

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
MAY 21, 2002 Session

IN THE MATTER OF D.L.B., A MINOR

**Direct Appeal from the Chancery Court for Shelby County
No. CH-01-0200-2; The Honorable Kenny Armstrong, Special Chancellor**

No. W2001-02245-COA-R3-CV - August 6, 2002

This is a case involving the termination of parental rights. The Appellees filed a petition in the Chancery Court of Shelby County to terminate the Appellant's parental rights to his child. Following a hearing, the trial court entered an order terminating the Appellant's parental rights on the basis of abandonment. The Appellant appeals the trial court's order terminating his parental rights. For the reasons stated herein, we affirm the trial court's decision.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Affirmed

ALAN E. HIGHERS, J., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY KIRBY LILLARD, J., joined.

Barbaralette G. Davis, Webb A. Brewer, Nancy Percer Kessler, Memphis, TN, for Appellant

Larry E. Parrish, Memphis, TN, for Appellees, Donald Joe Nickleson, et ux

Paul G. Summers, Attorney General & Reporter, Dianne Stamey Dycus, Deputy Attorney General, Nashville, for Appellee, Tennessee Department of Children's Services

OPINION

I. Facts and Procedural History

The Appellant, David Moore ("Mr. Moore"), and Georgia Smith Bady ("Mrs. Bady") are the biological parents of D.L.B. Mrs. Bady used crack cocaine during her pregnancy with D.L.B. On August 31, 1998, D.L.B. was born two months premature and placed in the intensive care unit at the Regional Medical Center ("the Med") in Memphis, Tennessee. No father was named on D.L.B.'s birth certificate. On October 20, 1998, the Tennessee Department of Children's Services ("DCS") filed a dependency and neglect petition in the Juvenile Court of Shelby County. The dependency and neglect petition alleged that D.L.B. was a dependent and neglected child due to Mrs. Bady's

history of drug abuse and failure to maintain a stable home. The juvenile court entered a protective custody order recommending that D.L.B. be placed in the custody of DCS.

On October 29, 1998, D.L.B. was discharged from The Med into the custody of DCS. DCS referred D.L.B. to the AGAPE agency for foster care placement. AGAPE placed D.L.B. in the foster home of the Appellees, Donald and Denise Nickleson (“the Nicklesons”). D.L.B. has lived with the Nicklesons from October, 1998 until the present day. D.L.B. has respiratory problems as well as sensory integration problems which delay her development in occupational performance areas such as fine motor skills and gross motor skills. Mrs. Nickleson is a licensed physical therapist with a special certification in sensory integration assessment, evaluation, and treatment. Mrs. Nickleson privately sees patients from within her home and provides D.L.B. with constant therapy for her sensory integration problems.

On May 15, 2000, Court Appointed Special Advocate of Memphis and Shelby County (“CASA”) filed a petition for termination of parental rights of Mrs. Bady, her husband Jessie Bady (“Mr. Bady”), and all unknown fathers of D.L.B. On July 12, 2000, a hearing on the petition for termination of parental rights was held. Mr. Moore appeared at the hearing and claimed to be the father of D.L.B. The juvenile court entered an order terminating the parental rights of Mr. and Mrs. Bady. On August 15, 2000, CASA filed an amended petition for termination of parental rights to add Mr. Moore as the putative father of D.L.B.

DCS filed a petition in the juvenile court against Mr. Moore to establish parentage of D.L.B. On August 18, 2000, Mr. Moore submitted to a paternity test which confirmed that he was D.L.B.’s father. On September 15, 2000, the juvenile court entered an order establishing Mr. Moore as the natural father of D.L.B. and requiring Mr. Moore to pay child support in the amount of \$210.00 per month. The juvenile court also ordered Mr. Moore to pay all medical expenses related to D.L.B.’s birth, D.L.B.’s medical insurance, the cost of the paternity test, and court costs. In October, 2000, Mr. Moore made his first child support payment, and beginning in November, 2000, Mr. Moore’s wages were garnished to make the child support payments. Mr. Moore never paid any medical expenses related to D.L.B.’s birth, D.L.B.’s medical insurance, the cost of the paternity test, or court costs as ordered by the juvenile court.

