119 Hawai'i 28
Intermediate Court of Appeals of Hawai'i.

In the Interest of "A" CHILDREN: N.A., M.A. (1), M.A.(2), and L.A. (FC–S No. 03–09383).
and
In the Interest of J.A. (FC–S No. 03–09384).

Nos. 28129, 28130. | July 31, 2008.

Synopsis

Background: In child-protection proceedings, Department of Human Services (DHS) moved to terminate mother's parental rights to five children, and father's parental rights to the two children who were his biological children. Following a trial, the Family Court of the First Circuit, Paul T. Murakami, J., terminated parental rights and granted DHS permanent custody. Both parents appealed.

Holdings: The Intermediate Court of Appeals, Watanabe, Presiding J., held that:

[1] evidence was sufficient to establish that mother was unable to provide a safe home for her children and that DHS made reasonable efforts to reunite mother with her children;

[2] father, a native Hawaiian, was not entitled to the beyond-a-reasonable-doubt-proof standard applicable to the termination of parental rights of native Americans under the Indian Child Welfare Act (ICWA); and

[3] father, who was indigent, was deprived of his constitutional right to due process when he was not provided with appointed counsel until 16 days before the termination hearing.

Affirmed in part, and vacated and remanded in part.

West Headnotes (8)

[1] Infants

Inability to parent in general; skills

Infants

Compliance by parent or custodian

Infants

Counseling and treatment

Evidence in permanent custody trial was sufficient to establish that mother of five children was presently unable to provide a safe home for the children, that the Department of Human Services (DHS) made reasonable efforts to reunify mother with her children, and that the permanent plan approved by the family court was in the children's best interests; there was evidence that mother failed to comply with various family service plans ordered by the family court, that mother had inappropriate parenting skills and unresolved issues of physical and emotional abuse, that mother had a history of relapsing into drug use, and that mother's participation in substance-abuse-treatment programs, parenting classes, anger-management programs, and family-therapy sessions was very inconsistent.

3 Cases that cite this headnote

[2] Indians

Infants

The Indian Child Welfare Act (ICWA) does not include Native Hawaiians within its purview and applies only to state-child-protective proceedings involving an Indian child. Indian Child Welfare Act of 1978, §§ 2, 102(f), 25 U.S.C.A. §§ 1901, 1912(f).

Cases that cite this headnote

[3] Criminal Law

Penalty, potential or actual

Criminal Law

Indigence

Criminal Law

Duty of Inquiry, Warning, and Advice

In Hawai'i, an individual charged with an offense that is punishable by even one day in

jail has a constitutional and statutory right to be represented by counsel, to be advised of that right, and, if indigent, to have counsel appointed to represent him or her. Const. Art. 1, § 14; HRS § 802–1.

Cases that cite this headnote

[4] **Criminal Law**
Penalty, potential or actual

Criminal Law
Grand jury; indictment, information, or complaint

An indigent criminal defendant in the Hawai'i courts is entitled to the guiding hand of counsel as soon as he or she is charged with an offense for which the defendant, if convicted, may be punished by imprisonment. Const. Art. 1, § 14; HRS § 802–1.

Cases that cite this headnote

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

Appointment of counsel for an indigent parent who is a party to a child-protective proceeding is discretionary in Hawai'i. HRS § 587–34.

1 Cases that cite this headnote

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

Courts determining whether a particular indigent parent is entitled to court-appointed counsel in termination of parental rights proceeding must balance the presumption that the right to court-appointed counsel is triggered only when an indigent parent is threatened with the loss of his or her personal liberty against three due-process considerations: (1) the private interests at stake, (2) the government's interest, and (3) the risk that the failure to appoint counsel will lead to an erroneous decision; because the private interests of the parents and the competing interests of the government are evenly balanced, the court's determination invariably hinges on the third factor.

2 Cases that cite this headnote

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

Infants
Indigents and paupers; public defenders

Indigent father was denied his constitutional right to due process, in child-protection proceedings, when he was not provided with appointed counsel until 16 days prior to trial on motion by Department of Human Services (DHS) to divest him of his parental and custodial rights in his two children; father had not graduated from high school or obtained a general-education diploma, father was marginalized and confused during the child-protection proceedings, family court entered orders that affected father's rights and duties before he was served with the petitions filed by Department of Human Services (DHS), father had been defaulted and denied notice of future hearings after he did not appear at early hearings, and, though father had admitted paternity during the proceedings, family court conditioned father's right to counsel on the formal establishment of his paternity, which occurred just prior to hearing on motion to divest father of parental rights. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 5; HRS § 587–34.

2 Cases that cite this headnote

[8] **Infants**
Time for pleading, proceedings, or ruling; stay

Where an alleged natural father's paternity of a child is in question in a child-protection proceeding, it is incumbent on the family court to resolve the question as expeditiously as possible after the commencement of the proceeding, as a determination of an alleged natural father's paternity is essential to a permanent custody order that divests the alleged natural father of his

parental rights in his children, and there is no need to terminate rights in a child that an alleged father does not have.

