123 Hawai'i 1
Supreme Court of Hawai'i.

In the Interest of RGB, A Minor.

No. 28582. | April 1, 2010.

Synopsis

Background: Following termination of mother's parental rights, mother filed motion for relief of final judgment. The Family Court, Third Circuit, Ben H. Gaddis, J., denied motion. Mother appealed. The Intermediate Court of Appeals, 2009 WL 953392, affirmed. Mother sought certiorari review.

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

[1] mother had a federal constitutional due process right to counsel;

[2] motion for relief of final judgment for "any other reason justifying relief from the operation of the judgment," filed nearly two years after judgment of termination, was an appropriate vehicle for raising ineffective assistance of counsel claim;

[3] fundamental fairness test governed ineffective assistance of counsel claims in the termination of parental rights context;

[4] family court acted within its discretion in finding that mother failed to establish that her pre-termination counsel was ineffective;

[5] mother failed to establish that termination proceedings were fundamentally unfair, and thus could not establish ineffective assistance based on counsel's failure to timely appeal; and

[6] mother did not abuse its discretion in limiting mother's access to post-termination records.

Affirmed.

Acoba, J., dissented and filed opinion, in which Duffy, J., joined.

West Headnotes (15)

[1] **Infants**
Discretion of lower court

Family court's denial of a motion for relief of final judgment for "any other reason justifying relief from the operation of the judgment," is reviewed for whether there has been an abuse of discretion. Rules Civ.Proc., Rule 60(b)(6).

Cases that cite this headnote

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

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.

3 Cases that cite this headnote

[3] **Appeal and Error**
Burden of showing grounds for review

The burden of establishing abuse of discretion in the denial of a motion for relief of final judgment for "any other reason justifying relief from the operation of the judgment" is on appellant, and a strong showing is required to establish it. Rules Civ.Proc., Rule 60(b)(6).

3 Cases that cite this headnote

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

The United States Constitution does not require the appointment of counsel in all proceedings involving the potential for termination of parental rights; 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. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

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

Infants
Parent or parent figure in general

Mother had a federal constitutional due process right to counsel in termination of parental rights proceedings, given the risk that failure to appoint counsel would lead to an erroneous decision. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

[6] **Infants**
Absence, waiver, or ineffectiveness of counsel

Infants
Time for motion, proceedings, or ruling

Motion for relief from final judgment for "any other reason justifying relief from the operation of the judgment," filed nearly two years after judgment of termination, was an appropriate vehicle for raising ineffective assistance of counsel claim in termination of parental rights proceedings, where mother could not pursue any other avenue of relief, and child had not yet been adopted. Rules Civ.Proc., Rule 60(b)(6).

Cases that cite this headnote

[7] **Judgment**
Right to relief in general

A motion for relief of final judgment for "any other reason justifying relief from the operation of the judgment" permits the trial court in its sound discretion to relieve a party from a final judgment. Rules Civ.Proc., Rule 60(b)(6).

Cases that cite this headnote

[8] **Infants**
Effectiveness of Counsel

The right to counsel in termination of parental rights cases, where applicable, includes the right to effective counsel.

2 Cases that cite this headnote

[9] **Infants**
Effectiveness of Counsel

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.

1 Cases that cite this headnote

[10] **Infants**
Effectiveness of Counsel

Movant alleging ineffectiveness of counsel in a termination of parental rights case 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.

Cases that cite this headnote

[11] **Infants**
Effectiveness of Counsel

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.

Cases that cite this headnote

[12] **Infants**

Mother's child, RGB, was born in July 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
>
> 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 Hawai'i Constitution provides indigent parents a right to counsel in all termination proceedings. Second, we conclude that a Hawai'i 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 63–64, 229 P.3d at 1128–29. The motion was filed nearly two years after the family court's *4 **1069 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.
>
> 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. *5 **1070 Fearful that California authorities would remove her second child, she moved to Hawai'i when eight months pregnant with [RGB].
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> ...
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> 8. Mother encountered many difficulties living in Hawai'i 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.
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> 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.
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> 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.
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> 11. A temporary foster custody hearing was conducted. Mother applied for and received the services of court-appointed attorney, Cynthia Linet.
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> 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].
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> ...
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> 14. On June 15, 2001, ... the Court returned [RGB] to [Mother's] care under family supervision.
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> 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

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

[4] 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, 101 S.Ct. 2153. 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, 101 S.Ct. 2153 (citing *Eldridge,* 424 U.S. at 335, 96 S.Ct. 893). 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, 101 S.Ct. 2153.

This court has not determined whether article 1, section 5 of the Hawai'i Constitution affords parents a due process right to counsel in all termination proceedings.[17] However, in *In re Doe,* 99 Hawai'i 522, 533, 57 P.3d 447, 458 (2002) (citation omitted), we held that article 1, section 5 of 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, 101 S.Ct. 2153).

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 ***18** ****1083** 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.*

[5] 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, 101 S.Ct. 2153.

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 Hawai'i 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

[6] 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[,]" 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 ***19 **1084** 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

[7] "Rule 60(b)(6) permits the trial court in its sound discretion to relieve a party from a final judgment." *Hayashi*, 4 Haw.App. at 290, 666 P.2d at 174 (citing *Isemoto Contracting Co. v. Andrade*, 1 Haw.App. 202, 205, 616 P.2d 1022, 1025 (1980)). 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 *(6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time,* and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceedings was entered or taken.