In November, 2000, the juvenile court appointed Susan Hinsley (“Ms. Hinsley”) as the guardian ad litem. On November 2, 2000, Mr. Moore contacted DCS and requested visitation with D.L.B. Mr. Moore’s first supervised visit with D.L.B. occurred on November 13, 2000. On November 16, 2000, DCS requested that CASA withdraw its petition for termination of parental rights against Mr. Moore. In its November 28, 2000 quarterly progress report, DCS changed its permanency plan goal from “adoption” to “return to parent.” At a judicial review of D.L.B.’s case, DCS requested the juvenile court to change the goal from “adoption” to “return to parent.” On November 28, 2000, the juvenile court denied DCS’ request to change the goal to “return to parent” but ordered that visitation between Mr. Moore and D.L.B. continue. Mr. Moore engaged in fourteen supervised visits with D.L.B. from November 13, 2000 through January 29, 2001 and from March 29, 2001 through April 27, 2001.

On January 12, 2001, the Nicklesons filed a motion to intervene in the juvenile court proceedings. On January 29, 2001, Mr. Moore filed a response to the Nicklesons' motion to intervene. On January 31, 2001, Mr. Moore filed a motion in the juvenile court to modify the plan of care to reflect a change to "return to parent" and to have custody awarded to him. Also on January 31, 2001, the Nicklesons filed a petition to terminate parental rights and for adoption in the Chancery Court of Shelby County. The Nicklesons then notified the juvenile court that they had filed a petition to terminate parental rights and for adoption in the chancery court.

On February 1, 2001, CASA made an oral motion to dismiss their petition to terminate parental rights of Mr. Moore filed in the juvenile court. The Nicklesons objected to CASA's motion to dismiss. The juvenile court entered an order which suspended ruling on CASA's motion to dismiss due to the filing of the Nicklesons' petition to terminate parental rights and for adoption in the chancery court. The chancery court then referred the parties back to the juvenile court to request further ruling on CASA's motion to dismiss. On February 5, 2001, the Nicklesons filed an amended petition to terminate parental rights and for adoption in the chancery court which named DCS as an additional respondent due to its failure to consent to termination of Mr. Moore's parental rights.

Also on February 5, 2001, the Nicklesons sent a letter to DCS indicating that visitation with Mr. Moore was not in D.L.B.'s best interest and informing DCS that they were going to wait on an order from the chancery court before allowing visitation to continue. The Nicklesons claim that visitation with Mr. Moore had caused D.L.B. to regress in her toilet training and to become more clingy to Mrs. Nickleson following visitation. The Nicklesons also claim that visitation exacerbated D.L.B.'s "rocking," sitting up in bed and repeatedly banging her back against her bed as a means of self-stimulation. On March 6, 2001, Mr. Moore filed a response to the amended petition to terminate parental rights and for adoption which included an application for injunctive relief. The application for injunctive relief alleged that the Nicklesons had refused to comply with the juvenile court's grant of visitation to Mr. Moore since February 5, 2001 and requested that the chancery court order that D.L.B. be made available for visitation. On March 8, 2001, DCS filed a response to the amended petition to terminate parental rights and for adoption. On March 19, 2001, Mr. Moore filed a motion in the chancery court to dismiss the Nicklesons' petition and amended petition to terminate parental rights and for adoption.

On March 22, 2001, the juvenile court entered an order dismissing CASA's petition to terminate parental rights filed in the juvenile court. On March 28, 2001, the chancery court entered an order appointing Ms. Hinsley as the temporary guardian ad litem. Following her investigation, Ms. Hinsley filed an answer to the petition to terminate parental rights. Ms. Hinsley's answer stated that Mr. Moore had failed to show a sufficient willingness and ability to assume legal and physical custody of D.L.B. The answer stated that D.L.B. would not receive the therapy she needs if she is placed with Mr. Moore and that placing D.L.B. with Mr. Moore would pose a risk of substantial harm to the physical and psychological welfare of D.L.B. Finally, the answer asserted that Mr. Moore was incompetent to adequately provide for D.L.B. because his mental condition was so impaired that it was unlikely that Mr. Moore would be able to assume care of D.L.B. in the near

future. Ms. Hinsley recommended that the chancery court terminate Mr. Moore's parental rights.

