IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

IN RE: S.M., JR. (A minor)	)	Montgomery Juvenile No. 57-29
	)	Appeal No. 01-A-01-9506-JV-00233

APPEAL FROM THE JUVENILE COURT FOR MONTGOMERY COUNTY
AT CLARKSVILLE, TENNESSEE

THE HONORABLE CAROL CATALANO, JUDGE

For B.M.C.:

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For S.M., Sr.:

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For Dept. of Human Services:

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AFFIRMED AND REMANDED

WILLIAM C. KOCH, JR., JUDGE

O P I N I O N

This appeal involves the termination of parental rights of two mildly retarded parents with regard to their eleven-year-old son. The Montgomery County Juvenile Court removed the child from his parents' home and awarded temporary custody to the Department of Human Services after determining that he had been sexually abused by his father. Approximately two and one-half years later, the juvenile court terminated the parents' parental rights and awarded the department permanent custody of the child. On this appeal, the parents challenge the constitutionality of denying them a de novo appeal to the circuit court and the evidentiary support for the juvenile court's decision. We have determined that the parents were afforded a constitutionally adequate hearing in the juvenile court and that the evidence supports the juvenile court's decision. Accordingly, we affirm the judgment terminating the parents' parental rights.

I.

B.M.C. is a 36-year-old woman who lives in Clarksville. She is mildly mentally retarded and is also physically disabled as a result of a childhood bone disease. She is unemployable and supports herself with governmental assistance. B.M.C. was married at one time to S.M., Sr. who is thirty-nine years old and who is also mildly retarded. S.M., Sr. has a history of unemployment and excessive alcohol abuse and a sexual fetish for life-size dolls and pornographic materials.

In July 1984, B.M.C. gave birth to S.M., Jr. The boy was also mildly to moderately retarded and suffered from chronic encephalopathy, articulation disorders, and auditory problems. The Department of Human Services had been made aware of B.M.C. before her son's birth and undertook to provide her with homemaker services and other support for the first five or six years of the boy's life. Notwithstanding their problems, the family functioned fairly well because of the department's intensive intervention.

The family began to deteriorate after the department's support was no longer available. In mid-1992, S.M., Jr. complained to his mother that S.M., Sr. has been sexually abusing him. B.M.C. did not believe her son and permitted

S.M., Sr. to continue to take baths with the boy and to take the child into his bedroom every night and to remain there behind closed doors. B.M.C. finally recounted her son's statements to his aunt who insisted that the abuse be reported and who refused to allow S.M., Jr. to return home. When B.M.C. declined to report the abuse, S.M., Jr.'s aunt took it upon herself to inform the department of the boy's complaints.

The department filed a petition for temporary custody in the Montgomery County Juvenile Court. The court placed the child in protective custody on August 17, 1992, after finding that S.M., Sr. had sexually abused his son and that B.M.C. had failed to protect the child. The boy had all the symptoms of a child suffering from post-traumatic stress disorder and was also behaving like a child who had been sexually abused. Accordingly, the department placed him in a therapeutic foster care program in Nashville. It also placed him in special education classes because of his mental retardation.

B.M.C. divorced S.M., Sr. in June 1993, not because he had sexually abused their son but because of his excessive drinking. Three months later she married J.L.C., one of S.M., Sr.'s long-time friends. J.L.C. is fifty-five years old, functionally illiterate, and unemployed. He also has a history of alcohol abuse and still spends a great deal of time with S.M., Sr. He and B.M.C. have even permitted S.M., Sr. to reside with them. B.M.C. has lived in ten different places since her divorce and is currently living in a dilapidated house in one of Clarksville's poorest areas, the same house where she lived while married to S.M., Sr.

Following the divorce, S.M., Sr. and his new girlfriend moved into a low income apartment in Clarksville. He has not been employed and shows no interest in looking for work. S.M., Sr. supports himself with governmental benefits and spends most of his time watching television and riding around Clarksville in his girlfriend's automobile.

