relief as untimely and asserted that the motion lacked merit because "the record reflects that during the course of the case, Mother dictated who would represent her and how they would represent her

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> introduce audio tapes and augment her previous testimony;
> 4. MOTHER's desire is to provide the Court with a proper basis for its decision and to ensure a complete record; and
> 5. MOTHER seeks this additional opportunity as an accommodation for her established disability.

The family court issued its written denial of Mother's motion on March 7, 2005.

[14] On January 11, 2005, Mother filed a Motion to Reinstate Visitation. Mother's motion was supported by a Declaration of Counsel, in which Iopa stated that Mother was receiving care from Care Hawai'i and had been prescribed medication for anxiety, and that the YMCA was willing to supervise visits between Mother and RGB. The family court issued its written denial of Mother's motion on March 7, 2005.

and the court tried it's [sic] best to accommodate Mother and to ensure she had assistance even when she desired to represent herself pro se." DHS further asserted that "until the time Mother's parental rights were terminated, she had access to the court's records and files and any appeal would have been predicated upon the record up to the point of such termination."[15]

DHS argued that, "[a]t all relevant times herein Mother had competent representation, in that the court appointed counsel for Mother, or permitted Mother to proceed pro se if she could or appointed standby counsel to assist Mother in her case up and through the permanent plan hearing trial." DHS further argued that "Rule 60(b) should be used only where the relief will further justice without adversely affecting substantial rights of the parties. . . . it is clear the relief sought by this motion would adversely affect the child's substantial rights, and justice would not be served."

On April 24, 2007, more than two years after the filing of its Termination Order, the family court held a hearing on Mother's motion. The court denied the motion and all relief therein requested. The family court issued its written order on May 8, 2007, finding:

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[15] As discussed further, supra, it appears that Mother had full access to the court records in this case until a September 28, 2006 hearing before the family court, following which the family court issued its November 9, 2006 order restricting prospectively Mother's access to court records.

> A. As to Mothers [sic] claim that Mother lacked representation, the record clearly reflects that both Judges involved in this case made great effort to have Mother represented throughout the proceedings. The court accommodated Mother when she requested to have her counsel discharged and had standby counsel appointed to assist Mother throughout the case, all of which is reflected in the court's prior ruling contained in it's Findings of Fact, Conclusions of Law and Order filed March 11, 2005;
>
> B. The court adopts all of the facts, law and reasons cited in DHS' Memorandum in Opposition [to Mother's motion] . . .

On June 7, 2007, Mother filed a Notice of Appeal of the family court's May 8, 2007 order denying relief.

**D. ICA Appeal**

In her Opening Brief to the ICA, Mother, citing Mathews v. Eldridge, 424 U.S. 319 (1976) and Lassiter v. Department of Social Services, 452 U.S. 18 (1981), argued that the family court denied her constitutional due process rights by failing to provide her with competent counsel. Mother further argued that, because she did not have appointed counsel until "a mere 12 days before [Mother's] appeal period would run. . . . she lost her opportunity to have evidence reconsidered and effectively lost her right to file a timely appeal." Mother also argued that, by refusing to allow her to review the confidential records in this case, the family court deprived her of her due process right to a fair trial. Mother requested that the matter be remanded for "a new trial with competent counsel present at all stages of her new proceeding to prove that she is a competent and fit parent that has the ability to provide a safe family home." (Emphasis in

original).

In its Answering Brief, DHS argued that the family court did not abuse its discretion in its May 8, 2007 order denying relief. DHS argued that Mother's February 6, 2007 motion was not timely, because "it was not filed within one (1) year of the March 11, 2005 order terminating Mother's parental rights." DHS further argued that "there was no new evidence which would serve as a basis to re-open the case[,]" and that "Mother failed to present new evidence and/or arguments that could not have been presented at trial[.]"

DHS also argued that Mother's assertion that she was denied access to the record was without merit, because "the court did not prohibit Mother's access to records until September 28, 2006, . . . which was a year and a half after her parental rights were terminated, and six months beyond the time Mother would be permitted to file a Rule 60, HFCR motion . . . ." Finally, DHS argued that the analysis of Eldridge and Lassiter was inapplicable, because Mother "had counsel at all times during the pendency of this case[,]" and because she could not demonstrate substantial prejudice. In response to Mother's claim that she was denied time for her appellate counsel to file an appeal, DHS argued that "based upon the facts, it is Mother's own actions which caused a delay."

Mother subsequently filed a Reply Brief arguing:

> Her attorney selected by the trial court was appointed so late that it was clearly foreseeable that the 30

> day appeal period would run. The responsibility in initially correcting this problem laid with Judge Gaddis, who initiated and created the problem at Mother's expense. . . . Judge Gaddis could have made the appointment of new counsel **while** extending the due date to file a Notice of Appeal. Instead, he made a very late appointment of new counsel and jeopardized the legal and appeal interests of Mother. The trial judge not only filed an order against Mother, he failed to also protect Mother's concomitant due process interests in ensuring that she would be able to **timely file** a new Notice of Appeal. This is a clear violation of the due process rights of Mother that was easily preventable by the trial court.

(Emphasis in original).

Mother further asserted that "[a]s the trial court is responsible for **timely** appointing counsel, the court could have very easily extended the appeal due date or forewarned counsel of a pending notice of appeal due date." (Emphasis in original).

In its April 9, 2009 Summary Disposition Order (SDO), the ICA concluded that "the [f]amily [c]ourt did not err in declining to grant Mother relief based on ineffective assistance of counsel." In re RGB, No. 28582, 2009 WL 953392 at *2 (App. Apr. 9, 2009). The ICA further noted that "[f]rom Mother's point-of-view, this appeal concerns the termination of her parental rights with respect to her child . . . . However, the Termination Order is not before the court on this appeal." Id. at *1.

With regard to Mother's claim of ineffective assistance of counsel during the pre-termination period, the ICA noted:

> Mother fails to identify with specificity, however, at which points in the case that she was unconstitutionally deprived of access to competent counsel. It appears from the record that Mother was represented by appointed counsel or standby consulting counsel at all hearings leading up to the Termination

> Order. . . . More importantly, . . . Mother does not identify any specific error or omission of counsel during the events and proceedings which culminated in the Termination Order.

Id. at *2.

With respect to the post-termination time frame, the ICA noted:

> [T]his court is troubled by the impact of the Termination Order's immediate discharge of Mother's standby attorney, particularly in light of the [f]amily [c]ourt's assessment of Mother's mental health status . . . That said, Mother 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 concluded by stating:

> We consider, by analogy, the standard that is applied to claims of ineffective assistance of appellate counsel in criminal matters. . . . In this case, Mother 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. For these reasons, we conclude that the Family Court did not err in declining to grant Mother relief based on ineffective assistance of counsel.

Id. (Citation omitted).

With regard to Mother's claim that her due process rights were violated by being denied access to the record in this case, the ICA held:

> This limitation appears to be supported by HRS § 587-73(b)(4) (2006) and is grounded in the Family Court's prior final decision that Mother had no further parental rights or interests in the proceedings. Mother has not informed this court of any documents or category of documents that she reasonably requested access to or why she needs full access to the post-November 6, 2006 record in this case. Mother has failed to identify any prejudice stemming from this limitation. . . . We conclude that the Circuit Court did not err in limiting Mother's access to the post-November 6, 2006 confidential

> record in this case.

Id. at *3.

