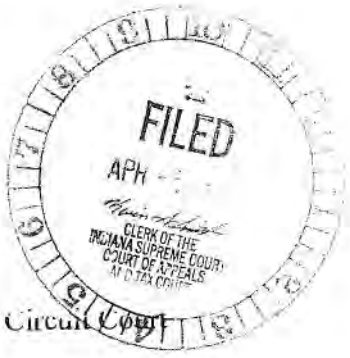

IN THE SUPREME COURT OF INDIANA

Appellate Case No. 03A05-0912-JV-676

IN RE: TERMINATION OF THE PARENT CHILD RELATIONSHIP	
	Appeal from the Bartholomew Circuit Court
I.B. (Minor child)	Juvenile Division
and	Trial Court Cause Number 03C01-0809-JT-2077
M.L., (Mother) Appellant (Respondent Below).	
vs.	The Honorable Heather Mollo, Magistrate
INDIANA DEPARTMENT OF CHILD SERVICES Appellee (Petitioner Below)	The Honorable Stephen R. Heimann, Judge Bartholomew Circuit Court

APPELLEE'S BRIEF IN RESPONSE TO APPELLANT'S PETITION TO TRANSFER

Prepared by:
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QUESTION PRESENTED ON TRANSFER:

DCS states the issue as:

> Does the Mother in this case have a right to compulsory appointment of appellate counsel to challenge the termination of her parental rights when she:
>
> - has demonstrated by her words and actions that she wanted nothing further to do with the case,
> - did not request appellate counsel, and
> - otherwise did not meet her burden for appointment of pauper appellate counsel?

TABLE OF CONTENTS

BACKGROUND AND PRIOR TREATMENT OF ISSUE:

As permitted by Indiana Appellate Rule 57(G)(3), DCS refers the Court to its Appellee's Brief for the *Statement of the Case*, as well as its *Statement of the Facts*.

Appellate Treatment of the Case:

On February 17, 2010, the Court of Appeals affirmed the juvenile court's denial of appointment of pauper appellate counsel. In doing so, the Court noted that there was no constitutional or statutory right to appointment of appellate counsel in termination of parental rights cases, and that the applicable statute makes the appointment of such counsel discretionary with the trial judge. Further, to determine whether the juvenile court abused its discretion, the Court examined the Indiana Appointment of Pauper Counsel statute and found that the mother had not met her burden in this regard. The Court specifically noted:

> that Mother never sought counsel…the evidence demonstrated Mother's lack of interest in retaining her parental relationship and her failure to participate in the termination hearings.
>
> ***
>
> Clearly Mother, who as the trial court noted has not even "requested" the appointment of counsel to appeal the termination order… has not carried her burden.

Termination of Parent-Child Relationship of I.B. v. Indiana Department of Child Services, 922 N.E.2d 62, 67-68 (Ind. Ct. App. 2010).

Mother thereafter filed her petition to transfer. DCS timely responds.

ARGUMENT

There is no right to appointment of appellate counsel in a civil case where one's personal liberty is *not* at stake. Constitutional rights, statutory law, nor policy requires courts to force upon parents legal proceedings they do not want and which they have the right *not* to pursue. In the case at bar, the parent clearly demonstrated the desire to be "left alone".

Here, mother[1] would have the Court assume facts not in evidence. Indeed, the record shows that mother's actions dictate that she wanted to be "left alone" and showed no interest in appealing. She, among other things:

a. never sought appellate counsel and did not participate in the appointment of appellate counsel hearing *(Appellant's App. 4-8)*
b. never communicated with her appointed trial counsel *(Term. Hr'g Tr. 5)*
c. did not substantially complete her CHINS services which were met to address her parental weaknesses and to improve her parenting skills, including her substance abuse problems, which caused the child's removal from her in the first place *(DCS App. 11-12, 15-16, 18, 21-23, 29-30, 31-34, 55-59, 78, 86, 94-95)*
d. stopped communicating with DCS in May 2008 *(DCS App. 77)*, and did not provide her own mother any means to contact her *(Term. Hr'g. Tr. 95-97)*
e. did not participate in the termination of parental rights evidentiary hearing *(Appellant's App. 7, quoting Term. Order ¶ 15)*
f. specifically told her mother and DCS that she wanted nothing more to do with the case *(Term. Hr'g. Tr. 77, 99)*.

