Parental Rights Termination Jurisprudence: Questioning the Framework

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PARENTAL RIGHTS TERMINATION JURISPRUDENCE: QUESTIONING THE FRAMEWORK
JENNIFER WRIGGINS*

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I. INTRODUCTION

In 1996, the United States Supreme Court decided M.L.B. v. S.L.J., its most recent decision concerning termination of parental rights. The Court held that where a state provides an appeal from a judgment terminating parental rights, it must, under the U.S. Constitution’s due process and equal protection

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2. The M.L.B. v. S.L.J. decision was 6-3, with Justice Kennedy concurring. Id. at 128. Justice Thomas and Justice Rehnquist filed separate dissenting opinions. Id. at 129. Justice Scalia joined Justice Thomas’ dissent; Justice Rehnquist joined in part in Justice Thomas’ dissent. Id.
mandates, provide indigent appellants with a transcript if a transcript is necessary to review the decision. To reach this result, Justice Ginsburg, writing for the majority, had to navigate unfavorable precedent holding that due process did not require states to provide an appeal and that indigent parents did not have an absolute right to counsel in termination of parental rights cases. M.L.B. strongly endorses parental rights against state authority, and on remand, the Mississippi courts ultimately reversed the initial termination of the petitioner's parental rights. Similarly, the Supreme Court's recent plurality decision in Troxel v. Granville, involving the constitutionality of Washington state's third party visitation statute in the context of grandparent visitation, also endorsed parental rights. Troxel, however, involved very different circumstances, and its ultimate significance is not clear because of the splintered nature of the decision.

3. Id. at 107. States were not required to provide an appeal, but once they did, they could not deny indigent defendants a transcript. Id. at 111, 128.
4. Id. at 110-11. See Griffin v. Illinois, 351 U.S. 12, 18 (1956) (plurality opinion) (holding states are not constitutionally required to provide appellate review in civil cases).
7. 120 S.Ct. 2054 (2000) (plurality opinion).
8. Id. at 2057.
9. In Troxel, a plurality of the United States Supreme Court found that Washington's broadly worded third party visitation statute, as applied in that case, was an unconstitutional infringement of a parent's right to raise her children without state interference. Id. at 2063. The Washington Supreme Court had held that the statute was unconstitutional on its face under federal law because it was overbroad and did not require a showing of harm to a child before visitation could be ordered. Id. at 2058-59. At the United States Supreme Court level, the plurality of four justices, in an opinion written by Justice O'Connor, found the law was unconstitutional as applied to the dispute at hand. Id. at 2063. The dispute was between a mother and the parents of her deceased boyfriend, over the extent of the grandparents' visitation with the children. Id. at 2057. The trial court had ordered more visitation to the grandparents than the mother wanted to allow. Id. at 2057-58. There had been no claim that the mother was unfit, the trial court had given no weight to the mother's evaluation of the children's interest, and the mother was not seeking to cut off visitation entirely. Id. at 2061-63. As applied to these circumstances, where the trial court had ordered a specific visitation schedule for the grandparents, the plurality held that the law unconstitutionally infringed on the mother's parental rights. Id. at 2063. The concurrences of Justices Souter and Thomas took contrasting positions, with Justice Souter saying that the Washington Supreme Court should have affirmed the lower court's holding that the statute was overbroad and facially unconstitutional because it interfered with parents' rights as set forth in Supreme Court precedents. Id. at 2065-2067. Justice Thomas' concurrence argued that strict scrutiny should have been applied to the statute since it interfered with fundamental rights and also noted that the validity of the parental rights precedents had not been challenged, implying that he might find those precedents incorrectly decided. Id. at 2067-68. Justice Scalia dissented,
The purpose of this Essay is to examine and raise questions about certain aspects of the Court's *M.L.B.* decision which are distinct from the narrowly doctrinal aspects of the decision. The goal is not to assert that the decision is "right" or "wrong," but rather to discuss family law issues related to the decision in light of the Supreme Court's decision and subsequent decisions in the case. The Court's decision and contemporary family law more generally make certain core assumptions. These assumptions include the following: (1) child custody decisionmaking is fundamentally different from termination of parental rights decisionmaking; (2) the advocacy system is the best forum for deciding termination of parental rights disputes; (3) stepparent adoptions are

arguing that the matter should be left to the states. *Id.* at 2074-75. Justices Kennedy and Stevens wrote separate dissents, both arguing that the lower court's decision should be reversed. *Id.* at 2075-79 (Kennedy), and 2068-74 (Stevens). As *Troxel* dealt with grandparent visitation rather than termination of parental rights, it is not directly on point. Moreover, the narrow wording of the plurality decision, discussing the statute only "as applied," and the divergent analysis of the concurrences limits its significance in this context. However, both decisions pertain to parental rights, and the language of the *Troxel* opinion is interesting in light of the *M.L.B.* decision so *Troxel* will be discussed herein to the extent that it is pertinent.


11. "Child custody decisionmaking" refers to decisions concerning which legally recognized parent shall live with the child and which legally recognized parent shall visit with the child. The term does not refer to the means by which someone can be recognized as a legal parent. *See,* e.g., E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999) (stating the probate court had equity jurisdiction to grant visitation between child and de facto parent), *cert. denied* 120 S.Ct. 500 (1999). Nor does the term refer to decisions related to custody or visitation of a child by grandparents or others who are not legally recognized as parents. Similarly, "child custody disputes" refers to disputes concerning which legally recognized parent shall live with the child and which legally recognized parent shall visit with the child.
essentially the same as non-stepparent adoptions; and (4) children’s interests are often overlooked in the applicable analytical framework. This Essay challenges these assumptions. As close examination of the facts in *M.L.B.* will show, these assumptions are ill-fitted to the facts of family situations in many instances. In fact, an examination of the relationship between the *M.L.B.* decision and the aforementioned assumptions indicates the need for suggestions with a different focus. For instance, providing legal assistance for indigent parents in custody litigation, considering open adoption in stepparent adoptions, and paying more attention to the legal status of children are ideas that may lead to the development of more nuanced, child-centered ways of thinking about parental rights.

Part II of this Essay highlights pertinent aspects of the *M.L.B.* decision and analyzes the doctrinal aspects of the decision. Part III discusses and questions key assumptions made in the *M.L.B.* decision and in contemporary family law and suggests other approaches that should be considered.

II. THE SUPREME COURT’S DECISION IN *M.L.B.* v. *S.L.J.* AND SUBSEQUENT CASE HISTORY

Although *M.L.B.* v. *S.L.J.* was a termination of parental rights case, it arose in the aftermath of a divorce and in conjunction with a remarriage and adoption.12 *M.L.B.* and *S.L.J.* were married for almost eight years before divorcing in June 1992.13 They had one child born in April 1985 and one child born in February 1987.14 Following the divorce, the children remained in their father’s custody, which was agreed upon at the time of the divorce.15 In September 1992, *S.L.J.*, the children’s father, remarried, and the children continued to live with him.16 In November 1993, *S.L.J.* and his new wife *J.P.J.* filed a petition to terminate *M.L.B.*’s parental rights17 and to allow for *J.P.J.*’s adoption of the children, who were six and eight years old at the time of the


14. *Id.*

15. *Id.*

16. *Id.*

petition. Under the conventional system, the parental rights of the biological parents must be terminated in order for an adoption to go forward. The petition alleged that M.L.B. had not exercised her visitation rights and still owed child support. M.L.B. counterclaimed, alleging that S.L.J. had not allowed her reasonable visitation in violation of the divorce decree and seeking primary custody of the children. Prior to filing the counterclaim to the termination petition, M.L.B. had not asked the court to enforce the divorce decree to allow her visitation.

After a hearing, which took place on three separate days between the summer and fall of 1994, the Chancellor in December 1994 terminated M.L.B.’s parental rights, ordered the adoption by J.P.J., and ordered that the children’s birth certificates show J.P.J. as their mother. This is standard Mississippi procedure for adoptions as well as the standard procedure in other states. Mississippi law provides that parental rights may be terminated “when there is [a] substantial erosion of the relationship between the parent and child which was caused at least in part by the parent’s serious neglect, abuse, prolonged and unreasonable absence, unreasonable failure to visit or communicate, or prolonged imprisonment.”