On March 29, 2001, the chancery court held a hearing on Mr. Moore's application for injunctive relief. On April 6, 2001, the chancery court entered an order granting supervised visitation to Mr. Moore. On April 19, 2001, the Nicklesons filed a motion to amend the order granting supervised visitation. On April 24, 2001, the Nicklesons filed a motion for leave to file a second amended petition to terminate parental rights and for adoption to allege additional grounds for termination of parental rights. On April 27, 2001, the chancery court held a hearing on the motion to amend the order granting supervised visitation. On May 24, 2001, the chancery court granted the Nicklesons' motion for leave to file a second amended petition to terminate parental rights and for adoption. The chancery court also granted the motion to amend the order granting supervised visitation and terminated the supervised visitation upon a finding that the visitation was adversely affecting D.L.B.'s psychological well being and was not in her best interest. The Nicklesons filed the second amended petition to terminate parental rights and for adoption.

On May 25, 2001, the Nicklesons filed a motion to appoint them as the temporary guardians of D.L.B. and suspend the authority of DCS over D.L.B. On June 5, 2001, the Nicklesons filed a motion to require Mr. Moore to be professionally evaluated. On June 11, 2001, the chancery court held a hearing on the two motions. The chancery court entered an order denying the Nicklesons' motion to appoint them as the temporary guardians of D.L.B. and suspend the authority of DCS over D.L.B. and the Nicklesons' motion to require Mr. Moore to be professionally evaluated. On June 19-27, 2001, the trial on the Nicklesons' petition to terminate parental rights was held. On June 20, 2001, Mr. Moore filed a response to the second amended petition to terminate parental rights and for adoption. On June 25, 2001, the Nicklesons made a motion for a directed verdict. The chancery court denied the motion for a directed verdict.

Following the trial, the chancery court directed the parties to submit proposed findings of fact. On July 12, 2001, the Nicklesons submitted their proposed findings of fact and conclusions of law. On July 23, 2001, Mr. Moore submitted his proposed findings of fact. On August 8, 2001, the chancery court entered an order terminating Mr. Moore's parental rights. The chancery court found that Mr. Moore abandoned D.L.B. because for a period of four consecutive months immediately preceding CASA's petition to terminate parental rights filed in the juvenile court, Mr. Moore willfully failed to visit and make payments toward the support of D.L.B. The chancery court also found that it was in D.L.B.'s best interest to terminate Mr. Moore's parental rights. This appeal followed.

II. Standard of Review

Parents have a fundamental right to the care, custody, and control of their children. See Stanley v. Illinois, 405 U.S. 645, 651 (1972). This right is not absolute, however, and parental rights may be terminated upon a finding by clear and convincing evidence that the grounds for termination of parental rights have been established and that termination is in the best interest of the child. See

TENN. CODE ANN. § 36-1-113(c) (2001). Clear and convincing evidence is evidence which “eliminates any serious or substantial doubt concerning the correctness of the conclusion to be drawn from the evidence. It should produce in the factfinder’s mind a firm belief or conviction with regard to the truth of the allegations sought to be established.” O’Daniel v. Messier, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995) (citations omitted).

Under this heightened standard of review, we must first review the trial court’s findings in accordance with section 13(d) of the Tennessee Rules of Appellate Procedure. That review is *de novo* with a presumption of correctness as to the trial court’s factual findings, unless the preponderance of the evidence is otherwise. See TENN. R. APP. P. 13(d). For issues of law, the standard of review is *de novo*, with no presumption of correctness. See Ridings v. Ralph M. Parsons Co., 914 S.W.2d 79, 80 (Tenn. 1996). We must then determine whether the facts make out a clear and convincing case in favor of terminating parental rights. See In re Drinnon, 776 S.W.2d 96, 100 (Tenn. Ct. App. 1988).

