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With few exceptions, the Supreme Court has rejected arguments that the Constitution guarantees affirmative rights that cost public resources and many Justices express concern that doing so would produce a slippery slope, without clear lines to divide constitutionally guaranteed rights from others. Against this backdrop, Justice Ruth Bader Ginsburg's opinion in *M. L. B. v. S. L. J.*—holding that a state may not deny an indigent parent the chance to appeal judicial termination of her parental rights by requiring payment to prepare the trial court record—is a work of great craftsmanship as well as a just and compassionate decision.

No Heightened Scrutiny Regarding Discrimination Against the Poor

The United States Constitution does not accord rights to government services or subsidies with extremely limited exceptions: the state must supply counsel for individuals facing imprisonment as a criminal sanction (*Gideon v. Wainwright*);[2] a state cannot deny free trial transcripts to indigent criminal defendants who were seeking appellate review of their convictions (*Griffin v. Illinois*);[3] nor may a state impose a poll tax effectively barring those who cannot pay from state and local elections (*Harper v. Virginia Board of Elections*).[4] When the Supreme Court rejected in 1973 the claim that discrimination against the poor deserves heightened scrutiny under the Fourteenth Amendment,[5] it was in fact affirming a prior decision to use rational basis review in cases challenging

"economics and social welfare" laws.[6] A rational basis could be supplied by a state's desire to save costs. That is what Mississippi asserted when a woman, known to the Court as M. L. B., sought to appeal a decree terminating her parental rights to two minor children but faced the barrier of an estimated $2,352.36 fee for preparing the record required for the appeal. Having no ability to pay that fee, the appeal was dismissed.

Not only did M. L. B. face the general rule of no constitutional right to a free transcript in a noncriminal matter; there was no plausible constitutional claim of a right to an appeal at all. And the Court had already rejected the argument that termination of parental rights posed at least as serious a deprivation as incarceration when a mother sought court-appointed counsel. In *Lassiter v. Department of Social Services of Durham County*, the Court held that indigent parents have no right to a government-appointed lawyer when facing termination of parental rights proceedings.[7] There, the Court did indicate that a due process analysis in individual cases could support appointment of counsel in a particular case where important to avoid likely error, but the Court went on to find no such need in Mrs. Lassiter's case, despite multiple indications of Mrs. Lassiter's inability to present her case.[8] In a noncriminal matter with no guaranteed appeal or counsel, how could M. L. B. persuade the Court that the Constitution called for a right to preparation of the trial record that would cost the state $2,352.36 to provide?

Building Access Out of Puzzle Pieces

Justice Ginsburg's opinion proceeds carefully and without frontal challenges to the constraining precedents. It treats as unquestioned the guideposts that a state need not establish avenues for appellate review; nor must a state make counsel available in any cases but those where incarceration is at stake. Without disturbing these precedents, the opinion nonetheless emphasizes that the Court had already prohibited: "'making access to appellate processes from even [the State's] most inferior courts depend upon the [convicted] defendant's ability to pay'" in *Mayer v. Chicago*.[9]

Moreover, Justice Ginsburg stressed that in facing criminal fines, defendant Mayer—like M. L. B.—did not face a risk of incarceration.[10]

Still adhering to the general rule that the Constitution mandates no provision of government benefits, the opinion nonetheless identified precedents recognizing the special situation of State-controlled determination of family status. Because a State "could not deny a divorce to a married couple based on their inability to pay approximately $60 in court costs,"[11] and a State "must pay for blood grouping tests sought by an indigent defendant to enable him to contest a paternity suit,"[12] there was already "a 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."[13] Reviewing other contexts in which claims of access failed, the opinion concludes, "[T]ellingly, the Court has consistently set apart from the mine run of cases those involving State controls or intrusions on family relationships."[14]

Aligning M. L. B.'s case with not only access-to-court but other decisions recognizing the significance of family relationships,[15] the opinion dodges efforts to bar relief for M.L.B. on the grounds that hers is a civil, not criminal, case and that she does not face incarceration. Here, the Court's previous conclusion that forced dissolution of her parental rights involves interests "'more substantial than mere loss of money.'"[16] In the hierarchy of interests, M. L. B.'s concerns are even more weighty because she faces not simply "loss of custody, which does not sever the parent child bond," but "parental status termination, which is 'irretrievabl[y] destructi[ve] of the most fundamental family relationship.'"[17] Here the opinion smartly relied on a procedural due process decision requiring a State to demonstrate evidence under the heightened "clear and convincing" burden of proof before terminating parental rights.[18] The Court's strong statements of the private interests at stake there called for careful judicial proceedings, but Justice Ginsburg emphasized how M.L.B. had the same strong private interests.

