No.

IN THE
Supreme Court of the United States

IN THE INTEREST OF J.C., A CHILD

On Petition For A Writ of Certiorari
To The Court of Appeals of Texas
Second District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a termination proceeding in a state that provides appeals as a matter of right from decisions terminating parental rights, does the State violate the Due Process Clause by denying court-appointed counsel to an indigent *pro se* parent facing termination of her parental rights without engaging in the due process analysis mandated by this Court in *Lassiter v. Department of Social Services*, then denying the indigent parent a free trial transcript in violation of this Court's decision in *M.L.B. v. S.L.J.*, then denying appellate review of the legal sufficiency of the evidence supporting termination because there is no transcript, and then denying appellate review of all the constitutional issues because the *pro se* indigent parent did not know how to preserve them because she had no attorney?

2. Does a statute providing court-appointed counsel to indigent parents facing termination of their parental rights in State-initiated—but not privately-initiated—actions violate the Equal Protection Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

Because this case involves a child, the Fort Worth Court of Appeals used initials and pseudonyms to identify the parties. But the parties' full names are in the trial court pleadings and briefs filed in the Texas Supreme Court. Ms. Rhine therefore refers to the parties, other than J.C., by their real names.

Petitioner is Tracy Rhine, J.C.'s natural mother. Respondents are Carl and Yolanda Deaton, J.C.'s adoptive parents.

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Petitioner Tracy Rhine respectfully submits this petition for a writ of *certiorari* to review the judgment of the Court of Appeals for the Second District of Texas.

OPINIONS AND ORDERS BELOW

The Texas Supreme Court's orders refusing discretionary review (App., *infra*, at 1a, 2a) are unreported. The opinion of the Court of Appeals for the Second District of Texas (App., *infra*, at 3a) is reported at 250 S.W.3d 486. The judgment entered by the Tarrant County District Court (App., *infra*, at 10a) is unreported.

JURISDICTION

The Court of Appeals for the Second District of Texas filed its opinion on March 13, 2008. The Texas Supreme Court denied a timely petition for discretionary review on February 13, 2009, and denied a timely petition for rehearing on April 3, 2009. This Court has jurisdiction under 28 U.S.C. § 1257(a).

Because this petition challenges the constitutionality of a Texas statute affecting the public interest, the terms of 28 U.S.C. § 2403(b) may apply and this petition therefore is being served on the Attorney General of Texas as required by Rule 29.4(c) of this Court.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 107.013 of the Texas Family Code provides in pertinent part:

> In a suit filed by a governmental entity in which termination of the parent-child relationship is requested, the court shall appoint an attorney ad litem to represent the interests of . . . an indigent parent of the child who responds in opposition to the termination . . . .

STATEMENT OF THE CASE

This case presents issues bedeviling indigent parents in Texas and other states facing termination of their parental rights in the wake of this Court's decision in *Lassiter* v. *Dep't of Social Services*, 452 U.S. 18 (1981), holding that due process does not necessarily require court-appointed counsel for indigent parents in termination actions. In response to *Lassiter*, most states enacted statutes providing court-appointed counsel to indigent parents resisting termination actions. But Texas guarantees counsel

only in State-initiated termination actions—not in actions filed by private parties, even where those private parties obtained standing as guardians or custodians through State action.

1. Statutory Background. In Texas, the State and certain private parties may file actions seeking termination of parental rights. TEX. FAM. CODE ANN. §§ 102.003(a)(12), 161.003 (Vernon 2002 & Supp. 2008). After *Lassiter*, Texas guaranteed court-appointed counsel by statute to all indigent parents facing termination actions. But in 2003, the Texas Legislature amended the statute to guarantee counsel only in State-initiated termination actions; in privately-initiated actions, appointment of counsel is discretionary. *Ibid* §§ 107.013, 107.021.

2. Factual Background and Trial Court Proceedings.[1] J.C. was born on August 10, 2004. The Texas Department of Protective and Regulatory Services removed J.C. from the custody of her mother, Tracy Rhine, at birth following a positive drug test and filed a termination action against Ms. Rhine in Dallas County. The Department then placed J.C. with foster parents Carl and Yolanda Deaton.

The Department and Ms. Rhine settled the termination action by a "binding and irrevocable" settlement agreement permitting Ms. Rhine to regain custody of J.C. upon fulfilling certain conditions. The Department and Ms. Rhine presented their agreement to the Dallas court for approval and enforcement. The Deatons intervened,

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[1] There is no trial record in this case. The only transcript is from an indigency hearing. Record citations are to that hearing, and the clerk's record from the trial court.

but the court struck that intervention because the Deatons filed it after the enforcement hearing.

After the enforcement hearing but before any ruling, in what the Deatons concede was "a coordinated maneuver," the Department (apparently having thought better of the settlement agreement) non-suited its case (CR 13) and the Deatons filed their own termination action in Tarrant County seeking to adopt J.C. and terminate the parental rights of her parents (CR 1-22). Ms. Rhine answered that lawsuit *pro se* and filed a counter-petition (CR 23-27). She sent the court a letter expressing her love for J.C. and asking the court to "please appoint [her] an attorney ad litem" because she was "indigent and [could not] afford counsel," explaining that her lack of legal knowledge prevented her from effectively presenting her case (CR 40-41).

The Tarrant court refused to appoint counsel for Ms. Rhine and terminated her parental rights following trial. Ms. Rhine filed a motion for new trial, again asking for court-appointed counsel on the basis that: "I was and still remain indigent and can not afford legal counsel, TERMINATION OF PARENTAL RIGHTS, is a matter of dire consequences, and I was not allowed opportunity to Effective legal counsel" (CR 60). When the trial court denied that motion, Ms. Rhine filed an affidavit—which the Deatons contested—of her inability to pay appeal costs. The trial court waived Ms. Rhine's costs of appeal but ordered her to pay for the trial transcript (CR 62, 64).

