No. ________

In The
Supreme Court of the United States

A.S.E.,

Petitioner,

v.

A.S.,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Texas Ninth District

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PETITION FOR A WRIT OF CERTIORARI

ERWIN CHEMERINSKY
Counsel of Record
UNIV. OF CALIFORNIA, IRVINE SCHOOL OF LAW
401 East Peltason
Irvine, California 92697
(949) 824-7722
EChemerinsky@law.uci.edu

AARON A. MARTINEZ
GODWIN LEWIS P.C.
1201 Elm Street, Suite 1700
Dallas, Texas 75270
(214) 939-4400

ELIOT D. SHAVIN
SOUTHERN METHODIST UNIVERSITY DEDMAN SCHOOL OF LAW CIVIL CLINIC
3315 Daniel Avenue
Dallas, Texas 75275
(214) 768-2025

CHARLES "CHAD" BARUCH
THE LAW OFFICE OF CHAD BARUCH
3201 Main Street
Rowlett, Texas 75088
(972) 412-7192

Counsel for Petitioner A.S.E.

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

In *Lassiter* v. *Department of Social Services,* 452 U.S. 19 (1981), this Court held that although there is no absolute right to counsel in parental termination proceedings, the state must provide counsel where necessary to ensure due process of law.

The State of Texas provides counsel, as a matter of right, in parental termination proceedings initiated by the State, but not in privately initiated parental termination proceedings.

The State of Texas terminated A.S.E.'s parental rights in a privately-initiated proceeding where neither A.S.E. nor his child had an attorney, where the party seeking termination was represented by counsel, and where the trial court never engaged in the due process analysis mandated by *Lassiter.*

This case thus poses the questions:

1. Whether in a privately-initiated parental termination proceeding the State violates the Due Process Clause by denying court-appointed counsel to an indigent *pro se* parent facing termination of his parental rights without engaging in the due process analysis mandated by this Court in *Lassiter* v. *Department of Social Services* and without providing the child the court-appointed counsel authorized by Texas law.

QUESTIONS PRESENTED – Continued

2. Whether the Texas Court of Appeals erred when ruling, in conflict with many other state courts, that a statute providing court-appointed counsel to indigent parents facing termination of their parental rights in State-initiated, but not privately-initiated actions, does not violate the Equal Protection Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

Because this case involves a child, the Beaumont Court of Appeals and the Texas Supreme Court used initials and pseudonyms to identify the parties in their opinions.

The petitioner is A.S.E., who was the defendant and appellant in the courts below. A.S., the plaintiff and respondent in the courts below, is the respondent. A.S.E. is the natural father of S.G.E., and A.S. is the natural mother of S.G.E.

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.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, A.S.E., respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth District of Texas.

OPINIONS AND ORDERS BELOW

The Texas Supreme Court's order refusing discretionary review (App. at 25) is unreported. The opinions of the Court of Appeals for the Ninth District of Texas (App. at 1, 9) are unreported. The opinions of the Court of Appeals are available electronically at 2012 WL 759056 and 2012 WL 1795132. The judgment entered by the Montgomery County District Court (App. at 21) is unreported.

JURISDICTION

The Court of Appeals for the Ninth District of Texas filed its opinion on March 8, 2012, and overruled Petitioner's timely filed motion for rehearing on May 17, 2012. The Texas Supreme Court denied a timely petition for discretionary review on June 21, 2013. This Court has jurisdiction under 28 U.S.C. § 1257(a).

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.

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 (West 2008 & Supp. 2012). After *Lassiter*, Texas, by statute, guaranteed court-appointed counsel 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.

The Texas Family Code also authorizes discretionary appointment of an amicus attorney, attorney ad litem, or guardian ad litem in privately initiated termination actions. *Ibid* § 107.021.

2. Factual Background and Trial Court Proceedings. S.G.E. is the natural daughter of A.S.E. and A.S., and was born during their marriage. A.S.E. and A.S. divorced on March 3, 2008. At the time of divorce and thereafter, A.S.E. lived is Wisconsin and A.S. lived in Texas. On August 19, 2010, A.S. filed a motion to terminate A.S.E.'s parental rights. A.S.

alleged that A.S.E. engaged in conduct constituting endangerment, created conditions constituting endangerment, and failed to support under TEX. FAM. CODE ANN. §§ 161.001(1)(D)-(F) (West 2008 & Supp. 2012).

Prior to trial, A.S.E. moved for appointment of an "amicus attorney" to represent S.G.E.'s interest.[1] But no appointment was ever made. The parties tried the case before the bench from March 21 to 23, 2011. A.S.E., who unsuccessfully attempted to retain legal assistance, represented himself *pro se*, while A.S. hired two attorneys to represent her at trial. On the third day of trial, A.S.E. filed a "motion for continuance" asserting he was indigent, had a constitutional right to an appointed counsel, and complained that the trial judge never ruled on his prior motion to appoint an "amicus attorney" to represent his daughter's interests. But the court denied his motion. After closing arguments, the court signed A.S.'s proposed order to terminate A.S.E.'s parental rights.

3. Court of Appeals Proceedings. A.S.E. appealed to the Ninth Court of Appeals in Beaumont. While the appeal was pending, A.S.E.'s newly retained *pro bono* counsel unfortunately fell victim to severe mental problems mid-representation, which prevented him from properly withdrawing and, therefore, A.S.E.

[1] There is no record of the court ruling on this motion. But the Order of Termination states that neither an amicus attorney nor attorney ad litem was appointed. (App. at 21).

from being able to secure new counsel. This forced A.S.E. to file almost all documents in the appeal himself. Because the court of appeals had no brief before it, the court initially dismissed the appeal. (App. at 1). But A.S.E. attempted to explain what happened to the court in a motion for rehearing, and the court decided to consider his motion partially as a brief on the merits, thus prompting the memorandum opinion on the motion for rehearing. (App. at 9).

On appeal, A.S.E. complained that the trial court failed to appoint an amicus attorney for his daughter, that the trial court deprived him of the right to counsel, and challenged the sufficiency of the evidence behind the termination order.