Cases that cite this headnote

Attorneys and Law Firms

**1229 Joseph Dubiel for father-appellant.

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Patrick A. Pascual, deputy attorney general (Mary Anne Magnier, deputy attorney general, with him on the briefs) for petitioner-appellee Department of Human Services.

WATANABE, PRESIDING J., NAKAMURA, and FUJISE, JJ.

Opinion

Opinion of the Court by WATANABE, Presiding J.

*29 This consolidated appeal arises from two cases in the Family Court of the First Circuit (family court) that culminated on August 14, 2006 with orders (August 14, 2006 Orders) that (1) divested Father–Appellant (Father) of his parental and custodial rights[1] in J.A. and L.A.[2] (collectively, Sons), his biological *30 **1230 sons with Mother–Appellant (Mother), and awarded permanent custody over Sons to the Director of the Department of Human Services, State of Hawai'i (DHS); and (2) divested Mother of her parental and custodial rights[3] in Sons, as well as N.A., M.A.(1), and M.A.(2) (collectively, Triplets), her three daughters with a man who died in August 2002 (Deceased Husband), and awarded permanent custody over Sons and Triplets (collectively, Children) to DHS.

We affirm the August 14, 2006 Orders as to Mother. However, we hold that Father was denied his right to due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution, when he was not provided with appointed counsel until sixteen days prior to the trial on DHS's motion for permanent custody. Accordingly, we vacate the August 14, 2006 Orders as to Father and remand for further proceedings consistent with this opinion.

BACKGROUND

These two cases are unfortunately typical of the majority of child-protective cases that this court sees on appeal. We set forth the factual and procedural history of these cases in detail to highlight the complex legal, social, and procedural issues that are often involved in these cases, especially for parents who have tested positive for drugs and are threatened with the prolonged or permanent deprivation of their parental and custodial rights in their children.

A. The Petitions Seeking Family Supervision of Triplets and Foster Custody of Sons

On November 5, 2003, DHS received a report that Mother and her newborn son, J.A., had tested positive for amphetamines and methamphetamine and that Mother had not engaged in any prenatal services. The next day, DHS interviewed Mother, who admitted that she had smoked "ice" the day prior to J.A.'s birth. Mother then signed a Voluntary Foster Custody Agreement with DHS, allowing DHS to place Sons in a foster home.

On November 18, 2003, DHS filed two petitions in the family court. In FC–S No. 03–09383 (Case 1), DHS filed a petition that sought foster custody[4] over L.A. and family *31 **1231 supervision[5] of Triplets. The petition in Case 1 alleged, in part, that Deceased Husband reportedly died of a heart attack in August 2002; Father was the "boyfriend" of Mother and "the biological father of [L.A.]"; Mother had signed a voluntary custody agreement that allowed DHS to place Sons in a child-specific foster home; DHS had confirmed the threats of abuse and neglect of Children due to Mother's use of illicit drugs and was requesting foster custody over Sons and family supervision over Triplets; DHS had assessed that Mother could provide a safe family home for Triplets; Mother appeared willing to engage in recommended services as she had admitted to using drugs and needing help with her drug problem, but Father's willingness to participate in services was unknown to DHS; Mother reported no history of domestic violence or mental health issues, was formerly employed at a distribution center, and had no criminal conviction record in Hawai'i; and Father was employed as a mason and had a purported history of substance

abuse, no reported mental health issues, and several prior convictions. [6] The petition prayed that an inquiry be made into the allegations and that action be taken pursuant to the provisions of HRS chapter 587, the Child Protective Act.

In FC–S No. 03–09384 (Case 2), DHS filed a petition seeking foster custody over J.A. *32 **1232 The petition identified Father as the " Alleged Natural Father" of J.A. and included allegations similar to those alleged in the petition in Case 1.

The last page of both petitions included the following paragraph:

> ***UNLESS THE FAMILY IS WILLING AND ABLE TO PROVIDE THE CHILDREN WITH A SAFE FAMILY HOME, EVEN WITH THE ASSISTANCE OF A SERVICE PLAN, WITHIN A REASONABLE PERIOD OF TIME, THEIR RESPECTIVE PARENTAL AND CUSTODIAL DUTIES AND RIGHTS SHALL BE SUBJECT TO TERMINATION.***

Attached to both petitions were two summonses, one addressed to Mother at an address in 'Ewa Beach, and the other to Father, "Address Unknown."

On November 24, 2003, the family court entered an order appointing Chris C. China, Esq. (China) as guardian ad litem (GAL) for Children in both cases. On August 23, 2004, the family court entered an order that discharged China as GAL, retroactive to June 30, 2004, due to the expiration of an agreement to provide GAL services, and appointed Matthew T. Ihara, Esq. as GAL for Children. The record indicates that Children were represented by a GAL throughout the proceedings below.

