

applies a questionable legally sufficient clear and convincing evidence test never requested by the parties or articulated by this Court. Then, the Court holds that the parents' failure to follow the Family Service Plan¹ is conclusively established, so that the net effect is the case is reversed and judgment is rendered without a remand to the court of appeals for the requested factual sufficiency review of the termination grounds. __ S.W.3d at __.

I respectfully dissent. The question squarely before the Court is whether procedural due process considerations require an appellate court to review unpreserved jury-charge errors in a parental-rights termination case. I would address that issue directly. And, in doing so, I would hold that Texas and the United States constitutional procedural due process considerations do not mandate appellate review of unpreserved jury-charge error. The Texas Legislature has devised, and our courts have applied, a fair and just procedural framework at the trial and appellate levels for handling parental-termination cases. Consequently, I would hold the parents waived their right to appellate review of the alleged jury-charge errors, because the parents failed to object in the trial court about the errors they raise here.

Finally, although I agree the court of appeals' decision should be reversed, I do not agree that this Court, under our Texas Constitution, can obviate the court of appeals' role. *See* TEX. CONST. art. V, § 6; TEX. GOV'T CODE § 22.225(a). This Court cannot conclusively determine a factual question, namely, whether the parents complied with the Family Service Plan. Thus, even if I agree the Court's "deemed finding" procedural route is appropriate in this case, I believe the Court should remand this case to the court

¹ The Family Service Plan is the trial court's order specifying the actions the parents had to take for the Department to return the children to their custody. *See* TEX. FAM. CODE § 161.001(1)(o).

of appeals for a factual sufficiency review on the termination grounds the parents challenge.

I. BACKGROUND

Depending upon one's view, the jury charge either (a) omitted a best interest instruction as to one of the parents and one of the grounds for the other parent; or (b) at the very least, positioned the best interest instruction in such a manner that it was unclear to the jury that the instruction applied to all the termination grounds alleged against both parents. In any event, neither party objected to the charge on the basis that it failed to include an instruction that termination under any ground alleged must also be in the child's best interest. The jury returned a verdict terminating parental rights for all three children, and the trial court rendered judgment based on the verdict. On appeal, the parents argued for the first time that the broad-form submission and disjunctive questions in the charge violated their due process rights. The parents also complained for the first time that the charge failed to instruct the jury that, to terminate under any ground alleged, the jury must also find that termination is in the best interest of the children.

The court of appeals held that, in parental-termination cases, applying Rule 33.1 of the Rules of Appellate Procedure to preclude an appellate court from reviewing an unpreserved complaint about "core issues" in the jury charge does not afford the parent due process. 57 S.W.3d 66, 72. *See also* TEX. R. APP. P. 33.1(a) (As a prerequisite for appellate review, the record must show the complaint was made to the trial court by a timely request, objection, or motion in compliance with Texas's civil and appellate rules.). The court of appeals then reviewed the alleged errors and held the broad-form jury charge was proper. 57 S.W.3d at 73-74. After determining the charge omitting a best interest instruction for all the

termination grounds alleged was harmful error, the court of appeals reversed the trial court's judgment and remanded the case for a new trial. 57 S.W.3d at 74-75.

II. ANALYSIS

The parents contend that their constitutional argument about the best interest instruction in the jury charge involves their substantive — not procedural — due process rights. According to the parents, the Family Code's procedural guarantees, such as the requirement that termination be in the best interest of the children, are meaningless unless appellate review is afforded to ensure the lower court correctly applied these procedures.

In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the U.S. Supreme Court explained the meaning of procedural and substantive due process.

We have emphasized time and again that “the touchstone of due process is protection of the individual against arbitrary action of government,” *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), whether the fault lies in a denial of fundamental procedural fairness, *see, e.g.*, *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against “arbitrary takings”), or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective, *see, e.g.*, *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (the substantive due process guarantee protects against government power arbitrarily and oppressively exercised).