18. M.L.B., 519 U.S. at 107 (1996). S.L.J. must consent to the adoption of the children by J.P.J. and himself; the adoption could then take effect immediately, assuming M.L.B.’s parental rights already had been terminated. The adoption decree may be entered immediately if a child is the stepchild of a petitioner or is related by blood to the petitioner within the third degree or in some other circumstances. Miss. Code Ann. § 93-17-13 (1994 & Supp. 2000).

19. An adoption cannot take place if any parent whose parental rights have not been terminated objects. Miss. Code Ann. § 93-17-7 (Supp. 2000). For a discussion of adoption proceedings requiring termination of parental rights see Mahoney, supra note 12, at 163-64; Margaret M. Mahoney, Open Adoption in Context: The Wisdom and Enforceability of Visitation Orders for Former Parents Under Uniform Adoption Act § 4-13, 51 Fla. L. Rev. 89, 92 (1999); and Philip S. Welt, Adoption and the Constitution: Are Adoptive Parents Really “Strangers Without Rights”? 1995 Ann. Surv. Am. L. 165, 174-77. As Mahoney notes, adoption by a stepparent generally takes place through the joint petition of the stepparent and the biological parent to whom the stepparent is married. Mahoney, supra note 12, at 161-63. Even though a court technically may temporarily terminate the parental rights of the biological parent who is married to the stepparent, the biological parent’s rights are reestablished through the granting of the petition. The adoption by the stepparent will not affect the legal or custodial relationship between the child and the biological parent who is married to the stepparent. Mahoney, supra note 12, at 163-64.

21. Id.
23. M.L.B., 519 U.S. at 107-08.
In the Chancellor’s written order terminating M.L.B.’s parental rights and allowing the adoption, the Chancellor echoed the statutory language, stating that there had been a “substantial erosion of the relationship between the natural mother . . . and the minor children” which had been caused “at least in part by [M.L.B.’s] serious neglect, abuse, prolonged and unreasonable absence or unreasonable failure to visit or communicate with her minor children.” The Chancellor further found that S.L.J. and J.P.J. had met their burden of proof by clear and convincing evidence in accordance with the required evidentiary standard. The Chancellor made a lengthy oral order from the bench, but because M.L.B. could not afford the transcript, she was not able to use the order in her initial appeal.

M.L.B. appealed and paid the $100 filing fee, but was not able to pay the $2352.36 transcript preparation fee. Mississippi law provides that “if the appellant ‘intends to urge on appeal,’ as M.L.B. did, ‘that a finding or conclusion is unsupported by the evidence or is contrary to the evidence’” the appellant must order and pay for the relevant parts of the transcript. The guardian ad litem, who was appointed in accordance with Mississippi law to protect the children’s interests in this matter, did not appeal the Chancellor’s decision.

The Mississippi Supreme Court denied M.L.B.’s application to

27. Id. at 107-08. Justice Ginsburg noted the brevity of the lower court’s order that was available to the Supreme Court: “Nothing in the Chancellor’s order describes the evidence, however, or otherwise reveals precisely why M.L.B. was decreed, forevermore, a stranger to her children.” Id. at 108; see infra note 30.
32. Id. Mississippi law states a party can make a motion for findings of fact and conclusions of law after a court has issued its decision, and if a party makes such a motion, the court must issue findings and conclusions. Miss. R. Civ. P. 52. However, the court’s findings and conclusions need not be in writing. Conversation with John McDuff, Esq. (January 21, 2000). It is not clear whether M.L.B. made such a motion after reviewing the Chancellor’s brief decision. Efforts to reach M.L.B.’s counsel were unsuccessful. Even if she had made such a motion, the court’s findings might have been oral, and thus a transcript would have been necessary to review them. In any event, the Chancellor did issue a lengthy oral order. See supra note 30.
proceed *in forma pauperis*, and, thus, M.L.B. could not pursue her appeal as the state would not pay for the transcript.\(^{35}\)

The issue before the Supreme Court was whether "a State, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, [may] condition appeals from trial court decrees terminating parental rights on the affected parent's ability to pay record preparation fees."\(^{36}\) In resolving this issue, Justice Ginsburg analyzed the nature of the decrees terminating parental rights.\(^{37}\)

In analyzing the issue of whether the state had to pay for M.L.B's transcript, Justice Ginsburg highlighted the "narrow category of civil cases in which the State must provide access to its judicial processes without regard to a party's ability to pay court fees."\(^{38}\) She noted that cases "involving state controls or intrusions on family relationships" are treated differently from other civil cases.\(^{39}\) In such contexts, "to guard against undue official intrusion, the Court has examined closely and contextually the importance of the governmental interest advanced in defense of the intrusion."\(^{40}\) Justice Ginsburg thus referred to the equation as "government interest" versus "family relationship."

Justice Ginsburg also cited two criminal cases as precedent. *Griffin v. Illinois*\(^ {41}\) and *Mayer v. Chicago*\(^ {42}\) require that a state providing an appeal from criminal convictions, including misdemeanor convictions, cannot bar indigents from the appeal process.\(^ {43}\) Justice Ginsburg, characterizing *Mayer*, stated that "[a]n impecunious party ... whether found guilty of a felony or conduct only

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37. Id. at 113-19. These are civil cases and do not involve the threat of incarceration or even a fine. Id.

38. Id. at 113. Filing fees in civil cases generally do not raise due process implications. Id. at 114-16.

39. Id. at 116; see also Boddie v. Connecticut, 401 U.S. 371, 374 (1971) (holding that it was a due process violation for the state to deny a divorce to a married couple based on their inability to pay court costs because of their fundamental interest at stake in the marriage and the "state monopolization of the means for legally dissolving this relationship").

40. M.L.B., 519 U.S. at 116 (citation omitted).

41. 351 U.S. 12 (1956) (overturning an Illinois rule that required all indigent defendants except those sentenced to death to pay for a transcript in order to appeal their convictions).

42. 404 U.S. 189 (1971) (extending the *Griffin* rule to misdemeanor defendants).

43. M.L.B., 519 U.S. at 110-12.
'quasi criminal in nature' 'cannot be denied a record of sufficient completeness to permit proper [appellate] consideration of his claims.'

Expanding on the constitutional protections for families, she restated the principle that "[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." She cited familiar precedents regarding marriage, procreation, and raising children. She characterized M.L.B.'s case as "involving the State's authority to sever permanently a parent-child bond" and stated that the Court approached the case "mindful of the gravity of the sanction imposed on [M.L.B.] and in light of two prior decisions most immediately in point," referencing the due process precedents of *Lassiter v. Department of Social Services* and *Santosky v. Kramer*.

In a footnote, Justice Ginsburg remarked that though "the termination proceeding . . . was 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: M.L.B. resists the imposition of an official decree extinguishing, as no power other than the State can, her parent-child relationships." To Ginsburg, the dilemma is simply governmental interest versus family relationship, despite the private origins of the issue in a breakdown of a marriage.

Justice Ginsburg then highlighted aspects of *Lassiter* and *Santosky* which emphasize the importance of the parents' interests over the state's interest. Although *Lassiter* held that indigent parents did not have an automatic right to counsel in cases involving termination of parental rights, it emphasized the importance of parents' interests in companionship with and custody of their children. A decision terminating parental rights "work[s] a unique kind of deprivation." For that reason, '[a] parent's interest in the accuracy and justice of the decision . . . is . . . a commanding one.'

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44. *Id.* at 112 (citing *Mayer*, 404 U.S. at 196, 198).
45. *Id.* at 116 (citation omitted).
47. *Id.* (citing *Skinner v. Oklahoma*, 316 U.S. 535 (1942)).
48. *Id.* (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) and *Meyer v. Nebraska*, 262 U.S. 390 (1923)).
50. *Id.* at 117.
52. 455 U.S. 745 (1982).
54. *Id.* at 117 (citing *Lassiter*, 452 U.S. at 31-32).
55. *Id.* at 117-18 (citing *Lassiter*, 452 U.S. at 27).
56. *Id.* at 118 (quoting *Lassiter*, 452 U.S. at 27).
characterized the parents’ interests as “far more precious than any property right.”