B. *The December 1, 2003 Hearing on the Petitions and Appointment of Initial Counsel for Mother*

Although Father had not yet been served with the petitions in Cases 1 and 2 and Mother had not filed any answer to the petitions, the family court [7] held a consolidated hearing on DHS's petitions in Cases 1 and 2 on December 1, 2003. Mother, but not Father, was present at the hearing.

Following the hearing, the family court entered orders concerning Child Protective Act (December 1, 2003 Orders) that (1) awarded DHS foster custody over Sons and family supervision over Triplets; (2) ordered implementation of a Family Service Plan dated November 7, 2003; [8] (3) ordered the parties to appear at a review hearing on June 25, 2004, at 9:30 a.m.; (4) ordered DHS to submit a report and plan to the family court two weeks prior to the June 25, 2004 review hearing; (5) ordered the GAL to submit a report to the family court one week prior to the June 25, 2004 review hearing; and (6) provided that Children shall not be removed from the island of O'ahu without a court order or the prior written approval of DHS and GAL.

These orders were predicated on the family court's findings that (1) continuation in the family home would be contrary to Sons' immediate welfare; (2) DHS had made reasonable efforts to prevent or eliminate the need for Sons to be removed from the family home and to reunify Sons with Mother and Father (collectively, Parents); (3) there is reasonable cause to believe that continued placement in emergency foster care is necessary to protect Sons from imminent harm; and (4) *33 **1233 in light of the reports submitted by DHS pursuant to HRS § 587–40 (Supp.2002) and the family court record, there was an adequate basis to determine that Children's physical or psychological health or welfare had been harmed or were subject to threatened harm by the acts or omissions of Children's family. The December 1, 2003 Orders also noted that Mother had knowingly and willingly waived her right to counsel for that day's proceedings and had knowingly and willingly stipulated to jurisdiction, foster custody of Sons, family supervision of Triplets, and the November 7, 2003 family service plan.

On December 2, 2003, the family court entered an order appointing attorney Carole D. Landry (Landry) as Mother's counsel.

C. *DHS's Assumption of Foster Custody of Triplets*

On December 30, 2003, DHS filed in Case 1(1) an *ex parte* motion for an order shortening time for a notice of motion for an immediate review; and (2) a motion for an immediate review hearing that was scheduled for December 31, 2003, the next day. The basis for these motions was that DHS had assumed foster custody of Triplets on December 16, 2003, upon discovery that Mother had continued to drink alcohol and use drugs after the December 1, 2003 hearing and was scheduled to enter the Salvation

> of their children and the state may not deprive a person of his or her liberty interest without providing a fair procedure for the deprivation.

Id. (brackets and internal quotation marks omitted).

At issue in this case is the scope of the State's obligation to ensure a fair and just proceeding when it seeks to permanently remove a child from a parent. In a dissenting opinion in *Lassiter v. Dep't of Soc. Serv. of Durham County, N.C.*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640, *reh'g denied*, 453 U.S. 927, 102 S.Ct. 889, 69 L.Ed.2d 1023 (1981), Justice Blackmun eloquently described what is at stake in cases such as this, which appear with demoralizing frequency on the calendars of our family and appellate courts:

> At stake here is the interest of a parent in the companionship, care, custody, and management of his or her children. This interest occupies a unique place in our legal culture, given the centrality of family life as the focus for personal meaning and responsibility. Far more precious ... than property rights, parental rights have been deemed to be among those essential to the orderly pursuit of happiness by free men, and to be more significant and priceless than liberties which derive merely from shifting economic arrangements. Accordingly, although the Constitution is verbally silent on the specific subject of families, freedom of personal choice in matters of family life long has been viewed as a fundamental liberty interest worthy of protection under the Fourteenth Amendment. Within the general ambit of family integrity, the Court has accorded a high degree of constitutional respect to a natural parent's interest both in controlling the details of the child's upbringing, and in retaining the custody and companionship of the child[.]
>
> In this case, the State's aim is not simply to influence the parent-child relationship but to *extinguish* it. A termination of parental rights is both total and irrevocable. Unlike other custody proceedings, it leaves the parent with no right to visit or communicate with the child, to participate in, or even to know about, any important decision affecting the child's religious, educational, emotional, or physical development. It is hardly surprising that this forced dissolution of the parent-child relationship has been recognized as a punitive sanction by courts, Congress, and commentators. The Court candidly notes, as it must, that termination of parental rights by the State is a unique kind of deprivation.
>
> The magnitude of this deprivation is of critical significance in the due process calculus, for the process to which an individual is entitled is in part determined by the extent to which he may be condemned to suffer grievous loss. Surely there can be few losses more grievous than the abrogation of parental rights.