Lewis, 523 U.S. at 845-46 (citations to Supreme Court Journal omitted and full cite to *Daniels* provided).

Here, the nature of the parents' due process argument demonstrates that they are in fact making a procedural due process claim. The parents repeatedly rely on the U.S. Supreme Court's analysis for determining whether parents' due process rights have been met in termination cases. *See Lassiter v. Dep't*

of Soc. Services, 452 U.S. 18 (1981). And the parents consistently claim that the procedure — that is, receiving no appellate review of alleged jury-charge errors because of the failure to preserve error — violated their due process rights. *See Daniels*, 474 U.S. at 340-41 (Stevens, J., concurring) (explaining that petitioners asserted procedural and not substantive due process violations, because they alleged the state procedures for redressing deprivations of prisoners’ property were constitutionally inadequate). However, the parents do not contend that the action by which the State terminates parental rights is arbitrary or oppressive. *See Daniels*, 474 U.S. at 331 (substantive due process bars certain government actions regardless of the fairness of the procedures used to implement them and prevents the government from using its power for oppression). Indeed, the court of appeals treated the parents’ complaint about the refusal to review unpreserved jury-charge error as a procedural due process issue. 57 S.W.3d at 72. And, the court of appeals applied the U.S. Supreme Court’s procedural due process analysis to conclude that “[t]o terminate parental rights — a Fourteenth Amendment liberty interest — when there is a fundamentally erroneous charge on a ‘core issue,’ only because the complaint was not preserved in the trial court, does not adhere to Fourteenth Amendment *procedural due process*.” *Id.* (emphasis added).

Accordingly, the court of appeals correctly concluded that procedural, not substantive, due process is at issue here. However, for several reasons, the court of appeals’ rationale for concluding that such due process requires review of the parents’ unpreserved jury-charge errors is flawed. As discussed in detail below, the court of appeals misplaces its reliance on Texas case law, misapplies our strict scrutiny directive from *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985), and conducts an erroneous due process analysis to conclude our error preservation rules deny the parents due process in this case.

**A. WHETHER DUE PROCESS REQUIRES APPELLATE
REVIEW OF UNPRESERVED JURY-CHARGE ERRORS**

1. Reliance on Texas Case Law

In holding that our error preservation rules do not preclude the court from reviewing the parents' jury-charge complaints raised for the first time on appeal, the court of appeals relied on two cases. 57 S.W.3d at 71-72 (discussing *In re A.P. & I.P.*, 42 S.W.3d 248 (Tex. App.–Waco 2001, no pet.) and *In re S.R.M.*, 601 S.W.2d 766 (Tex. Civ. App.–Amarillo 1980, no writ)). But these cases do not support the court of appeals' conclusion.

In *S.R.M.*, the evidence conclusively showed the mother's parental rights should not be terminated for the ground alleged. *In re S.R.M.*, 601 S.W.2d at 768-69. However, the trial court rendered a judgment terminating the mother's parental rights based on grounds not pleaded. *Id.* at 769. The mother argued the court of appeals should reverse the trial court's judgment, because it relied on unpleaded grounds to terminate her parental rights. *Id.* The paternal grandparents seeking termination argued the mother impliedly consented to a trial on unpleaded grounds, because she did not specially except or object to the introduction of evidence related to the unpleaded grounds. *Id.* Because the Family Code mandates that the petition set forth the statutory grounds for termination to afford the parents due process, and because the record showed the mother had no notice that the trial court would consider terminating on unpleaded statutory grounds, the court of appeals reversed the trial court's judgment. *Id.* at 770.

Here, unlike the circumstances in *S.R.M.* in which the mother had no notice of the trial court's action, the parents knew about the jury charge and had an opportunity to object. *See Id.* In fact, though

the parents' attorney did not object to the omission or placement of the best interest instruction, he did object to the definition of the clear and convincing evidentiary standard in the charge. And, because the trial court considered objections to the charge before the parents rested, their attorney specifically requested that everyone agree the objection would not be considered waived if he did not urge it again before closing arguments. Their counsel said, "I just don't want at some future time someone to write that I waived that objection." Thus, the parents had notice and an opportunity to object to the charge and acknowledged the consequences if they failed to do so.

