

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: M.L.B., Petitioner v. S.L.J., INDIVIDUALLY AND AS
NEXT FRIEND OF THE MINOR CHILDREN, S.L.J.
AND M.L.J., ET UX.

CASE NO: 95-853

PLACE: Washington, D.C.

DATE: Monday, October 7, 1996

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Supreme Court U.S.

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 M.L.B., :

4 Petitioner :

5 v. : No. 95-853

6 S.L.J., INDIVIDUALLY AND AS :

7 NEXT FRIEND OF THE MINOR :

8 CHILDREN, S.L.J. AND M.L.J., :

9 ET UX. :

10 - - - - -X

11 Washington, D.C.

12 Monday, October 7, 1996

13 The above-entitled matter came on for oral

14 argument before the Supreme Court of the United States at

15 1:00 p.m.

16 APPEARANCES:

17 ROBERT B. McDUFF, ESQ., Jackson, Mississippi; on behalf of

18 the Petitioner.

19 RICKEY T. MOORE, ESQ., Special Assistant Attorney General

20 of Mississippi, Jackson, Mississippi; on behalf of

21 the Respondents.

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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 95-853, M.L.B. v. S.L.J.

5 Mr. McDuff.

6 ORAL ARGUMENT OF ROBERT B. McDUFF

7 ON BEHALF OF THE PETITIONER

8 MR. McDUFF: Mr. Chief Justice and may it please
9 the Court:

10 As a result of an order of the Chancery Court of
11 Benton County, Mississippi, my client is no longer the
12 mother to her children in the eyes of the law. The only
13 way she can become their mother again under the law is
14 through the appeal that is available as a matter of right
15 under Mississippi law.

16 The question in this case is whether the supreme
17 court of Mississippi can, consistent with the Fourteenth
18 Amendment, prevent her from taking that appeal in a case
19 of this magnitude without even considering her claim that
20 she is too poor to pay the \$2,300 fee that the State has
21 imposed.

22 QUESTION: When you say, Mr. McDuff, considering
23 her claim, what do you suggest would be the factors that
24 the supreme court of Mississippi would take into
25 consideration if it were to "consider it," as you say?

1 MR. McDUFF: Well, I just mean that they have
2 not even considered her claim that she is too poor, which
3 would involve a consideration of her income.

4 QUESTION: But if they were to conclude that her
5 income were too poor, were below whatever standard --

6 MR. McDUFF: Yes.

7 QUESTION: -- then they would have to allow
8 the -- require this money be paid to the court reporter?

9 MR. McDUFF: Or they -- well, they could do a
10 number of things that would allow her to appeal. I mean,
11 one is they could excuse her as in a normal in forma
12 pauperis case, and allow her to proceed without a payment
13 to the court reporter. Another is, they could set up a
14 schedule of payments. Another is, they could have her
15 sign a note.

16 QUESTION: The court reporter is going to have
17 to be paid in any event, I take it. If your client
18 doesn't pay him the State is going to have to -- it's not
19 the sort of a fee that the State could simply waive.

20 MR. McDUFF: Under State law as it is written
21 now, that is correct, but as we pointed out in our reply
22 brief in response to the claim of the State that if we win
23 this case this will involve an incredible outlay from the
24 State Treasury, if Mississippi chooses it can change State
25 law so that in certain cases the court reporter is not

1 paid \$2 a page. The court reporter here is an employee of
2 the State, makes \$33,000 a year in salary.

3 QUESTION: But the reason he takes the job is
4 because of his access to these out -- these transcripts,
5 is it not? At least, that was my experience with court
6 reporters. You wouldn't hire -- they wouldn't come to
7 work just for the fees they get for sitting in court.
8 It's the transcripts on which they make their money.

9 MR. McDUFF: Well, I don't know the answer to
10 that. I assume that's true certainly for many, if not
11 all. But Mississippi could do, for instance, as Texas has
12 done, or has West Virginia has done.

13 QUESTION: Or it could abolish appeals,
14 alternatively, couldn't it?

15 MR. McDUFF: Certainly, yes, and I mean our
16 point here --

17 QUESTION: Which suggests, you know, if the
18 greater includes the lesser we can abolish the appeal
19 entirely, why can't it simply provide, we'll give appeals,
20 but not if the State has to put in any money, and we're
21 not going to give it to impecunious litigants?

22 MR. McDUFF: Well, for the same reason expressed
23 in the majority opinions in Griffin and the long line of
24 cases that have followed Griffin.

25 QUESTION: Those were criminal cases.

1 MR. McDUFF: That's true, Your Honor, but in,
2 for example, *Lindsey v. Normet*, which is a civil case,
3 this Court expressed the same principle that, if -- once
4 the right of appeal is provided by a State as a means of
5 promoting accuracy and as a means of correcting errors and
6 correcting injustices, it cannot be taken away in an
7 arbitrary fashion, and that's our argument here, is that
8 the interest in this case is so important that the same
9 principle should apply here that applies in *Griffin* and --

10 QUESTION: Payment is an arbitrary fashion? I
11 mean, gee, so much of what happens in the world is
12 determined upon whether you can pay for it or not. Why is
13 that an arbitrary fashion?

14 MR. McDUFF: Certainly, but this is different
15 than someone who comes along and says well, I want the
16 Government to pay for something I can -- I want to
17 purchase on the free market, whether it's a car, or
18 whatever.

19 This is where a citizen has been brought into
20 the court system for the sole purpose of attempting to
21 terminate her relationship with her children, and she is
22 thereby subject to all of the power of the State. Now --
23 and subject to the court system that has the unique
24 ability to terminate forever her relationship with her
25 children.

1 Now, in Mississippi, as in most States, the
2 State has chosen to provide a level of accuracy and a
3 level of corrective review for errors and injustices
4 through its appellate courts, but my client is being told,
5 because she's poor, she can't take advantage of that,
6 while those who have money can.

7 QUESTION: How about a custody proceeding, a
8 child custody proceeding? Would you be here making the
9 same argument if she had lost in a custody battle?

10 MR. McDUFF: I don't think -- I don't think that
11 argument would have the same weight we have here because
12 of the difference. I mean, when a person loses custody,
13 even though the child may leave the home, the parent can
14 still visit with the child.

15 QUESTION: Well, maybe the custody order doesn't
16 provide for visitation.

17 MR. McDUFF: Or -- and even if it doesn't --

18 QUESTION: Is it going to turn on that?

19 MR. McDUFF: Even -- it doesn't in most custody
20 orders, no. There is an element of an ability to
21 communicate, to play a role in the child's life, and in
22 the future, if conditions change, the parent can petition
23 for visitation or petition for custody. By contrast, with
24 a termination --

25 QUESTION: So you think a principle line can be

1 drawn --

2 MR. McDUFF: Yes.

3 QUESTION: -- between the --

4 MR. McDUFF: Yes, I --

5 QUESTION: -- this case and a custody case?

6 MR. McDUFF: Yes, I do, Your Honor, and one
7 example is Santosky v. Kramer, where this Court held that
8 in parental termination cases, because of the severity,
9 because of the finality and the irrevocability, a clear
10 and convincing evidence standard was necessary before
11 terminating parental rights.