In determining whether to grant A.S.E.'s motion for rehearing, the court of appeals considered the issue of whether A.S.E. had a right to appointed counsel. *See In re S.G.E.,* No. 09-11-00191-CV, 2012 WL 1795132, at *1-2 (Tex. App. – Beaumont May 17, 2012, pet. denied) (mem. op., not designated for publication). The court ultimately decided not to grant the motion, specifically finding, among other things, that "[n]o statutory right to counsel exists in a private termination suit" and that "[d]ue process does not require appointed counsel in every termination proceeding." *Ibid* at *1.

4. Texas Supreme Court Proceedings. A.S.E. timely filed a petition for discretionary review in the Texas Supreme Court. Finally represented by *pro*

bono counsel, A.S.E. raised the equal protection and due process arguments addressed in this petition. Without granting that petition, the Texas Supreme Court ordered merits briefing. The Texas Supreme Court, however, denied discretionary review without explanation on June 21, 2013. (App. at 25).

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).

There is no doubt 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 – elevates the risk of erroneous deprivation too high for the Due Process Clause to bear.

Closely related, this case provides an opportunity for this Court to address 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 *Mathews v. Eldridge*, 424 U.S. 919 (1976) factors. A.S.E. is indigent, and his 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 in deciding whether to appoint an attorney, these *Lassiter* hearings seldom take place. William Wesley Patton, *Standards 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).

The second question is whether the Texas statute extending the right to counsel in termination actions brought by the government, but not by a private

party violates the Equal Protection Clause. The Texas decisions upholding this scheme directly conflict with decisions of other state supreme courts holding that this type of statutory distinction violates the constitutional principle of equal protection. It makes no sense to distinguish among parents facing permanent loss of their parental rights; all facing the loss of the most precious aspect of their lives through a court order.

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE AND A CONFLICT BETWEEN THIS COURT'S DECISIONS REQUIRING DUE PROCESS, INCLUDING CONSIDERATION OF THE RIGHT TO COUNSEL IN PARENTAL TERMINATION PROCEEDINGS, AND THE DECISIONS OF THE TEXAS COURTS IN THIS CASE.

Analysis of the right to counsel in a termination action begins with this Court's decision in *Lassiter*, which held 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 specific circumstances. *Lassiter*, 452 U.S. at 31-32. Trial courts must perform this analysis using the factors set out in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), which requires a balancing of

"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. No such analysis was done in this case as to A.S.E.'s right to counsel. A.S.E. lost his child without the benefit of such an analysis.

A. A.S.E.'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). This Court recently stated that "in determining whether the [Due Process] Clause requires a right to counsel . . . we must take account of opposing interests, as well as consider the probable value of 'additional or substitute procedural safeguards.'" *Turner* v. *Rogers*, 131 S.Ct. 2507, 2518 (2011) (citing *Mathews*, 424 U.S. at 335).

The liberty interest at issue in this case – 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; *see also Santosky*, 455 U.S. at 753; *Stanley*, 405 U.S. at 651. A.S.E.'s right to the care, custody, and companionship of his child "undeniably warrants deference and, absent a powerful

countervailing interest, protection." *Stanley*, 405 U.S. at 651.

B. This Court Should Grant Certiorari to Determine What Process Is Required in Parental Termination Proceedings.

"[This] Court's precedents speak with one voice about what 'fundamental fairness' has meant when the Court has considered the right to appointed counsel." *Lassiter,* 452 U.S. at 27. Due process ensures the "essential fairness of the state-ordered proceedings anterior to adverse state action." *M.L.B.* v. *SLJ,* 519 U.S. 102, 120 (1996) (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. A.S.E. was indigent,[2] and as a result he was deprived of the safeguards established by this Court.

In his dissenting opinion in *M.L.B.*, Justice Thomas (joined by Chief Justice Rehnquist and

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[2] Although contested in the trial court, it is beyond question that A.S.E. was – and still remains – an indigent. The record contains ample evidence of his indigency, such as Social Security statements showing A.S.E.'s history of low income, a letter discussing A.S.E.'s finances and trouble finding employment, an uncontested Affidavit of Inability to Pay Costs, a motion for continuance asserting difficulty obtaining employment and lack of resources, and a motion for continuance asserting A.S.E.'s indigency. Further, A.S.E.'s status as indigent, although contested at the trial court, was never formally challenged on appeal.

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 that 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).

Recently – when considering an indigent's right to counsel in a civil contempt proceeding – this Court stated that:

> [W]e consequently determine the "specific dictates of due process" by examining the "distinct factors" that this Court has previously found useful in deciding what specific safeguards the Constitution's Due Process Clause requires in order to make a civil proceeding fundamentally fair. . . . As relevant here those factors include (1) the nature of "the private interest that will be affected," (2) the comparative "risk" of an "erroneous deprivation" of that interest with and without "additional or substitute procedural safeguards," and (3) the nature and magnitude of any countervailing interest in not providing "additional or substitute procedural requirement[s]."

Turner, 131 S.Ct. at 2517-18 (citations omitted).

Perhaps none of the deficiencies in A.S.E.'s termination proceeding, when taken alone, unilaterally deprived him of due process.[3] 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 deprivation beyond the constitutional breaking point.

A.S.E.'s loss of his child lacked too many of the safeguards relied upon by this Court. The most important safeguard that he lacked was counsel, essentially rendering the procedural and evidentiary protections useless. Recently, this Court in *Turner* highlighted the importance of this safeguard, particularly in proceedings where one side is represented by counsel. *See Turner*, 131 S.Ct. at 2520. Specifically, this Court noted that the "[Due Process] Clause does not require the provision of counsel where the opposing parent . . . is not represented by counsel. . . ." *Ibid*

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[3] 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 indication that the trial court ever performed any analysis of the *Eldridge* factors to determine whether A.S.E. warranted appointment of counsel. Rather, the trial court flatly denied A.S.E.'s motion for "continuance" and all relief he sought in it, including his assertion of a "constitutional right to an attorney." And the court later declined to revisit the issue.