III. Law and Analysis

The following issues, as we perceive them, are presented for our review:

1. Whether the trial court erred by terminating Mr. Moore’s parental rights on the basis of willful abandonment under section 36-1-102(1)(A)(i) of the Tennessee Code;
2. Whether other grounds to support termination of Mr. Moore’s parental rights exist; and
3. Whether termination of parental rights is in the best interest of D.L.B.

We will examine each issue in turn.

The first issue presented for our review is whether the trial court erred by terminating Mr. Moore’s parental rights on the basis of willful abandonment under section 36-1-102(1)(A)(i). Under the provisions of section 36-1-113(g)(1) of the Tennessee Code, termination of parental rights may be based upon a parent’s abandonment of his or her child. See TENN. CODE ANN. § 36-1-113(g)(1) (2001). Section 36-1-102 defines abandonment, in pertinent part, as:

(1)(A)(i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or make reasonable payments toward the support of the child;

(B) For purposes of this subdivision (1), “token support” means that the support, under the circumstances of the individual case, is insignificant given the parent’s means;

(C) For purposes of this subdivision (1), “token visitation”

means that the visitation, under the circumstances of the individual case, constitutes nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child;

(D) For purposes of this subdivision (1), “willfully failed to support” or “willfully failed to make reasonable payments toward such child’s support” means that, for a period of four (4) consecutive months, no monetary support was paid or that the amount of support paid is token support;

(E) For purposes of this subdivision (1), “willfully failed to visit” means the willful failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation.

TENN. CODE ANN. § 36-1-102(1)(A)-(E) (2001).

In In re Swanson, 2 S.W.3d 180 (Tenn. 1999), the Tennessee Supreme Court found the above definitions of “willfully failed to support” and “willfully failed to make reasonable payments toward such child’s support” to be unconstitutional because they “in effect create an irrebuttable presumption that the failure to provide monetary support for the four months preceding the petition to terminate parental rights constitutes abandonment, irrespective of whether that failure was intentional.” Id. at 188. The Swanson court held that the definition as it existed under the prior statute should be applied until the legislature amends the statute. See id. at 189. “Under the prior statute, the definition of ‘abandoned child’ contained an element of intent both in failures to visit and failures to support.” Id. at 189 n.14 (citing TENN. CODE ANN. § 36-1-102(1)(A)(i) (Supp. 1994)).

Tennessee courts have defined abandonment as “any conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child.” Ex parte Wolfenden, 348 S.W.2d 751, 755 (Tenn. Ct. App. 1961) (citations omitted). The evidence of abandonment must show “an actual desertion, accompanied with an intention to entirely sever, so far as it is possible to do so, the parental relationship and throw off all obligations growing out of the same.” Fancher v. Mann, 432 S.W.2d 63, 65 (Tenn. Ct. App. 1968) (citation omitted). Abandonment may be found only when, given the benefit of every controverted fact, an inference of abandonment follows as a matter of law. See id. at 66.

In the case at bar, the chancery court found that Mr. Moore willfully abandoned D.L.B. in that he willfully failed to visit and willfully failed to support D.L.B. during the four months immediately preceding the filing of CASA’s petition to terminate parental rights in the juvenile court. Mr. Moore argues that the chancery court erred by looking to the four months immediately preceding the filing of CASA’s petition to terminate parental rights in the *juvenile court* rather than

the four months immediately preceding the filing of the Nicklesons' petition to terminate parental rights in the *chancery court*. We must determine the relevant four month period.

At the trial on the Nicklesons' petition to terminate parental rights, the chancery court discussed why it considered the four months immediately preceding the filing of CASA's petition to terminate parental rights by stating the following:

[I]n regard to the grounds of abandonment, I read that statute literally in terms of what date I'm supposed to look at. And in the statute it says the filing of any petition. And it says a petition. So I'm using the triggering date as the date that an action was filed in Juvenile Court, and not when the adoption petition was filed in Chancery. Now, I think, I may read and interpret that differently than you. I think you were using the January date when the adoption proceeding was filed in Chancery Court. But as I read the statute, it talks about the filing of a petition and it talks about any petition, so I read it just as it appears. And the first petition to terminate was filed in Juvenile Court, and I think that was back in May of 2000. So that is the trigger, and I will be looking at his conduct and his activities before May of 2000 in making a determination about whether or not he abandoned this child.