Having laid the foundation, Justice Ginsburg turned to the issue of how to classify M.L.B.’s situation. The situation could either be categorized as a general civil case, in which the indigent would have no right to proceed without fees, or it could be in the free-transcript category of *Mayer v. City of Chicago* because the “accusatory state action [M.L.B.] is trying to fend off is barely distinguishable from criminal condemnation in view of the magnitude and

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57. *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982). *Santosky* articulated general agreement (even from the dissenters) 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.” *Id.* at 774 (Rehnquist, J., dissenting), quoted in *M.L.B.*, 519 U.S. at 119. In *M.L.B.* Justice Ginsburg also referred to a distinction between “the State’s termination of a fully existing parent-child relationship” and “the State’s imposition of the legal obligations attending a biological relationship between parent and child.” *M.L.B.*, 519 U.S. at 118 n.11. A later case held that paternity cases could be proved by a preponderance of the evidence. *See Rivera v. Minnich*, 483 U.S. 574, 575 (1987). For discussion of the issues of paternity and developing parent-child relationships, see generally *Miller v. Albright*, 523 U.S. 420, 424 (1998) (upholding statutory distinctions in citizenship requirements for children born out of wedlock in foreign lands which treat children of an alien father and citizen mother different from those of an alien mother and citizen father); *Lehr v. Robertson*, 463 U.S. 248, 267–68 (1983) (holding a state may accord different rights to parents if “one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship” with the child (footnote omitted)); *Caban v. Mohammed*, 441 U.S. 380, 382, 394 (1979) (holding a New York adoption law unconstitutional as it distinguished between the rights of unwed mothers and unwed fathers by providing for the adoption of an illegitimate child solely by the consent of the mother); *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978) (upholding the constitutionality of Georgia adoption laws denying an unwed father the power to prevent the adoption of his child and the state’s recognition of the “difference in the extent of commitment to the welfare of the child” of an unwed father compared to a married father); and *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (holding “parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody”). For consideration of problems with the child protective system, see generally Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System: An Essay*, 48 S.C.L. REV. 577 (1997) (arguing children’s needs are often not met by the various child protective systems); and Amy Sinden, *“Why Won’t Mom Cooperate?” A Critique of Informality in Child Welfare Proceedings*, 11 YALE J. L. & FEMINISM 339 (1999) (highlighting various problems in child welfare proceedings).

permanence of the loss she faces." Justice Ginsburg placed M.L.B.'s situation in the latter category. 60

In discussing the doctrinal foundations of Griffin v. Illinois, 61 Mayer v. City of Chicago, 62 and related cases, Justice Ginsburg acknowledged that both due process and equal protection concerns were present and that in the Griffin line of cases, "[d]ue process and equal protection principles converge." 63 M.L.B.'s

59. M.L.B., 519 U.S. at 119 (citation and footnote omitted). Justice Ginsburg's language in that sentence and throughout the opinion is laden with emotion; Justice Ginsburg then asks how much process is due before the state forever "brand[s] [her] unfit for affiliation with her children." Id. at 119. "Nothing in the Chancellor's order describes the evidence, however, or otherwise reveals precisely why M.L.B. was decreed, forevermore, a stranger to her children." Id. at 108. Justice Ginsburg refers to the lower court's decision as a "stern judgment." Id. at 122. M.L.B. is "endeavoring to defend against the State's destruction of her family bonds, and to resist the brand associated with a parental unfitness adjudication." Id. at 125. As the majority opinion's emotionally laden language may imply a particularly strong, gender-based bond between mothers and their children, it is interesting to consider whether the decision would have come out differently had M.L.B. been a man trying to stop the adoption of his children by his ex-wife's new husband, rather than a woman trying to stop the adoption of her children by her ex-husband's new wife. On the other hand, the rights of fathers to parent children born to their wives are deeply embedded in traditional family law. See generally Michael H. v. Gerald D., 491 U.S. 110, 130 (1989) (plurality opinion) (noting a husband has liberty interest in raising child born to his wife, although child is probably not biologically related to husband). Therefore, as the children were born "in wedlock," a hypothetical male would have the force of this tradition behind him. Even more interesting is whether the decision would have come out differently had M.L.B. been a man who had never married the mother of the children and who was trying to stop their adoption by his ex-girlfriend's new husband. The Supreme Court's precedents in this area have "protected the rights of unwed fathers when they have lived with or established a substantial relationship with their children, unless the unwed father is asserting rights against an 'intact' family," Naomi R. Cahn, Models of Family Privacy, 67 GEO. WASH. L. REV. 1225, 1237 (1999) (footnote omitted). See generally, Laurence C. Nolan, "Unwed Children" and Their Parents Before the United States Supreme Court from Levy to Michael H: Unlikely Participants in Constitutional Jurisprudence, 28 CAP. U. L. REV. 1 (1999) (explaining that unwed fathers do have a liberty interest in parent-child relationships). For an unwed father who had treated his visitation the way M.L.B. may have, see text accompanying notes 105-13, it is possible that the Court would not have been so sensitive to the meaning and consequences of terminating his parental rights. This possibility is supported by the fact that a plurality of the Court recently upheld an additional proof-of-paternity requirement for citizenship when the citizen parent of a child who is born out-of-wedlock and abroad is the child's father, as opposed to the child's mother, against an equal protection challenge. Miller v. Albright, 523 U.S. 420, 424 (1998).

60. The Court indicated that it was "[g]uided by Lassiter and Santosky, and other decisions acknowledging the primacy of the parent-child relationship . . . " M.L.B., 519 U.S. at 120. The additional cases "acknowledging the primacy of the parent-child relationship" were Stanley v. Illinois, 405 U.S. 645, 651 (1972) and Meyer v. Nebraska, 262 U.S. 390, 399 (1923). M.L.B., 519 U.S. at 120.

63. M.L.B., 519 U.S. at 120 (quoting Bearden v. Georgia, 461 U.S. 660, 665 (1983)). Justice Ginsburg noted, "The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs. The due process concern homes in on the essential fairness of the state-ordered proceedings anterior to adverse state action." Id.
claim "heavily" rested on an equal protection framework "for... due process
does not independently require that the State provide a right to appeal."64
Without explicitly stating that there is no due process basis for the decision,
Justice Ginsburg stated, "We place this case within the framework established
by our past decisions in this area. In line with those decisions, we inspect 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."65 Again, the parent's
individual interest is paired against the State's exaction.

M.L.B.'s individual interests were significant.66 She faced "forced
dissolution of her parental rights."67 The loss of parental rights would be
permanent: "In contrast to loss of custody, which does not sever the parent-
child bond, parental status termination is 'irretrievable' of the
most fundamental family relationship."68 Further, "the risk of error... is
considerable."69

Turning from M.L.B.'s interest, the majority considered the state's
"justification for its exaction."70 The only interest of the state that was
considered was its financial interest in "offsetting the costs of its court
system."71 Justice Ginsburg found that "in the tightly circumscribed category
of parental status termination cases, appeals are few, and not likely to impose
an undue burden on the State."72 Although state civil fees, such as filing fees,
generally are examined only for rationality, there are two exceptions: fees
involving the right to participate in political processes, and fees limiting access
to judicial processes in cases "criminal or 'quasi criminal in nature."73 Justice
Ginsburg placed termination of parental rights decrees in the quasi criminal

(citations omitted). She further noted, "A 'precise rationale' has not been composed because cases
of this order 'cannot be resolved by resort to easy slogans or pigeonhole analysis."7 Id. (citations
omitted).

64. Id. (citation omitted).
65. Id. at 120-21 (citation omitted).
66. M.L.B.'s interests were as strong as those of the "'impecunious medical student'" in
Mayer. Id. at 121 (quoting Mayer, 404 U.S. at 197). Justice Ginsburg noted that in Mayer the
student did not face jail, but "the conviction... could affect his professional prospects and,
possibly, even bar him from the practice of medicine." Id. (citing Mayer, 404 U.S. at 197). Justice
Ginsburg further noted in Mayer that the state's "pocketbook interest in advance payment for a
transcript... was unimpressive when measured against the stakes for the defendant." Id. (citing
Mayer, 404 U.S. at 197).
67. Id.
68. Id. (alteration in original) (quoting Santosky, 455 U.S. at 753).
69. M.L.B., 519 U.S. at 121. Justice Ginsburg noted that "of the eight reported appellate
challenges to Mississippi trial court termination orders from 1980 through May 1996, three were
reversed by the Mississippi Supreme Court for failure to meet the 'clear and convincing' proof
standard." Id. at 109 n.3.
70. See id. at 122-24.
71. Id. at 122.
72. Id. (citations omitted).
73. Id. at 124 (quoting Mayer v. City of Chicago, 404 U.S. 189, 196 (1971)).
category, namely the category where the State cannot "bolt the door to equal justice." 74 Even though the fee requirement may have been rational, the financial justification was unimpressive when measured against the rights at stake for M.L.B. 75

Following the United States Supreme Court’s decision, the Mississippi Supreme Court reinstated M.L.B.’s appeal, required that she be allowed to proceed without fees, and ordered that the record in the case be transcribed. 76 Based on a detailed review of the Chancellor’s trial level decision, the Mississippi Court of Appeals on remand held that M.L.B.’s parental rights had been improperly terminated. 77 According to that court, under Mississippi law S.L.J. must demonstrate by clear and convincing evidence that M.L.B. actually had abandoned her children, and as the evidence did not prove abandonment, her parental rights should not have been terminated. 78 This conclusion was upheld by the Mississippi Supreme Court in April 2000. 79 Thus, almost six years after M.L.B.’s parental rights had been terminated, her rights were reinstated so that she could have visitation with her children.