3. *Court of Appeals Proceedings.* Ms. Rhine appealed to the Fort Worth Court of Appeals, arguing the termination judgment was erroneous and reiterating her complaint about lacking counsel.

But Ms. Rhine's *pro se* appellate brief was mostly incomprehensible. For example, Ms. Rhine's statement of her second issue on appeal reads as follows:

> Kay Riffin, the head of the Family Court Services, gave conflicting testimonies which did not correspond with the written court documents, also during visits the only time there was conflicting documentation was when, Ms. Riffin; herself, or another Single worker whose name I am not clear of being how she did not coherently write her name on any of the documents was over the visits. Which leaves to me to believe that Kay Riffin and her cohort was in fact being massaged by the appellees attorney as well as the Guardian Ad Litem.

(Appellant's Brief). Ms. Rhine complained that she was "never granted a hearing nor did the court ever take into consideration [her] pleas for appointment of counsel." Ms. Rhine concluded by telling the court that although she did "not have counsel [or] hold a law degree, what [she did] have is a child that she loves with her entire being . . . ." *Ibid.*

Though Ms. Rhine complained of her lack of counsel, she did not raise due process or equal protection arguments. Neither did she complain of the trial court's order requiring her to pay for the transcript, though she never obtained it. When Ms. Rhine requested appointment of appellate counsel, the court of appeals remanded the case to the trial

court for an indigency hearing. The trial court found Ms. Rhine indigent but held she was not entitled to court-appointed counsel because the suit was not filed by a governmental entity. The trial court based its decision solely on Texas statutes and did not analyze the factors governing entitlement to court-appointed counsel set out by this Court in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976).

The trial court entered an order waiving costs of appeal but ordering Ms. Rhine to pay for the trial transcript. That order was based not on concern for Ms. Rhine's parental rights or J.C.'s best interests, but for the court reporter's income:

> I'll waive all the cost because of your indigency, with the exception of the four hundred and five dollars which would be necessary to pay for the court record and basically to pay for the typing cost so that the court reporter is not out that money. I don't think it's fair for the court reporter to be out four hundred and five dollars for this appeal.

(Transcript at 13).

The court of appeals affirmed the trial court's termination judgment, rejecting Ms. Rhine's sufficiency challenges because she failed to obtain and file the transcript, and relying on Texas statutes in rejecting her complaint about lack of court-appointed counsel. The court of appeals declined to review the trial court's refusal to provide Ms. Rhine a free transcript because she did not raise that issue, explaining this refusal in a footnote that acknowledged but ignored the due process violation:

> Tracy has not complained of that [transcript] order in this court. *Accord M.L.B.* v. *S.L.J.*, 519 U.S. 102, 128, 117 S. Ct. 555, 570 (1996) (holding that Mississippi had to provide indigent mother in private termination suit with record to afford appellate review of sufficiency of evidence).

4. ***Texas Supreme Court Proceedings.*** Ms. Rhine filed a *pro se* petition for discretionary review in the Texas Supreme Court. Without granting that petition, the Texas Supreme Court ordered merits briefing and asked the State Bar of Texas Appellate Law Section to locate an attorney to represent Ms. Rhine *pro bono*.

Finally represented by counsel, Ms. Rhine raised the equal protection and due process arguments addressed in this petition. In response, the Deatons argued that Ms. Rhine failed to preserve error on her constitutional complaints or provide the appellate court with a complete record. The Texas Supreme Court denied discretionary review without explanation (App., *infra*, at 1a, 2a).

REASONS FOR GRANTING THE WRIT

This case presents two important questions of Federal constitutional law concerning the State's handling of parental-rights termination cases. Nearly a century ago, this Court held that the Due Process Clause protects the right of parents to "establish a home and bring up children." *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). Since then, this Court consistently has recognized the primacy of the parent-child relationship—and cast a skeptical eye

on government attempts to burden it. See, e.g., *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972); *Wisconsin* v. *Yoder*, 406 U.S. 205, 232 (1972); *Quilloin* v. *Walcott*, 434 U.S. 246, 255 (1978); *Parham* v. *J. R.*, 442 U.S. 584, 602 (1979). Even in cases yielding divided opinions, this Court's justices find common ground in their agreement that "the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment." *Santosky* v. *Kramer*, 455 U.S. 745, 774 (1982) (Rehnquist, J., dissenting). And justices who do not view parental rights as constitutionally protected nevertheless concede their place among the "unalienable Rights" the Declaration of Independence posits are bestowed on all Americans by "their Creator." See *Troxel* v. *Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting).

The first question this case presents is whether the State's cumulative denial of multiple procedural safeguards in a parental-rights termination action—including counsel or any determination of the need for court-appointed counsel under the *Eldridge* factors and the lack of a free trial transcript—elevates the risk of erroneous deprivation too high for the Due Process Clause to bear. This raises the subsidiary issue of what role preservation-of-error rules may play—consistent with the Due Process Clause—in denying appellate review both of the sufficiency of the evidence underlying a termination judgment and the constitutionality of procedures leading up to it. In the end, the result in this case cannot be squared with the due process analysis underlying this Court's decisions in *Lassiter* and *M.L.B.*

The second question is whether the Texas statute extending a substantial procedural safeguard (the right to counsel in termination actions) but then arbitrarily withholding it from some indigent parents violates the Equal Protection Clause. The Texas decisions upholding this scheme conflict with decisions of four other state supreme courts holding that this type of statutory distinction violates the constitutional principle of equal protection.