12 In Mississippi, the Mississippi legislature
13 adopted that after this Court's decision in Santosky, but
14 Mississippi has not adopted, and other States have not,
15 for that reason adopted a clear and convincing standard
16 when the State seeks to take custody from parents without
17 terminating their rights.

18 QUESTION: How do you distinguish Harris v.
19 McRae, where the Court was dealing with a medically
20 necessary abortion for an indigent woman?

21 MR. McDUFF: The distinction I think there,
22 Justice O'Connor, is that in Harris the citizen wanted an
23 abortion paid by the Government that she would be
24 receiving on the free market of something she chose to
25 obtain. Here --

1 QUESTION: There was considered, I thought the
2 circumstances were that it was medically necessary.

3 MR. McDUFF: Yes, but it was done through the
4 governmental program of medicaid, is what the citizen was
5 seeking.

6 Here, by contrast, where the -- the petitioner
7 has been brought into the court system, where the State
8 has set up the exclusive mechanism for terminating her
9 parental rights, and all she is asking is that she receive
10 the same protections that have been set up by that
11 system --

12 QUESTION: Well, how much --

13 MR. McDUFF: -- that a wealthier person would
14 receive.

15 QUESTION: How much weight do we give to this
16 exclusive method for termination? In many States the only
17 way to foreclose on one's home is by a court proceeding, a
18 foreclosure of a mortgage. Now, would you distinguish
19 that --

20 MR. McDUFF: Yes.

21 QUESTION: The person says, this home is
22 absolutely essential to me. I'm raising my kids in it,
23 and if I lose it, it means my whole family life goes.

24 MR. McDUFF: Yes, and we're not basing our claim
25 solely on the fact that the State has this exclusive

1 power, but we are basing it in part.

2 The difference between our case and the case you
3 cite, I think, is the fact that housing and ownership of
4 land does not have the same constitutional status as the
5 relationship with one's children, and this Court said that
6 in Lindsey v. Normet, I think, when talking about how
7 housing does not have the sort of constitutional magnitude
8 that exists in other cases like this.

9 QUESTION: You think that's right?

10 QUESTION: And why is that?

11 QUESTION: Yes, I was about to ask, why --

12 QUESTION: Why is that?

13 QUESTION: Why doesn't it have the same
14 constitutional magnitude? It sounds important to me.

15 MR. McDUFF: Oh, certainly it's important, but I
16 think that -- I think this Court's long line of decisions
17 have noted that family relationships between children and
18 parents are of a much greater constitutional magnitude,
19 and the notion of liberty --

20 QUESTION: You mean to tell me that if I am --
21 let's say I am dismissed by an employer allegedly for
22 sexual abuse of a child committed to my care as an
23 employee, my reputation is ruined, I pay millions of
24 dollars in damages in a civil suit, I am unemployable in
25 the future, in that kind of a situation the State would

1 not have to pay for an appeal?

2 MR. McDUFF: There would be less of a case in
3 that situation --

4 QUESTION: Less of a --

5 MR. McDUFF: -- than we have here.

6 QUESTION: Less of a case than --

7 MR. McDUFF: Yes, less of an argument.

8 QUESTION: -- here?

9 MR. McDUFF: Oh, yes. I think less of an
10 argument, because the right here -- for example, in the
11 case you just posit, Justice Scalia, if someone goes into
12 court and tries to take away some privilege of a person
13 because of these types of accusations, as long as they're
14 not criminal --

15 QUESTION: Is that right?

16 MR. McDUFF: -- there's no clear and convincing
17 evidence standard. Here, the Court has held in Santosky,
18 in Lassiter where the court discussed the right to
19 counsel, has held the determination of parental rights
20 works a grievous harm that is unlike no other save,
21 perhaps, involuntary incarceration.

22 QUESTION: I'm just asking whether it's true, is
23 what I'm asking.

24 MR. McDUFF: Oh, yes. Yes.

25 QUESTION: It's true? Not just that we said it,

1 but that it's true?

2 MR. McDUFF: Oh.

3 (Laughter.)

4 QUESTION: You distinguish in response to
5 Justice O'Connor the custody case from the deprivation
6 permanently of parental status on the basis of the
7 permanence of the latter. Well, what about establishing
8 parental relationship? What about paternity proceedings?

9 Suppose there's a finding of paternity in a
10 district, in a lower court, is the defendant in that case,
11 by your reasoning, because of the permanence of that
12 determination, entitled to a free transcript?

13 MR. McDUFF: I think paternity is much closer to
14 what we have here. Now, there's one difference, and I'm
15 not -- I don't know this in detail, but my understanding
16 is that now, with the new DNA technology, that paternity
17 can be established or disestablished with something close
18 to certainty, so that the -- I think the court can take
19 into account --

20 QUESTION: Well, let's --

21 MR. McDUFF: -- the appropriateness of the --

22 QUESTION: Before that, let's say --

23 MR. McDUFF: Yes.

24 QUESTION: -- it was just that it was shown by a
25 preponderance of the evidence, not clear and convincing,

1 because as far as I know, clear and convincing --

2 MR. McDUFF: Right.

3 QUESTION: -- is not required to establish
4 paternity, and then the defendant says, for the rest of my
5 life I will have to support this child, whatever rights a
6 child has under the law, those rights I will have to
7 satisfy, and I don't want that for the rest of my life, so
8 give me a free transcript.

9 MR. McDUFF: I think paternity is very close to
10 the case we have here, yes.

11 QUESTION: Is it -- would you make any
12 distinction between the two?

13 MR. McDUFF: I --

14 QUESTION: So that if we hold for you, then when
15 the next case is paternity, we have to hold that too?

16 MR. McDUFF: I think -- I think one distinction
17 would be that in a parental termination case you do have a
18 constitutionally imposed standard of clear and convincing
19 evidence in which appellate review -- in which there is a
20 role for appellate review in assuring that is carried out,
21 as opposed to the parental termination, where you do not
22 have a -- I mean, as opposed to the paternity, where you
23 do not have a constitutionally imposed standard, and I
24 note in this connection a number of times this Court has
25 said that, for example, in the punitive damages cases,

1 that where a State establishes appellate review, it can
2 play a role in protecting constitutional rights, and so I
3 think that argument exists here that wouldn't exist in the
4 paternity case with respect to the level of evidence
5 that's required.

6 QUESTION: Well, do you want to take that as a
7 general rule, that whenever the constitution is said to
8 impose a higher burden of proof, that the right to sort of
9 economic equality in the vindication of one's position is
10 going to follow?

11 MR. McDUFF: I think that is certainly a way the
12 Court could draw the line in future cases.

13 Now, again though, we are not asking for
14 economic equality in presenting the case. I mean, this
15 Court's decision in Ross --

16 QUESTION: Well, so far as the issue before
17 us --

18 MR. McDUFF: Yes.

19 QUESTION: -- is concerned you are.

20 MR. McDUFF: Yes. Yes.

21 QUESTION: Yes.

22 MR. McDUFF: Yes, and I'm referring
23 specifically, though, to --

24 QUESTION: Why not counsel? Why shouldn't she
25 be entitled, if this is that significant, to have counsel

1 on the appeal?