In *A.P.*, the court of appeals was asked to review unpreserved factual and legal sufficiency complaints about the grounds for termination and whether termination was in the best interest of the child. 42 S.W.3d at 254-55. The court of appeals cited *S.R.M.* as precedent for considering unpreserved error and held that terminating parental rights without appellate review of an unpreserved sufficiency complaint is a due process violation. 42 S.W.3d at 255. Then, the court of appeals referred to criminal cases, which have held that a defendant does not have to preserve for appellate review a complaint that the evidence is factually or legally sufficient. 42 S.W.3d at 255-56 (citing *Chesnut v. State*, 959 S.W.2d 308, 311 (Tex. App.—El Paso 1997, no pet.); *Davila v. State*, 930 S.W.2d 641, 649 n. 7 (Tex. App.—El Paso 1996, writ ref'd)). Because criminal cases and termination cases both require heightened burdens of proof — "beyond a reasonable doubt" in criminal cases and "clear and convincing" in termination cases — the *A.P.* court concluded it a "logical extension" to review unpreserved sufficiency issues in termination cases. 42 S.W.3d at 256.

But the *A.P.* court wholly failed to conduct a due process analysis, as the U.S. Supreme Court

requires in parental-termination cases, to determine if the procedure for preserving sufficiency challenges violates parents' due process rights. *See Lassiter*, 452 U.S. at 27-28 . Instead, the court summarily cited *S.R.M.*, without recognizing its significantly distinguishable facts, to support its conclusion that it could review the unpreserved error. Moreover, the *A.P.* court improperly relied on criminal cases that only opine about how defendants may raise sufficiency points and, in any event, operate under different procedural rules and jurisprudence. Accordingly, *A.P.*, which should be overruled based on its erroneous analysis and holding, does not support the court of appeals' conclusion here that due process requires appellate courts to consider unpreserved jury-charge errors.

2. Strict Scrutiny

The court of appeals further explained that this Court's directive that "termination proceedings should be strictly scrutinized" justified its reviewing the unpreserved jury-charge errors. 57 S.W.2d at 72 (quoting *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985)). However, the strict scrutiny language in *Holick* only speaks to the important nature of the interests involved in parental-termination cases and does not support a conclusion that reviewing courts must consider unpreserved jury-charge errors.

In *Holick*, this Court determined how to construe a particular ground for termination in the Family Code. *Holick*, 685 S.W.2d at 19-20. Before answering the question, the Court discussed the fundamental constitutional rights involved in parental-termination proceedings. 685 S.W.2d at 20. After

recognizing these rights, and the fact that a clear and convincing evidentiary standard applies in these cases, the Court explained that this is why “termination proceedings should be strictly scrutinized” *Id.*

Since *Holick*, courts of appeals have cited the strict scrutiny language when generally discussing the standard of review principles that apply in termination cases. *See, e.g., In re A.V.*, 849 S.W.2d 393, 400 (Tex. App.–Fort Worth 1993, no writ). Further, courts of appeals have relied on the language to support the application of a heightened factual sufficiency review standard. *See In re C.H.*, ___ S.W.3d ___, ___ (Tex. 2002) (discussing various courts of appeals decisions attempting to define the factual sufficiency review standard when clear and convincing evidence is required). However, other than the decisions in *A.P.* and here, no courts of appeals have relied on *Holick’s* strict scrutiny directive to justify review of unpreserved error.