The ICA filed its judgment affirming the family court's May 8, 2007 order on May 21, 2009. Mother timely filed an application for writ of certiorari on August 13, 2009. DHS filed its response on August 28, 2009.

In her application, Mother "request[ed] the Court to apply or formulate a family court standard of the correct remedy for 'ineffective assistance of counsel' and if found, to grant a new trial." Mother further asserted that "[i]t is legally impossible to raise any points until the records are released for review."

In its Objection, DHS argued that the ICA's analogy to the criminal standard for ineffective assistance of counsel was appropriate. DHS further argued that Mother had full access to all records upon which an appeal would have been based.

## II. Standard of Review

The family court's denial of a motion under HFCR Rule 60(b)(6) is reviewed for abuse of discretion. Pratt v. Pratt, 104 Hawaiʻi 37, 42, 84 P.3d 545, 550 (2004). As the ICA noted in Hayashi v. Hayashi, 4 Haw. App. 286, 666 P.2d 171 (1983):

> [s]ince 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.

Id. at 291, 666 P.2d at 175 (citations omitted).

An "abuse of discretion occurs where the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Buscher v. Boning, 114 Hawaiʻi 202, 211, 159 P.3d 814, 823 (2007) (quoting Office of Hawaiian Affairs v. State, 110 Hawaiʻi 338, 351, 133 P.3d 767, 780 (2006)). In addition, "[t]he burden of establishing abuse of discretion is on appellant, and a strong showing is required to establish it." State v. Hinton, 120 Hawaiʻi 265, 273, 204 P.3d 484, 492 (2009) (quoting State v. Wong, 97 Hawaiʻi 512, 517, 40 P.3d 914, 919 (2002)).

## III. Discussion

In Mother's February 6, 2007 motion, Mother asserted that she was deprived of effective assistance of counsel in both the pre- and post-termination proceedings, in violation of her due process and equal protection rights under the United States and Hawaiʻi Constitutions. For the reasons set forth below, we construe Mother's motion as a HFCR Rule 60(b)(6) motion for relief and conclude that the family court did not abuse its discretion in denying the motion.

### A. The family court properly concluded that Mother had a due process right to appointed counsel during the termination proceedings

The United States Constitution does not require the

appointment of counsel in all proceedings involving the potential for termination of parental rights. Lassiter, 452 U.S. at 31. Rather, due process requires that "[a] parent's interest in the accuracy and justice of the decision to terminate his or her parental status" be balanced against the State's interest in the welfare of the child and the economy of the proceedings, as well as against the risk that "a parent will be erroneously deprived of his or her child because the parent is not represented by counsel." Id. at 27-28 (citing Eldridge, 424 U.S. at 335). In Lassiter, the Court held that:

> [t]he dispositive question . . . is whether the three Eldridge factors,[[16]] 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.

Id. at 31.

This court has not determined whether article 1, section 5 of the Hawaiʻi Constitution affords parents a due process right to counsel in all termination proceedings.[17] However, in In re Doe, 99 Hawaiʻi 522, 533, 57 P.3d 447, 458 (2002) (citation omitted), we held that article 1, section 5 of

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[16] In determining what due process requires under Eldridge, the court must consider "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." See Lassiter, 452 U.S. at 27.

[17] Article 1, section 5 of the Hawaiʻi Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws[.]"

the Hawai'i Constitution provides parents a "substantive liberty interest in the care, custody, and control of their children," independent of the United States Constitution, and that the state must provide parents "a fair procedure" for the deprivation of that liberty interest.

In Doe, we concluded that "parents who are in need of an interpreter because of their inability to understand English are entitled to the assistance of one at any family court hearing in which their parental rights are substantially affected." Id. at 526, 57 P.3d at 451. We further concluded that the determination of whether parental rights are substantially affected, such that due process is implicated, must be made on a case-by-case basis. Id. at 534, 57 P.3d at 459 (citing Lassiter, 452 U.S. at 32).

Under the circumstances of Doe, however, we concluded that the Appellant-Mother had failed to demonstrate her need for an interpreter, and failed to demonstrate that she was "substantially prejudiced" by the absence of an interpreter. Id. at 526, 57 P.3d at 451. Accordingly, we affirmed the order of the circuit court, which granted foster custody of the children to DHS. Id.

In In re "A" Children, 119 Hawai'i 28, 46, 193 P.3d 1228, 1246 (App. 2008), the ICA noted that the appointment of counsel remains discretionary under HRS § 587-34, which provides, in pertinent part:

> **Guardian ad litem; court appointed counsel.** (a) The 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.

HRS § 587-34 (2006)(emphasis added).

The ICA therefore applied the case-by-case approach adopted in Lassiter, and concluded that a father was deprived of his due process right to appointed counsel under the United States Constitution, where counsel was not appointed until two weeks before the termination proceedings. 119 Hawai'i at 59-60, 193 P.3d at 1259-60. Although the ICA expressed "grave concerns" about the case-by-case approach, it declined to adopt a bright-line rule requiring appointment of counsel for indigent parents in all termination proceedings. Id.

In this case, the family court immediately appointed counsel upon Mother's initial application. Thereafter, Mother was represented at all times by counsel or standby counsel, except when Mother expressly requested to proceed pro se, and during the period between March 11, 2005 (when the family court discharged Iopa in its Termination Order) and March 28, 2005 (when the family court appointed Yonemori). Thus, in electing to appoint counsel, it appears that the family court applied the Lassiter balancing test, and concluded that the balance of interests required that counsel be appointed for Mother in order

to satisfy the demands of due process under the United States Constitution. We conclude, with respect to those aspects of the proceedings that Mother seeks to challenge here, that the family court's determination was correct given the risk that failure to appoint counsel would lead to an erroneous decision. See Lassiter, 452 U.S. at 27.

Because the family court properly determined that Mother 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.[18]

**B. HFCR Rule 60(b)(6) is, in the circumstances of this case, a proper vehicle for raising ineffective assistance of counsel in proceedings concerning the termination of parental rights**

This appeal requires us to consider whether HFCR Rule 60(b)(6) (hereinafter "Rule 60(b)(6)") is an appropriate vehicle for raising ineffective assistance of counsel in proceedings concerning the termination of parental rights. We note at the outset that Mother's February 6, 2007 motion to the trial court, styled a "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[,]"

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[18] We therefore respectfully disagree with the dissent's assertion that we hereby "den[y] indigent persons access to justice in parental termination actions" or that we have adopted a "discretionary appointment approach[.]" Dissenting Opinion at 1, 46. We recognize instead that, because the family court properly determined that Mother had a due process right to appointed counsel under the U.S. Constitution, the determination of what protections the Hawaiʻi Constitution provides to indigent parents is not properly before us.

stated only that she sought relief pursuant to HFCR Rule 7(b), which is a general rule regarding pleadings and the form of motions. However, in Mother's Opening Brief to the ICA, she asserted that the "standard of review for a denial of a motion for post-decree relief is the abuse of discretion standard." In her Reply Brief, Mother described the "motion herein" as one under Rule 60(b). Because a Rule 60(b)(6) motion appears to have been the only motion for post-decree relief available to Mother under the applicable rules,[19] and because the family court and the ICA both appeared to construe Mother's motion as a Rule 60(b)(6) motion, we review Mother's assertions under the principles applicable to Rule 60(b)(6) motions.

**1. Principles applicable to HFCR Rule 60(b)(6) motions**

"Rule 60(b)(6) permits the trial court in its sound discretion to relieve a party from a final judgment." <u>Hayashi</u>, 4 Haw. App. at 290, 666 P.2d at 174 (citing <u>Isemoto Contracting Co. v. Andrade</u>, 1 Haw. App. 202, 205, 616 P.2d 1022, 1025 (1980)).