Here, A.S.E. was not represented by counsel, but A.S. was.

Without counsel, the procedural and evidentiary protections have little value. This Court has previously noted that even a sophisticated layman can have problems asserting his rights in a court of law without counsel:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step of the proceeding against him.

Powell v. *Alabama*, 287 U.S. 45, 69 (1932).

Even a cursory review of A.S.E.'s trial transcript and the documents filed on appeal reveal that A.S.E. could not have presented his case effectively or made coherent evidentiary arguments or effectively raised colorable due process and equal protection arguments. It is dubious at best that without counsel he could effectively confront the evidence and witnesses against him. 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." *M.L.B.*, 519 U.S. at 132. But here, both A.S.E. and his child lacked counsel. Under these circumstances, the

heightened evidentiary standard offers scant protection in the absence of any ability to contest introduction or gain admission of evidence.

A.S.E. also lacked the important protection of having a court engage in 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. But the trial court denied A.S.E. counsel based on the Texas statute.

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 crucial, and the risk of erroneous deprivation too substantial, for this Court to countenance waiver of A.S.E.'s appellate rights through error-preservation requirements in light of his lack of counsel.

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.

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. Although 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 Court should grant review to reconcile the tension between this Court's holding in *Lassiter* and *Turner* and the Texas court's ruling in this case. This is truly an issue of national importance. The lack of a *Lassiter* analysis affects 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. U. CHI. L.J. 363, 367 (2005).

A.S.E. did not have a lawyer and he was greatly prejudiced in the trial court and on appeal. This result cannot be squared with the type of due process scrutiny required by *Lassiter, Turner,* and *M.L.B.* and this Court should grant review to resolve this conflict.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT AMONG THE STATE COURTS AS TO WHETHER EQUAL PROTECTION IS VIOLATED WHEN A STATE PROVIDES COUNSEL, AS A MATTER OF RIGHT, IN STATE-INITIATED PARENTAL TERMINATION PROCEEDINGS, BUT NOT PRIVATELY INITIATED PROCEEDINGS.

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. Specifically, this Court held that 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.

A.S. sought to terminate A.S.E.'s parental rights. Though termination may be "initiated by private parties . . . 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). In *M.L.B.*, this Court "recognize[ed] that parental termination decrees are among the most severe forms of state action." *Ibid* at 128.

Termination orders are a form of State action. Indeed, few 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)). This is a power unique to the State that cannot exist wholly in isolation from the State, even in a privately-initiated parental termination action.

Texas extends a substantial procedural safeguard – namely the right to counsel in termination actions – but arbitrarily withholds it from indigent parents, like A.S.E. Although the Texas courts permitted this scheme to stand, 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 by 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. *See also Adoption of Meaghan*, 961 N.E.2d 110, 111-12 (Mass. 2012); *In re K.L.J.*, 813 P.2d 276, 283 (Alaska 1991) (finding a denial of equal protection in the failure to provide counsel at privately initiated parental termination proceedings.)

Because the Texas statute burdens A.S.E.'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 104 (citing *Bearden* v. *Georgia,* 461 U.S. 660, 666-67 (1983)).

The Texas statutes vest trial courts with discretion to appoint attorneys in privately-initiated

termination actions. But the statute profoundly restricts that discretion. As a result, it is hardly coextensive with the Due Process Clause or *Lassiter*. The trial court may appoint counsel only where necessary to determine the best interest of the child. TEX. FAM. CODE ANN. § 107.021 (West 2008 & Supp. 2012). The statute does not permit appointment where the child's best interest may be determined without it – notwithstanding the parent's due process rights.

The Texas scheme draws a distinction that is arbitrary on its face. Texas imposes additional burdens on indigent parents, like A.S.E., to obtain the same benefit automatically provided to indigent parents facing State-initiated termination actions. The statute is akin to one providing counsel as-of-right to citizens above six feet tall, while making it discretionary for those under six feet tall; or, worse yet, a statute providing the State *must* provide counsel to men, but *may* provide it to women. Neither could survive equal protection analysis under any standard of review.

Regardless of the precise standard of review employed, the Texas intrusion on A.S.E.'s fundamental rights cannot survive any heightened level of equal protection scrutiny. A.S.E.'s right to S.G.E.'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 a 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'. . . ." *Ibid* at 565-66 (quoting *In re Jay,* 197 Cal. Rptr. 672, 680 (Cal. Dist. Ct. App. 1983)). A.S.E. is resisting imposition of the State's official decree extinguishing his parental rights. In practical effect, no difference exists between State-initiated and privately-initiated termination actions. And certainly no difference exists 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) (quoting *Lassiter*, 452 U.S. at 28).

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.

Additionally, although the Texas courts permitted this scheme to stand, other state courts have concluded that similar statutes violate their respective state due process guarantees, all of which provide textually similar protection as does the U.S. Constitution.[4] As the Colorado Supreme Court put it, a

[4] Very similar to the due process clause found in U.S. CONST. amend. XIV, Colorado's Constitution states, "No person

(Continued on following page)

parent's right to counsel in a dependency or negligence proceeding is statutory in nature, but termination proceedings "cue constitutional due process concerns." *A.L.L.* v. *People*, 226 P.3d 1054, 1062 (Colo. 2010) (en banc). "Termination of the parent-child legal relationship is a drastic remedy and a parent is entitled to procedural due process before termination occurs." *Ibid* at 1062 (quoting *People ex rel. M.B.*, 70 P.3d 618, 622 (Colo. App. 2003)). Similarly, the Supreme Court of Delaware held that "a parent's compelling interest in maintaining a familial relationship with his or her child . . . does not diminish when the termination proceedings are initiated by private party rather than the State." *Walker* v. *Walker*, 892 A.2d 1053, 1055 (Del. 2006).

A.S.E. 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 and deprives the indigent parent of due process.