Lassiter, 452 U.S. at 38–40, 101 S.Ct. 2153 (quotation marks, brackets, and citations omitted).

[3] [4] In Hawai'i, an individual charged with an offense that is punishable by even one day in jail has a constitutional[32] and statutory[33] right to be represented by counsel ***46** ****1246** to be advised of that right, and, if indigent, to have counsel appointed to represent him or her. *State v. Dowler*, 80 Hawai'i 246, 909 P.2d 574 (App.1995), *cert. dismissed as improvidently granted*, 80 Hawai'i 357, 910 P.2d 128 (1996). Therefore, in contrast to an indigent criminal defendant in the federal courts who is entitled to be represented by counsel only if he or she is *actually sentenced* to imprisonment, *Scott v. Illinois*,[34] 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979), an indigent criminal defendant in the Hawai'i courts is entitled to the guiding hand of counsel as soon as he or she is charged with an offense for which the defendant, if convicted, *may* be punished by imprisonment.

[5] "The right of a parent to [his or her] child [is] more precious to many people than the right of life itself." *In re Luscier*, 84 Wash.2d 135, 524 P.2d 906, 908 (1974). Indeed, it has been recognized that "[t]he permanent termination of parental rights is one of the most drastic actions the state can take against its inhabitants." *State v. Jamison*, 251 Or. 114, 444 P.2d 15, 17 (1968), overruled by *State v. Geist*, 310 Or. 176, 796 P.2d 1193 (1990). Despite the magnitude of the deprivation faced by an indigent parent in a child-protective proceeding, appointment of counsel for an indigent parent who is a party to a child-protective proceeding remains discretionary in Hawai'i:

> 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.*

....

(e) A guardian ad litem or counsel appointed pursuant to this section for the child or other party may be paid for by the court, unless the party for whom counsel is appointed has an independent estate sufficient to pay such costs. The court may order the appropriate parties to pay or reimburse the costs and fees of the guardian ad litem and other counsel appointed for the child.

HRS § 587–34 (2006). Hawai'i thus remains one of only a handful of states that does not, by statute or case law, guarantee indigent parents a right to appointed counsel, at least at the stage of a child-protective proceeding at which parents are threatened with the prolonged and/or indefinite deprivation of custody of their children. *See* Rosalie R. Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The States' Response to Lassiter*, 14 Touro L.Rev. 247, 276–81 (1997);[35] *Watson v. Division of Family Services*, 813 A.2d 1101, 1107–08 (Del.2002).

Prior to 1981, the overwhelming majority of state and federal courts that had addressed the issue held that constitutional due process required that indigent parents be provided with court-appointed counsel in termination-of-parental-rights and prolonged-deprivation-of-custody cases. *See, e.g., Davis v. Page*, 640 F.2d 599, 604 (5th Cir.1981) (holding that "in a formal adjudication of dependency under Florida law, where prolonged or indefinite deprivation of parental custody is threatened, due process requires that an indigent parent be offered counsel and that counsel be provided unless a knowing and intelligent waiver is made"), *vacated on other grounds by Chastain v. Davis*, 458 U.S. 1118, 102 S.Ct. 3504, 73 L.Ed.2d 1380 (1982); ***47 **1247** *Smith v. Edmiston*, 431 F.Supp. 941, 945 (W.D.Tenn.1977) (holding that "the due process clause requires that parents in dependency and neglect proceedings be advised of their right to be assisted by counsel and if they cannot afford counsel that counsel be appointed for them unless they knowingly waive their right to counsel"); *In re D.B. and D.S.*, 385 So.2d 83, 90–91 (Fla. 1980) (holding that "in proceedings involving the permanent termination of parental rights to a child, or when the proceedings, because of their nature, may lead to criminal child abuse charges" indigent parents must be provided counsel under the due-process clause of the United States and Florida constitutions, but "where there is no threat of permanent termination of parental custody, the test [for determining the right to court-appointed counsel] should be applied on a case-by-case basis"); *In re Cooper*, 230 Kan. 57, 631 P.2d 632, 635 & 641 (1981) (holding that "[w]hen there is a permanent deprivation or severance of parental rights both the statute ... and the case law ... require that the natural parent or parents be represented by counsel at the hearing [and i]f the parent is financially unable to employ counsel the court must assign counsel to the parent at the expense of the county[,]" but in a "deprived child" hearing to temporarily remove children from the family with a view to giving them care, guidance, and discipline, due process requires that counsel be appointed for indigent parents "where the conditions outlined prior to the hearing appear to be serious and have remained so for a considerable time[.]"), *superseded by statute as stated in In re J.A.H.*, 285 Kan. 375, 172 P.3d 1 (2007);[36] *Danforth v. State Dep't of Health & Welfare*, 303 A.2d 794, 795 (Me.1973) (holding that the United States and Maine constitutions compel the conclusion that "an indigent parent or parents against whom a custody petition is instituted ... is entitled to have counsel appointed at the State's expense unless the right to counsel is knowingly waived"); *Crist v. Div. of Youth & Family Servs.*, 128 N.J.Super. 402, 320 A.2d 203, 211 (1974) (holding that prospectively, "indigent parents subjected to dependency proceedings looking towards temporary custody or permanent termination of parental rights are entitled to counsel free of charge" and that "[s]ince the proceeding for temporary custody is frequently a prelude to a petition to terminate parental rights, or failure in a temporary custody proceeding may permanently discourage further interest in a final termination proceeding, there is equal justification for legal representation at the earlier, temporary state of the proceeding"), *affirmed in part and reversed in part on other grounds by*, 135 N.J.Super. 573, 343 A.2d 815 (1975); *In re Ella R.B.*, 30 N.Y.2d 352, 334 N.Y.S.2d 133, 285 N.E.2d 288, 290 (1972) (holding that "an indigent parent, faced with the loss of a child's society, as well as the possibility of criminal charges, is entitled to the assistance of counsel"; "[a] parent's concern for the liberty of the child, as well as for his care and control, involves too