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[19] At the time the Termination Order was filed, it was subject to appeal only following the family court's decision on a motion for reconsideration, which was required to be filed within twenty days of the entry of the order. HRS § 571-54 (2005). However, a 2006 amendment to HRS § 571-54, which was designed to "speed the resolution of child protective services cases," eliminated the requirement that a motion for reconsideration precede an appeal. S. Stand. Comm. Rep. No. 2245, in 2006 Senate Journal, at 1132. Nevertheless, HFCR Rule 72(b) requires that a notice of appeal be filed within 30 days of a final decision or order. Accordingly, a direct appeal was not available to Mother at the time she filed her February 6, 2007 motion.

Similarly, a motion for new trial was no longer available to Mother, because HFCR Rule 59(b) requires that a motion for new trial be made within 10 days after the entry of judgment. In addition, a motion for relief from judgment under Rule 60(b)(1), (2), or (3) must be made not more than one year following judgment, and thus was no longer available to Mother. Finally, although relief under Rule 60(b)(4) and (5) is not subject to the one-year limitation, those rules do not appear to have been applicable to Mother's circumstances.

HFCR Rule 60(b) provides, in pertinent 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 . . . , 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 <u>(6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time</u>, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceedings was entered or taken.

(Emphasis added).

Although this court has not addressed the requirements for bringing a HFCR Rule 60(b)(6) motion, the ICA has explained that, under HFCR Rule 60(b)(6), a movant must meet three threshold requirements:

> 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.
>
> 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.

<u>Hayashi</u>, 4 Haw. App. at 290-91, 666 P.2d at 174-5 (internal citations omitted).

In <u>Hayashi</u>, the ICA considered whether a six-year delay in filing a Rule 60(b)(6) motion was justified by any "exceptional circumstances" which would "mitigate the lengthy delay in bringing the motion." 4 Haw. App. at 291, 666 P.2d at 175. <u>Hayashi</u> involved Wife's allegation that Husband's coercion led her to execute a property settlement agreement (PSA) upon their divorce. <u>Id</u>. at 288, 666 P.2d at 173. In her HFCR Rule 60(b)(6) motion seeking relief from the PSA, Wife claimed that "before and after execution of the PSA and entry of the decree, Husband exerted extreme influence over her so that she was acting under coercion and emotional duress when she signed the PSA[,]" and that "her dominated situation created the extraordinary circumstances justifying relief." <u>Id</u>. at 291, 666 P.2d at 175.

The family court found no evidence of extraordinary circumstances in the record to justify Wife's six-year delay in filing an HFCR Rule 60(b)(6) motion. <u>Id</u>. The ICA agreed, and noted that Wife had failed to prove the existence of extraordinary circumstances because she had been represented at all times by legal counsel who was able to protect her from any coercive action, and because she had consulted with several other lawyers prior to signing the PSA. <u>Id</u>. Thus, while a six-year delay in filing a Rule 60(b)(6) motion was not per se unreasonable, Wife's motion was deemed untimely. <u>Id</u>.

Accordingly, the ICA held that the family court did not abuse its discretion in denying Wife's motion. Id.

Moreover, in Nakata v. Nakata, 3 Haw. App. 51, 56, 641 P.2d 333, 336 (App. 1982), the ICA held that HFCR Rule 60(b)(6) "should be used only where the relief will further justice without adversely affecting substantial rights of the parties." (citing 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil §§ 2857, 2864 (1st ed. 1973)). The ICA further held that HFCR Rule 60(b) is not intended to "reliev[e] a party from free, calculated, and deliberate choices he, she, or it has made." Id. at 56, 641 P.2d at 336 (citing 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil § 2864 (1st ed. 1973); 46 Am. Jur. 2d, Judgments, § 688 (1969)).

In what the ICA construed to be a HFCR Rule 60(b) motion, id. at 55, 641 P.2d at 336, Wife sought relief from a divorce decree that gave Husband the option to purchase the marital residence at the conclusion of a six-month period if Wife failed to comply with a payoff provision, id. at 52-53, 641 P.2d at 334-35. Wife argued that "the court had the power to and should extend the six months to allow her to purchase the house upon the favorable terms stated in the decree[,]" id. at 53, 641 P.2d at 335, and the family court granted her relief. Id. at 53-54, 641 P.2d at 335. However, the ICA deemed Wife's HFCR Rule 60(b) claim "excessive," and concluded that the family court

abused its discretion in granting Wife relief. Id. at 51, 56, 641 P.2d at 334, 336.

**2. The use of Rule 60(b)(6) as a vehicle to raise ineffective assistance of counsel in termination of parental rights cases**

A majority of states now routinely appoint counsel for indigent parents in termination of parental rights cases, and have concluded that the right to counsel includes a right to effective counsel. See Susan Calkins, Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge for Appellate Courts, 6 J. App. Prac. & Process 179, 193-99 (2004). However, state courts have struggled to determine the proper procedural vehicle for raising ineffective assistance of counsel in termination of parental rights proceedings. See id. at 199.

A majority of jurisdictions has concluded that direct appeal is the most appropriate method for raising ineffective assistance of counsel in termination proceedings, due to the particular need for expeditious resolution and finality in child custody disputes. See, e.g., State ex rel. Juvenile Dep't of Multnomah County v. Geist, 796 P.2d 1193, 1201 (Or. 1990); In re James W.H., 849 P.2d 1079, 1080 (N.M. Ct. App. 1993); N.J. Div. of Youth & Family Servs. v. B.R., 929 A.2d 1034, 1040 (N.J. 2007). Where an appeal of an order terminating parental rights has not been timely filed, some jurisdictions allow for an enlargement of the time for filing an appeal upon a showing of good cause. See, e.g., In re A.J., 143 P.3d 1143, 1146 (Colo.

Ct. App. 2006).

California allows a parent to raise ineffective assistance of counsel in a petition for a writ of habeas corpus. In re Paul W., 60 Cal. Rptr. 3d 329, 333 (Cal. Ct. App. 2007) (citing In re Kristin H., 54 Cal. Rptr. 2d 722, 725 (Cal. Ct. App. 1996)). However, other jurisdictions have concluded that habeas corpus is not the appropriate vehicle to collaterally attack a judgment terminating parental rights on the basis of ineffective assistance of counsel because it would increase uncertainty in child custody proceedings and thereby limit the possibility of adoption. See, e.g., In re Jonathan M., 764 A.2d 739, 751-52 (Conn. 2001); see also Lehman v. Lycoming County Children's Servs. Agency, 458 U.S. 502, 513-14 (1982) (holding that federal habeas corpus may not be used to litigate constitutional issues in child-custody matters because "[t]he State's interest in finality is unusually strong in child-custody disputes. The grant of federal habeas would prolong uncertainty for children . . . possibly lessening their chances of adoption.").

Finally, some jurisdictions allow a claim of ineffective assistance of counsel to be raised under rules similar to HFCR Rule 60(b)(6). See Ex parte E.D., 777 So.2d 113 (Ala. 2000); In re Georgette, 768 N.E.2d 549, 557 (Mass. App. Ct. 2002). In Ex parte E.D., the Alabama Supreme Court held that "a [Alabama Rules of Civil Procedure (ARCP)] Rule 60(b) motion,

under certain circumstances, . . . can be an appropriate means by which a parent facing the termination of parental rights can present claims of ineffective assistance of appointed counsel." 777 So.2d at 116. In that case, a mother's parental rights were terminated, and her trial counsel subsequently withdrew from the case. Id. at 114. The court appointed a new attorney for the purpose of appeal and, on appeal, the Alabama Court of Civil Appeals affirmed the termination order. Id. Less than 60 days later, the mother filed a motion pursuant to ARCP Rule 60(b)(6), alleging ineffective assistance of trial counsel. Id.