Both B.M.C. and S.M., Sr. received counseling after S.M., Jr. was placed in protective custody. The teacher of their parenting class reported that they were incapable of comprehending the subject matter of the class. After several

sessions, B.M.C.'s therapist concluded that she would not benefit from additional therapy. S.M., Sr. also participated in group therapy for sexual abusers. Even though he made some progress, the persons working with him eventually concluded that he will never acquire appropriate parenting skills because he is focused more on satisfying his own desires than on being his child's caretaker.

B.M.C. does not believe her son's sexual abuse complaints and refuses to recognize his special needs. Even though she is permitted regular, supervised visits with her son, she does not visit with him regularly. Her visitations are generally difficult because she does not interact well with her son. S.M., Jr.'s clinical therapist noted that the visits disturb the boy and that he shows more progress when he does not visit with his mother. S.M., Sr. has not been permitted to visit with his son, and S.M., Jr. has shown no interest in visiting with his father.

B.M.C. and her new husband petitioned for custody of S.M., Jr. in April 1994. Six months later, the department requested the juvenile court to terminate B.M.C.'s and S.M., Sr.'s parental rights. Following a hearing in February 1995, the juvenile court entered an order on March 27, 1995, terminating B.M.C.'s and S.M., Sr.'s parental rights and naming the department as S.M., Jr.'s guardian. The court decided to terminate B.M.C.'s parental rights because of (1) her lack of progress in counseling, (2) her continuing relationship with S.M., Sr., (3) the poor quality of the visitation, (4) her inability to meet S.M., Jr.'s special needs, and (5) her poor housekeeping and inability to provide a stable environment. It terminated S.M., Sr.'s parental rights because of (1) his lack of parental responsibility and (2) his inability to provide for his son's special needs.

II.

We turn first to the parents' constitutional issues. They assert that they were deprived of their vested right to a de novo trial in circuit court following the proceeding in juvenile court and that the juvenile court proceeding itself was constitutionally deficient. We find no constitutional shortcomings in the procedures used to terminate the parents' parental rights in this case.

A.

Prior to 1994, any party dissatisfied with a juvenile court's decision in a termination of parental rights case was entitled to a de novo trial in the circuit court. Tenn. Code Ann. § 37-1-159(a) directed the circuit court to "hear the testimony of the witnesses and try the case de novo." Thus, instead of reviewing the juvenile court's decision based on the record of the juvenile court proceeding, the circuit court conducted an entirely new trial as if the case had originated in the circuit court. Parties dissatisfied with the circuit court's judgment were entitled to an appeal as of right to this court.

The General Assembly changed the adjudicatory procedure for termination of parental rights cases in 1994 by amending Tenn. Code Ann. § 37-1-159(a) to eliminate the de novo trial in circuit court.[1] While this amendment accomplished the desired effect of hastening final decisions in termination of parental rights cases, it also accentuated the importance of the juvenile court proceeding. The juvenile court trial was no longer the warm-up for a circuit court trial. Instead, it became the parties' only opportunity to present evidence on the termination of parental rights issue. Appellate courts base their decisions on the lower court's record, and thus the juvenile court record became the evidentiary foundation for all later judicial consideration of the case.

B.

The parents first assert that applying the amended version of Tenn. Code Ann. § 37-1-159 to their case violates the prohibition against *ex post facto* laws in Tenn. Const. art. I, § 11.[2] Their reliance on Tenn. Const. art. I, § 11 is misplaced because the constitutional prohibition against *ex post facto* laws applies exclusively to criminal offenses. *Jones v. Jones*, 2 Tenn. (2 Overt.) 2, 5 (1804) (*ex post facto* laws relate to public punishment). Recent decisions have held that the five types of statutes proscribed by Tenn. Const. art. I, § 11 include statutes that

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[1]Act of April 7, 1994, ch. 810, § 1, 1994 Tenn. Pub. Acts 556.