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shall be deprived of life, liberty or property, without due process of law." C.R.S.A. Const. Art. 2, § 25. Additionally, the Delaware Constitution, in pertinent part, states "nor shall he or she be deprived of life, liberty or property, unless by the judgment of his or her peers or by the law of the land." Del. C. Ann., Art. 1, § 7.

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECURRING, AND THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THEM.

The question of the right to counsel in a privately-initiated termination action was squarely presented to and passed upon by the Supreme Court of Texas. Yet, as previously examined, disagreement exists among various states about the proper application of this Court's prior decisions and the application of the Equal Protection and Due Process Clauses. This disagreement has existed for many years and appears to be deepening. The issue is thoroughly discussed in several lower court opinions, and the contrasting views on right to counsel in privately-initiated termination cases are clearly defined. Nothing would be gained from further percolation.

Moreover, the questions presented in this case are not only of legal significance, but of great practical urgency as well. This issue has the potential to affect scores of indigent parents in Texas and other states. In 2012, almost 4.5 million Texans lived in poverty, and many of them have children.[5] This is not an isolated instance of failure to appoint counsel in privately-initiated termination actions by the Texas courts. *See e.g.*, *In re B.C.T.*, No. 11-12-00359-CV, 2013 WL 1932914 (Tex. App. – Eastland May 9, 2013,

[5] U.S. Census Bureau, *State & County QuickFacts: Texas* (2012), *available at* http://quickfacts.census.gov/qfd/states/48000.html.

no pet.) (mem. op.); *In re T.L.W.*, No. 12-10-0041-CV, 2012 WL 1142475 (Tex. App. – Tyler Mar. 20, 2012, no pet.) (mem. op.); *In re A.S.L.*, No. 02-09-00452-CV, 2011 WL 2119645 (Tex. App. – Fort Worth May 26, 2011, no pet.); *In re D.L.S.*, No. 02-10-00366-CV, 2011 WL 2989830 (Tex. App. – Fort Worth Oct. 6, 2011, no pet.); *In re J.C.*, 250 S.W.3d 486 (Tex. App. – Fort Worth 2008, pet. denied); *Brothers* v. *West*, No. 2-08-202-CV, 2009 WL 1270652 (Tex. App. – Fort Worth May 7, 2009, no pet.) (mem. op.); *In re T.L.B.*, No. 07-07-0349-CV (Tex. App. – Amarillo Dec. 17, 2008, no pet.) (mem. op.); *In re C.M.R.*, No. 02-07-394-CV, 2008 WL 4963510 (Tex. App. – Fort Worth Nov. 20, 2008, no pet.) (mem. op.); *In re M.L.C.*, No. 14-09-01006-CV, 2010 WL 5238586 (Tex. App. – Houston [14th Dist.] Dec. 16, 2010, no pet.) (per curiam) (mem. op.); *In re I.E.Z.*, No. 09-09-00499-CV, 2010 WL 3261145 (Tex. App. – Beaumont Aug. 19, 2010, no pet.) (mem. op.). On the contrary, the repeated denial of counsel in privately-initiated termination cases illustrates that this is far from an isolated occurrence or a case specific issue.

Absent this Court's intervention, the Texas statutory framework, which denies court-appointed counsel to some indigent parents while granting it to others, violates the Equal Protection Clause and deprives an indigent parent of due process.

Finally, apart from these considerable systemic concerns, there is the substantial interest injustice for petitioner. The trial court terminated A.S.E.'s

parental rights and he faces total loss of any relationship with S.G.E.

CONCLUSION

For the foregoing reasons, and to resolve conflicts between the Texas court decisions in this case and the rulings of this Court and those of other states, the writ of certiorari should be granted.

Respectfully submitted,

ERWIN CHEMERINSKY
Counsel of Record
UNIV. OF CALIFORNIA,
IRVINE SCHOOL OF LAW
401 East Peltason
Irvine, California 92697
(949) 824-7722
EChemerinsky@law.uci.edu

AARON A. MARTINEZ
GODWIN LEWIS P.C.
1201 Elm Street,
Suite 1700
Dallas, Texas 75270
(214) 939-4400

ELIOT D. SHAVIN
SOUTHERN METHODIST
UNIVIERSITY DEDMAN
SCHOOL OF LAW
CIVIL CLINIC
3315 Daniel Avenue
Dallas, Texas 75275
(214) 768-2025

CHARLES "CHAD" BARUCH
THE LAW OFFICE
OF CHAD BARUCH
3201 Main Street
Rowlett, Texas 75088
(972) 412-7192

Counsel for Petitioner A.S.E.

SEPTEMBER 2013

APPENDIX A

IN THE
COURT OF APPEALS
NINTH DISTRICT OF TEXAS AT BEAUMONT

NO. 09-11-00191-CV

IN THE INTEREST OF S.G.E.

On Appeal from the 418th District Court
Montgomery County, Texas
Trial Cause No. 09-09-09379 CV

MEMORANDUM OPINION
ON MOTION FOR REHEARING

Appellant filed a motion for rehearing. Appellee filed a response. She notes that this is an accelerated appeal, and asks that this Court deny the motion because "[c]ontinued delay is not in the best interest of the child."

To the extent we are able to discern issues raised in the motion, we consider those issues to determine whether a rehearing should be granted. Appellant contends the judge who presided over the trial had a conflict of interest that tainted the integrity of the proceedings. The record does not show that the judge was disqualified by reason of the relationship

between the judge and appellee's lawyer. *See* Tex.R. Civ. P. 18b(a). Appellant's motion for rehearing suggests that the trial court should have disclosed the potential conflict. Appellant is relying on a copy of a newspaper article in which the author reports that appellant claimed to have learned on the third day of the trial that the lawyer representing appellee was the trial judge's personal attorney. This article is filed in the papers of the case but not attached to a motion for new trial. Absent a non-waivable disqualification or a record that supports a finding that the complaint could not have been preserved, the circumstances in this case do not support disregarding the usual procedures for error preservation. *See* Tex.R.App. P. 33.1; Tex.R. Civ. P. 18a; *see also generally Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (due process requirements). Appellant filed a motion for continuance, not a motion to recuse. *See McElwee v. McElwee*, 911 S.W.2d 182, 185-86 (Tex.App.-Houston [1st Dist.] 1995, writ denied).