fundamental an interest and right to be relinquished to the State without the opportunity for a hearing, with assigned counsel if the parent lacks the means to retain a lawyer"; and since a right to counsel exists, "it follows that one is entitled to be so advised"); *State v. Jamison,* 251 Or. 114, 444 P.2d 15, 17 (1968) (holding that "[i]t would be unconscionable for the state forever to terminate the parental rights of the poor without allowing such parents to be assisted by counsel"; counsel in juvenile court must be made available for parents and children alike when the relationship of parent and child is threatened by the state; "[i]f the parents are too poor to employ counsel, the cost thereof must be borne by the public"; and waiver of the right to counsel "cannot be inferred from a failure to request court-appointed counsel by a person who, insofar as the record reveals, does not know of her right to counsel"), *overruled by State v. Geist,* 310 Or. 176, 796 P.2d 1193 (1990) (holding that the United States Supreme Court's decision in *Lassiter* overruled the ***48 **1248** holding in *Jamison* that due process requires the appointment of counsel in every termination-of-parental-rights case); *In re Adoption of R.I.,* 455 Pa. 29, 312 A.2d 601, 602 (1973) (explaining that the logic behind the right to court-appointed counsel in criminal cases "is equally applicable to a case involving an indigent parent faced with the loss of [his or] her child"); *In re Welfare of Luscier,* 84 Wash.2d 135, 524 P.2d 906 (1974) (holding that a parent's right to counsel at public expense in a permanent-child-deprivation proceeding "is mandated by the constitutional guarantees of due process under the Fourteenth Amendment of the United States Constitution and Art. 1, § 3 of the Washington Constitution"); *In re Welfare of Myricks,* 85 Wash.2d 252, 533 P.2d 841 (1975) (extending the right of indigent parents to court-appointed counsel in permanent child deprivation proceedings to temporary deprivation proceedings " where permanent deprivation may likely follow the dependency and child neglect proceeding"); *State ex rel. Lemaster v. Oakley,* 157 W.Va. 590, 203 S.E.2d 140, 145 (1974) (concluding that "[c]onsidering the complexity of charges potentially directed to allegedly neglectful parents, the sources available to the State as charging party, the potential for the State viewing the parents' defensive testimony as probative of criminal conduct and the fundamental nature of the parents' rights to the care, custody and companionship of their natural children, we are impelled to hold that a minimum standard of due process requires indigent parents faced with charges of neglect and the potential for termination of parental rights to natural children to be furnished with court-appointed counsel to represent their interest at State expense. The vast majority of reviewing courts of our sister and federal jurisdictions have adopted the precise view which we adopt today."). *See also* Annotation, *Right of Indigent Parent to Appointed Counsel in Proceeding for Involuntary Termination of Parental Rights,* 92 A.L.R.5th 379 (2007).

In 1981, however, the United States Supreme Court, in a five-to-four decision, rejected the prevailing case law and held that under the Due Process Clause of the Fourteenth Amendment of the United States Constitution,[37] indigent parents in a state-initiated termination-of-parental-rights proceeding do not have a *per se* right to be represented by court-appointed counsel. *Lassiter,* 452 U.S. at 31–32, 101 S.Ct. 2153. In coming to this conclusion, Justice Stewart, writing for the majority, initially examined relevant Supreme Court precedents on an indigent's right to appointed counsel and observed that "[t]he pre-eminent generalization that emerges from this Court's precedents ... is that such a right has been recognized to exist only where the litigant may lose his [or her] physical liberty if he [or she] loses the litigation." *Id.* at 25, 101 S.Ct. 2153. The majority noted that "it is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments [sic] right to counsel in criminal cases, which triggers the right to appointed counsel[,]" and that "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel." *Id.* at 25–26, 101 S.Ct. 2153.