ARCP Rule 60(b)(6) is nearly identical to HFCR Rule 60(b)(6), and "permits a civil litigant to collaterally attack a civil judgment" within a "reasonable time." Id. at 116. The Alabama Supreme Court concluded that:

> [w]hat constitutes a "reasonable time" depends on the facts of each case, taking into consideration the interest of finality, the reason for the delay, the practical ability to learn earlier of the grounds relied upon, and the prejudice to other parties.

Id. (quoting Ex parte W.J., 622 So.2d 358, 361 (Ala. 1993) (quotation marks omitted)).

Weighing the "drastic effect of the termination of parental rights against the need for finality in the ultimate disposition of questions regarding parental rights[,]" the Alabama Supreme Court held that the mother's Rule 60(b)(6) motion, filed within 60 days of the appellate court's judgment affirming the termination order, was filed within a "reasonable

time." Id.

In contrast, in In re Georgette, the Appeals Court of Massachusetts noted that a motion raising ineffective assistance of trial counsel and made pursuant to Massachusetts Rule of Civil Procedure (MRCP) Rule 60(b)(6) "should be granted only in extraordinary circumstances, which are not present when the allegedly aggrieved party could have reasonably sought relief by means of direct appeal." 768 N.E.2d at 557. In that case, a father's parental rights were terminated, and his two daughters brought a MRCP Rule 60(b)(6) motion for a new trial, alleging that their appointed trial counsel was ineffective. Id. at 551. Although the court did not expressly reject MRCP Rule 60(b)(6) as a vehicle for raising ineffective assistance of counsel, it rejected the daughters' motion as an "improper effort to obtain relief." Id. at 557. The court further noted that:

> If cases are to have finality, the operation of rule 60(b) must receive "extremely meagre scope." Rule 60 is to litigation what mouth-to-mouth resuscitation is to first aid: a life-saving treatment, applicable in desperate cases. Achieving finality and minimizing delay and uncertainty are appropriate considerations when acting on any rule 60(b) motion; they are prime considerations . . . when the rights, interests, and welfare of children in custody and adoption proceedings are involved.

Id. at 557-558 (quotation marks, ellipses and citations omitted).

Recognizing that Mother cannot pursue any other avenue of relief here, we conclude that Rule 60(b)(6) was an appropriate vehicle for raising ineffective assistance of counsel in the

circumstances of this case.[20]

### C. We will review claims of ineffective assistance of counsel in termination of parental rights cases to determine whether fundamental fairness was compromised

State courts have also applied varying tests for determining whether appointed counsel in a termination of parental rights case was ineffective. A majority of states has adopted the standard for ineffective assistance of counsel in criminal cases that was announced in Strickland v. Washington, 466 U.S. 668, 687 (1984): "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense."[21] See, e.g., State v. T.L., 751 N.W.2d 677, 685 (N.D.

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[20] We note that RGB has not yet been adopted, and that this case is distinguishable from one in which adoption has already occurred. Our conclusion therefore 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 place.

[21] In State v. Antone, 62 Haw. 346, 615 P.2d 101 (1980), we articulated the standard under the Hawaiʻi constitution for reviewing ineffective assistance of counsel claims in criminal cases 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.

Id. at 348-49, 615 P.2d at 104 (citations omitted); see Dan v. State, 76 Hawaiʻi 423, 427, 879 P.2d 528, 532 (1994) ("no showing of 'actual' prejudice is required to prove ineffective assistance of counsel" in a criminal case) (quoting Briones v. State, 74 Haw. 442, 464, 848 P.2d 966, 977 (1993)).

With regard to ineffective assistance of appellate counsel in the criminal context, this court has held that, "[i]f . . . 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 467, 848 P.2d at 978. Where appellate counsel's ineffectiveness results in the failure to timely

2008); N.J. Div. of Youth & Family Servs. v. B.R., 929 A.2d 1034, 1038 (N.J. 2007); In re C.H., 166 P.3d 288, 290-91 (Colo. Ct. App. 2007). Aside from cases in which prejudice is presumed,[22] courts applying the Strickland standard in termination of parental rights cases rarely find ineffectiveness. Calkins, 6 J. App. Prac. & Process at 215.

Other jurisdictions apply the "fundamental fairness" test announced in State ex rel. Juvenile Department of Multnomah County v. Geist, 796 P.2d 1193, 1204 (Or. 1990), which required a mother whose parental rights were terminated to show "not only that her trial counsel was inadequate, but also that any inadequacy prejudiced her cause to the extent that she was denied a fair trial and, therefore, that the justice of the circuit court's decision is called into serious question." In declining to apply the Strickland standard, the Geist court distinguished juvenile court proceedings from adult criminal proceedings, noting that "[t]here simply is no compelling reason that the same standards applied in adult criminal cases also should be applied in juvenile cases." Id. at 1202; see also Baker v. Marion County

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file a notice of an appeal, this court has, under certain circumstances, "relax[ed] the deadline for filing a notice of appeal." State v. Shinyama, 101 Hawai'i 389, 393 n.6, 69 P.3d 517, 521 n.6 (2003); see also State v. Caraballo, 62 Haw. 309, 316, 615 P.2d 91, 96 (1980) (permitting a late-filed appeal where defendant had withdrawn his initial appeal based on counsel's erroneous advice).

[22] For example, the Court of Appeals of Kansas has held that an attorney's withdrawal mid-trial constituted a complete denial of counsel, and therefore prejudice was presumed. In re Rushing, 684 P.2d 445, 450 (Kan. Ct. App. 1984). As discussed further, infra, failure to file a notice of appeal in a criminal proceeding may be per se prejudicial under certain circumstances.

Office of Family & Children, 810 N.E.2d 1035, 1039 (Ind. 2004) ("We conclude that transporting the structure of the criminal law, featuring as it does the opportunity for repeated re-examination of the original court judgment through ineffectiveness claims and post-conviction processes, has the potential for doing serious harm to children whose lives have by definition already been very difficult"). We note that Mother, in her application, also urged this court to "apply or formulate a family court standard of the correct remedy for 'ineffective assistance of counsel.'"

In the criminal context, the United States Supreme Court has further refined the test for ineffective assistance of counsel, where counsel has failed to file a notice of appeal. Roe v. Flores-Ortega, 528 U.S. 470 (2000). In Flores-Ortega, the defendant pleaded guilty to second-degree murder, and was sentenced to 15 years to life in state prison. Id. at 473-74. Flores-Ortega was informed by the trial judge that he could file an appeal within 60 days following sentencing, and that counsel would be appointed to represent him on appeal if he was indigent. Id. at 474. However, Flores-Ortega's appointed counsel failed to file a notice of appeal, and Flores-Ortega himself was unable to communicate with counsel during the first 90 days following sentencing. Id. After Flores-Ortega's pro se attempt to file a belated notice of appeal was rejected, he filed a federal habeas petition alleging that his counsel's failure to file a notice of

appeal on his behalf constituted constitutionally ineffective assistance of counsel. Id. The district court adopted the Magistrate Judge's findings and recommendations and denied Flores-Ortega's petition. Id. at 475. Flores-Ortega appealed. Id. The United States Court of Appeals for the Ninth Circuit reversed, and certiorari was granted. Id. at 475-76.