The facts and logic dictate that mother did not want to go any further with her case, and that she did not desire to appeal. Indeed, the reasonable inferences from the evidence are that mother wanted to "be left alone", to engage in life as she saw fit, and to walk away from this case. *(See also Appellant's App. 4-8).*

A. Standard of Review:

The decision to appoint pauper counsel lies within the exclusive province and *discretion* of the trial court. *Poe v. State*, 445 N.E.2d 94 (Ind. 1983). To prevail on an argument that the trial court should have assigned counsel, the "burden is on the party seeking to proceed as an indigent person to demonstrate that he meets the statutory requirements for the appointment of counsel." *Maust v. Estate of Bair ex rel. Bair*, 859 N.E.2d 779, 785 (Ind. Ct. App. 2007) (citing *Sholes v. Sholes*, 760 N.E.2d 156, 160 (Ind. 2001)). The juvenile court did not abuse its

[1] DCS believes that proper protocol requires citation in this case being to *Mother's* pleading. However, DCS notes that at there is nothing in the record which demonstrates that Mother is involved in any manner in this appeal and this petition to transfer, nor that she wished to be so involved.

discretion in this case by denying appointment of appellate counsel.

B. This Court should not permit Mother to raise issues in her Petition to Transfer which were not raised or supported in Mother's Appellant's Brief:

1. **Issues not raised in Mother Appellant's Brief are waived and cannot be raised in a petition to transfer:**

Mother's Petition to Transfer raises several issues (federal and state constitutional claims), not previously raised in Appellant's Brief. An issue raised for the first time in a brief in support of a petition to transfer is waived. *See Bunch v. State*, 778 N.E.2d 1285, 1290 n. 3 (Ind. 2002); *Paramo v. Edwards*, 563 N.E.2d 595, 600 (Ind. 1990). A party on appeal may also waive a constitutional claim. *See Hite v. Vanderburgh County Office of Family & Children*, 845 N.E.2d 175, 180 (Ind. Ct. App. 2006) (party waives a claim raised for the first time on appeal); *In re K.S.*, 750 N.E.2d 832, 834 n. 1 (Ind. Ct. App. 2001) (waiver of alleged due process violations in pre-termination proceedings).

2. **Mother did not make any Constitutional Argument(s) in Her Appellant's Brief:**

Although Mother writes in her appellant's brief "Given the Constitutional implications of one's right to parent one's children..." she does not follow-up with an argument, citation to authority or to the record, i.e., she made no cogent argument. The Court of Appeals noted that, "Appellant's counsel directs us to no authority for the 'constitutional implications' of Mother's right to parent." *Termination of Parent-Child Relationship of I.B.*, 922 N.E.2d at 66. Thus, she has waived the issue and she is not entitled to consideration of this matter in her petition to transfer.

3. **At most, mother should be restricted to the issues of statutory construction and waiver of counsel:**

DCS asserts that only the issues raised and addressed with cogent argument in Mother's Appellant's brief are the proper subjects for consideration by this Court. As to mother's brief in

general, the Court of Appeals noted, "the brief provides no further citation to authority or development of a cogent argument in support of the proposition presented." *Termination of Parent-Child Relationship of I.B.*, 922 N.E.2d at 66. Our courts of review have consistently held that failure to make cogent argument will result in waiver of an appellant's claims of error. See, *Perry v. State*, 904 N.E.2d 302, 307 (Ind. Ct. App. 2009); see also, Indiana Appellate Rule 46(A)(8)(a). This Court noted in *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005), "waiver generally precludes appellate review of an issue..." *Id.* at 688 n. 13 (citations omitted). Accordingly, Mother should be deemed to have waived the issue of appointment of appellate counsel altogether, since she made no cogent argument to support her position.

However, whether cogent or not, in her appellant's brief mother only speaks to two issues, that of statutory interpretation, and whether she waived her right to appointment of counsel. (Mother's Br. 3-5). Thus, these two issues should be construed as the only possible subjects for this petition to transfer. However, DCS will undertake to address all Mother's claims.

C. *No Constitutional provision requires the Juvenile Court to appoint pauper appellate counsel to mother in this case:*

As a general rule, Indigent civil litigants possess neither a constitutional nor a statutory right to appointed counsel. See e.g., *Montgomery v. Pinchak*, 294 F.3d 492, 498-500 (3d Cir. 2002) (citing *Parham v. Johnson*, 126 F.3d 454, 456-57 (3d Cir. 1997); see also *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (C.A. Cal. 1980).[2] More specifically, the U.S. Supreme Court case of *Lassiter*, addressed whether a parent was entitled to appointment of counsel in a trial of a termination of parental rights case. In holding that appointment of counsel was to be made on a case-by-case basis, i.e., the discretion of the court (but leaving it up to the states to legislate