The trial court's discussion of the phrases "a petition" and "any petition" refer to section 36-1-102(1)(A)(i) and section 36-1-102(F), respectively. Section 36-1-102(1)(A)(i) defines abandonment as:

For a period of four (4) consecutive months immediately preceding the filing of *a proceeding or pleading* to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or make reasonable payments toward the support of the child.

TENN. CODE ANN. § 36-1-1-2(1)(A)(i) (emphasis added).

Section 36-1-102(1)(F) states: "Abandonment may not be repented of by resuming visitation or support subsequent to the filing of *any petition* seeking to terminate parental or guardianship rights or seeking the adoption of a child." TENN. CODE ANN. § 36-1-102(1)(F) (emphasis added).

When called upon to interpret a statute, this Court's primary objective is to effectuate the intent and purpose of the legislature. See Lipscomb v. Doe, 32 S.W.3d 840, 844 (Tenn. 2000). This Court should determine the intent of the legislature by looking to the natural and ordinary meaning of the words used in the statute, and not by a construction that is forced or which limits or extends

the meaning. See id. “When the language of the statute is clear and unambiguous, then this Court usually applies the plain language of the statute to resolve the issue.” Id. When approaching statutory text, this Court must presume that the legislature says in a statute what it means and means in a statute what it says there. See Worley v. Weigel’s, Inc., 919 S.W.2d 589, 593 (Tenn. 1996) (citation omitted). Accordingly, we must construe statutes as they are written, and our search for the meaning of statutory language must always begin with the statute itself. See Neff v. Cherokee Ins. Co., 704 S.W.2d 1, 3 (Tenn. 1986); Jackson v. Jackson, 210 S.W.2d 332, 334 (Tenn. 1948).

Section 36-1-102(1)(A)(i) defines abandonment, in pertinent part, as the parent’s willful failure to visit or to support or make reasonable payments toward the support of the child for a period of four months immediately preceding the filing of “a proceeding or pleading” to terminate parental rights. The statute does not refer to “*the* proceeding or pleading” which, in the case at bar, would reference the chancery court to the particular petition to terminate parental rights filed by the Nicklesons. Rather, under the plain and ordinary meaning of the words “a proceeding or pleading,” the statute references the chancery court to CASA’s petition to terminate parental rights filed in the juvenile court. More importantly, however, section 36-1-102(1)(F) states that a parent may not repent of abandonment by resuming visitation or support subsequent to the filing of “any petition” to terminate parental rights. Thus, under the plain and ordinary meaning of section 36-1-102(1)(F), once *any petition* to terminate parental rights has been filed, a parent may not then repent of his or her abandonment. This means that for purposes of the case at bar, though Mr. Moore began visitation and support following the filing of CASA’s amended petition to terminate parental rights, Mr. Moore could not repent of his prior abandonment because this occurred subsequent to the filing of *any petition* to terminate parental rights. Because we construe the statute according to its plain and ordinary meaning, we find that the relevant four month period is the four months immediately preceding the filing of CASA’s petition to terminate parental rights in the juvenile court.

Mr. Moore admitted that he knew that D.L.B. was in the custody of DCS beginning in December, 1998, but he failed to contact DCS to request visitation until November, 2000, six months following the filing of CASA’s petition to terminate parental rights in the juvenile court. Mr. Moore never paid any support to D.L.B. until October, 2000, five months following the filing of CASA’s petition to terminate parental rights in the juvenile court. As a result, the evidence supports the chancery court’s finding that Mr. Moore willfully failed to visit and willfully failed to support or make reasonable payments toward the support of D.L.B. during the four months immediately preceding the filing of CASA’s petition to terminate parental rights in the juvenile court. Accordingly, we affirm the trial court’s order terminating Mr. Moore’s parental rights on the basis of willful abandonment under section 36-1-102(1)(A)(i).