The United States Supreme Court held that the Strickland test applies to claims of ineffective assistance of counsel arising out of counsel's failure to file a notice of appeal. Id. at 476-77. The Court then addressed the circumstances under which the failure to file a notice of appeal would be considered to fall "below an objective standard of reasonableness." Id. at 476-78 (quoting Strickland, 466 U.S. at 688). The Court emphasized 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. at 477. However, the Court declined to establish a bright-line rule deeming it per se deficient to fail to "file a notice of appeal unless the defendant specifically instructs otherwise." Id. at 478. Rather, the Court held that:

> counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.

Id. at 480.

With regard to the prejudice prong, the Court concluded

that the "denial of the entire judicial proceeding itself," which resulted from counsel's failure to file a notice of appeal, was presumptively prejudicial. Id. at 483. However, the Court held that the Strickland standard required that "counsel's deficient performance must actually cause the forfeiture of the defendant's appeal." Id. at 484. The Court further held that:

> [i]f the defendant cannot demonstrate that, but for counsel's deficient performance, he would have appealed, counsel's deficient performance has not deprived him of anything, and he is not entitled to relief.

Id.

The Court further noted that:

> As with all applications of the Strickland test, the question of whether a given defendant has made the requisite showing will turn on the facts of a particular case. Nonetheless, evidence that there were nonfrivolous grounds for appeal or that the defendant in question promptly expressed a desire to appeal will often be highly relevant in making this determination.

Id. at 485 (citation omitted).

Applying this analysis to the facts of Flores-Ortega's case, the Court concluded that "the Magistrate Judge's findings do not provide us with sufficient information to determine whether [defense counsel] rendered constitutionally inadequate assistance." Id. at 487. The Court further noted:

> Assuming, arguendo, that there was a duty to consult in this case, it is impossible to determine whether that duty was satisfied without knowing whether [defense counsel] advised [Flores-Ortega] about the advantages and disadvantages of taking an appeal and made a reasonable effort to discover his wishes. Based on the record before us, we are unable to determine whether [defense counsel] had a duty to consult with [Flores-Ortega] (either because there were potential grounds for appeal or because [Flores-Ortega] expressed interest in appealing), whether she

> satisfied her obligations, and, if she did not, whether [Flores-Ortega] was prejudiced thereby.

Id. at 487.

In In re A.J., 143 P.3d 1143 (Colo. Ct. App. 2006), the Colorado Court of Appeals considered the effect of the holding in Flores-Ortega on a claim of ineffective assistance of counsel in a termination of parental rights case, in the context of determining whether to accept a late-filed notice of appeal. The mother timely communicated her decision to appeal the termination order to her counsel, who filed an untimely notice of appeal of the family court's termination order. Id. at 1149. The court noted that the mother filed her notice of appeal just over six weeks after the family court entered its termination order, "within nine months after the child's removal from the home, [and] three months before the [expedited permanency planning (EPP)] deadline for permanent placement of the child." Id. The court noted that the statutory framework for EPP cases requires that the child "be placed in a permanent home within twelve months of his [or her] initial placement out of the home[,]" and characterized the length of delay in this case as "relatively short." Id.

The court concluded that "counsel's failure to file a timely notice of appeal after mother told him she wanted to appeal the termination order amounts to ineffective assistance of counsel." Id. However, under Colorado law, the mother was also required to demonstrate good cause warranting reinstatement of

the right to appeal. Id. Because the mother had advised her counsel that she wished to appeal, the court concluded that she did not contribute to the delay in filing the appeal and, under the specific circumstances of the case, there was good cause for extending the appeal deadline. Id. at 1150. However, the court noted that:

> if any one of the circumstances in this case were different, we may have reached a different result. In particular, we might have been inclined to dismiss the appeal if the untimely filing of the notice of appeal were attributable to mother's carelessness or inaction, or if the delay had been longer or exceeded the EPP deadline for permanent placement of the child.

Id.

Finally, some federal courts have declined to extend the holding in Flores-Ortega to other civil contexts in which due process requires the effective assistance of counsel. In Hernandez v. Reno, 238 F.3d 50 (1st Cir. 2001), the Court of Appeals for the First Circuit noted that counsel's incompetence during immigration proceedings, which are civil in nature, "may make the proceeding fundamentally unfair and give rise to a Fifth Amendment due process objection." Id. at 55 (emphasis in original). Hernandez's counsel had filed a timely notice of appeal of Hernandez's deportation order with the Board of Immigration Appeals (Board) but failed to brief the issues on appeal, resulting in the appeal being dismissed. Id. at 52-53. Hernandez had the option to appeal the Board's decision, but his counsel failed to do so. Id. at 53. Almost four years later, Hernandez was issued a letter directing him to appear for

deportation, and Hernandez then filed a petition for a writ of habeas corpus with the district court and a motion to reopen his case with the Board, alleging ineffective assistance of counsel. Id. at 53.

The First Circuit noted that:

> Were this a criminal case, counsel's failure to comply with a defendant's request to appeal would be treated as prejudice per se. But we are unwilling, unless directed to do so, to incorporate into civil deportation proceedings the whole apparatus of Sixth Amendment precedent. Our concern in the immigration context is not with the Sixth Amendment but with preserving a fair opportunity to have a waiver considered; it does not include an opportunity to tie up deportation proceedings in knots through collateral attacks on defects that would not plausibly have altered the result.

Id. at 57 (citations omitted; emphasis added).

Moreover, the First Circuit noted that Hernandez "had some duty--as a condition of a successful due process claim--to monitor his lawyer's actions and assure that his appeal was being pursued[,]" but did not do so. Id. Accordingly, the First Circuit affirmed the District Court's dismissal of Hernandez's habeas petition. Id.

Applying these principles to Mother's case, we hold that the right to counsel in termination of parental rights cases, where applicable, includes the right to effective counsel. We further hold that the proper inquiry when a claim of ineffectiveness of counsel is raised in a termination of parental rights case is whether the proceedings were fundamentally unfair as a result of counsel's incompetence. Cf. Geist, 796 P.2d at

1203 ("Mother must show, not only that her trial counsel was inadequate, but also that any inadequacy prejudiced her cause to the extent that she was denied a fair trial and, therefore, that the justice of the [trial] court's decision is called into serious question."); Baker, 810 N.E.2d at 1041 ("Where parents whose rights were terminated upon trial claim on appeal that their lawyer underperformed, we deem the focus of the inquiry to be whether it appears that the parents received a fundamentally fair trial whose facts demonstrate an accurate determination."); Hernandez, 238 F.3d at 57 ("Our concern in the immigration context is not with the Sixth Amendment but with preserving a fair opportunity to have a waiver claim considered"). The movant bears the burden of establishing "not only that her trial counsel was inadequate, but also that any inadequacy prejudiced her cause to the extent that she was denied a fair trial and, therefore, that the justice of the [trial] court's decision is called into serious question." Id. at 1204. Although principles developed in assessing ineffective assistance of counsel claims in the criminal context may be instructive, they are not dispositive in the termination of parental rights context. Cf. Hernandez, 238 F.3d at 57 (noting that "Sixth Amendment precedent is worth consulting where counsel's performance is attacked in a deportation proceeding, but it is not binding and should not be blindly imported wholesale").