2 MR. McDUFF: Well, I think because of the
3 reasoning this Court expressed in the majority opinion in
4 Ross v. Moffitt. I mean, the Equal Protection Clause.

5 Although that wasn't the context of the criminal
6 case, I think the reasoning is applicable here, that the
7 Equal Protection Clause does not give a person the right
8 to duplicate the legal arsenal of a wealthier person in
9 presenting the case, but it does, the Fourteenth Amendment
10 does give a right to present the case in the first place
11 where the interest is important and where the State has
12 set up these mechanisms for promoting accuracy and for
13 correcting injustices.

14 The --

15 QUESTION: If we find that the Equal Protection
16 argument you make is unavailing, that is to say that it is
17 not unreasonable to make this distinction, does that not
18 necessarily determine also the invalidity of your due
19 process argument?

20 I mean, I take it you're making a due process
21 argument as well as an equal protection argument.

22 MR. McDUFF: Yes. Yes.

23 QUESTION: And I'm basically asking, is there a
24 difference between the two? Once we have said that it's
25 not -- I'm assuming we said that it's not unreasonable to

1 make that distinction. Wouldn't the due process argument
2 fail as well, or would it?

3 MR. McDUFF: I don't think so, and of course
4 the -- I mean, the Griffin line of cases has employed both
5 the Due Process and Equal Protection Clauses, and I think
6 the difference, I guess, is -- was expressed by this
7 Court's majority opinion in *Evitts v. Lucey*, describing
8 the Griffin line, where it said the due process claim is
9 based on the fact that the State has set up these
10 appellate procedures to promote accuracy and so forth, and
11 therefore the State acts arbitrarily towards a citizen
12 when it takes them away, in effect, and when it does not
13 give the citizen the full benefit of that panoply of
14 protection.

15 QUESTION: Even though we've said it's
16 reasonable for equal protection purposes, that's --

17 MR. McDUFF: I mean, you do have a point in the
18 sense that in the Griffin line the two have gone together,
19 but I do think it's a separate analysis.

20 I mean, if the State has set this up, and if the
21 State is telling a person that it should -- that it has
22 made these -- this level of review available and then -- I
23 do think it's an arbitrary action, even though you might
24 consider it's, quote, rational for equal protection
25 purposes.

1 QUESTION: Is the real problem with this case
2 that the judge didn't give reasons, the trial judge, and
3 did you preserve that as an independent ground for
4 alleging a constitutional violation at any point?

5 MR. McDUFF: There is --

6 QUESTION: The judge just doesn't give a reason.

7 MR. McDUFF: The judge's -- the judge's written
8 order came after the trial was over, and so it can be
9 raised on appeal, and will be if an appeal is permitted.

10 QUESTION: But you're not making that argument
11 here. That's a separate, independent constitutional
12 violation, a failure to give reasons.

13 MR. McDUFF: We're not making any merits
14 arguments --

15 QUESTION: Well, you could make that argument
16 without a transcript.

17 MR. McDUFF: Yes. Yes.

18 QUESTION: Can I go back --

19 QUESTION: Can I ask you --

20 QUESTION: Please.

21 QUESTION: -- just a sort of variation of
22 Justice Kennedy's question. In the Lassiter case, the
23 Court refused to hold that a person like your client is
24 entitled in all cases to counsel, but did indicate on a
25 case-by-case basis counsel might be required in some

1 situations.

2 Supposing in this case, instead of a one-line
3 order rejecting your claim, the trial judge had made
4 detailed findings of fact saying that he relied on the
5 testimony of so-and-so to the effect of blah, blah, blah,
6 and he gave a very careful opinion and analysis of the
7 reasons, and you could tell what the basis of the decision
8 was and what the evidentiary support for it was. Would
9 you still say you were entitled to counsel in that
10 situation -- I mean, entitled to a transcript in that
11 situation?

12 MR. McDUFF: I think we could. I don't think it
13 would be as strong an argument, but yes, I think as long
14 as Mississippi supreme court requires a transcript to
15 review contentions that the trial judge's findings and
16 conclusions were unsupported by the evidence or contrary
17 to the evidence, and assuming that argument could still be
18 made after this opinion, yes, we would still have the same
19 contention.

20 QUESTION: The other is the question whether you
21 really come within the rule of the due process cases,
22 because I thought the rule in the due process cases was
23 that the State could not on one side of it's -- from one
24 side of it's mouth say, you have a right to an appeal
25 here, you're entitled to be in court, and on the other

1 hand say, but aha, there is some barrier which we are
2 erecting which precludes you from taking advantage of this
3 appeal right.

4 Here, what the State is saying is, nobody
5 without the cost of a transcript, or nobody without a
6 transcript in his hand, has a right to appeal. It's a
7 condition precedent for the appellate right in the first
8 place. So that it seems to me you're not within the due
9 process cases reasoning, and it seems to me you've got to
10 stand or fall on equal protection.

11 MR. McDUFF: I don't think so, I mean, because
12 the fact that the State says yes, you have to have a
13 transcript in the beginning to take the appeal is simply a
14 procedural rule that it imposes, and because it conditions
15 it on this \$2 payment per page to a court reporter, I
16 think it is the same sort of barrier that you would have,
17 and that's why I think Griffin and its -- that line of
18 cases went off not only on equal protection but on due
19 process.

20 QUESTION: Mr. McDuff, as a practical matter,
21 what is the difference between a decree of nonparenthood,
22 as in this case, and a decree as sometimes occurs in cases
23 of no visitation rights, no custody and no visitation
24 rights? What does this individual lose that a parent who
25 is denied custody and visitation rights doesn't lose?

1 MR. McDUFF: The parent who is denied custody
2 and visitation rights can later petition to regain them if
3 conditions change, and depending on the order may still be
4 able to have some contact with the child over the
5 telephone, or letters, or still participate in decisions.

6 QUESTION: Well, that would happen here. Just
7 because the State declares you're a nonparent doesn't mean
8 you vanish. I assume you could still --

9 MR. McDUFF: It does mean that you are erased
10 from the child's life as their parent save for any grace
11 given by the ex-husband and the new mother, who I guess
12 could allow the children to visit with you, but
13 otherwise --

14 QUESTION: That's the same as no custody and no
15 visitation rights.

16 MR. McDUFF: But with no custody and no
17 visitation you can petition when conditions change. With
18 the termination of parental rights, as this Court said in
19 Santosky is, one of the reasons it imposes the clear and
20 convincing evidence rule, it is final and irrevocable.

21 The chancery court's order here illustrates it.
22 I mean, it ordered that the name of my client be taken off
23 the children's birth certificate as their mother and
24 replaced by the name of the new mother. Now, that's
25 symbolic, but I think it symbolizes the dramatic

1 difference here, and that's why I think this Court ordered
2 clear and convincing evidence as the appropriate standard
3 in these cases, but it has not been ordered in custody
4 cases of the type you're talking about.

5 The --

6 QUESTION: You made an analogy to the criminal
7 proceeding in terms of the impact on the person, so you
8 said what -- you're really asking for an extension of the
9 Griffin line. I think that's what you said.