III. DISCUSSION

Four aspects of the Supreme Court’s decision are particularly significant. One is the distinction the court makes between judicial decisions concerning termination of parental rights and judicial decisions concerning child custody. 80 Second is the framework applied to the situation, which assumes that the concept of a “risk of error” is meaningful and that adversarial decisionmaking

74. M.L.B., 519 U.S. at 124 (quoting Griffin v. Illinois, 351 U.S. 12, 24 (1955) (Frankfurter, J., concurring)).

75. In his dissent, Justice Thomas warned that the decision would result in “greater demands on the States to provide free assistance to would-be appellants in all manner of civil cases involving interests that cannot, based on the test established by the majority, be distinguished from the admittedly important interest at issue here.” Id. at 130. Justice Thomas pointed out that it was not clear whether the decision rested only on equal protection or had due process aspects, and he asserted that if neither clause provided the basis for the free transcript, a combination of the two clauses did not either. Id. He characterized the decision as dealing with “the new-found constitutional right to free transcripts in civil appeals.” Id. at 129.


77. Id. at *40.

78. See id. at *40. Although the Chancellor had found that there had been “substantial erosion” in the relationship, which was one of the requirements for terminating parental rights, he did not also conclude that her actions constituted “abandonment,” as required by Mississippi law; moreover, the facts that the Chancellor found did not constitute “abandonment.” Id. at *29, 40. See infra text accompanying notes 110-13.


is the best way to reach accurate and fair results.\textsuperscript{81} Third is the lack of distinction between stepparent adoptions and other adoptions.\textsuperscript{82} Fourth is the exclusion of the interests of children from the framework.\textsuperscript{83} Each will be discussed below.

\textbf{A. The Distinction Between Decisions Concerning Child Custody and Termination of Parental Rights: For Indigent Parents, Often the Difference Between the Two is Not Very Great}

The majority opinion in \textit{M.L.B.} sharply distinguishes between adjudication of child custody disputes between parents and termination of parental rights adjudication.\textsuperscript{84} The state’s role in these two situations, by implication, is also significantly different. Justice Ginsburg noted that “[i]n contrast to loss of custody, which does not sever the parent-child bond, parental status termination is ‘irretrievably destruct[ive]’ of the most fundamental family relationship.”\textsuperscript{85} Family law enumerates various differences as well. Decisions terminating parental rights must be based on clear and convincing evidence,\textsuperscript{86} while parents’ disputes over child custody, like other civil cases, are decided based on a preponderance of the evidence.\textsuperscript{87} There is no right to counsel for parents in custody cases, yet there is a right to counsel for parents in many termination of parental rights cases.\textsuperscript{88} Child custody orders are modifiable,\textsuperscript{89} while orders for the termination of parental rights are not.\textsuperscript{90} However, as explained below, the two situations are not necessarily different with respect to the impact of custody orders on indigent parents.

Justice Ginsburg noted that unlike termination orders, custody orders are “matters modifiable at the parties’ will or based on changed circumstances,”\textsuperscript{91} and indeed, custody orders can be modified in those instances.\textsuperscript{92} However, this

\footnotesize
\begin{itemize}
\item \textsuperscript{81} See \textit{M.L.B.}, 519 U.S. at 120-21; infra Part III.B.
\item \textsuperscript{82} See \textit{M.L.B.}, 519 U.S. at 116 n.8; infra Part III.C.
\item \textsuperscript{83} See infra Part III.D.
\item \textsuperscript{84} See \textit{M.L.B.}, 519 U.S. at 121, 127-28.
\item \textsuperscript{85} \textit{id.} at 121 (quoting Santosky v. Kramer, 455 U.S. 745, 753 (1982) (alteration in original)).
\item \textsuperscript{86} Santosky v. Kramer, 455 U.S. 745, 747-48 (1982) (decisions terminating parental rights must be based on clear and convincing evidence).
\item \textsuperscript{87} See, e.g., Lipsey v. Lipsey, 755 So. 2d 564, 565 (Miss. Ct. App. 2000) (stating that the moving party in an action to modify custody must prove its case by a preponderance of the evidence).
\item \textsuperscript{88} Lassiter v. Dept. of Soc. Serv., 452 U.S. 18, 31-32 (1981) (deciding the right to counsel in termination of parental rights cases depends on character and complexity of case).
\item \textsuperscript{89} See 2 \textsc{Homer H. Clark, Jr.}, The Law of Domestic Relations in the United States § 20.9, at 547 (Practitioner’s ed., 2d. ed. 1987).
\item \textsuperscript{90} See \textit{id.} § 21.2, at 572.
\item \textsuperscript{91} \textit{M.L.B.} v. S.L.J., 519 U.S. 102, 127-28 (1996).
\item \textsuperscript{92} \textsc{Clark, supra} note 89, § 20.9, at 547.
\end{itemize}
distinction may not be as great as it seems. In fact, if one parent loses custody to the other parent in a child custody dispute, it is unlikely that the custody order will ever be modified “at the parties’ will,” since the winner will be unlikely to agree to modify it. Further, a court’s ability to modify custody decisions is more theoretical than real, particularly when people cannot afford counsel. Moreover, when people cannot afford counsel, enforcement of custody decisions through contempt or other means is often impossible. By the time a termination of parental rights proceeding is brought and the indigent parent obtains court-appointed counsel, the relationship between the parent and child may already be damaged or destroyed.

Scrutiny of the facts of M.L.B. raises questions along these lines. According to the Supreme Court’s opinion, the father’s custody of the children was decided by agreement between the parties upon divorce. The children

93. People of low and moderate income levels have difficulty obtaining attorneys for civil matters. See generally Roy W. Reese & Carolyn A. Eldred, Report on the Legal Needs Among Low-Income and Moderate-Income Households: Summary of Findings from the Comprehensive Legal Needs Study (1994), reprinted in Findings of the Comprehensive Legal Needs Study 41-44 (American Bar Association 1994) (finding low-income families are less likely to seek counsel than moderate-income families and noting “a feeling that nothing could be done” was “most frequently cited in low-income situations”). Attorneys generally refuse to represent parties in a divorce without a substantial upfront retainer. Clark, supra note 89, § 17.2, at 234. This retainer requirement of course would be applied to persons seeking modifications of divorce decrees. Although domestic relations statutes often provide for fee-shifting based on the financial capabilities of the litigants, Clark, supra note 89, § 17.2, at 233, fee-shifting is unwieldy in practice and often does not ensure that the poorer spouse (usually the woman) receives competent representation. See Linda J. Ravdin & Kelly J. Capps, Alternative Pricing of Legal Services in a Domestic Relations Practice: Choices and Ethical Considerations, 33 Fam. L.Q. 387, 409 (1999); see also Melody Kay Fuller, Unbundling Family Law Practice Creates Pro Bono Opportunities, Colo. Law., Sept. 1998, at 29, 30 (noting a shortage of pro bono attorneys to represent parties in family law cases); Jeannette F. Swent, Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces, 6 S. Cal. Rev. L. & Women’s Stud. 1, 58-59 (1996) (summarizing findings of gender bias studies that women have particular difficulty finding attorneys in divorce because of lack of funds); Rosalie R. Young, The Search for Counsel: Perception of Applicants for Subsidized Legal Assistance, 36 Brandeis J. Fam. L. 551, 557-60, 572-74 (1998) (describing experiences of indigent people who cannot obtain attorneys and describing the particular need of women for counsel in divorce and other family cases).