[2] The only clear and consistent case for appointment of counsel in civil cases is in such cases that entail civil contempt, where a person's physical liberty is at stake.

otherwise), the *Lassiter* court held:

> In sum, the Court's precedents speak with one voice about what "*fundamental fairness*" has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that *an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.* It is against this presumption that all the other elements in the due process decision must be measured. (Emphasis added)

Lassiter v. Department of Social Services of Durham County, N. C., 452 U.S. 18, 26-27, 101 S.Ct. 2153, 2159 (1981). Thus, by analogy, since the appeal of a termination of parental rights case does not involve deprivation of physical liberty, and there is no absolute statutory right in our law, there is *no* presumption of a right to appointment of appellate counsel. See also, *E.P. v. Marion County Office of Family and Children*, 653 N.E.2d 1026, 1031 -1032 (Ind. App. Ct. 1995). Against this *presumption* the factors to be evaluated in deciding what due process requires must be weighed. *Lassiter*, 452 U.S. at 26-27, 101 S.Ct. at 2159.

1. Mother's Equal Protection Argument Fails:

a. <u>An "Absolute right" to appeal can be waived:</u>

In her petition to transfer, mother begins her newly made constitutional arguments by citing to the "absolute right to one appeal" of our Indiana Constitution, but follows up with no citation of controlling authority which would require appointment of appellate counsel to her in this case. Article 7, Section 6 of the Indiana Constitution provides in part, "the Supreme Court shall specify by rules which shall, however, provide in all cases an absolute right to one appeal..." This Court has recognized:

> The Judicial Study Commission commentary indicates that the "one appeal" provision was to ensure that the rules allocating appellate jurisdiction would not "infringe the traditional right to one appeal" ... *The clause appears not as an enumerated right in Article I but as a restriction on our rule-making authority in Article VII.* (Emphasis added)

Campbell v. Criterion Group, 605 N.E.2d 150, 158 n. 14 (Ind. 1992). Thus, the "one appeal"

provision in Article 7, Section 6 of the Indiana Constitution does not create an enumerated right, but a rule-making restriction on the Supreme Court. Further, to the extent that the "absolute right to one appeal" plays a part in this appeal, mother can still *waive that right*. See, *Clark v. State*, 506 N.E.2d 819, 821 (Ind. 1987); see also, *Jackson v. State*, 868 N.E.2d 494 (Ind. 2007).

b. <u>The *Douglas* case does not stand for the proposition that Mother was entitled to appointment of appellate counsel:</u>

Mother cites to *Douglas v. California*, 372 U.S. 353 (1963). *Douglas*, however, addressed a factual situation where the defendants "were tried and convicted of 13 felonies" without benefit of trial counsel. Subsequent thereto, the *California District Court of Appeal* denied defendants appointment of appellate counsel to appeal their convictions. *Id.* 353-354. "The District Court of Appeal was acting in accordance with a California rule of criminal procedure which provides that *state appellate courts*, upon the request of an indigent for counsel, may make 'an independent investigation of the record and determine whether it would be of advantage to the defendant or helpful to the appellate court to have counsel appointed...'" *Id.* at 355. Thus, the *Douglas* court only addressed under the case's factual situation and in light of the procedural rule the issue of "whether or not an indigent [criminal defendant] shall be denied the assistance of counsel on appeal." *Id.*

Hence, *Douglas* addresses issues unique to criminal cases, and stands for the proposition that "a State may not grant appellate review in such a way as to discriminate against some *convicted defendants* on account of their poverty." *Id.* at 355 (citations omitted). (Emphasis added). Contrary to mother's argument, the *Douglas* court was specially addressing indigent criminal defendants, whose physical liberty was at issue. Consequently, DCS asserts that *Douglas* can be read as standing for the rule that an indigent litigant has a right to appointed appellate counsel in cases where "he may be deprived of his physical liberty," and is therefore in

accord with *Lassiter*. *Douglas* does not require appointment of appellate counsel in this termination of parental rights cases.

c. <u>There is no solid constitutional ground upon which this Court can rely to find that parents whose rights are terminated are entitled to appointment of appellate counsel:</u>

In continuing her equal protection argument mother argues on page 9 of her petition that, "This Court would be on very solid constitutional ground by granting transfer and joining them [Michigan and Ohio]." Here, Mother cites to the cases of *State ex rel. Heller v. Miller*, 399 N.E.2d 66 (Ohio 1980) and *Reist v. Bay Circuit Judge*, 241 N.W.2d 55 (Mich. 1976). (Pet. 9). DCS disagrees with mother's argument. Both cases predate *Lassiter*, and as noted above the U.S. Supreme Court in *Lassiter* specifically addressed the issue of appointment of counsel in termination of parental rights cases. Thus, in effect, to the extent the two cases are contrary to *Lassiter*, they have been impliedly overruled.[3] Therefore, these cases do not offer this Court any solid "constitutional ground" for granting transfer (nor does any of the other authority mother offers); and transfer should be denied.