This case also provides an opportunity for this Court to address what is apparently the continuing refusal by state trial courts to follow this Court's directive in *Lassiter* concerning evaluation of the need for court-appointed counsel under the *Eldridge* factors. Ms. Rhine is indigent, and her parental rights were terminated without the benefit of the *Eldridge* analysis. "Although *Lassiter* requires trial courts in states that do not appoint counsel in every case to perform a *Mathews v. Eldridge* analysis, at least one commentator suggests that these *Lassiter* hearings seldom take place." Susan Calkins, *Ineffective Assistance of Counsel in Parental-Rights Termination Causes: The Challenge for Appellate Courts,* 6 J. OF APP. LAW & PRAC. 186, 193 (2004) (citing William Wesley Patton, *Standard of Appellate Review for Denial of Counsel and Ineffective Assistance of Counsel in Child Protection and Parental Severance Cases,* 27 LOY. U. CHI. L.J. 195, 202 (1996).

I. THIS CASE RAISES AN IMPORTANT ISSUE OF FEDERAL CONSTITUTIONAL LAW, AND THE TEXAS DECISIONS CONFLICT WITH THE REASONING UNDERLYING THIS COURT'S DECISIONS IN *LASSITER* AND *M.L.B.*

Analysis of the right to counsel in a termination action begins with this Court's decision in *Lassiter* that the Due Process Clause does not require appointment of counsel for indigent parents in every parental-rights termination action. After *Lassiter*, trial courts must conduct a case-by-case analysis—subject to appellate review—of whether federal due process requires appointment of counsel under the existing circumstances. *Ibid* at 31-32. Trial courts must perform this analysis using the factors, set out in *Mathews*, 424 U.S. at 335, that must be weighed against the presumption that there is no right to appointed counsel when there is no risk of lost liberty: "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." *Lassiter*, 452 U.S. at 27. But Ms. Rhine lost her child without the benefit of this analysis.

A. Ms. Rhine's Parental Rights Are Fundamental.

The Due Process Clause includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington* v. *Glucksberg*, 521 U.S. 702, 720 (1997); see also *Reno* v. *Flores*, 507 U.S. 292, 301-302 (1993). The liberty interest at issue—the interest of parents in the care, custody, and control of their children—"is perhaps the oldest of the fundamental liberty

interests recognized by this Court." *Troxel*, 530 U.S. at 65.

B. Termination Of Parental Rights Implicates State Action.

The Deatons sought to terminate Ms. Rhine's parental rights so they could adopt J.C. State involvement in the adoption process—including the necessary step of termination—is unavoidable. Though termination may be "initiated by private parties as a prelude to an adoption petition, rather than by a state agency, the challenged state action remains essentially the same: [The responding parent] resists the imposition of an official decree extinguishing, as no power other than the State can, her parent-child relationships." *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 116 n.8 (1996).

Termination orders implicate State action; "[f]ew forms of state action are both so severe and so irreversible." *Santosky*, 455 U.S. at 759. A termination decree represents "the State's destruction of . . . family bonds" as the targeted parent "seeks to be spared from the State's devastatingly adverse action." *M.L.B.*, 519 U.S. at 125. Termination invokes "the awesome authority of the State 'to destroy permanently all legal recognition of the parental relationship.'" *Ibid* at 128 (*citing Rivera* v. *Minnich*, 483 U.S. 574, 580 (1987)).

The State removed J.C. from Ms. Rhine's custody and placed her with the Deatons, who obtained standing solely by this State action. The State filed the initial petition seeking termination. The Deatons' termination petition carried out the State's plan—its "coordinated maneuver"—to substitute a private petition for the State petition.

This "maneuver" underscores the potential for chicanery by the State:

> Under those circumstances, the specter could be raised that the state intentionally chose to forego prosecution of a termination of parental rights petition, knowing that the accomplishment of its goal could be reached with greater ease and less expense without its involvement in a proceeding to terminate parental rights if the respondent could be denied the benefit of court-appointed counsel.

In re Adoption of K.L.P., 763 N.E.2d 741, 751 (Ill. 2002) (citation omitted).

The result in this case—if permitted to stand—sanctions conspiracies between the State and private litigants to conspire through a wink-and-a-nod to deprive counsel to indigent Texas parents, clearing the way for termination of their parental rights.

C. By Removing Too Many Safeguards Against Erroneous Deprivation, Texas Denied Ms. Rhine Due Process.

Due process ensures the "essential fairness of state-ordered proceedings anterior to adverse state action." *M.L.B.*, 519 U.S. at 120 (citing *Ross* v. *Moffitt*, 417 U.S. 600, 609 (1974)). Under *Lassiter*, examination of due process in the termination arena turns principally on analysis of the risk that the utilized procedures will result in erroneous decisions. *Lassiter*, 452 U.S. at 27.

Ms. Rhine was adjudged indigent but did not receive

- a trial lawyer,
- an appellate lawyer,
- the benefit of analysis of the *Eldridge* factors,
- a free transcript for appeal,
- appellate review of the denial of counsel under due process analysis,
- appellate review of the denial of a transcript, or
- appellate review of the sufficiency of the evidence supporting termination of her parental rights.

Perhaps none of these deficiencies taken alone—other than denial of the transcript, which denied Ms. Rhine due process under *M.L.B.* had she known how to preserve that violation—meant Ms. Rhine did not receive due process.[2] After all, *Lassiter* establishes that lack of counsel is not necessarily a due process violation. And this Court "has never held that the States are required to establish avenues of appellate review . . . ." *Rinaldi* v. *Yeager*, 384 U.S. 305, 310 (1966). But the cumulative effect of these denials raised the risk of erroneous

[2] Of course, *Lassiter* acknowledged that appointment of counsel is required when warranted by the character and difficulty of the case. *Lassiter*, 452 U.S. at 31-32. There is no record the trial court ever performed any analysis of the *Eldridge* factors to determine whether Ms. Rhine's defense warranted appointment of counsel. And the trial court's failure to do so during the indigency hearing suggests no such analysis ever occurred. It is unclear whether *Lassiter* mandated appellate review of the *Eldridge* analysis as a due process requirement.

deprivation beyond the constitutional breaking point.