[2]Tenn. Const. art. I, § 11 provides: "That laws made for the punishment of acts committed previous to the existence of such laws, and by them only declared criminal, are contrary to the principles of a free Government; wherefore, no Ex post facto laws shall be made."

criminalize previously noncriminal conduct, that aggravate criminal offenses, that increase criminal punishment, that ease the State's burden of proof in criminal cases, and that otherwise disadvantage a criminal defendant. *State v. Pearson,* 858 S.W.2d 879, 882 (Tenn. 1993); *Miller v. State,* 584 S.W.2d 758, 761 (Tenn. 1979); *State v. Edwards,* 868 S.W.2d 682, 701 (Tenn. Crim. App. 1993).

Tenn. Const. art. I, § 11 has no application to civil proceedings. A termination of parental rights case is a civil, not criminal, proceeding. The parents have not been charged with a criminal offense, and they are not exposed in this proceeding to even the remotest risk of receiving criminal punishment of any sort. Accordingly, applying the amended appellate procedures in Tenn. Code Ann. § 37-1-159 to this case does not run afoul of the constitutional prohibition against *ex post facto* laws.[3]

C.

The parents' argument that they were unconstitutionally deprived of their vested right to a de novo trial in circuit court more properly implicates the interests protected by Tenn. Const. art. I, § 20. This provision states: "That no retrospective law, or law impairing the obligation of contracts, shall be made." While its operation is similar to Tenn. Const. art. I, § 11, it protects different rights. *Townsend v. Townsend,* 7 Tenn. (Peck) 1, 15 (1821); *Jones v. Jones,* 2 Tenn. at 5.

Tenn. Const. art. I, § 20 does not proscribe all retrospective laws but rather proscribes only those laws that divest or impair vested substantive rights. *Hanover v. Ruch,* 809 S.W.2d 893, 896 (Tenn. 1991); *Miller v. Sohns,* 225 Tenn. 158, 162, 464 S.W.2d 824, 826 (Tenn. 1971); *Dark Tobacco Growers' Co-op. Ass'n v. Dunn,* 150 Tenn. 614, 632, 266 S.W. 308, 312 (1924). Vested rights, as defined by the Tennessee Supreme Court, include those "which it is proper for the State to recognize and protect and of which the individual should not be deprived

[3]Even if Tenn. Const. art. I, § 11 did apply to this case, altering the appellate review for juvenile court decisions is not unconstitutional. *See State v. Ashby,* 823 S.W.2d 166, 167 (Tenn. 1991); *State v. Edwards,* 868 S.W.2d at 701 (applying an amended appellate standard of review to conduct occurring prior to the effective date of the amendment does not violate Tenn. Const. art. I, § 11).

arbitrarily without injustice." *Morris v. Gross*, 572 S.W.2d 902, 905 (Tenn. 1978). Thus, retrospective laws are those "which take away or impair vested rights acquired under existing laws or create a new obligation, impose a new duty, or attach a new disability in respect of transactions or considerations already passed." *Morris v. Gross*, 572 S.W.2d at 907.

No party, however, has a vested right in a particular remedy. Accordingly, Tenn. Const. art. I, § 20 does not prohibit the General Assembly from changing existing remedies and procedures. *Morris v. Gross*, 572 S.W.2d at 905; *Lunati v. Progressive Bldg. & Loan Ass'n*, 167 Tenn. 161, 168, 67 S.W.2d 148, 150 (1934); *Gardenshire v. McCombs*, 33 Tenn. (1 Sneed) 83, 86 (1853). These changes may be applied to circumstances or proceedings occurring before their enactment. The courts have thus approved applying statutory changes in evidentiary rules,[4] remedies,[5] and the assessment of costs[6] to cases involving occurrences that took place before the changes became effective.