Summarizing its precedents, the majority stated:

> [T]he Court's precedents speak with one voice about what "fundamental fairness" has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he [or she] loses, he [or she] may be deprived of his [or her] physical liberty. It is against this presumption that all the other elements in the due process decision must be measured.

452 U.S. at 26–27, 101 S.Ct. 2153.

counsel in this type of case. I agree with his conclusion, but I would take one further step.

In my opinion the reasons supporting the conclusion that the Due Process Clause of the Fourteenth Amendment entitles the defendant in a criminal case to representation by counsel apply with equal force to a case of this kind. The issue is one of fundamental fairness, not of weighing the pecuniary costs against the societal benefits. Accordingly, even if the costs to the State were not relatively insignificant but rather were just as great as the costs of providing prosecutors, judges, and defense counsel to ensure the fairness of criminal proceedings, I would reach the same result in this category of cases. For the value of protecting our liberty from deprivation by the State without due process of law is priceless.

Id. at 59–60, 101 S.Ct. 2153 (citation omitted).

III.

[6] To summarize, the United States Supreme Court has instructed that courts determining **1257 *57 whether a particular indigent parent is entitled to court-appointed counsel must balance the presumption that the right to court-appointed counsel is triggered only when an indigent parent is threatened with the loss of his or her personal liberty against three due-process considerations: (1) the private interests at stake, (2) the government's interest, and (3) the risk that the failure to appoint counsel will lead to an erroneous decision. *Lassiter*, 452 U.S. at 31, 101 S.Ct. 2153. Because the private interests of the parents and the competing interests of the government are evenly balanced, the court's determination invariably hinges on the third factor. *Id.* (implying that ambiguity comes mostly in the third prong of the *Eldridge* analysis). *See also State v. Grannis*, 67 Or.App. 565, 680 P.2d 660, 664 (1984) (commenting that under *Lassiter*, "the nature of the parental interest and of the governmental interest are relatively constant and, generally, the only variable for the court to consider in deciding whether to appoint counsel is the extent of the 'risk that the procedures used will lead to erroneous decisions.' "); *in rE parentaL rights as tO N.D.O., T.L.O., anD T.O.*, 121 nev. 379, 115 P.3d 223, 226 (2005) ("We expect that both the parent's interests and the State's interests will almost invariably be strong in termination proceedings."); *S.C. Dep't of Soc. Servs. v. Vanderhorst*, 287 S.C. 554, 340 S.E.2d 149, 152–53 (1986) (applying *Lassiter* but only analyzing the "risk of error" prong of the *Eldridge* test); *State v. Min*, 802 S.W.2d 625, 626–27 (Tenn.Ct.App.1990) (holding that the interests of parents and the state in a termination-of-parental-rights proceeding are "evenly balanced" and that the risk-of-error prong was thus the "main consideration" in that case).

In *Lassiter*, the Supreme Court majority mentioned several factors that "may combine to overwhelm an uncounseled parent" and heighten the risk of an erroneous deprivation of a parent's rights:

> [T]he ultimate issues with which a termination hearing deals are not always simple, however commonplace they may be. Expert medical and psychiatric testimony, which few parents are equipped to understand and fewer still to confute, is sometimes presented. The parents are likely to be people with little education, who have had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation.

452 U.S. at 30, 101 S.Ct. 2153. The Supreme Court also noted that "[s]ome parents will have an additional interest to protect. Petitions to terminate parental rights are not uncommonly based on alleged criminal activity. Parents so accused may need legal counsel to guide them in understanding the problems such petitions may create." *Id.* at 27 n. 3, 101 S.Ct. 2153.

[7] Applying the *Lassiter* balancing test to Father, we conclude, in light of the record, that he was denied his constitutional right to due process when he was not provided with counsel until sixteen days prior to trial.

A.

The record indicates, first of all, that Father did not graduate from high school or obtain a general-education diploma. Father had a fifth-grade reading level, "low average" intelligence (with an intelligence quotient of 89),

a "low average vocabulary," and average "abstract concept formation ability." His life and life situations were difficult and he demonstrated difficulty grasping the complexities of the issues and procedures before the family court.

Additionally, Father was on probation, apparently for a drug-related offense, during the proceedings below, and some of the conditions of his probation, for example, the requirement that he undergo periodic drug-testing, seemingly overlapped with the conditions imposed on him by the family court. Since the petitions in Cases 1 and 2 and DHS's motions for permanent custody were premised in part on Father's history of substance abuse and past abuse and neglect of Children, areas of concern for DHS, Father would have benefitted from the guidance of counsel to ensure that he did not incriminate himself as to possible criminal charges.