10 MR. McDUFF: We think --

11 QUESTION: That deprivation of parental status
12 is as severe as a \$250 fine.

13 MR. McDUFF: Yes.

14 QUESTION: But you don't go all the way, because
15 Griffin and Douglas came together, and I think you are
16 recognizing that right to counsel is not something that
17 would be automatic.

18 MR. McDUFF: Oh, that's correct, but I think
19 that's also -- that's true in the Griffin line of cases.
20 For example, in Mayer v. City of Chicago the Court held
21 that a transcript is necessary for a -- an appeal of a
22 convic -- a misdemeanor conviction in which no jail time
23 is imposed, but the Court said in Scott v. Illinois that
24 counsel was not required, so I think that they are not
25 coextensive in terms of the breadth of the constitutional

1 principles. The --

2 QUESTION: You mentioned that you weren't sure
3 about the paternity situation. Is there -- and you are
4 attempting to distinguish all other civil proceedings. Is
5 there anything else that you would say is like this?

6 MR. McDUFF: Involuntary civil commitment, I
7 think, is of this magnitude.

8 QUESTION: May I ask --

9 QUESTION: Why is that the line? What if I feel
10 differently? What if I feel it's really bad, and maybe
11 even worse for some people to lose all their worldly
12 possessions? How do I decide which cases to -- just my
13 feeling about parenthood, or my feeling about worldly
14 possessions?

15 MR. McDUFF: Justice Scalia, I think through the
16 same process this Court has gone through in the cases, for
17 example, involving the clear and convincing evidence
18 standard, where it has imposed them as a constitutional
19 matter, in involuntary civil --

20 QUESTION: I wasn't here then, so I don't know
21 what they did.

22 (Laughter.)

23 QUESTION: I thought maybe you could help me out
24 as to how we came to those conclusions.

25 MR. McDUFF: I think it's the traditional sort

1 of Fourteenth Amendment analysis where you --

2 QUESTION: How I feel about it, essentially.

3 QUESTION: Read the opinions.

4 (Laughter.)

5 QUESTION: Mr. McDuff, may I ask a question
6 about Mississippi practice? Who paid the guardian ad
7 litem?

8 MR. McDUFF: The guardian ad litem's payment was
9 awarded as costs by the chancery court against the
10 plaintiff, who's the ex-husband.

11 QUESTION: So your client was charged \$500 for
12 the guardian ad litem?

13 MR. McDUFF: No, I'm sorry, it was awarded
14 against the -- the costs were awarded against the person
15 who actually prevailed in the case --

16 QUESTION: I see.

17 MR. McDUFF: -- in this instance, who is the
18 father.

19 QUESTION: And so the guardian was paid by the
20 successful party.

21 MR. McDUFF: Yes.

22 QUESTION: If you -- go ahead.

23 QUESTION: Could the guardian have appealed?

24 MR. McDUFF: Yes.

25 QUESTION: And who would have paid for the cost

1 of the transcript if the guardian had appealed?

2 MR. McDUFF: I -- there were several
3 possibilities there. I guess the court, either the
4 chancery court or the supreme court could have ordered one
5 of the parties to pay it, or I think the guardian might
6 have. If the guardian could not afford it, and if the
7 guardian --

8 QUESTION: Well, the guardian certainly doesn't
9 have any interest in paying it.

10 MR. McDUFF: Right. The -- I think the same
11 principle that we are invoking here might be available if
12 the guardian is able to claim, as the guardian could do in
13 claiming the rights of the child.

14 QUESTION: This is an -- I'm sorry, just one
15 more. This is an infant, two or three -- how old was the
16 child here?

17 MR. McDUFF: Five and seven, I believe --

18 QUESTION: I see.

19 MR. McDUFF: -- at the time of the termination.

20 QUESTION: If your client had succeeded in
21 raising the money to pay the -- for the transcript, could
22 she have -- and was successful on appeal, could she have
23 recovered that as part of her costs?

24 MR. McDUFF: Yes. Yes, and we cite in our reply
25 brief the provision of the Mississippi rules to that

1 effect.

2 QUESTION: What are the instances, or are there
3 instances in which the State does pay for the cost of the
4 transcript?

5 MR. McDUFF: In Mississippi, it is in criminal
6 cases.

7 QUESTION: Pardon me, in a civil case.

8 MR. McDUFF: There's a Mississippi statute that
9 provides that it will be paid for in involuntary civil
10 commitments.

11 Now, the Mississippi supreme court has a stated
12 principle that it stated in this case that in forma
13 pauperis appeals are not allowed in any civil case, but in
14 fact there is this statute that apparently the court was
15 not considering when it made that statement both in this
16 case and in several prior cases.

17 The -- Justice Kennedy, you earlier were talking
18 about the Equal Protection Clause and whether -- and what
19 would happen if the Court found that the Mississippi
20 scheme here was rational. We actually do think that,
21 because of the interest involved here, that there is
22 something greater than rational relationship test, and
23 something greater than minimal scrutiny, and that at the
24 very least intermediate scrutiny would be appropriate
25 give, number 1, the fundamental interest in the parental

1 right, and the fundamental interest in what this Court has
2 called an accurate determination regarding that right.

3 And specifically I'm referring to the Lassiter
4 case, so for that reason we think that the justification
5 offered by the State, particularly this \$2-per-page thing,
6 which is not required at all for the State to continue --
7 for it to keep its court system going, and does not
8 promote the State's interest in accuracy which it has
9 expressed by providing these appellate courts, that the
10 State has not put forward a persuasive or substantial --

11 QUESTION: Well, are you suggesting that the
12 court -- that courts could employ reporters at the same
13 salaries if they weren't allowed to charge for
14 transcripts?

15 MR. McDUFF: I don't know the answer to that,
16 Mr. Chief Justice. I think they could, but I think they
17 certainly would be able to keep them if, for example, they
18 continued paying them the \$33,000 a year they receive,
19 continue to allow them to receive \$2 per page for the many
20 paid transcripts they do during the year, but said that
21 these in forma pauperis transcripts are going to be part
22 of your duty as a salaried State employee.

23 I reserve the remainder of my time.

24 QUESTION: Very well, Mr. McDuff.

25 Mr. Moore.

1 ORAL ARGUMENT OF RICKEY T. MOORE

2 ON BEHALF OF THE RESPONDENTS

3 MR. MOORE: Mr. Chief Justice, and may it please
4 the Court:

5 The issue in this case is whether or not the
6 State is going to have to subsidize the cost of appeal of
7 an indigent appealing termination of parental rights, and
8 we contend that it does not either on due process or equal
9 protection grounds.

10 From a due process point of view, previous
11 longstanding decisions of this Court have held that
12 appellate review is not necessary for due process
13 purposes, and as to the equal protection claim, this
14 doesn't fit within any of the recognized equal protection
15 type claims.

16 First of all, there's no disparate treatment
17 among litigants. Everybody's treated the same.
18 Everybody's required to prepay the cost of the appeal.

19 Second, there's no suspect class involved,
20 because previous opinions of this Court have held that the
21 poor are not a suspect class for equal protection purposes
22 even when fundamental rights are involved.

23 And third, there's no impingement of a
24 fundamental right in this case because the only
25 interference with the parent-child relationship is the

1 statute that allows the State to terminate parental rights
2 under certain circumstances.