Those strong private interests—"commanding," and "far more precious than any property right"[19]—could supply the basis for waiving record

preparation fees at least as well as the risk of multiple fines supplied a basis for a right to a transcript to enable an appeal by individuals facing neither incarceration nor the stigma of a felony conviction. Weightier than the criminal fines at issue when the Court required waiver of transcript costs in *Mayer*, M. L. B.'s interests involve "the most fundamental family relationship."[20] Justice Ginsburg's opinion points to multiple decisions as "acknowledging the primacy of the parent child relationship."[21] Toward the end of the opinion, the interests at stake are described this way: "'[T]ermination adjudications involve the awesome authority of the State 'to destroy permanently all legal recognition of the parental relationship.'"[22] No formal category distinguishing civil and criminal nor functional category distinguishing jeopardy of incarceration from other liberties can stand in the way of recognizing M. L. B.'s precious interests at the mercy of State power.

And Mississippi's desire to save money could not outweigh these significant family interests.[23] If the State's "pocketbook interest in advance payment for a transcript" was unimpressive as a reason to bar appeal of a conviction to someone who faced only fines, not incarceration, it surely is not sufficient to bar appeal on similar grounds for a mother facing the permanent end of her "'most fundamental family relationship.'"[24] Even the financial interest is paltry, since the State had faced only a dozen appeals on the merits following parental rights termination decisions.[25]

All of these steps in the analysis are made without specifying whether the analysis depends on Due Process or Equal Protection. Given the limitations of the precedents under both doctrines, noted pointedly by the dissenting opinion,[26] that is quite a feat. Despite the dissent's objection that Justice Ginsburg's opinion fails sufficiently to confine the reach of its reasoning, Justice Kennedy, concurring in the judgment, complimented Justice Ginsburg's opinion for its "most careful and comprehensive recitation of the precedents."[27] While confining his endorsement to the due process elements of the analysis, Justice Kennedy further commends Justice Ginsburg's opinion for the Court because it "well describes the fundamental interests the petitioner has in ensuring that the order which terminated all her parental ties was based upon a fair assessment of the facts and the law."[28]

Subtle Rhetoric

Justice Ginsburg announces no broad or bold statements of constitutional guarantees; instead, her opinion pieces together exceptions, and threads a needle, connecting M. L. B.'s situation to the exceptional right to fee waiver for appeals from criminal convictions and to the recognition of weighty family interests in waiving fees for divorce and paternity tests and in requiring heightened burden of proof before a State could terminate parental rights. Almost every sentence depends in critical portions on language quoted from prior opinions. It is as if the opinion is written entirely through cut-and-pasted quotations, defying any charge of bold expansion of constitutional guarantees.

Yet the words that are Justice Ginsburg's own make a world of difference. From the opinion's first sentence, the opinion lays out the stakes: M. L. B.'s parental rights were "forever terminated" with only the appeal at issue as her remaining hope.[29] Later, the opinion explains, the Court approaches "M. L. B.'s petition mindful of the gravity of the sanction imposed on her."[30] It is that tone, a kind of hushed awareness of the gravity of the situation, that imbues the opinion with integrity and subtle shifts in emphasis.

Consider the question before the Court. Justice Ginsburg states it at the start as it was framed by M. L. B.:

"May a State, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, condition appeals from trial court decrees terminating parental rights on the affected parent's ability to pay record preparation fees?"[31] Demonstrating the subtlety of her argumentation, the question is restated later in the opinion as:

> Does the Fourteenth Amendment require Mississippi to accord M. L. B. access to an appeal available but for her inability to advance required costs before she is forever branded unfit for affiliation with her children?[32]

Note what has changed: 1) the focus on Due Process and Equal Protection has shifted to simply what does the Fourteenth Amendment require;

2) the appeal conditioned on record preparation fees is now recast as an appeal available but for inability to pay costs; and 3) termination of parental rights is reread as permanent branding of a mother as unfit to affiliate with her children. Each of these shifts is well supported by the close reasoning in the paragraphs between the opening statement and later restatement. By the time the question is restated, the conclusion seems nearly assured.

Halting the Objections

Nearly assured, that is, for two nagging objections remain. Justice Thomas's dissent warns that the Court's view opens the floodgates to further demands for free assistance by civil appellants in other kinds of cases,[33] and also objects that the key precedents either do not support the Court's conclusion or should be rejected.[34] While Justice Kennedy's separate opinion implies a restriction of the Court's decision to family matters, the analysis presented by Justice Ginsburg for the Court leaves open applications to further circumstances. Rather than a weakness, as claimed by the dissenters, this feature is commendable, for Justice Ginsburg's analysis provides reasons—seeing enormous stakes for an individual weigh heavily against financial concern of the State—which if duplicated in another context should prevent an arbitrary line barring access to appeal.