The second issue presented for our review is whether other grounds to support termination of Mr. Moore’s parental rights exist. Though the Nicklesons’ asserted several grounds upon which to base termination of parental rights, the chancery court only addressed the ground of willful abandonment under section 36-1-102(1)(A)(i). We will address each ground for termination of parental rights as asserted by the Nicklesons.

The Nicklesons claim that Mr. Moore's parental rights should be terminated upon an additional ground for abandonment as defined by section 36-1-102(1)(A)(iii) of the Tennessee Code. Section 36-1-102(1)(A)(iii) defines abandonment, in pertinent part, as:

(1)(A)(iii) A biological or legal father has either willfully failed to visit or willfully failed to make reasonable payments toward the support of the child's mother during the four (4) months immediately preceding the birth of the child; provided, that in no instance shall a final order terminating the parental rights of a parent as determined pursuant to this subdivision (iii) be entered until at least thirty (30) days have elapsed since the date of the child's birth;

TENN. CODE ANN. § 36-1-102(1)(A)(iii) (2001).

Mr. Moore met Mrs. Bady when he solicited her for a prostitution date and paid her twenty dollars. Mr. Moore claimed that he developed a relationship with Mrs. Bady, and she stayed at his house approximately once a month for two or three days each month. Six weeks into her pregnancy with D.L.B., Mrs. Bady notified Mr. Moore that he was the father of her child. At the trial on the petition to terminate parental rights, the Nicklesons' attorney questioned Mr. Moore as follows:

Q. And you testified today and you testified at a previous time I believe as to you would give [Mrs. Bady] \$10 or \$20 sometimes if she was going to buy food or clothes; is that correct?

A. Correct.

Q. And when she was at your house, you were having a sexual relationship, were you not?

A. Correct.

Q. And that was while she was pregnant with [D.L.B.]?

A. Correct.

Q. And isn't it true that when you're saying that she was living at your house, what was happening was she was staying two or three days and going away for a month and coming back and staying two or three more days and going away for a month? Sometimes longer than month and sometimes she would stay a little longer than two or three days?

A. Correct.

Q. And you call that living there?

A. Yes.

Q. And that's the support you were giving her was the place to sleep and food while she was there?

A. Correct.

Q. And did you not also testify that on the occasions that she was there for two or three days and be absent for this additional time that you didn't give her money every time she was there, did you?

A. Not every time she was there.

Q. Okay. So it was only some of the two or three-day periods she would be there that you gave her \$10 or \$20?

A. Correct.

Q. And part of that \$10 or \$20 you were expecting her to use for food, right?

A. Correct.

After reviewing the record, we find that the support Mr. Moore provided Mrs. Bady during the four months immediately preceding D.L.B.'s birth was unreasonable. Mr. Moore provided Mrs. Bady with a place to stay approximately once per month for two or three days each month and sometimes gave Mrs. Bady \$10 or \$20 which he expected her to use for food. Under section 36-1-102(1)(A)(iii), abandonment constitutes the willful failure to make *reasonable* payments toward the support of the child's mother during the four months immediately preceding the child's birth. We find nothing reasonable about the payments Mr. Moore made to Mrs. Bady during the four months prior to D.L.B.'s birth. Accordingly, we find that Mr. Moore's parental rights should be terminated under section 36-1-102(1)(A)(iii).

The Nicklesons also argue that Mr. Moore's parental rights should be terminated under the grounds stated in section 36-1-113(g)(3)(A) of the Tennessee Code. Section 36-1-113(g)(3)(A) states:

(3)(A) The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

(i) The conditions which led to the child's removal or other conditions which in all reasonable probability would cause the child to be subjected to further abuse or neglect and which, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s) still persist;

(ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and

(iii) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

TENN. CODE ANN. § 36-1-113(g)(3)(A) (2001).

Section 36-1-113(g)(3)(A) applies only in the case of a child that has been removed from the home of a parent. D.L.B. was not removed from the home of Mr. Moore. Accordingly, we find that Mr. Moore's parental rights should not be terminated on the basis of section 36-1-113(g)(3)(A).