3 The only issue in this case is what procedural
4 due process must be provided prior to that termination,
5 and that either goes back to a Mathews analysis of whether
6 or not the proceedings that are provided are fundamentally
7 fair, and then it would seem the question --

8 QUESTION: May I ask just one question? It is
9 true, is it not, that the child has to be represented
10 separately in the proceeding?

11 MR. MOORE: Yes, Your Honor.

12 QUESTION: And that's a matter of due process,
13 too, I would suppose, because the child's rights are as
14 vitally affected as either set of parents.

15 MR. MOORE: The statute requires --

16 QUESTION: At least the statute does require it,
17 and what is the -- and therefore there has to be a
18 guardian ad litem appointed if the child is a minor, and
19 what if the guardian -- I know it's -- it would be an
20 unusual case, but what if the guardian took the position
21 that the natural mother was a better parent and wanted to
22 appeal an adverse decision, would the guardian have to
23 advance the transcript cost?

24 MR. MOORE: That is unclear. The guardian is
25 paid pursuant to the -- a rule, I think it's Rule 17 of

1 the Appellate Procedures, and there is some statements
2 about the trial judge being able to enter any other
3 orders, which might imply there might be a possibility, if
4 the trial judge decided that that was in the best --

5 QUESTION: If the interest of justice required,
6 in this unusual case the judge might conceivably order the
7 State to pay the -- order a transcript if the guardian
8 indicated a desire to appeal.

9 MR. MOORE: Well, I think it simply -- it's
10 unclear. It seems to me there might be an argument to
11 that effect, but as to whether or not that would be
12 accepted, I don't know.

13 QUESTION: Would it be wrong for the court to
14 say that a guardian is entitled to an attorney, the child
15 is entitled to an attorney as an equal protection matter
16 because a fundamental right is implicated here?

17 MR. MOORE: I'm sorry, I didn't -- I didn't get
18 the question.

19 QUESTION: Suppose counsel were required in a
20 termination proceeding such as this, and the court
21 announced that the requirement was pursuant to the Equal
22 Protection Clause in the case of an indigent party, would
23 that be an incorrect statement of the law? I mean, i.e.,
24 it would be an alternative, alternative ground for -- to
25 due process, to Mathews v. Eldridge. Is it illogical to

1 say that?

2 MR. MOORE: If you're asking, if the court had
3 ordered an attorney be appointed for the mother, or the
4 child, then --

5 QUESTION: For the child. You said it was
6 required under Mathews v. Eldridge that there had to be an
7 attorney. My only question is, would it also be a
8 requirement under the Equal Protection Clause in the case
9 of an indigent person?

10 MR. MOORE: No, what I was saying is, the
11 attorney is -- has to be appointed for the child based on
12 the statute, the Mississippi statutes that deal with
13 termination.

14 QUESTION: It's not required by Mathews v.
15 Eldridge --

16 MR. MOORE: No.

17 QUESTION: -- to have an attorney, in your view?

18 MR. MOORE: No.

19 QUESTION: Or due process, no due process
20 requirement.

21 MR. MOORE: No. I think that's the Lassiter
22 case, or -- well, Lassiter leaves it open for a potential
23 in certain circumstances based on the balancing test that
24 an attorney might be required.

25 QUESTION: Mathews really doesn't address the

1 question of when you should have an attorney, does it?
2 It's more the type of hearing you should have.

3 MR. MOORE: Right. Mathews is just whether or
4 not fundamental fairness is met, and whether or not --

5 QUESTION: Yes.

6 MR. MOORE: -- additional safeguards have to be
7 provided. I also think that case assumes that fundamental
8 fairness can be met at the trial court level, and that an
9 appeal is not required, which is consistent with the older
10 cases saying that appellate review is not required for due
11 process purposes.

12 QUESTION: Counsel, do you concede that a
13 fundamental right is at issue here in the case when you
14 deprive a parent by State action of parental rights?

15 MR. MOORE: We would concede that the parent-
16 child relationship in the past has been held by this Court
17 to be a fundamental interest.

18 However, in this case we question whether or not
19 there is a fundamental right at this point in the
20 proceedings, and that's because at this point in all of
21 these proceedings there is a judgment by a State trial
22 court terminating this person's parental rights, and based
23 on the line of cases that deal with -- Stanley v.
24 Illinois, and the Quillion case, and Lehrer case dealing
25 with biological parents, it seems to indicate that

1 parental conduct determines parental interest, and it
2 would seem at this point that her interest would be at
3 least less than fundamental. We don't know what they are,
4 but it would be --

5 QUESTION: Well, I don't know why the interest
6 wouldn't remain the same throughout the proceeding. It's
7 either fundamental or it isn't, and maybe some heightened
8 scrutiny is required of procedures that the State invokes.

9 MR. MOORE: Well, the argument is based, again,
10 on those -- the biological father cases, and it seems like
11 at this point --

12 QUESTION: Hasn't the Court already decided in
13 Santosky that there is something about depriving one of
14 parental status that's not like anything else, and
15 therefore, instead of the ordinary preponderance test,
16 there is a clear and convincing evidence test? Isn't --
17 whether you agree with that or not, it is the precedent of
18 this Court.

19 MR. MOORE: Yes, I don't disagree with that, but
20 Santosky is talking about in the trial itself. It --

21 QUESTION: Yes, but in order to -- why did the
22 Court say that a clear and convincing evidence standard is
23 required, instead of the ordinary preponderance? What was
24 the basis for that?

25 MR. MOORE: Well, it may be the greater

1 interest, I'm not arguing with that, in the trial stage,
2 but what I'm arguing --

3 QUESTION: It may be -- what did the Court --
4 why did the Court say that as a matter of the Federal
5 Constitution, in order to deprive a parent of parental
6 status, the proof standard that the -- that must be met is
7 clear and convincing?

8 MR. MOORE: I assume that the interest were
9 considered somewhat more than the normal. I don't
10 remember specifically from the case whether or not it
11 specifically deals with that.

12 QUESTION: Well, if the Court said that because
13 there is a fundamental interest at stake, that is, the
14 parent-child relationship is a fundamental interest --
15 let's assume that's what the Court said, as I think it
16 did -- then the parent's loss at the trial level doesn't
17 mean the interest is changed, as Justice O'Connor
18 suggested. The interest remains the same.

19 MR. MOORE: Well, again, my argument is based on
20 those line of cases that talk about the biological
21 connection alone is not sufficient to raise any interest,
22 and the parent's conduct determines that, so when you have
23 a trial court determining that the conduct of the parent
24 is such that the parental right should be terminated, then
25 it would seem like at that point the presumption of a

1 fundamental right might be lessened, at least.

2 QUESTION: Well, wouldn't the same reasoning
3 that supported the Court's statement that this higher
4 standard -- why do we have clear and convincing as opposed
5 to preponderance for these cases? What would be the
6 reason for doing that? It's an extra check, right,
7 because something fundamental is involved.