The courts have also considered Tenn. Const. art. I, § 20's application to statutes affecting appeals. They have held that Tenn. Const. art. I, § 20 prohibits the application of a statute curtailing appeals in cases involving the removal of local election officials who took office before the effective date of the statute. *McKee v. Board of Elections*, 173 Tenn. 276, 287-88, 116 S.W.2d 1033, 1037 (1938). Even though statutes doing away with all appellate rights cannot be applied retroactively, this court has held that a statute enlarging the scope of appellate review could be applied to proceedings begun before its passage. *National Life & Accident Ins. Co. v. Atwood*, 29 Tenn. App. 141, 146, 194 S.W.2d 350, 353 (1946). In doing so, we stated:

> As applied to procedural changes governing the right of appeal the rule is that, where due provision has been made for the preservation of essential rights, the

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[4] *Brewer v. Aetna Life Ins. Co.*, 490 S.W.2d 506, 510-11 (Tenn. 1973) (statute declaring a rule of evidence); *State ex rel. Neilson v. Haywood*, 183 Tenn. 567, 575, 194 S.W.2d 448, 451 (1946) (statute increasing the scope of relevant evidence).

[5] *Dark Tobacco Growers' Co-op. Ass'n v. Dunn*, 150 Tenn. at 632, 266 S.W. at 312 (statute providing additional remedies).

[6] *Gardenshire v. McCombs*, 33 Tenn. at 85-86 (statute increasing the ceiling on the costs awarded to successful plaintiffs).

> procedure for review or the extent of review are so far within the power of the legislature as to preclude the raising of questions of due process with respect to the method or procedure for review, the parties entitled to review, or the character of review in the appellate court.

National Life & Accident Ins. Co. v. Atwood, 29 Tenn. App. at 147, 194 S.W.2d at 353.

The amendment to Tenn. Code Ann. § 37-1-159(a) was enacted eight months before the department petitioned to terminate the parents' parental rights and ten months before the trial in juvenile court. Applying the amended version of Tenn. Code Ann. § 37-1-159(a) to this case did not curtail the parents' appellate rights nor did it come at such an advanced stage of the proceeding that it undermined their substantive rights. The parents had ample notice of the procedural changes and of the increased importance of the juvenile proceeding. Since the amendment left intact the parents' right to appeal to this court, it did not unconstitutionally hinder their ability to present their case in the juvenile court or their ability to seek appellate review of the juvenile court's decision.

D.

The parents also challenge the fundamental fairness of the juvenile court proceedings in three other respects. They assert that the 1994 amendment to Tenn. Code Ann. § 37-1-159(a) deprived them of their right to a jury trial, their right to a trial presided over by a judge who is a licensed lawyer, and their right to obtain the broad pretrial discovery that would have been available to them in circuit court. We have concluded that the juvenile court proceeding in this case met the requirements of Tenn. Const. art. I, § 6 and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and of Tenn. Const. art. I, § 8.

THE PARENTS' RIGHT TO A JURY TRIAL

The right to a jury trial stems from one of two sources. It can be guaranteed by the state or federal constitutions, or it can be based on a statute. The parents

have not pointed to any statute giving them the right to a jury trial in a termination of parental rights proceeding. Accordingly, their right to a jury trial, if in fact it exists, must be constitutionally based.

The parents assert that their right to a jury trial derives from U. S. Const. amend. VII. The Seventh Amendment, however, does not does not apply to state court proceedings. *Minneapolis & St. L. R.R. v. Bombolis*, 241 U.S. 211, 217, 36 S. Ct. 595, 596-97 (1916); *Eilenbecker v. Plymouth County*, 134 U.S. 31, 34-35, 10 S. Ct. 424, 425 (1890); *Elliott v. City of Wheat Ridge*, 49 F.3d 1458, 1459-60 (10th Cir. 1995). Thus the only possible remaining source of the parents' right to a jury trial must be Tenn. Const. art. I, § 6. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 547, 91 S. Ct. 1976, 1987 (1971) (the right to trial by jury in juvenile cases is a question of state law).