(Emphasis added).

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 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 ***22** ****1087** 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, 104 S.Ct. 2052, 80 L.Ed.2d 674 (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.2008); *N.J. Div. of Youth & Family Servs. v. B.R.*, 192 N.J. 301, 929 A.2d 1034, 1038 (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*, 310 Or. 176, 796 P.2d 1193, 1204 (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 Office of Family & Children*, 810 N.E.2d 1035, 1039 (Ind.2004) ("We conclude that transporting ***23** ****1088** 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, 120 S.Ct. 1029, 145 L.Ed.2d 985 (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, 120 S.Ct. 1029. 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, 120 S.Ct. 1029. 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

Circuit affirmed the District Court's dismissal of Hernandez's habeas petition. *Id.*

[8] [9] [10] [11] 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 Hawai'i 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 Hawai'i 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 ***26 **1091** *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, 102 S.Ct. 1388, 71 L.Ed.2d 599 (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.,* 392 Pa.Super. 598, 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

Dissenting Opinion by ACOBA, J., With Whom DUFFY, J., Joins.

By its decision today, the majority denies indigent persons access to justice in parental termination actions. Hawai'i is now one of only five states that leaves the appointment of counsel for indigent parents in termination-of-parental-rights proceedings to the random method of case by case determination. *See In re "A" Children*, 119 Hawai'i 28, 46 n. 35, 193 P.3d 1228, 1246 n. 35 (App.2008). Despite the overwhelming national trend away from discretionary appointment, the majority embraces the majority's ultimate holding in *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981), which practically every state has justly rejected.

Here, Petitioner/Mother–Appellant (Petitioner) [1] was denied the opportunity to present her side of the case on appeal. On March 11, 2005, the family court of the third circuit (the court) rendered its findings of fact (findings), conclusions of law (conclusions), and order [collectively, Termination Order], terminating Petitioner's parental rights. After entry of this Termination Order, Petitioner had twenty days to file a motion for reconsideration of the court's decision under Hawai'i Revised Statutes (HRS) § 571–54 (1993), [2] as a prerequisite for filing an appeal. The court *sua sponte* discharged appointed counsel without the substituted appearance of any new attorney. Thus, Petitioner was left without counsel for the first eighteen days of this crucial period. When the court appointed appellate counsel, Carrie Yonemori, Esq. (Yonemori), Yonemori failed to file Petitioner's motion for reconsideration. As a consequence, Petitioner's direct appeal was dismissed for lack of jurisdiction. Therefore, Petitioner has never had the opportunity to object to the Termination Order on appeal.

In light of these circumstances, I would hold (1) that the Intermediate Court of Appeals ***33 **1098** (ICA) did not gravely err in concluding that Petitioner's "Motion for: 1) New Trial, and/or 2) to Reconsider and/or Amend Judgment and/or All Previous Orders, and/or 3) for Release of All Evidence or Files in Case, and/or 4) for Dismissal" filed on February 6, 2007 (Rule 60 Motion) was properly considered under Hawai'i Family Court Rules (HFCR) Rule 60(b)(6), (2) that article I, section 5 of the Hawai'i Constitution guarantees indigent parents the right to court-appointed counsel in parental termination proceedings, [3] (3) that Petitioner's right to court-appointed counsel was violated when Petitioner was not provided effective assistance of counsel on appeal, and (4) that Petitioner should be allowed a direct appeal in light of the fact that this court allows such appeals for indigent criminal defendants when an attorney fails to perfect the appeal or files a late appeal. Therefore, I would direct that Petitioner have twenty days from the issuance of this court's judgment to petition the court for reconsideration pursuant to HRS § 571–54, the denial of which is subject to appeal in accordance with that statute.

Unlike the majority, I believe it is wrong to reach the findings and conclusions in the Termination Order inasmuch as Petitioner has had no opportunity to present her side of the case on direct appeal. Accordingly, I respectfully dissent.

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

I.

A.

Pre–Termination Proceedings

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

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

On November 29, 2001 and November 30, 2001, Petitioner, along with Linet, appeared at hearings where DHS requested the court to award foster custody. On November 29, 2001, the court denied DHS's request. At that hearing, Petitioner requested permission to proceed *pro se,* and the court therefore granted Linet's oral motion to withdraw as counsel.

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

Following those hearings, the court found that Petitioner suffered from a mental condition which distorted her perception of the people she came in contact with, causing her to think that everyone was conspiring against her to deprive her of the child. The court further found that Petitioner's misperceptions and her inability to control her emotions led her to have conflicts with people who were trying to assist her. The court also found that Petitioner's mental disorder prevented her from applying lessons learned to adequately parent the child and, thus, the child was not provided clean or appropriate clothing, was not bathed on a regular basis, and was not adequately supervised. The ***34 **1099** court concluded that, due to her mental disorder, Petitioner was incapable of adapting to situations not compatible with her own lifestyle and beliefs, which endangered the child and rendered Petitioner incapable of providing a safe home for the child, and therefore, Petitioner's continued care for the child would result in serious injury to her, delaying physical, emotional, social, and/or psychological development with long term negative effects.

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

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

B.

Termination Proceedings

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

On December 23, 2004, Iopa filed a Motion to Reconsider Denial of Oral Motion to Continue Trial. On January 11, 2005, Iopa filed a Motion to Reinstate Visitation. Both motions were denied at a hearing on January 13, 2005.

