

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
March 17, 2004 Session

**IN RE: A.M.F AND Z.T.F, STATE OF TENNESSEE DEPARTMENT OF  
CHILDREN'S SERVICES v. LISA FRAZIER, ET AL.**

**A Direct Appeal from the Juvenile Court for Maury County  
No. 35-429 The Honorable George L. Lovell, Judge**

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**No. M2003-01276-COA-R3-PT - Filed April 21, 2004**

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This is a termination of parental rights case. The parents appeal from the order of the Juvenile Court of Maury County, terminating their parental rights. Specifically, the parents assert that the grounds cited for termination are not supported by clear and convincing evidence in the record. Because we find clear and convincing evidence in the record to support the trial court's findings, we affirm.

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

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and HOLLY M. KIRBY, J., joined.

Larry Samuel Patterson, Jr., Columbia, For Appellant, John Whatley  
David Kozlowski, Columbia, For Appellant, Lisa Frazier

Paul G. Summers, Attorney General and Reporter, Elizabeth C. Driver, Assistant Attorney General,  
for Appellee, Tennessee Department of Children's Services

**OPINION**

Lisa Frazier ("Frazier," or "Mother") is the mother of four (4) children: B.F., A.M.F.<sup>1</sup> (d.o.b. 4/14/92), C.F., and Z.T.F. (d.o.b. 2/8/93). Sean Moore is the father of A.M.F.;<sup>2</sup> Chris Keck is the father of B.F. John Whatley ("Whatley," and together with Frazier, "Respondents," "Defendants,"

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<sup>1</sup> During the pendency of this appeal, A.M.F. died from Muscular Dystrophy related complications.

<sup>2</sup> Frazier made a sworn statement that Sean Moore is the father of A.M.F. There is no father listed on A.M.F.'s birth certificate and Frazier's sworn statement is not part of this record.

or “Appellants”) is the father of both C.F. and Z.T.F.<sup>3</sup> Whatley and Frazier have never married, although they have lived together for nearly ten (10) years.<sup>4</sup>

The Department of Children’s Services’ (“DCS,” “Petitioner,” or “Appellee”) contact with Frazier began sometime around 1992 when A.M.F. fractured his leg and was hospitalized. At that time, DCS interviewed Frazier but did not remove A.M.F. from the home. From that point, DCS did drop in on the household from time to time and, sometime in 1994, found the conditions such that A.M.F. was removed to State custody.<sup>5</sup> A “Plan of Care” was drawn on July 20, 1994 and signed by Frazier and Whatley. The Plan indicated that A.M.F. had “kidney problems,” a “past history of failure to thrive,” and a “history of Herpes I on scalp which is recurring.” The Plan also indicated that “Mother did not meet the child’s nutritional needs,” and that “Mother has a lack of adequate parenting skills...” Several obligations/responsibilities were laid out in the Plan for Frazier to follow. These included providing nutritious snacks for the child at visitations, and attending “special classes geared toward her areas of need.” The Plan required DCS to assist the family in securing any needed services. Frazier testified that DCS provided a home aide to visit and to instruct her concerning nutrition and sanitation in the household. A.M.F. was returned to the home in 1994.

In November 1996, DCS received a referral regarding the Frazier children. On November 27, 1996, Gloria Kelly, a child protective service worker with DCS, went to the Frazier/Whatley home to investigate. Ms. Kelly testified as follows concerning the conditions she encountered at the home:

A [by Ms. Kelly]. ...And [I] found [A.M.F. and Z.T.F.] to be in a back bedroom with no bedroom furniture, aluminum foil over the windows, not dressed, torn, soiled diapers, torn up like confetti thrown all over the floor. No blankets, no pillows, nothing for them to lay down and they’d been there the course of the night and were still there in the morning.

Q. How do you know that they had been there that night at least?

A. Well, when I first walked into the living room, there was Ms. Frazier and Mr. [Whatley]...and they were all watching TV.... And they were all up and about. I assumed [A.M.F. and Z.T.F.] were

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<sup>3</sup> According to the Petition, by February 27, 1997 Order of the Juvenile Court of Maury County, Whatley was adjudicated to be the father of Z.T.F. No father is listed on Z.T.F.’s birth certificate and this Order is not part of the appellate record.

<sup>4</sup> Whatley and Frazier are first cousins.

<sup>5</sup> See “Order Terminating Parental Rights,” *infra*, for specific facts concerning the conditions that led to the removal on this occasion.

somewhere else and then we—I sat down and started talking with them and was told that [A.M.F. and Z.T.F.] were still in bed asleep. And told them that because of the referral, I had to, you know, see [A.M.F. and Z.T.F.] that day. And I started to get up and walk down the hall from the living room where there were two bedrooms. And the bedroom that [A.M.F. and Z.T.F.] were in was directly facing me at the end of the hall. And I saw their fingers protruding from underneath the doorway at the bottom of the floor, and it struck me like a cat underneath behind a door pawing to get out, you know.