Appellant contends he had a right to counsel that was violated by the trial court's failure to appoint an attorney to represent appellant in a trial in which a supervisor with Child Protective Services testified. No statutory right to counsel exists in a private termination suit. *In re J.M.W.*, No. 09-08-00295-CV, 2009 WL 6031287, at *6 (Tex.App.-Beaumont Mar. 11, 2010, pet. denied) (mem.op.); *In re J.C.*, 250 S.W.3d 486, 489 (Tex.App.-Fort Worth 2008, pet. denied). Due process does not require appointment of counsel in every termination proceeding. *See Lassiter v. Dep't of*

Soc. Servs., 452 U.S. 18, 27-32, 101 S.Ct. 2153, 2159-62, 68 L.Ed.2d 640 (1981) (termination suit filed by governmental entity); *see also Turner v. Rogers*, ___ U.S. ___, 131 S.Ct. 2507, 180 L.Ed.2d 452, 79 U.S.L.W. 4553 (2011) (child support enforcement contempt action brought by private party).

Appellant complains that the trial court failed to consider his motions. Appellant does not identify any particular motion, but he does mention that the trial court erred in proceeding to trial without a home study or financial statement. Lack of a home study is not outcome determinative even in cases where one is required. *In re D.C.*, No. 01-11-00387-CV, 2012 WL 682289, at *13 (Tex.App.-Houston [1st Dist.] Mar. 1, 2012, pet. denied) (mem.op.). Financial statements are mandatory in child support cases, but this is a termination case. *See* Tex. Fam.Code Ann. § 154.063 (West 2008).

Appellant also filed special exceptions, motions requesting a psychological evaluation and a mental examination of appellee, and a motion seeking appointment of an amicus attorney. Appellant requested that these motions be addressed in a hearing on September 20, 2010. A temporary order signed on September 20, 2010, recites that a hearing was held on that date and appellant appeared at the hearing. At that time, the parties had an October 4, 2010 trial setting. The trial court granted appellee's motion for a continuance. This record does not reflect why the trial court did not rule on appellant's motions on September 20, 2010 or during the pre-trial hearing

conducted on March 11, 2011. Because the record does not show that appellant requested rulings on these motions during either of the pre-trial hearings, appellant has not shown that the trial court abused its discretion.

Appellant filed several written motions during the trial, but these motions were untimely pursuant to the scheduling order. It appears appellant neither obtained leave to file the motions nor showed good cause for the trial court to grant leave for the late filing and presentation of these motions. After resting, appellant presented a motion for continuance that the trial court denied. No abuse of discretion is shown on this record.

Appellant complains that the trial court failed to consider exculpatory evidence from a hearing on a motion for a protective order. The trial court took judicial notice of the evidence from the protective order hearing. *See generally* Tex.R. Evid. 201. The record does not support appellant's claim.

Several complaints presented on rehearing relate to the exclusion of evidence at trial. Appellant complains that the trial court failed to consider a psychological assessment of appellant, but he has not shown that the document was admissible or that an objection to its admissibility was improperly sustained.

The trial court sustained appellee's hearsay and relevance objections to appellant's proffer of a videotape of a Safe Harbor interview of the child. A copy of a video recording of the forensic interview is in the

possession of the district clerk and has been forwarded to this Court pursuant to the trial court's safekeeping order, and is in the appellate record.

The forensic interview was conducted as part of an investigation initiated by a call from appellant. The C.P.S. records were admitted in evidence. The Department ruled out the allegation of abuse. In the interview, S.G.E. related that while she has been living in Texas with appellee she has been spanked. The trial court determined the forensic interview lacked relevance because it did not concern conduct by appellant. In the interview, S.G.E. says that appellant is "sweet." When appellant asked to play "three seconds" of the interview for this purpose, appellee stipulated to S.G.E. having made the statement.

We review a trial court's admission or exclusion of evidence for abuse of discretion. *In re J.P.B.*, 180 S.W.3d 570, 575 (Tex.2005). The trial court apparently concluded that the video recording would not tend to make any material fact more or less probable. The trial court could reasonably have determined that the video evidence of the child's statement regarding appellant was unnecessary to review because of appellee's stipulation. A judgment will not be reversed because the trial court erroneously excluded evidence that is cumulative or not controlling on a material issue dispositive to the case. *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex.2001).

Lastly, appellant complains that the trial court did not allow appellant to call a witness by telephone.

Appellant failed to demonstrate the witness's unavailability, and he did not make an offer of proof regarding the evidence the witness would have provided. *See* Tex.R. Evid. 103.

Referring to appellee's post-trial motion to withdraw the sum of $1,300 from the child support registry, appellant argues that the trial court's non-support finding is not supported by clear and convincing evidence. *See* Tex. Fam.Code Ann. § 161.001(1)(F) (West 2008). Appellant admitted he did not support the child in the year before this suit was filed. Payments made after the suit commenced do not establish that appellant provided support during an earlier period of time. Accordingly, the trial court could have disregarded evidence that tended to show support provided after the suit was filed. *See In re J.F.C.*, 96 S.W.3d 256, 266 (Tex.2002).

Appellant complains that the trial court stopped appellant's final argument. During his argument, appellant offered a personal apology to the judge. The judge responded, "Thank you." The judge asked, "Anything further?" Appellant did not inform the trial court that he wished to make an additional statement. *See* Tex.R.App. P. 33.1.

Appellant contends he failed to prosecute his appeal because his retained appellate counsel became too ill to prepare a brief but did not withdraw from the case. Appellee states in her response that appellant "had sufficient time to file a brief and state his

case prior to retaining" his attorney. She notes also that he was aware of his attorney's condition when he retained the attorney.