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

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

C.

Court–Discharge of Petitioner's Counsel and Subsequent Appointment of Counsel

The court's Termination Order stated that:

> *[Iopa], stand-by counsel for [Petitioner], is discharged.* Based on representations as to changes in her resource status, if [Petitioner] wishes the assistance of court-

appointed counsel to pursue further relief or to perfect an appeal, she must tender a new application for court-appointed counsel to the [c]ourt immediately.

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

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

D.

Post–Termination Proceedings

1.

2005 Proceedings

While the majority states that "[t]here are no filings in the record from either Yonemori or Petitioner from March 29, 2005 to March 10, 2006," majority opinion at 10, 229 P.3d at 1075, the record is replete with Petitioner's and Yonemori's actions leading up to Petitioner's March 10, 2006 "Motion for Relief From Judgment Order of March 11, 2005." The record indicates that DHS filed numerous reports indicating that Petitioner's appeal was pending. For example, on August 3, 2005, DHS filed a report to the court noting that Petitioner's appeal "may delay the adoption process[.]" On August 4, 2005, ***35 **1100** RGB's guardian ad litem filed a report stating that DHS would be unable to proceed with adoption unless Petitioner's appeal was resolved. The guardian ad litem report also stated that "[the guardian ad litem] ha[s] spoken to [Yonemori], the attorney appointed to represent [Petitioner] ... and [Yonemori] has related that the necessary paperwork pertaining to such appeal should be submitted to the Supreme Court shortly."

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

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

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

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

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

Ohana Conferencing, *I completely forgot about making the appropriate corrections for this case.*

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

2.

2006 Proceedings

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

**1101 *36 On March 10, 2006, Petitioner filed a pro se Motion for Relief from the Order of March 11, 2005, pursuant to HFCR Rule 60. Petitioner's affidavit attached to her pro se Motion for Relief argued that " [c]ounsel assigned by this court remains ineffective to bring this matter to justice [.]" On March 13, 2006, Yonemori refiled the Notice of Appeal of the Termination Order. On March 15, 2006, Yonemori also filed a Motion for Relief from the Termination Order, pursuant to HRCR Rule 60.

On June 2, 2006, Yonemori filed a Motion for Withdrawal and Substitution of Counsel. In support of the motion, Yonemori stated in her Declaration of Counsel that she believed a legal conflict existed with her continued representation of Petitioner due to Petitioner's ineffective assistance of counsel claim:

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

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

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

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

> 9. I have gone through voluminous files and spoken with [Petitioner] on a number of occasions, as well as done research, and *firmly believe in the various issues that she has brought up. I do not want to see her rights jeopardized or further compromised in any way and feel that she should*

be appointed a competent and knowledgeable attorney who will work closely with her and strenuously pursue this case.

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

(Emphases added.)

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

After a hearing held on June 2, 2006, the court issued an order on June 26, 2006, finding that "due to [Petitioner's direct] appeal, this court lacks jurisdiction to act on her Rule 60(b) motion and motion for withdrawal and substitution of counsel[.]" Therefore, the court "[held] in abeyance any ruling on [Petitioner's] Rule 60(b) motion or motion for withdrawal and substitution unless moved on; ***37 **1102** and direct[ed Petitioner] and [Petitioner's] counsel to address th[ose issues] to the appellate court."

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

[Petitioner] did not file a motion for reconsideration within twenty days after entry of the [Termination Order], as [HRS] § 571–54[ ] required. Therefore, [Petitioner] failed to perfect her right to assert an appeal under HRS § 571–54[ ], and there is no appealable order. Absent an appealable order, we lack jurisdiction over this case.

(Emphasis added.)

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

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

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

On February 6, 2007, Petitioner filed the Rule 60 Motion, from which this appeal was taken. On April 24, 2007, the court orally denied this motion, and filed its order on May 8, 2007. Petitioner filed a Notice of Appeal from the May 8, 2007 order on June 7, 2007.

E.

The ICA issued its SDO on April 9, 2009. The ICA stated that the Termination Order was not before it because Petitioner

prejudice to the adverse party, the commanding equities of the case, and the general policy that judgments be final." 4 Haw.App. at 290, 666 P.2d at 175. As noted *supra,* in its Answering Brief, Respondent asserted that "[i]n considering what is a 'reasonable time' to bring a Rule 60(b)(6) motion the court must consider all of the attendant circumstances including prejudice to the adverse party, and in this case the prejudice would be considerable since the child has spent the vast majority of her life in foster care." This was the only argument regarding "attendant circumstances" presented by Respondent. As stated above, Respondent apparently abandoned any argument as to the timeliness of the Rule 60(b) Motion in its Response on certiorari. While the rights of the child are undoubtedly of vital import, those rights are not inconsistent with Petitioner's constitutional right to effective assistance of counsel, and allowing Petitioner relief to which she is entitled at this point does not mean that the child's rights will be negatively impacted.

D.

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

V.

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

A.