94. See sources cited supra note 93.


96. M.L.B., 519 U.S. at 107. There is no information in the Court’s opinion about why the father had custody upon divorce or details of the circumstances of the agreement. The subsequent Mississippi Court of Appeals’ decision reveals that the divorce decree forbade M.L.B. from exercising her visitation in the presence of J.B., who was her husband at the time of the Chancellor’s decision. M.L.B. v. S.L.J., No. 97-CA-00929-COA, 1999 Miss. App. LEXIS 299,
lived with their father for almost a year and a half before the petition to terminate was filed. However, once the petition was filed and M.L.B. obtained a court-appointed lawyer in the termination case, she counterclaimed for full custody and alleged that the father had not provided her with reasonable visitation as provided in the divorce decree.

But prior to her counterclaim to the termination petition, M.L.B. had not taken steps to modify or enforce the judgment that she, in theory, could have obtained under Mississippi law. For example, she could have filed a motion to change the terms of the divorce judgment so that she would get more or different visitation rights. Alternatively, she could have filed a motion for contempt or enforcement of the judgment alleging that she was being denied visitation.

There is no way of knowing from any of the opinions exactly why M.L.B. did not take advantage of any of these options during the year and a half between the divorce judgment and the filing of the termination petition. However, some clues may be gleaned from the Chancellor's opinion. First, M.L.B., who had an eleventh grade education, worked various jobs during this period. After an eight year marriage, she received only an automobile and two quilts from the divorce. It is reasonable to infer that her jobs during this period did not pay high wages and that she did not have funds to hire a lawyer to try to enforce or modify the custody order during this period. Second, M.L.B. and her new husband had significant problems which may have interfered with her efforts to visit or to enforce the visitation provisions of the divorce decree. The parties were divorced in June 1992, and M.L.B. married J.B., her boyfriend prior to the divorce, in October 1992. At some

at *6. See infra notes 104-09.
98. Id.
99. Id.
100. See Miss. Code Ann. § 93-5-23 (1994 & Supp. 2000) (allowing the court on petition, after issuing a custody decision, to change the decree and make such new decrees as the case may require).
101. See Miss. Code Ann. § 93-5-87 (1991) (giving the chancery court power to punish violations of its orders through contempt proceedings). Contempt proceedings have been used to enforce visitation orders. See, e.g., Saunders v. Saunders, 724 So. 2d 1132, 1135-36 (Miss. Ct. App. 1998) (upholding lower court's determination that ex-wife was in contempt of court's order on visitation).
103. Id.
104. See Clark, supra note 89, § 17.2, at 233-34.
unspecified time, J.B. was convicted of an assault on a police officer and had spent time in jail.\textsuperscript{107} After he physically and emotionally abused M.L.B., she left him for about a year.\textsuperscript{108} Thus, during the year and a half between the divorce (June 1992) and when the petition was filed (November 1993), she married a man who abused her and then left him.\textsuperscript{109} When the petition was filed, she was apparently separated from him.

There are factual disputes concerning M.L.B.'s visitation and attempts at visitation during this period. M.L.B. claimed that S.L.J. hung up the phone on her when she tried to speak with her children.\textsuperscript{110} S.L.J. claimed that M.L.B. did not frequently visit\textsuperscript{111}—at times he did not know where she was\textsuperscript{112}—and that she hung up the phone when he called.\textsuperscript{113} It is possible that M.L.B. could have had more visitation during this period, but it is impossible to know whether M.L.B. would have taken the necessary steps to enforce or change the divorce judgment had she had ready access to an attorney. There is no way to know for certain whether the counterclaim in the parental rights case seeking full custody was made in order to try to strengthen her strategic position,\textsuperscript{114} or for some other reason.\textsuperscript{115}

\begin{itemize}
  \item \textsuperscript{107} M.L.B., 1999 Miss. App. LEXIS 299, at *17.
  \item \textsuperscript{108} Id. at *20. M.L.B. left J.B. between roughly June 1993 and July 1994. Id.
  \item \textsuperscript{109} The petition was filed in November 1993. M.L.B., 519 U.S. at 107.
  \item \textsuperscript{110} M.L.B., 1999 Miss. App. LEXIS 299, at *19. According to the Chancellor, M.L.B. testified that the last time she had the children with her was October 15, 1993, which was over a year before the final hearing prior to the termination. Id. at *17-18. M.L.B. visited the children at her sister's house in the fall of 1994 and on other occasions when the children were staying at her sister's house. Id. at *16-18. M.L.B.'s sister testified that M.L.B. tried to see her children, bought gifts for them, and that sometimes the children called M.L.B. Id. at *16. M.L.B. testified that S.L.J. would not allow her to deliver gifts for the children. Id. at *17. M.L.B. testified that S.L.J. "would not allow her visitation," and so she stopped paying child support. Id. at *19. S.L.J. testified that the last time he believed M.L.B. saw the children was in early August 1994, at their aunt's house. Id. at *9. S.L.J. testified he dropped the children off with their aunt (M.L.B.'s sister) so they could visit with their mother, but that M.L.B. had come by only one time and stayed for about thirty minutes. Id. at *10. S.L.J. also stated that at one point after the divorce he left the children with M.L.B.'s sister so that M.L.B. could visit with them but that M.L.B. "only visited about twice during that week." Id. at *11, 21. This testimony of S.L.J. is not clearly rebutted in the Chancellor's summary of M.L.B.'s or her sister's testimony. Id. at *22-28. It is difficult to tell from the Chancellor's opinion how much visitation was attempted and how much visitation actually took place. Id.
  \item \textsuperscript{111} Id. at *5.
  \item \textsuperscript{112} Id. at *8.
  \item \textsuperscript{113} Id. at *19.
  \item \textsuperscript{114} A possible strategic reason for the counterclaim is the possibility that a judge would be less likely to terminate her parental rights if she claimed she actually wanted full custody and not just visitation.
  \item \textsuperscript{115} After the counterclaim was filed, M.L.B.'s position changed. At the Chancellor's hearing, M.L.B. testified that she was only seeking visitation, not custody. M.L.B., 1999 Miss. App. LEXIS 299, at *20-21. See infra note 158.
\end{itemize}
In a practical sense, for the indigent parent losing custody, a judgment of custody for the other parent is not always very different from a judgment terminating parental rights. While the court orders are theoretically modifiable, without the assistance of counsel they may in practice be almost final adjudications of parental rights. Similarly, while orders are theoretically enforceable by contempt or other means, retaining counsel to handle such a fact-intensive, time-consuming matter is likely to be extremely difficult if a litigant lacks substantial funds. When a termination petition eventually is filed and counsel is appointed by the court for an indigent parent, the relationship between that parent and the child may already be thoroughly undermined. Thus, the state’s role in the two contexts may be viewed as more similar than different.

The state’s role in deciding custody disputes between parents is certainly not minor or incidental. As in termination of parental rights cases, it is tremendously consequential. If the fundamental reason for the free transcript requirement of M.L.B. is that the challenged state action deeply affects parental rights, logically there should be similar requirements in custody cases and other family law cases. In his dissent, Justice Thomas makes the same point with alarm. Although the extension of M.L.B. and Lassiter v. Department of Social Services to child custody cases involving indigent parents is unlikely, nonetheless, as noted above, strong arguments exist for such an extension.

116. See supra note 93.
117. The same argument applies to the court’s counsel requirement of Lassiter v. Department of Social Services, 452 U.S. 18 (1981). Custody issues cannot be clearly separated from visitation issues, as the flip side of a custody order often is the section pertaining to visitation for the non-custodial parent. The plurality and concurrences in Troxel v. Granville show that certain visitation orders can be unconstitutional, although the decision does not specify the exact circumstances where such orders will be unconstitutional. See supra note 9. See also Palmore v. Sidoti, 466 U.S. 429, 433-34 (1984) (holding that a custody decision based in part on race was an unconstitutional denial of equal protection). Since the Troxel plurality’s decision was narrow and the concurrences were splintered, the exact significance of the holding is debatable. But Troxel certainly does not say the custody or visitation orders are constitutionally equivalent to termination of parental rights orders.