Appellant had been given a final extension to file a brief, and one asserted basis for yet another extension was the condition of his newly retained attorney. Appellant's prior decision to represent himself on appeal was voluntary. He was previously represented by other counsel on appeal. Appellant's first attorney's motion to withdraw asserted that "appellant has requested counsel withdraw." Appellee objected, appellant's counsel explained, "because Appellee is pro se and thinks that this is an attempt by Appellant to put her in a position where she has to deal with him directly rather than through an attorney." Over appellee's objection, this Court granted appellant's request to proceed without an attorney in the appeal.

On April 12, 2012, this Court granted appellant's request to proceed without his second attorney. Appellant has not secured new counsel. We have considered the issues raised in the motion for rehearing. Appellant has had an adequate opportunity to present any appellate issues to this Court. We decline appellant's request to reinstate his appeal. Appellant's motion for rehearing is overruled. Tex.R.App. P. 49.3. No further motion for rehearing may be filed with this Court. Tex.R.App. P. 49.4; *see* Tex. Fam.Code Ann. § 109.002(a) (West Supp.2011) ("The procedures for an accelerated appeal under the Texas Rules of Appellate Procedure

apply to an appeal in which the termination of the parent-child relationship is in issue.").

s/David Gaultney
DAVID GAULTNEY
JUSTICE

Opinion On Motion for Rehearing
Delivered May 17, 2012

Before McKeithen, C.J., Gaultney and Kreger, JJ.

APPENDIX B

**IN THE
COURT OF APPEALS
NINTH DISTRICT OF TEXAS AT BEAUMONT**

NO. 09-11-00191-CV

IN THE INTEREST OF S.G.E.

**On Appeal from the 418th District Court
Montgomery County, Texas
Trial Cause No. 09-09-09379 CV**

MEMORANDUM OPINION

Appellant, the father of the minor child S.G.E., appeals the trial court's parental rights termination order in a suit filed by the child's mother. As required by the applicable rules, the parties will not be referred to by name, and the proceedings will be described as briefly as practicable. *See* Tex.R.App. P. 9.8, 47.1, 47.4; *see also* Tex. Fam.Code Ann. § 109.002(d) (West Supp.2011).

THE TRIAL COURT'S RULING

The termination order provides in part as follows:

The Court finds by clear and convincing evidence that [appellant] has –

a. knowingly placed the child in situations that endanger the physical or emotional well-being of the child;

b. engaged in conduct that endangers the physical or emotional well-being of the child; and

c. 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 this petition.

The Court also finds by clear and convincing evidence that termination of the parent-child relationship between [appellant] 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 [appellant] and the child the subject of this suit is terminated.

THE TRIAL COURT PROCEEDINGS

Appellee sought to terminate appellant's parental rights on grounds of conduct endangerment, condition endangerment, and lack of support. *See* Tex. Fam.Code Ann. § 161.001(1)(D), (E), (F) (West Supp.2011). Appellant filed a *pro se* answer. In the three-day bench trial, the judge heard testimony about appellant's mental health issues, behavior, threats, and failure to support. The judge heard testimony of appellant's prior behavior that had resulted in a restraining order against him. The trial court heard testimony that the child had resided with appellee in Texas for several years, and that appellant had neither visited

the child nor provided financial support for the child from February 2009 through March 2010. The trial court heard evidence about appellant's behavior during supervised visitation, and heard testimony from a Child Protective Services employee concerning whether appellant would pose a risk to the child even if future visitations were supervised. Appellant admitted that for one year prior to suit he neither exercised visitation nor sent financial support, and he explained why he did not exercise his visitation.

THE APPEAL

Appellant filed a notice of appeal on April 19, 2011. The Clerk of this Court notified the parties that the case is an accelerated appeal, and that in accelerated appeals the Court does not routinely grant extensions of time. *See* Tex. Fam.Code Ann. § 109.002(a) (West Supp.2011) ("The procedures for an accelerated appeal under the Texas Rules of Appellate Procedure apply to an appeal in which termination of the parent-child relationship is in issue."). After the trial court sustained a contest to appellant's affidavit of indigence, appellant twice requested and received additional time to pay for the record. Appellant paid for the trial record.

Appellant did not challenge the trial court's order determining that he was not indigent. He did not file an affidavit of indigency on appeal. This Court extended the time for filing the clerk's record for an additional thirty days and the reporter's record for an

additional sixty days. The clerk's record was filed on August 5, 2011, and the reporter's record was filed on September 28, 2011. As authorized by the Family Code in termination cases, the record was sealed by the trial court. *See* Tex. Fam.Code Ann. § 161.210 (West 2008).

After filing the notice of appeal, appellant was at one point represented by counsel for the appeal. Counsel subsequently filed a motion to withdraw. The attorney explained in the motion that appellant "asked the undersigned attorney to withdraw as his attorney[,]" but explained also that appellee opposed the motion because she was representing herself, and she thought "this is an attempt by Appellant to put her in a position where she has to deal with him directly rather than through an attorney."

This Court granted appellant's request to proceed without an attorney. Appellant's brief was originally due to be filed by October 18, 2011. The Clerk of this Court notified the parties to contact the Clerk to review the record. Appellant did not review the record prior to the due date for his brief.

On November 15, 2011, the Clerk notified appellant that a brief must be filed by December 5, 2011. On December 1, 2011, appellant filed a motion requesting an extension of time until December 27, 2011, to file the brief. The motion was granted with the notation that appellant was being granted a final extension.

Appellant reviewed the record for five days. Appellant filed a motion for additional time to access the record. This Court granted appellant additional time to access the record. The Clerk again informed the appellant that his brief must [sic] filed by December 27, 2011. The Clerk informed appellant by letter that if no brief was filed by that date the case would be submitted to the Court without briefs.

Appellant again requested and obtained additional access to the record. He asserted he was dictating notes into a computer. Appellant did not establish that the time for review of the record was unreasonable for the purpose of preparing a brief. Although the Court found that appellant had a reasonable time to review the record to prepare a brief, in the interest of justice the Court granted the request again. Appellant completed his review of the record without utilizing all the additional time. The Court's order of December 13, 2011, again notified appellant that no further extensions would be granted and that his brief was due on December 27, 2011.