With respect to the first threshold issue, the Supreme Court in *Lassiter* has not mandated counsel in termination proceedings as a due process right under the United States Constitution. In *Lassiter,* the Supreme Court, by a 5–4 majority, determined that an absolute right to counsel exists only where the indigent "may be deprived of his [or her] physical liberty." 452 U.S. at 27, 101 S.Ct. 2153. The Court ruled that, in all other ***44** ****1109** cases, including a termination of parental rights proceeding, the balancing test set forth in *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), should be applied on a case-by-case basis. 452 U.S. at 27, 101 S.Ct. 2153. That test "propounds three elements to be evaluated in deciding what due process requires, viz., the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." *Id.* The Supreme Court held that, in determining whether court-appointed counsel is required by due process, "[w]e must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom." *Id.*

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

> This Court's decisions have by now made plain beyond the need for multiple citation that *a parent's desire for and right to the companionship, care, custody and management of his or her children is an important interest that undeniably warrants deference and, absent a powerful countervailing interest, protection. Here the State has sought not simply to infringe upon that interest but to end it. If the State prevails, it will have worked a unique kind of deprivation. A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore[,] a commanding one.*
>
> Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision. For this reason, the State may share the indigent parent's interest in the availability of appointed counsel. If, as our adversary system presupposes, *accurate and just results are most likely to be obtained through the equal contest of opposed interests, the State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel,* without whom the contest of interests may become unwholesomely unequal.

Tracing the history of the case law on this subject, the ICA noted that "[p]rior to 1981, the overwhelming majority of state and federal courts that had addressed the issue held that constitutional due process required that indigent parents be provided with court-appointed counsel in termination-of-parental-rights and prolonged-deprivation-of-custody cases." *Id.* at 46, 193 P.3d at 1246. The ICA recognized, however, that, in 1981, in *Lassiter*, the Supreme Court "rejected the prevailing case law and held that under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, indigent parents in a state-initiated termination-of-parental-rights proceeding do not have a per se right to be represented by court-appointed counsel." *Id.* at 48, 193 P.3d at 1248 (footnote omitted). The ICA summarized the holding in *Lassiter* as requiring that courts "balance the presumption that the right to court-appointed counsel is triggered only when an indigent parent is threatened with the loss of his or her personal liberty against ... (1) the private interests at stake, (2) the government's interest, and (3) the risk that the failure to appoint counsel will lead to an erroneous decision." *Id.* at 57, 193 P.3d at 1257. The ICA interpreted *Lassiter* as providing that, "[b]ecause the private interests of the parents and the competing interests of the government are evenly balanced, the court's determination invariably hinges on the third factor." *Id.*

b.

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

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

**1112 *47 *Id.* (quoting *Lassiter*, 452 U.S. at 51 n. 19, 101 S.Ct. 2153 (Blackmun, J., dissenting)).

VI.

A.

However, this court has "affirm[ed], independent of the federal constitution, that parents have a *substantive liberty interest* in the care, custody, and control of their children protected by the due process clause of article [I], section 5 of the Hawai'i Constitution." *Doe*, 99 Hawai'i at 533, 57 P.3d at 458 (emphasis added). In that regard, in *Doe*, this court held that

> [p]arental rights guaranteed under the Hawai'i Constitution would mean little if parents were deprived of the custody of their children without a fair hearing. *Indeed, parents have a fundamental liberty interest in the care, custody, and management of their children and the state may not deprive a person of his or her liberty interest without providing a fair procedure for the deprivation.* Furthermore, the Supreme Court has said that parental rights cannot be denied without an opportunity for them to be heard at a *meaningful time and in a meaningful manner.*

Id. (first emphasis added) (second emphasis in original) (quotation marks, citations, and brackets omitted). This court determined in *Doe* that an opportunity to be heard in "a meaningful manner" included the right to an interpreter "where [ ] parental rights are substantially affected[,]" *id.*

at 534, 57 P.3d at 459, including "where one purpose of the hearings was to determine whether or not parental rights should eventually be terminated [,]" *id.* at 535, 57 P.3d at 460.

In light of the constitutionally protected liberty interest at stake in a termination of parental rights proceeding, this court should hold, consistent with the great majority of states, that indigent parents are guaranteed the right to court-appointed counsel in termination proceedings under the due process clause in article I, section 5 of the Hawai'i Constitution.

B.

Even assuming the balancing test in *Lassiter* were appropriate, weighing the *Eldridge* factors on a case-by-case basis will *always* come out in favor of appointing counsel under the Hawai'i Constitution. As *Lassiter* recognized, "a parent's desire for and right to the ... custody ... of his or her children is an important interest that undeniably warrants deference and, absent a powerful countervailing interest, protection[,]" and, therefore, "*[a] parent's interest in the accuracy and justice of the decision to terminate his or her parental status is ... a commanding one.*" 452 U.S. at 27, 101 S.Ct. 2153 (emphasis added). Thus, the private interests at stake in a termination proceeding weigh strongly in favor of appointing counsel, especially in light of the *substantive* liberty interest in custody embodied in the Hawai'i Constitution.

As for the State's interest, the *Lassiter* court indicated that the State's interests actually weighed largely *in favor* of appointing counsel, stating that "the State has an urgent interest in the welfare of the child," and thus, "it shares the parent's interest in an accurate and just decision." *Id.* The *Lassiter* court recognized that "[i]f, as our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed interests, *the State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal.*" *Id.* at 28, 101 S.Ct. 2153 (emphasis added). Additionally, although recognizing that the State has an interest in the economy of the proceedings, *Lassiter* noted that "*it is hardly significant enough to overcome private interests as important as those here*[.]" *Id.* (emphasis added). Thus, under the Supreme Court's formulation the competing interests weigh heavily in favor of appointing counsel.

