

DIGEST OF APPELLATE DECISIONS:

RIGHT TO COUNSEL

Lassiter v. North Carolina, 452 U.S. 18 (1981).

- Whether a parent was denied due process when an indigent parent is not appointed counsel in a termination of parental rights proceedings is determined on a case-by-case basis.
- The three-part *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) of (1) the private interests at stake, (2) the government's interest, and (3) the risk that the procedures used will lead to erroneous decisions must be balanced 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.

In re A Children, 119 Hawai'i 28, 193 P.3d 1228 (App. 2008) *abrogated by In re T.M.*, 131 Hawai'i 419, 319 P.3d 338 (2014).

- Under the U.S. Constitution, the indigent father was denied due process when the family court did not appoint counsel for the indigent parent until the eve of the TPR trial.
- Criticism of the discretionary language of the appointment of counsel provisions of the CPA in HRS § 587-34(a) [repealed] [now codified as HRS § 587A-17(a)].

In re R.G.B., 123 Hawai'i 1, 229 P.3d 1066 (2010).

- In a CPA proceeding to terminate parental rights, a parent has the due process right to effective assistance of counsel under the U.S. Constitution.
- Counsel was ineffective when counsel failed to file the notice of appeal when the client wanted to appeal.
- Fundamental fairness test: Due to counsel being ineffective, the result would be different. [Different from the criminal standard for ineffective assistance of counsel: waiver of a meritorious defense].

In re T.M., 131 Hawai'i 419, 319 P.3d 338 (2014).

- Independent of the U.S. Constitution, the Due Process Clause of the Hawai'i Constitution, article I, section 5 protects the parents' right to counsel in a CPA proceeding when the state (DHS CWS) takes a child into foster care.
- The court is required to appoint counsel for indigent parents when the DHS CWS files a petition for foster custody and/or temporary foster custody. The family court abused its discretion (under HRS § 587A-17(a)) when it failed to appoint counsel for the indigent minor birthing parent, but appointed a guardian ad litem for indigent birthing parent.
- The court-appointed guardian ad litem for the minor parent cannot be construed to be counsel for the minor parent because the role of counsel and the guardian ad litem are different.

In re L.I. and H.D.K., 149 Hawai'i 118, 482 P.3d 1079 (2021).

- Bright Line Rule: the failure to appoint counsel for indigent parents in CPA petitions for family supervision and foster custody is “structural error,” and no showing of prejudice required.

In re J.M. and Z.M., 150 Hawai'i 125, 497 P.3d 140 (2021) *abrogated by In re JH*, 152 Hawai'i 373, 526 P.3d 350 (2023).

- Ruling that discharge of court-appointed counsel for an indigent parent after the family court entered a default against the parent is structural error requiring *vacatur* of the order terminating parental rights was abrogated by the Hawai'i Supreme Court.

In re JH, 152 Hawai'i 373, 526 P.3d 350 (2023).

- The family court's discharge of court-appointed counsel after the parent is defaulted for the parent's failure to appear is not structural error.
- The issue of whether the parent, who is in default for their non-appearance, was denied due process when the family court discharged the court-appointed counsel for the indigent parent, who was appointed at the beginning of the case or when the parent made their first appearance, is determined by the “fundamental fairness” test.
- A parent's voluntary choice not to appear in court and maintain contact with counsel should not undermine the child's interests in permanency.
- The family court should advise the parents about the consequences of not appearing in court and of not maintaining contact with their counsel.

In re I Children, 153 Hawai'i 223, 529 P.3d 701 (App. 2023).

- Parents in CPA proceeding have the Due Process Right to Counsel, including the right to effective assistance of counsel.
- When the parent requests new counsel, Due Process requires:
The parent be given the opportunity to state the basis/reason for the request for new counsel.
A determination by the family court as to the merits of the objection.
- Due Process requires the family court to conduct a “penetrating and comprehensive examination” of the parent to determine the basis/reason for the request for new counsel to protect the parent's right to effective assistance of counsel..