The Nicklesons assert that Mr. Moore's parental rights should be terminated under the grounds stated in section 36-1-113(g)(8) of the Tennessee Code. Section 36-1-113(g)(8) states:

(8)(A) The chancery and circuit courts shall have jurisdiction in an adoption proceeding, and the chancery, circuit, and juvenile courts shall have jurisdiction in a separate, independent proceeding conducted prior to an adoption proceeding to determine if the parent or guardian is mentally incompetent to provide for the further care and supervision of the child, and to terminate that parent's or guardian's rights to the child.

(B) The court may terminate the parental or guardianship rights of that person if it determines on the basis of clear and convincing evidence that:

(i) The parent or guardian of the child is incompetent to adequately provide for the further care and supervision of the child because the parent's or guardian's mental condition is presently so impaired and is so likely to remain so that it is unlikely that the parent or guardian will be able to assume or resume the care of and responsibility for the child in the near future; and

(ii) That termination of parental or guardian rights is in the best interest of the child.

(C) In the circumstances described under subdivisions (A) and (B), no willfulness in the failure of the parent or guardian to establish the parent's or guardian's ability to care for the child need be shown to establish that the parental or guardianship rights should be terminated.

TENN. CODE ANN. § 36-1-113(g)(8) (2001).

We find no evidence in the record that Mr. Moore is mentally incompetent or mentally impaired. Accordingly, we find that Mr. Moore's parental rights should not be terminated on the basis of section 36-1-113(g)(8).

Finally, the Nicklesons argue that Mr. Moore's parental rights should be terminated under the grounds stated in section 36-1-113(g)(9)(A) of the Tennessee Code. Section 36-1-113(g)(9)(A) states:

(9)(A) The parental rights of any person *who is not the legal parent* or guardian of a child or who is described in § 36-1-117 (b) or (c) may also be terminated based upon any one (1) or more

of the following additional grounds:

- (i) The person has failed, without good cause or excuse, to pay a reasonable share of prenatal, natal, and postnatal expenses involving the birth of the child in accordance with the person's financial means promptly upon the person's receipt of notice of the child's impending birth;
- (ii) The person has failed, without good cause or excuse, to make reasonable and consistent payments for the support of the child in accordance with the child support guidelines promulgated by the department pursuant to § 36-5-101;
- (iii) The person has failed to seek reasonable visitation with the child, and if visitation has been granted, has failed to visit altogether, or has engaged in only token visitation, as defined in §36-1-102(1)(C);
- (iv) The person has failed to manifest an ability and willingness to assume legal and physical custody of the child;
- (v) Placing custody of the child in the person's legal and physical custody would pose a risk of substantial harm to the physical and psychological welfare of the child; or
- (vi) The person has failed to file a petition to establish paternity of the child within thirty (30) days after notice of alleged paternity by the child's mother, or as required by § 36-2-318(j), or after making a claim of paternity pursuant to § 36-1-117(c)(3).

TENN. CODE ANN. § 36-1-113(g)(9)(A) (2001) (emphasis added).

Mr. Moore argues that section 36-1-113(g)(9)(A) is inapplicable to him because this section only applies to non-legal parents. Legal parent is defined by section 36-1-102(28) of the Tennessee Code, in pertinent part, as:

- (D) A man who has been adjudicated to be the legal father of the child by any court or administrative body of this state or any other state or territory or foreign country or who has signed, pursuant to §§ 24-7-113, 68-3-203(g), 68-3-302, and 68-3-305(b), an unrevoked and sworn acknowledgment of paternity under the provisions of Tennessee law, or who has signed such a sworn acknowledgment pursuant to the law of any other state, territory, or foreign country;

TENN. CODE ANN. § 36-1-102(28) (2001).

We find that Mr. Moore was adjudicated to be D.L.B.'s legal parent following the juvenile court's September 15, 2000 order establishing D.L.B. as a legitimate child of Mr. Moore for all lawful purposes. Section 36-1-113(g)(9)(A) specifically states that it only applies to persons who are not legal parents. Accordingly, we find that Mr. Moore's parental rights cannot be terminated under section 36-1-113(g)(9)(A) because Mr. Moore is a legal parent.