d. <u>No Statutory Right exists to Appointment of Appellate Counsel in TPR cases:</u>

As DCS addressed in its Appellee's Brief, there is no statutory right to appointment of appellate counsel in termination cases. Indiana has two statutes that address the right of parents in juvenile cases to trial counsel: Ind. Code § 31-32-4-1 (right to counsel) and Ind. Code § 31-32-4-3 (right to appointed counsel). Indiana has a statute making it mandatory to appoint parents legal counsel in trial proceedings to terminate parental rights, if the parent has otherwise not waived the right. That same statute, however, does not make it mandatory for appointment of

[3] Westlaw shows in the case history that the *Reist* case was impliedly overruled in part by Michigan case law subsequent to *Lassiter*, citing to *In re RFF*, 242 Mich.App. 188, 617 N.W.2d 745 (Mich. Ct. App. 2000) (paternity/adoption case). Similarly, Westlaw shows the same for *State ex rel. Heller*, citing to the 2004 Ohio case of *McDermott v. State*, 2004 WL 2348520, 2004-Ohio-5560 (Ohio Ct. App. 2004) (regarding free transcript to civil indigent appellants in only three circumstances, one of which is a termination of parental rights)

appellate counsel in termination cases; rather, as the Court of Appeal pointed out, it is a matter for the juvenile court's discretion.

e. Fundamental Fairness does not require appointment of appellate counsel in this case:

As noted above, both the U.S. Supreme Court in *Lassiter,* as well as our courts of review has held that:

> the Court's precedents speak with one voice about what "***fundamental fairness***" has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that *an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.* (emphasis added)

Lassiter, 452 U.S. at 26-27; *E.P.*, 653 N.E.2d at 1031-1032. Mother cannot be said to have been deprived of fundamental fairness, since her liberty is not at issue, and because she has chosen not to be involved in the underlying CHINS and TPR cases, nor has she sought to appeal.

f. Appointment of Appellate Counsel in Termination of Parental Rights Cases is at the Juvenile Court's Discretion:

Since there is no constitutional right or specific statutory law or other rule of procedure that mandates appointment of appellate counsel, such appointment is in the juvenile court's discretion. See, Ind. Code § 34-10-1-2 (indigent assignment of attorney statute); see also *Poe v. State*, 445 N.E.2d 94 (Ind. 1983) (The decision to appoint pauper counsel lies within the exclusive province of the trial court and should not be hastily or superficially made); see also *Lassiter* supra.

Consequently, since appointment of counsel is in the discretion of the juvenile court, the question is whether the court abused its discretion. Indiana Code § 31-32-4-3 has permissive language which states, "The court *may* appoint counsel to represent any parent in any other proceeding." *Id.* at section (b). (Emphasis added). Thus, DCS asserts, and the Court of Appeal

agreed, that section (b) of 31-32-4-3 coupled with Ind. Code § 34-10-1-2 controls in the appointment of appellate counsel, both of which clearly gives the juvenile court discretion to appoint.[4] In this case, and under the facts presented, it is clear the court did not abuse its discretion and did not otherwise commit clear error.

2. Due Process does not require appointment of appellate counsel in this case:

Mother argues that due process "requires appointment of appellate counsel for every appeal because the risk of an erroneous deprivation is at its highest in such formal, complex proceedings." (Pet. 10). However, she provides no authority on point to support this position.

Further, in her footnote 6 (which is attached to the above quoted statement), mother qualifies her stated position by correctly noting, "non-participation of a parent in the proceedings may provide an exception to this rule…" However, nowhere in her brief or her petition does mother ever deal with the facts of the case at hand. In this case, mother *did not participate*, and she specifically told her mother and DCS that she did not want to be involved in the case; which she also clearly demonstrated by her acts.

Nevertheless, rather than apply the logic of *Lassiter* regarding a non-participating parent, mother instead attempts to use her personal decision not to participate as an artifice for being unable to waive her right to appeal. (Pet. 11-13). However, "a party may not take advantage of an error that she commits, invites, or which is the natural consequence of her own neglect or misconduct." *Witte v. Mundy ex rel. Mundy,* 820 N.E.2d 128, 133 (Ind. 2005).