The decisions by the Fort Worth Court of Appeals and the Texas Supreme Court upholding the termination decree conflict with the rationales of *M.L.B.* and *Lassiter*. Texas denied Ms. Rhine appellate review because she could not afford a transcript and did not know how to assert denial of that transcript as a due process violation. This cannot be acceptable where State action may "permanently deprive [Ms. Rhine] of her freedom to associate with her child . . . ." *Lassiter*, 452 U.S. at 59 (Stevens, J., dissenting).

This is not a situation where the appellate court had to rely on a litigant to alert it to a constitutional issue. The court of appeals judges knew there was no transcript. They knew the trial court denied Ms. Rhine's request for a free transcript. They knew about this Court's decisions in *M.L.B.* and *Lassiter*, and knew from the indigency hearing transcript filed in their court that the trial court failed to apply the *Eldridge* factors. They are trained in the law and rose in their professions to become appellate court judges. They did not need an indigent parent whose last job was as an hourly-wage fast-food worker to tell them the trial court had (twice) violated the Constitution.

In his dissenting opinion in *M.L.B.*, Justice Thomas (joined by Chief Justice Rehnquist and Justice Scalia) examined the safeguards usually present in a termination action: an impartial tribunal applying procedural and evidentiary rules, the right to confront opposing evidence and witnesses, application of the clear-and-convincing evidence standard, representation by counsel or

alternatively the trial court's determination no counsel is required under the circumstances, and appellate review of the denial of counsel and the merits of termination. See *M.L.B.*, 519 U.S. at 132 (Thomas, J., dissenting).

Ms. Rhine lacked too many of these safeguards. She lacked counsel, essentially rendering the procedural and evidentiary protections useless. Even a cursory review of Ms. Rhine's briefs reveals that she could not have presented her case effectively or made coherent evidentiary arguments. Ms. Rhine failed to present to the appellate court her entitlement under *M.L.B.* to a free transcript, and failed to raise colorable due process and equal protection arguments. The idea that she effectively confronted the evidence and witnesses against her without counsel is dubious at best. In *M.L.B.*, Justice Thomas cited the presence of counsel as an integral component in ensuring due process: "She was represented by counsel . . . [and] [t]hrough her attorney . . . was able to confront the evidence and witnesses against her." *Ibid.* Not so Ms. Rhine.

Ms. Rhine also lacked the important protection of the *Eldridge* analysis mandated by this Court in *Lassiter*. That analysis ensures appointment of counsel in cases that warrant it. And the requirement itself constitutes this Court's acknowledgement that some termination cases require appointment of counsel. The trial court denied Ms. Rhine counsel based solely on the Texas statute, but that statute does not trump federal due process requirements.

All this, of course, normally would be subject to appellate review. But the Texas courts denied Ms. Rhine review of her due process and equal protection

claims because she did not know how to preserve them. The Fort Worth Court of Appeals did not address the trial court's decision denying Ms. Rhine a free trial transcript because she did not know to raise that error. The court then refused to consider Ms. Rhine's substantive complaints about the termination order because she failed to provide the transcript. And the Texas Supreme Court refused to review any of these issues.

Texas left Ms. Rhine in the jarring position of being denied a lawyer, then being denied appellate review because she did not know how to preserve error (presumably because nothing in her Whataburger training acquainted her with error-preservation rules). *Lassiter* relied on the corrective measure of appellate review as a crucial bulwark against trial court error, expressly instructing that the trial court's due process analysis be subject to appellate review. *Lassiter*, 452 U.S. at 32. Without counsel or a transcript, and held strictly to error-preservation requirements, Ms. Rhine was left with "a meaningless ritual, while the rich man [would have had] a meaningful appeal." *Douglas* v. *California*, 372 U.S. 353, 358 (1963).

Appeals of Texas termination orders are an essential component of due process, because Texas trial courts sometimes misapply the clear-and-convincing evidence standard and erroneously terminate parental rights, leaving appeal as the sole remedy for these erroneous deprivations. See, e.g*., In re C.M.C.,* 273 S.W.3d 862 (Tex. App. – Houston, no pet.); *Yonko* v. *Dep't of Family & Prot. Servs.*, 196 S.W.3d 236 (Tex. App. – Houston [1st Dist.] 2006, no pet.); *In re D.S.P.*, 210 S.W.3d 776 (Tex. App. – Corpus Christi 2006, no pet.); *In re E.S.S.*, 131

S.W.3d 632 (Tex. App. – Fort Worth 2004, no pet.); *Vidaurri* v. *Ensey*, 58 S.W.3d 142 (Tex. App. – Amarillo 2001, no pet.).

Finally, the issue of error preservation—the threshold to appellate review—also is reviewed under the *Eldridge* factors. Weighing these factors, Ms. Rhine's fundamental liberty interest in maintaining custody and control of J.C., the risk of permanent loss of their parent-child relationship, and everyone's interest in a just and accurate decision weigh heavily in favor of permitting appellate review of the sufficiency of the evidence despite Ms. Rhine's failure to preserve error. And the State's fundamental interest in protecting J.C.'s best interests is not antagonistic to those concerns.

The State's corollary interest in efficient and speedy resolution pales in comparison to the private interests at stake. The State's interest in protecting child welfare must begin by working toward *preserving* the familial bond, rather than severing it. See *Santosky*, 455 U.S. at 766-67. The fundamental liberty interests at issue are too dear, and the risk of erroneous deprivation too substantial, for this Court to countenance waiver of Ms. Rhine's appellate rights through error-preservation requirements in light of her lack of counsel or a trial record.