8 MR. MOORE: Yes, I believe --

9 QUESTION: So the appellate review is similarly
10 an extra check.

11 MR. MOORE: I believe the higher standard is --
12 within the case was to lessen the risk of error.

13 QUESTION: And isn't that what the argument is
14 here? You lessen the risk of error by allowing the
15 appeal, and the argument was that there was insufficient
16 evidence to meet this high standard of proof.

17 MR. MOORE: Theoretically, any appeal would be
18 designed to lessen the risk of error, an appeal of any
19 case.

20 QUESTION: I suppose that would have been true
21 in *Ross v. Moffitt*, too, where you petition for certiorari
22 to the highest court of a State from the decision of an
23 intermediate court of appeal.

24 MR. MOORE: Yes, that -- yes, Your Honor.

25 QUESTION: Let's assume that the decisions of

1 this Court establish that the -- that this is a
2 fundamental right, fundamental relation. Then the equal
3 protection differential here between those who can get the
4 transcript and those who cannot does in one sense impinge
5 on the fundamental right, does it not?

6 MR. MOORE: I would disagree with that, because
7 I think that it's not an impingement of the parent-child
8 relationship, and it's certainly not a direct and
9 substantial impingement, which the Zablocki case and
10 others require for this kind of constitutional violation.
11 It's purely the procedural matter as to what procedures
12 they're entitled to, and in the procedural analysis in the
13 Mathews case, the interest of the parent is taken into
14 consideration in the first part of that balancing test.

15 We've taken the position that in effect what
16 petitioner is doing here is either attempting to extend
17 Boddie v. Connecticut to the appellate level, or
18 attempting to find an exception to the Ortwein case and,
19 based on their arguments, they seem to be making a purely
20 wealth disparity argument which would potentially bring in
21 all cases of a civil nature, especially those involving
22 rights that have been determined to be a --

23 QUESTION: But that's not the argument that was
24 made, and I may have misunderstood the petitioner's brief,
25 but I thought they were saying, we're trying to bracket

1 our case not with Boddie but with Griffin, that we think
2 that the impact on our client, permanent deprivation of
3 parental status, ought to be treated the same as a
4 criminal conviction, that there's no other civil case like
5 that that declares a woman a nonparent.

6 MR. MOORE: Well, I think based on the use of
7 the Griffin case and what you're arguing for the rights,
8 it's very hard to distinguish between fundamental rights
9 at that point, so you get into a situation of having to
10 kind of do a hierarchy of fundamental rights and then
11 decide where you cut off the appeals and where you don't.

12 QUESTION: But we asked the petitioner that
13 question, and the answer was, there's only one other thing
14 that the petitioner would put in that same box, and that's
15 civil commitment, involuntary civil commitment, so now you
16 want them -- you want to make their argument something
17 that they are not attempting to do with it.

18 MR. MOORE: I'm saying that that argument would
19 be very hard to implement. I think it implicates other
20 things. It would be very hard as a practical matter to
21 separate the one from the other interest. The result of
22 this would be, I think, that other courts would end up
23 interpreting this to include other fundamental rights and
24 other important rights, and in that regard, in the 1995 in
25 the State of Mississippi there were almost 40,000 domestic

1 relation cases filed in the lower courts, so if they were
2 expanded --

3 QUESTION: Yes, but how many of those involve
4 termination of parental rights?

5 MR. MOORE: There were 194 of these parental
6 rights cases.

7 QUESTION: Yes.

8 MR. MOORE: And there were a little over 6,000
9 paternity cases, and that's compared to a little over
10 15,000 criminal cases.

11 It's our contention that there --

12 QUESTION: But as far as the paternity cases are
13 concerned, there's no -- at least the -- in the trial
14 court there's no analogy to the clear and convincing
15 requirement of Santosky. I think it's just -- that has
16 been rejected for paternity rights. There is just a
17 preponderance of the evidence.

18 MR. MOORE: I don't recall on that, but the
19 paternity cases are kind of mirror images of the
20 termination cases. Just like in Boddie, the fundamental
21 right is a right to marry, but it involves a divorce, so
22 it would be hard to separate the two. I don't see how you
23 could separate the two.

24 QUESTION: But isn't it true that in the
25 paternity cases the issue is pretty well determined by

1 scientific evidence now, isn't it, rather -- you have a
2 rather narrow actual issue?

3 MR. MOORE: Yes.

4 QUESTION: Whereas this case could be a law and
5 record case, where you believe some witnesses and you
6 don't believe others, and all that.

7 MR. MOORE: A lot of those, as I understand,
8 probably go off on -- on the test.

9 QUESTION: Yes.

10 MR. MOORE: If the tests come back positive,
11 then the potential father admits it and doesn't fight it,
12 so --

13 QUESTION: Mr. Moore, isn't the paternity case
14 more like any civil case? I mean, what paternity is about
15 is money. You have to pay to support the child. You
16 don't -- they don't require you to love the child, to take
17 the child to soccer games. All you have to do is, if
18 you're saddled with a paternity decree, is to pay money.
19 That's something of a different quality than to say, you
20 have no parental relationship to this child. You are a
21 stranger to the child that you bore. That isn't about
22 money.

23 MR. MOORE: Well, I think, though, from a
24 paternity point of view it's just the opposite, I guess,
25 the -- in the sense that the person who is in the

1 paternity case doesn't want to be determined to be the
2 father.

3 QUESTION: Well, people don't want to lose a
4 damage suit, either, but all that's at stake is money.

5 MR. MOORE: Well, there's also the creation of a
6 legal relationship against the will of the individual as
7 well.

8 QUESTION: Well, in a -- I mean, it could
9 certainly ruin the reputation of someone who is decreed to
10 be the father of a child whose father he claims not to be.

11 MR. MOORE: Yes, Your Honor, there's other
12 social stigmas, or whatever, that would be associated with
13 it.

14 There's also, as far as the trial itself goes,
15 we've said that this is a fundamentally fair proceeding
16 that are had in these cases, and it's in a State trial
17 court in front of the judge, who's trained in the law.
18 The parties are allowed to submit evidence, and witnesses,
19 and documents, and allowed to cross-examine, and redirect,
20 and direct examination of witnesses, and there's nothing
21 been suggested by the petitioner in here that these are
22 not fundamentally fair proceedings and meet the
23 requirements --

24 QUESTION: No, but your rule would apply even if
25 that were the argument. Even if the petitioner was

1 arguing the judge wouldn't let us put on any witnesses.
2 She still couldn't appeal.

3 MR. MOORE: No, she could, in that regard. This
4 case involves, as was mentioned earlier -- the claim here
5 on the appeal is, it's not based on substantial evidence.

6 QUESTION: No, I understand in this case, but if
7 it were a case in which the mother claimed that the judge
8 wouldn't listen to me, he wouldn't let me put on any
9 evidence, and he entered his order without any evidence at
10 all, she still couldn't appeal, even if she made those
11 arguments.

12 MR. MOORE: You don't need a transcript for that
13 appeal.

14 QUESTION: Well, how can she establish what
15 happened at that trial if she doesn't have a transcript?

16 MR. MOORE: The rule that requires the
17 transcript in this particular case only requires the whole
18 transcript when the issue is raised here. But other than
19 that, all you need is sufficient information to raise the
20 issue that you have, and you can either do that by, in
21 this particular case by agreement of counsel as to what
22 happened, or potentially it might take one page of the
23 transcript, when the judge refused to let her cross-
24 examine witnesses, or submit witnesses.