We adopt a fundamental fairness test, rather than

importing criminal law concepts directly, for several reasons. First, the constitutional bases of the respective rights to counsel are different. The right to counsel in the criminal context is based on the Sixth Amendment of the United States Constitution and Article I, Section 14 of the Hawaiʻi Constitution. In contrast, the right to counsel in termination of parental rights proceedings is based on due process. Cf. Hernandez, 238 F.3d at 57; Anthony C. Musto, Potato, Potahto: Whether Ineffective Assistance or Due Process, An Effective Rule is Overdue in Termination of Parental Rights Cases in Florida, 21 St. Thomas L. Rev. 231, 243 (2009) ("It seems logical that if the right to counsel in a particular situation arises from due process, the issue of whether some act or omission of counsel rendered a proceeding unfair should be deemed to be one of due process."); see also In re Doe, 99 Hawaiʻi 522, 534, 57 P.3d 447, 459 (2002) (analyzing denial of an interpreter in a termination of parental rights proceeding under procedural due process principles).

Second, there are substantial differences in the purposes of criminal as opposed to termination of parental rights proceedings. See Baker, 810 N.E.2d at 1039 (noting that "[t]he resolution of a civil juvenile proceeding focuses on the best interests of the child, not on guilt or innocence as in a criminal proceeding"); Geist, 796 P.2d at 1202 ("There are substantial differences between adult criminal cases and juvenile

court proceedings involving children and their parents. Courts have long recognized that the substantive standards and procedural rules governing criminal cases are not necessarily applicable or even desirable in juvenile court proceedings."). Consistent with that understanding, some of the protections that exist for adult criminal defendants have not been fully imported into the parental rights context. Geist, 796 P.2d at 1202 (noting that, unlike in criminal cases, under Lassiter, the right to counsel in termination of parental rights cases is determined on a case-by-case basis and that, under Santosky v. Kramer, 455 U.S. 745, 768-69 (1982), the burden of proof in termination cases is clear and convincing evidence rather than proof beyond a reasonable doubt). Conversely, "the odds of an accurate determination in a termination case are enhanced by the fact of judicial involvement that is much more intensive than it is [in] the usual criminal case." Baker, 810 N.E.2d at 1041 (noting that the judge "is not limited to [the parties'] presentations, and . . . may require more than they present and direct further investigation, evaluations or expert testimony to assure him [or her] that the interests of the child and the respective parties are properly represented." (quoting In re Adoption of T.M.F., 573 A.2d 1035, 1042-43 (1990)).

Third, the interests implicated by criminal and termination of parental rights cases are substantially different. Most notably, termination of parental rights proceedings

implicate the interests of the child in having a prompt and permanent resolution of his or her custody status--a factor that is absent in the criminal context.[23] As the Supreme Court of Indiana noted in Baker:

> In the context of termination cases, extended litigation imposes that burden on the most vulnerable people whom the system and such cases seek to protect: the children. As Justice Powell wrote, "There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current 'home,' under the care of his parents or foster parents, especially when such uncertainty is prolonged." Lehman, 458 U.S. at 513-14, 102 S.Ct. 3231. Justice Joette Katz made a similar observation when Connecticut's high court decided not to permit state habeas as a vehicle for collateral attacks on judgments of termination: "[T]here exists, as the trial court noted in this case, a 'frightening possibility that a habeas petition will negate the permanent placement of a child whose status had presumably been in limbo for several years.' Consequently, the state's interest as paren patriae militates against allowing the writ." In re Jonathan M., 255 Conn. 208, 764 A.2d 739, 753 (2001) (footnote omitted).
>
> To permit the children to travel from one home to another while termination proceedings span across the years is "incongruous and contrary to the federal and state policy of minimizing the 'foster care drift' that has doomed millions of children to interim, multiple or otherwise impermanent placement." In re Adoption of A.M.B., 812 A.2d 659, 667 (Pa.Super.Ct. 2002). Due to the immeasurable damage a child may suffer amidst the uncertainty that comes with such collateral attacks, it is in the child's best interest and overall well being to limit the potential for years of litigation and instability. "It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty." Lehman, 458 U.S. at 513, 102 S.Ct. 3231.

Id. at 1040; see Geist, 796 P.2d at 1201 (observing that in

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[23] We therefore respectfully disagree with the dissent's assertion that the best interests of the child can only be considered "after Petitioner is given the opportunity to present her side of the case." Dissenting Opinion at 81 (emphasis added).

termination proceedings, "[w]hether or not the eventual result is termination, protracted litigation extends uncertainty in the child[ren]'s life"); Musto, 21 Saint Thomas L. Rev. at 243-44 ("It also appears from a policy perspective that due process is a more fitting framework than ineffective assistance for termination cases. . . . It [] broadens the appropriate considerations in a manner that can better focus courts on the best interest of the child[ren] involved, rather than merely the impact on the parent of counsel's acts or omissions").

Applying these principles here, we decline to adopt the rule adopted in Flores-Ortega, under which prejudice is presumed when defense counsel fails to comply with a defendant's request to file an appeal in a criminal case.[24] Rather, the failure of appellate counsel to file an appeal in a termination of parental rights case must be viewed in the broader context of whether the family court proceeding was fundamentally unfair. The merit (or lack thereof) of the issues that a party intends to raise on appeal is a relevant consideration in making that determination. Cf. Hernandez, 238 F.3d at 57 (court declines to apply Flores-Ortega to an immigration proceeding, and notes that a party who claims ineffective assistance of appellate counsel in that

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[24] However, we note that, even if the holding in Flores-Ortega were to apply in termination of parental rights cases, 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. 528 U.S. at 477. Although there are references in the record here which indirectly support an inference that Mother conveyed her desire to appeal to Yonemori, there is nothing in the record to directly confirm that she did so.

context must show more than "defects that would not plausibly have altered the result.").

**D. The family court did not abuse its discretion in denying Mother's Rule 60(b)(6) motion**

**1. Mother failed to establish that her pre-termination counsel was ineffective**

In her application, Mother appears to request a new trial on the basis of ineffective assistance of counsel in the four-year period leading up to the family court's March 11, 2005 Termination Order. In her February 6, 2007 motion from which this appeal is taken, Mother alleged that she was denied her due process rights by:

> the Order Denying Mother's Motion to Reconsider Denial of Oral Motion to Continue Trial; and Exclusion of Exhibits Filed December 23, 2004, filed on March 7, 2005, **and/or**, the Order Denying Mother's Motion to Reinstate Visitation Filed January 11, 2005, filed on March 7, 2005, **and/or**, at the time of entry of the Court's Findings of Fact, Conclusions of Law and Order filed on March 11, 2005.

(Emphasis in original).

However, Mother's February 6, 2007 motion failed to identify any specific error or omission on the part of counsel during the specified proceedings. Similarly, Mother has failed to point to any alleged errors apparent in the record. Moreover, Mother has not provided this court with transcripts from the pre-termination period or the permanent plan hearing to support her contention that Mother's counsel was ineffective, nor has she provided transcripts of the family court's hearing on her February 6, 2007 motion. Contrary to Mother's assertion that her

pre-termination counsel was ineffective, the family court expressly noted in its March 7, 2005 written order denying Mother's July 12, 2004 oral motion for a new attorney that "[t]he court has seen nothing to indicate Ms. Iopa [has] not been effective in her representation and notes Ms. Iopa has worked hard to assist [Mother]."