At a minimum, *Lassiter* required the appellate court to use the *Eldridge* factors to analyze whether application of preservation-of-error rules violated due process. In *Lassiter*, this Court held that the interest affected by the potential termination of parental rights is sufficiently important that state courts must, under the Due Process Clause, either provide counsel or make a case-by-case determination of whether appointment

of counsel is necessary. It follows, then, that due process would require a state court to make a similar case-by-case determination of whether error-preservation rules must be relaxed to comport with due process in a particular case, rather than applied rigidly in lock-step with other civil cases.

This Court recognized in *Lassiter* that because termination proceedings affect one of the most fundamental rights in American society, due process requires intense and searching scrutiny by trial courts—subject to appellate review—to ensure procedures sufficient to guard against an unacceptable risk of erroneous deprivation. In *M.L.B.*, this Court applied that scrutiny to strike down a state law conditioning termination appeals on the ability to pay for a transcript. And while the majority and dissenting justices of this Court disagreed in *M.L.B.* about the parameters of the due process requirement, they were unanimous in reiterating their commitment to a searching examination of the given circumstances in termination cases to ensure fundamental fairness.

This issue has the potential to affect scores of indigent parents in Texas and other states. Almost 4 million Texans live in poverty, and many of them have children. As of August 31, 2008, approximately 14,000 Texas children were placed in foster homes. TEXAS DEPT. OF FAM. & PROT. SERVCS., 2008 DATA BOOK 49 (2008). And even though the total number of children being placed in foster homes is declining in Texas, the number placed as a result of parental-rights termination is rising—with more than 10,000 Texas children in foster case after having both their parents' parental-rights terminated. *Ibid* at 52-53.

Of course, the lack of *Lassiter* analysis has the potential to affect (and probably is affecting) indigent parents in many other states. At least ten states other than Texas fail to provide a statutory right to counsel for indigent parents facing termination proceedings. See Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of* Lassiter v. Department of Social Services of Durham, 36 LOY. UNIV. OF CHICAGO L.J. 363, 367 (2005). And rigid application of error-preservation rules without any balancing test is a national issue that could affect even indigent parents in those states that provide court-appointed counsel.

Ms. Rhine did not have a lawyer, could not afford a transcript, and was denied appellate review because she did not know how to raise and preserve error. This result cannot be squared with the type of due process scrutiny suggested by *Lassiter* and both the majority and dissenting opinions in *M.L.B.*

II. THE TEXAS COURTS' DECISION TO LET STAND A STAUTORY SCHEME GRANTING COURT-APPOINTED COUNSEL TO INDIGENT PARENTS DEFENDING STATE-INITIATED—BUT NOT PRIVATELY INITIATED—TERMINATION ACTIONS VIOLATES THE EQUAL PROTECTION CLAUSE AND CONFLICTS WITH THE HOLDINGS OF FOUR OTHER STATE SUPREME COURTS.

The Equal Protection Clause forbids Texas from making a substantial procedural safeguard generally available but arbitrarily withholding it from some litigants. In *Baxstrom* v. *Herold*, 383 U.S. 107 (1966), this Court found that a legislative

scheme guaranteeing a jury trial to mental patients facing commitment proceedings under one statute but not another violated the Equal Protection Clause. *Ibid* at 110. A state, having made a substantial procedural safeguard "generally available on this issue, may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold it from some." *Ibid* at 111.

Texas extends a substantial procedural safeguard—the right to counsel in termination actions—but arbitrarily withholds it from indigent parents like Ms. Rhine. While the Texas courts permitted this scheme to stand, four other state supreme courts have concluded that it violates their respective state equal protection guarantees. *In re Adoption of K.L.P.*, 763 N.E.2d 741 (Ill. 2002); *In re S.A.J.B.*, 679 N.W.2d 645 (Iowa 2004); *Matter of Adoption of K.A.S.*, 499 N.W.2d 558 (N.D. 1993); *Zockert* v. *Fanning*, 800 P.2d 773 (Or. 1990). As the Oregon Supreme Court put it: "The legislative grant of the opportunity for a parent to benefit from the privilege of assistance of counsel in one mode of termination of parental rights requires that the opportunity to exercise that privilege be extended to all similarly situated parents directly threatened with permanent loss of parental rights." *Zockert*, 800 P.2d at 778.

Because the Texas statute burdens Ms. Rhine's attempt to exercise a fundamental right, this Court reviews the statute with heightened scrutiny. Traditionally, this analysis was referred to as "strict scrutiny" necessitating a "compelling state interest." See, e.g., *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967); *Kramer* v. *Union School Dist.*, 395 U.S. 621, 626-29

(1969); *Dunn* v. *Blumstein*, 405 U.S. 330, 336 (1972). Recently, however, this Court has applied a more fluid standard of review, inspecting "the character and intensity of the individual interest at stake, on the one hand, and the State's justification for its exaction, on the other." *M.L.B.*, 519 U.S. at 120-21 (citing *Bearden* v. *Georgia*, 461 U.S. 660, 666-667 (1983)).

Regardless of the precise standard of review employed, the Texas intrusion on Ms. Rhine's fundamental rights cannot survive any heightened level of equal protection scrutiny. Ms. Rhine's right to J.C.'s care, custody, and companionship is a central right that "warrants deference and, absent a powerful countervailing interest, protection." *Stanley*, 405 U.S. at 651. This is especially true in the termination context, because termination "work[s] a unique kind of deprivation." *Lassiter*, 452 U.S. at 27. Texas would need a mighty justification for burdening such a towering individual right.