And I went on down the hall and opened the door up. As I was turning the knob, I could hear [A.M.F. and Z.T.F.] jumping up from the door and running over to the other side of the room. And as I was opening it, I could see and sense that they were lying down. They were fully awake, but--

Q. Was the room dark?

A. Very dark, the room was very dark. There was no light in the room at all, no lamp, no bed, no piece of furniture whatsoever. It was a totally bear [sic] room with just the two boys in soiled diapers with not a pillow, not a pillow, not a sheet, not a bed, not a stuffed animal and just torn, soiled diapers thrown all over the floor.

\* \* \*

Q. What did you smell?

A. The moment I stood up to walk down the hall, just the strongest odor of urine, soiled defecation, bathroom smell...that was the smell that hit me at the beginning of the hall as I left the living room. And when you walked into the room, it just nearly knocked me down, the smell did.

\* \* \*

Q. While [A.M.F. and Z.T.F.] were in this bedroom, where was everyone else in the house?

A. They were all in the living room watching TV, just sitting around.

\* \* \*

Q. You said there was no bedding there in that room. Was there any bedding in the rest of the house?

A. Yes, the master bedroom, the parents' bedroom.

Q. What sort of bedding?

A. If I remember correctly, there was the parent's bedroom and bed and then there was a twin bed where the oldest child slept in. And then they had sheets, blankets, pillows, appropriate childlike pillows, you know, very warm, very inviting, just a completely opposite atmosphere.

\* \* \*

Q. Did you [Ms. Kelly] speak with Mr. Whatley and Ms. Frazier concerning this situation of what you saw?

A. Yes, just, you know, explain—and of course, you know, there was another room adjacent to that bedroom that had a hook on the outside of the door. It was hooked out to the wall and from the inside you couldn't get out, and from the outside you had to unhook the wire to get in. And I asked to see that bedroom and when I walked in there, there was [sic] just piles of feces, just various piles all in the room and the smell truly, truly would knock a person down just about.

So I, you know, I just immediately addressed to them how inappropriate this was, you know, and Mr. Whatley did immediately start trying to clean it up, you know—

\* \* \*

Q. What, if anything, did Ms. Frazier do?

A. Just no response at all, just no emotions and, you know, just nothing seem[ed] to get her attention, you know, the severity of the situation, you know, the condition of the bedroom, the condition of the boys.

I explained that I was concerned that, you know, the boys obviously knew they could not come out [of] the bedroom. They were obviously awake. When I stood up, I saw underneath the door

pawing at the carpet, but when I went to open the door up, you know, they just ran to the farthest corner of the room and laid back down.

\* \* \*

Q. Did you ask the parents about bedding for the children?

A. Yes, I'm sure I did. I think that their response was they [A.M.F. and Z.T.F.] had urinated on the bed and so they had to get rid of the mattresses I believe.

\* \* \*

A. And they [Whatley and Frazier] couldn't afford new ones [mattresses], so they laid the boys just on the floor, just on the bear [sic] floor without a blanket, without a sheet, without anything.

\* \* \*

Q. Were the children hungry to your knowledge?

A. Uh-huh, uh-huh, (affirmative).

Q. How do you know that?

A. I remember [A.M.F.] asking for food right away. And it was also just a few days before Thanksgiving and the house was just—the kitchen and refrigerator and counters were cram packed with food. They got donations from various charity organizations and they had every kind of possible food in the house. There was no reason for the children to go hungry. And she [Frazier] went and got a piece of candy and gave it to [A.M.F.]. And I recommended, you know, that it wasn't a proper diet for a child to have candy first thing in the morning when they got up. I recommended that, you know, she do an egg, a piece of toast, you know, a more appropriate food; milk juice for this child. And she just gave the candy anyway just like, you know, whatever I said went in one ear and out the other.

\* \* \*

Q. [B.F.] and [C.F.] were also there?

A. Yes, just as plump and healthy and overly—just very, very well-nourished children. And to compare [B.F. and C.F.] to [A.M.F. and Z.T.F.], you know, it was just night and day.

DCS obtained emergency permission to remove all four (4) children from the Frazier/Whatley home that same evening. Frazier and Whatley were indicted for severe child abuse and pled guilty to misdemeanor child abuse on April 29, 1999. On March 13, 2000 and March 20, 2000, the Juvenile Court of Maury County held an adjudicatory hearing to determine if the children were dependent and neglected. Following the hearing, B.F. and C.F. were returned to the Frazier/Whatley home. B.F. and C.F. have lived with Frazier and Whatley since that time. A.M.F. and Z.T.F. were declared dependent and neglected and have remained in foster care continuously since their removal from the Frazier/Whatley home in November 1996.