This court has held that "[t]he burden is upon appellant in an appeal to show error by reference to matters in the record, and he or she has the responsibility of providing an adequate transcript." Bettencourt v. Bettencourt, 80 Hawaiʻi 225, 230, 909 P.2d 553, 558 (1995) (quoting Union Building Materials Corp. v. The Kakaako Corp., 5 Haw. App. 146, 151, 682 P.2d 82, 87 (1984)) (brackets omitted); Lepere v. United Pub. Workers, Local 646, 77 Hawaiʻi 471, 474, 887 P.2d 1029, 1032 (1995) ("Lepere, as appellant, had a duty to include the relevant transcripts of proceedings as a part of the record on appeal.") (footnote omitted); see Hawaiʻi Rules of Appellate Procedure Rule 10(b)(1)(A) ("When an appellant desires to raise any point on appeal that requires consideration of the oral proceedings before the court . . . appealed from, the appellant shall file . . . a request or requests to prepare a reporter's transcript of such parts of the proceedings as the appellant deems necessary that are not already on file."). Given the family court's findings in the record, and absent a transcript of the proceedings or other indications in the record to suggest otherwise, the record does

not establish that Mother's pre-termination counsel was ineffective. Accordingly, the family court did not abuse its discretion in denying Mother's motion with respect to the pre-termination proceedings.

### 2. The family court did not abuse its discretion in denying Mother's motion with regard to the post-termination proceedings

The record establishes that Mother did not receive effective assistance of counsel with regard to her appeal. However, as we discuss below, Mother failed to establish that the family court proceedings were fundamentally unfair. Moreover, there was a nearly two-year delay between the March 11, 2005 order terminating custody, and Mother's filing of the Rule 60(b)(6) motion that is at issue here. A delay of that magnitude in determining permanent custodial status has a substantial negative impact on the interests of the child, which is a significant factor weighing against the granting of Rule 60(b)(6) relief. As we set forth below, Mother failed to demonstrate her entitlement to relief in the family court, and has failed on appeal to establish that the family court abused its discretion in denying the motion.

RGB was initially placed in temporary foster custody in 2001. She was later returned to Mother under family supervision, and then placed in foster custody in April, 2002. At the time of that placement, she was 2 years and 9 months old. She subsequently remained in the care of the same foster family

through the permanent plan hearing.

There are several reports in the record that discuss RGB's status after that hearing. On August 3, 2005, DHS filed a report to the family court in which it noted:

> [RGB] has lived with her foster parents for three years and five months and is well-adjusted and has adapted to her environment. . . .
>
> [RGB] is happy and doing well in her current placement. It would be in the best interest of [RGB] if the adoption process were to be completed sooner rather than later. However, Deputy Attorney General, Howard Shiroma, reports that Mother is appealing the [Termination Order]. . . . Thus, Mother's appeal to the [c]ourt may delay the adoption process, negatively impacting the well-being of [RGB].

On August 4, 2005, RGB's guardian ad litem filed a report stating:

> With regard to the permanency goal of adoption of he [sic] child . . . , I have spoken to Carrie Yonemori, the attorney appointed to represent Mother in her appeal of the [c]ourt's permanency order, and she has related that the necessary paperwork pertaining to such appeal should be submitted to the Supreme Court shortly. Although it is certainly not in the child's best interest, I would suppose that we would be unable to proceed with any adoption until such appeal is resolved.

On January 17, 2006, DHS filed a report to the family court in which it noted that RGB "continues to do very well in the care of foster parents, . . . whom she has resided with for nearly four years." DHS further noted that:

> [RGB's foster parents] want to adopt [RGB] and have been ready to proceed with the adoption process ever since biological mother's parental rights were terminated in March 2005. However, biological Mother's pending appeal to the court . . . has prevented the DHS and [RGB's foster parents] from proceeding with the adoption. Hence, [foster parents] and [RGB] and the entire family are disappointed. Per [foster mother], [RGB] continually wonders and asks "when will she be adopted".

On May 23, 2006, DHS filed a report to the family court, in which it noted that "[RGB] continue[d] in her placement" where she "ha[d] been [] since April 4, 2002[,]" that she "wants to remain there forever because she loves her foster parents whom she refers to as 'mom' and 'dad[,]'" and that "she wants to be adopted as soon as possible[.]"

On June 2, 2006, RGB's guardian ad litem filed a report to the family court, stating that, "[i]n the past, foster parents had reported [RGB] making reference to her mother, . . . . However, for some time now, the only references made by [RGB] of her mother are in the context of fantasized incidents."[25]

As noted in section C, supra, the negative effect on children of delays and uncertainty in determining permanent custodial arrangements has been well documented. See, e.g., Baker, 810 N.E.2d at 1039-41. The record here clearly establishes such negative impacts on RGB. She has lived with uncertainty about the status of her family for most of her life, and wants that uncertainty to end.

At the time the family court issued its Termination Order, RGB had been in foster custody for nearly three years. See HRS § 587-72(e) (Supp. 2004 & Supp. 2005) (requiring DHS, with limited exception, to file a motion to set a permanent plan

[25] The June 2, 2006 report is the last report in the record before the family court's September 28, 2006 hearing, after which it issued its November 9, 2006 written order prohibiting Mother from having access to the family court record going forward.

hearing if "the child has been residing outside of the family home for an aggregate of fifteen out of the most recent twenty-two months[.]"). The effect of the additional delay that would have been caused by granting the Rule 60(b)(6) motion was a factor that weighed substantially in favor of denying the motion. Cf. A.J., 143 P.3d at 1149-50 (although court allowed the filing of an untimely direct appeal in a termination of parental rights case, it noted that only nine months had elapsed since the child was first removed from the home and that the outcome could have been different "if the delay had been longer or exceeded the EPP deadline for permanent placement of the child"). Mother failed to establish an entitlement to relief sufficient to overcome that factor.

First, Mother has not identified, either in her Rule 60(b)(6) motion, her brief to the ICA, her application for certiorari, or oral argument in this court, what errors occurred in the permanent plan hearing that she would have challenged had Yonemori timely appealed on her behalf. In view of her 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. Cf. Hernandez, 238 F.3d at 57 (collateral attacks in immigration proceedings based on ineffective assistance of counsel should not be permitted based "on defects that would not plausibly have altered the result").

Second, Mother's Rule 60(b)(6) motion did not adequately establish that she did not play a role in contributing to the delay in bringing the motion. See Hayashi v. Hayashi, 4 Haw. App. 286, 290, 666 P.2d 171, 174-75 (1983) (noting that relief under Rule 60(b)(6) "calls for diligence by the moving party"); cf. Hernandez, 238 F.3d at 57 (observing that "it would seem that Hernandez had some duty--as a condition of a successful due process claim--to monitor his lawyer's actions and assure that his appeal was being pursued"); A.J., 143 P.3d at 1150 (allowing the filing of an untimely direct appeal in a termination of parental rights case, but noting that the result could have been different "if the untimely filing of the notice of appeal were attributable to mother's carelessness or inaction"). Yonemori's representation of Mother was deficient, as Yonemori conceded in her filings in the family court, and it is Yonemori who appears to bear primary responsibility for most of the delay that occurred after the family court appointed her to represent Mother. However, the record does not explain why Mother waited until March 10, 2006 before bringing Yonemori's inaction to the attention of the family court.