The final consideration in the balancing test is "the risk that a parent will be erroneously deprived of his or her child because the parent is not represented by counsel." *Id.* Contrary to the *Lassiter* court's conclusion that the risk may be determined on a case- ***48** ****1113** by-case basis, the risk of erroneous deprivation is undeniably present in every case. Due to the nature of the interests at stake, even in cases where the issues may not seem extremely complex and thus the risk may seem lesser in degree, the balance weighs in favor of appointing counsel.

C.

Other courts have similarly rejected *Lassiter's* "case by case" approach on state constitutional grounds. In *M.E.K. v. R.L.K.*, 921 So.2d 787, 790 (Fla.App. 5 Dist.2006), the Florida District Court of Appeals for the Fifth District rejected this aspect of *Lassiter*, because *Lassiter* "addressed only the minimum due process requirements under the federal due process clause [,]" and "[t]he citizens of Florida are also protected by the due process clause in Article [I], section 9 of the Florida Constitution." That court held that

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

Id. (emphasis added).

Similarly, in *Matter of K.L.J.*, 813 P.2d 276, 282 (Alaska 1991), the Supreme Court of Alaska "reject[ed] the case-by-case approach set out by the Supreme Court in *Lassiter* [,]" based on the due process clause of the Alaska Constitution, and because it agreed with the dissenters in *Lassiter* that due process balancing clearly comes out in favor of appointing counsel in every case. In evaluating the interests at stake, the *K.L.J.* court stated that "[t]he private interest of a parent

Second, the majority's assertion that "the determination of what protections the Hawai'i Constitution provides to indigent parents is not properly before us" is incorrect inasmuch as the majority opinion establishes the standard of ineffective assistance of counsel in parental terminations proceedings. This court has recognized that the right to effective assistance of counsel is protected under the Hawai'i Constitution. *See State v. Montalbo,* 73 Haw. 130, 828 P.2d 1274 (1992) ("Appellant had a right to effective counsel under the Hawaii Constitution, art. I, § 14 and the U.S. Constitution, Sixth and Fourteenth Amendments."); *State v. Smith,* 68 Haw. 304, 309, 712 P.2d 496, 499–500 (1986) (stating that the "assistance of counsel guaranteed by the ... Hawaii Constitution is satisfied only when such assistance is effective"). As discussed fully *infra,* while the majority rejects "importing criminal law concepts directly," majority opinion at 25, 229 P.3d at 1090, it in fact utilizes the "potentially meritorious defense" factor, one of the two factors constituting Hawaii's criminal standard for ineffective assistance of counsel under the Hawai'i Constitution. *See Briones v. State,* 74 Haw. 442, 465–66, 848 P.2d 966, 977 (1993) (establishing that the standard for ineffective assistance at the appellate level "centers on whether counsel informed him or herself enough to present appropriate appealable issues in the first instance" and "[a]n appealable issue is an error or omission ... resulting in the withdrawal or substantial impairment of a *potentially meritorious defense*)" (emphasis added); *State v. Antone,* 62 Haw. 346, 348–49, 615 P.2d 101, 104 (1980) (stating that in order to prove ineffective assistance of counsel at the trial level, the appellant must "[f]irst[,] ... establish specific errors omissions of defense counsel ... [and s]econd, ... establish that these errors or omissions resulted in either the withdrawal or substantial impairment of a *potentially* ***51 **1116** *meritorious defense* ") (emphasis added). Thus, the majority's opinion implicates Petitioner's due process right to effective counsel *under the Hawai'i Constitution.* In rejecting that right, the majority's decision today will have a deleterious effect on indigent parents, but especially on those parents who most need legal representation. [9]

VII.

A.

Having determined that article I, section 5, of the Hawai'i Constitution encompasses a right to counsel at termination proceedings, the question arises as to the standard of effectiveness to be applied. This court has stated that the right to counsel "cannot be satisfied by mere formal appointment, for the assistance of counsel guaranteed by the United States and Hawai'i Constitutions is satisfied only when such assistance is effective." *Smith,* 68 Haw. at 309, 712 P.2d at 499–500 (internal quotation marks, citations, and ellipsis omitted); *see also McMann v. Richardson,* 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (holding that "the right to counsel is the right to the effective assistance of counsel"); *Matter of D.D.F.,* 801 P.2d 703, 707 (Okl.1990) ("Taking into consideration both the constitutional and statutory requirements that counsel be provided [in a termination of parental rights proceeding], we must also agree with [the father] that the right to counsel is the right to effective assistance of counsel. *The right to counsel would be of no consequence if such counsel were not required to represent the parent in a manner consistent with an objective standard of reasonableness.*") (Emphasis added.). Thus, plainly, in order for it to be meaningful, the right to counsel in a termination proceeding must necessarily mean the right to *effective* counsel.

B.

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

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

> *parental rights will be the more grievous of the two.*

Lassiter, 452 U.S. at 59, 101 S.Ct. 2153 (Stevens, J., dissenting) (emphases added). Thus, as Justice Stevens recognized, "the Due Process Clause of the Fourteenth Amendment entitles a defendant in a criminal case to representation by counsel [and] *appl[ies] with equal force to a case of [parental termination].*" *Id.* at 60, 101 S.Ct. 2153 (emphasis added).