The most likely justification for the Texas scheme is the State's interest in conserving fiscal resources. But this Court has cautioned that while a state's pecuniary interest is legitimate, it is "hardly significant enough to overcome private interests as important as those" involved in parental rights determinations. *Ibid* at 28. Governmental pecuniary concerns are "unimpressive" when measured against the stakes for parents facing termination proceedings. See *M.L.B.*, 519 U.S. at 121; see also *Mem'l Hosp.* v. *Maricopa County*, 415 U.S. 250, 263 (1974) (conservation of public funds insufficient to state interest to justify infringement on right to migrate freely among states).

"Nor is such legislative framework narrowly tailored to further a pecuniary interest; the State could develop measures to recoup these costs, if it desired to do so." *S.A.J.B.*, 679 N.W.2d at 650 (citing *K.A.S.*, 499 N.W.2d at 565). And, as this Court previously has cautioned, to "water down" strict scrutiny in one context would be to "subvert its rigor" elsewhere. *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 888 (1990).

Alternatively, the Texas Legislature may have decided that only indigents who "must overcome the vast resources of the state" deserve counsel appointed at public expense. *K.A.S.*, 499 N.W.2d at 565. But this "understates the actual involvement of the state . . . which is called upon to exercise its exclusive authority to terminate the legal relationship of parent and child . . . ." *K.A.S.*, 499 N.W.2d at 565-566 (quoting *In re Jay*, 197 Cal. Rptr. 672, 680 (Cal. Dist. Ct. App. 1983)). Ms. Rhine was resisting imposition of the State's official decree extinguishing her parental rights. In practical effect, no difference exists between State-initiated and privately-initiated termination actions. And certainly no difference that would be dispositive of the equal protection issue.

Of course, the government always has a compelling interest in resolving child custody matters economically and efficiently, and obtaining a permanent home for a child as quickly as possible. But these efficiency interests pale in comparison to the risk that a parent may erroneously be deprived of parental rights and a child may erroneously be deprived of a parent's support and companionship. And efficiency concerns are only marginally implicated—if they are implicated at all —by the

right to counsel. The presence of counsel on both sides of a dispute usually promotes efficient settlement and reduces wasted time. When both parties have attorneys, fewer fruitless arguments are raised, less irrelevant evidence is offered, and there are fewer delays. And providing counsel promotes the best interests of children:

> 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.

In the Matter of K.L.J., 813 P.2d 276, 280 (Alaska 1991).

Where a statute is defective because of underinclusion, there are two remedial alternatives: a court may (1) declare the statute a nullity and order that its benefits not extend to the class the legislature intended to benefit, or (2) extend the statute's coverage to those aggrieved by exclusion. *Welsh* v. *United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring). The latter approach is warranted in this case. To deny all counsel would violate this Court's directive in *Lassiter* that some cases require appointment of counsel to comport with due process. See *Lassiter*, 452 U.S. at 31-32. The proper remedy for the constitutional imbalance is extension of the privilege to the neglected portion

of the class—in this case, essentially restoring the Texas statute to its original scope.

Ms. Rhine was entitled to court-appointed counsel. "[T]here is no narrowly tailored compelling state interest to deny counsel at public expense to indigent parents facing an involuntary termination of their parental rights" in a privately-initiated proceeding. *S.A.J.B.*, 679 N.W.2d at 650. The Texas statutory framework, which denies court-appointed counsel to some indigent parents while granting it to others, violates the Equal Protection Clause.

CONCLUSION

Based on the Due Process Clause and the Equal Protection Clause, and this Court's decisions in *Lassiter* and *M.L.B.*, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX A

OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
AUSTIN, TEXAS

Case No. 08-0351
COA #: 02-07-00081-CV
TC#: 324-397088-06

STYLE: IN THE INTEREST OF J.C., A CHILD

DATE: April 3, 2009

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.

APPENDIX B

OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
AUSTIN, TEXAS

Case No. 08-0351
COA #: 02-07-00081-CV
TC#: 324-397088-06

STYLE: IN THE INTEREST OF J.C., A CHILD

DATE: February 13, 2009

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

APPENDIX C

FILED
COURT OF APPEALS
SECOND DISTRICT OF TEXAS
MAR. 13, 2008
STEPHANIE ROBINSON, CLERK

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-07-081-CV

In the Interest of J.C., A Child

FROM THE 324TH DISTRICT COURT OF TARRANT COUNTY

OPINION

I. INTRODUCTION

In this termination of parental rights appeal, we confront the statutory right-to-counsel disparity that exists between indigent parents in a private termination suit and indigent parents in a termination suit brought by Child Protective Services (CPS). Indigent parents in a private termination of parental rights suit possess no statutory right to appointed counsel while indigent parents in a CPS-initiated suit do. *See* TEX. FAM

COD ANN. § 107.013(a)(1) (Vernon Supp. 2007) (mandating appointment of attorney ad litem for an indigent parent "in suit filed by governmental entity in which termination of the parent-child relationship is sought"). Here, although CPS initiated the suit to terminate the parental rights of Appellant Tracy, who is J.C.'s mother, in a coordinated maneuver, CPS subsequently nonsuited its termination suit, and on the same day, J.C.'s foster parents filed their own private termination suit. Consequently, because she was now defending a private termination suit, instead of a CPS-prosecuted termination suit, Tracy was forced to proceed pro se in the trial court and likewise proceeds pro se here. Because there is no relief available to Appellant, we will affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

Upon her birth in Dallas, Texas, J.C. tested positive for phencyclidine. CPS removed J.C. from Tracy at birth and filed a suit in Dallas County to terminate Tracy's parental rights to J.C. While CPS's termination suit was pending, CPS placed J.C. with foster parents, Appellees Mr. and Mrs. Smith who are Tarrant County residents.[1] The Smiths later attempted to intervene in CPS's termination suit, but their petition was stricken by the trial court. Because the statutory deadline for disposition of the termination suit was approaching[2] and for

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[1] We refer to Appellees by the fictitious names of Mr. and Mrs. Smith. See TEX. FAM. CODE ANN. § 109.002(d) (Vernon 2002).