DCS filed its first “Petition for Termination of Parental Rights” on March 6, 2000, alleging grounds of willful abandonment and non-support, persistence of conditions, and severe child abuse. On March 6, 2001, DCS submitted a “Notice of Voluntary Dismissal” of this petition. By Order of March 28, 2001, the trial court dismissed the petition without prejudice. A.M.F. and Z.T.F. remained in foster care.

On May 10, 2001, Permanency Plans (the “Plans”) were completed for both A.M.F. and Z.T.F. Frazier and Whatley signed these Plans on July 16, 2001. By the time these Plans were completed, A.M.F. had been diagnosed with Muscular Dystrophy (“MD”) and Z.T.F. had been diagnosed with ADHD. On July 21, 2001, an Order was entered, which required Whatley to pay \$209 per month for the support of Z.T.F. On August 25, 2000, two Amended Orders were entered, requiring Frazier to pay \$69.50 per month for the support of Z.T.F. and \$69.50 per month for the support of A.M.F. On June 1, 2001, two petitions (one for each child) were filed by the Assistant Attorney General against Frazier to enforce the child support orders. On or about July 20, 2001, an order was entered noting that the hearing was continued until September 7, 2001. Frazier failed to appear on September 7, 2001.

On November 27, 2001, DCS filed a second “Petition for Termination of Parental Rights” (the “Petition”), seeking to terminate Frazier, Whatley, and Sean Moore’s (father of A.M.F.) parental rights to A.M.F. and Z.T.F.. The Petition reads, in relevant part, as follows:

## XI

Since the non-suit of the original TPR, numerous developments have arisen:

1. The parents last visited on July 18, 2001. They “disappeared” for several months and then it was discovered that Mr. Whatley and Ms. Frazier were living in Illinois with Mr. Whatley’s father. They left

without giving any notice to the children or to the Department and as aforesaid, have not visited since July 18, 2001.

2. Both Mr. Whatley and Ms. Frazier have been ordered to pay child support. Neither has paid pursuant to the orders of the Court. On June 1, 2001, two petitions (one for each child) were filed by the Assistant Attorney General...against Frazier to enforce the child support orders. On or about July 20, 2001, an order was entered noting that the hearing was continued until September 7, 2001. Ms. Frazier did not appear on September 7, 2001.

3. Mr. Whatley and Ms. Frazier have not had stable employment or housing; they have not visited with the children for over four (4) months; they have not stayed in contact with the Department; they have not paid child support as ordered; they have not worked with [A.M.F.'s] doctors to learn how to treat his serious medical conditions; they have not undergone the required parenting assessment; and they have failed to work with the children's teachers to learn about the children's needs and demands.

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## **XII**

Proof of any one of the grounds for termination listed in the statute, plus best interest proof, is sufficient. The Petitioner's would assert the following grounds against the Defendants:

### 1. Abandonment by non-visitation

Defendants Lisa Frazier, John Whatley and Sean Moore have willfully failed to visit with [A.M.F. and Z.T.F.] for the four (4) months preceding the filing of this instant termination lawsuit.

### 2. Abandonment by non-support

Defendants, Lisa Frazier, John Whatley, and Sean Moore, have willfully failed to make reasonable payments toward the support of [A.M.F. and Z.T.F.] for the four (4) months preceding the filing of this instant termination lawsuit.

### 3. Persistence of conditions

The children have been removed from the custody of the Defendants for more than six (6) months.

The conditions which led to the removal of the children from the home of Lisa Frazier and John Whatley still exist or other conditions exist which in all probability would cause the children to be subject to further abuse and/or neglect, making it unlikely that the children could be returned to Lisa Frazier or John Whatley in the near future.

4. Severe abuse by John Whatley

John Whatley has committed severe abuse towards [Z.T.F.], who is [A.M.F.'s] half brother.<sup>6</sup>

5. Severe abuse by John Whatley and Lisa Frazier

John Whatley and Lisa Frazier have further and in addition committed severe abuse against both boys in the following particulars, to wit:

[A.M.F. and Z.T.F.] were kept locked in a room with tin foil over the window, making the room very dark. The carpet was soaked with urine and feces. The room was empty except for the children and a torn up soiled diaper. Both children were severely malnourished and under size. Both children grew rapidly when placed in foster care. Two other children in the household were not malnourished and were not locked in their rooms at the time of removal. Both children suffered significant emotional, social and physical injury from this abuse and neglect. The parents have never taken responsibility for their abuse and neglect of these children. The parents did enter a "best interest" guilty plea to the charge of child abuse in the Circuit Court of Maury County. The original unamended charge was for felony child abuse. No psychological and psychiatric testing and assessments have been done on the parents to determine why these two children were singled out for abuse and neglect. Both children are very fearful of returning to their parents due to the history of abuse and neglect. [A.M.F.] was placed in foster care in 1994 due to similar types of abuse and neglect. Despite services, [A.M.F. and