Although Mother has a mental health condition, nevertheless the record shows that Mother was of "above-average" intelligence, and that she did not hesitate to bring perceived defects in her counsels' performance to the attention of the family court. There may be good explanations for why Mother did

not act sooner with regard to Yonemori's failure to timely file the appeal; however, the record does not reflect them.[26] In seeking the extraordinary relief of setting aside the March 11, 2005 Termination Order nearly two years after it was entered, the burden was on Mother to establish that she was not responsible for the delay. See Hayashi, 4 Haw. App. at 290, 666 P.2d at 174 (noting that "relief [under Rule 60(b)(6)] is extraordinary and the movant must show that . . . the motion is made within a reasonable time").

Finally, we note that Mother failed to include in the appellate record any transcripts of proceedings relevant to determining whether the family court abused its discretion. As noted in section III(D)(1), supra, appellants have the burden of including in the record all transcripts relevant to their points of error. Bettencourt, 80 Hawai'i at 230, 909 P.2d at 558 ("The burden is upon appellant in an appeal to show error by reference to matters in the record, and he or she has the responsibility of providing an adequate transcript.") (brackets and citations omitted).

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[26] As discussed supra, "diligence by the moving party" is a threshold requirement of a Rule 60(b)(6) motion. Hayashi, 4 Haw. App. at 290-91, 666 P.2d at 174-75. We therefore require a showing by the movant of "exceptional circumstances" to mitigate any delay. Id. at 291, 666 P.2d at 175. We respectfully disagree with the dissent's assertion that, by doing so, we have "[laid] the fault for the failure to file a timely motion for reconsideration . . . at the feet of Petitioner[.]" Dissenting Opinion at 91. To the contrary, we express no view on the diligence or lack thereof of Mother, but rather observe that Mother has failed to provide any information regarding her own understanding of what was transpiring between the issuance of the Termination Order on March 11, 2005 and her filing of her pro se Motion for Relief from Judgment on March 10, 2006.

Although the proceedings in this case have lasted many years and included a six-day permanent plan hearing, Mother did not include any transcripts as part of the record on appeal. Mother did not include in the record any transcripts from the permanent plan hearing that might explain the circumstances surrounding the court's March 11, 2005 order discharging Iopa. Mother also did not include in the record any transcripts from the hearings held during the period between the Termination Order and the hearing on Mother's February 6, 2007 Rule 60(b)(6) motion. For example, in its written order following a hearing on April 6, 2006, the family court noted that Mother waived any conflict of interest Yonemori had in continuing to represent Mother; presumably, that hearing included some discussion of the consequences of the waiver and/or about what actions were expected to be taken subsequent to the hearing. Moreover, Mother did not include in the record any transcripts from the September 28, 2006 hearing on Mother's pro se Rule 60 motion, Yonemori's Rule 60 motion, and Yonemori's motion to withdraw.

Most notably, Mother did not include in the record a transcript of the April 24, 2007 hearing on Mother's February 6, 2007 Rule 60(b)(6) motion, which is the subject of this appeal. Thus, we do not know what, if anything, was said concerning the reasons for the delays that occurred after the Termination Order was issued, or any oral comments that might have been made by the court in explaining its ruling. The burden was on Mother to

include in the record an adequate transcript of the proceeding that gave rise to this appeal. See Bettencourt, 80 Hawaiʻi at 230, 909 P.2d at 558. Mother's failure to provide a transcript is a substantial omission. State v. Hoang, 93 Hawaiʻi 333, 334, 3 P.3d 499, 500 ("Without the . . . transcript, the Intermediate Court of Appeals did not, and this court does not, have a basis upon which to review the point of error raised in the present appeal.").

For all these reasons, Mother has failed to establish that the family court abused its discretion in denying her Rule 60(b)(6) motion.

**E. The family court did not abuse its discretion in limiting Mother's access to post-termination records**

As noted above, the family court held a hearing on September 28, 2006, following which it issued its November 9, 2006 written order, limiting Mother's access to the court records in this case as follows:

> Mother['s] . . . parental rights have been terminated and due to this status and the possibility of dissemination of these confidential records, the court finds that future court records are not currently available to Mother . . . ; provided however that court records will be made available for any appellate review of this decision.

In her February 6, 2007 motion, Mother moved for, inter alia, "release of all evidence or files in case," and alleged that the family court's November 9, 2006 limitation on her access to the court records "[was] a direct violation of the right to due process[.]"

On May 8, 2007, the family court denied Mother's motion and all relief therein requested, and Mother appealed. Mother's October 30, 2007 Opening Brief to the ICA again alleged that "when the trial court refused to allow [Mother] to review 'confidential' records and files, as stated in the Motion appealed from, this was yet another example of a deprivation of [Mother's] due process rights to a fair trial." The ICA concluded that the family court "did not err in limiting Mother's access to the post-November 6, 2006 confidential record in this case." In re RGB, 2009 WL 953392 at *3.

Finally, in her application for a writ of certiorari, Mother argued that "[a]s a parent's right to file an array of 60b [sic] motions continue for up to one year and in some cases beyond, a[n] unfettered right to review such records during the one year period at least should freely be given to Mother." Mother further argued that "a new trial must be granted as the only appropriate remedy."[27]

Although not entirely clear, Mother's application therefore appears to challenge the family court's November 9, 2006 order limiting her prospective access to the court records in this case. Accordingly, we construe Mother's February 6, 2007 motion as a request to vacate or reconsider the family court's

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[27] We note that Mother failed to include with her application a statement of the facts material to our consideration of the question presented concerning her access to records as required by HRAP Rule 40(d)(3), and her argument may accordingly be disregarded. Nevertheless, we address the merits of Mother's argument.

November 9, 2006 written order limiting her prospective access to the court records.

The family court's November 9, 2006 order limiting Mother's access to the court records draws support from its March 11, 2005 order terminating Mother's parental rights. Upon the termination of parental rights, HRS § 587-73(b)(4) (1993 & Supp. 2005 & 2006)[28] allows the family court to limit or restrict the participation of unnecessary parties in subsequent proceedings as follows:

> the court shall order . . . [t]hat such further orders as the court deems to be in the best interests of the child, including, but not limited to, restricting or excluding unnecessary parties from participating in adoption or other subsequent proceedings, be entered[.]

HRS § 587-73(b)(4).

Consistent with that power, the family court, in its Termination Order, found that "it is in [RGB's] best interests that the participation of Mother 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." The family court's November 9, 2006 order limiting Mother's access to the court records stems from the termination of Mother's parental rights, and the family court's finding that limitations on Mother's participation in subsequent proceedings concerning RGB would be in RGB's best interest. This

[28] HRS § 587-73(b)(4) now appears as HRS § 587-73(b)(1)(D) (Supp. 2008).

limitation is consistent with the powers afforded the family court under HRS § 587-73(b)(4).

In addition, as noted by the ICA, Mother has failed to identify "any documents or category of documents that she reasonably requested access to or why she need[ed] full access," In re RGB, 2009 WL 953392 at *3. and has not identified any relevance of the post-November 9, 2006 record to her appeal. Moreover, aside from acknowledging the length of time that has passed since the family court's March 11, 2005 Termination Order, we do not rely on the post-November 9, 2006 record in reaching our holding, and Mother therefore had access to all court records that were relevant to her appeal.

Accordingly, we hold that the family court did not abuse its discretion in issuing its November 9, 2006 order limiting Mother's prospective access to the court records or in denying Mother's February 6, 2007 motion insofar as it sought to have the court reconsider or vacate its earlier ruling.

**IV. Conclusion**

For the foregoing reasons, we affirm the ICA's May 21, 2009 judgment.

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petitioner/mother-
appellant

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petitioner-appellee