On December 16, 2011, a second attorney for appellant filed a motion for another extension of time to file a brief. Counsel asserted that appellant had completed his review of the record, but that counsel would be out of the state from December 17, 2011, through December 27, 2011. Counsel requested an additional thirty-day extension to file a brief for appellant. This Court granted another extension. The Court notified the parties that if no brief was filed by January 26, the case would be under submission to

the Court on January 27. The parties were notified that this was the final extension of time that would be granted.

The Court had issued an order stating that because the record was sealed by the trial court, the information contained in the record may not be disclosed by the parties without violating the trial court order sealing the record. On January 5, 2012, the Court notified the parties that after issuing the order, it had come to the attention of the Court that one or more documents designed to appear to be transcriptions, summaries, or notes of the record had been left unattended in a public place or had been distributed to a person other than the parties or their counsel of record, and that appellant was the only party who had accessed the record on appeal. Noting that the rules of appellate procedure provide that the appellate court may dismiss the appeal because the appellant has failed to comply with a court order, the Court provided appellant with an opportunity to explain why the appellant should not be sanctioned because the appellant failed to comply with a court order. Appellant filed his response on January 20, 2012. In the response, appellant admitted that he had left binders containing information obtained from the record, but appellant claimed that he had left the material with an airline official for delivery to appellant's counsel, and appellant argued that his action was reasonable and not in violation of a court order. In his affidavit, appellant also stated that he had "communications" with a newspaper reporter "on a number of

occasions beginning September of 2009 and continuing to the present day[,]" and admitted that the "communications" included "providing relevant documentary material regarding the case while it was being litigated" in the trial court. Appellant swore that "the only documents that I gave to the newspaper were provided BEFORE the trial started."

On January 24, 2012, appellant filed a motion to recuse the entire panel. On the same day, appellant filed a motion for continuance that requested a stay of the appeal until the Supreme Court ruled on an anticipated motion and also requested an additional thirty-day extension for filing a brief. None of the challenged justices removed himself from participation in the case. As to each challenged justice the motion to recuse was denied by the remaining justices sitting en banc. *See* Tex.R.App. P. 16.3; *Manges v. Guerra*, 673 S.W.2d 180, 185 (Tex.1984); *McCullough v. Kitzman*, 50 S.W.3d 87, 88 (Tex.App.-Waco 2001, pet. denied). Although appellant explained he was looking for another attorney, no motion to withdraw was filed. The Court denied appellant's motion for a continuance, a stay, and another extension. The Clerk again notified the parties by letter that appellant's brief must be filed by January 26, 2012.

Appellant did not file a brief. The appeal was submitted on January 27, 2012. Appellant filed a petition for writ of mandamus with the Supreme Court on January 27, 2012. The Supreme Court denied the petition on February 3, 2012.

The Clerk notified the parties in writing that "[a]ny party who desires to submit a brief at this time must obtain the permission of the Court by filing a motion for leave to allow late filing of the brief. The brief must be submitted with the motion, and the motion must provide a reasonable explanation for that party's failure to timely file the brief." No post-submission brief was filed by either party. *See* Tex.R.App. P. 38.8(a).

Appellant filed a post-submission motion: (1) to vacate the trial court's judgment for "structural error"; (2) to order the trial court to provide a supplemental record; (3) to stay the appeal; and (4) to permit access to the record. Although appellant is currently represented by counsel, appellant filed the motion *pro se* because he says his attorney is "medically disabled."

The first "structural error" that appellant argues is the trial court's failure to appoint an attorney ad litem or an amicus attorney for S.G.E. Appellant argues that the Department was a "de facto party" because a Department employee testified during the trial, and consequently appellant was entitled to a court-appointed attorney. The Department did not intervene in this case. The trial court found that S.G.E.'s mother could adequately represent the child's interests. An appointment would have required a finding that the appointment was necessary to ensure the determination of the best interests of the child. *See* Tex. Fam.Code Ann. § 107.021(b)(2) (West 2008). Under the circumstances, the trial court's decision to

decline to appoint an attorney for the child was a discretionary one and was not a structural error that requires that the judgment be vacated. *See* Tex. Fam.Code Ann. § 107.021(a). The fact that a Department employee was a witness did not make the Department a party for purposes of requiring appointment of counsel for appellant. *See* Tex. Fam.Code. Ann. § 107.013 (West Supp.2011). Furthermore, the trial court did not find that appellant was indigent.

The second alleged "structural error" that appellant argues is the trial court's failure to recuse because the judge was at the time of trial being represented by appellee's counsel. Because the relationship between the judge and the lawyer would not disqualify the judge, no structural error arose. *See* Tex.R. Civ. P. 18b; *Pena v. Pena*, 986 S.W.2d 696, 700 (Tex.App.-Corpus Christi 1998), *pet. denied*, 8 S.W.3d 639 (Tex.1999). Recusal is a different matter from disqualification, and appellant does not present a record that shows that the trial court failed to follow Rule 18a. *See* Tex.R. Civ. P. 18a.

Appellant notes that the appellee filed a post-judgment motion to release funds, and suggests that this demonstrates that the trial court and the appellee were aware that he had not failed to support the child. The relevant time period for non-support is "one year ending within six months of the date of the filing of the petition[.]" Tex. Fam.Code Ann. § 161.001(1)(F). Child support payments made after the case commenced would not negate that ground for termination.

Appellant suggests that the clerk's record is incomplete. The trial court took judicial notice of the contents of protective order proceedings that occurred in a case under a different cause number. With a letter request addressed to the trial court clerk, the clerk's record may be supplemented. *See* Tex.R.App. P. 34.5(c). A late request does not justify further delaying the disposition of this accelerated appeal, however. Appellant does not provide sufficient reasons why the written protective order proceedings in another cause would require setting aside the judgment in this case. Appellant also argues that the trial court did not rule on motions he filed, but he does not state how the motions might relate to his appeal or require a reversal.

