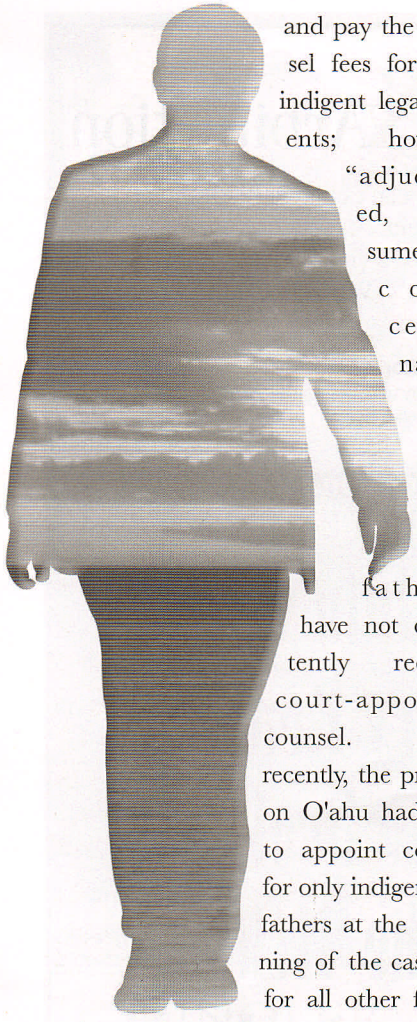
ACCESS TO JUSTICE: PARENTS' RIGHT TO COUNSEL IN TERMINATION OF PARENTAL RIGHTS CASES

by Iokona Baker and Faye Kimura

National child welfare experts generally consider Hawai'i to be at the forefront of most states in the provision of services to families and litigants in child abuse and neglect, aka "dependency" cases. For instance, Hawai'i was one of the first states to: (1) include its unique form of family group conferencing, called`Ohana Conferencing, as a key component in many court-ordered service plans; and (2) require mandatory training of all legal advocates as a condition of becoming a court-appointed counsel or child's guardian ad litem. Hawai'i's child welfare court system has challenges, however, not the least of which is ensuring access to timely and quality legal counsel for parents in cases that have a reasonable probability of resulting in a termination of those parents' rights.

Parents' rights are at stake whenever a child welfare case is opened in Family Court, yet the appointment of parents' counsel is discretionary and leaves alleged natural fathers especially vulnerable as they often have not qualified for court-appointed counsel at the inception of the case. The Child Protective Act, HAW. REV. STAT... Chapter 587, provides for the award of "permanent custody" upon a finding that a child's "legal mother, legal father, adjudicated, presumed, or concerned natural father ... are not presently willing and able to provide the child with a safe family home..." (HAW. REV. STAT. § 587-73(a)). The Court must appoint a guardian ad litem for the child "to serve throughout the pendency of the ... proceedings," but is not required to appoint counsel for the child or "independent counsel for any other party." (HAW. REV. STAT. § 587-34(a)). In practice, the Hawai'i Family Courts appoint



and pay the counsel fees for most indigent legal parents; however, "adjudicated, presumed, or concerned natural fathers" have not consistently received court-appointed counsel. Until recently, the practice on O'ahu had been to appoint counsel for only indigent *legal* fathers at the beginning of the case and for all other fathers only when they established paternity of the subject child; this sometimes precluded or created delays in the latter category of fathers receiving satisfactory legal assistance prior to permanent custody. Neighbor island judicial circuits have different policies for the appointment of court appointed counsel.

From November 2004 through August 13, 2008, O'ahu's Family Court provided "consulting counsel" to qualifying parents in Child Protective Act cases. Consulting counsel assisted parents only on hearing dates. At other times, parents were pro se litigants. Incarcerated legal parents, however, received "full service" counsel. Volunteers and court staff assisted, but did not advocate for, parents between hearings. As of August 2008, the O'ahu Family Court returned to providing full service counsel to qualifying parents through a group contract with a small number of attorneys who specialize in dependency litigation.

The Hawai'i Intermediate Court of Appeals (ICA) took a significant step towards ensuring the earlier appointment of legal counsel in Child Protective Act cases for non-adjudicated indigent fathers when it issued its opinion in *In Re "A" Children: N.A., M.A. (1), M.A. (2), and L.A.*, Nos. 28129 and 28130 on July 31, 2008. The ICA noted that Hawai'i is one of only five states (including Delaware, South Carolina, Tennessee, and Wyoming) that allows discretionary appointment of counsel for indigent parents in termination-of-parental-rights (TPR) cases. The ICA held that the trial court erred in conditioning the alleged, but undisputed, indigent father's right to counsel on a formal establishment of paternity and that the father was deprived of due process when he was not provided legal counsel until 16 days before trial. The Court refused to decide whether counsel must be appointed for all indigent parents in TPR cases, but urged an executive and legislative reexamination of the discretionary nature of HAW. REV. STAT. § 587-34.

Since children of Native Hawaiian descent represent the largest ethnic group in Hawai'i's foster care system, barriers to obtaining timely quality legal counsel in child welfare cases has had and will continue to have a profound effect on the character of the statewide community as more and more Native Hawaiian parents lose the right to have their children return home. It is unreasonable, of course, to believe that improving access to legal representation alone is the solution for reducing the frequency of terminations of parental rights and ensuring safe homes for children. Certainly, for those cases that are before the court, legal representation is necessary to reduce the inherent advantage given to the State, but for those families who have not yet become "cases," it would be wiser, instead, for the community to provide meaningful access to legal and social services that ameliorate child safety issues before the problem is brought to the courthouse door—when it may be simply too late.

Iokona Baker is a Law Fellow in the Hawai'i Child Welfare Program at the William S. Richardson School of Law. Faye Kimura is a Faculty Specialist at the William S. Richardson School of Law.