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<sup>6</sup> According to DCS' "Motion for Judgment and Petition to Add Post Termination of Parental Rights Fact," on March 20, 2003, after a jury trial in Maury County Circuit Court, Whatley was found guilty of sexual battery. Z.T.F. testified at the trial that Whatley forced Z.T.F. to perform oral sex when Z.T.F. was in his parent's custody. At that time, Whatley's bond had been revoked and his sentencing was set for April 22, 2003. By Order of April 7, 2003, "the DCS motion for inclusion of the additional post trial fact of Mr. Whatley's criminal disposition" was denied.



Z.T.F.] were neglected and abused again after [A.M.F.] was returned in 1994.

\_\_\_\_\_ On November 28, 2001, DCS filed a “Petition to Suspend Visitation” of Frazier and Whatley with A.M.F. and Z.T.F. Relying, *inter alia*, upon the advice of Dr. William Vaughn, the psychological examiner who counseled with A.M.F. and Z.T.F., DCS asserted that continued visitation with Frazier and Whatley “would be harmful to the boys and would not be in their best interest.” By “Ex Parte Order” of November 28, 2001, visitation was suspended. On March 18, 2002, the trial court held a hearing on the Petition to Suspend Visitation, at which time the trial court heard testimony from Dr. Vaughn, April Coons, the case manager for DCS, and Frazier. Following this hearing, an Order was entered on August 15, 2002 suspending visitation. This Order reads, in relevant part, as follows:

...Time and again, efforts have been made to do what is possible to have defendants develop a normal relationship with their children and the Court has tried to encourage visitation. In that context, it is inconceivable to the Court that the defendants would just up and leave Tennessee. The Court does agree with counsel for the defendants that the granting of this Motion may be tantamount to a termination of their parental rights, but the Court finds that the foster parents have been the only stable influence in the lives of these boys. The Court’s primary consideration at this point is the impact that visitation would have on the children and what progress the defendants have shown.

On April 25, 2002, Frazier filed her Answer to the Petition. The Answer reads, in pertinent part, as follows:<sup>7</sup>

...She [Frazier] admits that she left Tennessee without giving notice to the Department and admits that she has not visited with her sons since July 18, 2001.... She would, however, assert that she has attempted to visit with her sons and that the Department has refused to allow visits or to allow any contact between her and her sons and that, beginning on November 28, 2001, the Juvenile Court has refused to allow her to visit with her sons.

In addition, the Answer denies that Frazier willfully failed to support her sons.

\_\_\_\_\_ A hearing on the Petition to Terminate was held on September 12, 2002. On April 25, 2003, the trial court entered its “Order Terminating Parental Rights,” which reads, in relevant part, as follows:

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<sup>7</sup> The record contains no Answer from Whatley or Moore.

...Lisa Frazier and John Whatley are not married to one another, but they are first cousins and have been co-habiting since late 1992. Although John Whatley is not the biological father to [A.M.F.], he has been the only father [A.M.F.] has known, and for purposes of brevity in this Order, Lisa Frazier and John Whatley will be referred to as the “parents” of the two children.

### Sean Moore’s Parental Rights

The uncontroverted proof is that Sean Moore has never shown any kind of paternal interest in [A.M.F.], has not appeared or answered the Petition, has not been seen or heard from by Lisa Frazier since early 1992, and has neither visited nor supported the child in any manner. The Court finds that he has abandoned the child and that it is in the child’s best interest that Sean Moore’s parental rights should be, and therefore are, terminated as to [A.M.F.].

\* \* \*

...the parents had been granted visitation and had exercised same until July 18, 2001, after which time the parents left the State without giving DCS any notice of where they were, how they could be reached, or when they might return. When they did return in the latter part of November, DCS filed the motion to suspend [visitation]. The Court based its decision to suspend the parents’ visitation because of their apparent disregard of the effect that such an absence might have on the children, and upon the testimony of the children’s counselor, Dr. William Vaughn, that after the boys visitation they “evidenced significantly disturbed behavior” and that “visitation at present can be expected to create turmoil...adversely impacting the social and emotional gains they have made over the past several months.”

The Court’s suspension of visitation in November 2001, was an attempt to protect the fragile health of these children, and in and of itself, did not decide the termination of parental rights issue. It did put the parents in the position of showing to the Court how committed they were to these children. Had the parents come into Court and shown a genuine concern for the children by explaining why they had left abruptly and how a four month break in visitation would not harm their relationship with the children, or if they had expressed a true willingness to work with the children’s counselor to re-integrate themselves to the children, the outcome may have been

much different. The Court recognizes that these parents may not be rocket scientists, but they were represented by conscientious and capable counsel and could have shown some minimal concern for these boys. The Court is left to speculate as to how long the parents would have been in Illinois had the employment prospects been brighter.