Appellant contends continued delay of the appeal would not adversely affect S.G.E. because the trial court's order is currently being enforced. The United States Supreme Court has explained that, because children require secure and stable relationships and because continued uncertainty may be detrimental to a child's sound development, the interest in finality is especially strong in disputes involving child custody. *See Lehman v. Lycoming Cnty. Children's Servs. Agency*, 458 U.S. 502, 513, 102 S.Ct. 3231, 73 L.Ed.2d 928 (1982). Appellant's delay motion is denied.

Appellee filed a motion to dismiss the appeal noting that this is an accelerated appeal and that appellant had failed to file a brief. Generally, appellate courts "are limited to the issues urged and record presented by the parties[.]" *In re Columbia Med. Ctr.*,

290 S.W.3d 204, 211 (Tex.2009). The Court has reviewed the trial record under submission. Appellant does not present any reporter's record of any proceeding other than the trial itself. This Court granted extensions to file the record and a brief, including two this Court designated as final. *See* Tex.R.App. P. 38.8, 38.9.

The applicable law in termination proceedings is well-established. *See Jordan v. Dossey*, 325 S.W.3d 700, 712 (Tex.App.-Houston [1st Dist.] 2010, pet. denied). "Recognizing that a parent may forfeit his or her parental rights by their acts or omissions, the primary focus of a termination suit is protection of the child's best interests." *Id.* The Legislature has mandated that appeals in termination cases be "accelerated" and "given precedence over other civil cases." *See* Tex. Fam.Code Ann. § 109.002(a). We also note that recently proposed appellate rules will further assure accelerated disposition of termination cases. *See* Misc. Docket No. 12-9030 (Tex. Feb. 13, 2012), *available at* http://www.supreme.courts.state.tx.us/miscdocket/12/12903000.pdf. An appellate court considers the statutory mandate and the rights and interests of both parties and the child. *See* Tex. Fam.Code Ann. § 109.002(a); *Lehman*, 458 U.S. at 513; *see also Jordan*, 325 S.W.3d at 712.

Under the circumstances of this case, further delay in the disposition of this accelerated appeal is not justified. Delay for the purpose of delay alone is not a proper purpose for an appeal. Appellant has had sufficient opportunity to present any alleged errors

for appellate review. Despite multiple filings of documents by appellant in this Court and the Supreme Court, no brief addressing the merits of the appeal has been presented.

Normally a court of appeals does not reverse a trial court's judgment in a civil case in the absence of assigned error supported by the record presented by the parties. *See In re Columbia Med. Ctr.*, 290 S.W.3d at 211; *San Jacinto River Authority v. Duke*, 783 S.W.2d 209, 209-10 (Tex.1990); *see also* Tex.R.App. P. 47.1 (An opinion is to address "every issue raised and necessary to final disposition of the appeal."); Tex.R.App. P. 38.8(a). The record reviewed by this Court does not support a different procedure or result under the circumstances in this case. Appellant has not presented a brief asserting trial court error for this Court to review. Appellee's motion to dismiss the appeal is therefore granted and the appeal is dismissed. *See* Tex.R.App. P. 38.8(a).

APPEAL DISMISSED.

s/David Gaultney
DAVID GAULTNEY
JUSTICE

Submitted on January 27, 2012
Opinion Delivered March 8, 2012

Before McKeithen, C.J., Gaultney and Kreger, JJ.

APPENDIX C

NO. 09-09-09379 CV

IN THE INTEREST OF S.G.E., A CHILD

IN THE 418TH DISTRICT COURT

MONTGOMERY COUNTY, TEXAS

ORDER OF TERMINATION

1. Date of Hearing

On November 21-23, 2011 this Court heard this case.

2. Appearances

Petitioners, A.J.S., appeared in person and through attorney of record, Stephen D. Jackson, and announced ready for trial.

Respondent, A.S.E., appeared in person and announced ready for trial.

The Court finds A.J.S., a party to the suit, has no interest adverse to the child the subject of this suit and would adequately represent the interest of the child. No attorney ad litem or amicus attorney was necessary, and none was appointed.

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 418TH Judicial District Court.

6. Child

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

Name: ■■■■■■■■■
Sex: ■■■■■■■■■
Birth date: ■■■■■■■■■

7. Termination

Presumed Father.

The Court finds by clear and convincing evidence that A.S.E. has –

a. knowingly placed the child in situations that endanger the physical or emotional well-being of the child;

b. engaged in conduct that endangers the physical or emotional well-being of the child; and

c. 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 this petition.

The Court also finds by clear and convincing evidence that termination of the parent-child relationship between A.S.E. 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 A.S.E. and the child the subject of this suit is terminated.

8. 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.

9. Managing Conservator

IT IS ORDERED that A.J.S. is appointed Sole Managing Conservators of the child the subject of this suit, the Court finding this appointment to be in the best interest of the child.

10. Costs

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

11. Record Sealed

IT IS ORDERED that all papers and records in this case, including the minutes of the Court, be sealed.

12. 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 the 418th Judicial District Court, MONTGOMERY County, Texas, on March 23, 2011, and further noted on the court's docket sheet on the same date, but signed on March 31, 2011.

s/JUDGE PRESIDING

APPROVED AS TO FORM ONLY:

Stephen D. Jackson & Associates
215 Simonton
Conroe, TX 77301
Tel: (936) 756-5744
Fax: (936) 756-5842

By: s/Taryn D. Criswell
Stephen D. Jackson
State Bar No. 00784324
Attorney for A.J.S.

APPENDIX D

OFFICIAL NOTICE FROM SUPRME COURT OF TEXAS AUSTIN, TEXAS

Case No. 12-0542
COA #: 09-11-00191-CV
TC#: 09-09-09379-CV

STYLE: IN THE INTEREST OF S.G.E.

DATE: June 21, 2013

Today the Supreme Court of Texas denied the petition for review in the above-referenced case. The Unopposed Motion to Supplement Record is dismissed as moot.