The judicial procedures utilized for termination proceedings resembles a criminal prosecution. The State has considerable expertise and resources in prosecuting the case in comparison to an indigent parent defendant. *Id.* at 44–45, 101 S.Ct. 2153 (Blackmun, J. dissenting, joined by Brennan, J. and Marshall, J.). "The legal issues ... are neither simple nor easily defined" and the legal standard against which the defendant parent is judged is "imprecise and open to the subjective ***52 **1117** values of the judge." *Id.* at 45, 101 S.Ct. 2153.

Because the liberty interest at stake in a termination proceeding parallels that in a criminal proceeding, "the range of competence demanded of attorneys in criminal cases" should be similar to that demanded of attorneys in termination proceedings. A survey of other jurisdictions demonstrates that the great majority of courts apply the criminal standard for determining the ineffective assistance of counsel in termination proceedings. *See, e.g., V.F. v. State,* 666 P.2d 42, 46 (Alaska 1983) (applying Alaska's criminal standard for ineffective assistance of counsel as announced in *Risher v. State,* 523 P.2d 421, 425 (Alaska 1974)); *Jones v. Ark. Dep't of Human Servs.,* 361 Ark. 164, 205 S.W.3d 778, 794 (2005) (adopting the federal criminal "standard for ineffectiveness set out in *Strickland [v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)]"); *In re V.M.R.,* 768 P.2d 1268, 1270 (Colo.Ct.App.1989) (holding that the *Strickland* standard applied to non-criminal cases such as parental termination cases); *State v. Anonymous,* 179 Conn. 155, 425 A.2d 939, 943 (1979) (adopting the Connecticut criminal standard for ineffective assistance of counsel enunciated in *Buckley v. Warden,* 177 Conn. 538, 418 A.2d 913, 916 (1979)); *In re A.H.P.,* 232 Ga.App. 330, 500 S.E.2d 418, 421–22 (1998) (" 'In order to prevail on a claim of ineffective assistance of counsel [the mother] must show that [her] counsel's performance was deficient and that the deficient performance was prejudicial to [her] defense.' " (Quoting *Smith v. Francis,* [253 Ga. 782] 325 S.E.2d 362[, 363] ([Ga.] 1985). (Citing *Strickland* [ ].))); *In re R.G.,* 165 Ill.App.3d 112, 116 Ill.Dec. 69, 518 N.E.2d 691, 700–01 (1988) ("[W]hether respondent shall prevail on her claim that she was deprived of her right to the effective assistance of counsel is guided by the standards set out in *Strickland* [ ], and adopted by our supreme court in *People v. Albanese*[, 104 Ill.2d 504, 85 Ill.Dec. 441,] 473 N.E.2d 1246 [, 1255 (Ill.1984)]."); *In re D.W.,* 385 N.W.2d 570, 579 (Iowa 1986) ("Although the sixth amendment is not implicated here, we nonetheless will apply the same standards adopted for counsel appointed in a criminal proceeding.") (Citations omitted.); *In re Rushing,* 9 Kan.App.2d 541, 684 P.2d 445, 449 (1984) ("While the case before us is not a criminal prosecution, we are not asked to and we see no justification to decline application of Sixth Amendment right to effective assistance of counsel law and yardsticks to this parental severance case."); *In re Stephen,* 401 Mass. 144, 514 N.E.2d 1087, 1091 (1987) (concluding that "the [criminal] standard set forth in [*Commonwealth v. Saferian,* 366 Mass. 89, 315 N.E.2d 878, 882–83 (1974),] for judging the effectiveness of counsel's assistance is appropriate for evaluating claims of ineffective assistance of counsel in care and protection proceedings"); *Powell v. Simon,* 171 Mich.App. 443, 431 N.W.2d 71, 74 (1988) (applying "by analogy the principles of ineffective assistance of counsel as they have developed in the criminal law context" (citing *In re Trowbridge,* 155 Mich.App. 785, 401 N.W.2d 65 (1986))); *New Jersey Div. of Youth & Family Servs. v. V.K.,* 236 N.J.Super. 243, 565 A.2d 706, 712–13 (App.Div.1989) (applying *Strickland*); *In re Matthew C.,* 227 A.D.2d 679, 682, 641 N.Y.S.2d 753 (App.Div.1996) (affording parents the "protections equivalent to the constitutional standard of effective assistance of counsel afforded defendants in criminal proceedings" (citing *In re Erin G.,* 139 A.D.2d 737, 527 N.Y.S.2d 488, 490 (App.Div.1988))); *Jones v. Lucas County Children Servs. Bd.,* 46 Ohio App.3d 85, 546 N.E.2d 471, 473 (1988) ("[T]he two-part test for ineffective assistance of counsel used in criminal cases, announced in *Strickland*[,] is equally applicable in actions by the state to force the permanent, involuntary termination of parental rights."); *In re K.L.C.,* 12 P.3d 478, 480–81 (Okla.App.2000) (using *Strickland* as a "guiding principle[ ]" in determining whether counsel was ineffective in termination of parental rights case); *In re Bishop,* 92 N.C.App. 662, 375 S.E.2d 676, 678 (1989) (applying the criminal standard for ineffective assistance of counsel as set out in *State v. Braswell,* 312 N.C.