Tenn. Const. art. I, § 6 does not guarantee the right to a jury trial in every civil case. It preserves the right to a jury trial only in those cases where the right existed at common law. *Newport Housing Auth. v. Ballard*, 839 S.W.2d 86, 88 (Tenn. 1992); *Harbison v. Briggs Bros. Paint Mfg. Co.*, 209 Tenn. 534, 541, 354 S.W.2d 464, 467 (1962); *Spurgeon v. Worley*, 169 Tenn. 697, 701, 90 S.W.2d 948, 949 (1936). Termination proceedings are civil in nature and statutory in origin. Accordingly, parents do not have a common-law right to a jury trial in a proceeding to terminate their parental rights. *Mays v. Department of Human Resources*, 656 S.W.2d 252, 253 (Ky. Ct. App. 1983); *In re Shane T*, 544 A.2d 1295, 1297 (Me. 1988); *In re Colon*, 377 N.W.2d 321, 328 (Mich. Ct. App. 1985); *In re C.L.A.*, 685 P.2d 931, 933-34 (Mont. 1984); *In re Clark*, 281 S.E.2d 47, 57 (N.C. 1981); *In re GP*, 679 P.2d 976, 983 (Wyo. 1984).

The parents did not have a constitutional right to a jury trial either in the juvenile court or in the circuit court prior to the enactment of the amendment to Tenn. Code Ann. § 37-1-159(a) in 1994.[7] Accordingly, the 1994 amendment had

[7]The cases cited by the parents to support their claimed right to a jury trial are inapposite. They either recognize a *juvenile's* right to a jury trial in a *delinquency* proceeding, *State v. Strickland*, 532 S.W.2d 912, 921 (Tenn. 1975); *Arwood v. State*, 62 Tenn. App. 453, 457-58, 463 S.W.2d 943, 946 (1970), or construe a juvenile's *statutory* right to a jury trial in a *delinquency* proceeding, *Doster v. State*, 195 Tenn. 535, 539, 260 S.W.2d 279, 280-81 (1953).

no effect on their right to a jury and did not deprive them of a fundamental right existing before the enactment of the amendments.

THE PARENTS' RIGHT TO A LAW-TRAINED JUDGE

The parents also assert that the 1994 amendment to Tenn. Code Ann. § 39-1-159(a) violates Tenn. Const. art. I, § 8 because it creates the possibility that the only trial in a termination case will be presided over by a judge who is not licensed to practice law. The Tennessee Supreme Court has held that the judges presiding over delinquency proceedings must be licensed to practice law because of the fundamental importance of the child's liberty interests. *State ex rel. Anglin v. Mitchell,* 596 S.W.2d 779, 791 (Tenn. 1980). While parental rights may be equally as important, no court has yet held that due process requires that judges who preside over termination of parental rights cases must be licensed to practice law.

Notwithstanding the importance or novelty of an issue, courts should stay their hand when a case does not involve a genuine controversy requiring the adjudication of existing rights. *State ex rel. Lewis v. State,* 208 Tenn. 534, 537, 347 S.W.2d 47, 48 (1961); *Dockery v. Dockery*, 559 S.W.2d 952, 954 (Tenn. Ct. App. 1977). Accordingly, we regularly decline to render advisory opinions, *Super Flea Mkt. of Chattanooga v. Olsen,* 677 S.W.2d 449, 451 (Tenn. 1984); *Parks v. Alexander,* 608 S.W.2d 881, 892 (Tenn. Ct. App. 1980), or to decide abstract legal questions. *State ex rel. Lewis v. State,* 208 Tenn. at 538, 347 S.W.2d at 49.

This is not the proper case for addressing the constitutionality of permitting non-lawyer juvenile court judges to preside over termination of parental rights cases. The question here is theoretical and academic since the juvenile judge who presided over the parents' hearing was licensed to practice law. Accordingly, the question must await another day and a proper case.

THE PARENTS' RIGHT TO DISCOVER RELEVANT INFORMATION

As a final matter, the parents assert that eliminating the trial de novo in circuit court undermines their ability to defend themselves by curtailing their right to discover the key elements of the department's case. They insist that their discovery rights in juvenile court under Tenn. R. Juv. P. 25 are narrower than their rights in circuit court under Tenn. R. Civ. P. 26. We fail to perceive a material difference in the scope of discovery in the two courts.