The record also reveals that Father was marginalized and confused during the proceedings below, and he was definitely not an ***58 **1258** active participant who was able to protect his own interests. At the February 28, 2006 hearing, for example, a great deal of discussion took place about Father's paternity, the options available to Father to establish his paternity, and whether Father should establish his paternity. However, except to answer an initial inquiry as to his name, Father was not addressed at all during the hearing. Father's paternity status as to L.A. was clearly complicated, as even DHS's attorney conceded, because Mother had been married to Deceased Husband at the time of L.A.'s birth and L.A. had been receiving social security benefits following Deceased Husband's death. Such benefits would cease if Father acknowledged his paternity of L.A. or was adjudicated to be L.A.'s biological father, and Father would then become statutorily responsible for L.A.'s support, even if Father's parental rights in L.A. were terminated. It was important for Father to understand the legal ramifications of his paternity status as to Sons.

Additionally, the petitions filed by DHS on November 18, 2003 in Cases 1 and 2 sought foster custody of Sons and named Father as Sons' "Alleged Natural Father." Although the petition in Case 1 (as to L.A.) was not served on Father until March 4, 2004 and the petition in Case 2 (as to J.A.) was not served until November 16, 2004, the family court nevertheless entered orders that affected Father's rights and duties as to Sons. Furthermore, the record reflects that because Father was not initially served with the petitions, he did not receive notice of certain family court proceedings, and when he failed to appear at these proceedings, he was defaulted and denied notice of future hearings, at which he understandably seldom appeared—a chain of events that could have been broken if Father had had counsel. Father's failure to comply fully with the family court's orders and attend scheduled court proceedings factored into the family court's decisions regarding Father's parental rights.

Finally, the record reveals that a potential conflict of interest existed between Parents because DHS reports implied that if Parents chose to stay in their sometimes-abusive relationship, the safety risks to Children were heightened. Yet, Father was the only party to Cases 1 and 2 who was not represented by any type of counsel during most of the proceedings below.

Based on our review of the record, it is apparent to us that the belated appointment of an attorney for Father created an appreciable risk that Father would be erroneously deprived of his parental rights in Sons. This risk was heightened when, sixteen days before trial, after Father was finally appointed an attorney, the family court denied that attorney's request for a continuance. According to the record, another attorney showed up to represent Father at trial.

Applying the case-by-case balancing test of *Lassiter*, we conclude that Father was deprived of his due-process right under the United States Constitution when he was not appointed counsel until sixteen days prior to trial.

B.

It appears from the record that the main reason the family court did not appoint counsel for Father until sixteen days prior to the permanent-custody trial was that Father's paternity as to Sons had not been adjudicated until that point in time. Since Father admitted during the proceedings below that he was Sons' father, we conclude that the family court erred in conditioning Father's right to counsel on Father's formal establishment of his paternity.

The petitions in Cases 1 and 2 claimed that Father was the "Alleged Natural Father" of Sons. Although Father did not file a written answer to the petitions, admitting these allegations,[39] he orally told the court on several ***59**

**1259 occasions that he was Sons' father, once even requesting to be put on J.A.'s birth certificate. The record also indicates that Father held himself out as Sons' father, Mother acknowledged that Father was Sons' biological father, and Father's brother and sister-in-law were helping to care for Sons. Despite Father's admission of his paternity, the family court never orally advised Father of his right to be represented by counsel in Cases 1 and 2, and that if he were indigent, the family court, in its discretion, *may* appoint counsel for him. Indeed, the first time the family court personally addressed Father and advised him of any right to appointed counsel was on April 26, 2006, more than two years after Father had been served with the petition in Case 1, and this advisement related to Father's right to be represented by counsel in the proceeding to establish his paternity, not in Cases 1 and 2. If it was the family court's policy not to provide Father with counsel in Cases 1 and 2 unless he had formally established his paternity, that policy was not expressly or clearly communicated to Father.

[8] Where an alleged natural father's paternity of a child is in question, we believe it is incumbent on the family court to resolve the question as expeditiously as possible after the commencement of child-protective proceedings. A determination of an alleged natural father's paternity is essential to a permanent custody order that divests the alleged natural father of his parental rights in his children, for there is no need to terminate rights in a child that an alleged father does not have.

In *Estes v. Dallas County Child Welfare Unit of Texas Dep't of Human Servs.*, 773 S.W.2d 800 (Tex.App.1989), Estes, the alleged biological father of a child appealed a judgment terminating his rights in the child. Estes had filed, *pro se,* an answer to a petition for termination of his rights, generally denying the allegations in the petition but alleging that he was an indigent parent and requesting court-appointed counsel. The trial court denied his request for an indigency hearing and for appointment of counsel, finding that Estes "had failed to respond by timely filing an admission of paternity or a counterclaim for paternity or for voluntary legitimation as required by section 15.023 of the Texas Family Code." *Id.* at 801. Reversing, the Texas Supreme Court held that Estes's allegation in his *pro se* answer that he was an "indigent parent," along with the child's guardian ad litem's statement that Estes described himself as an indigent parent, were sufficient to constitute a timely filed admission of paternity and notification of his intent to oppose termination of his rights with respect to the child. The Texas court reasoned:

> Because the natural rights existing between a parent and child are of constitutional dimensions, involuntary termination proceedings must be strictly scrutinized. The rights of biological fathers of illegitimate children are protected by the Texas Equal Rights Amendment, Tex. Const. art. I, § 3a. In applying the required strict scrutiny to this case, we are compelled to agree with the arguments stated by Estes and the guardian ad litem. Estes's answer was sufficient to indicate that he was admitting, and, indeed, asserting paternity. We hold that his answer constituted an admission of paternity that was timely filed since it was filed prior to the final hearing in the suit for termination. The trial court erred in ruling otherwise.

Id. at 802 (citations omitted).

We similarly hold that the family court erred when it seemingly concluded that Father, who had admitted his paternity of Sons, was not entitled to be provided with counsel until he had established his paternity as to Sons.

C.

In light of our conclusion that Father was deprived of due process under the *Lassiter* *60 **1260 test when he was not provided appointed counsel until two weeks before trial, we need not decide in this case whether to join the vast majority of states that require, as a bright-line rule, that counsel be appointed for indigent parents in all termination-of-parental-rights cases. We express grave concerns, however, about the case-by-case approach adopted in *Lassiter* for determining the right to counsel. As Justice Blackmun observed, such an approach

> places an even heavier burden on the trial court, which will be required to

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

Lassiter, 452 U.S. at 51, n. 19, 101 S.Ct. 2153 (Blackmun, J., dissenting). Because the *Lassiter* dissents present compelling arguments for a bright-line rule regarding the provision of counsel in termination-of-parental-rights cases, we invite DHS, the Department of the Attorney General, and the Hawai'i Legislature to re-examine the discretionary nature of HRS § 587–34.

CONCLUSION

Based on the foregoing discussion, we affirm the August 14, 2006 Orders in Cases 1 and 2 as to Mother. We vacate, as to Father, the August 14, 2006 Order entered in Case 1 as to L.A. and the August 14, 2006 Order entered in Case 2 as to J.A., and we remand for further proceedings.

On remand, we instruct that foster custody of Sons shall remain with DHS, Sons shall remain in the foster home of their paternal uncle and aunt, and DHS shall prepare a new safe-family-home plan for Father.

Parallel Citations

193 P.3d 1228

Footnotes

1 Under the August 14, 2006 Orders and consistent with that part of the definition of "[p]ermanent custody" in Hawaii Revised Statutes (HRS) § 587–2(2) (1993), Father remained responsible for the support of Sons, "including, but not limited to, the payment for the cost of any and all care, treatment, or any other service supplied or provided by the permanent custodian, any subsequent permanent custodian/s, other authorized agency, or the Court for [Sons'] benefit" until Sons were legally adopted.

2 L.A. was born while Mother was married to Deceased Husband. Deceased Husband was therefore the presumed natural father of L.A. pursuant to HRS § 584–4(a) (1993), which states, in part: "A man is presumed to be the natural father of a child if [h]e and the child's natural mother are or have been married to each other and the child is born during the marriage [.]" It is not clear from the record whether Deceased Father was listed as L.A.'s father on L.A.'s birth certificate.

3 Under the August 14, 2006 Orders, Mother remained responsible for the support of Children until they were legally adopted. *See* footnote 1.

4 HRS § 587–2 (2006), which is part of HRS chapter 587, the Child Protective Act, defines "foster custody" as follows:

> "Foster custody" means the legal status created pursuant to this section, section 587–21(b)(2), or by an order of court after the court has determined that the child's family is not presently willing and able to provide the child with a safe family home, even with the assistance of a service plan.
>
> (1) Foster custody vests in a foster custodian the following duties and rights:
>
> (A) To determine where and with whom the child shall be placed in foster care; provided that the child shall not be placed in foster care outside the State without prior order of the court; provided further that, subsequent to the temporary foster custody hearing, unless otherwise ordered by the court, the temporary foster custodian or the foster custodian may permit the child to resume residence with the family from which the child was removed after providing prior written notice to the court and to all parties, which notice shall state that there is no objection of any party to the return; and upon the return of the child to the family, temporary foster custody, or foster custody automatically shall be revoked and the child and the child's family members who are parties shall be under the temporary family supervision or the family supervision of the former temporary foster custodian or foster custodian;
>
> (B) To assure that the child is provided in a timely manner with adequate food, clothing, shelter, psychological care, physical care, medical care, supervision, and other necessities;
>
> (C) To monitor the provision to the child of appropriate education;
>
> (D) To provide all consents which are required for the child's physical or psychological health or welfare, including, but not limited to, ordinary medical, dental, psychiatric, psychological, educational, employment, recreational, or social needs; and to