In sum, there is no indication the Court ever intended *Holick’s* strict scrutiny language to support appellate review of unpreserved jury-charge errors. In fact, this Court recently rejected relying on *Holick’s* strict scrutiny language as a basis for reversing a parental-termination judgment based on a parent’s due process claim. *See In re K.R.*, 63 S.W.3d 796, 800, n.20 (Tex. 2001). In *K.R.*, the Court considered a parent’s argument that procedural due process precludes a reviewing court from applying a harmless error analysis to his claim that his being handcuffed throughout the trial improperly prejudiced the jury. *Id.* at 798. The Court held that, while it agreed “that judgments terminating the parent-child relationship must be carefully scrutinized because of the importance of that relationship, [it could not] conclude that the Fourteenth Amendment requires reversal of the judgment in this case without regard to harm.” *Id.* at 800. The Court explained that, even in criminal cases, the U.S. Supreme Court has rejected the notion that any

constitutional error requires automatic reversal. *Id.* To the contrary, if “trial errors” such as “errors in the charge and in evidentiary rulings” occur, courts may not reverse the judgment unless the error caused harm. *Id.*

Accordingly, *Holick’s* strict scrutiny language does not dictate procedure. The language simply evidences this Court’s recognition of the important interests involved in parental-termination proceedings. *See Holick*, 685 S.W.2d at 20.

3. United States Supreme Court Due Process Analysis

The court of appeals additionally determined that appellate review of the parents’ unpreserved jury-charge errors “comports with the requirements in *Lassiter*.” 57 S.W.3d at 72. However, if all the pertinent factors are properly considered and weighed, the *Lassiter* due process test does not support the court of appeals’ conclusion.

In *Lassiter*, the U.S. Supreme Court held that due process does not require states to provide indigent parents counsel in all termination cases. *Lassiter*, 452 U.S. at 33-34. Before answering the due process question, the U.S. Supreme Court explained the nebulous nature of this concept:

“[D]ue process” has never been, and perhaps can never be, precisely defined. . . . Rather, the phrase [due process] expresses the requirement of “fundamental fairness,” a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what “fundamental fairness” consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Lassiter, 452 U.S. at 24-25.

The U.S. Supreme Court then held that the nature of the process due in parental-termination proceedings depends upon a balancing of three factors: (1) the private interests at stake; (2) the government's interests; and (3) the risk that the procedures used will lead to an erroneous deprivation. *Lassiter*, 452 U.S. at 27 (relying on *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)); *see also see also Santosky II v. Kramer*, 455 U.S. 745, 754 (1982). Once these *Eldridge* factors are weighed against each other, the court must next “set their net weight in the scales against the presumption” that the procedure applied did not violate due process. *Id.*

Here, the analysis begins with the presumption that our rules governing preservation of jury-charge error comport with due process. *Lassiter*, 452 U.S. at 27. But this must be balanced against the net weight of the three *Eldridge* factors to determine if the presumption is overcome. *Santosky II*, 455 U.S. at 754; *Lassiter*, 452 U.S. at 27; *Eldridge*, 424 U.S. at 335. With respect to the first *Eldridge* factor — the private interests at stake — this Court has long recognized that the “natural right existing between parents and their children is of constitutional dimensions.” *Holick*, 685 S.W.2d at 20; *see also In re G.M.*, 596 S.W.2d 846, 846 (Tex. 1980). A parent's right to the parent-child relationship is “‘essential,’ ‘a basic civil right of man,’ and ‘far more precious than property rights.’” *Holick*, 685 S.W.2d at 20 (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1976)). Similarly, the U.S. Supreme Court has noted, “A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one.” *Lassiter*, 455 U.S. at 759.

However, the child's interests are also necessarily involved and must be considered in this analysis. The Family Code's entire statutory scheme for protecting children's welfare focuses on the child's best

interest. *See, e.g.*, TEX. FAM. CODE §§ 51.11(b); 153.001; 153.002; 161.001(2); 161.101. And, like their parents, children have an interest in an accurate resolution and just decision in termination cases. But children also have a strong interest in a final decision on termination so that adoption to a stable home or return to the parents is not unduly prolonged. In fact, it is this State's express policy to provide a safe, stable, and nonviolent environment for the child. TEX. FAM. CODE § 153.001(a)(2). And, if error is properly preserved, the Legislature has upheld this interest by requiring prompt appellate decisions: "An appeal in a suit in which termination of the parent-child relationship is in issue shall be given precedence over other civil cases and shall be accelerated by the appellate courts." TEX. FAM. CODE § 109.002(a). Similarly, Texas's preservation of error rules promote the child's interest in a final decision and thus placement in a safe and stable home, because they preclude appellate courts from unduly prolonging a decision by appellate review of issues not properly raised in the trial court.