25 QUESTION: I thought the State statute required

1 the full transcript.

2 MR. MOORE: No, only when the appeal is based on
3 lack of substantial evidence.

4 QUESTION: Ah, I see.

5 MR. MOORE: Then the court has to have all of it
6 to make the determination.

7 QUESTION: I see, but if the challenge is that
8 the trial or the judge was biased, or something like
9 that -- well, but even then, I suppose you might need the
10 transcript to establish that.

11 But you're saying if the error is one that can
12 be established without a transcript, she could appeal.

13 MR. MOORE: Yes. If it could be established
14 without the transcript she could certainly appeal, and in
15 other cases, as I said, it might not take but two or three
16 pages of the transcript.

17 QUESTION: The transcript is only required --
18 apart from the practicality of her being able to establish
19 bias, for example, without the whole transcript, she could
20 claim bias and get an appeal without the transcript. The
21 transcript is only required by statute when substantiality
22 of the evidence is at issue, right, sufficiency of the
23 evidence?

24 MR. MOORE: That's the only time the rule or the
25 statute says that --

1 QUESTION: Okay.

2 MR. MOORE: -- you have to have a full
3 transcript.

4 QUESTION: So she can go up without one for
5 everything else, even though for some of those she may not
6 win without the transcript. I mean, as a practical
7 matter.

8 You don't have to concede that.

9 QUESTION: Why doesn't that cut in favor of the
10 other side? I mean, it won't cost the State much money
11 then.

12 I mean, in most cases she'll be able to afford
13 the \$6, and if she really couldn't afford the \$6, I mean,
14 if that was true, she really couldn't afford it, it costs
15 the State \$6, not a big deal.

16 I mean, so it isn't much burden on the State,
17 almost no burden. It means a lot to her. Have a
18 certificate of probable cause, say, weed out the baddies,
19 you know, no claim.

20 What's the major problem for the State?

21 MR. MOORE: I think as a practical matter almost
22 all of these appeals will be where they require the entire
23 transcript, because they're based on lack of substantial
24 evidence. It would be unusual for a claim that a State
25 trial court doesn't provide a fundamentally fair

1 proceeding, based on the procedures used.

2 QUESTION: Is there any proceeding in
3 Mississippi in connection with an appeal where there would
4 be a certificate of probable cause, at least by that name?

5 MR. MOORE: Not that I'm aware of, no, Your
6 Honor.

7 QUESTION: Are there other States that do not
8 provide a free transcript to a poor person for a
9 deprivation of parental status case?

10 MR. MOORE: I don't know specifically on that.
11 I know there are some citations in petitioner's brief
12 about States that do. I don't think they cite all of the
13 States as doing that, though.

14 QUESTION: And there's nothing short of a full
15 transcript that could be a transcript of part, but
16 Mississippi doesn't tape the proceeding, does it, keep it
17 on audio tape?

18 MR. MOORE: No. The proceeding would be taken
19 by a court reporter.

20 QUESTION: Yes, but that wouldn't exclude also
21 having an audio tape. But you're telling me they don't.

22 MR. MOORE: It wouldn't exclude it, but I would
23 doubt if there are any court reporters still using audio
24 tapes. I don't know that. I mean, there could be an
25 individual court reporter somewhere that did that, but I

1 wouldn't think so now.

2 The State's interest in this include other
3 things beside the cost --

4 QUESTION: Just one other question of
5 Mississippi proceedings. Is what happened here the norm?
6 That is, all the evidence comes in, and then the judge
7 makes a kind of a boilerplate judgment, repeating the
8 words of the statute, and says, I have found by clear and
9 convincing evidence that this parent is unfit?

10 MR. MOORE: I think the order of the judge in
11 any individual case will be dependent -- depend on that
12 judge. There's not any --

13 QUESTION: Well, from your experience in the
14 State, what is the usual? Is this typical, what we've
15 seen here?

16 MR. MOORE: I don't know. I haven't tried any
17 of these cases actually in --

18 QUESTION: How many circuit judges are there in
19 the State of Mississippi, do you know?

20 MR. MOORE: No, I don't. There are 82 counties,
21 but as far as actual numbers of circuit judges, I don't
22 know.

23 I would point out that in -- when the State is
24 involved in actually prosecuting a termination, there are
25 additional safeguards that take place prior to the filing

1 of the petition in the chancery court, and all of those
2 occur in the youth court, and involve at least four
3 hearings, three of which are judicial in nature, at which
4 the parent is allowed to attend with the assistance of
5 counsel and participate, and that the rights are not
6 terminated of the parent until there have been all of
7 these procedural safeguards taken, and usually it's at
8 least a year after the child has been taken out of the
9 custody of the parents.

10 QUESTION: So are you saying that when the other
11 parent petitions to have a parent declared unfit, there's
12 less protection than when the State does it? The -- that
13 the petitioner in this case did not get the protection
14 that she would have gotten if the State itself, rather
15 than her former husband, had initiated the proceedings?

16 MR. MOORE: Yes. The proceedings are viewed --
17 when the State itself prosecutes a termination, then it's
18 viewed as a little different, because what you're doing
19 there is coming in and eventually terminating the right of
20 the parent so that the child can be adopted by what ends
21 up being strangers, nonrelatives, and it arises here
22 because it's absolutely necessary that the State, the
23 Department of Human Services go in and remove the child
24 from the home because of potential abuse or --

25 QUESTION: But you can remove a child from a

1 home without depriving a parent of parental status.

2 MR. MOORE: Well, it's not always done when the
3 State does it. It's when it becomes necessary. There are
4 several things that the State goes through with the -- an
5 analysis of whether or not it should be brought, obviously
6 children that are taken out, that it's unfeasible to put
7 them back in the home, some of them may be 14 or 15 or
8 16 --

9 QUESTION: But you were explaining from the
10 point of view of the right of the petitioner why she is
11 entitled to less process when it's her ex-husband than
12 when it's the State that is trying to deprive her of
13 parental status.

14 MR. MOORE: Well, the State is simply set up for
15 the State because of the unique situation that the State
16 is in, so in essence more process is provided because of
17 that particular situation, that the State is coming in and
18 taking the child.

19 QUESTION: Do I -- I want to be sure I didn't
20 miss something. In that situation, does the State provide
21 the transcript, when the State initiates the termination
22 proceeding?

23 MR. MOORE: No.

24 QUESTION: No, it still doesn't. So -- I
25 don't -- what is the difference between that proceeding

1 and this in terms of State procedural protections?

2 MR. MOORE: Just that this is done in youth
3 court before a -- an action would be filed in chancery
4 court to actually terminate. There's no termination that
5 takes place in the youth court. It's only judging the
6 status of the child and being able to take the child out
7 of a bad situation if necessary.

8 QUESTION: Well, in this case the complainant,
9 the petitioner was already a noncustodial parent, was she
10 not?

11 MR. MOORE: Yes, Your Honor.

12 QUESTION: I mean, it wasn't as if the custody
13 was taken away from her. It already had been.

14 MR. MOORE: She had lost her custody of the
15 children at the time of the divorce, and this was sometime
16 later when the proceedings to terminate her rights were
17 brought.