[2] *See* TEX. FAM CODE ANN. § 263.401 (Vernon Supp. 2007) (setting forth deadlines for commencing trial on the merits of a termination suit filed by a governmental entity).

other reasons not relevant to this appeal, CPS nonsuited its termination suit.

On the same day that CPS nonsuited its termination suit, Mr. and Mrs. Smith filed in Tarrant County an "Original Petition for Termination of Parental Rights & Request for Temporary Orders & Request for Temporary Restraining Order." The Smiths sought to be named temporary managing conservators of J.C., to terminate Tracy's and J.C.'s father's parental rights, and to adopt J.C. The trial court entered temporary orders naming the Smiths temporary managing conservators of J.C.

Tracy filed a pro se answer in the Smiths' termination suit. She also sent a letter to the trial court judge stating, "I am indigent and cannot afford counsel." She explained, "I am currently attending community college in hopes to be able to provide my daughter with a better future and security…." She expressed her love for her daughter and her inability to properly represent herself and reiterated her need for an attorney.

In due course, the Smiths' termination suit was called for final trial. Tracy appeared pro se. After the trial, the trial court terminated Tracy's parental right to J.C., finding by clear and convincing evidence that Tracy had

> a. knowingly placed or knowingly allowed the child to remain in conditions or surroundings that endanger the physical or emotional well-being of the child;
>
> b. failed to support the child in accordance with [her] ability during a

> period of one year ending within six months of the date of the filing of the petition;
>
> c. engaged in conduct or knowingly placed the child with persons who engaged in conduct that endangers the physical or emotional well-being of the child; and
>
> d. been the cause of the child's being born addicted to alcohol or a controlled substance legally obtained by prescription, as defined by section 261.001 of the Texas Family Code.

The trial court also found that termination of Tracy's parental rights was in J.C.'s best interest. J.C.'s father did not appear at trial and is not a party to this appeal.

Tracy subsequently filed a "Mother's Motion for Re-Trial," complaining that, "I was and still remain indigent and cannot afford legal counsel, TERMINATION OF PARENTAL RIGHTS, is a matter of dire consequences, and I was not allowed opportunity of Effective legal counsel." Tracy also filed a notarized "Mother's Affidavit of Inability to Pay Costs of Appeal." The Smiths filed a contest to Tracy's pauper's affidavit. After a hearing, the trial court sustained the contest in part to the extent that Tracy was ordered to pay $405 for the reporter's record.[3] *See* TEX R. APP. P. 20.1(k) (authorizing

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[3] Tracy has not complained of that order in this court. *Accord M.L.B. v. S.L.J.,* 519 U.S. 102, 128, 117 S. Ct. 555, 570 (1996) (holding that Mississippi had to provide indigent mother in private termination suit with record to afford appellate review of sufficiency of evidence).

order of partial payment of costs). The trial court denied the balance of the contest and ordered that Tracy be permitted to appeal without the payment of any other costs.

Tracy then filed a request with this court for appointment of counsel on appeal. We abated the appeal to the trial court for consideration of her request, and the trial court held that no statutory mandate existed requiring the appointment of counsel in a private termination suit. Tracy did not pay the $405 that she was ordered to pay toward the reporter's record, and no reporter's record has been filed in this appeal. Tracy has filed a pro se brief raising four issues.

III. TRACY'S ISSUES

In her first issue, Tracy attacks the sufficiency of the evidence to support the grounds for termination found by the trial court and to support the trial court's best interest finding. In her second issue, Tracy complains that the trial court should not have believed the testimony of Kay Riffin. In her third issue, Tracy complains that the bonding assessor did not obtain her permission to conduct a bonding assessment. In her fourth issue, Tracy complains that the trial court did not appoint her counsel. We cannot review Tracy's first three issues in the absence of a reporter's record. *See, e.g., Catalina v. Bladel*, 881 S. W.2d 295, 297 (Tex. 1994) (explaining that after a bench trial, a trial court's findings of fact are conclusive unless the appellate court has a complete reporter's record); *Mar. Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406-07 (Tex. 1998) (explaining that appellate court may not pass upon a witness's credibility or substitute its

judgment for that of the fact-finder), *cert. denied*, 525 U.S. 1017 (1998).

Concerning Tracy's fourth issue, no statutory right exists to appointed counsel in a private termination suit. The legislature has mandated the appointment of counsel for indigent parents in a termination suit only "in a suit filed by a governmental entity in which termination of the parent-child relationship is sought." *Compare* TEX. FAM. CODE ANN. §§ 107.001(1), 015(a), (b), .021 (Vernon Supp. 2007) (appearing to permit, in a private termination suit, permissive appointment of an attorney ad litem for a parent and payment of such attorney ad litem "by one or more of the parties") with § 107.013(a)(1) (mandating appointment of attorney ad litem for an indigent parent in a termination suit filed by a governmental entity); *see also generally Lassiter v. Dept. of Social Servs.*, 452 U.S. 18, 101 S. Ct. 2153 (1981). Here, CPS nonsuited its Dallas County termination suit, and the Smiths concurrently filed a new private termination suit in Tarrant County seeking to terminate Tracy's parental rights to J.C. Because Tracy's parental rights were terminated pursuant to a private termination suit, she possessed no mandatory statutory right to appointed counsel; although we abated this case to the trial court to consider the availability, if any, of discretionary appointment of counsel for Tracy, the trial court declined to appoint counsel. There is no relief that this court may grant to Tracy concerning the appointment of counsel.