Indeed, the U.S. Supreme Court has recognized that prolonged termination proceedings can have psychological effects on a child of such a magnitude that time is of the essence:

It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current "home," under the care of his parents or foster parents, especially when such uncertainty is prolonged.

Lehman v. Lycoming County Children's Services Agency, 458 U.S. 502, 513-14 (1982); *see also Lassiter*, 452 U.S. at 32 ("[C]hild-custody litigation must be concluded as rapidly as is consistent with fairness . . ."). Accordingly, under the first *Eldridge* factor, the private interests reflect a desire for an accurate and just decision, but one that does not unduly prolong a final decision about the child's permanent

home.

The second factor under *Eldridge* is the State's interests. *See Santosky II*, 455 U.S. at 754; *Lassiter*, 452 U.S. at 27; *Eldridge*, 424 U.S. at 335. Undoubtedly, the State shares the parents' and child's interests in an accurate and just decision. *See Lassiter*, 452 U.S. at 27. However, the child's best interest is always the State's primary concern in termination proceedings. *See* TEX. FAM. CODE §§ 161.001(2); 161.101. Thus, the State additionally shares the child's interest in not unduly prolonging a final decision about the child's future. *See Lehman*, 458 U.S. at 513 ("The State's interest in finality is unusually strong in child-custody disputes."); *see also* TEX. FAM. CODE §§ 109.002(a) (giving appeals in parental-termination cases precedence over other civil cases); 161.202 (court shall grant motion for a preferential setting for a final termination hearing on the merits if termination would make the child eligible for adoption).

Additionally, the State has an interest in courts consistently and uniformly applying our preservation of error rules. This interest does not merely reflect a fiscal policy. Without uniform application of our error preservation rules, termination proceedings would be conducted and reviewed in an arbitrary manner. "At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost." *Eldridge*, 424 U.S. at 348. Here, the cost of disregarding our error preservation rules risks not only unduly prolonging termination proceedings but also losing any predictability for the State, counsel for parents, and guardians for children about how courts will conduct and review these proceedings. Consequently, under the second factor, the State's interests encompass all the private interests, but weigh in favor of conducting termination proceedings under our error preservation rules so that the proceedings

are not unduly prolonged or unpredictable.

Finally, the third *Eldridge* factor to consider is the risk that our rules for preserving error about the jury charge will lead to an erroneous deprivation. *See Santosky II*, 455 U.S. at 754; *Lassiter*, 452 U.S. at 27; *Eldridge*, 424 U.S. at 335. Texas Rules of Civil Procedure 272-274 establish the procedures for parties to participate in the formulation of the jury charge. TEX. R. CIV. P. 272-274. Rule 272 requires a party to object to the charge, either orally or in writing, before the court reads the charge to the jury. TEX. R. CIV. P. 272. A party objecting to the charge must point out distinctly the objectionable matter and the grounds for the objection. TEX. R. CIV. P. 274. In addition to objecting to the charge, either party may request the trial court to submit certain questions, definitions, and instructions in the charge. TEX. R. CIV. P. 273. If a party fails to timely abide by the rules concerning the jury charge, the party waives any complaint on appeal. TEX. R. CIV. P. 273-74; TEX. R. APP. P. 33.1(a).