118. In his dissent, Justice Thomas claims the principles underlying the majority’s decision do not necessarily limit it to the context of termination of parental rights, but could be extended to other contexts such as transcripts for custody appeals. M.L.B. v. S.L.J., 519 U.S. 102, 142 (1996) (Thomas, J., dissenting).
120. Some policy arguments would call for a retention of the current system. One argument is that broadened access to lawyers may breed more destructive litigation. However, under the current system, the party with the most funds has the most access to lawyers and thus the greater opportunity to engage in destructive litigation, which is highly problematic. Some also may argue that in a world of finite resources and massive child poverty, using public resources to enable parents to engage in custody battles at the government’s expense is not a wise use of these resources. However, one could respond that the current situation is untenable and that resources are not so scarce.
B. Risk of Error and the Advocacy System

This section will discuss and question two assumptions found in the Supreme Court’s decision in *M.L.B.* and in its other termination of parental rights decisions. First is the idea that “risk of error” is a meaningful concept in the context of parental rights terminations. Second is the idea that the advocacy system, the “equal contest of opposed interests,” is the best way to resolve disputes in this arena.

The termination of parental rights in *M.L.B.* and other opinions is governed by the due process framework established in *Mathews v. Eldridge.* A balancing test is used to evaluate whether the state’s process for terminating individual interests is sufficient to support the Court’s decision. The Court must balance the individual’s interest, the risk of erroneous deprivation of that interest, and the state’s interest. Justice Ginsburg notes in *M.L.B.* the “risk of error . . . is considerable” in the context of termination of parental rights. This statement assumes that there is a correct outcome and an incorrect outcome in parental rights termination cases and that the appeal process determines whether the trial outcome was correct.

The idea of risk of error in parental rights termination cases ties in with basic ideas about our adversary system, as articulated in *Lassiter v. Department of Social Services.* The *Lassiter* Court stated “[O]ur adversary system presupposes [that] accurate and just results are most likely to be obtained through the equal contest of opposed interests.” This statement presupposes that accurate results can be reached in all areas of the law, including termination of parental rights as in the context of *Lassiter.* It further

123. “Equal contest of opposed interests” is a phrase used by Justice Stewart in *Lassiter.* *See Lassiter,* 452 U.S. at 28.
124. *See, e.g., Santosky,* 455 U.S. 745; *Lassiter v. Dep’t of Soc. Serv.,* 452 U.S. 18 (examining the right of indigents to receive appointment of counsel in termination proceedings).
125. 424 U.S. 319, 334-35 (1976) (identifying three factors to be considered in determining whether administrative procedures are constitutionally sufficient: the private interest affected by the official action, the risk of erroneous deprivation of such interest, and the government’s interest); *see Santosky,* 455 U.S. at 754-70 (applying the *Mathews* framework); *Lassiter,* 452 U.S. at 27-31 (referencing the *Mathews* framework).
127. *Id.*
128. *M.L.B. v. S.L.J.,* 519 U.S. 102, 121 (1996). This is based on the fact that three out of eight parental termination cases appealed in Mississippi between 1980 and 1996 were reversed on appeal for failure to meet the “clear and convincing evidence” standard. *Id.* at 109 n.3 (citation omitted).
130. *Id.* at 28. *Lassiter* also discussed a parent’s interest in the “accuracy and justice” of a parental rights termination decision. *Id.* at 27.
presupposes that all issues within the scope of our adversary system are based on binary, opposed interests. This assumption is also at the heart of the M.L.B. decision.

The notion of a risk of error is somewhat puzzling in the context of termination of parental rights because the standards are vague, and therefore the application of the standards to the facts is murky in many instances. The judicial determination is very different from that involving application of a clear rule. The termination of parental rights context is radically different from the termination of social security benefits context, seen in Mathews v. Eldridge. In Santosky v. Kramer the Court noted that the substantive standards for terminating parental rights are imprecise and “leave determinations unusually open to the subjective values of the judge.” The Court used this observation and other factors to justify a higher standard of proof for termination of parental rights proceedings than had previously been required.

But if you are requiring clear and convincing evidence of something that is vague, the result is not necessarily more accurate than requiring a preponderance of the evidence of something that is vague. Similarly, if you require a right to a transcript in order to appeal a determination that is vague, you will not necessarily gain any more accuracy than if you do not possess such a transcript. Thus, the notion of a risk of error is somewhat problematic in this area.

131. See Clark, supra note 89, § 21.6, at 625 (noting that definitions in termination of parental rights statutes are tautological); id. § 21.7, at 632-33 (noting several reasons for the vague standards: definitions of grounds for involuntary termination of parental rights vary widely between states, a variety of circumstances exist where termination is ordered, stare decisis has limited applicability, and courts have widely divergent approaches to similar statutes).

132. The difficulty of determining whether trial courts have made proper decisions in the termination of parental rights areas is illustrated by the Mississippi Court of Appeals ruling in M.L.B. which was a divided vote of 7-3. M.L.B. v. S.L.J., No. 97-CA-00929-COA, 1999 Miss. App. LEXIS 299 (Miss. Ct. App. May 18, 1999). The Mississippi Supreme Court decision affirming the Mississippi Court of Appeals decision was a divided vote of 6-2. M.L.B. v. S.L.J., No. 97-CT-00929-SCT, 2000 Miss. LEXIS 93 (April 20, 2000). The various opinions differed greatly concerning the significance of the facts found by the Chancellor and the interpretation of the legal standard. Thus, one may say that the appeal process corrected the errors of the lower court, but one may also argue that the errors of the lower court still are not so clear.

133. See Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685, 1687, 1688-89 (1976) (noting that rules in contrast to standards offer certainty and reduce arbitrary judicial action).

134. 424 U.S. 319 (1976). In Mathews, the court noted the continued receipt of social security benefits was “a statutorily created ‘property’ interest protected by the Fifth Amendment.” Id. at 332.


136. Id. at 762 (citing Smith v. Org. of Foster Families, 431 U.S. 816, 835 n.26 (1977)). See generally Appell, supra note 57, at 580 (determining “the state’s reasons for both initial and continuing intervention are ill-defined and maternally-focused”).

137. Id. at 764.
Second, the assumption found in *Lassiter* and *M.L.B.* that an “equal contest of opposed interests” is the best way to reach “accurate and just results” is suspect in the area of family law and, increasingly, in law generally.¹³⁸ Mediation, which is increasingly prevalent in family law, questions this assumption at a fundamental level.¹³⁹ It is based on the idea that there are many instances where the best way to reach positive outcomes is precisely not to view conflicts as the equal contest of opposed interests, but to look for mutually acceptable resolutions.¹⁴⁰ The trend toward mediation began with family law, where mediation is most commonly required.¹⁴¹

In termination of parental rights cases, the equal contest of opposed interests of state and parent may be the least likely route to a positive result for children. The decisionmaking process, with its delays, intrusive processes, and painful situations can traumatize children.¹⁴² A less confrontational, less absolute approach might work better in most circumstances for all involved.¹⁴³ Similarly, an equal contest of opposed interests of parents may be the worst possible way of reaching positive results in child custody cases.¹⁴⁴

The idea that the risk of error concept fits uneasily with termination of parental rights litigation also applies to child custody litigation. Yet, risk of

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¹³⁹ See generally id.
¹⁴⁰ See generally id.
¹⁴¹ Id. § 7.02, at 4. Mediation is seen by some as a response to the indeterminacy of the best interests of the child standard. See CLARK, supra note 89, § 15.2, at 163. Several states have programs for mediating termination of parental rights cases. See Sinden, supra note 57, at 355-58.
¹⁴² In addition to these concerns about the decisionmaking process, there are conceptual problems with always viewing the issue as solely concerning the state versus parents’ interests without considering children’s interests. See infra Part III.D.
¹⁴³ However, concerns have also been raised that the mediation process reinforces power dynamics that can be undercut somewhat by the formality of the litigation process. See, e.g., Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 445 (1992) (noting that mediation empowers “the already more powerful husband” in divorce proceeding to the disadvantage of wife); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549 (1991) (concluding mandatory mediation does not provide a more humane or just alternative to the adversarial system); Scott H. Hughes, *Elizabeth’s Story: Exploring Power Imbalances in Divorce Mediation*, 8 GEO. J. LEGAL ETHICS 553, 579-80 (1995) (noting that while mediation can balance power among spouses, there are inherent flaws); Sinden, supra note 57, at 389-91 (noting the effectiveness of informal procedures may be lessened by the disparity of power). For a thoughtful analysis advocating formal approaches and critiquing approaches such as mediation, see Sinden, supra note 57, at 355-58. See also infra Part III.C.
¹⁴⁴ The author’s experience in supervising third year law students in a clinical program, where students practice family law in Maine Courts for four years, is that the assumption that contested custody litigation is terrible for parents and children appears to be universally shared by lawyers, judges, and guardians ad litem.
error is not discussed in the context of child custody litigation.\textsuperscript{145} The best interest of the child standard is a very vague concept, which may be one reason risk of error is not an explicit consideration. But, if the concept of risk of error is meaningful in one area of children’s legal relationships with their parents—termination of parental rights—a better explanation is needed as to why this concept is not meaningful in a related area—custody litigation. Similarly, the idea that an equal contest of opposed interests may not actually lead to positive results in parental rights termination cases also applies to child custody disputes. But if an equal contest of opposed interests indeed is the best way to make decisions about termination of parental rights, a more robust explanation is needed as to why this model works for litigation of parental rights termination but not for child custody litigation. Concomitantly, a stronger explanation is needed to explain why the constitutional protections that apply to litigation of termination of parental rights do not apply to parental disputes about child custody.