The majority's view in the instant case that "parental proceedings implicate the interests of the child in prompt and permanent resolution" erroneously assumes that the child's best interest can only be served by the termination of Petitioner's parental rights even though Petitioner was not effectively represented during her appeal. Even the *Lassiter* majority would not go so far. According to *Lassiter*, while "the State has an urgent interest in the welfare of the child," "it *shares the parent's interest in an accurate and just decision.*" *Lassiter*, 452 U.S. at 27, 101 S.Ct. 2153 (emphasis added). To reiterate, because "accurate and just results are most likely to be obtained through equal contest of opposed interests," "the State's interest *in the child's best interest may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal.*" *Id.* at 28, 101 S.Ct. 2153 (emphasis added).

D.

After reciting three reasons for not "importing criminal law concepts directly," the majority purportedly adopts "a fundamental fairness test" from *State ex rel. Juvenile Department of Multnomah County v. Geist*, 310 Or. 176, 796 P.2d 1193 (1990) [hereinafter *Geist II*], affirming on other grounds, *State ex rel. Juv. Dep't v. Geist*, 97 Or.App. 10, 775 P.2d 843 (1989) [hereinafter *Geist I*]. In *Geist II*, mother, on direct appeal to the Oregon court of appeals, sought review of the Oregon circuit court's order terminating her parental rights. *Id.* at 1196. The court of appeals refused to review mother's claim that her trial counsel was inadequate because the ***58 **1123** legislature had not created an appropriate forum in which to bring a direct appeal.

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

Id. at 1200 (quoting *Geist I*, 775 P.2d at 848). However, the Oregon Supreme Court decided that "[a]bsent an express legislative procedure ..., this court may fashion an appropriate procedure[,]" *id.*, that "any challenges to the adequacy of appointed trial counsel must be reviewed on direct appeal," *id.* at 1201, and that "a standard which seeks to determine whether a termination proceeding was 'fundamentally fair [,]' " *id.*, must be adopted. Under this "fundamental fairness test," a parent "must show, not only that [the parent's] trial counsel was inadequate, *but also that any inadequacy prejudiced [the parent's] cause* to the extent that [the parent] was denied a fair trial, and therefore, that the justice of the circuit court's decision is called into serious question." *Id.* at 1204 (emphasis added). That court concluded that "mother's trial counsel represented her with professional skill and judgment" and on de novo review, concluded that the evidence justified terminating mother's parental rights. *Id.* at 1205.

Other jurisdictions, however, have criticized the *Geist II* test by pointing out that there is little practical difference between the *Geist II* test and the test of ineffective assistance of counsel in criminal cases as set forth in *Strickland*. *See L.W. v. Dep't of Children & Families*, 812 So.2d 551, 554 (Fla.App.2002) (declining to follow the fundamental fairness test because "[i]t is not clear to us how these civil standards of ineffective assistance of counsel [such as the fundamental fairness test employed in *Geist II*] differ in practice from the criminal standard announced in *Strickland* "); *New Jersey Div. of Youth & Family Servs. v. B.R.*, 192 N.J. 301, 929 A.2d 1034, 1038 (2007) (declining to adopt the fundamental fairness test because the court "see[s] little practical difference between the [*Geist II* and *Strickland*] standards"); *In re Termination of Parental Rights of James W.H.*, 115 N.M. 256, 849 P.2d 1079 (App.1993) (describing *Strickland* as the majority position and noting that while "contrary authority [such as *Geist II*] appears to provide lesser standards, ... we are not certain that the result reached would have been different under the criminal law standard [of *Strickland*]"); *State in Interest of E.H. v. A.H.*, 880 P.2d 11, 13 n. 2 (Utah App.1994) ("We believe that *Geist [II]* essentially adopts the *Strickland* test in holding that the parent must show inadequate performance by counsel and that the inadequacy prejudiced the parent's case." (Citing *Geist II*, 796 P.2d at 1204.)).

In *Strickland*, the Supreme Court adopted the federal standard for ineffectiveness of counsel in a criminal proceeding, to the effect that (1) "counsel's performance was deficient[,]" 466 U.S. at 687, 104 S.Ct. 2052, and (2) counsel's "deficient performance prejudiced the defense[,]" *id.*,—i.e., there must be "a reasonable probability, that *but for* counsel's unprofessional errors, *the result of the proceeding would have been different* [,]" *id.* at 694, 104 S.Ct. 2052 (emphases added). This court has expressly rejected the *Strickland* standard. *Briones*, 74 Haw. at 462, 848 P.2d at 976 ("We have declined, however, to adopt the federal standard for reviewing trial counsel's performance." (Citation omitted.)); *Smith*, 68 Haw. at 310 n. 7, 712 P.2d at 500 n. 7 (criticizing the *Strickland* test as being "unduly difficult for a defendant to meet."). In rejecting the *Strickland* standard, this court criticized the federal prejudice requirement:

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

**1124 *59 *Id.* at 310, 712 P.2d at 500 (quoting Genego, *The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation*, 22 Am.Crim. L.Rev. 181, 199).

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

> Federal cases concerning effective assistance of trial and appellate counsel rely on the standard enunciated in *Strickland*, a test criticized as being too burdensome for defendants to meet because it imposes a double burden upon defendants trying to show their counsel's ineffective assistance, resulting in a prejudice requirement almost impossible to surmount. *Smith*, 68 Haw. at 310 n. 7, 712 P.2d at 500 n. 7. *Strickland* required not only that trial counsel's action or omission be an "unprofessional error," but that that error resulted in a "reasonable probability that ... *the result of the proceeding would have been different.*" 466 U.S. at 694, 104 S.Ct. 2052.