This Court has relaxed the jury-charge preservation rules in an effort to determine cases on the merits rather than on slight technical defects. *See State Dep't. of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992). In *Payne*, the Court held that, although the State requested an improperly worded jury-charge instruction, it was sufficient to preserve error. *Id.* at 241. The Court explained that “[t]here should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling. The more specific requirements of the rules should be applied, while they remain, to serve rather than defeat this principle.” *Id.*

Accordingly, parties have various opportunities to formulate the jury charge and preserve error

about the charge before the trial court reads it to the jury. TEX. R. CIV. P. 273-74. And, after *Payne*, a party need only timely and plainly make the trial court aware of a complaint to preserve such error. *Payne*, 838 S.W.2d at 241. Consequently, Texas's rules for preserving jury-charge error raise little risk of erroneous deprivations

To summarize the *Eldridge* factors, then: (1) the parents' interest is extremely important, but must be balanced with the child's important interests for not only an accurate and just decision but also finality and placement in a stable home; (2) the State shares both the parents' and child's interests in an accurate and just decision, but the State's interest in not unduly prolonging finality and in uniformity and predictability in applying our preservation of error rules is stronger; and (3) the risk of an erroneous deprivation under our rules about preserving error in the jury charge is low, because parties have notice and an opportunity to be heard about issues submitted and omitted from the charge, and error is preserved so long as the party timely and plainly made the trial court aware of the party's complaint. Weighing these factors' net weight against the presumption that our error preservation rules comport with due process, it cannot be said that the parents' were not afforded due process here so that appellate review of their unpreserved jury-charge errors is warranted.

In fact, the record supports the conclusion that the parents' due process rights were not violated. The parents had an opportunity to be heard and object to the charge. *Eldridge*, 424 U.S. at 333 ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). As previously discussed, the parents' counsel objected to a portion of the charge not challenged on appeal. And, in

making this objection, their counsel expressly acknowledged the risk involved in failing to object in a timely manner. For these reasons, under *Lassiter* analysis, the court of appeals erroneously relied upon due process considerations to review the parents' unpreserved jury-charge errors.

An additional factor further supports the conclusion that due process does not require appellate review of the unpreserved jury-charge errors. Texas's Legislature has established the procedures for terminating parental rights. *See* TEX. FAM. CODE §§ 161.001-161.211. In doing so, the Legislature has been heedful of the important interests — parents' and children's — at stake. For example, the Family Code expressly requires that a court terminate the parent-child relationship only if the grounds for termination, including whether termination is in the best interest of the child, are proven with "clear and convincing evidence." TEX. FAM. CODE § 161.001. This, of course, is a higher evidentiary standard than in ordinary civil case. *See In re G.M.*, 596 S.W.2d at 847. Moreover, though the U.S. Supreme Court has held that states need not do so in every case, the Family Code requires courts to provide counsel for indigent parents in termination proceedings. TEX. FAM. CODE § 107.013(a)(1); *see Lassiter*, 452 U.S. at 33-34.

Neither the Family Code passed by our Legislature nor the procedural and appellate rules promulgated and applied by our courts deny parents fair notice and the right to be heard in parental-termination cases. The U.S. Supreme Court has recognized that, "[i]n assessing what process is due . . . substantial weight must be given to the good-faith judgments" of our law makers "that the procedures they have provided assure fair consideration of entitlement claims of individuals." *Eldridge*, 424 U.S. at 349. Here, our Legislature has carefully constructed a statutory scheme governing how courts shall conduct

termination proceedings. In that scheme, though the Legislature has expressly provided certain procedures that differ from other civil cases, *see* TEX. FAM. CODE §§ 107.013(a)(1), 161.001, it has chosen not to preclude application of our procedural and appellate rules in parental-termination cases. Therefore, substantial weight should be given to the Legislature’s good-faith judgment when deciding these cases. *See Eldridge*, 424 U.S. at 349.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

As the Court recognizes, the parents complain that their counsel’s failure to object to the charge and other alleged mistakes rendered his assistance ineffective. Assuming the parents may raise this contention, and assuming they may do so for the first time on appeal, the Court correctly concludes that the assistance in this case was not ineffective. In fact, even assuming the parents can overcome the strong presumption that their counsel’s performance was reasonable, there is no reasonable probability that, but for their counsel’s unprofessional errors, the result of this termination proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001).