### Lisa Frazier and John Whatley's Parental Rights

A decision to terminate parental rights must be based on clear and convincing evidence that one or more of the statutory grounds have been established and that termination is in the best interest of the child per TCA 36-1-113. Rule 39(g) of the Rules of Juvenile Procedure states that if one or more of the grounds exist, then the Court shall enter an order terminating the parent's rights, unless it is contrary to the best interest of the child.

DCS has alleged four of the five statutory grounds for termination:

1. Abandonment by the parents in July, 2001
2. Removal of the children from the home and persistence of conditions
3. Severe child abuse by the parents in 1996
4. Severe child abuse by John Whatley on [Z.T.F.]

The Court makes the following findings of fact:

1. On June 28, 1994, [A.M.F.], age 2, was removed from Lisa Frazier's custody because he was found in a darkened room in a crib with no bedding, with bruises on his forehead and cheek, being underweight and lethargic, in a filthy condition with dried feces on him and a dead roach stuck on his foot. Six weeks earlier, he had been found with bruises and dried vomit on him. At the Staffing Summary hearing, DCS had already begun homemaker services, and a Home Ties services referral was made along with a recommendation that Lisa Frazier attend the Exchange Club parenting class. In August, the child was returned to Lisa Frazier. Although this series of incidents were not alleged as grounds to terminate, it is

a part of the Court's file in this case and is relevant to the issue of persistence of conditions.

2. On November 27, 1996, this Court granted DCS' motion for emergency removal of all four children of Lisa Frazier, based on allegations of abuse. After a preliminary hearing, [B.F.] and [C.F.] were returned to Lisa Frazier on the Court's finding that those two children were healthy and doing well, despite the fact that [C.F.'s] room had feces smeared into the carpet and that the door to her room had no handle, but was wired shut from the hallway side. [B.F.] seemed healthy and bright. His bed was in the same room as the parents'. [A.M.F. and Z.T.F.] were ordered to remain in custody based on testimony of the DCS worker that as she approached the room that [A.M.F. and Z.T.F.] shared, she was almost overcome by the stench of urine. A small hand was under the closed door, feeling the hall carpet. As she turned the knob, the hand pulled back and upon opening the door, she saw two small shadowy figures run to the far corner of the room and lie down as if they were asleep. It was approximately 9:30 A.M., but there was very little light in the room, the window having been covered with aluminum foil. There was no furniture in the room, nor was there any bedding, blankets, pillows, or toys. [A.M.F. and Z.T.F.] were clothed only in diapers. Shredded, soiled diapers were the only other things in the room. A pediatrician testified that the boys were below the five percentile level on the standard growth chart, and that [A.M.F.] had gained only one pound in the past year despite being on a growth hormone. After being placed into DCS custody, dramatic weight gain occurred. Both of the boys had the skin of their penis grown over the head of the penis, which was caused by not properly cleaning the genital area. Lisa Frazier and John Whatley were indicted for severe child abuse and pled guilty to misdemeanor child abuse on April 29, 1999. They had not visited with the boys during the pendency of the criminal charges.

3. Although the parents sought visitation after the criminal charges were settled and they have tried to expand the visits, the visitation has been sporadic. The parents believe that the evidence shows that DCS has tried to thwart their efforts to visit and has engaged in the game of "gotcha" whenever a visit would be missed. DCS maintains that it has tried to provide meaningful visitation, but that the parents would miss visits for a variety of reasons and without notifying DCS, frustrating the children and the foster parents. The Court finds that most of the missed visits were due to action or

inaction of the parents, although some were due to miscommunication between DCS, the foster parents, and the parents. The whole reason for the visitation is to maintain or re-establish the bond between parent and child. It is apparent to the Court that [A.M.F. and Z.T.F.] do not have a normal parent-child bond with the parents. Whether the loss of that relationship is a result of the almost two and one-half year gap in visitation brought on by the criminal charges or the lack of consistent visitation, this Court cannot say, but the Court can say with certainty that the children have bonded with the foster parents as well as they will ever bond with anyone and that it would be devastating to the children to be returned to the parents.

4. For more than a four month period, from July 18 to November 27, 2001, the parents did not support the children by the payment of court-ordered child support and did not visit with the children. The parents went to Illinois to stay with relatives and find a job. Unable to find suitable employment, they returned to Tennessee in late November. Lisa Frazier claims to have called DCS in November to set up telephone visits, but given the ages of the boys and the lack of meaningful verbal interaction during past visitations, such an attempt seems to be token visitation, at best. During this period, DCS and the foster parents had no knowledge of the parents' location. On her return, Lisa Frazier called DCS, but would not or could not give an address where they were living.