Concerning parental rights termination litigation, important questions arise concerning the appropriateness of the binary rights advocacy framework in all instances.\textsuperscript{146} Risk of error may not be a sufficiently meaningful concept in this context, and the binary advocacy framework may also be inadequate. Other approaches such as mediation and changing the requirements for adoption, as discussed below, should be considered.

\textbf{C. The Lack of Distinction Between Stepparent Adoptions and Other Adoptions}

Justice Ginsburg and Justice Thomas characterized \textit{M.L.B. v. S.L.J.} simply as a termination of parental rights case. Neither Justice seemed to view stepparent adoption, which constitutes a large proportion of adoptions in the United States,\textsuperscript{147} as significant to the decision. Even though the state was not taking the children away from a custodial parent and placing them with strangers, “the challenged state action remains essentially the same: M.L.B. resists the imposition of an official decree extinguishing, as no power other

\textsuperscript{145} See \textit{Mahoney}, supra note 12, at 124; see, e.g., Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981) (introducing a more determinate “primary caretaker” standard in place of best interests standard); cf. \textit{Clark}, supra note 89, § 20.4, at 494-517. For example, in \textit{Troxel v. Granville}, Justice Kennedy’s dissent noted that “[t]he best interests of the child standard has at times been criticized as indeterminate, leading to unpredictable results.” \textit{Troxel}, 120 S. Ct. 2054, 2079 (Kennedy, J., dissenting) (citing \textit{American Law Institute, Principles of the Law of Family Dissolution 2} & n.2 (Tentative Draft No. 3, 1998)). Yet, as discussed above, the standards for terminating parental rights also are vague. See supra text accompanying notes 131, 135-36.

\textsuperscript{146} For additional discussion of the framework concerning the best interests of the child, see infra Part III.D.

\textsuperscript{147} \textit{Mahoney}, supra note 12, at 161.
than the State can, her parent-child relationships."

In a sense this concept is true—the law of Mississippi and other states treats stepparent adoption the same as other adoptions by requiring the termination of parental rights of the noncustodial parent before the adoption can take place.

However, different people affected by the controversy may have varying perspectives as to whether the challenged state action is essentially the same in this and other contexts. For example, M.L.B. may view the state action as essentially the same whether the children are being placed with a stranger or with her former husband of eight years and his new wife. Nonetheless, this does not classify the state action as essentially the same from all perspectives. For example, from the children’s perspective, as articulated by the guardian ad litem, the proposed state action apparently was not objectionable as the guardian ad litem did not appeal the Chancellor’s decision. Moreover, the state action in allowing stepparent adoptions is very different from a state action where a parent’s rights are terminated so that the child may be placed with strangers. In M.L.B. the children were being placed with one person, their father, with whom they had a fully formed parental relationship and with whom they had been living their entire lives. They were also being placed with his new wife, with whom they had been living for at least a year. The state did not intrude on an intact family and seize the children or destroy bonds that were unfrayed. The state of Mississippi in M.L.B. chose one parent over the other, which is not unlike the general outcomes of custody cases.

However, the situation of M.L.B., S.L.J., and their children raises questions about whether complete termination of parental rights should be required in stepparent and other kinds of adoptions. The traditional adoption fiction of a child being transferred to a new family, with all traces of the child’s old family being obliterated, does not fit this situation nor many other current situations. The children were six and eight years old when the petition to terminate was filed. The petition did not allege abuse, but claimed that M.L.B. had failed to visit regularly and had failed to pay child support. The children may have formed important bonds with M.L.B. that would be against their best interests to totally sever. It may also have been in the children’s best interest for there to be a legally recognized relationship between them and their stepmother,

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149. See discussion supra note 19.
151. See Appell, supra note 25, at 1008-13; MAHONEY, supra note 12, at 162-63; Mahoney, supra note 19, at 101.
153. Id. M.L.B. testified that the reason she stopped paying child support was “because the plaintiff would not allow her visitation.” M.L.B. v. S.L.J., No. 97-CA-009290-COA, 1999 Miss. App. LEXIS 299, at *19.
Under these circumstances, it is not clear that the law should require such an absolute termination in all adoptions.\textsuperscript{155} Various commentators and courts have advocated more flexible options.\textsuperscript{156} The Uniform Adoption Act allows for the possibility of post-adoption visitation rights for the former noncustodial parent after a stepparent adoption.\textsuperscript{157} For example, why not allow J.P.J. to adopt the children and still allow M.L.B. and the children the opportunity to visit one another?\textsuperscript{158} Why not have an adoption certificate recognizing J.P.J. as a parent to the children, but not obliterate the initial birth certificate? Why do we characterize parental rights in this binary fashion when relationships are more complex than that? The open or \textit{collaborative} adoption movement has various proposals allowing for a more nuanced approach.\textsuperscript{159}

The state’s requirement of absolute termination is part of what leads to the perceived need for constitutional protections. Since the deprivation is complete, the process that is due is correspondingly greater. If the deprivation had not been complete, lesser due process protections should be acceptable. Moreover, this would probably facilitate the adoption process, in stepparent cases and other cases, by making a consent to termination of one’s parental rights less absolute and less stigmatizing. Many situations exist where a parent is genuinely overwhelmed and is willing to allow an ex-partner or foster parents to adopt the child, but retaining some connection, such as annually receiving

\textsuperscript{154} Particularly as M.L.B. did not want custody but only wanted visitation, it might have made sense to have a legally recognized relationship between the children and their stepmother in the event of J.P.J.’s death. See Mahoney, \textit{supra} note 19, at 108 (noting that prior to adoption, legal relationship of stepparent and child is an “uncertain affair,” but once adoption is final, rights and duties of stepparent are the same as those of any other parent). See generally MAHONEY, \textit{supra} note 12, at 177-78 (describing the legal consequences of stepparent adoption).

\textsuperscript{155} It is similarly unclear why termination needs to be so stigmatizing. Justice Ginsburg refers repeatedly to the “brand” associated with parental rights terminations. \textit{M.L.B.}, 319 U.S. at 125. She analogizes termination proceedings to criminal misdemeanor convictions. \textit{Id.} at 120, 122-23, 125. Justice Ginsburg’s tone may imply that they are worse than misdemeanor convictions. \textit{Id.} For a different perspective on this analogy, see Sinden, \textit{supra} note 57, at 344-50.

\textsuperscript{156} See, e.g., Appell, \textit{supra} note 25, at 1010-55 (discussing options for open or cooperative adoptions); \textit{MAHONEY, supra} note 12, at 161-89 (discussing stepparent adoptions).

\textsuperscript{157} See \textit{Mahoney, supra} note 19, at 100.

\textsuperscript{158} According to the Chancellor, M.L.B. on cross-examination by the guardian \textit{ad litem} testified to the following:

She testified that she was not complaining about the children living with their father, she knows that they are being well taken care of. She was concerned about the telephone calls and having the right to converse with her children. She said she had no doubt that J.P.J. [the stepmother] loves the children and she loves them also. It used to bother her for the children to call J.P.J. ‘mother,’ but she now understands. She is willing to pay child support, provide medical insurance, but she wants visitation.


\textsuperscript{159} See, e.g., Appell, \textit{supra} note 25, at 1010-49 (discussing the utility of open adoptions and providing examples of cooperative adoption practices).
pictures of the child, makes the parent’s consent to absolute termination of her parental rights psychologically possible. The absoluteness of parental rights and the rigidity of the adoption framework make this kind of resolution harder. Legislative and judicial efforts to craft practical solutions for adoption dilemmas should be applauded.