We note that the eastern section of this court recently decided a case that is factually similar to the case at bar. In Jones v. Garrett, No. E2000-00196-COA-R3-CV, 2001 Tenn. App. Lexis 840, *1 (Tenn. Ct. App. Nov. 9, 2001), Amy Penland ("Ms. Penland") notified Pierce Garrett ("Mr. Garrett") on October 7, 1997, that she was pregnant with his child. See id. at *3. On January 30, 1998, C.L.J. was born, and Ms. Penland surrendered C.L.J. to the Joneses for adoption. See id. at *1-2. In March, 1998, a paternity test revealed that Mr. Garrett was the father of C.L.J. See id. at *3. On May 26, 1998, Mr. Garrett filed a petition to establish paternity. See id. The trial court sustained the petition to establish paternity. See id. On August 13, 1998, the trial court found that Mr. Garrett failed to file a petition to establish paternity within thirty days after receiving notice and terminated Mr. Garrett's parental rights on the basis of section 36-1-113(g)(9)(A)(iv). Mr. Garrett appealed.

On appeal, Mr. Garrett argued that because in the proceeding on the petition to establish paternity, he was found to be the legal father of C.L.J., section 36-1-113(g)(9)(A) did not apply to him. See id. at *5. In response to this argument, the court of appeals stated, "We see nothing in the Statute that supports this insistence." Id. The court of appeals affirmed the trial court on this issue but remanded this case to the trial court for a determination that termination of parental rights was in the best interest of C.L.J. While we are hesitant to hold contrary to a decision by another section of this court, we note that the Jones opinion is not controlling, as it has not been reported in the official reporter. See TENN. S.C.T.R. 4(H)(1) & (2). Furthermore, the Tennessee Supreme Court granted Mr. Garrett's permission to appeal this case on April 1, 2002. As of the date of this opinion, the supreme court had not yet decided this matter.

The third issue presented for our review is whether termination of parental rights is in the best interest of D.L.B. Section 36-1-113(i) of the Tennessee Code provides courts with the following factors to consider when making a best interest determination:

(i) In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:

(1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;

- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological, and mental condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
- (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

TENN. CODE ANN. § 36-1-113(i) (2001).

In reviewing the aforementioned factors, we agree with the chancery court that termination of Mr. Moore's parental rights is in D.L.B.'s best interest. D.L.B. is a special needs child who requires constant treatment and supervision to progress developmentally due to her sensory integration problems. The record reveals that Mr. Moore has made no effort to educate himself concerning D.L.B.'s sensory integration problems or to arrange for training to meet her needs. D.L.B.'s sensory integration problems cause her to have problems with transition and change.

D.L.B. has lived with the Nicklesons for almost four years and considers the Nicklesons her family. Mrs. Nickleson provides D.L.B. with twenty-four hour treatment for her sensory integration problems due to Mrs. Nickleson's certification in this field. As a result, the expert proof at trial showed that D.L.B. would likely regress developmentally and have a major setback if taken out of her present environment in that she would become withdrawn, demonstrate more sensory integration problems, and lose the progress she has made.

We find that it is highly unlikely that Mr. Moore could provide D.L.B. with the constant treatment and supervision she requires to progress developmentally. Mr. Moore works five to six days a week for seven to ten hours per day. Mr. Moore's sister testified that she would care for D.L.B. while Mr. Moore was at work, but she is already a caretaker for her mother, three grandchildren, and roommate. Mr. Moore stated that if his sister did not care for D.L.B., then he would place D.L.B. in daycare while he was at work. The expert testimony showed, however, that daycare was not an option for D.L.B. due to her sensory integration problems. The expert proof also showed that it would be detrimental to D.L.B.'s respiratory problems to live with Mr. Moore who smokes cigarettes. Finally, the record reveals that Mr. Moore failed to develop a meaningful relationship with D.L.B. during their visitation. Accordingly, we find that termination of parental rights is in the best interest of D.L.B.

IV. Conclusion

For the foregoing reasons, the decision of the trial court is affirmed. We remand this case to the trial court for further proceedings consistent with this opinion. Costs of this appeal are taxed against the Appellant, David Moore, and his surety, for which execution may issue if necessary.

ALAN E. HIGHERS, JUDGE