As discussed at length in the Court’s opinion, the jury heard abundant evidence that supports a conclusion that termination is in the children’s best interest. Further, given the all evidence the jury considered from numerous sources and witnesses, the counsel’s alleged mistakes do not raise even “a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. Thus, the assistance of the parents’ counsel in this case was not ineffective.

C. THE COURT'S WRITINGS

The Court engages in procedural gymnastics to avoid answering the constitutional question in this case. While Rule 279 may indeed resolve the specific alleged problem with the jury charge in this case, the Court refuses to answer the threshold procedural due process question and does not analyze the due process issue under the U.S. Supreme Court's guidelines for ascertaining the process due in termination proceedings. *See Santosky II*, 455 U.S. at 754; *Lassiter*, 452 U.S. at 27. Because the Court does not answer the threshold constitutional question, the Court's writing leaves little guidance for practitioners and lower courts for how to determine if our error preservation rules violate due process when applied to other types of unpreserved errors. Undoubtedly, the Court must eventually resolve this issue, as there will not be a Rule 279 "band-aid" for every unpreserved trial error in parental-termination cases.

JUSTICE HANKINSON'S fundamental error analysis is no more compelling. The fundamental-error analysis disregards that the parents' due process claim here relates to our procedures about preserving error for appeal. And, the U.S. Supreme Court has dictated how courts must determine what process is due a parent. *Santosky II*, 455 U.S. at 754; *Lassiter*, 452 U.S. at 27. However, rather than conduct this analysis, the dissent contends that our common law doctrine of fundamental error applies. But this disregards the true nature — and danger — of Texas's fundamental error jurisprudence.

Historically, courts have applied fundamental error in civil cases under very limited circumstances. Typically, as the dissent recognizes, the concept of fundamental error is expressed in our jurisprudence holding that subject-matter jurisdiction may be raised at any time. *See, e.g., Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993). However, the other types of civil cases applying

fundamental error — the cases involving “public-interest-based” issues — are rare. Again, as the dissent recognizes, this Court has often declined to apply fundamental-error review, recently doing so in a case in which a child’s welfare and constitutional issues were raised. *See, e.g., Texas Dep’t of Protective & Regulatory Servs. v. Sherry*, 46 S.W.3d 857, 861 (Tex. 2001).

Perhaps the Court has not applied fundamental-error review in many cases, because the concept is nebulous and imprecise. This Court has held that fundamental error exists if the error “directly and adversely affects the interest of the public generally, as that interest is declared in the statutes or Constitution of this state.” *Ramsey v. Dunlop*, 205 S.W.2d 979, 983 (Tex. 1947). But under this test, an argument may be made under almost any statute that public policy favors reviewing the unpreserved issue.

Moreover, under the dissent’s analysis, if courts can review unpreserved jury-charge errors based on the Family Code expressing a public policy that the child’s best interest is of primary concern, then courts can review any unpreserved error in parental-termination cases. In other words, a logical extension of the dissent’s applying fundamental-error review here is that appellate courts must review any unpreserved error in a parental-termination case, because any error could affect the public’s overarching concern with the child’s best interest. Thus, fundamental-error review results in a slippery slope that, for all the reasons under the *Eldridge* factors adopted in *Lassiter* and discussed above, would cause more harm than good in termination cases.

III. CONCLUSION

The question the Court is asked to answer today is whether due process requires an appellate court to review unpreserved errors in the jury charge. The answer is “no.” I cannot join the Court’s opinion, because it declines to answer this question and instead relies on a procedural rule that gives no guidance for future cases. Moreover, the parents raised other issues the court of appeals did not consider, including a challenge to the factual sufficiency of the evidence. Accordingly, the court of appeals’ judgment should be reversed and remanded to that court for further proceedings.

Michael H. Schneider, Justice

Opinion Delivered: December 31, 2002