The second objection remains a vigorous line of attack by members of the Court who seek to curb Equal Protection doctrine. Justice Thomas argues that only demonstrations of intentional discrimination should warrant constitutional solicitude and hence asserts no defect in a neutral rule of general applicability—like a requirement that litigants pay for record preparation prior to an appeal.[35] On this reasoning, relying on *Washington v. Davis*,[36] the dissent would insulate any general fee requirement from challenge by impoverished individuals even if such a requirement effectively bars access to court. Indeed, this line of reasoning would lead to reversing decisions guaranteeing access to court, access to counsel, and access to the ballot box. The dissenters are right to find a tension between

the intentional discrimination requirement of *Washington v. Davis* and many Equal Protection precedents. By securing the endorsement of the Court, Justice Ginsburg's opinion in *M.L.B. v. S.L.J.* places a boulder in the path of the dissent's campaign to extend *Washington v. Davis*—and undoes the dissent's claims that only old precedents diverge in allowing protection against the impact of neutral rules on the poor.

The United States remains one of a handful of U.N. member states that have not ratified the International Covenant on Economic, Social and Cultural Rights. The treaty was signed by President Jimmy Carter in 1977, but the nation has taken no steps toward ratification. Ours is widely understood to be a Constitution of negative, not positive, liberties. It is also sadly often a place where the poor are left without support or access to food, shelter, and security. A rising dependence by government agencies on user fees and other charges and a trend toward privatizing what once had been public programs put in jeopardy participation by low-income people in the central institutions of society. In this context, Justice Ginsburg's opinion for the Court in *M. L. B. v. S. L. J.* is truly extraordinary. And it ensures that no parents will be locked out of judicial review of a decision to forever end legal relationships with their children simply because they cannot pay a court fee.

Endnotes

1 Thanks to Lynnette Miner for fine and timely editorial assistance.

2 372 U.S. 335, 339 (1963).

3 351 U.S. 12, 19 (1956).

4 383 U.S. 663, 666 (1966).

5 *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18 (1973)(finding no basis for applying suspect classification or fundamental interest analysis to a challenge to reliance on local property taxes to support public education).

6 *Dandridge v. Williams*, 397 U.S. 471 (1970) (applying rational basis review to uphold a cap on welfare benefits regardless of family size). The Court also rejected the claim of an Equal Protection Clause violation when a federal program denied funding for abortion while paying for childbirth and related medical care costs. *Maher v. Roe*, 432 U.S. 464, 470 (1977).

7 452 U.S. 18, 31 (1981).

8 *See id.*, at 44-47 (Blackmun, J., dissenting).

9 *M. L. B. v. S. L. J.*, 519 U.S. 102 (1996) (quoting *Mayer v. Chicago*, 404 U.S. 189, 197 (1971)).

10 *Id.* at 111-12.

11 519 U.S., at 113 (citing *Boddie v. Connecticut*, 401 U.S. 371 (1971)).

12 *Id.* (citing *Little v. Streater*, 452 U.S. 1, 13-17 (1981)).

13 *Id.* at 103.

14 *Id.* at 116.

15 519 U.S. at 116 (citing *Moore v. East Cleveland*, 431 U.S. 494 (1977), *Turner v. Safley*, 482 U.S. 78 (1987), *Zablocki v. Redhail*, 434 U.S. 374 (1978), *Loving v. Virginia*, 388 U.S. 1 (1967); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18 (1981); *Santosky v. Kramer*, 455 U.S. 745 (1982)).

16 519 U.S. at 121 (quoting *Santosky*, 455 U.S. at 756).

17 *Id.* (quoting *Santosky*, 455 U.S. at 753).

18 455 U.S. 745, 748 (1982).

19 519 U.S. at 118-19 (quoting *Santosky,* 455 U.S. at 758-59 (citing *Lassiter*, 452 U.S. at 27)).

20 *Id.* at 121.

21 *Id.* at 120.

22 *Id.* (quoting *Rivera v. Minnich*, 483 U.S. 574, 580 (1987)).

23 *Id.* at 121-2.

24 *Id*. at 121.

25 *Id*. at 122.

26 519 U.S. at 130-39 (Thomas, J., dissenting).

27 *Id.* at 128 (Kennedy, J., concurring in the judgment).

28 *Id*. at 129.

29 *Id.* at 106.

30 *Id.* at 103.

31 *Id.* at 107.

32 *Id.* at 119.

33 *Id.* at 129-30 (Thomas, J., dissenting): "I do not think, however, that the newfound constitutional right to free transcripts in civil appeals can be effectively restricted to this case. The inevitable consequence will be 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."

34 *Id.* at 130-44.

35 *Id.* at 133-39.

36 426 U.S. 229 (1976) (rejecting a disparate impact theory of the Equal Protection Clause altogether).