IV. CONCLUSION

Having overruled all of Tracy's issues, we affirm the trial court's judgment termination Tracy's parental rights to J.C.

s/Sue Walker
SUE WALKER
JUSTICE

PANEL M: LIVINGSTON, DAUPHINOT, and WALKER, JJ.

DELIVERED: March, 13, 2008

APPENDIX D

NO. 324-397088-06

IN THE INTEREST OF JASALYN CROW, A CHILD

IN THE 342TH JUDICIAL DISTRICT COURT

TARRANT COUNTY, TEXAS

ORDER OF TERMINATION

1. Date of Hearing

On November 6, 2006, the Court heard this case.

2. Appearances

Petitioners, CARL DEATON AND YOLANDA DEATON, appeared in person and through attorney of record, KELLYE A. SWANDA, and announced ready for trial.

Respondent, DARIA SHERMAN, a/k/a TRACY RHINE, appeared in person *pro se* and announced ready for trial.

Also appearing was KEE ABLES, appointed by the Court as guardian ad litem of the child the subject of this suit.

Also appearing was MAX BREWINGTON, appointed by the Court as attorney ad litem for ANTHONY FARQUASON, who received process by substituted service but did not otherwise answer or appear.

3. Jurisdiction

The Court, after examining the record and hearing the evidence and argument of counsel, finds

that it has jurisdiction of this case and of all the parties and that no other court has continuing, exclusive jurisdiction of this case. All persons entitled to citation were properly cited.

4. Jury

A jury was waived, and all questions of fact and law were submitted to the Court.

5. Record

The record of testimony was duly reported by the court reporter for the 324th Judicial District Court.

6. Child

The Court finds that the following child is the subject of this suit:

Name:	JASALYN CROW
Sex:	Female
Birth date:	August 10, 2004

7. Termination

Mother.

The Court finds by clear and convincing evidence that DARIA SHERMAN a/k/a TRACY RHINE has –

a. knowingly placed or knowingly allowed the child to remain in conditions or surroundings that endanger the physical or emotional well-being of the child;

b. failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition;

c. engaged in conduct or knowingly placed the child with persons who engaged in conduct that endangers the physical or emotional well-being of the child; and

d. been the cause of the child's being born addicted to alcohol or a controlled substance, other

than a controlled substance legally obtained by prescription, as defined by Section 261.001 of the Texas Family Code.

The Court also finds by clear and convincing evidence that termination of the parent-child relationship between DARIA SHERMAN a/k/a TRACY RHINE and the child the subject of this suit is in the best interest of the child.

IT IS THEREFORE ORDERED that the parent-child relationship between DARIA SHERMAN a/k/a TRACY RHINE and the child the subject of this suit is terminated.

Alleged Father.

The Court finds by clear and convincing evidence that ANTHONY FARQUASON has –

a. knowingly placed or knowingly allowed the child to remain in conditions or surroundings that endanger the physical or emotional well-being of the child;

b. failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition;

c. voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child and remained apart from the child or failed to support the child since the birth; and

d. failed to register with the paternity registry under Chapter D, Chapter 160, Texas Family Code.

The Court also finds by clear and convincing evidence that termination of the parent-child

relationship, if any exists or could exist, between the alleged father and the child the subject of this suit is in the best interest of the child.

IT IS THEREFORE ORDERED that the parent-child relationship, if any exists or could exist between ANTHONY FARQUASON and the child the subject of this suit is terminated.

8. Inheritance Rights

IT IS ORDERED that the right of the child to inherit from and through DARIA SHERMAN a/k/a TRACY RHINE and ANTHONY FARQUASON is termination.

9. Home Screening

The Court finds that the required preadoptive home screening report will be made and filed.

10. Interstate Compact

The Court finds by clear and convincing evidence that Petitioners have filed a verified allegation or statement regarding compliance with the Interstate Compact on the Placement of Children as required by section 162.002 of the Texas Family Code.

11. Managing Conservator

IT IS ORDERED that CARL DEATON and YOLANDA DEATON are appointed Managing Conservators of the child the subject of this suit, the Court finding this appointment to be in the best interest of the child.

12. Attorney's Fees, Expenses, and Costs

The Court finds that KEE ABLES has satisfactorily discharged all of her duties and obligations under chapter 107 of the Texas Family Code, and IT IS ORDERED that she is hereby discharged and relieved of any further rights, duties, and responsibilities in this cause. The Court finds that KEE ABLES has incurred $5,566.25 as

professional fees and expenses, which were a necessary benefit for the child. IT IS FURTHER ORDERED that KEE ABLES is awarded $5,566.25 as professional fees rendered as guardian ad litem. These fees are taxed as costs, and CARL DEATON AND YOLANDA DEATON, Petitioners, are ORDERED to pay the fees to KEE ABLES by cash, cashier's check, or money order on or before December 6, 2006. KEE ABLES may enforce this order for fees in her own name.

IT IS ORDERED that MAX BREWINGTON is awarded $1,200.00 as attorney's fees for legal services rendered for ANTHONY FARQUASON, who received process by substituted service but did not otherwise appear. These fees are taxed as costs, and CARL DEATON, Petitioner, and YOLANDA DEATON, Petitioner, are ORDERED to pay the fees to MAX BREWINGTON by cash, cashier's check, or money order on or before December 6, 2006. MAX BREWINGTON may enforce this order for fees in his own name.

13. Costs

IT IS ORDERED that costs of court are to be borne by the party who incurred them.

14. Relief Not Granted

IT IS ORDERED that all relief requested in this case and not expressly granted is denied.

This Order of Termination judicially PRONOUNCED AND RENDERED in court at Fort Worth, Tarrant County, Texas, on November 6, 2006, and further noted on the court's docket sheet on the same date, but signed on January 4, 2007.

s/JUDGE PRESIDING

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