5. With regard to the charge of severe sexual abuse by John Whatley on [Z.T.F.], the Court finds that this ground was not established by clear and convincing evidence. DCS has recently filed a motion asking the Court to consider a judgment rendered last month by the 22<sup>nd</sup> District Circuit Court wherein a jury found John Whatley guilty of severe child abuse on [Z.T.F.] based on the same incident DCS had alleged in its grounds to terminate. As that issue was adjudicated in this court and found not to be established by clear and convincing evidence, and even though a jury found him guilty beyond a reasonable doubt, this Court finds that DCS's motion is not well-taken and that verdict is not to be considered in this case.

The Court makes the following conclusions of law:

1. DCS has shown by clear and convincing evidence that Lisa Frazier and John Whatley abandoned the children from July 18, 2001 until November 27, 2001, the date that the Motion to Terminate Parental Rights was filed, by moving out of state without notifying

the children or DCS, by not paying child support as ordered, and by not visiting with the children.

2. DCS has shown by clear and convincing evidence that the children have been removed from the parents' home for greater than six months and that the conditions which led to the removal still persist. The proof does not show that the parents are incapable of parenting. Indeed, the oldest and youngest children seem healthy and [are] being cared for well. The proof is that for some unexplained reason these boys were not cared for properly, even after Lisa Frazier had services for a similar situation in 1994. These boys deserve to have a home that they know will not be jerked out from under them at any moment. For the last five years these boys have been in a home where they have found unconditional love and unceasing care. To remove them from the only nurturing home they have known or to persist in the notion that they will ever return to their parents' home is ludicrous at best.

3. The allegation of severe child abuse by John Whatley on [Z.T.F.] has not been established.

4. The allegation of severe child abuse by both parents in 1996 has not been established, due to the statutory definition of severe child abuse, but the Court has already determined that the children were abused by being in those conditions.

5. Termination of the parents' rights is in the best interest of the children. Although DCS may be taken to task for some things, it has paired these two children, who have some very special needs, with a family who has shown real compassion and love for these boys and a determination to work with them.

IT IS THEREFORE ORDERED, that the parental rights of Lisa Frazier and John Whatley as to [A.M.F. and Z.T.F.] are hereby terminated. DCS is awarded guardianship of the children with the right to place them for adoption.

Both Frazier and Whatley appeal from this Order. Frazier and Whatley each raise the sole issue of whether the trial court's decision to terminate their respective parental rights, on the grounds of persistence of conditions, willful abandonment, and failure to pay child support, was supported by clear and convincing evidence.

Before turning to the issue, we note that, during the pendency of this appeal, A.M.F. died from MD related complications.

Since this case was tried by the court sitting without a jury, we review the case *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. *See* Tenn. R. App. P. 13(d).

T.C.A. § 36-1-113(c)(Supp. 2003) governs termination of parental rights and requires that such termination be based upon:

- (1) A finding by the court by clear and convincing evidence that the grounds for termination [of] parental or guardianship rights have been established; and
- (2) That termination of the parent's or guardian's rights is in the best interest of the child.

The trial court terminated Frazier and Whatley's parental rights on the following grounds, which are found at T.C.A. § 36-1-113(g)(5)(Supp.2003):

- (1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred;

\* \* \*

- (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.

T.C.A. § 36-1-102(1)(A)(Supp.2003) defines "Abandonment" as follows:

(1)(A) "Abandonment" means, for purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, that:

(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 have willfully failed to make reasonable payments toward the support of the child;

(ii) The child has been removed from the home of the parent(s) or guardian(s) as the result of a petition filed in the juvenile court in which the child was found to be a dependent and neglected child, as defined in § 37-1-102, and the child was placed in the custody of the department ... that the juvenile court found ... that the department ... made reasonable efforts to prevent removal of the child or that the circumstances of the child's situation prevented reasonable efforts from being made prior to the child's removal; and for a period of four (4) months following the removal, the department ... has made reasonable efforts to assist the parent(s) or guardian(s) to establish a suitable home for the child, but that the parent(s) or guardian(s) have made no reasonable efforts to provide a suitable home and have demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date;

T.C.A. § 36-1-113(c) allows for termination of parental rights if any one of the grounds outlined in T.C.A. § 36-1-113(g) are found by clear and convincing evidence, and termination is in the best interest of the child. We have reviewed the entire record in this case and we find that the record is replete with evidence to support the trial court's finding that termination of Frazier and Whatley's parental rights is warranted on any and all of the grounds listed in the Order. We further find, in accordance with the trial court, that termination of Frazier and Whatley's parental rights is in the best interest of Z.T.F..