18 QUESTION: But your friend says that that can be
19 changed, whereas this can't be changed. Now, is that
20 accurate?

21 MR. MOORE: Well, certainly a parent could go
22 back in and attempt to petition to change custody, that's
23 true.

24 QUESTION: Or modify the decree to provide for
25 visitation rights, which might not have been -- custody

1 decrees are modifiable, is that not right?

2 MR. MOORE: Yes, Your Honor.

3 QUESTION: And a deprivation of parental status
4 is final, not modifiable.

5 MR. MOORE: Yes, the termination would be -- I
6 guess like any other civil case, once the time runs for
7 asking the court to reconsider something, that it would be
8 final, just like any other case. It would be res
9 judicata, probably, from a --

10 QUESTION: I suppose the risk of error present
11 in a case like this is that the trial judge naturally
12 would be influenced by the best interests of the child,
13 and therefore would tend to give custody to the adopting
14 parents, and not apt to make detailed findings about
15 unfitness of the mother whose rights are being terminated.
16 The termination is a condition precedent to the adoption
17 in all these cases, I guess.

18 MR. MOORE: The termination is precedent to the
19 adoption.

20 QUESTION: Yes.

21 MR. MOORE: I would disagree with what the trial
22 judge would do, because I think trial judges take these
23 things very seriously, and I don't think that they would
24 terminate the mother's rights, regardless of the
25 situation, unless they felt it was absolutely justified

1 based on the evidence that's presented.

2 In conclusion, what the petitioner is apparently
3 attempting to do here is create a vast new constitutional
4 right and further federalize domestic relations law, and
5 we submit that that shouldn't be done in the absence of
6 clear constitutional violation, and we further submit that
7 there's been no showing or evidence that a clear
8 constitutional violation exists in this case.

9 Thank you.

10 QUESTION: Thank you, Mr. Moore.

11 Mr. McDuff, you have 4 minutes remaining.

12 REBUTTAL ARGUMENT OF ROBERT B. McDUFF

13 ON BEHALF OF THE PETITIONER

14 MR. McDUFF: Thank you, Mr. Chief Justice.

15 Justice O'Connor, I believe it was in response
16 to questions from you that the Attorney General's Office
17 gave figures about the number of filings of termination
18 cases in the chancery court, and those figures are at page
19 28 of their brief, but those figures are not in the
20 sources they cite on page 28, and we have not seen any
21 such figures about the number of parental termination
22 filings in chancery courts or in the appellate courts.

23 The Mississippi supreme court does keep figures,
24 and we've cited them in our brief, as have our opponents,
25 on the numbers of custody appeals, of which parental

1 termination are a subset, and in 1995 there were 10
2 custody cases decided by the Mississippi supreme court and
3 another six decided by the intermediate court of appeals.

4 QUESTION: Mr. McDuff --

5 MR. McDUFF: Yes.

6 QUESTION: -- what about divorce? That's final.
7 It deals with status. Should we apply the same rule to a
8 divorce decree that you're asserting here?

9 MR. McDUFF: No, sir, and a divorce also is
10 something actually that can be remedied in the future if
11 people want to remarry, plus they can continue to have
12 contact or not contact. There's a level of freedom in the
13 relationship.

14 QUESTION: No, but let's assume it's not a no-
15 fault divorce kind of State. Your reason has to be
16 established. The other person doesn't want to remedy the
17 divorce. The person who's want it fully wants it.

18 If a State -- I gather most of the States, maybe
19 all of them now, have effectively no-fault divorce, but
20 let's assume a State changes that and does not have no-
21 fault divorce. I guess we would have to apply the same
22 rule to divorce, wouldn't we?

23 If the party unwillingly divorced wants to
24 appeal, we would have to allow that appeal IFP.

25 MR. McDUFF: No, I don't think so. I mean, I

1 don't think that involves nearly the kind of termination
2 of an intimate relationship beyond the control of the
3 parent that you have, or beyond the control of the party
4 involved that you have when a child is taken away against
5 your will by State action.

6 QUESTION: Well, I thought that was the
7 rationale of Boddie, that divorce did.

8 MR. McDUFF: The rationale of Boddie, as I
9 understand it, is that divorce, because it involves a
10 marriage relationship, is very important, and because the
11 State has an exclusive monopoly on it, that filing fees
12 that freeze people out are unconstitutional, so I think
13 there is a high status and an important interest here, but
14 I don't think it comes to the kind of grievous injury
15 that's done here.

16 QUESTION: So cutting off a parental relation is
17 a "fundamental" interest, and a right to get a divorce is
18 high, but not fundamental?

19 MR. McDUFF: No, I didn't -- no, I'm sorry, I
20 don't mean to sort of do a gradation there, but in Boddie
21 the people were married and wanted access to the State-
22 created apparatus for obtaining a divorce, and this Court
23 said they can't be frozen out by a certain amount of
24 money, and when you're talking about appeal, I do think
25 that is different.

1 QUESTION: Well, but you have to do a gradation,
2 or then Boddie is going to come out the same way as your
3 case, isn't it, and we'll have transcripts in all divorce
4 cases.

5 MR. McDUFF: No --

6 QUESTION: So that I take it was the thrust of
7 the Chief Justice's question.

8 MR. McDUFF: Yes, and I didn't mean to sort
9 of --

10 QUESTION: And so I think you have to have a
11 hierarchy, or a gradation.

12 MR. McDUFF: And I guess that's what we're
13 saying, is that because of the nature of the harm here as
14 compared to whatever happens in a divorce proceeding, that
15 this is the kind of thing where a transcript will be
16 required and it might not there.

17 QUESTION: On the theory that children are more
18 important than spouses to the individuals involved, is
19 that the theory that causes you to put this on a lower
20 level?

21 MR. McDUFF: No, on the theory that a divorce
22 decree, or the resolution of a divorce case, involves all
23 kinds of complicated mechanisms that the parties have a
24 right to effect in terms of their interrelationship, but
25 here, the person's child is being taken away against their

1 will, and we think it's a qualitative --

2 QUESTION: Are you saying that Boddie is -- or
3 Boddie, I don't know how to pronounce it --

4 QUESTION: It's two D's.

5 QUESTION: -- is a different -- however that
6 comes out, it's a different case because those are the
7 people who say, State, we want you to pay for our divorce,
8 we want something from you, where here the woman is
9 saying, please don't take my child away. She's not coming
10 to the court asking for anything. She just wants to be
11 spared from the State taking away her child.

12 MR. McDUFF: That's correct.

13 QUESTION: So the two cases seem to me quite
14 distinct. However you would come out in Boddie or Boddie,
15 it's not what we're dealing with here.

16 MR. McDUFF: Yes.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr. McDuff.
18 The case is submitted.

19 (Whereupon, at 2:01 p.m., the case in the above-
20 entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

M.L.B., Petitioner v. S.L.J., INDIVIDUALLY AND AS NEXT FRIEND OF THE MINOR CHILDREN, S.L.J. AND M.L.J., ET UX.
CASE NO. 95-853

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Ann Marie Federico*

(REPORTER)