Tenn. R. Civ. P. 26.02(1) provides parties with a broad right of discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action." The scope of discovery under the Tennessee Rules of Juvenile Procedure is equally as broad, and in fact, the discovery procedures available in juvenile court are more flexible than those available in the circuit or chancery courts. Tenn. R. Juv. P. 25 provides, in part, that

> By local rule and according to whatever process, informal or otherwise, is appropriate for that court, each juvenile court shall insure . . . that the parties in other cases [cases other than delinquent and unruly proceedings] have access to information which would be available in the circuit court.

Accordingly, parents faced with the prospect of losing their parental rights have the right to discover the substance of any expert reports or studies ordered by the court, *see* Tenn. R. Juv. P. 39(f)(3), including the predisposition reports and social histories authorized in Tenn. R. Juv. P. 33.

The parents do not assert that the juvenile court placed any significant restrictions on their discovery or that the department failed or refused to produce any evidence that would have assisted in the preparation of their case. In fact, they concede in their brief that the "[j]uvenile [c]ourt ruled that termination cases should proceed under Tenn. R. Civ. P. 26 discovery." Accordingly, they have failed to demonstrate how the juvenile court's decisions with regard to discovery undermined their right to a fair hearing in this case.

E.

The parents conclude their constitutional arguments with a litany of complaints concerning the 1994 amendment to Tenn. Code Ann. § 39-1-159(c).

These complains involve substance of the "collateral references" prepared by the Tennessee Code Commission for inclusion with other statutes applicable to this case,[8] an open letter from the former chief justice urging lawyers to volunteer for more pro bono cases,[9] and the court's refusal to provide indigent parents with their own experts.[10] None of these complaints have been adequately briefed, and accordingly we deem them waived on this appeal.

Parental rights are fundamental liberty interests for constitutional purposes. *In re Adoption of a Female Child (Bond v. McKenzie),* 896 S.W.2d 546, 547 (Tenn. 1995); *Nale v. Robertson,* 871 S.W.2d 674, 678 (Tenn. 1994); *Broadwell v. Holmes,* 871 S.W.2d 471, 475 (Tenn. 1994). Accordingly, parents faced with the prospect of losing their parental rights are entitled to the due process protections guaranteed by Tenn. Const. art. I, § 8 and the Due Process Clause of the Fourteenth Amendment. Determining the scope of these protections requires a balancing of the private interests at issue, the government's interests, and the risk that the procedures used will lead to erroneous decisions. *Lassiter v. Department of Social Servs.,* 452 U.S. 18, 27, 101 S. Ct. 2153, 2159 (1981).

Because of the interests at stake in a termination case, fundamental fairness requires that parents be afforded a hearing on adequate notice, *Stanley v. Illinois,* 405 U.S. 645, 649, 92 S. Ct. 1208, 1211 (1972); Tenn. R. Juv. P. 39(f)(1), and representation when required by the facts of the particular case, *Lassiter v. Department of Social Servs.,* 452 U.S. at 31-32, 101 S. Ct. at 2162; Tenn. R. Juv. P. 39(f)(2). Due process also requires that parties seeking to terminate a parent's rights prove their case by clear and convincing evidence. *Santosky v. Kramer,* 455 U.S. 745, 747-48, 102 S. Ct. 1388, 1391-92 (1982); Tenn. R. Juv. P. 39(f)(5).

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[8]The parents' lawyers took issue with the inclusion of a citation to an A.L.R. annotation dealing with legal malpractice in the "collateral references" to Tenn. Code Ann. § 23-3-201 (Supp. 1995), the statute describing the grounds for disbarring or disciplining lawyers.

[9]On May 10, 1994, the chief justice wrote an open letter to the members of the bar encouraging them to volunteer to accept more pro bono cases.