### **Abandonment Grounds**

Pursuant to T.C.A. § 36-1-102(1)(A)(i) abandonment occurs when a parent has willfully failed to visit or support the child 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. Concerning visitation, Frazier testified, in relevant part, as follows:

Q. You [Frazier] would agree that in 1999, you and Mr. Whatley missed consecutively visiting the children for three months and three



weeks from July of '99 till November of '99, for three months and three weeks, correct, three months and three weeks, you dispute that?

A. No, because I'm not sure. I know I missed a lot.

Q. Why?

A. Well, some of the reason was because I didn't have a stable enough car and it was broke down all the time. I didn't have a phone and I couldn't contact nobody.

Q. You missed visitation other than that. You missed a lot of other visitation the first part of '99, correct, approximately nine visits, correct?

A. I'm not sure how many visits I missed. I know—I admit that we did miss a lot. I don't know if it was 1999 or '98, but throughout the time that they been before in December '99, we missed quite a few.

Q. On July 18<sup>th</sup>, 2001, one year and almost two months ago was the last time that you visited with [A.M.F. and Z.T.F.], correct?

A. Uh-huh, I believe it was the last Wednesday of the month of July. I don't know what the date was.

Q. That's the last time that you visited and the last time that Mr. Whatley visited, correct?

A. Yes.

Although sporadic, Frazier and Whatley did visit A.M.F. and Z.T.F. before they moved to Illinois. However, the statutory language of T.C.A. § 36-1-102(1)(A)(i), *see supra*, clearly indicates that visitation, for purposes of determining whether a parent has abandoned the child, is measured for the period of four (4) months immediately preceding the filing of the Petition to Terminate. Here, the Petition to Terminate was filed on November 27, 2001. The only evidence adduced at the hearing in this case indicates that Frazier and Whatley's last visit with A.M.F. and Z.T.F. prior to this filing was on July 18, 2001. Frazier contends that she and Whatley were kept from exercising visitation rights with A.M.F. and Z.T.F. by actions of DCS. Specifically, Frazier contends that she (or her attorney) contacted DCS on November 26, 2001 to set up telephone visitation with A.M.F. and Z.T.F. and that her request was not entertained by DCS. Even if we allow that Frazier did try to visit A.M.F. and Z.T.F. on or about November 26, 2001, this effort does not excuse Frazier and Whatley's absence from the State of Tennessee and from these boys' lives for over four (4) months (July 18 through November 26, 2001) without notice to the boys,

their foster parents, and/or DCS. In explanation of why she and Whatley gave no notice to DCS before moving to Illinois, Frazier made the following statements:

Q. You [Frazier and Whatley] gave no notice to the Department of Children's Services before you left, none?

A. That's correct.

Q. Why?

A. Because I didn't know I was supposed to. I was doing what was at the time was in the best interest of the two kids [B.F. and C.F.] that I had at home.

Q. What do you mean in the best interest of the two kids you had at home?

A. Because at that time frame when we moved to Illinois, of course I wasn't working. The job that John [Whatley] had had cut his hours up from three to six hours a week and we couldn't—we didn't have enough money to pay our light bill or our rent and the landlord was wanting her money. We was going to have to move, and so we had opportunities from family members in Illinois to move up there where we could work and financially take care of [B.F. and C.F.].

Q. You took [B.F. and C.F.] with you?

A. Yes.

Grounds of abandonment by failure to visit for four (4) months prior to the filing of the Petition to Terminate are, therefore, met by clear and convincing evidence.

As discussed, *supra*, both Frazier and Whatley were under court order to provide monthly support for A.M.F. and Z.T.F. Concerning her ability to make support payments, and actual payment of support, Frazier testified as follows:

Q. Did you [Frazier], in fact, work up there [Illinois]?

A. Yes.

Q. Did John [Whatley]?

A. Yes.

Q. Where did you work?

A. I worked at his [Whatley's] sister's. She had her own cleaning business, house cleaning business.

Q. Did you make money?

A. Yes.

Q. How much money did you make?

A. \$50 for every house I cleaned, helped clean with her.

Q. And how much per week would it average out to?

\* \* \*

A. Sometimes I cleaned two houses a week, sometimes I cleaned three with her.

Q. Three is the maximum, 150 a week?

A. Yes.

Q. And the minimum is 100 a week?

A. Yes.

Q. What were your living expenses then?

A. We were staying with John's parents. We didn't have to pay anything. They were just trying to help us out.

\* \* \*

Q. You were under an order to pay child support from this court, correct?

A. From—I guess you could say this court....

\* \* \*

Q. Isn't it true that during this four months you were in Illinois you paid no child support?

A. That's correct.

Whatley also testified concerning his support obligations and ability to pay, to wit:

Q. When you [Whatley] were up in Illinois, I believe the testimony was that you had a job up there; is that correct?

A. I worked in a metal factory cutting steel bars, just pushing buttons....

Q. And how much did you earn up there?

A. I think I got \$7 an hour.

Q. And how long did you work at that job?

A. About a month.

Q. And did you send any money for child support?

A. Ma'am?

Q. Did you send any of that money for child support?

A. All the money that I made up north was to take care of the two [children, B.F. and C.F.] that we got at the house.

Q. You think it's more important to take care of the two [children] that you had up in—

A. Well, all four of them, actually, are important to take care of.

Not only do Frazier and Whatley's statements provide clear and convincing evidence to support a finding that their respective parental rights were correctly terminated on the ground of abandonment (both in failing to visit and in failing to support A.M.F. and Z.T.F. for at least four (4) months prior to the filing of the Petition), the statements also indicate that their favoritism towards B.F. and C.F. persists. Frankly, it has befuddled this Court that Frazier and Whatley

singled out A.M.F. and Z.T.F. for mistreatment.<sup>8</sup> However, the record clearly shows that B.F. and C.F. were thriving (and continue to thrive) in the Frazier/Whatley household while A.M.F. and Z.T.F. were locked in a back bedroom, without light, proper food, or other basic necessities. When this Court reads statements such as Frazier's "I was doing what was at the time was in the best interest of the two kids [B.F. and C.F.] that I had at home," and Whatley's "All the money that I made up north was to take care of the two [children, B.F. and C.F.] that we got at the house," it is clear that Frazier and Whatley's discrimination against A.M.F. and Z.T.F. has not been remedied, even in the face of losing their parental rights. This finding brings us to the next ground for termination, persistence of conditions.

### **Persistence of Conditions**

A.M.F. and Z.T.F. were removed from the Frazier/Whatley home in November 1996 when they were found in a back bedroom, in filthy conditions, with no bedding or blankets. Ms. Kelly testified that, by the time she returned to the house later that same evening, the feces had been removed from the carpet and that the conditions had improved drastically. However, a thorough cleaning of this environment does not wash away the underlying cause as to why these two children were made to live in these conditions while B.F. and C.F. were well tended. The utter dichotomy between the treatment of A.M.F. and Z.T.F. and these two other children is, on some level, more troubling than the abhorrent conditions in which Ms. Kelly found them. There is nothing in this record to indicate that the disparate treatment will cease if Z.T.F. is returned to the Frazier/Whatley home. In fact, the only evidence adduced at the hearing indicates that both Frazier and Whatley still, at least subconsciously, distinguish between the children who remained in the household and Z.T.F. Since there is no indication that the reasons for this different treatment have been discovered, much less remedied, in all reasonable probability, Z.T.F. would be subjected to further abuse and neglect if returned to Frazier and Whatley. At present, there is little likelihood that this, obviously deep-seated, issue will be resolved at an early date. In addition, Frazier testified that she and Whatley have moved numerous times, usually due to financial problems, that she is currently working at Wal-Mart and that that is the sole income (other than Food Stamps) that the family has. Also, Z.T.F. has been removed from the Frazier/Whatley home for nearly eight (8) years. For all of these reasons, we find that the continuation of the parent and child relationship in this case greatly diminishes Z.T.F.'s chances of early integration into a safe, stable and permanent home.

### **Best Interest**

Having found that all of the grounds for termination listed in the Order are well supported by clear and convincing evidence in this record, we now turn to the question of whether the evidence clearly and convincingly evinces termination to be in Z.T.F.'s best interest. The uncontested testimony is that Z.T.F. is a special needs child. He has been diagnosed with

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<sup>8</sup> There is no indication, psychologically speaking, in this record to indicate why [A.M.F. and Z.T.F.] were singled out for mistreatment by Frazier and Whatley.

ADHD. In addition, Dr. Vaughn testified that A.M.F. and Z.T.F. came to him as fearful and angry children and that they were both delayed “emotionally, socially, every way.” According to Dr. Vaughn, the instability that has been perpetuated in the life of Z.T.F. by Frazier and Whatley makes “it extremely difficult for [Z.T.F.] to function effectively day to day because [he doesn’t] know what’s going to happen next.” To compound matters, Z.T.F. has recently suffered the death of his brother, A.M.F. It appears that all of Z.T.F.’s coping mechanisms, and all of the stability and love he has ever known, have come from his foster parents. To remove Z.T.F. now from this environment would be inapposite to his best interest.

For the foregoing reasons, we find that there is clear and convincing evidence in the record to support the termination grounds cited by the trial court. Furthermore, the record adequately establishes that termination of parental rights is in the best interest of this child. We, therefore, affirm the Final Order of the juvenile court, terminating the parental rights of Lisa A. Frazier, John Whatley, and Sean Moore. Costs of this appeal are assessed equally to the Appellants, Lisa A. Frazier and John Whatley, and their respective sureties.

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W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.