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

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

Requiring a showing that the result would not *inevitably* have been the same in order to qualify for remand or reversal imposes an identical burden on parents in termination proceedings as on defendants in federal criminal cases under *Strickland*. As noted before, this court has rejected the *Strickland* standard "[g]iven the inherent subjectivity of determining whether past results would probably have been different." *Smith*, 68 Haw. at 310, 712 P.2d at 500. In my view, then, this court must also reject the *Geist II* test because, like *Strickland*, there is an "inherent subjectivity" in determining whether the outcome of the case would or would not be "inevitably" the same and, like *Strickland*, imposes "a requirement almost impossible to surmount." *See Briones*, 74 Haw. at 462, 848 P.2d at 976. Hawaii's ineffective assistance standard in the criminal context, on the other hand, is significantly less demanding, allowing parties to prove ineffective assistance of counsel without a showing of " 'actual' prejudice" and instead requiring "an evaluation of the possible, rather than probable, effect of the defense on the decision maker." *Dan*, 76 Hawai'i at 427, 879 P.2d at 532 (quoting *Briones*, 74 Haw. at 464,

848 P.2d at 977). Respectfully, it is illogical and unfair for this court to impose a stricter standard on *parents* in family court proceedings than on defendants in criminal court proceedings where this court has recognized that parents in termination proceedings "have a substantial liberty interest ... protected by the due process clause of article I, section 5 of the Hawai'i Constitution." *Doe*, 99 Hawai'i at 533, 57 P.3d at 458. As stated before, the "Due Process Clause of the Fourteenth Amendment entitles a defendant in a criminal case to representation by counsel [and] *appl [ies] with equal force to a case of [parental termination].*" *Lassiter*, 452 U.S. at 60, 101 S.Ct. 2153 (Stevens, J., dissenting). Thus, inasmuch as (1) other jurisdictions have criticized *Geist II* for having "little practical difference" from the *Strickland* standard, (2) this court has rejected *Strickland* because of its prejudice requirement, (3) *Geist II* imposes a prejudice requirement like ***60 **1125** that in *Strickland*, and (4) *Geist II* would impose a heavier burden on parents than on criminal defendants to demonstrate ineffective assistance of counsel, the *Geist II* test should be rejected and the ICA's analogue of Hawaii's criminal standard should be applied to questions of ineffective assistance in termination cases.

IX.

A.

"[I]t is well settled that this court may relax the deadline for filing a notice of appeal 'where justice so warrants' and 'the untimely appeal had not been due to the defendant's error or wilful inadvertence.' " *State v. Shinyama*, 101 Hawai'i 389, 393 n. 6, 69 P.3d 517, 521 n. 6 (2003) (quoting *State v. Caraballo*, 62 Haw. 309, 312, 315, 615 P.2d 91, 94, 96 (1980)). In numerous cases, and under varying circumstances, this court and the ICA have heard appeals in criminal cases despite the fact that the attorney failed to perfect the appeal, or that the appeal was not timely filed. *See, e.g., State v. Ontiveros*, 82 Hawai'i 446, 448, 923 P.2d 388, 390 (1996) (declining to dismiss, although "[t]echnically, the conviction was not properly appealed [,]" because "we have established, as a general proposition, that counsel's failure to perfect an appeal in a criminal case does not preclude an appellant's right to appeal"); *State v. Knight*, 80 Hawai'i 318, 323–24, 909 P.2d 1133, 1138–39 (1996) (declining to dismiss the appeal "[i]n the interest of justice" because, "[n]otwithstanding counsel's failure to comply with the time requirements of HRAP Rule 4(b), Knight, as a criminal defendant, is entitled, on his first appeal, to effective counsel who may not deprive him of his appeal by failure to comply with procedural rules"); *State v. Erwin*, 57 Haw. 268, 269, 554 P.2d 236, 237–38 (1976) (refusing to dismiss the appeal although it was "inescapable that timely filing of the notice of appeal did not take place[,]" because "it is clear that an indigent criminal defendant is entitled, on his first appeal, to court-appointed counsel who may not deprive him of his appeal by electing to forego compliance with procedural rules"); *State v. Graybeard*, 93 Hawai'i 513, 518, 6 P.3d 385, 390 (App.2000) (declining to dismiss because "our appellate courts have ignored formal jurisdictional defects that are due to the derelictions of a criminal defendant's attorney"); *State v. Maumalanga*, 90 Hawai'i 96, 99–100, 976 P.2d 410, 413–14 (App.1998) (although "[the d]efendant filed his notice of appeal fifty-nine days late[,]" holding that "the interests of justice require us to hold that [the d]efendant's failure to comply with HRAP Rule 4(b) does not preclude his right to appeal"); *State v. Ahlo*, 79 Hawai'i 385, 391–92, 903 P.2d 690, 696–97 (App.1995) (where defendant was financially unable to obtain counsel and appellate counsel was late-appointed, holding that, "[u]nder these circumstances, faulting [the d]efendant for his failure to comply with the 30–day rule would lead to harsh and unjust results"). As discussed above, the liberty interests at stake in a termination proceeding make it far more akin to a criminal proceeding than a typical civil matter.

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