

IN THE COURT OF APPEALS OF IOWA

No. 7-926 / 07-0219
Filed December 12, 2007

**IN THE INTEREST OF P.S.,
Minor Child,**

**P.H. and R.H., Intervenors,
Appellants.**

Appeal from the Iowa District Court for Cass County, Kathleen A. Kilnoski,
District Associate Judge.

Foster parents appeal a juvenile court order returning child to the physical
custody of his mother. **AFFIRMED.**

Kimberly Haddox of Haddox Law Firm, Indianola, for appellant intervenor.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, and Daniel Feistner, Assistant County Attorney, for appellee State.

William Early, Harlan, for appellee mother.

Andrew Knuth of Rutherford, Trewet & Knuth, Atlantic, for appellee father.

Karen Mailander of Mailander Law Office, Anita, for minor child.

Considered by Sackett, C.J., and Vaitheswaran and Baker, JJ.

BAKER, J.

Foster parents appeal a juvenile court order returning a child to the physical custody of his mother. Because the foster parents failed to establish the mother is not a suitable parent and the child's best interests require he be removed from her care, we affirm the juvenile court order.

I. Background and Facts

Misty is the mother and Joseph is the father of two daughters, C.S., born in December 1999, and L.S., born in March 2001. They are also the parents of a son, P.S., born in July 2002. The children were removed from their parents' home in September 2003 due to their father's failure to supervise them while the mother was at work and the dirty and inappropriate condition of the home. In October 2003 they were adjudicated children in need of assistance (CINA) pursuant to Iowa Code sections 232.2(6)(c)(2) and (g) (2003). At that time, the parents were married and living together. They are currently separated and plan to divorce.

The children were initially placed in family foster care. In November 2003, the two girls were placed with their maternal grandmother, and P.S. was placed with maternal relatives, Pansie and Richard, in foster care. In June 2004, C.S. returned to her mother's custody, and in February 2005, L.S. returned to her mother's custody. Both have remained continuously in their mother's care. They continue to be adjudicated CINA and continue to receive services through the Iowa Department of Human Services (DHS).

P.S. remained at the home of his foster parents. When he was first placed with them, he had some developmental delays. Under their care, he made good

progress. He has been diagnosed with attention deficit hyperactivity disorder and oppositional defiant disorder. He also has a congenital medical condition, osteochondroma, which requires regular medical attention and attention to his diet.

In March 2006, the juvenile court dismissed the State's petition to terminate Misty and Joseph's parental rights to P.S., finding there was not clear and convincing evidence that P.S. could not be returned to the custody of his parents or that continued services would not correct the conditions within a reasonable time. Although it was anticipated he would have difficulty returning to his mother's home due to the significant bond he had developed with his foster parents, DHS developed a permanency plan to reunify P.S. with his mother. He was placed with his mother in April 2006 and remains with her. He continues to be adjudicated CINA and to participate in services through DHS.

On December 20, 2006, a contested CINA permanency review hearing was held. The court ordered P.S. remain CINA and continue in his mother's custody, subject to DHS supervision. Having intervened in the proceedings, the foster parents now appeal that portion of the juvenile court's permanency review order that keeps the custody of P.S. with his mother. The foster parents did not appeal the March 2006 order dismissing the State's petition to terminate parental rights.

II. Merits

Our scope of review in juvenile proceedings is *de novo*. *In re K.N.*, 625 N.W.2d 731, 733 (Iowa 2001). We give weight to the court's findings of fact, but are not bound by them. *Id.* "As in all juvenile proceedings, our fundamental concern is the best interests of the child." *Id.*

The foster parents contend the juvenile court erred in placing P.S. with his mother “merely because she is his mother.” The parents of a minor child, if suitable and qualified, are preferred over all others as the child’s guardian and custodian. See Iowa Code § 633.559 (2005); *In re Guardianship of Stodden*, 569 N.W.2d 621, 623 (Iowa Ct. App. 1997). This presumption of parental preference is rebuttable. *Stodden*, 569 N.W.2d at 623. The party advocating against parental custody bears the burden of proof to rebut the presumption by establishing the parent is not a suitable parent and the child’s best interests require him to remain out of the parent’s care. *Id.*

The foster parents cite *In re T.G.*, No. 03-0454 (Iowa Ct. App. Aug. 13, 2003) for the proposition that the parent is to be given no preference over other family members for placement. There are a number of problems with the applicability or suitability of citing this case. First, it is unpublished and not binding on us (and the court notes that a copy of the case was not attached to the brief as required by Iowa Rule of Appellate Procedure 6.14(5)(b)). Second, it does not stand for the proposition claimed by the foster parents. To the extent it has any precedential value, the abrogation of a preference for a parent was limited only to a parent who did not have physical care of the child at the time of removal. That case involved a parent who did not have physical care at the time of the removal whereas the mother here did have physical care at the time of removal.