D. The Continued Invisibility of Children

Children are invisible in both Justice Ginsburg’s opinion and in the dissenting opinions. Justice Ginsburg writes that the Court is “[g]uided by Lassiter and Santosky, and other decisions acknowledging the primacy of the parent-child relationship.” The Court’s references to the “parent-child relationship” in those decisions indicate an acknowledgment of the two-way nature of that relationship: the child’s relationship with the parents and the parents’ relationship with the child. However, those decisions only concern the latter half of that relationship: the parents’ relationship with their child. The National Center for Youth Law and other groups filed an amicus curiae brief urging the Court to consider “not only the fundamental rights of parents, but the fundamental rights of children to a parent-child relationship.” None of the opinions by the United States Supreme Court or the Mississippi courts mention this brief. None of the Justices acknowledge the invisibility of children or mention the possible effect of the decision itself on the children.

160. The drafters of the stepparent visitation provisions of the Uniform Adoption Act assumed that this would be the case. Mahoney, supra note 19, at 104. This is confirmed anecdotally through various conversations with attorneys and guardians ad litem. E.g., Conversation with Cushman Anthony, Esq. and Caroline Gardiner, Esq., in Portland, Me. (December 7, 1999).


163. Interestingly, in Troxel v. Granville, Justice Stevens’ dissent highlights the issue of children’s interests and states that “it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation [of parent’s interest versus state’s interest].” Troxel, 120 S. Ct. 2054, 2072 (2000). Neither the concurrences nor the dissents explicitly discuss the liberty interests of children. See supra note 9.

164. The litigation probably was confusing for the children, who found that five and a half years after M.L.B.’s parental rights had been terminated and they had been adopted by their stepmother, M.L.B.’s parental rights actually had been improperly terminated and that they had not been adopted after all. See supra notes 76-79. One concern is whether the resolution of these kinds of cases should take as long as it does.
As noted above, under Mississippi law, a guardian ad litem has to be appointed when an adoption involves termination of parental rights. The guardian is not mentioned in the Court’s opinion, but it was mentioned in the oral argument that a guardian ad litem had been appointed who could have appealed but did not. One of the Justices also suggested that the child’s due process interest was the same as the parent. In Justice Ginsburg’s and Justice Thomas’ framework of parental rights versus the state, children are remarkably absent. In that sense, the decision is in line with the decisions protecting parents’ rights to raise children, such as Meyer v. Nebraska and Pierce v. Society of Sisters, which are thoughtfully characterized by one commentator as cases about ownership of children.

The issue of how to identify the interests of children is challenging. In termination proceedings, the issue is framed simply as the interests of the state versus the interests of the parent or parents. Although Justice Ginsburg states that the court must examine “closely and contextually” the governmental interest advanced in support of the intrusion, the interest advanced by the state was purely financial. Because the governmental interest was conceived in such a constricted way, it is not surprising that even a contextual examination resulted in the dismissal of the government’s interest. However, in family


166. See supra note 34.

167. A portion of the transcript indicates the Justice’s suggestion that the due process interests for parent and child are the same:
   “Q: It is true, is it not, that the child has to be represented separately in the proceeding?
   A: Yes, your Honor.
   Q: And that’s a matter of due process, too, I would suppose, because the child’s rights are as vitally affected as either set of parents.”
   See Transcript at *28, M.L.B. v. S.L.J., 519 U.S. 102 (1996) (No. 95-853), available at 1996 WL 587663. This statement is incorrect because the Court has recognized lesser constitutional rights for children. See, e.g., Michael H. v. Gerald D., 491 U.S. 110, 130-32 (1989) (finding a child does not have a constitutionally protected interest in maintaining a relationship with the biological father where that interest conflicts with constitutionally protected interest of legal father). The transcript does not identify which Justice asked the question. The author spoke with the attorneys who were involved with the case and found the attorneys could not remember who asked the question. Based on Justice Stevens’ focus on the children’s interest in his dissent, it seems that the question may have been posed by Justice Stevens.

168. 262 U.S. 390 (1923).

169. 268 U.S. 510 (1925).


172. Id. at 122.

173. The Court in Santosky v. Kramer had already stated that a parent’s interest was more precious than money, 455 U.S. 745, 758-59 (1982). Thus, it is unsurprising in M.L.B. that the parental interest outweighed the state’s financial interest.
law, the state is supposed to have a parens patriae interest in the well-being of children.\textsuperscript{174} Thus, in termination proceedings, the state interest should be seen not simply as an external power opposing the parent but rather as an interest aligned with the child’s interests. However, this is difficult because in some instances as the interest in the well-being of children is met by having the children stay with their parents,\textsuperscript{175} while in other instances it will be met by removing them from their parents’ custody.\textsuperscript{176} Nonetheless, to conceive of the state’s interest in a particular termination procedure as merely financial seems to define the state’s interest in an overly constricted fashion.

Legal scholars have been developing theories regarding the associational rights and interests of children. Gilbert Holmes has cogently argued that “children’s liberty interests in familial relationships” should receive constitutional recognition.\textsuperscript{177} Barbara Bennett Woodhouse argues that “our attachment to [the] property-based notion of the private child cuts off a more fruitful consideration of the rights of all children to safety, nurture, and stability, to a voice, and to membership in the national family.”\textsuperscript{178} Katherine Federle proposes an empowerment model for children.\textsuperscript{179} Bruce and Jonathan Hafen argue that rights-based frameworks often are inappropriate for children.\textsuperscript{180} Martha Minow acknowledges that while the language of rights does not fit all children’s situations, it can be used in some situations to “reach the realities of children’s lives.”\textsuperscript{181} When it does not fit children’s lives, other language must be used “to talk about children’s needs and society’s responsibilities.”\textsuperscript{182} A comprehensive theory of children’s rights or interests has not been developed, and it may be that no single theory will be sufficient to

\textsuperscript{174} See Troxel v. Granville, 120 S. Ct. 2054, 2072 (2000) (Stevens, J., dissenting) (noting that the state’s interest as parens patriae must be balanced against a parent’s interest in a child). The Court’s powers to deal both with custody of children as between parents, and protection of children from parents, derive from the parens patriae power. CLARK, supra note 89, § 20.1, at 476-77.

\textsuperscript{175} Santosky, 455 U.S. at 766-67.

\textsuperscript{176} Id. at 767 & n.17. The Santosky majority claims that the parens patriae interest only arises “at the disposition phase, after the parents have been found unfit.” Id. The dissent contemplates an earlier alignment between the child’s interest and the state’s interest and considers the child’s interest separate from the parent’s interest. Id. at 788 n.13. The scope and meaning of the parens patriae power is not clear from the Court’s decisions and has not been clarified by Troxel v. Granville. See supra notes 9, 163, 174.


\textsuperscript{178} Woodhouse, supra note 170, at 1002, 1112-22.


\textsuperscript{181} Martha Minow, Children’s Rights: Where We’ve Been, and Where We’re Going, 68 Temp. L. Rev. 1573, 1583 (1995).

\textsuperscript{182} Id.
deal with all issues of parents, children, and the state. However, we need to continue to think of ways to include children in the legal frameworks that apply to their lives.

IV. CONCLUSION

*M.L.B.* v. *S.L.J.* presents opportunities to analyze the parental rights framework and the family law issues to which it relates in new ways. Termination of parental rights decisions are not as distinct from child custody decisions for indigent parents as the law assumes. The adversary framework, with its assumption of risk of error, may not be the most suitable framework for termination of parental rights in all instances, despite its application in *M.L.B.* and other termination of parental rights cases. Modifying traditional adoption doctrines to recognize different approaches that might work in stepparent and other adoption contexts is one way to move away from the simplistic framework we currently use. Last, we need to continue to explore ways to expand our consideration of the children’s interests.

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183. For example, Emily Buss recently developed a theory for dealing with the free exercise rights of children, based on an analogy between exercise of religious freedom and abortion rights. Emily Buss, *What Does Frieda Yoder Believe?*, 2 U. PA. J. CONST. L. 53, 74-76 (1999). This framework may be appropriate for children’s free exercise rights, but not for custody determinations. *Id.* at 76. See generally Sean Ireland, *Children as Legal Persons: Defining Standards Through Judicial Discretion* (unpublished paper on file with the author).