[10]The parents concede that they were afforded full access to the reports of the department's treatment personnel as well as to the persons who prepared the court-ordered reports. While they requested independent expert assistance, they could not point to a rule, statute, or constitutional mandate that required the provision of expert assistance in termination cases. This right is not even available to indigent criminal defendants in non-capital cases. *See Davis v. State,* 912 S.W.2d 689, 695 (Tenn. 1995).

We are satisfied that the procedure employed by the juvenile court in this case complies with the requirements of due process and that the parents received a fair hearing. Accordingly, we find that the parents' constitutional challenges to the termination procedures are without merit. Having disposed of the constitutional issues that are ripe for adjudication, we will now consider whether the department proved by clear and convincing evidence that the parents' rights with regard to S.M., Jr. should be terminated.

III.

Both parents also question the evidentiary foundation of the juvenile court's decision to terminate their parental rights. Since the decision implicates fundamental constitutional rights, we employ a heightened standard of review in order to prevent the unwarranted termination or interference with the biological parents' parental rights. *O'Daniel v. Messier*, 905 S.W.2d 182, 186 (Tenn. Ct. App. 1995). Accordingly, we first review the juvenile court's findings of fact in accordance with Tenn. R. App. P. 13(d), and then we determine whether the facts make out a clear and convincing case in favor of terminating the parents' parental rights. Tenn. Code Ann. § 37-1-147(d) (Supp. 1994); *see also O'Daniel v. Messier*, 905 S.W.2d at 187; *Tennessee Dept. of Human Servs. v. Smith*, 785 S.W.2d 336, 339 (Tenn. 1990).

At the time of these proceedings, parental rights could be terminated only in a limited number of well defined circumstances and only if the court determined that terminating the parental rights was in the child's best interests. Tenn. Code Ann. § 37-1-147(d) defined five circumstances warranting the termination of parental rights, including the continuation for at least one year of the conditions that warranted the child's removal from his or her parents' home. Tenn. Code Ann. § 37-1-147(d)(1). The department predicated its termination petition in this case on Tenn. Code Ann. § 37-1-147(d)(1).

In order to terminate parental rights under Tenn. Code Ann. § 37-1-147(d)(1), the juvenile court must find that the record establishes by clear and convincing evidence (1) that the child has been removed from his or her parents'

home for at least one year,[11] (2) that the conditions that led to the removal or other similar conditions warranting removal still persist,[12] (3) that there is little likelihood that the conditions will be remedied at an early date,[13] (4) that continuing the parents' relationship with the child will greatly diminish the child's chances of early integration into a stable and permanent home,[14] and (5) that termination of the parents' parental rights is in the child's best interests.[15] Consideration of the child's best interests and the possibility of returning the child to his or her parents in the near future should be guided by the six factors in Tenn. Code Ann. § 37-1-147(e) and other similar factors. These factors include extent of the parents' adjustment to the circumstances, the parents' brutality, abuse, or neglect of other children, the parents' use of drugs or alcohol, the level of financial support if the parents are financially able to support the child, the extent of the parents' visitation or other contacts with the child.

By the time of the hearing in juvenile court, S.M., Jr. had been removed from their custody for over two years. S.M., Sr. still continued to play a role in B.M.C.'s life even though she had divorced him. S.M., Sr. was a close friend of her new husband and spent a great deal of time in B.M.C.'s home. B.M.C. continued to fail to understand the significance of her continuing relationship with S.M., Sr. because she still does not believe that S.M., Sr. sexually abused their son. All counseling and parental skills training have had little effect on either B.M.C. or S.M., Sr., and thus there is little likelihood that the conditions that caused them to lose custody of S.M., Jr. in August 1992 will be remedied in the foreseeable future. All professionals familiar with the parents and the child have concluded that terminating B.M.C.'s and S.M., Sr.'s parental rights will advance S.M., Jr.'s best interests by improving his chances of being provided a stable, permanent placement.

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[11]Tenn. Code Ann. § 37-1-147(d)(1).

[12]Tenn. Code Ann. § 37-1-147(d)(1)(A).

[13]Tenn. Code Ann. § 37-1-147(d)(1)(B).