Furthermore, the United States Supreme Court has recognized there is a distinction between an established relationship between a parent and a child and the existence of a biological link, with the latter entitled to less constitutional protection than the former. *Lehr v.*

[4] The federal courts have consistently held that appointment of counsel for an indigent is a discretionary matter for the trial court, and have held that the *merits* of the case is something to take into consideration when appointing such counsel. See e.g., *Maclin v. Freake*, 650 F.2d 885, 886 -889 (C.A. Ind., 1981).

Robertson, 463 U.S. 248, 261, 266-268, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983). The *Lehr* Court held that where a father has never established a "custodial, personal, or financial relationship" with a child, or has abandoned a child, he does not possess the fundamental right of parenthood. *Id.* at 267-268, 103 S.Ct. 2985. In this case, mother has abandoned her child, and although given several opportunities to be a meaningful part of his life, she chose not to. Treating mothers and fathers equally would mean that when a mother abandons she too has in effect waived her "fundamental right to parenthood."

Mother has not shown that there is a due process right to appointment of appellate counsel in every termination case: and especially not in a case where the parent has of her own free will refused to participate in reunification efforts or to protect her parental rights.

D. ***Mother Waived Her Right to Counsel:***

As noted above mother states in her petition that because mother chose not be to be present at the hearings, and thus was not personally advised of her right to appeal because of her failure to attend, she cannot be held to have knowingly and voluntarily waived her right to appeal and to seek appointment of appellate counsel. (Pet. 11-13). She further argues, "Mother was never in court to be advised of hearing dates, and only possibly notice of the hearing would have occurred through publication." (Id. at 13).

First, notice of the hearing was given to mother pursuant to the Indiana Trial Rules, and there is no issue before this Court to the contrary. *(See State's Ex. A).* Second, maternal Grandmother testified that she had also advised mother of the TPR hearing, but mother stated that did not want anything else to do with the case. Third, using mother's logic, if a parent can simply evade the underlying proceedings (and her responsibilities to the child), she suddenly is entitled to compulsory appointment of appellate counsel and the use of further public funds, as

well as succeeding in putting off further the child's permanency. Such result is contrary to the child's best interests, as well as Indiana and federal child-welfare policy.

Thus, because "a party may not take advantage of an error that she commits, invites, or which is the natural consequence of her own neglect or misconduct" (see, *Witte,* 820 N.E.2d at 133), this Court should construe under the facts herein that Mother knowingly and voluntarily waived any such rights she may have had to seek appointment of appellate counsel.

1. **Mother has the right to be "left alone":**

"[T]he right to life has come to mean the right to enjoy life -- the right to be let alone...", wrote the future Supreme Court Justice Louis Brandeis and Boston attorney Samuel Warren in 1890. *The Right To Privacy*, 4 Harv.L.Rev. 193-220 (1890). Although this statement was unsupported by legal authority at that time, courts and legislatures slowly accepted, defined, and enacted numerous principles described as a "right to privacy." As our Indiana Supreme Court noted, "[our Indiana Constitutional framers] would have readily embraced the 'right to be let alone' as a fair summary of one incident of what they were getting at in assuring the rights to "life, liberty, and the pursuit of happiness.' The 'opportunity to manage one's own life...'" *Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973, 1002 (Ind. 2005). Likewise, this Court summarized "it follows that 'the constitution's key values are ... liberty, opportunity, vigor, and privacy.'" *Id.*, 837 N.E.2d at 1002. See also, *Planned Parenthood of Indiana v. Carter*, 854 N.E.2d 853, 872 (Ind. Ct. App. 2006) (privacy involves at least two different kinds of interests; the individual interest in avoiding disclosure of personal matters, and interest in independence in making certain kinds of important decisions).

Mother clearly chose to "be left alone": she made the personal decision to walk away from her child and this case. The facts of this case are clear: the juvenile court did not violate any constitutional or statutory right when denying counsel's motion to appoint appellate counsel,

and this Court should affirm its judgment.

CONCLUSION

For the foregoing reasons, Appellee, the Indiana Department of Child Services respectfully requests this Court to deny Appellant's petition to transfer, and for all other proper relief.

Respectfully submitted,

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WORD COUNT CERTIFICATE

The undersigned attorney verifies that this brief contains no more than 4,200 words.

Robert J Henke/BB

Robert Henke, #15454-64

CERTIFICATE OF SERVICE

The undersigned attorney certifies that a copy of the above and foregoing Appellee's Brief was served by deposit in United States mail, postage prepaid, on this 5th day of April, 2010, addressed to:

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