Here, the court found the following:

[T]he in-home worker and DHS social worker testified that [P.S.] made a better adjustment to his mother’s home during the past eight months than they anticipated. [P.S.] and his mother have a

positive relationship. [P.S.] also has developed sibling relationships with his sisters.

. . . .

Misty has kept all appointments with the in-home service provider. All three of the children attend daycare, preschool, or school and have good attendance. Her home is clean and safe for the children. She has maintained a job. She does not have drug problems. Misty's parenting skills have improved, and she has been receptive to suggestions from the service provider. At the time of this review hearing, neither the DHS social worker nor the in-home service provider believed that [P.S.] should be removed from his mother's care.

Clearly the juvenile court considered more than Misty's status as P.S.'s mother in determining it was in his best interests to remain in her custody.

Further, the foster parents have not presented sufficient evidence to rebut the presumption in favor of parental custody. They have alleged P.S. suffered physical abuse, i.e., bruises and scrapes, and has regressed in other areas, e.g., speech and toileting, since his return to his mother's care. The foster parents allegedly did not report the injuries because they were concerned the mother would not let them continue to have visitation with P.S. if they reported suspected abuse.

In spite of these allegations, the juvenile court concluded the evidence did not support a change in custody. "[W]e give weight to the juvenile court's findings of fact because the juvenile court has had the unique opportunity to hear and observe the witnesses firsthand." *In re S.V.*, 395 N.W.2d 666, 668 (Iowa Ct. App. 1986). Further, it has been well established that "the status of children should be fixed as quickly as possible, be thereafter disturbed as little as possible, and then only for the most cogent reasons." *In re Leehey*, 317 N.W.2d

513, 516 (Iowa Ct. App. 1982) (citations omitted). Upon our de novo review, we conclude there is no merit to the argument that the juvenile court erred by placing P.S. with his mother “merely because she is his mother” or that such placement was against his best interests.

The foster parents also argue the juvenile court erred (1) by not fully weighing the evidence of P.S.’s sexual acting out and the possible reasons for his behavior and (2) in failing to remove P.S.’s guardian ad litem (GAL) from the case. They cite no legal authority, however, to support these arguments, leaving us to wonder what legal authority they believe supports these arguments. See Iowa R. App. P. 6.14(1)(c) (“Failure in the brief to state, to argue, or to cite authority in support of an issue may be deemed waiver of that issue.”). Notwithstanding their failure to cite legal authority to support their arguments, upon our de novo review, we find no merit to these arguments.

The juvenile court did not address these issues in its ruling, and the foster parents failed to move the court to enlarge its findings. The State argues error was not preserved on these issues because the foster parents failed to file a motion to enlarge the court’s findings pursuant to Iowa Rule of Civil Procedure 1.904(2).

Under our rules of civil procedure, an issue which is not raised at the trial court may not be raised for the first time on appeal. In district court, when a ruling fails to address an issue properly submitted, the method to preserve such error is to file a [1.904(2)] motion. Because juvenile proceedings are to be conducted in an informal manner, not all of the rules of civil procedure are applicable in juvenile cases. However, Rule [1.904(2)] has been held to apply to juvenile court . . . CINA proceedings.

In re. N.W.E., 564 N.W.2d 451, 455-56 (Iowa Ct. App. 1997) (citations omitted). Notwithstanding their failure to preserve error on these issues, we find the foster parents have not established that the mother is not a suitable parent and that P.S.'s best interests require he be removed from her care. *Stodden*, 569 N.W.2d at 623.

At the December 20, 2006 permanency review hearing, Pansie testified that P.S. had sexually acted out, e.g., talking about the things Misty's boyfriend, Charlie, did to Misty. The foster parents contend it is unlikely P.S. "could have gathered that sort of information from anywhere except witnessing it," and, if P.S. witnessed sex acts, he should be removed from his mother's care. They presented no additional evidence at the hearing, however, that P.S. witnessed any sex acts while in Misty's care. Mere speculation that he witnessed sex acts is insufficient to overcome the presumption in favor of parental custody.

We also find no merit to the argument that the juvenile court erred in failing to remove P.S.'s GAL from the case. The foster parents first raised the issue at the December 20, 2006 permanency review hearing. They contend that, because the GAL did not visit P.S. prior to the time they retained counsel, another GAL should be appointed. They have not specified, however, how the appointment of another GAL would have produced any different outcome or how the GAL's failure to visit P.S. in their home resulted in his failure to receive "the representation he very much deserves." In fact, according to their own brief to this court, at the time of the March 2006 termination hearing, the GAL was supportive of P.S. remaining with the foster parents. We find no error in the juvenile court's failure to remove the GAL.

Upon our de novo review, we conclude the juvenile court did not err by continuing placement of P.S. with his mother. The foster parents failed to establish that the mother is not a suitable parent and that P.S.'s best interests require he be removed from her care.

AFFIRMED.