[14]Tenn. Code Ann. § 37-1-147(d)(1)(C).

[15]Tenn. Code Ann. § 37-1-147(d).

We are aware of the gravity of the decision to remove a child permanently from his or her natural parents and to terminate their parental rights. Decisions in cases of this sort are among the most difficult that judges are called upon to make because they indelibly affect all parties concerned. The evidence in this case demonstrates clearly and convincingly that S.M., Jr.'s physical safety and psychological maturation will be best served by terminating B.M.C.'s and S.M., Sr.'s parental rights. Accordingly, we find that the evidence supports the juvenile court's decision to terminate the parents' parental rights.

IV.

B.M.C.'s final argument is that the juvenile court erred when it terminated her parental rights because the department had not demonstrated that it could no longer provide her rehabilitative and support services. This argument assumes that B.M.C. has a constitutional right to demand that the State provide these services and that her parental rights cannot be terminated if she might be able to meet her parental responsibilities and obligations with governmental support. We find that her assumptions are misplaced.

Biological parents have a fundamental liberty and privacy interest in the care and custody of their children. *In re Adoption of Female Chile (Bond v. McKenzie*), 896 S.W.2d at 547; *Nale v. Robertson,* 871 S.W.2d at 678. They do not, however, have a constitutional right to expect that the government will guarantee the continuing existence of the family unit at state expense. *Black v. Beame,* 550 F.2d 815, 817 (2d Cir. 1977); *Doe v. Oettle,* 293 N.W.2d 760, 761 (Mich. Ct. App. 1980); *In re Welfare of J.H.,* 880 P.2d 1030, 1033 (Wash. Ct. App. 1994). A state is not constitutionally required to continue to provide support indefinitely simply because it provided support at some earlier time. *Savage v. Aronson,* 571 A.2d 696, 711-12 (Conn. 1990).

Decisions to create family support programs and to continue to fund them are the Congress's or the legislature's. *In re Welfare of J.H.*, 880 F.2d at 1033. Neither the state nor the federal constitution empowers the courts to second-guess the decisions of state officers charged with the difficult responsibility of allocating

limited public resources among the many potential recipients. *Dandridge v. Williams*, 397 U.S. 471, 487, 90 S. Ct. 1153, 1162-63 (1970). Accordingly, the state is not constitutionally required to provide the housing and support services needed to keep a family of nine children together, *Black v. Beame*, 550 F.2d at 817, or to provide a single mother with placement in a group home in order to prevent the termination of her parental rights. *Doe v. Oettle*, 293 N.W.2d at 761. It is likewise not required to provide emergency housing to a single mother and four children, *In re Welfare of J.H.*, 880 P.2d at 1033, or to continue to provide housing subsidies to AFDC recipients. *Savage v. Aronson*, 571 A.2d at 712.

B.M.C. has not directly challenged the department's decision to discontinue providing her with intensive support, and thus she should not be permitted to attack that decision collaterally in this proceeding. Even though the department provided her with intensive homemaker and other support services at one time, she does not have a constitutional or statutory right to expect to continue to receive these services indefinitely. More importantly, the department's representatives testified that continuing to provide these services would not enhance B.M.C.'s parenting skills to the point where she could provide S.M., Jr. with the type of environment required to meet his special needs. Thus, the record contains no evidence that continuing to provide these services would tip the factors contained in Tenn. Code Ann. §§ 37-1-147(d)(1), -147(e) in B.M.C.'s favor and away from terminating her parental rights.

V.

We have determined that the juvenile court proceedings complied with state and federal constitutional requirements and that the evidence supports the juvenile court's decision. Accordingly, we affirm the judgment terminating B.M.C.'s and S.M., Sr.'s parental rights and remand the case to the juvenile court. We tax the costs of this appeal to the Tennessee Department of Human Services.

WILLIAM C. KOCH, JR., JUDGE

CONCUR:

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HENRY F. TODD, P.J., M.S.

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SAMUEL L. LEWIS, JUDGE